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Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945

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Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945

by Michael Stolleis*

I.

As long as there have been lawyers in any significant number in Central Europe—that is to say since about the 14th century—there has been criticism of them. There is a German saying "Juristen böse Christen" (Lawyers are wicked Christians). It was first recorded around 1300.(1) Ever since, attitudes towards this new administrative elite has oscillated between respect and disdain, trust and distaste. There is a sense of dependence, of needing them when disagreements turn into lawsuits, and of having to pay dearly for their services. The clergy, the nobility, peasants and bourgeoisie alike all had their own problems with this new administrative elite, with the increasing importance of legislation and the emphasis this placed on the written word and professional training.

I have briefly alluded to this historical background because it goes some way towards explaining the ambivalence with which lawyers and jurists were treated under National Socialism. In the Third Reich, too, lawyers were regarded as hybrid creatures. The NSDAP saw the traditional civil service...
system, dominated as it was by lawyers, as a reactionary force that was an impediment to the Nazi movement. At the same time, the Party was dependent on these structures at every level, from the highest offices in the Reich to the regional and municipal authorities. The many conflicts between the "state" and the "movement" were, however, conflicts between lawyers and non-lawyers. This is reflected in the gradual removal of "jurists" (Hans Frank, Wilhelm Frick, Franz Gürtner) while anti-judicial, power-hungry individuals asserted themselves (Himmler, Heydrich, Goebbels, Freisler, Thierack).(2) Hitler, in his "Table-talk" conversations with his henchmen at the Fuehrer’s Headquarters, was dismissive and aggressive in his remarks about lawyers. In the Reichstag in 1942, in a fit of rage, he made brutal threats against judges whose rulings he considered too lenient. Thierack’s commentaries on rulings, the so-called “Richterbriefe” or Judges’ Letters, followed—intended as both guidance and intimidation.(3)

The generally antagonistic attitude towards the judiciary that prevailed among the leading figures of the Nazi regime, the suppression of regular justice and administrative jurisdiction from the political arena, and, in particular, the infamous Reichstag speech of 1942, fitted well with the lawyers’ own self-image. Indeed, it seemed heaven-sent, for it underpinned their notion of a "suffering judiciary" and lent credence to the idea of lawyers as the “most hated profession” in the Third Reich, not to mention the violation of justice by a criminal legislator.(4)

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4 Hubert Schorn, Der Richter im Dritten Reich, Frankfurt 1959; Hermann Weinkauff ans Albrecht Wagner, Die deutsche Justiz und der
This self-image took hold and remained dominant for two decades. It formed the basis of the Federal German legal system—a basis that was apparently necessary for re-stabilization. The conclusions drawn from it were the following:

After Germany’s “Catastrophe” and “Zero Hour” a return to Western values of idealism and natural law was seen as the only possible path to take. Natural law alone seemed “to provide law with a backup against the pressure of political power and naked violence.” (5) This was favored by the fact that in 1945, the churches, especially the less compromised Catholic Church, were virtually the only major organizations in a position to restore Germany’s place in the civilized world. “Legal positivism”—little more than a phantom of legal theory—was regarded as outmoded. (6) This meant that the polemical criticism of legal positivism that had prevailed throughout the Weimar period and the Nazi period continued unabated. Only the anti-Jewish aspect of the arguments, such as the attacks against Hans Kelsen, disappeared. It also meant that general or blanket clauses found favor as points where the new political order could revert to older law, precisely repeating the patterns of 1933—though this time around it seemed excusable because the “contents” were now right. And after all, the restitution of a neo-idealistic methodology was part and parcel of this internal reconstruction of jurisprudence. (7)

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In terms of constitutional theory, this approach was equivalent to establishing a "scale of values" that could be worn as a protective shield in the Cold War, both at home and abroad. It was developed from the text of the constitution and other authoritative sources, almost as a kind of spiritual and intellectual substratum. In terms of method, this was undeniably the heritage of the 1930s when not only Carl Schmitt propagated the distinction between (actual) constitution and (mere) constitutional text, but when Rudolf Smend had also transcended positive constitutional law by emphasizing the spiritual and intellectual process of "integration". The "scale of values" was the constitutional and methodological counterpart to the "liberal democratic basic order" (fdGO) that was imposed on the legal system. So much for the intellectual climate.(8) Very soon, the "scale of values" became a disciplinary tool.(9) Consider, for example, the Communist Party ban pursued from 1951 onwards and finalized in 1956 with the so-called KPD ruling that declared the party unconstitutional (BVerfGE 5,85); or the political justice meted out to communists;(10) or the fundamental difficulties in defining "constitutional enemies" during the inner political unrest after 1968; or the "Berufsverbot" debate about banning individuals with certain political affiliations from occupations such as teaching or civil service posts; or finally the debate about limitations on freedom to demonstrate and the limitations of civil disobedience.

In retrospect, we can recognize in the founding of the Federal Republic a distinct pattern of defensive “common values” in which the “others” were excluded by these values. For German lawyers after 1945, who formed an even more specific professional community of shared values, this meant having to band together in order to gain a foothold and dispel the criticism leveled, for example, at their involvement in National Socialism. Through tacit coalition and active association, virtually all the lawyers who had practiced in the Third Reich were reinstated in public office and private law firms. There were hardly any abrupt breaks or dismissals. Like the rest of the nation, they were reluctant to look back into the abyss. (11) Only those considered to have gone beyond the pale were excluded, but even that was not public knowledge. (12) In an essay published anonymously in November 1949, Carl Schmitt invoked a theme that typifies the spirit of the time: “amnesty, the power of forgetting.”

What this new departure meant was that Germany’s recent history under National Socialism could be disregarded or, at most, remembered only as a time marred by a regrettable perversion of justice. The legal authors of those years kept silent about their earlier publications. Their pupils adjusted the bibliographies. Librarians were instructed to sift out the writings from the relevant period and stash it away in the vaults. In fact, the Allies did the same in the immediate post-war period, and had lists drawn up by “untainted” specialists. So the process of “denazification”, in this very broad

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sense, not only meant demotion or professional exclusion, but was actually undertaken by the individuals themselves in a bid to make their past disappear. In other words, it was a self-imposed damnatio memoriae. As such, it seemed only logical that there were very few studies in legal history to address the period before 1965 and that “contemporary legal history” did not take shape as a discipline until much later. (13) Younger scholars were taught that the time was not yet ripe and, in addition, that nobody without first hand experience of those days had any right to comment.

This broad consensus was rarely disturbed by dissonant voices crying that it was not “legal positivism” that had been the main problem—but a dearth of courage and a general compliance on the part of the lawyers. Nor was the world of lawyers caught up in National Socialism the non-political, unsuspecting victim it was made out to be, but rather, it was a politically conscious group whose nationalistic tendencies were often perfectly in keeping with National Socialist thought. After all, what was needed was not a return to natural law (which provided no practically feasible directives anyway) but a move towards the “unfinished project of the Enlightenment”—in other words, western constitutional and legal ideas.

A glance at the Soviet zone of occupation and the emerging East German state of the GDR indicates that very similar processes were at work there, although with a quite different political content. A new world view was being established, a kind of Socialist natural law, albeit under another name. (14)

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The same tendency towards polemical criticism of consistent legal positivism (especially in the form given by Hans Kelsen) could be found there, for this expressly politically neutral legal theory could not be applied for their own purposes. It served as the bogeyman of a bourgeois academic discipline feigning objectivity as a mantle beneath which to pursue its own class interests. (15) West and East, then, for all their political differences, were both “anti-positivist”.

Admittedly, beyond this common denominator, there were more differences than similarities. Under the rule of the Soviet military administration, the new regime systematically destroyed the bourgeois state based on the rule of law. The situation in Thuringia was to set the scene. (16) Staffing policies were aimed at ousting conventional lawyers as quickly as possible and replacing them with Party members who had trained in special courses as People’s Judges. (17) This program was gradually extended from public prosecutors to judges, lawyers and university teaching staff, so that by 1955 it was more or less fully in place. However, the most important aim was the general elimination, or weakening, of the rule of law as a means of control. It was one of the most painful long-term experiences of East German lawyers that they were never able to accept fully that the GDR government believed it could dispense with “law” in the sense of a structured system of checks and balances and that it could do without publicly debated textual criticism or commentaries—an attitude it had clearly held since the Babelsberg

Conference of 1958.(18) It was only in the final decade of the GDR that there appeared to be signs of a return towards independent control of the administration, albeit with little success.

II.

There is no simple way of summing up the shape of jurisprudence after 1945. Almost all the colleagues driven into exile by National Socialism were missing. Many others had died or been murdered. With so few qualifying as professors during the Nazi era, there was no broad-based, politically untainted younger generation to take over the task of teaching and training. The core of the faculties that now began to regroup was still formed by the same professors who had taught at the universities from 1933 to 1945. A few of the older generation who had gone into retirement in 1933 were reinstated. And a few younger ones who had had no opportunity to advance under National Socialism, were added. Almost all the “bourgeois” professors from the universities in the Soviet zone came to the west. The “denazification” of professors was conducted along the same lines as happened with any other administrative elites. Colleagues without a Nazi past wrote dozens of certificates, known in Germany as “Persil notes“, attesting the recipient’s conscience to be “whiter-than-white.”(19) Lengthy correspondences were conducted, old contacts revived, a helping hand was given to colleagues in the “eastern zone,” and by 1950, almost all of them were back at their old desks.

19 Collections of those “Persil-Notes” for example in the Archives of the Federal Republic of Germany, Koblenz, in the papers of Walter Jellinek and Friedrich Giese.
Some of the more famous exceptions to this rule in the field of public law should be mentioned. Carl Schmitt was barred from holding any position of public importance, and few doubted the justice of that. Yet the fact that he nevertheless went on to exert a far-reaching influence on society in the Federal Republic of Germany is part and parcel of the country’s social and intellectual history. (20) His less able counterpart in the Third Reich, Otto Koellreutter, (21) seemed to have forgotten his former enthusiasm for Nazi ideals. Embittered and unrepentant, he fought in vain to reinstated. Though he was barred from the Association of German Teachers of Public Law, he did become Honorary President of the Federation of Victims of Denazification. Reinhard Hohn, at one time an influential SS lawyer, but an outsider on the Berlin faculty, kept a low profile after 1945 and later founded a successful “Führungsakademie” in Bad Harzburg. Ernst Rudolf Huber, probably the most important scholar in the group apart from Carl Schmitt, was regarded as particularly problematic because of his 1939 book on constitutional law in Greater Germany (Verfassungsrecht des Grossdeutschen Reiches). He returned to university much later, and then only gradually. (22) His monumental study of constitutional history since 1789, seven volumes covering the period up to 1933, also contains the message: No more politics.

There were others who went on to enjoy careers with a meteoric success impressive enough to parallel the economic miracle itself. Hermann von Mangold became involved in regional constitutional law and served as a member of the

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Parliamentary Council; Hans-Peter Ipsen drew up early commentaries on the new Basic Law; Hans-Carl Nipperdey(23) became President of the Federal Supreme Court and Theodor Maunz(24) even became Minister of Arts and Culture. The associations of teachers of civil and penal law, public law teachers and legal historians regrouped. They could greet one another with an enigmatic smile, united in silence about the past. Today, now that we have the opportunity of examining the post-war correspondence of such figures as Carl Schmitt, Rudolf Smend, Walter Jellinek, Erik Kaufmann, Friedrich Giese and others, we find that they did indeed express their opinions quite clearly in private. Gerhard Leibholz, who returned from exile, spoke disparagingly in 1950 of what he called the "National Socialist shadow faculty". Jellinek wrote at the time that "there are more Nazis among our colleagues than we in our harmlessness might suspect." (25) Hans Peters, the only public law specialist in the resistance, who taught initially in Berlin and later in Cologne, was president of the Görres Society. He wrote a letter threatening to resign if any more "old Nazis" were admitted to the association.

Yet those who really did have nothing to hide did not join forces in order to make a new start. They had far too little in common. There were people of all age groups and personality types, some who tried to equate their professional insignificance with political integrity, others who felt they had escaped a living hell they could not bear to talk about. Still others took an opportunistic attitude towards the more powerful and more active colleagues who so breezily maintained that they had written some things in the past that they would

not write in the present, explaining that it had been, as Max Frisch put it, “a time of excitement”, that they had only been commenting on prevailing law (Maunz), that they had sprinkled their reservations and subtle warnings between the lines, and that they had often expressed their misgivings about the regime off the record. In short, the members of the new faculties gradually reached a mutual accommodation and took the pragmatic approach of letting sleeping dogs lie,(26) especially since many colleagues kept their distance from the more sensitive issues and may even have made it clear in private that they had put their past behind them. Johannes Heckel in Munich turned to canon law. Theodor Maunz in Freiburg was allowed to work only in the field of administrative law at first. Ernst Rudolf Huber turned his attention to constitutional history. Karl Larenz abandoned legal philosophy to make his name instead in the least political aspect of civil law (BGB; German Civil Code, law of obligations).(27) Georg Dahm, an outstanding educator, shifted from penal law to international law. Many new teaching books and fundamental outlines proved to be little more than superficially revised re-editions of works published in the 1930s. As Joachim Ruckert pointed out in his major survey, this was particularly true of the core areas of civil law, penal law, legal philosophy and legal history, whereas constitutional law, administrative law and labor law presented rather more serious problems in terms of continuity.(28)

28 Ruckert (above note 26).
III.

If we go back to 1933, defying the seemingly linear course of history, to examine the situation of German jurisprudence, we find it difficult enough to obtain statements of any substance relating to individual aspects of legal disciplines, let alone generalize about a body of several hundred active individuals, a plethora of institutions and countless publications. Add to that all the problems of self-image and retrospective self-description. The deeper the waters plumbed by research, however, the more clearly the picture emerges. On the whole, it is possible to trace a typical development in attitudes to the regime. First of all, what we find is an administrative elite, half-willing, without really knowing what it wants, half-fearful without really knowing how justified its fears will prove, being drawn into a political avalanche and torn into the abyss along with it. Whether the confusion of voices was the sound of triumphal whooping or anguished screaming, is unclear. This confused, exhilarated yet inhibited early stage lasted until about mid-1934. After that, it became obvious that the regime would gain stability. This, depending on one's point of view, was either a threatening or a reassuring prospect. The November pogrom of 1938 and the outbreak of war the following year marked, for many, the beginning of a sense of detachment from the regime, though that sense of detachment would soon be tested by the pressures of war. This ambivalence held sway until the final days of the regime.

In the summer semester of 1933, jurisprudence regrouped in a new political climate in which colleagues were dismissed and NS students given power. Yet the new pattern that was clearly emerging cannot be described in purely political terms. Most professors of jurisprudence teaching in 1933 were critics of the republic without being actively anti-constitutional. They envisaged an outwardly and inwardly strong
state in which a politically neutral civil service
(Berufsbeamtenrntum) would have no party links. This majority
was, for the most part, affiliated to what might be termed the
center field, but also embracing the Deutsche Staatspartei and
even the Deutschnationale Party. Most of them were bourgeois
and conservative, and were willing to co-operate with the
new regime as long as it was able to produce further achieve­
ments and success, willing to temper its persecution of dis­
senters, and otherwise refrain from upsetting the apple cart.
It was on this sandy soil that the symbiotic relationship
between government and traditional elites, so typical of
National Socialism, was built.

An occupational pattern based, for example, on disci­
plines or specific areas of jurisprudence, cannot be discerned.
All fields of law were involved to more or less the same
degree, with the exception of those areas in which there was
a particularly high proportion of Jewish scholars, as was the
case in international law, comparative law, international pri­
ivate law and the history of civil law. Indeed, the last if these
had some difficulty in developing any kind of identification,
given that it was explicitly targeted for disparagement by the
NSDAP party program. Nonetheless, even in that area, there
were also specialist representatives who strove to be civil law
specialists and National Socialists (E. Schönbauer).

Age proves a more revealing factor, based on the assump­
tion that the older generation did not waver as readily as the
enthusiastic and ambitious “young wolves” who replaced
them as professors in 1933 (Georg Dahm. Karl Larenz, Franz
Wieacker, Friedrich Schaffstein, Erenst Forsthoff, Theodor
Maunz, Ernst Rudolf Huber et al.). Yet there are exceptions to
this rule in both camps. Some older academics (Conrad
Bornhak, Philipp Heck., Justus W. Hedemann) did try to
jump on the bandwagon, while some younger colleagues
(Ernst Friesenhahn, Hermann Mosler, Wolfgang Kunkel,
Ludwig Raiser) resisted the temptation. Their resistance may have been based on religious faith, social background or personal character. Whatever their reasons, the sectors typically regarded as less conducive to National Socialism (working class, Catholic communities, landed gentry, Wehrmacht officers) do not apply here. At the time, the educated protestant bourgeoisie (Kulturprotestantismus) dominated university life.

This brings us to the fairly obvious conclusion that professors of jurisprudence were average individuals with average reactions, and that their connivance with the regime only casts a dark shadow where ideal and reality met. As the publications indicate, the first wave of enthusiasm, like the first wave of silence, came in 1933-1935, and was followed by a period of stabilization in 1935-1938, when power groups formed within the system. After that came a period of publishing shaped by the war, including a “war effort” in the field of arts and social science activities organized by Paul Ritterbusch, rector of Kiel University.(29) Throughout this period, publishing in the field of jurisprudence typically produced innumerable publications that typically give little indication of the political climate in which they were written. These were practice-related specialist publications that concentrated on conveying and commentating upon standard legislation without actually having to take any political stance. Indeed, leafing through the legal periodicals of those years is likely to give the impression that this dry, specialist approach was prevalent. Of course, this does not apply to the periodicals founded during the Third Reich with the specific aim of providing ideological training for lawyers in “Deutsches Recht”, “Deutsche Verwaltung”, “Reich—

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Volksordnung—Lebensraum”. Yet it is interesting to note that
the mood of enthusiasm that emerged between 1933 and 1935
did not swell still further with the outbreak of war. On the
contrary, from 1939 onwards, debates started to become more
objective, occasionally even cautious, accommodating a broad
spectrum of opinion.(30)

If we are to do justice, as it were, to jurisprudence as a
field so closely linked to court and administrative practice
that its scientific character has always been questioned, then
only jurisprudence itself can provide the appropriate yard-
stick. We must look both to its actively involved apologists
and to those who seek to apply today’s standards to its evalu­
ation. The history of the subject must first of all reflect upon
the functions that jurisprudence as a subject, with all its sub­
divisions, has had to fulfill. Only a small minority of its pro­
tagonists pursue the maxims of basic research. Legal theoreti-
cians and legal historians—when they are not delving into
utterly esoteric issues—also have a tendency to attribute con­
temporary references to their findings. They, too, are depen­
dent upon the political context in the creation of research
hypotheses and in the selection of sources and references as
well as in the presentation of findings.

Essentially, the parallel tasks of research and teaching in
the field of jurisprudence are as follows: (1) Introducing the
next generation to the system of prevailing law; in other
words, conveying legislation in the broadest sense; (2)
Drawing political givens, new legislation and jurisdiction into
a coherent system of dogma. This coherence and clarity help,
on the one hand, to convey standards of legislation for teach­
ing purposes, while, on the other hand, they play an impor-
tant role in ensuring that legislation is accepted as reliable and predictable by those to whom it is addressed; (3) Adapting the system to changes, real or perceived, in the political situation. This involves defining and interpreting changes in state, law and society, as a means of prognosis and as mediation between political and legislative systems. In the case of National Socialism, jurisprudence specifically served the political system by the conventional means of molding what the political system wanted into authoritative legal doctrine. Legislation, jurisdiction and even academia transformed such violent acts as annulment of citizenship, arrest, murder and pogroms into "lawful acts". Consider, by way of example, the law passed following the Röhm murders of June 1934. In a move unparalleled in legal history, this law, consisting of a single sentence, declared the "measures" to be lawful acts of self-defense on the part of the state. When a respected leading authority in the field of jurisprudence justified this law with such conviction as to make it sound inevitable, he was appealing to his readers to accept the unacceptable. (31) The Nazi state, which was able to clothe its acts of violence in the formal standards of the bourgeois state that were based on the rule of law, had every reason to assume that many citizens who should have known better would accept the form as content and thereby be persuaded to go along with it. Thus, the technique of legally seizing power became a legal assertion and implementation of power. The legal form in which injustice was clothed made it seem as though a limit had been set.

Jurisprudence in the years 1933 to 1945 fulfilled the functions described here in various ways. There was a drop in the number of new lawyers being trained. Whereas there were

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some 22,000 students of law registered in the summer semester of 1930, that figure had fallen to 4,555 by the summer semester of 1939. During the war, the numbers declined still further, reaching barely 3,000 in the winter semester of 1941. The number of women studying law fell even more dramatically (from 1175 in the summer semester of 1930 to just 42 in the summer semester of 1938). This trend went so far that there was talk of closing down some of the smaller faculties (such as Frankfurt am Main, Marburg and Halle). Whether the quality of legal training also declined is difficult to say, but there is little affirmative indication of its decay.

Admittedly, there were certain distractions, in the form of student "camps" and various obligations connected with the institutional procedures of the Nazi state, but, on the whole, the university teaching staff that remained was as highly qualified as it had been in the days of the Weimar Republic. The faculties were fairly successful in warding off infiltration of the staff by party loyalists.

Given the increasingly hectic and uncoordinated lawmaking of the Nazi state, let alone its sheer volume, it was hardly possible to shape the new legislative material into a coherent system. As there was no longer any parliamentary discussion of new legislation, and since new laws were soon being passed by the ministries, any control at all was now in the hands of a ministerial bureaucracy that frequently found its aims thwarted by orders from the various power centers of the NSDAP. The new legislation took both the public and the academic world alike by surprise. There could no longer be any talk of jurisprudence as a shaping force. Even Ernst Rudolf Huber's enormous endeavor to systematize public law was clearly an artificial construct that was no longer seen as
in any way binding. The many legislative proposals drawn up in the Academy of German Law suffered the same fate. Even if a few of them did find their way into social law, penal law, civil procedure or other legal fields, it was not because of the authority of the academic body, but, at most, because of their acceptance by the ministerial bureaucracy.

Things look different if we ask what jurisprudence did in terms of adapting to the new situation created by the Nazi state. Here, we find a number of effective contributions, such as the "specific-general concept" (coined by Larenz), the acceptance of a graduated concept of property and ownership and the abolition of the general section of the Civil Code (BGB) (Wieacker), the implementation of a new vocabulary relating to the "Gemeinschaft" or "community" and the corresponding exclusion of those deemed "alien to the community" in labor law (the corporate community), landlord and tenant law (the household community) and other areas. Carl Schmitt's remarkable formula "thinking in terms of concrete order" proved highly successful. It was Carl Schmitt, too, who, just before Germany launched its campaign of aggressive expansion, introduced the "Grossraum (Greater Space Theory with prohibition of intervention by foreign powers). In administrative law, Ernst Forsthoff described local state benefits as "Daseinsvorsorge" or "existence assurance" — a well-chosen term borrowed from Jaspers that was not to be fully accepted until the Federal Republic. In penal law, the definition of criminal types, "Tätertypenlehre" (Edmund Mezger), the inclusion of "characteristics of will" in the facts of the case (Hans Welzel), and the shift of focus from the "crime" itself to the "criminal will", helped to bring traditional penal law closer in line with the new political will,

32 Ernst Rudolf Huber, Verfassungsrecht des Großdeutschen Reiches, Hamburg 1939.
placing it more fully in its service. In a similar spirit, jurisprudence addressed such issues as easier divorce proceedings in the case of childless marriages, forced sterilization, the killing of the mentally ill, the dismissal of legal protection in "political" cases as a "justizloser Hoheitsakt" ("act of sovereignty bar justice") and many other specific political issues related to National Socialism. In this respect, it must unfortunately be said that jurisprudence fulfilled its core function very well indeed—fundamentally reflecting the spirit of the times and implementing such reflection in a wealth of proposals, small and large. In this, it remained a creative force, with prolific publication occurring until well into the war years.

IV.

The reluctance to glance in the mirror after 1945, of which I have already spoken, is hardly surprising, given what we know about the psychology of memory. Every author writes "in his time", and every writer feels that his own work is more coherent and free from influence than it really is. No-one wants to have his life's work declared worthless. These are understandable attitudes. As Friedrich Nietzsche put it so succinctly: "This I have done,' says my memory. 'This I cannot have done,' says my pride and remains intractable. In the end, memory gives in."(33)

The resulting reluctance of academics to look into their own academic history after 1945 has been noted and criticized many times. Explanations have been offered, many of them plausible enough, such as the lack of impartial detachment or an unwillingness to indulge in self historicizing. There was probably also a sense of shame, for the most part suppressed but nevertheless subconsciously present, at hav-

33 Friedrich Nietzsche, Jenseits von Gut und Böse, Viertes Hauptstück, 68.
ing succumbed so readily to the spirit of the times. This sense of shame easily co-exists with an aversion towards those who were born late enough to feel righteous and who so often took the moral high ground in expressing their surprise at the behavior of their elders. It was a gesture of accusation that not only sealed the lips of the older generation, but proved academically unproductive, for the oft-repeated talk of the older generation's alleged failure was a moralist stance that obscured more than it enlightened. It defined the problem primarily as a moral one, linking it to a single "misled" generation, and thereby not only avoiding an actual historical explanation, but also distorting the view of their own conformity and capacity to adapt. That is something the older generation was only too happy to point out to the revolutionary generation of 1968 at every opportunity.

In fact, the history of jurisprudence in the Federal Republic has barely been tackled to date. A joint project undertaken by Dieter Simon, and a broad survey by Joachim Rückert clearly did not set anything in motion. This may have something to do with the continued emphasis on treating the National Socialism complex, together with a reluctance to explore one's own personal lines of continuity. There may also be a special kind of irritation that tends to be triggered by any historicizing of those subjects in which dogmatic truths are involved.

As a number of new findings have shown, the first decades of the Federal Republic, at least, have now become history. Norbert Frei has systematically examined the way the young republic dealt with its Nazi past, albeit without going into the history of jurisprudence. Nevertheless, he does touch

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upon the subject indirectly, in talking of the reconstruction of the legislative content of Article 131 of the Basic Law regarding the legal relations of persons formerly employed in public service. University staff, too, were persons who had been "in public service on 8 May 1945" and who now sought reinstatement at the universities. This process had been concluded by 1950, bar a few exceptions.

The three years between capitulation and currency reform saw a heated and almost anarchic debate flare up in periodicals and conferences, after which silence ruled. The annual meetings of the individual specialist disciplines did not take place again until about 1949. When they did, they did not discuss their own past. Those who had believed in genuine moral renewal were disappointed to see the public sector filling up again with former NSDAP members. Those who really did have a guilty past refused to confront the matter. All this was overshadowed by the Wirtschaftswunder—the economic miracle—by integration into Western Europe, by the euphoria of winning the 1954 World Cup and the status that victory conferred, along with a new-found affluence reflected in holidays abroad and a general mood of eat-drink-and-be-merry. The furies, it seemed, had been silenced.

Yet a new sense of unrest had been fomenting after 1960. Eichmann’s trial in Jerusalem in 1961, the anti-nuclear movement, an increasingly strong GDR that sought to prove the continuity of fascist tendencies in the West, Western publications (such as Seeliger’s Die Braune Universität), the Auschwitz trial in 1965, and the first series of lectures at Munich, Tübingen and Berlin on the Nazi past of the universities(40) created a climate in which any accusation of a Nazi past had a good chance of being believed. With new cases

35 Frei (above note 11) pp. 69 ff.
emerging all the time, the younger generation's suspicions were fuelled. All this, together with the first critical voices raised against America and emotions fuelled by an underlying generation conflict, created the volatile mixture that exploded in 1967-1969.

The lawyers, on the whole, responded by withdrawing into their own closed world. Anyone who admitted their own "involvement" was likely to be shunned. Such an admission was *infra dignitatem*. Those who criticized too strongly or expressed solidarity with the students were marginalized. For this reason, many who were eager to establish their careers avoided the subject of the Nazi past rather than risk clashing with the leading figures of the faculties. The wheels of legal history moved slowly. In those days, there was no such thing as "contemporary legal history". Irrespective of such internal hindrances, 1968 saw the start of a new direction in scholarly writing in that field. It was Herbert Jäger in 1967 and Bernd Rüthers in 1968 who first began to explore the subject in any real depth with their post-doctoral theses. In 1968, the Institute for Contemporary History also began its major, albeit flawed, project on German judiciary and National Socialism. (36) From then on there was a steady stream of publications, dealing at first with the judiciary, then with the legislation and administration of National Socialism, and finally with jurisprudence itself.

At first, the question of criminal wrong, that is to say the question of guilt, took the fore. It was often linked with calls for the punishment of Nazi crimes to be pursued more energetically. (37) At the end of the 1970s, there followed a phase

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of greater emphasis on analyzing the political system as a whole. By the 1980s, when it came to writing an encyclopaedia article on Nazi law, I had the impression that interest had already waned. (38) But this was only a temporary phenomenon, for interest has increased again enormously since then, and has, as it were, taken off in two directions. On the one hand there is a continued tendency towards historicizing that goes hand in hand with a sober analysis of functions and a willingness to compare systems. On the other hand, there is a new collective sense of shock when contemplating the Holocaust. There is also an awareness of a change of generation, international interest in Steven Spielberg’s film Schindler’s List, the debate about compensation for slave laborers, an international neo-Nazi scene and many other factors, possibly including a newly awakened fear of German unity. Finally, there was and still is a considerable financial interest in the marketing of publications concerning the terror of this era.

An interesting example of delayed self awareness is the way in which the Association of German Public Law Teachers has so far painstakingly avoided undertaking any form of analysis of its past. Having reconstituted their association in 1949 with considerable inner conflict and a certain amount of defiance, they have consistently avoided glancing in the mirror. Only once, on 17 December 1953, when the Federal Constitutional Court (BVerfG) determined the end of public employee status on 8 May 1945, sending a cry of dismay through their ranks, did they turn to the theme of “professional public service and state crises.” (39) Needless to say, the

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predominant view was that professional public service had re-emerged from the state crisis of 1945 and that civil servants had been greatly wronged by the Federal Constitutional Court. It was fifty years after the re-founding of the Association of Public Law Teachers that it was decided that the subject of their Nazi past should be examined.(40)

The question I put now, by way of conclusion, is aimed at a theoretical gain. Allow me to outline briefly wherein this might lie. It all began with the trivial assertion that jurisprudence is a science based on specific responsibilities, actions, transactions or punishments. Jurisprudence makes statements of a preparatory, commentating, correcting and systematizing nature in respect of political, economic and social issues. Its scientific character is often questioned. It is "involved" in politics in every sense. Only in marginal areas of jurisprudence (legal history, legal sociology, comparative law, philosophy of law) is its active role diluted and its scope for "free" scientific or academic reflection increased—in so far as it is possible at all to achieve a "disinterested" meta level through the contemplation of social contexts.

Praxis oriented jurisprudence, embedded within the system of co-ordinates of politics and contemporary values, is part and parcel of social communication and interaction. It seems unrealistic to demand of it more reflection and unbiased observation of its own past than we expect from society as a whole. Administrative elites, by definition, have to adapt to changing circumstances, because otherwise they would not be able to function.

The processes of adaptation, however, take place at different speeds. The years after 1933 and the period after 1945 dif-

fer fundamentally in this respect. After 1933, there were enormous inner tensions, because the traditional image of the legal profession and the scale of values that prevailed in a state based on the rule of law came into conflict with a political sea change, one that many bourgeois lawyers, in particular, had welcomed. Bonds between colleagues were torn apart, and at the same time jobs became available for the next generation. The type of "moderate" anti-Semitism acceptable in bourgeois circles was pandered to, albeit at the price of professional ethics. Political satisfaction and moral shame continued to coexist. It was only when the final phase of the war increased their own suffering that the shame was suppressed and forgotten.

After 1945, it was the memory of personal suffering and, with that, the instinct for survival, that dominated. The legal profession as a whole, including most of the university faculties, focused on short term goals: physical survival and keeping their families together, "denazification", getting back their old job or securing a new professorship, building up the curriculum, drawing up new textbooks, re-founding professional organizations. Psychologically, they concentrated on defending themselves against accusations, sometimes perhaps even shutting out the feelings of guilt they sensed on renewing contacts with colleagues who had emigrated. Politically, they had no problems in detaching themselves from National Socialism after its collapse; there was a tendency to claim that one had never really been a part of it, that one had always resisted mentally, and sometimes even in word and deed. This may have not been entirely mistaken, but as a general description of the group, neither was it entirely correct.
The reluctance to glance in the mirror may be morally reprehensible, but in retrospect, there is a certain rationality about it. It served, and still does, as the cement that bonds groups who are threatened or who feel threatened and who seek to climb back up the ladder. Too much retrospective or introspective thinking would appear to be detrimental to an outward assertiveness. And so, as the saying so aptly goes, the skeletons were left in the closet, in the hope that the problematic memories would disappear into thin air all by themselves—that time would take care of them (the so-called biological solution), though participants tended to forget that their own biological solution was nearing and that they would not be able to tell the following generation what to think, let alone to seal their lips.

What I find surprising is not so much what the philosopher Hermann Lübbe called the “communicative silence,” (41) but the fact that it worked so well for so long. However, there is an explanation for that, too. Small groups, such as the clergy, business managers or academics have a tendency to co-opt younger colleagues. In other words, they push their own disciples through the eye of a needle to make them part of the system. This makes the up and coming generation extremely dependent on the patronage and good will of the older generation. In such a situation, breaking the taboo of mentioning the past can be a risky business. The cartel of silence does not collapse until public pressure on the older generation increases or until the job market expands and diversifies to the extent that the profession can no longer respond homogeneously.

This can be observed in retrospect at the threshold already mentioned: the period from 1964 to around 1970. Since then,

we have seen that it is indeed possible to ask questions about the Nazi past of the legal profession, but at the same time, we find the answers given superficial and uninteresting as long as the only aim is to show up the "brown spots" in the spirit of a denazification process. Today, there are many monographic studies examining individual representatives of jurisprudence during the National Socialist era (Carl Schmitt, Ernst Rudolf Huber, Karl August Eckhardt, Erwin Bumke, Franz Gürtrner, Karl Larenz, Theodor Maunz, Otto Koellreutter, Heinrich Lange, Hermann von Mangoldt, etc.). Needless to say, these studies do not have all the answers. They are, without exception, doctoral theses, whose "life and work" structure tends to be too much for the average doctoral candidate to handle. Yet, no matter how methodical the approach, and no matter which issues are confronted, the fact is that studies on the history of jurisprudence did start moving, although they began later (which seems to be fairly typical) than the studies of the matter itself, such as research focusing on penal law, analysis of jurisdiction in other fields, or histories of specific institutions (regional courts, Reich Administrative Court, Supreme Administrative Court, Reich Ministry of Justice etc.).

Today, there is no succinct and comprehensive history of science linking the history of mentalities, ideas and institutions. For this reason, we have to form our image from the histories of private law, constitutional and administrative law and penal law. One particular area that requires greater scholarly attention is the history of penal law and philosophy of law.(42) A history of the history of law would also be a fascinating subject. And in fact there are already two volumes of

individual studies on that. (43)

The idea of drawing up a comparative history of twentieth-century European jurisprudence would appear to verge on the impossible, for the project seems to be dogged by insurmountable obstacles. As far as I am aware, there is no country that has undertaken a study of the internal development of this profession in the course of the last fifty years—a study highlighting the key experiences of the generation in question and linking the immanent changes in academic debate with shifts within the academy and society. These studies would have to focus microscopically on individual figures while at the same time drawing macroscopic structural outlines. What is more, they would have to be written with moral courage, without fear of the reactions of colleagues or their students, especially when the insignificant is to be deemed insignificant. In France, this would mean pointing to the collaboration with the Vichy regime and, above all, the many years of (post-Stalinist) Communist involvement by French intellectuals. Italians would have to confront the ease with which former Fascists were rehabilitated and take a closer look at the Italian left, including the Brigate Rosse. The same applies to other countries that were victims of National Socialism (Netherlands, Denmark, Norway) or Stalinism (Poland, Hungary, Bulgaria, Romania, the Baltic states) or those which operated profitably on the margins (Sweden, Switzerland). That is something that has not happened yet and is likely to be some time in coming. Just how deep the wounds are and how profound the self-deception, is evident, for example, in Ditlev Tamm’s major study of Danish collabo-

ration,(44) a work which caused a sensation. The same is true of the Papon trial in France and the beginning of Swiss and Swedish studies of their countries' collaboration with the Nazi state. Yet we are still a long way from an analysis of jurisprudence, which is not the focal point of such studies. This is particularly true of states that have only recently freed themselves from their own forms of Fascism, such as Spain and Portugal, where the “phase of silence” continues. In the case of Russia, the difficulties are further compounded by the fact that there was no sudden changing of the guard in the faculties of jurisprudence during the transition to the post-Soviet era. Instead, it would seem that the current blend of old and new is a guarantee that no unbiased history of twentieth century jurisprudence is likely to be forthcoming in the foreseeable future.