On “Public Law and the Law of Nature and Nations”:

A Tercentenary Lecture in the University of Edinburgh

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Introduction: Questions of War and Peace

May I start this lecture with a vivid image. Let us picture the moment of ‘shock and awe’ when in 2003 air strikes were launched on Baghdad on behalf of the ‘coalition of the willing’ with devastating, though quite tightly targeted effects. These included inevitably what we euphemise as ‘collateral damage’, deaths of and horrifying injuries to innocent civilians, themselves victims also of the Saddam regime.

Opinions in this room, and in the country at large divide sharply over vital questions about all this. Was the military intervention lawful under international law? Whether lawful or unlawful, was it morally justified given the issues at stake? If justified either legally or morally, was it or was it not a prudent course of action in relation to the short and long-term interests of the citizens of the countries engaged in the action? As is no secret, I am and have all along been of the negative opinion on all three points. “Illegal, morally unjustified, and imprudent” say I. But others in the room tonight took and still take a different view, and that in all good conscience, some of them on the basis of much more detailed information than I have ever possessed. I listened attentively to the Prime Minister’s Plymouth speech on Friday 12 January, in which he put his case for the lawfulness, the moral rectitude and the prudence of the actions he authorised, with the approval of a parliamentary resolution. He did not convince me, but he spoke for the convictions of others whose right to their opinion and honesty in holding it I fully respect.
It is a serious question how we ought to regard these differences of opinion we have on such matters. Are these issues on which there is a single right view, or only the possibility of different opinions, mutually opposing gut-reactions? Is there any real law between nations, or only a vague kind of shared or customary morality? Does ‘illegality’ matter anyway, if nothing can be done against a superpower in alleged violation of alleged law? Are morality and justice, as Thrasymachus long ago argued against Socrates, nothing more than the interest of the powerful? What other objective test do we have for morality or immorality in such matters? As for prudence, whose interests count, and how long is the long run when we concern ourselves with long-run self-interest? How can we judge counterfactually what would have happened had the intervention not taken place when and how it did?

Questions like these matter deeply. Such questions have mattered to human beings since the beginnings of recorded history. The theme of my lecture, “On Public Law and the Law of Nature and Nations”, is about one particular academic commitment to finding a basis for reasonable answers to them. It is also, of course, the title of the oldest law chair in our University, the tercentenary of which is the occasion for our celebrating three hundred years of scholarship, research and teaching in law here.

II Some Hasty History

(a) The Regius Chair – How it Came About

the part of my conversation-partner. Today, at last, I have time at my disposal, and am
too far away from my audience to be deterred by any amount of eye-glazing. If you
are all sitting comfortably, then, let me at last tell you about it.

The Chair was established by Royal Warrant on 11 February 1707, by
diversion of funds from theological scholarships. Charles Areskine, or Erskine, till
then a regent master in philosophy in this University under the old pre-professorial
system of instruction, was appointed. He was a kinsman of the Earl of Mar, who was,
as one of Queen Anne’s Secretaries for Scotland, deeply engaged in seeing to the
Scottish Parliament’s enactment of Act of Union that would give effect to the Articles
of Union agreed between English and Scottish Commissioners earlier in 1706.

‘Bobbing John’ Mar was, however, a somewhat insecure supporter of the Union and
the Hanoverian succession. By 1715 we find him raising the standard for King James
on the Braes of Mar and with typical irresolution making a slow journey towards
Stirling only to be stopped dead by Argyll at the indecisive Battle of Sheriffmuir. But
that still lay in the future. In 1707, shortly after the Union had taken effect and the
first Parliament of Great Britain convened on 1 May, Mar’s younger kinsman had
betaken himself in 1707 to the Netherlands to study the law of nature and nations
under the great masters in Leiden, returning in 1711 to advertise his first classes. But
others interested in Public law and the Law of Nature and Nations were, as he had
been, more interested in doing so in the Netherlands than at home, there never seems
to have been any uptake of his advertised private lectures, and the professorship never
became fully active.² As public lawyer, Areskine busied himself more about affairs of
state than of academia, spent time in Parliament, became Solicitor general, then Lord
Advocate, then a judge, and finally in 1748 Lord Justice-Clerk under the title of Lord
Tinwald (after his Dumfries-shire estate, acquired on marriage). Of his successors,
only George Bruce\textsuperscript{3} and Allan Maconochie\textsuperscript{4} were really active in discharging the duties of the chair, by teaching at least, if not by writing.

**II (b) *Ius Naturae et Gentium***

Others in the Scotland of that epoch were more engaged with investigating the theme of the Law of Nature and Nations than my earlier professorial predecessors. Let us go back to the later years of the seventeenth century. James, Viscount Stair, also a former regent master, but of Glasgow, not Edinburgh University, and eventually Lord President of the Court of Session wrote the greatest of all Scottish law books in his *Institutions of the Law of Scotland*.\textsuperscript{5} Following in the steps of Grotius, with his ‘Law of War and of Peace’ and in parallel with Pufendorf, in his ‘On the Law of Nature and Nations’ (*De Iure Naturae et Gentium*, a numinous phrase for today) Stair grounded his exposition of Scots law in principles derived from the law of nature, such law being ‘the dictate of reason determining every rational being to that which is congruous and convenient for the nature and condition thereof’.\textsuperscript{6} We know this law, he said, either by divine revelation through scripture, or because its basic precepts are written in our hearts, as was stated by St Paul in chapter 2 of his *Letter to the Romans*.\textsuperscript{7} Finer points of law can be worked out by reasoning from first principles in difficult cases. First principles of equity are “Obedience Freedom and Engagement” and of positive law, “Society Property and Commerce”.\textsuperscript{8}

Not merely can such principles be traced out through the established and enforceable positive law of Scotland as of any other country. They also form the basis of law between those who have no common sovereign power to lay down law among them. Notably, this applies to relationships between independent sovereigns that is, independent states. The Law of Nature, if it exists, is thus a foundation not merely for
the law of each nation, but also for the law between nations, Ius Gentium or ‘the law of nations’ in the contemporary understanding of the phrase.

The particular constitutional foundations of each state constitute its public law. This was a topic of considerable interest to Scots of 1706-7 as they deliberated whether or not to dissolve their ancient constitution and set up a new united kingdom with the constitutional structure laid down in the Articles of Union and associated legislation. Article XVIII indeed said that public law could be made uniform in Great Britain, while the private law of Scotland should be free from amendment by the new Parliament of Great Britain except ‘for the evident utility of the subjects’ in Scotland.

II(c) Enlightenment and Law of Nature

Well, there is a brief and breathless account of a line of thought that could have seemed familiar by those who founded our chair of Public law and the Law of Nature and Nations. It was a line of thought with continuing resonance during the eighteenth century. Notwithstanding the relative silence of our eighteenth century Regius Professors, the idea, or ideas, did excite a lot of attention among philosophically inclined lawyers and legally interested philosophers of the period. A central figure was the prodigiously industrious Henry Home, Lord Kames, Senator of the College of Justice, and author of Principles of Equity, Historical Law Tracts, Sketches from the History of Man and much else besides. He also acted as patron for younger scholars including Adam Smith and John Millar, respectively professors of Moral Philosophy and of Law at Glasgow, one in succession to the other. He stood in a somewhat cagey relationship with his remote kinsman David Hume, some time librarian to the Faculty of Advocates and unsuccessful candidate for Edinburgh’s Moral Philosophy chair.

Hume, no friend to rationalist natural law, argued vigorously against the idea that we might be born with moral or other information ‘written in our hearts’. He
rejected the whole idea of innate knowledge, arguing that all our ideas come to us through sensory experience acting on the mind, which is initially a blank sheet. We construct our ideas of right and wrong out of considerations of utility as we discover what are the conditions of human survival in circumstances of a degree of felt mutual sympathy among people. Adam Smith in turn developed Humean thought in a different line carrying much further the insight about humans’ capacity for mutual sympathy, and Smith the economist re-states the linkage between ‘society, property and commerce’ in the context of a broadly evolutionary theory of law-in-society. This theme was carried on by John Millar in the first serious Scottish post-Union work about public law, his lectures on the science of government and the English Constitution.9

The counterblast to Hume and Smith and their sentimental moral philosophy came from Thomas Reid (Smith’s successor in the Glasgow chair of moral philosophy). Reid swung attention back to the prior conceptions of natural law. He attacked Hume’s theory of the mind as a passive receptor taking on whatever impressions it receives. Humans are born, says Reid, with mental powers, some of them intellectual some active, or practical. Some of these are solitary in character, but some, most obviously the power of speech, are inherently social. In this light, humans have a shared, or ‘common’ sense of the right and the wrong.10 Insights into moral truths that we apprehend by recourse to this common sense are entirely natural, and so ‘natural law’ is a fully acceptable concept.

II (d) Meanwhile in England

Contemporary and later philosophical radicals in England learned more from Hume than from Reid or Smith. Finding their own exemplar of the natural law tradition in the Commentaries of Sir William Blackstone – like Areskine, successively professor
and then judge – they, and most particularly Jeremy Bentham, condemned ‘natural law’ thought as simply an ideological prop for political and legal conservatism. Law should be subjected to a critique, based on a Hume-like but more rigorously elaborated principle of utility, the ‘greatest happiness principle’. Law is not some ‘natural’ set of principles; it is simply the command of the sovereign. As such it can either be beneficial or be damaging in its effects on human happiness. The sovereign should be persuaded to reform existing law to improve its beneficial quality and diminish its harmful quality.\textsuperscript{11}

In one form or another ‘legal positivism’ coupled with utilitarianism became the dominant line of thought in England in the later eighteenth century and on into the nineteenth. Natural rights as ‘nonsense on stilts’ became a subject of general revulsion during and after the Terror that supervened upon Revolution in France.\textsuperscript{12}

\textbf{II(e) James Lorimer: Regius Chair Revived}

In mainland Europe, and especially in Germany, this kind of positivism-with-utilitarianism never took root to any great extent. In Germany and elsewhere, the influence of Kant and later Hegel kept alive a variant of natural law. A young Scottish Advocate, or intrant to the faculty, born in (say) 1818, might go to study in Germany, and if so would learn much of this transcendental natural law, and be impressed with the scholarly excellence of the strongly resurgent universities of Germany. Exactly this happened to a certain James Lorimer, following on his studies in Edinburgh under the continuing ‘common sense’ tradition founded by Thomas Reid and carried on first by Dugald Stewart and then Sir William Hamilton, Lorimer’s own philosophy teacher.
Back in Scotland, once in practice in the Parliament House, Lorimer became a strong partisan of University reform in Scotland in the eighteen-fifties. He is one of the heroic figures of *The Democratic Intellect*, George Davie’s famous but controversial celebration of the intellectual tradition of the Scottish universities. A part of the reform advocated by Lorimer was to secure the re-establishment of the Regius Chair of Public Law and the Law of Nature and Nations, which had been permitted to lapse after Robert Hamilton’s thirty six years of inglorious invisibility as incumbent of the Chair, 1798-1832. Another, related, theme of Lorimer’s was the proposal to re-model our Scottish universities along the lines of the powerful research schools he saw building up around professorial chairs in the German universities.

Lorimer did succeed in persuading the University to re-establish the Regius Chair. In due course, indeed he was appointed to it in 1862, holding office till his death in 1890. He was a very considerable scholar, and he fully rescued the name and reputation of the chair. He taught both private and public international law and he made a very significant contribution to philosophical jurisprudence, with his *The Institutes of Law: A treatise of the principles of jurisprudence, as determined by nature* (1872). Indeed, he was the first Scottish professor to make such a contribution from within a University law school. His international law contribution was no less massive, in his *The Institutes of the Law of Nations: A treatise of the jural relations of separate political communities* (1884). In jurisprudence, he defended a version of the Scottish common sense philosophy that was derived through Sir William Hamilton and Dugald Stewart from the great Thomas Reid. But he drew also on work in the Germanic tradition he had studied in Bonn and elsewhere. As for international law, Lorimer gave a remarkable account of its character in the great (but also greatly shameful) age of the European Empires. In that age, a surprisingly small
number of governments could be considered (in a pretty ethnocentric way, it must be
said) as representing practically all human beings then alive. The early idea of
improving world order through a league of nations comprising these governments
could be credibly advanced, as Lorimer indeed did, in foreseeing the prospect of the
development of some form of world government in place of international anarchy.

His version of ‘the principles of jurisprudence as determined by nature’
included a spirited attack on the then-prevalent English Utilitarianism that J S Mill
and other philosophical radicals had developed out of the work of Jeremy Bentham. It
also entailed a rejection of the legal positivism of Bentham’s other celebrated disciple,
John Austin, for whom all real law was the command of some sovereign and so called
international law was nothing more than ‘international positive morality’. Things
being so, Lorimer’s conception of natural law cut little ice in contemporary England,\(^{16}\)
but was continued in a highly dialectical style of debate with the master through the
work of his pupil Willam Galbraith Miller, lecturer in Jurisprudence in the University
of Glasgow.\(^{17}\) We can at least glimpse in the work of Lorimer, and even more in that
of Miller, a shift in focus from the idea that law always presupposes a lawgiver. If
there is natural law, it may indeed be built in to the creation by the will of a creator,
but it is not itself a work of human creation.

II (f) The Law Faculty Re-Formed

Lorimer’s Edinburgh successor, Ludovic Grant (son of Principal Sir Alexander Grant)
announced annually at the beginning of his jurisprudence class that he intended to
expound legal positivism. But he eschewed published controversy, and never, so far
as I know, undertook any published engagement with his predecessor’s extensive
writings. He ended by contributing more to University Administration (as first
Secretary of the University) than to jurisprudence. My own predecessor Archie Campbell could, however, recount vividly the style and content of Grant’s lectures in international law and in jurisprudence, and was instrumental in securing that Grant’s voluminous but never-published lecture notes were given a safe home in the University Archives.18

Archie Campbell, to whose memory I would like to pay special tribute this evening, was an extremely engaging person, and prodigiously clever. He was famous for having acquired five first-class honours degrees in seven years divided between this University and Oxford, then topped off with a Prize Fellowship of All Souls. The post-war victims of Professor George Montgomery’s lectures in Scots law found great relief in Archie’s urbane exposition of the mysteries of jurisprudence, and he produced a number of gem-like papers, almost all on the occasion of distinguished lectures. He also contributed greatly to establishing the improved law degree syllabus recommended by Lord President Cooper in the aftermath of World War II, and was Dean of the Faculty (1960-63) at the time of our developing the then novelty of a full-time four-year honours degree in law.

The long-run achievement of Archie Campbell lay principally in establishing a new style Law Faculty. For this he shares credit with John Mitchell, appointed in 1947 to the Law Faculty as Professor of Constitutional Law, and with T B Smith first in Civil Law from 1958 and later briefly in Scots Law before appointment as a full-time law Commissioner. The late Bill Wilson, first Lord President Reid Professor of Law was another of the great departed who made a signal contribution. (For the time being, we have reverted to the Americanism of a ‘law school’, but the next local outbreak of management consultancy may change that again. I rather hope so) Their achievement, brought to full fruition by those of us who have served in the
immediately following generations, has resulted in the emergence here of the kind of
research-led law school that was advocated in the eighteen-fifties by James Lorimer.
Lorimer’s advocacy, as I mentioned, was based on his own German experiences and
expressed his admiration for the way the great Universities of Germany had built
around eminent professors a substantial body of Rechtswissenschaft (‘science of law’
is our lame and unconvincing translation). This was on intellectually equal terms with
the other human and social sciences and the natural sciences.

It is a bold but a justified claim that we, the Law School of the University of
Edinburgh now in the twenty-first century, are, and have achieved recognition as, a
major international centre of legal learning. We educate, rather than train, aspiring
members of our own Scottish legal professions, and we also educate at undergraduate
and even more at postgraduate level students from all around the world. Our faculty
members are in wide demand and make extensive contributions around Europe and
the wider world to learning both in legal doctrinal scholarship, in law and technology,
and in the philosophical historical and social scientific study of law.

In the process, the first, and then the later few, historic Chairs with which we
started have been supplemented by many others and by lectureships senior
lectureships and readerships which themselves support independent scholars, not the
mere ‘assistants’ of the German tradition. Public Law and the Law of Nature and
Nations have effectively been distributed among us. There are those whose focus is on
public law, both domestically and in the European Union. There are the public
international lawyers who follow in the shoes of James Lorimer if not quite in his
metaphysical mode. Scots law now boasts several chairs covering private, commercial
and criminal law, and if we have temporarily lost Conveyancing we have gained the
law of property, and we have a first-rate Legal Practice Unit. Medical Jurisprudence
has established a new bridgehead where Forensic Medicine long stood alone. The ‘law of nature’ is perhaps all that remains in the undisputed possession of the Regius Chair. I have found it an inexpressible pleasure and privilege to study and teach about law, state and practical reason here since 1972. For my own part, I owe special thanks to those colleagues for whom the philosophy, the sociology and the anthropology of law, criminology and socio-legal studies, have been the principal domain of activity in learning and education. They have been a conspicuously bright and creative – and highly original, even perhaps occasionally eccentric – group of colleagues during my time here, and I believe we have done good work. This is an anniversary worth celebrating. Our beginnings were not massive or impressive, but we have come a long way since 1707. Of the Regius Professors, James Lorimer and Archie Campbell should be specially remembered for their contribution to this.


That is where we have come from. Where have we reached now in regard to Public Law and the Law of Nature and Nations? Perhaps I may report briefly on the relevance of my current work to the business of public law and the law of nature and nations, by way of giving an account of my stewardship of what I consider a precious inheritance. Since 1997, subject to a break of five years from 1999 to 2004, I have held a Leverhulme Research Professorship. I pay profound tribute to the generosity of support from the Leverhulme Trustees, and also to this University, for permitting me a five-year leave of absence while I served as one of the eight MEPs for Scotland, 1999-2004. Experience in the European Parliament and at the European Constitutional Convention certainly enriched my understanding in relation to the work on which I was embarked. The overall title of my programme of research is ‘Law,
State, and Practical Reason’ – nearly as ambitious and comprehensive as Public Law and the Law of Nature and Nations, if indeed distinguishable at all. Today I can lay before you the just-published third volume of a quartet on the stated theme. It is a work which has been taking shape for thirty-five years.

Its partners in the series date from 1999 and 2005. Questioning Sovereignty\(^{19}\) is a contribution to the theory of public law that deals with the issue of transformation in the character of state and sovereignty wrought by the new constellation of institutional authority devised within the European Union, yet for long strangely neglected by legal theorists. Rhetoric and the Rule of Law\(^{20}\) gave an answer to Stair’s question about the possible rationality of law and legal activity. This answer is based on a reconciliation between the always arguable quality of any legal proposition and the demand for security and relative certainty that is implicit in commitment to the Rule of Law. Both these works presupposed a background understanding of the character of law and the nature of legal understanding. That background is supplied by the latest instalment, ambitiously entitled Institutions of Law.\(^{21}\) The echo of the title of James Lorimer’s *magnum opus* is not accidental, and I have taken the risk of putting myself ostensibly on a level with Stair.

### III (a) What Law, Written Where?

I mentioned earlier one of the ways Stair thought we became acquainted with ‘the law of nature’. He wrote: ‘Divine law is that mainly which is written in men’s hearts, according to [the words] of the apostle: “For when the Gentiles, who have not the law (to wit, written in the Word) do by nature the things contained in the law, these are a law unto themselves, which sheweth the works of the Lord, written in their
hearts…”22 I find this ‘writing’ metaphor fascinating. It is a metaphor that keeps recurring in one context or another.

Contemporary life-scientists, for example, both in their frontier work and in their popular accounts of what they are doing, tell us to think of the human genome as a book. This book contains an elaborate code of biochemical letters and words, which function as a kind of recipe for the construction of the proteins of which we (like every other living thing) are made up.23 In the beginning was the word. Actually, a word or even a book of words is in the beginning of each living thing, each with its own genetic coding written in the matching pairs of bases in the double-helix of its DNA. The writing is not, rather it is not only, in our hearts, but in every cell of our bodies. But this is not itself a moral code, or anything like one. What it may be, on the other hand, is a precondition of any possibility of any moral code, and much else besides.

To the extent that what I am saying has been understood, or at least recognised as an exposition of ideas in the English language, by each of you in my audience, I can make one inference: each person here has a properly working gene known as ‘FOXP2’ on chromosome 7. ‘Th[is] gene is necessary for the development of normal grammatical and speaking ability in human beings, including fine motor control of the larynx. … When it is bust, the person never develops full language.’24 Of course, genes that are necessary for speech are not sufficient for it. They are themselves switched on through the exposure of the human being between infancy and puberty to the environment of a speech community, and the language one develops is the language of that community – a language translatable, however, if with imperfections, into any other language.
III (b) Speech, Nature and Norms

As Thomas Reid long ago and Ludwig Wittgenstein much more recently pointed out, a private language is inconceivable. The power of speech is one of the irreducibly social powers of the human mind. The conditions of learning and using speech thus depend absolutely on a common adherence to the common norms of grammar and the like that structure our speech. These must include a norm favouring truthfulness and sincerity over falsehood and cheating, for a community without such norms would either never develop a language or swiftly lose the one they have. That lying and cheating are wrong is not itself written in the genome. But abilities that can be developed by bearers of the human genome do depend on most members of a speech community treating them as wrong most of the time, and refraining from them especially in front of learners.

Let us add to this a recognition of the connection between language as speech by vocalising or signing and the invention and development of writing. First written, then printed, and now digitally encrypted language messages create an extraordinary human facility that has progressively distinguished us from our closest relatives, the chimpanzees, whose gene code is astonishingly close to our own. This is our capacity to communicate at a distance both in place and in time, and to accumulate knowledge generation by generation, becoming ever more specialised in the branches of knowledge we can master and thus almost inevitably undergoing an ever more advanced social division of labour. This implies a capability to develop a more and more extensive civil society, in turn requiring an extension of at least provisional trust across an ever-wider range of people who are not personally acquainted with each other. This idea is again familiar to any reader of Adam Smith.
The civility of civil society, and the impersonal trust it both requires and underpins, is a remarkable achievement to the extent that humans manage to achieve and sustain it. Hitherto, at least, it has depended on the construction and maintenance of constitutionalist states, states with some constitutional distribution of powers that facilitate checking and balancing of different power holders over time. Only in constitutionalist states of that kind has democracy been a long-term possibility. None of this is dictated by the gene code, of course, nor was its construction achieved by reasoning a priori. It does nevertheless remain true that such developments have been possible for human beings given the nature that we have, and given that we are capable of learning how to improve what has evolved with us. The fragility of civility and civilisation always confronts us, and the lesson of events such as those in Iraq warns us how much easier it is to knock down than to rebuild. The impulse to destroy is also a part of our nature, but one against which our institutions can help us to guard.

The example of human language from which these brief reflections commenced is an important one. We all speak some language, perhaps more than one. Languages are highly normative. Yet their norms were not made by any human act of will clad with some form of institutional authority – even the académie française has a comparatively subsidiary role in respect of the great language it cares for. The moral is that we humans are norm-users before we are norm-creators, or legislators. Our sense of duty and obligation to each other is and has to be prior to any authoritative imposition of rules upon us. Were it not so, civil institutions could never have developed.

But they have developed – generation by generation, humans have developed them. Without them, our states and great trans-state unions such as the EU would be impossible. International organisations like the Council of Europe and with it our now
well-entrenched European Human Rights Convention would not be possible. As I
remarked, states, and nowadays beyond-state organisations, are conditions for the
security and extensiveness of civil society. The law they have established protects
civil peace, through criminal law especially, secures property and facilitates economic
exchange in a market economy, through private law especially, and creates
institutions of social justice, through public law especially. Because states have more
or less successfully asserted a monopoly on the use of coercive physical force in their
territories, the law they make and uphold has a coercive character different from that
of other forms of normative order that are important to us.

III (d) Institutions of Law

The definition of law that flows from these reflections is this: law is institutional
normative order, and state law is a coercively upheld institutional normative order. It
is both different from morality, and yet it is subject to moral constraints. As moral
beings, moral beings with an intrinsic disposition to sociality, we live according to
standards of rightness and wrongness. As moral beings we are autonomous in respect
of these standards. We are, and can be none other than, a “law unto ourselves” in this
respect. The very institutional character of states and their laws entails that they are
never entitled to more than provisional moral assent from autonomous moral beings,
but they do often earn that assent, and the price of their overthrow is an extreme one.
Conversely, institutional regulation is the prime mark of what counts as law within a
state. The adopted constitution and the legislation and (to the extent it is recognised)
the body of judicial precedent recorded in law reports are, for good or ill, the valid
law of the state in question.
The controversial character of any moral opinion among human beings, and the corresponding controversies about justice and the common good within a state or union do create a necessity for institutional law, and coercion seems necessary to a sense of security about rights enshrined in law. The moral reason for having institutional law does not, however, mandate any programme whatsoever under the name of law. There are limits to what can conceivably be put forward as publicly justifiable in a political discourse. Gross extremes of injustice in human conduct deprive of legal character the acts of those who perform them or who mandate them. However a holocaust might be set in motion, and no matter the institutional authority of those who set it in motion, it cannot, need not, and indeed must not, be recognised by anyone as having any kind of authority under law.

The case for these dogmatically stated opinions is, I hope, more carefully and convincingly argued in the pages of *Institutions of Law* than I can possibly argue them here. Thirty five years ago, I came to Edinburgh to a chair of jurisprudence in respect of whose official title I had continuing responsibility mainly for the middle term, the ‘law of nature’. At the time, I was a straightforward legal positivist, and my stance toward the law of nature was patiently to refute it and show how human law was intelligible without recourse to any such construct. I have steadily come to realise, however, that whatever valuable insights into law the legal positivists established, these are not antithetical to some broader conception of a law of nature, a law grounded in the nature of humans as the remarkable biological organisms we are. In particular, we must recognize that the user’s perspective on norms has primacy over the issuer’s. People are law-users more fundamentally than they are law-makers. To this extent, I seem in the end to have developed into a part-way worthy custodian of
the law of nature, and a reasonably fit exponent of “public law and the law of nature and nations”. It has been a profound pleasure, and a great privilege, to have tried.

I started this lecture by raising deep and currently controversial questions about war and peace. Nothing that I have said demonstrates the rightness or wrongness of specific answers to these questions. What I do think it important to have established is that there is a genuine possibility of non-arbitrary and rationally grounded answers to them. However difficult the arguments may be, the domains with which we are concerned are domains of the true and the false, not just places for rival gut-reactions, or triumphalist demonstrations of hard power.


2 This is a very compressed and partial account. Professor John Cairns’s brilliant Tercentenary Lecture ‘The Origins of the Edinburgh Law School’ adds important qualifications to the standard picture of Areskine as a wholly inactive professor – he did engage in the corporate life of the University, notwithstanding a paucity of student demand for specialised course in public law and the law of nature and nations.

3 Regius Professor 1759-1764, later a Senator of the College of Justice, as Lord Kennet.

4 Regius Professor 1779-96, later a Senator of the College of Justice, as Lord Meadowbank (the first)


6 Inst., I.1.1.

7 Inst., I.1.3, citing Romans II at 44-45


14 Edinburgh, 1872.

15 Edinburgh, 1884.

16 See the strongly critical review of Lorimer’s Institutes, by Frederick (later Sir Frederick) Pollok in Essays in Jurisprudence and Ethics (London: Macmillan, 1882), in chapter 1 ‘The Nature of Jurisprudence’ 1-41 at 18-31. While wholly rejecting Lorimer’s high idealist conception of Natural Law, Pollock concedes that it is ‘the only work known to me which adequately sets forth in English a view on the nature of jurisprudence diametrically opposed to that of the English analytical school.’ (pp18-19). Compare D. P. Heatley, ‘Pollock and Lorimer’ 56 Jur Rev (1944) 6-26.

Between Ludovic Grant and Archie Campbell, Professor William Wilson devoted his attentions principally to international law. He did so in the context of the new world order mapped out at Versailles, but all too swiftly re-embroiled in a conflict so catastrophic as to renew doubts about the possibility of a serious rule of law prevailing among sovereign nation states. It does not seem that Professor Wilson published much, if anything – at any rate, my efforts so far have brought nothing to light.


22. Inst., I.1.3.
