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Liberalism, Democracy, and Lawyerly Thinking

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The slim volume of essays, each a close reading of important and difficult German legal texts, represents a valuable introduction for the non-specialist to a lively field of scholarship whose abstruseness may have prevented it from reaching a wider audience of historians of Germany. The editors have collected original essays from scholars in law, political science, and history, which distill and introduce more expansive treatments that appear in a series of important and imposing monographs. The ambition of the volume is to transcend the retrospective context of Weimar and to contribute new insights into contemporary debates about the nature of the relationship between form and substance in law, the strength and nature of liberalism, relativism versus determinacy of knowledge and values, and current calls for a reassertion of "community" as against the individual. Without dwelling too largely on the current debates, the volume raises provocative and illuminating parallels that help to make clearer the genealogies of certain pernicious manifestations of the epistemological crisis, such as "left-Schmittianism," thus unmasking and demystifying them.

This book is aimed at a very wide audience, including legal philosophers, political theorists, as well as historians. Any historian, of the history of Germany, of legal history of any Western state, indeed any scholar concerned about the rule of law in time of foreign policy, economic, and political turmoil, would be well-served to begin to enter the literature of twentieth-century legal theory by reading these essays before moving to the monographs.

These essays explore how talented lawyers and legal theorists, in the turmoil of the Weimar Republic, wrestled with the question of how to reconcile the nature of law with the demands of democracy. As the German people and state struggled with the post-revolutionary transition from a concept of sovereignty lodged in emperor, king, or prince to a concept of popular sovereignty, all aspects of legal and political theory came into play. Particularly in Germany, the debates revolved around the question of the source of law, namely "legal positivism" versus any one of a variety of theories of "natural law." Positivism, a protean concept whose manifold definitions the editors tease out very ably in the introductory essay,

but whose very foundation lies in the Kantian distinction between law and morals and the belief in the autonomy of law and legal concepts from the swirl of historical and social change, famously prevailed as the dominant legal theory in Germany at the end of the Empire. The essays in *From Liberal Democracy to Fascism* treat the ways in which a number of anti-positivists sought to reconcile legal theory to democratic practice in an era of sharply conflicting social and economic interests in a class-divided industrial society.

On the surface, legal positivism seems quite a logical theory: the law is what it says and what the sovereign chooses to enact. But all citizens of the United States warmly recall the invocation of natural law as the basis for the list of grievances against George III contained in the Declaration of Independence, whose very thrust is that the formally correct imposition of laws by the sovereign is subject to inherent limitations found in the "law of nature." As contemporary debates in the United States about abortion rights, privacy, and the conditions at Camp X-Ray show, however, in a contentious democratic society, agreement as to both the source and the content of the "law of nature" is almost impossible to reach. Legal theorists in democratic systems, therefore, struggle to root positive law in the democratic process while seeking to avoid majoritarian abuse by codifying limits to positive law "found" in natural law. This process lacks the virtues of logical consistency and universal acceptance, so that it becomes very unstable in times of crisis.

The attraction of legal positivism as a theory of law was so great in Weimar Germany that it gave rise to powerful left and right versions. Most famously, Carl Schmitt, whose presence lurks in most of these essays, articulated a theory based entirely upon the will of the sovereign and articulated a new basis for authoritarian democracy that paved the way for and justified the National Socialist assertion that the will of the *Fuehrer* represented the will of the *Volk* and thus that his pronouncements, formally promulgated, became thereby "law." On the opposite extreme, Hans Kelsen sought valiantly to secure democracy from authoritarian limitation by assertion of natural law by developing a super-positivism that he defined as a "pure theory of law." He sought to tie the hands of anti-democratic judges by extending the ideal of the liberal *Rechtsstaat* or rule of law to finally "driv[e] out the subjectivity from the governance of human affairs by controlling personal arbitrariness through a system of legislated norms" (p. 25). The theorists examined in these essays sought to avoid *both* forms of positivism.

David Dyzenhaus, professor of law and philosophy at the University of Toronto, outlines how Hermann Heller took on both the democratically inclined Kelsen and the prophet of authoritarianism, Schmitt, with an anti-positivist rejection of the strict distinction between a substantive concept of a statute and a formal one. In his social democratic legal theory, Heller criticized Kelsen's deracinated super-positivism while preserving, in the words of the editors, greater democratic legitimacy than contemporary anti-positivist legal philosophers such as Ronald Dworkin. Heller rejected the Kantian thesis of the separation between law and morality, arguing that "legal order is moral in that it enables the emergence through the democratic process of collective judgments about morality" (p. 46), connecting his theory more to that of Habermas.

John P. McCormick, a political scientist at Yale, treats the phenomenon of legal positivism less directly, instead delving directly into Schmitt's complex theory of representation as developed in some of his earlier writings and connecting them to important work of the Frankfurt School, particularly of Walter Benjamin and Juergen Habermas's *The Structural Transformation of the Public Sphere*. Schmitt noted the distinction later picked up by Habermas between representation in the sense of "standing for" and that in the sense of "acting for" (p. 60). Schmitt argued over the course of several writings that the medieval representation of the prince embodying the political "essence" of the state could only ultimately be replaced, not by a parliament as the rationalist representation of the democratic "essence," but in an increasingly irrationalist era by the quite modern theory of plebiscitary representation. This representation amounted to government by acclamation, ultimately best expressed by the *Fuehrer*, who as dictator served as the modern representation of the democratic "essence" that had succeeded the medieval concept of representation. McCormick shows how Habermas draws upon Schmitt in his analysis of how the Fordist welfare state supplants the discursive community of the public sphere with an undifferentiated mass of consumers, but how Habermas's prescription is a truly democratic commitment to discourse ethics rather than Schmitt's celebration of irrationalist subsumption to the will of the Fuehrer (p. 73).

William Scheuerman's essay on Ernst Fraenkel, who in emigration contributed to the evolution of legal theory in United States before his postwar return to Berlin, is one of the most useful contributions to the volume. He shows how Fraenkel's social democratic theory of the rule of law sought to infuse substance into the lib-

eral rule of law, which had desiccated into legal positivism. Best known for his 1941 book, *The Dual State*, Fraenkel more than his collaborator Franz Neumann recognized the persistence of legal formalism into the National Socialist regime and thus the compatibility of legal positivism with this new form of authoritarianism. Scheuerman explores how Fraenkel sifted the rubble of the Weimar experiment to formulate a social democratic rule of law by means of a welfare state with democratized courts and administrative bodies (p. 103). "Collective democracy" thus curbs the tendency of positive law to serve as the basis for injustice under the "total state."

As the editors point out, the final two essays by Manfred Wiegandt and Peter C. Caldwell show how anti-positivism helped determine the basic contours of legal debate and legal culture in the Federal Republic after 1949. Wiegandt examines the Weimar era legal theory of Gerhard Leibholz, later the dominant personality of the Federal Constitutional Court in the 1950s and 1960s. Rooted in the phenomenology of Husserl, Leibholz advanced an anti-positivist position that envisioned a conservative form of community while maintaining a commitment to democracy through his positive attitude toward political parties as the organizations through which modern mass democracy was exercised (p. 134). Rejecting the value-free formalism of Kelsen, nonetheless Leibholz avoided the rejection of democracy that accompanied a similar conversion on the part of other legal theorists, such as Rudolf Smend (p. 121).

Finally, Peter C. Caldwell's concluding essay projects the scope of this volume into the 1950s and the debate over the "social *Rechtsstaat*," by establishing the Weimar foundations of that debate in the work of Smend, Heller, Ernst Forsthoff, and Hans-Carl Nipperdey. These Weimar era debates elided the stark state-society distinction crucial to the liberal rule of law, which established negative liberties that freed the citizen (and thus society) from infringements by the state, and yet avoided the subjugation of the state to society, leading to majoritarian tyranny. These varied thinkings sought to reconceptualize rights as positive values rather than negative limits on state power, as substantive goods rather than procedural constraints, and to root the interpretation of these rights in the culture and history of the German nation. What emerged in the jurisprudence of the Federal Constitutional Court was a new conception of the *Sozialstaat* which retained the limitations to state activity embodied in the *Rechtsstaat* while embracing the democratic principle that society should direct state activity, subject to those limitations to preserve democratic freedoms. Hard questions remain, but a democratic praxis found deep roots in German legal theory for the first time.

These short accounts of the authors' arguments in no way do justice to the subtlety and precision of their analysis and arguments. Yet the essays are not above criticism. Historians, particularly social historians, may find some of these essays rather remote from the immediate political, economic, and social context of the Weimar era. Indeed, the essays by Dyzenhaus, McCormick, and Wiegandt sometimes read like old-style intellectual history, in which disembodied texts engage in a conversation with each other. In addition, the self-referentiality of some of the essays makes reading them hard going. But the essays do more than rescue from obscurity theorists whom the authors convincingly argue offer clearer understanding of Germany during the Weimar Republic. They contribute to the revival of pragmatic philosophy as a *via media* in the epistemological crisis of historical theory as well as legal theory. The volume is work wrestling with for this if no other reason.

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