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Matthew Takavarasha April 12, 2022

Apostates of the *Rechtsstaat*: Jurisprudence between Weimar Democracy and Nazi Dictatorship

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Abstract

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This thesis examines select events between 1932 and 1935, the period spanning the end of the Weimar Republic and the consolidation of Nazi Germany. It is not concerned with explaining the well-documented outcomes of the Nazi rise to power, but instead questions how representatives of the legal profession twisted existing constitutional and legal concepts to serve their own interests or the ideological mission of the Nazi regime.

The contextual framework for this project is a series of contemporary constitutional debates and ex post facto legal justifications. From this, I argue that lawyers and legal theorists loyal to the Nazi regime twisted existing concepts to overthrow Weimar democracy and install Nazi dictatorship. Consequently, the Nazi legal system reflected to an extent an attempt to continue the Weimar legal system as a way of legitimising the Nazi dictatorship. However, scholarship after the war overlooks this facet of the legal system, instead focusing on the extrajudicial violence of the regime, as it believes that the system was so corrupt that it did not reflect the law at all. This approach ultimately prevents a more holistic understanding of the most infamous regime in modern European history.

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INTRODUCTION

The worst evil of disregard for some law is that it destroys respect for all law.[1]

- Inaugural Address of Herbert Hoover, 1929

"The dagger of the assassin was concealed beneath the robe of the jurist."[2] That was the opinion of the judges at the Nuremberg trial in the case *The United States of America vs. Josef Altstötter, et al.* In this trial, also known as the Justice Case, judges from the United States assessed the complicity of German lawyers and judges in the Nazi dictatorship.[3] In doing so, they showed that, even if only carrying out their "normal" functions, lawyers were capable of the most heinous of crimes, even mass murder.[4]

How could it have come to pass that the "ultimate goal" of the law would be the genocidal killing of European Jews on an unprecedently and hitherto unimaginably boundless scale in a country that only a decade before enjoyed the most liberal and democratic constitution in Europe at the time? Questions like this have dominated post-war scholarship of a time period and a regime that in German history continues to be "a reference point [in German history] against which past and present continue to be measured…the watershed between an *ancien régime* and a new order, separating distinct political philosophies, civic ideals, social values, and national loyalties."[5]

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[1] "Inaugural Address of Herbert Hoover, Monday, March 4, 1929." Avalon Project - Documents in Law, History and Diplomacy, accessed May 6, 2022, https://avalon.law.yale.edu/20th_century/hoover.asp.
[2] "The United States of America v Josef Altstoetter, et al, Military Tribunal III, Case 3" *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Nuernberg, October 1946–April 1949, Vol. III (Washington, 1951), 985.
[3] For more on the details of the Justice Case, see Harry Reicher, "The Jurists' Trial and Lessons for the Rule of Law / Der Juristenprozess und die Lehren für den Rechtsstaat" in *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference / Internationale Konferenz zum 60. Jahrestag*, eds. Herbert R. Reginbogin and Christoph Safferling, (München: K. G. Saur Verlag, 2006), 175-181.
[4] Harry Reicher, "Evading Responsibility for Crimes against Humanity: Murderous Lawyers at Nuremberg." in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice,* eds. Alan E. Steinweis and Robert D. Rachlin, (New York: Berghahn Books, 2013), 137.
[5] Theodore S. Hamerow, "Guilt, Redemption, and Writing German History." *The American Historical Review* vol. 88, no. 1 (1983), 53.

This project aims to consider such questions by examining select events between 1932 and 1935, the period spanning the end of the Weimar Republic and the beginnings and consolidation of the Nazi dictatorship. It is not concerned with explaining the well-documented outcomes of the Nazi rise to power, but instead questions how representatives of the legal profession twisted existing legal and constitutional concepts to serve their own interests or the ideological mission of the Nazi regime. It furthermore seeks to examine the extent of continuities and discontinuities between the Weimar Republic and Nazi Germany, and how these are represented in legal historiography.[6]

To the lattermost point, the dominant school of German historiography after 1945 - the *Sonderweg*, or "special path" interpretation - suggests that long-term deviations in German modernity in the nineteenth century serve to explain the rise of Nazism in the twentieth.[7] This approach has subsequently cemented "master narratives," which attempt to interpret German history on a large scale as a way of coming to terms with Nazism and the extremities of the Holocaust.[8] This approach has bled into studies of German legal history, leading to a scholarship notable for its "tendency toward positivistic, academic, and apolitical discourse in the legal sciences".[9] In this, post-war scholars have traditionally focused on judicial ideologies – politically, on the supposed authoritarian-conservative bent of the legal profession, jurisprudentially, on an adherence to legal positivism, with its roots in the transcendental idealism of Immanuel Kant, that subsequently left the legal profession defenceless in the face of Nazism.[10]

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[6] See for example Panikos Panayi, ed., *Weimar and Nazi Germany: Continuities and Discontinuities* (Harlow: Longman, 2001).
[7] Annie Everett, "The Genesis of the Sonderweg." *International Social Science Review* 91, no. 2 (2015), 1-2.
[8] Everett, "The Genesis of the Sonderweg," 2.
[9] Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn Books, 2001), 419.
[10] Benjamin Carter Hett, *Death in the Tiergarten: Murder and Criminal Justice in the Kaiser's Berlin*, (Cambridge: Harvard University Press, 2004), 6. For more on German legal positivism, see Suri Ratnapala, "Germanic Legal Positivism: Hans Kelsen's Quest for the Pure Theory of Law." In Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009), 58–92; Stephan Kirste, "The German Tradition of Legal Positivism." *The Cambridge Companion to Legal Positivism*, eds. Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 105–32.

The *Sonderweg* thesis, however, presents another issue with its implication that the natural development of Germany would be a regime resembling Nazism. In post-war legal history, one response to this issue has been to create a "jurisprudential imaginary" of Nazi law to parallel the popular imagining of the Nazi state, whereby the state must be characterised as a "criminal state" in which "law" existed in form only; criminalising this entire juridical epoch then enables scholars to understand Nazi law as a kind of rupture from the deeply flawed, but ideologically and legally acceptable, Weimar Republic.[11] This 'discontinuity' thesis itself caused a rupture within Western jurisprudential circles between its supporters, who promote natural law theories, and the legal positivists, who reject the 'discontinuity' thesis, questioning the extent to which the law has underlying moral, substantive content.[12]

In this thesis, I will argue that, legally speaking, the Nazi regime did represent a continuity with the Weimar Republic, both in the sense that prior developments in the Weimar years helped lay foundations for the Nazi regime's use of the law and that Nazi legal theorists and officials were after 1933 able to interpret Weimar legal concepts in such a way as to give the legitimizing impression of legal continuity. To achieve this, I will look not at the later years of the Nazi regime and the well-documented atrocities that Stuckart and Schiedermair allude to in their report, but rather at legal developments in the years between 1932 and 1935. This timeframe instead connects the end of the Weimar Republic with the beginning of the Nazi dictatorship. In doing so, I will be able to examine the ways in which the Nazi era represented a continuity from its predecessor, as well as understand the role that legal theorists played in the transformation from a constitutional democracy to a totalitarian dictatorship.

Several frameworks establish the boundaries of this thesis. Firstly, I will use two case studies to

[11] David A. Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham: Carolina Academic Press, 2005), 19-22.
[12] Fraser, *Law After Auschwitz,* 22.

frame legal developments between 1932 and 1935: the *Preußenschlag,* or Prussian coup, of 1932, and the Nuremberg Laws of 1935. The *Preußenschlag* began when the German Chancellor Franz von Papen, an arch-conservative aristocrat-cum-politician, initiated a takeover of the Social-Democratic-led Free State of Prussia using emergency powers granted to the President by the Weimar Constitution. In response to this takeover, Prussia brought legal action before the *Staatsgerichtshof* ('State Court') – an extenension of the *Reichsgericht* ('Reich Supreme Court') - leading to the case *Preußen contra Reich* ("Prussia v. Reich"), and bringing about a constitutional crisis. By beginning with an event that pre-dates the Nazi era, I will demonstrate that the erosion of constitutional law began before the Nazis and not because of them; simultaneously, I will repudiate the notion that the Weimar Republic's constitutional democracy was a predestined failure, and suggest that its undoing in the legal sphere represents intentionality by legal theorists instead.[13] The Nuremberg Laws of 1935 were a series of antisemitic and racist laws passed by a now-established Nazi Party to isolate and persecute its Jewish population. The subsequent legal justification published by the Nazis represented the jurisprudential culmination of their extremist "racial" thought, even before the arbitrary extermination of the European Jewish population in the Final Solution.[14]

This racist thought was enshrined in the language of natural law, albeit not a natural law that responded to transcendental or reasoned values of human equality, but rather to an idea of a concrete, biologically conceived, *Volksgemeinschaft* ("racial community").[15] The term 'natural law'

[13] See Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), 11. Caldwell rejects the argument in conservative historiography that the Weimar democracy was "defenceless" and "gave itself up".

[14] For a legal justification of the Nuremberg Laws, see Wilhelm Stuckart and Hans Globke, "Civil Rights and the Natural Inequality of Man" in *The Third Reich Sourcebook*, eds. Anson Rabinbach and Sander L. Gilman (Berkeley: University of California Press year), 211-213.

[15] Douglas G. Morris, "Politics, Ethics, and Natural Law in Early-Twentieth-Century Germany, 1900-50," in *Nazi Law: From Nuremberg to Nuremberg*, ed. John J. Michalczyk (London: Bloomsbury, 2018), 19. Although there are several translations of *Volksgemeinschaft*, the translation here as "racial community" reflects the 'racial' aspect of the Nazi *Volksgemeinschaft*, as only those of 'Aryan' blood could be members. See for example Claudia Koonz, *The Nazi Conscience* (Cambridge: The

refers to the theory that the moral and legal principles that shape human behaviour derive from a universal set of values. By contrast, 'legal positivism' poses that law is constructed socially by whichever person or institution possesses the authority to create them, and therefore there is no inherent relationship between law and morality. The positivist-naturalist divide has featured heavily in jurisprudential studies of Germany, with the attack on legal positivism's distinction between 'law as it is' and 'law as it ought to be' dominating discourse in the years immediately following the Nazi regime.[16] It also featured prominently in the early years of the Weimar Republic.[17] This thesis, however, will not focus on the positivist-naturalist divide, but rather will seek to situate it in the context of political developments in Weimar Germany; the jurisprudential debate over the relationship between these two theories occurred amidst another ideological clash between the liberal democratic values of the new Weimar Republic and the conservative authority of the Wilhelminian era.[18] This thesis will analyse the interplay between these factors to capture the nuances of Weimar Germany and its eventual decline.

Beyond this, the thesis will use a general theory of dictatorship. Our understanding of the Nazi regime today is greatly influenced by Ernst Fraenkel's seminal treatise on political theory *The Dual State.* Originally published in 1941, the work analyses the Nazi state as the coexistence of a 'normative state' (*Normenstaat*), comprised of the legal and bureaucratic organisations of the traditional German state, and the 'prerogative state' (*Maßnahmenstaat*), comprised of Nazi Party-affiliated organisations that exercised arbitrary power outside of the law to perpetuate the goals of

Belknap Press of Harvard University Press, 2003), 10; Joseph W. Bendersky, *A Concise History of Nazi Germany* (Lanham: Rowman & Littlefield Publishers, 2014), 32-35.

[16] Markus Dirk Dubber, "Judicial Positivism and Hitler's Injustice." *Columbia Law Review*, vol. 93, no. 7, (1993), 1807–1808.

[17] See David Dyzenhaus, "Legal Theory in the Collapse of Weimar: Contemporary Lessons?" *The American Political Science Review* 91, no. 1 (1997), 121–34; David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997), 1-2.

[18] Morris, "Politics, Ethics, and Natural Law", 15.

Nazism against its perceived enemies.[19] In Fraenkel's wake, many historians have held the prerogative state responsible for the worst atrocities of the Nazi regime. It was typically the instruments of the 'prerogative state' that were responsible for facilitating the worst excesses of the Nazi regime: for instance, it was the paramilitary *Schutzstaffel,* or SS, who were responsible for co-ordinating the extra-legal concentration camp system that first came into use.[20] As a consequence, historiography of the Nazi era has tended to focus on the 'prerogative state' at the expense of the 'normative state', relegating it to a performative status, existing only to provide an air of legitimacy to a Nazi regime that otherwise held the rule of law in utter contempt.[21] This thesis, though, will focus on the 'normative state', and seek to demonstrate that select continuities link the Weimar and the Nazi eras and bore their own deleterious consequences.

The framework that underpins this continuity is also the idea that underpins this thesis: the eponymous *Rechtsstaat*.[22] Conceived in the early nineteenth century by Carl Theodor Welcker, Robert von Mohl publicised the concept as a doctrine whose basic idea (*"Grundidee*") was to "order…a *Volk*'s social existence" (*"ordnen…Zusammenleben des Volkes"*) through the "removal" (*"Wegräumung"*) of barriers to private enterprise.[23] With its emphasis on individual rights, the *Rechtsstaat* served as a liberal antithesis to the *Polizeistaat*, the concept of the police state that was prevalent in continental Europe at the time, thereby forming a dichotomy that augured Fraenkel's

[19] Alan E. Steinweis and Robert D. Rachlin, "Introduction: The Law in Nazi Germany and the Holocaust." In *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice,* eds. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn Books, 2013), 2-3.
[20] For further reading, see Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* (New York: Farrar, Strauss and Giroux, 2015).
[21] Wachsmann also examines the prison system in Nazi Germany. The prisons were populated with prisoners of the regular courts, an example of the "normative state" in action. Wachsmann shows that the regular courts increasingly radicalised to retain their relevance vis-à-vis the Gestapo and the various special courts that rose from the "prerogative state". For further reading, see Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven: Yale University Press, 2004).
[22] lit. the "legal state" or the "state of law"; the *Rechtsstaat* is similar to the 'rule of law' in Anglo-American jurisprudence. For more on the 'rule of law' concept, see Tom Bingham, *The Rule of Law*. (London: Penguin Books Limited, 2011.)
[23] Robert von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, vol. 1 (Tübingen: Laupp, 1832), 7. Cited in Meierhenrich, *Remnants of the Rechtsstaat*, 78.

dual state theory.[24] Just as Germany changed, through its imperial and democratic eras, so too did the *Rechtsstaat*. The Weimar Republic brought about an era where, for the first time in German constitutional history, a state promoted the principle of popular sovereignty and the supremacy of the normative state over the prerogative. [25] Theodor Maunz, who would become an eminent law professor in Nazi Germany, described the *Rechtsstaat* as "not only a *Rechtsstaat* in a formal sense (a state of law), but also a Rechtsstaat in a material sense (a state of justice)."[26]

This thesis, then, also aims to investigate the development of the *Rechtsstaat* in the pivotal years between 1932 and 1935. Parallel to legal-political developments, it aims to examine whether there existed an intellectual bridge between the Weimar and Nazi eras, and the role of legal theorists in twisting, and eventually abdicating, the meaning of the *Rechtsstaat*. In the first chapter, I will examine the events of the *Preußenschlag*, and how legal theorists twisted existing Weimar concepts in order to achieve the destruction of democracy. This investigation will illustrate that the Weimar Constitution did suffer from some weaknesses, albeit none necessarily terminal, and that those legal theorists revealed and exploited the lingering authoritarian practices of the 'prerogative state' present even in the Weimar Constitution. These weaknesses were supposedly reflected in the *Rechtsstaat*, whose reduction as a concept to a *Gesetzesstaat* ('legislative state') arguably left it vulnerable to the Nazi assault.[27] In the second Chapter, I will examine the role of legal theorists in the development of anti-Jewish legislation in the early Nazi period by surveying their methods of

[24] Though police state then had different connotations to what we think of these days, it could in some ways be more bureaucratic and normative in the rule-bound sense, not just arbitrary, even if the goal was government oversight of public order. Meierhenrich describes the *Polizeistaat* as the "intellectual foundation for the regimes of enlightened despotism that governed most of continental Europe at the time." The *Rechtsstaat* idea could then justify the workings of the legal and administrative system by rule rather than by arbitrary decisions of the officials or ruler; see Meierhenrich, *The Remnants of the Rechtsstaat*, 76-77.
[25] Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933 *[sic]*-1937", *Cardozo Law Review* 16 (1994), 401.
[26] Theodor Maunz and Reinhold Zippelius, *Deutsches Staatsrecht: Ein Studienbuch*, 28th ed. (Munich: Beck, 1991), 85; cited in Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), 75.
[27] Meierhenrich, *Remnants of the Rechtsstaat*, 85-86.

incorporating Nazi racial doctrine into their legal thought. With the persecution of political and ideological opponents resulting in a jurisprudentially stunted spectrum, I will probe the parallel debate over the *Rechtsstaat*, which produced a split, even among legal theorists loyal to the Nazi regime, between those attempting to 'racialise' the *Rechtsstaat* and bring it in line with the antisemitic mission of the Nazis, and those who wanted to abandon the concept of the *Rechtsstaat* altogether. This debate will illustrate that normativity was a thread connecting the Weimar Republic to the Nazi era, thereby giving credence to the 'continuity' thesis.

In the third chapter, I will revisit one of the oldest questions in Western analytical jurisprudence: the relationship between law and morality. Using the seminal postwar Hart-Fuller debate as a framework, I will examine the question of continuity between the Weimar and Nazi eras through the lens of law and morality in the concept of law.[28] To say that I will promote a 'continuity' thesis is not to suggest that I exclusively endorse a positivistic reading of law, nor is it to suggest that I will argue that the Nazi era was completely and unambiguously a continuation of Weimar law. Rather, I will use the Hart-Fuller debate to illustrate that thinking about Nazi law in such dualistically absolutist terms fails to forward our understanding of the concept, but in fact distorts it once again. The point is not so much to introduce a new way of understanding Nazi law, but to reinforce that we must move past definitions enshrined in such moral absolutism.

In the epilogue, I will consider the legacy of the Nazi era in the European legal tradition, as well as the contemporary relevance of the death of the Weimar Republic in an era marked by the increasing threat to democracies from populist and authoritarian forces, a trend that has only accelerated in the face of the COVID-19 pandemic.

[28] See H. L. A. Hart, "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958), 593-629, and its response, Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart", *Harvard Law Review* 71, no. 4 (1958), 630-672.

CHAPTER I: The *Preußenschlag* and the Crisis of Constitutional Democracy

Wenn ein Land die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt, kann der Reichspräsident es dazu mit Hilfe der bewaffneten Macht anhalten.	*In the event of a State not fulfilling the duties imposed upon it by the Reich Constitution or by the laws of the Reich, the President of the Reich may make use of the armed forces to compel it to do so.*[29]

On Sunday 17 July 1932, the quiet town of Altona, an unassuming working-class municipality in the Free State of Prussia, found itself as the battleground for a violent political confrontation with consequences that would reach far beyond the banks of the Elbe River. A march staged by the *Sturmabteilung* (SA) and *Schutzstaffel* (SS), two paramilitary organisations of the Nazi Party (NSDAP) in the streets of Altona, a Communist stronghold, provoked violent resistance from the *Rotfrontkämpferbund* (RFB), the paramilitary organisation of the Communist Party (KPD), with the Prussian state police closely following proceedings. Although some reports claimed the RFB had placed sharpshooters on the roofs ready to fire on the Nazis below, the violence was initially limited to the hurling of projectiles.[30] At some point though, a shot rang out, sparking pandemonium; by the time the dust settled, eighteen people lay dead, most of them killed by bullets fired from police revolvers.[31] The confrontation took on the name *Altonaer Blutsonntag*: Altona Bloody Sunday.

The massacre in Altona by no means marked the beginning of violent political confrontations in Weimar Germany, but it denoted an unfortunate watershed moment in the troubled democracy's history, even prompting international attention.[32] In response, rather than

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[29] Article 48 of the Weimar Constitution. For a German version see Gerhard Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919: ein Kommentar für Wissenschaft und Praxis*, Vierte Bearbeitung, 14th ed. (Berlin: Georg Stilke, 1933). For an English version, see "The Weimar Constitution" in Carl Schmitt, *Constitutional Theory*, ed. and transl. by Jeffrey Seitzer (Durham: Duke University Press, 2008), 417.

[30] Richard J. Evans, *The Coming of the Third Reich: How the Nazis Destroyed Democracy and Seized Power in Germany* (London: Penguin, 2005), 285.

[31] Evans, *The Coming of the Third Reich*, 285.

[32] See Associated Press. "Fifteen Killed in Week-End Clashes in Reich; Reds Shoot at Nazis From Roofs in Altona." *New York Times*. July 18, 1932.

punish the perpetrators of the violence in Altona, was the Chancellor of the Weimar Republic, Franz von Papen, instead dismiss the government of Prussia, led by a Social Democratic Prime Minister, Otto Braun, and place the state under the authority of a Federal commissioner.[33] Papen did not have the authority to carry out this action himself, but instead acted by relying on the powers of the President Paul von Hindenburg. Hindenburg had issued an emergency decree authorising the so-called *Preußenschlag* by taking advantage of Article 48 of the Weimar Constitution.[34] This article allowed President Hindenburg to call upon the armed forces, if necessary, or abrogate other Articles guaranteeing fundamental civil rights and liberties, if a state (*Land*) failed to fulfil its duties to the Reich.[35]

Although the restoration of order was seemingly the goal of Papen and Hindenburg, the realities of the incident betrayed ulterior motives. On 28 June 1932, less than a month before the coup in Prussia, Papen had lifted a ban on the SA and SS which had been in place since April, facilitating the violent clashes and breakdown of public order that he would then use as a pretext to dismiss the Prussian government. The likely goal of the *Preußenschlag*, then, was for the arch-conservative Papen to seize control of Prussia, the largest state in Germany, from the Social Democrat-led coalition government.[36] In doing so, Papen also hoped to win over the NSDAP, who were expected to perform well in the upcoming federal elections; lifting the ban on the SA and SS

[33] Lars Vinx, ed. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), 1; Herlinde Pauer-Studer, *Justifying Injustice: Legal Theory in Nazi Germany* (Cambridge: Cambridge University Press, 2020), 31. While Vinx suggests that von Papen appointed multiple "federal commissioners" to take over from the Prussian ministers serving with Braun, Pauer-Studer states that von Papen placed Prussia under the control of a single "Federal commissioner". Both statements are correct, but we have chosen Pauer-Studer's reading here.

[34] *Preußenschlag* literally translates to the 'Prussian strike' or 'the strike against Prussia'. In this context, it is understood to mean the 'Prussian coup' or the 'coup against Prussia'

[35] These duties were defined as those imposed by the Constitution or the laws of the Republic. Some of the Articles that the President could abrogate included Article 114, which guaranteed individual freedom, Article 118 (freedom of expression), and Articles 123 and 124 (freedom of assembly and organisation).

[36] Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia 1600-1947* (London: Penguin, 2007), 640-54; Vinx, *The Guardian of the Constitution*, 1.

was therefore a conciliatory move, albeit one that proved a disastrous miscalculation.[37]

However dubious the actions of the federal government might have been, the Prussian government was limited in its response, choosing to bring the matter before the *Staatsgerichtshof* in Leipzig.[38] In part, the Prussian government's lack of active resistance owed to the lack of options available to them. Papen had some precedent in Ebert's deposition of the Saxon and Thuringian state governments in 1923, and there were no courts, constitutional or otherwise, in the Weimar Republic with the full competencies of judicial review to question the validity of Papen's actions.[39] Political considerations also motivated their decision-making: there was no resistance to Papen and Hindenburg's actions from the *Reichstag*, Germany's federal parliament, despite the fact that Article 48 predicated the use of emergency powers on the condition that the President would inform the *Reichstag* of their decision.[40] Furthermore, the Prussian coalition government had itself also acted dubiously in the months leading up to the coup. It had lost its parliamentary majority in elections to the Prussian legislature in April 1932, but in anticipation of this had introduced a requirement that a new government could only be elected with an absolute majority, leaving the coalition government in charge in a caretaker role and the NSDAP, who had won the election with a relative majority but lacked an absolute majority, unable to assume office in Prussia.[41]

The actions and reactions of the Papen cabinet set the State Court in Prussia as the stage for what would prove to be a battle for the Weimar Constitution and the heart of the Republic. To

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[37] Vinx, *The Guardian of the Constitution*, 2-3.
[38] Vinx, *The Guardian of the Constitution*, 4; Pauer-Studer, *Justifying Injustice*, 32. Again, these two slightly differ in their interpretation of the term, with Vinx translating *Staatsgerichtshof* as the 'court of justice in matters of state' and Pauer-Studer translating it as 'State Court'. Again, both statements are correct, but for simplicity's sake we will use Pauer-Studer's definition.
[39] Evans, *The Coming of the Third Reich*, 286. The *Staatsgerichtshof* was meant to be the surrogate for such a court, so it would be the best venue for such an appeal. The issue of a lack of judicial review has since been addressed with the establishment of the *Bundesverfassungsgericht* (Federal Constitutional Court) in the Federal Republic of Germany in 1951.
[40] The *Reichstag* could also invalidate a Presidential decree with a majority vote, as they did to Hindenburg in 1930. However, since then the parties in the *Reichstag* had been unable to form a legislative majority, leaving Germany to be governed by Presidential decree. See Vinx, *The Guardian of the Constitution,* 2.
[41] Clark, *Iron Kingdom*, 640-54. Cited in Vinx, *The Guardian of the Constitution*, 3. Evans, *The Coming of the Third Reich*, 285.

represent its claim that only the Reich, and not a state government, could decide what was 'constitutional' or 'anti-constitutional', Papen's Cabinet called upon Carl Schmitt, a leading legal theorist who had long challenged what he saw as the shortcomings of liberal political philosophy and practice.[42] Schmitt's closing statement before the State Court reveals not only an attack on the Prussian government, but on the Weimar Constitution and the very notion of parliamentary democracy, one that would ultimately pave the way for Adolf Hitler's rise to power in January 1933.

Ostensibly, Schmitt's Closing Statement had two aims: to discredit the deposed Prussian government, and to instill the office of President in their place as the only legitimate political authority. To the former, he argued that the very fact the Prussian government had been deposed served to discredit it; he said of their presence in Leipzig that "they appear on the basis of a fictitious right to represent that is *ad hoc* and for this case only", making this assertion based on the fact that the Prussians ministers "have already been removed from their offices".[43] In other words, the government's right to represent Prussia came to an end, or became "fictitious", after the presidential decree in July 1932. Schmitt, however, took the argument a step further, arguing that this Prussian government was never legitimate to begin with, owing its very existence to the "notorious and devious trick" of changing the governmental electoral proceedings.[44]

Undermining the legitimacy of the Prussian government allowed Schmitt, in his mind, to dismiss any claims they might have made regarding "autonomy" or the "inalienable and intangible rights" of the Prussian *Land*.[45] Into this vacuum of federal legitimacy, Schmitt inserted an entity whose role had been "overlooked" in the proceedings: the President of the Reich. Specifically, the

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[42] Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 2-5, 168.
[43] Carl Schmitt, "Prussia contra Reich: Schmitt's closing statement in Leipzig (1932)", in Vinx, *The Guardian of the Constitution*, 223.
[44] Vinx, *The Guardian of the Constitution*, 223.
[45] Vinx, *The Guardian of the Constitution*, 224.

President, under Article 48 of the Weimar Constitution, "can and must, if necessary, also exercise these competences in the interest of the autonomy of the *Land*".[46] Should the President choose to exercise these constitutional competences, then, Schmitt asserted, "the question of the right to represent has been answered", and to speak any further of the autonomy of the *Land* would be a "manifest confusion".[47]

Once again, Schmitt took his argument a step further. Not content with solely establishing the legitimacy of the President's actions, he sought instead to ultimately define the President as a political institution:

> "Since a constitution is a political entity, there is a need, in addition, for essentially political decisions, and in this respect it is, I believe, the president of the *Reich* who is the guardian of the constitution, and his competence under article 48, in particular, have the purpose, above all, of constituting a genuinely political guardian of the constitution, for the parts of the constitution that deal with federalism as well as for all others."[48]

That is, not only did the President legitimately apply his constitutional power but, as the "guardian of the constitution", he would be free to continue to do so at his "political discretion".[49] With this, Schmitt changed the potentiality of the *Preußenschlag* from an isolated incident to a precedent-setter.

It is possible that, in contrast to the arguments he ostensibly laid out, setting a precedent was really Schmitt's goal all along. Indeed, taking the statement at face value, its flaws quickly become apparent. Schmitt relies on the paradox that the Prussian government were illegitimate because they had been deposed, when it was precisely this deposition that they sought to protest. Pauer-Studer

[46] Vinx, *The Guardian of the Constitution*, 224.
[47] Vinx, *The Guardian of the Constitution*, 225.
[48] Vinx, *The Guardian of the Constitution*, 226.
[49] Vinx, *The Guardian of the Constitution*, 226.

observes: “Schmitt’s remarks amount to a recitation of the facts rather than an explanation for why the Reich President’s emergency decree deposing of the Prussian government was justified.”[50] Schmitt was being intentionally provocative, with his comment that “tightly organized and centralized political parties”, an obvious swipe at the SPD, endangered the autonomy of the *Land*, provoking cries of outrage from the Prussian counsel.[51] Yet the office of President was apparently immune from these same pressures; of this argument, Pauer-Studer notes that Schmitt “implicitly relied…on his conception of the ‘political,’ namely that the state must be a kind of political unity that is granted by presidential authority”.[52]

Here, Schmitt was aware of the political implications of *Prussia contra* Reich: he began his closing statement with the assertion that the “formalities” discussed before the court were not simple legal proceedings, but instead represented “very real, political issues”.[53] Thus, Schmitt’s words do not perhaps constitute a legal statement, but a *political* one. What Schmitt in fact provides us, then, is a glimpse into a wider debate, one that straddles the borders of legal and political thought, and is key to understanding how the climate in 1932 was such that a number of lawyers were dedicated to undermining the Weimar Republic with the eventual goal of destroying constitutional democracy.

The humiliation of the First World War left the German nation in a political-philosophical bind. Emerging from a failed Hindenburg-Ludendorff military dictatorship, and historically the disappointing semi-constitutional monarchy of the German Empire and, earlier still, the thwarted Frankfurt Parliament of 1848, Germany found itself with three interconnected, but conflicting,

[50] Herlinde Pauer-Studer, *Justifying Injustice: Legal Theory in Nazi Germany* (Cambridge: Cambridge University Press, 2020), 35.
[51] Vinx, *The Guardian of the Constitution*, 225
[52] Pauer-Studer, *Justifying Injustice*, 151.
[53] Vinx, *The Guardian of the Constitution*, 222.

visions of political authority: democratic authority, authoritarian democracy and dictatorship.[54] Tasked with reconciling these seemingly contradictory views, was German lawyer and political theorist Hugo Preuß, who drafted what would become the Weimar Constitution.

In this endeavour, political realities constantly worked to undermine Preuß. The Weimar Republic was by no means the first liberal democracy in the West, but it certainly suffered from a distinct set of circumstances. In previous instances, such as in the United Kingdom with the Westminster model, democratisation occurred against already established parliamentary institutions, which themselves had been sustained by non-democratic parliamentary practices.[55] Save for vestiges of the system of constitutional monarchy set up in the imperial era, Weimar Germany lacked this element. Two main factors compounded this issue. First was the increasing polarisation amongst Germany's political parties, even under the shadow of Prussian hegemony. While this feature was certainly not unique to Germany, it posed a more severe threat to the Republic, as without political homogeneity to form a parliamentary framework, Preuß noted, authoritarianism "[offered] itself as the supposedly sole unpolitical third element to the contending social forces."[56] This divide was then exacerbated by propaganda; this was the case both domestically, in particular with the promulgation of the 'stab-in-the-back myth' in right-wing circles (in which Preuß's Jewish heritage likely played a role), and internationally in Allied propaganda regarding the aftermath of the war.[57] Both of these contributed to the sentiment that the goal of the Allies was, in Preuß's words, "not the democratisation or subjection of Germany but

[54] Anthony McElligott, *Rethinking the Weimar Republic: Authority and Authoritarianism, 1916-1936*. (London: Bloomsbury, 2014), 181-182.
[55] Peter Stirk, "Hugo Preuss, German Political Thought and the Weimar Constitution." *History of Political Thought* vol. 23, no. 3 (2002), 515.
[56] Hugo Preuss, "Deutsche Demokratisierung" [1917] in Preuss, S*taat, Recht und Freiheit. Aus vierzig Jahren deutscher Politik und Geschichte*, ed. Theodor Heuss (Hildesheim: Georg Olms Verlag, 1926), 343. Cited in Stirk, "Hugo Preuss", 515.
[57] The 'stab-in-the-back myth' (*Dolchstoßlegende*) was an antisemitic conspiracy theory alleging that the German Army lost the War because civilians on the home front (in particular Jews) had sowed discord into the war effort. It has been universally debunked by historians. See Evans, *The Coming of the Third Reich*, and Ian Kershaw, *To Hell and Back: Europe 1914–1949* (London: Penguin, 2016).

rather the subjection of Germany through its democratisation."[58]

For his own part, Preuß was committed to a vision of the Weimar Republic in which political authority derived from the people. He had long criticised the German fascination with monarchical power in the *Obrigkeitsstaat*, the 'authoritarian state,' that he saw as the political leadership of a self-contained elite.[59] For Preuß, the Weimar Republic should be an expression of the common will through a plurality of federal institutions that would form "the conceptual essence of the constitutional *Rechsstaat*".[60] Preuß, however, also recognised the exigencies of the post-war German landscape. Although it is easy to see in the Constitution he drafted a perpetuation of the President as an *Ersatzkaiser*, Preuß in fact hoped that, by making this reality explicit in the Constitution, he would be able to limit the role of the executive within a German parliamentary government.[61] In this, he drew inspiration from Max Weber, who advocated for *Führerdemokratie*, or the expanded powers of the President within a parliamentary democracy, as well as Robert Redslob, who incorporated the British parliamentary system. However, incorporating the British system into the Weimar government produced a problem, as the British system had emerged from a uniform and, as aforementioned, non-democratic, will that did not reflect the pluralistic nature of German democracy.[62] This contradiction produced, in the words of Ernst Fraenkel, a "kind of political schizophrenia…a defect of birth".[63] Crucially, it facilitated legal theorists like Schmitt to use the same assumption of homogeneity in the British system as an argument against the liberal

[58] Preuss, "Deutsche Demokratisierung", 343. Cited in Stirk, "Hugo Preuss," 515.
[59] Hugo Preuss, "Weltkrieg, Demokratie und Deutschlands Erneuerung", in *Archivfiir Sozialwissenschaft und Sozialpolitik*, vol. 44 (1917), 2. Cited in Stirk, "Hugo Preuss", 499-500. Stirk notes that the *Obrigkeitsstaat* was "contrasted with the *Volksstaat*, although Preuss was not as strongly attached to the latter term as to the former."
[60] Cited in Stirk, "Hugo Preuss", 499.
[61] As *Ersatzkaiser,* the President's role would be similar to that of the Kaiser under the system of constitutional monarchy in Imperial Germany. See Stirk, "Hugo Preuss", 499 & 512.
[62] Stirk, "Hugo Preuss", 500.
[63] Ernst Fraenkel, *Die repräsentative und die plebiszitäre Komponente imn demokratischen Verfassungsstaat* (Tübingen: Mohr, 1958), 55. Cited in Stirk, "Hugo Preuss", 501-502.

representative system.[64]

The Weimar Constitution, then, was as much a work of compromising pragmatism as of lofty idealism. Far from being a symbolic triumph of the new republic in the manner of, for instance, the American Constitution, the Weimar Constitution instead, in the words of Preuß himself, "came about in the shadow of a terrible defeat…It did not come easily to the people, but entered history in arduous negotiations."[65] These arduous negotiations were reflected in the many complexities of the Articles of the Weimar Constitution. These complexities would require subsequent interpretation, and it is this element, as well as "the persistence of conceptions of the power of the state that long pre-dated the Weimar Republic", that ultimately precipitated the downfall of the Weimar Republic.[66]

In the legal sphere, the anti-Weimar cause found perhaps its most prominent champion in Carl Schmitt, but he certainly was not the only voice to question the very nature of the Weimar Republic. Indeed, the disillusionment that permeated German society also pierced the jurisprudential sphere, and the interwar period saw amongst a considerable number of legal theorists a "prevailing psychological need in Germany for a metaphysical grounding, for a fusion of law and morality, for the overcoming of the separation between Is and Ought".[67] This jurisprudential struggle was complemented by the Constitution and its attempts to combine the tradition of the *Rechtsstaat* with the new realities of Weimar democracy; much of the effort of legal theorists was directed towards the relationship between popular sovereignty and the *Rechtsstaat*, and indeed between the principle of the People's State, and the rules and procedures written out in

[64] Stirk, "Hugo Preuss", 502.
[65] Preuß, "Rede über die neue Reichsverfassung (1919)", in Hugo Preuss, *Gesammelte Schriften, Vierter Band: Politik und Verfassung in der Weimarer Republik*, ed. With an introduction by Detlef Lehnert (Tübingen: Mohr Siebeck, 2008), 589. Cited in Pauer-Studer, *Justifying Injustice*, 24.
[66] Stirk, "Hugo Preuss", 498, 515.
[67] Michael Stolleis, *A History of Public Law in Germany, 1914-1945* (Oxford: Oxford University Press, 2004), 83-84.

the constitution itself.[68] From this emerged, in keeping with Weimar's dualistic political climate, two main strands of jurisprudence: the formalist statutory-positivists, legal traditionalists and proponents of *Gesetzespositivismus* ('statutory positivism') who argued that the statute, and subsequently its determination through the Reichstag as the legislative body, was the highest expression of the people's will, and the so-called 'anti-positivists', who argued for the primacy of the constitution over the legislative body, thereby transforming the pluralist parliamentary system into a representative republican system.[69] The latter group was politically disparate, boasting advocates from Rudolf Smend to those who were prominent voices in the new Republic, such as Preuß and Herman Heller, as well as those who sought an end to parliamentary rule, such as Schmitt, Otto Koellreutter, and Ernst Forsthoff, figures who would reach the height of their legal careers in the Nazi era. They were united, though, in rejecting *Gesetzespositivismus* and challenging the prevailing nineteenth century idea of the *Rechtsstaat* as a state of reason born from the Kantian tradition, albeit hoping at the same time to maintain the political balance of that era, in particular the "illusory stability" of constitutional monarchism.[70] What differentiated those anti-positivists who opposed the Weimar Republic from those who were for it, was a "deep-seated and longstanding" intellectual theme of antiliberalism.[71] Developments in Weimar in the 1920s and 1930s would only reinforce these sentiments, with declining socio-economic and political conditions enabling legal theorists to voice their disdain for Weimar democracy, their rebukes focusing on its lack of political authority, its valuelessness and its dissonance with the German

[68] Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933-1937," *Cardozo Law Review* 16, no. 2 (1994), 401-403.
[69] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law*. (Oxford: Oxford University Press, 2018), 91; Caldwell, "National Socialism and Constitutional Law", 403.
[70] Meierhenrich, *The Remnants of the Rechtsstaat*, 77, 91-92; Caldwell, "National Socialism and Constitutional Law", 403. Note also that the text is referring to the German jurist Carl Friedrich Rudolf Smend (1882 – 1975), not to be confused with his father, the German theologian Rudolf Smend (1851 – 1913).
[71] Meierhenrich, *The Remnants of the Rechtsstaat*, 98.

Volk.[72]

These developments in the legal sphere ran in parallel to developments in wider Weimar society. The history of Weimar's economy, a "bundle of conflicts and contradictions", splits into roughly three phases, with eras of inflation in 1918 to 1923 and depression from 1929 to 1933 falling either side of a period of relative stability.[73] This was mirrored in the political sphere, with two periods of crisis sandwiching an intermediary period of relative stability. The Weimar Republic experienced twenty different cabinets between 1919 and 1933, and although no one party was able to exercise a hegemony, the political configuration of the Reichstag shifted more and more towards the authoritarian right.[74] There is certainly an argument that the Weimar Constitution, in which the void of a leading political party was filled by the President and his extensive and constitutionally-guaranteed powers, naturally lent itself towards authoritarianism, a fact that Preuß himself foresaw.[75] At the same time, it might also be argued that the institutional conflict inherent in the dualism of the Constitution paradoxically had a stabilising effect during the crises-ridden post-war years by encouraging political flexibility and innovation, not dissimilarly from the United States and in Fifth Republic France.[76] Regardless, the Weimar experiment ultimately hinged, somewhat tenuously, on the goodwill of the major political forces, in particular the President, and their adherence to or defiance of the Constitution.[77] At first, the Weimar Republic enjoyed the former of these under the stewardship of Friedrich Ebert as President. Appointed in 1919, Ebert sought to steer the Weimar Republic into a new era, placing an emphasis on a smooth transition with his willingness to collaborate with his ideological opponents as well as vestiges of the Imperial era

[72] Pauer-Studer, *Justifying Injustice*, 18.
[73] Eric D. Weitz, *Weimar Germany: Promise and Tragedy*. (Princeton: Princeton University Press, 2018), 131.
[74] Weitz, *Weimar Germany* 83-84; Evans, *The Coming of the Third Reich,* 83.
[75] Pauer-Studer, *Justifying Injustice*, 28.
[76] Detlev J.K. Peukert, *The Weimar Republic: The Crisis of Classical Modernity*. (New York: Hill and Wang, 1987), 39.
[77] Peukert, *The Weimar Republic*, 39.

such as the army and civil service. This is not to say that in doing so, Ebert steered clear of the excesses of Presidential power. The reality was in fact the opposite: Ebert utilised Article 48 on 136 separate occasions in his six years in power, in the process deposing legitimately elected governments in Saxony and Thuringia in a manner similar to the events of the *Preußenschlag*.[78] Crucially, Ebert did not just use Article 48 in emergency situations, but also where negotiating the political hurdle of parliamentary approval for legislation would prove too difficult.[79] By the standards of today, his actions come across as decidedly undemocratic; nevertheless, Ebert, a Social Democrat, was very committed to parliamentary democracy, even willing to work against more radical elements on the left, who called for a Bolshevik revolution.[80] Consequently, it could be said that, with Ebert as the incumbent, the existential threat that the accumulation of presidential power posed would not be realised.[81]

This would change when Paul von Hindenburg eventually took over in 1925, following Ebert's death earlier that year. In contrast to Ebert, Hindenburg legislated in defiance of the will of Parliament, countering each attempt to terminate his emergency powers by ordering a dissolution, as was his prerogative under Article 25 of the Constitution.[82] Indeed, Hindenburg dissolved the Reichstag in 1928, 1930, and 1932, and with each dissolution the Nazi Party incrementally gained political support. Such were the realities of the political situation in Weimar Germany that the Reichstag was ultimately left with two options: either a constant cycle of dissolutions of parliament followed by elections, or an outright coup.[83] The Nazis were invited into power through a version of the first option, but showed increasing signs of the second in the aftermath of the *Preußenschlag*,

[78] Evans, *The Coming of the Third Reich*, 80.
[79] Evans, *The Coming of the Third Reich*, 80.
[80] Evans, *The Coming of the Third Reich*, 78-79.
[81] Pauer-Studer, *Justifying Injustice*, 29.
[82] Peukert, *The Weimar Republic*, 40.
[83] Peukert, *The Weimar Republic*, 40.

as the elections approached in 1933.

The State Court ultimately ruled on October 25, 1932, that the Prussian government had fulfilled its duties to the Reich but had endangered public security and order; conversely, Papen's transfer of responsibilities from Prussia to the Reich and his dismissal of their government was not necessarily valid, but his measure to take control of the Prussian police force was considered as covered by Article 48.[84] Although billed as a conciliatory ruling, by offering a compromise between two legal opinions that, in the words of Hans Kelsen, "completely exclude one another," in effect it did little more than to legitimise the actions of Papen.[85] Ostensibly, the ruling represented a Prussian victory, as the court determined that the state had not violated its constitutional duties. The political reality, however, was a complete victory for the Reich government, because the court also determined that the Reich President had the right to invoke Article 48 to take control of a state if he believed such a move was in the interests of the Reich. The court had completely accepted Schmitt's argument that the Reich President could determine when a constitutional emergency superseded the constitution, thus giving the Braun government "the illusion of authority" and the Papen government "the reality of power", de facto control of Prussia.[86] This subsequent unbalancing of power simply incentivised more action from the federal branch of government. The biggest beneficiary from this would not be Papen, but Hitler, who eventually took over as Chancellor in January 1933, and would go on to utilise similar tactics in order to establish total control over Germany. First, in the aftermath of the Reichstag Fire on February 27, 1933, Hitler, using Article 48, brought into law the Reichstag Fire Decree, which suspended many of the Articles

[84] Pauer-Studer, *Justifying Injustice*, 32.
[85] Hans Kelsen (1932a) 'Das Urteil des Staatsgerichtshofs vom 25. Oktober 1932', *Die Justiz*, vol. 8 (1932), 65–91 in Vinx, *The Guardian of the Constitution*, 240.
[86] Dietrich Orlow, *Weimar Prussia, 1925-1933: The Illusion of Strength* (Pittsburgh: University of Pittsburgh Press, 1991), 244

that guaranteed civil liberties for German citizens. [87] Then, in March, Hitler brought into law the Enabling Act, which allowed him to bypass the system of checks and balances in the government and to enact laws without the involvement or consultation of the Reichstag – effectively making him a dictator.

Writing in the leading German legal publication of the time, Carl Schmitt marked the Enabling Act as "a turning point of constitutional significance."[88] For all his posturing before the Prussian State Court, though, Schmitt had not offered a viable alternative to the parliamentary democracy of the Weimar Republic. In the words of historian Peter Caldwell: "The Schmittian theory provided no solution. It merely opened the gate for the eventual Nazi takeover."[89] In the next chapter, we will see how legal theorists, having overthrown the democratic order and paved the way for Hitler and the Nazis, would then work symbiotically with the new regime to once again corrupt existing German legal concepts, only this time with an explicit end goal enshrined in the Nazi ideological mission: the persecution of the Jews.

[87] See *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat* ('Order of the Reich President for the Protection of People and State')
[88] Carl Schmitt, Das Gesetz zur Behebung der Not von Volk und Reich, 38 *Deutsche Juristen-Zeitung* (1933), 455-58, cited in Caldwell, "National Socialism and Constitutional Law", 407.
[89] Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), 119.

CHAPTER II: The Nuremberg Laws and the 'Racialisation' of the *Rechtsstaat*

The Jews, who constitute an alien body among all European peoples, are especially characterized by racial foreignness. Jews, therefore, cannot be seen as being fit for service to the German Volk and Reich. Hence, they must necessarily remain excluded from Reich citizenship.[90]

The Final Solution did not develop as evil incarnate but rather as the dark side of ethnic righteousness…To Germans caught up in a simulacrum of high moral purpose, purification of racial aliens became a difficult but necessary duty.[91]

Adolf Hitler became Chancellor on 30 January 1933; by July, the Nazis had declared themselves Germany's only legal political party, centralised the civil service at the state and federal level, and removed all political opposition, in particular Jews and Communists, from all the major institutions of German society, all but establishing the conditions for their totalitarian regime.[92] They achieved this despite securing only 43.9 per cent of the vote in the Reichstag elections in March 1933 in an election where left-wing parties were prohibited (often violently) from campaigning.[93] The speed with which the Nazis obtained total dominance over German society has led some historians of a previous generation to suggest that long-term weaknesses in the German "national character" gave rise to an inherent opposition to democracy and imbued the German people with a proclivity for authoritarianism.[94] However, as the last chapter established, Hitler and the Nazis profited from a deliberate effort to undermine and eventually overthrow democracy in the Weimar Republic. Just as their rise to power had precedent, so too did the ideological mission that motivated Nazi legislation.

Hitler had assembled the ideological views of Nazism, outlined in his autobiographical

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[90] Wilhelm Stuckart and Hans Globke. "Civil Rights and the Natural Inequality of Man (1936)." In Anson Rabinbach and Sander L. Gilman (eds.), *The Third Reich Sourcebook*, 1st ed. (Berkeley: University of California Press, 2013), 214.
[91] Claudia Koonz, *The Nazi Conscience* (Cambridge: Harvard University Press, Belknap Press, 2003), 273.
[92] Richard J. Evans, *The Coming of the Third Reich: How the Nazis Destroyed Democracy and Seized Power in Germany.* (Penguin, 2003), 340, 382, 437. The process of 'Nazifying' Germany is referred to in Nazi terminology as *Gleichschaltung* ('co-ordination').
[93] Richard J. Evans, *The Third Reich in Power: How the Nazis Won Over the Hearts and Minds of a Nation* (New York: Penguin, 2005), 1.
[94] Evans, *The Third Reich in Power*, 1. These historians subscribe to the *Sonderweg* interpretation in German historiography.

book *Mein Kampf*, by integrating such variegated elements as pan-Germanism, eugenics, anti-democracy and anti-modernism, and especially antisemitism.[95] His social policies of biological racism were inherited from the so-called 'racial hygienists' of the late nineteenth century.[96] These *Rasseforscher* ("racial scientists") were heavily influenced by Social Darwinism and late eighteenth-century linguistic theories about language families, synthesising these ideas to develop scientific theories that divided ethnic groups into 'races'.[97] It is from this that the Nazis formed their two most prominent racial categories: "Aryan" ('Germanic') and "Semitic" ('Jewish').[98] In particular, Hans F. K. Günther's definition of "race" as a "group of humans differing from all other human groups by its typical physical features and spiritual characteristics", as well as his distinctions between race and *Volk* ('people'), found its way into many Nazi legal commentaries.[99] The *Judenfrage* ('Jewish Question'), which lay at the heart of the National Socialist worldview, originated in the nineteenth century as a contestation of Jewish integration into wider European society, before antisemitic racists in Germany co-opted the term and transmutated its meaning into the removal of the Jews as an unassimilable group into German society and one responsible for its defeat in the Great War.[100]

This provided fertile ground for the Nazi Party in 1933, and, as such, they were able to mobilise their ideological mission expeditiously.[101] Hitler's government passed their first pieces of antisemitic legislation on 7 April 1933 with the Law for the Restoration of the Professional Civil

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[95] Evans, *The Third Reich in Power,* 7-8.
[96] Evans, *The Third Reich in Power*, 506-514
[97] Karl Schleunes, "The Enigma of Bernhard Loesener—Nazi Bureaucrat" in Karl Schleunes (ed.), *Legislating The Holocaust: The Bernhard Loesener Memoirs and Supporting Documents* (Westview Press, 2001), 5; Herlinde Pauer-Studer, *Justifying Injustice: Legal Theory in Nazi Germany* (Cambridge University Press, 2020), 117.
[98] For more, see Leon Poliakov, *The Aryan Myth: A History of Racist and Nationalist Ideas in Europe*, trans. Edmund Howard (Basic Books, 1974). Cited in Schleunes, *Legislating the Holocaust*, 5.
[99] Hans F. K. Günther, *Rassenkunde des Deutschen Volkes* (J. F. Lehmanns, 1922), 7; cited in Pauer-Studer, *Justifying Injustice*, 121, 131.
[100] Hannah Arendt, "Privileged Jews." J*ewish Social Studies* vol. 8, no. 1 (1946), 28; Schleunes, *Legislating the Holocaust*, 4-5.
[101] Evans, *The Coming of the Thrid Reich,* 34-38, 377-38.

Service, which removed officials who were not of 'Aryan descent', and a tangential law ordering 'non-Aryan' lawyers to cease practising.[102] From here, the first phase of Nazi racial policy had two main strands: 'contagionistic antisemism', which focused on maintaining 'racial purity' among Aryans, and a type of genetic racism based in racial anthropology and heredity.[103] These two threads converged and culminated in the Nuremberg Laws of 1935, which came to represent the "fundamental constitutional law of the national socialist state."[104]

To facilitate this wave of legislation, the Nazis established, at the state institutions that they had assumed total control over, offices for *Rassen- und Judenreferate* ('Racial and Jewish Questions'). The most important of these was the office founded in the Ministry of the Interior, which bore responsibility for "Legislation in the Jewish Question", including the Nuremberg Laws.[105] At the head of these efforts was Bernhard Lösener, whose 1950 memoir of his experiences proved a major, albeit controversial, source for scholars seeking to understand the making of antisemitic Nazi policy.[106]

With the majority of dissenting voices in the state bureaucracy already expelled, these developments were met with enthusiasm in the legal realm. Nevertheless, even amongst the legal theoreticians who identified with National Socialism, a divide began to open up as they sought to define a 'racial' legal order for the Nazi state. Examining this emerging divide is critical to understanding not only how legal theorists continued to abuse constitutional norms to justify their

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[102] Laurence Rees, *The Holocaust: A New History* (New York: Penguin, 2017), 61; the Civil Service Law also targeted political opponents, in particular the Social Democrats and Communists.
[103] The term "contagionistic antisemitism" was coined by Cornelia Esser. See Cornelia Esser, *Die "Nürnberger Gesetze" oder die Verwaltung des Rassenwahns 1933-1945* (Paderborn: Ferdinand Schöningh, 2002), 32-49. Cited in Pauer-Studer, *Justifying Injustice*, 118. I use the word 'phase' here because the importance of legislation receded after 1935 in the face of more violent antisemitic measures.
[104] "Entscheidungen des Reichgerichts in Strafsachen 72, 91, 96 (Decision of the Reichgerichts in Cases 72, 91, 96), *Deustche Justiz*, vol. 100 (1938), 422-24, cited in Whitman, *Hitler's American Model,* 73.
[105] Schleunes, *Legislating the Holocaust*, 4; Pauer-Studer, *Justifying Injustice*, 130.
[106] Schleunes, *Legislating the Holocaust*, 4. Schleunes states that the controversy of Lösener's memoir centres around his claim that he worked to mitigate the severity of antisemitic laws, wording them in such a way as to limit the number of people affected.

violation of natural rights, but how these theorists abandoned the *Rechtsstaat* altogether to pursue the Nazi ideological mission and ultimately to even overthrow the meaning of law itself.

At the time of the first antisemitic laws, German lawyers of Jewish faith or ancestry – the latter being a factor arbitrarily decided by the Nazis – accounted for approximately twenty percent of the Bar in Germany.[107] German-Jewish lawyers formed part of an "array of collective brilliance that formed a fitting counterpoint to the artistic, literary, and scientific glories of Weimar Berlin."[108] This picture changed drastically as a result of the Law for the Restoration of the Professional Civil Service (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) and the Law on the Admission to the Bar, the latter of which mandated the disbarment of Jewish lawyers by September. [109] That said, the *Law* itself only referred to members of the civil service "not of Aryan descent"; the Nazis did not classify the Jews as members of a separate juridical category until the First Regulation under the *Law*, passed four days later:

> "A person is to be considered non-Aryan if he is descended from non-Aryan, and especially from Jewish parents or grandparents. It is sufficient if one parent or grandparent is non-Aryan. This is to be assumed in particular where one parent or grandparent was of the Jewish religion"[110]

Much has been made of the "baleful continuities" in the legal profession – particularly those judges in state employ between Imperial Germany and the Weimar Republic that might have foreshadowed the Third Reich, and on the moral and ethical failures of lawyers in failing to prevent latter regime's rise.[111] It is important to recognise these two laws as a turning point, though,

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[107] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press, 1991), 61.
[108] Benjamin Carter Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (Oxford, 2008), 125.
[109] *Reichsgesetzblatt* 1933 I, 175-7.
[110] David A. Fraser, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press, 2005), 32-33.
[111] Benjamin Carter Hett, *Death in the Tiergarten: Murder and Criminal Justice in the Kaiser's Berlin* (Cambridge: Harvard University Press, 2004), 2-3; Kenneth F. Ledford, *From General Estate to Special Interest: German Lawyers 1878-1933* (NewYork: Cambridge University Press, 1996), 296.

because, for the first time, the law not only distinguished Jews from so-called Aryans, but actively and unambiguously discriminated against the former group, in the same manner that the Nuremberg Laws would eventually do, with the scope expanded from particular professions to the entire Jewish population in Germany.[112] This constituted the most fundamental transformation in the law under Nazi Germany: the creation of "the Jew" as a legal subject. This creation was the prerequisite to then proceed and destroy "the Jew" as a legal subject; in retrospect, it becomes evident that this legal destruction preceded a physical destruction, as was the case with the Holocaust.[113]

One cannot, though, delve into jurisprudence of Nazi-era lawyers without first confronting the antisemitism deeply entrenched in their legal thought. This is an important fact that has been overlooked by historians, as we can see in the case of Carl Schmitt. Historians have explained away Schmitt's antisemitic activism in the Nazi years as opportunistically motivated, a position reliant on the presumed fact that Schmitt made no antisemitic pronouncements before or after the Nazi period.[114] This presumption was exacerbated in no small part by Schmitt himself, with the publication of his diary for the years 1947-51, which seemed to "confirm his often intimate, complex relationships with Jews."[115] The subsequent publication, however, of Schmitt's diary entries between 1912 and 1915 paint a far different portrait of a man obsessed with "the Jews", often expressed in outbursts of rage, in one instance stating that he was not afraid of these "sneaks" ("*Schleicher*") and that "Mankind is interspersed with vermin" ("*Es gibt Ungeziefer unter den*

[112] Douglas G. Morris, "Discrimination, Degradation, Defiance: Jewish Lawyers under Nazism." In *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, edited by Alan E. Steinweis and Robert D. Rachlin, 1st ed. (New York: Berghahn Books, 2013), 111.
[113] Fraser, *Law after Auschwitz*, 32.
[114] For example George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936* (Santa Barbara, ABC-Clio, 1989), 137; Joseph J. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton Legacy Library, 1983), 207, 227, 234. Cited in Raphael Gross, *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory*. Translated by Joel Golb (Madison: University of Wisconsin Press, 2007), 17.
[115] Joseph J. Bendersky, "Schmitt's Diaries" in *The Oxford Handbook of Carl Schmitt*, eds. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press), 117.

Menschen").[116] Thus, such assertions as "a Jewish author has no authority, no "purely scholarly" authority", made in 1936, were not moments of political opportunism, but evidence of a deep-seated antisemitism.[117]

Far from representing atypical views (and contrary to assumptions held in postwar Germany) Schmitt's perspective reflected much of the non-Jewish German population, especially the academic leadership in the upper-middle class, in their support for an "antisemitism of reason."[118] Not only was antisemitism a "legislative pillar" of the Nazi social engineering scheme, but a basic feature of Nazism was the linkage of antiliberal and antisemitic polemics.[119] Jurisprudentially speaking, the persecution of the Jews was not just symbolic to the vision of Nazi law but was intertwined with the dismantling of the liberal legal order, itself viewed as a manifestation of "Jewish legal thought" (*jüdische Rechtsdenken*).[120] The Nazis "replaced equality with racial superiority, subordinated the individual to the Aryan community, and discarded democratic participation for the dictatorial Führer state."[121] This transition to the Führer state is apparent in the increasingly extremist language of Nazi legal and political theorists, in particular references to totalities and 'German' ideals such as the *Volk* and 'blood and race.' Ernst Forsthoff, writing on the disintegration of the Weimar Constitution, reflected that "genuine rank" grows out of

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[116] Carl Schmitt, *Carl Schmitt Tagebücher: Oktober 1912 bis Februar 1915*, ed. Ernst Hüsmert (Berlin: Akademie Verlag, 2005), 47-50. Cited in Gross, *Carl Schmitt and the Jews*, 20, 234-237

[117] Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," in *Deutsche Juristen-Zeitung* 41, no.20 (1936), 1193. Translated by Timothy Nunan as "German Jurisprudence and the Struggle against the Jewish Spirit", in *The Third Reich Sourcebook*, 216.

[118] On approval for Hitler's policies, see Werner Jochmann, *Gesellschaftskrise und Judenfeindschaft in Deutschland, 1870-1945*, 2nd ed. (Hamburg: Christians, 1991), 13; Hitler's reference to "antisemitism of reason" is found in an edited letter to Adolf Gemlich in *Hitler: Sämtliche Aufzerichnungen, 1905-1924*, ed. Eberhard Jäckel and Axel Kuhn (Stuttgart: Deutsche Verlagsanstalt, 1980), 80; see also Wolfram Meyer, "Wann wurde Hitler zum Antisemiten? Einige Überlegungen zu einer strittigen Frage," *Zeitschrift für Geschichtswissenschaft* 43 (1995), 687-697. All cited in Gross, *Carl Schmitt and the Jews*, 29.

[119] Oleksandr Kobrynskyy, "Defining the Jew: The Origins of the Nuremberg Laws" in Nazi Law, 35; Gross, *Carl Schmitt and the Jews*, 35.

[120] Carl Schmitt, "Nationalsozialistisches Rechtsdenken," *Deutsches Recht*, Vol. 4 (1934), 225-9. Cited in Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law*. (Oxford University Press, 2018), 105.

[121] Douglas G. Morris, "Discrimination, Degradation, Defiance: Jewish Lawyers under Nazism." In *The Law in Nazi Germany*, 107.

the "elementary presuppositions of blood and race", and that the "unity of state and party" is a "spiritual-political" one signifying the "obligation" of the National Socialist ideology.[122] Alfred Rosenberg, while questioning the use of the term 'total state', nevertheless acclaimed the "totality" of the National Socialist state in "securing the soul, the mind, and spirit", and the "blood" of National Socialism as an "epochal manifestation."[123] Schmitt, like Forsthoff, deplored the weakness of the logic of the liberal constitutional Weimar state with its lack of political instinct and its "empty *legality* of a false neutrality", proposing in its place a new system with the Führer as the "supreme judicial authority" who "directly creates law".[124] Hans Frank modified the role of the judge into one of "safeguarding the concrete order of the racial community", a role that required the judge to be "independent" and "not bound by instructions".[125] Professional banalities aggravated this already increasingly extreme rhetoric: jurists such as Forsthoff at the start of their careers needed to demonstrate a far greater identification with Nazism than their established counterparts in order to advance.[126]

Whether an early adopter or a relative newcomer, those legal theorists who embraced the National Socialist worldview shared a number of commonalities: perhaps most prominently, that the function of law in the Nazi dictatorship was to create a strong state. This strength derived from

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[122] Ernst Forsthoff, *Der totale Staat* (Hamburg: Hanseatische Verlagsanstalt, 1933), 34-39. Translated as "The Total State (1933)." in *The Third Reich Sourcebook*, 1st ed., ed. Anson Rabinbach and Sander L. Gilman, (University of California Press, 2013.), 59-60.

[123] Alfred Rosenberg, "Totaler Staat?", *Völkischer Beobachter*, January 9, 1934. Translated as "The Total State?: (1934)." in *The Third Reich Sourcebook*, 1st ed., ed. Anson Rabinbach and Sander L. Gilman, (University of California Press, 2013.), 62-63.

[124] Carl Schmitt, "Der Führer schützt das Recht: zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934," *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles 1923–1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), 198–201. Translated by Timothy Nunan as "The Führer Protects the Law: On Adolf Hitler's Reichstag Address of 13 July 1934." in *The Third Reich Sourcebook*, 1st ed., ed. Anson Rabinbach and Sander L. Gilman, (University of California Press, 2013.), 63-67.

[125] Hans Frank, "Leitsätze des Reichsrechtsminister Hans Frank über die Stellung des Richters in dem nationalsozialistichen Staat und vor dem nationalsozialistichen Recht" (14 January 1936), in Dokumente der deutschen Politik, edited by Franz Alfred Six (Berlin: Junker und Dünnhaupt, 1942), 337. Translated as "On the Position of the Judge before National Socialist Law and in the National Socialist State (1936)." in *The Third Reich Sourcebook*, 1st ed., ed. Anson Rabinbach and Sander L. Gilman, (University of California Press, 2013.), 67.

[126] Gertrud Rapp, *Die Stellung der Juden in der nationalsozialistischen Staatsrechtslehre: die Emanzipation der Juden im 19. Jahrhundert und die Haltung der deutschen Staatsrechtslehre zur staatsrechtlichen Stellung der Juden im Nationalsozialismus*

the subordination of the individual and their rights to the collective, in contrast to liberal theories of law, which protected the individual against state power. These theories were to them a betrayal of German idealism resulting in decadence, materialism, and, among other factors, the destruction of law as a moral idea. They aimed to create this impenetrable state by embracing scientific racism, in particular Hans F. K. Günther's distinction between *Volk* (including cultural values) and race (meaning hereditary biological features).[127] The jurists adjusted this principle slightly, as a *Volk* could only be a community if it were based on homogeneity. Race served as the basis of the *Volk*. Forsthoff, for instance, wrote that the *Volk* is a community based on an "ontological, generic homogeneity (*seinsmäßige, artmäßige Gleichartigkeit*)."[128] In this system, anyone who was "racially alien" could neither ethically nor legally comply with German law and justice, and hereby existed outside of the *Volk*. This created a contradiction whereby "the Jew" was both subject to the law and yet existed outside of it.

Nor was this the only contradiction that Nazi theorists had to contend with: one consequence of making race a determining factor in *völkisch* jurisprudence was that jurists had to present it as irrefutably empirical as opposed to *normative*. This, coupled with the hyper-fixation of a racial-scientific vision of the *Volksgemeinschaft*, meant that the National Socialist state defined itself as *völkisch* only in the racial sense. In other words, the ideals of the Nazi state were fundamentally only achievable by first excluding and then eliminating the Jews residing in Germany.[129]

The culmination of this thought, as well as the efforts to deconstruct the concept of the individual embodied in the liberal legal order, is apparent in the legal commentary on the

[127] See, for instance, Wilhelm Stuckart and Hans Globke, *Kommentare zur deutschen Rassengesetzgebung*, vol. 1 (München und Berlin: C. H. Beck, 1936), 1. Cited in Pauer-Studer, *Justifying Injustice*, 131.
[128] Forsthoff, *Der totale Staat*, 38. Cited in Pauer-Studer, *Justifying Injustice*, 131.
[129] Fraser, *Law After Auschwitz*, 34-35.

Nuremberg Laws, written by Wilhelm Stuckart and Hans Globke at the behest of Hitler. It reaffirms many staples of Nazism: the *Volk* as the "fundamental political value", a rejection of the "individualistic-liberal point of view", that "the individual human being can be conceived only as a member of a community of people to whom he is racially similar", and the idea that "only those who are racial comrades can become citizens", and therefore "no Jew can be a racial comrade".[130] Stuckart and Globke find the answers to this in the Nuremberg Laws:

> "In the Reich Citizenship Law, National Socialism sets the doctrine of the equality of man and of the fundamentally restricted freedom of the individual vis-á-vis the state against the hard yet ineluctable fact of the natural inequality and disparate natures of men."[131]

Despite, however, the overwhelmingly one-sided nature of the legal profession as a consequence of the Nazi purge of its ranks, it would be a mistake to assume that the destruction of the liberal legal order resulted in an intellectual homogeneity among the remaining jurists loyal to the Nazi regime.[132] Indeed, one way in which the jurisprudential tensions over the creation of "the Jew" as a legal category manifested itself was in the debate over the *Rechtsstaat*. The debate over the *Rechtsstaat* illustrates an attempt to continue normative functions of state, contrary to popular images of the 'lawless' Nazi regime. Fought on the one hand, by those seeking to retain (within Nazi reason) the terminology of the *Rechtsstaat*, and, on the other, those seeking to do away with and replace the *Rechtsstaat* with a new vocabulary to capture the revolutionary overhaul of the institutions of state, the discourse displayed the tensions between the normative state and the growing prerogative state, tensions that would define the nature of the Nazi regime.[133]

Otto Koellreutter was a prime example of these tensions. Koellreutter was firmly against the

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[130] Wilhelm Stuckart and Hans Globke, "Civil Rights and the Natural Inequality of Man (1936)" in *The Third Reich Sourcebook*, 210-214.
[131] Stuckart and Globke, "Civil Rights and the Natural Inequality of Man (1936)," 213.
[132] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law*. (Oxford University Press, 2018), 132.
[133] Meierhenrich, *The Remnants of the Rechtsstaat*, 95-96.

Weimar Republic, welcoming the Nazi regime as "a clear, new construction of the state" that would enshrine the "old German conservative heritage" in National Socialist "countenance".[134] At the same time, Koellreutter sought to protect the "eternal value" of the *Rechtsstaat*, albeit rejecting the formalist and individualistic principles of its liberal iteration.[135] To him, this would require a new definition of the *Rechtsstaat* that no longer defended individual rights, but instead imbued it with a "national" feeling.[136] For Koellreutter, the "national *Rechtsstaat*" would underpin the "authoritarian *Führerstaat*" ("*autoritäter Führerstaat*), holding the state together by an "idea of law" ("*Rechtsidee"*) based on an "experience of community" (*"Gemeinschaftserlebnis"*) made possible by the *völkisch* ideology underpinning it.[137] This *völkisch* ideology would serve as Koellreutter's justification of a 'racialisation' of law, in which the preservation of the *Volk* "in its racial substance and as a body of physically healthy members" would be the basis of "any political and cultural progress."[138]

Ostensibly, there was little to separate the 'nationale *Rechtsstaat*' that Koellreutter envisioned from its liberal predecessor. Koellreutter advocated for the independence of the judiciary; unlike Hans Frank, though, who wanted the judiciary to be grounded in "the living community of the German Volk" and bound by the "healthy sentiment of the people", Koellreutter merely wanted to maintain the independence of the judiciary from its executive and legislative counterparts, maintaining the tripartite separation of powers of the Weimar era. This nod towards separation of powers does not mean, though, that Koellreutter, had any interest in democratic

[134] Otto Koellreutter, "Der nationale Rechtsstaat", 38 *Deutsche Juristen-Zeitung* (1933) 517- 24. Cited in Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1993-1937," *Cardozo Law Review* 16, no. 2 (December 1994), 407.
[135] Koellreutter, "Der nationale Rechtsstaat", 519. Cited in Caldwell, "National Socialism and Constitutional Law", 407.
[136] Koellreutter, "Der nationale Rechtsstaat", 521-522. Cited in Caldwell, "National Socialism and Constitutional Law", 407-408
[137] Otto Koellreutter, *Grundriß der Allgemeinen Staatslehre* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1933), 74. Cited in Meierhenrich, *The Remnants of the Rechtsstaat*, 112.
[138] Otto Koellreutter, *Grundriß der Allgemeinen Staatslehre*, 50. Cited in Pauer-Studer, *Justifying Injustice*, 132.

government. One difference hinged on a key phrase: "The primary value of law is the legal shaping and securing of our national life-order."[139] Invoking the 'life-order' (*Lebensordnung*) of the 'racial community' (*Volksgemeinschaft*) as a guiding principle enabled Koellreutter to transmutate the executive into a more dictatorial figure, writing that leadership required "the power of creating inner order and of using its own strengths to ward off disruptive influences", a viewpoint that echoed those of Papen or Schmitt in the *Preußenschlag*.[140] This thinking led Koellreutter to make more and more concessions in his language to compensate for increasingly extreme extrajudicial violence of the Nazi regime. One such example was the Night of the Long Knives in 1934, a series of political extrajudicial executions ordered by a paranoid and deeply vindictive Hitler to settle old scores and eliminate rivals whose power and influence threatened his own.[141] The regime subsequently passed a "Law Regarding Measures of State Self-Defence" (*Gesetz über Maßnahmen zur Staatsnotwehr*), which retroactively legalised the murders committed during the purge as a defensive measure against "attacks of high treason."[142] To Koellreutter, this not only served as an adequate justification, but in fact as a precedent whereby the law of exception (*Staatsnotrecht*) "positivises itself" (*positiviert sich*) to preserve the *Lebensordnung*.[143] Eventually, Koellreutter felt compelled to revise his concept into a 'National Socialist *Rechtsstaat*' where the supreme source of law was not legislation but *das Recht* – the law itself.[144] Central to this evolved understanding of the state was the "polarity" ("*Polaritätsverhältnis*") between the "ethical" demands and "political

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[139] Otto Koellreutter, *Der nationale Rechtsstaat: Zum Wandel der deutschen Staatsidee* (Tübingen: J.C.B. Mohr, 1932), 33-35, cited in Caldwell, "National Socialism and Constitutional Law", 413.
[140] Koellreutter, *Grundriß der Allgemeinen Staatslehre*, 54. Cited in Pauer-Studer, *Justifying Injustice*, 132.
[141] Richard J. Evans, *The Third Reich in Power* (Penguin, 2006), 36-38; Volker Ullrich, *Hitler: Volume I: Ascent 1889-1939* (Vintage, 2017), 466-471.
[142] Evans, *The Third Reich in Power,* 72. The commentary by Schmitt, which argued that Hitler, as the "supreme judicial authority, directly creates law" provided the legal justification for the *ex post facto* law. See Carl Schmitt, "The Führer Protects the Law: On Adolf Hitler's Reichstag Address of 13 July 1934" in *The Third Reich Sourcebook*, 64.
[143] Otto Koellreutter, "Der nationalsozialistische Rechtsstaat" in Hans Heinrich Lammers and Hans Pfundtner, eds., *Die Verwaltungsakademie: Ein Handbuch für den Beamten im nationalsozialistischen Staat* (Berlin: Industrieverlag Spaeth und Linde, 1934) 6-7. Cited in Meierhenrich, *The Remnants of the Rechtsstaat*, 113.
[144] Otto Koellreutter, "Quellen des nationalsozialistischen Staatsrechts" in Hans Heinrich Lammers and Hans Pfundtner, eds., *Die Verwaltungsakademie,* 2. Cited in Meierhenrich, *The Remnants of the Rechtsstaat*, 112-113.

necessities" of the law.[145] In highlighting the dichotomous relationship between the law and politics, between the actions of the normative judiciary and the whims of Hitler and the Nazi regime, Koellreutter had developed, at least preliminarily, a vision of the dual state.[146] Moreover, he had created a 'racialised' version of the *Rechtsstaat* that – albeit with a heavy dose of legal chicanery to facilitate the violent excesses of the growing prerogative state – maintained the legal institutions of the Weimar era.

Far from resolving the issues of the previous era, the transformation to a 'National Socialist *Rechtsstaat*' proliferated them. The more concessions that theorists like Koellreutter made in their language, the more credence it gave to those who argued against the need for the *Rechtsstaat*. Other theorists, like Heinrich Lange and Otto von Schweinichen, also argued for retaining the *Rechtsstaat*, at least as a concept, albeit stripped of the empty formalism of the legislative state ("*Gesetzesstaat*"), a vestige of the "bourgeois-liberal" *Rechtsstaat*, and instead imbuing it with an "inner value" ("*inneren Wert*"), making it the "essence of morality" ("*der Inbegriff des Sittlichen*").[147] The separation of law and statute, though, as opposed to strengthening the 'National Socialist *Rechtsstaat*', instead left it vulnerable to those who sought to reject the *Rechtsstaat* as a category of practice as well as analysis.

The call for replacing or abandoning entirely the *Rechtsstaat* centered on its supposed lack of intrinsic value. Perhaps the most prominent advocate in rejecting the *Rechtsstaat* was Carl Schmitt. Schmitt agreed with Koellreutter that the institution of the Führer (*Führertum*) and the

[145] Koellreutter, "Der nationale Rechtsstaat," 523.
[146] Caldwell, "National Socialism and Constitutional Law", 413-414; Meierhenrich, *The Remnants of the Rechtsstaat*, 113-114.
[147] Heinrich Lange, *Vom Gesetzesstaat zum Rechtsstaat* (Tübingen: Mohr, 1934), 4; Otto von Schweinichen, "Gegenthese" in Günther Krauß and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), 42. Cited in Meierhenrich, *The Remnants of the Rechtsstaat*, 117-121.

principle of "racial equality" (*Artgleichheit*) were the basic concepts of National Socialist law.[148] Unlike Koellreutter, Schmitt saw no point in 'racialising' the *Rechtsstaat*, seeing the term as a relic of the Weimar era, which did not belong to "those indestructible words of German legal and *Volk* history."[149] Indeed, the *Rechtsstaat* posed a danger to the regime, as a failure to precisely define it would leave the "law and justice of the National Socialist state" subject to challenges from its enemies.[150] Schmitt did not agree with the notion that the *Rechtsstaat* needed to be stripped of its liberalism to create an authentical 'National Socialist *Rechtsstaat*'; for Schmitt liberal formalism was so inherent to the *Rechtsstaat* that the concept would need to be replaced entirely to allow for a state that could override any legal rule when necessary to protect the *Lebensordnung*.[151] Rather than a *Rechtsstaat* like Weimar, which, "paralyzed by the logic of a liberal constitutional state…lacked all political instinct", Schmitt instead propagates a system in which the Führer "protects the law from its worst abuse when in the moment of danger he…as the supreme judicial authority, directly creates law", a "judicial duty whose inner justice cannot be realized by any other actor".[152]

Concerns over the liberal legacy of the *Rechtsstaat* were not unique to its detractors, but for them it served as evidence as to why the term should be abandoned. Ernst Forsthoff, himself a doctoral student of Schmitt in the Weimar era, criticised the *Rechtsstaat* as a semantic invention of liberal (that is also to say, "Jewish") thought, and thus impossible to purge of liberalism.[153] The

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[148] Carl Schmitt, *Staat, Bewegung, Volk: die Dreigliederung der politischen Einheit*. 2nd ed. (Hamburg: Hanseatische Verlagsanstalt, 1934). Cited in Caldwell, "National Socialism and Constitutional Law", 408-409; Caldwell translates *Artgleichheit* as "unity of species, type, or race", in contrast to some authors, who translate the term as "substantial equality."
[149] Carl Schmitt, "Nachwort", in Günther Krauß and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), 85; Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?", *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 95 (1935), 200. Cited in Meierhenrich, *The Remnants of the Rechtsstaat*, 141.
[150] Carl Schmitt, "Neue Leitsätze zur Rechtspraxis," *Juristische Wochenschrift*, Vol. 62 (1933), 351. Cited in Meierhenrich, *The Remnants of the Rechtsstaat*, 141.
[151] Carl Schmitt, "Nationalsozialismus und Rechtsstaat", *Juristische Wochenschrift* 63 (1934), 713-718; see Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 192.
[152] Schmitt, "The Führer Protects the Law", 64-66.
[153] Ernst Forsthoff, "Otto Koellreutter, Der deutsche Führerstaat" (Book review), *Juristische Wochenschrift*, Vol. 63 (1934), 538.

absence of the *Rechtsstaat* would engender new semantic inventions, a new vocabulary of law. However, given the "petty conflicts and one-upmanship that marked theoretical discussions of the time," this ultimately left the door open for increasingly radical and extremist language.[154] Schmitt, for instance, enjoyed a burgeoning reputation in a field where his senior colleagues had been purged, if not on 'racial' or political grounds, then in anticipation of future purges, or even out of defiance.[155] His firm stance against the *Rechtsstaat* brought him into conflict with Koellreutter. With the declining relevancy of the 'normative' state, marginalised in the 'racial' dictatorship by the increasing power of its prerogative counterpart, the debate about the *Rechtsstaat* "ended in a grotesquerie and was soon abandoned", with the term beginning to disappear from legal discourse.[156]

Unsurprisingly, a prevalent narrative surrounding the *Rechtsstaat* that developed held that the concept effectively ceased to exist in 1933, a viewpoint reinforced by the horrors that followed.[157] Consequently, it is worth questioning the merits of examining a system and a jurisprudence that, by effectively creating new legal concepts, "[took] pride in pretending that it has established a legal system which is *sui generis* and beyond the reach of comparative standards."[158] However, it is still important to recognise the Nazi attempt to reconstitute legal norms and subsequently acknowledge the Nazi quest for normativity, even if the law they were creating "had little in common with what lawyers had theretofore called law."[159] Even though Nazi legal theorists shared a deep disdain for the Weimar era and its 'bourgeois-liberal' traditions (again, a code word for "Jewish"), they nevertheless had difficulty in escaping the long shadow of the *Rechtsstaat*

[154] Caldwell, "National Socialism and constitutional Law", 400.
[155] Balakrishnan, *The Enemy*, 190.
[156] Michael Stolleis, *Public Law in Germany: A Historical Introduction from the 16th to the 21st Century*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2017), 108.
[157] Meierhenrich, *The Remnants of the Rechtsstaat*, 95.
[158] Karl Loewenstein, "Dictatorship and the German Constitution: 1933-1937." *The University of Chicago Law Review* 4, no. 4 (1937), 538.
[159] Friedrich Roetter, "The Impact of Nazi Law," *Wisconsin Law Review* (1945), 516.

tradition, and therefore merely appropriated much of the language they had inherited from the Weimar era. For all the arbitrariness of the Nazi state, though, to reject or completely dismiss its 'legality' ultimately does not emancipate the historian from the "existential reality" that the legal system of the Third Reich functioned more or less as it had beforehand: not only did the consolidation of political power in the hands of Hitler – both the suspension of civil rights protections and invocation of emergency powers - occur under the provisions of Article 48, but lawyers still played a role in the legislation, even if to provide a façade of "legally" coming to power.[160] As the debate over the *Rechtsstaat* shows, lawyers played a fundamental role in the institutional development of the Nazi regime, and, ultimately, its direction towards racial persecution.

[160] Fraser, *Law after Auschwitz*, 28.

CHAPTER III: The Hart-Fuller Debate and Jurisprudence After Nazi Germany

"The emotional involvement of authors with their topic is not a problem unique to this field of research, though it surely occurs here with special intensity. National Socialism was not merely one dictatorship among many others, it has left its imprint on the psyche of several generations."[161]

In 1944, a man was sentenced to death.[162] The sentence was never carried out, but, after some time in prison the convicted man was instead sent back to the front, where he served in the German army. His crime, allegedly, was one of sedition: he had made insulting remarks about Hitler while on leave from the German army, which violated statutes making it illegal to "assert or repeat any statements inimical to the welfare of the Third Reich" or "to impair by any means the military defence of the German people."[163] The person who denounced him to the authorities and testified against him was none other than his wife, apparently wishing to be rid of him. The story did not end there, however: in 1949, after World War II and the collapse of the Nazi regime, the wife was prosecuted in a West German court for an offence described as "unlawful deprivation of another's liberty" (*rechtswidrige Freiheitsberaubung*). The court eventually found the wife guilty as she had, acting out of free choice, exploited a Nazi "law" which is contrary "to the sound conscience and sense of justice of all decent human beings" to bring about the death or imprisonment of her husband.[164]

The so-called Grudge Informer Case gained notoriety as the focal point of a debate that took place in 1958 in the pages of the *Harvard Law Review* between Herbert Lionel Adolphus Hart and Lon Luvois Fuller, an Englishman and an American, and the leading proponents of legal positivism

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[161] Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*. Translated by Thomas Dunlap (Chicago: University of Chicago Press, 1998), 28.
[162]. "Criminal Law. In General. German Citizen Who Pursuant to Nazi Statute Informed on Husband for Expressing Anti-Nazi Sentiments Convicted under Another German Statute in Effect at Time of Act." *Harvard Law Review* 64, no. 6 (1951), 1005–7. Both cited in H. L. A. Hart, "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958), 618-619. Here, I paraphrase the details of the 1944 case as Hart provides them.
[163] Hart, "Positivism and the Separation of Law and Morals", 619.
[164] Judgment of July 27, 1949, Oberlandesgericht, Bamberg, 5 *Süddeutsche Juristen-Zeitung* 207 (1950) in "Criminal Law", *Harvard Law Review* (1951), 1006.

and natural law theory respectively in the Anglo-American sphere. In their hands, a seemingly isolated case transformed into an examination of jurisprudence as such. This debate, however, was not the first of its kind: although our thesis has dealt overwhelmingly with theorists in 1930s Germany who supported National Socialism, there was at the same time a community of lawyers and legal scholars working both inside and outside of Germany publishing their observations on the "momentous transformation of a previously liberal and democratic state."[165] Many of these jurists were Jewish Germans, and a good number of them fled Germany over the course of the 1930s, commenting on developments from abroad. In their contemporary debates with pro-Nazi theorists like Schmitt, they advanced many of the same ideas as Hart and Fuller. Even today, the naturalist-positivist debate remains unresolved. By scrutinising it, we can understand not only how jurisprudential ideologies have distorted the discourse surrounding Nazi law, but also appreciate the significance of Nazi law for the concept of law itself.

It is necessary, though, to first summarise the arguments laid out by Hart and Fuller. The Hart-Fuller debate revolved around two central issues: the conditions for the validity for law, and the relationship between law and morality.[166] Also at stake was how the German legal system in the post-war era should best respond to the crimes and atrocities committed during the Nazi period, many of which – as with the Grudge Informer case – had been 'authorised' by Nazi law. In response, Hart argued that such acts were indeed lawful, and consequently were valid, because they were lawful at the time; to argue otherwise, especially by trying to invalidate laws because they were morally disagreeable, would, according to Hart, be a "confusion of what is and what ought to be law."[167] With this, Hart also defined his belief that the law was separate from morality. Hart did

[165] Karl Loewenstein, "Law in the Third Reich", *The Yale Law Journal* vol. 45, no. 5 (1936), 779.
[166] Simon Lavis, "The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the 'Rupture Thesis' in the Anglo-American Legal Academy." *International Journal for the Semiotics of Law* 31, no. 4 (2018), 746.
[167] Hart, "Positivism and the Separation of Law and Morals", 621.

acknowledge the influences of morality and law on each other in the historical development of legal systems, such that he recognised that the content of many legal rules "mirrored moral rules or principles."[168] Nevertheless, he wanted to respond to the criticism of legal positivism for weakening the resistance of German jurists and lawyers to Nazism and for foundationally undermining any argument that the debasement of German legal values could be described as an attack upon law itself.[169] In particular, he guarded against a "passionate appeal" from those German thinkers who "lived through the Nazi regime and reflected upon its evil manifestations in the legal system" [170] Citing Gustav Radbruch, a Social Democratic legal philosopher and Weimar-era Minister of Justice, he noted that it was "impossible to read without sympathy" his calls for the German legal conscience to be open to morality, nor his complaint that such expectations have been absent in the German tradition.[171] However, he countered that it would betray an "extraordinary naïveté" to suggest that positivism bred any "insensitiveness to the demands of morality" or "subservience to state power".[172] In Hart's words "Law is not morality; do not let it supplant morality."[173]

Fuller, like Hart, saw law as a means of creating social order by guiding human behaviour.[174] However, where he differed with Hart was in the view that in order for law to fulfil its objectives, it must meet a basic standard of morality. To Fuller there was "a twofold sense in which it is true that law cannot be built on law": an 'external' morality, in which the authority to make law

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[168] Hart, "Positivism and the Separation of Law and Morals", 598.
[169] New York University Law Review Editorial Board, "Foreword: Fifty Years Later", *New York University Law Review* 83, no.4 (2008), 994.
[170] Hart, "Positivism and the Separation of Law and Morals", 615-616,
[171] Hart, "Positivism and the Separation of Law and Morals", 615-616; see also Gustav Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1 (1946): 105-8, reprinted in Radbruch, *Rechtsphilosophie*, 8th ed., ed. Erik Wolf und Hans-Peter Schneider (Stuttgart: K. F. Koehler, 1973), 347-357. Gustav Radbruch had belonged to the positivist tradition, but adopted a more naturalistic legal philosophy in the aftermath of the Nazi regime; see Douglas G. Morris, "Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War." *Law and History Review* 34, no. 3 (2016): 649–88.
[172] Hart, "Positivism and the Separation of Law and Morals", 617-618.
[173] Hart, "Positivism and the Separation of Law and Morals", 618.
[174] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71, no. 4 (1958): 646.

must be supported by moral attitudes reciprocally influenced by the 'internal' morality of law itself.[175] Fuller would later articulate eight criteria for the law, at the core of which were the publication and transparency of legal norms, which relied on a "congruence", a conformity between these prescribed norms and the actions of lawmakers imposing them.[176] In the context of the Grudge Informer case, the judge would never be able to achieve a satisfactory resolution "unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be."[177] Such consideration of what 'ought to be' in this case would have lead the judge to regard such actions as unlawful.

It is necessary to interject that, however seminal the Hart-Fuller debate might be in Western jurisprudence, its representation of Nazi law was inadequate, at times even damagingly misleading. The Grudge Informer case – and, by implication, an understanding of Nazi law – was merely one of many points of contention between Hart and Fuller. Nazi law was not discussed in great depth, reflected in their understanding of the Nazi informer case. In the actual case of the Grudge Informer, the Bamberg Court of Appeal overturned the decision of the trial court.[178] This fundamental misreading of the case ultimately had no impact on the arguments of Hart or Fuller, illustrating its lack of direct relevance to the arguments made.[179] The peripherality of Nazi law bled into both Hart's and Fuller's analysis. For instance, Hart claimed that his interest in the "terrible history" was sparked by the question of why the slogan "law is law," acquired a "sinister character" in Germany, but in other countries went along with the "most enlightened liberal attitudes."[180] In this Hart assumed that the Nazi legal state retained the positivistic characteristics of its liberal

[175] Fuller, "Positivism and Fidelity to Law," 645.
[176] See Lon L. Fuller, *The Morality of Law*, revised ed. (New Haven and London: Yale University Press, 1969), 39.
[177] Fuller, "Positivism and Fidelity to Law," 647.
[178] David Dyzenhaus, "The Grudge Informer Case Revisited", *New York University Law Review* 83, no.4 (2008), 1008.
[179] Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 758.
[180] Hart, "Positivism and the Separation of Law and Morals", 618.

predecessor regarding the separation of law and morals. As we have seen, though, Nazi jurisprudence overwhelmingly rejected the principle of separability, seeing such a positivistic characteristic as 'liberal'. This ignorance of historical context pervades Hart's analysis, leading him to treat as legally sufficient the mere 'tinsel of legal form' in a regime that considered formalism to be nothing more than, as Carl Schmitt put it, the "timetable of the bureaucratic machine" ("*Fahrplan der bürokratischen Maschine*").[181]

Fuller himself noted that Hart had made assumptions about persisting characteristics of the legal system without "any inquiry into the actual workings of whatever remained of a legal system under the Nazis."[182] Fuller was also more attentive to the development of Nazi law, noting that the regime took advantage of "the retroactive statute curing past legal irregularities" and the "secret statute", as well as noticing "the most important affronts to the morality of law", namely the capacity for the Nazi government to bypass law altogether and "act through the party in the streets" instead.[183] Since this enabled the judges in Nazi courts to disregard any law, even those passed by the Nazis themselves, whenever this "suited their convenience" or if they "feared that a lawyer-like interpretation might incur displeasure above", Fuller came to the conclusion that he could "deny to it the name of law" altogether.[184]

However, Fuller's interpretation of Nazi law was not without its own misrepresentations. Fuller, like Hart, believed that Germany had been "raised with a generation that said 'law is law' and meant it."[185] Fuller, though, acted under the basic assumption that there was a clear distinction between the good of law and the evil that corrupts law, and that the Nazis understood this

[181] Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat?," *Zeitschrift für die gesamte Staatswissenschaft* 95 (1935), 192. Cited in Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), 103; Desmond Manderson, "Two Turns of the Screw," in *The Hart-Fuller Debate in the Twenty-First Century*, ed. Peter Cane (Oxford: Hart, 2010), 204-205; Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 751.
[182] Fuller, "Positivism and Fidelity to Law," 633.
[183] Fuller, "Positivism and Fidelity to Law," 650-652.
[184] Fuller, "Positivism and Fidelity to Law," 652, 660.
[185] Fuller, "Positivism and Fidelity to Law," 660.

difference and simply chose to undermine the pre-existing *Rechtsstaat*.[186] By presupposing a universal and incontrovertible standard of good and evil, Fuller oversimplified problems which have confronted many societies, not least the Third Reich.[187] Furthermore, this standard of morality that he imposed was entirely static, completely neglecting the fact that – no matter how odious – the Nazis employed a different standard of 'morality' than he did. Even here, 'standard' may be a misnomer: the Nazis employed radical particularistic moralities and ethics, which assimilated local customs and prejudices, thereby creating a system that simultaneously appealed to local interests while maintaining an "ethnic fundamentalism" of deeply anti-liberal collectivism at the centre of public life in the Third Reich.[188] Fuller similarly oversimplified the complexities of Nazi legal development: although the use of retroactive and secret legislation appeared ostensibly arbitrary, especially to external observers, it also in part reflected the efforts by Nazi legal theorists to define a more 'proactive' legal ethic, rather than purely to retain power.[189]

The problematic generality of the Hart-Fuller framework becomes clearer when considering the leading contemporary voices in Weimar Germany. The first chapter introduced Carl Schmitt and his concept of sovereignty and the sovereign moment, that being the moment outside the normal in which norms are suspended and the political appears.[190] To Schmitt, the sovereign was the person or institution that, in a given polity, was capable of bringing about a total suspension of the law and using extra-legal force to 'normalise' the situation, hence his assertion that "sovereign is he who decides on the state of exception."[191] The sovereign also had the additional quasi-

[186] Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 751.
[187] Manderson, "Two Turns of the Screw", 212-213.
[188] Anthony D. Kauders, "From Particularism to Mass Murder: Nazi Morality, Antisemitism, and Cognitive Dissonance " Holocaust and Genocide Studies 36, no. 1 (2022), 2-5; Koonz, *The Nazi Conscience*, 13. For a contemporary perspective on Nazi morality, see Aurel Kolnai, *The War Against the West* (London: Victor Gollancz, 1938).
[189] Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 760.
[190] Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), 94-95.
[191] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), trans. by G. Schwab (Chicago: University of Chicago Press, 2005), 5.

normative constraint of distinguishing between friend and enemy, a distinction hinging on substantive (*völkisch*) homogeneity.[192] To Schmitt, one great pretense of liberal legalism, and by extension parliamentary democracy, was that it ignored this distinction between friend and enemy, while promoting ideologies that sought to destroy substantive homogeneity.[193] Schmitt's highly political conception of law argued that there was a link between legality and legitimacy insofar as the legitimate was able to assert itself over the legal, a link in which law and morality were the products of a battle for political supremacy between hostile groups.[194]

Contrasting Schmitt was Hans Kelsen, author of the 1920 Austrian Constitution, and a leading figure in the continental tradition of legal positivism. His treatise *The Pure Theory of Law* aimed to categorically define a self-conscious legal theory "purified of all political ideology and every element of the natural sciences."[195] Under Kelsen's Pure Theory, a legal system would involve a hierarchy of norms tracing back to a *Grundnorm*, or basic norm, contingent on the will of the founders of the legal order.[196] Theoretically, not only would this legal system be free of contradictions - the hierarchy of norms would resolve any apparent conflicts - but this system would be applicable to any *Rechtsstaat*, regardless of what political ideology it served.[197]

Situated between Schmitt and Kelsen was Hermann Heller, a legal theorist with strong affiliations to the Social Democratic Party in Weimar Germany, who also served on behalf of Prussia during the *Preußenschlag*. Where Heller agreed with Schmitt that all conceptions of law are

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[192] David Dyzenhaus, "Legal Theory in the Collapse of Weimar: Contemporary Lessons?" *The American Political Science Review* 91, no. 1 (1997), 126; Gross, *Carl Schmitt and the Jews*, 35.
[193] Carl Schmitt, *The Concept of the Political*, translated by George Schwab (New Brunswick: Rutgers University Press, [1932] 1976), 69-79
[194] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997), 2.
[195] Hans Kelsen, *Introduction to the Problems of Legal Theory*, translated by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, [1934] 1992), 1.
[196] Kelsen, *Introduction*, 59-60; Dyzenhaus, "Legal Theory," 128-129.
[197] Hans Kelsen, *Der soziologische und der juristische Staatsbegniff* (1928) 2nd ed. (Tübingen: Scientia Verlag Aalen, 1981), 253; Dyzenhaus, *Legality and Legitimacy*, 102-103.

inherently political and tied to socio-historical contexts, he shared Kelsen's commitment to democratic ideals and for constraints of legality.[198] To Heller, the Weimar *Rechtsstaat* suffered from an "emptying out of all meaning" ("*Entleerung aller Sinngehalte*") for which he blamed legal positivists like Kelsen.[199] To inject substantive value into the *Rechtsstaat*, Heller argued for the creation of a *"Staatsvolk"* , a unified people with socially homogenised values, for whom the *Rechtsstaat* would serve as a concrete expression; in other words, a "social *Rechtsstaat*" ("*sozialer Rechtsstaat*").[200]

The philosophies of neither Schmitt, nor Kelsen (nor Heller by extension) are without flaws, and their contradictions were made clear by the Prussian coup case from the first chapter. Schmitt's concept of sovereignty effectively erodes the very idea of a state of emergency, since the sovereign itself has exclusive control over whether or not a state of emergency exists Kelsen's Pure Theory paradoxically creates a situation where the political, unbridled from law, is free to dictate what law is.[201] The point, here, though, is not to make a judgement on Schmitt, Kelsen, or Heller, but to highlight that the differences between the three are not clear cut. Kelsen and Schmitt both sought (albeit in different ways) a "Hobbesian" model of the sovereign state that separated sovereignty from every day politics.[202] Heller, like Schmitt, attacked Kelsen's Pure Theory, and, like Schmitt, saw the institution of the state as concrete, unifying 'is' and 'ought'.[203] Rather, the point here is that the Hart-Fuller framework would box Kelsen in the positivist camp, and Schmitt and Heller, despite their inherently opposed political-ideological views, in the naturalist camp, eliminating the nuances and complexities in their thought.

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[198] Dyzenhaus, *Legality and Legitimacy*, 162-163.
[199] Herman Heller, "Rechtsstaat oder Diktatur?" in *Gesammelte Schriften, vol. 2: Recht, Staat, Macht*, 2nd edition, ed. Christoph Müller (Tübingen: Mohr, [1930] 1992), 445; Meierhenrich, *Remnants of the Rechtsstaat*, 87.
[200] Heller, "Rechtsstaat order Diktatur?", 450-462; Meierhenrich, *Remnants of the Rechtsstaat*, 86-87.
[201] Dyzenhaus, "Legal Theory", 126-129.
[202] Caldwell, *Popular Sovereignty*, 120.
[203] Heller, *Die Souveränität*, 38-41; Caldwell, *Popular Sovereignty*, 128.

The significance of the Hart-Fuller debate, though, lies not so much in the qualities or flaws of their arguments, but in the legacy of this debate for wider jurisprudential discourse. On the occasion of the 50th anniversary of the Hart-Fuller debate in 2008, the editorial staff of the New York University Law Review reflected:

> "The fact is that the exchange between Hart and Fuller really did set the agenda for modern jurisprudence: the separation of law and morality, the place of values in interpretation, and the relation between the concept of law and the values associated with the rule of law."[204]

As such, modern jurisprudence inherited many of the characteristics of the Hart-Fuller debate in their representation of Nazi law. To Hart, the Nazi legal system remained so remote, barely touching upon its specificities, that it was ultimately replaceable, merely a curious case study to be used as an example of how even the most extreme evil can be valid law; this is reflected in later positivist literature.[205] To Fuller, there was a clear-cut legal discontinuity between Nazi 'law' and the concept of law; there was a sort of legal-moral barrier between the two that results in a *theoretical exclusion* of the Nazi legal system from jurisprudential consideration altogether.[206]

The legacy of the Hart-Fuller debate manifests itself in two main interpretations. The first of these posits a "radical historical discontinuity" of the period between 1933 and 1945.[207] This viewpoint emerged out of a desire to construct a historical memory of the rule of law within a liberal tradition that cherishes the law, a desire which necessitates Nazi law be viewed as "a most egregious case of legal pathology."[208] As such, the Anglo-American jurisprudence has been "especially resistant", at times "completely immune", to exploring the "moral, ethical, and political

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[204] N.Y.U. Law Review Editorial Board, "Foreword: Fifty Years Later," 996-997.
[205] See, for example, Martin Krygier, "The Hart-Fuller Debate, Transitional Societies and the Rule of Law' in *The Hart-Fuller Debate in the Twenty-First Century*, 97-106. Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 761-762.
[206] Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 761.
[207] David A. Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham: Carolina Academic Press, 2005), 22.
[208] Martin P. Goldberg, "Transitional Regimes and the Rule of Law," *Ratio Juris* 9 no.4 (1996), 387-395; Fraser, *Law After Auschwitz,* 22.

significance of events in Europe between 1933 and 1945", despite the centrality of law and lawyers in the Nazi regime.[209] Leading on from this, the dichotomous framing of the Hart-Fuller debate, within the two pillars of positivism and natural law, combined with the fear of accidentally legitimising Nazi law by even discussing it, served to effectively side-line Nazi law itself from the discourse. The language surrounding the competing theoretical paradigms in this discourse, positivism and natural law, is so absolute that it eliminates any position of nuance: one is either for legal positivism or for a natural theory of law – a fluid position between these poles, or one that questions the parameters of the debate, does not exist. Consequently, as the debate has generated a large number of sub-questions and issues over the years, these have effectively fed not into the representation of Nazi Germany (whose representation is more general than concerning its legal field specifically), but into the "broader struggle for supremacy" between the two paradigms.[210] The misrepresentation of the Nazi regime is arguably further proliferated by the reality that the discourse, enshrined in a framework of liberalism, democracy, and the rule of law, is intrinsically not equipped to analyse a regime whose law is so incompatible with those principles: the affirmation of liberal and democratic ideals is simply not applicable to a system that was so decidedly antiliberal and antidemocratic. There is no doubt as to the question of the depravity of Nazi morality, but the insistence on a liberal-democratic standard of law and morality lends itself too easily to the claim that Nazi law was 'not law', and therefore not worthy of scholarly consideration. Indeed, neither Hart nor Fuller were able to reconcile the Nazi regime with its Weimar predecessor, a proponent of the historically liberal *Rechtsstaat*.[211] Fundamentally, the primary legacy of Hart-Fuller debate as it relates to Nazi law is a distorted framework for

[209] Frederick DeCoste, "Law/Holocaust/Academy," review of *Vichy Law and the Holocaust in France*, by Richard H. Weisberg, *Modern Law Review* 62 (1999), 792-793, 800.
[210] Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 763-764.
[211] Lavis, "The Distorted Jurisprudential Discourse of Nazi Law", 765-766.

understanding jurisprudence. While Nazi law serves as a historical example of great significance, neither positivism nor natural law are capable of truly encapsulating the nuances of the Nazi legal system, languishing under the heaviness of their own moral weight.

If Anglo-American jurisprudence suffers from a moral burden, then for thinkers in Germany, this burden is felt only more intensely. The Third Reich remains a central historical experience in modern Germany, a reference point against which past and present continue to be measured.[212] In the aftermath of the Nazi regime, the discontinuity thesis and the characterisation of Nazi law as 'not law' served to reassure thinkers of their own ethical validity, as well as an affirmation that something 'new' had replaced the Nazi regime; the "perversion" idea was, for instance, central to the prosecution of German legal officials at Nuremberg.[213] Gustav Radbruch provided another such example: in the immediate aftermath of the collapse of the Nazi regime, he redefined his position by introducing the principle that when statutory rules reach a level of extreme injustice, they cease to be law, a formalistic response to the validity question that challenged positivist legal philosophy.[214]

Despite the overwhelming moral burden, though, studies of legal history in Germany are, like their Anglo-American counterparts, also subject to more conventional biases. As in the Hart-Fuller debate, jurisprudential leanings colour perspectives on Nazi law. In a study of public law under National Socialism, Rudolf Echterhölter arranged his material according to "the constitutional value judgments and principles that have crystallized today, precisely after the experiences under National Socialism", paradoxically judging the Nazi legal system not within its

[212] Theodore S. Hamerow, "Guilt, Redemption, and Writing German History." *The American Historical Review* 88, no. 1 (1983), 53.
[213] Fraser, *Law After Auschwitz*, 77-78.
[214] Frank Haldemann, "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law." *Ratio Juris* 18, no. 2 (2005), 162.

own context, but under a premise motivated by that context.[215] Historian Michael Stolleis highlights similarly unhistorical tendencies of jurists. Typically, he claims, jurists are "systematically trained" to ignore, suppress, or dismiss extralegal motivations, distorting their perspectives on historical situations by ignoring interwoven 'extrajudicial' factors such as social and cultural contexts; correspondingly, Stolleis adds jurists have traditionally been trained to view the law as a "closed system", and therefore (in principle) free of inconsistencies and contradictions, an approach whose shortcomings become particularly evident when analysing a dictatorship such as the Nazi regime.[216] Therefore, while not influenced by the distorting effect of the Hart-Fuller discourse, jurisprudence in Germany, as with its English-speaking counterpart, nevertheless struggles to interpret the nature and legacy of the Nazi dictatorship in the legal realm.

This should not, though, be a cause for despair. The German legal system in its Weimar and Nazi iterations was full of contradictions, complexities and nuances that belie the misleading law-morality binary. The Weimar Constitution was "on paper, the most liberal and democratic document of its kind the twentieth century had ever seen", borrowing many of its key principles from the examples of England, France, the United States and Switzerland. Yet within its clauses it also enabled its President, when and if he desired, to exercise quasi-monarchical powers with relative impunity, an inconsistency that its disparagers happily exploited. These disparaging voices shared the common goal of overthrowing Weimar democracy and redefining the legal system to support a 'strong' state. Even then, a generational conflict emerged amongst those who sought to preserve and adapt the remnants of the dismantled legal order, and those who, in a bizarre paradox, sought to define new legal terminology while simultaneously rejecting attempts to formulate

[215] Rudolf Echterhölter, *Das öffentliche Recht im nationalsozialistischen Staat* (München: Deutsche Verlags-Anstalt, 1970), 12. Cited in Stolleis, *The Law Under the Swastika*, 33-34.
[216] Stolleis, *The Law Under the Swastika*, 33-35.

definitions.[217] Although the increasingly commonplace political violence of the Nazi regime eroded the intellectual nuances of this debate (and, ultimately, debate altogether) it serves to disprove that the law simply ceased to function – or even exist – in 1933. The biggest questions raised by the Nazi dictatorship, namely how it could have come into existence, and how we might prevent a similar dictatorship from rising again, continue to be unsettling because we are unable to answer them.[218] This anxiety is only exacerbated by the quasi-existential burden of the Nazi legacy, which has led post-war legal scholars to rethink the historical developmental models not just of Germany, but even for the entirety of Europe.[219] In the face of such a burden, it can be difficult for the scholar to pierce such a dense and well-established historiography. The spate of recent scholarship on the law in Nazi Germany illustrates, however, that by continually interrogating this, by examining the development of certain legal languages and terminologies, and their use by lawyers, we can yet gain new insights.

[217] Stolleis, *The Law Under the Swastika*, 66.
[218] Stolleis, *The Law Under the Swastika*, 21.
[219] For examples in legal studies, see Michael Stolleis, "'Fortschritte der Rechtsgeschichte' in der Zeit des Nationalsozialismus?" in Michael Stolleis and Dieter Simon, eds., *Rechtsgeschichte im Nationalsozialismus. Beiträge zur Geschichte einer Disziplin* (Tübingen: Mohr Siebeck, 1989), 188; Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge: Cambridge University Press, 2020), 215-220.

EPILOGUE: Coda - Democracy in Retreat?

The second half of the 1980s saw a thaw in relations between the world's two great superpowers, the United States and the Soviet Union, as the latter underwent deep structural reforms to stave off its impending implosion.[220] Looking back on the turn of events in the months before the collapse of the Berlin Wall, Francis Fukuyama reflected the following:

> "What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government."[221]

Events since the fall of the Berlin Wall have foreclosed the possibility that Fukuyama's relegation of autocratisation to the history books was permanent. The rise to economic and political prominence of China, a one-party state, and Russia, which under Putin has become an authoritarian regime masquerading as a democracy, has disabused any notion that the hegemony of Western liberal democracy would continue unchallenged.[222] The last decade in particular has seen a rise in democratic backsliding, or a gradual decline in the quality of democracy, so much so that scholars have claimed that a "third wave of autocratization [sic]" affecting an unprecedentedly high number of democracies is under way.[223] In Poland, the triumph of the Law and Justice party (*Prawo i Sprawiedliwość*, PiS) in the country's 2015 Parliamentary and Presidential elections precipitated a

[220] John Lewis Gaddis, *The Cold War: A New History* (New York: The Penguin Press, 2005), 235-236.
[221] Francis Fukuyama, "The End of History?" *The National Interest*, no. 16 (1989), 3–4.
[222] On authoritarianism in Putin's Russia, see for instance Vladimir Shlapentokh, "How Putin's Russia Embraces Authoritarianism: The Case of Yegor Gaidar." *Communist and Post-Communist Studies* 40, no. 4 (2007), 493–99; Taras Kuzio, "Nationalism and Authoritarianism in Russia: Introduction to the Special Issue." *Communist and Post-Communist Studies* 49, no. 1 (2016), 1–11; Natalia Forrat, "Shock-Resistant Authoritarianism: Schoolteachers and Infrastructural State Capacity in Putin's Russia." *Comparative Politics* 50, no. 3 (2018), 417–34; Alexei Trochev and Peter H. Solomon, "Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State." *Communist and Post-Communist Studies* 51, no. 3 (2018), 201–14.
[223] Anna Lührmann & Staffan I. Lindberg, "A third wave of autocratization is here: what is new about it?" *Democratization*, 26 no. 7 (2019), 1095-1113.

hitherto unresolved constitutional crisis that came to involve the Polish Supreme Court and the European Commission over efforts by the PiS to (unconstitutionally) establish political control of the Constitutional Tribunal, Poland's constitutional court.[224] Similarly to Poland, political interference by Viktor Orbán and his right-wing Fidesz party threatens the independence of the judiciary. In 2012, legislative reforms fundamentally altered the complexion of the Hungarian judiciary: they centralised administration under the newly-established National Judiciary Office and National Judiciary Council – the former headed by the wife of a Fidesz Member of the European Parliament – and lowered the age of retirement for judges, forcing more than 50 justices, including the head of the Supreme Court, from the judicial system; these actions helped contribute to a "constitutional crisis" within Hungary.[225]

Across Western democracies, the rise of populist politics poses an ever-present threat to liberal democracy: in the United Kingdom, actions of the government of Boris Johnson to undermine legal processes, including the suspension of Parliament during the Brexit negotiations to prevent scrutiny, and the repeated bypassing of Parliament during the COVID-19 pandemic, bear troubling signs of democratic backsliding.[226] Although a recent report found strong evidence that

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[224] Marcin Wiącek, "Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle." In *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, edited byArmin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt (Berlin: Springer, 2021), 15-33; Laurent Pech and R. Daniel Kelemen, "If you think the U.S. is having a constitutional crisis, you should see what is happening in Poland," *Washington Post*, January 25, 2020, https://www.washingtonpost.com/politics/2020/01/25/if-you-think-us-is-having-constitutional-crisis-you-should-see-what-is-happening-poland/.

[225] "Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012)". *Venice Commission*, accessed 6 April 2022, https://www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx; "A Constitutional Crisis in the Hungarian Judiciary", *Hungarian Helsinki Committee*, 10 July 2019, accessed 4 April 2022 https://helsinki.hu/en/constitutional-crisis-in-the-judiciary-july2019/; "Hungary: Fearing the Unknown - How Rising Control Is Undermining Judicial Independence in Hungary", *Amnesty International*, 6 April 2020, accessed 3 April 2022, https://www.amnesty.org/es/documents/eur27/2051/2020/en/; "Hungary: Status of the Hungarian Judiciary – Legal Changes have to Guarantee the Independence of Judiciary in Hungary", *Amnesty International*, February 22 2021, accessed 2 April 2022, https://www.amnesty.org/en/documents/eur27/3623/2021/en/.

[226] Benjamin Ward, "Britain's Democratic Fabric is Being Eroded by Boris Johnson's Government", *Human Rights Watch*, October 26 2020, https://www.hrw.org/news/2020/10/26/britains-democratic-fabric-being-eroded-boris-johnsons-government#.

the pandemic has blunted the rise of populism, it also found a disturbing erosion of support for core democratic beliefs and principles, including less liberal attitudes with respect to basic civil rights and liberties and weaker preference for democratic government.[227] The Global State of Democracy 2021 shows that more countries than ever are suffering from 'democratic erosion' and listed, for the first time, the United States of America as a backsliding democracy.[228]

Times like this increase scholarly interest in authoritarian regimes, as the litany of recent publication of the Nazis, perhaps the most infamous example of a totalitarian regime in the Western popular imagination, illustrates. It consequently increases the parallels drawn between the present day and the Nazis, for better or worse. If though, there is any parallel to the Germany of this thesis it is in the lessons about democracy. Democracy is neither a given nor a constant; it must be constantly reaffirmed, by both the institutions created to defend it, and the individuals who make up those institutions. The rise of Nazi Germany saw the opposite, a symbiosis of the legal and political spheres to subvert, and eventually destroy, democracy. In such a case, even the best constitution may do little more than channel those destructive aims.[229] Indeed, when times imperil the belief that constitutional or legal orders can uphold and defend the wants and needs of a plurality of groups, those who argue against this belief gain larger audiences.[230]

It may be that we will never be able to reconcile the realities of a regime like that of the Nazis with our own values. If, though, there is one takeaway from this thesis, it is to reinforce the necessity of attempting to understand such a regime for the health of our own democracy, and democracies worldwide.

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[227] Roberto S. Foa, Xavier Romero-Vidal, Andrew J. Klassen, Joaquin Fuenzalida Concha, Marian Quednau, Lisa Sophie Fenner, "The Great Reset: Public Opinion, Populism, and the Pandemic" (2022), *Bennett Institute for Public Policy at the University of Cambridge*, accessed 10 April 2022, https://www.bennettinstitute.cam.ac.uk/publications/great-reset/.
[228] "The Global State of Democracy 2021: Building Resilience in a Pandemic Era", *International Institute for Democracy and Electoral Assistance* (2021), https://doi.org/10.31752/idea.2021.91.
[229] Peter Caldwell, "The Weimar Constitution" in *The Oxford Handbook of the Weimar Republic*, edited by Nadine Rossol and Benjamin Ziemann (Oxford: Oxford University Press, 2022), 135.
[230] Dyzenhaus, "Legal Theory", 122.

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