Total Enemy, Total State, & Total War

Carl Schmitt

 3,106 words

Translated by Simona Draghici

Editor's Note:

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I

In a certain sense, there have been total wars at all times; a theory of the total war, however, presumably dates only from the time of Clausewitz who would talk of "abstract" and "absolute" wars."[1] Later on, under the impact of the experiences of the last Great War, the formula of total war has acquired a specific meaning and a particular effectiveness. Since 1920, it has become the prevailing catchword. It was first brought out in sharp relief in the French literature, in book titles like *La guerre totale*. Afterwards, between 1926 and 1928, it found its way into the language of the proceedings of the disarmament committee at Geneva. In concepts such as "war potential" (*potentiel de guerre*), "moral disarmament" (*désarmement moral*) and "total disarmament" (*désarmement total*). The fascist doctrine of the "total state" came to it by way of the state; the association yielded the conceptual pair: total state, total war. In Germany, the publication of the *Concept of the Political* has since 1927 expanded the pair of totalities to a set of three: total enemy, total war, total state. Ernst Jünger's book of 1930 *Total Mobilization* made the formula part of the general consciousness. Nonetheless, it was only Ludendorff's 1936 booklet entitled *Der Totale Krieg* (*The Total War*) that lent it an irresistible force and caused its dissemination beyond all bounds.

The formula is omnipresent; it forces into view a truth whose horrors the general consciousness would rather shun. Such formulas, however, are always in danger of becoming widespread nationally and internationally and of being degraded to summary slogans, to mere gramophone records of the publicity mill. Hence some clarifications may be appropriate.

(a) A war may be total in the sense of summoning up one's strength to the limit, and of the commitment of everything to the last reserves.[2] It may also be called total in the sense of the unsparing use of war means of annihilation. When the well-known English author J. F. C. Fuller writes in a recent article, entitled "The First of the League Wars, Its Lessons and Omens," that the Italian campaign in Abyssinia was a modern total war, he only refers to the use of efficacious weapons (airplanes and gas), whereas looked at from another vantage point, Abyssinia in fact was not capable of waging a modern total war nor did Italy use its reserves to the limit, reach the highest intensity, and lead to an oil blockade or to the closing of the Suez Canal, because of the pressure exerted through the sanctions imposed by the League of Nations.

(b) A war may be total either on both sides or on one side only. It may also be deliberately limited, rationed and measured out, because of the geographical situation, the war technique in use, and also the predominant political principles of both sides. The typical 18th-century war, the so-called "cabinet war," was essentially and deliberately a partial war. It rested on the clear segregation of the soldiers participating in the war from the non-participant inhabitants and non-combatants. Nevertheless, the Seven Years War of Frederick the Great was relatively total, on Prussia's side, when compared with the other powers' mobilization of forces. A situation, typical of Germany, showed itself readily in that case: the adversity of geographical conditions and the foreign coalitions compelled a German state to mobilize its forces to a higher degree than its more affluent and fortunate bigger neighbors.[3]

(c) The character of the war may change during the belligerent showdown. The will to fight may grow limp or it may intensify, as it happened in the 1914–1918 world war, when the war trend on the German side towards the mobilization of all the economic and industrial reserves soon forced the English side to introduce general conscription.

(d) Finally, some other methods of confrontation and trial of strength, which are not total, always develop within the totality of war. Thus for a time, everyone seeks to avoid a total war which naturally carries a total risk. In this way, after the world war, there were the so-called military reprisals (the 1923 Corfu Conflict, Japan-China in 1932), followed by the attempts at non-military, economic sanctions, according to Article 16 of the Covenant of the League of Nations (against Italy, autumn 1935), and finally, certain methods of power testing on foreign soil (Spain 1936–1937) emerged in a way that could be correctly interpreted only in close connection with the total character of modern warfare. They are intermediate and transitional forms between open war and true peace; they derive their meaning from the fact that total war looms large in the background as a possibility, and an understandable caution recommends itself in the delineation of the conflictual spaces. Likewise, it is only from this point of view that they can be grasped by the science of international law.

II

The core of the matter lies in warfare. From the nature of the total war one may grasp the character and the whole aspect of state totality; from the special character of the decisive weapons one may deduce

the peculiar character and aspect of the totality of war. But it is the total enemy that gives the total war its meaning.[4]

The different services and types of warfare, land warfare, sea warfare, air warfare, they each experience the totality of war in a particular way. A corresponding world of notions and ideas piles on each of these types of warfare. The traditional notions of "*levée en masse*" (levy), "*nation armée*" (nation in arms), and "*Volk in Waffen*" (the people in arms) belong to land warfare.[5] Out of these notions emerged the continental doctrine of total war, essentially as a doctrine of land warfare, and that thanks mainly to Clausewitz. Sea warfare, on the other hand, has its own strategic and tactical methods and criteria; moreover, until recently, it has been first and foremost a war against the opponent's trade and economy, whence a war against non-combatants, an economic war, which by its laws of blockade, contraband, and prizes, drew neutral trade into the hostilities, as well. Air warfare has not so far built up a similar fully-fledged and independent system of its own. There is no doctrine of air warfare yet that would correspond to the world of notions and concepts accumulated with regard to land and sea warfare. Nonetheless, as a consequence of air warfare, the overall configuration sways in the main towards a three-dimensional total war.

The "if" of a total war is beyond any doubt today. The "how" may vary. The totality is perceptible from opposite vantage points. Hence the standard type of guide and leader in a total war is necessarily different. It would be too simple an equation to accept that the soldier will step into the centre of this totality as the prevailing type in a total war to the same extent as in other kinds of wars previously.[6] If, as it has been said, total mobilization abolishes the separation of the soldier from the civilian, it may very well happen that the soldier changes into a civilian as the civilian changes into a soldier, or both may change into something new, a third alternative. In reality, it all depends on the general character of the war. A real war of religion turns the soldiers into the tools of priests or preachers. A total war that is waged on behalf of the economy becomes the tool of economic power groups. There are other forms in which the soldier himself is the typical model and the ascending expression of the character of the people. Geographical conditions, racial and social peculiarities of all kinds, are factors that determine the type of warfare waged by great nations. Even today it is unlikely that a nation could engage in all the three kinds of warfare to a degree equal to the three-dimensional total war. It is probable that the centre of gravity in the deployment of forces will always rest with one or the other of the three kinds of warfare and the doctrine of total war will draw on it.[7]

Until now the history of the European peoples has been dominated by the contrast of the English sea warfare with the Continental land warfare. It is not a matter of "traders and heroes" or that sort of thing, but rather the recognition that any of the various kinds of warfare may become total, and out of its own characteristics generate a special world of notions and ideals as its own doctrine and also relevant to international and constitutional law, particularly in the assessment of the soldier's worth and of his position in the general body of the people. It would be a mistake to regard the English sea warfare of the last three centuries in the light of the total land warfare of Clausewitz's theory, essentially as mere trade and economic but not total warfare, and to misinterpret it as unconnected with and markedly different from totality. It is the English sea warfare that generated the kernel of a total world view.[8]

The English sea warfare is total in its capacity for total enmity. It knows how to mobilize religious, ideological, spiritual, and moral forces as only few of the great wars in world history have done. The

English sea warfare against Spain was a world-wide combat of the Germanic and Romance peoples, between Protestantism and Catholicism, Calvinism and Jesuitism, and there are few instances of such outbursts of enmity as intense and final as Cromwell's against the Spaniards. The English war against Napoleon likewise changed from a sea war into a "crusade." In the war against Germany between 1914 and 1918, the world-wide English propaganda knew how to whip up enormous moral and spiritual energies in the name of civilization and humanity, of democracy and freedom, against the Prussian-German "militarism." The English mind had also proved its ability to interpret the industrial-technical upsurge of the 19th century in the terms of the English worldview. Herbert Spencer drew an extremely effective picture of history that was disseminated all over the world, in countless works of popularization, the propagandistic force of which proved its worth in the 1914–1918 World War. It was the philosophy of mankind's progress, presented as an evolution from feudalism to trade and industry, from the political to the economic, from soldiers to industrialists, from war to peace. It portrayed the soldier essentially as Prussian-German, *eo ipso* "feudal reactionary," a "medieval" figure standing in the way of progress and peace. Moreover, out of its specificity, the English sea warfare evolved a full, self-contained system of international law. It asserted itself and its own concepts held on their own against the corresponding concepts of Continental international law throughout the 19th century. There is an Anglo-Saxon concept of enemy, which in essence rejects the differentiation between combatants and non-combatants, and an Anglo-Saxon conception of war that incorporates the so-called economic war. In short, the fundamental concepts and norms of this English international law are total as such and certainly indicative of an ideology in itself total.

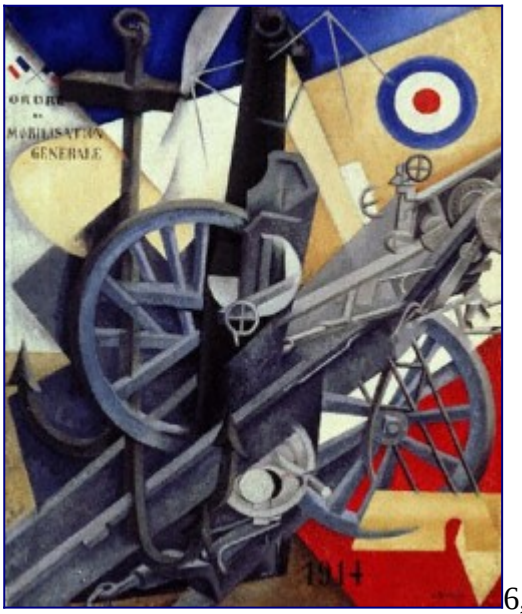
Finally, the English constitutional regulations turned the subordination of the soldiers to the civilians into an ideological principle and imposed it upon the Continent during the liberal 19th century. By those standards, civilization lies in the rule of the bourgeois, civilian ideal which is essentially unsoldierly. Accordingly, the constitution is always but a civil-bourgeois system in which, as Clemenceau put it, the soldier's only r*aison d'être* is to defend the civilian bourgeois society, while basically he is subject to civilian command. The Prussian soldier state carried on a century-long political struggle on the home front against this bourgeois constitutional ideal. It succumbed to it in the Autumn of 1918. The history of Prussian Germany's home politics from 1848 to 1918 was a ceaseless conflict between the army and parliament, an uninterrupted battle which the government had to fight with the parliament over the structure of the army, and the army budget necessary to make ready for an unavoidable war, that were determined not by the necessities of foreign policy but rather by compromises regarding internal policy. The dictate of Versailles, which stipulated the army's organization and its equipment to the smallest detail, in an agreement of foreign policy, was preceded by half a century of periodical agreements of internal policy between the Prussian-German soldier state and its internal policy opponents, in which all the details of the organization and the equipment of the army had been decided by the internal policy. The conflict between bourgeois society and the Prussian soldier state led to an unnatural isolation of the War Office from the power of command and to many other separations, consistently rooted in the opposition between a bourgeois constitutional ideal imported from England either directly or through France and Belgium, on the one hand, and the older constitutional ideal of the German soldiery, on the other.[9]

Today Germany has surmounted that division and achieved a close integration of its soldier force.[10] Indeed, attempts will not fail to be made to describe it as militarism, in the manner of earlier

propaganda methods, and to hold Germany guilty of the advent of total war. Such questions of guilt too belong to the totality of the ideological wrangles. *Le combat spirituel est aussi brutal que la bataille d'hommes* (spiritual combat is as brutal as the battles of men). Nonetheless, before nations stagger into a total war once more, one must raise the question whether a total enmity truly exists among the European nations nowadays. War and enmity belong to the history of nations. But the worst misfortune only occurs wherever the enmity is generated by the war itself, as in the 1914–1918 war, and not as it would be right and sensible, namely that an older, unswayed enmity, true and total to the Day of Judgment, should led to a total war.

The Way to the Total State

Carl Schmitt



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Translated by Simona Draghici

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The present-day constitutional situation is characterized first of all by the fact that numerous institutions and regulations of the 19th century have continued unchanged, while the current state of things appears to have changed entirely, when compared to those earlier circumstances. The German constitutions of the 19th century belong to an era, the basis of which had been formulated clearly and for all practical purposes by the outstanding German theoreticians of the state in those days, namely, the distinction between state and society.

Another, closely related question about the ranking of state and society, whether one was given precedence over the other, whether one was dependent on the other, and if so how, and so on and so forth, does not concern us here. The distinction, though, remains.

Moreover, one must take into consideration the fact that “society” was essentially a polemical notion, used as an objection to the concrete, monarchical militaro-bureaucratic state in existence at the time: it referred to what was regarded as not belonging to that state, and was called society for that very reason. The state was strong enough to hold out on its own against the other social forces surrounding it, and as a result, to determine the segregation in a way that the numerous differences inside the “state-free” society—denominational, cultural, economic—relativized themselves by necessity, in virtue of the collective separation from it, while the state, on its part, did not hinder their concentration into “society.” On the other hand, it maintained a far-reaching neutrality and non-intervention regarding religion and economy, and to a large extent, observed their autonomy and that of their practical spheres of activity. Thus that state was not absolute in any sense, or so strong as to render meaningless all that was not it.

In that way, too, both a dualism and an equilibrium were possible: in particular, one could believe in the possibility of a state free of religious and ideological ideas, even fully agnostic, and of the development of a state-free economy alongside of an economy-free state. The state however remained the decisive point of contact as long as its stark reality was not lost from sight. Even nowadays, to the extent it interests us here, the ambiguous word “society” should above all stand for what is not state, and occasionally for what is not church, either.[1]

As premise, that distinction lay at the basis of every important institution and regulation of public law as it evolved in Germany in the 19th century, and still represents a large part of our present-day public law. The fact that by and large the state of the German constitutional monarchy, with its pairs of opposites, prince and people, crown and chamber, government and popular representation, has been built “dualistically” is only an expression of the overall, fundamental dualism of state and society. The popular representation, the parliament, the legislative body, had been conceived as the stage on which society would come and face the state. It was there that it had been meant to integrate into the state (or the state into it).[2]

The dualistic basis makes itself evident in all the important conceptual constructions. The constitution was considered a contract between prince and people. It would be discovered therein that by its essential contents, a state law “encroaches on the citizen’s freedom and property. A legal ruling, formerly a kind of administrative order concerning only the public bodies and the civil servants, was changed to address all the citizens of the state. The Budget law was based on the premise of a budget reconciliation that took place regularly between two partners, and even in the latest edition of the Meyer-Anschutz textbook (the 1919 edition, pp. 890, 897), the Budget law is still called “Budget reconciliation.” When a so-called formal law is demanded for such an administrative act as the state budget estimates, this formalization only betrays the politicization of the concept. The political power of the parliament is big enough to push through the notion that a regulation is enforceable as law only if the parliament has played a part in it, and also enough to deduce a formal legal concept from the related proceedings. This formalization comes to convey the very political success of the popular representation over the government, of society over the state of the monarchical civil service. Even the

auto-administration, with its procedures, presupposed the distinction between state and society. The auto-administration was that part of society which confronted the state and its civil service. It was on this presupposition that it developed and formulated its conceptions and procedures in the 19th century.

Such a “dualistic” state is an equilibration of two different kinds of state: it is a governing state and a legislative state at one and the same time. It grew into a legislative state as the parliament increasingly developed into the legislative body of the government, in other words, the more the former society showed itself superior to the state as it was at the time. States may all be classified in keeping with the sphere of their state activity in order to uncover the essence of their operation. Accordingly, there are justice, or better still, jurisdictional states; next, states that are essentially executive and governing, and finally, legislative states.[3]

In the medieval state, as the Anglo-Saxon theory of the state still largely assumes, the core of the state power lay in the judicial authority. State power and judicial authority stood on a par, and are still presented as such in the *Codex Juris Canonici* (canons 196 and 218, for instance). Relatedly, indeed, one may notice that the authority of the Roman-Catholic church and of her highest offices is not conveyed through the image of a judge but rather of a shepherd tending his flock.

From the 16th century on, the form of an absolute state, which it assumed, derived directly from the collapse and disintegration of the medieval, pluralistic, judicial state, with its feudal hierarchy and its jurisdiction, and leaned upon the military and the civil service. From then on, it was essentially a state of the executive and of government. Its rationale, the *ratio status*, the often misinterpreted reason of state, did not lie in the existence of norms loaded with content, but rather in the efficient handling of situations in which norms could be made to carry weight, generally for the first time, while the state put a stop to the cause of all disorder and civil war, namely the strife for normative correctness. That state “established public order and safety.”

As soon as that was achieved, the legislative state, with its civil legalistic constitution, was able to force its way in. The essence of that particular state came to light in the so-called state of exception. In those circumstances, the jurisdictional state made use of martial law (more exactly, the authority of the court martial), that is to say, summary justice; thus the sate appears above all as the stopgap of the executive power for what is necessarily associated with the suspension of the fundamental rights. In other words, the legislative state of emergency decrees and exception orders is but the state of summary legislative proceedings.[4]

Whenever working with such classifications and typologies of the various kinds of state, one must remember that in real life there are no pure types, that a legislative state as such is hardly possible, or for that matter, a genuinely jurisdictional state, or a state reduced to government and public administration. In this respect, every state is a combination of these types, a *status mixtus*. With this qualification, a taxonomy of states in keeping with the main state activity may still prove useful.

Thereupon, it is correct, and particularly appropriate concerning the guardian of the constitution, to regard the bourgeois legal and constitutional state in the way it developed in the 19th century as a legislative state. As Richard Thoma has aptly remarked, “it is characteristic of the modern state with its propensities for definition that one may always quarrel about the soundness and fairness of the decision, and leave it to the legislator to make and to the judge to take.”[5] A jurisdictional state is

possible as long as certain norms and their contents remain uncontested and are acknowledged as such even in the absence of a known and written set of norms issued by an organized central power.

In a legislative state, on the other hand, no constitutional justice or state judicial authority may be taken for the true guardian of the constitution. That is, in the last instance, the reason why in such a state, the judiciary do not decide controversial constitutional and legislative matters on their own. In this respect, it would be useful to quote to some length Bluntschli's opinion which by virtue of its objective clarity and the wisdom of its practical knowledge may be considered a classical position within the 19th-century state theory.

Bluntschli admits that the constitution unquestionably applies to the legislation and the latter in no way has the right to do what it is expressedly forbidden to do. He has a correct appreciation of the principles and the advantages of the American practice of the judiciary examination of the laws. Then he goes on:

If one takes into consideration, though, that the legislator is content with the principle of the mediation of the law by the constitution and will remain so, yet builds his opinions on slightly different foundations so that his statement becomes object of dispute, the court may have a different opinion than the legislator on the matter; when one comes to think of it, the higher authority of the legislator admittedly would be reduced not in principle but by the outcome of the lower-placed court, and so in the conflict with a separate organ of the state body, the representative of the whole nation must take second place to the latter. If one thinks about and recalls the conflict and the disruption which are brought to bear on the homogeneous life-course, and the fact that in its current condition the court refers mostly to and is slanted in favor of the recognition of the norms of private law and of legal circumstances, and stresses the formal-logical factors, whereas quite often it deals with important constitutional interests and the general welfare, which are the job of the legislator to know and support, then, considering all this, one may feel inclined to give preference to the European system, although the latter itself is not protected from all the evils either, and has its own share of human imperfection. It is in its own formation, though, that the legislative body carries its weightiest guarantee against the exercise of its powers in an anti-constitutional spirit.[6]

This last sentence is crucial. There, he shows that in the conception of the 19th century, the parliament itself was the guarantee of the constitution, by virtue of its very existence. That was part of the belief in parliament and its premise, namely, that the legislative body of state executive, the state itself, was a legislative state.

But that position of the legislative body was possible only in a certain situation. To be precise, whenever it was assumed that the parliament, the legislative assembly, as representative of the people or of society—people and society could be considered one and the same, as long as they both stood in opposition to the government and the state—was on its guard against a strong monarchical state of civil servants, independent of it, and which was its partner in the constitutional pact. As long as it was representative of the people, the parliament was supposed to be there as true guardian and guarantor of the constitution, because the other party to the contract, the government, had concluded the pact only reluctantly. The government gained from it only suspicions; it spent money and exacted taxes; it was thought to spend freely while the representatives of the people were held to be frugal and reluctant to spend, what wholly and factually became its downfall.

Then the trend of the liberal 19th century came along to shrink the state to the minimum, to hinder it as much as possible from intruding and intervening in the economy in any way, to neutralize it most of all with regard to society and its opposite interests so that society and economy should win the necessary decisions for their sphere, according to their immanent principles: political parties came into existence in the free play of opinions, on the basis of free campaigning, while public opinion emerged from their discussions and battles of ideas, and the contents of the will of the state were determined by its means.

The freedom of contract and trade prevailed in the free play of the social and economic forces, and as a result, the greatest economic prosperity seemed assured, as long as the automatic mechanism of free trade and of the free market steered and regulated itself according to the economic laws (through the supply and demand, the competitive exchange, the capital accumulation of political economy). The fundamental civil rights and freedoms, in particular personal liberty, the freedom of expression, the freedom of contract, economic freedom and the freedom of trade and private ownership, in other words, the real points of reference in the top issues handled by the Supreme Court of the United States, assume the existence of a neutral state that would not intervene, and most of all would not mess with the cause of restoring the disrupted stipulations of free competition.

This state, which in the liberal non-interventionist sense, was basically neutral towards society and economy, remained as a premise of the constitution even when allowances were made for social and cultural political exceptions. Nevertheless, it changed itself from top to bottom, and admittedly in equal measure, it lost the strain it had shown as dualistic structure of state and society, government, and people: the legislative state was complete. As a consequence, the state would become the “auto-organization of society.” The distinction between state and society, government and people, that had previously been taken for granted, was cancelled in the process, while concepts and institutions built on that premise (law, budget, auto-administration) turned into new problems.

Simultaneously, though, something more profound and far-reaching set in. Society organized itself in the image of the state; were state and society to be fundamentally identical, the social and economic problems would automatically become state problems, and one would no longer be able to distinguish between the state-political and the societal-unpolitical spheres. All the outstanding confrontations that had been customary in the conditions of the neutral state, came to an end. They had become manifest in the wake of the distinction between state and society, and were misapplications and redrafts of that separation. Such antithetical distinctions between politics and economy, politics and education, politics and religion, state” and law, politics and law, which were meaningful when they corresponded to an objective separation into distinct parts or areas, became groundless and lost their meaning.

Changed into state, society becomes an economic state, a cultural state, a welfare state, a social security state, a provider state. It is a state which is the result of the auto-organization of society, and so in fact no longer separated from it, that seizes all the social, that is to say, everything that has to do with the common life of human beings. There is no sector in it any longer which would observe the unqualified neutrality towards the state, in the sense of nonintervention. The parties in which various societal interests and trends organize themselves are the very society turned into a multi-party state. Because they are economically, denominationally, culturally determined parties, the state can no longer remain neutral towards the economic, confessional, and cultural spheres. In the state that has developed

through the auto-organization of society, there is simply nothing left that is not at least potentially state-related and political. All the sectors are included in this new state.

French jurists and soldiers conceived the notion of the potential armor of the state, which covers not only the military, in the narrow technical sense, but everything else, the industrial and the economic preparation of war, even the intellectual and moral development, as well as the education of the citizens of the state.

Ernst Jünger has come up with a very pregnant formula to describe this astonishing process: total mobilization. With the necessary qualifications regarding contents and accuracy, the formulas of potential armor and total mobilization are individually befitting. One must pay attention to the important insight gained from them and make good use of it. They impart a sense of sweeping range while conveying the idea of a great and profound transformation: as it has organized itself into state, society is in the process of changing from a neutral state of the liberal 19th century into a potentially total state. The tremendous turning may be construed as the one side of a dialectical evolution which passes through three stages: from the absolute state of the 17th and the 18th centuries, over the neutral state of the liberal 19th century, to the total state of the identity between state and society.

The change stands out most conspicuously in the economic sphere. Thus, it is made evident by a generally recognized and uncontested fact, namely that when compared both with their earlier, pre-war state and with the present free and private, that is to say, non-public, economy, the public finances have assumed such proportions that cannot be considered merely a quantitative increase, but rather a qualitative transformation, a “structural change” which will affect all the sectors of public life, and not just financial and economic matters. Whatever the figures by which change is attested, whether, for instance, the often quoted estimate, calculated for the year 1928, that 53% of the German national revenue will be controlled by the public purse[7] is correct statistically need not be answered here, because the overall phenomenon is uncontestable and uncontested.

In a summing-up speech about the financial balance sheet,[8] State Secretary Professor Johann Popitz, an expert of the highest authority, assumes that in the action to allocate the larger percentage of the German national revenue, the self-regulatory mechanism of the free economy and of the free-market is switched off and its place is taken by “the decisive influence of a will in itself essentially extra-economic, namely, the will of the state.” Another specialist of the highest rank, the Reich Commissioner for the Economy, State Minister Saemisch has said that it is the present-day political situation in Germany that exerts a decisive influence upon the economy of public finances.[9]

From an economic perspective, there is an extremely apt formulation of the contrast which distinguishes the yesterday’s system from that of today, or so it seems to me: from a system of proportions (according to which the state is entitled only to a share of the national revenue, a sort of dividend from the net profit) to a control system through which the state has a say in the national economy as a participant in and new distributor of the national revenue, as producer, consumer, and employer, as a result of the close connection between financial economy and national economy, and as a result of the strong increase both in the needs of the state and in state revenue.

This formula must be used here for what it is worth, without embarking on a critique of the national economy. It has been spelled out by Fritz Karl Mann in an interesting and significant book, *Die*

Staatswirtschaft unserer Zeit (The State Economy of Our Times), published at Jena in 1930. In this context, it is very important for the theoretical studies on state and constitution to consider the relation between state and economy nowadays as the real issue of the problems of home policy, while the traditional formulae of the earlier state, built upon the separation of state from society, are suited only to mislead as far as the facts are concerned.

In every modern state, the distinction between state and economy emerges as the real issue of the current, direct questions of internal policy. They can no longer be answered by means of the old liberal principle of unqualified non-interference and unrestricted non-intervention. Apart from a few exceptions, this will be recognized fully and generally. In the present-day state, the economic questions constitute the core of the difficulties of the internal policy, and all the more so, the more modern and industrialized the state is. Internal and foreign policies are economic policy to a considerable extent, and admittedly not just as customs and trade policy or as social policy. If a state law "against the misuse of positions of power in economy" is passed (such as the Ruling of November 2, 1923, with regard to German cartels), so too, as a result and by this very formulation, the idea and the existence of an "economic power" are recognized by state and law. The present day state has a comprehensive labor legislation, including basic pay rates and state arbitration of wage disputes, through which it exerts a decisive influence on wages; it grants subventions to the various sectors of industry, it is a welfare state and a social security state, and simultaneously as a result, a tax and duty state on a vast scale. Moreover, in Germany, it is also a reparations state which must raise billions as tribute to foreign states. In such a situation, the demand for non-intervention would amount to utopia, to a contradiction in terms. Because non-intervention would mean that in the social and economic conflicts and contradictions, which cannot be overcome nowadays with purely economic means, the way is left open for various power groups. Under such circumstances, non-intervention is but intervention in favor both of concealment and recklessness, and once more the simple truth of Talleyrand's seemingly paradoxical words about foreign politics becomes obvious: non-intervention is a difficult notion, roughly, it means the same thing as intervention.

The most striking change in the conceptions about the state, prevalent in the 19th century, occurs in the transition to the economic state. The transformation may be seen in other spheres as well, although at present they will be felt mostly as less obtrusive, because of the crushing burdens of the economic problems and hardships. It is not surprising that the resistance to such an expansion of the state appears next as a resistance to the legislative state. Therefore, safeguards against the legislator will be called for next. So too, I suppose, the first gropings for remedies need to be elucidated as they are clamped on the judiciary in order to win a counterweight against the ever more powerful and grabbing legislator. They would end in empty formalities unless they are built on accurate knowledge of the overall situation of the constitutional law, and are not merely a reflex reaction. The actual error lies in the fact that to the power of the modern legislator one could oppose only a judiciary that either is bound to this legislator by specific norms and their contents, or is able to hold out against him only by means of vague and controversial principles that will not succeed in justifying their authority over the legislator.

The transition to the economic and the welfare state admittedly represents a critical moment for the surrendering legislative state, and for that reason, it need not, nor could it after all, provide the courts with renewed strength and political energy any more. In such changed circumstances, and given the

broad scope of state problems and responsibilities, perhaps the government may take remedial action, but certainly not the judiciary. Nowadays, most countries of continental Europe have allowed the judiciary to be deprived of all substantial norms on the pretext that it was capable of mastering the completely new situation on its own.

At the very moment when the victory seemed to be fully its own, parliament, the legislative body, the vehicle and keystone of the legislative state, turned into a contradiction-ridden structure, disowning its own qualifications and the premises of its victory. Its previous position and superiority, its expansionist drive at the expense of the government, its representation in the name of the people, all that presupposed the distinction between state and society did not survive the parliament's victory, at least not in that form. Its unity, actually its identity with itself, had been defined until then against the opponent in domestic affairs, the old monarchical, military and bureaucratic state. When it fell, the parliament in turn came apart, so to speak.

Now the state is, as the saying goes, the auto-organization of society, but the question is: how does the auto-organized society achieve its unity, and provided the unity sets in, is it truly the result of auto-organization? The difference between a state of parliamentary parties, with loose, that is to say, not firmly organized parties, on the one hand, and a multi-party state with tightly organized structures which are vehicles in the shaping of the will of the state, on the other, may be greater than that between monarchy and republic or any other state form. The exponents of the pluralistic state reproduce a naked likeness of the pluralistic division of the state itself, outside parliament where their representatives assume the form of factions.

Wherefrom is the unity to come in this state of affairs? From the abolition and the amalgamation of strong party and interest connections? There is no more room for discussion. Well, my mere hint to this ideal principle of parliamentarianism has induced Richard Thoma to dismiss it as an "entirely moldy" foundation. Certain, so-called "direct connections" that go through political parties (agricultural interests, labor interests, civil servants, in some cases, women, too) can produce a majority, in distinct areas; in the conditions of pluralism, they are no longer the exclusive concern of parliamentary parties and factions. Moreover, such direct connections themselves may be factors of pluralistic grouping, so admittedly, they complicate the state of affairs even more, and instead of doing away with it, they are more likely to entrench its very conditions.

Understandably, the famous "*solidarité parlementaire*," the common, selfish, private interests of parliamentary deputies, and particularly of the true professional politicians, that run across party lines and may be an effective motive and a useful factor of unity, is no longer sufficient in such a difficult situation as that of present-day Germany, in the conditions of an intensive hardening of the organizations. Parliament changes itself from a stage for a unifying free debate among free representatives of the people, from a transformer of narrow party interests into a supraparty will, into a stage for the pluralistic division of the organized, societal powers.

As a result, either it becomes incapable of majority rule and action, because of its immanent pluralism, or the majority in office exhausts the legal means as tools and safeguards of its power-holders, makes the most of its stint of state power in all directions, but above all seeks to narrow as much as possible the chance of the strongest and most dangerous opponent to do the same.

Perhaps it would be rather naive to interpret it as human wickedness or a particular kind of baseness, possible only nowadays. The history of the German state and constitution has registered similar occurrences in a disturbing number and with the same disturbing regularity in the past centuries. What the emperor and the princes did to safeguard the power of their houses during the disintegration of the old Roman Empire of the Germanic nation repeats itself in numerous parallels.

The transformation from the 19th century is fundamental even in this respect. In this case, too, it would cover itself with the veil of words and phrases, kept unchanged, with old ways of speaking and thinking and a formalism that served those residues. But one must not be under the illusion that the effect both on the character of the state and constitution and directly on the state and constitution is great beyond any measure. It consists mainly in the fact that to the same extent in which the state has changed itself into a pluralistic structure, the loyalty to the social organization, the structure generated by state pluralism, replaces the loyalty to the state and its constitution, especially as the social complex often shows a tendency to become total, that is to say, to bind the helpless citizen entirely to itself economically, in accordance with its ideology.

So, ultimately, a pluralism of moral ties and obligations of loyalty, a “plurality of loyalties,”[10] also comes into being, through which the pluralistic dispersion is increasingly reinforced and the prospect of building up a state unity becomes ever more remote. Taken to its logical conclusion, it turns a civil service with obligations to the state into an impossibility, because this sort of officialdom too is supposed to be one of the organized social complexes of the disaggregated state.

Moreover, a conceptual pluralism of legality comes to the fore, destroying the respect for the constitution and turning its foundations into an uncertain terrain contested from several sides, whereas according to every constitution, a political separation exists beyond any doubt, and which together with the constitution, is the given basis of state unity. With the clearest conscience, each group or coalition in power call legality the exploitation of all the legal means and the safeguarding of each of their positions of power, the utilization of all state and constitutional power in legislation, administration, personnel policy, disciplinary law and auto-administration. As a consequence, every serious criticism or even the mere exposure of their situation seems to them an illegality, a coup, and a violation of the spirit of the constitution.

On the other hand, every organization in opposition, affected by such methods of government, refers to it, pleading that the infringement of the principle of the equal opportunity provided for by the constitution is the worst violation of the spirit and of the fundamental principles of a democratic constitution. In this way, and likewise with the clearest conscience, it can return the accusation of illegality and abuse of the constitution. The constitution itself will be smashed into smithereens between these two, in the conditions of a state pluralism in which mutual negations function almost automatically.

This examination of the concrete constitutional conditions should make one aware of a truth the sight of which many would rather avoid for many various reasons and on all kinds of pretexts. Nonetheless, it is indispensable for the study of constitutional law, which concerns itself with such problems as the protection and the safeguarding of the present constitution of the Reich. It will not do to speak in general terms of a “crisis” or to dismiss this presentation as another specimen of the “crisis literature.”

Whether the present-day state is to be a legislative state, whether in addition and considering the expansion of the sectors of state life and activity, one may already talk of a transition to the total state, whether in that case, the legislative body, already the stage and focus of a pluralistic dispersion of state unity, would become a majority of tightly organized social complexes, whatever the questions, one thing is certain, namely that the formulas and counter-formulas, coined to describe the conditions of the constitutional monarchy of the 19th century, will not be of much help: the most difficult question of today's constitutional law cannot be answered by talking about the "sovereignty of the parliament."

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The Tyranny of Values, 1959

Carl Schmitt


5,218 words

The Reflections of a Jurist upon the Philosophy of Values Dedicated to Those who Were at Ebrach in 1959

Trans. Simona Draghici

Editor's Note:

The following text is one of two essays (from 1959 and 1967) by Carl Schmitt with the title "The Tyranny of Values" later published in Carl Schmitt, *Die Tyrannei der Werte* (Hamburg: Lutherisches Verlagshaus, 1979). This text was written in 1959. The translation is from Carl Schmitt, *The Tyranny of Values*, ed. and trans. Simona Draghici (Washington, D.C.: Plutarch Press, 1996), which is out of print and very hard to find. If anyone knows the translator, please put me in contact.

The Question

There are people and things, persons and objects. There are also forces and powers, thrones and dominations. The theologians and the moralists speak of virtues and vices, the philosophers speak of qualities and modes of being. On the other hand, what are values? And what does a philosophy of values mean?

Indeed, value and disvalue had been talked about even before a philosophy of values came into being. Still, in most cases, a distinction is made whenever it is said that objects have value and people have merit. To put a value on merit is considered unworthy. On the other hand, nowadays, merit too tends to be changed into value, as a consequence of the philosophy of values. The shift implies quite a striking rank-promotion of value. Thus value has been revalued, so to speak. It should be noticed that the values talked about by the philosophy of values are not meant to have an existence of their own, but rather, validity. Value is not, rather it validates. There are some people who talk of the ideal being of values. Nevertheless, such shades of meaning need not be deepened, because no matter what, value is not, but rather it validates. As we shall see at even closer quarters, value readily implies a stronger urge to materalize. Value pines for direct actualization. It is not there, to be pointed to, but realization-prone and on the watch for enactment and execution.

One may remark: we are dealing here with sharp distinctions of meaning. Hence the inference of a complicated issue, a challenge that one faces. It is not a difficult problem for Marxist thinkers and sociologists, though. Dialectical materialism provides them with a convenient key. Besides, they can hold each and every non-Marxist philosophy under suspicion, expose it and unsparingly unmask it as sheer ideology. The pillorying is particularly easy in the case of a philosophy that deals with values and presents itself as a philosophy of values. According to the Marxist teachings, the whole bourgeois society is a society of owners of money and goods, in whose hands all — people and things, persons and objects — is converted into money and goods. All is brought to the market where only economic categories are relevant, namely, worth, price, and money. On the other hand, in the productive sector, one deals with the surplus-value. A small number of people appropriate the surplus-value which a great many produce, while the latter are cheated out of the surplus-value which is their due. It always goes back to value. No wonder, the Marxists would say, that the reality of such a situation is imprinted on the minds of ideologists as a philosophy of values.

Here, our answer to the issue, though, will not be reduced to such simplicity. It is self-evident that value and price and money-value are economic concepts, deeply rooted in the economic sphere. But it would be unfair to reduce everybody and everything to them, and so dismiss the whole philosophy of values.

Rather, the philosophy of values will be tackled as a philosophical-historical phenomenon. We shall probe its origin and its state, and seek to clarify its undeniable achievements.

The Philosophy of Values: Its Beginning and Historical Philosophical Circumstances

The explanation of its astounding success lies in the fact that the philosophy of values originated in very peculiar, historical-philosophical circumstances, in a response to a threatening question raised by 19th-century nihilism. It is of no consequence whether it assumes or rejects existential philosophy under any of its forms, whether it upholds or denies existentialism. Both historically and philosophically, it is always true what Martin Heidegger had to say about the origin of the philosophy of values, and his words are quoted here at length:

In the 19th century, value became a current topic of discussion, and reflection on value, customary. Nonetheless; it was only as a consequence of the dissemination of Nietzsche’s writings that it became quite popular to talk about values. One would talk of vital values, eternal values, about the hierarchy of values, about spiritual values, which one claimed to have discovered in Antiquity, for instance. The

philosophy of values came into being through a scholarly commerce with philosophy and the resystematization carried out by neo-Kantianism. Systems are built out of values, and value-ranks are traced in ethics. Even in the Christian theology, God is understood to be the highest value, the *summum ens qua summum bonum* [highest being as highest good]. Science is held to be value-free, and valorizations are attributed to the various world outlooks. Value and valuation act as a positivistic substitute for the metaphysical.[1]

Martin Heidegger's words clearly define and accurately outline the origin and the historical-philosophical circumstances of the philosophy of values. A science that observes the laws of causation, and so is value-free, threatens human freedom and man's religious, ethical, and legal responsibility. The philosophy of values raised to that challenge, in the sense that it opposed a sphere of values, as a realm of ideal valuations, to a sphere of being that was only causally understood. It was an attempt to assert the human being as a free, responsible creature, indeed not in itself, but at least, in its valuation, what one called value. That attempt was put forth as a positivistic substitute for the metaphysical.

The valorization of value is grounded in it. Who sets up values? The clearest and so far also the most candid answer to this question is to be found in Max Weber's writings. According to Weber, it is the individual human being who, in full and genuinely subjective freedom of decision, sets up values. Thus, the absolute value-freedom of scientific positivism is circumvented, and values are set free from it, in the opposite direction, namely, of the subjective world outlook. The genuinely subjective freedom of value-setting leads, however, to an endless struggle of all against all, to an endless *bellum omnium contra omnes*. In such circumstances, the very presuppositions about a ruthless human nature on which Thomas Hobbes' philosophy of the state rests, seem quite idyllic by comparison. The old gods rise from their graves and fight their old battles on and on, but disenchanted and, as we today must add, with new fighting means that are no longer weapons, but rather abominable instruments of annihilation and processes of extermination, horrible products of value-free science and of the technology and industrial production that follow suit. What for one is the Devil is God for the other. "And so it goes on through all the orders of life . . . and that is so for all times." One may fill many pages with such emotional and graphic remarks as Max Weber's.[2] It always happens that values stir up strife and keep enmity alive. The fact that the debunked old gods have become merely valorized values only renders the struggle more ghostlike and the fighters hopelessly dogmatic. That is, in brief, Max Weber's message.

Such earnest thinkers as Max Scheler and Nicolai Hartmann have sought to do away with the subjectivism of valuations and in its stead to lay the groundwork for an objective and, at the same time, non-formal[3] philosophy of values. Max Scheler worked out a ranking order of values that goes upwards, from the useful to the holy. Nicolai Hartmann, on the other hand, built up a system of objective connective parts of a real world, set up in layers, with the inorganic lying at the bottom and the spiritual at the top. Nevertheless, values still must valuate, even whenever they are valuated as lofty or sacred, because values always count for something or for someone. Nicolai Hartmann himself has stressed it forcibly. What he says is that value "does not attach itself to its ideal valuations, but to its actual," that is to say, "the value-affected individual subject."[4] His observation is decisive for our juridical approach, which takes into consideration only the actual valuation. Hence, in concrete situations, we deal only with the value-affected subject.

The immanent logic of the reflection on values cannot elude just everybody. A peculiar thought-shift becomes inevitable as soon as value is expressed, whether it is subjective, formal, or material. It is given, and one must add: by necessity, with each value-judgment. Thus, the peculiarity of value lies in the very fact that instead of an existence of its own, it is part of a valuation only. Consequently, its potential comes to nothing, unless it gains acceptance. Value must continuously valuate, that is to say, it must bring its influence to bear: otherwise it dissolves into an empty manifestation. Whoever says value brings its influence to bear and has it enacted. Virtues are practiced, norms are applied, orders are executed, but values are set up and enacted. Whoever asserts a value, must bring its influence to bear. Whoever maintains that it has value regardless of the influence brought to bear by any individual human being who endorses it, is simply cheating.

The Point of Attack

Whether something has value and how much, whether something is worthy and how high can be determined only from an assumed point of view or particular vantage-point. The philosophy of values is a point philosophy; the ethics of values, a point ethics. Standpoint, viewpoint, vantage point are always head-words of their vocabulary. They are neither ideas nor categories, neither principles *nor* premises. They are just points. They stand in the system of a genuine perspectivism, in a system of reference. Each value is therefore a positing value. Even the highest value — whether the individual human being in his own earthly existence, or humankind "as the supreme being," whether freedom or the classless society, life as such or the living standard, whether the sacred or also the deity — each has as such, that is, as the highest value, only a ranking value within the value system. Therefore, one may speak freely of the "revalorization of value." The revalorization raises no difficulty here, as long as it is simply a matter of commutation, of exchange. The purpose of standpoints, viewpoints, vantage-points is not to remain fixated. On the contrary, it is part of their meaning and function to change with the changing planes. It is at this stage that the point-character of the reflection on value becomes evident, that Max Weber's straightforwardness breaks through.

It would be wrong, indeed, to reduce it to a mere position of force and so overlook his considerable sociological insights into the matter. Nor should one stick to his allegedly neo-Kantian theory of knowledge.[5] Weber's thinking reveals a characteristic penetrating quality with regard to this very aspect of the philosophy of values. Amid so many viewpoints, standpoints, and vantage-points, he distinguishes another, quite special, the personal point, which is the really decisive. He openly calls it the point of attack. In his debate with the historian Eduard Meyer, Max Weber maintains that the result is an "endless diversity of appraising positions," and to interpret it means "to uncover just the possible standpoints and the points of attack of the valuation." The three terms, "standpoint," "point of attack," and "valuation" are placed by Weber in quotes, in his characteristic way of thinking and writing.[6]

The term "point of attack" carries with it the potential aggressiveness that is immanent in each value-attribution. Terms like "standpoint" or "viewpoint" divert one's attention and give the impression of an apparently limitless relativism, relationism, and perspectivism, and concomittantly, of as great a tolerance, joint to a fundamental neutrality. Before long, however, one becomes aware of the fact that here, too, the points of attack are at work, dispersing the illusions of neutrality. One may try to neutralize the term "point of attack," in the sense of recasting it into a weaker formulation, such as "starting point," for instance. That would soften only the uncomfortable representation, though, while

leaving the immanent aggressiveness untouched. The latter remains the “fatal, seamy side of values.”[7] The aggressiveness is the logical consequence of the thetic and subjective essence of values and it renews itself continuously through their practical enactment. Likewise, the distinction between value law and statutory law does not do away with the aggressiveness, but rather intensifies it.[8] Because of the ambivalence of values, that aggressiveness will not cease to renew its virulence, whenever values as such are brought by actual people to bear upon other people as real as they.

The Realization of Value-Destroying Values

At first sight, the ambivalence of values too seems to wear a neutral garment of the kind of, for instance, plus and minus in the sphere of mathematical objectivity, or of the positive and negative poles, in the objective realm of physics. Nonetheless, it does not take long to perceive that this kind of neutrality is but the positivism of the natural sciences, the very nihilistic value-freedom of which one wants to get rid without delay, as one plunges into the freedom of the genuinely subjective values, and then through it, to take up the unleashed struggle of all against all, again, and overcome the great nihilistic crisis. Has meanwhile the bridge to the objective theory of values been cast over the abyss which severs the value-free science from the human freedom of decision? Have the new objective values dispelled the nightmare which, to use Max Weber’s words, the struggle of valuations has left in store for us?

They have not and could not. To claim an objective character for values which we set up means only to create a new occasion for rekindling the aggressiveness in the struggle of valuations, to introduce a new instrument of self-righteousness, without for that matter increasing in the least the objective evidence for those people who think differently.

The subjective theory of values has not yet been rendered obsolete, nor have the objective values prevailed: the subject has not been obliterated, nor have the value carriers, whose interests are served by the standpoints, viewpoints, and points of attack of values, been reduced to silence. Nobody can valuate without devaluating, revaluating, and serving one’s interests. Whoever sets a value, takes position against a disvalue by that very action. The boundless tolerance and the neutrality of the standpoints and viewpoints turn themselves very quickly into their opposite, into enmity, as soon as the enforcement is carried out in earnest. The valuation pressure of the value is irresistible, and the conflict of the valuator, devaluator, revaluator, and implementor, inevitable.

A thinker of objective values, for whom the higher values represent the physical existence of the living human beings, respectively, is ready to make use of the destructive means made available by modern science and technology, in order to gain acceptance for those higher values. Another regards it a crime to wish to do away with the allegedly higher values of human existence. One may get a sample of it from the debate over the use of nuclear weapons.[9] It is unnerving to see that ultimately even the origins and the meaning of the philosophy of values are lost through this logic, and the incipient self-restraint claimed by the scientific positivistic nihilism is eliminated. Consequently, the absolute value-freedom of science may also be posited as value, even as the highest value, and assert itself. No consistent logic of values can hinder the positor and the enforcing agent of this highest value from rejecting the whole philosophy of values as unscientific, retrograde, and nihilistic. Thus, the struggle

between valuator and devaluator ends, on both sides, with the sounding of the dreadful *Pereat Mundus* [the world perish].

The Tyranny of Values

How else should the struggle of the subjective or even the objective values end? The higher value has the right and the obligation to subdue the lower value, while the value *per se* righteously eliminates the disvalue. That is plain and clear, and is grounded in the peculiar character of valuation. It is precisely "the tyranny of values" that gradually emerges in our consciousness. It was not I who coined the phrase. One comes across it in the work of the outstanding objective theoretician of values, Nicolai Hartmann. Its significance to our context is such that we must quote from his work here as we did earlier from Martin Heidegger's on the historical origins of the theory of values. Here is what Nicolai Hartmann had to say:

As soon as it prevails upon a person, each and every value tends to raise itself to the position of sole tyrant of the whole human ethos, and that at the expense of other values, and even of those that are not diametrically opposed to it. Indeed, the tendency is not limited to values as such, in their ideal sphere of existence, but readily extends to them as determining (or selective) forces in the sphere of human feelings regarding values. This tyranny of values appears clearly in the one-sided types of the prevailing morality, in the familiar intolerance shown to an alien morality, and moreover, is succeeds in winning over individually any person to a single value. Thus, there is a fanaticism of justice (*fiat justitia pereat mundus* [let there be justice though the world perish]), which is opposed not only to love, to say nothing of charity, but essentially also to all the superior values.[10]

These words of Nicolai Hartmann's conjure the image of a value assertion that is destructive of value, as already mentioned. For practical purposes, with which we as jurists are concerned here, it makes no difference whether the tyranny of values is unavoidable only psychologically, or also existentially, or still, whether it finds its way through the subjective human affinity for value, as Hartmann meant it, or whether it lies in the structure of value thinking, as it has already been shown in our exposition. Correctly understood, the phrase "tyranny of values" may supply the key to the understanding that all thinking about values only foments and intensifies the old and endless struggle between convictions and interests. Not much is gained by what the modern philosophy of values acknowledges as the "fundamental relationship," according to which, occasionally the lower value may be preferred to the higher value, because that is the prerequisite of the higher value. All that points only to the confusion that affects the whole argumentation about values, which continually gives rise to new relations and points of view, thereby the position is always maintained from which the opponent is reproached that he does not heed the manifest values; or, in other words, he is disqualified as value-blind. The polemical utilization of the word "blind" is adequate to the logic of values as long as it is concerned with the systems of reference that it will build up out of viewpoints, standpoints, and vantage-points. [11]

From the point of view of its logic, value must always valuate. In other words, for the highest value, the highest price is not too high and must be paid. This logic is by far too strong and conspicuous to be subdued in the struggle of values. One needs only to compare the old-fashioned relationship between end and means with the modern relationship between higher and lower values, or even that between

value and disvalue, in order to understand how checks and concerns on account of the particular value-logic disappear. Formerly, when value was substantially something else than worth, the end could not justify the means. That the end should justify the means was considered an abominable maxim. On the other hand, in the hierarchy of values, there are other relationships that count and justify it, namely that the value cancels the disvalue, and the higher value treats the lower value as inferior to it. Max Scheler, the grand master of the objective theory of values said, and Theodor Haecker has repeated after him with a zeal that is more polemical than reflective, that the negation of a negative value is a positive value. Mathematically that is clear, namely, that minus and minus equals plus. From such a statement it is easily inferred that the connection between the theory of values and its old, value-free opponent cannot be so readily loosened. All of Max Scheler's propositions allow evil to be returned for evil, and in that way, to transform our planet into a hell that turns into paradise for value.

The Unmediated and the Legally Mediated Enactment of Values

The theory of values scores its real triumph in the debate about the question of the just war, as we have seen. That lies in the nature of the thing itself. All respect for the opponent disappears — well, it turns into a disvalue — whenever the struggle against the opponent is a struggle for the highest value. Disvalue has no rights over value, and there is no price too high to pay in order to force the highest value through. Thus, one deals here only with the annihilator and the annihilated. All the concepts of the classical law of warfare of the *Jus Publicum Europaeum* (the European Civil Law) — such as the just enemy, the just motive of war, the proportionality of the means, the prescribed course of action, the *debitus modus* — fall hopelessly victim to this valuelessness. The urge to make values prevail becomes a coercion to enact values directly.

In 1920, a book was published in Germany, under the prophetic title: *Freigabe der Vernichtung Lebensumwerten Lebens* (Licence for the Annihilation of Life-Deprecating Life).[12] Its authors were two highly regarded German academics, belonging to the best German cultural tradition, namely, the physician Alfred Hache, and the jurist Karl Binding. Both were liberals, and both were animated by the best humane intentions. Both had pondered over, in a downright touching way, how the misuse of one's propositions as concerns the annihilation of an existence that devaluates value through limitations and reservations of all sorts might be prevented. It was not only unfair but also particularly base to attribute after the fact to the two German scholars some of the blame, and hold them responsible, for the actual annihilation that occurred 20 years later.

No matter what, one should not discard the opportunity of weighing each word in the title of their book, strictly in the light of the concept of the tyranny of values. *Ne simus faciles in verbis*. Let us not be careless about the ways we use our words. In earlier times, such as in 1920, it was possible in all humaneness and good faith to challenge the annihilation of a life-deprecating existence. How harmless and benign may today appear any attempt to suppress opinions about the devaluation of expression, books that disparage book-publishing, books and articles that deprecate printing while they are in the press, and to make impossible the transportation of persons or goods that devalue transportation while those persons and goods are already in railways stations or in market-places. All that could be clamored for in virtue of the watchword of license to annihilate by disvalue. All would be but the unmediated prevalence of the higher value at the expense of the lower value or of the very disvalue.

It would be an interesting topic of philosophical research in itself to compare the problematic enabling of values with the problematic existence of the Platonic ideas. What the specialist-philosophers might say about it would no doubt prove as true of the values of a still higher rank as what Goethe has said about the idea: it would always appear as the strange visitor. Nor can value be otherwise, truly speaking. The idea requires mediation: whenever it appears in naked directness or in automatical self-fulfillment, then there is terror, and the misfortune is awesome. For that matter, what today is called value must grasp the corresponding truth automatically. One must bear that in mind, as long as one wants to hold unto the category of "value." The idea needs mediation, but value demands much more of that mediation.

In a community, the constitution of which provides for a legislator and a law, it is the concern of the legislator and of the laws given by him to ascertain the mediation through calculable and attainable rules and to prevent the terror of the direct and automatic enactment of values. That is a very complicated problem, indeed. One may understand why law-givers all along world history, from Lycurgus to Solon and Napoleon have been turned into mythical figures. In the highly industrialized nations of our times, with their provisions for the organization of the lives of the masses, the mediation would give rise to a new problem. Under the circumstances, there is no room for the law-giver, and so there is no substitute for him. At best, there is only a makeshift which sooner or later is turned into a scapegoat, due to the unthankful role it was given to play.[13]

A jurist who interferes, and wants to become the direct executor of values should know what he is doing. He must recall the origins and the structure of values and dare not treat lightly the problem of the tyranny of values and of the unmediated enactment of values. He must attain a clear understanding of the modern philosophy of values before he decides to become valuator, revaluator, upgrader of values. As a value-carrier and value-sensitive person, he must do that before he goes on to proclaim the positings of a subjective, as well as objective, rank-order of values in the form of pronouncements with the force of law.

Notes

The Tyranny of Values, 1967

Carl Schmitt

6,572 words

Trans. Simona Draghici, Romanian translation here

Jeanne Argent, *Alice Through the Looking Glass*

Editor's Note:

The following text, which was written in 1967, is one of two essays Carl Schmitt published under the title "The Tyranny of Values." Both were reprinted in Carl Schmitt, *Die Tyrannei der Werte* (Hamburg: Lutherisches Verlagshaus, 1979). The translation is from Carl Schmitt, *The Tyranny of Values*, ed. and trans. Simona Draghici (Washington, D.C.: Plutarch Press, 1996), which is out of print and very hard to find. If anyone knows the translator, please put me in contact.

Introduction

This introductory essay[1] is a jurist's contribution to a discussion on "Virtue and Value in the Theory of the State," that followed a paper read by Professor Ernst Forsthoff at Ebrach, on the 23rd of October, 1959. On that occasion, Professor Forsthoff showed that while virtue still had a place in the system of absolute monarchy, the legalism of the bourgeois legal state no longer knew what to do with such a word as virtue and its meaning.

The term "value" offered itself as a kind of substitute. Notwithstanding, even before WWI, pains had been taken to rehabilitate "virtue" by means of a philosophy of values (Max Scheler, 1913). After WWI, such notions and trains of thought, peculiar to the philosophy of values, were driven into the theory of state and constitution that stood behind the Weimar Republic and its Constitution (1919–1933). The intention was to provide a new interpretation of the constitution and its legal basis. Nevertheless, the legalistic vocabulary regained its ground eventually. Only after WWII, however, did the German justice make good its decisions on a large scale by assuming the perspectives of a philosophy of values.

Thereby, practically speaking, the issue has ever since been about a new, fully systematic interpretation of human rights, the so-called third effect, and the unmediated value of civil law, as well as the resulting interpretation of the term "social" in Article 20, 28 of the Bonn Basic Law of the 23rd of

May,1949. In this way, the problem of the ratification of the Constitution in the light of the theory of the legal state emerges in all its magnitude. Professor Forsthoff has made known his stand on the matter in several papers and articles that have been gathered together into a book entitled *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen 1950–1964* [The Constitutional State in Transformation: Essays in Constitutional Law, 1950–1964].[2] There, he puts his finger on the heart of the whole matter conclusively, in a singular and clear-cut sentence: “Value has its own particular logic.”

I.

The system of justice of the Federal Republic of Germany has relied on the interpretation of the Bonn Basic Law, without giving much thought to the logic of values. That is not yet to say that the logic of values has recovered legal and juridical force by us, in the direction of adopting a ranking mechanism that is also binding, such as the jurisprudence of the highest German tribunal, or in other words, a German “judge-made law” principle. In this respect, the German federal legislators would hold themselves back on each and every occasion. Under such circumstances, a judge who is serving justice, needs an objective grounding of his decisions and sentences. Instead, nowadays, he has a multitude of philosophies of values to choose from. The question is whether such a broad variety is capable of providing the desired, all-convincing, objective premises. It is quite likely that he considers himself less a federal judge than a pioneer of finite values. Nonetheless, in practical life, he may actually hesitate to present himself as a promoter of force, power, targets, and interests, a stand which in his case bears the official endorsement of a philosophy of values. Not mistakenly, but rather according to the particular logic of values, he would dare to dismiss the issue as a mere wrangle about words. As a practical, law-abiding jurist, he will soon find out from experience that the strongest oppositions in the decisive moment are a wrangle about words. On the other hand, as a theoretician, he would distinguish between the force of law, the good of law, and the value of law, and would not dismiss them as meaningless pedantry. As a historiographer of law, he knows that in the beginning, property was the thing itself (*rea mea est*), then it turned into an objective “right to the thing,” and that nowadays it has been reduced to a mere value.

Even the law-giver, whose statutes in normal conditions must define the calculable boundaries of the full scope of a free logic of values, may, in his official statements, fall back upon the vocabulary of one of those many philosophies. Thus, for instance, the premise tor the draft of the “Law for the Reorganization of the Civil Procedure for the Protection of Person and Honor”[3] starts as follows: “In the true democracy, man’s dignity is the highest value. It is indisputable.” The value, however, remains open-ended, undecided.

Perhaps, something very special and topical makes itself manifest in such a formulation: a multiple, that is to say, overdeveloped pluralistic society, made up of a great many heterogeneous groups that are integrated in it, must transform its corresponding openness into a drilling field for the exhibitions of the logic of values. In such a society, group interests appear as values to the extent they make out of any value system that suits them essential legal categories for the values of their positions. The transformation into values, the “valuation,” renders the unmeasurable measurable. Quite unconnected goods, targets, ideals, and interests, some derived from the Christian churches, others belonging to the socialist corporations, agricultural, medical, charitable, philanthropic, and trade associations, families with many children, and so on and so forth, differentiate themselves by that process and render

themselves capable of compromise, in order that a quota in the distribution of the social product could be calculated. All this as its good purport, as long as the specific conceptual peculiarity of value remains known and its concrete meaning is sought there where it belongs, namely, in the economic sphere.

Nowadays, a transformation into values, an over-all valuation, is in progress in all the spheres of social life, and makes itself evident in the official language of its most exalted planes, as proven by the translations of the social encyclicals of Pope John XXIII, *Mater et Magistra*, of the 15th of May, 1961. There, the Latin word *bonus* (good) is translated into Italian as *valore* and into German, as *Werth*.[4] Quite often, this linguistic transformation rightly does away with the notion altogether: the Latin terms are no longer able to keep up with the rhythm of the modern industrial-technological development. In the Declaration of the Second Vatican Council about "The Relation of the Church with the Non-Christian Religions," of the 28th of October, 1965, they are indeed called *valores socio-culturales*, after the manner of *bons spiritualis et moralia*, as recognizable to and also acknowledged by the followers of non-Christian religions, and which should be guaranteed and applied into the practice of everyday life.

II.

As a matter of fact, the Latin word *valor* has retained the meaning of force, fortitude, and virtue in the Romance languages to a larger extent than the German word *Werth*. In music and painting *valeurs* have their aesthetic significance. They can "unfetter," that is to say, they become absolute, fertile colors no longer confined by the frame, or as music, no longer bound to words. In the German language, a hundred years of rapid industrialization turned *Werth* into a mainly economic category. Nowadays, *Werth*has become so economic and commercial in the public consciousness, that one cannot retrace one's steps and reimpregnate it with the other meanings, least of all in an age of industrial progress and of growing wealth that is continuously redistributed. A scientific theory of values belongs under economics. It is there that the logic of values is in place. That is made obvious by the law of restitutions. As Lorenz von Stein says, the principle of restitutions rests "on the separation of good from value, which is possible only in the context of national economy.[5] Economy, market, and the stock exchange, all share a common basis, namely, what one specifically calls a value. All the higher "values," beyond the economic, rest upon the economic basis only as a superstructure, and which could be understood correctly only by means of the principle of infrastructure: *superficies solo cedit*. This not "Marxism," but rather a fact with which Marxism may associate itself fruitfully.

The irresistible process of economization is perhaps not only a consequence or merely a concomitant phenomenon of capitalism, that has turned everything, even human labor, into wares, values, and price, for which money is "the universal, self-generating value of all things," while the rest, people and nature, "rob it of its singular value." A thoroughly anti-capitalistic philosophy of labor works into the same direction, in the sense that it takes capitalism with its specific logic at its word and follows that logic to its end. Human labor may be treated as commodity. All right. But what follows, when instead, it is treated as value, in order to raise its price? Only labor creates the real value. All right. If that is so, value still belongs first and foremost to the economic sector, and has its home base in it, as long as one can still talk of "home" and "base" without transforming them into value or commodity. And on top of all that, still another word, and none else than "surplus value"! As industry and technology develop, the surplus value assumes fantastic dimensions. The social product grows from year to year. Who is now

the true creator of this surplus value which grows wildly and beyond any measure? Who can afford to figure out the profit yielded causally adequate by this immense wealth and the series of economic miracles? In concrete terms: who is the legitimate distributor of the social product and who actually assesses the shares in practical life? As long as the issue is about value, all such questions must above all be formulated as economic questions.

III.

The logic of the economic notion of value has thus a rational sphere in the law of exchange, the *justitia commutativa*, and can develop from it meaningfully on the premise of a stable currency. From the point of view of jurisprudence, it is the sphere of the law of debt and trade, of restitution for property damage, of fiscal law and of household law, and in particular, of insurance law. From the point of view of the cultural sciences and the sociology of knowledge, the insurance system is a matter in which the representation of value is not simply absorbed by the market economy. The very symbolic payments in cash for wounding someone's honor, for fictional or affective values, are instances that may be judged only within the framework of the practical order. The *Weregeld* taxes of the primitive penal law estimate the body and the life of the noble or of free men in substantive and not in charter money. All that, however, has nothing to do with a philosophy of values which should rescue the good, the true, and the beautiful from the causal thinking of a value-free natural science.

IV.

Nowadays, each time the word "value" is used knowingly or unknowingly by the two opposing camps, they unfailingly steer it into the economic sphere. Both capitalism and anti-capitalist socialism do it, even if the latter is more polemical though no less effective. The same thing happens, almost automatically, whenever one adopts a third stand, apparently quite different from the other two. Since 1848, there has been a syncronism as remarkable as it is shocking, a simultaneity, an osmosis and symbiosis between the philosophy of values and the philosophy of life. This should not be regarded as an academic event, belonging exclusively to the history of philosophy, such as, for instance, the foundation of the philosophy of life by the great Wilhelm Dilthey. The historical contemporaneity of word and notion is of greater interest to us as a fact that disregards the quarrels of the schools and of the dogmas and has been able to bring about a common alignment of opposite, nay, antagonistic, ideas and trends.

Life is if not the highest, still one of the higher values of every philosophy of life. For over a hundred years now, the twin pair life-value/value-life makes its presence felt in a tightly interwoven contemporaneity and features in German books under an alternate, unintendedly symptomatic, and often quite naive title of an altogether different provenance. The series stretches from Eugen Dühring's *Der Werth des Lebens* [The Value of Life], 1865, for instance, to Heinrich Mittel's *Der Lebenswerth der Rechtsgeschichte* [The Life Value of Law History], 1947. In the value system and the vocabulary of racial world outlooks, value and life appear intimately bound on a higher plane. Thus, while addressing the Press on the 10th of November, 1938, Hitler spelled out an "incomparable value" for the benefit of everybody, and indeed, of the Germans: the German people was "the highest value that there is on this entire earth." Alfred Rosenberg saw in "the service to the highest values" the "mark of true genius."

The various philosophies of life presented themselves as a conquest of materialism, or in any case, they readily claimed it. That does not change anything: their valuations, revaluations, and explanations of disvalue have been emptied into the over-all secularization stream, where they have only hastened the tendency to unlearn, which is a neutralizing process, after all. The transformation into a value is but a transposition into a system of rank values. It makes possible lasting revaluations of entire value-systems, and also of parts of one and the same value-system, through enduring changes in the value-scale. Likewise, through this transformation, fantastic possibilities are opened for the valorization of the valueless and the elimination of disvalue.

Hence it does not follow that religious, spiritual, and moral values will be placed on a higher rung of the value scale, and that the vital values, as Max Scheler called them, will range higher in value only against material values, while on the other side, they are held to be inferior to the spiritual values. It is decisive to range all values, from the highest to the lowest, along the same value-scale. The ranking and the placement are of secondary importance; the logic of value works above all with values, and only secondarily with the positions along the value scale. With the sequential integration into a system of values, even the highest value does change into a value, the position of which will be assigned within that system. Hence whatever it is, or whatever it has been until now, it turns into a value. What always may be rated as the highest value — God or mankind, the individual or freedom, the greatest happiness of the largest number, or the freedom of scientific research — is a value firstly and above anything else, and only afterwards, it is the highest value. Were it not a value, it would not appear on the value-scale at all. No value-system can acknowledge a super-value that is not a value to start with. Thus only the disvalue remains, and for its part, it must be left out of the value-system, while at the same time, the absolute negation of the disvalue is a positive value. God may be the highest value for value thinking, but also nothing else. On the other hand, in the atheistic value system, from which he is not absent, indeed, God becomes an absolute disvalue. A pessimist, in the ontological sense of the word, such as Eduard von Hartmann, would turn existence itself into disvalue, as Max Scheler would say.[6]

Some jurists, philosophers, and theologians hope for a philosophy of values that would save their existence as jurists, philosophers, and theologians from an irresistible and pervasive value-free treatment, characteristic of the natural sciences. Those are idle hopes. Universal valorization can only hasten over-all neutralization, in the sense that it transforms into values the very basis of the juridical, philosophical, and theological existence, as well. The error, on which all those hopes rest, is similar to the mistake made by the noble horseman who saw a guarantee of his knightly existence in the fact that his horse would recognize him every time the horse saw him. The error is that modern energetics and its technology still reckon in terms of horsepower.

The general neutralization puts an end to all traditional contradictions, including the opposition between science and utopia, so successfully worked out in his time by Friedrich Engels while putting together his essay on “The Evolution of Socialism from Utopia to Science” (1882). Nowadays, at long last, science and utopia have blended. Utopia has become scientific: “*quels savants que les poètes*!” It was the great mathematician Henri Poincaré (d. 1912) who had already said that at a time when he could not have even divined the present actuality of Jorge Luis Borges, the prize-winner of 1961.[7] Science has become utopian as it is made evident particularly by the assertions of well-known biologists, biochemists, and evolutionary geneticists.

As a consequence, values of all kinds place themselves at the disposal of each and every social and biological utopia. Value and the logic of extra-economic values prove to be engines of utopia. Within the framework of such comprehensive topic as “Secularization and Utopia,”[8] it should be easy to point to some practical, legal consequences of the logic of extra-economic values. From the same it follows closely that the contribution to the discussion about the tyranny of values in its time-bound wording, as it would be referred to here time and again, has ensued from the report delivered by Forsthoff on “Virtue and Value in the Theory of the State.”

V.

The interest in a value-philosophical grounding, shown by German jurisprudence after WWII, went hand in hand with a revival of natural law. Both were the expression of the general effort to surmount the empty legality of juridical positivism and to lay the groundwork for an acknowledged legitimacy. In the eyes of some of the jurists, the philosophy of value enjoyed the great advantage of scientism and modernity over the Thomist natural law. Only a material theory of values was adequate in the conditions of the impending transition from positivism and legality. The purely formal theory of values of the neo-Kantian school of thought was too relativistic and subjective to be able to offer what one was looking for, namely, a scientific substitute for a natural law that was no longer yielding any legitimacy. The phenomenology of Max Scheler’s incipient material value ethics was produced ever so emphatically as the substitute. The very title of his major work had already signaled what one was looking for: *Formalism in Ethics and Non-Formal Ethics of Values* (1913-1916). As Scheler saw him, Max Weber was a lawyer, a nominalist, and formally, a democrat. “The scientific ideal of a value-free science is in fact bound to modern democracy.” It is this very formalism that Scheler wanted to overcome by means of his material value-ethics. Then history, so he said, would not shoot forward through democracy, but rather through elites, minorities, leaders, and individuals.[9] As a matter of fact, Max Weber had never discovered in “value” the last word or the wisdom of the last conclusion. He welcomed the theory about values as long as it gave him the scientific means to take his historical and sociological insights farther, despite the restrictions and the misgivings of “purely causal” thinking. To him, “value” was first and foremost an instrument for his scientific work, a tool that gave free scope to his “ideal types.” In rest, he thought it quite possible that one “would indeed reject the expression ‘value,’” as soon as it becomes downright earnest and penetrates the “very concreteness of experience.”[10]

Debates such as those at Ebrach, in which theologians, philosophers, and jurists would participate, surge time and again from the opposition between the formal and the non-formal approaches to value and will always swear by the two names that represent this opposition: Max Weber and Max Scheler. Given our juridical topic, the reinterpretation of fundamental rights and of the constitution in the light of a value-system, the third effect of the basic rights and the transformation of the implementation of the constitution into a value-enactment, it means therefore that the implementation of the constitution must change from an implementation of norms and decisions into an enactment of values. We must keep in mind, for this very reason, that the logic of values gets warped as soon as it abandons its adequate sphere, namely that of economics and of *justitia comutativa*, and goes on to transform the like of economic goods, interests, targets, and ideals into values and then valuate them. The higher value than justifies incalculable claims and statements of depreciation. The unmediated enactment of values

destroys the juridically meaningful implementation which can take place only in concrete forms, on the basis of firm sentences and clear decisions. It is a disastrous mistake to believe that the goods and interests, targets and ideals here in question could be saved through their "valorization," in the circumstances of the value-freedom of modern scientism. Values and value theory do not have the capacity to make good any legitimacy; what they can do is always only to valuate.

The distinction between fact and law, *factum* and *jus*, the identification of the circumstances of a case, on the one hand, appraisement, weighing, judicial discovery, and decision, on the other, the discrepancies in the report and the votes, the facts of the case and the reasons for decision, all that has long been familiar to the lawyers. Legal practice and legal theory have worked for millennia with measures and standards, positions and denials, recognitions and dismissals. Nowadays, when legitimation of it all is sought in a philosophy of value, what is kept on and what is added to it?

What is kept on is the search for a way out of a critical situation in which it landed, in the wake of the scientific claim made by the cultural sciences during the advancing natural scientism in 19th-century Europe. In other words, the philosophy of values is a reaction against the nihilistic crisis of the 19th century. What is added is somewhat negative, but neither in the arithmetical sense of plus and minus, nor in the sense of a dialectical "negation" of the negation: rather, a certain supplement of degradation, discrimination, and also justification of annihilation. One should no longer allow oneself nowadays to be misled by the memories of preindustrial meanings of the German word "*Werth*" that quite often still have a sedative effect. To do so is to evade the claim to juridical relevance and the enactment. Each and every enacted valuation outside its adequate economic sphere becomes negative in its statement as it singles out those of inferior value and explains disvalue with the purpose of excluding and eliminating it. By comparison, the simple elucidation of the valueless leaves open several possibilities. Thus, it may squeeze out the entire disinterestedness of the valued; it may also keep open the opportunity for a further revaluation ("revaluation of the valueless"), and finally, it may proceed towards the elucidation of disvalue. The handling "value" assumes the appearance of factuality, objectivity, and scientism, characteristic of the economic sphere of an adequate value-logic. This should not dissemble the fact that outside the economic sphere, the assessment remains negative and the logic of higher and the highest values outside economics rests on disvalue.

"It is the relation to the negation that is the criterion by which one thing and not another belongs to the sphere of values."[11] Heinrich Rickert explains this sentence by implying that there is no negative existence, but only negative values, indeed. The inherent aggressiveness ("the point of attack") of the reflection upon values is by and large a step backwards for the jurist, whenever he has to deal with strongly formal, neo-Kantian theories of value. From the very beginning, the emphatic subjectivity and relativity of the purely formal theory of values gives the impression of a boundless tolerance. The strict dogma of the excessive value-enactment excludes any emphatic legal positivism and normativism. Nevertheless, whenever the logic of values applies, its immanent aggressiveness is only shifted (it never disappears). We need not go into detail about that here, but only as far as the two opposite aspects of "*Verstehen*"[12] must be taken into consideration. Its practical result may be an "over-all forgiveness" (*comprendre c'est pardonner*), but also an "over-all demolition" (*comprendre c'est detruire*), if the person who understands affirms to understand the object of his understanding better than the latter understands himself. As regards our juridical problem of valuation, we are dealing in

German jurisprudence nowadays with those philosophies of values that have prevailed over formalism and now proffer material[13] and objectively obtainable values. For that reason, it suffices to reveal the negative and aggressive background of the philosophy of values by referring to Max Scheler's value axiomatics, and to set straight the widely disseminated idea that all that is bad in the theory of values is due to its formalism. Max Scheler says: "Therefore, the ultimate meaning of a positive statement such as, for instance, 'there ought to be justice in the world' or 'indemnity ought to be paid,' also and necessarily implies a disvalue, or more accurately, the absence of a positive value."[14]

Thus, this material theory of values makes sense only in a continuous and necessary relation to a disvalue. Scheler goes on saying that: "indeed, more than ever, the negative statement presupposes the presence of a disvalue." It is worth quoting on, word by word: "The absence of a positive value is a disvalue. From this it follows (syllogistically) that the positive statements too are bound to negative values."

According to Scheler, the negativity belongs to the axioms of every material value-ethics ("partially already made evident by Franz Brentano"). Relatedly, the editor of Max Scheler's collected works[15] could not decide whether "disvalue," as a separate catchword, should be listed incidentally only under "commands," or should also appear under "value," in the otherwise exhaustive index which he compiled for the occasion. Despite all the textual illustrations, the index, though excellent, does not even let the reader to divine the central position occupied by disvalue, to which attention has been drawn here by means of a few quotations, as the most important point in the discussion about the concepts of the philosophy of values.

The analogy or the parallel by means of which Scheler elucidates the characteristic consistency of the material and objective values are also relevant to the problem of value enactment. The existence of values is, in his opinion, independent of things, goods, and circumstances; all values are substantive qualities which have a determined order from top downward, one under the other, and all that, independent the form of being which they become part of.[16] In the autonomy of colors (the red of the apple, for example), he found the analogy or parallel which he drew to explain the autonomy of values. For quite a long time, modern painting had been effectively practicing the autonomy and independence of color. But the freed color, which had been tamed by such outstanding modern artists as Emil Nolde, Wassily Kandinsky, or E. W. Nay, on canvas within the frames of paintings, would stop being an independent value in legal practice and in public administration. Thus, for instance, it would let the freed values of the theory of the constitutional state and those of the welfare state recoil each upon the other. According to Scheler, all commands are grounded in values, and by no means, the other way round, that is to say, values are grounded in commands. The command, however, "gets," rises from a disvalue. A dialectical negation does not suffice to this material value-logic because it does not lead to the absolute elimination of the disvalue, with regard to which this logic of values retains its meaning. The wolf, that gobbles up the lamb, confirms the superiority inherent in the nutritional value which the lamb "holds" for the wolf, as distinct from the inferiority of the life-value which the same lamb "holds," when compared to the wolf's life-value. At no time does the wolf negate the nutritional value of the lamb: he does not kill the lamb only to destroy it. Only the definition of the lamb in terms of an absolute disvalue would have supplied him with the value-syllogistical motivation for an otherwise meaningless annihilation.

Some of us jurists remember the booklet published in the 1920s and entitled *Freigabe der Vernichtung Lebensunwerten Lebens* [License for the Annihilation of Life-Deprecating Life]. Only Karl Binding, the great scholar of penal law, could have been one of its authors, because in his unfailing, positivistic reliance on the state, he regarded it from the position of a legislator, a judge, and an executive. He never thought of it in terms of an autonomous, self-sufficient value-enactment.[17]

VI.

The discussion at Ebrach, on the 23rd of October, 1959, took place with the participation of theologians, philosophers and jurists. The catchword "tyranny of values" surfaced on the occasion, in the concluding remarks made by Professor Joachim Ritter of Munster and Dr. Konrad Huber of Freiburg. Ritter stated that the notion of value becomes manifest as modern natural science demolishes the notion of nature; value would occupy the emptied nature and impose itself upon the latter. In turn, Huber drew distinctions among virtue-ethics, value-ethics, and the ethics of justice. Relatedly, he recalled that Max Scheler was the true representative of value-ethics, and expressed his opinion that Scheler would not have allowed himself to be frightened by the word "terror" — an allusion to the famous word which the French Jacobins used instead of virtue, and which had also been mentioned by Forsthoff in his report. Both contributions to the debate, that of Joachim Ritter, and also that of Konrad Huber, are full of ideas and reintroduce such catchwords as "to occupy," "to impose," and "terror," but in no way, limit themselves to those terms. Nevertheless, they were still hesitant about quoting from "The Tyranny of Values" and referring to the opinions that ensued during the discussion, as any attentive reader of the proceedings would notice. Juridical self-consciousness should appropriate such expressions as "to occupy" and "to impose," which are philosophical notions, for its own field. Given today's scientific activity with its division of labor, methodologically still so pure. Forsthoff's report alone contains a lot of sound philosophy. All sound philosophy cannot help but bring about sound jurisprudence, and that should be made evident by the Jacobin word derived from "terror" in Nicolai Hartmann's formulation of the tyranny of values.

In spite of all that, it is to be feared that the discussion might degenerate into a sterile tug of war about subjective and objective, formal and material, neo-Kantianism and phenomenology, the theory of knowledge and existentialism, Max Weber and Max Scheler, while the specific juridical topic would be missed altogether. As early as 1923, Ortega Y Gasset pitted phenomenology against the neo-Kantian theory of knowledge and was full of praise for Scheler's material ethics as a new, firmer science based on quasi-mathematical evidence, on the one hand, while he dismissed the neo-Kantian philosophy of values as uninteresting, on the other. Scheler recorded with satisfaction that "adhesion" of Ortega's.[18] The danger of such complications as concerns the various schools of thought may be avoided, though, and best by reference to Martin Heidegger's opinion on the matter, which is as expert as it is peremptory, in "Disquisition upon Values and the Thinking in Terms of Values."[19] There, Heidegger approached the issue from a phenomenological standpoint, and not from a neo-Kantian one, while considering the frame of such a debate from his position as academic philosopher.[20]

VII.

Thus a jurist's reflections upon the tyranny of values are reproduced below, as a contribution to the debate. They had been revised and printed privately as a 16-page pamphlet with a circulation of 200

copies that had been made available to the participants in the discussion at Ebrach and to several friends. The subtitle stresses the fact that it deals with “the reflections of a jurist upon the philosophy of values.” The dedication: “To the Participants in the Ebrach Symposium of 1959” testifies to the author’s intention not to exceed the frame of that discussion in his own considerations.

In Spain, the *Revista de estudios politicos* [Review of Political Studies][21] published a revised translation of the privately printed pamphlet, which it linked to Ortega Y Gasset’s enthusiastic reception of the phenomenological philosophy of values, as mentioned above. Thus, it became evident once more that an international discussion of the issue of the philosophy of values has hardly any unsurmountable linguistic difficulties to grapple with. In France, Professor Julien Freund of Strasbourg, author of such an important work as *L’Essence du politique* [The Essence of the Political][22] has published four of Max Weber’s essays on the theory of science, as part of the series Recherches en sciences humaines [Studies in the Human Sciences] (No. 19).[23] He concludes his highly instructive introduction to it by referring to the text of my privately printed article. He has fully mastered the linguistic difficulties that the controversies about methods and the theory of knowledge keep adding, and as a result, has made the practical aspect of the problem clearer, too. As an edifying example in this respect, one should mention the way Julien Freund translated “*Wertfreiheit*” [value-freedom] by “*neutralité axiologique*” [axiological neutrality]. Raymond Aron, in his turn, has spoken of “*indifference aux valeurs*” [indifference to values].

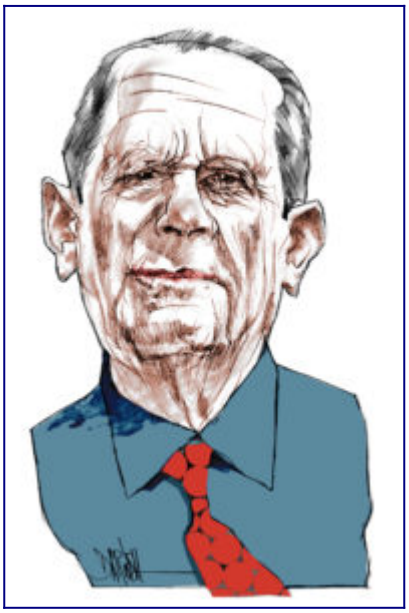
In Germany, though, my privately printed text has met with an unusual fate. Four years after its presentation, it started all of a sudden to catch on, and through a newspaper of world-wide circulation, [24] it was dragged out and torn to pieces by controversial debates. What had been said in a circle of some 40 people and then as a privately printed booklet, brought to the attention of 200 people at most and always within the framework of a discussion about virtue and value in the theory of the state, found itself shouted out loud before an altogether different audience, and quoted by some hundred thousand readers who had but the slightest idea of the sense and the context of the original discussion. My modest vehicle, of an almost vintage form, would be overhauled all of a sudden by a gigantic machine, built to increase the speed of sound. It would break the sound barrier. The uproar set in motion by such a procedure could not contribute in the slightest to the elucidation of the difficult topic. It would only demonstrate anew that value has its own logic.

The contribution to the discussion at Ebrach regarding the tyranny of values is reproduced below, unchanged, from the privately printed text of 1960,[25] as a document. The attentive reader will not fail to notice that the basis for the further elucidation of the thoughts expressed here has already been laid out, and its accessibility is secured by a question in the text set before him, namely the question about the order-value of value-freedom. A consistent philosophy of values, that concerns itself with freedom, cannot be content only to proclaim freedom as the highest value; it must mean more. Not only is freedom the highest value for the philosophy of values, but also value-freedom is the highest freedom.

Value has its own logic. In the constitutional state that is most clearly recognizable in the enactment of its constitution.

The Question of Legality (1950)

Carl Schmitt



3,544 words

Translated by Simona Draghici

The Reverend Oratorian Father Laberthonnière, who died in 1932, left behind the voluminous work of a lifetime, which is being edited by his friend Louis Canet. Between 1933 and 1948, six impressive volumes were published. Quite recently, another book of his was added to them, and which is of particular interest to us, namely, a *Critique of the Notion of the Sovereignty of the Law*.[1] Father Laberthonnière critically examines the widespread notions of the supremacy of the law prevailing in moral theology, philosophy, and in jurisprudence, and which go back to and reach their acme in a well-known saying of Aristotle's, namely that "not men but the law" must rule. To this, the learned Oratorian opposes the assertion that men stand directly behind every earthly law and that they use the law as a means of their power.

In his criticism, Father Laberthonnière goes very far. "La maxime: 'c'est la loi,' ne differe en rien au fond de la maxime: 'c'est la guerre'" [The saying: "that's the law" does not differ in any way from the saying "that's war"]. This connection made between law and war is in fact surprising and sounds quite radical. The knowledge on which it is based can be grasped only as the bitter fruit of the experiences of civil war. This formulation by the Oratorian Father should serve as an opportunity to reflect on some historical, moral, juridical, and sociological experiences of the last few decades.

I.

Why did the German civil service follow Hitler? The problem of culpability need not be stirred anew nor other attempts at exculpation be made by raising this question. We address the general and practical problem of legality which is highly topical and by no means of concern only to the German civil service. We are not dealing here with individual cases, but rather with the overall sociological situation

of a broad circle of people. On the other hand, within this circle which includes hundreds of thousand people, there is in particular the matter of a leading and commanding layer, namely, the ministerial bureaucracy, the product of the higher civil service.

Many higher- and lower-ranking civil servants had sympathized with Hitler and his movement from before 1933, more exactly, since his big electoral success of 1930. The motives of the sympathizers were numerous and diverse. Partly, they rested on the national watchwords disseminated by Hitler, and partly on status and class interests. The German civil service, in general, and the higher- and highest-ranking civil servants, in particular, feared no harm from Hitler to their overall social and economic existence. This overall existence, however, had a twofold foundation: the traditional German State of the civil service with its well-earned rights, and an influential higher, ministerial bureaucracy. Both foundations—that is, the well-earned rights of the civil servants and the strong position of the higher, ministerial bureaucracy—had attained an astonishingly high point in the last years of the Weimar Constitution. The Weimar Constitution had explicitly guaranteed the well-earned rights of the civil servants. Through the practice of decrees, in virtue of Article 48 of the Constitution, the higher ministerial bureaucracy had become legislative. The decree had ousted the law. The legislation was "mechanized" through simplifications and precipitations. Every mechanization of the legislative procedure, however, meant a power increase for the bureaus in which the decrees were worked out.

The majority of the civil servants feared no harm from Hitler either to their well-earned rights or to the position of power of the German civil service as a whole. Many believed his repeated assurances and even held him for the rescuer of the principles of the traditional German career civil service. All of them feared an open civil war and saw Hitler's protestations of legality as a shield against the civil war. At that time only very few suspected the danger that a totalitarian party system must represent for the traditional German State of the civil service. Hitler too did everything to maintain this unsuspectingness. His eulogies of the German civil service in his book *Mein Kampf,* the program for a restoration of the German career civil service, and the organization of the NS association of civil servants, all served that aim. Decisive, though, were the solemn declarations of legality, in particular the famous oath of legality at the Scheringer trial in 1930.[2] Already at that time the issue of legality had turned out to be the key to the problem of state-related power in Germany. Likewise, in the notion of legality one finds the true answer to our question: why did the German civil service follow Hitler?

Because in the eyes of the German civil service, Hitler's seizure of power was not illegal. Nor was it so for the large majority of the German people, and equally so for the foreign governments which continued to maintain diplomatic relations without considering it necessary to proceed to a new recognition, according to international law, which would have been necessary in a case of illegality. Likewise, there was no German government in opposition to Hitler. Such a government materialized neither on German soil nor as a government in exile. The so-called Enabling Act of March 24, 1933 removed all the misgivings and had the effect of a great general and sweeping legislation, and in fact, retrospectively, both for the events of February and March 1933 and for all the actions to come. The factual and sweeping legalizing effect of the Enabling Act was therefore so comprehensive because Hitler and his following were confirmed in their effective possession of power by a constitutional amendment voted by Parliament. Thus every legal path to a cancellation of the seizure of power was blocked. All that remained was the feeble hope that the Reich President Hindenburg might still be in

the position to dismiss Hitler and appoint another Reich Chancellor. But since the fear of a civil war had been such a strong motive to submit to Hitler, the hope of Hitler's dismissal by Hindenburg did not make much sense, because everybody knew that the attempt to remove Hitler would have unleashed an even more dangerous civil war.

It has been established in the judgment of the Nuremberg International Military Tribunal of October 1, 1947 that "In 1934, all power was in Hitler's hands." This statement is of the greatest importance for our problem. Thereupon, it follows for every positive idea of legality that Hitler's power was by far more than just legal in itself, it was also the source of all positive legality.

The law of January 26, 1937 concerning the German civil servants concealed its totalitarian poison,[3] particularly in the general reservation of §71 on party-politics, under detailed definitions and guarantees of the legal position of German civil servants, in accordance with the traditional principles of the career civil service. Starting with the end of August 1939, the last remnants of a moral resistance on the part of the German civil service vanished as a result of the war. Firstly, because of the self-understood invocation of the necessities of a total war, and secondly, because the concentration of all state power in Hitler's hands reached its maximum degree at the time. Legislation, administration, and justice functioned with new simplifications and precipitations, always unrestrained, as command machines. In the last years of the war, a new concept came into being in the sphere of food supply: the "disposition" [*Anordnung*], the essential feature of which rested in the fact that if the ruling represented a mechanized law, the "disposition" [*Anordnung*] was a mechanized ruling. The general mechanization is characteristic of the unmixed functionalism of this machinery.

Oddly enough in 1942, a fit of the need for legitimation suddenly seized Hitler himself, in fact not only in the sense of his own positivistically absolute legality, but also as a kind of democratic legitimacy. At that time, it was revealed in two strange explanations. A clarification of the Reichstag of April 26, 1942 acknowledged that in time of war Hitler had the right to interfere in the well-earned rights of the civil servants (as if in such a total war and in such a system no other demands for rights had been granted but only those of the civil servants). An explanation of May 10, 1943 by Hitler himself renewed the Enabling Act of March 24, 1933. Both explanations are simply incredible in the confusion of their inner contradictions. They prove all the more clearly that ultimately Hitler himself was interested in a certain legitimation even more than the machine functioning according to the concept of the *positivist* law, and which obeyed him as the holder of State power and the only source of legality.

II.

Our analysis keeps running into the notion of legality which lies at the core of the problem. There lies the key to an understanding of Hitler's regime, at least to the extent it deals with the specifically state-related aspect of his power. Beyond that, it tackles a wholly important question of modern development. Here we are talking not of the lawfulness or the unlawfulness of countless isolated orders, but about the problem of the functioning of a regime as a whole. It is a highly topical sociological problem which deserves fully to be treated with all objectivity.

In order to do just that we must become aware of an extraordinary difficulty. It resides in the fact that the word "legality" acquires a distinctive, rather specific meaning in a modern, thoroughly organized State entity. It is only from this point of view that one can, grasp the history of the German civil service

since 1918. The legality in question here does not mean a merely external, purely formal, purely juridical accompaniment. It does not refer to the question of law and justice under the aspect of their contents, either. It is also to be distinguished from legitimacy, whether in a conservative or a revolutionary sense. Nowadays, the words “legal” and “legality” can mean everything that the word “lex” somehow conveys; and this word *lex* has an altogether different content at different times, and in different countries, in different constitutions and for different organizational forms of legislation and administration of justice. Hence we must seek to some extent to overcome the almost Babylonian confusion of speech that prevails here.

In a modern system, that is to say, an industrialized, thoroughly organized system, endowed with a division of labor and highly specialized, legality means a specific working and functioning method of the public body. The manner in which affairs are decided, the routine and the habits of departments, the somewhat calculable functioning, the concern to retain this kind of life and the need of a “cover” against an account-demanding authority: all that belongs to the complex of legality from a bureaucratic- functionalist point of view. If a sociologist like Max Weber says: “The bureaucracy is our fate,” we must add: “legality is the working mode of this bureaucracy.”

In those countries in which the State bureaucracy has not, or not yet, the monopoly of the administration of public tasks, one can hardly grasp the transformation of the law into the working mode of an operating public body and perhaps would not understand the change in the meaning of the word “legal” at all. It would be hard to make our reasoning clear to an Englishman or an American without any sociological training. In the Anglo-Saxon usage, the word “legal” has the same sense as “lawful” or “juridical.” Of course, there are antitheses between lawful and moral, lawful and politically possible and habitual, but the sharpest antithesis between lawful and legal, which is the basis of our analysis, cannot be expressed in English. On the contrary, in France, the homeland of State legislation and of the great state-related codifications, the state-related administrative machine has since 1799 survived half-a dozen regime changes. There, the most clear-cut formulations of a purely formalist-functional legality came into being as a consequence, in opposition to substantive law and historical legitimation. As early as 1829, Lamennais had with all precision formulated the antithesis between legality and legitimacy. Even before the 1848 revolution, would the word be preached: legality kills (*la legalite tue*). In no time, this sentence became a familiar saying in France and in the French language. It can hardly be translated into English, which may be explained only by the fact that the English of the nineteenth century had distanced themselves more than the French from the line of fire of the European civil war. Immediately after 1848, the then President Louis Napoleon issued proclamations in which “He urged, “to get out of legality in order to attain the law” (*de sortir de la legalite, pour rentrer dans le droit*). From around 1900, the opposition in France began speaking of a “legal country” *(pays legal*) which it represents, in contradistinction to a “real country” (*pays reel*).

France is the country of legalists. She has got a strong state-related centralist tradition but also an important independent advocateship and magistracy which do not regard themselves merely as part of the State administration of justice. In this way, it becomes clear why it was in France that the separation of law and legality had been first and most sharply felt and had been formulated most pregnantly. Likewise, the phrases of the Rev. Father Laberthonniere, with which we started, could emerge with

such clarity only in France. In Germany, on the other hand, one became critically aware of the antithesis much later, after its most massive effects had been taken into consideration.

For centuries, the German State had been a State of civil servants. Nevertheless, until the collapse of 1918, purely state-related functionalism was hidden despite the prevailing legal positivism, by a thick veil of a dual tradition, namely that of the monarchically dynastic legitimacy and the federalist decentralization. The dynastic legitimacy collapsed in November 1918. Economic-industrial development followed the path of increasing centralization. Finally, only state-related legality remained as the sole lawful foundation of State functioning. Legality would become, as Max Weber said, the only apparent form of legitimacy.

III.

The Germans are said to be a people with a touching need for legality. Also, they have often been reproached for being incapable of offering any right resistance to the powers that be. They have presumably shown a special ability to combine submission to the powers of the time with an inner sense of freedom. Whether Luther or Kant or anybody else should be held responsible for it need not be looked into here. For the rest, there can be no doubt that the Germans are in a particularly high degree a people of civil servants with a cast of mind common to a state-related civil service. To that may be added a stronger sense of a technicized discipline for specialization and the delimitation of responsibilities and for the ideal of functioning without a hitch.

Perhaps. But the transformation of law into legality as a mere functioning mode of the work of the state-related administration and the corresponding relationship with the individual human beings who are dependent on such an administration is no longer a specifically German problem. Juridical positivism rules everywhere, and that means the acceptance of the sentence that the law will be set by whomever simply asserts himself *de facto.* Juridical positivism is but the transformation of law into a positing of posits. At the same time, it is the acceptance of the “normative force of the factual,” an interesting kind of force which was not discovered only in Germany and only in 1933. Still nowadays, at the beginning of December 1949, the English delegate at the UN explained with reference to the recognition of China’s new communist government that recognition according to international law is to be based only on factual reality. The rightfulness of its genesis is not a characteristic trait of the power of a State. The German Supreme Court said the same after the collapse of November 1918, with regard to the then workers’ and soldiers’ councils. But that is a platitude, a *topos* of juridical manuals and commentaries. A State machine that functions effectively is in itself the carrier of the State power and the source of all positive law.

This transformation of law into legality is a consequence of positivism. It is unavoidable as soon as a political community distances itself from the Church. Sociologically speaking, it is an aspect of the evolution of the industrial-technical age. In the history of philosophy, it belongs to the transformation of substantive thinking into functional thinking, a transformation which until recently has been extolled to us as a marvelous instance of scientific and cultural progress. The frightful image which results from a complete functionalization of mankind has been the subject of an impressive recent article in the journal *Universitas* in Tübingen, written by its publisher Serge Maiwald. But already more than thirty years before it, Max Weber, the great German sociologist, had made a diagnosis and a prognosis that

proved to be correct. We have already quoted his words about bureaucracy as fate. As another illustration of his marvelous prognosis we quote from his posthumous work *Economy and Society* (1921, pp. 511–12): “Whatever form law and legal practice might assume under these influences, it is the unavoidable fate in all circumstances and as a consequence of the technical and economic development that each law in force will expand as a rational technical machine, capable of being adjusted any time, and be devoid of any sacred content. Admittedly, this fate may be concealed by the ability to conform to the existing law on general grounds and in many ways, but in reality it cannot be deflected.”[4] True, these sentences of Max Weber may not be easily understood, but even so they are not an oracle but a sociological prognosis.

The transformation of law into legality was directly followed by the transformation of legality into a weapon of civil war. That was not a German invention either. It was Lenin who proclaimed it with full awareness and sharpness. His essay of 1920, entitled “Left-Wing Communism—An Infantile Disorder” is such a confirming document that any discussion of the problem of legality becomes anachronistic unless its words are taken into consideration. Lenin says: “But revolutionaries who are incapable of combining illegal forms of struggle with *every* [the emphasis is Lenin’s] form of legal struggle are poor revolutionaries indeed.”[5]

That is it. Renowned philosophers and publicists of Leninism and Stalinism have made these theses of Lenin’s the object of their exegeses, with the result that all legality becomes a tactical tool, whereas for them there is only one kind of historical legitimacy, that of the communist revolution. For them, that legitimacy justifies every measure and every legal and illegal terror.

With this observation we have reached our point of departure, the words of Father Laberthonnière that the maxim “law is law” basically means the same thing as “war is war.” That becomes even clearer when we say “civil war is civil war.” With great sadness Father Laberthonnière reminds us of the long lists of revolutionary tribunals, extraordinary, special, people’s courts, which have been busy in the course of history and in the hands of which the law has been a tool of persecution and vengeance. Then, while shuddering intensely, we hear his amazing statement: “I do not compare the victims, I compare only the judges.”