

“By Their Acts You Shall Know Them...” (And Not by Their Legal Theories)

*By Martti Koskenniemi**

Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions. Edited by Christian Joerges and Navraj Singh Ghaleigh with a prologue by Michael Stolleis and an epilogue by JHH Weiler. Hart Publishing, 2003. ISBN 1-84113-310-8. BP 55/\$ 116.

A.**

"Christian Joerges and his Nazis..." – this was the reaction of many of the colleagues of the two editors, as recorded by one of them, Navraj Ghaleigh, to the project from which this collection of essays emerges. That this should have been the reaction of a part of the legal profession – or perhaps of the European law profession – testifies less to its insensitivity to problems in the European past than to its utter marginalization from the core of social and political theory for which the ethics and politics of "memory" has for some years been the subject of intense debate. Viewing itself as above all a technical craft and, if pressed, finding its justifying ethos from an optimistic functionalism, European law projects the past principally as a place from which to escape. Its founding narrative situates war as the breaking-point: the immediate past as ideology, division and violence, the future as economy, unity, and peace. This move is seen as pedigree history, that is, as the fulfillment of the latent promise of (Europe's) origin in the present.¹ By this means, everything between, say, the French Enlightenment and the Schuman Plan

* Professor of International Law, University of Helsinki. Email: martti.koskenniemi@helsinki.fi.

** Previously published in 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 839 (2004).

¹ On "pedigree history" see RAYMOND GEUSS, MORALITY, CULTURE, AND HISTORY. ESSAYS ON GERMAN PHILOSOPHY 1-5 (1999).

may be seen as an obscurantist mistake, significant only for today's Europeans' recognizing what we are *not*.

No doubt these essays are highly due. One feels almost embarrassed to read author after author testify to the urgency of a task that should have been started years ago. Joseph Weiler is right to stress in his Epilogue that the problems of Nazism and Fascism are European problems as much as "German" or "Italian" problems. In contrast to the extensive *Vergangenheitsbewältigung* (coming to terms with the past) carried out by German society, and finally also the German legal profession, as recounted in Michael Stolleis' introductory chapter, the rest of Europe, particularly Eastern and Central Europe, have barely embarked upon working on their past. Now is certainly the time to remind ourselves that the European Union was and is an economic project only in a secondary sense, and that its core lay in 1950 as it does today in a political rejection of precisely the "darker legacies" of which this book speaks. Whatever the merits of the specific studies carried out herein, the principal virtue of this book – for which the editors should be warmly thanked – is that it is there, standing hopefully at the outset of a widespread and intensive new research agenda for European law. It would be a scandal if this work did not trigger subsequent studies on the role and influence of Fascist or National-Socialist thinking in individual European locations – not out of archival interest (though that should not be underestimated) but as a contribution to today's European politics.

Most of the 19 essays together with the Prologue by Stolleis and Epilogue by Weiler do seek to reach beyond chronicling the role of Nazi or Fascist legal thinking in the inter-war period. Almost all of the authors are law professors. Many of them are German or Italian, but there are also essays by British and American scholars. The editors' ambition has been "to deal not only with ruptures but with continuity"² (Joerges, 169). This is easier said than done. One needs first to generalize from whatever exist as significant aspects of a contentious past – and then to link those generalizations to an intellectual and institutional present in which one is a participant oneself. Neither task is politically innocent and no conclusion assured to be proof against politically obnoxious uses. In this regard, the ambition of the essays may have focused on the wrong place. Legal and historical analyses are surely necessary in order to enlighten today's political decision-makers. But the past does not produce ready-made answers for today's problems. No history can set aside the indeterminacy of legal and political doctrines, including doctrines of European integration and law, and free the decision-makers from the essential contingency of the situation in which legal and political choices are made.

² Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualisations of the Integration Project*, in *DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS* 167, 169 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

B.

One approach to studying the "legacy" of the darker aspects of European law that is unlikely to succeed is to seek to define, by some general formula, what might count as a "National Socialist" or "Fascist" legal doctrine so as to be able to identify its eventual contemporary recurrence. In itself, such an effort might seem laudable enough. Oliver Lepsius, for instance, suggests that to single out:

"definite special features of National Socialist law [might make] it possible to attribute positions and concepts to National Socialism, and correspondingly also show continuities and breaks in the development of legal thinking."³

The temptation is to assume that such a definition might work as a litmus test making possible the early recognition of incipient forms of "evil" thinking before they have reached positions of influence. Like early cancerous formations, they might then be removed before it is too late.

Put in this way (which the contributors do not do), the problematic nature of the suggestion becomes, I think, plain. Surely the one thing European societies do not need, are standards of political correctness (together with eventual watchdog institutions) that identify forms of thinking, or legal doctrines or methods as somehow intrinsically geared towards Fascism, irrespective of what those doctrines themselves teach. Though most of the authors concede that the fluid and eclectic nature of Fascist theorizing makes it hard to define it by reference to specific doctrinal positions, most of them nonetheless stress the need of some such definition, at least, as Lepsius puts it, in terms of a "comparative yardstick".⁴ I am uncertain about the necessity of this. The genuinely political task of identifying attitudes or positions that should be rejected because of what we know from history is both easier and more difficult than the way of such "definition".

It is easier because a doctrine that suggests, for example, that an ethnic community is of "lower" level than one's own is a racist doctrine and should be treated as such whatever reasoning or method it invokes to support itself. We know racist doctrines by what it is they propose to do. No litmus test is needed. Likewise, a

³ Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS *supra* note 2, at 19, 20.

⁴ *Id.*, 39.

doctrine such as Höhn's in Germany or Panunzio's in Italy that suggests that the Nazi/Fascist Party's word should be law is undoubtedly a Nazi/Fascist doctrine. But the matter becomes much more complex when one tries to identify some views as "intrinsically racist", whatever it is they teach because, we think, racist policies are *necessary outcomes* of such doctrines. This approach has an altogether excessive faith in the social determinacy of political or legal doctrines, that is, in the tendency of particular doctrines to bring out particular outcomes, whatever the circumstances. To take an example, it is certainly possible to buttress racist policies by, for example, Darwinist and creationist arguments alike. Perhaps some communities are thought inferior because this has been decreed by the "laws of evolution" or the "laws of god". But surely the fact that some people *may* make such arguments does not compel us to view Darwinism and creationism as *inherently* "racist".

The problem lies not in the doctrines, but in their interpretation, the consequences that people draw from them. What do "laws of evolution" or "divine laws" actually say? On this, as on *any other conceivable doctrine*, people may disagree. We are inevitably in an area of historical undecidability, and thus of political evaluation. Evolutionism and creationism can both be associated with racist and non-racist policies and the interesting stories are those that recount how this has taken place in particular environments and at particular periods. Intellectual history should not just describe abstract doctrines without regard to how they have been used in particular contexts. This is why those essays that have concentrated in single countries – the prologue by Stolleis (the only one that expressly discusses also the difficulty of "coming to terms" with a Nazi or Fascist past), as well as the essays on Italy, Spain and Austria – are in fact most effective in demonstrating the elusiveness of abstract doctrinal categories and the ease with which different positions or methods – even initially liberal or merely "authoritarian" positions (such as, for instance, those having to do with the use of the bona fides principle in the law of contract or with the protection of workers and against sexual discrimination in labor law – turn to support abominable causes.⁵

The effort to pin down legal doctrines or methods as "Nazi" or "Fascist" is doomed to fail for precisely the reasons that make it nonsense to say that Darwinism or creationism are "inherently racist" forms of reasoning. The problem about such claims resides in the inflated expectations of legal determinacy pinned on such doctrines. Though none of the essays makes this point expressly, many arrive in it

⁵ See e.g. Pier Giuseppe Monateri and Alessandro Somma, *The Fascist Legal Theory of Contract*, 55, 61-63 and James Q Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, 243, 251-264, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2.

in different ways. Vivian Grosswald Curran demonstrates that it is possible to connect extreme right wing policies (but one surely needs to add, extreme left-wing policies, too) with positivist and as well as naturalist arguments, formalist as well as anti-formalist styles or reasoning: of this Vichy France and Hitler's Germany provide good examples. And as Monateri and Somma note, while the Nazis rejected the use of Roman law for a more *völkisch* (folkish) German legal orientation, Fascists grasped it to buttress the authority of *Il Duce*.⁶ The stories about the ways of jurisprudence and legal practice in Nazi Germany, Vichy France, Mussolini's Italy, but also South Africa under *apartheid* or totalitarian regimes in South America (these are only fleetingly referred to in this book) provide examples of the cunning of extreme right-wing reason as it is able to co-opt almost any fashionable legal vocabulary so as to defend Fascist policies. As Menéndez puts it in regard to the problem of how to characterize Franco's regime in Spain: "To those at the wrong end of arms, so to say, it was quite irrelevant whether fascists or authoritarians were violating their rights."⁷ *By their acts you shall know them, and not by their words...*

A related point has to do with the association of French jurisprudence with "positivism" and German with "anti-positivism" - as well as the rather easy way in which these essays use such labels. Though such a contrast may have its uses for cultural description (as in Massimo La Torre's excellent analysis of the German influences on Constantino Mortati's constitutional doctrine, it should not be taken to mean that the French were as they were owing to their "positivism" and the Germans as they were owing to their "anti-positivism". First, it is far from clear what "positivism" and "anti-positivism" mean, and that doctrines can be defined as such independently of their cultural environments. And in any case, second, "positivism" and "anti-positivism" also depend on each other: something like a legal "positivism" is justified only by reference to "anti-positivist" arguments (about the significance of "will", or the stature of legislative sovereignty) while any "anti-formalism" can make its content known only by reference to what is "positively" there (as practice, custom, institution, class bias or other "fact").⁸ Again, the indeterminacy of legal theories should make us wary of their association permanently (that is, irrespective of the cultural context) with particular outcomes: they cannot be so associated because the doctrines are, after all, not so different:

⁶ see Monateri and Somma, *supra* note 5, at 59.

⁷ Agustín José Menéndez, *From Republicanism to Fascist ideology under the Early Franquismo*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 337, 341n11.

⁸ Compare MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA. THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

Darwinists and creationists point at the *same fossils* in order to argue their contradicting theses.

Lepsius notes that Nazi legal doctrines were constituted of eclectic borrowings from many sources and that they cannot therefore be defined by reference to their particular *content*. Anything went, as long as it seemed an efficient defense of Nazi policy. This leads him to suggest that what was specific in Nazi law was its "method", namely that it was "open and undefined in content and even downright invited interpretation".⁹ It is conventional to argue that Nazi and Fascist legal thinking typically used large anti-formal and functional arguments to adapt existing law to new ideologies.¹⁰ Massimo La Torre, for instance, views "occasionalism" as a "cultural, ideological trait" inherently linked with Fascism¹¹ while Monateri and Somma highlight the use of the good faith principle so as to detach contract doctrine from its individualist basis and to re-interpret it in a functionalist, communitarian fashion.¹²

And yet, instrumental reasoning, openness and deformalization (together with decisionism, despite the association of that word with Schmitt) are surely no Nazi exclusivity, but rather defining aspects of much law from "cadi justice" to complex modernity, as Max Weber famously pointed out.¹³ Deformalization has its logic and role: it is a technique of functional (or "dynamic") adaptation to override the dead weight of some (obsolete) form in order to realize the law-applier's view of what is substantively right.¹⁴

⁹ Lepsius, *supra* note 3.

¹⁰ See also WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION. FRANKFURT SCHOOL AND THE RULE OF LAW, 34, 145-147 (1997) and *passim*.

¹¹ Massimo La Torre, *The German Impact on Fascist Public Law Doctrine – Constantino Mortati's Material Constitution*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 305, 307, 319.

¹² Monateri and Somma, *supra* note 5, at 62.

¹³ It may be suggested that a distinction should be made between rampant, all-absorbing, totalitarian deformalization and the type of technical deformalization witnessed in late liberal modernity. But I find that this rather reflects contemporary distinctions between "normal" and "exceptional" (or perhaps "transitional") moments in the legal system. I suppose many people would be inclined to characterise the scaling down of public law and public administration in order to bring in the liberal market in the former socialist countries, for instance, precisely in terms of this type of deformalization.

¹⁴ See for example ROBERTO UNGER, LAW IN MODERN SOCIETY 198-223 (1986).

The search for “intellectual rigor” and “realism”¹⁵ was typical of the inter-war attacks from various sides on the “formalism” and “idealism” of the liberal mind.¹⁶ It has been equally available to new generations of socialist, conservative - and Nazi - jurists seeking to challenge jurisprudential orthodoxy or results of past legislation. To defend the breach of formal legality by appeal to a “substantive constitution” may have united Italian and Spanish Fascists with Schmittian theory but it is no different from, say, US arguments about the Iraqi war fulfilling the purposes of the UN Charter while violating its provisions - “illegal but legitimate”.¹⁷ Surely the use of the Radbruch formula in West Germany after the war (the holding of formally valid Nazi law as invalid owing to its substantive content) and the creative use of East German statutes in the border guard trials in the 1990's also manifest types of anti-formal reasoning, the quest to reach substantive justice by condemning and transgressing the regressive formalism of an abnormal normality, a *staatliches Unrecht* (state injustice).

The conclusion that Nazi law could only be defined in methodological terms may seem reasonable if that “method” is seen as a ramshackle of contradictory elements from which some “contradiction-transcending” “higher” synthesis or a “new stage of knowledge” is received,¹⁸ especially if connected with a celebration of the exceptional or the *Führerprinzip* (leader principle). But in fact most mainstream liberal legal theory builds on or seeks to live with contradictory assumptions and trends of reasoning (e.g. Rawls’ “overlapping consensus”). Working with and attempting to transcend contradictions is a celebrated technique that has developed from Hegel into a variety of directions, some of which (e.g. much of post-Marxian left writing by theorists such as Judith Butler or Alain Badiou) are programmatically anti-fascist.

But one need not be a Marxist or a postmodernist to accept that pluralistic and conflictual societies give rise to contradictory and eclectic forms of jurisprudence in which the “decision” is always undetermined by the available legal materials. It seems quite plausible that much Nazi or Fascist theorizing comes out as contradictory and abstraction-ridden mumble-jumble in which only the hypothesized “new levels of consciousness” that always form part of totalitarian

¹⁵ Giacinto Della Cananea, *Mortati and the Science of Public Law: A Comment on La Torre*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 321, 323.

¹⁶ See e.g. HANS MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLICY* (1946).

¹⁷ See e.g. Anne-Marie Slaughter, *Good Reasons For Going Around The UN*, N.Y. Times, 18 March 2003.

¹⁸ Lepsius, *supra* note 3, 35.

rhetoric make it impossible for its adherents to recognize it for what it is: bad jurisprudence – "a disaster in academic terms".¹⁹ But the fact that a legal theory is failed *qua* theory, confusing, erratic, or just plain nonsense does not make it a Fascist theory, perhaps unfortunately inasmuch as the contrary may also be true: the academic brilliance of a doctrine is not proof against its being used to set up a concentration camp. Again, the issue is political and has to do with the undetermined consequences that any doctrine may be used to support.

For such reasons, essays focusing on individuals, their choices and careers, such as Ingo Hueck's overview of the German *Völkerrechtler* (professor of international law) Reinhard Höhn and La Torre's and Giocinto della Cananea's in-depth surveys of the "material constitution" of Constantino Mortati are more in touch with the complexity of the positions that reified doctrines reach at the hands of interesting individuals. Likewise, Menéndez' account of the rise of Fascist jurisprudence in Spain usefully contextualizes abstract doctrines showing the contingency of the past (that it might have gone the other way) and highlighting the need for sharp political awareness in the present. Developing "better" legal doctrines is useful in times of normality, but insufficient during moments of transformation. Instead, the conclusion by Stolleis is surely right. The problem with inter-war German lawyers was not their "positivism" but "a dearth of courage and a general compliance."²⁰

Similar considerations lead me to suggest that David Fraser's analysis of the failure of Western European lawyers to condemn Nazi law as not-law in the 1930's "because of its substance"²¹ builds on a "Radbruchian" anti-formalism that smacks of anachronism. Surely, as Hart insisted, merely holding a rule as formally valid is not a morally suspect complicity in its creation or application. When the German-origin Carl J. Friedrich was commenting (instead of condemning) Nazi law from his position as Professor at Harvard, there is as little reason to establish guilt by association as there is for Lustgarten to fear that because there have been common strands of argument in Nazi and Anglo-American law (over the *nulla poena sine lege* principle, the use of eugenics and the treatment of habitual criminals)²², the latter is

¹⁹ Joerges, *supra* note 2, 175.

²⁰ Michael Stolleis, *Prologue: Reluctance to Gance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 1, 4.

²¹ David Fraser, 'The outsider does not see all the game...': Perceptions of German Law in Anglo-American Legal Scholarship, 1933-1940, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 87, 91.

²² Laurence Lustgarten, 'A Distorted Image of Ourselves': Nazism, 'Liberal' Societies and the Qualities of Difference, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 113, 118-127.

"similar" to the former. It would have been odd to condemn a doctrine in Germany (the political task) without first outlining what in fact was the "doctrine in Germany" (the task of elucidating valid law). It would have been odd for comparativists (I have no idea of the representative nature of the authors discussed by Fraser and Lustgarten) to interest themselves in foreign legal systems in order to reject them from safe distance away. Themes in genetics or criminology were and continue to be discussed and constitutional interest in states of exception is shown in many places outside Germany. Trends in civil and criminal law cross boundaries as experts in these fields do, and give rise to parallel debates about "eugenics", "abortion", "euthanasia" or indeed "death penalty" without this signifying that the social practices in those societies are the same. One need not have studied structural anthropology to realize that the "same" ritual or doctrine has different meanings in different societies and that the meaning of legal doctrines, too, is socially constructed. To discuss death penalty and not to discuss death penalty are, as forms of social practice, at equal distance from putting someone to death by State-sponsored means.

The same points may be made in regard to Whitman's essay on the historical continuum between Nazi notions of "honor" and modern European doctrines of "dignity", the sense in which dignity as a leveling instrument of social discourse is a generalization of older notions of "social honor".²³ However much the two doctrines may be used in the relevant contexts to buttress contradictory social practices, the two are culturally and sociologically speaking continuous and none the worse for that fact. The correctness of the old Schmittian argument about the notion of "universal humanity" being a useful instrument to cast someone out of "humanity" altogether so as apply extreme measures against that person is no reason to stop speaking about "universal humanity". That this has been so difficult to understand has followed from the unfounded "essentialist" assumption that words, positions, doctrines or arguments have fixed meanings that can be translated into determinate social consequences. Again, as Quentin Skinner, above all, has repeatedly insisted, the meaning of a political concept (such as "honor" or "dignity", or "universality" or "humanity", "or indeed "Fascism" or "liberalism") is its *use*: what it is invoked for and what it is invoked against, in which context, and by whom?²⁴

²³ James Q Whitman, *On Nazi 'Honour' and the new European 'Dignity'* in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 243, 254.

²⁴ See especially Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in VISIONS OF POLITICS VOL. I, at 57-89 (2003).

It is undoubtedly true, as pointed out by Lustgarten, that although the themes debated in Germany, Britain and the US may have been similar, the "democratic" nature of the latter prevented them from going the German way.²⁵ But how helpful is this? Stalin used to be the head of a political entity that called itself "democratic" and ended up murdering perhaps 80 million of its citizens. To invoke "democracy" as an explanation of why parallel doctrines did not lead to identical outcomes is too general: after all, Schmitt (why does that name crop up constantly?) was able to make the point that sometimes only a (commissarial) dictatorship is compatible with democracy because only it can safeguard the essential homogeneity between the ruler and the ruled.²⁶

Invoking "democracy" explains too little. England and the US did not go the German way *because they were England and the United States and not Germany*. But now we have reached the paradox of prediction: in order to learn the past we must know the details of the past very well: but the better we know those details (the specific histories of England and the United States), the less we are able to find a general lesson - for no country can repeat the history that once made England or the United States.

This is what makes Mahlmann's essay useful and frustrating at the same time. Legal substances or methodologies do not explain the birth or influence of Fascism or Nazism. The general beliefs and attitudes of the legal communities account for the emergence of the Nazi legal order.²⁷ Though true, and important, this is of course wholly unhelpful as a means of tracing Fascist doctrines in the present. To say that German jurisprudence supported Nazi positions because it had Nazi-prone attitudes while such attitudes did not exist in UK or the US is a *petito principii*. Germany became Nazi because it was Germany. Well fall back on situationalism. But there is more. To examine our own societies only to the extent that they resemble or deviate from Nazi Germany makes us blind to our own kinds of wrong: the persistent racism in the United States, class society and what Joerges calls ordo-liberal market authoritarianism in Europe.

²⁵ Lustgarten *supra* note 22, 127.

²⁶ See CARL SCHMITT-DOROTIC, *DIE DIKTATUR: VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF* (1928).

²⁷ Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 229, 232-235.

C.

The essays on Europe revolve understandably around the legacy of Carl Schmitt whose shadow, as noted by John McCormick, "haunts the study of European integration".²⁸ Though the essays carefully highlight the objectionable character of Schmitt's politics and of the elusiveness of his writing, Joerges reminds us that Schmitt needs to be engaged as "the weightiest exponent of anti-liberal thought in the German tradition".²⁹ Schmitt's writing has various links with constitutionalism in general and the identity and role of Europe in the world in particular. Invoking the theme of European identity, one enters almost automatically a Schmittian world, one in which the issues of cultural homogeneity³⁰ and geographical localization³¹ become central. In addition, as highlighted in Ghaleigh's essay, there are the striking parallels between how Schmitt viewed the new world order in his *Der Nomos der Erde* in 1950³² and the hegemonic activities of the United States in the world today. Even for an American liberal such as Bruce Ackerman it is difficult to avoid an engagement with Schmittian themes when discussing the unlimited state of exception declared by the Americans on the world in waging their morally inspired (or at least defended) "discriminatory" war against terrorist "outlaws" throughout the world.

But for these essays, it is above all constitutional theory where the Schmittian legacy is most pressing. The theme of Europe's identity and the sense of the integration project emerged sharply with the German Constitutional Court's controversial Maastricht decision of 1994. Was the citizenry of Europe "homogeneous" enough to constitute a *demos* and qualifying it as a democratic polity? For Schmitt, democracy in terms of "homogeneity" was antithetical to a liberalism which celebrated diversity. Democracy could only be realized through an idea or a person with whom the *demos* could identify. This, again, was possible only through an existential decision about who one's enemy was. Homogeneity depended, as it still does, on exclusion. Because exclusion cannot be fitted within

²⁸ John P. McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 133, 141.

²⁹ Joerges, *supra* note 2, 171.

³⁰ Especially McCormick (note 28), 140, 141.

³¹ Especially Peter Burgess, *Culture and the Rationality of Law from Weimar to Maastricht*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 143, 160-163.

³² CARL SCHMITT, *DER NOMOS DER ERDE DES JUS PUBLICUM EUROPAEUM* (1950).

Europe's liberal ethos, the question emerges about how to construct an identity for Europe without assuming that it must refer back to some homogeneity. McCormick invokes the Habermasian response of Europe's identity as a *cosmopolitan* identity: out of diversity, homogeneity. The same direction is taken by Peter J. Burgess in his insightful Schmitt-exegesis, looking for an evolutionary concept of the constitution, one that would be open to the "debate and dissent" between citizens. To the extent that the constitution is seen (in Schmittian terms) as "the political unity of the people"³³, this need not necessarily be taken to mean that it seeks to realize some fixed, pre-constitutional and authentic datum: a "legitimacy" before the "law". In a Habermasian vein, Burgess accepts the co-constitutive role of formal legality and substantive legitimacy³⁴: neither is "foundational" in respect of the other.

Some such paradoxical notion seems indeed necessary in order to avoid the more objectionable effects of European identity politics. In contrast to the apparently overwhelming difficulties of that task conceived in terms of political theory, some consolation may be received from the sense that European debates were already in the Middle Ages torn between localism and cosmopolitanism,³⁵ and that the *demos* that in fact *may* exist (contrary to the German Constitutional Court) is split within itself; instead of a fixed pre-political fact, its identity may be constructed by *one of several tensions* (particular/general, secular/religious, etc.) in which case work for European identity could be understood as therapy instead of ideology.

The discussion of Europe's international role suffers from a neglect of Schmitt's friend/enemy theme. Nothing has put the question of European identity in the past year more sharply than the opposition to the United States. Joerges makes the good point about the contemporary relevance of distinction between *Großraum* and Empire in Schmittian theory. Might Schmitt have been right to think that only by constituting itself as a *Großraum*, Europe could counter (American) Empire?³⁶ As I read him, Joerges would respond to this question (which in all fairness I have to admit he does not pose) by a qualified yes. At least he suggests that certain themes do suggest Europe as a kind of *Großraum*, defending itself (against external intervention) by developing into a large space whose concrete order would be based on economy, technology and administration, instead of a determined (and

³³ Burgess, *supra* note 31, 151.

³⁴ *Id.*, 143-166.

³⁵ William Chester Jordan, "Europe" in *the Middle Ages*, in: THE IDEA OF EUROPE. FROM ANTIQUITY TO THE EUROPEAN UNION, 72-90 (Anthony Pagden ed., 2002).

³⁶ See Carl Schmitt, *Der neue Nomos der Erde*, in STAAT, GROSSRAUM, NOMOS. ARBEITEN AUS DEN JAHREN 1916-1969, 518-522 (1995).

thus possibly antagonistic) political claim. One of the more important points in this book is his suggestion that Europe might have already have developed into an authoritarian form of “ordo”-liberalism on the one hand (free market created by European law and enforced by European bureaucracy), and functional integration through public law on the other.³⁷ Whichever way the stakes fall here, depolitization seems to be Europe’s fate.

This conclusion is ironically strengthened by Neil Walker’s response according to which Europe (meaning Brussels) need be careful not to jump too hastily to support any of the suggested “core values” it is being offered. Instead, it needs to balance the different values carefully against each other. His conclusion spells out clearly where I think the problem lies: “the institutional implications of the balancing of the core values are themselves deeply complex.”³⁸ “Balancing” is the rule by bureaucrats in accordance with technical “measuring” undertaken by experts. I myself would have nothing against Europe’s single-minded pursuit of the “core value” or eradicating poverty in the third world almost at whatever cost to Europe itself.³⁹ The “reasonable” solution here as well as in the essays on legal method underwrites a de facto eclecticism that may be just a prelude for in fact doing nothing.

What is Europe's *Nomos* as its spatial order, its *Raumordnung*? asks Burgess.⁴⁰ If that *Nomos* is no longer spatially based, and popular “homogeneity” is a forbidden theme, what then? Clearly, there is no natural spatial entity such as “Europe”. “Europe” is a political choice, its boundaries contingent and contestable. But if this is so, how can Europe be anything but an *imperial* policy from the perspective of those whose self-identification is spatial? If Europe is a political idea (as, along with most of the writers of these essays I think it should be), then it is also a hegemonic project and in this regard there is no difference between it and what it sees the United States involved in today. The difference must then be invoked in political terms: why is it hegemony by *me* is better than *yours*? This is a large theme that falls outside the scope of the present essays.⁴¹ It leads into debates about the possibility

³⁷ Joerges, *supra* note 2, 168-191.

³⁸ Neil Walker, *From Großraum to Condominium – A Comment*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 193, 202.

³⁹ Never mind that the cost might not be too great, and soon offset by a working Third World economy. See THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS, 18-20, 96-100 (2002).

⁴⁰ Burgess, *supra* note 31, 160-166.

⁴¹ But I have dealt with it in my THE GENTLE CIVILIZER OF NATIONS. THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, 480-509 (2002).

of distinguishing between “false” and “genuine” universalisms that can here be invoked only by the metaphoric opposition between “frontier” and “horizon”, implicit in many of the complex and open-ended directions that the authors of these essays have provided for debates on Europe’s identity.

Overall, the essays on the “darker legacy” for conceptions of Europe might have been sharper had they actually identified questionable features in present European politics. But the authors have with few exceptions been unwilling to assess the continuity between Nazi and Fascist thinking during the inter-war and post-war European developments. The review by Stolleis of developments in German jurisprudence after 1945, however, usefully highlights some techniques whereby glancing in the mirror may be avoided. But it has surely been not only Germany where collaborating colleagues “could greet one another with an enigmatic smile, united in silence about the past”.⁴² Little of stock-staking about the post-war is included in these essays, and almost nothing on “enigmatic smiles” on the faces of former communist apparatchiks.

Not that parallels could not be made. Luca Nogler’s insightful discussion of joint German and Italian labor law projects in the early 1940’s, for instance, leaves it to the reader to draw them. It seems clear that Fascist corporatist ideas are not at all alien to present functionalist and positivist views on economy and society. Also interesting is the study by Alexander Somek of inter-war Austrian authoritarianism. The latter actually applies his “Authoritarian Test” to the institutions of the European Union, concluding that their present functioning “depends vitally” on the existence of the democratic deficit and thus should be characterized in the mode of “the authoritarian component of constitutional law” as it has existed in post-war Europe generally.⁴³ The reality, according to Somer, is that Member States use the Commission and the Court to exercise authoritarian rule over their populations in order to create a space of economic freedom that is “deeply at odds with a functioning democracy”.⁴⁴ This is an important conclusion that emerges well-argued from Somer’s brief review. One would have hoped for more such interventions for the simple sense of reinvigorating a political debate on what (and on the need for this? there seems little disagreement among the authors) the European Union should be.

⁴² Stolleis, *supra* note 20, 6.

⁴³ Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 2, at 361, 383.

⁴⁴ *Id.*, 386

D.

One of the paradoxical lessons of these studies is that no single legal doctrine or method is by itself inherently geared towards Fascism. The meaning of a doctrine depends on what kinds of claims are made or challenged by it, what institutions are supported by and what decisions justified by it. The endless debate about whether "positivism" or "anti-positivism", formalism or anti-formalism was responsible for the legal profession's turn to supporting Hitler's rule in Germany or Mussolini's in Italy fails to grasp that the meaning of such doctrines can only be situationally determined. This appears to undermine even the minimal conclusion (by La Torre) that even as it may be impossible to link Nazism or Fascism with any single substantive legal doctrine, there is still a common denominator in all Nazi or Fascist thinking that lies in its "occasionalism" or "decisionism", its inherent bent towards freeing the decision-maker from the constraint of "rules", a pervasive preference for the "exceptional" over the "normal". But if it is possible to recognise a position as "Fascist" only by reference to the context, then this means that anti-fascism, too, may become dependent on equally occasionalist or "decisionist" premises.

This is suggested also by the numerous studies (not included here) that link types of authoritarian personality not with the occasionalism or non-conformity and impulsiveness of political romanticism but to an obsessive following of the (rational) rules and unhinged deference to formal authority. This, after all, is one of the key points made in Zygmunt Bauman's dictum about the Holocaust being "a legitimate offspring in the house of modernity".⁴⁵ It may be possible to challenge the controversial portrait of the "banality of evil" drawn by Hannah Arendt through the person of Adolf Eichmann.⁴⁶ But the sketch of the Nazi as the one that follows the order to the hilt, suspending all sense of personal (romantic) decision, is surely as much suggested by experience as its contrary. As an aesthetic attitude or psychological disposition, classicism is no less compatible with the gas chambers than romanticism.

The evil that resided in the inter-war Fascist or Nazi policies cannot be compressed in doctrines, attitudes, positions or methods. One need not be a conservative political theorist of the vein of Judith Shklar, to believe that the most pressing of political problems is cruelty and that cruelty is in fact compatible with many kinds of doctrine, particularly with utopian doctrine, or may in fact be an offshoot of

⁴⁵ ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989): "The more rational is the organization of action, the easier it is to cause suffering - and remaining in peace with oneself" (155).

⁴⁶ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1984).

utopianism.⁴⁷ Mahlmann and Walker come close to Shklar in suggesting a middle-of-the-road liberal ("moderate, pragmatic positivism"⁴⁸, "balancing of the core values"⁴⁹) attitude as the only workable antidote. But this suggestion is unhelpful for at least three reasons. First, I think, such "moderate" minds exist in societies that are anyway not going down the Nazi way. There is again a *petitio principii* involved. Fascist solutions start to seem tempting only when liberal normality has broken down, when "pragmatism" and balancing" have, for some reason, come to seem unacceptable and need to be either supported or replaced by something beyond themselves.

Second, the middle-of-the-road suggestion (as presented in Mahlmann, for example) misunderstands the indeterminacy thesis as presented by legal realists and critical lawyers. This is not a semantic thesis about the linguistic vagueness of norms. Some rules *are* clearer than other rules. The indeterminacy theses deals with *relationships between rules and exceptions, counter-rules and the reasons for rules*, and shows that even a valid, clear rule may be inapplicable due to the need to apply a narrow exception or a standard so as to realize the purpose of the rule. Because rules are no more important than the purposes for which they are enacted, and because there is disagreement about those purposes (as rules always come about through legislative compromise over "conflicting considerations"), it is always possible to set aside a rule. Thus, *all law* (and not just semantically unclear law) is infected by indeterminacy. There is, in this sense, no middle-of-the-road solution at all: even one that initially seems such, is an occasionalist reliance on a momentarily hegemonic solution.

Third, no totalitarian society can be transformed through "moderate, pragmatic positivism". Courage and political wisdom are needed, as Stolleis reminds us, but also risk-taking. In such conditions, "moderation" may often spell passivity, and even as IT is counseled by a tragic sense of the human possibility it may turn into a defense of the status quo. The significance of a doctrine - including the doctrine of moderation - is its use. With this, one arrives at the most pressing, and the most worrying of the historical lessons. It is this: tomorrow's evil will not be exactly what yesterday's evil was. On the contrary, the one thing we are entitled to say about it with some confidence is that a future evil worthy of being struggled against will not have the familiar face of National Socialism or Fascism. It will not emerge with Swastikas or *fasces*. As Tzvetan Todorov's discussion of the legacy of the 20th

⁴⁷ See especially Judith Shklar, *The Liberalism of Fear*, in *POLITICAL THOUGHT AND POLITICAL THINKERS*, 3-20 (1998).

⁴⁸ Mahlmann, *supra* note 27, 239.

⁴⁹ Walker, *supra* note 38, 202.

century suggests, it will emerge as the dark side of some novel and widely supported program to do good in some regard.⁵⁰ The only certainty we can receive about this dark side is retrospective. *By their acts you shall know them...*

Nothing of this constitutes an argument to refrain from politics, or from thinking in utopian terms, and sometimes engaging in utopian action. On the contrary. Politics is unavoidable but it is also difficult. Historical experience is an indispensable aspect of it but is insufficient without more. Even as courage, wisdom and all the old Weberian virtues that push the "calling" of politics into an "ethics of responsibility" are necessary, the best argument for democracy may be that it insists on such calling to be generalized. To seek to replace it by economics, technology or administration is to be blind to the truth that if the ability to do evil is an aspect of our shared humanity, so is the urge to do good, whatever risks it may bring.

⁵⁰ TZVETAN TODOROV, MEMOIRE DE LA MAL, TENTATION DU BIEN. ENQUETE SUR LE SIECLE (2000).