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## CRITICAL DEBATE

# Justice, amnesty, and the strange lessons of 1945

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If, as Max Weber famously argued, science in general (*Wissenschaft*)—that is, the focused, disciplined use of reason—cannot justify itself on its own terms, then each individual science—law is among his examples—remains without foundation. Law, Weber wrote, operates by distinguishing between legality and illegality. Whatever is brought before it by way of formally correct procedures demands and receives judgment. An action is either legal or illegal; a person either not-guilty or guilty. But law itself remains in legal limbo. Law as a science cannot determine whether the science of law is legal.<sup>1</sup> This conundrum, Niklas Luhmann would say, is the foundational paradox, the paradox of all foundations, and thus the foundation of all of Luhmann's speculations. Modernity consists in the functioning of operationally closed social systems that reproduce themselves internally, autopoietically, by means of their own elements. Seen from the perspective of sociology, or at least Luhmann's sociology, social systems—law included—find their legitimacy only through the continued success of their operations. *Legitimation durch Verfahren* [Legitimation through procedure],<sup>2</sup> as Luhmann famously and controversially put it early in his career.

Modern social systems, however, also describe themselves. Their self-descriptions are designed to hide what Luhmann claims to be able to see, namely the impossibility of giving a normative account of their own origins. As Luhmann would say, self-descriptions unfold the paradox of their origins and thereby make that paradox invisible. To do so, law has traditionally anchored itself in something outside of itself. God, for instance. Law is revealed to the prophet. Or Nature. Law is what is common to all humans. Or Reason. Law, inscribed in our heart, is discernable by all. In each case, what is made invisible is that the truth of divine, natural, or rational law must be

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supplemented by the wise man, right procedure, or authoritative institution for its correct articulation. In each case, immanent authority—law—is given legitimacy by transcendent authority, whose own legitimacy requires further procedures, if not simply a leap of faith.

But if rejection of God is no longer punishable by death, and if neither nature nor reason compel any longer because what both nature shows and reason says are open to multiple interpretations, then we stare full face at the paradox and call it legal positivism. Law is law. It exists until it no longer exists, and then new law exists and once again law is law. Its legitimacy is provided either by its own internal operation and efficacy—we call this normalcy; or, in times of crisis, it seeks shelter in political power until, with a new condition of normalcy, it can once again disavow its association with force.

What, then, is justice? If justice suffers the same fate as law in that it no longer can rely on an absconded god, dissected nature, or dispersed reason, what is its relationship to positive law? Luhmann sees in justice a formula for contingency. That is, the legal system finds it ‘appropriate to treat justice as a relevant norm,’ but because ‘all legal norms and decisions, all reasons and arguments can take a different form,’ the system ‘must avoid seeing this norm as a criterion for selection.’<sup>3</sup> Justice, then, is a placeholder for the possibility of change. This, however, merely defers the answer to the question of what justice is, for now we know its function, but not its source of ‘legitimacy,’ not what precisely occupies the place that justice holds in reserve. Quite possibly nothing need occupy it, or many things can; I offer the following ruminations as a preliminary nomination for one possible contender for justice’s throne.

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The International Court of Justice was established in 1945 as part of the newly formed United Nations (UN). Charged with settling disputes between states (contentious cases) or giving legal opinions to questions put to it by agencies of the UN (advisory proceedings), it began work in 1946 and heard its first case in 1947. There is no appeal to a higher court; there is no International Court of Meta-Justice. The majority of the 144 (and counting) contentious cases between states have dealt with border disputes, fishery rights, treatment of nationals in other countries, environmental effects of industries such as pulp mills on rivers that serve as international borders, and the like. The majority of advisory proceedings, especially in the early years, dealt with UN rules and procedures. Occasionally, legal advice is sought by the General Assembly concerning the legality of actions taken by states against non-state entities (who would otherwise have no access to the court). In 1970 the court was asked to judge what legal consequences for states arose from the fact that South Africa kept a presence in Namibia in violation of Security Council Resolution 276. More recently it was asked to judge the legality of Israel’s wall of partition in Palestine.<sup>4</sup> I wish to focus on this latter decision briefly, not because of the judgment but the reaction to the judgment.

On the 9th of July, by a vote of 14 to 1, the 15 judges of the court declared that the ‘construction of the wall being built by Israel . . . [is] contrary to international law,’ that ‘Israel is under an obligation to terminate its breaches of international law,’ and ‘Israel is under an obligation to make reparation for all damages caused by the construction of the wall.’ By a vote of 13 to 2, they also declared that

. . . all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

We know that the ruling of the court was ignored not only by Israel but by everyone else as well. This led UN Special Rapporteur Professor John Dugard to make the following statement: ‘The apparent failure of Western States to take steps to bring such a situation to an end places the future of the international protection of human rights in jeopardy as developing nations begin to question the commitment of Western States to human rights.’<sup>5</sup>

One can imagine a variety of reactions to Dugard’s stated concerns. My immediate temptation is to laugh, but I know that it would not be proper to do so. To scoff, I tell myself, would be to fall all too easily into an all too easy ad hoc skepticism. Though Dugard could not have been genuinely disappointed in the thoroughly unsurprising non-action of Western States, his statement must have had some meaning. If, then, I am to respect his apparent earnestness, I feel enjoined to respond to his disappointment and his concern. I therefore ask myself the following: What might it mean for an institution called the International Court of Justice, an institution that lays claim to legal power yet has no backing by an autonomous political entity, that is, an entity that can martial the necessary monopoly of violence over a delimited territory (or indeed, over the entire globe)—what might it mean for such an institution to issue a verdict condemning an action taken by a powerful sovereign state that enjoys strong alliances with even more powerful sovereign states? What might it mean for Professor Dugard or anyone else to have anticipated that the European Union or the United States would have acted in any forceful or meaningful way to oppose the construction of the wall in Palestine or ‘see to it’ that impediments to Palestinian self-determination not be tolerated? Furthermore, given that the history of European and North American concern with genocide and human rights begins only after 1945 in response to a European genocide conducted against Europeans, and given that the history of European genocide against *non*-Europeans in the Western Hemisphere, Africa, Asia, Australia, and elsewhere begins at least 450 years before that magic date, what does it mean to claim that *only now*, after the failure of addressing the issue of the Israeli wall, ‘developing nations’ might ‘begin to question the commitment of Western States to human rights?’ In short: What does it mean to assume the validity or legitimacy or effectiveness of international law as uttered by an international

court, and what does it mean to worry that perceptions of this validity may change over time?

International law, however, is not what I wish to discuss directly, but rather a related question. The coupling of the international court's ruling and Professor Dugard's mournful comments inevitably lead, it seems to me, to the perennial question: What is justice? The laugh with which I am tempted to respond to Dugard's remarks could then be translated into a traditional realist critique of ideology, which would presume to allow me to expose the utopian unrealities and/or hegemonic politics behind the concept of justice. And, I must admit, that is the undeniable impulse behind my reaction to Dugard's comments on the International Court of Justice and, more obliquely, behind this article. But if I am wary of the all-to-easiness of that impulse, it is not because I feel it is all that easy to deconstruct the notion of justice; on the contrary, though it is easy—for me at least—to be skeptical, if not cynical, about international courts, whether they manifest themselves as a series of ineffectual pieties or as a series of highly selective 'war crimes' trials, it is not at all easy to take on the concept of justice without, paradoxically, *affirming* the concept in its very critique. Why, after all, would the concept of justice be such a problem? Is it merely because it is impotent? If so, it could be dismissed as idle utopianism, hardly worth the effort of serious scrutiny. Or rather, is the opposite the case, namely that it is deceptively powerful. In other words, does the problem lie in the claim that justice is a potent political weapon disguised as some universal moral principle like equality? If so, what would be wrong with that if it fulfilled its political function? Are we worried about honesty? Full disclosure? Hypocrisy? Since when? Or finally, is the problem even more deep-seated and logically difficult. Can the skepticism concerning justice be best phrased as the paradoxical question that asks: Is the concept of justice itself just?

Since 1945 was the *annus mirabilis* in which the issue of justice was emphatically put back on the international table, I propose we start there. Clearly, a day of reckoning was at hand. But which deity presided over this day, the goddess of victory or justice? Let me avoid the extraordinary case of the Nürnberg and Tokyo Trials and move to the micro-level, the German–German balancing of accounts, where the problem becomes more complicated. In September 1945, the German jurist Gustav Radbruch published in a Heidelberg newspaper a 'Fünf Minuten Rechtsphilosophie' [Five-minute Philosophy of Law], in which law is defined as the will to justice, and justice defined as equality before the law, a simple if incomplete resurrection of a traditional claim. A year later he published an article called 'Gesetzliches Unrecht and übergesetzliches Recht,' an interesting, programmatic title that could be translated as 'Legal Injustice and Superlegal Justice,' or perhaps better: 'Legal Injustice and the Justice that Transcends Law.'<sup>6</sup> In both texts, Radbruch is interested in delegitimizing the National Socialist legal system, which he contends was neither legal nor a system, but rather a set of arbitrary commands of a mad sovereign. What allowed this state of affairs, Radbruch concludes, was the inability of legal positivism to defend the law's legitimacy against usurpers. The positivist creed, 'Gesetz ist Gesetz' (law is law), proved, in Radbruch's view, to be defenseless against perverse

manipulation. For National Socialist law to be declared illegitimate, a position Radbruch emphatically maintained, a standard above the law as immanently posited must be assumed; and Radbruch labels that formal standard devoid of specific content ‘justice.’

None of this is surprising. Indeed, talking of ‘unjust’ laws in everyday speech seems to be a simple reflex, a ‘thoughtless’ habit, so to speak, such that natural law theorists, among many other believers in transcendent or transcendental standards, use these speech acts as signs of an undeniable moral sensibility inborn in the human animal, or at least as a linguistic betrayal of a truth one cannot deny. Radbruch, however, does not go that far, though he derives the demise of law in the Third Reich from Hitler’s lack of a sense of truth (*Wahrheitssinn*), an odd rhetorical flourish that strikes me as wildly inconsequential. Nevertheless Radbruch clearly posits the existence of a just standard, if for no other reason than out of a sense of its crying need. Of interest to me are the examples of abuse he points to. His concern is not with the major Nazi figures, not with the Allied trials, but with everyday German citizens and functionaries who followed too slavishly the laws of the regime—for instance, the informant who denounces a young soldier as defeatist for making comments to the effect that the war was lost, the judge who condemns this poor soldier to death, and the executioners (other young soldiers) who carry out the verdict. They embody a few of the many individual heartbreaking stories of which millions upon millions could be told, including of course far worse ones. And one ‘instinctively,’ as one is in fact tempted to say, bemoans the injustice of it all. But what does the word ‘injustice’ express here besides our anger or sorrow?

Radbruch cites the newspaper article of a prosecuting attorney who wishes to justify—interesting, is it not, how our language continually returns us to the notion which we examine—who wishes to justify the prosecution of judges who passed egregiously disturbing verdicts during the former regime. This prosecutor wishes to ground his wish by declaring all National Socialist law null and void, first by claiming that such law was passed after the constitution had been suspended by the enabling act of 1933, but more importantly because the content of Nazi law was not simply unjust (*ungerecht*) but criminal (*verbrecherisch*). His claim is made with an appeal to human rights (*Menschenrechte*), which, he says, ‘stand above all written laws,’ are ‘irrevocable’ and ‘indefeasible,’ and invalidate the ‘criminal commands of an inhuman tyrant.’<sup>7</sup> On these grounds, then, the prosecutor wishes to bring judges to trial who ordered the death penalty for what at best could be described as trivial, political offenses.

What Radbruch quotes is a rousing display of hyperbole, a monumental battle of evil vs. good: not just illegal and unjust but downright criminal laws, proclaimed by that quintessential demon of political discourse, the tyrant, are opposed by eternal standards that transcend all human law but to which apparently the prosecutor (the prophet?) has direct access. If we strip the situation of its precise historical context and thus of its more affective connotations, this is what we have. A judge hands down a verdict nominally in accordance with state law and the death penalty is carried out in the last days of a dying regime. When a new regime is installed the judge and

executioners are held accountable not to the laws which were in effect at the time of the judgment but to standards that the spokespersons for the new regime claim obtain timelessly, standards of which they are the custodians. What do we make of this? I would assume that all of us, especially in the flush of a hard-fought victory, would sympathize with the move to punish a judge who, by our lights, acted so callously in the service of a hated regime. But what does it mean to call this move an act of justice?

Reading this text more than 60 years after the event, one's suspicions—well, *my* suspicions—cannot help but be aroused, no matter how much I may sympathize with the impulse to purge. And one's suspicions could do worse than call upon the master of suspicion, Nietzsche, for instruction in the matter. In the first essay of his *Genealogy of Morality*, Nietzsche invites an imaginary interlocutor to tour a subterranean workshop of ideals and describe what he or she sees there. This modern-day Dante describes a sickly sweet hell in which lies turn weakness into an accomplishment, impotence into goodness, timid baseness into humility, submission into obedience, cowardice into patience and forgiveness, and misery into bliss. 'Bad air! Bad air!', the interlocutor cries. 'This workshop where *ideals are fabricated*—it seems to me just to stink of lies.' But Nietzsche pushes the disgusted observer further. 'Wait a minute!', Nietzsche says. 'You haven't said anything yet about the masterpieces of those black magicians . . . These cellar rats full of revenge and hatred—what do they turn revenge and hatred into?', which provokes the final epiphany: 'Now, at last,' our voyager says, 'I can hear what they have been saying so often: "We good people—*we are the just*"; what they are demanding is not called retribution, but, the triumph of *justice*'; what they hate is not their enemy, oh no! they hate '*injustice*,' 'godlessness'; what they believe and hope for is not the prospect of revenge, the delirium of sweet revenge (—Homer early on dubbed it 'sweeter than honey'), but the victory of God, the *just* God, over the Godless.'<sup>8</sup>

Even though our sympathies lie rather with the prosecutor than the judges he wishes to punish, it seems to me not at all difficult see him busily toiling in the workshop where ideals are fabricated. As an advocate for the weak, but acting from a newly achieved position of strength, the prosecutor argues morally rather than on a strictly legal basis, using the conveniently indeterminate concept of human rights as a weapon with which he can exact his revenge against a despised foe. Nietzsche's genealogy of justice as revenge rings discomfingly true, even when we side with those who wish to get even. But what is the genealogy of *our* impulse to trace the genealogy of justice as revenge? Where does our—or let me speak for myself—where does *my* suspicion come from? Surprisingly Nietzsche has an answer for this as well; for in the second essay of the *Genealogy of Morality*, he *condemns* the conclusion that the definition of justice is to be sought in the spirit of revenge. Indeed he accuses the *suspicion* that sees nothing but revenge in the protestations of justice of being guilty of the very same thing it analyzes, namely resentment. Both the revenge-as-justice it observes and the act of observing are reactive sentiments motivated by the resentment and jealousy of the weak. To be suspicious of justice is, then, to be precisely like those who seek revenge by way of justice; to be a person who assumes

that justice is nothing but revenge in sheep's clothing is, as Nietzsche says, to be a 'man of *ressentiment*' who has a soul that 'squints.'<sup>9</sup>

I enjoy but am never completely comfortable with the quasi-psychological language Nietzsche employs. Thus, I recognize his basic insight more clearly when it is transposed onto a more formal or even 'logical' plane—and to do so seems to be to say that the *critique* of justice often if not almost invariably *replicates* the gesture of the trope of justice that it critiques. When Radbruch's prosecutor says that it is unjust for a judge to follow slavishly what we now deem to have been criminal laws, the critic of that prosecutor then seems to say that it is unjust for the prosecutor to use *ex post facto* standards. After all, if we do not think that some principled standard was violated, why would we worry about what happens to our pernicious judge? We have no sympathy for him personally. We have no sympathy for the regime he served. Perhaps some of us even have no sympathy for his particular victim, who, after all, wore the uniform of that despised regime. So why are we loathe to label this particular act of revenge 'justice,' except that we think the term 'justice' ought to be reserved for something more noble or at least something more honest?

And something like honesty is precisely what Nietzsche has in mind when he finally gives what he takes to be the true definition of justice. Justice, for Nietzsche, is proactive, not reactive, and is thus the robust expression of the strong and not the squint of resentment by the weak. Justice is not revenge but its opposite, the suppression of the cycle of revenge. Stripped of its psychological accoutrements, justice is, simply put, the establishment of civic peace. 'Historically speaking,' Nietzsche writes,

justice on earth represents ... the battle ... *against* reactive sentiment, the war waged against the same on the part of active and aggressive forces, which have partly expended their strength in trying to put a stop to the spread of reactive pathos, to keep it in check and within bounds, and to force a compromise with it. Everywhere that justice is practiced and maintained, the stronger power can be seen looking for means of putting an end to the senseless ravages of *ressentiment* amongst those inferior to it.<sup>10</sup>

Nietzsche's is a profoundly Hobbesian or early modern world, albeit with an imposed and not an agreed-upon social contract. Justice is nothing but the word for this imposed social peace, which is to say that justice is the *political* legitimacy of a legal order. 'The most decisive thing,' Nietzsche continues, 'that the higher authorities can invent and enforce against the even stronger power of hostile and spiteful feelings ... is the setting up of a *legal system*, the imperative declaration of what counts as permissible in their eyes, as just, and what counts as forbidden, as unjust ... To talk of "just" and "unjust" *as such* is meaningless.' As Nietzsche writes a few lines further, 'states of legality' are '*exceptional states*.'<sup>11</sup>

The bluntness of Nietzsche's language leaves no doubt that if justice transcends positive law it is because justice is a political, not a legal or moral category. It is the political presupposition upon which law is based. What is just or unjust, on this view, is determined by the establishment of civic peace. Thus, the notion of an 'unjust' law



makes sense only as the law of a previous regime or the law of an existing regime as imagined from the point of view of a successor (or at least a radically transformed) regime. In other words, justice is either conquest or revolution, that is, the constitution or at least possibility of a constitution of a new legal order. Or, put another way, justice is the legitimacy of a legal order, but is itself not of that legal order. Therefore, to critique the concept of justice when it is used as a category that somehow inheres in law itself need not involve one in a performative paradox, for one, presumably, merely reminds one's interlocutor that he or she is making a category mistake. An unjust law is not a law that falls short of a pre-political moral standard, it is a law not sanctioned by the political order that constitutes the legal system; or, in our case, a law not sanctioned by the political order that overthrows the previous legal system.

I am quite sure that most of us think that equating the notion of justice with the notion of political legitimacy (especially imposed legitimacy) would be normatively disastrous, even if, more often than not, empirically true. I would like to wonder about this a bit, again by pondering the events and texts concerned with the often invoked *Wende* of 1945.

Radbruch would no doubt have vigorously opposed what to him would have seemed a cynical or brutish view. But equally obvious is the fact that Radbruch, at the very same time that he wrote on justice, concretely lived the events Nietzsche describes in the abstract, that is, the imposition of order by a conquering regime. And it is not clear that Radbruch could completely escape the empirical implications of this fact. Let me then return to his text for a minute. In a crucial section of his essay he maintains that three basic notions inhere in law: utility (*Zweckmäßigkeit*), consistency (*Rechtssicherheit*), and justice (*Gerechtigkeit*), in reverse order of importance. Often, however, these values conflict with one another. The latter two—consistency and justice—always trump the first of these values, but a conflict between *Rechtssicherheit* (consistency) and *Gerechtigkeit* (justice) is more complex. On the one hand, consistency (*Rechtssicherheit*)—that a law ought not to be interpreted tomorrow arbitrarily differently than the way it was today—is a demand made by justice itself; but on the other hand, claims of consistency can contradict claims of justice.<sup>12</sup> 'Where a conflict [*Widerstreit*] arises,' Radbruch writes, 'between consistency and justice, between a positive law with a contestable content and a just law that has no positive legal form, there is in truth a conflict of justice with itself, a conflict between an illusory and a real justice.'<sup>13</sup> Interestingly, the primal form of this conflict, he states, is to be found in the Gospels, in the contradictory commands, on the one hand, to obey secular authority and, on the other, to obey God more than man. He breezes by this comparison, for, I suspect, were he to linger he would necessarily have to resurrect natural if not divine law as the placeholder of justice; and to do that he would have to address the issue of mediation, which, it seems would lead us squarely back to the political. After all, what, we may ask, does a conflict between these two biblical injunctions concretely look like? Within the Catholic tradition, the conflict between a secular and divine law becomes a contestation between two worldly institutions, the state and the church. Within Protestantism, the church is replaced by the individual

conscience of the pious rebel who places him or herself outside of state law. In both cases, the appeal to justice manifests itself as a political battle over jurisdiction. On the one hand, it is said that secular authority cannot violate divine law, while on the other, the community of saints claim that it cannot be held accountable to state law when the state is in the hands of the Anti-Christ. In modern, secular society, neither claim can be countenanced.

Ultimately, given these implicit options, even Radbruch has to side with obedience to secular authority; for, as a jurist, he comes to the conclusion that in the vast majority of instances when a conflict between the consistency of positive law and the presumed higher authority of just law arises, consistency, *not* justice, wins out and should win out. In the vast majority of cases, in other words, the appeal to spiritual or individual conscience is invalid, regardless of the content of the appeal. In fact, if one interprets *Zweckmäßigkeit* as *salus populi* (welfare of the people) and interprets the rule of law as the highest *bonum publicum* (public good), as I suspect Radbruch would do, then it seems that *Zweckmäßigkeit*, *Rechtssicherheit*, and *Gerechtigkeit* come together under the single rubric of law. Justice is law, its judicial predictability and its benefit to the civic order. Even for Radbruch, justice seems to be civic peace. Only in the rarest of occasions does a transcendent notion of justice—as, apparently, ‘a just law that has no positive legal form’—trump *Rechtssicherheit*. It cannot be underestimated, he explicitly states, how dangerous the concept of ‘legal injustice’ (*gesetzliches Unrecht*) is, precisely because it threatens the function of legal certainty and the predictability of the legal system as a whole. He therefore reserves the term—which is meant to describe the reality of a putatively valid legal system that nonetheless is felt to be fundamentally unjust—for one, single example, the legal system or, as he would say, pseudo-system of the National Socialist regime; and he hopes there never will come a time when such a description will have to be used again.<sup>14</sup>

However, his vantage point is not located within that regime, but from within the military occupation that succeeded that regime. How then are we to understand the postulated extraordinary exceptionality of National Socialist Germany? Are we to say that what preceded it and what followed it represented normality? What preceded it, the Weimar Republic, was the result of a revolution following defeat in a devastating war; and what came after the National Socialist regime was the result of another defeat, a conquest that resulted in zones of occupation. Was the founding of the Weimar Republic just? Was the military occupation that eventually led to two separate constitutions of new states, the Federal Republic and the German Democratic Republic, also just? Where, then, does justice lie, in the normality of the daily functioning of a system or in its founding act? If justice lies in the normality of the daily functioning of a system, does that mean that justice and *Rechtssicherheit* are not just related but in truth the same thing, as Radbruch seems to say when normality reigns supreme? Or does it mean that justice is what *guarantees* legal certainty, and if so, does that guarantee lie in the founding political act, which, in the case of Germany, is revolution or conquest? Is justice, legality, and political legitimacy so intertwined that one cannot in fact undo the strands in any definitively simple way? Is Nietzsche right, just too blunt, too Hobbes-like, for our comfort?

If Nietzsche might be right, then let me paint a different scenario for 1945. In a recent review of Michael Neufeld's biography of German rocket scientist Werner von Braun, the physicist Freeman Dyson discusses the details of von Braun's many compromises with the Nazi regime in order to continue his work, including, of course, the development of missiles used to bomb Britain, the use of slave labor from concentration camps under horrific conditions, and his own compelled enlistment in the SS in order to remain in charge of the projects at Peenemunde. 'In the end,' Dyson concludes, 'I admire von Braun for using his God-given talents to achieve his visions, even when this required him to make a pact with the devil.'<sup>15</sup> Dyson's professed admiration (for von Braun's *entire* career, not the Nazi years) cuts against the grain of much contemporary intellectual discourse and its moral sensibilities. It does so, perhaps, because Dyson recognizes in von Braun a kindred spirit; for in his book *Weapons and Hope*, Dyson acknowledged what he felt to be his own pact with the devil. Working as a civilian for Great Britain's Bomber Command under its leader Sir Arthur Harris, Dyson had access to all the reports on the devastating raids on Hamburg, Dresden, and other German cities. He writes:

I felt deeply my responsibility, being in possession of all this information which was so carefully concealed from the British public. I was sickened by what I knew. Many times I decided I had a moral obligation to run out into the streets and tell the British people what stupidities were being done in their name. But I never had the courage to do it. I sat in my office until the end, carefully calculating how to murder most economically another hundred thousand people.

In fact, Dyson compares himself to those who worked for Eichmann. 'They had sat in their offices, writing memoranda and calculating how to murder people efficiently, just like me. The main difference was that they were sent to jail or hanged as war criminals, while I went free.' Even going so far as to write: 'I felt a certain sympathy for these men. Probably many of them loathed the SS as much as I loathed Bomber Command, but they, too, had not the courage to speak out.'<sup>16</sup> It is not my aim here to indict, morally, strategic bombing of civilian populations<sup>17</sup> or compare the Allied campaign against Germany and Japan with the Holocaust.<sup>18</sup> However, Dyson's self-indictment and the comparison it entails speak to the moral and legal issues of personal culpability; and I use his self-incrimination here to sketch the background to which he alludes in his review of the von Braun biography as he makes the following point, and I now quote Dyson from the review:

In my opinion, the moral imperative at the end of every war is reconciliation. Without reconciliation there can be no real peace. Reconciliation means amnesty. It is allowable to execute the worst war criminals, with or without a legal trial, provided that this is done quickly, while the passions of war are still raging. After the executions are done, there should be no more hunting for criminals and collaborators. In order to make a lasting peace, we must learn to live with our enemies and forgive their crimes. Amnesty means that we are all equal before the law. Amnesty is not easy and not fair, but it is a moral necessity, because the alternative is an unending cycle of hatred and revenge.<sup>19</sup>

He ends by claiming that South Africa has shown us how it can be done.

Though it has received fresh impulses in recent years, amnesty is no new notion. Not surprisingly, the idea was revived and gained currency in certain German legal circles around 1950.<sup>20</sup> Again not surprising, Carl Schmitt weighed in on the issue in a frequently reprinted (in German and in Italian translation) newspaper article extolling the ‘power of forgetting.’ As in much of his immediate post-1945 writings, there is an odor of disingenuousness that hangs over his words, but almost always also a commonsensical clarity that one wishes had come from a less incriminated pen. After tracing a brief, if ironic, genealogy of the notion through English history (1660 and 1495 are the operative dates) to the Peloponnesian War (in connection with which, he claims, the word ‘amnesty’ first appears), he notes that like the English and Greek wars, contemporary wars are civil wars, and civil wars require a general amnesty at their conclusion to restore civil peace. Amnesty, he writes, ‘is a mutual act of forgetting. It is neither a pardon nor charity.’<sup>21</sup> Whoever accepts amnesty must also give it; and whoever gives it must know that he also accepts it.’ Justice never explicitly enters into Schmitt’s deliberations. Given that the opposite of amnesty is annihilation (*Vernichtung*),<sup>22</sup> legal justice seems implicitly equated with revenge. Amnesty is the counterweight. Not a unilateral act, it is a contract between victor and vanquished, an acceptance, by way of forgetting, of the outcome of a struggle as the new status quo upon which civic peace will be built.

Coming from Schmitt, a complicit member of the vanquished,<sup>23</sup> the call for amnesty cannot help but raise questions about motivations. A similar plea coming from Dyson, however, who claims a comparable (indeed, in relation to Schmitt, greater) complicity, yet does so from the securely immune position of the victorious, is more complex. I wish to draw out some of its implications.

There are two notions of justice assumed in Dyson’s suggestion to let bygones be bygones, and neither seems to be recommended. On the one hand, justice is represented to be the continued ‘hunting for criminals and collaborators,’ which would lead to ‘an unending cycle of hatred and revenge.’ Like Nietzsche’s interlocutor, Dyson here can only smell ‘Bad air! Bad air!’ The other notion of justice is more complicated, for it is phrased in a customary way. ‘Amnesty,’ he states, ‘means that we are all equal before the law.’ But, as he also notes, amnesty is ‘not fair.’ If amnesty is synonymous with equality, why is it unfair? Equality before the law is a standard prerequisite for both *Rechtssicherheit* (consistency and predictability) and *Gerechtigkeit* (justice). But Dyson cannot advocate equality as the basis for justice, for that would implicate his own history. He has already equated his own actions with those of the enemy that deserve just retribution. Justice requires equality before the law. Following Dyson’s reasoning, then, if Eichmann is to be tried and executed, so is Sir Arthur Harris. If those who served under Eichmann are to be tried and punished, so is Dyson. *Yet, no victor, no conqueror, no revolutionary subjects himself or herself to the dictates of this form of justice, to this requirement of equality under the law.* As classic sovereigns, conquerors, and revolutionary founders of a new order remain above the law they impose. Thus justice, defined as equality, is factually not possible, making the justice that is factually practiced ‘not fair.’ Accordingly, amnesty is

psychologically ‘not fair’ because it simultaneously denies the possibility of ‘ideal’ justice (in which we putatively believe) and refuses the easy pleasure of justice as revenge. To say, as Dyson does, that, at the end of a war, executions may occur with or without a trial simply recognizes that the courtroom in a postwar political trial serves functions other than ideal justice—public spectacle to dampen the blood lust, for instance, or public pedagogy, to disseminate information in an authoritative manner about deeds done.

What, then, is amnesty? Amnesty might be considered a third notion of justice, the notion Nietzsche (and, implicitly, Schmitt) advocated: justice as the founding of a new law and, therefore, justice as the imposition of civic peace. Behind amnesty lies the ‘moral necessity’ of reconciliation which dictates living with one’s enemies (past, present, and future) and forgiving their sins. Even Schmitt realizes that forgiveness may be too much or too personal to ask, but, after time, mutual *public* forgetfulness may not be. That, at any rate, would be the Nietzschean imperative. Amnesty, Dyson seems to think, might just avoid both the bad faith of incomplete justice carried out and the bad faith accompanying the impossibility of ideal justice. Therefore, we might say, *amnesty does justice to the impossibility of justice.*

However, I suspect that we live in an era in which it is the notion of amnesty (as amnesia) and *not* justice that smells to most of bad air. Indeed, the pursuit of justice against former members of the German armed forces continues to this day, as the recent conviction of Heinrich Boere, a former member of the Dutch Waffen SS, demonstrates. In March 2010, Boere was sentenced to life imprisonment for the murder of three Dutch civilians in 1944.<sup>24</sup> Despite Nietzsche’s and Dyson’s fears about a cycle of revenge resulting from the overzealous pursuit of justice, it cannot be said that European civic peace has been disturbed by these periodic trials. On the contrary, the continued legal pursuit of (select) criminals of the past was and is part of the post-1945 social contract, thus a condition for European civic peace and world order. Nor can it be said that one feels compelled to muster any sympathy for a man who has lived a full and comfortable life after having deprived three fellow human beings of theirs. But one wonders how individuals from ‘developing nations,’ about whom Professor Dugard professes to worry that they may ‘begin to question the commitment of Western States to human rights,’ may look upon the spectacle of sentencing to life imprisonment an 88-year-old man for the murder of three European civilians 66 years ago. After all, the killing of civilians—by the armed forces and secret services of states, including those who claim most urgently to stand for ‘human rights,’ and by non-state political actors who claim to be liberation and resistance fighters—happens today on a regular basis, and not just by accident or as ‘collateral damage.’ Today even *German* soldiers are once again on foreign soil, allied with those who torture and murder ‘illegal combatants’ and target households and festive celebrations because it is suspected that an ‘insurgent’ is in their midst. As someone *unschooled* in Western values might ask, what makes an 88-year-old *former* German soldier so much more worthy of retribution than a 22-year-old German or American (or Dutch!) soldier *currently* stationed in Afghanistan (or Iraq, or who knows where tomorrow), or soldiers from any of a variety of other nationalities who

invade foreign territory and conduct brutal occupations? Put another way: if, as Dyson's notion of amnesty seems to suggest, what we normally think of, when we think of 'justice,' is impossible, and if, as Dugard apparently fears, non-Western, 'developing nations' might (already have) come to the conclusion that the Western profession of human rights is fraudulent (because selective, hence 'unjust'), what might be the consequences? Let me suggest the following.

Luhmann defines legal norms in terms of expectations. Here is how he puts it:

Expectations are either given up when they are disappointed or they are retained. If one anticipates such a bifurcation and opts in advance for one of its strands, one predetermines one's expectations as cognitive in the first case and as normative in the second. In this way, the concept norm defines one side of a form, which form also has another side. The concept does not exist without the other side; it must be pitched against it while keeping options open for transition from the one side to the other. The concept norm is the result of an option that an observer has, and it occurs empirically only when this form is used for making distinctions.<sup>25</sup>

One can illustrate this distinction in the following way. I may lend money to a friend who later refuses to pay me back. I may then *learn* never to loan money to this particular friend again, but I still *retain* the belief that if I loan someone money I have the right to expect repayment. Cognitively—experientially—I have learned something about a particular individual, but I refuse to use this particular instance as a general lesson and therefore I continue to believe in the sanctity of contracts. Again, in Luhmann's terms, norms, as a form of expectation, 'do not promise conduct that conforms to norms but they protect all those who are expecting such conduct.'<sup>26</sup> That is, they guarantee nothing, but they guide the communications of those whose actions count on the counterfactual persistence in the belief of their validity. In the legal system, norms stabilize expectations and make these expectations the basis for legal communication (including, of course, litigation). Furthermore, normative expectations (from the disappointment of which one refuses to learn) reflexively apply not just to individual laws but to the entire legal system. '[I]t is normatively expected,' Luhmann continues, 'that one must expect normatively. Law is, in other words, not indifferent toward itself. Neither does it merely demand that it be obeyed. It transforms the distinction between cognitive and normative expectations into an object of normative expectations in its own right.'<sup>27</sup> Just as violations of a law do not invalidate the law or negate future expectations that the law should be followed, so too the imperfections (injustices) of a legal system do not relieve one from the normative duty of having normative expectations.<sup>28</sup>

What, then, are cognitive expectations, that is, the expectations of which it is permissible to learn from their disappointment and therefore to give them up? There are numerous candidates—experiential expectations, for instance, like the one concerning the untrustworthy friend given above, or scientific ones, like those guided by rigorously designed and falsifiable scientific experimentation. However, within the context of our discussion as well as Luhmann's discussion of legal norms, cognitive expectations are political expectations. One need not invoke Aristotelian *phronesis* or

a Weberian ethics of responsibility to claim that in the political world, expectations must constantly be adjusted to circumstance and possibilities if one hopes for even a modicum of success. When, of his distinction between normative and cognitive expectations, Luhmann notes that ‘options’ are ‘open for transition from one side to the other,’ he acknowledges the interplay (structural coupling) of law and politics, at least in the relatively benign modes of parliamentary legislation and (more controversially) judicial review. But I suspect Dugard’s worry and warning is more fundamental.

Dugard’s repeated disappointment with the reaction of non-compliant states to the International Court’s judgments is consistent with his belief in normative, legal standards. The whole point of expressing disappointment is to *reaffirm* normative expectations, even when normative demands remain chronically unfulfilled. On this view, justice is treated as a ‘formula for contingency,’ or better, a regulative ideal, a placeholder for the future mutability of conditions that would allow for the eventual realization of normative demands. To give in to experience and no longer hold normative expectations regarding the workings of the International Court of Justice or the UN, say, would be to give up on justice as it is classically defined and putatively instantiated in those very institutions. Thus, it is Dugard’s duty to remind us all of the demands articulated by the court. But this ritualistic disappointment is coupled with an existential concern that those in the so-called developing nations may forego persistence in the face of disappointed expectations. Dugard worries, in other words, that whatever faith ‘we’ may have in the institutions entrusted with actualizing ideal justice, others—namely those who do *not* politically benefit from the *disappointment* of specific expectations—may find that there is something fundamentally amiss in the West’s administration of the law that it put into place in and after 1945. They may simply lose faith, not in the West’s intentions (a faith they may never have had), but in its institutions. Such a loss may then provoke a shift from a belief in justice as a regulative ideal to justice as the execution of political power in the establishment of a new legal order based on a new (im)balance of power. Put in plain text: one can wait only so long for the promise of justice-as-law to be fulfilled before one opts for the ‘transition from the one side to the other’ and fights (diplomatically, economically, physically, or otherwise) for justice-as-politics, justice as the imposition of a new civic peace, no matter how dismal the outlook or counterproductive the outcome may be.

To the complaint that this bleak scenario makes a mockery of normative expectations, one could respond: Is this not how it always has been?

## NOTES

1. ‘Science as a Vocation,’ Max Weber, *The Vocation Lectures*, ed. D. Owen and T. Strong, trans. R. Livingstone (Indianapolis and Cambridge: Hackett, 2004), 1–31.
2. Niklas Luhmann, *Legitimation durch Verfahren* [Legitimation through procedure] (Frankfurt: Suhrkamp, 1983), originally published in 1969.

3. Luhmann, *Law as a Social System*, ed. Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert, trans. Klaus A. Ziegert (Oxford: Oxford UP, 2004), 216.
4. Details on the Court's history can be found on its website: <http://www.icj-cij.org/homepage/index.php?lang=en>. The citations below from the ruling on the wall in occupied Palestinian territory are taken from the 'Summary of the Advisory Opinion of 9 July 2004' and can be found at <http://www.icj-cij.org/docket/files/131/1677.pdf> (accessed April 5, 2010).
5. This statement was taken from the website of the Critical Legal Conference 2007 at Birkbeck College, London, UK, which is no longer on the web. I have not been able to locate the original, though Dugard has made similarly worded comments, such as the one that can be found here: <http://electronicintifada.net/v2/article6602.shtml> (accessed April 5, 2010).
6. Both texts can be found in Gustav Radbruch, *Rechtsphilosophie: Studienausgabe*, ed. Ralf Dreier and Stanley L. Paulson. 2nd ed. (Heidelberg: C.F. Müller Verlag, 2003), 209–19. All translations from Radbruch are my own.
7. *Ibid.*, 214.
8. Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson and trans. Carol Diethe, 2nd rev. student ed. (Cambridge: Cambridge UP, 2007), 27–29.
9. *Ibid.*, 21.
10. *Ibid.*, 49.
11. *Ibid.*, 49–50.
12. Radbruch, *Rechtsphilosophie*, 215–16. Luhmann also emphasizes the persistent identity of justice and consistency. 'Justice as a formula for contingency in its most general form has traditionally, and still today, has [sic] been identified with *equality*. Equality is seen as a general, formal element, which contains all concepts of justice but which means only something akin to regularity or consistency' (Luhmann, *Law as a Social System*, 217. Luhmann then repeats this definition of justice in a formulaic way: 'consistent decision-making' (*Ibid.*, 219) or 'consistency in decision-making' (*Ibid.*, 220, 221).
13. Radbruch, *Rechtsphilosophie*, 216.
14. *Ibid.*, 217.
15. Freeman Dyson, 'Rocket Man' review of Michael Neufeld, Von Braun: Dreamer of Space, Engineer of War, in *New York Review of Books* LV, No. 1 (January 17, 2008): 8–12.
16. Dyson, *Weapons and Hope* (New York: Harper, 1984), 120.
17. For the entire twentieth century, this has ably and imaginatively been done by Sven Lindqvist, *Strategic Bombing* (New York: New Press, 2001). For the Allied campaigns, see A.C. Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (New York: Walker, 2006). For my views, see the introduction and afterward to Wilfried Wilms and William Rasch, eds., *Bombs Away! Representing the Air War over Europe and Japan, Amsterdamer Beiträge zur Neueren Germanistik* 60 (Amsterdam and New York: Rodopi, 2006), 7–21, 395–404.
18. This has been done, with the necessary care to mark the essential differences as well, by Eric Markusen and David Kopf, *The Holocaust and Strategic Bombing: Genocide and Total War in the 20th Century* (Boulder, CO: Westview Press, 1995).
19. In his review essay, Dyson writes: 'I should here declare my own interest in this debate. In my work for the RAF Bomber Command, I was collaborating with people who planned the destruction of Dresden in February 1945, a notorious calamity in which many thousands of innocent civilians were burned to death. If we had lost the war, those responsible might have been condemned as war criminals, and I might have been found guilty of collaborating with them' (Dyson, 'Rocket Man', 12).
20. For details, see the editor's appendix to Carl Schmitt, 'Amnestie oder die Kraft des Vergessens', in *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916–1969*, ed. Günter Maschke (Berlin: Duncker & Humblot, 1995), 220–21.



21. In the previous paragraph Schmitt more pointedly and with a touch of sarcasm states, ‘... amnesty is more than the cigarette that one offers the disenfranchised [*Entrechteten*] to prove one’s humanity to oneself’ (Ibid., 219). All translations from Schmitt are my own.
22. Ibid., 218.
23. By 1949, the year of the first appearance of his article, Schmitt’s legal problems with the occupying forces were over. Personally, therefore, he was out of danger. For details, see Schmitt, *Antworten in Nürnberg*, ed. Helmut Quaritsch (Berlin: Duncker & Humblot, 2000).
24. Boere, who was originally sentenced to death by a Dutch court in 1949, was tried and convicted this time in a German court, as was 90-year-old Josef Scheungraber in August, 2009. Because of appeals and the men’s advanced age, it is unlikely that either will serve time. Details can be found at <http://news.bbc.co.uk/2/hi/europe/8582449.stm> (accessed April 5, 2010).
25. Luhmann, *Law as a Social System*, 149.
26. Ibid., 150.
27. Ibid., 157.
28. For a fuller discussion of Luhmann and norms, see the special issue of *Soziale Systeme* 14, no. 1 (2008).