

The Messianic in the Law: Rule, Exception, Health and the Emancipatory Potential of the Legal Maxim *Salus Populi Suprema Lex Esto*

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ABSTRACT: The following article discusses the contradictory relationship between the concepts of the messianic and the law, and reconciles this in a critical interpretation of the legal maxim *salus populi suprema lex esto*. After discussing the concepts of the messianic, the law and the exception in the thought of Carl Schmitt, Walter Benjamin, Judith Butler, and others, this essay argues that there is a messianic presence in the law traceable from classical myth (particularly the myth of the Fates and Asclepius) to the figure of Jesus, the Trinity, and into contemporary constitutional structures. Appearing most clearly in the legal maxim *salus populi suprema lex esto*, a genealogy of the maxim is undertaken. Distinguishing the concept of health and the figure of the healer from the concept of necessity and the *nomos*, and demonstrating how these manifest in the maxim's opposing (mutative and conservative) meanings, the modern history of the maxim is explored. Following this, and a discussion of the interrelation of the concepts of law, justice, and health, this essay concludes with a critical reinterpretation of the maxim, one that uncovers positive rights to water, food, housing, health care, and other conditions of health.

KEYWORDS: *Constitutional Theory; Legal History; Law and Literature; Political Theology; Law and Health; Jurisprudence; The Nomos; Biopolitics.*

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1. INTRODUCTION

Although legal scholars and historians consider the claim that the U.S. Constitution was inspired by the figure of Jesus of Nazareth to be little more than myth,¹ the figure of Jesus (or, more precisely, the messianic) nevertheless maintains an objective, albeit unintended, presence in the structure of the U.S. Constitution, as well as in Western law as such.

Not only does an analysis of the relation between the U.S. Constitution and the messianic figure of Jesus provide an opportunity to explore the often contradictory concepts of justice and the law, on a practical level an analysis of the presence of the messianic (in the general emancipatory sense) within the law allows for the presentation of a theory of justice and rights responsive to the exigencies of the early 21st century, and the demands of an actually democratic form of politics.

Beyond Carl Schmitt's claim that all significant political concepts are "secularized theological concepts,"² or Hans Kelsen's critique of the notion that "the nature of modernity is Gnosticism,"³ an examination of the relation between law and myth reveals that present day legal structures are not only theological, or mythical, in origin. An analysis of the structures of the *trias politica* (the tripartite separation of powers schema) and the Greek Fates, and their relation to the *nomos*, reveals the lingering presence of ancient models of order in present day constitutional structures; and though this examination may not uncover "the metaphysical core of all politics,"⁴ it may at least uncover the theological, or mythic core of Western law and its exception.

By comparing these systems and their respective exceptions (the mythical figure of Asclepius as the exception to the Fates, and the maxim

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¹ See STEVEN K. GREEN, *INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING* 3 (2015).

² CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab ed. and trans., The U. of Chi. Press 2005) (1985).

³ HANS KELSEN, *SECULAR RELIGION, A POLEMIC AGAINST THE MISINTERPRETATION OF MODERN SOCIAL PHILOSOPHY, SCIENCE AND POLITICS AS "NEW RELIGIONS"* 262 (Clemens Jabloner et al eds., 2012).

⁴ HEINRICH MEIER, *CARL SCHMITT AND LEO STRAUSS: THE HIDDEN DIALOGUE* 77 (Harvey Lomax trans., 1995).

salus populi suprema lex esto as the exception to the constitutions of the United States of America, France, Italy, India, Pakistan, and others whose tripartite separation of powers structure replicates that of the Fates), we can distinguish the maxim from the maxim of necessity (*necessitas vincit legem*), with which it is often conflated. Moreover, we can begin to distinguish a critical notion of justice (related to a critical conceptualization of health) from a model of order and public safety steeped in myth and religion, enabling us to articulate the practical and emancipatory potential of the Ciceronian maxim.

After discussing the ambiguity of the concept of law, and the symbolic manifestation of its antitheses (order and justice) in the figures of the shepherd and the healer (which comprise two aspects, or roles, of the figure of Jesus, as well), this essay will discuss the conceptual and symbolic relationship between law as order and necessity (the *nomos*), and law as justice and its historical and conceptual association with the concept of health. After distinguishing the concept of necessity (and its appearance in classical myth) from the concept of health, the figure of the healer, symbolic of noncoercive power, and its opposition to coercive power, the *nomos* (represented by the figure of the *nomeus*, the shepherd), will be examined.

Appearing as an exception to a political order, functioning as a secular messiah “associated with the destruction of the legal framework,”⁵ the healer points to affinities between the concept of health and the concept of justice. After discussing the mythical and historical relationship between the concepts of justice and health, and presenting a novel interpretation of the iconography of the rod of Asclepius, the history of the maxim that the health of the people should be the supreme law is surveyed. Employed historically to support both conservative and emancipatory politics (the shepherd and the healer), the maxim is discussed in the context of modern constitutional history.

⁵ Judith Butler, *Critique, Coercion, and Sacred Life in Walter Benjamin’s “Critique of Violence,”* in *POLITICAL THEOLOGIES: PUBLIC RELIGIONS IN A POST-SECULAR WORLD* 207 (Hent De Vries & Lawrence E. Sullivan eds., 2006).

After examining its relation to the healer, and clarifying its emancipatory aspects, the maxim is distinguished from another maxim, associated with the *nomos*, which is concerned with bare survival, particularly the survival of the state and coercive power (as opposed to health, wellness, and human flourishing) – the maxim of necessity. Finally, in light of its history, and its relation to the messianic, *salus populi suprema lex esto*, the maxim that the health of the people should be the supreme law, is reinterpreted in the context of the requirements for social, economic, and environmental justice in the Anthropocene – the increasingly unhealthy and unjust world of the early 21st century.

2. LAW'S AMBIGUITY

Since at least the time of the Athenian statesman Solon, whose reforms in the 6th century B.C.E. are credited with setting the historical stage for the emergence of democracy in ancient Athens, the concept of law has contained a crucial ambiguity. While the law is rightfully recognized as an instrument of any existing order, legitimizing and maintaining a status quo, it is not by any means restricted to this conservative function. Any consideration of its origin raises its diametrical opposition. That is, mirroring its retentive, conservative aspect, is law's mutative, metamorphic one. In this respect law may even be likened to D.N.A.; it not only clones itself (maintaining the same), it mutates, and adjusts (a term which literally translates as 'toward the just').

This latter aspect of the law is what allowed Solon to not only nullify the law of Draco – abolishing people's debts, freeing debt-slaves, and constraining the power of Athens' ancient oligarchy⁶ – but enabled a relatively egalitarian redistribution of the social world of the ancient Athenians to occur as well. And while it is important to note that this egalitarianism did not extend to women, slaves, and other excluded people, and so exposes the limitations of Athenian democracy, it does not diminish the emancipatory potential of this mutative aspect of the law.

⁶ See PLUTARCH, *THE RISE AND FALL OF ATHENS* 60-61 (Ian Scott-Klivert trans., Penguin Classics 1960).

Law as such is constituted by this very contradiction. Unstable, it is forever adjusting and responding to the flux of the living world. Beside the inanimate letter of the law that a given order enshrines and appeals to for support and legitimacy, is its living, vital aspect – justice, the unwritten, divine law that, among others, Martin Luther King, in his *Letter from a Birmingham Jail*, argued trumps the written law of human beings. And though King, in paraphrasing Augustine of Hippo that “an unjust law is no law at all,”⁷ seems to resolve the contradiction between these two types of law, in the diametrically opposed symbolic appearance of shepherd and healer, the figure of Jesus expresses both of law’s contrary, overlapping, modes – and maintains, leaving unresolved, the contradiction.

In his role as shepherd, central to the institution of the pastorate, with its emphasis on obedience, the figure of Jesus is not only a part of, but is also symbolic of, the structure of the Trinity – a structure reflected in the U.S. Constitution’s separation of powers schema. Norm and *nomos*, the shepherd, or *nomeus*, represent the conservative modes of law: order, tradition, precedent, obedience. Simultaneously, as a healer, the figure of Jesus appears as the exception, or deactivation, of the law. Not only does Jesus, the healer, oppose the law with grace; the healer is immanent in the ancient legal maxim and metanorm *salus populi suprema lex esto*. As the following will demonstrate, the contradiction of this double (antithetical) presence (of shepherd and healer) is entirely reconcilable.

3. NOMOS AND SHEPHERD

“All significant concepts of the modern theory of the state are secularized theological concepts,” argued Carl Schmitt in his *Political Theology*,⁸ advancing the claim put forth by, among others, the philosophical giant Leibniz back in the 17th century that there is a “systematic relationship between jurisprudence and theology.”⁹ The theological, however, beyond the merely conceptual and abstract, has determined the concrete structures of

⁷ MARTIN LUTHER KING JR., *Letter from a Birmingham Jail*, in *WHY WE CAN’T WAIT* (1964).

⁸ SCHMITT, *supra* note 2, at 5.

⁹ *Id.* at 37.

legal systems and, consequently, the concrete world as well. In addition to works of scholarship illuminating the degree to which secular legal concepts and religious traditions overlap and interact,¹⁰ in his *The Kingdom and the Glory* contemporary philosopher and classical scholar Giorgio Agamben discusses how the medieval administrative structures and institutions of the Catholic Church mirror contemporary constitutional and administrative legal structures. In particular, Agamben points out the degree to which the structure of the Church's Trinity corresponds to that other tripartite schema of order, the separation of powers schema (the *trias politica*) handed down from Montesquieu.¹¹

Indeed, it is not terribly difficult to see how the father – god, the creator – has an analogue in the creative branch of the government, the legislature. Nor is it difficult to recognize how the son, often referred to as the one who judges, can be seen to correspond to the institution of the judiciary. Lastly, the Holy Spirit – defined by the Fourth Lateral Council of 1215 as that “who proceeds” – corresponds to the executive branch. Insofar as the verb ‘to execute’ means to carry out fully, the executive branch of government conforms to this notion of one “who proceeds” quite closely. Because the figure of Jesus is not merely one aspect of the Trinity, however, but is symbolically inseparable from the Trinity (the basis for the institution of the pastorate) one may arguably see an echo of Jesus (however metonymically) in the U.S. Constitution's separation of powers structure – the *trias politica* – as a whole. This aspect of the law, the conservative aspect of order and norms, the *nomos*, may be regarded as one aspect of Jesus in the law, the aspect of the shepherd.

Hardly a novel coupling, the figure of the shepherd and the conservative aspect of the law have a long and deep association. As such, it is hardly surprising that the Greek word *nomos* (the conservative law of social convention, tradition, norms, and culture generally, as opposed to nature¹²) is

¹⁰ See Peter Goodrich, *The Political Theology of Private Law*, 11 INT'L J. CONST. L. 146 (2013) in which Goodrich discusses the relationship between marriage and contract law.

¹¹ See GIORGIO AGAMBEN, *THE KINGDOM AND THE GLORY* 141–43 (2011).

¹² Dermot Moran, *The Secret Folds of Nature*, in REIMAGINING NATURE: ENVIRONMENTAL HUMANITIES AND ECOSEMIOTICS 111 (Alfred Kentigern Siewers ed., 2014).

derived from the Greek for pasturing (*nemein*)¹³ and etymologically related to the Greek word for shepherd, *nomeus*. Indeed, the conservative, traditional aspect of the law, the social order that demands obedience, has been associated with shepherds for over four millennia. From the ancient Mesopotamian *Epic of Gilgamesh*, which apprises us that “the king should be a shepherd to his people,”¹⁴ to the Sumerian myth of the shepherd-god Dumuzi (consort of the fertility goddess Inanna/Ishtar), to countless images of Egyptian Pharaohs wielding a shepherd’s crook to the shepherd turned lawgiver Moses, to David, the shepherd turned King; from the Old Testament (Genesis, Isaiah, etc.), to the New Testament, and from Plato¹⁵ to the medieval poem *Beowulf*,¹⁶ the *nomos* (the law as custom, tradition, and authority) has been intertwined with the *nomeus*, the shepherd (associated not merely with the King or a god, but with law, authority, and power in general) since the earliest days of civilization.

It is this, the symbolic shepherd’s demand for obedience and control, that results in a naturalized though ultimately arbitrary social order, one that the sociologist Peter Berger referred to as the *nomos* – that construct in which customs and tradition merge “with what are considered to be the fundamental meanings of the universe.”¹⁷ Likewise, the concept of the *nomos* is central to Carl Schmitt’s later writings. Expressing a comprehensive “unity of space and law,”¹⁸ a *nomos* for Schmitt is an entire social world, a concrete and cultural ideology that proceeds from an initial conquest of land or territory.¹⁹ And, considering how politics and war are virtually indistinct in Schmitt’s thought, it is hardly incidental that the concrete and cultural order, that is the *nomos*, proceeds from this originary violence. Nor is it irrelevant that, just as the shepherd demands obedience, Schmitt’s “political theology places everything under the commandment to be obedient.”²⁰ Just as

¹³ See, e.g., Benno Gerhard Teschke, *Fatal Attraction: A Critique of Carl Schmitt’s International Political and Legal Theory*, 3 INT’L THEORY 179, 193 (2011).

¹⁴ EPIC OF GILGAMESH 4 (Andrew George trans., Penguin Classics 2003).

¹⁵ See PLATO, THE STATESMAN 10, 29 (Julia Annas & Robin Waterfield eds., Robin Waterfield trans., Cambridge U. Press 2000) in which the perfect statesman is equated with a shepherd.

¹⁶ BEOWULF 200 (Seamus Heaney trans., W. W. Norton & Company 2000).

¹⁷ PETER L. BERGER, THE SACRED CANOPY 24–25 (Anchor Books Editions 1990)(1967).

¹⁸ Teschke, *supra* note 13, at 193.

¹⁹ *Id.*

²⁰ MEIER, SCHMITT & STRAUSS, *supra* note 4, at 80.

Schmitt's political theology is rooted in obedience and faith,²¹ as opposed to critical thought, subtending Schmitt's *nomos*, with its emphasis on obedience and order, is that blending and institutionalization of the shepherd and the law that we find in the institution of the pastorate of the Christian Church.

In his studies of governmentality and biopolitics, Michel Foucault devotes a lengthy examination to this institution of the pastorate and the specific form of power it wields.²² Referring to the type of power associated with the shepherd (the power a shepherd exerts over a flock, which includes panoptic surveillance along with the determination of all aspects of the concrete context, and the obedience demanded in return) as pastoral power, Foucault describes the pastorate as being comprised of certain characteristics, foremost among which is that of "pure obedience."²³

While the story is most likely apocryphal, the "perfect obedience" and "complete servitude" demanded by this type of political power is nicely illustrated by an anecdote related by Ernst Kantorowicz in his *The King's Two Bodies* in which Attila the Hun arrives at the gates of a Christian town and demands entrance. Asked by the bishop to identify himself, Attila the Hun reputedly announced that he was the scourge of god. Ever obedient to power, the bishop admitted the Hun, and was promptly eviscerated,²⁴ cut down by the sword of Attila (which, according to legend, was presented to him by a shepherd).

All of which is to say, as Foucault argues, the pastorate is a form of power. And though, with its demands for submission, it is a predominately coercive type of power (heteronomy, *potestas*),²⁵ practical concerns dictate that this power have some degree, however slight, of flexibility. For an example of an absolute, essential form of power we must turn our attention away from concrete, historically manifesting instances of power to the abstract realm of myth where coercive power's essence – total determination,

²¹ *Id.*, at 68.

²² See MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION* 170 (Arnold I. Davidson ed., Graham Burchell trans., 2004).

²³ *Id.* at 178.

²⁴ See ERNST KANTOROWICZ, *THE KING'S TWO BODIES* 54-55 (7th paperback printing, 1997).

²⁵ FOUCAULT, *supra* note 22, at 150-1.

the tyrannical demand for complete submission and obedience – finds eidetic expression in the Fates, or Moirai, of Greek myth.

Not only do The Fates illustrate the *nomos* (as a totality symbolic of a unity of space and law), by following the law of the shepherd to its purest representation we are also pointed to the diametrical opposition, the exception, to the shepherd, and the second form in which Jesus appears in Law – the healer, who not only contests but prevails over the “Hellenic or ‘mythic violence’”²⁶ of the Fates.

4. FATE AND EXCEPTION

While the *trias politica*, the separation of powers schema of the U.S. Constitution, among others, and the Trinity correspond very closely, today’s constitutional arrangement can be traced to an entity that predates the Trinity – not to mention the mixed constitutions described by Polybius and Aristotle – by centuries. Moreover, not only do the Greek *Moirai*, or Fates, substantially predate the Trinity, its tripartite structure matches the U.S. Constitution’s separation of power schema exactly.

Like the single power (*potestas*) that, according to the *tria politica* principle, is separated into legislative, judicial and executive branches – and the Trinity, which is one thing with three distinct aspects – the Fates are one force comprised of three aspects. The three daughters of *Ananke* are *Klotho* (the spinner), *Lachesis* (the measurer), and *Atropos* (the cutter).

Spinning the thread of life, *Klotho* corresponds to the creator of laws, the legislature. *Lachesis*, whose function is to measure the thread of life, is typically depicted with a scroll in her hand. She corresponds to the judiciary. And it is interesting to note that, aside from the fact that measuring implies a rule, or law, as a noun a measure is itself a rule or law. Thirdly, there is *Atropos*. Known as the cutter, *Atropos*’ name translates as “the inflexible,” or “the inevitable.” The cutter of the thread of life, *Atropos*’ analogue is the executive branch. And it is telling that, in describing his executive function,

²⁶ Butler, *supra* note 5, at 203.

former president George W. Bush famously characterized himself as “the decider” (a designation that, etymologically, means to cut – unwittingly drawing the executive and the cutter even closer).

While the Fates manifest the *nomos* (in the general sense of an ideological or mythical order, as well as in the sense it has for Carl Schmitt, for whom “the political remains essentially fate”²⁷), it is worth pointing out that, according to Hesiod at least,²⁸ the three sisters are the offspring of *Themis* (herself the personification of law, or the *nomos*). According to other authorities, foremost among whom is Plato, the mother of the three Fates is not the titan *Themis*, but an even more elemental entity: one of the Protogenoi, or primordial deities, *Ananke*.²⁹

Known to the Romans as *Necessitas*, *Ananke*, it should be noted, was the personification of Necessity. And, according to the maxim believed to have been first formulated in the *Decretum* of Gratian in the 12th century,³⁰ it is equally pertinent to note that Necessity is said to both justify law and create law. Generating the Fates, *Ananke/Necessity* is hardly distinct, then, from the *nomos*, the law of the shepherd – illustrating the fact that, as Giorgio Agamben reminds us, throughout history jurists have maintained that the principle of necessity lies at the very root of law.³¹ That is, politically, mythologically, and mythically, Necessity subtends legitimizations of political and legal orders. As such, it seems to reflect more than mere coincidence (and, as “mythos” arguably “reveals, discloses, and lets be seen”³² the otherwise hidden historical fact) that *Klotho*, *Lachesis* and *Atropos* mirror Montesquieu’s, and the U.S. Constitution’s, tripartite separation of powers schema (i.e., the structure of the *nomos*).

To be sure, whether they are said to be the issue of *Themis* or *Ananke*, both sources of the Fates are associated with law and the *nomos*. Those

²⁷ See MEIER, SCHMITT & STRAUSS, *supra* note 4, at 70. See also *id.* at 68–9, where Meier discusses how Schmitt’s thought is rooted in faith, a faith which leads to obligation, and that “Schmitt cannot understand the obligatoriness of the political in any other way than as fate.”

²⁸ See HESIOD, *THEOGONY* 41 (Richard S. Caldwell trans., 1987).

²⁹ See PLATO, *THE REPUBLIC* 340 (Giovanni R. F. Ferrari ed., Cambridge Univ. Press 2000).

³⁰ See DIANE A. DESIERTO, *NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION* 64, n.4, (2012)., *Quia enim necessitas non habet legem, set ipsa sibi facit legem* (necessity knows no law but makes law).

³¹ See GIORGIO AGAMBEN, *STATE OF EXCEPTION* 25 (2005).

³² MARTIN HEIDEGGER, *PARMENIDES* 60 (Indiana U. Press 1992).

traditions that regard the Moirai as extensions of Ananke, however, may bear a closer relationship to the *nomos*, the law of the shepherd. For, among its other attributes, Necessity is that which cannot be avoided – its essence is that which must be obeyed (that which, like the shepherd, demands total subordination). Indeed, for Jean Bodin, the originator of the modern notion of sovereignty, it is precisely this, “urgent necessity,” that releases a sovereign from the duty to assure and protect “the interests of the people.”³³

Furthermore, *Ananke* is typically associated with *Bia*, the goddess of force, compulsion and violence³⁴ – the “sine qua non” of the *nomos*. And, as Leo Strauss points out, not only Parmenides and Thucydides, but Greek thought generally equated necessity with what was compulsory; and the “alternative to compulsion was right,”³⁵ the unwritten law. Atropos, the unyielding, and its negation, illustrates the conceptual contradistinction inhering between law and justice. Substantiating this, *Bia* is counterposited in Greek myth to *Dike* (justice),³⁶ corroborating Walter Benjamin’s observation in his *Critique of Violence* that “violence crowned by fate is the origin of the law.”³⁷ And yet, for all of the insuperable, unyielding power of the Fates, like Law, the rule of the Fates has a (messianic) exception, “a distinct alternative to mythic power.”³⁸

Although none can defy the Fates, and even Zeus, “who is more powerful than all of the gods combined,”³⁹ can do nothing to alter the decisions of the Fates,⁴⁰ the son of a god, a healer, who is referred to again and again as “savior,”⁴¹ able to restore sight to the blind and raise the dead – and who is ultimately killed and raised to the heavens as a god for his transgressions against the *nomos* – is able to act beyond the Fates’ powers.

³³ SCHMITT, *supra* note 2, at 8.

³⁴ See, e.g., GIORGIO AGAMBEN, *HOMO SACER* 31 (1998).

³⁵ LEO STRAUSS, *Thucydides’ Peloponnesian War*, in *THE CITY AND MAN* 174–77 (U. of Chi. Press 1978).

³⁶ *Id.*

³⁷ WALTER BENJAMIN, *Critique of Violence*, in *REFLECTIONS* 286 (1978).

³⁸ Butler, *supra* note 5, at 207.

³⁹ See LISA RAPHALS, *Fatalism, Fate, and Stratagem in China and Greece*, in *EARLY CHINA/ANCIENT GREECE: THINKING THROUGH COMPARISONS* 224 (Steven Shankman, et al eds., 2002). See also AESCHYLUS, *Prometheus Bound*, in *THE COMPLETE GREEK TRAGEDIES: AESCHYLUS I* 194 (Richard Lattimore et al. eds., David Grene trans. 2013) in which Prometheus says of Zeus that “[Yes, for] he, too, cannot escape what is fated.”

⁴⁰ See PLATO, *supra* note 29, at 218.

⁴¹ See, e.g., JAMES H. CHARLESWORTH, *THE GOOD AND EVIL SERPENT* 164 (2010).

The exception to the ancient *nomos*, the only figure able to act outside the rule of the Fates, is the son of Apollo, Asclepius.

Related to his function as exception, it is noteworthy that Asclepius' name translates as "cut open." Though this name derives from the conditions surrounding his birth (cut from the womb of his mother, Koronis), it also bears an inverted relation to the function of Atropos (i.e., cutting the causal chain). In cutting, *Atropos* decides – executes, and, according to Carl Schmitt's definition of the sovereign as "he who decides on the exception,"⁴² appears to manifest sovereignty through a decision. Contesting this sovereign decision, Asclepius provides a countervailing sovereignty – or nullification, or deactivation, of sovereignty. For through his healing practice Asclepius demonstrates that he is not bound by the rule of the Fates. By raising the son of Theseus, Hippolytus, from the dead, for instance, Asclepius operates outside the *nomos* – beyond not only the arbitrary rule of traditional authority and custom, but outside of Necessity/*Ananke* itself.

Not merely able to operate outside the *nomos*, Asclepius is able to rewrite (by raising the dead, for instance, and retroactively changing or annulling Fate) what the Fates had previously decided. Illustrating Kelsen's critique of decisionistic notions of sovereignty as failing to account for the power to make and unmake law,⁴³ Asclepius' acts demonstrate not only that he is outside, or beyond, the power of the Fates, but that they are, as it turns out, subsumed by his. In the battle of their respective sovereignties (or, in the battle between sovereignty and its deactivation), Asclepius prevails, though not by overpowering the Fates. Asclepius' power is not quantitatively, but qualitatively different from that of the Fates. Unlike the coercive power of the shepherd (the *potestas* – force and violence) that demands obedience, Asclepius manifests the power of the healer – a generative power analogous to Spinoza's *potentia*. Rather than the transcendent, smothering power of the Fates, the immanent power of Asclepius is an enabling power. Enabling autonomy, as opposed to heteronomy, the healer may be said to possess the power to deactivate force – a type of power not unlike what anthropologist Pierre Clastres described as noncoercive political power among the

⁴² SCHMITT, *supra* note 2, at 5.

⁴³ See KELSEN, *supra* note 3, at 18.

Tupinamba, and the Jivaro,⁴⁴ or what in Judith Butler's reading of Walter Benjamin's *Critique of Violence* is associated with the notion of noncoercive "divine violence."⁴⁵ Indeed, although Asclepius' and Atropos' respective decisions may not illustrate the distinction between Carl Schmitt's "genuine decision" and its "degenerate" counterpart⁴⁶ (and the states of emergency extending from them), the decisions of Atropos and Asclepius may be illustrative of the distinction between the state of emergency and the "real state of emergency"⁴⁷ Benjamin refers to in his *Theses on the Philosophy of History*.

Along with the incarnation of force, *Bia*, the Fates are subsumed by and subordinated to the healer who manifests law as *recht*, as opposed to *gesetz* – not force, but a type of righteousness. And it is in this context all the more relevant that the word salvation (the essence of the figure of Jesus, which is also the purview of the healer, the "savior") is derived from the Greek verb 'to heal.' For not only are the figures of Jesus and Asclepius both healers,⁴⁸ the two share a similar messianic function; not merely the secular or political messianism of Marxism,⁴⁹ or of a messianic class,⁵⁰ but the broader secular notion of the messianic "associated with the destruction of the legal framework"⁵¹ and the delivery of people from the tyranny of the *nomos*. Or, as Jacques Derrida put it, a "demand for salvation and for justice beyond law."⁵²

Acting outside of the *nomos*, and exposing what was thought to be necessary as arbitrary, the command that demands faith and pure obedience (the purview of the Fates, *nomos*, *potestas*, and heteronomy) is revealed by Asclepius to be not only illusory, but tyrannical. As such, we see in the figure of the healer generally not only a manifestation of noncoercive, emancipatory

⁴⁴ PIERRE CLASTRES, *SOCIETY AGAINST THE STATE* 30 (Robert Hurley & Abe Stein trans., Zone Books Rev. ed., 1989).

⁴⁵ See Butler, *supra* note 5, at 207.

⁴⁶ See SCHMITT, *supra* note 2, at 3.

⁴⁷ Walter Benjamin, *Theses on the Philosophy of History*, in *ILLUMINATIONS: ESSAYS AND REFLECTIONS* 257 (Hannah Arendt ed., Harry Zohn trans., 1968).

⁴⁸ See CHARLESWORTH, *supra* note 41, at 371. Asclepius is "virtually a mirror of the story of Jesus."

⁴⁹ See KELSEN, *supra* note 3, at 44.

⁵⁰ *Id.* at 8.

⁵¹ See Butler, *supra* note 5, at 207.

⁵² See JACQUES DERRIDA ET AL., *SPECTRES OF MARX: THE STATE OF DEBT, THE WORK OF MOURNING AND THE NEW INTERNATIONAL* 210 (Peggy Kamuf trans., Routledge 2006) (1993).

power, autonomy, and *potentia*, but justice (the overcoming of an arbitrary determination) prevailing over, or overruling, law.

This contrast between the shepherd and the healer finds further expression in the symbolism of the symbolism. The shepherd, the *nomeus*, carries the staff – the scepter, the rigid, unyielding letter of the law. And it is noteworthy that the staff, insofar as it is a phallus (associated with the symbolic order generally, according to Lacan, and with the law in particular⁵³), is related to law in this respect as well. As the legal scholar Joseph Indaimo observes: “it is the masculine phallus which is the symbolic expression for the power and logic of traditional politico-legal institutions.”⁵⁴

The healer Asclepius, meanwhile, is not represented by the staff alone but by a staff constrained by a serpent. Symbolic of Asclepius, and his daughter, Hygieia, aka Salus (as well as, according to the Ophidians – early Gnostics who worshiped Jesus as a serpent⁵⁵ – the figure of Jesus himself), the serpent, as opposed to the staff, is flexible, rather than rigid, living, rather than dead. Symbolic of wisdom, the serpent may be said to represent not simply the generative, healing power (known to classical thought as the *vis medicatrix naturae*, associated with the life force itself) but the mutative function of the law of the healer.⁵⁶

Among many others, the story of the physician Eustochius of Alexandria illustrates this symbolism. A follower of the neo-Platonic philosopher Plotinus, Eustochius reported that, as the philosopher lay dying, a serpent mysteriously appeared in his chamber. And just as the serpent disappeared into a hole in the wall, into another realm, Plotinus died.⁵⁷ Though most likely apocryphal, this tale nevertheless reflects the symbolic

⁵³ALEXANDRA HOWSON, EMBODYING GENDER 103 (2005).

⁵⁴ JOSEPH A. INDAIMO, THE SELF, ETHICS AND HUMAN RIGHTS, LACAN, LEVINAS, AND ALTERITY 88 (2015). Incidentally, the term phallus is related to the Greek *phalle* – which means whale, and is closely associated in the cultural imaginary with the leviathan – which for Hobbes is symbolic of the *potestas*.

⁵⁵ See CHARLESWORTH, *supra* note 41, at 36.

⁵⁶ It should be noted that the mutative and retentive aspects of the law of the healer and the mutative and retentive aspects of the law of the shepherd are distinct. Whereas the former tends to radiate, or distribute its surplus, the latter strives toward concentration. Concentrations of power are but one manifestation of this tendency.

⁵⁷ See M.J. Edwards, *Birth, Death, and Divinity in Porphyry's Life of Plotinus* in GREEK BIOGRAPHY AND PANEGYRIC IN LATE ANTIQUITY 59 (Tomas Hagg & Philip Rousseau eds., 2000).

value of the serpent in classical thought. Not the serpent of Adam and Eve⁵⁸, but the serpent who, in eating its tail (like the ouroboros), and in sloughing off its skin, represents renewal, regeneration, noncoercive power and, by extension, autonomy.

Relatedly, the lawgiver Moses, who had worked as a shepherd for years in Midian, carried a rod that was instrumental to the realization of his powers. But while his staff was generally stiff and unyielding, in performing the role of an emancipator of the enslaved Hebrews, his rod was transformed into a flexible, living serpent.

In light of this symbolism, rather than simply symbolic of deliverance from death,⁵⁹ we may recognize the serpent-entwined rod of Asclepius as symbolic of the healer's noncoercive power prevailing over, and constraining, the coercive, unbending power, and demand for obedience, of the law of the shepherd. Relatedly, we may also view the fasces – the bundle of rods, or hypertrophied rod, that is symbolic of coercive power and authority, i.e., mythic power – as the symbolic antithesis of the rod of Asclepius.

None of this, however, should be construed to support the argument that Hans Kelsen critiqued in his *Secular Religion* – i.e., that modernity is characterized by a hidden gnostic order.⁶⁰ Rather, the structural resemblances between the *trias politica* and the Fates point to the presence of mythical structures embedded not merely in subjective beliefs but, to some degree, in objective structures and traditions – structures in conflict with properly modern structures that, as Kelsen notes, go “hand in hand with emancipation from religion.”⁶¹ In light of this it is no small irony that in the 1920s, decades before writing his *Secular Religion*, Kelsen helped draft the Austrian constitution, which incorporated the *trias politica*, this theological echo of the

⁵⁸ Not only do Adam and Eve not know the difference between good and evil in the story of Genesis, Yahweh wants to keep them ignorant of this knowledge. That is, he wants to prevent them from thinking for themselves, from developing autonomy. In leading them to negate a command that has no other reason than obedience – i.e., the shepherd – the serpent contests this *nomos*. And, though arguably not terribly successfully, the serpent contributes in this respect to the development of autonomy over heteronomy, too.

⁵⁹ See CHARLESWORTH, *supra* note 41, at 164.

⁶⁰ See KELSEN, *supra* note 3, at 262.

⁶¹ *Id.* at 269.

Trinity and the Fates.⁶² Yet, this ancient mythical schema does not only perpetuate ancient superstitions and traditions. In both the myth of Asclepius and, in a more ambiguous way, in its analogue, the maxim *salus populi suprema lex esto*, the superstitious order's negation is embedded as well. Contrary to the determinism of the Fates, Asclepius, and the caring healer in general, contests traditional orders, arguably symbolizing an unconscious recognition that, among others, human health and flourishing are contrary to traditional authority, order and force.

5. HEALTH AND JUSTICE

But it is not simply the heteronomy of the Fates that is trumped by the emancipatory, noncoercive power of the healer. The law of custom (common sense, ideology, traditional authority – the *nomos*), and of the written law in particular, with its reliance on precedent (the principle of *stare decisis*), is trumped by the law as justice; not justice in the narrow, punitive sense of retribution – of the equilibrium of *jus talionis*, in which the weight of an eye is balanced out by the weight of another eye – but the equilibrium of egalitarian social conditions necessary for the actualization of a healthy and just society.

In addition to its relation to the concept of value,⁶³ health has a deep conceptual relationship with the notion of justice. Reflective of this kinship, everyday speech is replete with examples of the interchangeability of the language of justice and the language of health. When speaking of being wronged, for instance, one frequently expresses this in nominally medical language, remarking that one “suffers a harm,” or “is injured.” While the language of justice appears to be employing a type of medical metaphor, however, the term injury literally translates as ‘not,’ or ‘the opposite of’ right, law, or justice. In other words, the language of justice does not employ

⁶² See David Ingram, *A Morally Enlightened Positivism? Kelsen and Habermas on the Democratic Roots of Validity in Municipal and International Law*, in HANS KELSEN IN AMERICA – SELECTIVE AFFINITIES AND THE MYSTERIES OF ACADEMIC INFLUENCE 202 (D.A. Jeremy Telman ed., 2016).

⁶³ Beyond that reification of value, money, the word value itself derives from the Latin word for health, *valetudo*.

a medical metaphor in this case, so much as medical language appeals to notions of justice in the articulation of its most basic concepts. Similarly, notions of justice are often borrowed from the terminology of health. For example, the remedy for many types of legal wrongs, or injuries, is ‘to be made whole’ – and whole, like the word hale, derives from the word health.⁶⁴

These metaphorical and symbolic associations reflect more than a superficial relationship. In many respects the material and social conditions necessary for the development of a genuine, general notion of health (not simply the health of individuals, but the health of communities and their general environment) may be said to be homologous with conditions of actual social justice. Hardly an outlier, when it comes to expressing the conceptual and symbolic relationship between health and justice, the myth of Asclepius is one of many illustrating the overlap, or greater unity, of the two concepts.

In Hesiod’s *Works and Days* (c. 700 B.C.E.), for example, a work whose authority, along with his *Theogony*, is rivaled only by the epics of Homer, we are told that in the mythical Golden Age, people were not only free from the need to perform physical labor, human beings were free from disease altogether. It was only after Prometheus stole fire and granted this technology to humankind, Hesiod apprises us, that people had to work, and grew sick, and died. “Before this time men lived upon the earth/ Apart from sorrow and painful work/ Free from disease, which brings the death-Gods in.”⁶⁵ Disease had been released from the jar of Pandora as a punishment.

Frequently depicted in ancient myth, plagues and epidemics were explained as divine retribution for transgressions of the law or as consequences stemming from insults to the gods. At the opening of Homer’s *Iliad*, “the basic text of European civilization,”⁶⁶ the leader of the

⁶⁴ See OXFORD ENGLISH DICTIONARY, The root of health, the Old English hEl, related to Hale, means “Wholeness, a being whole, sound or well.”

⁶⁵ See Hesiod, *Works and Days* in HESIOD AND THEOGNIS 61–62 (Dorothea Wender trans., 1976). Hesiod recounts that had Prometheus not provoked Zeus “you [people] would easily do work enough in a day to supply you for a full year even without working” 44–47, an amount of daily work only moderately less than what anthropologist MARSHALL SAHLINS argues in *THE ORIGINAL AFFLUENT SOCIETY*, and *STONE AGE ECONOMICS*, was the typical workload of early human beings; see also MARK NATHAN COHEN, *HEALTH AND THE RISE OF CIVILIZATION* 32–53 (1989), in which the author describes how diseases, from the common cold and the flu to tuberculosis, were introduced to humankind through animal domestication, i.e. by civilization.

⁶⁶ See MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* 37 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., Stanford U. Press 2002) (1987).

assembled Greek forces, Agamemnon, insults Apollo's priest Chryses. As a punishment for this insult, Apollo ravages the Greek army with plague.⁶⁷ And who can forget how, in the story of *Oedipus Rex*, the city of Thebes is afflicted by a "grievous plague" as a consequence of Oedipus' unintentional patricide and matrophilia. Of course, the nexus of justice and health is not at all limited to the realm of myth.

Contemporaries of Sophocles, the writers of the Hippocratic Corpus, rejected the superstitious notion that disease was of divine origin. In spite of their rejection, however, they continued to assert that a strong relationship existed between justice and health. In following the Hippocratic Oath (late 5th century B.C.E.), for instance, physicians not only submitted to the well-known oath to "do no harm" to their patients, physicians swore to keep their patients "from harm and injustice" as well.⁶⁸

Among other places, the source of this plexus of justice and health lies in the Ancient Greek regard for proportionality and harmony. As Ivan Illich writes, "For Greek philosophers 'healthy' was a concept for harmonious mingling, balanced order. A rational interplay of the basic elements. He was healthy who integrated himself into the harmony of the totality of his world according to the time and place he had come into the world."⁶⁹

Healthy means balanced, and proportional. And just as health was regarded as an extension of this proportionality, harmony, and balance, so too was justice. As Ernst Bloch apprises us, since Pythagoras "justice has been thought without hesitation as proportionality par excellence."⁷⁰

A contemporary of Pythagoras, one of the most eminent medical theorists of antiquity, provides us with further evidence of the homology of justice and health. In his *Concerning Nature* Alcmaeon of Croton not only defined health "as the proportionate blending of the qualities."⁷¹ He also maintained "that the equality (*isonomia*) of the powers (wet, dry, cold, hot,

⁶⁷ See HOMER, *THE ILIAD*, Book I (Collins ed., Robert Fitzgerald trans., 1986).

⁶⁸ See generally LUDWIG EDELSTEIN, *ANCIENT MEDICINE: SELECTED PAPERS OF LUDWIG EDELSTEIN* 6 (Owsei Temkin et Clarice Lilian Temkin eds., Clarice Lilian Temkin trans., 1987).

⁶⁹ See Ivan Illich, *Brave New Biocracy: Health Care from Womb to Tomb*, *NEW PERSP. Q.*, Winter 1994, at 4-12.

⁷⁰ ERNST BLOCH, *NATURAL LAW AND HUMAN DIGNITY* 40 (Dennis J. Schmidt trans., 1987).

⁷¹ EARLY GREEK PHILOSOPHY 90 (Jonathan Barnes ed., 1987).

bitter, sweet, etc.) maintains health but that monarchy [a harmful concentration] among them produces disease.”⁷² Beyond his definition of health, by equating disease with the explicitly political notion of monarchy, Alcmaeon drew the concepts of justice and health even closer.

This connection was developed further when, about a century later (c. 380 B.C.E.), in outlining what he reasoned was the perfect social arrangement, Plato wrote in his *Republic* that, among its other qualities, the “true city” is the “healthy version.”⁷³ In contrast, the other version, the luxurious one, is “the swollen and inflamed city.”⁷⁴

Leading up to this comparison, Socrates informs us that in “looking at the origin of a luxurious city [the unhealthy one] ... we may perhaps see the point where justice and injustice come into existence in cities,”⁷⁵ drawing a direct connection between justice and health in the art of government.

As the philosopher Hans-Georg Gadamer put it, “in Plato’s great utopia of the *Republic* the true part of the citizen in the ideal state is described in terms of health, as a harmony in which everything is in accord, in which even the fateful problem of governing and being governed is resolved through reciprocal agreement and mutual interaction.”⁷⁶

And though the political philosopher Leo Strauss, in his course on Plato’s *Gorgias*, noted that “justice is restoration of health of the soul,”⁷⁷ the conceptual relationship between justice and health must be construed to include the health of the body as well. For even if the soul were not regarded as a property of the body, physical health was an aspect of the good, the

⁷² See IAIN M. LONIE, THE HIPPOCRATIC TREATISES “ON GENERATION” “ON THE NATURE OF THE CHILD” “DISEASES IV” 330 (Gerhard Baader et al eds., 1981).

⁷³ See PLATO, *supra* note 29, at 55; the city which, incidentally, is referred to as the “city of pigs” owing to the vegetarian dishes typically eaten there, described by Socrates describes a typical meal in this healthy city. The description that generates his interlocutor’s ire, and thereby inspires the appellation City of Pigs, is of a vegetarian meal – olives, wild roots and vegetables, chickpeas, beans, figs, cheese, myrtle berries and acorns.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See HANS-GEORG GADAMER, THE ENIGMA OF HEALTH 75 (Jason Gaiger & Nicholas Walker trans., 1996).

⁷⁷ See LEO STRAUSS, PLATO’S GORGIAS, A COURSE OFFERED IN THE AUTUMN QUARTER, 1963 AT THE UNIVERSITY OF CHICAGO (Devin Stauffer ed., 1963) <https://leostrausscenter.uchicago.edu/sites/default/files/Plato's%20Gorgias%201963.pdf>

actualization of which is the aim of law. As Aristotle writes in his *Politics*: “*Eudaimonia* is the aim of the constitution.”⁷⁸

Notoriously difficult to render into English, *eudaimonia* literally translates as “good spirit.” And though the term happiness has traditionally been employed, *eudaimonia* is just as often translated as “wellbeing,” not to mention “doing and living well.”⁷⁹ In attempting to articulate a more accurate definition, the term “human flourishing” has been adopted in recent years by scholars.⁸⁰

Eudaimonia, Aristotle tells us in Book I of his *Nicomachean Ethics*, “is the best, noblest and most pleasant thing in the world.”⁸¹ Referring to the inscription at Delos, which defines the most pleasant as winning what we love, the most noble as that which is most just, and the best as health,⁸² Aristotle writes that “these attributes are not severed.”⁸³ In other words, health is a constitutive element of *eudaimonia*. Because Aristotle’s notion of *eudaimonia* subsumes health – as a necessary precondition for its realization – and because he writes that *eudaimonia* is the aim of the constitution, health is implicitly the aim of the law as well.

Importantly for the present study, this notion finds lasting expression in the Roman legal maxim *salus populi suprema lex esto* – the health of the people should be the supreme law. Derived from the writings of the Roman statesman Marcus Tullius Cicero⁸⁴ (whose notion of justice, echoes Hippocrates’ oath insofar as it “requires, first, not doing any harm to anyone”⁸⁵), this legal maxim continues to this day to function as a

⁷⁸ See ARISTOTLE, *POLITICS* 426 (Trevor Saunders ed., Penguin Books 1992).

⁷⁹ See ARISTOTLE, *NICOMACHEAN ETHICS* 4-5 (David Ross trans., Oxford U. Press 1991); equivalent to Aristotle’s concept of *eu zen*, good life.

⁸⁰ Whether regarded as constitutive of happiness, or flourishing, health is associated with each in ancient thought. Ariphron of Sicyon (c. 550 B.C.E.) wrote of Hygieia that “without you no man is happy.” [Ariphron, *Fragment 813*, in *V GREEK LYRIC: THE NEW SCHOOL OF POETRY AND ANONYMOUS SONGS AND HYMNS* (David A. Campbell trans. 1993)] Also said of Hygieia: “Every house is flourishing and fair, if with rejoicing aspect thou art there.” ORPHIC HYMN 67, TO HYGIEIA (Thomas Taylor trans., 1792)

⁸¹ See ARISTOTLE, *supra* note 79, at 17.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See ANDREW R. DYCK, *A COMMENTARY ON CICERO, DE LEGIBUS* 459 (2003) where Dyck writes that the maxim appears several times in Cicero’s work on law, *DE LEGIBUS* (c. 51 B.C.E.), as well as appearing 18 times in his speeches and “is virtually Ciceronian property.”

⁸⁵ See Martha Nussbaum, *Duties Of Justice, Duties Of Material Aid: Cicero’s Problematic Legacy*, 8 *J. OF POL. PHIL.* 176, 181 (2000).

constitutional metanorm, capable of nullifying those laws that conflict with it. Replicating the god of medicine Asclepius' function as exception to the Fates, Asclepius' daughter, the goddess of health Hygieia, known to the Romans as the goddess Salus,⁸⁶ finds her way into the maxim that functions as an exception to the law. Insofar as it ushers the healer into the law (the exception to the shepherd), Salus (translated as health, but also as safety, security, good, welfare, and, notably, salvation), manifests the second, countervailing, presence of Jesus in the law: the messianic (the secular, or political messiah – such as Gramsci's modern prince, or those discussed by Kelsen⁸⁷ and Butler⁸⁸ – as opposed to a strictly theological, magical savior) that negates the law of the shepherd.

6. A BRIEF HISTORY OF THE MAXIM

Associated with declarations of states of exception (in which emergencies justified limited suspensions of the law) during the late Roman Republic and across the Roman Empire,⁸⁹ the maxim *salus populi suprema lex esto* functioned throughout the Roman world. And there, embedded in legal systems, it remained long after the Empire's dissolution. Among other former Roman jurisdictions, the maxim has enjoyed an authoritative position in English law (and, subsequently, in U.S. law) since the time that the English Common Law was first cobbled together during the reign of Henry II (1133-89). Throughout the Middle Ages and well into the modern period legal maxims in general exerted "the same strength as acts of parliament" in England.⁹⁰ And the maxim *salus populi suprema lex esto* occupied a particularly esteemed position among these.

Usually translated as the health of the people is the supreme law, in his *Table Talk*, 17th century English jurist John Selden pointed out that

⁸⁶ See Angelos Chaniotis, Book Review, 97 *BRYN MAWR CLASSICAL REV.*, no. 3, 1997 (reviewing LORENZO WINKLER, *SALUS. VON STAATSKULT ZUR POLITISCHEN IDEE. EINE ARCHEOLOGISCHE UNTERSUCHUNG [Salus. From state cult to political idea. An archaeological study] 1995*).

⁸⁷ See KELSEN, *supra* note 3, at 100-1.

⁸⁸ See Butler, *supra* note 5, at 207.

⁸⁹ See THOMAS POOLE, *REASON OF STATE: LAW, PREROGATIVE AND EMPIRE 1-2* (2015).

⁹⁰ See SIR THOMAS EDLYNE TOMLINS, *THE LAW-DICTIONARY, EXPLAINING THE RISE, PROGRESS AND PRESENT STATE OF THE BRITISH LAW: DEFINING AND INTERPRETING THE TERMS AND WORDS OF ART, AND COMPRISING ALSO COPIOUS INFORMATION ON THE SUBJECTS OF TRADE AND GOVERNMENT VOL. II 540* (1836).

because “it is not *salus populi suprema lex est*, but *esto*,”⁹¹ the maxim ought to be translated as ‘the health of the people *should* be the supreme law.’ In other words, rather than a (descriptive) statement of fact the maxim should be seen as a (prescriptive) command. When confronted with the question of how social life ought to be arranged, of what the supreme law should be, the maxim holds that the deciding factor should be the health of the people.

Cited in innumerable U.S. state, federal, and Supreme Court decisions, the maxim has exerted a significant influence on the development of U.S. law.⁹² Yet, because the maxim suffers from the same ambiguity that law itself suffers from (privileging sometimes its mutative character, the healer, and at other times privileging its retentive, conservative aspect – the shepherd), over the centuries the maxim has been construed to mean both responsive justice and reactive order – the welfare of people in general, or the welfare of particular people, or a particular social class, or even a particular person. During the reign of Augustus, for example, the health of the people became identified with the health (or power) of the emperor.⁹³ That is, far from functioning as an exception to traditional order and custom (*nomos*), the maxim was used to reiterate the rule of the shepherd; anticipating Bodin’s concept of sovereignty,⁹⁴ it enabled coercive power to function, in a state of exception, outside of legal constraints, in order to preserve itself.^{95 96}

In other words, rather than the pursuit of anything approximating social or public health (which is distinguishable from necessity insofar as health is concerned not with mere self-preservation and survival but with human flourishing) the notion and maxim of the health of the people became conflated with necessity (*Ananke*), particularly with what is necessary for the preservation and aggrandizement of the *nomos*. Consequently, over the centuries, jurists and political philosophers alike came to view the maxim

⁹¹ See JOHN SELDEN, *THE TABLE TALK* 100 (London, 1821).

⁹² WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN 19TH CENTURY AMERICA* 42–50 (1996).

⁹³ See STEFAN WEINSTOCK, *DIVUS JULIUS 174* (1971); see also WINKLER, *supra* note 86.

⁹⁴ See SCHMITT, *supra* note 2, at 8.

⁹⁵ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L. J.* 1011, 1011–1134 (2003).

⁹⁶ See John Ferejohn & Pasquale Pasquino, *The Law of the Exception: a Typology of Emergency Powers*, 2 *INT’L J. OF CONST. L.* 210 (2004).

salus populi as interchangeable with Gratian's maxim that necessity has no law.

Cicero's more philosophical writings notwithstanding, the maxim was used to further *potestas* since the time he penned it. While persisting in various forms after the erosion of the Roman Empire, especially in Canon Law (where the term *salus* was understood to mean, among other things, the salvation of people's souls), like so many facets of the classical world it was revived during the Renaissance. As Ferejohn and Pasquino put it, its use by Machiavelli, and later writers such as James Harrington, and Rousseau, came to act "as a kind of bridge between the Roman model of dictatorship and the modern idea of constitutional emergency powers."⁹⁷ And this use was more often than not inextricable from the defense or justification of necessity.

Thomas Jefferson's use of the maxim provides a good example of this overlap. Zealously pursuing territorial expansion, Jefferson purchased the Louisiana Territory from France in 1803. Justifying his extralegal executive act after retiring from office in his 1810 letter to John B. Colvin, Jefferson wrote that beating imperial rivals to possession of valuable and strategic territory was necessary for "self-preservation and rendered the *salus populi* supreme over the written law."⁹⁸ In writing that "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but... the laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation,"⁹⁹ Jefferson simultaneously conflated national security with a notion of human security (the health of the people), and the maxim *salus populi* with Gratian's maxim that necessity triumphs over law.

In spite of Jefferson's claim and use, however, the actual health of the people subjected to his decision was not advanced at all. While the ruling classes and the state would profit from territorial expansion, nearly everyone else experienced the opposite of security and health. The autochthonous people of the territory of the newly expanded nation, for instance, were annihilated. And for millions more it meant a new world of plantations to live

⁹⁷ *Id.* at 213.

⁹⁸ Quoted in MAURIZIO VALSANIA, *THE LIMITS OF OPTIMISM: THOMAS JEFFERSON'S DUALISTIC ENLIGHTENMENT* 150 (2013 ed., 2013).

⁹⁹ *Id.*

and suffer in, to say nothing of the plight of women, the poor, and others. Although appearing to deviate from the *nomos*, the rule of the shepherd, Jefferson was not instantiating the law of the healer. Rather, via Bia, he was advancing Necessity, the mythical, the law of the shepherd in a less robed form.

Notwithstanding its utilization by coercive power/*potestas*, however, the maxim's inherent ambiguity continued to manifest throughout modern political thought. In the mid-17th century, for instance, while common lands were being transformed into salable things, enclosed, and sold off in England (transforming the people that had historically lived on those lands into refugees and paupers¹⁰⁰), the Levellers, fighting in the English Civil War, appropriated and radicalized the maxim *salus populi*, appealing to the mutative, emancipatory aspect of the maxim for the satisfaction of their demands.¹⁰¹

Advocating autonomy over heteronomy, the Levellers (whose name derived from the practice of those revolting against the enclosure and privatization of the commons by leveling the hedges used to enclose plots of land) stood for the rule of law, the extension of suffrage, and religious tolerance, among other contemporaneous issues. And because the health of the people requires land on which to live, among other conditions, or preconditions, of health, its alienation was contrary to the supreme law and must for that reason (that the health of the people should be the supreme law) be halted, they argued.

Reappropriating the maxim from the Levellers, invoking it in the introduction to his *Leviathan* (the "artificall man" that in so many ways resembles the coercive shepherd) Hobbes used the maxim for conservative ends.¹⁰² This was not, of course, at all innovative. As the historian Peter Miller notes in his study of the period, "in the war between parliament and the crown, the *salus populi* could be found on all sides."¹⁰³

¹⁰⁰See GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY* (1983) in which she discusses the historical development of the new class of people of the pauper.

¹⁰¹ See, e.g., JASON S. MALOY, *THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT* 160 (2008).

¹⁰² *Id.*

See PETER N. MILLER, *DEFINING THE COMMON GOOD* 42 (1994).

A generation after Hobbes, John Locke famously employed the maxim in both the epitaph to his *Second Treatise on Government* as well as in its section on executive prerogative. And it was by way of Locke (who wrote that “*Salus Populi Suprema Lex* is so just and fundamental a rule that he who sincerely follows it cannot dangerously err”¹⁰⁴), among others, such as the Scottish Enlightenment philosopher Francis Hutcheson,¹⁰⁵ that the maxim influenced the Founders of the United States of America – who, like Locke, emphasized the emancipatory dimension of the maxim (to the degree that it benefitted them) in their efforts to free themselves from the *nomos* of the British Crown.

While the maxim was instrumental in justifying the shift from monarchical to nominally democratic rule in North America, its double nature persisted. As John Adams put it, “The public good, the *salus populi* is the professed end of all government, the most despotic, as well as the most free.”¹⁰⁶ And as British law gave way to U.S. law, this intrinsic ambiguity persisted.

In the late 1780s, for instance, when farmers and veterans of the Continental Army found themselves facing the confiscation of their farms and/or time in debtors’ prisons for debts accumulated during the time they were fighting an ostensible war of liberation, what came to be known as Shays’ Rebellion broke out in Massachusetts. Rising up against their creditors to secure debt relief and the cessation of the confiscation of their farms, the creditor-dominated Massachusetts legislature found little compunction in opposing the movement with military force.

At the same time, in February of 1787, debtors in the state of South Carolina also challenged the legitimacy of their debts. Unlike the situation in Massachusetts, however, the South Carolina legislature represented predominantly debtors and, to the great chagrin of their creditors, the

¹⁰⁴ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 2 (Crawford Brough Macpherson ed., Hackett Publishing Company 1980)(1690).

¹⁰⁵ See generally ISTVAN HONT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* 412-419 (2005).

¹⁰⁶ CHARLES F. ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES*, VOL. III 479 (Boston, Little, Brown & Co. 1851).

legislature granted debtors radical debt-relief.¹⁰⁷ Citing the maxim *salus populi suprema lex esto*, the future attorney general of South Carolina, John Julius Pringle, defended the debt nullification, maintaining that it is the purpose of government to secure the welfare of the community (however narrowly defined in this case); where the law of contracts conflicts with this, he argued, the law must yield.¹⁰⁸ Norms (laws) must yield to metanorms. Among others who felt that the democratic tendencies (relatively economically democratic, at least) of the revolution were going too far, George Washington was prompted by these events to vocalize his support for a stronger national government and the adoption of the Fates-like Constitution to achieve such ends.¹⁰⁹

While the above example illustrates one aspect of the emancipatory tendency of the maxim, the South Carolina example is problematic – not least because of the proliferation of slavery (which was not seen as violating the health of the people). Nevertheless, it marks an important event in the history of the maxim – a precedent that contemporary debtors could arguably employ as well.

After the ratification of the U.S. Constitution (which both reflects the structure of the Fates and alludes to the Ciceronian maxim in the phrase ‘the general welfare’ in its preamble¹¹⁰), and throughout the 19th century, courts in all regions of the United States deferred to the maxim in affirming or sanctioning municipalities’ power to regulate all manners of daily life. Not only were “the people” empowered to build things (e.g., sanitation systems) that improved “the health of the people,” the maxim also empowered “the people” to destroy unhealthy conditions. If, for instance, a slaughterhouse, or tannery, a cache of gunpowder, wooden buildings, or any other noxious or potentially harmful condition or activity were found to intrude upon the public health (polluting waterways, producing toxic effluence, or noxious smells, or creating fire hazards, inter alia), the courts found again and again

¹⁰⁷ See Robert. A. Becker, *Salus Populi Suprema Lex: Public Peace and South Carolina Debtor Relief Laws, 1783-1788*, 80 S.C. HIST. MAG. 65, 74-75 (1979).

¹⁰⁸ *Id.* at 75.

¹⁰⁹ See LEONARD L. RICHARDS, *SHAY’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE 1-4*, 129-130 (2002).

¹¹⁰ See generally NOVAK, *supra* note 92, at 52.

that the people had the power and authority to eliminate the offensive operation.¹¹¹ Courts held nearly uniformly that the health of the people trumped both property rights and the right of contract.¹¹²

If the above leads some to conclude that the public health was being pursued in these instances in the interest of autonomy (over heteronomy), and manifested the messianic, healing aspect of the maxim (over the determinations of the invisible shepherd), they would do well to consider the fact that, though public health legislation did reflect a general tendency toward (quasi-) egalitarian salutariness, and while it did objectively ameliorate many harmful conditions (the noxious presence of slaughterhouses, for instance), this apparent salutariness was in conflict with a properly egalitarian health for the simple reason that these reforms were not only pursued in concert with deep expressions of heteronomy (in the form of economic exploitation, not to mention genocide, within a *nomos* that justified the enslavement of millions, wars of expansion, pervasive, systemic misogyny, among other concrete harms), the poor laws and sanitary reforms were not pursued for their own sake. Rather than a genuine, general health, the maxim's use in North America reflects not the manifestation of the healer but its semblance; instead of the deactivation of the *nomos*, its application is congruent with Carl Schmitt's particular notion of the *nomos*, which refers to an antagonistic concrete social order derived from the forcible conquest and "division of pastureland."¹¹³

Indeed, as Michel Foucault points out, public health legislation was not instituted to help the public generally.¹¹⁴ Epidemics and health crises may have been avoided, but these policies were enacted primarily to protect the wealthy from the slums and disease of the poor. In addition to protecting the rich from the poor, rather than the good health of the people in general, what was strived for was the minimal health of the poor. As opposed to that which was supportive of human flourishing, what was simply necessary for the survival of the general order was advocated and pursued. These policies advanced the interest of the *nomos*, the law of the shepherd, not the healer,

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Teschke, *supra* note 13, at 193.

¹¹⁴ See Michel Foucault, *Birth of Social Medicine*, in *POWER* (James D. Faubion ed., 2001).

since genuine health would not maintain and administer poverty (and mere survival) but eliminate it. Likewise, eugenicist policies, human subject research, and other practices that were justified by reference to the public health pursued not an actual, critical (genuine, general) health but the health of the state, or the health or wellbeing of only a particular class of people.

As such, a critical conception of health (of a genuine, general health) should not be mistaken for the type of health that Foucault, for instance, has argued provided the justification for the pervasive and invasive administrative control of populations.¹¹⁵ To be sure, such a conception (concerned with health in an instrumental sense – not the health of the human being but the limited health of the soldier or worker, or of the health of such entities as forests for their exchange-value, rather than for their use-value) may be said, to be the health of, if anything, the shepherd – of the *nomos* (custom, tradition, and coercive power). In other words, it is merely a qualified type of health, the health, ability, or power to dominate akin to Randolph Bourne’s observation that “war is the health of the state.”¹¹⁶ Unlike the messianic, which is “radically distinct from, and opposed to, coerced obedience,”¹¹⁷ such an instrumental type of health is an illusory health ancillary to obedience to the *nomos*, rather than an end in itself.

While history has produced numerous instances of this instrumental form of health (the semblance of actual health), the Nazis’ concept of health provides perhaps the most notorious example. Subjecting its population to every manner of biopolitical intrusion, the Nazi order appeared to be obsessed with health. In addition to the glorification of such outdoor activities (bound up with nationalistic sentiments as they were) as mountain climbing, and wrestling, and sports in general, scores of laws were passed that appeared to promote social health in order to advance only the health of the so-called *volk*. Bakeries, for instance, were required to carry whole grain bread¹¹⁸ – though, as with other regulations, this law had just as much to do with a genocidal national chauvinism than with any appreciation for the salutary

¹¹⁵ See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY; VOLUME I: AN INTRODUCTION* (Robert Hurley trans., Vintage Books 1990)(1976).

Quoted in HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 359 (2003 ed., 2003).

¹¹⁷ Butler, *supra* note 5, at 215.

¹¹⁸ See, e.g., ROBERT N. PROCTOR, *THE NAZI WAR ON CANCER* 47 (2000).

characteristics or lack thereof of white bread (which was associated with the French and said to be decadent).¹¹⁹ Rather than for its own sake, the Nazis' racist, superstitious, and militaristic pseudoscientific notion of health was entirely in the service of coercive power – the shepherd. In addition to restricting people of Jewish descent from entering parks, for instance (nominally to protect the fictitious German germ plasm from fictitious contamination), German women were rewarded for producing many children; not because a large population was good or healthy for its own sake, but simply because this produced workers and soldiers that strengthened the state – a type of instrumental reasoning that subtended the eugenicist policies of Nazi Germany, not to mention those of the U.S. Supreme Court in decisions upholding the constitutionality of forced sterilization in the 1920s and 30s.¹²⁰ Rather than an end in itself, health was always directed toward violence and power. As Martin Heidegger, a one-time enthusiastic member of the Nazi party, put it, for the Nazis the “essence of health” is “the capacity to act for the state.”¹²¹

Rather than aiding coercive forms of power (*potestas*), however, what we might refer to as critical notions of health involve perpetual contestations of and (in both the physiological as well as the political sense) resistances to coercive powers and structures.

7. REINTERPRETING THE MAXIM

Although the maxim would continue to be invoked by U.S. courts well into the 20th century, as the industrial business classes exerted more influence over social policy, a shift in legal philosophy led the courts to employ the maxim less and less frequently.¹²² By the beginning of the 21st century, the rise of the national security jurisprudence and the ideology of the so-called war on terror only furthered the reading of the maxim prioritizing the

¹¹⁹ *Id.*

¹²⁰ See *Buck v. Bell*, 274 U.S. 200 (1927).

¹²¹ EMMANUEL FAYE, HEIDEGGER: THE INTRODUCTION OF NAZISM INTO PHILOSOPHY IN LIGHT OF THE UNPUBLISHED SEMINARS OF 1933–1935 68 (Michael B. Smith trans., Yale U. Press 2011).

¹²² See NOVAK, *supra* note 92, at 247.

shepherd which sees the health of the state justifying harms, such as war and torture, committed against the actual health of actual people.¹²³

While the maxim that the health of the people should be the supreme law has been interpreted over the centuries to support authoritarian and heteronomous regimes, however, we must not forget that it has also been employed in egalitarian and emancipatory struggles. And as manifold exigencies (stemming from the unprecedented exploitation of the physical and social worlds) daily confront us, we ought to consider that the maxim could – and should – be (re)interpreted today to support a critical notion of health, which would, in practice, translate to a radically egalitarian politics.

Such a reinterpretation would have to grapple with three basic components of the maxim: health, people, and the supreme law. Of these, “the supreme law” is the most straightforward. We can simply refer to the supremacy clause in Article VI of the U.S. Constitution and similar clauses in other constitutions, which define the supreme law simply as that which prevails in any conflict.

Next is the term people. While Giorgio Agamben reminds us that, historically, in European languages at least, people has referred specifically to the poor,¹²⁴ and the marginalized, there are competing traditions with less egalitarian tendencies. The most notorious of these, perhaps, is that of the Nazi *volk*, which had an explicitly racist and genocidal meaning. Relatedly, since the Enlightenment ‘people’ has tended in practice to refer juridically to wealthy or property owning, white, males – denying not only the status of people but of human being from everyone else. In short, the term people has exclusionary as well as inclusionary implications. And though a proper examination of the term people would require a thorough investigation of, among others, non-human entities (organic and inorganic) with which human flourishing is interdependent (the so-called natural environment, or ecology, for instance, not to mention the wellbeing of non-human animals), for a provisional, emancipatory interpretation of the maxim we can note that, in the early 21st century, international norms recognize, at the very least, all

¹²³ See Conor Gearty, *State Surveillance in an Age of Security*, in SURVEILLANCE, COUNTERTERRORISM, AND COMPARATIVE CONSTITUTIONALISM 288–289 (Fergal Davis et al eds., 2013).

¹²⁴ See AGAMBEN, *supra* note 34, at 176.

human beings as people. As such, in addition to every human being, since our health is interdependent with theirs, ecosystems and animals generally ought to be included within the notion of people as well.

Of the maxim's three elements, the most problematic is the concept of health. Associated for centuries with tyrannical norms, the concept of health suffers from a host of definitional problems. For an egalitarian interpretation of the maxim, however, it perhaps suffices to discuss health in the Asclepian sense as that radiance or resistance which contests the coercive power of the law of the shepherd – the immanent (as opposed to transcendent), noncoercive power of autonomy, or *potentia*, as opposed to *potestas* and heteronomy.

Consistent with mainstream bioethical norms (the four basic principles of which are justice, beneficence, non-maleficence, and autonomy¹²⁵), as well as with Cicero's own position that something "is only just if it is voluntary,"¹²⁶ and that "a healthy human being could not live as a slave,"¹²⁷ so long as personal practices do not directly intrude upon the public health, questions of personal behavior lie entirely outside the social category of the "health of the people." In the shadow of the racist, patriarchal, and genocidal measures undertaken in the name of health and "the health of the people" in recent history, distinctions between private and public health remain crucial. In order for this autonomy, or *potentia*, to overcome its mere potentiality, however, the presence of particular, concrete conditions – the conditions for health – must be present. For just as it is in many respects an absurdity to force a person to be healthy, it is equally the case that justice is impeded to the degree that people are forced, by circumstances people are born into, to be *unhealthy*.

Because most people in the world today find themselves born into circumstances in which basic conditions of health, such as housing and nutrition, are systemically scarified, and not only the energy systems and

¹²⁵ See Raanan Gillon, *Medical ethics: four principles plus attention to scope* 309 BRITISH MED. J. 184(1994) <http://www.bmj.com/content/309/6948/184>.

¹²⁶ CICERO, ON DUTIES 12 (Miriam T. Griffin & E. Margaret Atkins eds., Cambridge U. Press 1991).

¹²⁷ LEO STRAUSS, CICERO, The Leo Strauss Center, University of Chicago (Spring, 1959), <https://leostrausscenter.uchicago.edu/sites/default/files/Cicero%20%281959%29.pdf>.

the water but the air itself is carcinogenic,¹²⁸ most people, then, find themselves born into an unjust position. And just as Cicero noted that slavery and health are antithetical, Schopenhauer's observation that poverty and slavery are indistinct¹²⁹ must lead us to consider (as copious studies linking poverty to shorter lifespans, poor nutrition, increases in unhealthy stress levels, and heightened exposure to toxins, among other harms) that poverty is contrary to health as well – and, therefore, is contrary to the supreme law. Vis-à-vis these problems, an emancipatory interpretation of the maxim might proceed in the following manner:

If the health of the people should be the supreme law, then those conditions that conflict with the health of the people should be against the law. As such, the existence of unhealthy conditions (slums, food deserts, brownfields, prisons, land mines, toxic waste, etc.) would be illegal according to the maxim. Consequently, they must not be allowed to persist – a turn of the maxim that gives rise to a duty to correct unhealthy conditions.

While what constitutes a condition (or precondition) for health is subject to debate, no reasonable person can disagree that there are certain basic material conditions without which health cannot flourish. The most basic of these are: housing, nutrition, health care, and a healthy environment (which, in the urban context, at least, includes basic infrastructures such as sanitation systems, transportation systems, communication systems, educational systems, etc.).

If a particular condition for health, such as housing (of a quality sufficient to support not basic survival but the minimal flourishing of health) is absent, then, the health of the people, the supreme law, is violated. And because this condition cannot be allowed to remain in a state of violation (a form of neglect that is itself a type of violence) a duty to correct the insufficient condition(s) arises. This duty, in this case, creates a positive right to housing sufficient to support actual health. And because this is a right, it must not only be supplied directly, not through exchange, but as an end in

¹²⁸ See WORLD HEALTH ORG., *Ambient (Outdoor) Air Quality and Health*, WHO.INT (Sep., 2016), <http://www.who.int/mediacentre/factsheets/fs313/en/>.

¹²⁹ See ARTHUR SCHOPENHAUER, *Government*, in *ON HUMAN NATURE: ESSAYS IN ETHICS AND POLITICS* 23, 28 (Thomas Bailey Saunders trans., Dover 2010)(1897).

itself, it must also be inalienable – i.e., not for sale. Through this interpretation of the maxim, positive rights to housing, food, health care, a healthy environment, and other conditions of health are uncovered.

According to a critical reading, then, the (messianic) maxim does not merely create a duty to deactivate the *nomos* – that is, to remove unhealthy conditions (e.g. banning the ecocidal commercial meat industry, and the fossil fuel industry). A duty of care, to supply basic conditions of health, extends from this duty to correct, which in turn creates positive rights to the conditions for health. The basis of a society's legitimacy, the satisfaction of its duty to itself, is to supply these conditions to itself – not in exchange for any other thing, or act, but for its own sake. According to a critical reading of the maxim that the health of the people should be the supreme law, the society that neglects to correct unhealthy conditions and supply the conditions of health – that neglects to dismantle the mythic law and realize the law's messianic command – commits a positive harm; where it fails to satisfy this duty a society is in breach, and itself needs to be corrected in order to comply with the demands of justice.

8. CONCLUSION

This essay has argued that the fundamental structure of Western law is grounded in a dynamic of conservation and change, law as order and law as justice, preservation of the existing order and its messianic destruction. Since the dawn of civilization, when legal systems were indistinct from mythical orders, the concept of necessity, symbolized by the *nomos*, the Fates, and the etymologically and conceptually related figure of the shepherd, has played a role in justifying existing orders. So prevalent is this symbolism that it arguably displaced and colonized its own negation; for as the intuition of the messianic (the healer as opposed to the shepherd) traveled through myth and into history the exception became conflated with the rule. Jesus as healer became interblended with Jesus the shepherd, and the healer (Asclepius, Hygieia, Salus, Jesus) of the maxim *salus populi suprema lex esto* was fused, or confused, with Necessity and the Fates – i.e., the *nomos*.

Conflated with necessity, the maxim has functioned to preserve and conserve legal orders. Yet its messianic potentiality has historically flickered into actuality as well, justifying emancipatory deviations from traditional orders. And though the maxim remains ambiguous (and, like Augustine's City of God and City of Man, the healer and the shepherd are blended and to some degree indissoluble), a critical reading of the maxim uncovers a radically democratic, egalitarian notion of justice that, by prioritizing the actual health, nourishment, and wellbeing of the people of the world over the necessity of the existing biophagous order, could enable the development of an actually healthy, just society. Rather than the states of emergency justified by necessity, perhaps this is the "real state of emergency" of which Benjamin writes,¹³⁰ one which implies a messianic deactivation of the law of the shepherd, and the instantiation of noncoercive modes of social life – the law of the healer.

¹³⁰ Benjamin, *supra* note 47, at 257.