

Carlsbad 1819

Like another Chouannerie

The Bifurcation Point of the Liberal Jurists

August 6, 2017 by Nulle Terre Sans Seigneur

As I was reading a book on an episode in Bulgarian history known in Marxist historiography as the “White Terror” (1923-25) — in truth a rather restrained and ad hoc reaction to an attempted communist uprising in September 1923, I was struck by a reference to one of Johann Caspar Bluntschli’s tomes. The book was written by law students, so evidently the legacy of this Swiss transitional figure lives on in Slavic lands. Bluntschli was the premier moderate of his times. “I’m not one of these reactionaries like K.L. von Haller and F.J. Stahl! But I also ain’t no commie...” Woodrow Wilson liked him, too.

People associate the phrase “end of history” in reference to liberal democracy with Fukuyama, but Bluntschli said it much earlier in *Theory of the State* (in more conventional Whiggish fashion, he was talking about constitutional monarchy, though with the same implication): “[It is] the end of a history of more than a thousand years, the completion of the Romano-Germanic political life, the true political civilization of Europe.”

Bluntschli may have been liberal, but he sure as hell was no radical. Much in the same way that Hubert Humphrey was an anti-communist. After all, Sen. Humphrey was chairman of the Americans for Democratic Action... an organization growing out of then Socialist Party member Reinhold Niebuhr’s grand liberal front, the UDA, and in conjunction with advocates of the Lend-Lease acts like the CDAAA. “Appeasement is treason to democracy,” they spoke like loyal comrades. But still, Humphrey was an anti-communist. *Who is an anti-communist, I decide! Bitch.*

Still, Bluntschli’s anti-radical credentials are far less spotty than Sen. Humphrey’s, all things considered. His testimony on the early communist movement in Switzerland will be consulted later.

Bluntschli had a cordial relationship with a certain Francis Lieber. Yes, of Lieber Code fame — widely regarded as the precursor to the Geneva Conventions, although it was still characteristically (and from a purely military standpoint, understandably) harsh on the Confederates. Rights don’t belong to no goddamned *racists*.

Lieber knew what he was talking about. So in Chapter VI of *On Civil Liberty and Self-Government* (1853), he writes (http://oll.libertyfund.org/titles/1943#lf1382_label_099) of the national character of liberty:

It is impossible to imagine liberty in its fulness, if the people as a totality, the country, the nation, whatever name may be preferred, or its government, is not independent of foreign interference. The country must have what the Greeks called autonomy. This implies that the country must have the right, and, of course, the power, of establishing that government which it considers best, unexposed to interference from without or pressure from above. **No foreigner must dictate; no extra-governmental principle, no divine right or “principle of legitimacy,” must act in the choice and foundation of the government; no claim superior to that of the people’s, that is, superior to national sovereignty, must be allowed.**

No damned “legitimacy” or higher or divine principle outside the confines of the positive constitution itself can be allowed to reign if *liberty* is to prevail. Liberty or licentiousness? Whatever the case, one thing is certain – hang the pope from a fucking rope:

It is one of the reasons why a broadcast liberty and national development was so difficult in the middle ages, that the pope, in the times of his highest power, could interfere with the autonomy of states. I do not discuss here whether this was not salutary at times. Gregory VII. was a great, and, possibly, a necessary man; but where civil liberty is the object, as it is now with civilized nations, this medieval interference of the pope would be an abridgment of it, just as much as the Austrian or French influence in the States of the Church is an abridgment of their independence at present.

Thankfully, with the advent of “Anglican liberty” as Lieber calls it, the long shadow of the Dark Ages has passed into the age of civil liberty and national development. National development being handing over princely estates to a bunch of ethno-Jacobin mobs raising hell after deliberating in their Masonic lodges. If it doesn’t work the first time, you’ll be given plenty more. Get shot in the hip, have your wounds treated immediately, get amnesty and a pat on the back, and try again later. (https://en.wikipedia.org/wiki/Battle_of_Aspromonte).

Where our Bluntschli comes into play, is his praise of Lieber in an introduction to his collected works. It’s also valuable in that Bluntschli ends up summarizing the purpose of his work, too. As he puts it (<https://archive.org/stream/miscellaneouswri02lieb#page/8/mode/2up>), German jurisprudence was caught in a brawl between two factions: the daydreaming airheads of the “philosophical school,” (right-Hegelians, etc.) and the outmoded curmudgeons of the “historical school” (represented foremost by none other than Sauvigny). Lieber overcame this dichotomy to yield the great synthesis of proper *Liberalism* (which isn’t Rousseauism, good heavens!) Bluntschli is really talking about himself here, of course.

Define political modernity in one word! Tough one, isn’t it? But I think I have a tentative answer: *Rechtsstaat*.

Many people have tried to escape its confines, but they just can’t. Our great right-wing extremist commentators always end up defaulting back to a vacuous “citizenism” a la Steve Sailer. Civil society, equality before the law, representation, statutory law — these spooks will not stop haunting them, these wheels on man’s head.

Many people believe they have transcended such LIEBRUHL dogmas as civic equality by espousing restrictive covenants and various schemes involving segregation and exclusion based on ethnicity.

Quick, guess who wrote these lines:

The Negro leaders agree with W. E. B. DuBois that they are seeking for the members of their race “full economic, political and social equality with American citizens, in thought, expression and action, with no discrimination based on race or color.” Concerning the first two demands, there is not so much dispute.

All American citizens are entitled to economic equality; every man, white or black, is entitled to a job and to a wage sufficient to support himself and his family. A unified effort should be made to further the economic advancement of the Negro race in this country.

[...]

No one questions the fact that Negroes have the constitutional right to qualify as electors. Even in the South where Negroes heretofore did not vote in the white Democratic primaries, there was nothing to prevent them from voting in the general elections, and many of them did vote if they were qualified under the laws of their respective states. Whenever and wherever he can comply with the qualifications for voting as prescribed by the state in which he lives, the Negro should be permitted to vote.

None other than (<https://archive.org/stream/TakeYourChoice#page/n79/mode/2up>). Sen. Theodore G. Bilbo, the maverick segregationist himself.

The great defender of Jim Crow has spoken: there is “not so much dispute” that negroes are entitled to political and economic equality. But it’s that there *social equality* which is completely unacceptable! Booker T. Washington was a great man, no doubt, but Du Bois is going too far!

Not particularly convincing. But what could have Bilbo said? He was a patriotic American, not some heartless Old World Junker.

By 1946, the time to be a Southern Fire-Eater had passed. And so the respectable Jim Crow advocate, if he were to remain a patriotic American, had little choice but to dilute his case to the point of de facto concession. Franz Boas’ cultural relativism is much more befitting the republican mythos of the self-made man than any stark hereditarianism of Madison Grant where, if you ain’t got that dolichocephalic skull, you might as well head on to the latifundia.

Segregation is not so much a way of subverting civic equality as it is of inflating its worth. Like a cartel burning down coffee plants, the point is to make the remaining stock that much more valuable in its scarcity. Order for the blacks, anarchy for the whites. Indeed, the architects of such schemes do not consider uppity whites to even be a problem at all. A grave error. (https://en.wikipedia.org/wiki/Hambach_Festival).

Herbert Baxter Adams wrote (<https://archive.org/stream/bluntschlislife00adamgoog#page/n22/mode/2up>):

[Bluntschli’s] comforting thought for the German people, in their parliamentary quarrels, is that the fundamental idea of the German Constitution — a good civil service — is by no means a low stage of development in the life of the modern state. On the contrary, it perhaps stands nearer the highest ideal of state-life than does the party-government of an English Parliament, however noble.

But... back to the question of “historical” and “philosophical” schools of jurisprudence that Bluntschli raised. Might explain some of that “highest ideal of state-life.”

Hegel is quite clear on one thing: Germany must become a state. The time of petty corporatism each inhabiting their own *rechtskreise* (sphere of law) has to finally end. Germany needs a Theseus to unite the many imperial estates into a synoecism, like the making of the Athenian villages into a polis.

The concrete mechanism Hegel proposes for unification is actually quite underwhelming. He wants to mediatize all principalities such that all states of the Reich become imperial immediacies. This entails creating a standing army in the process. But in fact, this has major significance to Hegel, since it means achieving modern *representation*. And how he speaks of it

(<https://www.marxists.org/reference/archive/hegel/works/gc/ch02.htm#s6>):

This system of representation is the system of all modern European states. It did not exist in the forests of Germania, but it did emerge from them; it marks an epoch in world history. The continuum [Zusammenhang] of world culture [Bildung] has led the human race from oriental despotism to a republic which ruled the world and then, through the decay of this republic, to the present mean between the two extremes; and the Germans are the people from whom this universal shape [Gestalt] of the world spirit was born.

Unfortunately, the goddamned krauts refuse to get in line with the new epoch of world history. Well, as of 1802. The Margrave of Brandenburg (i.e. the Hohenzollern King of Prussia) would end up changing this, steadily and surely. Hegel even complains of how Prussian interests are held back by the Reich: “An Emperor of modern times is thus identified with Charlemagne as Emperor to such an extent that he even wears the latter’s own clothes. Even if the Margrave of Brandenburg now has an army of 200,000 troops, his relationship to the German Empire does not seem to have changed since he had fewer than 2,000 regular soldiers in his pay, for the Brandenburg envoy still presents the Emperor with oats at his coronation, just as he did in the past.”

That it boiled down to the Habsburgs against the Hohenzollerns is noted: “The fate of the German estates lies directly between the politics of two great powers. These two powers are now equal inasmuch as their relationship with Germany is primarily a political one — more so in the case of Prussia than in that of Austria, because the latter carries with it the Imperial crown and has consequently been hampered since ancient times by the pressure of an infinite number of rights.”

Four years later, it no longer would carry that crown. Sixty-four years later, it would be neutralized entirely.

Hegel is quite concerned with the issue of how to square the existing German non-state (but a “mass of independent states,” as he calls it) with a hypothetical future unified jurisdiction.

For analytical purposes, he simply declares: “IT’S REAL IN MY MIND, GOY!”

Like so:

Thus, if the problem of how Germany can simultaneously be a state and not be a state is to be solved, it must, in so far as it is a state, exist only as a state in thought [Gedankenstaat], while its non-existence must possess the reality. Now if the state in thought is to have being for itself, the judicial authority which is to overcome [aufheben] the contradiction and apply to actuality what was merely thought, thereby realising it and making actuality correspond to it, must be so constituted that even its application remains merely a thought. Thus, those universal orders [Ordnungen] which might transform the country into a state would be paralysed in their transition to reality; and although this transition would itself be posited and decreed — for such arrangements have no meaning unless they are meant to be executed — the act of transition would also be turned into a work of thought [Gedankending].

Now, this figment of the imagination (the “state-in-thought”) is a necessary construct because of what Hegel understands as an act emanating from a political authority (which Germany evidently lacks):

An act which emanates from the political authority is a universal act, and by virtue of its true universality, it also bears the rule of its application within itself. What it refers to is universal and identical with itself. The act of the political authority imparts a free and universal determinacy, and its execution is at the same time its application. Since no distinctions can be made in what it applies to, its application must be defined in the act itself, and no refractory or disparate material offers resistance in its application.

A free and universal determinacy! No more lords holding jurisdictional powers. This means any subordinates are mere delegates, and hence subject to the doctrine of *delegata potestas non potest delegari*, flattening our beautiful feudalism. All of the franchises like fiscal immunities and baronial courts are also gone. Alas.

On the other hand, from the “historical school,” we have Savigny, arguing for a multiplicity of legal codes (<https://books.google.com/books?pg=PA57&id=JyukCY8Rbz0C#v=onepage&q&f=false>), based the *Volksgeist* of the jurisdiction in question. Here he is replying to Anton Thibaut’s proposal for such a unification, in an 1814 pamphlet (transl. 1831):

In the second place, the great diversity of the provincial laws is complained of; and this complaint is not confined to the differences between different German states; for often, even in the same country, provinces and towns have systems peculiar to themselves. That the administration of justice is impaired and intercourse impeded by this diversity, has been often asserted; but experience is silent upon the point, and the true ground is probably different. It is to be found in the indescribable power, which the bare idea of uniformity has so long exercised in all directions throughout Europe; a power, the abuse of which we were formerly cautioned against by Montesquieu. It is well worth the trouble to take a closer view of this uniformity in this particular application.

The most important argument urged in favour of the uniformity of the law, is, that our love for our common country is enhanced by it, but weakened by a multiplicity of particular laws. If this supposition be well founded, every German of good feeling will wish that Germany may have throughout the same system of law. But this very supposition is now the subject of discussion.

The well-being of every organic being, (consequently of states,) depends on the maintenance of an equipoise between the whole and its parts — on each having its due. For a citizen, a town, a province to forget the state to which they belong, is a very common phenomenon, and every one will regard this as an unnatural and morbid state of things. But for this very reason a lively affection for the whole can only proceed from the thorough participation in all particular relations; and he only who takes good care of his own family, will be a truly good citizen. It is, therefore, an error to suppose that the common weal would gain new life by the annihilation of all individual relations. Were it possible to generate a peculiar corporate spirit in every class, every town, nay, every village, the common weal would gain new strength from this heightened and multiplied individuality. When, therefore, the influence of law on the love of country, is the question, the particular laws of particular provinces and states are not to be regarded as obstacles. In this point of view, the law merits praise, in so far as it falls in, or is adapted to fall in, with the feelings and consciousness of the people; blame, if, like an uncongenial and arbitrary thing, it leaves the people without participation. That, however, will be oftener and more easily the case with the distinct systems of particular districts, although it certainly is not every municipal law that will be truly popular.

Indeed, for this political end, no state of law appears more favourable than that which was formerly general in Germany: great variety and individuality in particulars, but with the common law for the general foundation, constantly reminding all the Germanic nations of their indissoluble unity. The most pernicious, however, in this point of view, is the light and capricious alteration of law; and even were uniformity and fitness attainable by change, the advantage would not be worth naming in comparison with the political disadvantage just alluded to.

In Hegel's scheme, everyone is a tenant in capite to the Emperor and represented through an intermediary diet. In Sauvigny's scheme, the many corporations one is a part of successively stack up to the Emperor.

Sauvigny goes into detail on the dangers of jurists aprioristically deducing law from a mere intuition of *Naturrecht* by eviscerating the Code Napoleon (pp.70-100), in particular. Despite being an infamous Roman law fanboy, he does not like the Code Napoleon one bit.

Now before we take a peak as to Bluntschli's synthesis, let's first confirm that his pinko-hunting credentials are in shape. In 1843, the canton of Zurich commissioned him to write a report on the activities and ideas of Wilhelm Weitling, one of the most noted commies of his time. Hilariously enough, the report may have unintentionally ended up serving as a manifesto of communist beliefs, which reportedly led to Moses Hess sending a sardonic letter of gratitude to Bluntschli.

Much of the pamphlet is compilation of source documents with sporadic commentary. But early on when he briefly draws some remarks (<https://books.google.com/books?pg=PA13&id=3vT4-43redYC>), on the communist project, it is clear that he appeals to the futility of communism on the basis of a principle of individuation. That “men are equal as men” and that everyone regardless of income and status demands an “equal right to exist” on the basis of “full and effective protection,” he does not deny. Nonetheless, men are unequal on an individual basis in terms of cognitive abilities and a host of other attributes.

This is the standard anti-pinko argument, isn't it? It is, and it's weak. One can retort that a community of all property will amplify the abilities of the gifted (perhaps by liberating them from the “alienation of the product of their labor,” or by ending periodic crises based on alleged “dialectical contradictions” in the process of production, or by enabling production-for-use only, etc.) even as it has no tangible benefit to the lower classes, still making it a Pareto improvement. Communism, dear comrade, is the arc of history bending forward *in the same way that constitutional monarchy is*.

For Bluntschli himself does not at all deny the primitivity of estate, as compared to the *wisdom* of modern classes (TOTS, p.155):

Classes start with the State and end in it: while Estates have their basis outside the State. Classes presuppose the unity of the nation, Estates ignore it. Classes are a political institution based on national unity and public law, Estates are groups formed on the basis of individual and private rights, and their object is not exclusively or primarily political. The Clergy put the Church before the State: the Nobility think first of themselves and their own social interests, the Citizen lives for his business, the Peasant for his husbandry. Thus in the Estates we see the bond of common education and common way of life: the division between the groups is a professional one, while the State is only indirectly considered.

Shame on the egoist Estates who think only of their private rights! It is only in the divisions of freemen on basis of class: governing, aristocratic, middle and working (in his schema), that men become a *common weal* pursuing the general interest.

Well then, is it not the same with the allodial holder holding seisin of immovable property? We need communism so that everyone gets efficiently and justly apportioned his rightful share of the usufruct (by the governing class, who, Bluntschli notes, “form the apex of the State” and that “the People are its base”), thus approximating a *general interest*.

Bluntschli reiterates this (TOTS, p.415) like so: “The functions of public service are determined by the State, and have a public and organic character. The office exists only for the State, and not for the individual who holds it. It cannot therefore become the property of a private person, nor as such become an object of private trafficking. Where anything of the sort happens, as in the middle ages, and in France even in later times, the State has not escaped from the limits of private law, and has not yet attained a full consciousness of its political existence.”

If such offices become hereditary estates, they are reduced to mere *seigniories*, which he says “destroy the unity and order of the State.”

And this was his beef with Hegel. Hegel did not extend the theory of state-as-organism far enough. Bluntschli was not a social contract theorist, but he did believe that the end goal of governing was to actualize the general will. This entails the destruction of the *esprit de corps* in favor of a autistically

legalistic and constitutionalist attitude. As for history, well, it serves the purpose of legitimizing this great victory.

The liberal bifurcation point, then, in a nutshell: the conversion of the many differences in status (villeinage, sokemanry, freemanry, etc.) and legal obligations into that of only one set of legal obligations but the differences of status intact, though rearranged to face only one center point. Note that liberalism is a highly degenerated subset of feudalism: the differences in status go on to be determined on the basis of the productive capabilities of the estates alone (which are all freeholds in fee simple), with no difference in legal rights and obligations. But this “legal equality” is nothing more than a sleight of hand where everyone is promoted to a tenant-in-chief of the Emperor (now a “civic bond”), such that everyone is made a public servant by definition. It is not that any actual “general interest” comes out of any this, but rather that the laws of real property are manipulated to *forcefully* incorporate the entire realm into one circle.

Bluntschli says as much in (TOTS, p.266):

For example, the State can secure to all men equally the possession of a corporeal thing, which we call property, but it must leave to the individual the disposal and management of this property. The property of Paganini in his violin, of Liszt in his pianoforte, or of Kaulbach in his crayons, is a wholly different thing from the property of an unskilled person in those instruments. With this more subtle form of ownership the State has nothing to do, because it is individual and not common.

The individual is given the free right to dispose of the legal categories *that have been designated in advance as common*. You can work for wages, because here obtains the equality condition that defines the category of “property.” You cannot, however, make your own person a villein in exchange for an entire domestic security beyond only wages, for this violates the equality condition intrinsic to the liberal definition of property. It means setting up an estate-relation and not only a class-relation, which is unacceptable because it introduces a corporate interest inimical to the legal unity of the state. *Down with the Slave Power!*

And so, in (TOTS p.156), Bluntschli reveals the entire formula:

The Governing Class form the apex of the State, the People are its base: The energy and solid strength of a nation depend mainly on healthy relations between these two classes. The two intermediate classes [Aristocracy and Middle Class] complete, while they limit the action of the first class: modifying it with the influencess of aristocracy and representative democracy. Their higher education and more favoured social conditions give them the capacity, as their lofty feeling for law and freedom prompt them, to watch over the conditions of the general national welfare. They are the natural guardians, leaders, and representatives of the lowest and largest class [the People].

To stare into the face of liberalism, simply consult the [United Nations World Public Sector Report](https://publicadministration.un.org/en/Research/World-Public-Sector-Reports). (<https://publicadministration.un.org/en/Research/World-Public-Sector-Reports>).

We’re no commies. We just want to run the world like it’s a post office! Why is that too much to ask for?

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11 thoughts on “The Bifurcation Point of the Liberal Jurists”

1. Michael Rothblatt says:

August 6, 2017 at 9:22 pm

I don't understand why liberals were opposed to private law. For mandating equality before the law the excuse was to protect people from each other, but instead it guaranteed totalitarian State, for there is always some perceived "inequities" (proving that liberty and equality are incompatible). Besides, if one's State-mandated "inalienable rights" protect one from his social structure is then there such a structure, i.e. if State "protects" children from parents, and wife from husband can there be family? Does not family in that case degenerate into merely roommates? Or if village is not allowed enforcement over its villagers, is there really a village? Does not village in that case degenerate into merely housing?

Incidentally if USA were made an actual aristocratic republic, with noble houses, state religion and all, instead of an incomplete democracy with "all men created equal", things might have actually worked out well (like they did for maritime republics). Unfortunately, the framers were allergic to such things...

Reply2. quaslacrimas says:August 7, 2017 at 4:19 pm

"Whatever the case, one thing is certain – hang the pope from a fucking rope

~t. Nigel"

You don't mind if I quote you on that, do you? (Glad to see you've come around)

It's much easier to sympathize with Hegel's view on the structure of Germany after reading Leibniz's pathetic, sniveling apologetics for Imperial incompetence in the face of French unity and strength.

Reply◦ Nulle Terre Sans Seigneur says:August 7, 2017 at 7:52 pm

Don't you dare besmirch my loyal ultramontanist name.

Oh, that 1802 essay on the German constitution has to be the clearest work Hegel has ever written. David Stove would have been relieved. And, of course, the thesis that the Holy Roman Empire was an outmoded relic that had to be superseded was the dominant one during the 19th century, for better or worse.

Reply◦ quaslacrimas says:August 8, 2017 at 3:17 am

No, it is *not* particularly clear – as an essay, that is – and, to be frank, I think it is entirely intentional that neither he nor his executors saw fit to publish it. But when you compare it to the pathetic apologies for the maiestas of the Emperor, the general drift of Hegel's position in 1802 becomes sparkling-clear.

Reply

3. KamaelSH says:

August 9, 2017 at 12:48 pm

May what text on the bulgarian white terror you were reading?

Reply.

o Nulle Terre Sans Seigneur says:

August 9, 2017 at 12:58 pm

“Three Epochs of State Repression” by Hristo Hristov and Hristo Petrov (published 2016).

Reply.

4. KamaelSH says:

August 9, 2017 at 1:57 pm

Thanks for the fast answer. You’ve learned bulgarian or are a native speaker?

Reply.

o Nulle Terre Sans Seigneur says:

August 9, 2017 at 3:10 pm

Native speaker, fam. Proudly celebrating the great victory every 9th of September.

Reply.

o Michael Rothblatt says:

August 9, 2017 at 6:17 pm

Would you shoot me an e-mail? I have a few question about Bulgaria. Here in Serbia there’s a complete and total ignorance (which I am ashamed to admit to unfortunately share) of all things Bulgarian, and despite the past warfare between the two countries there is not even any animosity. In Serbia it’s simply as if Bulgaria doesn’t exist! Sure we’re aware it exists, but that’s about the extent of it.

Reply.

5. marcusmontisursinensis says:

August 9, 2017 at 10:15 pm

An extremely important topic: estates versus classes and the fact that different people may be subjected to different paragraphs of the law (or an entirely different law in case of the clergy), based on different obligations pertaining to different Estates.

The horror and the rage of the so-called intellectuals, poor scribes without power, working for the Majesties, driven by jealousy concealed as love!

Considering the Holy Roman Empire, what do you (Nulle Terre Sans Seigneur) think of Prince-Bishoprics around the end of the 18th century. Would the old Catholic-vs-Protestant dispute and the fact that Prince-Bishoprics in the Protestant territory were secularized 200 years before contribute to the generally negative opinion? Of course, it was nice for the Habsburgs themselves to get Salzburg, Trent and Brixen, or the Wittelsbachs to get Freising and Berchtesgaden.

Reply.

6. Hristo Petrov says:

October 1, 2017 at 10:15 am

Hello, friends! I am Hristo Petrov, one of the authors of the above mentioned book “White Terror 1923-1925”. Please, feel free to discuss anything about the topic with me at hr.petrov@mail.bg. Best regards!

Reply.

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