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Leibniz: Logico-Philosophical Puzzles in the Law

Philosophical Questions and Perplexing Cases in the Law

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Editors

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Je ne sçaurois laisser passer cette occasion sans vous entretenir, Monsieur, de quelques meditations que j'ay eues depuis que je n'ay pas eu l'honneur de vous voir. Entre autres j'ay fait quantité des reflexions de jurisprudence, et il me semble qu'on y pourroit establir quelque chose de solide et d'utile, tant pour avoir un droit certain (ce qui nous manque fort an Allemagne et peutestre encor en France) que pour établir une forme de procés courte et bonne.

Leibniz to Arnauld, 14 July 1686 (G II 60).

Sed juris incertitudini mederi difficilius est. [But to remedy the uncertainty of the law is harder]

Leibniz to Kestner, 5 September 1708 (D IV, 3, 254).

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Foreword

Why translate two of Leibniz's first academic writings, the works of a young university student? The most obvious answer is: because this young student was Gottfried Wilhelm Leibniz. But there are also other, less obvious reasons.

The most important of these reasons is the genuine intellectual interest these writings elicit, and in particular the freshness and originality of Leibniz's reflections on what we have called "legal puzzles." These fall under a range of legal issues to which Leibniz in these two short works applies his logical skills (still developing but already considerable, given his amazing precocity). There are puzzles resulting from cases of apparent conflict between law and philosophy (the latter broadly understood to comprise not only metaphysics but also mathematics, the empirical sciences, and theology). These puzzles sometimes arise from the fact that the same terms are used in different ways in philosophy and in law. Other times the puzzles arise from the fact that a certain principle is assumed to have universal application, while its use is only justified under particular pragmatic conditions, or from the fact that lawyers and jurists work within a defective conceptual framework. Some puzzles result not from an apparent conflict between law and philosophy but from the need to provide a deeper logical analysis of a conceptual issue. And finally there are cases which provide proper legal puzzles, i.e., those cases whose solution is doubtful because of the convoluted logical form of dispositions (expressions of intent) or because of a conflicting priority relationship. In addressing all these different kinds of puzzles, Leibniz always dissects the problem with the greatest clarity, disentangling its different aspects, and then proposes solutions, always reasonable and sometimes surprising. And he does not refrain from peppering his intellectual acrobatics with some humorous comments.

We will not comment here on the specific issues addressed in the two works, since we have included extensive comments introducing each section of our translations. These comments we have provided to make Leibniz's reasoning more accessible to the contemporary reader, who might have some difficulty extracting our young lawyer-philosopher's subtle analyses from his writings, cast in the style of the legal and philosophical commentaries of the time. But we believe that these puzzles should be considered not merely as an object of philologico-historical interest, but also and especially as living examples of legal-philosophical reasoning, whose understanding requires an active engagement, rewarded by the intellectual enjoyment of following the processes of Leibniz's brilliant mind.

Another reason for translating these two youthful writings is that they usually receive little attention in works concerned with the development of Leibniz's thought (see, for instance, Mercer 2001: 24, 45–6, and Antognazza 2009: 61–2, 65–6), and therefore these writings remain largely unknown. On the other hand, these early writings by Leibniz (among the few works by him published during his lifetime) have recently attracted increasing scholarly interest. From 1998 to 2009 there appeared the first modern-language translations of Leibniz's *Doctrina conditionum* (Leibniz 1998), *Disputatio juridica de conditionibus* (Leibniz 2002), *Nova methodus discendae docendaeque jurisprudentiae* (Leibniz 2003, 2012), and *Disputatio de casibus perplexis in jure* (Leibniz 2009). In the same period, Leibniz's youthful legal dissertations increasingly came under the focus of many Leibnizian scholars (among whom Armgardt 2001, Roinila 2007, Dascal 2008, Boucher 2008, Thiercelin 2008, Vargas 2008, Johns 2009, and Thiercelin 2011). But there still does not emerge from this body of work a comprehensive picture of those dissertations and of their role in Leibniz's intellectual development. We hope the present translations will contribute to completing such a picture.

The volume has been jointly edited by its three authors, who have translated the two Leibnizian works. Alberto Artosi and Giovanni Sartor have written the Introduction (apart from Sect. 2), as well as the comments introducing the single sections of Leibniz's two works. Bernardo Pieri has written Sect. 2 of the Introduction, the Bio-Biographical Note and the footnotes and endnotes, and has also prepared all Annexes. A special thanks is owed to Filippo Valente for copy-editing the entire volume. Moreover, we are happy to include Stuart Brewer's essay, "Law, Logic and Leibniz: A Contemporary Perspective," which provides a much needed link to the current jurisprudential discussion.

Abbreviations

A	G. W. Leibniz, *Sämtliche Schriften und Briefe*, ed. German (formerly Prussian) Academy of Sciences at Berlin. Darmstadt: Reichl, 1923- (reprint Hildesheim: Olms, 1972-). Cited by series, volume, and page, e.g., A VI/1 347.
AG	G. W. Leibniz, *Philosophical Essays*, ed. and trans. R. Ariew and D. Garber. Indianapolis: Hackett, 1989.
D	*Gothofredi Guillelmi Leibnitii Opera Omnia. Nunc primum collecta*, *in Classes distributa*, *praefationbus et indicibus exornata*, ed. L. Dutens, 6 vols. Genevae: Apud Fratres de Tournes, 1768 (reprint Hildesheim: Olms, 1989). Cited by volume, part, and page, e.g., D IV, 3, 253.
FC	G. W. Leibniz, *Nouvelles lettres et opuscules inédits*, ed. A. Foucher De Careil. Paris: Durand, 1857 (reprint Hildesheim: Olms, 1971).
G	*Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, ed. C. I Gerhardt, 7 vols. Berlin: Weidmann, 1875–90 (reprint Hildesheim: Olms, 1965). Cited by volume and page, e.g., G II 60.
GR	G. W. Leibniz, *Textes inédits d'aprés le manuscrits de la Bibliothèque Provinciale de Hanovre*, ed. G. Grua. Paris: Presses Universitaires de France, 1948 (reprint New York: Garland, 1985).
L	G. W. Leibniz, *Philosophical Papers and Letters*, ed. and trans. L. E. Loemker, 2nd ed. Dordrecht: Reidel, 1976.
R	G. W. Leibniz, *Political Writings*, ed. and trans. P. Riley, 2nd ed. Cambridge: Cambridge University Press, 1988.

Introduction

Biographical Background

Gottfried Wilhelm Leibniz was born in Leipzig on July 1, 1646, into an orthodox Lutheran family steeped in academic and legal tradition. His father was a professor of moral philosophy at the local university, where he also served as registrar.[1] His mother was the daughter of a renowned lawyer,[2] and after her parents died, she came under the guardianship of the distinguished law professor Quirinius Schacher. His maternal aunt was married to the eminent jurist Johann Strauch, who would exercise a considerable influence in shaping Leibniz's legal vocation.[3] In 1661, Leibniz enrolled in the University of Leipzig, where in 1662 he received a bachelor's degree in philosophy, for which he wrote his first academic dissertation. This work was submitted in the canonical form of a disputation[4] held in June 1663 under the chairmanship of Leibniz's first teacher, Jakob Thomasius,[5] and was later published under the title *Disputatio metaphysica de principio individui* (Metaphysical disputation on the principle of individuation).[6] The *Disputatio metaphysica* inaugurates the series of Leibniz's early publications, to which the works here translated belong. The following passage illustrates the way education was set up at German universities when Leibniz was studying in Leipzig:

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[1] This university post may be to account for the frequent misconception that Leibniz's father was (or was *also*) a lawyer.

[2] Wilhelm Schmuck, whose legal library was incorporated into the library of Leibniz's father.

[3] Johann Strauch is mentioned in Question VII of the *Specimen* as "the most noble Dr. Strauch, now Proto-Syndic at Brunswick, my relative and very honoured patron". In Leibniz's early legal writings, Strauch is also mentioned in the *Disputatio juridica de conditionibus* (see note 8 below) and in the *Nova methodus discendae docendaeque jurisprudentiae* (A VI/1 347).

[4] The *disputatio* was the standard method of examination for access to the various academic degrees. It consisted in a public discussion of a number of theses, with one disputant arguing *pro* and the other arguing *contra* (a closely related issue is addressed in Question II of the *Specimen*)—all this under oversight of a chairman whose role was to ensure compliance with the rules of disputation.

[5] Jakob Thomasius (1622–1684), the father of Christian Thomasius, was professor of rhetoric, dialectic, and moral philosophy. He is mentioned in Question VIII of the *Specimen* as "our Illustrious Thomasius, my preceptor and highest mentor," and again in Question XII as "our Thomasius ὁ θαυμάσιος" (a witty pun on the word *Thomasius*, spelled *thaumasios*, meaning "wonderful," so as to give "wonderful Thomasius"). Thomasius is also mentioned in *On Perplexing Cases*, IV, a propos of "a course he taught in 1662 in Leipzig on Machiavellism." On Thomasius and his importance to Leibniz's intellectual development, see Mercer (1999: 28–32).

> Like most of his learned countrymen, Leibniz's first published works were versions of the academic disputations required to mark the various major stages of his higher education. Although many of the students who matriculated in seventeenth-century universities chose to sidestep formal degree studies for one reason or another, the ordinary formal course of study began with a Bachelor's degree in the general "arts" or "philosophy" course and then followed this with higher degrees in philosophy or – far more normally – with Bachelor's, Master's and Doctoral degrees in one of the three "higher faculties" of theology, law, or medicine (Antognazza 2009: 57).

In October 1663, Leibniz went back to Leipzig after a summer term at the University of Jena (where he met Erhard Weigel).[7] Faced with the dilemma whether to complete his studies in philosophy or move on to one of the higher faculties, he decided to do both, simultaneously enrolling in the law faculty of his native Leipzig, where he began his legal apprenticeship under professors Quirinius Schacher and Bartholomaeus Schwendendörffer. As Leibniz himself would later recall in his biographical sketch: "I felt that my prior study of history and philosophy made jurisprudence very easy to acquire, so that I had no difficulty in understanding the laws, and since I needed not linger over theory, which I despised for its easiness, I turned my attention to the practice of law" (FC 383). He adds that he was intrigued by the role of the judge, but that he despised the lawyers' chicanery, and that for this reason he had never wished to plead in court.

In 1664, Leibniz earned his Master of Philosophy, and that same year he defended and published his dissertation, *Specimen quaestionum philosophicarum ex jure collectarum* ("Specimen of Philosophical Questions Collected from the Law"), in which he brought his recent legal training to bear on his philosophical interests. In the meantime he visited his uncle Johann Strauch in Brunswick. The illustrious scholar was struck by the young man's rare talent and warmly encouraged him to pursue the study of law.[8] In September 1665, Leibniz earned his bachelor's degree in law, for which he wrote the dissertation *Disputatio juridica de conditionibus* (Juridical disputation on conditions) under the supervision of Schwendendörffer.[9] A few months later, on March 17, 1666, he earned his habilitation in philosophy with the first part of what was to become the *Dissertatio de arte combinatoria* (Dissertation on combinatorial art),[10] published in the same year.

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[6] A VI/1 3–19. The work addressed the classic Scholastic issue of the nature of individual substance.

[7] Erhard Weigel (1625–1699) was professor of mathematics and astronomy. He is mentioned in Question XVI of the *Specimen* as "the Illustrious Weigel, professor of Mathematics in Jena, my preceptor and revered patron", as well as in *On Perplexing Cases*, II, where Leibniz mentions Weigel's main work, *Analysis Aristotelica ex Euclide restituta* (1658): see note 54 below (on Weigel, see also notes 32 and 52 below). For an account of Weigel and his influence on Leibniz, see Mercer (1999: 33–35). Interestingly, in Question VII of the *Specimen* Leibniz mentions another professor at Jena, one "Dr. Posner, professor of Physiology in Jena," along with his work *Dissertatio de principatu partium.* This Posner is Caspar Posner, Sr. The work cited is almost certainly Posner's *Disputatio physica de principatu partium in corpore animalium*, published in Jena in 1663. According to Busche (1997: 104), Leibniz's reference to Posner may be evidence that during his summer semester in Jena he attended Posner's medical seminar.

Immediately thereafter, he turned to the study of law, working on his dissertation for the degree of Doctor of Law. Astonishingly, the law faculty refused him the title for reasons that are unclear: perhaps the scheming of some older students or the dean's wife's ill will toward Leibniz.[11] As a result, in October 1666, Leibniz transferred to the law faculty of the University of Altdorf (near Nuremberg), where in short order he completed and submitted his doctoral dissertation, *Disputatio inauguralis de casibus perplexis in jure* ("Inaugural Dissertation on Perplexing Cases in the Law"). In February 1667, at the age of 21, Leibniz obtained his doctor's degree and, having declined an offer for an academic position,[12] he set off for Frankfurt. On his way there, "from a guesthouse to the other, without books," he wrote his first (and only) jurisprudential treatise, *Nova methodus discendae docendaeque jurisprudentiae* (A new method for learning and teaching jurisprudence),[13] through which he planned to gain favour with the prince elector of Mainz. Indeed, this new work made such a good impression on the prince elector that he enlisted the young scholar in his service by appointing him assistant to his *Hofrat* (court counsellor), Hermann Andreas Lasser, who was working to reform the electorate's legal code. In 1669, at the age of 23, Leibniz was appointed assessor (i.e., judge) to the High Court of Appeals,[14] notwithstanding his Protestant persuasion (the court of Mainz was Roman Catholic). This was the first of a series of increasingly prestigious offices he would hold as a jurist.[15] In the same year, he collected his first three legal dissertations into a single volume under the title

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[8] See Strauch's letter to Leibniz of 6 July, 1665 (A VI/1 124). Leibniz acknowledges his debt to Strauch in the preface to the *Disputatio juridica de conditionibus* (A VI/1 101).

[9] The disputation was held in two sessions, in July and August 1665, and published in the same year under two separate titles: *Disputatio juridica de conditionibus* (A VI/1 97–124) and *Disputatio juridica posterior de conditionibus* (A VI/1 125–50).

[10] A VI/1 163–230.

[11] Aiton (1985: 65).

[12] This is Leibniz's first manifestation of that "preference for a career in the world rather than in the academy" (Mulvaney 1994: 413), a preference that would keep him away from the universities throughout his life.

[13] A VI/1 259–364. The reference to the extemporaneous writing of this work ("*inter diversoria, sine libris*") is on p. 292. See also Leibniz's letter to Placcius of 10 May, 1676 (A II/1 260).

[14] This was the electorate's highest tribunal.

[15] *Hofrat* in Hanover in 1677, *Geheimer Justizrat* (privy counsellor of justice) in Hanover in 1696 and in Brandemburg in 1700, privy counsellor of justice to the Russian tsar Peter the Great of Russia in 1712, and *Reichshofrat* (member of the Imperial Aulic Council, one of the empire's two higher appeals courts) in 1713.

Specimina juris (Specimens of the law). This ends our story.[16] In the following sections we offer an overview of Leibniz's early legal thinking. But first, in order to provide the proper setting, we will paint, at least in outline, a picture of the state of the law in early modern Europe.

Law in Leibniz's Time[17]

When Leibniz made his debut as a jurist, the legal landscape in Western Europe was marked by divergent, albeit concurrent, trends. On the one hand was the advent of new sources of law, especially the legislation enacted by national monarchies, coupled with the disruption of the medieval ideal of the unity of the *respublica christianorum* (republic of Christians) brought about by the Papal Schism – two forces that had been conspiring to undermine the *ius commune*, leading to its progressive confinement to the role of a mere complement to the different *iura municipalia* (i.e., the municipal laws of states and cities). In Germany, in particular, no sooner did the *ius commune* reach its heyday – with its reception through the institution of the Imperial Chamber Court (the (*Reichskammergericht*)[18] – than its influence began to wane. Even so, partly on account of the empire's inherent weakness, and partly on account of its fragmentation into a plurality of states subject to powerful municipal particularisms (every city had its own senate, council or parliament, and courts), the judges became increasingly powerful, so much so that they lost sight of the keen medieval awareness of the judge's subordination to the law.[19] On the other hand, those concerned to secure the certainty of the law often pinned their hopes on the absolutist pretensions of the sovereigns, who at that time, especially after the Peace of Westphalia (signed just 2 years after Leibniz's birth), were keen to appropriate the law by reducing it to their own authoritative statements. This process had started in the late fifteenth century and can be regarded as epitomized by the fate of the closing remark in Bartolo da Sassoferrato's *Tractatus de regimine civitatis*: "So we see that some things concerning the tyrant pertain to the jurists" (*ideo de tyranno aliqua ad juristas spectancia videamus*).[20] This remark, appearing in Bartolus' fourteenth-century manuscripts, disappeared from the printed editions, reflecting the modern princes' unwillingness to submit to the jurist's judgment and to grant jurists an area of exclusive competence (Bellomo 1994: 215).

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[16] Leibniz's Mainz period ended with his departure for Paris on 19 March, 1672. He would never return to Mainz.

[17] This section is by Bernardo Pieri.

[18] The Imperial Chamber Court was among the first central courts of the empire. It was established in 1495 by Emperor Maximilian I (1486–1519) at the request of the Diet of Worms, which sought to restrain the emperor's personal influence in legal (and especially feudal) matters. Indeed, half of its members were lawyers trained in Roman law, so as to offset the number of those who were members by hereditary privilege, and through this composition the court was instrumental in the final adoption of Roman law as the common law of the Empire, in the form of both the Justinian *Corpus iuris* and the exegetical and doctrinal works of the medieval jurists.

[19] The power of the supreme state courts was such that the judgments they delivered were mostly based on what came to be known as the principle of "equitable arbitrariness" (*secundum conscientiam*).

Roman law had been under attack for over two centuries. First came the sixteenth-century rationalists, who called into question the classic Roman partition of law into the three domains of *personae*, *res*, and *actiones* (respectively dealing with individuals and their family relationships; with things, property, and contracts; and with the means by which to claim and protect rights),[21] and who in the footsteps of the Scuola Culta,[22] and drawing on the humanistic canons (reevaluated most notably in light of Melanchthon's work), objected to the arrangement of the Pandects on the ground that it was in such disarray as to make them ineffective. It was Johann Apel (1486–1536)[23] who led the way, by inspiring new attempts to systematize the Pandects, especially on the part of Sebastian Derrer († 1541),[24] Melchior Kling (1504–1571),[25] and Conrad Lagus (1500–1546).[26] Lagus was among the first to reclaim the philosophical dimension of the law,[27] a dimension he viewed as linked to its positive one (which he termed "historical"), in that "the form of the institutes of positive law derived from the natural source viewed as a necessary foundation" (Birocchi 2002: 15). To this end Lagus invoked the old distinction between a *ius naturale primaevum* (the law common to all animals) and a *ius naturale secondarium* (the Romans' *ius gentium*, which like other jurists he called *ius divinum*)[28] and claimed that the latter included not only what had been laid down in the Scriptures but also what "springs from the judgment of reason" (*ex iudicio rationi nasci*).[29] In this way, the law's systematic order came to be viewed as the realization of God's design through human reason.

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[20] The critical edition of Bartolus's treatise is found in Quaglioni (1983).

[21] This partition would also be criticized by Leibniz in the *Nova methodus* on the ground that it is a factual, not a legal, partition (A VI/1 295–9).

[22] The term *Scuola Culta* designates the humanistic strand of legal science, which paved the way for the application of philology and of historical critique to the study of law.

[23] Author of *Methodica dialectices ratio ad jurisprudentiam adcommodata* (Norimbergae, 1535) and of *Isagoge per dialogum in quatuor libros Institutionum* (Wratislaviae, 1540).

[24] Author of *Iurisprudentiae liber primus*, *instar disciplinae institutus et axiomatibus magna ex parte conscriptus* (Lugduni, 1540).

[25] Author of *Enarrationes in libros IV Institutionum* (Francoforti, 1542).

[26] Author of *Iuris utriusque traditio methodica* (Francoforti, 1543). This work was published without the author's permission. He replied the following year with a *Protestatio*. On this whole affair, see Theuerkauf (1968: 200 ff.).

[27] He did so with Johann Oldendorp, author of *Iuris naturalis*, *gentium*, *et civilis eisagoge* (Cologne, 1539).

[28] This distinction is also espoused by the young Leibniz in Question VIII of the *Specimen*.

[29] Lagus (1543: 11), quoted from the Lyon edition of 1566.

Along a similar path, the natural lawyers of the seventeenth century worked out an objective and rational conception of natural law entailing a sharp distinction between law and theology.[30] Indeed, there are still in Grotius deep influences of the theologians of the School of Salamanca,[31] as well as traces of the method of the Scuola Culta (Birocchi 2002: 169). But with Thomas Hobbes (1588–1679), Spinoza (1632–1677), and especially Samuel Pufendorf (1632–1694) and his most prominent follower, Christian Thomasius (1655–1728), the need for a separation between law and theology became a cornerstone of the natural law doctrine, along with the belief that the law's basic principles should be approached scientifically through the application of mathematical methods.[32] To "define" and to "systematize" became widely accepted scientific imperatives, and the certainty of the law was increasingly understood as something that could be attained *more geometrico*.[33]

The systematic construction of natural law as the science-based "law of reason" was supposed to replace Roman law,[34] but jurists still received a predominantly Romanist training, and Roman law, especially in Germany, was firmly rooted as the common law of the land in judicial practice.[35] Although by that time this common law could no longer be identified with the Justinian *Corpus iuris* (still less with canon law, which had entirely lost its vitality),[36] the latter survived as the *ratio scripta* of the law,[37] providing the underlying legal unity the new centralizing states were still unable to establish. Even so, throughout Leibniz's long legal career, Roman law remained the object of conflicting stances. Whereas Georg Adam Struve (1619–1692), in his 1670 *Jurisprudentia romano-germanica forensi*, endeavoured to fit the principles and institutes of German law into the dogmatic and institutional scheme of Justinian law, Pufendorf and Christian Thomasius carried on Conring's effort to lessen the influence of Roman law on German judicial practice.[38] Toward the end of his life, Leibniz took up a correspondence with Heinrich Ernst Kestner (1671–1723),[39] who in *De statu jurisprudentiae*, *necessariaque juris naturalis et civilis conjunctione* (1699) had invoked Leibniz in support of his criticism of Roman law and his preference for natural law and traditional German law (G 682). Leibniz replied that, although the Roman laws have much that is "obscure, perplexing and redundant," they must be considered the basis of the law: going back to ancient German laws, with their innumerable traces of barbarism, would be tantamount to feeding on acorns after having harvested corn (*inventa fruge glandibus vesci*). On the other hand, the body of the Roman laws could be reduced to a few general rules "in which both equity and meaning would appear in a clear light" and "all the variety of cases" would be "encompassed as if it were encircled with toils."[40] That is what Leibniz had dreamed of from the time he "first set [his] feet in the paths of jurisprudence,"[41] and what he kept on dreaming of for the rest of his life. In his last letter to Kestner, written just a few months before dying, Leibniz reaffirmed all the basic tenets of his lifelong meditation on law:[42] his admiration for the Roman jurists and the quasi-geometrical subtlety of their reasoning, an admiration first expressed in the preface to *De conditionibus* (A VI/1 101); his assimilation of Roman law to natural law, a view expounded as early as in the *Nova methodus*;[43] and the need for a "concise, clear, sufficient new Code" that would bring order and certainty to the confusing multitude of laws, a code he had been concerned with enacting as a legal reformer,[44] ever since the days of the *Nova methodus* and his collaboration with Lasser.[45] It is now time to follow Leibniz in his first forays into jurisprudence.

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[30] The seventeenth-century revival of natural law is part of a more pervasive cultural process begun at the outset of the sixteenth century with the publication of Jacopo Sannazzaro's internationally renowned poem *L'Arcadia* (1502). Drawing inspiration from Virgil's *Bucolica* (in turn inspired by Theocritus), Sannazzaro depicted the idyllic world of shepherds and nymphs as a moral allegory meant to conjure up an imaginary Golden Age. The fondness for this fanciful world is evidenced by the wide success attained by literary works like Torquato Tasso's *Aminta* (1573), Giovan Battista Guarini's *Pastor fido* (1590), and Giovan Battista Marino's poems (which were translated into English, German, and even Dutch), as well as by emblematic paintings like Nicolas Poussin's *The Shepherds of Arcadia*, not to mention an endless series of musical works.

[31] The theological school of the University of Salamanca was founded by Francisco de Vitoria (1492–1546) and included among its leading figures the theologian-philosopher-jurists Domingo de Soto (1494–1560) and Francisco Suarez (1548–1617). The school sought to reconcile Aquinas's thinking with the humanistic view of man and his relation to God.

[32] An example was the view of both Pufendorf and Weigel that moral entities (*entia moralia*) were subject to mathematically determinable laws, precisely in the manner of physical entities. On Weigel, see note 52 below. Pufendorf's "geometric" approach to jurisprudence (in his *Elements of Universal Jurisprudence*) is mentioned by Leibniz (together with Hobbes's *Elements of Law and of Citizen*) in the *Nova methodus*, II, 6 (A VI/1 295).

[33] Although Leibniz would himself embrace this view, he was always consistently hostile to the idea of a separation between law and theology because of his belief, first stated in the *Dissertatio de arte combinatoria* (A VI 190) and then in the *Nova methodus* (A VI/1 294), that theology is part of a universal jurisprudence embracing laws both human and divine.

[34] In the fragmented Germany, it was especially Hermann Conring (1606–1681) who made the case against Roman law, with his influential *De origine iuris Germanici* (Helmstedt 1643), eulogizing a purportedly native German law founded on time-honoured customs uncorrupted by Roman law. Conring, an eclectic scholar of Aristotelian lineage, established contacts with Leibniz after receiving a copy of the *Nova methodus*, and he also corresponded with Leibniz in the 1670s.

[35] See note 18 above.

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[36] In the sixteenth century, canon law had "lost its primacy as a normative science", and owing to its increasing positivization, it "was turning more and more into an ecclesiastical discipline" (Prodi 2000: 190).

[37] This is probably what Leibniz was referring to in his letter to Kestner of 1 July, 1716, where he commented that "in the meantime [. . .] the best course is to consider the corpus of the old laws as having for us the force not of law but of reason (*vim non legis*, *sed rationis*) and, as the Gauls say, of great Doctor" (D IV, 3, 269). On Leibniz's exchange with Kestner, see note 39 below and the text corresponding to the note.

[38] According to Thomasius, the German peoples could dispense with Roman law because natural law and the law of nations, being the "dictate of right reason" (*dictamen rectae rationis*), were independent of Roman law (a position emphatically rejected by Leibniz), and the basic principles of law became established among these peoples before they even had any notion of Justinian law.

[39] D IV, 3, 253–69 (additions in G 681–99). This exchange lasted from 1708 to 1716, the year of Leibniz's death.

[40] Leibniz to Kestner, 5 September, 1708 (D IV, 3, 253–54). See Kestner's reply of 12 September, 1708 (G 682–85).

[41] Leibniz to Hobbes, 13/23 July, 1670. See full quotation at note 58 below.

[42] Leibniz to Kestner, 1 July, 1716 (D IV, 3, 267–69). It is odd that in summarizing this letter, Dascal (2008: 73, note r) misdescribes it having been written by Kestner to Leibniz.

The Quest for Certainty: Leibniz contra Judicial Discretion

When Leibniz wrote the *Specimen*, no particular connection was seen to exist between law and philosophy, still less between law and such domains of knowledge as physics and mathematics. Hence, the *Specimen* can rightly be regarded as the first evidence of Leibniz's impressive intellectual independence and originality. The young scholar's bold contention was that law needs philosophical underpinnings. For, as he writes in the Preface, "many places in [the] law would be an inextricable labyrinth without the guidance of philosophy." Having argued this point, he reexamines a variety of questions drawn from Roman law in a progression from logic to metaphysics going through mathematics, physics, physiology, and zoology.[46] This might not seem enough to conjure into being even the barest outline of a legal conception. But a careful reading of the text reveals the direction the young scholar was already taking. Leibniz's most important remark appears in Question II, where he discusses the vexed issue of the allocation of the burden of proof:

> Thus it is necessary to extract the truth from the deeds and from what has been proved in whatever licit way, so that the matter can be decided. From which it follows that the burden of proof should be imposed upon the party that can discharge it most easily, in order that the matter should not remain without a decision.

Two years later, we find Leibniz holding, with Plato, that

> in any state whatsoever a judicial matter is the better treated, the less is left to the discretion of the judge (*in arbitrio judicis*).[47]

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[43] See Sect. 5 below.

[44] Equally important for him, in advocating for enactment, was that this would do away with (or at least drastically downscale) judicial discretion in the interpretation and application of the law.

[45] See Leibniz's statement of the three requirements for a new legal corpus in the *Nova methodus*, II, 21 (A VI/1 306–7) and his 1668 project for a systematic reformulation of Roman law, *Ratio corporis juris reconcinnandi* (A method for restoring the body of law), probably written with Lasser (A VI/2 93–113). On Leibniz's codification projects, see Berkowitz (2005).

[46] The model for this endeavour is clearly the system of the sciences set out by the so-called Herborn encyclopaedists, and especially by Johann Heinrich Alsted in his 1630 *Encyclopaedia*. Alsted is mentioned in the Preface to the *Specimen* (another important Herborn philosopher, Johannes Althusius, is mentioned in *On Perplexing Cases*, I and IX). On the influence the Herborn encyclopaedists had on Leibniz, see Loemker (1961).

[47] *Dissertatio de arte combinatoria*, 39 (A VI/1 189, L 82).

These passages provide further evidence of Leibniz's precocious originality. For they entail the unconventional view that no case, no matter how difficult and perplexing, should be deemed insoluble: every case must admit of a solution *ex jure* (directly derived from the law), and indeed it will do so, if only the powers of rational thinking are applied to it. This view is nicely exemplified in Leibniz's account of the well-known case of Protagoras *v*. Euathlus in Question XII of the *Specimen*.[48] This was traditionally considered the quintessential insoluble case, since Protagoras's argument (namely, that he would win no matter how the judges decided) also applied to his pupil Euathlus.[49] The facts of the case are as follows. Protagoras and Euathlus made an agreement under which Protagoras would be Euathlus's teacher on the condition that Euathlus would pay him on winning his first case. Time passed and Euathlus did not take any case. Protagoras thus sued Euathlus to claim his credit. Here are the arguments the two parties put forward before the judges:

Protagoras. If I win the case, then in accordance with the ruling, Euathlus will have to pay me. If Euathlus wins the case, then he will have won his first case and will thus have to pay me under the terms of our contract. In either event, Euathlus will have to pay.

Euathlus. If I win the case, then in accordance with the ruling, I won't have to pay Protagoras. If Protagoras wins the case, then I will not have won my first case and will therefore owe him nothing under the terms of our contact. In either event, I will not have to pay.

One of Leibniz's sources (Gellius's *Attic Nights*) tells us that "the judges, thinking that the plea on both sides was uncertain and insoluble, for fear that their decision, for whichever side it was rendered, might annul itself, left the matter undecided and postponed the case to a distant day" (V.10). Leibniz's solution is

> that the judges could have ruled most equitably as follows: "You will win, Euathlus. This means that you will certainly win in this lawsuit that the master brought against you, when the condition of your contract was not yet satisfied, so that now you certainly don't have to pay him anything, since of course he was repelled by the plea that he made an excessive claim. In the future, however, he will not lack a cause of action against you in order that you pay, given that the condition of the contract is fulfilled, since you have now won." In this way the judges could respect both natural equity and strict law at the same time, since independently of the subtleties of the contract, gratitude is certainly due to the master.

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[48] This case is discussed in connection with the logico-metaphysical question "whether two contradictory propositions can simultaneously be false, that is, whether being and non-being admit a middle [. . .] of negation."

[49] It stands to reason that in the rhetorical tradition of antiquity this kind of argument should have been described as ἀντιστρέφοντα, or "reversible" (Latin *reciproca*), since the argument "implies the reversibility of the reasons provided by the two adversaries" (Calboli Montefusco 2010: 369), and this is why they are also referred to as "boomerang arguments."

In *On Perplexing Cases*, XVI, Leibniz further elaborates his solution:

> my view [is] that this case is wrongly classed among the perplexing ones. In fact, the polity in which this question is discussed punishes he who asserts a claim before the proper time. It does so either by finding against that party in the action – as the Romans once did [...] – or [...] by rejecting the claim, according to the law of nations, and as is customary today. In the first case Protagoras would be defeated, in the second he would win. In fact, since Protagoras asked his disciple to pay before the credit existed and could be claimed, and before the condition was fulfilled (the condition for payment is in fact victory in the first lawsuit), he will no doubt be considered as having made an untimely claim. Therefore, the lawsuit for this claim is lost in the first round, and owing to this very fact, the condition for payment is satisfied, since in this way Euathlus won his first lawsuit. Consequently, Protagoras now really has a cause of action against Euathlus, one no longer liable to any exception, not even the exception that the issue has already been adjudged, since Euathlus has not been absolved from the lawsuit, but only from the earlier claim, through an exception that is not peremptory but dilatory. In this way equity and strict law are joined together, for when there is doubt, it is the teacher's case that ought to be favoured.

Thus, the old controversy ceases to be a perplexing case and proves to be amenable to a solution *ex mero jure* (on grounds of mere law). Indeed, Leibniz's view is that *all* legal cases should be so decided – or, in his own words, that "there is no lawsuit to which law cannot be applied, as there is no disease that rejects absolutely every medicine" – despite the uncertainty inherent in the interpretation of positive laws or in the welter of common opinions.[50] For

> positive laws rest on civil reason, which limits the law of nature and of nations by way of an exception, and more particularly a restriction. Therefore, the law of nature and of nations will hold in a given case so long as it is not proved that the contrary has been introduced through statute [...]. And indeed, if the interpretation is uncertain, we must resort to the interpretive rules of natural reason, and even if the rules and presumptions give equal support to both parties, we must find against that party that grounds his claim in some positive law but cannot sufficiently establish that this law has been enacted. Thus it becomes clear that everything can in effect always be decided on the basis of the mere law of nature and of nations, under which nothing is uncertain (Section XI).

Perplexity is thereby blotted out. There are, at bottom, no truly perplexing cases.

The Consilience Between Natural Law and the Laws of Nature

The conviction that positive laws are established on the basis of natural law was destined to develop in important ways in Leibniz's legal thinking by the end of the 1660s. For the moment, it is enough to inquire into Leibniz's grounds for his belief in the certainty of natural law. To this end, we have to again turn to the *Specimen*.

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[50] Of course, only much later, in Article 4 of the *Code Napoléon* of 1804, would the principle be set forth under which the judge cannot refuse to decide "under pretext of the silence, of the obscurity, or of the inadequacy of the law."

In Question III, Leibniz offers a geometrical analysis of the rule that in order for a ditch not to damage a neighbouring estate, its distance from the estate's border should not be inferior to its depth. Leibniz starts out in his reasoning by considering that

> a body which cannot fall in a straight line, can, however, descend obliquely very easily, if it forms an angle wider than 45° (with the way or line of descent) with the ground on which it sits; if the angle is narrower, [the body] will descend very uneasily and very slowly, since the more oblique and narrower the angle, the more it is necessary that the body in descending should lean sideways, which, however, is against its nature.

He then devises the following *Gedankenexperiment*. Let a ditch be dug perpendicularly, close to the neighbouring estate, and let d and r be its depth and its distance from the border, respectively. Suppose that the ditch is filled with water and that for some time new water is added as its level decreases. In this situation, the level will remain about constant, but as the rate of outflow increases, the water will seep obliquely into the side of the ditch, edging toward the neighbour's estate. However, on account of what has just been said about the inclination of an obliquely descending body, the water will seep at an inclination $\geq 45°$. From this it follows that if $r \geq d$, then the water will not cross the boundary into the neighbouring estate. On the contrary,

> if the estate of the neighbour began within the sphere of activity of the water [. . .] it is clear that the water [. . .] would come into the estate of the neighbour, and it would ruin the soil by washing it away, and having destroyed the ground [. . .], it will cause the earth of the neighbour [. . .] to encroach on my estate by sliding in the opposite direction, in such a way as to fill the hole [. . .]; and so my utility will harm another, and another's damage will benefit me, which is contrary to the law of nature [. . .] in which, on that account, this law appears to be grounded.

As contrived as the argument may seem, it reveals that what Leibniz had in mind was not a mere analogy,[51] but a close correspondence between the reasons of law and the laws of nature, thanks to which natural law would become scientifically knowable.[52] This is borne out by Leibniz's treatment of the case concerning equally well-grounded conflicting claims in Theorem 27_1 of *Doctrina conditionum*.[53] "This theorem," Leibniz writes, "has been subtly deduced from natural law itself (*ex ipso iure naturae*) by the old jurists [. . .]. Indeed, this matter contains a sort of physical principle drawn from the nature of movement"

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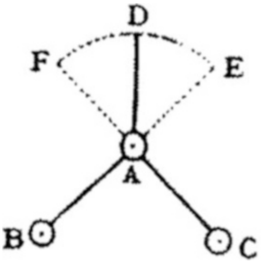
[51] Compare Question IV of the *Specimen*, where Leibniz writes of "an elegant analogy [. . .] between possession and the position or location of bodies in a place".

[52] The idea may have been drawn from Erhard Weigel. In Question XVI of the *Specimen*, Leibniz mentions Weigel's distinction between the "three highest genera of entities [. . .]: natural, moral, and notional," each of which characterized by quantity, quality, and action, as well as the close connection Weigel saw between ethics and mechanics: "He thus reduces rights to moral qualities, and just as space is the substrate to natural action or motion, so the State is in a way a moral space, in which something like a moral motion is effected."

[53] The final version of *De conditionibus* (see Sect. 6 below). This line of thought is also pursued by Luig (2008: 188–89).

(A VI/1 392). Leibniz's proof proceeds as follows. Let B and C be two bodies simultaneously striking with equal force a third body, A, along the trajectories of lines BA and CA, respectively (see figure below).



Leibniz's figure (A VI/1 392)

Let angle BAC be bisected by line AD in the direction opposite to the two moving bodies B and C, and let AE and AF be the prolongations of BA and CA to E and F, respectively. The claim is that A will move along line AD. For, given that the body being pushed moves along the prolongation of the line drawn by the pushing body (AE and AF), if A were pushed only by B, it would proceed in its movement along line AE, whereas if it were pushed only by C, it would proceed along line AF. But since B and C concur, it follows that: (*i*) A will not remain motionless, for it is being pushed in one and same direction, and that by more than one body; (*ii*) A will not move along either lines AE or AF, for B and C exert an equal force, and since nothing happens without a cause, there is no reason why A should move along line AE rather than along line AF; (*iii*) much less will A move along both lines AE and AF, for nothing can be in more than one place at the same time; and finally (*iv*) A will not move anywhere between AE and AF other than along line AD, for there is by definition no intervening force that would cause A's trajectory to deviate from the line bisecting angle EAF. Therefore, A will only move along line AD. And now the legal application:

> The concurrent [competing] parties correspond to movements BA and CA. The object of the concursus [the object of their competing claims] corresponds to the inclination of the line of the movement of A towards the concurrent lines [i.e., AE and AF]. This inclination is the greater the smaller is the angle [with A], since when the inclination is maximal the angle is null, but the movement of A and the movement of either of the pushing bodies are on a single straight line, which is what happens when one of the pushing bodies pushes alone without the concourse of the other. This corresponds in the law to the acquisition of a thing (*consecutio solidi*), and of the absolutely greatest part of the thing, i.e., of the whole, when no other [claim] concurs. In fact, he who does not concur obtains the absolutely smallest part of the thing, i.e., nothing. Now, just as in the movement the inclination divides among several concurrent lines – when the actual force is uniform, the movement of the body being pushed has, with respect to the movements of the pushing bodies, an angle and an inclination that are equal on both sides – so in the same way in the law, when several parties are joined with respect to one and the same thing on equal grounds, the thing is divided in such a way that each party is assigned an equal portion (A VI/1 393).

This parallel between law and physics is perfectly in keeping with the philosophical and scientific approach to law developed both in the *Specimen* and in *On Perplexing Cases*, and shows that Leibniz considered natural law a source of certainty by virtue of its correspondence with the intelligible (i.e., lawful) order of the natural world.

Jurisprudence as Geometry: Leibniz's Combinatorial Approach to Law

Leibniz's view that all legal cases can be decided with certainty largely rests on his belief in the certainty of natural law. But there is more. That view also rests on the similarity he saw between geometry and jurisprudence.[54] In *De arte combinatoria*, that similarity is explained in the following way:

> both have elements and both have cases. The elements are simples (*simplicia*); in geometry figures, a triangle, circle, etc.; in jurisprudence an action, a promise, a sale, etc. Cases are complexions (*complexiones*) of these, which are infinitely variable in either field. Euclid composed the *Elements of Geometry*; the elements of law are contained in the *Corpus Juris* [. . .]. To us it seems thus: the [simple] terms from whose complexion there arises the diversity of cases in the law are persons, things, acts, and rights (A VI/1 189, L 82).

The idea that law had to be approached *more geometrico* was not in itself new.[55] What *was* new is Leibniz's insistence on applying the combinatorial method to calculate all possible legal cases and rules out of a set of simple elements. Leibniz recommends his method as a means for removing the uncertainty of legislation, and with it judicial discretion. Here is Leibniz's best-known example of a jurisprudential application of this method. He considers the case of a mandate (gratuitous agency), namely, the contract through which an agent (a) agrees to gratuitously transact one or more affairs for the principal (p), possibly involving a third party (t). According to the Roman jurist Gaius, this gives rise to five legally relevant cases, depending on whether the mandate is contracted in favour of (1) only p; (2) both p and a; (3) only t; (4) both p and t; or (5) both r and t. Now, according to Leibniz's rule of combinatorial calculus,[56] there are seven complexions, or possible combinations, of m, r, and t: three unary combinations, i.e., (p), (a), and (t) with (p) and (t), corresponding to cases (1) and (3), respectively; three binary combinations, i.e., (p, a), (p, t), and (a, t), corresponding to cases (2), (4), and (5), respectively; and one ternary combination, i.e., (p, a, t). As Leibniz notes, the case corresponding to (a) is explicitly rejected by Gaius as legally irrelevant, for if the mandate is exclusively in favour of the mandatary (the agent) it does not give rise to any obligation, whereas (p, a, t), corresponding to the case in which the mandate is in favour of all three parties, is simply neglected for reasons that Leibniz admits elude him (A VI/1 177, L 81). As a demonstration of the jurisprudential significance of his method, this example may look disappointing.[57] More importantly, the method suffered from serious limitations, the most serious of which, as Leibniz knew all too well, was the difficulty involved in computing and assessing the huge number of possible combinations of simple elements. In fact, by the time of his collaboration with Lasser, Leibniz would have turned his early and tentative reflections into an ambitious plan for the rational systematization of the entire body of positive law on the basis of natural law.[58]

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[54] This similarity had already been emphasized by Leibniz in *On Perplexing Cases*, II, through a reference to Weigel's *Analysis Aristotelica*.

[55] See Sect. 2 above.

[56] As specified in table ℵ of § 3 of *De arte combinatoria* (A VI/1 174, L 79).

The Jurist's Compass: Leibniz's Doctrine of Natural Law

Until that time, the *Nova methodus* represented Leibniz's most comprehensive attempt at resting the law on a firm rational footing and providing jurisprudence with a "solid method" (A VI/1 300) by which all legal matters could be derived from a set of basic elements. But it would be wrong to see in that work an essentially foundationalist endeavour. As a plan for legal education, Leibniz's "new method" was primarily aimed at training the ideal or "perfect" lawyer by

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[57] The missing case had in fact been already detected by the twelfth-century Italian jurist Johannes Bassianus using a simple listing of the possible cases (Berkowitz 2005: 37). Boucher sees Leibniz's example as possibly leading to "a kind of reductionism" (Boucher 2008: 237–38). Indeed, Leibniz's method is highly significant as the first attempt to use a combinatorial technique for identifying gaps in the law (consider in this regard the use that in recent decades has been made of similar ideas in legal theory and in the development of artificial intelligence and law). However, when in the *Nova methodus* Leibniz mentions the legal application of his combinatorial art, it is not this example that comes up but another one (see note 59 below).

[58] In a letter to Hobbes of July 1670 (A II/1 56, L 106), Leibniz mentions "a work on rational jurisprudence on which I am collaborating with a friend." In the same letter he also remarks that his early attempts were prompted by his having "realized that a large part of [the solutions provided by the Roman jurisconsults] were arrived at almost entirely by demonstration from the law of nature alone". He traces his first attempts back to *De arte combinatoria*: "When I first set my feet in the paths of jurisprudence, therefore, I began 4 years ago to work out a plan for compiling in the fewest words possible the elements of the law contained in the Roman Corpus (in the manner of the old Perpetual Edict), so that one could, so to speak, finally demonstrate from them its universal laws". Interestingly, Leibniz recognizes here the difficulty of the task, but he does not set that difficulty to the limitations of the combinatorial method. He instead offers this explanation: "There are many laws which will prove refractory to this method, especially in the Imperial Rescripts, because they do not belong to natural law." In spite of this, Leibniz optimistically concludes that "these [laws] are clearly discernible among the rest and will be counterbalanced by the multitude of the others – especially since I venture to assert that half of the Roman law is mere natural law" (A II/1 57, L 106; an analogous statement is found in Leibniz's letter to van Velthuysen of 6/16 April 1670, A II/1 40). As we will see, only shortly after the Mainz period will Leibniz explicitly acknowledge the difficulties of applying his combinatorial method to jurisprudence. On Leibniz's work in the Mainz period and the developments beyond it see Sect. 7, and note 80 in particular.