CHAPTER IX

LEIBNIZ

He combined two great qualities which are almost incompatible with one another—the spirit of discovery and that of method.

Diderot

Leibniz brought to legal philosophy the set of ideas which has explicitly controlled all scientific inquiry since his day—identity, system, consistency, possibility, and causality. “Our reasonings,” he insisted,1 “are grounded upon two great principles, that of contradiction, in virtue of which we judge false that which involves a contradiction, and true that which is opposed or contradictory to the false; and that of sufficient reason, in virtue of which we hold that there can be no fact real or existing, no statement true, unless there be a sufficient reason, why it should be so and not otherwise, although these reasons usually cannot be known by us.” What Leibniz intended as the full meaning of these two principles is not entirely clear; but from them he developed his doctrine of necessary and contingent truth, the former being demonstrable by the principle of contradiction, the latter by that of sufficient reason.

Leibniz’ writings on jurisprudence, so far as they have been collected, are contained in 4 Dutens, G. G. Leibniti, opera omnia (1768), cited here as “Dutens,” and Mollat, Mittheilungen aus Leibnizens ungedruckten Schriften (1887), cited here as “Mollat.” But there are many discussions of juridical matters in his other writings and in his letters. For secondary sources, my greatest indebtedness is to Hartmann’s Leibniz als Jurist und Rechtsphilosoph (1892); Zimmermann’s Das Rechtsprinzip bei Leibnitz (1852); and Cassirer’s Leibniz’ System in seinen wissenschaftlichen Grundlagen (1902).

1 The Monadology, Latta’s ed., (1898) § 31-32. Elsewhere he rephrased the principle of contradiction: “The principle of contradiction is in general: A proposition is either true or false; this comprises two true statements; one, that the true and the false are not compatible in the same proposition, or that a proposition cannot be true and false at the same time; the other, that the opposite or the negation of the true and the false are not compatible, or that there is no middle ground between the true and the false, or better, that it is impossible for a proposition to be neither true nor false.” Erdmann, God. Guil. Leibnitii opera philosophica (1840) 339.
Thus he held that the criterion of truth is thought; this permitted him to substitute, in place of the dominant theological attitude of the time, a rationalistic approach to natural law and the positive law deductions made from it. His method resulted in the construction of one of the great philosophical systems, of which his legal theory forms an integral part; but that system was never expounded in any unified form and must be put together from many papers and letters. As a philosopher his ultimate views were as comprehensive as the outlook of that domain demands; but the naturalistic science of his time led him also to piecemeal investigation, to the detailed study of the part rather than the whole. It is this latter method of approach which predominates in his jurisprudence and which accounts for the many gaps in that aspect of his thought. His basic legal ideas are clearly enough attached to his main philosophical system, but the connections between them and many of his concrete suggestions in the field of positive law often have to be surmised.

Leibniz' immense theoretical powers were always guided in the area of human affairs by an intense awareness of the practical. No other philosopher has participated more intimately in the practical concerns of his time and none has been more perceptive in the isolation of the essential forces. In this achievement Hobbes, one of the architects of the British colonial empire, alone approaches him. Among Leibniz' many achievements in this field are his suggestions to Peter the Great which led to the administrative reforms that placed the Russian system on approximately the same footing as that of the Western powers, and his arguments addressed to Louis XIV on the importance of Egypt in the plans for an Eastern empire, arguments which are thought to have guided Napoleon's Egyptian campaign.

Preliminary Writings

Leibniz' views were not settled until his fortieth year; as he confessed, he had changed them again and again in accord-
ance with the fresh knowledge he had acquired. However, his early writings on jurisprudence, a field with which he began to occupy himself when he was eighteen years old, reveal clearly the mixture of scholasticism, novelty of insight, and scientific analysis that was to characterize his mature studies. Throughout his life he continued to value these preliminary excursions into juridical theory, although he frankly conceded that they stood in need of revision. At his death the most important of them, his *Nova methodus juris*, lay open in his study, marked with marginal alterations.

In his early writings, his method was predominantly that of the formal logic of the preceding centuries; he nevertheless was plainly feeling his way towards the philosophical approach and the substitution of reason for authority, ideas which dominated the thought of the seventeenth and eighteenth centuries. It was always one of his leading ideas, that the usefulness of a science varied directly with the speculative depth it was able to attain. His thesis for the degree of Master of Philosophy, the *Quaestiones philosophicae amoeniores, ex Jure collectae*, was aimed avowedly at saving law students from the dangers of over-specialization and of curing them of any contempt which they might hold for the other departments of knowledge, particularly philosophy. This idea is a remarkable anticipation of the current doctrine, now insisted upon by many jurists, that jurisprudence is not a self-sufficient science, and that it must cooperate with the other disciplines, such as history, economics and sociology, which face similar problems. "I am undertaking a difficult matter," Leibniz wrote in the preface to the paper, "one which is beyond my power, but which is productive and welcome to myself. I was raised on philosophy and thus became a student of jurisprudence; and as often as the opportunity presented itself I went back to philosophy and made a note of what either originated in philosophy or was related to it. The examination which I am about to undertake will also serve to remove the disdain of the expert jurists for philosophy"

*Dutens, pt. 3, 68.*
when they see how many parts of their 'jus' would be an inextricable labyrinth without the guidance of philosophy and how the ancient authorities were as thoroughly familiar with its profundities as with their own science. It is certainly understandable that Ulpian called jurisprudence the science of divine and human things because he was convinced that without this previous philosophic insight the jurist could neither come to his own nor, in consequence, could the science of right and wrong be achieved." Leibniz developed the idea in an unsystematic fashion by propounding seventeen questions which were intended to show connections between law and such subjects as metaphysics, logic, mathematics, and physics. Some of the questions appear to us today to raise matters of no moment, or to be handled in an overly subtle fashion; but it would not be difficult to match Leibniz' attenuated reasoning with present-day court opinions on such topics as the taxation of foreign corporations. Leibniz asked, for example, if property is a relation, a question which he, in company with some modern jurists, answered affirmatively, but which he, unlike them, pushed on to the further question: Can a relation subsist upon a relation? More practically, he raises the question whether bees are wild animals, a matter which modern courts have had to face in determining the liability of bee-keepers for injuries committed by their bees. His formal logic is perhaps put to its best use in his discussion of the maxim *affirmanti incumbit probatio*; here he shows that an affirmation is not dependent upon a form of words, and that the same idea can be expressed in either negative or positive form. At the time of the writing of this paper, and for a considerable period thereafter, Leibniz was still strongly under the influence of the scholastic tradition, and his premises and arguments were both formulated in strict accordance with the technique of that school.

His succeeding paper, the *Doctrina conditionum,* published the next year in 1665, dealt with the doctrine of conditions

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* Dutens, pt. 3, 92.
and the rules of interpretation, subjects made to order for his formal methods. The doctrine was pronounced to be a part of juridical logic and its conclusions to be susceptible of mathematical demonstration. It is, he insisted, a prime example of jurisprudence as a science in the true sense of the word, and all the genius and profundity of the classical Roman jurists is to be found in its development. "The ancient jurists," he wrote, "have displayed so much genius and shown such penetrating judgment in the definition of law that to give their explanations the form of a completely positive and almost mathematical argument is a work which requires sifting rather than further ingenuity." The doctrine is to be treated rigorously, beginning with definitions and proceeding syllogistically to the deduction of theories and rules of law. Thus, "when the ship arrives from Asia, Titius shall have a hundred" is taken by Leibniz to assert a condition of fact independent of temporal consideration. The mere arrival of the ship, altogether apart from the time of its arrival, is the condition to be satisfied. From this it followed, in Leibniz' view, that the money would be due at once on a certification from an officially approved Oracle that the ship would arrive; in the absence of such transcendental intervention, it is also clear, on the actual arrival of the ship, that the money was due at the time of the bargain. Notwithstanding results of this kind, which may be taken as illustrative of the dangers of a too-rigid application of formal logic to the circumstances of the legal order, the paper was received favorably by the more advanced professors of the day. Even in modern times it is regarded as containing a grain of truth; that once the premises of a legal system have been validly established, it should be possible, in accordance with the methods of the physical sciences, to make proper deductions from them. However, the infinitude of variables to be ordered in the construction of any such system in the juristic field necessarily reduces the effectiveness of the system to a minimum area.

* Dutens, pt. 3, 94.  
* Hartmann, 16.
At the age of twenty, in his *Dissertatio de Arte Combinatoria*, Leibniz put forward an idea to which he was to return frequently throughout his life. This was the conception of a *Characteristica Universalis* or Universal Mathematics which would solve all problems and end all disputes. Apparently through the symbolic method, in which formal rules would supplant rational analysis, results could be achieved in all sciences comparable to those which had been produced by the same method in mathematics. The procedure, he pointed out, would enable us to reason in morals as we do in geometry. If controversies were to arise, he added, disputation between two philosophers would be as unnecessary as between two accountants. All they would need do would be to take their pencils in their hands, sit down to their slates, and say to each other (with a friend as witness, if they desired it): Let us calculate.

Bertrand Russell points out that Leibniz thought that by establishing the premises in any *a priori* science, the rest could be effected by mere rules of inference; and to establish the right premises, it was only necessary to analyze all the notions employed until simple notions were reached from which all the axioms would follow as identical propositions. Leibniz regarded the syllogism as the most fruitful of human inventions, a kind of universal mathematics, and he evidently held the Universal Characteristic to be akin to the syllogism. Leibniz’ idea has been a basic one in an important branch of modern mathematics, but it has failed in philosophy because of the almost insuperable difficulty of formulating premises which are significant.

Nevertheless, Leibniz in the same year at once gave the idea a legal application in his tract *De Casibus Perplexis*; his theory was that the legal system is a complete science in which no problem can arise for which an answer cannot be found. This idea is still widely held by practicing lawyers and also by some jurists. As a descriptive statement of the existing legal order

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*7 Gerhardt, *Die philosophischen Schriften von G. W. Leibniz* (1931) 200.
*Dutens, pt. 3, 45.*
it is clearly erroneous; it is true only in the sense, as Ehrlich observes, of an expression of the practical endeavor to supply the judge with a store of norms for decision, sufficient for all cases that might arise, and to make them binding upon him as effectively as possible. Leibniz defined the “perplexing case” as the entangled knot of a juridical nature which apparently could not be unraveled because of an inner logical conflict. He promised to decide all such cases *ex mero jure*, and he thus put aside the arguments that they were insoluble, or should be decided by lot or by an arbitrator. Since he defined “ex mero jure” as embracing the positive law of the land, plus natural or general human law, he had the same virtually illimitable latitude for decision as is accorded the modern American judge, allowing only for a difference in phraseology.

Nor did Leibniz hesitate to attack problems of the kind known in the logic books as dilemmas. Logicians had long wrangled over one of the dilemmas he chose for discussion. Eulathus, a pupil, had agreed to pay his rhetoric teacher Protagoras half of his fee when he won his first case in court. Eulathus delayed going into court, however, and Protagoras brought suit against him for the balance due. Protagoras then argued to the jury: If Eulathus loses this case, he ought to pay by the judgment of the court; and if he wins, he ought to pay by his own agreement. But he must either win or lose. Therefore, he ought to pay. This argument was rebutted by Eulathus as follows: If I win this case, I ought not to pay, by the judgment of the court; and if I lose, I ought not to pay by my own agreement. But I must either win or lose. Therefore, I ought not to pay. It is reported that the jurors were so profoundly perplexed by the argument that they put off the decision to a distant day, which in effect gave the verdict to Eulathus.

Leibniz, prompted no doubt by motives of abstract justice, awarded the ultimate decision to Protagoras. He would first

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have Protagoras' suit dismissed on the ground that it was filed prior to the time of the condition of the agreement. Protagoras could then at once sue again successfully, inasmuch as the previous victory of Eulathus had fulfilled the condition of the agreement. The argument of *res judicata* would not apply because the previous suit would have been dismissed without prejudice, since Protagoras' right to sue would accrue only after the termination of the first action. Perhaps what Leibniz really meant was that the case should be treated as an exception, either because it did not occur to the parties at the time of the agreement or because Protagoras had in mind as a legally inoperative mental reservation, such an exception in his favor. This argument is an anticipation of the theory of types, on the analogous basis of which modern logic holds that Protagoras did not mean by his pupil's first case any case whatsoever. If he did, his own suit fell under the agreement. Inasmuch as this was plainly not Protagoras' intention, the case was an exception. Such dilemmas are not altogether the sport of logicians' fancies, and we sometimes meet them in judicial proceedings heavy with the weight of tragedy. When Henry VIII attempted to force the oath of supremacy upon Sir Thomas More, the question was put to More whether he thought the statute "giving to the King the title of Supreme Head of the Church under Christ" had been "lawfully made or not." He answered that the act was like a two-edged sword, for "if he said that it were good, he would imperil his soul; and if he said contrary to the statute, it were death to the body." Sir Thomas More declined to swear at all and was put to death.

THE NEW METHOD OF LEARNING AND TEACHING JURISPRUDENCE

It is not surprising that at this point in Leibniz's career he should undertake a complete reformation of the whole field of jurisprudence. His previous papers were all marked with the unmistakable hopes of youth—the conviction that the impasses of one discipline can be surmounted by recourse to the ideas of
other domains, and a belief in the competency of reason, functioning through a formal methodology, to meet the tasks of any inquiry. All the intellectual ferment of the seventeenth century met in Leibniz, and its effects were evident even in his early writings. Whitehead has remarked that the intellectual life of Europe during the succeeding centuries up to our own time has been existing upon the accumulated capital of ideas provided by the genius of the seventeenth century. When Leibniz first began to publish the century was two-thirds over, and he drew heavily on the work of his immediate predecessors. He aimed frankly and audaciously at an application of the new ideas to the study of jurisprudence. He pursued this ideal throughout his entire life, but his first major attempt to achieve it was the *Nova Methodus Discendae Docendaeque Jurisprudentiae* of 1667. This paper, which brought Leibniz great fame, bears many resemblances to the *Novum Organum*, which Bacon wrote at the age of fifty-nine. If Leibniz' early age, twenty-one, was any handicap in the production of his paper, it was balanced by the ideas already formulated in the century and available for application by someone possessing his insight. Leibniz' only reservation about the paper was the fact that it was composed while travelling, without the benefit of libraries, and without the necessary leisure to polish it.

Leibniz' paper was a protest against the jurisprudential methods of his period, and an outline of the grounds on which they could be reformed. These methods were an inheritance of the techniques devised by Imerius and his successors during the twelfth century revival of jurisprudence at Bologna and elsewhere. Imerius, through his glosses, examined fully the meaning of the passages of the *Corpus Juris*, and by the use of questions and discussion he clarified for his students whatever obscurities or apparent contradictions remained. Basically it was the method which was also applied to the problems of theology and science—the so-called scholastic method. Through the instrument of logic it proceeded dialectically to analyze

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11 Dutens, pt. 3, 159.
conceptions and construct syllogisms.\textsuperscript{12} Rashdall sums it up thus: "An almost superstitious reverence for the \textit{littera scripta}, a disposition to push a principle to its extreme logical consequences, and an equally strong disposition to harmonize it at all costs with a seemingly contradictory principle; a passion for classification, for definition and minute distinction, a genius for subtlety—these, when associated with good sense and ordinary knowledge of affairs, are at least some of the characteristics of a great legal intellect."\textsuperscript{13} The results of the method represented a great achievement in legal history; but by the middle of the thirteenth century, with the appearance of the extraordinary \textit{Glossa ordinaria} of Accursius, the high-water point of the school, the method already stood in need of revision. There were complaints that the glosses were a plague of locusts which covered up the text, and the saying was prevalent that only glossed portions would be recognized in court. When the jurists began to gloss the glosses the end was in sight.\textsuperscript{14} The Glossators were succeeded by the Commentators, whose method was known as the \textit{mos Italicus}. Instead of confining themselves to an understanding of the Roman law of Justinian's day, they attempted to know the Roman law of their own time. Their great achievement was in making over the old law into an Italian law. Although the way for a new approach had been opened to them by the Humanists, they still pursued the dialectical method. They gave a new impetus to legal studies by their emphasis on logical reasoning; but disadvantages were present from the beginning. "When their system," Calisse \textsuperscript{15} writes, "after a formative period, was finally developed, it stood forth as the apotheosis of a painstaking logic. The jurist's ideal now was to divide and subdivide; to state premises and then to draw the inferences; to test the conclusion by extreme cases, sometimes insoluble and always sophistical; to raise objections and then to make a parade of

\textsuperscript{12} Vinogradoff, \textit{Roman Law in Medieval Europe} (1929) 56.
\textsuperscript{13} \textit{The Universities of Europe in the Middle Ages} (1936) 254.
\textsuperscript{14} Haskins, \textit{The Renaissance of the Twelfth Century} (1933) 202.
\textsuperscript{15} \textit{General Survey of Continental Legal History} (1912) 142.
overthrowing them—in short, to solve all problems by a fine-spun logic.” But soon the lectures and treatises became so prolix that only a small topic would be treated in each. The jurists therefore discussed only the easier points, and passed the difficult ones over in silence. Cujas summed up in an aphorism the case of their critics: *Verbosi in re facili, in difficili muti, in angusta diffusi.* Aristotelianism also had its place. To know is to know by means of causes, according to Aristotle; and thus the four causes—the “*causa efficiens,*” “*materialis,*” “*formalis,*” and “*finalis*”—were extensively employed as the basis of a methodological scheme into which the elements of the legal process were fitted. The third revival of jurisprudence came with the work of the Humanists. Dante had complained that the jurists had rejected the new knowledge and were too literal in their interpretations of the texts. Petrarch dismissed them as venal and ignorant in their refusal to look to other sciences for aid, and he accused them of wasting their lives in vain, imaginary quibbles; Boccaccio washed his hands of law altogether, saying it was no science at all. The crowd of pedants and imitators who produced the so-called learning of the Italian Renaissance added little to juristic knowledge; their goal was scholarship as such, improved taste, purer Latin, applied antiquarianism and the moderation of dialectical subtleties. The lack of significance in such puerile objectives was known to the handful of serious students of the period: “I am no Humanist,” said Leonardo da Vinci. Among the Humanists, Lorenzo Valla was the great exception. He regarded Greek and Latin scholarship as instruments to greater ends. His dislike of the Commentators, and his enthusiasm for classic Roman law, led him to the development of a bold method of textual criticism. He was followed by his pupil Pomponius Leto, who was a pioneer in the reconstruction of Roman legal history. Leto’s younger contemporary, the gifted poet and scholar Politian, formed a great plan, which was cut short by his untimely death, for the compilation of a variorum edition of

the Roman texts. Altogether the labors of these men and others in their textual studies opened a new horizon in jurisprudence. "Not only in textual criticism," Calisse 17 writes, "but also in topics and methods, legal research was broadened and advanced. Public law was now included, not merely private law. To textual interpretation was added synthetic reconstruction and general treatises. Practice ceased to be the sole objective; a legal science in the true sense was the inspired aim; and history and philology were pressed into service."

In the northern lands one of the legacies of the Humanist movement was the work of Peter Ramus; and it was against Ramus and the "Ramistic" that Leibniz' reforms were specially directed. At its inception Ramism had claimed for itself all the liberalizing qualities of its predecessors. 18 Men's minds should not be controlled by pedagogical rules, but should have all the freedom allowed them by the laws of nature. Those laws should be discovered by observing carefully how men's minds actually work in practice. After the laws had been collected they should be set forth in their natural order, and the rules established in model form for those who wish to reason well. Dialectics is thus a system founded upon the practice of those who are best fitted to reason, i.e., the wise. Ramus defines dialectics as the art of discussing well, and it is more concerned with persuasion and exposition than the discovery of truth. 19 It consists of two parts, invention and arrangement. "Inventio" is that which is concerned with the "invention of arguments," and "judicium" or "dispositio" with the "suitable arrangement of things invented, with the combination and classification of these elements into a complete whole." "Invention" and "arrangement" are further subdivided into two groups, and these subdivisions in turn fall into still further groups, and so on, until the domain of dialectic

17 Ibid., 150.
18 For a summary of the movement see Waddington, Ramus, sa vie, ses écrits et ses opinions (1855) 364 et seq.
appears to be accounted for. Ramus held that wise deliberation was always from the general to the particular, and that if “method” were neglected in either science or practical life nothing but chaos could result. His method was widely adopted in Europe, particularly that part of it which insisted upon the utilization of the four causes of Aristotle. It yielded some notable legal textbooks, particularly Lauterbach’s *Collegium theoretico-practicum* (1690), a work that held its place as a fundamental manual in German universities until the middle of the eighteenth century. The chief merit of the method lay in the fact that it did not permit the jurist to ignore difficult problems, a freedom accorded him by less restraining methods, but compelled him to take account of all the troublesome points in the subject under investigation. Ramism fell into the same quagmire, however, that had engulfed the methods it was designed to supplant. Instead of a pure naturalism it yielded a new formalism, and eventually perished in the strangling rigidity of its methodology.20

One central idea is implicit in Leibniz’ theory of legal education: Law should be taught both as a science and as a practical discipline. If instruction is carried on entirely at the scientific level, that is to say, on an academic basis, the student acquires knowledge by means of lectures, recitations, and the memorizing of textbooks. The recitative system, which is the basic method in most universities for instruction in the humanities, has many merits, not the least of which is that, if properly handled, it inculcates in the student a synoptic view of the subject, and a clear understanding of the principles upon which it is constructed. But the method is not adequate for instruction in a professional subject such as law. At the level at which law is sometimes practiced the lawyer and judge may be mere reciters—formalists and merchants of lifeless ideas. Legal instruction, however, aims among other things at an imaginative grasp of the principles of the legal process; and the testimony of lawyers is abundant that it is at this precise point

that the recitative method fails. It does not permit the student to perform the same operations that are employed by the creative judge or lawyer when confronted with a legal task.\textsuperscript{21} To meet this defect of purely academic instruction, resort has been had to various devices such as the requirement in England that a candidate to practice as a solicitor must serve for a term of years as an articled clerk in a solicitor's office, and the widespread adoption by American law schools of the case system of instruction. All this was clearly perceived in the universities of the Middle Ages, and Leibniz' paper was an attempt to reinstate, against the excessive formalism of his day, this essential idea.

Like North,\textsuperscript{22} Leibniz insisted upon the necessity of a liberal education for the skillful lawyer. He must have a firm grasp of history, politics, philosophy, ethics, mathematics, and logic.\textsuperscript{23} The grounds for this belief, although not stated by Leibniz, are not difficult to surmise. When we train students in the law we are instructing them in one of the most vital functions of a culture—the maintenance and development of a dominant order of the society. But that order is interrelated with many other orders, and its propositions, if they are to be effective, must be similarly interrelated. Leibniz' new method of legal instruction aimed at a reduction in the time necessary for the course from five to two years. It was to open with what we would call today a course in legal history and bibliography. The authentic sources of the law, including contemporary statutes and decrees, were to be explained to the student. Technical terms, on the pedagogic value of which Leibniz laid great stress, were to be fully explained, and their use illustrated through actual cases. At this point the student was to proceed to the study of the original legal sources, the main course of instruction. With a little help from the teacher, but for the most part left to his own enterprise, the student was to be required to

\textsuperscript{21} See, \textit{e.g.}, Ames, \textit{Lectures on Legal History} (1913) 362.

\textsuperscript{22} \textit{A Discourse on the Study of the Laws}, published in 1824, but written many years before his death in 1734.

\textsuperscript{23} Dutens, pt. 3, 200-201.
master the problems of the texts and to understand them in the context of actual cases. "We have to remember that the valuable intellectual development is self-development," Whitehead has written, and Leibniz made this truth one of the main principles of his system. In the second year, for the so-called *curriculum polemicum*, Leibniz proposed what was essentially a system of moot courts. It was intended to supplant the traditional syllogistic method of treating legal propositions, and the procedure was to be in accordance with actual German court practice. Sessions were to last two hours, with a participation of twelve students, each maintaining or defending two propositions. Inasmuch as a number of *quaestiones* could be combined, as in actual practice, in one *casus*, Leibniz thought that about 3,600 *quaestiones* could be covered in a year. The teacher was to act as judge, and was to decide the case with a full statement of the grounds of his decision. The propositions to be maintained were to be originated by students from half the class, and defended by those from the other half. The arguments were to be direct, brief, and in German—not Latin. But the proceeding was not to be superficial, and the questions to be argued should therefore be disclosed one day in advance to the teacher and the students. Resourcefulness in argument was to be attained through the extemporaneous verbal replies that the students would have to originate to defend their positions.

On the analogy of theology, Leibniz divided the law curriculum into four parts, the didactic, the historical, the exegetic and as we have seen, the polemic. For this classification he called for the composition of a new set of textbooks. The first text should be elementary, consisting entirely of "*definitiones et praecepta,*" expounded with the conciseness of a mathematical argument; he wanted also a "*novum corpus juris*" based on Justinian but newly arranged. For the second, he demanded an "*historia mutationum juris,*" and an "*historia irenica.*" For the third there was to be a "*philologia juris,*" a "*grammatica legalis seu lexicon juridicum,*" an "*ethica et politica legalis,*"
and a "logica et metaphysica juris." In the actual work of exegesis, the *mos Italicus* should be followed. For polemics, he asked for a vast "syntagma juris universi" with a natural law foundation. The conception of these volumes is strikingly similar to the three texts proposed by Bacon in the *De Augmentis* for a science of law: a book of Institutes, which was "to be a key and general preparation to the reading of the course"; a treatise "*de regulis juris*" which would acquaint the student with the leading principles of the law; and a dictionary of legal terms, not arranged alphabetically, but rather on the principle of Roget's *Thesaurus*. Leibniz closed his paper with a list of thirty-one desiderata demanded by the new method, beginning with a "partitiones juris," closing with a "pandecta juris novi," and including such items as an "arithmetic juris." That the list was inspired by the desiderata at the end of Bacon's *Novum Organum* seems clear. Leibniz at once undertook to supply at least one of the desiderata, a "reconcinnation" of Justinian; the state of legal science, however, made it impracticable to carry it to a conclusion. One commentator would excuse him on the analogy of Bacon, who has had a large influence notwithstanding his similar failure to supply the philosophical desiderata. Another, whose attitude is distinctly favorable, dismisses the plan to the extent that it calls for new texts as "just unfermented cider of a roaring and foaming youth." Lists of desiderata are notoriously easy to compile; but perhaps the wisest attitude is merely one of regret that Leibniz never found the time to execute his projects.

**Philosophy of Law**

Leibniz' general theory of law was worked out by the controversial method that distinguishes most of his writings. Like an organism, he did not act, he reacted. Thus we owe many of his most significant ideas in jurisprudence to his critical reformulation of propositions put forward by Hobbes, Grotius, Pufendorf, Descartes, Locke, and many others now forgotten.

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24 Landsberg, *op. cit.* note 15 at 422.  
25 Hartmann, 25.
Some idea of what jurisprudence has lost by his failure specifically to formulate his legal philosophy systematically can be gained from a reading of the *Monadology*. That paper was an attempt to bring into a coherent order the philosophical principles, with their important implications, that he had scattered through many brochures and letters. That the most careful student of Leibniz could have constructed it is more than doubtful. The composition of the paper generated a burst of creative activity in him, which led to such a bold and imaginative statement of his principles that it amounted to an innovation in his thought. However, his legal principles are not inconsistent even with the doctrines of the *Monadology*, and it is possible to form some idea of the kind of system he might have devised in jurisprudence if he had undertaken the task.

He had a distinct idea of the plan on which the ideal treatise on jurisprudence should be constructed, although he was never to write it. Its point of departure would be a set of clear definitions, and the argument would proceed deductively from correct premises to proper conclusions; it would fix the foundations of social behavior in their fit systematic setting and would allow for the exceptions authorized by nature; it would establish a determinate method by which all legal questions could be overcome. He had no doubt that jurisprudence could be made into such an absolute and methodical science, and that its author might have been Grotius if he had not been occupied with other matters, or Hobbes if he had not run after depraved principles. Selden could easily have initiated the science if he had devoted his extraordinary abilities to the undertaking.26

Leibniz' first task was to establish natural law on a rational basis, and to divorce it from both theological and political absolutism. His aim was to show that natural law is wholly an ethical law of reason. It is very true, he said, that God is the author of all natural law—not, however, through His will, but rather through its own nature, in the same sense in which He is the author of truth, which also does not depend upon His will.

26 Dutens, pt. 3, 276.
It is possible for both geometricians and jurists to be atheists, and Grotius correctly remarked that the natural law is intelligible in itself even if one should imagine that there is no God. Just as the mathematical rules of equality and proportion rest upon eternal reason, so do the rules of fairness and decency. It is impossible that God Himself could violate them, and somehow at some time could wish that someone should torture innocent persons just because he has an itch to do so. Leibniz expressly rejected Descartes' belief that there are truths which are dependent upon God's arbitrariness, and he thought it absurd for Descartes to maintain that God was perfectly free to make it untrue that the three angles of a triangle should be equal to two right angles. God could neither bring it about that a triangle have four sides, nor that four be an uneven number. If in this field there is something exempt from God's will, then the case is even stronger in the domain of morals and jurisprudence. Here it is completely beyond His power to turn good into evil, wrong into right, and vice versa. The eternal truths, Leibniz insisted, are above God's will, even though they are not above His understanding; for otherwise the latter would not be the most perfect. The reason for these eternal truths, however, is not to be found in His understanding. They are not truths because He understands them, but, rather, He must understand them by virtue of His most perfect knowledge, because they are truths. And that they are truths is as little His work as why they are truths. Truth, whatever subject it concerns, is immutable, eternal. Truth exists in God's mind, but not as a result of God's mind. God knows all truths, but He does not create them. The conception of God, Leibniz said, signifies the pinnacle of the moral philosophy—not however, the foundation upon which it is constructed.

27 Monadology, 267; Dutens, pt. 3, 273, 279.
29 See Monadology, 242, note 72.
30 Zimmermann, 13. See op. cit. pages 32 et seq. and 44 for a reconciliation of statements by Leibniz apparently in conflict with this doctrine.
31 S Gerhardt, 429.
Locke maintained that God had laid down a rule according to which mankind should behave. In opposition to Locke's idea of a positive precept it was generally argued that the ideal basic rules of judgment would be transformed into arbitrary norms subject to cancellation at any time. Leibniz rejected this argument, and held that the true measure of the moral was the unalterable rule of reason which God had obligated Himself to maintain (la règle invariable de la raison, que Dieu s'est chargé de maintenir). Thus it is true that the conception of God is considered related to jurisprudence in so far as it forms the explanation and guarantee of the final realization of the ethical demands for the individual, as well as for the totality—it is not, however, the motive and the legitimization of those demands themselves.

Leibniz' argument against Hobbes and other exponents of the absolute State is substantially identical with that advanced by present-day advocates of natural-law doctrines. Power or authority, he said, cannot decide the formal reason of a binding force, cannot answer the deeper question of its why. Power is not the formal reason which makes the just just. Otherwise, all power would be just, exactly in proportion to its power; but this is against experience. To put right and might on the same plane is the sign of a fundamental misconception of the true relation between the "is" and the "ought." It is one thing to be able, another thing to be commanded. The necessary and demonstrative sciences, such as logic, metaphysics, arithmetic, geometry, mechanics, and the science of right and wrong, are not founded on experience or facts, but serve rather to give an account from the facts themselves and to regulate them in advance (à rendre raison des faits et à les régler par avance).

The conception of right would therefore remain in force even if there were no laws in the world. The mistake of those who make justice conditional upon might originates in the confusion of right with law, the ideal principle itself with its empirical coinage. The "ought" must not be read off from the existing

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\textsuperscript{32} Erdmann, 286.  
\textsuperscript{33} See op. cit. 451.  
\textsuperscript{34} Mollat, 51.
order of things and its patterns, but must be recognized as a regulative factor whose function is to direct the creation of the positive law. Thus Leibniz set the positive law against justice, the “is” against the “ought,” and appealed from the former to the latter. In essence, he argues for a hypothetico-deductive system of natural law, in which the claims of rival hypotheses would receive adequate analysis. This is the method of the sciences that have passed beyond the classificatory or descriptive stage, and appears to be the only one on which a rational natural-law doctrine can be founded. Leibniz often pointed out that Thrasymachus’ definition of justice as the interest of the stronger was the model for the absolutistic theories of his day. “With this remark,” as Cassirer observes, “he himself denoted the historical perspective from which his doctrine is to be viewed and judged. It is the struggle of the Socratic teachings against those of the Sophists, of the eternal ‘idea’ of right against its relativity to convention, which renews itself here in modern philosophy.” That there are definite limits to the realization of the ideal in the realm of the empirical Leibniz clearly recognized; this limitation, however, is no contradiction, but in such a system is merely a stimulus toward the greater understanding of the rôle of the ideal.

With natural law grounded on reason, rather than on the will of God or State absolutism, Leibniz proceeded to elaborate his system. The object of the highest reason is to act in such a manner that as much good as possible is done for as many as possible, and that as much happiness flows over all and everything as they are able to contain. This is the supreme command, and the being who acts according to this principle is of a truly divine nature; for if we wanted to take the opposite view, namely, that God rules with such despotic arbitrariness that he is influenced by neither rational creatures’ happiness, nor by irrational expediency, then He could be called neither wise, good, nor just in the hitherto accepted sense of the words. Jurisprudence itself Leibniz defines as the science of just and

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unjust actions, the just and the unjust are what is useful or injurious to the public.\textsuperscript{38} The "public" is the world and its Ruler, God, the human race, and the State. These elements are so arranged that in case of conflict, the will of God takes precedence over that of the human race; the latter over that of the State, and the State over personal advantage. There is thus a three-fold science of jurisprudence: a divine, a human, and a civil. The doctrine of the promotion of personal advantage is not a part of jurisprudence, Leibniz declared; it belongs to politics.

This general theory, and even the arguments in support of it, have much in common with the ideas advanced by Grotius and Suárez, which in turn have their antecedents in the tradition which extends back to Cicero, the Stoics and Plato. The immutability of the moral law which is beyond even God's power to alter, was a premise of Grotius;\textsuperscript{39} that He could make right that which by reason is wrong is as incomprehensible as that He could make two times two something other than four. Reason for Grotius also was the basis of morality, and would be a sure guide even if there were no God. Again, Grotius understood politics to be the wise arrangement of the conditions peculiar to every human being and to every State as entities. Leibniz himself freely acknowledged many of his indebtednesses and thought that he had combined with his own system sound conceptions that had been advanced previously. Thus, he called attention to Grotius, who deduced law from a society of intelligent beings; to Hobbes who traced peace within the State to the war of all against all in the natural state; and to Sforza Pallavicino who found law in the wise origin of the world, motion and rest.\textsuperscript{40} Leibniz' eclecticism, however, has often been remarked, and need not be explored here. Nor, in the other direction, need we concern ourselves with the relations between his thought and that of Bentham. That there are affinities between their ideas seems clear enough.

\textsuperscript{38} Dutens, pt. 3, 185.
\textsuperscript{39} De Jure Belli ac Pacis Libri Tres (1625) Bk. I, c. 1, sec. 5.
\textsuperscript{40} Dutens, pt. 3, 212.
Leibniz' next step is the development of the idea of right,\footnote{Preface to the Codex Juris Gentium Diplomaticus (1693). It is translated in part by Latta, op. cit. 282 et seq. For the full text see Dutens, pt. 3, 287.} which he attempted to do systematically. In stating the elements of natural right, he observed,\footnote{Mollat, 19. See Latta, op. cit., 282.} there must be expounded, first, the common principles of justice, the charity of the wise man; secondly, private right or the precepts of commutative justice, concerning what is observed among men in so far as they are regarded as equal; thirdly, public right, concerning the dispensing of common goods and evils among unequal people for the greatest common good in this life; fourthly, inward right, concerning universal virtue and natural obligation toward God, that we may have regard to perpetual happiness. To these must be added the elements of legitimate and divine right: human right both in our own commonwealth and between nations, divine right in the universal church.

Right, he said, is a certain moral power, and duty (obligatio) a moral necessity. Moral is that which is equivalent to "natural" in a good man; for as a Roman lawyer admirably says, it is not to be believed that we are capable of doing things which are contrary to good morals. Further, a good man is one who loves all men, so far as reason allows. Justice, therefore, will be most fittingly defined as the charity of the wise man, that is to say, charity in obedience to the dictates of wisdom.\footnote{The idea of justice is a priori according to Leibniz. "Since justice consists in a certain congruity and proportion, the just may have a meaning, although there may neither be any one who practices justice nor any one towards whom it is practiced, just as the ratios of numbers are true, although there may neither be any one who numbers nor anything which is numbered, and it may be predicted of a house that it will be beautiful, of a machine that it will be effective, of a commonwealth that it will be happy, if it comes into existence, although it may never come into existence." Juris et aequi elementa (Mollat, 23). The doctrine of Right must therefore be deduced from definitions, in Leibniz' view. For other definitions of justice by Leibniz see those collected in Latta, op. cit., 285 note 7.} Therefore the saying attributed to Carneades that justice is supreme folly, because it bids us attend to the interests of others, neglecting our own, proceeds from the ignorance of the definition of justice. Charity is universal benevolence, and benevolence is the habit of loving or esteem-
ing. But to love or esteem is to take pleasure in the happiness of another, or what comes to the same thing, to adopt another's happiness as our own. In this way is solved the difficult problem, also of great importance in theology, of how there can be a disinterested love, a love apart from hope and fear and every consideration of advantage; the solution being that the happiness of those in whose happiness we take pleasure becomes a part of our own happiness, for things which give us pleasure are desired for their own sakes. And as the very contemplation of beautiful things is pleasant, and a picture by Raphael moves him who understands it, although it brings him no gain, so that it becomes dear and delightful to him, inspiring in him something like love; so when the beautiful thing is also capable of happiness, his feeling for it passes into real love. Divine love excels other loves, for God can be loved with the happiest results, since nothing is happier than God and nothing more worthy of happiness can be conceived. And since He possesses supreme power and wisdom, His happiness not only becomes a part of ours but even constitutes it (if we are wise; that is, if we love Him). But since wisdom ought to direct charity, wisdom also requires to be defined. It is nothing but the very science of happiness, so that we are brought back again to the notion of happiness.

With this statement, as Zimmermann remarks,44 we have reached the crux of the matter. Justice is perfection in accordance with wisdom,45 and wisdom is the science of supreme happiness; hence the definition of justice depends upon the definition of supreme happiness, and the latter is the conception which supplements the former upon which everything depends. It is through the idea of supreme happiness that, in Leibniz' opinion, the hitherto empty, formal notion of justice is to receive its specific content. Supreme happiness is defined as "a state of permanent joy." 46 Joy, he said, does not produce happiness if it is not lasting; rather, he who for the sake of brief joy falls into prolonged sadness, is unhappy. Joy, how-

ever, is a desire (lust) if the soul itself registers it; desire is the feeling of perfection or superiority, either about ourselves or about something else. Supreme happiness, accordingly, is the permanent feeling of one’s own perfection, or of a perfection external to oneself.

Now from this source flows natural Right (jus naturae) of which there are three degrees: strict Right (jus strictum), equity, and piety, or, civil, human and divine law. The first of these refers to the State, the second to humanity, the last to God and the universe: Strict Right in commutative justice, equity (or charity in the narrower sense of the word) in distributive justice, and piety (or uprightness) in universal justice.\(^\text{47}\) Hence come Ulpian’s precepts that we should do injury to no one, that we should give each his own, that we should live virtuously (or rather piously). Each degree that follows is more complete than the preceding one, confirms it, and in case of conflict neutralizes it.

Strict Right is basically nothing but the law of war and peace. Between two people the law of peace prevails so long as one does not start war, that is to say, violates the law. Between the person (the intelligent being) and the thing (which has no intelligence) there exists a continual law of war (jus belli). The lion may tear a man to pieces and a mountain may crush him; a man on the other hand may subdue the lion and tunnel through the mountain. Victory of the person over things and the reduction of the latter is called possession. Thus, under the law of war, possession gives the person the right to a thing if it is ownerless. If someone injures the person or the thing of another, then that act gives the other person the right to obtain redress through force. Deception also is a violation of right, inasmuch as a disadvantage is coupled with other intentions, and out of this flows the necessity of keeping promises. The single rule of the pure natural law therefore is: Injure no one so that the right to use force does not arise.\(^\text{48}\)

\[^{47}\text{Cf. Aristotle, N. E. 1130}\,^b\,30, 1131\,^b\,27, 33.\]
\[^{48}\text{Dutens, pt. 3, 213.}\]
the person injured would have ground for an action at law, or if it be without the State, he would have the right to make war. From this there comes the justice which the philosophers call *commutative*, and the *right* which Grotius called *right proper* (*facultas*).⁴⁹

The next higher degree of natural right is *equity* (*aequitas*) or, in the narrower sense of the word, *charity* (*caritas*). This degree extends beyond the rigor of strict Right to those obligations which those to whom we are obliged have no right of action to compel us to perform. These include gratitude, pity, and the things that were said by Grotius to have *imperfect right* (or fitness, *aptitudo*), not *right proper* (*facultas*). Equity requires as a condition for its existence some sort of "society." A society may exist in which the strict law alone is recognized, but it will not be a happy one, for it will be full of "perpetual quarrels."⁵⁰ Equity demands that though I make war upon him who has injured me, I do not carry it to the point of annihilation, but only so far as to receive indemnification; that I admit arbitrators; that I do nothing against others that I do not want them to do to me; that I do not particularly aim at the punishment of imprudence, but rather only at wickedness and deception; finally, that the cunningly contrived contract be rectified and the dupe assisted. For the rest, equity commands the observance of strict Right.⁵¹ As the precept of strict Right was to injure no one, so that of equity is to do good to everyone so far as befits each person or so far as each deserves, since we cannot equally befriend all men. Thus we have here *distributive* justice, and that precept of law (*jus*) which bids us give to each his own. And to this our related political laws in the State, laws that have to do with the happiness of persons, and which usually bring it about that those who had only a moral claim (*aptitudo*) acquire a jural claim (*facultas*), that is, they are enabled to demand what it is fair that others should give. But while in the lowest degree of natural Right no regard

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⁵⁰ Mollat, 15. Latta, 289, note 29.

⁵¹ Dutens, pt. 3, 213.
was paid to the differences among men, (except to those which arose from the particular matter in hand), and all men were regarded as equal, now in this higher degree merits are weighed, and hence privileges, rewards and punishments appear. Equity itself leads us in business to act upon strict Right, that is, the equality of men, except when a weighty reason of greater good requires us to depart from it.

The highest degree of Right is that of uprightness, or rather piety. For what has been said so far may be understood in such a way as to be limited to the relations of a mortal life. Strict Right has its source in the need of keeping the peace; equity or charity strives after something more, so that while each to the other does as much good as possible, each may increase his own happiness through that of others; in a word, strict Right avoids misery, whereas Right in the higher sense (*jus superius*) tends to happiness, but of such a kind as falls to our mortal lot. We ought to subordinate life itself and whatever makes life desirable to the great good of others, so that it behooves us to bear patiently the greatest pains for the sake of others. This is beautifully inculcated by the philosophers rather than thoroughly proved by them. Moral dignity and glory and the soul's feeling of joy on account of virtue, to which philosophers appeal under the name of rectitude, are indeed great goods, but not such as to prevail with all men nor to overcome all the sharpness of evil, since all men are not equally moved by imagination; especially those who have not become accustomed to the thought of honor or to the appreciation of the good things of the soul, either through a liberal education, or a noble way of living, or the discipline of life or of method. In order that it may be concluded by a universal demonstration that everything honorable is beneficial and that everything base is hurtful, we must assume the immortality of the soul, and the Ruler of the Universe, God. Thus it is that we think of all men as living in the City of God, that is to say, in the most perfect State that is possible, under the most perfect of Monarchs.\(^5^3\)

\(^{52}\) *E. g.*, Cicero, Mollat, 30.  
\(^{53}\) *Monadology*, Par. 85.
That Monarch cannot be deceived because of His wisdom, and His power cannot be avoided; He is also so lovable that it is happiness to serve such a master. By His power and providence it comes to pass that every right passes into fact, that no one is injured except by himself, that nothing done rightly is without a reward and no sin without a punishment. It is on this account that justice is called universal and comprehends all other virtues; for things which otherwise do not seem to concern any one else, as for instance whether we abuse our own body or our own property, are nevertheless forbidden by the law of nature, that is, by the eternal laws of the Divine Monarchy, since we owe ourselves and all that is ours to God. For as it is of importance to a commonwealth, so much more is it to the universe, that no one should make a bad use of that which is his own. Accordingly from this is derived the force of that highest precept of the natural law which bids us live virtuously.

Thus the highest degree of Right formally completes Leibniz' scheme. It expresses the will of a superior; but the superior is either superior by nature, as God is: and His will natural, hence piety or law, hence positive Divine Right; or the superior is superior by agreement (pactum), as a man is; hence civil Right. Piety therefore is the third degree of natural Right, and it gives perfection and effect to the others. For God, since He is omniscient and wise, confirms bare right and equity; and since He is omnipotent, He carries them out. Hence the advantage of the human race, and indeed the beauty and harmony of the world, coincide with the Divine will. Now there must be a higher degree of right than mere equity, for God is supremely just and good, and the justice of God differs not in kind but in degree from the justice of man. “But it is not for His ease nor in order to keep the peace with us, that God shows us so much goodness; for we could not make war upon Him. What then will be the principle of His justice and what will be its rule? It will not be that equity or that equality which has its place among men. We cannot regard God as

54 Dutens, pt. 3, 214.
having any other motive than perfection.”

Thus the highest degree of Right equalizes the antagonisms of the first two; strict Right can come into conflict with equity, and equity can come into conflict with strict Right. In the external world, both cannot prevail side by side without an equalizing physical force. Here God is the mediator and arranges that whatever is of benefit to the public welfare also brings advantages to the individual; and thus that all that is moral is useful, and all that is immoral is destructive. The existence of an omniscient and omnipotent Being is therefore the last foundation of natural Right.

Leibniz’ theory is thus both metaphysical and ethical, but it is not theological. God is the foundation of all natural Right, in the sense that without the assumption of God’s existence it is impossible to speak of the existence of a legal order in the world, inasmuch as the world itself would be non-existent. Since God is the last cause of being, He is also the cause of its being so. It is the assumption of God’s existence which serves as a sufficient guarantee of the existence of the highest possible legal and moral condition in the universe. But God is merely the originator of the condition and not of the laws that substantiate Him. These latter are entirely independent of Him, and flow out of the nature of truth itself. They form the object and substance of His cognition, not however of His arbitrariness. God desires what is right; but right would also remain right if He did not desire it.

What is the interest of Leibniz’ philosophy of law for us today? His general philosophical system, together with those of Plato and Aristotle, St. Thomas, Descartes, Hobbes, Spinoza, Locke, Kant, Hegel and the rest, has long ceased to be accepted as embodying a final account of the truth. Yet those systems are still studied with the greatest care, a tribute not accorded—apart from purely historical concerns—the various scientific systems advanced in the past, such as the Hippocratic and the Ptolemaic. The answer appears to be that the systems are

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65 Mollat, 65, Latta, 291, note 37.  
66 Dutens, pt. 3, 214.  
67 Zimmermann, 32.  
68 Ibid., 44.
occupied with problems which are still persistent, that they contain certainly not the whole truth but perhaps some part of it, and that the methods of the systems have not been overthrown completely, as has, for example, the practice of divination in the treatment of disease.

Leibniz' philosophy of law is addressed to the attempted solution of a central enduring problem of jurisprudence—the determination of a just legal order. That determination was the object of Socrates' proposition that law tends to be the discovery of reality, and it is the ultimate concern of the twentieth century revival of natural law. Under the influence of nineteenth century positivism the problem of a just legal order was held to be insoluble, on the ground that human processes are subject to the rule of causality, so that evaluative judgments are without significance. It was urged also that it is impossible to test such judgments scientifically. Notwithstanding a contemporary revival of natural-law doctrines, this is the dominant attitude today. We are told that the only legitimate concern of jurisprudence, that is to say, the only scientifically possible one, is the study of the law that is, and not the law that ought to be. Judgments of value must be eliminated not only from jurisprudence but from all the social sciences; the concern in such fields of inquiry is solely with what happens. That this view has a certain plausibility it is impossible to deny, in view of the large number of distinguished adherents who profess it; but that it has been refuted on numerous occasions it is also certainly possible to affirm.

It is indisputable that values constitute an omnipresent factor in the legal process. In the realm of statute-making we have to determine whether conduct shall be ordered in this way or in that, and what kind and degree of penalty shall be imposed for an infraction of the rule. Here there is clearly a competition among ideals, which demands some sort of resolution. In the realm of judicial decision the competition is no less intense, and extends from Mr. Justice Peckham's 59 denial of

the validity of particular social legislation as "meddlesome interference" to Mr. Justice Cardozo's allowance of a claim in tort on the ground of "considerations of analogy, of convenience, of policy, and of justice." Early in the history of American law the problem of values assumed an acute form. The States were faced with the task of determining the extent to which English law should operate within their domains. Some States admitted as authoritative only decisions prior to colonization, and regarded those between the reign of James I and the Revolution as merely persuasive. In a letter written in 1788 Jefferson held "it essential, in America, to forbid that any English decision which has happened since the accession of Lord Mansfield to the bench, should ever be cited in a court; because, though there have come many good ones from him, yet there is so much sly poison instilled into a great part of them, that it is better to proscribe the whole." And this of the man now held to be the greatest lawyer of his century, and who succeeded in revitalizing the entire common law! Although human actions may be causally determined, must not the jurist study the ideals of the eighteenth century if he is fully to understand the structure of contemporary American law? And may he not test Jefferson's position by assuming that Jefferson's ideals had triumphed, and that Mansfield's doctrines were thus initially excluded from American law? A little reflection would reveal to him that the common law prior to Mansfield was inadequate to cope with the commercial society of the nineteenth century, and that Mansfield's doctrines, or their equivalent, were essential if the common law was to meet its full responsibility.

But Leibniz' philosophy of law raises an apparently deeper issue. He proposes an evaluation of values, not at the historicodescriptive level, but as a measure for the future. In principle, this proposal is substantiated by the considerations just advanced, but it may be well to make it explicit. Scientific

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61 7 Writings (1907) 157.
inquiry, in its essence, proceeds by the so-called hypothetico-deductive method. It formulates hypotheses on the firmest ground available, makes logically proper deductions from them, and tests the results dialectically or empirically. No sound arguments appear to have been brought forward against the view that ethical systems can be made scientific through the development of adequate hypotheses as to what is good or bad, or what is necessary to achieve certain ends. At bottom, and this is its great merit, Leibniz' philosophy of law is a specimen of such a scientific system, put forward by one of the greatest minds in Western philosophy, and rigorously thought out by the identical methods which have achieved much success in the exact sciences. He began his system with two hypotheses: " (a) The Monad is nothing but a simple substance which enters into compounds. By 'simple' is meant 'without parts';" (b) "There must be simple substances, since there are compounds; for a compound is nothing but a collection or aggregatum of simple things." These hypotheses culminated, through steps which seemed to Leibniz inexorable, in the theory of the City of God, the apex of his philosophy generally, as well as of his philosophy of law. The elements of his hypotheses are ideal elements, exactly comparable to the ideal bodies whose masses are concentrated into ideal points for the purposes of physics. For the objectives of this theory, as for that of the physicist, it is irrelevant whether or not they exist in nature. He proceeded by the same method in his philosophy of law: "jus strictum," "equity" or "caritas," and "uprightness" or "piety" are all ideal entities that exist nowhere in the social world, but against which actual social events can be measured. That the system is defective on many grounds, principally in that it cannot be applied to the actual world in any meaningful sense, need not be denied. Similar failures in the history of science do not impugn the validity of the method. Nor need it be denied that the difficulties in the way of the construction of a system which will yield applicability are

**For a recent discussion, see Cohen, A Preface to Logic (1944) 155 et seq.
immense. But that does not necessarily mean, as the contemporary positivist asserts, that the construction of such systems is impossible. A theory of natural law that possesses no application is at best an idle game; but a theory of positive law that ignores the normative is fatally incomplete.

**Law and the Social Order**

Parallel with his theory of natural law, Leibniz developed a theory of law in society. He was, as his numerous papers on specific contemporary legal issues amply reveal, an intensely practical man, and his grasp of the problems of positive law was as firm as his hold on those in the domain of natural law. In the sphere of positive law his thought was basically sociological, that is, it took its departure from the idea of the group, or the human plural, the pivotal concept, as it has been called, of present-day sociological theory. At the same time, his social values were of such an ameliorative nature that his nineteenth century followers felt themselves compelled to deny that his ideas were "socialistic." Among other things, he proposed that the State safeguard the opportunity to work, that it promote an adequate insurance system, a wise colonial policy, a modernized tariff system and a State liquor monopoly.\(^6^3\) The whole tendency of his temperament, as of his philosophy, Russell \(^6^4\) remarks, was to exalt enlightenment, education and learning, at the expense of ignorant good intentions. If his thought in this respect is not always as clear as it might be, it is because the Church had explicit views on the topics with which he was concerned. He consistently attempted in all fields to harmonize his views with those of that powerful institution, and where that was not feasible he did not hesitate to defer. But it is impossible to mistake the true direction of his thought, or fail to realize the extent to which it was permeated with social considerations. "Laws," he remarks, "are not made for the purpose of destroying man, they are made to preserve man."\(^6^5\)

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\(^{63}\) Hartmann, 80.

\(^{64}\) *The Philosophy of Leibniz* (1900) 202.

\(^{65}\) Dutens, pt. 3, 256.
At the root of his social theory of law was a conception of law and justice as a totality, a resolute opposition to any attempt at a bifurcation of the legal order into law on one side and justice on the other. This does not mean that in the social world law and justice are not frequently in opposition. Right, he remarked, for example, can never be unjust, for that would be a self-contradiction; law, however, can very well be unjust. For it is force that gives and maintains the law; and if this force lacks wisdom or good will, it can give and maintain very bad laws. In such cases the duty of the magistrate is identical with that of the citizen: there must be absolute obedience to the rules of the legal order, even when it is unmistakable that they run counter to the true right. If Leibniz was here attempting to be practical he was not being practical enough. Much closer to an accurate description of the social process, in the sense that it allows for the facts of individual resistance and social revolution, is the doctrine associated with the name of Rousseau, that the basis of obedience is consent. Since this means that the activities of the State are subject to examination it means also that authority under certain conditions will pass over into anarchy. History is replete with the record of men who have defied the instructions of the legal order, from an overwhelming sense of duty. The Anabaptists rejected all law, since the Holy Spirit, who was unfettered, would be the complete guide for the good man. A theory such as that of Leibniz, which condemns them on a priori grounds, ignores a permanent tradition of human society.

In his social theory of law Leibniz conceived of justice as a communal virtue, that is, a virtue which preserves the community, and which therefore can come into being only with the existence of a community. A community is defined as “a union of various human beings for a common aim.” Now law originates in the community not as a result of a natural social condition, but as a consequence of the desire for happiness.

66 Mollat, 51. 67 Mollat, 108. 68 Guhrauer, Leibniz' Deutsche Schriften (1838) 414.
Human beings do not establish the legal order because they, like certain animals, possess originally an inclination to live socially, and because, as Aristotle taught, man is a social animal. On the contrary they live socially because they desire happiness, and because every individual sees his own welfare advanced and less endangered by others if, instead of standing isolated, he unites with others for common protection and advancement, thus forming a community. The most perfect community is one with the objective of common and supreme happiness, from which it follows that any community that desires perfection should have the sole objective of common and supreme happiness. It may be well to add that Leibniz' theory of happiness was based ultimately on a doctrine of unconscious or insensible perceptions. At every moment there are an infinite number of perceptions in us, but not accompanied by apperception and reflection, i.e., changes in the soul itself of which we are not conscious, because the impressions are either too slight and too great in number, or too even, so that they have nothing sufficient to distinguish them from one another; but joined to others they do not fail to produce their effect and to make themselves felt at least confusedly in the mass. They form, Leibniz knows not what, these tastes, these images of the sense-qualities, clear in the mass, but confused in the parts, these impressions which surrounding bodies make upon us, which involve the infinite, this connection which each being has with all the rest of the universe. We may even say that in consequence of these minute perceptions, the present is big with the future and laden with the past, that all things conspire, and that in the least of substances eyes as penetrating as those of God could read the whole course of things in the universe. These unconscious perceptions form the inclinations and propensities, but not the passions. Happiness is, so to speak, a road through pleasures, and pleasure is only a step and an advance towards happiness, the shortest that can be made according to present impressions, but not always the best; one may miss the true road in desiring to follow the shortest. Thus we know
that it is the reason and the will that lead us towards happiness, but the feeling and appetite carry us only towards pleasure. At bottom, however, pleasure is a feeling of perfection, and pain a feeling of imperfection, provided it be marked enough to make us capable of perceiving it. Out of the fountainhead of the unconscious perceptions flow ultimately the recognizable impulses and the perceptible inclinations.\(^{69}\)

Leibniz defined six types of communities, each with its own type of law. There are the three elementary types made up of a few persons: the marital community, the family community of parents and children that results, and the community of master and servant. The fourth is the community of the household, which combines the first three types. Then there is the civil community, comprising the city, province, and state. Finally, the series is crowned by the supreme, all-embracing community, the Church of God, whose destiny it is to be general and catholic, as a moral world within a natural world, with God Himself at the head as invisible Lord and Ruler. These are natural communities because they are the kind "that nature wants." We know nature desires them, because nature has given us a desire for them and an ability to satisfy that desire; for nature does nothing in vain, particularly when the matter is necessary or when it is of permanent advantage, for nature dispenses everywhere for the best. Out of the natural community flows the natural law, the purpose of which is to preserve and further the natural community.

Each community is interpreted in the light of this principle. The community of husband and wife serves "to preserve the human race." Preservation is the fundamental assumption for all happiness and, to that extent, a condition for its satisfaction. The community of parents and children is cultivated and preserved by the parents for the pleasure of enjoying grateful children, and by the children in order that they themselves may reach perfection. Thus the family community serves the pur-

pose of happiness, although, as Zimmermann remarked, it is plain that Leibniz' conception has not exhausted the meaning of the family. The careless and sketchy manner in which the idea is presented probably explains why Leibniz himself never made public the paper in which it appears. The third natural community, that of master and servant, exists in accordance with nature if one person lacks intelligence but not the physical strength to earn a living. Such a person is a servant by nature and must work as instructed by someone else, he thus makes a livelihood, but the surplus belongs to the master. Leibniz apparently did not want this argument used as a justification for slavery or serfdom, however, for he at once added that he doubted whether an example of such bondage, in which the servant exists solely for the master's sake could be found, particularly since souls are immortal and someday can acquire knowledge and participate in the happiness of the master's life. For if there is hope that the servant may acquire knowledge, then the master is obliged to further his servant's freedom through education, to the extent the servant needs it for his happiness. Accordingly, he concluded that this type of community exists only between man and cattle. The household community has as its purpose the meeting of "daily exigencies." The civil community serves the purpose of attaining happiness more quickly and, at the same time, of remaining secure. Its aim is temporal welfare. The aim of the ecclesiastical community is eternal happiness.

Two ideas of importance emerge from Leibniz' theory, the first an attempt to find a ground for law in a principle of society, and the second an endeavor to work out a conception of the end of law within the framework of that principle. As to the first, his principle is merely that society has a structure, and that positive law is grounded upon that structure and its character is determined by it. This idea is now a commonplace of contemporary social thought, which recognizes many types of organization—the community, crowds, classes, the family, and the organized groups such as the state and the various
economic organizations. This structure holds together and perpetuates itself through various controls, of which one of the most important is the legal order. The idea of finding the basis of law in the structure of society is familiar enough to sociologists, but it is rarely attempted by jurists, who generally associate law with the state, or with an ideal of morality, or with some principle of power, either in a naked form or as expressed through the sovereign, the legislature, the courts or officials. Perhaps the most successful formulation by a jurist in modern times of the structural principle in its legal aspect is Maine's hypothesis that ancient society was organized on the basis of status and that modern society had its focus in contract. We hear much from jurists today of law as an instrument of social control, but we receive little or no analysis of that aspect of the legal order in the only terms that appear to be valid. Sociologists have developed the foundations of the structural principle in a seemingly unanswerable manner, but so far they have lacked the technical knowledge to make its application to the legal order fruitful. Leibniz' sketch of the principle was hardly more than a beginning, but its power and objectivity when united with the tasks of legal analysis in the hands of its two most eminent juristic exponents, Maine and Jordan, should long ago have awakened a wide conception of its possibilities. At its very outset, it may be noted, the structural principle challenges the foundations of the most influential of contemporary legal philosophies. Since Jhering we have been taught that the State is a harmony of conflicting interests, and that law is the instrument of effecting and maintaining the harmony. In the words of Pound, who has given this theory its classic form, "an interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilized society must take account." Does this theory fall because of the argument that no organization of subjective

70 *Ancient Law* (1861).
71 *Forms of Individuality* (1937).
72 *Outlines of Lectures on Jurisprudence* (5th ed. 1943) 96.
phenomena is possible, that subjective facts do not submit to order, that the order of mind is not the superficial juxtaposition of mental states? We do not know, since nowhere, notwithstanding the advancement of this explicit criticism, is the problem faced by the exponents of the theory of an order of interests.

Leibniz' theory of the end of law emphasizes two tasks that are also at the bottom of most present-day legal thinking about the problem: (1) insistence upon a proper consideration of the human being, and (2) the attainment of the common end as the measure of social values. An economic relationship, such as that of master and servant, has validity in Leibniz' system only in so far as it expresses an intellectual class relationship. This at once eliminates any idea of property, as in slavery, or of individual privilege, and refuses to admit the conception of the individual as a mere expedient. This ethical ideal of self-realization has its metaphysical correlate in the idea of immortality. Intellectual priority, representing the legal title of authority, contains within itself the obligation to produce an effect upon the spiritual community which at once abrogates absolute dependence.73 The master-servant relationship itself sets the aim and task of education for freedom. These values fix a barrier to the idea of exclusive property, which has no place under an ideal constitution. Although the necessity of individual proprietors is recognized, under present conditions it must be held to be a symptom of ethical bondage and immaturity.74 Above the idea of property stands society, with its right of control. At the stage of strict Right the aim is to limit and guarantee to the human being a highly circumscribed circle of individual operation. But at the stage of equity, this negative rule is transformed into the positive principle of furtherance of individual purposes, through active social participation and cooperation. This demands of the individual a voluntary renunciation of the advantages that arise from separation and isolation.75 As Cassirer put it, "the objective goal

73 Mollat, 16. 74 Mollat, 9. 75 Mollat, 14.
of the community alone decides the legal and social structure.”

The gulf that separates this conception of the end of law from Plato’s idea of its task as the preservation in their distinctness of the principal functions of society, or from Cicero’s and St. Thomas Aquinas’ idea that it was to give to each his due, need scarcely be remarked. Not until the twentieth century did Leibniz’ idea of the task of the legal order receive full expression in the writings of jurists. But that contemporary jurists are now putting forward in this field ideas that he long ago formulated cannot be doubted.

CONCLUSION

Leibniz presented his ideas in what for many must be a somewhat strange and baffling form. His writings on law represent an amalgam of conceptions drawn from the three great divisions of thought of his time, science, philosophy and theology, with the addition of a fourth that we would call today the social sciences. He did not see any of these divisions as self-contained departments of knowledge, and he expected any proposition which he asserted to be valid, whether tested scientifically, philosophically or theologically. Consequently, the system which he constructed in any particular field was apt to contain elements from other domains and to be related to them explicitly. Such a method, when used by a man of Leibniz’ powers, makes for great complexity and apparent obscurity. It also accounts for the fact that although his intellectual abilities were undoubtedly the equal of Plato’s his philosophy even yet has not been fully expounded in its generality, and no complete collection of his writings has ever been published. In studying any major philosopher, Russell has remarked, the right attitude is “a kind of hypothetical sympathy, until it is possible to know what it feels like to believe in his theories, and only then a revival of the critical attitude,

76 Leibniz, 456.
77 For a summary of the present-day leading ideas, see Pound, Twentieth Century Ideas as to the End of Law, Harvard Legal Essays (1934) 357, 365-366.
78 A History of Western Philosophy (1945) 39.
which should resemble, as far as possible, the state of mind of a person abandoning opinions which he has hitherto held.” This counsel is peculiarly appropriate to the study of Leibniz, whose complexities of thought may appear without much reflection to embrace too large a share of the fantastic. But it is the part of wisdom to remember always, when confronted with elements of this character, that Leibniz’ methods were as rigidly scientific as they could well be. “An abstraction is not an error,” he wrote pointedly, “provided we know what it is that we feign therein,” and on this ground he justified not only the employment by mathematicians of perfect lines, uniform motions and other ideal entities, but also the comparable use of similar abstractions in other fields. The main task in the study of Leibniz is to grasp the full content of such abstractions.

79 New Essays, 51.