



Kierkegaardian Ethics and the Rule of Law

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Abstract

We approach law with deep ambivalence. On the one hand, we take immense pride in living under the rule of law. On the other hand, we often catch ourselves lamenting the existence of law. When we lament the existence of law, we are not just saying that there is too much of it. We are not just complaining about the amount of law. Rather, our complaint goes to the very nature of law itself. We complain that its rules are constraining, that its generality ignores the particularity of each situation, that its coercive force rides roughshod over our autonomy, and the list goes on. However, notwithstanding the frustration with law, it is not that we want to get rid of it. This paper seeks to express and explain our conflicting sentiments about law – why we sometimes view law as a monumental moral achievement and why we are sometimes so frustrated with it. The answer, as this paper will argue, lies in the nature of norms. The value and limit of law is traceable to the value and limit of norms. Kierkegaard helps us see that. This paper will argue that our ambivalence about law mirrors Kierkegaard's ambivalence about ethics.

Keywords Søren Kierkegaard · Rule of Law · State of Nature · State of Exception

We approach law with deep ambivalence. On the one hand, we take immense pride in living under the rule of law. We celebrate the rule of law as a moral achievement, and some even endeavour to spread it around the globe. When we spot pockets of lawlessness, both at home and abroad, our instinctive reaction is to blot them out with law. The void of lawlessness has to be filled with law. Law is good, and the more the better. On the other hand, we often catch ourselves lamenting the existence of law. When we lament the existence of law, we are not just saying that there is too much

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of it. We are not just complaining about the amount of law. Rather, our complaint goes to the very nature of law itself. We complain that its rules are constraining, that its generality ignores the particularity of each situation, that its coercive force rides roughshod over our autonomy, and the list goes on. The law operates by generalizing, whereas a genuinely reflective judgment should start ‘Lesbian fashion,¹ from the particular object that confronts us and functions without any pre-existing general rules’ (Douzinas and Warrington 1994, p. 421). In a paper aptly titled ‘The Poverty of (Rights) Jurisprudence’, Douzinas (2012, p. 64) argues that ‘acting the right way has been replaced by a bunch of rights’, with the result that ‘the deepening tear in the social fabric, opened by selfish individualism, is being filled by proliferating individual rights.’

We speak about law with a forked tongue. I have used the plural pronoun, ‘we’, as I hope that the above description resonates with your experience of law. In the above paragraph, I try to express the conflicting sentiments about law. Law is both a blessing and a bane. We can’t live with it, nor can we live without it. If the above description does not resonate with your experience, then perhaps the following vignette from the Gospel of Luke might serve to illustrate the conflicting sentiments about law that I am trying to express and explain in this paper:

On a Sabbath, while he was going through the grain fields, his disciples plucked and ate some heads of grain, rubbing them in their hands. But some of the Pharisees said, ‘Why are you doing what is not lawful to do on the Sabbath?’ And Jesus answered, ‘Have you not read what David did when he was hungry, he and those who were with him: how he entered the house of God, and took and ate the bread of the Presence, which it is not lawful for any but the priests to eat, and also gave it to those with him?’ And he said to them, ‘The Son of Man is Lord of the Sabbath.’²

The Sabbath is a legally prescribed day of rest under Mosaic law. Let us accept, for present purposes, that it is not lawful for the disciples to have plucked, rubbed, and ate the heads of grain on the Sabbath. If so, then the Pharisees are merely pointing out the requirements of the law. They are merely stating what the law says. It is difficult to see what is wrong with that. The law is what it is. Surely, it cannot be wrong to quote the law and ask why the disciples are breaking the law. If we find something off-putting about the Pharisees’ question, the discomfort is not with the Pharisees, but it is a deeper discomfort about law itself. The blanket rule on not working on the Sabbath is too constraining; its generality ignores the particularity of the situation. This discomfort about law goes to the very nature of law, not just its content. The response by Jesus is not to get rid of law, which would have been a simple, even simplistic, response. Instead, Jesus gives a complex multilayered response. Jesus does not advo-

¹ ‘For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts’ (Aristotle 2009, p. 99). The Lesbian moulding here refers to the method of moulding used on the island of Lesbos.

² Gospel of Luke 6:1–5.

cate for the abolition of law. Rather, he appeals to some exception that responds to the immediate needs of the particular situation: hunger. Not only is there an exceptional case here arising out of hunger, there is also an exceptional figure present: the Son of Man as the Lord of the Sabbath.

We are thus faced with the generality of law and the particularity of the exception: the latter is a response to a frustration with the former. However, notwithstanding the frustration with law, it is not that we want to get rid of it. If the opening paragraph and the biblical vignette resonate with your felt experience of law, then this paper seeks to explain why that is so – why we sometimes view law as a monumental moral achievement and why we are sometimes so frustrated with it. The answer, as this paper will argue, lies in the nature of norms. The value and limit of law is traceable to the value and limit of norms. Kierkegaard helps us see that. This paper will argue that our ambivalence about law mirrors Kierkegaard's ambivalence about ethics.

The paper will begin with Kierkegaard's conception of ethics and situate it between two spheres: the aesthetic sphere *before* ethics and the religious sphere *beyond* ethics. Kierkegaard's three spheres of life pivot on the ethical. Both the aesthetic sphere and the religious sphere are defined in opposition to the ethical. The ethical is a social form of life that is structured by norms. The norm is the social basis of living together. It covers the entire range from the normal to the normative. Take the prescription of the Sabbath as a day of rest, and the corresponding proscription on working on the Sabbath, as an example. A community that accepts that norm as binding endows it with normativity, and in acting according to it, sets the standard of normality, which enables the Pharisees to ask anyone who breaks the norm, 'Why are you doing what is not lawful to do on the Sabbath?' Ethical norms are sandwiched between the aesthetic and the religious. The Kierkegaardian trichotomy invites reflection on the role of norms in structuring one's life. The aesthete stands before the norm, while the religious person goes beyond the norm. The aesthete refuses to submit to the norm, while the religious person leaps out of it. Jesus calls on his disciples to take the religious leap of faith.

Much of Kierkegaard's ambivalence about ethics is attributable to this tripartite structure. Ethics has a before and a beyond. Ethics is good when compared to the aesthetic, but it falls short when viewed from the perspective of the religious. With this ethical insight, this paper will turn to law next in the second half. Law, too, is situated between two spheres: the state of nature *before* law and the state of exception *beyond* law. Much of our ambivalence about law is attributable to this tripartite structure. Legal norms are sandwiched between the state of nature and the state of exception. Law has a before and a beyond. Moving from the state of nature to the rule of law is a monumental achievement, but there are moments of exception when departure from law is not only justified but required. In ethics, Kierkegaard calls it the teleological suspension of the ethical. In law, Schmitt calls it the state of exception. The state of exception can be triggered by an exceptional event or an exceptional figure, such as the Son of Man as the Lord of the Sabbath. The rule of law is an achievement over the state of nature, but it exists in the shadow of the state of exception. The state of nature is pre-law, while the state of exception is post-law. Caught between pre and post, the result is ambivalence, in law as in ethics.

Kierkegaardian Ethics

Kierkegaard posits three stages of life: the aesthetic, the ethical and the religious. The contrast between the aesthetic and the ethical is the subject of *Either/Or*, while the contrast between the ethical and the religious is the subject of *Fear and Trembling. Either/Or* (Kierkegaard 1992) is a stylistically complex work. It was written under the pseudonym, Victor Eremita, who presents himself as the editor of two sets of papers, A and B, which he found hidden inside an old escritoire. A is unnamed, while B is identified as Judge William. A's papers celebrate the aesthetic values of 'free love', while Judge William's letters to A try to convince A of the ethical virtues of 'marital love'. The character A expresses the aesthetic position, while Judge William expresses the ethical position. It is no accident that the figure who expresses the value of ethical norms is a judge. As a judge, norms are his stock-in-trade. There is close connection and natural affinity between legal and ethical norms. Norms confer rights and impose duties on individuals to act or refrain from acting in certain ways. An individual living in the ethical stage justifies their actions in terms of rights and duties. In contrast to the ethical mode of life, the aesthetic individual ignores the moral framework that would guide the ethical individual's actions.

The aesthetic individual acts only to fulfil their particular and subjective desires. 'Aesthetic judgments are examples in search of their rule, subjective and individual', which reaches for but falls short of an 'undetermined universal' (Douzinas and Warrington 1994, p. 421). The move from the aesthetic to the ethical represents a movement from particular desires to general norms. The aesthetic individual is individualistic. The aesthete is not only amoral, but also asocial. Or to phrase the point more sharply, the aesthete is amoral because the aesthete is asocial. Asocial does not mean that the aesthete is not living around people. The aesthete might be living *around* people, but the aesthete is not living *with* people. The aesthete can be surrounded by people and enjoy their company. The aesthete need not be a hermit. However, the aesthete is not committed to any persons and projects. For the aesthete, relationships are stuff that can be hived off at will, on a whim, when they appear to be burdensome. They do not let these persons and projects define their sense of self. They fancy themselves to be free spirits, with no ties, and nothing tying them down. They might have people around them, but they are not connected to these people in any existentially significant sense. The aesthete sees themselves as the protagonist of their own life story in which others only appear as cameos.

In contrast to the aesthete, the ethical person sees others as major characters in a shared plot, whose life stories are inextricably intertwined with theirs. The ethical person lives *with* people, and not simply have people live *around* them. To live with people is to engage in a joint project with them, as a shared enterprise and common endeavour. It is to place oneself in a network of social relations, and to accept one's place within that network. Consider, for example, the position of the Pharisees in the vignette. They see the Jewish people as a covenantal community. The nation of Israel is God's chosen people. To be a Jewish person is to be part of the Jewish people, that is, to place oneself within that network of communal relations. Righteousness is the keeping of right relations within the community. The holy days and holidays, such as the Sabbath, and the associated prescriptions and proscriptions on those days, are

ways and means of maintaining communal ties. The norms surrounding the Sabbath are at once legal and ethical: legal because they are the requirements of Jewish law which flows out of the Mosaic covenant, and ethical because they are justified on the basis of one's ties to others in the maintenance of the Jewish community.

The ethical life requires commitment to persons and projects. The social role that one has within that network comes with social standards that are attached to that role. One can perform that role well or poorly. Accepting that social role is to subject oneself to those standards, to which others are also subject. In this relationship, others might come to expect something of oneself, and one would attempt to live up to those expectations. In the commitment to persons and projects, one finds standards of excellence, according to which one might evaluate oneself. When the Pharisees ask, 'Why are you doing what is not lawful to do on the Sabbath?', they are in effect holding other members of the same community to account. They are asking for an account, which only a member of the community could ask of another member of the same community. The shared social identity provides the basis to judge oneself and others. In accepting a social role, one finds oneself within the domain of the ethical. The ethical is the socialization of the aesthetic individual into civic life. The tie that binds a person to a project is not a logical connection, but a social and existential one. The knot is tied by the existential choice to enter the social domain of the ethical.

There has been a niche debate among Kierkegaardian scholars as to whether Kierkegaard's view of ethics is Kantian or Hegelian. Kant's view of ethics moves from the individual to the universal via the faculty of reason which resides in the individual. The use of the faculty of reason enables one to apply the test of universalizability to grasp the content of the universal moral law. There is no noticeably social dimension to this account, which Hegel picks up on and criticizes Kant for. On this point, Kierkegaard is on Hegel's side. Although Kierkegaard's reliance on Hegel pertains to ethical norms, the same point holds true for legal norms as well, as articulated Douzinas (2012, p. 73) who argues that it is 'only when we depart neo-Kantian jurisprudence in the direction of Hegel that the full contribution of rights emerges.' For Kierkegaard, the ethical domain is marked by ethical commitments to roles and relationships in society. These commitments need not be universalizable in the Kantian sense. These commitments are not morally abstract, but socially concrete. The 'self is constructed in social relations, in family settings, community belongings and country loyalties' (Douzinas 2012, p. 77), and the 'emergence of self-consciousness is embedded within this familial, political, religious, cultural matrix' (Bhandar 2009, p. 322). Judge William, who is the spokesperson for the ethical in *Either/Or*, presents the ethical in terms of committing to roles and relationships in society and accepting the ethical standards that attach to these roles and relationships. This view of ethics is more Hegelian than Kantian. In defending the social institution of marriage, Judge Williams is not only 'following Hegel in treating the family as a central institution of ethical life, but he also defends it as such in clearly Hegelian terms, through the working of "love's dialectic"' (Stern 2011, p. 190). Aesthetic love, which is based entirely on feeling, is transformed into ethical love, which is based in part on duty, through the social institution of marriage.

One gets to the ethical, not through *a priori* reason, but through *a posteriori* socialization, by embedding oneself in a concrete community. Kierkegaard's view on the

ethical is closer to Hegel's *Sittlichkeit* than to Kant's categorical imperative. Hegel's *Sittlichkeit* is a kind of social morality that is founded on the laws and customs of an existing community, with the result that there is no sharp divide between a legal norm and an ethical norm (as is the case with the norm against working on a Sabbath, which is at once legal and ethical). In *Fear and Trembling*, Kierkegaard ties the ethical to language. Ethics is tied to language through their shared nexus to society. Both are social practices. For Hegel, as for Kierkegaard, culture is not conceived of as a set of discrete and isolated practices, but rather, it is 'an embodiment of a way of life and being' (Bhandar 2009, p. 325). As Wittgenstein (1953, § 19) says, 'to imagine a language is to imagine a form of life.' Ethical justification relies on an ethical vocabulary. The shared ethical sense of right and wrong is embodied in the shared language of that society. Consequently, the loss of the ethical is marked by a loss for words, which is what happened to Abraham on Kierkegaard's account in *Fear and Trembling*. When confronted with God's command to kill his son Isaac, Abraham lacks the ethical vocabulary to justify his actions. He cannot make his actions ethically intelligible to his family, and even if he were to try, there would be no mutual comprehensibility. Hence, he just kept silent. What Abraham did, literally, makes no sense. Kierkegaard calls it 'absurd'. Consequently, either he falls into silence, or when he speaks, he lapses into irony.³ Wittgenstein (1953, p. 223) says that 'if a lion could speak, we could not understand him.' It seems that Abraham has turned into a lion. What Abraham intends to do is not, and cannot be, justified ethically using language. To be ethical is to be able to give an account of oneself to others. Abraham cannot do that. Abraham must leave society to go up a mountain to carry out his plan. In going up Mount Moriah, he is leaving society behind, and with it, the domain of the ethical.

Grounding in a society is a necessary, but not sufficient, condition of the ethical. That must be so because it cannot be the case that anything that is demanded by society amounts, ipso facto, to an ethical demand, no matter what the demand is. To avoid that unpalatable conclusion, Hegel has to insert additional conditions as constraints, which he does through the idea of the 'rational state'. The society into which the individual is socialized has to be fundamentally sound. For ethical growth, the individual must come into maturity in a society which is itself mature. Hegel's philosophy of the state focuses on a person's 'relationship to and within the state', which constitutes 'the ethical life of the political state' (Bhandar 2009, pp. 322-3). There is a progressive aspect to Hegel's society: 'his account of the social structures that he upholds does not pertain to just the existing state of his time, but to one that is fully "rational" and developed, in a way that takes his work beyond an appeal merely to how things happen to be' (Stern 2011, p. 247). The ethical individual within a 'rational state' would act with what Hegel calls rectitude. The ethical norms of that community would not be felt as an external imposition, but as part and parcel of their being, of who they are, by virtue of their commitment to that community. The individual's particular interests are subject to and subsumed within the community's

³ See, for example, the supremely ironic conversation between Abraham and Isaac, just before Abraham binds Isaac. Isaac asks Abraham where the sheep is for the offering to God. In reply, Abraham says, 'God will provide himself the lamb for a burnt offering, my son' (Genesis 22:8).

general norms. As Hegel (1991, p. 285) says, ‘in the state, everything depends on the unity of the universal and the particular’.

Before and Beyond Ethics

Kierkegaard endorses the Hegelian conception of ethics, but he does not swallow it whole. Hegelian ethics is superior to aesthetics, to be sure, but it is inferior to faith. Kierkegaard’s critique of Hegel in this regard is not that Hegel has got the wrong conception of ethics. Rather, Hegel’s mistake is in thinking that ethics is the highest mode of existence. *Fear and Trembling* presents an account of the inadequacy of ethics when measured from the perspective of faith. It is good to be ethical – it is certainly better than being an aesthete – but it should not be thought of as the highest stage that one can attain. The highest is faith. Hegel’s mistake is not in his portrayal of ethics, but in his valuation and evaluation of it.

For Kierkegaard, beyond the ethical is the religious, where the individual once again becomes the single individual, alone before God. The move from the aesthetic to the ethical is a process of socialization and engagement with society, whereas the move from the ethical to the religious is a process of detachment and disengagement from society. In the religious stage, the individual wrenches itself from society to pursue this isolated relationship with God: the one individual before the one God. What makes Kierkegaard an existentialist par excellence is this third and final step – the return to the individual self in the religious stage. The ethical sociability is the halfway house between aesthetic individuality and religious individuality. It is the stage that the aesthetic individual must pass through to get to the other side to become the religious individual. Hegel mistakes the halfway house for the final destination. Hegel’s conception of ethics is correct as far as it goes – as a description of the halfway house called ethics. On the Kierkegaardian taxonomy, one might think of the Pharisees as living in the intermediate ethical domain, with Jesus inviting them and his disciples to move up and enter the religious domain.

We will better understand the nature of the ethical by considering what comes before it and what goes beyond it. The transformation of the self into an ethical being is a momentous psychosocial and psycho-spiritual achievement. We can start to see and appreciate its momentousness by noting where we begin and how far we have to travel to arrive at the ethical stage. Human life begins with instinctive desires. We have an instinctive desire for pleasure. We can see that most clearly in children, and also in adults who act like children. The object of desire could be crude or refined. The difference between a child and a childish adult is simply that the former has cruder desires, while the latter has a more refined taste. A child wants candy, while an adult wants brandy. They both seek pleasurable experiences. When they don’t get what they want, they throw a tantrum. However, even when they get what they want, they soon get bored with it anyway. Think of a child’s desire for a new toy, and how they throw a tantrum when they do not get it, and become bored with it soon after they get it, which leads them to desire another new toy, and the cycle continues. We can easily imagine adults trap in the same cycle too.

The aesthete is trapped in this cycle of desire. The problem with the pursuit of desire is not that it is immoral. Leaving morality and immorality aside, this style of life is actually depressing to the person living that sort of life. The person is pulled in different directions by instincts. They are busy chasing desires which are ever changing. They end up having a fragmented life. Their life is scattered, and their lifestyle helter-skelter. Despite any surface pleasure, it is a very unhappy state. It is empty at its heart. The person who is driven by desire is driven into despair. The desire-driven person is stuck in a rut, and Kierkegaard argues that the only way to get out of the rut is by making a commitment. A commitment is a promise – to oneself and to others. Promise projects oneself into the future. When I make a promise, I care, not only about who I am today, but also who I will be tomorrow. By projecting oneself into the future, it turns one's life into a project. The commitment lifts one up from the aesthetic to the ethical. In the ethical stage, one is no longer able to do as one pleases. My commitments bind me. In moving from the aesthetic to the ethical stage, one moves from a shapeless individual existence into a normative social structure. The normative social structure houses one's life and gives shape to it.

It is good to be in the ethical, but it is not the highest. Why not? Because every ethical norm admits of exceptions that reaches beyond the ethical, and when those moments of exception arise, the ethical norm must be cast aside. If the first aesthetic stage is defined by desires and the second ethical stage by norms, then the third and final religious stage is defined by faith. Every ethical norm is susceptible to what Kierkegaard calls the 'teleological suspension of the ethical', which one gets to through a 'leap of faith'. It is a *teleological* suspension, which means that the suspension of the ethical is in the pursuit of a *telos*, a higher end that is beyond the ethical. This higher, indeed highest, end is the Supreme Good, which Kierkegaard equates with God. God is the personification the Good. The Good God is in excess of the ethical. The Son of Man as the Lord of the Sabbath can suspend the norms on the Sabbath. The appearance of the Messiah inaugurates an exceptional epoch, in which the ethical norms must give way to a higher reality. The totality of ethical requirements cannot exhaust the Good, hence there will always be exceptions. Ethical norms are finite, but the Good has an infinite dimension. The self is trapped in the finite, in which ethical norms rule, but the self is conscious of an infinite dimension.

'The elusiveness of the infinite expresses itself through the possibility of death at any moment', and this infinite thought 'threatens to transform my existence into a vanishing nothing' (Kierkegaard 1941, p. 76). I can drop dead anytime. This uncertainty of death lurks within every moment of life. 'The conception of death will transform a man's entire life, when in order to think its uncertainty he has to think it in every moment' (Kierkegaard 1941, p. 150). What happens when I reflect on my own death is not simply a passive interpretation of the phenomenon of death, but an active interpenetration of death into my own existence. Kierkegaard (1941, p. 151) calls these moments 'religious moments', when we straddle between the here and the hereafter, between finitude and infinity. The meaning of life in the face of death is found, not in the ethical, but in the religious, in which we find the Supreme Good. When the ethical conflicts with the religious, it is the ethical that has to give way. When God asks Abraham to sacrifice Isaac, one finds the coming together of God and the Good, and of death and the suspension of the ethical. God's command to

Abraham to kill Isaac suspends the ethical norm against murder. Abraham's compliance with God's command brings him into the religious sphere, in which God is the supreme Good beyond the ethical.

Both love and death straddle between the finite and the infinite. In love unto death, 'there is born a love that does not flame up, that is not equivocal, that is not – until death, but beyond death, a love that endures' (Kierkegaard 1961, p. 132). The Gospels say that God is love. If God is love, then 'we can resemble God', and conquer death, 'only in loving' (Kierkegaard 1946, p. 53). 'Love's secret life is in the heart, unfathomable, and it also has an unfathomable connection with the whole of existence.' (Kierkegaard 1946, p. 8). When we are in love, we say with the Beatles: all we need is love. Nothing else matters. I am prepared to sweep away every part of my life that stands in the way of love. One has not truly loved if one has not felt the 'urge to sacrifice everything for love' (Kierkegaard 1989, p. 160). Love could not be accomplished without tears, for 'in the joy of love (as love is always joyful, especially when it sacrifices everything), there would nonetheless be a deep sorrow' (Kierkegaard 1989, p. 160). The idealization of forbidden love is the stuff of legend. In forbidden love, there is a whole network of social and ethical norms that stand in the way of love, forbidding the lovers from pursuing their love. Love breaks free of those norms. The lovers are prepared to tear down the entire social structure to pursue their love, come what may, even if it means hell. To hell with norms. The story of the 'star-cross'd lovers' and their 'death-mark'd love' in *Romeo and Juliet* memorializes the power of love, not only in the face of social opposition, but also in the face of death. Philippopoulos-Mihalopoulos (2003, p. 354) lines up two pairs of concepts – the legal and the amorous (or to put it more simply, law and love); and the ethical and the religious – and argues that 'suspension operates in both cases as a "cut" between two...ultimately incommensurable sets of values', with the result that one has to suspend the normative frame 'in order to reach the beyond of love.'

The radicalism of love is manifest, not only in romantic love, but also in parental love. One feels it most intensely in moments of crisis, such as when one's child is on the brink of death. Consider the following scenario.⁴ Two children have fallen into a river and are drowning. You can only save one. One is your child, and the other is your neighbor's child. Who would you save? Would you first consider what the norms of justice require before deciding what to do? Would you first put yourself behind Rawls's veil of ignorance to figure out objectively which ethical principles you should use to decide which child to save? My bet is that you would not. Without any second thought, you would jump in to save your child, and not your neighbor's child. No ethical norms matter. They are not even open to consideration. All that matters is your child's existence. You will do anything and everything to preserve your child's existence in whom your own existence is rooted. A lover is willing to sacrifice all for the beloved, as much as a parent is willing to sacrifice all for the child. The willingness to sacrifice for love is 'the highest that can be said of any [hu]man' (Kierkegaard 1946, p. 251). We know our love through our sacrifice. Sacrifice is the test of love.

⁴ Which is a modification of Bernard Williams' (1981, p 18) 'one thought too many' thought experiment.

As powerful as romantic love and parental love may be, they are not the highest love. Kierkegaard suggests that there is a love that is higher than both romantic love and parental love, for which one might be willing to sacrifice even romantic love and parental love itself. Abraham is willing to kill his son Isaac, and Kierkegaard was willing to break off his engagement with Regine. The former sacrifices parental love, while the latter sacrifices romantic love. Both episodes, one biblical and the other biographical, are central to Kierkegaard's view of love. Kierkegaard loves Regine, just as Abraham loves Isaac, but there is a higher love that he and Abraham must respond to. Abraham's binding of Isaac and Kierkegaard's breaking off his engagement with Regine are exceptional acts. The exceptional act is the ultimate test of love, of where one's true love lies. Both Abraham and Kierkegaard were willing to sacrifice one love for a higher love. Again, it comes back to sacrifice: for what, or for whom, are you willing to sacrifice? The highest love is the absolute telos, 'which involves a volitional concentration in the highest sense' by making the object of my love the highest end in my life (Kierkegaard 1941, p. 353). For Kierkegaard, the love of God is the highest love attainable for humankind, which one can only get to through a leap of faith.

Rule of Law⁵

In Kierkegaard's scheme, the ethical is situated between the aesthetic and the religious spheres. The aesthete exists before ethics, while the religious exists beyond ethics. Using Kierkegaard's conceptual architecture, one could construct a similar tripartite structure for jurisprudence. Law is situated between the state of nature and the state of exception. The state of nature is the state before law, while the state of exception is the state beyond law. One moves into the state of civil society when one enters into a social contract, which is a form of commitment, and allows oneself to be constrained and restrained by the legal order that comes with the state of civil society. One cannot move into the state of civil society alone. One has to move into it with others. The rule of law, which emerges in the state of civil society, must have a social foundation, just as ethics must have a social foundation. Law is a mode of structuring a common life in community. Both ethics and law structure life through norms: ethics consists of moral norms, while law consists of legal norms. They create forms of life. Norm gives life a form.

The social contract is a promise. It relies on 'the power of stabilization inherent in the faculty of making promises' (Arendt 1958, p. 243). In contrast to the aesthete in the state of nature, who is 'unbound by any promises and unkept by any purpose', in the ethical sphere, 'promises are valid and binding' (Arendt 1958, p. 245). In making a promise, I commit myself to something and thereby stabilize myself. It is the ethical solution to the aesthetic volatilizing of the self that breaks the self into a series of disconnected moments in time. The ethical promise puts the self back together into one piece. It injects an element of predictability and reliability into human affairs. No longer is everything in flux. There will be some islands of certainty to build a

⁵ Part of this section is drawn from my theory of law, which is set out more fully in Neoh 2019.

common life and a common future. Promises give us predictability in the midst of plurality. Promises are future-oriented. They project the self into the future. I say now what I will do tomorrow. A promise gives the self a sense of persistence through time.

The Mosaic covenant, which lies at the foundation of Mosaic law, is a promise. The Mosaic covenant may be as historically non-existent as the social contract, but historical non-existence has not stopped people theorizing about the social contract or theologizing about the covenant. Neither the social contract nor the covenant has to be a historical reality in order for it to do its work as a theoretical/theological construct, which serves as the foundation of the legal order. The covenant is a promise between God and the nation of Israel, which is renewed in every generation and by every person who claims to be part of the chosen people. From the covenant, there arises the law, including the Sabbath laws that we encounter in the vignette. The Pharisees live up to that promise by upholding the law.

In the ethical sphere of the Hobbesian social contract or the Mosaic covenant, a community is bound by norms. We call the norms that govern a community ‘law’, and that mode of governance ‘the rule of law’. By the ‘rule of law’, this paper refers only to its thin conception (Tamanaha 2004). To have the rule of law is to have the form of law as a mode of social organization. According to Finnis (1980, p. 260), the focal instance of law is the law ‘of a complete community, purporting to have authority to provide comprehensive and supreme direction for human behaviour in that community.’ Law’s authority is justified because it is ‘required for the realization of the common good’ (Finnis 1980, p. 246). Authority is necessary to realize the common good in a common life. The political philosopher who did most to foreground the need for authority as the justification for law is Hobbes. His portrayal of the state of nature presents starkly the awful fate that awaits humanity in the absence of law. Law provides authoritative solutions to problems in the state of nature.

Hobbes’ (1651, ch 13) construction of the state of nature starts with the three principal causes of quarrel arising out of ‘the nature of man’: competition, diffidence and glory. The state of nature is a state of war, where nothing can be just or unjust: ‘where there is no common power, there is no law; where no law, no injustice.’ There are only force and fraud. To attain peace, we need to get out of this deplorable condition. The way out is to create a common, coercive, compelling power that could rule with authority. The authoritative ruler is known idiomatically as the Leviathan, but is technically called the sovereign. Crucially, the Hobbesian sovereign is one who exerts its authority through the medium of law. Dyzenhaus (2001, pp. 464, 483) argues that Hobbes has a legalist view of sovereignty: ‘a sovereign is by definition one who governs through law’, and who is able to have its commands ‘recognised as law’. Within this political order, ‘the relationship between sovereign and subject is mediated by law’ (Dyzenhaus 2010, p. 453). This view of the sovereign still stands even if one agrees with Schmitt that the ‘sovereign is he who decides on the exception’ (Schmitt 1985, p. 5). Normally, the sovereign governs through law; exceptionally, the sovereign may step outside it.

The humans in the Hobbesian state of nature do not have to be selfish in order to generate this need for the authority of law. To motivate this thought, Finnis (1980, p. 269) imagines a ‘world of saints’, Raz (1999a, p. 159) conjures up a ‘society of angels’, and asks whether law would be needed in that alternate universe. Finnis is a

natural lawyer, while Raz is a legal positivist. Both theorists, a natural lawyer and a legal positivist, arrive at the same answer: absolutely yes. Even a world of saints or a society of angels would have the need for law, for even they would have the need for coordination. With all the goodwill in the world, they would have an abundance of ‘intelligence, dedication, skill and commitment’ which would ‘multiply the problems of coordination’ (Finnis 1980, p. 232). The authority of law ‘shapes, supports, and furthers patterns of coordination’ by bringing ‘definition, specificity, clarity, and thus predictability’ into their interactions, without which neither angels nor saints could live together (Finnis 1980, pp. 267-8). Law is needed, regardless of whether the angels and saints converge on the same set of universal moral norms. If they do not converge, then law is needed to manage their disagreements (Waldron 1999). If they converge, law is nonetheless needed to render these universal, but vague, moral norms more determinate.

Law creates a distinctive normative domain, whose justification can be sourced in rationality. Devoid of a transcendent source of normativity in the modern age, ‘reason was called in to provide the missing link between moral [or in this case, legal] rules and the limited sources of normativity in modernity’ (Douzinas 2012, p. 69). Kelsen’s theory of law seeks to ‘explain how laws can be interpreted as objectively valid norms which ought to be obeyed’, by showing ‘how laws can create obligations which the individual can, if he chooses, rationally regard as binding’ (Honoré 1999, p. 89). For the system to meet that standard of rationality, consistency among all the norms within the system is paramount. ‘A person who is required to act inconsistently is not treated as a rational person’; therefore, in order for law to appeal to the rational faculty of those it addresses, it cannot contain inconsistent norms (Honoré 1999, p. 97). The self-contained normative domain must also be a rational domain. It is sufficient, for Kelsen’s purposes, that the legal system is rationally justified from a given point of view. In the case of law, that given point of view is the point of view of what Raz calls ‘the Legal Man’, or more appropriately, ‘the Legal Person’. The Pharisee is just such a ‘Legal Person’.

In Kelsen’s theory, the Legal Person is a hypothetical person that is posited in legal science in order to generate a hypothetical point of view. Legal science sees the world as the Legal Person sees it. Raz (1999b, p. 246) describes the Kelsenian Legal Person as follows:

Imagine a man whose moral beliefs are identical with the law. He does not add nor detract one iota from it. Furthermore assume that his moral beliefs all derive from his belief in the moral authority of the ultimate law-making processes. For him, in other words, his belief in the validity of all and only the legal norms is not a haphazard result of chance but a logical consequence of one of his beliefs. Let us call this person the legal man.

The Legal Person is exclusively and entirely law-oriented, for whom ‘obedience to law prevails over all else’ and ‘all laws without exception bind those to whom they apply’ (Honoré 1999, p. 105). Kelsen carves out a peculiar and particular juristic consciousness ‘by claiming for it a special point of view, that of the legal man, and contending that legal science adopts this point of view’ (Honoré 1999, p. 66). The Legal

Person proceeds by turning people into ‘various types of legal subject endowed with rights and entitlements’ (Douzinas and Warrington 1994, p. 419), which necessarily obliterates the particularities of each person and of each situation. Kierkegaard’s Ethical Person finds its counterpart in Kelsen’s Legal Person.

Before and Beyond Law

The three stages of life have their counterparts in the three stages of law. The aesthetic stage finds its political expression in the state of nature. The ethical stage finds its political expression in the rule of law. The religious stage finds its political expression in the state of exception. Starting with the condition before law, the state of nature that political theorists imagine at the collective level looks remarkably similar to the desire-driven aesthetic life that Kierkegaard posits at the individual level. There are no stable social relations in the state of nature. In the state of nature, where there is no security of person or property, one cannot but take a non-committal approach to life, where anything goes. Not knowing what tomorrow brings, one is limited in the state of nature to enjoying the satisfaction of immediate desires. The aesthetic stage describes a personal condition of existence, while the state of nature describes a political condition.

The aesthete exists as a bundle of instincts. The aesthete does not accept the normative demands of social roles and the ethical standards that come with those roles. In Freudian terms, the aesthete is pre-social, like a person who lives in the state of nature. The child, who is a natural aesthete, has to go through the process of socialization. Children have to be socialized into following social norms. Keeping things to oneself is instinctive, but sharing does not come instinctively, so children have to be taught to share their toys with their siblings. Learning to share is a lesson in following a basic social norm. Sharing is a tough lesson, and many adults have not fully learned it either. We call that process ‘growing up’. Collectively, a group also has to go through that process of socialization. Political theorists call that leaving the state of nature. Unless one is Peter Pan in Neverland, one eventually has to grow up, which means learning to control one’s desires in order to conform to social norms, and thereby leaving the state of nature to enter the state of civil society. Just as the ethical stage is the personal subjection of an individual to a set of norms, so the rule of law is the collective subjection of a community to a set of norms. In law as well as in ethics, a whole new vocabulary emerges: the normative vocabulary of right and wrong, and of good and bad.

The Pharisees’ accusation against Jesus and his disciples are that they are living like lawless aesthetes – doing what they want, eating whenever they want – in wanton disregard of clearly established Jewish norms. The response by Jesus is that they have not regressed into the aesthetic sphere, but rather, they have entered the religious state of exception. The norm regulates the normal, but it is inapplicable to the exceptional. The exceptional requires ‘sensitivity to singularity’ (Douzinas and Warrington 1994, p. 422), in which the singular event exceeds the general norm: to subject such an exceptional event to the regulation of a norm is like trying to calculate the incalculable. Both the aesthetic and the religious spheres may exhibit the same outward action,

but they have radically different inward motivation. The religious state of exception is inaugurated by the appearance of the sovereign: the Son of Man as the Lord of the Sabbath can suspend the Sabbath. Law is structured by a set of norms, which constitute the social practice of living together in a community, but law is not the be-all and end-all. Beyond the rule of law lies the state of exception. Just as the Kierkegaardian trichotomy of life invites reflection on the role of ethics in structuring one's life, so the application of the Kierkegaardian trichotomy to law invites reflection on the role of law in structuring the state. The state, simpliciter, is sandwiched between the state of nature and the state of exception.

Hobbes only has two stages: state of nature versus state of civil society. For Hobbes, when a polity leaves the state of civil society, it can only mean falling back into the state of nature. The Kierkegaard-inspired scheme includes a third stage: the state of exception. It substitutes the dichotomy with a trichotomy. The utility of the third stage lies in its explanatory power. Although the suspension of the law that constitutes the state of exception operates as a 'cut' between two incommensurable sets of values, it is also 'the first step toward linking disparate values' (Philippopoulos-Mihalopoulos 2003, p. 356). Entering the state of exception is not a return to the state of nature, just as entering the religious domain is not a regression into the aesthetic sphere. The utility of the third stage lies in its ability to explain certain features of political life that cannot otherwise be adequately accounted for within a dualistic frame. This same motivation was also what prompted Kierkegaard to introduce a third stage in his account of the stages of life. The dominant Kantian and Hegelian moral philosophy of his day had a dualistic scheme that revolves around two categories: desires and norms. The former leads to an aesthetic life, while the latter leads to an ethical life. Kierkegaard adds a third stage – the religious life – to explain certain features of existence that cannot otherwise be adequately accounted for. The state of exception carries the same explanatory value to law that the religious stage brings to life.

The state of exception shows that the existence of the state is a matter of life and death. The state presents the citizen with a higher calling, in which the citizen may be asked to make the supreme sacrifice: to kill and be killed for the state in war. War is the paradigm of the state of exception. A subject is willing to die for the state because the relationship between the self and the state is transcendental. There are several ways to characterize the transcendental nature of this relationship between self and state. Following Taylor (2007, p. 5), one might say that the state gives the self a sense of 'fullness': 'somewhere, in some activity, or condition, lies a fullness, a richness; that is, in that place (activity or condition), life is fuller, richer, deeper, more worthwhile, more admirable, more than what it should be.' Or following Schmitt (1985, p. 46), one might say that politics is a reflection of metaphysics, such that one's political relations take on metaphysical significance: 'the metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization.'

In the state of exception, we are not dealing with political bargain, but existential meaning. A citizen is willing to die for the state because the relationship between the self and the state is not merely contractual, but ultimately existential. A religious experience is a transcendental experience, when we experience something larger than

life, in which we get a sense of the sacred. Love, which the Gospels equate with God, is a site of the sacred. The state is another. The history of the transference of the idea of the sacred is encapsulated in the motto: 'For God, King and Country.' We honor the patriotic soldier as a hero who is prepared to give up everything to defend the state, leaving behind family and friends and everything else that the person normally holds dear. The state becomes the new source of ultimate existential meaning. There is a saying that all is fair in love and war. Patriotic war brings together love and war. Patriotism is a form of love. Compare patriotic love with parental love. When I discussed the religious stage earlier, I invited you to imagine your child on the brink of death. At that moment of crisis, the parent will do anything and everything to preserve the child's existence in whom the parent's own existence is rooted. Now replace the parent with the patriot, and the child with the state. In a moment of crisis when the state's existence is on the line, the patriot will go to the front line. At that point, the soldier's existence is tied to the continued existence of the political community that the soldier is defending. Is the patriot a fanatic? Yes, but so is the parent. Love is fanatical, and for that reason, one can only get there through a leap of faith.

Carl Schmitt, who first introduced the idea of the state of exception into legal theory, is also the first who made this connection between his idea of the exception and Kierkegaard's idea. Ever the staunch Catholic, Schmitt does not refer to Kierkegaard by name in *Political Theology*. Schmitt (1985, p. 15) calls him a Protestant theologian, and then quotes a crucial line from Kierkegaard's *Repetition*: 'if one wants to study the general correctly, one only needs to look around for a true exception.' One arrives at a better understanding of the place of law, by seeing what comes before it and what lies beyond it. To put law in its place does not mean to put it down. Rather, it is to put it in the right relation to the exception. The exception proves the norm. In the state of exception, we are confronted with 'the impossible task of welding norm and reality together, and thereby constituting the normal sphere' (Agamben 2005, p. 40), which exists in the shadow of the exception. The attempt in this paper to ground the state of exception on love and the leap of faith might perhaps appear ludicrous, for Schmitt's own politics was filled with hate. But then, hate is often just the flipside of love. Both love and hate are acts of will. Take one wrong turn, and the will may be twisted towards evil. A legal theory that 'does not recognize evil in any sense' is also a legal theory that has no place for 'free will' (Hirvonen 2007, p. 31). Heaven has no rage like love to hatred turned. 'As it is said about the tongue, that "out of the same mouth proceedeth both blessing and cursing", so we must also say that it is the same love which loves and hates' (Kierkegaard 1946, p. 29). 'Only when the love is burnt out is the flame of hate also quenched' (Kierkegaard 1946, p. 29).

To say, as I do here, that the state of exception is grounded on love is not to say that it is unproblematic. On the contrary, it will often be highly problematic. It is especially problematic when the paradigmatic example that Kierkegaard provides of the move into the exception is God's command to Abraham to kill his son Isaac. It is bad enough that Abraham is prepared to kill his son. It makes it even worse to say that is an expression of love. At that point, Abraham looks like a fanatic. What is at stake here is 'the status of violence as a cipher for human action' (Agamben 2005, p. 59). As Kierkegaard (1954, p. 123) himself recognizes, 'the demonic has that same property as the divine, that the individual can enter into an absolute relationship to

it.’ What makes it problematic is that the religious sphere can be unethical, just as the state of exception can be unlawful. To say that the state of exception is grounded on love is as shocking as saying that Abraham’s binding of Isaac is an expression of love. If we find that shocking, that is because we have grown accustomed to a lovey-dovey view of love. That rose-tinted view of love is misleading. Love is often problematic, and always risky. Therefore, from Augustine, we get two maxims on love, which together sum up succinctly the unsettling nature of love: ‘love, and do what you will’, so ‘love, but be careful what you love’. The first maxim points to the antinomianism in love, while the second maxim points to the riskiness of love. Love is risky because it is antinomian – unbound by norms. The risk is that the leap of faith might turn out to be a leap into the abyss. The risk of falling into the abyss is the danger that Agamben attempts to alert his readers to in his critique of Schmitt. When the norm and the exception enter into a zone of undecidability – when the norm and the exception become ‘bound and blurred together’ – what results may be ‘a killing machine’, for ‘this confusion between the exception and the rule was precisely what the Third Reich had concretely brought about’ (Agamben 2005, pp. 58, 86).

Conclusion

This paper has followed Kierkegaard’s exhortation to find meaning, not in a detached search for truth in the world, but in a self-reflective inward search for truth within the self. Existential truth is no more ‘evident in human history, where millions are involved, than in one’s own poor little life’; in my own self, I can find what I need for the study of existence, and what is more, ‘this is the only place where I can study it with any assurance of certainty’ (Kierkegaard 1941, pp. 127–8). We will understand the world better by, first, understanding the self. The same, this paper suggests, holds true for law: we will understand law better by, first, understanding the self. Where Hegel looks outward into world history to construct his philosophical system, Kierkegaard looks inward into the self. Kierkegaard distinguishes between conceptual truth and existential truth. The difference between a conceptual truth and an existential truth is the difference between knowing ‘what life means’, objectively, and knowing ‘what life means *for me*’, subjectively. Kierkegaard’s claim is that we will understand the former better by paying attention to the latter. This paper’s Kierkegaard-inspired claim is that, just as we understand what life means by considering what life means *for me*, so we understand what law means by considering what law means *for me*. Looking within the self, Kierkegaard finds three stages of selfhood and spheres of life: the aesthetic, the ethical, and the religious. Turning from the self to the state, one finds three corresponding stages and spheres: the state of nature, the rule of law, and the state of exception.

In closing, let’s return to the vignette and the puzzle that we started off with. The disciples are hungry, but the Sabbath norm prohibits the plucking of the heads of grain, which the Pharisees point out. Should the disciples control their desire to conform with the norm, or breach the norm to give in to their desire? That is the way the Pharisees frame the issue. It is a law-based paradigm. In fact, that is the choice that legal subjects are confronted with all the time: desire versus norm. Desire falls into

the aesthetic sphere, while the norm is legal/ethical. Jesus' response to the Pharisees is paradigm-shifting in that he introduces a third stage: the religious stage, founded on the exception. In the state of exception, the Sabbath norm is suspended, but not abolished. It is not that Jesus is saying, from now on, the Sabbath is no more. Jesus is not an antinomian or a proto anarchist. Rather, he is saying that this particular Sabbath norm is suspended in this particular case. When we are confronted with the generality of law, it is not that we want to get rid of law. Rather, what we want is to keep the law, but also respond to the exception. Kierkegaard shows us how we can make sense of our ambivalence about law. In the state of exception, the Sovereign could turn out to be the Christ or the Antichrist. Whether he is God Incarnate or the Devil Incarnate is something that one can never tell in advance. When the sovereign suspends the law, thereby creating the state of exception, a subject might choose to follow the sovereign into the state of exception or not, but if the subject were to choose to follow, that choice must be the result of a leap of faith. The leap of faith is the subject's response to the sovereign exception. The subject's response is necessarily subjective. Faith is a subjective belief in that which is objectively uncertain. Faith in God and the love of God are inseparable. One cannot work without the other. Faith and love work together to orient the will to do that which one has no sufficient rational grounds to do, for which nothing more could be said.

Our life is bound by law. Legality is the virtue of law, but legalism is its vice (Shklar 1964). We want our relationships to be lawful, but we do not want them to be entirely law-filled. The worry is that legality slides easily into legalism. In the Book of Exodus, the formation of the covenant on Mount Sinai is accompanied by the promulgation of laws, laws and more laws. The Israelites, understandably, 'want laws but not too many' (Walzer 1985, p. 73). There is an old Jewish folktale, which tells the story that, on the day after the Sinai covenant, 'the Israelites rose early and marched at double speed away from the mountain so that they would not be given any more laws' (Walzer 1992, p. 335). Despite all our complaints about legalism, it is not that we prefer to be lawless either. We associate lawlessness with the dreaded chaos and anarchy that might befall the world if we were to give up on law. When we want to criticize a situation for its lawlessness, we say that there is just the law of the jungle, which harks back to the state of nature, where there is really no law at all. The constraint of law is the price that we have to pay to hold chaos at bay. We might be willing to pay the price, but we do so grudgingly. Law is the *katechon* (the Restrainer) that we need to hold back the forces of chaos, but that does not mean that we love it. We are torn about the role of norms in law and life. This ambivalence is rooted in human existence itself. To understand this ambivalence, we need to 'read through once again the original text of individual human existence', as Kierkegaard (1941, p. 629) exhorts us to.

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