

§ 3 Life That Does Not Deserve to Live

3.1. In 1920, Felix Meiner, one of the most distinguished German publishers of philosophical works, released a blue-gray *plaque* bearing the title *Authorization for the Annihilation of Life Unworthy of Being Lived* (*Die Freigabe der Vernichtung lebensunwerten Lebens*). The authors were Karl Binding, a highly respected specialist of penal law (an insert attached to the jacket cover at the last minute informed readers that since the *doct. iur. et phil.* K. B. had passed away during the printing of the work, the publication was to be considered as "his last act for the good of humanity"), and Alfred Hoche, a professor of medicine whose interest lay in questions concerning the ethics of his profession.

The book warrants our attention for two reasons. The first is that in order to explain the unpunishability of suicide, Binding is led to conceive of suicide as the expression of man's sovereignty over his own existence. Since suicide, he argues, cannot be understood as a crime (for example, as a violation of a duty toward oneself) yet also cannot be considered as a matter of indifference to the law, "the law has no other option than to consider living man as sovereign over his own existence [*als Souverän über sein Dasein*]" (*Die Freigabe*, p. 14). Like the sovereign decision on the state of exception, the sovereignty of the living being over himself takes the form of a threshold of indiscernibility between exteriority and interiority, which the juridical order can therefore neither exclude nor include,

neither forbid nor permit: "The juridical order," Binding writes, "tolerates the act despite the actual consequences that it must itself suffer on account of it. It does not claim to have the power to forbid it" (*ibid.*).

Yet from this particular sovereignty of man over his own existence, Binding derives—and this is the second, and more urgent, reason for our interest in this book—the necessity of authorizing "the annihilation of life unworthy of being lived." The fact that Binding uses this disquieting expression to designate merely the problem of the lawfulness of euthanasia should not lead one to underestimate the novelty and decisive importance of the concept that here makes its first appearance on the European juridical scene: life that does not deserve to be lived (or to live, as the German expression *lebensunwerten Leben* also quite literally suggests), along with its implicit and more familiar correlate—life that deserves to be lived (or to live). The fundamental biopolitical structure of modernity—the decision on the value (or nonvalue) of life as such—therefore finds its first juridical articulation in a well-intentioned pamphlet in favor of euthanasia.

It is not surprising that Binding's essay aroused the curiosity of Schmitt, who cites it in his *Theorie des Partisanen* in the context of a critique of the introduction of the concept of value into law. "He who determines a value," Schmitt writes, "*eo ipso* always fixes a nonvalue. The sense of this determination of a nonvalue is the annihilation of the nonvalue" (p. 80, n. 49). Schmitt approximates Binding's theories concerning life that does not deserve to live to Heinrich Rickert's idea that "negation is the criterion by which to establish whether something belongs to the sphere of value" and that "the true act of evaluation is negation." Here Schmitt does not seem to notice that the logic of value he is criticizing resembles his own theory of sovereignty, according to which the true life of the rule is the exception.

3.2. For Binding the concept of "life unworthy of being lived" is essential, since it allows him to find an answer to the juridical question he wishes to pose: "Must the unpunishability of the killing of life remain limited to suicide, as it is in contemporary law