

OTTO BIRD'S DIALECTIC IDEA OF JUSTICE
AND
MODERN GERMAN POSITIVE LAW PHILOSOPHY

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OTTO BIRD'S DIALECTIC IDEA OF JUSTICE
and
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INTRODUCTION

Proceeding on the assumption that the issues in any philosophical idea concern matters about which objective truth is ascertainable, Otto Bird developed a dialectic notion of the concept of justice. His idea is predicated on a non-historical approach in that he considers all the literature as contemporary—as if all the authors, both past and present, were presently sitting and having an oral argument about the subject. His approach is also non-philosophical in the sense that he does not undertake to develop or defend a theory of justice. He carefully avoids taking part in any discussion concerning the truth of any author's particular arguments. Only the truth concerning the body of thought about the concept justice and not the truth about justice is of concern to Bird.

In Section I, I shall briefly discuss the problem with trying to define the term “justice.” I will examine Bird's notion of justice, set forth his three theories,¹ and then examine Bird's principal propositions taken in each theory. Although I will present all three of Bird's theories, I will concentrate on the classical positive law and its relationship to his Positive Law Theory of Justice.

Section II will be a discussion of the positive law as it is inseparable from Bird's Positive Law Theory of Justice. Using the Weimar Constitution and a court case involving the German Federal Government and Prussia and its effect on Kelsen Positive Law Theory in Germany as an extreme example, I will illustrate why I reject Bird's Positive Law Theory of Justice as a workable model. This case, which David Dyzenhaus refers to as a “battle of professors,” involved the most distinguished German legal theorists of the day—Hans Kelsen, Carl Schmitt, and Hermann Heller. I will discuss the philosophies and central arguments of each in relation to legal positivism. I will then discuss the postwar attempts by Gustav Radbruch and Robert Alexy to change the dominance of the Positive Law Theory as a result of the Nazi disaster and how they facilitated the end of positive law in Germany.

¹ Bird tends to muddy the waters a bit by naming his three dialectical constructs “theories”— which technically they are. His analysis is dialectical and not a meta-claim that there are three theories of justice that cannot be reduced further. He leaves the argument “what is justice” to those of a more metaphysical bent to uncover. He only hopes to make their task more orderly and less arduous.

I OTTO BIRD'S NOTION

"Sure ain't no justice in this courtroom"
Mumbled by losing party leaving the court

1. JUSTICE

It seems everyone has his or her own notion of justice. The author of the above quote certainly did. Surely the judge thought his idea of justice prevailed. The jury either collectively or individually acted upon their understanding of the term as did the lawyers involved. One can be quite certain that the above mumbler's idea of justice did not agree with that of the judge, prosecutor, or jury. Justice is a vast subject with a myriad of topics and subtopics and has been a subject of much discussion among scholars, especially in law, philosophy, and theology. The literature on the subject is immense. For example, Questia, an online library and a service that provides access to a large collection of scholarly books and journal articles in the humanities and social sciences for students and scholars, lists 545,593 books and 27,097 journal articles under the topic "justice." This collection is by no means complete.

One of the problems with understanding the concept of justice is that most of the larger volumes devoted to the subject attempt to make an extensive examination of just what is the right thing to do in life's circumstances. For instance, Aquinas in his treatise devoted to justice, the *summa theologica*, considers: the nature of right; restitution and when it is mandatory; cheating; usury; respect of persons; injury done to another, whether by deed or by word; the virtue of religion; the special virtues of obedience, gratitude, vengeance, truth, friendliness, equity; and whether or not all of the Ten Commandments are precepts of justice, among other topics. Plato, on the other hand, simply makes justice equal to all virtue and the good life.

Consulting dictionaries of philosophy only further complicates our investigation. They often discuss concepts such as formal justice, substantive justice, retributive justice, corrective justice, commutative justice, and distributive justice, among others. These, like most arguments concerning justice, arise over human actions or emotions and do not get to the heart of the meaning of justice but simply to its application.

Henry Sidgwick, the Knightbridge professor of moral philosophy in the University of Cambridge, wrote extensively on the subject of ethics and justice. At the beginning of one of his chapters on justice, he stated, "... we have to attempt to give to common terms a definite and precise meaning [of justice]. This process of definition always requires some reflection and care and is sometimes one of considerable difficulty. But there is no case where the difficulty is greater, or the result more disputed, than when we try to define Justice." (Sidgwick 1962, 265) He then proceeds for approximately 30 pages to set forth his notion of justice. Therein, he goes on to discuss the ideas of conservative justice, ideal justice, the Socialistic ideal of distribution and rules of legal justice—all of which he admits are difficult to explain.

Again the author is not going to the meaning of justice but merely discussing its application. After his examination, we find that we are not much further along in our quest to establish the common subject of controversy underlying the disagreement about justice. His chapter on justice ends:

The results of this examination of Justice may be summed up as follows.

The prominent element in Justice as ordinarily conceived is a kind of equality: that is, impartiality in the observance or enforcement of certain general rules allotting good or evil to individuals. ...We see that the definition of the virtue required for practical guidance is left obviously incomplete. (Sidgwick 1962, 293)

The Institute for Philosophical Research,² a group of philosophy scholars under the direction of Mortimer J. Adler, was established with the aim of transforming what appears to be a chaos of differing opinions into an orderly set of points of agreement and disagreement that give rise to real issues and make possible the kind of rational debate that constitute genuine controversy. Certainly the idea of justice is one that needs clarification and the multitude of differing opinions thereof set into some semblance of order. The Institute's research and efforts resulted in the construction of a notion concerning justice approximating the dialectical ideal of how a true controversy should appear. The result of this study of philosophy is a wonderful little book, *The Idea of Justice*, written by Dr. Otto Bird, then professor at Notre Dame University.

2. BIRD'S NOTION OF JUSTICE

The Common Subject of the Controversy

The purpose of Bird's book is to provide a clear and simple map of the entire controversy concerning justice as a whole and which locates the basic position that men have taken about the nature of justice. This provides what Bird identifies as a dialectical clarification of the subject of justice. (Bird, 6) His purpose in analyzing the various theories is to show what the controversy is about, what its main issues are, and where the theories agree and disagree. The only differences taken into account among the nearly infinite theories are those that give rise to serious and fundamental disagreement and that isolate and locate the few major and basic positions regarding the nature of justice. If one is to postulate a dialectical clarification of the idea of justice, there must first be a common subject of controversy. For this purpose, he went straight to the original source —*The Republic* of Plato. As a result of his examination of Plato's discussions about justice, Bird discovered four characteristics that he (Bird) felt identified the commonality of justice:

- Telling the truth and rendering up what we have received (331c);
- Rendering to each his due (331e);
- Complying with the interests of the stronger, that is, of the ruling class as it is expressed in law (339a);³

² The Institute published several volumes in its "CONCEPTS IN WESTERN THOUGHT SERIES." Mortimer J. Adler, General Editor. Other titles include *The Idea of Love*, *The Idea of Happiness*, *The Idea of Progress*, and a two-volume study entitled *The Idea of Freedom*.

³ This statement was made by Thrasymachus, a Sophist and contemporary of Socrates. In the *Republic* Thrasymachus is represented as a foil to Socrates, arguing that justice is nothing other than the advantage of the stronger, that is, of the ruling class as it is expressed in law. As a Sophist, Thrasymachus is generally thought of as a relativist but has been also claimed by nihilists, ethical egoists, and realists. Since Bird is not doing philosophy and is only taking the basic philosophical ideas about justice as a dialectical bystander to provide a

- Minding one's own business both in external relations with others and in the internal ordering of the soul (334a; 443d).
(Bird, 10)

These characteristics serve to identify justice as a common subject of controversy. The middle two (331e and 339a) represent perennial claimants as the best and most adequate definition of justice

Bird's Common Notes of the Controversy

According to Bird, all four of the above characteristics share certain common assumptions about the meaning of justice; and all conceive justice as having certain characteristics as a term or concept. These characteristics, A, B, and C below, serve to make known the subject; and they identify the three characteristics that constitute what Bird calls the common notes of the controversy. (Bird, 10) Bird's three separate theories of justice, the Positive Law, the Natural Right, and the Social Good Theories, will be developed below.

The three common notes are:

- A. That justice is a social norm—in that justice is a directive for guiding men in their actions.
- B. That justice is approbative—in the sense that judging an action to be just manifests approval of that action.
- C. That justice is obligatory—in that judging a course of action entails that a person in a like situation ought to do the same thing.

Justice Is a Social Norm

All of the four characteristics in *The Republic*, tell us that the relation in question is a social relationship among men. The first three—telling the truth, rendering to another what is due, and obeying the law—are obviously all actions involving other men. The fourth definition, that of Plato, seems to make justice primarily a quality of the individual soul and appears to be a concept related to an individual rather than a social concept. Bird argues that the definition in terms of the individual is more a matter of emphasis and a result of Plato's approach and analogical method than a denial that justice is primarily a social norm. *The Republic* first seeks justice in the state and only thereafter does it search for justice in the individual, and Socrates does not bring forth his own definition until he is pressed to show that justice is intrinsically good. by the effects it has on its own possessors (367e). Socrates himself maintains that doing injustice is worse than suffering it, and he may be defining justice as the internal ordering of the soul simply because of his desire to show how doing injustice harms the individual as well as society as a whole.

Justice is Approbative

All agree that justice is a concept that is used for evaluating men and their actions. In Bird's Positive Law Theory, a just man is one who merely follows the law in that law is subjective, and any justice apart from legality is only a manifestation of peer approval.

simple and clear map of the controversy as a whole, he takes Socrates search for justice as a search for a definition (Bird, 10) and not for its philosophical content or meaning.

Bird's Natural Right Justice Theory and the Social Good Theory agree that justice has an objective basis apart from law. These two theories also maintain that law is approbative but deny that it is subjective. They posit that the statement "X is just" may be true in the eyes of the law itself, but X may also may be just in matters where there is no law.

This "objective basis apart from law" leads to the major disagreement between the theorists of the Natural Right and Social Good Justice. The Natural Right Theory posits that justice demands a natural right founded on the nature of man, and the Social Good demands that the social good provides the basis for justice apart from law.

Sidgwick summed it up nicely declaring about justice, "[it is] the quality which is ultimately desirable to realize in conduct and the social relations of men." (Sidgwick 1962, 264)

Justice is Obligatory

If one acts in a just manner, then that action does more than indicate that one is being evaluated as good and meets the approval of his society. A just action also entails that such action ought to be done by anyone in the same situation. Justice is a social norm that requires an obligation or duty on members of society. The thing to be done in a given situation is what ought to be done, and not doing that thing is to be judged unjust.

All theories of justice assert the existence of a norm of what ought to be done. Of course, not all state the grounds for that norm and why it is obligatory. Bird makes his argument by stating that not all writers explicitly set forth his norm, but his norm is assumed and taken for granted. He cites examples such as *The Republic*, Alf Ross,⁴ R. M. Hare⁵, and others. (Bird, 15)

3. BIRD'S THREE THEORIES OF JUSTICE

The Six Fundamental Issues of the Controversy

There are as many theories of justice as there are writers on the subject. All theories are not equally close or distanced from one another, but the theories do tend to gather into more or less definable groups. Bird's three notes provide a common subject of controversy upon which many authors have disagreed. They do, however, agree about the notes in that they agree that justice is approbative, obligatory, and a social norm. Bird attempted to filter out issues that may be philosophically fundamental to an author's understanding of an issue, but may not be dialectically essential. Bird admits that a few authors, Plato and Hegel being the most notorious, seem to resist taking a definite position on issues that serve to divide most others. Except for these two, and a very few others, most writers on the subject take a definite position on issues that are dialectically fundamental. Applying his three common notes to the literature, Bird constructed a series of six fundamental issues that will show a pattern of agreements and disagreements among various authors.

The position taken with respect to these issues provides the means of identifying and comparing different theories of justice. These six fundamental issues, set forth as questions, comprise Bird's taxonomic key to the vast literature. (Bird, 22)

1. Is justice the same as legality?
2. Is justice a criterion of law?
3. Is justice based on natural right?

⁴See: Ross (1959) wherein he refers to justice as a "directive" for action.

⁵ See: Hare, 1961.

4. Is justice, in any sense other than that of legality, an objective norm of human action?
5. Is justice obligatory on its own, apart from legal or social sanctions?
6. Is justice a distinct virtue?

Now we have six fundamental issues and only three notes from which we claim issues are derived. Generally the wording of an issue shows its dependence upon the note from which it derives. The first four issues bear in different ways upon justice as a norm: Is justice to be identified with positive law or with a natural right, and is justice objective? The fifth concerns the obligatory nature, or *ought*, of justice and the last not only justice's virtue but its approbative and objective concept. These relationships can be seen in the following chart:

The Fundamental Issues and How Each Relates to the Common Notes

Fundamental Issue	Justice as a Norm	Justice as an Obligation (<i>ought</i>)	Justice as Approbative, Objective and as a Virtue
1. Is justice the same as legality?	X		
2. Is justice a criterion of law?	X		
3. Is justice based on natural right?	X		
4. Is justice, in any sense other than that of legality, an objective norm of human action?	X		
5. Is justice obligatory on its own, apart from legal or social sanctions?		X	
6. Is justice a distinct virtue?			X

The Positive Law, Natural Right, and Social Good Theories of Justice

Each fundamental issue is formulated to elicit a “yes” or “no” answer that provides a dichotomous principle of classification. Some issues are interrelated so that a “yes” answer on any one will require an affirmative on others. The result of various combinations of affirmatives and negatives serve to identify the basic positions among the many theories of justice.

Bird postulates that there are only three positions that can be taken in the controversy regarding justice. One he calls the Positive Law Theory, which identifies justice with the positive law. It answers the first question in the affirmative and the remaining in the negative and by doing so, asserts that justice is the same as legality. The other two basic positions, Social Good Theory and his Natural Right Justice Theory, also posit that justice is dependent upon obeying the law but confirms that justice is a criterion of law and not the same as legality. These two positions do not agree on the third issue regarding the naturalness of justice. The Natural Right Theory is based on natural right and answers the first issue negatively and answers affirmatively on the last five. The Social Good Theory of Justice takes the negative on the first and third issues and affirmative on the remainder. The different positions taken by each theory can be seen on the following chart.

Fundamental Issue	Positive Law Theory	Natural Right Theory	Social Good Theory
1. Is justice the same as legality?	Yes	No	No
2. Is justice a criterion of law?	No	Yes	Yes
3. Is justice based on natural right?	No	Yes	No
4. Is justice, in any sense other than that of legality, an objective norm of human action?	No	Yes	Yes
5. Is justice obligatory on its own, apart from legal or social sanctions?	No	Yes	Yes
6. Is justice a distinct virtue?	No	Yes	Yes

Before we begin to discuss the differences between the three theories, it will be helpful to discuss the issues in relation to the common notes.

The Issues Regarding the Social Norm

All three theories supply a guide by which men should regulate their behavior toward one another and, therefore, agree that justice is a social norm. One can also stipulate that all of Bird's theories of justice agree that they are sometimes identical with what is legal or lawful and that one who breaks the law is in some manner unjust. When Bird discusses the "law," he emphasizes that the only law in question is the positive law, legislatively enacted, morally neutral, and agreed to by society and is the law of the land. Neither natural law nor God's law is intended or implied; whenever any mention is made of law, he refers only to positive law unless stated otherwise. Bird makes this stipulation because many theories claim that justice depends upon law but refer not to the positive law but to natural law or something higher. They then appeal to these laws as a norm not only for man's actions but also for man's positive laws. Whether or not there exists such a law is a matter of dispute about law and not about justice. He further states there is no need to raise the question of "natural law" because to use the term law in two different senses, positive and natural, would cause great confusion in analyzing the various theories of justice. (Bird, 26)

Questions about law pose fundamental issues that serve to discriminate among the various theories of justice. For instance, does it make sense to raise questions of justice and injustice in matters where there is no law and there should not be any law? Can law be just or unjust? In other words, is justice a criterion of law? These questions yielded the first two fundamental issues: "Is justice the same as legality?" and "Is justice a criterion of positive law?" The positive law cannot be both. If one argues that positive law is determinative of justice, then one cannot hold justice to be a criterion of law. If one does, then one is arguing that positive law is its own criterion, and that diminishes the argument to the ridiculous statement – "a law is a law." A criterion and that which it measures must logically belong to different orders. Therefore, one must be discussing two different senses of law. These senses of law are the positive and natural law.

In considering the above questions, it becomes clear that what has been an issue regarding law divides the theories of justice in two camps—those who maintain that justice is fundamentally the same as legality or lawfulness and those who maintain justice is something more. The first camp maintains that acting justly is acting in conformity to the law; and that law, as a standard or norm of justice, cannot be just or unjust. The second camp maintains

that there are areas outside the confines of law where it makes sense to speak of justice and injustice. Since justice can be something outside the law, then law itself can be measured by justice; and, therefore, justice is a criterion of the law.

No one disagrees that questions of justice may concern matters of conventional agreement among members of a society about such things as how society will treat them in their commercial endeavors and how one is to be fairly treated in one's common life. Disagreements do arise when one asks whether justice can be something more than conventional: Is justice more than leading a common life in organized society—has it a natural basis apart from a conventional agreement? This brings us to Bird's third fundamental issue: Is justice based on natural right? This issue raises the question of whether justice as a social norm has a natural basis. An affirmative answer to this question identifies the Natural Right Theory of Justice.

Thus far we have identified three theories of justice: the Positive Law Theory, the Social Good Theory, and the Natural Right Theory. Bird argues that one can yield different cuts among his theories of justice. On the issue regarding legality, Bird posited that the position be summarized in the following proposition:

- (1) The laws made by a state or government are the only directions of conduct applying to men in society that establish a norm of justice. (Bird, 29)

An affirmation of this proposition is the note that identifies the Positive Law Theory of Justice. A denial of this proposition identifies both the Social Good and Natural Right Theories.

- (2) The rights of man and rules of justice based on them are conferred by society and are exclusively the result of man's efforts to achieve a viable and good life. (Bird, 29)

An affirmative response here, which is a denial of natural right, is shared by both the Positive Law and Social Good Theories of Justice. A denial sets forth the Natural Right position which when stated affirmatively lays claim to the proposition that natural right is the basis for justice. One must remember here that an author using the term "natural" or "natural right" in a theory of justice does not necessarily identify that author as one who is an adherent to the Natural Right Theory. Hobbes, whom Bird contends subscribes to the Positive Law Theory, talks of natural laws; and Hume speaks of natural justice, yet he is an adherent to the Social Good Theory. However, the denial of natural right or that nature has anything to do with justice does identify a non-natural right author.

The Issue Regarding Approbativeness

All of Bird's theories admit as a common datum that one who is just garners approval. The Positive Law Theory differs from the other two in that it separates approbative. To declare X as "just" indicates one's approval of X. The theories differ not in that they confirm X as just but in how they define it. In the Positive Law Theory, calling X just merely means that X is following the law. It says nothing further about X except that one only individually approves of X's action. It differs from the other two theories in that it separates the approbative nature of justice from its normative character. (Bird, 30-31)

The other two theories, the Social Good and Natural Right Theories, admit that justice is approbative, but deny that it is only subjective. For them to hold that "X is just" is a

judgment that one cannot only make about law itself but also that justice involves matters other than law. In addition to manifesting the speaker's attitude, it also makes an objective assertion about X. The split between these two arises over the issue of objectivity. One finds that the social good is the basis for objectivity, and the other finds objectivity in the natural right founded on the nature of man. (Bird, 30)

The issue of objectivity, seen in fundamental issue four above, serves to show the disagreements among the three theories concerning the approbative nature of justice. In the case of justice as a social norm, all theories agree that justice is both approbative and a social norm. They, however, do not agree about the impact of those common data and how those common data are related together to account for justice.

The Issues Regarding Obligatoriness

All the theories agree that one ought to do the right thing and refrain from doing anything unjust. One ought to be just. The reason why one ought to be just elicits different answers from each theory. The Natural Right Theory imposes that one ought to be just merely because it is the right thing to do. Whether or not society imposes sanctions to guarantee that justice is done is of no concern. The *ought* of justice has within itself an unconditional moral obligation.

The other two theories are somewhat more complex as each reaches beyond justice itself to explain the duty imposed. Moreover, to determine this *ought*, Bird proposes that one must distinguish three different kinds of hypothetical *oughts* to distinguish their answer.

For this purpose, he sets forth what he identifies as the penal, the approbative, and the teleological *ought*. All are hypothetical in that they can take the form of a conditional statement, such as: "You ought to do X if you want to avoid ____." Then according to the evil to be avoided—penal, disapproval, or failure—one can fill in the blank and determine the hypothetical *ought* to be applied. (Bird, 32)

The Positive Law Theory seems to require the penal or the approbative *ought*, and the Social Good requires the teleological. The Positive Law answer, depending on whether justice is used in an objective or subjective sense, has two parts. In the objective sense, justice is identified with conformity to the law one ought to obey to avoid punishment. If used subjectively, it rests on the subjective judgment of others and the *ought* is, therefore, approbative in that one ought to be just because that is what garners approval.

The answer for the Social Good Theory is even less clear since some of its answers come close to the Natural Right answer and others approach the Positive Law Theory. Where it differs from the others is that it requires that the social good provide the ultimate sanction. To achieve justice then, one must effectuate the social good as an end. Justice is looked upon as a means to an end, the social good, and therefore its *ought* is teleological.

Bird next proceeds to examine what is sometimes called the "naturalistic fallacy" which, for his purposes, he defines as "the fallacy of deriving an *ought* statement from premises consisting entirely of *is* statements." (Bird, 32) Thus, the mere fact that a course of action *is* socially good in some way does not impose a duty. For that, one must know what social good *ought* to be done. The social good authors should be concerned about this fallacy because it is clear from their position regarding the *ought* of justice: One ought to be just because of the common good. Why? If one ought to do the social good only to avoid the sanctions, then we find ourselves back into the Positive Law Theory, which all social good authors deny. If one maintains that one ought to maintain the social good as a moral obligation and a duty on its own (and, therefore, it contains within itself its own moral force),

we find ourselves back into the Natural Right position in opposition to the Positive Law position.

The Issue Regarding Virtue

We have accounted for all three of Bird's common notes regarding justice as well as the first five of the six fundamental issues. We still have to examine the last fundamental issue (is justice a distinct virtue) which seems to dangle in space without any relevance to the others.

Many Natural Right authors elaborate their theory of justice as part of a larger theory of virtue. Justice is presented primarily as a social virtue, which establishes a norm for men in their association among one another. It is approved and, therefore, should be obeyed because its good is an intrinsic good or a virtuous good, a *bonum honestum*.

Only the Natural Right Theory links itself so closely to virtue; however, it will be constructive to advance the issue concerning virtue to the other two theories. To do so will serve to show the character a just man possesses, as well as what kind of good justice is conceived to be.

In the Positive Law Theory, nothing more is demanded than obedience to the law since justice itself is identified with legality. Therefore, obedience to the law is virtuous without further requirements from the actor. The other basic theories do not identify justice with legality and claim that the virtue of justice requires something more than mere obedience.

Unlike the proponents of the other two theories, the Social Good writers usually discuss justice in connection with benevolence. They do hold that the two are distinct; however, they tend to assimilate them with each other since both are social virtues and all have the common good or social utility as their end.

The Natural Right authors when discussing justice along with other virtues do not have this difficulty. When they discuss justice and virtues, they generally use "virtues" in connection with the cardinal virtues and not benevolence. The Natural Right Theory does have some difficulty in discussing justice as a virtue. The problem appears in an ambiguity of "right" as the object of justice and yet is also coextensive with the moral good resulting in the tendency to identify justice with the whole of virtue. Bird finds this tendency most evident in Plato's *The Republic* where often it is the moral good, and not a particular form of it, that is the main concern.

Since justice as a virtue falls within a different context in each theory, then we have the issue of virtue as dialectically fundamental and, therefore, it can serve to distinguish one theory from another.

Bird's Plan of Analysis

Bird next sets forth his twin aims which are (1) to present each theory so that it can be judged for itself on its own and in such a way that its agreements and disagreements with the others may be distinguished and identified and (2) to show that each theory has been held, actually occurs in the literature, and is not a mere invention of his own. (Bird 39)

To accomplish this, he will construct a model or paradigm of each basic theory which will be a dialectical construction, and not an exposition of any particular writer on the subject. He will then rely most heavily on the authors' writings within his paradigm to show that his position has actually been taken in the literature. He hopes to show how their work can be read and reveal their constancy to his dialectical theory.

The basic differences regarding the nature of justice are revealed in the fundamental issues; and by using them, we can determine the basic positions regarding justice. Adherents to one and the same theory do not necessarily agree on all points, and a position on such a disputed point may be shared in common by adherents of an otherwise different theory. Bird gives the example that a Positive Law writer may agree on a given point with a Social Good author and oppose other proponents of each of these theories.

Thus, besides the fundamental issues that determine the basic positions, there are also certain subsidiary issues on which writers divide into different groups. (Bird, 42) He keeps these subsidiary issues to a minimum, and major consideration is given to the position taken by each author on a fundamental issue.

Bird then develops a set of principal propositions that set forth the dialectical core of each of his three theories of justice.

4. BIRD'S PRINCIPAL PROPOSITIONS FOR EACH THEORY OF JUSTICE

The Positive Law Theory of Justice

In this subsection, Bird argues his position that he has established a dialectically fundamental theory for his Positive Law Theory of Justice. I will examine his arguments only briefly.

Bird sets out his principal propositions identifying the Positive Law Theory of Justice as follows:

- (1) Justice and injustice are dependent on positive law.
- (2) Law itself is independent of justice.
- (3) Justice consists in conformity to positive law.
- (4) Justice, apart from legality, is merely a subjective norm.
- (5) Justice is obligatory ultimately only because of legal and political sanctions.
- (6) The virtue of justice is identical with obedience. (Bird, 78)

He does admit that no author explicitly asserts all six of his propositions and relies most substantially upon Hobbes as his standard bearer, insisting that he comes the closest by agreeing to at least the first four of his propositions. Because Hobbes does not consider the question of what is meant when one attributes justice or injustice to laws, he has not developed a theory that fully embraces Bird's last two propositions. One must account for the fact that justice is used in other senses and not merely to identify law with legality. Bird uses the arguments of Hans Kelsen and Alf Ross to further that end, in that they not only clearly take the Positive Law position, but they further acknowledge that justice in any other sense must be a subjective expression of attitude.

Bird's Positive Law Theory of Justice states that the positive law can explain all the important uses of the term "justice." To substantiate this claim, Bird distinguishes three what he calls "moments."

First, that justice depends upon law and is posterior to it; second, that law itself, being prior to justice, cannot be judged on terms of justice; and, third, that law provides the whole measure of justice so that justice consists of nothing but conformity to law. (Bird, 46)

In defense of his first moment, Bird relies exclusively on Hobbes' *Leviathan*⁶ wherein Hobbes argues that there can be no justice without the establishment of a commonwealth that can use its coercive powers to compel men equally to perform their covenants—hence, justice. Hobbes states:

. . . to consider the contrariety of mens Opinions, and Manners in generall. It is they say, impossible to entertain a constant Civill Amity with all those, with whom the Businesse of the world constrains us to converse: Which Businesse, consisteth almost in nothing else but a perpetuall contention for Honor, Riches, and Authority. (Hobbes, 1904, 519)

His second moment again relies on Hobbes (no law can be unjust) but he also relies on Kelsen (justice means legality). (Bird, 50)⁷ In his third moment, wherein he states that law provides the whole measure of justice, he further uses the arguments by Hobbes, Austin, and Kelsen.

Bird lists the following writers that he classifies as holding the Positive Law Theory of Justice, in that their own theories tend to lead toward the position characterized by the six identifying propositions given above even though they may not assert them explicitly.

⁶ Leviathan—the word itself conjures up notions of things not only large but somewhat frightful. That is exactly what Hobbes, at age 63, hatched when he published his *magnum opus*—*Leviathan*. Hobbes, in setting forth his theory in *Leviathan*, appeared to make several basic assumptions which are necessary to the bedrock of his political philosophy. These were his insistence upon the priority of the individual to the State, the concept that the individual is antisocial, the relationship between the state of nature and the State is an antithesis, and lastly the idea that the State itself as leviathan. Hobbes did not intend for his description of man in the state of nature to be a complete picture of human nature nor was he intending a simple defense of absolute monarchy. He was not positing a state where each person is pursuing their own ambition and there is no honor. (Hobbes, 1904, ch. X.)

Hobbes believed that people, in so far as they are rational, desire to live out their lives in peace and security. To do this, they must gather together in groups and form societies such as cities for their mutual protection. When they do this, there will always be some who cannot be trusted. In a state of nature every man ought to be governed by his own reason. Reason dictates that they live in peace, but it also allows men to use any means which they believe will be necessary to achieve that end. Men left to their own inclinations, and having a disposition toward selfishness, would subject each other to the appalling state of nature, a place where life was "solitary, poor, nasty, brutish, and short"; and as a result, there would be incessant war among individuals. Hobbes's idea was that man needed a social contract to prevent such a society and to guide one's actions. To accomplish these ends, he realized that contracts between individuals were inoperable in that there was no way to insure such contracts would be performed as there was no enforcement mechanism. The only solution, as Hobbes saw it, was that there must be an enforceable social contract and that necessitated the creation of a "sovereignty by institution." The sovereign whether it be a monarch or a parliament would be obligated to insure always the happiness and safety of the people. In Hobbes's *Leviathan*, men are to be held to the laws instituted by the sovereign, and the sovereign is to be responsible for the enforcement of its laws.

Hobbes further believed that long term obedience to the sovereign was the only way to guarantee peace, even if some disobedient acts would have been more beneficial during the short term. In Hobbes's view, only injustice can be properly punished. He does not deny that sovereigns can be immoral, only that they cannot be punished for it. If they could, then any immoral act, actual or supposed, could be used as a pretext for punishing the sovereign and would result in civil war. Therefore, he separates justice and morality—what is just and unjust is decided by the laws of the state and what is moral or not moral is a wider concept and is determined by man's reason as to what leads to peace and prosperity. To let morality determined by the reason of each individual become the legal standard rather than rely on the reason of sovereign can only lead to strife, discord, and war—which is, of course, immoral. What we have, from Hobbes, is a framework upon which Bird can grow his Positive Law Justice Theory.

⁷ See: Kelson, 1961, p. 14.

Amos	Gray	Holland	Paton
Austin	Hearn	Holmes	Robertson
Ayer	Hegel*	Ihering*	Roguin
Bobbio	Hobbes	Kelsen	Alf Ross
Clark	Hohfeld	Markaby	Salmond
			Spinoza

*One of the dialectically difficult authors and therefore subject to questions of classification. They tend to resist classification and cannot readily be identified exclusively within any one group, except with great qualification.

The Social Good Theory of Justice

Bird summarizes the six principal propositions identifying the Social Good Theory of Justice as follows:

- (1) Justice and injustice are not exclusively dependent on positive law.
 - (2) Justice provides a criterion for the goodness of law.
 - (3) Justice derives exclusively from society and consists ultimately in promoting the social good.
 - (4) Justice is an objective norm for human actions.
 - (5) Justice imposes a moral duty based on the social good and not merely on legal sanctions.
 - (6) Justice is a distinct virtue, disposing one to act for the social good.
- (Bird, 116)

In arguing for this position, Bird relies on several philosophers including Bentham, Blanshard, Hume, Mill, Pound, Rawls and Sidgwick. Here again he sets forth his six propositions, and authors are counted if they would support each of these six. One may be inclined to call Bird's Social Good Theory of Justice the Utilitarian Theory of Justice because of his dependence upon Bentham, Mill, and Sidgwick—all Utilitarian philosophers. However, there are some whom Bird considers as contributors to his theory who would object to the Utilitarian label. Blanshard would object since he would deny either that the social good consists of the greatest good for the greatest number or that pleasure constitutes the good desirable in and of itself. Nevertheless, he relies most heavily on Hume, Mill, and Sidgwick citing them almost exclusively. Bird uses Utilitarian philosophers as the paradigm for his thesis as they come closest to his central position of his identifying issues as a whole.

The way in which the Social Good Theory varies from the Positive Law Theory is most artfully stated by Sidgwick (1962, 265):

Still reflection shows that we do not mean by Justice merely conformity to Law. For, first, we do not always call the violators of law unjust, but only of some Laws: not, for example, duelists or gamblers. And secondly, we often judge that Law as it exists does not completely realize Justice; our notion of Justice furnishes a standard with which we compare actual laws, and pronounce them just or unjust. And, thirdly, there is a part of just conduct which lies outside the sphere even of law as it ought to be; for example, we think that a father may be just or unjust to his children in matters where the law leaves (and ought to leave) him free. (Paraphrased by Bird at p. 83)

In this theory, all laws and rights are just according to their conformity to the social good; and, therefore, the social good becomes the norm or justice.

Although it would appear to some that Rawls, in claiming that justice is natural to man,⁸ should best be categorized as an adherent to the Natural Right Theory, Bird argues otherwise. What is essential to Bird's Social Good Theory is that justice is subordinated to society in such a way that all its principles are made ultimately dependent upon society and its needs. Bird finds that Rawls's use of the social contract⁹ is enough to satisfy the Social Good criteria. (Bird, 90)

Bird also relies heavily on Sidgwick to solve his "naturalist fallacy" problem. Sidgwick did not deny that there could be several types of *ought* involved in finding that X may be just. However, to be moral it must include a manifestly moral *ought*. He finds shortcomings in both Hume and Mill in that they have failed to construct a moral *ought* in their arguments. Hume attempts to reduce the obligatoriness of justice to an approbative *ought*, social rather than merely individual in character. Mill accounts for justice's *ought* by combining a teleological and punitive *ought*. Knowing that X is for the common good does not of itself impose the duty of doing X.

Sidgwick maintains that we must also know that the common good ought to be done. Only with this ultimate intuition of the moral *ought* can the utilitarian method be made coherent and harmonious.¹⁰ (Bird, 110)

Bird admits that there is some confusion in the virtues of benevolence and justice. He argues the decisions of Hume, Sidgwick, and Mill, deciding that Mill's position is most typical of the social good premises. Mill argues that all cases of justice are also cases of expediency but not the converse. Some cases of expediency lacked the "natural feeling of resentment, moralized by being coextensive with the demands of social good." (Bird, 115) Therefore, justice for Mill is concerned with more important matters so that its claim assumes the character of absoluteness.

Bird lists the following writers as proponents of the Social Good Theory.

Baylis	Hobhouse	Mill	Rawls
Bentham	Hume	Moore	Sidgwick
Blanshard	Ihering*	Pound	Smith
Broad	Lloyd	Radbruch	Toulmin
Godwin	Melden	Rashdall	

*A dialectically difficult author

The Natural Right Theory of Justice

Bird summarizes the six principal propositions identifying the Natural Right Theory of Justice as follows:

- (1) Justice is a wider notion than law, inasmuch as questions of justice arise independent of questions of law.

⁸ See Rawls, pp. 283-284.

⁹ In discussing justice, Rawls maintains that we must view "each person as an individual sovereign" engaged in deciding with others how they are to lead a life together. *Ibid*, p. 304. (Bird, 90)

¹⁰ Sidgwick, 1962, pp. xvi -xvii.

- (2) Justice provides a criterion of law—a just law being one that is based on or not contrary to natural right.
 - (3) Justice consists in rendering to each his right or due.
 - (4) Justice is an objective norm for human action based on what is due man as a man.
 - (5) Justice imposes a moral duty to render to each his due.
 - (6) Justice is a distinct virtue, disposing one to render to each his due.
- (Bird, 160)

The Natural Right and the Social Good Theories seem to be quite similar at first glance. Of the six fundamental issues set forth by Bird, the two theories only disagree on the third issue: that justice is a natural right. These theories do, however, give a fundamentally different account of justice. One needs to start by how the word "natural" is to be understood in the name of the position. All that is required to establish an author as a proponent of the Natural Right Theory of Justice is the denial that justice is exclusively a matter of law and of the social good, conjoined with the assertion that both of these must serve the interest of man. Most importantly, however, natural right theorists must also assert the existence of natural law. Bird lists those natural law philosophers whom he feels are adherents to the theory. Among those on his long list he includes Aquinas, Aristotle, Blackstone, Burke, Jefferson, Locke, and Del Vecchio. (Bird, 121)

Bird finds a great diversity among his list of proponents finding the major split between what he calls the individualistic and the non-individualistic versions of the theory. The first version bases natural right ultimately on the nature of man as an individual and finds it useful to conceive of man existing apart from any organized political society. The other bases natural right on the social nature of man and makes no appeal to man existing as an individual in a state of nature apart from society. He identifies Locke as an individualistic theorist and Maritain as a theorist from the non-individualistic camp.

For the first time in these discussions, Bird examines the most famous definition of justice in the entire discussion; it is enshrined by Roman lawyers in the Justinian Code: "Justice is the constant and perpetual will of rendering to each his right."¹¹ (Bird, 123) Bird contends there is good reason for maintaining this definition can be rightfully claimed only by the Natural Right Theory. Both the Positive Law and the Social Good theorists would accept this definition only with the understanding that what is one's due or right is exclusively the work of the positive law or society. Therefore, the Justinian definition cannot be the theoretical foundation for these theorists as it is for the Natural Right position.

The Natural Right position holds the natural right to be the basic element in justice, underlying both positive law and the social good and, therefore, becoming the criteria for them. He cites Cicero: "Justice has its beginning in nature; then certain things become customary by reason of their utility; still later, both those that came from nature and those approved by custom were sanctioned by the fear of the law and religion."¹² (Bird, 127) The order in which Cicero places these three elements accurately shows their relative importance in the Natural Right Theory.

Bird, citing Locke, contends natural rights are sometimes understood as the rights that man obtained as individuals before they enter into a state of political society; they belong to man in a state of nature prior to civilized life. Since a right imposes an obligation that

¹¹ Digest I. 1, De Justitia et jure, 10.

¹² De Inventione, II, 53, 160.

someone else must respect and observe, it must, therefore, be an interpersonal relationship since only in a new metaphorical sense can solitary man have any rights. Although a natural right can exist only in a society of men, the right itself is possessed by a man and not because he is a citizen or is subject to a particular society. Citing Aquinas, Aristotle, Kant, and T. H. Green, Bird finds that there are significant differences whether there is only one or more than one natural right and if more than one, how many. This difference, however, is not obligatory to the argument for the classification of justice into one of Bird's three theories.

Some writers such as Aristotle and Aquinas give equality a very prominent place in their theories. Other writers such as Locke and Maritain give equity no more importance than any other natural right. Furthermore, most writers agree that justice is a wider notion of law, and questions of justice can arise independent of any question of law. This does not mean, however, that to hold that justice may be found outside the law one must deny that justice may be found most completely within the sphere where our law rules.

Bird lists the following writers as proponents of the Natural Right Theory of Justice.

Aquinas	Burke	Hart ¹³	Maritain	Rommen	Suarez
Aristotle	Burlamaqui	Hooker	Messner	D. Ross	Taparelli
Augustine	Bynkershoek	Hegel*	Montesquieu	Ryan	Del Vecchio
Blackstone	Cicero	Jefferson	Paine	St.Germain	Vitoria
Brentano	Frankena	Kant*	Plato*	Scheler	Whewell
Brown	Green	Leibniz	Pufendorf	Simon	Wilson
Brunner	Grotius	Locke	Ritchie	Stammler*	Wolff

*A dialectically difficult author

5. THE CONTROVERSY

Now we have it—Bird's notion of a dialectic theory of justice. The stated aim of Bird's exercise was to discover how a writer on justice would answer the question "What does it mean to say that X is just or unjust?" (Bird, 7) It is apparent that all the formal requirements of controversy are present: an identifiable subject of discussion, a set of questions that elicit answers from major writers on the subject, three theories on the subject of justice that take positions that are raised by those questions and, in terms of the patterns of agreements and disagreements they take, constitute a three-sided controversy about justice.¹⁴ Admittedly my presentation of Bird's work is exiguous; and although Bird goes into much more detail arguing his various positions and theories, I have given enough to press on with my analysis.

In the city where I live, there is a statute generally known as the "Jay Walking Law." The stated purpose of this law is pedestrian safety and to enhance the orderly flow of traffic. This law prohibits anyone from crossing a public street between two intersections (outside of a crosswalk) where there is a traffic control device (light or stop sign) located at the street intersection at each end of the block. The statute provides for a fine upon violation. If one were to apply Bird's Positive Law Theory of Justice, X would be judged unjust if X were to

¹³ Bird includes Hart on this list based on Hart's early writings. See Hart, 1955, p. 175.

¹⁴ Mortimer J. Adler at Bird xi.

cross the street in violation of the law. So be it! What if one illegally crossed at a time when there was no traffic so there would be no danger to any person nor any disruption to the flow of traffic? X would still be unjust by Bird's Positive Law Justice Theory. If X violated the law for some social good superior to that contemplated by the statute, such as going to help someone who had fallen down on the other side of the street, then one could argue that he be judged just.

One can make all of the old arguments with the same result—not coming to a consensus in determining an act just or unjust. I do not argue that Bird's method of systematizing the literature is without value, for it is most certainly meritorious. With Bird's analysis, we can now put each argument into its own "dialectic camp" and assign it a name which is a step forward, even if we cannot conclusively agree to a precise definition of the terms "just" or "unjust" in any given factual situation.

II

BIRD'S POSITIVE LAW THEORY OF JUSTICE AND THE POSITIVE LAW

1. INTRODUCTION

In this section I will discuss Bird's Positive Law Theory of Justice and the Positive Law Theory and their relationship to one another. It is important to remember that Bird's Positive Law Theory of Justice is not a theory of justice but it is merely a dialectical construction so that one may have a concise understanding of the issues to facilitate reasonable argument about justice. To use Bird's positive law dialectical construct in an argument (either for or against) one must comprehend Bird's understanding of Positive Law Theory as he uses it in constructing his dialectical model.

Positive Law Theory is one of two broad philosophical theories about law and goes to the question: what is law? This general question about law assumes that law is a social phenomenon with characteristics that can be discerned through philosophical analysis. The law, being sociopolitical, is one of the most complex and intricate aspects of human society. According to Brian Bix, legal theory, narrowly understood, is a theory offered to explain the nature of law. (Bix 2006b, 4 and n.7)

Philosophical questions arise when one raises a question about either normative issues or issues of conceptual analysis. (Murphy and Coleman, 1) Within philosophical jurisprudence, a substantial body of thought focuses on legal theory and the relationship between that concept and the concept of morality or justice. The primary task of the philosopher is analytical or conceptual, even when the initial concern is with normative matters. Normative discourse is valuable only when it is analytically clear and rationally structured. Any legal philosophy whose norms are poorly crafted and applied, when it is anything but rational, is highly dangerous, as we shall see in our discussion of Weimar constitutionalism.

Modern jurisprudence generally divides the concept of legal theory into two broad categories—the Positive Law and the Natural Law. In its simplest form, the Positive Law Theory posits that there should be no connection between law and morality. The second concept, the Natural Law Theory, is located at the other end of the legal spectrum in that it holds there always is some nexus between law and morality.

John Austin, the father of the school of analytical jurisprudence, is also considered by most theorists to be the father of legal positivism. I will also examine authors such as Hans Kelsen and his Pure Law Theory as well as more modern theorists. These authors all relate

their philosophical writings in the areas of law and justice to the Positive Law Theory. They agree that justice is associated with law, and justice used in any other sense must only be a subjective expression of attitude. In simple terms, Austin, et al., set forth the position that Positive Law could be summarized as follows:

The existence of law is one thing;¹⁵ its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or not be comfortable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.” (Bix 1996, 36)¹⁶

Modern positive law consists of several sub series and theorists (Bix 2006a, *passim*) of which I will visit only a few. The Natural Law Theory is the oldest and more complex of the two basic theories of law. It has a wealth of subclasses and species making any attempt to classify it difficult.

As Yves R. Simon so felicitously stated:

Let us try to explain, no matter how briefly, why the subject of natural law is so difficult. There is no easy subject in philosophy, but there are circumstances which make a subject particularly hard to organize and expound. The subject with which we are concerned is difficult because it is engaged in an overwhelming diversity of doctrinal contexts and of historical accidents. It is doubtful that this double diversity, doctrinal and historical, can so be mastered as to make possible a completely orderly exposition of the subject of natural law. (Simon, 5)

Unfortunately, Simon may be correct. It is not the purpose of this paper to discuss the natural law except as has been done above in my analysis of Bird’s theory.

2. THE POSITIVE LAW AND THE POSITIVE LAW THEORY OF JUSTICE

John Austin may fairly be considered as the father of a view of law now known as legal positivism. Prior to Austin, most legal theorists treated “law” as a branch of political or moral theory. They considered such questions as: “How should a state govern?” “Why should a person obey a government?” and often “Is the government even legitimate?” Austin unhappy with what he considered the sloppy natural law thinking of William Blackstone (Bix 2006a, 38) sought to formulate a more “scientific” approach to law. He thought that it would be beneficial and valuable to have a theory of law, which is completely morally neutral. Joseph Raz, in his summation of Austin’s theory, stated: “Austin, it will be remembered, postulated that ‘a legal system exists if, and only if, (1) its supreme legislator is habitually obeyed; (2) its supreme legislator does not habitually obey anyone; (3) its supreme

¹⁵ Here Austin is only concerned with the scientific purity of his basic normative theory, not messy things like statutory interpretation or legislative error. He felt at that time one must not confuse “law” with its application.

¹⁶ From John Austin, 1970.

legislator is superior to the subjects of every one of his laws relative to the sanction of that law.”¹⁷ (Raz 1980, 16)

The concept was further developed by Hans Kelsen and his idea of a single basic norm. Kelsen, who began his career as a legal theorist in the early 20th century, was concerned that the traditional legal theories were political ideology or moralizing and an attempt to reduce the law to a social or natural science. He proposed a “pure theory of law” where methodological reductionism would be avoided because a legal theory should be separated from moral and natural concerns. Kelsen understood the law as a system of norms, which are *ought* statements prescribing certain manners of conduct. His theory is based on the separation between *is* and *ought* (*Sein und Sollen*)—its foundation is the epistemological dualism between facts and values, statements and norms, and cognition and volition. The statement “If X, then Y *is*” is of a different logic than “If X, then Y *should be*.”

The first set of statements explained the world in terms of causal relations, while the second explicated the world of norms. He assumed a basic norm which does not lie at the basis of just any normative order but is a norm that is effective as a whole. There is a strict separation between legal science, prescriptive legal norms, descriptive normative propositions, and Kelsen’s Positive Law Theory. (Jablonek, 1997, 2000. Passim)

Only a competent authority can create valid norms and such competence can only come from a higher norm. This search for validity, unlike the search for cause and effect, cannot go on forever. It must end with a norm which is the last and highest and, therefore, presupposed. It must be presupposed because it cannot be created by an authority whose authority rests on a still higher norm. Kelsen named this highest norm the “basic norm,” and all norms whose validity can be traced back to the basic norm constitute a normative order. A legal norm’s validity cannot be content based, no matter how unjust it may seem, because it was created by the presupposed basic norm.

The basic norm is the presupposed starting point of a legal order—the creation of a positive law system. If one were to look at a modern state wherein laws (general norms) are promulgated by a legislature which is delegated authority by a constitution (the basic norm) to create such norms, then such general norms would be perfectly “legal” no matter their content so long as they are allowed by the basic norm. Kelsen saw his basic norm as the presupposed starting point of the procedure of positive law creation. (Kelsen 1967, 193-214)

Raz gave an example of the genesis of the basic norm quoting Kelsen from his (Kelsen’s) *The General Theory of Law and State*. Quote from Raz 1979, 125.

To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes. If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind

¹⁷ Kelsen omits the last condition. While Austin’s initial theory required obedience to the supreme legislator, Kelsen’s theory required obedience to the law. Austin’s theory, by making the existence of a system dependent upon the obedience to its legislator and denying that laws apply to the supreme legislator, requires one to assume that every change of supreme legislators required a new legal system. Kelsen, in requiring obedience to law and not the legislator as well as requiring sanctions, corrected that theoretical error, thereby improving Austin’s system.

of assembly. . . . It is postulated that one ought to behave as the individual, or the individuals, who laid down the constitution have ordained. This is the basic norm of the legal order under consideration.

Kelson's denial of a natural right was explicit. His Positive Law Theory expressly denies the ancient and common definition of justice rendering each his own—*suum cuique*. Kelson refers to the *suum cuique* as an "empty formula" as it does not answer the question as to what is everybody's own. (Bird, 57) If one were to claim a natural right, then one is claiming a right that is not the creation of the positive law. Claiming a natural right is claiming that one has something by virtue of being a person, independent of being a member of a state and being subject to its laws.

Bird asks the question "if justice, objectively, means nothing but legality, is there any real need for such terms as "justice" and its cognates? Could these words be eliminated entirely and their place taken, without loss, by "legality" and its cognates?" Bird says of course not— that "just" means more than "legal" as can be seen from the way the words are employed in quite ordinary usage. (Bird, 62) One of the common notes of justice, as set forth above, is its approbative character. By using the term "just," one manifests an attitude toward that object to which it is being applied in that one considers that object to be good and something that we would approve of. This is obviously more than can be said of the term "legal." Bird also claims that the two (law and justice) may be disjoined and used separately, and he feels this possibly furnishes the Positive Law with an exclamation of what people mean when they assert that law itself is either just or unjust. "By this, they can only mean that they approve or disapprove of the law, since, according to the theory, justice consists in legality, and it is senseless to speak of the legality of a law." (Byrd, 64)

Alf Ross, a disciple of Kelson's, states:

A person who maintains that a certain rule or order— for example, a system of taxation—is unjust, does not indicate any discernible quality in that order; he does not provide any reason for his attitude, but merely gives it an emotional expression. A says "I am against his rule because it is unjust." What he should say is: "this rule is unjust because I oppose it." To invoke justice is the same thing as banging on a table: an emotional expression which turns one's demand into a absolute postulate. (Bird, 64)¹⁸

The Positive Law theory provides a rule for the judge, but not for the legislator who makes the rule. The judge is under the law and the legislator is not, at least while making it. When one questions whether a law has been properly applied or not, one appeals to a judge sitting in a "Court of Justice." According to the Positive Law Theory justice does provide a criterion for the judge's activity.

Again quoting Ross:

The words 'just' and 'unjust'... makes sense when applied to characterize the decision that is made by the judge—or any other persons dealing with the application of a given set of rules. To say that the decision is just means that

¹⁸ See Ross, p. 274.

it has been made in regular fashion, that is, in conformity with the rules or system of rules in force. (Bird, 53)¹⁹

Bird has identified and distinguished two fundamental characteristics of justice as applied to the positive law theory. (1) As referring to positive law, justice implies an objective social norm—a relational idea implying the existence of many individuals involved in some kind of common action. (2) When used in the approbative sense and implying that an action which conforms to the norm is good, then justice is subjective and relative to the individual. That is, justice is divorced from legality and loses all descriptive meaning. The Positive Law Theory is distinguished from the other basic legal theories by its tendency to isolate these two elements and provide them with distinct explanations.

This is about as far as Bird goes in his analysis of the Positive Law.²⁰ He did not argue with what we consider the modern positivists.²¹ He postulated that his Positive Law Theory of Justice consisted of two claims. The first is that justice as an objective norm is identical with legality, and second that justice in any other sense is not objectively meaningful. The second point involves a theory of normative and value terms. Justice is commonly held to be a complex idea because of the compounding of the subjective and objective use of these terms. Bird's Positive Law Theory holds that justice in the objective sense (which he deems most important) is to consist simply in legality. (Bird, 164)

3. THE WEIMAR CONSTITUTION AND THE PRUSSIA CASE

The Weimar Constitution—A Positive Law Basic Norm

I will now discuss the Weimar Constitution—the basic norm for the legal system in the German Weimar Republic. The predominate legal theory in Germany at that time was the Positive Law Theory. Upon the failure of the Republic and the usurping of power by the National Socialist German Workers Party (NSDAP) resulting in the Nazi horrors, the positive law came under disrepute. I will then discuss the predominate modern German legal philosophies resulting from the Weimar failure—the Radbruch formula and Alexy's correctness thesis—and discuss them in relation to Bird's Positive Law Theory of Justice and Kelsen's Positive Law Theory.

Peter Caldwell in his comprehensive work on constitutional law and Weimar constitutionalism discusses the positivist tradition in the German Republic and asserts that three distinct concepts are to be included in that positivist theory:

1. *Sociological positivism* identifies law with the social practices of a community—the norms that are objectively enforced by either state officials or the people in pursuit of their everyday activity. Legal scholars determine these norms by a sociological standard.

2. *Statist positivism* identifies these norms as positivized by a legal authority corresponding to the ideas of H. L. A. Hart²² and others in the analytical tradition who thought that common law should be part of the system if the normative rules for recognizing law so allowed. Hart's concept addresses law as that which is based on a valid recognizable

¹⁹ *Ibid.*

²⁰ See: Spaak, T. for an excellent discussion of normativity of law and the nature of the legal *ought*.

²¹ Kelsen's writings and ideas changed over the six decades of a very productive career. The discussion here concentrates on Kelsen's most productive works; however, it does not consider his works after 1967 as Bird's work is prior to them.

²² See Bix, 1996, Ch. 5.

norm within a legal system and takes the “internal” point of view in that it looks at what the legal actor counts as a legal norm. (Caldwell 1997, 3)

3. *Statutory positivism* as it was associated with state law in the German Republic prior to the mid 1920’s was closest to the *statist* school but was qualitatively quite different. Paul Laband, the central figure of this school, thought that a constitution should be specifically preserved; and although Germany had a new constitution in 1919 establishing a new democratic republic, he felt the old 1871 constitution (a constitutional monarchy) and statutes emanating from it comprised the legal system. He also refused to allow a constitution any special authority and posited that the state as a “willing sovereign” produced both the statutory and constitutional law which, of course, reduced the constitution to a no higher status than those statutes. LaBand died in 1918; and between 1924 and 1929, a new culture of constitutionalism and jurisprudence emerged with an emphasis on the connection between political and legal philosophy.

The major players in these debates are (1) Hans Kelsen and his Pure Theory of Law, (2) Carl Schmitt and his communitarian existentialism who asserts that there is a link between legality and legitimacy such that the legitimate will always assert itself over the legal, and (3) Hermann Heller who argues the same legal/legitimacy link but argues that law provides a constraint on political power. (Dyzenhaus, xi)

In mid-August 1919 the German people, for the first time ever, enjoyed a constitution based on the principle of popular sovereignty. According to Article 1 of the new Weimar Constitution, the state's power emanated from the people; but the constitution also contained Article 48, which gave extraordinary powers to the president.²³

Article 48 was as follows:

If a *Land*²⁴ does not fulfill [sic] the duties imposed on it by the Constitution of the Reich or by a law of the Reich, the President can ensure that these duties are performed with the help of armed force.

If the public safety and order of the German Reich is seriously disturbed or endangered, the President may take the measures necessary for the restoration of public safety and order, and may intervene if necessary with the help of armed force. To this end he may temporarily revoke in whole or in part the fundamental rights contained in Articles 114 [*inviolability of personal liberty*], 115 [*inviolability of the home*], 117 [*privacy of mail, telegraph, and telephone*], 118 [*freedom of opinion and press*], 123 [*freedom of assembly*], 124 [*freedom of association*], and 153 [*inviolability of private property*]. (Italics are my included material.)

The President must inform the Reichstag immediately of all measures taken in terms of paragraphs 1 and 2. On demand of the Reichstag, the measures are revoked. In a case of immediate danger [*Bei Gefahr im Verzuge*], a state government may for its territory take interim measures of the kind set out in

²³An interesting analysis of the early German philosophical views and the related theoretical constitutional law arguments leading to the 1919 constitution are found in Rupert Emerson’s *State and Sovereignty in Modern Germany*. See: Works Cited.

²⁴During the German Empire, the governments of particular provinces were called states (*Staaten*) as in the United States. The Weimar Constitution explicitly referred to these entities as *Länder* or “*Lands*,” to emphasize the states’ subordinate place in the constitutional system. (Caldwell, xi)

paragraph 2. These measures must be revoked on demand of the President or the Reichstag.

A law of the Reichstag will determine details [of appropriate action in terms of the Article]. (Dyzenhaus, 33)

Both the right and left factions in the government had reservations about the legitimacy of the new constitution, and soon the situation was sliding into near civil war. As the country experienced hyperinflation and near economic collapse, the Reichstag, citing Article 48, passed enabling laws granting the president extraordinary powers to control both budgetary and legislative functions. The new president responded by extensive use of the emergency powers granted by Article 48, and by 1924 the country had returned to political stability.

The Prussia Case

In 1932 the president of the German Federal Republic, citing Article 48, intervened in the political processes of Prussia. He issued a decree concerning the “restoration of public safety and order in the *Land* of Prussia”; and using this decree, he installed the Reich Chancellor as the Commissioner of Prussia. Prussia, realizing it had no military might to resist, took the matter to the *Staatsgerichtshof* as set forth in the constitution to settle matters between a *Länder* and the central government.²⁵ This resulted in a state trial on the constitutional issues presented—most specifically the presidential powers pursuant to Article 48. The most interesting to us here, except of course the trials outcome, is the array of arguments concerning various legal philosophies and their impact on the concept of constitutional democracy and eventually how the outcome affected the legality of the Nazi legal system.

The foremost legal theorists in Germany argued the case—Hans Kelsen²⁶ with his pure theory of law, the most predominate theorist Carl Schmitt,²⁷ and the least known outside

²⁵ Alongside the *Reichsgericht* (high courts) Article 19 of the Weimar Constitution created a specially organized State Court (*Staatsgerichtshof*), which was intended to have a different function in the judicial system. While the *Reichsgericht* decided "ordinary" cases of civil and criminal law, the State Court was created to decide matters of constitutional law. Its function was to address "political" issues and to review decisions by the highest state organs related to the points of friction in the constitutional system. (Caldwell, 148) The president was charged with executing its judgments.

²⁶ Kelsen, who was at the time dean of the law faculty at the University of Cologne, did not participate in the proceedings before the court. He did, however, write a detailed analysis of the judgment before it was published which followed his prior acidulant arguments against Schmitt's assertion that the president was the guardian of the Weimar constitution.

²⁷ Schmitt, because he was a committed Nazi, could not teach after the war but has become one of the most read legal theorists by the German public. He is still revered by an influential group of public lawyers, political theorists, and journalists; and he is taken very seriously by the German constitutional court.

He is also well know in Great Britain and the U.S. His bibliography is huge and a sample of his English works are as follows: Older English-language works on Schmitt have tended toward the apologetic: Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983); George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker und Humblot, 1970); Paul Edward Gottfried, *Carl Schmitt: Politics and Theory* (New York: Greenwood, 1990).

More recently, political scientists have attempted to reappropriate some of Schmitt's arguments in an attempt to refashion pluralist democracy. See, e.g., Chantal Mouffe, "Pluralism and Modern Democracy: around Carl Schmitt," *New Formations* 14 (1991): 1-16; and the more critical approach of John McCormick, "Fear, Technology and the State: Carl Schmitt, Leo Strauss and the Revival of Hobbes in Weimar and National Socialist Germany," *Political Theory* 22 (1994): 619-52, and *Against Politics as Technology: Carl Schmitt's Critique of Liberalism* (New York: Cambridge University Press, 1997).

Germany, Hermann Heller²⁸ whose positional theories concentrated on the point at which a norm becomes a concrete decision.

Schmitt argued that under conditions of civil war someone had to make a sovereign decision distinguishing between legal and illegal parties. In a state of emergency “illegal” meant not just of acting without the positive legal norms but the factual condition of being an enemy of the state. The determination of who was a friend and who was a foe was to be left to the president and his government to decide as it was they who were “independent” and “above the parties.” According to Schmitt, Article 48 functioned as the “real” basis of democracy, and neither the judiciary nor constitutional articles designed to operate under normal conditions should limit presidential power. Schmitt’s view was that the president was beholden to no other state organ during a time of emergency. Schmitt presented just what the National Socialist German Workers Party (NSDAP) wanted—a theory of presidential absolutism. (Caldwell, 171-72)

The following Schmitt quote reflects the metaphysical tone of his work as well as the essence of his constitutional thought:

[The Weimar Constitution] presupposes the entire German nation as a unity, which is immediately ready for action, and not first mediated through social group organizations; [as a unity] that can express its will and at the decisive moment over and beyond pluralistic divisions find its way back to unity and bring its influence to bear [*Geltung verschaffen*]. The constitution seeks in particular to give the authority of the president the possibility of binding itself immediately with this political total will of the German nation and precisely thereby to act as guardian and protector of the constitutional unity and totality of the German nation. (Caldwell, 115)²⁹

Like Schmitt, Heller developed a Hobbesian notion of the state as a separate and higher force guaranteeing social peace. However, he rejected the identification of sovereignty with any particular state organ.

In arguing against Schmitt, Heller posited that the state was neither Sovereignty, nor "majesty," and was not "localizable" in an individual organ. Against Kelsen, he argued that

For critical sources about Carl Schmitt see: Richard Wolin, ‘Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror,’ *Political Theory* 20 ,1992, pp. 424-47; William P. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1994); Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge: Harvard University Press, 1993, pp. 37-60). (Caldwell, 182 n. 24)

²⁸ Heller, on the other hand, is not well known outside Germany; and few of his works have been translated into English. On Heller, see Ellen Kennedy, “The Politics of Toleration in Late Weimar: Hermann Heller’s Analysis of Fascism and Political Culture,” *History of Political Thought* 5 , 1984, pp. 109-125; and David Dyzenhaus: *Truth’s Revenge: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (New York: Clarendon, 1997).

²⁹ Diner states: “A norm presupposes normality, yet there is no norm for chaos. [Quoting Schmitt] ‘One law cannot protect another law’—such is the sum and substance of Schmitt’s constitutional doctrine of 1927. Therefore, only individuals— and *not* norms—can be sovereign: namely, those individuals who must decide on the state of emergency. Although the constitution can determine who is empowered to decide on the state of emergency—according to Article 48, the decision is up to the president—it cannot specify when such decisions are to occur. As a *pouvoir neutre*, placed above all institutions through election by plebiscite, the *Reichspräsident* is the “guardian of the constitution.” In a state of emergency, the president functions as provisional dictator, and it remains his prerogative to suspend the constitution up to the point of, as Schmitt terms it, an “institutional minimum.” (Diner, 19 from: C.[arl] S.[chmitt], “Das Ausführungsgesetz zu Art. 48 der Reichsverfassung (sog. Diktaturgesetz),” *Kölnische Volkszeitung*, October 30, 1926.)

the state was not "dissolvable into positive law." It was rather a symbol for the dialectical unity of will and norm in a state act—an "effective unity" of norm and will. A viable state only existed as long as real living wills gave its norms substantial being. A community is made up of a multitude of opposing wills and each having its own idea of what is right. Only a political body has the ability to take all of these wills and decide what is "right," and it is the job of the legislator and others in the government to transform this community of wills into a viable norm—the Positive Law. Just as will was necessary to elevate simple form to the level of political organization, it is necessary to have written, positive constitutional norms to provide the form within which political will could operate. It was this dialectical theory of organization that differentiated Heller's notion of the state from more conservative, state-affirming theories. (Caldwell, 133)

Hans Nawiasky, a professor of public law in Munich, appearing *amicus curiae* for the Bavaria *Länder* who was not a party to the case, also entered the fray arguing a more Kelsen legal-positivist position on constitutional law. He argued that Schmitt's argument concerning Article 48, put into Kelsen's terms, created two "basic norms." One created a constitution for use in "normal time," and the other presumed presidential validity in times of emergency.

The Judgment

The court first examined whether or not it had the authority to review the preconditions of the president's decree pursuant to Article 48, paragraph 2. The court stated it was evident that a state of emergency existed, and the president had reasonably concluded that a concentration of power by the president would certainly reduce the state of emergency. The court then declined review—a most strange disposition in that the court reviewed the preconditions, upheld the president's judgment, and then refused to declare that it had the authority to review such matters.

As to paragraph 2, the court, falling back on an earlier argument in a 1925 case, held that paragraph 2 constituted an independent norm of jurisdiction that permitted the president to appropriate areas of jurisdiction which are normally (and constitutionally) held by the *Länder*. (Caldwell, 167)

Schmitt won and the president became the sovereign of Germany. By declining review, the court had become *origo mali* of the rapid rise of the Third Reich. As a final insult to the principles of democratic constitutionalism, Adolph Hitler gave National Socialist rule the gloss of constitutionality through the enabling act approved by the Reichstag on March 24, 1933. The Hitler regime made extensive use of this power in its first months, culminating in the "Emergency Ordinance for the Protection of Nation, and State" suspending basic rights. The Enabling Act approved by the Reichstag just the day before was the end result of the earlier court decisions interpreting Article 48.

The actions of the president was pursuant to general norms derived from a basic norm and as such were found "legal" when appropriate legal authority denied review. Bird, in his Positive Law Theory of Justice, declares that "law provides the whole measure of justice so that justice consists of nothing but conformity to the law" (Bird 46); therefore, one must conclude, at least under that theory, that the actions by the judges were "just."³⁰ One must remember, however, that in the Positive Law Theory, calling X just merely means that X is

³⁰ Numerous volumes have been written arguing the validity of the Nazi government. I will not argue that point nor will I state my personal view as that is not the purpose of this paper. Two excellent books on the history, legal philosophy, and constitutional theory of the Weimar Republic are Caldwell (1997) and Dyzenhaus (1999).

following the law. It says nothing further about X except that one only individually approves of X's action rather than a cognitive judgment about X.

The reality is that one cannot even imagine that the atrocities allowed by the Nazi government using the then prevailing legal system could be, by any definition of the word, "just."

4. RETHINKING POSITIVE LAW

The atrocious acts effectuated by the Reichstag, Hitler, and the judges resulting in the murder of millions of people—all under the color of law—resulted in a rethinking of the positive law. After World War II, a debate ensued on the role German positive law played in the Nazis rise to power. Also discussed was that the German lawyers and judges did so little to resist the creation and application of the draconian Nazi laws. (Bix 2006a, 31) Dyzenhus argues that any legal or legal philosophies have some impact on practice.

As Gramsci tells us, all participants in politics are philosophers in that their commitments presuppose a philosophy even if they would not or could not themselves take the time to articulate it. Conversely, even when they deny it, the doctrines of professional philosophers are part of a fabric of ideas which are tied, albeit in very complex ways, to actual experience and practice. The doctrines are reflections on practice which are meant either to sustain or to reform that practice." (Dyzenhaus, 5 from: A. Gramsci, *Selections from the Prison Notebooks*, London, 1976. pp. 5-23)

For the first decade or so after the war, the scholarly literature generally held that legal positivism, the dominant legal philosophy in 1930's Germany, was responsible for the ease with which the law and courts were corrupted. Legal positivism was accused of advocating a wooden perspective on judicial decision making and legal interpretation, as well as asserting some versions of "might makes right" as applied by law. Positivism, especially Kelsen's formal legal positivism, was easily blamed as no moral content was subsumed in the theory; and, therefore, legal scholarship was not to be concerned with morality, justice, right, wrong, good, and bad. The scholar's work was seen to be one of clarifying, conceptualizing, and explaining the legal concepts; and, therefore, this perceived disinclination to inquire into the morality of the law as practiced by the lawyers, judges, and legal scholars was easily seen as the facilitator of the Nazi usurpation of power.

Many still believe the myth that Kelsen's formalist legal positivism bore significant responsibility for the fall of the Weimar Republic. Such notions arose from the reaction of the natural law school at the beginning of the second German republic. They are understandable to a certain degree, but in fact wrong. Kelsen argued strongly against Schmitt and the National Socialist German Workers Party (NSDAP). Because he was Jewish as well as anti Nazi, he left Germany prior to the outbreak of the war.

The positive law tradition was not new to the German community nor to Austin. Although Austin is considered the father of German positive law, the reality was that by the establishment of the Nazi Regime, positivistic philosophy had been enjoying a high standing for seventy-five years, much higher than in any other country.

Positivism was the only theory of law that could claim to be "scientific" in an age of science. Dissenters from this view were characterized by positivists with that epithet modern man fears above all others: "naive." The result was that it could be reported by 1927 that "to

be found guilty of adherence to natural law theories is a kind of social disgrace." (Olafson, 494)

The Weimar Republic came under the National Socialist Party reign for two reasons: the 1919 Weimar Constitution was a relatively new document in the 1930's and had little history of prior judicial interpretation;³¹ and the court's interpretation of Article 48 was based upon the political aims of the judiciary because the legislative and judiciary branches of the government had been usurped by the National Socialists by terror and political pressure. As a result of all of this, one can only minimally (if at all) blame the Positive Law Theory for the failure. I think any law theory would have been equally usurped and found to be unworthy.

The problem is that after the war and millions of deaths, the German psyche was in need of healing. Some of the culprits had been swept out by the Nuremberg trials et al., but a sanguinary stench still laid heavily on the land. Germany needed a scapegoat—especially the legal community—and shortly came up with one: Positive law with its concept of no moral content was an easy target.

The problem, of course, was not "The Positive Law Theory" but the wresting of political power by the Nazis and a poorly thought out and drafted basic norm—most specifically Article 48 – all enhanced by a politically influenced court decision. Positive law did not help nor did it hinder the collapse of the Weimar republic. Had there been a natural law tradition, one can easily see, considering the political conditions at the time, how the Social Democrats would still have taken power over the government, including the judicial. A legal philosophy or theory could not have stopped those set on using terror and murder to gain political and legal power.

By 1934, there was essentially no legal theory left in Weimar.³² Reinhardt Mehring, in discussing the decline of theory during the Weimar constitutional era, stated that the main participants in the constitutional struggle suffered various fates. The various advocates of positivism either resigned their professorships, were dismissed and retreated into internal exile, or like Kelson, were forced to emigrate. If anyone should have been blamed, other than the Nazi party, it should have been Carl Schmitt and his national Socialist theories of law and state.³³ (Jacobson, 314)

The fact that the Nazis had a spy, and the judges knew it, in every court room would have intimidated the staunchest natural law advocate or effectuated his ultimate demise. The court as well as the *Reichstag* clearly saw their duty through this political prism and not the positive law tradition.

³¹ Actually the *Reichsgericht* had decided numerous cases; however, the courts were spread throughout the German Republic and many of the decisions were not reduced to writing and most of those that were written were not signed or were not easily available. The *Staatsgerichtshof* was a newer court with few written opinions.

³² Ernst Huber, in his 1937 article entitled *Constitution*, stated "the core of the Constitution in the Weimar system consists of the principles of democracy, liberalism, parliamentarism, party state, federalism, separation of powers, liberal rule of law. These pillars of the Weimar Republic have been destroyed by the National Socialist revolution... the new constitution... is not a constitution in the formal sense, as was typical in the 19th century. It provides no written constitutional document for the new Reich. But this new constitution exists as the unwritten fundamental policy order on the Reich.." (Jacobson, 328) In 1934, Theodor Maunz wrote "the law of the people consists not of norms but,—this is crucial in changing administrative law thinking—of legal patterns that bear their order in themselves. The task of administrative law will consist of revealing and assessing the order of these legal patterns." (Jacobson, 327)

³³ Reinhardt Mehring. *The Decline of Theory—Introduction*, in Jacobson, pp. 313-320.

Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle. (Olafson, 494)

As positive law was discredited, there was still a desire for a normative based legal theory; and on the western European continent, three major theories stood by to fill the void: a new Thomism put forward by Roman Catholic scholars, a secular version of natural law, and the one I will examine here the “Radbruch Formula.” (Herghet, 2)

The German Denouement The Radbruch Formula - Restricted Positivism

Gustav Radbruch, a professor at Heidelberg University, was a noted politician and scholar in pre-Hitler Germany. Although he was dismissed from his position in 1933 because of his political views, he lived in Germany during the period of the Nazi regime and after the war resumed his professorship. He then addressed the problem of obedience to Hitler’s laws. He was concerned that, under legal positivism, legal philosophy had been completely subsumed by legal science and that the positive law only answers the question of when a law “may be correctly discerned” rather than asking whether a law is “right or just.” (Leawoods, 504)

Radbruch was among the first modern legal philosophers to break with the tradition of aligning one’s self with either the positive law or the natural law schools of thought by combining the two.³⁴ Leawoods argues that Radbruch has succeeded in combining the two by assigning them to two different fields—the ordinary and the extraordinary.

According to Radbruch, the “task of legal philosophical relativism” is to develop systems without deciding between them. (Radbruch, 69; Leawoods, 507) Borrowing from cultural philosophy, Radbruch asks as an example “is it possible to describe only a table without reference to its purpose?” Of course not, he says, and therefore a value-blind view of the law is similarly impossible without some reference to its purpose.

By relying on the objective idea of distributive justice—one that Radbruch believes ideally directs the relationship between people in a society—he finds that the essence of justice is equality and, therefore, justice is essential to the legal precept in its meaning. (Radbruch, 73-76)

He then concludes, “law can be understood only within the framework of the value-relating attitude. Law is a cultural phenomenon, that is, a fact related to value. The concept of law can be determined only as something given, the meaning of which is to realize the idea of law.” (Leawoods, 507 n. 98. See also Radbruch, 51-52). He then develops a three-legged legal theory—justice, certainty, and purposiveness—three equally weighted tensions. However, the legal certainty leg was to be the primary concern of a judge.

³⁴ Most theorists believe that the separability thesis and the morality thesis together exhaust the field, are mutually exclusive, and consequently exclude any third theory. Theories that purport to be distinct from one of the two are merely disguised versions of them. Paulson argues that neither type of theory is defensible; therefore, one faces what he identifies as his “jurisprudential antinomy.” Paulson posits that Kelsen resolves the antimony by showing that the traditional theories are not exhaustive of the field, and he is then in a position to introduce his alternative – his “Pure Theory.” His theory is pure in that he uses neither the morality thesis nor the separability thesis and, therefore, depends on neither conditions of morality or matters of fact. See Kelsen 1992 introduction by Paulson, pp. xix-xxvii.

In his later work, as a result of his witnessing the Nazi intolerable degree of injustice, he asserts a form of legal positivism but still believes that the positive law must be defined in terms that realize justice, which is the idea of law. He was naturally outraged, as was the rest of the postwar world, and could not imagine a legal theory that was value free. He rejects his earlier assertion that legal certainty was the primary role of the judge and asserts that the judge *must* decide first in accordance with justice (Leawoods, 498) although he still considers certainty important.

The result is a reconstruction of his earlier work wherein he posits the distinction between the ordinary (the time for legal certainty) and the extraordinary (the time to consider justice). (Leawoods, 500) This latest version has become known as the Radbruch formula.

Preference is given to the **positive law**, duly enacted and secured by state power as it is even when it is unjust and of no benefit to the people, unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, “false law” (*unrichtiges Recht*) and must therefore yield to justice.³⁵

It is impossible to draw a sharper line between cases of statutory non-law and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of **positive law**, then the statute is not merely “false law, it lacks completely the very nature of law. (Radbruch 1970: 353, Bjarup’s translation in Bjarup, 296)³⁶ (my bold)

His “formula” has been used by the modern German courts to hold the intolerable Nazi law as null and void as well as in cases involving East German border guards for acts prior to the unification and other similar cases. (Bix 2006b, p.4, n.8)

It seems to me that Radbruch is trying to do for legal theory what modern physicists and cosmologists have been attempting in the physical sciences since Einstein developed his Theory of Relativity—discover one theory of everything— by marrying the separability thesis and the morality thesis. Thus far, they have been unsuccessful, as has Radbruch. Positive law determined in the terms of justice cannot be positive law.

The first sentence of Radbruch’s law is rather convoluted, and a careful reading would show that it makes little sense if one posits that positive law is to be value free. We may parse it into the following statements as A, B and C.

- A. Preference is given to the **positive law**, duly enacted and secured by state power as it is
- B. even when it is **unjust** and of no benefit to the people
- C. unless its conflict with **justice** reaches so intolerable a level that the statute becomes, in effect “false law” and must therefore yield to justice. (my bold)

³⁵ See Bix 2006b, pp. 5-9, concerning the effect of this sentence on judicial opinion.

³⁶ Compare this with his statement in 1932: “It is the professional duty of the judge to validate the law’s claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just.” (Radbruch §10, p. 119.)

We are here considering Bird's (and Kelsen's) positive law. Therefore statement A must be wholly value (justice) neutral; inasmuch as positive law is the measure of justice, it cannot be either just or unjust. Since statement A defines the law as positive, then statement B, in making justice a quality of positive law, cannot be true. Conversely, if B is true, then A cannot be positive law.

Using the Universal Negative (E) Categorical Proposition in the conversion form for A and B—the statement “no A are B” and its converse proposition “no B are A”—our conclusion is found to be reliable.

Even if we omit statement B, statement A/C would also be difficult. His first sentence could then be restated as “Preference is given to the positive law, duly enacted and secured by state power as it is...unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, “false law” (*unrichtiges Recht*) and must therefore yield to justice.” The A/C statement does not work. Radbruch discusses extensively the internal tensions contained within his Positive Law Theory—justice, certainty, and purposiveness—and it is quite clear that the justice referred to in C is presupposed in A, and the conflict referred to is the tension internal to A.

I suppose one could argue that it is only the statute and not the positive law that becomes “false law.” The problem is that in the Positive Law Theory, all statutes (general norms) are derived as progeny of the basic positive law norm and, therefore, can only be positive law which leads us back into the argument above.

If all Nazi statutes and judicial decisions were indiscriminately “law,” then these despicable creatures were guiltless, since they had turned their victims over to processes which the Nazis themselves knew by the name of law.

From the above, I contend that Radbruch's theory is not positivism as Kelsen and Bird envisioned it. He injects value into a theory intended to be value free and, therefore, alters the entire concept. He posits a new theory wherein he subscribes to the connection thesis where at some point laws lose their quality of law (by becoming unjust) and are no longer binding within a legal system. The most obvious weakness is the criteria for determining exactly when “the laws conflict with justice reaches so intolerable a level that the statute becomes, in effect, false law.” People can, and do, disagree about moral issues. Intolerable is so subjective as used here it becomes meaningless. Another crucial weakness is that the second leg of his three-legged theory, certainty, now becomes nonexistent; and therefore his three-legged table cannot stand.

In effect Radbruch is setting up a system whereby the judge, by invoking a principle without an underlying social process, becomes a sovereign with a veto power leaving the law subject to the whims of his or her ego and a possibility of throwing the legal system into chaos. Furthermore, importing moral reasoning into the law confronts the law with serious epistemological problems of moral knowledge and justification.³⁷

³⁷ In debates about what the law ought to be, two kinds of ethical questions can arise. There are first-order questions, e.g. the conventional arguments of principle or policy for and against particular legal rules. These first-order questions involve issues of political morality; that is, normative legal theory involves first-order questions of normative ethics. Second-order questions raise different kind of issues. Second-order questions might include the following: “What do statements about what the law should be mean?” or “Are the propositions of normative legal theory objective?” These second-order questions of normative legal theory are a subclass of the more general class of second-order questions of moral and ethical theory. This is the domain of metaethics.

I also see a problem with the application of Bird's justice theory. If the positive law is as Radbruch would have it, at times just and other times unjust, then Bird's Positive Law Theory of Justice does not work. Bird's theory posits that the law itself provides the whole measure of justice. (Bird 46) If one argues that positive law is determinative of justice, then one cannot hold justice to be a criterion of law. Therefore in Radbruch's theory parts B (positive law can be unjust) and C (which are in effect justice) are justice being used as criteria to measure A (justice). A criterion and that which it measures must logically belong to different orders. Radbruch's statements lead us to the nonsensical statement—"justice is justice." His theory is merely a variation on the Natural Law Theory and not Positive Law.

Robert Alexy and the End of German Positive Law

Recently, Robert Alexy, has restated Radbruch's formula and made it the nucleus of his own theory by combining it with his own "correctness thesis." (Bix 2006b, 4) The acceptance of Alexy's theory by the German courts has effectively ended the reign of positive law philosophy in Germany.

He posits that there are two divergent concepts in legal philosophy—his "meta-criterion" (he also refers to it as the "comprehensive ideal") and the "restrictive maxim." His meta-criterion generally states that legal philosophy should reflect the entire object of philosophy: ontology, ethics, and epistemology. Therefore, legal philosophy shares the critical, analytic, and systematic dimension of philosophy in general. (Alexy, 158)

He defines the restrictive maxim as:

First, that legal philosophy should never get involved in any genuinely philosophical problem, second, that legal philosophy should concentrate its efforts on the institutional or authoritative character of law, and, third, that legal philosophy should delegate critical normative questions to moral and political philosophy. ... The choice between the comprehensive ideal and the restrictive maxim is a fundamental choice. The character of legal philosophy is determined [by Alexy] much more radically than by the choice between legal positivism and non-positivism ... [which is] a choice inside the realm of legal philosophy (Alexy, 161).

He, like Radbruch, posited that the separability thesis and the morality thesis together do not exhaust the field, are not mutually exclusive, and consequently do not exclude any third theory. His statement "The character of legal philosophy is determined by it much more radically than by the choice between legal positivism and non-positivism" is profound. He then chose non-positivism and posited yet another Natural Law Theory.

The main question of legal philosophy is (according to Alexy): "What is the nature of law?" or in more contemporary terms "What are the necessary properties of law?" The two necessary properties are coercion and correctness, which has important consequences for the concept of law and for a paradoxical normative problem that is specific to the law. (Of course, now each of these claims is highly contested.)

From the point of view of normative legal theory, one of the most important debates in metaethics is the debate between cognitivism and noncognitivism. Very roughly, cognitivism is the position that moral statements (such as "There ought to be a constitutional right to privacy") express beliefs that can be true or false. Therefore beliefs are "cognitive" states, hence the name "cognitivism." Noncognitivism denies this and asserts that moral statements express noncognitive states, such as emotions or desires. Noncognitive states (emotions, desires) cannot be true or false.

Alexy describes his concept of law as the relation among three elements:

1. Proper promulgation (PP) (*ordnungsgem Gesetztheit*)—by a legislative body.
2. Social efficacy (SE) (*soziale Wirksamkeit*)—people, by and large, follow the rule.
3. Permissible content (PC) (*inhaltliche Richtigkeit*)— the rule is not extremely unjust.

Non-positivist positions include the permissible content element, whereas positivist positions do not (*separation thesis*). Any non-positivist theory can be located within the triangle “A” below. In contrast, positivist theories move along the line between social efficacy and proper promulgation, as displayed in diagram “B” below.³⁸



Points 1 (PP) and 2 (SE) relate to the coercion property of the law while point 3 (PC) relates to the correctness property. Virtually every theory about the nature of law, for example in the context of the discussion positivism versus natural law debate, can be analyzed within this framework. Positivists rely solely on points (1) and (2) for their definition while natural law theorists include (3).

Law as a social practice cannot be a normative system without coercion (simply because law cannot fulfill its social functions, unless there is an element of coercion) and, therefore, coercion is a necessary property of law. Alexy posits a second necessity for a law—one of correctness which stands in opposition to coercion. Unlike coercion that owes its necessity to social practice which law cannot perform without it, he states:

The necessity of the claim to correctness is a necessity resulting from the structure of legal acts and legal reasoning. It has a deontological character. To make explicit this deontological structure implicit in law is one of the most important tasks of legal philosophy. (Id., 164).

Identifying correctness (he is talking about justice here) as a necessary property of law implies the rejection of positivism, which, in turn, requires us to make explicit in what way legal philosophy relates to moral philosophy.

³⁸ From Hanno Kaiser, January 15, 2006, and June 11, 2005, in *Jurisprudence*. Available at: <http://www.lawsocietyblog.com/> and subject to a Creative Commons Attribution-noncommercial 2,5 license.

CONCLUSION

Otto Bird did not set out to settle the philosophical question of the nature of justice but to categorize the literature into a useable format to enhance our argumentative efforts. Although he does present only the truth concerning the body of thought about the concept of justice and not the truth about justice, he does muddy the water by presenting us with not a dialectical constructed theory of justice—but three. There is no philosophical agreement on what justice “is” and the argument—although now categorized—will assuredly still go on forever.

In concluding his arguments for his three theories, Bird surmises that justice is defined in three different ways: conformity to the law, doing what is useful for the social good, and rendering to each what is his own or due by right. (Bird, 164)

Of the three, Bird finds the Positive Law Theory of Justice to be the simplest.

The scope of justice is more restricted, since it will apply only to action that is measured by positive law; it will not apply to the law itself as it does in the other three theories. Then, too, there are agreed upon and public ways of resolving differences over justice when it consists only in determining whether or not an action is in accord with the law, since it is for this very purpose courts of law and judges have been established. (Bird, 165)

The Positive Law Theory of Justice maintains that legality constitutes the only determinate and objective meaning of justice. It does not deny that justice can be used in other senses; but when it does, the meaning is indeterminate and subjective. It may speak volumes about the locators, but it is not asserting anything about the world. It does indicate what the speaker thinks is good, that the speaker approves of that which he calls just, that he may even defend it; but it does not signify anything about the object itself. Only when justice means legality does it say something determinate and objective about its object. For it then refers to a definite system of law with objective and determinate rules of procedure.

Scott Shapiro argues—the primacy that positivism affords to social facts reflects a fundamental truth about law, namely, that the law guides conduct through the authoritative settlement of moral and political issues. Moral facts cannot ultimately determine the law because they would unsettle the very questions that the law aims to resolve. (Shapiro, 2007)

One way to attack the problem concerning positive law and justice is asking not “what positive law *is*” but rather “what positive law is *not*.” During the early and mid-20th-century, as previously discussed above, legal positivism was accused of advocating a wooden respect to judicial decisions as well as legislative interpretation. According to Brian Bix, this is a bad mischaracterization and is rarely based upon facts. Bix argues this mischaracterization is probably attributable to a certain American bias because judicial review is so important to judicial life in the United States. When an American legislative body writes legislation, it also promulgators material setting forth its rationale behind the law as well as the law's intent. This explanatory material is not law; however, it is often used in the courts for clarification of the law. As a result, American legal theorists tend to ask of *all* legal theories what they have to tell us about judicial reasoning and even more particularly about constitutional interpretation. Theorists tend to see legal theories through an American

lens despite what the theory says about such matters. (Bix 2006a, 31) Contrarily, legal positivism does not have consequences for how disputes are to be decided, how legal texts are to be interpreted, or how institutions, legal or otherwise, are organized.

The German denunciation of the Positive Law Theory after World War II was an excellent example of bad mischaracterization exhibiting a misunderstanding about what is claimed and what is at stake in the Positive Law Theory. Most of the key figures in legal positivism were reformers and certainly not apologists for the status quo. (Bix 2006a, 31)

The 1958 debate between H. L. A. Hart³⁹ and Lon Fuller⁴⁰ was, at least in part, a discussion about what role positive law could or did play in response to evil regimes. Hart's argument proposed that a legal positivist knows that the validity of law is one thing and its merit is quite another. He then argued that the Natural Law Theory, with its equalizing legal status with moral status ("an unjust law is no law at all") creates confusion among the citizenry about whether a law is moral just because it happens to be treated as valid. Bix contends that in the final analysis there are no arguments, logical or psychological, for selecting either theory for resistance to evil law. He states,

One should no more expect theories about the nature of law to guide behavior or answer difficult ethical questions than one should expect day-to-day guidance in life from theories of metaphysics (and, many would add, and inability of general philosophical theories to answer mundane ethical questions is no reason to dismiss such inquiries as useless). (Bix 2006a, 32)

Bird's Positive Law Theory of Justice falls apart at a point where the law permits unconscionable actions and following the rules leads to catastrophic consequences which cannot be sanctioned by any ethicist—whether a defender of the deontology school (an ethics of rules including natural law theorists, natural right theorists, W.D. Ross's notion of prima facie duties, and Kant's categorical imperative) or *per contra* consequentialism, specifically Hart-utilitarianism—and cannot be tolerated.

Although Bird's Positive Law Theory falls apart where the law permits unconscionable actions and one must either reject its premise or argue the unthinkable, Bird did contribute to the discussions by allowing one to categorize various theories of justice.

³⁹ See Hart, 1958.

⁴⁰ See Fuller, 1958.

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