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NEO-FASCIST LEGAL THEORY ON TRIAL: AN INTERPRETATION OF CARL SCHMITT'S DEFENCE AT NUREMBERG FROM THE PERSPECTIVE OF FRANZ NEUMANN'S CRITICAL THEORY OF LAW

ABSTRACT. This article addresses, from a Frankfurt School perspective on law identified with Franz Neumann and more recently Habermas, the attack upon the principles of war criminality formulated at the Nuremberg trials by the increasingly influential legal and political theory of Carl Schmitt. It also considers the contradictions within certain of the defence arguments that Schmitt himself resorted to when interrogated as a possible war crimes defendant at Nuremberg. The overall argument is that a distinctly internal, or "immanent", form of critique is required of Schmitt's position, in which its is found wanting even on its own terms. In principle, the application of this dialectical mode of critique can allow a genuine debate to emerge between those seeking to continue both the Schmittian and critical theory traditions, whilst safeguarding the latter from the dangers of formulating polemical interventions that are, in effect, counterproductive to their own intentions.

KEY WORDS: Carl Schmitt, Franz Neumann, immanent modes of critique, incitement to genocide, legal theory of the Frankfurt School, Nuremberg principles, OSS, war crimes

INTRODUCTION

This article tackles a series of issues, as much methodological and political as they are jurisprudential, concerning the relationship between the libertarian socialist account of the rule of law provided by Franz Neumann and the authoritarian, proto-fascist theory developed by Carl Schmitt. The empirical and historical focus is Schmitt's interrogation by Nuremberg war crimes prosecutor Robert Kempner, a war-time colleague and friend of Neumann.

That focus is not purely historical however. For as long as civil libertarian appeals to preserve democratic values of accountability, transparency and openness to maximum participation in the exercise of public and private power fail to gain and sustain majority support amongst those both exercising and subject to such power, then a distinctly fascistic reconstruction of our existing governmental, institutional and social system remains an ever-present possibility. With depressingly few exceptions, the Nazi

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regime was able to rely upon strong support from both practitioner and academic branches of the legal profession, most of whom regained their positions under the post-war settlement. If a different version of Fascism ever re-surfaces, then it is conceivable that many of the arguments used to greatest effect by the Nazi jurist Carl Schmitt to ridicule and undermine support for a civil and human rights-based form of liberal parliamentary democracy will resurface, and then gain increasing support, in 'radical' and would-be avant-garde circles.

Since 1985, this renaissance has been happening at an ever-increasing rate, precisely during a period which has coincided with the re-emergence of "the radical right" as a distinctly political force (Scheuerman 1994: ch. 1). Within the European continent, the latter's most extreme nationalistic expressions have involved so-called 'ethnic cleansing' against groups which fall outside racial, ethnic or religious definitions of 'homogeneity', and whose very existence within national borders re-interpreted as a 'threat'. Even have been those who are not alarmed by genocidal expressions of right-wing orientations should find the status and potential of the arguments of Carl Schmitt of interest, notwithstanding their distance from the present author's critique of their validity. Any legal or political theorist eager either to support or combat the re-emergence of a distinctly fascistic re-ordering could do far worse than to study the character, rhetorical appeal and implications for liberal democracy of Schmitt's ideas and involvements, not least in the context of how he attempted to justify himself before a Nuremberg prosecutor who, like Neumann himself, had had to flee from Nazi Germany.

Although an adequate exposition of Schmitt's central ideas would require a monograph, a brief summary may be helpful at this point. Schmitt made a powerful attack upon what he portrayed as the fatal contradictions and "problematic nature" of the spurious 'neutrality' of the liberal constitutional state: For example, liberalism's theoretical claim to accord pluralistic and non-judgmental tolerance to *all* substantive accounts of what constitutes the "common good"; whilst, in practice, also implicitly undermining citizens' efforts to organise their lives according to well-defined communal values which diverge from liberalism's own commitment to market-oriented individualism. For Schmitt, the liberal state's application of such substantive 'neutrality' (in the form of an allegedly non-ideological "proceduralism" and commitment to supposedly universal values of pre-political individual rights) condemns it to a series of back-and-forth movements between equally untenable positions. These include two oscillations: one between a natural law commitment to the subordination of positive law to higher "natural rights", and the diametrically

opposed stance of Kelsen's positivism; and another between a dogmatically authoritarian imposition of the 'truth' of its own individualistic values which threaten to displace rival perspectives, and a relativistic denial of the very possibility of such absolute 'truth' to any competing political ideologies (including its own).

For Schmitt, the practical end-result of liberalism's structural incoherence is the perpetual procrastination of inconclusive parliamentary debates which 'decide' only to postpone decisive action, and hence engender the state's paralysis in the face of historical threats from both its internal and external enemies (Schmitt 1985). Schmitt argues that such threats urgently require the mobilisation of a unified homogeneous state which is centred around a sovereign's personal vision of its people's unique historical destiny. He maintains that such contradictions are self-destructive. They leave the liberal constitutional state utterly defenceless against effective colonisation by the most powerful of privately funded special interest groups, whose pervasive impact creates widespread popular disillusion with respect to both liberal parliamentary institutions and the wider democratic political process (Schmitt 1985).

Dyzenhaus has rightly argued that Schmitt's critique of liberal constitutionalism depends upon a series of dramatic *inversions* of the presuppositions of liberal ideology more generally (Dyzenhaus 1997). These include the relationship between *abstractly universal* and impersonal general legal principles characteristic of Enlightenment rationalism (such as the rule of law), and the essentially *particularistic* and *concrete* character of full-blooded contestation between starkly incompatible ideologies. The latter are resolvable only by the private exercise of decision expressive of an irreducibly *personal* form of "existential" commitment and political "vision". Furthermore, whereas liberalism claims to *subordinate* sovereign political power to a supposedly closed system of self-sufficient legal norms, the "separation of powers" and ideologically-neutral constitutional procedures expressive of reason, Schmitt's subordination of all legal-constitutional authority to an essentially particularistic form of untameable sovereign power effectively denies the very possibility of any such overarching 'neutrality' (Dyzenhaus 1997). Schmitt also reverses liberalism's prioritisation of the relationship between mundane constitutional norms and the "exceptional state". He does so by interpreting the power to identify the latter as *constitutive* for the authority of the former. Whereas liberalism promotes political-cultural pluralism and open-ended discursive deliberation between competing perspectives on the goals of public policy, Schmitt advocates decisive and pre-emptory sovereign action, unhindered

by constitutional limitations, to enforce the absolute value of whatever substantive principle of homogeneity is promoted by the sovereign power.

Arguably, Schmitt's inversions are essentially authoritarian in that they *reduce* principles of constitutionality to a secondary expression of sovereign power, itself independently constituted by the non-rational force of brute and unaccountable "existential decision". For Schmitt, the latter is basic in that it first establishes the fundamental nature of the entire legal order of the liberal state, and hence cannot be held accountable to the content of merely derivative constitutional norms. Schmitt's "decisionism" effectively *reduces* legal authority that is regulated by the rule of law and basic rights to an essentially *instrumental* form of sovereign power. The latter is exercised in a moral vacuum, in which the only criterion of success is success itself.

Ironically, given his appeal to a decisionist, as distinct from either a normative or a rationalistic source of constitutional legitimacy, Schmitt defended his own work during the Weimar and Nazi periods in *exclusively theoretical terms*. In April 1947, and facing the prospect of prosecution for participation in a "conspiracy to wage aggressive war" at the subsequent proceedings of the Nuremberg International Military Tribunal, Carl Schmitt wrote the following from his prison cell:

> [T]hat for which I am being held responsible is essentially only that which I have written – scholarly treatises, which have resulted in many fruitful scholarly debates (in Bendersky 1987: 125).

The present study has been extracted from a larger project which compares the life and scholarship of Franz Neumann with that of Schmitt. This wider project places particular emphasis upon the interplay between these authors' respective ideas, political commitments and activities that relate both to the war crimes of the Nazi period and to the mixed legacy of de-Nazification and democratic reconstruction. The scholarly differences between Neumann and Schmitt intensified as the illiberal implications, and fascistic consequences, of Schmitt's authoritarian view of law became increasingly apparent (Scheuerman 1994; Kennedy 1987a; Söllner 1987). Furthermore, both these jurists had firsthand experience of the Nuremberg war crimes prosecution process, albeit from different sides. Whilst in May 1933 Neumann's career was terminated by the Nazis, with whom Schmitt had recently ingratiated himself, the immediate *post-war* situation witnessed an ironic reversal of their respective roles. Neumann, who had once been arrested by the Nazis, joined the prosecutors; while Schmitt was detained as a suspected war criminal. More specifically, Neumann – following his escape from persecution and exile – made a direct contribution to the Nuremberg process both through his research on war crimes for

the American Office of Strategic Services (OSS) between 1943–1945 and his subsequent work as a Chief of Research for Justice Jackson's prosecution team. In this way, Neumann contributed to a process that ensured that Schmitt faced the possibility of 'poetic justice'. Indeed, the member of Jackson's team who interrogated Schmitt, and ensured that he remained interned for a full year, was none other than Robert Kempner, a colleague and friend of Neumann (Bendersky 1987).

Much of the documentation giving the details of Neumann's involvement with the work of the OSS, including his section's involvement with the preparation of the prosecution strategies and assisting with the detailed briefs for the Nuremberg Trials, has only recently been declassified by the CIA. To date, however, the specifically war crimes aspect has largely escaped attention within both the general OSS literature (cf. Smith 1983) and that focusing upon Neumann's personal involvement within this organisation's Research and Analysis Branch (Söllner 1982). Nevertheless, addressing the diametrically opposed positions taken up by Schmitt and Neumann with respect to the meaning and implications for the rule of law of the Nuremberg process could provide a concrete focus for future studies of the relationship between these two legal theorists.

Although the following study re-examines the "fruitful debate" between Neumann and Schmitt, viewed as the representatives of critical legal theory and fascist jurisprudence respectively, the relationship between these jurists is hardly reducible to purely scholarly disagreements. What is at stake is rather a decisive conflict over contrasting values, ideologies and social goals, whose institutional and political ramifications may never be resolved, at least not in any definitive fashion.

Hence the present article sets itself the modest task of indicating, in a preliminary fashion, what may be *at stake* in the interrogation of Schmitt from that critical theory perspective which informs Neumann's engagement, and how the issues raised by the debate between Schmittian and Frankfurt School interpretations of law should be addressed if counterproductive results are to be avoided. Here is a controversy between rival traditions whose interpretation by contemporary writers from either camp is rich in possible dangers of over-heated polemical overstatement, "guilt-by-association", strategic distortion and self-defeating "critiques". Those associated with Critical Theory, who defend a broadly "enlightenment" commitment to radical participatory democracy, are set against those, such as Schmitt, who challenge the basic tenets of mainstream conceptions of liberal democracy. Such tenets are rejected in favour of the values associated with an existential politics of "solidarity" centred upon racial, ethnic or other pre-rational sources of "identity". In this context, the critical

theorists are uniquely at risk of engaging in polemics with Schmittians that generate far more heat than enlightenment (Kennedy 1987b). If this occurs, then polemicists from the critical theory tradition would unfortunately fall into the trap set by their Schmittian opponents, who want to suggest that human destiny is incapable of being shaped by a democratic political process guided by the rational force of better argument. A key issue raised by the crucial, and – for Habermas (Habermas 1989, 1994, 1997) – increasingly topical, Schmitt vs. critical theory debate, is how best to avoid the adoption of self-defeating positions. Arguably, this is a controversy that, notwithstanding its pertinence to, and emotional significance for, both the defenders and assailants of liberal democratic values, must be approached in a highly cautious, self-critical and nuanced manner. Any rush to judgement that ignores a number of important caveats by aiming to 'conclude' the Schmitt vs. critical theory debate in a manner that is both decisive and definitive is problematic: and especially so for would-be critical legal theorists, because of the serious risk of undermining its own position, irrespective of its cognitive and political merits.

While the relevance, either as opportunity or as pathology, of Carl Schmitt's ideas and their political implications has become increasingly clear within the last decade, it is still necessary explicitly to justify my strategy of employing Neumann *as a foil to* Schmitt. Here, it is important to emphasise that not only did Neumann engage very directly with Schmitt's ideas and suffer at first hand from the fascist regime which the latter endorsed, supported and received great esteem from, but also that Neumann's tradition employed a distinctly "immanent" form of critique. The type of critique could be developed as a *possible remedy* for some of the pitfalls associated with a purely external form of critique of Schmitt: one which simply presupposes the validity of the liberal values which he so forcefully attacks (Salter 1998).

The current resurgence of interest in Franz Neumann's contribution to legal scholarship, which is found mainly in the work of Cotterrell (1995: Chs. 8, 10, 1996), Chase (1984), Tribe (1981, 1987), Ruete (1986) and Scheuerman (1993, 1994, 1996) is both timely and incomplete. It is timely because the extreme cold war polarisation in both ideology and international relations that effectively eclipsed and marginalised Neumann's position has now finally collapsed. As both ideological polarisation and entrenchment of antagonistic East-West power-blocs intensified during the late 1940s and early 1950s, Neumann's social democratic programme of research and proposed policy reforms became increasingly marginalised. Since his programme supported a strong defence of a distinctly socialist

version of the "rule of law" and individual rights, it was widely seen as "too liberal" for most orthodox Marxists, particularly those affiliated with Marxist-Leninist political parties. Yet, at the same time, Neumann's programme incorporated important elements of a strong socialist critique of internally contradictory aspects of liberalism, including the co-existence of economic libertarianism and political authoritarianism, and hence appeared 'too left-wing' for right-wingers. Neumann's writings occupied a centre-left social democratic position that was itself located in the fast crumbling space between Marxism and liberal democracy; between an authoritarian version of state socialism lead by Stalin's Soviet Union and a free-market capitalism dominated by American strategic interests and McCarthyite purges of 'un-American' left-wingers (Jay 1973: 161; Hirst 1987; cf. Hughes 1969). In many ways, Neumann's ideas pre-figure the currently fashionable but vague emphasis upon developing a "third way" between unregulated capitalism and state socialism. Following the post-1989 collapse of state socialism and related cold war polarisation, it is not surprising to discover a legal scholar reviewing the results of the current revival of academic interest in Neumann's writings referring to "events catching up with us, rather than with Neumann's message" (Hirst 1987: 474). The lack of an immediate audience can be the price paid by scholarship whose own message and mode of analysis are both "ahead of their time.

If any resurgent legal theory located on the authoritarian right of the political spectrum is currently poised to lend support to a comprehensive attack upon the basic presuppositions of rule of law and liberal democracy more generally, it is that of Carl Schmitt (Habermas 1989: 128–139, 1997: 107–117). Habermas makes the point that although Carl Schmitt died in 1985 at the age of 97, the polemical character of his obituaries reveals the continuing power of his writings on constitutional law, sovereignty and politics to provoke strong reactions of both a positive and negative kind. Such reactions reflect the powerful influence exerted upon successive generations of (exclusively male) legal, constitutional, philosophical and historical scholars within the German academy by Schmitt's dramatic, even melodramatic, works on constitutional questions – including the constitutional status of the welfare state (Habermas 1989: 33–34, 1994: 72, 161, 1997: 112). For Habermas, Schmitt's influence is extensive even amongst senior judicial circles within the German establishment, i.e., "all the way up to the federal constitutional court" (1989: 128, 134, cf. 1997: 116–117). Arguably, within Germany at least, the strongest counter-tradition to Schmitt is the Critical Theory tradition, especially the legal and political theorists Franz Neumann and – to a lesser extent – Otto

Kirchheimer and, more recently, Jürgen Habermas. A strong argument can be made that Neumann remains one of the most powerful thinkers against a Schmittian conception – or, better, misinterpretation – of the rule of law.[1]

Given the recent resurgence of scholarly and political interest in Schmitt, it should prove interesting to explore, albeit in a preliminary manner, certain difficulties that arise in connection with the contemporary relevance of Schmitt. Such difficulties may well cause many tempted by his ideas in abstraction from their political implications to find reason to pause before endorsing them (Tribe 1987: 9–14).

SCHMITT AND FASCIST LEGAL THEORY

Carl Schmitt has been aptly described as the "crown jurist of the Third Reich", as "the self-appointed ideologue of the Nazis" (Schwab 1989: 3), as the "leading theorist of Fascism" (Dyzenhaus 1994: 1) and as having "offered the most impressive intellectual defence of Nazism ever devised" (O'Sullivan 1983: 153). Many scholarly accounts of fascism and its legal and judicial underpinnings devote considerable attention to Schmitt's significant contribution to authoritarian/totalitarian perspectives upon constitutional law and political theory (Barker 1942: 287–292; Neumann 1942; O'Sullivan 1983). From 1933 onwards, Schmitt not only assisted with drafting Nazi legislation, such as the municipal laws of December 1933, and other "practical questions of Prussian administration and organisation" as a member of the Prussian State Council (July 1933–1945), but also defended Hitler's extra-judicial executions of his rivals within the National Socialist movement (Schmitt in Bendersky 1987: 120). In autumn 1933, Schmitt accepted the directorship of the Berlin faculty group of the Nazi lawyers' guild, an organisation created by Hans Frank who – as Minister for Legal Affairs and Governor General of Poland (1939–1945) – was, with respect to the latter role, himself later convicted at Nuremberg of war crimes and crimes against humanity (Maus 1997). Schmitt's standing within this organisation was, he claimed, dependent upon the patronage and support of Frank, which itself ended in December 1936, following Schmitt's denunciation by the SS (Schmitt in Bendersky 1987: 121).

Worse still, as Schmitt began to be outflanked by the Nazi zealots of the SS during an internal power struggle, he made a series of increasingly desperate attempts to demonstrate his Nazi and anti-Semitic credentials (Bendersky 1987: 95). Schmitt's reputation as a genuine Nazi was under

[1] I owe this point to correspondence with Alfons Söllner (13 May 1998).

threat from those who recalled his close personal relations during the Weimar Republic with a number of Jewish colleagues, scholars and friends. In response to such suspicions, Schmitt organised a "conference" to promote the policy of having the works of Jewish legal writers labelled as "non-Germanic", and then ultimately expelled from libraries of "pure German" legal scholarship. As Bendersky notes, "[T]his was self-serving, dishonest and morally despicable – and it failed to convince even his opponents that it was anything but a sham." (1987: 96). Schmitt also included a series of gratuitous anti-Semitic remarks within his published articles and books (Bendersky 1987: 95, n. 13). Such conduct represents only some of the more noteworthy examples of Schmitt's contributions to the fascist project (Caldwell 1994: 406–407; Carty 1995: 1246; Muller 1991).

It is, however, important to realise that Schmitt's Weimar writings belong more closely to the fascist tradition exemplified by Mussolini and Franco, as distinct from the racially-based irrationalism of German National Socialism (Bendersky 1987: 91; Neumann 1986: 286–289; Scheuerman 1996: 186, n. 24). Indeed, Schmitt's own political theory of law cannot – as he emphasised during his Nuremberg interrogation – consistently endorse any essentially *racial and biological* – as distinct from essentially political – grounds for the unity of the sovereign nation state (Schmitt in Bendersky 1987: 110–111; Scheuerman 1994: 23). Indeed, Schmitt argues that it was precisely his refusal to endorse a racially-based theory of *Grossraum*, i.e., large-scale geo-political power blocs, as distinct from his own critical, scholarly concept, which explains the "failure" of his work between 1933–1945 to feature within the approved lists of official Nazi publications (Schmitt in Bendersky 1987: 110–111, 114–115). As a result, his theory is *intellectually* far closer to Mussolini's distinctive version of Fascism and to authoritarian right-wing thought more generally than to the specifically Nazi variant (Schmitt 1985: 76; cf. Neumann 1942: 48). Schmitt unintentionally acknowledged this when he argued to his Nuremberg prosecutors that it was another Fascist state – Franco's Spain – which sought to honour his work with prizes, a public acclamation which the Nazis refused to allow to take place. Indeed, Schmitt's conception of *Grossraum* as a post-liberal conception of sovereignty within international affairs was itself strongly attacked by orthodox Nazi legal scholars precisely for its "neglect" of racial factors (Bendersky 1987: 93).

Although Schmitt advocated a series of anti-Semitic measures during the mid-1930s, this arguably represented crass political opportunism on his part. It represented an ultimately unsuccessful effort to prove his Nazi credentials in the face of his internal enemies within the SS. Indeed,

Schmitt's supporters have strongly argued that the racist zealots within the SS had *good grounds* for suspecting that Schmitt's explicitly pro-Nazi statements were opportunistic and self-defensive responses. Such statements were not essentially grounded in his prior political conduct, his strong friendships with Jewish colleagues and students (including Kircheimer and Neumann) or his continuing scholarship. His internal critics within the Nazi movement, whose views are now being echoed by Schmitt's apologists, argue that Schmitt, who had once argued in favour of banning all extra-constitutional parties, including both the Communist and Nazi parties, had 'discovered' his commitment to National Socialism *only after* this movement had taken power.

Such arguments about the unprincipled political opportunism of Schmitt's personal involvement with the Nazi movement may help to acquit his academic writings of the charge of representing a "pure" illustration of Nazi philosophy. However, they do not establish that such scholarship can offer any *significant opposition* to *other forms* of Fascism that are no less authoritarian. The political significance of Schmitt's theoretical writings is not that they are a pure embodiment of the Nazi variant of Fascism as such; it is rather that their arguments offer – at most – only a minimal degree of resistance to an extreme nationalistic, fascist, and specifically Nazi, appropriation (Habermas 1997: 107).

It is, perhaps, no coincidence that it is in Italy that Schmitt's writings have gained enormous popularity amongst Socialists and Marxists, to the obvious dismay and incomprehension of their German counterparts, such as Habermas, for whom the fascistic authoritarian-statist dimension of Schmitt's work has taken on a somewhat different association (Söllner 1987; Habermas 1989: 135, 138). However, it is arguable that because Schmitt's increasingly influential scholarship more closely resembles that type of authoritarian-conservatism given expression by Italian, as distinct from racially-based National Socialist types of Fascism, makes it in one sense *more* ominous for any convinced democrat and civil libertarian. This is because the Italian variant is less impeded by the accusation of representing an essentially genocidal movement: one whose agenda culminated in the Holocaust. The legacy of anti-Semitic genocide represents a factor that even those who, such as the recently resurgent German People's Union in Germany, presently seek to promote a renewed version of far-right politics are generally forced, contrary to all the historical evidence, to deny, minimise or (with active 'scholarly' help from revisionist historians) relativise (Habermas 1989). Had it ever been possible directly to link Schmitt's *specifically scholarly* activity with a series of racialist assumptions, whose practical policy implications entailed support for a genocidal campaign of

extermination, then it is difficult to envisage that the current renaissance in Schmitt scholarship would have achieved its present degree of momentum (Habermas 1997: 107). If such a linkage were clearly demonstrable, then it is unlikely that the large and growing groups of Schmittian scholars would have been able to breach the 'taboo' with which Schmitt's name was associated within liberal and socialist circles from 1945 to the mid-1980s.

During Schmitt's interrogation by assistant Nuremberg prosecutor Robert Kempner, the latter responded to Schmitt's boast about his popularity as a scholar that, "[T]o the extent that it relates to audience, your reputation vacillates in history" (Bendersky 1987: 103). However, perhaps even Kempner would have been surprised at the truth of his own remarks with respect to the current "Schmitt renaissance" (Habermas 1997: 107). In short, Schmitt's affinity with Mussolini's corporatist version of Fascism, whose popular appeal is less impeded by its recent past, could make his type of authoritarian approach to constitutional issues *all the more dangerous* for the liberal rights-based project.

SCHMITT'S "WAGING OF AGGRESSIVE WAR" AGAINST THE NUREMBERG INNOVATIONS

There is an interesting argument that the key to the relationship between Neumann and Schmitt can, in part, be derived from their respective political biographies, and that Schmitt's interpretation of war crimes is broadly consistent not only with his personal support for some version of Fascism but with his intellectual position more generally. Certainly, one ironic contradiction is that those amongst Schmitt's contemporary supporters who are most anxious to downplay the significance of his collaboration with Nazism for his overall theory of law nevertheless insist that his analysis of war crimes, including those arguments written specifically for the defence of leading Nazis industrialists at the Nuremberg trials, is *utterly consistent* with his more general theory (cf. Ulmen 1996: 106). Schmitt even complained bitterly in his post-war diary (his *Glossarium*) about the fact that his fundamental critique of the Nuremberg principles was not published prior to, or during, the main trials themselves, something which would have allowed him to "die willingly" (1991: 167). Fortunately for Schmitt, from at least 1949 onwards leading right-wing industrialists, some of whom had themselves been vulnerable to war crimes charges, returned Schmitt's favour by supporting him financially via the oddly named "Academia Moralis" association. The latter was, in effect, little more than a Schmitt "support group", which was largely comprised of

individuals impressed with his refusal to renounce National Socialism (Habermas 1997: 110–111).

In April 1945, Schmitt was arrested, interrogated and released by the Russian Army in Berlin, before being re-arrested by the American Army six months later. In June 1945, he was made to respond to the *fragebogen* questionnaire. The latter had been designed by Neumann and Marcuse for the American Civil Affairs Units in order to identify those leading Nazis who should be interned and further investigated, as potential war criminals (Bower 1983: 185; Bendersky 1983: 265–266). According to Ulmen, during Summer 1945, "in war ravaged Berlin", Schmitt had composed

> [A] comprehensive legal opinion (hereafter *Gutachten*) concerning the criminality of aggressive war and the possibility of indicting industrialist as well as military and political leaders. . . . Its significance transcends its immediate purpose because it addresses the question of the reconstitution of international law. Thus *Quaritisch* [an edited collection of Schmitt's previously unpublished works, first published in 1994] is justified in locating Schmitt's *Gutachten* in the history of "aggressive wars" from the Nuremberg and Tokyo Trials to recent UN deliberations concerning the war in the Balkans (Ulmen 1996: 101).

This legal opinion was written for the benefit of prominent German industrialists, such as Friedrich Flick,[2] who were preparing for their trial on war crimes charges at Nuremberg. These industrialists had both supported, and – through forced labour from prisoners of war – benefited from, National Socialism (cf. Ulmen 1996: 105). Neumann's OSS section, by contrast, had pressed hard for the indictment of leading German capitalists at the proposed Nuremberg trials, since these represented both the financiers of genocide, and the major beneficiaries of slave labour. Given the resistance of the British, the OSS were removed from this "economic" aspect of the Nuremberg case.

Schmitt argued that the pretensions of the Allied Military Government and Nuremberg prosecutors to be carrying forward a genuinely "universalist" project on behalf of humanity as such, and the associated values of basic human rights, was *necessarily* spurious (cf. Habermas 1994: 20, 31). The trial had been set up to preclude, by *fiat*, any challenge to the legal validity of the newly invented principles of criminalising "aggressive war",[3] and hence represented the particularism of "victors' justice" (Schmitt 1994: 170, cited in Ulmen 1996: 101). Schmitt's critique here is perverse, given his dismissive views of the supreme value afforded to

[2] Flick was sentenced to seven years imprisonment at Nuremberg. His grandson's attempts to fund a chair at Oxford University were rejected by that University's ethics committee in April 1996.

[3] As ever, Schmitt is keen to historicise the question by emphasising the newly invented quality of the crime of "waging aggressive war", and retracing the contingencies of its emergence. See his *Glossarium* entries of August 31, 1947 published in Schmitt (1991), 6.

"discussion" within liberal political theory, and his proposal for a renewed focus upon non-rational "decision", including the plebiscitory acclamation of dictatorship, as a supposedly viable substitute for public deliberation (Habermas 1997: 110–111).

Characteristically, in the post-war context, Schmitt was more concerned with producing a critique of the Allies' justification of the Nuremberg *criminalisation* of genocidal and expansionist wars, which he dismissed as mere political scapegoating, than he was with recognising the rights of the victims of Nazism. His references to the gross character of Nazi genocidal actions were made primarily to set up a rhetorical contrast between the self-evident guilt of those most directly involved (even where this is not directly covered by "prior positive criminal law") and the relative lack of (legal) responsibility of others who were only indirectly involved. Amongst the latter were "economically active, ordinary" industrialists, who had found themselves under immediate threat within a "critical situation". The latter group, he argues, could "excuse" their conduct (Schmitt 1994: 16, 23, cited in Ulmen 1996: 108–109). Whilst this second category may be held *morally* responsible for their support of the Nazi regime, and may also be required to make financial reparations – for example to former prisoners of war abused as slave labour – they should not be made to face any *criminal* responsibility at international law. As will be discussed below, Schmitt sought to evade war crimes charges by placing his own conduct firmly within this latter category.

Schmitt further suggests that if provisions of international criminal law are to be extended in such a way as to bring them into conflict with the legal duties imposed upon civilians during war by their own nation's system of positive law, then this would create major difficulties. It would place individual citizens in an impossible position, since they would then be facing criminal liability under one legal system for actions which are deemed to constitute mandatory duties by another, without providing that individual with any immediate or effective personal protection in the meantime. Schmitt argues that there is no basis for placing individuals in this invidious "Catch 22" position. He further suggests that international law cannot impose on civilians the strict obligation to differentiate between "just" and "unjust" wars, and then make treachery to one's own country – whether by acts of treason or sabotage – a formal legal requirement, with non-compliance subject to the threat of criminalisation by war crimes trials (Ulmen 1996: 111).

Schmitt further argues that the Nuremberg criminalisation of "waging aggressive war" represented the triumph of a depoliticised legalism:

Schmitt asks rhetorically: "Why is it criminal?" Because it is not law but power which decides the outcome. It is a crime only if a people rejects the proceedings of the international court (Ulmen 1996: 102).

His position here fails to acknowledge a serious internal contradiction. Even if it were true that Nuremberg did represent an essentially particularistic form of "victors' justice", such particularism[4] and political justice is – according to Schmitt himself – an *inevitable* feature of the politics of social life "as such"; and hence no more represents a fitting target for a Schmittian type of critique than the law of gravity (Habermas 1994: 9–10, 21). Those, such as Schmitt, who are committed to a "false concretism" that rejects any element of universalism within normative issues, are precluded from condemning a particularistic orientation in others (cf. Habermas 1994: 21–22). Habermas makes the point that Schmitt's particularism takes the semi-pathological fractious politics of Balkan history as an expression of the *unchanging essence* of "the political" (Habermas 1994: 163). Schmitt thus undercuts both the specificity and the uniquely immoral character of genocidal actions, such as 'ethnic cleansing', which in turn have motivated the re-launch of war crimes trials.

Whilst in 1945 Schmitt accepted that some retribution must be extracted from Hitler's accomplices, his "ingenious" argument was that the extreme character of their "monstrous atrocities", especially those of his former rivals in the SS and Gestapo, precluded any adequate response by either municipal or international law. Here, the clear implication is that only an extra-judicial mode of punishment, i.e., a type of "political justice", would be appropriate, since this would prevent such atrocities from ever becoming a legal precedent (Schmitt 1994: 109). This represented a point of agreement with Neumann's OSS team.[5] Schmitt's direct legal support for leading Nazis facing war crimes charges was bolstered by his related critique of the very idea that Allied forces had pursued a "just war" against the Third Reich. For Schmitt, the concept of a "just war" represented an outmoded and problematic idea originating in scholastic theologians such as Vitoria (Ulmen 1996: 103); nor can "waging an aggressive war", as proposed by the Nuremberg principles, appeal to Vitoria as a precedent. This is because the initial trials had already been set up in such a way as to both *preclude* the possibility of attaching responsibility for the initial causes of the war, and to *criminalise the military "aggression" itself* (Ulmen 1996: 103). Schmitt suggested that whereas there was an estab-

[4] That is, "the a priori certainty that ideas will prostrate themselves before interests everytime" (Habermas 1994: 9–10).

[5] See R&A Report 2571, "Problems Concerning the Treatment of War Criminals' September 1944.

lished legal basis for criminalising atrocities carried out by soldiers during war, the attempt to criminalise "aggressive war" as a distinct and independent offence was especially problematic. This represented an extension of international criminal law which was not only unprecedented but also both retrospective and contradictory. Such an extension violated the long-standing rights of national states to engage in warfare free of any dubious moralistic distinction between "just" or "unjust" wars that effectively reduced defeated states to the status of captured pirates (Ulmen 1996: 106–107, 110).

Schmitt emphasised that the rule of law prohibition on retroactive criminalisation, even of grossly immoral acts, had formed a long-standing part of English and European law, although recognised only partially by American law. Consequently, the Nuremberg trials represented the triumph of American over European jurisprudence (Ulmen 1996: 107–108). Whereas the former tend to fuse legal and moral criteria, the latter have always paid greater attention to the specifically legal difficulties of criminalising aggressive wars, such as lack of clear definition, sanctions or organisational means of enforcement (Ulmen 1996: 107–108). In his far from disinterested critique of the Nuremberg innovations, Schmitt also extends his earlier analysis on the basis of an address given in the late 1930s. This insisted that a viable system of international law could no more embody a "discriminatory" concept of war containing "two antithetical concepts of war", than it could embody "two different concepts of neutrality" (Schmitt, cited in Ulmen 1996: 101). Schmitt's argument implies that the very distinction between just and unjust war was imposed by military victors for the sake not only of re-emphasising their enemies' defeat, but also to vindicate their own particular interests. In his topsy-turvy moral universe, it is the leading Nazis who are the true "victims".

SCHMITT'S MESSAGE FROM PRISON

From September 26th 1945 to March 1947, Schmitt was detained in different internment camps "as a potential defendant in the War Crimes Trials" (Bendersky 1987: 91). Even a sympathetic commentator, such as Bendersky, recognises that "[T]he decision to interrogate him at Nuremberg was largely due to the infamous reputation he had acquired abroad . . . of Schmitt as the 'Crown Jurist' of the Third Reich and the theorist of Nazi expansionism" (1987: 91). What Bendersky does not state is that it was Neumann's powerful and sustained indictment of Schmitt in his English language book *Behemoth* (1942/44), which was largely responsible for this reputation in the eyes of the American forces, including the prosec-

ution team at Nuremberg. During his period of internment, Schmitt was questioned first by the U.S. Army counter-intelligence officials and then by Ossip Flechtheim, who was a German émigré working as a lawyer with the U.S. war crimes staff. These preliminary sessions were followed up by a more sustained session of interrogation by Robert Kempner, a German émigré who was serving as an attorney within Justice Jackson's war crimes prosecution team.

Kempner was a colleague of Neumann within OSS, and – according to those whose war crimes investigations involved working with both men – they enjoyed good personal and professional relations.[6] Indeed, the claims made about Schmitt by his initial U.S. interrogators contain references to how Schmitt was the "official constitutional apologist" for the Nazi regime,[7] and how he was "the most eminent legal exponent of the Nazi ideology". These statements represent close paraphrases from Neumann's *Behemoth* – a book which informed not only the U.S. Army's Civil Affairs Guides (themselves partly co-authored by Neumann's section of OSS) but was also circulated amongst Justice Jackson's prosecutors, many of whose members were dependent on these works for their knowledge of the internal structure and ideology of the Third Reich.[8]

Kempner's interrogation focused upon Schmitt's alleged "participation, direct and indirect, in the planning of wars of aggression, of war crimes and of crimes against humanity" (Kempner, in Bendersky 1987: 98). Although Kempner attempted to force Schmitt to respond to "yes or no" type questions, the latter displayed considerable tactical skill in challenging the very terms of the questions. Often Schmitt gave qualified, negative replies, or minor concessions, in respect of only the least serious matters, a tactic which often successfully frustrated any "follow up" questions. Kempner failed in his attempts to force Schmitt to draw analogies between the latter's role as both a constitutional lawyer and member of the Prussian Chancery and the activities of Hans Lammers, who was Hitler's legal advisor and chief of the overall Reich Chancery (Bendersky 1987: 104). Whilst Schmitt was willing[9] to help Kempner by analysing, as a "constitutional expert", the legal responsibility of Lammers under Nuremberg principles, he refused to accept that any analogies could then be drawn with

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6 I owe this point to Drexel Sprecher (telephone interview 5 May 1998).

7 See "Preliminary Interrogation Report of Carl Schmitt", Berlin, October 18, 1945, NA RG 238.

8 I owe this point to a telephone interview with Bradley Smith, 2 June 1998.

9 But only if the official record clearly stated that he was acting upon the specific instruction of the prosecution authorities.

his own position. Lammers was later sentenced to 20 years' imprisonment for war crimes (ibid., 104).

Schmitt successfully blocked all Kempner's efforts to interpret his action as lending material intellectual support for the "preparation of aggressive wars", either generally or for the SS in particular. Schmitt answered less by a denial of relevant facts than with a self-serving reinterpretation of their constitutional and legal significance (ibid., 102). He denied that, despite being one of "the leading university professors in this field", i.e., within public and international law, he had ever exercised any role at the crucial point of decision-making comparable with that of "other high state or party officials" (ibid., 102). Schmitt's ingenious argument was that Kempner's accusation ignored the minimal role that respect for the purely scholarly realm of intellectual ideas can ever play within the policy-making processes of an essentially totalitarian state.

On the vital legal question of whether or not Schmitt's writings and various institutional involvements contributed to the "waging of an aggressive war" under the Nuremberg principles, Schmitt turned the tables upon his accusers. He argued that he had already been involved in a debate with Professor Wehberg, a famous Geneva pacifist and international lawyer who helped originate the very idea that the preparation for such a war should constitute a "war crime". At no time during this debate had Wehberg ever suggested that Schmitt's own theory, with which the former was already familiar, could be linked in any way to the proposed war crime of "waging aggressive war". Schmitt argued that if one of the earliest and most important originators of a key Nuremberg principle had failed to accuse Schmitt's work of complicity in war crimes as "a party to the new criminal offense inaugurated by Wehberg himself", then this fact should be treated as conclusive, and hence taken to represent a decisive defence (ibid., 113–114). This rhetorically powerful argument is, however, entirely inconsistent with Schmitt's other assertion that a radical dichotomy exists between the realms of theory and practice. The fact that, during a specifically theoretical debate within an academic law journal, Wehberg did not explicitly accuse Schmitt (an equally famous law professor) of being a war criminal, should – on the latter's own premises – be treated as completely irrelevant to the question of liability within the realm of judicial "practice". In other words, for Schmitt to presuppose the existence of any necessary element of reciprocal dependency and interaction between constitutional theory and political practice would undermine his own defence arguments.

Schmitt also argued that his rôle as both a Prussian State Councillor and as Director of the Nazi Lawyers' Guild was confined to purely technical matters. Such affairs had no bearing on the charge of "collaborating in the

preparation of a war of aggression" at a "decisive point" (ibid., 120, 123). Kempner also failed to force Schmitt to accept the validity of Neumann's earlier charge, first made in *Behemoth*, that he had provided – both in substance and in style – "an international legal theory of *Lebensraum*", i.e., an idea of existential "living space" central to Hitler's justification for German military invasion and expansionism (ibid., 99–100). What is more, Schmitt himself was surely right when, in his defence against the Nuremberg prosecutors, he argued that no serious scholar who was concerned for his or her reputation as such, *could ever have* endorsed a patently unscientific and irrationalistic Nazi *racial* ideology (ibid., 111). However, and contrary to the intentions behind Schmitt's claims, if this argument were valid, then to establish a serious discrepancy between the core of his intellectual position and that of a pure Nazi "philosophy" would hardly be a significant achievement. Whilst his defenders argue that "the Nazis totally neglected his work" (Bendersky 1987: 91) to establish that such a discrepancy exists is problematic *even in Schmitt's own terms*; it is to seek to make a virtue out of a necessity.

Here it should be recalled that, as Schmitt himself recognised, his ideological value to the Nazis did not lie in the *substance* of his legal and constitutional theories at all. Instead, he was of value as an already internationally famous legal scholar *who had also* publicly endorsed the National Socialist party, both generally and in his leadership of the Nazi lawyers' guild. During his interrogation with Kempner, Schmitt argued that

> [I]f a few authorities, journalists and propagandists tolerated my name being used as a figurehead, that is still no theoretical foundation. It belongs much more to the style of a totalitarian system, which exploits the names of numerous scholars, destroys what it cannot exploit, and seeks to exploit what it cannot destroy (ibid., 116).

Here, it is important to make a distinction that is easily overlooked. It is one thing for a fascist political movement to capitalise upon the public endorsement of someone who is already famous as a legal scholar (Bendersky 1983: 250–262, 1987: 95): it is quite another for the same movement to seek to justify its very existence and overall programme by reference to the rational force of intellectual arguments produced by the scholarship of one of its leading members. And it is at least arguable that Schmitt's relationship to the Nazi movement falls under the former heading.

Indeed, it was his position as a famous legal theorist, who had already earned an international reputation independently of any explicit promotion of Nazism as the source of all human justice, that gave Schmitt's later endorsement of Hitler its particular value for the National Socialist movement. If, by contrast, Schmitt had entirely compromised his scholarly reputation by making anti-Semitic speeches to mass rallies, or integrat-

ing primitive racial factors into the core of his underlying constitutional theories, then this would have *diminished* his strategic value to the Nazis. Schmitt could no longer be paraded as a famous academic ornament to their genocidal regime. Here it is important to recall that, notwithstanding his fall from favour in 1936, Schmitt was paraded by the Nazi state around the Law Faculties of Spain, Budapest and occupied Europe between 1942–1943 as part of an attempt to present a respectably scholarly "front" for Hitler's Germany (Kempner, cited in Bendersky 1987: 100–101, 106; see Schmitt 1987 at 109).

Kempner's interrogation attempted to force Schmitt to admit that these visits, and other associated writings, "provided the scholarly foundation for war crimes, crimes against humanity, the forceful expansion and widening of *Grossraum*". Kempner also suggested to Schmitt that, by virtue of his intellectual endorsement, he was *no less liable* than those who had personally carried out Nazi atrocities:

> [W]e are of the opinion the executing agencies in the administration, the economy and military are not more important than the men who conceived the theory and the plans for the entire affair . . . to what extent did you provide the theoretical foundation for Hitlerian Grossraum policy? (cited in Bendersky 1987: 101).

Schmitt's interesting response was not to deny his fame and high reputation as a scholar but to argue that, with respect to government activity, "such a position was not 'decisive', not even as a basis for making decisive contacts":

> [E]nough to say here that it was impossible for a chair in jurisprudence to be regarded as a decisive position or as a basis for exercising a decisive influence at decisive points in Hitler's totalitarian system, given its prevailing conceptions of science, education and jurisprudence. Such a position would never have been considered for initiation into Hitler's secret planning. . . . Theories and ideas do have influence, but this influence is not traceable to 'decisive points'. The effects of spoken, written and printed words are various and incalculable. . . . When an author makes public the results of this research and thinking, his intent is as scientific as his intellectual habitus is scholarly – the purpose is to further knowledge and the exchange of opinion. It is well known that my publications have always greatly stimulated both. But many listeners and readers do not respond to theories and formulations in a scholarly way, but automatically and unreflectively link them with practical matters and their momentary goals and interests. This is particularly dangerous with theories, theses and formulations of international law, constitutional law and politics (ibid., 128).

A hostile reading of Schmitt's response would suggest that he is seeking to deflect any responsibility for the practical effects of his scholarly activities from himself, and on to both segments of his audience and the scholarly discipline to which he had contributed. His argument was that the type of proof required to demonstrate a causal link between theoretical ideas and

practical actions transcends the realm of what can be decided by any judicial process, with the result that "not even the political opinions expressed in Hitler's *Mein Kampf* constitute criminal planning as such" (ibid., 125).

If scholars fail to recognise the easily-overlooked distinction between the exploitation of an already famous scholar, and the promotion of an academic whose work is grounded in Nazi racial theories, then they risk making a highly questionable supposition. They could assume that Nazism, which glorified in its own emotive appeals to "volkish" attachments to "blood and soil" and irrational hatred of everything "foreign", was itself based upon, or even required grounding in, theoretical scholarship. Clearly irrationalist political movements do not typically depend upon, or submit themselves to, processes of critical self-examination guided by the rational force of argument. For example, it is certainly possible to enter into a meaningful debate over the merits of the historical, political and constitutional arguments for and against an authoritarian state embodying a Marxist-Leninist or corporatist Italian-Fascist ideology. Considering the source of the appeal of Nazism, however, such a rationalistic endeavour would have been almost entirely meaningless, and could even have become self-defeating. Schmitt maintained that

> [M]y theory of *Grossraum* and international law has a broad scholarly framework, is the result of scholarly research; it is a theory which had been and should be taken seriously as a scientific hypothesis. Hitler had no *Grossraum* policy in the sense of this theory. He pursued a policy inimical to this theory in both thought and principle. . . . Hitler's policy of conquest was so primitive that any kind of scholarly analysis necessarily threatened it (ibid., 116).

According to Schmitt, the difference between his own conception and a biological-racial Nazi ideology, together with the former's potential threat to the latter, explained why Schmitt ideas were responded to in "deadly silence" by the Nazi Party press (ibid., 116). However, for Schmitt to argue, as he did before his Nuremberg interrogators, that his scholarship scrupulously avoided any discussion of racial theories of the state or military expansionism, hardly has the argumentative force that he intended it to have (cf. ibid., 95).

The most powerful forces appealed to by Nazi ideologies were emotive ties based upon the very 'identity politics' which both Neumann and Habermas accuse Schmitt of prioritising. Rhetorical appeals to these pre-rational sources of political authority were designed precisely to neutralise any obligation on the part of their audience to 'weigh up' the relative force of competing arguments and counter-arguments before making either political judgements or any other type of practical commitment. In this sense, Neumann could, perhaps, have accepted Schmitt's argument that

Nazism not only lacked any scholarly foundation but was hostile to the very critical processes of rational inquiry required by independent scholarship. Yet even if this were the case, Schmitt could still be accused of refusing to exploit, and in fact actively concealing, the alleged tension between his own scholarship and the requirements of Nazi propaganda. Indeed, by admitting that some degree of connection necessarily existed between the theoretical and practical realms, Schmitt does appear to have further undermined the theory/practice dichotomy on which rests his general defence to the charge of being a war criminal.

As discussed already, the charge put to Schmitt by the Nuremberg interrogators, which partly echoes Neumann's famous critique in *Behemoth*, was that he had provided the "theoretical foundations" for the Nazi regime's militaristic expansionism. This contribution had, allegedly, not only been made directly with his formulation of the concept of *Grossraum*, or spatial "power-blocs", as the central focus of international law, but also implicitly. It was implicit in Schmitt's policy of discounting those traditional legal interpretations that recognise valid *normative limits* upon such expansion. Thus Kempner's questioning implied that Schmitt's writings had helped undermine the internal forces of resistance to fascism within the Weimar Republic by discrediting those normative limits which confine the expression of "political will" to rational principles based upon individual, group and national rights. That is, Schmitt's repeated and radical attacks upon the basic universalistic presuppositions of liberal democracy, which any well-functioning constitutional state must maintain against the threat of Fascism, provided ideological support for Nazi expansionism. Schmitt's response to this charge was to insist upon a *strict dichotomy* between the realms of political practice and legal theory: he distinguished, that is to say, between the formulation of theoretical ideas within a specifically scholarly context oriented towards the production of knowledge for its own sake ("scholarly research which had no other purpose than to further knowledge" (ibid., 108)) and the contingent reinterpretation and practical employment of such ideas by politicians and others who had their own pragmatic agendas. Hence, Schmitt argued, "[T]here is also no protection against the exploitation of the results of scholarly research" (ibid., 115).

Schmitt thus made effective, if disingenuous, use of a strict theory/practice dichotomy; one which claims to rest upon the "objective" distinction between "serious scholarly theory" on the one hand and "propaganda" on the other, whose subjective equivalent is the intention to promote purely scholarly research – as distinct from practical goals (ibid., 115). Relying upon this questionable dichotomy, Schmitt stated to Kempner that, although he was willing to accept responsibility for the

consequence of his personal actions, he could not reasonably be held responsible for how his specifically theoretical ideas were received and applied outside the scholarly realm of ideas (ibid., 108).

Kempner's powerful response to Schmitt's self-interested tactic was to challenge the validity of the underlying dichotomy itself. He did so by asking the rhetorical question: "[What] if, however, what you call the pursuit of knowledge results in the murder of millions of people?" (ibid., 101). Kempner's charge is itself clearly predicated upon a refusal to accept an absolute dichotomy between value-free scholarship and political practice. Schmitt responded to this question with a strategy, which has recently become familiar within contemporary Germany as part of the so-called "historians' debate", of not so much denying the factual existence of Nazi genocide as 'sanitising' its historical significance. This strategy involves placing the Nazi genocide 'on a par' with other historical events that also involved mass extermination, such as the nuclear attack on Hiroshima or the Allied bombing of Dresden (Habermas 1994: 31, 1989, 1997: 107): "Christianity also resulted in the murder of millions of people", as Schmitt put it (Bendersky 1987: 104). Not surprisingly, Habermas directly accuses Schmitt of having provided the intellectual arguments which support such revisionist sanitisation by means of the historical relativisation of a uniquely evil event (Habermas 1994: 161, 1997: 107).

Kempner's second line of attack was to quote back to Schmitt those parts of the latter's publications from 1933 which advocated that the entire system of German law should be interpreted, administered and enforced in the light of "the spirit" of National Socialist principles and aims: in other words, that the German legal system should, in effect, be reduced to an instrument of political will as defined by Hitler. Schmitt's chilling response was to say: "it was a thesis" (Bendersky 1987: 106). In fact, Schmitt's exact words used in his notorious "New Principles of National Socialist Law" had already been translated by Neumann: "[F]or the application and handling of the legal standards of conduct by the judge, the lawyer, the magistrate, and the law teacher, the principles of National Socialism are directly and exclusively decisive" (Neumann 1986: 295). Once again Schmitt's 'legal skills' were sufficient to deflect the issue by his claiming to be giving the meaning of National Socialism a connotation that was entirely different from the official Nazi Party version. Hence, what Schmitt claimed to be promoting was his "own meaning" of National Socialism, which (as he insisted repeatedly) lacked both racial foundations and genocidal ambitions (Bendersky 1987: 106). As Habermas notes:

> [A]ccording to what they [Schmitt and Heidegger] themselves profess, they have nothing to regret after 1945, for they feel that the movement they had supported in 1933 had let

them down. They had seen National Socialism in the light of their own ideas . . . a variation on what is 'their own' (1997: 116–117).

Yet the weakness of Schmitt's position here, which neither Kempner (nor most recently Habermas) have thoroughly followed up, was that his own "five principles" included the idea that the definition of what is truly in accord with National Socialism is "solely determined by the leader" (Schmitt 1933, cited in Neumann 1986: 298). Habermas has, however, recently noted the delusionary character of the vain aspiration of both Schmitt and Heidegger to "lead the leader", given the independence of totalitarian regimes from scholarly foundations that they allege (Habermas 1997: 108).

The fact that during his Nuremberg interrogation Schmitt reinterpreted his endorsement of National Socialism as a purely theoretical and dispassionate "diagnosis", one that neither explicitly advocated nor defended German military expansionism in a polemical way, could be seen as more a matter of form than substance. Kempner confronted Schmitt with quotations from the latter's publications which contained plainly anti-Semitic statements dissociating his conception of *Grossraum* theory from any Jewish ancestry, and whose "content and form" Schmitt accepted was in "the Goebbels' style". However, Schmitt also claimed that – when viewed in their "serious scholarly context" – the "intent, method and formulation" of such statements was "pure diagnosis". He also insisted that everything he wrote, even remarks that linked Jewish authors with the "dissolution of concretely determined territorial orders", was written *as scholarship only*. It was "intended as scholarship, as a scholarly thesis I would defend before any scholarly body in the world" (in Bendersky 1987: 100). Kempner suggested that no legal scholar such as Schmitt – who had himself written *the* seminal work on political dictatorship (i.e., Schmitt 1919) – could, when challenged to explain his advocacy of allowing "the spirit" of National Socialism to guide all legal activities, deny knowledge of how actual dictatorships really work. True to form, Schmitt simply replied that Hitler's totalitarian type of authoritarian regime was in fact "actually something new", so that his earlier research was irrelevant to the question of his responsibility within the Third Reich (ibid., 107).

The outcome of Kempner's interrogation was that insufficient evidence was deemed forthcoming to warrant Schmitt's being formally charged with war crimes (Wiegandt 1995: 1575–1576). Schmitt's interrogation reports concluded that he was the "official constitutional apologist" for Hitler, and the "most eminent legal exponent of the Nazi Ideology" (cited in Bendersky 1983: 266). However, Schmitt was not formally charged for three reasons: his legalistic guile during prolonged interrogations; his disingenu-

ous defences about the purely "scholarly" nature of his involvements with Nazism; and the difficulties in establishing to a high standard of proof any *causal* relationship between his theoretical ideas and practical events (Bendersky 1983: 265–273; Wiegandt 1995: 1575–1576). In the absence of further admissable evidence of *direct* involvements in war crimes, as strictly defined by the initial Nuremberg judgements, his punishment was to have his university career ended and denied access to his personal library of books and other research material (Bendersky 1983: 265–266; Vagts 1990: 677–678; Dyzenhaus 1997: 3).

After his period of internment, Schmitt refused "resolutely" to submit to even a token procedure of "de-Nazification". He thus became an "exception even among the heavily compromised jurists", since he alone was not allowed to return to university teaching. Schmitt's refusal to submit to the detailed "de-Nazification" procedure drawn up by Neumann and Marcuse whilst employed by the OSS was based on the grounds that he considered the "entire process artificial and meaningless in his case" (Bendersky 1987: 96).

Habermas is particularly critical of the political (and ethical) significance of the resolute refusal by Schmitt (and other theorists such as Heidegger) publicly to exhibit even the slightest measure of self-criticism; or to either apologise for or retract their public support for Nazism (Habermas 1997: 108). With reference to the sentiments contained in Schmitt's personal record from the late 1940s, Habermas suggests that

> Schmitt was obviously pathologically incapable of judging the proportions of what happened and his own role in it; he denies everything and exculpates himself; he fulminates against 'the criminalizers in Nuremberg', against the 'constructors of crimes against humanity; he derisively says, 'crimes against humanity are perpetuated by Germans. Crimes for humanity are perpetuated on Germans. That is the only difference' . . . (Habermas 1997: 113–114).

Habermas argues that this "resolute" stance by Nazi scholars is consistent, albeit in a perverse way, with the very *existentialist* character of their explicit theories (cf. Wolin 1990). More specifically, their refusal to apologise or retract is consistent with a commitment to the idea that the central constitutive phenomenon of social life is the sheer force of individual "decision". Such force is itself supposed to be based upon a deep-seated "existential commitment" operating at a primordial level which itself transcends the realm of rational or moral considerations (1989: 132). Habermas also cites in this context Schmitt's rhetorical question, "Which was actually more indecent, supporting Hitler in 1933 or spitting on him in 1945?". Habermas suggests that this refusal to recognise in public any need to retract earlier support for Nazism has been partly respons-

ible for the continued influence of both Schmitt and Heidegger within postwar Germany, for their "incompatible effect", especially amongst the generation who were born after the Nazi epoch (Habermas 1994: 72, 1997: 108–109). Schmitt provided an alternative to those other compromised academics and schools of thought, which – having been re-admitted to élite positions – had every reason to continue to exclude Schmitt in order to deflect attention from their own Nazi collaborations. Schmitt's own continuing appeal was partly due to the fact that, having refused to renounce Fascism, he "was able to articulate German continuities with which others went on living, but about which they never spoke" (Habermas 1997: 115). Habermas particularly objects to the fact that Schmitt's own theory precludes any need to reconsider even those aspects of his activities which were directly and indirectly supportive of the Nazi version of Fascism, even after the gruesome evidence of the Holocaust had been uncovered. Here, the fact that "his tune is the same as it once was" – combined with the continuing rejection within Schmitt's post-war writings of any "belief in discussion" – is, for Habermas, "reason enough to pale at it" (Habermas 1989: 139).

The Significance of Neumann's Relationship with Schmitt

This section will discuss the proposition that it is important to address the continuing repercussions of the scholarly, political and institutional struggle between Schmitt and Neumann during, and then immediately after, the period of the Weimar republic. This dispute, which was as much political as jurisprudential, centred around the value that should be accorded to the rule of law and liberal democracy more generally.

Any analysis of these two writers would have to address a cluster of distinct but related issues faced by convinced democrats, such as Neumann, when attempting to re-assert – at institutional as well as scholarly levels – the rule of law in response to Nazi genocide (Neumann 1986; 1949). For example, one major and continuing difficulty faced by Neumann, and other employees of the OSS's Research and Analysis Branch who were involved in war crimes research between 1943 and 1945, lay in how to attribute legal responsibility for programmes of 'successful' genocide. A crucial question here was to devise a policy that was not flawed by an *in-built contradiction between institutional means and ultimate ends*. In other words, the problem entailed finding a way to attribute legal responsibility to Nazi war criminals with respect to their gross violations of human rights, but in a manner *that did not itself violate the*

very rule of law which fascist and other genocidal regimes treat with such marked contempt.[10]

Furthermore, given Schmitt's remorseless scholarly attack upon the foundations of the rule of law, which he made at constitutional, international law and political levels (Scheuerman 1996), how should a contemporary audience assess, and then respond to, Schmitt's contribution to the theory and practice of Fascism? If his critique of the principle of the rule of law as an outmoded ideological expression of the "liberal" phase of early capitalism is correct, then is it still meaningful to identify the discrepancy between the authoritarian practical implications of Schmitt's legal theory and liberal democratic principles which depend upon the validity of the rule of law? Does Neumann's own complex institutional, political and scholarly reaction to Schmitt and the wider fascist movement that the latter both supported, and – for a time – received considerable acclamation from, contain lessons for the present? Now that over fifty years have elapsed since the Nuremberg war crimes trials, how should democratically inclined legal scholars react to the contemporary resurgence in scholarly and legal interest in Schmitt's ideas?

My own response, which in some respects follows, but also builds upon, the lead given previously by Scheuerman (1993, 1994, 1996), Dyzenhaus (1997) and Habermas (1989, 1997) has been to conduct intensive research into the intellectual and political biography of one of Schmitt's most rigorous and original German critics – Franz Neumann. This is because there is good reason to believe that Neumann's critique of Schmitt is no less relevant for, or challenging to, a *second generation* of Schmittian legal and constitutional theorists as it was to Schmitt himself. It is possible that the very accusations posed to Schmitt about the responsibility of academics have retained a significant degree of force – not least with respect to those who are currently promoting a "Schmitt renaissance" (Habermas 1997: 107).

In a classic case of double standards, Schmitt's recently published criticism of the legal basis for the Nuremberg war crime trials draws upon precisely those traditional liberal principles which – as the Nazi's "Crown Jurist" – he had attacked remorselessly during the decade prior to the Nazi takeover in 1933 (Schmitt 1994). Arguably, an *immanent* form of criticism in which those who, in practice, willingly violate liberal constitutionalism

[10] Here, we can distinguish between outright criminality and violence by elements within the Nazi movement that was allowed to go unpunished, and 'constitutional' violations of the rule of law as when the Reichstag recognised the leader's 'right' to deviate from existing law without sanction or other form of accountability for so doing: see Bendersky 1987: 121, n. 4.

are judged by *their own* procedures and criteria, rather by reference to those standards of liberal constitutionalism, could represent an appropriate response here. Indeed, it could be fruitful to explore the implications of the argument that if any single instance of legal theory merits being subjected to a strictly internal or immanent type of critique, it is that of Carl Schmitt (Habermas 1997: 111). If the present generation of legal academics fails even to try to make the strongest possible case against the authoritarian implications of the present resurgence in Schmittian scholarship, then how will subsequent historians judge this omission? This question becomes especially pressing if the current scholarly resurgence operates as a contributory factor in paving the way for a political revival of Fascism as a political mass-movement.

From a strictly legal perspective, based firmly upon the Nuremberg principles, contemporary followers of Schmitt could no doubt seek to contest accusations that those principles too give ideological support to anti-democratic forces by their practice of undermining universalistic principles of humanitarianism and universal human rights. Nevertheless, there is still an argument for re-assessing such criticisms in a broader political, moral and jurisprudential sense. The absence of conduct sufficient to warrant a prosecution for war crimes is hardly a sufficient criterion of political, moral or ethical responsibility.

It is here that it may be fruitful to contrast Schmitt's analytic conclusions on liberal democracy with those of Neumann. In contrast to Schmitt, it is at least arguable that Neumann's social democratic model of law, and constitutional rights more generally, is capable of taking full account of the intellectual force of Schmitt's critique of various internal contradictions within liberal democracy (Scheuerman 1994: Ch. 7). Neumann's model has equal diagnostic force in relation to the challenge that advanced monopoly-capitalist societies pose for the presuppositions of the rule of law interpreted according to the presuppositions of the Diceyian model. Furthermore, his mature model, whose synthesis of socialist and liberal democratic themes centres around the implications of a rationalist conception of political freedom, represents a sharp contrast to the authoritarianism contained in Schmitt's decisionist – and hence irrationalist – perspective. Neumann thus does not succumb to Schmitt's idea that the only viable solution to the contradictions of liberal democracy is some version of elected dictatorship, in which governance is 'liberated' from all rights-based constitutional norms and safeguards (Seitzer 1997: 223). If Schmitt's "post-liberal" model leads to the answer that dictatorship, albeit of a plebiscitory form, is the 'answer' to the difficulties facing liberal democracy, then there is some reason for believing that he is misinterpreting

what is at issue. Indeed, it is arguable that plebiscites, which reduce political culture to a binary choice between two alternative proposals supplied by the regime itself, have historically formed part of dictatorships, rather than comprising a bulwark against it.[11] This conclusion could, in turn, open up the possibility that Neumann's critique of Schmitt offers a less problematic alternative – at least for those not already predisposed towards dictatorial authoritarianism.

Interpreting the Schmitt vs. Neumann Debate: The Limits of Giving the Enemies of Democracy an 'Equal Chance'

The question of how to approach the Neumann/Schmitt relationship itself raises a series of difficult issues with respect to conventional expectations of scholarly neutrality and evenhandedness. To what extent should jurists adopt a stance that gives a platform for the promotion of authoritarianism? Any account of the starkly opposed, if not entirely unconnected, models of law articulated by Neumann and Schmitt should not, I believe, pretend to be impartial. It should instead define and present its analysis as a deliberate exercise in advocacy – not in judicial neutrality. Thus my own research within this field is written explicitly from the left-Hegelian or critical theory tradition that is embodied, in part, within Neumann's writings on law, and – to a lesser extent – in those of both Otto Kirchheimer (1961) and Jürgen Habermas (1996).

The polemical task of arguing the case for Schmitt and other fascist theorists such as Heidegger can be safely left to others. It is clear from the contributions to the special issues devoted to Schmitt by the once-socialist journal *Telos* that there is no shortage of intelligent academics who are both willing and able to defend him (*Telos* 1987, cf. Scheuerman 1994: 7–8). Certainly the remorseless rise of Schmitt scholarship, which in Germany is beginning to take on the characteristics of a major academic industry, demonstrates how a significant number of postmarxists, authoritarian conservatives and postmodernists possess a special empathy for Schmitt's "existential" approach to the interface between legal, constitutional and political issues (Dyzenhaus 1997: Ch. 1; McCarthy 1990: 159–162; Scheuerman 1994: 8; Habermas 1994: 21; 1997: 107).

It is possible that Schmitt's rhetorically powerful critique of the basic presuppositions of liberal democracy contains one element of truth sufficient to confirm his status as this century's pre-eminent fascist jurist. This

[11] I owe this point to comments on an earlier draft by my colleague David Seymour.

half-truth is contained in his argument – made in *Legality and Legitimacy*[12] – that it is self-defeating for democrats to promote a policy of giving an "equal chance" to those whose entire project is oriented towards the violent eradication of democracy itself, especially the democratic right of dissent (Ulmen 1996: 104, n. 104). Between 1930 and 1933, Schmitt's writings and political advice to the authoritarian conservative regime of Schleicher supported, as a last resort, proposals to ban all extra-constitutional parties, including the National Socialists (Bendersky 1987: 91). However, the other side of this half-truth, i.e., its half-lie, is that attempts to 'outlaw' anti-democratic movements may not only legitimate an increase in state power and control over political culture and civil society more generally, but also create the idea that participation in such movements represents a form of 'rebellion' against authority. This pseudo-rebellious quality has become clear from the support given to French and German neo-Fascist parties by young people who are both unemployed and alienated from conventional politics. Habermas maintains that Schmitt's status as an outcast in the postwar years appealed precisely to younger scholars who were terminally bored with, and alienated from, conventional political theories, and consequently became attracted to the conspiratorial 'aura' associated with this unrepentant scholar (1997: 109–110).

Precisely because I have adopted the social democratic perspective of Neumann, however I must – like Neumann himself – do justice to the *clear scholarly merits* and rhetorical appeal of Schmitt's own account of law. It is most important to resist the temptation to engage in any entirely polemical and dismissive 'trashing' of Schmitt's work by means of the imposition of *extrinsic* liberal-democratic criteria, which then duplicates the very authoritarian hostility to competing forms of life that it purports to condemn in Fascism. This type of reaction would itself be counterproductive. In other words, adopting an authoritarian reaction to the presence of fascist legal theory would defeat the object of the exercise; it would serve only to duplicate, *and hence multiply*, the very presence of that which democrats should oppose. Instead, it is better to follow the example of Neumann's own lead, which differentiated between propagandistic, (predominantly) "scholarly" and implicitly ideological facets of Schmitt's work, without ever succumbing to the naiveté of thinking that the scholarly aspects were entirely free of the influence of specific ideological presuppositions and undertones.

A dialectical approach to law, associated with the Frankfurt School tradition, employs a notion of truth as the reciprocal adequacy of concept (e.g., "justice") to the object of lived-experience (e.g., the experience of

[12] First published in 1932, 2nd edition 1968 (Berlin: Duncker and Humblot 1968).

how a court decides a particular case). This approach employs a strictly *immanent* critique in order to identify relative shortfalls on *both sides* of the concept/experienced-object equation (Salter and Shaw 1994; Salter 1998). As a result, it prefers to envisage the relationship between truth and falsity as points along a continuum – as distinct from a stark juxtaposition of 'all or nothing'. This, in turn, supports a strictly immanent mode of critique during which a rival theory is shown to be inadequate, incoherent or self-contradictory when judged by its own explicit or presupposed criteria of validity. Hence, in the present context, it is not a case of asserting the comprehensive truth of Neumann's model of law as opposed to the unmitigated falsity of Schmitt's. On the contrary, it is important to understand how it was possible for the latter's highly politicised and conceptually rigorous analysis of law to exert a limited attraction upon Neumann and – to a greater extent – Kirchheimer. Whilst the authoritarian conclusions that Schmitt draws from his empirical diagnosis of the various tensions and contradictions within the underlying presuppositions of liberal democracy are largely spurious, the diagnosis of various pathological features does articulate historical phenomena which continue to pose challenges for the present.

If Schmitt's empirical diagnosis (as distinct from his authoritarian prognosis) lacked *any* sociological reality or scholarly merits whatsoever, then it is difficult to explain why Neumann and Kirchheimer (and many other intelligent socialists including the early Habermas) ever had reason to take it seriously at all. Indeed, it is arguable that part of the relevance of Neumann lies in his attempt to come to terms, albeit from a quite different and politically opposed left-Hegelian tradition, with a related series of institutional pathologies and challenges to democratic ideals. Neumann reacted to the problems caused by a form of democracy predicated upon economic liberalism's transformation into a monopolistic form of advanced capitalism by arguing for an *anti-capitalist* interpretation of the rule of law (Scheuerman 1994: Ch. 4). Schmitt, by contrast, employed a related diagnosis to locate the source of the problem within parliamentary democracy itself, and then advocated an authoritarian dictatorship as a would-be 'solution' to contemporary social problems. Hence anyone addressing the Schmitt/Neumann relationship needs to be careful not to assume that, because they approached the question of democracy from opposed perspectives, and advocated contrasting solutions, there be nothing in common between their analyses.

Furthermore, it is important to must seek to do justice not only to the complexity of the relationship between Schmitt and Neumann but also to

the relative strengths and weaknesses of *both* writers.[13] As an antidote to the temptation simply to denounce Schmitt, it is important to realise that Schmitt represented a fitting *scholarly* as well as political opponent for Neumann, who refused to waste time and effort engaging with lesser intellects within the juristic wing of the Nazi movement such as Hans Frank, who was later sentenced to death at Nuremberg.

However, establishing a viable relationship between the specifically jurisprudential and political dimensions of the Schmitt/Neumann relationship is unlikely to be a straightforward affair. There is the perennial danger of a premature 'resolution' of the complexity of this relationship by means of reductionism, i.e., reducing scholarly disputes into 'nothing but' ideological conflicts, or vice-versa.

CONCLUSION

The present article has addressed the dangers of approaching the close connection between Carl Schmitt and a fascist form of legal theory in a simplistically polemical fashion. It suggests that only a highly nuanced and dialectical form of internal criticism of Schmitt, and self-criticism of his protagonists, can constitute an appropriate interpretative orientation to the debate between Schmittian legal theory and the Frankfurt School. While the interaction between intellectual and political biography is clearly illustrated within the scholarly works of both Schmitt and Neumann, the responsibilities of the legal theorist – acting as such – are to confront arguments with counter-arguments. Such confrontation should avoid seeking refuge in a Schmitt-like deception regarding the supposedly absolute dichotomy between legal theory and political/criminal responsibility – least of all when issues of the contribution of lawyers to acts of genocide are at stake. Whilst the employment of a distinctly immanent form of critique to the contradictions within Schmitt's ideas, and between these and the latter's political engagements, can be criticised for giving too much leeway to a neo-fascist scholar, in this context such critique gives a theoretical school sufficient rope with which to hang itself.

[13] The contrast between internal critiques and dismissive form of 'trashing' by means of the imposition of external criteria is not intended as an exhaustive exposition of all the available options.

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