Legal Pluralism and the Problem of Evil

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Abstract and Keywords

This chapter argues that the problem of evil is a way to reflect upon three underlying problems that pertain to legal pluralism as a critical, self-reflective theory. First, legal pluralism is prone to be absorbed by its "saved subjects." Second, there is no theoretical space outside or above political contestation. Third, the legal pluralist herself potentially exerts influence on the observed through her observations. By analyzing the debate between Eugen Ehrlich and Hans Kelsen, the chapter demonstrates how these three issues accompany the development of the debate on legal pluralism and how the problem of evil emerges as its underlying enigma.

Keywords: Eugen Ehrlich, Hans Kelsen, Austro-Hungarian Compromise, Austrian liberalism, problem of evil, critical theory, rule of law, Holocaust

13.1 Introduction

THE fundamental working assumption of legal pluralism is that we inhabit a world of multiple normative communities, only some of which enforce their norms through officially sanctioned coercive force and formal legal process.[1] In a global perspective, legal pluralism can be studied everywhere, from the past to the present, in local and global circumstances.[2] Since legal pluralism abstracts from official state law from the outset it is not simply a juridical discipline like any other but has roots in other disciplines, in particular ethnology, history, and sociology, and branches out into philosophy and legal theory. It is moreover, unlike traditional disciplines, not a self-standing area of studies such as physics, metaphysics, or mathematics, but a critical, self-reflective discipline insofar as it reacts to already established discourses in specific fields. The default position legal pluralism reacts to is foremost not only some form of state-centered positivism, but increasingly also some forms of narrowly constructed international law or human rights triumphalism.[3] The two fundamental questions of legal pluralism are therefore to come up with an appropriate theory of law or normative practices and a more equitable ethical theory.[4] The problem of evil—its definition, relation to the good, (p. 384) and apparent tri-

umph over it in mundane perspective—is not part of the canonical questions raised in this debate. It might even appear to be too fundamental ("metaphysical") or too remote to be dealt with in this context. Crimes against humanity, as an instance of extreme evil, will arguably be condemned by all sides in the debate, whereas the human condition, that people are free to choose or agree upon different courses of action, both good and evil, is usually taken for granted from a legal perspective. I will, however, show that the problem of evil is a way to reflect upon three underlying problems that pertain to legal pluralism in particular as a critical, self-reflective theory.

First, legal pluralism is prone to be absorbed by its "saved subjects" (in literary terms: the revolution is devoured by its own children[5]). Second, there is no safe theoretical space outside or above political contestation. Third, the legal pluralist herself potentially exerts influence on the observed through her observations. All three problems are far-reaching theoretical issues in themselves, and their relation to the debates about pluralism might not be obvious at first sight. Instead of developing these questions further abstractly, I will demonstrate how these three issues accompany the development of the debate on legal pluralism and how the problem of evil emerges as its underlying enigma. I will start with a discussion of the origins of legal pluralism in the work of Eugen Ehrlich and argue that even though he championed the social forces of living law he lacks the conceptual means to address their unsettling side effects emerging at his time. I will then show that Ehrlich's counterpart Hans Kelsen found himself in a theoretically equally unfortunate situation. I will end with a meditation on a scene in Jonathan Littell's novel *The Kindly Ones* that explains how the very practice of scholarship might inevitably be consumed by the night of the twentieth century. Together these three genealogical explorations will not "solve" the problem of evil or add a new quandary. Instead, the reflections show how legal pluralism can become aware of its own limitations.

13.2 The Problem of Evil: A Literary Account

A succinct way to open the dimension of the question of evil would be to ask whose side of a given discussion Mephisto would join. In a scholarly context, people might cringe even at considering this question, since Mephisto apparently does not exist in reality, but only as a bogeyman in the political-theological discourse of American religion.[6] To (p. 385) this trite charge that he is "*Dicis et non es*," that is, words with no reality, Mephisto in Thomas Mann's novel *Doktor Faustus* replies, "[t]ut tut tut, ever the skeptic, ever the same lack of self-regard" and proceeds to explain to the protagonist of the novel, the composer Adrian Leverkühn from the German town Kaisersaschern, his special relation to him:

> Had you but courage to say to yourself, "Where I am, there is Kaisersaschern," why then, of a sudden the matter would be in accord. … You value yourself too low, my friend—and value me too low as well in limiting me so, wishing to make naught but a German provincial of me. German I am, German to the core, if you will, but then surely in an older, better sense, to wit: cosmopolitan at heart.[7]

This conversation, culminating in the eerie twist that Mephisto is “cosmopolitan at heart,” contains, in a nutshell, the thesis of this chapter: considering the problem of evil helps to reveal the dark, unenlightened sides of one’s own theory or self.[8]

To bring the problem of evil into established debates in legal pluralism one might consider the following quandary: What if Mephisto had said after one has come up with a “new” pluralistic (or alternatively state-centered, positivist) legal theory, or engaged in a respective practice, “Good job! This is exactly what I would have recommended!” How could this be possible? Since he apparently has no say in the whole debate? Yet, as a German proverb says, “the devil is old” and knows how to sneak into minds and hidden sanctuaries. It is therefore spurious to hope for a new trick he hasn’t already come across. However, a genealogical introspection into the legacy of legal pluralism might help to prepare ourselves when we meet uncanny sights again.[9]

13.3 The Origin of the Debate on Legal Pluralism

Even though the problem of legal pluralism is arguably as old as the law itself,[10] the debate on its significance started with Eugen Ehrlich’s studies on “living law” in (p. 386) Bukovina[11] and reached a first culmination, on a theoretical level, with the dispute between Eugen Ehrlich and Hans Kelsen.[12] Ehrlich was one of the first academic lawyers who realized that the official law of modern bureaucratic states often had little to do with the actual life of peoples who continue to live according to their own laws and customs, for which Ehrlich coined the term “living law.” His example was not the law under colonial rule but social life in Bukovina, a remote region of the Austro-Hungarian Empire (nowadays between Ukraine, Poland, and Romania) where different ethnicities, religions, and national minorities lived together in a semi-autonomous way under the law of the Austro-Hungarian Empire.[13] As a law professor at the German-speaking university in Czernowitz, the administrative capital of the Bukovina, Ehrlich studied the living law of the various mostly rural communities in order to provide a framework for fostering their economic and cultural development in more equitable ways. His research culminated in his wide-ranging *Fundamental Principles of the Sociology of Law*, in which he provided an initial theoretical framework for legal pluralist studies.

According to Ehrlich, “living law” is to be understood as the practice of specific communities or social groups, and exists not because of enforcement by the state, but as widely accepted within a given group. He claims that throughout history and different circumstances there are a small number of “facts of the law” (usage, domination, possession, declaration of will) that give rise to various social orders.[14] Even though state law has some influence on social order, Ehrlich claims that “at the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”[15] Because he aimed at an understanding of a very wide range of phenomena—not just local communities but also professional communities such as mercantile societies—he used a very wide, pragmatic concept of law. Given

this brief outline, Ehrlich could thus easily be included among contemporary contributions in legal pluralism that study local communities in postcolonial contexts or normative practices within professional communities and try to defend the independent legal standing of such norms vis-à-vis overreaching ambitions of official law. However, the full range and tragedy of Ehrlich's position comes only into sight when considering the cultural context and ensuing theoretical debate with the counter position.

Ehrlich implicitly assumed in his writing that the default position of lawyers at his time was a kind of black-letter, state-centered positivism.[16] The theoretical debate about (p. 387) legal pluralism, however, was initiated by Hans Kelsen, whose legal positivism was a more refined theoretical position. At the time Ehrlich worked in the Bukovina, Kelsen was professor of law at the University of Vienna, the cultural and administrative capital of Austria-Hungary. His devastating review of Ehrlich's book set the tone for later disputes between legal pluralists and legal positivists.[17] Kelsen criticized Ehrlich for failing to come up with a proper definition of law in contrast to moral rules or social customs, for confusing the descriptive and prescriptive sense of rules, and—instead of clarifying the concept of law—obfuscating issues through a methodological mishmash. A short equally dismissive reply followed from Ehrlich, in which Ehrlich accused Kelsen of misinterpretation, blinded by idiosyncratic presuppositions. Two more counter replies only buttressed the mutual lack of understanding.

At its surface, the debate appears to be about the proper definition of law, the correct way to demarcate the domain of jurisprudence, distinct from related disciplines such as sociology or political philosophy, and the proper task and method of jurisprudence.[18] Since in addition to his pure theory of law—in contemporary terms an essay in analytical jurisprudence—Kelsen wrote ethnological, sociological, political, and philosophical studies later in his life himself, one might think that the debate on the proper domain of jurisprudence is somewhat spurious.[19] Yet the heated and occasionally even personal exchange between the two scholars might also indicate that there was more at stake, namely, the fear of some ominous developments that could already be sensed in the years leading up to World War I, but not yet determined. Curiously, both scholars shared this feeling and a common concern for something at risk, namely, a concern for the precarious political and social compromise established in Austria-Hungary.[20]

13.4 The Austro-Hungarian *Modus Vivendi* as Background for Ehrlich's Legal Pluralism

It has already been indicated that Ehrlich's interest in living law was prompted by the multitude of religious and ethnic groups peacefully living in the Bukovina and his desire (p. 388) to provide more equitable means of economic and cultural developments. One might consider his ethnological interest in the law and the lives of the mostly rural, disadvantaged groups in the Bukovina from the point of view of an academic lawyer as the hallmark of the ethos of a legal pluralist. This ethos is also apparent in that Ehrlich did not indiscriminately record all customs, but aimed at singling out only those that were con-

densed into legal maxims or wisdom (*Rechtssätze*)[21] and did not outright conflict with state law.[22] For this reason, Ehrlich considered the living law of groups as the "moral forces of society."[23] However, his moral convictions remained mostly implicit, because, as a sociologist, he was well aware of the diverse and often conflicting ideas of justice. Thus, he did not promote a "communitarian" concept of justice in distinction to a "liberal" one,[24] but stated that these two stand in an eternal tension:

> Among all of the ideas of justice that have been described until now there is not one that has failed to encounter an antagonist in the course of historical development who, in the deepest chest-tones of genuine conviction, would proclaim the opposite as that which alone is just. This affords a deep insight into the nature of justice.[25]

Nevertheless, there is one idea of justice that is a current undertone in his writings, namely, justice as equity. He consistently condemned indiscriminate or abstract legal regulations that were not attentive to the needs and customs of the governed group. At the same time, he defended equitable solutions practiced in social groups, even if they were not in accordance with the official law.[26]

Because Ehrlich did not write anything on public law or political philosophy, his esteem for the certainly imperfect social and political compromise established in the Austro-Hungarian Empire becomes apparent mostly in retrospect. Right at the beginning of World War I, he joined a peace movement of intellectuals and politicians who sought to sound out the conditions for a lasting peace in Europe. Ehrlich explained in a memorandum aimed at the anti-German and anti-Austrian English audience why a forceful dissolution of the multicultural and multiethnic Austro-Hungarian Empire would not simply "liberate unjustly incarcerated nations" but would most likely result in (p. 389) yet another, though different, wave of ethnic tensions and social conflicts.[27] But this does not mean that he defended the aristocratic regime of the Empire. On the contrary, he held the Hapsburg rulers accountable for failing to build up a common, multicultural Austrian identity, neglecting the social and cultural needs of many of their subjects, and thus contributing—due to sheer stupidity and blind allegiance to a belligerent Germany—to "the fall of a great empire."[28]

13.5 Kelsen's Legal Positivism as a Second Answer to the Historical Condition

The previously mentioned account of Ehrlich as founder of a legal pluralism with an implicit ethos is well known and could easily be elaborated through more historical studies.[29] It might, however, be unfamiliar to hear that Hans Kelsen, who is often seen as the epitome of a kind of highly abstract legal positivist thinking, which shows no concerns for any real life or social considerations whatsoever, was initially driven by very similar

concerns. To this end, it is necessary to read Kelsen in a contextual way as providing answers to specific questions of his time.[30]

Kelsen's form of legal positivism is built on three building blocks: the thesis of the separation between the domains of the "ought" and the "is," the thesis of a hierarchy of norms, and the thesis that the highest norm, the so-called *Grundnorm*, or basic norm, conceived as a (transcendental) presupposition.[31] The contemporary discussion of these three theses (though under different labels) is what defines the Anglo-American tradition of legal positivism or analytical jurisprudence. For this reason, it might be unclear how (p. 390) the origin of this discourse in Kelsen could arise out of a concern shared by sociologists and early legal pluralists such as Ehrlich. To see this connection, one has to take into account that Kelsen's main objective was not to develop a theory about "law" understood as a natural kind,[32] but a theory about "legal science, "that is, a theory aiming at purifying the German tradition of scholarly and interpretive writings about the law (*Rechtswissenschaft*).[33] According to Kelsen, legal science needs to realize that there is no necessary connection between law and morality, and that its proper domain is to analyze the legal "ought" that can be worked out by presuming the basic norm.

This perhaps arcane-sounding program can be explained by considering the theoretical alternatives and social tensions to which it responded. In late nineteenth-century German legal science, the idealistic quest to provide a firm basis for law in morality or reason was discredited, as there were simply too many natural law theories around, each mirroring the convictions of its author. Likewise, the promise of the historical school of Friedrich Karl von Savigny of finding the true spirit of Germanic law through historical studies tended to dissolve into either mere historical studies or dimly disguised justifications for nationalistic ideologies. In Austria-Hungary, these kinds of academic discussions were especially heated because everybody was aware that the implicit constitutional compromise between different nations, ethnicities, social classes, and traditions was untenable in the long term, even if nobody could think of a feasible and peaceful solution. Against this background,[34] Kelsen first developed his theoretical account in a discussion of the supremacy of Austrian over Hungarian law.[35] His reasoning was that legal science could only overcome the irresolvable ideological conflicts between Hungarian nationalist and Austrian defenders of the Empire by avoiding all ideological or value-based arguments and concentrating solely on its own proper domain, the analysis of the legal "ought." Only then could the law be perceived of as a consistent and value-free means of social regulation and resolving conflicts.[36]

This idea might appear from a contemporary liberal perspective that takes certain value judgments—especially individual liberty and a republican form of government—for granted as an exercise in a "utopia of legality."[37] However, seen within its historical context it had a very practical social backing. In political debates, the Austro-Hungarian Empire was under attack from all sides of society: for clerics it was too liberal, for liberals it (p. 391) was too social, for socialists too capitalistic, for republicans too feudal, for the avant-garde too old-fashioned, and all nations tried to get the most out of it by denouncing the Empire as unjust. There was only one group throughout all the various milieus

and ethnicities that overwhelmingly supported the common bureaucracy,[38] the large Jewish population. Arguably they sensed that whatever might come afterward would turn out to be worse for them.[39] For this very practical reason, namely, to preserve a fragile but at least peaceful and rule-of-law-based *modus vivendi*,[40] the interests of Kelsen and Ehrlich aligned, even though they approached the common objective from two different angles. Ehrlich wanted to preserve the local traditions of the various ethnicities and social groups by acknowledging them through his research and by providing the means for cautious economic and cultural developments.[41] For Kelsen, Ehrlich's attempt was just another way to contaminate legal science with ultimately unjustifiable subjective value judgments and a mishmash of methods that obstruct the law's role of being a neutral arbiter. Ehrlich, on the other hand, could have replied that Kelsen's utopia of legality is not just pure cognition but a social reality itself, which due to its social insensitivities might de facto serve a state-driven, "imperialistic" agenda. So, each could see in the other the extreme manifestation of what they abhorred the most, even though they implicitly valued the same political system, a *sozialer Rechtsstaat* (i.e., a social welfare state founded on the rule of law) that leaves room for diverse identities and competing belief systems. They even shared the esteem for the professional ethos of academic lawyers of enlightening through scientific,[42] value-free scholarship the state bureaucracy.

13.6 The Gorgonian Head of Power Stares at Us

Up to this point in the analysis, the problem of evil might have been implicitly present in the form of knowledge about the subsequent history of the twentieth century. But it did (p. 392) not come up as a topic or question within the theories. It would be precipitous therefore to conclude that Ehrlich or Kelsen would have denounced each other's theories —let alone the other in person—as "evil." However, the roaring thunders of World War I already formed the background for this academic debate and heralded the tragedies and terrors of the twentieth century. Ehrlich died in 1922 but had to witness the dissolution of the multiethnic Hapsburg Empire and the rise of xenophobia and resentful nationalism in his native Bukovina. The newly formed Kingdom of Romania incorporated the Bukovina under a nationalistic agenda that was bound up with xenophobic (anti-German, anti-Ukrainian, and, last but not least, anti-Semitic) sentiments.[43] The German-speaking university of Czernowitz was transformed into a university with the explicit mission of fostering nationalistic narratives and consciousness among young Romanians. The "old-fashioned" multicultural-minded faculty was ousted, and attempts by Ehrlich to return to his home university, which he had served for many years, failed due to anti-Semitic and nationalistic protests from students and faculty members directed against him.[44]

The exact details of these events that played out at the international level (the establishment of the principle of self-determination of "civilized" people in the Treaty of Versailles), at the national level (the formation of nation-states in Eastern Europe), and at the local level in Czernowitz need not be expounded here in detail. Curiously, the clearest instances of what one might call "evil" are not to be seen at the international or national level but at the local one. The peace negotiations after World War I—at least the initiative

by President Woodrow Wilson—included noble objectives.[45] The prospect of a restoration of a multiethnic Danube state under Austrian tutelage was after the inner-ethnic fighting the Hapsburg generals imposed upon their troops likewise no longer tenable so that the dissolution of the Empire was inevitable. But the way in which the Romanianization proceeded in Czernowitz—harassing and evicting non-Romanian, especially German, Ukrainian, and Jewish citizens—in order to allot expropriations in the form of farms, houses, government positions, university posts, and the tacit forbearance of anti-Semitic riots foreshadowed even more savage forms of ethnic cleansing to come. It was so to say the Gorgonian head of power that surfaced once the veil of "living law" was lifted.[46]

(p. 393) One might reason that all this is irrelevant for legal pluralism, as it all happens outside the scope of Ehrlich's theory. But it depicts an important gap in his work, which is at the same time an archetypical instance of the first fundamental problem of legal pluralism named in the beginning: the revolution is devoured by its children. Ehrlich fails to account for the inner dynamics of groups of "living law" and their repercussions on other groups in a broader societal context because he has no conceptual means of explaining how "living law" can outgrow its guardian, turn into official state law and become itself oppressive. Even though he starts from the idea of a living, that is, dynamic, law, he presumed that various groups and associations in society are basically static and always remain subject to an all-encompassing state bureaucracy that forms a system of its own. In this respect, Ehrlich's thinking remains bound to a nineteenth-century pre-democratic conception of an opposition between state and society, in which the (monarchical) state has a social basis (the aristocracy) and legitimacy of its own, but does not arise through a self-constituting process out of civil society (*bürgerliche Gesellschaft*). Therefore, Ehrlich also fails to see—and has no means of conceptualizing—that through some (nationalistic) ideology one group within a broader society can presume to represent the "true" society, while depicting minorities as internal enemies. It is the vexing problem that a democratic process—in Ehrlich's terms, a living law-based process[47]—can have antidemocratic or authoritarian consequences. Moreover, a greater awareness of judges and the state bureaucracy for the "living law" can reinforce xenophobic or nationalistic ideologies of these living law groups once they gain the upper hand and dominate administrative positions.

As a legal pluralist, Ehrlich was especially disappointed that his hopes for a peaceful future for Jews in Eastern Europe were irrevocably damaged. In one of his political essays he analyzed how economic, social, and ethnic problems and tensions, in which Jews found themselves, were intertwined, and that the formation of nation-states would not solve any of them. Forlornly he notes that he belonged to the generation that had hoped for an assimilation of Jews among the German-speaking population, especially in Austria-Hungary. Together they could have sustained German culture within Eastern Europe's cultures and helped to develop these countries economically.[48] (Especially in a chapter on evil it is important to note that besides the slogan of the "Jewish problem"[49] (p. 394) voiced by anti-Semites all over Europe there was also—if only a dim—prospect of a "multicultural resolution.")

Ehrlich personally experienced the double-edged evil of anti-Semitism. Since he was known in Czernowitz as an assimilated German-speaking Catholic Jew, he was rejected by the new Romanian government. His offer to learn Romanian and teach in Romanian was seen as a sign of "typical Jewish fickleness and national unreliability." Thus his trust in the integrity of legal institutions, the ethos of the academic community, and his hope for a growing enlightenment through value-free scholarship was shattered.[50] In his writings he referred to anti-Semitism only once, calling it an "imprudent student prank,"[51] maybe hinting at the joke as a last resort to affirm a human existence in turbulent times.

13.7 The Rule of Law as Minimal Background Condition for Legal Pluralism?

Contemporary scholars of legal pluralism in postcolonial circumstances will easily recognize similarities between the recounted events and developments taking place elsewhere. The struggle for power, the ambition of dominating others, and the formation of political movements through xenophobia may even appear to be an anthropological constant. But the historical account on its own does not suffice to give an account of evil, let alone a theory. Not even desires such as the struggle for power or the lust to dominate others are in themselves evil since they can be tamed and made to work for some better end, just as greed can be channeled to stimulate a market economy, and thirst for power transformed into a law-abiding authority.[52] Similarly, nationalism, that is, the invention of an "imagined community" with a common history,[53] is not "evil" per se but can be a precondition of liberation from a colonial regime and for the formation of a stable political community. As long as minority rights are respected, and the newly formed nation abides by the rule of law and the law of nations, even nationalism can become unproblematic.[54] Given such a framework legal pluralist studies could be seen as spadework for (p. 395) (later) peace and institution building in a way that is less state-centric and more amenable to local understandings of justice and legal practices.

Explaining the details of such a framework in terms of basic principles of liberalism might appear to be far off and even lead astray the usual topics and problems with which legal pluralism is concerned. However, because at least some basic values such as respect for the rule of law, toleration for minorities, and maybe some consultation processes are incorporated into most accounts of legal pluralism,[55] it is necessary to realize that even such minimal value commitments have an inherent dialectics as well. To this end, it is helpful to follow the development of Kelsen's thoughts a bit longer.

I have argued above that Kelsen's form of positivism is better understood as a post-foundational answer to multiethnic conditions under circumstances of radical value pluralism. But there is also another Kelsen, namely, the democratic theorist of the interwar republics.[56] After the demise of the empires both Germany and Austria were transformed from constitutional monarchies into republics; however, both republics were constantly under pressure. They faced resistance from the conservative or monarchically disposed elites in law and bureaucracy and were fundamentally opposed by communist and proto-

fascist movements. Kelsen was one of the few prominent law professors who defended the liberal democratic form of government against a socialist people's republic, a monarchy, or a proto-fascist corporative state (*Ständestaat*), which were the alternatives discussed at the time.

His defense took on a specific form. He did not, like later twentieth-century social contract theorists, start from a number of liberal premises, as these were not widely shared and accepted by everyone. Instead, he gave a formal and procedural defense of democracy.[57] Starting from the historically informed premise of radical value-pluralism, Kelsen shows that no party or ideology can expect to win over the other through rational discourse. Therefore, he argues that a continuing contestation between government and opposition with recognized rights for minorities would be the most rational way to stabilize these conflicts in a peaceful manner. For legal science and the judicial bureaucracy, he again proposed to pursue a scientific, that is, value-free and apolitical, mode of analysis, because the incorporation of any substantive values into such disputes or administrative decisions could only endanger the coherence and stability of the legal (p. 396) apparatus and the *modus operandi* of a given regime.[58] This short description might suffice to characterize the distinctiveness of Kelsen's approach vis-à-vis later post-Rawlsian liberal political theories. At the same time, it is helpful to keep this minimal or formal justification in mind as a counterfoil to assess the perversion of law and morality during the Nazi regime. So strangely enough Kelsen could in some aspects be seen as a founding father of all legal pluralists that hold on to some minimal rule of law standards.

13.8 The Dialectics of Minimalism

From the point of view of political theory, one might think that with the formulation of the idea of a rule-of-law-based and minorities-respecting democracy (or decent consultation hierarchy) all suppressive side effects of nationalistic exuberance and in any case outrageously wicked actions are theoretically exorcized.[59] However, the history of the Weimar Republic shows that among the many factors that brought about its decline were also some repercussions of political theory in the public sphere. Thus, political theory or more generally political thinking cannot presume to be an innocent bystander or an impartial arbiter but has a dark side as well. As long as some thin or minimal normative account is presumed in legal pluralism, the dialectics of political theory pertains to it as well. So, the genealogical reading of the development of political theory entails a lesson for legal pluralism insofar it reveals that there is no place above political contestation. The further entanglement of Kelsen's theory is again an archetypical instance that proves this point.

The most influential and fierce opponent of Kelsen's compromise-based account of democracy was in Weimar times Carl Schmitt. Even though Schmitt is nowadays infamous for being a "Nazi theorist," one has to keep in mind that in the 1920s, at the time he was writing his most famous books and articles, he was arguing as a constitutional lawyer, thus presenting his agenda as an "integrative"[60] or value-laden interpretation of the Weimar Constitution. Schmitt's fundamental thesis is that "the genuine political dis-

tinction is the one between friend and foe."[61] This thesis does not directly revoke liberal (p. 397) claims, for example, by saying that "all men are created unequal," but instead challenges the premises of the liberal tradition. It declares that the first political question, that is, the formation of a political community or a *volonté générale*, cannot be traced back to non-political, for example, moral, aesthetic, economic, or other criteria, but is an independent and original distinction. By introducing this distinction not abstractly but concretely as a friend-foe opposition Schmitt suggests at the same time that the formation of the political always takes place in the midst of a specific historical situation. In other words, every actual political "we" (representing a *volonté générale*) is already built on the bedrock of past wars, historical injustices, and deteriorated ideologies. Thus, the world Schmitt evokes is devoid of any ideal counterimage like Rawls's original position but is always the real, historical world, traversed by irreducible conflicts in which there are only some islands of rationality or order.

Through this theoretical intervention, the theory of constitutional democracy, which appeared in Kelsen's rendering as the solution to the ideological turmoil, becomes part of the problem. Once the basic objective of facilitating peace and reconciliation between various groups and ethnicities is no longer presumed as the most fundamental value as in Kelsen (and as implicitly by many legal pluralists) but instead, as in Schmitt, is consciously revoked, and struggle (in German, *Kampf*) is promoted as the inevitable reality, political theory itself turns into a tool to enable and fuel ethnic or ideological conflicts. When peace and reconciliation are said to represent simply one side of the conflict, there is no way to find peace and reconciliation on a higher level, there is only struggle all the way up (or down).

The relation of this "dialectics of political theory" to debates on legal pluralism is indirect but reveals nevertheless a recurring feature. Whatever proto-liberal or minimalist framework one might think of to tame, regulate, pacify, or fight underlying social tensions and conflicts found in groups regulated by unofficial law, can itself become a party to the conflict and thus intensify the ideological struggles. Therefore, the idea of staying clear and above ideological conflicts by formulating only minimal moral standards is inherently problematic because the distinction between "moral" and "immoral" judged from a neutral vantage point breaks down into a friend-foe opposition once this vantage point is drawn into the conflict.

This is not to say that the liberal tradition of political theory is completely helpless vis-à-vis Schmitt's challenge. One of the best responses given at the time was Kelsen's critique of Schmitt. Toward the end of the Weimar Republic, Schmitt employed his theoretical distinction to a practical, political end by arguing that only the president (who happened to be the conservative Hindenburg) represents the "people as a whole" but not the "pluralistic dispersed parliament."[62] Kelsen answered this shrewd attack on democratic institutions, not by criticizing Schmitt's implicit values or convictions directly, but instead by showing through a sharply pointed, meticulous, and devastating (p. 398) critique how Schmitt failed on his own terms as a constitutional lawyer.[63] However, one might also reason that Schmitt has indirectly won the argument, since through his ferocious form of cri-

tique Kelsen had shown that even though he valued peace and conciliation he pursued his goal through contestation, thus the very kind of friend-foe distinction where one side has to lose and no reconciliation is possible. This observation is not a structuralist analysis but reflects some of Kelsen's commitments as well. As previously shown, Kelsen agreed with Schmitt that ultimately there is no rational way to decide between completely different value commitments and that the law is not suited to decide such questions through any form of value-based (in Dworkin's terms, integrative) interpretation. Instead, Kelsen hoped that the courts could function as neutral arbiters and that a pure theory of law could stay out of value conflicts so that at least the "science of law" could be saved from endless and idle value conflicts. However, the story of Kelsen's life, together with the perversion of law in Nazi Germany, furnished this hope with a blistering warning, which adds another aspect to the cautionary tale.

13.9 The Demise of Legal Profession and Scholarship

With the advent to power of the Nazi party, Kelsen was among the first professors to be ousted from his university position at Cologne, since he was reckoned to be a "typical communist Jew."[64] As in Ehrlich's case, it did not help that Kelsen had written a critique of communism and was a baptized Christian (he considered himself to be agnostic). Again, the dismissal and the encompassing biographical events have a theoretical significance because they reveal that certain pragmatic presuppositions Kelsen took for granted could be revoked. Even though Kelsen acknowledged value pluralism, he still presumed that its underlying fundamental beliefs, for example, individualism or collectivism, could at least somehow be understood and reconstructed as respectable philosophical traditions. However, it is impossible to argue with someone who denies his or her opponent an equal standing due to racial prejudices. If whatever a Jew says does not count or will be held against him or her, the basic precondition for any civilized dealing with conflicts is revoked. Moreover, with the passing of an openly racist law,[65] an element of irrationality is introduced into the law, so that it loses its claim to be at least in principle or potentially a rational order of human affairs. Last but not least, academia (p. 399) itself, the battlefield of ideas, turned out to be especially prone to political corruption arguably due to its dependence on career networks.[66]

These three elements taken together, namely, a political theory that lends credibility to an antidemocratic (more specifically, non-rule-of-law-abiding) regime, the introduction of the germs of irrationality into the law, and the lack of integrity on the part of academia and the legal administration suffice to give at least a partial account of the degeneration of a reasonably well-functioning republic into one of the most atrocious regimes in history. One example might show that reversal of the meaning of legal institutions did not require a complete overhaul of all laws, institutions, or replacement of all officials, but that some slight changes sufficed.

A typical state law examination in Nazi Germany might involve a "Jewish" tenant whose lease is terminated and who then sues his "Aryan" landlord.[67] (There were strong tenant protection laws in place even during this time.) If the candidate solved this case by merely politicizing in the best Nazi jargon, he would fail. However, a candidate who would solve the case *lege artis* in favor of the Jewish tenant would also fail. The magical way of passing the exam was to show first that one had mastered the "fit" dimension and then, at the last possible moment, evoke the "justification" (or maybe we should say "squeeze") dimension and interpret the law according to the "appropriate" values.[68] Theories about those two dimensions were also developed by academics at this time and after the war, mysteriously, reformulated by merely changing the underlying values.[69]

The example highlights the general point that neither the existence of a legal system, value-based theories of interpretation, engagement with "Western" political theory, nor a judiciary trained during republican times (as was the case with many Weimar lawyers) sufficed to shield the law from turning into a pernicious institution. Even the ultimate resort of rationality invoked by Kelsen, namely, the natural sciences, propelled only by the inherent logic of discovery, turned out to be just as corruptible as law and politics. **(p. 400)** Without any hesitation representatives across all scientific fields were eager to show how they could integrate the Nazi ideology into their studies, thus introducing the irrational Jewish/Aryan dichotomy into biology, physics, engineering, and so on.[70]

The dialectics of political theory is not merely a historical case study of a remote (and fortunately extinct) tribe, but entails a cautionary warning for contemporary debates about legal pluralism. Any attempt to obtain a neutral position beyond political quarrels in the field, for example, by presuming only a minimal normative standard, or a neutral position beyond theoretical debates, for example, between various versions of pluralism by presuming a pragmatic concept of law, is at risk of being drawn back into the dispute by depicting the underlying assumptions as one part of the debate. Especially when the implicit assumption of law as a means of peaceful conflict resolution and scholarship as a rational and verifiable endeavor is drawn into doubt the dialectics of political theory inevitably pertains to debates on legal pluralism as well. One might think that the complete demise of Western scholarship is merely a hypothetical dystopia. However, legal pluralist scholars will easily recognize such patterns in post-conflict societies or areas of limited statehood. Moreover, the assumption that the international practice of scholarship or the integrity of the scholar herself can, in any case, be presumed and separated from worldly turmoil on the ground can also be questioned. Again, a further step in the genealogical reading prepares the way for this insight. This step finally forces us to face the problem of evil, which has so far only subliminally propelled the insights into the fundamental problems of legal pluralism.

13.10 In the Eye of the Hurricane

The name "Auschwitz" has become the symbol of evil in its most monstrous forms. Even the mere mention of it requires elaborate efforts to avoid using it as a superficial gesture

or failing to grasp its never-ending, multifaceted wickedness. At this point, we are apparently not only in the eye of the storm of the twentieth century but also very far away from anything that can be described or grasped with methods of legal pluralism, or maybe legal theory.[71] And yet there is one more fundamental problem of legal pluralism that can be explained by reflecting on the Holocaust.

Since the Nuremberg Military Tribunals, the monstrous bureaucratic killing machine the Nazis installed with its widespread system of camps has been elaborately described, (p. 401) its relation to the war machine, the military-industrial complex, and areas of civil society have been analyzed, and reports of victims and survivors have been assembled so that Holocaust studies has become a discipline in its own right. However, there is still one gap in the literature: we know of only very few reports, diaries, autobiographical, or semi-fictional writings from the inside, from culprits, accomplices, and bystanders, so that this part of the story, its innermost abyss, remains mysterious.[72] This realization of the silence, good conscience, or even "healthiness of evil"[73] would in itself be worth reflecting. However, the apparent absence of firsthand reports can at least to some degree be filled by a literary account. Jonathan Littell's *The Kindly Ones* is one of the first novels written from the perspective of a (fictitious) SS (*Schutzstaffel*) officer, and thus invents the voice and reasoning of a perpetrator.[74] More than in other novels, it is important to distinguish between the views uttered by the main protagonist—a self-obsessed, sexually depraved SS officer and serial murder—the aesthetic point of view of the novel, and the interpretation the author and critics give afterward.[75] Because the book is not a *roman à thèse*, it invites us to engage, in spite of its topic, in a "free play" of imagination and understanding.[76] The second chapter relates directly to the discussion about legal pluralism. The narrator and main protagonist, a high-ranking SS officer named Dr. Aue, is sent to the Caucasus and assigned to come up with a "manageable" definition of who among the various ethnic groups is to be labeled as Jewish. The group of the so-called *Bergjuden*, a local ethnicity living in the Caucasus mountains, poses a special problem, as they do not fit the simplistic Nazi ideology that all Jews must have a common racial origin and subsist like a foreign body among a truly native population.[77] During the course of his investigation, Dr. Aue assembles historical reports, and writings of ethnologists and anthropologists, and informs himself about the customs of the local population. Thus, he works in the best fashion of a legal pluralist, only he does so as a representative of a murderous regime. The crucial point of the story is that it is not only the protagonist who can be singled out as the perpetrator, but all scholarly, scientific writings, and personal reports he consults that become part of his perverse occupation. (p. 402) In the novel, this insight is exemplified in the character of Dr. Voss. He is introduced as a preeminent linguist who uses the advances of the Wehrmacht to collect more material and firsthand experience for his studies on undocumented Iranian languages. At the same time, he delivers the counternarrative to the scheme of Dr. Aue and his colleagues in the SS. When asked by Dr. Aue what he thinks about the "problem" of the *Bergjuden*, Dr. Voss replies, "[t]he way they've put it, it's absurd. The only thing you can say about these people is that they speak an Iranian language, practice the Mosaic religion, and live according to the customs of the Caucasian mountain people. That's it." To Dr. Aue's insistence that they "must have an

origin," Dr. Voss shrugged his shoulders: "Everyone has an origin, most of the time a dreamed one."[78] It is all too tempting to hail Dr. Voss as the voice of reason. However, Littell resists depicting one character as the mouthpiece of the author, but instead ends the episode with two striking twists. The counterspeech delivered by Dr. Voss is rendered as a private conversation; thus he does not leave any paper trails in official files. Moreover, Dr. Voss doesn't survive long but is shot during one of his field trips, notably not by an enemy or resistance fighter, but by a local farmer who witnesses Voss trying to seduce his daughter. The last scene in which Voss appears describes how the polyglot and polymath scholar dies in a hospital while mourning incomprehensible vowels.

In the ensuing conference meeting among officers of SS, the Wehrmacht, and a representative of the Reich (again an over-the-top literary fantasy) on the "final solution" of the question of the *Bergjuden*, the views of Dr. Voss do not play any role. The crucial and unsettling point of this meeting is that all scholarly activities, regardless of their orientation or premises, are drawn into the perverse logic of extermination. Thus, it is the practice of scholarship itself, the systematic collection of knowledge that involuntarily contributes to the ends of a perverse administration.[79]

The lesson for the practice of legal pluralist scholarship is far-reaching. The problem that the scholar might exert influence on her subject through her scholarship is no longer an abstract theoretical worry but becomes an existentialist dimension like in Job's temptations. Especially when it comes to exploring uncharted terrain, for example, by recording customs and classifying members of a community for the first time, knowledge means power and is prone to be abused.

13.11 Coda

The genealogy of the discourse on legal pluralism reveals three fundamental questions that underlie pluralist scholarship until today. While examining Ehrlich, we have seen (p. 403) how the pluralist spirits Ehrlich invoked haunted him like veritable ghosts, once they emerged as nationalistic ideologies of the very groups whose customs he previously studied. Kelsen's minimalist fallback position of providing a framework for political contestation of different groups turned out to be untenable once his implicit value presuppositions (peace and reconciliation) became a party to the whirl of ideological conflicts. Both scholars came to witness how a constellation of ideas and pragmatic presuppositions they took for granted crumbled before their very eyes. However, evil did not appear as a topic of their theories but unfolded in the background through unaccounted moments. At the deepest and most unsettling level, the example of the literary character Dr. Aue reveals that even pluralist scholarship itself often rests on the advance of an imperialistic agenda and is prone to be drawn into it, so that scholarship itself is at risk of ending up as a curio in a killing field. The aim of the genealogy is making pluralist studies aware of an additional layer of problems. One's favorite subject can turn out to be the monster of tomorrow, one's favorite fallback position party in a political conflict, and even

one's own research, destined for some archive, can be abused so that Mephisto has the last laugh.

Throughout the genealogy, the problem of evil slowly unfolded as driving force. However, the account is not a theory because it does not pretend to give a definite description of evil and its different kinds (metaphysical, psychological, moral), as if it could then be in all contexts determined and defeated. The literary excursions at the beginning and the end have indicated why any such theoretical attempts are incomplete and insufficiently complex. At the same time, they have advanced the hope that education through the arts might provide better ways of fostering moral judgment, notably not moral theory.[80] In this respect, the account is more realistic and more abstract than any theory. It acknowledges that what later on is easily recognized as evil works typically at the back of one's own theory and therefore cannot be determined by it or any other theory. The answer to the implicit question on which side of the debate between legal pluralists and legal positivists Mephisto himself would show up is therefore paradoxical: on each side and in each occupation or cause of action. This is, however, no reason for despair but instead a cause to recollect and remember that resistance against the inclination to evil and its uncanny attraction is not to be found in any worldly institution, but only in the sublime whispering of one's inner, uncompromisable but ever-changing soul. The richness of historical examples and depth of literature might help to inculcate one's moral judgment, but only in real life can it be proven.

Notes:

([1]) For contemporary definitions of legal pluralism, see Robert M. Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative," *Harvard Law Review* 97, no. 4 (1983): 4–68, and Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80, no. 6 (Sept. 2007): 1155–237, with further references.

([2]) See Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30, no. 3 (2008): 375–411.

([3]) See Berman, *supra* note 1, at 1180–92. Brian Tamanaha also notes and criticizes the general tendency of legal pluralism to "combat legal centralism" and romanticize non-state normative systems. See *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), at 550, 561.

([4]) Tamanaha and Berman question whether it is necessary or even possible to develop an "essentialist" theory of law in the first place and abstain from the "legitimation enterprise." However, the aim to attain a better or more realistic understanding of the social existence of law carries at least implicit normative commitments (emphatically, enlightenment through scholarship) that could be further theorized and their relation to normative practices reflected.

([5]) The original expression *la révolution, comme Saturne, dévore ses propres enfants* was coined by Georges Danton. By rephrasing it I want to point out that later on, Chronos, the Greek model of Saturn, is killed by Zeus, one of his sons, just as the first generation of revolutionaries are often killed by the second.

([6]) On the Manichaean character of American religion, depicting an eternal fight between good and evil, see Harold Bloom, *The American Religion*, 2nd ed. (New York: Chu Hartley, 2006). The prevalence of this thinking is though not in philosophy but in popular culture conspicuous.

([7]) Thomas Mann, *Doctor Faustus: The Life of the German Composer Adrian Leverkuhn as Told by a Friend*, trans. John E. Woods (New York: Vintage Books, 1997), 242. It is of course very questionable whether this conversation ever took place as the reasonable and diligent narrator of the story explains and speculates that “it is gruesome to think that the cynicism, the mockery, and the humbug likewise comes from his own stricken soul.” Ibid., 237.

([8]) The term “cosmopolitanism” is used here not as a moral term but in an ambiguous way, such as Hermes is the god of the merchants and thieves likewise.

([9]) As always, a proviso applies: “The devil never enters through the same door twice,” as another German proverb states.

([10]) Every remembered legislation is typically superimposed on previous social practices. The commandment “thou shalt not covet your neighbor’s wife” means you shalt not take her into debt bondage, as it was apparently previously practiced, again a practice that might have reformed even more archaic or cruel forms of retribution. See David Graeber, *Debt: The First 5,000 Years* (Brooklyn: Melville, 2011), 75–87.

([11]) Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (Cambridge, MA: Harvard University Press, 1936).

([12]) The debate is collected in Stanley L. Paulson, ed., *Hans Kelsen und die Rechtssoziologie. Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber* (Aalen, Germany: Scientia, 1992).

([13]) The nine ethnicities or social groups with their own “living law” in the Bukovina were according to Ehrlich “Armenians, Germans, Jews, Romanians, Russians (Lipovans), Ruthenes, Slovaks (often classed among Poles), Hungarians, and Gypsies.” See Eugen Ehrlich, “Das lebende Recht der Völker der Bukowina,” *Recht und Leben. Gesammelte Schriften zur Rechtstatsachenforschung und zur Freirechtslehre*, ed. Manfred Rehbinder (Berlin: Duncker & Humblot, 1967), 43.

([14]) Ehrlich, *Fundamental Principles of the Sociology of Law, supra* note 11, at 85.

([15]) Ibid., xv.

([16]) The German public lawyer Paul Laband could be seen as representing such a position.

([17]) For Kelsen's review and the exchange with Ehrlich, see Paulson, *supra* note 12.

([18]) At this point the translation is important. Both Ehrlich and Kelsen are based in the German tradition of *Rechtswissenschaft* science of law, the scholarly studies of laws, and their inner relations ("dogmatics"). Sociology was just established as a discipline in universities, whereas political theory did exist in terms of *Staatswissenschaften*.

([19]) Since Kelsen is mostly discussed in legal theory there is no monograph that describes the entire range of his theoretical interests and practical work. For a brief analysis of Kelsen as cultural theorist, see Christoph Kletzer, "Kelsen and Blumenberg: The Legitimacy of the Modern Age," *King's Law Journal* 25, no. 1 (2014): 19–33.

([20]) On the weary *fin-de-siècle* mood in Vienna and Austro-Hungary, see Carl E. Schorske, *Fin-de-Siècle Vienna: Politics and Culture* (New York: Alfred A. Knopf, Inc., 1980), 3–23.

([21]) See Ehrlich, *Fundamental Principles of the Sociology of Law, supra* note 11, at 171–91. The English translation "legal propositions" is problematic as it does not convey the idea of long-standing, respected rules.

([22]) Ibid., 170.

([23]) Eugen Ehrlich, "Bismarck und der Weltkrieg," in *Politische Schriften*, ed. Manfred Rehbinder (Berlin: Duncker & Humblot, 2007), 107. Bismarck's policy is for Ehrlich a warning example of a purely state- and force-driven idea of law that fails to take account of the moral forces of society.

([24]) The distinction between communitarianism and liberalism was not established at this time. Ehrlich uses instead the terms "collectivism" and "individualism" to denote a similar point.

([25]) Ehrlich, *Fundamental Principles of the Sociology of Law, supra* note 11, at 241–42.

([26]) Ehrlich did not extensively explain or justify this notion of justice. However, the tradition of conceiving "justice as equity of the wise" could be traced back to Leibniz. See Patrick Riley, *Leibniz' Universal Jurisprudence: Justice as the Charity of the Wise* (Cambridge, MA: Harvard University Press, 1996), 141–98.

([27]) Eugen Ehrlich, *The National Problems in Austria* (The Hague: Martinus Nijhoff, 1917).

([28]) See Eugen Ehrlich, "Das Ende eines großen Reiches," in *Politische Schriften*, ed. Manfred Rehbinder (Berlin: Duncker und Humblot2007), 19–80. Ehrlich's own ideas for a peaceful postwar order were more along the lines of the thinking of Austro-Marxists who promoted a federal, social democratic republic with Vienna as cultural capital. See Manfred Rehbinder, "Aus den letzten Jahren im Leben und Schaffen von Eugen Ehrlich," in

Festschrift Ernst-Joachim Lampe, ed. Dieter Dölling (Berlin: Duncker & Humblot, 2003), 199.

([29]) For the only English monograph dealing with Ehrlich, see Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart, 2009). For the most detailed overview, see Stefan Vogl, *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich* (Baden-Baden: Nomos, 2003).

([30]) On the method of contextual reading, see Quentin Skinner, "Meaning and Understanding in the History of Ideas," *History and Theory* 8, no. 1 (1969): 3–53.

([31]) See Hans Kelsen, *Pure Theory of Law*, trans. from the 2nd ed. by Max Knight (Berkeley: University of California Press, 1967), 2, 5, 195. Kelsen has changed his conception of the basic norm several times throughout his writings. On the transcendental account, see Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," *Oxford Journal of Legal Studies* 12, no. 3 (1992): 311–32.

([32]) For an analysis of law as a natural kind, see Joseph Raz, "On the Nature of Law," *Archiv für Rechts- und Sozialphilosophie* 82 (1996): 1–25.

([33]) For a brief history of the various schools, see Mathias Reimann, "Nineteenth Century German Legal Science," *Boston College Law Review* 31, no. 4 (July 1990): 837–97.

([34]) In a short autobiographical note Kelsen explicitly acknowledged that the "pure theory" can be considered as a specifically Austrian theory. See Hans Kelsen, *Werke, Vol. 1. Veröffentlichte Schriften 1905–1910 und Selbstzeugnisse*, ed. Matthias Jestaedt (Tübingen: Mohr Siebeck, 2007), 60.

([35]) See Hans Kelsen, "Reichsgesetz und Landesgesetz nach österreichischer Verfassung," *Archiv des öffentlichen Rechts* 32 (1914): 202–45, 390–438.

([36]) On the objective of the law, see Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1949), 3–15.

([37]) Lars Vinx, *Hans Kelsen's Pure Theory of Law. Legality and Legitimacy* (Oxford: Oxford University Press, 2008), 25.

([38]) Even Ehrlich praised in retrospect the efficient bureaucracy and mused that it could have been used to a better end. See Ehrlich, "Das Ende eines großen Reiches," *supra* note 28, at 23.

([39]) On Freud as a traditional liberal Jew among the rising anti-Semitic mass movements, see Schorske, *supra* note 20, at 6–8.

([40]) The *modus vivendi* is exactly the kind of stability out of a balance of political forces Rawls considers as insufficient as it is not supported by a sense of justice. See John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* 14, no. 3 (Summer 1985): 223–51, 247–8. Ehrlich and Kelsen, on the other hand, both sensed

that such a common sense of justice could not be achieved under the given multicultural and multiethnic circumstances of an empire and striving for it would imperil even the *modus vivendi*.

([41]) Ehrlich developed his view indirectly through a critique of socialist ideas. See Ehrlich, “Die Aufgaben der Sozialpolitik im österreichischen Osten (Juden- und Bauernfrage),” in *Politische Schriften*, ed. Manfred Rehbinder (Berlin: Duncker und Humblot 2007), 135–44.

([42]) The German term *Wissenschaft* comprises both natural and social sciences including the humanities and therefore suggests that academic lawyers are engaged in the exploration of the objective world just as natural scientists.

([43]) The history of the Romanization of the Bukovina is still a contested field. SeeMariana Hausleitner, *Die Rumänisierung der Bukowina. Die Durchsetzung des nationalstaatlichen Anspruchs Grossrumäniens 1918–1944* (München: Oldenbourg, 2001). For a brief account, see Monica Eppinger, “Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography,” in *Living Law: Reconsidering Eugen Ehrlich*, ed. Marc Hertogh (Oxford: Hart, 2009), 21–47.

([44]) On the history of the university and Ehrlich’s role, see Manfred Rehbinder, “Die rechts- und staatswissenschaftliche Fakultät der Franz-Josephs-Universität Czernowitz. Ihr Beitrag zur Erforschung des Rechts in einer multikulturellen Gesellschaft,” in *Festschrift Hans Stoll*, ed. Gerhard Holoch et al. (Tübingen: Mohr Siebeck, 2001), 327–44.

([45]) For a more nuanced view of the political aims of Woodrow and his antagonists, see Stephen Wertheim, “The League That Wasn’t: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920,” *Diplomatic History* 35, no. 5 (Nov. 2011): 797–836.

([46]) The expression “Gorgonian head of power” was coined by Kelsen in a reply to natural law theorist Erich Kaufmann. The full quote is: “The question natural law aims at is the eternal question of what lies behind positive law. And whoever seeks the answer, I fear, will not find the absolute truth of some metaphysics nor the absolute justice of natural law. Whoever lifts the veil and does not close his eye, the Gorgonian head of power stares at him.” Hans Kelsen, “Diskussionsbeitrag,” *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler* 3 (1927):54–55, author’s translation.

([47]) Ehrlich has no elaborated theory of democracy. However, he equals it with “living law” as only in a democracy “the forces of society are utilized by the state.” See Eugen Ehrlich, “Von der Zukunft des Völkerbundes,” in *Politische Schriften*, ed. Manfred Rehbinder (Berlin: Duncker und Humblot, 2007), 186.

([48]) Eugen Ehrlich, “Die Aufgabe der Sozialpolitik im österreichischen Osten,” in *Politische Schriften*, ed. Manfred Rehbinder (Berlin: Duncker und Humblot, 2007), 142–43.

([49]) In Germany, the historian Heinrich von Treitschke coined in 1879 the infamous slogan “the Jews are our misfortune” and, because of his reputation, made anti-Semitism socially acceptable. See Alfred J. Andrea and James H. Overfield, eds., *The Human Record: Sources of Global History, Volume II: Since 1500* (Boston: Cengage Learning, 2011), 294–95.

([50]) For a detailed account of the events, see Stefan Vogl, *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich* (Baden-Baden: Nomos, 2002), 91–107.

([51]) Ehrlich, “Die Aufgabe der Sozialpolitik im österreichischen Osten,” *supra* note 48, at 143.

([52]) Kant was the first in a long history of speculative philosophy to argue that even antagonistic forces of nature have in the end an ameliorating effect, which is, of course, a secular form of theodicy. See Immanuel Kant, “The End of All Things,” in *Religion and Rational Theology*, trans. and eds. Allen W. Wood and George di Giovanni (Cambridge: Cambridge University Press, 2001), 221–31.

([53]) See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991).

([54]) The separation of Slovakia and the Czech Republic into separate nation-states is one of the rare occasions of a peaceful and law-abiding formation of two states with separate national identities.

([55]) Brian Z. Tamanaha, “The Rule of Law for Everyone?,” *Current Legal Problems* 55, no. 1 (2002): 97–122, argues in favor of a preliberal understanding of the rule of law for coming to terms with non-liberal societies. For John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”* (Cambridge, MA: Harvard University Press, 1999), 71–72, having a “consultation hierarchy” is a condition for qualifying non-liberal societies as “decent.”

([56]) Kelsen’s essays in defense of democracy from the 1920s, unlike Carl Schmitt’s antiliberal critique, have only recently been republished. See Hans Kelsen, *Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie*, eds. Matthias Jestaedt and Oliver Lepsius (Tübingen: Mohr Siebeck, 2006). For an adapted English translation, see Hans Kelsen, “Foundations of Democracy,” *Ethics* 66, no. 1 (1955): 1–101.

([57]) For a short version of his account, see Hans Kelsen, “What Is Justice?,” in *Justice, Law, and Politics in the Mirror of Science: Collected Essays* (Berkeley: University of California Press, 1957), 1–25.

([58]) Kelsen’s seminal work *Vom Wesen und Wert der Demokratie*, 2nd ed. (Aalen, Germany: Scientia, 1981), is only partially available in English. See “On the Essence and Value of Democracy,” in *Weimar. A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bern-

hard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 84–109.

([59]) Even contemporary defenders of nationalism or a restrictive immigration policy formulate their ideas within a framework of weak liberal cosmopolitanism. See, e.g., David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge, MA: Harvard University Press, 2016), 37.

([60]) Schmitt's method of "concrete order thinking" (*konkretes Ordnungsdenken*) is reminiscent of Ronald Dworkin's method of "integrative interpretation"; however, the underlying values are certainly different. See Carl Schmitt, *On the Three Types of Juristic Thought*[1934], trans. Joseph Bendersky (Santa Barbara: Praegar, 2004).

([61]) That is the opening sentence of the more radical 1933 edition of *The Concept of the Political*. See Carl Schmitt, *Der Begriff des Politischen* (Hamburg: Hanseatische Verlagsanstalt, 1933), 7.

([62]) See Carl Schmitt, "The Guardian of the Constitution," in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, ed. and trans. Lars Vinx (Cambridge: Cambridge University Press, 2015), 79–124.

([63]) See "Who Ought to Be the Guardian of the Constitution? Kelsen's Reply to Schmitt," in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, ed. and trans. Lars Vinx (Cambridge: Cambridge University Press, 2015), 174–221.

([64]) On the details of this episode, see Rudolf Aldár Métall, *Hans Kelsen: Leben und Werk* (Vienna: Franz Deuticke, 1969), 47–57.

([65]) One of the first laws the Nazis enacted was the so-called "Law for the Restoration of the Professional Civil Service," which dismissed all "non-Aryan" members of the civil service.

([66]) For Hannah Arendt, the realization that not just the Nazis but also friends of her turned against Jews for opportunistic reasons was the most shocking experience of the advent of the Nazi regime. See "*Zur Person*: Hannah Arendt's Television Interview with Günter Gaus," recorded Oct. 28, 1964, https://www.youtube.com/watch?v=dsoImQfVsO4.

([67]) It is not a real but a simplified fictitious case to explain the way the whole legal system worked. A full historical study would have to go into the details of the two exams and the different legal topics dealt in them and detect the ideological agenda in slight changes of the wordings. For a more detailed account along these lines, see Louis Pahlow, "'Ich verüble dem Verf. weniger einzelne juristische Fehler als das Versagen des Rechtsgefühls': Juristische Staatsprüfungen im Dritten Reich (1934–1945)," in *Von den Leges Barbarorum bis zum ius barbarum des Nationalsozialismus. Festschrift für Hermann*

Nehlsen zum 70. Geburtstag, eds. Thomas Gutmann et al. (Cologne: Böhlau, 2008), 399–420.

([68]) Fit and justification are the two dimensions in Ronald Dworkin's theory of integrative interpretation. See Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 225–75. It is easy to see that this theory could also be used in a different context by simply changing the underlying values.

([69]) The details of the sweeping transformation of the legal system are of course more complex. For the case of private law, Bernd Rüthers has shown the continuities in his classical study *Die unbegrenzte Auslegung: zum Wandel der Privatrechtsordnung im Nationalsozialismus*, 7th ed. (Tübingen: Mohr Siebeck, 2012).

([70]) For a "Hall of Shame" in which representatives of all sciences are assembled, see *Deutsche Wissenschaft: Arbeit und Aufgabe. Dem Führer und Reichskanzler legt die Deutsche Wissenschaft zu seinem 50. Geburtstag Rechenschaft ab über ihre Arbeit im Rahmen der ihr gestellten Aufgabe* [German Sciences. Accomplishments and Tasks. On the Occasion of the 50. Birthday of the Führer and Reich Chancellor the German Science Accounts for its Accomplishment within its Given Task] (Leipzig: Hirzel, 1939).

([71]) In legal theory, "Nazi law" is often discussed as a hypothetical example without taking actual legal practices and scholarly discussions at the time into account. More historical minded studies, on the other hand, often fail to recognize eerie methodological similarities between "Nazi theories" and today's approaches.

([72]) A notable literary exception is Robert Merle, *Death Is My Trade*, trans. Alan Ross (London: Derek Verschoyle, 1954), a novel written in first person based on the life of the commander of Auschwitz, Rudolf Höß. The study on the Reserve Police Battalion 101 is notably a relatively late historical study but not an account written by one of the perpetrators. See Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (London: Penguin, 1998).

([73]) Strangely enough, the guilt of perpetrators seemed to be hidden, or worse unproblematic, even in psychoanalytic therapy. At least there are hardly any reports of guilt voiced in psychoanalytic sessions. See also Christopher R. Browning, "The Strange Health of Captain Hofmann," in *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (London: Penguin, 1998), 114–20.

([74]) Jonathan Littell, *The Kindly Ones*, trans. Charlotte Manell (London: Vintage, 2010).

([75]) After its publication the novel has been intensely discussed in various countries. See *Writing the Holocaust Today: Critical Perspectives on Jonathan Littell's The Kindly Ones*, eds. Aurélie Barjonet and Liran Razinsky (Amsterdam: Rodopi, 2012).

([76]) This is Kant's characterization of the aesthetic experience. Immanuel Kant, "Kritik der Urteilskraft," in *Berlin-Brandenburgische Akademie der Wissenschaften*, ed., Kants Werke, vol. V (Berlin: de Gruyter, 1963 [1790]), 218.

([77]) Littell, *supra* note 74, at 299.

([78]) Ibid.

([79]) The only way of resistance against the fundamental form of authority through writing would be to retreat into a nonwriting and constantly name-changing society. For examples and analysis, see James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009).

([80]) This idea has first been voiced by Friedrich Schiller in a critique of Kant and has since then influenced various movements and renaissances in liberal arts education.

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