

Book Review

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BOOK REVIEW

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Hitler's Justice: The Courts of the Third Reich. By Ingo Müller. Translated from the German by Deborah Lucas Schneider. Cambridge: Harvard University Press, 1991. Pp. xviii, 349. \$29.95.

Introduction

Contrary to the suggestion of its English title,¹ *Hitler's Justice: The Courts of the Third Reich*, is an attempted comprehensive treatment of the origins, workings, and post-war survival of Nazism and its supporters in Germany's legal order. I say "attempted" because while the book is comprehensive in topical coverage, it occasionally appears to be a gathering of anecdotes rather than a detailed investigation and report.²

I. The Failure of the German Legal System

Ingo Müller makes a powerful case that the German legal order, particularly its judges, welcomed Hitler, knowingly and flexibly accommodated legal outrages that secured the Nazis in power after the Reichstag fire,³ and then comprehensively participated in a human Holocaust against Jews, Poles, numerous dissidents, and the disabled. He presents a breathtaking and nauseating story, even if incomplete, that is made worse by German and Allied efforts to ignore it or cover it up in the rush to rehabilitate Germany after the war.⁴ The active and enthusiastic connivance of leading German legal academics at each stage in the Nazi period is particularly sickening.⁵

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1. The German title is *Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz* (Dreaded Lawyers: Unheeded Lessons from the History of Our Courts). Walter Weyrauch has also noted the title's change as translated into English and has written an interesting comment on how the book must be viewed very cautiously not only for comparative law reasons, but also and perhaps more significantly in light of inter-generational conflicts within Germany about the Nazi period. See Walter Otto Weyrauch, Comment, *Limits of Perception: Reader Response to Hitler's Justice*, 40 AM. J. COMP. L. 237 (1992).

2. Some chapters, such as the one on German law schools, are particularly thin. INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 235-39 (1991).

3. *Id.* at 27-35, 46-47.

4. *Id.* at 209-92.

5. *Id.* at 68-70.

The book reveals a vast and inexplicable complicity in Nazi domination of the legal order. Nazi leaders first mercilessly twisted the emergency power provisions of the Weimar Constitution⁶ and eventually ignored the entire Constitution.⁷ The Nazis spawned vague laws that presupposed and advanced phantasms of ethnic or genetic purity.⁸ They applied penal laws retroactively to cover conduct which was not criminal when undertaken,⁹ and manipulated the language of statutes to serve Nazi ends.¹⁰ The courts even went beyond statutory interpretation to impose sanctions (including the death penalty) that were not mandated¹¹ under law and to include as possible defendants categories of people not listed in the legislation.¹² The leadership created special courts to handle anti-Nazi or anti-state "dissent."¹³ These courts proceeded in secret,¹⁴ dispensed with virtually all procedural safeguards in the criminal process,¹⁵ and served as the handymen of the execution apparatus of the Third Reich. Finally, military courts displaced civil tribunals in many legal areas as the military situation deteriorated.¹⁶

In addition to the changes in substantive law, all aspects of German legal culture were made to conform to Nazi values. For instance, the legal profession and legal academia were simultaneously "cleansed" of Jews, non-Jewish liberals, and other dissenters.¹⁷ The Reich justice ministry¹⁸ and the courts¹⁹ were composed of servants, not of the law, but of a Führer and his slavish political party whose power base was largely extra-legal.

II. Müller's Reasons for the Legal Failure

When the legal order fully and formally participates in implementing a policy of ethnic cleansing and mass homicide, it is natural to look for a cause or causes. Müller's book is a serious effort to evaluate the suggestion, attributed to the late Lon L. Fuller,²⁰ that Germany's attachment to legal positivism,²¹ a jurisprudential theory which denies that there is any

6. *Id.* at 46-49.

7. *Id.* at 46, 49.

8. *Id.* at 90-119.

9. *Id.* at 74.

10. *Id.* at 72-73, 90-119.

11. *Id.* at 134-36.

12. *Id.* at 106-109. All of this was in derogation of the ancient Roman maxim, widely known in Germany: "Nulla crima sine legis."

13. *Id.* at 140-52.

14. *Id.* at 170-73.

15. *Id.* at 140-52.

16. *Id.* at 183-91.

17. *Id.* at 59-67.

18. *Id.* at 82-84.

19. *Id.* at 36-41.

20. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

21. *Id.* at 632-33. Positivism is an approach to jurisprudence which is thought to claim that law is exhaustively defined by reference to the official texts or canons which allegedly created it.

necessary connection between law and morality,²² was a major contributing factor. Müller argues, by way of refutation, that the Nazis and their judicial sympathizers employed an extravagantly anti-formalist legal approach that was anti-positivist.²³

Müller's evidence against the positivism-as-cause theory is quite convincing if one equates positivism with formalism. H.L.A. Hart's seminal contributions, gathered together in chapters six and seven of his book *The Concept of Law*,²⁴ suggest that one cannot accurately equate these two jurisprudential phenomena. It is, nevertheless, interesting to note the extent to which an order dominated by positivist theory disregarded considerations of legal formality. It is as though Austin's unlimited sovereign²⁵ (in this case Hitler) rises to deny, in advance of delineation, the careful limitations placed on him by Hart's rule of recognition.²⁶ In summary, it seems a non-sequitur to Fuller's argument to say that the Nazis were radical anti-formalists.

My own reaction is that Fuller's basic point, that a divorcing of law and morality is descriptively wrong and also dangerous, remains uncontradicted. However, it is also true that the supporters of approaches akin to Fuller's, by licensing the importation of "personal moral" theories, may have encouraged racist Nazi judges to pour their weird venom into the law's generalities as a form of Aryan social "morality." Thus, in the end, perhaps both positivists and anti-positivists share some blame for this dreadful episode in the history of Western legalism.²⁷

In place of positivism-as-scapegoat, Müller offers the view that the facilitation of Nazism was attributable to the fact that the German judiciary of the 1930s was dominated by anti-democratic monarchists educated before World War I.²⁸ The judiciary regarded the Weimar Republic and its legal system as weak and contemptible.²⁹ Curiously, Müller never definitively indicates whether this clique of judges had any developed notions of due process or the rule of law. At points he suggests that they did, such as when he discusses the degradation of legality in the Weimar period.³⁰ However, his argument also suggests that they did not, when he

22. See R.W.M. DIAS, JURISPRUDENCE 331-35 (5th ed. 1985). But see Neil McCormick, *Natural Law and the Separation of Law and Morals*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105 (Robert P. George ed., 1992), for the latest word on this matter from the point of view of a positivist.

23. MÜLLER, *supra* note 2, at 68-81. Formalism is a belief that legal dictates are plainly and easily enforced according to their literal provisions.

24. See H.L.A. HART, THE CONCEPT OF LAW 97-150 (1961).

25. See DIAS, *supra* note 22, at 348-51.

26. *Id.* at 351-56.

27. It is ironic that Germany's leading positivist, Hans Kelsen, and the man who later became its leading proponent of natural law, Gustav Radbruch, both were deprived of their jobs by the Nazis. See MÜLLER, *supra* note 2, at 220.

28. *Id.* at 10-24. At least one other scholar agrees with Müller's analysis of the judiciary, but he describes the pre-war judges as anxious to embrace National Socialism's rise because justice in the Weimar Republic had made their role too "political." See H.W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY 7 (1989).

29. Koch essentially agrees with this. KOCH, *supra* note 28, at 7.

30. MÜLLER, *supra* note 2, at 21-24.

asserts that these judges quickly embraced an anti-rule of law approach.³¹

Müller indirectly suggests that the progress of the war as reflected in German legal affairs was another cause of the Nazification of the law. It seems indisputable that the total-war psychology and the realization that Germany was losing facilitated the complete Nazification of German institutions. While Americans and others will perhaps sneer at the notion that the state of war in Germany was any kind of an excuse, a deterioration of legal functioning could be observed in analogous areas of British and American life in the 1940s.³²

Müller touches on but never develops an alternative causal explanation—namely, that German judges and law professors saw themselves more as civil servants than as checks on possible excesses of executive and legislative power,³³ as in the American legal tradition. This promising theme, if developed, would have synthesized a good deal of Müller's materials.

III. Failure of Individuals in the Legal System

While the foregoing discussion of causes may suggest some factors in the process whereby the German legal system became a full partner in Nazi genocide and terror, it skirts the most interesting issue. How did bourgeois German judges and law professors who, for the most part, were not people with evil or nefarious pasts, continue to participate in such a charade of justice? Was it merely fear? Was it the undeniable and vicious historical anti-Semitism of Central Europe? What happened to the broadly liberal and deeply intellectual culture of learning achieved during the nineteenth century in Germany? Are we all weak and sniveling creatures or, even worse, happy murderers on behalf of a cause when whipped up by race-baiting demagogues like Goebbels and Hitler? For lawyers and law professors, the particular question is: Are the lawyer's and judge's tools and techniques, such as the claims of legal formality particularly in the criminal law, so flimsy a protection against mass hysteria and vituperation? Some of these questions have been addressed in other scholarly writing, such as a fine study of the mechanics and effects of the Nazi takeover in one German town,³⁴ but no work has focused on the overall role and

31. *Id.* In a lengthy review of Müller's book, Professor Markus Dubber has argued that the record of the German judiciary during the Nazi period was, in fact, a mixed record of adherence to rule-of-law norms and abdication in the face of Nazism. See Markus Dirk Dubber, Book Review, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807, 1815 (1993). For a specifically focused view also contrary to Müller's, see MARC LINDER, *THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS* (1987). Linder concludes: "With notable exceptions the majority of the [Supreme Labor Court's] decisions maintained the court's intellectual distance from the Nazi regime." *Id.* at 61 (citation omitted).

32. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

33. MÜLLER, *supra* note 2, at 7-9.

34. See generally WILLIAM SHERIDAN ALLEN, *THE NAZI SEIZURE OF POWER: THE EXPERIENCE OF A SINGLE GERMAN TOWN 1922-1945* (rev. ed. 1984).

responsibilities of lawyers and judges.³⁵

Müller's only answer appears to be his claim that Germany really had no entrenched "rule-of-law" tradition,³⁶ and arguments phrased in rule-of-law terms were not made or were easily swept aside.³⁷ While I find this probative, I think one has to look deeper to explain such a total nullification of legal norms, even by German standards, as Müller's research shows.

At the risk of speaking overbroadly, it seems to me that three additional explanations are plausible. The first posits that there was a sense of failure (or a desire for revenge) associated with "Germanness." Germans and Italians were the last two great peoples of Western Europe to unify as nation-states. This late union was preceded by centuries of disorder and disunity, of political, dynastic, and imperial failure and defeat at the hands of the French, the English, and various international alliances. Thus World War I and the defeat of Germany were not singlehandedly responsible for creating Nazism, but did serve to reinforce a sense of failure and a thirst for revenge that abetted Nazism's rise.³⁸

A second explanation is that German legal institutions were quite undeveloped because of the past history of political failure. For instance, an American observer of the pre-Weimar and Weimar periods³⁹ will be struck by the primitiveness of German institutional and legal behavior as it related to major national political questions.⁴⁰ When confronted with an environment of a claimed patriotic German "revival," followed by a German war, legal professionals disregarded claims of legal formality and the concept of judicial independence.

Finally and most speculatively, it may be that while positivism is not an appropriate target for "blame," the German tendency in law to overtheorize is partially responsible for what transpired. While I am not implying that Germans are racially or genetically prone to overtheorization, I do suggest that German legalism, particularly on the academic side, was characterized by a focus on abstraction starting at least at some point in the nineteenth century.⁴¹ This characterization contrasts sharply with Britain and the United States, but not, surprisingly, with Oliver Wendell Holmes, Jr., a jurist who has proven hard to categorize in the American context and

35. See, however, LINDER, *supra* note 31.

36. This claim is somewhat at variance with the introductory remarks contained in KOCH, *supra* note 28, at 5-10.

37. MÜLLER, *supra* note 2, at 10-24.

38. See KARL DIETRICH BRACHER, *THE GERMAN DILEMMA: THE THROES OF POLITICAL EMANCIPATION* 49-68 (Richard Barry trans., 1974), and F.L. Carsten, *The Historical Roots of National Socialism, in UPHEAVAL AND CONTINUITY: A CENTURY OF GERMAN HISTORY* 116-33 (E.J. Feuchtwanger ed., 1974).

39. See generally GORDON A. CRAIG, *THE GERMANS* 15-34 (1982).

40. *Id.*

41. Even if this controversial statement is accepted, it leads naturally to the further question of why overtheorization occurred. Of course this phenomenon in legal doctrine is consistent with the rich and diverse flowering of philosophy and theology in nineteenth century Germany. But it may also be a function of the fact that because there was no coherent body of "national" law, jurists directed their efforts to synthesizing the diverse strands that comprised the German legal tradition.

who was strongly attracted to this aspect of German legalism.⁴² It may be that a thorough disembodiment of legal doctrine, no matter what the particular theoretical angle, is intrinsically a bad thing or at least potentially a bad thing. For all of its untidiness and chaos, the Anglo-American common law system prevents a divorce of theoretical insights from practical consequences. It also prevents *volte-faces* in the law, such as might be thought to have occurred during the Nazi take-over. The common law system denies that any formulation of doctrine is itself final or complete. While the common law is not completely anti-theoretical, it erects bulwarks against a theoretical coup-d'état, like Nazism, by its incrementalist methodology, its focus on practical results, and its view that all legal doctrine is provisional.

IV. Analyzing the Legal Failure Using Fuller's Framework

But in the end, isn't Fuller, or that which Fuller never could quite say, right? Law is not law in a society, and is not entitled to respect and prima facie obedience, unless in a fairly comprehensive way it is based on and furthers the pursuit of minimum goals of human dignity. The exact content of those minimum goals may not be absolutely fixed or invariable, but there must be a substantial adherence to them. Perhaps this is so because, as Thomas Aquinas believed, we can all "see" by reason a natural law of human dignity.⁴³ Or perhaps Jeremy Bentham is right to assert that this minimum quantity of human dignity is best defined and calibrated in terms of maximizing happiness for members of the group.⁴⁴ Obviously neither theory is deducible on purely logical grounds. However, even as ultimately unprovable postulates they provide a more convincing and safer account of law and its operation than a "valueless" positivist descriptivism.

The Müller book concludes by posing another question that is either behavioral or social. The German experience with Nazism suggests that once a society at war steps across a line and engages in genocide particularly against an identified group outside of the perceived mainstream, like Jews, very few humans can summon up the courage to resist. Müller's book cites only one case of a German judge officially and directly confronting the Nazis and their collaborators; interestingly, the Nazis dealt with the judge fairly gently.⁴⁵ Müller also gives the example of the bishop of Münster, obviously a non-legal figure, who sued the Nazis in connection

42. See generally SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 312-15 (1989). Some might interpret my comment as implying that Holmes had the makings of a Nazi, but I do not believe that. On the other hand, I believe that he loved abstracted theoretical discourse for its own sake more than anything else, and I find that potentially dangerous.

43. See John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 134 (Robert P. George ed., 1992). See also Lloyd L. Weinreb, *Natural Law and Rights*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 278 (Robert P. George ed., 1992).

44. See DIAS, *supra* note 22, at 427-29.

45. MÜLLER, *supra* note 2, at 193-95.

with the disappearance of a member of his flock⁴⁶ and also condemned them in public homilies delivered in the midst of war. In addition, Müller mentions a law professor who took early retirement because he believed that his ideas were incompatible with those of the Nazi order.⁴⁷

The docility of German lawyers and judges may not have been worse than that of Germans in other occupations, but it does suggest that when a legal order is taken over by a vicious and murderous clique, internal⁴⁸ resistance is not a viable option. The only effective response is to attack the entire apparatus as an evil thing. The hard choice comes in deciding, in contexts less clear than Germany's, whether the immorality is so profound and pervasive as to justify full-fledged disobedience.

Conclusion

There is a related behavioral point. Based on the example of Germany, it may be that once a legal order becomes preponderantly and demonstrably immoral and jettisons the rule of law, it is extraordinarily difficult to stop the slide toward even greater excesses. While some German legal figures suggested a reformulation or "repackaging" of particularly offensive results,⁴⁹ there is almost no evidence of legal arguments against or resistance to sending innocent human beings, including children, rabbis, tailors, priests, foreigners, mundane criminals, farm laborers, etc., to summary executions or to camps for mass extermination.

In effect, this second point also may support Fuller's argument that once a system violates certain internal "moral" constraints of legality (laws must be publicly promulgated, laws can not generally be retroactive, etc.), the entire order will collapse into substantive immorality (or vice versa).⁵⁰ In framing his overall thesis that law requires the observance of an internal morality, Fuller avoided the deeply divisive and irresolvable debate over the rightness of a natural law approach or a conventionalist account of minimum human rights, a debate that perhaps Fuller could never resolve in his own mind. Yet, even though his avoidance may have been a controversialist's stratagem, it may be that he was still descriptively correct. While theoretically one could conceive of a legal system that observed all of Fuller's internal moral constraints and nonetheless was profoundly and substantively immoral, in practical terms that combination is very unlikely and in fact it did not present itself in Germany. In Germany, sadly, the violation of the dictates of Fuller's internal morality was as massive as the substantive degradation of the system's ends.

46. *Id.* at 127.

47. *Id.* at 69.

48. In his review, Professor Dubber, without claiming that "internal" resistance was common, argues that Müller was uninterested in exploring the utility or prevalence of "creative, narrow interpretations of Nazi laws." Dubber, *supra* note 31, at 1813-15.

49. MÜLLER, *supra* note 2, at 148.

50. LON L. FULLER, *THE MORALITY OF LAW* 3-32, 95-151 (2d ed. 1969).

