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Introduction

I shall not say much by way of introduction to this volume or elaboration of my title. I believe that legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law. Whether or not this disrepute is justly earned by the antics of the past or present membership of the British House of Commons, say, or the two houses of the US Congress is an issue on which I shall say nothing. For the problem I see is that we have not even developed a normative theory of legislation that could serve as a basis for criticizing or disciplining such antics. More importantly, we are not in possession of a jurisprudential model that is capable of making normative sense of legislation as a genuine form of law, of the authority that it claims, and of the demands that it makes on the other actors in a legal system.

Our silence on this matter is deafening compared with our philosophical loquacity on the subject of courts. There is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of judicial decision-making. No one seems to have seen the need for a theory or ideal-type that would do for legislation what Ronald Dworkin's model judge, "Hercules," purports to do for adjudicative reasoning.[1]

Indeed the situation may be even worse than this; it is certainly worse in America. Not only do we not have the normative or aspirational models of legislation that we need, but our jurispru-

dence is pervaded by imagery that presents ordinary legislative activity as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling – as anything, indeed, except principled political decision-making. And there's a reason for this. We paint legislation up in these lurid shades in order to lend credibility to the idea of judicial review (i.e. judicial review of legislation under the authority of a Bill of Rights), and to silence what would otherwise be our embarrassment about the democratic or "counter-majoritarian" difficulties that judicial review is sometimes thought to involve.[2]

And so we develop an idealized picture of judging and frame it together with a disreputable picture of legislating. Political scientists know better of course. Unlike law professors, they have the good grace to match a cynical model of legislating with an equally cynical model of appellate and Supreme Court adjudication. Part of what I am interested in doing in these lectures is to ask, "What would it be like to develop a *rosy* picture of legislatures that matched, in its normativity, perhaps in its naivete, certainly in its aspirational quality, the picture of courts – 'the forum of principle,'[3] etc. – that we present in the more elevated moments of our constitutional jurisprudence?"

In this volume, then, I am going to try to recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law. I want us to see the process of legislation – at its best – as something like the following: the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them. That is the sort of understanding of legislation I would like to cultivate.

And I think that if we grasped that as our image of legislation, it would make a healthy difference in turn to our overall concept of law.

To articulate this understanding is partly a task for analytical legal philosophy; and I have attempted that side of things elsewhere.[4] But we also need to explore the resources we have in our tradition of political thought for sustaining and elaborating this view of legislation; and that is the purpose of this volume. None of the political philosophers whose work I shall discuss can be regarded primarily as *a theorist of legislation*. But there is much more on this in their writing than is commonly supposed – even in the writings of thinkers who are taken to be opposed to the claims of positive law and majority-rule in the name of natural rights or autonomous moral reason. In the chapters that follow, I will be pursuing clues and intimations in the thought of three major thinkers in our tradition – Kant, Locke, and Aristotle – to see what we can learn from them in regard to the standing of this philosophically under-theorized form of law-making. They are not by any means "the usual suspects" in this matter: if there *are* theorists of legislation in our tradition, they are *par excellence* Jeremy Bentham, Jean-Jacques Rousseau, and perhaps Thomas Hobbes. Those three will not be neglected; but I thought it important to show that themes connected with legislation are a little more pervasive in the canon of political theory than a study confined to the usual suspects would reveal.

I hope that what follows is of more than merely academic interest. The British people are justly proud of their Parliament – particularly the House of Commons. In the next few years, however, the government of the United Kingdom is likely to undertake considerable revision of the country's constitutional structure. Many of the proposed changes will be salutary – reform

of the monarchy, for example, and the hereditary and ecclesiastical sides of the House of Lords. Other needed changes may be neglected: I have in mind some reform of the preposterously unfair and disproportionate system of electoral representation; it is now a matter of some embarrassment that the UK is one of a very few democracies that persevere with a "first past the post" rule. One of the changes that *is* envisaged is the incorporation of a Bill of Rights into British law, together with an American-style practice of judicial review of legislation. (The incorporated Bill of Rights is likely to be the European Convention on Human Rights, and at the time of writing it is unclear whether British courts will be given the power to strike down statutes or simply to declare them unconstitutional.) Such a change, if it goes through, will have momentous consequences for the British Parliament and its place in the constitution. The proposal for this particular reform commands widespread support, and it does so largely because ordinary people are worried about the extent of executive control of legislative affairs in Britain. The executive dominates Parliament, so that parliamentary sovereignty often seems to amount to a form of elective executive dictatorship. But people are also worried about majority legislation as such – that is, by the idea of legislation by a popular assembly, even at its best, even if it were not dominated by Downing Street. In other words, I am sure the bad reputation of legislation in legal and political theory has a lot to do with the enthusiasm (particularly elite enthusiasm) for this change. People have become convinced that there is something *disreputable* about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle. It seems that such a forum is thought unworthy of the gravest and most serious issues of human rights that a modern

society confronts. The thought seems to be that the courts, with their wigs and ceremonies, their leather-bound volumes, and their relative insulation from party politics, are a more appropriate place for resolving matters of this character.

I am not convinced;[5] but it is not my intention to make the case here against judicial review of legislation. I do think it imperative, however, that such a reform should not be undertaken without a clear sense of what is valuable and important in the idea of a legislature and of the dignity and authority that legislation can command. It should certainly not be undertaken on the basis of the impoverished conception of legislation that is found presently in our jurisprudence or in the theoretical underpinnings of American constitutional law. I hope, therefore, that the chapters that follow may contribute something substantial to the development of this understanding, and provide us with a better basis for thinking about the constitutional choices that we face.

So, my title is "The Dignity of Legislation" and my aim is to evoke, recover, and highlight ways of thinking about legislation in legal and political philosophy that present it as an important and dignified mode of governance. My strategy is two-fold. In the first chapter and the last, I shall speak directly of the matters I have just outlined. But in the three middle chapters, I am going to try and tease out what there is to be said in favor of positive legislation from the three rather unpromising canonical sources that I mentioned: Aristotle, John Locke, and Immanuel Kant. My sense is that these are names not commonly associated with the idea of the dignity of legislation. On the contrary: Kant is associated with the notion that there are severe limits on the claims that positive law may make against the autonomous moral thinking of the individual person; Locke is philosophically the founding father of the limited legislature and the idea of natural rights against the

legislature; and Aristotle is more commonly associated with suspicion of democracy and the ideas of political virtue on the basis of which an enhanced role for the judiciary is often today defended. Nevertheless it is from Aristotle's work, from Locke's and from Kant's, in the canon of political thought, that I shall try to recover some of what I think we need in the way of a philosophical account of the dignity of legislation.

2

The indignity of legislation

I

In the introductory lectures on political science that he gave in Cambridge in Michaelmas Term 1885,[1] John Robert Seeley noted the tendency of German writers on politics to characterize states (or stages in the development of the state) according to what is taken to be the province of their main activity, their most important function, the function that organizes and inspires everything that they do. There is *Der Kriegstaat* (the state organized for war), *Der Rechtstaat* (the state organized around the principle of the Rule of Law and individual rights), *Der Handelstaat* (the state devoted to the advancement of trade), *Der Polizeistaat* (the police-state), and so on.[2] *We* live, said Sir John, in a *Legislation*-state, which is not at all the same thing as a *Rechtstaat*, but rather a form of state devoted to the business of making continual improvements in the life of the community by means of explicit legal innovations, i.e. by parliamentary legislation.[3] We may be committed in principle to *laissez-faire* economics and to free trade, he said; we may accept Mill's principle of liberty so far as society's interference with the private life of the individual is concerned,[4] but we do not infer from this any principle or moral requirement of government inactivity. On the contrary, every day another demand emerges for new legislation to deal with some difficulty or to reorganize some aspect of social affairs, be it education or public hygiene or the reform of the civil service. All parties in modern politics agree, said

Seeley, "that there is a vast amount to be done, that we have more work before us than can possibly be overtaken," and that consequently "governments ought to be continually busy in passing important laws."[5]

Seeley denied that he was passing judgment on this tendency; he said he was just trying to classify it. But the tone of distaste is unmistakable in the midst of his taxonomy. The legislation-state, he said – that is, the state engaged continually in making laws, unmaking them, and amending them – is an anomaly:

> Historically, this is as unlike as possible to the doctrine of other periods. The state in other times . . . was not supposed to be concerned with legislation. Communities had indeed laws, and at times, though rarely, they altered them; but the task of alteration hardly fell to the state . . . In earlier times, the state, that is the power which issues commands and inflicts punishments, was hardly supposed capable of making law. It could conduct a campaign, levy a tax, remedy a grievance, but law was supposed to be in a somewhat different sphere. Law was a sacred custom; the state might administer, or enforce, or codify it; but legislation, the creating or altering or annulling of law, was conceived as a very high power, rarely to be used, and concerning which it was doubtful who possessed it. Laws are ὑψίποδες δί αἰθέρα τεκνωθέτες "walking on high, born above the heavens." Often religion was called in, and commonly some degree of fiction was used to conceal the all too daring alteration that was made.[6]

On this point, Seeley concluded, "we have completely broken with the tradition of earlier times."[7]

He was not the only person who took this tone – Henry Sumner Maine was another,[8] Walter Bagehot was a third[9] – and though the pitch of legislative activity in England in their time was unprecedented, their attitude towards legislation and legislators was hardly new. More than a hundred years earlier and at Oxford,

William Blackstone observed, in his lectures on the Common Law of England, that a long course of reading and study is required to form a professor of laws, "but every man of superior fortune thinks himself *born* a legislator." As a result, said Blackstone, "the Common Law of England has fared like other venerable edifices of antiquity, which rash and unexperienced work-men have ventured to new-dress and refine, with all the rage of modern improvement."[10] (Indeed it was the point of his *Commentaries* to remedy this situation. Though they were delivered in 1765 as lectures at Oxford, they were not intended as a contribution to the education of *lawyers*; instead they were aimed at the sort of gentlemen in the audience who might be expected to seek positions as legislators, five or ten years hence, in the House of Commons.)[11]

And the attitude persists into our own time, in American jurisprudence perhaps even more than in English. We hear the concerns of Blackstone and Bagehot and Seeley echoed in the sentiment widespread among twentieth-century legal scholars that the character of Common Law systems is changing for the worse as legislation crowds out the more endogenous and traditional bases of legal growth. Statutes, we are told, "have no roots" and are often "hastily and inconsiderately adopted."[12] "Choking on Statutes" – the title of the first chapter of Guido Calabresi's book on courts and legislation – is an apt motto for this sort of attitude.[13]

II

Among some Common Law jurists, this attitude crystallizes in a curious, almost snobbish reluctance to regard legislation as a form of law at all. In what I think was his last published essay, the great Harvard formalist Christopher Columbus Langdell reviewed

A.V. Dicey's book *The Relation Between Law and Public Opinion in England During the Nineteenth Century*.[14] Langdell began his review by explaining that, despite its title, this was not a *law* book at all,[15] that the inclusion of the word "law" in Dicey's title was unfortunate and misleading. "As commonly used by lawyers, the word means law as administered by courts of justice in suits between litigating parties, but here it is clearly not used in that sense but in the sense of legislation."[16]

What could possibly be meant by anyone's insisting that legislation is not law? At its least controversial, the claim embodies a healthy dose of Legal Realism. A bill does not become law simply by being enacted, or taking its place in Halsbury or in the statute-book. It becomes law only when it starts to play a role in the life of the community, and we cannot tell what role that will be – and so we cannot tell *what law* it is that has been created – until the thing begins to be administered and interpreted by the courts. Considered as a piece of paper with the stamp of parliamentary approval, a statute is not law, but only a possible *source of law*.[17]

But Langdell, of all people, was anything but a Legal Realist; his approach to the law and to legal education at Harvard Law School was exactly what the realists took themselves to be revolting against.[18] Anyway I am sure he was not just making this simple analytic point in denying the honorific "law" to something as mean and ordinary and political as the parliamentary legislation that Dicey was writing about. As I said in Chapter 1, there is a sense in legal philosophy that legislation lacks some of the *dignity* associated with the venerable institution we call law. While the Common Law has been evolving for centuries, "working itself pure" in Lord Mansfield's phrase[19] – so that each precedent or each doctrine, however much we dislike it in itself, has something in its lineage that elicits our respect – a statute thrusts itself before