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On the Three Types of Juristic Thought

Carl Schmitt

Translated by Joseph W. Bendersky

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To George Bock,
teacher, friend, guardian

Contents

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This translation of *On the Three Types of Juristic Thought* is part of the continuing study of the life and ideas of Carl Schmitt that has occupied a good part of my scholarly endeavors over the past thirty years. However, it could not have been brought to fruition without the generous assistance of others. George Schwab of the Graduate Center of the City University of New York encouraged the initiation of this important translation project and regularly prodded me to bring it to completion. He was also kind enough to read the entire work and suggest useful revisions. I owe a major debt as well to Paul F. Dvorak and Margaret T. Peischl of the Foreign Language Department of Virginia Commonwealth University. They devoted considerable time to assisting me in translating particularly difficult German passages into readable English sentences and paragraphs that retained the precision and tone of the original German. At various points I also called upon the scholarly expertise of Arthur B. Gunlicks of the Political Science Department at the University of Richmond.

Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context

Joseph W. Bendersky

HISTORIOGRAPHICAL TRENDS

Despite its brevity, Carl Schmitt's *On the Three Types of Juristic Thought* ranks among his most important contributions to political and legal theory. It offers a disturbing challenge to long-standing, commonly assumed liberal ideas, ideals, and standards of law, particularly as they relate to government and political culture. Within these pages, Schmitt provides perhaps his clearest and most elaborate critique of the legal positivism and normativism so closely linked to the political liberalism of his day. It is a critique with continuing relevance for our own time. By undermining the comforting but no longer tenable claim to certainty and objectivity of positivism and normativism, Schmitt opened the way for the elements of contingency and indeterminacy at the very heart of contemporary debates over social and political modernity.[1]

This work also documents a dramatic shift in Schmitt's thinking that had been gradually developing since the late 1920s. He now exposes and critiques the limits of the very decisionist legal and political theory he earlier espoused and with which his name is still inextricably associated. In this respect, a reading of *On the Three Types of Juristic Thought*, where he introduces his concept of concrete-order thinking, is essential to avoid the

many misconceptions and misrepresentations of him and his decisionism. And beyond clarifying his theoretical stand, his concept of concrete orders, with its emphasis upon traditional institutions, community, and cultural foundations, reconfirms that Schmitt remained primarily a traditional conservative thinker.

However, for over half a century, Carl Schmitt's *On the Three Types of Juristic Thought* received rather scant attention. Published in the early stages of the Third Reich, this book's contribution to legal theory appeared highly dubious. Schmitt's scathing critique of liberal legal principles and practice, written as he acquiesced to the new National Socialist political reality in Germany, confirmed the reservations many had about his political and legal theory. Unlike the reputable academic publishers, such as Duncker and Humblot in Berlin, which had issued his earlier books, *On the Three Types of Juristic Thought* was published in 1934 by the Hanseatische Verlagsanstalt in Hamburg, a house famous for its right-wing nationalist, and then Nazi, authors and readership. That this book also appeared as a publication of the Nazi Academy of German Law under the editorship of Reich Minister Dr. Hans Frank further damaged its credibility among legal scholars.

The wartime treatment of this book by Ernest Fraenkel and Franz Neumann, two leftist émigrés intimately familiar with Schmitt's Weimar writings, probably reflected the widespread estimate of its value for decades thereafter. Although Fraenkel called it the "most influential juridical study of recent years" by the "most brilliant political theorist of post-war Germany," he found its "theoretical shortcomings" highly problematic. Fraenkel ultimately condemned it as "nothing but the new legitimation of this capitalistic legal order" of Nazi Germany. And in his classic study, *Behemoth: The Structure and Practice of National Socialism*, Neumann dismissed it as a major part of the theoretical foundation for a legal system that was "nothing but a technique of mass manipulation by terror." Thus, it was not surprising that

during the subsequent decades in which Schmitt and his ideas were either universally condemned or ignored, this work in particular suffered a similar fate.[2]

However, the international renaissance in Schmitt studies that began in the 1980s has opened the way for various reinterpretations of this jurist and his work. Earlier characterizations of him as a forerunner of National Socialism, a nihilist, or an amoral opportunist now have been challenged by diverse perspectives of this enigmatic figure, ranging from depictions of him as a traditional conservative thinker to the more recent argument of certain German scholars that he was a theological thinker.[3] More telling still are the latest series of publications in English in which even his most strident critics acknowledge the enduring significance of his theory. As one conceded, "Schmitt's critique of liberalism captures better than contemporary critics the problematic nature of liberalism." Others emphasized his influence on the constitutional system of the Federal Republic of Germany, particularly the Constitutional Court and its relationship to popular sovereignty and democracy. Schmitt has even been called the "godfather" of "contemporary American conservatism."[4]

As part of this renewed interest, several of Schmitt's major Weimar works have been translated into English.[5] Although this clearly indicates an increasing recognition of Schmitt's importance in the history of legal and political theory, especially of his significant Weimar contributions, his compromises with the Nazi regime automatically render anything he wrote during those years as inherently suspect and likely to be dismissed out of hand.

Nonetheless, while this revisionist scholarship has been emerging, there have been various signs that, despite the taint of Nazism, some of Schmitt's works from the Hitler era also warrant serious examination. It has been realized that such analyses are necessary to fully grasp the evolution in Schmitt's thinking, as well as his relationship to National Socialism. Moreover, George

Schwab pointed out quite early in this reevaluation process that, his collaboration notwithstanding, Schmitt's writings during these years retained fundamental conservative characteristics in contrast to Nazi ideology and policies. Equally important, Schwab showed not only how essential concepts in *On the Three Types of Juristic Thought* were outgrowths of Schmitt's earlier legal ideas, but also how they were part of a broader tradition of European legal thought on "institutions," which included the prolific and highly respected work of such distinguished French thinkers as Maurice Hauriou and George Renard.[6]

Still, it has only been since the late 1980s that the notion of "concrete orders" embodied in *On the Three Types of Juristic Thought* has become the focus of direct attention. At an international conference on Schmitt in 1986 at Speyer, Germany, two prominent German legal scholars, Joseph H. Kaiser and Ernst-Wolfgang Böckenförde, suggested that "concrete orders" and institutional thinking have a continuing relevance in politics and law. It was just such suggestions—that "concrete orders" and institutional thinking might have any validity or current acceptance in law—that has long greatly alarmed another German legal scholar and judge, Bernd Rüthers.[7]

In Rüthers's mind, the experience of National Socialism demonstrated categorically that "law can degenerate into an instrument of state terror," and he identifies Schmitt as the very "paradigm" of the kind of German jurist whose ideas and actions facilitated that "perversion" of law. Thus, Rüthers was greatly disturbed by the growing interest in Schmitt on the part of both rightist and leftist thinkers in contemporary Germany and elsewhere. An early critic of institutional theory, Rüthers argued that this type of thinking had actually reemerged rather quickly in Germany after 1945, overtly in legal theory, as well as in the practice of constitutional and civil law, and in disguised forms in other areas of law and sociological theory. Rüthers is convinced that, as before, the acceptance of institutional forms of thinking and "general clauses" endangers democratic equality

and individual rights; it also poses a serious and ominous challenge to the entire constitutional form of government.[8]

Ingeborg Maus, on the other hand, has argued that Schmitt's legal ideas had already long pervaded Germany's postwar system. Reviving a Marxian analysis she imposed on Schmitt decades ago, Maus has continued to insist Schmitt's ideas were always directed at maintaining domination by the bourgeoisie and monopoly capitalism as opposed to the social and economic interests of other segments of society. When Weimar collapsed, Schmitt merely turned to institutions, concrete orders, and general clauses to achieve the same objectives under National Socialism. Maus sees continuity in Schmitt's thought and influence not only from Weimar to the Third Reich but down to the present. Schmitt's work "was from the outset," she writes, "the secret dominant legal theory of the Federal Republic, particularly the Constitutional Court."[9]

At the same time, ironically, *TELOS*, formerly a key journal among those Marxist intellectuals in America devoted to the Frankfurt School's legacy of critical theory, has taken a special interest in Schmitt. Its editor, the late Paul Piccone, had gradually integrated more and more Schmittian concepts into his own critical political and sociological analyses until he reached the point of presenting *On the Three Types of Juristic Thought* as a valuable contribution to the theoretical framework of a postmodern brand of communitarianism and new form of populist legitimacy for government.[10]

In one of the most recent major studies, Andreas Koenen argues that with concrete-order thinking and institutionalism Schmitt was attempting to guide the Hitler regime into a more conservative and less radical direction during the early stages of the Third Reich. Essentially, Koenen has taken Schwab's earlier interpretation and added what is now referred to in historiography as the "theological twist." For Koenen believes Schmitt was pursuing much more than traditional conservative political and cultural goals. Rather than merely seeking to constrain Nazi

extremism, and thereby preserve as much of traditional German society and culture as possible, Schmitt, a devout Catholic political activist, was actually hoping to realize a Christian counterrevolution during the Third Reich.[11]

Whether one considers *On the Three Types of Juristic Thought* a foundation of Nazi legal theory and practice or a failed attempt at a conservative counterweight to the most extreme tendencies in National Socialism, it was definitely a transitional work for Schmitt. There is an undeniable continuity with Schmitt's pre-Nazi critiques and ideas on legal and political theory. In this respect, it reflects the evolution in his thinking in the course of a natural intellectual development of ideas. On the other hand, these preexisting theories and ideas are clearly adjusted to accommodate the new political realities after the Nazi *Machtergreifung*.

That *On the Three Types of Juristic Thought* constituted a grafting of the new upon the old is strongly suggested not only from the actual content of this work, but also from the differing public forums in which Schmitt introduced his theory of concrete-order thinking. The first was a very traditional academic venue, the Kaiser-Wilhelm Society for the Advancement of Science, where he lectured on February 21, 1934. There, Schmitt felt comfortable among old and respected professional colleagues. Although in such settings Schmitt had often encountered heated, often hostile, debates, he shared with such intellectual critics a commonly accepted set of professional values, standards, and expectations concerning scholarship, as well as society. A few weeks later, on March 10, he spoke before the Reich Group of Young Jurists of the National Socialist League of German Jurists. While this group included familiar professional and academic types, it definitely represented the emerging forces of Nazism gradually penetrating more and more of traditional society. Here, the personnel, the ideas, and the still rather indeterminate expectations differed significantly from the academic and public arenas in which he had functioned throughout his distinguished

professional career. This was the new milieu in which Schmitt had been cautiously feeling his uncertain way since the spring of 1933.

THE CONTINUING STRUGGLE AGAINST LEGAL POSITIVISM AND NORMATIVISM

Those scholars who argue the importance of concrete-order concepts and institutional thinking could point out the great extent to which this work is really vintage Schmitt. Indeed, one could contend that Schmitt's arguments regarding concrete orders would lose little, if anything at all, by purging those aspects relating to National Socialism. Much of this work is, in fact, a continuation of the struggle against legal positivism and normativism that Schmitt had been waging for decades. And though mentioned only briefly, the shadow of Hans Kelsen, Schmitt's perennial adversary in jurisprudence, is evident to anyone knowledgeable about either thinker. Kelsen was an intellectual heir to the nineteenth-century jurisprudential tradition of German legal positivism, which had attempted to develop a value-neutral approach that dictated an inviolable separation between law and all other nonlegal spheres such as politics, morality, or society.

This school of legal thought (founded by Carl Friedrich von Gerber and further elaborated by Paul Laband and Georg Meyer) had acquired one of its most renowned Weimar proponents in Gerhard Anschütz.[12] Beginning with the founding of the Bismarckian Reich, positivism became the prevailing form of German legal thought in the latter half of the nineteenth century. And for law, as was the case with other disciplines, this meant an increasing emphasis on observation and analysis instead of on idealist assumption or philosophical speculation. It also signified a turning away from the universalism of natural law and a turning toward law as a creation of the individual sovereign state. Each of these trends was an outgrowth of the

general scientific empiricism of a materialistic, positivistic era and of the triumph of German national power and sovereignty that followed unification.[13] German legal positivists like Laband argued that law was granted by the sovereign state, and it was the responsibility of jurists to develop an empirical and systematic analysis of legal norms as they existed in statutes, decisions, and practice. Because positivist law consisted of the norms created by the power of the sovereign state that recognized no higher authority, the ethical principles embodied in natural law theories, which might conflict with these norms or with the power of the state, were disregarded.[14] In the process, law became equated more and more only with legal statutes to such an extent that legal positivism is sometimes described as statute positivism.[15]

It would be for Kelsen's normativism and *reine Rechtslehre* (theory of pure law) that Schmitt reserved some of his harshest criticism. To Kelsen, law was norm. All forms of law, which in themselves were nothing but norms, had emanated from an original *Grundnorm* (fundamental norm). The task of jurists was to analyze objectively the nature and relationship between this fundamental norm and those legal norms derived from it, as well as the applicability of these legal norms to actual cases, within narrow legalistic confines. In order to protect the "purity" and value-neutrality of law from anything which might taint its juristic clarity and autonomy, jurists were obligated to exclude from consideration such potentially contaminating factors as history, politics, morality, sociology, and so on.[16]

While laudable in the abstract as a goal of scientific and scholarly inquiry, Schmitt argued, the fixation of Kelsen and other legal positivists on *wissenschaftliche Objektivität* (scientific objectivity) made their entire theoretical approach impractical, inadequate, and potentially dangerous. Normativism neglected the inescapable political and sociological realities, as well as the crucial element of historical change, that inevitably bear on law and its actual relationship to society. Normativists excluded as beyond

the scope of jurisprudence inescapable questions concerning legitimacy, power, and sovereignty. In both their general jurisprudence and constitutional theory, the legal positivists also basically "separated *Rechtsmässigkeit* from *Rechtswirksamkeit*, the justice of laws from their effectiveness."[17]

By the early twentieth century, legal positivism was under attack from several quarters. Together with the neo-Kantian response there had emerged the Free-Law Movement (*Freirechtslehre*) and various schools of neo-Hegelian thought, each antipositivist and idealist in orientation. The neo-Kantian jurists, best represented by Rudolf Stammler, disputed the absolute power of the state in establishing "*Recht*" (right or right law); instead, they contended there was a "right law" above the norms created by the state. This idea of a "higher" or "right law" was not a return to natural-law theory, and the concept always remained vague, yet it did contain the precept that *Recht* existed before its establishment by the state and that it was not dependent upon state power. Agreeing that *Recht* did not emanate from the state, the neo-Hegelians argued, nonetheless, that it arose from within society itself. Of the prominent neo-Hegelians, Josef Kohler held that each society assumes certain general principles of right and that it is the function of jurists to analyze these and derive ideals to which laws should conform. The members of the Free-Law Movement, such as Eugen Ehrlich, were more concerned that law be created and administered in accordance with justice and equity. For this purpose, they would allow a judge considerable discretion in arriving at different interpretations of higher legal norms.[18]

A fundamental question raised by these new schools of thought was how to determine when the "right" legal decision had been reached. From the positivist point of view, it would be the function of the judge to interpret the legal statute, or written norms, in strict conformity with the will of the lawgiver. With the new emphasis on right law, the positivist notion that the correct legal decision would be one which adhered to the

literal wording of the statute was totally inadequate. Free-Law advocates were now willing to permit a judge to ignore the letter of the statute where it did not conform to fundamental principles of justice and right.[19]

But the question still remained as to whether judicial decisions arrived at in this manner approximated the dictates of right law. The young Carl Schmitt was convinced the solution to this problem must come from within the legal profession itself. After publishing his doctoral dissertation on the concept of guilt and types of guilt,[20] he turned his attention to the question of when a legal decision is right (*Richtig*).

In his second major publication, *Gesetz und Urteil* (1912), Schmitt stated that the will of the lawgiver, the literal wording of the statute, and even the subjectivity of the judge, all fail to provide the criteria for evaluating the correctness of a legal decision. Disagreeing with the positivist concept of law, he asserted that "the judge is neither a legislator nor the mouth of the law." A judge could not decide strictly in accordance with the will of the lawgiver, because in most cases difficulties arise in determining the actual intent of the lawgiver. Neither could the precise wording of the statute serve as the criterion for a right decision, because most statutes require interpretation. Similarly, the subjective legal interpretation of a judge is no guarantee of a right decision. He concluded, therefore, that a legal decision could be considered right when "another judge" would decide that very case in the same manner. "Another judge signifies here the empirical type of modern judge trained in jurisprudence." According to Schmitt, a judge could conceivably even arrive at a decision contrary to the literal wording of a statute, and this decision would still be right, so long as another judge would decide the case likewise.[21]

While the extensive latitude he allowed the judge in making a legal decision resembled the outlook of Free-Law thinkers, the thrust of *Gesetz und Urteil* was at the same time one of the

most pronounced indications of the new type of legal thought known as "decisionism," which Schmitt would introduce in the 1920s. After overcoming his own pre–World War I neo-Kantianism, Schmitt, however, had become a starkly realistic political and legal thinker with a strong sociological orientation. In his mind, jurists had to surmount the tradition of abstract normativism and formulate theories and analyses that relate law with actual political and societal circumstances and forces. Thereafter, the phrase "concrete situation" would retain a central place in his legal and political writings such as *Political Theology* (1922) and *Legalität und Legitimität* (1932). Certain phrases, in fact, were recognized as distinctly Schmittian: "a philosophy of real life," an "adequate expression of reality," "*juristisch Konkreten*," "value- and reality-neutral functionalism," and "truth will avenge itself."[22]

Normativism's inability to accommodate the *Ausnahmezustand* (state-of-exception) was for Schmitt one of the most revealing aspects of its theoretical deficiencies and practical dangers. Even in theoretical legal terms, the exceptional case, by definition, could not be bound to a norm. But far more important for Schmitt was that in the real world, where law actually functioned in the context of political and social conflict, the *Ausnahmezustand* connoted a condition in which domestic order was seriously disrupted or even one in which the survival of the existing political system was at stake. Since such conditions could not be predicted, the necessary responses to them could not be precisely prescribed according to predetermined norms or exact normative procedures. Neither could the *Ausnahmezustand*, in a practical sense, be accommodated by the normative legal order; for norms required a normal situation in which to function. "Since there is no norm which would be applicable to chaos," the creation or restoration of order and security remained prerequisites for the existence and functioning of any legal system.[23]

In the early 1920s, Schmitt contrasted this normative legal theory with what he called "decisionism," whose "classical representative" he identified as Thomas Hobbes, a "juristic thinker" who grasped the "reality of societal life." Hobbes had "rejected all attempts to substitute an abstractly valid order for a concrete sovereignty of the state." Neither the *Grundnorm* nor its derivative norms but rather the ultimate decision of the "sovereign produces and guarantees the situation in its totality." In this regard, Schmitt frequently invoked Hobbes's "classic formulation," *auctoritas, non veritas facit legem* (authority, not truth, makes the law). "What matters for the reality of legal life," Schmitt wrote, "is who decides." All laws, norms, or interpretations and applications of these are the creation of the sovereign whose fundamental decision first established order, peace, and security out of a pre-stately existence of nothing and disorder. Right, justice, and law are whatever this sovereign lawgiver decides; they are only possible, in fact, after this sovereign authority has formed order out of chaos. Likewise, it is the sovereign who will thereafter decide when this normal order he has established has been sufficiently disrupted or endangered to constitute an *Ausnahmezustand* and what measures are necessary to reestablish a normal situation.[24]

Schmitt contended that aspects of Hobbesian decisionism continued to exist even within modern democratic constitutional systems. The very act of creating a constitutional order was a sovereign act of decisionism on the part of those (e.g., the people in a democratic process) instituting that system. The original decision-makers or fundamental lawgivers would also designate, usually through specific constitutional articles, who in a practical sense will exercise state sovereignty, especially within a crucial *Ausnahmezustand.* In the Weimar Republic, Schmitt argued, the constitution had endowed the Reich president with sovereign decisionist powers over an *Ausnahmezustand,* so long as his actions were directed toward preservation of the existing political and legal order and had the consent of the Reichstag.[25]

By the early 1930s, Schmitt had developed serious concerns that the prevailing "value-neutral" constitutional interpretations of normativist legal theorists were endangering the entire Weimar political and legal system. By that point, the economic collapse caused by the Great Depression, together with the paralysis of the Reichstag due to intransigent political parties representing irreconcilable ideologies and class interests, had generated conditions under which the republican form of government was disintegrating from within while the anticonstitutional Nazi and Communist parties posed an ever-increasing overt revolutionary threat from without. Schmitt was especially fearful that "value-neutral" constitutional interpretations were also allowing Hitler to manipulate the concept of legality. Maintaining legal neutrality toward a political movement whose ultimate objective was the destruction of that legal system was, to Schmitt, suicidal and absurd. A constitutional system, he argued strenuously in *Legalität und Legitimität* and elsewhere, could not maintain neutrality toward its own principles and very existence. No matter what legal norms and procedures the Nazis adhered to, their ultimate objectives constituted an intolerable threat to the existing constitutional order and therefore they must be denied the legal access to power.[26]

Schmitt advocated a resolution of this crisis through the Reich president's exercise of his constitutional authority, especially that authority granted in an *Ausnahmezustand* under Article 48. As the legally designated "defender of the constitution" in Schmitt's interpretation, the Reich president was obligated not only to restore order and security, but also to prevent a Nazi acquisition of power by legal means or revolution.[27] Most normativist legal theorists, however, adhered strictly to the concept of legal and political neutrality. They also rejected Schmitt's political solution of employing the Reich president's constitutional powers; they favored instead a legal approach in which the supreme court would render the ultimate decision regarding the legality or illegality of a political party. Schmitt's opponents

decried his constitutional interpretations as "situational jurisprudence" that would relativize constitutional law by interjecting uncertainties and arbitrariness.[28]

While Schmitt had conceded the courts were the legal arbiters in such cases, he remained convinced that legal decisions alone, especially if the current sense of neutrality continued to prevail, would prove inadequate to defend the republic. Soon, as he had predicted, the normative system (including the courts) failed against both the Nazi legal acquisition of power and their destruction of the constitutional system which had granted them that opportunity.[29]

Nevertheless, the gradual evolution of Schmitt's own views over the past several years had already led him to recognize the limits of decisionist legal theory. In *Verfassungslehre* (1928), his classic study of constitutional theory, and "*Freiheitsrechte und institutionelle Garantien der Reichsverfassung*" (1931), Schmitt started to address institutional theory and take an interest in the preservation and special protection of certain institutions of state and society such as marriage, property, civil service, and churches.[30] But it was the reality of a Germany under control of the Nazis, pursuing the total transformation of society, culture, and state in accordance with their grandiose ideological visions of a Third Reich, that finally prompted Schmitt to turn to institutional thinking to rectify the deficiencies his critics had long pointed out regarding decisionism. It was one thing to advocate sovereign decisionism within the Weimar constitutional framework or even to entrust Paul von Hindenburg, a political figure of proven responsibility deeply devoted to German traditions and western civilization generally, with broad exceptional powers in an *Ausnahmezustand.* It was quite another when such decisions would be made by the leader of a dynamic, revolutionary movement unrestrained by the values, traditions, and institutions that conservatives such as Schmitt cherished.

SCHMITT AND THE THIRD REICH

Initially, it appeared highly unlikely that Schmitt would have any association with Nazi legal institutions or theoretical developments. Given his earlier ideas and recent political background, even his professional future seemed in doubt. He had displayed not the least sympathy, or even toleration, for the ideology or politics of the Nazi movement, which he had humorously referred to at one point as "organized mass insanity." None of his Weimar works had proposed totalitarian dictatorship or the revolutionary transformation of society. His Weimar writings had all been directed at ensuring the stability of the German state and Weimar constitutional system. In stark contrast to the central importance the Nazis attached to biological racism and anti-Semitism, his political theory was not racial and his writings and personal relationships were free of anti-Semitism. He had very close and devoted Jewish friends, associates, and students. While Schmitt ranked among the most frequently cited political and legal thinkers in Weimar, the Nazis totally neglected his work; his ideas had contributed nothing to their ideology or movement. Indeed, as the political and economic turmoil intensified in the early 1930s, Schmitt feared increasing Nazi power. For this reason, he supported Chancellor Kurt von Schleicher, to whom Schmitt served as a constitutional adviser, in his attempt to prevent a Nazi acquisition of power in January 1933, by instituting an *Ausnahmezustand* and banning both the Nazi and the Communist parties. Schmitt's political and legal efforts to sustain the Schleicher alternative to the Nazis has been reconfirmed by crucial new archival documentation recently discovered by Lutz Berthold. This is one of the most important evidentiary contributions to our understanding of Schmitt's relationship to the Weimar Republic and to National Socialism to appear in decades.[31]

Schmitt's metamorphosis in 1933 from Nazi opponent to collaborator cannot be explained by either ideological conversion or mere opportunism. His involvements with Nazism took place in stages, each of which tied him closer to the regime and required more reprehensible compromises. Only after the Enabling Act of March 24, 1933, had virtually destroyed Weimar and, in effect, granted Hitler dictatorial power, did Schmitt begin to reconcile himself to the new regime. At that point, Hindenburg's retention of the presidency and control of the *Reichswehr*, together with the number of conservatives in Hitler's cabinet, created the illusion of continued conservative influence. When the Nazis displayed uncharacteristic tolerance by overlooking Schmitt's earlier opposition to acquire the cooperation of such a prestigious name, Schmitt believed that he and his conservative cohorts might direct the new regime along more traditional conservative lines.[32]

It was this early hope of guiding constitutional developments in the Third Reich toward a more conservative and less radical course that first brought him into the service of the Nazi state. Although even at this stage he had maintained his distance from the Nazi Party, he soon succumbed to fear for his personal, family, and professional welfare when he witnessed the Nazi purge of the universities. Thus, on May 1, 1933, Schmitt joined the Nazi Party. For the next three years, Schmitt publicly supported the Hitler regime under the double illusion that he might exert some conservative influence in legal affairs and at the same time remove suspicions about his past and his present loyalty.

In the beginning, not only were his illusions fed by a positive Nazi response, but he was also greatly rewarded professionally for his collaboration. Schmitt was appointed to the Prussian State Council in July 1933, in October he received the prestigious chair of public law at the University of Berlin, and the following month he became director of the University Teachers Group of the National Socialist League of German Jurists. Honors like these and subsequent ones, together with his new writings, led

to his erroneous (but, nonetheless, enduring) reputation as *Kronjurist* of the Third Reich. In actuality, he would never be anything but a temporary figurehead.

Yet, decades later Schmitt admitted that, at the time, he really thought he would be allowed to construct the legal framework for the new order and thereby restrain the more extremist tendencies emanating from party ideologues. By mid-1933, when Schmitt made this attempt, the future nature and direction of a National Socialist Germany was not yet entirely clear. Liberal democracy and political freedom, of course, were lost. Jews and leftists had been purged from the civil service and universities, while communists and other active opponents had been incarcerated in newly constructed concentration camps or had fled abroad. Through their policy of *Gleichschaltung*, the Nazis had also usurped the power of state governments, controlled the media and general public information, crushed the labor unions, and outlawed all other political parties. However, most traditional aspects and institutions of German society, culture, and the state had not been eliminated or Nazified as yet. The state bureaucracy, the churches, the legal system, economic enterprises, as well as property and social relationships (e.g., the family), had to this point remained very much as before.

Far more important, Hindenburg was still president. And though Schmitt himself conceded that by late summer 1933, Hindenburg "reigned but did not rule," his importance and potential action should not be underestimated. As president, Hindenburg legally controlled and personally retained the allegiance of the prestigious *Reichswehr*, a powerful institution still beyond Hitler's command. Furthermore, Hindenburg was a reservoir of legitimacy, who, in the eyes of many Germans also served as a symbolic, psychological, and perhaps legal-institutional link to their traditional conservative past and to the remaining non-Nazi aspects of German society and culture.

During this first year of the Third Reich, the most horrendous features of Nazism were yet to surface. Despite the oppression

and dictatorial means used during the Nazi consolidation of power, this new regime had not subjected German society in general to widespread or constant violence. By winter 1933–1934, even Hitler was disassociating himself more and more from the radical goals, rhetoric, and activities of the SA storm troopers (*Sturmabteilung*) under Ernst Röhm who were agitating for the total economic, social, and institutional transformation of Germany.

Conservatives like Schmitt, as well as substantial portions of the German population, understood clearly that major adjustments had to be made to National Socialist power, symbols, language, policies, and expectations. But a significant degree of uncertainty remained about the nature and extent of what would be required. It was from this perspective, that Schmitt viewed his summer appointment to the Prussian State Council as an opportunity to develop that institution as a conservative counterweight to absolute party control and societal penetration. Together with his close friend and political ally, former Prussian finance minister, Johannes Popitz (who was later executed for his involvement in the July 20, 1944, coup to overthrow Hitler), he began to envisage his interpretation of the council's structure and role as a type of model for the broad outlines of a less radical political-legal system for the Third Reich.

Without any direction from the Nazis, an overconfident, yet obviously cautious Schmitt took the initiative to test his ideas in lectures and articles in the summer and fall of 1933. These culminated in his *Staat, Bewegung, Volk*, published at the end of the year. Whereas the Prussian State Council had three main divisions: state secretaries, party members, and societal representatives (e.g., churches, economy, culture), his tripartite structural scheme for the Third Reich included the state (essentially the bureaucracy and army), the National Socialist German Workers Party (NSDAP), and the German people.

As a conservative, Schmitt not only listed the state first but retained an essential role for it as the "static political part"

carrying out its traditional administrative or military functions without continual Nazi interference. In recognition of Nazi power and domination, he made political decisions and activity the prerogative of the NSDAP, which he defined as the politically dynamic part. And he relegated the people to the apolitical sphere of public life, except where plebiscites were concerned. Although each component in this tripartite system would remain different, they would be united and led by the party, which would penetrate both the state and society. As head of both state and party, the *Führer* would be the ultimate leader within this system, but not a dictator. For, Schmitt argued, implicit in the National Socialist concept of *Führung* was a requisite identity and equality between a *Führer* and his followers. These identities, reinforced by "continual contact," sustained mutual trust, and occasional plebiscites, on the one side, and by the burden of responsibility on the *Führer*, on the other, would supposedly prevent the abuse of power, "tyranny and caprice."[33]

ON THE THREE TYPES OF JURISTIC THOUGHT

It was in these personal, political, and intellectual contexts that in early 1934, Schmitt advanced his arguments on the historical and theoretical characteristics of the various schools of jurisprudential thought. Schmitt's interpretations in *On the Three Types of Juristic Thought*, as well as the language he used in certain places, reflected the time and circumstances. Yet, in content and style, most of this work was simply a treatise on legal theory similar to those he had always written. Only at the very end, did he really relate this work specifically to the emerging, though still unclear and undeveloped, National Socialist law and institutions.

The three kinds of legal thinking Schmitt identified were characterized by the manner in which each conceives of the foundation and essence of law, in other words, whether law is viewed in terms of concrete orders, decision, or norms. While every legal

theory does contain elements of all three types, the determining factor is which concept of law is the fundamental one from which all the others are derived and therefore which concept of law uses the others as instruments in its own actualization.

Concrete-order or institutional thinking is not centered around the individual, but rather is founded upon social groups, associations, and institutions. It was most evident during the Middle Ages, with some residue still found with Luther and Hegel. Actual life (i.e., the social reality) was organized according to natural social groupings such as peasants, burghers, clergy, and nobility. These were the *Stände* or concrete orders and institutions in which men lived and worked.[34] The legal system reflected the presuppositions of that age and culture about right, normalcy, values, and so on, as well as of a life organized around that society's institutions. One is judged and held accountable, therefore, not according to an abstract universal norm but according to the standards of the particular concrete order to which one belongs.

Equally important, the legal system is not perceived as a series of rules or regulations governing the relationship between individuals in society. Nor is the legal system created by or founded upon such rules and regulations. On the contrary, the rules and regulations are derived from the already-existing social order. Moreover, each concrete order could not be reduced merely to some legally defined contractual relationship. For example, the family could not be reduced to a series of legal rules governing the individual relationships between husband and wife, and parents and children. Members of a family, like soldiers in an army or clergy in a church, constitute a natural organic unit.

Legal norms, rules, regulations, and decisions must grow out of the intrinsic way of life within each concrete order and speak to its values and needs. Thus, for concrete-order thinking, law must always be conceived of institutionally, but also broadly and flexibly, so that law reflects the existing, yet always-evolving social reality.

The second type of legal thinking Schmitt described as decisionism, which found its classic representation in the seventeenth century with Thomas Hobbes. This kind of thinking focuses neither upon norms nor concrete orders, but upon pure decision. Historically, Hobbesian decisionist legal theory corresponded to the actual emergence of the Leviathan in the form of the modern state. And this political development had two major repercussions for legal thinking. First, the omnipotent Hobbesian state "devoured" all existing concrete social orders. It "sets aside or relativizes the traditional feudal legal, *ständischen* and ecclesiastical communities, hierarchical stratification and inherited rights."[35] It thereby undermined the very social foundations of concrete-order and institutional legal thinking. Secondly, by establishing civil peace and security, this modern state created the stability of the eighteenth century necessary for the rise and success of normative legal thinking, the third type of juristic thought in Schmitt's analysis.

Normative legal thinking asserts that law, not men, should govern. Normativism transforms a legal norm into an absolute, claiming for itself the status of superiority and eternal universality. As Schmitt wrote: "It elevates itself above the individual case and above the concrete situation and thus has, as 'norm,' a certain superiority and eminence above the mere reality and factual nature of the concrete individual case, the changing situation and the changing will of men."[36] It thus promises to reach the cherished goal of "impersonal, objective justice."

But in the process of developing law as a series of objective norms unaffected by social, economic, moral, or political contexts, normativists detach law more and more from social reality. Law becomes abstract. Instead of being broad and flexible, law becomes rigid, and is perceived as a rule or regulation emanating from impersonal, abstract norms. And a legal system appears to be nothing but the sum of all these rules and regulations. This trend in legal thinking toward greater abstract and imper-

sonal regulation through abstract norms reached its peak in the legal positivism of the nineteenth century.

To Schmitt, nineteenth-century legal positivism was not an original or distinct type of legal thinking. It was, instead, a legalitarian hybrid of decisionist and normativist legal thinking. One important decisionist component can be found in the sovereignty of the omnipotent state which provided the stable and secure political framework in which law could be viewed in such a "positive" manner of "legal certainty." In addition, legal positivists viewed law solely as the "will of the lawgiver." That decision by the lawgiver, in the form of legislation, claims to be the authoritative legal norm to which all else must be subjected.

In order to achieve and preserve "legal certainty," purity, objectivity, and calculability, with legal positivism, one must adhere strictly to the will of the lawgiver in terms of the literal contents or wording of the statute. Interpretations are taboo and judges should be nothing but the mouthpiece of the lawgiver. Likewise, anything "extra-legal" (i.e., anything not created by human legal statute) is rejected for fear of tainting the norm or law with social circumstances, interests, and subjectivity, for these would undermine the claim to objectivity and purity. Thus, legal positivists dismiss the interjection of "every nonlegal consideration as ideological, economic, sociological, moralistic, or political." Thus, Schmitt argued, "*Recht* thinking becomes legality thinking"; and an abstract legalitarianism prevails. In essence, the more legalistic a system becomes, the more unrealistic it becomes.[37]

And despite the attempts by legal positivists to eliminate human judgments, social circumstances, and interests, the need for the interpretation, application, and defense of laws remains. As Schmitt responded elsewhere to those who maintained a "purest" normativist position on the rule of law rather than the rule of men: "One law cannot protect another law," only men can be the interpreters and defenders of the law.[38]

Toward the end of his treatise, Schmitt finally related his theoretical and historical survey specifically to Nazi Germany.

Attributing widespread and significant changes in law to the new National Socialist regime and the spirit it engendered, Schmitt proclaimed the demise of the age of positivism in Germany and the emergence of concrete-order thinking as the new form of legal thought for the twentieth century. In spirit and practice, National Socialism was eliminating the artificial normativist separation of law from social reality, once again reuniting law with economic, moral, and political considerations. And he emphasized that this was not merely some adjustment or corrective to previous legal thought and practice, as had been the case with the Free-Law Movement, but an entirely new form of legal thinking, though one which, in a certain sense, salvaged the original Germanic concrete-order thinking of earlier ages.

Schmitt saw an important sign of such National Socialist success in the increasing reliance upon "general clauses" (or broad legal principles and codes of conduct) as opposed to specific rules and the literal content and details of laws. He likewise noticed similar trends in criminal, tax, constitutional, and administrative law over the previous year.

However, the limited number of examples Schmitt cited were mere indications of new currents in law. He was pointing out the general direction that law was headed, though one of great consequence, rather than offering a specific scheme or structure of his own. At most, Schmitt briefly insinuated a return to some type of corporatist legal structure composed of various *Stände*, along the lines of the tripartite system he had proposed in *Staat, Bewegung, Volk*.[39]

CONCEPTS AND LANGUAGE: SCHMITT'S CONCESSIONS TO NAZISM

Schmitt's adaptation of his earlier theories to National Socialism had its counterpart in his similar bastardization of his

concepts and language to reflect the spirit and rhetoric of the Nazi new order. It was in his gradually escalating use of the corrupted forms of his terminology generally and against those the Nazis had targeted as *Volksfeinde* (enemies of the people) that Schmitt made some of his most despicable compromises with the Third Reich. As was already abundantly evident to those familiar with his earlier work and personal relationships (and as would soon be discovered by his enemies within the party), Schmitt was obviously acting out of fear and opportunism rather than conviction or ideological conversion. Nazi ideology was founded upon a type of Darwinian biological racism, which the conservative, Catholic, Schmitt had long ago ridiculed. The political and legal theory that had established Schmitt's international reputation contained no resonance of racism or anti-Semitism. Neither of his wives, both Slavs, nor his daughter, met the Nazi ideological racial criteria of an Aryan.[10]

Thus, Schmitt was not only a National Socialist office holder, but also one with a potentially incriminating anti-Nazi past who now held ambitious aspirations to become a guiding force in future legal developments. And his rhetoric, including the homage he now paid in laudatory remarks about Nazi leaders from Hans Frank to Hitler, played a substantial role in his emerging image as the actual *Kronjurist* of the Third Reich. Even today, those who begin their study of Schmitt by reading his Weimar publications are invariably shocked upon first encountering some of what he wrote during the Nazi era and especially the vocabulary and tone through which he expressed his arguments.

In addition to highlighting the *Führer* concept, Schmitt began for the first time to use language which could imply legal thought had racial foundations. But even in this there was, initially, still a suggestive ambiguity. Did his new terminology connote nationality (based on culture, ethnicity, etc.) in the sense many conservative intellectuals had conceived it, or did it connote race in the deterministic biological and genetic conception

of the Nazis? Often his words could be read either way. Traditional cultural conservatives could see in Schmitt's ideas an attempt to rejuvenate a distinctly German culture and nationality whose identity and homogeneity had been dangerously diluted within modern liberal bourgeois society or by foreign cultural influences. Un-German ideas and forces, as well as the selfish individualism inherent in liberalism, which threatened the natural organic unity and order of Germandom could now be counteracted by the revival of age-old Germanic communitarian concepts. At the same time, Nazis could perceive his ideas as articulating a variant of the National Socialist racial principle of *Blut und Boden* (blood and soil) as the basis of a unique German nature and identity.

Schmitt replaced words like "association" used in his Weimar works with terms such as *Genossenschaft* and, in places, he referred to Germans as *Volksgenosse*. These expressions reflected the newly dominant anti-individualist and antiliberal communitarian *Zeitgeist* in Germany pervading both traditional conservative and Nazi thinking. While *Genossenschaft* had long denoted a type of cooperative society, or in German law a corporate association, and *Volksgenosse*, a fellow countryman or comrade, Nazi usage had imbued such social relationships with a distinctly racial character. Whereas the concept of homogeneity in his original Weimar political theory denoted commonalities based on class, religion, culture, or even constitutional consensus, it now had acquired an accent which could also be interpreted racially.[11]

Already in *Staat, Bewegung, Volk*, Schmitt had adopted the term *Artgleichheit*, which, though generally meaning "of identical type," intimated in Nazi jargon a combination of spiritual and biological similarities within a distinct species. Schmitt also drew distinctions between *Artgleiches* and *Artfremdes*, those of similar kind and aliens or foreigners. "An *Artfremder*," he wrote, "thinks and understands differently, because he is of a different kind and remains . . . in the existential service of his own kind."

While Schmitt's meaning is still ambiguous, the Nazis used these concepts with unequivocal clarity to distinguish racial kin from those of alien blood.

At first, Schmitt was also equally vague and circumspect in identifying these alien types, speaking only of "liberal and Marxist enemies."[42] But his two brief references to "specific people and races" in *On the Three Types of Juristic Thought* contained a rather transparent insinuation about Jews:

> there are people who without territory,
> without a state, without a church, exist only
> in "law"; to them normativist thought appears
> as the only reasonable legal thought.[43]

A few months later, Schmitt became explicit in an article for the Nazi legal journal *Deutsches Recht*, where he used the National Socialist identification of Jews as a *Gastvolk* and attributed the further development of nineteenth-century normativist legal thought to them:[44]

> Because of their peculiar nature, the Jewish
> people, who for thousands of years lived not
> as a state or in a territory, but only in law
> and in norms, are in the truest sense of the
> term "existentially normativistic."[45]

Such expressions were not only a betrayal of Schmitt's former Jewish friends, students, and colleagues, but a contradiction of his earlier work. He had, in fact, collaborated with Jewish friends and scholars in the development of his own political and legal theory. They had shared his theoretical reservations about normativism and positivism, and some were drawn to his decisionism. He had great respect for the early work of Leo Strauss whom, on the eve of the Nazi seizure of power, Schmitt assisted in earning a Rockefeller Fellowship. Schmitt had actually revised

the 1932 edition of his famous *Concept of the Political* in light of criticism from Strauss. What had happened since the end of Weimar was quite evident to Strauss, who exclaimed to a colleague: "Have you seen Carl Schmitt's last . . . [i.e., *On the Three Types of Juristic Thought*]? He is now against the decisionism of Hobbes and for 'thinking in terms of order' on the basis of the arguments in my review, which, of course, he does not cite." After all, Strauss added later, Schmitt "could not possibly allow himself to acknowledge his dependence on a Jew."[46]

Furthermore, if interpreted racially, Schmitt's *On the Three Types of Juristic Thought* suffered from internal inconsistencies. While speaking of the national (or race-specific) origin and nature of certain kinds of legal thought, Schmitt actually noted his intellectual debt to the institutional thinking of Maurice Hauriou, a Frenchman, and Santi Romano, an Italian, both of whom according to Nazi racial theory belonged to different races and therefore should also have exhibited a type of legal thought dissimilar to that of the Germans.[47] Although Schmitt's arguments could have been accommodated by certain kinds of racial theories of the day, they were definitely not in line with what Nazi racial ideologues would have demanded. Perhaps equally telling, even though he had mentioned the word "race" once in *On the Three Types of Juristic Thought*, it would still take two more years before he began to address the question of Nazi racial principles and policies or to use notions like "German blood" in a few of his articles.[48]

On the other hand, Schmitt's general ideas on concrete orders did resonate with some of those involved with National Socialist legal theory and affairs such as Karl Larenz. The concepts also apparently had some impact on the evolution of criminal law during this period.[49] But their influence remained quite limited. And certainly Schmitt's vision of concrete orders as the foundation of an emerging National Socialist legal and political order quickly proved illusionary.[50] Ernst Rudolf Huber, later one of postwar Germany's renowned constitutionalists, had at

the time perceived the true National Socialist reception of Schmitt's concrete-order concept. As Huber privately expressed it to Schmitt in 1939, the essence of concrete-order thinking was lost as the phrase rolled off the tongues of so many who turned a crucial insight into a banality.[51]

While Schmitt was introducing his concepts, ideological opponents within the Nazi Party and legal profession were launching what proved to be a relentless campaign against him and his ideas. For ideological purists like Otto Koellreutter, Schmitt's conversion to National Socialism was sheer opportunism. To him, Schmitt had never moved away from his earlier neo-Hegelian conservatism, and despite his adoption of Nazi terminology, his fundamental theories were never actually racially based. Thus, while Schmitt continued to advance in Nazi legal institutions over the next year under the protection of Hans Frank, widespread resentment and opposition was building against him.[52]

Starting in the fall of 1934 and continuing for several years, Schmitt was also subjected to incessant press attacks from abroad. Several of his former friends and students, now German émigrés, were determined to undermine his position in Nazi Germany by exposing in detail his past relationships with Jews, his political Catholicism, and his anti-Nazi activities.[53] In response to such internal and external assaults, Schmitt was equally determined to prove his conversion to National Socialism. He began to mouth more closely and frequently the Nazi rhetoric on race and Jews, defending the Nuremberg Laws as the "constitution of freedom." His opportunistic compromises reached their peak at the Conference on Judaism in Jurisprudence, which he sponsored in October 1936. At the conference, he urged purging the Jewish spirit from German law and "urgently" recommended reading *Mein Kampf* on the Jewish question.[54]

Very few were convinced, and Schmitt's National Socialist career came to an abrupt end by early 1937. The *Sicherheitsdienst* (Security Service) of the SS (*Schutzstaffel*), which had already had Schmitt under investigation for some time, publicly rebuked him in its publication *Das Schwarze Korps*, preparing the way for his removal from party offices. Schmitt was able to retain his professorship in Berlin, but he never again addressed domestic political or legal aspects of the Third Reich.[55]

While chastising Schmitt for his former affiliations with Jews, his anti-Nazi past, and the fact that his earlier theories were nonracial, the SS investigators privately considered *On the Three Types of Juristic Thought* a primary proof of his continuing political Catholicism. "Carl Schmitt combined politics and Catholicism in such a manner," they argued, "that all spheres of influence could become instruments of the Catholic Church." And they strongly suspected Schmitt's new direction in legal thought was, in fact, an effort "to bring the National Socialist state under the political power of the Catholic Church." Schmitt's phraseology, "concrete orders" and "institutions," merely disguised the fundamental Catholic precepts and interests supposedly still governing his thought. From their perspective, this work certainly could not provide the theoretical framework or even stimulate the proper ideas for the true *Volksgemeinschaft* within the Third Reich they were trying to create.[56]

THE LEGACY

Shortly after the war, Frederick Dessauer wrote that Schmitt had "supported the new rulers with all the weapons which a wide erudition, an unusual analytical ability, a brilliant style, and an elastic conscience could supply." But despite this, Dessauer respected this jurist's contributions to legal theory and clearly implied Schmitt's Weimar ideas had a great deal to offer. "So when constitutional decisions have to be made in Europe," Dessauer wrote in the journal *Ethics*, "Carl Schmitt's theory of the constitutional decision will not be forgotten." Dessauer was, however, far

more critical regarding *On the Three Types of Juristic Thought.* He found it "brilliant in its discussion of thinking in abstract rules and individual decisions." And, indeed, Schmitt's incisive analyses of decisionism, normativism, and legal positivism exposed many of the serious deficiencies in these types of legal thinking. Yet, Dessauer correctly pointed out that Schmitt's general contribution on concrete orders was "superficial."[57]

In retrospect, we see how prescient Dessauer's observations were. For the preliminary sketch of a Schmittian theory of concrete orders introduced in *On the Three Types of Juristic Thought* was never adequately developed thereafter. Schmitt identified what concrete orders meant for the Middle Ages and showed the residue in German legal thought thereafter; but his own ideas on concrete orders were the least detailed and developed parts of this work. And after the war, these ideas never assumed a central place in Schmitt's prolific writings. At best, there are a few brief references in his *Nomos der Erde* (1950) and *Verfassungsrechtliche Aufsätze* (1958), which fail to provide elaboration or clarity.[58] We are left not only with a sense of incompleteness, but with a general vagueness, which Rüthers noted in his critique of the concept.[59] What is the equivalent in the contemporary world of a concrete order or institution, and where is this kind of thinking expected to lead in terms of theories or laws and their application in a complex, modern mass society?

More important, though Dessauer conceded that "thinking in concrete forms of life, in institutional patterns," provides some insight into the conflict between "abstract and general rules . . . and the varieties and realities of life," he clearly understood the potential dangers as well. For "if one draws the ultimate conclusions from such premises, the individual rights are destroyed."[60] And if such institutional thinking is the alternative to normativism and legalitarianism, with their emphasis upon individual rights and legal procedures, how will it ensure equality before the law and the protection of the individual against the group? How will such a new system protect us against a capricious and arbitrary application of the law and ensure fairness and due process?

It is just such questions that have greatly concerned current critics who fear the insidious influx of concrete-order thinking and general clauses into legal and social theory as well as into law and public policy. Whether their apprehension about such subtle trends in German society and law is well founded is yet to be determined.

In any event, the place of *On the Three Types of Juristic Thought* in the broader context of Schmitt's oeuvre will not rest primarily on this outcome. For this work offers far more than an introduction of the concept of concrete-order thinking. It contains a major adjustment to the decisionism so inextricably identified with Schmitt's name and legal theory and which pervaded so much of his major writing. Moreover, it offers perhaps Schmitt's clearest and most elaborate critique of normativism and positivism. These reasons alone make it essential reading for any study of Schmitt.

NOTES

1. On Schmitt's importance for current scholarly disputes over modernism and postmodernism, see William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford, 2000).

2. Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York, 1941), 61, 118, 131, 142–146, 196; Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (New York, 1944), 440–458. See also Joseph W. Bendersky, "Carl Schmitt Confronts the English-Speaking World," *Canadian Journal of Political and Social Theory/Revue canadienne de théorie politique et sociale* 2, no. 3 (Fall/Automne 1978): 125–135.

3. For a recent discussion of the Schmitt renaissance, see the introduction in Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg zum 'Kronjuristen des Dritten Reiches'* (Darmstadt, 1995), 1–24, which also contains

an extensive, up-to-date bibliography. See also the long essay review by Mark Lilla on about a dozen new publications: "The Enemy of Liberalism," *New York Review of Books*, May 15, 1997, 38–44. Indicative of the widening attention to Schmitt was "Carl Schmitt: Legacy and Prospects: An International Conference" held in New York City in April 1999, sponsored by the Italian Academy, Columbia Law School, and Cardozo School of Law. The papers and commentary from this conference were published in the *Cardozo Law Review* 21, nos. 5–6 (May 2000). For an example of an important contribution by a newcomer to the field of Schmitt studies, see William Rasch, "Conflict as Vocation: Carl Schmitt and the Possibility of Politics," in *Theory, Culture & Society: Explorations in Critical Social Science* 17, no. 6 (December 2000): 1–32.

4. See David Dyzenhaus's introduction to the special edition on Schmitt of *The Canadian Journal of Law & Jurisprudence* X, no.1 (January 1997); Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (New York, 1997); and "'Now the Machine Runs Itself': Carl Schmitt on Hobbes and Kelsen," *Cardozo Law Review*. 16, no. 1 (August 1994): 1–19; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism* (Durham, 1997), and "Legal Positivism and Weimar Democracy," *The American Journal of Jurisprudence* 39 (1994): 273–301; John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge, Mass., 1997). For a critique of some of these trends, see Joseph W. Bendersky, "Schmitt and Heller," *TELOS: A Quarterly Journal of Critical Thought* 113 (Summer 1998), and the reviews of the works of David Dyzenhaus and William E. Scheuerman in *Central European History* 34, no. 1 (2001): 116–120.

5. See Carl Schmitt, *The Concept of the Political*, trans. George Schwab, 2nd ed. (Chicago, 1996); *Political Theology: Four Chapters on the Concept of Sovereignty*; trans. George Schwab (Cambridge, Mass., 1988); *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, Mass., 1985); *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport, Conn., 1996); *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York, 2003); *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham, N.C., 2004).

6. George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. (New York, 1989), 115–125.

7. Joseph H. Kaiser, "*Konkretes Ordnungsdenken*" and "*Aussprache*," in *Complexio Oppositorum, Über Carl Schmitt: Vorträge und Diskussionsbeiträge des 28. Sonderseminar 1986 der Hochschule für Verwaltungswissenschaften Speyer* (Berlin, 1988), 319–340.

8. Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (Munich, 1988), and *Die unbegrenzte Auslegung—Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Frankfurt am Main, 1973). See also my review in *The American Historical Review*, February 1990, 196–197.

9. First published in *Kritische Justiz* in 1969, this article appeared recently in English translation. See Ingeborg Maus, "The 1933 'Break' in Carl Schmitt's Theory," *The Canadian Journal of Law & Jurisprudence* X, no. 1 (January 1997): 125–140.

10. See Special Issue, "Carl Schmitt: Enemy or Foe?" *Telos: A Quarterly Journal of Critical Thought* 72 (Summer 1987), and most issues of the 1990s.

11. Koenen, *Der Fall Carl Schmitt*, 449–505.

12. One of the best descriptions of legal positivism in Germany can be found in Caldwell, *German Constitutional Law*. See also Ellen Kennedy, "Carl Schmitt's *Parlamentarismus* in Its Historical Context," in *Crisis of Parliamentary Democracy*, xxxv–xxxvi.

13. Rupert Emerson, *State and Sovereignty in Modern Germany* (New Haven, 1928), 47, 56; Caldwell, *German Constitutional Law*, 22–39.

14. Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), 165, 173; W. Friedman, *Legal Theory* (London, 1953), 150–151, 159–161.

15. See Caldwell, *German Constitutional Law*, passim.

16. Hans Kelsen, *Der Soziologie und der juristische Staatsbegriffe: Kritische Untersuchung des Verhältnisses von Staat und Recht* (Tübingen, 1922), 2–3, 75–81, 253; Schwab, *Challenge*, 47–53; Rudolf A. Metall, *Hans Kelsen: Lehren und Werk* (Vienna, 1969); Caldwell, *German Constitutional Law*, 40–51.

17. Schmitt, *Political Theology*, 16–32; Kennedy, "Schmitt's *Parlamentarismus*," xxxvi.

18. Emerson, *State and Sovereignty*, 159–167, 207–208; Roscoe Pound, *Jurisprudence* (St. Paul, Minn., 1959), 1: 167; Friedman, *Legal Theory*, 120, 245; Caldwell, 42–44.

19. Ibid.

20. Carl Schmitt, *Über Schuld und Schuldarten: Eine terminologische Untersuchung* (Breslau, 1910).

21. Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis*, 2nd ed. (Munich, 1969), 8, 22, 71–73, 101–102, 111–113.

22. Schmitt, *Political Theology*, 34–35; *Legalität und Legitimität* (Berlin, 1932), 49, 98. On the competing schools of Weimar legal thought and their influence on the political history of the republic, see Caldwell, *German Constitutional Law*.

23. Schmitt, *Political Theology*, 12–14.

24. Ibid., 13, 33–35.

25. Ibid., 10–12; Carl Schmitt, "*Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung*," in *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedanken bis zum proletarischen Klassenkampf*, 2nd ed. (Munich, 1928), 214–259. Schmitt had also placed specific limits on such powers of a president acting, in Schmitt's terminology, as a constitutional or commissarial dictator. A president's exceptional powers were restricted to the duration of the crisis, during which he could not change existing laws or abolish the constitutional form of government, or even make new laws. And the entire original constitutional system must be reinstated upon the end of the temporary crisis. On Schmitt's theories of presidential power and his distinction between a sovereign and a commissarial dictatorship, see Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, 1983), 31–35, 73–84.

26. Schmitt, *Legalität und Legitimität*, 28–60; Bendersky, *Carl Schmitt*, 145–154.

27. Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931).

28. These differing interpretations took on particular legal and political significance when Schmitt and opponents like Gerhard Anschütz and Arnold Brecht publicly clashed during the historic trial before the German Supreme Court in October 1932. Schmitt, representing the Reich government, defended the right of the Reich president under Article 48 to declare an *Ausnahmezustand* in the state of Prussia in order to restore order and security. The lawyers for Prussia, however, considered this an unconstitutional maneuver that was merely a mask for a political *Staatsstreich* against the state, and which, in effect, undermined the entire democratic constitutional framework of Weimar. The supreme court rendered a "Solomonic" decision allowing the Reich government to maintain the *Ausnahmezustand* but also restoring the Prussian state cabinet to office. *Preussen contra Reich vor dem Staatsgerichtshof: Stenogrammbericht der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10. bis 14. und vom 17. Oktober 1932* (Berlin, 1932); Earl R. Beck, *The Death of the Prussian Republic: A Study of Reich-Prussian Relations, 1932–1934* (Tallahassee, 1959); Jürgen Bay, *Der Preussenkonflikt 1932–33: Ein Kapital aus der Verfassungsgeschichte der Weimarer Republik* (Erlangen-Nuremberg, 1967); Bendersky, *Carl Schmitt*, 154–171; David Dyzenhaus, "Legal Theory in the Collapse of Weimar: Contemporary Lessons?," *American Political Science Review* 91, no. 1 (March 1997): 121–134.

29. Carl Schmitt, "*Das Reichsgericht als Hüter der Verfassung (1929)*," in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954: Materialen zu einer Verfassungslehre* (Berlin, 1958), 63–109; Bendersky, *Carl Schmitt*, 172–191.

30. Carl Schmitt, *Verfassungslehre* (Berlin, 1928), 170–182; "*Freiheitsrechte und institutionelle Garantien der Reichsverfassung* (1931)," in *Verfassungsrechtliche Aufsätze*, 140–173.

31. See Lutz Berthold, *Carl Schmitt und der Staatsnotstandsplan am Ende der Weimarer Republik* (Berlin, 1999).

32. For details of Schmitt's pre-1933 attitude toward the National Socialist movement and of his eventual collaboration, see: Bendersky, *Carl Schmitt*, 172–204; Schwab, *Challenge*, 90–107; Koenen, *Der Fall Carl Schmitt*, 173–268.

33. Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg, 1933), 11–12, 20–21, 40.

34. A *Stand* is the German equivalent of a feudal political estate. A *Ständestaat*, or system of government based on these *Stände*, is somewhat

similar to the French Estates-General before 1789. For an understanding of the actual organization and function of these *Stände* as opposed to romanticized versions of them, see Klaus Epstein, *The Genesis of German Conservatism* (Princeton, 1966), 259–276.

35. See this volume, p. 74.

36. See this volume, p. 49.

37. See this volume, pp. 63–65, 70–71.

38. Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen, 1914), 83.

39. George Schwab has offered some insight on this question. According to him, Schmitt believed that "legally recognized institutions such as religious associations and the professional civil service, or interest groups organized along professional or occupational lines, would ensure the continuity of the societal order more easily than a political system. . . . Every institution had its own legal existence established by the institutionalization of practice in light of a concept of justice based on the interaction of members in a given order. The more solidly an order is entrenched, the less likely it is that the sovereign authority will venture to intervene in normal times." *Political Theology*, xxv–xxvi; see also Schwab, *Challenge*, 122–125.

40. Bendersky, *Carl Schmitt*, 206–208.

41. In Weimar, Schmitt had argued that "every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity. . . . [The] substance of equality . . . can be found in certain physical and moral qualities, for example in civic virtue, in *arete*, the classical democracy of *vertus* (*vertu*). In the democracy of English sects during the seventeenth century, equality was based on a consensus of religious convictions. Since the nineteenth century . . . in national homogeneity." *Crisis of Parliamentary Government*, xxxiii, xxxvii, 8–12, 14–17. Compare the 1932 edition of *The Concept of the Political* with *Der Begriff des Politischen* (Hamburg, 1934), 27, 43–44.

42. Schmitt, *Staat, Bewegung, Volk*, 42–46.

43. See this volume, p. 45. More recently, Schmitt's attitudes toward Jews have again been called into question because of the references to Jews in his post–World War II diary entries. Although these have led to renewed charges that Schmitt was an anti-Semite, these notes and the entire relationship between him and the Jewish question have been neither sufficiently explained nor explored. For these references, see Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard Frhr. von Medem (Berlin, 1991). Notable among the questionable interpretations that Schmitt's legal thinking had always been anti-Semitic is Raphael Gross, *Carl Schmitt und die Juden: Eine deutsche Rechtslehre* (Frankfurt, 2000). For a critique of Gross, see Joseph W. Bendersky, "Carl Schmitt and the 'Jewish Question': New Evidence, Old Contradictions," German Studies Association Conference (October 2002), and "Carl Schmitt's Legal Theory and the Jewish Question," Seminar on the History of Legal and Political Thought, Columbia University, (March 1999).

44. The Nazi Party Program of 1920 stated: "Only members of the nation may be citizens of the State. Only those of German blood, whatever their creed, may be members of the nation. Accordingly, no Jew may be a member of the nation. [And] noncitizens may live in Germany only as guests and must be subject to laws for aliens." J. Noakes, and G. Pridham, eds., *Nazism, 1919–1945: A History in Documents and Eyewitness Accounts* (New York, 1983), 1: 14.

45. Here, too, a similar ambiguity in meaning existed in Schmitt's chosen term *Eigenart*, because Nazi usage implied a particular "racial character." See Carl Schmitt, "Nationalsozialistisches Rechtsdenken," *Deutsches Recht: Zentral-Organ des Bundes Nationalsozialistischer Deutscher Juristen* 4, nr. 10 (May 25, 1934): 226.

46. Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, trans. J. Harvey Lomax (Chicago, 1995), which contains Strauss's article on Schmitt's *Concept of the Political* and the Strauss letters from which these quotes are cited.

47. See this volume, pp. 57, 86–89.

48. Carl Schmitt, "Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung* 40, Heft 19 (October 1, 1935): 1133–1135; "Die nationalsozialistische Gesetzgebung und der Vorbehalt des 'ordre public' im Internationalen Privatrecht," *Zeitschrift der Akademie für Deutsches Recht* 3, Heft 4 (February 20, 1936): 204–205; a shorter version of the latter had been delivered as a paper before the International Law Association in Berlin on November 24, 1935.

49. Rüthers, *Entartetes Recht*, 54, 66, 73; Neumann, *Behemoth*, 453–458; Otto Kirchheimer, "Criminal Law in National Socialist Germany," *Studies in Philosophy and Social Science* 8 (1939/40): 445.

50. The limited influence of Schmitt's concrete-order concept on Nazi legal theory or practice is also suggested indirectly by Peter Caldwell. While analyzing Schmitt's *Staat, Bewegung, Volk* and controversial writings on the *Rechtsstaat* in relationship to legal developments in the Third Reich, Caldwell completely ignores Schmitt's ideas on concrete orders during these years. See "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933–1937," *Cardozo Law Review* 16 (1994): 399–427.

51. Ernst Rudolf Huber to Carl Schmitt, May 30, 1939, Carl Schmitt Nachlass, RW 265-6269, Hauptstaatsarchiv, Düsseldorf.

52. Otto Koellreutter, *Der Deutsche Führerstaat* (Tübingen, 1934), 16; *Volk und Staat in der Weltanschauung des Nationalsozialismus* (Berlin, 1935), 6–19; *Deutsches Verfassungsrecht: Ein Grundriss* (Berlin, 1935), 3–4, 26. Bendersky, *Carl Schmitt*, 220–223. For a very detailed coverage of this same subject, see Koenen, *Der Fall Carl Schmitt*, 509–650.

53. Paul Müller (Waldemar Gurian), "Entscheidung und Ordnung: Zu den Schriften von Carl Schmitt," *Schweizerische Rundschau* 34 (1934/1935): 566–576; Heinz Hürten, ed., *Deutsche Briefe: Ein Blatt der katholischen Emigration* (Mainz, 1969).

54. Carl Schmitt, "Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung* 40, Heft 19 (October 1, 1935): 1133–1135; "*Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist: Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936*," *Deutsche Juristen-Zeitung* 41, Heft 20 (October 15, 1936): 1193–1199.

55. The best primary source for the investigations of Schmitt are the extensive files collected on him by the SS contained in *Sicherheitsdienst des RFSS SD Hauptamt* (1936), PA 651C, Schmitt, whose originals have been relocated from London to the Wiener Library, Tel Aviv. On the Sicherheitsdienst campaign against Schmitt and on his life and work in the Third Reich thereafter, see Bendersky, *Carl Schmitt*, 230–264.

56. "Der Staatsrechtslehrer Prof. Dr. Carl Schmitt," *Mitteilungen Zur Weltanschaulichen Lage* 3 no. 1 (January 8, 1937), *Sicherheitsdienst*, 272–275.

57. Frederick E. Dessauer, "The Constitutional Decision: A German Theory of Constitutional Law and Politics," *ETHICS: An International Journal of Social, Political, and Legal Philosophy* 57, no. 1 (October 1946): 11–37.

58. Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Cologne, 1950), 175, 216–217; *Verfassungsrechtliche Aufsätze*, 172–173.

59. Rüthers, *Entartetes Recht*, 70–76. For a useful, though brief, recent attempt to interpret concrete orders and institutional thinking in Schmitt's work, see G. L. Ulmen, *Politischer Mehrwert: Eine Studie über Max Weber und Carl Schmitt* (Weinheim, 1991), 430–437.

60. Dessauer, "Constitutional Decision," 18.

On the Three Types of Juristic Thought

I ~ Distinctions among Juristic Ways of Thinking

Every jurist who consciously or unconsciously bases his work on the concept of *Recht*, conceives of this *Recht* either as a rule or as a decision, or as a concrete order and formation (*Gestaltung*).[1] It is in this way that we determine the three kinds of jurisprudential thought that will be distinguished in this work.

Every jurisprudential thought works with rules, as well as with decisions, and with orders and formations. But only one of these can be the ultimate jurisprudentially formed notion from which all the others are always juristically derived: either norm (in the sense of rule and statute), or decision, or concrete order. Even in every natural or rational law—both of which are nothing more than jurisprudential thought further developed to its logical conclusion—one will find the ultimate notion of *Recht* as either norm or decision or order. This is what determines the various kinds of natural or rational law. The Aristotelian-Thomistic natural law of the Middle Ages, for example, is jurisprudentially order thinking; the rational law of the seventeenth and eighteenth centuries, in contrast, is part abstract normativism, part decisionism. The three kinds of thinking—rule and statutes, decision, and concrete order and formation—are distinguished according to the various ranks each confers on the three specific concepts in juristic thought and according to the order of succession in which one is deduced from the other or traced back to the other.

When the types and ways of thinking are advanced for a certain field of knowledge, other distinctions are usually discovered linking or intersecting several, mostly broader and general, though often narrower, adjacent fields of knowledge. Philosophical or characterological classifications also function in jurisprudence. Moreover, among jurists one could establish, for example, the difference between Platonists and Aristotelians, Ontologists, Idealists, Realists, Nominalists, and among discursive and intuitive intellectual positions. Likewise, the general differences among human dispositions (habitus) are as observable within jurisprudence as within any field of knowledge. Here there are also phlegmatic and sanguine types, more dynamic and more static-oriented natures, voluntarists and intellectualists, and so on. Legal-historical states of maturation and ages are also identifiable; thus, for example, Savigny[2] differentiated between ages of childhood, youth, manhood, and old age in order to explain the need for codification as a sign of an ending age of youth and why the still-youthful German people should reject codification of a civil code. It would be a further question in itself whether one could associate jurisprudential thinking on the whole, or in a particular way in certain areas and specializations, with specific modes of thought or kinds of men. Whether, for example, as I suspect, genuine juristic thought, at least in public law, is conceptually realistic, while a consistent nominalism endangers or destroys good jurisprudence and at best could have a certain latitude in civil traffic law.

The theme of this treatise, however, involves another problem. Namely, that the various theoretical, practical, and intellectually prominent kinds of jurisprudential thought must here be identified and differentiated not from outside, but rather from the intrinsic nature of the jurisprudential work. That is the way of concrete observation, which perhaps will yield results sooner than general methodological or epistemological inquiries about pure logical possibilities or pure formal terms of a jurisprudence.

In so far as such general inquiries advance overall toward a concrete jurisprudential object and do not remain completely empty and superfluous, they could for the most part be explained only according to the differences among the three types of jurisprudential thought. Formalistic absolutes and supposedly pure categories in jurisprudence are based merely on the unqualified self-assertion of a specific type of jurisprudential thought, which one only needs to identify as such in order to detect and correctly classify the logic of its methodological train of thought.

It is of great import which kind of jurisprudential thought prevails in a specific age and among a specific people. Various peoples and races are associated with various types of thought, and an intellectual, and therefore political, domination over a people can be linked with the predominance of a specific type of thought. There are peoples that, without territory, without a state, and without a church, exist only in "law." To them, normativist thought is the only reasonable legal thought, and every other type of thought appears inconceivable, mystical, fantastic, or ridiculous. The Germanic thinking of the Middle Ages, in contrast, was through-and-through concrete-order thinking; however, the reception of Roman law in Germany since the fifteenth century had displaced this kind of thought among German jurists and advanced an abstract normativism.[3] In the nineteenth century, a second, no less consequential reception, that of a liberal constitutional normativism, had diverted German constitutional thought from the concrete reality of intrinsic German problems and twisted it into the normative thinking of the *Rechtsstaat*.[4]

It is inherent in the nature of the thing, that the reception of foreign legal systems have such consequences. Every form of political life stands in direct, mutual relationship with the specific mode of thought and argumentation of legal life. The sense of justice, legal practice, and legal theory of a feudal community, for example, differs from the societal legal thinking of a bourgeois legal system of exchange in more than methods

and the content of the individual juristic line of argument. For a jurisprudential distinction among the various kinds of juristic thought, it is of far greater and deeper significance that the distinction expresses itself in the presumed and underlying notions of an entire order. One can detect such distinctions in its notions of what is a normal situation, who is a normal person, and what in legal life and legal thought are presumed to be typical concrete examples of the life to be justly judged. Without persistent, unavoidable, and indispensable concrete suppositions there is neither jurisprudential theory nor jurisprudential practice. These legal suppositions, however, develop directly out of the concrete assumptions of a presumed normal condition and of a presumed normal type of man. They differ, therefore, according to eras and nations as well as to the kinds of jurisprudential thought.

1 ~ Rule and Statute Thinking (Normativism) and Concrete-Order Thinking

I proceed from the fact that it is a matter of importance for differentiating the kinds of jurisprudential thought whether *Recht* is conceived as rule, decision, or order. It is almost self-evident that each of the specific three types of juristic thought equates the notion specific to its type—either norm, decision, or concrete order—with the concept of *Recht* and denies other types the claim of a "strictly legal" mode of thought. We would do well, therefore, not to proceed from antitheses such as *Recht* and decision, or *Recht* and statute, or *Recht* and order, because within such antitheses hides a whole world of previously decided positions. For the same reason, it would also be more prudent not to speak immediately of legal norms, legal decisions, or legal orders, because not the antithesis of *Recht* and norm, decision or order stands in question, but rather the difference between normative, decisionist, and order thinking do, and each of these three concepts claims *Recht* for itself. Each of these maintains that it constitutes the true sense and core of *Recht*; each attempts to become universal and to determine juristically both other concepts from its own perspective.

When we, for example, have become accustomed to speak of a "*Rechts*-order" without clarifying the relationship between *Recht* and order, then we are only dealing with one of the many ambiguous compound words that were typically common and

popular in the nineteenth century. There are vigorous conceptual combinations which combine two real, equally substantive entities, like North Germany, Latin America, and so on. Thus, a word combination like "National Socialism" is necessary, because it puts an end to the tearing apart and antagonistic playing off of nationalism against the socialistic and in turn socialism against the national. There are, however, also superficial word combinations through which, instead of a comprehensive unity, is produced only a generalizing give and take or an amateurish "not only, but also." The compound word and concept "*Rechts*-order" no longer belongs today among suitable word associations, because it can be used to conceal the distinction that persists between "rule and order thinking." Namely, if the word *Recht* in "*Rechts*-order" is thought of as abstract norm, rule, or statute—and every normativist-thinking jurist conceives of it naturally in this sense—then from this normativist notion of *Recht* every order is transformed into a mere aggregate or a mere sum of rules and statutes. Then there are the well-known textbook definitions which, under the predominance of normativist thought, reduce every concrete order to rules of law and define all *Recht* and every order as the "epitome of legal rules" or the like. The compound word "*Rechts*-order" would also permit logically and linguistically the possibility of conceiving *Recht* from the perspective of concrete order rather than of legal-rules. Then an independent concept of "order" determines the concept of *Recht* and thereby overcomes the normativist seizure of the concept of *Recht* and the transformation of *Rechts*-order into pure legal-rules.

For concrete-order thinking, "order" is also juristically not primarily "rule" or a summation of rules, but conversely, rule is only a component and a medium of order. Norm or rule thinking is accordingly a more limited and indeed a more derivative part of the whole and complete jurisprudential purpose and application. The norm or rule does not create the order; on the contrary, only on the basis and in the framework of a given order

does it have a certain regulating function with a relatively small degree of validity, independent of the facts of the case. According to pure normativist method, it is, on the other hand, characteristic that it isolates and absolutizes the norm or rule (in contrast to decision or concrete order). Every rule, every legal norming, regulates many cases. It elevates itself above the individual case and above the concrete situation and thus has, as "norm," a certain superiority and eminence above the mere reality and factual nature of the concrete individual case, the changing situation, and the changing will of men.

The argument that endows the normativist with his superiority and makes him into an eternal type in legal history is founded upon this eminence. Normativist thinking can appeal to being impersonal and objective, whereas a decision is always personal and concrete orders are suprapersonal. The normativist, thus, claims impersonal, objective justice against the personal choices of the decisionist and the feudal, *ständischen*, or other pluralisms of the orders. In all ages, it has been demanded that law and not men should rule. Thus, the normativist generally expresses one of the most beautiful and oldest coinages of human legal thought, the saying of Pindar from *Nomos basileus*, from "Nomos as King." Normativistically: Only law, not the necessities of the momentary, continually changing situation or even the choices of men, should be allowed to "rule" or "command." In countless historical situations and many variations, this saying from *Nomos basileus*, of law as king, of the *Lex* as the only *Rex*, has proven quite efficacious. Always in a renewed form, it has been repeated that only law and not men should be allowed to govern. In the influential two-thousand-year stoic tradition it had further effectiveness through the definition of Chrysipp,[5] that law is king, overseer, ruler, and master over morality and immorality, right and wrong. Likewise, the often-repeated antithesis of *ratio* and *voluntas*, *veritas* and *auctoritas*, supports the normativist demand for the rule of law as opposed to the rule of men. The fathers of the

American Constitution of 1787 stood firmly in this tradition when they took the trouble to ensure that the Constitution and public life of the United States would have a "*government of law, not of men.*" Every representative of the "*Rechtsstaat*" speaks this language and turns the *Rechtsstaat* into a *Gesetzestaat* (lawgiving state).[6]

But *Nomos*, like "law," does not mean statute, rule, or norm, but rather *Recht*, which is norm, as well as decision and, above all, order. Concepts like king, master, overseer, or governor, as well as judge and court, shift us immediately into concrete institutional orders that are no longer mere rules.[7] *Recht* as master, the *Nomos basileus*, cannot be merely any arbitrary positive norm, rule, or legal stipulation; *Nomos*, which a legitimate king is supposed to embody, must have in itself certain of the highest, unalterable, but also concrete qualities of an order. One would not say that a mere method of operation or a schedule is "king." If pure normativist thinking wants to remain internally consistent with itself, it must always base itself on norms and the validity of norms, never on concrete power and office. For the pure normativist, who continually refers back to norm as the juristic foundation of his thought, king, leader, judge, and state become purely normative functions. The higher rank in the hierarchy of these authorities is merely something that emanates from the higher norm, until finally the highest or utmost norm, the law of laws, "the norm of norms," in the purest and most intensive manner becomes nothing but norm or statute.[8] *In concreto* nothing other is achieved except that norm or statute is played off against king or leader in a political-polemical manner; through this "rule of law (*Gesetz*)," law destroys the concrete kingly or leadership order (*Führerordnung*); the master of *Lex* subdues *Rex*.

That is also, in most cases, the concrete political objective of this kind of normativist playing off of *Lex* against *Rex*.[9] One can speak of a true *Nomos* as true king only if *Nomos* means precisely the concept of *Recht* encompassing a concrete order and

Gemeinschaft. Just as in the word and concept combination "*Rechts*-order" both distinctive concepts mutually determine *Recht* and order, so too is *Nomos* in the juxtaposition "*Nomos*-king" already thought of as a concrete order of life and community in so far as the word "king" is supposed to have a meaning here at all. Likewise, "king" is a legalistic concept of order, which must be brought into conformity (*gleichgeartet*) with *Nomos*, if the notion of "*Nomos*-king" is supposed to be more than a superficial word combination and denote a genuine classification. Just as *Nomos* is "king," so is "king" *Nomos*, and we thereby find ourselves already again in concrete decisions and institutions instead of abstract norms and general rules. Even if one endeavors to designate a judge as a pure organ of the pure norm, who is only dependent upon the norm and "only subject to the law," and in this manner permit only the norm to govern, one still proceeds along orders and a hierarchical sequence of authorities and subjects oneself not to a pure norm but to a concrete order.

For a law cannot apply, administer, or enforce itself. It can neither interpret, nor define, nor sanction itself; it cannot—without ceasing to be a norm—even designate or appoint the concrete men who are supposed to interpret and administer it. Even the independent judge, subject only to the law, is not a normativistic but rather an order concept, indicating a competent authority and member of an order system of officials and authorities. That this very concrete person is the duly appointed judge, results not from rules and norms, but from a concrete judicial organization and concrete personal appointments and nominations. Thus, it remains forever correct, what Hölderlin[10] said in a note to his translation of the aforementioned passage from Pindar's *Nomos basileus*:[11] "Nomos, the law, is here discipline (*Zucht*), in so far as it is the form within which man encounters himself and God. It is the church and the law of the land and inherited rules that, more firmly than art, embody the living relations within which a people encounters others and itself in time."

Every jurisprudential consideration of compound words such as "*Rechts*-order," "statute-rule," "norms-value," allows two different jurisprudential types of thought to come to light: the abstract rules or norm type and concrete-order type. For the jurist of the first type, who finds law in predetermined, general rules and statutes, which are independent of the concrete state of affairs, every manifestation of legal life—every command, every measure, every contract, every decision—turns into a norm. Every concrete order and community disintegrates into a series of effective norms, whose "unity" or "system" is, in turn, only normative. Order for him essentially consists of the fact that a concrete situation corresponds to general norms by which it is measured. This "correspondence" is certainly a difficult and often-debated logical problem, because normative thought, the more it becomes purely normativistic, leads to an increasingly sharper separation of norm and reality, ought and is, rule and concrete state-of-affairs. All valid norms, so long as they are valid, are naturally always "in order"; the "disorder" of the concrete situation, in contrast, does not interest the normativist who is only interested in the norm. Viewed in this way, the concrete state-of-affairs can never in a normativist sense, be disorder as opposed to order.

Normatively, the set legal norm is confirmed by sentencing the murderer to death through application of the valid penal statute; the crime, however, is not disorder, but rather mere "evidence." As such, according to juristic-normativist logic, it is in the very same manner "evidence" as when in tax law a tax claim of the state, or in civil law a private legal claim, is resolved through submission of legal evidence. The punishment is an "infringement" on the freedom of the criminal, just as the tax is an infringement on property and military service even on the right to one's own life. All of these "infringements" are indiscriminately either lawful or unlawful. Normatively, nothing else can be asserted about them. Every law is reduced to the norm, which is separated from the circumstances; the rest is "mere

fact" and the opportunity for factual "confirmation of the law." The crime, laying the foundation for the charges brought by the state, which are normativistically reduced to the application of a norm in accordance with the factual presuppositions, is no more order or disorder than is the engagement of a daughter, which lays the foundation for a claim to a dowry. The criminal does not break the peace or order; he does not even break the general norm as rule; "juristically considered," he actually breaks nothing at all. Only the concrete peace or a concrete order can be broken; only with this in mind can the concept of crime be salvaged. The abstract norm and rule, in contrast, continue to operate unchanged, as is well known, despite the "crime": it hovers above every concrete situation and every concrete action; it is not annulled through a so-called violation of a norm or unlawful behavior. Normativity and facticity are "completely different planes": the ought lies outside of the is and, according to normativist thought, retains its own inviolable sphere, while in concrete reality, all distinctions between right and wrong, order and disorder, normatively seen, are transformed into the material basis for the application of norms. The matter-of-factness and objectivity of pure normativism leads here to an order-destroying and order-dissolving juristic absurdity.

It is, of course, possible to imagine the calculable functioning of human traffic relationships as a mere function of predetermined, calculable, general rules. The smooth running, standardized, and orderly process of such traffic then appears as "order." There is an area and a sphere of human life in which such a fixed-functionalistic order concept is meaningful. In the framework of scheduled railroad traffic, for example, one can say that here not the personal choices of men, but the impersonal matter-of-factness of the timetable "rules," and that this scheduled regularity is "order." The well-regulated traffic on the highways of a modern metropolis offers the best picture of this kind of "order." Here, too, the last vestiges of human

rule and choice, as represented by the traffic policeman, appear to be replaced by precisely functioning, automatic traffic lights. A sphere of life whose interest is focused solely on the calculability of a sure regulation, such as an individualistic, bourgeois, commercial society, could perhaps still be linked to such an order concept.

There are, however, other spheres of human existence for which the transference of this kind of functional regularity would destroy the specific legal nature of the concrete order. These are all areas of life which have not been formed like technical traffic regulations but have been formed institutionally. They have their concepts of what, in itself, is normal, the normal type and the normal situation, and their concept of normality does not expend itself, as in a technologized commercial society, by being the calculable function of a standardized regulation.[12] They have one particular juristic substance, which no doubt recognizes general rules and regularities, but only as the emanation of this substance, as something deriving only from its concrete particular, inner order, which is not the sum of those regulations and functions. The cohabitation of spouses in a marriage, family members in a family, kin in a clan, peers in a *Stand*, officials in a state, clergy in a church, comrades in a work camp, and soldiers in an army can be reduced neither to the functionalism of predetermined laws nor to contractual regulations.

The various customs, regularities, and calculations within such orders cannot and should not seize and consume the essence of this order, but only serve it. The concrete inner order, discipline, and honor of every institution resists, so long as the institution endures, every attempt at complete standardization and regulation. It places the dilemma before every legislator and anyone who applies the law, either to accept and apply the given concrete legal concepts of the institution or to destroy the institution. Where there is, for example, still a family, the legislator as well as the jurist who applies the law, finds himself

compelled again and again to accept the concrete-order notions of the concrete institution of the "family," instead of the abstract arrangement of a general concept. When they speak of the "good head of a family" of the *bonus pater familias*, the judge and legislator thereby subject themselves to the traditional order of the concrete pattern "family." Such notions and concepts are, despite all normativistic dissolutions of the past century and despite the great number of codified legal rules of family law and other areas of law, still today numerous and typical of a substantive institutional order in contrast to pure normativistic regulation. Every *ständische* law as such presupposes only those recognizable concrete typical figures growing out of the order of the concrete "conditions," for example, brave soldiers, duty-conscious bureaucrats, respectable comrades, and so on. These kinds of figures provoke in many ways the criticism and scorn of normativist-thinking jurists. Karl Binding prided himself on having wrung the neck of "ghosts" like the *bonus pater familias*.[13] A still-greater narrowness of this renunciation of every concrete form shows itself in the criticisms which Professor J. Bonnecase had recently launched against Hauriou's theory of institutions, which is based completely on order thinking; everything is simply dismissed by identifying the concept of institution as "mysticism."[14]

Today, on the other hand, many jurists perceive the disintegration of such concrete-order figures into a sum or into a system of norms as unreal and ghostlike. We will understand a jurisprudentially important question better and solve a juristic task more correctly when we elaborate a concrete form, such as "defender of the constitution," which normatively cannot exist, because according to it all authorized "organs" are equally "defenders of the legal order."[15] The same is true of the "*Führer* of the movement," which normativist thinking must make into a duly authorized "state organ" in order to incorporate him into the constitutional system of legality, just as in the nineteenth century it made the declassed monarch into a "state organ."[16]

We encounter similar difficulties when we pose the problem of incongruities (incompatibilities), that is, pose the question regarding which functions and purposes are compatible or incompatible with a specific concrete figure in public life, a question that can be posed only in concrete orders, not merely normativistically. For normativistically, it is handled not in terms of concrete-order figures, but merely in terms of abstract "attribution points," by which naturally everything is compatible with everything else and "intrinsic" incompatibilities could never make any sense.[17] We know that the norm presupposes a normal situation and a normal type. Every order, including the "legal order," is bound to concrete concepts of what is normal, which are not derived from general norms, but rather such norms are generated by their specific order and for their specific order.

A legal regulation presupposes concepts of what is normal, which develop so little from the legal regulation that the norming itself becomes so incomprehensible without them that one can no longer speak of a "norm." A general rule should certainly be independent from the concrete individual case and elevate itself above the individual case, because it must regulate many cases and not only one individual case; but it elevates itself over the concrete situation only to a very limited extent, only in a completely defined sphere, and only to a certain modest level. If it exceeds this limit, it no longer affects or concerns the case which it is supposed to regulate. It becomes senseless and unconnected. The rule follows the changing situation for which it is determined. Even if a norm is as inviolable as one wants to make it, it controls a situation only so far as the situation has not become completely abnormal and so long as the normal presupposed concrete type has not disappeared. The normalcy of the concrete situation regulated by the norm and the concrete type presupposed by it are therefore not merely an external, jurisprudentially disregarded presupposition of the norm, but an inherent, characteristic juristic feature of the

norm's effectiveness and a normative determination of the norm itself. A pure, situationless, and typeless norm would be a juristic absurdity.

In his book *L'ordinamento giuridico,* Santi Romano had justifiably stated it is inaccurate to speak of Italian law, French law and so on and thereby think only of a sum of rules, while in truth the complex and heterogeneous organization of the Italian or French state as a concrete order determines this law. There are numerous authorities and combinations of state authority or state power that produce, modify, apply, and guarantee the juristic norms, but do not identify themselves with these norms. Only that is Italian or French law. "The legal order (*l'ordinamento giuridico*) is a uniform essence, an entity that moves to some extent according to rules, but most of all itself moves the rules like figures on a gameboard; the rules represent, therefore, mostly the object or the instrument of the legal order and not so much an element of its structure."[18] He added correctly that a change in the norm is more the consequence than the source of a change in the order.

2 ~ Decisionist Thinking (Decisionism)

The distinction developed here between norm and order thinking only became quite prominent and well known in recent decades. Among older authors one could hardly find an antithesis like the one in the previously cited position of Santi Romano. Earlier antitheses did not concern the opposition of norm and order, but mostly that of norm and decision, or norm and command. These oppositions overlapped with other opposing pairs such as *ratio* and *voluntas*, objectivity and subjectivity, impersonal norm and personal will. They had been previously brought to light because they involved old theological and metaphysical problems, especially the question of whether God commands something because it is good or whether something is good because God commands it. Indeed, Heraclitus told us that to follow the will of an individual man is likewise a *Nomos*.

One can find the ultimate juristic foundation of all legal validity and values in an act of will, in a decision, which, as decision, actually creates *Recht* initially and whose "force of law" cannot be derived from the force of law of decision-rules. For a decision that does not correspond to the rules also creates *Recht*. These norm-contradicting decisions, having the force of law, belong to every *Rechts*-order. In contrast to this, a logically consistent normativism must lead to the absurdity that the appropriate normative decision derives its force of law from the

norm, whereas the norm-contradicting decision derives its force only out of itself, out of its norm-contradiction!

For jurists of the decisionist type, it is not the command as command, but the authority or sovereignty of an ultimate decision with which the command is given that is the source of all *Recht*, that is, all ensuing norms and orders. The decisionist type is not less "eternal" than the normativist. He has, however, in his purity only lately become prominent. For before the disintegration of the ancient and Christian notions of the world order through modern natural science, order notions as a prerequisite of decision were always an integral part of the chain of reasoning. In this way, the pure nothing-but-decision was already restricted by and incorporated into order thinking; it was the emanation of a presupposed order. When the jurist and theologian Tertullian[19] states: "We are obligated to do something not because it is good, but because God commands it" (*neque enim quia bonum est, idcirco auscultare debemus, sed quia deus praecipit*), it already sounds like juristic decisionism. But because of the inherent, presupposed, Christian concept of God, it still lacks the conscious notion of complete disorder and chaos that is transformed into law and order not by the hand of a norm but rather only through pure decision. The ever-impenetrable decree of a personal God is, so long as one believes in God, always already "in order" and not pure decision. The Roman Catholic dogma of the infallibility of a Papal decision likewise contains strong juristic-decisionist elements; but the infallible decision of the Pope does not establish the order and institution of the church but presupposes them: the Pope is, as head of the church, only infallible in the power of his office; the Pope is not vice versa infallible.

Also in the Calvinist teaching of the dogma of "supralapsarian Predestination," according to which God had already decided conclusively before the Fall of Man about salvation and damnation, as well as grace and lack of grace for each individual human soul, one could find a decisionist stance against

every regulatory restriction, measurement, and calculation of the Divine decision. At the same time, however, this teaching reestablishes a genuine *Recht* and order concept, namely that of pure grace or lack of grace, which had been debased by juristic or moral normativization. It returns this concept of grace, which statute thinking continually attempts to normativize and relativize, back to its rightful place of deserved incalculability and immeasurability; it takes it out of a humanized normativistic order and places it back where it belongs in an exalted Divine order above human normativization. Not only in Calvin's "absolutist" concept of God (God is *lege solutus, ipse sibi lex, summa majestas*),[20] but also in his teaching of predestination, theological notions make their appearance whose inherent decisionism had also exercised an influence on sixteenth-century notions of state sovereignty, particularly those of Bodin.[21] But even Bodin's theory of sovereignty remains encompassed within traditional order thinking, it retains the family, *Stand*, and other legitimate orders and institutions, and the sovereign is a legitimate authority, namely the legitimate king.[22]

The classic case of decisionist thinking first appears in the seventeenth century with Hobbes.[23] All *Recht*, all norms and statutes, all interpretations of laws, and all orders are for him essentially decisions of the sovereign, and the sovereign is not a legitimate monarch or established authority, but merely the one who decides in a sovereign manner. *Recht* is statute, and statute is the deciding command in the conflict over *Recht*: *Auctoritas, non veritas facit legem.*[24] In this phrase, *auctoritas* does not signify some prestately order of authority; the otherwise (e.g., in Bodin) still-existing distinction at that time between *auctoritas* and *potestas*[25] also perished through the sovereign decision. It is *summa auctoritas* and *summa potestas* in one. Whoever establishes peace, security, and order is sovereign and has all authority. As genuine and pure decision, this establishment of order can neither be derived from contents of a preceding norm nor from a previously existing order. Otherwise, it would be conceived

either normativistically as pure self-application of the valid norm, or in concrete-order thinking, as the emanation of an already preexisting order—reestablishment not establishment of the order. The sovereign decision is, therefore, juristically explained neither from a norm nor from a concrete order, nor incorporated into the sphere of a concrete order, because for a decisionist it is, on the contrary, the decision which first establishes the norm as well as the order. The sovereign decision is the absolute beginning, and the beginning (also in the sense of *Arche*) is nothing but sovereign decision.

The sovereign decision springs from the normative nothing and a concrete disorder. The state-of-nature is for Hobbes a condition of strife, the deepest desperate disorder and insecurity, a ruleless and orderless struggle of all against all, the *bellum omnium contra omnes* of the *homo homini lupus*.[26] The transition from this anarchistic condition of total disorder and insecurity to the stately condition of peace, security, and order of a *societas civilis* is only brought about by a sovereign will, whose command and order is law. With Hobbes, the logical structure of decisionism is most clear, because pure decisionism presupposes a disorder that can only be brought into order by actually making a decision (*not* by how a decision is to be made). The deciding sovereign surely does not have jurisdiction for the decision on the basis of an already-established order. First of all, it is the decision that replaces the condition of disorder and insecurity of the state-of-nature with the order and security of the stately condition that makes him the sovereign and makes everything else possible, including law and order. For Hobbes, the foremost representative of the decisionist type, the sovereign decision creates the state dictatorship of law and order in and over the anarchistic insecurity of a pre- and substately natural existence.

3 ~ Nineteenth-Century Juristic Positivism as a Combination of Decisionist and Statute Thinking (Decisionism and Normativism)

The decisionist type is therefore particularly widespread among jurists, because legal training and a jurisprudence directly serving legal practice have the tendency to look at all legal questions only from the viewpoint of cases of conflict and to participate merely to pave the way for a court decision on the conflict. One specific method of examination preparation and juristic examination reduces this to crudely ascertaining answers and a quick decision on the case and to deriving its normativist "foundation" from the text of a written norm. In such a manner, juristic thinking orients itself exclusively toward cases of collision or conflict. It is governed by the notion that a conflict or a clash of interest, thus a concrete disorder, is first of all overcome and brought into order through a decision. The norms and rules, with which the jurisprudential foundation of the decision has to do, thereby become mere viewpoints for dispute resolutions, jurisprudential material evidence for the basis of judicial decisions. There is, then, really no longer any systematic jurisprudence; every jurisprudential argument is nothing but a potential basis for a decision which is waiting for a case of dispute.

The propensity toward this kind of jurisprudence occurs particularly when a self-contained codification becomes authoritative as "positive" norm and "positive law" for professional civil

services, judges, and the lawyers who adapt themselves to the thinking of such a judiciary. This positivism identifies statutory governing with *Recht*; it recognizes—also when it makes concession to the possibility of prescriptive law—instead of *Recht*, only the normative fixed legality. In the two great states in which juristic positivism achieved domination in the nineteenth century, in France as well as in Germany, it became apparent that, as the mode of operation of the state legality of a professional civil service judiciary, it was only conceivable under the effective influence of written codifications and on the basis of a stable, domestic, political order and security. In France, the positivistic nondistinction between *Recht* and law, the identity of *Droit* and *Loi*, found its jurisprudential expression in the *Ecole de l'exégèse*. For half a century—approximately from 1830 to 1880—it had dominated uncontested and, despite methodological and philosophical criticism, is still today in no way eliminated in practice.[27] Also in Germany, this positivism of the legal rule has until now been known to pass itself off as *the* juristic method. Neither the teaching of prescriptive law nor the decades-long methodological discussions over the relationship of law and judgment, law and judge, Free-Law Movement, and *Interessenjurisprudenz*[28] advanced to the decisive antitheses of the differences between statute-, decision-, and order thinking. They sought only the loosening up and better adaptation of legal thought in a situation that was changing and becoming unsteady.

The jurisprudential positivism of the nineteenth century belongs in the great intellectual-historical context of its age. It, therefore, not only has some contiguity and kinship with the philosophical positivism founded by Auguste Comte, but also with the positivism of the natural sciences. But above all it is comprehensible in the peculiarities of the legal situation of this century. For the jurisprudence of the nineteenth century, "positivism" signified first of all something polemical: the rejection of everything "extra-legal," all *Recht* not created through human statutes, whether it appears as Divine, natural, or rational law.

Recht thinking becomes legality thinking. The jurisprudential foundation of this legalitarian positivism has passed quickly through three phases: one had first of all to adhere to the will of the lawgiver; then, in order not to fall into subjective and psychological analyses, appear to have spoken objectively the will of the law; finally, one had to declare only the law itself, as a sufficient norm, to be authoritative. Therein lain an unconditional subjugation to the will or the contents of a specific norm, but at the same time also a limitation on this subjugation: one subjugates oneself only to the norm and its clearly identifiable contents. That gives to positivistic legality thinking the ostensible value of greatest objectivity, firmness, inviolability, security, and calculability, in short, "positivity." In a stable situation, this mode of thinking is plausible, and it appears possible in reality to disregard all "metajuristic" viewpoints. Positivism is then held to be a "pure juristic" method, whose purity is based on the fact that all metaphysical as well as all "metajuristic" considerations are excluded.

"Metajuristically," however, all ideological, moral, economic, political, or any other kind of considerations, are not just pure juristic viewpoints. Neither the normal-situations or normal-types presupposed in legal regulations, nor the pursuit of the goal determined by the statutes's framers, nor the underlying principles, nor the nature of the thing, nor the meaning of a definition, but only the obvious, indisputable contents of the norm itself are, for these positivistic jurists, allowed to be authoritative. Only then does he believe he is really staying on the "secure ground" of the "positive" and "pure juristic" handling of the contents of the norm. In every other case, he fears slipping into the incalculable "subjectivity" of metajuristic considerations. Security, firmness, inviolability, and objectivity are already once again endangered. This way of thinking found its clearest and best expression in the book *Jurisprudenz und Rechtsphilosophie* (1892) by Karl Bergbohm. Here the combination of normativism and decisionism, which is the characteristic of the

positivist type, also comes out quite distinctly. *Recht* for Bergbohm contains, on the one side, "the notion of something normative, something functioning as an abstract rule intended to be followed" (p. 81); at the same time, this *Recht* is nothing but "human statute," and everyone who imagines a *Recht* "that is independent of human statute" enters into the "corruption" of natural law (p. 131). In so far as this positivism furnishes a philosophical legal foundation, it leads in the intellectual direction of the interests of an individualistic legal-certainty and appeals to the fact that it would be wrong to disappoint the *Erwartung*, the *expectation*, and the "trust" of the legal community (*Rechtsgenossen*) evoked through the statute. Therein one beholds the "righteousness of Positivity."[29]

But security, certainty, firmness, strict scientific method, functioning calculability, and all kinds of "positive" qualities and advantages were in reality generally not advantages of the legal "norm" and human statute. These were, instead, only the attributes of the normal, relatively stable situation of a political system at that time in the nineteenth century, which had its focal point in legislation and therefore in the legality system of a legislative state.[30] Not because of the norm, but because and in so far as this state system was constructed in a certain stable, secure, and firm manner, could one be so "positive." Even the simplest problem of interpretation and proof had to teach one that the firmness and security of even the most painstakingly and carefully written legal texts remain in themselves entirely questionable. Wording and literal meaning, historical development, sense of justice, and communication requirements operate confusingly in the most varied manner in establishing the "unquestionable" contents of legal texts and regarding questions of proof and qualification of the "facts" in the "pure juristic" establishment of evidence.

One can understand the indignation that struck that fanatic of positivistic legal certainty, Jeremy Bentham,[31] by the very word "interpretation"; and his basic reason is the same as that

for the above-mentioned (p. 59) indignation of Hobbes against the discretion of the interpreting jurists: "If the judge presumes and claims the power to interpret laws, then everything becomes complete incalculable discretion. With this manner of proceeding there is no security."[32] Neither the English practice of subordination to precedent cases (the practice of so-called case law), nor the interpretations of the Roman-legal jurists, the Roman lawyers, satisfy Bentham's positivistic requirement of unconditional certainty and calculability. Only when the judge has been totally turned into a function of the clear wording and contents of the statute, have we approached the ideal of "certainty" and "inviolability." Then there is indeed no longer any jurisprudential productivity and only the certainty, firmness, and inviolability of a norm-fulfilling apparatus functioning according to a schedule, for which, instead of a jurisprudential education, one applies more pragmatically the technical schooling of a good switchman.

The positivist is not autonomous and therefore not an eternal type of jurisprudential thinker. He subjects himself—decisionistically—to the decision of whichever current legislator possesses state power, because only this legislator has the actual power to bring about the decision's realization. But, at the same time, the positivist demands in addition that this decision have a firm and inviolable value as norm, that is, that the state legislator himself also be subject to the very same statute and its interpretation that had been created by him. Only this system of legality does he call a "*Rechtsstaat*," although it substitutes a legislative state for a *Recht*-state, and the interest of legal certainty for justice.[33] But through the normativism of legality, this legal system again rises above the power-decision of the state, which it has subjugated in the interest of certainty and firmness, and now places normative demands on the legislator. He therefore establishes his standpoint first on a will (of the legislator or the law), then, against this will, directly on an "objective" law. In the historical devolution of the formula one is able to identify the sequence

from the will of the legislator, through the will of the law, to the law itself. It is natural to surmise from this an intrinsically consistent development from will to norm, from decision to regulation, from decisionism to normativism. But instead of growing out of the intrinsic consistency of a specific mode of thought, this sequence has only become possible through the peculiar combination of decisionism and normativism in the form of positivism. Depending upon the situation at hand, it permits positivism to be sometimes decisionist and sometimes normativist in order to satisfy the sole authoritative positivist requirement for certainty and calculability. That positivity always lies in the interest of the real certainty, firmness, and calculability of that which is actually realizable, whether that be the decision of the legislator or whether it be the statute emanating from his decision and the legally calculable decision emanating from that statute. That "positive" value of law is distinct from other kinds of value in that it is necessarily always something real and factually realizable directly through human power.

Now a fact, a "pure fact," is naturally not a source of law. The jurisprudential question focuses on how this solely factual point—will of the law or the moment of the realized value—to which the positivist adheres, is to be comprehended juristically, whether as norm or as decision or as part of an order. The positivist will be inclined to dismiss this question as to the beginning of the positive value of the norm as in itself no longer a juristic question. But he cannot also escape the jurisprudential necessity, already at the point at which he initiates his jurisprudential activity, to include the sources of *Recht* or the foundation of value in a jurisprudential category. He will, therefore, explain every real factual moment in which the positive value begins, either normatively or decisionistically. From the normativist side, a nineteenth-century positivist, Georg Jellinek, had coined the typical expression: "normative power of the factual." Because he proceeds from the "normative motivating power of law," facts and data, which undoubtedly exercise a particularly strong

motivating power, at once also have a "normative power."[34] The formula of "normative power of the factual" has been repeated innumerable times.

Considered on the basis of legal logic alone, it is a mere word combination and only a paraphrase of the empty tautology that, given its normativistic component, positivism can obviously always only explain factual positivity as a "normative" power. A positivist with sharper logic would speak of a "decisionist" power of the factual, which naturally is at least as great as the "normative" power. On the other hand, a positivist would not like to appeal to the "positive power" of the factual, although by his submission to the positive fact of the power of enforcement he supposes nothing other. But the self-revelation that lies in the idiom of the "positive power of the factual" would also probably be jurisprudentially intolerable to a pure positivist. This indeed shows that the positivist is not an original type of jurisprudential thinker.

One could speak previously of an "ordering power" of the factual. However, concrete-order thinking does not correspond in the same degree to the positivistic authority aimed at the functioning of certainty and justice as does the combination of normativism and decisionism, which constitutes the jurisprudential nature of positivism. A pure normativism must deduce the positive norm from a norm superior to the positive; concrete-order thinking would likewise lead to a comprehensive, total unified order superior to the positive. Decisionist thinking, on the other hand, permits the positive connection to a definite factual point in time, in which from a previous absence of norm or absence of order springs forth the positive sole noteworthy positive law, which then, however, is supposed to have additional value as positive norm. Once established, it nevertheless works against the will of the one who had established it; otherwise it could not create the necessary certainty "which one has come to expect from the state." But only the decisionist component makes it possible for the positivist, instead of always leading

further into the boundless "metajuristic," to break off the question of the ultimate foundation of the prevailing norm in a definite moment and in a definite place, and to acknowledge in a historical point in time the actually existing, actually prevailing, will of a sovereign power. It does so without presenting this power as an institution or other kind of concrete order or generally to inquire about its actual justification.

The certainty, firmness, and inviolability to which the positivist appeals relating to the decisionistic component of positivism is in reality only the certainty, firmness, and inviolability of the will of whoever's sovereign decision makes the norm into the effective norm. In appealing to the will of the state legislator or state laws, to an actually existing "supreme power" as an expressed and prevailing decision of the state legislator, he is, in terms of legal history, bound to the decisionist state theory that developed in the seventeenth century and must fall with it. However, in appealing to law as norm, he binds its certainty and firmness only to the certainty and firmness of the legality of the legislative state which achieved domination in the nineteenth century. Only to the extent that behind the certainty requirement of positivism is concealed the underlying universal-human striving for protection against risk and responsibility, can one essentially state—if only in a disparaging sense—that we are dealing here with an "eternal" and ineradicable universal human type. As a jurisprudentially notable manifestation, juristic positivism is, on the contrary, completely bound to the state and societal conditions characteristic of the nineteenth century. While the normativist and decisionist are always reoccurring types of jurisprudential thought, the combination of decisionism and normativism which constitute that nineteenth-century positivism can be considered neither an original nor an eternal juristic type.

If the alleged pure juristic method of this kind of positivism rejects every impure juristic consideration as ideological, economic, sociological, moralistic, or political, and consequently

excludes all of these factual considerations, then not much remains for pure juristic argumentation. What can remain as residue, if one removes everything ideological, economic, or political from a case and its evaluation? If juristic thought is torn loose from every contextual meaning and from the presupposed normal situation, then it brings itself out of necessity into an ever sharper contrast to all contents, to everything that is ideological, moralistic, economic, or political. As a result, the distinction between juristic and ideological, juristic and economic, juristic and political, juristic and moral, and so on, becomes so sharpened that in a logically consistent dialectic only the ideological, economic, ethical, and political absurdity ultimately remains as the sole specific characteristic of an unquestionably pure, nothing-but-juristic type of thought.

Max Planck has shown how in striving for unqualified certainty the positivism of the natural sciences relied only upon sensation and consequently could no longer distinguish deceptive and illusory sensory perceptions from others, because there are no illusions in positivist physics.[35] The fate of jurisprudential positivism aimed at certainty and avoidance of subjective choice has some similarity with this trend. If the normality of the concrete situation presupposed by the positive norm but ignored by positivist jurisprudence collapses, then the use of every firm, calculable, and inviolable norm collapses. Then, the "righteousness of positivity" of which Erich Jung spoke also ceases. Without the system of coordination of a concrete order, juristic positivism is capable of distinguishing neither right and wrong, nor objectivity and subjective choice.

II ~ Classification of Juristic Ways of Thinking in the Overall Development of Legal History

There does not exist a "free-floating" (*freischwebende*) jurisprudence anymore than there exists a "free-floating" intelligentsia.[36] Legal and jurisprudential thought expresses itself only in connection to a historical, concrete, total order. It cannot also rely upon free-floating rules or free-floating decisions. Even the fictions and illusions of such "freedom" and such "floating" belong, as an accompanying symptom, to a specific condition of a disintegrated order and are only comprehensible within it. The types of thought advanced here are therefore presented not relativistically, or arbitrarily so to speak, but rather maintain their status in the overall relationship to the concrete present situation and the reality of our current legal life.

Medieval Aristotelian-Thomistic natural law is a living unified order constructed out of stages of essence and being, upper and lower orders, and classifications and exclusions. The normativistic misinterpretations through which this natural law was cast off in the previous century are dissipating today. Out of the collapse of the many medieval orders and the order thinking belonging to them, there arose since the sixteenth century the order of the state as *the one* which absorbed in itself all the numerous other orders. The decisionism of Hobbesian political and legal theory is the most logically consistent and therefore

the most consequential legal-historical jurisprudential expression of the new thinking on sovereignty. With him appears the great *Leviathan,* which devoured completely the other orders. He sets aside or relativizes the traditional feudal legal, *ständischen* and ecclesiastical communities, hierarchical stratification and inherited rights. He sets aside every right of resistance based on such prestately orders, gives the lawgiver a monopoly on *Recht,* and seeks to construct the civil order from the individual. From this perspective of order, he seeks to create from a tabula rasa an order and community, out of nothing. The "contract" that produced the state (more precisely: the "consent" of the individual) is, however, only possible through a sovereign guarantee of the order thereby established and only through the state whose power just arose from this general consent. The sovereign is omnipotent through the consent that he himself produced and made possible through the omnipotence and decision of the state. Only after the new ground was prepared through this state that produced civil peace, security, and order during the great stability of the eighteenth century could a more normativistic rational law allow absolute decisionism to recede. This normativism dissolved all natural orders into norms and individualistic contractual relationships, until finally in the nineteenth century it culminated in the positivistic rule-functionalism of a bourgeois, individualistic, commercial society.

1 ~ German Development Up to the Present

Concrete-order and communitarian (*Gemeinschaft*) thinking has never ceased in Germany. In legal practice, it was first set aside in the nineteenth century, strictly speaking in the second half of the nineteenth century, through so-called legal and legislative positivism. Until then order concepts relating to ecclesiastical and internal affairs remained in effect. The internal order that developed since the seventeenth century with the new German territorial states never actually produced a tabula rasa. The institutional certainty of the Catholic Church and that of its spiritually educated life in Catholic countries—but no less in Protestant Germany in the Lutheran sense of the "natural orders of creation"—always determined the reality of legal life in a much stronger way than did the dominating rational-law legal and political theory of the philosophers. Through the slow, but nonetheless more secure path of "theory," these positivist theorists transform all governmental and domestic orders into contractual and legal normings and by doing so destroy them as concrete orders and communities. Luther had forcefully defended, and knew how to safeguard, the natural internal orders of marriage, family, *Stand,* person, and office against theological, moral, and juristic normativizations. His phrase: "If you are a mother, then act according to the laws of motherhood which is commanded of you and which Christ did not remove but

rather confirmed,"[37] expresses most beautifully the dominance of the existing concrete order over abstract normativity. This phrase is as valid for mothers as it is for every *Stand*, kaiser, prince, judge, soldier, peasant, husband, and wife. For Luther, all *Recht* is not abstract norming, but a concrete natural order and derived from the concrete condition of a *Stand*, not from "rules."

But even in the natural-law system of someone like Samuel Pufendorf,[38] who as an individual was still a seventeenth-century orthodox Lutheran, marriage and family were no longer concrete natural orders and communities. They were only reciprocal legal relationships of individuals contractually constituted on the basis of the dominating norms of rational law.[39] The final arguments of a century of individualistic rational law were articulated by Kant when he traced marriage back to a contract of individuals mutually interested in their sexuality.[40] Nonetheless, in the reality of domestic political life, concrete orders were still not destroyed by the end of the eighteenth century. The second part of the Prussian Law Code of 1794 showed that the codifying lawgiver of the absolutist state still understood church, *Stände*, family, household community, and marriage as institutions and in no way perceived them as mere functions of legal regulations. It is noted at the very beginning (Part I, Title I, paragraph 2): "Civil society consists of several smaller associations and *Stände* bound together through nature or law or both." Domestic servants still belong to the household community (paragraphs 3, 4), churches and sects are still distinguished from one another, some are "admitted," and therefore incorporated into the total order of public life, others in contrast are only "tolerated," and therefore not perceived as a member of the public order. The liberal concept of the "religious society" is still not recognized. Only the victory of the French Revolution had achieved an individualistically constituted, total, "civil society" and, as a further consequence, also the positivistic jurisprudence of the nineteenth century.

The spirit of the German people had long resisted the liberal "Ideas of 1789" and their disintegration of order thinking.[41] Fichte had overcome the individualistic Jacobinism of the year 1792 in an intensive inner struggle with himself (and by himself).[42] Fichte's "Idealism of Freedom" is not predestined for concrete-order thinking to the same extent as Hegel's "objective idealism." But Fichte had ultimately advanced in his own thinking, from the low conception of the state (as a servant of property owners) to the highest and most German order concept, to the *Reich* as a concrete-historical political unit which can distinguish friend and enemy.[43] Other motives for intellectual resistance came from a romantic-intuitive reaction against abstract rational law, and from a traditional-conservative restoration. The historical legal school of Savigny and its teaching of prescriptive law had long and successfully combatted the spirit of positivistic codification efforts and opened up new legal-historical sources, which only gradually overcame foreign thoughts. Schelling's[44] wonderful cosmic-naturalistic philosophical theory of organism, of worldview and of myth, did not have the same direct success and not the same effect. Yet, it also belongs to the great collective achievement of the German spirit in which the German people at that time remembered their own dignity and power when faced with a foreign invasion.

All of these currents and directions in German resistance found their systematic summation, their "summa," in Hegel's legal and political philosophy. In it, concrete-order thinking once again came alive (before the collapse of following generations) with an immediate force, the likes of which could hardly have been expected any longer after the development of seventeenth- and eighteenth-century political and legal theory. "In order that feeling, will, intellect become real, they must be cultivated; *Recht* must grow into custom, into habit, the state must have a rational organization, and then these transform the will of individuals into an actual legal one." "If one wants to marry or build a house, and so on, then the result is only

important for this individual; the truly divine is the institution of agriculture itself, the state, marriage, legal arrangements." Such phrases are only particularly pointed epigrammatic examples of a total and conscious order thinking. All individualistic, contractual teaching of abstract rational law is seen through here with a sense of absolute superiority; family and marriage are again recognized as natural partnerships; Kant's construction of marriage as a mutual contract of sexually desirable individuals is called "disgraceful" (*Rechtsphilosophie*, paragraph 75). Through *Stände* with special professional honor and through "corporations," civil society is fitted into a great total order and subordinated to the state. In this way, the theoretical foundation was provided for rendering innocuous, as far as it was still possible in the reality of the nineteenth century, the claim to totality that the bourgeois contractual society extolled in that century and which had also ultimately prevailed. The state is a "form (*Gestalt*), which is the complete realization of the spirit in being (*Dasein*)"; an "individual totality," a *Reich* of objective reason and morality.

From the decaying system of the Holy Roman Empire, Hegel fled to the Prussian state. Therefore, his construction of the state retained so many elements from the concept of the *Reich* that this state is depicted in a way that would be ridiculous to say about any state in a "general theory of the state": a *Reich* of objective morality and reason, which is in a position to stand above civil society and to fit it in from above. The very fact that the state in nineteenth-century Germany was conceived as a *Reich*, shows the difference between the German concept of the state and that conceived by western-liberal rational law or positivism. This latter concept of the state is suspended between the decisionism of the dictatorial state construction of Hobbes and the normativism of later rational-law thinking, between dictatorship and the bourgeois *Rechtsstaat*. Hegel's state, in contrast, is not the civil peace, security, and order of a calculable and enforceable legal functionalism. It is neither mere sovereign decision

nor a "norm of norms," nor a changing combination of both notions of the state, alternating between the state-of-exception (*Ausnahmezustand*) and legality. It is the concrete order of orders, the institution of institutions.

As "government philosopher," Hegel died in 1831. Already in the following generation, the great representatives of the German theory of the state—Lorenz von Stein in Vienna and Rudolf Gneist in Berlin—no longer dominated intellectually. To Lorenz von Stein (1815–1890) the domination of the state over society had already become problematic; state and society were now derived from one another like stroke and counterstroke. But Stein could still hope to save the autonomy and intrinsic right of the state vis-à-vis society, the intrinsic significance of "executive power" vis-à-vis the legislature, and the government vis-à-vis the claims of popular parliamentary representation. However, his attempt has, despite the most wonderful scholarly work, remained without practical results. A book full of concrete-order thinking such as his "*Verwaltungslehre*" (first published in 1865), which particularly attempted to develop a genuine concept of government from such thinking, could no longer strongly influence constitutional thought. Rudolf Gneist (1816–1895) also stopped at the state; self-government is for him the process by which the (educated and property-owning) citizens raise themselves to the level of the state. But despite all the theoretical claims of state domination, civil society appears to him already as the undoubted victor. Yet the state and societal picture is total and concrete. The book about a *Rechtsstaat* (1872) furnishes a vivid example of this, because here the *Rechtsstaat* is not thought of as an abstraction defined only by statutes, but as a state constructed harmoniously of state and society.[15] The collective jurisprudential works of both German constitutional theorists suffer from this futile endeavor at incorporating civil society into the state. Jurisprudential reason and concrete reality, reality and reason, are still not torn asunder in a normativistic-positivistic sense. The liberal doctrine of separation

of powers, the foundation of the liberal *Rechtsstaat* and the normativistic positivism associated with it, is—by Stein much more than by Gneist—set against German order thinking. Therefore, their works are still for us today of actual interest, monuments of a genuine, if unsuccessful, creative effort, and not only a storehouse of valuable materials.

Otto von Gierke's "organic theory of the state" and his theory of the "real personality of the group" is, in contrast, no longer, a concrete theory of the state, but a general theory of association.[46] Indeed, his interest in order and community is alive and the inherited estate of German legal thought still strong and powerful. But the liberal-democratic antithesis of corporate association (*Genossenschaft*) and institution clouds the objectivity of his legal-historical insights. He constructed the Prussian monarchy of the nineteenth century, which was desperately on the intellectual defensive, as a residue of the "institutional peak" of the absolutist era and thereby unintentionally sacrificed it. Despite all the provisos in favor of the "dominating" elements of the state and the great success of the first volume of "*Genossenschaftstheorie*" (1868), this association theory sank, in the end, into the typical dissension of nineteenth-century national liberalism. It was no longer capable of becoming the creative master of the enormous materials that it brought together with a mighty hand. The criticism which Gierke directed against the surging juristic positivism of Laband in 1883 remained just as unsuccessful as that of Lorenz von Stein. Based upon his own abundant concrete political knowledge, Stein warned in the years 1885–86 about the separation of a jurisprudence of public law posing as "juristic."[47]

In the face of individual historical events and problems in constitutional law, many examples could naturally be cited to prove that jurisprudential thinking in Germany had never evolved into normativistic abstractness. Here belongs above all the attempts to construe the foundation of the North German Confederation of 1867 and other common actions of a founding

character not as contract but as a "complete act" (*Gesamtakt*) or "agreement" (*Vereinbarung*) distinct from individualistic contractual notions.[48] Most of those enmeshed in a nineteenth-century positivist-normative legal theory could not understand the actual bearing and fruitfulness of this difference between "contract" (*Vertrag*) and "agreement" and could not generally recognize in such a distinction the inherent significant onset of a movement to overcome liberal-individualistic contractual thinking. After the World War, similar unsuccessful attempts were made once again in labor law, when it came to the point of taking the wage agreements between employers and employees out of the sphere of bourgeois contract thinking in civil law and to construe the difference between an "agreement" and a contract. This attempt also could not win acceptance in the concrete general situation of the political system of that time. Still, such starts hold symptomatic significance and demonstrate the continuous force of concrete-order thinking beneath the cover of a superficial positivism.

Compared to these prominent details in legal scholarship, it is of far greater significance to what extent concrete-order thinking survived in the practice of governmental administration and particularly in that of the Prussian Army.[49] The Prussian Army and the governmental administrative organization were in themselves too firm and vigorous creations and orders to have allowed their inner intrinsic right to be degenerated by normativistic or positivistic legal thinking. In concepts like "organizational power," "official authority," "leading force," "institutional police," and similar structures of constitutional and administrative law, an indestructible order-thinking manifests itself in the public law of a state, which, after all, first made possible a governmental and administrative state organism.

Prominent examples of this kind stand out naturally in the struggle of the Prussian Army leadership against the normativistic constitutional thinking of the liberal *Rechtsstaat*. On the occasion of the regulation of military discipline and military

punishment in the years 1872 and 1873, and the Imperial decree regarding honor courts of May 2, 1874, these adversaries were bound to clash publicly with each other. Leadership and the power of command, supreme command, supreme commander-in-chief, and supreme legal authority, could not be torn apart from each other without destroying the Prussian Army. The leadership necessary in every concrete-order unit and community showed here its intrinsic connection with the concepts of discipline and honor.

For normativistic-constitutional legal thought, however, it was "juristically self-evident" that every jurisdiction, as a function "stringently bound to norm," had to be separated from leadership. A dominating kind of legal thought based on the complete antithesis of norm and command, *Lex* and *Rex* cannot at all legally grasp leadership thinking (*Führergedanken*). It demands, therefore, an oath to the constitution, to a norm, instead of to a leader (*Führer*).[50] Its doctrine of separation of powers, separates justice and administration and makes necessary an even sharper separation of military jurisdiction, disciplinary jurisdiction, and military leadership. For the Prussian king, however, every individual verdict of the honor court and every appointment of a military judge was as much a discharge of his military leadership as a general order regarding honor courts and their principles. That it would also be legally impermissible and impossible to tear military leadership, application of discipline, qualifications of officers, and disciplinary legal affairs from each other, must simply be understood in itself as the legal sentiment of a Prussian king who thinks entirely in terms of the concrete order of the Prussian Army.

Today, after concrete-order thinking has again been revived with a new communal life (*Gemeinschaftsleben*), the legal axiom that truth, discipline, and honor cannot be separated from leadership, is better understood by us than the liberal-constitutional, power-separating, normativistic way of thinking of a bygone individualism.[51] Since the political movement (*staatstragende Bewegung*)[52] swears absolute loyalty to the *Führer*, we can today do immediate justice once again to the legal nature of an oath of allegiance. A normativistic legal type of thinking, however, is capable of grasping the desertion of a deserter or the disloyalty of a traitor only as a "punishable deed," only as a matter-of-fact supposition of a pronounced punishment by the state. It cannot understand these in terms of the essential wrong and specific crime of violating an oath and treachery.

2 ~ Developments in England and France

The jurisprudence of other European nations has found other expressions and forms of self-defense against normativistic positivism. In this regard, English jurisprudence can be left out of consideration, because the English method of so-called case law, of *Fallrechts*, is not in the same manner susceptible to the one-sidedness of normativism. This lies on the nature of the thing and applies to the legal life of all countries in which case law dominates, consequently also for the United States of America. Still, in this respect, great differences persist. In the practice of case law, a rational-law and natural-law normativism is, of course, also possible. In the interpretation frequently advanced by American jurists, the decision of a precedent case is regarded as binding only in so far as an underlying norm appears in the decision by which the judge in the precedent case, as well as those in subsequent cases, is bound. Thereby the practice of case law approximates once again rule-thinking, even if it cannot so easily be transformed into the narrow legal-positivism that must occur with the great codifications of entire areas of law.

According to the English conception of case law, however, precedent is binding as an individual case. A precedent is not bound to the norm underlying the decision and also not even (as in Blackstone's construction) by the obvious manifestation of custom in the precedent case.[53] Therein perhaps could be

embodied a purer decisionism as distinct from the American inclination toward natural-law and rational-law normativism. The binding to the precedent would then be considered binding only to the decision of the previous judge. There are to be found in English legal thought particularly clear and pure examples of genuine decision of which, besides Hobbes, I would like to cite the previously mentioned legislative state positivism of J. Bentham and for the nineteenth century, above all, Austin. Yet, a decisionistic interpretation does not appear to me to fit exactly the typical peculiarity of this practice in case law. Certainly, it is not easy for the kind of jurists on the European continent to get used to the autochthonous way of thinking of the insular English legal practice. It would, however, be conceivable that later judges should be bound neither by the norm underlying the decision of a previous judgment nor by the previous judgment as pure decision, but merely to the "case" as such. Then English case law would embody an example of concrete-order thinking, which adheres exclusively to the inner *Recht* of a specific case. The precedent, including its decision, then becomes the concrete paradigm for all subsequent cases, which have their *Recht* concretely in themselves—not in a norm or a decision. If one views the second case as a case equal to the precedent case, then to this concrete equality also belongs the order which is manifest in the previous judicial decision.

The state of jurisprudence in the romance countries was, in contrast to England, characterized mostly by great codifications and the consequent manifestations of positivist doctrine and practice. Here begins likewise, almost simultaneously with the German Free-Law Movement, even though less radical, a methodological critique and awareness (Gény and Saleilles). However, a new kind of thinking also appeared. The doctrine of the institution, which Maurice Hauriou (1856–1929) had developed during the period 1896–1926, contained the first systematic attempt of a restoration of concrete-order thinking since the dominance of juristic positivism. Santi Romano's previously

mentioned very significant theory of *Ordinamento giuridico* was already influenced by this work. Hauriou, long-standing *Doyen* on the law faculty at Toulouse, was the famous antagonist of his famous positivist colleague in Bordeaux, Léon Duguit (1859–1928). One can try to introduce the opposition of these two great jurists with the pithy catchwords: metaphysics versus positivism, pluralism versus monism, *institution* versus *règle de droit*.[54] But that point itself provides the best way to recognize to what extent the antitheses of the liberal nineteenth century have today become obsolete. The juristic positivism of Duguit is thoroughly of a metaphysical kind, and the alleged mystic Hauriou is "more real," more down-to-earth and in this sense by far "more positive" than a doctrinaire of principles and pure "scientific" positivism.

Hauriou did not start with a legal theory and even less with a methodology. Through forty years of work, he had observed, annotated, commented on, and in a scholarly way extended the practice of French administrative law, particularly the decisions of the *Conseil d'Etat*. French administrative law itself has in slow increments emerged from the practice of the French *Staatsrat*; Hauriou's doctrine of institutions grew in an actual "organic" manner from the observation of such administrative practice, and its subject matter is highly appropriate. In the daily firsthand dealing with its direct object,[55] not through a normativistic-positivistic way of squeezing something out of isolated legal texts, Hauriou acquired above all a clear jurisprudential view of the *régime administratif*, for example, the living French administrative organism. He regarded this as a unit living according to its own laws and inner discipline, and distinguished it from the government as well as from civil justice and the individual administrative functions found in all states. He developed his doctrine of the "institution" from this concrete view of a concrete order.

As the great German example of administrative doctrine (Lorenz von Stein's) already shows, the concrete jurisprudential

consideration of an orderly state administration can best provide the elements of a general theory of "institutions": jurisdictional authority, hierarchy of offices, inner autonomy, internal counterbalancing of opposing forces and tendencies, inner discipline, honor, and official secrets, and with these the all-important fundamental presupposition, namely a normal stabilized situation, a *situation établie.* These become the elements of a concept of the institution, which are now applied to the most varied structures and features of a public and private legal kind and make their jurisprudential realization fruitful. I must here resist giving a detailed lecture on Hauriou's theory; its various arenas and modifications are expressions of continual productive growth and change, and, as such, also of great juristic consequence.[56] However, it suffices for the general outline shown here that the mere restoration of a concept of institution overcomes both the previous normativism as well as decisionism and with it the positivism, which is composed of both. For the institutional mode of thinking, the state itself is no longer a norm or a system of norms, nor a pure sovereign decision, but the institution of institutions, in whose order numerous other, in themselves autonomous, institutions find their protection and their order.

3 ~ The Current Condition of German Jurisprudence

For us Germans, the word "institution" has all the disadvantages and few of the advantages of a foreign word. It can be translated neither as *Einrichtung* (establishment), nor as *Anstalt* (institution), nor as "organism," although it embodies something from each of these concepts. The word *Einrichtung* is too general and only permits the factual-external organizational side to protrude. *Anstalt* has become unusable because in the nineteenth century it had acquired a political-polemical meaning as a counter-concept against *Genossenschaft,* which binds it to the situation of the domestic political struggles of the nineteenth century. Finally, the word "organism" is burdened greatly by the now rather commonplace antithesis against "mechanism." That foreign Latin word, however, like many other relationships of Latin derivation, perhaps unconsciously directs us toward a fixation and rigidity. As a result, the coinage "institutional thinking"[57] became overly identified merely as the hallmark of a conservative reaction against normativism, decisionism, and the positivism of the last century, which was composed of both. And this gave rise to misinterpretations and far-too-many cheap objections. As it happened, Hauriou's doctrine of the institution was transformed by his disciple G. Renard into neo-Thomism, where it appears as typical Roman Catholic theory.[58] It would indeed be regrettable if the forceful advance toward concrete-order

and formation thinking, which captures the jurisprudential thinking of nations today, would be impeded by such misunderstandings and constrictions.

Naturally, various nations grapple with their previous thinking in words, concepts, and forms that are in accordance with their kind (*Art*) and their historical tradition. That is one of the great insights for which we are indebted to the National Socialist movement. For this reason, I would like to propose as a designation for the third and current type of jurisprudential thinking not "institutionalist" but rather "concrete-order" and "formation thinking."[59] In this way, we escape the misunderstandings and misinterpretations that attempt to impugn to this thinking the political propensity of a mere restoration of bygone things or a conservation of superannuated establishments (*Einrichtungen*).

The extent to which the age of juristic positivism has ended is most clearly recognizable today in Germany. From all sides and in all areas of legal life, so-called general clauses surge forward in a way that wipes out every positivistic "certainty": these include indeterminate concepts of all kinds, references to extralegal criteria, and notions such as common decency, good faith, reasonable and unreasonable demands, important reason, and so on. They embody a renunciation of the foundation of positivism, namely the detached lawgiving decision embodied in the norming. Neither legislation nor the administration of justice could dispense with them today. In German jurisprudence, they have been the real theme of juristic discussions for over a year. Their advance and their predominance have been made out to be a danger for legal certainty and calculability, and we have been warned against them.[60] From the standpoint of the earlier positivist belief such warnings and worries are well founded. For that belief engendered the idea that only the combination of legislative decision and rule that forms this positivism guarantees legal certainty. But with general clauses, the in-itself complete, gapless law, which is the "foundation of certainty," escapes. On the other

side, however, H. Lange perceived these general clauses as a vehicle of natural law, as a carrier of a new legal thought, as a breakthrough of new ideas, as a "cuckoo's egg in the liberal legal system," and as a symbol signifying the victory over the positivist legal thought that had developed in the nineteenth century.[61] As soon as concepts such as "good faith," "common decency," and so on are not linked to the individualistic, bourgeois, commercial society, but to the interests of the whole nation, the entire *Recht* changes in reality without it being necessary to change a single "positive" law. I am therefore of the conviction that a new juristic way of thinking can be brought about through these general clauses. Still, they should not be considered a mere corrective of the earlier positivism, but must be handled as the specific method of a new type of jurisprudential thinking.

As such, they are not only relevant to legal guilt in civil law, as well as in property, family, and inheritance law. How far the disintegration process of positivism has already progressed today, and how little possibility there is of returning to the kind of thought that achieved domination in the nineteenth century, becomes most strikingly evident in the two core areas of liberal constitutional thinking, in criminal law and tax law. The method of the seemingly firm, matter-of-fact, descriptive abstract concept and the ideal of its "matter-of-factness" are disintegrating. Regarding criminal law, these concepts and intellectual foundations have been carefully studied recently by Dahm, Schaffstein, and Henkel.[62] I am thinking about the new (as perceived through the old concepts) "indefinite" facts of a case, such as breach of trust, national and economic treason, as well as about the advance of so-called normative instead of descriptive factual elements.[63] Of even greater systematic bearing is the change in the relationship of general and special parts of the penal code, as already expressed in the report on a National Socialist criminal law of fall 1933, developed under the general direction of the Prussian Minister of Justice Kerrl.[64] Here, the norming of

criminal law does not begin with a general part, but with the specific punishable offense. The detachment of "general" concepts like guilt, aiding and abetting, and attempt, from concrete crimes like treason, theft, or arson, appears to us today no longer as a conceptual clarification or as a guarantee of greater legal certainty and precision, but more as an artificial and nonsensical abstraction tearing apart the natural and actually existing relationships of life.

Also in tax law, whose definitiveness shares the same fundamental significance for legal thought, other legal concepts directly related to economic and social reality replace the elaborate, seemingly juristically firm concepts taken over from civil law. This is, therefore, of symptomatic significance beyond the narrower sphere of tax law, because tax law, analogous to budget law in constitutional life, was a kind of holy shrine of liberal-constitutional positivism. The only jurisprudential system of tax law to emerge since 1919, that is, since the development of Germany as a reparations and taxation state, systematically developed the doctrine of the "matter-of-factness" of the public right of taxation deliberately analogous to criminal law.[65] But precisely in tax law it has above all become obvious that a just and meaningful regulation cannot be accomplished with the help of the increasingly irrelevant concepts of a pure positivism. In the Reich tax code of December 13, 1919, the groundbreaking clause of paragraph 4 already establishes that in the interpretation of tax legislation its purpose, its economic significance, and unfolding circumstances are to be taken into account. With this, collapses the foundation of positivist "certainty," the autarchy of the self-contained, definite contents of the statute. In the development of German sales-tax legislation from the law of July 26, 1918, to the additional laws of May 8, 1926, what had at first gained acceptance in the tax area, also found a systematic jurisprudential expression. German sales-tax legislation intentionally broke with the inherited types of legal transactions and contracts conceived

in terms of commercial civil law; it speaks intentionally not of buying, rent, wages, acquisition of property, but of delivery, remuneration, and so on.[66]

With these new concepts should not be introduced some concepts which are even more abstract and general than those of the contract types. Rather the possibility will be created for taking into account the concrete reality of life relationships in order to grasp an economic process in a fiscally correct manner. The normativism and positivism of the old style would here have been completely helpless against the logical unlimited possibilities of arbitrary, formal-juristic labelling. It would have made the *Rechtsstaat* in the area of tax law a laughingstock in the same way it rendered that possible for the bold and imaginatively endowed criminal with the help of the phrase *nulla poena sine lege* in the area of criminal law.[67] Prominent authorities on our new tax law such as Johannes Popitz and Enno Becker have recognized this danger and have proceeded with greatest jurisprudential and methodical awareness. They have in this way protected the new German tax jurisprudence from sinking into a mere science of tax evasion.[68] Unlike a legal positivism combined of rules and decision thinking and normativistically disengaged from the reality of life, such concepts directly relate to the concrete reality of a life relationship and lead necessarily to a new type of thinking that takes into account the existing and newly maturing orders of life. In German tax jurisprudence, including seemingly incidental legislative questions of taxation, the intrinsic order-relationship of the governmental, social and *völkisch* order of life and community is immediately and directly visible. Consider, for example, the question of the deduction for the father of a family and for a certain number of children, acknowledgement of a certain kind of living cost and expenditure, or the question of taxing civil servant incomes, and the computation of advertising expenses. In each of their particulars, they at once involve concrete orders of life and institutions

such as marriage, family, *Stand*, and state, and demand an opinion on fundamental principles.[69]

While this disintegration of positivistic rules and statute thinking is occurring in the development of criminal and tax law, numerous new orders have emerged in other areas of public law, which completely shun the nineteenth-century way of thinking. The new constitutional and administrative law has realized the leadership principle and with it concepts like loyalty, followers, discipline, and honor that could only be understood in terms of a concrete order and *Gemeinschaft*.[70] Political unity is formed by the tripartite order—state, movement, people. The construction of *ständischen Einrichtungen* (institutions) will even more forcefully realize the idea of the inseparable connection of leadership, discipline, and honor and thereby overcome a normativism erected on the earlier principle of "separation of powers." Within a *ständisch*-organized *Volk*, a majority of orders always governs, each of whom must form for itself the jurisdiction of its own *Stand*—"so many *Stände*, so many benches."[71]

However, the National Socialist lawgiver has expressed most clearly the new order thinking in its "Law for the Organization of National Labor" of January 20, 1934. If one recalls the abovementioned (p. 81) failed attempt in labor law to overcome the private contractual notion with the help of the concept of agreement, at least for the area of "wage agreements," then this new law for the order of national labor appears as a forceful step. With one stroke it leaves behind an entire world of individualistic thinking of contractual and legal relationships. That law speaks intentionally no longer of employers and employees; in the place of wage agreements steps a wage order. Entrepreneurs, employees, and workers are leaders and followers (*Führer und Gefolgschaft*) of a firm, working together for the advancement of the firm's aims and for the common good of *Volk* and state; both appear as members of a common order, a community with a public-legal character. The Social Honor Court is a

logical application of order thinking, which presents loyalty, followers, discipline, and honor, no longer as functions of detached rules and norms, but as essential elements of a new community and its concrete order and formation of life.[72]

Conclusion

Only after this short summary overview of the present condition of German jurisprudence can we recognize the deep and decisive significance of the new concept of jurists that the National Socialist movement has introduced into Germany. The *ständisch* concentration of German jurists in the German Legal Front has laid the foundation of its organization on a concept of the jurist who rises above and overcomes the earlier positivistic tearing apart of law and economy, law and society, law and politics. Every German *Volksgenosse*, who in his professional work deals with the application or improvement of German law in public life, state, economy, or self-administration, and who in such a manner is rooted in German legal life, should pay attention to the new *ständisch* image of the German jurist. The National Socialist League of German Jurists is based upon these new concepts of *Recht*, jurist, and *Rechtsstand*, as is that part of the National Socialist movement concerned in a special sense with German Law, such as the Academy of German Law founded in the fall of 1933. The leader of the German Legal Front and founder and president of the Academy of German Law, Reich Minister of Justice, Dr. Hans Frank, has perceived the task of German jurists to be above all a "*Sachgestaltung*"[73] that conforms to the German spirit.[74] In this word coined by him is pregnantly

manifested the essential course of the new order and formation thinking.[75]

To the traditional positivist type of thinker, the undeniable advance of the new juristic way of thinking appears, of course, only as a corrective to his old method, like the earlier Free-Law Movement's similar loosening of rigidity as a mere adjustment to a new condition for the purpose of continuing and preserving the previous type. But the change in the jurisprudential way of thinking is today linked with a change in the entire framework of the state. All transformations of a juristic type of thinking stand, as was shown above, in the great historical and systematic relationship that the momentary situation of the political life of the community places them. The decisionism of Hobbes in the seventeenth century belongs to the age of pervasive princely absolutism, and the rational-law normativism to the eighteenth century. So too, the combination of decisionism and normativism, which since the nineteenth century represents the dominance of legal positivism, is explained in terms of a specific dualistic relationship of state and civil society, and by the dualistic structure of the political unit of that time, which, in a disintegrating state and society, alternated between the state-of-exception and legality. As soon as this dualistic structure of state and state-free society ceases, the jurisprudential type of thinking belonging to it must also collapse.

The state of the present is no longer a dualistic one separated into state and society, but one built upon the tripartite order of state, movement, people. The state, as a special part of the order within the political unit, no longer has a monopoly on the political, but is only one organ of the *Führer* of the movement. The previous decisionistic or normativistic or positivistic legal thinking combined of both is no longer adequate for a political unit constructed in this way. Now a concrete order and formation thinking is required that will measure up to the numerous new tasks of the governmental, *völkisch*, economic, and ideological conditions and to the new form of community. Therefore,

embodied in every advance of a new jurisprudential way of thinking is not a mere corrective to the previous positivistic method, but a transition to a new type of jurisprudential thinking, which would be able to do justice to the emerging communities, orders, and formations of a new century.

Notes

1. [Tr.] Schmitt is using the term *Gestaltung* here to characterize a type of law that is in the continual process of formation. See Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. (New York & London, 1989), 120–121.

2. [Tr.] Karl Friedrich von Savigny (1779–1861) was the leading representative of the conservative-romantic Historical School of Law in the early nineteenth century. Opposing the notion of law as a creation of human reason, such thinkers held that laws and legal institutions were a natural evolving outgrowth of the *Volksgeist* (national spirit of a people) as expressed in historical customs.

3. [Tr.] The Nazis found this conflict between Roman law and an original, more genuine form of German law sufficiently important as a problem to address it already in their 1920 Party Program. See point 19: "We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law." J. Noakes, and G. Pridham, eds., *Nazism, 1919–1945: A History in Documents and Eyewitness Accounts* (New York, 1984), 1: 15.

4. [Tr.] *Rechtsstaat* is one of those German terms best left in the original because of the various connotations it has depending upon the historical, ideological, and political contexts in which writers, especially political and legal theorists, have used it over the past two centuries. In its most basic form, a *Rechtsstaat* implies a type of constitutional state that guarantees fundamental civil liberties of speech, press, religion,

equality before the law, and so on. It also usually involves a type of government based upon the consent of the governed and the separation of powers as a means of protection against arbitrary or oppressive government. As an outgrowth of the natural-law theory of the eighteenth-century Enlightenment, the principles of the *Rechtsstaat* were considered part of universal and eternal laws of reason, exercising the authority of absolute moral truth. The early German exponent of the *Rechtsstaat* was the eminent German philosopher Immanuel Kant (1724–1804). Despite varying interpretations, changing political alignments, and compromises with other political currents and the power of the Prussian State, and then the unified German *Reich* of 1871, the *Rechtsstaat* remained a cherish political goal of German liberalism since the eighteenth century.

5. Edition of the Stoiker-Fragments by H. V. Arnim (1905), 3: 314.

6. So reads the definition of *Rechtsstaat* by G. Anschütz, *Deutsches Staatsrecht*, in the *Encyclopedia* of Holtzendorff-Kohler (1904) Vol. 2, p. 593: "a state, which is symbolized completely by *Recht*, whose supreme will is not *Rex* but *Lex*; a commonwealth where the relationships of individuals not only to each other but above all to the supreme power are determined by legal maxims, where therefore governing and being governed proceed according to *Recht* and not according to the *tel est notre plaisir* of the governing persons. . . . The legal order should 'also be applied to the crown as opposed to absolutism' (von Martitz); law appears as a power, which is likewise set above the will of the governed as well as the governing person." This position is at the same time a typical example of the positivist identification of *Recht* and statute (whereby "statute" ultimately becomes decisionistically a pure majority decision of parliament).

7. [Tr.] The term *Nomos* originated with the classical Greeks as a key concept in their philosophy and left a legacy in western philosophy generally. For the classical Greeks, *Nomos* meant something "believed in, practiced or held to be right. . . . [which] presupposes an acting subject—believer, practitioner, or apportioner—a mind from which the *Nomos* emanates. Naturally therefore different people had different *Nomoi*, but, so long as religion remained an effective force, the devising mind could be the god's, and so there could be *Nomoi* that were

applicable to all mankind." On *Nomos*, especially as it pertained to the origins of law, see: W.K.C. Guthrie, *The Sophists* (Cambridge, 1971), 55–133. Schmitt later used this concept as the framework for one of his major works. See *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 2nd ed. (Berlin, 1974).

8. The so-called Vienna School led by H. Kelsen had championed with particular "purity" the exclusive claim to domination by an abstract normativism during the period 1919–1932.

9. See as an example from the last German century the one in the previous annotation to the definition of *Rechtsstaat* by G. Anschütz.

10. [Tr.] Friedrich Hölderlin (1770–1843) was a distinguished German romantic poet whose works underwent a renaissance in the twentieth century. His artistic work embodied idealized visions of the ancient Greek harmony of body and mind.

11. N. V. Hellingrath, L. V. Pigenot, and F. Seebass, eds., *Collected Works* (Berlin, 1923), 6: 9.

12. [Tr.] For a highly suggestive analysis of Schmitt's opposition in his Weimar writings to liberalism's attempt to apply the paradigm of the "neutralizing force" of modern technology to politics, see John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge, UK, 1997). Much more questionable, however, is McCormick's general interpretation of Schmitt as a fascist thinker and his claim that Schmitt is the progenitor of "all the major components of contemporary American conservatism" (p. 304).

13. [Tr.] See Karl Binding, *Die Normen und ihre Übertretung* (1872–1920) 4 vols.

14. *Une nouvelle mystique: la notion d'institution; Revue générale du Droit, de la Législation et de la Jurisprudence*, 1931–1932. The article by Bonnecase contains in other respects excellent material and remains valuable and worth reading. More on Hauriou follows below under section II 2 of this work.

15. Freiherr Marschall von Bieberstein, *Verantwortlichkeit und Gegenzeichnung bei Anordnungen des Obersten Kriegsherrn*, (Berlin, 1911), 392, speaks (critically) of "the advancing viewpoints that, in the victorious triumph of the *Rechtsstaat*, want to designate every organ of the state, no matter on which rung of the ladder, likewise as the defender of the

legal order." Otto Mayer, *Deutsches Verwaltungsrecht*, 2nd ed. (Munich and Leipzig, 1917), 2: 324, states: "The idea of the constitutional and *Rechtsstaat* allows everything to appear acceptable that could serve to secure *Recht* and law against abuse by the authorities. . . . Thus arises a security of law, as it could not have been better conceived: each official is now designated as this defender in relation to his superior." One had soon observed that this kind of exclusive domination by the law reverses the concrete order of the bureaucratic hierarchy and places it on its head. However, it could only be refuted on grounds of practicality, not in terms of juristic and "constitutional" normativism.

16. Concerning the destruction of the concept of leadership through the normativism of the concept of supervision: Carl Schmitt, *Staat, Bewegung, Volk: die Dreigliederung der politischen Einheit* (Hamburg, 1933), 36.

17. The pluralistic party-state of the Weimar constitution was therefore a "Reich of limitless compatibilities." After the dualistic construction of the state and state-free civil society had become problematical in liberal-democratic states, which recognize parliamentary incompatibilities for bureaucrats, there arises today the question (in such a state unsolvable) of so-called economic incompatibilities. Regarding this, see the meaningful dissertation at the Handels-Hochschule, Berlin, by Ruth Büttner (Berlin, 1933).

18. Santi Romano, *L'ordinamento giuridico* (Pisa, 1918), 17.

19. [Tr.] Tertullian (ca. 160–220 A.D.) was an early Christian writer who worked out the legal doctrines of Christianity, especially as they related to the Old Testament.

20. [Tr.] God is "unfettered from law, He himself is Law unto Himself, the ultimate Authority."

21. G. Beyerhaus, *Studien zur Staatsanschauung Calvins, mit besonderer Berücksichtigung seines Souveränitätsbegriffs* (Berlin, 1910), provides proofs that for Calvin, God is also master over the *ordo naturae* and the *jus naturae*. The influence of Calvin on the concept of state sovereignty is dealt with in the Marburg dissertation of Karl Buddeberg (1933), which contains an informative chapter on "political theology."

22. [Tr.] One of the great exponents of the theory of state sovereignty, Jean Bodin (1530–1596) was a pivotal figure in detaching law

philosophically from its medieval religious foundations. He exercised a great deal of influence upon Schmitt, who considered him one of the founding fathers of jurisprudence.

23. [Tr.] Much of Schmitt's own work had been significantly influenced by Hobbes. Although in *On the Three Types of Juristic Thought*, Schmitt repudiated his earlier decisionism, which had drawn heavily on Hobbes, he had not actually abandoned that thinker. After being rebuked by the Nazis in 1936, Schmitt, in fact, returned to his study of Hobbes. See Carl Schmitt, "Der Staat als Mechanismus bei Hobbes und Descartes," *Archiv für Rechts- und Sozialphilosophie* (1936–37), 30: 622–632; and *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symboles* (Hamburg, 1938). On the relationship between the thinking and work of these two theorists, see Helmut Rumpf, *Carl Schmitt und Thomas Hobbes: Ideelle Beziehungen und aktuelle Bedeutung mit einer Abhandlung über: Die Früschriften Carl Schmitts* (Berlin, 1972); and Gershon Weiler, *From Absolutism to Totalitarianism: Carl Schmitt on Thomas Hobbes* (Durango, Colo., 1994). For insights into Schmitt's writings on Hobbes in the proper historical context of Nazi Germany, see George Schwab's introduction to his recent translation of *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, Conn., 1996).

24. *Leviathan*, Chap. 26, p. 133, of the Latin edition of 1670; p. 143 of the English edition of 1651. In Chap. 26 also stand the clear passages about interpretation (*in qua sola consistit Legis Essentia*), about the incalculable possibilities and uncertainty of every interpretation, and about the sovereign as the sole interpreter, who through his sovereign decision puts an end to the maze of opinions, like—as it is called in the English edition of the *Leviathan*—Alexander the Great cutting through the Gordian Knot; a typical decisionistic image. The concluding Chap. 27 contains the first modern establishment of the phrase *nulla poena sine lege*.

25. On the distinction between *auctoritas* and *potestas* see Carl Schmitt, *Der Hüter der Verfassung* (1931), 136.

26. [Tr.] "Man is wolf to man." This pessimistic Hobbesian view of human life and conflict was shared by Schmitt, who wrote that "all genuine political theories presuppose man to be evil, that is, by no means

an unproblematic but a dangerous and dynamic being." Schmitt also often invoked the Hobbesian phrase *bellum omnium contra nomnes.* See Carl Schmitt, *The Concept of the Political,* trans. George Schwab, 2nd ed. (Chicago, 1996), 61.

27. J. Bonnecase, *L'école de l'exégèse* (Paris, 1924).

28. [Tr.] *Interessenjurisprudenz* was the pre-1933 school of legal thought that claimed to be "philosophy free" and neutral toward all ideological orientations. Its major representative, Philipp Heck, argued that the judge was the "servant not the master of the law." It was the duty of the judge to ascertain and follow the intent of the lawgiver and not to inquire into the justness of the law. According to Rüthers, this ideological and value-neutral legal method was an instrument perfectly suited to the new Nazi-state's efforts to manipulate the legal system to establish its "authoritarian *Führerstaat.*" Nonetheless, its ideological neutrality was attacked by *Völkisch* legal theorists like Karl Larenz precisely because they believed all aspects of life and culture, particularly law, must manifest the racial ideology of National Socialism. See Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (Munich, 1988), 36–41.

29. The most radical representative of positivist legal certainty is Jeremy Bentham; the classical stand on the "expectation" as the foundation of legal certainty is found in John Bowring's edition of Bentham's works (Edinburgh, 1843), 2: 299, 307, 311. Also the formula "justice through positivity" of Erich Jung, *Das Problem des natürlichen Rechts* (1912), establishes the claim of legal certainty on the expectation of the legal community. In *Allgemeine Staatslehre,* 3rd ed., 369, Georg Jellinek also speaks about the "assurance of being subject to the law," the "expectation" and the "trust" in inviolable administration; on "trust," see for example, Max Rümelin, *Rechtssicherheit* (1924), 6.

30. There are—depending on the activity that the state has as its focal point and speaks as its final word—legislative, cabinet or administrative, and jurisdictional states. This distinction is developed in my treatises, *Der Hüter der Verfassung* (Tübingen, 1931), 76 and *Legalität und Legitimität* (Munich, 1932), 7–19. See in particular p. 8: "A legislative state is a political system governed by impersonal, therefore general, and predetermined norms that are considered for the duration

to have measurable and determinable content, in which law and the execution of law are separated from each other." That is likewise a definition of what was previously called the *Rechtsstaat.* In the treatise by H. Henkel, *Strafrichter und Gesetz im neuen Staat* (Hamburg, 1934), the historical and systematic connection of the phrase *Nulla poena sine lege* with the legality system of such a legislative state, as well as with the previously mentioned interest in legal certainty, is demonstrated with perfect clarity.

31. [Tr.] An early utilitarian British philosopher, Jeremy Bentham (1748–1842), was determined to develop an objective science of human behavior and an empirical jurisprudence modeled on the experimental method. Also of importance for Schmitt was that Bentham remained a relentless critic of common law.

32. With this manner of proceeding there is no security, as cited on p. 325.

33. See the speech "National Socialism and *Rechtsstaat*" *Juristische Wochenschrift* (March 24, 1933), 713.

33. *Allgemeine Staatslehre,* 3rd ed., 341, 360, 371 (the first edition appeared in 1900); the basic normativist thesis is presented on p. 355: "All *Recht* is normative judgment and therefore never coincides with the circumstances to be judged by it." Moreover, despite this "normative power of the factual," "politics [should remain] excluded from the *allgemeinen Staatslehre*" (p. 23). Power and *Recht* are normatively opposed, the state's right of necessity as an expression of the phrase "might precedes right" is rejected, but "constitutional gaps" could be positively "filled through factual power relationships" (p. 359).

35. "Positivismus und reale Aussenwelt," lecture delivered on November 12, 1930, at the Kaiser-Wilhelm-Society, Berlin and Leipzig, 1931, p. 11. [Tr.] Max Planck (1858–1947) was a pioneer in quantum physics whose theories, in conjunction with those of Niels Bohr and Albert Einstein, shook the foundations of the nineteenth-century natural sciences after which the positivist social scientists and jurists had modeled themselves.

36. [Tr.] Although literally translated as "free-floating," *freischwebende* is sometimes also read as "unattached" in the context of an intelligentsia that is unattached to any social class. See Karl Mannheim (1893–1947),

Ideology and Utopia (London, 1936); and H. Stuart Hughes, *Consciousness and Society: The Reorientation of European Social Thought, 1890–1930* (New York, 1958), 418–427.

37. Weimar issue 391, p. 10

38. [Tr.] Samuel Pufendorf (1632–1694) marked a turning point in legal history and is often considered the first modern jurist. He offered a comprehensive system of natural law that included international law. See Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1958), 112–121.

39. Particularly characteristic is the derivation of the authority of father and mother from a natural-law norm of "sociability" and from the presumed rational consent of children: *de Jure Naturae et Gentium*, Book 6, Chap. 2, par. 4. I am indebted to university lecturer Dr. Rudolf Craemer in Königsberg for recognizing the strong fundamental Lutheran-orthodox elements that still exist in the character as well as the theories of Pufendorf. This makes his theoretical legal construction of marriage and family even more astounding.

40. *Metaphysik der Sitten, Rechtslehre*, par. 23.

41. [Tr.] An illuminating explanation of the attack by Weimar conservative intellectuals on the liberal "Ideas of 1789" and the embracement and articulation by conservative revolutionaries of the so-called "Ideas of 1914," which were supposedly more in tune with German *Kultur*, is contained in Klemens von Klemperer, *Germany's New Conservatism: Its History and Dilemma in the Twentieth Century* (Princeton, 1968), 25, 47–69.

42. [Tr.] One of Germany's greatest philosophers, Johann Gottlieb Fichte (1762–1814), played a significant role in the development of the theory of the state. During the Napoleonic occupation of Germany, Fichte became a fiery early advocate for the establishment of a German national-state. See Friedrich Meinecke, *Cosmopolitanism and the National State*, trans. Robert B. Kimber (Princeton, 1970), 71–94.

43. See especially the place in his lectures "*Staatslehre*" Werk 4, (Summer 1813): 409: "A group of people with a commonly developed history who are united in erecting a *Reich*, are called a *Volk*. Their independence and freedom consists in the elevating path toward developing themselves into a *Reich*. The people's freedom and independence

is assaulted if the path of this development is interrupted through some other force, if it is incorporated by others striving to develop themselves into a *Reich* or perhaps toward the destruction of every *Reich* and *Recht*. . . . Then a real war is not among the ruling families but among peoples, whose general freedom and that of everyone is especially threatened; without it he has no desire to live, without it he admits a kind of worthlessness. The struggle for 'life and death' is then given over to everyone personally without representation."

44. Introduction to *Philosophie der Mythologie*, edition of Manfred Schröter (Munich, 1928). Vol. 11.

45. [Tr.] Schmitt would encounter difficulties with the Nazis over whether the Third Reich was a *Rechtsstaat*. He originally concluded that the Hitler regime, though a "just state," could no longer be considered a *Rechtsstaat* in the traditional sense of the term. However, he soon adjusted his interpretation to accommodate the Nazi insistence that the new order was, indeed, a *Rechtsstaat*. See Carl Schmitt, "Nationalsozialismus und Rechtsstaat," *Deutsche Verwaltung* 11 (1934): 85–92; "Was bedeutet der Streit um den 'Rechtsstaat'?" *Zeitschrift für die gesamte Staatswissenschaft*, Bd. 95 (1935), 189–201. See also Hans Frank, "Der deutsche Rechtsstaat Adolf Hitlers," *Deutsches Recht* 6 (1934), 121.

46. [Tr.] Otto von Gierke (1844–1921) was perhaps the best representative of the German historical school of law and a pioneer in the field of Germanic legal history. Among his core ideas were that law derives from the people and that a unique concept of German law existed independent of Roman law; moreover, this German law, he argued, was never really eliminated by the reception of Roman law in Germany. Gierke exercised a great deal of influence on his student Hugo Preuss, who became the father of the Weimar constitution. Preuss essentially reoriented his mentor's organic theory of the state toward progressive liberal-democratic principles. For a sense of Gierke's insights and erudition see his *Political Theories of the Middle Ages*, trans. Frederic William Maitland (Cambridge, 1927), and *Natural Law and the Theory of Society, 1500 to 1800*, trans. Ernest Barker (Cambridge, 1958).

47. Gierke's article on Laband's *Staatsrecht und die deutsche Rechtswissenschaft* was published in *Schmollers Jahrbuch*, (1883): 1097–1195; he

starts from the position that "one of the highest purposes of genuine constitutional law" lies in the "clean separation of law from politics"; but that despite this, there is no completely apolitical constitutional law. Due to this lack of clarity, the otherwise striking criticism of Laband's only seemingly apolitical constitutional law was robbed of its penetrating power. Lorenz von Stein's warning from the years 1885–86 (in the foreword to vol. 2 [p. 75] and vol. 1 [p. 60] of the 5th ed. of his *Lehrbuches der Finanzwissenschaft*) is based on the insight that Laband's juristic positivism, with its divorce between political theory and the pure juristic treatment of administrative law, would show its scholarly inadequacy most conspicuously in the financial matters of the federal state. "One must confirm with admiration," states Johannes Popitz (*Finanzarchiv* (1932), 418), "how Lorenz von Stein through his deep insight into the significance of administration and into the power of taxation in state formation had already in 1885 foreseen how since then, if only considerably later than he perhaps assumed, this path would be trodden, and indeed, as he himself stated it, from the nature of the thing itself without waiting for scholarly analysis."

48. Karl Binding, *Die Gründung des Norddeutschen Bundes* (1889). Heinrich Triepel, *Völkerrecht und Landesrecht* (1899), 37, 178; Otto Gierke, *Das Wesen der menschlichen Verbände* (1902). Additional literature in Meyer-Anschütz, *Staatsrecht*, 7th ed. (1919), 201.

49. [Tr.] Schmitt's praise for the Prussian Army was another indication that he was still very much a conservative thinker at heart, despite his increasing compromises with Nazism. In early January 1934, only weeks before he introduced his ideas on concrete-order thinking, Schmitt had delivered a public lecture at the University of Berlin on the Prussian Army. Speaking of the army as an essential pillar of the state, Schmitt apparently was still hoping this institution could continue to serve as a traditional conservative counterweight to complete Nazi power. His lecture was subsequently published as *Staatsgefüge und Zusammenbruch des zweiten Reiches: Der Sieg des Bürgers über den Soldaten* (Hamburg, 1934). According to George Schwab, Schmitt was attempting to create a framework in which the army would be a major part of the constitutional scheme he intended to construct for the new regime. See *The Challenge of the Exception*, 126–130.

50. [Tr.] The danger inherent in Schmitt's position on an oath to an individual as opposed to a constitution or political system became painfully evident within less than a year. Upon president Hindenburg's death in August 1934, the Army had to swear an oath of allegiance to Hitler and this in the long run undermined Schmitt's hope that an autonomous Army could serve as a traditional conservative counterweight to the Nazis. For some officers sincerely believed that this oath bound them to obedience to Hitler, while others used it as a convenient rationalization for inaction against the Nazi regime during its most murderous and barbarous stages. Noakes and Pridham, *Nazism*, 635–636.

51. If today, for example (in Prussia through the decree of the Minister for Science, Art, and Education of October 28, 1933), in order to secure a centralized leadership of the university, the rights of the Senate were transferred to the Rector of the University, it would be incorrect to exclude from the transfer the legal disciplinary and judicial authority of the Senate on the grounds that it is here a matter of jurisdiction or similar judicial authority. That could be justifiable only with a "separation of powers" and liberal normativism that destroys the concept of leadership as well as that of discipline and honor courts.

52. [Tr.] The "movement" here is the National Socialist Party, which Schmitt had earlier designated as the "politically dynamic" component of the tripartite scheme he had attempted to construct for the Third Reich. "Neither the present state (in the sense of a political unit), nor the present German people (as the subject of the political unit of the 'German Reich')," he wrote, "can even be conceived without the movement." Though under the direction of the *Führer*, the movement was to be the unifying link between the state, the party, and the people, as well as the institution that provided the dynamic political leadership for both state and people. See Schmitt, *Staat, Bewegung, Volk*, 13.

53. See the illuminating treatment of this by Goodhart, *The Law Quarterly Review* L (London, 1934): 40.

54. Page 246 of J. Bonnecase's lecture on Waline and A. Mestre, as well as Bonnecase's comments (p. 262) are of special interest on this point.

55. It has left behind, in the three volumes edited by A. Hauriou in his collected annotations to the decisions of the *Conseil d'État* and the *Tribunal des Conflits* of 1892–1928, a great monument of juristic productivity (1st ed. under the title *Notes d'Arrets*, 1928; 2nd ed. as *Jurisprudence administrative*, 1930).

56. The three most important turning points lie in the years 1896 (*La Science sociale traditionelle*), 1910 (1st ed. of the *Principles de Droit public*), and 1925 (*La Théorie de l'Institution et de la fondation in la Cité moderne et les transformations du Droit*; vol. 4 of the *Cahiers de la Nouvelle Journée*).

57. I have frequently used this expression without further specified reference in my teaching of constitutional "institutional guarantees" (Berlin, 1931) and recently in the foreword to the 2nd ed. of my treatise *Politische Theologie* (Munich and Leipzig, 1934), 8.

58. Georges Renard, *La Théorie de l'Institution, Essai d'ontologie juridique* (Paris, 1930); *L'institution, fondement d'une renovation de l'ordre social* (Paris, 1933); see also the article by Ivor Jennings, "The Institutional Theory," in *Modern Theories of Law* (London, 1933), 68–85.

59. [Tr.] According to Franz Neumann, it was to avoid any association with neo-Thomism that exponents of concrete-order thinking such as Schmitt sought an alternative to the word "institutionalism." See *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (New York, 1966), 451. Yet, the SS Sicherheitsdienst was convinced that Schmitt's "rejection of the term "institutional thinking," was just another attempt by him to hide his true Catholic political motives and goals. It "would be too dangerous," the SS wrote, for Schmitt to promote Catholic institutionalism "so publicly and undisguised." *Mitteilungen zur weltanschaulichen Lage* 3, no. 1 (January 8, 1937): 275, Sicherheitsdienst des RFSS SD Hauptamt (1936), PA 651C, Schmitt.

60. J. Hedemann, *Die Flucht in die Generalklauseln* (Jena, 1933).

61. H. Lange, *Liberalismus, Nationalsozialismus und bürgerliches Recht* (Tübingen, 1933).

62. G. Dahm, and Freiherr Schaffstein, *Liberales oder autoritäres Strafrecht?* (Hamburg, 1933); H. Henkel, *Strafrichter und Gesetz im neuen Staat* (Hamburg, 1934). [Tr.] These jurists were among the leading advocates of the phenomenological school of criminal law in Nazi Germany, which, Neumann argues, combined "vitalism with Carl Schmitt's 'Thinking in concrete orders.'" See *Behemoth*, 453–458.

63. The catchword "normative" merits of the case (*Tatbestandsmerkmalen*) designates here only the antithesis of the alleged value-free, "firm," descriptive merits of the case; it is a symptom of the inner divisiveness of the positivism composed of normativism and decisionism and lets us know that a pure normativist no longer thinks purely positivistically; on this, see above pp. 33–36.

64. [Tr.] Hanns Kerrl (1887–1941), a jurist and early Nazi member, became president of the Prussian Landtag by 1932, and Prussian Minister of Justice after the Nazi seizure of power. Ironically in light of Schmitt's praise, Kerrl would in 1935 be appointed by Hitler as minister for church affairs with the expressed goal of undermining the autonomy from National Socialism and societal influence of the churches, the very institutions Schmitt wanted to preserve as concrete orders.

65. Albert Hensel, *Steuerrecht*, 1st ed. (Berlin 1924); 3rd ed. (1933).

66. [Tr.] Neumann provided an illustration of the new type of thinking as it pertained to law and business. "For positivism the plant is a technical unit in which the property owner produces, while the enterprise is an economic unit in which he pursues his business policy. Institutionalism transforms the plant into a social community. The enterprise becomes a social organization and the joint-stock company changes from an association of legal persons with property into an *Anstalt*. In short, property changes from a subjective right belonging to a legal person into an institution." *Behemoth*, 449.

67. [Tr.] "No penalty without law." After World War II, Schmitt himself would write a work, which remained unpublished until quite recently, on this concept as it related to international law and war crimes. See Carl Schmitt, *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz 'Nullum crimen, nulla poena sine lege,'* ed. Helmut Quaritsch (Berlin, 1994).

68. J. Popitz, *Einleitung zu dem Kommentar zum Umsatzsteuergesetz* (1929), 91; from the writings of E. Becker is only mentioned here his lecture at the German Jurist conference at Leipzig in 1933 (published in *Ansprachen und Fachvorträgen des deutschen Juristentags*, ed. *Oberregierungsrat* Dr. Schraut [Berlin, 1933], 300).

69. For this, if I may be permitted to say, character of scholarly thought, which is again becoming universal, the treatise by Prussian Finance Minister Popitz on the great work of the German national

economist von Gottl-Ottlilienfeld is of special interest. See his article "Recht und Wirtschaft" *Juristische Wochenschrift* 1 (1933). The economic doctrine of this Berlin scholar works with patterns and structure (*Gebilden und Gefügen*), instead of abstract and isolated concepts and relationships. That could become conducive to the new concrete-order thinking in jurisprudence in a manner analogous to how the individualistic system of the so-called classical national economy belonged to the capitalistic thinking of the bourgeois *Rechtsstaat* and its positivistic normativism.

70. [Tr.] On the introduction of this new jargon as it pertained to the ideological goals of National Socialism regarding the relationship between business and labor, as well as economic activity and enterprises generally, see David Schoenbaum, *Hitler's Social Revolution: Class and Status in Nazi Germany, 1933–1939* (New York, 1966), 73–151.

71. [Tr.] According to Neumann, Nazi legal theorists argued "that fronts and occupations are articulations of the natural order of the people, in which a series of laws created by occupational and estate groups appears to be the optimum principle of voluntary and orderly growth of law." *Behemoth*, 451.

72. [Tr.] Established under the "Law for the Organization of Labor," these courts were intended to "deal with violations of 'social honor' within the business enterprise." For a fuller explanation of how they actually functioned in the Third Reich, see Nathan A. Pelcovits, "The Social Honor Courts of Nazi Germany," *Political Science Quarterly* 53, no. 3 (1938): 350–371.

73. [Tr.] The term *Sachgestaltung* invented by the Nazis connotes a type of thinking and ultimately legal practice "shaped by the needs of the concrete situation." Neumann, *Behemoth*, 451.

74. *Juristische Wochenschrift* (1933), 2091.

75. [Tr.] Schmitt and Frank were developing a friendship, and a few months later, in June 1934, Frank appointed Schmitt editor of the country's leading law journal, *Deutsche Juristenzeitung*. Frank was also influential in defending Schmitt and protecting him from a worse fate than the loss of his party offices when the SS subsequently sought to purge him. See Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, 1983), 211–212, 230–239.

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