THE END OF LAW

POLITICAL THEOLOGY AND THE CRISIS OF SOVEREIGNTY

Mårten Björk and Tormod Johansen

The End of Law

This book examines how Gustav Radbruch, H. L. A. Hart, and Ernst-Wolfgang Böckenförde each addressed the question of the end of law, its function, and its normative foundation within the context of the modern legal and political order. Through a politico-theological reading, it highlights the tension between legal validity and moral legitimacy, as well as the extent to which law can maintain public order without compromising its own claim to justice.

The analysis of Radbruch, Hart, and Böckenförde sheds light on how valid law can become unjust, demanding actions that may conflict with individual judgement or morality. It raises questions about natural law, the relationship between morality and law, and law's ultimate purpose, suggesting that law and politics represent, at best, a relative good. It addresses the broader crisis of legal authority and state sovereignty, the expanding reach of state power, and whether law should instruct, command, or ultimately point beyond itself.

The End of Law is of interest to scholars in legal theory, political theology, and the philosophy of law.

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Preface

This book is the primary outcome of the research project *The End of Law*, funded by the Swedish Research Council (2019-02995), which has now concluded. The project and the book emerged from discussions on the concept of law between a theologian, Mårten Björk, and a legal scholar, Tormod Johansen.

While the introduction and conclusion are co-authored, Björk is the author of the chapters on Böckenförde and Radbruch, while Johansen has written the chapter on Hart. All quotes where direct references are made only to non-English language sources are translated by us, unless otherwise indicated.

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Mårten Björk
Osorno, June 2025

Tormod Johansen
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Introduction

Law reveals that life is not what it ought to be. A world without injustices would require no law, since a legal order is necessary only when humans must punish crimes, regulate their interactions with contracts, and uphold commitments which they may be tempted or forced to break. The author of the First Epistle to Timothy expressed this clearly when writing that "the law is not stated for the righteous" and a Greek comedian once wrote that "if the human were not so bad, there would be no law."[1] Our book explores this paradox, tracing the reemergence of the philosophical and theological intuition that the good life implies the end of law in three seminal twentieth-century legal arguments: the Radbruch formula from 1946, Hart's discussion on the minimum content of natural law from 1961, and the Böckenförde dilemma from 1967. Gustav Radbruch discussed the problem of statutory lawlessness or *Gesetzliches Unrecht* and sought a solution in what is often called natural law; H. L. A. Hart suggested that survival is at the core of law, and that law is not ultimately about coercion but instruction and freedom; and Ernst-Wolfgang Böckenförde insisted on the meta-juridical and hence non-legal foundations of the secular state. We will demonstrate how all three thinkers raise the question of the end of law and argue that this has significant implications for how we should understand law, whether it is divine, natural, or positive.

Paul wrote that "if you are led by the spirit, you are not under the law" and the author of the Epistle to the Hebrews stated that "the law is only a shadow of the good things that are coming—not the realities themselves."[2] Ovid described a golden age where there was no need for law since everyone spontaneously did what was good—*sponte sua, sine lege fidem rectumque colebat*—and Plato before him had argued that when humans lived close to the

1 1 Timothy 1:9. The other quote by the Greek playwright Philemon can be found in Arnold A. T. Ehrhardt, *Politsche Metaphysik von Solon bis Augustin. Band 2: Die christliche Revolution* (J. C. B. Mohr, 1959), 37–38.

2 Galatians 5:18, Hebrews 10:1.

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gods, they needed no law.[3] The mythical idea of a paradise or a golden age with no need for law was more than just a way to describe a utopian state that we might never reach and which we could only strive and hope for. It was also a paradigm for how our present life should be lived and what should guide us, which determined the understanding of the end, purpose, and, furthermore, necessity of law.[4] We will show how a similar discussion of the "end of law"—understood both as eschatological cessation and teleological fulfilment (definitions that will be explored further below and throughout this book)—lies at the heart of the Radbruch formula, Hart's analysis of the nature of law, and Böckenförde's dilemma. The Augustinian tradition in Western Christianity, for instance, often interpreted civil and positive law as a consequence of the Fall and described heaven as a state where such law is superfluous.[5] In contrast, the Thomist tradition has usually depicted law—as an instruction to do what is right—as something necessary even in Paradise, since to follow the law is to become what we are meant to be.[6] Herbert McCabe, a left-leaning British Thomist wrote that "when a man obeys the law of his 'species', the natural law, he is being true to a depth within himself, and that to act contrary to this law is to violate himself at his centre."[7] The Augustinian and Thomist traditions used the idea of Paradise as a paradigm to conceptualize the end of law, both as the purpose of law and as a means for theological speculation on the cessation of law, or at least its coercive aspect. Life in Paradise is envisioned as a return to God and a state of grace or mercy, in which crimes and sins are forgiven.

The idea of a paradisal state of being where grace reigns can legitimate resistance against unjust and tyrannical laws and urge us to seek the good life

3 Ovid, *Metamorphoses*, Loeb Classical Library 42 (Harvard University Press, 1916), 1.89. Plato, *Laws*, (Cambridge University Press, 2016), 680a.

4 Elaine H. Pagels, "The Politics of Paradise," *The New York Review of Books*, May 12, 1988.

5 "The complexity and poise of his [Augustine's] final estimate of politics stem from his conviction that the quest for perfection and happiness through politics is doomed. The archetypal society, where alone true human fulfilment can be found, is the society of the angels and the saints in heaven: not a *polis*." R. A. Markus, *Saeculum: History and Society in the Theology of St Augustine* (Cambridge University Press, 1970), 103.

6 Delphine Carron, "Le pouvoir politique avant et après le péché originel chez Ptolémée de Lucques († 1327)," in *Adam, la nature humaine, avant et après : Épistémologie de la Chute*, ed. Irène Rosier-Catach and Gianluca Briguglia (Éditions de la Sorbonne, 2016), 231–253. "Aquinas is clear that in such a paradise there would still be need for 'government and direction of free people', since social life requires some unity of social action and where there are many people—intelligent and good people—there are many competing ideas about what actions should be done for the sake of the common good. But he does not say that in such a state of affairs there would be need for specifically *political* government or law." John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998), 248, see also 269.

7 Herbert McCabe, *Law, Love and Language* (Sheed & Ward, 1968), 45.

beyond the force and compulsion of positive and sovereign law.[8] The famous Latin maxim which states that the greatest right is the greatest injustice—*summum ius*, *summa iniuria*—reminds us how easily law can become tyrannical, since when positive law is placed in the hands of a sovereign, it is coupled with force and coercion. It is not infrequent that justice is denied when people demand their legal rights, or when law is applied to its full extent.[9] Precisely because mere mortal and fallible beings like us might never live in a paradisal world, the idea of a paradise can be used to examine the end—or what in Aristotelian terminology can be called the nature—of law. The Edenic can be a way of envisioning a world beyond force and coercion, and thus serves as a foil for our mundane reality where the law itself can become an instrument for injustice. By examining the three legal arguments from Radbruch, Hart, and Böckenförde, we will show how they raise the problem of the end of law, in the sense of both its *telos* and its supersession (or its *eschaton*), in order to address the threat of injustice that is inherent to law, not least because it relies on coercion.

Our times have been described as a "crisis for the law," "a crisis for sovereignty," or, to borrow the ominous terminology from a report published by the World Economic Forum, an "age of polycrisis."[10] Conflicts between

8 Pagels, "The Politics of Paradise."

9 Thomas Aquinas, *Summa Theologiae: Volume 28, Law and political theory* (Cambridge University Press, 2006), II-II, q. 60, a. 5. On the need for equity in application of canon law, see Codex Iuris Canonici (CIC) 1983 c. 221 § 2. On the critical relationship between justice and mercy, see the volume edited by Judith Hahn and Gunda Werner, *Mercy and Justice: A Challenge for Contemporary Theology* (Brill, 2020), 186, which formulates the question clearly: "How can mercy and justice be reconciled within God?" Consider also the separate opinion by Judge Fouad Ammoun in the North Sea Continental Shelf cases, I.C.J. Reports 1969, where he discusses equity and connects the Latin adage with its equivalents in various legal traditions: "What is just is, however, not always equitable, as evidenced by the well-known adage: *summum jus, summa injuria*. It is to mitigate this inconvenience of strict justice that recourse may be had to equity, whose role is to moderate the rigor of the law." I.C.J. Reports 1969, 132. Dirk Ansorge, in a discussion of Anselm, argues that "justice and mercy are intrinsically linked with each other in every human or divine action. However, human reason will never be able to achieve a total congruence of justice and mercy." "Justice and Mercy: Can They Be Reconciled from a Systematic Point of View?" in *Mercy and Justice: A Challenge for Contemporary Theology*, ed. Judith Hahn and Gunda Werner (Brill, 2020), 123–139, here 136. See also the papal bull opening the Jubilee of Mercy in 2015: "If God limited himself to only justice, he would cease to be God, and would instead be like human beings who ask merely that the law be respected. But mere justice is not enough. Experience shows that an appeal to justice alone will result in its destruction. This is why God goes beyond justice with his mercy and forgiveness." Pope Francis, *Misericordiae Vultus*, Bull of Indiction of the Extraordinary Jubilee of Mercy (April 11, 2015).

10 Agustín J. Menéndez, "The Crisis of Law and the European Crises: From the Social and Democratic 'Rechtsstaat' to the Consolidating State of (Pseudo-)technocratic Governance" in *Journal of Law and Society*, Vol. 44, No. 1, Austerity and Law in Europe (March 2017), 56–78. World Economic Forum, *The Global Risks Report 2023* (World Economic Forum,

states, geoeconomic confrontations, natural disasters, and the collapse of ecosystems, all compounded by a severe cost-of-living crisis, are weakening the sovereignty and legitimacy of the state.[11] Christine Lagarde, then President of the IMF and now President of the European Central Bank, notes that we are "facing a crisis of trust in institutions across all sectors that shows no sign of abating."[12] Three leading scholars of law recently wrote in a similar vein that "[c]onstitutional democracies and constitutional democracy appear in trouble throughout the world."[13] Listing countries from all continents, they argue "that no earthly haven is immune to whatever is ailing regimes that purport to be constitutional and democratic."[14] Many of the national and global institutions—states, governments, parliaments, and public agencies—that address the multitude of crises we face are mired in their own crises. These organs of human society, whose main instrument is law, seem at times to be desperate, albeit impotent when it comes to containing the exigencies of our era.[15] The philosophical and theological question of the end of law has practical significance in today's time of crisis, which seems to imply the end of what John F. Kennedy called the *Pax Americana*.[16] This term refers to the period of relative peace and liberal dominance in the Western Hemisphere after 1945—a peace that coexisted with intense geopolitical tensions and violent conflicts during the Cold War, which resulted in the loss of millions

2023). See also: Adam Tooze, "Chartbook #165: Polycrisis — Thinking on the Tightrope," *adamtooze.com*, October 29, 2022. https://adamtooze.com/2022/10/29/chartbook-165-polycrisis-thinking-on-the-tightrope/.

11 World Economic Forum, *The Global Risks Report 2023* (World Economic Forum, 2023).

12 Christine Lagarde, "There's a Reason for the Lack of Trust in Government and Business: Corruption," *The Guardian*, May 4, 2018. Trust in political leaders, businesses, and government is low. In most countries a majority has grievances against business, government, and the rich: Edelman Trust Institute, *2025 Edelman Trust Barometer Global Report* (January 23, 2025). A study from June 2022 declares that "[o]nly two-in-ten Americans say they trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (19%)." Pew Research Center, *Public Trust in Government: 1958–2022* (June 6, 2022).

13 Mark A. Graber, Sanford Levinson, and Mark Tushnet, eds., *Constitutional Democracy in Crisis?* (IRL Press at Oxford University Press, Oxford Constitutions of the World, 2018), 1.

14 Graber, Levinson, and Tushnet, *Constitutional Democracy in Crisis?* 1.

15 As just one example, how successful the International Criminal Court's issuance of arrest warrants against leaders on both sides of the ongoing war in Gaza remains to be seen. The same goes for the case against Israel in the International Court of Justice. International Criminal Court, "Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant," November 21, 2024. International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)," Case No. 192, December 29, 2023.

16 Marco Overhaus, "Europe and the End of Pax Americana: Transatlantic Relations Must Be Put on a New Footing, Regardless of Who Wins the US Elections," SWP Comment 2024/C 45, October 2, 2024. John F. Kennedy, "Commencement Address at American University," June 10, 1963, John F. Kennedy Presidential Library and Museum.

of lives worldwide. While Western Europe and North America experienced stability, the broader global context was marked by proxy wars, repression, and ideological struggle. The collapse of the Soviet Union was therefore seen as the culmination of this era, symbolizing the "end of history" and the triumph of liberal democracy. Today, amid Russia's invasion of Ukraine, the Western support for the Israeli onslaught on Gaza, and the geopolitical upheavals triggered by Donald Trump's second term, the crises that gave rise to the Radbruch formula, Hart's attempt to reconceptualize the end of law after the Second World War, and Böckenförde's struggle with the foundations of liberal democracy no longer appear remote. During the final months of writing this book, political, environmental, and economic crises across the globe flared up relentlessly, as did chaotic shifts in US foreign policy vis-à-vis its NATO allies. These events reinforce the claim that we are living through a deep crisis of sovereignty and global order that we will address in the chapter on Böckenförde and the conclusion of this book.

Lagarde and other technocrats continually affirm the necessity of the institutions and legal frameworks that sustain the global status quo and ensure its orderly functioning. According to her and many other economists and scholars who describe the present bleak situation, the crisis seems to be a result of problems related to what Radbruch called the expediency and purposiveness of the state and to the legal certainty of the law (and which we will discuss in this book).[17] In this view, the main issue is corruption and incompetence, and only the rule of law as an administrative paradigm is capable of saving us from disasters and crises.[18] However, what these crises actually reveal are not merely technical difficulties to be solved through legal-administrative means, but rather deep challenges which point towards the purpose and end of law. This is why we investigate the problem of the end or purpose of law in Radbruch, Hart, and Böckenförde, to which we can now turn.

Beyond Judgement—Gustav Radbruch

In a short text published the year after the fall of the Third Reich, the former Weimar Minister of justice and celebrated legal scholar Gustav Radbruch

17 See further in Chapter 2.

18 An apt description of this very secular hope for a new kind of ideal legal order is found in the following reflection by a Portuguese thinker: "The European Union is not meant to make political decisions. What it tries to do is develop a system of rules to be applied more or less autonomously to a highly complex political and social reality. Once in place, these rules can be left to operate without human intervention. Of course, the system will need regular and periodic maintenance, much like a robot needs repair, but the point is to create a system of rules that can work on their own. We have entered the end of history in the sense that the repetitive and routine application of a system of rules will have replaced human decision." Bruno Maçães, *The Dawn of Eurasia: On the Trail of the New World Order* (Allen Lane, 2018), 228.

defended the distinction between law and state, unwritten law and legal statutes, which characterizes the doctrine of natural law.[19] The so-called Radbruch formula—that a sufficiently unjust law should not be applied—was a plea for what Heinrich Scholler described as *überpositiven Recht*: a form of law that was not statutory law since it was not posited by a state.[20] It was a form of law that was simply given as what Radbruch described in his *Rechtsphilosophie* as a "value" and which has been interpreted as a revival of natural law.[21] This non-positive vision of law implied a repudiation of the positivist dictum that "a law is a law" simply because it has been legislated by a parliament or decided by a court.[22] For, Radbruch argued, "while power may indeed serve as a basis for the 'must' of compulsion [*ein Müssen*], it never serves as a basis for the 'ought' of obligation or for legal validity [*ein Sollen und Gelten*]."[23] The argument was straightforward: a decree is not valid as a law simply by being promulgated and then enforced. Rather than a command enforced by a sovereign power, a law must fulfil the values of legal certainty, purposiveness, and justice in order to be valid as law.[24]

In this text, Radbruch raised an issue which at the time of writing was of immediate concern, namely determining the culpability of the executioners in the Nazi atrocities. The culpability of the *judges* was relatively clear—they had perverted justice in applying the statues of positive law. Since these statutes, in his view, were "no law at all," their application "made a mockery of any intention of doing justice."[25] It was also clear to Radbruch that the executioners of these perverted sentences were not culpable. Radbruch agreed with the traditional and long-established view that the "single, total duty" of the executioner lies in carrying out the execution.[26]

Radbruch's position has been criticized for aligning with an apologetic strategy that many Nazis employed—that they were simply obeying legal

19 Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law," *Oxford Journal of Legal Studies* 26, no. 1 (Spring, 2006): 1–11. For the original, see Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht" in *Süddeutsche Juristen-Zeitung* 1, no. 5 (1946): 105–108. Republished in Gustav Radbruch, *Rechtsphilosophie: Studienausgabe* (C. F. Müller, 2003), 211–219.

20 Heinrich Scholler, *Die Rechtsvergleichung bei Gustav Radbruch und seine Lehre vom überpositiven Recht* (Duncker & Humblot, 2002). See especially the chapter "Radbruchs wendung zum überpositiven Recht," 95–105.

21 Gustav Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press, 1950), 43–226, see page 49.

22 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 1.

23 Ibid., 6. Robert Alexy, "Gustav Radbruch's Concept of Law," in *Law's Ideal Dimension* (Oxford University Press, 2021), 107–118.

24 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 6–7.

25 Ibid., 9.

26 Ibid., 10.

commands.[27] The issue would be juridically resolved a few years later once the International Law Commission pronounced the principle that orders from a superior did not relieve individuals of criminal responsibility for actions which they knew were manifestly unlawful.[28] But even though the juridical question of culpability was answered in a new way by the judges of the Nuremberg trials, we have to remember that the question of justness which is at the core of the Radbruch formula can be understood on different levels.[29]

First, one can ask why it is that Radbruch limited his critique to merely judges. Are not all those who turn an abstract rule into a concrete action responsible for its justness? Second, the question of juridical culpability does not exhaust the question of the justness of the action. As Radbruch put it in another context, what is needed is to confront "reality with the ideal."[30] And third, justice relates to grace and mercy, which will be central for the argument we put forward in this book. The pardoning of an action, or an amnesty extended to those who have committed crimes, even the most heinous and extensive ones, is in conflict with a restricted understanding of justice giving each their due, but it does not contradict a higher notion of justice, a justice of grace and mercy (we will use both of these terms in this book interchangeably).[31] Though we find it difficult to accept that the guilty are oftentimes not held accountable, or that once their guilt is ascertained they can sometimes be spared from punishment, it is precisely such acceptance which becomes necessary in what Radbruch saw as a fallen world, in which we can never fully atone for the crimes we commit against each other. As Radbruch

27 Stanley Paulson, who is among those that sees Radbruch's position as shifting from positivism to natural law during the war, argues that there are vestiges of the legal positivism which makes both Radbruch and Lon. L. Fuller exonerate those adhering to the laws of the Third Reich. "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13, no. 3 (August 1994): 313–359. For an inquiry into the historical explanation of what the author considers to be Radbruch's misinterpretation of the actions of the Nazi judiciary, see Douglas G. Morris, "Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch after the War," *Law and History Review* 34, no. 3 (August 2016): 649–688. For an argument that neither positivism nor natural law are proper theories to describe Nazi law, see Simon Lavis, "The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the 'Rupture Thesis' in the Anglo-American Legal Academy," *International Journal for the Semiotics of Law* 31 (2018).

28 This was codified in 1998 in Article 33 of the Rome Statue which established the International Criminal Court. See *Rome Statute of the International Criminal Court* (International Criminal Court, 2021), 24.

29 Although it is still continuously discussed and of course difficult to realize in practice. See, e.g., Paola Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law," *European Journal of International Law* 10, no. 1 (1999): 172–191.

30 Radbruch, *Grundzüge der Rechtsphilosophie* (Verlag von Quelle und Meyer, 1914), 24.

31 We will return to this issue in the conclusion. See Ágnes Heller, *Beyond Justice* (Blackwell, 1987), 55.

emphasized, mercy or grace—*Gnade*—is the recognition that "there are still other values besides the law, and that it may become necessary to help these values to prevail against the law."[32] In this book, we will argue that law is, at best, a relative good for Radbruch since it can never fully liberate us from the crimes, problems, or violence that it seeks to counter. The only way to ensure that the law is something more than a machine for maintaining order, securing retribution, and apportioning deserved sanctions is through the power of mercy, which, in a sense, abolishes law or, at least, transforms it into what Radbruch at the end of his life called a *Gnadenrecht,* a "law of grace."[33]

Radbruch's formula sparked a heated debate that continues until today.[34] For instance, Joseph Raz has questioned it and argued that even the legal positivist Hans Kelsen's definition of law as a norm empty of content does not adequately differentiate law from justice.[35] Brian Bix has insisted that Radbruch did not aim to define the nature or concept of law with his formula.[36] Instead, he sought to make a narrower "prescription about how judges should decide cases."[37] However, to make such a prescription, one must differentiate "the 'must' of compulsion" from "the 'ought' of obligation," and we will show that this duality poses the question of the end of law. Bix's suggestion is related to the question of whether Radbruch's "philosophical thinking remained in principle the same from the *Grundzüge der Rechtsphilosophie* (1914) to the *Vorschule der Rechtsphilosophie* (1948), or whether it underwent a drastic revolution or reform after 1945."[38] According to some, Radbruch was a staunch legal positivist who turned to natural law in response to National Socialism.[39] Others insist that he had already turned away from legal positivism in the 1930s, and still others find no drastic change of position throughout Radbruch's oeuvre.[40] We tend towards the latter position and argue, with such

32 Radbruch, *Legal Philosophy*, 197.

33 Radbruch, "Gerechtigkeit und Gnade," 342.

34 Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958): 593–629. Fuller, Lon L. "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71, no. 4 (1958): 630–672. Raz "The Argument from Justice, or How Not to Reply to Legal Positivism" and Alexy "An Answer to Joseph Raz," both in George Pavlakos, ed., *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007).

35 Raz, "The Argument from Justice, or How Not to Reply to Legal Positivism."

36 Brian Bix, "Radbruch's Formula and Conceptual Analysis," *American Journal of Jurisprudence* 56 (2011): 53.

37 Ibid., 52.

38 Erik Wolf, "Revolution or Evolution in Gustav Radbruch's Legal Philosophy" in *Natural Law Forum* 1-1-1958, 1–23, here 1.

39 Hart argues for discontinuity, "Positivism and the Separation of Law and Morals." 73. Fuller implicitly agrees with him, "Positivism and Fidelity to Law." 656–657. We return to this in the chapter on Radbruch.

40 Alexy argues for the "continuity thesis," namely that Radbruch was a non-positivist throughout the entirety of his oeuvre, and that he did not shift from being positivist prior to 1933 to

an insightful reader of Radbruch as the jurist and theologian Erik Wolf, that even if Radbruch championed a relativistic positivism in his *Rechtsphilosophie*, he nevertheless insisted on the legitimacy of a theological interpretation of law.[41] In his *Rechtsphilosophie*, Radbruch emphasized that from the perspective of primitive Christianity, the human is something *more* than what the Aristotelian tradition would call a political animal.[42] It is noteworthy that as far as we know, there is no serious discussion of this theological aspect of Radbruch's work by legal scholars or theologians.[43] We will show that Radbruch argued that the early Christian Church questioned the value of worldly law, and that religion calls us not to judge.[44] Together with the theologian Paul Tillich, Radbruch published a book on the philosophy of religion in 1919, and in his *Kulturlehre des Sozialismus* from 1922, he wrote that religion calls the values of the world into question, even the values of certainty, purposiveness, and justice, which laid the basis for law.[45] The ethos of Christianity pushes us beyond the need for judgement, and we will demonstrate how this entails an intricate discussion on how law can be put to end in a quite literal sense.

Beyond Survival—H. L. A. Hart

In his seminal work from 1961, *The Concept of Law*, the English professor of jurisprudence H. L. A. Hart emphasized that the human animal, by the sheer fact of being mortal, requires law. The Oxford legal philosopher explicitly confronted the problem of the end of law when he noted that "the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence."[46] Survival defines what Hart termed the minimum content of natural law—in other words, law exists at least in order to ensure human survival.[47] This is a standard liberal

being a non-positivist after 1945; Alexy, "Gustav Radbruch's Concept of Law," 107–108. He had earlier taken a different position; see ibid., 114, note 59.

41 Radbruch, "Legal Philosophy," 50. Wolf, "Revolution or Evolution in Gustav Radbruch's Legal Philosophy," 22.

42 Mårten Björk, "The End and Purpose of Law: Hans Barion and Gustav Radbruch on Spiritual and Temporal Authority," *Studia Theologica – Nordic Journal of Theology*, *79*(1), 39–58. . Aristotle, *Politics* (Cambridge University Press, 1996), 13, 1253a2–3.

43 Among legal scholars Wolf's article, "Revolution or Evolution in Gustav Radbruch's Legal Philosophy" is an exception, and among theologians, an exceptional work is Gottlieb Söhngen, *Grundfragen einer Rechtstheologie* (Anton Püstet München, 1962), 130.

44 Gustav Radbruch "Kulturlehre des Sozialismus" in *Kulturphilosophische und kulturhistorische Schriften*, edited by Günther Spendel (C. F. Müller, 2002), 99–163, see 50. See further in Chapter 2.

45 Gustav Radbruch and Paul Tillich, *Religionsphilosophie der Kultur: Zwei Entwürfe* (Reuther & Reichard, 1919). Radbruch, *Kulturlehre des Sozialismus*, 108.

46 H.L.A. Hart, *The Concept of Law*, 2nd ed. (Clarendon Press, 1994), 191.

47 Ibid., 193.

interpretation of the legal order, which, we will argue, Böckenförde also came close to defending. John Stuart Mill insisted, for instance, that "[t]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm of others."[48] In a pluralistic society—unlike the homogeneous confessional state—attempts to define the purpose of law as something beyond the preservation of life often appear either overly teleological or unrealistically utopian. Hart thus questioned the teleology of the classical tradition of natural law and noted that "on this older outlook every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good or the end (τέλος, *finis*) appropriate for it."[49] It is true that survival—*perseverare in esse suo* (striving to preserve in being)—is the *basis* for law also according to most versions of the theory of natural law.[50] However, it is not the *end* of law.[51] The end or *telos* of law can be identified in different ways: through a philosophical contemplation of the eternal ideas, through the knowledge of God, through an intimate relationship with Christ, or simply through the righteous and happy life acquired when one lives according to the ends of nature or as a cynic sage who has the law written on his heart.[52] This proliferation of ends makes it necessary, according to Hart, to reduce the dimension of natural law in modern legal orders to a minimum. The law should just help us survive, and, beyond that, we are free to pursue our own projects in line with the ends of our choosing. Law becomes a restricted coercive instrument for the protection of freedom.

This coercive aspect of law does not necessarily arise because law should be identified with the need to punish the wicked man or defend oneself against the murderer: "Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is? Or with the 'man who wishes to arrange his affairs' if only he can be told how to do it?"[53] Inscribing himself in a tradition that

48 John Stuart Mill, *On Liberty* (J. W. Parker and Son, 1859), Chapter 1. See Hart, *Law, Liberty, and Morality*, 4.

49 Hart, *The Concept of Law*, 188–189.

50 Alessandro Passerin d'Entrèves, *Natural Law: An Introduction to Legal Philosophy*, 3rd ed. (Hutchinson University Library, 1970), 191, 203.

51 John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford University Press, 2011), 29, 82.

52 Plato, *The Republic*, (Cambridge University Press, 2000), 215 (508e), Aristotle, *Nicomachean Ethics* (Cambridge University Press, 2000), 7 (1096a), Proverbs 3:1, Jeremiah 31:33, Romans 2:15, Markus, *Saeculum*, 88.

53 Hart, *The Concept of Law*, 40.

can be traced back to Thomas Aquinas—who thought that law in the form of instruction was indispensable even in Paradise; that wondrous place where other theologians have insisted no school or police and hence no laws were needed—the English legal positivist emphasized that law cannot be identified merely with the court's administration of sanctions.[54] The law does more than solve conflicts and interpret contracts, more than punish criminals, and much more than police and secure order for the sovereign power. Law is a magister instructing us how to live and not a gunman who commands others to comply.[55] It is certainly a magister with a baton, and in the Xinjiang internment camps it might be impossible to differentiate instruction from command.[56] This is why even Hart's vision of law implies coercion. But the end and purpose of law is not to sanction crime. It is to "control, to guide, and to plan life out of court."[57] Hart polemicized against an idea which was still prevalent and hegemonic among many of his fellow jurists, namely that law's primary content is to command and force.[58]

Hart's defence of legal positivism after the horrors of the Second World War, which neither natural nor positive law had managed to halt, was therefore a reconceptualization of law as instruction rather than command.[59] One Australian jurist has argued that Hart's position is based on a Benthamite "economic man," "possessively individualist … modern bourgeois man—*homme moyen sensuel*."[60] It is within this frame of bourgeois individualism that Hart's project for the creation and protection of freedom was formulated. We will argue that Hart actually did pose the question of the end of law, which encompassed both its purpose and its limit or even cessation. His answer was fundamentally structured by the expansion of welfare society and by the fact that his particular strand of legal positivism placed limits on metaphysical reflection. But—as we will see—Hart used a series of speculative thought experiments on crab-like humans without law to depict his vision of the end of law. We will read these experiments together with his early essay on freedom as a natural right in order to uncover an almost eschatological ideal of non-judgemental

54 Michael P. Malloy, *Civil Authority in Medieval Philosophy: Lombard, Aquinas, and Bonaventure* (University Press of America, 1985), 59–61.

55 Hart, *The Concept of Law*, 19–24, 82–85.

56 See Lindsay Maizland, "China's Repression of Uyghurs in Xinjuiang," Council on Foreign Relations, September 22, 2022: https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights.

57 Hart, *The Concept of Law*, 40.

58 Ibid.

59 H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford University Press, 2008), 44. Hart, *The Concept of Law*, 249.

60 Brendan Edgeworth, "H.L.A. Hart, Legal Positivism and Post-war British Labourism," *University of Western Australia Law Review* 19, no. 2 (1989): 275–300, quoting Stuart Hall.

freedom.[61] This resulting freedom surpasses the horizon of a social democratic liberalism and, as such, it also surpasses the conception of the human as a possessive individualist or an economic man and confronts Hart's legal positivism with the problem of natural law.

Beyond the Polis—Ernst-Wolfgang Böckenförde

While Radbruch turned to natural law, or rather, as we argue, an interpretation of the biblical message that he had sketched long before 1946, to relativize the sovereignty of statutory law, the Catholic social democrat Ernst-Wolfgang Böckenförde questioned the validity of the classical natural law tradition.[62] In a celebrated article from 1967 (based on a lecture that he had held three years before), the legal scholar and later justice of the German Federal Constitutional Court showed how the secularization of Europe laid the basis for the modern state. Here Böckenförde formulated his often-quoted dictum that "*the liberal, secularized state is sustained by conditions it cannot itself guarantee*."[63] The liberal state had to be differentiated from "the Aristotelian *polis* tradition" on the one hand and "the proclamation of an 'objective order of values'" on the other.[64] At the same time, Böckenförde argued, the secular state cannot guarantee its legitimacy by turning itself into the "guarantor of the citizens' eudaemonistic life expectations." Were it to do so, the state would then turn the necessary protection of its citizens into its "very purpose" and "its legitimizing foundation." In making such a social utopia into its programme, Böckenförde argued that the state would fail to resolve the

61 Hart, "Positivism and the Separation of Law and Morals," 80, and see further in Chapter 3. H. L. A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64, no. 2 (1955): 175–191.

62 "The concept of law which underlies the doctrine of natural law is thus a genuinely moral [*ethischer*] one. Law appears to be part of the moral [*sittlich*] law of nature; what does not become visible is the specific characteristic of the law which does not separate it from morality [*Sittlichkeit*], but distinguishes it in terms of its task. Put in a nutshell, in the Catholic doctrine of natural law, law and morality [*Ethik*] are thought of as one. At a time when law and morals were closely interwoven also in the order of positive law, this was not a special problem. But with the separation of law and morals that emerged in the secular realm in Europe from the sixteenth and seventeenth centuries onwards—not least as a result of the legal response to the religious schism and as an aspect of the history of European freedom—this did become a problem." Ernst Wolfgang Böckenförde, "Reflections on a Theology of Modern Secular Law" in *Religion, Law, and Democracy*, edited by Mirjam Künkler and Tine Stein (Oxford University Press, 2020), 259–279, here 263–264. See also Judith Hahn, "Ernst-Wolfgang Böckenförde's Approach to Natural Law as Normative Legal Ethics," *Oxford Journal of Law and Religion* 7, no. 1 (2018): 28–50.

63 Ernst-Wolfgang Böckenförde, "The Rise of the State as a Process of Secularization," in *Religion, Law, and Democracy: Selected Writings* (Oxford University Press, 2020), 152–167, here 167.

64 Ibid.

fundamental problem of establishing peace in an increasingly heterogeneous society.[65] To turn to an Aristotelian vision, wherein the purpose of politics and law was to secure the happiness of the citizens, would reestablish "the claim of totality" that the modern, liberal state had rejected in order to guarantee order in societies that lack the religious and political homogeneity of the premodern period.[66] But nor could the state be restricted to the mere guarantor of survival, a "*Not- und Verstandesstaat*," as G. W. F. Hegel had put it, and which, according to Böckenförde, rested upon what he with C. B. Macpherson called "possessive individualism".[67] The state had to ensure freedom, rather than just security, and become what Böckenförde saw as an ethical state. And even if there was a specific form of freedom inherent to the possessive individualism that arose in the nineteenth century with the advent of industrialized capitalism, Böckenförde agreed with Macpherson that the modern state can no longer supply "the necessary conditions for deducing a valid theory of political obligation."[68] This, we will argue, made Böckenförde turn to natural law and even defend a form of eudaemonistic politics after the economic crisis in 2008. But then again, to be a legitimate liberal state, which for Böckenförde implied a secular and pluralistic state, this political entity demanded a vision that could sustain it without succumbing to a politics of shared values. The liberal state certainly needs a certain set of public virtues which ground its existence by making us accept a plurality of values and worldviews, yet if the state seeks to enforce these virtues through the use of force, it risks "abandoning its liberalness."[69]

Böckenförde argued that without the "inner regulatory forces" sustaining the liberal, secularized and pluralistic state, it would implode.[70] This has led some to conclude that the liberal state must be based on cultural, political, or even religious homogeneity.[71] The German theologian Georg Essen has

65 Ibid.

66 Ibid., translation modified. Böckenförde uses the concept "Totalitätsanspruch" and Thomas Dunlap translates this with "totalitarian claim." See the German version Ernst-Wolfgang Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation," in *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht* (Suhrkamp, 1976), 42–64, here 60.

67 Ernst-Wolfgang Böckenförde, "The State as an Ethical State," in *Constitutional and Political Theory*, 86–107, here 91. Originally published as Ernst-Wolfgang Böckenförde, *Der Staat als sittlicher Staat* (Duncker & Humblot, 1978). See also C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press, 1962).

68 Macpherson, *The Political Theory of Possessive Individualism*, 275.

69 Böckenförde, "The Rise of the State as a Process of Secularization," 167.

70 Ibid.

71 On the issue of "homogeneity" versus "commonality" and the "problematic association with a völkisch-national understanding," see Tine Stein, "The Böckenförde Dictum—On the Topicality of a Liberal Formula," *Oxford Journal of Law and Religion* 7, no. 1 (February 2018): 97–108, especially 104, footnote 24 with references. A conservative use of Böckenförde's argument with a chauvinistic bent for Christianity has been made by Paul Kirchhof, "Das

recently protested against such a vision of the state and we will insist that, for Böckenförde, such a reliance on homogeneity would imply the reintroduction of the "claim of totality" that he sought to challenge.[72] He tellingly wrote that the "individualism of human rights, brought to full fruition, liberates people not only from religion, but also, in a further stage from the (ethnic-folkish [*volkhaft*]) nation as a homogeneity-creating force."[73]

Böckenförde did not view this fragmentation solely or even primarily as a positive development even if it laid the ground for the kind of liberal pluralism he came to defend and even thought legitimised a political theology. However, rather than attempting "to find a new basis of homogeneity in the existence of shared beliefs about values"[74]—a move he warned would lead to dangerous "subjectivism" and ultimately "destroy rather than consolidate liberty"—we will argue that he offers an alternative to a political community based on shared values in his proposal of a "theology of modern secular law."[75] He developed a theological perspective on positive and statutory law which was not a means to implement natural law—since we live in a world where we do not agree on what is natural or not (or even if natural law has any meaning at all). For Böckenförde, Christian theology could be an instruction on how we can establish order in a pluralistic society by defending the human as a person and therefore as an individual who can never be reduced to the community she belongs to.[76]

In 1999, Böckenförde insisted that such a theology would refuse "to 'baptize' secular law—which has become autonomous—and appropriate it theologically. Rather, the intent has to be to prepare theology for a dialogue with modern secular law."[77] Before, he had wagered that the modern, secular, pluralistic state can reveal that "Christianity, in its inner structure" is something other than "the public (polis) cult" of the ancient state.[78] By way of such a

Christentum ist der Humus der freiheitlichen Verfassung," *Welt*, December 18, 2007, https://www.welt.de/print-welt/article689296/Das-Christentum-ist-der-Humus-der-freiheitlichen-Verfassung.html. A response to this general line of argumentation was made in the following interview with Böckenförde, where he makes clear that Islam and other religions have an important place in contemporary German society: Christian Rath, "'Freiheit ist ansteckend': Verfassungsrechtler Ernst-Wolfgang Böckenförde über den moralischen Zusammenhalt im modernen Staat," *taz*, January 23, 2009, https://taz.de/!576006/.

72 Georg Essen, *Fragile Souveränität: Eine politische Theologie der Freiheit* (Mohr Siebeck, 2024).

73 Böckenförde, "The Rise of the State as a Process of Secularization," 166.

74 Ibid., 166–167.

75 Böckenförde, "Reflections on a Theology of Modern Secular Law."

76 In an early text, Böckenförde critiqued traditional Catholic natural law and the Catholic response to National Socialism, "German Catholicism in 1933: A Critical Examination," in *Religion, Law, and Democracy: Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford University Press, 2020), 77–104, see especially 99.

77 Böckenförde, "Reflections on a Theology of Modern Secular Law," 259.

78 Ibid.

normative claim, the Catholic legal scholar did more than stress that religion should never be based on coercion.[79] He also emphasized that Christians who understood what he took to be the essence of their religion, namely, love and freedom, should not "see this state, in its secularity, as something alien, hostile to their faith, but as a chance for liberty, the preservation and realization of which is also their task."[80] Yet, we will argue, this can paradoxically be done only if the state is no longer seen as an absolute good. The state is a necessary evil, according to Böckenförde, ultimately produced by "the power of sin," that the Christian should hope is already relativized through the resurrection, which, ultimately, points beyond the mortal and frail life in need of political authority and legal coercion.[81] We shall therefore argue that Böckenförde's insistence that "Christianity, in its inner, structure" is something else than a "public (polis) cult" posits the question of the end of law both as a termination of positive law and as the *telos* of law itself.[82] This can explain what it means that the human is something *more* than a political or juridical animal, something which Radbruch also claimed, and which Hart's theory ultimately points to. Böckenförde also advanced a political critique of possessive individualism, which he identified as the foundation of the territorial state—a state whose sovereignty had been deeply undermined by the forces of the capitalist world market, with far-reaching implications for the legitimacy and effectiveness of law.

Coercion and Freedom

Radbruch, Hart, and Böckenförde confront us with the problem of the end and purpose of law; a problem of utmost importance because it seems impossible for us humans to coexist without the rule of law.[83] When the law works justly, it can save us from the wicked and malevolent. It can protect us from unfreedom and secure justice. But recently an American legal scholar emphasized that law, while having other functions as well, can only protect us by making us "do things we do not want to do" and sometimes even make us act against "our own personal interests or best judgment."[84] Law, in other

79 See Ernst-Wolfgang Böckenförde, "The Fundamental Right of Freedom of Conscience," in *Religion, Law, and Democracy: Selected Writings*, 168–198, especially 170.

80 Böckenförde, "The Rise of the State as a Process of Secularization," 167.

81 Böckenförde, "Reflections on a Theology of Modern Secular Law," 268. Furthermore, for Böckenförde the resurrection and the Last Judgement, together with the overall redemptive act of Christ, means that in "their relationship to one another, human beings need not and must not represent God's judicial power," ibid., 269.

82 Böckenförde, "The Rise of the State as a Process of Secularization," 165.

83 Hart, "Positivism and the Separation of Law and Morals," 622–623, Hart, *The Concept of Law*, 194–195.

84 Frederick Schauer, *The Force of Law* (Harvard University Press, 2015), 1.

words, rules over our lives with force. It is born from the need for retribution and regulation in capricious communities that know crime, demand sanctions, and must use agreements, contracts, and, hence, duties and obligations to reproduce themselves. It is true "that the movement of the progressive societies has hitherto been a movement *from Status to Contract*" since premodern law was centred on role and status rather than individual choice and liberal rights.[85] Both statuses and contracts have, however, been guaranteed by laws that, if violated, sanction the use of force. This, we argue, is the nexus between law and force that, according to Radbruch, made early Christianity crave a world which had no need of law. But since law can only regulate society if it forces us to do what we do not want to do, it also means that sometimes it coerces us into doing *what we should not do* since positive or statutory law is not necessarily identical with what is good and just. This intrinsic relation and potential conflict between force and law, the good and the just, necessitates the discussion of the end and purpose of law. As we will develop further in the coming chapters, all three subjects of this book engaged directly with the ethical interpellation that positive law poses. That legal norms are created by humans implies a fundamental contingency in their content, and the society in which we must coexist, with its differing values and worldviews, cannot, according to Radbruch, Hart, and Böckenförde, constitute a shared-value system in the simple sense. Pluralism must be defended.

We will now turn to the theoretical perspective that informs our interpretation of our study's main subjects. We aim to defend a theological critique of law which is legitimated by the three legal theoretical arguments at the centre of this book. Such a critique can help us address the crisis of law and sovereignty, the continuous expansion of legal regulation, public agencies, and the might of the state apparatus, with its parallel inability to prevent and effectively sanction violence and crime. As we are all too aware, states today are responsible for the rule of occupied territories, reeducation camps, black sites for interrogation, extraterritorial prisons, and detention centres. These injustices force us to address whether the law should be an instruction or a command (two concepts that surely can be hard to distinguish) and, hence, what it should orient us towards. As we will argue in the next section, this also involves a discussion of natural law and poses the question of the end of law in the sense of both its superfluity and its purpose.

85 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society*, ed. C.K. Allen (Oxford University Press, 1939), 141. For a recent critical evaluation of Maine's argument, see Katharina Isabel Schmidt, "Henry Maine's 'Modern Law': From Status to Contract and Back Again?" *The American Journal of Comparative Law* 65, no. 1 (2017): 145–186.

The End and Purpose of Law

The maxim *ubi homo, ibi societas, ubi societas, ibi ius*—where the human is, there is society, and where there is a society, there is law—captures the idea that there is an intrinsic anthropological link between the human species and legal orders.[86] One Italian legal scholar even claimed that "to abolish law, it would be necessary to abolish mankind."[87] Yet, he also observed "that the gravest offences against justice [have] happened not so much in opposition to the laws as through these very laws."[88] His answer to such atrocities was natural law. It challenges the legitimacy of human-made laws by asserting that nature itself can make stronger moral claims than social conventions or legal statutes.[89] While the tradition of natural law may seem foreign or outdated to many today—as Böckenförde already noted in 1967—important secular normative systems like international law and human rights remain indebted to it.[90] According to this tradition, the normative authority of natural, and therefore unwritten, law binds us.[91] It may compel us to feed the hungry, protect private property, or—as a contemporary Oxford scholar has argued—refuse to take part in state-led nuclear deterrence, which, in turn, could require us to abstain from participation in the army or even in working for the government.[92] These and other imperatives of unwritten law are, as the earlier-mentioned Hans Kelsen rightly stressed, not based on "the threat of a coercive act … but simply

86 See, e.g., Hans Kelsen, "The Law as a Specific Social Technique," in *What Is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (University of California Press, 1957), 231–256, see 239. On the original source of this summarisation of Aristotle's philosophy: David Heith-Stade, "Ubi Societas, Ibi Ius," *David Heith-Stade's Blog*, June 2, 2012, https://davidheithstade.wordpress.com/2012/06/02/ubi-societas-ibi-ius/.

87 Giorgio Del Vecchio, "Change and Permanence in Law" in *The Jurist* 18 (1958), 18–38, here 33.

88 Ibid., 30.

89 "The discovery of nature or of the fundamental distinction between nature and convention is the necessary condition for the emergence of the idea of natural right." Leo Strauss, *Natural Right and History* (University of Chicago Press, 1953), 93.

90 The history of human rights, international law, and natural law is complicated and intensely debated. As just one example, see Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010), and the critical responses to it, among them Seyla Benhabib, "Moving beyond False Binarisms: On Samuel Moyn's The Last Utopia," *Qui Parle* 22, no. 1 (2013): 81–93.

91 Moyn critiques a simple genealogy from natural law to human rights; see *The Last Utopia*, 21–22, on the appropriation by Jacques Maritain, arguing that Catholic natural was the proper framework for human rights, 54, see also 215.

92 John Finnis, Joseph M. Boyle, and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press, 1987). Numerous other arguments on current political issues from a natural law perspective exist of course. One example is Maximilian Ernst, "International Migration as Absolute Natural Law: An Inquiry into International Migration from the Perspective of Legal Philosophy," *Yonsei Journal of International Studies* 8, no. 1 (2016): 14–29.

the fact that this conduct is laid down as obligatory."[93] Natural law is dictated by the demands of reason, the imperatives of nature, or the revelation of God.

In a world supposedly redeemed from such perspectives, we no longer believe that we can discern what is good in the legal sense by understanding human nature. This refusal to derive *what ought to be* from *what is*, is a key part of accusing natural law of being arbitrary or even anarchical, at best, and tyrannical, at worst. Yet the so-called naturalistic fallacy—the assertion that goodness can be defined in terms of properties such as fitness, naturalness, or desirability—does not need to imply a Humean rejection of moral realism, and we shall show that this is important for our argument.[94] Kelsen, however, viewed the doctrine of natural law as unscientific and reactionary, and Böckenförde feared that a return to this tradition threatened to reintroduce "the claim of totality" that the liberal state had rejected, even if he ultimately affirmed the need for a critical form of natural law. Hart accepted that even legal positivism requires a "minimum content of natural law." And natural law is important for this study on the end of law, for as it has been stated in an excellent interpretation of Kelsen's legal positivism, "positive law" must, from the vantage point of natural law, either be considered "as superfluous, whenever its norms do correspond to natural laws norms, or as invalid (null, void), whenever its norms do not correspond to natural law norms."[95] This makes the relation between positive and natural law teleological. If positive law fulfils the end and purpose of law then it is law, but it is also paradoxically superfluous, since if we understood what was right, we would not need human-made law. According to Kelsen, this view made "positive law … justified and valid only so far as it corresponds to the natural law."[96] According to John Finnis, this interpretation is common but misleading.[97] We instead see Kelsen's critical interpretation demonstrating something valuable. He understood that one consequence of natural law was that it introduces an antagonistic and even anarchic duality, or "ontological dualism," into the perception of law, thus

93 Hans Kelsen, "The Idea of Natural Law" in *Essays in Legal and Moral Philosophy* (D. Reidel, 1973), 27–60, here 34.

94 G. E. Moore, *Principia Ethica* (Cambridge University Press, 1922), 9. Moore's ethics were non-naturalistic and for him the good is an indefinable, simple, and non-natural property.

95 Pierluigi Chiassoni, "Kelsen on Natural Law Theory: An Enduring Critical Affair" in *Revus: Journal for Constitutional Theory and Philosophy of Law* 23 (2014), 135–163, here 150. On Kelsen, see, e.g., Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," *Oxford Journal of Legal Studies* 12, no. 3 (Autumn 1992): 311–332 and Hart's two essays "Kelsen Visited" and "Kelsen's Doctrine of the Unity of Law" in *Essays in Legal and Moral Philosophy*.

96 Kelsen, "The Natural Law Doctrine before the Tribunal of Science" in *What Is Justice? Justice, Law, and Politics in the Mirror of Science* (University of California Press, 1949), 137–173, here 142.

97 Finnis, *Natural Law and Natural Rights*, 28, see also 26–27.

threatening the sovereign and exclusive character of positive law.[98] A prominent commentator on Kelsen has rightly insisted that the "duality of positive law and natural law, in which the latter was the ground or standard of the former, also contradicts the principle of the exclusive character of every sovereign order of norms."[99] Kelsen was very vocal about this. It was one of his main concerns with natural law theory. He stressed, conscious of the often-conservative character of theories of natural law, that these doctrines have an anarchic dimension because of the sharp duality which he discerned in the doctrine: "If by 'anarchy' we mean, not absolute lack of order, but only the idea of a non-coercive order in which the state is absent, then natural law can be described as an 'anarchic' order. Every *anarchistic theory*, in fact, is nothing else but a doctrine of natural law."[100] The reason why the "presuppositions of anarchism are the specific conditions of the idea of natural law" is because natural law, which classically has been based on a religious notion of a cosmic order, or, as with Augustine, on an eschatological hope for the perfection of human nature in a perpetual sabbath, relativizes "the essential conjunction of positive law with the state, and indeed the identity of the two from the standpoint of the coercive order."[101] Natural law relativizes the relation between law and state by questioning the sovereignty of positive or statutory law, and for Kelsen, "*the state is the perfected form of positive law*."[102] Thus, all "attempts to divorce law from the state, to apprehend law and the state as two distinct entities, the whole dualism of law and state in all the many forms it takes, are at deepest bottom and in ultimate aim derivative from natural law."[103] Kelsen came close to insisting that the teleology of natural law is an eschatology, namely, a doctrine of the potential superfluousness of positive law.

By having a purpose, all law has a teleological aim or consummation in its end, a *telos* such as securing order, guaranteeing our rights as citizens, or instructing us to live a good life. This is the teleology of law in general. Law is, therefore, linked to the philosophical and theological notion of what is often called perfection or consummation. Even a law which has a very limited purpose, such as a traffic regulation or a technical rule, still points towards at least

98 We borrow the term "ontological dualism" from Chiassoni, "Kelsen on Natural Law," 140–143.

99 Ota Weinberger, "Hans Kelsen as Philosopher" in *What Is Justice? Justice, Law, and Politics in the Mirror of Science* (University of California Press, 1949), ix–xxviii, here xxv.

100 Kelsen, "The Idea of Natural Law," 34.

101 Ibid. A good example of an eschatological interpretation of natural law is Augustine's. See, for instance, Klaus Demmer M. S. C., *Ius Caritatis: Zur christologischen Grundlegung der augustinischen Naturrechtslehre* (Liberia Editrice Dell'Università Gregoriana, 1961) for a fascinating discussion on how Augustine viewed divine love, or the law of love, as a mechanism to perfect nature in a physical and metaphysical sense through the resurrection of the dead.

102 Hans Kelsen, "The Idea of Natural Law," 33.

103 Ibid., 34.

the theoretical possibility of absolute compliance with what it instructs, and therefore superfluousness.[104] But more controversially, we argue that Kelsen can also help us understand the eschatological nature of law. Law has an eschatological dimension not only because it comes into being, evolves, and eventually ceases, but also because—as Kelsen rightly emphasized—the pursuit of perfection in positive law points to its own eventual transcendence. In this view, natural law represents the *eschaton* of law: it has the authority to declare positive law invalid and even imagine a state in which statutory law is no longer necessary. This helps explain why religious traditions that imagine a paradisal origin of human life often call us to hope for a redeemed world and uphold some version of natural law.[105] Thomas Aquinas, for instance, argued that the "righteous are not under the law … for they are the law to themselves."[106] A commentator on Aquinas stressed that the ideal of the Angelic doctor "is not an ethics under positive divine legislation, but an ethics without law, among those who are law to themselves."[107] He even wrote that "[t]he law has, according to the intention of God as lawgiver, the task of rendering itself superfluous."[108] The roots of this idea of an "ethics without law" are ancient and can be traced to thinkers like Plato, Paul, and Ovid, who suggested that the good life does not require law. The Catholic theologian Gottlieb Söhngen—teacher of Joseph Ratzinger and noted interlocutor of Karl Barth—argued in his book *Rechtstheologie* that it was a classical Christian teaching that there is no need for positive or statutory law in Paradise:

> Where there is no sin, there is no law; and where there is no law, there is no sin. Law and sin are theological concepts that require each other. Sin brings the law to light, and the law reveals sin and makes a sinner out of me; it awakens in me the desire for sin. The lawless Paradise on earth would exist

104 Leo Strauss claims that Plato's aim in the Republic is "the cessation of all evil on earth by purely human means," "The Three Waves of Modernity," in *An Introduction to Political Philosophy: Ten Essays*, ed. Hilail Gildin (Wayne State University Press, 1989), 81–98, here 82.

105 This idea has of course been secularized in different ways; see a recent discussing by Jayne Svenungsson, "A Secular Utopia: Remarks on the Löwith–Blumenberg Debate," in *Jewish Thought, Utopia and Revolution*, ed. Elena Namli, Jayne Svenungsson, and Alana M. Vincent (Rodopi, 2014), 69–84, and one with a focus on Marxist utopias: Vincent Geoghegan, *Utopianism and Marxism* (Methuen, 1987).

106 Thomas Aquinas, *Summa Theologiae: Volume 28, Law and Political Theory* (Cambridge University Press, 2006), 1a2ae. 96.5, 135. This in reference to 1 Timothy 1:9 that says "The law is not made for the just man," and Romans 2:14.

107 Ulrich Kühn, *Via Caritatis: Theologie des Gesetzes bei Thomas von Aquin* (Vandenhoeck & Ruprecht, 1969), 59.

108 Ibid., 60.

> if there were no sinners and if there were no evil desire smouldering in us, even in us Christians and spiritual people.[109]

The fulfilment of the law lies in its eschatological dissolution and its ultimate perfection in *das gesetzlose Paradies.* This seemingly antinomian vision of ethics remains highly relevant today, as it offers insights into the legal issues examined in this book. Radbruch, Hart, and Böckenförde grappled with questions rooted in what we term the ontological dualism between natural law and positive law. Thus, the question of the end and purpose of law is also a question of its sovereignty—why it holds authority—and why, as Kelsen observed, natural law theory often ends up legitimizing anarchism or reviving forms of political theology by severing the concept of law from the authority of the state.

A Social Understanding of Nature

Ancient and medieval texts often posit a relation between law and cosmology. In Homeric literature, the word cosmos meant "an apt and harmonious arrangement or constitution," since the world was seen to have a normative dimension.[110] The positivistic attempt to denaturalize "legal facts" into "social facts" is a rejection of such a cosmological paradigm of law that grounds natural law theories.[111] This, however, does not mean a rejection of metaphysics or cosmology as such. A philosopher close to the Vienna circle of logical positivists insisted that positivism itself entails a specific metaphysics.[112] Metaphysics is the intuition as well as the study of "the most fundamental structure of reality," and hence a claim of what is possible and rational.[113] Hart's minimum content of natural law is an excellent example of a metaphysics of positivist legal thought in this restricted sense, since he defines law as a custom

109 Söhngen, *Grundfragen einer Rechtstheologie,* 122.

110 "The Greeks believed that the world and its human subjects were primarily connected through the existence of laws that governed them all, and that those laws were of a moral nature. This idea was not specifically Greek. It can be found, for example, in Persia; the conception of the universe as a struggle between good and evil is at the heart of the doctrine of Zoroaster. … In Greece moral concepts also functioned as cosmology: ideas of justice, equality before the law, etc., were principles used to explain elementary cycles." Rémi Brague, *The Wisdom of the World: The Human Experience of the Universe in Western Thought* (University of Chicago Press, 2003), 29. See also Arnold Ehrhardt, "Creatio ex Nihilo," *Studia Theologica* 4, no. 1 (1950): 13–43.

111 Scott Shapiro summarizes the foundation of contemporary legal positivism with the formula "legal facts are ultimately determined by social facts alone." *Legality* (Belknap Press of Harvard University Press, 2011), 27.

112 Gustav Bergmann argues that "a crude metaphysics implicitly held … is the price every philosophy that explicitly rejects metaphysics must pay." *The Metaphysics of Logical Positivism* (University of Wisconsin Press, 1954), 66.

113 E. J. Lowe, *The Possibility of Metaphysics: Substance, Identity, and Time* (Clarendon Press, 1998), 2.

needed for survival.[114] What we claim in this book is that the positivist paradigm obscures the question of the end and purpose of law by restricting law to a product of social facts. By treating law as merely a social phenomenon, legal positivists are sceptical of the question of the end of law in the teleological and eschatological sense.[115]

No legal positivist denies that social facts are also natural facts. However, the theory of natural law uniquely interprets nature itself as a social fact. This marks the fundamental metaphysical divide between legal positivism and natural law theory. Viewing nature through a social lens blurs the boundaries between social and natural, custom and nature, allowing for the possibility of what Radbruch calls *überpositives Recht*—a form of law beyond mere positive law. While this perspective can risk opening the door to legal relativism, since posited law loses its absolute sovereignty, the ontological dualism between natural and positive law remains crucial. It posits the question of the end and purpose of law—in terms of both its teleological goal and its eschatological end. As our study demonstrates, this question resurfaces in seemingly secular legal debates, such as those surrounding the Radbruch formula, Hart's reflections on natural law, and Böckenförde's dilemma.[116]

We believe this question offers a way to rethink law, freeing our imagination from the positivist view that law is simply a social fact that defines human existence. Instead, we can understand positive law as a necessary evil—a relative good—that becomes dangerous when treated as absolute. Moving beyond the positivist paradigm may paradoxically also require the rejection of an idea that is important for many theoreticians of natural law, namely, that humans are naturally political or legal beings, and this is something we will explore in this book. Instead, humans can be seen as creatures who, under certain conditions, need law as a protective shield—especially against states that act without restraint—yet they cannot be reduced to a species of legal and political animals.[117] We are more than political animals. This might seem utopian, even religious, and Kelsen insisted that if "the natural-law doctrine is consistent, it must assume a religious character."[118] There are, without doubt, important attempts to develop a secular theory of natural law.[119] Still, even

114 Hart, *The Concept of Law*, 192.

115 Shapiro, *Legality*, 28.

116 John Dugard, "The Choice before Us: International Law or a 'Rules-Based International Order'?" *Leiden Journal of International Law* 36, no. 2 (2023): 223–232. On the critical role of judges in protecting and realizing the relative value of law, consider the courageous example of the same John Dugard at the height of South African apartheid: Catherine Albertyn and Dennis Davis, "Legal Realism, Transformation and the Legacy of Dugard," *South African Journal on Human Rights* 26, no. 2 (2010): 188–216.

117 Hart, "Positivism and the Separation of Law and Morals," 80.

118 Hans Kelsen, "The Natural Law Doctrine before the Tribunal of Science," 138.

119 Among the most important in the so-called new natural law are Germain Grisez and John Finnis, both Catholics. A critique of the idea that these natural law theories can be sustained

they often turn to religious traditions in search of arguments on how the moral imperative of nature should be interpreted.[120] Kelsen underlined how philosophers who explicitly broke with Catholic natural law theory, such as Hugo Grotius, Thomas Hobbes, or Samuel von Pufendorf, ultimately grounded their theories in some kind of religious doctrine.[121] It is hard to deny his claim that all "natural-law doctrine of any importance [has] a more or less religious character."[122] More controversial is the argument that natural law is ultimately religious owing to its reliance on the paradigm of "animism."[123] Animism is the doctrine, or cultural imagination, which postulates that the world is animated by some form of spirit or spirits, and it leads, according to Kelsen, to "a social" or "religious interpretation of nature."[124] We agree, however, also with this argument and will conclude this book with an affirmation of what we provocatively call jurisprudential animism by insisting, with Radbruch, that the soul is the place of law.[125]

Anthropologists have also recognized the relation between animism and later monotheistic religions. Claudé Levi-Strauss argued that what he called wild thought persisted in Europe at least until the medieval period; more recently, Marshall Sahlins, although deeply sceptical of monotheism, insisted that there is even an animistic dimension in the work of Augustine.[126] Essential for our argument here is the claim that "the natural-law doctrine, like primitive animism, conceives of nature as part of society."[127] What some of the

without reference to God is made by Christopher Tollefsen, "God, New Natural Law Theory, and Human Rights," *Religions* 12, no. 8 (2021): 613.

120 For Finnis, natural law as such is not exclusively or necessarily a religious project, although he writes that the "principal bearer of an explicit theory about natural law happens, in our civilization, to have been the Roman Catholic Church," *Natural Law and Natural Rights*, 124.

121 Kelsen, "The Natural Law Doctrine before the Tribunal of Science," 138.

122 Ibid.

123 Ibid.

124 Ibid.

125 Kelsen, "The Natural Law Doctrine before the Tribunal of Science." 138. Important early contributors on the connection between animism and religion were Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom*, vol. 1 (J. Murray, 1871), 377 ff. Sigmund Freud, *Totem and Taboo: Some Points of Agreement between the Mental Lives of Savages and Neurotics* (Routledge, 1950), 90. Edwin Oliver James, *The Beginnings of Religion: An Introductory and Scientific Study* (Hutchinson & Co., 1933), 14–17.

126 Claude Lévi-Strauss, *Wild Thought: A New Translation of La Pensée Sauvage* (University of Chicago Press, 2021). He argues that for most cultures "the natural and social world [needs] to be grasped in the form of an organized whole," 151. Consider also the radical thesis by Marshall Sahlins and David Graeber, *On Kings* (HAU Books, 2017), that "the state of nature has the nature of the state" and that "something quite like the state is a universal human condition," 3, or that it is the "original political society," 23. Marshall Sahlins, *The New Science of the Enchanted Universe: An Anthropology of Most of Humanity* (Princeton University Press, 2022), 4–5.

127 Hans Kelsen, "The Natural Law Doctrine before the Tribunal of Science," 138–139.

defenders of natural law fail to understand is that, according to Kelsen, even if society is part of nature, nature cannot be seen as part of society, since that would be an anthropomorphization of the natural world as a human community.[128] Animism sees nature as governed by moral rules and imperatives. For example, someone might argue that it was not only deeply wrong—but illegal from the perspective of natural law—when, say, a pair of Gauls and Greeks were buried alive at the Forum Boarium, when a pig was sacrificed at the Feast of Bacchus, or when the Synod of Gangra anathematized followers of the Bishop Eusthatius for urging masters to free their slaves.[129] Although slavery and human or animal sacrifice were legally permitted in these cultural contexts, they could still be seen as unjust or forbidden in themselves according to natural law, and such a perspective entails, according to Kelsen, an animistic understanding of reality. From the perspective of legal positivism, however, acts such as killing or enslaving are considered illegal solely by virtue of collective human agreement, rather than by virtue of any inherent moral quality. We will see in the chapter on Hart that this does not need to imply moral relativism in any sense. A legal positvist can obviously be critical of positive laws that are immoral or tyrannical. But without a social custom or law declaring an act illegal, there is no crime in the legal sense according to legal positivism, and to claim that there is a moral order beyond human opinion is to revert to an animistic or religious understanding of nature. This is why Kelsen can conclude that the doctrine of natural law "has no chance" before "the tribunal of science" and must deny "the jurisdiction of this tribunal by referring to its religious character" since otherwise, we would no longer accept the metaphysical division between nature and society.[130]

Many theorists of natural law have contested this claim.[131] A more direct approach is tested in this book. By interpreting how Radbruch, Hart, and Böckenförde ask the question of the end and purpose of law we challenge the positivistic paradigm, which seeks to delegitimize any perspective on "nature as part of society," a move which suppresses the question of the end of law in its full sense. The end of law for legal positivism is clear: law enforces rules and establishes norms as the legislator wishes. If laws have any ultimate purpose beyond those wishes and posited aims, it is that society should be able to survive and protect the humans who live in it. For the legal positivist, law is a

128 Eduardo Viveiros de Castro has argued that in the Amerindian context the "original common condition of both humans and animals is not animality but rather humanity," "Cosmological Deixis and Amerindian Perspectivism," *The Journal of the Royal Anthropological Institute* 4, no. 3 (September 1998): 469–488, here 472.

129 Jennifer A. Glancy, *Slavery in Early Christianity* (Oxford University Press, 2002), 90.

130 Kelsen, "The Natural Law Doctrine before the Tribunal of Science," 138–139.

131 See, for example, Robert P. George, "Kelsen and Aquinas on 'The Natural-Law Doctrine,'" *Notre Dame Law Review* 75, no. 5 (2000): 1625–1645. Chiassoni convincingly criticizes George for not dismantling Kelsen's critique, "Kelsen on Natural Law Theory".

custom necessary for survival, or, as Hart formulated it, "laws and morals" have the "minimum purpose of survival which men have in associating with each other."[132] Against this positivist paradigm, we argue that even the "minimum content of natural law," posits the "ontological dualism" between positive law and natural law that legitimizes a more maximal vision of the end and purpose of law. We are therefore not only interested in defending the right to use ethics or morality to question a specific statute. From the perspective of the legal positivist, this is not only possible but also necessary since "legal facts" are "social facts," and law is a custom that sometimes ought to be questioned.[133] It is, from this perspective, "in the nature of both law and custom that facts about their existence or content are ultimately determined by social facts alone (it is a custom to eat turkey on Thanksgiving just because people take it upon themselves to eat turkey on Thanksgiving)."[134]

From the standpoint of legal positivism, confusing nature with society reflects a misunderstanding: while society cannot exist without nature, law is a product of the social world of human customs. Still, customs—especially religious ones—that promote a normative understanding of nature and encourage us to see "nature as part of society" may be more reasonable than Kelsen assumed. After all, it is clear that human societies have a direct and significant impact on the natural world. Today, it seems almost self-evident to say that we are living in an age of climate change—an era that, many argue, calls for a new way of viewing nature, one that recognizes it as having inherent rights. Extending the concept of rights from human beings to nature itself can challenge the long-standing asymmetry between the social and natural worlds.[135] However, our argument in this book is more precise: the Kelsenian dictum—that even if the social world is part of the natural order, the natural order itself cannot be socially constituted—should not be understood as an objective fact, but rather as an ideological and ultimately untenable conception of nature. The understanding of law as a mere social convention is precisely what the discussions we examine call into question even if the three subjects of this book are critical to classical theories of natural law and even seek to define the human as something other than a political animal.[136] The conceptualizations

132 Hart *Concept of* Law, 193.
133 Shapiro, *Legality*, 27.
134 Ibid., 28.
135 Consider the ambitious anthropological synthesis by Philippe Descola, *Beyond Nature and Culture* (University of Chicago Press, 2013).
136 "Anthropology is thus faced with a daunting challenge: either to disappear as an exhausted form of humanism or else to transform itself by rethinking its domain and its tools in such a way as to include in its object far more than the anthropos: that is to say, the entire collective of beings that is linked to him but is at present relegated to the position of a merely peripheral role; or, to put that in more conventional terms, the anthropology of culture must be accompanied by an anthropology of nature that is open to that part of themselves and

of law that we examine help us legitimize the understanding of "nature as part of society" and hence the "ontological dualism" that posits the question of the end of law by severing the idea of law from the concept of the state.[137] As we will argue with Radbruch in the following chapter, law originates not merely from the sovereignty of the state, but from what he referred to as the *soul*—that is, from the natural and biological reality of the human as an animal that cultivates nature to a world she can live in.[138] Our central thesis is that the ontological dualism between natural and positive law—between unwritten and statutory law—lays the groundwork for what Kelsen feared: a form of political theology.[139] In Söhngen's terms, this may be understood as a *Rechtstheologie*—a theological conception of law—that challenges the secular foundations of modern state sovereignty in what Böckenförde described as possessive individualism. It does so by demonstrating that, in our era of polycrisis, the "minimum content of natural law" necessarily raises the maximal question of the end and purpose of law in both its eschatological and teleological dimension.

the world that human beings actualize and by means of which they objectivize themselves." Ibid., xx.

137 Kelsen, "The Natural Law Doctrine before the Tribunal of Science," 138–139.

138 The provocative speculation on this theme can be clearly seen in "his metaphysics of fleas" in Gustav Radbruch, "Zur Metaphysik des Flohs" in *Gesamtausgabe 4: Kulturphilosophische und kulturhistorische Schriften*, edited by Günter Spendel (C. F. Müller, 2002), 28–30.

139 Chiassoni, "Kelsen on Natural Law," 140–143.

Chapter 1

Beyond Judgement

Gustav Radbruch and the Relativization of Law

In the conclusion to *Grundfragen einer Rechtstheologie*, the theologian Gottlieb Söhngen cited a maxim, which Gustav Radbruch had included in a book of quotes which he sent to his son Anselm, when he served at the Russian Front, in 1941.[1] The maxim, written by the poet Albrecht Schaeffer, declared that the objectivity of law is a prerequisite for justice.[2] Yet, to be objective is to become like an object and, hence, inhuman, and to be inhuman is to be unrighteous and unjust. With this passage, Radbruch, the former Minister of Justice of the Weimar Republic, reminded his son that even the foundations of law—objectivity and legal certainty—could become instruments for injustice, as he explicitly insisted in 1948: "Objectivity and legality are sufficient as long as the state is in respectable hands. But if, to quote St. Augustine, the state becomes a large band of robbers, then only faith in higher values can help, and in that case, the hot iron of justice must prevail over all considerations and fears."[3] The problem for Radbruch was whether equity, objectivity, and even justice could protect the state from the threat of such "statutory lawlessness."[4]

The claim made in this chapter is that an unequivocally negative answer to this question can be found in his writings, despite the fact that in 1946, in the direct aftermath of the fall of the Third Reich, he famously argued for a normative conception of law that challenged statutory injustice and defended the "legal form" that secured law as law.[5] It will be shown that Radbruch searched for a perspective beyond the three dimensions of this

1 Söhngen, *Grundfragen einer Rechtstheologie,* 130.

2 Gustav Radbruch, *Kleines Rechtsbrevier: Spruchbuch für Anselm* (Vandhoeck & Ruprecht, 1954), 35.

3 Gustav Radbruch, "Des Reichsjustizministeriums Ruhm und Ende zum Nürnberger Juristen-Prozess," in *Süddeutsche Juristenzeitung* 3, no. 2 (1948): 57–64, here 63. Republished in Hans De With (editor), Gustav Radbruch: *Reichsminister der Justiz–Gedanken und Dokumente zur Rechtspolitik Gustav Radbruchs aus Anlass der hundersten Wiederkehr seines Geburtstages* (Bundesanzeiger Verlages, 1978), 54–55.

4 Radbruch, "Statutory Lawlessness and Supra-Statutory Law."

5 Ibid., 10–11.

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form—"justice," "purposiveness," and "legal certainty"—to guarantee that the law could be an instrument for justice rather than mere order.[6] A point of view transcending law, justice, and even judgement is necessary in order for the law to become just and righteous, and the search for such a standpoint characterized even his supposedly positivist or relativist period.[7] Together with his friend Hermann Kantorowicz, who in the pseudonymous manifesto for "free law" from 1906 criticized the "dogma" of "nineteenth-century positivism" which says "that there is no other law than that recognized by the state," Radbruch insisted on the importance of "supra-positive norms [*überpositiven Normen*]."[8] With the collapse of the German Empire after the First World War, he attacked the "idolatry of power" that permeated "legal positivism, in which law [*Recht*] was nothing but the arbitrary will of the state," and argued that this positivist vision of law could now be replaced with a legal apparatus that made "human- and civil rights" into the basis of the "fatherland."[9] The word positivism denoted less a school of thought than a general trend of identifying the origin of law with the legal apparatus of the sovereign and territorial state.[10] Radbruch did not entirely reject this view on law —all laws involve force—but he argued that the capacity to secure certainty and efficiency does not exhaust the legal form.[11]

We will not discuss whether Radbruch abandoned an earlier, more positivist and relativistic jurisprudence by turning to a religious form of natural law after 1945, although we sympathize with those who stress the continuity in the

6 Ibid., 6.

7 For an excellent discussion on Radbruch's view on legal positivism which comes to the conclusion that Radbruch was always critical of a particular form of positivist thought, see Stanley L. Paulson, "On the Background and Significance of Gustav Radbruch's Post-War Papers" in *Oxford Journal of Legal Studies* 26, no. 1 (2006): 17–40. See also Stanley L. Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views?" in *Oxford Journal of Legal Studies* 15, no. 1 (1995): 489–500.

8 Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft* (Carl Winter's Universitätsbuchhandlung, 1906). Flavius was Kantorowicz's pseudonym, and the manifesto was written in dialogue with Radbruch, who edited the text and handed it to the publisher in Heidelberg. See Frank Kantorowicz Carter, "Gustav Radbruch and Hermann Kantorowicz: Two Friends and a Book – Reflections on Gnaeus Flavius' Der Kampf um die Rechtswissenschaft (1906)" in *German Law Journal* 7, no. 7 (2006): 657–700.

9 Gustav Radbruch, "Ihr jungen Juristen!" in *Rechtsvergleichende Schriften*, ed. Heinrich Scholler (C. F. Müller, 1999), 77–92, here 90–91.

10 Paul Bonsmann already underlined that the Baden School of Neo-Kantianism that influenced Radbruch was anti-positivistic in character and that his *Methodendualismus* was an attack on nineteenth-century positivism. See Paul Bonsmann, *Die Rechts- und Staatsphilosophie Gustav Radbruchs* (H. Bouvier u. Co. Verlag, 1966), 78–80 and 107. A similar argument can be found in Marc André Wiegand, *Unrichtiges Recht: Gustav Radbruchs rechtsphilosophische Parteienlehre* (Mohr Siebeck, 2004), 82.

11 See Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 10, and our critical discussion of this thesis in the introduction.

evolution of his legal philosophy. Radbruch refused the "comfortable mentality of putting all one's eggs in one basket: either natural law or positivism, either freedom or equality, either individualism or socialism."[12] He "thought in terms of 'as well as' ['*sowohl als auch*'] and wrote to his wife that 'the world is too rich and vibrant to allow itself to be locked into a single truth.'"[13] We shall demonstrate that the Weimar Minister's legal relativism was strengthened by his use of natural law and even implied a necessary relativization of the force of law itself through the idea of mercy. Nature, as Kantorowicz insisted in the manifesto on "free law"—which Radbruch tellingly wanted to call "*außerstaatliches Recht* (non-governmental law)"—grows, changes, and dies.[14] Law is "as fragile as the stars themselves," and even natural law exists in constant flux as long as the world is "eternally changing and evolving."[15] Everything dies, and death, loss, and war shaped Radbruch's legal philosophy. His son, Anselm, wanted to become a jurist but was killed in 1942 during the offensive against Stalingrad. His daughter Renate was an art historian, and Radbruch completed her dissertation on the representation of peasants in the medieval period after her death in a skiing accident in 1939.[16] Ten years later, in 1949, it was Radbruch's turn to pass away in Heidelberg where he had studied, worked as a professor, been deposed by the Nazis, lived in domestic exile during the dictatorship, and resumed his professorship after the Second World War.[17]

The arbitrary cruelty of the twentieth century made Radbruch ask the question about the ultimate end and purpose of law. While discussing the prospects for a new world war in his 1932 magnum opus, the final edition of

12 Arthur Kaufmann, "Gustav Radbruch – Leben und Werk" in Gustav Radbruch, *Rechtsphilosophie I* (C. F. Müller Juristischer Verlag, 1987), 7–90, here 46. See also Erik Wolf, "Revolution or Evolution in Gustav Radbruch's Legal Philosophy" (1958), *Natural Law Forum*. Paper 25.

13 Kaufmann, "Gustav Radbruch," 46. A similar argument was recently defended in Wiegand, *Unrichtiges Recht*, 12. Robert Alexy has defended the continuity thesis in *Law's Ideal Dimension*, 107–118. Paulson also correctly observes that the Weimar Minister "could not have been 'converted' from legal positivism" since "Radbruch had already defended a basal criterion to the effect that 'law is the reality whose meaning (Sinn) is to serve justice.'" See S. L. Paulson, "On the Background and Significance of Gustav Radbruch's Post-War Papers," 19.

14 Carter, "Gustav Radbruch and Hermann Kantorowicz," 666.

15 Flavius, *Der Kampf um die Rechtswissenschaft*, 12.

16 See his moving discussion of Anselm and Renate in Gustav Radbruch, *Der Innere Weg* (K. F. Koehler Verlag, 1951), 189–193. Renate Maria and Gustav Radbruch, *Der deutsche Bauernstand zwischen Mittelalter und Neuzeit: Ein kunstgeschichtlicher Versuch begonnen von Renate Maria Radbruch, ausgeführt von ihrem Vater* (Vandenhoeck & Ruprecht, 1961). First published in 1941.

17 For a discussion of Radbruch's years in Heidelberg, see Wilfried Küper, "Gustav Radbruch als Heidelberger Rechtslehrer: Biographisches und Autobiographisches" in *Juristenzeitung* 31, no. 1 (1979): 1–6, and Michael Gottschalk, *Gustav Radbruchs Heidelberger Jahre 1926–1949* (University of Kiel, 1982).

the *Rechtsphilosophie*, he wrote that the jurist "faces the question whether the planet which is entrusted to us men is to be ruled by contingency [*Zufall*] or by reason [*Vernunft*]; whether on the very spot where the fate of the globe is to be decided, law, instead of establishing its sole rule, is weakly to leave the field to anarchy."[18] He had already criticized those who attacked the possibility of "a law without state [*ein Recht ohne Staat*]" when he defended the emergence of an international legal order after the First World War.[19] In a posthumously published essay, he once again stressed the need for a law over and above sovereign nations: "The horrific experience of the Second World War, culminating in the atomic bomb, presents us with the alternative: world peace or the end of the world."[20] But is law enough to guarantee peace?

If one listens to Radbruch carefully, it becomes apparent that he thought that in order to establish "a Rechtsstaat, a government of law that serves as well as makes possible the ideas of both justice and legal certainty,"[21] one must cultivate a way of life that questions the blatant need for judgement and retribution. "[J]ustice," "purposiveness," and "legal certainty," are the ends of law. But law also necessitates *Gnade*—mercy or grace—and moves, therefore, beyond the legal form that constitutes it as law.[22] In 1932, he insisted that "the legal institution of mercy [*Gnade*] implies a frank recognition of how questionable all law is, with its relations of tension within the idea of law and its possibilities of conflict between the idea of law and other ideas such as the ethical and the religious."[23] Already in 1915, in an article bearing the programmatic title "Juristen—böse Christen," Radbruch deliberated over the anarchic nature of law and sought a remedy in something greater than justice: "Love and mercy [*Gnade*], by definition, reject the demand for justice. They imply an affirmation of the human dignity of others, regardless of their worth, regardless of merit and value—regardless of justice."[24] Thus, the legal scholar stressed, "from the height of the Christian ideal of love … the reality of the

18 Gustav Radbruch, "Legal Philosophy," 224. See also Radbruch, *Rechtsphilosophie*, 192. English translation slightly modified.

19 Gustav Radbruch, *Einführung in die Rechtswissenschaft: fünfte und sechste durchgearbeitete Auflage* (Verlag von Quelle & Meyer, 1925), 174.

20 Gustav Radbruch, "Geistige Mächte als Subjekte des Völkerrechts" in *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics* 106, no. 3 (1950): 385–389, here 389.

21 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 11.

22 Radbruch writes in his final essay from 1949 that "mercy [*Gnade*] in its genuine and original sense is like a ray of light from another realm into the dark and cool world of law; it is intended to remind us that ... there are other and higher orders of value besides and above law." Gustav Radbruch, "Gerechtigkeit und Gnade: Beitrag zur Festschrift für Carnelutti – Rom 1949" in *Rechtsphilosophie*, 6th edition (K. F. Koehler Verlag, 1950), 337–343, here 343.

23 Radbruch, "Legal Philosophy," 195 and *Rechtsphilosophie*, 163.

24 Gustav Radbruch, "Juristen – böse Christen" in *Kulturphilosophische und kulturhistorische Schriften*, edited by Günther Spendel (C. F. Müller, 2002), 221–223, here 222.

legal system appears completely devoid of any moral value. Injustice is much older than justice, just as the attack is older than the defence, so, inescapably, injustice determines how law will behave. Intended as it is to fight violence, the law itself must become violent."[25] "The law" is "a form of violence [*Gewalt*]."[26] The problem was how one could ensure that law, even the just law that Radbruch fought for until the end of his life, did not regress into mere *Gewalt*. The answer he gave to this question was paradoxical: in order for the law to be law, one must move beyond law and find its end in a perspective that no longer strives to judge or seek retribution.

God and the Soul

Radbruch interpreted the law as a mechanism of evaluation; it differentiates the illicit from the licit, the illegal from the legal, and makes it possible for humans to cultivate the world of nature into a society by establishing external norms that coerce, instruct, and sanction.[27] Law thereby proves that we are cultural animals and that nature, or "the chaos of the given, for nature is nothing but that which is given, as it presents itself when cleared of falsifying evaluation," can be separated from culture by not being determined by human evaluations and ideas.[28] It is the need to *evaluate* that proves that humans are cultural beings, rational and mortal animals, who are prone to ask, even in the direst of circumstances, what is the meaning of it all? Out of this sense-giving arises the legal question par excellence: what is right and just? This question takes us, according to Radbruch, paradoxically also beyond the cultural and social dimension of law.

Radbruch had written in 1916 to his daughter Renate, while he was serving in the 111th Landwehr Infantry Regiment on the Western Front, that the narrow netherworld of the trenches disclosed why the question of justice exceeded the realms of state and nation, since it prompted an interrogation of individual conscience: "You do not pass through that dark, narrow gate in flocks, but each in ghastly solitude, and the Eternal does not have the final, serious conversation about the borrowed pound with states and nations, but

25 Ibid.

26 Ibid.

27 See, for example, the discussion on the concept of culture in Radbruch, *Grundzüge der Rechtsphilosophie*, 88–89.

28 Radbruch, "Legal Philosophy," 49. Radbruch borrowed the concept of chaos from the Heidelberg philosopher Heinrich Rickert who wrote that "when reality first confronts us before we understand it systematically, it is not yet a 'world' at all, but an accumulation of fragments or a chaos. Only by ordering its parts does what we call the cosmos emerge." Heinrich Rickert, *Die Philosophie des Lebens: Darstellung und Kritik der philosophischen Modeströmungen unserer Zeit* (J. C. B. Mohr, 1920), 14. See Oleksandr Kulyk, "Chaos in Heinrich Rickert's Philosophy" in *Granì* 22, no. 8 (2019): 37–46.

with you alone in private. In the end, there is only God and the soul."[29] Referring to the Parable of the Ten Pounds in the Gospel of Luke, he insisted that the question of what is just is eternal, or transhistorical and transcultural, since all cultures have asked this question, even if the answers have varied depending on specific historical and political circumstances. In a sense, the question of justice is also asocial since it can challenge the mores, rules, and even laws of a specific culture and society. It indicates a relation between the individual and God which, according to Radbruch, transcends every culture and society, and we will see that he would defend an asocial and even antisocial dimension of law. Radbruch's use of the word of God is telling since he believed that religion can help us overcome the logic of value thinking—our ideas of what is good and bad, licit or illicit—that shapes modern culture and defines positive law. The divine is the invaluable, that which escapes evaluation, and transcends our merely human judgement.

In an essential essay on Radbruch, which we mentioned in the introduction, Douglas Morris has argued that the legal scholar's interest in religion was a consequence of the catastrophes of the Second World War.[30] He claims that the death of Radbruch's two children "intensified his religiosity. Perhaps he also became more religious because, by the early 1940s, he experienced more and more impairments from Parkinson's disease. When the war ended, he hoped for a new Christian socialism and lent his hands to formulating a program for an imagined Christian Socialist Union."[31] This is undoubtedly true, but Radbruch himself says in his memoirs that it was his experiences at the front during the First World War that awoke his "religious conviction."[32] He relates this religious faith—which was shaped by his teacher Rudolph Sohm's antinomian interpretation of early Christianity—to his political radicalism.[33]

29 Radbruch, *Der Innere Weg,* 128. He returned to this passage in several of his texts; see, for example, the third edition of "Kulturlehre des Sozialismus" in *Kulturphilosophische und kulturhistorische Schriften*, edited by Günther Spendel (C. F. Müller, 2002), 99–163, here 149.

30 Douglas G. Morris, "Accommodating Nazi Tyranny?," 656. Morris insists that "Radbruch failed to appreciate a trap set by the Nazi regime: its ruthless power could always defeat law, any kind of law, whether positive or natural" and that his turn to natural law nourished "a conservative consolidation in German jurisprudence," 687–688. This might be true, but Radbruch died in 1949, and we do not know how he would have reacted to the separation of his theory of natural law from socialism and, even more, from his criticism of law that shaped his understanding of religion, including during the period that Morris lauds, such as when he and his friend Herman Heller participated in the armed resistance against the Fascist Kapp Putsch in 1920. More serious is, however, Radbruch's evaluation of the Nazi executioner's role in the crimes of the Third Reich. See Radbruch, *Der Innere Weg*, 133–136, and Christoph Möller, "Hermann Heller: Leben, Werk, Wirkung" in Hermann Heller, *Gesammelte Schriften I–III* (J. C. B. Mohr, 1992), 429–476, here 440.

31 Morris, "Accommodating Nazi Tyranny?," 656.

32 Radbruch, *Der Innere Weg*, 130.

33 It is not a coincidence that he, in 1919, not only published his manifesto on the need for a socialist law, "Ihr jungen Juristen," but also held his important lecture "Religionsphilosophie

He was even moved by his religious convictions to develop a critique of law as being a form of *Gewalt*, a critique that he thought socialism required if it was to avoid becoming a tyrannical state-centred system. This is also something Morris comes close to insisting when he scorns how Radbruch "juxtaposed religion, which he favoured, to power, which he feared," but this juxtaposition of religion and power might be one of the most significant aspects of his philosophy since it entails a critique of law as law.[34] What has been called Radbruch's "belief of the nonbeliever" was a radicalization of his legal relativism into an affirmation of religion as a force that can relativize the value of law itself.[35] The trinity of values that defined his famous formula—"legal certainty," "justice," and "the purposiveness of the law in serving the public"—makes it possible to distinguish law from mere force and command. But these values exist in an anarchic tension. Thus, if legal certainty, for instance, takes precedence over the purposiveness of the law in serving the public, then the inner tension of law can sever it from the idea of justice. Justice itself is a value that one might disagree about to the point of open conflict and war. This is why a perspective beyond the values of law is necessary.

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der Kultur: Religionsphilosophie des Rechts" where he referred to his teacher Sohm and said that "the religious community is not a community of law [*Recht*] but a pure, anarchic community of love." Radbruch, "Religionsphilosophie der Kultur: Religionsphilosophie des Rechts" in *Kulturphilosophische und kulturhistorische Schriften*, ed. Günther Spendel (C. F. Müller, 2002), 35–47, here 43.

34 Morris, "Accommodating Nazi Tyranny?," 656. Three years later Radbruch developed these themes and published the first edition of his *Kulturlehre des Sozialismus* where he insisted that "[r]eligion does not say what you should or should not do, what is good and what is evil. Religion is beyond good and evil. Religion lets its sun shine on the just and the unjust, says yes and amen to all things and all people, ultimately and despite everything." See *Kulturphilosophische und kulturhistorische Schriften*, 51–98, here 77. This might seem to be an overtly Nietzschean definition of religion, but it was rather a left-wing interpretation of Sohm and the gospels, and, interestingly, the Catholic priest and leading biblical scholar Meinrad Limbeck has more recently interpreted the New Testament in a similar manner. See Limbeck, *Ohnmacht des Rechts: Zur Gesetzkritik des Neuen Testaments* (Patmos, 1972),

35 Marie Baum, "Nachspiel: Erfüllung, 1945–1949" in *Der Innere Weg*, 196–212, here 211. According to Radbruch, scepticism and faith were not in any sense in contradiction, since religion was a way to relativize the world's permanence and question the values that govern our culture and morals. In Gustav Radbruch, *Theodor Fontane oder Skepsis und Glaube* (Koehler & Amelang, 1948) one can find a more systematic discussion on the relation between faith and scepticism. Similar arguments can be found in the previously mentioned *Kulturlehre des Sozialismus*, first published in 1922. Here, he emphasizes that the word "God" can sometimes stand in the way of a profound understanding of religion (p. 80). However, this does not mean that he did not believe in the Christian God, as his letter in 1916 to Renate and the discussion of Christianity on pp. 74–77 in this book suggest. It is important to stress that Radbruch exemplifies the religious attitude not only with reference to Jesus but to Rosa Luxemburg's meditation over nature and necessity in her prison letters: "You ask in your card: 'Why is everything like this?' You child, life has always been 'like this,' everything is part of it: suffering and separation and longing. You always have to take this as part of everything else and find *everything* beautiful and good." See p. 80.

It was the Heidelberg philosopher Emil Lask who had defined legal philosophy as *Wertspekulation*—a "speculation about values."[36] Inspired by him, Radbruch insisted that legal philosophy was a science of values and hence a cultural science.[37] The relation between Lask and Radbruch has made Dietmar von der Pfordten, Marc André Wiegand, and Andreas Funke argue that Radbruch was less a legal positivist than a philosopher adjacent to the southwest German school of Neo-Kantianism.[38] It is also important to note that this school was as much influenced by Platonism and German Romanticism as by Kant. This philosophical current, spearheaded by Wilhelm Windelband, Heinrich Rickert, and Lask, thematized the difference between nature and culture through concepts such as fact and value.[39] Lask's critical discussion on the *Zweiweltentheorie*, two-world-theory, of classical philosophy, influenced Radbruch's *Methodendualismus*, which differentiated reality, *Wirklichkeit*, from *Wert* or value without succumbing to an ontological dualism.[40] The evolution of the human species generates a world of evaluation and interpretation—what Radbruch called culture—which must be understood in its own right, even if it cannot be separated from the world of physical nature.[41]

In this way, the evolution of the human as a cultural animal lays the basis for the capitalist and industrialized civilization which, according to Radbruch, made classical natural law doctrines problematic. The human animal reshapes the world in its image by being a cultural animal, and this power becomes so explosive with the advent of the industrial world that it is nearly impossible to establish a clear link between *Wirklichkeit* and *Wert*.[42] Values are increasingly seen as nothing more than subjective projections on objective

36 Emil Lask, *Rechtsphilosophie* (Carl Winters Universitätsbuchhandlung, 1905), 3. See also Emil Lask, "Legal Philosophy" in *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press, 1950), 3–46, here 6.

37 Radbruch refers to Lask repeatedly in *Rechtsphilosophie* and underlines in the preface to his *Grundzüge der Rechtsphilosophie* from 1914 that he follows the philosophical path of Lask and his colleagues. See the "Vorwort," no page number.

38 Dietmar von der Pfordten, "Radbruch as Affirmative Holist" in *Ratio Juris,* 21 (2008), 387–403, Wiegland, *Unrichtiges Recht*, 115–117, and Andreas Funke, "Radbruchs Rechtsbegriffe, ihr neukantianischer Hintergrund und ihr staatsrechtlicher Kontext" *Die Natur des Rechts bei Gustav Radbruch*, ed. Martin Borowski and Stanley L. Paulson (Mohr Siebeck, 2015), 23–52.

39 For a detailed discussion on the Baden school and its influence on Radbruch, see, for example, Wiegland, *Unrichtiges Recht*, 61–102.

40 Lask, *Rechtsphilosophie*, 2 and "Legal philosophy," 4, and Radbruch, "Legal Philosophy," 53–55, and *Rechtsphilosophie*, 13–15.

41 It is not a coincidence that Radbruch begins his memoirs with a story about his childhood in a world "[w]ithout cars, cinemas and radios, without airships and airplanes, without telephones and gramophones, without electric light and trams, indeed without bicycles and typewriters, fountain pens and wristwatches, even (excepting the Emperor's palace) without bathrooms and toilets." Radbruch, *Der Innere Weg*, 7.

42 Radbruch contemplated this in one of his most provocative and fascinating texts: Radbruch, "Zur Metaphysik des Flohs".

reality. They do not reflect a moral structure in nature, but rather impose the human will on reality to the point that some believe that nature as such can be reshaped. According to another famous German jurist (and avowed enemy of Radbruch), namely, Carl Schmitt, the division of these two dimensions of human life—value and reality—laid the basis for a "tyranny of values" supposedly arising from the heterogeneous character of modern, capitalist societies.[43] For Radbruch, it was not the relativity of values but their absolutization that opened the way to tyranny. In criticizing what his friend Max Weber described as a kind polytheism of values in the industrialized nation-states with their conflicting interest groups, Radbruch was not endorsing a politics grounded in absolute and objective values.[44] He followed Rickert who insisted that "in order to penetrate to the whole, philosophy has to explore the one and the other everywhere, i.e. to proceed heterologically."[45] Every culture is stratified and full of potential conflicts due to its immanent heterogeneity. "Only an ontological pluralism can do justice to the richness of the world."[46] Thus, even if Radbruch, in his plea in 1949 for "class struggle" — a term which must be used "as long as the active class struggle of capital demands the essentially defensive class struggle of the proletariat" — went on to argue that "the Western man is, whether he wants it or not, 'Christian by nature,'" this *anima naturaliter christiana* did not signify a search for common values.[47] It presupposed a commitment to freedom—"freedom for science," "freedom of the press," and, even more radically, a form of "libertarian socialism"—on the grounds that only such freedom could sustain a genuine pluralism of values. However, he ultimately concluded that something more than value pluralism was required. This deeper foundation was found in a vision of Christianity that challenged what Ernst-Wolfgang Böckenförde would later describe as "public (*polis*) religion": a community grounded in shared values, rather than in the conviction that it is possible to transcend what the theologian Ida Simonsson

43 See Carl Schmitt, "Die Tyrannei der Werte" in *Säkularisation und Utopie: Ernst Forsthoff zum 65. Geburtstag*, ed. Sergius Buve (Kohlhammer, 1967), 37–62. The third and last edition of this text was published in 1979 and republished in 2011: Carl Schmitt, *Die Tyrannei der Werte: Dritte, korrigierte Auflage* (Duncker & Humblot, 2011).

44 Weber said that "[s]cientific pleading is meaningless in principle because the various value spheres of the world stand in irreconcilable conflict with each other. The elder Mill, whose philosophy I will not praise otherwise, was on this point right when he said: If one proceeds from pure experience, one arrives at polytheism." Max Weber, "Science as Vocation" in *From Max Weber: Essays in Sociology*, ed. H.H. Gerth and C. Wright Mills (Routledge, 1991), 129–158, here 147.

45 Heinrich Rickert, "Thesen zum System der Philosophie (1932)" in *Philosophische Aufsätze*, ed. Rainer A. Bast (Mohr Siebeck, 1999). 319–324, here 319.

46 Ibid.

47 Radbruch, "Kulturlehre des Sozialismus," 161.

has described as "the order of value" altogether by appealing to something invaluable—something that resists all forms of instrumental evaluation.[48]

For Radbruch, value was rooted in cultural subjectivity and relativity. He emphasized that the aspiration to return to a world governed by objective values would constitute a regression to regimes historically founded on serfdom and slavery—what he, in his seminal essay on the origin of criminal law, referred to as "the status of the unfree."[49] This had provoked the feudal peasant uprisings which he and his daughter insisted were legitimized by "the revolutionary thought of God's justice."[50] These and similar conflicts demonstrated that social life necessarily entailed a plurality of singular lives: a manifold of living beings with distinct perspectives, and it was this individual life that was invaluable for Radbruch. For, "[i]n the end, there is only God and the soul." On the one hand, Radbruch thought that law must reflect this social heterogeneity by seeking to protect the individual as an individual, but it also made him search for what we would like to call a *monotheism of the good*, which contests the polytheism of values. Not by absolutizing a specific value, which would reduce the good to a subjective standpoint, but rather by seeking to understand that which is given beyond the need for evaluation that grounds law. Radbruch found this strange monotheistic perspective — beyond the relativity of human assessments and conceptions, and thus beyond the polytheistic evaluations of law, morals, and culture — in the Christian call to not judge, which also implies the right of individuals and collectives to challenge unjust judgement.

48 Ibid., 161–162. See also Ida Simonsson, *The Order of Value: Christian Theology and the Market Economy* (Uppsala University, 2021).

49 See Mireille Hildebrandt, "Radbruch's Rechtsstaat and Schmitt's Legal Order: Legalism, Legality, and the Institution of Law" in *New Historical Jurisprudence & Historical Analysis of Law* 2, no. 1: (2015), 42–63, here: 43. See also Gustav Radbruch, "Der Ursprung des Strafrechts aus dem Stande der Unfreien," in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (Verlag für Recht und Gesellschaft, 1950), 1–12. Translated as "The Origin of Criminal Law in the Status of the Unfree" in *Foundational Texts in Modern Criminal Law*, ed. Markus D. Dubber (Oxford University Press, 2014), 407–413. The tyrannical administration of the serfs that Radbruch examines in this text is not only a historical phenomenon in the past. It could very well be compared to the rule of occupied territories, reeducation camps, black sites for interrogation, and extraterritorial prisons that the great powers of the world operate today.

50 Radbruch, *Der deutsche Bauernstand*, 22. It is worth mentioning that Radbruch emphasizes that his family came from the peasantry (*Bauernstand*) in his memoirs: *Der Innere Weg*, 14. For a related and much more detailed argument, see Stephen Humphreys, "Equity before 'Equity,'" in *Modern Law Review* 86, no. 1 (2023): 85–121.

The Purpose of Law

Five years after Radbruch's death, in 1954, his *Spruchbuch für Anselm*, the collection of quotes that he sent to his son on the Russian Front, was published by Vandenhoeck & Ruprecht. The book ends with a Latin translation of Matthew 5:6, "Blessed are those who hunger and thirst for righteousness, for they will be comforted," indicating Radbruch's belief in the almost divine nature of law.[51] He seemed to truly believe that law binds the individual soul to God in the sense that the one who desires to be righteous already belongs to the just.[52] Still, to be truly divine, one must transgress the values—legal certainty, purposiveness or expediency, and justice—that define law, not by denying them but sublating and overcoming them. Law must also be shaped by the mercy or grace—*Gnade*—that Radbruch's teacher Rudolph Sohm theorized as a type of power that, in contrast to the equity of law, transcends fairness, equality, and even justice.[53] A law based on mercy entailed, for example, that the penal code should be transformed into what Radbruch described as a *Besserungsrecht*, and made him struggle for "the abolition of the *Zuchthausstrafe* [house of correction punishment], the decriminalization of adultery and homosexuality, the humanization of abortion law" and other social reforms.[54] This radicalism also implied a rejection of his teacher Sohm's Hobbesian vision of temporal law as a command as well as his explicit definition of the state as *Zwangsgemeinschaft*—a community of coercion.[55]

Sohm was not alone in viewing law as a matter of command and coercion, and this perspective was not limited to conservative thinkers. A progressive legal scholar like Hans Kelsen stated that law, in contrast to morality, "*commands* a certain behaviour—i.e., makes it a legal duty—*by* decreeing a sanction to be obligatory when the opposite behaviour occurs."[56] According to Radbruch, law certainly implies the exercise of force, insofar as it necessarily entails the enforcement of specific behaviours or dispositions. However, it is not exhaustively defined by this coercive dimension. The ultimate purpose of law, Radbruch argued, is to constitute a just community; in this respect, law is more than a mere command. It functions as a normative mechanism

51 Radbruch, *Kleines Rechtsbrevier*, 61.

52 Radbruch discusses, for example, the religious character of the concept of justice in the following essay that also shows the intrinsic relation between his essays after the Second World War and his earlier work: "Lieb der Gerechtigkeit und Gemeiner Nutz: Eine Formel von Johann von Schwarzenberg" in Radbruch, *Elegantiae Juris Criminalis*, 70–89.

53 See Rudolph Sohm, *Kirchenrecht: Erster Band – Die Geschichtlichen Grundlagen* (Verlag von Duncker & Humblot, 1970 (1923), 27–28.

54 See Ulfrid Neumann, "Gustav Radbruchs Beitrag zur Strafrechtsreform" in *Kritische Justiz* 37, no. 4 (2004): 432–441.

55 Rudolph Sohm, *Kirchenrecht: Zweiter Band – Katholisches Kirchenrecht* (Verlag von Duncker & Humblot, 1970 (1923), 56.

56 Hans Kelsen, *General Theory of Norms* (Clarendon Press, 1991), 133.

by which a collective—whether a society or culture—distinguishes between what is legally just and licit and what is unjust and illicit. The establishment of obligatory norms is indeed a necessary condition for the existence of law, but it is not sufficient. Law presupposes order and, consequently, the possibility of legal certainty. While the capacity to enforce order—and thus to establish political authority—is foundational to positive law, it does not represent its *teleological end*. Rather, the *telos* of law lies in the realization of justice within a coherent legal and moral framework. In this, Radbruch agreed with Kelsen and alluding to the latter's theory of the basic or fundamental norm he implied that the foundation of law is force: "Charles Martel asked Pope Zachary: 'Should he who has the power also be king?' the Pope answered in the affirmative, upon the ground: *ne conturbaretur ordo*. 'He is lord who keeps us quiet' (Goethe, *Faust*, *Part II,* Act IV)—that is the 'fundamental norm' upon which the validity of all positive law is based."[57] Positive law—that is, the actual laws governing a specific society—is not identical with the idea of law.[58] While force may be the foundation of law, it is not its ultimate purpose. The end and hence purpose of the law is to constitute a community regulated by the "idea of justice," which, according to Radbruch, finds its "prototype" in "distributive justice" and therefore in the "equality of rights, equal capacity to act, equal status."[59] The law is thus related to the need to regulate economic exchange and it "is valid not because it can be carried through effectively; rather, it is valid if it can be carried through effectively, because it is only then that it can afford legal certainty."[60] The reason one ought, and not only must, follow the law is because it can be evaluated as just and not only as a rational means to enforce order. It seeks to establish a system of legal certainty and at least a minimum of distributive justice: a serf might, for instance, have the right to buy his freedom or retain a share of the crops he harvests.

Sohm had insisted that law "depends fundamentally on form (*summum jus*, *summa injuria*) and must first depend on form, for only in this way can it impose itself as just on the two parties … despite their opposing interests, as a just decision that must be imposed, not on the basis of the influences of the moment, but from established, traditional, common principles."[61] These established, traditional, common principles lay the basis for a community with a specific legal apparatus in the historical sense.[62] The legal form, on the other hand, was, according to both Sohm and Radbruch, transhistorical and implies

57 Radbruch, "Legal Philosophy," 117.

58 See the discussion on law as "the reality directed toward the idea of law" in ibid., 72.

59 Ibid., 74.

60 Ibid., 118.

61 Sohm, *Kirchenrecht*, 1–2.

62 For example, Radbruch wrote that "the concept of law is a cultural concept, that is, a concept of a reality related to values, a reality the meaning of which is to serve a value. Law is the reality the meaning of which is to serve the legal value, the idea of law. The concept of law

that law has a dual character. Law should be understood as, on the one hand, a cultural concept that denotes a specific "legal reality," and, on the other, as what Radbruch described as a transhistorical value or idea (such as justice) that is concretized in this reality as a specific rule or command.[63]

Radbruch frequently used the terms "form," "idea," and "value" interchangeably, viewing both historical and transhistorical values (or forms and ideas) as defined by purposes (*Zwecke*). These purposes reflect the uses and functions of things for humans as cultural beings, rather than merely biological ones. Law, in its transhistorical sense, serves, for example, purposes such as justice—an enduring or even transcultural aim. However, this abstract purpose is given concrete meaning through its articulation within a specific legal order. This articulation within a culture forms the basis of Radbruch's legal relativism, since the actual content of law can never "be answered unequivocally but only relativistically, by the systematic development of the different views of law and the state, the views of the different parties."[64] Law has a transhistorical form and thus a transcultural value, insofar as it can be abstracted from particular contexts and conceived as an idea in its own right.

Interpreted from this transhistorical perspective, Radbruch argues, "[l]aw is what, according to its meaning, is intended to serve the idea of the law."[65] The "idea of law" is conceptually determined by "justice," which implies "distributive justice" and "equality: equal treatment of equal, and correspondingly unequal treatment of different men and relationships."[66] This is why Sohm can insist that law "depends fundamentally on form." The form of law establishes equality and must "impose itself as just on the two parties," and, by doing so, the form of law cannot be shaped only by "justice." It also necessitates "expediency"—which Radbruch defined in 1932 as "suitability for a purpose"—and "legal certainty." Together, these three values or ideas determine that law is an instrument for justice and equality. But, as we have stressed, it is possible that these three ideas enter into conflict, since "legal certainty" implies "positivity" (the laws must be enforced and posited) and necessitates "a power that lays it down" as a positive statute, and that power can be unjust.[67] This argumentation from 1932 laid the basis for the 1946 formulation on unjust law, and explains why Radbruch did not consider positivism to denote a specific legal school. It denoted the tendency inherent in all legal systems to base law on force. Regimes based on natural law can paradoxically be said to legitimize a kind of positivistic one-dimensionality in denying "the two-dimensionality of

thus is oriented toward the idea of law. Now the idea of law can be none other than justice." Radbruch, "Legal Philosophy," 73.

63 Ibid., 72.

64 Ibid.,108.

65 Ibid., 107.

66 Ibid.

67 Ibid., 109.

the legal world" by reducing the abstract form of law to a factual legal system and thereby "identify 'material' and 'formal natural law.'"[68] Divine or natural law has often been equated with the material norms of a particular culture—for instance, it has been used to legitimize practices like serfdom and slavery, contributing to its loss of legitimacy in modern times. Yet "formal natural law" still holds "universal validity in the question concerning the 'natural', that is, the right law"—a law that embodies justice, or *richtiges Recht* (right law).[69] This is why, in 1932, Radbruch defended a doctrine of *critical natural law*. The question of justice—is this right and just?—implies a form of natural law that lacks fixed content but enables a principled critique of positive, material law. To reject the distinction between "material" and "formal natural law" is to deny the fundamental tension within law itself—a tension arising from the divide between reality and value, and from the fact that law always requires interpretation. This act of interpretation is inherently political and thereby polemical.

Kant's critique of metaphysics—and even more so, the French Revolution—paved the way for a new understanding of law, which Radbruch developed into a form of pragmatic Platonism without defending a premodern belief in objective values.[70] This is why he emphasized that modern individuals no longer see values as objective features of reality, but as subjective projections—shaped by varying interpretations of natural and social facts. However, even in the modern world, we still recognize that "reality and value are drastically intertwined. We experience men and things affected with value, that is, with worth or worthlessness, without reflecting that such worth and worthlessness originate from ourselves, the spectators, and not from those very men and

68 Ibid., 61. It should be noted that classical doctrines of natural law can and perhaps should be interpreted more along the line of what Lask and Radbruch called "formal natural law" since, as Shia Moser insisted already in 1979, even in Aquinas's "teaching about the eternal, the natural, and the human law" the "ethical and the juristic elements are logically separable, and we may therefore speak of a conjunction of two views, that is, the ethical doctrine and the thesis that positive laws depend for their validity on their accordance with the basic moral principles." See Shia Moser, "Ethical Non-cognitivism and Kelsen's Pure Theory of Law" in *The University of Toronto Law Journal* 29, no. 2 (1979): 93–113, here 97.

69 Radbruch, "Legal Philosophy," 60. See Radbruch, "Der Deutsche Bauernstand," 21–23 for an interesting discussion on how biblical argumentations and natural law could be used to both legitimize and contest serfdom.

70 Radbruch wrote that "[a]ll legal philosophy from its inception to the beginning of the nineteenth century was a doctrine of natural law" and insisted that "[t]he decisive blow against natural law has been struck not by legal history and comparative law but by epistemology; not by the historical school, but by critical philosophy; not by Savigny but by Kant." "Legal Philosophy," 60. Radbruch quotes Goethe's words about a great revolution on the horizon which "is not the fault of the people but the government" and views his legal philosophy as part of the revolutionary process that 1789 unleashed, and he thinks such a process can revive what he takes to be the authentic meaning of religion. See Radbruch, *Kulturlehre des Sozialismus*, 154.

things."[71] A legal philosopher should question this entanglement and make a distinction between *Wert* and *Wirklichkeit*. This "methodological dualism" does not imply "that evaluations may not be caused by existing facts, but rather that they may not be logically grounded upon them."[72] The division between value and reality emerged from the Kantian distinction between *Sollen*, what ought to be, and *Sein*, what is. In practice, *Sein* and *Sollen* are always related. Logically, one must differentiate them. And sociologically, facts are evaluated in diverging ways even within the same "social environment," since such milieus generate distinct and even conflicting ideologies "determined by their social settings."[73] The gap between *Sein* and *Sollen* remains as long as we lack an absolute correspondence between values and reality—and thereby as long as we remain within the order of value, which generates conflict, drives political struggles, and produces the necessity of law.

Platonic Pragmatism

With the onset of the Second Industrial Revolution, and throughout Radbruch's lifetime (1878–1949), social divisions in Europe intensified, giving rise to widespread mobilization through competing ideological movements. Radbruch saw legal philosophy as part of these conflicts and argued that it transfers "the struggle of political parties … into the realm of the spirit" just as political conflicts represent "a grandiose legal philosophical discussion."[74] All "great political changes were prepared or accompanied by legal philosophy. In the beginning there was legal philosophy; at the end, there was revolution."[75] The most efficient way of securing law and order in a period shaken by political upheavals, according to Radbruch, was through a democratic and philosophical relativism that disclosed how common interests can emerge from the clashes between different perspectives. This entailed a struggle for a *Parteienstaat*, a democratic order based on political parties, that broke with the authoritarian legacy of the Wilhelmine *Obrigkeitsstaat,* in which the state ruled the parties rather than reverse.[76]

The pluralistic *Parteienstaat* necessitated what Radbruch's adept in Kiel, the German-Jewish legal scholar Hermann Heller, described as "social homogeneity," a basic political and economic equality, which he distinguished from

71 Radbruch, "Legal Philosophy," 49.
72 Ibid., 54–55.
73 Ibid., 54 and 73.
74 Ibid., 55.
75 Radbruch, "Legal Philosophy," 55.
76 On the concept of *Obrigkeitsstaat*, see, for instance, Gustav Radbruch, "Parteienstaat und Volkgemeinschaft" in *Politische Schriften aus der Weimarer Zeit I: Demokratie, Sozialdemokratie, Justiz*, ed. Alessandro Baratta (C. F. Müller Juristischer Verlag, 1992), 94–99.

cultural or religious identity.[77] The two legal scholars had jointly participated in the armed workers' uprising in Kiel in opposition to Wolfgang Kapp's attempted military coup in 1920. Both recognized the fragility of the newly established democracy. They posited that a *Parteienstaat* grounded in relative social homogeneity, which they envisaged would encompass economic democracy, rather than being defined by specific cultural, religious, or ethnic identities, might generate sufficient social cohesion to endure. Heller explicitly acknowledged that economic reforms alone were insufficient to establish such a social democracy. A common ethics was needed. Nonetheless, he argued that the challenge of achieving such homogeneity could not be resolved through the politicization of religion or culture. In opposition to Carl Schmitt, Heller characterized "the use of religion as an instrument of politics" as "a religious blasphemy" and wrote that even if one can "construct a religious myth from the myth of the nation, one cannot actually create a people or a god."[78] Such an endeavour, he contended, would inevitably lead to a political catastrophe.

Despite this, Heller, much like Radbruch, believed that religion could serve as a progressive force. It could compel recognition of a domain that transcends mere cultural—and, by extension, economic and moral—values, which shape human existence. Radbruch even hoped, as we have stressed, that a culture based on the religious ideas of grace and mercy (*Gnade*) could transform political struggles. He argued that "socialism is not tied to a particular worldview; rather, it is the consistent conclusion from a wide range of different worldviews."[79] Socialism cannot be reduced to an ideology for the working class since it "also implies the redemption of the declassed bourgeoisie" and hence for everyone threatened by economic insecurity.[80] A social democracy did not imply a specific *Weltanschaaung*. It entailed "a party for a specific purpose [*politische Zweckpartei*]: one in its goal, diverse in its reasoning" precisely because socialism could be legitimized by both conservative and liberal arguments.[81]

Radbruch's nearly anti-political defence of the *Parteienstaat* against supporters of the Wilhelmine Empire during the Weimar period was not a result of liberal naivety but of political realism. The birth of the Weimar Republic at the end of the First World War showed that revolution was less a means to create better societies and more a social transformation driven by historical contradictions. Like law and politics themselves, revolution was a necessary evil—a relative good—which inevitably involves serious errors, political mistakes, and ethical failures. But because such catastrophic events as revolutions are

77 Hermann Heller, "Politische Demokratie und Soziale Homogenität" in *Gesammelte Schriften: II* (Mohr Siebeck, 1992), 421–434.

78 Heller, "Politische Demokratie und Soziale Homogenität," 433.

79 Radbruch, "Kulturlehre des Sozialismus," 160.

80 Ibid.

81 Ibid.

unavoidable, they will always be exploited by different social groups as political opportunities and as moments to establish new legal systems. Radbruch described the fall of the Third Reich as such a revolution and emphasized the need for organized defence against "the class struggle of capital" in 1949, the year of his death.[82] He was afraid that new social divisions could push Europe into the hands of fascist forces again and wrote that one "must not forget that the National Socialist seizure of power was a new form of active class struggle, and that since then this struggle has taken the form of an international exercise of power."[83] The response to the international class struggle led by the bourgeoisie—most clearly seen in how human survival became tied to wage labour—could not be a return to a form of *Weltanschauungssozialismus*. The Russian Revolution had demonstrated the failure of the communist one-party state. Radbruch did not support the rule of the workers' councils that emerged at the end of the First World War and helped bring about the Weimar Republic, because he doubted the ability of the councils to represent the diverse political perspectives present in the modern world. His vision of socialism involved the relativization of the political divisions between right and left by establishing a democratic form of socialism. He hoped that could provide a foundation for relative social homogeneity, which challenged the polytheism of values and strengthened a system of democratic political pluralism. The real danger of values is not that they are relative and plural, but that they risk becoming absolute powers and tyrannical idols. This tyranny of value is a constant threat in a world where both capitalist and communist systems are ruled by industrialized wage labour, the accumulation of profit, and the logic of evaluation.

Radbruch believed that a democratic order must oppose any party committed to a "total program based on a world-view [*weltanschaulich begründetes Totalprogramm*]," because such parties would hinder the political pluralism democracy requires to weaken the tyranny of values.[84] The democratic state had the right to defend itself with the use of force against its enemies since every legal order rests on such *Gewalt*. By securing what Radbruch saw as the fundamental basis of law—namely, peace and order—the *Parteienstaat* could work to identify the cultural and legal structures that create cohesion within a diverse community. Democracy was a political system worth defending, in specific situations even to the point of tyrannicide, because Radbruch believed it was the best way to uphold the three essential values of law: legal certainty, purposiveness (or expediency), and justice.[85] In that, Radbruch was perhaps mistaken since the democracy of the Weimar Republic evolved towards the

82 Radbruch, "Kulturlehre des Sozialismus," 161.
83 Ibid.
84 Ibid.
85 See the discussion on tyrannicide in Gustav Radbruch, "Der politische Mord: Zinn contra Stock," in *Süddeutsche Juristen-Zeitung*, Jahrg. 3, Nr. 6 (June 1948), 311–312.

tyranny of National Socialism. However, what is important to note here is that Radbruch's legal relativism recognized the objectivity of the good as something other than a value.

Like Lask before him, who wrote that the legal philosopher "searches for the formal absolute objective of any historically given law, the systematically articulated complex of postulates applicable to any empirical legal reality, or in Stammler's words, the law of the law, the right law," Radbruch also sought the political and legal form that would guarantee the objectivity of law.[86] His relativism did not mean rejecting the belief in what the legal scholar Rudolf Stammler called *richtiges Recht*—or right law.[87] He strongly emphasized that his own method "does not stop at the mere happening of factual legal philosophical evaluations. Rather it examines their meaning, and not only their subjective, actually intended meaning, but their objective, signifying meaning."[88] Such objectivity cannot be separated from the inevitably relative perspective of the living human subject, which Radbruch called the soul in his *Rechtsphilosophie*. However, the question itself has a certain objective structure. For example, no one could argue that the purpose of law is to promote injustice, so the question of law is always related to the question of justice. This is why the timeless concept of law is expressed in "the question concerning the 'natural,' that is, the right law."[89]

Lask made a helpful distinction between "individual" and "typical values" which clarifies the difference between the "subjective" and "objective" senses of values. Individual values emerge from evaluations which grasp the singularity and uniqueness of a specific object, such as the love a father can feel for his son. According to Lask, "legal philosophy, as the theory of the specific value of the law, can, like logic, aesthetics, philosophy of religion, and the other branches of philosophy, be only a theory of typical values" since it analyses how a value, such as justice, is repeated in distinct communities as a cultural form.[90] The "individual value falls short of the infinite variety of the fullness of empirical content. The 'typical value' is still further removed from that which is concretely given, since it embodies the absolute standard of an unlimited number of instances of its realization."[91] Typical values have clear forms that define them as standards—for example, a republic is not a monarchy, the attractive is the opposite of the ugly, and law is not anarchy. Because of this, Radbruch argued that these values possess "objective, signifying meaning." However, these objective meanings do not provide fixed answers that apply

86 Lask, "Legal Philosophy," 7.
87 See Rudolf Stammler, *Die Lehre von dem richtigen Rechte* (J. Guttentag Verlagsbuchhandlung, 1902).
88 Radbruch, "Legal Philosophy," 56.
89 Ibid., 60.
90 Lask, "Legal Philosophy," 5.
91 Ibid.

universally, since every standard must be interpreted within its specific cultural context. For instance, the Weimar Republic is very different from Plato's ideal *Kallipolis*—the beautiful city. There are always ongoing debates about the meaning of typical values because each standard raises questions, such as: what exactly is a republic? This is why Radbruch insisted that the "question concerning the 'natural', that is, the right law," remains the only acceptable form of natural—and thus transhistorical—law.

The struggle over the content of law prompted Radbruch to emphasize that "[l]aw is a creation of man, and like any human creation it can be understood only by its idea. Just try to define a human creation as simple as, say, a table, otherwise than by reference to its purpose!"[92] Radbruch used the terms "idea," "purpose," and "form" interchangeably to describe the "typical values" that define what something is, based on how people use or interpret it. A table might be defined simply as a board resting on four legs. But this definition isn't very helpful, since some tables have fewer or more legs. It also doesn't distinguish a table from a bar stool, which can also be described as a board with four legs. This doesn't mean that general definitions are useless or entirely relative. In fact, every form has a true, almost Platonic "objective, signifying meaning." Radbruch suggests that defining a table as "a contrivance on which to put something for those sitting at it" better captures the idea of a table from the user's perspective than a mere description of its physical structure.[93]

The "typical value" refers to the sociological function that an object serves for a particular individual within a specific society. At the same time, that same object possesses an objective and transcendental quality, which points to a general form that cannot be reduced to its physical material, as it represents a kind of collective type or notion—what Radbruch described as an idea. Although Radbruch and Lask explicitly distinguished their philosophies from metaphysical Platonism, we argue that this nonetheless reveals a Platonic aspect of Radbruch's legal philosophy, precisely because the concept of form involves a purpose with an objective, signifying meaning.[94] This is why we argue that Radbruch's legal philosophy can tentatively be described as a *Platonic pragmatism* in the sense that the purposes he sought to grasp with his theory of forms give an ideal structure to the human reality by setting limits to subjective

92 Radbruch, "Legal Philosophy," 51.

93 Ibid., 52.

94 Lask writes, for instance, that "[t]he critical theory of values differs from any Platonistic two-worlds theory in that it regards empirical reality as the only kind of reality, but at the same time as the scene or the substratum of transempirical values or meanings of general validity." Lask, "Legal Philosophy," 4. Lask was influenced by the Platonic tradition and wrote a study on Platonism. See Emil Lask, "Platon," in *Gesammelte Schriften: Dritter Band* (J. C. B. Mohr, 1924), 1–56, and "Die Logik der Philosophie und die Kategorienlehre," in *Gesammelte Schriften: Zweiter Band* (J. C. B. Mohr, 1923), 223–243.

interpretation.[95] Like a table, law cannot be defined arbitrarily. Moving from the definition of the table as "a contrivance on which to put something for those sitting at it" to the idea of law, Radbruch insisted that the value and therefore idea of law must be understood according to the end of realizing justice in a community. He thought that the form of law itself reveals that the definition of law as the command of a certain behaviour was unsatisfactory. The form and, hence, purpose of law entails something more than command: it implies the idea of justice.

Decades before H. L. A. Hart famously criticized John Austin's command theory of law—a topic we will explore in the next chapter—Radbruch had already argued that law, as a means of evaluation, functions more as an instruction than a command. While law requires obedience to be effective, it loses legitimacy if obedience is motivated solely by fear of sanctions. A law that lacks legitimacy may still establish order—the foundational condition of law—but it cannot fulfil its true purpose: justice. From a sociological perspective, the power of law depends on its ability to uphold values that are widely seen as right and just. Because conceptions of justice vary, there will always be disagreement over the meaning of law. This is why legal philosophy, according to Radbruch, must acknowledge the cultural relativity of values. He clarified in 1914 that "it would be a misunderstanding to think that relativism has anything to do with the resigned, cynical question posed by Pilate: 'What is truth?', that decadent, blasé approach that declares all evaluations to be equally right and wrong."[96] As a theoretical science, legal philosophy can only help us understand law since, in the end, it is the individual who has to use her practical reason to discern what is good or just for a specific community in a concrete situation. For this reason, "[r]elativism does not seem to be interrelated with the Pilate of the Gospel, in which theoretical reason as well as practical reason is silenced. Rather, it seems to be connected with Lessing's Nathan, for whom the strongest appeal to practical reason is in the silence of theoretical reason: 'Let each of you strive to show the power of the stone in his ring!'"[97] Referring to the parable of the rings in Gotthold Ephraim Lessing's

95 Platonic themes shaped both the Marburg and the Baden schools. Lask, as we have shown, developed Platonic ideas and the Heidelberger philosopher Johannes Theodorakopoulos has showed how Rickert and Lask's philosophy of judgement could be used to explore Plato's thoughts in his dissertation *Platons Dialektik des Seins* (Tübingen: J. C. B. Mohr, 1927). Hermann Cohen's philosophy can be seen as an attempt to fuse Platonism and Kantianism. See Karl-Heinz Lembeck, "Plato-Reception in the Marburg School," in *Brill's Companion to German Platonism* (Brill, 2019), 217–249. Paul Natorp wrote an important study on Plato's theory of ideas: *Platos Ideenlehre: eine Einführung in den Idealismus* (Verlag von Felix Meiner, 1921). See also Paolo Pecere, "History of Physics and the Platonic Legacy: Problem in Marburg Neo-Kantianism," in *British Journal for the History of Philosophy* 29, no. 4 (2021): 671–693.

96 Radbruch, *Grundzüge der Rechtsphilosophie*, 28.

97 Ibid.

1770 play *Nathan the Wise*, where a father promises each of his three sons a treasured ring believed to grant divine favour, Radbruch illustrated the eschatological dimension of his relativism. In the story, the father has two identical copies made of the original ring and gives one to each son, and the three rings symbolize Judaism, Christianity, and Islam. Since it is impossible to determine which ring is the original, and therefore which religion holds the ultimate truth, the Jew, the Christian, and the Muslim must treat one another with mutual respect. Until the final judgement, none can know for certain which, if any, will be chosen as the true bride of God.

In a significant lecture from 1934, one year after Adolf Hitler took power, Radbruch clarified the practical and political meaning of his eschatological relativism. He described the time in which he lived as "an era of supposedly absolute values" and insisted that "it takes courage to embrace relativism" because it entails an almost ascetic struggle against the self and its will to impose its values on the world.[98] Relativism was once again identified with the Socratic wisdom of "the smiling sceptic" and was now said to necessitate "a strong, even aggressive conviction" against the tyrannical absolutization of human relativity into an illiberal system of law.[99] He stressed that one must postulate "that every substantive conception of just law is valid only under the condition of a particular social situation and a particular system of values."[100] "Social circumstances," he clarified, "are endlessly mutable, but the number of value systems is limited. It is therefore possible to establish a complete system of valuations that are possible in a given social situation."[101] The "chaos of the given" is an infinite set, and what Lask had called "individual values" might belong to an even larger infinite set, since they are related to the inner lives of singular living beings who must interpret that chaos as a systematic whole in order to experience a common world. The typical values, and the value systems that they belong to, cannot be endless, since they are boundaries that shape the chaos of the world into a *cosmos*, an ordered whole. This is why the typical values can be called forms and why Radbruch's eschatological relativism leads to a Platonic heaven of ideas which shapes the chaos of nature into a cosmos where a truth beyond evaluation can be found.

The form of law cannot be endlessly modified without losing its "objective, signifying meaning." Thus, even if it is impossible to decide which value is true "in a scientific, provable and irrefutable way," one can still assess whether a system of values and, hence, more specifically a distinct legal order should be understood as a system of law or merely as a system of positive statutes

98 Gustav Radbruch, "Der Relativismus in der Rechtsphilosophie," in *Rechtsphilosophie III*, ed. Winfried Hassemer (C. F. Müller Juristischer Verlag, 1990), 17–22, here 17.

99 Ibid.

100 Ibid.

101 Ibid.

with no relation to the idea of justice. "We have derived absolute conclusions from relativism, namely the traditional demands of classical natural law," Radbruch wrote, and explained that "the ideas of 1789 have resurfaced from the sceptical flood in which they seemed to be drowning."[102] This is why Radbruch's relativism was not simply the humility of an enlightened sceptic who accepts that he can believe, but never truly know, whether his beliefs are correct. Radbruch's legal relativism was an open defence of two things, which he considered more important than mere liberal tolerance: the revolutionary overthrow of the Wilhelmine *Obrigkeitsstaat* in 1918, and his belief that democratic socialism was not a political movement, but something that could be demonstrated as a form of rational necessity also from a liberal or conservative perspective. His legal relativism led to a critique of law as such, for as early as 1914, the "smiling sceptic" represented the saintly refusal of judgement that Radbruch defended until his death.[103]

Against Retribution

In 1932, Radbruch argued that his legal relativism could be described as a "natural law with changing content" or as "a 'cultural law.'"[104] The human animal lives by creating culture, and cultures tend to produce an accumulation of conflicts and injustices which must be addressed through law. But law, as an evaluative judgement of what is licit for a specific community in a legal sense, does not emerge automatically from natural facts. It emerges through the transformation of a specific culture's subjective evaluations into a set of external norms. In contrast to these external norms, morality implies "internal conduct" and "enters the scope of law only if it suggests external conduct that is to be excepted."[105] The set of external conducts and norms that law regulates shapes culture into what Radbruch's friend in Heidelberg, the Hungarian philosopher György Lukács, called "a second nature," which has become an important concept to explain the naturalization of custom and culture.[106] Radbruch had a similar view of culture as "second nature," but he

102 Ibid., 22.
103 Radbuch, *Grundzüge der Rechtsphilosophie*, 37.
104 Radbruch, "Legal Philosophy," 60.
105 Ibid., 80.
106 See Georg Lukács, *The Theory of the Novel: A Historico-philosophical Essay on the Forms of Great Epic Literature* (The Merlin Press, 1988), 61. Radbruch writes in the "Vorwort" to *Grundzüge der Rechtsphilosophie* that "[t]he fact that its author has decided to set out his thoughts in sketched form at this early stage is due, first and foremost, to the encouraging and inspiring support of Dr. Georg v. Lukács in Heidelberg." No page number. On the relation between Lukács and Radbruch, see Csaba Varga, "Beiträge zu den Beziehungen zwischen Gustav Radbruch und Georg Lukács" in *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 67, no. 2 (1981): 253–259, and Csaba Vargá, *The Place of Law in Lukács' World Concept* (Szent István Társulat, 2012), 33–39.

can also be said to argue that nature is the first domain of culture, or what he called spirit, *Geist*, for humans. In actual life, nature cannot always be differentiated from culture: "The nobility of a man lights his face up like a halo. The rustling boughs of old oaks give us a thrill of the sacred."[107] Philosophy shatters this understanding of reality by postulating a logical difference between form and matter, value and reality, subject and object. But it also returns us to the real world where the nobility of man can glow like a halo and, hence, where we can insist that a specific evaluation is more than a subjective value. It can imply an idea or a form.

Tellingly, Kantorowicz insisted in his and Radbruch's manifesto on free law that "it must not be overlooked that everything that ought to be [*alles Sollende*] is also a being. Ought is will [*Sollen ist Wollen*], even if it is a peculiar kind of willing."[108] *Sollen ist Wollen* since willing is a natural condition for the human as a living being: an animal with real will and real desire. The legal order is the coagulation of human will—or rather the interests and wants of particular groups—into external norms that must and ought to be followed. This implies that politicians, judges, and lawyers do more than evaluate. They implement new values by relating instructions and commands to the specific outcomes that they want to see realized. This entails a struggle of persuasion that reshapes not only our understanding of law, but of our assessment of reality itself. Law implies a political struggle over what we take to be of absolute worth, and even raises the risk of civil war. Radbruch stressed this explicitly and wrote that "all politics is oriented towards the possibility of war. The well-known saying; war is only the continuation of politics by other means is based not so much on the essence of war being determined by politics as on politics being determined by war."[109] This is why the basis of law in the ontological bifurcation between *Wert* and *Wirklichkeit* implies an inherent instability in every legal order. Legal evaluations are always political and thereby related to the risk of war. It was this anarchic dimension of law that made Radbruch search for something that can overcome the relativity of law in religion. In his *Kulturlehre des Sozialismus* from 1922, he returned to what he had written to his daughter from the Western Front in 1916, and acknowledged that law is something that only has a relative value from the perspective of God:

107 Radbruch, "Legal Philosophy," 49. Radbruch comes close to the Italian anti-fascist and natural law scholar Alessandro Passerin d'Entrèves, who quoted Pascal's words, "I greatly fear that this nature is itself only first custom, as custom is second nature," and wrote that the "contrast between 'nature' and 'convention' is only one aspect of a deeper antithesis. As Pascal pointed out, it may well be that 'nature' is but a 'first custom,' as custom is a 'second nature.' What matters is the constant endeavour to place certain principles beyond discussion, by raising them to a different plane altogether." d'Entrèves, *Natural Law*, 11.

108 Flavius, *Der Kampf um die Rechtswissenschaft*, 34.

109 Gustav Radbruch, "Zur Philosophie dieses Krieges" in *Rechtsvergleichende Schriften* (C. F. Müller, 1999), 205–224, here 211.

> The entire objective ethos of law, justice and the institutions that support it—such as state, people, work, and culture—does not exist for early Christian ethics. "Before God," there is only the individual person and his soul. In terrible solitude, each individual has a final dialogue about the borrowed pound face to face with God.[110]

Relating socialism to what Radbruch saw as the other great historical movement which had gathered the poor masses, early Christianity, he noted that this popular sect that knew neither man nor woman, Greek nor Jew, was a religion of love for the neighbour—*Nächstenliebe*—rather than solidarity in the socialist sense.[111] But Radbruch commented: "There is no doubt about it: if there had never been Christianity in the world, there would have been no socialism either."[112] He warned his fellow social democrats that abstract juridical solidarity was insufficient. It was necessary for the soul itself to undergo a profound transformation in order to create a type of socialism that exceeded what it became during the Weimar Republic: an experiment in democracy that ultimately led to the disaster of 1933.

Early Christianity offered Radbruch a vision of a necessary anthropological transformation that was more than a moral, legal, or political revolution. Ethics and law are "not yet religion; religion knows nothing of duty and guilt, of good and evil. The essence of religion is contained in two phrases, one from the Old and one from the New Testament: the words with which the story of creation concludes, 'And God saw all that He had made, and behold, it was very good,' and the words of the New Testament, 'To those who love God, all things must serve for good.'"[113] Only a legal order—that is to say, a cultural nexus of what Lask called typical values—shaped by the increasing willingness of the souls that belong to it to refrain from judgement can produce genuinely just law. One should heed what Radbruch called "[t]he great doubters of the … value of the law."[114] He exemplified such doubt with Leo Tolstoy's religious anarchism and Anatole France's critique of the formal justice of law—"[t]he law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread"—and stressed that "one can only become a good jurist if one has a bad conscience as a jurist."[115] A good society laments the fact that it is forced to judge and knows that, ultimately, it is mercy rather than justice which is the true end of law.

110 Radbruch, "Kulturlehre des Sozialismus," 149.
111 Ibid., 148.
112 Ibid.
113 Ibid., 150.
114 Gustav Radbruch, "Vorwort zu einer geplanten Ausgabe des Vortrages von J.H. von Kirchmann 'Über die Wertlosigkeit der Jurisprudenz als Wissenschaft'" in *Kulturphilosophische und kulturhistorische Schriften*, 223–227, here 227.
115 Ibid.

In a text written after the Second World War to the legal scholar Francesco Carnelutti, who wrote a fascinating text on the necessary death of law a few years after Radbruch passed away, the German legal scholar pointed to the existence of a Catholic order in medieval Rome which cared for the souls of prisoners awaiting execution and which had the right to pardon, through the use of lottery, one of those who were waiting for their death.[116] This "*Gnadenrecht*" was a synthesis of the evaluation of what is just and necessary for secular law and the refusal to judge, which destabilizes this justice. But already in 1932, Radbruch emphasized that *Gnade* "does not merely mean a milder form of law; like a lightning flash, it strikes into the sphere of law from an utterly non-legal world and makes the frigid gloom of the legal world more clearly visible."[117] It persuades us not to judge, or at least understand that, as long we judge, we are ruled by the threat of lawlessness which exists in the heart of law since the law is bound to the contingency of power. In 1949, Radbruch stated that today, if an act by a religious order managed to get someone awaiting the death penalty released, it would be seen as arbitrary and unjust, and blatantly opposed to the legal certainty that shapes the modern understanding of the law.[118] But for Radbruch, the religious understanding of *Gnade* as a domain beyond the law was of utmost importance, since it could assist in constructing a nation that questioned the need for retribution. Christianity, the legal scholar repeatedly emphasized in his writings, promises repentance even to the most heinous criminal. Not necessarily by exempting him from sanction, or even denying him a harsh punishment, which was certainly necessary after the fall of the Third Reich, but by acknowledging that the sanction in itself was a necessary evil or at best a relative good. What the messianic movement centred around Jesus hoped, prayed, and laboured for was a world with no affliction, death, war and thus in no need of positive law. In 1932, Radbruch had argued that "the just and the unjust understand each other perfectly, Jesus feels; they are related by a secret underground family resemblance and sympathy, like forester and poacher, inquisitor and delinquent. Coming to close quarters with another, one cannot help having something in common with him."[119] The "secret underground family resemblance" can be found in force—it governs

116 Radbruch, "Gerechtigkeit und Gnade," 342. See also Francesco Carnelutti, "La morte del diritto" in *La crisi del diritto* (Cedam, 1953), 177–190.

117 The whole passage is worth quoting: "In mercy, non-legal realms of value penetrate into the midst of the legal world: values of religious compassion, of ethical tolerance. In mercy, the law's claim of comprehensive rationalization is opposed even by the kindly accident, by that lordship of chance which Nietzsche has called the oldest nobility of the world. So mercy is not exhausted by being 'the safety valve of the law,' to use Jhering's terms. It stands as a symbol for values in the world that are fed from deeper sources and culminate in higher summits than the law." Radbruch, "Legal Philosophy," 198.

118 Radbruch, "Gerechtigkeit und Gnade," 343.

119 Radbruch, "Legal Philosophy," 127.

both crime and law—and makes it necessary to recognize that “the way of law is necessarily governed by wrong; law, at best a relative good, is inextricably bound up with wrong in a sphere of common sinfulness.”[120] It is important to emphasize that Radbruch’s critique of law did not entail that he in any sense abandoned concern for the victim or advocated the abolition of legal sanctions. Rather, he wanted to stress that the very need for law arises from crime, and is therefore rooted in the “sinfulness” of power and force—and it is power that can easily turn the legal system into an instrument of injustice. What religion can relativize, in Radbruch’s view, is the barbaric and irrational belief—rooted in a deep human desire for retribution—that punishing the offender is, in itself, a form of liberation for the victim. While sanctions are necessary to restore order and enable reconciliation in a broken world—and in this sense, punishment can affirm the victim’s dignity—they should ultimately aim at improving society and possess only relative value in an unjust world where crime is often driven by necessity. As the Weimar Minister asked when reflecting on the ethos of early Christianity, “is the difference between right and wrong, between ownership and theft, really so very great? Mammon in any form is ’unjust mammon.’”[121] Radbruch recognized that Mammon, here a figure for capitalism, often shapes the law and even influences our concept of justice, and that social misery and economic inequality cause crime. But the issue is not only one of class; it is also about force—and thus the “secret underground family resemblance” between crime and law. Force underpins not just criminal acts but also the functioning of a just legal order. That is why the Christian critique of law was so important to the vision of social democracy that Radbruch and Heller championed. Even if they believed religion should not govern the state, it can still help us see why the cultural context of law is tied to retribution and force—realities that can be relativized only by the call not to judge. That call, in turn, allows us to break through the relativity of values—the oscillation between right and wrong—by teaching that everything is “very good” from the point of view of God. To reach that point is to take a step out of culture and, hence, the domain of value, by accepting that there exists something invaluable.

The Soul as the Place for Law

Rickert famously separated the natural sciences, *Naturwissenschaften*, from the cultural sciences, *Kulturwissenschaften*, and noted in a lecture from 1899 that “all cultural processes embody some value recognized by man, for the sake of which they are either produced or, if they have already come into being, cultivated, whereas, on the other hand, everything that has come into being and

120 Ibid.
121 Ibid.

grown by itself can be considered without regard to any value or purpose."[122] From the vantage point of this positing of values—*Wertsetzung*—"we can certainly distinguish between two types of objects"—that is to say one embodying values, and one not—"and we can do so solely because … every cultural process can also be understood as being related to nature and then as nature itself."[123] Natural phenomena embody values—a chemical substance like gold is considered valuable by humans because of its rarity, but, ultimately, it is society's use of this precious metal that makes it such a valuable commodity. The South Deep gold mine in Gauteng, South Africa, is a cultural phenomenon because it enables the extraction of raw materials that can be sold on the market. Yet it is also a natural phenomenon, by being material and physical, which can "be considered without regard to any value or purpose." Thus, the distinction between *Wert* and *Wirklichkeit*, which is so important for Radbruch's legal philosophy, serves to decentre the human subject by emphasizing that it is embedded in a world that cannot be entirely shaped to meet its evaluations. The notion of nature emerges according to Radbruch, as we have seen, "out of the chaos of what is given," for even the concept of nature is a cultural product. This *Chaos der Gegebenheit* stands apart from the human world simply by existing as something not made or governed by humanity.[124] It is not cultural and exists in a sense outside our evaluations.

The law is a way to create a cosmos out of "the chaos of what is given" and this is why it must be seen as a cultural, rather than natural, phenomenon. Yet in 1916, Kelsen criticized Rickert, Lask, and Radbruch for being unable to separate law from the murky realm of nature.[125] As Yumi Saito has shown, the Austrian legal scholar argued that the concept of value is psychophysical—and therefore biological—because it cannot be fully separated from human will and desire, which are inherently embodied.[126] Kelsen wrote that "the concept of culture is not clearly and distinctly enough distinguished from that of nature to bring the two into *opposition*."[127] One can separate the two epistemologically, but Rickert's insistence that "every cultural process can also be seen as being related to nature, and then as nature itself" reveals that it is impossible, even from a strictly analytical perspective, to make an ontological distinction

122 Heinrich Rickert, *Kulturwissenschaft und Naturwissenschaft*: Ein Vortrag (J. C. B. Mohr, 1899), 20.

123 Ibid., 21.

124 Radbruch, "Legal Philosophy," 49 and *Rechtsphilosophie*, 8.

125 Hans Kelsen, "Die Rechtwissenschaft als Norm- oder als Kulturwissenschaft" in *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* 40: 95–153.

126 Yumi Saito, "Reine Rechtslehre. Oder: Rechtswissenschaft als Normwissenschaft: Zum Geltungsproblem der Rechtssätze im Rechtspositivismus Hans Kelsens" in *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 89, no. 1 (2003): 87–102, here 90.

127 Kelsen, "Die Rechtwissenschaft als Norm- oder als Kulturwissenschaft," 119.

between culture and nature. As Kelsen wrote in his characteristically dense prose, "the essence of the 'value-based procedure [*wertbeziehenden Verfahren*] that is supposed to constitute the concept of culture, oscillates indecisively between an *objective knowledge of values* [*objektiven Werterkenntnis*] and *a representation of the psychically real striving for value* [*Wertstrebung*] *in history.*"[128] The *Wertstrebung* is *"a knowledge of reality* [*Wirklichkeitserkenntnis*]" and hence part of the natural world that Rickert and Radruch distinguish from culture and hence from the *Wertsetzung* of human subjectivity.[129] The psychophysical basis of *Wertstrebung* suggests that a biological residue remains in the philosophies of culture developed by Rickert, Lask, and Radbruch, since cultural value cannot be separated from the subjective will of a particular human being—and thus from a specific natural organism. One might argue that as early as 1916, Kelsen recognized that Radbruch's legal philosophy—which Radbruch himself described as a form of natural law with ever-changing content—ultimately amounted to a "social interpretation of nature" since culture is simply the biological way for a human organism to survive. Kelsen's definition of natural law as a "social interpretation of nature" fits Radbruch's view precisely because of his emphasis on law as a cultural evaluation of the idea of justice, which Kelsen argued still was rooted in nature.[130] Kelsen believed such an idea could not hold before the tribunal of science: culture can surely be seen as a natural concept, since man is a biological animal. But the inverse is not true: nature is not cultural and to believe so is to regress to animism and hence to "a religious interpretation of nature."[131]

Kelsen accused Radbruch and Rickert of something like the naturalistic fallacy that G. E. Moore sought to cleanse ethics and moral philosophy from. As we will see, it was important for Kelsen to emphasize this point in order to defend the state as something other than a community grounded in shared values. Moore championed a non-naturalistic ethics, arguing that "the good" is a simple, indefinable, and non-natural property. In the theological language that Radbruch sometimes used, the good is ineffable. It cannot be given substantive content beyond what Radbruch would call a formal definition, since any attempt to define goodness in concrete terms reveals that it eludes all axiomatic conceptualization, reducing such definitions to mere truisms. Against the utilitarians, Moore stressed that the good always has to be experienced in a concrete situation, and that is why it is irrational to argue that pleasure is the good, or that the good is what is desirable, since we can easily find exceptions to these definitions. "Good, then," Moore claimed, "if we mean by it that quality which we assert to belong to a thing, when we say that the thing

128 Ibid.
129 Ibid.
130 Hans Kelsen, "Causality and Imputation" in *What Is Justice?*, 324–350, here: 329.
131 Kelsen, "The Natural Law Doctrine before the Tribunal of Justice," 138.

is good, is incapable of any definition, in the most important sense of that word."[132] Being ineffable, the good is, from the perspective of what we have called Radbruch's Platonic pragmatism, something which transcends cultural and biological evaluation and even the domain of law.[133] The good as such cannot be equated with any specific subjective evaluation. However, particular goods—such as the good of food—are always tied to evaluation. According to Rickert and Radbruch, such goods are more than just natural entities like the nutrients (carbohydrates, fats, proteins, etc.) needed to sustain the physical functions of an organism. A particular good becomes a value by being embedded in cultural and social contexts. Yet, as Kelsen argues, this very connection introduces a biological residue into Radbruch's legal philosophy, undermining the strict separation between *Wert* and *Wirklichkeit*.

Still, Rickert had clarified in an article on psychophysical parallelism how Spinoza's dictum that "[o]nly souls can act on souls, only bodies on bodies" could be developed and thereby why we can differentiate reality in different spheres such as *Wert* and *Wirklichkeit*.[134] When we say that "the will moves the arm," we do not deny the existence of a correlation between physiological and psychological events. Rather, the point is that even if a precise naturalistic explanation exists for how the will triggers physical movement, we still experience the act of willing as free—as long as we are not physically impaired, we are confident that we can freely will our arm to move.[135] Rickert argued for the existence of a world of purposes—where the soul, to speak with Radbruch, has its home—that is embodied in the natural world without being identified with it. These purposes, we have to remember, are also values. Our movement as bodily creatures in time and space is done to fulfil cultural and social ends, such as lifting one's arm in order to salute a general, and these ends create a disjunction between *Wert* and *Wirklichkeit*. This is why a naturalistic explanation of culture is never total from a cultural perspective and why it is possible to argue that "only souls can act on souls," since the human, by nature, is moved by impressions, interests, desires, motives, thoughts, and hence values, that are "*seelisch*" in the sense that they have a specific cultural and not only biological or material content.[136]

132 G.E. Moore, *Principia Ethica* (Cambridge University Press, 1922), 9.

133 It should be noted that the Christian Platonist Stephen R. L. Clark insists that Moore's ethics implies a kind of moral Platonism since Plato posits the good outside being: Stephen R. L. Clark, "The Absence of a Gap between Facts and Values" in *Proceedings of the Aristotelian Society* 54: 225–240.

134 Heinrich Rickert, "Psychophysische Causalität und psychophysischer Parallelismus" in *Philosophische Abhandlungen: Christoph Sigwart zu seinem siebzigsten Geburtstage 28. März 1900* (Verlag von J. C . B. Mohr, 1900), 61–87, here 61.

135 Ibid.

136 Ibid., 79.

One should ask whether Rickert and Radbruch's theory of ends points to the need for a metaphysics of natural ends in the Aristotelian sense and, hence, a turn to natural law in the classical sense. But now, it suffices to draw attention to the fact that Rickert asked if "the concept of causality can also be useful for another world than the purely quantitative one of the mechanical understanding of nature, i.e., can one talk about a causal equation between two qualities?"[137] This might be possible if one views the object of "the actual science of reality, i.e. history" as a world which is more than a causal nexus in the mechanistic sense.[138] There might exist a form of causality inherent in quality since a quality like anger can move us to act. History is the domain of such qualities since it is the place where humans structure "the chaos of what is given" into a cultural cosmos they can live in. The cultivation of nature into a world of ends, and thereby a cosmos, is the work by souls in the sense of living, embodied human persons. From Radbruch's point of view, Kelsen's insistence that a cultural perspective on law cannot differentiate the *Wertstrebung* of law from its *Wirklichkeitserkenntnis*, and hence contains a biological residue, is arguably no problem at all. It simply proves that the soul is the domain of law since the legal system cannot be separated from human evaluation and hence from concrete desires, needs, and wishes.[139]

For this reason, Radbruch insisted that law cannot be conceptually reduced to a sanction—or, by extension, to a mere physical threat—as Kelsen tended to do by defining law as a command. It is true that a legal obligation, when violated, most often results in a sanction such as imprisonment or forfeiture. However, for a rule to be recognized or felt as *law*—and especially as *just law*—it must contain a teleological component: a sense of purpose (and hence value) that shapes and constitutes human culture. Radbruch argued that this *telos* is logically irreducible to the physiological facts of human existence, because culture, by definition, involves the organization of nature in accordance with human desires and will. This logical irreducibility of value to natural fact, Radbruch claimed, is what legal philosophy reveals when it shows that law is a cultural rather than natural concept. It demonstrates this not only by asserting that justice is a formal category which needs to be contextualized, but also by abstracting the idea of law from specific situations. Law, in the latter sense, is a transhistorical form rooted in the human condition: the fact that humans are beings who survive by generating a world of culture. This cultural interpretation of law made Radbruch question whether Kelsen's pure philosophy of law is a "legal philosophy at all."[140] He wrote that Kelsen's

137 Ibid., 83.

138 Ibid., 86.

139 This is, for instance, evident if one looks at Radbruch's theory of the soul that one can find in "Die Psychologie der Gefangenschaft" in *Strafvollzug* (C. F. Müller, 1993), 31–45.

140 Radbruch, "Legal Philosophy," 71.

theory entails "a peculiar combination of positivism with its seeming opposite, the 'norm-logical' theory of the ought." In other words, Kelsen believed that legal philosophy should be a theory of norms, detached from both culture and nature—a position which "seems to take up the challenge of an original philosopher of the school of Ludwig Feuerbach: that as the 'high police of knowledge' it should 'destroy' all 'legal phantasms,' and finally 'annihilate itself.'"[141] The left Hegelian Ludwig Feuerbach, son of the legal scholar Paul Johann Anselm Feuerbach, to whom Radbruch devoted a monograph, sought to prove that all theology was a mystified anthropology that projected human desires and wishes onto an abstraction called God.[142] One can argue with the help of Radbruch that Kelsen's criticism of the implicit naturalism of Rickert's cultural philosophy of value was driven by the same desire to liberate modern man from similar so-called irrationalities.

Contra Radbruch, Kelsen argued that legal philosophy should be a *Normwissenschaft* rather than a *Kulturwissenschaft* since otherwise it would be a mere sociology of law with no capacity to capture law in and for itself.[143] *Normwissenschaft* was not a Platonic pragmatism: a search for the transhistorical idea of justice that emerges from what Radbruch described as the soul. It was a purification of legal philosophy from every cultural and natural residue so that the formality of law—which ultimately implied law as command—could be distinguished from human wants and wills. Law in its pure form is not the fact that humans assemble and establish a set of rules that accounts for the cultural production of law. For Kelsen, a pure theory of law examines the norms that this assembly of humans says will involve sanctions if it is not followed, without taking into account the moral, political, or social content of law. A *Normwissenschaft* was therefore also purified from what Radbruch and Rickert called values. It was a theory of *Sollen* liberated from evaluation and therefore politics.

At first glance, it might seem odd that Kelsen, who was a staunch democrat on the left, insisted so strongly on this need to purify legal philosophy from cultural and political values.[144] But as a Jew in a conservative Austria, a nation which spawned Hitler, he knew how dangerous any discussion of values could

141 Ibid. See for example Kelsen, *Pure Theory of Law*, 1 and 59.

142 See Gustav Radbruch, *Paul Johann Anselm Feuerbach: Ein Juristenleben* (Julius Sprenger, 1934) and Ludwig Feuerbach, *The Essence of Christianity* (Trübner & Co., Ludgate Holl, 1881), 14: "Hence the historical progress of religion consists in this: that what by an earlier religion was regarded as objective, is now recognized as subjective; that is, what was formerly contemplated and worshipped as God is now perceived to be something *human*. What was at first religion becomes at a later period idolatry; man is seen to have adored his own nature." P. 13.

143 Kelsen, "Die Rechtwissenschaft als Norm- oder als Kulturwissenschaft," 119.

144 See Clemens Jabloner, "Kelsen and His Circle: The Viennese Years" in *European Journal of International Law* 9 (1998), 368–385, for an excellent discussion on the relation between Kelsen's democratic politics and his legal positivism.

be for minorities. His purification of legal philosophy was an ascetic cleansing of law intended to teach lawyers to be objective. This is also why Kelsen wanted to rid legal philosophy of anything remotely sounding like natural law. It had not been able to question slavery, prevent world war, or even guarantee what both Radbruch and Kelsen took to be fundamental human rights.[145] The Austrian legal scholar thought that an important task of modern law, therefore, was to secularize the state from religious residues and metaphysical ideas.[146] But for Radbruch this was impossible since the concept of ought, namely, what should be, implies something *supra-positive. Sollen* indicates something that cannot be reduced to the facticity of the given or what both these legal scholars would call the positivity of being.

On the one hand, Radbruch agreed that Kelsen was right to distinguish between what is (*Sein*) from what ought to be (*Sollen*). This distinction led to what Lask had called a *Zweiweltentheorie*, albeit of a non-metaphysical kind, since the cosmos of ought cannot be identified with the world of brute nature. On the other hand, Radbruch criticized Kelsen for going too far in stripping law of all value considerations. By insisting that law must be understood purely in terms of its structure and validity—independent of ethics or ideology—Kelsen, in Radbruch's view, reduced legal philosophy to a value-free science. This, Radbruch argued, made it impossible to fully understand law's role in history, where legal systems are always shaped by ethical and ideological values that transcend the order of (non-human) nature by being subjective evaluations rather than objective facts.[147] But the real problem with Kelsen's theory was that it, according to Radbruch, was stuck in the positivity of being by liberating itself from the intangible realm of value which defines culture and emanates from the immediacy of the soul as a sense-giving force. For Radbruch, every norm is a cultural norm. The abstract idea of ought, stripped of all content, is, in fact, a reflection of culture in its purest form. There is no ought without value and form. The "legal phantasms" which Kelsen attacked as biological or, for that matter theological, residues are powers that move and persuade the human soul precisely because the law, as the question of what is just, emerges every time humans cultivate a world that they can inhabit in common. The concept of value

145 Hans Kelsen, *Peace through Law* (University of North Carolina Press, 1944), vii.

146 See, for example, the posthumously published book on secular religion: Hans Kelsen, *Secular Religion: A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as 'New Religions,'* ed. Robert Walter and Clemens Jabloner (Franz Steiner Verlag, 2017). However, it has been argued that Hans Kelsen's defence of modern democratic legitimacy can be seen as a pantheistic political theology: cf. Benjamin A. Schupmann, "Hans Kelsen's Political Theology: Science, Pantheism, and Democracy" in *OZP – Austrian Journal of Political Science* 51, no. 3 (2022): 42–51.

147 Kelsen wrote, for instance, that the "methodological purity of the science of law is jeopardized not only because the bar that separates it from natural science is ignored, but even more so because the science of law is not (or not clearly enough) separated from ethics—that no clear distinction is made between law and morals." *Pure Theory of Law* (University of California Press, 1967), 59.

is, in this sense, transhistorical for Radbruch exactly because human life implies the differentiation between *Wert* and *Wirklichkeit*.

Radbruch also points out that the reality of value necessitates, physiologically, psychologically, and even logically and transcendentally, a knowing subject. Law only exists for souls. By being *more* than a mere command, namely, something that one *ought* and not only *must* obey, the law constitutes (and is constituted by) a subject which can ask the question of whether a specific precept should be viewed as law or not. There is, in other words, no law without a legal subject and therefore a living soul. A legal subject, as part of a cultural configuration, cannot only be a natural being since there is only law if living beings are bound by precepts that we can solely find in culture (but perhaps nature implies something cultural and can be seen as a society even if this implies animism according to Kelsen). Kelsen recognized this aspect of Radbruch's legal philosophy in 1916 and insisted that it muddles the difference between "a psychic process [*seelischer Prozess*] and its content. Thinking, feeling, willing, experiencing the law is something other than the law itself. Only this [the law] is the norm and the *ought* [*Sollen*], the psychic nature that impels it, is on the other hand *being* [*Sein*], motivated and motivating reality, and is, as such, power. The psychic process [*seelische Vorgang*] that has the law [*das Recht*] as its content is just as little the law itself as the thinking of a concept is this concept itself."[148] This is why Kelsen argued that Radbruch was not able to overcome what Moore described as the naturalistic fallacy, but Radbruch thought that Kelsen's attempt to purify law from all traces of nature, society, and morality made it into a spectre unable to manifest itself in the domain of time and space. It was necessary that culture served as the realm where the psychic processes manifested themselves as external norms and as real powers that moved the soul and constituted it as a legal subject. The differentiation between *Sollen* and *Sein*, what ought to be and what is, must be understood as the difference between value and reality that defines human existence exactly because the human is bound by her nature to evaluate and thereby be a cultural animal. The sphere of values can be abstracted from the substratum—what Kelsen called the *seelischer Prozess*—that embodies it historically and socially as a natural fact. A social form is *not* the same thing as its biological and historical incarnation in a specific culture, but this abstraction is, when it comes to law, still more than the empty form of the ought. The concept of law is related to the idea of justice that manifests itself in human life as a question with a specific structure: *is this just?* It is this question that Kelsen's legal positivism does not take into account, since it identifies law with the pure norm of ought rather than with the formal question of justice that is always answered through the "*seelische Vorgang*" which Kelsen wanted to ban from legal philosophy.

When Radbruch insisted that the form of a thing is its value, he referred to Lask's notion "*Übersein*"—transcendence, or that which is beyond being—to

148 Kelsen, "Die Rechtwissenschaft als Norm- oder als Kulturwissenschaft," 147.

stress that although value is a subjective interpretation of reality, it still has some kind of objective existence.[149] Lask had written that "in the absence of a special term, the specific non-being of the supersensible may be designated as 'transcendence' ['*Übersein*']."[150] Identifying being with the sensual existence in time and space, Lask noted that "the supersensible" is "the transcending [*Überseinendes*]" or "the transreal [*Überwirkliches*]."[151] The supersensible is more than sensual reality, namely, concepts, feelings, and ideas that certainly become embodied in writing, in the vibrations of sound in the air, or in what Kelsen described as our psychic operations, but that still cannot be identified with these incarnations in time and space. Lask insisted that a supersensible concept, be it an individual or typical value, should be understood as a "*valid*-nonbeing"—"*Geltend*-Nichtseiende"—if it can be said to have some truth value.[152] A "contrivance on which to put something for those sitting at it" might not be the only or best definition of the table. Still, if it can be proven to be valid by being purposeful, it can be said to be a true definition of a table, and hence a "*valid*–nonbeing" since we can never find such a concept in the realm of sensual experience (being) where only concrete and singular tables and other things exist. A world not in need of law might, in the same manner, be a world that never can be sensually experienced in the same manner as our world, in which law is a blatant necessity. But such a world is still, at least from Radbruch's perspective, a valid description of Paradise since such state of bliss denotes a world not governed by force, and is thereby a "*Geltend-Nichtseiende.*"

From Radbruch's perspective, Kelsen's mistake is in failing to understand "that the original nature of legal norms is that of standards measuring the mode in which individuals live together and not of commands directed to the individuals, that it is primarily composed of 'evaluative norms' and not of 'determinative norms.'"[153] What ought to be is not a stable and fixed command, since that would be a "determinative norm," but a calling that can interpellate us to question determinative norms. There is no "evaluative norm" without subjectivity and hence without the "psychic operation" of evaluation that Kelsen wanted to purge from legal philosophy. Kelsen later accepted that it is impossible to differentiate the norm from the will and wrote that he had accepted "that a should [*ein Sollen*] must be the correlate of a will."[154] Thus even according to the late Kelsen, it is impossible to differentiate law from

149 See footnote 5 in Radbruch, "Legal Philosophy," 51.
150 Emil Lask, "Die Logik der Philosophie und die Kategorienlehre," 10.
151 Ibid.
152 Ibid.
153 Radbruch, "Legal Philosophy," 82, translation modified.
154 Quoted in René Maric, "Gustav Radbruch und Hans Kelsen" in *Gedächtnisschrift für Gustav Radbruch 21. 11. 1878 – 23.11.1949*, ed. Arthur Kaufmann (Vandenhoeck & Ruprecht, 1968), 82–92, here 88.

the will of a soul and hence to extract what ought to be from subjectivity. For Radbruch, this implies that there is no law without a soul that evaluates the reality of a legal system as being unjust or not. Kelsen, on the other hand, insisted that law had to be defined by the sanction it entails and must ultimately be seen as a command. The law cannot be separated from the state, since laws are commands over the members of a community.

Radbruch returned to the relation between state and law when he examined whether states are bound by their own laws. This problem, he noted, "has traditionally been raised by asking whether law 'precedes' the state or the state 'precedes' law, that is, whether the state owes its power of command, as to its extent and limits, to the law, or whether contrariwise the validity of the law is determined and conditioned by the will of the state."[155] To argue that the state precedes the law reveals that law, ultimately, rests on an arbitrary ground, such as force. To insist that law precedes the state implies a doctrine of natural law or leads to an attempt "to anchor constitutional law in customary law, whereas the very fundamentals of constitutional law are settled not by peaceful legal usage but in the clash of legal views, which can be terminated only by the decision of the will of a recognized state-power."[156] Kelsen sought to liberate legal philosophy from this dilemma by attacking what he in *Pure Theory of Law* called the dualism between state and law, and thereby he came close to insisting there was a one-to-one correspondence between the law and the state. From such a perspective, Radbruch argued, "the question of the priority of the law or the state is inadmissible because the two are one as far as the lawyer is concerned, the state exists only to the extent to which and in the way in which it expresses itself by enactments—not as a social power, not as a historical formation, but only as the creator and the content of its enactments."[157] The genius of Kelsen's theory of pure law can be found in the radical insistence that the "legislation is the state" just as the state as "organized order or organization … is the law. The state and the law are related to each other like the organism and the organizational pattern."[158] State and law can therefore be distinguished but not separated. Radbruch comments on this by noting a paradox. From the point of view which "identifies the state with the law, the state would always be in the right [*wäre der Staat immer im Rechte*], the wrongdoing state [*der Unrechttuende Staat*] would no longer be a state. Thus, the question whether the state is bound by its law would not indeed be solved but would be made to disappear."[159] It would, in other words, not be possible

155 Radbruch, "Legal Philosophy," 202.
156 Ibid., 201.
157 Ibid., 202.
158 Ibid.
159 Radbruch, "Legal Philosophy," 202 and *Rechtsphilosophie*, 170. Translation modified.

to ask if one could imagine what Radbruch called "a law without a state" since law simply is the power of the sovereign state to command and sanction.[160]

The identification of law and state delinks the concept of law from the question of what is just and risks reducing the problem of the legal order to a question of sovereign power, and the consequence of this reduction is that power becomes nothing but force. Radbruch, however, argued that "an analysis of the concept of power is enough to lead one beyond the power theory. Power is not bounded by force. Power is spiritual: in the last analysis, all power is power over the soul."[161] What he meant was that the physical threat of a legal sanction should not only punish the criminal but also instruct every citizen in what is right through the threat of physical force. Norms are more than the imperatives and commands they are related to, since they have content that must be seen as legitimate in order to function as law. The fact that the state commands ultimately implies that it must persuade its citizens of what is right and legitimate. When it fails to do this and needs to resort to physical violence or other kinds of *Gewalt*, one can question whether the state rules through law, since the latter not only entails expediency and certainty but also a justice that might be undone by the force of law.

By following Rickert's differentiation between value and reality, Radbruch argued that the sphere of culture, which cannot be separated from the conscious and spiritual life of living human beings, is the domain where the question of what is right can emerge. This is true even for the most draconian legal order, since every state must legitimate itself as a system of law by persuading the souls that it seeks to govern. What Radbruch, in 1932, called *der Unrechttuende Staat*, the wrong-doing state, is certainly a state but it is not necessarily a legal order, since only a state that seeks to implement justice can be said to be ruled by law. He underlined this by writing, partially in agreement with Kelsen, that "in a purely juridical view, the state is indeed the structure that embodies itself in constitutional law." But Radbruch clarified that "the state as legal reality is nothing else than the substratum on which law, and especially constitutional law, *ought* to be realized, though it by no means has usually been so realised."[162]

160 Gustav Radbruch, *Einführung in die Rechtswissenschaft*, 174.

161 Radbruch, "Legal Philosophy," 115.

162 Ibid., 203. The translation is problematic not only because it emphasizes *sollte* but even more since it omits a whole subordinate clause: "Der Staat als Rechtswirklichkeit ist nicht anders als das Substrat, an dem sich das Recht und insbesondere das Staatsrecht verwirklichen sollte, aber keineswegs verwirklicht zu haben bracht, betrachtet unter ebendiesem Gesichtspunkt der Rechtsverwirklichung, d.h. im Vergleiche mit seiner rechtlichen Regelung." Radbruch, *Rechtsphilosophie*, 170. It should be noted that this translation overall is highly unstable. We have nonetheless decided to use it so that the Anglophone reader can follow along in Radbruch's text if they care to do so.

The translation quoted here is problematic since it omits a subordinate clause which clarifies why a state, "when it is viewed from the perspective of the realization of law [*Rechtsverwirklichung*], that is, in comparison to its legal regulation," can *fail* to implement law or even, as Radbruch insisted in 1946, be seen as a system of "statutory lawlessness."[163] This was not just a philosophical clarification that a state can fail to embody the concept of law—and thus fail to be a place where questions of justice can be openly explored—but also a sociological clarification that a state can fail to enforce its own laws and, as a result, fall short of becoming a *Rechtswirklichkeit*. Quoting his friend Hermann Kantorowicz, Radbruch noted that the enforcement of law could be "transformed into the chance, i.e., the probability that the commands of the staff will be, in fact, regarded as legitimate and actually obeyed."[164] This is why *Recht*, right or law, should be seen as a value that is not always realized as a reality since the physical substratum, the state as a material power, can fail to implement its laws.

Radbruch compared the concept of law to the notion of art and wrote how art is both "an ideal concept and standard."[165] As a standard for evaluation "the inartistic is banned from the realm of art." Yet, he continued, as "a concept of reality which includes all artistic achievements of a period," art designates all human products born from imagination and creativity. In this sense, art is a mere form. The concept of science implies, in the same manner, "the standard of truth for the activity of gathering knowledge, by which shortcomings in knowledge are measured as unscientific." But it can also designate "the historical cultural concept which, neutral with respect to values, embraces scientific truth and scientific error. Again, the very concept of culture may be understood both as an ideal for the historical-social cultural facts and as the inclusive concept of those cultural facts themselves."[166] Law can be understood as a *standard*, which we can use to judge whether a state should be understood as a system of law or not, in the same manner. However, law also indicates a historical reality, such as a state whose legal system we might find irrational or even evil, and this reality can, according to Radbruch, be in opposition to the form or idea of law. Kelsen could arguably not accept this argument, since such a reality would pertain to an ideological and normative theory of law, whereas Radbruch thought that it was sociologically and philosophically evident that states could fail to implement the law.

163 Radbruch, *Rechtsphilosophie*, 170.

164 Hermann Kantorowicz, "Staatsauffassungen: eine Skizze" 1 (1925): 101–114, here 108. Quoted in Radbruch, "Legal Philosophy," 203 and *Rechtsphilosophie*, 170.

165 Radbruch, "Legal Philosophy," 203.

166 Ibid.

The Antisocial Function of Law

The reason why the state can fail to become a *Rechtswirklichkeit*, and even transform itself to an *Unrechtsstaat* or *der Unrechttuende Staat*—a wrong-doing state—is because of the dimension of chance that Kantorowicz emphasized. The factual realization of the idea of law, which is something else than the idea of the state, rests on the persons in time and space who must enforce and observe the law. The difference between the idea of law and a factual legal apparatus implies that the latter can fail to become a *Rechtswirklichkeit* in failing to realize its own notion of justice. But the idea of law can even be said to be antithetical to the origin of the state. The establishment of states, with specific precepts that determine human beings' mode of living together, tends to be brutal, in turn provoking riots, strikes, and other actions that may be deemed as illegal. Quoting Johann Gottlieb Fichte, Radbruch stated that "any law there is at present has emerged against legal form" and asked with Otto von Bismarck: "How many existences in the political world of today are not rooted in revolutionary soil?"[167] In fact, for Radbruch, "[l]aw cannot originate in law alone; again and again law grows from wild roots. There is an original creation of law, a first generation of law out of factuality, lawmaking by law-breaking, new legal ground on congealed revolutionary lava."[168] The *Rechtswirklichkeit* is often a mere "protection racket" that secures order and peace in the midst of a dangerous world, and this fight for order is the basic norm for any legal apparatus.[169] Order is the "'fundamental norm' upon which the validity of all positive law is based."[170] But, as if through "the grace of God," the question of justice imposes itself on the juridical cosmos that emerges out of the chaos of human relations.[171] It does so by constituting the members of this world as legal subjects with specific rights and obligations. These rights and obligations can be deemed unjust, and Radbruch insisted that even the modern legal system he defended had its roots in this immorality and injustice. He wrote, for example, in the aforementioned article on the origin of German criminal law that during the medieval and early modern periods there was an important distinction "between punishments for the free and punishments for the unfree: for the former outlawry [*die Acht*], and for the latter capital punishment, mutilation and logging—so, for example in

167 Quoted in ibid., 125. Translation modified.

168 Ibid.

169 Radbruch can be said to come close to Charles Tilly's later argument that "[i]f protection rackets represent organized crime at its smoothest, then war making and state making—quintessential protection rackets with the advantage of legitimacy—qualify as our largest examples of organized crime." See Charles Tilly, "War Making and State Making as Organized Crime" in *Bringing the State In*, edited by Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol (Cambridge University Press, 1985), 169–191, here 169.

170 Radbruch, "Legal Philosophy," 117.

171 Ibid., 77.

the Mainz God Peace of Henry IV of 1085."[172] These practices, he stressed, sometimes met "resistance by the church, which could use the law of asylum [*Asylrecht*] in particular to frustrate them."[173] The "clergy pursued the salvation of criminals condemned to death as a kind of sport. It is evident from numerous legends of the saints that nothing brought the aroma of holiness more easily than when a pious man saved a criminal with or without a miracle from death on the gallows, which he deserved several times over."[174] This passage helps us understand that, even if he agreed with Fichte that "any law there is at present has emerged against legal form," Radbruch still maintained that law was concerned with the essence of justice. The subjects of law, such as the serfs and slaves who, throughout history, have found themselves trapped in a legal system that condemned them to unfreedom, eventually began to evaluate the legal code with the question of justice in mind. He stressed with his daughter that customary law, existing legal codices, and the Bible became weapons to criticize the status quo during the medieval period.[175] When uprisings arose in Franconia, Swabia, Austria, and Thuringia in the 1520s, the peasants demanded, initially, a return to old customary law. "But," Gustav and Renate commented, "more and more, a general ideology rose above the local demands, the revolutionary idea of 'God's judgement' appeared alongside the ideas of the 'old law'; the program of a new society in the spirit of the Gospel."[176] These struggles—viewed by the ruling class as antisocial, anarchic uprisings or outright criminal acts—ultimately laid the groundwork for later legal revolutions, including Radbruch's 1946 formula, which aimed to ensure that all people are treated equally under the law.[177]

It should be noted that one of Radbruch's doctrines is "to please everyone is to please no one." If one begins "from the concrete individual with all his fancies, whims, and spleen" one cannot establish "a legal and political order" which serves all equally since the interests of the individuals are too complex.[178] In this sense, "transindividual" and "transpersonal law," which Radbruch associated with conservatism and socialism, was right to emphasize,

172 Gustav Radbruch, "The Origin of Criminal Law in the Status of the Unfree," 412.

173 Ibid., 409.

174 Brunner quoted in Gustav Radbruch, "The Origin of Criminal Law in the Status of the Unfree," 409. This passage reveals Radbruch's deep sympathy for the Roman Catholic Church as a network of institutions that was able to establish a parallel legal system that could challenge the law of the state. See Richard Hauser, "Die verborgene Lebenslinie. Gustav Radbruch und die Religion" in *Gedächtnisschrift für Gustav Radbruch 21. 11. 1878 – 23.11.1949*, edited by Arthur Kaufmann (Vandenhoeck & Ruprecht, 1968), 50–59.

175 Radbruch, *Der deutsche Bauernstand zwischen Mittelalter und Neuzeit*, 21–22.

176 Ibid.

177 Tellingly they wrote, in the midst of the Third Reich, that the peasants were seen by "the burgher," to be from "a different race, strange and dangerous; to the knight, he was game and hunting booty." Ibid., 19.

178 Radbruch, "Legal Philosophy," 99.

contra the liberal idea of individual law, that the rights of persons must be viewed from the perspective of the social whole.[179] However, the insistence that the soul is the place of law also made Radbruch argue that the "antisocial function of the law" should be defended, since the human individual should not be sacrificed for the good of society.[180] Doing so risked turning the law once again into a tool of serfdom and slavery. The reason why one cannot base a legal and political order on the "concrete individual" is not because individuals don't exist, but because the individual *as such*—the legal subject—is an abstraction. The legal subject is a fiction defined by specific rights, independent of wealth, gender, or other social status. This "isolated individual," connected to others only through legal bonds, does not reflect the concrete individual in Radbruch's sense—what he called the soul. The soul is not an isolated entity but a being fundamentally related to others through pre-legal, lived relationships. The soul, like a monad with open rather than closed windows, exists in a world of singular persons and transindividual connections. Still, the abstraction of the individual as a legal subject remains crucial even if it is a legal fiction. It provides the real, living person—the concrete monad—with rights and protections in relation to society and the state.[181] Modern law rests on this legal fiction, rather than the concrete person, and is in this sense antisocial.

The antisocial function of modern law—what we will refer to as its asocial dimension—becomes clearer when we compare Radbruch's thinking with that of Lukács. The two friends shared a love for poetry, and Lukács had written in *Soul and Form* from 1910 that the new wave of German poets sang the song of "a lonely man detached from all social bonds."[182] Discussing the poet Stefan George, Lukács wrote that the "content of each of his songs and that of their totality is something that one must understand, yet never can: that two human beings can never become one."[183] Through this separation, a longing for a free association of individuals is born: "the great search, along a thousand paths, in every solitude, in all the arts, the search for human beings like ourselves, for a communion with simpler, more primitive, unspoiled beings."[184] He stressed in a Lukácsian manner that "in the individualistic view the social phenomenon of law purports, speaking paradoxically, to destroy the social, i.e., the fact that every one is determined by all or by some others, and to replace it with a side

179 Ibid., 104–106.
180 Ibid., 100.
181 We will see how Ernst-Wolfgang Böckenförde came to view the state as a necessary instrument against the "societal powers" of the market.
182 György Lukács, *Soul and Form*, edited by John. T. Sanders and Katie Terezakis (Columbia University Press, 2010), 107.
183 Ibid.
184 Ibid.

by side grouping of free individuals without contacts."[185] Such juridical alienation is necessary to secure what Radbruch took to be the innate right of the individual to live and die in peace in the face of the constant interpellations by firms, rackets, and parties which colonize the social sphere.

The liberal view of the human as a singularity detached from its social surroundings, in other words, an "individual without individuality, comparable and frequently compared to the atom of the natural sciences, forever equal in a thousandfold multiplications and infinite reflections" was not entirely flawed from Radbruch's social perspective on law.[186] It revealed the need for a political order in which the individual has the right to seclude himself from the social, and increasingly economic and political, imperatives of the world. Contrasting the ethical and concrete individual, which he described with the words of the Baroque mystic and Catholic convert Angelus Silesius: "each owns an image of what he ought to become," with the legal fiction of law, Radbruch argued that individuality in itself implies a kind of *asocial sociality* that must be protected.[187] In a passionate lecture on the public utility of religion in the modern world from 1918, he had already insisted that love and mercy move us beyond the strict confines of human, social relations.[188] He would repeat this in his *Rechtsphilosophie* when he said that birth and death reveal that humans, as mortal creatures, are much more than social and political animals. For "the entanglements of worldly man in society contrasts with the ultimate terrible loneliness of the woman who gives birth and of the human being who dies."[189] The law should protect these lonely men and women from the imperatives of the social world by guaranteeing their right to be asocial and therefore individual.

Alluding to Sohm's famous interpretation of primitive Christianity as a community without law, which Radbruch in 1914 explicitly described as a policy of "free love," the German legal scholar proclaimed that "the nature of grace knows no compulsion" and that love is "the affirmation of another being without regard to its value or valuelessness."[190] Radbruch emphasized that while religion is undoubtedly the "affirmation of morality," it also surpasses morality. Although it does not reject moral principles, religion transcends them by ultimately declaring, in its final judgement, that everything is good.[191] There is no grace without law and no love without ethics or morality.

185 Radbruch, "Legal Philosophy," 100.
186 Ibid.
187 Ibid.
188 Radbruch, "Religionsphilosophie der Kultur. Religionsphilosophie des Rechts," 36–37.
189 Radbruch, "Legal Philosophy," 129–130.
190 On Sohm and Christianity as free love see Radbruch, *Grundzüge der Rechtsphilosophie*, 48. On grace and love see Radbruch, "Religionsphilosophie der Kultur. Religionsphilosophie des Rechts," 36.
191 Radbruch, "Religionsphilosophie der Kultur. Religionsphilosophie des Rechts," 38.

But by being the burdensome work for the "redemption from guilt, liberation from law, [Christianity] becomes the overcoming of morality. If God is the lawgiver of the moral law, then he is a lawgiver who himself stands above his law: God, like the man who has succeeded in breaking through to God, is a super-moral being [*übermoralisches Wesen*]."[192] The Weimar Minister did not deny that Christianity provides ethical guidance or shapes the law. However, he emphasized that the idea of God opens us to the realm of *Gnade*—grace—which transcends both morality and legal norms. When religion is reduced to merely upholding moral values—even those of justice, legal certainty, and purposiveness—it becomes a worldly, and hence a cultural or political, construct. In doing so, it loses its true character as what Radbruch simply called religion and no longer serves as a force that reveals a reality beyond human values and judgements. By contrast, liberalism is only an ideology for citizens; it is not a legal philosophy capable of addressing the needs of *acosmic* and *asocial* souls. It requires the religion of grace to reveal that we are more than political animals governed by convention and law. We are souls in relation to the *übermoralisches Wesen*—the gracious God who transcends law and enables us to affirm the necessary "antisocial function" of law.

In January 1946, when the law faculty at the Heidelberg University was reopened and Radbruch reinstalled as dean, he insisted that "[t]he development of our law must increasingly go beyond the purely individualistic spirit of Roman law and the strict separation of private and public law."[193] Law must be a "social law."[194] He wagered in the ruins after the Second World War that the future was necessarily socialist in one form or another—the state would need to rebuild society—and he even wrote that "[i]n the new political world, there will no longer be any room for parties other than socialist parties, bourgeois parties in the old sense of the word."[195] This is why the law must be a social law. He hoped, however, for a "Christian socialism" in which Christianity implied a radical individualism and the defence of the asocial sociality he had detected in liberalism since, he wrote again, "'[b]efore God' there is only the individual person and his soul. In terrible solitude, each individual has a final dialogue about the borrowed pound, face-to-face with God."[196] Silesius's maxim, "each owns an image of what he ought to become," found its meaning in God—not society, which, like the individual, is an abstract and fictitious construct. Society should be a sphere of free association where we can become individual selves capable of living with others. The asociality of this individual freedom should, if necessary, wrest us free from the world of

192 Ibid., 39

193 Radbruch, "Erneuerung des Rechts" in *Rechtsphilosophie III*, 80–82, here 81.

194 Ibid.

195 Gustav Radbruch, "Neue Parteien – Neuer Geist" in *Rechtsphilosophie: Sechste Auflage*, 544–546, here 544.

196 Radbruch, "Kulturlehre des Sozialismus," 149.

customs, mores, and even culture that law itself belongs to. For, as Lukács wrote in a 1912 philosophical dialogue that Radbruch may have read, "most people live without life, but don't notice the difference. Their lives are *merely* social, *merely* interpersonal; you see: they could be satisfied with duties and their fulfilment."[197] The modern human could no longer see her life as merely social or interpersonal. Having rightly cast off the serfdom of feudalism, she now existed as an abstract individual—an atom within the structures of the state and the market. Yet, as Radbruch learned from Sohm, even the ancient human touched by the message of the Gospels—or, as Lask might put it, by the *Zweiweltentheorie* of the philosophers—yearned for a form of life that transcended the law and the entire cultural framework to which it belonged. Still, Radbruch remained cautious and insisted on the need for a social law at the same time as he defended the asocial dimension of law. He understood how easily the rejection of traditional duties and obligations could mask the rise of subtler, more invisible forms of authority. This is why he emphasized that "the individual of legal philosophical individualism, being but personified liberty, at the same time implies the equality of all individuals."[198] A liberalism that is not a liberalism for the masses, would re-embed us in the social and interpersonal forces that law should also protect us from. Thisliberalism for the masses was also a kind ofreligious socialism. On this side of death, there is no soul untouched by social and economic relations. The soul is the site of law because it is a battleground of interests, needs, and passions—shaped by both culture and biology. This makes it impossible to fully separate the individual from the social world to which they inherently belong.

Law must be grounded in the lives of concrete, singular human beings—though their individuality alone cannot serve as its sole foundation. In defending the paradoxical asocial sociality of human life, the Weimar Minister argued that legal philosophy must move beyond the liberal, individualistic view of law. Instead, it should embrace a social understanding of the individual, since the soul, for as long as it lives, belongs as much to the world as it does to God.[199] What Radbruch called "social law" in 1946 was not a revision of his 1932 discussion on the asociality of law. Rather, it was a reaffirmation of a basic sociological fact: individuals are always embedded in the political nature of social relations. If law is to be more than a tool of what Radbruch called "capital," it must take this embeddedness seriously.[200] In this spirit, Radbruch wrote apropos the formality of liberal rights, that "for the owner of the means of production, the liberty of property, which is supposed to be guaranteed

197 Lukács, "On Poverty of Spirit: A Conversation and Letter" in *Soul and Form,* 201–214, here 203–204.
198 Radbruch, "Legal Philosophy," 100.
199 Ibid., 103.
200 Radbruch, "Kulturlehre des Sozialismus," 161.

equally to all, turns from a dominion over goods into a dominion over men, and for the propertyless classes it becomes a form of serfdom to property."[201] "Political rights," he continued, "which are supposed to be guaranteed equally to all, become an exponentiated source of power when put in the hands of the propertied groups that fill the coffers of parties and finance the press, as compared with the propertyless."[202] In the end, Radbruch emphasized, "this criticism of merely formal legal equality is in the last instance directed against the isolated individual without individuality, from which the demo-liberal view starts."[203] The "lonely man detached from all social bonds" was only free either if he had the material resources to secure his *suum cuique* or quite differently the saintlike power to live for something more than this world, beyond that restricted justice.

If the legal system aspired to be a mechanism that protects everyone, and not only some individuals, from the interpellations of the societal forces that make up the modern capitalist world, it had to be oriented towards the concrete, historical person rather than the abstract citizen. The legal system cannot be ruled by "the individuality of every single being, since this starting point does not provide any conceivable path to the law and the state."[204] To serve the real, historical, individual, and protect her from the forces of capitalist society, the system of law has to be organized around "a plurality of social types, such as the employer and the employee, the labourer and the office worker."[205] These "social types" can be compared with the "typical values" that Lask examined in his legal philosophy, since they are the cultural (and therefore political and economic) forms that shape the life of concrete individuals. But Radbruch stressed that in order to be considered law, such "transindividual regulation" or "social individualism" must be intended "to serve the individuals," because law can be said to emerge whenever the individual soul is moved to ask: *is this right*?[206] That question can be radically asocial or antisocial, since it can disrupt the fabric of a given society, but it is also a social practice generating collective forms of evaluation, often involving harsh ideological conflicts and political or economic struggles. In this sense, the law is both social and asocial or even antisocial. It is related to disputes, partitions, and even revolutions and necessitates a "legal philosophical theory of parties."[207] Only death carries the soul beyond this world. And as Radbruch suggested in his Orphic letter to his daughter in 1916, it is in death that we see the ultimate truth: "in the end, there is only God and the soul." But death begins already at birth, for what is

201 Radbruch, "Legal Philosophy," 103. Translation modified.
202 Ibid.
203 Ibid.
204 Ibid. Translation modified.
205 Ibid.
206 Ibid., 104.
207 Ibid., 97–106.

born is an individual soul—a concrete, singular life that never loses its essential asociality. From an atheistic or agnostic perspective, the "God" in Radbruch's letter to Renate need not be seen as a being, but rather as a question—the question death poses to every mortal: *What did I do in this life?* It is this self, which, as Lukács insisted, was "detached from all social bonds," that must be protected by a social law—one that recognizes the individual's essential asociality, the solitude at the core of being human: we come into the world alone, and we leave it alone.

The Diversity of Values

The question of justice implies conflict—which is why Radbruch warned that law has often served, and can easily serve, injustice. In his *Einführung in die Rechtswissenschaft* from 1924, Radbruch rejected any sanctification of secular law, echoing a point he had made ten years earlier in *Grundzüge der Rechtsphilosophie*: that, "since the time of Augustine," one could find in "the armory of Catholic political philosophy … conceptual images [*Gedankenbilde*] that make it possible to characterize the purely secular state" as "a necessary evil, as a mere work of man [*Menschenwerk*]."[208] This view of the secular state as mere *Menschenwerk* formed the basis for a democracy grounded not on homogenous unity (which, for example, Carl Schmitt championed), but in the shared possibility that any individual might ask the essential philosophical questions: *What can we know? What ought we to do? What may we hope for?* For Radbruch, the question of justice was inseparable from these classical philosophical questions—questions he believed laid the basis for the modern democratic system of parliamentary parties that he defended and which therefore anyone could ask.[209]

The unexamined life had no meaning—whether one was a beggar, a shoemaker, or a Minister of Justice—and anyone who genuinely seeks to understand how to live must, by necessity, question the value of these merely contingent social roles. Questions arise from criticism and doubt, and societies that suppress such critique—whether consciously or not—tend to equate law with state authority and the cultural values that support it. In 1945, Radbruch drew parallels between the "Gestapo methods against so-called subhumans," the Wilhelmine police state's "demagogue-craziness," and "Bismarck's hatred

208 See also the latest, reworked edition that was published after Radbruch's death where the passage is repeated: Gustav Radbruch, *Einführung in die Rechtswissenschaft* (K. F. Koehler Verlag, 1964), 29. See also Radbruch, *Grundzüge der Rechtsphilosophie*, 151, where one can find a similar passage.

209 See, for example, Gustav Radbruch, "Wilhelm Meisters sozial-politische Sendung" in *Literatur- und kunsthistorische Schriften* (C. F. Müller, 1997), 174–195, where he uses J. W. F. von Goethe's *Wilhelm Meister's Apprenticeship* to depict the possibility of a society based on something like the examined and philosophical life.

against the enemies of the Reich."[210] What unites these various forms of the *Obrigkeitsstaat*—the authoritarian state that served as the political expression of *Gesetzpositivismus*, which Radbruch had already criticized in his lecture "Ihr Jungen Juristen"—is the shared attempt to silence the question of justice, the very question that makes just law possible.[211] Such silence can indeed serve to impose law and order. But as Radbruch emphasized, order is a necessary—yet not sufficient—condition for true law. Legal certainty and expedience can conflict with justice, turning the legal system into a tool of injustice. This explains why Radbruch insisted repeteadly that those who enforce the law must also question its value. They should even be willing to heed the words of an apocalyptic rabbi who called his followers to live beyond the limits of human judgement: "Do not judge, or you too will be judged." (Matthew 7:1) To refuse to judge is not merely to reject law—it is to step beyond it and even seek something beyond the moral sphere with its diverging evaluations and potential conflicts. Morality implies, for humans, a heterogeneity of values since we can disagree on what is moral or not. "Indeed," Radbruch wrote in a Paulinian manner, "law is only the *possibility* of morality and, for that very reason, the possibility of the immoral."[212] Law can, in other words, be used to legalize and legitimize what is, in fact, unethical or at least what many see or might come to see as immoral, such as, for instance, slavery or the death penalty. And because we seldom fully agree on what justice is, answering the question of what is just requires a willingness to let go of our need to judge and evaluate. In practice, we do this often—for example, when we accept a compromise. Radbruch saw compromise as a saintly disposition, a kind of political virtue, that can ground democracy, but he also recognized that it can lead to the toleration of injustice. This is why the "antisocial function of the law" is so important from the Weimar Minister's perspective. We must be prepared not only to suspend judgement, but also to question the law—even if it leads to strife—for justice implies evaluation and, hence, potential conflict and strife, whereas mercy implies an overcoming of even the value of justice.

In his 1918 lecture on the philosophy of religion, Radbruch identified three ways of relating to the values that shape the increasingly industrialized and conflict-driven civilization of modern nation-states: the *value-blind*, the *value-evaluating* (or value-relating), and the *value-conquering* (or value-overcoming). Radbruch introduced this framework in *Grundzüge der Rechtsphilosophie*, defended it again in *Einführung in die Rechtswissenschaft*, and would later restate it in the opening chapter of his *Rechtsphilosophie*. The ideal of the natural sciences is *value-blind*, as they do not seek to evaluate "the chaos of the given" from the standpoint of any particular culture—even though the sciences

210 Radbruch, "Neue Parteien – Neuer Geist," 346.

211 Radbruch, "Ihr jungen Juristen!," 90–91.

212 Radbruch, "Legal philosophy," 86 and *Grundzüge der Rechts*, 100.

themselves are cultural phenomena.[213] Their goal is to instead comprehend the brute mechanisms of reality and examine the causalities, forces, and repetitions in nature as laws independent of culture. Because of this, Radbruch emphasized the importance of objectivity at the same time as he defended a philosophical relativism: he believed that truth can be distinguished from opinion, and that everyday language can be used to articulate both facts and concepts of lasting significance. The statement "every human must die" is, in Radbruch's view, a value-neutral observation of a natural process. In contrast, "you shall not kill" is a moral and legal norm that applies within particular societies even if it can turn out to be a universal truth.[214] This distinction illustrates Radbruch's methodological dualism, which separates factual reality from moral values and legitimizes his legal relativism. He stressed that the "concept of science is not identical with the concept of truth; the science of an age embraces not only its scientific achievements, but also its scientific errors. But the reason why we use the concept of science to include its labours regardless of their failure or success is that they all at least aimed at being true and also claimed to be true."[215] Radbruch was conscious of how the so-called value-blind natural sciences can be separated only at a conceptual level from the ideologies and ideas that the *value-relating* cultural sciences examine. But even a pseudo-natural science like phrenology aims to be value-blind and hence autonomous from the world of subjective evaluations and feelings that the cultural sciences explore.

Almost all "evaluations," Radbruch wrote, "are the causal result, the ideological superstructure, of existing facts—for instance, the social environment of those who do the evaluating."[216] This insight clearly applies to the natural sciences. For example, advances in anatomy, biology, and surgery have made gender-affirming surgeries possible. These procedures have, in turn, sparked diverse and sometimes conflicting interpretations of what it means to be human and what counts as natural. This creates the need for the cultural sciences—which, for Radbruch, included legal philosophy—because these disciplines are concerned with how humans relate to values and create cultural artifacts. These sciences also seek truth, even though they do not follow the value-blind methods of the natural sciences. This does not mean, however, that they are inherently normative. On the contrary, Radbruch argued that they should strive for objectivity even if they study the human subjectivity that enables us to distinguish between nature and culture. This subjectivity follows its own laws and forms, even though human life can never be entirely separated from the natural world—from which it emerges, to which it belongs, and by which it is shaped. Radbruch emphasized in this vein that "in a deliberately

213 Radbruch, "Legal Philosophy," 49–53.
214 Radbruch, *Einführung in die Rechtswissenschaft*, 13.
215 Radbruch, "Legal Philosophy," 50.
216 Ibid., 54.

evaluating attitude, the mind becomes conscious of the standards of such evaluation, viz., the norms, and of their interconnection, which makes up the realm of the values that confront nature."[217] The meaning of these standards vary in different contexts, but it is still possible to analyze them as the typical values or transcultural ideas—truth, beauty, and goodness are Radbruch's examples—that we can use to compare distinct cultures.

Accordingly, the cultural sciences are more than just collections of opinions. They are scientific ways to discern the truth of reality, but they do so by either *evaluating* or *realizing value*. When a literary scholar assesses the importance of, for instance, Wallace Stevens and Ezra Pound, their works are evaluated. The scholar seeking to understand them can even realize values by giving us reasons for how we can differentiate good poetry from bad poetry and thereby, for instance, take the side of Pound over Stevens. One can judge that "the latter's mythology of self, the faith in the autonomy of the redemptive imagination, depends upon the ruthless elimination of whether the past is that of the whole culture or merely one's own."[218] Pound's poetry, in contrast, might be seen as a "desertion of the windowless monadic world of pigeonholed 'subjects' for a lively explorer's interest in particulars."[219] Someone who loves Stevens might react against this judgement and insist that it can be true that he was a poet of the introverted mind, but that this was his strength, since poetry should give us access to a private soul. There is strife in the cultural sciences and the same strife shapes legal philosophy as well, and explains why "legal philosophy is but the struggle of political parties" and should be seen as a "spiritualized class struggle."[220] This is why relativism was so essential for Radbruch. Without it, every cultural struggle becomes a combat over the absolute, and hence something that turns into a struggle over life and death.

It is important to note that, from Radbruch's perspective, judging Pound to be a better poet than Stevens is not necessarily an arbitrary evaluation. It could be an accurate, and even truthful, assessment of the two poets, since not all poets produce equally good poetry. Relativism did not amount to a denial of the truth but rather an endevour to disclose that the path to truth involves clashing perspectives. Artistic and cultural truth is not a mere description of reality. It is a realization of a value such as, for instance, beauty. Radbruch, who loved poetry and even assembled an anthology of German poems with a beautiful postface, saw the lawyer as something of an artist.[221] The jurist realizes a new world of evaluations through his judgements, and such evaluations

217 Ibid. 49.

218 Marjorie Perloff, "Pound/Stevens: Whose Era?" in *New Literary History* 13, no. 3 (1982): 485–514, here 502.

219 Ibid., 494.

220 Radbruch, "Legal Philosophy," 55.

221 See the postface to Gustav Radbruch, *Lyrisches Lebensgeleite – von Eichendorff bis Rilke* (Vandenhoeck & Ruprecht, 1958), 149–153, here 151.

belong to "a peculiar kind of reality, intermediate between the idea and the other realities."[222] He argued that evaluations "belong to reality themselves" since they are "psychological facts."[223] In this sense, they are impossible to separate from the domain of nature, just as Ludwig Feuerbach or, for that matter, the defenders of natural law insisted. But, Radbruch continued, "at the same time they [the values] rise above the other realities by applying standards and raising demands. Of this kind are conscience, the cultural phenomenon related to the moral idea; taste, related to the aesthetic idea; and reason, related to the logical idea."[224] Typical values—whether moral, aesthetic, or legal—are organized around general ideas, such as beauty or goodness. However, these values are also intertwined with what Radbruch called "factual phenomena," such as specific works of art or literature. The poetry of Pound and Stevens each embodies the idea of poetry in distinct ways and to varying degrees. While we may never be able to determine, from a completely impartial standpoint, which of them was the greater poet—since such a truly objective view would lie beyond human perspective—the very notion of such a view was significant for Radbruch. The theoretical possibility of such a beatific, and in a sense inhuman, vision of the world was important exactly because his relativism was a defence—rather than a critique—of the notion of absolute truth. This idea is echoed in Lessing's parable of the three rings that Radbruch often returned to: one day, we may discover which ring represents the true faith—or perhaps realize that all three partake in a greater, unified truth that transcends human judgement. Until such a revelation, we will continue to encounter a plurality of values, each shaped by its cultural context. Within this diversity, the arts and other factual phenomena of culture strive to embody and represent the general ideas and typical values that the cultural sciences seek to comprehend.

Democracy and the Radbruch Formula

The "factual phenomenon which in the same way corresponds to the legal idea is the precept."[225] Precepts are general rules that structure thoughts and behaviours. This is why law can be understood only "within the framework of the value-relating attitude. Law is a cultural phenomenon, that is, a fact related to value. The concept of law can be determined only as something given, the meaning of which is to realize the idea of law. Law may be unjust *(summum jus—summa injuria*); but it is law only because its meaning is to be just."[226] It was this formal definition of law as a means to realize the idea of justice—an

222 Radbruch, "Legal Philosophy," 76.
223 Ibid., 7.
224 Ibid., 76. Translation modified.
225 Ibid.
226 Radbruch, "Legal Philosophy," 52.

idea that a manifold of different societies have used to organize their own way of life—that was attractive to the theologian Gottlieb Söhngen, mentioned at the beginning of this chapter.

Referring to Radbruch, Söhngen wrote at the end of one of his books on *Rechtstheologie*: "To be just [*Gerecht*] means to be objective [*sachlich*]; without objectivity [*Sachlichkeit*] there is no law [*Recht*] and no justice [*Gerechtigkeit*]."[227] As we have seen, Söhngen also cited a lengthy passage by the German writer Albrecht Schaeffer from Radbruch's *Spruchbruch* to highlight the inherent ambiguity and even contradiction in the ideal of "objectivity," and with it, the principle of legal certainty—the foundation of law's formalism. Radbruch used Schaeffer to portray the pursuit of objectivity, and the required *Sachlichkeit* (detachment or factuality) in law, as an anarchic dilemma. The very formality that ensures the consistency and impartiality of law can also rigidify human relations, turning the pursuit of justice into something cold and inhumane. Yet, paradoxically, this inhuman element may be necessary in order to uphold a faith in absolute truth—one that alone can place all relative perspectives into an ultimate context:

> Humans have no endeavour so intimate as that of being inhuman and that under the pretence of being just, or worse, objective. No one has ever been objective, for an object [*eine Sache*] is an inhumanity [*ist eine Unmenschlichkeit*]; but when you think you must be objective, you become inhuman—and then you are quite human.[228]

The objectivity—*Sachlichkeit*—that elevates law above mere arbitrary command can also render it inhuman. Ultimately, there is no such thing as fully objective law. If such law did exist, it would reduce the human being to a mere object—*eine Sache*—and thus strip away her humanity. Yet true justice requires such detachment: to perceive reality exactly as it is, independent of personal interpretation or subjective bias. However, this kind of absolute impartiality is unattainable for humans, who cannot help but view the world through the lens of their own perspectives. Impartiality and objectivity are necessary for justice and truth, but impossible for humans, since they are subjects who always interpret reality, rather than impersonal instruments that reflect reality without distortion.

Söhngen turned Schaeffer's words into two axioms which indicated the contradiction that Radbruch thought characterized law: "1. Being just implies for humans wanting to be objective" and "2. Having to be objective means becoming inhuman; objectivity is not possible without inhumanity, without that inhumanity of objectivity in which people believe themselves to be

227 Söhngen, *Grundfragen einer Rechtstheologie*, 131.

228 Quoted in ibid., 130.

completely human."[229] The law is a *Widerspruch* in that it is an evaluation that is supposed to be impartial and objective, but it can never be entirely impartial since only subjects can make evaluations. The danger of law is that it can make us inhumane exactly when we try to be just and humane. Söhngen and Radbruch believed that a subject who could assess the whole domain of nature and culture as a unitary whole would be able to treat values as absolute structures rather than as relative perspectives. The belief in such an eschatological point of view, a God-like perspective even on the life of the individual soul, could be secularized as the hope that law can be turned into a mere administration of things liberated from subjective values. In the edition of *Einführung in die Rechtswissenschaft* from 1929, Radbruch discussed the political discussions in the Soviet Union and Fascist Italy to transform the penal code into a code of sanctions, which were said to be objective rather than subjective. He noted that "the harsh word 'labeling fraud' [*Etikettenschwindel*] is not entirely without merit," when one assesses these attempts to abolish the legal form by turning law into a mere administration of sanctions; especially since capital punishment could be seen as an administrative sanction rather than a legal punishment.[230]

Radbruch was at the same time deeply drawn to such ideas of rethinking law as a mechanism of punishment. As we have seen, he hoped that socialism could be understood more as a system of administration than as an ideology. However, he firmly emphasized that law cannot be reduced to administration—neither sociologically nor ontologically—without losing its form as law because the essence of law lies in its aim to determine what is just, a process that inherently involves subjective judgement. Administration, by contrast, is guided by values such as efficiency, organization, and often legal certainty, but it does not necessarily engage with the fundamental question of justice. Still, Radbruch believed that it was possible to reform penal law, shifting its focus from "retribution" to "improvement and protection." In the posthumously published version of *Einführung in die Rechtswissenschaft,* this was described as *Besserungs- und Bewahrungsrecht*—a law of rehabilitation and custody.[231] The state has the right to detain its citizens if they do criminal acts, but this punishment should be seen as part of a general transformation of law from a punishing command into an instruction on how one could live a good life.

229 Ibid.

230 Radbruch, *Einführung in die Rechtswissenschaft*, 313.

231 Gustav Radbruch, "Das neue Strafgesetzbuch" in *Strafrechtsreform* edited by Rudolf Wassermann (Heidelberg: C.F. Müller, 1992), 215–217, here 215, and Radbruch, *Einführung in die Rechtswissenschaft*, 147. "[T]he development of penal law may well turn out one day to step beyond penal law, with the reform of penal law opening not into an improved penal law, but into a corrective and custodial law that would be better than penal law, both more intelligent and more humane than penal law." Radbruch, *Legal Philosophy*, 190.

Because law is bound to evaluation—and thus to the living human subject who, even under unfree conditions, can still ask inwardly, *is this just?*—it must not be reduced to mere sanction or bureaucratic procedure. Law remains law precisely because it raises the problem of justice.

Thus when the former Minister of Justice wrote in 1946, three years before his death, that "[b]y means of two maxims, 'An order is an order' and 'a law is a law', National Socialism contrived to bind its followers to itself, soldiers and jurists respectively" he described, in fact, the silencing of the question of law.[232] As we have stressed, much ink has been spilled attempting to clarify whether this formula indicated a turn towards natural law in Radbruch's thinking, and whether his description of legal positivism as the dominant ideology in the Nazi state is correct or not. The claim that the Third Reich's authoritarian legal system was the inevitable outcome of legal positivism is clearly mistaken. Many legal positivists were, in fact, liberals, socialists, and outspoken anti-fascists—Hans Kelsen being a prominent example. Moreover, Horst Dreier has demonstrated that legal positivism was not the dominant legal theory in Nazi Germany.[233] It was according to Dreier rather authoritarian and conservative ideas, shaped by the Wilhelmine *Obrigkeitsstaat*, that led so many jurists to accept the new regime, not positivism as such.

Radbruch was therefore mistaken in attributing the compliance of German judges with Nazi law to legal positivism alone. However, when he wrote that the Nazi state "expressed the positivistic legal thinking that, almost unchallenged, held sway over German jurists for many decades," he was likely, as we have argued, making another form of critique.[234] He was not condemning positivism in general, but rather the tendency to equate law with the sovereign's power to impose sanctions—an understanding of law he had been challenging since before the First World War.

It was therefore false to argue that it was "[p]ositivism, with its principle that 'a law is a law'" which rendered "the German legal profession defenceless against statutes that are arbitrary and criminal." But Radbruch might have been correct to insist that only "*one* value comes with every positive-law statute without reference to its content: Any statute is always better than no statute at all, since it at least creates legal certainty."[235] Order, which can be posited through legal certainty, is the basis of any legal order. However, in 1946 Radbruch repeated what he had previously argued in his *Rechtsphilosophie* from 1932, namely that "there are two other values: purposiveness and justice" that are needed in order to differentiate the *Rechtsstaat* from the *Unrechtsstaat*.[236]

232 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 1.

233 See Horst Dreier, "Die Radbruchsche Formel – Erkenntnis oder Bekenntnis" in *Die Natur des Rechts bei Gustav Radbruch*, 1–22.

234 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 1.

235 Ibid., 7.

236 Ibid.

The purpose of law is to establish justice for its legal subjects, and justice sets limits on the content of positive law. First of all, since the form of law implies that law can "be certain and sure, that it is not to be interpreted and applied one way here and now, another way elsewhere and tomorrow."[237] Legal certainty is, as we have insisted, a necessary condition for just law, but it is insufficient for a definition of justice. Slavery can be upheld by laws that are consistent with the principle of legal certainty. Likewise, capital punishment can be justified as a sanction based on expediency, or what he referred to as *Zweckmäßigkeit* (purposiveness), even if might be unjust.[238] It can truly be argued that execution can be done for the purpose of specific people's interests. This is why the three values and hence forms that determine if a precept is a law—legal certainty, purposiveness or expedience, and justice—do not always align.

Söhngen was right to point out that every legal system needed to balance the inner contradictions of law that arise from the fact that law must but cannot be fully objective. Radbruch could even insist in his famous article from 1946 that when "there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice."[239] He continued by noting that this "conflict is perfectly expressed in the Gospel, in the command to 'obey them that have the rule over you, and submit yourselves', and in the dictate, on the other hand, to 'obey God rather than men."[240] This is the contradiction that defines law, and it explains why a state that fails to act justly can be seen as an *Unrechtsstaat*, even if most legal orders have emerged out of violence and conflicts. Aware of this contradiction, Radbruch insisted that "positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice."[241] As a legal relativist he knew that it often is difficult to make a clear distinction "between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt of justice, where equality, the core of justice is deliberately betrayed in the issuance of positive law then the statute is not merely 'flawed law', it lacks completely the very nature of law."[242] For, and this is essential since it reveals what Radbruch thought was the end and purpose of law, "law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve

237 Ibid., 6.
238 For Radbruch's critique of the death penalty see "Legal Philosophy," 191–194.
239 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 6–7.
240 Ibid., 7.
241 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 7.
242 Ibid.

justice" and hence to produce legal subjects with the innate right to discuss and define what is just.[243]

The teleological end of law is to secure justice for those subject to it. Achieving this requires that the state acts in the service of its citizens and upholds legal certainty. However, justice should not be equated with the collective interests of "the people," since society is not a uniform entity. Rather, it is composed of diverse groups and individuals, each of whom should have the democratic right to assert their own understanding of what is just (even if they do not have the right to act how they want). Thus, Radbruch insisted in 1945 in the Platonic manner that is so characteristic of his thinking, that one should not say "everything that benefits the people is just [*Recht*]; rather, the opposite is the case: only what is just [*Recht*] benefits the people."[244] For, he continued, "justice [*Gerechtigkeit*] is the will to do right. But justice means judging without regard to a person's standing, and applying the same measure to all" and this explains why justice necessitates both "social law" and "the antisocial function of law" that should protect the singular person from the state and the many associations of the social sphere.[245] This is also why law cannot be equated with the state—because even the state is bound to obey it.

It is important to keep this in mind when considering Hart's 1958 critique of Radbruch. Hart accused him of conflating law and morality in his attempt to define "statutory lawlessness" and to defend the idea of "supra-statutory law." The English legal scholar perceived a degree of illiberalism in Radbruch's position, writing that "we can see in his argument that he has only half digested the spiritual message of liberalism which he is seeking to convey to the legal profession."[246] Everything that Radbruch "says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this rule of law to be obeyed?'"[247] The "truly liberal answer to any sinister use of the slogan 'law is law' or of the distinction between law and morals is, 'Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.'"[248] From Hart's perspective, the legal system of the Third Reich was still a system of law, even if it was unethical law, since the law is simply what is posited by a state as a rule that one must follow. We should, the English philosopher insisted, follow the utilitarians and accept that if "we speak plainly, we say that laws may be law but

243 Ibid.

244 Gustav Radbruch, "Fünf Minuten Rechtsphilosophie" in *Rechtsphilosophie: Sechste Auflage* 335–337, here 335.

245 Ibid., 336.

246 H. L. A. Hart, "Positivism and the Separation of Law and Morals" in *Harvard Law Review* 71, no. 4 (1958), 593–629, here 618.

247 Ibid.

248 Ibid.

too evil to be obeyed."[249] Hart did not deny the existence of statutory lawlessness or what he described as evil law. He simply meant that one should refuse to obey it, even if it meant that laws would be broken. Yet, from Radbruch's perspective, this implies that the concept of law is tied to the power of the state rather than to the question of justice. We will see that Hart refused to view law as mere command, but by defending the positivist dictum which states that a posited law is law, he was less capable than Radbruch of envisioning a law that does not emerge from the sovereignty of the state, but rather is posited as an innate right of even the asocial individual to freely ask what is just. In fact, as we will see in the next chapter, Hart also originally argued that such freedom was the basis of the moral foundation of law, but he discarded that idea and came to insist that the minimum basis of law is survival.

The threat of death made Radbruch posit "the right to self-defence" as "an original human right left to the person attacked, while the right to execute the death penalty can only be thought of as a right created on the basis of the state treaty, or rather *cannot* be thought of on an individualistic basis."[250] An individual cannot have any legal rights when she is dead, and this is why the death penalty cannot be accepted if law is seen as a mechanism to protect the individual, even though the individual has the right to defend her own life if she is attacked. Law only has meaning for the living, and, in this sense, Radbruch would probably have agreed with Hart's definition of survival as the minimum content of natural law. But survival for a human is always something more than the persistence of what Rickert called naked or mere life.[251] Human life involves the production of culture, and thereby diversity of values, and this is why, for Radbruch, it is in the interest of the individual that the state is organized as a democracy which partitions the people into competing ideological movements and political parties that one can freely enter and leave. The definition of law as a mechanism for justice implied, therefore, for Radbruch, a defence of a parliamentary democracy based on political parties.

In his memoirs, which culminates with a meditation over all the losses in his life, Radbruch criticized the German socialists for misunderstanding the value of democracy.[252] Democracy was too often reduced to a mere means for socialism, when it should have been seen as an end in itself, since it could secure the three values that define law.[253] This was in line with his earlier argument that "the government of the *Kaiserreich* prided itself on being a government

249 Ibid., 620.
250 Radbruch, "Legal Philosophy," 195.
251 Rickert wrote, for instance: "From a philosophical point of view, life as *mere* life remains a chaos. Indeed, the more vividly, that is to say, the more vitally it lives, the more chaotic it must appear to the thinker if he really experiences it in its liveliness." Rickert, *Die Philosophie des Lebens*, 181.
252 Radbruch, *Der Innere Weg*, 177.
253 Ibid., 178.

over the parties; today's parliamentary government has consciously become a government of parties, indeed, the state is the *democratic state of parties*."[254] A new political experiment was being tested in the Weimar Republic—the *state of parties*. Radbruch differentiated the *Parteienstaat* from the authoritarian state—*der Obrigkeitsstaat*—by once again turning to Lessing's story about the ring.[255] As he noted in an important critique of the conservative legal scholars Carl Schmitt and Rudolf Smend, we shall have "different party conceptions of the common good" as "long as no angel from heaven has brought us the unmistakable revelation" and thereby established the truth once and for all.[256] To believe something else is to misunderstand what absolute and objective truth entails, and hence to mistake oneself for the angel of revelation.

One of the three rings might, as we have seen, indicate absolute truth. Before we know what truth is in its fullness, one ought to accept that "truth in politics is not knowledge, but decision" and that such decisions should be done freely through struggles of persuasion rather than force and violence.[257] This might seem naïve, since many of Radbruch's enemies did not accept his relativism, but the Platonic pragmatist believed that "in a democratic state, parties are the most important organs of constitutional life, the unrest that keeps the whole clockwork going" and those who seek to abolish this order should be combated as enemies to democracy.[258] Radbruch's defence of *Unruhe* (unrest) clearly showed that he took the rising threats to the new democratic regime seriously. He viewed Schmitt and Smend as part of a new "frontline … against the party state"—and, by extension, against a vision of the German nation as a heterogeneous whole: a diverse society made up of classes, religious groups, and communities increasingly capable of organizing themselves as political parties.[259]

Schmitt had written a few years before the Wall Street Crash in 1929 that "democracy requires … first homogeneity and second—if the need arises—elimination or eradication of heterogeneity."[260] This was the antithesis to Radbruch's vision of the people as a power that can only emerge out of the partitions that must be able to manifest themselves politically as distinct parties.[261] The social whole was a heterogenous unity. Radbruch described democracy as selection of leaders—*Führerauslese*—and argued that there is

254 Radbruch, *Einführung in die Rechtswissenschaft*, 74.

255 Ibid. See also the discussion on the same topic in "Partei und Staat" where he also turns to Lessing in *Politische Schriften aus der Weimarer Zeit* I, 42–46.

256 Radbruch, "Parteienstaat und Volkgemeinschaft," 97.

257 Ibid.

258 Radbruch, *Einführung in die Rechtswissenschaft*, 75.

259 Radbruch, "Parteienstaat und Volkgemeinschaft," 95.

260 Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press, 1988), 9.

261 Se Radbruch, "Partei und Staat," 42-46 and Radbruch, "Parteienstaat und Volkgemeinschaft," 94–99.

no legal philosophy without the competition between political parties.[262] Following Anselm Feuerbach, Radbruch wrote that democracy was the way to "establish peace in action during the war of opinions, during the struggle of philosophers": the same kind of dispute for which Socrates was killed after too stubbornly asking questions concerning the nature of the good life and the meaning of justice.[263] The forces of homogeneity that paved the way for the "absolute values" of National Socialism accepted no selection of leaders or relativization of the *Führer's* will. They refused to acknowledge "the antisocial function of law" since the individual had to be integrated into society. As we know, those who did not conform were ostracized, imprisoned, and ultimately killed. Hart's critique of Radbruch's liberalism, then, seems to miss the core issue. Radbruch's well-known formula ultimately defends liberal parliamentary democracy. The text concludes with a description of democracy as the best government to defend justice and legal certainty.[264] However, the key question is whether he overestimated the ability of such a system to prevent conflict. It is noteworthy that he himself, in one of his assaults against the *Obrigkeitsstaat*, described political apathy as a threat to the state:

> … those who place themselves outside of parties and political life, only to intervene decisively in political life on election day, whether by casting their ballot paper or, no less effectively, as the "party of the non-voter," are a constant danger to the smooth running of state life, and the cause of the lasting instability and unpredictability of political development.[265]

Here Radbruch almost sounds like Schmitt, who had forcefully argued that the modern state implied the need for total mobilization of society in the interests of the state. Schmitt went much further than Radbruch by viewing even the political parties as potential enemies to the homogeneity of the nation, and Radbruch was indeed right that parliamentary democracy would not function if its citizens no longer organized themselves politically in parties and other associations. Still, it was not the "non-voting party" that brought Hitler to power, it was, among other things, the support NSDAP got from the other political parties. Political organization, not political apathy, seems in a sense to have produced 1933.

Radbruch understood how easily the struggle over competing values could escalate into an absolute conflict over life and death. But as we have stressed several times in this chapter, as early as his *Grundzüge der Rechtsphilosophie*, he was already searching for a way to overcome the tyranny of values that

262 Radbruch, *Der Innere Weg*, 178.
263 Radbruch, "Legal Philosophy," 118.
264 Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 11.
265 Radbruch, "Partei und Staat," 43.

parliamentary politics could produce—since, to use his jargon, political parties function as instruments for *realizing* values. His last answer to the problem of value pluralism—which shaped his 1946 formula—was therefore not the democratic partition of the people into political parties. It existed outside democracy and the party system. "Religion," he wrote in 1914, "is the smiling positivism"—*der lächelnde Positivismus*—that can show an alternative to the party system which ultimately failed to counter the rise of National Socialism. This move towards what could be described as a form of political theology is difficult to reconcile with his contempt for the party of the non-voters—who may, in fact, simply be ordinary citizens who feel justifiably unrepresented. This contradiction in Radbruch's legal philosophy brings us to the conclusion of this chapter, where we consider the necessity not only of establishing or realizing values, but also of ultimately overcoming the logic of evaluation.

The Second Innocence

The so-called Radbruch formula can be interpreted as an endeavour to defend "a law without state" since from both a philosophical and a sociological perspective such a natural law cannot be identified with sovereignty or sanction. It implies a potential relativization of every temporal sovereign through the knowledge that there are only finite and partial values in the world, and that every power that seeks to absolutize itself will move outside the sphere of just law. However, history shows that this is what legal orders tend to do, and for this reason Radbruch turned from the *telos* to the *eschaton* of law with his affirmation of religion as a mode of accessing the world outside the battleground of political ideologies and economic values. Religion, he argued in 1914, "is the second innocence, not the one of indifference to values, which precedes the distinction between value and non-value, but the one that follows and overcomes it."[266] If the natural sciences are value-free, and the cultural sciences are assessments and realizations of values, then what Radbruch simply describes as religion is the overcoming of value through a last judgement, which sees the world from the point of view of redemption. In this way, the absolute good that religion can reveal transcends the oscillation between necessary evil and relative good, revealing something invaluable that lies beyond all evaluation.

The relative good that politics and law administer can, from the point of view of such an eschatological vision, be said to participate in the good—and hence invaluable—as such. But we can understand this only if we are able to rise above the oscillation between what is good and evil, licit or illicit, just or unjust, and, in the end, legal or illegal by refusing to judge. This would not only be the end of law, it would be the end of the division between nature and

266 Radbuch, *Grundzüge der Rechtsphilosophie*, 37.

culture, since we would be able to discern the values that permeate the world without evaluating and judging them from a merely human point of view.

The question is if this might be what the party of the non-voter can signify in a secular manner, for what Radbruch described as the value-overcoming attitude of religion implies a similar rejection of the choices that this world gives us: not by turning a blind eye to them, but by refusing their validity, since we have become innocent enough to refuse to judge. According to Radbruch, religion is often the cultural basis not only for morality, but also for law. When Pope Francis revised section 2267 of the Catechism of the Catholic Church on the death penalty in 2018 and insisted that "the Church teaches, in the light of the Gospel, that 'the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person'" the pope was realizing a value—abolition of the death penalty—and sought to reshape the political world.[267] This is an ethical stance that can serve as a foundation for law.

Religion, on the other hand, pushes us to think beyond the values of the world. The almost beatific vision of reality, without disavowing war and evil, is not the impartial or objective standpoint of the value-blind natural sciences. It is the "'Yea' and 'Amen' over all things, love without regard to the worth or worthlessness of what is loved, beatitude beyond happiness or unhappiness, mercy beyond guilt and innocence, peace higher than reason and its problems."[268] This is the eschatological negation of law, since it conquers the human need for purpose and evaluation and transcends the question of justice by answering with the loving indifference of "the smiling sceptic" that Radbruch, one year after the election in 1933, wrote had "ceased to be the ideal of the wise man. Relativism is seen as a lack of conviction, a lack of character."[269] But, as we have seen, relativism was not the refusal of the absolute. It was the relativization of human values in front of a world that ultimately cannot be explained from the perspective of human purpose, and an affirmation of what we have called the monotheism of the good against the polytheism of values.

This almost asocial relativization of the values that generate law is the reason why Söhngen turned to Radbruch in *Grundfragen einer Rechtstheologie,* when he sought to determine the inner contradiction of law, namely, why not only so-called evil law, but also just law, can become a threat to justice itself. We have seen that what Radbruch found in Christianity (or what he often simply called religion) was a radical form of individualism. If we are not ready to seek something *beyond justice*, we will become incapable of accepting that we live in a world where the question of justice cannot be solved, and thereby

267 Pope Francis, "New revision of number 2267 of the Catechism of the Catholic Church on the death penalty – Rescriptum 'ex Audentia SS.mi', 02.08.2018."

268 Radbruch, "Legal Philosophy," 50.

269 Radbruch, "Der Relativismus in der Rechtsphilosophie," 17.

we will be enslaved by what Schmitt described as the tyranny of values. For Schmitt, as we will see in the chapter on Böckenförde, value emerged out of the anarchic relativism of the modern world that weakened the sovereignty of the state, which he thought could be saved only through a politics for national and even racial homogeneity. Against such fascist or quasi-fascist positions, the Weimar Minister suggested that a "natural law with changing content" could be a means to defend a pluralistic society if we are ready to supplant the teleology of this law with the hope for a seemingly impossible eschatological end to law.

Quoting another maxim by the Catholic mystic Angelus Silesius—this time the striking phrase, "He who would treasure everything alike, in this his life attains the state of everlasting bliss"—Radbruch once again affirmed a vision of the world that lies beyond the realm of legal judgement and evaluation.[270] By doing so, he captured how the oscillation between distinct values, such as that between the just and the unjust, good and evil, is a necessary part of a world in time and space which needs to be administered by external norms and laws. The mystic, in a state of eternal bliss, has encountered the monotheism of the good—as if she has eaten from the Tree of Knowledge a second time and returned to a state of paradisiacal innocence. In this state, law is no longer necessary. However, this condition cannot be sustained permanently by human beings. Even the mystic, who momentarily sees the world from this Edenic perspective, still lives in the order of value. And the problem with values is that they are endlessly open to interpretation. The resulting polytheism of values inevitably leads to conflict—and may even lead to war. But, Radbruch insisted, exactly because such a rejection of the values of this world "is not like a monastery which one enters never to emerge from again, but rather like a wayside chapel where one leans the wandering stick against the wall for brief meditation and prayer," it can still be institutionalized in something he would probably have called a party.[271] The "term 'party,'" Radbruch wrote after the Second World War, "contains a strange contradiction: the word 'party' suggests that it is only a part, but it is part of its nature that it wants to control the whole life of the state—and yet it must remain only a part of the whole if it is to avoid the most terrible of all forms of despotism."[272] However, this strange antinomian party—the association for those who accept that since there exists a secret connection between crime and law, we should desire a world which obviates the need to judge—would not seek to rule.[273] This strange, almost anti-political party—anti-political since it can neither be ideological nor seek to rule the world in the conventional sense—could seek

270 Radbruch, "Legal Philosophy," 51.

271 Ibid.

272 Radbruch, "Neue Parteien – Neuer Geist," 544.

273 Radbruch, "Legal Philosophy," 51.

to establish a *Gnadenrecht* that fuses our need to make value judgements with our growing desire to suspend judgement.

Such an organization would want to transform law from being a mere command to avoid evil into an instruction to do good. To refuse the will to suspend law would be to refuse a longing for a world without crime, and hence to perpetuate the relative values that prevent us from understanding that the absolute good is not a value, and therefore not what Radbruch called a function or a means. The good is an end in itself, and every human—even the worst criminal—is such an end in himself. Values are, unlike the good, always relative to a perspective and hence defined by their usefulness for a subject. This does not mean that all values are equally valid, nor that there is no way out from the polytheistic tyranny of values. Yet, to deny that our thoughts and ideas are relative is to misunderstand why the good—that good which Moore perhaps rightly insisted could not be reduced to a natural property in this world—necessitates a sceptical life form: an eschatological relativism that accepts that there are only penultimate answers to the question of what is just in this transient world in which we are born and will die. This, it is important to note, also relativizes the refusal to judge. Thus, the quixotic characters who seek to overcome their need to judge would, not totally unlike the non-voter that Radbruch despised, resist the values that interpellate them and try to imprison their life in the dialectic of law and punishment. These smiling positivists would also understand that sometimes they must judge and even seek retribution. They could do so, Radbruch proposes, by seeking to transform punishment into betterment. A life completely outside the law cannot be fully actualized on this side of the *eschaton*. However, such a life can, according to Radbruch, be a helpful model that shapes our understanding of law. This is why he wrote to his daughter in 1916 that "the Eternal does not have the last, serious conversation about the borrowed pound with states and nations, but with you alone in private. In the end, there is only God and the soul." If we accept this asociality of both religion and law, and believe with Radbruch that we are more than legal, political, and even social animals, we can also affirm the "uncompromising ruthlessness" which is needed in order to confront "reality with the ideal."[274] From the perspective of such a political theology, the *telos* of law might be the death of law as a mechanism of evaluation, namely, the gradual eclipse of the struggle for relative values through the knowledge that we can only approach the absoluteness of truth if we abandon our infantile, albeit still painfully necessary, desire to judge. That can never happen as long as the order of values rules us and we are denied the revelation of the monotheism of the good in its pleromatic fullness. Yet according to Radbruch, we can still begin to incarnate this eschatological state by relativizing the value of law and the economic and political forces that law sometimes seeks to make

274 Ibid., 55.

just, but often simply makes more efficient and expedient. In the end, there is no lasting world for mortal and finite creatures. There is only God and the soul, and those who are not convinced by Radbruch's political theology can remember that it designates an acceptance that even the law grows, changes, and dies. Law is "as fragile as the stars themselves."[275] It will one day be lost in this world that is moving towards its end and, in the meantime, we mortal creatures should be ready to not only ask what is just but understand that such questions might have no ultimate answer in this world. They need to be transcended, and those who succeed in doing that reach the "second innocence" beyond both culture and law, and reveal for the rest of us that the ones who are just might be powerful enough not to judge.[276]

275 Flavius, *Der Kampf um die Rechtswissenschaft*, 12.

276 We note again that Radbruch exemplified this attitude with a passage from a prison letter by Rosa Luxemburg: "You ask in your card: 'Why is everything like this?' You child, life has always been 'like this', everything is part of it: suffering and separation and longing. You always have to take this as part of everything else and find *everything* beautiful and good." Radbruch, "Kulturlehre des Sozialismus," 80.

Chapter 2

Beyond Survival

H. L. A. Hart and the Minimum Content of Natural Law

In March 1984, a distinguished group of legal scholars held a conference to honour H. L. A. Hart at the Hebrew University in Jerusalem. Hart himself participated in the event, having diligently prepared for it in the preceding months.[1] Hart's former doctoral student, and arguably his foremost heir as a theoretician of legal positivism, the Israeli legal philosopher Joseph Raz was present, as was Ronald Dworkin, Hart's successor at Oxford, and several other of Hart's students. His nationality notwithstanding, Raz had made an exception to his long-standing position of refusing to enter Israel, which he had upheld since the Six-Day War of 1967 and the unlawful occupation of the West Bank, Gaza, and other Palestinian territories. Raz's reluctance was deep, and he himself compared participating in a publicly funded conference in Israel to doing the same in apartheid South Africa.[2] In order to be able to participate and honour Hart, Raz's compromise was to organize a one-day, extracurricular seminar on human rights at the Palestinian Bir Zeit University, to which he invited the other participants of the main conference. Despite the repressive circumstances and hardships the scholars at Bir Zeit laboured under, the event was a success. Among those who joined this counter-workshop was the Australian legal philosopher John Finnis, who had studied under Hart at Oxford. Four years prior to the conference in Jerusalem, Finnis had published his magnum opus *Natural Law and Natural Rights* in Hart's own book series Clarendon Law at Oxford University Press.[3] This massive treatise in which the Catholic Finnis defended a secular theory of modern natural law, had in fact been commissioned by Hart himself, even specifying the title. Hart did not only teach Finnis and commission his book, he continuously supported Finnis (as he did many other scholars) with detailed comments on manuscripts and

1 The conference papers were published in Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Clarendon Press, 1987).

2 Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), 345–346.

3 John Finnis, "Postscript," in *Natural Law and Natural Rights*, 414. Lacey, *A Life of H.L.A. Hart*, 273.

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incisive comments in correspondence and meetings.[4] During the Jerusalem trip, Hart, as per usual, made sure to do some sight-seeing. Asking Finnis to join him, they walked up the Mount of Olives and sat at a bench overlooking the Temple Mount and the old city. Hart, who was always convivial but rarely personal, "alluded to the fact that they were seeing Jerusalem through different eyes."[5] At the time, Finnis thought that it was their identities as Catholic and Jew which gave them different perspectives; it was only after Hart's death that he realized how Hart had hidden his deep antipathy to religion. Even though Hart was secular, he never hid his Jewish heritage and at one point he even surprised Dworkin by pointing out that it was remarkable that no English person had held the Oxford Chair of Jurisprudence for decades. "Amazed, Dworkin replied, 'But you are English.' 'No,' Herbert retorted, 'I'm Jewish.'"[6] But both Hart and his wife Jenifer were staunch atheists and raised their children accordingly. This makes the respect and even more encouragement that Hart showed to Finnis, as well as many other colleagues of different ideologies and faiths, even more impressive. In a particularly telling story, the two "firm—one might even say devout—atheists" accepted their son Jacob's conversion to Catholicism and even fought with the Jesuit clergy so that he could be baptized with the Dominicans at Blackfriars to whom he had become particularly attached.[7]

Even if he himself held strong moral and political views, Hart's life and his thought was based in a deep-seated liberalism that not only accepted, but celebrated, a pluralism of values, and defended the individual's freedom to decide such matters as fundamental. But what law could one envisage and support with such ideological inclinations? Hart, as we will see, would take on concrete political issues such as the decriminalization of homosexuality and be an important voice in the 1960s and 1970s debate on law and morality, making forceful arguments against those who wanted to keep such moralizing laws, justifying their position with dubious claims that homosexuality was evidence of social disintegration. His critique of what he called the "disintegration thesis"—the idea that society would disintegrate if did not sufficiently adhere to a common morality, which the majority has the right to impose on minorities—also depended on it collapsing into what Hart calls the "conservative thesis."[8] For Hart, this thesis was strongly associated with a form of classical

4 Santiago Legarre, "HLA Hart and the Making of the New Natural Law Theory," *Jurisprudence: An International Journal of Legal and Political Thought* 8, no. 1 (2017): 89.

5 Lacey, *A Life of H.L.A. Hart*, 347.

6 Ibid., 271.

7 Ibid., 241.

8 This is the argument from Patrick Devlin: "But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of

natural law in which morality was considered a "a uniquely true or correct set of principles" uncovered by reason or revelation.[9] Hart considered such a view of natural law, which attempts to totalize the field of morality in society, to be deeply repugnant. He could not accept the idea that law has specific ends based in the nature of each thing, as an older teleological view would claim. At the same time, what did unite all human law was the human striving for survival, which meant both that law had this minimal end and that the end of law would mean a renunciation of survival. For Hart this strive for survival even produced its own form of natural law, as we will discuss below.

Above all, Hart was concerned with protecting freedom. For Hart, law certainly could and should sanction different behaviours through coercion or force, but only when it was based in a rational and justifiable argument rather than being the result of some legislator—even a democratic one—arbitrarily imposing his will. His lifelong fascination with Jeremy Bentham led him to make significant scholarly contributions on utilitarianism, and throughout his life he was inspired by and sympathetic to a utilitarianism that he argued was often caricatured and misunderstood. But far from disregarding the fundamental question of *what is just*, his work aimed to be clearheaded about the specific characteristics of law as a social and normative order, so as to allow individuals the chance to make moral evaluations. The ultimate goal of his positivistic legal theory was to be bound neither by the authority of law nor by the supposition of a morality shared by society as a whole. His positivism was not concerned with reinforcing the sovereign decision to legislate in one way or another, but about presenting a clear moral argument which forced the individual to decide for herself whether a law should be obeyed or not. In one of the final interviews Hart gave, he once more defended his morally neutral theory, in opposition to those like Ronald Dworkin, who argued that legal theory was a branch of moral theory. It was precisely this moral neutrality that in Hart's view opened the space for the most important question: "A morally neutral conception of legal obligation serves to mark off the points at which the law itself restricts or permits the restriction of individual freedom. Whether laws are morally good or evil, just or unjust, these are focal points demanding attention as of supreme importance to human beings constituted as they

disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions." *The Enforcement of Morals* (Oxford University Press, 1965), 14–15.

9 H.L.A. Hart, "Social Solidarity and the Enforcement of Morality," in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 248–262; the essay which is a follow-up to his book *Law, Liberty, and Morality* (Stanford University Press, 1963) where he polemicizes against Devlin. The debate started with a short but scathing article by H.L.A. Hart, "Immorality and Treason," *The Listener*, July 30, 1959, 162–163, which prompted Devlin to write his book length reply. (See David Sugarman, "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman," *Journal of Law and Society* 32, no. 2 (2005): 284.)

are."[10] A theory that clearly describes the juridical features of a legal rule is the first step towards that supremely important issue of making it possible for individuals to evaluate its justness, morality, or even goodness or evil. As we will argue, the question of what is just relies on the ideal and the *telos* of law, in other words, the end of law.[11]

The question of how humans are constituted was a central aspect of Hart's theory, and his main case for legal positivism, spelled out in his *The Concept of Law* from 1961, centres around the human condition itself. In one sense, this is not surprising, since humans are of course the creators of the positive laws, the legislators or ones positing the law in the first place. On the other hand, it is somewhat surprising that the relative contingency of those laws that happened to be posited is a fundamental idea in legal positivism. That there is no necessary connection between law and morality implies that laws could take any form. Hart emphasizes the variability of laws throughout different human societies and human history, but at the same time he concedes that the "law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals."[12] But this variability is not the most fundamental aspect of law. Instead, the foundation of his theory of law is anchored in how humans are constituted, even their bodily constitution in a very literal sense. As we will expand upon below, the natural law that Hart puts forward is a critique of the mainstream proponents of natural law. Hart's theory is corporal and bodily and describes the frail and violent bodies we all have as being the ultimate justification for those features of law that all legal orders share or must share in order to function. But the core concern for Hart is not survival, even if he sees this as the fundamental value which must be protected through legal means. Survival is the end and fundamental goal of law, which is why law is necessary in human societies. For Hart, at least in his later work, survival is the purpose of law which all humans can agree upon, but it is also the basis for the possibility of all other goals. Survival might be fundamental, but only for ensuring that the actual lives of humans can unfold in the society that they have built, to open the field for human action, choice, and freedom. That is to say that the morally neutral theory of legal positivism has an ultimate purpose which is deeply moral, namely to show and realize the possibility of freedom.

In the penultimate year of the Second World War, Hart's senior, the Austrian legal positivist, jurist and philosopher Hans Kelsen wrote a short book on the possibility of "peace through law" in which he sketched an international legal

10 Lacey, *A Life of H.L.A. Hart,* 354, who quotes an excerpt from an English original transcription of a 1987 interview, later translated and published in Spanish.

11 See the section on "Critical Morality" below and the discussion of Hart in relation to del Vecchio.

12 Hart, *The Concept of Law*, 204.

system aimed at realizing peace. He did so in a moral outrage at the war that had killed millions and continued to ravage the Eurasian continent. In the preface, Kelsen criticized the idea that he lived in an "enlightened age under the blessings of a higher religion which impresses upon us the supreme duty of preserving the life of man" and asked whether "we men of a Christian civilization really [have] the right to relax morally?" Driven by "nationalistic folly," the two world wars had brought human sacrifices that far exceeded anything before it in all of human history.[13] For Kelsen, the central issue in his book, just as in his overall theory of law and society, was force, in two senses.[14] The first being that peace, the state we must seek to attain, "is a state characterized by the absence of force."[15] But at the same time, peace is only attainable by the use of force, suggesting that an absolute absence of force is not possible within organized society. The force required to pacify the social order must therefore be reserved for the community. The paradox of force was thus that it was, on the one hand, a threat that must be eradicated or minimized, while, on the other hand, it was a means of establishing peace. For Kelsen, the "essential characteristic of the law" is the monopolization of force in the hands of the state, which simultaneously is the legal community.[16] The state creates peace by punishing the violations of the social order.

This raises the question as to whether there could be an order without force that would still be considered a legal order? Within legal thought, sanctions have long been conceived as a necessary component of legal order or a necessary adjunct to laws.[17] As we saw in the chapter on Gustav Radbruch, the idea that law works through the threat of force is not the end-all be-all of legal thought. However, even those who hold that the essence of law is to be found in its coercive structure have wondered what the release of law from this fundamental requirement would entail. In this chapter, we begin by considering the work of Kelsen and his discussion of theoretical anarchism. In a polemic that ultimately turns against natural law, Kelsen forcefully argues against the idea that there could exist a community without force, the utopian idea that order could be upheld without violence. After this brief engagement with Kelsen, we turn to Hart and his central, but often overlooked, idea of a minimum content of natural law. While Hart was firmly based in a practice-oriented analytical philosophy, he was not without speculative inclinations.

13 Hans Kelsen, *Peace through Law* (University of North Carolina Press, 1944), vii.

14 In the following force and violence will be used interchangeably, following Kelsen's neutral use of the term "force" to refer to violence and coercion without necessarily evaluating it morally.

15 Kelsen, *Peace through Law*, 3.

16 Cf. Kelsen, *Pure Theory of Law*, 286. All references here are to the 1967 translation of the expanded second edition from 1961, while the first edition (which is mentioned below) was published in 1934 as *Reine Rechtslehre*.

17 Finnis, *Natural Law and Natural Rights*, 262–264.

Even though he had the same basic position as Kelsen on the empirical reality and practical necessity of sanctions in legal orders, his theory did not take sanctions as the basis of law as such. In line with this openness to the ordering function of law being distinct from its sanctioning function, Hart entertained thought experiments involving angels and invulnerable beings who needed no sanctions but still had legal systems. These angelological speculations were later picked up by Hart's disciple, Raz. What unites Kelsen, Hart, and Raz—arguably the three most important legal positivists, on top of being among the major legal philosophers of the twentieth century—is that they all seriously considered the idea that humans could live without coercive law. If the end of law is to create conditions for survival, and through those conditions the possibility of freedom and human flourishing, then the law has an end beyond itself. Even if these three philosophers disregarded it as an empirical possibility, they could not disregard the idea of a non-violent legal order in theory. It had to be seriously considered. Perhaps this is not surprising, considering that in one sense, the legal positivist holds that law has its basis in a contingent choice by humans rather than in a natural fact of human sociability. The law is what we have decided it should be. But even if it is not a natural fact that we have laws, that humans do organize themselves according to legal rules backed up by force might be a practically necessary fact. For the advocate of natural law, law is unavoidable. For the positivist, it is always the result of human action and choice, and thus the option to choose to organize society without law (as the legal positivist understands it) must at least be considered, even if it is never realized.[18] While any theory of natural law necessarily relies on a certain human anthropology, or a metaphysics of the human being, the positivist does as well. Legal positivism in its different variants implies a certain idea of the human, and it is not necessarily restricted to the often-violent individual who needs to be kept in check by threats of coercion and violence.

Kelsen on Law, Sanction, and Community without Force

Hans Kelsen is the twentieth century's most prominent exponent of the argument that law is necessarily related, and even intimately based on the *sanction*. Kelsen writes in his magnum opus, *Pure Theory of Law*, that "a definite action or refrainment is a delict because it is connected with a coercive act, that is, with a sanction as its consequence."[19] The delict, or violation of law, is defined by it having a sanction. It is therefore not the crime that necessitates

18 Even if it must be argued that the choice to not choose law in the sense of the coercive order of the state is a choice made everyday by millions of people in both their coordination of social activities as well as in their conflict resolution, just to mention two important roles to which the necessity of a legal order has been ascribed.

19 Kelsen, *Pure Theory of Law*, 111.

the sanction, but the sanction that defines the crime. In this extreme formulation, which ties the essence of the law to the sanction, Kelsen grants the sanction priority over the crime specifically and the law generally. Throughout his oeuvre, Kelsen's discussions of the sanction as being the fundamental feature of law always emphasize the importance of morality. In an earlier work, *General Theory of Norms*, he points out that different normative structures share many things in common. For example, duties to act in certain ways are not exclusive to legal orders, they are essential parts of moral orders as well. It is not even that morality and law "have different functions or different objects; nor is it that law decrees sanctions while morality does not, as almost everyone believes."[20] Moral behaviour is also sanctioned, but the sanction is secondary in relation to the norm of behaviour that morality commands.

> The difference is that law commands a certain behaviour—i.e., makes it a legal duty—by decreeing a sanction to be obligatory when the opposite behaviour occurs, while morality commands a certain behaviour (and thus makes it a moral duty) and then attaches a sanction both to behaviour in accordance with the norm and to behaviour violating the norm.[21]

In Kelsen's theory the law is pure sanction, a sanction that in itself carries the normative content, which is neither prior to nor beyond the sanction as such. As he formulates it, no "immanent quality, no relation to a meta-legal natural or divine norm is the reason for qualifying a specific human behavior to be regarded as a delict; but only and exclusively the fact that the positive legal order has made this behavior the condition of a coercive act—of a sanction."[22] The law is defined by the delict, the violation of its norms, but only through the violence that is specified as the response to the violation. *Law in this sense is essentially violence*, the threat of violence as a response to certain actions. However, the citations above do not exhaust the question of force and law in Kelsen's work. Even though he considered sanctions, in general, and coercive sanctions, in particular, to be necessary for legal orders, in other texts he went beyond this line of thought.

Kelsen discussed the question of law as a coercive order in 1941, the year after he had fled the inferno of Europe for the United States. In an important text devoted to "the law as a specific social technique" he elaborated on the idea he had already established in his 1934 edition of *Pure Theory of Law*.[23] Social orders exist to "bring about a certain mutual behaviour of individuals"

20 Hans Kelsen, *General Theory of Norms* (Clarendon Press, 1991), 133.

21 Kelsen, *General Theory of Norms*, 133.

22 Kelsen, *Pure Theory of Law*, 111.

23 Translated into English as Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, (Clarendon Press, 1992).

through the use of norms.[24] While norms are powerful or even essential aspects of the social order, they normally rely on sanctions. Kelsen writes that while there is an ideal type of social order in which "the mere idea of a norm … suffices as a motive for conduct conforming to the norm," in "social reality this type of direct motivation is seldom found in pure form."[25] This is significant, since while it may be true that it is rare for norms to carry their own motivating force without social pressure or the threat of more direct coercion, it is still possible that norms might be independent of coercion in an ideal world. The possibility contained by such an ideality could thus also lead to that possibility one day being realized in actuality. Kelsen argues that from Antiquity to today, and in all parts of the world, the specific technique of the law is essentially the same: "bringing about the desired social conduct of men through threat of coercion for contrary conduct."[26] It is a technique, a tool, that attempts to realize an end that it often shares with other social orders. The prohibition of murder, which is shared by law, morality, and religion, is upheld coercively only by law.

But Kelsen does not leave it there. He spends a few pages of the essay seriously considering the idea, which he recognizes is not uncommon throughout human history, of a *community without force*. The question is whether law as a social technique is unavoidable. Kelsen presents several variations of this idea, pointing towards different aspects of the basic notion of a world without coercive law:

> Perhaps it is only the peculiar content of a social order which makes it necessary to establish this order as coercive. Perhaps it is possible to give the social order such a content, to prescribe such conduct for the individuals, that it will no longer be necessary to prescribe coercive measures as sanctions for contrary conduct, because nobody would have an inducement to such contrary behavior. Perhaps there is a social order which would make possible a substitution of direct motivation, of voluntary obedience, for the specific technique of the law.[27]

24 Hans Kelsen, "The Law as a Specific Social Technique," in *What Is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (University of California Press, 1957), 231–256.

25 Ibid., 232.

26 Ibid., 236. Kelsen discusses the seeming paradox that what law attempts to hinder is the same thing that it uses to sanction, namely violence. But for him this is only an apparent contradiction in that law is an organization of force under a monopoly, which creates a sort of peace: "Peace is a condition in which force is not used. In this sense of the word, law provides only relative, not absolute peace—it deprives the individual of the right to employ force but reserves it for the community. The peace of the law is not a condition of absolute absence of force, a state of anarchy; it is a condition of a force monopoly of the community" (Ibid., 237 f). Cf. also Kelsen, *Peace through Law*.

27 Kelsen, "The Law as a Specific Social Technique," 239.

It is necessary to disentangle the different threads of Kelsen's concise presentation here. The first idea is that there is something peculiar to the legal social order which requires that it be coercive. This seems to contradict what Kelsen discussed earlier in the text, that law is just a means, and that different social orders (law, religion) can largely be said to share the same ends. It is of course an open question whether religious censure, moral outrage, or the threat of prison or corporal punishment is the most efficient way to prevent violence in society.[28]

The second idea is that the content of the social order and its norms would presumably be sufficient to inhibit undesirable behaviour and encourage the desired behaviour. This ties directly into the third possibility, namely that direct motivation, which would lead to voluntary obedience, could replace the coercive sanctions of legal orders. Would this hypothetical social order—the community without force—need to be a social order with a different content, with other types of rules than those of a sanctioned order? Or could the norms of the legal order be transformed into a social order without coercive sanctions, even without those other forms of sanctions we find in the social orders of morality or religion?[29]

For Kelsen, these questions are directly related to the state, such that the "question of the necessity of the law is identical with the question of the necessity of the state."[30] The political element of the state is coercion, and for this reason, "primitive" social orders of people without secularized states could also be considered to be legal. A religious order which wields coercion also creates a legal community, in Kelsen's view. But precisely the fact that large communities necessitate legal orders—orders of coercion—has always been considered unsatisfactory by some. The historic experience of law and society has given rise to the dream of its opposite: "History confirms the saying: *ubi societas, ibi jus*. Yet man has never been satisfied with this historic fact."[31] This "dream," Kelsen writes, has always been put forward by "optimists."

28 Surely the answer might differ from time and place as well. But harsh penal regimes do not have lower levels of violent crime. On this point, in a recent article, Hart's idea about coercion being ancillary in legal systems has been radicalized: "It is not just that coercive mechanisms motivate citizens in exceptional circumstances. When they do succeed in motivating citizens, their success tends to be due to the support of underlying social norms and the fact that citizens accept them as legitimate." Lucas Miotto, "The Good, the Bad, and the Puzzled: Coercion and Compliance," in *Conceptual Jurisprudence: Methodological Issues, Conceptual Tools, and New Approaches*, ed. Jorge Luis Fabra-Zamora and Gonzalo Villa Rosas (Springer, 2021), 111–129, here 127. See also Lucas Miotto, "From Angels to Humans: Law, Coercion, and the Society of Angels Thought Experiment," *Law and Philosophy* 40, no. 3 (2021): 277–303, where he argues that legal systems are contingently coercive and that "coerciveness "is a feature that our legal systems can and should strive to get rid of," 278.

29 Such as social ostracism, moral condemnation, censure or excommunication, etcetera.

30 Kelsen, "The Law as a Specific Social Technique," 239.

31 Ibid.

The dream is not just the hope for a world without a state and coercion, but necessarily the dream of "a condition in which force—even used as sanction—would no longer be exercised by man against man." This non-violent state of being would mean "a society free from all coercion, one in which there will no longer be any law or any state."[32] Kelsen calls the ideas stemming from the desire to live without force the "doctrine of theoretical anarchism."[33] Such a "social order immanent in nature" would be a kind of natural law, albeit one very different from law as actually found in historical reality, which always includes coercion.[34] This stateless order, an order without positive law, would rest on voluntary obedience, an idea which Kelsen traces back to Ovid, who in his description of the Golden Age formulated the essence of theoretical anarchism:

> Golden was that first age, which, with no one to compel, without a law, of its own will, kept faith and did the right. There was no fear of punishment, no threatening words were to be read on brazen tablets; no suppliant throng gazed fearfully upon its judge's face; but without judges lived secure.[35]

Such an order would of course represent a radical break with everything preceding it. Kelsen himself remains deeply sceptical that such a social order was actually possible, and he asks polemically why an order that "would make everyone happy and was therefore a just order" has "not yet been realized."[36] At most, Kelsen permits such an order to be a theoretical possibility, since even if it was "discoverable at all" not "everyone will immediately recognize it as just, and therefore be ready to obey it."[37] While he does not disregard it entirely, he points out that it is unlikely that those who do not want to obey such an order would refrain from violating it. The violations of this natural

32 Ibid.

33 See also Kelsen, *Peace through Law*, 3. This, in turn, goes back to Kant's notion of anarchy as "law and freedom without force," Immanuel Kant, *Anthropology from a Pragmatic Point of View*, (Cambridge University Press, 2006), 235. "The 'ethical state on earth' envisaged by Kant is not a state at all, for obvious reasons. Angels do not need states." Ágnes Heller, *Beyond Justice* (Basil Blackwell, 1987), 104. See also Leo Strauss, *An Introduction to Political Philosophy: Ten Essays*, ed. Hilail Gildin (Wayne State University Press, 1989), 87.

34 Miotto has described this position, which he specifically refers to Raz, but in general to those who argue that a non-coercive legal system is possible but humanly impossible, as "*nomologically impossible*; it is impossible given the biological and psychological dispositions of human beings," Miotto, "From Angels to Humans," 280.

35 Ovid, *Metamorphoses*, Loeb Classical Library, Vols. 42–43 (William Heinemann; New York: G.P. Putnam's Sons, 1916, 89–93. Cited in the Latin in Kelsen, "The Law as a Specific Social Technique," 240.

36 Ibid.

37 Ibid.

and just order would then need to be met with coercive measures.[38] In fact, for Kelsen such an order would mean "the suspension of all social order … the reëstablishment of a state of nature, which means a state of anarchy" and "the deepest meaning of this self-contradictory idea of a natural social order: the negation of society."[39] For Kelsen, this yearning for a society without law and coercion is self-contradictory since it ignores the aggressive urge innate in man and thus is essentially a negation of society. To believe it to be possible would require a belief in a different nature of man, without "innate urge to aggression" and this idea of another nature of man is a "moral postulate" rather than a "scientific experience."

Kelsen seems to be at odds with himself, wishing on the one hand to get rid of these utopian ideas of an alternative nature of man, while being intellectually honest enough to not disregard the possibility altogether: "To count on a human nature different from that known to us is Utopia. This is not to say that human nature is unchangeable, but only that we cannot foresee how it will change under changing circumstances."[40] How can we understand a possibility, however distant or unrealistic, which still cannot be altogether disregarded?[41] Is it just a variable in an abstract schema or a tool in the philosopher's thought-experiment toolbox? We will now turn to H. L. A. Hart and the continuation of the discussion of possibilities, theoretical or ideal, that humans could live together without the use of coercive measures. In Hart's curious discussion of angels as well as invulnerable beings in *The Concept of Law,* we will find that what is at stake is precisely the essence of human life which Kelsen so strongly believed could not be altered. Is the possibility of a fundamental change in the nature of man merely a theoretical possibility, only suitable for scholastic disputes, or does it point toward the eschatological and theological dimensions of law?

Hart's Angels

The first time Hart discusses a society of angels is in a debate with Jonathan Cohen as part of a broader discussion on Hart's theory of law.[42] The definition

38 Ibid., 240 f.

39 Ibid., 241. Kelsen continues on the following pages to critique the foremost exponent of this idea in his time, Marxian socialism, as well as anarchism, which he both considers to be fundamentally containing the same impossible claim, and he argues that even socialism needs the social technique of law. "Even in a socialistic society it is true that *ubi societas, ibi jus*," 244.

40 Ibid., 241.

41 Lucas Miotto has argued that such a claim of a "logical" possibility is best understood as a "metaphysical possibility" in the sense that "it is consistent with the most fundamental metaphysical principles and categories that structure reality." Miotto, "From Angels to Humans," 281–282.

42 Jonathan Cohen and H. L. A. Hart, "Symposium: Theory and Definition in Jurisprudence," *Aristotelian Society Supplementary Volume* 29, no. 1 (1955): 213–264. The symposium was

of law was a major part of this discussion. In his polemic against Cohen, Hart criticizes the approach whereby a list of necessary criteria are drawn up and then considered as a definition capable of deciding whether or not this or that order or social phenomena constitute law. In a line of argumentation reminiscent of Wittgenstein's classical family resemblance argument,[43] Hart points out that some criteria "are obviously necessary (e.g., there must be rules)," while only "*standard* or *normal* cases satisfy all" criteria. Examples of such lists typically contain several different requirements, such as the existence of courts, legislature, rules of procedure, and sanctions.[44] The obvious case of a legal order that does not fulfil all these criteria is international law, a recurrent problem for legal theory, in general, and the definitional approach, in particular.[45]

We saw in the previous section that for Hans Kelsen *sanctions* function as the fundamental criteria for law as a social technique, which differentiates law from other social and normative orders. Hart considers *rules* rather than sanctions to be the unavoidable element of law.[46] In the first sketch of what he later

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held as a response to Hart's seminal lecture "Definition and Theory in Jurisprudence" held in 1953, printed in 1953 in the Law Quarterly Review. Reprint: H. L. A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 21–48. He also discusses the issue of definition in the essay "Problems of the Philosophy of Law" in the same volume, 88–120, here 89.

43 Ludwig Wittgenstein, *Philosophical Investigations*, 2nd ed., (Blackwell, 1958), §§66–67. Hart was enamored with this work of Wittgenstein, see Lacey, *A Life of H.L.A. Hart*, 140.

44 Hart lists eleven "elements which are present in the standard case of a municipal legal system of an advanced modern society": "(1) Courts. / (2) Rules conferring jurisdiction on Courts and providing for the appointment and conditions of tenure of judicial office. / (3) Rules of procedure for Courts. / (4) Rules of Evidence for Courts. / (5) Substantive civil laws. / (6) Substantive criminal law. / (7) A Legislature. / (8) Constitutional rules providing criteria valid for the system for the identification of the rules of the system (sources of law). / (9) Sanctions. / (10) Possibility of argument. / (11) Universality of scope." In note 9, he clearly states that more elements could be added, e.g., "that the criminal laws of a legal system must contain certain minimum vetoes against the use of personal violence and that either the criminal or civil laws or both must provide for a minimum form of property or possession in the sense of a right to exclude others from material objects at certain times for certain purposes," Cohen and Hart, "Symposium: Theory and Definition in Jurisprudence," 252. The anti-definitional approach has been influential, see e.g., Fabra-Zamora and Villa Rosas, *Conceptual Jurisprudence*.

45 On Hart's theory of international law, and a critique of his claim that it is like a primitive legal system, see Jeremy Waldron, "Hart and the Principles of Legality," in *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy*, ed. Matthew H. Kramer et al. (Oxford University Press, 2008), 67–84, here 68–69.

46 In discussing Hart's theory, MacCormick has argued that all rules can be said to have sanctions in a broad sense: "Hence, if the somewhat woolly and indiscriminately used term 'sanction' is taken to mean any normally disagreeable experience which a person is liable to suffer on the ground of his being deemed to have contravened some standard of conduct, it follows that there are no rules without 'sanctions' in this wide sense." Neil MacCormick, *H.L.A. Hart*, 2nd ed. (Stanford University Press, 2008), 168, see also 183. Hart would touch upon the same issue in a text also published in 1955: "The most important common characteristic

would develop into a more fully elaborated thought experiment, Hart turns to the old idea that men could be "more like angels," but he does so while also considering a quite different situation in which some were much stronger than others, reversing one of the axioms of Thomas Hobbes's theory for the sake of argument. Here a longer quotation will be illuminating:

> Suppose, e.g., men were more like angels than they are and required not coercion but only to be told what to do both in general and where the rules were unclear by courts in particular cases. Or suppose men were not as they are roughly equal in physical strength but there were a few individuals, as there are a few nation states, vastly more powerful than the rest and so stood an excellent chance of lasting success in the war of all against all. It would then cease to be true, as it is now, that those on the side of law and order would in general be stronger than any likely combination of malefactors, and in such circumstances the operation of sanctions would then not only be uncertain but fraught with grave risk. Yet here, as on the international scene, long years of peace might in fact intervene between costly wars and it might be found well worth regulating by rules without sanctions those issues about which men were in fact unwilling to fight in order to introduce into the years of peace the important elements of predictability and stability. Is it clear that this would not be a legal system?[47]

In the first sentence, the angelic thought experiment is presented in an extremely concise form. It should be noted that Hart do not consider actual angels, but only more angelic humans. They only need "to be told what to do" and can then use courts to arbitrate or interpret rules for cases in which these are difficult to apply. It is not clear whether these angelic humans would do so automatically and without any reflection, out of a sense of moral duty, by being persuaded of the rationality or justness of the rules and judgements, or perhaps a combination of all of the above. We will return shortly to these pseudo-angels, since Hart develops the theme in later texts.

In the second sentence, Hart considers the possibility that some humans might actually be much stronger than others. In *Leviathan*, Hobbes points out that even if some of us are stronger or more intelligent "when all is reckoned together, the difference between man, and man, is not so considerable"

of this group of moral concepts [legal rights] is that there is no incongruity, but a special congruity in the use of force or the threat of force to secure that what is just or fair or someone's right to have done shall in fact be done; for it is in just these circumstances that coercion of another human being is legitimate," H. L. A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64, no. 2 (1955): 175–191, here 178. We will return to this text more closely later in this chapter.

47 Cohen and Hart, "Symposium: Theory and Definition in Jurisprudence," 253.

and therefore "the weakest has strength enough to kill the strongest."[48] If this were not the case, a few extremely strong individuals could overpower even a law-abiding majority. But even in this situation—in which the strongest would not have the obvious incentive to be law-abiding, since they could simply dominate all others directly—we might still find the emergence of a sort of rules-based order preferable to constant war. Here what could arise, like what has, in a certain sense, arisen in the international realm, would be regulation "by rules without sanctions."[49] Hart poses a rhetorical question as to whether it makes sense to call such a system—i.e., international law or any other legal order without sanctions—a legal system at all. Hart argues that even these two examples would be considered legal systems. So neither situation—a world of angels and a world dominated by Goliaths—would rule out the need for a legal system containing rules of some sort and perhaps also other institutions such as courts which would indicate the correct or preferable way of adhering to the rules. Both orders are, or at least could be, legal in nature according to Hart, even if one does not require sanctions and the other cannot effectively make use of them. The function of coordination is most clear in the angelic order, though it also has a function in an order such as today's international legal order. We will return to the coordination function below, which was developed by Hart and later picked up by his disciple Joseph Raz.

Hart's Crabs

Hart returned to questioning sanctions in his famous 1958 debate with the natural law theorist Lon L. Fuller. While sanctions still are a feature of most legal systems and Hart does not deny their importance, he points out that they need not, as Kelsen would have it, be a necessary part of every specific law. Contra Kelsen, Hart writes that it "is surely not arguable (without some desperate extension of the word 'sanction' or artificial narrowing of the word 'law') that every law in a municipal legal system must have a sanction."[50] In other words, we can have specific laws without sanctions attached to them, which are a kind of law different from those which do have sanctions. This leads us on to another question, namely whether all laws could be devoid of sanction? Here again, Hart leaves the question open, while indicating his own tendency to consider sanctions to be necessary to some extent. He writes that "it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules."[51] While particular laws could be

48 Thomas Hobbes, *Leviathan*, ed. Richard Tuck, rev. student ed. (Cambridge University Press, 1996), 87.

49 Cohen and Hart, "Symposium: Theory and Definition in Jurisprudence," 253.

50 H. L. A. Hart, "Positivism and the Separation of Law and Morals," in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 49–87, here 75.

51 Ibid.

without sanction, on a systemic level, the legal system relies on sanctions to some extent, and they could probably even be considered to be a fundamental feature of that system.

Hart again argues against the idea that we could use definitions to solve the conundrum of what law is. He writes that we must avoid "the arid wastes of inappropriate definition" since relying on any single or essential aspect is doomed to fail.[52] Here he does not polemicize so much against lists of features, but instead directs his critique towards the attempt by Fuller and other proponents of natural law to argue that there is a necessary connection between legal orders and moral principles, such as justice.[53] This connection—which Hart does not deny as a matter of empirical fact (there is a great deal of overlap between moral principles and legal rules in all societies)—is no more necessary than the connection between law and sanction. What Hart opposes is the notion that such connections must be proven to be absolute or "logical," as he writes, rather than "merely factual or causal." Hart does not consider the question of the nature of this connection to be important for an understanding of what law is, and thus he remarks that it "can safely be left as an innocent pastime for philosophers."[54] However, this does not hinder Hart himself from engaging in what he explicitly calls a "philosophical fantasy" in order to "show what could intelligibly be meant by the claim that certain provisions in a legal system are 'necessary.'"[55] As we will see, Hart himself later produces what is to all intents and purposes a philosophical account of what is necessary, in the sense of describing the "minimum content" that law must fulfil in order to be law.

In this third thought experiment, Hart does not use angels or angelic humans, nor humans of radically different strengths. Instead, he asks us to consider a different sort of inversion of our human condition. While Hobbes considered all men to be approximately equal in strength, meaning that even the most powerful are still vulnerable to others, Hart instead speculates on what would happen if we were all *invulnerable*.[56] In an admirably unprejudiced argument, he points out that we must acknowledge how "the whole of our social, moral, and legal life" rests on certain facts. Among these is the "contingent fact" that human bodies change in a sufficiently slow pace such that we can identify people as persistent individuals over time. Hart does not consider this to be a necessary or anthropologically fundamental fact. This contingent fact is however at the basis of "huge structures of our thought and

52 Ibid., 622.

53 As he does in other places, Hart, *The Concept of Law*, 185–186, and in the postscript, 240.

54 Hart, "Positivism and the Separation of Law and Morals," 79.

55 Ibid.. When Hart jokes about the innocent pastime of philosophers, it is not clear whether he considers his own speculation here as different.

56 On the point that Hart's theory is based in a Hobbesian and Humean paradigm, see MacCormick, *H.L.A. Hart*, 118.

principles of action and social life."[57] While even the theoretical possibility of humans changing their physical constitution so quickly that we would be unidentifiable over time might be difficult to accept, Hart continues with an even more radical speculative thought:

> Similarly, consider the following possibility (not because it is more than a possibility but because it reveals why we think certain things necessary in a legal system and what we mean by this): suppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace, and could extract the food they needed from the air by some internal chemical process. In such circumstances (the details of which can be left to science fiction) rules forbidding the free use of violence and rules constituting the minimum form of property—with its rights and duties sufficient to enable food to grow and be retained until eaten—would not have the necessary nonarbitrary status which they have for us, constituted as we are in a world like ours. At present, and until such radical changes supervene, such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points, the statement that this is, in this sense, necessarily so. And why not call it a "natural" necessity?[58]

This strange picture of men transformed into armoured crabs that inhale their nutrients from air is of course in one sense nothing more than a pure thought experiment.[59] Even so, we should consider some aspects of Hart's specific formulation. What he aims to show is that certain rules, which for us have a "nonarbitrary status" would not be necessary if we transformed into beings with different physical and anatomical properties. His two examples of such nonarbitrary rules are the prohibition on the free use of violence, i.e., violence which is not legally sanctioned, and the right to property. These examples of nonarbitrary rules are quite obviously not arbitrarily chosen. The prohibition on violence except under certain circumstances is once again based in a Hobbesian paradigm. In *Leviathan*, the problem of violence is solved by granting the state a monopoly on violence and coercion.[60] The issue of property ownership has been a perennial question throughout human history, not least due to the fact that it is at the basis of modern legal and political thought.

57 Hart, "Positivism and the Separation of Law and Morals," 80.

58 Ibid..

59 One can note how MacCormick just passes over it without any substantial discussion, *H.L.A. Hart*, 120–121.

60 The generation of a commonwealth is described in Chapter 17 of *Leviathan*.

For John Locke it is a natural right, in which each man "has a property in his own person"[61] and this extends to the labour he performs, which mixes his labour with natural things which subsequently becomes his property. Men unite into commonwealths and societies in order to preserve property.[62]

What Hart sketches here is a scenario in which it would be impossible to harm humans, necessarily creating a peaceful state of nature instead of the vulnerable state we now find ourselves in. It was this vulnerability that was at the basis of the theories of both Hobbes and Locke. For Hart, the rules for the protection of property are not based on any natural right, but on the need of providing for our own sustenance, which for him necessitates at least a minimal form of property. These necessary facts about our current state of being explain why the fundamental rules are shared by both morality and law. Hart is explicit that he has no intention of pushing the natural necessity much further than to this very basic level. His problem with the theory of natural law is that all its variants go much further than natural law itself by arguing "that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival." For Hart, even if human beings are in many ways similar, going above the "humble minimum" of survival means not seeing that "the purposes men have for living in society are too conflicting and varying" too warrant such an expanded natural law.[63] As the final question in the quote above indicates, Hart considers this a form of natural necessity, since these rules are necessary if our vulnerable condition is to be protected. But it is neither more nor less than that.

The implicit argument is that without such rules, we could not survive. We need prohibitions on violence in addition to some form of property to survive. Again, Hobbes is the most important forerunner in making this assumption the basis of his anthropology. Though it is not surprising, it is still worth pointing out that Hobbes never explicitly states his implicit assumption that every man desires to survive or persist in existence.[64] In a sense, it is the unacknowledged axiom of his thought, similar to how for Hart, it is an obvious truth whose axiomatic status does not need to be spelled out, argued, or supported.[65] For Hobbes, the right to do whatever is necessary to preserve oneself forms the basis of the primary natural right, "the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own

61 John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (Yale University Press, 2003), 111.

62 Ibid., 155.

63 Hart, "Positivism and the Separation of Law and Morals," 81.

64 Not least in Chapters 13–15 of *Leviathan*.

65 In this we see an underlying affinity that we might hypothesize as forming a core of Occidental legal and political thought since at least Hobbes up until the present.

judgment, and reason, he shall conceive to be the aptest means thereunto."[66] For Hobbes, the alternative to subjection under a sovereign that rules through coercion is war—mankind's infamous state of nature. Such a state of being does not only contain the perpetual threat of violence, it also hinders the development of agriculture, among many other things.[67] The same threat can be detected in Hart's thought experiment of carapaced land crabs who are able to move about, but sustain themselves through chemical processes, as if they were some kind of mobile armoured plants with no need to sow the land.

Hart Contra Maximal Natural Law

While in 1955, Hart's interlocutor Jonathan Cohen mentions natural law, Hart himself does not explicitly engage with that topic. Neither did he do so in the 1953 lecture "Definition and Theory in Jurisprudence" which spawned that debate. As we saw in the previous section, natural law makes an appearance in the 1958 exchange with Fuller. However, while Fuller's reply to Hart naturally is mainly focused on natural law, Hart's own engagement with natural law is not fully fleshed out in his initial article, which prompted Fuller to write his response.[68] In Hart's most important book, *The Concept of Law* from 1961, both natural law and Hart's thought experiments return in a more developed form. While there is no extensive reply directly to Fuller and other critics of Hart's positivism from a natural law perspective, it is clear that the arguments in the book are intended to be an indirect response to these interlocutors.[69]

Hart is not ignorant when it comes to the tradition of natural law, however sceptical he is of it.[70] There is a relatively extensive discussion of natural law

66 Hobbes, *Leviathan*, 86.
67 Ibid., 192.
68 He does refer to Gustav Radbruch, as we discuss in the previous chapter of this book and writes about Radbruch's supposed "conversion" from the "'positivist' doctrine," which implies Radbruch had a turn towards natural law. Hart, "Positivism and the Separation of Law and Morals," 73.
69 Hart points out in his 1994 postscript to the second edition of *The Concept of Law* that although he has "fired a few shots across the bows of some of my critics, notably the late Professor Lon Fuller and Professor R. M. Dworkin, I have hitherto made no general comprehensive reply to any of them," 238. He then goes on to respond to Dworkin's critique, but not to Fuller, one reason being that Hart did not finish the manuscript before his death. A draft of Hart's response has recently been uncovered and is published under the title H. L. A. Hart, "Policies, Principles, and Adjudication," *The American Journal of Jurisprudence* 69, no. 2 (2024): 127–134. See in the same issue Samuel Burry, "H.L.A. Hart's Lost Essay on Policies, Principles, and Adjudication," *The American Journal of Jurisprudence* 69, no. 2 (October 2024): 135–140.
70 In his notebooks at the time, he struggled to differentiate his own position from a sanction-based theory such as Kelsen's, worrying that "he would blur the boundaries between legal and moral obligation to a degree which would threaten his status as a legal positivist and move him perilously close to a natural law position." Lacey, *A Life of H.L.A. Hart*, 192. Lacey also

and its basis in *The Concept of Law*. He points out that even though much of the tradition is based in the notion of a "Divine Governor of the Universe" which prescribed or decreed the laws of nature, this feature was contingent rather than necessary.[71] In his view, ancient Greek thought on natural law and its successors were "quite secular." In fact, for Hart "the continued reassertion of some form of Natural Law doctrine is due in part to the fact that its appeal is independent of both divine and human authority, and to the fact that despite a terminology, and much metaphysics, which few could now accept, it contains certain elementary truths of importance for the understanding of both morality and law."[72] So, as long as one could get rid of the arcane terminology and the metaphysical underpinnings, "certain elementary truths" could be recovered. Matthew Kramer has argued that the first few pages of Hart's *The Concept of Law* are often overlooked or forgotten and that the focus for Hart's work is the law as it exists in a common-sense manner.[73] As Hart writes, most "educated people" know that laws exist and have some general awareness of their contents.[74] This is undoubtedly true, and Hart does attempt to construct his theory based on both this fact and with the aim of explaining what law is in this sense. One might think that this would prevent him from falling into any metaphysical speculation. But just as ordinary language philosophy tried to resolve the misunderstandings of philosophy through an explanation of how words are used, this ultimately did not prevent them from metaphysical reasoning.[75] Before we discuss Hart's own engagement with what he saw as basic (or we could say metaphysical) truths, we should briefly look at what he critiqued.

According to Hart, what kind of metaphysics must be gotten rid of? He identifies a metaphysical doctrine that stands in opposition to a modern view which understands laws of nature as scientific descriptions of certain regularities in nature, which can "predict what will occur … based on generalizations of what regularly occurs."[76] As we have already discussed in this book, the metaphysics underpinning the doctrine of natural law is based on a cosmology fundamentally different from the mainstream of today. In a succinct but accurate sentence, Hart summarizes this view: "[O]n this older outlook every

writes, based on Hart's notebooks from when he wrote *The Concept of Law*, that "he was, right from the start, thinking of the field in terms of a dialogue between positivism and natural law theory, with American realism interjecting occasionally from the wings," 227.

71 Hart, *The Concept of Law*, 187.

72 Ibid., 188.

73 Matthew H. Kramer, *H.L.A. Hart: The Nature of Law* (Polity Press, 2018), 4.

74 Hart, *The Concept of Law*, 2–3.

75 One argument on this point is John W. Cook, *Wittgenstein's Metaphysics* (Cambridge University Press, 1994).

76 Hart, *The Concept of Law*, 188. Examples given are the law of gravity and the second law of thermodynamics.

nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good—or the *end* (τέλος, *finis*) appropriate for it."[77] Hart goes on to explain in a pedagogical fashion that while it might seem strange to think about nature in this way, we still retain many ways of thinking and speaking which function in a similar manner. While we are accustomed to thinking about certain things teleologically, for example humans striving to reach the goals they set out to accomplish, we have more difficulty in believing this to be a general truth about nature. Hart refers to the Aristotelian example of the acorn growing into a mature oak, which still might be understood in the modern view as "something which is not only regularly achieved by acorns" but also "as an optimum state of maturity."[78] Other classical examples of teleology, such as falling stones achieving an optimum state when having arrived at the ground to rest, "like a horse galloping home to a stable," is in Hart's view "now somewhat comic."[79] In any case, the idea that things strive towards an end state is not unknown to us in modernity.

For Hart, who chose examples "drawn from the lowly sphere of biological fact which man shares with other animals," there is one aspect of the teleological view which still makes sense. This is "something entirely obvious," namely "the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence."[80] The *telos* of the human is survival. While survival (*perseverare in esse suo*) has always formed part of natural law, its importance has been evaluated differently over time. For Aristotle or Aquinas, it was "merely the lowest stratum" in their conceptions of the good or knowledge of God.[81] Hart instead sides with Hobbes and Hume, who "have been willing to lower their sights: they have seen in the modest aim of survival the central indisputable element which gives empirical good sense to the terminology of Natural Law."[82] For these three thinkers, the fundamental interest in survival is what drives man to form associations with others. Hart acknowledges that a simple preference for survival is a "a very attenuated version of Natural Law," which

77 Ibid., 188–189. For a recent discussion which supports and expands this theme, see Brague, *The Wisdom of the World*, 29, inter alia.

78 Hart, *The Concept of Law*, 189.

79 Ibid., 190.

80 Ibid., 191.

81 See discussion in d'Entrèves, *Natural Law*, 191, 203.

82 Hart, *The Concept of Law*, 191, with Hart quoting Hume: "Human nature cannot by any means subsist without the association of individuals: and that association never could have place were no regard paid to the laws of equity and justice." The reference seems incorrect in Hart, the correct quote can be found at https://davidhume.org/texts/m/4.

would not be satisfactory for the classical proponents of this doctrine no matter what guise it would take.[83]

Already in 1955, Hart had put forward an initial minimal account of natural law under the heading "Are There Any Natural Rights?" an argument he would later disown.[84] In this short article, he developed the thesis that if "there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free," which means that coercion or restraint is legitimate only if other people's equal right to act freely is hindered by the free action.[85] Hart emphasizes that he wants to describe this right to be free as a "*natural* right"[86] since all men who are "capable of choice … have it *qua* men and not only if they are members of some society or stand in some special relation to each other," but also because this right "is not created or conferred by men's voluntary action" like other moral rights.[87] In other words, it is not a posited right, nor is it artificially created, it is inherent in the human condition.[88] We will return to this important article later in this chapter and use its argument as a lens through which to critique Hart's later position.

Five Truisms: Minimum Content of Natural Law

Based on his thought experiment with angels, the fact that we are not land crabs, and the Hobbesian arguments of human vulnerability and approximate equality, Hart puts forward what he calls five *truisms*.[89] These form the "core

83 Hart, *The Concept of Law*, 191.

84 See H. L. A. Hart, "Introduction," in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 1–18, here 17.

85 Hart, "Are There Any Natural Rights?," 175.

86 Ibid., Emphasis in the original.

87 Ibid., 175–176.

88 It is interesting to contrast this position, which Hart would later renounce ("Introduction," *Essays*, 17), with what he wrote just two years earlier in his review of Giorgio del Vecchio's book *Justice*. Here he was unconvinced by the "Transcendental Deduction" which in Hart's very concise reconstruction ends with the self-consciousness of the individual, including that individual's awareness of others and the intersubjectivity which then arises with "the notions of parity and reciprocity between them" and "that we must treat [others] equally rather than unequally" (H. L. A. Hart, "Justice," review of *Justice: An Historical and Philosophical Essay*, by Giorgio del Vecchio, *Philosophy* 28, no. 107 (1953): 348–352, here 350). Del Vecchio's Kantian understanding of humans suggests (in Hart's formulation) that "those laws are just which will secure equal rights in the sense of an equal maximum degree of liberty to pursue those ends," 350. Hart might take a different path than del Vecchio, but he ends up in a quite similar position in 1955, one that he will then abandon for the survival-focused minimal natural law in 1961 in *The Concept of Law*.

89 Curiously, here Hart lists these truisms without explicit reference to Hobbes's argument, even though he refers to Hobbes in several other places in the book.

of good sense in the doctrine of Natural Law,"[90] which amounts to certain facts, each of which "afford[s] a *reason* why, given survival as an aim, law and morals should include a specific content." Without this minimum content of natural law, Hart argues, survival could not be achieved, and survival is the "minimum purpose … which men have in associating with each other."[91] Hart insists that this is an argument about *reasons*, not about causality or laws of nature which explain how people actually interact or form societies. It is about conscious choices based on reasons, in other words about the reasons humans have chosen to organize themselves on the basis of these truisms which form a minimum content of natural law. "In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible."[92]

The first truism, *human vulnerability*, further develops the aforementioned fact that all humans can be wounded. As Hobbes had pointed out, even though some are stronger than others, we are all so weak that "when all is reckoned together, the difference between man, and man, is not so considerable, … the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself."[93] For Hart, as for Hobbes, law and morality must protect us from bodily harm and they do so by forbidding the use of violence.[94] This is so fundamental according to Hart, that he pointedly asks: "If there were not these rules what point could there be for beings such as ourselves in having rules of *any* other kind?"[95] This familiar point then leads to another formulation of the land crab thought experiment:

> The force of this rhetorical question rests on the fact that men are both occasionally prone to, and normally vulnerable to, bodily attack. Yet though this

90 Hart, *The Concept of Law*, 199.

91 Ibid., 193. MacCormick points out "the remarkable omission" of sex from the list of truisms, which seems correct in that it is both the source and the object of rules in all human societies and also the basis for procreation of the human race, *H.L.A. Hart*, 124–126.

92 Hart, *The Concept of Law*, 193.

93 Hobbes, *Leviathan*, 87.

94 Hart would later bring this point up in a critique of overly extensive requirements on a shared morality: "For the decay of all moral restraint or the free use of violence or deception would not only cause individual harm but would jeopardize the existence of a society since it would remove the main conditions which make it possible and worthwhile for men to live together in close proximity to each other." "Social Solidarity and the Enforcement of Morality," in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 248–262, here 257. In the essay, he argues that other changes to morality, like more permissive sexual morality, would not have these same effects. See also Hart, *Law, Liberty, and Morality.*

95 Hart, *The Concept of Law*, 194.

> is a truism it is not a necessary truth; for things might have been, and might one day be, otherwise. There are species of animals whose physical structure (including exoskeletons or a carapace) renders them virtually immune from attack by other members of their species and animals who have no organs enabling them to attack. If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: Thou shalt not kill.[96]

If we could not physically harm each other—either by losing our extremities which could potentially be used as weapons or by growing shields on our bodies that would protect us—then these disarmed and armoured neo-humans could get rid of the commandment forbidding homicide, and the general prohibition on violence. This is clearly not a society of angels, but rather one full of incapacitated and protected creatures forced to leave each other be. What we cannot do we do not need to forbid, Hart argues. Again, we can refer back to Hobbes who interestingly (referring to Aristotle) discusses the possibility of creatures such as ants and bees having societies without coercive power.[97] They can, of course, hurt each other, but they cannot get offended without getting hurt physically, which humans can and do get due to pride or differing opinions.

The second truism, *approximate equality* ties into the first and returns to the argument he already put forward in 1958. "Men differ from each other in physical strength, agility, and even more in intellectual capacity. None the less it is a fact of quite major importance for the understanding of different forms of law and morality, that no individual is so much more powerful than others, that he is able, without co-operation, to dominate or subdue them for more than a short period."[98] Hart formulates this basic fact without explicit reference to Hobbes, but he implicitly refers to the most famous phrase from Hobbes's *Leviathan*: "Social life with its rules requiring such forbearances is irksome at times; but it is at any rate less nasty, less brutish, and less short than unrestrained aggression for beings thus approximately equal."[99] As we mentioned in previous paragraph, Hobbes argued that "the weakest has strength enough to kill the strongest." Following up on this description of the obvious reasons why moral and legal orders must exist, Hart again speculates on radical asymmetries in different individuals' strength. Against the a priori necessity of this approximate equality, Hart states that "things might have been otherwise" in the sense that some men could have been "immensely stronger than others and better able to dispense with rest" and thus not vulnerable to the threats

96 Hart, *The Concept of Law*, 194–195.
97 See Hobbes, *Leviathan*, 119.
98 Hart, *The Concept of Law*, 195.
99 Ibid.

from those who are weaker. If the world had such "giants among pygmies," the former could have "much to gain by aggression and little to gain from mutual forbearance or compromise with others." While Hart describes this as a "fantasy," he does admit that this description is in a certain sense correct when applied to states, which both gives international law a character different from domestic law as well as sets a limitation on "the extent to which it is capable of operating as an organized coercive system."[100]

Following on the first two, the third truism, *limited altruism*, again explicitly engages with theological language, with angels appearing in the company of devils:

> But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible. With angels, never tempted to harm others, rules requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible. As things are, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled.[101]

This quote gives an anthropological argument that humans can be said to be an average between selfish and violent devils and their opposite, the angels. The limited altruism of humans leads to violent and aggressive actions and Hart makes an assertion that requires a control of social life. With respect to angels, Hart argues that such unfortunate events would not arise, while in a society of devils there would be a constant situation of domination, aggression, and selfish behaviour. One situation would not need any law, the other would be incapable of being reigned in by law.[102]

The fourth truism in Hart's argument, *limited resources*, is perhaps the most self-evident, but also returns us to the strangest speculative thought experiment in the list. Humans need food, clothes, and shelter—resources that are scarce and require labour to create. For Hart, these "facts alone make indispensable some minimal form of the institution of property (though not necessarily individual property), and the distinctive kind of rule which requires respect

100 Ibid.

101 Ibid., 196.

102 It is interesting to note the different anthropological and empirically based claims that many societies do not need law. See Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology*, 2nd ed. (Quid Pro Books, 2013), 3, 13–15; Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013), 6. Even Hart's disciple, the legal philosopher Raz, attests to this: Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Oxford University Press, 1990), 162.

for it."[103] The use of land for growing crops and the use of other material things require ownership, Hart argues, in order to protect them from being taken by others. But here the legal philosopher once again turns speculative and writes that "things might have been otherwise than they are. The human organism might have been constructed like a plant, capable of extracting food from the air, or what it would need might have grown without cultivation in limitless abundance."[104] The Edenic quality of a life as plant, without scarcity and therefore need of ownership, here functions as a contrast to the toiling humans who must protect their crops from the intrusion of others.[105]

The fifth and final truism, *limited understanding and strength of will*, elucidates the mental and moral capacities of humans. Even though rational inquiry might possibly lead everyone to accept certain fundamental norms of social life,[106] we all differ in our capacities as well as what we can manage under different circumstances. "All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many would succumb to the temptation."[107] An important aspect of this for Hart is that this coercive system is created by voluntary cooperation, not simply submission. Although he accepts the possibility that strong individuals could rule by coercing others, his interest is in the voluntary submission of the majority, where sanctions against those who do not want to obey the rules benefits those that do:

> 'Sanctions' are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary co-operation in a coercive system.[108]

Most do not follow rules in response to the threat of sanctions, but for other reasons. But sanctions protect these rule-abiding people from freeloaders and would-be criminals.

The final part of Hart's discussion of the five truisms has already been touched upon above. He observes that "approximate equality between men is of crucial importance in the efficacy of organized sanctions," and that these sanctions are necessary to protect the minimum content of natural law that he describes. Massive inequalities between humans would mean that some would be too powerful for sanctions to work against them. Instead of intermittent

103 Hart, *The Concept of Law*, 196.
104 Ibid.
105 Also here the Hobbesian background is quite clear. Cf. Hobbes, *Leviathan*, 192.
106 Compare Rawls's veil of ignorance, John Rawls, *A Theory of Justice: Revised Edition* (Belknap Press of Harvard University Press, 1999), 118.
107 Hart, *The Concept of Law*, 197.
108 Ibid., 198.

force being used against malefactors, "the only viable system would be one in which the weak submitted to the strong on the best terms they could make and lived under their 'protection.'"[109] It is not clear from Hart's argument whether this is supposed to function as a hypothetical example or something that might actually happen. It seems reasonable to use this description for many actual situations in different societies and sub-societies, at least those where gangs, mafias, or para-military groups rule through protection rackets and other types of extortion, in the many cases of military occupation that exist today, or in colonial occupation historically.[110] The example that Hart raises applies at the international level: "The international scene, where the units concerned have differed vastly in strength, affords illustration enough. For centuries the disparities between states have resulted in a system where organized sanctions have been impossible, and law has been confined to matters which did not affect 'vital' issues."[111] International law does not have a centralized and efficient set of sanctions, but relies both on restricting its scope to non-vital issues and on what he calls "the natural sanction, never negligible, of the risk of defeat [that] might ensure an uneasy peace."[112] In other words, states do not follow international law (it seems that it is primarily the prohibition on the use of force in international law in UN Charter Article 2(4) and related rules that Hart implicitly refers to here) because they fear legal sanctions, but because they fear the risk of military defeat (the natural sanction). This is a much different reason for abstaining from breaking international law than a legal sanction is. It should be said that other conceptions of what constitutes sanctions in international law can be brought forward, and that some might argue that international law can be said to have legal sanctions, for example, in how it indirectly grants sovereign states the right to act against aggressors.[113] Hart wraps up this part of his argument with a slightly chilling

109 Ibid.

110 Whether colonialism is truly over and the decolonial era has given way to the post-colonial is of course an important discussion. The only point here is that such asymmetrical situations were more common in an earlier historical era. The lack of reference in Hart's work to such colonial conditions (he mentions at times only slavery), which his own country, the United Kingdom, was very much the culprit of, is perhaps something that should be studied. It seems to contradict, at least on the face of it, the argument he puts forward on the necessity of consent among relatively equal humans; see Hart "Symposium: Theory and Definition in Jurisprudence," 253. The use of superior military technology can, at least for a period, annul this equality and make an asymmetrical power relation persist.

111 Hart, *The Concept of Law*, 198.

112 Ibid. Hart's argument was written in the first half of the Cold War, in 1961, and it can be said that today international law is much more extensive, including many vital issues (like international crimes, climate, etc) which would disprove his thesis. But it can also be said that the relative inefficiency of these legal regimes supports his basic claim in that these do not really function like domestic legal orders do, since only the latter have efficient sanctions.

113 This include reprisals, i.e., use of force or other means that would otherwise be unlawful under international law, including not least economic sanctions (which are omnipresent today) as well as military action, the threat of which rises as these words are written.

prophecy by stating that the current situation in international law might change in the future: "How far atomic weapons, when available to all, will redress the balance of unequal power, and bring forms of control more closely resembling municipal criminal law, remains to be seen."[114]

What should we conclude from this succinct exposition of natural law by Hart? If we follow the path we have taken above and read his argument through the counterfactuals and speculative elements, then the core of Hart's argument is that humans are neither carapaced nor disarmed, nor devils, nor angels, nor "pygmies or giants," nor plants.

But still, sanctions for Hart are not an essential component of law, in the sense that we should provide a definition of "law" or the "legal system" that includes sanctions and force. He also finds the alternative—simply stating that most legal systems do offer sanctions—unsatisfying. This is because a system of primary and secondary rules, combined with a rule of recognition, would still fulfil all the basic criteria of a legal system without it necessarily being backed up by force.[115] Systems without centrally organized sanctions (like international law) can be called law, but sanctions are possible, necessary, and amount to a "natural necessity" in municipal (domestic) legal systems.[116] In a later text, he responds to the argument that a shared morality might fulfil the functions that are now carried out by the legal system, since abstention from "murder, theft, and dishonesty [comes] not from fear of legal sanctions but for other, usually moral, reasons."[117] If such a morality were more widespread, there would be no need for coercion to be used in connection with legal rules. Hart wavers in his assessment of this argument. "It seems clear, however, that social morality left to itself could not provide adequately for the fundamental needs of social life, save in the simplest forms of society."[118] So in a "simple society," it might be possible for morality to be adequate in ensuring that the minimum content of natural law be upheld without coercion, although Hart does not specify more clearly what such a society would be or if there are any examples of it. But, he writes, "it does not follow that without the law's protections, voluntary submission to these restraints would be either reasonable or likely."[119] The content of the minimal natural law that Hart puts forward is based on this

114 Hart, *The Concept of Law*, 198–189.

115 Hart distinguishes between primary rules, which impose duties and regulate behaviour (e.g., criminal laws), and secondary rules, which provide the structure for creating, modifying, and interpreting primary rules. Among secondary rules, the rule of recognition is the foundational rule, determining the validity of legal norms within a legal system, identifying which rules count as law. See ibid., 79–99.

116 Ibid., 199.

117 Hart, "Problems of the Philosophy of Law" in *Essays in Jurisprudence and Philosophy*, 113.

118 Ibid.

119 Ibid., 114.

natural necessity, the fact that human societies of a certain size (larger than the family or various smaller communities yet smaller than an international society) need these rules to function. But how can we define the functioning of a human society? Can it really be restricted to mere survival, which Hart defined as a core good of natural law, or is the purpose of law rather something that goes beyond law itself?

In 1965, the Dominican Herbert McCabe began teaching at another Oxford institution, Blackfriars Hall, in whose church Hart's son chose to be baptized. In his 1979 book *Law, Love and Language,* McCabe puts forward a theory of law which bears a close affinity to Hart's. McCabe's conception of natural law, which he acknowledges is just one among many possibilities, also presents a minimal theory of law. It does not produce detailed regulations, while at the same time being an attempt to rise above unhelpful (but perhaps important) truisms such as "good is to be done and evil to be avoided."[120] The fundamental aspect of law for McCabe is that to "be subject to law is to be a member of a community."[121] The meaning of our actions becomes apparent only in the context of the community in which we act. Thus for McCabe, the curious thing about natural law is the kind of community we are part of when we exist under that law. That community must be mankind. What unites this very large community is, on the one hand, biology, in that we are causally and genetically linked to all other humans, and, on the other hand, language, which makes it such that we can communicate with all other humans at least in principle.[122]

The central question for McCabe becomes what use do laws have for a specific community? They can be said to have a rational legitimation only if they exist for the welfare of the community as a whole. McCabe discusses at some length the difference between a traffic sign that *informs* the driver of something important—like "Dangerous Bend" ahead—and one that *commands,* such as a speed limit sign.[123] The reason why the decision on the legal speed limit is left to a legislator rather than an individual can vary, for example McCabe discusses the options that we are "too stupid, too busy or too vicious."[124] Each of these has merits in explaining why the decision on the speed limit is centralized and why the individual who fails to comply must be legally sanctioned. But—and here the theologian also briefly engages in the angelic thought experiments that we have seen the legal positivist entertaining—if everyone in a society was both virtuous and intelligent enough to make the right decisions, "there would be need for regulations of this kind," since

120 Herbert McCabe, *Law, Love and Language* (Sheed and Ward, 1968), 35.
121 Ibid., 36.
122 Ibid., 37.
123 Ibid., 47–49.
124 Ibid., 50.

only information would be necessary in order for the individual to make the correct decision. Laws, therefore, "are only required because people are to some extent stupid and vicious."[125] On this point, Hart agrees completely. Laws are necessary to deal with the viciousness and stupidity of humans. But none of these faults of man automatically gives an indication as to the proper response to wrongful behaviour.

Law as Instruction for the Puzzled Man

What is it that makes law an efficient system of social control? In Kelsen's theory, the sanction—as the specific social technique of law—takes centre stage. As we saw above, the thought experiment of a society of angels was based on the old idea that angels would do what is right, just as devils would do what is wrong. Since humans exist between these two ends of the scale, we both need and are able to realize forms of order different from these angels or devils. But there is a further twist to the speculation on angelic society, most clearly formulated in the work of Hart's disciple Raz. Raz agrees with Hart that sanctions and the regulation of violence are features of all actual legal orders.[126] But, Raz asks, is it possible to have an order without sanctions or coercive enforcement? His answer follows his teacher Hart, in that he regards it as "humanly impossible but logically possible" and asks us to "imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions."[127] This question was also considered by Augustine, who argued that it is a logical possibility that a human could be without sin, having attained "perfect righteousness." But, aside from Jesus, there has never been and never will be such a human.[128] Raz speculates that perhaps "even human beings may be transformed to become such creatures."[129] In other words, rather than Hart's fantasy about humans becoming invulnerable land crabs, we would become absolutely virtuous and obedient creatures, perfect saints, or even angels.[130] This would mean that we had a society with rules, a legal order, albeit one in which "the legislator would not bother to enact sanctions since they would be unnecessary and superfluous."[131]

125 Ibid., 53.

126 Raz, *Practical Reasons and Norms*, 157–160.

127 Ibid., 158.

128 Augustine, "The Punishment and Forgiveness of Sins and the Baptism of Little Ones," in *Answer to the Pelagians, I*, (New City Press, 1997), 28.

129 Raz, *Practical Reasons and Norms*, 159.

130 "They differ from us only in having universal and deep-rooted respect towards their legal institutions and in lacking all desire to disobey their rulings," Ibid.

131 Ibid.

Sanctions are therefore not necessary for Raz's concept of law. But—and this is Raz's unique development of the thought experiment—that might not be the end of the story. That is because law is not only about realizing the aims of the legislator, whether through the voluntary collaboration of the law's subjects or through legitimate coercion and sanctions. Law also fulfils important functions in ordering social life and resolving conflicts. The fact that it does so with the help of sanctions and violence does not mean that those important functions would recede or disappear if coercion was no longer necessary. Here we can again refer to McCabe, for whom the necessity of sanctions was only the result of stupidity and viciousness of humans.[132] But there could still be a use for laws in the sense of informing the citizens of such a society, since even those who are perfectly intelligent and virtuous might not always have all the relevant information. In a society of such perfect individuals, those individuals would not be omniscient, and "there would be need for general statements about risks" and therefore "there seems no reason why such a society should not have laws as well."[133] But notice that in that case, these laws would be nothing more than a convenient type of generalized information available from a central legislator that disseminates expert knowledge so as to relieve the individual of having to know everything at all times. This relates back to the useful road signage that warns of a dangerous bend ahead. But even the commanding speed limit sign would be transformed into mere information stating that it is not advisable to drive faster than what is posted on the sign.

Raz writes that such a "society of angels" may still need "legislative authorities to ensure coordination" since even though the angels agree on both values and best policies, they might have "different and conflicting goals" and would still need to settle disputes and resolve conflicts.[134] This also means that they would need courts, since for Raz, angels or saints would not lose their individualistic, self-serving interests and wills: "We should not think of the imagined society as a community of self-denying saints. Its members pursue their self-interest when they think they are right to do so, and they may be wrong."[135] However strange this secular angelology or hagiology is from a theological point of view, its straightforward philosophical point is at least clear: law fulfils other important functions than just enforcing the will and command of the legislator.[136] The question has been seriously considered in theology, with different positions taken on the existence of law or instruction in heaven. For Thomas Aquinas law is needed in heaven, while for Bonaventure it is not.

132 McCabe, *Law, Love and Language*, 53.

133 Ibid., 55–56.

134 Raz, *Practical Reasons and Norms*, 159. Another discussion of this directly in relation to Hart is found in MacCormick, *H.L.A. Hart*, 171.

135 Raz, *Practical Reasons and Norms*, 160.

136 A recent discussion is found in Miotto, "From Angels to Humans," 290.

Thomas rejected the traditional view, held by Augustine, that there was no place for a civil power in the state of innocence.[137] While there was no coercive or dominating form of sovereignty in paradise, there was still a form of sovereignty that was "guiding" or instructive.[138] For Bonaventure, law and punishment are the result of sin, and civil authority is not a natural institution.[139] In the state of grace to be attained in heaven, "the civil power of authority and the subjection of servitude will not remain."[140] Not even direction will exist in heaven.[141] It is clear that Hart here agrees with Thomas and Thomists such as McCabe. It is not the law as instruction, as information, or as a guiding of the acting subject which would disappear if we were angels, saints, or perfect humans, but only coercion.

For Hart, the question of sanction, or rather the specific issue of punishment, points to another key to unlocking the answer of law's function. In several essays, later collected in a volume titled *Punishment and Responsibility*, he again returns to arguments surrounding the central issue of punishment. But for Hart, the existence and centrality of punishment in legal orders showed something different from what Kelsen saw therein. As MacCormick has formulated it: "Kelsen's view, Hart suggests, inverts the proper order of things. The primary point of law or of morality is to settle what it is obligatory for people to do. Although obligations, duties, etc. presuppose rules backed by serious pressure, or indeed sanctions, the idea that such rules primarily authorize sanction imposition by legal officials and only secondarily require other people to do things misrepresents the social reality of the matter."[142] Rather than regarding "the law simply as a system of stimuli goading the individual by its threats into conformity," what the rules on liability—that is to say, when someone is found by the law to be not only causally but legally responsible for something—show is that law is about guiding the individual to make the right choices.[143] Law "guide[s] individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose."[144] In a certain sense, one could even say that this legal structure preserves, or even creates, the freedom of choice. But this then takes us beyond the need for coercion, since when exercising this freedom, we do not need to be either punished or coerced. It also points beyond the sphere

137 Michael P. Malloy, *Civil Authority in Medieval Philosophy: Lombard, Aquinas, and Bonaventure* (University Press of America, 1985), 59–61.
138 Ibid., 62–63. See also Finnis, *Aquinas*, 248, 269.
139 Malloy, *Civil Authority in Medieval Philosophy*, 121–122.
140 Bonaventure cited in Malloy, *Civil Authority in Medieval Philosophy*, 124.
141 Ibid., 125.
142 MacCormick, *H.L.A. Hart*, 76.
143 Hart, *Punishment and Responsibility*, 44.
144 Ibid.

of law itself towards an end of law that is beyond law, since it generates the free choices which are not realizations of the values or aims of the law as such.

In *The Concept of Law*, Hart would return to this issue and again interpret the activities in the legal order and in the courts as being not primarily focused on the administration of sanctions. Hart asked why the sanction of the "bad man" should be seen as the central case of a theory of law. "Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is? Or with the 'man who wishes to arrange his affairs' if only he can be told how to do it?" And indeed, Hart argues, law is concerned with this ignorant or puzzled man. McCabe makes the same fundamental point when he points out that laws are the proper tool to use when an individual choice is "the concern of the community as a whole, when my car and how it is driven become part of the way in which the community live together."[145] This has the same purpose as the prohibition of violence, namely of ensuring "the welfare of the group as a whole."[146] For Thomas, the guidance offered by sovereignty would persist even once we have reached the state of grace in heaven.[147]

Law is not simply there to punish the person acting wrongly, but to guide her to act as she should. This includes avoiding wrongdoing, but also offering a system for coordinating action through a plethora of legal tools, such as contracts, wills, licenses, etc. The need for judgements handing down verdicts or rulings on breaches of private law, these "vital but still ancillary provisions" are merely ways of handling "the failures of the system," and they do not touch upon the core of the function of law.[148] The "principal functions of the law" were for Hart "to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court."[149]

In the second edition of Hart's *Concept of Law*, the unfinished postscript contained yet another follow-up on the polemic against Kelsen's conception of coercion. While Kelsen's theory saw the sanction and its coercive effect as the central technique of law, Hart now went on to critique one of his most

145 McCabe, *Law, Love and Language*, 47–48.

146 Ibid., 48.

147 Malloy, *Civil Authority in Medieval Philosophy*, 62–63.

148 Hart, *The Concept of Law*, 40.

149 Ibid. John Gardner writes that Hart "is not denying that the law can be an effective goad. It is simply that this is not the specifically legal way of being effective. The specifically legal way of being effective is by guiding people, by providing them with authoritative rules which are effective in the relevant way if and only if they are followed. True, there normally have to be back-up threats, threats of legal consequences in the event of rule-violation. But the threats are there to motivate the following of the rules among those who would not otherwise be so motivated. So even these contribute to the specifically legal way of being effective," *Punishment and Responsibility*, xlii–xliii. He continues: "the rule of law has its highest value as an instrument of legal effectiveness when it is observed by a morally upstanding legal system," xlii.

important critics, Ronald Dworkin. In the latter's theory, law concerns the organized coercion of the state. Legal practice is "to guide and constrain the power of government," specifically the use of force when it is "licensed or required" by "past political decisions about when collective force is justified."[150] Hart adamantly disagreed with this view. Not only does his theory not claim any specific general truths about the content of law. Hart is indifferent (at least he argues here) to the specific "point or purpose of law and legal practices as such," and he even finds it "quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct."[151] Here, an interesting shift in emphasis in Hart's theory becomes clear. While he does not disown the claims he made in his previous theory, namely he maintains his strict view that sanctions are not necessary for law, he shifts his focus away from the wild thought experiments of angels and crabs, and points towards the persistent feature of laws already present in a world like ours. In this respect, Hart focuses on two aspects of law which perhaps can be said to comprise the crux of his theoretical invention. The first is the idea that law in its developed form is distinct from other normative orders in that it contains secondary rules which structure the identification, change, and enforcement of the primary rules.[152] The second aspect is that law can claim priority over the "standards" of other normative orders.[153] More importantly, here we see the explicit engagement with law as guidance, as *instruction*, and as *judgement*, an evaluation of actions.

It is not that Hart disregards the question of coercion and its legitimization; he is clear that one of the "particular moral merit[s] which law has" is that it "protects expectations by guaranteeing that prior notice of the occasions for legal coercion."[154] The law, as practiced in all legal systems, tells us what to do and, importantly, what not to do. If we disobey these instructions, we are (as long as the respect for the principle that all laws must be put into writing and published is upheld—*nulla poena sine lege*) at least aware of our disobedience and can expect the punishment or coercion that we will have to suffer as a consequence. This awareness can thus be grounds for legitimating the use of legally sanctioned force and coercion. But this is not what the essence of law is concerned with. Just as we have seen with McCabe, Hart sees "the primary function of the law in guiding the conduct of its subjects"; in other words, it is concerned with *instructing* the subjects of the law what to do.[155] This is not only about prohibiting and curtailing wrong behaviour, a point that Kelsen concedes (in that he also considers sanctions to be positive), it often reflects

150 Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press, 1986), 93.
151 Hart, *The Concept of Law*, 248–249.
152 Ibid., 81, 249. See discussion in MacCormick, *H.L.A. Hart*, 171.
153 Hart, *The Concept of Law*, 249.
154 Ibid.
155 Ibid., 249. Cf. McCabe, *Law, Love and Language,* 55–56.

the need for coordination, since it is "crucial for the intelligent exercise of legal powers (e.g., to make wills or contracts) and generally for the intelligent planning of private and public life."[156]

It is only when this primary instructive function "has broken down [that] legal coercion" becomes necessary, and therefore coercion is "though of course an important matter," still only "a secondary function."[157] He even sees it as a mere pragmatic concern—rather than relying on the "time-wasting inefficiency of leaving the enforcement of the rules to diffuse social pressure" it makes sense instead to use "organized sanctions administered by courts. But plainly a remedy for inefficiency is not a justification."[158] To justify coercion, this important, albeit only secondary, function of law "cannot be sensibly taken to be the point or purpose of the law as such."[159]

What is the point of law? What does law point towards? Does it have any purpose beyond the aforementioned coordinating function, backed up by a reasonable amount of coercive force when guidance fails? In his 1967 essay "Problems of the Philosophy of Law," Hart directly connects the issue of establishing a minimum content of natural law with the issue of evaluating the justness of law when he writes that "the criteria which distinguish good law from bad do not merely reflect human preferences, tastes, or conventions, which may vary from society to society or from time to time; rather, they are determined by certain constant features of human nature and the natural environment with which men must contend."[160] Here Hart once again reiterates his point that while the purposes "human beings pursue in society and for the realization of which they employ law as an instrument are infinitely various" there is still truth in the fact that "if law is to be of any value as an instrument for the realization of human purposes, it must contain certain rules concerning the basic conditions of social life."[161] For Hart, as he had already claimed in *The Concept of Law*, this argument could be seen to be an alternative against the "the more ambitious teleological doctrine of natural law" which aimed at a "specifically human optimum state or end (*finis*, *telos*) appointed for men by Nature or (in Christian doctrine) by God."[162] Hart's empirical theory only requires that the legal system enable humans to live and organize their lives in order to pursue their own aims, whatever they may be. This would be the basis upon which a law or a legal system could be evaluated and criticized. If a law does not further the possibilities for humans to live peacefully and grant

156 Hart, *The Concept of Law*, 250. On the issue of coordination, see also Raz, *Practical Reasons and Norms*, 159.
157 Hart, *The Concept of Law*, 249.
158 Ibid., 249–250.
159 Ibid., 249.
160 Hart, "Problems of the Philosophy of Law," 111.
161 Ibid., 112.
162 Ibid., 113.

them the freedom to pursue their own aims, it should be critiqued for failing to live up to these modest requirements of natural law. But is this really a minimal aim?

Here Hart is making an argument against a variant of natural law that is not based in "secular human purposes" but instead in a divine will or God's will, which would be a "religious doctrine" which states that "conformity to God's will is in itself meritorious or obligatory."[163] In line with his general scepticism of religion and faith, as well as his utilitarian ethics, Hart has no intention of engaging seriously with such a position.[164] In any case, Hart at least acknowledges that such a doctrine of natural law would expand the scope of standards or principles against which to judge laws.

But rather than accepting Hart's claim that his theory is merely a minimal version of natural law, we argue that if it is taken seriously—if the aim is to realize a kind of freedom in which humans can both live peacefully and enjoy the freedom to pursue their own aims—then it is not a minimal theory, but rather a maximal one. The realization of a form of life in which such a wide-ranging freedom is possible is not a minimalistic account of all "functioning" human societies, but rather the most ambitious goal possible. We will return to this later in this chapter and in the conclusion of the book.

Critical Morality and the Question of What Is Just

In 1978, in a tone and message similar to Kelsen's scolding words in *Peace through Law*, Hart wrote that a theory of rights was "urgently called for" since the previous half century had showed "man's inhumanity to man" and "the protection of a doctrine of basic human rights limiting what a state may do to its citizens seems to be precisely what the political problems of our own age most urgently require, or at any rate they require this more urgently than a call to maximise general utility."[165] For his intellectual hero Bentham, utility and logical calculation were originally the legal reformer's tools to make society more humane, less moralizing, and, in effect, more liberal. But, of course, the unrestrained calculations of utility always risk crushing human beings in its cogs. The question is whether Hart considered justice *solely* in utilitarian terms? In his 1967 essay, he is clear that there must be limits on utilitarian calculation. In general, he states, punishment should be based on the principle of

163 Ibid.

164 On religion, see Lacey, *A Life of H.L.A. Hart*, 81, 270. On utilitarianism: Hart, "Problems of the Philosophy of Law," 117–118.

165 Hart, "Utilitarianism and Natural Rights" in *Essays in Jurisprudence and Philosophy*, 196. Hart is optimistic in the sense that the conception of basic human rights "has deeply affected the style of diplomacy, the morality, and the political ideology of our time," ibid. But he wonders in closing "whether it will have as much success as utilitarianism once had in changing the practices of governments for human good," 197.

utility—in other words, the purpose of the punishment (or the threat thereof) is to have a positive effect on either the individual or the society surrounding the individual. But still, Hart says, a utilitarian calculus could never legitimize punishing innocent people, no matter how beneficial it could be shown to be. This limitation, which is shared by "all civilized legal systems" and which is taken exception to only in certain minor offences[166] is that "no man should be punished except for his own conduct, and … only then for such of his actions as were voluntary or within his power to control." This, Hart writes, is an "obvious requirements of justice."[167] Yet this does not detract from the value of utilitarian forms of rationalization or calculation, according to Hart. As he writes when engaging with the American legal scholar Richard Posner's work, the successful establishment of the "utilitarian underpinnings of the law … forces one to think what else is needed besides a theory of utility for a satisfactory, explanatory, and critical theory of legal decisions."[168] On the basis of this sober and rational utilitarianism, it "becomes clear that in general what is needed is a theory of individual moral rights and their relationship to other values pursued through law, a theory of far greater comprehensiveness and detailed articulation than any so far provided."[169]

In a characteristic act of intellectual humility, which was a recurrent theme throughout Hart's life even if it was often mixed with great ambition and a fearlessness in critiquing other positions, here he points to the limits which not only his own theory ran up against, but also legal theory in general. Hart wrote in an analytic philosophical style, taking clear inspiration from ordinary language philosophy, and one could argue that it was largely because of this approach that he was celebrated as the great revivalist of jurisprudence.[170] What characterizes philosophy is that it primarily engages with problems that have no proven theoretical conclusions. This requires that the philosophers clarify their fundamental positions or perspectives. And in his 1973 essay "Between Utility and Rights," Hart returned to the topic he had engaged with in his 1955 essay "Are There Any Natural Rights?" Despite the fact that he had disowned his position from 1955, and even chose not to include it in his 1983 collection of essays, what remains consistent is the emphasis he places on the individual: "The modern insight that it is the arch-sin of unqualified utilitarianism to ignore in the ways I have mentioned the moral importance of

166 Hart argues that, e.g., strict liability is one such acceptable exception, "Problems of the Philosophy of Law," 95.

167 Hart, "Problems of the Philosophy of Law," 118.

168 Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," in *Essays in Jurisprudence and Philosophy*, 123–144, here 144.

169 Ibid.

170 As the obituary over Hart written by Zenon Bankowski stated: "Then, there was only him. Now, a hundred flowers bloom. This is his lasting contribution." Lacey, *A Life of H.L.A. Hart*, 361.

the separateness of persons is, I think, in the main, a profound and penetrating criticism."[171] It was crucial for Hart to insist that each individual is a separate person and that their moral position and worth must be based in this individuality. Just as utilitarianism could not function without relying on extra-utilitarian conceptions of the good and of justice, there is in legal theory—even of the positivist tradition—a general openness to moral principles and principles of justice even beyond the scope of positive law. This is how moral evaluation and critical morality becomes possible, as the interrogation of the difference between the ought of what is moral and the existing positive law.[172]

But what should we do with the argument from Hart's disowned article, in which he made a strong case that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free"?[173] Should we simply accept Hart's excision of this argument from his oeuvre?[174] Is the point that such moral rights were no longer to be considered within the frame of legal theory, and instead left to the discipline of moral philosophy and the individual judgement of those individuals who had to exercise their own moral responsibility when deciding whether to participate in and apply the laws of a given legal order? If survival is a necessary feature of a legal order—and the five truisms are unavoidable for all but the most unstable legal systems—why can't "the equal right of all men to be free" be seen "as a *natural* right," as Hart himself put it in 1955?[175] We can connect this moral argument with the supposedly minimal account of natural law that Hart would present six years later. As we have already alluded to above, this theory of natural law was, in fact, not minimal, but rather a theory aimed at maximizing human freedom. That Hart did not accept a supposed existing normative structure of the cosmos in which humans existed alongside all other things with their predetermined teleologies does not weaken this interpretation. On the contrary, it strengthens the interpretation, since there is an openness to not only fulfilling a preexisting potential as the acorn growing into an oak, but also to realizing ones' own aims in a free choice, which is arguably a maximalist position.

Based on Hart's notebooks while he wrote *The Concept of Law*, Nicola Lacey writes that Hart considered the discussion on natural law to be a "reaction" to his prior positivistic argument. In this way, his thinking moves in

171 H. L. A. Hart, "Between Utility and Rights," in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 198–222, here 202.

172 Gardner makes the point in a direct discussion of Hart that it is exactly the fact that law can be morally evaluated that shows the necessary connection between law and morality, compared to other things that cannot be so evaluated, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012), 222.

173 Hart, "Are There Any Natural Rights?" 175.

174 Others have questioned Hart's choice; see Hillel Steiner, "Are There *Still* Any Natural Rights?" in Kramer et al. *The Legacy of H.L.A. Hart*, 239–250.

175 Hart, "Are There Any Natural Rights?" 175.

the opposite direction to how things unfolded historically, where positivism was a reaction to natural law.[176] So, we can read Hart not as retaining or accepting traces of natural law which he was incapable of excising, but rather as constructing his argument on natural law as a necessary result of the positivistic argument. We should be cautious not to read too much into Hart's notebooks, partly because they are mediated by Lacey's biographical account, but primarily because they are not what Hart finally decided to publish.[177] Nonetheless, the brief description Lacey gives us still lends a more precise illumination of the crucial question regarding the obligation that law has and how, or even whether it can be distinguished from a moral obligation. Ultimately, this question was central to Hart in writing the book. A quote from one of his notebooks states: "Perhaps all I need to convey is that the obligation is strictly *obligation*. i.e.: narrower than belief in moral goodness. But? there is a muddle (in me) I suspect here."[178] According to Lacey's interpretation, Hart "was never convinced that he had satisfactorily resolved this dilemma about the restricted, but genuinely normative, notion of obligation in law."[179] In her view, the critique by Finnis—namely that Hart's own "'central case' technique, combined with his view of a legal system oriented to fostering peaceful co-existence of its subjects" leads to a collapse of the "distinction between law and morality"—was "prefigured in his notebook entries."[180] In an interview later in life, Hart confessed in passing that his argument that law and morals are conceptually distinct meant he "possibly [had] gone over the deep end too much."[181]

That Hart struggled throughout his career with the relation between his theory and the question of morality is also attested to in one of his late letters, in which he refers to the topic of obligation in relation to the second edition of *The Concept of Law*: "I see I am in deep trouble with sense that a really large set of errors chiefly (not alas exclusively) about morals will have to be confessed and task [sic] seems immense."[182] He worried, Lacey writes, that revisions of his theory of obligations would "render it impossible to differentiate his own position from the earlier positivist account of obligation as equivalent to the demands of a gunman, or else from the fully moral account of obligation espoused by natural lawyers."[183] In his notebook, Hart remarks on a reply he was preparing to Gerald Postema for the conference in Jerusalem: "But

176 Lacey, *A Life of H.L.A. Hart*, 227–228.
177 But we might be in good company, see, e.g., his disciple John Finnis, "On Hart's Ways: Law as Reason and as Fact," *American Journal of Jurisprudence* 52, no. 1 (2007): 25–53.
178 Lacey, *A Life of H.L.A. Hart*, 228.
179 Ibid.
180 Ibid., 231.
181 Sugarman, "Hart Interviewed," 281.
182 Lacey, *A Life of H.L.A. Hart*, 335.
183 Ibid.

now (born again) with flexible openness to possibility that he is right and I am to fit in concessions to what I think best in him. But steady—no *wholesale* jettisoning of my whole 'position'. It looks as if the central concession is admission that law claims moral basis for conformity."[184] MacCormick argues that Hart is mistaken in supposing that the only conceptual overlap between law and morality can be that the former contains the latter. Hart argues that "criteria of legal validity neither are identical with nor necessarily include criteria of moral value," but this is not something most or all proponents of natural law would deny. For example, Finnis states clearly that he knows of "no theory of natural law" that affirms that "unjust laws are not law."[185] MacCormick has even argued that "there is no single grand divide between those who call themselves positivists and those who call themselves natural lawyers."[186]

In one of his final interviews, printed in the Spanish journal *Doxa*, Hart gave a concise explanation of his critique of Dworkin and his final position on legal obligation. For Dworkin, legal theory was a branch of moral theory.[187] The core of Hart's argument is that legal obligation requires legitimacy. In his unpublished reply to Dworkin, which is quoted by Lacey, he writes that he has always held the view "which most of my critics reject: that the concept of legal obligation is morally neutral, and that legal and moral obligations are conceptually distinct."[188] But Hart is adamant that a theory of obligation does not "only make sense if there is some moral ground for the supposed obligation."[189]

184 Ibid., 348. The volume is Gavison, *Issues in Contemporary Legal Philosophy*. Finnis also refers to Hart's equivocation on the issue of ethical objectivity, "On Hart's Ways," 25.

185 Finnis, *Natural Law and Natural Rights*, 351. Hart acknowledges this aspect of Finnis's theory: "Failure on the part of human law to conform to such principles of practical reason render it defective or perverse in various degrees, but will not, as in some versions of natural law (which Finnis considers a distortion), deprive such laws of their legal status, though they may be considered 'less legal' on that account." Hart "Introduction" in *Essays in Jurisprudence and Philosophy*, 11.

186 MacCormick, *H.L.A. Hart*, 199, referencing Finnis, *Natural Law and Natural Rights*. This is also a point that Hart himself makes, *Law, Liberty and Morality*, 2.

187 This point was most clearly spelled out in a later work by Dworkin: "We have now scrapped the old picture that counts law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have replaced this with a one-system picture: we now treat law as a part of political morality." *Justice for Hedgehogs* (Belknap Press of Harvard University Press, 2011), 405.

188 Lacey, *A Life of H.L.A. Hart*, 354.

189 Ibid. He continues: "So it is not the case, as my critics claim, that a theory of obligation can only make sense if there is some moral ground for the supposed obligation. Of course, those who, like Professor Dworkin, regard jurisprudence or legal theory as a branch of moral theory concerned to state why and under what conditions the enforcement of legal standards is justified will necessarily reject the morally neutral concept I have sought to elucidate here. But I see no good reason for holding that jurisprudence and legal theory must take this morally justificatory form."

The crucial point is that this conception of legal obligation, which is morally neutral, "serves to mark off the points at which the law itself restricts or permits the restriction of individual freedom."[190] This means that the very purpose of Hart's positivist distinction between the legal "ought" and the moral "ought" is to enable moral criticism: "Whether laws are morally good or evil, just or unjust, these are focal points demanding attention as of supreme importance to human beings constituted as they are."[191] We agree with Hart that the question of justness is not only supremely important, but we go even further: it is unavoidable. By justness, we do not mean that law makes a moral claim, as John Gardner has put it, referring to several authors, among them Raz, who argues that law claims moral authority, and Alexy, who argues that law claims moral correctness.[192] It is also not about the question of the possibility of incorporating moral values into positive law, a possibility Hart was open to and others have discussed under the headings of exclusive versus inclusive positivism.[193] Instead, we argue that law forces the question of whether it is just or not. As Radbruch wrote, "law is only the *possibility* of morality."[194] That law claims justice, or to itself be justice, is not the same as posing the question of justice or justness, even if these are related.[195]

190 Ibid.

191 Ibid. We must disagree with the charge made against Hart by Philip Selznick, but still notice his interesting formulation of the general critique against natural lawyers and legal positivists: "Both sides have failed to see that the connection between law and justice is variable and probabilistic, but not adventitious. There is *inclination* but not *necessity*." *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992), 444.

192 Gardner, *Law as a Leap of Faith*, 125.

193 "The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality." Hart, *The Concept of Law*, 203–204. See on inclusive/exclusive positivism: W. J. Waluchow, "Legality, Morality, and the Guiding Function of Law," in *The Legacy of H.L.A. Hart*, 87 ff, with references.

194 Radbruch, "Legal Philosophy," 86. The same argumentation can be found in *Grundzüge der Rechtsphilosophie*, 100.

195 Gardner (*Law as a Leap of Faith*, 125) refers to Selznick's formulation that law promises justice: "Law is not necessarily just, but it does promise justice." *The Moral Commonwealth*, 443. Additionally, he discusses Jacques Derrida, who writes "*droit* claims to exercise itself in the name of justice and that justice is required to establish itself in the name of a law that must be 'enforced,'" "Force of Law: The 'Mystical Foundation of Authority,'" in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson (Routledge, 1992), 22. Elsewhwere in the book (e.g., 139) Gardner discusses Robert Alexy's claim that "the *real* dimension of law is coercion or force" and that the "central element of its *ideal* dimension is a claim to correctness, which includes a claim to

Their relation is not due to the fact that every legal theory must be merged with a moral theory (as in Fuller or Dworkin), but rather because of the fact that no creation or application of law avoids the necessary reference to justice. At least in this sense, it ultimately does not matter if justice in a moral sense is considered to be a necessary component of the legal application of a rule, such as in a verdict or other forms of legal action, or whether justice is considered to be separate, in other words simply part of the extra-legal or moral evaluation by the person doing the legal action, applying the law, or making use of the law in any other way. Furthermore, the question of justness manifests itself to each individual who is responsible for such a legal act in the form of a choice which pertains to a certain conception of the good. We find a clear example of this in Hart's 1955 essay. Hart there considers freedom for all to be the ultimate good that produces what he then calls a natural right.[196]

In the introduction to his 1983 collection of essays on jurisprudence and philosophy, Hart briefly formulates his objections to his most important interlocutors, Dworkin, Raz, and Finnis. These objections pertain to the central question of morality in judgement or legal interpretation. In 1967, he had given a famously succinct and precise formulation of one of the central problems of the philosophy of law, namely that "it is clear that law as a mode of influence on human behaviour is intimately related to and in many ways dependent upon the use or threat of force on the one hand and on morality and justice on the other." But precisely the fact that law "is also, at points, distinct from both" means that the connection between law and morality is neither contingent nor necessary.[197]

Hart writes that among other problems he has with Dworkin's theory, it runs "into insuperable difficulties in its attempt to explain how there can be, as Dworkin admits, morally wicked legal systems in which what is legally right so far diverges from what is morally right that a judge would have a moral duty to lie rather than say what the law really is."[198] This problem, which Hart identifies with Dworkin's theory, points towards the moral choice of the judge.

moral correctness" (*Law's Ideal Dimension*, 27–28. Emphasis added). See also the distinctions made between "moral justice, political justice, economic justice and juridical justice" by Gunther Teubner, "Self-Subversive Justice: Contingency or Transcendence Formula of Law?" *Modern Law Review* 72, no. 1 (2009): 1–23, here 6.

196 We can compare this to a formulation already found in Justinian's *Institutes*: "By natural law all men were born free." R. W. Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian*, 4th ed. (Sweet & Maxwell, 1956), 58.

197 See the essay collected in the same volume, "Problems of the Philosophy of Law," 91. As Waluchow puts it, it is not that positivists argue "morality and law have absolutely nothing to do with one another," but rather that "positivists agree that law and morality are intimately connected with one another." See "Legality, Morality, and the Guiding Function of Law," 85. See also the discussion by Gardner in the chapter titled "Hart on Legality, Justice, and Morality" in his *Law as a Leap of Faith*, 221–237.

198 Hart "Introduction" in *Essays in Jurisprudence and Philosophy*, 9.

In Dworkin's theory, the law can have a content which is so at odds with what morality or justice requires that the judge must act on her understanding of justice, thereby undermining the adherence to the law as it stands. The question *what is just?* imposes itself as the crux of the interpretation and application of law.[199]

Further, Hart points out that even if it is "severely positivist," Raz's theory still accepts a "conceptual connection" between law and morality in the sense that "where a legal system is in force its judges claim moral authority for the law and make committed statements of legal rights and duties, and so must believe or at least pretend to believe that there is a moral obligation to conform to law." Hart prefers to formulate this as an implicit moral demand made on those tasked with upholding the law. He argues that what is at stake in the act of judgement is that judges understand that the law, which they "accept as setting the correct standard of legal adjudication and law enforcement," demands action in accordance with it. The statements made by judges can in this sense be "detached" from the actual moral position of the judge.[200] The question as to what it is to act morally and justly is inextricable from the question of judgement, despite the possibility that the positivist judge might adjudicate and proclaim the law even if she does not agree or even vehemently opposes the law and its legal effects.[201]

In this sense, it is not that positivism disregards or sidelines the question of the morality of judgement and adherence to the law; instead, it turns these into key issues. This is also what the debate between Fuller and Hart shows, since the positivist case Hart makes is not about avoiding the moral question of doing what is just. In fact, it becomes even more crucial for him than for Fuller. Hart put it strongly in 1965, when, in a critical review of Fuller's book *The Morality of Law*, he claimed that positivists were incapable of explaining why a system of "wholly retroactive laws" would be wrong. Fuller's argument is based on an account which claims that positivists simply view law as "a manifested fact of social power."[202] Hart defends Bentham and Austin, as well as Kelsen and himself. Despite their differences, all four positivists evaluated systems of laws based on extra-legal values or principles. For Kelsen and Hart adherence to the requirements of legality "is desirable not only for reasons of economy but because it will enable individuals to predict the future and that

199 Briefly referring back to Kelsen, who formulated his scepticism in writing the following: "For ever since mankind has thought at all, the most illustrious minds have striven to think up such an order, to answer the question of justice. Yet this question is as far from being answered today as it ever was." "The Law as a Specific Social Technique," 240.

200 Hart "Introduction" in *Essays in Jurisprudence and Philosophy*, 9–10.

201 As Gardner puts it: "There is never a live question of why we should be moral." "Nearly Natural Law," in *Law as a Leap of Faith*.

202 Hart, "Lon. L. Fuller: The Morality of Law," 356; Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964) 145, 147.

this is a powerful contribution to human liberty and happiness."[203] In fact, the different types of positivist definitions of law (law as command, law as rules) did not render "illegitimate consideration of the law from a sociological, functional, or critical standpoint"; in fact, they were formulated to make such critiques possible in the first place.[204]

For Hart, the very fact that Fuller terms his list of requirements for legality the "inner morality of law" demonstrates a confusion that positivists do not labour under. The positivist distinction between law and morality instead keeps the issue of legality and morality separate. The requirements of legality are "designed to maximize [the] efficiency" of the legal order, but for the positivists, they "are not valued … for their own sake, and are not dignified by them with the title of 'a morality'. They are valued so far only as they contribute to human happiness or other substantive moral aims of the law."[205] To reiterate, it is not the moral judgement or evaluation of the law or its application that the positivist contests or disregards. Hart instead argues that the clarity of the positivist position helps to illuminate this moral evaluation of the law. In his critique of Fuller, Hart points out that he regards his own theory "in *The Concept of Law* as complementary to and in no way exclusive of [Fuller's] investigation of 'purposes.'"[206] But while Fuller's theory is a standard bearer for a legal theory directed by ultimate purposes, a form of teleology, here Hart indicates that the same holds true for the positivist, at least for himself. The "substantive moral aims of the law" provide the answer to the question of justness. Is this legal system just? Is this legal rule just? Can I apply this rule in a just way? Hart argues that these questions are brought to the fore, rather than hidden, by the positivist account of law.

The same evaluation must be made, whether in the course of a legal interpretation that would determine whether a law is sufficiently evil and therefore should not be applied or in the choice to not apply the law (or leaving one's position as judge[207]) due to its conflict with one's moral convictions. Without suggesting that there is no significant difference between Fuller's position and Hart's, what is important for our purposes here is that both of the aforementioned solutions to the problem point to the central issue of deciding *what is just*, which is the central problem that Radbruch formulated in the texts that both Fuller and Hart directly referred back to, as well as in his other writings.

In discussing Finnis's theory of natural law, Hart refers to the fact that Finnis (as compared to Fuller, for example) essentially accepts the distinction

203 Hart, "Lon. L. Fuller: The Morality of Law," 356–357.

204 Ibid., 357.

205 Ibid..

206 Ibid., 358. He continues: "For in my book I tried to present improved ways of describing and a clearer view of the legal structure within which these 'purposes' are pursued." ibid.

207 See Hans Petter Graver, *Judges against Justice: On Judges When the Rule of Law Is under Attack* (Springer, 2015).

between law as it is and as it should be. Evaluating human law in its relation to natural law can make the former seem "less legal," but that does not "deprive [human laws] of their legal status."[208] One could understand the whole of Finnis's theory as being concerned with developing a certain conception of the *what is just* question, so that it could serve as the guiding principle for legislator, judge, and citizen alike. While Hart worries that even the new natural law which Finnis develops might "revive old confusions between law and the standards appropriate for the criticism of law," he sees its "chief and very great merit" in that "it shows the need to study law in the context of other disciplines and fosters awareness of the way in which unspoken assumptions, common sense, and moral aims influence the law and enter into adjudication."[209] Regardless of whether one might agree or disagree with Hart's assessment of the theories of his fellows and rivals, our point here is that each of these theoretical projects return us to the core question of deciding what is just.[210]

In response to Fuller, Hart even writes that there is "no logical restriction on the content of the rule of recognition" and that it could even contain a fundamental moral test, namely that "it could provide explicitly or implicitly that the criteria determining validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable."[211] The question of justness or deciding upon the moral quality of a law could even be inherent in the rule of recognition and, by proxy, the entire system of positive law.[212] In that way, the justness question would be considered positive in the sense that moral principles were codified/enacted in law by the legislator (as in the case of the United States constitution) or by an interpretation made by courts (as in the English constitution) or in a continental system legal doctrine as source of law. This consideration of morality, or the question of justness, supports the compatibility between positivism and moral evaluation. But what we argue here is not just the possibility of such an incorporation of morality into a legal rule. Even a legal order whose rules made no such references to or formulations of moral principles would not release us from having to ask the question of justness altogether. Our claim is instead that law, as such, always necessarily implies this question.

208 Hart "Introduction" in *Essays in Jurisprudence and Philosophy*, 11. Finnis, *Natural Law and Natural Rights*, 278–279.

209 Hart "Introduction" in *Essays in Jurisprudence and Philosophy*, 11.

210 Hart concludes his brief discussion that we have referred to here with the worry that apart from "obfuscating complexities," the new natural law theories "identification of the central meaning of law with what is morally legitimate, because orientated towards the common good, seems to me in view of the hideous record of the evil use of law for oppression to be an unbalanced perspective, and as great a distortion as the opposite Marxist identification of the central case of law with the pursuit of the interests of a dominant economic class." Ibid., 12.

211 Hart, "Lon. L. Fuller: The Morality of Law," 361.

212 Hart also makes these points in *The Concept of Law*, both in the original text and in the postscript, see 204, 247.

It is not that morality is immanent to law, as some natural law theorists would have it, but that the law always entails the question of justice, the question: is this law moral?

In Hart's postscript, where he defends himself against Dworkin's accusations that his theory is a plain-fact theory,[213] he states clearly that "my theory is not a plain-fact theory of positivism since amongst the criteria of law it admits values, not only 'plain' facts."[214] For Hart, the question of the moral value of a rule does not bear on its legal validity.[215] But the fact that the legal validity does not rely on such a moral evaluation does not mean that such a moral evaluation does not take place in each application of the law. This is true both as a psychological fact, in that most conscientious judges do consider their own practice to be in accordance with their personal vision of justice, but also as a necessary aspect of the implicit claim in the application of laws, or the application of justice as it is often called. That is to say that it is of course possible to imagine and even find judges who do not consider the justness of their adjudication, just as there are civil servants or private individuals who act against the law and the requirements of justice. But the fact that we can regard or evaluate their action in terms of justice (and thus engage in "moral criticism" in Hart's terms[216]) and justness shows that all laws and all legal applications raise the question of *what is just*.

> Even if we admit, as most would, the possibility of a moral criticism of law, we may ask whether there are any forms of moral criticism which are uniquely or exclusively relevant to law. Does criticism in terms of Justice exhaust all the relevant forms? Or does "good law" mean something different from and wider than "just law"?[217]

213 See Dworkin, *Law's Empire*, 7ff.

214 Hart, *The Concept of Law*, 248.

215 Hart, *The Concept of Law*, 207–209. MacCormick critiques Hart's first account of this in the first edition of *The Concept of Law* for being unsatisfactory. The idea that we "we should not exclude from the discipline of jurisprudence" the study of both "the abuses as to study the good uses of" legal systems in the sense of those that combine primary and secondary rules, is for MacCormick a far-fetched idea. For jurisprudence it would be vital to study "evil systems" and "the formal and structural analogies which obtain as between *Recht* and *Unrecht*." MacCormick, *H.L.A. Hart*, 196.

216 Hart, *Law, Liberty, and Morality*, 3. In another essay, Hart refers to Bentham calling this "censorial jurisprudence" (in distinction to "expository jurisprudence"), while Austin called the "study of concepts and the structure of legal systems as 'general jurisprudence' and distinguished it from the utilitarian criticism of law which he called 'the art of legislation.'" H.L.A Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence," in *Essays in Jurisprudence and Philosophy*, 265–277, here 272.

217 Hart, *Law, Liberty, and Morality*, 3.

For Hart, a central motive for constructing his positive theory of law was to make moral evaluation of the law possible. It is precisely when "[w]icked men … enact wicked rules" that it is necessary to be "clear-sighted in confronting the official abuse of power" and that "the certification of something as legally valid is not conclusive of the question of obedience." The laws must be subject to "moral scrutiny," as Hart writes in *The Concept of Law*.[218] In the short book *Law, Liberty and Morality*, he argues that the positivist who can consider a law to be unjust is the one who is most likely to carry out the necessary moral criticism:

> This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.[219]

The question of justness is always present in the evaluation of law. In a short review of the English translation of the Italian legal philosopher Giorgio Del Vecchio's book on justice, to which Hart is generally sympathetic, he finds that Del Vecchio does not quite succeed in solving one of the issues he sets out to resolve, namely "the 'problem' of justice presented by the fact that it bears a double aspect as something by reference to which we criticize laws and also something which consists in conformity with law."[220] The argument brought forward by Del Vecchio touches directly on the point we have already seen Hart make, namely that the law can be seen either from the perspective of sanction or from the perspective of the good that it seeks to realize. Del Vecchio, in a form of argumentation similar to Hart's, was attuned to the practical matters and considerations of the law, and he discussed the gradual elimination of punishment. He refers to the difference between serving a prison sentence or paying damages to another party, which is based on the perceived difference in severity of the illegal action. Del Vecchio speculates that this could lead us to the radical conclusion that we "might even envisage

218 Hart, *The Concept of Law*, 210.

219 Ibid. "Hart was a positivist because he was also a critical moralist. His aim was not to issue a warrant for obedience to the masters of the state. It was to reinforce the citizen's warrant for unrelenting moral criticism of the uses and abuses of state power." MacCormick, *H.L.A. Hart*, 197. "One reason for insisting on the distinctness of legal validity and moral value is a moral reason. The moral reason is the principle that every order of positive law or positive morality ought always to be subjected to the critical judgement of an enlightened morality which seeks to make rationally coherent and explicit the values and principles inherent in moralities as such," ibid., 200.

220 Hart, "Justice," 348. Giorgio Del Vecchio, *Justice: An Historical and Philosophical Essay*, ed. A. H. Campbell, (Philosophical Library, 1953),

the idea of a possible gradual elimination of specifically penal sanctions when civil sanctions should have correspondingly acquired a sufficient efficacy."[221] It is possible that societal progress could lead to the legal order retaining only the less serious and less stigmatizing sanctions now find in private law.[222] In continuing his discussion, Del Vecchio, perhaps surprisingly, considers rare (at least from today's perspective) forms of sanctions such as debt prison. Arguments claiming that these forms of punishment are unjust have led to them being abolished, and Del Vecchio believes that every type of sanction should be grounded in an appeal to justice. The outcome would not be even harsher penal regimes, but instead, "these should, in principle, rather be mitigated or abolished as far as possible, where they do not serve the only rationally legitimate end, which is the reparation of the wrong."[223]

Even if, as Del Vecchio writes, "the truth of law and right remains intact, nay, in a way it shines even more brightly, when contradicted by physical events, that is, when men ignore and transgress it," he cannot accept this quasi-Kelsenian view of the law. The fact that the crime reveals the truth of the law "does not absolve us from the duty of making every effort to ensure the practical realization of the ethical or deontological requirement which is implicit in the very idea of law and right, to ensure the triumph of right over wrong."[224] The question of justice beckons as the ideal and the *telos* of law, the creation of what is right and good.

The judge always answers the question of what is just. Hart, in his postscript, formulates this point in terms of the distinction between making law and being guided by already existing law. This goes both if the law is supposed, as in Dworkin's theory, to always supply a legal answer or if natural law works as an objective frame of legal truth. For Hart, the fact that we cannot agree, or perhaps ever know "objective moral facts," means that "a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion in accordance with his best understanding of morality and its requirements and subject to whatever constraints on this are imposed by the legal system."[225] Hart argues that it does not matter to the judge whether such moral truths are objective.

> For whatever the answer is to this philosophical question, the judge's duty will be the same: namely, to make the best moral judgement he can on any moral issues he may have to decide. It will not matter for any practical purpose whether in so deciding cases the judge is making law in accordance

221 Ibid., 215.
222 Ibid., 216.
223 Ibid., 217–218.
224 Ibid., 216.
225 Hart, *The Concept of Law*, 253.

> with morality (subject to whatever constraints are imposed by law) or alternatively is guided by his moral judgement as to what already existing law is revealed by a moral test for law.[226]

The judge must answer the question implicitly posed every time the law is applied, in every judgement or ruling: *what is just?* For the judge (or any other person evaluating the lawfulness of a certain behaviour or action for that matter), everything boils down to some sort of moral judgement. In the posthumously published draft of Hart's second part of the postscript, we find a clear formulation of this thought when Hart writes that while in a difficult case, the judge must take the established juridical tradition as well as other sources of law into account, "at the end of the line, though not at the beginning of the line, he may have to *choose* between competing considerations in the light of his conception of justice or morality or public interest."[227]

Dworkin's theory is, of course, also guided by a quest to answer the question of justness, albeit in a different sense. The idea that "law works itself pure" is a way of finding out what is right in the law, even if it is only the ideal judge Hercules that can always find the right answer.[228] Dworkin's theory is based on a moral judgement that both identifies and provides moral justification for the law.[229] But here we are not merely concerned with the general question of what specific value-commitments a legal theory must have.[230] Nor is it the

226 Ibid., 254.

227 Hart, "Policies, Principles, and Adjudication," 2. Emphasis in the original.

228 See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), 112. Dworkin's ideal judge Hercules is a hypothetical, superhumanly wise and diligent jurist who interprets the law as a coherent whole and is thereby able to answer any legal question in the correct way.

229 Hart, *The Concept of Law*, 269.

230 Dworkin essentially argues the same, since in his view "legal argument is a characteristically and pervasively moral argument" in which "[l]awyers must decide which of competing sets of principles provide the best—morally most compelling—justification of legal practice as a whole." Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy," *Oxford Journal of Legal Studies* 24, no. 1 (2004): 1–37, here 4–5. This article is discussed by MacCormick, who refers to a discussion around the lecture it is based on in which Hart remarked that he had been made "more of a natural lawyer than he wanted to be" *H.L.A. Hart*, 15. In the posthumously published draft of his response to Dworkin, Hart writes that judges "would I think be quite staggered by Dworkin's insistence that a judge, if he accepts (as I think they would agree he must) the settled practices of his legal system, must also accept some general political theory that justifies these." HLA Hart, "Policies, Principles, and Adjudication," 2. In discussing the choice between the primacy of international or municipal law, Kelsen writes that the choice must be guided by "ethical and political preferences," *General Theory of Norms*, 388; see the discussion in H. L. A. Hart, "Kelsen's Doctrine of the Unity of Law," in *Essays in Jurisprudence and Philosophy*, 312.

question of Fuller's inner morality of law, which only focuses on the internal question of adherence to certain principles of procedural fairness, etc.[231]

What is important is that the judge or person applying the rule must in some way answer the question of what is just. This becomes necessary for every legal actor in every system. MacCormick formulates Hart's position as being that law is always open to moral criticism, which is undoubtedly true. This "critical morality" as MacCormick writes, also makes it possible to critique the morality of a society.[232] "The proper attitude to law is … one which acknowledges that the existence of law depends on complex social facts and which therefore holds that all laws are always open to moral criticism. For there is no *conceptual* ground for supposing that the law which *is* and the law which *ought to be* coincide."[233]

Hart writes that what is implicit in such a critique of "the arrangements of society, including its accepted morality" is that it "must satisfy two formal conditions, one of rationality and the other of generality."[234] As we have already discussed, for Hart, rationality is based not in reasons that are considered to be valid beyond a shadow of a doubt, but in ideals and values which can be read in the written formulation of the legal rules or which the individual grants herself autonomously.[235] As MacCormick puts it, it is because law encapsulates "at least in part, a morality, that it is open to moral criticism. That it *does* always and unavoidably encapsulate some elements of positive morality is a powerful additional reason why it *must* always be subjected to the searching criticism of critical moralists."[236] So both the implicit and the explicit claims of all laws with respect to morality and justice, as well as the violence that law contains, push legal thought and legal practice in the direction of the question of justness.

231 Fuller, *The Morality of Law*, 39, 42.

232 MacCormick, *H.L.A. Hart*, 63 ff. Cf. H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982), 146.

233 Ibid., 36. See also the following quote: "one basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason. The point is to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law that actually exists." Ibid.

234 Hart, *The Concept of Law*, 183.

235 In the next section we will return to the Kantian background of Hart's argument.

236 MacCormick, *H.L.A. Hart*, 192. He continues: "Positive law is always relevant to morality both for that reason and for the special reason that the law invokes force and fear, at least in its contemporary manifestations. If allowance of the former reason goes against the letter of Hart's writings, it seems to me to belong better to their general spirit than do his express utterances on this point." It is interesting that MacCormick also formulates this in an open way, as we see in the phrase "in its contemporary manifestations," to a speculative future without such violence.

This same question is also at the heart of the Hart-Fuller debate. It is framed as a discussion on what law is, and thus as a question as to the distinction between law and morals. But it can also be understood as a debate concerning the question of justice. Since we all require justice, regardless of how we understand that term or what conclusions we draw from an argument, it must be posed as the ultimate legal question. This is also why it is significant that both Hart and Fuller refer directly to Radbruch's argument about the case of the Nazi informant whose wife informed the authorities that her husband was a political dissident. Was she in the right by following the positive law at the time or in the wrong by adhering to the unjust law? As Hart rightly points out, and Fuller accepts, every possible solution to this case (punishing her, not punishing her) could be considered unjust in one sense or another.[237] One of the central dilemmas of the case was whether retroactive sanction was a greater injustice than the injustice of not punishing her actions at all. How can justice be found in this situation of necessary unjustness? Hart's solution of using retroactive legislation is surely honest and avoids blurring the distinction between what the law is and what it ought to be.[238] It is at the same time a sort of post-facto legislation (positive norm setting) based on the insertion of a more just (or less unjust) norm into the positive law. As his biographer, Nicola Lacey, puts it: "At the foundation of Herbert's argument lay not so much an analytic as a substantive moral claim. It is, according to him, morally preferable, more honest, to look clearly at the variety of reasons bearing on an ethically problematic decision rather than to close off debate by dismissing certain considerations as irrelevant: arguing that something never was the law because it ought not to have been the law."[239]

Hart returns to this question throughout his writings, often explicitly. In a critique of the Scandinavian realist Alf Ross, who argued that natural law was based purely on intuition and therefore available as an argument to anyone regardless of what moral or position one happens to hold, Hart is explicit that justness is not something purely arbitrary:

237 Hart, "Positivism and the Separation of Law and Morals," 76–77. Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958): 630–672, here 655. Another aspect is that there is a general principle which forbids punishing those who did not voluntarily do wrong or act in a reckless or negligent way. This is not always upheld, since there are many rules which are enforced via strict liability, which does not leave room for considering whether the person accused did in fact know what they did or act negligently, for example. Such rules are constructed to simplify the sanctioning process and function as disincentives to wrongdoing in such cases where proving that someone has a guilty intent would be too difficult. But in general, justice demands that only the guilty, not the innocent are punished.

238 Hart, "Positivism and the Separation of Law and Morals," 76.

239 Lacey, *A Life of H.L.A. Hart*, 198.

> Surely it is wrong to say that the words 'just' and 'unjust' applied to a legal rule as distinct from a particular decision are 'devoid of meaning'. When we assert that a rule forbidding black men to sit in the public park is unjust we no doubt use, as our criterion of just treatment, the unstated principle that, in the distribution of rights and privileges among men, differences in colour should be neglected. In any full defence of this assertion the implicit criterion would have to be made explicit. But the dependence of concepts like justice on implicit, varying and challengeable criteria does not render them meaningless when applied to law. What is true of justice is true of all concepts into which variable standards are built. Words like 'long', 'short', 'genuine', 'false', and 'useful' exhibit the same feature.[240]

But, again, this external moral evaluation is not the only reason why morality is relevant to law, since the question pertaining to the moral and just way of applying the law is also crucial. So it is not just up to the philosopher, activist, or politician to critique the law on moral grounds, it is an unavoidable task for each person who has to apply the rule, whether they be a judge, a civil servant, or an individual enforcing a contract. This is the case not because their own moral position requires them to decide whether they want to enforce an unjust or otherwise morally problematic rule, but because the rule as such contains an implicit claim on justness.

The law always leaves room for discretion and interpretation.[241] The exercise of discretion entails introducing nonlegal factors of different sorts. Hart criticized Dworkin's view, which he called a "noble dream," which sees "law as a gapless system of entitlements "and claims that there is always one correct answer to each legal problem."[242] The flaw in Dworkin's position is that it is concerned with filling the gaps that the law inevitably contains, and with treating the problem of the law's application as if it were merely a matter of pragmatism. In patching the holes in a given legal system, the question of justness becomes most acute. If a rule does not clearly stipulate what it requires,

240 H. L. A. Hart, "Scandinavian Realism," in *Essays in Jurisprudence and Philosophy*, 163.

241 Hart, *The Concept of Law*, 124 ff. On the vagueness of rules and need for discretion, see MacCormick *H.L.A. Hart*, 157–167. Hart also discussed this issue in other texts, see "Introduction" in *Essays in Jurisprudence and Philosophy*, 6–8, which refers to the essays "Positivism and the Separation of Law and Morals," "Problems of the Philosophy of Law," "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," all published previously but included in that collection.

242 Hart, "American Jurisprudence" in *Essays in Jurisprudence and Philosophy*. See page 7 of the introduction to the same volume, as well as the important polemic against Dworkin in Hart's postscript, *The Concept of Law*, 274. Of course, this issue has been widely debated both between Dworkin and Hart as well as numerous other authors. See Ronald Dworkin, "No Right Answer?" in *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, edited by P. M. S. Hacker and Joseph Raz (Clarendon Press, 1977), 58–84, as well as *Taking Rights Seriously*, especially the Appendix.

how should this gap or lack be filled? In certain cases it can be solved by technical knowledge, or general principles that guide the interpretation and application of law in a certain direction. But it can also be about, or may be incapable of not being about, what the just application of the positive rule is. Yet this is only the *minor sense* of the justness question, while the *major sense* pertains to the issue of the justness of the rule and its application as such. Both of these aspects combined make up the actual, or what should be the actual, application of the rule, namely its just application. For Hart, there exists a fundamental principle of justness directly connected to the issue of punishment and other coercive means, namely the one put forward by Mill in his essay "On Liberty": "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."[243] While Hart does not agree that the *harm principle* is the only ground which justifies legal coercion, it is at least a fundamental principle of justness that can and should guide the judge or other actor applying a rule.[244] In any case, the harm principle touches on the fundamental problem of justness which is unavoidable in the application of a legal rule. If a principle such as the one posed by Mill is convincing for the judge, she must decide whether it is adhered to or not in her application of a legal rule. If an application of the positive law can be made which adheres to the principle, she is in the right to apply the positive law, but otherwise she is not.

What If There Is a Natural Right?

Hart's 1955 essay "Are There Any Natural Rights?" argued, as the title suggest, that *if* something like natural rights can be said to exist, then the right of each individual to equal personal freedom must be such a right. This essay was later disowned by Hart.[245] But it shows his early and, we would argue,

243 Hart, *Law, Liberty, and Morality*, 4, quoting John Stuart Mill, *On Liberty* (J. W. Parker and Son, 1859), Chapter 1. The engagement is discussed in MacCormick, *H.L.A. Hart*, 186 ff. It has been pointed out that there are significant similarities between Mill's thought and the common good as understood from a Thomistic perspective, and that a liberal regime is also a candidate for political Augustinianism; see Patrick Riordan, *Global Ethics and Global Common Goods* (Bloomsbury Academic, 2015), 176–177.

244 Hart, *Law, Liberty, and Morality*, 5. See also MacCormick, *H.L.A. Hart*, 189.

245 In the introduction to his 1983 collection of essays, he writes that "though it attracted some attention I have not included it here, since its main argument seems to me to be mistaken and my errors not sufficiently illuminating to justify re-printing now. The only part of that article which seems to me still to merit some consideration is my invocation of what has since been called 'the principle of fair play' as one ground of political obligation." Hart, *Essays in Jurisprudence and Philosophy*, 17. See on this also Steiner "Are There *Still* Any Natural Rights?" which goes into why he did not reprint the article. The article, notwithstanding its author's change of mind, has garnered a huge reception in moral and legal philosophy, ibid., 239.

sustained engagement with the fundamental question of what is just and right, regardless of the positive laws. As we have seen in our discussion of the minimal content of natural law, Hart would later focus on survival, while in this 1955 essay his focus was solely on freedom. Our claim here is that reading this early text on freedom can reveal the full extent of Hart's legal theory and its eschatological tendency.

It is, of course, possible to argue, as Hart later did, that the question of survival is the most fundamental one and that any freedom an individual can enjoy is premised on survival. But as we have already touched upon, freedom may not always be guided by survival and can often prioritize other values over mere survival. Countless people throughout history have prioritized their own freedom or the freedom of others over their own individual survival. So let us now turn to the young Hart and his account of natural right.[246] What we must note with the 1955 essay is that Hart's account here is even more minimal than the five truisms he would later put forward in *The Concept of Law*. And, more importantly, it is not at all based in the notion of survival, as neither the word nor the theme figure in it. The argument is centred around the freedom to choose or to act freely, without more constraint than necessary to respect the freedom of others. Hart briefly refers to the obvious precursor of his argument, Immanuel Kant, who wrote that "the concept of justice [or of a right] can be held to consist immediately of the possibility of the conjunction of universal reciprocal coercion with the freedom of everyone."[247]

Hart only briefly mentions "force" and survival and bodily existence are not mentioned all as moral concepts which can be grouped together.[248] To adequately support the philosophical argument that freedom is a natural right, the argument must, according to Hart, be able to begin to explain our empirical experience of different rules and legal practices. Hart presupposes that there are different kinds of rights. He distinguishes between general rights and special rights. *Special rights* are those that "arise out of special transactions between individuals or out of some special relationship in which they stand to each other" and only pertain to those individuals.[249] These can be as simple as a promise or a contract between two parties. They can also grant rights

246 It is interesting that as we have noted above it was Hart who decided on the title of Finnis's seminal work, *Natural Law and Natural Rights*. The relation, or tension, in the title between natural law and natural rights must have been on Hart's mind throughout the conception of the book in which he was continuously engaged. See Lacey, *A Life of H.L.A. Hart*, 347.

247 Immanuel Kant, *The Metaphysical Elements of Justice: Part I of The Metaphysics of Morals*, 2nd ed. (Hackett Publishing Company, 1999), 31. Hart mentions Kant's *Rechtslehre* in "Are There Any Natural Rights?" 178.

248 "The most important common characteristic of this group of moral concepts is that there is no incongruity, but a special congruity in the use of force or the threat of force to secure that what is just or fair or someone's right to have done shall in fact be done; for it is in just these circumstances that coercion of another human being is legitimate." Ibid., 178.

249 Ibid., 183.

to others. It is not only single individuals who can create rights in relation to other individuals. Hart also considers restrictions put in place throughout society, which he describes as *mutual restrictions*.[250] These are created through the joint actions of a group of people. The prime (and, Hart points out, most complex) example is political obligation. What's important here is that these obligations do not emerge through a mutual promise, as Hart claims the social contract theorists were wrong to believe.[251] Not everyone who belongs to such a group, such as a society, have promised to follow the rules by which they must abide by or to respect the rights of others in a society that requires them to do so. It is far-fetched to even argue that everyone has given their consent in every case, even if we all consent to some extent through our participation in society. But this implicit consent is not a truly free act, since we often do not have realistic alternatives. The question thus becomes on what basis does the duty towards society and the right of others to require our submission to this societal order arise? For Hart, it results from the actions of those who submit to the restrictions. He writes that "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."[252]

The right which arises through a promise, such as in a contract, can be said to exemplify a use of the freedom that each of us has. It only makes sense to be able to give or create what Hart calls *special rights*, such as the right of someone to demand the fulfilment of a promise, if we are free to give such a promise. The promise or the consent that creates that right is based in our equal freedom. But, if everyone is equally free, then it is also potentially justifiable to interfere with the freedom of someone else.[253] The only legitimation of reduction of freedom lies in the protection of the general and equal freedom of all.

General rights, in Hart's schema, are those which everyone has as a result of the fundamental natural right of freedom. They are not created through specific actions, as the *special rights* are, but they still create "moral justification for determining how another shall act, viz., that he shall not interfere."[254] Hart

250 Ibid., 185–186.

251 Ibid., 186.

252 Ibid., 185. Hart is sceptical of the utilitarian explanations of political obligation, which he claims fail to take account of mutual restrictions. A forceful critique of Hart's argument (as well as Rawls's similar "principle of fairness") is made by Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 2013), 90–95. The political aspect of John Rawls's argument is very explicit in his article "Justice as Fairness: Political not Metaphysical," *Philosophy & Public Affairs* 14, no. 3 (1985): 223–251, see 224–226. Hart and Rawls engaged in an extended discussion on the principle of fairness, see Hart "Rawls on Liberty and Its Priority," and "The Basic Liberties and Their Priority," both in *Essays in Jurisprudence and Philosophy,* and Rawls *A Theory of Justice*, 96, and "Preface for the Revised Edition," xii.

253 Hart, "Are There Any Natural Rights?" 190.

254 Ibid., 188.

gives specific examples, such as the right to say what one thinks or to worship whom one pleases.[255] These are essentially just more specifically formulated instances of the right to freedom. Since such acts do not interfere with anyone else's freedom, there is no obligation to refrain from using one's freedom in this way.

But there is more to morality than just rights. As we have seen above, Hart is sympathetic to utilitarian arguments, and he is open to considering more than just rights when defining morality.[256] Actions can be morally right even if they are not based in rights,[257] for instance, if someone breaks a promise or interferes with someone's freedom in order to save them or someone else from harm, such as when disarming an attacker or preventing a child from doing something dangerous. So the very concept of right implies freedom, for Hart. A paradox emerges because freedom is a moral right, yet at the same time we need the idea of right to formulate the idea that we are all free. There can be moral codes which do not refer to the idea of having rights, but instead simply guide us towards what morally just action is. Such moral systems contain "prescriptions" of what actions are "*good* or *bad*, *right* or *wrong*, *wise* or *foolish*, *fitting* or *unfit*," but they do not specify rights that individuals have. Therefore "those who lived by such systems could not of course be committed to the recognition of the equal right of all to be free."[258] This also means that such moral systems would not through "the bare fact that actions were recognized as ones which ought or ought not to be done, as right, wrong, good or bad" be able to show "that some specific kind of conduct fell under these categories."[259] Such moral systems would just be able to state what was right or wrong, but not be able to produce any extended argument on why that is the case. This contrasts with the argument Hart puts forward in his article, based on freedom and rights, which rests on the logical conclusion that the respect for the right to freedom of all entails certain freedoms, but it also entails the restriction of certain freedoms based on each individual's underlying right to freedom.

Hart's argument is a direct response to the question of justness: "we are in fact saying that this claim to interfere with another's freedom is justified because it is fair; and it is fair because only so will there be an equal distribution

255 Ibid., 187. Amartya Sen has argued that Hart's argument here is close to human rights, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32, no. 4 (2004): 315–356, see 326–327.

256 An interesting example of this is the much later draft (written somewhere between 1977 and 1982) with a critique of Dworkin, in which Hart polemicizes against the "Rights Thesis" that judicial decisions "should be generated not by policies but by principles securing or respecting some individual right" ("Policies, Principles, and Adjudication," 4), against which Hart writes that "it is just not the case that the Courts only generate common law decisions about rights and duties from principles describing individual rights," 6.

257 Hart, "Are There Any Natural Rights?," 176.

258 Ibid., 177.

259 Ibid.

of restrictions and so of freedom among this group of men."[260] It is the criteria of *fairness*—i.e., a just distribution of the freedom that is possible to create—that justifies placing restrictions in the form of rights and obligations to restrict the freedom of individuals. In order to protect the freedom that is both the natural right of all humans as well as the basis for creating new rights, restrictions on freedom are legitimate and justified as long as both the ensuing restrictions and freedoms are equally distributed.

In Hart's 1955 argument, as in all his later work, the moral and political philosophy he engages with is not based on obvious a priori axioms but on the attempt to explain important features of human society. This is the most realistic aspect of his analytic project. There must be some fundamental feature of human life which makes it possible to create moral obligations through promises, and, in this early text, Hart reconstructs this as an argument which upholds freedom as a natural right. But we must also note the openness and contingency of his argument, since certain features of his argument resonate with the central question we have formulated in this book. If the question is "what is just?" the answer can never be absolute or self-evident. It is instead a question that interpellates every legislator, every judge, every legal subject. "But my contention that there is this one natural right may appear unsatisfying in another respect; it is only the conditional assertion that *if* there are any moral rights then there must be this one natural right."[261] This one natural right to be free is therefore the purpose of law, since law must exist to protect what is just. But this natural right also transcends law in the sense that it is a right which does not ultimately point towards the law, but beyond it. The freedom to exercise this right cannot be reduced to a mere application of a legal competence; it is an act which surpasses the legal sphere altogether. The possibility to do something which is not only permitted, but which is also good in itself.

Here the radical tentativeness of the question of what is just shows itself: we do not know, we might never know what is just in an absolute sense. This forces us to keep the question of justness alive, open to question, to scepticism, and in a state of constant critical tension. One year after the publication of *Concept of Law*, Hart would reiterate that there is a lack of proof available to help determine issues such as the question of justness. As the conclusion of his seminal critique of the criminalization of homosexuality, he refers to "the critical principle, central to all morality, that human misery and the restriction of freedom are evils."[262] What must be legitimated is the restriction of freedom, and ultimately this must be based upon the protection of freedom. But this also points to the hope for a situation without the need for such restrictions,

260 Ibid., 191.
261 Ibid., 176.
262 Hart, *Law, Liberty, and Morality*, 82.

without the necessity for violence to curtail violence. Law and its attendant question of justness points to the end of law, to the cessation of that specific social technique of sanction and coercion that Kelsen identified as law, and a freedom exercised without violence.

Hart ultimately ends up in a position close to Radbruch's "antisocial" position, in which law ultimately motivates each individual to ask the question *is this right*?[263] The question of justness, what Hart called "critical morality," is a form of natural law centred on the individual. This natural law would pertain to what Ernst-Wolfgang Böckenförde called, as we will see in the next chapter, "the ethics of law." Böckenförde argued, not unlike Hart before him, that in a world where there is no common agreement upon what is just, natural law "cannot be postulated as already valid law, [but only] as an ethical demand to the law. As such it has an important function. It can legitimize positive law, it can be a spur to reform, and it can delegitimize it if positive law fundamentally contradicts its demands."[264] So while Hart engaged thoroughly with the question of legal validity, he argued that, in the final instance, law can have no authority over the individual human without that human conceding to the justness of the law. Each one of us evaluates the law based on our conception of what is right—for the younger Hart this was the natural right of freedom, and as we have argued, this remained at the core of his thought and his theory. But no matter what specific code or rule one adheres to, in the final instance, it is the individual assessment or evaluation of one's actions that matters. Hart's entire theory can thus be said to be a theory of morality, but it is also a legal theory that goes beyond law. While Radbruch stressed the antisocial, disruptive, and potentially even revolutionary aspect of the question of justness, both he and Hart agreed that the task of a given society is to protect the individual's opportunity to pose this question and the possibility of acting upon it. Since the only true authority of law comes from the individual decision to obey it, and therefore the law has both its basis and its end in the individual's moral evaluation.

For Hart, a legal system can be a minimal thing, where only the officials of a system are engaged from the internal point of view in interpreting what is a valid rule or not.[265] But this minimalistic theory of law should not fool us into believing that his general understanding of law was restricted to a purely descriptive account, without regard for the underlying question of justice.

263 Radbruch, *Grundzüge der Rechtsphilosophie*, 24.

264 Ernst-Wolfgang Böckenförde, "Biographical Interview with Ernst-Wolfgang Böckenförde [2011]" in *Constitutional and Political Theory*, 369–406, here 387.

265 "In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system." Hart, *The Concept of Law*, 117.

For Hart, the essence of law was never concerned with sanction. As MacCormick has pointed out, there is a tension in Hart between "his concern for justice or the firmness of his contentions that a precondition of justice as defined within his critical morality is the existence of a well working legal system" in which tolerance is crucial and coercion is minimized, and his equally strong conviction that legal systems do not "in their own essential nature tend to, realize justice or respect for human rights to liberty of thought and action or other such values."[266] Still, MacCormick argues that Hart's work proves to be important for the ideology of liberal social democracy, not a distanced and objective observer of political issues.[267] Hart wrote that "[e]xcept for a few privileged and lucky persons, the ability to shape life for oneself and lead a meaningful life is something to be constructed by positive marshalling of social and economic resources. It is not something automatically guaranteed by a structure of negative rights."[268] Here we must return to the question of survival. The freedom which Hart suggests is the ultimate natural right of all men can never be guaranteed by a society which creates only the conditions for mere survival. The millions of people who suffer under acute humanitarian distress might survive until tomorrow, but they are not free. Furthermore, the question of freedom under the existing economic system was never far from Hart's mind. His own politics were never neutral, they were driven by a deep sense of the injustices of the world. When visiting California in 1961, he found the ostentatious displays of wealth to be shocking, and when a fire broke out in the affluent Bel Air neighbourhood, where many of his colleagues at UCLA had homes, he was not exactly sympathetic. In a letter to his wife he noted that, "[f]or once disaster falls on the rich not poor" and in his diary, the atheist reflected: "A left-wing god would be nice."[269] In his diary he even wrote about the "grossness" of Los Angeles: "Everybody on a vast scale: I hated them: felt like welcoming their destruction so rich and ugly did they appear."[270] The relationship between the legal system and the ideals to be realized within it is always crucial, and Hart's legal positivism was never meant to separate morality, politics, and law. MacCormick writes:

> Legal systems can and should be geared to realizing noble ideals. A 'legal system' is not, however, itself the name of a noble ideal. (It is not, in its essence, either a nightmare or a noble dream, but human actions can make real laws tend more toward one or other pole.) Legal systems can indeed be 'managerial' or for that matter straightforwardly tyrannical. To suggest that

266 MacCormick, *H.L.A. Hart*, 194.
267 Ibid., 22.
268 Hart, "Between Utility and Rights," 207–208.
269 Lacey, *A Life of H.L.A. Hart*, 243–245.
270 Ibid., 245.

Hart commends such systems or that his philosophy makes straight the way for them is, however, a travesty.[271]

Here we might use Hart's five truisms as a way to read his later account of survival, and interpret it as yet another way of formulating or interpreting the natural right of freedom. What is survival for Hart? As we have argued above, insisting on the need for rules that guarantee survival is much more than just a way to preserve bare life: it aims to make possible the exercise of our freedoms. In an essay with the apt title, "Between Utility and Rights," Hart criticizes Robert Nozick's theory of rights, in which individual rights serve as the sole basis for morality. Hart critiques Nozick for misreading Locke's principles of life, liberty, and estate.[272] While Nozick focuses on the individual freedom and the right to non-interference from others, Hart points to what Locke also included in his formulation, namely that every person has a right to the basic necessities of bodily survival.[273]

Implicitly referring back to the 1955 discussion of positing a broader understanding of morality beyond just individual rights, Hart writes: "Why should a critic of society thus assume that there is only one form of moral wrong, namely, violation of individual rights? Why should he turn his gaze away from the consequences in terms of human happiness or misery produced by the working of a system of such rights?"[274] Hart's critique of Nozick's theory is that it does not explain how freedom is created, since freedom becomes possible only when survival, and survival beyond the level of avoiding completely perishing, is assured. As Hart ends his polemic, it is "an ancient insight that for a meaningful life not only the protection of freedom from deliberate restriction but opportunities and resources for its exercise are needed."[275] And here it is not difficult to see that Hart's argument points towards precisely what Kelsen had objected to, namely a natural law that ends up being a form of anarchism. A state of freedom for everyone amounts to the very form of natural law anarchism which Kelsen considered to be an age-old utopian fantasy. Again, the minimal natural law of Hart shows itself, without a catalogue of detailed prescriptions, to be, in fact, the most maximal project.

271 MacCormick, *H.L.A. Hart*, 194.

272 This is MacCormick's reading of Hart. Even though Hart does not mention Locke explicitly in this text specific text, the theme is life, liberty and estate—and the passages in Nozick discuss this in relation to Locke. Ibid., 21; Nozick, *Anarchy, State, and Utopia*, Chapter 2.

273 MacCormick, *H.L.A. Hart*, 21, 186. Interestingly, Hart criticises Nozick for essentially providing a legal type of moral theory, which again shows that a restriction to something purely legal is not satisfactory for Hart. "It is as if the model for Nozick's basic moral rights were a legal one. Just as there can be no legal objection to the exercise of a legal right, so in a morality as empty as Nozick's is of everything except rights, there can be no moral objection to the exercise of a moral right." Hart, "Between Utility and Rights," 205.

274 Ibid., 205.

275 Ibid., 207.

Hart's Anarchism

Let us now as a conclusion of this chapter return to the point Hart made in 1955, namely that there can be a morality which does not contain any rights. Moral codes can exist without any rights, even the right to freedom. Hart argues that this one right is the most fundamental, and even if one could argue that moral codes based upon it would be "imperfect," Hart is equally clear that "there is nothing contradictory or otherwise absurd in a code or morality consisting wholly of prescriptions or in a code which prescribed only what should be done for the realization of happiness or some ideal of personal perfection."[276] His explicit examples are Plato and Aristotle, in whose works on morality we do not find "the notion of *a* right,"[277] but which of course are still moral theories or codes containing prescriptions on how one should act. Human actions in a moral system without rights is still a question of morality, of what is right and wrong to do. It is a system in which actions that "would be evaluated or criticised as compliances with prescriptions or as *good* or *bad*, *right* or *wrong*, *wise* or *foolish*, *fitting* or *unfit*."[278] These "codes of behavior … prescribe what shall be done" and, as an example, Hart mentions the Decalogue, which states what one should do, but obviously does not confer any rights.[279]

Justice under the conditions of the world as such is restricted in the sense that it requires curtailing freedom in the name of freedom. In an important article critiquing a simplistic reading of Hart as a "whig historian" of modern Western civilization, Leslie Green argues convincingly that for Hart, law "is not a mark of civility or justice, or anything of the kind; it is just one way in which a complex society copes when the direct, transparent form of social order no longer works very well."[280] Hart is no legal chauvinist, he just remarks upon what he sees as the unavoidable need for developed legal orders in societies such as ours.

But at the same time, this insight points towards what Kelsen called theoretical anarchism, namely maximum freedom for all. The ultimate ideal is unrestricted freedom for all, but for us that is not possible, since we live with scarce resources and have limited altruism, faculties of reason, willpower, which means that we can easily hurt each other. In order to grapple with this fact of life—the human condition or, in theological terms, the fallen state of the human—after 1955 Hart turned increasingly to sophisticated thought experiments. A reasonable reading of these thought experiments might be

276 Hart, "Are There Any Natural Rights?" 176.
277 Ibid., 176, footnote 6.
278 Ibid., 177.
279 Ibid., 182.
280 Leslie Green, "The Concept of Law Revisited," *Michigan Law Review* 94, no. 6 (1996): 1687–1757, here 1700.

that they are simply fanciful constructions meant to show the absurdity of any alternative to the legal-political solution. The only realistic alternative is a Hobbesian sovereign, preferably for Hart of a social democratic sort, who protects a liberal and pluralistic society. Thus, these fanciful experiments must end up ridiculing theoretical anarchism, even if only for rational reasons. But, as we have done, these experiments can also be taken seriously, as considerations of the basic features of human life and the legal regulation it requires. In continuing with this approach, we could also read the experiments as metaphorical descriptions of legal and political arrangements, rather than their absence.

The thought experiments with carapaced land crabs are images of a situation which would not require law, but they are also a metaphor for the situation we find ourselves in. The carapace is the shield that is produced by the legal order and the sovereign state. The lack of arms or extremities with which we can hurt each other are the restrictions on violence which the legal order creates. The legally enforceable monopoly of violence is replaced by an even more perfect solution: the absolute and natural moratorium on violence. The nutritional-digestive system of the land crabs, in which food can be retained directly by each and every individual from the air, is a natural welfare system in which the most basic needs of all are met. All of this, in turn, forms the basis for the crabs' freedom, allowing them to tumble around on the face of the earth and freely pursue whatever endeavours the absolutely safe human land crabs would care to pursue. If our natural state of being had granted us these essentials, there would be no need to construct laws and states.

But what is also interesting about the thought experiment with the land crab carapace is that the invulnerable beings are invulnerable, rather than merely uninterested in or unaware of the possibility of hurting each other. Carapaces are built for protection against natural physical threats, from falling rocks or other species attacking them, but they also serve to protect the crabs from their own kin. Crabs fight each other, as do humans, which is why both clothe themselves in protective armour. This can be contrasted with the paradisal situation wherein Adam and Eve are naked. They are not protected against each other or their surroundings; instead, they are acutely vulnerable in their nudity. Only their innocence and ignorance keeps them safe. They exist in the first innocence, which inspired what Radbruch called a "second innocence" beyond law. It is not just that they would not want to hurt each other, but rather that they do not even know that they would be able to do such a thing in the first place.

Compare this again with the carapace-clad crab-men. If their invulnerability from each other affected them deeply, if it were to have anthropological effects, the natural evolutionary development from the phase of armoured skin would be towards shedding that weight, since it would be hard to see the point of carrying armour, and ultimately lead them to not even consider the possibility of hurting each other. Perhaps the carapaces would persist as a vestigial memory of the violent history, consciously or unconsciously, or they

would be transformed for a different use or social function, like a medieval wall which adorns the modern city without providing any defensive function. But what does this tell us about freedom? Could it be that freedom, absolute freedom, is an ideal that can only be understood beyond justice? We will return to these questions in the concluding chapter.

Chapter 3

Beyond the Polis

Ernst-Wolfgang Böckenförde and the Crisis of Sovereignty

In 1958, the future constitutional judge and Catholic philosopher of law, Ernst-Wolfgang Böckenförde, at that point 28 years old, wrote to Carl Schmitt that Rudolph Sohm's understanding of the law is "conceived entirely in terms of the modern, sovereign state, and has its basis in the anarchic *status naturalis*, which is overcome by law and the state."[1] The law, the young Böckenförde continued, is, according to Sohm, "the regulation of relations of will, which are understood as power relations, and must therefore necessarily emanate from a unified, ultimate authority [*Instanz*] and be coercive in character."[2] Sohm, as we have seen in the chapter on Radbruch, had famously argued in 1892 that the "essence of law is opposed to the ideal essence of the church. Just as the legal system is in harmony with the essence of the state, so it contradicts the innermost essence of the church."[3] The essence of law lies in its ultimate end and purpose. Sohm described this end in his study of the development of Christian ecclesiastical law as the formation of a nation capable of protecting its citizens through coercive means. The law safeguards security and property by establishing a community of coercion that prevents a regression into the state of nature—*status naturalis*—which, for Hobbes, was a war of all against all where there exists no freedom:

> The national community [*Volksgemeinschaft*] is a coercive community [*Zwangsgemeinschaft*]. The order of national life necessary for the preservation of the national community is the legal order [*Rechtsordnung*]. The national community is the source of law [*Rechtsquelle*]. It creates the state: the bearer and maintainer of the people's power. It generates property:

1 Ernst-Wolfgang Böckenförde in *Welch gütiges Schicksal: Ernst-Wolfgang Böckenförde/Carl Schmitt: Briefwechsel 1953–1984*, ed. Reinhard Mehring (Nomos, 2022), 178.
2 Ibid.
3 Sohm, *Kirchenrecht; Erster Band*, 2.

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increasing the power of the people through freedom. It generates secular authority and secular law [*weltliche Recht*].[4]

The law serves to secure the survival of a people and to protect private property, which in turn grounds a form of freedom that has the nation-state as its necessary foundation. This conceptualization of law, Böckenförde stated in the letter to Schmitt, was Hobbesian rather than Hegelian.[5] The singular individual has no real capacity to exist outside her community since alone, in the state of nature, she is at the whims of the powerful. Her property, and thus her life, cannot be protected from expropriation without the coercive mechanism of law. This was the primary task of the state according to the Hobbesian tradition. The state existed primarily to ensure what the intellectual historian C. B. Macpherson—writing on Thomas Hobbes and John Locke in 1962—called "possessive individualism."[6] The Hegelian vision of law was grounded in this form of life, but it sought to secure another end of law than security and property.

The idea of possessive individualism, which was rendered as *Besitzindividualismus* in German, was essential for Böckenförde's understanding of law in the time of crises which he thought we had entered with the global economic downturn between 2007 and 2009. In fact, he believed that this crisis was threatening the sovereignty of the European democratic nation-state. The argument in this chapter is that Böckenförde's vision of the law, as articulated in his famous text on secularization as the origin of the modern nation-state, originally delivered as a lecture in 1964 and published in 1967, implies a harsh critique of possesssive individualism and the form of life it engenders.[7] By distinguishing the Hobbesian tradition, which Sohm represented, from his own Hegelian idea of the possibility of an ethical state—a state centred around the free search for the good life rather than just property and security—Böckenförde can help us envision the human animal as something more than a political and even social animal. To be a human is to be more than a member of a state or another worldly community. Our species of rational animals can transcend the state of enmity and war that Hobbes saw as

4 Sohm, *Kirchenrecht: Zweiter Band*, 56.

5 Böckenförde, *Welch gütiges Schicksal*, 178–179.

6 Macpherson, *The Political Theory of Possessive Individualism*. Böckenförde refers to Macpherson in, for example, Ernst-Wolfgang Böckenförde, *Gesetz und gesetzgebende Gewalt: Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus* (Duncker & Humblot, 2014), 361. Böckenförde traces, not unlike Macpherson, how a legal tradition that begins with Locke and continues at least until the so-called German *Vernunftrechtlern* is centred around the defence of property.

7 Böckenförde wrote already in 1957 that the foundation of European democracy rested "not on service to a common task, but on a desire to possess (*Habenwollen*) and the dismantling of traditional authorities." Ernst-Wolfgang Böckenförde, "The Ethos of Modern Democracy and the Church" in *Religion, Law, and Democracy*, 61–77, here 69.

our state of nature without being trapped in a *Zwangsgemeinschaft* that easily devolves into either anarchy or tyranny. Instead, we can strive toward a form of life grounded in freedom rather than coercion. *The actualization of freedom* should be the end and purpose of law, but this necessitates that we surpass the possessive individualism that the modern nation-state rests upon, and it made Böckenförde turn to the Christian tradition in order to find a new understanding of human life. According to him, the theological notion of the person could be differentiated both from the Aristotelian and Thomistic idea of the human as a political animal and the Hobbesian understanding of the human as an animal that primarily wants to survive and secure its property.

A Social and Political Animal

In the essay "Vom Wandel des Menschenbildes im Recht" Böckenförde emphasized that every idea of law rests on an idea of what it means to be a human. The ancient and medieval understanding of law implied a view of the human "as *animal sociale et politicum*, and not abstractly … but very concretely as part of communities."[8] It was William of Moerbeke who, in his translation of Aristotle's *Politics* into Latin, coined the term *animal sociale et politicum*, and it was used by Thomas Aquinas and other scholastics to describe the human as a political and social animal living in groups.[9] For Böckenförde, this vision of the human implied that the rights of the individuals were bound to concrete roles in specific communities such as estates and guilds. The serf, the knight, and the king were all social and political animals and their rights were determined by their specific position and role in society. Politics was seen as something natural. It arose from the spontaneous sociability of humanity and designated the fact that humans are embedded in a network of interpersonal and God-given relations. Politics is our state of nature. Böckenförde sympathized with this idea, but he thought that it no longer matched the realities of the modern world.

The feudal and premodern understanding of the human underwent drastic changes in the long process of secularization, ultimately culminating in the French Revolution. This also implied a mutation of the concept and, hence, end and purpose of law.[10] Böckenförde wrote that the revolutionary unfolding of 1789 gave rights to the "autonomous individual" rather than to a member of a series of communities, but he also emphasized that the revolution paved the way for the modern idea of the human as a citizen of

8 Ernst Wolfgang Böckenförde, "Vom Wandel des Menschenbildes im Recht" in *Wissenschaft, Politik, Verfassungsgericht* (Suhrkamp Verlag, 2019), 13–52, here 17.

9 Juhana Toivanen, *The Political Animal in Medieval Philosophy* (Brill, 2020), 24–25.

10 This is something Böckenförde already emphasized in a discussion on natural law from 1958. See Ernst-Wolfgang Böckenförde, "Naturrecht auf dem Hintergrund des Heute" in *Archiv für Rechts- und Sozialphilosophie*, 4:1 (1958), 95–102, here 100.

a sovereign nation-state.[11] This transformation laid the ground both for the democratic and secular order he defended and the era of nationalism and totalitarianism that he saw as an antithesis to the good life. Today, Böckenförde argued, "a new image is emerging" which posits that the "value and utility [*Verwandbarkeit*] of people is linked to their usefulness [*Nützchlichkeit*], their contribution to productivity, profitability and competitiveness."[12] The individual is primarily seen as "human capital" and reduced to a function of the globalized economy.[13]

The vision of the human as living and variable capital determines contemporary law and reshapes politics since it has become natural to view the human as, first and foremost, a worker and a consumer rather than a person or even a citizen. Böckenförde insisted, however, that the law was not only a reflection of this emergent worldview of the human as a kind of variable capital. Laws and politics have a certain autonomy from the forces that determine them and can be powerful ways to challenge the hegemonic understanding of human life by remoulding society. He wrote, for example, apropos in-vitro fertilization, that if "it is undertaken to fulfil the wish for a genetically healthy child," then the "embryo created in vitro is not acknowledged and wanted as such, as a subject and 'purpose unto itself', but is dependent on specific characteristics and qualities it does or does not possess."[14] To illegalize such attempts to choose a "healthy" embryo, the Catholic Social Democrat continued, would not "clash with the human dignity and right to self-determination of the parents and especially not that of the woman" since there are many legal ways to become pregnant or adopt a child.[15] What is "blocked" is "the selection of embryos, which are ultimately human beings *in nuce*, and should not become a kind of disposable commodity in the hands of the parents or third parties."[16] The legal apparatus could therefore be used to defend a specific understanding of the human animal, namely, the vision of the human as a purpose unto itself.

Böckenförde was a staunch liberal pluralist, but he still believed that the state had the right to intervene in the civil sphere by establishing the conditions for a good life: a life that is a purpose unto itself. The point of law is, however, not to define the content of that life—that would be to regress to

11 Böckenförde, "Vom Wandel des Menschenbildes im Recht," 27.

12 Ibid., 43.

13 Ibid.

14 Böckenförde, "Human Dignity as a Normative Principle: Fundamental Rights in the Bioethics Debate" in *Religion, Law, and Democracy*, 319–338, here 351. Böckenförde joined the German Social Democratic Party in 1967 at the age of 37. For a detailed discussion about Böckenförde's understanding of socialism as something else than a *Weltanschaaung*, namely, a way to defend a Catholic democratic left-wing politics, see Mark Edward Ruff, "Building Bridges between Catholicism and Socialism: Ernst-Wolfgang Böckenförde and the Social Democratic Party of Germany" in *Contemporary European History* 29:2 (2020), 155–170.

15 Böckenförde, "Human Dignity," 351.

16 Ibid.

an authoritarian vision of society and politics. It is to provide an institutional framework for people to freely develop their own understanding of what the good life entails. This is, according to Böckenförde, what it implies to defend the human animal as a purpose in itself and hence as a subject who is free to choose how she wants to live her life.

Despite fearing the increasing power of the global market and its atomisation of society, Böckenförde never defended a communitarian understanding of politics and did not believe that one could return to an understanding of the human as an *animal sociale et politicum* in the medieval sense. For Böckenförde—who sat at the bench of the Federal Constitutional Court which decided that abortion in the first twelve weeks of pregnancy was "unlawful but exempt from punishment"—a restrictive vision on the use of reproductive technologies did not entail a support of the state as a community of shared values.[17] He saw it as a protection of the human individual. In 1978, he insisted against the sociologist Helmut Schelsky, who lamented the lack of "an unquestioned political faith on the part of the citizens," that "an unquestioned political faith as the foundation of the state would amount to nothing less than a state-administered and state-fostered political ideology."[18] The most vital purpose of the modern democratic legal order was the protection of the human individual as an autonomous being—"a purpose unto himself"—rather than as a member of a specific community or estate.[19] To secure that end, a critique of the anthropological form of the modern territorial state—and hence the state form that Böckenförde confessed his loyalty to—was necessary.

The possessive individualism, which Sohm had sanctioned with his idea of the state as a *Zwangsgemeinschaft*, must be questioned. Not because Böckenförde eschewed the ideas of nationalism or patriotism *per se*; on the contrary, he affirmed them, but since he believed that they had to be subordinated to the understanding of the human as a purpose unto itself. The Hobbesian vision of the state was not adequate to this task. The law, from this perspective, was primarily a mechanism of protection, and humans were still, first and foremost, seen as social and political animals that needed a coercive state in order to survive. Böckenförde did not deny the significant differences between the Aristotelian and Hobbesian traditions, both of which he admired and drew inspiration from. Yet each, in its own way, conceived of the human being primarily as an animal situated within a political community. No lawyer or legal scholar can deny this, but this vision of human life was not enough for Böckenförde, since for him the law had to instruct

17 Ernst-Wolfgang Böckenförde, "Abolition of Section 218 of the Criminal Code? Reflections on the Current Debate about the Prohibition of Abortion in German Criminal Law [1971]" in *Religion, Law, and Democracy*, 318–338.

18 Böckenförde, "The State as an Ethical State," 97.

19 Böckenförde, "Human Dignity," 351.

us to behave like subjects who could affirm each other as persons. This was the real possibility of the modern period, but only if law and politics resisted the reduction of human life to something that is valuable since it can be employed by the state or capital.

Böckenförde was, however, not a critic of authority or even of coercion as such. In his reflections on "a theology of modern secular law," he stressed that the law must necessarily maintain "the threat of coercion" as one of its foundations, and in 1958 he had underlined that the jurist differed from the theologian or philosopher by not first and foremost conceptualizing the human in relation to an ideal.[20] The jurist stands on "historical ground and does not deal with the ideal, but with the empirical—that is, theologically speaking, with the sinful."[21] The legal scholar must acknowledge the brutal reality of force and coercion, and Böckenförde concurred with Hermann Heller, the German Jewish legal scholar, that the state was a "*Wirkungs- und Entscheidungseinheit*"—a unity of actions and decisions—that had the right to act with authority.[22] The state uses force to establish unity and peace in a specific territory. But Böckenförde stressed at the same time that the state could not enforce its rule without threatening to lose its liberal—which for him basically meant pluralistic—character. He argued, for example, against the "Radicals Decree [*Radikalenerlass*]," the decree signed by Willy Brandt in 1972 which banned communists from becoming public servants, and wrote that a "use of liberty that remains within the boundaries of the law cannot be declared illegitimate because it adheres to values that are rejected. That undercuts and hollows out the structure of the *Rechtsstaat*."[23] Thus, just as for Hart and Radbruch, "a truly liberal state could only prosecute citizens for violations of the law, but not for their political inclinations and sympathies."[24] This is why Böckenförde distinguished the modern notion of the autonomous person, that he related to the Christian idea of the human as someone who primarily belongs to the heavenly, rather than earthly, city from the classical Aristotelian and Thomistic conception of the human being as a social and political animal—*animal sociale et politicum*. The modern individual was no longer fully defined by the ideas, values, or even the relationships that shaped a specific community. She was, in a sense, irreducible to the world that had produced her, by virtue of being a person: a being who certainly cannot live without friends, family, and a political community, but who nonetheless remains

20 Böckenförde, "Reflections on a Theology of Modern Secular Law," 272.

21 Böckenförde, "Naturrecht auf dem Hintergrund des Heute," 101.

22 See the discussion on Böckenförde and Heller in Mirjam Künkler and Tine Stein, "State, Law and Constitution: Ernst-Wolfgang Böckenförde's Political and Legal Thought in Context" in *Constitutional and Political Theory*, 1–37, here 10–18.

23 Böckenförde, "Biographical Interview," 376.

24 Künkler and Stein, "State, Law and Constitution," 30.

a unique individual that transcends every relation that defines her. She is an autonomous person—a singular individual—a free subject.

The liberal ideals of autonomy and freedom, which Böckenförde differentiated from the possessive individualism that had, in a sense, given rise to them, were for him not merely values since they could have different content for different groups and individuals. Rather, they were ends essential to a genuine pluralism given by what Böckenförde took to be the inherent dignity of the human individual. In the interest of securing these ends—autonomy and freedom—Böckenförde came to argue for a form of natural law rooted in the natural dignity of the human person. Not as "already valid law," that would imply a return to the premodern conception of the *animal sociale et politicum*, but "as an ethical demand to the law" which rested on the autonomy of the human individual.[25] He saw this as part of the Roman Catholic Church's official teaching that had developed out of the Second Vatican Council, which affirmed the dignity of the human person and accepted the secular state.

This broke with the medieval conception of the political animal since the origin of politics was now found in the human as an individual person, rather than as a social animal enmeshed in a web of binding relations that determine who we are. It was the individuality of human, singular life that gave every person—no matter culture, ethnicity, or nation—the natural dignity to exist as a free subject. This natural dignity and right is therefore in one sense without content, it is given by the sheer subjectivity of human existence, and Judith Hahn has rightly argued that "[t]he paradox of natural law—being a normative idea that understands itself as universal while being incapable of producing any norms of general acceptance—is present throughout Böckenförde's contribution on natural law."[26] This paradox gives natural law the limiting role which Kelsen argued that it logically implies, since it can render positive law null and void when it becomes authoritarian or tyrannical. Even if, according to Böckenförde, no absolute consensus exists regarding what we define as natural, one can still recognize that humans, as free subjects, should have the natural right to pursue a good life and, moreover, to define for themselves what that life entails.[27] This is why Böckenförde's understanding of natural law also transcends the idea of the state as what he, with G. W. F. Hegel, called a "*Not- und Verstandesstaat*"—the state of need and understanding—whose primary purpose is to secure the citizen's survival.[28]

25 Böckenförde, "Biographical Interview," 387.

26 Judith Hahn, "Ernst-Wolfgang Böckenförde's Approach to Natural Law as Normative Legal Ethics" in *Oxford Journal of Law and Religion* 7 (2018), 1–23, here 23.

27 For an early critique of the basis of natural law: Böckenförde, "Naturrecht auf dem Hintergrund des Heute," 95–102.

28 See paragraph 183 in G. W. F. Hegel, *Grundlinien der Philosophie des Rechts* (Felix Meiner Verlag, 2013), 182 or G. W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge

The modern state should become an "ethical state" and make freedom its substantive orientation. In doing so, it can envision the human being as more than merely a political or a social animal. It bears repeating that Böckenförde defended the territorial state as the foundation for such a legal order—even though he came to question the capacity of the modern nation-state to maintain its political autonomy in the face of global market forces. He also did not believe that humans can live without authority or coercion. Yet, despite these reservations, he held that the human being's true home lies in the freedom to shape a life of one's own. The state, then, ought to be more than a Hobbesian community of coercion that merely ensures survival, or a premodern web of binding obligations. Rather, it should serve as the foundation for a politics that enables us to become persons capable of treating others as purposes unto themselves. It is not merely a set of rules or prohibitions, but an institutional framework that supports the cultivation of autonomy and mutual recognition. This reveals why Böckenförde was neither a modern liberal nor a classical conservative. He was a Catholic in the modern personalist tradition who stressed that, in the end, "[t]he issue is not to defend or condemn modern democracy, but to see it for what it is, and then do what is right" and that entailed treating the other as a purpose in itself even if this implied a clash with the democratic majority.[29] For also within the modern democratic and secular society, "one should not idealize the political realities, and the Christian least of all. A democratic stance also presupposes multilateralism, and in the final analysis partnership is only possible if the Other, too, wishes to be a partner."[30] There are situations in which one must defend the right to choose one's own path to the good life—even against the state itself. This is exactly why a modern yet theological reinterpretation of the doctrine of natural law does not need to assume that the human being is a political animal in the strict Aristotelian sense. Rather, it emphasizes the individual's right to contest positive and statutory law when it conflicts with the vision of the human as a person who can choose her own path.

Possessive Individualism

Böckenförde wrote to Schmitt that Sohm's "concept of law is conceived entirely in terms of this [Hobbesian] state, necessarily presupposing it as the enactor and executor of the law, and since the law has always existed, the state is also a general, supra-historical phenomenon."[31] Böckenförde, on the

University Press, 1991), 221, where *Not- und Verstandsstaat* is translated as "the state of necessity and understanding."

29 Böckenförde, "The Ethos of Modern Democracy and the Church," 76.

30 Ibid.

31 Böckenförde, *Welch gütiges Schicksal*, 178–179.

contrary, insisted that the Austrian historian Otto Brunner had showed that the modern, territorial state was not an ahistorical entity but "slowly developed out of the quite unstate-like power structures and relationships of the Middle Ages."[32] Sohm's supra-historical understanding of the state could be seen as a rationalization of the "German concept of the nation," which Böckenförde believed emerged "at the beginning of the nineteenth century, in the era of Napoleonic rule and the wars of liberation. The emerging consciousness of the Germans was born precisely in the conflict with Napoleonic-French rule."[33] One way to legitimize the modern nation-state was to define it as something supra-historical, grounded in the seemingly anthropological claim that without law and politics humanity would revert to a state of anarchy and barbarism. Although this claim might be true, the underlying understanding of the origin of the state is not a neutral description of human reality. It is a political theology. The Hobbesian vision of the natural condition of humankind as one of permanent war is a secularization of the biblical account of Adam and Eve's fall, culminating in Cain's murder of his brother Abel—a narrative that clearly illustrates how the human being, left to his own devices, becomes a profoundly dangerous and even asocial creature. Beneath Sohm's seemingly liberal interpretation of Christianity—as a religion with no right to use legal force to secure submission—Böckenförde discerned a Hobbesian anthropology rooted in the logic of possessive individualism that resurrected the vision of the human as someone who primarily belongs to state, nation, and society.

Böckenförde believed, like Sohm, that Christianity directed humanity to something more significant than the world of law and politics. Yet, in contrast to the Lutheran legal scholar, he also hoped that this vision of a world outside the *polis*—that is, outside the state and the nation—could help shape the secular state into a community that transcended its nature as a *Zwangsgemeinschaft*. Böckenförde held on to this hope not because he believed in what his friend and collaborator, the Catholic conservative philosopher Robert Spaemann, scorned as the "utopia of freedom from domination."[34] The modern state is built on "enacted norms, commandments, and decisions, which demand compliance irrespective of whether the individual citizen or a particular group consents or approves of them."[35] Böckenförde was opposed to any form of anarchism and clarified that "as an entity of peace" the modern liberal,

32 Ernst-Wolfgang Böckenförde, "The Rise of the State as a Process of Secularization," 152. Böckenförde refers to the seminal study by Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria* (University of Pennsylvania, 2015).

33 Ernst-Wolfgang Böckenförde, "Citizenship and the Concept of Nationality" in *Religion, Law, and Democracy*, 318–324, here 320.

34 Robert Spaemann, "Die Utopie der Herrschaftsfreiheit (1972)" in *Zur Kritik der politischen Utopie* (Klett Cotta, 1977), 104–126.

35 Böckenförde, "The State as an Ethical State," 91.

territorial state, "is neither created by nor lives from a domination-free discourse [*herrschaftsfreier Diskurs*]; instead, it creates the very preconditions that make such a discourse possible."[36] The state must do so by establishing a political consensus, which rests on shared ideas and values just as conservative thinkers underline, but the consensus for a modern state in a pluralistic society could not be found in any *Gesinnungseinheit*—"unitary disposition"—and hence in a particular ideology or religion.[37]

A politics that sought to implement a *Gesinnungseinheit* would mean a return to the confessional state or, even worse, lay the basis for the totalitarian experiments which during the twentieth century had sought to absolutize particular national and cultural values. The popular consensus, and what Böckenförde apropos Heller had called "relative homogeneity" of the modern state, needed to reflect rather than repress the increasing heterogeneity of the modern world.[38] Possessive individualism had been one such implicit consensus in the modern period since it oriented people with different worldviews around the logic of security and property. However, the economic crises during the Weimar Republic revealed that fascism could quickly emerge in a state that nurtured this kind of economic subjectivity, and the economic crisis in 2008 even motivated Böckenförde to question the stability and sovereignty of the European nation-states. Already in 1973, as an answer to a question from the conservative Hegelian philosopher Joachim Ritter after a lecture on the difference between state and society, Böckenförde argued that the modern state had not been able to transcend its function as a *Not- und Verstandesstaat*.[39] The modern German welfare state was based on the *Besitzindividualismus* of the Hobbesian tradition and was not an ethical state in the Hegelian sense:

36 Ibid.

37 Ibid., 96–97.

38 See Heller, "Politische Demokratie und Soziale Homogenität". For a discussion on Hermann Heller's notion of "social homogeneity," see Alexander Somek, "The European Model of Transnational Democracy: A Tribute to Ernst-Wolfgang Böckenförde" in *German Law Journal* 19:2 (2018): 435–460. See also the discussion on Böckenförde and Heller in Künkler and Stein, "State, Law and Constitution," 12–13, which states: "Carl Schmitt spoke of substantive homogeneity, by which he meant a putatively natural relationship between the people that preceded the state, and in some ways made it possible. Hermann Heller, by contrast, in his main work on the topic, 'Political Democracy and Social Homogeneity', spoke of social homogeneity as a necessary basis for the state, resulting in a common consciousness of 'we the people,' a shared sentiment of cohesion, which evolves in substance depending on how people specify it. This homogeneity can be the facilitator of an ethic of constitutional rules. Böckenförde, finally, like much post-war constitutional scholarship speaks of relative homogeneity, which like Heller's is constructed and malleable. Böckenförde underlines that homogeneity must have a socio-economic and political dimension. Socio-economically, the differences in wealth and opportunity among the citizenry must not be too stark. Politically, a certain shared understanding of democratic procedures and the common good must exist."

39 Ernst-Wolfgang Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit* (Westdeutscher Verlag, 1973), 61–62.

> The problem we face is precisely the unresolved problem of the Hegelian state as an ethical state [*sittlicher Staat*]. We have the state of need and understanding [*Not- und Verstandesstaat*] as the self-organization of civil society. But little more. Here it is necessary first of all to make it generally clear that this is not enough, and then to direct the discussion to take up this problem. In doing so, one must of course see that the concrete solution that Hegel found is no longer realizable today. The conditions for it no longer exist.[40]

A new vision of the state's evolution towards the ethical state was needed and Böckenförde suggested that it could be found in an open discussion of "the quality of life" and, hence, in the strengthening and support of forms of life that crave more than survival and security.[41] Ritter bemoaned "[t]he hypertrophied use of the concept of society, as if 'society' were everything and the state nothing" and stressed that "the urgency of environmental protection" shows the need to differentiate the state from society.[42] He wondered who would "have the power to implement measures that are not defined by profit but instead cost money? Who is in a position not only to tell the industry what to do but also to enforce it?"[43] These important questions, the conservative philosopher continued, "bring the role of the state, or the union of states, into play. The problem that is being posed here and which we are increasingly faced with becomes evident when we see how the discussion of important environmental questions repeatedly ends in resignation."[44] The reason for the incapacity of the modern nation-state to deal with questions concerning the climate, and similar supra-national problems, "might be because the goals and ideas of the common good [*Gemeinwohl*] that come into play can no longer be satisfied by the progress [*Fortschritt*] that sustains society and its expansion."[45] By progress, Ritter primarily meant the development of capitalism that had expanded enormously since the industrial revolution began in Germany around 1830, and, by society, he was referring to the form of human subjectivity that this evolution generates and which has become dependent on the global flows of the market. The progress of capitalism weakens the political sovereignty of the state.

Böckenförde endorsed Ritter's critique of the concept of progress and drew on the conservative sociologist Hans Freyer's essay *Theorie der Gegenwärtigen Zeitalters* to conceptualize capitalism as an economy of "secondary systems"

40 Ibid.
41 Ibid., 53.
42 Ibid., 61.
43 Ibid.
44 Ibid.
45 Ibid.

that remoulds humanity's metabolic relation to the world that it inhabits.[46] Capitalism revolutionizes "existing orders" by binding them to "a few instrumentally rational foundations [*Zweckrationalen setzungen*], from which they are constructed and receive their rationality."[47] Accumulation, and production for the sake of accumulation and production, are two such "rational foundations" that structure both the primary and the secondary sectors of the economy. The primary sectors of the economy, such as farming, logging, fishing, and mining, are increasingly mobilized by the secondary systems, best represented by the industrialized capitalist firm. The secondary systems "do not involve people as whole persons, but only with the driving forces and functions … that are required by the foundations [*Setzungen*] and their realization: what people otherwise are or are supposed to be is left out."[48] The last clause is more powerful in German—*was die Menschen sonst sind oder sein sollen bleibt aussen vor*—and explains what capitalism entails for both the conservative sociologist and the Catholic constitutional court judge: the transformation of the human person into a function for the secondary systems.

The political superstructure of the increasingly global network of capitalist secondary systems is *the state of need and understanding*—the political formation that consolidated possessive individualism—and, as we have seen, Böckenförde stressed the limits of this political formation. He had warned of the consequences of basing the concept of freedom on the notion of property as early as 1972: "If the freedom of occupation [*Erwerbsfreiheit*] is exercised on the basis of legal equality and supported by the guarantee of acquired property [*erworben Eigentums*], then this will necessarily lead to different results and 'yields' due to the natural and inherent inequality of people."[49] Someone from a rich background will have more practical opportunities than someone from a poor family, even if they have the same formal legal rights. Thus, ""social inequality arises as a consequence of the principles of (civil) society [*der (bürgerlichen) Gesellschaft*] itself, and its orientation towards freedom."[50] This is the dialectic which, as Ritter emphasized, could destabilize the state, and according to Böckenförde this "social inequality is intensified when it becomes entrenched over generations by means of the guarantee of property and the right to inheritance, to such an extent that it turns to social *unfreedom* [*soziale Unfreiheit*] and into an increasing erosion of the legal freedom [*rechtlichen Freiheit*]."[51] Böckenförde's analysis can be said to

46 See, for example, Böckenförde, "Naturrecht auf dem Hintergrund des Heute," 100.

47 Böckenförde, "Woran der Kapitalismus krankt" in *Wissenschaft, Politik, Verfassungsgericht*, 64–71, here 65. See also Hans Freyer, *Theorie des gegenwärtigen Zeitalter* (Deutsche Verlags-Anstalt, 1956), 79–80.

48 Böckenförde, "Woran der Kapitalismus krankt," 65.

49 Böckenförde, *Die verfassungstheoretische Unterscheidung*, 37–38.

50 Ibid., 38.

51 Ibid.

have been confirmed empirically, and gives an explanation of why the modern state has not been able to prevent the rise of an "inheritocracy" which undermines meritocracy and thereby delegitimates capitalism as a system that promises that one can succeed in life through hard work.[52] The German legal scholar even claimed that the modern state was tending to become subsumed by the interests of the most powerful secondary systems, and this makes it increasingly difficult for the nation-states to domesticate the progress of capital and industry.

Böckenförde's lecture on the relation between state and society was published the same year as the 1973 oil crisis, which Henry Kissinger said "altered irrevocably the world" by moving the world economy into a neoliberal direction.[53] The crisis signified not least the shift towards a deregulated market and a global political order which strengthened the "possessive market society" that the previously mentioned Macpherson claimed Hobbes and Locke sought to legitimize.[54] Macpherson had argued in 1962 that the "modern liberal-democratic nations" of "the twentieth century" rested on the same foundations that Locke and Hobbes had responded to: the capitalist market. The development of liberal democracies in the modern sense, not least based on universal suffrage for all adult citizens, revealed however that even if "possessive individualism" was intact as a social force it no longer provided "the necessary conditions for deducing a valid theory of political obligation."[55] The question was "whether the actual relations of a possessive market society can be abandoned or transcended, without abandoning liberal political institutions."[56] The totalitarian character of the Soviet Union and its sister countries, paired with what Macpherson considered to be a crisis of legitimacy for Western capitalism weakened popular sovereignty. It made it unclear where one could find the basis for "a fundamental equality which had originally been provided by the supposed inevitable subordination of everyone to the market" in a world where politics now was determined by "the uncertain cohesion of the democratic franchise."[57] The problem was whether one could establish a new image of the human animal in a world where possessive individualism,

52 Eliza Filby, *Inheritocracy: It's Time to Talk about the Bank of Mum and Dad* (Biteback Publishing 2024). See also the report "Billonaire Ambitions Report 2023" by UBS: Global Wealth Management, which shows that as "increasing numbers of the early tycoons age, so responsibility is beginning to pass to their heirs, fostering potential future multigenerational billionaire families": https://www.ubs.com/global/en/wealthmanagement/family-office-uhnw/reports/billionaire-ambitions-client-report-2023.html.

53 Henry A. Kissinger, *Years of Upheaval* (Little, Brown and Company, 1982), 854.

54 For an insightful discussion of the relationship between neoliberal governance and the oil shocks of 1973 and 1979, see Cambridge professor Martin Daunton's 2023 lecture, "The Oil Shock and Neoliberalism": https://www.gresham.ac.uk/watch-now/oil-shock.

55 Macpherson, *The Political Theory of Possessive Individualism*, 275.

56 Ibid., 271–272.

57 Ibid., 274, 276.

more than two hundred years after Locke's death, still very accurately depicted what the human has become: "The individual in a possessive market society *is* human in his capacity as proprietor of his own person; his humanity does depend on his freedom from any but self-interested contractual relations with others; his society does consist of a series of market relations."[58] The obligations of the human can, from such a perspective, be clarified by her relation to the market and the state rather than to the "supposed purposes of Nature or the will of God."[59] But what happens when these obligations can no longer produce stability and the alternatives to capitalism have proven infectious and irrational?

The emergence of possessive individualism can be said to be the basis for Böckenförde's theory of the rise of the secular nation-state, which he developed only a few years after Macpherson's book was published. Böckenförde noted in his article on secularization as the origin of the modern state that a "pacified political order bestowing calm and security on nations and individuals could be restored only through the political sphere elevating itself above the demands of the feuding religious parties and emancipating itself from them."[60] This was a long, and in a sense still unfinished, process, but "the French Revolution … brought to completion the political state that had emerged from the confessional civil wars and had been prefigured in Hobbes."[61] Böckenförde wrote that the "1789 'Declaration of Rights of Man and of the Citizen'—what Lorenz von Stein called the 'first basic law of the new society'—speaks of the state as a *corps social*. The state is an organization of political power to protect the natural, prior rights and liberties of the individual."[62] Böckenförde had stressed in 1957 that "the equality that modern democracy demands and realizes is political, but not social (even though political equality creates all the preconditions for social equality)."[63] But as Macpherson argued in 1962 the evolution of human rights had made it possible for "[m]en" to "no longer" see "themselves as fundamentally equal in an inevitable subjection to the determination of the market."[64] They began to see themselves as individuals who no longer are wholly defined by their economic position within the framework of the "possessive market society," as they were now recognized as bearers of innate human rights. In this sense, the logic of possessive individualism transcended its original boundaries by enabling the human subject to assert herself as a person. However, this emergent possibility

58 Ibid., 275.
59 Ibid., 272.
60 Böckenförde, "The Rise of the State as a Process of Secularization," 159.
61 Ibid., 163.
62 Ibid.
63 Böckenförde, "The Ethos of Modern Democracy and the Church," 65.
64 Macpherson, *The Political Theory of Possessive Individualism*, 273, 275.

was, according to Macpherson, inseparable from a broader crisis facing the nation-state.

Böckenförde noted a similar crisis of the ideas and values that held the modern state together when he described how the process which generated the modern secular state was plunged into a crisis that has only deepened since the publication of his essay.[65] It was evident already in the 1960s that "the nation has lost its formative power, and not only in many European countries. In the new states of Asia and Africa, too, its formative power will be temporary."[66] This diagnosis of the crisis of the sovereignty of the nation-state—and even more of popular sovereignty—strengthens Macpherson's 1962 analysis of the contemporary dilemmas facing democracy. Böckenförde even wrote in 1967 that the "individualism of human rights, brought to full fruition, liberates people not only from religion, but also, in a further stage, from the (ethnic-folkish [*volkhaft*]) nation as a homogeneity-creating force."[67] He knew this could threaten the cohesion of the state but affirmed this evolution as "a chance of liberty" since it could force the state to treat humans as humans, that is as ends in themselves, and move beyond both possessive individualism and the medieval idea of the human as a social and political animal.[68]

In 1998, Böckenförde warned that "the justification of all social and political order solely on the basis of individual human rights, which is deeply rooted in the thinking of our day, has a tendency to dismantle or dissolve the binding force of traditional pre-rational commonalities expressed in the concepts 'people' and 'nation.'"[69] It is the modern pluralistic nation which creates this heterogeneity, and it can do so without being culturally or ethnically diverse, since the individual has been so thoroughly extracted from the world of what Freyer described as primary systems that the human being can no longer be seen as a primarily political or even juridical animal. She is often reduced to mere labour, a function of the secondary systems, and that creates increased social stratification and therefore cultural differences. However, the human is also said to have a personal dignity that transcends her role as a member of a specific state or even as a citizen with specific legal rights.[70] This is the conflict that determines modernity, and it would be naïve not to stress that it is rooted

65 Böckenförde, "The Rise of the State as a Process of Secularization," 166.

66 Ibid.

67 Ibid.

68 Ibid., 167.

69 Ernst-Wolfgang Böckenförde, "The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europanization, and Individualization" in *Constitutional and Political Theory: Selected Writings*, 325–342, here 335.

70 Böckenförde emphasized with a modicum of conservative melancholy in 1998 that the "claim to freedom and emancipation of human rights does not stop when it comes to these commonalities. Instead, it confronts them permanently with the question of legitimacy and reduces them to something factual, merely positive without obligatoriness. The notion of looking upon nation, people, or fatherland as something secularly sacred, which, if necessary, can

in class divisions and, hence, in the development of the possessive market society and the world of secondary systems.

Böckenförde agreed with Macpherson that even if the assumptions of possessive individualism are increasingly deprived of political and moral legitimacy, they are still "factually accurate for our possessive market societies."[71] This entails that it is not only the liberal secularized state which "*is sustained by conditions it cannot itself guarantee*" as Böckenförde famously wrote in 1967. Capitalism itself is sustained by conditions that it cannot itself guarantee, and this dilemma cannot be separated from Böckenförde's insistence that increased "social *unfreedom*" erodes the basis for the modern, liberal state.[72] With Böckenförde we can therefore interpret the evolution of capitalism after the Second World War as a crisis for both the political and the popular sovereignty of the state—which he regarded as essential for restraining capitalism and defending democracy—and as a historical opening towards a form of freedom that transcended the *Not- und Verstandstaat* he criticized. If he was right that the evolution of human rights not only liberates people "from religion, but also, in a further stage, from the (ethnic-folkish [*volkhaft*]) nation as a homogeneity-creating force" then this entails that the crisis of capitalism can generate the conditions for a political community that accepts the human as a person rather than as a member of a specific culture, nation, or race.

The State of Nature

The consolidation of the possessive market society was so total that Böckenförde, in 1998, quoted the *Communist Manifesto*, which insisted that "all nations, on pain of extinction, [have] to adopt the bourgeois mode of production" and commented: "By now the nation-state no longer has sovereignty over currency, capital allocations, business locations, and over national economies as such. Should this persist and, as is to be expected, extend also to the battle against unemployment, the experience of powerlessness will spread among the citizens, and affect their image of the state."[73] He warned that we were entering a severe crisis for the legitimacy of the modern territorial state that could soon become so drastic that the "basic relationship between protection and obedience, upon which loyalty to the state and patriotism have been built, runs the risk of losing its function."[74] These words were repeated in an

require putting one's life at risk, is no longer comprehensible." Böckenförde, "The Future of Political Autonomy," 335.

71 Macpherson, *The Political Theory of Possessive Individualism*, 275.

72 Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit*, 38.

73 Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin Books, 2002), 224, and Böckenförde, "The Future of Political Autonomy," 336.

74 Ibid., 335.

even harsher tone in his assessment of the 2008 American subprime mortgage crisis: “In view of global economic interdependence, the power of the nation-state is no longer sufficient; it can be repeatedly undermined by global economic forces.”[75] Something beyond the existing nation-state was necessary to restrain these powers and create a legal and political framework with the power and sovereignty to reshape capitalism in its core.[76] A “world state” was not feasible as a “state” since “statehood” can be organized only “for and in limited spaces that cooperate and stand in relation to each other.”[77] But according to two of Böckenförde’s most influential intellectual sources, Carl Schmitt and Ernst Forsthoff, the nation-state had begun to reach its historical zenith—and Böckenförde seemed to concur. He underlined that the state was increasingly losing its capacity for sovereign decision-making, and thus its function as a genuinely democratic institution. He argued that a union of states was necessary to rein in the forces of the market and wrote: “[T]he call [for such a political project] is in the first place to Europe. But will it have the will and the strength to do so?”[78] The answer, it seemed, was no.

In 1997, Böckenförde had urged his fellow Europeans “to bid farewell to the concept of the market-economic integration as the essential vehicle of Europe’s unification, and—returning to the beginnings—to replace it with a political concept.”[79] However, this might be utopian since the enlargement of the European Union had been “reduced to the perspective of economic growth” and this “economy trap” was destabilizing the whole project of European integration and threatened to push it towards “greater separation and into a dead end.”[80] What was needed was a political and social union of the European nation-states which, on their own, had no power to challenge the globalized world of secondary systems. Böckenförde admitted that it “is not clear where the pressure, the force to take action should come from, in order to bring about a ‘push’ analogous to what the establishment of the Coal and Steel Community was in its day.”[81] Without such a political will that ultimately rested on drives and wishes of the people, the whole European edifice would be revealed as solely concerned with financial prudence and economic gain.[82] This threatened to revive the communitarianism and populism that he eschewed and which would have no capacity to domesticate the market.

75 Böckenförde, “Woran der Kapitalismus krankt,” 71.
76 Ibid., 68.
77 Ibid., 71.
78 Ibid., 71.
79 Ernst-Wolfgang Böckenförde, “Which Path Is Europe Taking?” in *Constitutional and Political Theory: Selected Writings*, 343–367, here 363.
80 Ibid.
81 Ibid., 366.
82 Ibid.

Böckenförde's analysis of the state of the European Union can be said to confirm Macpherson's bleak diagnosis of the state of the world from the beginning of the 1960s. The Canadian historian had argued that "[t]wentieth-century technology" has "driven us again to a Hobbesian insecurity, at a new level."[83] He did not specify what he meant, but perhaps he was referring to the risk of nuclear war. His book was published in 1962, one year after the US government put Jupiter nuclear missiles in Italy and Turkey, which provoked the Cuban Missile Crisis . The book ended by stating that the "question now is whether, in the new setting, Hobbes can again be amended, this time more clearly than he was by Locke."[84] Locke had written, in an almost anarchistic way in *Second Treatise of Government* from 1689, that "[t]he Natural Liberty of Man is to be free from any superior Power on Earth, and not to be under the Will or legislative Authority of Man, but to have only the Law of Nature for his Rule."[85] The state of nature was "a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature."[86] It implied a realm of "*Equality*, wherein all the Power and Jurisdiction is Reciprocal, no one having more than another."[87] The Lockean state of nature is entirely different from the Hobbesian state of war of all against all.[88] It is a world of amiability that transforms into a state when social complexity increases to such a degree that coordination between people becomes necessary.

Böckenförde underlined that Locke agreed with Hobbes that "life in the state is preceded by a state of nature without a state, in which individuals live side by side without any connection or organization. However, this state of nature is not determined by the will to power or by the 'bellum omnium contra omnes,' as it is in Hobbes."[89] Böckenförde wrote that this almost Edenic existence "is ordered by rational insight with regard to the euadaemonistic purpose of human life. Natural law is the law that applies between the isolated individuals in the state of nature. … Among the rules of this natural law

83 Macpherson, *The Political Theory of Possessive Individualism*, 277.

84 Ibid.

85 Locke, *Second Treatise*, 11.

86 Ibid., 4.

87 Ibid.

88 Locke writes apropos the Hobbesian state of war and his own vision of the state of nature: "And here we have the plain Difference between the state of Nature, and the state of War, which however some Men have confounded, are as far distant, as a state of Peace, good Will, mutual Assistance and Preservation; and a state of Enmity, Malice, Violence and mutual Destruction are one from another." Ibid, 11. For a discussion on Hobbes's understanding of the state of nature as a state of war, see Gregory S. Kavka, "Hobbes's War of All against All" in *Ethics: An International Journal for Social, Political, and Legal Philosophy* 93:2, 291–310. Cf. Hobbes, *Leviathan*, 89.

89 Böckenförde, *Gesetz und gesetzgebende Gewalt*, 22.

are, for example, the right to life, liberty, and property."[90] These rights were characteristically summed up by Locke "under the collective term *property*."[91] Although Locke disagreed with Hobbes regarding the specific nature of the state of nature—which, for both thinkers, served less as a historical account of a prehistoric condition and more as a reflection on the anthropological foundations of politics—he ultimately concurred with Hobbes on a fundamental point: that the individual is primarily defined by his relationship to property and cannot survive without it. This is for both thinkers a transhistorical truth that unites all human beings—they must labour in order to live, and the role of law is to regulate the products of this labour in a world that needs instruction and coordination. In doing so, the state ensures that the reproduction and survival of a society is constituted through the exchange of goods among natural producers.

Böckenförde emphasized that Hobbes is particularly instructive for tracking the dialectic between secularization and possessive individualism in the modern period since he justified "the state as a sovereign decision-making entity that guarantees external peace and security. His starting point is simply and solely human need—in other words, the preservation and protection of the elementary good things of life as they pertain to outward existence."[92] The state is secularized by being reduced to a sovereign decision-making authority which safeguards "the conditions in which civic life may be preserved, and enable[s] citizens to satisfy their individual living requirements."[93] These living requirements are inseparable from what Locke designated with the term "property": they form the basis of possessive individualism which for both Locke and Hobbes can be identified with human nature as such.

Hobbes underlined explicitly that the "Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them."[94] *Fear of death*, *desire for commodious living* (or what Locke called property), and *hope that we can obtain the latter with our industry* constitute the anthropological basis of the territorial and sovereign state that has the right to intervene in political and religious conflicts in order to protect public order. The world of possessive individualism was, therefore, born together with the secularized territorial state as a sovereign decision-making entity, which we have seen that Böckenförde understood had entered a crisis due to what he described as "turbo-capitalism."[95] Böckenförde was ultimately asking whether it was possible to create a supranational framework—one with enough legal and political authority—to rein in

90 Ibid.
91 Ibid.
92 Böckenförde, "The Rise of the State as a Process of Secularization," 162.
93 Ibid.
94 Hobbes, *Leviathan*, 90.
95 Böckenförde, "Woran der Kapitalismus krankt," 64.

the global market, which was eroding the democratic sovereignty of modern nation-states. This raised a more fundamental issue: if possessive individualism and the world of secondary systems emerged alongside liberal democratic states, how could those states inspire their citizens to strive for something beyond fear, comfort, and productivity—without becoming authoritarian or powerless? Communist regimes have never provided an alternative. They have either collapsed completely or, like China, embraced and strengthened the world of possessive individualism by becoming a global industrial powerhouse. The only apparent way forward was to rethink the "state of nature" and envision a new way of life—one rooted in freedom, not just survival or security. Such a transformation would require a new kind of political internationalism, one capable of confronting the global market that now defines our existence. Without this, the hope that we can re-create a world of homogenous and shared values will be revived, and this will most likely clash with the idea of the human as a person with an invaluable dignity.

The Unregulated Heart

Böckenförde would undoubtedly agree with Hobbes that our drive towards peace is determined by "Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them."[96] The territorial state is a sovereign guarantee of life, liberty, and property in a world of war and enmity. This gives politics and law a clear set of ends: security, property, and survival. Hobbes, Macpherson emphasized, "observed that the same men who held this new concept of the unconditional individual right to property used the old order of ranks merely to subserve their new purposes."[97] Quoting Hobbes—"King, they thought, was but a title of the highest honour which gentleman, knight, baron, earl, duke, were but steps to ascend to, with the help of riches"—Macpherson wrote that the English Civil War between 1642 and 1651 became "an attempt to destroy the old constitution and replace it with one more favourable to the new market interests."[98] The "new strength of market morality and of market-made wealth" was the common denominator in Hobbes's pessimistic and Locke's optimistic political anthropologies that paved the way for the secular world of industrial capitalism.

Secularization, industrialization, and marketization laid the basis for the dialectic between globalization and individualization which Böckenförde insisted was leading "to a multitude of emancipations and to ever-expanding possibilities and opportunities. As a counterpart to this there arises within people the need for some kind of security and orientation, so they will not be tossed

96 Hobbes, *Leviathan*, 90.
97 Macpherson, *The Political Theory of Possessive Individualism*, 65.
98 Ibid.

about like drift sand on the field of possibilities."[99] He described an increasingly desperate "search for new solid ground to stand on. What is at stake is the defence against 'groundlessness,' some kind of rootedness on the basis of which the many possibilities can be meaningfully assessed and a decision made."[100] This necessary quest for order and stability can, however, undermine the relative homogeneity of the nation-state, which, for Böckenförde, primarily implied a political homogeneity and not a homogeneity of a shared set of beliefs or opinions. This was especially the case in the period of deindustrialization, deregulation of the market, and precarization of labour conditions that Böckenförde addressed from the 1990s and onwards. He warned that in such an increasingly unruly period, one would see a wide range of desperate attempts to absolutize something necessarily relative and subjective: values. The question was whether the state had the capacity to weaken this evolution and protect the individual from what Böckenförde in 1975 called "societal forces."[101]

In 1990, Böckenförde argued in a Schmittian vein that the concept of value arose "as a consequence of the dissolution of the classic philosophical concept of nature and the end of metaphysics."[102] It is produced together with the eclipse of the human as a political and social animal in the premodern sense. The term "value" denotes nothing objective or absolute according to Böckenförde (and here he clearly followed the arguments on value that Weber and Radbruch had defended) and indicates a subjectivization of ethics and politics. By definition, values lack objectivity by the fact of their being determined by a subject's relation to the world—the subjective evaluation of an objective fact.

In line with this, Böckenförde—echoing Radbruch—emphasized that values are grounded in the evaluative acts and decisions of individuals. These personal values must be situated within broader, shared evaluative frameworks that shape a community's collective worldview and define politics. The collective core values held by political and religious groups, Böckenförde argued, cannot fully be understood in terms of being right or wrong, true or false, or through rational argumentation, since the normalization of value-based modes of thinking suggests that pluralism has become hegemonic even on an epistemological level: "The only thing that is possible is discussion of the repercussions in order to bring the consequences of the different conceptions of values to light, and if possible also to illuminate actual errors."[103]

99 Böckenförde, "The Future of Political Autonomy," 339.

100 Ibid.

101 See Ernst-Wolfgang Böckenförde, "Protection of Liberty against Societal Power: Outline of a Problem," *Constitutional and Political Theory: Selected Writings*, 290–299.

102 Ernst-Wolfgang Böckenförde, "Critique of the Value-based Grounding of Law," *Constitutional and Political Theory: Selected Writings*, 217–234, here 218.

103 Ibid., 229.

Philosophers and jurists should therefore aim to transcend the subjective perspective of values in favour of a more objective and, to an extent, neutral standard which can elucidate the factual consequences of different political and juridical positions. This by no means reduces every political or ethical commitment to a subjective evaluation (or for that matter a neutral objectivity), but Böckenförde insisted that the "value-based grounding of law" is "in the final analysis … irrational" since it "leads to the recognition that there are several possible normative grounds of the law" and, consequently, to "a juridico-philosophical relativism. Since law cannot be dispensed with because of this relativism, this leads to a decisionistic justification of positive law for the sake of (legal) certainty."[104] Tellingly and rightly, Böckenförde related this decisionism not to his conservative mentor Schmitt, but to the socialist liberal Radbruch, who as we have seen, found a perspective beyond the order of values in religion. Böckenförde quoted a passage from the 1932 version of Radbruch's *Rechtsphilosophie* which emphasized that a decision must be made even if there is no consensus:

> If no one is able to determine what is just, someone must specify what is legal. And if all established law is to live up to the task of putting an end to the conflict of clashing conceptions of the law through an authoritative dictum, the fixing of the law must belong to one will, which is also capable of enforcing itself against any opposing view of the law. He who is capable of enforcing law proves thereby that he is called to establish law.[105]

Law rests on force, power, and will according to Radbruch, and Böckenförde accepted this. The one who has the capacity to enforce rules establishes laws. But as we saw in the chapter on the Weimar Minister, these laws need legitimation. Laws which do not convince but only command cannot, in the end, be enforced as laws since a law, per definition, is something that must produce consent on what one ought to do. Without the perennial discussion—which for Radbruch was to last until the Last Judgement—over the meaning of the law, the law would not be law: it would merely be an irrational force. At the same time, the law is grounded on the force of the decision and without such coercive power, no legal system can be established or persevere and thus survive. Thus, according to Böckenförde, Radbruch was right to insist that even if no one can determine once and for all what is just—not least because we evaluate justice in different ways—we still need to define what is legal through the force of the decision.

This is the conflict inherent in law, and it is the force of the decision which indicates that a return to values offers no resolution for a society which

104 Ibid., 229–230.

105 Quoted in ibid., 230. See also Radbruch, *Legal Philosophy*, 117, in a different translation.

struggles to determine what is just. Schmitt emphasized this in 1938, going so far as to argue that Hobbes's theory of sovereignty had to be corrected. Even if Hobbes legitimized the intervention of the state in matters of religious dispute so that the struggle of values woud not to threaten the public order, the English philosopher still believed that the sphere of private conscience should be exempt from the regulation of law: "Although Hobbes defended the natural unity of spiritual and secular power, he opened the door for a contrast to emerge because of religious reservation regarding private belief and thus paved the way for new, more dangerous kinds and forms of indirect powers."[106] For Schmitt, this necessitated a politics for cultural, political, and even racial *homogeneity* against the potential indirect powers that can arise from the private citizen's unregulated heart. Private beliefs can always become public, and in that respect they nurture "indirect powers," which threaten the integrity of the state. The private belief can become a public outcry against the force of the sovereign decision.

The proliferation of values and value-based thinking indicates a lack of political and legal homogeneity also according to Böckenförde, but the answer to this heterogeneity must come from a system of law that does *not* need to base itself on values. Böckenförde tellingly turned to Schmitt's theory of indirect powers to *defend* a state that secures the right to conscience and, hence, also makes different forms of dissidence legal.[107] The state should seek to establish peaceful cohabitation between individuals and groups without regressing to Schmitt's utopia of homogeneity. The end of modern and secular law, from Böckenförde's perspective, is, however, not exactly to secure the plurality of values. It is to protect the invaluable personhood of the singular human being without doing away with a neutral ruling body that enforces public order and protects the individual from the societal forces that threaten to usurp the objective basis of the law.[108] For, as the theologian Ida Simonsson has written, it "is no coincidence that some things are called invaluable. Those things are too important to be subjected to evaluation."[109] This is certainly true for the human subject, since being a person means that the human is an end in itself. This is why Böckenförde stressed that the modern state should not be defined by a community of shared values. It should function as a protector of the individual and the world she belongs to, recognizing both as irreplaceable and priceless, and, by doing so, Böckenförde hoped that the law could protect the invaluable nature of the human person without regressing to a politics of

106 Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Greenwood Press, 1996), 83.

107 Ibid.

108 Böckenförde, "Protection of Liberty against Societal Power," 290.

109 Simonsson, *The Order of Value*, 179.

shared values. The state and its law must protect the domain of the unregulated heart.

Practically this meant that Böckenförde came close to Radbruch's insistence on the "antisocial function of law": what Schmitt famously came to describe in the 1960s as the tyranny of values is the tyranny of the social in a world where society has become almost identical with economic progress. Böckenförde argued in 1975 that the "protection of individual and social liberty [in Western Germany] against threats from the exercise of power by state organs is fundamentally secured, institutionally and procedurally, by the basic guarantees of the constitution."[110] But, he continued, the growth of civil society implies that "societal power constellations and power structures arise from the divergence of property-acquisition and expansion of power on the one side, loss of power and impotence on the other side."[111] Unlike Schmitt, Böckenförde did not in any sense question the right to private belief and hence freedom of thought and conscience, but he agreed with Schmitt that these rights can give the "indirect forces" of market and society power over both the state and the individual. This is another antinomy of modern law.

Böckenförde's attack on the societal and indirect forces focused on the way in which the market invaded the civil sphere and even threatened to transform law into the facilitation of mere commodious living. By doing so, it tended to transform everything seemingly invaluable into something that can be bought and sold, and this makes us "fail to see other realities behind the veil of value," to once again quote Simonsson.[112] This is not an exaggeration, for Böckenförde underlined in the same manner that the "formal law equal for all, which is part of the very framework of modern society, has the inherent tendency to render those strong by nature or property even stronger, and those weaker by nature or because of a lack of property even weaker."[113] The liberal "[f]reedom as universal and fundamentally realizable by all evaporates, becomes increasingly an empty form. Social inequality turns into social *unfreedom*."[114] The possessive individualism that Locke and Hobbes had legitimized thus becomes a threat for all those "without societal power or special protection" since the right to commodious living does not guarantee the means to achieve it.[115]

The Tyranny of Values

If the state only secures negative rights—such as the rights to life, security, and property—it will not be able to shield its citizens from the tyranny of

110 Böckenförde, "Protection of Liberty against Societal Power," 290.
111 Ibid, 291.
112 Ida Simonsson, *The Order of Value*, 179.
113 Böckenförde, "Protection of Liberty against Societal Power," 291.
114 Ibid., 292. Emphasis in the original.
115 Ibid.

values. Samuel Garrett Zeitlin has argued that Schmitt's critique of values was part of a strategic effort to repurpose liberal ideals—such as tolerance and freedom, which he had previously ridiculed—to protect his own and other Nazi collaborators' careers after the fall of the Third Reich.[116] Tellingly, Schmitt traced the rise of "values" not to capitalism itself, but to the emergence of the individual as someone entitled to make independent moral judgements, giving rise to the unregulated heart: "The subjective freedom of evaluation leads to an eternal struggle of values and world views, a war against all, an eternal *bellum omnium contra omnes*, in comparison to which the old *bellum omnium contra omnes* and even the murderous state of nature in Thomas Hobbes's philosophy of the state are true idylls."[117] Identifying the welfare state, with its "organized mass provision of necessities," with the tyranny of values, Schmitt argued that this supposed tyranny was the necessary product of the "numerous heterogeneous groups" that transform the "public sphere into a testing ground for value-laden demonstrations."[118] He exemplified these "group interests" with "Christian churches, socialist trade unions, and associations of farmers, doctors, victims, injured parties and displaced persons, families with many children" and scorned the right of these indirect powers to demand that "a quota can be calculated for the distribution of the national product."[119] Schmitt's argument oscillated between two strategies. On the one hand, a liberal affirmation of what he in his essay "Die Wendung zum totalen Staat" from 1932 had described as the neutral state, tasked with securing the negative rights of property, life, and security. And on the other, a fatalistic insistence that the heterogeneity of human life itself undermines public order.[120]

The state of Wilhelmine Germany, which Radbruch described as an authoritarian state (*Obrigkeitsstaat*), was such a "neutral state" which secured the security, rights, and liberty of the citizens but also ruled over the civil sphere so that the different groups within it could not posit their own particular evaluations as law. The neutral state, Schmitt wrote, had the power "to confront the other social forces independently and thereby determine the grouping of itself, so that all the numerous differences within the 'state-free' society—confessional, cultural, economic antagonisms—were relativized by it."[121] The rise of popular mass movements undermined the so-called neutrality of the state and paved the way for the Weimar Republic, where social movements could reshape the state as such. This led Schmitt to defend what he and Ernst

116 Samuel Garrett Zeitlin, "Indirection and the Rhetoric of Tyranny: Carl Schmitt's *The Tyranny of Values*, 1960–1967" in *Modern Intellectual History* 18:2 (2021): 427–450.

117 Schmitt, *Die Tyrannei der Werte*, 39.

118 Ibid., 12.

119 Ibid., 12.

120 Carl Schmitt, "Die Wendung zum totalen Staat," in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles: 1923–1939* (Hanseatischen Verlagsanstalt, 1940), 147–157.

121 Ibid., 146.

Forsthoff called a "total state"—one with the authority to control the civil sphere and subsume the increasing heterogeneity of the social sphere.[122]

The "total state" emerged through what Schmitt, borrowing a term from Ernst Jünger, called "total mobilization"—a process by which the expanding societal sphere was brought under state control, not only through political movements and organizations loyal to the regime, but also through the suppression and criminalization of opposition.[123] Everything and everyone should be mobilized as part of the state. Schmitt argued that this had first been attempted in Fascist Italy and the Soviet Union, and we saw in the chapter on Radbruch that Schmitt a few years before the Wall Street Crash in 1929, wrote that "democracy requires … first homogeneity and second—if the need arises—elimination or eradication of heterogeneity."[124] This has to be the aim for the total state and Schmitt's meditation on the tyranny of values after the Second World War ought to be read in relation to this earlier defence of political homogeneity and his fear that private belief can threaten the public order.

Schmitt's essay on the tyranny of values was published in a *Festschrift* from 1967 dedicated to Forsthoff on the occasion of his 65th birthday. It was printed alongside Böckenförde's essay on how the process of secularization gave birth to the modern, territorial state.[125] In the latter text, Böckenförde emphasized that Forsthoff in *Der Staat der Industriegesellschaft* speaks "only of the 'memory of the state'" and wrote that Forsthoff "leaves no doubt that he considers the European state as it emerged out of the overcoming of the confessional civil wars to be 'truly dead.'"[126] Schmitt, Böckenförde continued, had claimed in his 1963 foreword to the third and final edition of *The Concept of the Political* that the "era of statehood [*Staatlichkeit*] is now over. There is nothing more to be said about this."[127] During the 1930s both Forsthoff and Schmitt had hoped that the total state would reverse this development—a goal fundamentally opposed to Böckenförde's quasi-Radbruchian vision of democracy. For Böckenförde, democracy is an order that arises from the divisions within society, which must find political expression, for instance through distinct political parties. The social whole, in his view, can never form a fully homogeneous unity, not least because of persistent economic differences.

122 Ernst Forsthoff, *Der Totale Staat* (Hanseatische Verlagsanstalt 1933).

123 Ibid., 152.

124 Schmitt, *The Crisis of Parliamentary Democracy*, 9.

125 Ernst-Wolfgang Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation," *Säkularisation und Utopie: Ernst Forsthoff zum 65. Geburtstag*, ed. Sergius Buve (Kohlhammer, 1967), 75–94, and Schmitt, "Die Tyrannei der Werte," 37–62 in the same volume.

126 Böckenförde, "The State as an Ethical State," 87, note 2. See also Ernst Forsthoff, *Der Staat der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland* (C. H. Beck, 1971).

127 Quoted in ibid.

Instead, it must assert itself as what can be called a heterogeneous unanimity. To achieve such relative homogeneity, the legal system must find a basis for public order beyond societal values, in order to maintain neutrality in the face of growing pluralism. The modern democracies had, with the emergence of the idea of human rights, found this basis in the vision of the human being as a free subject with the right to choose her life's path. In this sense, Böckenförde shared with Schmitt the belief in a neutral state capable of governing society. However, for Böckenförde, the essential task of the modern democratic state was to ensure that the individual could live as an autonomous person, free from domination by both economic forces and societal pressures, and in peace with other persons who might choose different forms of life.

In a 1970 interview Böckenförde presented an argument about the right of freedom of conscience in Article 4 of the Basic Law for the Federal Republic of Germany. Böckenförde said that the modern state is based "on the idea of the autonomy of the person and the concept of the freedom of thought and judgement inherent in man, as it has been developed in the thinking of European rationalism since the 17th century and then particularly in the philosophy of Kant."[128] In sharp contrast to Schmitt's attack on private belief in 1938, Böckenförde clarified that freedom of conscience "means not only freedom of belief—vis-à-vis the *jus reformandi* of the territorial lord—but also freedom from belief and, beyond that, in general, the freedom of the person to act and behave according to his own law, as given by conscience."[129] The individual has the right to disagree with the state and the societal forces which populate the civil sphere and this right must be protected. The "freedom of conscience is a principle of the modern state, especially of the constitutional state, and justifies its existence. The state that, in this sense, fulfils the claim to be an *imperium rationis*—which should certainly not be confused with an empire of realized values—will have the inner strength to grant tolerance even where it is unable to recognize a right."[130] The *raison d'etre* of the modern, liberal democratic state as such a rational authority consists in nurturing the growth of the private sphere of belief into a civil sphere where different forms of life are possible.

Political parties, religious organizations, newspapers, firms and enterprises, and today social media platforms are part and parcel of actually existing democracies. Democracy lives through the tension between the government and the people and cannot exist without these indirect powers. Böckenförde

128 Ernst-Wolfgang Böckenförde, "Mitbericht von Professor Dr. Ernst-Wolfgang Böckenförde: Leitsätze des Mitberichterstatters," *Das Grundrecht der Gewissensfreiheit: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Bern am 2. und 3. Oktober 1969*, ed. Richard Bäumlin and Ernst-Wolfgang Böckenförde (Walter de Gruyter & Co., 1970), 33–81, here 41.

129 Böckenförde, "Mitbericht," 41.

130 Ibid., 81.

admitted that the tension they create risks pushing this equilibrium to a breaking point, or weaken the state's capacity to represent the diverging interests of a necessarily heterogeneous people. In both cases, the foundations of democracy are eroded, and in the worst case, the democratic order tends toward oligarchy or tyranny. This is why the state must establish itself as a neutral yet sovereign power in relation to the proliferation of values implied by society's indirect powers. Böckenförde stressed this in his discussion on constitutionally protected freedom of conscience, where he argued that the state must be a value-free order due to "the fundamental irrationality of values and the lack of a rationally recognizable and debateable system of preferences for a value system."[131] The modern democratic state cannot be built on the premise of values without losing its liberal character: it should seek to treat the individual as an end in itself, regardless of how that individual views society. But, as we have seen, it is the same liberal logic which is part of facilitating the indirect powers that can undermine the sovereignty of the state as an institutional force capable of establishing political unity in a specific territory. To survive, the liberal, democratic state must simultaneously shield itself from the proliferation of the values that it engenders, in order to protect its citizens as well as itself from the societal forces that it rests upon.

However, Böckenförde also argued that the strength and openness of the state cannot be separated from the political organization of civil society, as a state cannot govern without the cooperation of its people. In this sense one can argue that every state is sustained by conditions it cannot establish and guarantee on its own. The territorial nation-state is, in a sense, a reflection of the character of its population—whether repressed, powerful, courageous, and so on. This explains why Böckenförde emphasized the need for "organized counter-power" within civil society to balance the "societal forces" of the market and, indeed, the state itself. Without strong popular movements, the state would be subsumed by the logic of the secondary systems and struggle to implement a politics of "constant relativization of societal inequality," which he saw as essential to preserving the state's political autonomy vis-à-vis the world of secondary systems.[132] However, this did not amount to a politics of total mobilization since the point of the modern state was not to regulate the hearts of individuals or establish ideological homogeneity, but to defend the right of each individual to freely choose their path in life and organise politically. Böckenförde's anti-Schmittian affirmation of the right of conscience was explicitly tied to the question of the right to political organization, since "conscience cannot be understood as pure inwardness, as an isolated world of values in itself."[133] It "stands inextricably in social communication, forming

131 Ibid., 58.
132 Böckenförde, "Protection of Liberty against Societal Power," 294, 297.
133 Böckenförde, "Mitbericht," 68.

and being formed by it in its convictions and judgments."[134] Thus, conscience is an intrinsic part of the pluralistic order of associations that Böckenförde hoped would generate counter-organizations capable of challenging the possessive individualism shaping both state and society. But, as we have seen, he also believed that the civil sphere generates the tyranny of values since it still is the domain for the human as a possessive individual. This is the paradox of modern democracy.

The State Which Needs No Belief

From the above, we can deduce that a key difference between the excommunicated Catholic conservative Carl Schmitt and the Catholic liberal socialist Ernst-Wolfgang Böckenförde lies in the latter's emphasis on political and economic equality as the only rational means to curb the unchecked proliferation of values without descending into tyranny. Böckenförde argued that economic justice could foster a relative homogeneity in society without relying on the "unitary disposition" defended by another conservative in Forsthoff and Schmitt's circle, Helmut Schelsky, whom we mentioned earlier.[135] It was Schelsky who, in the 1930s, had prompted Schmitt to criticize Hobbes for defending a sphere for private belief, and Böckenförde understood that Schelsky's search for a common *Gesinnungseinheit* after 1945 clashed with his own vision of the state as a mechanism that protects the invaluable dignity of the human person.[136]

Against Schelsky's search for a unity of shared values, or even a state that one can believe in, in his article "Ein Staat, an den niemand glaubt," Böckenförde argued that citizens should never be forced to believe in the state.[137] The citizen must be able to trust the state, but she should not need to believe in it. The end and purpose of the modern democratic state, even in its form as a *Not- und Verstandsstaat*, was not to establish a community based in values and requiring belief, but rather to guarantee the individual the right to believe in something much more significant than public order or, for that matter, to reject belief as such. The state was a means to an end, not an end in itself, and it was certainly not a deity that necessitated faith. This meant that the modern European democratic state should accept and even secure the heterogeneous and multicultural character of the late capitalist Western nations precisely because "religion, as Karl Marx recognized so early, is consigned, from the

134 Ibid., 81.

135 Böckenförde, "The State as an Ethical State," 96.

136 Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 11. Schmitt refers to Schelsky's article "Die Totalitat des Staates bei Hobbes" in *Archiv für Rechts- und Sozialphilosophie* XXXI (1937/38), 176–201.

137 Helmut Schelsky, "Ein Staat, an den niemand glaubt" in *Deutsche Zeitung: Christ und Welt* 53:23 (1977), 3.

perspective of the state, to the social sphere. It ceases to determine the spirit of the state, which thus can no longer be a Christian or Muslim state, or one shaped in obligatory fashion by any religion."[138] And this, Böckenförde argued, was also a liberation of religion from its self-secularization as an instrument that first and foremost produces political stability.

Religions, Böckenförde argued, can legitimately "exert and acquire influence upon the state, in the direction of shaping and ordering human coexistence. Political advocacy for goals and demands derived from religious motivations is thus by no means ruled out."[139] Political theology was therefore not only possible, but also legitimate. Still, the state as such should not be a value-based community: it had to be neutral since its purpose is to guarantee the proliferation of values which at the same time needs a clear limit to avoid becoming tyrannical. It should be stressed that neither Schmitt nor Forsthoff believed in the possibility of returning to a bygone era and, in his book on Forsthoff, Florian Meinel has emphasized a fundamentally liberal quality in the legal scholar's work. In Meinel's reading of Forsthoff, "the constitutional state and with it the principle of the lawfulness of administrative action (which stipulates the primacy and pre-eminence of the law) were, to a certain extent, created for the purpose of limiting encroachment on freedom and property by referring these issues to a formalized procedure."[140] For Forsthoff, the "subjective right to own property and the forms of restriction placed upon it formed the paradigm of administrative law under the constitutional state."[141] With the development of a fully industrialized society, which required railways, schooling for future workers, and a myriad of political and social regulations on the life of the masses, the needs of society took precedence over the state's authority. The industrial society had, according to Forsthoff, "taken over the function of guaranteeing order from the state: it itself was creating provisions for a social structure that served its purposes. The state, on the other hand, came to embody a mere function for this society which still needed it for specific purposes, but which was no longer dependent on the state as a whole."[142] Böckenförde noted a similar evolution and wrote that today, in the global age of capitalism, men and women are seen "as human capital, they must be cheap, flexible, constantly up to date and recyclable; they are not considered for what they are as persons."[143] Through what he explicitly

138 Ernst-Wolfgang Böckenförde, "The Secularized State: Its Character, Justification, and Problems in the Twenty-First Century" in *Religion, Law, and Democracy*, 220–237, here 221.

139 Ibid., 222.

140 Florian Meinel, *Der Jurist in der industriellen Gesellschaft: Ernst Forsthoff und seine Zeit* (Akademie Verlag, 2012), 196.

141 Ibid.

142 Ibid., 220.

143 Böckenförde, "Vom Wandel des Menschenbilden im Rechts," 43.

called "a total mobilization," the individual is "encouraged to be flexible, to engage in lifelong learning and voluntary self-optimization."[144] This explains why Böckenförde believed that the tyranny of values depicted by Schmitt and Forsthoff necessitated a theory of capitalism. Values are related both to the "the socio-economic sphere of society" and "the mental–communicative sphere. Society derives its fundamental make-up in this area from the fundamental rights of freedom of opinion, freedom of the press and of information, combined with the guarantee of property."[145] It is paradoxically these liberal rights that legalize and legitimize a situation in which those without "societal power" can be ruled by the economic, social, and political forces that govern our societies. What one, somewhat provocatively, can call the classical liberalism of Forsthoff and Schmitt was, from Böckenförde's perspective, not in any sense a protection from the tyranny of value.[146] It was its origin.

Böckenförde wrote explicitly of the "particular importance that the possibilities of legal protection provided by the legal system are equally effective for all, especially for the weaker members of society vis-à-vis the bearers of societal power."[147] He hoped that the modern welfare state, which emerged after the Second World War, could reshape industrial society rather than becoming merely enslaved by it. Still, he admitted that the only way to secure the state as an instrument against the order of value was to enact such a thorough redistribution of economic and political power that we would be forced to make a distinction between the liberty of possessive individualism and what he called *real freedom*: "If one gives free reign to the inequality of outcomes (arising from liberty) in order to let freedom develop, the liberty that is left to its own arbitrariness turns into unfreedom—for others and in the end for everyone."[148] Thus it "is precisely the inequality of outcomes which, once it has exceed a certain level, casts into question freedom itself (and of course the equality of opportunity)."[149] This is why the tyranny of value cannot be abstracted from the banalities of capital and class.

Böckenförde said this explicitly in 1998 when he described how the precarization of the European labour market was pushing "younger people to abstract ideologies, including extreme positions, and the refuge that members look for within the supposed security of sects. This grows stronger as a lack of prospects about the future spreads among young people."[150] If the modern,

144 Ibid.

145 Böckenförde, "Protection of Liberty against Societal Power," 293.

146 See Hermann Heller, "Authoritarian Liberalism?" in *European Law Journal: Review of European Law in Context* 21: 3 (2015), 295–301 for a convincing interpretation of Schmitt as a reactionary, authoritarian liberal.

147 Böckenförde, "Protection of Liberty against Societal Power," 298.

148 Ibid., 295.

149 Ibid.

150 Böckenförde, "The Future of Political Autonomy," 339.

liberal, and democratic state has no ability to foster "a balance between rootedness and orientation" it will lose its capacity to act as a state: a sovereign decision-making mechanism.[151] One possible response in a situation where, as Radbruch observed in 1932, "no one is able to determine what is just," is the imposition of an "authoritative dictum"—a move that often results in overt or covert forms of tyranny. In other words, democracy can, through its own internal dynamics, evolve into a form of totalitarian rule governed by autocrats or oligarchs, where party politics degenerates into the rule of non-ideological rackets. Böckenförde came to argue explicitly that the root cause of such democratic decline is the state's failure to become strong enough to domesticate the forces of economic progress that increasingly dominate it. As we have seen, addressing this failure requires the emergence of powerful, independent forces within the civil sphere—forces that persistently challenge the reduction of the person to human capital and advocate for a state that does not rely on a political religion.

The recurring theme in Böckenförde's work—that the state had to defend its political autonomy vis-à-vis economic and societal forces both inside and outside its territory, and thereby liberate itself from the tyranny of values—explains why his vision of the state as a Hellerian *Wirkungs- und Entscheidungseinheit* never meant a deification of the political order. Böckenförde was a liberal socialist but, as we have pointed out above, not in any sense a critic of authority or coercion as such. The necessary, but not sufficient, basis of law is "the threat of coercion" that the territorial state had to use to coordinate the lives of its citizens into an ordered whole.[152] These citizens had, however, inviolable rights vis-à-vis both state and society. The whole should, once again, not be ordered by values but by the freedom of the person. Böckenförde emphasized this when he pointed out that Locke wrote his "Two Treatises of Civil Government" during the Glorious Revolution and published it in the same year, 1689, that the Declaration of Rights became "an inviolable basis for government."[153] From now on, "the king was bound to the consent of Parliament for legislation, for taxation, and for the maintenance of a standing army, restricted in his right of dispensation and curtailed in his influence on the courts."[154] This was, without a doubt, true progress from Böckenförde's perspective, especially since it began to liberate Christianity from its captivity as "a public (polis) religion."[155] This was the true liberation offered by the secularization of the state. It weakened the necessity of political faith even though it also threatened to secularize religion as a civil religion that legitimized the

151 Ibid.

152 Böckenförde, "Reflections on a Theology of Modern Secular Law," 272.

153 Böckenförde, *Gesetz und gesetzgebende Gewalt*, 22.

154 Ibid.

155 Böckenförde, "The Rise of the State as a Process of Secularization," 165.

irrational need for a *Gesinnungseinheit*. A need that, in the end, threatened to rip apart the already fragile and heterogeneous societies by seeking to absolutize a particular way of life as the ruling norm. Tolerance was more than a virtue; it was a painfully necessary safeguard in a world of profound diversity

The Image of God

Taken to its logical conclusion, Böckenförde's argument implies that the kinds of political forces he envisioned paradoxically should fight for the right to what we would like to call a non-political life—one in which the ultimate purpose is not dictated by the state or for that matter the market.[156] This is evidently to surpass Böckenförde's vision of the state but he hoped that the legal order could serve as a guarantor of a plurality of life forms within the civil sphere. Such a shift would mean that the fundamental aim of law would no longer be merely to protect the liberal rights of security, property, and freedom. It would instead be the production of an ethical state that helped the citizens to develop a life on their own, independently from "societal coercion," and it was this that necessitated "the constant relativization of societal inequality."[157] In practice, this relativization implied "the necessary conditions for the creation and securing of liberty in and against society" through the production of "societal and legal framework conditions (including those of an institutional and societal-structure nature), which are not already provided by the general guarantee of legal freedom."[158] Public law, both constitutional and administrative, should be used to counteract the accumulation of economic and political power, which undermines the sovereignty of the nation and creates the dangerous belief that the heart of the individual can be governed and regulated.

Böckenförde insisted that just "as social inequality and the inequality of power caused by it cannot be entirely eliminated, unless freedom itself is to be eliminated as well, it cannot be left to develop unfettered, even if it arises from an equality of opportunity (which does not even exist in most cases)."[159] However, these fetters cannot just be enforced by the state. They have to be enabled and produced through the desires, hopes, and wishes that determine the social sphere since the state—even the authoritarian state—rests on the

156 He wrote, for instance, already in 1957 that what he arguably saw as the most important institution in this world, namely, the Roman Catholic Church should be "apolitical'" by being a "guardian and watcher beyond day-to-day politics independent from (and freely vis-à-vis) all groups." If it is "not branded a political power bloc" it will have "much better prospects to be heard also by those who are inwardly removed from it and recognize its legitimate demands." Böckenförde, "The Ethos of Modern Democracy and the Church," 75.

157 Böckenförde, "Protection of Liberty against Societal Power," 294.

158 Ibid., 295.

159 Ibid.

life of the people. Böckenförde did believe that the state, as a legal apparatus seeking to protect the individual as an end in itself, had no choice but to confront the political anthropology of Hobbes and Locke which legitimized a world of possessive market societies that has begun to threaten the public order. But this could be done only if important social forces sought to practically reshape what it meant to be a human, for otherwise the state's actions would become ineffective and draconic. The state could untangle itself from possessive individualism only if the masses of individuals that populated it desired something else than commodious living, and this they could do only if they were not afraid to try new forms of life, and the state could seek to facilitate the latter. This is the transhistorical truth of democracy: no state can survive without the implicit or explicit, free or enforced, cooperation of its people.

Böckenförde's critique of legal rights can help us answer how the state could encourage its citizens to live for something greater than fear, commodious living, and industry, without it becoming tyrannical and ineffectual. He pointed out that revolutions and wars put an end to the era of the absolute state, and wrote that "Locke, who had lived in exile in Holland from 1683 to 1689, was thus able to develop his theory largely on the basis of a newly emerging political order, underpinning it with natural law."[160] The Lockean doctrine of natural law, which, according to Böckenförde, made survival and security into the end and purpose of law—a notion which we saw Hart resurrect in the previous chapter—converged in this sense with the Hobbesian theory of natural law. We can now deduce that it doesn't really matter whether the natural condition for humans is a state of war as Hobbes claimed, or a world of cooperation and sociability for individuals, which Locke insisted on. The problem is that the human is entrapped in the logic of *Besitzindividualismus*, and the question is whether law and politics can be disentangled from it. To reduce the end of the law to survival one cannot, as Böckenförde wrote, easily explain how "the task of security, for example, which the state must assume, [would] not turn into the mere 'insurance of egoism', as Karl Marx put [it], not without clairvoyance."[161] The famous German revolutionary's solution to the problem of capitalism was not Böckenförde's, since he was not a revolutionary socialist and did not believe that the state could be identical with society. But Böckenförde defended the relevance of Marx after the financial collapse in 2008 and insisted that solidarity had to entail much more than an adjustment of living conditions.[162]

This is important in order to understand what Böckenförde meant with the possible evolution of the *Not- und Verstandsstaat* into the ethical state.

160 Böckenförde, *Gesetz und gesetzgebende Gewalt*, 22.
161 Böckenförde, "The State as an Ethical State," 88.
162 Böckenförde, "Woran der Kapitalismus krankt," 68–69.

The Catholic socialist believed that the state could become an instrument which helped direct humans towards ends other than profit and gain, which ensure survival in possessive market societies. In this way, the state could affirm the human as a person. Yet, as we have insisted, it ought not to give a decisive answer to the question of what it concretely entails to be a person. If it took this path, the state would no longer be an *imperium rationis*, and it would not take one step beyond its current form as a *Not- und Verstandsstaat*. It would threaten to turn itself into a tyranny driven by an irrational desire to control every aspect of human life politically, or even become like a secular god. This is irrational since the human person is an open question that transcends the world she inhabits. We do not fully understand our place in the cosmos, and we are historical animals that change with time and live in a manifold of different ways.

However, the human is also a question in a deeper sense, according to Böckenförde, since she is an image of the abundant and eternal mystery of God. The triune deity is, if we listen to the Roman Catholic Church, something ineffable which transcends everything in this world, and, in this sense, the human is always more than a *Polismensch* or even a social being. God's incarnation as a human person, who died only to be resurrected and ascend to heaven, reveals ultimately that even we finite and mortal humans can live for something greater than worldly law, temporal politics, and mere social affairs. It is this theological vision of the human as a living mystery, in other words, an image of God, which necessitates a vision of the state as a mechanism that must delimit the societal powers that are reshaping the human into their images. For the state to evolve towards such "real freedom," it must be able to make it possible for a plurality of life forms to appear beyond the possessive individualism of the market. To prescribe a state ideology as something "like the revival of the Aristotelian polis tradition or the proclamation of an 'objective order of values,' abolishes the very separation by which the liberty of the state is constituted. No path leads back across the threshold of 1789 without destroying the state as the order of liberty."[163] This sentence clearly reveals the anti-communitarian logic behind Böckenförde's vision of the state. The American and French Revolutions were not only political revolutions done in the name of freedom or social revolutions that demanded equality from his perspective. They produced a new political anthropology by generating political institutions that could treat the human as a person, an end and purpose in herself, whose rights transcend the same structures that enforce them. The state should not seek to define what the good life entails, nor what it means to be a human. It should establish the institutional structures which can guarantee that everyone has the right—in the sense of an actual possibility for an individual rather than as a being who belong to a specific community—to give

163 Böckenförde, "The Rise of the State as a Process of Secularization," 167.

tentative answers to what human life entails. And if this entails, as Schmitt argued, the end of the era of the Hobbesian nation-state, then we might have good reasons to hope that something better can replace it.

Political Anthropology

Schmitt argued in 1932 that modern political theories rested on "an anthropological profession of faith" and that one "could test all theories of state and political ideas according to their anthropology."[164] This seems to be an adaptation of a thesis that the Austrian-Jewish legal scholar Georg Jellinek had developed in a lecture in Heidelberg, published in the booklet titled *Adam in der Staatslehre* in 1893. Jellinek, who is perhaps most famous for his theory of "the normative force of the factual," argued that the "connection between Adam and political science seems almost self-evident when one considers that the perspectives on the state during an era are essentially determined by the understanding of man, which in turn is intimately connected with theories of the origin of the human race."[165]

An investigation of the anthropological and theological residues of politics is important in order to adequately conceptualize what Jellinek called the "double life [*Doppelleben*]" of the legal apparatus as "a social power that shapes the concrete cultural life of a people" and as "an embodiment of norms which is designed to be implemented in actions."[166] Viewed from the latter perspective the law does not belong to "the realm of being [*das Gebiet des Seienden*]," but rather to "that which should be [*des Seinsollenden*]." The distinction between the realm of that which is—*Sein*—and that which should be—*Sollen*—which shaped Radbruch's and Kelsen's legal philosophies was essential for Jellinek, who influenced both of them. The anthropological and theological dimensions of law determine the interpretation of what ought to be and can therefore help us understand the historical evolution of the state.

Jellinek argued that jurisprudence is "a *normative science* [*Normwissenschaft*]" that seeks "to judge reality" by investigating that which should be and thereby make a normative decision, instead of seeking to "understand the given" as

164 Carl Schmitt, *The Concept of the Political* (University of Chicago Press, 2007), 58.

165 Georg Jellinek, *Adam in der Staatslehre: Vortrag gehalten im Historischphilosophischen Verein zu Heidelberg* (Verlag von G. Koester, 1893), 3–4. Jellinek's discussion of the normative force of the factual is discussed in Nicoletta Bersier Ladavac, Christoph Bezemek, and Frederick F. Schauer (eds), *The Normative Force of the Factual: Legal Philosophy between Is and Ought* (Springer, 2019). A comparison between Jellinek and Schmitt can be found in Stephan Weser, *Der Souveränitätsbegriff bei Carl Schmitt und Georg Jellinek* (GRIN Verlag, 2008).

166 Georg Jellinek, *Allgemeine Staatslehre* (Häring, 1914), 138.

a fact in the realm of being that can be abstracted from our evaluations.[167] For "[r]ight and wrong are never predicates inherent in things themselves; they are not qualities but relations. Therefore, the legal knowledge [*juristische Erkenntnis*] of an object is fundamentally different from that of the real processes that take place in and on it."[168] The state is both a "legal institution" with a certain set of ends and purposes which belong to the domain of *Sollen,* which the *juristische Erkenntnis* posits, and a "social phenomenon" in history that can be comprehended as a historical, natural, and cultural fact that we can evaluate in different ways.[169]

Jellinek, whose doctoral dissertation was devoted to Leibniz's philosophical optimism and Schopenhauer's pessimism, acknowledged that the border between the normative (the realm of *Sollen*) and the factual (the realm of *Sein*) was anything but crystal clear.[170] Value judgements are, for instance, determined by our understanding of history and human nature (which belongs to the realm of *Sein*), such as whether our species is prone to cooperation or conflict or if there is progress in history or not. By examining the world views that underpin legal theories, we can improve our understanding of how we evaluate reality and strengthen legal philosophy as a *Normwissenschaft.* Jellinek's compilation of historical evidence which demonstrated that "the Adam of natural law has left his mark on the constitutional structure of modern states" was therefore more than a fascinating piece of legal history.[171] It identified a clear relation between theology and law and Jellinek thought it could help the legal scholar to make better evaluations of the end and purpose of law, one hundred years after the French Revolution. He emphasized that the 1789 Declaration of the Rights of Man, so essential for Böckenförde, had made the legitimacy of the legal apparatus into something which had to be tested and accepted by the people. The sociological fact of revolution produced a new understanding of natural law:

167 Ibid., 138.

168 Ibid.

169 For the distinction between the state as a "legal institution" and a "social entity" see Jellinek, *Allgemeine Staatslehre*, 10–11. A short but good introduction to Jellinek as a comparative sociologist can be found in Reinhard Bendix and Guenther Roth, *Scholarship and Partisanship: Essays on Max Weber* (University of California Press, 1970), 260–265.

170 Georg Jellinek, *Die Weltanschauungen Leibnitz' und Schopenhauer's: Ihre Gründe und ihre Berechtigung. Eine Studie über Optimismus und Pessimismus* (Hölder, 1872). It is telling that Jellinek ends this dissertation by declaring that the homeland of Kant, Fichte, and the categorical imperative is a restless nation and cannot be content with Schopenhauer's pessimistic fear of change. The author "takes up the cause of Leibniz, the universal thinker, who shows that tireless, restless activity, inexorable, progressive development, unceasing striving for perfection constitute the innermost essence of the world, and it realizes these great principles in the history of its deeds and thoughts," 31.

171 Jellinek, *Adam in der Staatslehre*, 28.

> Natural law now approaches all existing human institutions with the demand that they justify themselves with respect to it. People are posing this critical question to all social powers in an increasingly urgent tone, demanding that reason be used to justify their existence as well as that of the state. How does the state come to captivate and restrict people, to impose duties on them? Why does the state exist at all? The doctrine of natural law is supposed to provide the answer to this question, an answer that also includes a critique of existing state institutions.[172]

Adam had become free to choose his ruler and thereby expropriate his God-given right to rule nature from the lords and monarchs. The myth of the primordial disobedience against God in the Garden of Eden could no longer legitimize the brutality of serfdom and other oppression as a legitimate consequence of the Fall.[173] Injustice was not divine punishment, but human oppression. For centuries, the biblical stories of the human as a paradisal animal had legitimated both serfdom and slavery, as well as visions of the human as a creature that was capable of living a life free from economic injustice and political authority. John Ball, the English Catholic priest who led the peasant uprisings in 1381, had famously insisted in a sermon that "[w]hen Adam delved and Eve span, who was then the gentleman? From the beginning, all men by nature were created alike, and our bondage or servitude came in by the unjust oppression of naughty men."[174] The original state of Adam and Eve was freedom, rather than slavery or serfdom, and like so many before and after him, Ball was tortured to death by the political authorities for conveying his belief in the equality of all.[175] Böckenförde would, just like Radbruch had done before him, refer to Ball's motto when he discussed the political implications of popular theologies and insisted that Ball showed how one could derive "the legal equality of people" from "religion, especially a revealed religion."[176]

Jellinek emphasized that many political anthropologies envision the nature of humanity by postulating a hypothetical "state of nature, the *status naturalis*. In this state, some experience a silent bliss, while others experience discord and strife."[177] In evaluating these political anthropologies, Schmitt repeated after Jellinek (without acknowledging or perhaps knowing how close he was to the liberal legal scholar's theory) that one can classify them according to "whether they consciously or unconsciously presuppose man to be by nature

172 Ibid., 15.

173 On the views on slavery among the Church fathers and the early Church, see, for example, Glancy, *Slavery in Early Christianity*.

174 Jean Froissart, *Chronicles* (Penguin Books, 1968), 212.

175 Ibid., 229.

176 Böckenförde, "Biographical Interview," 385.

177 Jellinek, *Adam in der Staatslehre*, 14.

evil or by nature good."[178] The distinction between good and evil was not merely descriptive for Schmitt. It was normative since for him, evil implied a solemn recognition of the necessity of power to regulate human life and, hence, the need to focus on the need for stability and order.[179] Hobbes, for instance, recognized the evil character of human life. On the other hand, Locke legitimized a theory of inviolable human rights, such as the right to property, liberty, and security which was ultimately to be secured by the state. Schmitt, of course, considered Locke's theory of innate goodness as naïve even if he also came close to identify the purpose of the state with these ends. Jellinek emphasized, just like Böckenförde would do after him, that the "state has, since Locke, been conceived as a protective institution [*Schutzanstalt*] for these general human rights. All state institutions are supposed to have the sole purpose of guaranteeing the life, liberty and property of the citizens."[180] According to Jellinek, Hobbes and Locke concurred that the state should be oriented towards a simple end: "the preservation of innate freedom from the dangers threatening it in the state of nature, which arise from one's fellow human beings."[181] Security and survival were the primordial ends of the state.

Locke certainly refused to see the state of nature as a state of war, but the state was still first and foremost a mechanism for protection, and he legitimized the possessive individualism of the modern capitalist market as the anthropological basis for the territorial state. This is why, at least for Macpherson and Böckenförde, Locke and Hobbes defended a similar vision of the state as a *Schutzanstalt* even if they had diverging political anthropologies. Schmitt thought, however, that this difference signified a potential division which produced competing theories of how the state should be governed. Hobbes's vision of the law implied a radical affirmation of the state and government. In contrast, the "belief in the natural goodness of man is closely tied to the radical denial of state and government. One follows from the other, and both foment each other."[182] Jellinek might be right, from Schmitt's point of view, that the "political doctrine of the revolution, as outlined by Rousseau, is the final consequence of the school of natural law. Only the inconsistency of some writers, especially Kant, succeeds in severing the revolutionary impetus of the doctrine of natural law."[183] Schmitt argued, however, that the revolutionary belief in what Schmitt called "moral perfection," and which Jellinek affirmed in his defence of Leibniz over Schopenhauer, implied a naïve, liberal faith in historical progress "from religious fanaticism to intellectual liberty, from

178 Schmitt, *The Concept of the Political*, 58.

179 This becomes especially evident in his discussion of Helmuth Plessner's political anthropology, see ibid., 59–60.

180 Jellinek, *Adam in der Staatslehre*, 17.

181 Ibid., 15.

182 Schmitt, *The Concept of the Political*, 60.

183 Jellinek, *Adam in der Staatslehre*, 16.

dogma to criticism, from superstition to enlightenment, from darkness to light."[184] This kind of liberalism threatened to destabilize the public order by legitimizing the hope for an irreversible human improvement. Locke's mild philosophical anarchism laid the basis for the more radical republican tradition, which in 1848 proved itself to be an open threat to the public order.[185] These political transformations sowed the seeds for the transformation of the Lockean *Schutzanstalt* into what Schmitt and Forsthoff called the "total state," wherein the state intervened directly in the economy and the life of the masses. Schmitt thought that this total state was an almost inevitable effect of the growth of industrialized capitalism that would reshape the liberal project itself towards a more authoritarian direction. He underlined in 1932 that even if "[l]iberalism has changed all political conceptions in a peculiar and systematic fashion" it "has failed to elude the political. Its neutralizations and depoliticalizations (of education, the economy, etc.) are, to be sure, of political significance."[186] They can become political and thereby reveal that law rests on will and force.

According to Schmitt, the political refers to an intensification of cultural, ideological, or economic differences into differences of enmity. And as Hjalmar Falk has pointed out, Schmitt's rejection of liberalism was nurtured by his belief that the end of the First World War did not generate "a new world order, dominated by democracy, international cooperation, and global trade."[187] The internationalism of Schmitt's own era was "contrary to liberal assumptions, not a force for greater humanism but the way to ruin," something one might certainly accept without necessarily agreeing with his solution to this situation: the total state.[188] The Versailles Treaty from 1919 led to instability on the European continent, just as John Maynard Keynes warned.[189] The League of Nations, established in 1920 in Geneva, did according to Schmitt not secure peace but incite even greater enmity between the nations, since it was seen to consolidate Germany's economic and political weakness. And Schmitt defended, first and foremost, a strong German state that could secure peace and public order.

184 Schmitt, *The Concept of the Political*, 73.

185 On Locke's philosophical anarchism, see A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press, 1993). See also the discussion on the republicanism of 1848 in Pamela M. Pilbeam, *Republicanism in Nineteenth-Century France, 1814–1871* (Macmillan, 1995). Especially the chapters "Socialist Utopians and Reformers before 1848," 155–184, and "Universal Suffrage and the 'Right to Work': The Second Republic, February–April 1848," 185–209.

186 Schmitt, *The Concept of the Political*, 73.

187 Hjalmar Falk, "Carl Schmitt and the Challenges of Interwar Internationalism: Against Weimar – Geneva – Versailles" in *Global Intellectual History* 7:4 (2022), 765–783, here 765

188 Ibid., 766.

189 John Maynard Keynes, *The Economic Consequences of the Peace* (Macmillan, 1920).

It must be noted that for Schmitt, the ultimate end of the political was not enmity, but peace and order, as Böckenförde has emphasized in several essays.[190] But political relations are structured by the "distinction of friend and enemy" since the human animal is a dangerous creature prone to conflicts and wars.[191] This evil and sinful aspect of human life is what Schmitt's political anthropology underlined and what his political theology sought to come to terms with. The political enemy, Schmitt wrote, "need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible."[192] These words help us understand why the discussion of the nature of the human animal was so important for Böckenförde's mentor and why neither Böckenförde nor Schmitt could accept Jellinek's liberal optimism. The human is evil since she is inclined toward enmity.

In 1975, Böckenförde clarified that the "friend–enemy theory is nothing more and nothing less than the phenomenological–empirical demonstration of a criterion of the political, namely that it is peculiar to political tensions and conflicts that they reach a level of intensity that includes the grouping of the people (groups of people) according to friend and enemy and thus the willingness to fight one another also with force of arms."[193] To deny this aspect of human nature is worse than naïve even from a liberal point of view. It can undermine the sovereignty of the nation-state, which is ultimately upheld by military capability, and contribute to instability in an international system characterized by conflict, where weapons may simultaneously serve as instruments of deterrence and as catalysts for warfare that today threatens to annihilate civilization itself. Schmitt and Böckenförde understood this and it made the

190 See, for example, Ernst-Wolfgang Böckenförde, "The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory" in *Constitutional and Political Theory*, 69–85, and Böckenförde, "The State as an Ethical State," 88–89, note 7, where he writes that the "distinction between friend and enemy that Carl Schmitt developed as the criterion of the political has been repeatedly misunderstood to this day as a normative theory of the political, as though his intent was to define the goal and content of politics as a so-called friend–enemy relationship. The text itself already refutes such an interpretation. … It is the hallmark and tremendous achievement of the state as a political entity that it succeeds in keeping all internal disputes and conflicts between people and groups of people below the level of escalation into an extreme antagonism, that is, the friend–enemy relationship, and in so doing presents itself as an entity of peace."

191 Schmitt, *The Concept of the Political*, 26.

192 Ibid., 27.

193 Böckenförde, "The State as an Ethical State," 89, note 7.

latter argue that the proliferation of weapons of mass destruction had wrecked the classical theory of just war.[194]

As we have seen, Böckenförde insisted that the "state is not a universal concept. Instead, it denotes a form of political order that emerged in Europe between the thirteenth and the late eighteenth or early nineteenth centuries as a result of specific conditions and impulses of European history."[195] The state initially "developed out of the quite unstate-like power structures and relationships of the Middle Ages" through the vague forms of "territorial lordship."[196] Subsequently, it was established through "territorial sovereignty as the essentially territorially defined sovereign dominion of the prince in his land, combining and reinforcing the various titles to power (*jus territorii*)."[197] And, finally, it became "the concentrated, unitary authority of the state, externally sovereign, internally supreme and above the traditional legal order, potentially all-embracing in its authority and facing a society where political hierarchies had been levelled, a society of subjects or citizens (equal before the law)."[198] We have stressed that Schmitt was not an antimodernist hoping to return to a world before the Hobbesian state. And we can now clarify why Schmitt's fundamental problem with liberalism was "that society determines its own order and that state and government are subordinate and must distrustingly be controlled and bound to precise limits. The classical formulation by Thomas Paine says: society is the result of our reasonably regulated needs, government is the result of our wickedness."[199] Liberals do not usually reject the state and sovereign power altogether, since they are necessary for curbing the inherently anarchic facets of human societies. They merely stress the need to delimit the state, but thereby they risk legitimizing the social anarchy which Schmitt believed emerges from the potential politicization of human differences into a conflict between friend and enemy. This is the reason why both he and Schelsky criticized Hobbes for legitimizing a domain where the heterogeneous powers could grow freely in society: the sphere of conscience. The legal apparatus requires "a homogeneous medium" in order to enforce its laws and in the last instance regulate the heart.[200]

It was in *Political Theology* from 1922, which began with his celebrated dictum that the sovereign is the one who decides on the exception, that Schmitt clarified that the state cannot survive without ideological and cultural homogeneity:

194 See Ernst Wolfgang Böckenförde and Robert Spaemann, "Die Zerstörung der naturrechtlichen Kriegslehre" in *Atomare Kampfmittel und christliche Ethik: Diskussionsbeiträge deutscher Katholiken* (Kösel, 1960), 161–196.

195 Böckenförde, "The Rise of the State as a Process of Secularization," 152.

196 Ibid.

197 Ibid.

198 Ibid.

199 Schmitt, *The Concept of the Political*, 60–61.

200 Carl Schmitt, *Political Theology* (University of Chicago Press, 2005), 13.

> Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere "superficial presupposition" that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.[201]

The essential end of the modern territorial state was the establishment of "a homogenous medium" to secure "a normal situation" that a sovereign can govern. This was basically what Böckenförde described in his letter on Sohm to Schmitt in 1958 as "the modern sovereign and monistic state," which he differentiated from his own idea of the Hegelian ethical state.[202] "Monistic" here implied homogenously unified, and Sohm wrote explicitly that the "national community is an ethically [*sittlich*] necessary community. The individual is nothing without his people. What he is and has physically, mentally, and ethically, he is and has through his people. The people gave you your life: give it back to them! Give to the people what belongs to the people!"[203] The people cannot exist without the legal order that secures the survival of the nation. Politics should, for Sohm, be reduced to the governance of what Böckenförde described, apropos the tradition of *Vernunftrechtlern* he associated the Lutheran legal scholar with, as "a non-political burgherly society" and defined "as the epitome of private individuals subject to state authority."[204] This is the sphere of human life that both Forsthoff and Schmitt thought that the neutral state could no longer defend: the total state was needed. The reason why the positive or optimistic anthropologies of man are problematic, from Schmitt's perspective, is thus not that they defend the "burgherly society" and are liberal in that sense, but that they tend to destabilize its character as the necessary "homogenous medium" for the state. They are not authoritarian enough. Böckenförde, on the other hand, can, as we have argued, also be read as defending a form of non-political life, but only because he believed that the person should be protected from the political and social forces that seek to domesticate its freedom to blossom as an end in itself. Both Sohm and Schmitt's Hobbesian vision of the state had to be surpassed through a discussion of the quality of life.

Liberal perspectives were not only naïve according to Schmitt, they were banal, since they could not offer a genuine or even interesting interpretation

201 Ibid., 56.
202 Böckenförde, *Welch gütiges Schicksal*, 179.
203 Sohm, *Kirchenrecht: Zweiter Band*, 56.
204 Böckenförde, *Welch gütiges Schicksal*, 130.

of human life. He wrote explicitly that "all *genuine* political theories presuppose man to be evil, i.e., by no means an unproblematic but a dangerous and dynamic being" and insisted that this "can be easily documented in the works of every specific political thinker."[205] One just had to engage with the tradition of political thought and see how shallow the optimists were. The Böckenfördian vision of the state undoubtedly belonged to the optimistic tradition, since it defined the purpose of law as instruction, rather than mere command, and only this could help us achieve "real freedom." But Böckenförde was a Catholic, not a classical rationalist liberal and Schmitt, on the other hand, was honest. He stressed that orthodox Catholic teaching could be said to defend a vision of law as instruction rather than command and hence legitimize the kind of political theology that Böckenförde later would defend since the "dogma of Original Sin promulgated by the Council of Trent is not radical in any simple way. In contrast to the Lutheran understanding, the dogma asserts not absolute worthlessness but only distortion, opacity or injury and leaves open the possibility of the natural good."[206] The human can build a better world even if she is a sinful and dangerous animal.

Against such potential Catholic liberalism, Schmitt defended the radicalization of the doctrine of original sin as propagated by the reactionary Catholic philosopher Donoso Cortés, who saw the revolutions in 1848 as a one-way street towards mayhem.[207] It was the emergence of what Jellinek described as revolutionary doctrines of natural law that legitimized Cortés's understanding of the human as an animal that had to be shackled by the state. Böckenförde was vehemently opposed to this reactionary form of Catholicism, which Schmitt acknowledged broke with the classical Catholic definition of original sin, and in his lecture on political theology in 1999, Böckenförde insisted tellingly upon the importance of Jellinek's thesis of "the law as the ethical minimum. It states not only that the legal system does not and cannot make all ethical-moral demands obligatory. It also asserts that the virtuous life can be prescribed to the individual with only limited legal obligatoriness (relative to the demands of social compatibility)."[208] *The virtuous life must be based on freedom*, and the state should not enforce a particular vision of the good since it would then become a secular religion rather than a mechanism that protects the human individual as a person free to choose his own life. Thus, Böckenförde insisted against Schmitt that the state must be able to represent the different and increasingly heterogeneous demands in civil society. The alternative is for the state to resort "to the collective steering [*Lenkung*] of the consciousness of

205 Schmitt, *The Concept of the Political*, 61.

206 Ibid., 57.

207 See José Rafael Hernández Arias, *Donoso Cortés und Carl Schmitt: Eine Untersuchung über die staats- und rechtsphilosophische Bedeutung von Donoso Cortés im Werk Carl Schmitts* (Schöningh, 1998).

208 Böckenförde, "Reflections on a Theology of Modern Secular Law," 273.

the individuals in order to protect its own survival. This has nothing to do with the state as the realm of reason."[209] Such steering is irrational since it thwarts the freedom of conscience and thought that Böckenförde saw as "the inalienable legacy of humanism."[210] It even risks generating a "political and pedagogical programming of consciousness"—*polit-pädagogisch programmierter Bewußtseinslenkung*—which threatens "to turn growing human beings into objects, to shape them in accordance with a self-fashioned image instead of acknowledging their status as subjects."[211] Böckenförde was, as we have seen, not oblivious to the blatant fact that such "programming of consciousness" was increasingly generated by economic and social forces. He stressed that powerful media concerns and even computer games were in need of regulation since they shape "the entire mental climate" and make the culture "spiritless" by reducing it to "light, shallow entertainment."[212] This is interesting since he had insisted in 1967 that the state should not turn "itself into the guarantor of the citizen's eudaemonistic life expectations."[213] That would push the state "onto the path of elevating the realization of the social utopia into its programme."[214] But a few years later he also stressed, as we have seen, the need to address the quality of life with the means of the state. This indicates an explicitly conservative trait in Böckenförde's thinking and at least an implicit openness to a politics of eudaemonia: the good life cannot be reached by individuals on their own. However, it must be underlined that he saw such conservatism as fully compatible with his liberal socialism. The purpose of political

209 Ernst-Wolfgang Böckenförde, *Der Staat als sittlicher Staat* (Duncker & Humblot, 1978), 37. Böckenförde, "The State as an Ethical State," 105. Translation modified.

210 Böckenförde, *Der Staat als sittlicher Staat*, 33. Böckenförde, "The State as an Ethical State," 102.

211 Böckenförde, "The State as an Ethical State," 103. Translation modified, see original: Böckenförde, *Der Staat als sittlicher Staat*, 34.

212 Böckenförde insisted in an interview that the modern liberal state needed to shape the social and economic forces that turn cultural life to banal mediocrity: "One would have to commit the public institutions, which are financed by fees, more strongly to a cultural and educational mission circumscribed by law, the fulfilment of which would also be subject to oversight. It is more than regrettable to what extent public institutions are becoming like private broadcasters, where only money and ratings matter. One relative exception is still the Bayerischer Rundfunk. Added to this are computer games, most of which are hideous [*unsäglich*]. Nobody wants to think about—age-based—prohibitions, even if it is blatantly obvious that computer games promote a propensity to violence. The only answer one ever hears, in the sense of a knockout argument, is: the freedom of the media. As though the promotion of a sense of community, the building and strengthening of culture, and the defence against a propensity to use violence do not have their own, by no means insignificant, value. This also shapes the entire mental climate, the spirit of community, which then becomes rather spiritless and is reflected in light, shallow entertainment—mediocrity." See Böckenförde, "Biographical Interview," 380.

213 Böckenförde, "The Rise of the State as a Process of Secularization," 167.

214 Ibid.

regulation was not to impose an ideology on the citizens, but to ensure that the state had the political power to guarantee "their status as subjects," that is, as individuals who are more than mere social or political beings and, hence, more than citizens in nations. They must be cultivated as persons who are free to use their reason or spirit (*Geist*).

Explicitly referring to his famous article on the nature of the modern, secular state where he had stated that the "*liberal, secularized state is sustained by conditions it cannot itself guarantee*," Böckenförde argued in 1978 that these conditions were spiritual in the Hegelian sense. He stressed that "this does not mean, especially for Hegel, that this spirit—which for Hegel, incidentally, is decisively shaped and formed by religion—can be recreated or even replaced by the state if it loses its vitality and decays."[215] That would lead to a *polit-pädagogisch programmierter Bewußtseinslenkung* that effectively denies the citizen the attributes of a subject, reverting to the Hobbesian *Not- und Verstandesstaat*, which secures only the individual's survival rather than making "freedom" its "substantive orientation."[216]

From Schmitt's perspective, the belief that freedom could be the substance of the state clearly exemplified how the allegedly naïve optimism of liberalism provided the groundwork for something even more problematic: socialism. For Böckenförde, however, it represented an effort to employ political authority to confront the possessive individualism underlying both the Lockean and the Hobbesian conceptions of political obligation—an individualism that eroded the political autonomy of the state. Yet following the 2008 financial collapse, he emphasized in his essay "Woran der Kapitalismus krankt"—why capitalism is ailing—the necessity of "a counter-model to capitalism," thereby, perhaps inadvertently, reinforcing Schmitt's argument.[217] Could it be that liberalism laid the groundwork for a form of socialism?

Böckenförde at least wrote that capitalism "is not only afflicted by its excesses and by the greed and selfishness of the people who act within it."[218] It fosters a conception of human life as instrumental—valued primarily for its economic or utilitarian function—rather than as an end in itself. And reading this text through the prism of our interpretation of the legal scholar's political anthropology we can insist that capitalism generates false alternatives—such as the choice between Locke and Hobbes. These brilliant political thinkers ultimately represent two distinct evaluations of the same political reality. A reality which Böckenförde came close to argue no longer could serve as the foundation for any state seeking to reassert its sovereignty vis-à-vis the world

215 Böckenförde, *Der Staat als sittlicher Staat*, 37. Böckenförde, "The State as an Ethical State," 105. Translation slightly modified.
216 Böckenförde, "The State as an Ethical State," 91.
217 Böckenförde, "Woran der Kapitalismus krankt," 69.
218 Ibid., 68.

market, as the latter undermines not only the state but also the civil society the state is meant to protect.

Böckenförde answered his question of what troubles capitalism by insisting that this system "ails because of its starting point: the idea that guides its purpose [*zweckrationalen Leitidee*] and its system-building power."[219] The *zweckrationalen Leitidee* of capitalism is, once more, the possessive individualism that underpins the Lockean and Hobbesian political anthropologies, which Böckenförde argued must be transcended in order for politics to be oriented towards substantive freedom. This is why "a counter-model to capitalism" was necessary, and Böckenförde identified it with a Christian understanding of Adam and Eve as human beings with an inherent right to exist as more than merely functions of the state and the economy.[220] This is the state of nature he mobilized against the logic of possessive individualism. The crisis of the capitalist economy seems, therefore, to have made him more open to natural law, and even brought him closer to the politics of eudaemonia that he had criticized before. Drawing on Thomas Aquinas, he argued that, according to natural law, earthly goods exist to serve the common good, and private property is justified only pragmatically, not inherently. Therefore, when private ownership no longer serves the common good, natural law can override or annul property rights.[221] Security and survival cannot be the sole ends of the state: economic justice is needed to make the state rational.

Böckenförde fully agreed with Schmitt that every theory of law must reckon with what the Catholic Church describes as the "damaged state of man."[222] But he did not take Schmitt's path and abandon the belief in "the possibility of the natural good" by radicalizing the doctrine of original sin.[223] He agreed with the classic Catholic position that "the human being is ambivalent in his habitus; he is not necessarily good and not necessarily evil, but instead carries both possibilities within himself."[224] This ambiguity, Böckenförde argued in 1999, points to an inherent heterogeneity within the human being herself.

Schmitt was correct in warning that the expansion of society at the state's expense risked turning the nation into a battleground for internal political struggles. However, the Schmittian emphasis on the "homogenous medium," ostensibly intended to secure public order, ultimately served as a pretext for launching an attack against the internal enemies of the Third Reich. The "stranger and other" ceased to be someone beyond the border and instead became the neighbour. This demonstrates that absolute homogeneity has

219 Ibid.

220 Ibid.

221 Ibid., 70. Böckenförde also wrote that John Paul II is the "sharpest critic of capitalism since Karl Marx."

222 Böckenförde, "Reflections on a Theology of Modern Secular Law," 267.

223 Ibid., 269.

224 Ibid.

never existed, and that the liberal openness Böckenförde championed could rest on an understanding of the human animal as a dangerous creature—one capable of killing not only the stranger, but also the neighbour, or even the brother—since any form of difference can become politicized and turned into civil war.

The Apocalyptic Completion of Law

Schmitt was honest enough to acknowledge that the view of Adam and Eve as fundamentally good was a matter of Catholic dogma. The first human couple lived in Paradise without the need for military, education, or property. In the fallen world, this Edenic existence serves to illuminate what it means to say that the human is evil. To be evil is to be compelled to organize one's life in accordance with positive law, since humanity has fallen into a world marked by death, destruction, and enmity—not only between foreigners, but also between brothers. According to Schmitt, this is clearly illustrated in the story of Adam and Eve's sons Cain and Abel. It was no coincidence that Cain, the farmer and property owner, murdered his brother Abel, the nomad, and then went on to build the first city. In doing so, he set in motion the course of world history in which the human species—our Cainite race—is entrapped.

Schmitt reflected on this Genesis narrative while imprisoned in Nuremberg after the Second World War, where he had been held in custody for his collaboration with the Nazis. He wrote that what the war ultimately revealed was that the "other proves to be my brother, and the brother proves to be my enemy. Adam and Eve had two sons, Cain and Abel. Thus begins the history of humankind. This is what the father of all things looks like. This is the dialectical tension that keeps world history moving, and world history has not yet ended."[225] The denial of this tension, and hence the refusal to accept that Cain is a sign of what it means to be a human cast out of the innocence of Eden, generates the dangerous belief that we can move beyond the political which we remember that Schmitt identified with enmity. As we will see in this concluding section, this is, in a sense, what Böckenförde believed was possible since the human animal, according to him, cannot be fully identified with Cain. The human being is neither solely Abel nor solely Cain, but rather both—embodying the tension between the two brothers that, according to Schmitt, gave rise to world history. Perhaps it was political opportunism, or simply his deep mistrust of liberalism and socialism, that led Schmitt to overlook two crucials detail in the biblical account: Abel, too, was human, and God did not condemn Cain to death. Instead, God marked him with a sign to protect him from execution—a punishment that was arguably justified for his

225 Carl Schmitt, *Ex Captivitate Salus: Experiences 1945–47*, ed. Andreas Kalyvas and Federico Finchelstein (Polity Press, 2017), 71.

fratricide. By sparing Cain, God allowed the murderer to become the founder of the first city and, with it, the first political community mentioned in the Bible. In doing so, God moved humanity beyond the binary logic of enmity that Schmitt saw as the story's core message.[226]

This interpretation of the story about Cain and Abel is surely too liberal for Schmitt, who stressed only the killing of Abel and not the fact that God spared Cain's life. But Schmitt's use of the story still reveals why his search for a homogenous medium for the nation was deeply naïve: humans can be murderers like Cain. They can kill their own. Schmitt's total state did not secure public order; it legitimized the path towards the Second World War and the Holocaust. Böckenförde would agree with Schmitt that the human is a Cainite animal. However, she is also Abel: our species can be said to incarnate or even be the relation between the two brothers. This becomes evident if one turns to Böckenförde's 1999 lecture on the possibility of a political theology of secular law, in which he said that a Catholic affirmation of secular law should begin with four dogmas of faith: "1. The statement of Revelation about man; 2. The damaged state of man from the power of sin; 3. The promise of resurrection from the dead and the Last judgement; 4. Divine revelation as a historical event."[227]

The first dogma says that the human is created in the image of God and has "a unique dignity" which grants him "an existence for his own sake."[228] Böckenförde turned to Ernst Bloch to insist that the human "has the right to walk with his head held high" and that this dignity is based on a "fellowship" between humans.[229] The second dogma qualifies this Blochian defence of the dignity of the human animal by underlining the Cainite dimension in human life: "Human beings, as they are and live, are not *undamaged*. Part of the theological conception of man is the power of sin."[230] Böckenförde referred to the debate that Schmitt's *Political Theology* engaged with—specifically, the claim that Luther and Cortés had radicalized Augustine's doctrine of sin, thus departing from the classical Catholic understanding of original sin. In contrast to his mentor, Böckenförde aligned himself with the traditional Catholic position and stated, as we have seen, that the human "is not necessarily good and not necessarily evil"[231] This ambiguity implies a necessary heterogeneity in humans, since our species oscillates between the principles that Cain and Abel represent.

226 This is the interpretation of the story of Cain and Abel that the German theologian Eberhard Jüngel defends in *Das Evangelium von der Rechtfertigung des Gottlosen als Zentrum des christlichen Glaubens: Eine theologische Studie in ökumenischer Absicht* (Tübingen, 2011).

227 Böckenförde, "Reflections on a Theology of Modern Secular Law," 267.

228 Ibid., 268.

229 Ibid.

230 Ibid.

231 Ibid., 269.

According to Schmitt, the ambiguous nature of the human being—and the fact that world history is shaped by fraternal enmity—demanded a decisive, authoritative answer. In contrast, Böckenförde embraced this human ambivalence and argued that the third theological dogma—the promise of the resurrection—frees us from the grave seriousness demanded by Schmitt's pessimistic view of human nature. The resurrection introduces a sense of lightness, as it represents "relief from the necessity of a complete equalization of right and wrong in this world, the total worldly restoration of justice. Although in theological terms the secular striving for justice is of great importance to the orderly coexistence of human beings, at the same time it remains something provisional and incomplete."[232] From the standpoint of the resurrection, the state and the law—as well as any absolute demand for justice—are relativized. The human has no ultimate home in the state or even in this old and dying world. She is promised a new heaven and a new earth.

It is important to emphasize that the resurrection's relativization of worldly justice does not mean accepting the status quo; rather, it challenges the notion that human beings are primarily political animals. The human is the image of God and has thereby the right to question the state. Böckenförde was no utopian; he was a political realist who acknowledged that the modern state emerged as an instrument of peace and order. Still, his reference to Bloch—arguably the modern philosopher of utopia par excellence—was no coincidence. Böckenförde deeply admired the fifteenth-century statesman and Catholic martyr Thomas More, who coined the term "utopia," and he even requested that More's portrait be used on the cover of the second volume of his collected writings in English.[233] The martyrdom of More was not a defeat or a failure for someone who believes in the resurrection of the dead. It was an act of courage—an example of how the dogma of the resurrection enables believers to accept that, in certain historical circumstances, death may be preferable to survival.

Faith in the resurrection can give rise to an ethics that rejects all forms of "bitter resignation or despair" and refuses to accept that the defeat of the righteous—so frequent in this world of suffering—must inevitably lead "to an irresolvable tragedy. In the final analysis, God is the judge of man's actions, full justice emanates from Him—as does His mercy towards humankind."[234] This, Böckenförde underlined, implies that "human beings need not and must not represent God's judicial power; God Himself received satisfaction once and for all through the redemptive act of Christ, to the extent that it is

232 Ibid.

233 See Mirjam Künkler, "Freedom in Religion, Freedom in the State: Ernst-Wolfgang Böckenförde on Religion, Law, and Democracy," *Religion, Law, and Democracy*, 1–45, here 39–41.

234 Böckenförde, "Reflections on a Theology of Modern Secular Law," 269.

even needed."[235] Böckenförde's politics of immortality—for this is what his theology of resurrection entailed—indicates thereby that the human being is liberated from the need to make final judgements.[236] The state can be considered ethical only if it refrains from controlling every aspect of our lives and instead supports peaceful coexistence among its citizens.

Böckenförde never went as far as Radbruch in developing a political theology that directly challenged the very notion of judgement. However, like the Weimar Minister before him, the constitutional court judge firmly maintained that human beings are not capable of making final judgements—precisely because "*God* is the judge of man's actions, full justice emanates from Him—as does His mercy towards humankind." This perspective may help explain why the divine creator of Adam and Eve spared Cain from capital punishment demonstrating that even a murderer, for better or worse, can become the foundation upon which a political community is built.

Böckenförde's fourth theological dogma concerning secular law, namely, that "God's revelation reached humankind by way of a *historical event*" is related to this forgiveness of Cain.[237] The revelation "took place at a specific time and within history, namely in God's revelation through the covenant with His people (Israel) and the revelation through his incarnate son Jesus Christ."[238] This, Böckenförde continued, "means that there can be insights and demands, also with a view towards the law, that cannot be shown to have been 'always true' and always universally recognized, but which are nevertheless inherently valid once they have been attained."[239] The revelation is therefore not the basis for a transhistorical natural law or a moral cosmos that never changes. It generates, on the contrary, a theological critique of both natural and positive law by insisting on the existence of a divine or eternal law.[240] It is a means to "remove the cataract" so that humans can understand that what they thought was good and even natural yesterday might, in fact, have been wrong.[241] The revelation is an *apokálupsis* in the original sense of an unveiling, since it liberates "human

235 Ibid.

236 See Mårten Björk, *The Politics of Immortality in Rosenzweig, Barth and Goldberg: Theology and Resistance between 1914–1945* (Bloomsbury Academic, 2022).

237 Böckenförde, "Reflections on a Theology of Modern Secular Law," 270.

238 Ibid.

239 Ibid.

240 See Patrick Riordan SJ, "Misunderstanding Aquinas on Law," *New Blackfriars* (2025), 1–12, which ends with the words: "Theology can be a source of enrichment for other disciplines. At the same time, theology can provide a corrective, rescuing those disciplines from unwarranted imperialism. The recovery of the eternal law as the context for understanding instances of law, whether from a historical or a philosophical point of view, can help to relativise the specific concerns of those disciplines and remind them of the wider domain from which they fence off their own territory. Forgetfulness of that wider horizon may lead to exaggerated claims for their discoveries."

241 Böckenförde, "Reflections on a Theology of Modern Secular Law," 270.

thought and cognition, making it possible for truths that had previously been hidden or covered up to be fully recognized and grasped as 'natural' truths."[242] By introducing an apocalyptic end of history, the revelation of God discloses a process of conversion within the domain of history and explains why it is possible for Cain—the murderer—to change in relation to that end, even if he can never fully atone for the crime of killing his brother. According to Böckenförde, this almost revolutionary character of revelation, as something that unveils new truths, endures "irrespective of all the violations of human dignity perpetrated also by organs of the church and legitimized by theologians," because the essential purpose of the history of revelation is to disclose the evolving truth of Christianity itself.[243] The history of revelation can, in other words, be used to criticize real existing Christendom.

The "condemnation and execution at the stake of Jan Hus by the Council of Constance in 1415" is an example of what never could have been right according to Böckenförde.[244] Emperor Sigismund had promised Hus safe conduct, but the theologians at the council interpreted the law to mean that such a promise "need not to be honoured in the case of recalcitrant heretics" and thus condemned him to a brutal death.[245] Such a legal sanction should be declared null and void even if it was justified and sanctioned by interpretations of natural and positive law. A theology that does not recognize the apocalyptic character of history, and therefore refuses to accept change, conversion, and transformation, is simply not rational. Without this revelatory perspective, we cannot understand why religious and political authorities have repeatedly failed to uphold what Böckenförde would readily describe as divine law—that is, a force capable of correcting both positive law and, indeed, natural law since the revelation discloses that nature as such can change (the dead can, for example, become alive). A non-apocalyptic understanding of history would also obscure the fact that secular law—precisely because it is not grounded in religious values—can still be justified from the standpoint of God's revelation in history, since the ultimate aim and justification of law is to "guarantee the right to walk upright—incidentally, this inalienable demand grounded in revelation is also made against the Church and the church law."[246] This second reference to Bloch's emphasis on the human as a creature with the right to walk upright—even when this clashes with secular or ecclesial law—is essential. Human beings are far more than mere political citizens or economic agents. They are historical creatures capable of change and making the world better exactly because they have no right to make a final decision on what is good and right.

242 Ibid.
243 Ibid.
244 Ibid., note 36.
245 Ibid.
246 Ibid., 271.

The human, like Adam, the fallen being in need of coercive law, is transformed by the revelation that the human itself is the Cainite murderer who can be redeemed from his sins. This creature is promised a redemption that no secular politics or worldly law can grant it, but which apocalyptically orients human life to an end beyond the dialectic that Cain and Abel represent for world history. Böckenförde's political theology challenged what Hobbes argued characterized human nature by urging us to neither treat death nor life too seriously, by reminding us that we are promised eternal life. The resurrection can liberate us from the fear of death; we can be taught to live for something greater than commodious living or what Locke called property, and our hopes should not be limited to the desire to obtain worldly riches through our industry. Those who hope for the resurrection of the dead should seek to spread these glad tidings, and, in doing so, they can reshape the political and legal order.

Böckenförde underlined in 1981 that "a general demarcation between religion and politics and their problem-free coexistence cannot be expected. The content of political theology will not become non-political; rather, it remains potentially and—as the case may be—also actively political."[247] Schmitt was right that "beliefs, basic religious attitudes, religious-theological doctrines, and behavioural rules, can always be drawn into the relational and tension-filled sphere of the political."[248] There is no escape from the potential for enmity as long as humans must live together in a society that requires governance and rule. Still, for Böckenförde, it was essential that theology also aims to transcend this worldly and secular domain by offering a vision of liberation that no political system can provide. This is why the fundamentally supra-political message of the resurrection of the dead compels us to question the pursuit of ultimate justice and final retribution within this life. This is not primarily because of a rejection of what Böckenförde—alongside Forsthoff and Schmitt—scorned as political utopianism, but rather because such expectations inevitably call for the construction of a "homogenous medium" in which many would be denied the freedom to walk upright.

For Böckenförde, the religious—or even political—ambition to turn the state into a value-based community grounded in a specific *Gesinnungseinheit* was more than irrational; it was nearly blasphemous, as it betrayed a fundamental misunderstanding of what the history of revelation truly reveals. The reduction of Christianity to a "public (*polis*) cult" implied a denial of the historical fact that this faith "transcends all previous religions" by breaking "down the sacral forms of religion and the dominance of public worship."[249]

247 Ernst-Wolfgang Böckenförde, "Political Theory and Political Theology: Comments on their Reciprocal Relationship," *Religion, Law, and Democracy*, 248–259, here 257.
248 Ibid.
249 Böckenförde, "The Rise of the State as a Process of Secularization," 165.

Christianity should abolish the demand for a political religion by reminding everyone that we don't ultimately belong to the state. This is why the state cannot be based on a "a unitary disposition" and should not seek to establish a new civil religion. Such "an unquestioned political faith as the foundation of the state means nothing other than a state-administered and state-fostered political ideology, a secularized version of the classical polis religion, by means of which politics lays hold of the disposition of the individual."[250] It was the classical polis order that the early Christian church sought to break with and still seeks to evolve beyond by secularizing the state as an instrument that can have only a penultimate value.

If the revelation has any political meaning, it is in the enforcement of "a 'temporal' organization of the world based on reason" that can make humans aware that their "liberty" lies in their factual capacity to exist as "purposes unto themselves."[251] This is why Böckenförde believed that the human person should be the ultimate end of law. He also recognized how difficult it is for the modern nation-state to orient itself towards this end, especially when the masses it seeks to govern lack the practical means to realize themselves as more than just a lonely crowd of consumers—or, alternatively, as sectarian groups locked in nihilistic struggles over which values should rule society. For this reason, Böckenförde's most important contribution to our times may not stem from his role as a judge or jurist. His most profound insight might be political, ethical, and theological.

In 2010, he explicitly defended a theory of natural law as a force capable of rendering positive law null and void. Crucially, this understanding of natural law avoided what Judith Hahn has called the "Catholic temptation" to fight for a religious state.[252] The relevance of natural law in a world of increasing cultural heterogeneity, where even the meaning of nature itself has become contested, is the revolutionary consequence of this doctrine that Jellinek discerned in *Adam in der Staatslehre*. Natural law denaturalizes the state and positive law, since it makes evident that political authority can be challenged and governance can be transformed. First, Böckenförde argued, natural law can legitimize positive law by ensuring that "it essentially corresponds to its principles and implements them appropriately."[253] Second, it can act as "a compass for reforms and improvements of positive law" and, third, it can function "as an instance of critical questioning and delegitimization of positive law."[254] This is why natural law "can go as far as a refusal of loyalty or even

250 Böckenförde, "The State as an Ethical State," 97.

251 Böckenförde, "The Rise of the State as a Process of Secularization," 165.

252 Ernst-Wolfgang Böckenförde, *Vom Ethos der Juristen* (Duncker & Humblot, 2010), 44–46. See also Hahn, "Ernst-Wolfgang Böckenförde's Approach to Natural Law as Normative Legal Ethics," 23.

253 Böckenförde, *Vom ethos der Juristen*, 45.

254 Ibid.

resistance. In this way, positive law remains linked to the moral order."[255] But both revelation and revolution demonstrate that the human moral order is not fixed within history. Divine law is revealed as an apocalyptic event within time—its full meaning forever beyond our grasp as long as we remain human. This unfolding mystery shows that even nature itself is not immutable. For faithful Catholics, it is a matter of dogma that the resurrection of the dead has already begun: the fleshly bodies of Christ and Mary have been assumed into heaven. This belief implies that even natural law does not have a fixed or immutable content—treating it as such would reduce it to a form of value-based thinking. Instead, the essence of natural law lies in its ability to raise critical questions such as: *Is this right?* or *Should this be?*

This kind of questioning can indeed unsettle public order, just as Schmitt warned repeatedly. But it also points towards an ethical and political end that predates the modern territorial state and, one hopes, will outlast it: the human being as an end in herself. This is why Böckenförde turned to Thomas Aquinas in his important critique of capitalism, and this ethical end should not only guide law and politics. According to Böckenförde, it also constitutes the dogmatically correct answer—both juridically and theologically—to the question of the ultimate meaning of life. That human existence is an end in itself reveals why we can never find our final home in the modern territorial state or in any other worldly polis. To be human is to be more than a political—and therefore also juridical—animal. It is to be the image of God and, hence, to reflect something, in the midst of history, that cannot be reduced to any temporal or spatial category such as a state, a nation, or an occupation. From a non-religious or even atheistic perspective, this means affirming the individual's right to walk upright and, if necessary, to declare that the law is null and void when it no longer serves the human individual as a purpose unto itself. Thus, Böckenförde could perhaps be said to actualize Hart's suggestion in 1955 that freedom is a natural right that we discussed in the last chapter. As long as we live in this world, we need law both to command and to instruct, but the law has been relativized by the history of revelation and by the political and social demand on the state that it should protect the human as a person with the right to choose how she wants to live. Böckenförde's theology can therefore be understood as a theory of the end of law both in its eschatological and teleological senses. It urges us to believe that our ultimate end is not the world of the state, or the secondary systems that threaten to subsume it, but the God who, through his revelation, is re-creating the world so that we one day have no need for temporal politics and worldly law. Until then, we are stuck in the world of politics and economy, but we are always more than this web of societal powers, and it is this transcendence that the law needs to protect, especially if the end that Böckenförde hoped for never materializes.

255 Ibid.

Conclusion

In the introduction to this book, we asked whether current global events indicate the breakdown of the international legal order. Such questions are no longer hyperbolical in the light of Russia's invasion of Ukraine, Israel's brutal war on Gaza after Hamas's attack in October 2022, and the United States's defiance of WTO trade rules and violation of the non-aggression clause of the UN Charter with its threats to annex Greenland and other territories. The rule of law and constitutional values are also under threat in domestic legal orders. Respect for constitutions and courts is waning in the so-called free world. Globally, democracy is in decline, and some even speak of the end of the rule of law.[1] The political conflicts of our time clearly show that the question of the end of law is not merely an academic preoccupation but an immediate political problem which ought to be addressed concretely and explicitly.

President Trump's proclamation that "He who saves his Country does not violate any Law," posted to social media in March 2025 can be seen as one answer to the question of the end and purpose of law in the way that it equates the legal order with the power of the sovereign. Even if Trump's declaration is ultimately unconvincing to his critics, it reveals, as Radbruch wrote in 1932, that "if no one is able to determine what is just, somebody must lay down what is to be legal; and if the enacted law is to fulfil the task of terminating the conflict of opposing legal views by authoritative fiat, law must be enacted by

1 The *Financial Times* chief US commentator Edward Luce wrote apropos the detainment of Mahmoud Khalil that his "guess is that Khalil's case will make it to the Supreme Court. There, one of three scenarios could happen: 1 The court rejects Trump's attempts to bring back the Hanoverian bill of attainder and Trump reluctantly complies. 2 The court folds and essentially declares Trump to be king. 3 The court upholds the law, which gives due process to citizens and permanent residents alike, but Trump ignores the ruling. Both 2 and 3 would end the rule of law in America, though 3 would be a more dramatic way of doing it. 1 would be great, though do not bet on it." Edward Luce, "Je Suis Khalil" in *Financial Times*, March 14, 2025.

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a will which is able also to carry it through against any contrary legal view."[2] Trump's blitzkrieg of executive orders, 143 between January and April 2025, is not a Schmittian excess but an indication of the antinomies immanent to liberal law.[3] If it is true that the "liberal international order is slowly coming apart," this may indeed be because the purposiveness of law is now clashing with competing conceptions of justice, as Radbruch predicted in 1946. This is why today's crises—which, as argued in the chapter on Böckenförde, should be understood as a crisis of political representation and thus of popular sovereignty—are revealing the necessary connection between force and law, and bringing into focus the fundamental question of the end and purpose of law.[4]

Radbruch warned that "all politics is oriented towards the possibility of war. The well-known saying; war is only the continuation of politics by other means is based not so much on the essence of war being determined by politics as on politics being determined by war, and since it is related to it, as the threat of violence is to violence itself."[5] Today, in a world marked by what has been described as "a new cold war" or what the late Pope Francis even described as a Third World War, it is evident that law is determined by violence, politics, and war.[6] For, as Radbruch argued, it is in periods of turmoil that it becomes clear that the "first promise" of law is "the 'safety and order' which the revolution has just disturbed … because only by maintaining safety and order may a revolutionary government legitimize itself."[7] Safety and order depend on force, but, as we have shown, order is a necessary—though not sufficient—condition for law. While force and order may establish what Böckenförde called a *Not- und Verstandsstaat*, they do not suffice to create an ethical state—one that goes beyond what Hart identified as the law's minimal content: mere survival.

This is one reason why law can so easily become a tool for maintaining the status quo rather than a means of pursuing justice. As is relentlessly reiterated by people from every side of the legal spectrum, the law is most consistently considered to fail when it does not uphold the promise of justice. And since that necessary promise exists—law cannot proclaim the creation of injustice

2 Radbruch, *Legal Philosophy*, 117.

3 Donald J. Trump, *Executive Orders: 2025*, Federal Register, accessed May 7, 2025, https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025.

4 "The Liberal International Order Is Slowly Coming Apart," *The Economist*, May 9, 2024, https://www.economist.com/leaders/2024/05/09/the-liberal-international-order-is-slowly-coming-apart

5 Radbruch, "Zur Philosophie dieses Krieges," 211.

6 Skylar Christoffersen, "China and Russia: A New Cold War?" *Harvard International Review*, October 31, 2024. Michela Nicolais, "Pope Francis: 'The Present Third World War Fought Piecemeal Is Turning into a Global Conflict,'" *AgenSIR*, January 8, 2024, https://www.agensir.it/chiesa/2024/01/08/pope-francis-the-present-third-world-war-fought-piecemeal-is-turning-into-a-global-conflict/.

7 Radbruch, *Legal Philosophy*, 117.

to be its aim—the demand for justice never ceases, even when it is reduced to a pious wish for freedom in a prisoner's heart.[8] However, the conflicting demands of justice show that even a righteous struggle against injustice can turn into a fight for values that are not universally shared or seen as fundamental. In a world shaped by competing political and religious beliefs, not only the call for law and order but even the pursuit of justice itself can become unjust. Law can become tyrannical. Radbruch, Hart, and Böckenförde—the three central figures in this study—remind us of this by deflating our belief in law. They do not view law as a path to perfection but as a tool for grappling with the complexities and struggles of human life. At the same time, they challenge us to move beyond the concept of value and therefore to hope for something greater than law itself.

Radbruch—who insisted that "one can only become a good jurist if one has a bad conscience"—used religion to criticize value-thinking as such and prove that law is "a form of violence [*Gewalt*]."[9] Hart emphasized the importance of distinguishing between law and morality, and he championed a form of critical morality that could question the very foundations of the legal system. He defended an extra-legal ethics, arguing that law consists of what is posited by a sovereign, even if it cannot be reduced simply to a command. Böckenförde, by contrast, engaged with Carl Schmitt's critique of the "tyranny of values" and developed a political theology of secular law, highlighting that law originates in the very violence it seeks to contain. Their reflections on what we have called the end of law expose the internal contradictions of the modern liberal-democratic order. This is precisely why revisiting their thought is so important in light of today's crises. Their work compels us to grapple with the two central themes of this book—political theology and the crisis of sovereignty—which we will now explore by summarising and comparing Radbruch, Hart, and Böckenförde's respective understandings of the end and purpose of law.

The Crisis of Sovereignty

To grasp the contemporary importance of the thinkers in this study, we first need to look at the historical contexts that shaped their legal philosophies. Each of the three main figures argued, in different ways, that modernity revealed the relativity of values. Our first thinker, Radbruch, was born in 1878 and began his posthumously published memoirs by describing his childhood before the rise of highly complex industrial societies—experiences that led him to embrace legal and political relativism:

8 Alexy, *Law's Ideal Dimension*, 294. What Teubner calls a "general desire for justice" in his article "Self-Subversive Justice," 15, inter alia.

9 Radbruch, "Vorwort zu 'Über die Wertlosigkeit der Jurisprudenz,'" 227, and Radbruch, "Juristen – böse Christen," 222.

> In the morning, on my way to school, I was able to empty the stinking and dripping buckets into the so-called dirt farmer wagons and see the semi-liquid gold of agriculture leak onto the surface of the road between the wagon floor and sideboards. Since then, the world has become faster and faster, brighter and flashier. I experienced the first bicycles, called velocipedes, with their grotesque, giraffe-like frames and a very large wheel in front and a very small one in the back. … The greatest of all experiences of technology for me and my contemporaries was the conquest of the air by the human spirit. I saw tears in the eyes of many who, for the first time, looked up from the Heidelberg New Bridge to the Zeppelin airship. At that time, no one could have suspected that these and other inventions would neither make people better nor happier, but would instead lead to the ruin of humanity.[10]

Radbruch witnessed the democratic order that he had fought for collapse into tyranny and ultimately fall apart in 1933. His hope for a pluralistic yet socialist Europe after 1945—one that would reconnect with its religious roots—never came to fruition, although his ideas about law influenced the development of West Germany after 1949. In this way, Radbruch's work proved influential, much like Hart's and Böckenförde's visions of the state as something beyond a community of shared values shaped the postwar era. However, their liberal understanding of the state and the related international order is now increasingly challenged. This is why their continuing relevance may lie in those aspects of their thought that help us confront the crises of our own time and which challenge the return of a politics of homogeneity—which not only so-called populists champion today.

We noted in the introduction that our times have been described as a "crisis for the law," "a crisis for sovereignty," and even as an "age of polycrisis."[11] One should always be wary of the concept of crisis, since turmoil seems to be a necessary part of human life, at least the life that according to Böckenförde has been banished from the tranquillity of Paradise. But by crises, we are referring to conflicts around values in both the cultural and the economic sense. We wrote that the interstate conflicts, geoeconomic disputes, natural disasters, and collapse of ecosystems are all being compounded by a severe cost-of-living crisis. In a recent survey, 93% of Europeans worry about the costs of living and 48 million Europeans stated that they cannot afford to heat their homes properly.[12] Radbruch, Hart, and Böckenförde warned that such

10 Radbruch, *Der Innere Weg*, 7–8.

11 Menéndez, "The Crisis of Law and the European Crises"; Tooze, "Polycrisis"; World Economic Forum, *The Global Risks Report 2023.*

12 European Parliament, "Parlemeter 2022: EP Autumn 2022 Survey," Special Eurobarometer 98.1 (Brussels: European Parliament, January 2023), Donagh Cagney, "Almost 48 Million Europeans Cannot Heat Their Homes," *Euractiv*, February 24, 2025.

social shortcomings threatened the sovereignty and legitimacy of the state. They understood that democratic sovereignty, the self-government of citizens within a territorial state, could easily be undermined by economic and political forces or, for that matter, by technological development. This is what is happening today, and one reason why we have written this book.

All three figures of this study were staunch democrats on the political left. They believed that the law should protect popular sovereignty and guarantee political representation in a pluralistic society. Radbruch's and Böckenförde's legal philosophies were reactions to the nihilism of the First and Second World Wars. Hart's legal positivism was not "a purely value-free and therefore apolitical contemplative exercise" but rather a product of "post-war British labourism" and "Keynesian economic interventionism."[13] The social democratic ethos that they shared shaped many European countries in the decades after 1945 and required a vision of law which was something more than an "order backed by threats."[14] Hart suggested that "the operation of a *promise*" was "a far better model than that of coercive order for understanding many, though not all, features of law."[15] To "promise is to say something which creates an obligation for the promisor: in order that words should have this kind of effect, rules must exist providing that if words are used by appropriate persons on appropriate occasions … those who use these words shall be bound to do the things designated by them."[16] The modern welfare state rests on the promise that it can guarantee social cohesion and sufficient stability to ensure upward mobility and social security for the working masses.

It is this promise of cohesion and mobility that has been broken in countless countries, and as mentioned, in the wake of the 2008 economic crisis, Böckenförde argued that a "counter-model to capitalism" was needed to safeguard the sovereignty of the democratic national state. He emphasized that such a new order, which he thought would need to take the form of a union of states, transcended the vision of "solidarity" as a simple "repair concept [*Reparaturbegriff*] to cushion and compensate for the harmful consequences of the … possessive individualism."[17] The hope for a "counter-model to capitalism" was, in a sense, extra-legal. It called for a new way of understanding human nature that challenged the world of possessive individualism and opposed what Schmitt called the tyranny of values. This counter-model couldn't simply be imposed by the state—even though the legal system was necessary to support it—but had to arise from the free actions of the people. In this way, Radbruch, Hart, and Böckenförde's discussions about the end

13 Brendan Edgeworth, "H L A Hart, Legal Positivism and Post-war British Labourism," 276–277.
14 Hart, The Concept of Law, 20–21.
15 Ibid., 42–43.
16 Ibid., 43.
17 Böckenförde, "Woran der Kapitalismus krankt," 69.

and purpose of law reflect the political and economic developments that have brought us to a point where "[c]onstitutional democracies and constitutional democracy appear in trouble throughout the world."[18] This global crisis of political and democratic sovereignty means "that no earthly haven is immune to whatever is ailing regimes that purport to be constitutional and democratic."[19] It is this crisis that threatens the democratic legal order itself, by making political representation more conflicted and complex.

Böckenförde agreed with Forsthoff and Schmitt's that it was the evolution of capitalism which destabilized the legal apparatus as a *Wirkungs- und Entscheidungseinheit* and thereby endangered popular sovereignty. The growth of popular movements on the left prompted Forsthoff and Schmitt to defend the total state in the early 1930s and to worry about the tyranny of values after 1945. Böckenförde, on the other hand, lauded political organizations and civil movements and understood that they were essential for a functioning democracy. Our post-industrial world is weakening this political and democratic form of representation and in a sense undoing the enormous movements that shaped both the democratic and the totalitarian experiments during the twentieth century.[20] The ability of the democratic territorial state to fulfil its promises is severely compromised by the long downturn of capitalist growth and an increasingly heterogeneous civil society, consisting of groups with conflicting interests and visions of the common good. However, as the twentieth century demonstrated, any attempt to return to a politics based on enforced values and homogeneity quickly leads to conflict, turning brother against brother.

Radbruch hoped that the modern party system could help manage this diversity by encouraging everyone to accept that their values are relative, since we are all finite beings limited by time and space. After the defeat of the Third Reich in 1945, he argued that "only in the wealth of contradictory party demands can the national spirit [*Volksgeist*] find its genuine and full expression. Every party needs another party as a counterweight if all the dangers of a one-party state are to be avoided."[21] Yet, in the same text he wrote that even liberal and conservative party forms required some form of socialism as their economic basis.[22] In a Europe that needed rebuilding, the market required state intervention, and the moment was right to steer capitalism towards goals beyond just profit and accumulation. But this was surely something that many political and economic forces were not ready to accept.

18 Graber, Levinson, and Tushnet, *Constitutional Democracy in Crisis?,* 1.

19 Ibid.

20 For an important discussion on the relation between democracy, political representation, and the industrial revolution and the advent of post-industrialism as a crisis for parliamentary democracy, see Marco Revelli, *Finale di partito* (Giulio Einaudi editore, 2013).

21 Radbruch, "Neue Parteien—Neuer Geist," 344.

22 Ibid., 344–345.

In parallel with the weakening of this social democratic ethos—which certainly also permeated conservative and liberal parties in Europe—during the last few decades we have seen the return of authoritarianism, populism, and blatant racism. Furthermore, this shift has driven mainstream parties towards promoting homogenizing values—something Radbruch, Hart, and Böckenförde warned could threaten secular and liberal democracy—and has given rise to a political and economic elite that favours technocratic solutions to today's crises. As we noticed in the introduction, Christine Lagarde has insisted that we are in the middle of "a crisis of trust in institutions across all sectors that shows no sign of abating."[23] As a true technocrat, she prioritizes two aspects of the problem which were addressed in Radbruch's formula: expediency and legal certainty. But since the financial crisis of 2008, the third and arguably the most crucial dimension of Radbruch's argument from 1946 is being raised in ever new forms on streets and in workplaces: the demand for justice. To name a few: the Gezi park protests in Turkey in 2013, the violent protests of the yellow vests between 2018 and 2020 in France, the peaceful campaign against authoritarian rule in Serbia during the same years, the 2019–2022 protests in Chile which led to a new draft constitution, the Hong Kong protests in 2019–2020 against repressive and anti-democratic measures, the George Floyd uprisings between 2020–2021 in the United States, the 2021 protests in Colombia which included a national strike, the still ongoing wave of labour disputes and strikes in the United Kingdom that began in 2022, the 2023 Bangladesh garment workers strike, the list goes on. Since 2011 we have seen revolutions worldwide, among others in Tunisia, Libya, Egypt, Yemen, Syria, Ukraine, Burkina Faso, Armenia, Sudan, and Sri Lanka, with both hopeful and tragic outcomes.

As Radbruch noted in 1932, legal and political justice is fundamentally a matter of distributive justice. However, many of the protests we have discussed above are rooted not only in the unequal distribution of wealth but also in the ways that wealth is produced. The global crisis of political sovereignty reveals that, in a system grounded in possessive individualism, the ultimate aim of law is still—as Hart rightly observed—mere survival. In a world where resources are distributed neither equitably nor justly, growing inequality continues to fuel unrest and the question is whether the minimum content of natural law can be reduced to survival in such a scenario.[24] If the state is to survive as a sovereign power, it may need to move beyond its role as a *Not- und Verstandsstaat*. However, as Böckenförde recognized, the very industrial growth that once underpinned state sovereignty—especially in the West—now appears to be reaching its limits. This growth not only helped

23 Lagarde, "There's a reason for the lack of trust."

24 Isabel Ortiz, Sara Burke, Mohamed Berrada, and Hernán Saenz Cortés, *World Protests: A Study of Key Protest Issues in the 21st Century* (Palgrave Macmillan, 2022).

establish sovereignty but now threatens to undermine it, whether the state is democratic or not. In this context, Radbruch's belief that existing political parties could offer a solution seems overly optimistic. The crisis lies exactly in their diminished ability to represent the people and maintain law and order. As Peter Mair argued, many political parties today are "ruling the void"—exercising power without truly representing the public will.[25] The current crisis of sovereignty is, at its core, a crisis of popular sovereignty. It is a crisis of parliamentary representation, rooted in the fact that people in modern territorial states are no longer primarily united as citizens of a nation, but rather as consumers and workers in a global market.

The legal philosophies of Hart, born in 1907, and Böckenförde, born in 1930, responded to the economic, cultural, and legal transformations brought about by the global industrial system—what Freyer described as a world of secondary systems.[26] The farmer and worker in the "primary systems" lived before industrial production, since his "work from morning till evening, from ploughing to ploughing once again, do not constitute a series of purposes, beginning with raw material, moving to the middle with a semi-finished product and concluding with a finished thing."[27] However, with the rise of market-based manufacturing and the expansion of the secondary and tertiary sectors of the economy, it is not only our relationship to nature that has changed—nature itself appears to be transforming. This is why the traditional distinction between nature and custom, which formed the basis of debates on natural law versus positive law and shaped the interventions of Radbruch, Hart, and Böckenförde, has become increasingly explosive in our post-industrial world.

Böckenförde stressed the importance of what Freyer had called the "emancipation of the state" from the tyranny of values that weakened democratic representation.[28] The legal scholar's teacher Joachim Ritter bemoaned, as we saw, in a discussion with Böckenförde "[t]he hypertrophied use of the concept of society, as if 'society' were everything and the state nothing" when he spoke about "the urgency of environmental protection."[29] We remember that Ritter wondered who had "the power to implement measures that are not defined by profit but actually cost money? Who is in a position not only to tell industry what to do but also to enforce it?" in his discussion of what we today would

25 Peter Mair, *Ruling the Void: The Hollowing of Western Democracies* (London: Verso, 2013).

26 Freyer, *Theorie der Gegenwärtigen Zeitalers*, 79.

27 Ibid., 15.

28 Freyer, *Revolution vom rechts*, 56.

29 Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit*, 61. On the *Ritterschule* and the attempt to liberalize Carl Schmitt, see Sjoerd Laurens Victor Griffioen, "Weak Decisionism and Political Polytheology: The Neutralization of Carl Schmitt's Political Theology by Hans Blumenberg and the Ritter School" in *Open Theology* 9, no. 1 (2023), 1–18.

call the climate crisis.[30] These important questions, the right-wing Hegelian continued, "bring the role of the state, or the union of states, into play." And in a phrase that could have been written today, fifty years later, he bemoaned the fact that the effort to address "important environmental questions repeatedly ends in resignation."[31] Ritter suggested that the main reason why states fail to deal with the environment and similar supra-national problems "might be because the goals and ideas of the common good [*Gemeinwohl*] that come into play can no longer be satisfied by the progress [*Fortschritt*] that sustains society and its expansion."[32] The idea of progress came to signify the expansion of the secondary systems—bureaucracy, industry, and administration—that had led thinkers like Ritter, Freyer, Forsthoff, and Schmitt to support National Socialism. For them, the growing complexity and diversity of civil society threatened the unity and authority of the state. Even after 1945, Ritter remained concerned about the societal forces that weakened state sovereignty. Böckenförde, who was forty-two at the time, responded to Ritter's concerns by reaffirming the importance of the state. For him, the modern territorial state remained the political structure capable of securing what we might, following Hart, describe as the promise of a good life. But this was possible only if the state went beyond simply defending the status quo—if it became more than a *Not- und Verstandsstaat*:

> The state needs greater political decision-making power in the face of socially immanent impulses, interest groups, etc.; however, this is only possible on the basis of an ethical-moral legitimation of the state, which conveys an awareness to the citizens that absorbs and sustains such decision-making power. What can be done about this at the moment? I would like to refer here once again to the concept of "quality of life." We should treat it with great sympathy. I would like to think that it can be a starting point. In its opposition of quality versus quantity, it has an evidentiary force, and in this regard it ultimately relates to a conception of the common good that goes beyond a merely functional order of balance and does not view the state merely as a *Not- und Verstandsstaat*—that is, as a function of society. If this concept prevails, then I am convinced that conclusions can be drawn from it in this direction, and we ourselves can contribute to it.[33]

Böckenförde believed that the *Not- und Verstandsstaat* rested on the protection of survival and security, and he hoped that a discussion on the quality

30 Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit*, 61.

31 Ibid.

32 Ibid.

33 Ibid, 62.

of life could bring us closer to the ethical state. This was the political formation he thought perhaps could safeguard its members from the world of societal powers and secondary systems that undermined popular sovereignty and threatened the freedom of the individual. Yet Böckenförde also understood that the crisis of democratic sovereignty forces us to hope for something greater than the territorial state, namely, a union of states. Such a union could perhaps defend a form of life that broke with possessive individualism and a system which identified the common good with economic and technological progress. In discussions like these, he also came close to defending what Radbruch described as a "natural law with changing content."

In 1967, Hart wrote that it "is possible to extract from Plato's *Republic* and *Laws*, and perhaps from Aristotle's *Ethics* and *Politics*, the following thesis about the role of law in relation to the enforcement of morality: the law of the city state exists not merely to secure that men have the opportunity to lead a morally good life, but to see that they do."[34] What is essential for our discussion is that the English legal philosopher stressed that "the classical thesis" of Plato and Aristotle is the product of a society that has reached a specific form of complexity: "According to this thesis not only may the law be used to punish men for doing what morally it is wrong for them to do, but it should be so used; for the promotion of moral virtue by these means and by others is one of the ends or purposes of a society complex enough to have developed a legal system."[35] The "classical thesis" is related to what Böckenförde in the same year called "the public (*polis*) cult" and which he differentiated from his own attempt to ground "the quality of life" on the modern individual's freedom to choose a way of life; a choice he believed was rooted in the early Christian church's search for a form of redemption beyond every worldly city and state.

Hart noted that the classical vision of the state "is strongly associated with a specific conception of morality as a uniquely true or correct set of principles—not man-made, but either awaiting man's discovery by the use of his reason or (in a theological setting) awaiting its disclosure by revelation."[36] He distinguished this classical understanding of law from "the disintegration thesis" which he thought characterized modern conservatism and which, for instance, the judge Lord Patrick Devlin defended. From this perspective, the possibility of the good life had to be based on a common—and for Devlin religious—morality. Society rested, in other words, on cultural and perhaps even ethnic homogeneity. Calls for this form of enforcement of certain conceptions of the common good are today raised by not only conservative voices but also

34 Hart, "Social Solidarity and the Enforcement of Morality" in *Essays in Jurisprudence and Philosophy*, 248, see also 262.
35 Ibid, 248.
36 Ibid.

left-wing and liberal forces.[37] While progressives and conservatives may disagree on what specific values should guide society, they are increasingly united in promoting a politics based on shared values (that obviously produces new conflicts on what should be viewed as the common good).

Radbruch and Böckenförde's return to natural law was, in part, a critique of this affirmation of cultural and social homogeneity. Unlike Hart, they saw what Böckenförde referred to as political theology as a potential resource for defending difference and heterogeneity against the homogenizing forces of the global market and its political counterpart: the nation-state. It is important to remember that the system of nation-states emerged alongside industrialization and secularization—processes that both Böckenförde and Radbruch associated with capitalism. And both warned that this economic system could produce a crisis for law and politics by undoing the sovereignty of the state.

Critical Morality and Political Theology

Radbruch argued that law is a way to realize the idea of justice. But that meant that law is part of the relativity of values that define every modern society, since we seldom agree on what is just: "The concept of law can be determined only as something given, the meaning of which is to realize the idea of law. Law may be unjust (*summum jus—summa injuria*); but it is law only because its meaning is to be just."[38] The law is a mechanism for evaluating actions by being defined by the idea and value of justice.[39] The judge who adjudicates, the police officer who makes an arrest, the contracting party who demands their rights, the activist who will settle for nothing less than reform or even revolution, and the people who actively and passively follow the demands of law—all of them define the social world through their implicit or explicit evaluations of what is right or wrong.

This means that the legal system cannot guarantee justice on its own. Law must be obeyed to be effective—but its enforcement ultimately depends on the willingness of people to obey it. Without that, law becomes a norm without force. If obedience is based solely on fear of punishment, the law risks appearing illegitimate or even tyrannical. In this sense, law relies not

37 Adrian Vermeule, *Common Good Constitutionalism* (Harvard University Press, 2022). A good example of how liberals and social democrats are adopting populist rhetoric regarding immigration is Denmark. See, for example, David Leonhardt, "In an Age of Right-Wing Populism, Why Are Denmark's Liberals Winning?" *New York Times*, February 24, 2025, https://www.nytimes.com/2025/02/24/magazine/denmark-immigration-policy-progressives.html.

38 Radbruch, *Legal Philosophy*, 52.

39 Ibid., 73. Furthermore, he distinguishes between subjective justice—as the justice of a virtuous person—which is only relevant as directed towards that other form, namely objective justice. "The ideal of the moral good is represented by an ideal human being; the ideal of justice is represented by an ideal social order."

just on coercion, but on popular consent—or at least a degree of acceptance. As Radbruch argued, an imperative that tells us what we ought to do is not truly legal if it relies only on the threat of force. Of course, law often does involve such threats—fines, imprisonment, or even capital punishment. This is what Kelsen called the "social technique" unique to law: its capacity to guide behaviour through sanctions. Radbruch acknowledged this, describing every legal order as ultimately grounded in violence. Unlike Kelsen, Radbruch insisted that the essence of law lies not in its technique, but in its purpose. And that purpose is justice. This means that law always carries a moral or ethical claim—what Hart might call an assertion of what is right: *this law is just*, *this is how things ought to be*. When there is a deep conflict between the law as it is enforced and what people perceive as just, disobedience often follows. Over time, this can lead to legal reform—or even revolution. Radbruch was right to say that chaos and disorder often give rise to law. But the reverse is also true: when law relies solely on coercion to impose order, it may end up producing more disorder instead. Law must therefore be understood as something more than the sovereign power that it requires as its material basis. "Power," as Radbruch insisted, "is not bounded by force. Power is spiritual: in the last analysis, all power is power over souls."[40] Anyone who is powerful enough can affect souls, and a theory that views law merely as a mechanism of power ends up being a theory of recognition

This is the mystery of law and what gives it a theological dimension: a law is not a mere power that one *must* control since it can threaten us with force. Law is a power that one *ought to* follow. This is why we have argued that Radbruch anticipates Hart's argument that law must be seen as more than command. However, the utilitarian and positivist logic of Hart's legal theory which eloquently severs law from morality through a cut by Occam's razor and reduces it to the rules posited by humans to organize their social relations is not fully convincing. Radbruch instead saw the law as the relation of a specific culture to what Lask called "the typical values" that define what is right in an almost Platonic manner—even if only negatively as in the question of the meaning of justice that transcends the positivity of law. Radbruch's differentiation between *what is* and *what ought to be* was therefore not merely positivistic. It was, in a sense, Platonist, and Hart could not accept this methodological dualism between social reality and a conceptual world of ideas.

Hart did not see law as something that requires individuals to make moral or evaluative judgements about their particular social world. For him, doing so blurred the distinction between law and morality. This is why Hart emphasized the importance of an extra-legal critical morality—a separate framework we can use to assess the legitimacy of laws from the outside. Radbruch, by contrast, defined law as the attempt to make just judgements about issues

40 Ibid., 115.

that inevitably arise when humans form communities. For both Hart and Radbruch, the unifying function of law is cultural, not purely natural, and Radbruch would probably have rejected the idea that law could be reduced to the mere aim of ensuring biological survival. Human survival is always culturally situated—it takes place within a particular society or context. Survival can occur under just or unjust conditions, and this is why Radbruch believed that law necessarily involves philosophical and moral questions about what is good or just. In this sense, the "minimum content" of natural law—survival—expands into something far greater when seen through the lens of culture, economics, and politics. It becomes, as Böckenförde put it, a matter of the *quality* of life.

However, we have argued that even for Hart, the core concern is not survival. Survival is only fundamental because it is the prerequisite for human life and this is why it is also the minimum natural condition for a pluralistic society based on the choice and freedom of the individual person. As the Catholic philosopher Patrick Riordan has put it in a Hartian manner: the "law of a liberal political community would not attempt to make people good in an unrestricted moral sense but would have a more limited agenda of securing the society's survival and preventing harm to its members."[41] This is what such a structure and social order can guarantee. But as Riordan shows, the possibilities created by such a social order need not be restricted to merely the relative goods of survival, the prevention of harm, and some limited form of freedom. Such a social order can be based on a discussion on the quality of life exactly because the minimum content of natural life, survival, tends to become maximal: it becomes a discussion of justice and the content of the good life.

Böckenförde was right to emphasize that the possessive individualism of the modern territorial states tends to reduce the end of law to survival and security, making it impossible to achieve what he calls "real freedom." Radbruch, Hart, and Böckenförde all converge on the importance of freedom. They agree that law must preserve a certain asocial—or even antisocial—dimension, as Radbruch saw in liberalism, because individuals must be free to choose their own path to dignity and happiness. This idea of freedom ultimately leads us beyond the boundaries of law, order, state, and politics—towards natural law, or perhaps even beyond law altogether. Yet Hart was right to argue that freedom presupposes survival and therefore life and this reveals why even Böckenförde's ethical state had to include the protection of life and security. We saw in the chapter on Radbruch that the threat of death makes it rational to posit "the right to self-defence" as "an original human right left to the person attacked, while the right to the death penalty can only be thought of as a right created on the basis of the state treaty, or rather *cannot* be thought of

41 Riordan, *Human Dignity and Liberal Politics*, 176.

on an individualistic basis."[42] An individual can have no legal rights when she is dead, and killing a sovereign might be lawful if done in self-defence, for the latter could be said to be a natural law, given the fact that humans are mortal. In contrast, sanctioning a crime with the punishment of death is unrighteous since the execution pushes the human being outside the confines of law into the realm of death. But only, of course, if law is seen not only as a mechanism to protect society from disorder but also as a mechanism for ensuring justice to the individual, and this is what the end of the state should entail according to the subjects of this study. This is why it could be argued, with the help of Radbruch, that it was what Hart would later define as the minimum content of natural law, namely, survival, that made it impossible to tie law completely to the state, even if Radbruch, like Hart, accepted that the law ultimately rests on the sovereign's power.

Hart certainly refused to view law as mere command, but by defending the positivist dictum that any posited law must be considered law, he had more difficulty than Radbruch envisioning a law that does not emerge from the sovereignty of the state but is instead posited as the natural right to defend mortal life. It is the living individual, and, hence, the human as a biological organism or what Radbruch called a soul that has the practical power, and should have the lawful right, to ask: *is this just*? There are no individuals without a community, and as Ritter stressed in 1972, one of the most important political experiments we must undertake today is the creation of a way of existing that does not destroy the climate and the very conditions of life—literally the conditions for our survival—as the world of secondary systems is currently doing. The survival and security of the individuals who populate the world's advanced economies, as well as the hopes of many of those who are still excluded from reaping the benefits of capitalist society, are determined by the progress that undermines what Ritter took to be the *Gemeinwohl* of not only a specific people but of humanity as such.

The impetus to regulate capitalist progress is, of course, not a deduction of positive law from natural law, as if there were a rule in nature that stated, for example, that we have a duty to preserve and restore the balance of the Earth's climate system. An adequate response to the growth of the world's secondary systems requires a recalibration of humanity's metabolic relationship to nature. The dilemma can be explicitly formulated as such: what if the continuation of the anthropological form of possessive individualism stands in contradiction with the common good of humanity as such or at least with the web of life of which our species is a part? Phrasing the issue in this way likens it to Hart's argument that all legal orders must respond to certain unavoidable aspects of the human condition. The concept of nature becomes social and, thereby, political when humans begin to see that the progress of the civilization that

42 Radbruch, *Legal Philosophy*, 195.

they are trapped in shapes nature and has perhaps even become antithetical to the good life in the long run. This is why even modern, late capitalist individuals tend to view nature as a kind of society with rules and demands. This is the case not only concerning protection of the environment, but also in issues concerning what is natural, such as gender, parenthood, and sexuality. The recent trend of conferring legal subjectivity on features of the natural world—such as forests or rivers—is another clear symptom. We can already see this in the fact that more and more people, both on the right and on the left, question positive statutes—or even the whole legal order—in the name of a supra-statutory justice that emerges from nature rather than custom. From Extinction Rebellion to Indian farmer protests, Luigi Mangione's health-care terrorism, Serbian anti-mining campaigns, and the polarizing transgender issue, to name just a few. The most pressing social conflicts today arise from the complex interplay between the natural and the social. This means that legal science must embrace what Kelsen dismissed as a *social interpretation of nature*—even if doing so risks defending what he dismissed as a kind of jurisprudential animism, namely, an understanding of law as bound to what Radbruch called the soul of the individual human animal.

In this situation of conflicts over even the meaning of nature, it is important to defend Böckenförde's call for a legal order that makes a manifold of experiments in living possible and legitimate: "It is the task of law to create for humans the possibility to become free, free also in the sense of such divergent notions, the ability to be true to oneself, but not to prescribe any one of these notions as obligatory."[43] Böckenförde relates this pluralistic understanding of freedom to the principle of "law as the ethical minimum." The core of this argument is twofold: first, that "the legal system does not and cannot make all ethical-moral demands obligatory," and, second, "that the virtuous life can be prescribed to the individual with only limited legal obligatoriness (relative to the demands of social compatibility), while the rest must be placed into his ethical-moral responsibility as an act of freedom."[44] In other words, only those minimal requirements for coexistence (demands of social compatibility) that are needed can be legally required and therefore sanctioned. For Böckenförde, this pluralistic society does not in any way conflict with his vision of political theology even if the way to redemption is a narrow path; it "must in fact be acknowledged, if one proceeds from the assumption that the state and the state's law do not stand in for God's judicial power."[45]

Böckenförde's political theology is first of all an attack on the pagan cult of the polis, which, given today's polytheism of values, reemerges as a demand for absolute homogeneity. Theological thinking, on the other hand, can

43 Böckenförde "Reflections on a Theology of Modern Secular Law," 273.
44 Ibid.
45 Ibid.

counter this desire for homogeneity with an explicit affirmation of a nearly asocial vision of freedom, which opens up the possibility for individuals and associations to undertake the search for justice. Thus, one must conclude that theology enables us to envision social relations that are not bound to the immanence of merely human—and therefore relative—values. Theology reminds us that the good is not a subjective construct, but a gift: something given to us without merit and beyond our deserving. Yet paradoxically, we are right to ask for a good life because we are persons loved by God. It is therefore important to emphasize that we are not only called to refrain from judgement and to act with grace—as Radbruch might argue—but also endowed with the dignity and power to resist those who would judge us unjustly. Grace and mercy are not only what we can offer to others; they are also what we may rightly ask for and even struggle to receive. We are all worth more than mere justice by being images of God.

Theology was, in the hands of both Böckenförde and Radbruch, never an instrument to establish homogeneity or found a state. In fact, one can wonder if Schmitt's enemy in *Political Theology* was Radbruch, the Minister of Justice, who tried to show how democratic socialism, legal relativism, and Christian love could be the political and cultural basis for the Weimar Republic that Schmitt distrusted. Contra Schmitt, Böckenförde's and Radbruch's political theologies were never a defence of political sovereignty as such. It was a means to transcend the human, all-too-human, fixation on homogeneity by revealing that humans are, already in this life, much more than political animals. As creatures that die, we have no permanent home in any state or city; hence, we should view everything worldly as something with a relative worth. The good state, what Böckenförde called the ethical state, could be based on such relative homogeneity. For Böckenförde, this relative homogeneity implied, first and foremost, political and economic equality and a harsh criticism of possessive individualism. But it also aimed to create the opportunity for the individual to strive for a justice which transcends positive law. This is what Böckenförde formulates in the quote above on the virtuous life, what Hart fought for in the debates over fornication and homosexuality with Devlin, and what Radbruch called the antisocial form of law. Yet, this form of social liberalism—or perhaps asocial socialism—is threatened in a world where the progress of the world's secondary systems has come into an open conflict with the long-term interests of humans whose survival depends on a stable and secure environment. Is freedom, perhaps, not the path to the good life? Has the so-called open society showed itself to be farce?

Hart, who argued early in his career that freedom was the end of law, would later turn away from this reliance on a fundamental natural right. As we suggested in Chapter 3, one could read his later work as an attempt to arrive at this argument for freedom through another path. In a way he did, through the juridical-political arguments in the debates on morality and criminalization. But in his legal philosophy proper, he abandoned freedom as an end of law.

One could interpret this as his loss of belief in the possibility that law could generate such freedom. Even if freedom is an ultimate requirement, a demand, and even a natural right, it could be neither the basis nor the ultimate purpose of law. In the end, he accepted law as a sociological fact which could neither rely on nor produce freedom.

Another way of formulating this is through the difference between Hart, on the one hand, and Radbruch and Böckenförde, on the other. While the latter two could—and did—choose to develop political theologies in which the structure of law was both based on and teleologically directed by certain fundamental axioms or values, Hart did not do so, since he was sceptical of both religion and theology. Whatever his personal politics, his moral convictions (which we know were strong), and his engagement with the law as a theoretical and practical matter, he would never come to conceive of a form of law that directed it towards something beyond itself. However, his tongue-in-cheek wish for a left-wing God might be more significant than it seems on the surface. It at least gives us a way to read Hart against himself and return to our thesis that the minimum content of natural law posits the ontological dualism between positive law and natural law by legitimizing a more maximal vision of the end of law, exactly as Kelsen argued. In this sense, natural law becomes the ground on which the hope for freedom can be defended—especially today, when the very notion of freedom is under pressure, both within legal discourse and through the proliferation of secondary systems. As we have argued, the natural right of self-defence entails that individuals may claim the right to protect themselves from the state's actions. This is why it must be insisted that the call not to judge is not a call to passivity—it also entails the responsibility to resist unjust judgement and thereby fight for the freedom of oneself and others to not be judged.

Radbruch, Hart, and Böckenförde's focus on freedom also makes it possible to question whether justice is the ultimate horizon for understanding the good life, and even to revisit the dialectic between the eschatological and teleological dimensions of the end of law. As we have argued throughout this book, justice can in itself easily become unjust since it is based on distribution according to right or merit. To reiterate once more, this is not because justice in a worldly sense has no value. Obviously, a restoration from an unjust state of things, the just treatment of one's fellow humans, a just distribution of resources and opportunities, or even the punishment that we might need to administer, are important for human interaction. The calls for economic justice, social justice, racial justice, and so forth are both justified and meaningful. But it is equally important to state that they are not absolute aims in themselves. In the first instance, this is because their true meaning can never be adequately agreed upon in any process of consensus, but also because even their realization in some specific form does not sate the yearning for the good that drives these demands. On the contrary, the totalization of the ideal of justice in any specific form seems to only lead to new injustices. It is not the

punishment of former tyrants that liberates the oppressed, even though justice may require retribution, it is the endeavour to move beyond the conditions that produced the crime of oppression. Thus, the striving for freedom cannot rely on justice alone. Freedom must overcome the all-too-human need for justice, and thus for law — a demand which, as Radbruch rightly argued, is grounded on distributive justice and readily collapses into the demand for equity and retributive punishment governed by the *lex talionis*.

The desire to be just is the desire to be objective. The formulation by Gottlieb Söhngen, in which he approvingly referred to Radbruch, is indicative of how justice functions: "To be just [*Gerecht*] means to be objective [*sachlich*]; without objectivity [*Sachlichkeit*] there is no law [*Recht*] and no justice [*Gerechtigkeit*]."[46] This also means that the most human ambition—to be just—is inhuman; it is not possible to be objective without becoming inhumane, yet it is in such objectivity that people believe themselves to be completely human. Any attempt to restore equality and justice can easily turn into a set of impossible demands which spiral into a cycle of retribution, which in the end only brings destruction. What is left out of the equation is the power of forgiveness and the possibility to choose not to judge or, once again, to fight for one's own freedom not to be judged. This critique of judgement is important not only as an intermittent exception to the application of justice but also as an anti-economical ideal that is as important and concrete as the economic and distributive justice, which, according to Radbruch, defines the juridical idea of justice.

The fact that we can refuse to judge and thereby refuse to count, evaluate, and measure—and, hence, refuse to be counted, evaluated, and measured since, as Böckenförde argued, we ought to be ends in ourselves and not mere functions of the state and the market—pushes us even beyond natural law.[47] This is a step that Hart's concept of critical morality seemingly could not take, yet it is a path that the political theologies of law developed by both Böckenförde and Radbruch appear to demand—both implicitly and explicitly. Radbruch, however, was more radical in this respect than Böckenförde. As Minister of Justice, he explicitly argued that a theology of grace not only leads us beyond the domains of law and politics but also surpasses the moral sphere itself, seeking a perspective that transcends the very need for justice and judgement. This is why Radbruch's political theology cannot be reduced to Hart's

46 Söhngen, *Grundfragen einer Rechtstheologie*, 131.

47 It should be noted that Augustine envisioned communities beyond the sovereignty of law as such and Origen insisted that Paul pushes political thinking beyond both positive and natural law by envisioning Christ's love as a way to participate in a heavenly kingdom without temporal and earthly power. See John W. Peck, "Killing with Impunity: St. Augustine & Giorgio Agamben on Sovereignty" in *The Saint Anselm Journal* 10:2 (2015), 73–87, and Mika Ojakangas, "Apostle Paul and the Profanation of Law" in *Distinktion* 18 (2009), 47–68, especially page 58.

notion of critical morality or to Böckenförde's idea of the ethical dimension of law. Religion, in this view, prepares us to forgive those who may not "deserve" justice and, at the same time, to recognize that we ourselves are loved infinitely and undeservedly by God. This divine love enables us to question the limits of both positive and natural justice. Consequently, no state could—or should—be based on religion in this deeply antinomian sense, as Radbruch recognized, since any legal order must ultimately coerce, punish, and govern just as it must recognize our often blatant need for justice. However, it does follow that only a political order transformed by this rejection of judgement, evaluation, and retribution can lay claim to true justice. Such an order must treat even those it is compelled to punish not merely as criminals or prisoners, but as ends in themselves. Every human being is an image of God—and in the final analysis, no human being can be judged adequately since the divine, even from a strictly atheistic and secular perspective, can be defined as that which transcends human opinion and judgement.

The End of Law: An Undeserved Goodness

If all wrongs were to be redressed in full, humanity would destroy itself in a cataclysm of retributive justice. In this sense, Radbruch was correct to insist that it is not law or justice, but love and mercy, that keep human society together. It is love that makes it possible for the victim or the judge to refrain from punishing those who are responsible or accomplices in crimes and atrocities, and this love is not a mere sentiment but a political force. Radbruch described his position as philosophical relativism, though it may more accurately be understood as perspectivism—a way of viewing the world through multiple interpretive lenses, each of which evaluates reality differently. He never denied the objectivity of truth; rather, he questioned the capacity of any subjective evaluation to fully grasp it. Yet Radbruch also affirmed that there is a path to truth that transcends the limitations of human perspective. This path is marked by love—a love that resists the logic of evaluation and judgement, a logic that, at best, culminates in equity and equality. To follow this path requires a rigorous critique of law as such: not merely its procedures or outcomes, but the very presumption that justice can be achieved through law alone.

The law is, first and foremost, a sign that the world is not what it ought to be, but a world without law would be left to the whims of chance and anarchy. The apparent necessity of law—perhaps emerging from what Hart described as our species' intrinsic need to make promises that ought to be honoured—is, however, shaped by the *Zufall* inherent in human relations.[48]

48 On law as promise, see Hart, *The Concept of Law*, 43. For an attempt to differentiate promise from law, see Robert W. Jenson, *Story and Promise: A Brief Theology of the Gospel about Jesus* (Sigler Press, 1989).

Radbruch employed the term *Zufall*—chance or contingency—to denote both the power of grace and the instability of law itself. In his final text from 1949, "Gnade und Gerechtigkeit," written for a *Festschrift* in honour of the Italian Catholic and legal scholar Francesco Carnelutti, Radbruch articulated it clearly: "The technical age is characterized by the intention of complete foresight and anticipation or (in Max Weber's words) by the unrestricted rule of 'instrumental rationality.' This can also be described as the elimination of contingency [*Zufall*] or (from the perspective of another evaluation) of fate or divine providence."[49] Radbruch wrote that the "not yet technical, but religious medieval period" did not seek to eradicate the workings of this divine contingency. A death sentence, for example, did "not inevitably lead to its execution with cruel, mathematical consistency."[50]

While travelling to the place where he would be executed, "the condemned was still accompanied by the hope that the rope would break, the sword would miss its mark, that an old virgin might intervene with an offer of marriage, or that one would be lucky enough to be the tenth in a mass execution, and the executioner would spare him in accordance with ancient law."[51] From Radbruch's perspective, the divine nature of such *Zufall*—the one whom fortune spared was spared by God—was intimately connected to the acts of mercy that the Weimar Minister hoped could be institutionalized as a kind of *Gnadenrecht*. These practices of love and mercy signified a goodness that transcend the formal structure and purposiveness of law. He stressed how such activities were institutionalized during the medieval period, citing a religious brotherhood in Rome that ministered to the prisoners awaiting execution. It had the authority to "select three prisoners for pardon," one of whom would be granted clemency, decided by lot.[52]

With this example Radbruch once again identified what he thought was more important than law: the power of unmerited grace. He acknowledged that even if it "would be utopian to bring back such irrational legal forms for mercy," they can still teach us the necessity of questioning the justice of law. The idea of an undeserved and unreserved goodness can counter the distributive justice which is based on the equity that establishes legal certainty but which in a sense is inhuman since it seeks a form of objectivity we will never reach in this life. Radbruch stressed that "pardon is by nature irrational, i.e. without purpose [*zwecklos*], but that doesn't make it senselessness. … Mercy is most closely related to miracles: just as the latter breaks the laws of nature, so mercy breaks the laws of justice, and both have the effect of bestowing great

49 Radbruch, "Gerechtigkeit und Gnade," 342.
50 Ibid.
51 Ibid.
52 Ibid.

undeserved good fortune on everyone."[53] The importance of grace, as the power of mercy that might lack purpose, is that this *great undeserved good fortune might be given to everyone* and therefore cannot be owned nor reserved for oneself. It breaks with the logic of property, as well as entitlement and bequest, and is provocative in its disregard for merit, friendship, or familial preference. Radbruch thus made an essential theological distinction between what has been called "cheap grace" in which "the world finds a cheap covering for its sin" and "costly grace" for "whose sake a man will pluck out the eye which causes him to stumble."[54] To overcome law with mere force or use clemency to protect one's own allies or friends, such as when President Biden pardoned his son, or when President Trump granted clemency to nearly 1,600 persons convicted for the January 6 Capitol riot, are recent examples of such cheap grace which were widely discussed during the last months of writing this book.

Cheap grace does not relativize law. It reinforces what Radbruch saw as the inherent anarchic dimension of the legal order itself: the fact that law rests on sovereignty and, hence, on political power and will. A true and costly grace challenges the law's necessary connection to the political will of the sovereign, which in a modern parliamentary democracy is said to be suffrage. It stimulates us not to judge, or at least question our obsession with justice, by accepting that law itself is governed by arbitrary powers, since it can never be fully objective.[55] Cheap grace is also arbitrary; it rests on some human arbitrator and will, while real and costly grace is contingent and therefore beyond the will of the sovereign. This kind of grace is hence also something that one can, and in a sense must, struggle and fight for.

Today, amid what many have described as an unprecedented accumulation of laws and executive orders, there is growing concern that the legal order of the United States—the world's most powerful nation—is losing its normative grip and guiding function. What this situation primarily reveals is that the law remains bound to what Radbruch famously called *the status of the unfree*, and is thus inseparable from political force. It is surely not a coincidence that it is predominantly people who are poor and undocumented that are sent to prisons in El Salvador through presidential decrees based on eighteenth-century laws. While such developments may appear to mark the collapse or "end" of law, they, in fact, expose how the evolution of law itself can culminate in what Radbruch termed statutory lawlessness—a condition in which positive law persists, but no longer fulfils its moral function. In such moments, the fundamental question of why one ought to obey the law becomes inescapable.

53 Ibid., 343.

54 Dietrich Bonhoeffer, *The Cost of Discipleship* (Macmillan, 1979), 46–47.

55 "But no amount of theory, and no single principle, will answer the recurrent judicial question, which is only rarely 'On which side does justice lie?' and far more often 'Which is the least unjust solution?" Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011), xvi.

More crucially, they underline the idea that every human being has a natural right to resist unjust judgement and to struggle for mercy and grace. Law is only truly law when it carries a moral obligation to be followed—and, for Radbruch, this obligation must always take the form of a question: *Is this right?* As Hart also argued "the primary function of the law" was in "guiding the conduct of its subjects," and both he and Radbruch hoped that the law could instruct the citizens to live in a pluralistic society where people are free to choose different ways of life.[56] According to Radbruch, just as for Böckenförde, this meant that the question of natural law was not separate from the question of the positive law of the state; instead, this latter question always forcefully implied the need to ask the former since natural law is related to the freedom of the individual to choose a life of their own, just as Hart insisted.

The definitional conundrum led Hart to accept the label of law even for those rules and legal orders that might fail to meet most or even all the moral requirements one could place upon them. However, this legal positivism, which has been so influential, is often misunderstood as the ultimate determinant of what law is. The effect and the purpose of the distinction between positive law and its moral qualification is to pose the question of justice, which is always a question that goes beyond the law in the positive sense. The question of whether a law is valid in the sense of legal positivism is not irrelevant or unimportant, but it can only serve as a first step toward addressing the question of the end of law. Böckenförde gave a clear and important answer to the question of justice in his defence of a political theology of secular law. He expressed how law could be a forceful mechanism for repelling the societal powers of homogenization which threaten to strengthen the logic of value that Radbruch, Hart, and Böckenförde rebelled against, in their gentle manner:

> Divergent religious convictions also entail divergent notions about the goal and meaning of life, and what is good and perfect in relationship to them. The law must give space for realizing them, within the framework of the demands of fundamental social compatibility. It is the task of law to create for humans the possibility to become free, free also in the sense of such divergent notions, the ability to be true to oneself, but not to prescribe any one of these notions as obligatory. [57]

This is an essential passage since it not only indicates that Böckenförde was a staunch defender of what many today would dismiss as liberal multiculturalism; it also reveals that his notion of law was close to Hart's understanding of law as a promise. The state should create the institutional possibility of freedom that is necessary for developing a good life in common with others who

56 Hart, *The Concept of Law*, 249.
57 Böckenförde, "Reflections on a Modern Theology of Secular Law," 273.

have different convictions. The rise of the secularized state that Böckenförde detailed in his 1967 article was the logical outcome of the same underlying question of what the end and purpose of law entails in a world of increasing social heterogeneity. However, while the modern liberal state no longer abided by a single "objective order of values," its relativism and pluralism did not obviate a relation to ultimate visions of the good life. Rather, the creation of a society in which divergent ideals of the good life can exist side by side points beyond the belief that the good is a mere cultural and, hence, subjective value. It indicates that the human person is an end in itself. As we have stressed before, this also implied an anti-racist and anti-fascist argument against social homogeneity, for the "individualism of human rights, brought to full fruition, liberates people not only from religion, but also, in a further stage, from the (ethnic-folkish [*volkhaft*]) nation as a homogeneity-creating force."[58] Böckenförde insisted that the attempts after 1945 "to find a new basis of homogeneity in the existence of shared beliefs about values" were "an exceedingly poor and even dangerous substitute. It opens the door to the subjectivism and positivism of the values of the day, which—each laying claim to objective validity—tend to destroy rather than consolidate liberty."[59] He believed that the *form* of freedom—which precedes and transcends all kinds of evaluation by grounding itself in the idea of the human being as an end in itself—could serve as the foundation for an increasingly differentiated society. The human must be recognized as a person.

Radbruch insisted that the understanding of *freedom* as something that takes us beyond the order of value required a profound suspicion towards our compulsion to judge and evaluate, a compulsion that lies at the heart of both law and politics. This is why he turned to religion, and, more specifically, to Christianity, as a way to imagine a "second innocence, not the one of indifference to values, which precedes the divorce of value and non-value, but the one that follows and overcomes it."[60] This innocence transcends perspectivism since it does not evaluate from a subjective point of view. It makes one last judgement, the judgement that concludes the biblical story of creation, which negates all value-thinking, and which Radbruch connected with Rosa Luxemburg's insistence in prison that one has to "find *everything* beautiful and good," as well as with Genesis 1:31: "And God saw all that He had made, and behold, it was very good." The observation and conclusion that all of creation is good is not a judgement or evaluation in the legal or moral sense. It is not about weighing one thing against the other, on the scales of morality or those in the hand of Justitia. It is about recognizing the worth, the good, and therefore that which can be redeemed, even in what is also bad, evil,

58 Böckenförde, "The Rise of the State as a Process of Secularization," 166.
59 Ibid., 166–167.
60 Radbruch, *Grundzüge der Rechtsphilosophie*, 37

or unjust. This divine—and therefore more-than-human—perspective neither denies values nor the distinction between the just and the unjust. It envisions reality through the power of an undeserved and unreserved goodness that, at least temporarily, suspends judgment in this world of strife that stands in such urgent need of law.

If there is one weakness shared by the three thinkers we have focused upon in this study, it is their belief in the value of the state. This is not the place to assess their practical engagement and work in supporting their respective states in various formal roles and through public debate on important policy and legal issues. But we have shown that the horizon of their respective quite radical interpretations of the purpose of law was the sovereignty of the state. The reliance on the state for the creation of just conditions, even if it is conceived as taking up the relatively benign role of a protector, has severe limits. Böckenförde was right that the world of secondary systems undermines the sovereignty of the territorial state and threatens parliamentary democracy as such. Radbruch saw something similar when he concluded his 1932 *Rechtsphilosophie* with the question of whether contingency or law would rule the world. After the fall of the Third Reich he insisted that the law itself could become anarchic; a pure means for sovereign power. His and Böckenförde's answer to this danger inherent in the legal apparatus, and, hence, the territorial state, was to turn to natural law.

They believed that in a world where consensus on the common good has broken down, natural law could still function as a critical standard against which positive law may be judged. The relevance of natural law in a socially and culturally heterogeneous society lies not in its ability to serve as a universal foundation for law but in its capacity to critique existing legal orders. In this respect, Kelsen was right to describe natural law as "the doctrine of theoretical anarchism."[61] Neither Radbruch nor Böckenförde argued that natural law inevitably leads to anarchism. However, by maintaining that natural law is accessible not only to established powers but also to individuals and communities who challenge the justice of the legal order, they asserted that law must be distinguished from the sovereign authority that enacts it. Both saw the right to resistance as fundamentally legitimate, even against the state, and thereby they can be said to imply that natural law is the doctrine of theoretical anarchism in a qualified sense; namely, the doctrine that severs law from the state.

As we have argued, the retreat to a conception of natural law of the minimal type that Hart put forward is not only unconvincing but also unsatisfying. If mere survival is placed as the foundation, and ultimate *end* of the law, we end up in a place that has become all too familiar throughout modernity and not least in the last century. The possessive individualism which seems to drive law into a crisis then remains unchallenged. We need other paradigms for the

61 Kelsen, "The Law as a Specific Social Technique," 239.

good life because we live in a time where the argument of survival, or the life of the nation, is the rallying cry for the most dramatic developments in global and domestic politics. It is, of course, no coincidence that such pleas to save the nation occur at the moment in which the sovereignty of the territorial state is being called into question. The armament of the state and its attendant threats to kill its enemies are made in the name of our own survival and the deterrence of the violence with which others threaten us. In the same way, harsh measures are meted out against supposed criminals, those accused of cheating welfare systems, and migrants. The rallying cry of law and order can, just as Radbruch, Hart, and Böckenförde warned us, often lead to an irrational demand for social homogeneity in a world of increasing heterogeneity. In such a world, we need to envision something beyond the horizon of justice. The solution might be the *Gnadenrecht* that Radbruch saw as an impetus to take concrete action in this world, a world which also suffers under the rule of law and where it might be needed to recognize mercy as a natural right. The complex challenge of constructing an institutional life based on the undeserved goodness that negates, rather than refuses, evaluation by moving beyond it might seem quixotic. But, in fact, it is an affirmation of the reality that always precedes judgement and law. It is being itself: the gift of existence that has been given to all of us undeservedly. We exist whether we want to or not, and this blatant fact can remind us that even those who must be coerced, judged, and punished have an innate right to take part in this being in a dignified manner. The discussion of the quality of life should also determine the conditions of life in prison and for all those whom we must judge.

Our world is structured by societal forces that often make justice a mere formal category and criminality something of a necessity for many. A perspective beyond law can let us see this in all its brutality and discern a world in which we are powerful enough to question the identification of the good with value and equity and, hence, with law and judgement. We have discussed what this entails for Radbruch, Hart, and Böckenförde, and we can conclude by insisting that the discussion of the end of law can help us understand that freedom from the order of value may, in fact, be more concrete than it appears. It rests on the capacity of all of us to suspend judgement. Doing so is not to deny the evil that has been done, nor, for that matter, to abandon the need to instruct or command, but to affirm the reality which lies beyond all forms of relativism and perspectivism: the undeserved and unreserved goodness of being that is given to everyone, and which Radbruch and Böckenförde called God. They used this word to prompt us to see ourselves and every other human as images of that which transcends human verdict and judgement, and thereby to affirm human freedom as what Hart in 1955 described as a natural right. In a world in which we often find it difficult to suspend judgement, reaching this reality beyond evaluation requires politics and law, but a politics and law that transcend themselves by insisting that they are always only a relative good or a necessary evil. Laws are never fully objective, but only ever-subjective means

of grasping the invaluable absoluteness of what can be given and received, and to be fair and just, one must paradoxically be prepared to break with the logic of equity, equivalence, and merit that rule us. It is this grace that perhaps can be organized as an open challenge to the possessive individualism driving the crisis of the sovereign territorial state— a crisis that shows no sign of abating. To do so, one must grapple with the question of the end of law both in its teleological and in its eschatological sense. This clarifies the need for theology in a secular world that has forgotten the political relevance of the idea of undeserved goodness. And this is why the good can be reached only when we live in a world in which we become powerful enough to refuse to judge and, until then, lament our need for law and seek to relativize it.

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