Spinoza's law

The epicurean definition of the law in the *Theological Political Treatise*

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In the first few pages of chapter 4 of his *Theological Political Treatise* (1670), Spinoza defines his conception of the law.[1] In fact, he defines the law twice, first in terms of compulsion or necessity and then in terms of use. I would like to investigate here these definitions, in particular the second one, as it is Spinoza's preferred one. The difficulty with understanding this definition is that it contains an expression, *ratio vivendi*, that is repeated several times in the first few pages of chapter 4, but, unless it is taken as a technical term referring to law as use, it is easy to mistake it as a casual expression that might mean different things each time. As a result, it is indispensable to turn to the Latin text to unlock the technical meaning of *ratio vivendi*.

This holds a few surprises. First, there is a historical surprise. Spinoza's definition of the law according to its use is typical of the epicurean understanding of the law. This suggests that his account of the law is aligned with the epicurean tradition.[2] Moreover, it raises the question of why this epicurean conception of legality has not been noted in jurisprudence. Second, Spinoza's conception of the law has the potential to make an intervention in contemporary definitions of legality, since it avoids both decisionism and positivism. Law defined as use can allow neither of exceptionalism nor of a conception of unalloyed legality that remains immune from social and political influences.

An important inference will follow these considerations: when law is determined through its use, any law is invalidated or delegitimated by the mere fact that it does not contribute to the well-being of the community. This has a radical political potential that I will touch upon by way of conclusion. Spinoza's epicurean conception of the law will turn out to be of contemporary political relevance.

The two definitions of the law

The opening couple of sentences of chapter 4 of the *Theological Political Treatise* define the law in the course of drawing a distinction between divine and human law:

> The word law, taken in its absolute sense [*legis nomen absolute*], means that according to which each individual thing – either all in general or those of the same kind – acts in one and the same fixed and determinate manner, this manner depending either on Nature's necessity or on human will. A law which depends on Nature's necessity is one which necessarily follows from the very nature of the thing, that is, its definition; a law which depends on human will, and which could more properly be termed a statute [*jus*], is one which men ordain for themselves and for others with view to making life more secure and more convenient [*ad tutius, et commodius vivendum*]. (48/57)

It is striking what is elided in this distinction. Specifically, it does not say that the source or origin of divine law is revelation and that of human law is legitimacy or the sovereign as the one who has the authority to legislate. The two traditional sources of legality – a transcendent authority or the model of command and obedience – are absent from this definition.

The reason for these omissions is that these traditional avenues of approaching the law are not open to Spinoza. Revelation, according to chapter 1 of the *Theological Political Treatise*, is a communication with God that is mediated through the prophets' interpretation, which

makes it a human construct. And the command and obedience model cannot account for divine law, since God or nature is understood in strictly impersonal terms by Spinoza. Instead of the traditional routes of approaching legality, Spinoza has recourse to a qualitative distinction between the absolute necessity of divine or natural law, and the dependence of human law on the will of a polity to preserve itself.

The evasion of the traditional way of understanding legality may solve Spinoza's problem of making legality fit his understanding of revelation, but it creates another, serious problem. The qualitative distinction between necessity and will may be challenged on the grounds that the human will cannot be separated in reality from the necessity of nature. What we will and do forms part of the concatenation of causes and effects that constitute the totality of nature – a point forcefully argued for in Part I of the *Ethics*.

To bypass this further problem, Spinoza concedes that it appears as if we are using the word 'law' as it applies to nature '*per translationem*', as a figure of speech or as a translation, of what is commonly understood by law, namely human law (49/58). The suggestion is that a more rigorous (*particularius*) definition of the law is required, which Spinoza promptly supplies: 'law should be defined … as a logic of living [*ratio vivendi*] that one prescribes to oneself or to others for some end [*finem*]' (49/58). The most notable feature of this more rigorous definition is the supposition of the use of instrumental reasoning as a defining feature of the law. The law concerns a certain rationality in how we conduct our lives, which is concerned with calculating the ends of our actions.

Alas, this second definition also creates more problems than it appears to solve. In particular, both the expression 'ratio vivendi' and the idea of the 'end' (*finis*) are problematic. What do they refer to? How can we understand the law as a logic of living irrespective of statute and political authority? And how can we reconcile the reference to ends here given Spinoza's fierce rejection of teleology in the appendix to Part I of the *Ethics*? In other words, for an understanding of Spinoza's second, rigorous definition of the law, we need to unravel how it is possible to understand law as broader than legitimacy as well as how law is related to means and ends relations.[3]

I will take these two issues in turn by focusing on the terms *ratio vivendi* and *finis* from the definition of the law. I will concentrate on the first few pages of chapter 4 of the *Theological Political Treatise*, because it is here that Spinoza specifically focuses on the definition of the law. It is worth reading the opening of chapter 4 very carefully, something which has rarely been done before.

Ratio vivendi: law and living

The term *ratio vivendi* in Spinoza's definition of the law is unusual: 'law should be defined … as a logic of living [*ratio vivendi*] that one prescribes to oneself or to others for some end' (49/58). This expression is not uncommon in the *Theological Political Treatise* – for instance, we find it in the title of chapter 13. But its critical use in the definition of the law is unusual.[4]

There are three distinct meanings of *ratio*: 1) it can be rationality or logic, as a translation of the Greek *logos*; 2) *ratio* can also mean proportion, just as in the English ratio; and, 3) it can mean rule or regulation. In fact, the second and third meaning are derivative of the first one: proportion is a kind of mathematical logic and rule is the application of rationality.[5]

Let us look next at how the expression *ratio vivendi* is translated in the major English editions. Shirley translates *ratio vivendi* as 'a rule of life'. Curley translates it as 'a principle of living'.[6] And Israel's edition renders it as 'a rule for living'.[7] These translations, even if they seem similar, in fact suggest significantly different meanings to the predicate of the law. Shirley's translation suggests that *ratio* refers to some externally imposed prescription; Curley's that it denotes a universal principle; and Israel's that *ratio* is more like an instruction for the conduct of one's life. Thus, all these renditions of *ratio vivendi* translate it in such a way as to make it amenable only to human, not to divine law – even though Spinoza provides a second definition that is meant to cover both.

The reason that these translations fail to include divine law in the second definition is that none of these translations entertains the possibility that *ratio* refers here to rationality, which is the primary meaning of *ratio* – and which is precisely the meaning I am trying to convey with my translation as 'logic of living'. The effect of not rendering *ratio vivendi* in such a way as to capture the idea that there is a *logic* to living, or that thought and life – mind and body – are intertwined, is to obscure an idea that is critical for Spinoza, namely, that there is no

outside to the law. If the law is a *ratio vivendi* indicating that there is no life without thought, then *ratio vivendi* is a property not only of the law but also of human nature. What could this strange idea entail?

If we look for other uses of *ratio vivendi* in chapter 4, we note that the term and its cognates appears no less than nine times in the three opening pages of chapter 4, from 58 to 60 in the Gebhardt edition. Let us examine them in sequence:

1) The first use of the term occurs at the beginning where Spinoza asserts the distinction between divine and human law. Spinoza highlights the necessity of divine or natural law. Humans have no capacity to break or disobey divine law – nor do they have a say in how it operates. This is not the case with human law. 'The fact that people give up, or are compelled to give up, their natural right and bind themselves to live under certain *rationi vivendi*, depends on human will' (48/58). *Ratio vivendi* refers specifically to human law or specific statutes – notice the plural. It signifies the living arrangements that allow for the suspension of the law.

Spinoza immediately qualifies this distinction by noting that 'in an absolute sense, all things are determined by the universal laws of Nature' (48), whereby it may appear that a distinction between divine and human law is impossible. And yet, Spinoza insists on this distinction based on the transition from the monism contained in the idea that there is nothing outside the necessity to nature, on the one hand, to the primacy of practical judgment, on the other. Spinoza outlines this move in two steps. First, he argues that human law 'depends especially on the power of the human mind in the following respect, that the human mind, insofar as it is concerned with the perception of truth and falsity', has a capacity which 'can be quite clearly conceived without these human-made laws, whereas it cannot be conceived without Nature's necessary law' (48). This is the point that we learn in Part I of the *Ethics*, namely, that any form of knowledge presupposes a totality or what Spinoza calls substance, God or nature. Second, given that there is no usefulness in tracing every thought or every action back to its original causes, 'in terms of usefulness to life [*ad usum vitae*] it is better, indeed, it is necessary, to consider things as possible [*possibiles*]' (49/58). In other words, the impossibility of knowing the totality requires that we make practical judgments.[8]

So, the first use of *ratio vivendi* refers to human law in so far as it requires the operation of practical judgment as a result of the recognition of nothing existing outside nature or God. We already see that the standard translation of *ratio* as rule in the definition of the law is limited and it would not allow for the relation between monism and practical judgment in the first use of *ratio vivendi* in chapter 4.

2) The second use is in the definition of the law we saw already as the *ratio vivendi* prescribed toward certain ends. I will return to this definition after examining all the remaining uses of *ratio vivendi*.

3) Immediately after the definition of the law, Spinoza qualifies it by observing that such a conception of the law is obvious only to a minority whereas most people fail to perceive it since they '*nihil minus quam ex ratione vivunt*' (49/59). Instead of the participle 'vivendi', Spinoza uses here the indicative of the verb 'vivere', to live. Ratio is also in a prepositional phrase with 'ex' meaning according to. Here, then, Spinoza is referring to people who live with nothing like (*nihil minus*) rationality. Or, more simply, most people live without the capacity to make good practical judgments. In the sentence immediately after the definition, then, *ratio* clearly has the meaning of rationality – not that of rule.

4) Spinoza further explicates what it means for the law when people fail to exercise their *ratio* properly. He argues that since the majority do not understand the real meaning of the law, the legislators devise an expedient measure, namely, rewards for those following the law and punishments for those who do not. Due to this expediency, most people have a wrong understanding of the law as a *ratio vivendi* that is prescribed (*praescribitur*) by a sovereignty exterior to themselves (*ex aliorum imperio*) (49/59). Thus the logic of living of the law comes to be associated with the 'fear of the gallows', that is, with the sovereign prerogative of life and death. This, however, does not make one a 'just [*justus*]' person (49/59) because this conception of the law on the model of command and obedience is nothing but a trick or deception on the part of those who have power. Note that Spinoza does not outright reject this model, since it is still associated with *ratio vivendi*, that is, with a certain rationality concerned with the utility of the community.[9] In other words, Spinoza is not an anti-statist, nor an anarchist. Rather, his position is that political power (*imperium* or

summa potestas) cannot possibly be the precondition of the law. *Ratio vivendi* precedes legitimacy – not the other way round.

5 and 6) All uses up to now seem to suggest that *ratio vivendi* refers to human law. The fifth and sixth uses dispel this impression. Here Spinoza repeats the definition of the law (use 5) as a *ratio vivendi* used for a specific end, but now specifies that this applies both to human and divine law. It is only the end of this *ratio vivendi* that changes. For human law, it is the protection of life and the state (*rempublicam*), whereas for divine law it is the knowledge of God as the only supreme good (*solum summum bonum*) for the human (49/59). If the definition of the law above (in use 2) is consistent with the use here, then we cannot possibly translate *ratio* as rule, since no human rule can lead to the supreme good of Spinoza's divine law.

In other words, if both human and divine law are to be defined on a common basis that refers to instrumentality or utility, then *ratio vivendi* cannot refer to a restriction or a compulsion of living according to specified rules. Rather, for the human and divine law to have a common basis, *ratio* here must refer to rationality concerned with ends. I call this procedure the calculation of utility and I will return to it in the following section. Suffice it to say here that such a calculation may be linked to specific rules, but only to the extent that they are useful, that is, as effects of calculation. This means that for those who do not understand the real meaning of the law, *ratio* may be usefully misunderstood according to the command and obedience model – as we saw above in the fourth use. In other words, the misunderstanding of the law such as to confine it to a model that is applicable only to human law and that relies on command and obedience can still perform a positive function in society – for instance, so as to lead people to obey the law. But this misunderstanding is only an expedient and not definitional of the law. Prior to legitimacy, we have *ratio* as the calculation of utility. Prior to the command model of the law, there is practical judgment.

This priority of practical judgment shows that judgments about the utility of a community precede obedience, in which case no authority has legitimacy from the fact that it enjoys sovereignty. The priority of practical judgment implies that no constituted power is *ipso facto* legitimate, while it allows for the mobilization of utility to contest any notion of authority. It also shows that authority is grounded on how it justifies itself—that is, it uses instrumental rationality to justify its actions so as to construct its legitimacy. In short, *justification precedes legitimation*.[10]

7, 8 and 9) Immediately after specifying that the *ratio vivendi* applies both to human and to divine law, Spinoza goes on to explain in what sense the divine law can be useful. This consists in the perfection of our intelligence (*intellectus*) as the means to secure our utility (*utile*), which is what the supreme good consists in (49–50/59). The supreme good consists in recognizing 'firstly, that without God nothing can be or be conceived, and secondly, that everything can be called into doubt as long as we have no clear and distinct idea of God' (50). In other words, the supreme good consists in the recognition that there is nothing outside God (or monism), which is the precondition for avoiding the distracting and distressing idea that there are deities who can intervene in the course of nature to punish or reward us. Recognition of monism, then, leads to the overcoming of fear and anxiety – it leads to blessedness (*beatitudo*).

Spinoza summarizes his discussion of the supreme good as follows:

> the *ratio vivendi* that has regard to this end [*hunc finem*] [i.e. to the supreme good] can fitly be called the Divine Law. An enquiry as to what these means [*haec media*] are, and what *ratio vivendi* is required for this end [*hic finis*], and the fundamental principles of an optimal commonwealth and the *ratio vivendi* of human relations [*inter homines*] follow from it, belongs to a general treatise on Ethics. (50/60)

Here, the supreme good that is achieved by following the divine law is described in instrumental terms. The means and ends are provided by the *ratio vivendi* that is also responsible for good relations – social, political and ethical – amongst human beings. The supreme good has a *ratio vivendi* understood in terms of instrumentality. It is a living that rationalises conduct according to certain means and ends relations. *Ratio vivendi* as the predicate of both divine and human law can be translated as living under the guidance of calculating our utility or of forming practical judgments.

Spinoza concludes the discussion of the supreme good that can be derived from the *ratio vivendi* by saying that its proper exposition belongs to a treatise on ethics, that is, the *Ethics* whose writing Spinoza suspends in 1665 to compose the *Theological Political Treatise*. If we turn briefly to the discussion of the supreme good in the *Ethics*, we will discover more about its indissoluble relation to *phronesis* or practical knowledge.

In Part IV of the *Ethics* – that is, the part written immediately after the completion of the *Treatise* – Spinoza defines the supreme good (*summum bonum*) in Proposition 36 as follows: 'The greatest good of those who seek virtue is common to all, and can be enjoyed by all equally.' The Demonstration explains that virtue is to 'act according to the guidance of reason', which Spinoza supports with reference to Proposition 24 of Part IV: 'Acting absolutely from virtue is nothing else in us but acting, living, and preserving our being [*agere, vivere, suum esse conservare*] (these three signify the same thing) by the guidance of reason [*ex ductu rationis*], from the foundation of seeking one's own utility [*utile*].' From Propositions 36 and 24, then, we can say that the supreme good is to act, live and preserve oneself through the use of reason or rationality (*ratio*) insofar as *ratio* signifies both the virtue and the utility of human conduct. There is a coupling, then, of rationality and living, but the rationality here is not directed toward adequate ideas that are universally true but toward practical knowledge and the calculation of one's utility. In other words, *ratio* here signifies the kind of instrumental rationality that I designate as the calculation of utility.

But why is this calculation of one's utility 'enjoyed by all equally'? Why does phronesis contributes to sociality? Spinoza addresses this in Proposition 35: 'Only insofar as men live according to the guidance of reason [*ex ductu rationis vivunt*], must they always agree in nature.' The demonstration relies on the principle that what advances the utility of one person contributes to the utility of others given that rationality is common is to all. Consequently, as the second Corollary puts it, 'when each one most seeks one's utility for oneself, then everyone contributes the most to everyone else's utility.' Or, as the Scholium puts it more succinctly, 'man is God to man.'[11] The exercise of the calculation of one's utility is not the same as egoistic self-interest. Rather, a proper exercise of the calculation of utility is a precondition of sociality. We share common ends because the process whereby we arrive at those ends – that is, *ratio* – is common to all. The calculation of utility as a guide to living is common to all. Nobody is excluded from *ratio vivendi*. And this also means – given that *ratio vivendi* is the predicate of the law – nobody is excluded from the law.

If we return now to the definition of the law, how can we understand *ratio vivendi* so as to encompass all the meanings we discovered? We can say that law is a 'logic of living that one prescribes to oneself or to others for some end.' Such a logic of living is a means toward the prosperity of both the individual and the community. This can take two forms that are not mutually exclusive. It can be either the blessedness that arises from monism, or the preservation of individual life and the life of the community that arises from human law. *Ratio vivendi* is, then, irreducible to the logic of authority that appeals to legitimacy so as to demand obedience. This does not mean that it may not be expedient to use authority, but authority relies on something prior to it, namely, this *ratio vivendi*, that can be understood as the calculation of utility. We will in the next section see that this calculation of utility can be understood as *phronesis* in the epicurean tradition in which it is regarded as the highest good for the humans and the cause of all virtues.

Spinoza's definition of the law in terms of the calculation of utility can be articulated as three interconnected

ideas. First, Spinoza defines the law without recourse to a model of command and obedience, that is, the model that links legality with authority and legitimacy. Second, it entails that everyone is subject to the law, since everyone has the capacity to calculate their utility. This capacity is enough to place everyone within legality. Or, Spinoza rejects the possibility that one can find oneself outside the law. Third, if everyone is subject to the law, the account of the genesis of the law no longer requires an ante-legal or extra-legal origin, either in revelation or in some founding violence – that is, it does not require a political theological authority. We can understand the second and more precise definition of the law in chapter 4 of the *Theological Political Treatise* as the co-presence of these three ideas – the rejection of the command and obedience model as definitive of legality, the recognition that no one can be outside the law, and the anti-authoritarian thrust of the previous two positions.

It is worth underscoring that in this definition the calculation of utility contained in *ratio* is about living or *vivendi*. Thus, it is about the preservation of life for the individual and the community. It other words, in the *ratio vivendi* of human law, the calculation of utility encounters the conatus. Spinoza's law is about living and the pursuit of one's most vital ends.

Finem: phronesis and the law

Ivan Sergé notes that Spinoza's conception of the law is incompatible with Jewish, Aristotelian, Platonic and Stoic conceptions of legality.[12] I agree, but would like to add that this is because the definition of the law in terms of its use and utility is distinctively epicurean. It may appear strange to focus on the use and utility of the law in a time where instrumentality is largely seen as a key characteristic of neoliberalism, but we should remember that the means and ends relations were fundamental for a thinking of the ethical and the political for centuries – as for instance just a glance at the title of Cicero's most famous ethical treatise, *De finibus*, testifies.[13] This epicurean conception of the law is also incompatible with two main conceptions of legality that we can find in political philosophy in the last hundred years – namely, legal positivism and decisionism. Let us start with the epicurean connection before we turn to the contrast with the prevailing theories of law.

The connection between utility, use, law and justice is best described in Epicurus's *Principal Doctrines*, a collection of forty maxims or articles describing the key ideas of epicureanism, which are preserved in Diogenes Laertius. Articles 31 to 38 define legality in terms of utility.[14] Thus, article 33 says: 'There is no absolute justice [καθ' ἑαυτὸ δικαιοσύνη] but only a reciprocal agreement in specific places and times to prevent inflicting or suffering harm.'[15] No justice is absolute, and hence no laws are inviolable, because justice consist in calculating within specific circumstances what is good and what is bad. In article 36 Epicurus articulates the same idea in positive terms: 'justice is common to all [κοινὸν πᾶσιν] and it consists in calculating the utility [συμφέρον] that contributes to sociality [πρὸς ἀλλήλους κοινωνία]; thus, depending on particular conditions, justice articulates itself differently.'[16] We see in both of these citations how law and even justice are described in terms of their use and in particular how this use contributes to the utility of the community.

The notions of use and utility need to be further amplified, especially given that epicureanism is often understood as a hedonistic doctrine that identifies pleasure as the end of life – whereby it is often contrasted to Stoicism that emphasizes duty.[17] A closer scrutiny of the epicurean texts, however, contradicts this hedonistic interpretation precisely by emphasising the importance of use and utility that are so important for Epicurus's conception of the law.[18] Besides the law, the calculation of utility in epicureanism is understood as a defining feature of human activity and it is inseparable from pleasure. This is intimated in the *Principal Doctrines*. According to article 5, 'it is impossible to live a life of pleasure without being prudent [φρονίμως], and without conducing oneself ethically and justly' – and, Epicurus immediately adds, vice versa. This idea remains nonetheless undeveloped in the *Principal Doctrines*. From the few surviving texts by Epicurus, the greatest assistance on this connection between use and rationality as calculation of utility or prudence is offered by the letter to Menoeceus.

Let me quote a long passage from Epicurus's letter to Menoeceus to extract some insights that will be useful for our purposes of understanding the epicurean conception of the law:

> When we say, then, that pleasure is the end of action, we do not mean the pleasure of the prodigal or the pleasures

> of sensuality. … It is sober reasoning that calculates the causes of every judgment to do or avoid doing something good or harmful, and banishing those beliefs through which the greatest tumults take possession of the soul. *Of all this the principle and the greatest good is phronesis*. Wherefore phronesis is more significant even than philosophy; *from it spring all the other virtues*, for it teaches that we cannot lead a life of pleasure which is not also a life of usefulness, the good, and justice; nor lead a life of usefulness, the good, and justice, which is not also a life of pleasure. For the virtues have grown together with a pleasant life, and a pleasant life is inseparable from them.[19]

This is not simply a passage that blatantly contradicts the interpretation of epicureanism as hedonism. Additionally, the emphasis on phronesis, or what I also call above the calculation of utility, introduces a number of ideas that are crucial to Spinoza's epicureanism.

The first point to note is the startling predicate to pleasure that Epicurus provides, namely 'sober reasoning'. The word for reasoning here is *logismos*, not logos. If logos is what has come to be understood as Reason, *logismos* in the masculine or *to logistikon* in the neuter is instrumental reasoning – as, for instance, Aristotle makes clear in the opening of Book VI of the *Nicomachean Ethics*. The life of pleasure requires this kind of instrumental thinking that concentrates on means and ends.

A distinctive feature of this instrumental reasoning is that it posits the inseparability of mind and body – it is, as Epicurus says, the absence of pain in the body and of anxiety in the soul.[20] This is the same point raised in article 33 of the *Principal Doctrines* cited above, according to which justice aims to prevent harm. This instrumental reasoning is prominent in all the epicureans of the seventeenth century. For instance, Spinoza puts it as follows in the *Ethics*: 'From the guidance of reason, we pursue [*ex rationis ductu sequemur*] the greater of two goods or the lesser of two evils'.[21] Spinoza immediately explains that this calculative or instrumental reasoning is not confined to the present but also includes the future in its considerations.[22] In any case, the point I am making is that this *logismos* is not abstract or theoretical reasoning but rather a practical kind of reasoning that entrains ends and considers action.

When Epicurus writes that this practical reasoning is more significant than philosophy, he is pointing to a reversal of Aristotle's position. According to Book VI of the *Nicomachean Ethics*, theoretical reason leads to wisdom and virtue more than practical reason. When discussing the priority of theoretical over practical reason in the *Nicomachean Ethics*, Heidegger notes that this is the starting point of metaphysics and onto-theology.[23] We see Epicurus here evading that move. For him, the primary kind of knowledge is practical and it is articulated in the form of judgments that are calculations about pleasure – that is, calculations that combine ratiocination with considerations about the body.

Epicurus designates this practical, instrumental judgment as phronesis. This is the standard Greek name for this practical knowledge that he describes here. What is unusual in Epicurus is that he makes phronesis the precondition of both the good and of virtue. Such a move is indicative of his materialism – of the fact that knowledge is not abstract but rather articulated through its effects and how it impacts on the corporeal order of things. It is the fact that – to use a contemporary formulation – knowledge is power. The suggestion that the good and virtue require phronesis is a bold one. Phronesis is a judgment that arises by assessing – or, calculating – one's given circumstances. Because it is a response to materiality, phronesis can never aspire to a thorough formalisation.

Materiality is contingent and hence unthematisable. Any calculation in relation to materiality is faced with its ineluctable unpredictability. Spinoza is fully cognisant of this point and he embraces its positive potential. As I argue elsewhere, the notion of error is constitutive of his understanding of politics and of history. The seeming deficiency of phronesis – the fact that it has no steadfast rules to prove its validity or that it has to think 'without banisters' – is turned into a positive heuristic principle by Spinoza.[24]

Neither positivism nor decisionism

I have dwelled on this passage from the letter to Menoeceus because it brings to the fore a key idea that is critical for Spinoza's definition of the law, namely, that the law is to be understood in terms of its use, which consists in how it facilitates the people's calculation of their utility or exercise of phronesis.

It is noteworthy that Giorgio Agamben in *The Highest Poverty* identifies a tradition that interrogates the law in terms of its use. This is the tradition of communal use in the Franciscan tradition. There is a key difference, however, from the epicurean tradition that I have designated as the source of Spinoza's conception of legality. For the epicureans, use is definitional of the law. For Agamben, by contrast, the Franciscan conception of use delineates an extra-legal space. For instance, he writes that 'the juridical argumentation is here [that is, in the context of referring to use] bent on opening a space outside the law.'[25] Whereas use pertains to jurisprudence through its exclusion from the law, according to Agamben, use pertains to jurisprudence because it is internal to the law by indicating the limits of legality, according to epicureanism and Spinoza.[26]

Despite this contrast, Agamben's starting principle that 'Western philosophy lacks even the most elementary principles' of what he terms 'a theory of use' is nonetheless sound.[27] We can demonstrate this by comparing two dominant ways in which the law has been conceived in the Western tradition to contrast them briefly with the epicurean conception of the law. First, we can identify legal positivism. I do not want to be distracted here by the various views expressed within this school of jurisprudence, starting with John Austin in the nineteenth century before being further developed by Hans Kelsen in Austria and H.L.A. Hart in England in the following century. I just want to point out one key feature of this tradition, namely, that law needs to be understood as a system that is closed. Thus, Hart in his *The Concept of Law* (1961), which is a sustained attempt to define the law, rejects any view that conflates legal with moral norms, or that does not draw a clear line of separation from social factors.[28] Such a conception of the law as a closed system is incompatible with any definition of the law in terms of living, as in Spinoza's definition in chapter 4 of the *Theological Political Treatise*.

Second, one of the major critics of legal positivism—or more precisely, Kelsen's legal positivism—in the twentieth century was Carl Schmitt, whose influence in political philosophy has been powerful, especially in the last couple of decades. Unlike the positivists, Schmitt holds that the system of law can never be self-sufficient. Thus, he famously defines the sovereign as the one who decides on the exception. The law, according to Schmitt, lacks legitimacy in itself. Instead, the law requires the presence of a sovereign who has the capacity to transcend the law within specific circumstances of emergency.[29] Contra Schmitt, the epicurean conception of law as use rejects any notion of transcendence and it is decidedly anti-authoritarian requiring no recourse to a strong notion of sovereignty.

I have noted legal positivism and decisionism because they seem to form the antinomy upon which current political philosophy thinks the law, namely either as a closed system or as something that requires a strong personal political authority, given the impossibility of codifying every aspect of life. This antinomy is not so much mediated as entirely evaded by the epicurean definition of the law in terms of its use and utility. If the law is a logic of living, then the law is positioned prior to any codification, irrespective of whether that codification is understood as complete or incomplete.

If the epicurean conception of the law avoids the conflict between positivism and decisionism, then why has it not been taken up more vigorously in the theories of jurisprudence? What has it never been *explicitly* articulated? This is a speculative question, and as such it may have several answers, including the historical development of theories of the law, which excludes the epicurean theory. Nonetheless, there is an additional insight that is pertinent and significant, namely, the rad-

ical implication of an understanding of law in terms of use and utility contained in article 38 of the *Principal Doctrines*: 'the laws are just so long as they contribute to the utility of those living in a political community [τῶν συμπολιτευομένων], and when they cease to be expedient they are consequently not just.'[30] The implication here is clear: the legitimacy of the law does not rely on its statutes, nor on a political authority, but rather on the utility of the law for the community. In other words, so long as the law is not useful, it is no longer valid.

The same implication is contained in the definition of the law as having a certain logic of living that is directed toward a certain end. This end is the good and prosperity of the community. According to Spinoza, following the epicurean tradition, the law is invalidated as soon as this end disappears. Let me provide a couple of examples of this point.

In chapter 12 of the *Theological Political Treatise*, Spinoza returns to the divine law to examine in what sense we can say that it is sacred. Consistent with the definition of the law in chapter 4, Spinoza asserts that the sacredness of the divine law consists in its use. One of the illustrations of his point is the Tablets Moses carried when he descended from Mount Sinai the first time only to find the Hebrews venerating the golden calf. According to Spinoza, the Tablets were sacred only to the extent that 'on them was inscribed the Covenant under which the Jews had bound themselves to obey God.' But as soon as they started venerating the golden calf, they chose not to use the 'covenant [*pactum*]', whereby the tablets became useless and thus 'merely stones' (147/161). Use is more important than both revelation and a purported completeness of statute in defining the law. The law requires an end that is to be found within the lived experience of those it affects.

If we turn to chapter 20, Spinoza defends the position that everyone should be allowed to judge freely about matters pertaining to the running of the state as well as to express these judgments, but without acting to oppose the sovereign. He notes, at the same time, that 'nothing is more unbearable [*nihil magis impatienter*]' (226/244) than when people know what they are judging to be true and when they notice that the sovereign ignores this and consistently acts in such a way as to further his self-interest or harm the utility of the polity. For this reason, Spinoza adds, in a democracy people retain 'the authority to abrogate [*auctoritatem … abrogandi*]' (228/245). This kind of authority is the opposite of the sovereign prerogative to decide on the exception. Whereas the sovereign decision reinforces a personal authority that transcends the law, the authority to abrogate is the assertion of the uselessness of certain laws and hence of their relevance to a polity only insofar as they are useful.

What is the use of use?

Let me conclude with a few brief remarks that consider the importance of the epicurean conception of the law according to its use that Spinoza employs in the definition of the law in chapter 4 of the *Theological Political Treatise*. How can such a theory be useful today?

An initial observation concerns how provocative Spinoza's predicate of the law as a *ratio vivendi* appears in a biopolitical era in which the main business of government is to manage life – as opposed to the classical sovereign power that has the right to exercise capital punishment.[31] On the one hand, Spinoza's definition suggests that there is no pure life as such. Living is always imbued with a certain *ratio* – with a certain logic and a determined system of rules. No one can be a 'bare life' that is excluded from legality. On the other hand, this does not need to lead to a despair about how biopower completely controls our lives. To the contrary, it becomes the basis for examining the way that power is exercised because it allows for the repeal of any laws or regulations that are no longer contributing to our utility.

A second point to note is that scholars have noted the function of use in jurisprudence, even if this has not been explicitly thematized. For instance, this is the case in the way that property has been defined in the colonial project. One of the key concepts that justified colonisation was the legal principle of *terra nullius*. The idea was that uncultivated lands, that is, lands that are in 'disuse', are not legally owned and hence they can be claimed by colonial power.[32] As Brenna Bhandar argues, the concept of use was mobilized by colonial authorities to create legal definitions of property that were both racially tinted and justifications of the appropriation of native land.[33] This shows the danger of a principle of use: it can be moulded in such a way as to suit established power – it can be a weapon in the service of 'the right of the strongest'.

At the same time, as Bhandar further argues in *Colo-*

nial Lives of Property, the 'fundamental paradox' of use is that many indigenous land claims also rely on the concept of use.[34] For a native title claim to succeed in a court of law, native people need to demonstrate that they used and continue to make use of their land. The notion of use may be adapted from its native conception to that of the jurisdiction of the court that is designed to defend ownership and the use of land in settler society, but in any case the key term is 'use.' The most famous example of this in Australia is the Mabo ruling that upheld the claim of native title.[35] Significant work has also been done to challenge colonial understandings of the use of land. For instance, Bruce Pascoe's *Dark Emu* shows that, far from being 'uncultivated', Australian aboriginal peoples had sedentary communities that had developed sophisticated systems of agriculture.[36] Again, the challenge to colonialism here consists in employing the concept of use.

A third implication arises at this point. It is possible to mobilise this idea of use as law-defining to determine a number of political concepts that are inseparable from legality. In my book *Sovereignty and its Other*, I define sovereignty, for instance, through the way in which constituted power uses justifications of violence against its 'others', that is, against anyone who is not part of that constituted power.[37] I argue that neither a decisionist conception of sovereignty in terms of the exception to the norm, nor a positivist definition in terms of legal norms, is sufficient to demonstrate the ways in which sovereign power is exercised and how its effects are registered.

Let me be clear: I am not simply advocating that we need to redefine *post factum* law and cognate concepts in terms of use. Rather, I am suggesting that, despite the fact that there has been no *explicit* articulation of the law in terms of use in jurisprudence – as I noted above – *in fact* the law has operated *implicitly* with such a sense of use. The law has been *used* with an eye to use, usefulness and utility, as the examples from the colonial definitions of property or of the sovereign justification of violence demonstrate. Thus, what I am suggesting is a revision that departs from the material use of the law – its 'undercurrent' use as Althusser might have said – instead of its explicitly stated definition or determination. This will lead to a materialist way of understanding the law. Spinoza and the epicureans can be useful allies in such a project.

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Notes

1. All references to Spinoza's *Theological Political Treatise* are to the translation by Samuel Shirley (Indianapolis: Hackett, 2001) cited parenthetically by page number. I have often altered the translation. For the Latin, I have used the *Opera*, ed. Carl Gebhardt (Heidelberg: Carl Winters Universitätsbuchhandlung, 1924). The *Tractatus Theologico-Politicus* is contained in Volume 3. All page references to this edition follow after the English edition. I have used Edwin Curley's translation of the *Ethics* published by Princeton University Press as part of *The Collected Works of Spinoza*, volume 1, ed. and trans. Edwin Curley (Princeton: Princeton U. P., 1985), again often changing the translations.
2. Very little has been written on Spinoza's epicureanism, despite the fact that Spinoza explicitly avows his allegiance to it in Letter 56. For an exception, see Warren Montag, 'Lucretius Hebraizant: Spinoza's: Reading of Ecclesiastes', *European Journal of Philosophy*, 20.1 (2012), 109–29. I have tried to address this lacuna in various writings, but I cannot rehearse here all the arguments. See Dimitris Vardoulakis, *Spinoza, the Epicurean: Authority and Utility in Materialism* (forthcoming in 2020); Vardoulakis, 'Why is Spinoza Epicurean?', *Epoche* (forthcoming in 2019); and Vardoulakis, 'Freedom as Overcoming the Fear of Death: Epicureanism in the Subtitle of Spinoza's *Theological Political Treatise*', *Parrhesia* (forthcoming in 2019).
3. For law as non-commensurable with legitimacy in Spinoza, see Dimitris Vardoulakis, 'Authority and the Law: The Primacy of Justification over Legitimacy in Spinoza', in , *Spinoza's Authority Volume II: Resistance and Power in The Political Treatises*, eds. Kiarina Kordela and Dimitris Vardoulakis (London: Bloomsbury, 2018), 45–66. For teleology, see Filippo del Lucchesse, 'The Mother of All Prejudices: Teleology and Normativity in Spinoza', *Parrhesia* (forthcoming in 2019).
4. It is perhaps the polysemy of 'ratio' that forces all translators to render the expression 'ratio vivendi' in various different ways throughout the *Theological Political Treatise*. I will not trace here all the uses of *ratio vivendi* in the *Treatise* or its translations, not because this would be an arduous or tedious exercise, but rather because the most crucial and most ambiguous use is in chapter 4 – and it is crucial because it is used as the predicate of the law that is, in its turn, linked to authority by virtue of the fact that they both refer to obedience.
5. The edited volume by Beth Lord, *Spinoza's Philosophy of Ratio* (Edinburgh: Edinburgh University Press, 2018) has contributed a lot in identifying the first and second meanings of *ratio* that I identify above, but the third meaning is strangely repressed.

6. Spinoza, *Theological-Political Treatise*, ed. and trans. Edwin Curley, in *The Collected Works of Spinoza*, volume 2 (Princeton: Princeton University Press, 2016), 127.
7. Spinoza, *Theological-Political Treatise*, ed. Jonathan Israel, trans. Michael Silverthorne and Jonathan Israel (Cambridge: Cambridge University Press, 2007), 58.
8. As I outline in detail in *Authority and Utility*, the relation between monism and practical judgment, or phronesis, is a key characteristic of epicureanism and is a recurring theme in Spinoza. I cannot take up this issue in all its complexity here.
9. It is important to not confuse what Spinoza calls utility in the *Theological Political Treatise* and in the *Ethics*, especially Part IV, with various versions of utilitarianism. There are two reasons for this. First, there is a historical reason. The epicurean materialists in modernity hesitate to translate *phronesis*, the epicurean term for practical judgment, as *prudentia*, so as to not be confused with the Stoic and Christian uses of the term. Thus they resort to the term utility instead. Alison Brown has provided significant background to this in *The Return of Lucretius to Renaissance Florence* (Cambridge, MA: Harvard University Press, 2010). Second, the utilitarians, unlike the epicureans, tend to understand utility as something that ought to be calculated correctly and they attempt to construct algorithmic methods to do so. This is not the case in the epicurean tradition that focuses instead on the effects of the calculation of utility irrespective of whether that calculation itself is right or wrong. The only work on this topic that I am aware of is Jean-Marie Guyau's *La Morale d'Épicure et ses rapports avec les doctrines contemporaines* (Paris: Librairie Germer Baillière, 1878). I discuss both of these issues in *Spinoza, the Epicurean*.
10. This precedence of justification is described in detail in my book *Sovereignty and its Other: Toward the Dejustification of Violence* (New York: Fordham University Press, 2013). I return to this point later to show that it is a point where Spinoza's theory of the law differs both from decisionism and legal positivism.
11. There is a long literature examining Spinoza's idea of the mutual utility of the humans. For an astute account, see Hasana Sharp, *Spinoza and the Politics of Renaturalization* (Chicago: University of Chicago Press, 2011), chapter 3.
12. Ivan Sergé, *Spinoza: The Ethics of an Outlaw*, trans. David Broder (London: Bloomsbury, 2017).
13. See also Julia Annas, *The Morality of Happiness* (Oxford: Oxford University Press, 1993).
14. Diogenes Laertius, 'Epicurus', *Lives of Eminent Philosophers*, trans. R.D. Hicks (Cambridge, MA: Harvard University Press, 1931), X.150–153.
15. Diogenes Laertius, 'Epicurus', X.150.
16. Diogenes Laertius, 'Epicurus', X.151.
17. The contrast becomes something of a commonplace. See, e.g., G.W.F. Hegel, 'The Philosophy of the Epicureans', *Lectures on the History of Philosophy*, trans. E. S. Haldane and Frances H. Simson (London: Kegan Paul, 1895), vol. 2, 276–311.
18. See here Jean-Marie Guyau, *La Morale d'Épicure et ses rapports avec les doctrines contemporaines* (Paris: Librairie Germer Baillière, 1878). For a translation of the chapter on Spinoza, as well as an introduction to Guyau's work, see Guyau, 'Spinoza: A Synthesis of Epicureanism and Stoicism', trans. Frederico Testa, *Parrhesia* (forthcoming in 2019).
19. Diogenes Laertius, 'Epicurus', X.131–32 (emphasis added).
20. It is well-known that Spinoza also ascribes to the unity of body and mind. The best exposition of the Spinozan position is Chantal Jaquet, *Affects, Actions and Passions in Spinoza: The Unity of Body and Mind*, trans. Tatiana Reznichenko (Edinburgh, Edinburgh University Press, 2017) – which does not acknowledge the epicurean provenance of this position.
21. Spinoza, *Ethics IV,* 1985, p.65
22. *Ibid*, p.66
23. Martin Heidegger, *Plato's Sophist*, trans. Richard Rojcewicz and Andre Schuwer (Bloomington: Indiana University Press, 1997).
24. For a detailed analysis, see Dimitris Vardoulakis, 'The Figure of Moses: The Origins of Authority in Spinoza', *Textual Practice* 33.5 (2019), 771–85.
25. Giorgio Agamben, *The Highest Poverty: Monastic Life and Form-of-Life*, trans. Adam Kosko (Stanford: Stanford University Press, 2011), 125.
26. For a critique of Agamben's conception of something that is outside the law, see Vardoulakis, *Freedom from the Free Will: On Kafka's Laughter* (Albany, NY: SUNY, 2016), where I discuss a similar argument in Agamben's reading of Kafka's 'Before the Law.' For a detailed argument about the rejection of an 'outside' to the law in Spinoza, see Vardoulakis, 'Authority and the Law: The Primacy of Justification over Legitimacy in Spinoza', in *Spinoza's Authority Volume II: Resistance and Power in The Political Treatises*, eds. Kiarina Kordela and Dimitris Vardoulakis (London: Bloomsbury, 2018), 45–66.
27. Agamben, *Highest Poverty*, xiii.
28. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).
29. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George D. Schwab (Cambridge, MA: MIT, 1985).
30. Diogenes Laertius, 'Epicurus', X.153.
31. See Michel Foucault's last lecture in *Society Must be Defended: Lectures at the Collège de France 1975-1976*, trans. David Macey (New York: Picador, 2003).
32. For a concise account of the history of this legal term, see Andrew Fitzmaurice, 'The Genealogy of *Terra Nullius*', *Australian Historical Studies* 129 (2007), 1–15.
33. Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke U. P., 2018).
34. Bhandar, *Colonial Lives of Property*, 65.
35. For a Spinozan account of the Mabo case, see Moira Gatens and Genevieve Lloyd, *Collective Imaginings: Spinoza, Past and Present* (London: Routledge, 1999), chapter 6.
36. Bruce Pascoe, *Dark Emu: Aboriginal Australia and the Birth of Agriculture* (Broome: Magabala Books, 2014).
37. Dimitris Vardoulakis, *Sovereignty and its Other: Toward the Dejustification of Violence* (New York: Fordham University Press, 2013).