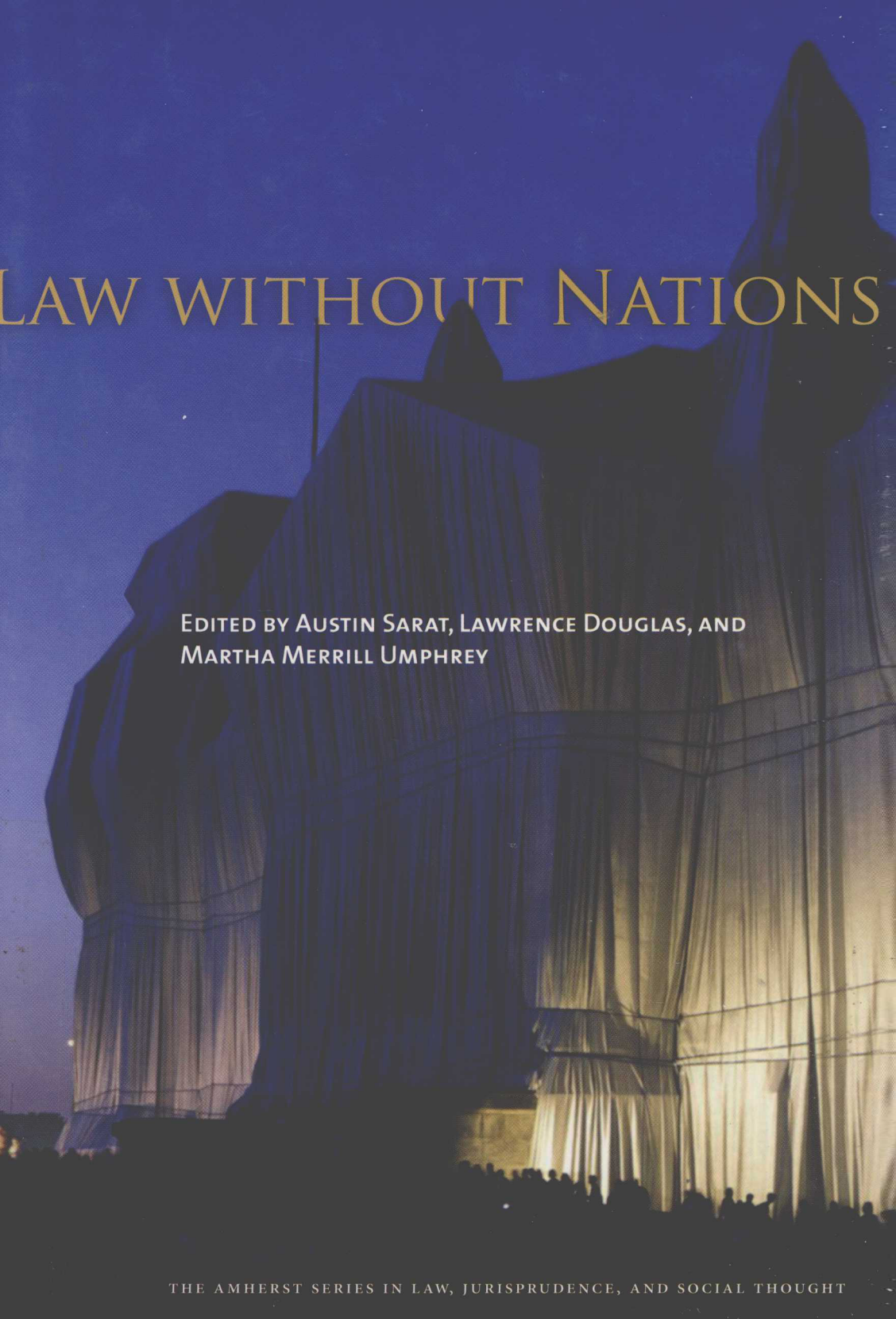

Law without Nations

Edited by Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey

The Amherst Series in Law, Jurisprudence, and Social Thought

Law without Nations

Edited by

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To Ben (AS)

For my students (LD)

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Law without Nations: An Introduction

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To speak about law without nations is to imagine the nightmarish possibility and the utopian. The possibility of law in the absence of a nation would seem to empty law of its animating spirit, to sever it from its source and meaning. At the same time, law divorced from nations would seem to clear the ground for a cosmopolitan legality free of the prejudices or idiosyncrasies of distinctive national traditions and universalist in its accents. These dystopian and utopian imaginings inspire and invigorate thinking about law without nations.

Law without Nation-States: Transitional Developments

The term "nation" has vexed political thinkers from Herder and Fichte to Benedict Anderson and Homi Bhabha. In his famous lecture "Qu-est-ce qu'une nation?" delivered in Sorbonne on March 11, 1882, Ernst Renan canvassed all the standard definitions of "nation" and found them all wanting.[1] The "exclusive concern with language"; the "excessive preoccupation with race"; the fixation on "theological dogma"; the "arbitrary" and "fatal" elevation of geography to "a kind of limiting *a priori*"—none of these, Renan insists, provide an adequate definition of "nation," as they all suffer from the problem of over- or underexclusivity.

Not all legal and political thinkers, however, have been equally vexed by the problem of definition. Today there is a tendency to treat the term "nation" as no more than shorthand for the term "nation-state," the form of political organization that arose in Europe in the wake of the Peace of Westphalia. This political form, with its familiar sovereign powers, centralized administrative systems, and monopoly of legitimate force, now serves as the principal vehicle for the

organization of political life for most of the world's inhabitants.[2] From this perspective, questions such as whether Belgium, with its French and Flemish halves, actually should be considered a state with two nations (a question we can ask of Canada, too) are largely irrelevant. The term "nation-state" serves, then, not to delimit or restrict the designation to only those states that have certain "bonus" features, such as a common linguistic or cultural heritage; rather, the insertion of "nation" serves merely to denote a level of analysis directing attention to the national sovereign itself. So understood, it matters not whether a nation arose organically from a long historical tradition or was artificially carved up by imperial mandate; it matters not whether it is ethnically and linguistically homogenous or is multicultural and multilingual; what matters is that it exercises sovereign control over a defined geographic area and a specifiable population.

If we follow this lead, and treat the "nation" as shorthand for "nation-state," then the phrase "law without nations" has an oxymoronic ring—at least from the perspective of legal positivism. Here Hobbes will be our guide. In *The Leviathan,* the brilliant theory of the state written against the backdrop of the English Civil War, Hobbes posited a state that is created artificially through the weak force of formal contract between warring individuals.[3] It is hard to exaggerate the radical quality of this vision, even if we accept, as Hobbes reminds us, that his account is meant to be heuristic and analytic, not historical. The idea alone that communities are bound together not by religion or extended family or shared traditions or common industry, but by a contract designed to staunch the mutual infliction of violence is indeed bleak. Durkheim observed that contract can never fully bootstrap its own efficacy—a regime of contracts always presupposes some precontractual social solidarity to make the system work.[4] Hobbes's scheme, however, does not presuppose any precontractual social glue—no nation precedes the creation of the state. For Hobbes, then, the social contract is binding not because it is a promissory instrument that appeals to pre-existing customs and norms. To the contrary, a contract predicated on mere trust is for Hobbes void. Contracts are binding only when "there be a common Power set over them both, with right and force sufficient to compel performance."[5]

For all its bleak simplicity, this account, as others have noted, appears to raise intractable problems.[6] The forging of the social contract is a necessary step toward exiting the state of nature—the war of all against all—and creating

the Leviathan, and yet in the absence of the state, the contract is void, without prescriptive force. Thus the social contract, if it is to be binding, presupposes the very state that it calls into being.

Whether Hobbes provides a way out of this dilemma is not our central concern—though his insistence that the Leviathan presupposes no social solidarity will be of relevance to our discussion of the relationship between state and nation. Of more direct relevance is the strong relation that Hobbes posits between law and the state.[7] The making of law is not simply one of the functions of the state; the state is the precondition of law. Without the state, there can be no law in the Hobbesian scheme: "Where there is no common Power, there is no Law."[8] To speak of any internal limits on the law-making power of the state, thus, makes no sense in Hobbes's world; the sovereign, while called into being by the social contract, cannot, by definition, be bound by its terms. Inasmuch as the sovereign's power overweans and makes all other contracts and laws enforceable, he himself cannot be said to be constrained by any law or contract; his power is absolute. Likewise, it is meaningless to speak of any external limits on the sovereign's law-making power. For Hobbes, there can be no global power or body of law superior to the sovereign; if such a power existed, *it would be sovereign.* Sovereignty is thus absolute and indivisible. Nations can, of course, enter into treaties, but these lack a truly legal character in the absence of a power capable of enforcing their terms. They are like the promissory agreements entered into in the state of nature: void. In the absence of an overarching sovereign, each state finds itself in a state of nature vis-à-vis all others.

From this perspective, it is easy to see why the phrase "law without nations" would leave a strict Hobbesian baffled. If law is exclusively the creation of the state, then it is impossible to imagine law qua law existing in the state's absence. We can imagine principles of prudence, maxims of reason, notions of justice existing in the absence of states, but not law as an enforceable code of conduct designed to solve social disputes. And just as law is the creation of the state and there can be no law without the state, the strict positivist must insist—as did influential latter-day exponents such as H. L. A. Hart and Hans Kelsen—that the state's power to make laws is plenary.[9]

And yet the term "law without nations" can be understood in a very different sense. That is, one might continue to treat "nations" as convenient shorthand for "nation-states," yet still parse the phrase in a manner altogether different

from Hobbes. We can trace this rival tradition back to another sixteenth-century thinker, Hugo Grotius. While Grotius, like Hobbes, was a strong defender of sovereign prerogative, he did not consider "international law" a contradiction in terms. Law, in his lexicon, also included long-agreed-upon practices of civilization—even in the absence of law-making bodies capable of specifying their exact content, adjudicatory instruments capable of resolving the disputes they might give rise to, and executive institutions with the power to enforce sanctions upon transgressors.[10]

Although Grotius never fully imagined the development of mechanisms of world governance, certainly the past sixty years have witnessed a remarkable development in international law. Perhaps the most spectacular development has taken place in the area of criminal law. It is no exaggeration to claim that our very understanding of what the law is and what it can do has been radically and irrevocably changed as a result of its contact with atrocity—first in the form of Nazi crimes, and more recently in the shape of atrocities in the Balkans and genocide in Rwanda. At the most basic level, this has led to a paradigm shift in our understanding of sovereignty and its prerogatives.

The revelations of Nazi atrocities led Karl Jaspers to frame the term *Verbrecherstaat,* the criminal state, a notion meant to name and denote a phenomenon that lay beyond the ken of the standard model of liberal positivist jurisprudence.[11] Jaspers formulation demanded that the state be seen not as the defender of order, the classic Hobbesian image, but as the very agent of criminality. The international tribunal at Nuremberg formalized this recognition, based as it was on the notion that international law *authorized* the puncturing of the shield of sovereignty that traditionally had insulated heads of state from international legal scrutiny.[12]

Today we accept without argument the idea that sovereign state actors responsible for atrocities must answer for their conduct in courts of criminal law—be they domestic, international, or of a hybrid character. But we run the risk of forgetting how deeply radical this idea was before the Nuremberg trial of the major Nazi war criminals.[13] While the Nuremberg precedent lay moribund for much of the Cold War, it has experienced a remarkable revival in recent years. First, we find the creation of various international courts—such as the ad hoc Yugoslavia and Rwandan tribunals, as well as the permanent International Criminal Court—capable of trying heads of states for violations of

international law. Notwithstanding the mistakes committed by the prosecution in the Milosevic trial and the disappointment occasioned by the defendant's untimely death, the trial itself represented something remarkable: the first time in human history that a former head of state answered for his conduct before an international court.[14] Second, and relatedly, we witness the development of a rich jurisprudence of three international crimes—crimes against humanity, genocide, and war crimes—that have largely severed any connection to the core meaning of the concept of "international."[15] Indeed, these crimes can better be described as transcending the nation-state, or as "supranational," "cosmopolitan," or "universal," as their norms are binding and obligatory upon all nations—even those that are not signatories to the Geneva Convention or the Genocide Convention.

The idea of law without nations conjures these remarkable developments in international criminal law but is not limited to them. Although pictures of Goering in the stand at Nuremberg or of Milosevic in The Hague may provide the most arresting images of law without nations—indeed, of law standing above and against the nation-state—equally remarkable developments have occurred on the more prosaic level of public and private international law. In certain respects, the European Union stands now as a semiautonomous supersovereign; the decisions and judgments of its various institutions, such as the European Court of Justice, the European Commission, and the Council of Ministers, are binding upon domestic national courts of its member states.[16] International trade organizations and institutions likewise enjoy unusual authority vis-à-vis nation-states; the World Trade Organization is perhaps the best known for its power to resolve disagreements between sovereign states through binding dispute resolution.[17] Although these judgments may lack the full panoply of coercive sanctions available to a state enforcing a judgment against a citizen, it would be querulous to deny that these judgments have a distinctly legal character. Clearly, they too represent the development of bodies of effective law that stand over and above the nation-state.[18]

The normative implications of these developments remain, of course, a matter of controversy. Certainly there are those, particularly within the human rights community, that see the development of a viable body of international criminal law as an entirely salutary, if long overdue, phenomenon.[19] International criminal law promises, in this view, to put an end to the kind of impunity

that reprobate state actors have all too long enjoyed. Others see the creation of institutions such as the International Criminal Court (ICC) in less sanguine terms.[20] It is well known that former president Clinton signed on to the ICC only in the last days of his administration, and then with many reservations; the Bush administration promptly unsigned the treaty and worked with determination to undermine the fledgling court just as it was opening shop.[21] Critics of the ICC have argued, not without reason, that international tribunals can be used to settle political scores, a matter of greater potential concern to the United States than, say, to Finland. Critics of international law also point to a "democracy deficit"—namely, the idea that international norms are often framed by administrative agencies or organizations that lack democratic forms of participatory governance.[22] To permit such norms to trump domestic national law is to permit nondemocratic practices to trump democratic ones. For some critics, the mere quoting of international sources in the decisions of the U.S. Supreme Court represents an unsupportable intrusion upon U.S. sovereignty and upon our right to steer our constitutional destiny free of external interference.[23]

It is not our purpose, or that of our contributors, to take sides in this controversy. One point, of an analytic character, needs, however, to be emphasized. Much of the literature on the clash between domestic-national and international law—regardless of the normative position taken—shares a common feature: it tends to view the struggle in zero-sum terms. Gains in international law come at the expense of national sovereignty; the strengthening of national sovereignty, by contrast, represents a weakening of international norms and institutions.[24] This view, it bears repeating, has been a stable feature of the ongoing debate, accepted by the champions of international law on the one hand, and the nation-state on the other. Yet as we shall see, it is precisely this assumption that is interrogated by the essays in the present volume.

Bringing the Nation (*das Volk*) Back In

There is, however, another way to conceptualize the meaning of "law without nations." This requires taking the term "nation" as something other than a shorthand for "nation-state." This returns us to our point of departure: the effort of theorists to offer a satisfactory definition of the "nation" without reducing it to a synonym for a sovereign state.

To provide but one example, consider the case of Germany. Over the entrance of the Reichstag, once again the seat of the German parliament, stands the famous dedication in bronze letters: *Dem Deutschen Volke.* "To the German People." The eager tourist who dutifully queues up to tour the building burdened with history soon encounters a fresh dedication inscribed in the Reichstag's main courtyard: *Der Bevölkerung.* "To the Population." Compared with "To the German People," "To the Population" sounds flat, drearily actuarial, better placed before the entrance to a bureau of the census than the national legislature.

The original inscription was added to the Reichstag in 1916 with the grudging support of Kaiser Wilhelm II to express support for the principle of parliamentary democracy, if not supremacy.[25] The bronze lettering was forged by S. A. Lövy, a successful bronze foundry owned by a Jewish family. The Lövy family, at least in part, later perished in Nazi death camps. To call this ironic captures only one dimension of the tragedy that engulfed the German nation and its Jewish population. Certainly the term "To the German People" had a more innocuous ring in 1916 than it would twenty years later in the wake of the Nuremberg laws that stripped German Jews of their full citizenship and paved the way for their exclusion from German society, their deportation, and their ultimate extermination.[26]

But even at the time of its original forging, the term *Volk* meant something more than can be denoted with the word "people," a mere amalgam of persons. Indeed, to translate *das Volk* as "people" is itself unsatisfactory, as it is also the German term for "nation." As such, *das Volk* denotes a people bound by something deeper than mere political ties; it speaks of a nation conjoined by tradition, memory, and history. *Das Volk* is a romantic ideal, a mythic body.

Historically *das Volk* was never coterminous with citizenship in the German state. *Das Volk* was at once a term of exclusion, barring membership even to those born and raised within Germany's territorial limits, and irredentist, sweeping in ethnic Germans far beyond the state's borders. Americans have long been familiar, if at times begrudgingly, with the concept of a hyphenated identity. It is meaningful to speak of a Japanese-American, a Jewish-American, an African-American. For most of German history, that was not the case—the term "German Jew" was oxymoronic, contradictory, on the order of "whitish black" or "largely small." One could be a German or a Jew, but not both; the one

excluded the other.[27] This idea of nationhood found early expression in Fichte's famous *Reden an die deutsche Nation (Addresses to the German Nation)*, the lectures that the philosopher delivered to the Berlin Academy over the course of the winter of 1807–8.[28] For Fichte, nationhood was defined in terms of the genius of language and the chauvinistic prerogatives of blood.[29] This definition, in turn, was later challenged by Ernst Renan, who eschewed an ethnic definition of nationhood in favor of a "spiritual principle." To be part of a nation, Renan insisted, was to share "a rich legacy of memories" and the desire "to perpetuate the value of that heritage that one has received in undivided form."[30]

Nationhood, for Renan, was defined in terms of a "large-scale solidarity," constituted by "having suffered, enjoyed, and hoped together."[31] Even this definition may sound odd to contemporary ears, but in its time it represented a marked advance over the aggressively ethnic definition of Fichte. Renan's "spiritual" idea of nationhood also importantly anticipated and influenced Benedict Anderson's influential view of the nation as "an imagined community"—that is, a community whose members "will never know most of their fellow members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[32]

However much these definitions of the nation may differ, they share an important common feature: they all express a similar normative understanding of the relationship between the nation and the state, and by extension, its laws. Today the term "nation-state" is largely a pleonasm. For classic theorists of the nation, however, the nation-state was meant as a term of restriction. The state was to serve as the vehicle of a specific nation, and each nation aspired to its own discrete state. To quote Anderson, "[T]he gauge and emblem of this freedom [of the nation] is the sovereign state."[33]

Germany remains a prime example of a state forged in the latter decades of the nineteenth century in the name of a nation. France remains a more problematic example, as many historians insist that the French nation was in fact an invention of the state, not vice versa.[34] (Often mentioned in this connection is the fact that only about half the population of France could speak French at the time of the revolution.) And then there are more problematic examples still: Belgium—a state with two nations; ditto for Canada.

But if we bracket the historical question of how specific national entities are to be characterized or classified, and focus our attention on the theoretical

model of nationhood, the contrast to Hobbesian statism could not be sharper. Hobbes, as we recall, understood the state as an entity created through thin bonds of contract among private individuals united by nothing more than their mutual distrust of each other. The state, in this view, was to serve no higher purpose than to secure order and peace over a specific territory; it was to protect the subjects of the state from *each other.*

For Fichte and Renan, notwithstanding their disagreements, the state was to serve the noble purposes of the nation. Far from simply an instrument to serve the self-interest of its subjects, the state was understood as a vehicle for the pursuit and advancement of common national projects. Individual life was to gain meaning and purpose by attaching itself to such collective goals. Held together by nothing more than the weak ties of promissory contract—ties unenforceable absent the threat of sanction from the state—the Hobbesian state was nothing more than a thing of convenience and force. The nation-state of Fichte and Renan, by contrast, was bound by precontractual forces of solidarity forged of common language, heritage, and ambitions.

The classic nationalist theories of the nation-state also defended a particular understanding of law. In contrast to the Hobbesian model, law was meant to do something more than simply keep violence between the subjects of a state in check. Law, as Roger Cotterrell has put it, was meant to embody and express "matters of tradition, affect, belief and ultimate values."[35] This vision found perhaps its purest expression in Montesquieu's influential text *The Spirit of Laws*, in which the great French legal thinker posited a particular quality, temper, and spirit to each system of national law.[36] Far from the cosmopolitan ideal discussed earlier, and far from the liberal idea that we will presently consider in greater detail, the nation-state aspired to *national* law: a legal system whose institutions, norms, and procedures would express and reflect the particular genius, values, and commitments of a particular *Volk* or people. From this perspective, the term "law without nations" expresses either something impossible—law *must* reflect national character—or something dystopic: the kind of artificial or inorganic legality thrust on a people from outside. That this latter vision can have its own profoundly dystopic quality should, of course, be noted; we need but recall Carl Schmitt's lethal attacks on the jurisprudence and legal norms of the German Weimar Republic. Weimar law, for Schmitt, reflected the legal thinking of internationalists—namely, Jews—and as such failed to express

the values and principles of the German nation. Schmitt insisted that Jewish jurists embraced a quintessentially Hobbesian understanding of law, one alien to the German nation.[37]

Law without Nations: The Liberal View

Let us return for a moment to the second, more recent, dedication that the casual tourist encounters in the Reichstag. *Der Bevölkerung*—"To the Population." Compared with *das Volk, die Bevölkerung* is a term without myth and romance. It speaks of an aggregate of persons, an accumulation of demographic groups. "To the population"—the state no longer declares its subservience to the *Volk*; it now serves all within its territorial bounds—citizens and noncitizens alike; Germans and non-Germans; all possible groups. In its flatness and straightforwardness, the population is a quintessential term of liberalism.

So understood, the phrase "law without nations" expresses an altogether different notion, one that is quintessentially post-Hobbesian and liberal. In this vision, the law is not the expression or the reflection of any particular national spirit; nor is it the tool for the furtherance of any particular national agenda, project, or vision of the good. The jurisprudence of nationalism insists on a unity of law and morality: the law is to be the expression of the moral commitments and principles of the people. The jurisprudence of liberalism insists on no such correspondence.

In liberalism, we encounter the famous separation thesis.[38] Law *may* express the content of morality, but it *need not* do so to be law. There is, in the liberal lexicon, no necessary or formal connection between law and morality. As odd as the separation thesis may appear—and it has been attacked by legal thinkers from Carl Schmitt and Karl Larenz to Stanley Fish and Catherine MacKinnon—it remains one of the great signposts and achievements of liberal legality. In this system, law intervenes to promote no particular vision of the Good; it is not a tool of moral perfectionism and teleological nationhood. Rather, the law does no more than establish and enforce basic principles of justice that permit each individual or group to pursue his, her, or its vision of the good.[39]

In this regard, liberal legality builds on the tradition of Hobbes, not of Fichte and Renan, though it drops the Hobbesian accent on absolute statism. Hobbes understood the state as an instrument for the suppression of private violence;