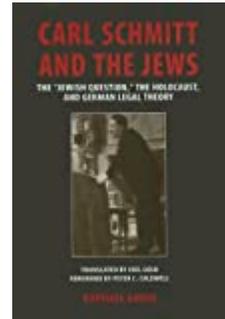




Raphael Gross. *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory.* Translated by Joel Golb. Madison: University of Wisconsin Press, 2007. xix + 347 pp. \$45.00 (cloth), ISBN 978-0-299-22240-6.



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How to Fall into Carl Schmitt's Trap

This is a long review and perhaps a controversial one. The much-awaited English translation of Raphael Gross's seminal book on Carl Schmitt's antisemitism, based on a doctoral dissertation at the University of Essen and first published by Suhrkamp ten years ago to much media attention in Germany, and subsequently in France, makes a substantial contribution to contemporary scholarship on Schmitt, one of the most influential public lawyers and constitutional theorists of the Weimar Republic. Preceded by a well-balanced preface by Peter C. Caldwell, which elegantly situates Gross's argument in the contemporary intellectual field, Joel Golb's translation is accurate and precise. It is, however, the argument of Gross's study which seems initially strikingly persuasive, but emerges as increasingly problematic. On the one hand, no doubt remains that Schmitt held deeply entrenched antisemitic views throughout his life. As such, Gross's study serves as a warning against the uncritical Schmitt enthusiasm that occasionally marks contemporary cultural studies, that is, a kind of desire for political *Eigentlichkeit* now that poststructuralist theories have

run their course. On the other hand, Gross's study has a far more ambitious goal than simply providing an account of Schmitt's antisemitism and, in this respect, it does have severe limitations that require a more detailed assessment. Most importantly, Gross unwittingly falls into Carl Schmitt's trap.

The central question of Gross's study is not whether Schmitt really was antisemitic—not even the most enthusiastic Schmitt apologists would seriously deny this. Neither is the central question whether traces of Schmitt's antisemitic convictions can be found throughout his political thought and his work as a constitutional scholar—needless to say, they can. Rather, Gross's project seeks to reduce Schmitt's entire way of thinking about the political and about law to the binary opposition between "friend" and "enemy"—introduced in *Der Begriff des Politischen* (1932)—which Gross interprets from the perspective of Schmitt's involvement in the Nazi state as the difference between a homogeneous German *Volk* and a perceived "other," that is, Judaism, that is not only "alien" to this *Volk* but threatens the latter's existential survival.[1]

Seen from this perspective, Gross claims, not only does Schmitt's thought stand in clear opposition to the tradition of the liberal *Rechtsstaat*—indeed, the very source of his critique of the modern democratic state is to be found in his antisemitic convictions.

Although Gross unearths much interesting historical material that had largely been neglected, at least before the German publication of his study in 1998, and although he aptly contextualizes Schmitt's antisemitism in the theological debates of the more radical strands of Protestantism and Catholicism in Weimar Germany, as soon as he seeks to engage with the substantive political and legal challenges of Schmitt's thought, his account reveals not only its lack of necessary philosophical sophistication but also of critical distance. In short: Gross's tendency to adopt a perspective of moral indignation ultimately falls into Schmitt's trap and amounts to a kind of "Schmittianism" in reverse, a stance that prevents Gross from undertaking a sober analysis of Schmitt's position in the theoretical debates of Weimar constitutionalism.[2] Although Gross wishes us to believe otherwise, there is more to Schmitt than his antisemitism, which is precisely what makes Schmitt the "dangerous mind" whose influence on postwar political thought—as Jan-Werner Müller has shown in great detail—should not be underestimated.[3] We might not agree with Schmitt's constitutional theories and his political thought, but we will do well to take seriously the uncomfortable questions that, for instance, his notions of sovereignty and legitimacy pose for any modern liberal state. Indeed, we ignore them at our peril.

Gross, of course, is entirely correct in pointing out the "provocative pseudoclarity" of the central concepts Schmitt employs, which make them "open to all kinds of interpretations" (p. 3). Any reader of Schmitt should beware of taking him at face value and without understanding the ultimate consequences to which Schmitt's line of argument can lead. But Gross's desire to reduce Schmitt's entire legal and political thought to a fairly simple antisemitic position and his attempt to exclude Schmitt from the history of modern political thought consistently underestimate the seriousness of Schmitt's challenge to modern liberal democracy. In other words, simply assuming, without any serious philosophical argument, that "formal equality" and a "claim to universality" constitute "the final form of state legitimacy" (pp. 96, 226) is not a sufficient defense against Schmitt's attack on the legislative state. More worryingly, however, Gross is also forced to adopt far-reaching conclusions whose implications can be occasionally somewhat problematic, to put it

diplomatically: assuming that Schmitt's antisemitic convictions and his opposition to the liberal *Rechtsstaat* are based on the same theoretical ideas, he begins to suggest, for instance, that any attempt to examine critically the universal claims of a normative theory of law not only must be indebted to Schmitt, but also tends toward an antisemitic position.

Despite these shortcomings, however, Gross's work has considerable merit. Schmitt's antisemitic convictions were obvious even before his almost stellar rise to prominence during the 1920s. In his early diaries, written between 1912 and 1915 and published only a few years ago, Schmitt complains about his own "Jewish complex": admittedly, he might occasionally note in a more positive vein that there are "more educated men among the Jews than among Christians which is why it is so easy to get on with them," but the many references to "the Jews" throughout the diaries, and often in the most unlikely of contexts, betray a barely hidden obsession, bordering on paranoia, with what he sees as the "other" of Wilhelmine society.[4] The culmination of Schmitt's antisemitism, however, comes in the aftermath of some of his most important and lasting contributions to modern political thought, such as *Politische Theologie* (1922), *Der Begriff des Politischen* (1932), and *Legalität und Legitimität* (1932): the conference "Das Judentum in der Rechtswissenschaft," organized and directed by Schmitt in October 1936 on behalf of the Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrerverbands, at which he outlined what he saw as the struggle of German jurisprudence against Judaism.[5] The importance that Schmitt attached to this struggle should not be underestimated and, indeed, he published his own concluding remarks to this conference twice in a slightly changed version.[6]

Schmitt also pursued his antisemitic ideas after 1945, of course, most prominently in the notes of the *Glossarium*, written between 1947 and 1951, in which he repeated, for instance, one of the central commonplaces of a religiously inspired antisemitism by arguing that the crucifixion of Jesus was ultimately the outcome of "Jewish" pressure on the Roman authorities.[7] Gross, who rightly sees such comments as Schmitt's Christian stylization of a political battle against Judaism, also lucidly points to the strategy that Schmitt adopts in these notes: "In the *Glossarium* Schmitt condemns antisemitism ... as something vulgar, while simultaneously demonizing the Jews" (p. 217). Prohibited from teaching in the new Federal Republic, Schmitt relied on a complex network of correspondents and, at times, truly bizarre forms of self-

stylization to influence the reception of his work among a new generation of legal scholars and political theorists, whose members often sought to downplay and minimize his direct involvement in the Nazi state, among them Ernst Forsthoff, Helmut Quaritsch, and Günter Maschke.[8]

Following the lead of Nicolaus Sombart—the son of the sociologist Werner Sombart, whose work on the evolution of modern capitalism rivaled that of Max Weber, but whose *Die Juden und das Wirtschaftsleben* (1911) fed into the antisemitic strands of the conservative revolution—Gross distinguishes between three different stages in the development of Schmitt’s antisemitism: while Schmitt’s legal and political thought before 1933 is marked by a “*structurally* antisemitic potential,” in the period between 1933 and 1945 Schmitt propagates “explicitly antisemitic ideas,” which he sought to disown and reinterpret after World War II by turning himself into the victim of historical forces beyond his control and by aligning himself with the conservative resistance to Hitler’s regime.[9]

Against this background, Gross’s study clearly and rightly seeks to correct the repeated assertion by many Schmitt enthusiasts on both sides of the Atlantic that Schmitt’s antisemitism, as alarming and appalling it may be, is of little relevance for his work as a political philosopher and constitutional scholar.[10] Nevertheless, despite his often explicit antisemitism Schmitt has also returned, in more recent years, to the forefront of political theory on both sides of the Atlantic. Some of the central arguments that can be found in his writings from the 1920s and early 1930s, uncannily pinpointing the pitfalls of liberal democracy and highlighting the uncomfortable limits of civil society, have even served as the basis of a revised conception of the political after the decline of a Rawlsian liberalism inspired by the tradition of Immanuel Kant’s notion of civil society.[11] At the same time, Schmitt’s theoretical *oeuvre* has also become a point of reference among cultural theorists writing in the aftermath of the 1980s deconstructive turn, such as Giorgio Agamben.[12] Whatever we might think of such theoretical concerns, Schmitt’s arguments—for instance, in *Legalität und Legitimität*—pose serious questions to those who regard constitutional democracy merely as a given, as a self-perpetuating normative order of society, without wishing to pay much attention to the fragility of this order.[13]

But does this mean that such recent work in political and legal thought, as well as cultural theory, unwittingly

or even willingly continues Schmitt’s antisemitic convictions into the present? Gross thinks so. In his concluding remarks he begins to suggest that any critique of theoretical positions that are generally described as empirical and positivist transports Schmitt’s antisemitic convictions into the present:

“Schmitt’s battle against positivism was not only widely approved in both the Weimar Republic and Nazi State. At present in Europe and North America, many efforts are evident in the academic fields of legal studies, political science, history, and literary studies to make his ideas fruitful by simply excising their openly racist and antisemitic dimension.... With the postwar renaissance of an antipositivist understanding of law and scholarship, the concept of positivism increasingly amounted to a defamatory slogan used negatively in scholarly, ideological, and political conflicts. But the defamation had already been initiated by the Young Hegelian critique of religion, for instance in Feuerbach’s definition of the Jewish religion of revelation as a morally indifferent faith based on law alone ... Carl Schmitt was an important representative of this intellectual current” (pp. 226-228).

Leaving aside the problem that there are indeed epistemological problems with positivism in the narrow sense of the term, it seems that Gross’s conclusion confuses analogies with causal links. Nevertheless, in his own afterword—in which he reacts to the German and French discussions of his book—Gross continues this argument, which is now formulated as a question: “The question emerges of whether a repeated use of central Schmittian concepts still reconstructs or transmits their antisemitic contents when political-moral demarcation from Schmitt’s perspective has also been established” (p. 237). Gross carefully avoids a direct answer, but his ensuing references to the philosopher Agamben, constitutional scholar Ernst-Wolfgang Bockenförde, the historian Reinhart Koselleck, and Egyptologist and cultural theorist Jan Assmann leave little doubt that he believes their work to continue Schmitt’s antisemitism unwittingly.

Gross’s reaction to Assmann’s argument, for instance, about ancient Israel’s “Mosaic distinction”—in *Moses the Egyptian* (1997) and *Herrschaft und Heil* (2000)—is a case in point: Gross accuses Assmann of carrying over “an entire spectrum of Schmittian positions intertwined with the jurist’s Nazi and antisemitic engagement” (p. 240).[14] This remark refers in particular to Assmann’s theory of cultural memory, which to a considerable extent rests on the notion that social groups

seek to construct such cultural memory in order to stabilize their own identity.[15] For Gross, however, this argument ultimately supports the notion of the “homogeneity of cultures and nations” and, as such, echoes antisemitic conceptions of a German *Volk*.

Gross’s response to Assmann is, however, part of a much wider and, in many ways, more problematic claim: if we take seriously the problems Schmitt highlights with regard to the foundation of democratic rule and constitutionalism, for instance, in his *Verfassungslehre* (1928) and in *Legalität und Legitimität*, the central arguments of which have little to do with Schmitt’s antisemitic convictions, do we unwittingly take, as Gross writes, a “structurally antisemitic” position (p. 9)? Gross discusses the *Verfassungslehre* only in passing and ignores *Legalität und Legitimität* entirely, although both represent Schmitt’s most important work as a constitutional scholar in Weimar Germany. To put it more sharply: is an attempt to critically examine the universalism of the modern liberal state camouflaged antisemitism? Again, Gross seems to think so, but it remains doubtful that Schmitt’s critique of the *Rechtsstaat* can be disqualified quite so easily. Indeed, the entire debate between Schmitt and the constitutional scholar Hans Kelsen, which features prominently in Gross’s study, is less concerned with the role of Judaism in the German state than with the demarcation between a substantive notion of the political, which influences the rule of law (Schmitt), and a formal notion of legality grounded in a basic norm which diffuses the problem of sovereignty (Kelsen).[16] Following earlier remarks by Leo Strauss, Gross regards this debate, however, as “Schmitt’s struggle” against a specifically “Jewish” neo-Kantianism, which furthermore continues Bruno Bauer’s nineteenth-century critique of Judaism.[17]

While Gross is correct to assume that Schmitt’s personal attack on Kelsen was motivated by his negative attitude toward the history of Jewish emancipation in Germany since the mid-nineteenth century, Schmitt’s arguments against the normative neo-Kantianism of Kelsen’s theory of law can also be made from a position that is decidedly not antisemitic. Gross, it seems, moves onto thin ice as soon as he leaves the history of antisemitism behind and enters the field of legal theory. He not only fails to realize that the problems addressed in the debate between Schmitt and Kelsen remain with us today, but he also underestimates Kelsen’s influence when he notes that, in contrast to Schmitt, Kelsen’s defense of Weimar constitutionalism is “virtually unknown” (p. 88). Given the more than twenty volumes of material published by

the Hans Kelsen Institut in Vienna and the wide reception of Kelsen’s constitutional thought in the United States, such a claim is somewhat bizarre.

But even Gross’s discussion of the climax of the debate between Schmitt and Kelsen, which took place in 1931 and was centered on their very different accounts of sovereignty and emergency powers, remains reductive. Schmitt’s argument for an authoritarian notion of sovereignty is simply described as following the logic of a theological miracle, while Kelsen’s alternative is not really discussed in any detail.[18] As such, it is not surprising that Gross, although he mentions it in a short discussion of Schmitt’s account of John Locke and Thomas Hobbes, downplays the fundamental problem of whether law generates authority (Locke and Kelsen) or authority creates law (Hobbes and Schmitt). It seems, then, that the move to reduce Schmitt’s constitutional thought to mere antisemitism forces Gross to overlook the fundamental issues at stake in the debate between Schmitt and Kelsen.

Given what I have said thus far, the English subtitle of Gross’s study is quite misleading, since we learn fairly little—apart from the obvious—about either Schmitt’s work in the field of legal theory or the state of German jurisprudence and state law theory in the Weimar Republic or under Nazi rule.[19] Schmitt was famous and, after 1933, especially close to the Nazi leadership, but his work hardly represents the entire field of public law in Germany between 1933 and 1945, and his actual influence in the legal profession waned considerably from 1936 onward.[20] Nevertheless, Gross is right to argue that Schmitt’s relationship to the National Socialists before and after 1933 is particularly illuminating with regard to his antisemitic convictions. Indeed, before 1933 Schmitt might not have opposed the Nazis directly, but “he has also nothing positive to say about them” (p. 27). In *Legalität und Legitimität*, published in 1932, he even defended the constitutional right of the Reichspräsident to dissolve the paramilitary wings of the Nazi Party and was quoted on both sides during the legal proceedings about the so-called coup against Prussia at the Staatsgerichtshof in Leipzig. Schmitt’s arguments are ironically better suited to defend the Social Democratic caretaker government of Prussia than Paul von Hindenburg’s and Franz von Papen’s attempt to place Prussia under commissarial rule.[21]

In the light of Schmitt’s remarks about the Nazis before 1933, it is necessary to ask whether Schmitt’s engagement with the Nazi state was the result of sheer careerism, whether he saw the Nazi state as the realiza-

tion of his own authoritarian political theory, or whether he simply aligned himself with the Nazis because they shared his antisemitic notion of a homogeneous German *Volk*. Needless to say, Schmitt is not the only public lawyer who regarded the Nazis before 1932 with some skepticism. Few German law professors, with the notable exception of Otto Koellreutter, supported the Nazis before they assumed power in 1933, only to declare their allegiance to the new state once Koellreutter had dissolved the important Association of German Teachers of State Law.[22] Although Koellreutter, the leading theoretician of state and administrative law in Nazi Germany, consulted with Schmitt about the reorganization of the legal profession under Nazi rule, he also regarded Schmitt as a direct rival and sought to generate doubts about the authenticity of the latter's political convictions among the establishment of the Nazi Party and SS.[23]

On the one hand, Schmitt's move toward the Nazis was clearly an example of opportunism, a development that becomes especially obvious in his reaction to the RÄ¶hm crisis, "Der FÄ¼hrer schÄ¼tzt das Recht" (1934).[24] On the other hand, the enthusiasm with which Schmitt involves himself in the racial policies of the Nazi state is suggestive of a much darker motivation.[25] Gross rightfully considers the problem of Schmitt's opportunism a central question, one that becomes particularly pertinent when we consider the anti-semitic agenda of the conference "Das Judentum in der Rechtswissenschaft." But although Gross first argues that "Schmitt's career indeed reveals a consistent opportunism" (p. 27), he finally concludes that it played no role in Schmitt's support of the Nazi state and its anti-semitic policies: "during the Nazi period Schmitt tried to concretely realize his antisemitic ideas. Nazism supplied him with an opportunity to apply those ideas, which he entertained, as political currency, before his Nazi engagement—no other conclusion makes logical sense" (p. 30). But what about the possibility that Schmitt was ready to further his own career by aligning himself with an ideology that shared his own antisemitic convictions? In other words, shared antisemitic attitudes between Schmitt and the Nazis made an opportunist career move especially easy—after all, the Nazis did not need Schmitt, but Schmitt needed the support of the Nazis, as Hannah Arendt once suggested.[26] Such a conclusion seems not entirely implausible, and Gross himself admits that "Schmitt and his disciples ... directly profited from the now-open positions" vacated by Hermann Heller, Hans Kelsen, and Erich Kaufmann, among others who had to flee the Nazi state (p. 25). Indeed, Schmitt

found the Nazi state attractive for a host of reasons: the *FÄ¼hrerstaat*, as technocratic as the latter turned out to be in the end, promised to be the realization of precisely the kind of authoritarian executive power, based on the personal sovereignty to decide, which he had already outlined in *Der Begriff des Politischen*, *Politische Theologie* and *LegalitÄ¼t und LegitimitÄ¼t* with regard to the position of the ReichsprÄ¼sident during the Weimar Republic. Since, for Schmitt, "legitimate government is government from above," he might have viewed the technocratic aspect of the National Socialist party system with some skepticism—unlike Koellreutter, who wholeheartedly endorsed the latter as an administrative lawyer—but the new *FÄ¼hrerstaat* was in many ways a radicalized version of the position Schmitt already held since the 1920s.[27]

Gross, however, does not regard Schmitt's appeal to the concepts of *FÄ¼hrer*, *FÄ¼hrtum*, and *FÄ¼hrung* as a radicalization of Schmitt's Weimar authoritarianism and his interpretation of Article 48 of the Weimar constitution, but rather as another example of Schmitt's anti-semitism.[28] Doubtless, Schmitt's language after 1933 follows the Nazi party line, yet during the Weimar Republic the desire for a charismatic and politically decisive *FÄ¼hrer*, including the term itself, cut across all party political, confessional, religious, and social divides.[29] Gross's analysis of Schmitt's political language is far more successful when he discusses the latter's use of the terms *Art* and *Gleichartigkeit*, which, in the second edition of *Der Begriff des Politischen* (1934), takes on an increasingly biologicistic and racist meaning, one that defines the Jewish population as *artfremd* vis-Ä¼-vis a homogeneous German *Volk*, although Schmitt hesitates to say so directly.

Gross's study is undoubtedly best when he examines the complex sources of Schmitt's antisemitic convictions and when he convincingly shows how, after 1945, Schmitt sought "to locate himself in the circle of the conservative German resistance" (p. 199). Most importantly, Gross corrects the widely held view that Schmitt's conservative Catholic upbringing in the Sauerland was the central source for his antisemitic convictions. While important, the latter contributed only one facet to Schmitt's antisemitism, and Gross successfully traces the profound influence of the political theology of German Protestantism on his notions of *Volk* and *nomos*. In a certain sense, the more radical fringes of German Protestantism provided the Catholic Schmitt with a politico-theological orientation that the political representatives of the Catholic middle class in the *Zentrumspartei* were

unable to deliver. Although involved in government throughout the Weimar Republic, the *Zentrumspartei* had to rely on a highly diverse base with often contradictory interests, a situation that stood in sharp contrast to the more unified image of the modern state in Schmitt's political theory.[30] As Gross correctly points out, this peculiar blend of Catholic and Protestant political theology led Schmitt to draw on the political tradition of a radical counter-Enlightenment—represented in particular by the Vicomte de Bonald, Joseph de Maistre, and Juan Donoso Cortés—and ultimately led him to combine “traditional anti-Jewish motifs with a modern anti-universalism” (pp. 80-81).

Without realizing it, however, Gross increasingly begins to fall victim to the strange logic of Schmitt's argument and even adopts what can be termed a kind of “Schmittianism in reverse,” characterized by the assumption that any critique of universalism is necessarily Schmittian and continues the latter's antisemitism. Philosophers call this type of argument a category mistake: in the same way that Schmitt, especially after 1933, openly describes a normative, formal, and legalistic interpretation of constitutional law, represented by Kelsen and Hermann Heller, as “Jewish,” Gross links the critique of universalism to a Schmittian antisemitism.[31] He repeats, in other words, Schmitt's own category mistake, simply in reverse.

But Gross's category mistake is not the only problem of his methodology, for he also presents us with a kind of informal fallacy: Gross explicitly argues that Schmitt's critique of the constitutional state as a “Jewish legal state” really only emerges after 1933 but then proceeds to show that the logic of Schmitt's bizarre claim is already structurally present in his earlier works, such as the first edition of *Der Begriff der Politischen* and *Politische Theologie*. It is “structurally” present, for instance, in Schmitt's distinction between “friend” and “enemy,” although there is no reason to assume that such a distinction—as undoubtedly problematic as it is—has to be read exclusively in terms of Schmitt's antisemitism. Does the binary structure of Schmitt's claim make it inherently antisemitic?

To be sure, antisemitism rests on such a binary opposition, but it would surely be far-fetched to argue that all binary oppositions are antisemitic, such as, for instance, the “Hegelian dialectic.” Indeed, the universalism and formal procedural qualities of the modern *Rechtsstaat*, and the notion of civil society that underlies this state, rest on a philosophical tradition—German Idealism and especially Kant and Georg Wilhelm Friedrich Hegel—

that operates rather often with such binary modes of thought. Although it has been claimed, somewhat unpersuasively, that Kant's philosophy is marked by the traces of antisemitism that run through German Idealism,[32] it should also be noted that Kelsen's own *Reine Rechtslehre* (1934), the counterpart to Schmitt's work, relies heavily on a Kantian model.[33] Does this imply that Kelsen's own defense of the democratic state, because it rests on a clear binary distinction between a formal and a substantive notion of law, ultimately follows the logic of Schmitt's argument?[34] This conclusion would be a necessary implication of Gross's own argument.

Gross's “Schmittianism in reverse” also leads him to an overly simplified opposition between a liberal strand of German intellectuals, represented by Max Weber, Ernst Cassirer, and Aby Warburg, and an irrational one, represented by Schmitt, Oswald Spengler, and Martin Heidegger. Such clear-cut distinctions might be a helpful heuristic device, but hardly reflect the complexity of intellectual culture between 1918 and 1933. Weber's liberalism remained an aristocratic one and his assessment of mass democracy was not entirely positive.[35] Likewise, it is certainly true that Cassirer and Warburg regarded myth as “a threat to liberal values,” but Cassirer's *Philosophie der symbolischen Formen* (1923-29) as well as Warburg's unfinished *Mnemosyne-Atlas* (1924-29) also emphasized, much like Walter Benjamin, the anthropological inevitability of myth-making.[36]

Seen against this background, the central problem of Gross's argument is what I have called his “Schmittianism in reverse”: he falls into the trap of Schmitt's ideas and is forced to give up critical and analytical distance. On the positive side, much can be learned from the material that Gross presents, and current scholarship on Schmitt will do well to take it seriously.

Notes

[1]. See Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), 27-37.

[2]. This was also pointed out, albeit in a different context, by Ruth Groh in the same year that Gross's study was published in Germany. See her *Arbeit an der Heiligkeit der Welt: Zur politisch-theologischen Mythologie und Anthropologie Carl Schmitts* (Frankfurt am Main: Suhrkamp, 1998), 23. I am grateful to Martin Blumenthal-Barby for this reference.

[3]. See Jan-Werner Müller, *A Dangerous Mind:*

Carl Schmitt in Post-War European Thought (New Haven: Yale University Press, 2003).

[4]. See Carl Schmitt, *Tagebücher: Oktober 1912 bis Februar 1915*, ed. Ernst Häßsmert (Berlin: Akademie Verlag, 2003), 226.

[5]. Carl Schmitt, "Eröffnung der wissenschaftlichen Vorträge durch den Reichsgruppenwarter Staatsrat Professor Dr. Carl Schmitt," in *Das Judentum in der Rechtswissenschaft: Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NRSB am 3. und 4. Oktober 1936*, ed. Carl Schmitt (Berlin: Deutscher Rechts-Verlag, 1936), 14-7, 28-34.

[6]. See Carl Schmitt, "Schlußwort des Reichsgruppenwalters Staatsrat Prof. Dr. Carl Schmitt," in idem, ed., *Das Judentum in der Rechtswissenschaft*, 28-34; and Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," *Deutsche-Juristen Zeitung* 41 (1935): 1193-1199.

[7]. See Carl Schmitt, *Glossarium: Aufzeichnungen aus den Jahren 1947-1951*, ed. Eberhard von Medem (Berlin: Duncker and Humblot, 1991), 208.

[8]. The most detailed studies of Schmitt's reception after 1945 are Dirk van Laak, *Gespräche in der Sicherheit des Schweigens: Carl Schmitt in der politischen Geistesgeschichte der frühen Bundesrepublik* (Berlin: Akademie Verlag, 1993); and Müller, *A Dangerous Mind*, 63-86.

[9]. See Nicolaus Sombart, *Die deutschen Männer und ihre Feinde: Carl Schmitt, ein deutsches Schicksal zwischen Männerbund und Matriarchatsmythos* (Munich: Hanser, 1991), 107, 278.

[10]. Gross refers to Helmut Quaritsch, "Einleitung: Über den Umgang mit Person und Werk Carl Schmitts," in *Complexio Oppositorum: Über Carl Schmitt*, ed. Helmut Quaritsch (Berlin: Duncker and Humblot, 1988), 13-21, 13.

[11]. One prominent example, of course, is Chantal Mouffe, *On the Political* (London: Routledge, 2005).

[12]. See, for instance, Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

[13]. See, for instance, the lucid remarks in David Dyzenhaus, "Why Carl Schmitt?" in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998), 1-20.

[14]. See Jan Assmann's studies *Moses the Egyptian: The Memory of Egypt in Western Monotheism* (Cambridge: Harvard University Press, 1997), 6-8, and *Herrschaft und Heil: Politische Theologie in Altägypten, Israel und Europa* (Munich: Hanser, 2000).

[15]. See Jan Assmann, *Das kulturelle Gedächtnis: Schrift, Erinnerung und politische Identität in frühen Hochkulturen* (Munich: C. H. Beck, 1992), 16-7, 48-70, 89-98, and 130-166.

[16]. For Kelsen's position, see his "On the Borders between Legal and Sociological Method" and "Legal Formalism and the Pure Theory of Law," both in Arthur J. Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence in Crisis* (Berkeley: University of California Press, 2000), 57-63 and 76-83, respectively, as well as *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the "Reine Rechtslehre" or Pure Theory of Law*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992).

[17]. Gross refers here to Leo Strauss, "Anmerkungen zu Carl Schmitts Begriff des Politischen," in *Carl Schmitt, Leo Strauss und der "Begriff des Politischen": Zu einem Dialog unter Abwesenden*, ed. Heinrich Meier (Stuttgart: J. B. Metzler, 1988), 97-128. For Bruno Bauer's views, see *Die Judenfrage* (Braunschweig: Otto, 1843).

[18]. Compare Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: J. C. B. Mohr, 1931); and Hans Kelsen, "Wer soll der Hüter der Verfassung sein?" *Die Justiz* 6 (1931): 576-628.

[19]. The same is also true with regard to the reference to the Holocaust. The latter is mentioned only twice in passing. The original German subtitle, *Eine deutsche Rechtslehre*, is more sophisticated in that it can mean both "a German theory of law" and "a lesson from German legal thought."

[20]. For a precise account of Schmitt's rise and fall in Nazi Germany, see Dirk Blasius, *Carl Schmitt: Preußischer Staatsrat in Hitlers Reich* (Göttingen: Vandenhoeck & Ruprecht, 2001). For a detailed assessment of legal thought and practice in Nazi Germany, see Michael Stolleis, *A History of Public Law in Germany, 1914-1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2005), 249-372, and *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: University of Chicago Press, 1998).

[21]. See Carl Schmitt, *Legality and Legitimacy*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press,

2004), 71; and Christian J. Emden, "Carl Schmitt, Hannah Arendt, and the Limits of Liberalism," *Telos* 142 (Spring 2008): 110-134, esp. 121-123. On the entire proceedings at the Staatsgerichtshof, see now Gabriel Seiberth, *Anwalt des Reiches: Carl Schmitt und der Prozeß "Preußen contra Reich" vor dem Staatsgerichtshof* (Berlin: Duncker and Humblot, 2001); and Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (Oxford: Oxford University Press, 2003), 248-251.

[22]. Stolleis, *A History of Public Law*, 327-31.

[23]. See Blasius, *Carl Schmitt*, 155-156.

[24]. See Carl Schmitt, "Der Führer schätzt das Recht: Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934," *Deutsche-Juristen Zeitung* 39 (1934): 945-950.

[25]. On Schmitt's involvement in the Nazi policy process, see Blasius, *Carl Schmitt*, 157-169.

[26]. See Hannah Arendt, *On the Origins of Totalitarianism* (New York: Harcourt, Brace, and Company, 1951), 332.

[27]. See Chris Thornhill, *Political Theory in Modern Germany* (Cambridge: Polity Press, 2000), 89.

[28]. Gross discusses here Carl Schmitt, "Der Neubau des Staats- und Verwaltungsrechts," in *Deutscher Juristentag 1933*, ed. Rudolf Schraut (Berlin: Deutsche Rechts- und Wirtschafts-Wissenschaftliche Verlagsgesellschaft, 1934), 242-252, 250-251.

[29]. See Thomas Mergel, "Führer, Volksgemeinschaft und Maschine: Politische Erwartungsstrukturen

in der Weimarer Republik und dem Nationalsozialismus, 1918-1936," in *Politische Kulturgeschichte der Zwischenkriegszeit*, ed. Wolfgang Hardtwig (Göttingen: Vandenhoeck and Ruprecht, 2005), 91-127, 105-115.

[30]. On the *Zentrum* and its inability to undertake political action, see Detlev J. K. Peukert, *The Weimar Republic: The Crisis of Classical Modernity*, trans. Richard Deveson (New York: Hill and Wang, 1992), 154-156.

[31]. See Gilbert Ryle, *The Problem of Mind* (Chicago: University of Chicago Press, 1984), 16-18.

[32]. See Michael Mack, *German Idealism and the Jew: The Inner Antisemitism of Philosophy and German Jewish Responses* (Chicago: University of Chicago Press, 2003).

[33]. See Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," *Oxford Journal of Legal Studies* 12 (1992): 311-32.

[34]. See Kelsen, Introduction, 13-14.

[35]. See, for instance, Max Weber, "Parliament and Government in Germany under a New Political Order: Toward a Political Critique of Officialdom and the Party System," in *Political Writings*, ed. Peter Lassman and Ronald Speirs (Cambridge: Cambridge University Press, 1994), 130-271, 220, 230.

[36]. See, for instance, Ernst Cassirer, *Die Philosophie der symbolischen Formen*, vol. 1 (Berlin: Cassirer, 1923), 9-10, and vol. 2, vii-xii; Aby Warburg, *Der Bilderatlas MNEMOSYNE*, ed. Martin Warnke (Berlin: Akademie Verlag, 2003); Christian J. Emden, *Walter Benjamin's Archäologie der Moderne: Kulturwissenschaft um 1930* (Munich: Wilhelm Fink, 2006), 147-172.

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