The Impossible in Political and Legal Philosophy

Arnold Brecht*

I

ON POLITICAL AND LEGAL PHILOSOPHY

POLITICAL PHILOSOPHY and philosophy of law have of late been treated as though they were two distinct fields of thought. But they cannot be so separated. As was quite correctly understood during the natural-law period, both deal with the same basic problem of what laws ought to govern a country. The law that *is* may properly constitute the primary subject of study in law schools and in legal theory. Yet to *philosophy* of law, exactly as to political philosophy, this law, as it is being handed down by constitutions, legislatures, courts and administrative agents, is only a matter of critique or justification. Whenever we ponder about justice in the trans-positive sense of what *ought* to be law, we necessarily turn to the question of whether there are eternal, or absolute, or at least objective, standards of justice. Examinations of this kind cannot be separated into political and legal divisions. If there are such standards, they are relevant to both policy and law. If there are not, philosophy of law, as well as of policy, must still establish and defend this negative contention, and thereafter either resign—as seems to have been the case generally with Anglo-American philosophy of law—or investigate, in a relativistic way, the political purposes to which legislation ought or ought not to be made subservient. Thus both “absolutists” and “relativists” in either branch of philosophy are bound to deal with legislation and political coercion. Absolutists have always done so quite elaborately. Whether building on revelation, intuition, reason, comparison or speculation, they have put forward dogmas on proper ends and means of legislation. Among relativists in legal

*Professor of Political Science and Jurisprudence in The Graduate Faculty of Political and Social Science, New York, organized under the New School for Social Research; formerly Visiting Professor of Government at Harvard University. Graduate of Lübeck *Gymnasium*; studied law in Bonn, Berlin and Göttingen. His career in Germany, as Dr. Brecht expresses it, is characterized by service “after legal training, as an official in various government offices before, within and after the World War until Hitler’s access to power.” Co-author with C. Glaser of *THE ART AND TECHNIQUE OF ADMINISTRATION IN GERMAN MINISTRIES* (1940), and author of numerous articles, particularly in political and legal philosophy.

philosophy, their present leader, Gustav Radbruch, has presented a thorough analysis of the ideas held by typical political parties, because the goals they consider highest determine their ideas of justice. "One may call," he wrote, "the theory of political parties the subject proper of the relativistic philosophy of law."¹

Thus, philosophy of law is necessarily political philosophy, and vice versa. So perfect is this ultimate identity that I feel justified in speaking of "political and legal philosophy" in the singular form. Granted that there may be questions which belong only to one or the other; in dealing as I do here with a common field, references to one alone would be misleading.

For almost a century, political and legal philosophy in our sense has been all but dead. This is not to disparage a few individual performances. Yet the community of scholars, lawyers, statesmen and public servants have no longer anything to do with professional philosophy. They have long discarded it, leaving philosophy to dilettantes, propagandists, demagogues and would-be saviors along with a few academic scholars, isolated oddities. They have resolved instead to live in the realm of "reality", content to grope step by step toward ends which they approve as philosophers *ad hoc*, deeply distrusting any systematic treatment of such questions in advance.

This neglect, so different from the universal confidence in political and legal philosophy which marked previous centuries, has resulted from the conviction that science is unable to present definite proof in the field of moral ends. This skepticism is well founded—so well that no one can overcome it who has not first profoundly understood its strength. Recent events urgently suggest, however, that we revive a systematic search for trails which lead beyond, or at least for boundaries which limit, skepticism and relativity. Hope has collapsed that western civilization, by sheer convention, would converge anyhow upon identical principles, such as the abolition of slavery, torture, flogging and hostages, equality of individuals before the law, competition for peaceful progress, the greatest happiness of the greatest number. There are many now who challenge these principles, and although not all are sincere, many are. What innocent apostles of neutral relativism sowed, subjective absolutists are harvesting. A new Babylonian confusion of tongues separates mankind. Thus philosophy, as the "science of the limits of science", should intervene once more to discern what, in the different claims, can ob-

¹ RADBRUCH, GRUNDZÜGE DER RECHTSPHILOSOPHIE (1914) 96.

jectively be stated to be correct or incorrect, and what, being incapable of such determination, must be left either to voluntary agreement or to dogmatic struggle.

Elsewhere I have dealt with the various levels of relativity in traditional and transtraditional justice and with the invariant ("absolute") elements that seem to be always present,² with the contemporary rise of relativism,³ contemporary attempts to find absolute standards,⁴ and the modern fallacy regarding the allegedly "unbridgeable" gulf between *is* and *ought*.⁵ I have tried to show that, despite the great number of questions which are not definitely answerable with scientific means—particularly those regarding the hierarchy of supreme values—it is, nevertheless, possible to isolate a few elements which can be said to be embodied inevitably in any idea of, or demand for, justice. These invariant elements predicate on such matters as that any act, law or judgment, to be just (objectively or subjectively), must be based on a *true* statement of facts and a *true* or valid hierarchy of values (objectively true or subjectively meant to be true); that the accepted hierarchy of values must be *general* in character and not chosen arbitrarily from case to case; that things equal according to this system of values must be *treated as equal*; that individual *freedom* is not encroached upon beyond what conforms to the system of values and never, on pain of punishment, beyond the *necessities of nature*. These elements are not mere reflections of arbitrary definitions, as one might rashly surmise. They can be traced to inescapable factors in our human equipment. I tried to anchor their validity—more carefully than did natural-law theories with their broader postulates—in the exacting severity of the method applied (multi-test theory).⁶ These invariant requirements of justice, elementary at first sight, could be shown to have a great practical bearing.

But there is another approach of science to the common field of

² Brecht, *Relative and Absolute Justice* (1939) 6 SOCIAL RESEARCH 58-87. Concerning the historical development of the concepts of justice and equity see the illuminating presentation in Radin, *A Juster Justice, a More Lawful Law* in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY (1935) 537-564.

³ Brecht, *The Rise of Relativism in Political and Legal Philosophy* (1939) 6 SOCIAL RESEARCH 392-414.

⁴ Brecht, *The Search for Absolutes in Political and Legal Philosophy* (1940) 7 SOCIAL RESEARCH 201-228; erratum, *ibid.* at 385.

⁵ See Brecht, *The Myth of Is and Ought* (1941) 54 HARV. L. REV. 811.

⁶ Brecht, *op. cit. supra* note 2, at 73 *et seq.*; Brecht, *op. cit. supra* note 4, at 209 *et seq.*; Brecht, *loc. cit. supra* note 5.

political and legal philosophy, an approach much more in line with customary scientific methods, and rivaling in importance the moral elements just mentioned. The present paper is dedicated to this approach.⁷

II

THE IMPOSSIBLE AS A LIMIT FOR GOVERNMENT AND LAW

In Plato's *Republic*, at a crucial point of the argument, Socrates discusses *utility* and *possibility* as two important aspects of any proposed reform. He tends, however, to discard the issue of possibility. True, he begins by speaking ironically of day dreamers who neglect thinking about possibility. "Before they have discovered any means of effecting their wishes—that is a matter which never troubles them—they would rather not tire themselves by thinking about possibilities; but assuming that what they desire is already granted to them, they proceed with their plan, and delight in detailing what they mean to do when their wish has come true. . . ."⁸ Nevertheless, Socrates wishes to postpone discussion of possibility when, on the ground of obvious political utility, he voices his most extreme proposal—eugenically selected women and children should be held in common by guardians of his ideal state. Towards the end of this discussion, Glaukos, who endorses the proposal in point of political utility, reminds Socrates of the postponed issue of possibility. Whereupon Socrates definitely discards as irrelevant the problem of possibility in its strict sense. We were searching after justice and injustice, he says. If we have discovered them, are we "to require that the just man should in nothing fail of absolute justice; or may we be satisfied with an approximation, and the attainment in him of a higher degree of justice than is to be found in other men?"⁹ They agree that approximation will be enough. Their intention was only to obtain *ideals* (παραδείγματα). They did not look at the ideals "with any view of showing that they could exist in fact",¹⁰ exactly as the painter is not any worse because he is unable to show that the perfectly ideal man he delineated could ever have existed. The actual must always fall short of the truth. "Then," Socrates concludes, "you

⁷ See the brief remarks on this problem in Brecht, *op. cit. supra* note 4, at 202; and Brecht, *op. cit. supra* note 2, at 71.

⁸ PLATO, *REPUBLIC* (Jowett's trans. 1908) Bk. 5, 458.

⁹ *Ibid.* at 472.

¹⁰ *Ibid.*

must not insist on my proving that the actual state will in every respect coincide with the ideal if we are only able to discover how a city may be governed nearly as we proposed you will admit that we have discovered the possibility which you demand; and will be contented."¹¹ Agreeing on this, too, they examine the question of what slightest change would be necessary to introduce the perfect constitution they have in mind. There follows the famous section wherein Socrates recommends as such minimal amendment, the crowning of the philosopher.

This view which would make the determination of goal independent of the possibility of attaining it, has been appropriately connected by Plato with "ideals". Referring to ideals in daily language, we often permit ourselves to use the modes of ought-to-be, or ought-to-do, even about the obviously impossible. There ought to be eternal youth. We never ought to sin. Such ideals, far from meaningless, may be valuable as goals toward which to exert ourselves in an effort to "approximate" what is desired as far as it is *possible* for us to do so. But this usage of the term "ought" is obviously different from that which describes our moral duty. Saying that it is our duty to do or achieve something while simultaneously stating that it cannot be done or achieved, seems to involve a definite contradiction. The contradiction is not necessarily "in terms", because the terms may be arbitrarily defined one way or the other. There is, however, a profound necessity for a term to describe an obligation that relates to a situation where a *choice* is open, or is thought to be so. Only if used in this narrower sense, is duty connected with the idea that non-fulfillment deserves *reproach*. It seems to be an invariant element in human thinking and feeling that reproach is not "deserved", not "justified", not "just", if the achievement was actually impossible. If we had not the terms Duty, or Thou Shalt, or You Ought To Do, for describing an open alternative in a choice-situation, we would have to invent such terms. But we do have and use these terms predominantly for such situations. When in vague speech we apply them to impossible achievements, we think either of the duty toward the closest *possible* approximation, as in Plato's case; or we present a postulate to God, to whom realization would be possible; or we merely state our opinion that the achievement, if it were possible, ought to be performed. If we go beyond this and insist on its being our duty to reach an unattainable goal, we change the meaning of

¹¹ *Ibid.* at 473.

the term, using, in fact, a different vocabulary. We cannot meaningfully conceive of a moral duty in the first and narrower sense to do or achieve what is impossible.

Several writers have hesitated to admit this. They have pointed to the deep sense which may lie in the submission to duty-conceptions independent of rational purposes and the possibility of reaching them. Thus, Max Weber has referred to the moral importance that may be found in the action of a soldier who, without any conceivable military utility, blows himself up with his untenable redoubt rather than become a prisoner or flee. Or of the extreme Buddhist who condemns all purposive acts.¹² Professor W. M. Urban has made a similar point.¹³ But such illustrations do not establish a conclusive counterargument. If all purposes are condemned, as in the case of the Buddhist, the question of whether purposes can be achieved does not arise. Even if they are achievable, they are deemed unworthy of pursuit. The only end accepted as worthwhile is that of abandoning all purposes. This end, which may be said to be in itself a purpose, can be approximated to a certain degree and even reached. The moral duty then, in this case as any other, is to reach or approximate an end which can be reached or approximated, or at least is conceived in these terms. No impossibility is involved. Likewise if the soldier thinks it his duty to die and "not to reason why", it is not impossible for him to do so. His government, educating him in such a spirit, may well pursue a meaningful purpose, such as establishing a formidable force of resistance. Whether and to what extent this goal may be attained by such means, is open to scientific discussion.

The effort to reach the impossible, as Weber pointed out, may have by-products of the deepest cultural value, or may in itself attract our admiration or love.¹⁴ Yet it can be considered a duty only as long as either some approximation is held possible or the exertion itself or the by-product is considered valuable. The fanatic may

¹² Weber, *Der Sinn der 'Wertfreiheit' der soziologischen und ökonomischen Wissenschaften* (1917) now WEBER, *GESAMMELTE AUFSÄTZE ZUR WISSENSCHAFTSLEHRE* (1922) 451, 467, 477, 492.

¹³ Urban, *Ontological Problems of Value* (1917) 14 JOURNAL OF PHILOSOPHY 309, 315.

¹⁴ Cf. Goethe's "*Den lieb' ich, der Unmögliches begehrt*," i. e., I love the one who asks (demands, yearns, aspires—the German term includes all these meanings) for the impossible. Manto, Aesculapius' daughter, gives this answer to the centaur, Chiron, who complains of Faust's madness in asking for a union with Helen, long since deceased. GOETHE, *FAUST*, pt. 2, Act 2, Scene 4.

hope to wrest an impossible thing from God, and therefore think it his duty to carry on. But that is to say that he still believes in the *possibility*. Once impossibility is definitely established and accepted as such by the parties to the argument, attaining *this* impossible end or doing *this* impossible deed can no longer be conceived of as a moral duty.

*Impossibilium nulla obligatio est*¹⁵ is the classical Roman formulation of this idea. It is important to see that the Roman doctrine expressed a necessary, inevitable element of political and legal as well as of ethical thinking rather than an arbitrary statement of positive law. Just as we cannot expect someone to do what he cannot do, we cannot seriously bind or force him to do it. We may, of course, pledge and eventually force him to pay us damages or to guarantee in another way that he will achieve the desired effect. We may compel him to suffer forced labor or a term in jail. Such impositions are not impossible for him to undertake or bear. But legal or moral duty, in the last analysis, can never go *ultra posse*. For this reason, in fact, one's duty can never be, accurately speaking, to *perform* any act or to *effect* any result, because impossibility may always intervene, but only to *exert* oneself to perform an act or effect a result eventually, and to exert oneself to pay damages and the like.¹⁶ In Richard Wagner's opera, *Rheingold*, Wotan reminds Loge of his promise to free Freia, only to receive this answer:

"With the greatest of care to consider how to attain it,
That is what I have pledged.
Yet to find what never will happen nor ever succeed,
How could that ever be pledged?"¹⁷

This cute reply is right as far as moral duty is concerned. One can add only that it passes by the question of whether expectation had not been unduly fostered, or a guarantee given. Liability or punishment may be justly incurred where that has happened.

Impossibility is a self-evident limit not only to moral duties, but also to morally neutral, and even to immoral, efforts. Wherever a definite purpose is being pursued deliberately, there is relevant dem-

¹⁵ D. 50. 17. 185.

¹⁶ I discussed this at length in Brecht, *System der Vertragshaftung* (1908) 53 JHERINGS JAHRBÜCHER 213-302, elaborating a detailed Self-Exertion Theory (*Kraftanstrengungslehre*). ROSS, *FOUNDATIONS OF ETHICS* (Oxford 1939) has recently made the same point with great force. The founder of the theory seems to have been HARTMANN, *DIE OBLIGATION—UNTERSUCHUNGEN ÜBER IHREN ZWECK UND BAU* (1875).

¹⁷ WAGNER, *THE RHINEGOLD* (Jameson trans., Shirmer, New York 1904) 82-83.

onstration that the purpose cannot be reached, or if approximation be considered sufficient, that even this be impossible. Once more, however, one must beware of thinking that effort is therefore necessarily "useless", for by-products, considered worthwhile, may be attained.

Aristotle, in the second book of his *Politics*, severely criticizes Socrates' communism precisely from the scientific angle of possibility, too easily brushed aside in Plato's *Republic*. It would be *impossible*, Aristotle writes, to reach the most important good, that is to him, the self-sufficiency of the state, if all persons were equal. If women and children were held in common, it would be "*impossible* to avoid men's supposing certain persons to be their real brothers and sons and fathers and mothers; for they would be found to form their belief about each other by the resemblances which occur between children and parents."¹⁸ Were that not the case, so much the worse. Community of children, then, would imply the *risk*—that is, would make it *impossible* to exclude the eventuality¹⁹—of assaults on parents and of incest. Even if communism were restricted to the economic sphere, it would be *impossible* to avoid certain psychological consequences. Here Aristotle spoke the legitimate language of science.

The doctrine that impossibility sets a limit to moral duties as well as to proper purposes of individuals and groups, seems to me always to have constituted a sound kernel in natural-law theory. Unfortunately, the summary rejection of natural law, which reached its height about the beginning of this century, covered up this solid corner-stone with everything else. It must be unearthed and relaid. Today we are only at the beginning. A brief restatement of the ethical idea that duty presupposes possibility, can be found in the writings of the German philosophers L. Nelson,²⁰ M. Scheler,²¹ and N. Hartmann.²² More recently, Felix S. Cohen²³ in this country and W. D.

¹⁸ ARISTOTLE, *POLITICS* (Rackham trans. in Loeb ed.) Bk. 2, 79.

¹⁹ See *infra* section IV.

²⁰ NELSON, *KRITIK DER PRAKTISCHEN VERNUNFT* (1916) 279.

²¹ SCHELER, *DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK* (3d ed. 1927) 24, 83, n.1, 244.

²² 2 HARTMANN, *ETHICS* (Coit trans., 1932, from the German original, *Ethik*, 1926) 34. See also HARTMANN, *DAS PROBLEM DES GEISTIGEN SEINS* (1933) 15, wherein he emphasizes that the higher layers in human nature depend on the lower, these being "stronger" in most but not all respects.

²³ F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 140 *et seq.* " . . . every assertion of *right*, *wrong*, and *duty* involves an assertion of *can* . . ." *Ibid.* at 140.

Ross²⁴ in England have emphasized the point. The Hungarian professor J. Moór, devoted an illuminating article to natural limitations.²⁵ But the whole significance of impossibility in political and legal fields is far from being plumbed.

III

THE BEARING OF IMPOSSIBILITY

Investigations of what is impossible do not promise important results, at first sight. It is, alas, not impossible to be arrested, tortured, flogged and executed, even for no cause. Nevertheless, postponing further examination of this calamity to later sections, we should take due notice of the fact that many things *are* impossible and cannot be made possible either by persuasion or force. It is impossible for people to work continuously for twenty-four hours a day, to work without food, to be strong when ill and underfed. Many a slave-owner has chafed in vain at this impossibility, which no flogging could amend. There it was, and it did set limits to human arbitrariness. It is likewise impossible for conscious human beings to live without thinking or to exclude, by the mere application of will-power, dreams and such reactions as sexual impulses. There is an infinite number of logical, physical, biological and psychological impossibilities.²⁶ Science can objectively exclude such impossible tasks from those in which government and law can properly engage.

Furthermore science can exclude *means* on the ground that they are not fit to reach the aims for which they are designed. In this way science can objectively clarify, and always has clarified, important problems of politics, for instance in the field of economics or education.

"... in calling a given act right we say simply that *it is a possible act which is not worse than any possible alternative*. . . ." *Ibid.* at 141. Therefore definitions of ought and duty "require the addition of a non-ethical concept which does not seem to be purely formal, namely the concept of possibility." *Ibid.* at 142, n. 21; see also 262.

²⁴ Urban, *loc. cit. supra* note 13. See also Macmurray, *Freedom in the Personal Nexus* in FREEDOM, ITS MEANING (1940) 507, 513, on the relation between freedom and possibility (loss of freedom = "a situation in which a real possibility is actually impossible to realize . . . the presence of an impossible possibility.")

²⁵ Moór, *Das Problem des Naturrechts* (1935) ARCHIV FÜR RECHTS—UND SOZIALPHILOSOPHIE 325, 543. See section following.

²⁶ See Moór, *ibid.*, who adds sociological and ethical impossibilities, omitting psychological ones. It seems to me that a sociological impossibility would always have biological or psychological causes, but not conversely. Regarding ethical impossibility, see discussion following.

Examinations of possibility are often carried through, however, under definite assumptions, such as an existing form of government, and are liberally intermingled with value judgments. For many current problems of practical life this may be quite unobjectionable, especially if a change in institutions and value judgments within the relevant area and period is *impossible* on naturalistic standards. But for the present purpose, any confusion of naturalistic research and ethical judgment must be strictly eliminated.

Moór's paper is characteristic of the fact that almost every writer who goes into detail in this field finally trespasses on ethical value judgments. Moór starts from the fundamental difference in the natural-law conceptions of the Aristotelian-Scholastic school and the continental school of the seventeenth and eighteenth centuries—the former resulting only in a few very broad principles, the latter deriving detailed codes from nature. He calls for a reversion to the earlier school. This school distinguished between the “flagrantly immoral” law and the “merely unjust” law, and denied validity to the former while, in general, holding any law laid down by proper authority to be valid even if unjust.²⁷ Moór holds that this idea, “which indeed means the denial of boundlessness to law-giving power,” ought to be salvaged and utilized for legal theory.²⁸ This introduction, while admirable in itself, is extremely misleading as a preface to a merely naturalistic investigation. It intimates that the author is seeking ethical standards while, instead, he turns to naturalistic impossibilities such as have been discussed above. But among them, as though he wishes to make good on the expectation he has aroused, he finally includes “ethical” impossibility, that is, the violation of “those ethical laws the disregard of which makes the existence of society causally impossible.”²⁹ Therewith, however, the terms *impossible* and *causal* are made dependent on non-naturalistic factors, namely, the kind of society which an individual interpreter has in mind. What the libertarian regards as a destruction of society, the equalitarian will not so regard, and thus from type to type.

Moór tries to evade this inference. He wishes to include merely that ethical “minimum” without which human society would “commit suicide”. With such restrictions, however, he reduces ethical im-

²⁷ See on this view, in modern Catholic philosophy, CATHREIN, *RECHT, NATURECHT UND POSITIVES RECHT* (2d ed. 1909) 300 *et seq.*, discussed in Brecht, *op. cit. supra* note 4, at 219.

²⁸ Moór, *op. cit. supra* note 25, at 543, 545

²⁹ *Ibid.*

possibility to trifling importance, far from identifying the "flagrantly immoral" law of the Scholastics from which he started. Indeed, he is led to question in a queer footnote,³⁰ whether that ethical minimum was violated even in Sodom and Gomorrha and to answer in the *negative*, inasmuch as social life was capable of sheer continuance. His illustration of an act amounting to social suicide, and therefore invalid for ethical reasons, is a law ordering the invariable extermination of all new-born children, a law not likely ever to be enacted. Even so, he is forced to spoil his naturalistic argument by interposing surreptitiously a value judgment, namely that human society is a positive value that ought to be continued in however rotten a state—an idea Schopenhauer would contradict and somewhat at variance also with the celibatarian laws of the Catholic church and the doctrine of the Last Judgment.³¹

Instead of trespassing on the ground of ethical value-judgments, we had better keep the naturalistic method pure, and concentrate on the many obstacles and limits set by nature to legislation.³² True, by this method we can only in small part identify flagrantly immoral law. A law requiring on pain of punishment what is obviously impossible of fulfillment, is certainly unjust and may be called flagrantly so. This follows, not from the impossibility as such, but from the invariant element in human feeling which repudiates as unjust reproaches and punishment in such a case, as I tried to show above and in my earlier paper on invariant elements in the idea of justice.³³ Yet such ultra-posse laws are rare, even under despotic regimes. In most instances of flagrant injustice, no impossibility is involved. In the generality of cases, then, only additional ethical standards of justice, such as those mentioned in the introductory section of this article, can provide a method of identifying a flagrantly immoral law. Standards of impossibility alone will not suffice. We must be on

³⁰ *Ibid.* at 563, n. 57.

³¹ "If someone approves, as a goal, the extirpation of the human race from the earth, one cannot refute such a viewpoint on rational grounds." Einstein, *Freedom and Science in FREEDOM, ITS MEANING*, *op. cit. supra* note 24, at 382.

³² In pursuit of such research we would, without applying any ethical standards of our own, hit on ethical ideals of individuals and groups as serious obstacles in the path of transtraditional legislation far earlier than the point where social suicide is reached. Studies of this kind have sometimes been made, as F. COHEN, *op. cit. supra* note 23, at 252; M. COHEN, *REASON AND NATURE* (1931) 422, 423; Llewellyn, *The Effect of Legal Institutions upon Economics* (1925) 15 AM. ECON. REV. 665, 673; Pound, *The Limits of Effective Legal Action* (1917) INT. J. OF ETHICS 150, 153, 163, 167.

³³ See Brecht, *op. cit. supra* note 2, at 76, 85.

our guard against a fusion of those ethical postulates with the purely naturalistic standard of impossibility.

The subjective element of judgment may lend particular importance to purely naturalistic impossibility even in questions of individual justice. As I may repeat from the paper just quoted, "... in regard to what is possible there may be a subjective difference of opinion; the receiver of a command may differ from the authority in his opinion. He will feel treated unjustly whenever he subjectively thinks that something is impossible of fulfillment, for instance a demand to work exceedingly long hours or with exceedingly little food; and he will feel so even if he completely approves of the hierarchy of values that has prompted the command. This may make him a rebel for the cause of justice in cases where the hierarchy of values is not an issue."⁸⁴

The main significance, however, of the factor of impossibility seems to lie in the sphere of proper purposes of government rather than in that of individual justice.

IV

IMPLIED EVILS

Granting the validity of these arguments the reader may grow even more skeptical of the value of the category of impossibility in research on political and legislative problems. That governments should not attempt to achieve what cannot be achieved (or to approximate what cannot be approximated) seems so obvious that an elaborate statement may be boring. Will not even the worst government in its own interest avoid such stupid action? Yes, to be sure, it will try. And yet he would be mistaken who, on that ground, would overlook the import of the impossible. Political history is a vast collection of plans and projects that were foredoomed to failure. Their success was *impossible* for naturalistic reasons—either because the end was beyond human reach or because the means were not adequate. The great bearing of the impossible will become clearer if we realize that it includes the category of "implied evils".

If someone proclaims *A* to be his highest end or value, it may appear according to physical, biological or psychological conditions, that *A* is necessarily linked with *B* and that, therefore, only $A + B$,

⁸⁴ *Ibid.* at 86.

that is *C*, can be attained, not *A* alone, or at least, that the means, *m*, proposed for attaining *A*, will never attain *A* alone, but always *A* + *B*. If the parties to the discussion define *B* as an evil, one may speak of an "implied evil" in the sense of an evil which it is *impossible* to evade in pursuing an otherwise desired value. One cannot live licentiously and remain young and fresh. One cannot eat one's cake and have it, too. Here are impossibilities in the strictly naturalistic sense. Thus, in the political field, science can examine with objectivity the implications inherent in single-man authority or majority rule, in liberty or equality, in peace-at-any-price or any other principle which is advocated, and compare the results with each other. Such investigation will exclude as solo aims from the list of proposed values many which can be achieved only in more or less unfortunate pairs.

It is from this angle that science can, in fact, approach the most important political issues. To illustrate, in the case of regimes. Although science cannot discard as impossible the contention that a dictatorial ruler may be a man of high moral and intellectual qualities, science can still state objectively a number of necessary implications. Even if he be a saint morally, he remains subject to the rule governing the human "span of control"—an inescapable naturalistic rule, which makes it *impossible* for him to give personal attention to, say, 100,000,000 people. To conduct the affairs of his country, therefore, he needs several thousand captains and lieutenants, not all of whom can be expected to be saints. If there is no freedom of public opinion and if neither independent courts nor other institutions of effective control are in operation, these agents can withhold from the saint complaints against serious injustices which they or others commit.⁸⁵ In the same way, other implied evils can be objectively ascertained. Although it may be possible to select a person of high qualities as a leader, it can easily be proved that it is *impossible* to devise institutions which can *guarantee* such a selection. It can further be objectively demonstrated that, according to the very principles of unlimited absolutism, it is *impossible* to secure the elimination of an unable and vile despot by peaceful means. These and other implied

⁸⁵ The Soviet chief of police, Yagoda, according to the official Soviet version, was able to commit the most devilish crimes, such as the assassination of Maxim Gorki, behind Stalin's back, terrorizing his tools into submission and preventing them from making any appeal to Stalin. See the report on the court proceedings in the *New York Times*, March 6, 9, and 10, 1938, at 1, 1, and 13, respectively. According to Trotsky, Stalin was himself involved. *Ibid.*

evils can be exposed with absolute scientific validity. Space does not permit going into the finer and finest implications here.

In turn the implied evils of majority rule can be examined, such as the possibility or impossibility of avoiding parties, bosses, predominance of minorities, moneyed interests, demagoguery and election trickery. In each case, proposals ("remedies") may be advanced designed to reduce the undesired evils. The results of the various investigations lend themselves to comparison by means of strictly scientific, objective methods.

In all such studies, one must bear in mind that he who prefers $A + B$ to *non-A* cannot be deterred from pursuing his goal by being reminded that *B* will necessarily be present. He will say, that is the price we pay. The fact that in war, even if victorious, many will be killed and mutilated, does not disparage war for him who is prepared to accept this implied evil, and so in any other case. Science can, however, bring out the cost more exactly and thereby influence preferences and reactions.

If the evil is not certain but only likely to occur, one may speak of implied "risks" as a sub-species of implied evils. Here, too, impossibility is the issue, because if a particular evil is *likely* to materialize in the pursuit of some goal, the question is whether it is *impossible* to exclude this concatenation.

That our category of implied evils offers a wide field to scientific research has always been recognized by social scientists instinctively and without much ado about theory. The objection that some demagogic proposal will lead to dismal by-products has been common from the Sophist to our time.³⁶ Modern relativists have lately contributed vividly to the theoretical side of the matter by emphasizing that the true meaning of values can be clarified by scientific discussion of their implications. The first to bring this out clearly and at full length was Max Weber, in two essays published in 1904 and 1917.³⁷ These papers are extremely rich and illuminate almost every side of the problem. The fundamental points which he advanced were taken up by Radbruch and, more sporadically, Kantorowicz,³⁸ the founders

³⁶ See the reference to the implied risk of incest in Aristotle's argument against community of children. ARISTOTLE, *op. cit. supra* note 18, at 81-83.

³⁷ WEBER, *op. cit. supra* note 12, at 451-502, and *Die 'Objektivität' in sozialwissenschaftlicher und sozialpolitischer Erkenntnis* (1904) *ibid.* at 146, 148-157.

³⁸ RADBRUCH, *op. cit. supra* note 1, at 25, 26; RADBRUCH, *RECHTS-PHILOSOPHIE* (3d ed. 1932) 9; KANTOROWICZ, *Probleme der Strafrechtsvergleichung* (1907) *MONATSSCHRIFT FÜR KRIMINALPSYCHOLOGIE UND STRAFRECHTSREFORM* 65, 102; and *Der Strafgesetzent-*

of the school of neutral relativism in legal philosophy. Meanwhile many statements have been made to the same effect in both Europe and America.³⁹

All studies along these lines, however, beginning with Weber's, have been contributions to the thesis that while science should not venture value judgments, it may clarify the meaning of values. It has hardly become clear that, in such arguments, we are dealing with the category of *impossibility* and its subdivisions, and that impossibility is a *necessary relevant* objection to social activities and purposes. The neglect of this side of the matter⁴⁰ may be the reason why, despite great, indirect, academic contributions, the category of impossibility is still far from being fully exploited for political and legal philosophy.

V

SELF-AVENGING LAWS

The fact that implied evils can be ascertained and calculated by naturalistic methods is also the scientifically relevant element in the idea that there are "self-avenging laws", that is, ethical laws which appear as such because violation avenges itself on the violator. In such cases the evil necessarily implied is held up as a warning to the individual not to commit a self-destructive act.⁴¹ This is permissible only with some qualification. First, whether an implied result can be classified as an evil must be specifically answered. Second, even when the answer is positive, the term "ethical" law had better be avoided in this context, since one cannot safely infer from resulting evils that an act is ethically wrong. The nurse who catches a deadly disease in ministering to sick persons, the martyr who incurs pain and death from his refusal to do that which is unjustly de-

wurf und die Wissenschaft (1910) 7 *ibid.* 257, 265; also Kantorowicz and Patterson, *Legal Science—A Summary of its Methodology* (1928) 28 COL. L. REV. 679, 684.

³⁹ F. COHEN, *op. cit. supra* note 23, at 121; M. COHEN, *op. cit. supra* note 32, at 421, 424; PERRY, *GENERAL THEORY OF VALUE* (1926) 611, 638 *et seq.*; SPRANGER, *DER SINN DER VORAUSSETZUNGSLOSIGKEIT IN DEN GEISTESWISSENSCHAFTEN* (1929) 18; Dewey, *Theory of Valuation* (1939) 2 INT. ENCYC. OF UNIFIED SCIENCE, No. 4, 33 *et seq.*, 42; Dickinson, *The Law Behind the Law: II* (1929) 29 COL. L. REV. 285, 295, n. 22; Wertheimer, *Some Problems in the Theory of Ethics* (1935) 2 SOCIAL RESEARCH 353.

⁴⁰ See *supra* note 12.

⁴¹ See LORIMER, *THE INSTITUTES OF LAW; A TREATISE OF THE PRINCIPLES OF JURISPRUDENCE AS DETERMINED BY NATURE* (2d ed. 1880). To Lorimer natural law meant just such self-avenging law (*ibid.* at 4, 237), although he amply trespassed on grounds far beyond this principle.

manded, are ready illustrations to the contrary. One ought again to speak only of "implied evils" or even more neutrally of "implications" which must be taken into account before final evaluation because evasion is impossible.

An extreme form of the belief in self-avenging laws is the doctrine that *every* wrong action leads to unpleasant results for the author. It is what Socrates pointed out, with elaborate illustration from family life and politics,⁴² and what finally Goethe repeated in the famous "Song of The Old One"—"All guilt avenges itself on this earth."⁴³

In recent times, preachers and poets rather than philosophers and scientists have emphasized such a view.⁴⁴ It remains perfectly legitimate to consider this as a working hypothesis for science. No final proof has yet been adduced against it. On the contrary, there are many indications of its validity, both in the lives of individuals (at least when these lives are not accidentally shortened), and of groups and movements. But there is still no definite proof that this is a universal law. And even if there were, we would obtain no objective criteria for the recognition of guilt, because the thesis does not exclude the possibility that mere accident or even good acts may have unpleasant results. Further, the finest forms of self-revenge are not readily observable from the outside, for example, an individual's inner restlessness or unhappiness which he conceals for shame, or a group's visionless materialism.

VI

NATURALISTIC HEDONISM

Hedonists have gone farther along naturalistic roads. Not content with connecting the morally evil with ensuing pain, they have

⁴² See XENOPHON, *MEMORABILIA* (Marchant trans., Loeb ed. 1923) Bk. IV, IV, 21, with two illustrations (incest and ingratitude): "But surely the transgressors of the laws ordained by the gods pay a penalty that a man can in no wise escape, as some, when they transgress the laws ordained by man, escape punishment, either by concealment or by violence." PLATO, *op. cit. supra* note 8, Bk. 9, 587, on the unhappiness of the tyrant, whose relative unhappiness Socrates calculates as precisely 729 times greater than that of the ruler under the ideal constitution, applying a queer mysticism of numbers but a very plausible psychological analysis.

⁴³ "Denn alle Schuld rächt sich auf Erden," WILHELM MEISTERS *LEHRJAHRE*, Bk. 3, c. 13; 17 *SÄMTLICHE WERKE* (Jubilee ed. 1902-07) 155. See also LORIMER, *op. cit. supra* note 41, at 238: "... every sin or folly we commit is, in principle, an act of self-destruction."

⁴⁴ A great part of the literary work of the Swedish poet, August Strindberg, was impressively dedicated to this task.

more generally equated the morally good with a surplus of pleasure over pain. Insofar as they have been thinking of the pleasure and pain of the acting subject, and not of third parties, their doctrine amounts to the thesis that it is *impossible* to be good and yet (predominantly) unhappy, or to be bad and yet (predominantly) happy.

Plato's Socrates voiced such general hedonism—or rather eudaimonism (this term allows better for joys more profound than ordinary pleasures)—as well as his belief in self-avenging laws. Also this broader theory of his has had numerous followers down to modern times (not including Goethe here, however, who required Heaven to reestablish justice in his Faust). Jeremy Bentham gave the doctrine a new social meaning. At the end of the nineteenth century, however, under the impact of the idealistic objections from Kant to Hegel, hedonism seemed to peter out except in some branches of religious philosophy, where it was carried on in ill-defined relation to the hope of rewards and punishment in another world.

Quite recently, an American lawyer, Felix S. Cohen, has revived secularized hedonism in a new form. True, Cohen does not want to define "good" directly in terms of pleasure; he prefers to hold good to be indefinable.⁴⁵ But he adopts the view that there can, nevertheless, be identified naturalistic criteria which always attend "the good". In this sense he holds that a surplus of pleasures over pains, each taken in its finest connotations and ramifications, is an outstanding characteristic and necessary concomitant of the good.

He offers this absolutistic hedonism, as he himself calls it, as an alternative to relativism. It is, he says, a doctrine "consistent with the writer's value judgments"⁴⁶ and, although this "does not prove the truth of the theory, it is a sufficient ground for belief. . . ."⁴⁷ Lack of proof does not bother him, because to him it is the very characteristic of science that, to the extent that it is not purely formal, its results are always uncertain and subject to empirical refutation, and because "the ultimate appeal of an ethical system is to the immediate obviousness of its intelligible conclusions".⁴⁸

⁴⁵ With MOORE, *PRINCIPIA ETHICA* (1903) 16, also rejecting Perry's definition in terms of preference (*op. cit. supra* note 39, at 115). The direct definition of good as "surplus of pleasures" would make it impossible even to ask whether the good be always pleasant. F. COHEN, *op. cit. supra* note 23, at 161, 172, 174.

⁴⁶ *Ibid.* at 188.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 125, 117, 186, 214. In the final summary he repeats that the alternative between relativism and absolutistic hedonism is insoluble, and slips into saying: "The conclusion is not a pleasant one. But the stories philosophy tells do not always have

These are rather loose and ambiguous passages in an otherwise very carefully written book. "Belief" is a legitimate argument *outside* science in the present sense, not within. Within science it is legitimate only as a working hypothesis, which may be confirmed or refuted by facts. If meant as such, a refined form of eudaimonism must be admitted, and even welcomed, to science. This seems to be Mr. Cohen's view, and there can be no quarrel with him thus far. It may also be admitted that immediate obviousness, in a well-defined sense of the term, can be considered as a means of evidence in the ethical field. But granting this much, the complete neglect of the *intersubjective* element of proof in Mr. Cohen's argument is surprising and scientifically unjustified. The difference between some *merely* subjective belief and "transmissible" proof in its various degrees of adequacy is scientifically of the greatest importance. Transmissible proof, for instance, can be presented with full adequacy in support of the thesis that men cannot live and work without eating and sleeping (naturalistic obviousness), and that *therefore* (ethical obviousness) it is flagrantly unjust to ask them on pain of punishment to do so. But there is no such intersubjective proof or immediate obviousness in support of the thesis that the good ones enjoy a naturalistic surplus of pleasure. If there were, everyone would be good.

The most plausible form of "eudaimonistic parallelism"—as we may call it, in the sense of a necessary coincidence between being good and happy—seems to me Max Scheler's version, foreshadowed by Plato. Scheler outlines several layers of feeling, each of a different "depth", and assumes that good and bad acts affect the deepest layer, that which determines the individual's happiness in the last resort.⁴⁹ I, for one, "hope" and, to a certain extent, even "be-

happy endings." *Ibid.* at 227. This, according to hedonism, would be identical with saying that the theory is not morally good, as it is a criterion of the good to be pleasant.

⁴⁹ SCHELER, *op. cit. supra* note 21, at 340, 368 *et seq.* Cf. PLATO, *op. cit. supra* note 8, Bk. 9. Scheler strictly rejects eudaimonism in the sense of happiness being a worthy goal that should be strived for and could be reached by such direct efforts. He assumes four layers of feeling: 1. sensual feelings (local); 2. general body-feelings (static) and general life-feelings (functional, active); 3. soul-feelings (I-feelings); 4. purely spiritual feelings (personality-feelings). Only feelings of the first layer and, to a lesser extent, those of the second layer, can be reached intentionally. In particular, feelings of the fourth layer are never the product of intentional endeavors directed toward their acquisition. But they present themselves as the by-product, accompaniment or aftermath of worthy acts, and in their turn are the *source* of moral acts. Different layers may be affected differently by the same event at the same time, *e. g.*, a person may feel a sensual pain and at the same time a positive increase in his deepest layer of feeling.

lieve" that this is true. But does the parallelism go so far as to make it *impossible* for the good ones to fall into deepest grief? History has witnessed many atrocious cruelties maliciously applied to or accidentally striking individuals who finally were overcome by utter despair although, to all outward appearances, they did not deserve such a fate on the ground of any particular failure of theirs. Confronted with these observations it would be rash for scientific conviction to take the universal and automatic rule of eudaimonistic justice for granted. One may think it obvious with Kant that there *ought* to be such compensatory justice. But one can hardly contend that the facts obviously conform to this desire. Close observation may offer many indications—as my personal observation indeed tends to confirm—that, with an almost faultless regularity, guilt avenges itself on this earth in some way or other in the long run, if there be a long run, and further, that inner balance in the deepest layers helps a person in overcoming even serious trials. But one may still feel that, beyond these two important elements, the eudaimonistic parallelism is far from obvious, nay that, if not the wish but the facts are observed, obviousness can be said to be rather on the opposite side. This hostile evidence may be only apparent—I do "hope" it is. At any rate it need not constitute a final barrier for the believer. But *the scholar has to take stock of it*.

There is, at least, no intersubjective measurement wherewith to verify a perfect eudaimonistic parallelism. The obvious psychological relation which can be easily stated to exist between subjective self-contentedness and subjective happiness, does not prove anything for our case, because self-contentedness may rest on self-complacency as well as on real goodness, just as its opposite, contrition, may not necessarily rest on real badness, but on oversensitiveness of conscience.

This particular field, then, is on a scientific level of speculation very different from the broad area wherein the yardstick of possible-impossible can be applied with intersubjective certainty.

VII

SUMMARY

The theories of the self-avenging nature of all guilt and of naturalistic hedonism have been shown to be two extreme applications of the absolute standard "possible-impossible" to moral judgments.

The scientific weakness of these theories lies in the fact that no sufficient intersubjective proof has so far been presented that it *is* in fact impossible to be or remain happy if bad, or unhappy if good. This weakness of two extreme attempts should not distract us from the fact that impossibilities, including implied evils and risks, are perfectly accessible to intersubjective demonstrations to a very large extent. Scientific research in these fields is capable of producing relevant results for politics and legislation. Let us show convincingly *what* is impossible and *why* it is impossible, and we may save the world the bloody cost of experiments doomed to failure. Let us show convincingly *that* some achievement is possible and *how* it can be reached without any undesirable implication, and we will open the road to peaceful progress.

Science, at any rate, is able to attack the problem of proper ends and means with objective standards from two angles. We may investigate either (1) the possibility or impossibility of attaining a certain end, attaining it through certain means and attaining it without certain implications; or we may investigate (2) whether ends or means violate those elements in the idea of justice, which, on the ground of their inescapable character, are verifiably invariant ("absolute"), as indicated in the introductory section.

Precisely as in plain geometry the circumference of a circle cannot be computed directly, but the circumference of an external and an internal polygon can be determined, so we cannot directly determine what is justice or what goals a government ought to pursue, but we can determine the answer's outer and inner limits—naturalistic impossibility, and the invariant ethical elements of justice.

Combination of these two approaches, exploiting all their implications and interrelations, offers an exceedingly fertile field of truly scientific contributions to the solution of transpositive problems in politics and justice. It has been my modest purpose to help in marking off this field and stimulating its systematic tilling.