RECENT DEVELOPMENTS OF GERMAN LEGAL PHILOSOPHY: A REPORT AND APPRAISAL (1964-1966)

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*Translator's Preface***

Fundamental German thought about law, appearing under the name of legal philosophy, has greatly influenced Anglo-American jurisprudential thought. In the present century several of our distinguished jurisprudents have derived stimulus from German legal philosophers, for example, Roscoe Pound from Josef Kohler and Julius Stone from Gustav Radbruch. Since Germany continues to be one of those countries where jurisprudential thought is cultivated in an outstanding manner, I have felt that it would render a service to the cultivation of the same thought in the English-speaking world if recent developments of German legal philosophy could be brought to the notice of our legal scholars.

Since only a few articles and no books by present German legal philosophers have been translated into English, this object could be achieved to a degree by translating a report on German legal-philosophical literature into English. The author of this report is one of the most distinguished contemporary German legal philosophers. In this area, he is particularly distinguished in the field of legal logic and the methodology of legal science and renowned for his keen analyses and sober judgment. His reports on the subject are published biennially in the periodical Zeitschrift für die gesamte Strafrechtswissenschaft *and the present report is the most recent of these. It appeared in 1967 in volume 78, No. 3 of that periodical (pp. 490-523).*

Hoping that this translation will serve a good purpose, I intend to continue making available in English his subsequent reports. It is to be noted that the name "report" is perhaps too modest for these expositions. They do not only provide valuable information about current German legal-philosophical literature

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** To provide as faithful a translation of the original German article as possible, the format of the original article was retained. Ed.

but also contain their author's penetrating explorations and insights into the problems discussed.

In the original German, Karl Engisch is a brilliant and lucid writer. However, brilliancy of expression in one language often cannot be matched with corresponding brilliancy in another language. My main endeavour has been to render the rapporteur's thoughts, and the thoughts by him reported, as faithfully as possible without doing too much violence to English idiom. Where I have failed on both scores, this has been due to my anxiety to do justice to both. In German philosophical parlance there are some expressions which have no exact or elegant English equivalents. To render them, I have used my own judgment. Thus for "Sosein" *(literally "thus-Being") I have used appropriate periphrase; I have rendered* "Gemeingeist" *by "collective mentality" instead of "common spirit" (which would perhaps be a more literal translation but rather misleading);* "sachlogische Strukturen" *I have rendered by "ontological structures" instead of "thing-logical structures" (believing that the relevant German phrase is simply a rather regrettable fashion of current German philosophic language and the thought conveyed by it could be expressed in German, too, far better by the expression* "ontologische Strukturen."

The rapporteur has devoted about half of the space of his report to a book by Heinrich Henkel. This is not to be regarded as a lack of proper balance in the exposition; Henkel's work is undoubtedly the most comprehensive outstanding treatment of legal-philosophical problems in the relevant period and has thus provided an occasion for Engisch to examine critically and constructively a number of current legal-philosophical issues in a thorough and illuminating manner. Throughout the report problems relating to criminal law are somewhat conspicuous. On the one hand this is due to the fact that the books discussed have been prominently addressed to these problems, on the other hand to the fact that the rapporteur is also a criminal lawyer and particularly interested in this aspect of the books. It may be mentioned that, undoubtedly as a matter of historical accident, most of the illustrious German legal philosophers today (e.g., Erik Wolf, Hans Welzel, Arthur Kaufmann, Werner Maihofer, and Karl Engisch himself, like the late Gustav Radbruch) also happen to be criminal lawyers. This has produced the situation that the attraction which they have exercised on the minds of many younger German legal philosophers has led these, too, to choose criminal law as their special legal expertise. To my mind, it has not been held by the German masters of legal philosophy that cri-

minal law is that legal speciality which alone can be perfectly matched with the teaching and research of legal philosophy.

It should be noted that the report by Engisch does not consider Austrian and Swiss legal-philosophical publications of the same period.

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Heinrich Henkel, *Einführung in die Rechtsphilosophie. Grundlagen des Rechts [Introduction to Legal Philosophy : Foundations of Law]*. Published by C. H. Beck'sche Verlagsbuchhandlung, Munich and Berlin, 1964. Pp. vii and 468.

This substantial book is one of the most important legal-philosophical publications of recent years and has accordingly received due attention. From the reader, it requires patient study. The author performs his task with great thoroughness and conscientious utilization of literature. Clarity of expression, soberness of reasoning, solidity of argumentation, prudence of judgment, and reserve regarding topical slogans are distinctive features of this *Introduction*. These qualities render the book particularly appropriate to educate students for serious, unbiassed reflection and to protect them against one-sided and exorbitant "ideological" conceptions. Sagacious dialectics or even challenging originality are not to be found in it. Henkel rather tends to harmonize opposing trends in legal philosophy. He seeks for the "golden middle road" between positions such as absolutism and relativism, idealism and realism, transcendentalism and historicism. His method of treatment exhibits features of dogmatic jurisprudence appropriate to legal textbooks and corresponding to "the second way of legal-philosophical treatment" recommended by the author, which "is independent in relation to general philosophy and treats legal philosophy emphatically as a branch of legal science" (p. 6.).

Instead of elaborate ideological designs, the book contains a treatment of special legal-philosophical problems in depth. There is scarcely an essential legal-philosophical issue which has been left out of account (I have noted only the neglect of the problem of "revolution and law"). The author has not entered into the history of legal philosophy (in contrast to the excellent treatment of this matter in Del Vecchio's textbook). Even historical vistas or hindsights are rare, even though it is to be observed that Henkel does know his classics. In general, he keeps to the literature of the recent past and to that of the present time. Of the great philosophers of our century, Nicolai Hartmann is especially congenial to him.

Although Henkel declines to treat legal philosophy on the basis of a definite philosophical system (pp. 5 ff.), he adopts Hartmann's theory of strata in the first part of his work, which contains a kind of legal ontology

("Law and Being"); in particular he draws on Hartmann's treatise *Das Problem des geistigen Seins* [The Problem of Noëtic Being] (2d ed. 1949) (pp. 8 ff.), which is indeed a most important work for legal philosophers. Henkel locates the "position of law in the 'stratified structure' of this world" as follows: "Law resides in the area of noëtic Being, and namely in the collective mentality of the human groups which are organized as a legal community" (p. 14). Both the "material" stratum and the stratum of mental phenomena are merely "supporting strata." The "collective mentality" is "objective mentality," "independent in respect of the minds of individuals"; nevertheless it is not a mystical substance but "that which, independently of individual divergencies of single persons, is thought, judged, or aspired in the group" (p. 15; also pp. 29 f.). In this sense it is always "unique," "living," "dynamic," "changeful," and constantly operative in actuality (p. 15). As the minds of the individuals become objectivized in works, so the collective mentality has for its objectivizations language, culture, economy, and also law. Law is "an objectivized social configuration" (p. 17); it is "a component area of the social order" (pp. 18 ff.). Law is linked with "social entities," that is, with groups of men which have a certain internal coherence and external seclusion; they are governed by an order of life independently of the changes in the composition of the group members; they are entities *sui generis*: unities and totalities which are rooted in "the dual nature of man as an individual and as a member of society" (p. 18—*cf.* Maihofer's distinction between "self-Being" and "as-Being").

The social entities are characterized by "social structures" and "social rules of game"; they are formed by posited "normative orders," of which law is one. Within the social entities there is "the polarity of self-determination and of being-fitted-into" (pp. 25 ff.). Being fitted into an order of the Ought, which confronts the individual in an extensively heteronomous manner, poses the problem of the manner in which this order arises as an objectivization of the common mentality. A dialectical tension becomes, of course, noticeable here. The "common mentality" as something common for law, "the coinciding content of the legal consciousness of many people in the social entity" (p. 31), requires "the intervention of law-making authorities" in the so-called "pluralistic society" today, which authorities "actualize" the common mentality in "the representation of the totality" (p. 31). There is a danger here that "the collective mentality as the creator of law" (pp. 28 ff.) and "law as an objectivization of the collective mentality" (pp. 32 ff.) become questionable; the changefulness of "the common mentality" in history and the situation-boundness of its existence must not become harmful (pp. 36 ff.), all the more so because "the mentality of time" imports, in any given instance, precisely "that community which, extending over the relatively secluded social entities, embraces a vaster unity—the unity of civilization" (p. 40).

The collective mentality is, according to Henkel, also that which decides or affects life and death of law: the factual existence and the abolition as well as the possible rebirth of dead, but in its objectivizations still intellectually apprehensible, law. In those objectivizations language has a decisive role; this is why the relations between law and language deserve special attention (for a detailed consideration of this matter see pp. 46 ff., where methodological problems are discussed). Only a positive law which has an appropriate linguistic form can have the claim to be called "a legal order," *viz.*, as a totality of demands to behave in a certain way and of ordaining or evaluating norms directed to "free" men who are addressable and dirigible by them. Legal norms or legal provisions (on the terminology see pp. 62-63) are created in part by legislation, in part by social custom, in part by judicial decisions (pp. 63 ff.). Their interpretation as "imperatives" (incidentally representing my view) is subscribed to by Henkel only partially (pp. 66-67). "By its most general meaning, the legal provision is a directive purporting to be valid"; it is "a directive posited by the will of the community" (p. 67). But when Henkel conceives "the validity contents of the legal provision, however they may be expressed," as having "ultimately" the purpose "to direct and organize human conduct" (p. 68), his conception becomes scarcely distinguishable from that of the imperative theory.

The legal order is embedded in the order of Being, *viz.*, in the stratified structure of the world. It is supported, in a manner still to be determined more precisely, by the order of nature and its regularities: equally by those of inorganic and organic nature (*bios*). Its content is co-determined by the structures of mental phenomena and of noëtic entities, especially by the "social structures" as "pre-forms of the legal order" (p. 73); also the neighbouring normative orders such as *mores* and morals contribute to its contents. Here again we encounter the well-known formula of the regularity which "inheres" everywhere in things and events confronting law; law discovers them and cannot afford to overlook them (p. 74). "The regularities of the manifold ontic regions and ontic objects import for law conditions as well as guidelines for its regulative designs; they never permit the contents of law to be completely or even approximatively determined (p. 75). In this manner the principles formulated by Nicolai Hartmann governing the stratified structure of the world, the principles of dependence and superimposition, find their application in the realm of law. "In law elements of heteronomous contentual determination based on their ontic dependence are combined with an autonomous decision of the free intellect which is, however, not absolute in respect of reality" (p. 76).

Henkel has thereby foreshadowed what he elaborates in greater detail in the subsequent part of the book which examines the "pre-existing data" of law-creation and the manner and measure of their impact on law.

Before this, however, he undertakes to explore, still in the framework of legal ontology, the two important problem areas: "law, power, and State" and "law, *mores*, and morals" (pp. 77-159). Almost one fifth of the work is devoted to problems relating to these topics. Although the author's relevant expositions are noteworthy, we shall consider them only briefly and confine ourselves only to those matters which may give rise to differences of opinion. Here views are propounded which are not particularly informative about Henkel's basic conception of legal philosophy, even though they often cast new light and exhibit the perspecuity and circumspection of his thought.

Proceeding from broad (perhaps too broad) definitions such as "power"—"the faculty to bring about an event" (this definition covers every faculty of human performance, *e.g.*, also that of a sport performance) or "social power" — "the human faculty of directing the conduct of other men in a social domain" (this covers also the faculty of obtaining information by a polite question), Henkel describes possible ways of exercising power and the relations between the concepts "power" and "violence" (pp. 78 ff.). He then critically considers various conceptions of the relations between power and law, which in literature are sometimes regarded as being in antagonism, sometimes as being in harmony, sometimes as complementary to each other, and sometimes as penetrating each other. But any of these positions contains only partial truths. If one undertakes to clarify the relations between power and law in an articulate manner, it is necessary to know how to distinguish various kinds of power relations (individuals in relation to one another, the relations of the social entity to its members, the mutual relations of social entities) and the different dimensions of law (its factuality and its normativity, its reality and its ideality and legitimacy). It then becomes manifest that law and power are in fact sometimes identical, sometimes in reciprocal tension, and that law assumes a different attitude to diverse ways of the exercise of power. At any rate, enforceability and the faculty of prevailing are essential features of a truly existing law (pp. 92 ff.).

The enforceability of law is not to be understood as a continual actual enforcement of all single legal norms but as a potential enforcement of the major part of the legal order. Because today it is the state that primarily disposes of the enforcement apparatus indispensable for positive law, Henkel's examination of the relations between law and power is followed by an examination of the relations between law and the state (pp. 101 ff.). Here the concept of political activity as well as the nature and typology of "domination" (drawing on Max Weber) are also discussed. Above all, the exposition is concerned with the inner relationships between law and the state: the logical, ontological, historical, and functional relationships.

As concerns the "relations of law to other social normative orders": *mores* and morals (pp. 115 ff.), Henkel, on the one hand, attempts to

provide a sharper delimitation of different relevant areas of order (custom, fashion, folkways, autonomous morality, "high ethos," social morality); on the other hand, he endeavours to re-examine certain conceptions which at the first glance are intriguing but prove to be untenable. As regards *mores*, Henkel examines the utilitarian conception of Ihering (incidentally already criticized excellently by W. Wundt in his *Ethics*) (pp. 117-118), Stammler's theory of *mores* representing "the conventional obligation from case to case" (p. 123, no. 1), and Radbruch's contentions that there is an "incommensurability" between law and *mores* and that "*mores*" is "an absurd cross-breed of legal and moral evaluations" or it is a "conventional lie" (pp. 119 ff.). Henkel rightly emphasizes the "enormous value" of the rules of decency and courtesy; here the old insight is applicable that we learn to value certain things by becoming keenly aware of their loss.

Henkel stresses that *mores* is similar to law in the mode of existence of its norms and in the way it combines heteronomy with autonomy (p. 122); it differs from law in respect of the manifestation of the enforcement of its norms (pp. 123 ff.). As regards morals, Henkel rightly points out that its comparison with law is not feasible *simpliciter* but always in reference to certain "spheres" of it. By the way, I would go here much further than Henkel does with his articulation of "morals," which he obviously (*cf.* pp. 158-159) still regards as a totality having only three "spheres" or "domains" (and which does not seem to offer a fitting characterization of what he elaborates in detail). There are, as Henkel himself emphasizes with regard to high ethos (pp. 132-133 and also p. 143), innumerable forms, types, systems of morality; there are many moralities each of which confronts law in a different way. I feel that it would also be necessary to make a sharper distinction between morals and moral philosophy (="ethics") when morals and law are compared.

When law and autonomous morality, especially law and "high ethos," are compared, discrepancies tend to become conspicuous (which in any event can be reduced by lenience, consideration, toleration, and mutual support). In contrast, when law and "social morality" are compared, there appears, by their very nature, "a structural correspondence" and conformity which can be conceived only in the sense of two intersecting circles. There are morally indifferent legal regulations and legally indifferent moral precepts; there are also outspoken divergences in legal and moral appraisal of particular cases (*e.g.*, reckless but legally unobjectionable behaviour of a creditor). On the whole, "the converging tendencies" still prevail here. Where law relegates to "morals" (to "*boni mores*" etc.), social morality is certainly meant (pp. 147 containing a detailed discussion of the practice of the German Federal Supreme Court in criminal jurisdiction, vol. VI, pp. 46 ff. and 147 ff.).

The second part of Henkel's treatise is devoted to the "pre-existing data of law-creation" and concerned with legal-philosophical problems which

are discussed particularly extensively today. Ultimately the question here is the significance of the "nature of things" and the "ontological structure" so much talked about at present.

By the "pre-existing data" of law Henkel understands (p. 160) above all the "objects of legal regulation," the "material of legal norm-giving," the "realities confronting legislative action" (Eugen Huber). In examining the problems of "the Is and the Ought," "reality and law," particularly the problem "whether a normative force residing in the factual data of the object of regulation exercises an influence upon law in the sense that the regularities or structures inherent in the 'things,' that is, their ontic regularities, co-determine the contents of legal norms" (p. 162), Henkel adds to the concept of the "pre-existing data" (p. 163) the element of this immanent "ontic order which is legal regulation is to be taken into account as building materials of legal provisions." Of course, such significant building materials are not to be encountered everywhere in the objects of regulation; there are also building materials which constitute elements of legal regulation only in combination with other factors, *viz.*, "ideal factors" attributed to "the idea of law." Law-creation and law-application are thus subjected to a double influence: to that of the pre-existing data as facts and to that of the "*facienda*" (Fechner) of law. To determine the role of both of them *in principio* and *in concreto* is a difficult task facing the legal philosopher on the one hand and the lawyer on the other. This task is the more difficult as a sharp distinction between "facts" and "*facienda*" is scarcely possible since on the one hand the immanent regularities of the pre-existing data may already have ideal features and on the other hand certain "ideal factors" may appear in the guise of cultural or political evaluations and exigencies as "being already given" (*cf.* Henkel himself p. 164 under No. 2). The reader may be anxious to know how Henkel will surmount these difficulties.

Henkel proceeds by first presenting those data "in a concrete manner" from which law must depart. These are "man" as an individual and as a social personality, the "social structures" of human groups, the needs and interests which are manifested in them, the "social value-order" of any given time, and the social "institutions." Here again we must abstain from imparting the details of this most enlightening part of Henkel's work. We must confine ourselves to mere catchwords and hints. At the same time we shall keep starting points for substantial treatment in sight.

1. *The Conception of Man in Law*

Man's self-understanding providing an image of man [is] a significant guiding light for law," it is also "the openly or secretly working regulator of all law" (p. 167). Man is relevant to law neither as an "ideal type" nor as an abstract entity (as he was viewed by classical natural law) nor as a fictional entity (into which shape law trims him according to Rad-

bruch's view!). Man must be conceived in taking into account his ontic structure and his constant as well as his changeable traits. Here again Henkel draws on the ideas of contemporary ontology (*inter alia* on those of Nicolai Hartmann) and also on those of exuberantly flourishing modern philosophical anthropology, whose theory of the stratified structure of reality he adopts. This theory supplies the following pre-existing data: biological and generally physical regularities of nature which affect man as "living being" and which are relevant to legal regulation concerning the relations between the sexes, the protection of the pregnant, and the prevention of infectious and hereditary diseases (pp. 175 f.); mental factors, which relate in part to the "endothyme ground" of the personality, in part to the "personal superstructure," and the "ego-layer," are relevant, for example, to the juristic theories of acts and guilt (pp. 179 ff. dealing extensively with the theory of criminal acts); finally insights into the nature of man as a "mind-entity" who freely determines himself, looks ahead into the future, makes projects, pursues rationally his ends thereby rising above the animals, and has the capacity to establish legal institutions such as marriage, property, and obligation. All in all, the pre-existing datum on which the fundamental structure of all legal institutions rest is man's "quality as a person" (pp. 192 ff.).

2. *Law and Social Structures*

Man as a social person does not surrender himself completely as an individual in his "actual existence"; he is not contained without a remainder in a "completely ordered social environment" (as it happens in animal societies); however, he has the "capability of and drive to sociability," whereby "elements of order founded on ontic regularities" are converted into "human social affairs" (p. 199). There are, of course, multifarious social configurations which, aside from a "constant basis determined by ontic laws," are characterized by an "open space of possible self-formation according to historically changeable projects."

Social configurations confront us even in simple contractual relations between single parties; they are more pronounced in the groups which are indeed sustained by individuals but exhibit a "mental unity" as an "emanation of the collective mentality of the group" (to this extent Gierke's group theory holds according to Henkel). The "social structures" and "social rules of game" are, by the way, most diverse, depending on whether the social configuration appears as a "community," a "society," an "organization," or a "power constellation" (see for their more detailed descriptions pp. 206-215). In every particular instance they appear "in a 'natural' relation to the diverse basic forms of association, to which they are, as it were, immanent" (p. 206). Although these "orders which are primarily grounded in the ontic regularities" are mostly "complemented by the superstructures of the normative orders created by the social entity" (p. 206),

the kind of this superstructure which law constitutes depends still on the peculiarity of the social configuration. The relation of law to community is different from the relation of law to society; it is different again to organization and to power constellation. Here also the varieties of structural interconnections of these different social configurations are important and must be taken into account. Whereas law should interfere with the life of community as little as possible and should only provide protection against disturbing internal and external influences (pp. 215-216), society is largely a "domain of law as a social order of balance and peace." Also here "the structures and rules of the game of societal relations constitute the foundation of the plan of legal regulation whose features are indicated by the order which is ontologically predelineated" (p. 217). The attitude of law to power constellations is ambivalent. With respect to private power relationships encountered, for example, in economy, the principle of non-intervention is largely applicable. However, where abuse of power constitutes a threat, as, for example, in the exercise of parental authority or in the exploitation of people in distress or in the oppressive use of the power of social groups, law functions to restrain the power.

Ultimately Henkel finds that the adherence of law to pre-existing social structures and social rules of game nowhere appears to be sufficiently strong. He thinks that law should not overlook the ontological data. However, in case of a conflict with the "structural rules of the game" unwholesome circumstances will appear and the "resistance of reality" will become manifest. Thus the immanent regularities of the ontic order "tend to assert themselves." At any rate, "a satisfactory and practicable solution is to be found only by bringing into harmony ontic orders with axiotic and purpose-conform order-tendencies of law" (p. 225).

3. *Interests and Law*

Henkel recognizes that law has a relative freedom in relation to the pre-existing social structures and that law, to a still higher degree, is independent of pre-existing interests. The doctrine of Ihering that the purpose is the creator of all law and Heck's conception that real interests give rise to law are opposed by the thesis which gained prominence in later modifications of the jurisprudence of interests according to which the creation and the application of law import "an act of mental creation," an act of evaluation. Nevertheless the "ontic structures of interests" are "building materials of legal norms" as "factors of reality" (p. 231, bottom). Among other factors bearing on legal evaluation they demand due attention (on the jurisprudence of interests in criminal law, see pp. 232-233).

4. *Law and the Order of Social Values*

The "insertion of axiotic considerations" into a pure "consideration of purposes and interests" raises the question as to whether "axiotic struc-

tures" as "pre-existing data" can also exercise influence upon law. A firmly established order of values, such as is assumed by the "material ethics of values" can come into question as a pre-existing datum. This is not accepted, however, by Henkel. In rejecting, on the other hand, also a relativistic value-subjectivism, he professes a "value-relationism" which allows for an "objectivity" of evaluations within certain groups, whereby this "objectivity" is nothing else but a certain uniformity and system of collective evaluations within a certain group. This kind of objectivity is not disputed by value-relativists, in particular because Henkel does not deny the historical changeability of collective value-systems. Where such a value-system is found in a social entity, it can be, despite the much-invoked "value pluralism" of our time, a social value-system of a certain completeness at least in regard to the "basic values." As such it can become significant as a pre-existing datum for law which receives this value-system. This has happened, for example, in the catalogue of fundamental rights in the Constitution of the Federal Republic of Germany and also in the system of legally protected values which is the basis of offenses according to our Penal Code. But naturally, the social value-order furnishes in such a reception nothing else but "building materials" for law-creation and law-application. The creative freedom of law in relation to a social value-order remains intact. It belongs only "to the essential conditions of the integration of law that it keeps to those evaluations which are to be regarded as valid in the social entity, that is, which are preponderantly recognized and observed" (p. 257).

5. *Law and Institutions*

"Institutions," theologically viewed as "arrangements of the order of creation and thereby establishments of God," sociologically viewed (by L. v. Wiese) as complexes of "inter-human relations which are intended for a longer duration and whose purpose is to maintain the cohesion of men and human groups in a configuration" constitute "a fundamental and decisive element of the order of a social entity" (p. 262). Institutions such as purchase, barter, hire, loan, and marriage comprise "typical real configurations of the same kind." They are "objective" and "suprapersonal." They are more concrete than social structures (pp. 263-264). But they are "an element of the stability and continuity of social life" (p. 265); from historical change they are as little removed as other pre-existing data. Two categories of institutions can be distinguished: "corporative" (the state, the municipality, the church, the trade union, etc.) and "ordinative" (purchase, barter, ownership, etc.). In one way or another, the individual finds himself to be involved in and enmeshed by institutions. Already Savigny appreciated their significance for law. Today institutional legal thought plays a considerable role; especially Carl Schmitt's "concrete thought of order," mentioned by Henkel only incidentally (p. 270 n. 1), may be recalled in this context.

Henkel, too, concedes to institutions an essential function in law; they are significant not only for the understanding of existing law but also for the creation of law. The "institutions which emerge from social reality have a preponderant tendency to be juridified"; conversely, the process of law-creation has recourse to the existing social institutions: law adopts institutional configurations. Henkel gives the transfer of property on trust for the purpose of securing a debt (which is against the spirit of German law) as an example. This example does not seem to be happily chosen since here everything is transacted in legal forms and only a concealed frustration of the purpose of German law is confirmed by the courts. Perhaps the illustration of the inclusion of combines in the new law of shares is more appropriate today. But quite generally, doubts arise as to where the "fore-field" of the pre-existing social institutions ends and the "juridification" begins. Is it not always the case that law (even when only as customary law or case law) or a specific legal evaluation participates in the elaboration of the presumably pre-existing social institutions?

With the last remarks we pass from the survey of the concrete pre-existing data decisive for law, which are of a highly diverse nature and defy a systematic exposition, to consideration of principles. Henkel undertakes to discuss critically the doctrines of "ontological structures" (Welzel) and of "the nature of things" in law (pp. 274 ff., 288 ff.). To some extent he follows (as I do) the view that law is intimately connected with the structure of realities. Thus for him (as for me, and likewise for Welzel himself) it is certain that the normative structure of law is correlated with the structure of human behaviour (*cf.* on this point my *Idee der Konkretisierung im Recht und Rechtswissenschaft unserer Zeit* [*The Idea of Concretization in Law and Legal Science of our Time*] (1953) 93 f., 102 f., 118): the legislator, following certain purposes, must choose the means for their realization, being guided by causality. It is well known that Welzel goes far beyond these simple insights. He assumes essence-regularities for the concepts of guilt and complicity. Henkel follows him here further than, in my opinion, is epistemologically warranted. Are "collective guilt" and "collective penalty" (which I also do not approve!) really "self-contradictory" (pp. 277-278)? At least a careful analysis was required here which would make it clear what represents tradition, linguistic usage and the theory of punishment. Moreover, is it self-evident from the viewpoint of ontology that instigation or aiding and abetting are punishable only when the main illegal act is punishable? Would it not be conceivable to punish as an instigation to perform a legally admissible act of self-defence when the instigator himself does not possess the will to ward off the attack but an outspoken malice is the motive of the instigation? Is it not in particular conceivable that the instigation to the commission of suicide, even if this is lawful, is an illegal instigation deserving punishment?

Henkel believes to be able to apprehend decisive ontological structures also in civil law. Like Reinach, Henkel speaks of insights into the essence of the rise and fall of claims. "The claim arises from a promise" (p. 280). But is this necessarily so? Is it not conceivable that a claim arises from a promise only in case the promise is accepted or in case certain forms are observed? Since, conversely, other grounds of the rise of the claim are conceivable, the promise is neither a necessary nor a sufficient condition of the claim! As an "ontological structure . . . furthermore necessary relations between two persons is apprehensible." Indeed? Is it not possible that, precisely as a matter of law, there are claims against oneself (as there are duties to oneself or legal transactions with oneself)?

Nevertheless, Henkel finally arrives at essential limitations which the legal efficacy of ontological structures has, for example, in relation to the controversy between the intention theory and the guilt theory in criminal law (p. 281). The law-maker's obligation to heed these structures is circumscribed by him as follows (p. 284): "The structures grounded in ontic regularities are fundamental forming elements of the legal regulation which the law-maker has to take into account in determining the contents of norms and which he has to utilize as a direction-giving factor. . . . His concern with the establishment of the requisite harmony of the Is and the Ought through taking into account these structures gives him the opportunity to create right law; if, on the contrary, he excludes arbitrarily [!] the ontological structures or overlooks them through ignorance or error, the result is wrong law." These are cautious formulations of principles which are still open to doubt. Why and in what sense indeed is it "wrong law"? Here we expect the answer at a later stage. Henkel by no means concedes—on this point expressly against Reinach—that law performs "an act of mere transformation of *a priori* contents" (transformation of the Is into an Ought). Once again the concept (actually a metaphor!) of "building materials" is employed (p. 285). And Henkel raises an objection against himself by saying that "by taking into account the ontological structures of positive law not much is achieved," which objection he repudiates, however, by the consideration that the effect of those structures still extends to what is most fundamental and general and thereby also the most comprehensive in every legal regulation (p. 287). But still much remains here to be explained. On this we agree!

The same holds also for the notion of the "nature of things" brought by Radbruch again into such great prominence. Henkel introduces this notion as "an omnibus concept of the pre-existing data of law." In so doing, he attaches to it all those reservations which, according to him, apply to the pre-existing data themselves in legal contexts. Accordingly, in the nature of things "merely order-elements and structures as pre-existing forms of law are to be seen; they have a determining effect upon the process of law-formation but nevertheless leave more or less open the legal

regulation in regard to other formative factors" (p. 293). To leave out of account the nature of things means to fail to realize the possibility of creating right law (p. 295).

Retrospectively and prospectively, we expect a doctrine which is supposed to determine "right law" to yield something more than the conceptions of legal obligation based on the "pre-existing data of law." With this expectation we come to the two final parts of Henkel's treatise devoted to "law posed as a problem" and to "the idea of law" together with "the problem of right law." We now move into a field which has been cultivated for a long time and in a thorough manner. Henkel can therefore link his exposition with Radbruch's threefold division of the idea of law into the ideas of justice, purpose-conformity, and legal certainty. Also in particular matters much that is familiar is here encountered. The character of the book as an introductory treatment is largely retained. Obviously, complementations and corrections are required. It would take us too far afield to point them out in the present survey.

The difficulties of concept formation, particularly in the area of the theory of justice and equity, make themselves felt here, likewise the relative barrenness of and the need for filling the formulae offered. The principle of purpose-conformity as such is conspicuously inadequate (pp. 331 ff.). Legal certainty is treated with greater love, at any rate with encroachments on concrete legal problems which have legal-philosophical dignity only obliquely (pp. 336 ff.). Henkel's exposition is the most important and interesting in the sections on the "polarity of the idea of law" (p. 339 ff.), where he finds repeated opportunity to criticize Radbruch's pointed but nevertheless alternating theses on the inner relationship and rank order of various ideas of law. The criminal lawyer is particularly addressed by the treatment of the much discussed problem of "the punishment orientated to law," of "the punishment orientated to purpose" (p. 346), and of the relationship of justice and purpose-conformity in criminal procedure (p. 347 f.). The final result of the sections reads as follows: "The idea of law appears as articulated into manifold demands and effects manifesting tensions, contradictions, and oppositions. . . . But these different elements of effect are not disjointed but seek and call for each other in order to achieve complementation and balance. . . . In their variety and possible antagonism they nevertheless leave intact the comprehensive unity of the idea of law" (pp. 349-350).

For the unity of the idea of law we would like to have a gravitating material expression. Henkel offers us "the common good" as "the basic value of law" for this, to which the particular ideas of justice, purpose-conformity, and legal certainty can be subordinated. Stammler's "social ideal" is only a "formal thought." Radbruch's trilogy "for choosing material principles of law" (the highest value is either the individual per-

sonality or a collective entity or an *opus*) fails to achieve the coveted synthesis and convergence of the three one-sidedly posited value-conceptions which, then, in particular instances, prove not to be observable. The utilitarianism of Bentham or R. von Ihering remains hanging in the antechamber of the consideration of legal values, because it does not know of the necessity of the control of mere needs, strivings for happiness, and interests through a "normative value-consideration." In contrast, "the common good" is a concept which "exhibits a sufficient latitude for bringing into expression the comprehensive basic value of social order" (p. 371) so as to bring into the field of vision "the truly fundamental aim for the sake of which the social entity has arisen and, exists in the present, and ought to be preserved in the future." At any rate, the common good must be understood in a sufficiently comprehensive manner in respect of its "dimensions of breadth, height, and depth" (pp. 372 ff.). It must be brought into right relationship with individual welfare, namely into the relationship of "reciprocal dependence and reciprocal interprenetration of individual welfare and the common good"; "a balanced relationship of general interests and individual interests" must be achieved (p. 374). Above all, the idea of the common good must be concretized again and again according to the measure of the historical situation (p. 375).

Supposing that with these statements "the idea of law" as such is sufficiently determined for Henkel, the question still remains how to establish its connection with the discussion of the possibility of natural law or any other kind of "right law." This is attempted in the fourth and final part of the book entitled "The Problem of 'Right' Law." With good reasons, Henkel decides to adopt the term "right law" (introduced by Stammler in the beginning of the present century): "right law" is chosen by Henkel because he has a sceptical attitude to the slogan of the so-called natural law. It is to be noted that Henkel rejects legal positivism of every variety (the rationalist, the naturalist, and the normativist legal positivism) (pp. 379 ff.). For even though law "comes into existence only through positivization," positivism nevertheless lacks "the insight that, apart from existence, essence also belongs to law, that is, a certain essential or axiotic quality which we would like to style 'rightness' " (p. 392). At least in marginal cases the "complete lack of the essence of law must make its existence as law questionable, that is, its validity" (pp. 393, 454 ff.). But the "essence" of law, as conceived by the genuine natural-law doctrines, be they expositions of an absolute natural law or a historically conditioned natural law with a changing content, is a misconception in so far as natural law is regarded as "a 'law' instituted by 'nature' or apprehensible from 'nature' " (see in detail pp. 393 ff., 414-416). There is no "pre-existing normative order having legal character" (p. 417). Between the Scylla of positivism and the Charybdis of natural law we can steer successfully

only when we content ourselves with the discovery of the "*tópoi*" as "guiding points of view" for the discovery of what is true and right.

Here again those real factors become relevant which were conceived on the one hand as "pre-existing data" of law (the anthropological basic vocation of man, the natural regularities of the world of things, the social structures, the interests, the customs and usages, the social morality, the institutions, and the order of legally protected values), on the other hand the axiotic ideas of justice, equity, purpose-conformity, and legal certainty—the idea of the common good at the apex. A complete and systematized catalogue of *tópoi* cannot be established. None the less a "graduated sequence" of viewpoints can be apprehended in the process of discovery of law, an inner mutual relationship of the viewpoints (pp. 421 f.). Since a general rank order of various determining factors of law, in which natural lawyers believed and still believe, does not exist, "it is necessary to assess . . . in every particular instance the weight of the relevant *tópoi* according to the requirements of the given material problem" (p. 422). Here "the art of finding the right way to right laws" sets in (*loc. cit.*). This art is oriented precisely to "the idea of the common good" as the "basic value" of law. "The solution found in consideration of relevant *tópoi* on the basis of the considerations of the common good may be called 'right law,' " in particular "objectively right law," even when it is not univocally predesigned but chosen from a plurality of "defensible" solutions and even when "in particular instances the gaining of standards for right law can eventuate only for a concrete historical situation of the social entity" (pp. 424, 428). For it is decisive for the "objectivity" of the decision that it rests not on subjective and personal thinking and appraisals but on intersubjective understanding and suprapersonal standards (p. 425).

With these results, which greatly appeal to me, Henkel believes that he has found the right middle road between absolutism and relativism leading to what may be called "right law." From the axiological standpoint, Henkel's position must nevertheless be regarded as relativist, in so far as "relativism" is understood as nothing else but the doctrine according to which in problems of evaluation there is no cognition of what is true governed by the principle of non-contradiction but only evaluational preferences differing from individual to individual, from group to group, in the best case preferences which are accepted by a preponderant majority or by a "dominant stratum" within a social entity.

Thus understood, the end result of Henkel's endeavour to solve the problem of right law may be a disappointment for some devout exponents of natural-law thought or for the representatives of a "material value-ethics." But can something different be expected from such an unbiassed author who examines all arguments so sincerely and who sides with them in such a prudent manner?

Karl Münzel, *Recht und Gerechtigkeit.* Ein *rechtsphilosophisch-naturrechtliches Studienbuch* [*Law and Justice: A Legal-philosophical and Iusnaturalist Study Book*]. Published by Carl Heymanns-Verlag, Cologne-Berlin-Bonn-Munich, 1965. Pp. 132.

Even the subtitle "Study Book" points out that the author, a retired Ministerial Councillor and the President of the Senate of the former Examination Office of German Judicature, does not so much propose to present new legal-philosophical insights as to perform a didactic task. In the *Preface* Münzel complains about the scanty familiarity of lawyers with legal philosophy essentially to be explained by the fact that legal-philosophical literature pays too little attention to the reader who has no previous philosophical education and frightens him too much with a special terminology. To this is added the confusion of those who have genuine interest, a confusion resulting from totally different interpretations and appraisals of the classics of philosophy and their places in the movement of philosophical thought. Münzel endeavours to bring relief on the one hand by "a possibly simple and intelligible exposition" (bringing also the Greek quotations in transcription and translation), on the other hand by an "objective presentation of the doctrines of legal philosophers" representing "what legal-philosophical thinkers have actually taught." In the latter respect Münzel appears to have become a victim of self-deception, since the unavoidable, and by him not avoided, emphasis of certain thoughts as being essential always imports something more than an "objective representation" and always rests on an interpretation. In addition, the author has a very critical vein and accordingly places decisively evaluative accents. So he protects the sophists against Plato's vilifications and, conversely, exhibits little sympathy with this most celebrated thinker of classical antiquity. Furthermore, following a certain fashion initiated by Welzel, he has a rather low opinion of Grotius, with which his extensive discussion of Grotius is at odds. Münzel's historical exposition gains greatly in attractiveness through copiously distributed censures, but it loses in "objectivity" in this manner.

The main part of the book (pp. 21-110) is occupied by a historical exposition obviously founded on a scrupulous study of sources testifying to a good erudition on the part of the author in the history of philosophy. One in inclined to compare this exposition with the one by Welzel (*Naturrecht und materiale Gerechtigkeit* [Natural Law and Material Justice] (2d ed. 1955)) and the one by Verdross (*Abendländische Rechtsphilosophie* [Occidental Legal Philosophy] (1958)) which are, however, more pretentious and penetrating and which, by the way, are constantly consulted by Münzel. I do believe that his book is more suitable to those who seek the access to the history of legal philosophy for the first time. The exposition of the author's ideas is extremely captivating and pleasant and is not difficult to follow. A peculiarity of the book lies in an extensive consideration

of legal-philosophical problems arising in the area of private law (*e.g.*, p. 19), which, according to Münzel, have been neglected (pp. 113 f.). However, his treatment does not do justice to some legal-philosophical writers of earlier and recent times.

Placed before and added to the treatment of the history of legal philosophy in the present book there are remarks of fundamental import on "the origin and nature of law," on "natural law and legal positivism," and on "the deplorable state of law" manifested in the legislation and adjudication of today. It seems to me that remarks as the following are somewhat over-simplified: "man did not come to the world in the perfection described in the story of creation of the Old Testament" (p. 13); "his behaviour is not necessarily impelled by natural drives and instincts but his action can be determined by the knowledge of good and evil" (p. 14); "he started to reflect upon life and its order as his intelligence increased with the growth of his brain" (*loc. cit.*); he "discovered the refinements and excesses of sexual pleasure by his intellect" (p. 15) so that ultimately the same intellect which led to "disorder" in this matter had to resort to punishment and compensation for the restoration of the order, whereby "natural order became legal order" (*loc. cit.*), which in its turn with its rights and legal relations is not anything perceptible by the senses but exists "in notions which man connects with observed facts" (p. 17). Here the intellectual capacity of those who are to be initiated into legal philosophy is greatly underrated.

In contrast, Münzel's thoughts on "legal philosophy and positive law" (pp. 111-127) are altogether noteworthy and mostly apposite. The author rejects emphatically any absolute natural law and any law which is accessible to *a priori* cognition. He campaigns (to wit in well-founded polemics against too declamatory utterances of Walter Schönfeld) for the good law of legal positivism. "None of the attacks made by the natural lawyers against legal positivism [is] justified as regards legal reality, as regards the legislative regulation and the judicial process" (p. 121). At any rate, in view of the tensions between positive law and "right law" in recent history, it may be asked whether "the struggle between 'natural law and legal positivism' is a purely scholarly dispute having no significance for reality" (*loc. cit.*). Münzel has here only those legislators in mind who "have endeavoured to deliver laws according to higher points of view" (p. 120).

As concerns "the deplorable state of law" today, Münzel complains about the unintelligibility of laws and their inaccessibility to popular understanding; he finds that they are too one-sidedly tailored for the performance of "the task to be guidelines for decisions" and he censures the administration of justice because it strives too much for individualized justice in particular cases instead of preserving matters of principle and the unity

of law and because it also misuses the "objective" method of interpretation and general principles "*bona fides*" and "*boni mores*" "for deciding *praeter legem* or even *contra legem*" (p. 124). It is "requisite that the courts would again keep more to the law" (p. 126). At any rate, our legislative procedure is too clumsy and therefore the adaptation of laws to changed conditions of life is difficult. These admonitions, which do not relate only to the present time, by a highly meritorious practitioner who has shown himself to be an erudite expert of legal-philosophical development and problems are worthy of reflection and of being taken to heart.

Hans Reiner, *Grundlagen, Grundsätze und Einzelnormen des Naturrechts [Foundations, Principles, and Particular Norms of Natural Law]*. Published by Verlag Karl Alber, Freiburg-Munich, 1964. Pp. 64.

This book represents a new attempt by a well-known ethician to provide a "foundation" for natural law or at least for some of its principles so that these are "removed from all relativity," even though by no means "all State legal norms which prove to be requisite can be derived from natural law in a rigorous manner"!

The central argumentation of the book is preceded (pp. 17 f.) by definitions—which do not quite correspond to juristic terminology—of the concepts such as "objective law," "subjective law," "claim," "powers," and "legal duty"; above all it is preceded (pp. 18 ff.) by some considerations of the essence of "practical reason" and of "axiological reason" which leads to the former. Without identifying his conception with Max Scheler's theory of values, Reiner adopts the view of Scheler by which reason as a feature distinguishing men from animals consists in the ability "to apprehend the world purely objectively in its being such as it actually is." From this view Reiner develops the idea that "practical reason" includes "a capacity to adopt viewpoints which have a purely objective orientation" (p. 20). By the aid of reason, which is initially axiological reason and becomes practical only gradually, man can "discover values and disvalues in the world constituted as it actually is and can experience their existence purely for the sake of their noumenal qualities as . . . something that ought to be or ought not to be" (p. 21). In this reason "the possibility to experience a legal order as something that ought to be and to affirm it" is grounded (p. 22). This material cognition of what ought legally to be enters into "consciousness" preeminently in "anger": in indignation about illegality and injustice. This insight is offered by Reiner in reliance on Bollnow. In my opinion it conflicts to some extent with the view according to which rational cognition is independent of instinctual drives, since anger is always something with which passion and instinct are commingled.

However "anger" as a source of "acquiring consciousness of law" may be appraised, it is correct that precisely in indignation about illegality and injustice the idea of justice itself becomes illumined. In developing tradi-

tional doctrines, Reiner distinguishes justice constituted by equal treatment of equals and injustice constituted by unequal treatment of equals on the one hand and avoidance of injury to fellow men and injurious illegality affecting them on the other. Whereas there is no unconditional claim to do justice in the sense of equal treatment (as the parable of the workers in the vineyard teaches), there is, according to Reiner, "an unconditional claim" of every man not to be injured. To guarantee this claim is essentially a matter of criminal law which, according to the traditional view, is regarded (in Aristotelian terms) as a domain of "compensatory justice." (On the substitution of "*justitia commutativa*" for "compensatory justice" by St. Thomas Aquinas, the criticism in n. 16 of p. 58 is interesting!)

Compensatory justice presupposes—and this is the cardinal point of Reiner's argumentation—that somebody has something lawfully (by the way, in this sense J. Pieper, *Über die Gerechtigkeit* [On Justice] (1954) 15-16, follows St. Thomas). Compensatory justice consists in compensation for some—voluntary or compelled—changes in possession. This raises for Reiner the question, "In what law is this grounded?" Those goods of which a person is deprived in case of compelled losses—namely in murder, manslaughter, bodily harm, or deprivations of freedom—are life, integrity of our body, and the command of the use of our limbs. Those goods are not, however, allotted to us by positive law but they are "among the endowments of nature." The "having of a body" in particular "belongs to nature and hence to the essence of man"; his own body is "for every man something that originally belongs to him" (p. 31). With this belongingness an "original capacity to dispose" of one's own body is connected, to wit "according to one's own discretion" (p. 32). This "power" is, in addition, an "exclusive" one, that is, others are not authorized to dispose of my body (p. 33).

We are confronted here with a "right to original possession of personality." This right is the foundation of the "justice of not causing injury" manifesting itself, for example, when "a punishment is imposed on an innocent person." This right is "founded on an exigence of oughtness" which is preordinated to all demands of justice oriented to equality (pp. 34-35). It indicates that "illegality" is the elementary form of injustice in face of infringement of the principle of equal treatment. Also the reaction to "illegality" has an elementary nature: the anger about what has taken place discharging itself in warding off an attack or in self-defence. Here again a natural-law principal becomes manifest, namely the principle according to which "the right of the other person not to be subjected to an attack against his body is forfeited and ceases to exist where he encroaches upon the sphere of our disposition." From this an "ordering principle of convivium" results having the following content: "the right to dispose of one's own body belongs exclusively to every person himself; no one else ought to encroach upon his sphere of rights, save for warding

off an attack against the corresponding right of one's own" (p. 38). According to Reiner, "an essential part of natural-law order among men is constituted" by this principle (p. 39). This part can easily be expanded by extending the right of self-defence to the repulsion of other (equally strong) attacks apart from those which are directed against the body as well as to warding off attacks against third persons. All in all, the following "norm of natural law then results": "He who attacks or injures the body or life of another man or forcibly deprives him of freedom, without this happening for preserving the same or at least an equally high legally protected value of someone else, acts illegally and makes himself punishable" (p. 40; repeated as a fundamental principle p. 41).

According to what has been said so far, the "original possession of personality" concerns above all life and the body. However, it is subsequently extended by Reiner to good reputation (pp. 41-42), to the "fruit of our work," and to "wages" (on this see pp. 43 ff. with a detailed discussion of the difficulties emerging in connection with the foundation of the right of ownership). As a further natural-law principle, the principle of the observance of contracts (pp. 50 f.) emerges, where Reiner invokes the conception of the "meaning of the promise" current in the phenomenological philosophy (Reinach, Bassenge). Finally, Reiner believes to be able also to legitimize the coercive power of the state by recourse to natural law (pp. 51 ff.).

In a critical examination of the thesis of Reiner according to which "natural law is not only something in whose existence one may believe or not believe but something which can be made really self-evident" (p. 53), we limit ourselves to the above presented fundamental argumentation about the "original possession of personality." Its affinity to the classical natural-law notions is unmistakeable. Certain essential characteristics of man (his reason, his inborn relation to his body) are regarded as sufficient grounds for the cognition of norms. The sceptic, including me on the present point, cannot admit the validity of the deontic conclusion which Reiner draws from ontic premisses. Even though "nature" has endowed us with a body having certain characteristics of which we can originally dispose according to our discretion and as we find proper, still nothing follows therefrom in respect of the legal situation into which we are placed as regards our body and life. All counterpleas against the statement that legal mentality is changeable (*cf.* pp. 14 ff.) cannot overrule the objection that a scientifically ascertainable right to the body and life exists not by nature but by virtue of being recognized by a legal community.

The finding that the body belongs naturally to a person does not automatically lead to the conclusion that it legally belongs to him. Otherwise why should not also the fact that a body naturally belongs to an animal lead to a "subjective natural law" of its integrity? That, to our blessing, in the modern state founded on the principle of the rule of law "the right

to life and to bodily integrity" and "the freedom of the person" are recognized as fundamental human rights which can be interfered with "only by virtue of some law" (but which can still be interfered with!) is an achievement of an enormous political struggle and not a matter of absolutely valid truths. Much less still can the thesis be substantiated that by virtue of natural law we can freely dispose of our body. Even the opposite is the case. Regarding the power to determine our bodily destiny we are subjected, quite legitimately, by state law to several restrictions which constrain us to a greater or smaller extent. We need only to recall ever-possible legal prohibitions to deprive oneself of one's body, to mutilate oneself, to submit voluntarily to sterilization, and to be subjected to certain cosmetic operations. Conversely, we may mention ever-possible legal prescriptions to tolerate certain encroachments upon the body. By no means is the principle here sufficient according to which my rights which relate to my body are reduced to the extent I injure others in bodily respect or in respect of their other rights. In particular, the idea of self-defence is not nearly enough to regulate the relationships of an individual to his fellow men.

Thus the natural law developed by Reiner seems to me to be a matter of belief rather than a matter of knowledge. This, however, does not diminish the value of the small book which (particularly in the highly informative and interesting footnotes) testifies to the author's great familiarity with the relevant literature.

Franz Wieacker, *Zum heutigen Stand der Naturrechtsdiskussion* [*On the Present Standing of the Discussion on Natural Law*], Fascicule No. 122 of the Arbeitsgemeinschaft für Forschung des Landes Nordrhein-Westfalen, Geisteswissenschaften. Published by Westdeutscher Verlag, Cologne and Opladen, 1965. P. 65.

It is most welcome that the *Arbeitsgemeinschaft für Forschung des Landes Nordrhein-Westfalen* (the Work-Community for Research of the Land Northrhine-Westphalia) has shown a lively interest also for legal philosophy. In its publications, two legal-philosophical writings deserving our attention have appeared within a relatively short interval: Wieacker's lecture on the present standing of the discussion on natural law (which in its turn has provoked a very lively comment printed in the present book) and Welzel's expositions relating to the problem of legal validity, which we shall consider hereinafter.

As concerns Wieacker's work, the author emphasizes at the outset that he proposes to speak neither as a legal philosopher nor as a legal historian but as a lawyer ensnared by contemporary controversies about natural law and wondering about the practical bearing of natural-law thought "on German legal reality of today." The re-emergence of natural-law tendencies today is, as is generally known, explained by the "disgrace which the national-socialist rule brought to positivism." It may be noted that

national socialism can be put on the slate also because it "has trampled down positive law," moreover national socialism was not really hostile to natural law but, as in so many other things, only misused natural-law thought or led it astray and into the wilderness.

Wieacker finds it striking that, in contradistinction to traditional natural law which was deemed to have the mission "to set the individual and the society into a relationship in which the freedom and rights of the individual are not destroyed" (p. 19), natural law in the contemporary administration of justice is supposed rather to procure "restoration of a threatened public morality" (p. 20), especially to settle accounts with the evil-doers of recent history so that it is thus "more frequently invoked to justify a punishment of perpetrators than to relieve the individual of too oppressive legal impositions" (*loc. cit.*). Here a point is touched upon which is especially important for criminal lawyers and incidentally—certainly not accidentally—also concerns Welzel.

Wieacker's scruples against the "assistance rendered by dogmatic natural law to extra-legal penalization" (p. 20) are directed in any event more against such decisions as the declaration that omission to avoid suicide is punishable than against those which have found evil deeds of the Third Reich to be punishable. For as to the latter it was not so much the question of reinstating, through verdicts of state authorities, the dignity of violated moral principles but rather of blocking the routes of escape sought for avoiding punishment by invoking (in regarding every superior order as a legally binding norm!) the legal practices of the *Führer*-state for exculpating behaviour which is punishable per se. Here the formulation of Wieacker, which speaks of "retributive measures to deal with political injustice trying to hide itself behind legal commands" (p. 19), is certainly apt.

The following is also to be noted: "protection of rights of liberty of the person against the superior power of the society which have been achieved through hard fight" (p. 24) is or ought to be one of the essential concerns of the natural law of the present time. This already suggests that such natural law is an altogether concrete one and this means above all that it must be a timely and situation-oriented natural law, if it is to meet our modern claims. Wieacker is decisively opposed to an "indoctrination" of natural-law thought and to its fixation to definite dogmas and rules. Such an indoctrination leads to rigidity, intolerance, and absolutization of subjective convictions.

Wieacker says "No!" to "all codes of norms which are not intended as proposals for discussion or semantic projects but as claims to establish an unconditional dogmatic authority" (p. 24). However, he says "Yes!" to the overcoming of legal positivism through the endeavour to "realize practical justice" (p. 11). The enterprise of positivism "to encapture

suprapositive law by positive legal rules themselves" is vain (wittily Wieacker compares this enterprise with that of the stupid bourgeois who tries to bring light in bags into a windowless town hall (pp. 12-13)). Even a positive law which is inspired by the best intentions needs suprapositive standards for its application (p. 13).

But which suprapositive standards must we observe when we must renounce a firm natural-law system in the classical sense? At least three groups of natural-law doctrines can be distinguished in the present time: the religiously coloured societal doctrines of neo-thomism and those of the protestant "rights" (Emil Brunner!), the natural law which follows the "humanitarian tradition of the law of reason" based on the material value-ethics (Coing!) and that of Radbruch in the late phase of his thought, and the natural law in multifarious forms which keeps itself "open to experience of reality and to the problem of truth" and has found perhaps its most characteristic expression in the *tópos*-motto of Theodore Viehweg (provided that it is warranted to speak here of "natural law" at all).

I believe that it is justified to assume that Wieacker himself regards the last-mentioned variety of natural law as the one which alone is possible in the present time and which at the same time holds promise for the future, provided, of course, that the liberal component mentioned above remains preserved. In many illustrations, which are chosen mainly from the area of criminal law, he demonstrates the tenability of that method of natural-law thought which he considers to be correct. He concedes to positivism that all decision-making "must be orientated to established facts," that the arguments for and against capital punishment cannot be evaluated without the knowledge of the background of the most serious crimes, and that "the ethical indication" cannot be appraised without the insight into the fate of a woman affected by the crime of rape (p. 11). Wieacker contends that for passing a "right" decision in this matter it is essential that "it is pointed out with all clarity which of the different versions of natural law is brought into play" (p. 15). He who decides, for example, for the ethical indication ought to make it known that he speaks here "in the name of the freedom of personality," that is, he intercedes for the "profane" postulate according to which a decision-maker who rejects the ethical indication ought not to conceal the supposed moral-theological premisses (*loc. cit.*). After that an "open discussion" can take place, which corresponds entirely to the tradition of natural law thought. With "truthfulness" an "approximation" to "justice" can then be aspired (*loc. cit.*). The ultimate decision is still to be made by the legislator. For the opposed points of view in a problem such as that of the ethical indication "are founded on legitimate basic moral decisions which cannot be settled by means of universally valid contents of natural law."

In this controversy perhaps a compromise is not the worst outcome: "A model legal attitude seems to me to be assumed by him who [*sc.* in case of abortion after rape] connects the religious and moral judgment according to which abortion after rape remains killing [a view shared by me] with the statement that the State does not have the [moral] right to punish every diversion from moral laws" (p. 18; *cf.* also p. 33, bottom). The finding of right law is a "decision of a person" as all "ethically relevant action is not implementation of a norm but a decision of a person . . . in a certain situation" (p. 21). The "right decision" is "never a subsumption but . . . a self-justifying decision for one of several possible evaluations" (p. 22). The decision which "does justice to the situation" has the chance to gain typicality (p. 21). Moreover, every, as it were, revolutionary decision which develops the law is not only "original creation of new law" but in a favourable case also "an origin of a future normative tradition" (p. 22). Hence "the place where natural law can be encountered is the legal experience which accrues *hic et nunc* from certain conditions of our historical world." This legal experience is nourished by a great ethical and legal tradition "accumulated equally in the fundamental rights, in well-established case law, and in dogmatic jurisprudence." Precisely in view of "this mighty mass of practical experience" against which the axioms and tenets of dogmatic natural law appear "paltry" (*loc. cit.*), "suprapositive standards and guidelines of justice can very well be discovered by a methodical approach to a given historical situation" (p. 23). After this statement, Wieacker poses for himself the anxious question as to whether his standpoint could still be properly called "iusnaturalistic." He ventures to answer this question in the affirmative, in order "not to withhold an honorific name" from "the suprapositive obligativeness of a morality of public action" and from the idea "of a law which is transempirical and concrete withal." This honorific name means also "encouragement for the search of justice."

It may be petty to be fastidious about words. Substantially, Wieacker keeps himself clearly at a distance from positivism but not from relativism, as this is testified, for example, by his attitude to monogamy. According to him, monogamy represents "by no means a suprapositive and trans-historical law" (p. 32). It can only be said that he who "is a Christian by a decision, which must be considered irrevokable, can no longer behave in a just manner if he wants to live in a polygamous marriage" (p. 36). In the same way Max Weber and later Gustav Radbruch in an early phase of his thought would have expressed themselves. Perhaps a radical relativist would entertain doubts about irrevocability of the decision for Christianity. A benevolent sceptic would point out the corrosion of monogamy in Christian civilization by successive polygamy resulting from the relaxation of the law of divorce.

In the report of the discussion on Wieacker's lecture, Mikat and Ritter comment precisely on the illustration of monogamy. They wonder whether it should not be accorded an absolute preference over polygamy, which can be an "abuse" or is to be considered as overhauled by the conception of every man as a person. Matters of principle are broached in the remark of Hans Peter who contends that in the search for a right law which would do justice to a given situation, firm standards are nevertheless required. These are perhaps to be sought in "the general principles of law" and in "the fundamental principles." To call them "rigid" is to commit a *petitio principii.* Matters of principles concern also Mikat and Joachim Ritter, the former saying that one should not forget the right law "*per determinationem*" in contrast to the natural law "*per conclusionem*" which, as already Aquinas clearly saw, is quesitonable indeed, and Ritter saying that the problem of the relationship between universally valid standards and historically conditioned law still awaits solution.

The rest of the discussion centres around the tension between natural law and pluralistic society, around the definability of justice, and around some exegetic problems of the history of philosophy. Of the concluding remarks of Wieacker the following deserves particular attention: "The character of man as a person is an indispensable presupposition for the recognition of an unconditional obligation" (p. 61). This thought plays a significant role in the work of Welzel, to which we now turn.

Hans Welzel, *An den Grenzen des Rechts. Die Frage nach der Rechtsgeltung* [*On the Boundaries of Law: The Problem of Legal Validity*], Fascicule No. 128 of the Arbeitsgemeinschaft für Forschung des Landes Nordrhein-Westfalen, Geisteswissenschaften. Published by Westdeutscher Verlag, Cologne and Opladen, 1966. Pp. 34.

The contemporary discussion of natural law, which is the main theme in Wieacker's above examined work, is the point of departure in Welzel's study—ingenious and stimulating as always. Welzel takes up the problem of "the search for suprapositive legal principles" after the collapse of the Third Reich in 1945. He submits that in the absence of positivization, this search would be, especially for criminal law (in view of the principle "*nullum crimen nulla poena sine lege*") but not only for criminal law, without any decisive practical consequence. Thus the question arises about legal validity precisely in regard to positive law. Where is the ground of validity to be sought? Does "validity" mean only enforceability by means of power and coercion, which leads to factual observance of legal norms enacted in law-making procedures? Or does it rest on the recognition by members of a legal community which the individualizing or generalizing "theories of recognition" relate sometimes to single legal norms, sometimes to essential legal principles, sometimes to the legal order by and large, sometimes also to a "supreme legal authority"? Is the tendering of such

a recognition to be expected from all members of a legal community or from their overwhelming majority? Or does legal validity of positive rules require still something else imported by the concept of "legitimacy"?

Welzel rejects the power and coercion theories of Ihering or Kelsen. He concedes, however, that the recognition theories have the function of avoiding "the identification of positivity [factual character] of legal validity with the mere 'enforceability' of a command, which identification has serious consequences" and of "distinguishing law from acts of naked power or coercion even on the level of its positivity" (p. 13). But nevertheless he does not consider the recognition theory to be capable of "exhausting" the concept of law. For the ultimately sociological phenomenon of recognition assures positivity only in the sense of effectivity but not true legitimacy of positive law. The common legal conviction or the general legal consciousness cannot be elevated to "something that is normatively right, objectively valid or valuable; it cannot be elevated to an 'objective mentality'" (as Henkel does in his above discussed *Introduction to Legal Philosophy*). Even the witch trials found recognition in their times and only three decades ago the Nuremberg statutes. If the majority principle is invoked in order to legitimize recognition, the following questions remain to be answered: "Why should a norm be valid for *me* because *others* observe it?" "Why ought the law which has acquired positivity in a State to be observed also by those who do not agree to it?" "What is the foundation of its binding force with respect to non-conformists?" (p. 21). If these questions are regarded as meaningless or as "purely chimerical" (as they are, for example, by the Uppsala school), then according to Welzel a value nihilism whose consequences are grave results (*loc. cit.*; *cf.* also pp. 26, 29). Even a moderate relativism does not succeed in avoiding a certain decisionism and thus exposes again law and the State to the "*factum brutum* of power." "Value-asceticism costs something" (p. 26).

Normatively obligating, actually binding oughtness confronting us in conscience and in genuine morals has "an objective status" and is unchallengeable even by virtue of the fact that its denial leads to power theory, to "skull bashing" as a basis of every power-constellation establishing the law." Thus the denial of oughtness destroys the presuppositions on which this denial rests as a rational proposition. For as a rational proposition it cannot be merely the function [the result] of the power of the given instance but must, independently of any superior power, observe truth alone; otherwise it would cease to be a rational proposition. Even the theorist of value-nihilism thrives ultimately on the freedom which accords him an inner bond to truth" (p. 29). Our main attention belongs to the above quoted sentences (printed in italics in Welzel's book). They reveal what constitutes the substance of Welzel's social philosophy: "every man must have the same respect for his fellow man as a responsible person

that he has for himself" (p. 30, likewise printed in italics). Thereby Welzel sets up a standard of "legitimacy" for law: an objectively obligating oughtness must recognize the legal subject as a "responsible person." "This statement about the correlation of oughtness and the responsible person is anterior to any choice between the 'highest ideals' in the sense of Max Weber; hence it is not the result of a choice between the highest ideals . . . . The recognition of man as a responsible person [more precisely: as a person to be accountable to himself] is the minimum presupposition of a legal order." Here we have something absolute before us, something beyond that which may bring about only historically conditioned rightness, beyond any attempt "to formulate what is right in the given point of time" (pp. 30-31) according to the guideline of moral conceptions and of legal consciousness.

I do not propose to call into question this noble ethos of the respect for the fellow man as "a responsible person." I am unable to name among the great, thoroughly liberal relativists of our century anyone who would not have affirmed this ethos *as a content of his personal conviction.* The discussion has always centred solely around the epistemological quality of this conviction. Therefore, as was mentioned, our attention is directed to those sentences by which Welzel claims truth for his ethos contending that here no choice between different standpoints comes into consideration. Welzel's rather obscure argumentation can perhaps be summarized as follows: An unconditional oughtness is not directly demonstrable, however, its denial as a rational proposition is not tenable either, because it destroys the presuppositions on which it rests as a rational proposition. For as such it claims truth and is therefore under the obligation to observe truth alone; consequently it does not possibly rest on a dictate of power.

It is to be conceded that the denial of an unconditional oughtness, in other words, the statement that "there is no absolute oughtness" (but, as the relativists say: an oughtness always as a content of a personal evaluation) can be no dictate of power; it can only be a rational proposition claimed to be true. But to what extent are the presuppositions here destroyed on which the "rational proposition" about the non-existence of an unconditionally obligating oughtness rests? If someone would say: "there is no truth at all," he would thereby also annul the truth of this sceptical proposition. This argument was adduced already by Plato. However, the statement that there is no unconditional oughtness is only a thesis about the dignity of ought-statements and is itself no ought-statement; hence it does not annul itself.

Thus, in my opinion, the doctrine according to which nothing definite can be said about the problem of legitimacy is quite defensible. Certainly we entertain a desire to regard positive law not only as something that is posited but also as something that is "unconditionally obligating." But this is a metaphysical need which cannot be allayed. If we do not want

to fall prey to a cynic power theory, then we must content ourselves with some variety of the theory of recognition and must leave everything else (namely the discussion of the "rightness" of positive law) to the evaluational controversy. It is noteworthy that the theory of recognition in Welzel, despite some concessions mentioned above, is not quite adequate. He seems to suggest that we have only a choice between professing an unconditionally obligating oughtness and "the *factum brutum* of power." Power can belong to the factors which engender recognition. But recognition is something more than a fear of coercion. If a proper point of reference is chosen, which I (like Graf Dohna) have always considered to be the *law-making authority*, we have in the recognition of this authority a point of departure, in order to secure for positive law not only positivity in the sense of effectivity but also to some extent "legitimacy." The recognized legislator is a legitimate legislator even when the recognition (as, for example, in the "Third Reich") is given only reluctantly by many and is refused to some legal norms created by the legislator because they are not binding in conscience and are not in agreement with religious or moral convictions (as was the case with the Nuremberg statutes).

Thus, deplorable as it may be, we must accept that (from a certain point of view) even "wrong" positive law can be legitimate in the restricted sense that a recognized law-making authority has the right (at least within certain limits) to create even wrong law. Ultimately every democracy is founded on this principle (which is always fateful for the "non-conformist") and not only a dictatorship, in which recognition becomes rather fragile. If the recognized legislative authority abuses its legitimate right, only a revolutionary act can remove the ground on which this abuse rests. But a genuine and right revolution does not consist only in "skull bashing," which may accompany it, but in a revolt against a mismanaged system of government and legislation in the name of an idea.

This is what a relativist "agnostic" may oppose to Welzel. The polemics against "degenerate" positive law remains here by no means excluded. But this polemics does not rest on an undemonstrable absolute oughtness but on individual or supra-individual evaluations, which are sustained by the confidence and belief that they are "right". How can the respect for fellow man as a responsible person posited by Welzel as absolute be imagined otherwise than that he is subjected not only to the standard of an univocal oughtness but also that his personal evaluations are admitted? Welzel's own line of thought reaches the same result when he says: "Neither nature nor historical development, neither laws of nature nor laws of history can give us binding information about what in a given historical situation is the right social order" (p. 30). But should the beautiful and also historically well-founded principle of respect for the responsibility of fellow man constitute an exception to the theoretical point of view? Here paradoxes emerge whose logical clarification is still required.

Paul Bockelmann, *Einführung in das Recht* [*Introduction to Law*]. *Published* by R. Piper & Co. Verlag, Munich, 1963, Pp. 196.

Besides the introductions to legal science intended for law students this small book by Bockelmann is meant to be an introduction to law which would appeal to a wider circle of readers. Even the apparently trivial change of the title suggests that the question is here about something special. The book has arisen from a series of lectures (supplemented by "a few sentences") which the Heidelberg Studio of South-German Radio Network had presented under the directorship of Johannes Schlemmer in 1953 and is now included as an *opusculum* in the well-known "Piper Collection." The book seeks to open up the main problems of law for the laymen. Whoever has been confronted with a similar task can appreciate the difficulty of the enterprise. Only a speaker and writer of Bockelmann's circumspection and brilliancy could succeed in reducing the mass of materials here relevant to a minimum of essentials and to present this minimum in such a manner that it does not look like a mere abstract but is for the reader most vivid and holds him in spell.

Naturally, this book cannot pretend to offer original theorems. However well founded in legal-philosophical respect, Bockelmann's book does not contain a new legal philosophy which would require a critical evaluation. The following familiar topics are dealt with here: law and morals, law and *mores,* law and justice, law and equality, law and equity, law and security, law and freedom, law and power, positive law and natural law. Further, the book contains some observations on legal history and on the structure of our contemporary law and presents traditional doctrines, which are discussed critically and in a cautious manner. Despite its modest scope, the book kindles many new lights which strike the expert and stimulate him. Thus, for example, Bockelmann's views about the relation between law and power and about the relation of the powers in the contemporary state are very interesting, likewise those about the atrophy of the legislator's authority and about the place of the judicature in the contemporary political organization. The exposition of the reception of the Roman law and the background to this reception is splendidly done. In contrast thereto, Bockelmann's thesis about the obsolescence of liberalism and the denial that the rule of law depends on liberalism are not quite convincing to me.

Reinhold Zippelius, *Das Wesen des Rechts* [*The Essence of Law*], vol. 35 of *Becksche Schwarze Reihe.* Published by C. H. Back Verlag, Munich, 1965, Pp. xii and 157.

As the above discussed book by Bockelmann is an issue of the Piper Collection and contains mainly the text of the lectures delivered on the South-German Radio Network, the small book by Zippelius published in the framework of Beck's Black Series is an upshot and compilation of

articles prepared for the *Evangelical State Lexicon.* The book represents a separate "pre-publication" of these articles. Here, as in Bockelmann's book, the task to teach a wider circle of readers lies in the foreground. Here, too, the intention is not to present original theories, even though Zippelius, like Bockelmann, does not desist from expressing his own opinions about great problems of legal philosophy. But even in the introduction, he abjures every one-sidedness and unveils the "scepticism against systems which decide issues in advance."

The book deals with seven fundamental questions. First, the question of the "essence" of law (I), which flows ultimately into the problem of validity (II) (pp. 28-29). In the treatment of the latter, a very clear distinction is made between moral validity (validity in conscience), social-ethical validity (as "objective mentality"), and coercive validity; their convergence and divergence is then examined in the area of law (most impressively pp. 46 f.). Thereafter Zippelius turns to the problem of the "materials of law," that is, the "pre-existing date" and their significance for law as well as to the "interests" and their elaboration by law (III). In view of my above expressed views on the problem of the nature of things and on the jurisprudence of interests, I am in agreement with his determination of the relationship between the pre-existing data and the content of law as well as between interests and legal evaluation of interests.

In great detail Zippelius treats the problem of justice in Chapter IV, dealing with the cognition of values, in connection with problems of natural law and right law. He also discusses the problem of *tópoi* (with an apposite reference to M. Salomons, to whose book I have also drawn attention in a review of Viehweg's book in vol. 69 of *Zeitschrift für die gesamte Strafrechtswissenschaft*, p. 600). The author's exposition of the theory of values is particularly noteworthy. It may be mentioned that his earlier monographic treatment *Wertungsprobleme im System der Grundrechte* [*Problems of Evaluation in the System of Fundamental Rights*] (1962) has prepared ground for this exposition. I have absolute sympathy with the reserve and "resignation" which he exhibits in his solution of the problem of values.

The three final chapters deal with "legal certainty" (V), "freedom" (VI), and the "fundamental structure of the community" (VII). Those who work in the field of criminal law and criminology would find above all the treatment of freedom and especially of freedom of will interesting. Here also I am personally addressed (in connection with my essay *Über die Lehre von der Willensfreiheit in der strafrechtsphilosophischen Doktrin der Gegenwart* [*On the Theory of Freedom of Will in the Contemporary Doctrine of the Philosophy of Criminal Law*] (1963, 1965)). Zippelius adopts the theory of Nicolai Hartmann relating to the "third determining factor," which of course is not "apprehensible as an object but only in the course of an act": human will and action is free in the sense that it

is not "determined without a remainder" either by natural laws or by mental representations (motives). Moreover, it is not free "to perform moral acts" but also free in the sense that the actor "can decide for or against a moral principle." According to Hartmann and Zippelius, above all the phenomena of responsibility and imputation, guilt consciousness and contrition account for a freedom of this kind.

Here, too, Zippelius' book excells in a clear development of problems and in a cautious consideration of arguments. By its basic characteristic, this small book is similar to the big work of Henkel. It is amazing how much Zippelius is able to convey to the reader in such a small volume. Also the knowledge and mastery of literature of the still young scholar commands respect. The book is to be recommended highly as an introduction to legal philosophy.