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ABSTRACT

This paper provides a critical reconstruction of J. B. Erhard's account of recognition that locates it within the context of his revolutionary natural law theory. The first three sections lay out the foundations of Erhard's position. The fourth section outlines Erhard's response to the opponents of revolution and raises a problem for it. The fifth section argues that we can resolve this problem by drawing upon Erhard's account of failures of legal recognition. The sixth and final section considers the relevance of that account for contemporary legal and political theory.

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The development of philosophy in late eighteenth-century Germany was marked by a proliferation of writings on the philosophy of right (legal and political philosophy). This proliferation was no doubt prompted by a desire to make philosophical sense of the momentous political events of the eighteenth century—the American and French Revolutions. But it was also prompted by a desire to apply the insights and methods of Kant's Critical Philosophy to the philosophy of right. Although Kant had authored several important essays on politics, he would not provide a comprehensive statement of his philosophy of right until the 1797 *The Metaphysics of Morals*. Prior to the publication of that work, the task of developing a 'critical' philosophy of right fell to thinkers such as Johann Benjamin Erhard, Johann Gottlieb Fichte, Karl Heinrich Heydenreich, Gottlieb Hufeland, and Theodor Anton Heinrich Schmalz.

It is within this intellectual context that the concept of 'recognition [*Anerkennung*]' assumes an important role. It is first used by thinkers such as

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Schmalz,[1] Heydenreich,[2] and Erhard to develop the legal and political implications of an idea that is central to Kant's ethical thought—namely, the idea that in virtue of their status as self-determining, rational agents, human beings are owed respect and should be treated as ends and never merely as means. To recognize someone is to acknowledge their status as a self-determining, rational agent and to treat them accordingly. For Schmalz, Heydenreich, and Erhard, the moral requirement that we recognize other human beings is intimately connected with human rights and imposes moral constraints on law and legal-political institutions. (This emphasis on the legal and political implications of respect for self-determining, rational agency means that these thinkers are preoccupied with 'legal recognition' rather than with the forms of recognition referred to, following Axel Honneth, as 'love' and 'social esteem' (see Honneth, *Kampf um Anerkennung*).)

Now, although Schmalz and Heydenreich both deploy the concept of 'recognition', they do so only fleetingly, and it is Erhard who develops the first fully fledged account of recognition. Erhard's work has received scant attention in the literature on recognition, which has tended to focus on Fichte and Hegel.[3] This is regrettable, since Erhard offers an account of recognition that is both distinctive and compelling.

Erhard's account is distinctive because it is explicitly designed to help answer the burning political question of the day: Is revolution morally justifiable? (Although Fichte's and Hegel's accounts of recognition are informed by a concern with the legitimacy of revolution, they do not provide an *explicit* answer to this question.) Erhard answers it by developing a revolutionary theory of natural law that accommodates, and provides a compelling response to, the objections raised by the opponents of revolution. His account of recognition plays a central role in that theory, furnishing Erhard with a principled way of specifying the kind of injustice that justifies revolution.

This paper provides a critical reconstruction of Erhard's account of recognition that locates it within the context of his revolutionary natural law theory. My reconstruction focuses on Erhard's 1795 book *On the Right of the People to a Revolution* (hereafter, *Revolution*)[4] but refers to other texts when they illuminate Erhard's arguments. The first three sections lay out the foundations of Erhard's position. The fourth section outlines Erhard's response to the opponents of revolution and raises a problem for it. The fifth section argues that we can resolve this problem by drawing upon Erhard's account

[1]Schmalz, *Das reine Naturrecht* [1792], §89; [1795], §100.
[2]Heydenreich, *System des Naturrechts*, 142.
[3]A notable exception is Gabriel Gottlieb's essay "A Family Quarrel", which provides an illuminating discussion of the relationship between Erhard's and Fichte's theories of recognition.
[4]*Über das Recht des Volks zu einer Revolution.* Translations from *Revolution* are either my own or by me and Michael Nance.

of failures of legal recognition. The sixth and final section considers the relevance of that account for contemporary legal and political theory.

1. Natural law theory

Erhard's position is a form of natural law theory. Natural law theorists distinguish between natural law and positive law. 'Natural law' denotes a set of moral (or rational) norms or standards that are universal and context-transcendent, holding for all societies and states. 'Positive law' denotes the laws (and legal-political institutions) that are authoritatively laid down, established, or 'posited' by human beings—viz., the laws of historically existing societies and states. Natural law theorists endorse the thesis that conformity with the standards of natural law is criterial for legal validity, so that a positive law that fails to satisfy those standards is, strictly speaking, not a law. (This thesis is traditionally associated with the slogan '*lex iniusta non est lex*'—'an unjust law is no law at all'). Natural law theorists also endorse the thesis that the legitimacy of legal-political institutions (and hence our obligation to obey them) is dependent on their conformity with the standards of natural law.[5]

One might think that natural law theory is congenial to revolutionary politics; for the idea that positive laws and legal-political institutions must be answerable to morality seems, at first glance, to provide a justification for disobeying unjust laws and for overthrowing unjust states. However, natural law theorists have often argued that there are powerful moral considerations (deriving from the requirements of natural law) that limit disobedience and resistance.[6] These considerations can be pressed into the service of a reactionary, conservative politics that seeks to rule out revolution entirely. Erhard aims to develop a revolutionary natural law theory that accommodates these considerations while neutralizing their anti-revolutionary implications. His account of legal recognition plays a central role in that theory.

2. Natural law, human rights, and recognition

Since natural law theory holds that positive law should conform to the standards of natural law, a natural law theory must provide an account of those standards. Within the tradition of natural law theory, the standards of natural law are typically conceived of as standards of human flourishing or perfection and are derived from an account of human nature (or of the basic goods pursued by human beings). Although Erhard's natural law theory is informed by the tradition, his account of the standards of natural law breaks with it.

[5]For Erhard's commitment to natural law theory, see *Revolution*, 14–16.
[6]See Aquinas, *Summa Theologiae*, Bk I-II, q. 96 a. 4; Bk II-II, q. 42 a. 2, q. 104 a. 6, q. 69 a. 4. See Wolff, *Vernünfftige Gedancken*, 461–3.

Like fellow post-Kantians such as Schmalz and Heydenreich, Erhard aims to derive the standards of natural law from the central insights of Kant's moral philosophy.

Erhard conceives of the standards of natural law in terms of "human rights", where these are not positive legal rights, but mandatory moral requirements to which positive laws (and positive legal rights) should conform. Erhard devotes the first chapter of *Revolution* to a "deduction" of human rights. The deduction aims to justify the claim that we possess human rights and to furnish a list or 'schedule' of human rights. Erhard deduces human rights as necessary conditions of the manifestation of "personhood [or "personality"—*Persönlichkeit*]". He borrows the concept of 'personhood' from Kant, who uses it to refer to the human being's independence from nature and capacity to be subject to self-given laws (*Schriften*, 5:87; 6:26). Erhard initially characterizes personhood as "[t]he capacity to determine myself to actions in accordance with self-chosen laws or to act in accordance with maxims". Since the exercise of this capacity involves knowledge of, and deliberation about, reasons for action, Erhard also characterizes it as "self-determination on the basis of insight". Personhood is intimately connected with moral agency (since moral agency involves self-determination) and Erhard often uses the phrase 'moral being [*moralisches Wesen*]' as a synonym for 'person' (*Revolution*, 17). Because of this connection to morality, personhood has a special value and dignity, a dignity that (as we will see) Erhard associates with "humanity [*Menschheit*]".

Erhard holds that personhood, and its unimpeded expression in action, is a necessary condition of the realization of morality in the world. Because morality demands its own realization in the world, it demands that personhood be protected, and treated in ways befitting its value and dignity. As Erhard conceives of them, human rights protect personhood (where this involves protecting its dignity as well as protecting the exercise of the capacities that constitute it) by imposing obligations on agents and institutions to treat human beings as persons: "All human rights are comprehended under the formula: The human being must be treated as a person" (17). The claim that we possess human rights is justified because morality requires that personhood be protected and human rights furnish that protection.

Having justified the claim that we possess human rights, Erhard derives a schedule of human rights (37). He organizes human rights into three classes, each of which contains three rights:

(1) *Rights of independence*: freedom of conscience; freedom of thought; right to the autonomous use of one's powers.
(2) *Rights of freedom*: unrestricted ownership of the body; unrestricted freedom of movement; right to a behaviour that honours the human being as a person.

(3) *Rights of equality*: the right to equal advantages with others in the acquisition of rights; the right to the free use of one's rights, or the right to conclude contracts; equal claim to the enjoyment of life.

Although Erhard does not include it in his schedule of human rights, he thinks that we have a human right to enlightenment (24). This human right is derived from our moral duty to enlighten ourselves and is possessed by social groups as well as individuals (92).

Much could be said about the significance and scope of Erhard's deduction. However, for our purposes what is important is the link that Erhard forges between human rights and the concept of recognition. As Erhard uses the term, 'recognition' denotes an attitude of respect for the moral status of a person coupled with the disposition to express that respect in action by treating the person in certain ways. We can therefore reformulate the general formula of human rights as the demand that the human being be recognized as a person.[7]

Erhard claims that personhood should be recognized wherever one encounters the capacity that characterizes it—the capacity to determine oneself to act on the basis of self-chosen laws (15). This raises the question of how one ought to treat human beings who have not yet manifested that capacity (e.g. young children; "savages") or who seem to be constitutionally incapable of manifesting it (e.g. people who are deemed to be mentally defective). Erhard argues that in these cases the capacity is "problematic", which is to say that it is *possible* that it is possessed by those concerned.[8] Since we cannot know with certainty that such human beings do *not* possess the capacity for rational self-determination (and thus that they are not persons), and since failure to treat persons in accordance with their distinctive status as moral beings (to recognize them) would violate morality, we should err on the side of caution and treat such human beings as "possible persons", where this involves respecting their human rights. As Erhard puts it:

> The fact that there are human beings in whom this capacity is problematic cannot justify the legislation [*Gesetzgebung*] – which should never put itself in danger of failing to recognize [*verkennen*] morality – in treating any human

[7]The concept of recognition is not only central to Erhard's overall conception of human rights, but also plays a prominent role in his schedule of human rights, the sixth right (the right to a behaviour that honours the human being as a person) being explicitly and exclusively concerned with other people's treatment of the right-holder. This human right requires that other people behave towards the right-holder in a way that *shows* that they recognize her human rights and thus that they respect her as a person. In virtue of this human right, she is *entitled* to demand that others not disparage, humiliate, or vilify her. Erhard claims, intriguingly, that consideration of this human right can yield a theory of the "natural demand for honour" and of "politeness" (27).

[8]Erhard is using the term 'problematic' in its logical sense, where it refers to judgements that something is possible.

> being other than as a possible person. The recognition of human rights is therefore a universal condition of the moral validity of a legislation.
>
> (17)[9]

As the sentence just cited indicates, the link that Erhard forges between human rights and recognition is central to his account of the standards of natural law. Erhard claims that it is a requirement of morality, and hence of natural law, that human rights be legally recognized or recognized in law (*gesetzlich anerkannt*) (14–15). (Although Erhard speaks of human rights being recognized, he thinks that recognition of human rights entails recognition of personhood (15)). This requirement provides us with a standard for appraising positive laws and legal-political institutions (where these include the state): No positive law may fail to recognize human rights by violating or restricting them, and any positive law that does this is, strictly speaking, not a law (17). A legislation (*eine Gesetzgebung*) that failed to recognize human rights would be morally invalid, and I would not, qua "moral being" (or "person"), be under any obligation to obey it (15). Finally, my human rights must be legally recognized in any state constitution (*Staatsverfassung*) if legislation is not to lose its dignity and if the state is not to be declared immoral (14–15).

For Erhard, then, it is a requirement of natural law that the state legally recognize human rights. But what exactly would it mean for my human rights to be recognized by or in the state? Would it be enough if my human rights were, as a matter of fact, not violated by government agencies or officials, or would something more be required? Erhard's answer to these questions is that my human rights would be "recognized legally in the state solely by the fact that I am declared by the state to be a person" (15). Unfortunately, Erhard does not explain what it means for the state to "declare" me to be a person.

I think that Erhard's claim is most plausibly construed in terms of the conferral of a specific kind of legal status—namely, a legal status that is commensurate with, and protects, an individual's moral status as a person. This conferral involves granting the individual certain fundamental positive legal rights that are commensurate with his or her human rights. There is no requirement, as far as I can see, that this conferral of status be done explicitly by, for example, issuing a declaration or bill of rights. The only

[9]Erhard's discussion here anticipates, and no doubt influenced, Fichte's account of 'problematic' recognition in the 1796/7 *Foundations of Natural Right*. In *Revolution*, Erhard does not provide an account of those characteristics of a human being that warrant the judgement that it is possible that it is a person. Fichte *does* provide such an account, arguing that our awareness of the complex articulation of the human body (especially of the human face) warrants the problematic judgement that it is possible that its owner is a free, rational being (see Fichte, *Foundations*, Second main division). In this respect, Fichte's account constitutes an advance over Erhard's.

requirement is that the legal status (and the legal rights that constitute it) have normative authority and be protected and enforced by law.

3. Revolution and the structure of government

Erhard intends to use his account of the standards of natural law to answer the question: Is revolution morally justifiable? However, he first needs to specify precisely what a revolution is and how it differs from other forms of social transformation such as the "emancipation of a people", "high treason", "rebellion", and "reform" (42, 92). Erhard distinguishes between revolution and other forms of social transformation by their impact on the structure of government.

A government (*Regierung*), as conceived of by Erhard, can be represented as a top-down hierarchical structure composed of three levels or strata. The first, most fundamental, level is that of the "basic laws [*Grundgesetze*]" or the "basic constitution [*Grundverfassung*]" of the state (42, 50, 51). Erhard sometimes refers to this level as the "state constitution [*Staatsverfassung*]" (9, 14, 95). The second level is the "constitution" ("*Verfassung*" or *"Konstitution"*), which presumably lays down the rules that regulate the various institutions of state (42). The third and lowest level is the "administration [*Administration*]" or the "government in the narrow sense" (where this includes governmental agencies) (42, 23). Each level is supposed to constrain and regulate the level or levels below it (and each level is answerable to the level or levels above it).

Erhard's account of the structure of government allows him to precisely characterize a revolution and to distinguish it from other forms of social transformation. Whereas a reform transforms the administration so that it conforms to the constitution (or transforms the constitution so that it conforms to the basic constitution), and a rebellion undermines the administration, a revolution transforms the basic constitution of a state (42–4). As Erhard puts it, a revolution is "an alteration of the basic laws" (43; see also 91).

The notion of the level of the basic laws plays a crucial role in Erhard's characterization and defence of revolution. Unfortunately, he does not provide an explicit, detailed account of this level, claiming only that the "basic laws" are the "principles" on which the government is based (42).[10] However, if we draw together Erhard's scattered remarks, we can attribute four functions to the basic laws. First, and this is crucial, the basic laws determine the fundamental legal rights of citizens within the state, what Erhard calls "constitutional rights" (92). These rights are not necessarily 'egalitarian' in nature and might confer radically unequal statuses on citizens, as is the case, for instance, in

[10]For a helpful discussion of the basic laws, see Nance, "Revolutionary Action", 82.

feudalism (cf. Erhard's reference, at *Revolution*, 30, to the "inhuman rights" of *Leibeigenschaft* (serfdom)). Second, the basic laws define and determine the basic duties that citizens have towards each other and towards the government. Third, they determine the distribution of political power and authority within the state (see 51). Fourth, they determine the regime of property acquisition and ownership within the state (see 66). Clearly, these four functions will overlap and intertwine: duties will often be the correlatives of rights; power will be conferred and secured by the distribution of rights and duties; the regime of property will be defined by rights and duties.

In addition to these functions, the basic laws are distinctive in possessing *ultimate positive legal authority*. The basic laws of a society are the ultimate determiners of positive legal-political obligations, permissions, and authorizations (which is to say that if there were a conflict between the basic laws and the laws or policies arising from the 'lower levels', the former would trump or override the latter), and they cannot be criticized, corrected, or revised by appealing to a more fundamental stratum of positive legal-political norms. The basic laws of a society are, so to speak, the normative bedrock of its positive law.[11] Note, finally, that Erhard's use of the term '*Grundverfassung*' does not imply that the basic laws must be codified: it is quite conceivable that a society's basic laws be customary.

This account of the basic laws sheds further light on Erhard's claim that my human rights are "recognized legally in the state solely by the fact that I am declared by the state to be a person". That claim, I suggested, should be construed in terms of the conferral of a specific legal status, a conferral that involves the granting of fundamental legal rights that are commensurate with human rights. We can now see that this conferral of legal status is effected by the basic laws (or the 'basic constitution') and that it involves the granting of 'constitutional rights'. The upshot of this is that human rights are legally recognized in a state only if its basic laws grant all citizens constitutional rights that are commensurate with their human rights. The state *fails* to legally recognize human rights if it fails to confer the requisite legal status on some or all citizens, granting them constitutional rights that are not commensurate with their human rights. This affords us greater insight into the aims of a revolution: in the kind of revolution with which Erhard is preoccupied – the revolution of the people against the "persons of distinction [*die Vornehmen*]" or upper classes – the transformation of the basic constitution aims to abolish a "manifest offence against human rights" and to alter the people's 'constitutional rights' so that they are in conformity with human rights (52, 92).

[11] Cf. Nance, "Revolutionary Action", 82: "basic laws are rock bottom, in terms of institutions and socially accepted principles".

4. Natural law theory and the justification of revolution

It seems that we now have all the elements in place for Erhard to answer the question: Is revolution morally justifiable? Erhard's answer is: A revolution is morally justifiable just in case it is a response to a failure of the basic laws to recognize human rights (see 52). Now, there is an immediate objection to this answer. Erhard conceives of the failure of the state to recognize human rights as a failure of the basic laws to confer certain constitutional rights on some or all citizens, and he thinks that this failure justifies revolutionary action. But surely, the objection runs, there are other ways that the state can fail to recognize human rights—the various branches and agencies of the state (the courts, the prison system, the police, etc.) can violate human rights and often do so in serious and sustained ways. Doesn't Erhard consider these violations to be failures of recognition? And what principled reason does he have for thinking that these violations cannot justify revolution?

To answer these questions, we need to consider Erhard's argument in support of his position, which he develops by engaging with the arguments of the opponents of revolution (hereafter, 'the counter-revolutionaries'). Erhard does not identify any of the counter-revolutionaries by name. However, the position that he attributes to them clearly draws upon, and exploits, the tradition of natural law theory. To comprehend the position, and Erhard's response to it, some background is necessary.

As I noted earlier, although natural law theory seems to be congenial to revolutionary politics, natural law theorists have often argued that there are powerful moral considerations that limit disobedience and resistance. The *locus classicus* for these arguments is the work of Aquinas.[12] In *Summa Theologiae*, Aquinas considers whether we ever have an obligation to obey unjust laws. He distinguishes between two kinds of unjust law. Some unjust laws conflict directly with God's commandments by requiring or authorizing us to do things that we should morally never do (e.g. rape, theft, infanticide) (*Summa Theologiae*, Bk I-II, q. 96 a. 4; Finnis, *Aquinas*, 272). Such laws are not binding in conscience and it "is never permissible to obey them since", and here Aquinas cites Acts 5:29, "we ought to obey God rather than human beings". These unjust laws are to be distinguished from unjust laws that involve the abuse of political authority or the unjust and oppressive treatment of citizens. Aquinas says that the latter kind of laws are "acts of violence rather than laws". Now, we might think that we would never have an obligation to obey such laws, but this is not Aquinas' view. He claims that we may disobey such laws only if we can do so

[12]Erhard is probably acquainted with these arguments via the German tradition of natural law theory, as represented by writers such as Wolff, Pütter, and Achenwall. (We know from Erhard's autobiography that he had studied Wolff's system. See *Denkwürdigkeiten*, 11, 18–20.) However, I focus here on Aquinas because he provides a canonical and lucid statement of the conceptual and normative issues.

without "giving scandal" (viz., setting a bad example for others) or "causing greater harm". If this not be possible – if resistance would be likely to cause "scandal or civil unrest [or "disorder"—*turbationem*]" –, then we have an obligation to "yield even [our] rights". In such cases, we can take solace in the words of 1 Peter 2:19: "It is a blessing if one, suffering unjustly, endures sorrow for the sake of conscience".

The obligations in such cases can be described, following John Finnis, as "collateral" because they are not imposed by the unjust laws themselves, but by moral requirements that are independent of them, and which flow, so to speak, through a secondary channel. These collateral obligations derive from the requirements that we not unjustly harm the common good or the private good of our fellow citizens (*Summa Theologiae*, Bk II-II, q. 104, a. 6; Finnis, *Aquinas*, 273).

Similar considerations inform Aquinas' position on the moral permissibility of rebellion. In *Summa Theologiae*, Aquinas holds that tyrannicide and rebellion are in principle permissible as responses to tyrannical rule. However, he adds a crucial qualification: if one feared that disturbing a tyrant's rule would lead to serious disorder and to citizens suffering greater harm than they presently suffer, one would have a moral obligation to acquiesce, and the only permissible form of resistance would be passive disobedience (Bk II-II, q. 42. a. 2, q. 104 a. 6, q. 69 a. 4). Now, since the effects of rebellions are (a) often highly unpredictable and (b) often highly deleterious to individuals and social institutions, there seems to be a strong presumption against rebellion (Finnis, *Aquinas*, 290). With this in mind, let us turn to Erhard's discussion of the counter-revolutionary position.

The counter-revolutionaries, as portrayed by Erhard, endorse natural law theory. They are committed to the existence of context-transcendent moral standards, which they identify with the commands of God, and they maintain that positive laws should conform to these standards. They further subscribe to the view that in cases of conflict between positive law and natural law – and here Erhard cites Acts 5:29 – "one must obey God rather than human beings" (45).[13] However, although the counter-revolutionaries subscribe to this view, they deny that the injustices that are inflicted by positive laws could ever morally justify a citizen in attempting to transform "positive institutions" in accordance with his conscience (45). Since this is precisely what the revolutionary aims to do, the counter-revolutionaries claim that revolution is morally impermissible.

In arguing for this claim, the counter-revolutionaries draw upon the kinds of consideration advanced by Aquinas. They envisage a scenario in which a citizen seeks to initiate a revolution in response to an injustice that he has suffered. Given that the citizen can be expected to have reflected upon

[13]Acts 5:29 is also cited by Wolff (*Vernünfftige Gedancken*, 463).

(and, as a morally responsible agent, *should* have reflected upon) the possible outcomes of his action, he will know that it is highly probable that revolution will lead to the "insecurity of civil existence" (what Aquinas calls '*turbatio*') (45, 52). But this means that he *knowingly* exposes his fellow citizens (many of whom will be innocent) to serious and disproportionate harm, and for this reason his action is morally impermissible. The upshot of this is that although a citizen who suffers injustice is morally permitted to passively resist or to seek legal redress, he is *not* permitted to initiate a revolution:

> If my human rights are offended, if I am convicted when innocent, then I am indeed allowed to do anything to prove my right and my innocence, but I am not allowed to revolt against the administration of justice itself and, so that I am not treated unjustly, place a people in the unhappy position that perhaps no right [or "law" – *Recht*] at all will be administered any longer. Only in forbearance can I manifest my morality, prove my religion […].
>
> (47)

Now, it might be objected that in *some* cases the injustices perpetrated by the government could be so severe as to warrant revolutionary action and its attendant risks, for in such cases *nothing could be worse than the prevailing situation*. The counter-revolutionaries' response to this objection is that we have no way of knowing this: life under an unjust or despotic government may be intolerable, but the anarchy unleashed by revolutionary action could be far worse. Moreover, if a revolution were to fail, it is highly likely that unjust or despotic rule would be intensified (60–1).

The counter-revolutionaries supplement this argument with considerations that focus on the fact that the individual who seeks to initiate revolution does so in response to injustice that *he* has experienced. They argue that although the individual may act in good faith, it is possible that he is motivated by self-interest—by fear of the harm that threatens him personally (47).

Erhard's response to the counter-revolutionaries' argument is ingenious, and constitutes a major innovation in natural law theory. It consists in offering an alternative classification of injustice to that offered by the natural law tradition. Erhard is willing to concede that in the cases of injustice discussed by the counter-revolutionaries (cases in which an individual suffers injustice), there is a moral obligation not to revolt. (At most, one may seek legal redress, but if that is unsuccessful, one should patiently forbear). However, he argues that the counter-revolutionaries (and, by implication, the natural law tradition) have overlooked the fact that there is another *kind* (*Art*) of injustice, the instantiation of which signals that a state has completely failed to fulfil its moral vocation (49). From the perspective of natural law, a state in which this kind of injustice exists is no longer a state at all, but, as Erhard puts it elsewhere, "a hell from which human beings ought to save themselves" ("*Rezension*", 158). In this case, there is an obligation to transform

the existing legal-political system by revolution, and the potentially deleterious consequences of revolutionary action cannot defeat this obligation, for even the wholesale abolition of legal order would be morally preferable to the current state of affairs. (In this case, Erhard thinks, we can *know* that things cannot be morally worse). As Erhard puts it in his letter to Friedrich Carl Forberg (which comments on the argument of *Revolution*): "[I]t would be better that there were no law [*Recht*] at all in the world than that humanity be degraded" ("Brief an Forberg").

Clearly, if Erhard's response is to be successful, he needs to show convincingly that there is another kind of injustice and that it warrants revolution. Erhard attempts to do this by drawing upon his account of the structure of government. He begins by establishing a threefold distinction between cases of injustice in terms of the level of government in which they originate. Injustices can either (i) be "perpetrated by the administration [viz., the government in the narrow sense—J.A.C.]", or (ii) "be a consequence of the current constitution", or (iii) "follow immediately from the basic laws" or basic constitution (*Revolution*, 49). The origin of a case of injustice plays a crucial role in determining the appropriate remedies for it. Institutions, laws, and procedures that occur at the 'lower' levels of government are *legally corrigible* in that they can be corrected in the light of the legal norms or standards present in the 'higher' levels (43). This means that legal reform is in principle an option for tackling injustices that originate in the administration and the constitution. By contrast, legal reform is *not* an option for tackling injustices that originate in the level of the basic laws because the basic laws are, qua basic, not legally corrigible—i.e. there are no legal norms or standards to which they are answerable and in light of which they might be corrected. Injustices that originate in the basic laws can be corrected only in light of *moral* norms or standards (the standards of natural law).

Having established a threefold distinction between injustices in terms of their origin, Erhard argues that a twofold distinction between kinds of injustice supervenes on it. In cases of injustice that originate in the administration or the constitution, the person who experiences injustice suffers as an individual—that is, as a being with particular concerns, opinions, and interests. In cases of injustice that arise directly from the basic constitution, it is not only the person qua individual who suffers, but also the "humanity" in her person, or "reason". Erhard illustrates the distinction with several examples (49–51, 53–4). I cite the first two:

> But we can conceive of a case in which the basic laws themselves are to blame for the injustice that I suffer, and this case is very different from the first two [which arise from the lower levels of government—J.A.C.]. The case in which I am robbed of my freedom when innocent and condemned to slave labour as a criminal is completely different from the case in which I am robbed of my

> freedom and compelled to be the serf [*Leibeigene*] of another person simply because the right of serfdom [*Recht der Leibeigenschaft*] is to be found in the basic constitution of the state and my father had the misfortune to be an object of this right. In this case, it is not only I who suffer injustice, but also the humanity in my person. My forbearance is therefore not to be unconditionally extolled as moral, since it contains the possibility of the injustice that many thousands after me will suffer. The case is the same if I am persecuted for the candid communication of truths in which I believe and if it is absolutely forbidden, in accordance with the basic constitution of the state, to make further progress in knowledge of the matters that are most important for the human being —namely, right [or "law"—*Recht*], religion, morals, and the organization of the civil constitution; for in that case, it is not I, but reason in general, that is the suffering party. This is so clear that no one, unless his heart is obdurate, can doubt the necessity of a revolution in such a state […].
>
> (49–50)

For brevity's sake, I will call the kind of injustice in which the individual alone is wronged 'I-injustice', and the kind in which both the individual and the humanity in her are wronged 'H-injustice'. Erhard's distinction between these two kinds of injustice allows him to respond to the counter-revolutionaries' argument. That argument applies only to cases of I-injustice. In these cases, the individual is prohibited from initiating a revolution because risking the welfare of her fellow citizens is an unreasonable response to an injustice that affects only her. However, the argument does *not* apply to cases of H-injustice, because revolution is the only reasonable response to an injustice that affects the "humanity" (or "reason") in the individual.

Although the structure of Erhard's response is clear, its plausibility obviously depends on the plausibility of his distinction between I-injustice and H-injustice and on the notion that humanity can suffer injustice.[14] Now, it is precisely here that we encounter a problem. For the claim that there are cases in which both the individual and the humanity in her suffer is a perplexing one, for several reasons. First, it does not, at first glance, seem to make much sense within the framework of Kantian ethics. Given his account of humanity in the *Groundwork* and elsewhere, it is not obvious that Kant would draw, or even find intelligible, a distinction between *me* suffering injustice and the *humanity* in me suffering injustice. Second, locutions such as 'humanity in my person' or 'reason in general […] is the suffering party' might be taken to suggest a dubious metaphysical commitment to there being something – perhaps some thinking substance – that suffers in some cases of injustice but not in others. Finally, why should the origins of an instance of injustice have any bearing on its ability to harm our humanity? Why do injustices that originate in the basic laws

[14] I focus on 'humanity' rather than 'reason', because it is the former concept that plays the central role in Erhard's argument.

harm humanity, but not injustices that originate in the lower levels of government?

These perplexities pose a problem because they suggest that Erhard's response rests on commitments that are at best contentious and at worst wildly implausible. If we are to provide a philosophically compelling interpretation of his response, we need to address them.[15]

5. Recognition and wrongs to humanity

The place to start is with Erhard's conception of 'humanity [*Menschheit*]'. In his 1793 essay "Examination of Autocracy", Erhard defines 'humanity' in a way that suggests that it is closely connected with personhood: humanity is "self-activity of the will in accordance with moral maxims" ("Alleinherrschaft", 372). In *Revolution*, Erhard typically uses the term 'humanity' when discussing the "dignity [*Würde*]" that belongs to a human being; and in both *Revolution* and the letter to Forberg, he speaks of humanity being "degraded". (*Revolution*, 29, 54, 97; "Brief an Forberg").

This textual evidence does not point unambiguously in any one interpretative direction. But I take it to be significant that Erhard connects 'humanity' with 'personhood' and 'dignity'. Indeed, it seems to me that Erhard uses 'humanity' as a substitute for 'personhood' when he wants to speak of the special dignity that belongs to the human capacity for rational self-determination. I therefore want to suggest that H-injustice involves a distinctive failure to recognize the dignity of our nature as self-determining, rational beings—a failure that degrades and undermines that dignity. In short, I want to construe H-injustice as involving a distinctive, and especially egregious, failure of recognition.[16]

This failure of recognition is one that we have encountered before: it is the failure of the basic laws to recognize the personhood of individuals. It can be characterized as 'structural misrecognition', and it should be distinguished from the specific acts of misrecognition that are perpetrated by persons and governmental agencies. For while structural misrecognition will be manifested in specific acts of misrecognition, the latter can occur in the absence of the former (which is precisely what happens in cases of I-injustice).

To understand what is distinctive about structural misrecognition, and how it degrades humanity, we need to consider how it is brought about by the basic laws. As we saw earlier, the basic laws possess ultimate positive legal authority. They are the ultimate determiners of positive legal-political

[15]For a different interpretation, see Nance, "Revolutionary Action". Nance attributes to Erhard a theory of structural injustice and construes wrongs to humanity as involving structural injustices that expose individuals to the risk of being wronged.

[16]Gottlieb discusses the failure of recognition that I have in mind, but he does not relate it to Erhard's conception of wrongs to humanity ("A Family Quarrel", 186).

obligations, permissions, and authorizations within a society, and they cannot be overridden by, or criticized in light of, any more fundamental positive legal-political norms. In virtue of these features, the basic laws constitute a fundamental normative framework or horizon for the appraisal of actions.[17]

Structural misrecognition arises when the basic laws confer a legal status on individuals that is not commensurate with their moral status as self-determining, rational agents. This status is conferred on individuals as members of a social group (e.g. feudal serfs; African Americans), which means that it is conferred on them not in virtue of characteristics specific to them as individuals, but in virtue of general characteristics (e.g. descent from unfree parents; skin colour) that mark them as members of the relevant group.

What is crucial about this conferral of legal status is that it determines the *legally permissible* treatment of members of a social group and *authorizes* certain forms of behaviour towards them.[18] The concept of authorization provides the key to understanding Erhard's claim that in cases of H-injustice, the injustices "follow immediately" from the basic laws. The injustices – which are specific acts of misrecognition – follow immediately from the basic laws because they are authorized by the basic laws and can be justified by reference to them. Thus, the feudal lord's mistreatment of his serfs can be said to follow immediately from the basic laws of feudalism (specifically, the laws surrounding *Leibeigenschaft*) because they confer on him the *right* to – and hence authorize him to – punish, sell, give away, and bequeath his serfs (see Eisenhardt, *Rechtsgeschichte*, 24–5, 31, 124–5).[19]

Structural failures of recognition degrade the humanity of individuals by conferring on them legal statuses that present them as, and authorize them to be treated as, *less* than self-determining, rational agents (at the extreme limit, they can authorize them to be treated as things that can be bought and sold). Such degrading legal statuses mask and conceal the humanity of those to whom they apply, hiding it from sight. The harm that is done by such failures of recognition is not only of moral concern to members of the relevant social group; it is of moral concern to *all of us* inasmuch as it offends the dignity that we all possess in virtue of our nature as self-determining, rational beings.

We are now in a position to see how cases of H-injustice involve structural failures of recognition that wrong the humanity in individuals and how they differ from cases of I-injustice. Cases of I-injustice involve specific acts of

[17]Cf. Nance, "Revolutionary Action", 82: "the basic laws are the fundamental normative infrastructure that defines the community of right".

[18]Cf. "Alleinherrschaft", 371–2: "morality vetos the decrees of politics if, through these decrees, some human beings would be *authorized* [*berechtigt*] to act *contrary to duty* and others would be *prevented* from acting *in accordance with duty*. This happens when human rights are offended".

[19]In his deduction of human rights, Erhard characterizes *Leibeigenschaft* as the state-sanctioned withholding of human rights (*Revolution*, 30). To say that the withholding of human rights is 'sanctioned' or 'approved' (*gebilligte*) by the state is to say that it is authorized by the basic laws.

misrecognition, and the perpetrators of these acts clearly fail to respect the humanity of their victims. (Thus, the corrupt police officer who extorts a false confession from a suspect fails to respect the suspect's status and dignity as a self-determining, rational agent). However, in cases of I-injustice, the basic laws recognize the humanity of citizens, and this means that specific acts of misrecognition are *not* authorized by the basic laws[20] and can be criticized and corrected in light of them. In these cases, the basic laws constitute a normative 'horizon' or 'background' against which the acts of misrecognition are publicly visible and salient as failures of recognition and as wrongful acts.

In cases of H-injustice, things are quite different. Here, the specific acts of misrecognition are authorized by the basic laws, which degrade, undermine, and obscure the humanity of the individuals who are affected. But this means that the basic laws do not constitute a background against which the acts of misrecognition are publicly visible and salient as failures of recognition and as wrongful acts. Because the acts of misrecognition "follow immediately" from structural misrecognition at the level of the basic laws, their nature as failures of recognition is obscured: they appear not as failures of recognition, but as *rightful, legally permissible acts*.

Insofar as both kinds of injustice involve failures of recognition, they involve moral wrongs, but – and this is the core of Erhard's response to the counter-revolutionaries – these wrongs merit very different responses. In cases of I-injustice, the victim suffers disrespect, but he *knows* (and this may, admittedly, be cold comfort) that his status and worth as a self-determining, rational being is recognized by the fundamental public norms of the society in which he lives. In virtue of those norms, the injustice he suffers is visible and salient as a failure of recognition, and he can seek redress by appealing to the legal and political institutions of his society. It would be morally wrong for the victim of such injustice to initiate a revolution, for he would knowingly risk destroying a society that recognizes and honours the humanity of its citizens.

In cases of H-injustice, the victim suffers a double indignity: he suffers disrespect, but he also suffers the indignity of knowing that he (and every other member of the group to which he belongs) is rated as less than human by the fundamental public norms of the society in which he lives. Such an experience of injustice will undoubtedly have a profound effect on the victim's self-respect, undermining his sense of himself as an autonomous, self-determining agent. However, what is morally decisive here for Erhard is not the suffering of the individual, but the fact that the society, at is most

[20]Erhard does not say explicitly that in cases of I-injustice the basic laws recognize the humanity of citizens. However, the claim seems to follow from the fact that in cases of I-injustice the injustices are in principle legally corrigible, which is to say that they can be criticized and corrected in light of the basic laws.

fundamental level, attacks, undermines, and degrades the dignity of humanity. Erhard thinks that a society that inflicts this kind of wrong is beyond hope, and could not, morally speaking, be any worse. In this case, the *only* moral response is to transform the society's basic laws by revolution.

If this interpretation is plausible, Erhard's response to the counter-revolutionaries does not rely on dubious metaphysical commitments, but on a compelling and plausible theory of structural misrecognition. Having reconstructed Erhard's position, I now turn, by way of conclusion, to a discussion of its relevance for contemporary legal and political theory.

6. Recognition, slavery, and reification

A distinctive feature of Erhard's account of recognition is its emphasis on the way that law can degrade and dehumanize individuals by failing to recognize them. As such, it has implications for two areas of research in legal and political theory.

The first area is scholarship on slavery and slave law, which has often focussed on the dehumanizing effects of law. In his pathbreaking work *Slave and Citizen*, Frank Tannenbaum describes how the slave laws in Britain and North America denied the slave "recognition as a moral person", and he tells how chattel slavery led to the "moral personality of the slave as a human being [becoming] completely obscured" (xvi, 82). A similar analysis is offered by A. Leon Higginbotham Jr. in *A Matter of Color: Slavery and the American Legal Process*. Higginbotham argues that the development of slave law involved the progressive "debasement and dehumanization" of black people, a process that he characterizes with the vivid metaphor of "legal cannibalism" (20, 39). According to Higginbotham, slave laws dehumanized black people by conferring on them a "uniquely degraded", "subhuman status" (19, 39, 57). Of particular interest in this connection is Higginbotham's commentary on a Virginian statute from 1705: "They seemed to view blacks as if they were fungible products—just like trees, tobacco, or other disposable commodities" (56).

There is, I think, a striking affinity between these analyses and Erhard's account of the way that law can systematically degrade and undermine humanity. Tannenbaum's and Higginbotham's analyses might be used to illustrate and enrich Erhard's account; and Erhard's account might provide a conceptual framework for understanding the distinctive failures of recognition that are perpetrated by slave law.

The second area of research is the critical theory of 'reification', as developed by Axel Honneth. In his brief monograph *Reification*, Honneth advances an account of reification that draws upon the theory of recognition. Reification, as Honneth conceives of it, is a "forgetting" of our antecedent recognition of, and empathetic engagement with, other human beings. This

forgetting involves losing sight of or denying the "humanity [*Menschsein*]" of other human beings and regarding and treating them as mere "things" (*Verdinglichung*, 70).

A central aim of Honneth's discussion of reification is to outline a "social aetiology"—that is, an account of the "social causes" that "systematically facilitate and perpetuate" reification (95, 99). Honneth identifies two causal factors, which correspond to two forms of reification. The first causal factor is institutionalized social practices in which the observation and instrumental treatment of human beings has taken on a life of its own, becoming detached from the intersubjective contexts in which the practices originated and from which they derive their point and purpose (71–3, 100–2). (Think, for example, of a university admissions procedure that compels admissions tutors to think of students solely in financial terms). Such practices encourage the individuals who participate in them to adopt a reifying attitude, losing sight of the humanity of the human beings who are affected by the practices. The second causal factor is ideology (72, 100). Ideologies are "system[s] of convictions" or "world-views" that involve "reifying typifications (of women, Jews, etc.)" (72, 98, 100–2). In virtue of these typifications, ideologies obscure the humanity of certain human beings—they "cause entire groups of people to appear dehumanized and thus as mere things" (98).

Honneth doubts whether ideologies could by themselves engender reification. This is because they involve beliefs or convictions, and Honneth thinks that it is hard to understand how mere beliefs and convictions could motivate someone to "persistently deny the personal characteristics of members of other social groups" (102–3). However, ideological convictions could engender reification if they were supported by objectifying social practices, which would provide the ideological convictions with "motivational nourishment". Honneth therefore argues that it makes more sense to conceive of the two causal factors as working together to engender reification (102–3).

I think that there is considerable affinity between Honneth's account of reification and Erhard's position as I have reconstructed it. Both Honneth and Erhard are concerned with failures of recognition that involve systematically obscuring or denying the humanity of groups of individuals; and they are both concerned with identifying the structural sources of such failures of recognition. However, they differ on one crucial point: their account of the significance of law.

In his discussion of the social causes of reification, Honneth argues that Georg Lukács was mistaken in thinking that capitalist processes of economic exchange inevitably engender reifying attitudes (96). This is because the participants in economic exchange – the contracting individuals – are determined by law as *persons*. By conferring the "legal status" of person

on the contracting individuals, law guarantees them a minimal, legally enforceable recognition of their personhood and thereby protects them from being regarded and treated merely as things (100–1). Honneth dubs this the "protective function of law", and he claims that an appreciation of it underpins Kant's defence of the marriage contract (100–2; 101 n. 4; see also 94). For Honneth, law functions as a *barrier* against reification and the possibility of reification increases to the extent that this barrier is weakened (101).

What is noteworthy about Honneth's discussion of law (in *Reification*) is that it conceives of the role of law in a primarily positive light. Law protects us from reification, and it does not seem to bring about reification directly and by itself (it seems to be the *absence* of the protective barrier provided by law that facilitates reification, not the influence of law itself). Erhard differs from Honneth on this point. As we have seen, Erhard thinks that law can play a *direct* role in engendering reifying, dehumanizing attitudes. By conferring degrading legal statuses on individuals, law obscures their humanity and authorizes them to be treated as *less* than human. But that is just to say that law reifies individuals. It is precisely here, I think, that Erhard has something to offer to contemporary critical theory, for his analysis of failures of legal recognition holds out the prospect of a richer account of the nature and causes of reification. Developing this account is a task for another paper.

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Bibliography

Works by Erhard

Denkwürdigkeiten des Philosophen und Arztes Johann Benjamin Erhard. Edited by Karl A. Varnhagen von Ense. Stuttgart: J. G. Cotta, 1830.

"Prüfung der Alleinherrschaft nach moralischen Prinzipien". *Der neue Teutsche Merkur* 3, no. 12 (1793): 329–93.

Über das Recht des Volks zu einer Revolution. In J. B. Erhard, *Über das Recht des Volks zu einer Revolution und andere* Schriften, edited by H. G. Haasis, 7–98. Frankfurt am Main: Syndikat, 1976.

"Brief an Forberg vom Dezember 1794". In J. B. Erhard, *Über das Recht des Volks zu einer Revolution und andere Schriften*, 99.

"Rezension von Fichtes Revolutionsbuch". In J. B. Erhard, *Über das Recht des Volks zu einer Revolution und andere* Schriften, 135–64.

Other Works

Aquinas, T. *On Law, Morality, and Politics*. Edited by W. P. Baumgarten and R. J. Regan. Indianapolis: Hackett, 2002.
Eisenhardt, U. *Deutsche Rechtsgeschichte*. Munich: C. H. Beck, 1984.
Fichte, J. G. *Foundations of Natural Right*. Translated by M. Baur. Cambridge: Cambridge University Press, 2000.
Finnis, J. *Aquinas. Moral, Legal, and Political Theory*. Oxford: Oxford University Press, 1998.
Gottlieb, G. "A Family Quarrel: Fichte's Deduction of Right and Recognition". In *Kant and His German Contemporaries, Vol. II: Aesthetics, History, Politics, and Religion*, edited by D. O. Dahlstrom, 170–92. Cambridge: Cambridge University Press, 2018.
Heydenreich, K. H. *System des Naturrechts nach kritischen Prinzipien*. Leipzig: J. G. Feind, 1794.
Higginbotham, A. L., Jr. *In the Matter of Color. Race and the American Legal Process: The Colonial Period*. Oxford: Oxford University Press, 1978.
Honneth, A. *Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte*. Frankfurt: Suhrkamp, 1995.
Honneth, A. *Verdinglichung. Eine anerkennungstheoretische Studie*. Frankfurt: Suhrkamp, 2005.
Kant, I. *Kants gesammelte Schriften*. Akademie-Ausgabe. Berlin: de Gruyter, 1902–.
Nance, M. "Erhard on Revolutionary Action". In *Practical Philosophy from Kant to Hegel: Freedom, Right, and Revolution*, edited by J. A. Clarke and G. Gottlieb, 80–98. Cambridge: Cambridge University Press, 2021.
Schmalz, T. *Das reine Naturrecht*. Königsberg: Nicolovius, 1792 (2nd ed., 1795).
Tannenbaum, F. *Slave and Citizen*. Boston, MA: Beacon Press, 1992 [1946].
Wolff, C. *Vernünfftige Gedancken von dem gesellschafftlichen Leben der Menschen und insonderheit dem gemeinen Wesen*. Frankfurt, 1736.