1 Introduction

"In him was life, and that life
was the light of all mankind."

John 1:4

1.1 "Life" – a socio-cultural theme at the beginning of the 20th century

In Hermann Hesse's *Steppenwolf* from 1927, we meet Harry Haller, a man driven into a state of crisis by fundamental contradictions both within his own mind and society at large. Harry leads an intellectual-bohemian life, where classical literature and art, usually digested together with alcohol and cigars, form the essential parts of daily – and nightly – life. He despises the direction the cities have been going in, with their storehouses, neon advertising signs, buildings occupied by lawyers, doctors, and barbers, their cinemas, variety shows, and dance halls with loud jazz music and foxtrot-dancing masses. He deplores the shallow and self-righteous bourgeois way of life, marked as it is by a belief in reason, progress, and evolution, but at the same time detached from reality. He is, in short, a stranger; a "stray wolf of the steppes, now part of the herd of city-dwellers".[1]

1 Hermann Hesse, *Steppenwolf* (first published 1927, David Horrocks tr, Penguin Books 2012) 18. Harry's attitude towards the bourgeoisie way of life was, however, ambiguous. He loved the smell of plant pots, floor polish, turpentine, and mahogany, something that reminded him of his childhood, see p. 15 f. This tension between the world of the bourgeoisie home, with its calm atmosphere, and the more adventurous and unpredictable world outside, is also something that Hesse thematised in his

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Originally, Harry's way of living was a result of his yearning for independence and preservation of freedom. Yet freedom can be paradoxical and turn into its antithesis, and for Harry, his isolated position has turned out to be a "living death". He has become a "melancholy hermit in his cell crammed full of books" and "an outsider to all social circles, loved by no one, viewed with suspicion by many, in constant, bitter conflict with public opinion and public morality". His desperation has driven him so far that he considers leaving the world.[2]

But then he meets Hermione, a lifebuoy of a muse who leads him away from the lethal razor and turns him towards life instead. "You have strange ideas of what it means to live!", she exclaims when Harry tells her that his life has consisted of studying at the university, making music, reading and writing books, and travelling.[3] She guides him into a new form of life, and the first step of this metamorphosis is, tellingly, that they buy a gramophone and that she teaches him the foxtrot in his attic. At first he is hesitant, for this is a real clash of civilizations: "To expect me to tolerate the sound of American hit-tunes in my room, my refuge, my thinker's den with its volumes of Novalis and Jean Paul, and to dance to them, was simply too much to ask."[4] But he gives in, perhaps because he realizes how Hermione has shattered "the clouded glass cloche that covered my corpse-like existence" and thereby offered "an open door through which life could get in to me".[5]

In the book's fictitious preface, the editor – the nephew of the woman from whom Harry rented his attic, who has decided to publish Harry's notebooks after he has suddenly disappeared – writes that the notebooks "are a document of our times, for today I can see that Haller's sickness of mind is no individual eccentricity, but the sickness of our times themselves, the neurosis of that generation to which Haller belongs." Harry himself had told him that "[n]ow, there are times when

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Demian (first published 1919, Suhrkamp Taschenbuch 1974), where the first chapter is – tellingly enough – titled "two worlds".

2 *Ibid.* 52, 73 and 140.

3 *Ibid.* 95.

4 *Ibid.* 125.

5 *Ibid.* 110.

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a whole generation gets caught to such an extent between two eras, two styles of life, that nothing comes naturally to it since it has lost all sense of morality, security and innocence."[6]

And there is perhaps something to it. Harry's turn from the isolated attic full of books towards the pulsating and vibrant *life* of the dance halls can be seen as mirroring a more general socio-cultural critique that dates back to around the turn of the century.[7] In this period, the intellectual sphere was full of "life"; as a concept, a motive, or an idea, "life" permeated the philosophy, literature, fine arts, music, theology, and pedagogy of the days.[8] In the arts, a number of avant-garde movements entered the scene, and they thematized motives like youth, spring, landscape, nakedness, sexuality, dance, experience, and, finally, life.[9] One example was the art nouveau, which was "deliberately revolutionary, anti-historicist, anti-academic" and which used "metaphors of nature, youth, growth and movement so characteristic for the time."[10] Furthermore, the arts became influenced by the machine and turned increasingly into a commercialized mass phenomenon. The uneasiness and insecurity are very much present in for instance Filippo Marinetti's (1876–1944) manifesto of futurism from 1909. The manifesto declared that "the beauty of the world has been enriched by a new form of beauty: the beauty of speed". "Time and Space died yesterday", the pamphlet followed up, and called for the futurist movement to "destroy

6 *Ibid.* 23.

7 Hermann Hesse (1877–1962) wrote *Steppenwolf* in the virulent atmosphere of the 1920's, and interwar topics are present in the book, see e.g. *ibid.* 85 f. But Hesse also points back to the turn from the 19th to the 20th century, for instance with the following on p. 23–24: "A man of Nietzsche's mettle had to endure our present misery more than a generation in advance. Today, thousands are enduring what he had to suffer alone without being understood".

8 Karl Albert, *Lebensphilosophie. Von den Anfängen bei Nietzsche bis zu ihrer Kritik bei Lukács* (new edn, Verlag Karl Alber 2017) 7; Elenor Jain, *Das Prinzip Leben. Lebensphilosophie und Ästhetische Erziehung* (Peter Lang 1993) 51.

9 Albert (2017) 7 with further reference to Dolf Sternberger, *Über Jugendstil* (Insel-Verlag 1977) 108; Modris Eksteins, *Rites of Spring. The Great War and the Birth of the Modern Age* (Doubleday 1989) 31 and 83.

10 E. J. Hobsbawm, *The Age of Empire 1875–1914* (first published 1987, Sphere Books Ltd 1991) 229–230.

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museums, libraries, academies of every sort, and to fight against moralism, feminism and every utilitarian or opportunistic cowardice."[11]

In the field of philosophy, a new, critical life philosophy (*Lebensphilosophie*) emerged in Europe around the turn of the century, most notably associated with Friedrich Nietzsche (1844–1900), Wilhelm Dilthey, (1833–1911), and Henri Bergson (1859–1941).[12] Nietzsche, who followed in the footsteps of Arthur Schopenhauer (1788–1860), criticized the abstract philosophy that was taught at the universities, and claimed that the criterium for a true critical philosophy was "whether one can live by it".[13] Mainstream philosophy, he further contended, had gone astray and was valuing knowledge (*Erkennen*) at the expense of life (*Leben*).[14] For Dilthey, it was the adoption of paradigms from the physical science to the humanities that was the main problem; he directed his critique against an atomistic-mechanical worldview, rationalism and positivism, and mainstream logics and epistemology.[15] "Current philosophical thinking thirsts and hungers for life", he wrote, and declared that a comprehension of "the entire and complete reality" was the proper objective of philosophy.[16] Bergson, for his part, introduced in his philosophy a concept of a non-predetermined vital force (*élan vital*) inherent in all things living, in an attempt to challenge the rationalist mechanic or teleological understandings of life.[17] In his epistemology, moreover, Bergson declared that whereas we employ our intellect in matters of natural science, this mode of thought has an "inherent incapability of understanding life".[18] In philosophy, it is rather primarily through intuition, Bergson claimed, that we are able to gain a

11 Filippo Tommaso Marinetti, 'The Founding and Manifesto of Futurism' (*Le Figaro* 20 February 1909, printed in Lawrence Rainey, Christine Poggi, and Laura Wittman (eds), *Futurism: An Anthology*, Yale University Press 2009) 49–53, 51.
12 On the predecessors and roots of life philosophy, see Albert (2017) chapter 1.
13 Quoted from *ibid.* 43.
14 Quoted from *ibid.* 47.
15 Jain (1993) 42–47.
16 Quoted from Albert (2017) 58 and 59, with further references to Wilhelm Dilthey, *Gesammelte Schriften*, Volume 7, 268 and Volume 8, 17.
17 Albert (2017) 79.
18 Quoted from *ibid.* 80.

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deep and holistic understanding of life. With this more anti-intellectual intuitivism, Bergson hoped to "free the philosophy from the narrowness of mainstream science, in order to bring it back closer to life".[19] This attempt to approximate "philosophy" and "life" was a grand theme of the life philosophers, who in general were "entranced by movement, word, and life, sometimes to the point of exultation" and who "opposed reason with intuition, theory with practice, the abstract with the concrete, quantity with quality, analysis with synthesis, the part with the whole."[20] They used "life" as "a polemical cultural concept targeting a 'civilization that has become intellectualist and anti-life,' against which it sets the power of 'true experience' in all its irrationality."[21]

If we cross the Atlantic, pragmatism, another critical and anti-intellectualist philosophical direction, was one of the main currents within philosophy around 1900. In the words of its leading spokesperson, William James (1842–1910), pragmatism turned "away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins" and "towards concreteness and adequacy, towards facts, towards action, and towards power."[22] More generally, the period saw a "revolt against formalism", as it is coined in a classical study. The revolters were scholars from different branches of the humanities and social sciences who were "convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of

19 *Ibid.* 79–88, the quote by Bergson from 87. On Bergson and "*le bon sens*", including his criticism of the abstractions of natural science, language and legal thinking, cfr. also Hans-Georg Gadamer, *Truth and Method* (2nd edn, Joel Weinsheimer and Donald G. Marshall tr, Continuum 2004) 23.

20 Jan Romein, *The Watershed of Two Eras. Europe in 1900* (Arnold J. Pomerans tr, Wesleyan University Press 1978) 466.

21 Stefan Korioth, 'Introduction' in Arthur Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 41–49, 47 with further reference (endnote 17, p. 346). The idea that life was a "polemical concept" – a *Kampfbegriff* – for the life philosophers is common, see Albert (2017) 9 and Jain (1993) 51. Jain credits the expression to Otto Friedrich Bollnow, *Die Lebensphilosophie* (Springer-Verlag 1958) 4.

22 William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (first published in 1907, The Floating Press 2010) 39.

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containing the rich, moving, living current of social life" and who "insist[ed] upon coming to grips with life, experience, process, growth, context, function."[23]

In the field of legal scholarship, corresponding trends can be observed in several countries in the first decades of the 20th century. When the *Steppenwolf* Harry Haller, at this stage obviously well into his metamorphosis, states that "anyone who makes thinking his priority may well go far as a thinker, but when all's said and done he has just mistaken water for dry land, and one of these days he'll drown"[24] – then this is something that could equally well have been written by several legal scholars in this period. And many of them would probably have approved of it when Haller explained that "knowledge and understanding were not what I needed. Instead, what I was desperately longing for was experience, decisive action, the cut and thrust of life".[25] In this period, legal scholarship went through a general reorientation similar to the one that took place in other realms of cultural and intellectual life – one might speak of a legal *Lebensphilosophie*, a legal vitalism. Many scholars criticized a mainstream legal thinking which they considered to be formalistic, abstract, empty, theoretical, mechanical, obsessed with systematization and logics, and/or detached from the practical needs of society. The legal theorist Wolfgang Friedman later commented that "[l]egal logic and techniques came to be seen as elements but by no means the sole, or even the predominant factor, in the unending race between law and new social problems".[26] More recently, the legal historian Katharina Isabel Schmidt has spoken of "a genuine response to the theoretical and practical challenges of modernity advanced by individuals who had one foot each in the legal

23 Morton G. White, *Social Thought in America: The Revolt Against Formalism* (The Viking Press 1949) 11 and 13. See similarly the overview in Laura Kalman, *Legal Realism at Yale 1927–1960* (The University of North Carolina Press 1986) 14–16 of functionalism as a broad intellectual phenomenon in the social sciences.

24 Hesse (2012) 17.

25 *Ibid.* 114.

26 Wolfgang Friedmann, *Law in a Changing Society*, 2nd edn (Steven & Sons 1972) 47.

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establishment and the avant-garde antiestablishmentarianism that surrounded them".[27]

As a part of their critique, several of these scholars – who are often referred to in the literature as anti-formalists, critics of jurisprudence of concepts (*Begriffsjurisprudenz*), anti-positivists, sociological lawyers, legal realists, and so on –[28] adapted the widespread "life"-trope into legal language. In one way or another, they wrote about the relationship between "law" and "life". What they wanted was, very broadly speaking, that lawyers should "shatter the clouded glass cloche" (Hesse) that allegedly isolated law from life. This study is devoted to these debates about "law" and "life" as theoretical issues in American and German constitutional legal scholarship from about 1900 until about 1930.

1.2 A living topic

In the next chapter, I will explain *how* this study is conducted, i.e. its methodological framework. At this point, I will say something about *why* the particular "law" and "life"-topic has been chosen for this study. This means providing a brief overview of existing research on the topic and in what sense this work brings something new to the table, as well as explaining why the legal theoretical debates from the early 20th century might be of interest to us today.

Law deals with life. It deals with human beings: their conduct, their relations to other human beings, their properties, their money – their way, in brief, of living together in a society. As such, claiming that law is isolated from life is obviously intended as a fundamental critique. It is a diagnosis, a way of asserting that law doesn't function the way it should, that something is completely wrong. Most often, such claims are then combined with alternative programs, narratives and directions

27 Katharina Isabel Schmidt, 'Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to "Life," 1903–1933' (2016) 39 GER. STUD. REV. 121, 137.

28 I will come back to terminological issues in section 2.2.

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for law. This was at least the general pattern at the beginning of the 20th century: diagnoses combined with proposed cures.

The debates concerned what the Danish legal philosopher Alf Ross defined as "jurisprudential problems", i.e. something that "dwells, so to speak, one storey higher than the study of law and 'looks down' upon it".[29] They dealt with a number of fundamental issues at the crossroads of legal theory, legal methodology, legal ideology, ideals of legal science and legal education, and, of course, politics. They were also related – in various and heterogenous ways – to what one could coin certain "legal theoretical antinomies", to borrow an expression from the legal theorist Wolfgang Friedmann.[30] Was law (first and foremost) a normative or a factual phenomenon? Should it be approached by intellect or intuition? Was it bent towards stability or change? Should legal science be concrete or abstract, practical or theoretical? As a scientific field, should it adhere to some sort of positivism or some sort of idealism?

Given this combination of a fundamental critique that touched upon a number of fundamental issues, it is no wonder that there is an extensive literature devoted to legal theoretical developments at the beginning of the 20th century. The widespread use of "life" as a trope in legal scholarship at the beginning of the 20th century has already been noted and analysed by legal historians, most recently by Katharina Isabel Schmidt.[31] As demonstrated in German legal historiography, it even affected the discipline of legal history itself, as a new, "life"-oriented understanding of law shaped the way legal historians in this period looked

29 Alf Ross, *On Law and Justice* (Steven & Sons Limited 1958) 26.

30 Friedmann (1967) lists, in chapter 6, the following principal antinomies in legal theory: individual and universe, voluntarism and objective knowledge, intellect and intuition, stability and change, positivism and idealism, collectivism and individualism, democracy and autocracy, nationalism and internationalism.

31 See in particular Schmidt (2016) and Katharina Isabel Schmidt, 'How Hermann Kantorowicz Changed His Mind About America and Its Law, 1927–1934' (2023) 41 *Law and History Review* 93. See also Hans-Peter Haferkamp, 'Legal Formalism and its Critics' in Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 928, 936 f.; Joachim Rückert, 'Die Schlachtrufe im Methodenkampf – ein historischer Überblick' in Joachim Rückert and Ralf Seinecke (eds), *Methodik des Zivilrechts – von Savigny bis Teubner*, (2nd edn, Nomos 2012) 501–550, for instance para. 1379 f.

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upon and approached legal pasts.[32] If one, more generally, gathered the entire literature on anti-formalism, anti-positivism, the critique of jurisprudence of concepts or orthodox legal thought, and so on, it would cover shelf upon shelf.[33] Some studies have also included the comparative aspect between German and American legal thought.[34] To my knowledge, however, it is not written a comparative study on the theoretical developments that focuses more specifically on constitutional scholarship.[35] By combining these two elements – the *comparative* aspect *and* the focus on *constitutional* scholarship – this study aims to contribute with new perspectives to the existing literature.

It should also be mentioned briefly that the choice of topic for this study was initially motivated by methodological debates in Norwegian constitutional scholarship in the period, which contained references to American and German positions and debates. In future research, it could hopefully be possible to expand the geographical scope further – the Scandinavian legal realism definitely belongs to the same picture,

32 See Johannes Liebrecht, *Die junge Rechtsgeschichte. Kategorienwandel in der rechtshistorischen Germanistik der Zwischenkriegszeit* (Mohr Siebeck 2018) 278, 282, 327 f. and 380–381; Joachim Rückert, 'Die Deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen' in Joachim Rückert and Dietmar Willoweit (eds), *Die Deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen* (Mohr Siebeck 1995) 177.

33 Just to mention a few standard accounts, see e.g. Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn, Vandenhoeck & Ruprecht 1967) part 6; Michael Stolleis, *A History of Public Law in Germany 1914–1945* (Oxford University Press 2004), chapter 5; Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (Oxford University Press 1992).

34 See already Hermann Kantorowicz, 'Some Rationalism about Realism' (1934) 34 YALE L.J. 1240, 1240–1241. See further James E. Herget and Stephen Wallace, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73 VA. L. REV. 399; Schmidt (2016) and Schmidt (2023); David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press 2012); David M. Rabban, 'American Responses to German Legal Scholarship: From the Civil War to World War I' (2013) 1 *Comparative Legal History* 13.

35 See, however, to some extent Arthur J. Jacobson and Bernhard Schlink, 'Constitutional Crisis. The German and the American Experience' in Arthur J. Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 1–39. This contribution focuses mostly on German developments.

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and so does developments in French legal thinking, and most likely other countries too.[36] Further comparative research on these issues would deepen our understanding of constitutional, legal-theoretical and political developments in Western societies (and perhaps beyond) at the beginning of the 20th century.

Although this study offers a new perspective by focusing more specifically on constitutional scholarship, it is a more fundamental question whether these debates, that are now about 100 years old and that took place in very different historical contexts, are worth looking at today. Do they "speak" to us, and if so, should we "listen" to them in hope of learning something from history for our own lives? Or are they rather "a settled chapter of the history of science"?[37]

As I will explain in more detail in the next chapter on methodology, the primary aim with this study is a historicizing, not an actualizing one – the ambition is to learn something about, not from, history. As a consequence, the project does not hinge on the question about actuality and present-day utility. But at any rate, the debates *are*, I think, at some level undeniably relevant today. This can be observed by the simple fact that they are still written about – either the debates in themselves and their historiography,[38] the more general legal-historical contexts they were a part of,[39] or single authors who participated in

36 The most in-depth legal historical analysis of Scandinavian legal realism in English language is now Toni Malminen, *The Intellectual Origins of Legal Realism* (doctoral dissertation, University of Helsinki 2016). On French developments, where the influential writings of François Gény are often mentioned, see e.g. Wolfgang Friedmann, *Legal Theory* (5th edn, Steven & Sons 1967) 328 f. See, moreover, Liebrecht (2018) 381 with reference to literature on France and Italy.

37 I borrow this expression from Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechtslehre – ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Franz Steiner Verlag 2001), also printed in *Ausgewählte Aufsätze und Beiträge*, Volume I (edited by Stefan Ruppert and Miloš Vec, Vittorio Klostermann 2011) 545–566.

38 See e.g. Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide. The Role of Politics in Judging* (Princeton University Press 2010); Axel-Johannes Korb, *Kelsens Kritiker. Ein Beitrag zur Geschichte der Rechts- und Staatstheorie (1911–1934)* (Mohr Siebeck 2010).

39 See e.g. Laura Kalman, 'In Defense of Progressive Legal Historiography' (2018) 36 LAW & HIST. REV. 1021. And in the run-up to the 100th anniversary of the Weimar Constitution in 2019, several legal historical works were published, see Udo Di

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the debates.[40] What is more, the debates were, as already mentioned, connected to a number of legal theoretical "antinomies". Some of the ideas and views that were put forward might be too bound up with their historical context for us to make any "use" of them today – they might be legal theoretical dead ends. But other might be vital, might offer us perspectives on constitutional law and theory that we are still dealing with today (and, presumably, tomorrow too). A hint at this is offered by the fact that the "life"-trope is still alive in legal language; in the United States, the notion of a "living Constitution" has been vividly discussed in constitutional law,[41] whereas in Europe, similarly, one of the most important legal doctrines of the last decades has been that of the European Convention on Human Rights as a "living instrument".[42]

1.3 The life of this study – a brief overview

In the following, I will start out in Chapter 2 with some reflections on the methodology of the study, drawing mainly upon theories of comparative legal history. Then I will proceed with the analyses of constitutional legal scholarship in Germany (Chapter 3) and the United States (Chapter 4), where more detailed overviews will be provided at the beginning of each chapter. These two chapters share, roughly

Fabio, *Die Weimarer Verfassung. Aufbruch und Scheitern* (C. H. Beck 2018); Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018); Christoph Gusy, *100 Jahre Weimarer Verfassung. Eine gute Verfassung in schlechter Zeit* (Mohr Siebeck 2018).

40 About Carl Schmitt, to take just one example, it has been said that barely a month passes without a new publication on him, see Volker Neumann, *Carl Schmitt als Jurist* (Mohr Siebeck 2015) V (preface).

41 See e.g. David A. Strauss, *The Living Constitution* (Oxford University Press 2010). For an overview of the historical roots of this concept, see G. Edward White, *The Constitution and the New Deal* (Harvard University Press 2000) 205 f. and section 4.3.8 below.

42 This is the well-known doctrine developed by the European Court of Human Rights concerning the dynamic interpretation of the European Convention on Human Rights in the light of present-day conditions, see already *Tyrer v. The United Kingdom* App no. 5856/72 (25 April 1978) para. 31. On the doctrine, see e.g. Francis Jacobs, Robert White, Clare Ovey, Bernadette Rainey and Elizabeth Wicks, *The European Convention on Human Rights* (6th edn, Oxford University Press 2014) 74.

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speaking, similar structures, but they are nonetheless separate studies – the comparison is saved for Chapter 5. In this final chapter, I will also conclude by offering some more theoretical perspectives on the historical developments that have been described in the two main chapters of the study.

Two notes on formalities: First, all quotes from non-English works are translated by me, unless otherwise indicated. Second, everything that is kept within brackets inside a quote is added by me – again, as long as I have not positively indicated something else.

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