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National Socialism and the Rule of Law

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clause. Limitations on judicial power, he argued, were less a matter of textual prohibitions than self-restraint. Zines's may be right to see some limit on judicial discretion in the general limitations clause, but in this essay, at least, the claim is more assertion than argument.

In his final essay, Zines addresses federalism and other supranational features in the Commonwealth. Of particular interest is his comparison of Canadian and Australian courts in policing the boundaries of federalism. Again, judicial behavior is substantially affected by "underlying political forces" (p. 97).

Underlying political forces are also the primary explanation for the assertive role the European Court has assumed in the European Economic Community. In this chapter, then, as in the first, Zines subordinates constitutional interpretation to larger political forces: an assertive European Court is in many ways a consequence of an organic law, the Treaty of Rome, that envisions a united community. The court therefore approaches the treaty's "federalism" provisions, he argues, not as a catalogue of divided subjects, but as aspirations to be achieved.

The distinction between subjects and aspirations is tidy but trite. Like the observations on judicial discretion in chapter two, it surely needs elaboration. As these two instances suggest, Zines sometimes makes interesting and provocative comments in a desultory, off-hand manner. His failure to follow through in such cases is disappointing, but may be caused by economies of time and space in the original lectures. Notwithstanding these occasional omissions, this book is a notable addition to the literature on comparative constitutional law.

—John E. Finn

NATIONAL SOCIALISM AND THE RULE OF LAW

Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*. Translated by Deborah Lucas Schneider. (Cambridge, MA: Harvard University Press, 1991. Pp. 368. \$29.95.)

Ingo Müller's book, originally published in 1987 as *Furchtbare Juristen: Die unbewaltigte Vergangenheit unserer Justiz* (literally "Dreadful Jurists: The Remorseless Past of Our Judiciary"), describes the moral collapse of the German legal profession and its role in facilitating the construction and maintenance of the Nazi regime. Gracefully translated by Deborah Lucas Schneider, *Hitler's Justice* seeks, first, to show how legal professionals betrayed their trust as lawyers, prosecutors, and judges and, second, to assess the degree to which Germany in the postwar period reformed its legal system, purged the judiciary of former Nazis, and rededicated itself to the rule of law. Detlev Vag't's short introduction to the English edition helps to orient the non-German reader. It contains an overview of Germany's court system, a sketch of the legal profession's organization, a note on the controversies about the role of lawyers and judges under National Socialism, and a summary of the allied effort to reform the German legal system after the war.

The main message of this book is that lawyers and judges trained to serve the *Rechtsstaat* (a state based on the rule of law) had instead subverted it by going along with Hitler and his criminal regime. Like physicians, professors, and even clergymen—members of professions dedicated to serving human needs—lawyers and judges, far from opposing injustice, actually helped to perpetuate it. The judiciary's record by any standard is a tale of iniquity, its collusion with evil having already begun during the Weimar period when judges antagonistic to constitutional democracy openly sympathized with Nazi defendants charged with committing acts of violence against their political enemies. Thus, as the author argues, the German judiciary compromised its integrity even before the Nazis took over.

There follows an account of the various ways in which lawyers, prosecutors, and judges subverted the *Rechtsstaat* during the Nazi years. We find them making a mockery of the Reichstag fire trial; conducting political trials and bullying defendants in open court; confining political prisoners to inhuman prison conditions; driving Jews out of the bar and off the bench; depriving them in turn of all other rights of citizenship, even to the point of imposing the death sentence for petty offenses; formulating policies that allowed physicians to experiment genetically on disabled people and to kill persons regarded as unworthy of life; organizing special courts for the prosecution of "asocial elements" and "political and military enemies of the state"; and "correcting" the decisions of regular courts to the disadvantage of litigants or defendants disfavored by the state.

These perversions of justice were real. They happened, and the author hammers home the reality of what happened by parading before the reader example after example of judicial lawlessness and legalized terror. Much of this story, based heavily on court records and other official reports, has been told before. Actually, this book is intended to refute studies that defend or explain away the record of the judiciary during the Third Reich, seeking to demolish any interpretation of that record that would diminish the extent of its contribution to the rise and acceptance of the Nazi state. Hence, armed with information selected from the sources just mentioned and citing chapter and verse of laws and regulations that sanctioned Hitler's justice, the author proceeds to indict the entire judicial establishment.

Müller powerfully substantiates his indictment, yet somehow the indictment is not sustained by the evidence adduced. He gives the reader snapshots of the judicial role under the Nazis, and while such snapshots build a case for an unquestionably broad condemnation they do not warrant the conclusion that the judiciary or the legal profession was totally corrupt. We read, for example, that only one "stout-hearted" judge—Dr. Lothar Kreyssig—"refused to serve the [Nazi] regime from the bench" (p. 196), an assertion that verges on being an *ipse dixit*. Did not other judges resist the pressure to do evil, even if only by the smallest acts of insubordination? By the author's own account Nazi officials had to "correct" a large number of judicial decisions, belying the impression of a totally tainted judiciary. He also reminds us that "Hitler . . . considered jurists 'complete fools' incapable of recognizing what measures the state had to take" (p. 174). If Hitler had really had his way he would, like Dick the Butcher in Shakespeare's *Henry VI*, have killed all the lawyers.

Hitler's Justice presses the claim, as already suggested, that the judiciary—and indeed the entire legal establishment—succumbed to the temptation of evil. It presses that claim too far, however, and ignores evidence that tends to undermine its wholesale condemnation of the judiciary. In this regard, it is interesting to compare Müller's book with Marck Linder's recent study of the Supreme Labor Court (*The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis* [Frankfurt am Main: Vittoria Klostermann, 1987]). A careful study of the published decisions of the *Reichsarbeitsgericht* between 1933 and 1945, it is a nuanced account of the court's work, for it resists the temptation to charge the judiciary *en masse* with carrying out the will of the Nazi regime. Linder is able to show, for example, that in labor contract cases the court retained a large measure of its autonomy, resorting in some instances to rigid formalistic reasoning as a way of ignoring the Volk-consciousness that was supposed to inform its decisions. Even Jews who lost their jobs or pension rights as a result of a company's "aryranization" were successful in their suits before this tribunal. In short, Linder's study supports Ernst Fraenkel's notion of a dual state in which a system of Nazi justice, practiced mainly in special courts and criminal tribunals, coexisted along side of courts that interpreted law much as they had done before 1933.

Another and consequent problem is the book's unevenness and anecdotal character. Anecdotes—stories of victims and their oppressors—do capture the reality of Hitler's justice but these tales of injustice do not tell the full story of bench and bar between 1933 and 1945. In addition, some topics are covered in a flash while others are treated at length. The author devotes thirty pages to the Nuremberg laws and only three each to chapters on Hitler's euthanasia program and the deeds of lawyers in the civil service. In a two-page chapter (pp. 138–139) on "the arbitrary decisions of everyday life" he is satisfied with citing decisions of six different courts, including the Prussian Administrative Court of Appeals and the Supreme Labor Court.

Perhaps we should overlook the omissions in Müller's account. After all, the criminal actions of some courts and judges need to be placed under a magnifying glass if only as a reminder that educated elites are as susceptible as the unwashed masses to becoming unwitting as well as willing participants in the commission of evil. The last part of the book, however, in which the author assesses the Federal Republic's record in "overcoming the past," is less excusable. Here the book recedes into injudicious criticism of the Federal Republic's effort to reform the judiciary and the legal profession.

Müller speaks of the postwar "re-Nazification" of the German judiciary which in his view has had "a profound effect on the development of democracy in West Germany" (p. 203). The charge of "re-Nazification" rests on the large number of former National Socialists who were apparently reappointed to the judiciary after the War. Rightly, Müller condemns the reappointment of judges who were implicated in Nazi crimes, but mere membership in the Nazi party could and should not have been a disqualifying factor in judicial appointments since judges and lawyers who joined the party did so for a wide variety of reasons ranging from mere expediency to ideological conviction. Karl Jaspers once distinguished between four kinds of guilt among men and women who lived and worked in Nazi Germany, namely, metaphysical,

moral, political, and criminal. Müller's account is inattentive to these distinctions.

The author's description of the German judiciary after 1945 is also limited. Indeed, it resolves itself into a partisan account. Three items may be cited to illustrate the partisanship. The first is his criticism of the postwar revival of natural law in Germany or certain "supra-positive" standards of judicial review, a criticism that recalls his attack, earlier in the book, on teleological methods of inquiry used by certain courts during the Weimar Republic. Here the author tries to rescue legal positivism from the familiar charge that it caused the breakdown of the rule of law during the Nazi period. He is surely right to attack this oversimplified view of legal positivism, but he is surely wrong to suggest that teleological analysis or natural law thought in its West German incarnation is a continuation of old ways of legal thinking. Teleological inquiry is in fact a standard mode of analysis in many constitutional courts today, including the European Court of Justice.

Second, and relatedly, the author barely conceals his political leanings in condemning the generally conservative work-product of the West German judiciary, including decisions relating to internal security, reinstatement of civil servants, and reparation payments to certain opponents of Nazi injustice. The author is rightly critical of these decisions, but he fails to make the case that the postwar judiciary has on the whole served as a conservative and thus, for him, an antidemocratic force in German politics. Actually, the postwar record of the German judiciary in defending democratic values is probably no better or worse than the record of the judiciary elsewhere in western Europe or for that matter in the United States.

Finally, the author calls attention to the fact that Willi Geiger, a justice of the Federal Constitutional Court for 26 years (1951-1977), wrote the 1975 decision that constitutionally sustained a governmental decree to bar radicals from the public service, asserting in passing that Geiger served as a prosecutor of a special court where he "had successfully pleaded for at least five death sentences" (p. 218). Müller then proceeds to link the Constitutional Court's antiradicals decision to the "undemocratic and authoritarian view" that he-Geiger-expressed in an essay he wrote as a very young man in 1941. These remarks are unworthy of the author, for they are as gratuitous as they are unproven. In support of this charge he cites a virulently antigovernment tract (*Recht Justiz und Faschismus nach 1933 und heute*) published in 1984. He surely must know that such sources of information, like East Germany's *Braunbuch*, which he also frequently cites, lack credibility.

Several things might be said about the author's unfortunate remark about Justice Geiger. First, no sources are cited to back up the claim that Geiger authored the Constitutional Court's antiradicals opinion. Judicial opinions in Germany are institutional products. Except for dissenting opinions on the Federal Constitutional Court, authorship of judicial opinions is not a matter of public record. Second, whatever one may think of the prudence or propriety of the antiradicals case, it can be defended in terms of democratic theory. Third, other justices with impeccable reputations were aligned with Geiger in the majority: one was formerly a leading Social Democratic member of the Bundestag; another was imprisoned by the Nazis for his participation in the

officers' revolt against Hitler. Fourth, as one of its first appointees Geiger could not have been elected to the Federal Constitutional Court had he fatally compromised himself during the Nazi years. Indeed, several of the persons responsible for his elevation to the court were themselves imprisoned or persecuted by the Nazis.

None of this is to suggest that West Germany's judicial record is beyond criticism, or that the German legal profession has fully come to terms with its past. One only wishes that *Hitler's Justice* had offered the reader a more balanced account of both the judicial role during the Third Reich and West Germany's record after World War II.

—Donald P. Kommers

A PLURAL THEORY OF PROPERTY

Stephen R. Munzer. *A Theory of Property*. (Cambridge: Cambridge University Press, 1990. Pp. x, 491. \$55.00.)

Some theorists maintain that justification for holdings in private property is fundamentally unitary; there is some one dominant factor that sanctions patterns or rules of ownership. Locke's labor theory is a unitary account; so too is a utilitarian treatment of the rationale of property or a Marxian prescription of "to each according to his need." (I do not mean to deny that these accounts come attached to various codicils and qualifications.)

Other theorists reject unitary justification. They maintain that a full and satisfactory theory of property will contain a plurality of irreducible normative principles. Munzer's important *A Theory of Property* is, in this sense, avowedly pluralist. He identifies three independent principles governing property claims: (1) a principle of utility and efficiency; (2) a principle of justice and equality; (3) a principle of desert based on labor. The principles are not hierarchically ordered; that is, in contrast with Rawls's principles of justice, there is no algorithm for determining which takes precedence in cases of conflict. Munzer's theory is thus intuitionistic in the sense that conflicts are to be adjudicated through case-by-case judgments of overall moral satisfactoriness. His explanation and defense of the methodology of intuitionistic pluralism is both sophisticated and a persuasive counter to those theorists who allege the existence of an "Archimedean point" from which all conflicts can be resolved. In this respect, and others, *Theory of Property* has a philosophical importance that extends beyond the theory of property narrowly construed.

Theory of Property opens with a presentation of the standard Hohfeldian classification of rights, illustrating its relevance to property relations. Munzer then offers a modified Hegelian account of why ownership of property is a matter of normative significance to individuals. Through making things in the world one's own one thereby projects oneself as a morally considerable being onto the social realm. Property, he argues, confers on its owners the important goods of control, privacy and individuality. That is why we have reason to