

Precedent and Tradition

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*In its original telling sense, memory means as much as devotion.**

I. A CHALLENGE TO THE PHILOSOPHY OF LAW

In certain fields of inquiry, the discipline of philosophy is presented with a special challenge: that of understanding actions and experiences which belong to a sphere of life governed by a spirit very different from its own. Not every branch of philosophical inquiry presents this special challenge. Metaphysics and epistemology, for example, do not, for in these departments of philosophy—its oldest and most self-centered ones—the subject matter as well as the method of inquiry is supplied by the discipline of philosophy itself. The questions that metaphysics and epistemology address, including the question of how we are to understand the very process of philosophical reflection they display,¹ are in this sense all internal ones. Here the challenge to which I have referred does not arise. But in other, less self-centered, branches of philosophy, where the subject-matter of inquiry is drawn from a sphere of life that is external to, and often even in tension with, the discipline of philosophy itself, this challenge does arise, sometimes in dramatic form. The philosophy of religion, for example, and the branch of thought we call aesthetics, both challenge philosophers in this way, for in each, those devoted to philosophy are forced to confront attitudes and values alien to their own and practices shaped by a ruling spirit that is stubbornly non-philosophical.

To be sure, even in those fields of philosophical inquiry that present this special challenge, one remains free simply to ignore it, and to treat whatever problems the subject in question happens to suggest as topics no different from those that metaphysics and epistemology address. Philosophers who adopt this imperial attitude toward the spheres, say, of art and religion, may still find in them abundant material for thought. But what

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* M. HEIDEGGER, *WHAT IS CALLED THINKING?* 145 (F. Wieck & J. Gray trans. 1968).

1. See Lear, *On Reflection: The Legacy of Wittgenstein's Later Philosophy*, 2 *RATIO* 19, 19 (1989) ("Since Hegel, a central problem for philosophy has been to give a philosophical account of how philosophical consciousness is possible.").

they find is bound to seem familiar, for the problems they encounter in these outlying provinces can never be, for them, anything more than variations of the ones they have already met in the heartland of their own discipline. Indeed, a philosopher who sees art and religion in this light—as nothing but a quarry for metaphysical and epistemological questions—may not even notice the ways in which they differ from philosophy, and is unlikely, in any case, to think these differences worthy of close study. The important thing, from his perspective, will be the philosophical issues that art and religion present, and not the vantage points from which these problems appear within the fields of aesthetic and religious experience themselves (these vantage points being, for him, just the disposable packaging in which the problems originally come wrapped).

Not all philosophers, however, take this view. Some, indeed, have been less interested in the metaphysical and epistemological questions that other spheres of life suggest, than in the non-philosophical attitudes which define them, and have made the understanding of these attitudes their primary task. Two good examples of the sort of thing I have in mind are James' *The Varieties of Religious Experience*² and Dilthey's *Poetry and Experience*.³ Each of these is essentially a phenomenological work whose aim is to explore what Dilthey calls the "constitution" of a sphere of human life, a sphere that is in each case marked by internal attitudes and motives different from those of philosophy itself. Where the material of philosophical inquiry is drawn from its own domestic resources, as it is in metaphysics and epistemology, the phenomenological questions that interested both James and Dilthey do not arise. It is only when philosophy looks beyond its borders that such questions first appear. And though even in these foreign ventures one may adopt an imperial attitude which insures that there is nothing to be met but more philosophy, no matter how far from it one seems to travel, there are certain lines of philosophical inquiry, like the philosophy of religion and aesthetics, which do present a possibility that others, like metaphysics and epistemology, do not, regardless of whether that possibility is exploited or even recognized. This is the possibility that in pursuing them one will come up against something which is, from the standpoint of philosophy itself, genuinely different, and be challenged to give an account of those attitudes and interests that make it so. The challenge, of course, is to do this in a way that is philosophically illuminating yet faithful to the foreignness of the attitudes in question, whatever they may be.

Should the philosophy of law be included among the branches of philosophical inquiry that present this special challenge? Many may think that it should not, for in contrast to art and religion, the law does not appear,

2. W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902).

3. W. DILTHEY, *POETRY AND EXPERIENCE* (1985).

on its face at least, to make demands that philosophy cannot meet or to imply a way of seeing things that is deeply different from the philosophical. Religion, for example, whether it be quietly pietistic or mystical in character, at some point always demands an "intellectual sacrifice"⁴ that is incompatible with the uncompromising rationalism of philosophy. And whatever form it takes, art assigns a value to the specific and concrete which the generalizing ambition of philosophy—its project of abstraction—necessarily rules out (as Plato, the first writer in the West to examine the relation between philosophy and art, already clearly understood).⁵ By contrast to these others, the sphere of law appears to impose no requirements incompatible with those of philosophy. Indeed, the main problems which the law addresses—those having to do, for example, with the content and priority of human rights and the ends of society generally—seem themselves to be philosophical problems of a very straightforward sort. It is true that in the law these problems are pursued to a level of greater detail than is likely to be of interest to most philosophers, but that does not itself imply any incompatibility of attitude or outlook. The law, one may be tempted to conclude, is just philosophy in practice—the application of philosophical methods to the world's complexities—something that cannot be said about either art or religion without ignoring certain central features of what Dilthey called their constitution.⁶

The temptation to draw this conclusion must be resisted, however, for contrary to appearances, the sphere of law is characterized by an attitude that is as alien in its own way to the spirit of philosophy as are the attitudes that define the spheres of aesthetic and religious experience. The law does, of course, carry philosophical arguments to a level of greater refinement or detail, but in one respect, at least, it runs against them and contradicts the tenor and assumptions of philosophy itself. I have in mind what in the Anglo-American legal system is called the "rule" of *stare decisis*, or, more generally, the practice of deciding disputes on the basis of earlier decisions: the practice of following precedent.

This practice is most prominent in common law systems of adjudication, where the law has been built up by a long line of judges—"an infinite number of Grave and Learned Men"⁷—deciding individual cases. But even in those legal systems that have a code, or some other comprehensive and rationally organized statement of principles for their foundation, the rule that judges should respect past decisions interpreting the

4. The phrase is Max Weber's. See M. WEBER, *Science as a Vocation*, in FROM MAX WEBER 129, 155 (H. Gerth & C. Mills ed. 1946).

5. This is one of the main themes of Book X of Plato's *Republic*, in which Socrates explores with his companions what he calls the "old quarrel between philosophy and poetry." PLATO, *THE REPUBLIC OF PLATO* 290 (A. Bloom trans. 1968) (*607b).

6. See *supra* note 3 and accompanying text.

7. T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 55 (J. Cropsey ed. 1971).

meaning of these principles is recognized and accorded an important place.⁸ Respect for past decisions, for precedent, is not a characteristic of certain legal systems only. It is rather a feature of law in general, and wherever there exists a set of practices and institutions that we believe are entitled to the name of law, the rule of precedent will be at work, influencing, to one degree or another, the conduct of those responsible for administering the practices and institutions in question. By contrast, the rule of precedent has no place in philosophy and is indeed antithetical to its governing spirit.

I do not mean to imply by this that philosophy has no past. In one very obvious sense, philosophy is a cultural artifact with a long and complicated past, and when a person begins to philosophize, it is generally against the background of this past that he proceeds.⁹ This is particularly true of those who decide to pursue a career in philosophy—which today means a career as a university teacher—for unless he is an extraordinary genius, a person has a much greater chance of making a contribution to philosophical understanding, as professional philosophers now conceive it, by first studying the views of those who have preceded him and by examining the strengths and weaknesses of their positions. Every graduate program in philosophy is organized on that assumption.

But to say that philosophy has a past, and that its past is a repository of valuable experiments with which professionals, or even educated persons generally, should be acquainted, is not to say that precedent, as lawyers understand it, plays any role in the process of philosophical analysis and judgment. An argument from precedent asserts that something should be done a certain way now because it was done that way in the past. If, for example, a person claims to have a particular legal right, the fact that the right was acknowledged to exist in similar circumstances in the past is an argument—from precedent—for acknowledging it now. Arguments of this sort play a familiar role in the work of courts and lawyers. To be sure, such arguments are not always decisive. Sometimes they are overridden by arguments of other sorts (for example, that it would be unjust to follow precedent), and sometimes those on both sides of a dispute can appeal to precedent with equal plausibility, so that the question must be decided by a process of interpretation in which, by assumption, precedent cannot be a determinative guide. But however circumscribed their role, arguments from precedent do have a legitimate place in the law, as every lawyer recognizes. Put differently, the past is, for lawyers and judges, a reposi-

8. For a discussion of the similarities and differences between the roles of precedent in civilian and common-law systems, see R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, *COMPARATIVE LAW* 643-51 (5th ed. 1988). See also M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 33-38 (1986).

9. I shall return to the subject of philosophy's status as a cultural artifact later in the Article. See *infra* note 84 and accompanying text.

tory not just of information but of value, with the power to confer legitimacy on actions in the present, and though its power to do so is not limitless, neither is it nonexistent. In philosophy, by contrast, the past has no legitimating power of this sort.

Imagine, for example, that you are struggling with one of the classic problems of metaphysics—the relationship, say, between universals and particulars. For inspiration, and to avoid wrong turns, you may, of course, read what Plato, Ockham, Leibniz, Kant, and others have to say about the subject. You may even conclude that one of these discovered the truth, and be convinced that his views cannot be improved upon. But whatever conclusion you reach, the fact that Plato (or anyone else) held a certain view will not be for you a reason to adopt that view yourself. You must make up your own mind as to which view is correct, and however informative the positions of your predecessors, it does not count in favor of any position—not even a little bit—that some or all of them held it. In philosophy, unlike law, the past has no authoritative force, no power of its own to legitimate or justify, and no philosopher ever says—as lawyers and judges often do—that the judgments of his predecessors compel him to decide an issue one way rather than another.

I can express this same idea in another way. When I am engaged in philosophical thought about a problem in metaphysics or epistemology, I am thinking about the problem from a timeless point of view, from the standpoint, so to speak, of eternity. This point of view is the same tenseless “now” from which Plato and every other philosopher who has ever lived conducted their inquiries as well—at least when they were engaged in philosophy and not the ordinary business of living. It is in this light that we should understand Socrates’ famous remark in the *Phaedo* that “those who really apply themselves in the right way to philosophy are directly and of their own accord preparing themselves for dying and death.”¹⁰ Philosophy is like death because it, too, is a condition in which the temporal distinctions between past, present, and future are annulled—and with them, any authoritative power the past might have. If arguments from precedent attribute such a power, however small or controversial, to the past, then there can be no arguments of this sort in philosophy. To recognize such an argument in a philosophical dispute is, we might say, simply to be confused about the nature of philosophy itself. “[T]he radicalism belonging to the essence of genuine philosophical science [demands that] we accept nothing given in advance, allow nothing traditional to pass as a beginning, nor ourselves to be dazzled by any names however great, but rather seek to attain the beginnings in a free

10. PLATO, *Phaedo*, in *THE COLLECTED DIALOGUES OF PLATO* 40, 46 (E. Hamilton & H. Cairns ed. 1961) (*64a).

dedication to the problems themselves and to the demands stemming from them."¹¹

We can now understand the special challenge that a philosophy of law must meet. The law accords the past an authority that philosophy does not—an authority which indeed is incompatible with the independent spirit of all philosophical reflection. From the standpoint of philosophy, it is this deference to the past, to precedent, that gives the law its foreign look. The rule of precedent, more than any other feature of legal practice, runs against the current of philosophy itself, and its explanation therefore poses, for philosophers of law, a challenge of an especially serious sort. How, in general, have they sought to meet it?

II. THE PHILOSOPHICAL REDUCTION OF THE PAST

The truth is that many philosophers have avoided this challenge entirely, and instead of offering an explanation for the rule of precedent, have simply declared it an absurdity—which, from a strictly philosophical point of view, it obviously is. Hobbes, for one, took this position. After noting that “[a]ll laws, written, and unwritten, have need of interpretation,”¹² Hobbes states, reasonably enough, that there is no judge whose interpretations are wholly free from the risk of error. He then asserts, more revealingly, that any judge who has made a mistake is obligated—required, he says, by the laws of nature—to reverse himself should the opportunity to do so subsequently arise. “No man’s error becomes his own law,” Hobbes writes, “nor obliges him to persist in it. Neither, for the same reason, becomes it a law to other judges, though sworn to follow it.”¹³ Indeed, Hobbes argues, only the truth should be given any weight in the interpretation of an uncertain or disputed law, no matter how consistently or often the law has been interpreted a particular way in the past. To that extent adjudication is like geometry—the model for Hobbes’ new science of politics¹⁴—where arguments from precedent are quite obviously out of place. In law, as in geometry, Hobbes insists, it is only the dictates of natural reason that are deserving of respect (however liable to error they may be). Against their judgment, the past simply does not count at all. Thus, “though the sentence of the judge [in a given case], be a law to the party pleading, yet it is no law to any judge, that shall succeed him in that office.”¹⁵ Each judge must make up his own mind for himself, yielding only to the truth and giving no more deference to the past than a geometer or philosopher would give. But to insist, in this way, on the

11. E. HUSSERL, *Philosophy as Rigorous Science*, in *PHENOMENOLOGY AND THE CRISIS OF PHILOSOPHY* 71, 145–46 (Q. Lauer trans. 1965).

12. T. HOBBS, *LEVIATHAN* 180 (M. Oakeshott ed. n.d.) (1st ed. 1651).

13. *Id.* at 181.

14. *Id.* at 21, 27.

15. *Id.* at 182.

independence and finality of the judge's natural reason and the past's lack of authoritative force, is to import into the law the attitude of philosophy itself and, in particular, its hostility toward the rule of precedent. What Hobbes offers us is thus not really a philosophy of law at all, but rather a philosophical replacement for it—an immensely powerful replacement, to be sure, but one that is in essence faithless to the constitution of the legal point of view.

Holmes' famous remark that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"¹⁶ reflects a similarly contemptuous attitude toward the claims of precedent. "Everywhere," Holmes writes, "the basis of principle is tradition,"¹⁷ the blind belief that it is right simply to "do as our fathers have done."¹⁸ This he regards as an indefensible practice, for though the study of the past may, as he puts it, throw "light" upon the present by helping us to understand the quirky path by which we have arrived at our current situation, the mere fact that the law once had a certain content is, in Holmes' view, no reason—not even a weak one—for continuing to preserve it in that form.

There may be reasons, Holmes points out, for preserving some ancient legal rule, but that can only be because the rule in question, though originally fitted to social ends very different from our own, has been adapted over time to changing circumstances, becoming (despite its archaic appearance) a suitable instrument for contemporary policies. But only its suitability in this regard counts in favor of the rule's retention, and the mere fact that it has been in existence for a long time is by itself, Holmes says, utterly irrelevant—a fact to which only the superstitious will give weight. For tradition, Holmes argues, we must substitute "rational policy,"¹⁹ a "study of the ends sought to be attained [by the law] and the reasons for desiring them."²⁰ The object of this study is to "consider and weigh the ends of legislation, the means of attaining them, and the cost."²¹ Through it we learn "that for everything we have we give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect."²² The model for such a study, according to Holmes, is the science of economics, a discipline, he says, that every modern lawyer will need eventually to master.

In economics, however, precedent has no more authoritative force than it does in the science of geometry. To be sure, in calculating the costs and benefits of a legal rule, an economist must sometimes study the history of

16. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920).

17. *Id.* at 191.

18. *Id.* at 188.

19. *Id.* at 192.

20. *Id.* at 195.

21. *Id.*

22. *Id.*

his society, for in certain cases its history alone can provide the information which he needs to make his computations. In this way the accidents of the past do enter into the economist's thinking and play some role in his deliberations, in contrast to the thought of a geometer, where they play no role at all. But the role that the past plays in economics is purely informational. From the viewpoint of an economist, the past has no inherent authority, and an appeal to it can never have, for him, a justificatory power of its own. The past constrains us and limits our present possibilities, and the economist recognizes that we must take these limits into account if we are to act rationally now, that is, with full awareness of the costs and benefits of our actions. But what an economist cannot recognize, what must indeed seem to him absurd, is the suggestion that we are bound by the past in the sense of being obligated to respect it for its own sake. That suggestion must, as Holmes says, seem "revolting" to those lawyers who believe in rational policy rather than tradition. Holmes' celebrated dictum that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics,"²³ should thus be understood as a call for the rejection of tradition and, to the extent it rests upon traditionalist assumptions, of precedent itself, an unshackling of the law from the authority of the past and its replacement by the timeless authority of reason, or more precisely, by the particular species of reason that is embodied in the calculative judgments of economic science.

III. THE MODERN FRIENDS OF PRECEDENT

Not all philosophers of law, however, have been as openly antagonistic to the claims of precedent as Hobbes and Holmes were. Indeed, if one surveys the very large literature on the subject, the opposite attitude seems more common, at least among recent commentators, for much of what has been said about precedent in the last thirty or forty years has been said in its defense.²⁴ But this appearance of friendliness or sympathy toward the rule of *stare decisis* makes it easy to overlook what is perhaps the most important feature of the arguments that are commonly deployed in defense of precedent by contemporary philosophers of law: their uniform adoption of a point of view from which it is absurd to claim that we are ever bound, even in some limited way, to honor the past for its own sake. To many, perhaps, this will seem a strength and not a weakness of the arguments to which I am referring. But it is my own belief that an ac-

23. *Id.* at 187.

24. See, e.g., J. FRANK, *COURTS ON TRIAL* 262-89 (1949); N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 82-86, 134-38 (1978); R. WASSERSTROM, *THE JUDICIAL DECISION* 39-83 (1961); Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125 (1972); Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in *OXFORD ESSAYS IN JURISPRUDENCE* 148 (A. Guest ed. 1961); Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974).

count of precedent must leave some room for this idea, and not reduce to an absurdity the notion that in addition to whatever other reasons we have for following past practice, we have this direct and simple one as well.

The idea that we are bound, within whatever limits, to honor the past for its own sake, to respect it just because it is the past we happen to have, is an idea that is at war with the spirit of philosophy. Of all the justifications that may be given for following precedent it is, in fact, the only one that cannot be fit into a view of law which conceives the rule of *stare decisis* to be compatible, in some ultimate sense, with the timeless truths of philosophy itself. To that extent it represents the truly foreign element in law, and when it is eliminated, when it is made to seem absurd and hence unworthy of being taken seriously, the law loses its power to challenge philosophy in the special way that only something deeply different can. Once we have rejected as absurd the claim that the past is able simply in virtue of its pastness to oblige us to behave in certain ways, there is nothing that remains in the idea of precedent to threaten or disturb philosophy. But that is not, I think, a victory, as it may appear to some. It is instead a kind of defeat, for it closes the way to a deeper understanding of the human meaning of the past.

A recent article by Professor Frederick Schauer illustrates my point.²⁵ Professor Schauer's argument is direct and comprehensive, and his article as a whole exemplifies, with admirable clarity, a way of thinking about precedent that is common among contemporary philosophers of law. I choose it as an illustration for that reason.

After some preliminary remarks, Schauer comes to what he acknowledges many will consider "the biggest question," the question of why "a decisionmaking mechanism [should] incorporate substantial precedential constraints within it," the question, that is, of why we should recognize the claims of precedent at all.²⁶ Schauer considers three answers to this question. The first he calls the "argument from fairness."²⁷ Fairness, he says, requires that like cases be treated alike, and that basic principle in turn requires that earlier decisions be followed in subsequent cases of the same kind. Schauer does not challenge the normative force of this first argument, but he does make the obvious point that it must be supplemented by an account of what is meant by saying that one case is "like" another, for without some such account the general principle that like cases be treated alike is empty.²⁸

The second of the answers that Schauer considers he calls the "argument from predictability."²⁹ Adherence to precedent, this argument as-

25. Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987).

26. *Id.* at 595.

27. *Id.*

28. *See id.* at 596-97.

29. *Id.* at 597. For explicitly economic analyses of precedent, see Kornhauser, *An Economic Per-*

serts, enhances the predictability of law and thus makes it easier for people to plan their lives, an important moral value. Schauer accepts the premise of this argument too, pointing out only that the rule of *stare decisis* has costs as well as benefits—most notably, the cost of “diminishing our ability to adapt to a changing future”³⁰—and that these must be balanced against the advantage of enhanced predictability, before concluding that it is appropriate to follow precedent in any particular area of law, or even in any individual case. “[T]he value of predictability,” he writes, is thus “really a question of balancing expected gain against expected loss. We ask how important predictability is for those affected by the decisions, and we then ask whether that amount of predictability is worth the price of the frequency of suboptimal results multiplied by the costs of those suboptimal results.”³¹ In a pragmatic spirit Schauer adds, “there is no best answer to this calculation, for the answer will vary with the kinds of decisions that given decisionmakers are expected to make.”³²

The third and final justification that Schauer offers for the rule of precedent rests on what he terms “the argument from strengthened decisionmaking.”³³ This is actually two arguments in one: the argument that precedent conserves “the decisional resources of the decisionmakers” (that is, their time and energy) by allowing them to avoid the “reconsideration of questions already considered;” and that it works “to dampen the variability that would otherwise result from dissimilar decisionmakers,” thereby creating an “aura of similarity among decisionmakers even where none may exist”—an aura, Schauer notes, that enhances the credibility, and hence the power, of judges and the institutions associated with them.³⁴ To be sure, the first of these arguments depends on the assumption that judges are sufficiently alike to justify their reliance on one another’s decisions; and the second must take account of the fact “that any attempt to stabilize decisionmaking in an unstable world is likely to produce some suboptimal results,”³⁵ and balance the costs of these results against the benefits of enhanced stability (the same balance that the argument from predictability must strike). With these two qualifications, however, Schauer endorses both branches of the argument from strengthened decisionmaking, along with the other justifications for precedent that he considers.

The several different arguments that Schauer offers in defense of precedent all rest, at bottom, on two claims. The first is that respect for past

spective on Stare Decisis, 65 CHI-KENT L. REV. 63 (1989); Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI-KENT L. REV. 93 (1989).

30. Schauer, *supra* note 25, at 597.

31. *Id.* at 598.

32. *Id.*

33. *Id.* at 599.

34. *Id.* at 599–600.

35. *Id.* at 600.

decisions is desirable to the extent that it increases the sum of social welfare (by enhancing the law's predictability, economizing judicial resources, strengthening the prestige of legal institutions, etc.). This first claim is in essence utilitarian. The second claim is that like cases must be treated alike if a legal system is to be even minimally fair, so that when a case is like some other in all relevant respects except for the fact that it happens to arise at a later moment in time, the later case must be decided in the same way as the earlier one (a formulation which, as Schauer notes, leaves open the question of what, in any given situation, makes two cases relevantly comparable). This second line of defense is not utilitarian, but deontological. Its premise is that people have a right to be treated in the same way as their equals, including not just contemporaneous equals but also those who precede and follow them in time. From this it follows, Schauer claims, that the rule of precedent must be a part of any legal system which respects that basic right.

Both of these arguments—the utilitarian and the deontological—are staples of the literature, endlessly repeated with only minor variations in the many articles and books on precedent that have been written by philosophers of law in recent years.³⁶ Schauer's article is in this respect quite typical and may be treated as a fair representative of the literature as a whole. Neither argument, however, takes seriously the claim that the past deserves to be respected merely because it is the past—not, of course, uncritically or unconditionally, but for its own sake nonetheless. That is a claim both arguments reject, and their rejection of it represents an important common element in the utilitarian and deontological accounts of precedent—an element whose importance far exceeds the more obvious differences that set these two theories apart.

Utilitarianism and deontology take as their respective standards of judgment the global welfare of society and the rights of individuals. In each case the standard is an exclusive one, because there are either no values which exist apart from it (utilitarianism) or none that count against it (deontology). Thus the only argument that has any justificatory force from a utilitarian point of view is one that appeals to global welfare, and the only argument that has such force within a deontological framework is an argument appealing to individual rights. But both of these basic ideas—global welfare and individual rights—are intelligible only if we remove ourselves, by a process of abstraction, from our real temporal situation and examine the society and legal system we inhabit from what may properly be called a timeless point of view. From this point of view, the temporal distinctions that define our ordinary experience of life—including the distinction between past and present—all disappear, and cease to have any inherent meaning or authority of their own.

36. See, e.g., sources cited *supra* note 24.

This is perhaps easiest to see in the case of utilitarianism, for if it is global welfare that we are to maximize, there can be no reason for giving any local portion of it special weight, whether we understand "local" in its original spatial sense or give it (as we must) a temporal meaning too. Economists—the most thoroughgoing of all utilitarians—emphasize this point and describe as irrational those who, for example, give greater weight to present satisfactions than to future ones just because the satisfactions in question happen to be present: and so, indeed, such people must be if global welfare is presumed to be the sole criterion of value, for that criterion can be properly applied only from a timeless point of view. It follows, by parity of reasoning, that the past can have no special weight within the framework of utilitarianism, and that arguments which assert that the past is worthy of respect for no other reason than that it is the past must be dismissed as equally irrational.

In a similar way, the deontological point of view also requires us to judge the morality of human actions from a vantage point outside the stream of time in which these actions all occur. To see this it is necessary only to recall the procedure that proponents of this view employ to identify those rights which they claim any morally acceptable law or institution must acknowledge. This procedure might be described as a kind of *via negativa*, a process of abstraction whose object is to isolate the grounds of moral personality—the properties of human beings in virtue of which they possess the rights they do—by paring away all the accidental qualities that distinguish different human beings from one another. The rights in question are human rights; they are rights that belong to mankind generally, and not just to some discrete subpart of it. They therefore cannot have as their foundation any characteristic which only certain human beings possess and others lack, like skin color or gender. It is this familiar and widely accepted thought that lies behind every modern anti-discrimination movement and that gives these movements their immense appeal. But to the claim that a person's moral standing is not founded upon physical or psychosexual characteristics, we must add that it is equally independent of temporal location, for from a deontological point of view, that is just as much an accident as these other attributes. It is an accident that I am born with a certain skin color, but just as accidental that I happen to live when I do, coming after some and before others in the stream of time. Neither contingency, therefore, should have any bearing on my rights. If moral personality—the foundation of whatever rights we have—is colorless and sexless, then it must be timeless too. From this it follows that no one can have greater rights than others just because he happens to live at a later time than they. Time itself must therefore be included among the accidental conditions of human life which the deontological point of view demands that we ignore. To adopt this point of view is thus necessarily to assume what John Rawls calls "the perspective of

eternity," and to "regard the human situation not only from all social but also from all temporal points of view."³⁷ In that respect, however, the deontological and utilitarian perspectives are identical, and the timelessness of each—its indifference to the temporal distinctions we ordinarily accept—prevents those who embrace either point of view from acknowledging that it can ever be right to follow a certain rule or practice just because it was followed in the past.

To this it may be objected that I am overlooking the perfectly straightforward role which the facts of past practice play in both utilitarian and deontological arguments, and thus failing to notice how each argument can provide, in principle at least, support for the rule of precedent. Consider the deontological argument first. All that it asserts is that every moral person has the same rights as every other and must therefore be treated in the same way (that like cases must be treated alike). This we might call the formal first principle of deontology. It often happens, however, that this principle can be given content and made meaningfully applicable to human problems only by taking account of certain temporal contingencies. Thus, for example, if on Day One a plaintiff presents a novel claim—a claim that has never before been asserted—and prevails, the principle that like cases should be treated alike means that when another plaintiff presents an identical claim on Day Two he ought to prevail as well. Since the past cannot be undone, the only way to treat later cases like (identical) earlier ones is to conform the later cases to them; this is a consequence of the rather obvious fact that time flows in one direction only. It follows that the injunction to treat all persons alike, to accord their claims equal respect from the standpoint of eternity, can sometimes be given operational significance only by looking to see what has actually been done in the past and thus by taking account of certain temporal relationships which have no inherent value from that standpoint.

Something similar is true of utilitarian arguments as well. All such arguments start from the assumption that the best rule, practice, or decision is the one that maximizes global welfare, a concept which, abstractly defined, gives no more weight to temporal distinctions than it does to those among persons. To actually apply this concept, however, one must often take account of such distinctions. Thus, for example, the mere continuation of an existing rule or practice may sometimes increase global utility simply by making it easier for people to plan their future actions. Indeed, this can be true, within limits, even if the substance of the rule or practice is, in Schauer's words, "suboptimal" from a utilitarian point of view. But this means that there will sometimes be good reasons for deferring to the past in the name of global welfare. If the observational and intellectual powers of human beings were not as limited as they are, such deference

37. J. RAWLS, *A THEORY OF JUSTICE* 587 (1971).

might be unnecessary, for in that case every dispute, however much like those that have been decided in the past, could be approached directly from the standpoint of eternity. That is presumably what the pursuit of global welfare would require, if judges and litigants were sufficiently farsighted. But judges and litigants are not, in fact, so prescient, and when one takes their cognitive and other limitations into account, it is easy to see why some deference to precedent may be needed to achieve the greatest amount of welfare overall. Any utilitarianism which acknowledges these limitations will therefore find some room for precedent, despite the timeless nature of the ultimate good that guides every such philosophy.³⁸

Thus in different ways both the deontological and utilitarian points of view seem to allow—indeed to require—an acceptance of the claim that having done something in the past may in certain circumstances be a reason for continuing to do it now. But in each case the reason is an indirect one which fails to support—indeed subverts—the idea that the past can ever have an immediate claim to our respect simply in virtue of its pastness.

The deontological defense of precedent starts by assuming that only moral personality has what Kant called “intrinsic worth,”³⁹ and that the value of everything else, including the rule of precedent, must be established by demonstrating its instrumental relationship to this one intrinsic good. That is what the deontological defense of precedent purports to do. On this view, we do not respect the past because it is inherently worthy of respect—for a deontologist that would be a kind of fetishism—but because we must respect it if we are to treat persons with the equality they deserve, given the unidirectionality of the time stream in which all human beings happen, contingently, to live. Adherence to precedent is, from this point of view, nothing more than a method for giving operational effect to the one fundamental principle of morality under the accidental local conditions that define our human situation, including the condition of temporality. Given our temporal constitution, the basic moral obligation to treat persons equally requires that we take the past as a benchmark for the present, and conform our actions to it, since the reverse strategy is for us quite obviously impossible. But it would be absurd to infer from this that the past has any meaning or value in its own right, or any claim on us of a more direct kind. Respect for the past is justifiable, from a deontological point of view, only when it serves an end outside of time, and it is thus only from the standpoint of eternity that the rule of precedent can be made deontologically defensible.

The utilitarian defense of precedent is likewise indirect. Unless we as-

38. See, e.g., H. SIDGWICK, *THE METHODS OF ETHICS* 480–84 (7th ed. 1907).

39. I. KANT, *Fundamental Principles of the Metaphysic of Morals*, in *KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS* 1, 9 (T. Abbott 6th ed. 1909).

sume that the practice of following past decisions promotes global welfare in some fashion (by increasing predictability, for example, or economizing on judicial resources), a sober-minded utilitarian must dismiss it as a superstition which, like any other, ascribes a meaning to events that by themselves possess none. If it is desirable that we give weight to past decisions, this can be so, from a utilitarian point of view, only for instrumental reasons, and the suggestion that the past has some direct claim on us, just in virtue of its being what it is, is bound to seem as absurd from this perspective as from a deontological one. Here, too, the claims of the past can be comprehended and defended, to the extent they are defensible at all, only from the standpoint of an ultimate value that requires us to conceive the problems of society *sub specie aeternitatis* and to deny that the past has any inherent authority of its own.

Thus neither the deontological defense of precedent nor its utilitarian counterpart leaves any room for the idea that we are bound, within limits, to honor the past for its own sake: not because doing so is necessary to maximize utility or to guarantee the equality of persons, but for the simpler and more direct reason that it is the past and, simply as such, has some claim to our respect. For both deontologists and utilitarians that idea is just a superstition (though perhaps, for utilitarians at least, a useful one); at a philosophical level, they agree, we cannot take it seriously.

Indeed, at this point, one may be inclined to ask what it would mean to take it seriously. Why should we think there is anything left to be said in defense of precedent once we have taken account of all the utilitarian and deontological reasons that Schauer and others offer? That the search for reasons beyond these should now seem such a hopeless endeavor shows how successful the modern friends of precedent have been in making the rule of stare decisis safe for philosophy by encouraging us to see the question of our relation to the past from the same timeless vantage point that philosophy sees everything. They have succeeded, so to speak, in making the idea of precedent unmysterious from a philosophical point of view. But perhaps that is a way less of answering the challenge law poses to philosophy, than of avoiding it. Perhaps the idea that we should honor the past for its own sake ought not to be dismissed as an absurdity, but explicated sympathetically. Perhaps we should reject the advice of those enlightened thinkers who tell us this idea is nothing but a superstition and treat it instead as a clue to some important fact about ourselves. Perhaps we should take it seriously after all.

IV. PRECEDENT AND TRADITION

Most modern philosophers of law who have sought to justify the rule of precedent maintain that we are never bound to honor the past for its own sake. To the extent that we owe the practices of the past any respect at

all, they say, we do so for more indirect reasons of a utilitarian or deontological sort, reasons that come into view only when we consider the law from a vantage point outside the stream of time. Even those, like Schauer, who seem most eager to defend the rule of precedent do so in this spirit. But that is perhaps not so surprising after all, for in rejecting the idea that the past has a more direct claim upon us and insisting that whatever authority it does possess must be founded derivatively upon timeless principles of utility or justice, Schauer and those who share his view of precedent express an attitude that is today so commonplace, so deeply embedded in our modern culture, as to seem more like a fact than a controversial judgment. The modern friends of precedent are, in this respect, only rejecting an idea that everyone now does, and in the culture they inhabit that can hardly seem disturbing; indeed, it can hardly seem to be the rejection of anything intelligible at all.

I have so far been concerned with the question of how philosophers should understand the authority of the past in the special sphere of law—and whether they have succeeded in doing so. But while the authority of the past continues, perhaps, to exert a greater influence in the law than in other spheres of life, so that legal philosophers are particularly challenged to explain it, the law is not the only realm of human action and experience in which the past has at one time or another exerted a direct authority of its own. Indeed, for most of the time that human beings have lived together in organized communities, every aspect of their communal lives—social, religious, political, and economic as well as legal—has to a large degree been organized on the assumption that the past has an inherent authority of just this kind, a sanctity that obligates us to respect the patterns it prescribes.⁴⁰ The name we give this once-pervasive attitude is traditionalism, and the legal practice that we call the rule of precedent—the willingness of lawyers and judges to be guided by the past—is merely one expression of this more general outlook.

But in the societies of the modern West, and in those others, capitalist and not, that subscribe to its ideals, traditionalism is today in disrepute, and whatever small areas of traditionalist belief survive in these societies (mainly in the realms of social and religious life) are subject to a constant and seemingly irreversible process of erosion. Indeed, wherever modern ideas have gained ground, traditionalist ones have lost it and come under a cloud of moral and intellectual suspicion, the self-conscious rejection of all traditionalist thinking being, in fact, one of the principal badges by which the champions of modernity have, from the beginning of their battle against unenlightened superstition, sought to distinguish themselves from their opponents. The particular form that traditionalism assumes within the domain of law has, along with all its other forms, come under this

40. See 1 M. WEBER, *ECONOMY AND SOCIETY* 226-41 (G. Roth & C. Wittich eds. 1968).

same cloud, making the authority of past legal decisions, however great it still may be, appear inexplicable on any grounds but antitraditionalist ones of the sort that utilitarians and deontologists propose. In their efforts to find a justification for the rule of precedent that is consistent with the repudiation of traditionalism on which the whole of modern culture rests, Schauer and those who share his views are simply taking the most basic starting point of this wider culture as their own.

The disrepute in which traditionalism now stands is a consequence of the process of rationalization that in the last three hundred years has remade the human world, a process of intellectual and institutional disenchantment (*Entzauberung*) whose remorseless operation Max Weber called the "fate"⁴¹ of our "godless and prophetless time."⁴² It is in the West that this process of rationalization began and here, too, that it has been carried to its furthest limits. Weber spent a lifetime exploring the causes, material and spiritual, of the uniquely rational course that Western civilization has followed. But though the career of the West has been, as he acknowledged, a special one, Weber stressed that the attitudes and institutions which constitute the core of its "specific and peculiar rationalism"⁴³ "lie in a line of development having *universal* significance and value."⁴⁴ What Weber meant by this is that the civilization of the modern West, however contingent or historically peculiar, is based upon a system of beliefs that to every independent-minded person must appear more rational (though not necessarily more conducive to human happiness) than those that underlay its premodern counterparts. In that sense, we might say, the process of disenchantment which constitutes "the inescapable condition of our historical situation"⁴⁵ represents the fate not only of the West, but of mankind as a whole, for its rational authority, Weber implies, is as obvious and final as that of science itself (if equally vulnerable to the forces of religious obscurantism that continue to draw, as they always have, on the ordinary human preference for salvation over reason).

This process is a ubiquitous one, and no area of human life has been exempt from its effects. In every sphere, however, its general tendency has been the same. Wherever its effects have been felt, the process of rationalization that Weber describes has resulted in a similar state of moral leveling.⁴⁶ It has brought this result about, in every sphere of life that it has touched, by evacuating the moral meaning from a wide range of natural

41. M. WEBER, *supra* note 4, at 155.

42. *Id.* at 153.

43. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 26 (T. Parsons trans. 1958).

44. *Id.* at 13 (emphasis in original).

45. M. WEBER, *supra* note 4, at 152.

46. I borrow the term "leveling" from Nietzsche, who used it to describe the distinctive character of modern European civilization as a whole. See F. NIETZSCHE, *BEYOND GOOD AND EVIL* 176 (W. Kaufmann trans. 1966). Hegel uses the same expression. See G. HEGEL, *PHILOSOPHY OF RIGHT* 9 (T.M. Knox trans. 1952).

and social distinctions that were once presumed to be invested with normative significance—the distinctions, for example, between old and young, male and female, wellborn and plebeian. In the past these distinctions possessed a self-evident meaning and importance that they now no longer do, a meaning which the disenchantment of the world forbids us to regard as anything but magical or superstitious.

To these once-prestigious distinctions, whose meaning has been flattened by the process of rationalization, we must also add the distinction between past and present, for that distinction too—which in every premodern culture was infused with moral meaning—has been transformed by this same process into a natural fact devoid of all normative significance. By draining this distinction of its inherent moral meaning, the process of rationalization has undermined the basis of every traditionalist claim to authority, and introduced into our thinking about politics and law the same indifference to time that characterizes the philosophical point of view. The disenchantment of the world has introduced into the realm of politics the spirit of reason itself, a spirit antithetical to every form of traditionalism, with its belief in the authority of the past. As a result, the past today possesses no more sanctity in politics than it does in the sphere of philosophy, where all actions must be considered, and judgments made, from the standpoint of reason alone. That is, I think, part of the meaning of Hegel's famous remark that the modern age is defined by the congruence of reason and reality,⁴⁷ a remark that Weber would also have endorsed. Given the immense prestige that reason now enjoys in every department of political life and the extent to which a philosophical point of view incapable of seeing any intrinsic moral meaning in the distinction between past and present has penetrated our political attitudes generally, it is hardly to be expected that modern philosophers of law would in their accounts of precedent endorse the traditionalist idea that the past possesses an authority of its own. Like the rest of their contemporaries, they are the products of a disenchanted world, and no more capable of granting the past such an authority in law than in any other sphere of human life.

The proposition that the past enjoys a certain moral prestige of its own has become, to us, nearly incredible—even in the law, where it might be thought this idea would have retained some plausibility. In order to defend the rule of *stare decisis* today, therefore, one must begin by reconceiving it in terms that are acceptable from the same rationalist perspective that now dominates our thinking on every political topic. One must begin, that is to say, by rejecting the claims of tradition. Any contemporary philosopher of law who instead takes traditionalism seriously enough even to want to understand it, thereby does more than place himself in opposition

47. See G. HEGEL, *supra* note 46, at 10.

to the main tendencies of philosophy (whose contempt for tradition has been explicit at least since Plato). He also places himself in opposition to his age, an age in which the rationalizing spirit of philosophy, having escaped all previous limits, now rules the world of Western politics unchallenged. Among contemporary philosophers in the English-speaking world only Alasdair MacIntyre may be said to have taken the claims of tradition seriously in the sense that I have indicated, and the chilly reception he has received from the professional philosophical establishment is some indication of how far out of step with prevailing ideas even MacIntyre's tepid traditionalism is.⁴⁸

V. WITH BURKE AGAINST THE CURRENT

If a person were inclined, as I am, to swim against the current by taking the claims of traditionalism seriously, both in the law and outside it, where might he or she search for materials with which to construct a philosophical account of these claims that would be faithful to them on their own, unmodern terms? One place to begin, I believe, is the work of Edmund Burke. Burke's most important speeches and essays were all written in response to particular political events, and each sought to achieve a specific polemical objective. None of his highly contextual writings contain what could honestly be called a philosophy of tradition (a phrase that Burke himself would probably have thought an oxymoron and in any case rejected as a description of his work). But however we classify him, whether as a politician or philosopher or odd hybrid of the two, the fact remains that no one since Burke has defended the claims of traditionalism with more vigor and intelligence. Burke is the outstanding defender of tradition in the modern age, and his writings remain an extraordinary resource for those, like me, who want to understand the ancient but now largely discredited idea that the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative.

There are, of course, other, older sources to which one might turn as well, but Burke's defense of tradition is particularly suggestive, for it was conceived in opposition to the process of disenchantment that had, by his own day, already undermined the claims of tradition to an unprecedented degree. For those, like Hegel, who have been sympathetic to this process and its results, there is one event that more than any other has symbolized its liberating power. That event, of course, is the French Revolution.⁴⁹

48. See A. MACINTYRE, *AFTER VIRTUE* (1981); A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); Nagel, *Agreeing in Principle* (Book Review), *TIMES LITERARY SUPPLEMENT*, July 8, 1988, at 747 (reviewing latter book).

49. For an account of Hegel's generally sympathetic, though by no means uncritical, reaction to the French Revolution, see S. AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 7-8, 47-49 (1972). See also Suter, *Burke, Hegel, and the French Revolution*, in *HEGEL'S POLITICAL PHILOSOPHY* 52 (Z. Pelczynski ed. 1971).

Because Burke's defense of traditionalism was composed in response to this event, and with an understanding of the larger tendencies it represented, it has a special relevance to modern readers, all of whom, as Marx and Nietzsche recognized,⁵⁰ are the heirs of the French Revolution and its leveling ideology. For anyone who wishes to see just how far the claims of tradition can be defended or even understood on their own terms in the leveled world we now inhabit, a world the French Revolution helped importantly to define, Burke's writings are perhaps the best place to begin.

I propose, therefore, to conclude this Article with some thoughts suggested by a passage in Burke's celebrated essay on the French Revolution.⁵¹ What I shall have to say about this passage ought not, of course, to be mistaken for an interpretation of the essay as a whole, let alone of Burke's political philosophy. Nor should it be mistaken for a complete account of the claims of tradition, something I cannot now pretend to be able to produce. My comments are meant only to suggest how, beginning with one Burkean text, it may be possible to take a step toward understanding what has, for us, become so nearly unintelligible: the inherent authority of the past and the directness of the claim it has upon us.

VI. "THE FLIES OF A SUMMER"

The passage that shall serve as my text is one of the most powerful and moving in the whole of Burke's *Reflections*. It appears in the context of his account of the "shamelessness" of democracies. The citizens of democratic regimes have, Burke claims, a natural tendency toward selfishness, a destructive tendency that in his view can be most effectively combatted by a "state religious establishment" that works continuously, in private life as well as public, to impress on "all persons possessing any portion of power" the "idea that they act in trust; and that they are to account for their conduct in that trust to the one great master, author and founder of society."⁵² A few paragraphs later, returning to the idea that political power must be exercised in trust, Burke writes:

[O]ne of the first and most leading principles on which the common-

50. For Marx's view of the French Revolution and its implications, see K. MARX, *On the Jewish Question*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 216 (L. Easton & K. Guddat trans. 1967); K. MARX & F. ENGELS, *THE HOLY FAMILY, OR CRITIQUE OF CRITICAL CRITICISM* 140-41 (R. Dixon & C. Dutt trans. 1975). See also S. AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX 185-201* (1968). Nietzsche called the French Revolution the "daughter and continuation of Christianity," F. NIETZSCHE, *THE WILL TO POWER* 111 (W. Kaufmann trans. 1968), and viewed it as the culmination of the slave revolt in morality. With the French Revolution, he wrote, the "scepter" of moral authority was "actually and solemnly placed . . . in the hands of 'the good human being' (the sheep, the ass, the goose, and all who are incurably shallow squallers, ripe for the nut house of 'modern ideas')." F. NIETZSCHE, *THE GAY SCIENCE* 293 (W. Kaufmann trans. 1974).

51. E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (C. O'Brien rev. ed. 1969) (1790).

52. *Id.* at 190-91.

wealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of an habitation—and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.⁵³

Burke's imagery in this passage is predominantly legal ("life-renters," "entail," "waste on the inheritance"), but with the flies—the last and most striking of his images—our attention is drawn away from the realm of law to that of nature, from property and obligation to biology. This is itself significant, for one of the things the world of flies most obviously lacks is law, the whole complex structure of norms and institutions that is the subject of the "science of jurisprudence," the "pride of the human intellect," as Burke calls it in the paragraph that follows the one I have just quoted.⁵⁴ Burke's imagistic shift from entails to flies thus serves to underscore the distinctly human character of law and to remind us that however we understand the idea of natural law—that most ambiguous of legal concepts—it is only because we live lives less natural than flies that we have, or can have, law at all.

What is it about a fly's life that Burke wishes us to notice? First, I suppose, its brevity: flies live only for one summer, while human beings, as a rule, live considerably longer (though not as long as some animals, like tortoises, whose lives, despite their length, are clearly more like flies' lives than our own). But what is most inhuman about a fly's life is not, in Burke's view, its short duration, but its disconnection from the future and the past. A fly's life is self-contained. Viewed in any perspective but the exceptionally long one of evolutionary theory, the life lived by the flies of any given generation repeats exactly the lives lived by their predecessors and successors in the chain of generations. Each generation begins at the same point as those that came before it and follows the same path that they did to the same conclusion. Flies neither inherit nor bequeath but in each generation repeat an identical metabolic drama, living through the same cycle and displaying, in every generation, the life of the species as a

53. *Id.* at 192–93. For another commentary on this same passage, see J. WHITE, *WHEN WORDS LOSE THEIR MEANING* 207–08 (1984).

54. E. BURKE, *supra* note 51, at 193.

whole. Flies are in every generation all that they can be. And even if we take an evolutionary view of the matter—a view that challenges the ancient Aristotelian belief in the permanence of species-types and introduces, as Marx observed, a quasi-historical element into our understanding of nature itself⁵⁵—it remains true that no generation of flies can ever *do* anything to alter the situation of its successors, for if their situation is different, that can only be, according to the principles of evolutionary theory, because of some random genetic accident or environmental change. Thus, whether we take an Aristotelian view of flies or a Darwinian one, the notion that each generation must affirmatively do something to insure that the next starts life at the same point as its predecessor—that the generations of flies are linked by a series of sustaining acts, of inheritances and bequests, and depend upon one another's efforts in this regard—is absurd. Species may exist forever or evolve, but with the exception of the human species their generations are not connected in this way. That is what Hannah Arendt means when she observes that human parents, unlike their animal counterparts, “have not only summoned their children into life through conception and birth,” but have “simultaneously introduced them into a world,” a common world of human achievements that precedes and will outlast them.⁵⁶ By contrast, each generation of flies has a history complete unto itself, and every generation starts its story anew, unencumbered by debts to the past or duties to the future. More so even than its brevity, it is this disconnection from both past and future that makes a fly's life seem so alien from a human point of view.

We are, of course, biological beings as well as political and historical ones, and to that extent our lives are indeed like those of other living things, including flies. Viewed strictly from a biological point of view, each human being's career is a replica of every other's and remains the same from one generation to the next. All human beings begin their lives in a condition of weakness and dependency and, unless their biological careers are interrupted by an accident of one sort or another, grow to maturity, reproduce, and die. That is our biological destiny, the “sensual music”⁵⁷ of love and death in which we all are caught, just as it is our destiny that we must eat and sleep to live, a destiny that represents, in Marx's phrase, “the everlasting nature-imposed condition of human existence.”⁵⁸ One generation of human beings may, of course, eat better and live longer than its predecessors, but every generation begins and ends at the same biological points and in that sense can never do more than repeat the natural history of the generations that came before. All of us, regardless of where we appear in the chain of generations, live under the same

55. See K. MARX, *CAPITAL* 406 n.2 (S. Moore & E. Aveling trans. 1906).

56. H. ARENDT, *The Crisis in Education*, in *BETWEEN PAST AND FUTURE* 173, 185 (1977).

57. W.B. YEATS, *Sailing to Byzantium*, in *COLLECTED POEMS* 191 (1956).

58. K. MARX, *supra* note 55, at 205.

metabolic requirements and follow the same biological careers as our ancestors and descendants, reliving the drama of life in an endless series of identical performances. No generation can escape from the wheel of biological fate or do anything to liberate its successors from it; like the generations of flies, every human generation stands in this respect on its own and tells the same complete tale as every other.

But unlike flies, human beings are cultural creatures as well as biological ones. Each generation of human beings is born into a cultured or cultivated world, a world of things that earlier generations have made and which, having outlasted their makers, still exist—physical things like buildings, tools, and gardens, and less tangible ones like laws. This world of artifacts owes its existence to the human capacity for what Marx calls “productive consumption”⁵⁹ and Hannah Arendt terms “work,”⁶⁰ the ability of living human beings to fashion things that have a durability greater than they themselves do.

The artifacts that together constitute the world of culture have all been brought into existence to serve some end or satisfy some need. Each of them therefore has the special kind of meaning which only those things that have a purpose can possess, in contrast to the unmade things of the natural world that acquire a meaning only when they are incorporated, in one way or another, into some human enterprise or undertaking (including the age-old enterprise of explaining the world, and the fortunes of its inhabitants, in mythic or religious terms).⁶¹ The world of artifacts, of culture, into which we all are born is therefore not a world merely of objects, but of meanings too, a system, so to speak, of signs,⁶² and just as every human being stands under the rule of biological necessity, so, too, he or she belongs to this humanly created world of significant things. Every human being is a participant in both domains, a citizen of two kingdoms, and it is this dual citizenship that distinguishes us from flies, for the life of every fly is lived entirely within the territory of the first.

Two features of the world of culture are particularly striking. The first is the cumulative, or potentially cumulative, character of its achievements. The longevity of the artifacts that at any given moment constitute the world of culture make it possible for one generation to build upon the work of its predecessors, to refine their accomplishments and to extend them, thereby passing on to its successors a world richer and more finished than the one it inherited. The possibility of accumulating achievements in this way enables human beings to do something that no other living creatures can: to undertake and execute projects that by their nature

59. *Id.* at 204.

60. See H. ARENDT, *THE HUMAN CONDITION* 119–53 (1959).

61. See 1 M. WEBER, *supra* note 40, at 7; M. WEBER, *Social Psychology of the World Religions*, in FROM MAX WEBER, *supra* note 4, at 267–77.

62. See M. HEIDEGGER, *BEING AND TIME* 107–14 (J. Macquarrie & J. Robinson trans. 1962).

cannot be completed within the span of a single human lifetime, like the construction of the great cathedrals of medieval Europe. The cumulative character of culture thus liberates human beings from the narrow temporal constraints within which their ambitions would otherwise be confined, and permits them to dream and work on a scale larger than the limits of a single lifetime will permit.

Not every human group, of course, has sought to exploit the cumulative potential of the cultural world in a deliberate or self-conscious way. Many, indeed, have endeavored only to pass their cultures on, intact and unchanged, from one generation to the next (though even here, as Marx points out, the effort to reproduce, unaltered, an existing mode of human life almost always results in its modification, despite the intentions of those involved).⁶³ Cultures of this sort—characteristic of primitive societies and of the Greco-Roman world before the triumph of Christianity, with its emphasis on progress and perfection in human history⁶⁴—appear on their surface to exhibit the circularity of life itself. But whatever their inhabitants may think, these circular-seeming cultures possess the same potential for accumulation that distinguishes the realm of culture as a whole from that of metabolic life, a potential which, if Marx is right, human beings cannot help but realize even though they do not recognize or value it. It is this potential that gives the realm of culture its liberating power. The potential additivity of human culture permits us—each of us in every generation—to participate in projects that it would be pointless to pursue were our goals limited to those that can be reached in the time before we die, and thereby enhances human freedom by allowing us to escape, if only in a qualified way, the tyranny of our biological fate; which is why Plato includes culture and its opportunities among the weapons that we have to fight our war against mortality.⁶⁵

The first characteristic of the world of culture is thus its potential for accumulation. The second is its destructibility. I do not mean by this only that the artifacts which constitute the world of culture can be deliberately

63. K. MARX, *GRUNDRISSE* 493-94 (M. Nicolau trans. 1973) (emphasis in original):

The aim of all these communities is survival: i.e. *reproduction of the individuals who compose it as proprietors, i.e. in the same objective mode of existence as forms the relation among the members and at the same time therefore the commune itself. This reproduction, however, is at the same time necessarily new production and destruction of the old form.*

64. For an interesting discussion of the Christian conceptions of history and salvation, and their implications for our understanding of human society, see K. LOWITH, *MEANING IN HISTORY* 1-19, 182-207 (1948).

65. PLATO, *Symposium*, in *THE COLLECTED DIALOGUES OF PLATO*, *supra* note 10, at 526, 561 (*209d-e):

Or think of Lycurgus, she went on, and what offspring he left behind him in his laws, which proved to be the saviors of Sparta and, perhaps, the whole of Hellas. Or think of the fame of Solon, the father of Athenian law, and think of all the other names that are remembered in Grecian cities and in lands beyond the sea for the noble deeds they did before the eyes of all the world, and for the diverse virtues that they fathered. And think of all the shrines that have been dedicated to them in memory of their immortal issue, and tell me if you can of *anyone* whose mortal children have brought him so much fame.

destroyed, though that is of course true too, for the human capacity to destroy things far exceeds our capacity to create them (as the existence of nuclear weapons makes unambiguously clear).⁶⁶ The world of culture is destructible in another, more prosaic sense. It is destructible because the things that it contains, if left to themselves and not purposefully kept up, will all eventually deteriorate, returning, if they are physical objects, to the natural materials from which they were composed.⁶⁷ Of course everything in the world of life decomposes too; death and deterioration are essential moments in all of life's routines. The processes of disintegration, which are a universal feature of the world of life, do not, however, threaten to destroy that world itself. Indeed, it is through them that life is sustained. These processes are in reality not the enemies of life but an aspect of it, part of life's own cycle. But they are the enemies of culture, and if allowed to operate unimpeded for a sufficient length of time, they must eventually destroy the world of culture as a whole, obliterating its distinctness as a realm apart from that of life by reimposing on all its special artifacts life's cosmic uniformity. In contrast to the world of life, which is preserved through the natural destructibility of things, the very existence of a separate world of culture thus depends on an unrelaxed resistance to these same destructive forces, on a constant effort at upkeep and repair without which the boundary between life and culture must itself eventually disappear.

This is easy enough to see in the case of physical structures like buildings and roads, but it is true of intangible cultural artifacts as well, like laws and poems. These, too, will eventually be lost if they are not kept up, and merely putting them in writing is never by itself enough to do this, for there are many books of law and poetry that we still possess but no longer know how to read. A building may be kept up with bricks and mortar, but to keep up a system of laws requires an educational program of some sort through which each generation of newcomers can be introduced to the laws and learn the methods for interpreting them.⁶⁸ The same is true of literary works. In all these cases a ceaseless effort at preservation is required if the artifact in question is to retain its meaning within the system of signs that constitutes the world of culture: if, that is to say, it is to survive as a cultural artifact at all. Sometimes the preservation that is needed will be physical, sometimes institutional, and very often both, but whatever form it takes, the world of culture, unlike that of life, cannot exist without it.

One generation may therefore damage the cultural inheritance of the next not only by actively destroying what has been given to it, but also

66. See J. SCHELL, *THE FATE OF THE EARTH* 93-96 (1982).

67. H. ARENDT, *supra* note 60, at 119-20; ARISTOTLE, *Physics*, in *THE BASIC WORKS OF ARISTOTLE* 213, 237 (R. McKeon ed. 1941) (*193a).

68. See H. ARENDT, *supra* note 56, at 189.

merely by neglecting to keep it up. No generation of human beings can pass on to its successors the cultural world it has received without devoting considerable resources (including many individual lives) to its preservation. This is an iron law, and the responsibility it creates is the chief one that the world of culture imposes on all those who inhabit it, a responsibility that goes with culture's liberating freedom and which indeed is its condition. Today, I might add, this responsibility is greater than it has ever been before. As a result of the unprecedented growth in human power that has taken place during the past two hundred years, large parts of the natural world that could before be expected to preserve themselves without human intervention now depend upon such intervention for their survival. Unless we work to keep them up, they, too, will eventually disappear, consumed by human need, just as a building that is not kept up will be consumed by wind and water. In that sense, one might say, a large part of what before belonged to the world of nature has been drawn into the world of culture and made subject to its different laws.⁶⁹ Two centuries ago, no one dreamed that the earth itself might perish from human neglect. Today that seems a real possibility, and one that is bound to make us feel more poignantly than any generation ever has the threat of ruin that hangs over every tangible and intangible component of human culture.

These two features of the world of culture—its additivity and constant vulnerability to ruin—distinguish it from the metabolic world of which we, like every other living thing, are all inhabitants as well. In the latter world, to which Burke's flies are confined, the generations do not build upon one another's achievements, nor is there anything they must work to keep up, to save from the ruin of time. There is no progress in the world of life but only circularity and repetition, the endless return of the same, and because every generation begins and ends at the same place, there can be no projects in that world that require the participation of successive generations, as in the realm of culture. The liberating power of culture is therefore absent from the world of metabolic routine. But by the same token, the responsibility of preservation that the world of culture imposes on us is missing here as well. The generations of flies cannot join in common projects, but neither must they take any care for their successors; each generation comes and goes in a carefree way, without attention to the past or concern for the future. Given the burdens of the world of culture, such a life must at times appear quite enviable. Nietzsche, for one, understood the source and power of this envy.

Consider the cattle, grazing as they pass you by . . . [T]hey do not

69. For Marx's comments on the industrialization of nature, see K. MARX, *supra* note 63, at 704-06. For a discussion of the same phenomenon from a contemporary environmentalist standpoint, see McKibben, *Reflections: The End of Nature*, NEW YORKER, Sept. 11, 1989, at 47, 74-81.

know what is meant by yesterday or today, they leap about, eat, rest, digest, leap about again, and so from morn till night and from day to day, fettered to the moment and its pleasure or displeasure, and thus neither melancholy nor bored. This is a hard sight for man to see; for, though he thinks himself better than the animals because he is human, he cannot help envying them their happiness—what they have, a life neither bored nor painful, is precisely what he wants, yet he cannot have it because he refuses to be like an animal.⁷⁰

Along with the burdens of a trust that cannot be escaped, the envy Nietzsche describes, and the peculiar sort of unhappiness associated with it, are thus a price that we must pay for the freedom culture gives us.

VII. THE "COXCOMBS OF PHILOSOPHY"⁷¹

The passage of Burke's that I have taken as my text draws our attention to two different realms of human action and experience and suggests, implicitly at least, the features that distinguish them. To these two realms—those of life and culture—I now wish to add a third. I shall call this third realm the realm of thought, an ordinary word to which, as I will soon explain, I give a special meaning.⁷² This realm, too, like that of life, lacks the features of impermanence and additivity that mark the world of culture, and the desire that constitutes its driving force is as much a threat to our cultural achievements as those that drive the circular routines of life. In the passage I have quoted, there is no mention of this third realm, nor any indication of the antagonism of thought to culture. But the tension between these two domains is an important theme in the *Reflections* as a whole, indeed in all of Burke's political writings, and any attempt to follow his lead in understanding the claims of tradition must take this tension into account and make an effort to explain its origin.

If one asks what Burke found most disturbing in the attitudes of the French revolutionaries and their English sympathizers, the answer must surely be their tendency to substitute for what he calls the "prudential" view of politics a very different attitude that he repeatedly describes as philosophical or metaphysical.⁷³ Those who approach the problems of political life in the prudential spirit Burke recommends give great (though not uncritical) deference to established routines and existing institutions. In their judgments they take account of the peculiar, and largely accidental, features that define the particular political culture in which they hap-

70. F. NIETZSCHE, *On the Uses and Disadvantages of History for Life*, in *UNTIMELY MEDITATIONS* 60 (R.J. Hollingdale trans. 1983).

71. See E. BURKE, *supra* note 51, at 141.

72. In this respect, I am following the lead of Hannah Arendt, whose own account of thought is the inspiration for the one I offer here. See H. ARENDT, *THE LIFE OF THE MIND: VOLUME ONE (THINKING)* 80-193 (1978). Arendt's account appears to have been influenced in turn by Martin Heidegger's. See *id.* at 174 (quoting M. HEIDEGGER, *supra* note *).

73. See E. BURKE, *supra* note 51, at 141, 149, 152-53, 296, 299, 338, 347-48.

pen, also by accident, to find themselves. By contrast, those who see these same problems in a philosophical light refuse to acknowledge the contingencies that count so heavily in the judgments of the prudential politician. They insist instead that politics requires a more abstract approach which disregards past practice and the distinctions among historically evolved regimes. For them these contingencies are nothing but a kind of meaningless debris, and their ideal is to see every problem with a freshness and transparency that can be achieved only by ignoring the accumulated rubbish of the past.⁷⁴ To achieve this ideal, one does not require the wisdom and experience of a statesman; indeed, those who possess these qualities are the least likely ever to attain it. What one needs, instead, is the philosopher's talent for abstraction, for seeing through the accidents of time and place that give each political regime its local color. Those who possess this special sort of vision must soon conclude, Burke tells us, that their powers of abstract reflection are sufficient by themselves to meet any imaginable dilemma, and resolve therefore to act, at every moment, as if they were founding their regimes anew, treating the constitutions of their countries, however old or well-respected, as blank sheets of paper on which one may, in Burke's words, "scribble whatever he pleases."⁷⁵ The encouragement of this attitude, which he attacked with an immense, indeed nearly reckless passion, was, Burke thought, the chief vice of the French Revolution and its main danger as a model for politics in general.

The metaphysical approach to politics that he associated with the Revolution Burke hated both for its arrogance and impiety.⁷⁶ No single person or even generation, he maintained, can ever possess the self-sufficiency of understanding that the metaphysical ideal contemplates. The usages and institutions of every long-established political regime represent an accumulated fund of wisdom and experience, and any generation would be presumptuous, Burke argued, to think it can replace this fund using only its own intellectual resources in the way the metaphysicians recommend. The wisdom and experience of the past is never perfect, and Burke is careful to point out that there is always room to improve upon its record. Indeed, it is just this ongoing task of improvement that in Burke's view constitutes the main work of politics, and which distinguishes every living political culture from a superstitious antiquarianism.⁷⁷ But even the most needed reforms ought to be carried out, Burke writes, in a spirit of "infinite caution" that proceeds only with the greatest hesitation "to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society,"⁷⁸ and

74. *Id.* at 285.

75. *Id.* at 266.

76. *See id.* at 193-94.

77. *See id.* at 120, 280.

78. *Id.* at 152.

not with the arrogance of those philosophers who, viewing every political question "in all the nakedness and solitude of metaphysical abstraction,"⁷⁹ presume to possess, in their powers of rational reflection, everything they need to answer them. That is a foolish presumption and one, Burke insists, that is certain in the long run to diminish the happiness of the human beings who live in any regime that adopts it.

It is, in addition, an impious presumption, and a politician who declares that the abstractions of philosophy contain all he needs to govern his society should be compared, Burke tells us, to a parricidal child who, contrary to all natural feeling, turns against his parents and announces his willingness to hack them into bits.⁸⁰ A politician has much to learn from the past, but beyond that, he owes it a certain honor or respect, for without the work of all who have preceded him and whose collective efforts have produced the regime he now inhabits, his own political existence would be unthinkable. For his existence as a citizen and politician he is indebted to the past, just as he is indebted to his parents for his physical existence. The "coxcombs of philosophy,"⁸¹ who in a spirit of prideful self-sufficiency reject the past, who give no weight to "the solid test of long experience" and are prepared to "blow up at one grand explosion all examples of antiquity,"⁸² thus not only lose the benefit of what the past can teach them; they also show an ingratitude for the gift of life itself—the greatest gift and hence, Burke thought, the supreme ingratitude.

It is clear that Burke conceived the practical science of government⁸³ to be a cultural endeavor in the sense that I have indicated, an enterprise requiring the collaboration of many generations and imposing on all who participate in it a duty to respect and to conserve the achievements of their predecessors. And it is clear, too, that he believed the metaphysical impulse in politics, which he so despised, to be at war with this duty and with the claims of human culture generally. But what exactly is the source of this hostility, and is it a deep or superficial one? To answer that question, which Burke himself did not address, we need to understand more clearly the character and ambition of philosophy itself.

It is helpful to begin with a distinction between what I shall call the work of professional philosophers, on the one hand, and the activity of thinking on the other.⁸⁴ To the extent that he views himself as working in

79. *Id.* at 90.

80. *Id.* at 194; *see also id.* at 277 (if revolutionaries of France may be compared to ungrateful children, they also lack "tender parental solicitude" for what they have created).

81. *Id.* at 141.

82. *Id.* at 148.

83. *See id.* at 152, 193.

84. The distinction is Heidegger's:

It is no evidence of any readiness to think that people show an interest in philosophy. There is, of course, serious preoccupation everywhere with philosophy and its problems. The learned world is expending commendable efforts in the investigation of the history of philosophy. These are useful and worthy tasks, and only the best talents are good enough for them, espe-

a philosophical tradition, and as adding to or refining the achievements of his predecessors in that tradition, contributing, so to speak, a few bricks of his own to the construction of some common edifice, a person is a professional philosopher in the sense in which I am using that term here. The activity of philosophy, so understood, belongs to the world of culture; it is as much a cultural artifact as law, and, like it, is subject to the same risk of ruin and requirement of conservation. Because it shares these properties, the enterprise of professional philosophy may, like any cultural activity, be marked by either progress or decline, even though its practitioners do not themselves acknowledge the force of precedent, the authority of the past, in the way that lawyers and judges do. In this respect professional philosophy resembles the natural sciences, for in the sciences too, one may speak of progress or decline despite the fact that their practitioners also reject all arguments from precedent and purport, instead, to resolve their disagreements by appeal to the truth alone.

Professional philosophy thus stands in an ambiguous relationship to the world of culture. On the one hand, it depends upon the conservation of the past, whose achievements it seeks to develop and extend. On the other, it grants the past no more authority than chemistry and physics do, and like them insists that its own accomplishments be judged solely in accordance with the timeless criterion of truth. In this respect, professional philosophy differs from many other branches of cultural life, including law and politics, which not only draw upon the past but accord it some legitimating power too. Unlike law and politics, which are more completely confined within the cultural world, professional philosophy at once belongs to and transcends that world, in the same way the natural sciences do. Anyone who takes up professional philosophy thus assumes an ambiguous, indeed almost contradictory, stance toward the realm of cultural existence, and the tension this produces cannot be dissolved without renouncing either the ambition of building in a cumulative way on the culturally transmitted achievements of the past, or the desire to be judged from a point of view beyond all culture and history.

But however great this tension may be, professional philosophy still resembles every other cultural activity in two respects: in its potential for accumulation and liability to ruin. In these ways its fate remains tied to the world of culture. Thinking, by contrast, possesses neither of these traits and thus, unlike professional philosophy, is wholly disconnected from the cultural world, from its burdens and opportunities alike. When a

cially when they present to us models of great thinking. But even if we have devoted many years to the intensive study of the treatises and writings of the great thinkers, that fact is still no guarantee that we ourselves are thinking, or even are ready to learn thinking. On the contrary—preoccupation with philosophy more than anything else may give us the stubborn illusion that we are thinking just because we are incessantly “philosophizing.”

M. HEIDEGGER, *supra* note *, at 5; see also M. HEIDEGGER, DISCOURSE ON THINKING 44–45 (J. Anderson & E. Freund trans. 1966).

person begins to think, in the sense in which I understand that term, he leaves the realm of culture behind, and more completely than the professional philosopher ever does, enters a different world that is distinguished by its lack of just those features which define its cultural counterpart, a world as remote from the realm of culture in one way as the world of life is in another. He enters the world of thought.

What is it that a person does when he begins to think? In the simplest terms, he asks himself a question, though it must immediately be added, a question of a certain sort, for professional philosophers and scientists ask questions too. But the questions they ask are asked for the sake of obtaining answers, and the more obvious it is that a question cannot be answered, or that it leads round in a circle, the less reason they have to ask it. Some questions, however, have no answers, or can be answered only in a circular fashion, but nonetheless seem to us worth asking. Why, for example, is there something rather than nothing? Does time itself have a beginning? Is death an evil or a good? To these questions there are no answers, in the sense in which there are answers to the questions of science and even professional philosophy; they remain forever open and can never be resolved. Hence, the point of asking them cannot be to find their answers, since we acknowledge that they have none. Whatever point they have must therefore be intrinsic to the questions themselves. It must, in other words, be something we achieve merely by asking them, by adopting the meditative posture they invite or travelling round in the circles they describe. Whenever a person puts such a question to himself, or to another person, he, or they, take up a point of view very different from the professional philosopher's, a point of view that leads out into what I call the world of thought. The Socratic dialogues of Plato are the classical example of this sort of questioning, and in them, more clearly perhaps than anywhere else, we are able to discern the nature of thinking and of the world it opens up.⁸⁵

The activity of thinking does not, of course, arise spontaneously from nothing. Thinking always begins within the context of a particular cultural milieu, and the questions that a person chooses to think about are often determined by the culture he inhabits. In that sense, we might say, culture gives thought its stimulus or starting point. And there is also a more general way in which thought depends on culture, for leisure, which is a prerequisite of thought, is itself a product of cultural life (though it should be added that the amount of leisure a person needs to think is small in comparison to what cultural activities like politics require—small enough, indeed, that even a slave may possess it). But while it is linked to the world of culture in these ways, there is a deeper sense in which the activity of thought is wholly disconnected from that world, for in contrast

85. See H. ARENDT, *supra* note 72, at 166–79.

to professional philosophy it lacks, as I have said, just those features of fragility and additivity that define the realm of culture and give all its works their special character.

To begin with, the world of thought, unlike the world of culture, does not need to be kept up as a building or a legal system does. Cultural activities leave behind them "a growing treasure of knowledge that is retained and kept in store by every civilization as part and parcel of its world," and "[t]he loss of this accumulation and of the technical expertise required to conserve and increase it inevitably spells the end of this particular world."⁸⁶ But the activity of thinking, as exemplified by Socrates' aporetic conversations, "leaves nothing so tangible behind."⁸⁷ Thinking neither deposits a treasure for the future nor depends upon an accumulation from the past. There is therefore no danger that the world of thought to which Socrates' questions point us can ever be lost through human neglect. Even if all books of philosophy were burnt and the achievements of every past philosopher forgotten, the world of thought would remain, and to rediscover it, to bring it back intact, one would need only to begin thinking again. The same immortal problems would then reappear in unchanged form. Unlike professional philosophy, thinking is addressed to questions for which no answers, or only circular ones, exist, and it is in the mere asking of these questions that the point of thought consists. Answers can, of course, be lost or forgotten, which is why professional philosophy, like everything else in the world of culture, including science and technology, must be kept up if it is not to disappear. But the questions that arise when one begins to think do not display this same fragility. They do not have answers that can be lost or forgotten, and as regards the questions themselves, they arise immediately from the world and our consciousness of it, so that nothing need be done to ensure their preservation from one generation to the next.

If the world of thought lacks the vulnerability that marks every artifact of culture, it also lacks the second feature of the cultural world, namely, the additivity of its achievements. There is no progress in thinking, in contrast, for example, to science and technology. "[T]he business of thinking is like Penelope's web; it undoes every morning what it has finished the night before. For the need to think can never be stilled by allegedly definite insights of 'wise men;' it can be satisfied only through thinking, and the thoughts I had yesterday will satisfy this need today only to the extent that I want and am able to think them anew."⁸⁸ In that sense we are today no further advanced in thought than Socrates was, though our science, and even our philosophy—our professional philosophy—is cer-

86. *Id.* at 62.

87. *Id.*

88. *Id.* at 88 (footnote omitted).

tainly better. That is why the questions that he asked still have for us their original freshness, and the same power to provoke that they possessed when he first asked them, and anyone who takes these old Socratic questions up must sooner or later come to the unsettling conclusion that no progress has been made toward their solution in all the intervening centuries. Whenever a person begins to think, regardless of his position in the chain of generations, he always starts at the same point as his predecessors, and leaves behind, when he is done, no permanent deposit, no fund of settled wisdom, on which those who follow him may draw. Professional philosophy, which today takes the form of a separate academic specialty with cultural traditions of its own, rests on the assumption that philosophers, like scientists, each make their contribution to some common fund of knowledge, which, like a bank account, accumulates over time. But it misconceives the essence of thinking to suggest that its aim, too, like that of professional philosophy, is the accumulation of a fund of knowledge or wisdom or anything else at all. Thought does not advance or accumulate, and when a person starts to think, he enters a world that is forever the same, like the current of wind to which Socrates compares the activity of thinking itself.⁸⁹ It is in this sense that the world of thought lacks the additivity of culture, as well as its impermanence and fragility.

These differences between the world of thought and that of culture are both suggested by the Stoic image of the philosopher in chains.⁹⁰ Even a slave, excluded from the world of culture, can enter the world of thought whenever he wishes, and no human action—no amount of injustice or inattention—can ever impair the world that he discovers when he begins to think. But by the same token, he must do all his thinking on his own. However much he talks to others, in the ordinary sense of exchanging communications with them, he knows that thinking is a solitary activity and that in the world of thought he must build his own foundations for himself, and indeed rebuild them whenever he starts to think again, like Penelope at her loom—which is of course what makes it possible for him to think in chains, cut off from the realm of cultural artifacts that other human beings inhabit, and on whose conservation the accumulating work of lawyers, politicians, and professional philosophers depends.

The world of thought, then, differs from the world of culture in two decisive ways, in its unchanging sameness and invulnerability to ruin. But these are just the ways in which the world of life, of biological routine, is

89. *See id.* at 174 (quoting XENOPHON, MEMORABILIA IV, iii, 14 (discussing Socrates)).

90. Marcus Aurelius, *Meditations*, in MARCUS AURELIUS AND HIS TIMES 11, 87 (I. Edman ed. 1945) ("Take me and cast me where you will; for there I shall keep my divine part tranquil, that is, content, if it can feel and act in harmony with its proper constitution."); SENECA, *On Tranquility of Mind*, in THE STOIC PHILOSOPHY OF SENECA 75, 93 (M. Hadas trans. 1958) ("All life is bondage. Man must therefore habituate himself to his condition, complain of it as little as possible, and grasp whatever good lies within his reach. No situation is so harsh that a dispassionate mind cannot find some consolation in it.").

distinguished from the realm of culture too. Both living and thinking—the highest and lowest human activities—are thus characterized by the absence of those attributes that shape the world of culture and which determine at once its limits and possibilities. In the worlds of life and thought, each individual begins just where his predecessors did. There is no progress to be made in either of these worlds, nor is there any place in them for the sorts of multigenerational projects that define the world of culture. Properly speaking, they have no history at all; there is, in both, only sameness and repetition, the circularities of thought and life respectively—no past or future, but only an unchanging now. Each is thus marked by a timelessness that releases us, in different ways, from history and the finitude of all the human projects that compose it, and our participation in these two worlds constitutes the only direct experience of immortality that we shall ever have—the immortality of the species, on the one hand, and of thinking on the other. Socrates—the model thinker—compared these two immortalities, calling the first an image of the second.⁹¹ But he also compared them both to the kind of immortality that one achieves by participating in the establishment of laws and other institutions, and thus failed to notice the ways in which the world of culture differs from these other two. The world of culture, and the more individualized immortality it offers through the agency of fame, exists only by virtue of the accumulated efforts of many generations and their continual struggle to save it from decay, in part by the simple act of remembering what people in the past have done. If this struggle were abandoned, the world of culture would eventually disappear, ruined by forgetfulness in the way that an untended garden will eventually be ruined by weeds. But even if all culture disappeared, life and the immortality it promises would remain. And the gateway that thought opens to eternity—to the land of the dead, as Socrates tells us in the *Phaedo*⁹²—would stand just as open as it had before for anyone willing to walk through it. The immortality of life and thought would survive the destruction of all culture because the worlds that make them possible, in contrast to the cultural realm, neither require nor permit the combined efforts of many generations in a cumulative program of construction and repair.

But the worlds of life and thought not only differ from that of culture; they also represent, in different ways, a threat to its existence. This is easiest to see with respect to the world of life. The simplicities of life, of the metabolic wheel, offer an escape from history and the anxieties of the cultural world. They offer the peace of the eternal now in which Nietzsche's herd is frozen, and the temptation to pursue this peace by

91. See PLATO, *Symposium*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 10, at 526, 558–63 (*206c–211e).

92. See *supra* note 10 and accompanying text.

abandoning oneself to the repetitive routines of life is for many human beings a strong one. But the erotic energies that power the wheel of life, and to which a person abandons himself when he seeks salvation from time in the eternal circle of living, threaten the world of culture and its achievements. Eros may be, in Auden's phrase, the "builder of cities,"⁹³ but only when it is constrained by the repressive discipline of culture, by what Freud called civilization.⁹⁴ When the forces of Eros are liberated from these constraints, and permitted to operate with the thoughtlessness that gives the world of life its great appeal, their tendency is always to destroy the uniqueness of the world of culture through a process, as it might be called, of metabolic leveling, a process that attacks the world of culture by burying its singular achievements under the uniform and utterly predictable rhythms of bodily life.

That is why culture is threatened by life. It is threatened by thought for a similar reason. Thinking, like living, offers an escape from the burdens and anxieties of the cultural world—far more completely than professional philosophy does, for, as I have said, the latter always remains, at its core, a cultural activity. Thinking, by contrast, is not, and whenever a person begins to think he leaves the cultural world behind, and enters a different realm in which progress and loss do not exist. Here, too, as in the realm of life, there is the promise of a certain kind of immortality, a promise which helps to explain the appeal of thought and of its invitation to throw off all our cultural entanglements and the responsibilities they imply. But to the extent that one is able to attain this socratic point of view, and to see the world of culture from it, the perishable contents of that world are bound to look, as Socrates himself observes, like a shadow play,⁹⁵ a noisy spectacle of comings and goings without any substance of its own. By comparison with the thinker's own preoccupations, none of this is likely to seem very real, and those who learn to view the world of culture in this light must in time become indifferent to its fate, for why, they will ask, should it matter what becomes of something so unreal? In contrast to science, politics, and professional philosophy, all of which are cultural endeavors, the activity of thinking encourages an indifference to the world of culture as a whole and to its accumulation of decaying artifacts. That is why the world of thought is a threat to the world of culture, and why defenders of the cultural realm, like Burke, correctly believe they have as much reason to fear the activity of thinking as they do the erotic energies of life. The irruption of either into the world of culture threatens its integrity and indeed its very existence. Whether or not Burke understood the appeal of thinking or felt any sympathy for those who respond

93. W.H. AUDEN, *In Memory of Sigmund Freud*, in *COLLECTED POEMS* 215, 218 (E. Mendelson ed. 1976).

94. *See* S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 33-45 (J. Strachey trans. 1961).

95. PLATO, *supra* note 5, at 193-94 (*514a-515e).

to its seductive promise of immortality, he understood very clearly the danger that the thinker's indifference to the accidents of time and place poses to the conservation of any political community and to the world of culture generally. The world of culture must be protected, on the one side, from life, from Eros, from the world of flies. But, as Burke recognized, it must also be protected from the world of thought, from Socrates and all his followers, and the threat to culture on this side he rightly assumed to be as serious as the danger on the other.

VIII. THE HUMAN MEANING OF THE PAST

Every human being belongs to the world of life and, potentially at least, to those of thought and culture too, so that we are in reality citizens of three kingdoms and not just two, as I suggested earlier. But of these three, there is a special connection between the last—the world of culture—and our unique identity as human beings. There is nothing distinctively human about the world of life; we inhabit it along with every living thing and are equally subject to its fateful laws of birth and death. Nor—though this is less obvious—is there anything peculiarly human about the world of thought. When we think, Aristotle said, we acquire a kind of divinity, by which he meant that when we are engaged in thought we see things from a standpoint that is indifferent to, and takes no interest in, our peculiarly human situation.⁹⁶ Of course, as Aristotle also noted, no human being can sustain this point of view indefinitely. Sooner or later, biological demands, or cultural ones, force even the most determined thinker back into a condition of mere humanity. But so long as one is thinking, these demands are in suspension, and a genuine thinker, like Socrates, will be unconcerned to meet them.

As inhabitants of the world of life, then, human beings are no different from any other animal, and as inhabitants of the world of thought—as members of what Kant called the “kingdom of ends”⁹⁷—they are indistinguishable from other rational beings and take no special interest in their own human needs and institutions. Thus to the extent they are either animals or thinkers, human beings lead lives that others—flies and gods—may live as well. The source of their unique identity as human beings therefore cannot be discovered in either of these two worlds. It is to be found, instead, in the world of culture, a world that only human beings inhabit and which, as I have said, is not only different from, but threatened by, the inhuman worlds of life and thought.

This is what Aristotle meant, I believe, when he remarked that neither

96. ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 67, at 927, 1107–08 (*1178a8–1179a33).

97. I. KANT, *supra* note 39, at 51.

beasts nor gods live in cities—the locus of the cultural world.⁹⁸ Only human beings live in cities; only they have culture. The city, the cultural world, makes available to human beings a form of immortality that animals cannot attain and gods do not require. Ancient writers, like Thucydides, associated this human form of immortality with remembrance, the remembering of famous deeds, which may be taken as an emblem of that whole ongoing project of preservation and repair on which the existence of the cultural world depends.⁹⁹ Unlike the biological immortality that all living things enjoy by virtue of their membership in a species that outlasts the lives of the individuals who make it up, and the divine immortality that even human beings experience intermittently in thought—both of which entail, though in different ways, the extinction of one's separateness or individuality—the uniquely human form of immortality that the world of culture makes available does not entail the same loss of individual identity. Fame is the name we give to the form of immortality that is peculiar to the world of culture, and because fame preserves the identities of individuals rather than annulling them, it is distinguished from the immortalities that both life and thinking promise. Through remembrance and fame, the world of culture makes it possible to extend one's life beyond its mortal limits without sacrificing the separateness that makes that life peculiarly one's own. Only human beings inhabit the world of culture, and so only they can realize this special, individual-preserving form of immortality. But by the same token, as inhabitants of that world, only they are subject to the obligation to keep it up, and only they are linked, across the generations, in a chain of indebtedness and duty. Remembrance and fame, the work of conservation, the linkage of the generations in joint projects of culture-building—together these define the world of culture, a uniquely human world in which neither gods nor animals appear. Human beings do inhabit other worlds, the worlds of life and thought. But they are not alone in them, as they are in the world of culture. The world of culture is our own, and no one else's, and that is why I say there is a special connection between it and our identity as human beings.

What should we make of this fact? The passage from Burke, which I

98. ARISTOTLE, *Politics*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 67, at 1113, 1129 (*1253a3-18).

99. Thus in his own stylized version of Pericles' famous Funeral Oration, Thucydides has Pericles say of those Athenians who died in battle:

They gave [Athens] their lives, to her and to all of us, and for their own selves they won praises that never grow old, the most splendid of sepulchres—not the sepulchre in which their bodies are laid, but where their glory remains eternal in men's minds, always there on the right occasion to stir others to speech or to action. For famous men have the whole earth as their memorial: it is not only the inscriptions on their graves in their own country that mark them out; no, in foreign lands also, not in any visible form but in people's hearts, their memory abides and grows.

THUCYDIDES, *THE PELOPONNESIAN WAR* 149 (R. Warner trans. 1954).

quoted earlier,¹⁰⁰ suggests an answer. If the distinctiveness of our humanity is tied to our participation in the world of culture, then respect for the work of past generations, who have given that world to us, is founded upon something deeper than utilitarian or deontological defenders of precedent acknowledge. We must respect the past not because doing so increases the welfare of human beings or because their right to equality demands it. We must respect the past because the world of culture that we inherit from it makes us who we are. The past is not something that we, as already constituted human beings, choose for one reason or another to respect; rather, it is such respect that establishes our humanity in the first place. We must, if we are to be human beings at all, adopt toward the past the custodial attitude Burke recommends. That attitude is itself constitutive of our membership in the uniquely human world of culture; it is what makes us cultural beings, as opposed to animals or thinkers.

One may, of course, reject Burke's view on the ground that there is some other and better identity than this human one which it is within our power to attain. Socrates' celebration of philosophy as a form of suicide¹⁰¹ and Aristotle's account of contemplation in the last book of the *Nicomachean Ethics*¹⁰² both carry this suggestion. But if one affirms our human condition instead of viewing it as a limit to be overcome, then one must affirm the attitude of trusteeship on which the cultural world depends—not for the indirect reasons that utilitarians and deontologists do, but because it is constitutive of that world and hence of our identity as human beings. “We receive many gifts, of many kinds,” Heidegger writes, “[b]ut the highest and really most lasting gift given to us is always our essential nature, with which we are gifted in such a way that we are what we are only through it. That is why we owe thanks for this endowment, first and unceasingly.”¹⁰³ The world of culture that we inherit from those who went before is a gift, the gift that makes us who we are, and we show thanks for this, in Heidegger's sense, by taking up the work of conservation on which the existence of that world depends. In doing so we express our indebtedness to the past, and our conviction that we are bound, within limits, to respect it for its own sake, just as we are obligated to respect our parents for a reason that is anterior to all considerations of utility or rights. A failure to honor the past is thus not only foolish or imprudent—the stupidly shortsighted waste of its accumulated wisdom, “the general bank and capital of nations, and of ages.”¹⁰⁴ It is also, as Burke emphasized, an act of impiety, and when we understand why it is, we see

100. See *supra* note 53 and accompanying text.

101. See *supra* note 10 and accompanying text.

102. See *supra* note 96 and accompanying text.

103. M. HEIDEGGER, *supra* note *, at 142.

104. E. BURKE, *supra* note 51, at 183.

that the claims of the past have a deeper and more direct hold on us than the anti-traditionalist philosophies of the modern age admit.

The position of trusteeship that defines our place in the world of culture, and which Burke compares to the situation of a life-renter who has inherited an estate, but only for a term of years, may be thought of as one node in a complex web of obligations. We are indebted to those who came before us, for it is through their efforts that the world of culture we inhabit now exists. But by the same token, they are indebted to us, for it is only through our efforts that their achievements can be saved from ruin. Our relationship with our predecessors is therefore one of mutual indebtedness, and so, of course, is our relationship with our successors, though the debts in that case are reversed. All these debts, moreover, are connected, for the very acts by which we satisfy our obligations to the past put the future in debt to us, and force us to depend upon the future for the preservation of whatever contributions we in turn make to the world of culture during our trusteeship.

The "chain and continuity" of the generations of which Burke speaks is therefore a chain of interwoven obligations. In this respect, he says, society is founded on "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born," a "contract" to which the succeeding generations are all parties.¹⁰⁵ This contract is not, of course, one we choose to enter. It is something that a person is born into, like his family, and the benefits he receives from it have already been irrevocably transferred to him by the time he becomes conscious of his own contractual duties: benefits that can no more be disgorged than a person can disgorge the care and nourishment his parents gave him. In that sense Burke's partnership among the generations is only metaphorically a contract, for the duties it imposes on us are entirely a consequence of the temporal position that we happen quite by fate to occupy—of our status, not our will. These duties thus arise, to borrow a phrase that Burke uses in another context, from "a necessity that is not chosen but chooses,"¹⁰⁶ unlike the duties we voluntarily assume in most contractual relationships.

But by describing the relationship among the generations as a contract, Burke reminds us that we are not just constrained by the past, but have obligations toward it, in the same way that one partner to a contract of any sort has obligations toward the others. There is, however, no mechanism by which these duties can be enforced. The past cannot enforce its claim against us if we choose to disrespect it. Nor, by the same token, can we enforce the claims we have against our successors and compel them to meet their obligation to conserve the cultural world on whose continued

105. *Id.* at 194–95.

106. *Id.* at 195.

existence our own remembrance depends. Indeed, in the absence of any means of enforcement, the only basis we have for believing our successors will preserve what we have done is our own willingness to carry on the projects of those who came before, despite their inability to compel our collaboration. If we have any grounds for believing that the future will honor what we do, it can therefore only be the uncompelled honor we show the past. The partnership among the generations—"a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection"¹⁰⁷—thus depends for the attainment of its ends on each generation's treating the achievements of its predecessors as something inherently worthy of respect. It is only on that condition—on the basis of a traditionalism which honors the past for its own sake—that the world of culture can be sustained. This traditionalist attitude, which is an ingredient in every argument from precedent, however limited or qualified the claims of that argument may be, is of course something no thinker who surveys the realm of culture from the standpoint of eternity can accept, either in the law or out. That is understandable. What I have been trying to suggest in these concluding pages is that this same attitude is also, and not inconsistently, a condition of our humanity, of our distinctive identity as human beings.

Simone Weil expressed the point perfectly. "The past once destroyed," she wrote, "never returns. The destruction of the past is perhaps the greatest of all crimes. Today the preservation of what little of it remains ought to become almost an obsession."¹⁰⁸ Weil wrote these words in 1943, when the fate of European civilization was in doubt. But we still need the obsession she describes, if our world is to retain its human shape. Indeed, with the earth drawn up into the world of culture and now placed within our trust, we need it on a planetary scale.

107. *Id.* at 194.

108. S. WEIL, *THE NEED FOR ROOTS* 51-52 (A. Wills trans. 1952).