Public Law, Precarity, and Access to Justice

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Equality before the law is an axiom of public law, perhaps the most fundamental public law axiom of all. Our commitment to this equality is deepened by the knowledge that it does not map perfectly onto social reality. Because people are not equal in rank and privilege, precisely because they are not afforded the same opportunities, or rather the same opportunity to take advantage of opportunity, we must provide equal access to justice for those that lack a voice in society: the poor, the marginalized, the "deviants." Seen in that perspective, access to justice is an unconditional good. In this paper I shall attempt to nuance that belief by showing that, in addition to making us equal before the law, public law systems generate precarity. Public law systems do so by distributing access to justice in ways that make certain groups in society easy prey for those more powerful than themselves. The most obvious implications of the argument concern the constitutional sphere. But its most momentous implications may show themselves beyond that sphere. As the idea of the rule of law spreads around the world, driven by governance reforms and by the efforts of human rights advocates, the mechanisms of in- and exclusion that underpin the operation of public law spread with it, reproducing on a global scale the social dynamics that generate inequality within the polities that law orders. As we shall see, public law may be one of the links that tie the relative deprivation we encounter in the West to the absolute deprivation suffered by millions in other parts of the world.[1]

If we want to determine how the *machine* of public law works in generating precarity, we need first to understand how the machine is wired. That is no easy task. The machine was not built from one

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1. On the conduits between relative and absolute deprivation, see LEA YPI, GLOBAL JUSTICE AND AVANT-GARDE POLITICAL AGENCY 116-18 (2012); *cf. id.* at 108 (discussing how the enjoyment of positional goods is dependent on how one fares compared to others).

blueprint, drawn by a master builder. It developed over time in response to emerging and often contradictory imperatives. For our purposes, inquiry can be limited to two key moments in the intellectual history of public law: its foundation by Thomas Hobbes, and its constitutionalization by John Locke. Juxtaposing, or rather over-layering, their philosophies, we see how public law, in raising everybody up to the status of subjects of law, exposes some to depredation by others.

In the first part, I examine Thomas Hobbes' theory of commonwealth to see how it situates subjects in relation to justice. Hobbes famously founds his commonwealth on the equal subjection of all to the Leviathan, which is the equal subjection of all to law. We need to understand why he nevertheless needs to accommodate the diversity of society—the basic fact that some are weak while others are not—into the operation of the public law machine. As we shall see, the accommodation of social diversity is tied to a proto-liberal distinction between social spheres that relegates much of human life to a sphere beyond the reach of law where domination is unchecked. What this suggests is that, by bridging the divide between theory and reality, between the ideal of equality and the reality of domination, the domination of the weak by the strong is a condition of *equality for all*.

The second part deals with John Locke's theory of government. Most scholarship focuses on the differences between Hobbes and Locke. I shall read them as complementary moments in the elaboration of public law theory. As I hope to show, Locke's theory of government works through different strategies for how to calibrate Hobbes' public law machine of equal subjection so as to give it more purchase in a social reality where inequality is the norm. Consequently, we shall not focus on Locke's critique of sovereignty, but on the way Locke tweaks the operation of the machine from within, without changing its basic setup. I show how he embeds the political relation between sovereign and subject within non-political relations: those obtaining within the family and property relations. In and through this dual operation, Locke overlays the skeletal order of subjection that Hobbes laid down by a mesh of effective and material relations that facilitate interaction between government and subjects. If the introduction of property entrenches–and renders more determinate–the social exclusion of some, paternalism provides a conduit for reaching out to those so exposed in order to tie them closer to the society of which they are full members only in law.

In the third and final part, I consider how we should think about the relationship between the political struggles that have been the traditional object of political theory and the absolute deprivation

millions outside the western world suffer. I briefly contrast the approach I am taking with recent developments in global justice theory, and I argue that studying the operation of public law might give us new insights into how liberal order generates precarity.

WITH SUBJECTION FOR ALL AND LIBERTY FOR SOME

Any critique of public law theory has to acknowledge that the foundation of social life in law represents a great civilizational achievement. The idea that all men are equal in the eyes of the law is revolutionary, and has served as the conduit for the progressive transformation of social order.[2] The argument I make is that the idea of equality, as it operated in early modern public law, depended on a set of implicit protocols that ensured that it did not apply *equally* across all sectors of social life. This introduces the theme of how law reflects, and in turn shapes, social architecture. The task of interpretation is double: on the one hand, we need to discover how, and by what conceptual operations, Hobbes laid down a framework for society that revolves around equal subjection to law, and on the other, we must shed light on the means he employed to ensure that the idea of a society of equals could find uptake in a time that was structured around massive inequalities.

Public law theory rests on the idea that the law that governs society is public in nature. To Hobbes falls the merit of having made this the cornerstone of a philosophy of civil life. In earlier political jurisprudence, including the work of Bodin and Grotius, it was not clear whether the law that governs society was public or private, as reflected in the then-current idea of patrimonial kingdoms. In his inquiry into the rights of war and peace, Grotius identified the source of constitutional authority as being public law, or at a minimum, the consent of the people; at the same time, he acknowledged that in certain kingdoms, authority was distributed according to norms not public in nature: "[f]or in Kingdoms not Patrimonial, the Regency belongs to those, to whom the publick Laws, or upon their Deficiency, the Consent of the People shall consign it. But in Kingdoms Patrimonial, it belongs to those whom the Father, or nearest Kindred shall chuse."[3]

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2. *See generally* Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464, 470-71 (2010) (providing a standard account of the rise of law as an Enlightenment project).

3. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 297-98 (Richard Tuck ed., Liberty Fund 2005) (1625); *see also* JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE 225-26 (Librairie Arthème Fayard 1986) (1576).

By the time of Hobbes' work, the indeterminacy between public and private law had been lifted: the distinction between the office and the person of the sovereign had become commonplace. As the student of the common laws tells the philosopher in Hobbes' dialogue on the common laws, "[a]ll Soveraigns are said to have a double Capacity; viz. a natural Capacity, as he is Man, and a politick Capacity, as a King."[4] The distinction between the king's two bodies contains, in outline, the idea of *public* law—the notion that authority is a function not of particular features of the sovereign, such as his power or virtue, but of the collective over which he presides.[5]

Hobbes was able to reduce all forms of title and authority to one public format of law through his supposition of the state of nature. The radical uncertainty of life in this state acts as a solvent of all pre-existing ties and distributions of power between individuals.[6] What emerges from this operation is a format of power that is imminent to the society it governs, in the sense of being completely self-governed and wholly contained within the moment of its creation. The mechanism of the *creatio ex nihilo* is authorization: each man covenants with every other man to subject his will to the will of the sovereign, making himself the author of the sovereign's every act, provided all others do the same. This is the backdrop to Hobbes' laconic commitment to the principle of popular sovereignty. Sovereignty is *popular* sovereignty because civil order is a product of will as determined by the coming together of the

4. THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 160 (Joseph Cropsey ed., Univ. of Chi. Press 1971) (1681) [hereinafter DIALOGUE OF COMMON LAWS].

5. The question of the public/private nature of power precedes, and conditions, the question of constitutional form, that is, of how power is to be distributed within the commonwealth. Hobbes' theory opens up in equal measure to a government of one, a government of the few, and a government by all, even if his preference is clearly for the first option. However, what ultimately renders the differences between constitutional forms irrelevant, collapsing the hierarchy on which a millennial tradition had been built, was the demonstration that all power stems from one single source and therefore retains nothing from whatever configuration it might be represented through.

6. For an analysis of the connections and tensions between contractualism and access to justice, see Daniel Bonilla Maldonado, *The Right to Access to Justice: Its Conceptual Architecture*, 27.1 IND. J. GLOBAL LEGAL STUD. 15 (2020) and Colin Crawford, *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, 27.1 IND. J. GLOBAL LEGAL STUD. 59 (2020). Bonilla's and Crawford's articles are in dialogue between them and with this article. With regard to the state of nature, custom and law, see DIALOGUE OF COMMON LAWS, *supra* note 4, at 96 ("Now as to the Authority you ascribe to Custome, I deny that any Custome of its own Nature, can amount to the Authority of Law: For if the Custom be unreasonable, you must with all other Lawyers confess that it is no Law, but ought to be abolished; and if the Custom be reasonable, it is not the Custom, but the Equity [and hence the implicit jurisdiction of the King] that makes it Law.").

individuals that make up the people: "[w]hen men have met to erect a commonwealth, they are, almost by the very fact that they have met, a *Democracy*."[7]

The novelty of Hobbes' conception is that the subject's alienation of liberty is tied to his or her integration into the people. Where medieval forms of authorization revolved around the notion of an always revocable transfer of power between already constituted entities, authorization is generative of a new subject, the great Leviathan.[8] Creation happens through authorization, it does not outlast it. As creation occurs, the elements–each individual subject, the sovereign, and the collective–remain in a state of continuous implication. Authorization must occur repeatedly. Paradoxically, the fact that the sovereign is at all times tied to his constituent parts is what allows Hobbes to detach the exercise of sovereign power from the will of those constituent parts: the will of the individual subjects, and the will of the people. Every point in the triadic structure—subjects-sovereign-people—makes reference to every other point and, therefore, maintains its structure within the present. At no point is the fusion of the individual subjects into a collective entity—the people—consummated such that the collective entity could take their place. The continuous implication of subjects and collective means that each dims the presence of the other, which in turn means that only the sovereign is *manifestly* present, and so capable of carrying the unity of the collective. Thus, the capacity for the collective's agency, and indeed its very existence, is tied to the person of the sovereign.[9] Without that link, which is to say *absent subjection*, the collective is nothing but a disorderly mass:

> A multitude of men are made one person, when they are by one man, or one person, represented so that it be done with the consent of every one of that multitude in particular. For it is the unity of the representer, not the unity of the represented, that maketh the person one.[10]

In this sense, the inaugural gesture of public law theory is to strip the people of political agency. The public nature of public law is

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7. THOMAS HOBBES, ON THE CITIZEN 239 (Richard Tuck & Michael Silverthorne eds., Cambridge Univ. Press 1998) (1642).

8. On the development of Hobbes' theory of authorization and its relationship to medieval publicism, see AMNON LEV, SOVEREIGNTY AND LIBERTY: A STUDY OF THE FOUNDATIONS OF POWER 62-70 (2014).

9. *See* THOMAS HOBBES, LEVIATHAN 104 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

10. *Id.* (emphasis omitted).

predicated on the self-effacing of the subject whose (collective) will is the only source of law. The agency of the people exhausts itself in the act whereby it wills itself into being. Its genesis as an entity coincides with its eclipse as an agent, leaving the sovereign as the only political actor.[11]

This move has the effect of creating a level playing field in law, cancelling out all earlier distributions of power. Equality before the law, which is a corollary to the equality of subjection, is constitutive of modern political life. However, this equality also creates two fundamental and interlinked problems that early modern public law theory must address, the solution to which will determine how we conceive of justice and access to it.

The first problem concerns the question of political obligation. As this level playing field revolves around the destitution of the citizen as a political agent, it is not clear why anyone would ever agree to the terms on which sovereignty is established. Life in the commonwealth is certainly preferable to the near certainty of death in the state of nature, but fear does not constitute sufficient grounds for a firm attachment to the polity. The drama of Hobbes' text has diverted attention from the mundane promise he makes that life in the commonwealth will fulfil our expectations of what a human life should look like. Life in the commonwealth, he tells us, will be a life dedicated to industry, culture of the earth, commerce, navigation, arts, letters, and society–all the things that are lacking in the state of nature.[12]

Recent Hobbes scholarship has drawn attention to the importance—for Hobbes' theory of commonwealth—of these liberal, or proto-liberal, concerns.[13] Obviously, the first order of business for Hobbes and social contract theory is to *found* a power capable of ordering life in the polity, but foundation is only half of the story. Hobbes knew only too well that once sovereign power was founded, he would need to find ways for the subjects to live with it, ways of making a life lived in subjection to sovereign power desirable on its own merits, not only as an alternative to violent death but as an end in itself. If not, the polity would dissolve

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11. *See generally* Yves Charles Zarka, *The Political Subject*, *in* LEVIATHAN AFTER 350 YEARS 167, 177 (Tom Sorell & Luc Foisneau eds., 2004) (defining the citizen as traditionally participating in the political life of a city).

12. *See* HOBBES, *supra* note 9, at 76.

13. For this reading, see LUC FOISNEAU, HOBBES: LA VIE INQUIETE 237-240, 501-503 (2016); Lucien Jaume, *Le vocabulaire de la représentation politique*, *in* HOBBES ET SON VOCABULAIRE 237 n.15 (Yves Charles Zarka ed., 1992); Franck Lessay, *Le vocabulaire de la personne*, *in* HOBBES ET SON VOCABULAIRE 162 (Yves Charles Zarka ed., 1992); YVES CHARLES ZARKA, LA DECISION METAPHYSIQUE DE HOBBES 342, 351 (1999). It bears saying that, as early as 1936, Leo Strauss noted that the ideals set up in Hobbes' political philosophy were those of the bourgeois middle class, see LEO STRAUSS, THE POLITICAL PHILOSOPHY OF HOBBES: ITS BASIS AND GENESIS 118-119 (1936).

from within. As we shall see, this raises the question of how *liberty* is implemented within the commonwealth, a question we can only begin to answer once we tear ourselves away from the legalistic focus on foundations—a heritage from Hobbes—and ask how the society that revolves around sovereign power functions as a society; how, among other things, it is governed.

The problem of how to make liberty a reality is intimately bound up with the second problem that public law theory must address. Leveling the field of social interaction, which is needed to create a domain in which everybody is if not fully free, then equally free, has the effect of detaching constitutional order from social order. In law, all subjects are equal in that they are in equal measure subjected to the lordship of the great Leviathan. This allows Hobbes to dismiss other, traditional titles to authority. Titles of nobility, "[i]n old time titles of office and command," have "[b]y occasion of trouble and for reasons of good and peaceable government" been turned into "mere titles, serving for the most part to distinguish the precedence, place, and order of subjects in the commonwealth."[14] For some time, Hobbes tells us, men have been made into "[c]ounts, marquises, and barons of places wherein they had neither possession nor command."[15]

However, the cancellation of titles does not negate the power differentials of which they were the social manifestation. Even with the creation of the great Leviathan, power is not evenly distributed—a fact that has been overlooked, no doubt because of the overwhelming presence of the figure of the sea-monster.[16] The persistence of (non-trivial) differences in power explains that Hobbes' treatise should contain chapters on the social manifestations of status in which he stresses that power, and reputation of it, is desirable as it secures the adherence of those needing protection.[17]

The problem here is not that the polity might not be able to fulfil the promise of political life that causes us to commit to society once we have made the transition from the state of nature, but that life in the polity might not be that different from life in the state of nature. The persistence of power structures in the commonwealth entails the persistence of the social dynamics that define this limiting state of society.

Again, the problem would seem to be general. Hobbes attributes to all men "[a] perpetual and restless desire of power after power, that

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14. HOBBES, *supra* note 9, at 56.
15. *Id.*
16. *See id.* at 50-51.
17. *See id.*

ceaseth only in death."[18] The desire after power is tied to the question of liberty: what are the limits to what the individual can do in the exercise of his powers? This is a question that we must ask of every man. But for obvious reasons the question has most urgency in relation to those who have power. The challenge facing Hobbes is how to bring those in power to commit to a polity in which their status is no different from that of the next man: they are the ones who stand to lose from equality. It is noteworthy, and often overlooked, that Hobbes did in fact acknowledge that even under the Leviathan, differences in power matter. This acknowledgement is reflected in his inclusion of the good and the great in government, privy councils and the like. Hobbes makes reference to this practice as he tells us not to mistake counsel and command, which is an oblique way of acknowledging that certain people, while they are formally the equals of all other subjects, have the sovereign's ear.[19]

But while giving the grandest lords of the realm direct access to the sovereign acknowledges their power, it does not address the *social* problem of liberty, the problem of what men were free to do to each other in society. To solve that problem, which had momentous implications for the stability of the commonwealth, Hobbes was forced to take apart what he had so laboriously assembled, to *dis-aggregate the polity* into a political and a social sphere. At the heart of his commonwealth is a sphere of individual action where man is free to do as he pleases and where sovereign power does not manifest itself. The primary significance of the liberty that man enjoys within this sphere is corporal liberty, the liberty from chains and prison.[20] Liberty circumscribes a sphere of action that attaches directly to the individual. As we proceed, however, it becomes clear that the domain of liberty extends well beyond this narrow definition:

> The liberty of a subject lieth, therefore, only in those things which, in regulating their actions, the sovereign hath praetermitted (such as is the liberty to buy, and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit; and the like).[21]

Around the kernel of natural right, life and physical integrity, lies a wider sphere of human life. The activities that take place within this

18. *Id.* at 58.
19. *Id.* at 165.
20. *See id.* at 136.
21. *Id.* at 138.

sphere have all been "praetermitted" by the sovereign; in other words, they have not been made the object of a sovereign decision. The sphere is formally subject to the jurisdiction of the sovereign, but as the sovereign keeps himself out of sight, the law has no actual bearing on what goes on: "[a]s for other liberties [than the liberty to defend oneself against attack], they depend on the silence of the law. In cases where the sovereign has prescribed no role, there the subject hath the liberty to do or forbear, according to his own discretion."[22]

What Hobbes accords the subject is, we might say, an *interstitial liberty*, which is conditional and therefore subject to revocation, but which is experienced as real for as long as sovereign power respects the limits it has imposed on itself. Where man perceives himself to be free, acting according to his own will and to his own desires, the existence of sovereign power will not be seen to pose limits to his freedom even if it does in law. Keeping the sovereign out of sight is a question of honoring the sanctity of contracts. Contracts are the only means by which subjects can, in law, limit their freedom in relation to one another. If men honor the contractual obligations they have undertaken, they remain masters of the contract. If not, the contract becomes a matter for the sovereign, acting not as lord but as judge, and the power of the sovereign is thus introduced into the civil sphere.

For the reasons given above, Hobbes must find a way to uphold the sanctity of contracts. This is the theme of chapter XV of the *Leviathan*. The point he makes is that the contracting parties have no grounds on which to void the mutual determination of wills that is in the contract.[23] That would presuppose the existence of an independent standard of justice, according to which the terms of the contract could be assessed. This, in turn, presupposes that the things or services exchanged and/or the parties involved have an inherent value that must be factored in to the determination of value.[24] To Hobbes, differences between men are

22. *Id.* at 143.

23. *See id.* at XV.

24. Hobbes articulates his theory against Aristotle's theory of justice which relies on a distinction between distributive and corrective justice (rendered by Hobbes as distributive and commutative justice). The grounds of Aristotle's distinction concern the social setting of justice. Distributive justice orders the distribution of honour, wealth and other goods between citizens as a function of their dignity; corrective justice governs judicial review of private transactions for the purposes of deciding on claims of compensation for damages or injury. ARISTOTLE, NICOMACHEAN ETHICS 117 (Martin Ostwald ed., Bobbs-Merrill Co. 1962). These differences aside, justice, to Aristotle, means the same thing, viz. equality of terms. In matters of corrective justice, equality refers either to the equality of the goods involved in the exchange. The persons are seen as equals; only the extent of damage/injury is considered. In matters of distributive justice, the dignity and social worth of the person also factors. Equality is seen as the geometrical equality of the ratio of shares and persons. *Id.* at 121; *cf. id.* at 118 (discussing equality between persons and their shares).

not natural; these differences were introduced by consent andthis is the key pointwere rendered void with the institution of the commonwealth which, as we have seen, is predicated on the equal subjection of all.[25]

What this means is that there is no context within which the dignity and social worth of the parties can be taken into consideration. In other words, the question of intrinsic or just value for the things or services involved does not arise. Hobbes defines the value of goods by the desire that they arouse in the buying party: "[t]he value of all things contracted for is measured by the appetite of the contractors; and therefore the just value is that which they be contended to give."[26] In this respect, man is no different from other commodities. The value of a man, Hobbes tells us, is that which another man is ready to pay for his power.[27]

The reduction of equality to the determination in contract means that no grounds can be invoked for voiding the contract. As we have seen, this is essential to preserve the autonomy of the civil sphere and, with it, the experience of freedom. But positing the contract as the exclusive locus of the determination of value also opens up a venue for another exercise of freedom: the freedom to bring differences of power to bear on the interaction out of which the contract grows. In excluding from view the question of man's intrinsic value, Hobbes morally neutralises the horrendous consequences of unbridled competition in the marketplace: what C.B. Macpherson called the continued peaceful invasion of each by each.[28]

Our analysis suggests that a series of metapolitical imperatives combine to determine how public law systems develop and operate. In order for the commonwealth to function as a *political society* and as a *polity*, Hobbes had to find a way to accommodate the reality of power that is not constitutionally mediated within a polity that acknowledges no form of power other than constitutional authority. Founding a public law system required detaching constitutional order from society; making that system function as a template for social life required that law be mediated through society. On the terms of the social contract, the synthesis of metapolitical imperatives is weighted in favor of social stability simply because commitment to the commonwealth is

25. HOBBES, *supra* note 9, at 96-97.

26. *Id.* at 94. As Luc Foisneau has shown, there is an epistemological dimension to Hobbes' reductive conception of justice in that it posits the contract as a publicly accessible standard by which to measure men's actions. *See* Luc Foisneau, *Hobbes et les Limites de la Justice*, *in* 10 LUMIERES 187, 196-98 (2007).

27. HOBBES, *supra* note 9, at 51.

28. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 62 (1962).

conditional and needs to be constantly reaffirmed. Securing commitment from those that would have an alternative, the powerful, must always be the primary consideration. The domination of the weak by the strong is therefore not only a *corollary to* but a *condition of* the equality of all. In more graphic terms, the equilibrium of the system is predicated on the dis-equilibrium of the interaction that takes place within. To secure commitment from those that have the power to disrupt, public law systems must create conditions where the powerful can exercise agency freely so that they may experience as real the interstitial liberty that is, in theory, available to all. Public law systems must, in order to function, generate a precariat. Crucially, this precariat is not defined by the absence of law. On the contrary, it is law—the full and equal status of the subjects under it—that bars their access to justice and, in doing so, makes them easy prey.

CONSTITUTIONALISM: MECHANISMS OF INCLUSION AND EXCLUSION

Our analysis showed that Hobbes had to juggle two contradictory imperatives in settling the terms of modern social life. On the one hand, his foundation of the commonwealth requires that all be subject in equal measure to the sovereign. On the other hand, in order to secure commitment, he needs to deliver on the promise of liberty, if only for some. Hobbes does not solve the problem as much as he devises a way to live with it: a system of smoke and mirrors where some get to act out, and others are acted upon, only hidden from view. As effective as this system was in accommodating differences in power, the life it allowed for was *virtual*. It could only mark out the different spheres of human life. To see how the machine works within those spheres, we have to look elsewhere—to John Locke's theory of government. As indicated, the interpretive approach involves seeing Hobbes and Locke as complementary moments in the intellectual history of public law. What we are looking to find in Locke's work are not arguments to rebut Hobbes, but rather strategies for making the system work. Of those strategies, we shall focus on two: *paternalism* and *property*. Around them, a society that is very familiar to us begins to take shape.

The precariat may be outside the purview of the social contract, but it is not outside the moral compass of Locke. He is adamant that those most in need cannot be left to fend for themselves. They have a claim on us, a right to assistance: "God hath not left one Man so to the Mercy of

another, that he may starve him if he please . . . ."[29] God, "the Lord and Father of all," Locke goes on to say, has determined that we cannot justly deny our "needy Brother" a right to the surplus of our property "when his present Wants call for it."[30] The duty to help one's fellow man, to meet his subsistence needs, is thus divinely ordained.

The qualification of God as Father is conventional. However, it assumes a special significance here in that it sets up a segue from morality to theory of government where Locke will constantly exploit the analogy between ruler (God as Lord) and parent (God as Father) to convince us of the good intentions of government. To bring us around to the goodness of government, Locke employs a montage in which the characteristics of pre-political authority are transposed onto the relationship of subject and prince. As God is both Lord and Father, so is the Father (of the family) a ruler of men. It was, we are told, ever thus, and habituation carries familial forms of authority over into political society:

> Thus 'twas easie, and almost natural for Children by a tacit, and scarce avoidable consent to make way for the *Father's Authority and Government*. They had been accustomed in their Childhood to follow his Direction, and to refer their little differences to him, and when they were Men, who fitter to rule them?[31]

So strong is the authority of the father that the transition from the family to political society is seamless. "[B]y an insensible change," fathers came to be also "*politick Monarchs*" of their family and, with successive generations continuing their work, eventually laid the foundations of kingdoms, hereditary and elective.[32]

Trust, the key concept in Locke's theory of government, refers back to this first relationship of care. Locke devotes the entire first treatise to refuting the rival theory of Filmer that monarchic power is an inheritance, in the final instance from Adam,[33] but as we have seen, he

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29. JOHN LOCKE, *First Treatise*, *in* TWO TREATISES OF GOVERNMENT 159, 188 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689).

30. *Id.*

31. *Id.* at 335.

32. *Id.* at 336.

33. Peter Laslett saw the choice between Filmer and Hobbes as mutually exclusive; it was the former who set the terms of the argument, "not Locke himself, and decidedly not Hobbes." Peter Laslett, *Locke and Hobbes: Introduction* to JOHN LOCKE, *The First Treatise*, *in* TWO TREATISES OF GOVERNMENT 67, 67-68 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689). However, if Locke needs to engage with Filmer, it is because of the aporetic situation in which Hobbes had left public law theory. Locke needs to

too models power on paternal authority. The extent to which power is a trust is a function of the ruler's capacity to look after society as if it were a child left to his care. In "the Infancies of Commonwealths," Locke tells us, those entrusted with sovereign rule "commonly" used their power so; had they failed in their paternal duties, their offspring would not have grown to maturity: "[w]ithout such nursing Fathers tender and carefull of the publick weale, all Governments would have sunk under the Weakness and Infirmities of their Infancy; and the Prince and the People had soon perished together."[34]

The idea of trust derives its force from its hybrid nature: it is simultaneously natural and moral. As a quasi-filial duty, it is something of which we can presume the existence *and* censure the absence. Trust thus permits the oscillation between description and prescription in Locke's text. It allows him to replace the Hobbesian question of how to adjudicate mutually exclusive rights claim with the question of how men interact in the absence of legitimate governmental authority.[35] But as society grows, it becomes less and less credible that familial forms of authority, which are grounded in care, can rein in power. This is a function of the scale of society, but it is also a function of a more general change in the nature of social relations, a change that grows out of social development. In the "poor but vertuous Age" in which governments were begun, the familial analogy still held, but ambition and luxury would in time drive a wedge between the prince and his people. This divide would teach the former to have "distinct and separate Interests" from those of his subjects and impressing upon the latter the need to "examine more carefully *the Original* and Rights of *Government*."[36]

In other words, the forces that disaggregate political society and place ever-greater demands on trust also render trust more fragile. What we might call Locke's *moral conservatism* consists of his belief that trust is a nonrenewable stock left over from before the beginnings of political society. Given the thrust of society's development, it is imperative to find ways to preserve what is left of it. This conservative intuition underpins and informs Locke's attempt to set limits *in law* to

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naturalize power; to confer upon it something of the aura of fatherly authority, without making power a divine right. Trust enables this balancing act and marks its success.

34. LOCKE, *supra* note 29, at 360.

35. *See* John Dunn, *The Concept of 'Trust' in the Politics of John Locke*, *in* PHILOSOPHY IN HISTORY: ESSAYS ON THE HISTORIOGRAPHY OF PHILOSOPHY 279, 290 (Richard Rorty et al. eds., 1984). For a brilliant analysis of the pivotal role Locke played in moving public law theory from Hobbes' "anti-constitutionalism" to what would become the format of British public law theory, see DENIS BARANGER, ÉCRIRE LA CONSTITUTION NON-ÉCRITE: UNE INTRODUCTION AU DROIT POLITIQUE BRITANNIQUE 80-93 (2008).

36. LOCKE, *supra* note 29, at 360-61.

the prince's power. Once we stop seeing the monarch as a fatherly figure in whom we can blindly trust, we need assurance that he will not use his power in an arbitrary way. Subjection of princely power to constitutional constraints does not guarantee that it will not be used to improper ends, but it is a *prima facie* indication that those ends are not private, particular to a specific sovereign. Locke's constitutionalism thus operates by situating the exercise of government at the public level.

The crisis of familial forms of authority and the transition in government from paternalism to constitutionalism, is a function of the introduction of money. As James Tully has shown, economic systems and money fundamentally changes the way man uses the Earth by rendering inoperative the most important checks on the appropriation of power, goods, and money.[37] In the infancy of commonwealths, spoilage meant that appropriation stayed within bounds dictated by need: "[t]he greatest part of *things really useful* to the Life of Man . . . *are* generally things *of short duration*; such as, if they are not consumed by use, will decay and perish of themselves . . . ."[38]

With the introduction of a piece of metal as the yardstick for ascribing value, accumulation became an end in itself. Men began to acquire property in things, not for the support of their life but in order to indulge their taste for luxury and opulence.[39] This is the origin of the "evil Concupiscence" and vain ambition that, to Locke, defines the modern political condition, in contrast to the golden age in human history where men had more virtue as governors and as subjects.[40]

With the possibility of unlimited accumulation comes the possibility of conflict over property. In a curious inversion of Hobbes' work where the reality of property is proof of the efficacy of sovereignty,[41] in Locke's theory of government, property is the driver of the move from pre-societal state into ordered society. The threat to man comes not from penury, but from his desire for opulence. By rendering

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37. *See* JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 135-47, 153-54 (1980).

38. LOCKE, *supra* note 29, at 309, 312, 317-18. This ontological check on man's appropriation of the Earth, coupled with a belief that labor adds the most value to the land, explains Locke's claim that in enclosing ten actress of land for cultivation, yielding what hundred acres of land would yield if left to nature, a man would effectively be giving ninety acres to mankind. This makes sense of Locke's confidence that there will always be "enough, and as good, left" in common for others, the proviso on which he predicates man's right of appropriation.

39. *Id.* at 318-19; *see* JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT' 248 (1969).

40. LOCKE, *supra* note 29, at 360.

41. *See* HOBBES, *supra* note 9, at 89.

inoperative a modulator of desire, money upsets the equilibrium in the state of nature that allows every man to prosecute his own right and therefore obviates the need for a sovereign. With the introduction of money, and only with it, does the state of nature become a place of uncertainty where the dynamics of social interaction change to resemble closely those we find in the Hobbesian account. In the (monetized economy of the) state of nature, man may have a sovereign right to his own person and possessions, but he does not have the enjoyment of his right:

> [T]hough in the state of Nature he hath such a right, yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others. For all being Kings as much as he, every Man his Equal, and the greater part no strict Observers of Equity and Justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which however free, is full of fears and continual dangers: Ant 'tis not without reason, that he seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.[42]

Given how we usually think about liberalism, it might come as a surprise to some that to its first great thinker, property was meant to ward off the threats that come from concupiscence. Securing the enjoyment of property is what makes men give up the freedom they enjoy in the state of nature,[43] but the influence of property extends beyond the foundation of political society to encompass the government of political society. Government must regulate the right of property and determine the ways and modes of possessing it by "positive constitutions."[44] Political society, to Locke, revolves around property. Property conditions all relevant forms of social interaction, interactions between the subjects and, more importantly, interactions between subject and sovereign. The question is how.

Seeing that property entails possession, we would expect it to be an essentially static mode of being, the primary function of which is to

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42. LOCKE, *supra* note 29, at 368.

43. *Id.* at 368-69 ("The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.").

44. *Id.* at 320.

delimit spheres of action, the *mine* and *thine* of Hobbes. Property does this, but that is not all it does in Locke's work. More fundamentally, it mediates social action and interaction. Indeed, property is so close to action as to almost be a form of agency itself. The proximity between property and action is reflected on different levels in Locke's work. Most fundamentally, property is an individuation of human labor, and as such, the way in which a man owns in the double sense of *appropriating* and *recognizing paternity* for something it was in his power to do. The closeness of action and property carries over into the power of government that reflects the agency of the people, namely legislative power. In telling us that legislative power could never have the "[p]ower . . . to destroy . . . Life, or take away . . . Property."[45] Locke is not stating an impossibility in fact. Instead, he is taking legislative power back to the act by which man owned his first, primordial property: property in himself. Just like property, legislative authority—which arises out of the transfer to the legislator of the joint power of every member of society and therefore cannot have more power than a person in the state of nature could have in himself—is generated through, and bounded by, human agency.

This is not the only way in which property acts as a conduit for agency. At the level of Locke's text, property is the means by which people enter into constitutional order. Given its centrality in political society, the need to secure the enjoyment of propertythe end for which man gave up the freedom he enjoyed in the state of natureis the linchpin in Locke's argument that legislative power is and should be supreme. Enjoyment of property being the "great End of Mens entring into Society," establishing a legislative power by which man can set limits to the prince's power, is the "the *first and fundamental positive Law* of all Commonwealths."[46] Locke's hope is that the primacy of the legislature will temper the excesses of the monarch.

Locke's attempt to secure property is inconclusive. He protests that absolute power has no place in political society; men are not "so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*."[47] But Locke too allows that executive power can act, in certain instances, without the prescription of law, and sometimes can even act against it.[48] Worse still, in cases of conflict between the legislative and the executive branches about the proper use of the prerogative, "[t]he

45. *Id.* at 375.
46. *Id.* at 373.
47. *Id.* at 346.
48. *Id.* at 375.

people have no other remedy in this, as in all other cases where they have no Judge on Earth, but to *appeal to Heaven*."[49]

It is relevant to point out that, in the final analysis, man is no better off in Locke's constitutionally ordered polity than he was in Hobbes' commonwealth of subjection. But we would miss the point of Locke's theory of government if we measure its success by how well it *ultimately* performs. His is not a theory for the last days, but for the life that unfolds within the commonwealth. The real test is not how his theory performs in times of great crisis but whether it can keep us from getting to that point. The option that Locke takes on the future is that, between trust and rule of law, the insolence of office and the perpetual and restless desire of power after power can be kept in check. The touchstone of that faith is property.

Having laid out the first law of all commonwealths, that legislative power is supreme, Locke goes on to say that, in respect to property, the legislative power cannot arrogate to itself the right to rule by arbitrary decree but "*is bound to dispense Justice*, and decide the Rights of the Subject *by promulgated standing Laws*, *and known Authoris'd Judges*."[50] These are protocols fit for a well-functioning society, sure to be set aside in times of crisis. But for as long as these protocols function, they do something quite remarkable: in forcing the commonwealth to act using the forms and institutions of law, they shift the domain of action, and in doing so, open up a venue through which the subject can act under the law, in his capacity of *proprietor*. Legal procedure confers agency on the subject by giving him effective access to justice. One might say that this is true also of Hobbes' subject, but his agency extends no further than the ability to enter into contractual relations. If subjection to sovereign power cancels out earlier seigneurial differences, and so places the subject on an equal footing with his erstwhile lord, the point of making subjects equal under the law is not to enable them to defend their rights before a court of justice. In theory, the Hobbesian subject has full access to justice, this is even the primary attribute of his civil status. But the whole point of the theory of commonwealth is that justice and subject should intersect, no more. Maintaining the equilibrium of the commonwealth requires the sovereign—the holder of judicial power—to exercise restraint, and it requires the subject to exercise agency under the threshold of law away from its institutions. Lockean property, on the contrary, enables the individual to act in his own defense under the law. In this sense, it is the outward form and element of human agency.

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49. *Id.* at 397.

50. *Id.* at 376; *see also id.* at 371 (discussing how the power of the legislature cannot extend father than the common good).

What emerges when we read these foundational texts of political theory in conjunction is the image of a composite society where skeletal relations of subjection are overlaid first by fatherly love and authority, and second by property relations. These two are not always and not immediately compatible. As a result, the uniform structure of Hobbes' polity gives way to the uneven topography of modern liberal society. Given the terms on which that society is set up, the *semiosis of property* comes to cover a much broader range of social dimensions and to operate much more immediately than did traditional signs of honor and valor.

With the introduction of property, new forms of agency become possible, and differences in agency become visible. Property offers a means to distinguish those who are active, full members of society from those who are not. The build-up of property has the effect of giving greater determinacy to the stratification of social order in the commonwealth. At the same time, property is a locus of tension because it is a catalyst for the desire to accumulate. Contrary to what we should expect, this tension does not necessarily undermine the paternalism that underpins government but might in fact reinforce it. The precariat, now much more easily identified by themselves and others as those who have no property, are pushed out to society's margins by the build-up of property. They remain subjects of law–the equals of all other citizens–but cannot act under the law as they have no property. On the terms of Hobbes' theory, this is a potentially revolutionary situation. He who does not feel himself to be adequately protected by law can take up arms to fend for himself, if need be, against the sovereign. Locke points to a reason why those who have little to lose only infrequently rise up against their masters. The precarity that comes from the lack of effective access to justice entrenches the dependence on the paternal figure of the monarch whose charity and love is the only means of succour.[51] Those who are exposed to depredation by the operation of the public law system are, by virtue of their exposure, prompted to identify with the polity in terms of *kinship*. This double bind explains, I suggest, the vehemence of the reaction against according welfare services to non-nationals that we have seen in countries across Europe in recent years. What we have dismissed out of hand as the recrudescence of archaic

51. The importance of meeting subsistence needs is a primary concern to Hegel as he reflects on the workings of bourgeois society. In relation to the poor, the state takes over from the family. It addresses their material wants and needs as well as their disinclination to work. G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 265 (Allen W. Wood ed., H. B. Nisbit trans., Cambridge Univ. Press 1991) (1820). He adds that the subjective aspect of "poverty, and in general of every kind of want" also requires assistance in respect of "the *particular* circumstances and with regard to *emotion* and *love*."

fears and hatred may, on closer inspection, turn out to be an instantiation of the public law disposition I have outlined here, with the nation or race standing in for the figure of the Father.

GOING GLOBAL

We have seen that the operation of a sovereignty-based public law system presupposes the existence of, and produces, individuals that have legal personality but lack effective access to justice. Reconfiguring political community property allows some to accede to the status of agents under the law while making the exclusion of others more pronounced and more deeply entrenched. Access to justice is caught between two imperatives: the need to found the polity and the need to deliver on the promise of political life, if only for some. The tension between the two imperatives plays out in the double bind which the law imposes on that group of individuals we have been concerned with here: those who suffer precarity by virtue of being subjects. We might say that, for them, vulnerability to depredation is a function of the exposure to law as much as law is a shield against depredation.

The mechanisms we have described concern the constitutional sphere—the sphere of citizens. That sphere is no longer the only—or the most relevant—sphere for efforts to fight precarity. This raises the question of how to relate the political struggles, born of tremendous hardship and suffering, that have been the object and concern of political theory, and the absolute deprivation suffered by millions outside the western world. The moral equivalence of persons who suffer (an equal degree of) deprivation is, it would seem, so self-evident as to impose the juxtaposition. It is, however, a remarkable fact that the different forms of deprivation were, for a long time, regarded as separate phenomenaours and theirs. The reasons for this were conjunctural and theoretical. After World War II, global diarchy overlaid deprivation with an ideological grid which had the double effect of referring it back to (the fiction of) political self-determination and of preventing theorists from taking a comprehensive view of deprivation. The resulting bifurcation of the visual field was reinforced by, and in turn gave new life to, the modern dogma that justice is *political*, and that the moral obligations we owe to others do not extend beyond what Rawls termed the *basic structure*.[52] We may have moved beyond this conjuncture so that it no longer seems intelligible to us, but we should be clear that moral theory took a few steps to shift to its current

52. On the basic structure, see JOHN RAWLS, A THEORY OF JUSTICE 7-11 (1999) (1971); JOHN RAWLS, POLITICAL LIBERALISM 257-259, 265 (2005) (1993).

position, and that the determinations contained in these steps continue to condition the way we think about deprivation. I shall therefore briefly summarize the arc global justice theory has followed, which will serve to frame the discussion and to highlight the ways in which our analysis of public law can contribute new insights to the study of global deprivation.

For reasons I have tried to disentangle elsewhere, the global justice theory—associated first and foremost with the work of Thomas Pogge—that rose to prominence in the years following the end of the Cold War proceeded on the basis of a minimalist conception of justice requirements.[53] This minimalist basis rendered social cooperation irrelevant to the determination of moral obligations and so rendered the deprivation we find in western societies irrelevant from the standpoint of justice theory, which had the effect of situating moral theory at a remove from standard political theory. Subsequent global justice theory has sought to develop richer notions of justice requirements that would enable it to break its isolation, for which we may take as evidence the work of Mathias Risse and Lea Ypi, today's most prominent global justice theorists.[54]

The problem that Risse and Ypi face is how to connect the absolute deprivation from which global justice theory constitutes its (unbounded) domain of obligation to the hard political choices and attendant relative forms of deprivation that political theorists debate. It is not clear to me that they have been successful. Risse, whose justice theory rests on the integration of the requirements of Rawlsian and international justice theory into one catalogue of grounds of justice, admits that a divide persists between the two spheres—the principles of which do not operate in the same way. While he is adamant that the global order generates its own moral principles, he is unable to indicate what sort of obligations the principles give rise to once we rise above the level of subsistence living that is the object of global justice theory. He explains that in a general sense:

> there is a considerable *boundary problem* as far as the limits of our duties are concerned that derive from the idea of the distinctively human life [and so do not arise through social cooperation] . . . the question of how

53. *See* AMNON LEV, TO EVERY THING THERE IS A SEASON: THEORY, HISTORY, AND GLOBAL JUSTICE (forthcoming).

54. *See generally* Andrea Sangiovanni, *Justice and the Priority of Politics to Morality*, 2 J. POL. PHIL. 137 (2008) (making the case that existing institutions and practices should play a crucial role in the justification of a conception of justice rather than its mere implementation).

> much, and precisely what, is owed in virtue of our common humanity will remain rather intractable.[55]

Ypi, for her part, delivers only the outline of a demonstration that relative and absolute deprivation are causally related through positional goods like education, legal assistance, purchasing power, and employment; goods, the ultimate value of which is determined by how the individual is situated vis-à-vis others in relation to the possibility of making use of that good.[56]

Neither Risse nor Ypi is able to give a satisfactory account of how the domain of the State and the international domain, and their respective forms of deprivation, are implicated. Both point to the *aggregate agency* of the markets to show that we are at least dealing with connected vessels: a precondition of the success of the proposals for reforming international trade on which both, their many other differences notwithstanding, pin their hopes.[57]

While I have considerable sympathy for Lea Ypi's project especially, I believe that global justice theory finds itself at an impasse because it cannot successfully account for the role of agency in generating global deprivation. The point is not that no agency is involved in creating global deprivation, but that it may be of a different kind than the one global justice theory is concerned with. Like all forms of justice theory, global justice theory operates on a bias that focuses attention on stronger forms of agency directly or indirectly causal agency as only they are morally salient. The inconclusive nature of Risse's and Ypi's analyses suggests that this may not be the best approach. Our analysis of public law provides, if only in outline, an alternative model that may give us more traction on how the nonglobal and the global combine to produce misery. It suggests that exploitation, at least in modern polities, works in more intangible ways. If it invariably involves some level of power, it is not about coercion, nor is it about creating the conditions where exploitation can take place: it is about coordinating or linking systems of exploitation that formerly operated in isolation from each other. This is the work of public law.

I believe that in adopting this perspective we can provide a better account of how different spheres interact in the production of deprivation than the one provided by global justice theory. I suspect that the fundamental flaw of global justice theory, if we can call it that,

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55. MATHIAS RISSE, ON GLOBAL JUSTICE 81 (2012).

56. YPI, *supra* note 1; *cf. id.* at 108 (discussing instances of relative and absolute deprivation).

57. RISSE, *supra* note 55, at 350; YPI, *supra* note 1, at 216; *cf.* RISSE, *supra* note 55, 272, 277.

derives from its preoccupation with primary sites of agency, which it inherits from Rawls. In Rawls, the primary site of agency is the basic structure. In all its form, global justice theory strenuously denies that one can legitimately designate any closed arena of social action as *the* basic unit of analysis; this is what makes the theory a *global* theory. Global justice theory is nevertheless concerned with identifying what sites of agency are causing, directly or indirectly, the ills that must be righted, and with ranking these sites in terms of primacy of the global and the nonglobal. Seeing exploitation in terms of coordinating or linking already existing systems of exploitation opens the realization that there are no privileged sites of agency outside the given relationship of exploitation. Exploitation constitutes its own topography.

The brevity of the remarks that we can dedicate to this vast subject suggest caution in what claims we make. Suffice it to say that the intuition we have come away with is that the global turn does not fundamentally challenge the operation of the public law machine we have described there. On the contrary, it is perfectly continuous with it. Indeed, one might argue that the global turn is a function of how we have configured society around public law, and so around systemic precarity. Much as we like to think of humanity as a moral absolute—naked and frail but endowed with an inherent moral force—the weight we attach to this absolute is also a function of equilibrium considerations. By disaggregating society, the overlaying of a skeletal order of subjection by a mesh of property relations adds urgency to the need to bring the parts of the polity together. Immanuel Kant intuited this. He worried that relegating citizens to an inferior civil status—the infamous distinction between active and passive citizens—would fragment the polity.[58] To counter the effects of fragmentation, he introduced a common denominator that would engage all equally: humanity. The "dependence upon the will of others" that marks out some as passive members of the polity, and the "inequality" that follows from this designation, he assures us, "is . . . does not, however in any way conflict with the freedom and equality of all men *as human beings* who together constitute a people."[59]

The idea of humanity is introduced to bridge the gap that has opened between citizens as a result of the way public law orders their capacity for capacity, that is, their effective access to justice. In this sense, the *operation of public law generates the need for humanity*. Humanity would be an emergent imperative—a systemic consideration that arises out of the operation of the machine of public law. One might

58. IMMANUEL KANT, METAPHYSICS OF MORALS 139 (Hans Reiss ed., Cambridge Univ. Press 1991) (1797).

59. *Id.* at 140.

object that, in introducing this imperative, Kant was thinking within the parameters of the State. The human beings about whom he predicated freedom and equality were, as we have seen, those that "together constitute a people." However, the real significance of his gesture is that it transcends national borders. In identifying humanity as what ties a polity together, Kant is appealing to something that lies beyond civil laws and can therefore not have its sole locus within the State.

Some might object to this interpretation on the grounds that it cynically denigrates the good work of human rights advocates that has alleviated suffering amongst the poorest of the world. Others might find that, in assuming that public law continues to operate in much the same way outside its traditional domain of application, we are taking for granted what needs to be shown in a rigorous study of how the law works.[60] These are weighty objections to which we cannot give full and satisfactory answers here. Ultimately, the answers would revolve around the same intuition. The point has not been to deny the good that law does, but to show that in order to do good, it must rely on mechanisms of in- and exclusion that remain in the dark. How these mechanisms work may change as law migrates, but it would be naïve to suppose that they do not continue to be operative. We have not seen public law function any other way.

60. *See* Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 L. & CONTEMP. PROBS. 147, 156 (2014) (discussing lazy assumptions and methodological precautions).