

War through (International) Law? Some Neo-rhetoric of “Othering”  
in the European “De jure belli ac pacis” Context

To my grandparents and to my uncles, *veterans*;

to the victims of terrorism, *in memoriam*.

«Whoever rejects the theory of the *bellum justum* denies the legal nature of international law. War is permitted as a sanction only as a reaction against a wrong suffered, against a definite conduct of states, determined by international law, and permitted only when directed against the state responsible for this conduct. Any war that does not present this character is a violation of international law. This is the substance of the *bellum iustum*. War is a mass murder, the greatest misfortune of our culture. The elimination of war is a problem of international politics and the most important instrument of international politics is international law ».

(H. Kelsen, *Peace through Law*)

## **SECTION I**

### ***The problem of peace and the roads to war: an historical investigation on the use of international force***

«Si vis pacem, para bellum; si vis pacem, para iustitiam».

«There are several Ways of living, some better than others,  
and every one may chuse what he pleases of all those Sorts».

(H. Grotius, *De jure belli ac pacis*)

«The state of peace is not a state of nature, which is rather a state of war,  
so must the state of peace is established».

(I. Kant, *Toward Perpetual Peace: A Philosophical Sketch*)

«The war is nothing but the continuation  
of politics by other means».

(K. von Clausewitz, *Vom Kriege*)

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«One should never tire of emphasizing that the logical unity of the system is the fundamental axiom of any normative knowledge.

In the sphere of normative consideration,  
a real objective conflict of norms is unthinkable.

The idea of law, in spite of everything,  
seems still to be stronger than an ideology of power».

(H. Kelsen, *Das Problem der Souveränität*)

«War is the only hygiene in the world».

(F.T. Marinetti, *The Manifesto of Futurism*)

«Hungry children, victims tortured by their oppressors,  
defenseless elders considered an odious burden by their children;  
and all the loneliness, poverty, and pain made mockery  
of what human life should have been.

I strongly wish to alleviate the evils of the world,  
but I can not do it, and I suffer from it».

(B. Russell, *Autobiography*)

### 1. The project of Max Weber's *nationalstaat*

Nowdays Europe faces troubling times. Constructive suggestions - such as the federal finality that Joschka Fischer sought to promote in his legendary lecture at the Humboldt University in Berlin<sup>[1]</sup> more than ten years ago - no longer sound credible. They now stand

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in contrast with the endless and frenzied crisis management that has placed its stamp of rigid austerity policy on the “periphery” of what was to evolve into an “ever closer Union.” The rule of law and the project of “integration through law” are at stake, concepts which characterized and connected European law scholarship transnationally[2] in the formative phase of the integration project and for a good while thereafter. Europe is far from hosting «the most competitive, knowledge-based economy in the world» as the Lisbon Council proclaimed in the year 2000[3]; its economy stands at the core of the present crisis. European constitutionalism, which dominated academic discussions for a decade and thoroughly neglected the inherently political dimensions of the “Economic,” has been silenced[4].

Paradoxically, the same holds true for Germany’s Ordo-liberalism and its project of an “economic constitution.” According to this school of thought, the legitimacy of the European project rested upon the legal ordering of the economy[5], the economic freedoms of the EEC Treaty — a system of undistorted competition — and an economic policy «complying with justiciable criteria.»[6] These stood as the potential cornerstones of this order, to orient the integration process in a way by which the European polity would be legitimized by — and reduced to — an economic *ordo* whose validity did not depend upon democratic credentials, let alone upon the transformation of Europe into a fully-fledged federal state[7].

This idea guided and accompanied Ordo-liberalism’s path to Europe. Nobody championed or developed it more consistently than Ernst-Joachim Mestmäcker. One of his seminal essays explained that the pressure to harmonize, stemming from integration, would become stronger[8]. A Common Monetary Policy would mean “ultimately giving up” the opportunity to maintain far-reaching differences between the economic orders[9].

The Community for which the original ordo-liberal concepts were conceived — and to which Mestmäcker referred — looks nothing less than idyllic from today’s perspective. It was both smaller and more homogeneous than the current Union. For this reason alone, the incorporation of the project of integration through law, particularly its commitments to a legal ordering of economic policy (*Ordnungspolitik*), no longer seem viable. By now, individuals see the symptoms of a deep crisis and the necessity for developing new perspectives for the European project appears irrefutable. One cannot reverse the course of history, but one can analyze and try to understand how and why the configuration of the relationship between law and politics in the integration project has contributed to the “integration failure” which we are now witnessing in the current crisis. This essay proceeds in five steps.

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The first step, taken somewhat in haste, concerns the Weberian notion of the nation-state and its pursuit of power through economic strength. The second involves the taming of the self-same nation-state by law and the de-coupling of the European economic constitution from the labor and social constitutions of the nation-states, which presents itself to the one — Ordo-liberal — side as nothing but a logical implication of the establishment of a European economic order, while other political quarters perceive this disconnection as a threat to the legacy of the welfare state. This is followed by an analysis of the various dimensions of the integration project’s problems, referring to Karl Polanyi’s economic sociology. The next section elaborates on these remarks, dealing with the establishment and the crisis of Europe’s EMU and including an overview of Europe’s new “crisis law” and its assessment by the German Constitutional Court (FCC) and the Court of Justice of the European Union (CJEU). The dramatic nature of our current situation will then be illustrated by means of a fictitious debate between Carl Schmitt and Jürgen Habermas. In the analysis of this debate, Carl Schmitt’s theorems will prove to be frighteningly realistic: “But where danger threatens, that which saves from it also grows.”[\[10\]](#) What kind of regime did Europe impose on itself, and what does this mean for European citizenship? These challenges will be addressed in the Epilogue, which will also tentatively consider an alternative vision to both the frightening as well as the possibly merely voluntarist scenarios on the future of the European integration project.

The steps towards European integration after World War II document how we overcame our bellicose past. At the same time, the designers of the project wanted to rein in the economic militancy of the nation-state. Max Weber[\[11\]](#) formulated his perception of that nation-state in his 1895 inaugural Freiburg address as follows: “Our successors will not hold us responsible before history for the kind of economic organization we hand over to them, but rather for the amount of elbow-room we conquer for them in the world and leave behind us”. Processes of economic development are in the final analysis also power struggles, and the ultimate and decisive interests at whose service economic policy must place itself are the interests of national power, where these interests are in question. The science of political economy is a political science. It is a servant of politics, not the day-to-day politics of the individuals and classes who happen to be ruling at a particular time, but the lasting power-political interests of the nation. And for us the national state is not, as some people believe, an indeterminate entity raised higher and higher into the clouds in proportion as one clothes its nature in mystical darkness, but the temporal power-organization of the nation, and in this national state the ultimate standard of value for economic policy is “reason of state”. There is a strange misinterpretation of this view current to the effect that we advocate “state assistance” instead of “self-help”: state regulation of economic life instead of the free play of economic forces. We do not. Rather we wish under this slogan of

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“reason of state” to raise the demand that for questions of German economic policy – including the question of whether, and how far, the state should intervene in economic life, and when it should rather untie the economic forces of the nation and tear down the barriers in the way of their free development—the ultimate and decisive voice should be that of the economic and political interests of our nation’s power, and the vehicle of that power, the German national state[12].

«It was not the agreement of many audience members with the following remarks, but their dissent that prompted me to publish them», Weber wrote in the preliminary notes to the publication of his lecture[13]. This text has weathered these concerns well. He developed a profoundly thought-through in terms of economic theory, sociology, and history, and – despite all its jingoistic pronouncements – also stands as a critique of the lack of political capacity of the German political class[14]. The martial tone of Weber’s lecture clearly spells out a target of the European project as people understood it later, particularly in Freiburg when that city had become the intellectual *Heimat* of the Ordo-liberal School.

### **2. A European constellation: the Carl Schmitt’s *Großraum* theory**

Europe’s values crisis is not an expression of a faulty way of dealing with prevailing law, but an expression of the imperfection of Europe’s legal design – including its configuration of the law-politics relationship. A rare, albeit superficial, consensus has emerged regarding this critical evaluation. Beyond this consensus, the crisis has generated challenges for all disciplines engaged in European studies. This is why it would be presumptuous to venture legal and constitutional policy hypotheses here based upon some definite assessment as to the causes of the crisis, as well as forecasts regarding its further course, intending to provide a blueprint for Europe’s future constitutional architecture. The following deliberations will examine the peculiar position of Carl Schmitt[15].

In view of the European dimension of the crisis of constitutional (and financial) values, it seems best to begin with the theory of the *Großraum*, a notion which was explicitly, albeit not exclusively designed to capture the European constellation, Carl Schmitt selected a memorable occasion to present it: From 29 March 1939 to 1 April 1939, still half a year before the war against Poland, but after the *Anschluss* of Austria and the invasion of Bohemia and Moravia (the *Sudetenland*) at the *Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrer-Bundes* (Reich section of professors in the National Socialist Association of Lawyers) convened in Kiel. Also during this time period, the Institute for Politics und International Law was celebrating its 25th anniversary. Thus, Carl Schmitt gave his lecture entitled “*Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*”

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(The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law) amidst this momentous setting.[16]

The core argument of Schmitt’s key note was that the *jus publicum europaeum*, which had made the sovereign state its central concept, was no longer in line with the *de facto* spatial order of Europe.[17] Following the model of the Monroe Doctrine, a specific “space” (the *Raum*) had to become the conceptual basis for international law, with the *Reich* constituting the order of that space. To quote directly: “The new ordering concept for a new international law is our concept of the *Reich*, with its *Volk*-based, *völkisch Großraum* order.” But what does this mean for the internal order of the *Großraum*? Schmitt refers to the elasticity of the concept of international law, which could also cover the inter-*völkische* relations within a *Großraum* as well. What the *Großraum* requires and constitutes is an “order that excludes the possibility of intervention on the part of spatially foreign powers and whose guarantor and guardian is a nation that shows itself to be up to this task.”[18]

This claim to leadership was, in Schmitt’s words, “situational,”[19] and the overall notion of the *Großraum*, as he underlined in discussions with his Nazi contemporaries, rivals, and critics, was a “concrete, historical and politically contemporary concept” (*konkreter geschichtlich-politischer Gegenwartsbegriff*).[20] But in so doing, he emphasized elements which he claimed to be valid long-term. The obviousness of the *Großraum* concept, he argued, resulted from transformations dominated by technical, industrial, and economic developments. Thus, Schmitt outlined, albeit somewhat apocryphally, an erosion of the territorial state as the harbinger of the necessity to adapt international law to the factual restructuring of international relations and the replacement of classical international law by norm systems which, today, would affirmatively be called “governance structures,” or, distanced and critically, “managerialism.”[21] He underlined two phenomena in particular, namely, the economic interdependencies beyond state frontiers (*Großraumwirtschaft*), and the specific dynamics of technology-driven developments (“technicity” [*Technizität*]).[22] Schmitt had already published on both topics prior to 1933.[23]

Schmitt was silent on the internal “order” of the *Großraum* during the years of war. In the 1941 edition of the *Großraum*, he remained sibylline[24] and only published his famous “*Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*” in 1950, which he had written prior to 1945.[25] But the topic continued to haunt him.[26] When considering Schmitt’s theories within the context of the financial crisis, not only must his diagnoses of the loss of nation states’ sovereignty and the de-legalization of their relationships be taken seriously. His observations on the increase of executive power – broadly supported by comparative legal research – must also be taken into account.[27] But here, above all, we

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are concerned with his theorems of the state of emergency[28] and the (commissarial) dictatorship.[29] Ernst-Wolfgang Böckenförde was the first to take up the term “state of emergency,”[30] and others followed. “The European Stability Mechanism,” writes Ulrich Hufeld, has “the format of a constitution-breaching measure along the lines of Carl Schmitt’s conceptualization of contrasts,”[31] and adds a quotation from Schmitt’s 1928 *Constitutional Theory*: Such breakout entities are, by nature, measures, not norms. Their necessity arises from the particular circumstances of an individual case, an unexpected abnormal situation. If, in the interest of the whole, such renegade entities are formed, the superiority of the existential over mere normativity is apparent. Whoever authorised such acts and is capable of acting, is sovereign.[32]

In a tone of urgency, Frank Schorkopf calls the calamity that we are dealing with a “crisis without an alternative”;<sup>[33]</sup> a constellation in which the actors, including the governments and the executive branches, “merely have power within the existing conditions, but not over them.”<sup>[34]</sup> Anna-Bettina Kaiser arrives at her position following a precise reconstruction of the debates around Article 48(2) of the Weimar Constitution.<sup>[35]</sup> The handling of this provision and the extensive interpretation of Article 122(2) TFEU today are in her view equally dubious and can be placed at the same level.<sup>[36]</sup> Furthermore, the rules laid down in the Six-Pack, the Two-Pack, and the TSCG must not be sugar-coated.<sup>[37]</sup> Yet, is the academic community fulfilling its responsibility by merely accepting that the provisions of the EMU are dysfunctional, and abstracting from the dilemma of the political in the EU?

We cannot escape from Carl Schmitt’s shadow that easily. The concept of “commissarial dictatorship” is most plausible to except to. After all, in the current management of the crisis, the actors are not alone. They must not only come to an arrangement at a supranational level, but also between the levels of the multilevel governance system, as well as internationally—the dictator has been replaced by technicity. But how comforting is this? The fact remains that the new form of European government collides with democratically-legitimized institutions and processes. Thus, it is anything but comforting that the new European practice coincides with ideas of prominent American constitutionalists who draw upon Carl Schmitt in order to turn away from James Madison and argue the case for a plebiscitary democracy in place of a representative one; theorists who advocate delegating political power to the executive in case of need.<sup>[38]</sup> And are we, perhaps, exchanging Scylla for Charybdis? Anyone who observes the busy activities of the Commission’s Services—their tireless production of additional lists of criteria for ever-more policy fields, in ever-more regions—will remember Carl Schmitt’s words about the “total,” but by no means “strong” state, which he linked with a polemic against all

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technocratic efforts that believe they can decide “all issues according to technical and economic expert knowledge following supposedly purely substantive, purely technical and purely economic considerations.”[\[39\]](#) Ironically, Schmitt’s late essay,[\[40\]](#) quoted above, provides a situational, theoretical interpretation of this. Reading Hans Peter Ipsen’s 1,000-page tome on European law, Schmitt confessed, he was “stricken with deep sorrow,” for the following reason: the approach of European law, which “legalizes” a technocratic-functional administration of European associations, has no concept of a “legitimate political” project.[\[41\]](#) Therefore, one cannot speak of the rule of law (*Rechtsstaatlichkeit*), much less of democracy. Now, one must take into account what *Rechtsstaatlichkeit*[\[42\]](#) and democracy meant to Schmitt. In *Constitutional Theory*, he writes that democracy “is a state form that is consistent with the principle of identity (e.g., of the concretely existing people identified with itself as a political unit)”—and consequently, it cannot apply to an ethnically diverse Europe.[\[43\]](#)

### 3. Neo-Kantian Epistemological Assumptions

In his essay *Das Problem der Souveränität und die Theorie des Völkerrechts*, written during the First World War and published in 1920, Kelsen tackled for the first time the theme of the nature and functions of the international legal system[\[44\]](#). With undoubted originality and impressive theoretical development, he puts forward a ‘monist’ view in opposition to the theories of the primacy of state law and of the pluralism on a parity basis of sources of law. For Kelsen there exists only one legal system, which includes in its single normative hierarchy both domestic and international law.

The starting point is radical, in that the premises Kelsen takes have their roots in general epistemology. Kelsen adopts the theory of knowledge and the philosophy of science developed by the Marburg school, deducing from them, following the teaching of Rudolf Stammler, the central assumptions of his theory of law. Hermann Cohen’s neo-Kantian Platonism instilled in him an almost obsessive methodological concern: to eliminate from the science of law all subjective elements and make it a unitary, objective and therefore ‘pure’ knowledge[\[45\]](#). The pureness of knowledge – as Cohen had maintained and Kelsen repeated – is nothing other than its ‘unity’ according to the model of the deductive sciences. Logico-mathematical knowledge, by contrast with the empirical disciplines that study natural phenomena, is autonomous in object and method[\[46\]](#). It is, moreover, transcendental knowledge in the Kantian sense[\[47\]](#), i.e., ‘original’ and valid in itself, independently of any reference whatever to content, reality or *praxis*[\[48\]](#).

The unity and objectivity of the logico-mathematical method requires the internal unification of each cognitive sphere, including that of the ‘ought’. For Cohen and for Kelsen,

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the universe of the ‘ought’ – including the realms of law and the state – is inconceivable without reference to the logical idea of ‘unity’: here too ‘the unity of the viewpoint of knowledge imperatively requires a monist conception’[\[49\]](#). In this case the unity is represented by mankind as a whole, and it is only here that, according to Kant’s teaching, the individual finds meaning and fulfilment.

The unitary nature of the legal universe (and the primacy within it of the international law) is for Kelsen an ‘epistemological hypothesis’ which corresponds to a very general option supporting the objectivity of knowledge: it presupposes a ‘universal objective reason’ and an ‘objectivist world view’. In this epistemology of the unity and objectivity of the science of law, the dimension of state subjectivity, and even the individual and his or her fundamental rights – in a paradoxical equation of the individualism of states with the individualism of individuals – are subordinated to the objectivity of the universal legal system. For Kelsen “the subjects who know and will are really only ephemeral and temporary phenomenal forms, the spirits of which are co-ordinated and related only insofar as they are integral parts of the universal world spirit, the knowing reason of which is merely an emanation of the supreme universal reason. For objectivism the individual is a mere appearance. And the legal theory that takes the objectivity of law to its ultimate consequences and therefore affirms the primacy of international law, must not only remove the idea that individual state subjects are definitive and supreme entities, but ultimately must, to be consistent, reduce the ‘physical’ person too – the ‘natural’ legal subject – to its substrate, that is, to an element of the objective legal system”[\[50\]](#).

On the contrary, maintains Kelsen, the subjectivism and cognitive relativism that inspire the thesis of the primacy of state sovereignty lead not only to a logic of ‘pure power’ in international relations, but, still more, to the denial of law and of the possibility of legal science[\[51\]](#).

Kelsen admits that the acceptance or rejection of these epistemological hypotheses are, in principle, the object of an evaluative choice involving alternative world views[\[52\]](#). Yet he nonetheless maintains that the primacy of international law is imposed by logical and conceptual (‘normological’) requirements internal to the scientific, that is unitary and objective, interpretation of law: it is a hypothesis that ‘must be accepted if one intends to interpret social relations as legal relations.’[\[53\]](#) Indeed, maintains Kelsen, ‘the binding nature of law and its entire existence lie in the objectivity of its validity.’[\[54\]](#)

The ‘monist’ hypothesis of the unity of law and the primacy of the international legal system is inseparable from a series of collateral assumptions that Kelsen’s construction has recourse to. It is in any case typical of Kelsen’s style of thought to develop systematically all

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possible implications of the theory's central hypotheses. In particular, it is clear that Kelsen cannot maintain the primacy of international law without committing himself to maintaining its juridical nature too. He must accordingly take a stance against the argument, going back to John Austin, which attributes to the international normative system the nature of a sort of 'positive morality', rather than that of a legal system in a strict sense. As we know, doubts as to the legal nature of the international normative[55] system have mostly been raised by pointing to the lack at the international level of sanctioning institutions or instruments, or to the decentralized, fragmentary and ineffectual nature of those which do exist[56].

### 4. On “world citizenship” and the “League”: a Kelsen utopia?

In *Peace through Law* Kelsen, as is well known, sets forth a complete legal-institutional strategy to pursue a stable and universal peace among nations[57]. Kelsen borrows from Kant both the ideal of perpetual peace and the federalist model, as well as the idea of a *Weltbürgerrecht*, a 'world citizenship' which includes as its subjects all the members of the human species[58]. According to Kelsen, the royal road to achieving the aim of peace is the union of all states (or the greatest possible number of them) in a world federal state[59]. But to be a realist, this objective must be viewed as the outcome of a long historical process. It is only through numerous intermediate stages and on the basis of a conscious ideological, political and educational commitment that it is possible to achieve an attenuation of national feelings and a levelling out of cultural differences between the various countries[60]. Although it is Utopian to think of the goal of the world state as immediately possible it is nonetheless plausible[61], Kelsen declares, to create, once the war is over, a 'Permanent League for the Maintenance of Peace' whose members will be, first and foremost, the victor powers, including the Soviet Union[62].

Kelsen elaborates the project for the 'League' by incorporating some substantial innovations in the old League of Nations model. These give a central role to judicial functions by comparison with those of government or legislation. The failure of the League of Nations, Kelsen maintains, is due to the very fact that the centre of its operations was not the Court of Justice but the Council, that is, a sort of international government. This was a 'fatal error of design' since the most serious lacuna in international law is the very absence of a judicial authority. Failing this higher authority, every state has *de facto* competence to decide who is in breach of international law and to make recourse to war or reprisals against those presumed in breach of international law[63].

According to Kelsen, there was no reason to fear that the Great Powers, once the Covenant was signed, would not respect the Court's decisions or assist it in enforcing its sentences by means of military force. Nor did it make much sense to maintain that this

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would amount to ratifying at legal level their political and military hegemony. In fact, the Great Powers would make themselves the guarantors of international law: they would be ‘the power behind the law’[\[64\]](#). By accepting the rules of the Covenant and ensuring their observation the Great Powers would commit themselves to exercising their inevitable superiority within the conventions of international law rather than in arbitrary fashion[\[65\]](#).

### 4.1. Judicial Cosmopolitanism?

One might even surmise that Kelsen’s cosmopolitanism[\[66\]](#), taken together with the proposal of the medieval doctrine of the *iustum bellum* and the idea of a court of justice with the power to resolve military disputes between states, evokes the image of the *respublica christiana*, with at its centre the undisputed spiritual and legal *auctoritas* of the Roman Papacy. But apart from this anachronistic aspect, Kelsen’s judicial pacifism seems to date to have been challenged in its very aspiration to present itself as an innovative and at the same time realist proposal. The bitterness with which Kelsen first denounced the partiality of the Nuremberg Tribunal[\[67\]](#) and then criticized the excessive political and military power granted by the United Nations Charter to the Security Council[\[68\]](#) is a pointer to the impracticability of Kelsen’s judicial pacifism, to its illusory nature. Kelsen’s disappointment is the proof that his distinction between ‘judicial’ pacifism and ‘governmental’ pacifism is of little significance.

On the other hand, it is clear that an international court, in order to secure enforcement of its own verdicts without recourse to the military force of the Great Powers (or even against them), would have to have extremely great power at hand: it would itself have to be a (nuclear) superpower or the judicial organ of a (nuclear) superpower, endowed with overwhelming force by comparison with the other Great Powers. The consequences this would have in terms of impartiality of its verdicts are easy to conjecture. It need scarcely be added that the concentration of political and military power in the hands of an international institution – whether governmental or judicial – amounts to concentration in it of the *ius ad bellum* that has been taken away from nation-states. Any sort of ‘police action’ carried out by a supranational authority holding the world monopoly of force is inevitably destined to take on the more classic outlines of war, as since proved by the 1991 Gulf War[\[69\]](#).

### 5. Hart and his concept of international law: «Is international law really law?»

The question «Is international law really law?» has not proved troublesome, according to H. L. A. Hart, simply because «a trivial question about the meaning of words has been mistaken for a serious question about the nature of things.»[\[70\]](#) His examination of this

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problem in *The Concept of Law* deserves a greater measure of critical scrutiny than it has received, partly because of the increasing recognition that his book is destined to become a milestone in jurisprudence and partly because of the way in which he reaches a generally acceptable conclusion. Unlike his predecessor Austin’s claim that international law was merely positive morality, Hart defends international law in Bentham’s terms as “sufficiently analogous” to municipal law.<sup>[71]</sup> It is important to see in what way this analogy is viewed by Professor Hart in order to determine whether the reasoning he offers is too high a price to pay for accepting a neo-positivist into the circle of those who hold that international law is really law.

Hart’s argument deals with two principal sources of doubt arising from the claim that international law is somehow less real than municipal law. The first is easily dealt with: how international law can be binding upon sovereign states. At an early stage in his book Hart disclaims the usefulness of “sovereignty” in describing any legal system. When he turns to international law, he adds the further argument that “sovereign” means no more than “independent.” Thus we must look to the rules of international law to see just how far this independence extends. The second doubt is how international law can, in the absence of organized international sanctions, be binding in the same sense as ordinary municipal law. Hart argues that, although in any legal system obligation is generally congruent with a likelihood of sanctions for disobedience, there is no necessary relation between the two. Nor are sanctions “necessary” to a legal system, for while they may be used in municipal law against an expected minority of malefactors without too much risk, in international law sanctions may lead to widespread and self-defeating international strife.

Whatever differences exist do not overcome the fact that international law is thought and spoken of as obligatory, that it gives rise to claims and admissions couched in legal terms, and that when rules of international law are disregarded, states attempt to show that the facts are not as claimed (or, it may be added, that the rules do not apply to the alleged facts), rather than that the rules are not binding. Thus, summarized, Hart’s position appears to be one with which few would substantially disagree. Nevertheless each of his arguments entails a line of reasoning which may lead to undesirable implications for international law. In his first line of argument, Hart finds “sovereignty” unnecessary to neo-positivism because there is a more illuminating tool of analysis which he labels the “rule of recognition.” By this he means the rule or rules in a society which confer power upon lawmakers. This rule makes it possible to identify sources of law. The rule of recognition is more fundamental than the notion of sovereignty since it tells who the sovereign is and how his power can be transferred. Yet in his consideration of international law, Professor Hart argues that there is no unifying rule of recognition specifying “sources” of law and providing general criteria for

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the identification of its rules. This argument runs parallel to his view that there is no proper sense of “sovereignty” in international law other than “independence.”<sup>[72]</sup> But if international law lacks a rule of recognition, how can it still be termed “law”? Hart’s answer appears to be that international law is still primitive: it is a set of rules, not a system. Yet it is no less “law” since there is a great range of principles, concepts and methods which are common to both municipal and international law and which make a lawyer’s technique freely transferable from one to the other. Perhaps, Hart adds, if multilateral treaties were to be generally recognized as binding upon states that are not parties to them, such treaties would become legislative enactments and thus international law would be provided with a distinctive criterion of validity for its rules.

The advent of such a rule of recognition would lay to rest the skeptic’s last doubts that international law is really law. This Hart’s argument is disturbing in that international law becomes law at the price of conceding that it is a primitive kind of law lacking in “rules of recognition.” His conclusion will certainly be challenged by those who agree with his analysis of rules of recognition but consider that they are more fundamental than he does. More significantly, Hart’s argument may suggest that international law is basically incomplete and thus deserving of less respect on the part of states than ordinary municipal law. A closer look at the idea of rules of recognition is therefore in order. When does the rule of recognition arise which transforms a primitive society into a modern legal system? How does it arise? Once it has arisen, can it be revoked? Hart does not appear to give a satisfactory answer to these questions, which are analogous to questions one might ask about a theory of sovereignty. Further, how does the rule of recognition cope with the possibility of an abuse of authority on the part of the lawmakers? Hart’s answer to this appears to be that the authority conferred by the rule cannot be withdrawn even if the rule is abused. But if this is true, it would not take long for a legislator to change or manipulate the rules of recognition at whim.

Additionally, as Fuller points out, Hart seems saddled with the necessity of excluding from a rule of recognition any express or tacit provision to the effect that the authority it confers can be withdrawn for abuses of it, such a provision might seem to impose a duty upon the legislator—an idea contrary to Hart’s definition of the rule of recognition as solely a power-conferring rule which cannot give rise to duties.<sup>[73]</sup> The difficulty with the idea of a rule of recognition is that it mistakenly tries to account for sociological fact (how and why people obey laws) by the use of legal concepts which necessarily arise after such fact. This point is easily seen in international law. The practice of states which gives rise to rules of international law often reflects shared attitudes about what international law ought to be. States are aware that their actions have legal consequences - that their conduct is the raw

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material of custom and precedent - within a system in which it is generally accepted that their actions ought to have legal consequences. Thus there is an interrelation between law-formation and law-interpretation; the "rules of recognition" of international law, as it were, are a product of the practice of states. Why this has come about is a matter of sociology, but there is no doubt that it does occur. Hart's own example of multilateral treaties provides a good illustration. His argument is that when multilateral treaties become generally accepted as binding upon nonparties, they will become legislative enactments and thus international law will finally have a rule of recognition. But this argument betrays a longing for a legislative system similar to that in municipal law despite Hart's insistence that international law is "law."

How can it be assumed that the extension of rules contained in multilateral conventions to non-parties will necessarily become a sort of "legislation?" These treaties might, on the contrary, be viewed as evidence of custom to be weighed in the balance with other evidence of usage becoming customary obligation. The treaties might be given weight according to the number of states which have ratified each convention, an idea wholly at variance with municipal legislation. But quite apart from these objections, it is apparent that if treaties become a form of international legislation, they will have done so by the operation of the practice of states hardening into law. State practice may accept a form of international legislation or it may not, but the entire legal system is not fundamentally altered thereby. Assigning international legislative consequences to multilateral conventions may be a step in the direction of simplicity, but surely cannot be held to be the revolution which transforms primitive international law into a complex system of modern law. In his second argument that international law is "binding" without organized sanctions, Hart uses the same reasoning to read out of international law any necessary connection with morality per se or with morality induced by sanctions. In addition he uses the conclusion that international law is really law to exclude the classification of international law as "morality" in any normal sense of that word.

Although neither of these arguments separating law and morality appears logically compelled by his main arguments on international law, it is nevertheless significant that Hart has made them. They tie in with his general thesis that rules of law are often morally indifferent but are no less rules of law. While it is true that at least some rules of law in most legal systems may be morally indifferent, to emphasize this too much is to underestimate the contribution of natural law to international law or to misinterpret some of the rules deriving from natural law. Thus Hart rejects the views of Brierly and Lauterpacht that moral obligation is a foundation of international law. Yet to reject this learning may be to discard much of the structure that is common to international law and to classic theories

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of natural law. Two brief examples may be cited: first, it is possible to argue that the prohibition against unjust wars found in Grotius and many of his contemporaries has persisted as a rule which requires by its own terms a moral or natural-law interpretation. Even in the era of the United Nations there may still be a just war fought solely for self-defense against an armed attack or fought by the international community acting through appropriate United Nations organs against a state which has caused a threat to the peace. If in years to come the idea of threat to the peace is enlarged to include such actions as violation of an arms control treaty or even severe violations of human rights law, natural law and morality will have to be taken into account in determining whether the international community is authorized to take action. Second, the rule of *pacta sunt servanda* cannot always be satisfactorily applied without reference to its moral purpose. Hart suggests that a state may adhere to an onerous treaty because of a long-term interest in preserving confidence in treaties or because it considers that, having received the benefits of a treaty, it is likewise obliged to accept its present burdens. Yet such motivation - which may indeed explain the not quite analogous municipal law contract - is no help in assessing a claim of *clausula rebus sic stantibus*.

But attention to the substance of morality inherent in a prior promise may, in some cases where the circumstances have radically changed, indicate that the prior promise is no longer substantively applicable and that it would be unjust to insist upon strict compliance<sup>[74]</sup>. One might tentatively conclude that the attempt to apply a positivist Occam's razor to morality or natural law in international law may lead to considerable distortion in its interpretation.

### 6. How war has changed nowadays: the human factor

The just war tradition is comprised of *jus ad bellum*, which governs the decision to go to war, and *jus in bello*, which regulates the conduct of war. This has been the standard used by moral philosophers to examine the use of force in an international context<sup>[75]</sup>. There exist significant disagreements within the just war tradition regarding the correct interpretations of just war theory, for example, revisionist/traditionalist debate and so on. To avoid unnecessary confusion, my paper assumes a defence of the collective approach in war has already been given, i.e. the traditionalist reading of the tradition.

This allows me to make two claims which are relevant to this structure. First, the ethics of war is, indeed, *sui generis* and, contra revisionists, cannot be governed by any accounts of individual defensive ethics. Second, if war and personal self-defence are governed by different set of rules then it's possible, and I shall argue necessary, that we further elaborate on the ethics of war. To this end, I explore a conceptually different form of

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force, or more specifically the way in which military force is used, in modern warfare and assess whether this has any implications for the Just War paradigm[76]. I want to talk about ‘force short of war’/vis in this paper; what it is and whether, and how, it should be considered a distinct category from acts of war.

Wars are fought by people so it’s only logical that our discussion begins with the agents of war. There are various ways in which this issue can be unpacked but I will limit the scope of this exchange to combatants and non-combatants only.

The risk to civilians in modern warfare is heightened by the rise of non-state actors in that non-state actors make it harder to distinguish legitimate targets from illegitimate ones. To be clear, the law of armed conflict requires combatants to wear proper uniform and insignia to separate them from civilians[77]. Non-state actors, however, do not respect this. They even ignore it and use it to their own advantage. They mix in with the civilian population, dress as civilians, make no effort to distinguish themselves from others. This creates confusion for the warring parties to separate legitimate targets from civilians[78]. In response to this, the U.S. has defined *combatants* as ‘all military-age males in the strike zone, unless there is explicit intelligence posthumously proving them innocent’ [79].

This definition of combatant is clearly troubling for several reasons. First, this presumes any targets who fit the profile are legitimate targets. But any males over the age of 16 in Yemen cannot be automatically assumed to be combatants, any more than any males over 16 year-old in Detroit are in the U.S. military. Second, this undermines the principle of discrimination. The job of soldiers on the field is to carefully distinguish combatants from non-combatants before they engage and only combatants can then be targeted. This definition of combatant runs the danger of turning the discrimination assessment from one of *ex ante* to one of *ex post*.

Furthermore, there is the question of how to classify these non-state actors. In other words, are non-state actors merely criminals, albeit their crimes are much worse than robbing a bank or even homicide? Or are they (illegal) combatants? If they are criminals, they should be treated accordingly. They should be arrested, given a fair trial and, if guilty, given an appropriate punishment. This is how criminals ought to be treated in a just society. This view is referred to as the ‘policing paradigm’. Kenneth Roth, a U.S. attorney and executive director of “Human Rights Watch”, is a supporter of this view. He argues that the so-called *War on Terror* is not a real war and, accordingly, the U.S. criminal law should be sufficient for dealing with terrorists (Roth, quoted in Wedgwood 2004)[80]. On the contrary, others such as Ruth Wedgwood (2004) oppose this view[81]. The main argument is that the policing paradigm cannot be applied to most, if not all, terrorists since these individuals

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operate in areas where the rule of law is often non-existent because the hosting states are either unable or unwilling to apply it. If this is the case, non-state actors should be regarded as combatants and, therefore, subject to the *in bello* rules[82].

Thus, the reality of modern conflict is such that on both an epistemic and conceptual levels it is becoming increasingly difficult to identify legitimate targets. It is epistemic because non-state actors readily eschew the legal norms[83] that would help distinguishing combatants from non-combatants. It is conceptual because the majority of non-state actors fall in the moral grey zone between criminality and warring belligerent. As the human element of war changes, the weapons used to fight also undergoes some transformations. This will be the focus just of the next lines.

### 7. The weapons

Drones[84] proliferated under President Obama. The “Bureau of Investigative Journalism” reports that only 11 drone strikes in Pakistan were authorised under President Bush (2014). This rose to 413 drone strikes under President Obama[85]. The appeal of drones can, in part, be explained by their ability to be deployed for highly targeted and localised missions. This was a point raised by the ex-CIA chief John Brennan when he stated that drones can better adhere to the principles of discrimination and proportionality[86]. Brennan’s point is drones can be used in ways that minimise the risks to non-combatants due to their use of guided ordnance and ability to loiter over the intended targets for a long time before striking.

This notion, however, is disputable. Brunstetter and Braun, recently[87], contend that while it may be true a turn to drones has reduced the number of civilian casualties, new weapons also make the use of force easier for states with the technology to deploy such weapons. The reason for this is there is virtually no risk to the drone operators. As such, dronesenable governments to decrease the risk to their own soldiers. So, although each individual drone strike poses less damage to civilians than conventional weapons[88], states, overall, are tempted to enact more drone strikes, meaning the overall risk posed to civilians may be higher in the long run. In addition, the simplicity with which drones can be deployed runs the danger of political leaders foregoing other non-violent measures to adopt a policy of preventive strike. This results in the blurring roles of the principles of just cause and last resort.

To quickly summarise, the implications for warfare with the changes in the belligerents and the weapons of war are crucial in the sense that they have transformed modern warfare. The battlefield is undefined with no clearly designated zones where

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combat takes place and ones where civilians can find refuge. New weapons also make the use of force more accessible, particularly to strong states. This invites questions regarding the applicability of *jus ad bellum* and *jus in bello* vis-à-vis modern warfare.

Michael Walzer believes that the reality of modern warfare warrants a change in the way in which we morally think about war[89]. He proposes we should think of *vis* actions as very different from actual warfare, even though they both involve the use of force. Walzer derived this by looking at the containment regime in Iraq from 1991 to the Second Gulf War[90]. The containment had three elements: 1) the first was an embargo intended to prevent the importation of arms; 2) the second was an inspection system organised by the U.N. to block the domestic development of weapons of mass destruction; 3) the third was the establishment of no-fly zones in the northern and southern parts of the country[91]. I give a definition of *vis* actions in the next lines and then proceed to separate *vis* from *bellum*.

### 8. Definition and *Vis/Bellum* distinction

“*Vis* actions” can be defined as: the use of kinetic military force to achieve a clearly defined objective. *Vis* actions are often targeted and localised in nature. Both states and/or non-state actors can deploy forces that can be considered as *vis*.

The use of military force can be precise partly because the overall aim of the operation is clearly defined at the outset[92]. For example, *Operation Neptune Spear* to kill Osama bin Laden was executed with a team of 23 U.S. Navy SEALs[93] was over in just under forty minutes. *Operation Deliberate Force*- NATO first air campaign conducted over Bosnia in 1995 lasted two weeks and achieved its goal of protecting U.N. - designated safe zones for refugees in Bosnia. In practice, this means that *vis* can avoid the danger of mission creep - when initial military successes pave the way for more ambitious goals to be achieved.

I think this is an advantage of *vis*, namely it is, in theory at least, easy to contain and, with due cautions, have a low probability of escalation. *Vis*, Walzer argues, lack the unpredictability and often catastrophic consequences of war. They are, therefore, easier to justify than, say, a full scale attack (2006).

I acknowledge here that the definition of *vis* that I just provided is quite vague. The reason is that *vis*, it seems to me, is comprised of a range of different scenarios from quick hostage rescue to lengthier humanitarian intervention. As such, a more concrete and rigid definition of *vim* is difficult to formulate.

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So how do *vis* actions differ to *bellum* actions? I propose three criteria: 1) degree of force; 2) time of operation and 3) space.

A feature in the limited literature on *vis* is that *vis* is defined negatively, that is in the absence of war. *Vis* actions are discerned from *bellum* by categorising the latter as ‘full scale’, ‘full blown’, ‘large scale’. These qualifiers seem to suggest that the distinction between the two is really ‘large scale conflicts’ - wars - and ‘not-so-large-scale conflicts’ - *vis*. I certainly think that the quantum of force plays a role in the *vis/bellum* distinction. It is intuitively implausible to think that *Operation Neptune Spears* is of the same spectrum as the Korean War. This is, as Walzer argues, a logical deduction which one arrives at by comparing the two cases. But, as Enemark<sup>[94]</sup> convincingly puts, ‘for *vis* to be meaningfully distinct from *bellum*, such that *jus ad vim* can have practical purchase as a moral framework when *jus ad bellum* cannot, there has to be more to the story than quantum of force alone’. To bolster the distinction, I propose two other criteria: 1) time of operation and 2) space.

The Clausewitzian conception of war<sup>[95]</sup> as not an end in itself but a means to a political end explicitly implies that war is fought to bring about an end. This idea is also implicated in the just war tradition in the doctrine of *jus post bellum* which deals with the just termination of war and facilitates the transition of society back to a peaceful order. In short, war ends when one side achieves victory over the other or, in some instances, stalemate on the battlefield leads to the termination of hostile activities on all sides, for example, the Korean War. War is, as Coady observes, political violence<sup>[96]</sup>. Fighting is never for fighting sake but, as instead, a resort to violence by one side to continue the pursuit of a political objective that cannot be, or wouldn’t be, settled through other peaceful means. It is then possible to contemplate of war in a temporal sense. Of course, war is not always fought continuously. There are moments during the course of fighting when hostilities would cease, either through a mutual agreement (e.g. ceasefire) or for some other tactical reasons. The point remains, however, that war has a beginning phase and an ending phase. The use of force is contained within this timeframe.

When *vis* is assessed temporally, it appears that similar temporal component is difficult to locate. In fact, the ending phase of certain *vis* actions cannot be pinpointed. Take, for example, the U.S. drone programme. The programme is nearing its 15<sup>th</sup> year in running with no end date in sight. The programme seems to have been broadened, as is evident by the increase of drone strikes year-on-year. A possible practical explanation for this is the concept of winning has changed. Here, the changing nature of threat, non-state actors in this case, means that the struggle is now perpetual. The drone programme is part of the ongoing War on Terror waged by the U.S. and allies after the 9/11 attack<sup>[97]</sup>. However, a question which is asked as often as it is being avoided is: what does a victory in

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this War on Terror look like[98]? Indeed, when al-Qaeda and Taliban were showing signs of retreat around the year 2010, ISIL cropped up and controlled vast territory in both Iraq and Syria. Now that ISIL is losing the vast majority of its strongholds like Mosul and Raqqa, the Taliban is resurging in Afghanistan (some estimate they control or contest as much as 45% of Afghanistan), al-Qaeda is gaining ground in Yemen, Libya and pockets inside Syria and Iraq. Not to mention smaller, less well-known but equally effective and dangerous groups such as al-Nusra Front. Consequently, *vis* can commit the users to an open-ended timeline which force is used.

I will now turn to discuss the space in which *vis* takes place, or the theatre of *vis* and how it differs from war. The Meriam-Webster dictionary defines *battlefield* as ‘a place where a battle is fought or an area of conflict’. This separates areas where active conflict takes place from where it does not. This was true for the Second World War with Europe, the Pacific islands, Northern China as the battlefields. This was also true for the Vietnam War with actions took place mainly in South Vietnam. Traditional wars are confined within a fixed physical space, usually within the borders of the country where the fighting takes place. By contrast, *vis* actions are not bound by the physical constraint of border. *Vis* is used in countries which are not in direct conflict with the user. The reason for this is that more often than not, those at the receiving end, namely non-state actors, are not bound by any specific geographical constraints. They move freely between countries, which is in part due to the lack of the rule of law in areas where they operate.

We can see the unrestricted battlefield of force short of war in *Operation Neptune Spear*. In legal terms, the U.S. is not at war with Pakistan. That is to say that the U.S. has no legal basis upon which it can justify using force within Pakistani sovereignty. In reality, however, there have been numerous occasions in which the U.S. appears to use deadly force to pursue individuals or group of individuals within the border of Pakistan. These attacks are often tacitly approved by the Pakistani government. *Operation Neptune Spear*, however, was not one such occasion. The Pakistani government was kept in the dark throughout the entire time which the operation happened and was only informed of it *ex post facto*.

*Operation Neptune Spear* is not the only case in which the battlefield of *vis* is difficult to pinpoint. It exemplifies the operational logic behind *vis*, namely that its battle space is rather seamless. This resembles what Noam Lubell[99] refers to as ‘the global battlefield whereby the entire planet is subject to the application of the laws of armed conflict and the consequences that flow from it’. The point here is that recent inventions of weapons such as drones and cruise missiles etc. and the increased role of non-state actors in modern day conflicts have essentially made it a reality that force can be used anywhere at any time.

### 9. Terrorism: supreme emergency or distributive justice?

Terrorism may be the scourge of the modern age<sup>[100]</sup>, but for those who commit such acts of violence, terrorism is justified. This essay will examine the two best known arguments that attempt to provide a moral justification for terrorism, that of the supreme emergency (SE) case of Michael Walzer, and the distributive justice (DJ) case of Virginia Held. After examining and ultimately rejecting both arguments, I will propose a third case, original and ancient, that both theoretically and historically provides an argument that terrorism can be morally justifiable under specific and narrow conditions.

As such, I will analyze the following assumptions and positions:

1. Terrorism is almost always, though as shall be argued not absolutely always, immoral and wrong.
2. There exists an objective right-wrong morality. The moral position I write from is that of natural law and human rights and the tradition that such innate natural morality is universal.
3. Violence is not always immoral and can be of what I below call “moral necessity”, as in cases of self-defense and just war.

Between political and legal usage, and other linguistic and cultural framing issues, I agree that, “The struggle to define terrorism is...as hard as the struggle against terrorism itself”<sup>[101]</sup>. The aforementioned positions collectively oppose the claim that one man’s terrorist is another’s freedom fighter, as this ventures into moral relativism<sup>[102]</sup>. This essay agrees with Held<sup>[103]</sup> that, “terrorism is political violence that usually involves sudden attacks to spread fear to a wider group than those attacked, often by targeting civilians,” and that some attacks against military personnel, such as the 9/11 attack on the Pentagon, qualifies as terrorism. Furthermore, I follow international law that “state *qua* state” violence is not terrorism, as this would constitute an act of war *ad bellum* or a war crime *in bellum*, but that there can be state-sponsored terrorism<sup>[104]</sup>. Similarly, state violence against its own citizens is a violation of human rights, murder, and genocide, but also is not terrorism.

I will not engage with the consequentialist argument beyond its relevance to the SE and DJ cases, as the rationale for rejecting consequentialism specific to those cases can be applied to the consequentialist argument more generally. The only addition I will make is that the argument that terrorism can be morally justified requires a definite understanding of morality, and like many I find little basis for morality only using mathematical ratios. However, consequentialism is a relevant and important factor for decisions, especially in matters of killing. Proportionality and reasonable chance of success are necessary criteria.

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Therefore, the final assumed position of the argument is a reserved belief in the Doctrine of Double Effect (DDE).

As these positions are popularly known and well argued for elsewhere, I will not spend further time in their defense. Perhaps the best known argument that terrorism can be morally justified, and certainly the most intuitive, is the SE case. That the killing of innocents is still immoral is not denied, but the severe necessity of the act justifies this immorality. A common term for those attracted to this line of thinking is “threshold deontologists”[\[105\]](#). Walzer[\[106\]](#) presents the SE argument, though not in the context of terrorism, in *Just and Unjust Wars* under the recurring subtitle, “The Nature of Necessity”, which encapsulates the essence of the argument and its criteria, that of imminence of danger and the danger’s supreme nature. Walzer makes it clear that both must apply, and throughout his discussion he readily acknowledges the argument’s risks and his own hesitations in presenting what could easily become a slippery slope. Walzer’s discussion limits the subject of the danger to a political entity, as his examples are about past interstate wars. John Rawls’[\[107\]](#) argument in favor of the SE justification for terror bombing has the same limitations. Nevertheless, it seems no stretch of the SE logic to expand the possible subjects to include “situations where there is a clear danger to a group’s very existence or the mass extermination of noncombatants”[\[108\]](#). This expanded definition describes genocide, the imminent threat of which Walzer says would justify humanitarian intervention and the supersession of the principle of sovereignty. If “acts that shock the moral conscience of mankind”[\[109\]](#) are enough to break the ultimate political principle of the current world order, are such acts or the imminent threat of such acts enough to justify terrorist activity?

There are several problems with this line of thought beyond the slippery slope risk. First, for the historical genocides that the SE argument may have applied to, it is unlikely that terrorism would have altered the result, except to further provoke the killers[\[110\]](#). Second, the argument’s reliance on consequentialist reasoning weakens it, for the SE case seems to be justified only if the terrorism successfully turns back the danger, which is unknowable in advance. Another issue is the problem of last resort and legitimate authority that expose the argument to exploitation: for substate groups, who has the power to make such a decision, and which groups qualify? Also, nothing in the SE argument limits its application to moral actors. If Hitler had possessed the atomic bomb in 1945, Walzer’s argument seems to allow its usage to prevent the imminent destruction of the Nazi Regime. Finally, the SE argument goes against the just war tradition, directly contravening both the secular rights tradition and the Christian moral tradition’s prohibition against the intentional shedding of innocent blood[\[111\]](#). Yet to deny the SE argument would seem to force an endangered group to

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accept extermination, and therein lies the rub. To break moral principles to survive in order to later institute a government upon those same principles is hypocritical, but, to be intentionally crass, upheld moral principles aren't worth a damn if everyone is dead.

This paradox is the essence of Walzer's[112] argument, that, “communities in emergencies have different and larger prerogatives”, and is what Nagel has called a moral blind alley, where both actions are immoral. Coady correctly points out that the SE case exhibits a pro-state bias, specifically concerning legitimate authority. As my definition of terrorism excludes states, this would eliminate the possibility of the SE argument being used to morally justify terrorism. However, this overly complicates the question, which Walzer and other proponents of the SE justification have already implicitly answered. The SE justification is one of necessity trumping morality, not necessity as a form of morality. It does not deny the immorality of intentionally killing innocents. Therefore, an immoral rationale cannot logically be used to turn an immoral act of terrorism into a moral one.

The other attempt to morally justify terrorism is Held's deontological argument for distributive justice (DJ), which is fundamentally different from the SE case because for Held the killing of innocents is justified[113]. This justification rests on the fairness principle for victims of oppressed groups that are denied rights, where although using terrorism would violate the rights of even more victims, over time the oppressed group will experience a reduction in the violation of their own rights. Rekha Nath[114] describes the DJ reasoning in her rebuttal of Held's argument as “a choice between two morally bad outcomes”, and that Held “finds it better to equalize rights violations” than to allow the status quo to persist. This idea of equalizing violations strikes me as a bit childish, like the kid who breaks his sister's toy because if he can't have one then neither should she. It may be cliché, but life is not fair and attempts to make it fair, especially through indiscriminate killing, sounds outrageously unrealistic, even if it is theoretically intriguing. Admittedly, Held offers three criteria for DJ terrorism: “it aims for a fairer distribution of rights violations is a last-resort measure, and is likely to bring about greater rights enjoyment for all”[115], but these criteria share many problems with the SE argument. By removing the legitimate authority requirement, Held discards a key just war tenet, heightens the difficulty of deciding what constitutes a last-resort, and, as even Miller[116], a supporter, acknowledges, seriously limits the ability of governments to condemn any terrorist attack. Her inclusion of a probable success standard fails to avoid the consequentialist pitfall of not fully knowing what will happen and is severely undermined by her vagueness on how long DJ terrorism can be perpetrated to achieve the desired rights equality. There is no break point beyond which terrorism should stop because it does not produce the desired results, opening the door for a cascade of escalating violence between the oppressors and victims. Another issue

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is her expanding the list of violated rights that justify terrorism from human or natural rights to legal rights. This implies that if a group is legally barred from the cinema, bombing the cinema might be a justified response. Finally, her focus on fairness ignores other principles of deontology such as desert and responsibility, thereby creating issues of guilt by association. As Coady[117] points out, babies of the oppressors are viable targets under Held’s argument. Even without the other serious issues, this intentional escalation of violence to include the most innocent is a bridge too far. Held’s argument removes too many discriminatory norms for her brand of terrorism to ever be deemed moral.

One possibility for morally justified terrorism has been overlooked, and is summed up by the immortal words of Brutus, *Sic semper tyrannis*. Tyrannicide, unlike the reactive and responsive SE and DJ cases, is often proactive and preventive, and has long been considered a moral necessity. Tyrannicide alone is assassination, but a conceivable variant of Caesar’s assassination offers a narrow possibility for moral terrorism. Despite the surprising failure of its ultimate goal, the murder of Caesar to save the Roman Republic has long stood as a rallying cry of democracy and freedom, as tyranny has been understood as a violation of divine or natural law since ancient times around the world, from Confucius to Cicero[118] to Grotius[119]. The strict criteria in Aquinas’s defense of tyrannicide mirror his criteria for just war and the DDE[120].

The scenario I imagine is identical to the historical case except in one respect: Caesar has a large family of powerful civilians that has enabled his rise. In this scenario, which could exist both to prevent or stop tyranny, Caesar is physically unreachable. However, his family and political sycophants are not. So, the Senators kill a family member or a military or political sycophant who has enabled Caesar’s tyranny, and threaten to kill daily until Caesar submits to exile or trial. This is undoubtedly terrorism, albeit a highly focused version. If possible, innocent family members would be spared, but in some circumstances under the DDE innocent life may be taken as collateral. For example and to mirror the classic bombing raid DDE scenario, if during a meeting of guilty collaborators Brutus burns the house and the hostess dies too, this is acceptable. It is terrorism as spiritual sacrifice and violence as moral necessity, with the onus on the good citizen to act.

The question of determining true tyranny plus the problems of legitimate authority and last-resort from the former arguments all apply, but Caesar’s death shows that they are surmountable. The Senate constituted legitimate authority, lacked better options, and had a reasonable chance of success, a just cause, noble intent, and used proportional violence. So long as the terrorism was sufficiently focused, for tyrannicide, terrorism can be morally justified. Realistically, modern terrorism is clearly immoral. Terrorism may almost never be morally justifiable, however, history does prove that moral terrorism is technically possible.

## **SECTION II**

### ***From conflict to democratic difference in post-conflict societies: strangers at your door!***

«I didn't kill a man, I killed the King,  
I killed a principle».

(G. Brescia)

«An individual has not started living until  
he can rise above the narrow confines of  
his individualistic concerns to the broader  
concerns of all humanity».

(M. L. King)

«Abandon all hope of totality, future as a past,  
you who enter the world of liquid modernity».

(Z. Bauman, *Liquid modernity*)

«Imagine there's no countries.  
It isn't hard to do.  
Nothing to kill or die for,  
and no religion too.  
Imagine all the people  
living life in peace».

(J. Lennon, *Imagine*)

«All we are saying is give peace a chance».

(J. Lennon, *Give peace a chance*)

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«Give me love, give me love.  
Give me peace on earth».

(G. Harrison, *Give me love*)

### 1. Introduction

In post-conflict societies, consociational democracy is often implemented under the auspices of liberal peacebuilding. It is from this perspective that the academic debate [\[121\]](#) between consociationalism and liberalism also gains practical importance, especially because neither liberal peacebuilding nor consociational democracy has remained uncontested [\[122\]](#). Indeed, as the current research aims to show, on the one hand, in post-conflict societies approaches to peacebuilding want to avoid translating wartime narratives on collective identities into long-lasting political structures. As top-down approaches, both consociationalism and liberalism as approaches in peacebuilding commonly accept the narratives on identities that are pre-determined by the previous (or even ongoing) conflict. On the other hand, to achieve the ending of violent conflict, it is often necessary to somehow accommodate the claims of the warring parties. Secular assumptions on the public and the private that influence the conceptualisation of comprehensive worldviews, however, prevent the political process from becoming inclusive towards all the outlooks that may matter to the citizens of a given society.

The final aim is not to offer a new theoretical alternative, but rather to point to ways in which the current impasse in the theoretical debate between consociationalism and liberalism might be overcome. These two terms, in fact, can be considered opposite types of approaches: while consociationalists claim to be realistic, liberal theory is often ideal theory.

Although various forms of both integration and accommodation can be distinguished, in this section, I will abstract from the differences within both approaches in presenting the debate between them and treat liberalism and consociationalism as ideal types of integration and accommodation. In the second part of this section, I will introduce the debate on the public/private divide and show how it can be employed to understand the differences and similarities between consociationalism and liberalism, before; then I discuss some critiques to the public/private divide that pertain particularly to liberal secularism, showing how the implications of these critiques are also apparent in consociational theory and practice. In the final section the implications of the altered understanding of the relationship between liberalism and consociationalism will be discussed.

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On influential liberal views the freedom of religion is thought to be sufficiently warranted through a focus on the rights and freedoms of the individual. Other theories, as well as democratic practice in various societies severely divided along religious lines, have emphasized the necessity of special attention for the rights of religious groups or minorities in addition to the rights and freedoms of the individual[\[123\]](#).

Two main approaches towards democracy in severely segmented societies can be discerned: accommodation and integration. While consociationalism is a prominent example of accommodation, liberalism is often associated with integration. According to both liberalism and consociationalism, (religious) pluralism poses a danger to the democratic state, because continuing disagreement leads to instable government. Both integration and accommodation are strategies to reach agreement; the one, accommodation, through explicitly finding a *modus vivendi* that serves all groups, the other, liberalism, through finding the common ground or consensus between groups and basing cooperation on this overlapping consensus.

Especially in post-conflict societies dealing with difference democratically is crucial. Within the peacebuilding discourse, both consociationalism and liberalism are important and influential views[\[124\]](#). Yet neither remains uncontested. Accommodation is often associated with essentialist or even primordial conceptions of group identities, whereas integrationists want to emphasize their fluid and malleable character[\[125\]](#). Liberal democratic approaches of integration are often argued to be unable to deal with the grave oppositions in segmented societies, while various forms of accommodation are thought to entrench collective religious identities in illiberal ways[\[126\]](#).

As liberals assert that consociational democracy is illiberal, and consociationalists argue that liberal strategies are unrealistic, the debate between liberals and consociationalists, seems to have reached a stalemate[\[127\]](#). In this section, I aim to shed a new light on the debate between consociationalism and liberalism by examining the way in which both employ the public/private divide. I will argue that both consociationalists and liberals assume the public/private divide in their approaches to pluralism. This not only causes a bias in both theories towards certain types of difference, say national or ethno-national difference, but also prevents the emergence of truly inclusive approaches towards difference from this debate. Consociationalism and liberalism differ in the way they deal with difference and concerning the types of difference they with, religious difference or difference otherwise centered around certain ‘conceptions of the good life’ and national or ethno-national difference[\[128\]](#).

This section offers also an analysis of the issue of religious identities in democratic

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societies through a discussion of the debate between two strands of theory associated with respectively integration and accommodation: liberalism and consociationalism. Firstly, I will focus on the understanding of religious identity underpinning liberalism and consociationalism. From this perspective it will become clear that instead of being strictly antagonistic positions, liberalism and consociationalism share an understanding of the nature of religious identities, albeit disagreeing on their role in political processes. This understanding of religious identities is premised upon secular assumptions concerning the nature of religion and religious identity. On this view, religious identity is mostly considered to be individual, private and irrational.

Secondly, this section will draw on contributions in religious and secular studies as well as recent debates about intersectionality to emphasize the complexity of relationships between individuals and collective identities. Presenting religious identities as individual, private and irrational is a stern oversimplification. Moreover, it unfairly places religion in contrast with other collective identities that are considered public and rational, while in reality various interrelations connect individuals and groups across the public and the private. This complexity, I argue, should be reflected in a theory on the role of religious identity in democratic society. Neither banning religious identity from politics, nor accommodating certain predetermined religious identities does this. Drawing on debates about secularism and intersectionality, I will point out some of the problems that arise from both integrationist and accommodationist approaches to religious identities. Finally, I will explore what alternative approaches towards the role of religious identities in severely divided democratic societies can emerge from this different understanding of the nature of religious identity.

Most critiques to the public/private divide center around the role of religion in (international) politics as well as International Relations Theory. In this section the scope will be slightly widened by considering the critiques to apply to groups formed around a ‘conception of the good life’ or a ‘comprehensive worldview’ following Rawls (1993) in his highly influential liberal approach to ‘the fact of pluralism’[\[129\]](#). These identities, from the perspective of the public/private divide, will be contrasted with another type of collective identities, namely national or ethno-national identities, that do not seem to correspond with a Rawlsian understanding of the fact of pluralism.

In post-conflict societies, consociational democracy is often implemented under the auspices of liberal peacebuilding[\[130\]](#). It is from this perspective that the academic debate between consociationalism and liberalism also gains practical importance. Especially because neither liberal peacebuilding nor consociational democracy has remained uncontested[\[131\]](#).

## 2. Consociationalism and liberalism

When a state is severely plural consociationalists assert that classical liberal democratic theory, maintaining that a difference can be relegated to the public sphere and a common political discourse can be formulated, gives little hope for a stable democracy[132]. In his seminal work on the stable democratic system of the Netherlands, Arend Lijphart displays the observation that elite cooperation fosters democratic stability in spite of severe societal segmentation[133]. In the following decades, based on numerous theoretical and empirical contributions, consociationalism has become a normative theory, prescribing particular power-sharing devices to deeply divided societies to develop a stable democratic system[134]. The implementation of certain institutional structures is expected to encourage elite cooperation, which will in turn result in a stable democracy[135]. Consociationalism has since become an important strategy in democratization efforts in plural societies, particularly in the context of peace operations[136].

The terms consociationalism and power-sharing have often been used interchangeably[137]. But, as consociationalism presents just one way in which power can be shared[138], it seems more accurate to distinguish between consociationalism as a specific ‘system of institutions and systemic incentive structure’ of power-sharing[139] and power-sharing as ‘any set of arrangements that prevent one agent, or organized collective agency, from being the “winner who holds all political power,” whether temporarily or permanently’[140]. The core idea, divided into four key characteristics, of consociational democracy is summarized by Bogaards as follows:

‘In a consociational democracy, elite cooperation takes the form of executive coalitions in which the leaders of all main social groups are represented; proportional representation in assemblies as well as a proportional allocation of offices and resources; autonomy for social groups in the spheres important to them, such as education; and a mutual veto for groups that see their vital interests at stake’[141].

These four key characteristics must be seen as indicating an ideal type of which cases can be found in varying degrees[142]. Although the success of consociationalism is highly dependent upon the context in which it is implemented, it is thought to be the most viable solution to internal conflict in divided societies[143]. In these societies ‘consociationalism is expected to depoliticize ethnicity and allow development of a common national identity’[144]. Research on consociationalism in peacebuilding has often focused on consociational provision in peace agreements[145].

On basis of the level of inclusion of the relevant social groups in a grand coalition, a

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differentiation has been made between complete, concurrent and weak consociations[146]. The exact institutional shape given to the four aspects of consociational democracy determines whether consociationalism is ‘undemocratic or democratic, formal or informal, liberal or corporate’[147]. Furthermore, a distinction must be made between consociational institutions, and the ‘spirit of accommodation’ or the willingness to cooperate of the political elites. As Lehmburch[148] already notices, consociational institutions do not necessarily have the envisioned result of democratic stability, but can when they advance the internalization of ‘consociational norms and behaviour’. Lastly, contemporary cases of consociationalism can be distinguished from classical cases like the Netherlands, Belgium, and Switzerland. Although the latter played a vital role in the development of consociational theory, they differ from contemporary cases in one fundamental as consociationalism was not introduced as a normative model to manage difference in these classical cases, but rather conceived of as the system that more or less spontaneously emerged when difference threatened democracy.

### 2.1 The liberal critique

Consociationalism has attracted numerous critiques, among which liberal critiques. This strand of critique includes the charges

- that it does not uphold basic liberal values,
- that it entrenches social segmentation, and
- that consociationalism provides insufficiently democratic governance. Although others (e.g. Nagle and Clancy, 2010)[149] have discussed these three critiques separately and not as different forms of liberal critique, I will discuss them as different varieties of a liberal critique to consociational democracy.

Here I will concentrate on (1) and (2), as these two critiques target the group-focus of consociationalism, while critique (3) is directed at its elite focus. The problem of consociationalism’s elite-focus will not be addressed at length in this paper, but will be touched forward.

Whereas the elite-focus of consociational democracy is thought to render it undemocratic, as it significantly limits popular participation, the group-focus of consociational democracy is argued to runs counter to liberal values, particularly the freedom and equality of individuals. Focusing on the *Good Friday Agreement* in Northern Ireland, Rupert Taylor has argued that consociational democracy ‘rests on and promotes and ethno-national group-based understanding of politics that is inherently illiberal’[150]. Basing political representation on group identities, often meaning ethno-national identities,

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is to ‘encourage and reward those who pursue strategic ethno-national group calculations and interests in ways that run counter to liberal politics’[151]. What characterizes liberal politics, according to Taylor, is that it places the ‘freedom of political choice’ over the social categories that characterize a society[152]. In other words, by privileging the representation of group interests and group rights – through a system that is designed to accommodate and defend group interests – over the representation of the interests and rights of the individual, consociational democracy is indeed illiberal. Consociational democracy relies on processes ‘that are inimical to liberal democracy’[153].

By making the rights and representation of groups central to the political process instead of the rights and representation of the individual, consociational democracy ‘curtails the freedom’ of individuals, both between and within communities[154]. The *Good Friday Agreement*, for example, ‘placed traditions and group equality before the higher and more dignified principle of individual rights’[155]. Consociationalists hold that the focus on groups is necessary to achieve an equal democratic appreciation of the rights and interests of members of all groups, and not only for members of a dominant majority[156]. Being premised upon the principle that individuals are fundamentally free and equal, any liberal political system should thus be based on the equality of individuals. O’Flynn argues that ‘it is difficult to see how the thought that intrinsic equality can be ascribed to groups can be rendered compatible with ascribing intrinsic equality to their individual members’[157].

When an individual is first and foremost treated as a member of a certain group, the individual is not primarily conceived of as free and equal to all other individuals in a society. The groups are given equal standing, but individuals are perceived through their membership of a certain group, even when this group membership does not necessarily mean the same to each individual.

‘By prioritizing one interpretation of a group’s identity over others, we may well end up failing to treat some of its individual members as valuable of themselves’[158].

As we cannot assume that the interest of each group member aligns perfectly with the interest of the group as a whole, or that the identity of a group means the same to every group member, the rights and interests of each individual are not represented equally through the representation of groups[159].

The second liberal critique to consociational democracy also pertains to its group focus: consociational democracy only further strengthens fragmentation instead of helping overcome it[160]. This is problematic especially with peace agreements, such as the *Dayton Accords* or the *Good Friday Agreement*, because these ‘entrench or institutionalise ethnic

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divisions and thereby sustain antagonism or at least inhibit reconciliation’[161]. Nagle and Clancy[162] summarise this critique as a critique that ‘is espoused by critics who argue that consociationalism has entrenched and exacerbated sectarian division across all domains of public and even private life, thereby ensuring that group based hostilities remain at the expense of any chance of a shared and reconciled society. It reifies and freezes groups when all encouragement should be given to individuals to emancipate themselves from antagonistic ethno-national communal identities by forging multiple, hybrid and fluid social encapsulations within the framework of a common civic identity’[163].

Poignant arguments are made stating that consociationalism ‘endorses social segregation’[164] or even that it is a form of ‘benign apartheid’[165]. Although consociational democracy is based upon the idea of cooperation at the elite level, it offers little incentive for cooperation at the mass-level. Intra-group competition for leadership positions may even exacerbate group identity at the mass-level[166].

### 2.2 Liberal consociation

In response to the alleged incompatibility with liberal values, consociationalists have introduced the idea of liberal consociation. Lijphart[167] first articulated a liberal version of consociationalism by arguing for the self-determination of social groups within a consociational democratic system that has been developed further by contemporary consociationalists such as McGarry and O’Leary[168]. Instead of pre-determining what the relevant social groups are, segments should be permitted ‘to define themselves’[169]. This does not only apply to proportional representation in the executive government, but can also concern the segmental autonomy granted to specific groups[170]. McGarry and O’Leary further draw on the distinction between pre-determination and self-determination when differentiating between ‘corporate’ and ‘liberal’ consociation[171].

‘A corporate or predetermined consociation accommodates groups according to ascriptive criteria, such as ethnicity or religion, on the assumption that group identities are fixed and that groups are both internally homogeneous and externally bounded. This thinking indeed privileges such identities at the expense of those group identities that are not accommodated, and/or at the expense of intragroup or transgroup identities. Politicians associated with these unprivileged categories find it more difficult to thrive. A liberal or self-determined consociation, by contrast, rewards whatever salient political identities emerge in democratic elections, whether these are based on ethnic or religious groups, or on subgroup or transgroup identities’[172].

The institutional lay-out, and especially the electoral system, of liberal and corporate

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consociation differ accordingly:

‘Where a political system deliberately obliges voter to vote only within their own segment for their own ethnic parties, then the system should be called corporately consociational. By contrast, in a liberal consociation, all voters are on a common electoral register, and, though they may vote for their own ethnic parties, they are not required to do so’[\[173\]](#).

Especially Lijphart’s early consociationalism is associated with corporate consociational institutions, while McGarry and O’Leary assert that ‘most modern consociationalists, in fact, would eschew these (corporate consociational) devices and prefer liberal rules that protect equally whatever groups emerge in free elections’[\[174\]](#).

Consociationalists may claim that individuals are free to choose their alliance with and support for one group or another, but this argument calls into question whether through any group the rights and interests of all its members can ever be represented equally. On the one hand because a group may mean different things to different people, and on the other hand, because group membership of the groups consociationalism deals with – namely groups based on ethnicity or nationalism – are often not open to all members of a society equally.

Although consociationalists have put a great deal of emphasis on the distinction between corporate and liberal consociations, in the light of the theoretical analysis presented in the current article, the distinction does not seem to carry much weight in response to the formulated critiques.

Firstly, as McCulloch argues, because liberal consociational devices are rarely successfully used in peacebuilding:

‘Consociational settlements are negotiated at the very point at which group identities are the most politically salient and polarized. Under conditions of insecurity, groups and their representatives are unlikely to settle for anything other than a strong guarantee of their share in power, regardless of electoral prospects’[\[175\]](#).

Some seminal examples of consociationalism in peacebuilding support this contention, as for example Bosnia and Herzegovina is a clear example of a corporate consociational system[\[176\]](#) and it has been pointed out that also Northern Ireland exhibits problems associated with corporate consociational practices[\[177\]](#).

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Secondly, consociationalism, both in its liberal and in its corporate form, conceives of identities as durable and resilient because to serve as a point of reference in political representation they need to have a stable essence. It suggests that there is something particular about, for example, ‘Christianity’ that requires its negotiation in the political arena, or that there are certain interests that ‘Serbs’ have and that need to be voiced in the public sphere. Thirdly, as the next pages will go on to show, there are certain similarities in the assumptions underpinning both consociationalism and liberalism that go beyond the supposed distinction between corporate and liberal consociations. For the purposes of the subsequent analysis, it is hence not important to emphasize this distinction.

### **3. The public and the private**

The debate between consociationalism and liberalism can be reconstructed and understood through the way in which they navigate and employ the public/private divide. The dichotomy between the public and the private is widely represented in liberal theory, as it is closely connected with the idea of liberal pluralism and, concurrently, secularism[178]. The distinction between the public and the private sphere is an important feature of liberal ideas concerning the integration of pluralism in democracies. The idea that ‘religious and cultural pluralism cannot be accommodated in international society, but must be privatized, marginalized, or even overcome’ has played an important role in international as well as domestic politics since the Peace of Westphalia[179]. Liberal authors view the exclusion of religion from the public realm as a necessity for the realization of individual freedoms[180].

The notion of the public realm or the public sphere, however, is ambivalent, as its wide use has been accompanied by a wide range of meanings. The public is often understood in contrast with the private. The contrast between both concepts can be understood in two main ways:

1. What is hidden or withdrawn versus what is open, revealed or accessible’;
2. and what is individual, or pertains only to the individual, versus what is collective, or affect the interests of a collectivity of individuals’[181]. In practice, the boundaries between both concepts are less clear-cut than suggested, but the general idea of the distinction between a particular or individual interest and a collective or public interest is clear enough[182]. The distinction, however, can pertain to various facets of life, for example the market versus the state, the family versus the society, or religion versus the state.

As we are currently concerned with models for democracy, the notion of the public that I will appeal to is one concerned with the political community. In this sense,

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‘The notion of a public realm is accordingly almost always ambivalent, referring to the collective concerns of the political community and the activities of the state that is central to defining that political community. The private is simultaneously that which is not subject to the purview of the state and that which concerns personal ends distinct from the public good, the *res publica* or matters of legitimate public concern’[\[183\]](#).

The ‘public’, as it will be used here, is considered to be separate from the state as a power-exercising apparatus, yet closely related to it through its close connection to the political community as a ‘state-oriented discourse’. The public sphere is, much in the way that both Rawls[\[184\]](#) and Habermas[\[185\]](#) suggest, the realm where citizens communicate about collective interest without bringing into play the differences that characterizes them in the realm of the private. Instead of appealing to private difference, the political community is bound through argumentation based on a rational-critical assessment of arguments based on their merits (Habermas) or through an appeal to public reason (Rawls) accessible to all citizens.

Functioning so prominently within liberal theorizing, the public/private dichotomy plays an important role in contemporary liberalism as a tool in dealing with what John Rawls (1993) has termed ‘the fact of pluralism’. Crudely put, the crux of just social cooperation in a plural societies lies in the freedom of the individual to pursue their own conception of the good (according with their comprehensive worldview) in the private sphere, while social cooperation in the public sphere[\[186\]](#) is guided by a consensus on the basic ideas of justice. What is guiding conduct in the public sphere, according to Rawls, is a non-substantive conception of justice that every individual can agree to regardless of the conception of the good she endorses. His theory of political liberalism is also referred to as non-comprehensive liberalism and can be distinguished from comprehensive liberalism[\[187\]](#). Whereas Rawlsian non-comprehensive liberalism aims a conception of justice on basis of what can be agreed on, comprehensive liberalism additionally aims to provide a substantive secular, liberal value system upon which liberal democratic cooperation is premised[\[188\]](#). In either form, the separation between the public and the private sphere is thought to enforce a certain neutrality onto the public sphere that endows equal rights upon all citizens, regardless of their worldviews.

### 3.1 Consociationalism and public/private divide

Liberalism relies on the assumption that the public sphere can, to a certain extent, be neutral towards the different comprehensive worldviews represented in a society and that individuals are capable of seeing the fairness of this neutrality. Consociationalists assert, however, that the picture of pluralism put forth by liberalism is based upon an

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understanding of collective identities and the capacities of liberal regimes to ‘dissolve, transform or transcend’ these collective identities that is ‘too facile and too optimistic’[\[189\]](#). In severely divided societies ethnic, religious, cultural or linguistic divisions are mirrored in organizational divisions[\[190\]](#). This means, for instance, that for each social group different political parties, news media, and education institutions exist[\[191\]](#). Under these circumstances, consociationalists assert, assuming or demanding the privatization of comprehensive doctrines is futile. Hence, in divided societies accommodating comprehensive doctrines[\[192\]](#) in politics is a more realistic option than requiring their privatization and the neutrality of the public sphere.

It seems to be exactly at this point that consociational theory deviates from liberalism. But, in justifying consociational democracy its advocates actually appeal to the public/private divide in a way closely resembling the way in which the public/private divide functions in liberal theory, both in the diagnosis of the problem and in the proposed solution.

Firstly, the liberal distinction between the public and the private sphere is already manifested in the basic assumption of consociationalism: difference, when brought into the public sphere by citizens, forms a problem for a democracy. The primary assumption of consociationalism is that that when citizens affirming diverging comprehensive doctrines interact in the public sphere, this will necessary lead to conflict[\[193\]](#). In the absence of contact between groups, there is thought to be no moderation in the conduct of citizens in the public sphere[\[194\]](#). Put in a more Rawlsian vocabulary, democracy is thought to be under threat when citizens do not accept the fact of pluralism and acknowledge the need to find a consensus on basic principles of justice.

Secondly, the idea that elite cooperation is a solution to severe societal pluralism also draws on the idea that comprehensive doctrines of citizens can remain private affairs, when only at an elite level these doctrines can be publically accommodated. Political elites, as opposed to other citizens, are thought to be able to recognize the threat and the severity of a collapse of the system[\[195\]](#). The only way to handle the accommodation of comprehensive worldviews in the public sphere is by assigning power only to those that, like liberal, view the presence of comprehensive in doctrines in the public sphere as a threat to democratic stability and support the idea that there can and should be a separation of the public and the private sphere. The boundaries of the private sphere are negotiated in consociational politics and often broadened. For example, education may be a matter transferred to the private sphere in order to enable citizens to raise their children in accordance with their worldview. Consociationalism is on the one hand more inclusive towards comprehensive doctrines, yet at the same time affirms the idea that comprehensive

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doctrines should not play a role in the public sphere.

We can interpret this in two ways. On the one hand this could prompt us to call the consociational public sphere more inclusive. On the other hand, we can interpret it as an expansion of the private sphere, as these matters that are often considered to be part of the public sphere are, under consociational system, not controlled by the state or shared through a common notion of citizenship, but managed, controlled and enjoyed only by the relevant communities themselves which have been given a large extend of autonomy. The elite-focus of consociationalism, from this perspective, limits the influence of comprehensive doctrines in the public sphere through a rather exclusive approach to political participation[196].

Furthermore it could be objected that political elites represent the relevant social groups and that hence consociationalism is inclusive towards these groups as a whole and not only towards political elites, and argument resembling recommendations of liberal consociationalism. This argument, however, seem to run counter to the point of consociationalism’s focus on elite politics. As Rupert Taylor explains in relation to the case of Northern Ireland: ‘the point here is that the *Good Friday Agreement* was bargained at elite level, “tête-à-tête”, not defended in wide-ranging deliberation in the civic public sphere - people were not motivate to think through the issues or discuss them with others’[197].

Rather than an exception, this situation should be considered the rule in consociational politics as, in severely divided societies ‘the political elites have to be able to make concessions and to arrive at pragmatic compromises even when religious or ideological values are at stake’[198].

Thirdly, like liberalism, consociationalism views the state and its institutions to be neutral entities themselves in which comprehensive worldviews can be accommodated fairly. Even when comprehensive doctrines are included in the public sphere through elite representation, this inclusion is based on the idea that the state can neutrally guard the accommodation of these doctrines in the public sphere. Although consociationalism challenges liberal assumptions on the role that comprehensive doctrines are allowed to play in politics, it does not question the nature of the state itself or its ability to accommodate these doctrines equally and fairly. Furthermore, the doctrines may be accommodated by the state, but no matter what their content is, they cannot play a role in the formation of the state. This is exemplified by contemporary examples of consociational democracy like Bosnia and Herzegovina or Northern Ireland, where the interests of (ethno) nationalist group are accommodated in politics, but yet are not allowed to alter the basic structure of the state.

#### 4. Contesting the public/private divide

Various contributions in (post-)secular studies have convincingly argued that the private/public divide is not a neutral vehicle for the liberal plural state, but has a content of its own, making it more appropriate to consider it, like religion, a comprehensive world view, or even an ideology[199]. As a part of secular ideology, or as a strategy in politics, the public/private divide carries with it certain normative assumptions concerning the question which comprehensive doctrines or identities[200] get to play a role in the public sphere[201]. The public/private divide in this way this resonates with a central liberal critique to consociational theory, namely that it cements or entrenches collective identities, because certain identities or doctrines are given more space and are allowed to gain in importance, while other remain marginalized and unaddressed in the public sphere.

In this section I will briefly discuss two aspects of critiques directed at the exclusiveness of the public private divide: firstly the way in which the public/private divide privileges certain identities or doctrines over others, and secondly how it does so through the posing of dichotomies that do not correspond to the ways in which individuals act in and experience the world. The former pertains mostly (though not exclusively) to the inclusion and exclusion of groups, while the latter focuses more on the individual level. In section 5 these critiques will be connected to consociationalism and their implications for the understanding of the debate between consociationalism and liberalism will be examined.

##### 4.1 A secularist bias

Critical examinations of the public/private divide have mainly focused on how the divide has influenced the perception and role of religion in political theory and practice. In political practice, the public/private divide can be considered an important vehicle in establishing this secularist bias. As a result of the secularist bias that works through the public/private divide the understanding of religion offered based on the assumption of the public/private divide is too narrow and gives ‘an incomplete picture of the different ways in which religion can and does influence politics and public life’[202].

The question of the role of religion in politics underlays the public/private divide[203]. However, and at least partly due to the prevalence of the public/private divide in political theory, the influence of religion is often overlooked in political theory and policy[204]. Since the early 2000s, however, it has become more apparent that religion is not a factor to be ignored in international politics nor in International Relations theory. Critically examining the previous shortcomings of International Relations scholars in their approach to religion and politics, recognition has since then grown ‘of the existence of a

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‘secularist bias’ within the field (and, arguable, in public and political discourses within the West more generally)’[205].

The secularist bias, represented in both political theory and practice, consist of ‘the unquestioned acceptance of the secularist division between religion and politics’[206]. Although often assumed in liberal theorizing and of vital importance to many understandings of the possibility of democratic pluralism, the dichotomy between the public and the private is not uncontested, not in the least because of the historical development of the distinction and its close connection to the role of religion in the modern state: ‘Of all dichotomous pairs of relational terms few are as ambiguous, multivocal, and open to discursive interpretation as the private/public distinction. Yet the private/public distinction is crucial to all conceptions of the modern social order and religion itself is intrinsically connected with the modern historical differentiation of private and public spheres’[207].

The historical process preceding the current usage of the public/private divide is described by Charles Taylor[208] as a historical, three-step process comprising the ‘distinction of church/state, then separation of church/state, then sidelining of religion from state and public life’. The public private/divide is closely related to secularism and is itself a way of both understanding and categorizing the world that is not neutral, but rather a more substantive view that is historically constructed, instead of a neutral vehicle or objective observation[209].

Although there are different ways in which the separation of church and state is justified[210], religious belief and religious arguments are generally considered to be inconsistent with the ‘principles that liberals maintain should govern public political decision-making’[211]. What has resulted from this historical process is the idea that religion not only can be, but also should be a private matter that does not play a role in the neutral public sphere. The assumption that the public and the private sphere can and should be separated is essentially a normative assumption[212]. As the public/private divide is not neutral but clearly biased against particular worldviews depending on their concurrence with the idea of the public/private divide as ‘a form of political authority in its own right’[213].

### 4.2 Dichotomous relationships

Pertaining more to the individual level, the public/private distinction also carries with it certain assumptions concerning the relationship between the individual and the group identity or comprehensive doctrine the individuals want to base her conduct in the public sphere on. The idea that religion *can* be privatized rests upon a particular understanding of

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religion that does not necessarily correspond with the ways in which religion is manifested in the world or with the way in which it is experienced by religious individuals or communities. For many people ‘their religion is not, for them, about *something other* than their social and political existence; it is *also* about their social and political existence’[\[214\]](#). Requiring citizens to privatize religion places an unfair burden upon those who are religion and consider religion to inform, at least to an important extent, their conduct in the public sphere[\[215\]](#). Not because they are unwilling to compromise with other not affirming their beliefs, but because the very nature of their religious belief requires them to do so. Religion may be irrational and private from a secular perspective, but when we realize that this secular perspective is itself a worldview, we can see that this bias is implicit in the normative assumption of the public/private divide[\[216\]](#).

From the perspective of the public/private divide, religion is understood as being ‘essentially nonrational, particularistic, and intolerant (or illiberal) and as such dangerous and a threat to democratic politics once it enters the public sphere’[\[217\]](#). This is what necessitates and justifies the idea that religion can and should be privatized. For individuals, however, the dichotomous pairs that are assumed in the enforcement of the public/private divide do not correspond to the way in which individuals relate to collective identities or comprehensive doctrines. They do not experience them as *either* public *or* private, *either* rational *or* irrational. The dichotomies underpin secularism, but thereby categorize the world in a particular way. The idea that religion is irrational, for example, rests upon a particular notion of rationality that is intimately intertwined with a secular worldview[\[218\]](#). The dichotomies between rationality and irrationality as well as between the public and the private are less stark than suggested by liberal approaches to pluralism.

### 5. Contesting the consociational public/private divide

So far I have argued two concepts. Firstly, that consociationalism and liberalism both rely on the assumption of the public/private divide in their approach to pluralism or segmentation. Secondly, that the public/private divide carries with it certain exclusionary implications for certain identities and individuals. This critique to the secular public/private divide has been directed at liberal secularism and has focused on the role of religion within liberal secularism.

The idea that the public sphere is a place for rational, universal, and tolerant reasoning, combined with the idea that religion is nonrational, particularistic, and intolerant, gives rise to the idea that also in liberal and consociational theory a bias exists in the analysis of different forms of pluralism and in assessing the problematic nature of these forms of pluralism. Consociationalists argue that the group identities accommodated in

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consociational democracies are more pervasive than the group identities formed around Rawlsian comprehensive doctrines that are implied in the liberal approach to pluralism. The assumption is that these more pervasive collective identities, often based on nationalism or ethnicity, cannot be privatized like the ‘liberal’ collective identities based on religious or other worldviews[219].

Looking at the different identities targeted by respectively consociationalism and liberalism, the identities that are accommodated in the public sphere through consociational practices are national or ethnic identities rather than ‘merely’ religious identities. These identities, I suggest, are more compatible with the secular idea of what can be represented in the public sphere and are mostly national or ethno-national identities. The fact that the nation state is the usual unit of analysis, both consociationalism and liberalism are concerned with the question how in plural nation states democracy can work, exhibit a bias in favor of nationalism *vis-à-vis* religion. The assumption of nationalism and the exclusion of religion from the public sphere is implicated in the public/private divide. This may partly explain why liberals seem to have much more difficulty dealing with national pluralism within states than they have with dealing with religious pluralism and why consociationalists often focus on the different peoples that make up a state and not the different religions (as religion alone would be an insufficient basis for representation).

### 5.1 Religious versus nationalist difference

Examining the interrelatedness of the public sphere and nationalism, Calhoun[220] states that ‘it reflects a nationalist presumption that membership in a common society is prior to democratic deliberations as well as an implicit belief that politics revolves around a single and unitary state’. Historically, the notion of nation, people, and public have become intertwined as they served as demarcation of ‘potentially sovereign political communities’[221]. Shared communication or conduct in the public sphere is viewed as an integral part of democracy. Shared communication as well as the demarcation of the relevant community, is dependent upon some form of shared discourse. When looking at the formation of nation states after the fall of empires, for example Turkey after the fall of the Ottoman Empire or the Balkan states after the disintegration of Yugoslavia ‘nationalism and the creation of cultural publics and political public spheres went hand in hand’[222]. Whether they were formed around the idea of democratic pluralism (as in Bosnia-Herzegovina) or ethnic unity (as in Serbia) ‘in either case the institutionalization of a public sphere was at the heart of the project defining the nation’[223].

Although consociationalism is aimed less at the creation of political unity than liberal theories of integration, a bias can be detected in both liberalism and consociationalism that

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fosters the accommodation of national identities and doctrines over the accommodation of religious doctrines. Religious identities, because they can and should be privatized, pose less of a problem to democratic stability than national identities, which are legitimately present in the public sphere. McCrudden and O’Leary quote John Stuart Mill in arguing that ‘free institutions are next to impossible in a country made up of different nationalities’[\[224\]](#). As McGarry and O’Leary[\[225\]](#), state: ‘accommodation is the second option democracies with multiple peoples’. Consociationalism is about accommodating groups ‘that cannot easily win their own sovereign states’[\[226\]](#), implying that these groups do strive for their own state. Consociationalists do not argue that accommodation is necessary in every society characterized by pluralism, but rather only on those where the nature of pluralism consists of ‘dual or multiple public identities’[\[227\]](#). The intertwining of people, nation and public is this not only present in liberal integrationist discourse, but, through the public/private divide, also works through consociational theory.

The institutionalization of consociational democracy corroborates the picture painted of the secular bias. Although religion is, for example, considered to be an important marker of ethnic or national identity of the three major groups in Bosnia and Herzegovina, the consociational Bosnian constitution speaks of ‘Bosniacs, Croats, and Serbs, as constituent peoples’, emphasizing the fact that they should be considered different peoples and not one people divided by different religions (Constitution of Bosnia and Herzegovina, preamble). And although the Lebanese constitution requires ‘proportional representation among confessional groups’ in the Chamber of Deputies as well as ‘equal representation between Christians and Muslims’ (The Lebanese Constitution, art. 24), the same constitution declares one national public identity, “Arab”, and pronounces ‘the abolition of political confessionalism a basic national goal’ (The Lebanese Constitution, preamble).

Furthermore, at the level of the individual, the elite focus of consociational democracy is an example of exclusive politics fostered by the assumption of the public/private divide: as citizens are unable to withhold arguments based on their collective identities in the public sphere (due to the lack of overlapping membership they do not have access to ‘public reason’ or generally accepted arguments) they are left out of debate in the public sphere. Debates in the public sphere are conducted by political elites who, apart from representing the interests of their social group, also have the capacity to transcend these differences when they see the need for cooperation. The consociational move towards elite politics and away from popular participation can thus be justified through the assumption that debate in the public sphere should be based on a set of commonly accepted arguments and not on doctrines that are considered to be private.

By introducing elite politics as a solution to severe segmentation, consociationalism

introduces another dichotomous relationship into its approach towards democratic difference: political elites versus ‘the masses’. This dichotomy was already introduced as an explanatory variable by Lijphart[228], but subsequently has become an exclusionary device in the turn from consociationalism as an explanatory to a normative model.

## 6. Overcoming the liberal/consociational stalemate

Both consociationalism and liberalism rely on the assumption of the public/private divide: pluralism is thought to challenge democratic stability and the public sphere should be a neutral space for democratic debate, separate from variety in comprehensive doctrines or collective identities that characterize a plural society. In this sense, consociationalism and liberalism are not antagonistic positions, as they sometimes seem to be portrayed in the academic debate. Rather, they are complementary positions. Both assume that comprehensive doctrines or collective identities can best be privatized. Liberalism offers a model for integration in for an ideal situation in which comprehensive doctrines or collective identities indeed can be privatized. Consociationalism offers a realistic solution when, as often seems the case in practice, these doctrines cannot easily be relegated to the private realm. Neither case, however, takes into account the fluid relationships between the individual, group membership, and citizenship.

What does this mean for the debate between consociationalism and liberalism? It seems that both consociational critiques to liberalism and liberal critiques to consociationalism, albeit slightly differently interpreted, are right. This concluding section will first re-examine critiques consociationalists and liberals have directed at each other, and then briefly point to a possible way out of the current impasse.

### 6.1 Reinterpreting the debate

Consociationalists assert that the liberal integrationist approach supposes a too optimistic view of the severity of pluralism in certain (especially post-conflict) societies. Examining the types of identities or doctrines targeted by consociationalism and liberalism, we have seen that this charge could be reformulated: liberalism only targets certain differences, that is religious differences or differences otherwise associated with comprehensive doctrines or conceptions of the good life, while consociationalism targets identities that are also in liberalism often associated with statehood (of the liberal secular nation state), namely national or ethno-national identities.

But, the distinction between these two types of identities rests upon the normative assumption of the public/private divide. Taking into consideration the critiques directed at

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the public/private divide it seems that liberalism indeed does not take the importance of comprehensive doctrines or collective identities for conduct in the public sphere seriously enough and that it overestimates the possibility of the creation of a shared identity or consensus. This does not, however, only apply to national or ethno-national identities, but also to other identities formed around conceptions of the good life. Requiring the privatization of these views leads to a bias against certain doctrines and imposing an unfair burden of justification on certain individuals. Liberal strategies for integration do not take the importance of all collective identities for the individual seriously enough.

Liberals assert that consociationalism entrenched collective identities. As the fourth section has argued, this can indeed be the case: by allowing political elites to argue in the public sphere on basis of certain collective identities, these identities gain prominence *vis-à-vis* others and may indeed be strengthened and entrenched. Other, mainly religious, identities, may equally be strengthened, as fruitful debate between different identities is unlikely when some are deemed suitable for reasoning in the public sphere while others should be privatized. The reason that consociationalism may entrench collective identities is thus not the fact that it allows for the accommodation of these identities in the public sphere as liberals assume, but rather that it only allows for the accommodation of some identities in the public sphere.

Lastly, consociationalism has been argued to be incompatible with basic liberal values, namely the freedom and equality of the individual. In line with the reinterpretation of the previous liberal critique to consociationalism, this critique seems to apply not to accommodation *per se*, but rather to accommodation reliant on the public/private divide. The rights and freedoms of individuals may be impeded by a combination of accommodation and the public/private divide in two ways. Firstly, citizens cannot equally participate in democratic debate, as this privilege is reserved for political elites. Secondly, as Wolterstorff[229] argues, the public/private divide places an unfairly heavy burden on citizens confirming doctrines that are incompatible with secular rationality. The latter argument does not only pertain to consociationalism, but also to liberalism.

### **7. A strategy of liberal peacebuilding: how to accommodate the claims of the warring parties?**

The main problem, in my opinion, lies at the intersection of liberal and consociational approaches to pluralism, the intersection of integration and accommodation. Indeed, as the current paper aimed to show, on the one hand, in post-conflict societies approaches to peacebuilding want to avoid translating wartime narratives on collective identities into long-lasting political structures. As top-down approaches, both consociationalism and liberalism

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as approaches in peacebuilding commonly accept the narratives on identities that are pre-determined by the previous (or even ongoing) conflict. On the other hand, to achieve the ending of violent conflict, it is often necessary to somehow accommodate the claims of the warring parties. Secular assumptions on the public and the private that influence the conceptualisation of comprehensive worldviews, however, prevent the political process from becoming inclusive towards all the outlooks that may matter to the citizens of a given society.

The latter point, I believe, is also visible in the literature on, for example, Bosnia Herzegovina. Even though there are excellent and highly nuanced contributions on the conflict and the subsequent process of peacebuilding and democratisation, and even though these studies often emphasize the constructed character of the collective identities in the conflict, these studies do not escape from accepting these (violent) narratives on collective identities as the basis of the conflict and of the current political system. This may be a result of the political choices made by peacebuilder or it may be the result of the wartime narratives (like the political structures are). Either way, even though some commentators seem more aware of the problematic nature of these narratives and the repetition of these narratives than others, the literature seems to mirror the problems of the political choices of peacebuilders.

The present paper examines consociationalism as a strategy of liberal peacebuilding in order to see whether more inclusive approaches can be derived from it. I want to develop an approach to democratisation in peacebuilding that may allow for the accommodation of difference in more inclusive ways. Can there be a way of speaking about pluralism in post-conflict societies that does not presuppose the existence of particular social groups? On basis of the current part of the paper, I suggest two direction in which this research might unfold further.

Firstly, on a conceptual level, we should explore ways of theorizing the relationship between groups (affirming a particular comprehensive doctrine) and the state, between the individual and the group, and between the individual and the state. Theories of citizenship as well as theories of group membership should reflect the complex interrelations between group identities and the individual’s political conduct. Ongoing debates about the public sphere and the secular have already discussed these relationship to some extent. Wilson[230], for example, suggests that relational dialogism may provide a way out of the dualism that characterizes the current debate, combining the insights of Kristeva’s[231] interpretation and Prokohnik’s[232] relational thought. Additionally, contributions by Wolterstorff[233] and Eberle[234] have also focused on breaking the boundary between what is considered private religious reasoning and public justification. These are all

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examples of efforts to break the liberal secular distinction between the public and the private in order to make for a more inclusive form of politics or democratic debate.

The scope of these studies, however, is mostly limited to the role of religion in (international) politics. The current project, as well as the current papers, seeks to show that these approaches can and need to be expanded to include a wider range of forms of pluralism. As the current paper has shown, for example, the secular bias does not only affect the way in which religion and religious identities are conceived, but allows for contrast with other identities, influencing also conceptions of the role of nationalism. The interrelations need to be more carefully examined in the development of a more inclusive model for democracy.

Secondly, following the local turn in peacebuilding studies, the issue of locality should be explored further. The problem of contemporary approaches to democratic pluralism lies in the posing of dichotomies, either/or propositions, between integration and accommodation, the public and the private, rational and irrational, that do not correspond to the more complex ways in which group identities are constituted and the way in which individual relate to group identities. The local turn in peacebuilding advocated the replacement of top-down policies with bottom-up approaches relying on citizen’s initiatives[235]. Given the top-down nature of the examined dichotomies, examining ways of understanding local dynamics and incorporating these into approaches for democratic difference may thus also provide a fruitful direction for further challenges and changes that will be felt by our society, starting from the coming years.

### **8. Does liberalism demand strict separation between state and religion?**

Until now, there has been no direct and extensive engagement with the category of religion from liberal political philosophy. Over the last thirty years or so, liberals have tended to analyze religion under proximate categories such as ‘conceptions of the good’ (in debates about neutrality) or ‘culture’ (in debates about multiculturalism)[236]. US constitutional lawyers and French political theorists both tackled the category of religion head-on (under First Amendment jurisprudence and the political tradition of *laïcité*, respectively) but neither of these specialized national discourses found their way into mainstream liberal political philosophy.

This is somewhat paradoxical because key liberal notions (state sovereignty, toleration, individual freedom, the rights of conscience, public reason) were elaborated as a response to 17<sup>th</sup> Century European Wars of Religion, and the fundamental structure of liberalism is rooted in the western experience of politico-religious conflict. So a reappraisal of this

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tradition – and of its validity in the light of contemporary challenges – is well overdue[237].

Should the liberal state be secular? The issue is not merely a theoretical one. Most western states are secular states, even as they accommodate various forms of religious establishment and accommodation. Yet the great majority of people in the world live under regimes that are either constitutional theocracies – where religion is formally enshrined in the state – or where religious affiliation is a pillar of collective political identity. In countries otherwise as different as Egypt, Israel, Turkey, India, Indonesia, Poland, and many others, politics and religion are interconnected in ways that belie any simplified model of secular separation. Many such states, for example, appeal to religious tradition in making the law, provide material and symbolic advantages to members of the majority religion, and enforce conservative laws in matters of sexuality and the family. Are they *ipso facto* in breach of liberal legitimacy? Is there a minimal secularism – or separation between state and religion – that is required by liberal legitimacy?

In her book *Liberalism's religion*, the author argues that there is. Secularism, however, is a more complex political ideal than is commonly realised. I disaggregate the different strands of secularism, and I show how they relate to different dimensions of what we (in the West) have come to call religion. Instead of asking the question, can secularism travel? – which invites answers measuring how well non-western countries fare in relation to a presumed model of western secularism – I start from liberal democratic ideals and assume that they are not ethnocentric: human rights, freedom, equality and democracy are universal aspirations. I then ask how much, and what kind of, state separation from religion is required to secure these ideals. In brief, I extract the minimal secular core of liberal democracy[238].

This allows us to see that it is a mistake to assume that liberal democracy requires a strict separation of state and religion on the French[239] or US model. There is a broader range of permissible secularisms. There are the four liberal-democratic ideals that underpin and justify minimal secularism: the *justifiable* state, the *inclusive* state, the *limited* state and the *democratic* state. Each picks out a different feature of religion: religion as *non-cessible*; religion as *vulnerable*; religion as *comprehensive*; and religion as *theocratic*. Let me analyse these in turn.

The *justifiable* state draws on the idea that state officials should only justify their actions by appeal to public, *accessible* reasons. In the theory of minimal secularism, only officials are under an obligation to provide public reasons: secularism is a constraint on state action and justification, not a duty on the part of citizens. State officials should not appeal to the authority of sacred doctrines or to personal revelation to justify the legal

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coercion of all citizens. Accessibility articulates what citizens need to share, in particular societies, in order for public deliberation about the reasons for laws to be possible at all. Importantly, it is not the case that *only* religious ideas are inaccessible, nor is it the case that *all* religious ideas are inaccessible. The accessibility condition, then, does not rule out the public presence of religion.

The *inclusive* state draws on the idea that the state should not associate itself with one religious identity, lest it deny equal civic status to dissenters and non-members. Merely symbolic establishment is wrong if – but only if – it infringes on equal citizenship. The dimension of religion that this picks out is different from the previous one: here religion has nothing to do with personal revelation or inaccessible belief or doctrines. It is, rather, structurally similar to *other politically divisive or vulnerable identities*, such as race, and sometimes culture or ethnic identity. A liberal state must not be a Christian state or a Muslim state when such identities are – as they are in many states today – factors of political salience and vulnerability. But in societies where religion is not a socially divisive, vulnerable identity, there is less ground for secular separation.

The *limited* state draws on the idea that a liberal state should not enforce a comprehensive ethics of life on its citizens. The dimension of religion that this liberal value picks out is that of religion as comprehensive personal ethics that covers education, sexuality, eating codes, work, dress, and so forth. Many liberal rights were products of hard-won struggles, against the authority of traditional religious authorities, to construct and preserve a sphere of individual liberty. Consider the range of liberal laws in the 19<sup>th</sup> and 20<sup>th</sup> centuries such as laws about marriage and divorce, women’s rights, and sexuality, and contemporary conflicts about abortion and gay rights in Africa and South and North America. Yet not all religion is about comprehensive personal ethics. Religious traditions also provide collective norms of coordination and cooperation (eg. holidays) which raise less acute threats to individual liberty[\[240\]](#).

Finally, a *democratic* state is necessary because citizens profoundly disagree about the boundary between personal and collective ethics, the public and the private, the right and the good. John Locke[\[241\]](#) argued that the state should deal with ‘civil’ interests, and leave ‘spiritual’ matters of the salvation of the soul to individuals in their private lives. But who is to decide what pertains to the civil, and what pertains to the spiritual? In the areas of church autonomy and anti-discrimination laws, the nature of personhood, the family, marriage, bio-ethics and education, general liberal principles do not generate uniquely determinate and conclusive solutions. In such conflicts, the democratic state – not competing authorities such as churches – has final sovereign authority. It decides where the boundary between the this-worldly and the other-worldly, the religious and the secular, lies.

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This, I argue, is what is radical about liberalism’s secularism: that it is democratic – that it locates its legitimacy in the will of the people, not in extra-political, divinely ordained or philosophically grounded authority.

The most radical challenge to religion posed by liberalism is not, therefore, that liberalism maintains a wall of separation between state and religion. It is, rather, that it assumes democratic sovereignty. Within the bounds of basic liberal legitimacy and human rights, deep reasonable disagreements are to be solved democratically (democracy is, of course, not to be equated with majoritarian tyranny, and must provide for minority representation, separation of powers, and judicial review). This democratic conception of liberal legitimacy allows for more variation in permissible state-religion arrangements than both secular liberals and religiously minded liberals have assumed. Just as secularized majorities can impose their own conception of the boundary between state and religion, so can religious majorities, provided they honour the other three liberal principles of accessible justification, civic inclusiveness and individual liberty. In secularized societies, state law will naturally reflect and promote the non-religious ethics of the majority, for example via the dismantling of structures of traditional family and marriage and the expanding reach of norms of human rights and non-discrimination. Likewise, in societies where religious citizens are a majority, they can shape the public sphere of their societies to some extent. But only to some extent: religious majorities can shape the state within the constraints of what Laborde, in particular, has called minimal liberal secularism[242]. Beyond that, minimal secularism has no ambition of providing final substantive answers to key questions of political, public, private and sexual morality.

### 9. Epilogue: from «one size fits all» to «unity in diversity!»

The debate on the transformation of Europe’s constitutional constellation, its new *Verfassungswirklichkeit*, [243] has only just begun and is bound to continue. Pertinent characterizations oscillate between Executive Federalism (Jürgen Habermas), [244] a Distributive Regulatory State or New Sovereignty with Largely Unfettered Power of Rule (Damian Chalmers), [245] a *Konsolidierungsstaat* (Consolidating State, Wolfgang Streeck), [246] Authoritarian Managerialism (Christian Joerges and Maria Weimer), [247] an Unconstrained Expertocracy (Fritz W. Scharpf), [248] an Unbound Executive (Deirdre Curtin), [249] and *Krisenkapitalismus* (Crisis Constitutionalism, Hans-Jürgen Bieling). [250] None of these characterizations are in line with the ever-so positive and optimistic presentation of the integration project which we have been reading for decades. [251] Among the features underlined include the lack of a theoretical/conceptual paradigm; a radical disregard of Friedrich A. von Hayek’s warnings against the “pretence of knowledge,” [252] a disregard of the rule of law, and a thorough de-legalization of

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governance.[253]

What does all this mean for European citizenship? What was once a cherished accomplishment is now characterized by inequalities between the North and the South, the social exclusions of a large part of the European population, and political disempowerment. The present calamities are not without precursors,[254] but the ambivalences of the vision of transnational, albeit nationally dis-embedded, citizenship have, by now, become increasingly apparent and disquieting. I am not trying to go, in this already overly lengthy paper, into any detailed analysis and refer instead to the contributions by Giubboni.[255] Just as it is misconceived to subject a socio-economically and politically diverse Union to the discipline of one currency, the construction of a uniform “European social model” is a similarly misconceived project.[256]

All foregoing, disheartening diagnoses notwithstanding, this epilogue should not conclude without an outline of what has been announced in the introductory remark: “But where danger threatens, that which saves from it also grows.”[257] The present state of the Union is unsustainable. The efforts to force Member States and their citizens into the straitjacket of new economic governance are bound to fail. The Euro-crisis, somewhat paradoxically and inadvertently, underlines the urgent need for pluralistic variety – the toleration of disagreement and contestation – rather than an ever-more centralized executive Europe. The failures of Europe generate growing unrest and protest among disempowered citizens who are exposed to austerity measures, experienced as hopeless, and, to a considerable degree, useless suffering. They increasingly provoke the political public, national parliaments, and even the EP. It will become progressively more apparent that it is impossible for the great majority of signatories of the Fiscal Compact to comply with the requirements imposed upon them. It will also become ever more apparent that it is simply impracticable for the great majority of signatories to comply with the requirements imposed upon them, and the “*die neue Umständlichkeit*” (cumbersomeness) of all these procedures will affect their impact.[258]

Hence, there is room for maneuver. And yet, to date, any substantial transformation of the established regime remains out of sight. Is it nevertheless conceivable that, in the not-too-distant future, the new policy coordination within the annually repeating European Semester, the reporting and multilateral surveillance obligations, the macro-economic imbalance procedures, and the responses to country – specific recommendations will lead to new assessments of the weight of socio-economic diversity. Growing awareness of the social embeddedness of markets, acknowledgement of the different regulatory, social, and economic cultures in the Member States, may well generate a search for innovative responses to Europe’s complex conflict constellations – and sooner or later, even to the

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developments of standards and criteria which discipline authoritarian managerialism.

It would be absurdly pretentious to promise a “solution” to these difficulties. But we must not shy away from the construction of projects which seek to respond to the problems which we have identified. The project which I have pursued for more than a decade is “conflicts-law constitutionalism.”<sup>[259]</sup> Its analytical and normative core can be briefly summarized as follows: As long as the shape of a pan-European democracy lacks contours, and the conditions for its realization remain entirely unclear, we must explore alternatives which take the difficulties the European project must not, and cannot, avoid into account.

How should we respond to the reality that the socio-economic disparities in the expanded Union are not melting away? Which conclusions should be drawn from the insight that the neo-liberal interventions to which the “varieties of capitalism” in the Union have been exposed have repeatedly disintegrative effects? If it is impossible to construct a uniform welfare-state model, is it then advisable to dismantle Europe’s welfare-state traditions altogether? If it is not our goal to suppress the painful memories of Europeans, to not iron out the differences between their bitter historical experiences, to not waste the wealth of their cultures, must not tolerance therefore determine the status of European citizens, tolerance which is established in law and based upon the principle of mutual acceptance? These questions are not merely rhetorical. They have a normative point of reference in the optimistic “motto” of the ill-fated Treaty establishing a Constitution for Europe as «United in Diversity,»<sup>[260]</sup> which need not remain an empty phrase. My proposal for putting this motto into practice is as follows: Europe must find its constitutional form in a new type of “conflicts law,” which is characterized by two guiding principles. Firstly, the supranational European conflict of laws is to require Member States of the Union to take their neighbors’ concerns seriously – in this respect, it aims at compensating the structural democratic deficits of nation-statehood. Secondly, this European conflicts law should structure cooperative solutions to problems in specific areas – thereby reacting to the interdependencies of modern societies. Suffice it here to underline three points.

We should shift our attention from the democratic deficit of the EU to the structural democracy deficit of its Member States. Nation states continuously, and unavoidably, violate the principle that those affected by their laws can “in the last instance” understand themselves as their authors. The Member States of the Union can be requested to take the impact of their own policies on other jurisdictions into account and *vice versa* – they can expect that their concerns be included in the decision-making processes of the others. In the Union, these commandments correspond to the common commitments to democracy which European law is legitimated to implement. European law has the vocation, and some potential, to compensate these deficits. It can derive its legitimacy from its capacity to

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correct the democracy deficits of Member States.[\[261\]](#)

The second vocation and task stems from the erosion of the potential of the nation state to resolve problems autonomously. In the Union, this dependence upon the other transforms itself into duties of cooperation which European law is legitimated to organize. The “constitutionalization of co-operation”[\[262\]](#) must then seek to derive its validity from the normative credentials of the very interactions that it organizes.

Conflicts-law constitutionalism was meant to be elaborated further and to proceed as a “re-constructive project.” For example, a re-conceptualization of European law which would, to a considerable degree, be compatible with European law as it stood, and be able to orient its further development. The re-constructive status was based upon its sociological premises which reflect the European constellation more adequately than the orthodoxy of European law. It seems, indeed, overdue to reconsider the integration project in the light of Europe’s ever-growing diversity, to take the conflicts which this diversity generates into account, and to re-orient Europe’s agenda from harmonization and unity to the management of complex conflict constellations.

The last point is the most difficult to defend. The reconstructive status of the conflicts-law approach was based on its sociological premises which reflect the conflict-laden European constellation more adequately than the orthodoxy of European law. All that seemed needed, and indeed overdue, was to reconsider the integration project in the light of Europe’s ever growing diversity, to take the conflicts which this diversity generated into account, and to re-orient Europe’s agenda from harmonization and unity to the management of complex conflict constellations. Following the financial crisis, such hopes and ambitions are obviously unrealistic, with substantial backing in already existing European law. This bold assertion has suffered numerous setbacks. For example, through the de-legalization and de-formalization of European governance.[\[263\]](#) At present, under the pressures of European crisis management, it continues to dwindle, and conflicts-laws constitutionalism is, for the time being, a merely critical project.[\[264\]](#) What can nevertheless be explored are the conflict constellations which the new modes of economic governance and the imposition of austerity politics on a large part of the Union generate – together with the space for counter-movements which the unfortunate state of the Union may generate. That, although, requires another project.

### **SECTION III**

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***Spheres of injustice: are refugees escaping from poverty of rights?***

«Indifference is not a beginning, it is an end.

And, therefore, indifference is always a friend to the enemy,

for it benefits the aggressor, but never his victim».

(Elie Wiesel)

«Many, individuals or peoples, may believe, more or less consciously,  
that every foreigner is an enemy».

(P. Levi, *Se questo è un uomo*)

«I call upon us to reject what seemed to be positive social identities.

We should refuse to be gendered man or woman, refuse to be raced.

This goes beyond denying essentialist claims about one's embodiment  
and involves an active political commitment to live one's life differently».

(S. Haslanger, *Gender and Race*)

«For one's ideals, a man should only  
sacrifice himself, but never others».

(K. Popper)

«Strangers in the night, two lonely people.  
We were strangers in the night».

(F. Sinatra, *Strangers in the night*)

«Back then long time ago when grass was green.  
Arrived like strangers in the night.  
Fab! Long time ago when we was fab».

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(G. Harrison, *When we was fab*)

### 1. Introduction

The aim of this section is to argue that the poverty migrant should be entitled to stay in a liberal democratic state after her Asylum application has been denied. I will defend this view against one main objection. For this purpose I will, first, introduce an *ameliorative account* of the poverty migrant. Second, I will defend this view against surrogate membership objection that disputes the similarity between refugees and poverty migrants.

I will argue that the underlying rationale of refugee protection as an instance of human rights protection does not single out a morally significant criterion that justifies affording the goods that come with refugee status only to those holding it in accordance with the *Refugee Convention*. Consequently, we have to broaden the scope of refugee protection; but with a broadened scope of refugee protection, we amplify the problem that is hard to single who should be awarded refugee status.

But how should we categorize different threats so it is justified to afford refugee protection only to some people in need? I will discuss the view that a morally significant line falls between those people that can receive protection only by migrating to another country and those who can receive protection in another way, i.e. by exporting resources or carrying out diplomatic pressure, as a solution to this problem.

Finally, I will describe the importance of a current political theory: that is to say the particular Sally Haslanger’s conception of race: she believes that all racial classifications ascribed to groups of people depend on social, geographical and historical contexts.

I would begin with discussing and dismissing the surrogate membership objection and concluding that poverty migrant should be entitled to Asylum, as amoral philosopher might say that a ‘refugee’ is someone “whose situation generates a strong moral claim to admission to a state in which she is not a citizen”[\[265\]](#). In the use of the ordinary language of politics, legal philosophers[\[266\]](#) needs an account of who qualifies as a refugee: the term ‘refugee’ signifies someone on the flight to freedom or protection, escaping circumstances like deprivation, poverty[\[267\]](#), civil war, drought, or natural disaster. A refugee is someone who “is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight”[\[268\]](#).

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These different understandings of who a refugee is should puzzle us as philosophers. Indeed, most accounts in political philosophy that defend that states are justified in limited immigration make an exception for refugees. This means that although they believe that states are generally justified in limiting immigration, they also acknowledge a special responsibility to offer refugee protection. Accordingly refugees do not have to compete with other immigrants for entry, but have to show that their case is somehow special. The fact that there are these different understandings shows that the concept of ‘refugee’ in the Refugee Convention and our ordinary understanding vary significantly. Hence, depending on who we ask, the group that is entitled to special treatment changes. Here the question arises: out of the flows of people in need that cross borders, who is deserving of the goods that come with refugee protection?

### 2. The poverty migrant: what is amelioration?

The first step of my inquiry is the introduction of an ameliorative account of the poverty migrant. For this aim I will briefly explain what an ameliorative approach is and then introduce the concept of the poverty migrant.

The ameliorative approach is discussed by Sally Haslanger in her article *Gender and Race*, in which she defends a view that conceptualizes women and persons of color in respect to their subordinated position in a given society. In contrast to descriptive or analytic approaches that ask (in different ways) how we understand a concept already, the ameliorative approach begins with the question what our concept should accomplish[269].

The concept is embedded in the larger project of a critical inquiry[270], that is why the content of the concept is determined by its role in the theory. This is the reason it comes with normative input[271]. Hence, the ameliorative approach is not bound by a given understanding of a concept, instead it offers a new way to think about it[272]. Katharine Jenkins summarizes Haslanger’s view as: “An ameliorative inquiry into a concept F is the project of arriving at the concept of F-ness that a particular group should aim to get people to use, given a particular set of goals that the group holds”[273].

So, in contrast to descriptive or analytic approaches[274], the ameliorative approach does not ask who a poverty migrant is, but who we want her to be. By employing the ameliorative concept, we aim to point to a problem and ultimately to bring about change.

I think that the ameliorative approach is especially promising for our talk about immigration, because we have less salient and intransigent intuitions about this concept. In contrast to a concept like ‘woman’ that is loaded by biological assumptions, it is always up

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to us who a refugee, an economic migrant or a poverty migrant is. By providing a concept of the poverty migrant I aim to make the poverty migrant, her plight and her legitimate claim for entry visible in the debate about immigration. I aim to show that the poverty migrant is unjustified excluded from Asylum on the policy as well as on the principle level.

### 2.1 Who should be a poverty migrant?

In this section I present poverty migrants as a group of immigrants *sui generis*. I will argue for the following ameliorative account of the poverty migrant. A person P is a poverty migrant if,

1. she is not able to migrate through general immigration policies;
2. seeks special entry by applying for Asylum;
3. and is not eligible to Asylum;
4. but is deprived of her basic needs.

(C) That is why she should be entitled to stay.

(1)-(3) constitute empirical conditions on the policy level, whereas (4) has a double function as an empirical as well as a normative condition on the principle level. (C) is the conclusion that liberal democracies should draw from (1)-(4). I will briefly say a bit about each condition in the following.

(1) This condition draws on the practice of border crossing. Entering a state as a noncitizen requires one to have an entry permission like a visa. Depending on which visa one holds, rights and duties vary. Whenever a person wants to enter another country she has to fulfill certain conditions. Depending on different features and characteristics, the person who wishes to enter holds, it can be harder or easier to enter the state[275]. Entry requirements depend on the role in which a person wishes to enter and reside, the duration of the stay, qualifying characteristics for that role, the rights and duties the person enjoys during her stay and admission quotas[276].

An economic migrant needs a work visa to enter a state, only such a visa will allow her to take up employment or to open a business. Often economic migrants are required to show certain skills to receive such a visa. They need the relevant education and work experience, they have to show language proficiency, an employment contract or someone who vouches for them. Hence, one's ability to cross borders legally depends on her status in her home country as well as on the status of her home country in the world community[277].

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The economic migrant is able to cross a border to seek employment elsewhere legally. I submit that there is a qualitative difference between the French entrepreneur who aims to work in the Silicon Valley and the Albanian mother who goes to Germany and wishes to feed her family.

The poverty migrant is in contrast to the economic migrant unable to seek employment in a different state legally, because she is in an unprivileged position. She lacks the features desired by the host state to be eligible for a work visa like education, employment contract or language proficiency. On my account the poverty migrant is distinct from the economic migrant, because she lacks the substantive opportunities the economic migrant enjoys.

(2) Why only Asylum seekers? I would like to think more about illegal immigrants and people deprived of their basic needs outside of the territory of liberal democracies in the future. But for now they fall out of the scope of this paper. One reason why Asylum seekers are especially interesting is, that by applying for Asylum the poverty migrant exposes herself to the liberal democratic state. This establishes a link between the applicant and the liberal democratic state. That is why the liberal democratic state has to take her request seriously.

(3) This condition draws on refugee protection. In contrast to other immigrants most refugees cross borders illegally<sup>[278]</sup>. Poverty migrants fall neither under refugee protection afforded by the Refugee Convention nor under the humanitarian protection based on the non-refoulement principle. The Refugee Convention offers protection for people who are outside of their home state and have well-founded fear of persecution for a limited range of reasons. Humanitarian protection is mostly based on the principle of non-refoulement. The principle of non-refoulement provides that no state shall return a person to a territory where she fears threats to life or freedom. Hence, the poverty migrant is excluded from the protection mechanisms offered by international law.

(1) and (3) are empirical conditions, in case the policies in (1) and (3) change the poverty migrant will not exist anymore, because she will either gain entrance through general immigration policies or will be entitled to Asylum. This is not a bug of my theory, but a feature, because in both cases the poverty migrant would be able to leave her desperate position. Hence, if (1) or (3) are not given, this concept would be obsolete<sup>[279]</sup>.

(4) Is the core normative premise of this argument. It presses on the values and commitments of liberal democratic states. That is why one could assume that cosmopolitan views and particularist views - the two competing views in the immigration debate - differ

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in respect to it. But even particularist views – these are the views that defend that states are justified in limiting immigration – admit that there is a duty to help people in need. In most accounts this duty stems from the mutual aid principle or some other humanitarian principle. So on the level of principle the competing views agree: there is a duty to help persons in need. They also agree that the focus of refugee protection as explained in (3) is misplaced [280]. What we should focus on instead, is the protection of human rights or (less loaded through terminology) basic needs. It is only through further assumptions that these views draw a line between Convention refugees and other persons in need like poverty migrants. I will discuss these assumptions in the following section as an objection to my view. I submit that just as the refugee, the poverty migrant is deprived of her basic needs. The same values and principles that justify why the refugee is entitled to stay, hold for the poverty migrant. Liberal democracies are committed to the idea and protection of basic needs. This constitutes the normative condition the poverty migrant has to meet. It marks the unprivileged position of the poverty migrant as unjust.

In sum, I argue that the poverty migrant is trapped through (1) and (3) in an unprivileged position (4) from which she (2) tries to escape. That is why (C), the poverty migrant should be entitled to stay. Following, I will discuss one main objection to the similarity between refugees and poverty migrants postulated in (4).

### 3. Surrogate membership

This objection holds that poverty migrants and refugees are not similar in the relevant sense, because Convention refugees are special. Convention refugees are special, because their basic needs are violated in a special way – they are persecuted. That is why, they need the special protection offered by Asylum. This objection is structured as follows:

1. Liberal democratic states have a duty to help people in need.
2. The means to help have to be used effectively. Group A can receive help only through action x, but group B can receive help through action x and y. If x is scarce, it should go to A instead of B.
3. Persecuted persons can receive help only through Asylum, persons deprived of their basic needs can receive help through Asylum and other means. That is why Asylum should be reserved for persecuted persons.

So, according to this objection refugees and poverty migrants are not similar in the relevant way, because poverty migrants can receive help through other actions.

What motivates this objection? In *Spheres of Justice* Michael Walzer defines

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refugees as those people in need who lack membership in the political community, which is a nonexportable good[281]. Matthew Price takes up this idea, he calls his account the political view of Asylum. He argues that persecuted persons face a distinctive kind of harm that is to lack political membership. This point is rooted in the historical function of Asylum, as it was supposed to protect political offenders[282]. It is persecution that marks the loss of political membership. The practice of granting Asylum is a communicative act of condemnation between states. Granting Asylum is, as Price argues, a judgement on the legitimate exercise of authority of a state over its citizen. The idea is the following, by granting Asylum the host state sends a message to the home state, that is: there is something wrong in your home state, so your citizen has to seek protection with us. Hence, granting Asylum only to persecuted persons is deeply connected with its expressive character. Taken together these two points constitute the distinctive face of Asylum. What makes Asylum special, according to Price, is that it is the remedy to a particular kind of harm – persecution. According to Price persecution captures the particular kind of harm that is maliciously and unjustifiably inflicted on the refugee that seeks Asylum[283]. Asylum offers surrogate membership to those who are denied political membership in their home states. Asylum is the appropriate remedy for people who lack membership. Asylum is a scarce good. Thus, only those who lack membership should be entitled to Asylum.

Hence, Price offers a view that justifies the limitation in the Refugee Convention to those who suffer from persecution. Price points out that Asylum is only one way to help, there are other measures like relief aid, development assistance, and humanitarian protection abroad[284]. These tools can be used to address the needs of those people who are excluded by Asylum, but Asylum is exclusively for those who suffer from persecution.

In the following pages I will present three answers to this objection that each hold independently and complement each other:

First, Asylum is not a scarce good. The argument offered by Price only works if we assume that Asylum is a scarce good in liberal democracies. This is particularly easy for particularist views on immigration. In these views the states decide for themselves when Asylum is scarce[285]. The assumption that Asylum is in fact scarce, sounds compelling as we remind ourselves of the 2015 migration crisis and the overload bureaucracies of European states experienced reviewing Asylum applications. But Asylum is only scarce, because these views and our practice make it scarce. In the case of poverty migrants their basic needs are at stake. They do not merely wish to immigrate, they are forced to migrate by the circumstances in their home states. That is why the burden of proof here should lie with the host state. To make this objection work liberal democracies need to show that they cannot take more people in.

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Second, the remedy that is needed by persecuted persons and poverty migrants are not different. Sarah Song argues that for his argument to hold, Price has to show that the needs of persecuted persons are significantly different from others who seek refuge. She states that we should not overemphasize the difference between Convention Refugees[286] and other people in need. Generalized violence or poverty can just like persecution stem from poor governance[287]. The state has failed to protect its citizens’ basic needs, when subsistence is threatened because of inadequacies in technology, infrastructure or distribution[288]. In such circumstances the receiving state is also justified in sending a message of condemnation, because the threat to basic needs stems from bad governance. Hence, this answer holds that the expressive character that constitutes the distinctive face of Asylum is also given in the case of generalized violence or poverty. By receiving Asylum the poverty migrant gets an appropriate remedy that - in addition - communicates condemnation of poor governance to the home state.

Third, Asylum is not the kind of remedy Price takes it to be. Asylum, as Price takes it, offers surrogate membership in the host community. Asylum, as it is supposed to be, entails the rights codified in the art. 3-34 Refugee Convention. Such rights include the most favorable treatment for aliens - which means they enjoy the same rights as the best treated non-citizens - concerning the labor or housing market and access to education as well as social security that is available to citizens[289]. This broad set of rights meant to integrate refugees economically into host states. By exercising these rights refugees were supposed to provide for their own needs. If Asylum were like this, it would in fact only offer something similar to surrogate membership. Many states do not naturalize refugees after time, so they are trapped in a limbus that requires them to renew their refugee status every couple of years[290]. Only through naturalization refugees can enjoy membership rights like to right to vote or to take public offices. This means, that the Refugee Convention offers at its best participation rights, but not membership rights.

Unfortunately many states do not provide these participation rights either, so they rely on the host states[291]. Asylum as it was intended, should grant a broad array of rights, but today Asylum is rather assistance. Hence, Asylum as we practice it today does not offer surrogate membership. That is why it is not only an appropriate remedy for persecuted persons, but also to those who lack basic needs. Hence, we cannot restrict Asylum reasonably to those who lack membership.

#### **4. On Sally Haslanger’s conception of race**

Sally Haslanger believes that races are hierarchical social classifications that must be eliminated in a just world: “Justice will never be achieved by just working to change beliefs,

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for the habits of the body, mind and heart are usually more powerful than argument. As a result it must be a non-trivial part of feminist and antiracist efforts, not just to change minds, but also to retrain bodies, and not just to retrain bodies, but to change the material conditions that our bodies encounter on a daily basis.”[292]

Although races are real as social categories[293], their reality is the product of unjust social structures and hence should be resisted[294]. So one can ask:

1. Why can't we conceive of races as non-hierarchical social classifications and look forward to racial equality?
2. Doesn't she unwittingly invite assimilating policies that reject certain “races or ethnicities” by arguing for elimination of races?

These questions about her depiction of race will be the points of departure of the subject matter of this paper. I will name the first “the conceivability” and the second “the assimilation” question for brevity. My underlying assertion will be that as Haslanger argues, eliminating hierarchical races and organizing ourselves around cultural features or practices seems as an idea worth to dwell on.

### **5. Race: natural or constructed?**

Haslanger discusses race and gender together as she thinks there are certain similarities between them as social categories[295]. She takes sides with the social constructionist camp in regard to the question of race and gender. Because she thinks both are real as social classifications, and thus are social kinds, she identifies her account as realist[296]. Haslanger believes that all racial classifications ascribed to groups of people depend on social, geographical and historical contexts. There are not racial essences of any sort and consequently “people can travel from the United States to Brasil and function socially as a member of a different race”. [297] Also, in different contexts racial differences are drawn according to different features, e.g., the Brazilian and U.S. categorizations for who count as Black[298] differs tremendously[299]. That implies that none of the physical/anatomical features such as color, hair texture, eye shape and so on are essential to race. That is also approved by scientific findings, too. Recent research in race genetics and biology has not given us enough evidence to believe that there are certain natural properties that refer to racial classifications[300]. Hence, she claims that race is a biological fiction[301].

Just as materialist feminists think gender is social meaning of sex, Haslanger thinks race is the social meaning of “color”, that is, the social meaning of the geographically marked, “colored” body[302]. By color she doesn't solely point to the skin color of groups of

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people such as Whites, Blacks, Browns, etc., but also to their eye and lip shapes, hair texture and so on[303]. Here is the definition: “A group is *racialized* if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the group is “marked” as target for this treatment by observed or imagined bodily features presumed to be evidence of ancestral links to a certain geographical region”[304].

Whether or how a group or individual is racialized is not an absolute fact but varies according to context. She notes that Blacks, Native Americans, etc. are currently racialized in the U.S., whereas the Italians, the Germans and the Irish used to be racialized in the past. Nonetheless, it doesn't mean that they won't be racialized again when the context changes[305]. Haslanger's account of race bears a difference at this point from her account of gender. Her definition of gender allows for both hierarchical and non-hierarchical or non-oppressive classifications. She provisionally offers such alternative classifications as lactating persons, pregnant persons and so on because she thinks some females bear the burden of maintaining the species of human and a just society must address to those differences[306]. However, when race is the case, she thinks no anatomical or biological differences of different groups provide a ground for such distinctions in any context or world.

### 6. A racialization case: the Kurds

Kurdish people have faced discrimination and suffered various sorts of oppression in Turkey for the last half century. Although they have been one of the archaic peoples that have existed in eastern Anatolia for hundreds of years, life started to change for them and for some other indigenous peoples such as Armenians and Assyrians in their region after the foundation of “Turkish Nation State” following World War I.

In fact the discrimination and oppression they have faced has been in a variety of ways. Yet, the denial of their ethnical and cultural identity and the indoctrination of Turkish identity have been the most damaging. The people who have resisted assimilation have been punished in varying degrees, e.g., with social oppression, imprisonment, torture, death sentences and so on.

#### 6.1 Resisting racism by recognition and compensation of the racialized groups

Haslanger thinks that in the short term the urgent thing to do is to resist and combat racism which first of all requires recognizing racialized groups or ethnicities[307]. Remember that her definition of races involved hierarchies which subordinated some and privileged the

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others. Because an ideal and just world requires elimination of hierarchies, races must be eliminated. On the other hand, in the case of Kurdish people, one attempt of oppressing the Kurds has been to claim that Kurdish race is actually fictitious. According to a theory defended by Turkish State in the 1980s, Kurds have been claimed to be actually mountain Turks whose wandering on mountain snow has produced “kart-kurt” sounds and which, thus, has inspired people to name them “Kurd”[\[308\]](#). According to “The Sun Language Theory”, another hypothesis which was developed and supported by Ataturk, the leading figure in the foundation of Turkish Republic, in 1930s, all languages are descendants of one proto-Turkish primal language, and so is Kurdish[\[309\]](#). These two theories which have been developed and supported by Turkish state ideology have for very long years denied Kurdish race or ethnicity[\[310\]](#). Even today there are some people who hold this sort of beliefs[\[311\]](#). This instance apparently shows the cunningness denying the existence of a racial/ethnic group and by this means ignore the social, political, economic responsibilities of a state to the assimilated and oppressed group.

Although some may believe that Haslanger’s idea of elimination of races in a just world seems to invite and support such means of oppression or assimilation to some subordinated racial or ethnical groups, in my opinion this is not the case. She would reject the idea of overlooking and undermining the Kurdish race, its culture or identity[\[312\]](#). She endorses and allows embracing one’s ethnic culture or identity as a tool and resource to resist against racial injustice. She thinks, “for members of subordinated races, their racial affiliation... is often not only a source of pride and value in their lives, but has provided resources to combat racial oppression”[\[313\]](#).

Another significant remark that shows that Haslanger’s account doesn’t invite such kind of assimilations concerns her view about the social, political and economic structures or institutions of a state. She thinks that in order for a system or structure to be just and non racist it must not be “neutral”, “color blind” (or gender blind) against the racialized groups that have faced racial harms. So-called “neutral” institutions contribute to and sustain injustice rather than preclude it. Nonetheless justice requires the recognition of the racialized groups and past harms be compensated[\[314\]](#). The individual efforts of well-meaning people would not suffice to recognize and compensate the past harms done to racialized groups, either, but rather, structural adjustments are required to resist racism and finish social injustice[\[315\]](#).

### **7. Future prospect: the elimination of races based on “color”**

Our conceivability question inquires why she suggests the elimination of hierarchical races rather than suggesting preservation of race and work towards racial equality. She responds

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to three alternative arguments for non-hierarchical races. According to those three arguments, races can be interpreted as meaningful social classifications that need to be preserved.

1. The first argument points out the ‘medical necessity of “color” coding’[\[316\]](#). According to the proponents of this argument for race, they think that some races may have genetic patterns that are susceptible to diseases and therefore societies must be prepared as a matter of justice to address those races that have risk factors. However, Haslanger claims that the basis of the links made between races and diseases is social rather than biological, particularly in the United States. Although the diseases Black people suffer are biological, the racial differences are not. Blacks are more susceptible to such diseases as H.I.V.-A.I.D.S. or diabetes not because they have as a race susceptibility to those diseases but because “race” affects their income, healthcare, housing and so on and that they have effects on health. We could group an individual born in or with ancestors from a distinct area with the same genetic defect with those Black people when the issue is medical.
2. Lucius Outlaw argues that different “colored” racial groups may be “the result of bio-cultural group attachments and practices that are conducive to human survival and well-being”.[\[317\]](#) He argues that races are socially meaningful and inevitable. He thinks people desire to achieve relative immortality by choosing mates from their inner communities and thus have offspring that “look and carry on somewhat like” themselves[\[318\]](#). He consequently argues that this natural way of reproduction renders their races fit for survival. Haslanger finds this argument quite weak. She gives many empirical examples from history in which different races or ethnicities or tribe sex change their woman to increase their chance of friendship or for some other purposes. She also criticizes “the valorization of descent which is seen by Outlaw as a factor that contributes to the uniformity of ‘color’ in population”. Yet, Haslanger thinks valorization of descent may contribute to hierarchical family forms in even “liberal democratic societies”. Parentless or adopted children and women who give birth to “illegitimate” children may be mistreated in a society where the descent is valorized[\[319\]](#).
3. Linda Alcoff introduces the notion of “ethnorace” which she thinks is more useful for understanding the complex character of social divisions[\[320\]](#). She thinks neither mere “color” nor “ethnicity” is sufficient to understand the diversity of ways in which people are racialized. Many social groups such as Latina/os and Asians do not fit many assumptions typically made about races since they are diverse in “color”, which is why ordinary Black and White binary remains insufficient to define those racialized groups who have shared experiences and a common history. She opts for the idea of

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reconstructing positive racial identities, i.e, ethnoraces, such as Pan-Latina/os, Pan-Asian which will have two crucial dimensions. First, ethnorace is group of people who have been marked bodily as of the same race, and second, active agency and subjectivity become a feature of those people in order to constitute their shared identity as they share common cultural elements. Although Haslanger believes that such conceptions of ethnicity, ethnorace, culture, pan ethnicity and so on are to be employed for understanding the more constructive efforts to form new identities that do justice to our histories and experiences[321], she avoids taking a normative stand on the issue of opting for positive reconstruction of races or ethnoraces or pan-ethnicities. She thinks that an account of race that is centered on shared history or common culture and a corresponding strategy to fight against racial injustice by reconstruction of races in terms of those commonalities produces the problem of normativity. She argues that in gender studies, the problem of commonality questions whether there is anything social that females have in common that could count as their gender. Accordingly, normativity problem raises the concern that any definition of “what woman is” is value-laden, and will marginalize certain females, privilege others and reinforce current gender norms[322]. Even though she thinks there might be nuances, the problem of commonality and normativity can be extended to racialized groups, too. “Insofar as a reconstruction of race in terms of history and experience will have to provide an interpretation of that history and experience, and so select what aspects to highlight, we re-encounter the problem of normativity”.[323] As opposed to Alcoff, Haslanger thinks that races do not require any common culture, identity and so on. Races are more ascribed to people rather than embraced by them, that is, whether they want it or not people are socially positioned as subordinated or privileged structurally. For instance, the internationally and interracially adopted children in the States are still racialized because of their “color” even when they are brought up in an identity and culture that is unrelated to their birth country or a pan-ethnic identity. So, she concludes, although the concept of ethnorace seems to be an interim category to understand the future evolution of today’s raced societies, she finds it controversial whether it is valuable and is skeptical about encouraging social investment in positive racial identities. She believes encouraging ongoing social investment in “color” is “harmful”. [324]

### **8. The effects of institutional denial of recognition: sociology of the injustice of type *Racial Profiling***

The types of effects of recognition provide an analytical framework that will give an account of the diversity of claims for recognition. In particular, the denial of recognition can take, sometimes, the shape of the “invisibility” of type, “*colour-blindness*” invisibility for those

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that do not correspond to a socially enhanced presentation of self (this is the case in the type of racism in Ralph Ellison’s novel *Invisible Man*)[\[325\]](#).

But invisibility can also be a consequence of a “stigmatizing contempt” (*stigmatisation*[\[326\]](#)): it is the case that corresponds to the type of racism described by Fanon in the chapter of *Pelle nera, maschere bianche* entitled “The experience lived by the blacks.”

Furthermore, another goal of my research is an analysis of the change that in the last few years has invested both the sociological and constitutional dimension, since the introduction of the so-called *Critical Race Theory* and its emblematic building process of the breed defined as “racialization” within the discriminatory processes of the type “*Racial Profiling*”, which started in the American context, and are emerging and developing in Europe, following the advent of multiculturalism in contemporary liberal democracies.

The presence of the breed is the main data that informs different policies, based, originally, on belonging to ethnic African-American and later extended to all non-white minorities. In this context, there are those who have made reference to a double track along which runs the American penal system, incardinated in the matrix of the racial “*whiteness vs. Colour*”[\[327\]](#).

One of the most problematic institutions, is certainly that of *racial profiling*, “an ultra-modern investigative technique based on ethnic or racial profiling that leads to different treatment and applied, generally, only to minorities of colour”; however, the white majority, is usually excluded.

Not many previous research efforts have been directed towards an investigation that focuses only on the use of *racial profiling* techniques, excluding outright all the important contributions made by the *School of Critical Race Theory* (CRT) and the “constructive” role of the law in the formation of the races. There does not, in fact, exist to date, a real study that has a higher flow rate, a search that embraces the interactions between different constitutional systems among them, such as the American system and that tied to the typical patterns of continental Europe. In addition to the conceptual framework proposed in the research of Gotanda, of particular significance as a reference model is the work done by Schauer (2003)[\[328\]](#), as it is an investigation on solid *profiling* in general[\[329\]](#), conducted with great sociological sensitivity.

With the intention to adopt a perspective closer to that of the *Critical Race Theory*[\[330\]](#), my research aims, in the light of the ineffectiveness of the social costs and

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injustices that this practice involves, to analyze this technique, highlighting the limits on the theoretical and application levels, also with the intention of making a contribution to the debate and those positions that are intended to reduce or eliminate the legal systems and security policies.

The study of Zanetti, is to be used as the basis for a theoretical framework of normative arguments on *racial profiling*, along with, of course, the anthology edited by the same Zanetti and Thomas, which is, according to the definition of Casalini (2006)[\[331\]](#), “a useful tool to get closer to a theory deeply connected to the multiracial reality of the United States of America, but whose interest may well go beyond the specific legal tradition”.

Thus, from the contributions of Groppi (2006), through the methodological approach of lexical survey conducted by Balbo (2006), drawing from research conducted by Bonetti (2006) and without underestimating the importance of the socio-comparative studies of Goldoni (2007)[\[332\]](#), my proposal for discussion around the *racial profiling* on the one hand, and the racialization on the other, can only be preliminary to a more delicate original rethinking of the relationship between law, minorities and “*the rhetoric of race*”. Despite having been the subject of great interest from the American Academy, in the Italian debate the institution of *racial profiling* has not occupied a prominent place. The absence of the theme does not correspond with that of practice: the *European Commission Against Racism and Intolerance* (ECRI), in fact, has advised Italy of a series of important concerns about discrimination by the authorities in respect of the foreign minorities (especially the Roma).

The effects of the measures taken after the attacks in Madrid and London are not yet measurable, but portend developments on which a scientific debate would be at least desirable, provided that this is done taking into account the wider reality of racism in Europe. Indeed, it would be a grave mistake to assume that the genesis of the American theme exempts Europeans from dealing with an institution that seems to have several applications in the space of Community law.

### **SECTION IV**

#### ***Liberal ethics of migration or populist anti-immigrant rhetoric?***

«Let us show them how to play the pipes of peace.

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Will the human race be run in a day?  
Or will someone save this planet we’re playing on».

(P. Mc Cartney, *Pipes of peace*)

«The eastern world, it is exploding.  
Violence flaring, bullets loading.  
You’re old enough to kill but not for voting.  
You don’t believe in war, but what’s that gun you’re toting?  
Ah, you don’t believe we’re on the eve of destruction».

(B. Mc Guire, *Eve of destruction*)

«We shall overcome, some day;  
we shall live in peace, some day».

(J. Baez, *We shall overcome*)

«In a universe subtly stripped  
of illusions and lights,  
man feels like a stranger.  
There is no defense  
against contempt.  
Every man is a criminal  
without knowing it».

(A. Camus, *The stranger*)

«As fast as the wind, as slow as a forest,  
assaults and devastates like fire,  
be as motionless as a mountain,

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as mysterious as yin, as fast as thunder.

With order, tackle the disorder;

calmly, impetuosity.

This means having control of the heart».

(Sun Tzu, *The art of war*)

«In life the most important thing is to live the present moment with the utmost attention.

All existence is nothing but a succession of moments after another».

(From *Hagakure: the secret book of the Samurai*)

## 1. **Right-wing populist movements and the anti-immigrant rhetoric**

Over the last three decades, right-wing populist movements have been gaining increasing consensus in liberal democracies[333], and have become real competitors to mainstream political parties, as the results of the most recent political elections in Western Europe confirm[334]. Right-wing populism is even stronger in Eastern Europe’s younger democracies[335]. While in the U.S. Trump’s election in 2016 was seen as an unprecedented phenomenon, right-wing populist parties had already obtained remarkable results all over Europe in earlier elections and their appeal does not seem to be substantially undermined when they cease to be outsiders and participate to government. Thus, their success is neither episodic nor a mere expression of protest votes[336].

Despite the differences among them, these parties share a populist and nativist ideology[337]. Their anti-elitist claims aim at replacing the values of the dominant establishment with the common sense of the people[338], as explicitly stated in Italian *Northern League* slogan for 2018 elections, “The revolution of common sense”. Therefore, a first antagonism emerges, opposing the virtuous people and the corrupt elite. However, another core trait qualifies these movements as “right-wing”: namely, the antagonism between the homogeneous native people and the aliens. These two antagonisms often overlap: the cosmopolitan establishment is believed to plot against the people, protecting immigrants more than their own citizens[339]. Authoritarian tones are also utilized to stress a firm rejection of the establishment tolerant and multicultural policies and to call for the

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restoration of law and order.

Right-wing populism is thus marked by a strong anti-immigrant rhetoric, which is emerging as its most noticeable feature[340]. It promises to prioritize nationals in the access to welfare state and employment, as well as to protect their distinctive culture, endangered by the newcomers with the complicity of the corrupt elite[341]. Ironically, such a nationalist and exclusionary ideology has a transnational character[342], being declined in a similar vein in several countries[343].

It is certainly true that a reasonable disagreement can also be traced in the academic debate among political theorists on the ethics of migration. Even leaving communitarian critiques aside to focus on liberal political theory only, it is clear that authors disagree on what justice in migration requires in principle, as well as on how states should act under current non ideal conditions. Since the ethics of migration is mainly concerned with immigration in Western countries, the key issue has long been how inclusive admission policies should be. On the one side, liberal egalitarian thinkers, such as Joseph Carens, argue that, at least in principle, justice in migration requires open borders[344]. On the other side, liberal nationalists such as David Miller defend the right of the receiving state to exclude immigrants in order to protect citizens’ national identity and interests[345]. Moreover, not only admission policies but also integration and citizenship policies are disputed: theorist are far from unanimous when it comes to what is due to immigrants who already settled.

Briefly, liberal theorists disagree on how to balance cosmopolitan impartialist moral claims, consistent with the principle of individuals’ equal moral worth, with the partialist moral claims of the citizens, grounded on the State’s special responsibility towards them[346].

It may be suggested that what right-wing populism is seeking to convey is ultimately a legitimate claim for partiality. However, despite a reasonable partiality towards compatriots may be compatible with liberal principles, as Miller contends, right-wing populist propaganda often radically exceeds the limits of what is admissible in a liberal perspective. Not only the contents but also the language chosen to express them are aimed at challenging basic liberal principles, embedded in the alleged “dictatorship of the political correctness”. Right-wing populist movements go as far as denying any obligation whatsoever towards non citizens. They may justify mass refoulement of undocumented migrants before they reach national borders, irrespective of migrants’ personal conditions or potential refugee status, and the deportation of those who managed to cross the borders. They may even deny fundamental rights to national or non-national residents who are not recognized to be part of the nation. In fact, members of groups perceived as “others” (e.g.

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Roma and Sinti minorities, immigrants, and persons of immigrant descent, especially Muslims) are “depicted as unable to be and even become fully functioning members of society”[347]. Since they are not recognized as equals, they cannot be trusted as fellow citizens.

It is worth noting that some supporters of right-wing populist movements may not be aware of holding unreasonable beliefs, and may even think to be the actual guardians of the liberal Western heritage which is threatened by the barbarous invaders[348]. Anti-elitist sentiments, moreover, make them suspicious towards the moderate tones of academics, and even mistrust mainstream press, which is thought to be as corrupt as the political elite and to hide or minimize the dangers that immigrants presence entail[349]. Therefore, they may rely on the most sensationalistic tabloids or on partisan niche media, which in turn reinforce stereotypes and foster readers’ hostile attitudes.

### 2. **Anti-immigrant sentiments in the ethics of migration**

Despite posing a serious challenge for liberal political theory, the diffusion of populist anti-immigrant sentiments have not gained much attention in the ethics of migration[350]. For instance, the issue is not included by Carens in *The Ethics of Immigration*, while in *Strangers in Our Midst*, David Miller only mentions the existence of “resentful working-class whites, susceptible to incitement by far-right parties”[351].

A reason why the diffusion of anti-immigrant sentiments and the rise of right-wing populist parties have not been addressed may lie in the idea that normative political theory is primarily concerned with what is morally ideal. Therefore, as Matthew Gibney noted, normative theorists are inclined to abstract from practical constraints, including political ones[352].

A further reason to exclude the claims of the populist right-wing movements from the scope of an ethics of migration may depend on their being dismissed as embarrassing, unreasonable and not worth philosophical concern. Such claims can be overtly racist and hardly defensible on the grounds of liberal principles. A liberal nationalist thinker, like Miller, can contend that “the general justification for immigration restrictions involves an appeal to national self-determination and in particular a people’s right to shape its own cultural development”[353], but he would nonetheless deny that such a principle can legitimize the rejection of a migrant’s claim to entry on the basis of their nationality, ethnicity or religion. In a liberal view, the principle of non-discrimination constrains the principle of self-determination[354]. When it comes to integration policies, despite arguing that the human right to religious freedom does not go as far as requiring unessential

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features like minarets, Miller maintains that Muslims cannot be refused a mosque to pray in[355]. As in the case of the Swiss referendum on minarets, it seems that right-wing populist claims can at best offer a point of departure for some sensible general reflection, once deprived of their “lurid language”[356], but that they do not deserve to be taken into account as such[357].

By contrast, I argue that populist anti-immigrant sentiments should be taken seriously. This is not to say that they should be granted the same epistemic status as reasonable arguments. However, besides posing a risk for the stability of liberal institutions[358], the diffusion of populist anti-immigrant sentiments in particular entails at least two additional relevant implications for liberal political theorists interested in the ethics of migration.

Firstly, the rise of populist anti-immigrant parties results in strong feasibility constraints for a liberal ethics of migration. As I will discuss in more detail in the following section, normative theorizing may include different degrees of idealization, depending on the goal of the inquiry. When it is meant to address current immigration policies, an ethics of migration is supposed to include at least some real world features which policy makers cannot ignore. Public opinion’s hostile attitude should be counted among these features, since forcibly imposed policies can provoke backlash reactions. Of course, admitting the existence of feasibility constraints does not mean to passively accept them. Some existing constraints can and ought to be loosened, but they must be recognized first.

Secondly, anti-immigrant sentiments in Western liberal democracies are politically relevant from the legitimacy point of view, as expression of citizens’ opinion and electoral choices. Anti-immigrant sentiments emerge as precise political claims defended by populist right-wing parties which take part in representative legislative organs, including local administrations, national parliaments and the European parliament, and have already been part of government coalitions, too[359]. Moreover, the official line of populist right-wing parties does not exactly mirror the stances of their supporters: the electorate is not uniform and some of them may hold even more radical views than their elected representatives. Therefore, the principles of democratic legitimacy impose to take seriously the claims of both populist right-wing parties’ representatives and electors.

It might be argued that, in a representative democracy, citizens express their preferences while voting, so taking into account such preferences through the electoral system is sufficient for democratic legitimacy. However, as Nadia Urbinati pointed out, representative democracy is better understood as a diarchy of will and opinion, where “the sovereign is not simply the authorized will contained in the civil law and implemented by

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states’ magistrates and institutions” but also “the opinion of those who obey and participate only indirectly in ruling”[360]. Thus, election day is not the only moment when the citizens’ opinion matter: what citizens think and say outside the polling place cannot be ignored.

In sum, populist anti-immigrant sentiments should be taken seriously by political theorists, instead of being blamed, demonized, or simply dismissed as untenable. If theorists aim to offer practical guidance to policymakers, they need to recognize that such sentiments ought to be addressed and examined: liberal politicians should listen to the claims of right-wing populism supporters. They should admit the existence of serious underlying issues, such as unemployment or housing scarcity, and separate those real problems from inconsistent, simplistic, or unreasonable conclusions, which should be contested on both principle and factual levels. Taking anti-immigrant sentiments seriously implies a commitment to keep a continuous dialogue with those citizens who hold such views, recognizing them as interlocutors, and offering them reasons to reject populist right-wing rhetoric.

### 3. A realistic approach

In order to include the issue of populist anti-immigrant sentiments, a realistic approach to the ethics of migration is needed. According to Joseph Carens, normative theorists can situate their work along a continuum, from (extremely) realistic to (extremely) idealistic[361]. An idealistic approach is particularly useful to focus on what justice requires in principle, under the best circumstances, because it allows to transcend most practical constraints and to radically criticize the *status quo*. An idealistic approach permits to see that the best realistic option may not correspond to what justice ultimately requires[362]. However, as Carens himself recognizes, the more idealistic the approach, the more current issues would disappear from the view[363]. An idealistic approach is thus unhelpful if we are interested in what to do here and now to address urgent problems, such as the diffusion of anti-immigrant sentiments.

A realistic approach, by contrast, takes institutional, political and social reality into account. It tries to identify the agents responsible of bringing about a change and to offer feasible proposals having plausible chances to be implemented under current conditions. Gibney’s method aimed to “combine empirical and theoretical elements in an attempt to bring considerations of values and agency together”[364] can be considered an example of a realistic approach to the ethics of asylum. The first ten chapters of Carens’ last book on the ethics of migration also adopt a realistic approach[365]. As the image of a continuum suggest, there is no such thing as a single realistic approach to the ethics of migration, but several approaches can be more or less realistic and include different factual conditions,

according to the scope of the inquiry.

It is worth reminding that a realistic approach to normative political theory must not be conflated with realist political theory. Realism is not merely an approach but an alternative tradition having a distinct conception of politics and political theory[366]. Despite the degree of idealization can vary, liberal normative political theory belonging to the Rawlsian tradition cannot be realist[367]. Analogously, I am arguing here that liberal ethics of migration cannot be realist[368], but still it can be realistic.

To sum up, even though the ethics of migration cannot be realist, it still can be realistic: assuming a realistic approach allows political theorists to see the issue of anti-immigrant sentiments and to see that it results in feasibility and legitimacy constraints to liberal inclusive policies. Only one these constraints become visible, theorists can start wondering how to loosen them.

Taking anti-immigrant sentiments seriously implies a commitment to engage in a dialogue with those citizens who hold such views, recognizing them as interlocutors, and offering them reasons to reject populist right-wing rhetoric. Theorists adopting a realistic approach to the ethics of migration can stress the importance of this goal and offer some lines for political action.

#### **4. Two lines of action**

It can be argued that the diffusion of anti-immigrant sentiments is first and foremost a product of structural causes, such as the current global economic regime, the subsequent erosion of citizens control over the policies of their own government and the demand of protectionism. This is a wide issue for political philosophy, but it is best understood in the frame of a broader global ethics. Despite the scope a realistic approach ethics of migration is much reduced, some normative conclusions can be drawn even in a scenario where the constraints imposed by current structural, macroeconomic arrangements still hold.

I will not attempt to provide precise policy prescriptions, nor to suggest a comprehensive strategy. However, my aim is to propose some possible directions that may be developed to offer liberal democracies practical guidance in discouraging opinion’s hostile sentiments towards immigrants. I suggest two lines of action: promoting interaction at the local level and providing information on immigration-related issues.

Promoting interaction is a way to reduce mutual prejudice and foster social inclusion. Political theorists rely on the wide literature on immigrants’ integration, which is

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mainly understood as a matter of national policy, as if it could be designed and applied uniformly to the whole territory of a State. Nevertheless, scholars and policy makers are becoming increasingly aware of the fact that migrants’ social inclusion is primarily at stake at the local level[369]. Normative theorists too should devote more attention to the local character of social inclusion. In fact, local administrations already have some autonomy in shaping their own inclusion policies. Most importantly, cities and villages are the physical spaces where citizens and immigrants live. It is at the local level that citizens directly experience a growing diversity in their neighborhoods during their everyday activities[370]. Anti-immigrant sentiments, then, can derive from a feeling of displacement due to “multicultural place-sharing”[371]: as the town landscape and population become increasingly unfamiliar, citizens may feel insecure. It has been suggested, then, that not only migrants’ but also citizens’ experience of uprooting ought to be taken into account[372].

Briefly, inclusion policies are best understood at the local level not only because they are already locally elaborated or carried out, but also because they ought to be context sensitive and to address the specific needs of a given local community. Despite interaction *per se* may not be sufficient to discredit mutual prejudices and may also reinforce them, positive interpersonal relations is likely to reduce hostile sentiments[373]. Local governments possess better knowledge than national or supranational ones on their territory and population, so they can focus on single neighborhoods and villages to listen to residents claims, to detect and prevent conflict and to foster positive interaction among citizens and immigrants. Local governments are also placed in a favorable position to carry out a bidirectional dialogue with residents and avoid paternalism: if interaction policies are perceived by citizens as an imposition by a distant, central government ignoring their everyday problems, such policies may strengthen anti-elitist sentiments along with anti-immigrant ones.

Populist right-wing elected representatives in local governments may oppose interaction policies, claiming that immigrants should be refouled or expelled, rather than admitted and included. However, since they value law and order, they may agree that achieving peaceful coexistence between native and (legal) immigrant residents is a somehow desirable goal. Some of their supporters may still resist the opportunities to interact with immigrants, but positive interaction, at least, is expected to increase interpersonal trust and reduce the appeal of anti-immigrant rhetoric on those citizens who have not yet assumed excessively radical positions.

It might be argued, though, that interaction policies cannot be effective in the case of populist right-wing electors living in areas where immigrants’ presence is scarce, since

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they seem to base their hostility more on press sensationalist news or hearsay evidence than on personal experience.

This objection strengthens the importance of information: since not only direct contact but also exposure to media representation of immigrants can influence citizens' attitudes[374], information, as a form of distant interaction, can be considered as crucial as personal interaction.

Empirical research shows that citizens overestimate the incidence of immigrants presence in their country[375]. Some studies even suggest that the actual number of immigrants living in an area is unrelated to increasing or decreasing anti-immigrant attitudes[376]: it seems that the perception of the immigrants' presence matters more than the presence itself[377]. This is why it is necessary to provide detailed and reliable information on sensible topics, such as the actual immigrants' presence rate, who those migrants are, or which contexts they come from.

Stereotypes on immigrants and scapegoats change from a country to another, but overall the suspicion about asylum seekers has increased because of the recent so-called “refugee crisis”. Since migration has jumped on the top of political agendas, as well as on the front page of newspapers, citizens should be offered sufficient knowledge of immigration and asylum law and policies. Populist right-wing parties rhetoric conflates migrants and asylum seekers, equating all categories to illegal migrants and claiming that they represent a threat for public order and pose a financial burden for the state, receiving undeserved benefits at the expenses of citizens. Therefore, citizens should be able to have a clearer idea of how many refugees and asylum seekers live in their country, comparing the rate to the overall immigrants' rate, whether or not they are authorized to work, or how heavy actually is the financial burden they pose. Moreover, citizens should be better informed about the countries migrants and asylum seekers come from as well as about the reasons why they can be granted asylum. For instance, citizens may ignore the existence of some armed conflicts or the fact that persecution on a personal bases can make a country unsafe for a particular person even though that country is not at war.

In the case of information, the risk of paternalism is even higher than in the case of interaction policies. Again, local administrations can be the key actors in providing open forums where citizens can express their views, have them taken seriously and be offered alternative ones, instead of being considered as passive recipients of information or, worse, as plebs who solely deserve to be reeducated. Along with local administrations, NGOs and private companies can also engage in information strategies or organize meetings, addressing a general public or particular groups such as populist right-wing supporters.

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Such non-state actors too should avoid paternalistic approaches.

Last but not least, information needs not only to be made available but also to be efficaciously communicated. Right-wing populism provides citizens with oversimplified yet convincing pictures. Therefore, they are unlikely to look for alternative accounts and may be skeptical towards excessively vague, nuanced and complex ones. Solid counterarguments should be specifically formulated to oppose right-wing populists’ flawed rhetoric and addressed to the very same people target. Such counterarguments should highlight why populist rhetoric is fallacious or misleading and offer a credible alternative account. Finally, since populist right-wing message is particularly effective in appealing to emotions and values, not only rational but also emotive roots of anti-immigrant sentiments are to be taken into account while developing an information strategy.

### 5. Personal conclusions

1) Even the harshest critics have acknowledged Kelsen’s great historical merit: to have brought about a decisive change in direction in the study of international law, moving away from the narrow perspective of statist legal positivism towards a presentation of the problem of the world order in radically new terms. There is no doubt that Kelsen, fifty years ago, anticipated many of the legal and institutional problems that have emerged at the international level in the second half of our century. Consider the processes of globalization that have dramatically raised the issue of the crisis of nation-states and of the Westphalian system founded on their sovereignty. Consider the growing assertion of the doctrine of human rights and the new practice of ‘humanitarian intervention’ to protect them, phenomena that have both contributed *de facto* to extending the subjectivity of international law to individuals[378]. Consider, over and above all, the recent creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda - mandated to judge war crimes and crimes against humanity committed by individuals - which are very likely preludes to the creation before too long of a permanent international criminal court.

Moreover, one cannot fail to recognize the profound originality and theoretical greatness of Kelsen’s internationalist constructions, supported by many, among whom Norberto Bobbio[379], Richard Falk and Antonio Cassese[380]. Finally, one cannot but recognize that, despite the proclaimed purity of his theory - indeed, incorporating in it, with systematic inconsistency, a quantity of value assumptions and historical and empirical references - Kelsen has proved himself a jurist attentive like few others to the international events of his time: from the ‘nationalist madness’ that invaded European culture with the failure of the League of Nations, to the primary imperative of the construction of a more ordered, peaceful pattern for the world after the scourge of the two world wars[381].

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To conclude, the first section argues that *vis*actions should be considered a distinct form of force from acts of war. The *vis/bellum* distinction can be maintained by the difference in the degree of force used, the timeline of the operation and the theatre of operation. I think that even though changes in modern warfare, namely the introduction of new weapons such as drones or the evolving nature of threat are crucial to bring *vis*actions to the forefront of academic attention, *vis* actions are not particularly a new feature of modern war. This is why it's even more urgent to recognise *vim* force as morally distinctive from *bellum*. Only when this is applied can we move on to the legal and moral implications of such a separation.

2) The debate between consociationalists and liberals seems to have reached a stalemate. While consociationalists claim that the institutional devices they propose for achieving a more inclusive approach towards comprehensive worldviews do not conflict with liberal values concerning the liberty and equality of the individual, while liberals fear that any focus on groups as the unit of political representation and debate may impede the individual's freedom[382]. The second section has provided a new perspective on this debate between consociationalism and liberalism. I have shown that it is not only the institutional arrangements that determine the inclusiveness of a democratic system, but also (or perhaps even more so) the understanding of comprehensive outlooks or group identities underpinning these institutional arrangements[383]. The liberal secular contention that the public and the private sphere can and ought to be separated forms a normative, comprehensive, worldviews in itself. Theories taking this as their point of departure are thus not neutral towards comprehensive worldviews, but instead risk subordinating certain worldviews to others on basis of this distinction.

A reinterpretation of the public/private divide has not resolved the current impasse in the consociationalism/liberalism debate. What has been argued is the two positions should not be conceived of as opposites, but rather as similar understandings of and solutions to different problems[384]. While the object of both theories is different, religious difference versus (ethno-) national difference, both see this problem through the lens of the supposed neutrality of the public sphere, and offer a solution based on the assumption of the desirability of the neutrality of the public sphere. When we look at the debate in this way, it becomes clear that we do not have to be either consociationalists or liberals, but that the two perspectives are compatible to the extent that they have different subject matters.

To move beyond the dichotomies implied by public/private, accommodation/integration, and rational/irrational dichotomies, two different angles for further research have been suggested. Critical contributions to secular studies have aimed to break down the public/private divide and offer more a more nuanced understanding of religion. This

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approached could be extended to cover not only religious, but also other forms of pluralism. Furthermore, starting from a rethinking of the connections between group membership and citizenship, may also provide a new impulse to thinking about democracy and (severe) pluralism.

Liberal societies conventionally treat religion as unique under the law, requiring both special protection (as in guarantees of free worship) and special containment (to keep religion and the state separate). But recently this idea that religion requires a legal exception has come under fire from those who argue that religion is no different from any other conception of the good, and the state should treat all such conceptions according to principles of neutrality and equal liberty. In particular, I have highlighted that Cécile Laborde agrees with much of this liberal egalitarian critique, but she argues that a simple analogy between the good and religion misrepresents the complex relationships among religion, law and the state. Religion serves as more than a statement of belief about what is true, or a code of moral and ethical conduct. It also refers to comprehensive ways of life, political theories of justice, models of voluntary association, and vulnerable collective identities[385].

3) In the third section I put forward an ameliorative account of the poverty migrant. I argued that the poverty migrant is excluded from the tools of regular economic migration and not entitled to refugee protection. The poverty migrant is - similar to the refugee - trapped in an unprivileged position that is marked by her basic needs deprivation. She tries to escape from this unprivileged position by applying for Asylum. In my point of view the poverty migrant should be entitled to stay in a liberal democratic state, because she is deprived of her basic needs. I defended this view against one main objections that targets the similarity between refugees and poverty migrants: surrogate membership.

As to the ‘Gender & Race’ problem, Haslanger believes that identities may not be all-or-nothing, i.e., racial identities may come in degrees and have different formations[386]. So racial, gender or ethnic identities may be formed in a developmental process. Her idea that we can organize around values, cultures or practices rather than races makes quite sense.

When we think of “Zaza” people of Turkey, some of which count themselves as Turkish, some other as “Kurdish” and some other as just “Zaza”, Haslanger’s account seems as a remedy to such complexities and controversies. So Haslanger’s solution of a “raceless” world in which people organize around cultures may provide tools and basis for resolution of such controversies, too.

Therefore, let me quote Haslanger herself: “I call upon us to reject what seemed to

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be positive social identities. I’m suggesting that we should work to undermine those forces that make being a man, a woman, or a member of a racialized group possible; we should refuse to be gendered man or woman, refuse to be raced. This goes beyond denying essentialist claims about one’s embodiment and involves an active political commitment to live one’s life differently”[\[387\]](#).

4) The last section of my paper argued that normative political theory should take seriously the rise of populist right-wing movements and the spreading of anti-immigrant sentiments in Western liberal democracies. The aim was to show that this issue is particularly relevant for theorists working on the ethics of migration. First of all, public opinion’s hostile attitude towards immigrants poses serious feasibility constraints on the implementation of migration and integration policies. What is more, citizens are also electors and the democratic principles impose to take the opinion of right-wing populist parties’ electorate into account.

It has been argued that anti-immigrant sentiments emerge as a relevant topic when adopting a realistic approach to the ethics of migration, dealing with how liberal democracies should manage immigration here and now, under current conditions. I contended that a realistic ethics of migration should not only recognize the phenomenon, without demonizing or simply dismissing it, but also offer strategies to reduce the appeal of anti-immigrant rhetoric. Finally, I proposed two lines of action: firstly, focusing on local-level policies to increase positive interaction between native citizens and immigrants; secondly, providing information on immigration related issues, using specifically tailored counterarguments to object to populist right-wing narrative. In both cases, I suggested that local administrations can be the most relevant actors in engaging in a bidirectional dialogue with people having anti-immigrant sentiments, in order to take them seriously and avoid paternalistic approaches which can fuel anti-elitism and provoke backlash reactions.

### Endnotes

[\[1\]](#) Joschka Fischer, *Vom Staatenverbund zur Föderation—Gedanken über die Finalität der europäischen Integration [From Confederacy to Federation: Thoughts on the Finality of European Integration]* (May 12, 2000), <http://whi-berlin.de/documents/fischer.pdf>. See also WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? RESPONSES TO JOSCHKA FISCHER (Christian Joerges et al. eds., 2000) (illustrating how widely the lecture was noted).

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[2] A chapter from Joseph H.H. Weiler’s Ph.D. thesis was ground-breaking, see Joseph H.H. Weiler, *The Community System: The Dual Character of Suprenationalism*, 1 Y.B. EUR. L. 257-306 (1981), and then the seminal work he orchestrated, INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1985).

[3] See Presidency Conclusions of the Lisbon Council of Mar. 23-24 2000, EUR. PARL. DOC., [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm).

[4] As to two Italian books: Mauro Barberis, *Europa del diritto*, il Mulino, Bologna, 2008; Id., *Stato costituzionale. Sul nuovo costituzionalismo*, Mucchi, Milano, 2013.

[5] See Christian Joerges, *What is left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUR. L. REV. 461, 465 (2005); Christian Joerges, *Europa nach dem Ordoliberalismus: Eine Philippika*, 43 KRITISCHE JUSTIZ 394 (2010).

[6] Ernst-Joachim Mestmäcker, *Macht-Recht-Wirtschaftsverfassung*, 137 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 97, 106 (1973). See also the lecture at the Verein für Socialpolitik conference in Bonn in 1972: Ernst-Joachim Mestmäcker, *Power, Law and Economic Constitution*, 11 GERMAN ECON. REV. 177-192 (1973).

[7] See MILÈNE WEGMANN, FRÜHER NEOLIBERALISMUS UND EUROPÄISCHE INTEGRATION (2002) (re-constructing this scenario thoroughly). Her work corresponds instructively to Wolfgang Fikentscher’s earlier *magnum opus* on *Wirtschaftsrecht* (economic law). *Id.* Decades before the studies on global governance, European governance, the relation between the levels and the impact of transnational governance on national statehood became *en vogue* in political science, and “constitutionalism beyond the state” became everybody’s concern in legal scholarship, Fikentscher had conceptualized WIRTSCHAFTSRECHT (1983) in truly transnational and constitutional perspectives, and composed the two monumental volumes accordingly: the first volume is dedicated to *Weltwirtschaftsrecht* (world economic law) and *Europäisches Wirtschaftsrecht* (European economic law); national economic law (*Deutsches Wirtschaftsrecht*) is presented upon this basis. This conceptualization documents the truly universalist commitments of the ordo-liberal tradition which Wegmann emphasises in her reconstruction of the ordo-liberal tradition.

[8] Ernst-Joachim Mestmäcker, *Address at the Verein für Socialpolitik Conference: Macht-Recht-Wirtschaftsverfassung [Power-Law-Economic Constitution]* (1972);

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Mestmäcker, *supra* note 5.

[9] Ernst-Joachim Mestmäcker, *supra* note 5.

[10] FRIEDRICH HÖLDERLIN, *PATMOS DEM LANDGRAFEN VON HOMBURG ÜBERREICHTE HANDSCHRIFT* (1802), *quoted in* FRIEDRICH HÖLDERLIN WERKE 379 (1954), *translated in* MICHAEL HAMBURGER, FRIEDRICH HÖLDERLIN, *SELECTED POEMS AND FRAGMENTS* 243 (1994).

[11] Max Weber (born April 21, 1864, Erfurt, Prussia, [now Germany]—died June 14, 1920, Munich, Germany), was a 19th-century German sociologist and one of the founders of modern sociology. He wrote *The Protestant Ethic and the Spirit of Capitalism* in 1905.

He was a precocious child; he went to university and became a professor, but suffered a mental breakdown in 1897 that left him unable to work for five years. In 1905 he published his most famous work, *The Protestant Ethic and the Spirit of Capitalism*. He returned to teaching in 1918 and died in 1920. He is considered the father of modern sociology.

His father, Max Weber Sr., was a politically active lawyer with a penchant for “earthly pleasures,” while his mother, Helene Fallenstein Weber, preferred a more ascetic lifestyle. The conflicts this created in their marriage acutely influenced Max. Still, their house was full of prominent intellectuals and lively discourse, an environment in which Weber thrived. Growing up, he was bored with school and disdained his teachers, but devoured classic literature on his own.

After graduating from high school, Weber studied law, history, philosophy and economics for three semesters at Heidelberg University before spending a year in the military. When he resumed his studies in 1884, he went to the University of Berlin and spent one semester at Göttingen. He passed the bar exam in 1886 and earned his Ph.D. in 1889, ultimately completing his habilitation thesis, which allowed him to obtain a position in academia.

Weber married a distant cousin, Marianne Schnitger, in 1893. He got a job teaching economics at Freiburg University the following year, before returning to Heidelberg in 1896 as a professor. In 1897, Max had a falling out with his father, which went unresolved. After his father died in 1897, Weber suffered a mental breakdown. He was plagued by depression, anxiety and insomnia, which made it impossible for him to teach. He spent the next five years in and out of sanatoriums.

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When Weber was finally able to resume working in 1903, he became an editor at a prominent social science journal. In 1904, he was invited to deliver a lecture at the Congress of Arts and Sciences in St. Louis, Missouri and later became widely known for his famed essays, *The Protestant Ethic and the Spirit of Capitalism*. These essays, published in 1904 and 1905, discussed his idea that the rise of modern capitalism was attributable to Protestantism, particularly Calvinism.

After a stint volunteering in the medical service during World War I, Weber published three more books on religion in a sociological context. These works, *The Religion of China* (1916), *The Religion of India* (1916) and *Ancient Judaism* (1917-1918), contrasted their respective religions and cultures with that of the Western world by weighing the importance of economic and religious factors, among others, on historical outcomes. Weber resumed teaching in 1918. He intended to publish additional volumes on Christianity and Islam, but he contracted the Spanish flu and died in Munich on June 14, 1920. His manuscript of *Economy and Society* was left unfinished; it was edited by his wife and published in 1922.

1) In general, see: A. Korotayev, A. Malkov, D. Khaltourina D. *Introduction to Social Macrodynamics*. Moscow: URSS, 2006; Bernhard K. Quensel (2007), *Max Webers Konstruktionslogik. Sozialökonomik zwischen Geschichte und Theorie*. Baden-Baden: Nomos. [Revisiting MW's concept of sociology against the background of his juristic and economic provenance within the framework of “social economics”]; Guenther Roth (2001). *Max Webers deutsch-englische Familiengeschichte*. J.C.B. Mohr (Paul Siebeck); Joachim Radkau (2005). *Max Weber The most important Weber-biography on Max Weber's life and torments since Marianne Weber*; Richard Swedberg, “Max Weber as an Economist and as a Sociologist”, in *American Journal of Economics and Sociology*; William H. Swatos, ed. (1990), *Time, Place, and Circumstance: Neo-Weberian Studies in Comparative Religious History*. New York: Greenwood Press; Richard Swedberg, *Max Weber and the Idea of Economic Sociology*. Princeton: Princeton University Press; Marianne Weber (1926/1988). *Max Weber: A Biography*. New Brunswick: Transaction Books.

2) As for the Italian legal debate, see: Franco Ferrarotti, *Max Weber e il destino della ragione*, Bari-Roma, Laterza, 1985; Massimo Fotino e Marta Losito, *La ricezione di Max Weber in Italia: ricerca bibliografica*, in “Annali dell'Istituto storico italo-germanico in Trento”, IX/1983, Il Mulino, Bologna; David Beetham, *La teoria politica di Max Weber*, Bologna, Il Mulino, 1989; Francesco Tuccari, *Carisma e leadership nel pensiero di Max Weber*, Milano, Franco Angeli, 1991; Francesco Tuccari, *I dilemmi della democrazia moderna. Max Weber e Robert Michels*, Roma-Bari, Laterza, 1993; Furio Ferraresi, *Il fantasma della comunità. Concetti politici e scienza sociale in Max Weber*, Milano, Franco

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Angeli, 2003; Realino Marra, *Capitalismo e anticapitalismo in Max Weber*, Bologna, Il Mulino, 2002; Id., *La religione dei diritti. Durkheim - Jellinek - Weber*, Torino, Giappichelli, 2006; Id., *Dalla comunità al diritto moderno. La formazione giuridica di Max Weber, 1882-1889*, Giappichelli, Torino, 1992; Edoardo Massimilla, *Intorno a Weber. Scienza, vita e valori nella polemica su Wissenschaft als Beruf*, Napoli, Liguori, 2000; Id., *Scienza, professione, gioventù: rifrazione weberiane*, Soveria Mannelli, Rubbettino, 2008; Id., *Tre studi su Weber tra Rickert e von Kries*, Napoli, Liguori, 2010.

Now I would like to examine a Weber's book: *Politics as a Vocation (Politik als Beruf)*, originated in the second lecture of a series (the first was *Science as a Vocation*) Weber gave in Munich to the “Free (i.e. Non-incorporated) Students Union” of Bavaria on 28 January 1919, during the German Revolution. Published in an extended version in July 1919, it is today regarded as a classic work of political science.

In his essay Weber states that politics is the art of compromise and decision making based on social benefits weighed against costs; in this respect, political action cannot be rooted only in conviction, since one's conviction can be another's social anathema. Using as an example Christianity, seen as a core conviction, Weber affirms that a politician cannot only be a man of “true Christian ethic” (understood in terms “turning the other cheek”). The political realm is no realm for saints. A politician should marry the ethic of ultimate ends with an ethic of responsibility. The latter, which is the ultimate criterion for judging politicians, should take into account all that is at stake in making a political decision, namely all the convictions and the relative weight and moral importance. A politician must possess both passion for his vocation and the capacity to distance himself from the subject of his exertions (the governed).

The lecture introduces a definition of the state that has become pivotal to Western social thought: that the state is that entity which claims the monopoly of the legitimate use of force, which it may therefore elect to delegate as it sees fit. Politics is to be understood as any activity in which the state might engage in order to influence the relative distribution of force. Politics thus comes to obtain two power-based concepts, to be understood as deriving of power.

Weber defines politics as a form of “independent leadership activity”. In this essay, the “state” serves as the placeholder for the analysis of political organizations. The grounds for the legitimate rule of these political organizations, according to Weber, fall into three major categories, or types:

1. a) Traditional: the authority of “eternal past,” based on habit. Weber defines custom as

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largely patriarchal, patrimonial, and traditional in scope.

2. b) *Gift of grace/charisma*: The authority of the “revelations, heroism, or other leadership qualities of an individual”. Associated with “charisma” of prophets, demagogues, and popular vote.
3. c) *Statutes*: Legal rational authority, legality based on valid statutes. Based on rational competence and obedience of the “servant of the state”.

Weber focuses his analysis on “political organizations”, i.e. “states”, and identifies two general forms of the state, supposedly encompassing all state forms at the most general.

1. The administrative staff beneath the ruler in status and power has its own means of administration separate from those of the ruler. This can include various forms of wealth and possessions, as well as means of production and control over labor. This administrative staff is essentially aristocratic, subdivided into distinct estates.
2. The administrative staff is completely or partially separated from the actual tools of administration, i.e., how the proletariat is separated from the means of production. This staff become confidants without means in a patriarchal organization of deference and delegation.

Weber delineates two different ideas of the “state” based on the relationship between the administrators and their access to the actual means of administration. The second form of the state is considered to be modern; the administrators do not own the money, buildings, and organizations they direct but are in the process of becoming expropriated expropriators by the actions of the monarch or the higher ruling class. With this expropriation completed, the leaders are then free to invest all resources in what way they choose, executive decisions often remaining with the discretion of the highest representatives.

[12] Max Weber, *The National State and Economic Policy (Freiburg Address)*, 9 ECON. & SOC’Y 428, 438 (Ben Fowkes trans., 1980) (1895).

[13] Max Weber, *Inaugural Lecture at Freiburg: Der Nationalstaat und die Volkswirtschaftspolitik* (May 1895), at 1-2.

[14] See Rita Aldenhoff, *Nationalökonomie, Nationalstaat und Werturteile. Wissenschaftskritik in Max Webers Freiburger Antrittsrede im Kontext der Wissenschaftsdebatten in den 1890er Jahren*, in DEUTSCHE RECHTS - UND SOZIALPHILOSOPHIE UM 1900 79-90 (Gerhard Sprenger ed., 1991).

[15] Carl Schmitt (11 July 1888, Plettenberg, Westphalia, Prussia, - 7 April 1985,

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Plettemberg, North Rhine-Westphalia, West Germany) was a German philosopher, jurist and political theorist. Schmitt is a major figure in 20th century legal and political theory, writing extensively on the effective wielding of political power. His work has been a major influence on subsequent political theory, legal theory, continental philosophy and political theology in the 20th century and beyond.

Schmitt's work has attracted the attention of numerous philosophers and political theorists, including Walter Benjamin, Leo Strauss, Jürgen Habermas, Friedrich Hayek, Jacques Derrida, Hannah Arendt, Susan Buck-Morss, Giorgio Agamben, Jaime Guzmán, Antonio Negri and Slavoj Žižek among many others. Much of his work remains both influential and controversial today in light of his association with Nazism, for which he is known as the “crown jurist of the Third Reich”.

Schmitt, whose father was a minor businessman, was the son of Roman Catholic parents from the German Eifel region who settled in Plettemberg, Westphalia. He studied law in Berlin, Munich and Strasbourg and took his graduation and state exams in the then-German Strasbourg in 1915. He volunteered for the army in 1916. The same year, he earned his habilitation in Strasbourg. He taught at various business schools and universities in Munich, Greifswald, Bonn, Berlin and Cologne.

In 1916, Schmitt married his first wife, Pavla (in Germany usually rendered as “Pawla” even though the letter “w” is used in the Serbian auxiliary Latin alphabet only for foreign words) Dorotić, a Serbian woman who pretended to be a countess. They were divorced although an appeal to the Church for an annulment was rejected. In 1926 he married his second wife, Duška Todorović (1903-1950), also Serbian; they had one daughter, called Anima. Subsequently Schmitt was excommunicated because his first marriage had not been annulled by the Church. His daughter Anima Schmitt de Otero (1931-1983) was married, from 1957, to Alfonso Otero Valera (1925-2001), a Spanish law professor at the University of Santiago de Compostela and a member of the ruling Spanish Falange party under the Franco régime. She translated several works by her father into Spanish. Letters from Carl Schmitt to his son-in-law have also been published.

As a young man, Schmitt was “a devoted Catholic until his break with the church in the mid twenties.” From around the end of the First World War he began to describe his Catholicism as “displaced” and “de-totalised”. Consequently, Gross argues that his work “cannot be reduced to Roman Catholic theology given a political turn. Rather, Schmitt should be understood as carrying an atheistic political-theological tradition to an extreme.”

Apart from his academic functions, in 1932 Schmitt was counsel for the Reich

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government in the case “*Preussen contra Reich*” wherein the SPD-led government of the state of Prussia disputed its dismissal by the right-wing von Papen government. Papen was motivated to make this move because Prussia, by far the largest state in Germany, served as a powerful base upon which the political left could draw, and also provided them with institutional power, particularly in the form of the Prussian Police. Schmitt, Carl Bilfinger and Erwin Jacobi represented the Reich and one of the counsel for the Prussian government was Hermann Heller. The court ruling on October 1932 was that the Prussian government had been unlawfully suspended but the Reich had the right to install a commissar. In German history, this struggle leading to the *de facto* destruction of federalism in the Weimar republic is known as the “Preußenschlag.”

Schmitt remarked on 31 January 1933 that with Hitler’s appointment “one can say that ‘Hegel died.’” Richard Wolin observes: «it is Hegel qua philosopher of the “bureaucratic class” or Beamtenstaat that has been definitely surpassed with Hitler’s triumph. This class of civil servants—which Hegel in the *Rechtsphilosophie* deems the “universal class” – represents an impermissible drag on the sovereignty of executive authority. For Schmitt the very essence of the bureaucratic conduct of business is reverence for the norm, a standpoint that could not but exist in great tension with the doctrines of Carl Schmitt. Hegel had set an ignominious precedent by according this putative universal class a position of preeminence in his political thought, insofar as the primacy of the bureaucracy tends to diminish or supplant the prerogative of sovereign authority».

Schmitt joined the Nazi Party on 1 May 1933. Within days of joining the party, Schmitt was party to the burning of books by Jewish authors, rejoicing in the burning of “un-German” and “anti-German” material, and calling for a much more extensive purge, to include works by authors influenced by Jewish ideas. In July, he was appointed State Councillor for Prussia (*Preußischer Staatsrat*) by Hermann Göring and became the president of the *Vereinigung nationalsozialistischer Juristen* (“Union of National-Socialist Jurists”) in November. He also replaced Hermann Heller as professor at the University of Berlin (a position he held until the end of World War II). He presented his theories as an ideological foundation of the Nazi dictatorship, and a justification of the Führer state with regard to legal philosophy, in particular through the concept of *auctoritas*.

Six months later, in June 1934, Schmitt was appointed editor-in-chief of the Nazi news organ for lawyers, the *Deutsche Juristen-Zeitung* (“German Jurists’ Journal”). In July 1934, he published in it “The Leader Protects the Law (*Der Führer schützt das Recht*)”, a justification of the political murders of the Night of the Long Knives with the authority of Hitler as the “highest form of administrative justice (*höchste Form administrativer Justiz*)”. Schmitt presented himself as a radical anti-semitic and also was the chairman of a law

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teachers’ convention in Berlin in October 1936, where he demanded that German law be cleansed of the “Jewish spirit (*jüdischem Geist*)”, going so far as to demand that all publications by Jewish scientists should henceforth be marked with a small symbol.

Nevertheless, in December 1936, the SS publication *Das schwarze Korps* accused Schmitt of being an opportunist, a Hegelian state thinker, and basically a Catholic, and called his anti-semitism a mere pretense, citing earlier statements in which he criticized the Nazis’ racial theories. After this, Schmitt resigned from his position as “Reichsfachgruppenleiter” (*Reich Professional Group Leader*), although he retained his post as a professor in Berlin, and his post as “*Preußischer Staatsrat*”. Although Schmitt continued to be investigated into 1937, further reprisals were stopped by Göring.

In 1945, Schmitt was captured by American forces and, after spending more than a year in an internment camp, he returned to his home town of Plettenberg following his release in 1946, and later to the house of his housekeeper Anni Stand in Plettenberg-Pasel. Schmitt refused every attempt at de-nazification, which effectively barred him from positions in academia. Despite being isolated from the mainstream of the scholarly and political community, he continued his studies especially of international law from the 1950s on, and he received a never-ending stream of visitors, both colleagues and younger intellectuals, until well into his old age. Important among these visitors were Ernst Jünger, Jacob Taubes and Alexandre Kojève.

In 1962, Schmitt gave lectures in Francoist Spain, two of them giving rise to the publication, the following year, of *Theory of the Partisan* (Telos Press, 2007), in which he qualified the Spanish Civil War as a “war of national liberation” against “international Communism.” Schmitt regarded the partisan as a specific and significant phenomenon that, in the latter half of the 20th century, indicated the emergence of a new theory of warfare.

Schmitt died on 7 April 1985 and is buried in Plettenberg.

In 1921, Schmitt became a professor at the University of Greifswald, where he published his essay *Die Diktatur* (on dictatorship), in which he discussed the foundations of the newly established Weimar Republic, emphasising the office of the *Reichpräsident*. In this essay, Schmitt compared and contrasted what he saw as the effective and ineffective elements of the new constitution of his country. To him, the office of the president could be characterized as a comparatively effective element within the new constitution, because of the power granted to the president to declare a state of emergency. This power, which Schmitt discussed and implicitly praised as dictatorial, was seen as more in line with the underlying mentality of political power than the comparatively slow and ineffective

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processes of legislative political power reached through parliamentary discussion and compromise.

Schmitt was at pains to remove what he saw as a taboo surrounding the concept of "dictatorship" and to show that, in his eyes, the concept is implicit whenever power is wielded through pathways outside the slow processes of parliamentary politics and the bureaucracy:

"If the constitution of a state is democratic, then every exceptional negation of democratic principles, every exercise of state power independent of the approval of the majority, can be called dictatorship."

For Schmitt, every government capable of decisive action must include a dictatorial element within its constitution. Although the German concept of *Ausnahmezustand* is best translated as "state of emergency", it literally means state of exception which, according to Schmitt, frees the executive from any legal restraints to its power that would normally apply. The use of the term "exceptional" has to be underlined here: Schmitt defines sovereignty as the power to *decide* the instauration of state of exception, as Giorgio Agamben has noted. According to Agamben, Schmitt's conceptualization of the "state of exception" as belonging to the core-concept of sovereignty was a response to Walter Benjamin's concept of a "pure" or "revolutionary" violence, which did not enter into any relationship whatsoever with right. Through the state of exception, Schmitt included all types of violence under right, in the case of the authority of Hitler leading to the formulation "The leader defends the law" ("*Der Führer schützt das Recht*").

Schmitt opposed what he called "commissarial dictatorship", or the declaration of a state of emergency in order to save the legal order (a temporary suspension of law, defined itself by moral or legal right): the state of emergency is limited (even if *a posteriori*, by law) to "sovereign dictatorship", in which law was suspended, as in the classical state of exception, not to "save the Constitution", but rather to create another Constitution. This is how he theorized Hitler's continual suspension of the legal constitutional order during the Third Reich (the Weimar Republic's Constitution was never abrogated, underlined Giorgio Agamben; rather, it was "suspended" for four years, first with the 28 February 1933 Reichstag Fire Decree, with the suspension renewed every four years, implying a continual state of emergency).

The direction all this leads, and the reason why Schmitt has been taken so seriously by political theory, is to the theorisation of the crisis and state of emergency not as exceptional moments in political life, opposed to some stable normality, but as themselves the

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predominant form of the life of modern nations.

*On Dictatorship* was followed by another essay in 1922, titled "*Politische Theologie*" (political theology); in it, Schmitt, who at the time was working as a professor at the University of Bonn, gave further substance to his authoritarian theories, analysing the concept of "free will" influenced by Christian-Catholic thinkers. The book begins with Schmitt's famous, or notorious, definition: "Sovereign is he who decides on the exception." By "exception," Schmitt means the appropriate moment for stepping outside the rule of law in the public interest. Schmitt proposes this definition to those offered by contemporary theorists of sovereignty, particularly Hans Kelsen, whose work is criticized at several points in the essay.

The book's title derives from Schmitt's assertion (in chapter 3) that "all significant concepts of the modern theory of the state are secularized theological concepts" - in other words, that political theory addresses the state (and sovereignty) in much the same manner as theology does God.

A year later, Schmitt supported the emergence of totalitarian power structures in his paper "*Die geistesgeschichtliche Lage des heutigen Parlamentarismus*" (roughly: "The Intellectual-Historical Situation of Today's Parliamentarism", translated as *The Crisis of Parliamentary Democracy* by Ellen Kennedy). Schmitt criticized the institutional practices of liberal politics, arguing that they are justified by a faith in rational discussion and openness that is at odds with actual parliamentary party politics, in which outcomes are hammered out in smoke-filled rooms by party leaders. Schmitt also posits an essential division between the liberal doctrine of separation of powers and what he holds to be the nature of democracy itself, the identity of the rulers and the ruled. Although many critics of Schmitt today, such as Stephen Holmes in his *The Anatomy of Anti-Liberalism*, take exception to his fundamentally authoritarian outlook, the idea of incompatibility between liberalism and democracy is one reason for the continued interest in his political philosophy.

Schmitt changed universities in 1926, when he became professor of law at the Handelshochschule in Berlin, and again in 1932, when he accepted a position in Cologne. It was from lectures at the Deutsche Hochschule für Politik in Berlin that he wrote his most famous paper, "*Der Begriff des Politischen*" ("The Concept of the Political"), in which he developed his theory of "the political". Distinct from party politics, "the political" is the essence of politics. While churches are predominant in religion or society is predominant in economics, the state is predominant in politics. Yet for Schmitt the political was not an autonomous domain equivalent to the other domains, but rather the existential basis that would determine any other domain should it reach the point of politics (e.g. religion ceases

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to be merely theological when it makes a clear distinction between the “friend” and the “enemy”). The political is not equal to any other domain, such as the economic, but instead is the most essential to identity.

Schmitt, in perhaps his best-known formulation, bases his conceptual realm of state sovereignty and autonomy upon the distinction between *friend* and *enemy*. This distinction is to be determined “existentially,” which is to say that the enemy is whoever is “in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.” (Schmitt, 1996, p. 27) Such an enemy need not even be based on nationality: so long as the conflict is potentially intense enough to become a violent one between political entities, the actual substance of enmity may be anything.

Although there have been divergent interpretations concerning this work, there is broad agreement that “*The Concept of the Political*” is an attempt to achieve state unity by defining the content of politics as opposition to the “other” (that is to say, an enemy, a *stranger*. This applies to any person or entity that represents a serious threat or conflict to one’s own interests.) In addition, the prominence of the state stands as a neutral force over potentially fractious civil society, whose various antagonisms must not be allowed to reach the level of the political, lest civil war result.

Some of the letters between Schmitt and Strauss have been published. Schmitt’s highly positive reference for Leo Strauss, and Schmitt’s approval of his work, had been instrumental in winning Strauss the scholarship funding that allowed him to leave Germany. In turn, Strauss’s critique and clarifications of *The Concept of the Political* led Schmitt to make significant emendations in its second edition. Writing to Schmitt in 1932, Strauss summarised Schmitt’s political theology thus: “Because man is by nature evil, he therefore needs *dominion*. But dominion can be established, that is, men can be unified only in a unity against - against other men. Every association of men is necessarily a separation from other men... the political thus understood is not the constitutive principle of the state, of order, but a condition of the state.”

*The Nomos of the Earth* is Schmitt’s most historical and geopolitical work. Published in 1950, it was also one of his final texts. It describes the origin of the Eurocentric global order, which Schmitt dates from the discovery of the New World, discusses its specific character and its contribution to civilisation, analyses the reasons for its decline at the end of the 19th century, and concludes with prospects for a new world order. It defends European achievements, not only in creating the first truly global order of international law, but also in limiting war to conflicts among sovereign states, which, in effect, civilised war. In Schmitt’s view, the European sovereign state was the greatest achievement of Occidental

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rationalism; in becoming the principal agency of secularisation, the European state created the modern age.

Notable in Schmitt's discussion of the European epoch of world history is the role played by the New World, which ultimately replaced the old world as the centre of the Earth and became the arbiter in European and world politics. According to Schmitt, the United States' internal conflicts between economic presence and political absence, between isolationism and interventionism, are global problems, which today continue to hamper the creation of a new world order. But however critical Schmitt is of American actions at the turn of the 20th century and after World War I, he considered the United States to be the only political entity capable of resolving the crisis of global order.

Schmitt's *Theory of the Partisan* originated in two lectures delivered in 1962, and has been seen as a rethinking of *The Concept of the Political*. It addressed the transformation of war in the post-European age, analysing a specific and significant phenomenon that ushered in a new theory of war and enmity. It contains an implicit theory of the terrorist, which in the 21st century has ushered in yet another new theory of war and enmity. In the lectures, Schmitt directly tackles the issues surrounding “the problem of the Partisan” figure: the guerrilla or revolutionary who “fights irregularly” (p. 3). Both because of its scope, with extended discussions on historical figures like Napoleon Bonaparte, Vladimir Lenin and Mao Zedong, as well as the events marking the beginning of the 21st century, Schmitt's text has had a resurgence of popularity. Jacques Derrida, in his *Politics of Friendship* remarked: «Despite certain signs of ironic distrust in the areas of metaphysics and ontology, *The Concept of the Political* was, as we have seen, a philosophical type of essay to ‘frame’ the topic of a concept unable to constitute itself on philosophical ground. But in *Theory of the Partisan*, it is in the same areas that the topic of this concept is both radicalised and properly uprooted, where Schmitt wished to regasp in history the event or node of events that engaged this uprooting radicalisation, and it is precisely there that the philosophical as such intervenes again.»

Schmitt concludes *Theory of the Partisan* with the statement: “The theory of the partisan flows into the question of the concept of the political, into the question of the real enemy and of a new *nomos* of the earth.”

- English translations of Carl Schmitt:

*The Concept of the Political*. George D. Schwab, trans. (University of Chicago Press, 1996; Expanded edition 2006, with an Introduction by Tracy B. Strong). Original publication: 1927, 2nd edn. 1932; *Constitutional Theory*. Jeffrey Seitzer, trans. (Duke University Press,

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2007). Original publication: 1928; *The Crisis of Parliamentary Democracy*. Ellen Kennedy, trans. (MIT Press, 1988). Original publication: 1923, 2nd edn. 1926; *Four Articles, 1931-1938*. Simona Draghici, trans. (Plutarch Press, 1999). Originally published as part of *Positionen und Begriffe im Kampf mit Weimar - Genf - Versailles, 1923-1939* (1940); *The Idea of Representation: A Discussion*. E. M. Codd, trans. (Plutarch Press, 1988), reprint of *The Necessity of Politics* (1931). Original publication: 1923; *Land and Sea*. Simona Draghici, trans. (Plutarch Press, 1997). Original publication: 1954; *Legality and Legitimacy*. Jeffrey Seitzer, trans. (Duke University Press, 2004). Original publication: 1932; *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. George D. Schwab & Erna Hilfstein, trans. (Greenwood Press, 1996). Original publication: 1938; *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. G.L. Ulmen, trans. (Telos Press, 2003). Original publication: 1950; *On the Three Types of Juristic Thought*. Joseph Bendersky, trans. (Praegar, 2004). Original publication: 1934; *Political Romanticism*. Guy Oakes, trans. (MIT Press, 1986). Original publication: 1919, 2nd edn. 1925; *Political Theology: Four Chapters on the Concept of Sovereignty*. George D. Schwab, trans. (MIT Press, 1985 / University of Chicago Press; University of Chicago edition, 2004 with an Introduction by Tracy B. Strong. Original publication: 1922, 2nd edn. 1934; *Roman Catholicism and Political Form*. G. L. Ulmen, trans. (Greenwood Press, 1996). Original publication: 1923; *State, Movement, People* (includes *The Question of Legality*). Simona Draghici, trans. (Plutarch Press, 2001). Original publication: *Staat, Bewegung, Volk* (1933); *Das Problem der Legalität* (1950); *Theory of the Partisan*. G. L. Ulmen, trans. (Telos Press, 2007). Original publication: 1963; 2nd ed. 1975; *The Tyranny of Values*. Simona Draghici, trans. (Plutarch Press, 1996). Original publication: 1979; *War/Non-War: A Dilemma*. Simona Draghici, trans. (Plutarch Press, 2004). Original publication: 1937.

- Secondary literature:

Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998); Id., *State of Exception* (2005); Jeffrey Andrew Barash, *Politiques de l'histoire. L'historicisme comme promesse et comme mythe* (2004); Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (2000); Amine Benabdallah, *Une réception de Carl Schmitt dans l'extrême-gauche: La théologie politique de Giorgio Agamben* (2007); Eckard Bolsinger, *The Autonomy of the Political: Carl Schmitt's and Lenin's Political Realism* (2001); Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (1998); Mariano Croce, Andrea Salvatore, *The Legal Theory of Carl Schmitt* (Abingdon: Routledge, 2012); Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’,” in *Acts of Religion* (2002); Id., *Politics of Friendship* (1997); Carlo Galli, “Hamlet: Representation and the Concrete” (translated from

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Italian by Adam Sitze and Amanda Minervini) in *Points of Departure: Political Theology on the Scenes of Early Modernity*, Ed. Julia Reinhard Lupton And Graham Hammill, University of Chicago Press, 2011; Paul Gottfried, *Carl Schmitt: Politics and Theory* (New York: Greenwood Press, 1990); Michael Hardt & Antonio Negri, *Empire* (2000); Julia Hell, “Katechon: Carl Schmitt’s Imperial Theology and the Ruins of the Future,” *The Germanic Review* 84:4 (2009): 283 - 326; William Hooker, *Carl Schmitt’s International Thought: Order and Orientation* (Cambridge: Cambridge University Press, 2009); Michael Marder, *Groundless Existence: The Political Ontology of Carl Schmitt*, (London & New York: Continuum, 2010); Reinhard Mehring, *Carl Schmitt - Aufstieg und Fall. Eine Biographie*, München: Verlag C.H. Beck, 2009; Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*, University of Chicago Press, 2011; Chantal Mouffe (ed.), *The Challenge of Carl Schmitt* (1999); Ingo Müller (Deborah Lucas Schneider trans.) (1991). *Hitler’s Justice: The Courts of the Third Reich* (Cambridge, Mass.: Harvard University Press); Ojakangas Mika, *A Philosophy of Concrete Life: Carl Schmitt and the political thought of late modernity* (2nd ed Peter Lang, 2006); Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror* (New York: Palgrave Macmillan, 2009); Nicolaus Sombart, *Die deutschen Männer und ihre Feinde: Carl Schmitt, ein deutsches Schicksal zwischen Männerbund und Matriarchatsmythos*, Munich: Hanser, 1991, (2nd ed Fischer TB, Frankfurt, 1997).

In *Telos*, see also: *Telos*, 72, *Carl Schmitt: Enemy or Foe?* New York: Telos Press, Summer 1987; *Telos*, 109, *Carl Schmitt Now*. New York: Telos Press, Fall 1996; *Telos*, 125, *Carl Schmitt and Donoso Cortés*. New York: Telos Press, Fall 2002; *Telos*, 132, *Special Edition on Carl Schmitt*. New York: Telos Press, Fall 2005; *Telos*, 142, *Culture and Politics in Carl Schmitt* New York: Telos Press, Spring 2008; *Telos*, 147, *Carl Schmitt and the Event*. New York: Telos Press, Summer 2009; *Telos*, 153, *Special Issue on Carl Schmitt’s Hamlet or Hecuba*. New York: Telos Press, Winter 2010; Ola Tunander, *The Dual State and the Sovereign: A Schmittian Approach to Western Politics*, Challenge Second Annual Report to the European Commission 2006 (7.3.3 Work package 3 - Deliverable No. 32), Challenge, Brussels; Johannes, Türk. “The Intrusion: Carl Schmitt’s Non-Mimetic Logic of Art.” *Telos* 142 (2008): 73-89.

[16] The lecture was published as early as April 1939 in the Institute’s series; its 4th edition of 1941 refers to translations into five languages. The quotations in the following are either our own translations of the extremely carefully annotated reprint in GÜNTER MASCHKE, CARL SCHMITT, STAAT, GROßRAUM, NOMOS. ARBEITEN AUS DEN JAHREN 1916-1969 269-320 (1995) or, as the title reproduced in this text, CARL SCHMITT, WRITINGS ON WAR 75-124 (Timothy Nunan ed. & trans., 2011).

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[17] For more detail on the following, see Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 167-191 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

[18] See CARL SCHMITT, WRITINGS ON WAR 110 (Timothy Nunan ed. and trans., 2011). Contemporary reactions attested to how the theory of the *Großraum* with its “German Monroe doctrine” suited Nazi policy; for this reason, the theory is considered Schmitt’s way of indicating his return as a leading legal thinker; see LOTHAR GRUCHMANN, NATIONALSOZIALISTISCHE GROßRAUMORDNUNG. DIE KONSTRUKTION EINER “DEUTSCHEN MONROE-DOKTRIN” 11 (1962); WILLIAM E. SCHEUERMAN & CARL SCHMITT: THE END OF LAW 161, 169 (1965).

[19] On the theoretical understanding, but also the determination with which Schmitt championed this claim of leadership, lucidly HASSO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS 215 (1992); later Oliver Eberl, *Großraum und Imperium. Die Entwicklung der ‘Völkerrechtlichen Großraumordnung’ aus dem Geiste des totalen Krieges*, in GROßRAUM-DENKEN. CARL SCHMITTS KATEGORIE DER GROßRAUMORDNUNG 185-206 (Rüdiger Voigt ed., 2008). More complacently, in contrast, see Horst Dreier’s appreciation in *Wirtschaftsraum – Großraum – Lebensraum. Facetten eines belasteten Begriffs*, in FESTSCHRIFT 600 JAHRE WÜRZBURGER JURISTENFAKULTÄT 47, 66-73 (Horst Dreier, Hans Forkel & Klaus Laubenthal eds., 2002).

[20] Schmitt, *supra* note 131, at 107.

[21] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN L. 9, 16 (2007); Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EURO. J. OF INT’L REL. 395, 411 (2009).

[22] Schmitt, *supra* note 131, at 111; see JOHN P. MCCORMICK, CARL SCHMITT’S CRITIQUE OF LIBERALISM. AGAINST POLITICS AS TECHNOLOGY 42-46, 92-105 (1997) (noting the technicity).

[23] Infamous and important, Carl Schmitt, *Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern* (delivered on Nov. 23, 1932), 2 VOLK UND REICH 81-94 (1933).

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[24] The preliminary remarks to the 4th edition (Berlin 1941) include the famous motto: “We are like mariners on a continuing journey, and no book can be more than a log book.”

[25] CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* (1950); CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* (G.L. Ulmen trans., Telos Press 2003).

[26] Carl Schmitt, *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität*, in 17 *DER STAAT* 321-339 (1978). In this tribute to the French economic theorist François Perroux, who examined apparently related economic dimensions of space, we read at 328:

Today, the issue is about the political system for society adequate in relation to scientific-technical-industrial developments. Today, the adage *cujus industria, ejus regio* or *cujus regio, ejus industria* applies”, and on the following page Schmitt went on: “The industrialised society is bound to rationalisation, including the transformation of law into legality.

[27] Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems gesetzgeberischer Ermächtigungen* (legislative Delegationen), 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252-288 (1938); on this, of course under the impression of the American understanding of the executive, see PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* 62 (2010). Lindseth has underlined the importance and topicality of this aspect of Schmitt’s work already in his essay, Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s–1950s*, 113 *YALE L.J.*, 1343, 1354, 1382 (2004).

[28] JOHN P. MCCORMICK, *CARL SCHMITT’S CRITIQUE OF LIBERALISM. AGAINST POLITICS AS TECHNOLOGY* 122-156 (1997); Ellen Kennedy, *Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, ‘The Dictatorship of the Reich president according to Article 48 R.V.’*, 18 *CONSTELLATIONS* 284-297 (2011).

[29] CARL SCHMITT, *DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF* [1921] (1989). As examples of the copious literature compare the explanations in HASSO HOFMANN, *LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS* (1992).

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[30] Ernst-Wolfgang Böckenförde, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung*, NEUE ZÜRCHER ZEITUNG, June 21, 2010; also Ernst-Wolfgang Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, in 67 JURISTENZEITUNG 197 (2012).

[31] Ulrich Hufeld, *Zwischen Notrettung und Rütlichwur: der Umbau der Wirtschafts- und Währungsunion in der Krise*, 34 INTEGRATION 117, 122 (2011).

[32] CARL SCHMITT, VERFASSUNGSLEHRE 107 (1928) (this author’s translation, 2010).

[33] Frank Schorkopf, *Gestaltung mit Recht – Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 136, 323, 341 (2011); Frank Schorkopf, *Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtssetzung*, 71 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 183 (2012).

[34] *Id.* at 225.

[35] Anna-Bettina Kaiser, *Die Verantwortung der Staatsrechtslehre in Krisenzeiten – Art. 48 WRV im Spiegel der Staatsrechtslehrertagung und des Deutschen Juristentages 1924*, in ZUR AKTUALITÄT DER WEIMARER STAATSRECHTSLEHRE 119-142 (Ulrich Jan Schröder & Antje V. Ungern-Sternberg eds., 2011).

[36] *Id.* at 140.

[37] *See supra* Parts D.III & D.IV.

[38] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND. AFTER THE MADISONIAN REPUBLIC 8 (2010): “When emergencies occur, legislatures acting under real constraints of time, expertise, and institutional energy typically face the choice between doing nothing at all or delegating new powers to the executive to manage the crisis.” This book is riddled with such pronouncements; on this, see NADIA URBINATI, DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE 171-227 (2012); for a critical discussion of the empirical dimensions and claims of *The Executive Unbound*, see Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777 (2012). In an earlier essay, Posner and Vermeule have underlined that they seek to re-construct Schmitt’s work in “generalizable social-scientific terms”; see Posner & Vermeule, *supra* note 126. I am by no means the only one to underline, and to relativize, the topicality of Schmittian notions in the present state of the European project: “Without a modicum of legitimacy derived from

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any European treaties, the austerity dictates of the Troika (comprised of the EU, the ECB, and the IMF) have insinuated themselves as the sovereign acts in the distinctly Schmittian sense of the term, *i.e.*, as extra-legal decisions on the exception.” *Id.* Thus, Michael Marder, *Carl Schmitt and the De-Constitutionalisation of Europe*, contribution to Conference on “Europe after the Euro-crisis: Legitimacy, Democracy and Justice, organised by the Institute for Democratic Governance, Bilbao, September 2-3, 2013 (ms. on file with the author).

[39] Carl Schmitt, *Die Wendung zum totalen Staat* (The turn to the total state), reprinted in CARL SCHMITT: *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENÈ-VERSAILLES, 1923-1939*, 146-153 (1988) (quoted according to the reprint). On this see also CARL SCHMITT, *DER HÜTER DER VERFASSUNG* 78 (1969); on this WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 85 (1965).

[40] Carl Schmitt, *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität*, 17 *DER STAAT* 335 (1978).

[41] Italics are used for German terms and a book title. Italics added. On the recourse to the duality of legality and legitimacy in the present context, see Reinhard Mehring, *Der ‘Nomos’ nach 1945 bei Carl Schmitt und Jürgen Habermas*, in *FORUM HISTORIAE IURIS*, paras. 20-26.

[42] On the theory of the *Rechtsstaat*, see INGEBORG MAUS, *RECHTSTHEORIE UND POLITISCHE THEORIE IM INDUSTRIEKAPITALISMUS* 40 (1986). Schmitt’s differentiation of the categories of “formal” and “political” concepts of law and legislation, see CARL SCHMITT, *VERFASSUNGSLEHRE* 143 (1928) (reprinted in 2010), between the generality of laws and the concrete political act of will, leads him to executive and governmental law-making in the Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems gesetzgeberischer Ermächtigungen* (legislative Delegationen), 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252 (1938); see HASSO HOFMANN, *LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS* 83 (1992).

[43] CARL SCHMITT, *VERFASSUNGSLEHRE* 223 (1928) (reprinted in 2010); see Ulrich K. Preuß, *Die Weimarer Republik – ein Laboratorium für neues verfassungsrechtliches Denken*, in *METAMORPHOSEN DES POLITISCHEN: GRUNDFRAGEN POLITISCHER EINHEITSBILDUNG SEIT DEN 20ER JAHREN* 177, 180. (Andreas Göbel ed., 1995).

44 See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920) [hereinafter *Das Problem der Souveränität*]; *Idem*, ‘Les

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rappports du système entre le droit interne et le droit international public’, 13 *RdC* (1926) 4; *Idem*, ‘Die Einheit von Völkerrecht und staatlichem Recht’, 19 *Zeitschrift für ausländisches öffentliches Recht* (1958); *Idem*, ‘Souveränität’, in H. Kelsen, A. Merkl, A. Verdross, *Die Wiener rechtstheoretische Schule* Bd. 2, (1968); *Idem*, ‘The Essence of International Law’, in K. W. Deutsch, S. Hoffmann (eds.), *The Relevance of International Law. Essays in Honour of Leo Gross* (1968).

[45] For a critique of the excessive normative ambitions of Kelsen’s conception see Bull, ‘Hans Kelsen and International Law’, in R. Tur and W. Twining (eds.), *Essays on Kelsen* (1986); see also Lauterpacht, ‘Kelsen’s Pure Science of Law’, in *Modern Theories of Law* (1933); G. Sperduti, ‘Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne’, 153 *RdC* (1983).

[46] As to a methodology of legal science see: A. Peczenik, “Legal Research and Growth of Science”, en Curiel, J. L., *Memorias del X congreso mundial ordinario de filosofía del derecho y filosofía social*, UNAM, México, vol. V, 1981, pp. 17-28; C. S. Nino, *Algunos modelos metodológicos de ‘ciencia’ jurídica*, Fontamara, México, 2003, cap. I; H. Kelsen, *Teoría Pura del Derecho*, UNAM, México, 1982, párrafos 1-4; 14-18 y 21-22; A. Ross, *Sobre el derecho y la justicia*, Eudeba, Buenos Aires, 1997, pp. 1-72; Atienza y Ruiz Manero, “Dejemos atrás el positivismo jurídico”, en *Isonomía*, 27/2007, pp. 7-28; R. Dworkin, “In Praise of Theory”, en *Arizona State Law Journal*, vol. 29, 1997, pp. 353-376; B. Leiter, “In Praise of Realism (and Against Non-Sense Jurisprudence)”, en *University of Texas Law, Public Law Research Paper*, No. 138, 2010, pp. 1-37.

[47] In 1795 Immanuel Kant published an essay entitled *Toward Perpetual Peace: A Philosophical Sketch*. The immediate occasion for the essay was the March 1795 signing of the Treaty of Basel by Prussia and revolutionary France, which Kant condemned as only “the suspension of hostilities, not a peace.” In the essay, Kant argues that it is humankind’s immediate duty to solve the problem of violence and enter into the cosmopolitan ideal of a universal community of all peoples governed by the rule of law. The essay’s two-hundredth anniversary, 1995, also marked the fiftieth anniversary of the end of World War II and of the establishment of the Charter of the United Nations. As recent events have shown, we certainly have not emerged from the violence of the state of nature. Accelerating globalization also gives these reconstructions and reappraisals of Kant’s cosmopolitan ideal a new urgency.

Kant’s *Perpetual peace* has had significant influence upon modern politics. *Perpetual peace* has been the foundation for peace and conflict studies, a relatively newly laid field which started in Europe around the 1950s and 1960s.

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In this essay, Kant described his proposed peace program. *Perpetual peace* is arguably seen as the starting point of contemporary liberal thought.

*Perpetual Peace* is structured in two parts. The Preliminary Articles described the steps that should be taken immediately, or with all deliberate speed:

- “No secret treaty of peace shall be held valid in which there is tacitly reserved matter for a future war”;
- “No independent states, large or small, shall come under the dominion of another state by inheritance, exchange, purchase, or donation”;
- “Standing armies shall in time be totally abolished”;
- “National debts shall not be contracted with a view to the external friction of states”;
- “No state shall by force interfere with the constitution or government of another state”;
- “No state shall, during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible: such are the employment of assassins (percussores), poisoners (venefici), breach of capitulation, and incitement to treason (perduellio) in the opposing state”.

Three Definitive Articles would provide not merely a cessation of hostilities, but a foundation on which to build a peace:

- “The civil constitution of every state should be republican”;
- “The law of nations shall be founded on a federation of free states”
- “The law of world citizenship shall be limited to conditions of universal hospitality”;

Kant’s essay in some ways resembles modern democratic peace theory, though it also differs significantly from it. He speaks of republican (*Republikanisch*) states (rather than of democratic ones), which he defines to have representative governments, in which the legislature is separated from the executive. He does not discuss universal suffrage, which is vital to modern democracy and quite important to some modern theorists; his commentators dispute whether it is implied by his language. Most importantly, he does not regard republican governments as sufficient by themselves to produce peace: freedom of travel, though not necessarily migration, (hospitality); and a league of nations are necessary to consciously enact his six-point program.

Unlike some modern theorists, Kant claims not that republics will be at peace only with each other, but are more pacific than other forms of government in general.

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The general idea that popular and responsible governments would be more inclined to promote peace and commerce became one current in the stream of European thought and political practice. It was one element of the American policy of George Canning and the foreign policy of Lord Palmertson. It was also represented in the liberal internationalism of Woodrow Wilson, George Creel, and H.G. Wells, although other planks in Kant's platform had even more influence. In the next generation, Kant's program was represented by the Four Freedoms and the United Nations.

Kant's essay is a three-legged stool (besides the preliminary disarmament). Various projects for perpetual peace have relied on one leg - either claiming that it is sufficient to produce peace, or that it will create the other two.

In “A Plan for an Universal and Perpetual Peace”, part IV of *Principles of International Law* (1786-89), Jeremy Bentham proposed that disarmament, arbitration, and the renunciation of colonies would produce perpetual peace, thus relying merely on Kant's preliminary articles and on none of the three main points; contrary to the modern theorists, he relied on public opinion, even against the absolute monarchy in Sweden.

Since 2008, the Perpetual Peace Project - a partnership between the European Union National Institutes for Culture (EUNIC), the International Peace Institute (IPI), the United Nations University, and Syracuse University - is engaging Kant's essay in an ongoing philosophical and curatorial initiative that is conceptualized around ultimately “re-writing” Kant's 1795 treatise, as well as a republication of the essay. Thinking through the ideas behind the project and its links to Kant, Gregg Lambert, Aaron Levy, and Martin Rauchbauer rely on the secret article contained in the second supplement which “is detached from the main body of the public treatise that outlines the preliminary and definitive articles, and offered as a secret pact”. They draw on the ironic tone of Kant's writing to argue that the treatise performs the idea that the conditions for peace are best considered silently. Secretly, that is, statesmen and politicians can take the idea of peace seriously, since it will never be associated with them. As such, the project brings together theorists and practitioners, such as diplomats, policy experts, philosophers, and artists, in order to revisit 21<sup>st</sup> century prospects for international peace through Kant's essay, in order to change people's minds, get them to take the idea seriously, start to imagine what it would be like to live in a peaceful society.

See Adolf, Antony. *Peace. A World History*. Polity, 2009; Beck, Sanderson. *Peace Plans of Rousseau, Bentham, and Kant*. 2003 <<http://rousseaustudies.free.fr/ArticleBeck.htm>>; Bohman, James. “*Perpetual peace: essays on Kant's cosmopolitan ideal*”. MIT Press, 1997; Ferraro, Vincent. *Kant's Project for a Perpetual Peace*.

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<<http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>>; Hinsley, Francis H. *Power and the pursuit of peace: theory and practice in the history of relations between states*, Cambridge University Press, 1967; Lenhard, Johannes. *Kant and the Liberal Democratic Peace Theory – the Cases of Kosovo, Iraq and Afghanistan*, GRIN Verlag, 2010; Palmquist, Stephen. “The Philosopher as a ‘Secret Agent’ for Peace: Taking Seriously Kant’s Revival of the ‘Old Question’” <<http://www.hkbu.edu.hk/~ppp/srp/arts/PSAP.htm>>; Senghaas, Dieter. *On perpetual peace: a timely assessment*, Berghahn Books, 2007; Terminski, Bogumil. *The evolution of the concept of perpetual peace in the history of political-legal thought, Perspectivas internacionales*, vol. 6, n.º 1, 2010, pp. 277-291.

[48] See the illuminating pages of the *Vorrede* in *Das Problem der Souveränität*, at v-ix.

*Das Problem der Souveränität*, at 123. And elsewhere: ‘The postulate of the unity of knowledge holds without limit, at normative level too, finding its expression here in the unity and exclusivity of the system of norms taken as valid, or, which amounts to the same thing, in the necessary unity of the viewpoint of consideration, evaluation and interpretation’ (*ibid*, at 104-105). On Kelsen’s neo-Kantian epistemology, cf. H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (1986), at 56-90; see also H. Kelsen and F. Sander, *Die Rolle des Neukantianismus in der Reinen Rechtslehre: eine Debatte zwischen Sander und Kelsen* (1988); also useful is Carrino, ‘Presentazione’, in H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale* (Italian transl., 1989), esp. at xiii-xx.

[50] Kant, *Das Problem der Souveränität*, at 316-317. Again, with rigorous legal positivism: ‘the only rights that exist are those deriving from the legal system or conferred by the state. The “personalities inserted in the state” have their rights (and their obligations) not ... “as bearers of rights, as persons”. They are persons only to the extent that the state or the legal order sanction their rights and obligations, or recognize them as persons. Just as the state confers personhood on them, so it can take this quality away from them too. The introduction of slavery as a legal institution is entirely within the possibilities of a legal system or state’ (*ibid*, at 45).

[51] See *Das Problem der Souveränität*, at 317. ‘Just as the egocentric position of a subjectivist theory of knowledge is bound up with an ethical egoism, so the legal cognitive hypothesis of the primacy of the particular state legal system is coupled with the state egoism of an imperialist policy’ (*ibid*).

[52] *Ibid*, at 314-315, 317; more than thirty years later, in his *Principles of International Law* (3rd. ed., 1967) [hereinafter *Principles*], at 569-588, Kelsen retained a position of strict

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adherence to the Marburg school’s neo-Kantian epistemology.

[53] *Principles*, at 587. Kelsen’s position on this crucial point nonetheless fluctuates. In *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934) [hereinafter *Reine Rechtslehre*], the primacy of international law and the dissolution of the ‘dogma of sovereignty’ are presented as a technical outcome of the pure theory of law (English trans. *Introduction to the Problems of Legal Theory* (1992), at 124-125). In the second edition of *Reine Rechtslehre* (1960), at 343-345, Kelsen maintains that only the monist conception is laid down by theoretical requirement, whereas the choice between the primacy of international law and the primacy of domestic law can be based only on preferences of an ideological or political nature (English trans. *Pure Theory of Law* (1967), at 344-347. On this point see in general H. Hart, ‘Kelsen’s Doctrine of the Unity of Law’, in H. Hart, *Essays in Jurisprudence and Philosophy* (1983).

[54] *Das Problem der Souveränität*, at 317.

[55] The idea of law as a coercive social system tending towards increasingly centralized forms through historical evolution is one that Kelsen increasingly returns to in his writings: cf. esp. H. Kelsen, *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures 1940-41* (1952), at 48-51, 56-81.

[56] See J. Austin, *The Province of Jurisprudence Determined* (1832, reprint H. L. A. Hart (ed.), 1954), *Lecture VI*; H. L. A. Hart, *The Concept of Law* (1981), *passim*. On the doubts regarding the legal nature of international law, see also N. Bobbio, *Teoria generale del diritto* (1993), at 138-140; H. Bull, *The Anarchical Society* (1977), at 130 *et seq.*

[57] Kelsen was writing *Peace through Law* in the very years that the Allies’ ‘just’ war was ending with the ‘terrorist bombings’ (as Michael Walzer calls them in his *Just and Unjust Wars* (1992), at 263-268), of such German cities as Dresden, Hamburg and Berlin, then the dropping of the atom bombs on Japan.

[58] As we know, however, by contrast with Kelsen, Kant in *Zum ewigen Frieden* rules out the possibility of speaking, in the absence of an international political order, of a ‘just war’: for Kant, a state embarking on war is acting as judge in its own case. On the debate between ‘cosmopolitan’ (H. Bull, M. Wight, T. Schlereth) and ‘statist’ (F. H. Hinsley, W. B. Gallie, I. Clark, P. Riley, H. L. Williams) interpreters of Kantian pacifism, see Hurrell, ‘Kant and the Kantian Paradigm in International Relations’, 16 *Review of International Studies* (1990) 3, at 183-205.

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[59] Cf. *Peace through Law*, at 3-9, 11-13; *Law and Peace*, at 142-144.

[60] Cf. *Peace through Law*, at 72-73 (‘That an individual is to be punished although he has not acted wilfully and maliciously or with culpable negligence, so-called “absolute liability”, is not completely excluded, even in modern criminal law’). On the theme of ‘absolute liability’ in domestic and international law see also *Law and Peace*, at 96-106. On the same theme see the recent essay by Parisoli, ‘Soggetto responsabile, sanzione collettiva e principi morali: suggestioni kelseniane in tema di politica internazionale’, 11 *Filosofia politica* (1997) 3, at 471-489.

[61] See also Virally, ‘Sur la prétendue primitivité du droit international’, in M. Virally, *Le droit international en devenir* (1990); more generally, Herz, ‘The Pure Theory of Law Revisited: Hans Kelsen’s Doctrine of International Law in the Nuclear Age’, in S. Engel and R. A. Métall (eds.), *Law, State and International Legal Order. Essays in Honor of Hans Kelsen* (1964); Isak, ‘Bemerkungen zu einigen völkerrechtlichen Lehren Hans Kelsens’, in O. Weinberger and W. Krawietz (eds.), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988).

[62] Cf. *ibid*, at 14-15. In the early 1940s Kelsen devoted a long series of essays and articles to this proposal, which he cites in a long footnote together with testimony of assent from numerous political and religious associations in the United States (*ibid*).

[63] Cf. *Peace through Law*, at 13-15; *Peace and Law*, at 145-168.

[64] Cf. *ibid*, at 87-88. Here too Kelsen displays a normative contamination between morality and law from which he should have been barred by the assumption of the ‘purity’ of his theory of law. In general, in relation to the international criminal court’s competence to judge individual liability for war crimes Bull, *supra* note 16, at 89, has noted that their symbolic function has been obfuscated by the selective nature of their pronouncements. It has been the ‘victors’ that have promoted these tribunals and without exception acted as judges there, while those who appeared in the dock were normally a few scapegoats representing the defeated.

[65] Cf. *Peace through Law*, at 66-67.

[66] Kelsen traced the failure of modern institutional pacifism back to the primacy given to the executive functions over judicial ones. For Kelsen, peace could be guaranteed only by an international court of justice operating in relation to disputes between states as a higher, impartial third party, with an international police force under its command. The theme of

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the ‘third party’ as a guarantee of international peace was developed by Norberto Bobbio in the collection of articles *Il terzo assente* (1989). More generally, see also P. P. Portinaro, *Il terzo. Una figura del politico*, Milano, Franco Angeli (1986).

[67] Kelsen’s demand for the victor states of the Second World War to subject their own soldiers to the verdict of the same courts as those set up to judge the enemy seems to ignore the radically partisan, destructive logic of war.

[68] In *Principles* Kelsen emphatically stresses the fact that the United Nations Charter finally introduces ‘a system of international security marked by a high degree of centralization’ (at 40), but nonetheless complains that the excessive discretionality of the power conferred on the Security Council prevents it from acting as a ‘legal’ body, that is, as a source of centralized, equal and universal jurisdiction able to give rise to an effective system of sanctions alternative to war, especially “defensive war” (at 47-51).

[69] Cf. Falk, “Reflections on the Gulf War Experience: Force and War in the United Nations System”, 3 *Juridisk Tidskrift* (1991) 1, at 192.

[70] Hart, *The Concept of Law*, 209 (1961).

[71] Hart, *cit.*, 231.

[72] In making this claim, Hart is aware of the theories advanced for “basic norm” in international law. Of the two serious candidates, *pacta sunt servanda* does not account for all obligations under international law, however widely the term “pacta” is construed, while the rule that “States should behave as they customarily behave” says nothing more than that “those who accept certain rules must also observe a rule that the rules ought to be observed,” which is only another way saying that these rules are accepted as binding.

[73] Fuller, *The Morality of Law*, pp. 137-138 (1964).

[74] See K. Popper, *The Lesson of This Century: With Two Talks On Freedom and The Democratic State*, Venezia, Tascabili Marsilio, 1992. One of the century’s greatest and most influential thinkers, Karl Popper reminds us that we must recognize our responsibilities in preserving the democratic system we enjoy: it is our actions which will create the world of tomorrow. In these interviews with journalist Giancarlo Bosetti, Karl Popper ranges widely over contemporary political and social issues. He reflects on many topics, from the decline of the Soviet Union and the danger of a Third World War, to our obligations to children and the potentially harmful influence of television. He warns us that the increasing violence and

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egotism of our society, if unchecked, will imperil our civilisation. The volume also contains two talks on the theory of democracy, arguing that democracy has never been the rule of the people (nor can or should it be), but only the best method we know for preventing tyranny.

Popper's purpose is to warn us against the increasing violence and egoism of our society. What solutions can we offer to the problems of the environment, demography and corruption? How can we prevent the violence our society engenders? How can we preserve our democratic system while at the same time paving the way for global peace? Popper believes that the philosopher has a duty to intervene in politics and he utters a clear call to all of us to recognise our responsibilities. He reminds us that it is our actions which will create the world of tomorrow.

“The lesson of this century is an exhortation to realize that it is foolish to compromise the inestimable good of peace in the state of law to seek illusory paradises that lead, as history has shown, to war and tyranny” (Maurizio Viroli).

See also R. Dahrendorf, *Economic Opportunity, Civil Society and Political Liberty*, Roma-bari, Laterza, 1996. This essay explores the dilemmas associated with ‘squaring the circle’ of wealth creation, social cohesion and political freedom in the OECD countries. As the metaphor of square and circle implies, these three essential goals of development are not necessarily compatible and may even conflict with each other, particularly at a time when advancing globalization creates perverse choices. To become and remain competitive in international markets requires a flexible use of resources which threatens social cohesion and political freedom in a number of ways. After analysing these tensions, the essay concludes with six proposals for improving the likelihood that a workable balance between prosperity, democracy and social cohesion can be maintained in advanced industrial societies.

“The OECD countries, to put it in a very direct and hasty way, have reached a level of development in which the economic opportunities of their citizens lead to dramatic choices. To remain competitive in a growing world market must take measures to irreparably damage the cohesion of the respective civil societies. If they are unprepared to take these measures, they have to resort to restrictions on civil liberties and political participation that even shape a new authoritarianism, or at least that seems to be the dilemma. In the next decade or so it is to square the circle between creation of wealth, social cohesion and political freedom. The quadrature of the circle is impossible, but we can perhaps approach it, and a realistic project of social welfare promotion probably can not have goals more ambitious” (Ralf Dahrendorf, 1995).

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[75] As to a philosophy of international law see: H. Kelsen, *Pure Theory of Law* (1960), Berkeley, University of California Press, 1967, pp. 320-347 (Chapter VII on “State and International Law”); H.L.A. Hart, *The Concept of Law* (1961), Oxford University Press, Oxford, 1997, pp. 213-237 (Chapter X on “International Law”); C. Leben, *Hans Kelsen and the Advancement of International Law*, in “European Journal of International Law”, 9, 1998, 287-305; D. Zolo, *Hans Kelsen: International Peace Through International Law*, in “European Journal of International Law”, 9, 1998, pp. 306-324; M. Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, in “European Journal of International Law”, 21/4, 2010, pp. 967-995; N. W. Barber, *Legal Pluralism and the European Union*, in “European Law Journal”, 12/3, 2006, pp. 306-329.

[76] As to the global preventive war, with some bibliographical references concerning Italy, see D.J. Bederman, *International Law in Antiquity*, Cambridge, Cambridge University Press, 2001; J.B. Elshtain (ed.), *Just War Theory*, Oxford, Basil Blackwell, 1992; R.F. Peters, *The Jihad in Classical and Modern Islam*, Princeton, Princeton University Press, 1995; P. Partner, *Il Dio degli eserciti. Islam e cristianesimo: le guerre sante*, Einaudi, Torino 1997; J.T. Johnson, *Holy War Idea. Western and Islamic Traditions*, University Park (Pe), The Pennsylvania State University, 2001; F.H. Russell, *The Just War in the Middle Ages*, Cambridge, Cambridge University Press, 1975; W.V. O’Brien, *The Conduct of Just and Limited War*, New York, Praeger, 1981; C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin, Duncker und Humblot, 1974, trad. it. Milano, Adelphi, 1991; Id., *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, trad. it. cit.; P. Frezza, *Ius gentium*, ‘Revue Internationale Droits Antiquité’ 2, 2, 1949 (Mélanges De Visscher, 1); M. Khadduri, *The Islamic Law of Nations: Shaybani’s Siyar*, Baltimore, Johns Hopkins University Press, 1966; J.G. de Sepúlveda, *Democrates Secundus, sive de iustis belli causis apud Indos*, (1545), ed. by M. Menendez y Pelayo ‘Boletín de la Real Academia de la Historia’, Madrid 1892; F. de Vitoria, *Relectio de Indis*, (1538), by L. Pereña, Italian ed. by A. Lamacchia, Bari, Levante, 1996; A. Messineo, *Propagazione della civiltà ed espansione coloniale*, ‘La civiltà cattolica’, 1936, 2; A. Messineo, *Necessità di vita e diritto di espansione*, ivi, 1936, 3; A. Cassese, *Il diritto internazionale nel mondo contemporaneo*, Bologna, il Mulino, 1984; C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, pp. 335-67; D. Zolo, *Chi dice umanità. Guerra, diritto e ordine globale*, Torino, Einaudi, 2000; Id., *Chi dice umanità. Guerra, diritto e ordine globale*, cit., pp. 134-63; Id., *Cosmopolis. Le prospettive del governo mondiale*, Milano, Feltrinelli, 1955; *I signori della pace*, Roma, Carocci, 1998; Id., *Globalizzazione. una mappa dei problemi*, Roma-Bari, Laterza, 2004; Id., *La guerra globale preventiva*, in *La giustizia dei vincitori. Da Norimberga a Bagdad*, Roma-Bari, Laterza, 2006; C. Galli, *La guerra globale*, Roma-Bari, Laterza, 2002; T.M. Hawley, *Against the Fires of Hell. The Environmental Disaster of the Gulf War*, New

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York-San Diego-London, Harcourt Brace Jovanovich, 1992, p. 184; W. R. Thompson, *On Global War: Historical-Structural Approaches to World Politics*, Columbia (S.C.), University of South Carolina Press, 1988; A.M. Dershowitz, *Why Terrorism Works. Understanding the Threat, Responding to the Challenge*, 2002, New Haven, Yale University Press, trans. it. *Terrorismo*, Roma, Carocci, 2003; M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton. Princeton University Press, 2001.

[77] Pfanner, T. (2004). *International Committee of the Red Cross*. [online] Icrc.org. Available at: [https://www.icrc.org/eng/assets/files/other/irrc\\_853\\_pfanner.pdf](https://www.icrc.org/eng/assets/files/other/irrc_853_pfanner.pdf) [Accessed 3 May 2016].

[78] See D. Zolo, *Sulla paura. Fragilità, aggressività, potere*. Feltrinelli, Milano, 2011. The author said: “I wrote this book because I felt like a grain of sand at the mercy of the wind, at my age, I was afraid of not resisting, but before I gave in I wanted to understand why I was afraid in my life. of my fear, but also of the fear of others, and I finally wanted to understand why so often fear made me aggressive and because my aggression and the arrogance of others were closely intertwined. I asked myself, in essence, what was the relationship between fear, aggression and violence unleashed by my peers over the millennia. “A book written by Danilo Zolo to understand where and when fear is born, if the struggle for existence always involves conflict and conflict, which is the place occupied by politics in the management of fear and insecurity of men, and finally the role of fear in the globalized world, with its wars and the spread in every corner of the earth of a c rescinding precariousness and the overwhelming of the rich and powerful on the poor and weak. But Zolo’s gaze is not of resignation, of surrender, but of “active pessimism”: he teaches us that to the end we must not renounce fighting against the boundless universe of human folly.

[79] Woods, C. (2012). Analysis: Obama embraced redefinition of ‘civilian’ in drone wars. [online] *The Bureau of Investigative Journalism*. Available at: <https://www.thebureauinvestigates.com/opinion/2012-05-29/analysis-obama-embraced-redefinition-of-civilian-in-drone-wars> [Accessed 14 Jun. 2017].

[80] Roth, K. (2004). *The Law of War in the War on Terror*. [online] Foreign Affairs. Available at: <https://www.foreignaffairs.com/articles/2004-01-01/law-war-war-terror> [Accessed 3 Apr. 2016].

[81] Wedgwood, Ruth, “Just War and the War on Terror” (2004). *Saint Pope John XXIII Lecture Series*. 9, Columbus School of Law, 2004. For months, the candidates for president of the United States have pushed back and forth over the appropriate role of the United Nations and the international community as a whole, in the current conflict in Iraq. The

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election may well hinge on how voters respond to each man’s argument. One of the nation’s most prominent international scholars, Professor Ruth Wedgwood of Johns Hopkins University, frames the question differently. As she sees it, the question is more fundamental. Can the U.N., with its carefully promulgated rules about when and under what circumstances military solutions are permissible, even cope with what’s really happening in the world today?

[82] This is the view taken by the U.S.

[83] See Barberis, M., *Non c’è sicurezza senza libertà. Il fallimento delle politiche antiterrorismo*, il Mulino, Bologna, 2017. What if all we know about security is false? This is the question to which the book confronts us, in its stringent analysis of the anti-terrorist policies adopted by the major Western powers since September 11, 2001. Subjected to the controls of adequacy, necessity and proportionality, commonly used by the great constitutional and international courts, most measures against terrorism prove to be useless or counterproductive. The same irrationality, moreover, pervades even most of the current opinions on the subject of emergency, public order and self-defense.

[84] Or *Unmanned Aircraft Vehicle* (UAV).

[85] BIJ, T. (2018). *Drone Warfare — The Bureau of Investigative Journalism*. [online] The Bureau of Investigative Journalism. Available at: <https://www.thebureauinvestigates.com/projects/drone-war> [Accessed 9 May 2018].

[86] Brunstetter, D. and Braun, M. (2011). The Implications of Drones on the Just War Tradition. *Ethics & International Affairs*, 25(03), pp. 337-358.

[87] Brunstetter, D. and Braun, M. (2013). From Jus ad Bellum to Jus ad Vim: Recalibrating Our Understanding of the Moral Use of Force. *Ethics & International Affairs*, 27(01), pp. 87-106.

[88] This is, at least, in theory.

[89] Walzer, M. (2006). *Just and unjust wars*. 4th ed. New York: Basic Books, p. xvi. *Just and Unjust Wars* forever changed the way we think about the ethics of conflict. First published in 1977 and now brought up to the present with a new preface and postscript, this classic work by political philosopher Michael Walzer examines the moral issues that arise before, during, and after the wars we fight. Reaching from the Athenian attack on Melos, to the Mai Lai massacre, to Afghanistan and beyond (e.g. from the wars in the Balkans through

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the first war in Iraq, as well as from the invasion of Czechoslovakia and Poland, the six-day war of Israel against the Arabs, the American war in Vietnam, but also Cuba, the Korean War, the war of Spain, the Mao campaign to seize China, the terrorism of Wrath, the French war in Algeria, Beirut, the Nuremberg trial), Walzer mines historical accounts and the testimony of participants, decision makers, and victims to explain when war is justified and what ethical limitations apply to those who wage it. The author examines the moral issues surrounding military theory, war crimes, and the spoils of war. He studies a variety of conflicts over the course of history, as well as the testimony of those who have been most directly involved - participants, decision makers, and victims. In his introduction to this new edition, Walzer specifically addresses the moral issues surrounding the war in and occupation of Iraq, reminding us once again that “the argument about war and justice is still a political and moral necessity.”

“Even just talking about the morality of war is not an easy task, because war is ‘a hell’, as Walzer says, and in any case an evil in itself. Even if granted, we can recognize that two are the typical problems of morality in war. Evaluate whether and when to resort to it is fair and the moral lawfulness of the means used to obtain victory (regardless of the correctness or otherwise of recourse to war) “Walzer starts from the assumption that war and military actions are justifiable in some cases and not in others in the practice of collective moral discourse, ‘just and unjust wars’ can be read as a repertoire of cases on which the philosopher uses his theoretical imagination and his ethical capacity”, said Sebastiano Maffettone, one of the most important Italian legal philosophers, in Id., *Filosofia politica. Una piccola introduzione*, Roma, LUISS, 2015.

[90] On the theory of preventive war against terrorism elaborated by Walzer see R.R. Dipert, *Preventive War and the Epistemological Dimension of Morality of War*; M. Bothe, *Terrorism and the Legality of Pre-emptive Force*, in «European Journal of International Law», 14 (2003); F. Vander, *Kant, Schmitt e la guerra preventiva. Diritto e politica nell'epoca del conflitto globale*, Roma, Manifestolibri, 2004.

[91] The document *What We're Fighting For*, written in February 2002 by a large group of American intellectuals - among them Michael Walzer, Samuel Huntington, Samuel G. Freedman, Francis Fukuyama, Amitai Etzioni, Jean B. Elshtain, Theda Skocpol - pronounced in the name of “American values”, proposed as universal, and presents the war decided by the US administration against terrorism as a “just war”. The ethical justification concerns the war in Afghanistan, and even without direct references, even possible future wars, including the attack on Iraq. The document makes no mention of either international law or the functions of international institutions such as the United Nations. See <http://www.americanvalues.org/html/wwff.html>.

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[92] A.M. Dershowitz, *Why Terrorism Works. Understanding the Treath, Responding to the Challenge*, New Haven, Yale University Press, 2002; C. Schimtt, *Der Nomos Der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin, Duncker und Humblot, 1974, p. 271 (in this essay the author uses the expression *globaler Weltbürgerkrieg* - “global civil war” - to refer to a global war no longer subject to European international law, and therefore extremely destructive and bloody); F. Mernissi, *Islam and Democracy. Fear of the Modern World*, Cambridge (Mass:), Perseus, 1992; G. Preterossi, *L’Occidente contro se stesso*, Roma-Bari, Laterza, 2004; R. Pape, *Dying to Win: the Strategic Logic of Suicide Terrorism*, New York, Random House, 2005; E. Said, *The Question of Palestine*, New York, Vintage Books Editions, 1992; A. Cassese, *Lineamenti di diritto penale internazionale*, il Mulino, Bologna, 2005; Id., *Il processo a Saddam e i fini nobili della giustizia*, in «La Repubblica», 19 ottobre 2005, p. 23.

[93] Although Navy SEALs and Marines (or better: Unites States Marine Corps - U.S.M.C.) belong to two different Armed Forces, I would like to mention here that the latter are often quoted and remembered - even in Hollywood films (e.g. *A Few Good Men*), and novels (e.g. *The Short-Timers* by Gustav Hasford), - for their “prayer” or “creed”. *The Rifleman’s Creed* (also known as *My Rifle* and *The Creed of the United States Marine*) is a part of basic United States Marine Corps doctrine. Major General William H. Rupertus wrote it during World War II, probably in late 1941 or early 1942. In the past, all enlisted Marines would learn the creed at recruit training. However, in recent years the creed has been relegated to the back pages of the standard recruit training guide book and its memorization is no longer considered doctrine for recruits. Different, more concise versions of the creed have developed since its early days, but those closest to the original version remain the most widely accepted.

«This is my rifle. There are many like it, but this one is mine.

My rifle is my best friend. It is my life. I must master it as I must master my life.

Without me, my rifle is useless. Without my rifle, I am useless. I must fire my rifle true. I must shoot straighter than my enemy who is trying to kill me. I must shoot him before he shoots me. I will ...

My rifle and I know that what counts in war is not the rounds we fire, the noise of our burst, nor the smoke we make. We know that it is the hits that count. We will hit ...

My rifle is human, even as I, because it is my life. Thus, I will learn it as a brother. I will learn its weaknesses, its strength, its parts, its accessories, its sights and its barrel. I will

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keep my rifle clean and ready, even as I am clean and ready. We will become part of each other. We will ...

Before God, I swear this creed. My rifle and I are the defenders of my country. We are the masters of our enemy. We are the saviors of my life.

So be it, until victory is America's and there is no enemy, but peace. Amen»!

(See the movie *Full Metal Jacket*, directed by Stanley Kubrick, 1987, in which this Creed is enunciated by a group of young recruits of the U.S. Marines. Lastly, see a sequence from the movie *A Few Good Men*, directed by Rob Reiner, 1992, in which Colonel Jessep says: «You can't handle the truth! Son, we live in a world full of walls, and those walls must be guarded by men with rifles»).

[94] Enemark, C. (2014). Drones, Risk, and Perpetual Force. *Ethics & International Affairs*, 28(03), pp. 365-381.

[95] Western strategic thought is still heavily conditioned by the work of the Prussian soldier-scholar Carl von Clausewitz. In his main work, *Vom Kriege* (work composed of eight books in Berlin: Ferdinand Dummler, 1832), or *On War* (abridged version translated by Michael Howard and Peter Paret, edited with an introduction by Beatrice Heuser, Oxford World's Classics, Oxford University Press, 2007), he sets out a theory of war and a theory of warfare. The two are intrinsically related; his theory of warfare is designed to work within his theory of war. This article considers first how far Clausewitz's theory of war applies today, and then, considers the applicability of the idea of victory within his theory of warfare. (One can identify this approach as Kantian or Hegelian. See Antulio J. Echevarria II, *Clausewitz and Contemporary War*, Oxford: Oxford University Press, 2007).

To assess both continuity and change in war, a standard distinction in contemporary debate is drawn between the nature (permanent features) and character (context dependent features) of war. Although this distinction is commonly misattributed to Clausewitz, he did not use the term “nature” in quite this way. Hence at the end of book 1, chapter 1, he writes: “War is thus more than a mere chameleon, because it changes its nature (seine natur) to some extent in each concrete case.” If nature is supposed to be unchanging, how can we make sense of this passage? As Antulio J. Echevarria II sets out, Clausewitz followed a dialectical analytical framework in which the world could be seen either in the abstract, through the lens of reasoning based on pure logic, or in reality, through the lens of reasoning based on practical experience. To understand the nature of a given phenomenon through this dialectical analysis, the abstract perspective is tested against practical reality.

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In *On War*, this dialectical analysis produces a narrow and a broad account of what war is. Both are set out in book 1, chapter 1, which opens with this definition of war as an abstract phenomenon: “War is thus an act of force to compel our enemy to do our will. To secure that object we must render the enemy powerless; and that, in theory, is the true aim of warfare. That aim takes the place of the object, discarding it as something not actually part of war itself”.

What Clausewitz does here is to delimit a narrow account of war as a purely military act in which the military objective takes the place of the political aim, which is then classified as being outside war itself. This idealized, abstract view of war is sequential: the focus during war – the true aim of warfare – is on the military objective; only when the military objective is satisfied does the political objective once again come to the fore. In other words, there is a clear line between military action in war and political action in peace.

Clausewitz posits how in the abstract: “If you want to overcome your enemy you must match your effort against his power of resistance. But the enemy will do the same; competition will again result and, in pure theory, it must again force you both to extremes.” Crucially, however, Clausewitz notes that a war would only conform to the ideal if it was a single decisive act isolated from its political context, which for that reason, means that no war in reality has ever met this ideal.

In summary, to understand what Clausewitz means by the nature of war, it is necessary to recognize that there are two ideas of war at play in *On War*. One is the abstract version found in the realm of logic, which Clausewitz identifies as the nature of war. As Clausewitz stresses, “it must be observed that the phrase the natural tendency of war, is used in its philosophical, strictly logical sense alone and does not refer to the tendencies of the forces that are actually engaged in fighting – including – for instance, the morale and emotions of the combatants.”

The other idea of war is the phenomenon produced when the abstract concept of war is modified by reality, to give us real war. This is the idea of war that we reach at the end of book 1, chapter 1, in which Clausewitz presents his well-known image of the “total phenomenon” of war as it appears in reality as a “trinity” comprised of three “dominant tendencies.” These three tendencies effectively provide categorical buckets within which to place the various reasons listed above for why war in reality moderates the abstract concept.

As to an important Italian book: Rusconi, G.E., *Clausewitz, il prussiano. La politica della guerra nell'equilibrio europeo*. Torino, Einaudi, 1999.

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[96] Coady, C. (2008). *Morality of political violence*. Cambridge: Cambridge University Press.

[97] For America, the September 11 attacks underscored the danger of allowing threats to linger unresolved. Saddam Hussein’s continued defiance of 16 UNSC resolutions over 12 years, combined with his record of invading neighboring countries, supporting terrorists, tyrannizing his own people, and using chemical weapons, presented a threat we could no longer ignore. The UNSC unanimously passed Resolution 1441 on November 8, 2002, calling for full and immediate compliance by the Iraqi regime with its disarmament obligations. Once again, Saddam defied the international community. According to the Iraq Survey Group, the team of inspectors that went into Iraq after Saddam Hussein was toppled and whose report provides the fullest accounting of the Iraqi regime’s illicit activities: “Saddam continued to see the utility of WMD. He explained that he purposely gave an ambiguous impression about possession as a deterrent to Iran. He gave explicit direction to maintain the intellectual capabilities. As U.N. sanctions eroded there was a concomitant expansion of activities that could support full WMD reactivation. He directed that ballistic missile work continue that would support long-range missile development. Virtually no senior Iraqi believed that Saddam had forsaken WMD forever. Evidence suggests that, as resources became available and the constraints of sanctions decayed, there was a direct expansion of activity that would have the effect of supporting future WMD reconstitution.” With the elimination of Saddam’s regime, this threat has been addressed, once and for all. The Iraq Survey Group also found that pre-war intelligence estimates of Iraqi WMD stockpiles were wrong - a conclusion that has been confirmed by a bipartisan commission and congressional investigations. We must learn from this experience if we are to counter successfully the very real threat of proliferation. First, our intelligence must improve. The President and the Congress have taken steps to reorganize and strengthen the U.S. intelligence community. A single, accountable leader of the intelligence community with authorities to match his responsibilities, and increased sharing of information and increased resources, are helping realize this objective. Second, there will always be some uncertainty about the status of hidden programs since proliferators are often brutal regimes that go to great lengths to conceal their activities. Indeed, prior to the 1991 Gulf War, many intelligence analysts underestimated the WMD threat posed by the Iraqi regime. After that conflict, they were surprised to learn how far Iraq had progressed along various pathways to try to produce fissile material. Third, Saddam’s strategy of bluff, denial, and deception is a dangerous game that dictators play at their peril. The world offered Saddam a clear choice: effect full and immediate compliance with his disarmament obligations or face serious consequences. Saddam chose the latter course and is now facing judgment in an Iraqi court. It was Saddam’s reckless behavior that demanded the world’s attention, and it

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was his refusal to remove the ambiguity that he created that forced the United States and its allies to act. We have no doubt that the world is a better place for the removal of this dangerous and unpredictable tyrant, and we have no doubt that the world is better off if tyrants know that they pursue WMD at their own peril. See A.M. Dershowitz, *cit.* The central chapter of *Terrorism* is dedicated to proving that the benefits that the European allies and the United Nations have granted to the Palestinian people since 1968 “have made it inevitable on September 11<sup>th</sup>”.

[98] See The White House, *National Security Strategy of The United States of America*, Washington D.C., 17 settembre 2002; sect. III, in “Guerra, diritto e ordine globale”, at *Jura Gentium*, <http://www.juragentium.unifi.it>. (“While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right to selfdefense by acting preemptively against such terrorism”). On June 1<sup>st</sup>, 2003, President Bush confirms this doctrine: “We must take the battle to enemy, disrupt his plans and confront the worst threats before they emerge. In the world we have entered the only path to safety is the path of action. And this nation will act”. (*The National Strategy for Combatting Terrorism*, Washington, 2003, p. 11).

About the distinction between *preventive war* and *preemptive war* see R. Falk, *Why International Law Matters*, at the on-line web site *Jura Gentium*, <http://www.juragentium.unifi.it>.

99 Lubell, N. and Derejko, N. (2013). A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict. *Journal of International Criminal Justice*, 11(1), pp. 65-88.

100 As to democracy, terrorism, war and peace see: Bobbio, Norberto: *Teoría general de la política*, Trotta, Madrid, 2003; Id., “Paz y guerra”, pp. 547-583; Ferrajoli, Luigi: “La guerra y el futuro del derecho internacional”, en L. Bimbi (ed.), *No en mi nombre*, Trotta, Madrid, 2003, pp. 213-223; Bobbio, Norberto: *Teoría general de la política*, Trotta, Madrid, 2003, “Paz y derecho”, pp. 605-614; Kelsen, Hans: “Naturaleza del derecho internacional”, en *Derecho y paz en las relaciones internacionales*, FCE, México, 21989, pp. 49-79; Rigaux, François: “La doctrina de la guerra justa”, en L. Bimbi (ed.), *No en mi nombre*, Trotta, Madrid, 2003, pp. 91-121; D. Zolo, Danilo: *La giustizia dei vincitori. Da Norimberga a Bagdad*, Laterza, Roma-Bari, 2006; Id., “La guerra globale preventiva”, pp. 88-108; Id., “Le ragioni del terrorismo”, pp. 127-139; Ackerman, Bruce: *Antes de que nos ataquen de nuevo*, Península, Barcelona, 2007; Id., “Introducción”, pp. 11-20; “La constitución política”, pp. 107-137; Jakobs, Günther, *Derecho penal del enemigo*, Civitas, Madrid, 2006; “Derecho penal del ciudadano y derecho penal del enemigo”, pp. 23-56; Id., “¿Terroristas como personas en derecho?”, pp. 57-83; Echevarría, Javier: “Terrorismo en el tercer entorno”, en

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C. Roldán, T. Ausín, R. Mate (eds.), *Guerra y paz. En nombre de la política*, Calamar Ediciones, Madrid, 2004, pp. 193-206; Sen, Amartya: *Identità e violenza*, Laterza, Roma-Bari, 2006; Id., “La violenza dell’illusione”, pp. 3-19; Id., “Libertà di pensiero”, pp. 173-188; Bauman, Zygmunt: *La globalización. Consecuencias humanas*, FCE, México, 2001; Id., “Ley global órdenes locales”, pp. 135-165; Ignatieff, Michael: *El mal menor. Ética política en una era de terror*, Santillana, Madrid, 2005; Id., “La democracia y el mal menor”, pp. 15-44; Id., “Libertad y apocalipsis”, pp. 191-221; Bernstein, Richard: *El abuso del mal. La corrupción de la política y la religión desde el 11/9*, Katz Editores, Buenos Aires, 2006; Id., “Introducción”, pp. 13-38; Id., “La certeza moral y el compromiso profundo”, pp. 93-115; Revelli, Marco: *La política perdida*, Trotta, Madrid, 2008; Id., “La política hecha añicos”, pp. 53-74; Vitale, Ermanno: “La paz (im)posible y el mal radical”, en *Derechos y paz. Destinos individuales y colectivos*, Fontamara, México, 2004, pp. 49-71.

[101] Ganor, B. (2002). Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter? *Police Practice and Research* [online] 3(4), pp. 287-304. Available from: 10.1080/1561426022000032060. [Accessed 8 March 2015].

[102] Schnelle, S. (2012). Abdullah Azzam, Ideologue of Jihad: Freedom Fighter or Terrorist? *Journal of Church and State* [online] 54(4), pp. 625-647. Available from: 10.1093/jcs/csr123. [Accessed 8 March 2015].

[103] Held, V. (2005). Legitimate Authority in Non-state Groups Using Violence. *Journal of Social Philosophy* [online] 36(2), pp. 202-217. Available through Wiley Online Library [Accessed 9 March 2015].

[104] Jaggar, A. (2005). What is Terrorism, Why is it Wrong, and Could It ever be Morally Permissible? *Journal of Social Philosophy* [online] 36(2), pp. 175-193. Available through Wiley Online Library. [Accessed 9 March 2015].

[105] Kamm, F.M. (2008). Terrorism and Intending Evil. *Philosophy & Public Affairs* [online] 36(2). Available at; <http://www.jstor.org/stable/40212817>. [Accessed 9 March 2015].

[106] Walzer, M. (2006). *Just and Unjust Wars*. 4<sup>th</sup>ed. New York: Basic Books, 1<sup>st</sup> edition 1977, pp. 251-252.

[107] Rawls, J. (1995). *Fifty Years after Hiroshima. Dissent* [online] 42(3) pp. 323-327 (part of a symposium), Education Source, EBSCO host. [Accessed 9 March 2015].

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[108] Smilansky, S. (2004). Terrorism, Justification, and Illusion. *Ethics* [online] 114(4), pp. 790-805, Available at: <http://www.jstor.org/stable/10.1086/383443>. [Accessed 7 March 2015].

[109] Walzer, M. *cit.*, 107.

[110] Smilansky, S. *cit.*, pp.798-800.

[111] Coady, CAJ. (2004). Terrorism, Morality, and Supreme Emergency. *Ethics* [online] 114(4), pp 772-789. Available at <http://www.jstor.org/stable/10.1086/38340>. [Accessed 8 March 2015].

[112] Walzer, M. *cit.*, 254.

[113] Coady, CAJ. (2010). Book Review of *How Terrorism is Wrong: Morality and Political Violence*. In *Mind* [online] 119(476), pp. 1186-1189. Available at: <http://www.jstor.org/stable/23012218>. [Accessed 9 March 2015].

[114] Nath, R. (2011). Two Wrongs Don't Make a Right: A Critique of Virginia Held's Deontological Justification of Terrorism. *Social Theory and Practice* [online] 37(4), pp. 679-696. Available at: <http://www.jstor.org/stable/23558500>. [Accessed 9 March 2015].

[115] Nath, R. *cit.*, 682.

[116] Miller, R. (2005). Terrorism and Legitimacy: A Response to Virginia Held. *Journal of Social Philosophy* [online] 36(2), pp. 194-201. Available from: 10.1111/j.1467-9833.2005.00266.x. [Accessed 9 March 2015].

[117] Coady, CAJ., *cit.*, 1188.

[118] Brincat, SK. (2009). “Death to Tyrants’: Self-Defence, Human Rights and Tyrannicide – Part II. *Journal of International Political Theory* [online] 5(1), p. 75. Available from: 10.3366/E1755088209000330. [Accessed 9 March 2015]; see also Kalin, W, and Kunzli, J. (2000). Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes. *International Journal of Refugee Law* [online] 12 (special supplementary issue), pp. 46-78. [Accessed 9 March 2015].

[119] Grotius, H., *De iure belli ac pacis* (English: *On the Law of War and Peace*) is a 1625 book in Latin, written by Hugo Grotius and published in Paris, on the legal status of war. It is now regarded as a foundational work in international law.

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Its content owed much to Spanish theologians of the previous century, particularly Francisco de Vitoria and Francisco Suarez, working in the Catholic tradition of natural law.

Grotius began writing the work while in prison in the Netherlands. He completed it in 1623, at Senlis, in the company of Dirk Granswinckel.

According to Pieter Geyl: “it is an attempt by a theologically and classically educated jurist to base upon law order and security in the community of states as well as in the national society in which he had grown up. In the rather naïve rationalism, the belief in reason as the lord of life, is revealed the spiritual son of Erasmus”.

In particular, this work is remembered for the Latin sentence: *Et haec quidem quae iam diximus, locum aliquem haberent etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana.*

What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness: that there is no God, or that the affairs of men are of no concern to Him.

Such a concept has been synthesized with the famous Latin phrase *etsi Deus non daretur*, which means “even when God were assumed not to exist” but is normally translated “as if God did not exist”.

Hugo Grotius was born on 10 April 1583, to one of the wealthy ruling families in the Dutch city of Delft. The De Groot ( “Grotius” is the Latinized version of his Dutch name—in common with intellectuals all over Europe, Grotius spoke and wrote to his fellow writers in Latin, and gave himself an appropriately Latin name) were regents of the city; that is, they were members of the self-selecting oligarchy which governed Delft, like many other Dutch cities. The generation before Grotius’s birth, his relatives had fought in the great struggle that established the freedom of the northern provinces of the Netherlands from the rule of the Spanish Crown, and many of Grotius’s writings display the intense patriotism engendered by that struggle. In Grotius’s case, his patriotism was as much focused on what he called his “nation,” the province of Holland and Zeeland, as it was on the wider United Provinces, which had collectively asserted their independence, and which form the modern kingdom of the Netherlands. All his life, Grotius remained wedded to the oligarchic republicanism of cities such as Delft, and somewhat wary of bigger states.

The young Grotius was educated as a humanist, in the tradition going back to the Italian Renaissance in which the study of classical texts provided an entire education, and in which the ability to write and speak persuasively, using all the ancient arts of rhetoric, was prized

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above all things. Although Grotius frequently cited philosophical texts written in a more “scholastic” style (that is, the style of the “schoolmen” of the Middle Ages, in which moral or legal issues were discussed in a kind of Aristotelian terminology, with little regard for literary elegance), his own writing was always essentially humanist in character. The *De Iure Belli ac Pacis* is full of literary and historical material from antiquity, and Grotius would have been delighted that a Genevan watch maker should think that his book was a natural companion to the works of Tacitus and Plutarch. Grotius was a prodigy within this education system and quickly made his reputation as a Latin poet and historian. For these rhetorical skills he was picked (as well-trained humanists always hoped to be) as an adviser and secretary by a leading politician, Jan van Oldenbarnevelt, who was in effect prime minister of the Dutch Republic. Grotius quickly became caught up in the political struggles of the new republic, an involvement that was ultimately to prove personally disastrous for him.

Grotius was taken in the winter of 1618 to his prison, Louvestein Castle, in the south of the United Provinces. He lived there until March 1621, when he escaped in famous and romantic circumstances: his wife arrived with a basket of books; Grotius (who was quite a small man) hid in the empty basket and was carried out of the castle. He succeeded in crossing the border to the Spanish Netherlands undetected, and took refuge in France, where he lived for most of the rest of his life. He returned to the United Provinces under a false identity in October 1631, hoping that Maurice’s successor as Statholder, Frederick William (who had always been personally sympathetic to Grotius), could arrange for him to be rehabilitated; but in the end Frederick William could not deliver an annulment of the original conviction, and Grotius slipped out of the country again in April 1632. As we shall see, these six months in his native land had an important effect on the received text of *De Iure Belli ac Pacis*, since Grotius issued a second edition of the work during this period in which some of his more disturbing claims were modified in order to win over his Dutch opponents. For the next three years he moved around Germany, until at the beginning of 1635 the government of Sweden appointed him as their ambassador to France, a post that allowed him to play a major role in the complex diplomacy surrounding the last years of the Thirty Years’ War. There was always a certain amount of unease in Sweden about using him in this important position, however, and in 1645 Grotius visited Sweden to defend himself against criticism; he passed briefly through the United Provinces on his way, without molestation. He failed to persuade the Swedes to renew his appointment, and left the country; his ship was caught in a storm in the Baltic and wrecked on the coast near Rostock. Grotius collapsed on shore after being rescued, and died in Rostock on 28 August 1645. His body was returned to Delft and given an honored burial by the same Dutch authorities who had kept him in exile for twenty-four years.

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Though it was not published until four years after his escape, *De Iure Belli ac Pacis* really grew out of Grotius’s time in prison. Political prisoners in the sixteenth and seventeenth centuries enjoyed full access to their books and papers, and unlimited time to write: Sir Walter Raleigh, for example, wrote his massive *History of the World* while awaiting execution in the Tower of London. His two years in Louvestein allowed Grotius to revisit old projects; as he wrote to his old friend G. J. Vossius in July 1619, “I have resumed the study of jurisprudence [*iuris studium*] which had been interrupted by all my affairs, and the rest of my time is devoted to moral philosophy [*moralis sapientiae*].” He told Vossius that to help his work in moral philosophy he was giving a Latin dress to the ethical passages in the Greek poets and dramatists collected by the Byzantine anthologist Stobaeus, and the effect of this approach to the subject is visible on every page of the *De Iure Belli ac Pacis*. Rousseau was to remark sardonically that Grotius’s use of quotations concealed the fundamental similarity between Grotius and Hobbes: “The truth is that their principles are exactly the same: they only differ in their expression. They also differ in their method. Hobbes relies on sophisms, and Grotius on the poets; all the rest is the same.” Grotius also turned his attention to rewriting and expanding his earlier work on theology, and it was this which he brought to fruition first after his escape; but once settled in France he concentrated on his juridical and moral project and wrote *De Iure Belli ac Pacis* between the autumn of 1622 and the spring of 1624, partly while staying as a guest at the country house of one of the presidents of the Parlement of Paris, Henri de Mesmes, at Balagny near Senlis. Printing took place slowly and inefficiently from January to March 1625; copies were rushed to the Frankfurt Book Fair in March in order to catch the eye of the European public, and in May Grotius was at last able to give a presentation copy to the book’s dedicatee, King Louis XIII of France.

Among the papers to which he must have turned while in prison was a long manuscript which he had written in 1606, before the practical requirements of Dutch politics came to occupy all his time and attention. It was a defense of the military and commercial activity of the Dutch East India Company in the Far East, and in it the central themes of *De Iure Belli ac Pacis* were already adumbrated. He had begun to circulate the manuscript among his friends, no doubt with a view to publishing it, but in the end only Chapter XII of the manuscript had appeared in print, as the famous *Mare Liberum* (1609); clearly, Grotius decided that his enforced leisure at Louvestein was an ideal opportunity to rewrite this early draft and finally put it in a publishable form. The manuscript lay unknown among Grotius’s papers until 1864, when it was discovered and published; its first editor gave it the title *De Iure Praedae, The Law of Prizes*, but Grotius himself referred to it more loosely as his *De Indis*, and its real scope was expressed by the subtitle of *Mare Liberum*, “a dissertation on the law which covers the Hollanders’ trade with the Indies.” Dutch expansion in the Far East was a peculiarly fertile context for Grotius’s political theory to develop, since (as I said

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earlier) it was essentially driven by a private corporation, interacting with local rulers such as the sultan of Johore and offering them military protection and beneficial trading arrangements. The Indian Ocean and the China Sea were an arena in which actors had to deal with one another without the overarching frameworks of common laws, customs, or religions; it was a proving ground for modern politics in general, as the states of Western Europe themselves came to terms with religious and cultural diversity. The principles that were to govern dealings of this kind had to be appropriately stripped down: there was no point in asserting to a king in Sumatra that Aristotelian moral philosophy was universally true, and not much more point in telling the admiral of the Dutch East India Company's fleet that he had to wait for some judicial pronouncement by an appropriate sovereign before making war on a threatening naval force. The minimalist character of the principles that emerged from this setting caught the imagination of modern Europe, for they seemed to offer the prospect of an understanding of political and moral life to which all men—the poor and dispossessed and religiously heterodox of Europe as well as the exotic peoples of the Far East or the New World—could give their assent.

Grotius remained committed to this view in *De Iure Belli ac Pacis*, remarking in one of its most striking passages that “there are several Ways of living, some better than others, and every one may chuse what he pleases of all those Sorts.” He thus presupposed the naturally autonomous agents familiar to us from later seventeenth- and eighteenth-century political theory, who constructed their political arrangements through voluntary agreements. Though he did not have precisely the concept of the “state of nature,” which was so central to Hobbes and his successors, and which they always contrasted with “civil Society” (the product of agreement among naturally free men), he did use the terms in somewhat similar ways; and of course the domain of foreign trade and war was in itself the best example of such a state, and was always used as such by later writers.

[120] Crick, B. (2006). Justifications of Violence. *Political Quarterly*, [online] 77(4), pp. 433-438. Available from: 10.1111/j.1467-923X.2006.00815.x. [Accessed 9 March 2015].

[121] As for the Italian academic debate, I would like to point out the cases and the materials I have taken in the context of the Conference “The rethoric of ‘othering’ from Aristotle to Frank Westerman. Giornate in onore di Flavio Baroncelli”, at the University of Genoa, School of Humanities, 27-28 november 2018, which saw the participation - among others - of Prof. Mikael Karlsoon.

[122] Consociational democracy is closely linked to the idea of deliberative democracy: it advances a particular theory of political legitimacy based on the combination of two ideas or values: the value of democracy itself and the value of argumentation or deliberation - that

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is, the idea that collective, binding decisions should be the outcome of a deliberative procedure, a collective exchange and mutual scrutiny of rational arguments. Republicanism, in particular, relates to one of the major contemporary democratic theories, deliberative democracy: republicanism is an ancient tradition in the history of political philosophy which has enjoyed a very important revival in the last three decades. It is characterized by its central claim on a particular view of human freedom, as the basic value for political relations, namely, the idea of freedom as non-domination.

As to an introduction to the republican tradition and the idea of freedom as non-domination, see Philip Pettit, “Civic Republican Theory”, in José Luis Martí and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero’s Spain*, Princeton University Press, 2010: ch. 2; Philip Pettit, *Republicanism*, Oxford University Press, 1999: chs. 1 and 2.

As to others republican values and practical applications, see Frank Lovett and Philip Pettit, “Neo-republicanism: A Normative and Institutional Research Program”, *Annual Review of Political Science*, 2009; Richard Dagger, *Civic Virtues*, Oxford University Press, 1997: chs. 7 and 8; José Luis Martí and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero’s Spain*, Princeton University Press, 2010: ch. 3.

As to two debates about a global republican deliberative democracy, see Philip Pettit, “Legitimate International Institutions”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, 2010: ch. 6; James Bohman, *Democracy Across Borders*, MIT Press, 2007: ch. 1; Rafael Domingo, *The New Global Law*, Cambridge University Press, 2010: ch. 5; José Luis Martí, “A Global Republic to Prevent Global Domination”, *Diacritica*, 24/2, 2010.

[123] SOMERS, M. (1994). “Reclaiming the epistemological “Other”: Narrative and the social constitution of identity”, C. Calhoun (Ed.), *Social theory and the politics of identity*, 37-99, Cambridge: Blackwell.

[124] Contemporary cases comprising a ‘new wave of consociationalism’ and associated with peacebuilding (TAYLOR, R. (2009). Introduction. The promise of consociational theory. In *Consociational Theory. McGarry and O’Leary and the Northern Ireland conflict*, pp. 1-12), include for example former Yugoslavian countries Bosnia-Herzegovina and Macedonia (BIEBER, F. (2000). Bosnia-Herzegovina and Lebanon: Historical Lessons of Two Multireligious States. *Third World Quarterly*, 21(2), 269-281; Id. (2005). Power Sharing After Yugoslavia: Functionality and Dysfunctionality of Power-sharing Institutions in Post-War Bosnia, Macedonia, and Kosovo. In S. Noel (Ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (pp. 85-103), Montreal & Kingston:

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McGill-Queen’s University Press. See also BOSE, S. (2002). *Bosnia after Dayton: Nationalist Partition and International Intervention*. London: Hurst; Id., (2005). The Bosnian State a Decade After Dayton. *International Peace Keeping*, 12 (3), 322-335; and CASPERSEN, N. F. (2004). Good Fences Make Good Neighbours? A Comparison of Conflict-Regulation Strategies in Postwar Bosnia. *Journal of Peace Research*, 41(5), 569-588); Northern Ireland (MCGARRY, J., & O’LEARY, B. (2006). Consociational theory, Northern Ireland’s conflict, and its agreement. Part 1: What consociationalists can learn from Northern Ireland. *Government and Opposition*, 41(1), 43-63; Id., (2009). Power shared after the death of thousands. In *Consociational Theory. McGarry and O’Leary and the Northern Ireland conflict*. Abingdon and New York: Routledge); South Africa (JUNG, C., & SHAPIRO, I. (1995). South Africa’s negotiated transition: democracy, opposition, and the new constitutional order. *Politics and Society*, 23(3), 269-308), and several African countries post-Cold War like Rwanda, Burundi and the Democratic republic of Congo (LEMARCHAND, R. (2007). Consociationalism and power sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo. *African Affairs*, 106(422), 1-20).

In Bosnia-Herzegovina and Northern Ireland consociational thought has decidedly influenced the peace agreements precluding the end of internal conflict and in Cyprus, albeit until now without success, diplomats have also proposed consociational arrangements (MCCRUDDEN, C., & O’LEARY BRENDAN. (2013). *Courts and Consociations: Human Rights and Power Sharing*. Oxford: Oxford University Press, 5). Even more recent cases, like Afghanistan and Iraq, corroborate the found influence of consociational thought on policies in conflict resolution (MCGARRY, J., & O’LEARY, B. (2007), *op. cit.*; ROTHCHILD, D., & ROEDER, P. G. (2005). Dilemmas of state-building in divided societies. In P. G. Roeder & D. Rothchild (Eds.), *Sustainable Peace. Power and democracy after civil wars* (pp. 1-16). Ithaca: Cornell University Press). These contemporary cases of consociationalism can be distinguished from classical cases like the Netherlands, Belgium, Switzerland, and Lebanon that played a vital role in the development of consociational theory.

[125] FINLAY, A. (2011). *Governing Ethnic Conflict. Consociation, identity and the price of peace*. Abingdon and New York: Routledge. See also MCGARRY, J., & O’LEARY, B. (2007). Iraq’s Constitution of 2005: Liberal consociation as political prescription. *International Journal of Constitutional Law*, 5(4), 670-698.

[126] AITKEN, R. (2007). Cementing Divisions? *Policy Studies*, 28(3), 247-267; O’LEARY, B. (2005). Debating Consociational Politics: Normative and Explanatory Arguments. In S. Noel (Ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (pp. 3-44). Montreal & Kingston: McGill-Queen’s University Press; WILSON, E.K. (2010). Beyond Dualism: Expanded Understandings of Religion and Global Justice.

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*International Studies Quarterly* 54: 733-754.

[127] O’LEARY, B. (2013). Power Sharing in Deeply Divided Places. In *Power Sharing in Deeply Divided Places* (p. 432) provides an elaborate overview of the difference accommodationist and integrationist approaches.

[128] O’LEARY, B. (2005). Debating Consociational Politics: Normative and Explanatory Arguments: 9, *cit.*

[129] RAWLS, J. (1993). *Political Liberalism* (Revised ed 2005). New York: Columbia University Press.

[130] MCGARRY and O’LEARY, 2007, *cit.*; O’FLYNN, I. (2003). The Problem of Recognising Individual and National Identities: A Liberal Critique of the Belfast Agreement. *Critical Review of International Social and Political Philosophy*, 6(3), 129-153. But see also TAYLOR, R. (2006). The Belfast agreement and the politics of consociationalism: A critique. *Political Quarterly*, 77(2), 217-226, available at: <https://doi.org/10.1111/j.1467-923X.2006.00764.x>

[131] HERBST, J. (2004). Let Them Fail: State Failure in Theory and Practice, Implications for Policy. In *When States Fail: Causes and Consequences* (pp. 302-318); JABRI, V. (2010). War, Government, Politics: A Critical Response to the Hegemony of the Liberal Peace. *Palgrave Advances in Peacebuilding: Critical Developments and Approaches*, 41-57; PUGH, M. C. (2004). Peacekeeping and critical theory. *International Peacekeeping*, 11(1), 39-58.

[132] LIJPHART, A. (1968a). Typologies of Democratic Systems. *Comparative Political Studies*, 1(1), 3-44.

[133] LIJPHART, A. (1968b). *The Politics of Accommodation: pluralism and democracy in the Netherlands*. Berkeley & Los Angeles: University of California Press.

[134] LIJPHART, A. (1985). *Power-Sharing in South Africa*. Berkeley: University of California Press. See also O’LEARY, B. (2005), *cit.*, and McGarry, J., & O’Leary, B. (2009). Power shared after the death of thousands. In *Consociational Theory. McGarry and O’Leary and the Northern Ireland conflict*. Abingdon and New York: Routledge.

[135] BAUMAN, Z., *Liquid modernity*, trans. it., Roma-Bari, 1999. “Abandon all hope of totality, future as a past, you who enter the world of liquid modernity.” The metaphor of liquidity, since Bauman coined it, has marked our years and has entered into common language to describe modernity in which we live. Individualized, privatized, uncertain, flexible, vulnerable, in which unprecedented freedom contrasts an ambiguous joy and an

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impossible desire to satisfy.

In the 1980s and 1990s, Bauman was known as a key theorist of postmodernity. While many theorists of the postmodern condition argued that it signified a radical break with modern society, Bauman contended that modernity had always been characterized by an ambivalent, “dual” nature. On the one hand, Bauman saw modern society as being largely characterized by a need for order—a need to domesticate, categorize, and rationalize the world so it would be controllable, predictable, and understandable. It is this ordering, rationalizing tendency that Max Weber saw as the characteristic force of modernization. But, on the other hand, modernity was also always characterized by radical change, by a constant overthrowing of tradition and traditional forms of economy, culture, and relationship—“all that is solid melts into air,” as Marx characterized this aspect of modern society. For Bauman, postmodernity is the result of modernity’s failure to rationalize the world and the amplification of its capacity for constant change.

Late modernity (or liquid modernity) is the characterization of today’s highly developed global societies as the continuation (or development) of modernity rather than as an element of the succeeding era known as postmodernity, or the postmodern.

Introduced as ‘liquid’ modernity by the Polish-British sociologist Zygmunt Bauman, late modernity is marked by the global capitalist economies with their increasing privatisation of services and by the information revolution.

Social theorists and sociologists such as Scott Lash, Ulrich Beck, Zygmunt Bauman and Antony Giddens maintain (against postmodernists) that modernization continues into the contemporary era, which is thus better conceived as a radical state of late modernity. On technological and social changes since the 1960s, the concept of “late modernity” proposes that contemporary societies are a clear continuation of modern institutional transitions and cultural developments. Such authors talk about a reflexive modernization process: in Giddens’ words, “social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character”. Modernity now tends to be self-referring, instead of being defined largely in opposition to traditionalism, as with classical modernity.

Anthony Giddens does not dispute that important changes have occurred since “high” modernity, but he argues that we have not truly abandoned modernity. Rather, the modernity of contemporary society is a developed, radicalized, ‘late’ modernity—but still modernity, not postmodernity. In such a perspective, postmodernism appears only as a hyper-technological version of modernity.’

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The subject is constructed in late modernity against the backdrop of a fragmented world of competing and contrasting identities and life-style cultures. The framing matrix of the late modern personality is the ambiguous way the fluid social relations of late modernity impinge on the individual, producing a reflexive and multiple self.

Zygmunt Bauman, who introduced the idea of liquid modernity, wrote that its characteristics are about the individual, namely increasing feelings of uncertainty and the privatization of ambivalence. It is a kind of chaotic continuation of modernity, where a person can shift from one social position to another in a fluid manner. Nomadism becomes a general trait of the ‘liquid modern’ man as he flows through his own life like a tourist, changing places, jobs, spouses, values and sometimes more—such as political or sexual orientation—excluding himself from traditional networks of support, while also freeing himself from the restrictions or requirements those networks impose.

Bauman stressed the new burden of responsibility that fluid modernism placed on the individual—traditional patterns would be replaced by self-chosen ones. Entry into the globalized society was open to anyone with their own stance and the ability to fund it, in a similar way as was the reception of travellers at the old-fashioned caravanserai. The result is a normative mindset with emphasis on shifting rather than on staying—on provisional in lieu of permanent (or ‘solid’) commitment—which (the new style) can lead a person astray towards a prison of their own existential creation. See Anita Harris, *Future Girl* (2004) p. 3; Marc Cools et al., *Safety, Societal Problems and Citizens’ Perceptions* (2010) p. 88; R. Appignanesi et al., *Postmodernism for Beginners* (Cambridge 1995) p. 126 and p. 172; Jennifer Craik, *The Face of Fashion* (London 1994) p. 8; Kim Toffoletti, *Baudrillard Reframed* (London 2011) p. 75; John Mandalios, *Civilization and the Human Subject* (1999) p. 2; Zygmunt Bauman, *Liquid Modernity* (2000) p. 8; Id., p. 23; Adam Phillips, *On Flirtation* (London 1994) p. 124; Richard Brown, in Neil Corcoran ed, *Do you, Mr Jones?* (London 2002) p. 196 and p. 219; Ulrich Beck, Anthony Giddens and Scott Lash. 1994. *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*. Blackwell; Beck, Ulrich. 1992. *Risk Society*. SAGE Publications; Giddens, Anthony. 1991. *The Consequences of Modernity*. Stanford University Press; Lash, Scott. 1990. *The Sociology of Postmodernism*. Routledge. See also Gary Minda, *Teorie postmoderne del diritto*, Bologna, il Mulino (Italian edn. and intr. by M. Barberis).

[136] HARTZELL, C., & HODDIE, M. (2003). Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management, *American Journal of Political Science*, 47(2), 318-332. This article examines how power sharing institutions might best be designed to stabilize the transition to enduring peace among former adversaries following the negotiated settlement of civil wars. We identify four different forms of power sharing based on whether the intent

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of the policy is to share or divide power among rivals along its political, territorial, military, or economic dimension. Employing the statistical methodology of survival analysis to examine the 38 civil wars resolved via the process of negotiations between 1945 and 1998, we find that the more dimensions of power sharing among former combatants specified in a peace agreement the higher is the likelihood that peace will endure. We suggest that this relationship obtains because of the unique capacity of power sharing institutions to foster a sense of security among former enemies and encourage conditions conducive to a self-enforcing peace. See also HODDIE, M. (2014). *Managing Conflict after Civil War*, (August 2018).

[137] LIJPHART, A. (1995). Self-determination versus pre-determination of ethnic minorities in power-sharing systems. In *The rights of minority cultures* (pp. 275-287).

[138] BOOGARDS, M. (2004). Counting parties and identifying dominant party systems in Africa, *European Journal of Political Research*, 43(2), 173-197. By most definitions, the third wave of democratisation has given rise to dominant parties and dominant party systems in Africa. The effective number of parties, the most widely used method to count parties, does not adequately capture this fact. An analysis of 59 election results in 18 sub-Saharan African countries shows that classifications of party systems on the basis of the effective number of parties are problematic and often flawed. Some of these problems are well known, but the African evidence brings them out with unusual clarity and force. It is found that Sartori's counting rules, party system typology and definition of a dominant party are still the most helpful analytical tools to arrive at an accurate classification of party systems and their dynamics in general, and of dominant party systems in particular.

[139] MERDZANOVIC, A. (2015). *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina*. Ibidem-Verlag, p. 113.

[140] O'LEARY, B. (2013), *cit.*, p. 3.

[141] BOOGARDS, M. (2007). Measuring Democracy through Election Outcomes. A Critique with African Data, *Comparative Political Studies*, 40(10), 234-252. Cross-national measures of democracy are widely used to track the development and spread of democracy around the world and to study the causes and correlates of democratization. Most of the best-known democracy indexes have a component on election outcomes. In many measures, election outcomes make a significant contribution to a country's overall rating, and in some, the outcomes are even decisive. However, in the first empirical test of this relationship, using data from 165 African multiparty elections in 26 countries, this article demonstrates that election outcomes are not consistently related to democracy and that the assumptions

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behind such a relationship are problematic. Therefore, election outcomes are a flawed shortcut to measuring democracy.

[142] LIJPHART, A. (1968a), *cit.*, p. 224; MERDZANOVIC, A. (2015), *cit.*, p. 139.

[143] HARTZELL and HODDIE, (2003); HODDIE, (2014); LIJPHART, (1985), all *cit.*, in SCHNECKENER, U. (2002). Making Power-sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation. *Journal of Peace Research*, 39(2), 203-228.

[144] JARSTAD, A., & SISK, T. D. (2008). *From War to Democracy: Dilemma's of Peacebuilding*. Cambridge: Cambridge University Press, 123.

[145] BINNINGSBØ, H. M. (2013). Power sharing, peace and democracy: Any obvious relationships? *International Area Studies Review*, 16(1), 89-112.

[146] O'LEARY, B. (2005), *cit.*, pp. 12-13.

[147] MCGARRY, J., LEARY, B. O., & SIMEON, R. (2008). Integration or accommodation? The enduring debate in conflict regulation. In Choudry (ed) *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford: Oxford University Press, 60.

[148] LEHMBRUCH, G. (1975). Consociational democracy in the international system. *European Journal of Political Research*, 3, 377-391.

[149] NAGLE, J., & CLANCY, M. C. (2010). *Shared Society or Benign Apartheid? Understanding Peace-building in Divided Societies*. Basingstoke: Palgrave Macmillan.

[150] TAYLOR, R. (2006). The Belfast agreement and the politics of consociationalism: A critique. *Political Quarterly*, 77(2), 217-226. Available at: <https://doi.org/10.1111/j.1467-923X.2006.00764.x>. See also EUROPEAN COUNCIL. (2003). *European Council Directive 2003/109/EC*.

[151] TAYLOR, R. (2006), *cit.*, p. 218.

[152] TAYLOR, R. (2006), *cit.*, p. 220.

[153] TAYLOR, R. (2006), *cit.*, p. 222.

[154] O'FLYNN, I. (2003), *cit.*, p. 130.

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[155] SHIRLOW, P., & BRENDAN MURTAGH. (2006). *Belfast: segregation, violence and the city*. London: Pluto Press, 41.

[156] Liberal critics of consociational democracy oppose the idea that ‘the liberal conception of equal citizenship needs to be replaced by a set of culturally differentiated rights’ BARRY, B. (2001). *Culture and Equality. An egalitarian critique of multiculturalism*. Cambridge: Polity Press, 9.

[157] O’FLYNN, I. (2010). Democratic theory and practice in deeply divided societies. *Representation*, 46(3), 281.

[158] O’FLYNN, I. (2010), *cit.*, p. 118.

[159] O’FLYNN, I. (2010), *cit.*, p. 175; PAREKH, B. (1999). The Cultural Particularity of Liberal Democracy. *Political Studies*, 40, 160.

[160] AITKEN, R. (2007), *cit.*, p. 244; WILFORD, R. (2001). The Assembly. In R. Wilford (Ed.), *Agreeing to Disagree? A Guide to the Northern Ireland Assembly*. Norwich: The Stationary Office; WILSON, E. K. (2012). *After Secularism. Rethinking Religion in Global Politics*. Basingstoke: Palgrave Macmillan.

[161] O’FLYNN, I. (2010), *cit.*, p. 197.

[162] NAGLE, J., & CLANCY, M. C. (2010), *cit.*, p. 54.

[163] NAGLE, J., & CLANCY, M. C. (2010), *cit.*, p. 44.

[164] WILFORD, R. (2001), *cit.*, pp. 60-61.

[165] GRAHAM, B., & NASH, C. (2006). A shared future: territoriality, pluralism and public policy in Northern Ireland. *Political Geography*, 25(3), 253-278.

[166] MERDZANOVIC, A. (2015), *cit.*, p. 146.

[167] LIJPHART, A. (1995), *cit.*

[168] FINLAY, A. (2011). *Governing Ethnic Conflict. Consociation, identity and the price of peace*. Abingdon and New York: Routledge, 22; MCGARRY, J., & O’LEARY, B. (2007), *cit.*

[169] LIJPHART, A. (1995), *cit.*, p. 281.

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[170] LIJPHART, A. (1995), *cit.*, p. 282.

[171] MCGARRY, J., & O’LEARY, B. (2006), *cit.*; and also *Id.*, (2007).

[172] MCGARRY, J., & O’LEARY, B. (2007), *cit.*, p. 675.

[173] O’LEARY, B. (2005), *cit.*, pp. 15-16.

[174] MCGARRY, J., & O’LEARY, B. (2006), *cit.*, p. 272.

[175] MCCULLOCH, A. (2014). Consociational settlements in deeply divided societies: the liberal-corporate distinction. *Democratization*, 21(February 2014), 1-18.

[176] MCGARRY, J., & O’LEARY, B. (2007).

[177] O’LEARY, B. (2013), *cit.*, p. 19.

[178] BADER, V. (1999) Religious Pluralism: Secularism or Priority for Democracy? *Political Theory*, 27(5): 597-633.

[179] THOMAS, S. M. (2000). Taking Religious and Cultural Pluralism Seriously: The Global Resurgence of Religion and the Transformation of International Society. *Millennium - Journal of International Studies*, 29(3), 815-841.

[180] WILSON, E. K. (2012), *cit.*, p. 33.

[181] WOLTERSTORFF, N. (2007). The Paradoxical Role of Coercion in the Theory of Political Liberalism. *Journal of Law, Philosophy and Culture*, 1(1), 135.

[182] WOLTERSTORFF, N. (2007), *cit.*, p. 142.

[183] CALHOUN, C. (1997). Nationalism and the Public Sphere. In J. Weintraub & C. Kumar (Eds.), *Public and Private in Thought and Practice. Perspectives on a Grand Dichotomy*. Chicago and London: University of Chicago Press, 81.

[184] RAWLS, J. (1993). *Political Liberalism* (Revised ed 2005). New York: Columbia University Press.

[185] HABERMAS, J. (1962) Transl. Burger T. (1991). *The Structural Transformation of the Public Sphere*. MIT Press.

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[186] CALHOUN, C. (1997), *cit.*, p. 82. Some have emphasized that it is inaccurate to speak of one public sphere and one public. Liberal theorizing, however, does on the idea of a single political unit defining democratic societies: *e.g.* CALHOUN, C. (1997), *cit.*, p. 87. For my current purposes, I will hence focus on this conception of the public and save the qualifications of the notion for later.

[187] WALDRON, J. (2004). Liberalism, political and comprehensive. In G. F. Gaus & C. Kukathas (Eds.), *Handbook of political theory* (pp. 1-11). London: SAGE Publications Ltd.

[188] DOMBROWSKI, D. (2001). *Rawls and Religion: The Case for Political Liberalism*. Albany: University of New York Press, 5.

[189] O’LEARY, B. (2013), *cit.*, p. 430.

[190] LIJPHART, A. (1977). *Democracy in Plural Societies: A Comparative Explanation*. New Haven & London: Yale University Press, 3-4.

[191] For instance, this was the case in the Netherlands during the period of pillarization: *see* LIJPHART, A. (1968b). In classic consociational theory this phenomenon (the coinciding of ideological and organizational divisions) is also referred to as the absence of overlapping memberships. Overlapping membership occur ‘when individuals belong to a number of different organized or unorganized groups with diverse interests and outlook’ and facilitate the capacity and willingness to adopt more moderate political attitudes that are acceptable to members of other social groups as well: LIJPHART, A. (1968a), *cit.*, p. 12; *see also* VERBA, S. (1965). Organizational Membership and Democratic Consensus. *The Journal of Politics*, 27(3), 467-497.

[192] HAMMAR, T. (1990). *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*. Aldershot: Avebury.

[193] LIJPHART, A. (1968a), *cit.*, pp. 17-18.

[194] LIJPHART, A. (1968a), *cit.*, p. 19.

[195] LIJPHART, A. (1968a), *cit.*, p. 18.

[196] LIPPMANN, W. (1922). [1997], *Public Opinion*, New York: Free Press; MCADAMS, D. (2001). “The psychology of life stories”, *Review of General Psychology*, 5(2), 100-122.

[197] TAYLOR, R. (2006), *cit.*, p. 221.

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[198] LIJPHART, A. (1968b), *cit.*, p. 131.

[199] AGER, A., & AGER, J. (2011). Faith and the discourse of secular humanitarianism. *Journal of Refugee Studies*, 24(3), 456-472; but also CASANOVA, J. (2009). The Secular and Secularisms. *Social Research*, 76(4), 1049-1066.

[200] As for “Justice and Identity”: C. Taylor, “Cross-purposes: the Liberal-Communitarian debate”, in N. Rosenblum (ed.), *Liberalism and the Moral Life*, Harvard University Press, Cambridge 1989, pp. 159-182; trans. It. “Il dibattito fra sordi di liberali e comunitaristi”, in A. Ferrara (ed.), *Comunitarismo e liberalismo*, Editori Riuniti, Roma 1992, pp. 137-167; C. Taylor, *Two theories of modernity*, Hastings Centre Report 25 (1995), n. 2, pp. 24- 33; C. Taylor, *Hegel*, Cambridge University Press, Cambridge 1975; *Hegel and Modern Society*, Cambridge University Press, Cambridge 1979; trans. It. *Hegel e la società moderna*, Il Mulino, Bologna 1984; C. Taylor, *Sources of the Self. The Making of the Modern Identity*, Harvard University Press, Cambridge 1989; trans. It. by R. Rini, *Radici dell’io. La costruzione dell’identità moderna*, Feltrinelli, Milano 1994; C. Taylor, ‘Atomism’, in Id., *Philosophical Papers. Vol. II: Philosophy and the Human Sciences*, Cambridge University Press, Cambridge 1985, pp. 187-210; C. Taylor, *The Malaise of Modernity*, Canadian Broadcasting Corporation, 1991, (*The Ethics of Authenticity*, Harvard University Press, Cambridge 1991; trans. It. by G. Ferrara degli Uberti, *Il disagio della modernità*, Laterza, Roma - Bari 1999); C. Taylor, ‘The diversity of goods’, in Sen A., Williams B. (eds.), *Utilitarianism and Beyond*, Cambridge University Press, Cambridge 1982; trans. It. by A. Besussi, *Utilitarismo e oltre*, Il Saggiatore, Milano 1984, pp. 165-185; C. Taylor, ‘The politics of recognition’, in Id., *Multiculturalism and the Politics of Recognition*, Princeton University Press, Princeton 1992; trans. It. by G. Rigamonti, *Multiculturalismo. La politica del riconoscimento*, Anabasi, Milano 1993, pp. 41-103; C. Taylor, *The Malaise of Modernity*, Canadian Broadcasting Corporation, 1991, *The Ethics of Authenticity*, Harvard University Press, Cambridge 1991; trans. It. by G. Ferrara degli Uberti, *Il disagio della modernità*, Laterza, Roma - Bari 1999; T. Nagel, *The Possibility of Altruism*, Clarendon Press, Oxford 1970; trans. It. by R. Scognamiglio, *La possibilità dell’altruismo*, Il Mulino, Bologna 1994; A.C. MacIntyre, *After Virtue*, University of Notre Dame Press, Notre Dame 1981; trans. It. by P. Capriolo, *Dopo la virtù. Saggio di teoria morale*, Feltrinelli, Milano 1988, pp. 69-81; M. Sandel, *Liberalism and the Limits of Justice*, Cambridge University Press, Cambridge 1982; trans. It. by S. D’Amico, *Il liberalismo e i limiti della giustizia*, Feltrinelli, Milano 1994; J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge 1971; trans. It. by U. Santini, *Una teoria della giustizia*, Feltrinelli, Milano 1982; R. Nozick, *Anarchy, State and Utopia*, Basic Books, New York 1974; trans. It. by G. Ferranti, *Anarchia, Stato, Utopia. I fondamenti dello Stato minimo*, Il Saggiatore, Milano 1999; M.N. Rothbard, *The Ethics of*

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*Liberty*, Humanities Press, Atlantic Highlands 1982; trans. It. *L’etica della libertà*, Liberilibri, Macerata 1996; J. L. Mackie, *Ethics. Inventing Right and Wrong*, Penguin, Harmondsworth 1977; trans. It. by B. De Mori, *Etica: inventare il giusto e l’ingiusto*, Giappichelli, Torino 2001; J. McDowell, *Mind, Value and Reality*, Harvard University Press, Cambridge 1998; D. Wiggins, *Needs, Values, Truth: Essays in the Philosophy of Value*, Blackwell, Oxford 1987, 1997, 3 ed.; J. Dancy, *Moral Reasons*, Blackwell, Oxford 1993; J.J. Rousseau, *Les Rêveries du promeneur solitaire*, ‘Cinquième promenade’, in *Oeuvres complètes*, Gallimard, Paris 1959, 1, 1047; J. Habermas, “Anerkennungskämpfe im demokratischen Rechtsstaat”, in C. Taylor, *Multikulturalismus und die Politik der Anerkennung*, Suhrkamp, Frankfurt a. M. 1993, pp. 147-196; trans. It. by L. Ceppa in *Ragion pratica* II (1994), pp. 132-165, p. 151; T. Nagel, *The Possibility of Altruism*, Clarendon Press, Oxford 1970; trans. It. by R. Scognamiglio, *La possibilità dell’altruismo*, Il Mulino, Bologna 1994; Jeremy Waldron, *Minority cultures and the cosmopolitan alternative*, in Will Kymlicka (ed.) *The rights of Minority Cultures*, Oxford University Press 1995, pp. 93-119.

[201] As to the general theories of justice: see John Rawls, “Justice as Fairness”, in *Philosophical Review* Vol. LXVII, 1958; Michael Sandel, *Justice. What’s the Right Thing to do?* Farrar, Straus and Giroux, 2009. Chapter 6 and 7, pp. 160-206 and 311-313. (Italian translation: *Giustizia. Il nostro bene comune*, Feltrinelli, Milano, 2010, trans. by Tania Gargiulo).

As to justice and human rights: Amartya Sen, “Elements of a Theory of Human Rights”, *Philosophy and public affairs* 32, No. 4, 2004, pp. 315-356; Steven Lukes “Five fables on human rights”, in Stephen Shute and Susan Hurley (eds.), *On Human Rights*, Basic Books, New York, 1993. (Spanish translation: “Cinco fábulas sobre los derechos humanos”, en Stephen Shute and Susan Hurley (eds.), *De los derechos humanos*, Trotta, Madrid, pp. 29-46).

As to justice and identity: Jeremy Waldron, *Minority cultures and the cosmopolitan alternative*, in Will Kymlicka (ed.) *The rights of Minority Cultures*, Oxford University Press 1995, pp. 93-119. In Italian: Charles Taylor, *Multiculturalismo: la politica del riconoscimento*, traduzione dall’inglese di Gianni Rigamonti, Milano, Anabasi, 1993.

More in general, see Barry, Brian *Theories of Justice*, University of California Press, 1989 (Spanish translation: *Teorías de la justicia*, Gedisa, Barcelona 1995, trans. by Cecilia Hidalgo); Campbell, Tom *Justice*, Palgrave, 1988-2001 (Spanish translation: *La Justicia. Los principales debates contemporáneos*, Gedisa, Barcelona 2002, trans. by Silvina Alvarez); 3. Gargarella, Roberto *Las teorías de la justicia después de Rawls. Un breve manual de*

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*filosofía política*, Paidós, Buenos Aires, 1999; Hierro, Liborio L. “El concepto de justicia y la teoría de los derechos” en Elias Dias y José Luis Colomer (eds.) *Estado, justicia, derechos*, Alianza, Madrid 2002, pp. 11-73; Kelsen, Hans, *What is justice*, University of California Press, Berkeley, California 1971). (Spanish translation: *¿Que es justicia?* en Hans Kelsen *¿Qué es justicia?*, Planeta-Agostini, Barcelona 1993, trans. by Albert Calsamiglia, pp. 35-63); Kymlicka, Will, *Contemporary political philosophy. An introduction*, Oxford University Press 2002, second edition; Sen, Amartya *The idea of justice*, Penguin Press, 2009 (*La idea de la justicia*, Taurus, Madrid 2010, translation to spanish by Hernando Valencia Villa); Van Parijs, Philippe *¿Qué es una sociedad justa? Introducción a la práctica de la filosofía política*, Ariel, Barcelona 1993, translation into Spanish by J. A. Bignozzi; Veca, Salvatore *La filosofía política*, Laterza, Bari 2005, Fourth edition; Walzer, Michel *The spheres of justice. A defense of pluralism and equality*, Basic Books, New York 1993 (*Las esferas de la justicia. Una defensa del pluralism y la igualdad*, Fondo de cultura económica, México 1993, translation to spanish by Heriberto Rubio).

[202] WILSON, E. K. (2012), *cit.*, p. 3.

[203] THOMAS, S. M. (2000), *cit.*, p. 819.

[204] FOX, J. (2001). Religion as an Overlooked Element of International Relations. *International Studies Review*, 3(3), 53-73.

[205] WILSON, E. K. (2012), *cit.*, pp. 1-2.

[206] HURD, E. S. (2008). *The politics of secularism in International Relations*. Princeton & Oxford: Princeton University Press, 1.

[207] CASANOVA, J. (1994). *Public religions in the modern world*. Chicago and London: The University of Chicago Press, 40.

[208] TAYLOR, C. (2009). The polysemy of the secular. *Social Research*, 76, 1143-1167, available at <https://doi.org/10.2307/40972206> .

[209] HURD, E. S. (2008), *cit.*, p. 12.

[210] HURD, E. S. (2008), *cit.*, p. 14.

[211] WILSON, E. K. (2012), *cit.*, p. 34.

[212] WILSON, E. K. (2012), *cit.*, p. 36.

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[213] HURD, E. S. (2008), *cit.*, p. 12.

[214] WOLTERSTORFF, N. (2007), *cit.*, p. 105.

[215] WOLTERSTORFF, N. (2007), *cit.*, p. 177, discerns a paradoxical relationship between the required secularity of the public sphere and the freedom of religion: ‘It is when we bring into the picture persons for whom it is a matter of religious conviction that they ought to strive for a religiously integrated existence – it’s then, especially, though not only then, that the unfairness of liberalism to religion comes to the light’.

[216] OWEN, D. (2012). “Constituting the polity, constituting the demos: on the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem”, *Ethics & Global Politics*, Vol. 5, No. 3, 129-152.

[217] CASANOVA, J. (2009). The Secular and Secularisms. *Social Research*, 76(4), 1049-1066.

[218] But, there are many different conceptions of rationality, and ‘a great deal hinges on the conception of rationality we employ to determine whether a citizen is rationally justified in adhering to some religious commitment’ and hence if their worldview can be a basis for public justification and democratic participation (EBERLE, C. J. (2002). *Religious Conviction in Liberal Politics*. Cambridge: Cambridge University Press, 16). The very notion of rationality employed by liberalism to disregard religion (as well as other comprehensive doctrines) in public debate is a liberal secular notion of rationality that considers ‘pure reason’ (that is reason uninformed by faith) to be the ultimate arbiter of truth’ (AGER, A., & AGER, J. (2011), *cit.*, p. 466). When considering that this is merely one understanding of the conception of rationality, we could understand religion ‘not as much as irrational so much as it is non-rational’ (AGER, A., & AGER, J. (2011), *cit.*, p. 451).

[219] DEWEY, J. (All references to Dewey’s works are to the multivolume series comprising *The Early Works, 1882-1898*, *The Middle Works, 1899-1924*, and *The Later Works, 1925-1953*, edited by Jo Ann Boydston and published by Southern Illinois University Press. These are cited in the text as *EW*, *MW*, and *LW*, respectively, *LW2: The Public and Its Problems*; GOODIN, R. (2007). “Enfranchising All Affected Interests, and Its Alternatives”, *Philosophy & Public Affairs*, Volume 35, Issue 1, 40-68.

[220] CALHOUN, C. (1997), *cit.*, p. 84.

[221] CALHOUN, C. (1997), *cit.*, p. 91.

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[222] CALHOUN, C. (1997), *cit.*, p. 98.

[223] CALHOUN, C. (1997), *cit.*, p. 97.

[224] See the comment about Mill in MCCRUDDEN, C., & O’LEARY BRENDAN. (2013), *cit.*, p. 2.

[225] MCGARRY, J., & O’LEARY, B. (2006), *cit.*, p. 16.

[226] MCGARRY, J., & O’LEARY, B. (2006), *cit.*, p. 18.

[227] MCGARRY, J., & O’LEARY, B. (2006), *cit.*, p. 19.

[228] LIJPHART, A. (1968a), *cit.*

[229] WOLTERSTORFF, N. (2007), *cit.*

[230] WILSON, E.K. (2010), *cit.*, and Id., (2012), *cit.*

[231] KRISTEVA, J. (1986). Word Dialogue and Novel. In Moi (ed) *The Kristeva Reader*, New York: Columbia University Press.

[232] PROKHOVNIK, R. (2003). *Rational Woman: A feminist Critique of Dichotomy*, Manchester: Manchester University Press.

[233] WOLTERSTORFF, N. (2007), *cit.*

[234] EBERLE, C. J. (2002), *cit.*

[235] BAUBÖCK, R. (1994). *Transnational citizenship: membership and rights in international migration*. Aldershot: Edward Elgar; Id., (2005). “Expansive Citizenship - Voting beyond Territory and Membership”, *Political Science and Politics/ Volume / Issue 04*, 683-68; Id.,(ed.), (2006). *Migration and Citizenship. Legal Status, Rights and Political Participation*, Amsterdam University Press, IMISCOE report series, 128. Chapters by Rainer Bauböck, Albert Kraker, Bernhard Perchinig, Marco Martiniello; Id., (2009). “The rights and duties of external citizenship”. *Citizenship Studies*, 13(5): 475-499; Id., (2011). “Temporary migrants, partial citizenship and hypermigration”, *Critical Review of International Social and Political Philosophy*, Volume 14, Issue 5, Special Issue: Democratic Citizenship and its Futures.

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[236] As to culture and ethics of immigration: CARENS, J. (2014). “An overview of the ethics of immigration”, *Critical Review of International Social and Political Philosophy*, Volume 17, Issue 5, Special Issue: *New Challenges in Immigration Theory*; Id., (2002). “Citizenship and civil society: what rights for residents?”, R. Hansen and P. Weil, eds. *Dual nationality, social rights and federal citizenship in the US and Europe: the reinvention of citizenship*. Oxford: Berghahn Books, 100-118; Id., (2013). *The ethics of immigration*. New York: Oxford University Press.

[237] LABORDE, C. (2017). *Liberalism’s Religion*, Cambridge, MA: Harvard University Press, 344 pp. This book offers the first extensive engagement with religion from liberal political philosophers. The volume analyzes, from within the liberal philosophical tradition itself, the key notions of conscience, public reason, non-establishment, and neutrality. Insofar as the contemporary religious revival is seen as posing a challenge to liberalism, it seems more crucial than ever to explore the specific resources that the liberal tradition has to answer it. Disaggregating religion into its various dimensions, as Laborde does, has two clear advantages: first, it shows greater respect for ethical and social pluralism by ensuring that whatever treatment religion receives from the law, it receives because of features that it shares with nonreligious beliefs, conceptions, and identities. Second, it dispenses with the Western, Christian-inflected conception of religion that liberal political theory relies on, especially in dealing with the issue of separation between religion and state. As a result, *Liberalism’s Religion* offers a novel answer to the question: Can Western theories of secularism and religion be applied more universally in non-Western societies?

[238] LABORDE, C. (2017), *cit.*, p. 234.

[239] As to the French scenario: BOLZMAN, C. (2007). *Migrants au quotidien : les frontaliers. Pratiques, représentations et identités collectives*, Zurich, Éditions Seismo, 264; see also the accurate analysis carried out by DELPLA, I. (2014). «Cosmopolitisme ou internationalisme méthodologique», *Raisons politiques*, 2014/2 N° 54, 87-102.

[240] LABORDE, C. (2017), *cit.*, p. 237.

[241] LOCKE, J. (1689). *Two Treatises of Government*. Ed. Peter Laslett. Cambridge: Cambridge University Press (1988), 137.

[242] LABORDE, C. (2017), *cit.*, p. 58.

[243] The terminological and structural contrast between *Verfassungsrecht* (constitutional law) and *Verfassungswirklichkeit* (constitutional reality) is another problematical German

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legacy — again with root in CARL SCHMITT, VERFASSUNGSLEHRE 107 (1928; reprinted in 2010).

[244] Jürgen Habermas, *A Pact for or against Europe?*, in WHAT DOES GERMANY THINK ABOUT EUROPE? 83-89 (Ulrike Guérot & Jacqueline Hénard eds., 2011).

[245] Damian Chalmers, *The European Redistributive State and the Need for a European Law of Struggle*, 18 EUROPEAN LAW JOURNAL 667 (2012) and Damian Chalmers, *European Restatements of Sovereignty*, (LSE Working Paper No. 10, 2013).

[246] WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* Verso Books, 97-164 (2014).

[247] Christian Joerges and Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative?* (2012).

[248] Fritz W. Scharpf, *Political Legitimacy in a Non-optimal Currency Area*, in *Adjusting to European Diversity: ADJUSTING TO EUROPEAN DIVERSITY: THE END OF THE EUROCRATS’ DREAM* (Damian Chalmers, Markus Jachtenfuchs & Christian Joerges eds. (2015).

[249] Deirdre Curtin, *The Challenge of Executive Democracy in Europe*, 77 MODERN L. REV. 1, 1-32 (2014).

[250] Hans-Jürgen Bieling, *Das Projekt der Euro-Rettung und die Widersprüche des europäischen Krisenkonstitutionalismus*, 20 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 89, 89-103 (2013).

[251] For a critique of the European “political culture of total optimism” and its weak underpinnings, see Giandomenico Majone, *RETHINKING THE UNION OF EUROPE POST-CRISIS. HAS INTEGRATION GONE TOO FAR?* 74-80 (2014).

[252] Friedrich A. von Hayek, *Nobel Memorial Lecture* (Dec. 11, 1974), <http://pavroz.ru/files/hayekpretence.pdf>.

[253] This is why law should not be called the culprit here; but see K.A. Armstrong, *New Governance and the European Union: An Empirical and Conceptual Critique*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M TRUBEK* n. 10 and accompanying text (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244762](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244762).

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[254] See Michelle Everson, *A very cosmopolitan citizenship; but who pays the price?* in MICHAEL DOUGAN, NIAMH NIC SHUIBHNE AND ELEANOR SPAVENTA, EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN 145 (2013).

[255] Stefano Giubboni, in *European citizenship, labour law and social rights in times of crisis?*, GLJ Special Issue, March 2015.

[256] It is worth noting that very similar disappointments are also becoming a concern in the accession states; see for an instructive analysis Bojan Bugaric, *Europe Against the Left? On Legal Limits to Progressive Politics* (LEQS Paper No. 61, 2013).

[257] FRIEDRICH HÖLDERLIN, note 9 *supra*.

[258] For a thorough reconstruction see BEATE BRAAMS, KOORDINIERUNG ALS KOMPETENZKATEGORIE 15-49 (2013).

[259] See *supra* notes 31 & 33. For an evaluation see the contributions in *Conflicts Law as Constitutional Form in the Postnational Constellation*, 2:2 TRANSNATIONAL LEGAL THEORY (Christian Joerges, Poul F. Kjaer & Tommi Ralli eds., 2011). The core premises of the approach are explained in the introductory chapter by the three editors on “A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation,” 153-165.

[260] Draft European Constitutional Treaty arts. 1-8 (Dec. 16, 2004).

[261] It seems worth noting that Habermas expresses the same ideas in his recent work on the constitutionalisation of international law:

Nation-states encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level.

See Jürgen Habermas *Does the Constitutionalization of International Law still have a Chance?*, in JÜRGEN HABERMAS, THE DIVIDED WEST 113, 176 (Ciaran Cronin trans., 2007).

[262] See Christian Joerges, Poul F. Kjaer & Tommi Ralli *A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation*, in CONFLICTS LAW AS CONSTITUTIONAL FORM IN THE POSTNATIONAL CONSTELLATION, 2:2 TRANSNATIONAL LEGAL THEORY 159-160.

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[263] See *supra* notes 73, 76.

[264] See Christian Joerges & Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative?*, in CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M TRUBEK 295 (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013).

[265] Carens J., *The Ethics of Immigration*, Oxford University Press, 2013. Carens is often considered a leading scholar in the ethics of immigration. In a review of Carens’s 2013 book *The Ethics of Immigration* published in the academic journal *Migration Studies*, Matthew Gibney wrote that, beginning with a highly influential article defending open borders in 1987, Carens has produced a steady stream of pieces on citizenship, refugees, economic migration and irregular migration that have informed almost all serious ethical theorizing on migration.

Carens has summarized his position on immigration and open borders thinking that the way the world is organized today is fundamentally unjust. It’s like feudalism in important respects. In a world of relatively closed borders like ours, citizenship is an inherited status and a source of privilege. Being born a citizen of a rich country in North America or Europe is a lot like being born into the nobility in the Middle Ages. It greatly enhances one’s life prospects (even if there are lesser and greater nobles). And being born a citizen of a poor country in Asia or Africa is a lot like being born into the peasantry in the Middle Ages. It greatly limits one’s life chances (even if there are some rich peasants and a few gain access to the nobility). These advantages and disadvantages are intimately linked to the restrictions on mobility that are characteristic of the modern state system, although the deepest problem is the vast inequality between states that makes so many people want to move. This is not the natural order of things. It is a set of social arrangements that human beings have constructed and that they maintain.

Also known for previous book, *Culture, Citizenship and Community, A Contextual Exploration of Justice as Evenhandedness*, Oxford University Press, 2000, the Author distinguishes three dimensions of citizenship: a legal, psychological and political dimension. The legal dimension refers to the formal rights and duties to the political community to which one belongs, the psychological dimension refers to one’s identification with the political community to which one belongs, the political dimension refers to one’s sense of the representational legitimacy of those who act authoritatively on behalf of and in the name of the political community.

[266] The title of this paper intentionally refers to that of Waltzer, M., *Spheres of Justice*,

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New York, Basic Books, 1983.

[267] As to world poverty, global justice and gender, see Garrett Hardin, "Lifeboat ethics: The case against helping the poor", *Psychology today*, 1974, 38-43, at [http://www.garretthardinsociety.org/articles/art\\_lifeboat\\_ethics\\_case\\_against\\_helping\\_poor.html](http://www.garretthardinsociety.org/articles/art_lifeboat_ethics_case_against_helping_poor.html).

Hugh LaFollette, "World Hunger" *Blackwell Companion to Applied Ethics*, Blackwell, Oxford, 2003, at <http://www.hughlafollette.com/papers/World.Hunger.htm>.

As to utilitarianism and general duties of assistance, see Peter Singer, "Famine, Affluence and Morality", *Philosophy & Public Affairs*, 1, n. 3, 1972, 229-243; Tom Campbell, "Humanity before Justice", *British Journal of Political Science*, v. 4, n. 1, 1974, 1-16.

As to world poverty and human rights, see Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (Second Edition)*, Princeton University Press, 1996, chapter 1 and 2; Amartya Sen, "Capability and Well-being", in M. Nussbaum and A. Sen (eds), *The Quality of Life*, Clarendon Press, Oxford, 1993, 30-53; Amartya Sen, "Human Rights and Capabilities", *Journal of Human Development*, v. 6, n. 2, 2005, 151-166, at [http://www.unicef.org/socialpolicy/files/Human\\_Rights\\_and\\_Capabilities.pdf](http://www.unicef.org/socialpolicy/files/Human_Rights_and_Capabilities.pdf).

As to poverty and gender, see Thomas Pogge, "Severe Poverty as a Human Rights Violation", in T. Pogge, (ed.), *Freedom from Poverty as a Human Right. Who Owes What to the Very Poor*, Unesco/Oxford University Press, Oxford, 2007, 11-53; Liam Murphy, "Institutions and the Demands of Justice", *Philosophy & Public Affairs*, 27, n. 4, 1999, 251-291, esp. 251-277 and 171-275; Susan Moller Okini, Poverty, Well-Being, and Gender: What Counts, Who's Heard? in *Philosophy & Public Affairs*, vol. 31 n.3, pp. 280-316.

[268] Guy S. Goodwin Gill, *The Refugee in International Law*, Clarendon Press, 1996. The situation of refugees is now one of the most pressing and urgent problems facing the international community and refugee law has grown in recent years to a subject of global importance. In this long-awaited second edition, each chapter has been thoroughly revised and updated and every issue, old and new, has received fresh analysis. Features of this new edition include: extensive additional annexes; coverage of new subjects, including internally displaced persons; so-called preventive protection; access to refugees; safety of refugees and relief personnel; the situation of refugee women and children; a detailed examination of the role of the UNHCR; an assessment of the protection possibilities (or lack of them) in the European Convention on Human Rights, and the current situation and possible future problems for Palestinians and emphasis on the decision-making process.

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[269] Haslanger, Gender and Race, (What) are they? (What) do we want them to be?, in *Noûs* 34 (1): 31-55 (2000). The author is a 'debunking' social constructivist, but when it comes to sex, she defends a refined realist view. The debunking project aims at showing how some presumably natural kind actually is a social kind. In defining what it is to be, e.g., a woman, we must make reference to social factors. These tunes are familiar. But how does Haslanger conceive of sex? And why ought we not to debunk sex as well as gender? Since Haslanger defines gender in terms of sex, and criticizes other constructivists for going too far with their constructivist claims, she ought to make some important difference between gender and sex. And so she seems to do. She argues that the sexes are two objective natural types of bodies, while the genders-man and woman-are social types. Nevertheless, since the rationale for our current sex categories is pragmatic or social according to Haslanger, it is possible to debunk sex-in some sense-also within her theory. Many feminists and queer theorists believe that a pluralistic system of sex would be less damaging than our actual division into males and females. If they are right, then there are strong political reasons for debunking sex, too.

The author believes that "It is always awkward when someone asks me informally what I'm working on and I answer that I'm trying to figure out what gender is. For outside a rather narrow segment of the academic world, the term 'gender' has come to function as the polite way to talk about the sexes. And one thing people feel pretty confident about is their knowledge of the difference between males and females. Males are those human beings with a range of familiar primary and secondary sex characteristics, most important being the penis; females are those with a different sex, most important being the vagina or, perhaps, the uterus. Against this background, it isn't clear what could be the point of an inquiry, especially a philosophical inquiry, into what gender is".

[270] *Ibid.*, p. 239.

[271] *Ibid.*, p. 224.

[272] Jenkins, *Amelioration and Inclusion: Gender Identity and the Concept of Woman*, p. 395. Feminist analyses of gender concepts must avoid the inclusion problem, the fault of marginalizing or excluding some *prima facie* women. Sally Haslanger's 'ameliorative' analysis of gender concepts seeks to do so by defining woman by reference to subordination. I argue that Haslanger's analysis problematically marginalizes trans women, thereby failing to avoid the inclusion problem. I propose an improved ameliorative analysis that ensures the inclusion of trans women. This analysis yields 'twin' target concepts of woman, one concerning gender as class and the other concerning gender as identity, both of which I hold to be equally necessary for feminist aims.

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[273] *Ibid.*, p. 395.

[274] Since publication of Haslanger, *Gender and Race* there has been a shift in terminology, in the paper Haslanger refers to the ameliorative approach as analytic and to the analytic as conceptual.

[275] Kukathas, *Expatriatism: The Theory and Practice of Open Borders*, p. 327.

[276] *Ibid.*, p. 329 ss.

[277] See, as general references: Bosniak, Linda, *The Citizen and the Alien*, Princeton University Press, 2008; Kanstroom, Daniel, *Aftermath: Deportation law and the new American diaspora*, Oxford University Press, 2012; Smith, Rogers, Ed., *Citizenship, Borders, and Human Needs*, University of Pennsylvania Press, 2011; Swain, Carol, Ed., *Debating Immigration*, Cambridge University Press, 2007; Heath Wellman, Christopher, and Cole, Philipp, *Debating the Ethics of Immigration: Is there a right to exclude?* Oxford University Press, 2011; Sen, Amartya, *Identity and violence*, New York-London, W.W. Norton & Company, 2006.

[278] An exception are refugees sur place, they apply for Asylum during a lawful stay, because they fear to return home.

[279] Similarly Haslanger hopes for the day there are no more women. Haslanger, *Gender and Race*, p. 239.

[280] Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, p. 8. Asylum has become a highly charged political issue across developed countries, raising a host of difficult ethical and political questions. What responsibilities do the world's richest countries have to refugees arriving at their borders? Are states justified in implementing measures to prevent the arrival of economic migrants if they also block entry for refugees? Is it legitimate to curtail the rights of asylum seekers to maximize the number of refugees receiving protection overall? This book draws upon political and ethical theory and an examination of the experiences of the United States, Germany, the United Kingdom and Australia to consider how to respond to the challenges of asylum. In addition to explaining why asylum has emerged as such a key political issue in recent years, it provides a compelling account of how states could move towards implementing morally defensible responses to refugees.

See also, partly, Miller, *Strangers in Our Midst*, p. 83: it is not unusual for people in

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countries with limited job opportunities and economic resources to want to seek a better life in different lands. This is especially so for those who come from countries where they are treated poorly, discriminated against, or worse. But moving from one country to another in large numbers creates serious problems for receiving countries as well as those sending them.

How should Western democracies respond to the many millions of people who want to settle in their societies? Economists and human rights advocates tend to downplay the considerable cultural and demographic impact of immigration on host societies. Seeking to balance the rights of immigrants with the legitimate concerns of citizens, *Strangers in Our Midst* brings a bracing dose of realism to this debate. The author defends the right of democratic states to control their borders and decide upon the future size, shape, and cultural make-up of their populations.

Reframing immigration as a question of political philosophy, he asks how democracy within a state can be reconciled with the rights of those outside its borders. A just immigration policy must distinguish refugees from economic migrants and determine the rights that immigrants in both categories acquire, once admitted. But being welcomed into a country as a prospective citizen does more than confer benefits: it imposes responsibilities. In Miller's view, immigrants share with the state an obligation to integrate into their adopted societies, even if it means shedding some cultural baggage from their former home.

[281] Walzer, *Spheres of Justice*, p. 48. In this book, one of the most important books that most people have not read, Walzer identifies eleven goods – spheres of justice – that get distributed in western culture. For each sphere, he delineates the criteria and marks out the appropriate boundaries that guide our internal judgments of justice. These eleven goods of society are as follows: (1) membership in the community, (2) security and welfare, (3) money and commodities, (4) office, (5) hard work-jobs that nobody wants to do in society, (6) free time, (7) education, (8) kinship and love (family), (9) divine grace, (10) recognition, and (11) political power.

Walzer argues that these goods are determined by the shared understandings of the members of the community (citizens) and justice occurs when the boundaries of these goods are established and preserved. For example, the boundaries of education require that all children be given access to a basic education – they have a need to be educated in such a way to develop the character necessary to be contributing members of society. But the boundaries also require that after the basic education, further education is based on the student's aptitude, desire and skill. Therefore determining qualifications for post-secondary school is based on complex equality.

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Justice occurs when the members of the community understand the social goods, understand how they relate to one another through these social goods and develop a diversity of criteria that mirrors the diversity of the social goods. The three criteria that Walzer offers (1) free exchange, (2) desert, and (3) need. An example of free exchange is in the sphere of kinship and love. Marriage, for Walzer is a free exchange of love between two people and should not be regulated by any other criteria. Desert, on the other hand regulates the sphere of recognition. Positive recognition and penal justice require one to get what one deserves in honor or in punishment. Finally, need governs the sphere of security and welfare. Everyone in society needs to have limited protection from the domination of others.

In *Spheres*, Walzer is concerned with understanding and controlling social goods in a way that does not stretch or shrink human beings. He is concerned with recognizing the similarities of individuals while at the same time honoring their differences. Therefore, Walzer offers his notions of simple and complex equality. Equality is a tenuous relationship between the different spheres of goods determined by the shared understandings of the members of the community. Simple equality is the principle that guides those goods that the society determines as “needs” (e.g., basic education, security and welfare, parts of hard work and political power). Complex equality, on the other hand, governs those spheres that rely on free exchange and desert (e.g., money and commodities, divine grace, office, etc...).

For the author, the sphere of political power is unique because it distributes all the other goods of society. Thus, political power must have some mechanism to regulate itself. Thus, he argues for a limited form of democracy as the political structure that best supports a just distribution of the goods of society.

[282] Price, *Rethinking Asylum*, p. 48 ss., and 57. Each year, hundreds of thousands of people apply for asylum in Europe, North America, and Australia. Some fear political persecution and genocide; some are escaping civil war or environmental catastrophe; others flee poverty, crime, or domestic violence. Who should qualify for asylum? Traditionally, asylum has been reserved for the targets of government persecution, but many believe that its scope should be widened to protect others exposed to serious harm. Matthew Price argues for retaining asylum’s focus on persecution – even as other types of refugee aid are expanded – and offers a framework for deciding what constitutes persecution. Asylum, he argues, not only protects refugees but also expresses political values by condemning states for mistreating those refugees. Price’s argument explains not only why asylum remains politically relevant and valuable, but also why states should dismantle many of the barriers they have erected against asylum seekers over the last fifteen years.

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[283] *Ibid.*, p. 70.

[284] *Ibid.*, p. 136.

[285] Miller, *Strangers in Our Midst*, p. 93. Walzer, *Spheres of Justice*, p. 50 ss.

[286] Convention Refugees are those refugees who fulfill the persecution requirement.

[287] Song, *Immigration and the Limits of Democracy*, p. 18: in this book she offers new “realistically utopian” theory of immigration that offers an intermediate position between open borders and closed borders; she integrates normative reflection on the values and principles relevant to public debate about immigration with accessible analysis of immigration law and policy; she defends the right of states to control immigration while also arguing that states have an obligation to open their doors to refugees and migrants seeking to be reunited with family.

But see also Id., *Justice, Gender, and the Politics of Multiculturalism*, Cambridge University Press, 2007, where the author analyzes theories of group rights for religious and cultural minorities and their intersection with women’s rights through a range of case studies in American law and politics. (The book was awarded the 2008 Ralph Bunche Award by the American Political Science Association).

[288] Shacknove, A., *Who is a Refugee?*, p. 280 ss. The 1951 UN Convention defines a refugee as a person who “owing to well-founded fear of being persecuted is outside the country of his nationality” (UNHCR 1951: Art. 1), and due to such fear is unable or unwilling to return to it. This definition, crafted in the aftermath of World War II, has been criticized on a number of grounds. First, it excludes internally displaced persons who flee persecution but who remain in their own country (perhaps during a civil war). Second, as Andrew Shacknove argues in a much-cited article, the focus on persecution seems unfounded, since persecution is but one instance of a broader phenomenon: the absence of state protection of a citizen’s basic needs. Refugees, in his view, are individuals who have no option but to seek international restitution of their needs. Along these lines, courts in Western states have adopted a broad notion of persecution, entertaining claims for asylum from people fleeing ethnic conflict, criminal gangs, family abuse, or seeking urgent medical care. On Shacknove’s view, desperate people from the world’s poorest regions and victims of natural disasters also count as refugees or something very similar to them. So too would victims of human-made catastrophes, such as those induced by climate change. Shacknove’s definition, however, drops one requirement that may seem distinctive of refugees (and is suggested by the wording of the UN Convention): that they flee whatever disruption to their

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basic needs is visited on them. By including victims of purely natural events and also, perhaps, the global poor, Shacknove also fails to draw the morally relevant distinction between cases in which a state is willing but unable to meet its citizens' needs, and cases in which the state actively harms its citizens or fails to prevent harm being inflicted on them where it could do so. These distinctions may affect where we think responsibility to address the injustice should fall. More recently, Matthew Price (2009) has reasserted the orthodox view of refugees, arguing that what is distinctive about them is their state's denial of their claim to political membership. In contrast to other groups whose basic needs are insecure, refugees are exiles, targeted for persecution by their own state in a way. Such persecution communicates that, politically speaking, they no longer count.

[289] Arnould, *Völkerrecht*, p. 307. Hathaway, *The Rights Of Refugees Under International Law*, p. 95. Although the Refugee Convention of 28 July 1951 has been recognised generally as the Magna Charta of international refugee law and the Convention has been followed in more than 100 contracting states for many decades, it is still the source of numerous questions of interpretation. A particularly problematic field is the question of rights of refugees asking for protection in different stages of procedure. The Refugee Convention, as such, does not contain an obligation of contracting states to grant asylum. Nevertheless, the Convention provides for a number of obligations of states laid down in Articles 2, and following.

This book presents the first comprehensive analysis of the human rights of refugees as set by the UN Refugee Convention. In an era where States are increasingly challenging the logic of simply assimilating refugees to their own citizens, questions are now being raised about whether refugees should be allowed to enjoy freedom of movement, to work, to access public welfare programs, or to be reunited with family members. Doubts have been expressed about the propriety of exempting refugees from visa and other immigration rules, and whether there is a duty to admit refugees at all. Hathaway links the standards of the UN Refugee Convention to key norms of international human rights law, and applies his analysis to the world's most difficult protection challenges. This is a critical resource for advocates, judges, and policymakers. It will also be a pioneering scholarly work for graduate students of international and human rights law.

[290] Hathaway, *A Global Solution to a Global Refugee Crisis*. In this book, the author argues that the time is right to change the way that refugee law is implemented. Specifically, Hathaway advocates a shift towards a managed and collectivized approach to the implementation of refugee protection obligations. He contends that while the obligations under the Convention remain sound, the mechanisms for implementing those obligations are flawed in ways that too often lead States to act against their own values and interests, and

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which produce needless suffering amongst refugees. The author concludes with a five-point plan to revitalize the Refugee Convention.

[291] *Ibid.*

[292] Sally Haslanger, *Resisting Reality: Social Construction and Social Critique*, New York: Oxford University Press, 2012, p. 4, 11, III chapt. This chapter proposes social constructionist accounts of gender and race. The focus of the inquiry – an inquiry aiming to provide resources for feminist and antiracist projects – are the social positions of those marked for privilege or subordination by observed or imagined features assumed to be relevant to reproductive function, or geographical origins. The chapter develops these ideas and propose that other gendered and racialized phenomena are usefully demarcated and explained by reference to these social positions. In doing so, the chapter addresses the concern that attempts to define race or gender are misguided because they either assume a false commonality or marginalize some members of the group in question.

Contemporary theorists use the term “social construction” with the aim of exposing how what’s purportedly “natural” is often at least partly social and, more specifically, how this masking of the social is politically significant. In these previously published essays, Sally Haslanger draws on insights from feminist and critical race theory to explore and develop the idea that gender and race are positions within a structure of social relations. On this interpretation, the point of saying that gender and race are socially constructed is not to make a causal claim about the origins of our concepts of gender and race, or to take a stand in the nature/nurture debate, but to locate these categories within a realist social ontology. This is politically important, for by theorizing how gender and race fit within different structures of social relations we are better able to identify and combat forms of systematic injustice.

Although the central essays of the book focus on a critical social realism about gender and race, these accounts function as case studies for a broader critical social realism. To develop this broader approach, several essays offer reworked notions of ideology, practice, and social structure, drawing on recent research in sociology and social psychology. Ideology, on the proposed view, is a relatively stable set of shared dispositions to respond to the world, often in ways that also shape the world to evoke those very dispositions. This looping of our dispositions through the material world enables the social to appear natural.

Additional essays in the book situate this approach to social phenomena in relation to philosophical methodology, and to specific debates in metaphysics, epistemology, and philosophy of language. The book as a whole explores the interface between analytic

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philosophy and critical theory.

[293] Haslanger argues that because social kinds or categories are no less real for being social, it is the social theorist that we should rely on for our meanings of the terms in social domain. Thus in the case of race the authority should not be the biologist.

[294] *Ibid.*, p. 7.

[295] Sally Haslanger employs an analytic project rather than a descriptive or conceptual analysis. According to Haslanger, in an analytic project we decide on what job we want certain concepts of inquiry do for us and why we need them at all. On this approach the world itself cannot answer what race or gender is and it is to a certain extent up to us to define what they are. As an antiracist feminist Haslanger captures and revises the meaning of race and gender for certain theoretical and political purposes (p. 224). She notes that she is primarily “interested in certain forms of oppression that are read into, marked upon, and lived through the body.” She thinks that the markers of race and gender, like the markers of disability and age, are not accessories that might be added or dropped, habits to be taught or broken; they are parts of our bodies and “as-if” indelible. Although other forms of oppression may be equally lasting, and may be more severe, it is both analytically and politically valuable to have a framework within which we can explore cotemporary forms of embodied oppression. (p. 6).

[296] While *race eliminativists* asserts that talk of races is no better than talk of witches or ghosts, and in order to achieve racial justice we should stop participating in a fiction that underwrites racism, “race naturalists believe that “human species can be divided on the basis of natural (biological, genetic, physical) features into a small set of groups that correspond to the ordinary racial divisions. She notes that eliminativism can still be a goal for which to aim, yet as things stand now, race is something that we see in the faces and bodies of others. *Ibid.*, p.306.

[297] *Ibid.*, p. 301.

[298] Haslanger uses the lower case ‘black’ or ‘white’ or ‘brown’ for the “color” markings relevant to racial designation and upper case for homonymous names of races such as ‘Black,’ ‘White,’ etc.

[299] *Ibid.*, p. 235.

[300] *Ibid.*, p. 255, p. 306.

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[301] *Ibid.*, p. 236.

[302] *Ibid.*, p. 196, 245, 254, 308.

[303] *Ibid.*, p. 185.

[304] *Ibid.*, p. 236. She thinks social constructionist account of race provides important resources in politically addressing the problem of injustice. It especially enables us to capture those groups who have suffered injustice due to the assumptions about their “color”. However, she notes that she does not argue her account captures the meaning of race or what we should mean by “race” for all time and in all contexts.

[305] *Ibid.*, p. 308.

[306] Haslanger feels sympathetic to Beauvoir’s argument that females on the whole bear a great physical burden for the species than males and that is the society’s responsibility to address this in order to achieve social justice. *Ibid.*, p. 254.

[307] She makes a crucial difference between recognizing and compensating racialized groups or ethnicities and endorsing and encouraging the formation of racial identities. By recognizing the social positions created by existing racist ideologies and institutions the former is compatible with justice and essential to it. However, she thinks we must be attentive to encouraging racial identity formations based on “color”, p. 256.

[308] Murat Belge, “Kart-Kurt Teorisi’nin Tarihiçesi”: <http://www.taraf.com.tr/murat-belge/makale-kart-kurt-teorisi-nin-tarihcesi.htm>

[309] [http://en.wikipedia.org/wiki/Sun\\_Language\\_Theory](http://en.wikipedia.org/wiki/Sun_Language_Theory)

[310] Haslanger doesn’t have a theory of ethnicity except for some preliminary comparisons with race. Ethnicity concerns one’s ancestral links to a certain geographical region and perhaps together with participation in the cultural practices of that region. Ethnicity also is associated with characteristic physical features but systematic subordination or privilege isn’t constitutive of ethnicity. However ethnic groups can be and are racialized and when they are racialized they function as race according to Haslanger. Haslanger, p. 238.

[311] But with the later resistance of both armed Kurdish people and unarmed political activists, those kinds of theories have lost their attraction. However, the oppression maintains under another guise. Now they are recognized as a different race with their peculiar culture, identity etc. but racialization and so oppression by Turkish people

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maintains.

[312] “Although I am in favour of cultural diversity, on my view too we should aim to eliminate “color” hierarchies; to eliminate “color” hierarchy is to eliminate race. (Similarly this is not to recommend genocide! Cultural and non -hierarchical ethnic groups may remain even where there are no races.)” *Ibid.*, p. 9.

[313] *Ibid.*, p. 264.

[314] *Ibid.*, p. 333.

[315] *Ibid.*, p. 336.

[316] *Ibid.*, p. 256.

[317] *Ibid.*, Cited by Haslanger, p. 260. Outlaw, *Critical Social Theory in the Interests of Black Folks*. Rowman & Littlefield Publishers, Inc. (2005).

Examining the situations of African Americans in the U.S.A., this Lucius Outlaw’s essays illustrate over twenty years of work dedicated to articulating a ‘critical theory of society’ that would account for issues and limiting-factors affecting African-descended peoples in the U.S. Attempting to put politics aside, Outlaw writes from a non-partisan standpoint, in the hopes that the issues he raises in his essays will inspire improvement for the well-bring of African Americans and will also strengthen America’s democracy. Outlaw envisions a democratic order that is not built upon racist projections of the past. Instead, he seeks in these essays a transformative social theory that would help create a truly democratic social order.

[318] *Ibid.*, cit. by Haslanger, p. 260.

[319] *Ibid.*, p. 262.

[320] Alcoff, L.M., *Visible Identities: Race, Gender and the Self*, Oxford University Press, 2006, book that attempted to offer a unified account of social identity by bridging her previous work in epistemology, metaphysics, and the politics of ethnicity, race, and gender. In it, Alcoff suggested that geographic location has significant implications for social identity above and beyond those conveyed by other contributors to identity (although she does not view such implications as deterministic).

Alcoff has written widely on subjects including Foucault, sexual violence, the politics of

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epistemology, gender and race identity, and Latino issues. She has authored three books *Real Knowing: New Versions of Coherence Theory*, New York: Cornell University Press, 1996; *Visible Identities: Race, Gender and the Self*, Oxford University Press, 2006; and *The Future of Whiteness*, Cambridge and Malden, MA: Polity Press, 2015, and *Rape and Resistance*, (forthcoming, 2018). She has also edited ten volumes, written a large number of peer-reviewed articles, and contributed a large number of book and encyclopedia chapters and entries.

In particular, *Real Knowing: New Versions of Coherence Theory* is a timely contribution to a fast-growing body of research in “social epistemology,” a field drawing the attention of philosophers, sociologists of knowledge, social constructionists, and others. Her book begins with an introductory chapter, laying out her project for a new paradigm of epistemology and the consequent metaphysical position that she calls “immanent realism.” Alcoff follows with chapters on Gadamer, Davidson, Foucault, and Putnam, devoting two chapters each to Gadamer and Foucault. In these chapters, she shows how their works—Gadamer’s hermeneutics, Davidson’s account of truth, Foucault’s analyses of discursive formations and his idea of power/knowledge, and Putnam’s internal realism—contribute to her project. In the concluding chapter, Alcoff summarizes her coherentist theory of knowledge and distinguishes it from Michael Williams’s contextualist epistemology in his *Unnatural Doubts* (Williams, 1996).

[321] *Ibid.*, p. 269.

[322] *Ibid.*, p. 228. Hence she thinks the emphasis of her critical project is not to discover commonalities either among sexes, or people of racialized groups but rather to develop analyses that will serve as tools to quest for social justice.

[323] *Ibid.*, p. 265.

[324] *Ibid.*, p. 269

[325] ELLISON, R., *Invisible man*, Random House, 1952. A first novel by an unknown writer, it remained on the bestseller list for sixteen weeks, won the National Book Award for fiction, and established Ralph Ellison as one of the key writers of the century. The nameless narrator of the novel describes growing up in a black community in the South, attending a Negro college from which he is expelled, moving to New York and becoming the chief spokesman of the Harlem branch of “the Brotherhood”, and retreating amid violence and confusion to the basement lair of the Invisible Man he imagines himself to be. The book is a passionate and witty tour de force of style, strongly influenced by T.S. Eliot’s *The Waste*

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*Land*, Joyce, and Dostoevsky.

The narrator introduces himself as an "invisible man." He explains that his invisibility owes not to some biochemical accident or supernatural cause but rather to the unwillingness of other people to notice him, as he is black. It is as though other people are sleepwalkers moving through a dream in which he doesn't appear. The narrator says that his invisibility can serve both as an advantage and as a constant aggravation. Being invisible sometimes makes him doubt whether he really exists. He describes his anguished, aching need to make others recognize him, and says he has found that such attempts rarely succeed.

The narrator relates an incident in which he accidentally bumped into a tall, blond man in the dark. The blond man called him an insulting name, and the narrator attacked him, demanding an apology. He threw the blond man to the ground, kicked him, and pulled out his knife, prepared to slit the man's throat. Only at the last minute did he come to his senses. He realized that the blond man insulted him because he couldn't really see him. The next day, the narrator reads about the incident in the newspaper, only to find the attack described as a mugging. The narrator remarks upon the irony of being mugged by an invisible man.

The narrator describes the current battle that he is waging against the Monopolated Light & Power Company. He secretly lives for free in a shut-off section of a basement, in a building that allows only white tenants. He steals electricity from the company to light his room, which he has lined with 1,369 bulbs. The company knows that someone is stealing electricity from them but is unaware of the culprit's identity or location.

The narrator stays in his secret, underground home, listening to Louis Armstrong's jazz records at top volume on his phonograph. He states that he wishes that he had five record players with which to listen to Armstrong, as he likes feeling the vibrations of the music as well as hearing it. While listening, he imagines a scene in a black church and hears the voice of a black woman speaking out of the congregation. She confesses that she loved her white master because he gave her sons. Through her sons she learned to love her master, though she also hated him, for he promised to set the children free but never did. In the end, she says, she killed him with poison, knowing that her sons planned to tear him to pieces with their homemade knives. The narrator interrogates her about the idea of freedom until one of the woman's sons throws the narrator out on the street. The narrator then describes his experiences of listening to Armstrong's music under the influence of marijuana and says that the power of Armstrong's music, like the power of marijuana, comes from its ability to change one's sense of time. But eventually, the narrator notes, he stopped smoking marijuana, because he felt that it dampened his ability to take action,

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whereas the music to which he listened impelled him to act.

Now, the narrator hibernates in his invisibility with his invisible music, preparing for his unnamed action. He states that the beginning of his story is really the end. He asks who was responsible for his near-murder of the blond man—after all, the blond man insulted him. Though he may have been lost in a dream world of sleepwalkers, the blond man ultimately controlled the dream. Nevertheless, if the blond man had called a police officer, the narrator would have been blamed for the incident.

The Prologue of *“Invisible Man”* introduces the major themes that define the rest of the novel. The metaphors of invisibility and blindness allow for an examination of the effects of racism on the victim and the perpetrator. Because the narrator is black, whites refuse to see him as an actual, three-dimensional person; hence, he portrays himself as invisible and describes them as blind.

[326] *Stigmatisation*: the recognition of an individual as an agent of harmful or reprehensible actions: excellent judgment of which are the gypsy victims all over Europe.

[327] COLE, D., *No Equal Justice. Race and Class in the American Criminal Justice System*, New York, The New Press, 1999; FERRAROTTI, F., *Oltre il razzismo - Verso la società multirazziale e multiculturale*, Roma, 1988; GALLI, C., *Introduzione*, in Id. (ed.), *Multiculturalismo. Ideologie e sfide*, Bologna, Il Mulino, 2006; GOLDONI, M., *I profili della discriminazione. «Racial Profiling» ed argomenti normativi*, in «Ragion Pratica», Il Mulino, Bologna, n. 28, giugno 2007, pp. 187-217; LEANZA, U., *Le migrazioni. Una sfida per il diritto internazionale, comunitario e interno*, Napoli, Ed., 2005; LEVIN, M., *Responses to Race Differences in Crime*, in «Journal of Social Philosophy», 23, 1, 1992, pp. 5-29; O’SULLIVAN SEE, K.; WILSON, W.J., *Race and Ethnicity*, in SMELER, N.J., (ed.), *Handbook of Sociology*, Beverly Hills, 1988; O’TOOLE, M., *The School shooter: A Therat Assesment Perspective*, Federal Bureau of Investigation, Washington D.C., 2000; RAZ, J., *Multiculturalism*, in «Ratio Juris», 11, 3, 1998, pp. 193-205; SOWELL, T., *Race, politique et économie - Une approche internationale*, Parigi, 1986; THOMAS, L., *Statistical Badness*, in «Journal of Social Philosophy», 23, 1, 1992, pp. 40-41; VAN DEN BERGHE, P.L., *The Ethnic Phenomenon*, New York, 1981; VAN DIJK, T.A., *Communicating Racism - Ethnic Prejudice in Thought and Talk*, Londra, 1987; WASSERMAN, D., *Racial Generalizations and Police Discretion*, in KLEINIG, J., (ed.), *Handled with Discretion: Ethical Issues in Police Decision Making*, New York, Rowman and Littlefield, 1996; WIEVIORKA, M.; *L’espace du racisme*, Parigi, 1991; O’SULLIVAN SEE, K.; WILSON, W.J., *Race and Ethnicity*, in SMELER, N.J., (ed.), *Handbook of Sociology*, Beverly Hills, 1988.

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[328] SCHAUER, FREDERICK, *Playing by the Rules*. Oxford, Clarendon Press, 2002, 171-184; Id., *Balancing, Subsumption, and the Constraining Role of Legal Text*. In *Law & Ethics of Human Rights*, 4 (2010), 34-45; Id., *The Theory of Rules*, Karl N. Llewellyn. Chicago, Chicago University Press, 2011; Id., in KLATT, MATTHIAS, *Institutional Reason: The Jurisprudence of Robert Alexy*. Oxford, Oxford University Press, ed. 2012, 307-16; Id., *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*. Harvard, Harvard University Press, 2013.

[329] In Spain (the case of William Lecraft: STC 13/2001 of 29/01/2001; in <http://www.tribunalconstitucional.es/Stc2001/STC2001-013.htm>). In France we refer to the term *ciblage racial*. BODY-GENDROT, S; WITHOL DE VENDEN, C., *Police et discrimination raciales. Le tabou francais*, Paris Ed. De L'Atelier, 2000. ERI, *Second Report on Italy*, 22nd June 2001, para. 51. The *European Roma Rights Centre* (ERRC) has documented numerous cases of abuse by the Italian authorities against the minority Roma.

On the European situation: monograph number of June 2005 of «Justice Initiative-Open Society». *A Europe Without Ethnic Profiling*. (In <http://www.justiceinitiative.org/publications/jinitatives>).

[330] THOMAS, K., in *Law, race and rights: Critical Race Theory and Politics of Rights in the United States*, (pp. 179-202). The school of the *Critical Race Theory* has produced some important anthological volumes (by R. Delgado, *Critical Race Theory: The Cutting Edge*, 1995 and K. Crenshaw, N. Gotanda, G. Peller, and K. Thomas (e.d.), *Critical Race Theory: The Key Writings That Formed The Movement*, 1996); has, arecognisedscientific identity, notwithstanding its recent origin.

[331] GOTANDA, N. «*La nostra costituzione è cieca rispetto al colore: una critica*», 1991, in THOMAS, K. - ZANETTI, Gf., (ed.), *Legge, razza e diritti. La “Critical Race Theory” negli Stati Uniti*, Reggio Emilia, Diabasis, 2005, pp. 27-69.

[332] ALSCHULER, A., *Racial Profiling and the Constitution*, in «*University of Chicago Legal Forum*», 1, 2002, p. 171; AMAR, A., *Fourt Amendment First Principles*, in «*Harvard Law Review*», 107, 4, 1994, pp. 839-841; ALSCHULER, A., *Racial Quotas and the Jury*, in «*Duke Law Journal*», 44, 4, 2004, pp. 704-743; BANKS, R., *Race Based Suspect Selection and Colorblind Equal Protection Doctrine and Discorse*, in «*UCLA Law Review*», 48, 5, 2001, p. 1077; BANKS, R., *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racial Discrimination Under the Equal Protection Clause*, in DORF, M., (ed.), *Constitutional Law Stories*, New York, Foundation Press, 2004, pp. 223-248; BIONDO, F., *Two Types of Liberal Perfectionism*, in «*Ratio Juris*», 18, 4, 2005, pp. 519-535; CARTER W., *A Thirteen*

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*Amendment Framework for Combatting Racial Profiling*, in «Harvard Civil Rights-Civil Liberties Law Review», 39, 1, 2004, pp. 17-93; CRENSHAW, K.; GOTANDA, N.; PELLER, G.; THOMAS, K., (ed.), *Critical Race Theory: The Key Writings That Formed The Movement*, 1996; DEFOSSE, J., *Asian Americans, Racial Profiling and National Security*, in «George Washington Law Review», 70, 1, 2002, pp. 192-203; DELGADO, R., (ed.), *Critical Race Theory: The Cutting Edge*, 1995; DELGADO, R.; STEFANCIC, J., *Critical Race Theory. An Introduction*, New York, New York University Press, 2001.

[333] WALTER B. GALLIE, 'Essentially Contested Concepts,' *Proceedings of the Aristotelian Society*, New Series 56 (1955): 167-98; ALVIN GOULDNER, 'The Norm of Reciprocity: A Preliminary Statement', *American Sociological Review* 25(2) (1960): 161.

1) As for Aristotle and the ancient Greek history, Aristotle, *Pol.*, I, 1259b 5 sg.; III, 1283b 44-45; III, 1287a 13-19; III, 1288a 14; cfr. G. Crifò, *Civis. La cittadinanza tra antico e moderno*, Laterza, Roma-Bari 2000, p. 45; E. Balibar, *Citoyen sujet*, «Cahier confrontation», XX, 1989, p. 23; C. Mossé, *Le citoyen dans la Grèce antique*, Nathan, Paris 1993, p. 111; I. Düring, *Aristoteles. Darstellung und Interpretation seines Denkens*, Winter, Heidelberg 1966; C. Johnson, *Who Is Aristotle's Citizen?*, «Phronesis: A Journal for Ancient Philosophy», 29, 1984, pp. 73-90; C. Mossé, *La conception du citoyen dans la Politique d'Aristote*, «Eirene», VI, 1967, p. 17. As for Aristotle's *Politics*, R. Robinson, *Introduction*, in Aristotle (ed. by R. Robinson), *Politics, Book III and IV*, Clarendon Press, Oxford 1962, in particular pp. IX ss.; W.D. Ross, *Aristotle*, (ed. orig. 1918); trans. It. (ed. by A. Spinelli), *Aristotele*, Laterza, Bari 1946, p. 353; D. Frede, *Citizenship in Aristotle's Politics*, in R. Kraut, S. Skultety, (ed.), *Aristotle's Politics: Critical Essays*, Rowman and Littlefield, Lanham MD 2005, pp. 167-84; F. Miller, *Aristotle's Political Theory, ad vocem*, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Center for the Study of Language and Information, Stanford (CA) 2012, <<http://plato.stanford.edu/archives/fall2012/entries/aristotle-politics/>>; J. Aubonnet, *Notes complémentaires*, in *Aristotele*, (ed. by J. Aubonnet), *Politique*, Les belles lettres, Paris 1971, p. 211; G. Glotz, *Histoire grecque*, II, Puf, Paris 1938, p. 234-235; G. Mathieu, *La réorganisation du corps civique athénien à la fin du Vème siècle*, «Revue d'études grecques», XCVI, 40, 1927, pp. 65 ss; L. Prandi, *Ricerche sulla concessione della cittadinanza ateniese nel V sec. a.c.*, Cisalpino, Milano 1982, pp. 57 sg.; K.J. Beloch, *Griechische Geschichte*, «Vereinigung Wissenschaftlicher Verleger», III, 1, 1922, pp. 160 sg.; C. Mossé, *Le citoyen dans la Grèce antique*, cit., pp. 42 ss.; M.J. Osborne, *Naturalisation in Athens*, I-IV, Paleis der Academiën, Bruxelles 1981-1983; C. Patterson, *Pericles' Citizenship Law of 451/0 B.C.*, Salem, New York 1981, pp. 27 ss.; E. Barker, *The Vocabulary of the Politics*, in Aristotle, (ed. by E. Barker), *The Politics of Aristotle*, Oxford Univ. Press, Oxford 1958 (orig. ed. 1946), pp. Lxvi-lxvii; R. G. Mulgan, *Aristotle and the Value of Political*

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*Participation*, «Political Theory», 18, 1990, pp. 195-215; F. D. Miller, *Aristotle's Theory of Political Rights*, in R.O. Brooks, J.B. Murphy (ed.), *Aristotle and Modern Law*, Ashgate, Aldershot 2003, pp. 309-50; J. Barnes, *Aristotle and Political Liberty*, in G. Patzig (ed.), *Aristoteles' 'Politik'*, Vandenhoeck & Ruprecht, Göttingen 1990, pp. 249-63; P.B. Manville, *The Origins of Citizenship in Ancient Athens*, Princeton University Press, Princeton (New Jersey) 1990, p. 24.

Many have commented on the difficulties of Aristotle in defining the concept of citizenship. As for this point, see E. Szanto, *Das griechische Bürgerrecht*, Mohr, Freiburg 1892, pp. 2 sg.; J. Pečirka, *A Note on Aristotle's Conception of Citizenship and the Role of Foreigners in Forth-Century Athens*, «Eirene», 6, 1967, pp. 23-26; C. Mossé, *La conception du citoyen dans la Politique d'Aristote*, «Eirene», 6, 1967, pp. 17-21; U.E. Paoli, *Cittadinanza e nazionalità nell'antica Grecia*, in A. Biscardi (ed.), *Ugo Enrico Paoli. Altri studi di diritto greco e romano*, Istituto editoriale Cisalpino, Milano 1976, pp. 197-200; C. Johnson, *Who Is Aristotle's Citizen?*, «Phrónesis: A Journal for Ancient Philosophy», 29, 1984, pp. 73-90. I also point out one of the preferred sources of Egon Braun: K. Kahlenberg, *Beitrag zur Interpretation des Buches III aristotelischen der Politik*, Ph.D. Diss., Berlin 1934. More recently see bibliography collected in Susan D. Collins, *Aristotle and The Rediscovery of Citizenship*, Cambridge University Press, Cambridge 2006.

2) As for the relations between the individual citizen is the set of citizenship see J.T. Bookman, *The Wisdom of the Many: an Analysis of the Arguments of Book III and IV of Aristotle's Politics*, «History of Political Thought», XIII, 1, 1992, pp. 1 ss.; *Pol.*, III, 1282a 20-25; E. Barker, *The Vocabulary of the Politics*, cit., p. lxxvii-lxxviii; D.J. Allan, *Individual and State in the Ethics and Politics*, «Entretiens sur l'Antiquité Classique», IX (La 'Politique' d'Aristote), 1964, pp. 53-95; J. Roberts, *Excellences of the Citizen and of the Individual*, in G. Anagnostopoulos (ed.), *A Companion to Aristotle*, Wiley-Blackwell, Oxford 2009, pp. 555-565.

3) As for *ius migrandi* and the institute of *civis sine suffragio*, see the analysis conducted by A.N. Sherwin-White, *The Roman Citizenship*, cit., pp. 42 ss.; J. Aubonnet, *Notice du livre III*, in Aristotle, *Politique*, Les belles lettres, Paris 1971, p. 7; W. Seston, *La citoyenneté romaine*, in *Scripta varia. Mélanges d'histoire romaine, de droit, d'épigraphie et d'histoire du christianisme*, École française de Rome, Paris 1980, p. 6.

4) As for 'proxenos': P.B. Manville, *The Origins of Citizenship in Ancient Athens*, Princeton University Press, Princeton (New Jersey) 1990, p. 207: «by 480 at the latest, another special class of foreigner was instituted by the Athenian polis: the *proxenos*. The *proxenos* was a foreigner charged with the duty of looking after the interests of Athens in his native city; in

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return he was granted special privileges by the Athenian people. Those privileges might include legal safeguards for the *proxenos* and his family, the right to seek redress in Athens at the court of the polemarch»; M. Fallace, *Early Greek Proxeni*, «Phoenix», 24, 1970, pp. 196-204; M.B. Walbank, *Athenian Proxemies of the Fifth Century B.C.*, Toronto University Press, Toronto 1978, pp. 63 ss.

5) As for the ‘status of *metoikos*’, see *The Origins of Citizenship in Ancient Athens*, cit., p.135: «a *metoikos* is when a man comes from abroad and resides in a *polis*, paying a tax for certain of its fixed requirements. For so many days he is called a *perepidemos* [‘visitor’] and is free from tax, but if he exceeds the limited period, he becomes a *metoikos* and is liable to tax». And also: D.M. MacDowell, *The Law in Classical Athens*, Thames & Hudson, Ithaca (NY) 1978, pp. 76 ss.

6) As for the role of the woman in antiquity, see C. Mossé, *La femme dans la Grèce antique*, Albin Michel, Paris 1983; Id., *Citoyens actifs et citoyens passifs dans les cités grecques*, «REA», 81, 1979, pp. 241-49; N. Loraux, *Les enfants d’Athéna: idées athéniennes sur la citoyenneté et la division des sexes*, Maspero, Paris 1981; E. Cantarella, *Tacita muta. La donna nella città antica*, Editori Riuniti, Roma 1985; R. Just, *Woman in Athenian Law and Life*, Routledge, London 1989; A. Cameron, A. Kuhrt, (ed.), *Images of Woman in Antiquity*, Routledge, London 1983; D. Cohen, *Seclusion, Separation and the Status of Woman in Classical Athens*, «Greece and Rome», 36, 1985, pp. 3-15; S. Blundell, *Women in Ancient Greece*, British Museum Press, London 1995. P. Rosanvallon, *Le sacre du citoyen. Histoire du suffrage universel en France*, Gallimard, Paris 1992, pp. 142-150.

7) I point out a useful collection, with discussion of the sources and bibliography, about the Roman citizenship from its origins until the Edict of Caracalla: P. Donati Giacobini, G. Poma, *Cittadini e non cittadini nel mondo romano. Guida ai testi e ai documenti*, Clueb, Bologna 1996, oltre al riferimento classico A.N. Sherwin-White, *The Roman Citizenship*, Clarendon Press, Oxford 1973 (orig. ed. 1939); J. Gaudemet, *Les Romains et les “autres”*, in *La nozione di “Romano”. Atti del 2° Seminario internazionale di studi storici - Da Roma alla terza Roma - 21/04/1982*, Esi, Napoli 1984, pp. 10 ss.; Y. Thomas, «Origine » et « commune patrie ». *Étude de droit public romain (89 av. J-C.-212 ap. C)*, «Collection de l’École française de Rome», 1996; C. Lovisi, *Les espaces successifs de la citoyenneté à Rome*, in P. Gonod, J.-P. Dubois, (eds.), *Citoyenneté, souveraineté, société civile*, Dalloz, Paris 2003, pp. 8-20; C. Tristano, S. Allegria, (eds.), *Civis/civitas: cittadinanza politico-istituzionale e identità socio-culturale da Roma alla prima età moderna: atti del Seminario internazionale Siena-Montepulciano, 10-13 luglio 2008*, Thesan & Turan, Montepulciano 2009; D. Mattiangeli, *Romanitas, latinitas, peregrinitas: uno studio essenziale sui principi del diritto di cittadinanza romano*, Lateran University Press, Roma 2010; V. Marotta, *La cittadinanza*

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*romana in età imperiale (secoli 1.-3. d.C.): una sintesi*, Giappichelli, Torino 2009; J.W. Liebeschuetz, *Citizen Status and Law in the Roman Empire and the Visigothic Kingdom*, in W. Pohl, H. Reimitz, *Strategies of Distinction. The Construction of Ethnic Communities, 300-800*, Brill, Leiden- Boston 1998; D. Quaglioni, *The Legal Definition of Citizenship in the Late Middle Age*, in A. Moho, K. Raaflaub, J. Emlen, (eds.), *City States in Classical Antiquity and Medieval Italy*, Steiner, Stuttgart 1991, pp. 155 ss.

8) About Solon and his reforms, C. Gilliard, *Quelques réformes de Solon. Essai de critique historique*, Bridel, Lausanne 1907; I. Linforth, *Solon the Athenian*, University of California Press, Berkeley (CA) in 1919; A. Masaracchia, *Solon*, New Italy, Florence 1958; P. Oliva, *Gesetze Solons und die athenische Polis*, “Listy Filologicke”, 106, 1983, pp. 65-69; N.G.L. Hammond, *Land and Society in the Athens of Solon*, in N.G.L. Hammond (eds.), *Collected Studies in Greek Literature and History, Excluding Epirus and Macedonia*, Adolf Hakkert, Amsterdam 1993, pp. 104-144; L-M. L’Homme-Wéry, *Eleusis and Solon’s seisachtheia*, “Greek, Roman and Byzantine Studies», 40, 1999, pp. 109-133.

9) On the problematic relationship between citizenship and land ownership, see C. Hignett, *A History of the Athenian Constitution to the End of the Fifth Century B.C.*, Clarendon Press, Oxford 1952, p. 79; P.B. Manville, *The Origins of Citizenship in Ancient Athens*, cit., p. 94). Moses Finley claims, even in the pre-classical landless citizens they accounted for about 20-25% of citizens *in toto* (M.I. Finley, *Land, Debt, and the Man of Property in Classical Athens*, in Id., (eds. B.D. Shaw, R. Saller), *Economy and Society in Ancient Greece*, Chatto & Windus, London 1981, p. 65. Cfr. Aristotle (by W. L. Newman), *The Politics of Aristotle*, cit., I, p. 231 n. 1), as well as Busolt G. and H. Svoboda, (*Griech. Staatskunde*, II, Monaco 1926, p. 875, n. 5) who admit that it is impossible to reach an unambiguous interpretation. Manville shows how J.H. Oliver (*Reforms of Kleisthenes*, “Historia”, 9, 1960, pp. 503-507) «tried to emend and gloss the passage to mean That Kleisthenes created a separate class of metics, but forced His interpretation was refuted by properly Kagan [*The enfranchisement of Aliens by Clisthenes*, “Historia”, 12, 1963, pp. 41-46]. Though it is the institution of the ‘metoikia’ belongs to this general period, Aristotle’s testimony here can not be made to mean that» (*The Origins of Citizenship in Ancient Athens*, cit., p. 191). Among the scholars who welcome the prospect of Newman, even D. Whitehead, *The Ideology of Athenian Metic*, The Cambridge Philological Society, Cambridge 1977, pp. 144-145; O. Murray, *Early Greece*, Stanford Univ. Press, London 1980, pp. 255-256.

10) See also (in alphabetic order): BARRY, BRIAN. 1979. And who is my neighbor? *Yale Law Journal* 88: 629-58; BARRY, BRIAN. 1982. Humanity and justice in global perspective. Pp. 219-52 in J.R. Pennock and J.W. Chapman, eds, *Nomos XXIV: Ethics, Economics and the Law*, New York: New York University Press; BEITZ, CHARLES R. and ROBERT E. GOODIN.

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2009. *Basic Rights and beyond*. Pp. 1-24 in Beitz and Goodin, eds., *Global Basic Rights*. Oxford: Oxford University Press; Buchanan, Allen. 1987. Justice and charity. *Ethics*, 97 (3: Ap): 558-75; BUCHANAN, ALLEN. 1996. Perfecting imperfect duties: collective action to create moral obligations. *Business Ethics Quarterly*, 6 (1: Jan): 27-42; CAMPBELL, T. D. 1974. Humanity before justice. *British Journal of Political Science*, 4: 1-16; CHISHOLM, R.M. 1963. Supererogation and offence: a conceptual scheme for ethics. *Ratio*, 5: 1-14; COLLINS, STEPHANIE. 2013. Collectives' duties and collectivization duties. *Australasian Journal of Philosophy*, 91 (#2): 231-48; FEINBERG, JOEL. 1970. Justice and personal desert. Pp. 55-94 in Feinberg, *Doing and Deserving*. Princeton, NJ: Princeton University Press; GOODIN, ROBERT E. 1995. The state as a moral agent. Pp. 28-44 in Goodin, *Utilitarianism as a Public Philosophy*. New York: Cambridge University Press; GOODIN, ROBERT E. 2009. Demandingness as a virtue. *Journal of Ethics*, 13: 1-13; GROTIUS, HUGO. 1625. *The Law of War and Peace*, trans. F.W. Kelsey, ed. J.B. Scott. New York: Oceana, 1964; originally published 1625; HART, H. L. A. 1955. Are there any natural rights? *Philosophical Review* 64: 175-91; HERMAN, BARBARA. 1984. Mutual aid and respect for persons. *Ethics*, 94 (4: July): 577-602; HERMAN, BARBARA. 2013. Being helped and being grateful: imperfect duties, the ethics of possession and the unity of morality. *Journal of Philosophy*, 109 (5/6): 391-411; HEYD, DAVID. 1982. *Supererogation*. Cambridge: Cambridge University Press; HILL, THOMAS E. JR. 1971. Kant on imperfect duty and supererogation. *Kant-Studien*, 61: 55-77; HILL, THOMAS E. JR. 2002. Meeting needs and doing favors. Pp. 201-43 in Hill, *Human Welfare and Moral Worth: Kantian Perspectives*. Oxford: Oxford University Press; KIS, JÁNOS. 2000. The unity of mankind and the plurality of states. Pp. 89-125 in *The Paradox of Unintended Consequences*. Budapest: Central European University Press; Kuosmanen, Jaakko. 2013. Perfecting imperfect duties: the institutionalisation of a universal right to asylum. *Journal of Political Philosophy*, 21 (1: Mar): 24-43; MILL, JOHN STUART. 1861. *Utilitarianism*. Volume 10, pp. 203-60 in *Collected Works*, ed. J. M. Robson. Toronto: University of Toronto Press, 1969; MONTESQUIEU, BARON DE. 1748. *The Spirit of the Laws*, trans. Thomas Nugent. New York: Hafner Press, Macmillan, 1949; NAGEL, THOMAS. 2005. The problem of global justice. *Philosophy & Public Affairs*, 33: 114-47; O'NEILL, ONORA. 1986. *Faces of Hunger*. London: Allen & Unwin; O'NEILL, ONORA. 2005. The dark side of human rights. *International Affairs*, 81: 427-39; PUFENDORF, SAMUEL. 1672. *On the Law of Nature and of Nations*, trans. C.H. and W. A. Oldfather. Oxford: Clarendon Press, 1934; RAINBOLT, GEORGE. 2000. Perfect and imperfect obligations. *Philosophical Studies*, 98 (3: Ap): 233-56; SCHEFFLER, SAMUEL. 2000. Justice and desert in liberal theory. *California Law Review*, 88: 965-90; SCHROEDER, S. ANDREW. 2014. Imperfect duties, group obligations and beneficence. *Journal of Moral Philosophy*, 11 (5): 557-84; SEARLE, JOHN R. 1964. How to derive 'ought' from 'is.' *Philosophical Review*, 73 (1: Jan): 43-58; SHUE, HENRY. 1988. Mediating duties. *Ethics* 98: 687-704; SHUE, HENRY. 1996.

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Afterword: right-grounded duties and the international turn. Pp. 153-80 in Shue, *Basic Rights*, 2nd edn. Princeton, NJ: Princeton University Press; SINGER, PETER. 1972. Famine, affluence and morality. *Philosophy & Public Affairs* 1 (3: Spring): 229-43; STATMAN, DANIEL. 1996. Who needs imperfect duties? *American Philosophical Review*, 33 (2: Ap): 211-24; STOCKER, MICHAEL. 1967. Acts, perfect duties and imperfect duties. *Review of Metaphysics*, 20: 507-17; URMSON, J.O. 1958; Saints and heroes. Pp. 198-216 in A.I. Melden, ed., *Essays in Moral Philosophy*. Seattle, WA: University of Washington Press.

[334] In 2017, although finally defeated, the *National Front* candidate Marine Le Pen participated to the run-off during French presidential elections, while the *Dutch Party for Freedom* increased its seats in the parliament and in Austria over a fourth of the electorate voted for the *Freedom Party* (FPÖ) which entered the government. In 2018, during Italian elections, the *Northern League* proved to be the third major political party (the first party being the populist *Five Star Movement*).

[335] In 2018 Orban’s party *Fidesz* triumphed in Hungary for the third time, while almost a fifth of the electorate voted for the even more radical *Movement for a Better Hungary* (Jobbik).

[336] According to Cas Mudde, “the key to the electoral persistence of populist radical right parties is their ability to transform protest voters into support voters” (Mudde, C. (2007) *Populist Radical Right Parties in Europe*, Cambridge: Cambridge University Press, p. 229).

[337] Mudde identifies three core ideological features: nativism, authoritarianism, and populism (Mudde 2007, *cit.*, p. 22).

[338] Guibernau, M. (2010) “Migration and the rise of the radical right”, Policy Network Paper, p. 10. On the alleged superiority of layman common sense see also Betz, H.-G. (1994) *Radical Right-Wing Populism in Western Europe*, Basingstoke: Palgrave Macmillan, p. 4.

[339] See Mudde 2007, *cit.*, p. 66.

[340] Some authors even coined the label “anti-immigrant party” (see Mudde 2007, *cit.*, p. 69).

[341] See Guibernau 2010, *cit.*, p. 12.

[342] The term “transitional justice” refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an

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adequate response.

Transitional justice is rooted in accountability and redress for victims. It recognizes their dignity as citizens and as human beings. Ignoring massive abuses is an easy way out but it destroys the values on which any decent society can be built. Transitional justice asks the most difficult questions imaginable about law and politics. By putting victims and their dignity first, it signals the way forward for a renewed commitment to make sure ordinary citizens are safe in their own countries – safe from the abuses of their own authorities and effectively protected from violations by others.

Mass atrocities and systematic abuses devastate societies and their legacy is likely to make conditions of the country fragile: Political and legal institutions like parliament, the judiciary, the police and the prosecution service may be weak, unstable, politicized, and under-resourced. The violations themselves will have severely damaged whatever confidence might have existed in the state to guarantee the rights and safety of citizens. And communities will often have been ripped asunder in the process and social or political organizations greatly weakened.

Finding legitimate responses to massive violations under these real constraints of scale and societal fragility is what defines transitional justice and distinguishes it from human rights promotion and defense in general.

The aims of transitional justice will vary depending on the context but these features are constant: the recognition of the dignity of individuals, the redress and acknowledgment of violations, and the aim to prevent them from happening again.

In the 1990s various American academics coined the term to describe the different ways that countries had approached the problems of new regimes coming to power faced with massive violations by their predecessors.

It was simply a descriptive term. It did not suggest that there was a standard approach or even common principles, as can be seen from the huge variety of ways different countries did or did not try to address violations.

The term took hold, especially in the United States, due to the great interest in the way former Soviet Bloc countries were dealing with the legacy of totalitarianism.

The term originally described different approaches in different places, not a coherent notion or practice. In the 1990s and 2000s, approaches were developed based on recognition of

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human rights principles and the insistence that violated rights could not be ignored. Associated with this was the idea of particular kinds of mechanisms, such as prosecutions, fact-finding (or “truth seeking”) inquiries, reparations programs, and reform initiatives as the most effective means to give effect to those human rights principles.

Where are we now? Best understood, the practice of transitional justice today is the attempt to confront impunity, seek effective redress, and prevent recurrence, not in the routine application of normative standards, but in the careful and conscious appreciation of the contexts where it is to be done.

It is not the way to fix everything that is wrong with society. The long-term social and political struggles for justice and equal opportunities might be assisted by measure of transitional justice but not solved by it.

It is not a particular type of justice like restorative justice, distributive justice, or retributive justice. It is the application of a human rights policy in particular circumstances.

It is not “soft” justice. It is the attempt to provide the most meaningful justice possible in the political conditions at the time. If it is simply an effort to evade meaningful measures of justice, it is sophisticated impunity.

As to the so called “transitional justice”, and this debate in Spanish, *see* Atienza, M. (2004), “Si usted fuera Presidente...”, en Atienza, M., *El sentido del derecho*, Ariel, Barcelona, pp. 96-99; Sáez, R. (2009), “Justicia transicional y España: ¿se puede juzgar la historia?”, en AAVV, *Memoria histórica: ¿se puede juzgar la historia?*, Fundación Antonio Carretero, Madrid, pp. 85-112; Capellà, M. (XX), “Represión política y Derecho internacional: una perspectiva comparada”, en Capellà, M. y Ginard, D. (coords.): *Represión política, justicia y reparación. La memoria histórica en perspectiva jurídica (1936-2008)*, Ediciones Documenta Balear, Palma de Mallorca, 2009, pp. 161-254; Elster, J. (2006), “La estructura de la justicia transicional”, en Elster, J., *Rendición de cuentas. La justicia transicional en perspectiva histórica*, Katz editores, Buenos Aires, pp. 99-160; Vázquez, R. (2009), “Memoria, perdón y castigo”, en Vázquez, R., *Las fronteras morales del derecho*, Fontamara, México, pp. 85-112; Mate, R. (2008): “Tierra y huesos. Reflexiones sobre la historia, la memoria y la memoria histórica”, en Mate, R., *La herencia del olvido*, Errata Naturae, Madrid, pp. 149-176; Etxeberria, X. (2006), “Memoria y víctimas. Una perspectiva filosófica”, en Gómez Isa, F. (dir.), *El derecho a la memoria*, Instituto de Derechos Humanos Pedro Arrupe, Bilbao, pp. 223-249; Aguilar, P. (2008), *Políticas de la memoria y memorias de la política*, Alianza Editorial, Madrid; Almqvist, J. y Espósito, C. (coords.): *Justicia transicional en Iberoamérica*, Centro de Estudios Políticos y Constitucionales, Madrid, 2009; Ambos, K. (2008), *El marco*

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*jurídico de la Justicia de Transición*, Temis, Bogotá, 2008; Barahona de Brito, A., Aguilar, P. y González Enríquez, C. (eds.) (2002), *Las políticas hacia el pasado. Juicios depuraciones, perdón y olvido en las nuevas democracias*, Istmo, Madrid, 2002; Escudero, R. (ed.) (2011), *Diccionario de memoria histórica. Conceptos contra el olvido*, Los Libros de la Catarata, Madrid; Gómez Isa, F. (dir.) (2006), *El derecho a la memoria*, Instituto de Derechos Humanos Pedro Arrupe, Bilbao; Greiff, P. de (ed.) (2006), *The Handbook of Reparations*, Oxford University Press, Oxford; Martín Pallín, J. A., y Escudero, R. (eds.) (2008), *Derecho y memoria histórica*, Trotta, Madrid, 2008; Méndez, J. E. (1998), “Responsabilización por los abusos del pasado”, *Revista de Ciencias Sociales*, nº 7/8, 1998; O’Donell, G., Schmitter, P.C. y Whitehead, L. (comps.) (1988), *Transiciones desde un gobierno autoritario*, 4 vols., Paidós, Buenos Aires; Uprimny, R. (coord) (2006), *¿Justicia transicional sin transición? Reflexiones sobre verdad, justicia y reparación en Colombia*, Centro de Estudios de Derecho, Justicia y Sociedad, Bogotá; Roth-Arriaza, N. (eda.) (1995), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Nueva York; Teitel, R. G. (2000), *Transitional Justice*, Oxford University Press, Nueva York, 2000; Traverso, E. (2007), *El pasado, instrucciones de uso. Historia, memoria, política*, Marcial Pons, Madrid.

See also a web-site: International Center for Transitional Justice of New York: <http://www.ictj.org>.

[343] Right-wing populism can also combine nationalist claims with the vindication of a transnational, though exclusionary, European culture (see Guibernau 2010, *cit.*, p. 13).

[344] The first famous defense of the open borders case can be found in Carens 1987, while a recent restatement is extensively presented in Carens 2013. Although several commentators label Carens a liberal cosmopolitan, Carens himself refuses this label and defines his perspective as liberal egalitarian (see Carens, J. H. (2013) *The Ethics of Immigration*, New York: Oxford University Press). See also Cole’s defense of the open borders case in Wellman, C. H. and Cole, P. (2011) *Debating the Ethics of Immigration. Is There a Right to Exclude?*, New York: Oxford University Press.

[345] Miller, D. (2016a) *Strangers in Our Midst. The Political Philosophy of Immigration*, Cambridge MA: Harvard University Press; Miller, D. (2007) *National Responsibility and Global Justice*, Oxford: Oxford University Press. See also Wellman’s defense of the right to exclude in Wellman and Cole 2011, *cit.*.

[346] The terms “partialist” and “impartialist” are borrowed from Gibney, M. (2004) *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees*, Cambridge: Cambridge University Press.

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[347] Badano, G. and Nuti, A. (2017) “Under Pressure: Political Liberalism, the Rise of Unreasonableness, and the Complexity of Containment”, *The Journal of Political Philosophy*, p. 6.

[348] Badano and Nuti 2017, *cit.*, p. 7. As to the Italian scenario, see Lupoi, M. (2000) *The origins of the European legal order*: (24 editions published between 1999 and 2010 in 3 languages and held by 448 WorldCat member libraries worldwide). This is the first translation into English of *Alle radici del mondo giuridico europeo. Saggio storico-comparativo*, printed in Italy in 1994 (by Istituto Poligrafico e Zecca dello Stato). The book is a comprehensive reappraisal of thinking on the common structural features of the various European jurisdictions. Lupoi argues the case for the existence of an earlier system of common law as far back between the sixth and eleventh centuries. Based on various Germanic customs, the law was codified in Latin and survives in modified form in modern English common law. Legal sources from all over Europe are compared and discussed. Cultures formerly considered to be ‘barbarian’ emerge in a new light and common strands emerge which have gone unnoticed until now.

[349] Mudde 2007, *cit.*, p. 67.

[350] The second part of my paper is aimed to show that, although anti-immigrant sentiments have not been directly examined by political theorists working on the ethics of migration, there are important reasons to consider the issue. This part, in particular, argues that, besides posing a risk for the stability of liberal institutions, the fact that a growing number of citizens share anti-immigrant sentiments results in feasibility and legitimacy constraints to the implementation of liberal inclusive immigration policies. It also argues that liberal political theorists should wonder how to reduce such hostile sentiments.

[351] Miller 2016a, *cit.*

[352] Gibney, M. (2004) *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees*, Cambridge: Cambridge University Press, pp. 15-16. Despite focusing on the special case of refugees, Gibney’s book on the ethics and politics of asylum includes two explicit references to the rise of “far right leaders” (see pp. 17 and 221). However, the book was not aimed at dealing with how to respond to the diffusion of hostile attitudes towards migrants and asylum seekers, thus it only mentions the importance of combating stereotypes with a more accurate account of reality (see p. 222).

[353] Miller 2007, *cit.*, p. 228.

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[354] Though ultimately legitimate, the protection of national culture “cannot provide a strong rationale for discrimination at the point of entry” (Miller 2007, *cit.*, p. 229).

[355] Miller, D. (2016a) *Strangers in Our Midst. The Political Philosophy of Immigration*, Cambridge MA: Harvard University Press.

[356] Miller 2016b, *cit.*

[357] See Luzzati, C., Lo strano caso del crocefisso, in «*Ragion Pratica*», 2007, n. 28, p. 129.

[358] Badano and Nuti 2017, *cit.*, p. 3. On this ground, Badano and Nuti have argued for a “duty to pressure” falling upon ordinary people, namely a moral duty to discursively engage in contrasting right-wing populist views expressed by fellow citizens (*see* p. 12).

[359] According to a recent study, 21 radical right-wing populist parties gained representation in the European Parliament or in national parliaments between 1990 and 2015, while 17 European governments included representatives of these parties or relied on their support over the considered period (Akkerman, T., de Lange, S. L. and Rooduijn, M., eds., (2016) *Radical Right-Wing Populist Parties in Western Europe. Into the mainstream?*, New York: Routledge, pp. 1-5).

[360] Urbinati, N. (2014) *Democracy Disfigured: Truth, Opinion and the People*, Cambridge MA: Harvard University Press, p. 22.

[361] Carens, J. H. (1996) “Realistic and Idealistic Approaches to the Ethics of Migration”, *International Migration Review* 30 (2): 156-170.

[362] Carens 1996, *cit.*, pp. 166-167.

[363] Carens 1996, *cit.*, p. 168.

[364] Gibney 2004, *cit.*, p. 16.

[365] More precisely, he affirms to adopt a “real world presupposition” (Carens, J. H. (2013) *The Ethics of Immigration*, New York: Oxford University Press, pp. 303-306).

[366] According to Bernard Williams, there is a fundamental distinction between political realism and political moralism, depending on the relation between morality and politics (*see* Williams, B. (2005) *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, Princeton: Princeton University Press). Realists also consider politics as

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inherently conflictual. Some liberals endorse this account and propose thin, negative foundations for consensus, in the case of the liberalism of fear (see Williams 2005, *cit.*), or a temporary equilibrium based on a *modus vivendi* (for an overview, see Sleat, M. (2011) “Liberal Realism: A Liberal Response to the Realist Critique”, *The Review of Politics* 73: 469–496. On *modus vivendi* liberalism, see Jones, P. (2017) “The Politics of Modus Vivendi”, *Philosophia* 45: 443–461). However, political liberalism is at least incompatible with Rawlsian political liberalism (Sleat, M. (2016) “Realism, Liberalism and Non-ideal Theory Or, Are there Two Ways to do Realistic Political Theory?”, *Political Studies* 64(1): 27–41, p. 34).

[367] As Sleat puts it, “the more facts one incorporates, the more *realistic* the theory will be” (Sleat 2016, *cit.*, p. 29, emphasis in the original). By contrast, the peculiarity of realism is conceptual rather than methodological (Sleat 2016, *cit.*, pp. 34–35).

[368] When Miller defines “realist” his approach in his most recent book, the adjective seems to be better understood as “realistic”. In fact, he admits in a footnote that he is not “using the term in his technical meaning”, but “simply to signal an approach that starts by looking at the world as it is and asks what range of immigration policies it is legitimate for democratic states to pursue under these circumstances”. Moreover, although he defines his work a realist political philosophy of migration, as opposed to an ethics of migration, it would still be considered by a political realist as a work of public (applied) ethics, i.e. an inquiry over the morally legitimate policies a State should adopt, according to a given set of values (namely, weak moral cosmopolitanism, national self-determination, fairness and social integration: see Miller 2016a, *cit.*).

[369] Borkert, M. and Caponio (2010), T., “Introduction: the local dimension of migration policymaking”, in Caponio, T. and Borkert, M., (eds.) *The local dimension of migration policymaking*, Amsterdam: Amsterdam University Press, p. 9.

[370] They may or may not include immigrants in their acquaintances, but they necessarily have sensory experiences of the changing environment they live, and this sensory perception has an emotional impact on them (see Wise, A. (2010) “Sensuous Multiculturalism: Emotional Landscapes of Inter-Ethnic Living in Australian Suburbia”, *Journal of Ethnic and Migration Studies*, 36(6): 917–937).

[371] Wise 2010, *cit.*, p. 918.

[372] Wise 2010, *cit.*, p. 935.

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[373] Contact theory, inspired by Allport’s works, suggests that inter-group interaction results in a decrease of hostile attitudes. Despite there is evidence that negative contact fuels hostile attitudes (McHugh-Dillon, H. (2015) “If they are genuine refugees, why? Public attitudes to unauthorised arrivals in Australia”, Brunswick: Foundation House, p. 32), the predictions of contact theory seem to be confirmed in cases of positive contact, particularly prolonged and intimate forms of interaction such as friendships (Hooghe, M. and de Vroome, T. (2015) “The perception of ethnic diversity and anti-immigrant sentiments: a multilevel analysis of local communities in Belgium”, *Ethnic and Racial Studies* 38(1): 38-56, p. 47).

[374] Herda, D. (2010) “How Many Immigrants? Foreign-born Population Innumeracy in Europe” *Public Opinion Quarterly* 74(4): 674-695, p. 688.

[375] This phenomenon is known as innumeracy. In a survey carried out in 21 European countries, respondents overestimated significantly the number of immigrants present in their countries, though innumeracy levels varied from a country to another. On average, the estimated size of the immigrant population was double than the real one (Herda 2010, *cit.*, table 2).

[376] Rustenbach, E. (2010) “Sources of Negative Attitudes toward Immigrants in Europe: A Multi-Level Analysis”, *International Migration Review* 44(1): 53-77, p. 65.

[377] A survey conducted in Belgium found out that anti-immigrant sentiments were positively correlated to high perceived numbers of immigrants, while living in areas with higher rates of immigrants proved no significant correlation with anti-immigrant sentiments (Hooghe and de Vroome 2015, *cit.*).

[378] D. Zolo, International Peace through International Law, *European Journal of International Law*, 9(1998) 2, pp. 306-324; D. Zolo-Cassano F., *L’alternativa mediterranea*, Roma-Bari, 2007. These lines are dedicated, in particular, to Prof. Danilo Zolo (Fiume, 1936 - Firenze, 17/10/2018), a Bobbio scholar, *in memoriam*.

[379] About the *consensus omnium gentium* in the Bobbio’s political theory, see S. Castignone, *Nuovi soggetti e nuovi diritti*, ECIG, Genova, 1995, part. I., pp. 7-11. On the intellectual figure of Bobbio, see D. Zolo, *L’alito della libertà. Su Bobbio*, Roma-Bari, 2008. Norberto Bobbio, who has died aged 94 (Turin, October 18, 1909 - Turin, January 9, 2004 but buried in Rivalta Bormida -AL-), was Italy’s leading legal and political philosopher, Senator for life and one of the most authoritative figures in his country’s politics. His status was marked by the Italian president’s immediate departure for Turin to be among the first

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mourners, and an extensive discussion of his writing in the media.

Bobbio had taken degrees in jurisprudence and philosophy at Turin. His first book, *The Phenomenological Turn In Social And Legal Philosophy* (1934, Torino, Einaudi), had been followed by a monograph on *The Use Of Analogy In Legal Logic* (1938, Torino, Einaudi).

He set himself the task of elaborating a general theory of the practice and validity of law, breaking with the attempts of most contemporary Italian philosophers to offer a speculative philosophy of the idea and morality of law. In elaborating his version of legal positivism, Bobbio drew on the writings of Hans Kelsen, whose work he had come across as early as 1932. This research ultimately bore fruit in a number of books based on his Turin lectures, of which the most important are *A Theory Of Judicial Norms* (1958, Torino, Giappichelli) and *A Theory Of The Legal Order* (1960, Torino, Giappichelli), and studies of Locke, Kant and legal positivism. Between 1955 and 1970, he also published three collections of essays. These writings had a similar place in Italian academic legal circles to the work of H.L.A. Hart, the late Oxford professor of jurisprudence, and both men, at different times, expressed their mutual esteem for each other to me.

Bobbio’s legal studies fed into his political writings. Influenced again by Kelsen, he adopted a procedural view of democracy as consisting of certain minimal “rules of the game”, such as regular elections, free competition between parties, equal votes and majority rule. His theory was enriched by a strong, realist current, deriving partly from Hobbes and partly from the Italian pioneers of political science, such as Gaetano Mosca and Vilfredo Pareto (whose reputation he did much to resurrect). He had produced the first Italian edition of Hobbes’s *De Cive* in 1948 (Milano, Giuffrè), and later dedicated numerous studies to the English philosopher, a collection of which were published in 1989 (and appeared in English a couple of years later). He drew on Hobbes to modify what he now saw as unsatisfactory elements of his earlier Kelsenism.

Bobbio regarded Kelsen as caught uncomfortably between a purely formal account of law and a substantive position grounded in what he called the “basic norm” underlying all law. The missing dimension was the institutional context of law-making, and its relationship to the exercise of power. Unlike earlier legal positivists, such as John Austin, Bobbio did not thereby equate law with the commands of the sovereign; his point was rather that law and rights were best conceived as a historical achievement belonging to a particular form of state.

Bobbio’s shift from a pure theory of law to a concern with its political embodiment was marked by his moving to a chair in the newly created faculty of political science in Turin in

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1972, where he remained until the then statutory retirement age of 75 in 1984. The essays from this period were later collected as *The Future Of Democracy: A Defence Of The Rules Of The Game* (1984, Torino, Einaudi) - to my mind, the most original of his books - *State, Government And Society* (1985, Torino, Einaudi) and *The Age Of Rights* (1990, Torino, Giappichelli), all of which appeared in English.

He was a passionate critic of nuclear weapons, which he saw as making war intrinsically unjust, and a member of the Bertrand Russell Foundation. His writings on this issue were collected in the volumes *The Problem Of War And The Roads To Peace* (1979, Torino, Giappichelli). In particular, peace is the goal and condition of democracy: human rights, democracy and peace are for Bobbio the three inseparable elements of the same historical movement. It is from this perspective that he considers the writings on peace gathered in this volume to be central in his political reflection. In them Bobbio examines how to pose the dilemma between peace and war in today's society, which has at its disposal the means of its own self-destruction, and discusses the possibilities of pacifism and non-violent action to come up with a more realistic “institutional pacifism” that it sends to the superior control bodies the peaceful solution of conflicts, at least the limitation or regulation of violence.

[380] N. Bobbio, *Diritto e potere. Saggi su Kelsen* (1992). Richard Falk regards Kelsen as a ‘great international lawyer of our era who has developed and sustained a coherent interpretation of the international order’, R. Falk, *The Status of Law in International Society* (1970), at p. x. More soberly, Antonio Cassese maintains that Kelsen's doctrine of the primacy of international law ‘has been instrumental in consolidating the notion that State agencies should abide by international legal standards and ought therefore to put international imperatives before national postulates’, A. Cassese, *International Law in a Divided World* (1986), at p. 22.

[381] We cannot forget that also Bertrand Russell was a convinced pacifist. He believed that the best government was a world federation of free states. He opposed the United Kingdom's participation in the First World War. Because of his position he was first dismissed and then lost his professorship at Trinity College of the University of Oxford; finally he was imprisoned for six months in Bixton prison as a “dissident”.

In the years immediately preceding the Second World War, Russell was a proponent of a policy of pacification, also tending to dialogue with the Nazis to prevent a new conflict, but in the end, in 1940, he recognized that Hitler had to be fought. Russell called his position “relative pacifism”: he believed that war was bad, but also that, under extreme circumstances (for example, when Hitler threatened to occupy Europe as a whole), war itself could be the lesser evil. A similar position will have towards Stalin.

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Politically a supporter of democratic and reformist socialism, for some time an open supporter of the Labor Party, but approaching liberal socialism and social liberalism after the war, Russell harshly criticized Stalin's totalitarianism, so much so that until the dictator's death (1953) he maintained an attitude of sharp contrast to the Soviet bloc, considering Marxism a "dogmatic system" and an enemy of freedom, like capitalism without restraints. He was also a friend of John Maynard Keynes, of whom he shared some socio-liberal economic settings and for a while a follower of the "Fabiana Society", but he abandoned it after the Fabians began to support a system of international military agreements in anti-German function, that he thought would lead to open war, which Russell at the time was trying to prevent.

Russell argued at a public conference in 1948 that there was a need for a preventive nuclear attack on military and non-civilian targets against the Soviet Union in order to eliminate Stalinism and prevent it from obtaining the atomic bomb. Russell had visited the Soviet Union in the 1920s, observing its dictatorial involution and feared an expansion of communism in the West.

Starting from the fifties, however, it became, together with Albert Einstein, once including the collateral damage of atomic radiation, an authoritative supporter of nuclear disarmament. According to some, like Nicholas Griffin of McMaster University, Russell's speech, of which he obtained the exact text, did not imply the actual use of the bomb (to whose realization he had opposed, unlike Einstein who had supported it, although pentendosene) but simply its use as a threat or deterrent, so as to exert a massive diplomatic pressure on the actions of the Soviets.

Griffin's interpretation was challenged by Nigel Lawson, former Chancellor of the Exchequer during the conservative government of Margaret Thatcher and who was present at the speech as a student (at the time he was sixteen), who claimed that it was quite clear that Russell was leaning a real surprise attack.

Whatever the correct interpretation, Russell almost immediately abandoned this line, advocating mutual disarmament by the nuclear powers.

In 1961, Russell was tried and sentenced to two months in prison, of which he served a week in prison in Bixton, following his arrest in a demonstration in London against the proliferation of nuclear weapons. The judge granted him, given the advanced age (89 years), to have conditional freedom if he guaranteed his future "good behavior" on honor, but Russell refused; he also renounced his privilege, like Peers of England, to be exempt from arrest without authorization from the House of Lords.

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The war in Vietnam was the last polemic goal of Russell’s pacifism, who together with the existentialist communist philosopher Jean-Paul Sartre founded the court that took his name to try the United States of America for war crimes.

As to his pacifism, see Russell, B., *Nobel Lecture: What Desires Are Politically Important?* (December 11, 1950). “I have chosen this subject for my lecture tonight because I think that most current discussions of politics and political theory take insufficient account of psychology. Economic facts, population statistics, constitutional organization, and so on, are set forth minutely. There is no difficulty in finding out how many South Koreans and how many North Koreans there were when the Korean War began. If you will look into the right books you will be able to ascertain what was their average income per head, and what were the sizes of their respective armies. But if you want to know what sort of person a Korean is, and whether there is any appreciable difference between a North Korean and a South Korean; if you wish to know what they respectively want out of life, what are their discontents, what their hopes and what their fears; in a word, what it is that, as they say, «makes them tick», you will look through the reference books in vain. And so you cannot tell whether the South Koreans are enthusiastic about UNO, or would prefer union with their cousins in the North. Nor can you guess whether they are willing to forgo land reform for the privilege of voting for some politician they have never heard of. It is neglect of such questions by the eminent men who sit in remote capitals, that so frequently causes disappointment. If politics is to become scientific, and if the event is not to be constantly surprising, it is imperative that our political thinking should penetrate more deeply into the springs of human action. What is the influence of hunger upon slogans? How does their effectiveness fluctuate with the number of calories in your diet? If one man offers you democracy and another offers you a bag of grain, at what stage of starvation will you prefer the grain to the vote? Such questions are far too little considered. However, let us, for the present, forget the Koreans, and consider the human race.

There are some desires which, though very powerful, have not, as a rule, any great political importance. Most men at some period of their lives desire to marry, but as a rule they can satisfy this desire without having to take any political action. The desires that are politically important may be divided into a primary and a secondary group. In the primary group come the necessities of life: food and shelter and clothing. When these things become very scarce, there is no limit to the efforts that men will make, or to the violence that they will display, in the hope of securing them. It is said by students of the earliest history that, on four separate occasions, drought in Arabia caused the population of that country to overflow into surrounding regions, with immense effects, political, cultural, and religious. The last of these four occasions was the rise of Islam. The gradual spread of Germanic tribes from

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southern Russia to England, and thence to San Francisco, had similar motives. Undoubtedly the desire for food has been, and still is, one of the main causes of great political events”.

[382] ADEKANYE, J. B. (1998). Power-sharing in multi-ethnic political systems. *Security Dialogue*, 29 (1), 25-36.

[383] RUBIO-MARÍN, R. (2000). *Immigration as a democratic challenge*. Cambridge: Cambridge University Press; SCHNECKENER, U. (2002). Making Power-sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation. *Journal of Peace Research*, 39(2), 203-228.

[384] CASANOVA, J. (2009). The Secular and Secularisms. *Social Research*, 76(4), 1049-1066.

[385] AHMET T., KURU. (2009). *Secularism and state policies toward religion. The United States, France, and Turkey*. Cambridge: Cambridge University Press.

[386] Haslanger, S. *cit.*, p. 285.

[387] *Ibid.*, p. 242.

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