II

The Concept of Law

1. Central Elements

The question is this: Which concept of law is correct or adequate? An answer to the question turns on the relation of three elements to one another—authoritative *issuance*, social *efficacy*, and *correctness* of content. Altogether different concepts of law emerge according to how the relative significance of these elements is assessed. Attaching no significance whatsoever to authoritative issuance and social efficacy, focusing exclusively on correctness of content, one arrives at a concept of law purely reflective of natural law or the law of reason. One arrives at a purely positivistic concept of law by ruling out correctness of content altogether and staking everything on authoritative issuance and/or social efficacy. Between these extremes, many intermediate forms are possible.

The tripartite division indicates that positivism has two defining elements. A positivist must exclude the element of correctness of content, but then can define in many different ways the relation between the elements of authoritative issuance and social efficacy, giving rise to numerous variations of legal positivism. I look first at the differing versions and then criticize positivistic concepts of law as inadequate.

2. *Positivistic Concepts of Law*

Not only is it possible to combine the elements of social efficacy and authoritative issuance in different ways, it is possible to interpret them very differently, too. Because of this, the variety of positivistic concepts of law is wellnigh unlimited. These can be divided into two main groups: concepts of law that are primarily oriented toward efficacy and those that are primarily oriented toward issuance. The qualifier 'primarily' should make it clear that, as a rule, a given orientation represents simply the main focus, meaning that the other element is not being altogether excluded.

A. Primarily Oriented toward Efficacy

Definitions of law that are oriented toward efficacy are usually found in the realm of sociological and realist legal theories. What distinguishes one definition from another is whether the focus is on the external or the internal aspect of a norm or a system of norms. Here too, in most cases, the distinction reflects relative significance, not a strict dichotomy. And, in addition, there are frequently combinations of external and internal aspects.[21]

(i) External Aspect

The external aspect of a norm consists in the regularity of compliance with the norm and/or the imposition of a sanction

[21] An example of a combination of the external with the internal aspect is found in Alf Ross, *Of Law and Justice*, trans. Margaret Dutton (London: Stevens & Sons, 1974), at 73–4.

for non-compliance. What counts is observable behaviour, even that requiring interpretation, and the main thrust of sociological definitions of law focuses there. Examples are the definitions of Max Weber and Theodor Geiger. Weber writes:

A system is to be called . . . *law* if it is externally guaranteed by the possibility of (physical or psychic) *coercion* through action aimed at enforcing compliance or punishing violation, the action of a *staff* of persons *expressly* geared to this task.[22]

Geiger's definition reads:

What law is, that is, the content that it seems to me practical to characterize with the word 'law', has already been explained in great detail: the social system of a centrally organized, broadly inclusive community, provided this system is based on a sanction-apparatus implemented monopolistically by particular organs.[23]

Efficacy-oriented concepts of law that focus on the external aspect are also found in legal philosophy, especially in pragmatic instrumentalism or legal realism. A famous example is the predictive definition of Oliver Wendell Holmes:

The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[24]

[22] Max Weber, *Law in Economy and Society*, trans. Max Rheinstein, in Weber, *Economy and Society* (1st pub. 1922), ed. Guenther Roth and Claus Wittich (Berkeley and Los Angeles: University of California Press, 1978), pt. I, ch. 1, sect. 6 (p. 34) (emphasis in original) (trans. altered). In its details, Max Weber's sociological concept of law is far more complex than the quotation would suggest. Here, however, as with the other examples of definitions, we are concerned simply with the basic idea. For a more detailed account of Weber's concept of law, see Fritz Loos, *Zur Wert- und Rechtslehre Max Webers* (Tübingen: J. C. B. Mohr, 1970), at 93–112.

[23] Theodor Geiger, *Vorstudien zu einer Soziologie des Rechts* (1st pub. 1947), 4th edn., ed. Manfred Rehbinder (Berlin: Duncker & Humblot, 1987), 297.

[24] Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review*, 10 (1896–7), 457–78, at 461, repr. in Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), 167–202, at 173. See Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, NY: Cornell University Press, 1982), at 116–35.

Definitions of this kind are addressed primarily to the perspective of the lawyer.

(ii) Internal Aspect

The internal aspect of a norm consists in the motivation—however generated—for compliance with the norm and/or for application of the norm. What counts are psychic dispositions, and one example of a definition with that focus is Ernst Rudolf Bierling's, where the concept of recognition plays a central role:

> Law in the juridical sense is generally everything that human beings who live together in some community or another mutually recognize as norm and rule of their life together.[25]

Niklas Luhmann provides another variant of a legal definition in which an essential role is played by the internal aspect, here in the form of a normative expectation of behaviour:

> We can now define law as structure of a social system, a structure based on the congruent generalization of normative expectations of behaviour.[26]

B. Primarily Oriented toward Issuance

Concepts of law that are oriented toward issuance are usually found in analytical legal theory, that is, in that branch of legal theory where the first concern is the logical or conceptual analysis of the jurist's participation in the law. While it is the observer's perspective that is dominant in concepts of law oriented toward efficacy, it is the participant's perspec-

[25] Bierling, Ernst Rudolf, *Juristische Prinzipienlehre*, vol. 1 (Freiburg i. Br. and Leipzig: J. C. B. Mohr, 1894, repr. Aalen: Scientia, 1979), 19.

[26] Niklas Luhmann, *A Sociological Theory of Law*, trans. Elizabeth King and Martin Albrow (London: Routledge & Kegan Paul, 1985), 82 (emphasis omitted) (trans. altered).

tive—in particular, the judge's—that is foremost in concepts of law oriented toward issuance.

A classic example of a concept of law oriented toward issuance is found in the work of John Austin. According to Austin, the law is composed of commands:

> Every law or rule . . . is a command.[27]

A command is defined as being armed with a sanction:

> A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.[28]

Not every command, but, rather, only the command of a politically superior authority is law:

> Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies . . . To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term law, as used simply and strictly, is exclusively applied.[29]

Summarizing, one can say that Austin defines the law as the totality of a sovereign's commands armed with sanctions. While a stronger orientation toward issuance is scarcely possible, elements of efficacy also play a not unimportant role in Austin's theory. Thus, in defining the sovereign as someone who is customarily obeyed, Austin combines the element of issuance with the element of efficacy:

> If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society . . .[30]

[27] Austin, *Province* 13; Austin, *Lectures* vol. 1, 88 (emphasis omitted).
[28] Austin, *Province* 14; Austin, *Lectures* vol. 1, 89.
[29] Austin, *Province* 11; Austin, *Lectures* vol. 1, 86–7 (emphasis omitted).
[30] Austin, *Province* 194; Austin, *Lectures* vol. 1, 221 (emphasis omitted).

The most significant twentieth-century representatives of issuance-oriented legal positivism are Hans Kelsen and H. L. A. Hart. Kelsen defines the law as a 'normative coercive order'[31] whose validity rests on a presupposed basic norm

> according to which one ought to comply with a constitution actually issued and by and large efficacious, and therefore ought also to comply with norms actually issued in accordance with this constitution and themselves by and large efficacious.[32]

The status of Kelsen's basic norm will be considered below.[33] Here it suffices to note that the basic norm is an altogether content-neutral norm that is only imagined or thought, a norm, according to Kelsen, that must be presupposed if one's aim is to interpret a coercive system as a legal system. What is of significance here is simply that Kelsen's definition, while it is indeed primarily oriented toward issuance, also includes the element of efficacy:

> In the basic norm, issuance and efficacy are made a condition for validity—efficacy in the sense that it must be added to issuance so that the legal system as a whole, as well as an individual legal norm, not forfeit its validity.[34]

According to Hart, the law is a system of rules that are identified by appeal to a rule of recognition.[35] While the function of Hart's rule of recognition corresponds to that of Kelsen's basic norm, its status is altogether different, something to which I return below.[36] Its existence is a social fact:

> [T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.[37]

[31] See Kelsen, *PTL*, at § 6(c) (pp. 44–50).
[32] See ibid. § 34(g) (at p. 212) (trans. altered).
[33] See below, this text, at 96–116.
[34] Kelsen, *PTL* § 34(g) (at p. 212) (trans. altered).
[35] (This sentence of the original text has been modified by the author.)
[36] See below, this text, at 121–3.
[37] Hart, *CL* 107, 2nd edn. 110.

Hart formulates a pivotal point of the rule of recognition for the English legal system: '[W]hat the Queen in Parliament enacts is law.'[38]

[38] Hart, *CL* 104, 2nd edn. 107.

3. Critique of Positivistic Concepts of Law

This brief look at positivistic concepts of law shows that very different positions are represented within the field known as legal positivism. The only thing common to all of them is the thesis of the separation of law and morality. If the positivistic separation thesis were certainly correct, analysis of the concept of law could be completely confined to the questions of what the best interpretation is of the elements of efficacy and issuance and how the relation between the two elements is best understood. The Federal Constitutional Court decisions sketched above, however, show that the separation thesis can at least be regarded as less than obvious. So the question becomes whether a positivistic concept of law as such is adequate in the first place, and that depends on whether it is the separation thesis or the connection thesis that is correct.

A. Separation Thesis and Connection Thesis

The separation thesis and the connection thesis tell us how the concept of law is to be defined. They formulate the result of a line of reasoning without giving voice to the arguments behind it. The supporting arguments can be divided into two groups: analytical and normative.[39]

[39] One might think of a third group of arguments, namely, empirical arguments. On closer inspection, however, one sees that, where the concept of law is being defined in terms of either the separation thesis or the connection thesis, empirical arguments become components of analytical or normative arguments. It is an empirical thesis that a legal system that

The most important *analytical* argument for the positivistic separation thesis is that there is no conceptually necessary connection between law and morality. Every positivist must defend this thesis, for if it is granted that a conceptually necessary connection between law and morality does exist, then it can no longer be said that the definition of law is to exclude moral elements. By contrast, the non-positivist is free in arguing at the analytical level. He can either claim a conceptually necessary connection or not. If he succeeds in spelling out a conceptually necessary connection, he has settled the debate in his favour. If he fails in spelling out or does not claim a conceptually necessary connection, he has not yet lost the debate. He can appeal to normative arguments in attempting to support his thesis that the definition of the concept of law is to incorporate moral elements.

It is a *normative* argument that supports the separation thesis or the connection thesis when it is stated that, to attain a certain goal or to comply with a certain norm, it is necessary to exclude or to include moral elements in the concept of law. A separation or a connection justified in this way may be called 'normatively necessary'.[40] It is a normative argument, for example, when it is stated that only the separation thesis

protects neither the life nor the liberty nor the property of any legal subject has no prospect of long-term validity. But the protection of life, liberty, and property is also a moral requirement. Thus it can be said that the satisfaction of certain minimum moral requirements is factually necessary for the long-term validity of a legal system. The empirical argument leads to precisely this point and no further. The bridge to the concept of law is inserted into an analytical argument that says that, for conceptual reasons, only systems having long-term validity are legal systems. By contrast, there is an insertion into a normative argument when, for example, the empirical thesis that certain goals like survival can be attained only if the law has a certain content, coupled with the normative premiss that this goal ought to be attained, is adduced as an argument for a certain definition of law.

[40] Normative necessity is strictly to be distinguished from conceptual necessity. That something is normatively necessary means nothing other than that it is commanded. One can, without contradicting oneself, challenge the validity of a command but not the existence of a conceptual necessity. It is clear that only in a broader sense, then, is normative necessity a necessity.

leads to linguistic and conceptual clarity or guarantees legal certainty, or when it is established that the problems of statutory injustice can best be resolved with the help of the connection thesis.

In recent debates about the concept of law, the prevailing view has been that the expression 'law' is so ambiguous, so vague, that nothing in the debate about legal positivism can be settled by means of conceptual analysis,[41] that what is at stake here is simply 'a normative determination, a definitional postulate'.[42] This kind of concept formation can, by definition, only be justified by normative arguments or considerations of expediency, a thesis presupposing the thesis that a connection between law and morality is neither conceptually impossible nor conceptually necessary. The first part of this presupposed thesis is correct, that is, the claim that a connection between law and morality is not conceptually impossible. In some contexts there is no contradiction in a sentence like: 'The norm *N* is authoritatively issued and socially efficacious but not law, for it violates fundamental principles.' Such a sentence would have to be contradictory, however, if a connection between law and morality were conceptually impossible. The second part of the thesis, on the other hand, is doubtful—that is, the claim that there is no conceptually necessary connection between law and morality. Indeed, in what follows, just such a connection will be shown to exist. And if this showing is successful, then the prevailing view is incorrect, the view, namely, that the debate surrounding the concept of law turns exclusively on an expediential decision that can only be justified by normative arguments. I do not mean to suggest that in the discussion on the concept of law, normative considerations have no role to play. The conceptual argument will prove to be limited both in range and in force; and beyond that range, as well as to strengthen the conceptual argument, normative arguments are necessary.

[41] See Ott, *Der Rechtspositivismus* (n. 4 above), at 142–53.
[42] Hoerster, *VR* 2481.

The thesis runs: first, there is a conceptually necessary connection between law and morality, and, second, there are normative arguments for including moral elements in the concept of law, arguments that in part strengthen and in part go beyond the conceptually necessary connection. In short, there are conceptually necessary as well as normatively necessary connections between law and morality.

B. A Conceptual Framework

The thesis that there are conceptually necessary as well as normatively necessary connections between law and morality will be substantiated within a conceptual framework consisting of five distinctions.[43]

(i) Concepts of Law Omitting Validity and Embracing Validity

The first distinction is between concepts of law that *omit* validity and those that *embrace* validity. The former is a concept of law that does not include the concept of validity, the latter, a concept of law that does.[44] It is easy to see that there is occasion for making this distinction. One can say without contradiction, '*N* is a legal norm, but *N* is not (is no longer, is not yet) valid.' And, imagining an ideal legal system, one can remark without contradiction, 'This legal system will never be valid.' Conversely, in appealing to valid law, one need not speak of validity; one can simply say, 'This is required by law.' Thus, both are clearly possible: a concept of law that includes the concept of validity, as well as a concept of law that does not include the concept of validity.

[43] See Robert Alexy, 'On Necessary Relations between Law and Morality', *Ratio Juris*, 2 (1989), 167–83.

[44] See Hermann Kantorowicz, *The Definition of Law*, ed. A. H. Campbell, with an introduction by A. L. Goodhart (Cambridge: Cambridge University Press, 1958), at 16–20.

For the discussion of positivism, it is well to select a concept of law that includes the concept of validity. What can be avoided thereby is trivializing the problem by first ignoring the dimension of validity and defining the law as a class of norms, say, for external behaviour,[45] in order to argue, then, that because it is possible to imagine the content of norms for external behaviour being anything whatsoever, there can be no conceptually necessary connection between law and morality. Incorporating into the concept of law the concept of validity means including in the concept of law the institutional context of lawmaking, law application, and law enforcement, a context that can be of significance on the question of a conceptually necessary connection between law and morality.

(ii) Legal Systems as Systems of Norms and as Systems of Procedures

The second distinction is between the legal system as a system of norms and the legal system as a system of procedures.[46] As a system of *procedures*, the legal system is a system of processes or actions based on and governed by rules, actions by means of which norms are issued, justified, interpreted, applied, and enforced. As a system of *norms*, the legal system is a system of results or products of norm-creating procedures, whatever the origin or character of these procedures. One can say that to regard the legal system as a system of

[45] See Ralf Dreier, 'Neues Naturrecht oder Rechtspositivismus?' *Rechtstheorie*, 18 (1987), 368–85, at 374–5.

[46] On the legal system as a system of procedures, see Robert Alexy, 'Die Idee einer prozeduralen Theorie der juristischen Argumentation', in *MEA* 177–88, at 185–8, repr. in Alexy, *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie* (Frankfurt: Suhrkamp, 1995), 94–108, at 104–8. Lon L. Fuller's distinction between 'the purposive effort that goes into the making of law and the law that in fact emerges from that effort', Fuller, *The Morality of Law*, rev. edn. (New Haven: Yale University Press, 1969), 193, may well approach the distinction between norm and procedure introduced here.

norms is to refer to its external side, whereas to regard it as a system of procedures is to refer to its internal side.

(iii) Observer's and Participant's Perspectives

The third distinction is between the observer's perspective and the participant's perspective. This dichotomy is ambiguous, and the interpretation here is as follows. The *participant's perspective* is adopted by one who, within a legal system, participates in disputation about what is commanded, forbidden, and permitted in this legal system and to what end this legal system confers power. At the centre of the participant's perspective stands the judge. When other participants—say, legal scholars, attorneys, or interested citizens—adduce arguments for or against certain contents of the legal system, they refer in the end to how a judge would have to decide if he wanted to decide correctly. The *observer's perspective* is adopted by one who asks not what the correct decision is in a certain legal system, but, rather, how decisions are actually made in a certain legal system. An example of this kind of observer is Norbert Hoerster's white American, who, wanting to travel with his African-American wife in South Africa, where apartheid laws prevailed at the time, reflected on legal particulars of his trip.[47]

The distinction between the participant's perspective and the observer's perspective is related to H. L. A. Hart's distinction between internal and external points of view.[48] Correspondence in every respect, however, is out of the question, if for no other reason than the ambiguity of Hart's distinction.[49] Therefore, this proviso: Whenever I speak of an internal and an external standpoint without further elucidation, I mean precisely what I have defined above as the participant's perspective and the observer's perspective.

[47] Hoerster, *VR* 2481.

[48] Hart, *CL* 86–7, 2nd edn. 88–90.

[49] See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), at 275–92.

(iv) Classifying and Qualifying Connections

The fourth distinction refers to two different kinds of connection between law and morality. I shall call the first 'classifying', the second 'qualifying'. A *classifying* connection is reflected in the claim that norms or systems of norms that do not meet a certain moral criterion are, for either conceptual or normative reasons, not legal norms or legal systems. A *qualifying* connection is reflected in the claim that norms or systems of norms that do not meet a certain moral criterion can indeed be legal norms or legal systems, but, for either conceptual or normative reasons, are legally defective legal norms or legal systems. What is crucial is that the asserted defect is a legal defect and not simply a moral defect. Arguments addressed to qualifying connections are based on the assumption that necessarily legal ideals are contained within the reality of a legal system. Thus, instead of a 'qualifying' connection, one could also speak of an 'ideal' connection.

(v) Conceptually Necessary and Normatively Necessary Connections

In addition to these four distinctions—between a concept of law that omits validity and one that embraces validity, between norm and procedure, between observer and participant, and between classifying and qualifying connections—there is the distinction, introduced above, between a *conceptually necessary* and a *normatively necessary connection*. With these five distinctions, the conceptual framework is complete.

(vi) Combinations

The framework makes it clear that very different meanings can be attached to the thesis that a necessary connection exists between law and morality. Within the framework, there are thirty-two possible combinations of the components of the

five distinctions. For each combination, both the thesis that a necessary connection exists, as well as the thesis that a necessary connection does not exist, can be formulated. There emerge, then, sixty-four theses altogether. Now, among these, there are certainly a number of implicative relations, which is to say that the truth or falsity of some of the theses implies the truth or falsity of others. And it may be that some combinations are conceptually impossible. That changes nothing, however, in the fundamental insight that a multitude of different claims are made in the debate about necessary connections between law and morality. One explanation for the inconclusiveness of this debate may be that the respective debaters often fail to recognize that the thesis they are defending is altogether different in kind from the thesis they are attacking, with the result that they are talking at cross purposes with one another. This explanation seems even more plausible when one considers that alongside the five distinctions in play here, further distinctions are imaginable, so that the number of possible theses could swell well beyond sixty-four.

In one respect, the large number of possible theses has already been reduced here, namely, in that our point of departure is a concept of law that includes the concept of validity. Simplifying things further is our emphasis on one distinction, the distinction between the observer's perspective or external standpoint and the participant's perspective or internal standpoint. It is within the framework of this dichotomy that the other distinctions come into play. The question, then, is whether the separation thesis or the connection thesis is correct from the observer's perspective or from the participant's perspective.

C. The Observer's Perspective

The problem of legal positivism is discussed for the most part as the problem of a classifying connection between law and

morality. One asks whether contravention of some moral criterion or another exacts from the norms of a system of norms the character of legal norms, or from the whole system of norms the character of a legal system. If one aims to answer this question in the affirmative, one must show that legal character is forfeited when norms or systems of norms cross a certain threshold of injustice (*Unrecht*). It is precisely this thesis that I shall call the 'argument from injustice', the thesis, namely, of forfeiting legal character by crossing a certain threshold of injustice, however that threshold is to be determined.[50] The argument from injustice is nothing other than the connection thesis focused on a classifying connection. It should be asked here, first of all, whether the connection thesis in the form of the argument from injustice is correct from the observer's perspective, an enquiry in which individual norms of a legal system are to be distinguished from the legal system as a whole.

(i) Individual Norms

Probably the best-known version of the argument from injustice applied to individual norms stems from Gustav Radbruch, whose famous formula reads:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and inexpedient, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'lawless law', must yield to justice.[51]

This formula is the basis for the decision on citizenship set out above,[52] as well as for a number of other decisions of the

[50] Dreier, 'Der Begriff des Rechts' (n. 5 above), 99. Other names are the argument from tyranny, the *lex corrupta* argument, the argument from perversion of law, the argument from totalitarianism.

[51] Radbruch, *GUR* 107, *RGA 3* 89.

[52] *BVerfGE* 23 (1968), 98, at 106. See above, this text, at 5–7.

Federal Constitutional Court and the Federal Supreme Court of Germany.[53]

Is Radbruch's formula acceptable from the standpoint of an observer? Once again, our example is Ordinance 11 of 25 November 1941, by means of which emigrant Jews were stripped of German citizenship on grounds of race. In the related decision discussed above, the Federal Constitutional Court appealed to Radbruch's formula in holding Ordinance 11 to be null and void. This represents the participant's perspective. How would the case of the denaturalized Jew, call him '*A*', be described by a contemporary observer of the National Socialist legal system, say, a jurist from abroad who is writing a report for a law journal back home on the legal system of National Socialism? Everyone back home would understand, without further elucidation, the jurist's statement,

(1) *A* has been deprived of citizenship according to German law.

That is not the case with the statement,

(2) *A* has not been deprived of citizenship according to German law.

If no further information is given, this statement either informs incorrectly or creates confusion.

This shows that from the external standpoint of the observer, the inclusion of moral elements in the concept of law is at any rate not conceptually necessary. Rather, there is occasion to ask whether, from this standpoint, such an inclusion is conceptually impossible. Assume that the report of our observer contains the following statement:

(3) *A* has not been deprived of citizenship according to German law, although all German courts and officials

[53] See *BVerfGE* 3 (1954), 58, at 119; ibid. 225, at 233; ibid. 6 (1957), 132, at 198; ibid. 309, at 332; ibid. 389, at 414–15; ibid. 54 (1981), 53, at 67–8; *BGHZ* 3 (1951), 94, at 107; ibid. 23 (1957), 175, at 181; *BGHSt* 2 (1952), 173, at 177; ibid. 234, at 238–9; ibid. 3 (1953), 357, at 362–3.

> treat *A* as denaturalized and support their action by appeal to the literal reading of a norm authoritatively issued in accordance with the criteria for validity that are part of the legal system efficacious in Germany.

This statement, as the statement of an observer, contains a contradiction. From the standpoint of an observer, the law includes whatever courts and officials do when they support their action by appeal to the literal reading of norms authoritatively issued in accordance with the criteria for validity that are part of the currently efficacious legal system. Thus it is clear that in the observer's perspective, the expression 'law' can be used in such a way that, as applied to individual norms, not only is a classifying inclusion of moral elements in the concept of law not conceptually necessary, it is also conceptually impossible. There is no adequate rejoinder here in countering that our observer can conclude his report straightaway by putting the open question,

> (4) *A* has been authoritatively deprived of citizenship in accordance with the criteria valid in Germany, and the denaturalization is socially efficacious as well, but is it law?

With this question, the position of the observer is abandoned and that of the critic is adopted, a shift lending another meaning to the expression 'law'.[54] For the record then: From the perspective of an observer, Radbruch's connection thesis cannot be supported by appeal to a conceptually necessary connection between law and morality.

In addition to this conceptual or analytical argument, there is, by way of an expediential consideration, a normative argument. Norbert Hoerster has claimed, first, that there is a need for a value-neutral designation for authoritatively issued and

[54] The change in meaning also applies to what is conceptually necessary or analytically true. On the thesis that what is conceptually necessary or analytically true is dependent on usage, see D. W. Hamlyn, 'Analytic and Synthetic Statements', in *The Encyclopedia of Philosophy*, ed. Paul Edwards (New York: Macmillan and Free Press, 1967), vol. 1, 105–9, at 108.

socially efficacious norms like Ordinance 11 discussed above, and, second, that there is no useful alternative to the expression 'law'.[55] In terms of the observer's perspective, I agree with this.[56] Thus, analytical as well as normative considerations lead to the conclusion that, from the standpoint of an observer who looks at individual norms and enquires into a classifying connection, the positivistic separation thesis is correct. Radbruch's argument from injustice is not acceptable from this standpoint.

(ii) Legal Systems

What applies to an individual norm need not apply to a legal system as a whole.[57] The question, then, is whether a conceptually necessary connection exists between a legal system as a whole and morality. The question is posed, again, from the standpoint of an observer who enquires into a classifying connection, that is, who wants to know whether the contravention of some moral requirement or another exacts from a system of norms the character of a legal system.

There are two kinds of moral requirement that can be necessarily connected to the legal system: formal and material. Fuller's theory of the internal morality of the law is an example of a theory that claims a necessary connection between formal moral criteria and the legal system. Fuller includes the principles of legality, the generality of the law, promulgation, and the prohibition of retroactive laws.[58] By contrast, the connection is between material moral criteria and the legal system when Otfried Höffe claims that a system

[55] Hoerster, *LR* 187.

[56] I do not endorse, however, the more general thesis that what is true of the 'exclusively externally descriptive' standpoint is also correct for all other standpoints, Hoerster, *LR* 187–8. Different concepts of law may well correspond to different standpoints, and that they ought to do so will be shown below.

[57] Hart, *PSLM* 621, repr. Hart, *Essays* 78.

[58] Fuller, *The Morality of Law* (n. 46 above), 46–62.

of norms that does not meet certain fundamental criteria for justice is not a legal system.[59] Höffe determines these fundamental criteria for justice through the principle of distributive advantage, a principle including the principle of collective security, which, *inter alia*, requires that a proscription of murder and manslaughter, as well as of robbery and theft, be addressed to all members of the legal community.[60]

In discussing these kinds of connection, one must clearly distinguish between factual and conceptual connections.[61] In view of the present character of the world and of human beings, it is a simple but important empirical fact that a legal system containing no general norms, or only secret norms, or only retroactive norms, or protecting neither the lives nor the liberty nor the property of its subjects, has no chance of long-term validity and, in this sense, a long-term existence. Rather than pursuing this here, however, our question is whether such a system still falls within the concept of the legal system.

There are two kinds of social order that, independently of whether or not they can show long-term validity, are for conceptual reasons alone not legal systems: senseless, and predatory or rapacious orders. A *senseless* order exists when a group of individuals is ruled such that consistent purposes of the ruler or rulers are not discernible nor is a long-term pursuit of a purpose by the ruled possible. Imagine a large number of people who are subject to armed desperadoes. The subjects have no rights, and among the desperadoes themselves, every exercise of force is allowed. Except for this permissory norm, there is no general norm.[62] The armed

[59] Otfried Höffe, *Politische Gerechtigkeit* (Frankfurt: Suhrkamp, 1987), 159, 170.

[60] ibid. 169–71.

[61] Kelsen is aiming at a merely factual connection when he characterizes a 'minimum of collective security' as a 'condition for relatively long-term efficacy' but not as a necessary moral element of the concept of law. Kelsen, *PTL* § 6(c) (p. 48) (trans. altered).

[62] Here Kelsen would not even speak of a 'robber band'. The desperadoes, lacking a proscription of the use of force among themselves, are not a community and therefore not a 'band' either; ibid. § 6(c) (p. 47).

desperadoes issue to their subjects individual commands that are sometimes contradictory, always changing, and sometimes impossible to carry out. If the subjects obey a command, they do so solely out of fear. Such a social order is for conceptual reasons alone not a legal system.

The senseless order becomes a *predatory* or rapacious order if the desperadoes organize themselves into a gang of bandits, which presupposes at the least the introduction among themselves of a command hierarchy and a proscription of the use of force. Assume further that a system of rules for the subjects is decreed that has as its sole purpose permanently maintaining the subjects as suitable objects of exploitation. An extreme example: A primary source of revenue for the bandits is that they regularly kill subjects in order to sell their organs. To have available the healthiest possible victims for this purpose, the bandits forbid smoking, drinking, and all violence among their subjects. These rules establish no rights for the subjects, that is, no obligations on the part of the bandits toward the subjects. The purpose of the exploitation is clear to everyone, the bandits making no effort whatsoever to hush it up. One can quarrel over whether the system of norms prevailing among the bandits themselves is a legal system, but, for conceptual reasons alone, the system as a whole is not.[63] To establish this, we turn now to a third kind of social order.

In the long run, the predatory order proves not to be expedient, so the bandits strive to acquire legitimacy. They develop into governors and thereby transform the predatory order into a *governor system*. They continue to exploit their subjects, but their acts of exploitation proceed according to a rule-driven practice. Everyone is told that this practice is correct because it serves a higher purpose, say, the

[63] Applying Augustine's robber-band argument here leads to denial of the legal character of the bandit system. Augustine writes: 'Justice removed, then, what are kingdoms but great bands of robbers? What are bands of robbers themselves but little kingdoms?' Augustine, *The City of God against the Pagans*, trans. R. W. Dyson (Cambridge: Cambridge University Press, 1998), bk. IV, ch. 4 (p. 147).

development of the people. The killing and robbing of governed individuals, acts that in point of fact serve only the exploitative interests of the governors, remain possible at any time. But they are punishable if they are not carried out in a certain form—say, on the strength of the unanimous decision of three members of the group of governors—and if they are not publicly justified by appeal to the higher purpose, the development of the people.

With the move to a governor system, a line is crossed. Although the system is without a doubt unjust in the extreme, its designation as 'legal system' is not conceptually excluded. With that, the question is put: What distinguishes the governor system from the desperado system and the bandit system? The difference is not that here general rules of some kind prevail, for that is already the case in the bandit system. And the difference is not that the governor system is equally advantageous for all, even if only at the minimum level of protecting life, liberty, and property; for in this system, too, killing and robbing the governed remain possible at any time. Rather, the decisive point is that a *claim to correctness* is anchored in the practice of the governor system, a claim that is made to everyone. The claim to correctness is a necessary element of the concept of law. This thesis, called the 'argument from correctness', will be established in the next section. Here, in anticipation of the case to be made, it suffices to say that a system of norms that neither explicitly nor implicitly lays claim to correctness is not a legal system. Every legal system lays claim to correctness.[64] In this respect, the claim to correctness has a classifying significance. An observer can at best in an indirect or extended sense characterize as a 'legal system' a system of norms that neither explicitly nor implicitly makes any claim to correctness.

[64] This statement is the point of departure for a rational reconstruction of Radbruch's somewhat opaque statement: 'Law is the reality whose meaning is in serving the legal value, the legal idea.' Radbruch, *LP* § 4 (p. 73) (emphasis omitted) (trans. altered).

This has few practical consequences, for actually existing systems of norms regularly lay claim to correctness, however feebly justified the claim may be. Practically speaking, relevant problems first turn up where the claim to correctness is indeed made but not satisfied. What is significant, however, are the systematic consequences of the claim to correctness; that is, it restricts the positivistic separation thesis a good bit even in the observer's perspective. In this perspective, the separation thesis does in fact count as unrestricted where individual norms are concerned, but with legal systems, the separation thesis—albeit only in extreme and indeed improbable cases—reaches a limit defined by the claim to correctness. This claim moves from the limit in the observer's perspective to the centre in the participant's perspective, thus representing a link between the two.

D. The Participant's Perspective

It has been shown that the positivistic separation thesis is essentially correct from the observer's perspective. Only in the extreme and indeed improbable case of a system of norms that fails even to claim correctness does the separation thesis reach a limit. An altogether different picture emerges if one considers the law from the perspective of a participant, say, a judge. From this perspective, the separation thesis is inadequate, and the connection thesis is correct. In order to establish the point, three arguments shall be considered: the argument from correctness, the argument from injustice, and the argument from principles.

(i) The Argument from Correctness

The argument from correctness is the basis of the other two arguments, that is, the arguments from injustice and from principles. It says that individual legal norms and individual

legal decisions as well as legal systems as a whole necessarily lay claim to correctness. A system of norms that neither explicitly nor implicitly makes this claim is not a legal system. In this respect, the claim to correctness has a classifying significance. Legal systems that do indeed make this claim but fail to satisfy it are legally defective legal systems. In this respect, the claim to correctness has a qualifying significance. An exclusively qualifying significance is attached to the claim to correctness of individual legal norms and individual legal decisions. These are legally defective if they do not make the claim to correctness or if they fail to satisfy it.

An objection can be made that the argument from correctness is mistaken in saying that a claim to correctness is necessarily attached to the law. In reply to this objection, two examples might be considered. One example concerns the first article of a new constitution for state *X*, where the minority oppresses the majority. The minority would like to continue to enjoy the advantages of oppressing the majority, but would like also to be honest. The constitutional assembly therefore adopts as the first article of the constitution the following proposition:

(1) *X* is a sovereign, federal, and unjust republic.

There is something defective about this constitutional article.[65] The question is where the defect lies.

One might think that the defect is simply that the article is not expedient. After all, the minority wants to preserve the unjust status quo, but its chances of doing so are slim if it does not at least pretend that the status quo is just. There is in fact a *technical defect* of this kind here; still, it does not explain the defectiveness of the article. One might assume that in providing for a republic, the new article scraps a pre-existing monarchy, and one might assume further that the oppressed

[65] For a similar argument, see Neil MacCormick, 'Law, Morality and Positivism', *Legal Studies*, 1 (1981), 131–45, at 144, repr. in MacCormick and Ota Weinberger, *An Institutional Theory of Law* (Dordrecht: Reidel, 1986), 127–44, at 141.

majority deeply reveres the former monarch, with the result that the status quo is as threatened by the introduction of the republic as by the characterization of the state as 'unjust'. In this case, the constitutional framer—if the injustice provision were simply a technical defect—would be giving rise to the same defect by providing for a republic as by providing for injustice. But that is not so. There is something absurd about the injustice provision, but not about the republic provision.

There must be another explanation for the defectiveness of the article. A *moral defect* readily obtains, but this, too, is obviously still not a complete explanation. Assuming the injustice to be that certain rights are withheld from persons belonging to a certain race, then it would make no difference from the standpoint of morality if the injustice provision were stricken and replaced with a provision withholding these rights from persons of this race. It would indeed make a difference, however, from the standpoint of defectiveness; the article would no longer be absurd.

The explanation could lie in the violation of a widespread though not a necessary convention for drawing up constitutional texts, that is to say, the defect is a *conventional defect*. Without a doubt, a widespread convention is being violated, although this, too, is by itself still not a complete explanation. The rule that was violated is more than a mere convention, for it cannot be changed even in the event of changing circumstances and preferences. Rather, it is an essential element in the practice of framing a constitution, a point made clear by the redundancy, in a constitution, of an article like:

(2) *X* is a just state.

Only a *conceptual defect* remains then. I use the term 'conceptual defect' broadly here, as referring also to violations of rules that are constitutive for speech acts, that is, linguistic expressions qua actions. The claim to correctness—in this case as, above all, a claim to justice—is necessarily attached to the act of framing a constitution. A constitutional framer

gives rise to a performative contradiction if the content of his act of framing a constitution negates the claim to justice, even though he makes this very claim in acting to frame a constitution.[66]

In the second example addressing the objection to the argument from correctness, a judge hands down the decision:

(1) The accused is sentenced to life imprisonment, which is wrong.

This proposition requires interpretation. The judge may want to say that his decision contradicts positive law. He may also want to say, however, that although his decision does comply with positive law, the decision is unjust. These and other interpretations lead to numerous problems that shall be set aside here. Only the following interpretation is of interest:

(2) The accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law.

In handing down this decision, the judge without a doubt abandons his social role, and he violates rules of positive law that, surely in all legal systems, obligate him to interpret prevailing law correctly. But he would also be violating social rules if he were unshaven and wearing a filthy robe as he handed down the decision, and rules of positive law would also be violated by the decision if the interpretation were indeed incorrect, but the judge believed and claimed it to be correct. Conversely, there would still be a defect even if the judge were to assume erroneously that his interpretation is incorrect and he did not violate positive law by announcing in

[66] In this respect there exists a certain analogy to J. L. Austin's well-known example: '[T]he cat is on the mat but I do not believe it is.' Austin, *How to Do Things with Words*, ed. J. O. Urmson (Oxford: Clarendon Press, 1962), 48, and see at 48–50; see also Austin, 'The Meaning of a Word', in Austin, *Philosophical Papers*, 1st edn., ed. J. O. Urmson and G. J. Warnock (Oxford: Clarendon Press, 1961), 23–43, at 31–2; 2nd edn. (1970), 55–75, at 63–4.

his decision this erroneous assumption. Clearly what we have here is more than a violation of social or legal rules.[67] The judge gives rise to a performative contradiction and, in this sense, a conceptual defect. With a judicial decision, the claim is always made that the law is being correctly applied, however ill satisfied the claim may be. The very claim made in carrying out the institutional act of sentencing is contradicted by the content of the decision.

These two examples show that participants in a legal system necessarily, on all sorts of levels, lay claim to correctness. If and in so far as this claim has moral implications, a conceptually necessary connection between law and morality is demonstrated.

This still does not prove the connection thesis, of course. A positivist can endorse the argument from correctness and nevertheless insist on the separation thesis. Two strategies are available to him. First, he can show that the failure to satisfy the claim to correctness does not by itself lead to forfeiture of legal character. Apart from the limiting case of the system of norms that in no way makes the claim, the claim to correctness establishes at best a qualifying, not a classifying connection. Thus, the separation thesis, at any rate in so far as it is geared to a classifying connection, is not affected by the argument from correctness, apart from the limiting case just mentioned. A second strategy is to maintain that the claim to correctness, having a trivial content lacking in moral implications, cannot lead to a conceptually necessary connection between law and morality. The positivist's first objection points toward the argument from injustice, the second toward the argument from principles.

[67] Ulfrid Neumann, in *Juristische Argumentationslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986), 87–8, is of a different opinion. He refers to the following example: 'In the name of the people, Mr. N. is sentenced to ten years in prison although there are no good reasons for this sentence.'

(ii) The Argument from Injustice

The argument from injustice, as noted earlier, can be applied to individual norms or to legal systems as a whole. I consider it first with reference to individual norms.

(a) Individual Norms

This version of the argument has it that legal character is forfeited when individual norms of a legal system cross a certain threshold of injustice. Its best-known variant is Radbruch's formula, which has already been discussed and rejected from the standpoint of an observer.[68] The question now is whether or not the argument from injustice, as expressed in Radbruch's formula, is acceptable from the standpoint of a participant. It should be emphasized here that Radbruch's formula does not say that a norm forfeits its legal character simply if it is unjust. The threshold is set higher than that. Legal character is forfeited only if the injustice reaches an 'intolerable degree'. Ordinance 11, pursuant to the Statute on Reich Citizenship, serves once again as our example.

There is widespread agreement today that the debate surrounding Radbruch's formula cannot be decided on the basis of analytical or conceptual arguments alone. What matters is expedient or adequate concept formation that is justified by normative arguments.[69] To be sure, the argument from correctness has a role to play in evaluating normative arguments for and against the argument from injustice. The earlier statement to the effect that the argument from correctness is the basis of the argument from injustice, too, was meant in exactly this sense.

The many and diverse positions taken in the debate surrounding Radbruch's formula can be essentially summarized

[68] See above, this text, at 28–31.
[69] See above, this text, at 20–3.

under eight rubrics—language, clarity, effectiveness, legal certainty, relativism, democracy, dispensability, and candour.

Language. In view of the ambiguity and vagueness of the expression 'law', a compelling linguistic-conceptual case cannot be made either for or against the argument from injustice. What can be defended, however, is the normative thesis that the inclusion of moral elements in the concept of law, required by the argument from injustice, leads to an inexpedient specification of language. So it is that Hoerster reproached the non-positivist—say, one who will not classify Ordinance 11 as law—for failing 'to say which ordinary word in our language could substitute for his morally charged concept of law, lending it a value-neutral function.'[70] The non-positivist, according to Hoerster, loses out on the possibility of generally identifying a norm like Ordinance 11 in a readily intelligible way; that can be done without difficulty only by calling it 'law'.

As noted above, this is correct from the standpoint of an observer.[71] That things change, however, if one adopts the participant's perspective can be shown with the help of the dichotomy between norm and procedure discussed earlier. The observer sees Ordinance 11 as the *result* or product of a norm-creating procedure in which other persons have participated. Similarly, a judge's decision based on Ordinance 11 is, for the observer, the result of a procedure, namely, a norm-applying procedure, in which the observer has not participated. If norm and decision agree, there is no reason for him not to call both 'law'. If the two do not agree, he faces the question of whether he should describe a contradiction or determine derogating judge-made law. A different picture emerges from the participant's perspective. To be sure, the participant—say, the judge—also sees Ordinance 11 as first of all the result of a norm-creating procedure. For him, though, this is simply the way to a second quality of Ordinance 11,

[70] Hoerster, *LR* 187; Hoerster, *VT* 27.
[71] See above, this text, at 30–1.

namely, that it is the *point of departure* for a norm-applying procedure in which he participates and whose result is accompanied by the claim to correctness.

Our concern here is not yet with substantive arguments, but simply with the expedient use of the expression 'law'. In order that such considerations of linguistic usage not prejudice substantive arguments, they must be compatible with different substantive theses. Take the substantive thesis that there are good legal reasons for the judge not to apply Ordinance 11 but instead to hand down a decision that contradicts its language. Given this presupposition, it would be unsatisfactory for the judge to say that Ordinance 11 is law. He must characterize his decision as 'law' since he is deciding on the basis of legal reasons. Since his decision contradicts Ordinance 11, then if he were also to classify Ordinance 11 as 'law', he would be characterizing contradictory norms as 'law', namely, the general norm established by the Ordinance and the individual norm expressed by his decision. This contradiction can be resolved without difficulty if the judge says that Ordinance 11 is indeed prima-facie law but in the end not law at all. What is expressed thereby is that, in the course of the norm-applying procedure, Ordinance 11 is denied legal character. If there are good legal reasons for not applying Ordinance 11, then not only is it possible for the judge to say that the Ordinance is in the end not law, it is necessary that he do so in order to avoid a contradiction. Thus, Hoerster's argument from language would be correct only if there could not ever be good legal reasons for deciding contrary to the language of a statute that is unjust in the extreme. If there can be such reasons in some case or another, then Hoerster's argument is incorrect from the participant's perspective. Whether there can or cannot ever be good legal reasons of this kind, however, is a substantive question not to be decided on the basis of considerations of expedient linguistic usage. This means that Hoerster's argument from language cannot justify objecting to the inclusion of moral elements in a concept of law that is seen as adequate from the participant's perspective. On the contrary,

if substantive reasons speak in favour of such inclusion, linguistic usage has to fall in line.

Clarity. The second argument in the debate surrounding Radbruch's formula is made in terms of clarity. H. L. A. Hart offers a classic formulation:

> [I]f we adopt Radbruch's view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted . . . [W]hen we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.[72]

On first glance, this objection cannot be denied a certain legitimacy. A positivistic concept of law that renounces the inclusion of any moral elements at all is simpler and at least in this respect clearer than a concept of law that includes moral elements. Another consideration, however, is that clarity in terms of simplicity is not the only goal of concept formation. Simplicity must not prevail at the expense of adequacy.[73] Moreover, even a complex concept can be clear. One scarcely need fear that jurists will be confused by the inclusion of moral elements in the concept of law.[74] Jurists are accustomed to dealing with complicated concepts. For the citizen, what

[72] Hart, *PSLM* 620–1, repr. Hart, *Essays* 77–8. Similarly Hoerster, *LR* 187–8; Hoerster, *VR* 2481–2.

[73] See Walter Ott, 'Die Radbruch'sche Formel. Pro und Contra', *Zeitschrift für Schweizerisches Recht*, N.F. (new series) 107 (1988), 335–57, at 343.

[74] ibid. 349–50.

gives rise to a lack of clarity is not primarily that moral elements are included in the concept of law. He might also be confused by the news that even extreme injustice is law. Rather, what gives rise to a lack of clarity is that it is not easy, in many cases, to draw the line between norms that are unjust in the extreme and norms that are not. That is a problem to be addressed in terms of legal certainty, however, not clarity. The objection based on clarity is concerned only with whether or not moral elements are to be included at all in the concept of law.

A general kind of conceptual indeterminacy, then, is not the focus of the argument adduced in terms of clarity by Hart and Hoerster. Rather, the question is how a conflict between law and morality is to be comprehended conceptually. Neither Hart nor Hoerster would resolve the conflict even in the case of extreme injustice. What the law demands is one thing, what morality requires is another. That is, morality can permit or require the jurist, as human being and citizen, to refuse to obey the law, but what he refuses to obey is still the law. Every other account serves 'to cloak the true nature of the problems with which we are faced'.[75] The positivist can discuss the questions associated with statutory injustice 'unveiled as what they are, namely, questions of ethics'. The non-positivist, by contrast, runs the 'risk of hiding their ethical character by shifting them, by definition, into the concept of law'.[76]

Is this objection justified? Is the problem being cloaked, veiled, and hidden by the non-positivist? The answer is no. The non-positivist does not deny the ethical character of the problem. He simply claims that, in the case of extreme injustice, the ethical problem is also a legal problem. The result is that he draws legal conclusions from his moral judgment. The content of his argumentation may coincide with that of the positivist's, and he, too, must lay out his arguments and open them up for discussion. That he moves, in the case of extreme

[75] Hart, *PSLM* 620, repr. Hart, *Essays* 77.
[76] Hoerster, *LR* 187.

injustice, away from the standpoint of morality to the standpoint of the law is not a veiling of the problem, but, rather, the expression of a substantive thesis. And this thesis can be attacked only with substantive arguments, not with a formal argument charging a lack of clarity.

The remaining objection is to a 'disputable philosophy' that 'would seem to raise a whole host of philosophical issues'[77] and could therefore lead to a lack of clarity and to confusion. But this objection can be held against positivism, too, which also gives expression to a certain legal philosophy that can be debated. In this debate, positivism and non-positivism are, in principle, on equal footing in direct opposition to one another. That positivism cannot pretend to anything like a presumption of correctness is shown by the claim to correctness that is necessarily attached to the law, a claim that speaks more in favour of non-positivism. Thus, the non-positivist cannot be dislodged by an argument adduced in terms of clarity either.

Effectiveness. Before the era of National Socialism in Germany,[78] Radbruch was a legal positivist—not in terms of justification, to be sure,[79] but in terms of result, at any rate where the judge is concerned.[80] After 1945, Radbruch changed his mind and defended the view that legal positivism 'rendered both jurist and the people defenceless against arbitrary, cruel, criminal statutes, however extreme'.[81] He now demanded the inclusion of moral elements in the concept of law in order to 'arm jurists against the recurrence of a rogue state (*Unrechtsstaat*)' like Nazi Germany.[82] Hart objected that it was naïve to assume that a non-positivistic definition of the law could have

[77] Hart, *PSLM* 621, 620, repr. Hart, *Essays* 78.

[78] (This sentence of the original text has been modified by the author.)

[79] See Arthur Kaufmann, *Rechtsphilosophie*, 2nd edn. (Munich: C. H. Beck, 1997), at 41–4.

[80] See Radbruch, *LP* § 10 (at pp. 116–20).

[81] Gustav Radbruch, 'Five Minutes of Legal Philosophy', trans. Stanley L. Paulson, in *Philosophy of Law*, 3rd edn., ed. Joel Feinberg and Hyman Gross (Belmont, Calif.: Wadsworth, 1986), 109–10, at 109 (trans. altered).

[82] Radbruch, *GUR* 107, *RGA 3* 90.

any effect on statutory lawlessness.[83] Hart's argument, directed to the effectiveness of the non-positivistic concept of law, was fine-tuned by Hoerster. According to him, the expectations that Radbruch attaches to this concept are based on an 'enormous overestimation'[84] of the effect the legal theorist or philosopher has on the behaviour of citizens and jurists.

> For one cannot change reality simply through the definition of a concept. A statute that is morally dubious but enacted within the framework of the prevailing legal system—whether the legal philosopher calls it 'valid law' or not—possesses, apart from its immorality, all the qualities that a morally impeccable statute possesses: It has come into being in accordance with the prevailing constitution. It is applied and enforced by a legal staff. And whoever refuses to obey it (say, because of its immorality) must reckon with the usual consequences of a violation of law. One cannot dispose of all these facts by deciding in favour of the anti-positivistic, morally charged definition of the concept of law.[85]

The thesis that a non-positivistic concept of law has no effect on statutory lawlessness can be sharpened into the claim that such a concept is not only not helpful, it is in fact a hindrance in the struggle against statutory lawlessness. Positivism, with its strict separation of legal and moral obligations, encourages a critical stance vis-à-vis the law. By contrast, one who begins by including moral elements in the concept of law runs the risk of uncritically identifying legal with moral requirements. So it is that Kelsen rejects the thesis 'that only a moral social system is law', offering as his reason: '... such a system, in its actual application by the jurisprudence prevailing in a particular legal community, leads to an uncritical legitimation of the state coercive system constituting this community.'[86] Within the framework of the argument

[83] Cf. Hart, *PSLM* 617–18, repr. Hart, *Essays* 74; Hart, *CL* 205, 2nd edn. 209–10.

[84] Hoerster, *LR* 185.

[85] ibid. 186.

[86] Kelsen, *PTL* § 13 (pp. 68–9) (trans. altered); in agreement, Hoerster, *VT* 32; see also Horst Dreier, 'Die Radbruchsche Formel—Erkenntnis oder

adduced in terms of effectiveness, there are, then, two theses to be distinguished. The first says that a non-positivistic concept of law can have no effect on statutory lawlessness. The second has it that a non-positivistic concept of law carries with it the risk of uncritically legitimating statutory lawlessness. The latter thesis goes further, and I shall consider it first.

The risk of uncritical legitimation would indeed exist if the non-positivistic connection thesis said that a norm is a legal norm only if its content corresponds to morality. It is this variant of the connection thesis that Kelsen and Hoerster have in mind when they formulate their objection in terms of uncritical legitimation. Thus, Kelsen speaks of the 'thesis that the law is in its essence moral'.[87] According to Hoerster, the connection thesis runs: 'A norm is legal only if it is moral', which is logically equivalent to 'if a norm is legal, it is moral'.[88] If the point of departure is this version of the connection thesis, which may be called the 'strong' version, then every jurist who characterizes a norm as a legal norm must at the same time classify it as morally justified. That would indeed carry with it the risk of an uncritical legitimation of the law.

The objection in terms of uncritical legitimation fails to recognize, however, that a non-positivist need not defend the strong connection thesis, with its postulate of a contentual agreement between every legal norm and morality. Radbruch's formula says expressly, 'The positive law, secured by legislation and power, takes precedence even when its content is unjust and inexpedient'.[89] Legal character, according to the formula, is forfeited only if the conflict between law and morality reaches an 'intolerable', that is, an extreme degree. This may be called the 'weak' connection thesis.

The weak connection thesis does not lead to an identification of the law with morality. It says that unjust and therefore

Bekenntnis?' in *Staatsrecht in Theorie und Praxis. Festschrift Robert Walter zum 60. Geburtstag*, ed. Heinz Mayer *et al.* (Vienna: Manz, 1991), 133.

[87] Kelsen, *PTL* § 13 (p. 68) (trans. altered).
[88] Hoerster, *VT* 32.
[89] Radbruch, *GUR* 107, *RGA 3* 89.

immoral norms can be law. So, like legal positivism, it admits of a moral critique of the law and, in this respect, makes possible a critical stance vis-à-vis the law. It differs from legal positivism simply in that beyond a certain threshold, legal character is forfeited. Now, one might think that this alone suffices for uncritical legitimation. Jurists would be inclined to say that the threshold has not been crossed, therefore their legal system possesses at least a minimum moral legitimacy. A counter-argument, however, lies in the character of the threshold. The threshold is extreme injustice. The formulation found in the Federal Constitutional Court decision on citizenship, referred to above, serves as an example. 'The attempt to destroy physically and materially, in accordance with "racist" criteria, certain parts of one's own population, including women and children, has nothing in common with law and justice.'[90]

If any moral judgments can be justified in terms of the claim to universal bindingness,[91] then surely it is those that characterize as immoral and unjust in the extreme the pursuit of goals like this. The threshold beyond which norms forfeit legal character is marked by minimum moral requirements. An example is the elementary human right to life and physical security. The claim is made that moral requirements like this, at any rate, can be rationally justified.[92] If this is so, then one scarcely need fear something like an 'uncritical legitimation' of norms that are beyond the threshold of extreme injustice. Such legitimation would at least cause some trouble—which may be one reason that barbaric acts of injustice are often carried out not in accordance with proper legal form but on the strength of more or less secret orders.[93]

[90] *BVerfGE* 23 (1968), 98, at 106.

[91] (This sentence of the original text has been modified by the author.)

[92] See Robert Alexy, 'A Discourse-Theoretical Conception of Practical Reason', trans. Ruth Adler and Neil MacCormick, *Ratio Juris*, 5 (1992), 231–51.

[93] See on this issue Walter Ott, 'Der Euthanasie-Befehl Hitlers vom 1. September 1939 im Lichte der rechtspositivistischen Theorien', in *Staatsrecht in Theorie und Praxis* (n. 86 above), 519–33.

There is, then, a double conclusion to report. Below the threshold of extreme injustice, the weak connection thesis—as expressed, say, in Radbruch's formula—does not run the risk of uncritical legitimation, because a conflict between law and morality at this level does not rule out legal character. And beyond the threshold of extreme injustice, there is at any rate no risk of uncritical legitimation if the minimum moral requirements that mark the threshold can be rationally justified. In passing, I might point out that an uncritical legitimation of currently prevailing law is also possible from the positivistic standpoint of strict separation of law and morality, for contentual agreement can be claimed even on the basis of conceptual separation.

Within the framework of the argument adduced in terms of effectiveness, the other objection to the non-positivistic concept of law has it that such a concept can have no effect on statutory lawlessness. This objection charging ineffectiveness is to a considerable extent legitimate. Hart and Hoerster are correct in saying that definitions of the concept of law that are offered by legal theory or legal philosophy cannot, as such, change reality. It makes no essential difference to a judge in a rogue state whether, in refusing to apply a statute that is unjust in the extreme, he appeals to Hart and refuses on *moral* grounds or joins Radbruch and refuses on *legal* grounds.[94] Either way, he has to reckon with personal consequences, and his willingness to make this sacrifice turns on factors other than the definition of the concept of law.

Still, there are differences from the standpoint of effectiveness. One difference is clear if the focus is on legal practice rather than on the individual judge, who measures statutory lawlessness or injustice against his conscience.[95] If there exists in legal practice a consensus that the satisfaction of certain minimum requirements of justice is a necessary

[94] See Ott, 'Die Radbruch'sche Formel. Pro und Contra' (n. 73 above), at 346.
[95] ibid. 347.

presupposition for the legal character of state directives, then not only is there a line of moral argumentation available for resisting the acts of a rogue regime, there is also, anchored in legal practice, a line of legal argumentation. One ought to have no illusions, though, about the prospects for the success of such resistance. A rogue regime that is halfway successful can quickly destroy the legal practitioners' consensus by intimidating individuals, making personnel changes, and rewarding conformity. It is at least conceivable, however, that this fails to work for a weaker rogue regime, especially in its initial phase. Granted, this is a relatively limited effect, but it is an effect. What is important is that even if this relatively limited effect should prove to be an erroneous assumption, no compelling objection to the non-positivistic concept of law results. To defend his position, the non-positivist does not need to show that, in a rogue state, his concept of law makes a better safeguard against statutory lawlessness than the positivistic concept of law does. It is enough that the struggle against statutory lawlessness can be just as effectively waged on the basis of the non-positivistic concept of law as on the basis of a positivistic concept of law. And that much is certain. For why should it not be the case that the struggle can be just as effectively waged when statutory lawlessness or injustice is not seen as law as when it is seen as law?

Once a rogue state is successfully established, legal concepts may no longer have much effect. Only after the collapse of such a state are essential differences between the positivist and the non-positivist evident. Still, even in the successfully established rogue state, the non-positivistic concept of law does have one slight but not unimportant effect that can work against statutory lawlessness. It may be called the 'risk effect'. A judge or another office-holder in a rogue state sees his own situation differently according to whether he interprets it in light of a positivistic or a non-positivistic concept of law. A judge, for example, faces the question of whether or not he should hand down a terroristic criminal sentence that is covered by lawless or unjust statutes. He is neither a saint

nor a hero. He has little interest in the fate of the accused, but more interest in his own. All historical experience says that he cannot rule out the collapse of the rogue state, and he worries about what might happen to him then. If he has to assume the predominant or general acceptance of a non-positivistic concept of law according to which the norm supporting the terroristic sentence is not law, then he takes a relatively high risk of being unable to justify himself later and therefore of being prosecuted. The risk diminishes if he can be certain that his behaviour will be evaluated later on the basis of a positivistic concept of law. To be sure, the risk does not disappear altogether, for a retroactive statute may be enacted that could hold him accountable. Still, the risk is a lesser one. Retroactive statutes pose problems for the *Rechtsstaat* or rule of law, so it is entirely possible that no such statute will be enacted, and if one is, our judge can nevertheless try to defend himself by claiming to have acted on the basis of formerly valid law. It is clear, then, that a predominant or general acceptance of a non-positivistic concept of law increases the risk of those persons who, in a rogue state, commit or participate in committing lawless or unjust acts that are covered by statute. Thus, even for persons who see no real reason not to be involved in injustice, or who would actually favour such involvement, an incentive arises or is reinforced for them not to participate in injustice at all or at least to tone it down. In this way, the predominant or general acceptance of a non-positivistic concept of law can have an affirmative effect even in a rogue state. All in all, therefore, one can say that the practical consequences of the non-positivistic concept of law, from the point of view of fighting statutory lawlessness, are at any rate not worse and in some respects even better than those of the positivistic concept of law.

Legal Certainty. A fourth argument against the non-positivistic concept of law asserts that this concept jeopardizes legal certainty. The argument does indeed count against variants of non-positivism that take as their point of departure a

strong connection thesis, that is, those variants according to which every injustice leads to the forfeiture of legal character. If, in addition, every person is given the authority, appealing to his own notion of justice, to refuse to comply with statutes, then the argument from jeopardized legal certainty is magnified into the argument from anarchy. This need not be pursued further, however, for no serious non-positivist defends such views. Here, the question is simply whether or not legal certainty is jeopardized by a concept of law that entails the forfeiture of legal character not in every case of injustice, but only in cases of extreme injustice. The answer to the question is no.

If there are notions of justice that are rationally justifiable, then one who rationally justifies his view that an action is unjust can be said to know this. Now, the following principle applies: the more extreme the injustice, the more certain the knowledge of it. This principle connects material and epistemological considerations. It provides a justification for the Federal Constitutional Court's view, stated in the decision on citizenship discussed above, not only that the injustice of Ordinance 11 reached an 'intolerable degree', but also that this was 'evident'.[96] There may well be cases, of course, in which one cannot say with complete certainty whether or not extreme injustice is at hand. This scarcely counts at all, however, when compared with the uncertainties generally attending knowledge of the law. The non-positivistic connection thesis leads at most, then, to a minimal loss of legal certainty.

An answer to the question of whether this minimal loss of legal certainty is acceptable must take into account that while legal certainty is indeed an important value, it is not the only value. The value of legal certainty must be weighed against the value of material justice.[97] Radbruch's formula makes an assessment that fundamentally gives precedence to

[96] *BVerfGE* 23 (1968), 98, at 106.
[97] Radbruch, *GUR* 107, *RGA 3* 88–9.

legal certainty and only in extreme cases inverts the relation. The only one who can object to this at all is one who regards legal certainty as an absolute principle.[98] And that, like every pursuit of an absolute principle, has an air of fanaticism about it.

Relativism. The argument adduced in terms of legal certainty is sharpened by the argument from relativism. It says that not only is it difficult to recognize the boundary between injustice that is and is not extreme, but no notion of justice, not even of extreme injustice, can be rationally justified or objectively known. This is the thesis of radical relativism. If this thesis is correct, then the inclusion of moral elements in the concept of law means nothing other than that the judge, in cases where his subjective preferences are especially intensely affected, is offered the possibility of deciding contrary to the statute. Hoerster paints a drastic picture:

> There is no guarantee, not even the mere likelihood, that the morality the judge or the citizen in question brings into his concept of law is in fact an 'enlightened' morality . . . Nothing says in general that the moral notions of some particular individual or of some particular society are in some sense or another more enlightened (say, 'more humane' or 'more just') than the positive legal norms of the state in question . . . It is not exactly as if there were only—as the opponents of legal positivism are always suggesting—the judge or the citizen who, confronted with 'Nazi statutes', would rather pay heed to a humane morality. There is just as well the judge or the citizen who, confronted with 'democratic' statutes (say, those of the Weimar Republic or of the post-war Bonn Republic), would rather pay heed to a Nazi morality.[99]

The argument from relativism makes explicit what was already obvious as a presupposition in the arguments adduced in terms of effectiveness and legal certainty: The non-positivist presupposes an at least rudimentary non-relativistic ethics. It is no accident that Radbruch, before 1933, establishes

[98] On the concept of an absolute principle, see Alexy, *TCR*, at 62–4.
[99] Hoerster, *VR* 2482.

his in effect positivistic view[100] by appealing to relativism, that is, by appealing to the thesis that a universally compelling justification of moral principles is impossible.

> Now, however, it has proved to be impossible to answer the question as to the purpose of the law other than by listing the diverse opinions of interested parties. And it is precisely on this alone, on this impossibility of a natural law, that the validity of the positive law can be established; at this point, relativism—simply our method of observation until now—is itself admitted as a building block into our system.[101]

After 1945, Radbruch extracts a basic repertory of human and civil rights from relativistic scepticism:

> Certainly [these legal principles, called natural law or the law of reason,] are surrounded by doubt when it comes to particulars, but the work of centuries has nevertheless developed a solid repertory, collected with such broad consensus in the so-called declarations of human and civil rights that, with respect to some of them, only a labored scepticism can still harbour doubts.[102]

The references to historical experience—'the work of centuries'—and to an actually existent 'broad' consensus still do not amount to a refutation of relativism, even if in terms of national, supranational, and international legal practice these factual references approach such a refutation. A sceptic may object that the development of moral views over the last centuries or millennia has gone off the track, and that it is possible that everyone or nearly everyone is entangled in a collective mistake. To dispel this sceptical objection, one must show that one can rationally justify a proposition like:

(1) The physical and material destruction of a minority of the population on grounds of race is injustice in the extreme.

[100] (This sentence of the original text has been modified by the author.)
[101] Radbruch, *LP* § 10 (p. 116) (trans. altered).
[102] Radbruch, 'Five Minutes of Legal Philosophy' (n. 81 above), 110 (trans. altered).

Showing this is *eo ipso* to show that one can rationally refute a proposition like:

(2) The physical and material destruction of a minority of the population on grounds of race is not injustice in the extreme.

The problem of legal positivism leads, then, to the meta-ethical problem of the justifiability of moral judgments. I shall not discuss this problem here,[103] resting content with the claim that a proposition like (1) is rationally justifiable and a proposition like (2) is rationally refutable. If this claim is correct, then the objection based on relativism is answered. If this claim is not correct, then to counter the objection based on relativism, one could only—but could at least—point to the fact of a currently broad consensus, which is not in itself, to be sure, a refutation in the strict sense but which does, for legal practice, as mentioned above, approach a refutation.

What this means with respect to Hoerster's concern that a judge faced with democratically enacted, just statutes could appeal to a 'Nazi morality' is that such a judge, at any rate in a state steeped in the tradition of human rights or open to them, should be thwarted by the fact of a broad consensus on fundamental rights. Furthermore, if rationally justified notions of extreme injustice are possible, then there are rational grounds for not resisting democratically enacted statutes by appealing to a 'Nazi morality'. Only in a society already given over in its majority to a 'Nazi morality' does a serious risk exist that a judge, appealing to a non-positivistic concept of law, will deny legal character to just statutes because he finds intolerable a violation of 'Nazi morality'. That the non-positivistic concept of law may be misused this way in such a society is a drawback, but not one that is all that weighty. Once 'Nazi morality' achieves dominance, statutes conflicting with it to an extreme degree do not last long anyway.

[103] See Alexy, *TLA*, at 33–100; Alexy, 'On Necessary Relations between Law and Morality' (n. 43 above).

Democracy. What has been said here about the objection based on relativism can be applied to another possible objection to the non-positivistic concept of law, the objection based on democracy. It says that the non-positivistic concept of law carries with it the risk that the judge, appealing to justice, will oppose decisions of the democratically legitimated legislator.[104] Since this would amount to an intrusion of the judiciary into the sphere of the legislature, the objection can also be formulated in terms of jeopardizing the separation of powers.

This objection loses its punch if one considers that the non-positivistic concept of law entails the forfeiture of legal character only in cases of extreme injustice. It has an effect only in a core area. The content of the constitutional review of rights violations in democratic constitutional states reaches much further. Whoever appeals to democracy or the separation of powers to argue against the weak connection thesis represented here would have to reject any judicial review whatsoever of the legislator's commitment to fundamental rights.

Dispensability. Radbruch's formula is of practical significance above all after the collapse of a rogue regime. The Federal Constitutional Court's decision on citizenship discussed above serves as an example of this. By contrast, the objection based on dispensability says that statutory injustice can be accounted for other than by revoking legal character. That is, the new legislator can abrogate the unjust older statute by means of a retroactive statute.[105]

In order to assess correctly the objection based on dispensability, criminal cases must be distinguished from other cases. Art. 103, para. 2, of the Basic Law[106] formulates an elementary principle of the *Rechtsstaat*, namely, *nulla poena sine*

[104] Ingeborg Maus, 'Die Trennung von Recht und Moral als Begrenzung des Rechts', *Rechtstheorie*, 20 (1989), 191–210, at 193: 'The moral argument can . . . easily be misused as a substitute for democracy.'

[105] Hart, *PSLM* 619, repr. Hart, *Essays* 77.

[106] *GG* art. 103, para. 2: 'An act may be punished only if it was defined by a law as a criminal offense before the act was committed' (trans. altered).

lege,[107] as a norm of positive constitutional law, thereby proscribing the enactment of retroactive criminal statutes by the ordinary legislator. This can be generalized. If the principle *nulla poena sine lege* has constitutional status, then one can hardly say in the field of criminal law that the enactment of a retroactive ordinary statute would render dispensable the application of a non-positivistic concept of law. Certainly one could imagine a constitutional change that, in cases of extreme injustice, would permit exceptions to the principle *nulla poena sine lege*—and thereby exceptions to the principle *nullum crimen sine lege*,[108] too. Such exceptions would be problematic at the least, however, under a constitution that—as the Basic Law does in art. 79, para. 3[109]—withholds the competence to change elementary principles of the *Rechtsstaat* even from the legislator empowered to change the constitution. Accompanying this legal problem is a factual one. Even if it should be legally permissible to attach an exceptions-clause to the principle *nulla poena sine lege*, it would be highly doubtful that such a clause could garner the qualified majority necessary for changing the constitution. All of this shows that merely referring to the legislator does not establish in all legal systems and under all circumstances the dispensability of Radbruch's formula.

If the principle *nulla poena sine lege* has constitutional status and is unchangeable, or if it does not formally have constitutional status but, as a fundamental legal principle, cannot be restricted, then the real problem in criminal law cases is not that a non-positivistic concept of law is dispensable, but, rather, whether or not the application of such a concept of law leads to a *circumvention* of the principle *nulla poena sine lege*. To be sure, this problem is not identical with

[107] 'Without a law, there is no punishment.'

[108] 'Without a law, there is no crime.'

[109] *GG* art. 79, para. 3: 'Amendments of this Basic Law affecting the division of the Federation into *Länder*, the participation in principle of the *Länder* in legislation, or the basic principles laid down in articles 1 and 20 shall be inadmissible.'

the problem of dispensability, and I take it up within the framework of the next objection, based on candour.

In essence, then, the appeal to dispensability is restricted to cases outside the field of criminal law, cases where there exists in principle the possibility of solving the problem of lawless or unjust statutes by means of retroactive statutes. The question, though, is what the judge ought to do if the legislator, for whatever reason, fails to act and if the lawless or unjust statute cannot, on the basis of currently prevailing constitutional law, be declared irrelevant for the decision at hand. Should the judge, then, hand down decisions based on, and themselves representing, injustice in the extreme? One might think that the judge should go ahead and do this in order to prompt the legislator to enact retroactive statutes. But that would mean in numerous cases, especially in the civil law, that the affected citizen suffers a disadvantageous decision based on, and itself representing, injustice in the extreme, simply to prompt the legislator to react. Thus, the citizen would be used, permanently or temporarily, as a means of provoking legislative activity. That cannot be reconciled with his fundamental rights, which shows that pointing out the mere possibility of a retroactive statute is not enough to demonstrate that the application of a non-positivistic concept of law is dispensable. If the legislator fails to make use of this possibility, and if the lawless or unjust statute cannot, on the basis of currently prevailing constitutional law, be declared irrelevant for the decision at hand, then a non-positivistic concept of law must of necessity be applied in order to protect the fundamental rights of the citizen.

Along with this counter-argument, focused on the rights of the citizen, comes a second, based on the claim to correctness. As discussed above, every judicial decision necessarily lays claim to correctness. A decision based on, and itself representing, injustice in the extreme fails in the extreme to satisfy this claim. So there are, outside the field of criminal law, two grounds for refuting the argument from dispensability and maintaining that a non-positivistic concept of law is indis-

pensable: respect for the rights of the citizen and the claim to correctness.

Candour. The objection based on candour says that, in criminal law cases, the non-positivistic concept of law leads to a circumvention of the principle *nulla poena sine lege*. Hart illustrates this argument with a case decided in 1949 by a German court of appeals.[110] A woman who wanted to be rid of her husband told the authorities in 1944 that he had made disparaging comments about Hitler while home on leave from the front. The husband was arrested and, pursuant to provisions imposing criminal liability for such remarks, sentenced to death. He was not executed, but sent to the front instead. In 1949, the wife was prosecuted for depriving her husband of his liberty. The Court of Appeals in Bamberg, which finally heard the case, found her guilty. The Court was of the opinion that the husband's death sentence was legal, since the National Socialist criminal statutes on which it was based simply prescribed 'an omission, namely, to remain silent', and for that reason it was not based on 'a statute obviously contrary to natural law'.[111] The Court condemned the wife, however, on the basis of a controversial criminal law construction according to which a deprivation of liberty perpetrated indirectly can be criminally punishable even if the direct perpetrator—here, the National Socialist court—acts legally. The Court in Bamberg held that the wife's denunciation of her husband was illegal because it 'violated the sound conscience and sense of justice of all decent human beings'. The correctness of this criminal law construction need not be discussed here.[112] Nor is it of any concern that Hart, as he himself later

[110] *OLG Bamberg*, reported in *Süddeutsche Juristen-Zeitung*, 5 (1950), 207–9.

[111] ibid. 208–9 (court opinion).

[112] One might enquire in particular into the implications of the thesis that the denunciation 'violated the sound conscience and sense of justice of all decent human beings' to such a degree that it was illegal and therefore punishable. Does this not imply that the death sentence resulting from the denunciation was unjust? Can the denunciation violate 'the sound

remarks,[113] represents the case incorrectly in that he supposes that the Court in Bamberg reached its conclusion by denying legal validity to the National Socialist statutes underlying the death sentence.[114] If one agrees with the Court in Bamberg that a statute permitting the death penalty for disparaging comments about a dictator does not amount to extreme injustice because it simply prescribes an omission, then one need only consider the hypothetical case of a woman who denounces her husband because, in a dictatorship, he disobeys a command, based on a statute, to commit homicidal acts of extreme injustice. Following the opinion of the Court in Bamberg, the wife would be subject to condemnation in this case because the sentence resulting from her denunciation would be illegal.

Hart objects:

> There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.[115]

The objection based on candour is the strongest argument against the non-positivistic concept of law, but not its down-

conscience and sense of justice of all decent human beings' enough to be illegal and therefore punishable, even if the death sentence was in no way unjust? If one answers 'no' to the latter question, then the decisive question is whether the punishability of the denunciation simply presupposes that the death sentence was to some degree unjust, or whether it requires an extreme and therefore evident injustice of the sentence.

[113] Hart, *CL* 254–5, 2nd edn. 303–4.
[114] Hart, *PSLM* 619, repr. Hart, *Essays* 76–7.
[115] ibid.

fall. First of all, the non-positivist has a way out of Hart's dilemma. He can deny the legal character of an unjust statute that implies the right to denounce someone and can none the less arrive at exemption from criminal liability. To do this, he needs simply to apply, on specifically criminal law grounds, the principle *nulla poena sine lege* to all statutory and efficacious norms and only to these, however unjust they may be. For the field of criminal law, then, Radbruch's formula is, in order to protect the citizen, restricted by the principle *nulla poena sine lege*. Accordingly, it has an effect now only outside the criminal law. Still, another rejoinder to the appeal to candour is preferable. Radbruch's formula leads to the criminal punishment of those deeds alone whose injustice is so extreme and therefore so evident that it is more easily recognizable than the injustice in many run-of-the-mill criminal law cases.[116] That is at any rate acceptable when—as in the case of denunciation—it is not that norms establishing criminal liability are produced with the help of a non-positivistic concept of law, but, rather, that statutory injustice leading to an exclusion of criminal liability is defeated. If the injustice of these norms is so extreme and therefore so evident that everyone can clearly recognize it, then there can be no question of a covert retroactivity. For then the injustice was clearly recognizable when the deed was committed, and, because at that point it was so extreme and therefore so evident that everyone could clearly recognize it, these norms were not, at the time of the deed, law that could lead to the exclusion of criminal liability. Thus, the legal situation is not changed retroactively, but, rather, what the legal situation was at the time of the deed is simply determined. If the argument from injustice is limited to the weak connection thesis, that is, comes into play only in the event of extreme and therefore evident injustice, then there cannot be any question of a covert retroactivity and therefore not of a lack of candour either.

[116] As Walter Ott correctly notes in 'Die Radbruch'sche Formel. Pro und Contra' (n. 73 above), at 355.

The Results of the Enquiry into the Debate surrounding Radbruch's Formula. Applied to individual norms, the argument from injustice—in the weaker version expressed in Radbruch's formula—fares better in our enquiry than do the objections raised against it. All the objections were answered at least well enough to tie the score. And what is more, reasons were given for preferring the argument from injustice. Within the framework of one objection, the argument adduced in terms of effectiveness, a risk effect was introduced that can work to a certain extent against statutory lawlessness even in a rogue state. The necessity of applying the non-positivistic concept of law, as explained in discussing the objection based on dispensability, takes on special significance after the collapse of a rogue state. If the new legislator fails to act, and if the lawless or unjust older statute cannot, on the basis of currently prevailing constitutional law, be declared irrelevant for the decision at hand, then the necessity of applying the non-positivistic concept of law follows from respect for the rights of the citizen and from the claim to correctness necessarily made by judicial decisions. For the field of criminal law, the argument from injustice can be shown, in its weaker version, to be reconcilable with the principle *nulla poena sine lege*. It has also become clear, though, that the refutation of a number of objections depends on the possibility of a rational justification for at least some minimum moral requirements, a core repertory of elementary human rights. Should such justification prove unsuccessful, then only relative to a legal practice steeped in the tradition of human rights would the positivistic opponents of the argument from injustice be refuted. To be sure, that would not be a refutation in the strict sense, but, from a practical standpoint, it would come close.

(b) Legal Systems

The question arises of whether the argument from injustice can be applied not only to individual norms but also to legal

systems as a whole. As noted above, a system of norms that neither explicitly nor implicitly lays claim to correctness is not, even from the observer's perspective, to be classified as a legal system.[117] It was also noted that this has few practical consequences, for actually existing systems of norms regularly lay claim to correctness, however feebly justified the claim may be. Practically speaking, significant problems first turn up where this claim is indeed made but not satisfied. The argument from injustice comes into play when the failure to satisfy the claim to correctness crosses the threshold of extreme injustice. Then the question is whether there are consequences that affect the legal system as a whole, that is, consequences beyond a mere summing up of the consequences of individual norms that are unjust in the extreme.

An argument like this, applied to the system as a whole, is adduced by Martin Kriele. His point of departure is the thesis that it is 'a moral obligation to comply with the law, if the law "by and large" takes morality into account'.[118] According to Kriele, this condition is satisfied when the legal system rests on the principles of the democratic constitutional state. It is not satisfied in totalitarian dictatorships. Kriele's entire argument focuses on legal obligation as moral obligation and on the related question of the legitimacy of legal systems and individual legal norms.

The question of legitimacy that Kriele asks is not the same as our question here. A lack of legitimacy need not entail a lack of legal character, and a norm classified as a legal norm may well prescribe something that is in conflict with a moral obligation. So it is that Kriele himself speaks of 'immoral law'.[119] In order to reach to the question posed here, Kriele's argument has to be reworked into an argument that focuses on legal character. The variant to be considered runs, then, as follows: A system of norms forfeits its legal character if it is by

[117] See above, this text, at 34.

[118] Martin Kriele, *Recht und praktische Vernunft* (Göttingen: Vandenhoeck & Ruprecht, 1979), 117.

[119] ibid. 125.

and large unjust in the extreme. This formula lends itself to different interpretations, two of which are of interest here: the extension thesis and the collapse thesis.

The Extension Thesis. The extension thesis says that a lack of legal character on the part of the fundamental substantive norms of a legal system entails a lack of legal character on the part of all norms typical of the system, and in this sense extends to them. Within the framework of his own enquiry, Kriele defends the extension thesis. This is apparent in his thesis

> that, even in a totalitarian state, there is direct statutory legitimacy, namely, the legitimacy of those statutes that are not typical of the system and, exceptionally, coincide with morality. Statutes about contract compliance, entering into marriage, the proscription of murder, as well as traffic regulations, all these are recognized as legitimate in the totalitarian state, too, because they would be justified even if measured against enlightened standards. The legitimacy of such statutes exists, then, not because of their origins in the totalitarian system—to which they are related only externally and not internally—but, rather, in spite of those origins.[120]

According to an argument structured like this, an individual norm in a legal system of extreme injustice does not forfeit its legal character only if it is itself unjust in the extreme. Legal character may be forfeited simply because a norm 'typical of the system' shares in the lawless character of the whole system, even though the norm itself may not cross the threshold of extreme injustice. Thus, the extension thesis leads to a typical case of an argument from the whole to its parts. A single element, because it is part of a whole that has a particular property, is supposed to have this particular property, which it would not have if considered in isolation. Such an argument from the whole to its parts can indeed easily explain how it is that, in the case of extreme injustice, the legal

[120] Martin Kriele, *Recht und praktische Vernunft* (Göttingen: Vandenhoeck & Ruprecht, 1979), 125–6.

character of a system of norms as a whole has consequences that go beyond a mere summing up of the consequences of individual norms that are unjust in the extreme. The question is whether the extension thesis and thereby the argument from the whole to its parts is acceptable. The decisive point in answering this question is that what is at issue is not moral correctness, justice, or the preservation of enlightened standards but, rather, legal character. In discussing the argument from injustice applied to individual norms, as expressed in Radbruch's formula, legal certainty is shown to be a central argument against denying the legal character of norms that are authoritatively issued and socially efficacious; only in cases of extreme injustice, because they are relatively easy to recognize, was it possible to rebuff the argument adduced in terms of legal certainty. The same applies to legal systems as a whole. Legal certainty would be too severely compromised if a norm below the threshold of extreme injustice were to forfeit its legal character because it somehow shares in the injustice of the whole system and is therefore typical of it. A norm can share to a greater or lesser degree in the injustice of the whole system. A norm can be to a greater or lesser degree typical of the system. Should its legal character be revoked by any degree of participation whatsoever, even a modest one? If so, how is a norm to be recognized as sharing in the injustice of the whole system, even if only modestly? Is that already the case when a norm is occasionally interpreted and applied as typical of the system, although it could also be interpreted and applied otherwise? If a modest degree of participation is not sufficient, what degree is? And how should it be determined in a way that satisfies legal certainty? These questions demonstrate that, below the threshold of extreme injustice, every denial of legal character incurs a serious loss of legal certainty. Rebuffing the principle of legal certainty is just barely tolerable in cases of extreme injustice; no further restriction of the principle is acceptable. This means, when legal character is at issue, that the criterion of extreme injustice is to be upheld and that this criterion is to be applied to individual norms and

only to individual norms. The extension thesis may be plausible in other contexts, but, as a thesis on legal character, it cannot persuade. It cannot, therefore, lead to the conclusion that the lawless or unjust character of a legal system as a whole gives rise to consequences that go beyond the consequences of applying the argument from injustice to individual norms.

The Collapse Thesis. The question now is whether the second interpretation yields something else. Here, the statement that a system of norms forfeits its legal character if it is by and large unjust in the extreme is interpreted in terms of the collapse thesis, which, in contrast to the extension thesis, asserts that only if an individual norm is itself unjust in the extreme does it forfeit its legal character on grounds of morality. The collapse thesis is based, then, on the argument from injustice applied to individual norms, as expressed in Radbruch's formula, and, with reference to individual norms, nothing is added to that argument. The collapse thesis takes the legal system as a whole into account in the assertion that the system collapses as a legal system if very many individual norms, in particular those important to the system, are denied legal character. The reason for the collapse is not some sort of extension or another, but, rather, the simple fact that there is no longer enough left over to be called a legal system.

The collapse thesis is correct in asserting that the character of a legal system can change fundamentally if very many of its individual norms, in particular those important to the system, are denied legal character. In this case, one can also speak of a change in the contentual identity of the legal system and, in this sense but only in this sense, of a collapse of the old system. What is decisive here, however, is that in another sense, focused not on contentual identity but on the existence of a system as a legal system, a collapse is out of the question. Even when a great many individual norms are denied legal character on grounds of morality, including many that are important to the character of the system, even then the system

can continue to exist as a legal system. This presupposes that a minimum complement of norms, the minimum necessary for the existence of a legal system, retain legal character. Take a legal system whose constitution empowers a dictator to issue norms without constraint. Thirty per cent of the norms issued by the dictator on the basis of this empowerment are unjust in the extreme, 20 per cent are unjust but not in the extreme, 20 per cent are neither unjust nor required by justice, and 30 per cent are required by justice. The 30 per cent that are unjust in the extreme are the norms that lend to the rogue system its specific character. The 30 per cent that are required by justice are, say, norms of contract law, tort law, and social security law. According to Radbruch's formula, legal character is to be denied only to that 30 per cent of norms that are unjust in the extreme. The formula does not apply to the remaining 70 per cent. Thus, the existence of the legal system would be endangered only if the 30 per cent of norms that are unjust in the extreme were to have such an effect on the empowering norm that, as a norm of extreme injustice, it forfeited its legal character over its entire range. For then the remaining 70 per cent of the norms of the system would also forfeit the basis of their validity. And then the legal system, as a hierarchically constructed system, would forfeit its existence and in this sense collapse. Only a partial class of norms could still be characterized as a system based on customary and/or natural law. That would be another system, though, in spite of the partial identity of the norms.

The latter makes clear that one would have to resort to relatively artificial constructions in denying legal character to an empowering norm over its entire range if on its basis extreme injustice can be or is being enacted. Legal norms duly issued on the basis of socially efficacious empowering norms would have to be classified as customary and/or natural law in order to explain their validity. That this is also unreasonable in its consequences becomes clear if one simply changes the dictator in the example into a democratically elected parliament that makes use, as described, of the

empowerment to issue norms. Then the possible objection disappears that it is unjust in the extreme to empower one single person to issue norms without constraint. The empowering norm as such, given this presupposition, would not be unjust in the extreme. Only a partial class of its progeny is. That means, however, that the 30 per cent of norms that are unjust in the extreme do not lead to a forfeiture of legal character on the part of the empowering norm as such,[121] and the legal system as a whole does not collapse.

For the record, then: applying the argument from injustice to a legal system as a whole does not lead to consequences that go beyond the consequences of applying the argument to individual norms.[122]

(iii) The Argument from Principles

The argument from injustice focuses on an exceptional situation, that of the statute that is unjust in the extreme. The argument from principles is addressed to the everyday life of the law. Its point of departure is an insight of legal method agreed upon by positivists and non-positivists alike. As Hart puts it, every positive law has 'an open texture'.[123] There are several reasons for this. Of special significance are the vagaries

[121] It is typical that the Federal Constitutional Court, in its *Concordat* decision, does not mention the problem discussed here. Rather, it restricts itself to the inverse question, namely, whether all norms based on the Enabling Act of 24 March 1933 are necessarily to be seen as valid law. The Court answers in the negative: 'Simple recognition of the new system of competence says nothing about whether the statutes and ordinances issued on its basis can be recognized as valid law. For that, what is at issue is their *content*. They cannot be recognized as valid law if they contravene the essence and the possible content of the law.' *BVerfGE* 6 (1957), 309, at 331–2 (emphasis in original).

[122] The character of the legal system as a whole is of significance in a different respect, namely, that of the recognition of states and governments under international law. At issue here is the collision between the principles of effectiveness and legitimacy, with the former predominant in both the theory and the practice of such recognition. See e.g. Knut Ipsen, *Völkerrecht*, 3rd edn. (Munich: C. H. Beck, 1990), at 237.

[123] Hart, *CL* 124, 2nd edn. 128.

of legal language, the possibility of norm conflicts, the absence of a norm on which to base a decision, and, in certain cases, the possibility of making a decision even contrary to the literal reading of a norm.[124] One can speak here of an 'open area' of the positive law, which may be more or less broad, but which exists in every legal system. A case that falls within the open area shall be called a 'doubtful case'.

From the standpoint of positivistic theory, this phenomenon can be interpreted in only one way. In the open area of the positive law, one cannot, by definition, base a decision on the positive law, for if one could do that, the case would not be in the open area. Since only the positive law is law, the judge must decide in the open area, that is, in all doubtful cases, on the basis of non-legal or extra-legal standards. Accordingly, he is empowered by the positive law to create new law essentially as a legislator does, on the basis of extra-legal standards.[125] Over a century ago, John Austin put it into words this way: 'So far as the judge's *arbitrium* extends, there is no law at all.'[126]

By contrast, the argument from principles says that the judge is legally bound even in the open area of the positive (issued and efficacious) law, indeed, legally bound in a way that establishes a necessary connection between law and morality.[127] This is reflected in the decision mentioned above in the context of judicial development of the law, where the Federal Constitutional Court says: 'The law is not identical

[124] Alexy, *TLA* 1.

[125] See e.g. Kelsen, *PTL*, at § 46 (pp. 353–5).

[126] Austin, *Lectures* vol. 2, 664 (Austin's emphasis).

[127] In this sense, see also Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Vienna and New York: Springer, 1982), at 289–90, who calls his argument a 'methodological argument'; similarly Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), at 87, 410, who conceives of law in terms of interpretation: 'Law is an interpretive concept.' See Claudia Bittner, *Recht als interpretative Praxis* (Berlin: Duncker & Humblot, 1988), at 20–5; Marc Maria Strolz, *Ronald Dworkins These der Rechte im Vergleich zur gesetzgeberischen Methode nach Art. 1 Abs. 2 und 3 ZGB* (Zurich: Schulthess Polygraphischer Verlag, 1991), at 98–118.

with the totality of written statutes. As against the express directives of state authorities, there can be in some circumstances a greater law . . .'.[128]

The argument from principles is based on the distinction between rules and principles.[129] Rules are norms that, upon satisfaction of the conditions specified therein, prescribe a definitive legal consequence, that is, upon satisfaction of certain conditions, they definitively command, forbid, or permit something, or definitively confer power to some end or another. For simplicity's sake, rules may be called '*definitive commands*'. The characteristic form of their application is subsumption. By contrast, principles are *optimizing commands*. As such, they are norms commanding that something be realized to the greatest possible extent relative to the factual and legal possibilities at hand. This means that principles can be realized to varying degrees and that the commanded extent of their realization is dependent on not only factual potential but also legal potential. The legal possibilities for realizing a principle, besides being determined by rules, are essentially determined by competing principles, implying that principles can and must be balanced against one another. The characteristic form for applying principles is the balancing of one against another.

This theoretical distinction between norms as rules and as principles leads to a necessary connection between law and morality by way of three theses: the 'incorporation thesis', the 'morality thesis', and the 'correctness thesis'. The necessary connection that can be established with the help of these theses is, first, a conceptual connection, second, simply a qualifying connection, not—as the argument from injustice has it—a classifying connection, and it exists, third, only for a participant in the legal system, not for an observer of the legal system.

[128] *BVerfGE* 34 (1973), 269, at 287.

[129] On this theme, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), at 14–45; Alexy, *TCR*, at 44–110; Jan-Reinard Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), at 52–87.

(a) The Incorporation Thesis

The *incorporation thesis* says that every legal system that is at least minimally developed necessarily comprises principles. In a fully developed legal system, such an incorporation is readily apparent, and the legal system of Germany offers an instructive example. The German Basic Law or Constitution, in affirming the principles of human dignity,[130] liberty,[131] equality,[132] the *Rechtsstaat* or rule of law, democracy, and the social state,[133] has incorporated into the German legal system, as principles of positive law, the basic principles of modern natural law and the law of reason and thereby the basic principles of modern legal and state morality. The same may be said of all legal systems affirming democracy and the *Rechtsstaat*, notwithstanding varying techniques for incorporating principles and different assessments of them.

No positivist will challenge this, provided he accepts that, alongside rules, principles can also belong to the legal system. What he will challenge, however, is that the result is some conceptually necessary connection between law and morality. Several arguments are available to him. One is that it is exclusively a question of positive law whether or not any principles at all are incorporated into a legal system.[134] Were this correct,

[130] *GG* art. 1, para. 1: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority.'

[131] *GG* art. 2, para. 1: 'Everyone has the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral law.'

[132] *GG* art. 3, para. 1: 'All persons are equal before the law.'

[133] *GG* art. 20, paras. 1–3: (1) 'The Federal Republic of Germany is a democratic and social federal state. (2) All state authority emanates from the people. It shall be exercised by the people through elections and voting and by specific legislative, executive, and judicial organs. (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by statute and law' (trans. altered). *GG*, art. 28, para. 1: 'The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state under the rule of law, within the meaning of this Basic Law' (trans. altered).

[134] Hoerster, *LR* 186; Hoerster, *VR* 2481.

the argument from principles would be defeated in the very first round. It could at best still claim that a connection established by the positive law exists between law and morality. This would be compatible with legal positivism, for the positivist does not deny that the positive law, as Hoerster puts it, 'can guarantee that morality be taken into account'.[135] What the positivist does insist upon is simply that it is up to the positive law to decide whether or not morality is to play a role.

Is it, then, that not only some legal systems, on the basis of positive law, comprise norms structured like principles, but, rather, that all legal systems necessarily comprise norms structured like principles? This question shall be answered from the perspective of a participant, namely, a judge who is to decide a doubtful case, that is, a case that falls within the open area of the legal system and so cannot be decided on the basis of preset authoritative material alone. A criterion for whether or not the judge appeals to principles for support is whether or not he undertakes to strike a balance. The following proposition seems to be true: In undertaking to strike a balance, one necessarily appeals to principles for support. For it is necessary to strike a balance precisely when there are competing reasons, each of which is by itself a good reason for a decision and only fails to lead directly to a definitive decision because of the other reason, calling for another decision; reasons like this are either principles or supported by principles.[136]

[135] Hoerster, *LR* 186.

[136] Günther claims that the distinction between rules and principles ought not to be understood as a distinction between two types of norm, but, rather, solely as a distinction between two types of norm application. See Klaus Günther, *The Sense of Appropriateness*, trans. John Farrell (Albany, NY: State University of New York Press, 1993), at 212–19. By way of rejoinder, it should be pointed out that a model depicting the distinction between rules and principles at the level of norms as well as at the level of application is more comprehensive. Such a model can explain, for example, why a certain type of application takes place. In any case, one cannot forgo the distinction between rules and principles, for only with its help can one adequately reconstruct concepts like the concept of restricting a right. See Alexy, *TCR*, at 178–222.

A positivist can concede this point and still challenge the view that what follows from it is that principles are included in all legal systems in which judges undertake to strike a balance in doubtful cases. The positivist may claim that the simple fact that balancing is undertaken does not mean that the principles being balanced against one another belong to the legal system. They are simply moral principles, he may argue, or principles to be qualified in some other way, and the requirement of balancing one against another is an extra-legal postulate, not a legal one. A response in support of the argument from principles is that, for a participant, the legal system is not only a system of norms qua results or products, but also a system of procedures or processes, and so, from the participant's perspective, the reasons taken into account in a procedure—here, the process of making a decision and justifying it—belong to the procedure and thereby to the legal system.

An opponent of the argument from principles need not rest content with this point either. He may object that the simple fact that the judge takes into account certain reasons, namely, principles, in the process of making a decision and justifying it need not lead to the conclusion that they belong to the legal system. This objection can be dispelled, however, with the help of the argument from correctness. As explained above, a judicial decision necessarily lays claim to correctness.[137] This claim, because it is necessarily attached to the judicial decision, is a legal claim and not simply a moral one. Corresponding to this legal claim to correctness is a legal obligation to satisfy the claim, quite apart from the legal consequences of failing to do so. The claim to correctness requires, in a doubtful case, that whenever possible a balance be struck and thereby principles be taken into account. So the claim to correctness is necessarily unsatisfied if a judge, in a doubtful case, offers the following reason for choosing one of two decisions that are both compatible with the authoritative material: 'Had I struck a balance, I would have arrived at

[137] See above, this text, at 38–9.

the other decision, but I did not strike a balance.' This makes it clear that in all legal systems in which there are doubtful cases that give rise to the question of striking a balance, it is legally required to strike a balance and thereby to take principles into account. Thus, in all legal systems of this kind, principles are, for legal reasons, necessary elements of the legal system.

There is a last resort for the opponent of the argument from principles. He may claim that there can be legal systems in which no case is felt to be doubtful, so that in no case does the question of striking a balance arise. Since decisions can be made in such legal systems without taking principles into account, he may argue, it is not correct to say that all legal systems necessarily comprise norms structured like principles. I shall not pursue here the interesting empirical question of whether there have ever been legal systems in which no case was felt to be doubtful, so that in no case did the question of striking a balance arise. In any event, such a system would not even be a minimally developed legal system. Thus, the following proposition is true: Beginning at a minimum level of development, all legal systems necessarily comprise principles. This is a sufficient basis for establishing, by way of the argument from principles, a necessary connection between law and morality. The thesis that all legal systems necessarily comprise principles can therefore—without thereby defeating the argument from principles—be limited in accordance with the proposition above, namely, to legal systems that are at least minimally developed.

(b) The Morality Thesis

That all legal systems, beginning at a minimum level of development, necessarily comprise norms structured like principles is not enough to justify the conclusion that a necessary connection exists between law and morality. Such a connection is not yet established, then, by the simple fact, say, that the basic

principles of modern legal and state morality are incorporated into all legal systems affirming democracy and the *Rechtsstaat*. Every positivist can say that the incorporation of precisely these principles is based on positive law. And that can be sharpened into the statement that it is always a question of the positive law whether or not principles belonging to a legal system establish a connection between law and morality.

In order to respond here, one must distinguish between two versions of the thesis of a necessary connection between law and morality: a weak and a strong version. In the weak version, the thesis says that a necessary connection exists between law and *some* morality. The strong version has it that a necessary connection exists between law and the *right* or *correct* morality. Here, only the weak version is of interest initially, that is, the thesis that the necessary presence of principles in the legal system leads to a necessary connection between law and some morality or another. This thesis shall be called the '*morality thesis*'.

The morality thesis is correct if, among the principles to be taken into account in doubtful cases in order to satisfy the claim to correctness, some principles are always found that belong to some morality or another. That is in fact so. In doubtful cases, the task is to find an answer to a practical question where an answer cannot be definitively drawn from the preset authoritative material. To answer a practical question in the legal arena is to say what is obligatory. One who wants to say what is obligatory but cannot support his answer exclusively by appeal to the decisions of an authority must take into account all relevant principles if he wants to satisfy the claim to correctness. But among the principles relevant to the solution of a practical question are always principles that belong to some morality or another. These need not be as abstract as the principles of liberty or the *Rechtsstaat*. Often, they are relatively concrete, as are the principles of non-retroactivity or environmental protection. In terms of content, too, some—say, the principle of racial segregation—

can be sharply distinguished from the principles of a democratic constitutional state. What is significant here is only that these principles are at the same time always principles of some morality or another, whether or not this morality be correct.

A positivist could object that this is not incompatible with his theory. Indeed, legal positivism emphasizes precisely the requirement that the judge decide in doubtful cases on the basis of extra-legal standards, a requirement that includes the decision based on moral principles.[138] This objection, however, misses the decisive point, which is that principles, first, according to the incorporation thesis, are necessarily components of the legal system and, second, according to the morality thesis, necessarily include principles that belong to a morality. This dual quality of necessarily belonging at the same time to law and to morality means that the judge's decision in doubtful cases is to be interpreted otherwise than in positivistic theories. Principles that are, according to their content, moral principles are incorporated into the law, so that the judge who appeals to them for support is making his decision on the basis of legal standards. Calling on the ambiguous dichotomy of form and content, one can say that, according to form, the judge's decision is based on legal reasons, but, according to content, it is based on moral reasons.

(c) The Correctness Thesis

What has been shown so far is simply that the argument from principles leads to a necessary connection between law and some kind of morality. The obvious objection is that this is too little. For when one speaks of a necessary connection between law and morality, one generally means a necessary connection between law and the—or a—correct morality.

[138] See Hart, *CL*, at 199, 2nd edn., at 203–4: 'The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals.'

That is especially true from the participant's perspective. This objection would in fact undermine the non-positivist if the argument from principles were not successful in establishing some kind of a necessary connection between law and correct morality. That the argument does succeed in establishing just such a connection is the substance of the *correctness thesis*. The correctness thesis is the result of applying the argument from correctness within the framework of the argument from principles.

The correctness thesis presents no problems if the content of principles of positive law is morally required or at least morally permitted. An example would be the six basic principles of the German Basic Law or Constitution, namely, the principles of human dignity, liberty, equality, the *Rechtsstaat* or rule of law, democracy, and the social state. As optimizing commands, these principles require realization to the greatest possible extent. Together they require a realization that approximates a legal ideal, namely, the ideal of the democratic, social *Rechtsstaat*.[139] If these principles or their numerous subprinciples are relevant in a doubtful case, then the judge is legally obligated to undertake an optimal realization of them, geared to the concrete case. He is to answer a legal question that, according to its content, is also a question of political morality. At least some of the arguments with which the judge justifies the balance he strikes have, in terms of content, the character of moral arguments. It follows, then, that the claim to legal correctness necessarily attached to the decision includes a claim to moral correctness. Therefore, in legal systems whose positive law principles have a content that is morally required or at least morally permitted, a necessary connection exists between law and correct morality.

An opponent of the argument from principles may object that this leads to a necessary connection between law and correct morality only in morally vindicated legal systems,

[139] Ralf Dreier, *Rechtsbegriff und Rechtsidee* (Frankfurt: Alfred Metzner, 1986), 30–1.

not, however, to a quintessential necessary connection that applies to all legal systems. He may refer in this context to a legal system like that of National Socialism, which, with its principles of race and absolute leadership (the *Führer*-principle),[140] comprised principles reflecting a morality altogether different from that reflected by the principles of the German Basic Law. How is it that here, he may ask, the application of the argument from correctness within the framework of the argument from principles is supposed to lead to a necessary connection between law and correct morality?

It does not matter at this point that here the argument from principles meets the argument from injustice. What is decisive is that even the judge who applies the principle of race and the *Führer*-principle lays claim to correctness with his decision. The claim to correctness implies a *claim to justifiability*. This claim is not limited to the justifiability of the decision in terms of some kind of morality leading to the correctness of the decision; rather, it refers to the correctness of the decision in terms of a justifiable and therefore correct morality. The necessary connection between law and correct morality is established in that the claim to correctness includes a claim to moral correctness that also applies to the principles on which the decision is based.

A critic could object that in this way the link between law and correct morality is so dissipated that one can no longer speak of a necessary connection. The concern now is only with a claim and no longer with its satisfaction, and, in addition, despite the emphasis on correct morality, there is no talk of what correct morality is. Both of these observations

[140] See e.g. Wilhelm Stuckart and Hans Globke, *Kommentare zur deutschen Rassengesetzgebung*, vol. 1 (Munich and Berlin: C. H. Beck, 1936), at 7: 'The responsible leaders of the state are to examine the racial composition of the people entrusted to them and are to undertake due measures preventing at least the further loss of the best racial values and strengthening as much as possible the ethnic core.' And, at 13: 'From the idea of race flows inevitably the idea of the *Führer*. Thus, the ethnic national state must of necessity be a *Führer*-state.'

are correct, but they do not spell the downfall of the connection thesis.

It is easy to see that, outside the realm of the argument from injustice, that is, below the threshold of extreme injustice, the claim alone and not its satisfaction can establish a necessary connection between law and correct morality. To focus on the satisfaction of the claim is to say too much. It is to say that the law, including every single judicial decision, necessarily satisfies the claim to moral correctness, in short, that the law is always morally correct. The latter implies that whatever is not morally correct is not law. A thesis that strong cannot be defended, as shown in the discussion of the argument from injustice. Thus, the issue here cannot be a classifying connection, it can only be a qualifying connection. Below the threshold of extreme injustice, a violation of morality means not that the norm or decision in question forfeits legal character, in other words, is not law (a classifying connection), but, rather, that the norm or decision in question is legally defective (a qualifying connection). The claim to correctness that is necessarily attached to the law, because it includes a claim to moral correctness, is the reason that, below the threshold of extreme injustice, a violation of correct morality leads not, indeed, to the forfeiture of legal character, but necessarily to legal defectiveness. The classifying connection can be called 'hard', the qualifying connection, 'soft'. Even soft connections can be necessary.

The remaining objection is that simply referring to correct morality is too little. This objection cannot be dispelled by providing a comprehensive system of moral rules that permit in every case a certain judgment about whether or not these rules are being violated by a legal norm or a judicial decision. Beyond the threshold of extreme injustice, there is broad agreement about what violates morality, but below this threshold, controversy prevails. This does not mean that, below the threshold, there are no standards whatsoever for what is just and what is unjust. The key is the claim to justifiability implicit in the claim to correctness. The claim

to justifiability leads to requirements that must be satisfied at a minimum by morality in order that this morality not be identified as false morality, and it leads to requirements that must be satisfied to the greatest possible extent by morality in order that this morality stand a chance of being the—or a—correct morality.[141] An example of the failure to satisfy these requirements is the justification of the principle of race as set out in the 1936 commentary of Stuckart and Globke:

> Based on the most rigorous scientific examination, we know today that the human being, to the deepest unconscious stirrings of his temperament, but also to the smallest fibril of his brain, exists in the reality and the inescapability of his ethnic and racial origins. Race stamps his spiritual countenance no less than his outward form. It determines his thoughts and sensibilities, his strengths and propensities, it constitutes his particular character, his nature.[142]

This justification does not satisfy the minimum requirements of a rational justification. Consider only the claim that race determines the thoughts of the individual. Far from reflecting 'the most rigorous scientific examination', this claim is empirically false, which the most quotidian of experience demonstrates.

The qualifying or soft connection that emerges when the legal system is considered as a system of procedures, too, from the perspective of a participant leads not to a necessary connection between law and a particular morality to be labelled as correct in terms of content, but, rather, to a necessary connection between law and the idea of correct morality as a justified morality. This idea is far from empty. Linking it with the law means that not only are the special rules of juridical justification part of the law, but the general rules of moral argumentation are too, for whatever correctness is possible in the area of morality is possible on the basis of these rules. They thwart considerable irrationality and injustice. What is

[141] See Alexy, *TLA*, at 187–205.

[142] Stuckart and Globke, *Kommentare zur deutschen Rassengesetzgebung* (n. 140 above), 10.

more, the idea of correct morality has the character of a regulative idea in the sense of a goal to be pursued.[143] Thus, the claim to correctness leads to an ideal dimension that is necessarily linked with the law.

[143] See Immanuel Kant, *Critique of Pure Reason* (1st pub. 1781, 2nd edn. 1787), trans. and ed. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1997), at A644/B672 (p. 591) (trans. altered): 'On the contrary, transcendental ideas have an excellent and indispensably necessary regulative use, namely, that of directing the understanding toward a certain goal, the prospect of which has the directional lines of all its rules converging into one point.'