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# On the Dangerous Game of Collaborating with Nazis: An Historico-Socio-Legal Reconstruction of that Forgotten Past Located within Silence, Absence and [Dis]Connections between Law's History and Critical Legal Scholarship

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**ON THE DANGEROUS GAME OF  
COLLABORATING WITH NAZIS:  
AN HISTORICO-SOCIO-LEGAL RECONSTRUCTION OF THAT  
FORGOTTEN PAST LOCATED WITHIN SILENCE, ABSENCE AND  
[DIS]CONNECTIONS BETWEEN LAW'S HISTORY AND CRITICAL  
LEGAL SCHOLARSHIP**

*Lorie Charlesworth<sup>1</sup>*

**Abstract:**

Responses to the deliberately provocative title are contextualised within this writer's research findings to date concerning the Allied investigation and prosecution of 'minor' war crimes trials after WWII. From these the writer considered the survival of certain categories of Nazi thought, permitting some critical legal theorists to admit the Nazi Carl Schmitt and his anti-liberal concept of 'concrete orders' into its canon of critical texts. In this, some theorists appear concerned more with testing or searching for a 'pure idea' of law than noting a moral absence within such legal scholarship. That is, the nature of the transgressive, taboo-breaking, politically and culturally sanctioned behaviour of the Nazi state to which Schmitt and others contributed. In order to widen this debate this work considers neglected alternative contemporary and co-existing legal and cultural norms revealed in the actions of Allied soldiers prosecuting Germans and others for appalling breaches of legal and human rights.

The work follows an original methodology in drawing upon research into the actions of individuals, British soldiers, of Nazi theorists and of the German post war population's silence. Its aim is to recontextualise Schmitt's work within his very political commitment to the Nazi cause. This article further suggests that decency, understood as a personal sense of justice within shared cultural and political values, serves as an alternative if less elegant framework to counter the tendency of legal theory to devalue the human. A further question thus emerges: do some strands of modern theory, as occurred under Nazi rule, collude in this devaluation by failing to acknowledge and validate positive human cultural values as a defence against perverse political pressures that lead inevitably to the corruption of legal process and law itself?

**Keywords:** 'Minor' war crimes trials; British Army; Schmitt; critical legal studies

**Introduction**

This article considers liberal common law. It illuminates justice upheld in war crimes prosecutions; justice that appears in a positive and beneficial light when placed against the critique of liberalism by Nazi theorist Carl Schmitt and some contemporary writers within Critical Legal Theory (CLT). In order to shed that light, this critique of Schmitt and his

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contemporary admirers draws upon the author's own research. This involves a focus on the investigation and prosecution of Nazi and other war criminals by the British Army in Occupied Germany from 1945-8.<sup>2</sup> These military prosecutions, known as the 'minor' trials to differentiate them from the International Military Tribunal's prosecution of the 'major' war criminals at Nuremberg, were undertaken by all the Allies in their Zones of Occupation under the legal authority of Control Council Order No. 10, issued December 1945. The methodology adopts a 'bottom up' approach to reconstructing the 'minor' trials.<sup>3</sup> In the final section, this article sets the investigation culminating in a 'minor' trial and its jurisprudential and ethical context against the rejection of liberal law epitomised by Schmitt and an extreme strand within CLT as displayed, particularly, in an article by Salter and Twist.<sup>4</sup> The war crimes research also revealed certain aspects of human behaviour involved in the delivery of justice other than those normally associated with the study of Nazi war crimes: notably those associated with a value for human decency, something demonstrated on a daily basis by Allied soldiers and others involved in the prosecutions.<sup>5</sup>

War crimes research to date reveals much that has been neglected and undervalued, extending even to the recognition of the volume of trials; probably 356 in the British Zone (yet the transcripts are held at The National Archives, Kew).<sup>6</sup> The neglect includes an awareness of those extraordinary efforts made by serving soldiers, many of them lawyers, to ensure that some at least of the guilty were brought to justice as those soldiers understood it; a very different 'justice' from that in Germany under Nazi rule. The importance of these findings is that they emphasise the significance of cultural, social and political norms in the

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<sup>2</sup> Lorie Charlesworth, *The 'Minor' War Crimes Trials. An Exploration of Victims' Justice*, (London: Routledge, forthcoming 2014).

<sup>3</sup> The inspiration here has been the work of Rowbotham and Stevenson. See, for instance, Judith Rowbotham and Kim Stevenson (eds), *Behaving Badly. Visible crime, Social panics, and Legal Responses* (Aldershot: Ashgate, 2003); Judith Rowbotham and Kim Stevenson (eds), *Criminal Conversations: Social Panic, Moral Outrage and the Victorians* (Bloomington, Ohio: Ohio State University Press, 2005).

<sup>4</sup> Michael Salter and Susan Twist, 'The Micro-Sovereignty of Discretion in Legal Decision-Making: Carl Schmitt's Critique of Liberal Principles of Legality', *Web Journal of Current Legal Issues* 3 (2007) at: <http://webjcli.ncl.ac.uk/2007/issue3/salter3.html>. [Accessed 1 August 2013].

<sup>5</sup> Lorie Charlesworth, '2 SAS Regiment, War Crimes Investigations and British Intelligence: Intelligence Officials and the *Natzweiler Trial*', *Journal of Intelligence History* 6 (Winter 2006), 1-48; 'Forgotten Justice: forgetting law's history and victims' justice in British 'minor' war crimes trials in Germany 1945-8', *Amicus Curiae*, 74, Summer (2008).

<sup>6</sup> Howard S. Levie, *Terrorism in War - The Law of War Crimes* (NY: Oceana Publications, 1993) pp.135-9. Frei has calculated totals for the Western Zone of Occupation (including the *IMT* and *Subsequent Trials*), stating there were 5,000 defendants and 800 death sentences. Norbert Frei, *Vergangenheitspolitik: Die Anfänge der Bundesrepublik die NS-Vergangenheit* 2<sup>nd</sup> ed. (Munich: 1997), p.143 n.29.

administration of justice, revealing very different contemporary perspectives (between German and Allied citizens) towards ideas of legality, justice and process.<sup>7</sup>

These findings have led the writer to a methodological focus that considers the historical context of legal scholarship which formed part of Nazi culture, specifically the Nazi jurist Carl Schmitt. It is Schmitt's legal scholarship which has served to legitimise transgressive cultural norms (including expressions of subtly anti-Semitic scholarship) that is today pursued by some within CLT, largely without its Nazi context. As a result, although there are extensive publications available revealing much about theorists and their fulsome involvement within the National Socialist project,<sup>8</sup> what is often missing is the incorporation of this material into contemporary discussions. This paradox forms the inspiration for this paper.

In this context, the writer takes her stance as an historian of law's pervasiveness using a rich variety of sources in her research to illuminate the issues involved. As a result, although the methodology takes as its locus the archival research it draws upon other topics to spiral around that study. The approach is not linear, rather it adopts a helical framework of issues and questions to challenge and destabilise developing orthodoxies within critical legal studies. Although a metaphorical construct, intellectually this model of a helix illuminates the methodological structure of the piece. The strands of that helix consist of the soldiers investigating and prosecuting war crimes and the survival, within some aspects of CLT, of anti-liberal Carl Schmitt whose legal and other writings from 1933 as Hitler came to power, provided the Nazi regime with intellectual and jurisprudential legitimacy. This strand, illuminating an ethics-free, value-neutral approach to law, reveals a Nazi voice speaking within CLT. Finally, those points at which the various strands of the helix intellectually interact provide complex but meaningful signposts in this piece.

It is acknowledged that the perspective is liberal and is motivated by a concern with the effects of, and relationships between, individuals who contribute to collective human behaviour creating and reinforcing cultural norms. To achieve this purpose, the work coils

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<sup>7</sup> Charlesworth, 'Forgotten Justice'.

<sup>8</sup> Jan-Werner Muller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003); Michael Stolleis, trans. Thomas Dunlap, *The Law under the Swastika* (Chicago: The University of Chicago Press, 1998); *A History of Public Law in Germany 1914-1945* (Oxford: OUP, 2004); Michael Salter, 'Neo-fascist legal theory on trial: an interpretation of Carl Schmitt's defence at Nuremberg from the perspective of Franz Neumann's critical theory of law', *Res Publica*, 5(2) (1999), pp.161-94; Victor Farias, *Heidegger and Nazism*, Joseph Margolis and Tom Rockmore (ed.), trans: Paul Burrell, (Philadelphia: Temple University Press, 1989); Hugo Ott, *Martin Heidegger: A Political Life*, Trans, Allan Blunden (London: Harper Collins, 1993); Berel Lang, *Heidegger's Silence* (Ithaca: Cornell University Press, 1996); Michael Wolin, *Heidegger's Children* (Princeton: Princeton University Press, 2001); Theodore Kiesel, *Heidegger's Way of Thought*, (New York: Continuum, 2002).

around history and forgetting, from collective to individual behaviour, all set against a background of shifting pre and post war societal norms, where the German people and Nazi theorists alike struggled for survival. Silence in this work includes that of Germans in wartime continued by some within CLT. This writer suggests that such a powerful behavioural pattern permits, authorises and still endorses an intellectual reverence towards Schmitt absent the requirement to confront problematic ethical concerns.<sup>9</sup>

The key to this article is the concept of 'human decency'; can it ever be inherent, situational, and/or conventional? Its elusive presence is glimpsed in the actions and attitudes of serving battle-hardened British soldiers who investigated and prosecuted war crimes, beginning that task in the middle of battle. Years of hard fighting did not produce in them the level of institutionalised brutality they uncovered in evidence. Although German citizens and British soldiers were temporally and geographically congruent in 1945, to the British, their German prisoners' behaviour was utterly alien, unthinkable. German society itself was fully complicit in those acts, its jurists too were part of a cultural framework that facilitated and accepted the horrors. For that reason, this article posits the question: how are legal theorists able to gloss the obscenity of Nazi Germany underpinning these texts? It does not find a satisfactory answer.

As noted above the intellectual structure of this article is helical, but its methodology may be more classically described as interdisciplinary. This writer has written elsewhere in support of Hutchinson's call for an end to that arbitrary division between jurisprudence and politics and also concerning the value of historical reconstructions within socio-legal studies.<sup>10</sup> In addition, in order to illuminate theory's ahistorical turn this writer, as suggested by Bartlett, has widened the methodology to include theory-based elements within this reconstruction.<sup>11</sup> A further influence is Seymour's perceptive analysis of the relationship between critical theory, anti-Semitism, resentment and absence.<sup>12</sup> Of particular value was that writer's suggestion (albeit nuanced) that critical theory has come to take on some of the characteristics it challenges where it asserts that there is: '[S]omething about the modern era

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<sup>9</sup> See most recently: Michael Salter, *Carl Schmitt: Law as Politics, Ideology and Strategic Myth* (London: Routledge, 2012).

<sup>10</sup> Lorie Charlesworth, 'On historical contextualisation: some critical socio-legal reflections,' *Crimes and Misdemeanours: Exploring Law and Deviance in Historical Perspective*, 1/1 (2007), pp.1-40, at: <http://www.perc.plymouth.ac.uk/solon/journal/issue%201.1/CharlesworthCandMIssue1.pdf>; Allan C. Hutchinson, 'Casaubon's ghosts: the haunting of legal scholarship', *Legal Studies*, 21 (1) (2001), pp.65-98.

<sup>11</sup> Peter Bartlett, "On Historical Contextualisation" – A Lawyer Responds', *Crimes and Misdemeanours: Exploring Law and Deviance in Historical Perspective*, 1/2 (2007), pp.102-6, at: <http://www.research.plymouth.ac.uk/solon/journal/issue1.2/Debate%20Forum.pdf> .

<sup>12</sup> David Seymour, *Law, Anti-Semitism and the Holocaust* (Abingdon: Routledge-Cavendish, 2007).

in general and emancipation in particular that brings with it a specific Jewish dimension'.<sup>13</sup> The range of sources and disciplines invoked in this article have led to the writer adopting a synthesis within and beyond the boundaries of interdisciplinarity, drawing upon the model of a helix as an intellectual framework to structure this work. In summary, this article maps theory and biography onto a foundation of archival war crimes research. Finally, in order to underline the contemporary relevance of such historico-socio-legal reconstructions, the article closes with the deconstruction of a widely-available (because on-line) article as an exemplar of those trends that minimise Nazi elements within Schmitt's theories.

It must be emphasised that this project began specifically as socio-legal archival research to reconstruct the lived experience of investigators and prosecutors involved in Allied 'minor' war crimes trials. What became increasingly evident, however, is the scale of that cognitive dissonance in 1945 between German and British attitudes towards what we acknowledge as common Western European values concerning, law, justice and decency. An absence of intellectual discourse concerning the implications of that dissonance, particularly for legal scholarship, broadened the research project. This subsequently included an exploration of the implications of silence; drawing in turn upon methodology developed by Fraser in order to revisit contextually the significance of Nazi legal theory.<sup>14</sup> Thus the eloquence of silences surrounding that German past are revealed to permit interpretations of multiple meanings and wider significance; not solely of the silences of the past, but more, how silence continues to 'speak' to us today.

## **1 On Reconstructing Allied 'Minor' War Crimes Trials**

It is notable that research into 'minor' trials to date has been very limited and what has been produced has both developed and subsequently entrenched a negative orthodoxy, focusing on failures to prosecute; few trials [sic], 'victor's justice' and alleged 'failures' of legal process.<sup>15</sup> However, the research project to date has led this writer to arrive at rather different conclusions; that much of this activity revealed the ethical power of the liberal common law in action. Within the Allied Zones many thousands of war criminals were prosecuted in spite of the chaos that reigned in defeated Germany. In addition, in the British Zone serving soldiers, victims and army lawyers were closely connected within the legal

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<sup>13</sup> Ibid, xix.

<sup>14</sup> David Fraser, *Law after Auschwitz*, (Durham, North Carolina: Carolina Academic Press, 2004).

<sup>15</sup> Donald Bloxham, *Genocide on Trial* (Oxford: OUP, 2001), pp.95-100; 'British war crimes trial policy in Germany, 1945-1957; Implementation and collapse', *Journal of British Studies*, 42 (1) (2003), pp.91-118. Frank M. Buscher, *The US War Crimes Trial Program in Germany, 1946-1955*, New York, Greenwood Press, 1998); Fern Hilton, *The Dachau Defendants*, (Jefferson: McFarland and Company, Inc., 2004). Patrick Brode, *Casual Slaughter and Accidental Judgements*, (Toronto: University of Toronto Press, 1997). Ben Shephard, *After Daybreak*, (London: Jonathan Cape, 2005).

process and most demonstrated a high level of professional competence and/or personal commitment to their task. This is evident from the very beginning of this process, before and during the British *Belsen Trial* 1945;<sup>16</sup> the first 'minor' trial by the Western Allies in Occupied Germany. In consequence, those who handled this matter on the ground were venturing into entirely new legal territory.

As originally envisaged by the British, such military prosecutions would primarily be for the mis-treatment of Allied prisoners of war.<sup>17</sup> However, the situation revealed at Belsen transcended such parochial considerations, although the legal issues concerning prosecutions remained a live question until the trial itself. As one investigator notes:

The British concern with Belsen Camp is based from the War Crimes point of view almost entirely on the fact that it was in the British fighting area and is in the British area of occupation. Such war crimes as have been committed have been committed against prisoners of many nationalities, but only one has come to light of a British Prisoner of War who was confined in the Camp and in whose case a crime is proved.<sup>18</sup>

This reconstruction takes as its starting point the perspective of those who were entrusted with a new role; serving soldiers of the British Army formed into War Crimes Investigation Teams (WCIT) as the scale of the crimes committed at Belsen and elsewhere unfolded. Archival sources held at the National Archives and the Imperial War Museum concerning the Belsen investigations contain formal and informal correspondence, scribbled notes, lists of accused and their crimes, wanted and detained prisoners and the first *Interim Report* on war crimes at Belsen and gas chamber(s) at Auschwitz. That *Report* recommended prosecutions; detailed methods of taking statements; and contained medical and other information on Belsen along with much more. Most harrowing are the accounts (one written on the day Belsen was liberated) of conditions in that camp immediately upon arrival and what measures were undertaken to ameliorate those conditions and begin the desperate attempt to save as many lives as possible, all whilst battle continued around the camp. Much of this material formed the basis of witness statements and affidavits in the trial and is drawn on below.

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<sup>16</sup> Raymond Phillips (ed.), *Trial of Joseph Kramer and Forty-Four others* (London: William Hodge and Sons, 1949)

<sup>17</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the Laws of War* (London: HMSO, 1948), p.361. Priscilla Dale Jones, 'Nazi Atrocities against Allied Airmen: Stalag Luft III and the end of British War Crimes Trials', *The Historical Journal*, 41, 2(1998), 543-565 at 547; 'British policy towards German Crimes against German Jews, 1939-1945', *Leo Beck Institute Year Book*, 36 (1991), pp.339-66; 'British Policy Towards 'Minor' Nazi War Criminals, 1939-1958' (University of Cambridge: unpublished D. Phil, 1989).

<sup>18</sup> Lt. Col. S.G. Champion RA: Imperial War Museum, London, UK: (IWM) 93/11/1, (Hereafter: Champion's File). *Interim Report*, 1

Bergen-Belsen concentration camp exploded onto public consciousness on 15 April 1945.<sup>19</sup> There were dead bodies in piles, at least 10,000.<sup>20</sup> Thousands more men, women and children were in the last stages of starvation, some dying as the British entered the camp and many for weeks afterwards (some 500 a day in the first weeks after liberation).<sup>21</sup> There was sickness, most recently typhus; and amongst the sick and dying moved healthy male and female SS camp officials, Hungarian soldiers and the Wehrmacht, initially still acting as 'guards'.<sup>22</sup> Shocked British soldiers also walked amongst the Nazi victims – viewed as if from another world. Reporters, photographers, film crews came to Belsen. They experienced and, day-by-day, reported back. Richard Dimbleby recorded a broadcast immediately after visiting the camp, but the BBC, hardly believing what he said, waited for a few days in order to confirm his story before broadcasting it to the nation.<sup>23</sup> Belsen was a humanitarian disaster that nearly defeated the British Army, still engaged in actively fighting the Germans. Those serving soldiers, devastated by what they found, felt an absolute need to photograph, film and write, recording Bergen-Belsen in those first weeks and beyond; realising that otherwise no one would believe them, ironically foreshadowing the Holocaust denials of David Irving and others. One RAF officer wrote: 'I was anxious to take the opportunity of seeing with my own eyes. If in five years time I hear people saying that Belsen etc. were so much propaganda, I shall be in a position to argue from conviction'.<sup>24</sup>

The legal foundations of British war crimes trials have been reconstructed elsewhere, including contemporary concerns about the use of field courts-martial procedures amended by Royal Warrant.<sup>25</sup> This was issued on 18 June 1945 in order to bring those charged with war crimes to trial within the British Zone.<sup>26</sup> Most contentious were the amendments to the rules of evidence.<sup>27</sup> It should however be noted, that those accused were not charged with common law murder, rather: 'murder as a war crime'. Under the terms of Regulation 9, a

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<sup>19</sup> Joanne Reilly, *Belsen: the liberation of a concentration camp* (London: Routledge, 1998), p.1; Phillips, *Trial of Joseph Kramer*, p.396.

<sup>20</sup> *The Relief of Belsen, Eyewitness Accounts*, (London: Imperial War Museum, 1991), pp.9; 19-21.

<sup>21</sup> *Ibid*, pp.13-14. The earlier death rate was estimated at 'some 17,000 in March', see *ibid*, p.9.

<sup>22</sup> See film shot when British soldiers entered the camp and witness accounts: Phillips, *Trial of Joseph Kramer*, pp.21; 56-7.

<sup>23</sup> Part of the broadcast is held at the Imperial War Museum: see *The Relief of Belsen*, p.11.

<sup>24</sup> Squadron Leader F.J. Jones, HQ 8501 Wing, RAF: *ibid*, p.30.

<sup>25</sup> Dale Jones, 'British Policy'; 'Nazi Atrocities', p.547; 'British policy towards German Crimes'; A.P.V. Rogers, 'War Crimes Trials under the Royal Warrant: British Practice 1945-1949', *International and Comparative Law Quarterly*, 39 (1990) pp.780-800.

<sup>26</sup> *History UNWCC*, 462. The text of the Royal Warrant can be found at: <http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm> [Accessed 1 August 2013]

<sup>27</sup> These permitted the use of hearsay evidence, by affidavit or (Reg. 8(i)(e)): 'diary, letter or other document appearing to contain information relating to the charge'. In summary, under the terms of Reg. 8(i), the Court was given wide discretion in the admission of evidence: 'It shall be the duty of the Court to judge the weight to be attached to any evidence given in pursuance of the Regulation which would not otherwise be admissible'.



guilty verdict gave the possibility of death sentence, not the mandatory death sentence required in British criminal trials in the 1940s. This in some way tempers the retroactive nature of parts of this legal process, a topic not within the remit of this article.

In reality, exactly how this would all work in practice was the subject of on-going concern to army lawyers and investigators in the months before the *Belsen Trial* began. For example, archival sources reveal that investigators expressed concern that depositions should be 'on the face of them, reasonable; otherwise in court – or shall we say in a British court - they will throw them out and acquit the prisoner.'<sup>28</sup> In addition, as the rules of evidence were relaxed by the terms of the Warrant, the investigators were concerned that witnesses might not differentiate between hearsay and direct evidence. However, they found that once the difference was explained, witnesses showed: 'complete frankness', in stating which evidence was, and which evidence was not, hearsay'.<sup>29</sup>

It is also clear from surviving records that investigators were involved in the decision-making processes concerning trials. For example, in July 1945 then Lt. Col. Leo Genn Officer Commanding No. 1 WCIT (see below) was in England for a conference on the matter. This was not a smooth process; Lt. Col. 'Geoff' Champion, his second-in-command, notes that Colonel Backhouse, chief prosecutor for the trial, was also attending a meeting in England

with nearly every lawyer in the Kingdom as far as I can gather ... [the] result of this distinguished gathering will probably be confusion worse confounded, but may enable Col. Backhouse to give concrete directions.<sup>30</sup>

At this point Champion is reflecting upon those practical and legal issues that are raised within Genn's *Interim Report*. These recommended prosecution of camp officials, Wehrmacht and Hungarian soldiers (no soldiers were brought to trial) and others for atrocities committed largely against Jews in pursuit of, or as a result of, the Nazi Final Solution. Although not clear at the time, this was beginning to emerge from witness statements obtained at Belsen and became publicly visible within the subsequent trial.

No. 1 WCIT arrived at Belsen only four weeks before they produced their '*Interim Report*' dated 22 June 1945. It is thus apparent that the Team began investigations before details concerning the precise legal framework or jurisdiction had been finalised. However, their methods of inquiry, of taking affidavits etc., make it clear that they are following a pre-existing sense of appropriate behaviour in criminal investigations; bringing what they

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<sup>28</sup> Champion's File, Letter, Champion to Genn, 11 July 1945.

<sup>29</sup> *Ibid*, *Interim Report*, p.10.

<sup>30</sup> *Ibid*, Memo, Champion to Till, 11 July 1945.

understand about due legal process into the bizarre transgressive world of Belsen. Although a work in progress, that *Report* reveals that their investigative remit had rapidly moved beyond Belsen to encompass those committed at 'OTHER CONCENTRATION CAMPS from 1940-1945'.<sup>31</sup> The volume of information available both from Belsen detainees and in statements from SS and other officials all of whom had been in a variety of camps undoubtedly drove such a decision. This particular build-up of available evidence was a direct consequence of Belsen's peculiar characteristic of final destination for those prisoners who survived the death marches from the East as the Germans retreated from the Russian Army advance.

Genn, the author of this *Report*, was a qualified barrister and well known (Jewish) actor, who served with the Royal Artillery.<sup>32</sup> There is an additional signature; that of Champion, 'owner' of the copy drawn from here. He emerges from these documents as possessing a strong commitment to his role, a dry sense of humour and a good, close working relationship with his commanding officer. The file contains a list of additional typed amendments, corrections and comments by Champion, where he notes:

I feel rather amazed that in the rush and bustle of getting it done, even with my able assistance and suggesting deletions of "and" and substitution of "or", could have produced a document which on leisurely consideration seems to have set out so concisely and clearly the main issues.<sup>33</sup>

If this seems frivolous, if any reader may be led to believe that these officers merely retained a wry detachment, then there is another comment by Champion to Genn, hand-written in the margin:

Possibly special mention might be made of the number of child victims, dead or riddled with T.B. – having regard to the crimes against these, I should like to amend the Royal Warrant, to death by breaking on the wheel – but I have no hope of acceptance of this idea.<sup>34</sup>

Clearly these investigators were overcoming personal disgust and many other emotions yet they continuously expressed concern to ensure that the 'best' evidence only be used, and that this was obtained and carefully recorded. It may be that these two very English middle-class lawyers, Genn and Champion, felt obliged to obtain witness statements in a fashion that complied so far as was possible, with that legal culture in which they practised and experienced law at 'home'; the English common law tradition. Moreover, in so doing they

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<sup>31</sup> Ibid, *Interim Report*, p.1.

<sup>32</sup> Genn was promoted to Lieutenant Colonel in 1943 and awarded the Croix de Guerre in 1945. Remarkably, during this period he was given a brief leave of absence (in 1944) specifically to appear as the Constable of France in the film *Henry V*, starring Laurence Olivier.

<sup>33</sup> Champion's File, 'Notes on interim report re BELSEN camp'.

<sup>34</sup> Ibid.

were putting clear water between English 'legality' and that 'lawfulness' so many of the accused claimed in their defence. Plus, of course there is a strong sense of professionalism in their records; perhaps self-justificatory. But that is no different from views expressed by Sir Thomas Hetherington in his *Report of the War Crimes Inquiry* 1989.<sup>35</sup> In this *Report*, Genn set out the size of the task facing these investigators at Belsen. In summary, he estimated that initially there were 'some 55,000 potential witnesses sick or healthy, distributed over an area of several square miles'; that the task of bringing some sort of order to the camps was 'Herculean'. In spite of the magnitude of this task the Team retained their concerns that Depositions should be scrupulously obtained.<sup>36</sup> As a corollary to this aspect, investigators were greatly concerned as to the value of the evidence given by former prisoners, in the context of the severe privations these victims had experienced. Thus in those cases where 'it was apparent that the witnesses' experiences had not had inconsiderable effect on his or her mental outlook', no deposition was taken.<sup>37</sup>

Pressures on the investigators must have been considerable. They arrived at Belsen on 20 May 1945; their *Interim Report* was issued on 22 June.<sup>38</sup> The trial of 45 defendants began 19 September and lasted three months. Of 13 charged with war crimes at Belsen and Auschwitz: six were found guilty for both; one guilty for Belsen; four guilty for Auschwitz; two not guilty. Of the 32 charged with war crimes committed at Belsen; 20 were found guilty. In total, 11 death sentences and one life sentence were passed down. The remainder found guilty were given sentences ranging from one to 15 years imprisonment.

The minimal research undertaken in these trials to date has ensured that those achievements by soldiers who investigated and took part in this and subsequent war crimes prosecutions have been consistently overlooked. So too is the Belsen reality from the point of liberation, potential witnesses (victims), rescuers, investigators, accused and lawyers came together in that place; many remaining there until the trial five months later. Following the participants' perspective provides one platform from which to provide alternative reconstructions that perhaps satisfies Fraser's critique (in summary) that historicity concerning 'perpetrator' trials exemplifies a concern with various ideological aspects of law, culture, politics and history in the creation of a collective Holocaust memory.<sup>39</sup> Unlike such

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<sup>35</sup> *War Crimes. Report of the War Crimes Inquiry, Cm 744* (London: HMSO, 1989).

<sup>36</sup> Champion's File, Letter Champion to Genn, 11 July 1945.

<sup>37</sup> *Ibid. Interim Report*, p.10.

<sup>38</sup> *Ibid.* 'Appendices A-C Interim Report', 22 June 1945. On 25 June they had 46 SS men, 20 SS women and 16 Kapos in custody; they listed 39 others wanted for crimes at Belsen and 197 for crimes at other camps. Deposition numbers appear against all those listed, at least one, and for most rather more; Mengele's name appears with 37 depositions, far and away the largest number.

<sup>39</sup> Fraser, *Law after Auschwitz*, p.5.

teleological historicity, approaching the trials from a socio-legal perspective reveals that in a very intimate and intimidating physical environment, British army investigators retained a strong sense of the 'transgressive and taboo-breaking' nature of what we now understand as the Holocaust.<sup>40</sup> And more that at all points the soldiers scrupulously differentiated their behaviour from that of their German prisoners.

Undoubtedly, the actions of WCIT soldiers reflect their social, legal and political norms. But other very different norms co-existed and the next thread in the methodological helix presents an account of German silence. This section will be followed by a return to the individual, the German legal academic Carl Schmitt, specifically to consider his role in providing an intellectual framework supporting social and political norms whose horrific endpoint the British Army encountered in Belsen on 15 April 1945. It will consider how Schmitt continued actively to support the Nazi regime; and how 'silence' and the collusion of academics (possibly unaware of the dimensions revealed here) continues to veil the extent of his personal guilt.

## **2 On the Power of Silence**

It is undeniable that social attitudes and behaviour underpin and validate all legal structures and law itself. Thus Germany, a modern Western European state, enabled, ordered, and sanctioned its citizens' taboo-breaking behaviour, all the while ensuring that it was publicly unmentionable: a shared shame.

Most of you know what it means when 100 corpses lie there, or when 500 corpses lie there. To have gone through this and – apart from a few exceptions caused by human weakness – to have remained decent, that has made us great. That is a page of glory in our history that has never been written and which will never be written ... (Himmler's speech at Posen 1943).<sup>41</sup>

By this deliberate tactic, Nazi Germany and its citizens circumvented public conscience as a social construct, permitting evil as physically possible, acceptable, even natural. That process of silence continued after defeat and enabled the post-war German population to claim: 'We did not know'. The taboo was not the doing but the talking about what was done. Importantly, in the 'minor' trials Allied soldiers in Germany broke that taboo, enabling victims to speaking publicly and some trials were widely reported. But most Germans remained silent.

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<sup>40</sup> Steven E. Aschheim, 'On Saul Friedlander', *History and Memory*, 9 (1 /2) (1997), pp.11-47.

<sup>41</sup> Raul Hilberg, *The Destruction of the German Jews*, (New York: Harper and Row, 1979), p.648.

However, the British Army too has taboos and restraints. All the records of the investigations and the trial transcripts held in War Office files at Kew are labelled 'TOP SECRET'. In addition, in 1945, WCIT soldiers had to overcome personal emotions in order to perform properly public social, military and legal roles. Those duties and perhaps their decency and the imperatives attached to Army files combined largely to prevent any expression of anger; but not those expressions found in the margins of their reports in personal file copies where occasionally soldiers recorded their feelings. Most notably, Geoff Champion, solicitor and JP from Tenterden in Kent, in breach of all army regulations, took his 'Top Secret' Belsen file home and thence to the Imperial War Museum, ensuring that it would be read one day. His legacy short-circuited the 'secrecy' of War Office files (closed until at least 1968; some remain closed today) and also bypassed the military taboo of silence to allow us to hear his voice and that of his colleagues, telling the world their 'real' story of Belsen. In this there is resonance with Gunter Grass in *Peeling the Onion* who has broken his very German silence to reveal his truth; that of a juvenile Nazi past. This too is what Habermas called for in his statement in the 1987 *Historikerstreit*, that the memory of the suffering of those murdered be kept alive openly, not just in people's minds.

The reality is, during the Nazi regime the majority of the population were aware that their leaders were passing all the boundaries of human behaviour, for that reason those actions took on an aura of the unbelievable. This enabled some quite extra-ordinary self-justifications to emerge.

Once again the human psyche demonstrated the ability to manipulate, encapsulate or repress events in such a way as to make them bearable. The foundations for the post-war strategies of exculpation were laid early.<sup>42</sup>

In consequence, it can be asserted that German silence does not necessarily represent collective shame. For that silent majority it reflects both anger and an absence of a sense of personal guilt; their actions were those of loyal citizens of the Reich. In spite of this, there was always a risk of being indicted for war crimes, many such trials were held in Germany from the 1950s in both the Eastern Zone and the BRD. That possibility continues today: on 2 September 2013 the trial of Siert Bruins, a 92-year-old Dutch-born naturalised German commenced at Hagen, near Dortmund in Germany.<sup>43</sup> He is accused of executing a Dutch resistance fighter Aldert Klaas Dijkema in 1944, having already served a prison sentence in Germany in the 1980s for his part in the wartime murder of two Dutch Jews. This is a continuation of the doctrine set out in May 2008 when the Simon Wiesenthal Centre

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<sup>42</sup> Stolleis, *History of Public Law*, p.439.

<sup>43</sup> 'Ex-SS man Siert Bruins stands trial over alleged Nazi war crimes', *The Independent*, 2 September 2013, at <http://www.independent.co.uk/news/world/europe/exss-man-siert-bruins-stands-trial-over-alleged-nazi-war-crimes-8794875.html> (accessed 10 September 2013)

released its 'most wanted' list of Nazi war criminals, all males in their 80s and 90s. The release states: 'the passage of time in no way diminishes the guilt of the perpetrators'.<sup>44</sup> However, many former SS did extremely well after the war; an SS past was no barrier to worldly success in West Germany.<sup>45</sup> It is therefore not surprising that few of those actively involved, or who lived as adults through Germany's Nazi era either spoke of, or expressed regret at that past. This recognition is required in order to understand how notorious disgraced Nazi theorist Schmitt could continue to live in post-war Germany without becoming a social pariah. In short, only Nazis who found themselves in the Russian Zone after 1944-5, and those with a high profile on war crimes wanted lists felt it necessary to flee Germany.

### **3 On the Eloquence of Silence: Introducing Carl Schmitt, the Great Fabricator**

This section will consider the professional life of Schmitt including the significance of 'silence' as a major aspect of the survival of his work. This section also forms a connecting strand to the decontextualised work (their silence?) of modern CLT scholars discussed below. It is clear that silence is a powerful protective psychological weapon, both on personal and political levels. A convention of silence, however created, becomes orthodoxy, constituting 'normal' social good behaviour. As a result, breaking silence became not simply a broad cultural taboo in post-war Germany; it constituted bad manners. For example, Stolleis a German legal historian, reveals that after 1950, it was considered 'tactless' for academic lawyers to speak about Nazi constitutional law and the involvement of specific individuals; that by doing so one ran the 'danger of insulting a colleague'.<sup>46</sup> More, the German word, *Taktlos*, carries an inherent meaning of crass bad-manners, unthinkable in respectable German bourgeois society. That cultural norm with its emphasis upon formal politeness, facilitated by a shared sense of being an elite leadership group, thus enabled a new post war beginning for legal academics.<sup>47</sup> All of these, bar a very few returning refugees and those in the Russian Military Zone where anti-Nazi policies were strictly pursued, were professor-collaborators under the Nazi regime; teaching Nazi law and ideology to their students.

It is evident that post-war patterns of silence originated within the Nazi regime. As a result, during that period the silence was deafening amongst all established and organised elites in Nazi Germany. As Bauman notes, Hitler's capture of state power in Germany did not change those rules of professional conduct that remained loyal to

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<sup>44</sup> *The Independent*, 1 May 2008.

<sup>45</sup> Steiner, 'SS Yesterday and Today', p.429.

<sup>46</sup> Stolleis, *Law under the Swastika*, p.88.

<sup>47</sup> Stolleis, *History of Public Law*, p.448.

The principle of the moral neutrality of reason and the pursuit of rationality ... German universities, like their counterparts in other modern countries, carefully cultivated the idea of science as an emphatically value-free activity; they bestowed upon their wards the right and duty to serve the "interests of knowledge" and to brush aside other interests with which the welfare of scientific pursuits might clash.<sup>48</sup>

This quotation might be read as a positive endorsement. *This* writer both understands and presents it as a damning statement, as did Baumann himself she argues. It is this approach which permits some CLT scholars to remove Nazism from the Nazi theorist. What mattered to scholars then and now (perhaps) was the preservation of their integrity as spokesmen of Reason. Consequently, their task[s] did not include concerns with ethical meaning and their ordinary life continued. In their surrender, German legal academics moved from shame to pride; as accomplices they had to deal with cognitive dissonances generated by complicity. This later allowed professional rejoicing, for example, in the blessed cleanliness of the universities purged of all Jewish influence.<sup>49</sup>

It is within this framework that we can begin to find additional meaning in post-war responses to and explanations for, the silences surrounding Schmitt. These served to conceal the extent to which he exercised his considerable intellectual talents to assist, promote and legitimate the political values of the Third Reich. Thus Schmitt was 'protected' by German post-war cultural discretion, supported in various ways by those academics invested in his work. Of course, he could not keep his Nazi past secret, but by selective silences and manipulation could minimise the damage and any risk of prosecution by the government of the BRD.<sup>50</sup> Through this strategy, he 'enabled' his readers to lose sight of the centrality of that Nazi project in which he fully participated. But today, as Muller and Stolleis' publications are now widely available to English-speaking scholars, especially those containing revelations concerning Schmitt and his foundational role in Nazi legal scholarship (see later), it is disquieting that a 'value-free' approach to his work continues mirroring Bauman's depiction of Nazi scholarship above.

This leads to another 'intersection' point within the methodological helix that synergises the main strands of this article. Namely, that such complex but significant connections between life and thought raise profound ethical questions concerning that current affirmation of the utility of Schmitt's legal theories. In his fall, although fractured and broken by the extreme conditions of his time, Schmitt could still find intellectual support in post-war Germany and from the wider academic world despite a Nazi past. This antimony permits theorists to read

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<sup>48</sup> Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989), pp.126-7.

<sup>49</sup> *Ibid*, p.128.

<sup>50</sup> On Schmitt's manipulative legal responses to US interrogators, see Salter, 'Neo-fascist legal theory on trial', pp.171-83.

Schmitt's work written from a Nazi standpoint whilst presenting their research in a quasi-critical framework. This article questions if, in that rejection of boundaries, theorists are transgressing ethical norms.

If this is so, then it is morally repugnant that decontextualised scholarship based upon Nazi theory has become intellectually acceptable in some quarters.<sup>51</sup> One explanation for this state of affairs may be situated in that presumed link maintained by philosophers, between philosophy and virtue.<sup>52</sup> Dominick LaCapra is a historian who, in his work on Holocaust and memory, has reflected at length upon this question. He defines such behaviour as amounting to complex interactions between the personal, the political and the text.<sup>53</sup> Thus, text, author and reader are bound in time and space – none fixed, since people and language all change with time. Perhaps the honest approach is to explore and define every influence on each element – author, text and reader – and to situate them in different times and places in order to provide a multi-dimensional portrait of the past. Consequentially, material with value and meaning from one perspective, political viewpoint, or historical moment may appear disjointed, even transgressive from another. To that end, LaCapra suggests we examine contemporary responses specifically to reveal elements of transference in that exchange between past and present. What follows will attempt that exercise.

## 5 On Nazi Legal Academics: Unmasking Carl Schmitt

From 1949 in Germany, there was a general if duplicitous consensus amongst legal academics not to speak of the recent past (for now). Silence was the pre-requisite for a new beginning – along with shared nationalist, anti-communist and Cold War views (consideration of the latter does not form part of this work) all framed within the certainty of belonging to a leadership group.<sup>54</sup> Such tactics did not aid any coming to terms with the past. Consequently, the role of German lawyers during the Third Reich still presents one of the greatest challenges to the legitimacy and status of the contemporary German legal establishment.

In consequence, the juristic nature of Nazi Germany continues to reverberate and disturb legal equanimity today. As a result of his own position, that is an academic trained within that

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<sup>51</sup> On the political dangers in such unreflective acceptance see Salter, 'Neo-fascist legal theory on trial', p.187.

<sup>52</sup> Farias, *Heidegger and Nazism*, p.xii

<sup>53</sup> Dominick LaCapra, *Representing the Holocaust: History, Theory, Trauma*, (Ithaca, NY: Cornell University Press, 1996), p.111.

<sup>54</sup> Stolleis, *History of Public Law*, p.448.



long unbroken German legal tradition, Stolleis' *Law under the Swastika* provides an often-painful reflective insider's account of practitioners and judges in Nazi Germany, of the nature of Nazi legality and law. Of particular interest is the book's final section, concerning 1945 onwards. It constitutes a damning account that spares few and highlights how the legal profession escaped social ostracism for prosecution and punishments they unjustly inflicted upon so many during their years of loyal service to Nazi rule. It is highly significant that after the US *Judges Trial* at Nuremberg 1947, not a single judge was put on trial in West Germany for his [sic] activities under National Socialism.<sup>55</sup> Stolleis has similarly reconstructed the extensive and ignoble career of German legal academics in *A History of Public Law in Germany 1914-1945*. Supreme amongst those academics, Schmitt was regarded as *the* political theorist both of the collapse of the Weimar Republic and of the Nazi regime.<sup>56</sup>

And yet, in spite of his past, Schmitt remains of great interest to theorists today. In consequence, this section has two purposes; the first is to re-connect Schmitt's Nazi ideology with his publications and thereby shed light on those political motives underpinning his work. The second is to provide a framework for the case study at the end of the article, illustrating certain aspects of the current reception of Schmitt's theories. It is important to note at this point that the most consistent part of Schmitt's worldview, implicit within all his writing, is its thread of German-ness and the importance of *Heimat*. This concept does not directly translate into English, but is a quality of belonging to place possessed by every German. It was stolen from German Jews and is a fundamental and traditional element of German blood and *Volk*. *Heimat* is 'understood' and central throughout Schmitt's work and life. For example, it underpins Schmitt's connection of the concept of the partisan to that of territory in *The Theory of the Partisan* published in 1963.<sup>57</sup> Any contemporary scholar seeking to mine Schmitt's writings as a basis for critical analysis does violence to the academic project by failing to acknowledge this ultra-nationalist Germanic basis at its heart. Through all his incarnations, Schmitt remained a patriotic German.<sup>58</sup>

In short, Schmitt was amongst the most prominent and renowned scholars who professed themselves followers of National Socialism.<sup>59</sup> He was enormously and ruthlessly ambitious; Stolleis describes him as 'ambiguously multifaceted', placing him within a group formed

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<sup>55</sup> Stolleis, *Law under the Swastika*, p.183, (he incorrectly states 1945).

<sup>56</sup> Ulrick K. Preuss, 'Political Order and Democracy: Carl Schmitt and His Influence', in Chantal Mouffe (ed.), *The Challenge of Carl Schmitt* (London: Verso, 1999), pp.155-79.

<sup>57</sup> Muller, *A Dangerous Mind*, pp.146-7.

<sup>58</sup> *Ibid*, p.248.

<sup>59</sup> Stolleis, *Law under the Swastika*, p.97.

during the last years of the Weimar Republic, who viewed themselves as 'young rightists'.<sup>60</sup> As extensive biographical details concerning Schmitt's life have now been published in English, this article will concern itself solely with Schmitt's Nazi engagement, as personal ambition moved him to join the Nazi Party in 1933.<sup>61</sup> The period from 1936 to 1945 requires underlining as it is still being incorrectly characterised by some writers. As a result of this, in a version built upon Schmitt's own silence, lies and other influences, some scholars repeat his own claim. This runs that from 1936-1945, Schmitt allegedly 'fell from power' as the Nazi apparatus, 'turned against him.' That position, although manifestly not so, has increasingly become orthodoxy, and thus requires specific attention here.

The facts reveal that in 1932 Schmitt's was a rising academic star; his connections at the highest level within the Weimar Republic, combined with his academic reputation had secured him a position as law professor at the University of Köln. At that point he had hopes of a future professorship in Berlin. The regime change made that impossible without Party support, and so Schmitt joined the Nazi Party. From this time onwards, it is now well established that he devoted himself both to the Party and his own career. For 12 years his work provided legal 'legitimacy' for the Third Reich. Schmitt was awarded the most prestigious academic post, the Chair of Public Law in Berlin in 1933 and additional appointments from the State.<sup>62</sup> Meanwhile, his Jewish former colleagues were excluded from the universities, deprived of their citizenship, and if fortunate, escaped into exile. In addition, he rapidly acquired international fame as a fascist, meeting Mussolini in 1936.<sup>63</sup> He was at this point a loyal servant to the regime protected both by Goering and his own ever more rabid anti-Semitism. This is explicit in his notorious address: 'Jewry in Legal Studies' delivered to open a conference of German jurists in 1936:

We need to liberate the German spirit from all Jewish falsifications, falsifications of the concept of spirit which have made it possible for Jewish emigrants to label the great struggle of Gauleiter Julius Streicher as something unspiritual.<sup>64</sup>

Schmitt's most influential contribution to Nazi 'legality' emerged from his writings on jurisprudence. Briefly, Schmitt deconstructs jurisprudence into three divisions: normative, positivist and concrete orders, rejecting the first two. The latter, illustrated by analogy with medieval institutions, concerns the force and integrity of social groupings. Within these, 'rules' develop organically via consensus and thus individuals are (should be) judged

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<sup>60</sup> Ibid, p. 92.

<sup>61</sup> Muller, *A Dangerous Mind*, p.37.

<sup>62</sup> Stolleis, *History of Public Law*, p.271.

<sup>63</sup> Muller, *A Dangerous Mind*, p.40.

<sup>64</sup> Wolin, *Heidegger's Children*, p.26; Stolleis, *History of Public Law*, p.257. The reader will recall that Streicher, the most notorious Nazi publicist of anti-Semitism, was convicted by the International Military Tribunal at Nuremberg and subsequently executed.

according to the standards (concrete orders) of the order to which they belong. Soldiers, clergy, bureaucracies and members of a family constitute such orders.<sup>65</sup> Further, Schmitt asserts that 'the legitimacy of judges' decisions is not to be based upon the content and derivation of the law but on what was authorised by the State'.<sup>66</sup> This transmuted into the Nazi slogan: 'concrete thinking about order and organisation'.<sup>67</sup> Schmitt's contribution. He modified earlier writings to provide 'concrete order formation' with an amorphous, but manifestly National Socialist slant.<sup>68</sup> His work, *Über die Drei Arten* was seminal in this achievement; published in 1934, it also forms the basis of the article identified for later deconstruction).<sup>69</sup> In consequence, in the elevation of his brutal reality philosophy Schmitt rendered his greatest service to the Nazi system.<sup>70</sup> Nonetheless, in an increasingly factional political system, Schmitt fell foul of internal Nazi and university intrigues from 1936 as younger, ambitious (and more committed) Nazis elbowed him aside. His enemies played upon his Catholic background (although he was excommunicated by the Church in 1926)<sup>71</sup> and his former Jewish acquaintances.<sup>72</sup> Both were true of many Germans before 1935. In response, Schmitt continued to engage in specific anti-Semitic propaganda to re-affirm his Nazi credentials.<sup>73</sup> Although forced to resign from some of his positions, he remained a Berlin law professor and continued his academic career.

In summary, Schmitt did not abandon his ambitions for academic success in the Third Reich. Instead, he re-invented himself as an international lawyer. He continued to provide legal justifications for the actions of the Third Reich, this time German expansionism. In 1939, two weeks after the fall of Czechoslovakia, he was invited to lecture on *Grossraum* at the Kiel Institute of International Law. Furthermore, at home his publications on this subject elevated *Grossraum* to a 'principle' of world politics, permanently associating his name with German expansionism, the Third Reich and its 'World Order'. In this context, an attempt to revive Schmitt's *Grossraum* theories as a useful theoretical tool in contemporary critical discourse on (neo)liberalism has been challenged as 'indissolubly tied up with Nazi ideology and

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<sup>65</sup> Carl Schmitt *Über die Drei Arten des rechtswissenschaftlichen Denkens*, (2<sup>nd</sup> ed.), (Hamburg: Nazi Academy of German Law, 1934). Editor, Reich Minister Frank. (Translated into English in 2004); Carl Schmitt, *On the Three Types of Juristic Thought*, Trans. Joseph W. Bendersky, originally published, 1934 (Westport, Conn: Praeger, 2004), p.54.

<sup>66</sup> Stolleis, *Law under the Swastika*, p.89.

<sup>67</sup> *Ibid*, p.15.

<sup>68</sup> Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff: University of Wales Press, 1998), p.160.

<sup>69</sup> Schmitt, *On the Three Types of Juristic Thought*. For a full analysis of the role of this work in legitimating Nazi 'law' see Stolleis, *History of Public Law*, pp.340-3; 396.

<sup>70</sup> Stolleis, *Law under the Swastika*, pp.21; 71;110.

<sup>71</sup> Muller, *A Dangerous Mind*, p.19.

<sup>72</sup> *Ibid*, pp.40-1, n.17.

<sup>73</sup> Stolleis, *Law under the Swastika*, p.97.

political purpose'.<sup>74</sup> Later, during 1942 and 1943, Schmitt was officially permitted to tour Bucharest, Budapest, Madrid, Coimbra, Barcelona and Leipzig, delivering lectures on: 'The State of European Jurisprudence'.<sup>75</sup> Some of these international connections continued after the war, when Schmitt maintained his links with Fascist regimes in Spain and Portugal and, from 1948, Opus Dei.<sup>76</sup>

It is apparent that, although the Party initially lauded him, in common with most German academics he became side-lined as the project moved on beyond concerns of legality and philosophy, to propaganda and totalitarianism. However, Schmitt remained part of the 'establishment'; a respected and influential (if not as much as he wished) professor and, like all ambitious academics, took advantage of any career opportunities. As a result, despite his assertions to American interrogators at Nuremberg in 1947, that he had no longer been any part of the Nazi project after 1936,<sup>77</sup> it must be noted that he had still been permitted to lecture and even to travel abroad and publish. Such activities emphasise how close he remained to the regime.<sup>78</sup> One case in point is *Leviathan* (1938), where Schmitt combined a melancholy retrospective on the state with the vilest anti-Semitism.<sup>79</sup> He also held the chair of the Committee for Administrative Law in the Academy for German Law from 1939-1942.<sup>80</sup> In summary, he remained a force in the academic milieu and a Party member to the end of the war.<sup>81</sup> At that point, he refused to co-operate with De-Nazification requirements – thereby ensuring no official record appears today in those particular files.<sup>82</sup> He was held by the Americans at Nuremberg for a year, 'assisting' enquiries. On his release he was given a life-time ban from German Universities, (the only professor to be so treated) first by the Allies, then confirmed by the West German Government.

However, many powerful challenges to Schmitt, as theorist and individual have appeared: from Franz Neumann's *Behemoth* (1944) to recent historical reconstructions,<sup>83</sup> and from

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<sup>74</sup> Andrea Gattini, 'Sense and Quasisense of Schmitt's *Grossraum* Theory in International Law – A Rejoinder to Carty's "Carl Schmitt's Critique Of Liberal International Legal Order"' *Leiden Journal of International Law* 15 (2002), pp.53-68.

<sup>75</sup> Stolleis, *Law under the Swastika*, p.51, n.76.

<sup>76</sup> Muller, *A Dangerous Mind*, p.132.

<sup>77</sup> Joseph W. Bendersky, 'Carl Schmitt's Path to Nuremberg: A Sixty Year Reassessment', *Telos*, 139 (2007), pp.6-34; Salter, 'Neo-fascist legal theory on trial'.

<sup>78</sup> Stolleis, *History of Public Law*, p.441.

<sup>79</sup> Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes; Sinn und Fehlschlag eines politischen Symbols* (Hamburg: Hanseatische Verlagsanstalt, 1938).

<sup>80</sup> Stolleis, *Law under the Swastika*, p.121.

<sup>81</sup> Farias, *Heidegger and Nazism*, pp.192-3; 236.

<sup>82</sup> Muller, *A Dangerous Mind*, p.51

<sup>83</sup> Franz Neumann *Behemoth: The Structure and Practice of National Socialism, 1933 – 1944*, 2<sup>nd</sup> ed.(London: Octagon Books,1988).

within studies into critical legal theory.<sup>84</sup> These include many critiques of Schmitt's work and intellectual position, not least by Habermas.<sup>85</sup> However, unlike Habermas, perhaps also more in line with the thrust of this article, Lubbe (second only to Habermas as a German 'public' philosopher) argues that political debate and political decision-making should be underpinned by an acute consciousness of the: 'contingency (and brevity) of political and individual life'. Lubbe retains a sense of the 'sheer fragility of political order'.<sup>86</sup> Writing from the 1950s onwards, Lubbe selectively appropriates Schmitt's thought in order to strengthen liberal democracy and defend it against its enemies.<sup>87</sup> For Lubbe, Schmitt's theories serve as a whetstone to sharpen liberalism, and provide an edge for philosophical debate. Such an approach, born in the aftermath of war and the collapse of the power of the Third Reich, is also evidence of a contingent specifically German response to those elements of Nazi theory that had been triumphant for so long. However, that justification, 'a defence of liberalism' looks shabby 50 years later. Today it has been totally detached from those contemporary pressures that drove post-war German philosophers to 'defeat' Nazism and its intellectual influence in the post-war German state.

In spite of this, theorists' fascination with Nazi theory continues, assisted by Schmitt's post-war tactics; specifically his ability to remain silent about his Nazi past, a habit fully established by the 1950s. This, combined with a German culture of silence discussed above, allowed Schmitt to partially re-invent himself in later years, for example when he and his theories were adopted by the new left in Italy and Germany.<sup>88</sup> In the post-war period, although permanently banned from the universities, (as already noted, the only law professor so punished) for his notorious Nazi stance, Schmitt kept up his academic contacts and met students 'off campus', beginning at Heidelberg in the 1950s. One of those former students, Sombart, has admitted that in those meetings, it was not 'normal' that he and his fellow students accepted Schmitt's silence concerning his Nazi past: 'we accepted the silence and thereby justified it. That was undoubtedly how he wanted it. Someone who is not asked cannot owe an answer.'<sup>89</sup> As a result, by the 1980s, Schmitt was increasingly portrayed as an individual scholar rather than a Nazi 'case'. This perception, of Schmitt as the great European intellectual and man of letters rather than a political or legal theorist in any 'narrow'

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<sup>84</sup> See especially: Amanda Loumansky, 'Critical Legal Theory's Turn to Schmitt: Not Waving but Drowning', *Liverpool Law Review* 1 (2013), 34, pp.1-16.

<sup>85</sup> For a discussion of Neumann and Habermas' intellectual challenge to Schmitt's work see Salter, 'Neo-fascist legal theory on trial'.

<sup>86</sup> Muller, *A Dangerous Mind*, p.127.

<sup>87</sup> *Ibid*, p.124.

<sup>88</sup> *Ibid*, p.168-70.

<sup>89</sup> Nicholas Sombart, *Rendezvous mit dem Weltgeist*, p.193, cited in *ibid*, p.104.

sense, characterises much Schmittian scholarship both within and beyond critical legal theory. Muller notes:

Directly or indirectly, Schmitt was treated as a classic who merited careful decoding. One could go so far as to claim that Schmitt's trap had finally sprung shut. The self-mythologisation he had put so much effort into, paid off after his death. Schmitt's hermetic, self-consciously myth-making approach led to ever more hermeneutics – the kind of hermeneutics in which the German approach to the history of political thought and theory excels.<sup>90</sup>

To conclude this section, there is much to concern scholars in the lives of German academics who maintained their careers under Nazi rule. Their post-war lives are characterised by silence, mis-direction and dishonesty, originating from multiple motives. Although the Nazis failed in their project, academics had played their full part in 'legitimising' the Fascist state. Their contribution played a major role not only in the legal mind-set of German lawyers in 1945 but also in the response of many of those accused of war crimes and tried in Allied military courts. The ubiquitous 'defence' of obeying orders horridly echoed Schmitt's creation of the amorphous 'concrete orders' where, crudely put, law was created by the will of the people or the Fuhrer and so expressed by Nazi judges in Special Courts. In post-war Germany many like Schmitt, re-formulated and adapted their position to appear more acceptable to intellectuals in Western democracies. As a result, this writer suggests that their work should be approached as LaCapra suggests. Academics should challenge the quarantine or delimiting of questions of subject-positions and adopt a narrative voice that permits a researcher to avoid confronting aspects of the principal text. More specifically, LaCapra is concerned with the problem of transference and the manner in which it links the individual and society premised on dichotomies of subjective/objective, public/private. In brief, he suggests that theorists who make a passing reference to a Nazi past are operating a metaphorical safety valve that draws off and releases forces that are explicitly prevented from exerting pressure in the principal text.<sup>91</sup> This will be explored further through the case study below.

## **6 On Schmitt in Modern Legal Theory: Not Waving but Drowning<sup>92</sup>**

It may seem that this work has travelled a considerable distance from Belsen in 1945 yet Schmitt represents one element of the transgressive Nazi state that legitimated those monstrous crimes the British Army confronted and investigated. As such, it does seem peculiar that any element of that Nazi legal culture should be embraced as having value

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<sup>90</sup> Muller, *A Dangerous Mind*, p.203.

<sup>91</sup> LaCapra, *Representing the Holocaust*, 82.

<sup>92</sup> With thanks to Amanda Loumansky for lending me her title. See Loumansky, 'Critical Legal Theory's Turn'.

today. This final section illuminates some of the disquiet expressed in this article; namely, the power of silence, the reception of Nazi theory and the current ahistorical orthodoxy as one strand within legal theory. The challenges set by the Nazi regime are without parallel in the European legal tradition, their crimes still uncounted. In spite of this, some critical legal scholars find virtue and value in 'testing' Western legal systems against that Nazi scholarship, absent of full recognition of its Nazi genesis. This article has briefly considered one example, that concerning Schmitt and International Law.

This section will consider another, published in 2007, by Michael Salter and Susan Twist.<sup>93</sup> Salter has also recently (2012) published a work on Schmitt: *Carl Schmitt: Law as Politics, Ideology and Strategic Myth*.<sup>94</sup> That work provides a decontextualised account of Schmittian theory, with what reads like an add-on final chapter acting as a LaCapra-esque 'safety valve'. It could be argued that his approach continues the West German 'silence' that once surrounded the Nazi past, thereby importing silence into a strand of CLT. Both Salter's work and Schmitt's role in modern theory have been considered elsewhere by Loumansky, in a scholarly article which questions the adoption of Schmitt by some members of her discipline. She considers the use of Schmitt in critical legal theory as a *cul-de-sac* that is anathema to the protection of human rights.<sup>95</sup> It must be emphasised that the position adopted by Salter and Twist stands on the margins of CLT, but also that it does personify the end point of that position. Both because, and in spite of, this, as an illustration of the themes of this article, the Salter and Twist contribution to CLT has a number of additional elements that make it relevant to this study. Firstly it is accessible to readers as it is free to access on line. Secondly, unlike Loumansky, both Salter and Twist have both published research on Nazi war crimes which is inherently historical, thus emphasising their deliberate choice of an ahistorical methodology.<sup>96</sup> Thirdly, in 1999 Salter published a nuanced account of Schmitt, the 'fascist jurist' at Nuremberg, contextualising that account both historically and within subsequent intellectual critiques of Schmitt's work.<sup>97</sup> Finally the work draws on Schmitt's seminal and notoriously Nazi work, published in 1934 as a source.

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<sup>93</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion'.

<sup>94</sup> Salter, *Carl Schmitt*.

<sup>95</sup> Loumansky, 'Critical Legal Theory's Turn', p.15.

<sup>96</sup> For example: Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies regarding the role of the Office of Strategic Service* (London: Glasshouse Press, 2007); K. von Lingen and M. Salter, 'Contrasting Strategies within the War Crimes Trials of Kesselring and Wolff,' *Liverpool Law Review*, 26 (3) (2005), pp.225-66; Salter, 'Neo-fascist legal theory on trial'; Susan Twist, 'Evidence of Atrocities or Atrocious Use of Evidence: The Controversial use of Atrocity Film at Nuremberg' *Liverpool Law Review*, 26 (3) (2005), pp.267-302.

<sup>97</sup> Salter, 'Neo-fascist legal theory on trial'.

The basic position of the Salter-Twist article is an analysis of the 'perennial status of discretion as a feature of any conceivable modern legal system'; drawing upon the application and value of Schmitt's 'concrete orders'.<sup>98</sup> On a positive note, the authors join their voices to an urgent and important call for the end of an artificial divide between law and politics, much as Hutchinson and others have suggested for theory, history and politics. However, Salter and Twist do not extend that interdisciplinarity to history. Thus it is ironic that in their silences concerning Schmitt's full and successful Nazi past they therefore separate law, history and politics thereby intellectually sabotaging their own declared aims. In continuing this culture of Schmittian silence they also perpetuate and reflect the very positivism they appear to be criticising below. Of course, this returns to the very substance of this article; does the lack of detail concerning Schmitt's Nazi history delegitimise the academic approach? One further point, the text selected as the intellectual foundation for their critical analysis is cited throughout as *On the Three Types of Juristic Thought* (2004), the date of its first publication in English. But *Über die Drei Arten* was published in 1934 as Schmitt reached ambitiously towards the height of his influence and power within the new Nazi State; being based upon two public lectures given then.<sup>99</sup> The work contains another of Schmitt's better-known anti-Semitic statements, transparent as such to his contemporary audience:

There are peoples that, without territory, without a state, and without a church, exist only in 'law'. To them normativist thought is the only reasonable legal thought, and every other type of thought appears inconceivable, mystical, fantastical or ridiculous.<sup>100</sup>

Consequently, both the brief dismissal of Schmitt's Nazi past combined with the absence of an original publication date (both in text and bibliography) provided by the article deconstructed here underline what increasingly appears as the disingenuous choice of an ahistorical methodology by Salter and Twist.

In addition, considerable critical scholarship has previously been devoted to *Über die Drei Arten*. For example Hayek notes Schmitt's position that law must not consist of abstract rules that make possible the formation of spontaneous order by the free actions of individuals through limiting the range of their actions. Rather law is to be the instrument of arrangement

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<sup>98</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.1

<sup>99</sup> The first lecture was given 21 February 1934 for the *Kaiser-Wilhelm-Gesellschaft zur Förderung der Wissenschaften*; the second on 10 March 1934 at a convention of the *Reichsgruppenrates der Referendare*, organised by the *Bund Nationalsozialistischer Deutscher Juristen*; Cristi, *Carl Schmitt*, p.159.

<sup>100</sup> Schmitt, *On the Three Types*, p.45. Schmitt's Nazi implication is clear, only Jews could disagree with his perspective, and thus to disagree is to be racially inferior.



or organisation by which the individual is to be made to serve concrete purpose.<sup>101</sup> In adopting Schmitt's 'concrete orders' as a base line for their jurisprudential position, Salter and Twist consider that proposition in the context of dichotomies inherent within liberalism. Specifically, that liberalism's positivist assertions currently co-exist with the 'routine' exercise of discretion, and therefore this antinomy undermines the intellectual integrity of the liberal-positivist position. This is further explored through analysis of family law 'decisions' reached by District Judges. There is an inherent paradox in adopting this methodology. Tragically, Nazi judges indulged in unrestrained interpretation under the juristic authority of 'concrete order formation', on a scale unimaginable in modern Western legal systems, resulting in death sentences or concentration camp imprisonment for tens of thousands of German citizens.<sup>102</sup>

It is thus within all these contexts that the dangers of ahistoricity must be used to frame a consideration of the value of the work: it matters how much of the Nazi past is acknowledged in the Salter-Twist article. Sadly, there is very little, and neither do Salter and Twist situate their work within that long history of Schmittian critical scholarship, except to note that it exists. True they do not abandon a sense of history. However, instead of looking at the context of their core source (something normally essential for good history), they instead adopt an alternative and so less relevant historiography for this exercise: one specifically concerned with other developments in British legal studies. Thus: 'The collapse of the credibility of Marxism....The decline of the mind-numbing positivism of traditional black letter scholarship, with its spurious and threadbare dichotomy between law and politics', and the rise of the socio-legal studies movement form their intellectual context. They conclude that

Such factors have removed the *questionable excuse* from excluding Schmitt from legal scholarship on the grounds that, despite holding professorial posts in top German university law schools, he remained *a suspiciously political* rather than a distinctly legal writer.<sup>103</sup> [Author's italics](S-T, p. 2)

In truth, Schmitt was never a professor after 1945. The authors are, however, following that early post-war German tradition of adopting Schmitt's theory to test the tenets and presumptions inherent within liberalism:

classical forms of liberal thought and ideology construct and justify their traditionally negative view of administrative and judicial discretion in the decision-making work of civil servants, judges and other officials responsible for the interpretation and application of law to specific factual contexts. His theory of liberalism's entrenched

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<sup>101</sup> Friedrich Hayek, *Law, Legislation and Liberty*, Vol. 2: *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), p.71.

<sup>102</sup> Most notoriously in the People's Courts and Special Courts set up under the authority of the 'terms' of [or principles set out in] the notorious Enabling Act 1933. See: H.W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (London: IB.Tauris, 1997).

<sup>103</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.3. The italics are the authors' own.

assumptions and values provides a possible although challenging and controversial *explanation* of this negative reaction.

As noted earlier, that tradition, dating from Germany in the 1950s, included full acknowledgement of Schmitt's Nazi past. However, the sole historical reconstruction within the selected text is exceedingly brief, it opens the article:

There is little doubt that legal scholarship is currently witnessing a considerable revival of interest in the controversial writings of German jurist Carl Schmitt (1888-1985). Schmitt's reputation suffered from his brief and deplorably opportunistic collaboration with the Third Reich between 1933-36 [sic] ... Our concern is not with Schmitt the person but discussing the possible contemporary utility of a broadly Schmittian perspective, particularly his critique of mainstream liberal thought about law. The question of the validity or errors in his analysis of liberalism *is obviously* distinct from the personal, political or religious motivations he possessed for making these criticisms.<sup>104</sup>

In this adoption of LaCapra's metaphorical 'safety valve', the authors tap into an implicit intellectual 'truth'; that in our liberal democratic society, there is a presumption that such an approach will not be read as support for Nazism. Discharging the past permits these writers to both subvert and contain ethical pressures produced by those Nazi elements within their selected text. However, acknowledging Schmitt as a Nazi legal academic writing in 1934 to both impress and bolster the Nazi state has potential relevance to a reading of the substantive discussion. Within this context, the reader is asked to accept Schmitt's definition of 'liberalism', without that definition being fully exposed as a Nazi ideological attack on the rights of the individual. Indeed, Schmitt's definition of 'liberalism' within *Über die Drei Arten* contains two elements of very specific historicity, the first that of 'liberal positivism' as constructed intellectually in 1934 Germany. In following Schmitt, Salter and Twist deduce that within [Schmittian-defined] liberalism: 'there will always exist a single correct answer to any legal answer';<sup>105</sup> that liberalism suggests: 'legal certainty can be achieved because it is possible for suitably trained lawyers to identify the essence of law as consisting of a system of autonomous and internally coherent rules'.<sup>106</sup> Even that 'Students of family law are supposed to learn the case law only to illustrate family law doctrine, not the vagaries of judicial practice in the area'.<sup>107</sup> If it is difficult for the reader to recognise modern law teaching or contemporary doctrinal legal scholarship (however 'mind-numbing') in these assertions, this is hardly surprising.

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<sup>104</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.2. The italics here are those of this author.

<sup>105</sup> Ibid, pp.11; 15.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid, p.12.

It is the second element of historicity within this presentation of Schmitt's account of liberalism/positivism that explains this oddity. Namely it is that Schmitt's 'understanding' of the fundamental nature of liberalism as inherently positivist is constructed from his interpretation of nineteenth century French and German (doctrinal) legal history, plus the writings of Bentham and Austin.<sup>108</sup> This article is not concerned with the intellectual provenance of Schmitt's jurisprudence, but rather how scholars currently appropriate his work. It is noticeable that the authors are rather let down by that Nazi theorist in specifically adopting his account of liberalism to expose weaknesses in English law. In *Über die Drei Arten* Schmitt excludes the English common law system from his broad liberal-positivist critique, referring to the: '... autochthonous way of thinking of the insular English legal practice'. Interestingly however, Schmitt asserts that in certain of its aspects English case law may embody an example of 'concrete order thinking' [sic].<sup>109</sup>

There are other matters of concern within the content of those two speeches included in *Über die Drei Arten*, for example their fulsome support for the Führer.<sup>110</sup> Cristi provides a translation of one extract that differs from Bendersky's but which is closer to the original text.<sup>111</sup>

The new public and administrative law has put forth a foundational principle, the *Führerprinzip*, together with notions like loyalty, devotion, discipline and honour, which can only be understood from the point of view of a concrete order and community.<sup>112</sup>

This is how the work was written and positively received by its contemporary National Socialist audience.

In short, reconstructing elements of that specific historicity embedded within Schmitt's writings permits alternative readings to emerge from the Salter-Twist article. This challenges other facets of their choice of the 1934 writings. One such occurs in their introduction:

Schmitt's analysis differs from internal critics of liberal self-images of the legal system because it is carried out from a position that is radically detached from the deepest presuppositions of liberalism itself, something that makes possible his *uniquely remorseless*, thorough-going and systematic critique. It is the paradoxes of liberalism viewed through the *telescopic sights of a sniper's rifle*.<sup>113</sup>

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<sup>108</sup> Schmitt, *On the Three Types*, pp.63-71.

<sup>109</sup> Ibid, pp.85-6.

<sup>110</sup> Ibid, pp.82-3.

<sup>111</sup> In addition, in a footnote in his introduction to Schmitt's text, Bendersky specifically rejects that now well-established link between Schmitt's concrete order concept and Nazi theory and practice: see Schmitt, *On the Three Types*, pp.38, n.50. On the legal significance of the *Führerprinzip*, in the brutal operation of the People's Courts see: Koch, *In the Name of the Volk*, pp.76-8.

<sup>112</sup> Schmitt, *On Three Types*, p.63; Cristi, *Carl Schmitt*, p.160.

<sup>113</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.2. The italics are those of this author.

This revealing metaphor, in its loaded vocabulary, mirrors Schmitt's own text. Its macho tone sits oddly with Salter and Twist's choice of contemporary legal subject, family law. In their article, these authors consider (amongst other matters) aspects of Schmitt's theory via exemplars drawn from English family law practice; in an amended version of that methodology developed successfully by Carline. That writer has examined decided cases of women who kill their abusive partners, read through the lens of Judith Butler's theory, testing legal suppositions and assertions empirically.<sup>114</sup> Her work, in reading Court of Appeal decisions amongst others through queer theory, illuminates how women, victims of long term domestic abuse, are constructed within the doctrinal black-letter framework of criminal law. Carline demonstrates the inherent patriarchal legal notions of women in domestic relationships, how the feminine is constructed as 'passive' and so on. Those women who fail to conform to entrenched societal and cultural norms (shared at least by the predominantly male judiciary) are treated more harshly within the legal system. The reader in turn, is free to revisit those cases and judge the validity of Carline's conclusions for herself. However, Salter and Twist's approach differs. For those authors, 'family law practice' consists of various anecdotal accounts of District Court hearings, first instance, confidential and unreported.

There are other differences between Carline's methodology and that adopted within the article under discussion. In summary, Carline adopts non-legal theory to illuminate and challenge the fundamentally sexist and discriminatory nature of English law. Contrarily, Salter and Twist adopt a 1930s Schmittian perspective to take issue with the nature of liberal-decision-making in family law matters, concluding that it fails in its self-declared (or perhaps Schmittian-declared) purposes:

Liberalism insists that, within a modern liberal regime characterised by the rule of law and an independent judiciary, to be largely "determinate" that is, definable, stable and fixed. Indeed the determinacy of legal doctrines positively reinforces the rule of law. This is because state officials, including judges are positively [sic] required to adhere to pre-defined, precise and clear standards, which allow little scope for discretion.<sup>115</sup>

In consequence of this narrow definition, any exercise of discretionary judicial decision-making is held to support the Schmittian critique of liberalism. Furthermore, other aspects of Salter and Twist's discussion resonate with Schmitt's worldview: 'family law necessarily draws upon pre-existing and independently constituted "concrete order" of family life, as this

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<sup>114</sup> Anna Carline: 'Resignifications and Subversive Transformations: Judith Butler's Queer Theory and Women who Kill', *Liverpool Law Review*, 27 (3) (2004), 303-335; 'Women who Kill Their Abusive Partners: From Sameness to Gender Construction', *Liverpool Law Review*, 26 (1) (2005), 13-44; 'Zoorah Shah "An Unusual Woman"', *Social & Legal Studies*, 14 (2) (2005), 215-238.

<sup>115</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.11.

is being concretely lived and experienced by family members'.<sup>116</sup> The Schmittian perspective is underlined as they consider Schmitt to be: 'Ostensibly cognisant' of 'family' as constituting: 'a concrete inner order, discipline and honour [sic]', suggesting Schmitt would have celebrated the 'no order' presumption (under s1(4) Children's Act 1989) that aims to preserve 'the pre-existing informal governance of the family'.<sup>117</sup> In addition, Salter and Twist present a narrow concept of what constitutes a 'family' (husband, wife, etc). The final aspect concerns occasional uses of an unreconstructed linguistic turn, for example, 'alleged domestic violence' or 'the mother purportedly a victim'.<sup>118</sup> Ironically, these elements echo what Sombart (who had regular meetings with Schmitt after the war) has identified as Schmitt's 'fear of the feminine'. In fact, Sombart characterises Schmitt's anti-liberalism as a 'psychological state'.<sup>119</sup>

In summary, as Salter and Twist themselves underline, their article takes as its basis a decontextualised analysis of Schmitt's 1934 text. In so doing, they deliberately adopt a position that sidesteps any real discussion of the responsibility of the individual and the implications of the influence of personal histories within political, philosophical and legal theory. Paradoxically however, they note how cultural norms may influence District Judges in arriving at their decisions.<sup>120</sup> However, this example apart, their perspective explicitly avoids recognition of those elements of historical context, cultural norms and contingency inherent within all theory. This article suggests that, on the contrary, such an approach is vital when considering theory's application to current issues; whether of law, politics or any other aspect of human life and experience.<sup>121</sup> It is for the reader to decide his or her own position.

## Conclusion

One further significant element has not been discussed within this article: that of denial; both the act of denying and of being in a state of denial. Post-war Germans commonly claimed that Hitler's seizure of power was a kind of *Betriebsunfall* (industrial accident), something from outside that left German traditions unscathed. Such a view assisted both the post-war 'normalisation' of Germany and the concealment of Nazi pasts. Thomas Mann speaking in 1945 at the US Library of Congress presented an account not shared by most of his fellow Germans: 'There are not two Germanys, an evil and a good, but only one, which through

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<sup>116</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.8.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid, pp.14-15.

<sup>119</sup> Muller, *A Dangerous Mind*, pp.112;104.

<sup>120</sup> Salter and Twist, 'The Micro-Sovereignty of Discretion', p.10.

<sup>121</sup> A position supported by Salter in 1999: see Salter, 'Neo-fascist legal theory on trial', pp.168; 171; 187.

devil's cunning transformed its best into evil.<sup>122</sup> Mann was not overstating the extent to which educated Germans, the intellectuals, intelligentsia and professional classes turned their intellects over to the service of the Fascist dictatorship of the Third Reich.

If this account damns academics, it must be acknowledged that German legal theorists did not create Nazi ideology. However as Stolleis affirms, they significantly assisted in the creation of a cultural and legal milieu that justified and supported that ideology. Hence this writer's concern that legal theorists are privileging historically contingent Nazi theory. In so doing, are they colluding, however unwittingly with the Nazi project? Do such uses, absent specific and accurate historical context, legitimate aspects of mind-sets that initiated the Holocaust, signified the end of human rights in Nazi Germany and the deaths of so many in pursuit of a New World Order?<sup>123</sup> Furthermore, do academics in bolstering an intellectual stance that claims to strengthen the liberal project by a rigorous critique based upon the writings of an opportunist Nazi theorist in fact destabilise and weaken democratic liberalism? This is not a plea for censorship, rather a request that theorists take a moment to consider the human and historical elements always present in any work they adopt as part of their intellectual canon. Indeed, we should ask; why must theory so often deconstruct from the negative?

Derrida apart, all words have an author, all writers have motives and these may include malice, cruelty and political aims opposed to human decency. Schmitt's career and ambition stand far removed from those British WCIT soldiers who attempted to retain their sense of decency as they moved through a hell created by the Nazi regime supported and legally legitimated by Schmitt amongst others. This (legal) historian suggests therefore, that certain aspects of critical legal theory discussed in this article, are founded upon utopian aims that suggest theory can be abstracted both from its human creators and its historical context, to reveal 'hidden' truths about our very real present. This constitutes a seductive intellectual game, but a dangerous one, particularly when it provides, as it did in the Nazi past, a de-humanised ethos to current cultural milieu. Accordingly, both following and building upon LaCapra's suggestion, this article suggests that 'there is a need in critical theory for an explicitly [historical and] ethical turn.'<sup>124</sup>

Finally, in a time of oppression, most do not resist; in a country that is occupied, many collaborate. Neither situation exists in modern Britain but, as this article contends, there is

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<sup>122</sup> Wolin, *Heidegger's Children*, p.31.

<sup>123</sup> This human rights perspective is discussed in Loumansky, 'Critical Legal Theory's Turn'.

<sup>124</sup> Dominick LaCapra, *History and Memory after Auschwitz*, (Ithaca, NY: Cornell University Press, 1998), pp.199-210.

both a 'history' and a developing orthodoxy of what might almost be characterised as intellectual collaboration with aspects of the National Socialist project. It may be that the reader feels this is overstating the case. Perhaps so, but this is not an issue that is always debated where one might expect to find it, within scholarship revisiting those theories. This lends support to the argument that [critical] legal theory is engaged in a dangerous flirtation with Schmitt and is currently in denial about his very shady past. The helical structure of this article has allowed this writer to range from past to present, from war crimes to theory. The heart of this piece is individual people, their actions and their personal responsibilities and those connections concerning fundamental ethical issues concerning law and legal scholarship that link Schmitt and Genn. To return to the title of the piece, the article suggests that some legal theory is embracing politics. The question is: will the dark side capture it again?