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CONTENTS

Articles

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Volume 23 | Issue 2 Article 1

2005

Dedication

David D. Caron

Laurel E. Fletcher

James Gordley

Andrew T. Guzman

Dedication

In 2005, our colleague, Richard M. Buxbaum, the Jackson H. Ralston Professor of International Law, reached the marvelous age of seventy-five years. This special issue of the BERKELEY JOURNAL OF INTERNATIONAL LAW celebrates this event and seeks to advance our understanding of issues of special interest to Richard throughout his career.

Richard has been a singularly important figure in both international and comparative law since he joined the University of California in 1961. He has also been the spirit of our community. He is generous to colleagues and students alike with his time and thought. The breadth of his experience and learning make each such encounter both a joy and precious. Richard's humanity makes all encounters an example of the excellence and vision that symbolize the best of Berkeley. Our appreciation of Richard is expressed in this volume in the tribute by James Gordley on the awarding of the 2004 Stefan A. Riesenfeld Prize to Richard and in the oral history by Laurel Fletcher. It is with this appreciation that we—the Law School members of the Journal's Advisory Board—dedicate this issue of the Journal to Richard M. Buxbaum.

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Berkeley Journal of International Law

Volume 23 | Issue 2 Article 2

2005

A Tribute to Richard Buxbaum

James Gordley

A Tribute To Richard Buxbaum

By
James Gordley*

It is my honor to introduce Richard Buxbaum, our Jackson Ralston Professor of International Law. I talked to him about this speech, and he told me to go easy on the professional honors that he has received. I can't do that—this speech is supposed to honor Dick, so he will have to just sit and bear with it. He has received honorary degrees from the University of Osnabrück, from the Eötvös Lorand University in Budapest, and from Peking University. He has received the Humboldt Prize for the Humanities and Social Sciences, the Arthur Burkhart Prize, and the German *Großes Bundesverdienstkreuz* or Order of Merit. He is an *Officier* of the *Ordre des Arts et Lettres of France* and a *Comendador* of the Brazilian *Ordem de Rio Branco*. In addition, he is also one of the five thousand members of the American Academy of Arts and Sciences, members who represent all branches of human knowledge. The Academy goes back to John Adams. Richard is a member of the International Academy of Comparative Law, one of the highest honors one can obtain in that field. He is a corresponding member of the *Gesellschaft für Rechtsvergleichung,* or Society for Comparative Law. He belongs to the advisory counsel to the Max Planck Institute for Comparative Law in Hamburg. He served on the founding commission of Bucerius Law School, which is an interesting endeavor. German law schools are public. The Bucerius Law School is the first attempt to set one up that is private. It has restricted admissions like an American law school, and is in some ways built on the American model, and Dick was one of the Americans who was asked to be in on this enterprise. He has served on the Committee on Corporate Laws of the American Bar Association and the Committee on Take-Overs and Corporate Governance of the State Bar of California. He is a member of the State of California Senate Commission on Corporate Governance, Shareholder's Rights, and Securities Regulation. He works with the American Law Institute's Corporate Governance Project.

Over the years, he has been a leader in many organizations. He was Dean of the International Legal Studies Program of the University of California. He was Director of the Center for German and European Studies, the Chair of the Center of West European Studies, the Director of our Earl Warren Legal Insti-

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tute, the Director of the National Center on Financial Services, and the Dean of the LLM program at the American University of Armenia. For many years, he was Editor-in-Chief of the *American Journal of Comparative Law*, and I'd like to say a bit about that. It is one of the premier learned journals in the world. It has a subscription rate in the thousands. I think if you took the next five most prestigious journals in the field of comparative law and added up their subscription rates, they wouldn't equal it. It is read all over the world. If you want to publish something and want to have the best chance of it being read everywhere, you should publish there. It receives articles from scholars all over the world, and prints perhaps one in ten of what it receives. This has been in large part due to Dick's management over the years. He recently retired from that position, and people are hoping that the *Journal* can succeed without him.

During the last five years, he has been researching war reparation practices after World War II. He is at present the American Appointed Member in Geneva of the Property Claims Commission under the German Forced Labor Settlement Agreement. His work has led him into such current questions as the status of laws made by a victorious power for a state conquered in war, which is a subject of importance today in Iraq, and one that he will tell us about in his speech. It has led him into the current debates on African-American slavery.

Now, we don't always accomplish what we set out to achieve in life. I have to admit that from my conversation with Dick, I have learned that he did not. His ambition was to be a solo practitioner in a small village. Part of the reason may be that he was born in the small German village of Griesheim. His family left in 1938 for a small town in upstate New York where his father—who was a medical practitioner—worked with the people on the local Indian reservation. Dick was very familiar with small towns, both in New York and in Germany. He once went on a trip to Indonesia where he visited a village with an American anthropologist. The anthropologist explained the vast differences between human beings of different cultures. His example was this village. There were no indoor toilets, there was raw sewage, there was no plumbing, there was a square where people would meet and talk in the evenings, and there were the mores of a small farming community. The anthropologist thought that this showed a *Geist*, a spirit, or a cosmology foreign to the west. Dick knew better. It was a village, and he had seen them before in Germany and in the United States. The anthropologist might have done better if he had stepped outside an American city before going to Indonesia.

Perhaps Dick liked small towns. At any rate, after receiving his law degree from Cornell, he decided that his lifetime goal would be to practice in one as a solo practitioner. For a time he did. His first case was an action of replevin for two heifers. An action of replevin, as you know, is the action used to retrieve property that has been taken by somebody to whom it does not belong. He also brought an action of conversion, but that was gilding the lily. Of course, as we all know, for that action to lie, the defendants must have converted the heifers to their own use, for example, by selling them or chopping them into hamburger meat, which they had not. So needless to say he lost on that one, but he did get

the heifers back.

His goals may have changed because of his military service from 1953 to 1957. He was appointed junior negotiator for the United States in the negotiations that led up to the 1955 Status of Forces Agreement with Germany. When he returned, his ambitions may have grown. Instead of running a one-man firm, he became a member of a three-person firm located in Rochester, New York, which, I understand, is a somewhat larger village. It had very few clients. One of them happened to be the Helloid Corporation. You know it by its current name probably better. It's Xerox. And it took off. Soon, Dick found himself handling a major international client. Then in 1961, he was offered a faculty position here at the University of California, not because of his work with Xerox, but because he had received his master's degree here, and the faculty was impressed with him. They thought he could be a leader in securities and corporation law, which he has become. I once asked him, "Why, Dick, did you turn your back on representing a major corporation such as Xerox, and devote yourself to the world of knowledge?" He said, "Do you know what the weather is like in upstate New York?"

Since he came here, he has done much beyond what I have mentioned. He represented students during the free speech movement from 1964 to 1967. He represented campus organizations in the third world strike that led to the establishment of the affirmative action program which we once had here at the University of California. I must say that he has also been a blessing to his colleagues. I noticed this the first time I met him. When you are hired here, you have to give a job talk. The people who hire you don't know who you are. You stand up, as I did in 1977, you talk a while, and then the faculty tries to tear you apart. One of the tricks of the game is to make your points clearly and then shut up rather than trailing off. At the right moment, as I looked around the room, a man who I later learned was Dick Buxbaum made a motion that meant, "wrap it up," and grinned. What he meant was: "Fine. Shut up. You're OK." They hired me, and I have been forever grateful.

Dick is the sort of person who, at faculty meetings, has poured oil on troubled waters, and the waters have been troubled here sometimes. Dick has been of so much help to the foreign students here that once, spontaneously, they brought him this huge bunch of flowers at the graduation ceremony and presented them to him. I've been to many countries in the world, and except for one rather remote part of Italy, everywhere I have been, I have been asked, "How is Dick Buxbaum? How is Dick getting on?" I think if I ever meet foreign heads of state, or the Queen of England, or the Pope, the question I am likely to be asked is, "How is Dick Buxbaum?"

He has also been a source of comfort in difficult times. When one of our colleagues dies, he is often asked to give the memorial speech. When he does, we see our colleague better by seeing him through Dick's eyes. In fact, one of my long-term goals is to predecease Dick, so that he can give my memorial speech, although I have considered the disadvantage that I won't be there to hear it. But, you can't have it both ways. Should this happen, however, whether I

end up in heaven or whether I end up in hell, I know that the first question I'm likely to be asked is: "How is Dick Buxbaum?"

So, I would like to introduce Dick, who will give a speech on "The Transformation of States: Germany 1945, Iraq 2003—What's Different?"

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Volume 23 | Issue 2 Article 3

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Reflections on Germany, the Legal Academy, and Social Engagement: An Interview with Richard Buxbaum

Laurel E. Fletcher

Reflections on Germany, the Legal Academy, and Social Engagement: An Interview with Richard Buxbaum

By
Laurel E. Fletcher*

The following is an edited transcript of interviews with Richard Buxbaum that took place over several weeks in October and November 2004, in Berkeley, California.

I.
GERMANY

A. The Early Years

RB: My father was Jewish; my mother was a non-practicing Catholic. We were raised Jewish. In fact, in 1936, when my father recognized that something had to be done to get out, we were preparing to emigrate to Palestine. He went to pave the way, but he got very ill there and was hospitalized, which caused him to rethink that approach.

He had an odd career as a country doctor in Germany because after 1933 patients were not able to go to Jewish doctors on the basis of their participation in the national social security system. Most Jewish doctors, therefore, actually emigrated at that time because they had lost their livelihood, just as lawyers and university professors had lost theirs: because they were all civil servants. Some people in the village offered him a kind of mutual insurance company. He took that over and created his own socialized medicine system just for the village. Every family that joined—and essentially all did—paid one Reichsmark and twenty-five Pfennig per month, per family. I used to collect it occasionally. And he did that from '33 on.

Our village, Griesheim, also had the advantage of being a kind of "red village"—social democratic. There was not a strong local anti-Semitism, except in individual cases. There were people who made your life miserable, but it wasn't a generic thing. I had friends, for example, Gerald Gunther, who died

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two years ago at Stanford, who had other experiences. He was born only about ten miles from my birthplace, Friedberg, in Usingen. That town turned out to be a real mess of ugly anti-Semitism and he got to feel it. He was fully Jewish, and on top of it, his father was the kosher butcher, and that was always a tense thing with the local populations.

You couldn't generalize, but we had a very easy time. For example, after going to the Jewish school in Darmstadt for first grade, I was put in second grade in the local public school, where there was mandatory religious instruction. The population was about two-thirds Catholic, one-third Lutheran. I was excused from religious instruction, of course, being a Jew (I was the only Jewish kid in the class). I couldn't go home because it was still school time, but I was allowed to go out in the yard and play by myself. I didn't think of that as exclusion, but as free time. Then, in my third year, because my father was planning to leave for the United States, we moved to Darmstadt and I attended its Jewish school. My father thought that the anonymity of the city was going to be helpful, but it was exactly the wrong move. Attending the Jewish school when I was in third grade caused me more trouble: the local kids who were next door at the school for young *Pimpfe* (young Nazis) would beat me up. I had to run the gauntlet daily.

B. Post-war Germany

LF: You were raised in Germany. You came to the United States as a kid and were educated here. You earned an LL.M. degree at Boalt and then went back to Germany. How did that happen?

RB: I was a draftee and went through basic training at Fort Bliss, Texas. Then I received a J.A.G. position.[1] I had applied for it just before the draft and nothing happened, and later I found out it was because I had had somewhat left-wing Cornell activities. I ran for student council on a broad communist-left ticket and I founded a kind of whimsical club called "Republicans for Wallace" in '48, which was sort of a joke, although I did persuade my father to vote for Wallace, which he was so angry about afterwards. He said, "You realize Truman might have lost?"

Anyway, I got the commission and I went through the usual training and then I was lucky—this was in March of '54—the army assigned me to Germany. I went over there in the summer of '54. I was interviewed by the brigadier general, who was the Judge Advocate General of Europe, because at that time we were still in the occupation of Germany. He reviews my transcript: "Uh huh, military affairs, you were second"—this was a class of about eighty people—"Very good. Well, we don't really have a position in that, but that's certainly something to keep in mind . . . . Procurement,"—that was another course—"Oh, very good. Well that's certainly some place to put you, but I don't think we have a need right now." Then, he gets to criminal procedure. "Ugh, not so good,

1. The Judge Advocate General's Corps is the legal division of the U.S. Army.

eh?"—because I think I was 55 out of 80 in criminal procedure—"Well, we do have a place for defense counsel." I always accused him afterwards, sort of semi-joking, that that's what he wanted, a patsy for defense counsel. I was appointed as court-martial defense. It was fantastic work.

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Most of the work, first as defense counsel and then as prosecutor, was the normal range of crimes. But, here is an example that gets closer to the issue of returning to Germany. Because I spoke German as a native, I served for a while as a junior member of a team that was finishing the negotiations in Bonn of the NATO Status of Forces Agreement that was to go into effect when Germany turned independent in May '55. Until '55, Germany had no jurisdiction over Americans. But since this would change in May '55, already in September '54 there was a lot of discussion about how the United States should address these relations. Also, I was the liaison to the German judicial system for our headquarters. I introduced our senior judge advocate corps to the German court system.

LF: What was it like for you, socially and personally, to be in Germany?

RB: It was made easy in two ways. First, my mother was not Jewish. So, through my relatives on her side, I certainly was less susceptible to automatically finding anti-Semitism. Already in '52, my father and mother had come back to visit Germany. My father was very much like most German Jews: despite having lost everybody, he knew the difference between the people who had suffered themselves and those who had been perpetrators, even though every family had some of each on the whole. My mother's family, being a Catholic family, had been pretty immune. It also made a difference that my father had been close to my mother's family. Second, the village where my father practiced medicine was politically liberal. His ability to reconnect to that Germany was specific to those two elements. And, of course, I had the benefit of both those things. In personal terms, therefore, returning to Germany was marked by the fact that you always felt somewhat suspicious of people you hadn't known before the war.

For example, it was a known fact that the legal profession and the judiciary were among the worst in terms of being former Nazis, in the post-war period. There had been very little clean-up of old Nazis in the legal profession and you always were a little bit nervous as to who was who. There would be people with whom you got along fine, professionally, and then you learn six months later that they had been SS legal officers. And, of course, the same thing was still going on from '61 on. In other words, when I went back as a professor you'd be sitting at a table with someone and then later you learn he had been a Nazi. But, I also had a lot of academic and professional colleagues in '54, '55, who I knew were clean because some of our civilian attorneys in headquarters had stayed on after they were demobilized in '46. These colleagues were tremendous resources. They would advise me: "Stay away from him . . ." or "You don't have to worry about him; he's good, clean, and he really did his best during the

war."

When you were working in Germany at that time, you had to feel compromised by the presence of former Nazis. There was no way to function otherwise. You accepted it, although you had your nervousness and your anger.

Years later, one of the wonderful professors who helped set up the exchange program for the Ford Foundation for Berkeley, Gerhard Kegel, said about this time: "Look, it's a little like Shylock: There was no way in my view to tear out the bad part from this scene because it was a continuum from people who were against the regime, people who wished it would go away, people who were resigned to have to live within it, people who compromised with it, people who were happy to have a little advantage, people who were believers, and then people who were doers. So, all of that is just part of the fabric." What are you going to do if you don't have a Night of the Long Knives[2] at the beginning? After it is over, you aren't going to have much luck with anything other than evolution. I must say that's sort of what happened.

When I was there in the mid-50s, the anti-Semitism was still pretty strong. That wasn't a kind of poison that you could quickly leach out with anything like an antidote. Thirty-year-olds in 1955 were fifteen in 1940. They were totally indoctrinated with anti-Semitism. Whether they were in the war or not, it took time for these attitudes to lessen. And, of course, the urban population of Germany, not the rural but the urban, was and saw itself as victims—the bombing was unbelievable.

LF: How did the anti-Semitism manifest itself?

RB: Ill ease with Jews. Somebody at that time wrote, "They'll never forgive us for what we did to them." And that's the best single way to put it. Now, "never forgive" is not so much literally that, but that they will never get over what they did. The ill ease was exhibited by a false philo-Semitism, false friendship, and false behavior. Whether it was "anti" wasn't so much the point; the point was that it was unresolved.

LF: And you felt that?

RB: Well, for example, many people would talk about their Jewish friend or friends, or those who were their colleagues before the war. Almost everybody had some "Jew" in this category; it was just standard. And of course, a large part of the population, let's not forget this, did have these relationships up into the '30s and did feel the reality of this loss.

C. The Second Generation

Once you get to the late 60s, what are you going to do with people who were born in 1940 and who are now twenty eight years old? The more you deal with younger people, and of course by now, today, these younger people themselves are sixty five, the more you really have to ask yourself why would I

2. The Night of the Long Knives, between June 29 and June 30, 1934, saw Hitler eliminate many Nazi leaders whom he feared would someday challenge him for power.

be ill at ease about this now?

The psychological need to suppress, repress, put aside, get to work, reconstruct, rebuild your psyche as a victim yourself, and so on—all of those things are mostly the problem of the first generation. This "inability to mourn" is what the Mitscherlisches termed it. They were a famous husband-wife team of psychologists who studied the immediate post-war German psyche and whose book was about the inability to mourn. That's sort of inevitable.

By the time of the second generation, the issue is how people who were born from 1935 on deal with their parents' generation. It was very hard in many families. There was silence, taboos, outbreaks against the father, rebellion, and unconscious absorption of the father's retrogressive views, or mother's, but more often the father's. Those are the problems of the second generation. In a way, the '68 rebellion, at least for the German part of it, was sort of sons-versus-fathers. There were those who had a strong need to break out of this shell and to batter themselves against the prior generation. Often, these individuals were members of the extreme left, but that's only one part of those who went to the other extreme to "fight against false philo-Semitism."

There was a famous debate around 1970 in the German SDS[3] around the question: "How are we going to get over this stupid love of Jews?" Now, it was a provocative thing, but you can also see it. And of course, by 1970, after all the Palestinian miseries had begun to come to the attention of the world and to some in Europe, especially Germany, it was very easy for some to use that as an excuse to shed one's phony love of Israel. Of course, for others it was a dilemma and an agony. And all of that was nascent during my service years there. During this time, the Arab world was not understood as a society, so that the pioneers of Israel were considered heroic without any ambivalence. The Germans appreciated that, I would say, like everybody did. The pioneers of Indonesia also were considered heroic because they were anti-colonization. And, the pioneers of Yugoslavia were admired because they were a communist, anti-Soviet group. Those three countries absorbed a certain amount of energy from the left and that slowly, in various ways, was dissipated in the case of Israel.

D. Experience with and Reflections on the Post-war Generations

LF: It seems that you have had a complicated and multi-dimensional relationship with your country of origin. What do you make of your own connections to Germany? What do you think about what we now call transitional justice and the ways in which theorists and advocates talk of the need for justice and accountability and closure for victims? Are these goals achievable? Is it better to remember or better to forget?

RB: I personally think that an outside observer would make more of my connection to Germany than I feel is worth making. An awful lot is absent, old,

3. Students for a Democratic Society, a leftist organization of the era.

and incidental. For example, my marriage to my former wife did not occur in Germany. She was a student here at Boalt. We met when she finished her graduate studies. I'm sure the fact that she was German had some bearing, but I met her in a very American context and it could have been somebody else who didn't have a German background.

The fact that I'm bilingual and retain German made it obvious and natural that I would have easier relations or different, somewhat more subtle, and ultimately deeper relations with the various German graduate students and with the various German professors who came here. And, we've had more than a random run of German colleagues here: Stephan Riesenfeld and Albert Ehrenzweig were on the faculty. And, in 1954, Dean Prosser decided to focus Boalt's international legal studies money (provided by the Ford Foundation) on that specific country, the country of their linguistic origin, and they decided to focus on this post-war reconnection. So, I walked into that here, but that certainly wasn't why I was hired, nor was it a basis for me coming. I came because it was a wonderful place.

I certainly have the sense that I know a lot about the German society, especially the academic society, because of the chances to develop these relations. The fact that I can speak German makes Germany the most likely place to go as a visiting scholar because I can lecture in German. Those things evolve and they end up in retrospect being a fairly significant element of your professional life, and to some extent, your personal life.

The way that connects to the history of the Third Reich is a little bit complex. We were out before really bad things happened to us. Also, I was too young and I took my emotional marching orders from my parents. How they saw it and how they reacted became a very big part about how I would react to it. In the post-war period, the fact that I come from a mixed family where I had insights into what a non-Jewish German family or family groups were like was special. I don't have a fully "Jewish" reaction, although I have to make one important point here: there are people of my generation—and even children of those people—who never grew up in Germany, but who will not set foot in Germany to this day. But, even among Jews, I would not say that this is a majority.

Many of those who had been able to leave returned as visitors (but very few permanently). The wish to be reengaged may have come from many different motives. But, even some of those who had lost most of their family, who were Jewish fully as I was not, reengaged with Germany. For many of them, that was a very important political reengagement, particularly for the ones who were adults when the Holocaust happened. It's almost a mixture of the depth of religious and ethnic bonding and of class. If you come from an academic class, you tend to develop a loyalty to a set of principles and values which may to some degree trump other more ethnically, linguistically, or religiously related issues.

I remember very well my Berkeley colleague, Reinhard Bendix, a wonderful man, who was a young adult when he escaped Germany as a Jew, and

suffered much more than I did. In his autobiography, which is entitled *From Berlin to Berkeley*, he ends with an interesting observation: "I belong to a university. I'm not German, I'm not American, I'm not Jewish, I'm a professor. My true community is the university." This was not facetious. He made a very interesting point, subtle, but also very dangerous because it's open to misperception. Nevertheless, there is something to your socialization in the very particular atmosphere and kind of value system that I have spent my professional adult life in which makes that difference.

LF: On that continuum, would you say that your identity then is primarily as an academic?

RB: And as an American, I think. I have this very easy comfort granted me in Germany. I am a privileged visitor there because of speaking German, so I am kind of carried on satin pillows. I get the benefit of both worlds. I play the American, but I get inside the German discourse in a way that people privilege. So, it is a very ego-stroking situation, in fact.

LF: What are your thoughts and experiences around what can be described as the project of transitional justice? In Germany, transitional justice was the most advanced in many ways. There were trials and extensive reparations. In fact, the reparations project is ongoing and involves not just the state, but private actors returning property, and so forth.

RB: You know, we are now sixty years past the end of that horror. The bulk of the generations that we live among really have only, even by their consciousness—maybe by being Jewish—a historical relationship to that time. And it is therefore somewhat a constructed relationship.

My experience, simply going by my generation, is that in the immediate post-war years the Germans were able to characterize themselves, to some extent legitimately, as victims. Their own dealing with the specific horrors of what their own people did in terms of both the aggressive war and the slaughters added to this sense of victimization, which was also fueled by the post-war hardships.

There's a slow evolving out of that as a younger generation comes along, the '68 generation. There was never an early internalization of a collective responsibility or guilt, but there was a collective shame or a collective recognition. There was never a sense: "We were the doers—even if we were duped." I think it is relatively rare that people will figure this out on their own when the ones to whom they did it are no longer there. It isn't like in South Africa where both groups continued to live together. The Germans or the Nazis did their job too well and Germans and German Jews didn't have to live together afterwards. What's happened with the new multicultural situation in Germany, the influx of other people, is a new phenomenon that can't resolve the tensions and the history of what happened to Jews. You also could not expect the German World War II experience to permanently lead their modern reactions to these new migrations into a uniquely different relationship than is the case in other countries, like Poland, or even Italy, where you have xenophobic difficulties.

LF: Do you think there's something that could have been done that would have stimulated this internalization of what you called collective shame, or was that an unrealizable aspiration?

RB: Well, you can look at it in two ways. One is that the circumstances of the post-war years—the anti-communist bipolarization—prevented that and therefore it's a moot question. Or, you can take a more general perspective and ask is it ever feasible? Are you still the same society evolving out of a shameful period by your own, on your own, or are you a conquered people who are being "helped" to evolve out of a shameful period through the heavy hand of the conqueror, even benignly, acting for you? That's the first question. The second is do you still have the same two groups that have to live with each other? And that, of course, is the tragic situation in Germany. On the whole, Germans were left without having to face the people against whom they, or rather some of them, had committed these atrocities. Those are the two big differences I think.

II.
THE LEGAL ACADEMY

LF: What led you to law school?

RB: Well, I was the oldest and the lightest sleeper and I was the one who was always awakened by my father to help him. Remember these were country practices, particularly out in Bombay, New York, where we first lived. Whenever something happened, I was the one who got up and went to the door. I felt that a doctor's life was a very hard life and I didn't like it.

I was much more attracted to the easy job of playing with words. That was more reasonable. My father didn't like it that I didn't attend medical school. Luckily, my brother did, so that took the heat off. My father thought medicine was a noble profession and he hated lawyers, he just hated lawyers. He always thought they were out to cheat people.

LF: Did you consider anything else?

RB: I had a double major in Economics and Slavic Literature. I didn't give a damn about economics: it was boring. But the Russian literature was wonderful. Nabokov came to Cornell in the fall of '48 and I was eligible to enroll in his Russian language seminar on Russian literature. We were only eight people, so it was very nice. However, I didn't think a non-Russian had much of a shot at a career in it, since at that time most of the Russian literature professors were Russian emigrants.

LF: What was law school like?

RB: I did very well. Once we got our first semester grades, I was amazed that I was very high and I didn't have any clue as to why. You would be surprised about how much you like something if you look like you are good at it!

First semester was not great, although we did have a wonderful teacher, Rudolf Schlesinger. He was really an inspiring teacher—he had the energy and the crackle. But, the other classes consisted of pretty doctrinal teaching. The

professors certainly hadn't heard of the kind of contextual, social science approach we now have. They taught policy in the "pre-toolkit" sense; they just knew it was good to have a progressive income tax.

LF: How many women were in your class?

RB: We had six women in a class of 137. I remember that exactly.

LF: What were your interests during law school?

RB: Two things really: corporation law and international transactions. I was interested in corporations from the beginning. Rudy Schlesinger got me interested in international transactions. He was just brilliant at getting you to think of the world of new transactions in the postwar period. I got really quite excited about that.

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When I graduated I had an offer to be a teaching associate at Boalt. Just when I was more or less close to leaving for California, my draft board said: "You can't do it"—I had to enroll in a degree program. I wrote Dean Prosser and he said: "Well, we have an LL.M. program. Why don't you come and do that?" That's all the admissions there was. Democratic centralism, you know? The only problem was that I was going to be paid $4,800 a year for the teaching associate position and instead I was paid $1,200 for the LL.M. program. I had to take jobs when I got out here. But, the tuition was nothing: it was $200 for the year or something, so it was doable.

LF: What was the subject of your LL.M. thesis?

RB: Preferred stock, corporation law. Now, that was a weird, a weird thing. I, myself, have tried to think back on it. I liked corporation law at Cornell, although we had a terrible teacher. The only thing I remembered about that class was Professor Larson looking up saying: "Oh, my God! It's raining and my top's down!" and running out the door. That's the sum total of what I remember from corporation law!

When I got to Boalt, there were two major strands in corporation law. One was the comparative angle, and we had people like Ehrenzweig and Riesenfeld. For me, it was wonderful. Here were émigrés who already had their education in Germany and they kind of took me under their wing as a young kid of German-Jewish background. They liked the fact that I could schmooze with them in German.

I was looking for a thesis topic in the fall and Dick Jennings said: "Well, you seem to like this corporate finance." He was beginning to work on preferred stock, which he hadn't apparently done much of and he said: "You know that would be a good topic to go into at more depth, but you'd have to really know what the practices are with it." And, Steve Riesenfeld already had been very influential on me in terms of thinking I needed to go to "bedrock" documents. He told me: "You're not a scholar and you're not a legally trained person if you rely on secondary sources; and it doesn't matter what language, and it doesn't matter what material."

I remember that he had done his own dissertation in 1931 or so with Arthur

Nussbaum on mutual insurance companies. What he had done was to actually read the statutes—the charters—of dozens and dozens of mutual insurance companies in order to know exactly how they formed their relationship with their members. When Jennings said that the way to do this project is to know what is being done in preferred stocks and not just by reading the cases, I got the idea of setting up a questionnaire. I wrote to an underwriting firm in New York, Spencer & Trask, asking them, because they specialized in preferred stock underwriting, if they would send me the actual certificates—the board of director resolutions of preferred stock issuance—which are the preferences and privileges of the particular issue of stock. I got about one hundred and fifty of those and I analyzed them.

My thesis, and then an article in the California Law Review, analyzed the case law and saw that there were pathologies, but also looked at the actual drafting. That's why it is called "Law and Draftsmanship." It's weird, but that's the very first real thing I wrote, other than student notes, and it's the one thing that still gets quoted because it's still somewhat relevant. The Delaware court still uses it. I'd like to think that something I wrote in a more mature way is also interesting, but the fact is that my thesis was more practical.

On the other hand, I really got interested in this comparative jurisprudence business. You know, Albert Ehrenzweig was just wonderful in that. And then the other guy who was very, very helpful and is still here is Adrian Kragen.[4] He is a tax person, but he taught antitrust and I took it and I was just fascinated with this government-business interaction stuff. I just loved that. I think it was from that year that I decided if I could get back and be an academic, I would love it. But, it didn't look to be in my future. I was still waiting to join the Army and I was sort of an upstate kid. My image had been to be a small town practitioner. My father was a small town doctor, rural doctor, and I really did think that was a good way to spend your professional life. So, I sort of loved this idea of teaching but I didn't think it was a real idea.

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I went on the market after I returned from the Army and had practiced for a few years. Rudy Schlesinger talked with Frank Newman—this is where the old boy network really functioned in the old days! The old gang who had been teachers already in '52 knew me and liked me. I had done a good job on my thesis, Jennings was very pleased, and Boalt needed a second corporation and corporate finance person. They had nobody but Jennings.

Bill Prosser, kind of an eccentric character, held a dinner for me during the three or four days I was out here in January. It was the typical faculty dinner of the time. The wives did the work; his wife, Eleanor, was the hostess. A black woman, a Negro woman if I'm to be true to the vocabulary then, a very nice upper middle aged woman with a black dress and white apron served us. She

4. Professor Kragen passed away on March 25, 2005.

was not a servant—nobody had servants—but she was the traveling domestic. I still remember being intrigued by the fact that most of the women who came to dinner greeted her by name, so they knew her from their own dinners! And we ate as fast as I had ever eaten in my life. I was barely finished with the main course and Prosser says: "We'll take the dessert downstairs in the family room." He just gets up and everybody leaves. I don't think anybody was finished.

Prosser sits down at the piano and starts tinkling away at it. Mike Heyman was near the piano and Prosser beckons me over and says: "I don't suppose you read music do you?" I said: "I read music." He said: "Try this." You know, I'm flabbergasted. I still remember the tune. I think it was from *The Bohemian Girl*, a 19th-century musical: "I Dreamt That I Dwelt in Marble Halls." It was high for me, but I sang it at the piano. And when we were done with it, he turns to Heyman and he honestly says: "Ok, I think he'll do."

I learned from Mike that Prosser was responsible every year for the music revues at the AALS[5] annual meeting. He had inherited that apparently from Paige Keeton. Prosser had raised a storm with Mike that he was damned if they were going to appoint another man to the faculty who couldn't help him set up the music revue. Now, obviously it was not a sufficient condition to get hired, but I honestly believe it was a necessary condition.

There were four of us hired that year: Bob Cole and I, Preble Stolz, who sadly died so early, and John Jackson, who left as soon as he got tenure to go to Michigan and who has specialized ever since in the World Trade Organization and the GATT and has made a terrific specialty out of that. Preble, Bob and I were the three who continued through the years and were buddies. And we all got tenure the same year. I mean, in those days tenure track was not more than three or four years: we were tenured each with an article or two.

LF: What do you think about the changes in the legal academy during your teaching career?

RB: I'm a professional-type law professor in the sense that I think we should write more for the profession than for our closed circle of academics. On the other hand, I do really appreciate what social science input, especially economic, offers us professionally. It's always been a bit of a dilemma. I can read the stuff—I appreciate it, I use it—but I don't produce it.

I still don't know how I feel about this full graduate school concept that we all now at the best law schools feel we must be. I do think it has the disadvantage of creating writing for each other. At the top, especially in economic analysis, this writing has powerfully influenced the courts and legislatures, but it is a derivative influence. The larger movements towards economic liberalism, the Reagan revolution, the Thatcher revolution, were not generated by Easterbrook and Posner, right? Even if they provide a good deal of the scholarly grit that helps justify and maybe even to some degree advance these agendas, these agendas are not generated by the academy. The counter-

5. The Association of American Law Schools.

forces of the critical legal studies movement and so forth are also part of that larger societal context.

I think we are coming into a second generation where the range of this additional academic training is broader—psychology, history—and therefore the inputs into policy discussions are less "one-legged." But, I still feel that there is a certain balance that could be struck in terms of service to the profession. This professional or purely doctrinal component has been left to the second-rate schools, second-rate law reviews, third-rate even.

The new legal scholars in the United States come to all of these faculties with these "tool kits" of economic analysis. We have seen an increase in the number of powerful mechanics skilled in the art, but have not necessarily seen a large increase in the number of inventors. I don't find as much imaginative push among these people as I wish there were because they are too wedded to what they can do best. I don't think that except for a very few of them that what they can do best is necessarily pushing the envelope, breaking bonds; and that is an issue for me. Mind you, I'm not speaking about Boalt—present company is definitely excepted.

There is both the professional aspect and the issue of when does real innovation happen. You are not going to expect a hundred breakthrough people; if you have five, you're lucky. You get imaginative people like Cass Sunstein, like Posner. Posner is an inventor because in addition to his analytic prestige that he has created for the academy, he has a powerful mind. One never expects more than one percent to do that, but then there are second-level imaginative talents and it is there that we have a little bit of a problem. Now, there was plenty of bad academic writing when you were aiming at the profession, too, so it isn't one or the other. It would be foolish to deny that overall there is an improvement—that would be denying the possibility of progress, right?

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LF: When you look back on your tenure here as a faculty member, what are the accomplishments of which you are most proud?

RB: I think having a concern with the development of students and their careers. I really don't see the point of bashing students. I think I've been a good professor if you take the combination of teaching, research and service. I don't think I've been a very good professor in teaching and research. And service is more a matter for me of outlets for energy and escaping from the hum-drum part of research. I'm not a top teacher. I'm not clear enough, and I wander. The Eisenberg model[6] is one that I will always aspire to, but never reach. In research, I think I've done decent research, and had some mid-level ideas. I'm not being negative about it; I'm just saying I did my job. I think I was a reasonably good citizen and part of it is being engaged in my desires.

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6. Professor Melvin Eisenberg.

LF: What are the primary changes you have seen in the legal academy?

RB: I think the teaching is the main change. The addition of clinical teaching, which we resisted, in fact, for longer than most peer faculties did, is a big change. For the rest of the curriculum, we are still stuck in similar boxes. It is just amazing to me how fifty years go by, and any argument that you shouldn't teach torts and contracts separately just doesn't apply. But clinical teaching is different.

In terms of research, I do think this dearth in producing practical research—because we are aiming to be another graduate faculty, and using the ethos of social science departments and their visions of research, particularly economics—is increasing. But there are other social science disciplines that take quite different methodologies and more of those are being reflected here too. I do think we are not likely to go back in the near future to doctrinal work or to be of significant aid to the profession's practitioners in a way that a good law school fifty years ago thought it was. We've divorced ourselves to a considerable degree from the image which a medical school might have; that is, that even if you want to do path-breaking research, you are still training the professionals and a lot of your focus should be on that. I don't think we see the profession anymore as our principal target of service. I think we see ourselves in our academic self-reflexive circles as being the principal target of our attention.

LF: What do you think of Dean Edley's vision of the relationship between the academy, problem-solving for the real world, and research centers as the new model for the law school?

RB: I think it's going to be interesting and difficult. We've had here the Earl Warren Legal Institute, which once I thought could be a center for service of various types of groups. We had a short-lived national center for financial services. But, we have never been able to get large bodies of our colleagues to buy into those objectives and to shift their way of working to the goals of such service groups. I will be very interested to see whether BCLBE[7] becomes an example of service to the business side of society. I don't mean business as such, but service to the economy in its organized form. The goal for these centers starts as being a mix of some wish for more relation to the real world and some expectation that the real world would want us to care about its wishes. It may be good for students. The Berkeley Center for Law and Technology has found a reasonably good medium in that regard. But, I don't think it's easy to move the individual academic into this kind of team with an external focus work. We'll see. Perhaps having more colleagues whose social-science background leads them to teamwork will help in this specific regard.

7. The new U.C. Berkeley Center for Law, Business, and the Economy.

III.
SOCIAL ENGAGEMENT

RB: I was involved in litigation in three areas: the Free Speech Movement, protests against the Vietnam War, and the affirmative action strike. All of those involved criminal and civil cases.

LF: What drew you to these areas?

RB: Well, part of it was that I was a lefty. I was a socialist in the classic socialist terms when I was an undergraduate (remember this is 1946). I certainly was on the left at Cornell, and in the Army too. I was down in El Paso, Texas, during basic training. That's a western town, not a southern town, but because it's Texas, there was segregation. The restaurants, essentially by law, were segregated.

I had the luck to be part of a northern platoon; in fact, the only one down there at that time. We were like a cuckoo's egg in another bird's nest. When we first got Sunday passes to go into El Paso, we never went with less than six people together because we would get into fights. Among our group were some blacks and if we went to go eat, we'd all go together. I remember the first restaurant we went to, there were about eight of us, and the waiter said: "I can't serve a colored man here." And I remember saying: "Well then, you can't serve any of us, it's your choice." He chickened out and we all went in. From then on, even those who weren't particularly political, got into the zest of this. We'd go to bars and always be sure that we were a mixed group because we wanted to make a statement that serving all of us, black and white, was going to be allowed.

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The last stages of the Free Speech trial and the sentencing stretched out and stretched out and overlapped with the beginnings of our reactions against the engagement in Vietnam. I certainly wasn't in a minority of one in being anti-Vietnam War. That was much more of almost a mainstream reaction. I would say the majority of the Berkeley faculty, including the law faculty, was fairly anti-war. We were actively engaged to say publicly that these were terribly mistaken directions that we were taking.

Some of the students who had been engaged in the early days of the Free Speech Movement were now major players on the campus in creating "stop the draft" movements. There were reactions against this from the Board of Supervisors of Alameda County, local police, and so forth, who tried to get injunctions against campus meetings. I was counsel a few times for the ASUC.[8] There was one action in federal court before Chief Judge Harris, in which we sued to dissolve a temporary injunction against holding marches.

Also, I was involved in some of the conscientious objector (CO) litigation, more as a witness in court regarding international law than as a litigator. But we

8. The Associated Students of the University of California.

represented some Catholics who had a very hard time with CO status because their doctrines did not contain anything as simple as those of the Quakers. When Catholics tried to avoid going to the Army by claiming CO status, those were tough cases and they would get prosecuted.

Starting in '69, we had this major effort to get affirmative action for student admission on campus and there I was involved quite consciously and intentionally. In the summer, I think of '69 and some of '70, I was very much involved in that kind of work because there was a lot of campus turmoil and there were a lot of criminal cases because students would constantly be charged with assault, trespass and so on.

I thought affirmative action was wonderful. I would say a good half of the faculty found it quite enriching. The other half accepted it, and up to maybe three or four, at the most, carefully tried nonetheless to hold to the position they saw as anti-affirmative action. But, the major sense here was pro. For example, you have to remember that one of the main amicus briefs in the *Bakke* case,[9] a very important brief for the AAUP,[10] was authored by our colleagues David Feller and Paul Mishkin.

LF: How did affirmative action play out in the day-to-day interactions in the classroom?

RB: Some faculty members had a few in their class who were not up to the level of the other groups and I would say that might have just bubbled along, but got quietly accepted. There were very significant battles inside Boalt when student movements pushed for a stronger, more engaged, activist affirmative action. Students led campaigns in front of the campus, entering classes, even rarely more direct action like pouring glue into the locks of the door so they couldn't be opened, and so forth.

After the mid-1970s, affirmative action got settled in. Up to the early 80s, there were occasional conflicts within the school about the degree of change—usually pressed by students for more change. Once in a while, we had to bring in outside lawyers, black lawyers, to create some sense of stability, but also to push us faculty.

LF: What is your sense of the faculty reaction to the dismantlement of affirmative action at Boalt?

RB: We all looked at that with a lot of anger. If there were two or three people who welcomed it that would be a lot. That there were fifteen or so who acquiesced in it after thinking it through and deciding there was nothing to do, is also true. But, there were certainly also ten or fifteen who were constantly looking at ways to push the envelope. And the silence at Boalt, I think it has been read as being a sense of acquiescence that I think isn't quite fair. It wasn't that acquiescent.

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9. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
10. The American Association of University Professors.

LF: Do you view the two spheres—your scholarship and your social engagement—as two separate arenas?

RB: No, I think that's kind of reductionist. I don't know that your intellectual or curricular interests have to be all of a piece. I don't think anything I have done in terms of teaching or writing, say in corporation law, would not be accepted by somebody who wants to be an activist. I have taught corporation law with some sense for the role of the large enterprises of power *vis-à-vis* society and the polity and the culture. It just happened, also partly accidentally, that I got into it early because of interesting intellectual interests and then because that's the field I got hired to teach. You develop an agenda in terms of writing. I've never thought of the two as being bifurcated in that sense. I think that's more a young student group's sense that it's got to be one or the other. You know, that you are either "them or us" in these contexts, and that doesn't bother me.

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A Legal History of International Reparations

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INTRODUCTION

We have witnessed an increasing interest in reparations over the past decade, an interest derived from episodes both domestic and international, ranging historically from the legacy of slavery in the United States to events occurring these past ten years in Iraq and the Horn of Africa.[1] One principal event, which not only generated most of the reparations activities and discourse of the past half-century but which has also been the subject of much of the litigation and negotiations of the most recent period, is the German payment of reparations arising out of World War II atrocities.[2]

German reparations have also been at the center of the single most critical and controversial evolution of public international law in the past century; namely, the movement from state-centered to societal- and individual-centered rights and obligations. This evolution has its substantive focus in the field of international human rights, and its procedural focus in the increasingly contested primacy of state reparations over direct individual claims for compensation and restitution. Both issues arose in and are illuminated by the history of German reparations and compensation or restitution payments.

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1. For a general overview along with some case studies, see ELEAZAR BARKAN, THE GUILT OF NATIONS (New York 2000). The litigation history involving private-sector, largely corporate defendants is briefly traced in Anita Ramasastry, *Corporate Complicity from Nuremberg to Rangoon*, 20 BERKELEY J. INT'L L. 91 (2002).

2. *See* Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683 (2003) (detailing this litigation history).

This article, the first part of a larger project, is concerned with the history of these issues in the early postwar period, during which time the interstate form of reparations occupied center stage and the direct form of victim compensation and restitution, now established, was only beginning to be formulated. While this article does not purport to contribute directly to the doctrinal question of whether the individual is a rights-bearing subject of international law, it does illuminate the context within which this development first became visible. Given the focus of the following discussion on the wartime and early postwar period, from the Yalta Conference of 1943 to the Paris Reparation Agreement of January 1946, the discussion's relevance to that doctrinal question is derived from placement of the Paris Agreement in a broader framework, one providing the apparent primacy of interstate reparation that the Paris Agreement is often read to have established.

The current salience of the question of the individual as a rights-bearing subject of international law is well illustrated by two important cases that are phrased in the modern terminology of *jus cogens*, or peremptory norms of public international law. These cases exemplify the potential migration of those peremptory norms from their original location in the law of treaties to their debatable use in municipal litigation.[3] In 1994, *Princz v. Federal Republic of Germany*[4] held that even claims based on these peremptory norms (in this case, genocide and crimes against humanity) could not be brought in U.S. courts without the foreign sovereign's consent. Nine years later, the German Supreme Court decided a parallel case,[5] holding that the state-centered concept of international law still prevalent during the war period precluded an individual from bringing suit against the sovereign. On this basis, the court denied German recognition and enforcement of a Greek judgment in a private action against Germany on *ordre public* grounds.[6]

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3. This distinction and development is well-explained in Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97 (2004).

4. 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied.*, 513 U.S. 1121 (1995); *see also* Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (6th Cir. 1992).

5. Decision of the Bundesgerichtshof (Federal Supreme Court), June 26, 2003 ("Distomo"), 115 BGHZ 279 (2004); for an English translation, see Elizabeth C. Handl, *German Federal Supreme Court: The Distomo Massacre Case* (Greek Citizens v. F.R.G.), 42 I.L.M. 1030 (2003). This case is also discussed in Sabine Pitthoff, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case*, 5 GERMAN L.J. 1 (January 2004).

6. Decision of the Areios Pagos (Court of Cassation) 137/97, May 4, 2000; German translation in 33 Kritische Justiz 472 (2000). *See also* von Hein, *The Law Applicable to Governmental Liability for Violations of Human Rights in World War II*, 3 Y.B. PRIVATE L. 185 (2001); Maria Gavouneli & Ilias Bentekas, Note, 95 AM. J. INT'L L. 198 (2001). In a later case seeking execution on that judgment, however, a specially convened session of the court ruled that the distinct doctrine of sovereign immunity against execution of judgments prevented that step. *See* Court of Cassation, No. 6/2002, June 28, 2002 ; Maria Panezi, *Sovereign Immunity and Violation of* Jus Cogens *Norms*, 56 REVUE HELLENIQUE DE DROIT INT'L 199 (2003) (providing a summary and critique of that case). In

In this pair of cases, the two principal nations involved in the postwar German reparations process reaffirmed that states remain the primary, if not exclusive, actors, at least so far as litigation concerning the earlier era's version of public international law is concerned. Furthermore, the exclusivity of this remedy continued to govern later efforts of non-state parties to claim direct rights of compensation for injuries arising out of behavior that not only now, but even at the time of its commission, would have been characterized as a basic violation of the law of nations.

At the same time, these types of rulings, issued fairly consistently though infrequently over the past half-century, have not withstood domestic political pressure to provide compensation to victims of persecution. While these rulings may state the law on the books, on the whole they do not fully reflect the law in action. This article addresses the underlying historical basis for this pattern.

Postwar claims against Germany blurred traditional boundaries between public international law and domestic constitutional law. They also provided an important impetus, though not the only one, for the evolution of traditional state-centered international law to a system of international-relations law that now includes non-state actors as both active and passive subjects of the law. To explore these two cases in the European reparations context, five strands of thought—three general and two specific to Germany—need to be separated and then rewoven. One: whether state claims for reparations encompass compensation for particularized harms suffered by a subject of the claimant state. Two: may that subject make a claim directly against the other state? Three: do claims, either by the state or its subjects, encompass compensation for harms caused by non-state actors of the offending state? This issue also raises the question of whether those private actors may be sued directly, either by the claimant state or, more typically, by the victim-subject of that state. Four (an issue historically specific to World War II): the temporary disappearance of Germany as a sovereign state actor and the substitution of the Occupying Powers as that sovereign. Five (again, historically specific): the nature of the atrocities committed by the Third Reich against both its own persecuted subjects and those of other states that was qualitatively different from those known to modern warfare.

The last two issues bear on the postwar influence of public international law on the constitutional and administrative law of the recreated Germany. They also at least indirectly bear, however, on the converse situation—the way

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the meantime the Greek complainants filed an appeal (against the original refusal of execution by the Ministry of Justice) with the European Court of Human Rights, alleging this denial of justice was a violation of the European Human Rights Convention. However, they were rebuffed by that court. Kalogeropoulou et al. v. Greece & Germany, Admissibility Decision of 12 December 2002, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=kalogeropoulou&sessionid=4135968&skin=hudoc-en. *See* Kerstin Bartsch and Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in* Kalogeropoulou et al. v. Greece and Germany, 4 GERMAN L.J. No. 5 (2003). For a broader context see Andrea Bianchi, *L'immunité des Etats et les violations graves des droits de l'homme: la function de l'interprète dans la determination du droit international*, 108 REV. GÉN'L DROIT INT'L PUBLIC 63 (2004).

and extent to which the substantive law of state responsibility has evolved since World War II. The wartime behavior of the German Reich was a significant influence on the postwar substantive expansion of traditional public international law through its development of the *jus cogens* concept, which it developed by contesting the traditional immunity of a foreign sovereign[7] from suit in the municipal courts of other states when particularly abhorrent state behavior is involved.[8] In addition, it influenced the procedural expansion of international law from a set of norms bearing exclusively on interstate relationships to a vehicle for permitting non-state actors, including individual human beings, to act as subjects of public international law capable of asserting claims against their own as well as other nations.[9]

While all of these issues are addressed in the discussion that follows, only the evolution of interstate relations in the reparations context (and only the first postwar stage) is covered in detail.[10] In Part I, the traditional concept of reparations is briefly sketched out. Parts II and III describe the wartime and postwar formulation of a reparations policy by the Allies, largely from within the framework of property claims.[11] The emphasis in those Parts is on elements of the policy that highlight the contradictions between general and exclusively interstate reparations on the one hand, and a policy of restitution that might privilege certain claimant states on the other.[12] The contradiction between general and particular restitution policies planted seeds of conflicts that resonate to this day.

In related studies I hope to broaden my focus to consider the history of di-

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7. In what context and in what forum—politics or law—is a preliminary issue. In this article, I focus on the political forum: but, as the text suggests, the judicial forum and the implication that their non-state complainants now may be heard is the subject of most debates.

8. The most contested recent example of that proposition is the cited decision of the Areios Pagos of Greece, supra n. 6. More recently, the Italian Supreme Court (Corte suprema di cassazione), in Ferrini c. Repubblica Federale di Germania, Decision of November 6, 2003, reported in 87 Rivista Diritto Internazionale 539 (2004), following the *Distomo* decision in a case that also arose out of alleged *jus cogens* violations occurring on Italian soil during the German occupation. Like *Distomo*, it limited its use of *jus cogens* to trump foreign sovereign immunity in situations in which the action complained of occurred in the territory of the forum state. For an evaluation of the decision's significance, see Recent Decisions [Andrea Bianchi], "Ferrini v. Federal Republic of Germany," 99 AM. J. INT'L L. 242 (2005). The French courts, however, have recently confirmed the more traditional position that foreign sovereign immunity trumps at least forced-labor claims, even if the German seizure of such persons took place on French soil. *See, e.g.*, Cour Cass., *Bucheron*, 108 REV.GÉN'L DR. INT'L PUB. 259 (2004).

9. It also influenced the development of norms permitting private civil actions against individuals and corporations for violation of relevant norms of international law. That development will not be discussed in this article.

10. Other papers, currently in process, intend to continue analyzing the interstate aspect of reparations to the present day as well as to extend the discussion to these other actors and to the role of municipal courts and legislatures.

11. At the interstate level, the intensity and legitimacy of individual expectations of compensation for the loss of life, liberty, and health are only indirectly visible in the espousal of reparations for these delicts by the states to which those individuals owe their allegiance. Individuals' direct claims against the state-perpetrator are another matter, but the tensions between the two forms of redress lie at the center of today's discourses about reparations.

12. Such a policy, privileging restitution, would favor private claimants of property seized by the German occupation regime and now available for return.

rect compensation awarded for the loss of life, liberty, health, and prospects. This type of compensation was first imposed upon the Western Zones of early postwar Germany by the Occupying Powers and then built into the domestic legislation of the new Federal Republic as an obligation attendant upon its birth. This domestic obligation to the Republic's own persecuted subjects generated similar expectations by similarly persecuted subjects (or former subjects) of the occupied states, and, persisting to the present, resulted in a number of compensation schemes, including the Foundation for Responsibility, Remembrance, and the Future, established by the German government in response to class action litigation in U.S. courts during the latter half of the 1990s.[13]

The ongoing struggle over these issues during the postwar period calls for a simple periodicization. I suggest five postwar eras, each with its own focus on one of the substantive issues adumbrated above. The first period, the first part of which is the subject of this article, runs from wartime to the establishment of the Federal Republic's formal status in 1949. Its substantive focus, apart from the immediate issue of life support for the variously affected populations, was on reparations in the classic sense: payments of various types to the Allied states. The second period lies between 1950, when discussions about payment of occupation costs and prewar privately-held debt began, and the mid-1960s, when the first satisfaction of interstate reparations had been achieved and a serious statutory effort to compensate the (mostly formerly) German victims of wartime persecution was established. The third period is that of the *Ostpolitik*, initiated by the first Social-Democratic Chancellor of the Federal Republic, Willy Brandt, and its consequences for new intergovernmental claims. The fourth, roughly the decade of the 1980s, saw a sea change in the position of individuals and social groups vis-à-vis their respective governments, and specifically toward the Federal Republic on the issue of compensation for persecution. This development explains the explosion of claims and expectations during the fifth period—specifically, the period following the collapse of State Socialism and the unification of Germany—more than is commonly appreciated, even if those political transformations also generated their own dynamic in this field.

The recent experiences of a number of international commissions engaged in private-claim settlements over the past decade highlight a common thread running through all of these five stages, and help explain why no repose has been achieved on this question of compensation since 1945. The espousal by

13. Gesetz zur Errichtung einer Stiftung (Erinnerung, Verantwortung und Zukunft), Aug. 2, 2000 BGBl. I at 1263, based on the United States-Germany agreement concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, reprinted in 39 I.L.M. 1298 (2000). Its creation and the events leading thereto are discussed by a leading participant in STUART E. EIZENSTAT, IMPERFECT JUSTICE (2003), and by two close observers in JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE (2002). For critical comment, see generally Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503 (2002) (creating a record of the settled cases and relevant issues, arguments, and authorities); Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1 (2002) (identifying numerous flaws with the Foundation Law).

the state of its own claims for economic loss inherently conflicts with its espousal, as their agent, of claims of particular classes of its subjects.[14] The dissatisfaction of increasingly empowered private actors with the representation offered them by the state goes far to explain this conflict.[15] Of course, the gradual increase of subject empowerment is a broader phenomenon than this one component, but the latter was a causal factor, among others,[16] in the overall changes in state-society relations.

I.
THE PRE-WORLD WAR II CONCEPT OF REPARATIONS

Until World War I, the payment of reparations by the vanquished state to the victorious state had been one of the many elements of peace negotiations. The issue had no particular moral connotation, and payments were limited by the limited nature of the preceding war. World War I differed from its post-Westphalian European predecessors both in its scale and its total involvement of civilian populations. These differences raised the stakes of reparations for the victors[17] and invited the possibility of justifying higher stakes by reference to moral and political responsibility.[18] This foreshadowed the reparations component of the peace negotiations, and produced the notorious Article 231 of the Treaty of Versailles. During negotiations preceding the Armistice Agreement as well as in the so-called pre-Armistice Agreement of November 1919, Germany agreed to pay reparations. In the Versailles negotiations, the United States believed that a specific reparations amount should be negotiated; indeed, this was one of Wilson's Fourteen Points. Article 232 of the Treaty expressed the original German agreement with that position: "Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers."[19] As Colonel House, Wilson's advisor, put it, "[b]y

14. I owe this approach to its use in the somewhat different case of compensation for environmental damage by David Caron, *The Place of the Environment in International Tribunals*, *in* THE ENVIRONMENTAL CONSEQUENCES OF WAR 250 (Austin & Bruch eds., 2000).

15. The most vivid current example is the effort of various classes of U.S. victims of terrorist and rogue-state torts to recover against them under new U.S. legislation. I review this development in the comparative context of German reparations in Richard Buxbaum, *Equalization of Burdens*, *in* II FESTSCHRIFT FÜR ERIK JAYME 1051 (Heinz-Peter Mansel et al. eds., 2004); *see also* W. Michael Reisman & Monica Hakimi, *Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561 (2003).

16. The lack of a state to represent the large class of former German and former Eastern European victims of persecution is a more specific aspect of this reality. *See* Agreement on Reparation From Germany on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, art. 8, 61 Stat. 3457, 3171, 555 U.N.T.S. 69, 87 [hereinafter "Paris Reparations Agreement"].

17. These differences also raised the stakes for other issues, such as the cession of the Saar, the occupation of the Rhineland, and, in other treaties, for issues such as the cession of major territories and formation and restructuring of entire nation-states.

18. For a review of this development, see BRUCE KENT, THE SPOILS OF WAR 17 (1989); JÖRG FISCH, REPARATIONEN NACH DEM ZWEITEN WELTKRIEG 20 (1992).

19. Treaty of Versailles, Jan. 10, 1920, art. 232, 1919 L.N.T.S. 153-54.

this clause the Allies would have been entitled to all that Germany could pay."[20] To lay the groundwork for larger reparations beyond the issue of damages to the civilian population, the French government, in the next round of negotiations, led the European Allies in successfully arguing for a "war guilt" concession. The result was Article 231:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.[21]

The larger consequence of this post-Armistice coerced confession was to provide the fodder for much of Germany's domestic politics between the two World Wars. But this provision also influenced the discussion of the amount, as well as of the nature of, the later negotiated reparations obligations.[22] The Allies argued that this moral responsibility had no relation to the size and character of the reparations; but as the leading commentator of the day noted when comparing the general nature of Article 232 with the more detailed and extensive list of reparations categories in Annex I to the Treaty, "in practice, the terms of the Annex will in this case be held to override the main Treaty text. Differences of principle which had to be reconciled are here seen imperfectly fused together in the terms of Peace."[23] Ultimately, the determination of the aggregate amount of reparations and the means of payment was left to a Reparations Commission, and payments beyond a first large tranche were left to the German Government.[24]

This brief summary of the situation that arose during and after World War I is relevant for two reasons. Though challenged as an inappropriate use of war guilt to justify larger and broader categories of reparations,[25] the Treaty of Versailles set a floor for the amount of reparations to be paid after World War II by a Germany whose Third Reich had committed atrocities and wreaked destruction beyond any measure of comparison with the earlier war. At the same time, however, U.S. support of a Weimar Germany enfeebled by early postwar blows, including the reparation burden, led it to resist excessive reparations through a commitment to support a Germany already drained of its productive capacity by those reparations.[26] In addition, a third issue not yet discussed also arose out of

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20. EDWARD M. HOUSE, THE INTIMATE PAPERS OF COLONEL HOUSE 408-09 (Charles Seymour ed., 1928).

21. Treaty of Versailles, *supra* note 19, art. 231.

22. Reparations also included the permanent confiscation of private enemy-alien properties in the Allied countries, a matter that also became contentious after World War II.

23. 2 A HISTORY OF THE PEACE CONFERENCE OF PARIS 77 (H.W.V. Temperley ed., 1920).

24. *Id.* at 90.

25. And not only in Germany. See the Introduction, by Harry Elmer Barnes, to a famous German argument about the effects of Versailles, in ALFRED VON WEGENER, A REFUTATION OF THE VERSAILLES WAR GUILT THESIS xvii-xxvi (Edwin H. Zeydel trans., 1930).

26. It is tempting but anachronistic to suggest further explanation for the possible mitigation of Western reparation claims: the unprecedented destruction of the German landscape, especially the indiscriminate carpet bombing late in the war when its military justification became debatable; the

the pre-World War II period. In 1924 and again in 1930, Weimar Germany's reparations obligations under the Dawes and Young plans were privatized through bond issues emitted and sold on international capital markets. In the hands of the private sector, these bonds became a significant element during the reparations settlement negotiations after World War II.

II.
WARTIME AND EARLY POSTWAR REPARATIONS POLICIES AND CONFLICTS

A. Reparations versus Restitution at the Interstate Level

1. The Major Political Context of Reparations

The question of whether a state's waiver of claims against the offending state also waives those of its subjects was a source of difficulties from the start of negotiations. These difficulties originated, however, in an interstate rather than a state-individual conflict. This section traces the roots of those difficulties to the inter-Allied disputes concerning the concept and scope of reparations sought from defeated Germany. Those disputes both presaged and influenced the Western-Soviet divisions that arose almost immediately upon the conclusion of hostilities;[27] and they also reflected significant differences between the American and French (and to a lesser extent, the British) positions.[28] Indeed, it

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significant losses of territory after the war; the expulsion of ethnic Germans from the East; and other injuries suffered by the civilian population. Today, these are discussed and politically instrumentalized more freely. However, at the time, these issues figured as arguments of the kind that would, for example, support the Marshall Plan. Eugen Kogon, no apologist, wrote in 1948 that preventing German reconstruction was to condemn Europe to destitution. Eugen Kogon, *Man Braucht Deutschland, auch Deutsche Soldaten?*, 4 FRANKFURTER HEFTE 18 (1949), reprinted in DIE RESTAURATIVE REPUBLIK: ZUR GESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND 148 (Michael Kogon & Gottfried Erb eds., 1996). Even German writers of the 1945-1950 period did not, or could not, put them forward in any but a quantitative sense. They did so primarily in the context of using Western concepts of the protection of property to challenge reparation-based vesting of private German property. *See* Paris Reparations Agreement, *supra* note 16.

27. The division leading to the Cold War is neither directly relevant to this narrower question of the reparations sought from Germany, nor within my competence to analyze. Frequently cited sources on this topic include: MARSHALL SHULMAN, STALIN'S FOREIGN POLICY REAPPRAISED (1963) and ADAM B. ULAM, THE RIVALS: AMERICA AND RUSSIA SINCE WORLD WAR II (1971) on the one hand; and BRUCE KUKLICK, AMERICAN POLICY AND THE DIVISION OF GERMANY: THE CLASH WITH RUSSIA OVER REPARATIONS (1972) on the other; *see also* JOHN GIMBEL, THE AMERICAN OCCUPATION OF GERMANY (1968). It is common ground among historians that the United States' reaction to the Soviet Union's de facto incorporation of Poland into its realm, despite the expectations created by the Yalta Agreement, was central in the creation of distrust before the war's end. This distrust was later confirmed by United States-Soviet reparations disputes over Germany. *See* MARC TRACHTENBERG, A CONSTRUCTED PEACE 7 (1999). *See generally* MELVYN P. LEFFLER, A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR (1992) (describing the mutual perception of intentions and capabilities).

28. The best recent sources for this element of postwar history are the detailed studies, based on a comprehensive review of primary source material, of GUNTHER MAI, DER ALLIIERTE KONTROLLRAT IN DEUTSCHLAND 1945-1948 (1995) (placing the reparations issues in the context of efforts to maintain a functioning Allied Control Council); and OTTO NÜBEL, DIE AMERIKANISCHE REPARATIONSPOLITIK GEGENÜBER DEUTSCHLAND 1941-1945 (1980) (providing a detailed account of both the Moscow negotiations preceding Potsdam and of the Potsdam negotiations themselves,

is the latter set of disagreements that is more immediately relevant to the issue of the waiver of a state's claims, since those disagreements more directly foreshadowed the later conflicts involving the application of the state's waiver of claims to those of its subjects.

The distinction between a state's general claim to reparations and a subject's specific claim to compensation for harm wrongfully inflicted to either personal or property interests became important after the war, though it previously had not been a point of argument at the (Allied) state level. The wartime focus of the Allies was, understandably, on each state's own monetary claims, since it was compensation for the cost of war and of postwar reconstruction that loomed large at that time. Even then, direct monetary compensation of the Allies was considered less feasible and, given the disappointing post-World War I experience with that approach, less desirable than compensation through the seizure of productive capital and monetary assets, the labor of prisoners of war (POWs), and possible diversion of goods production.

A short presentation of what is unavoidably a potted history is essential to demonstrate how East-West conflicts around these issues later led to the legal, even doctrinal, conflicts that are the focus of this article. This summary will also clarify how the preoccupation with traditional war cost claims led to the subordination of concerns for the direct compensation of the victims of persecution, though eventually their unprecedented level of suffering forced the question of direct compensation back to the table.

The Soviet view of postwar Germany's fate was understandably harsh: they wanted the lowest living standard compatible with survival, or at least not higher than the standard of the Soviet Union itself, forcing delivery of goods out of those postwar production facilities Germany would be permitted to retain; the dismantling of all industrial capacity even indirectly related to any potential for rearmament; and if not the lion's then the largest share of compensation claimed by any Allied Power, commensurate with the Soviet Union's largest share of damage.[29] Through the above means, as well as through incorporation of border territories, the Soviet Union hoped to exercise a continuing influence on Germany; it may also have seen a hopeless German population as a source of revolution, and thus, of direct political influence.[30]

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which highlights the role of the reparations debate in setting the course leading to the later creation of East and West Germany). The role of the reparations issue at the later stages of this first period, and specifically in the failure of the Four-Power Council of Foreign Ministers' Moscow Conference of spring 1947—a watershed in sealing the Western-Soviet division—is thoroughly aired in CAROLYN WOODS EISENBERG, DRAWING THE LINE 358-62, 453-59 (1996); HANNS JÜRGEN KÜSTERS, DER INTEGRATIONSFRIEDE 336-47 (2000). For a somewhat earlier study that still bears reading, see generally ALEC CAIRNCROSS, THE PRICE OF WAR (1986) (emphasizing the role of reparations in the development of the United Kingdom's German policy, but with judicious reflections on the relationship of reparations to the larger issue of Western-Soviet relations).

29. NÜBEL, *supra* note 28, at 181.

30. MAI, *supra* note 28, at 305-06 (citing Eugen Varga, the influential promoter of the described Soviet policies, as stating that "payment of these compensations doubtless will make the substantive situation in the conquered lands even worse, and in any event lead to a growing dissatis-

The American view of postwar Germany's fate first formed in reaction to that of the Soviet Union in the preparation of the Yalta Conference, and though it was marked by much internal dissension,[31] it always had two guiding principles that were of particular importance to the issue of reparations. First, the United States would not underwrite excessive claims against Germany only then to have to support the country; second, it would insist that any postwar policy bearing on Germany, including a reparations policy, be compatible with the larger goal of creating a postwar global economy free of the disastrous beggar-thy-neighbor policies that contributed significantly to World War II.[32]

The conflicting principles guiding the Soviet Union and United States necessarily brought in their train a set of secondary policies concerning both the scope and the forms of reparations. The conflict over the implementation of these secondary policies punctuated the next two years and indeed the entire period of active postwar reparations efforts until 1949. While not the thesis of this narrative, a wide consensus among principal actors at the time and of later historians is that the division over reparations was a significant (though not decisive) factor leading to the Cold War. Then-Secretary of State James Byrnes bluntly stated in his memoirs that disagreement about reparations was central to the beginning of the great division between the United States and the Soviet Union;[33] his successor, George Marshall, called reparations "the heart of the problem,"[34] a judgment that analysts of various schools have since supported.[35]

Here, it is sufficient to note that neither at the May-July 1945 prepatory Moscow meetings nor at the July-August Potsdam Summit were the Allies able to achieve consensus on the extent and the form of German reparations. By necessity, and given the realities on the ground, the question of a definitive resolution was postponed (eventually *ad calendas graecas*) and an interim "program" of reparations was agreed upon. This program consisted of little more than acceptance of the actions Soviet authorities were conducting in their Zone and the

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faction of their people and to a revolutionary situation").

31. *See, e.g.*, MICHAEL BESCHLOSS, THE CONQUERORS: ROOSEVELT, TRUMAN AND THE DESTRUCTION OF HITLER'S GERMANY, 1941-1945 (2002).

32. U.S. STATE DEPARTMENT, II FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 620-21 (1945) [hereinafter "FRUS-II"].

33. JAMES F. BYRNES, SPEAKING FRANKLY 194 (1947).

34. Manuel Gottlieb, *The Reparations Problem Again*, 16 CAN. J. ECON. & POLIT. SCI. 22, 25 n.9 (1950); *see also* MANUEL GOTTLIEB, THE GERMAN PEACE SETTLEMENT AND THE BERLIN CRISIS (1960). Gottlieb, an economic adviser of General Clay during the Berlin crisis, offers a lucid review of the large lines of this period in the reparations context (as distinguished from the larger political context), and provides a useful set of comments to support this point. For a valuable example see Edward S. Mason, *Economic Relationships Among European Countries*, 21 PROC. ACAD. POLI. SCI. No. 4 (Jan. 1946) at 2-15 (1946).

35. This was a principal argument of the early postwar Social Democratic Party. *See* Adolf Arndt, *Status and Development of Constitutional Law in Germany*, 260 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 4-5 (1948) (Arndt puts it simply: the originally planned government of "Germany as a whole" by the Allied Control "has not been realized, for economic unity is impossible without political unity. Economic unity was destroyed from the very beginning by the decision to take reparations by zones.").

policies that the three Western Occupying Powers then implemented in theirs.[36] Yet hope for a future agreement remained, and this hope was the principal thread keeping the Allied Control Council, the only four-power German authority, minimally functional for another couple of years, as briefly discussed below. Nonetheless, one major consequence of the non-solution that ratified activities under the "interim" label bears directly on the focus of this article: reparations questions were not settled by the Potsdam Reparations Protocol.[37] Thus, none of the legal issues bedeviling reparations—especially finality and exclusivity—were settled.[38]

2. The Allied Conflicts over Restitution in Preference to Reparations

The immediate practical consequence of this impasse was a return by the three Western Occupying Powers to the older but largely neglected question of sharing future reparations among the Western Allies and other nations that had entered the war against the Axis Powers. Within this group, the already described issues of the Western-Soviet conflict were not of major concern; rather, it was each nation's own division of the pie that was of foremost interest. The composition of reparations, whether in monetary assets, productive facilities and other physical assets, deliveries out of current production, or even temporary use of prisoners of war as a labor force, now came to the fore. With this change of priorities another element of the Allies' earlier wartime planning again became relevant, namely the treatment of the German wartime seizures of facilities, and of state and privately owned monetary and non-monetary assets during the period of German occupation. This recreated the distinction between a generic equal-treatment reparations policy and one granting priority over specific properties.

This focus on the distinction between generic and specific reparations necessarily brought with it questions of tracing, and thus of restitution as a complement or possible alternative to reparations. The restitution of property, the ownership of which was traceable to original owners or their appropriate successors, is not, however, a simple matter. Restitution of property is not conceptually limited to state-owned property, and already during the war the Western Allies discussed whether to distinguish between the restitution of property taken by the Third Reich from its own subjects and property taken from the subjects of occupied or other enemy countries. That situation has its own history and is the subject of a separate discussion found below.[39] A policy governing the right of a state to claim a restitution-type priority to state or privately owned assets traceable to its territory, however, could not be postponed because it could not be separated from the question of traditional reparations paid by the Axis States to

36. *See, e.g.*, NÜBEL, *supra* note 28, at 171; MAI, *supra* note 28, at 310-11.
37. For its text, see FRUS-II, *supra* note 32, at 1485-87.
38. *See* NÜBEL, *supra* note 28, at 202.
39. *See* Paris Reparations Agreement, *supra* note 16.

the Allies in the event of an Allied victory.

The restitution-reparations connection began with the introduction of the subject of restitution by British and French members of the European Advisory Commission late in 1944, an action in turn derived from the Reparations Protocol, a major element of the Yalta Agreement.[40] In his January 1945 instructions to Ambassador Winant, Secretary of State Stettinius made clear this connection:

> [T]he question of replacement, in so far as that term is more broadly construed than merely the replacement of looted and unrecoverable or destroyed works of art and similar unique objects, is closely related to the general problem of reparation on which discussion is still going forward here. You should, therefore, withhold comment on any replacement proposals other than those limited to the class of unique cultural objects. . . . [Further, it] should be definitely provided that the Restitution Commission will be a sub-commission of whatever Reparation Commission is eventually set up.[41]

One reason for this separation was an effort to keep any productive facility whole, though its components might have come from separate and identifiable sources. The Allied powers wanted to keep production facilities whole to prevent stripping essential components of such facilities.[42] This related to the focused determination of the United States, so far as it was in its power, to cast the reparations issue as a bankruptcy problem, making the equal treatment of all claimants the touchstone policy.[43] In this effort, the predictable non-cooperation of the Soviet Union was less problematic than the efforts of the French government to use traceable ownership of looted productive assets as the basis for a superior claim to those assets.[44] The U.S. policy was closely tied to

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40. FRUS-II, *supra* note 32, at 1048-51.

41. U.S. STATE DEPARTMENT, III FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1172 (1945) [hereinafter "FRUS-III"]; *see also id.* at 1198:

> [W]hile the Department's policy has been to advocate restitution of all identifiable looted property . . . I understand that the Department still deems it desirable that the restitution of productive equipment should be treated as a separate category and should be limited by reparations principles. While productive equipment like other looted property may be considered, . . . it should be borne in mind that the problems of possible conflict with or subordination to reparations principles are particularly acute where such equipment is concerned. For this reason . . . the principle of the restitution of large amounts of productive equipment should be avoided as far as possible.

42. *Id.* at 1187 ("A reparation decision to transfer a plant to one claimant should not . . . be frustrated by the absolute right of another claimant to remove a vital and irreplaceable machine, which is a minor part of such plant . . . I cannot see how such difficulties can be avoided if the restitution of productive equipment is handled by a body independent of the Reparations Commission.").

43. An interesting later echo of exactly this concept as a justification for the prioritization of claims by persecutees of the Nazi regime is found in Philipp Auerbach, *Restitution for Victims of Nazi Persecution*, 260 ANNALS AM. ACAD. POL. SCI. 131, 133 (1948) ("We must start with the theory that postwar Germany is like a bankrupt estate, in which the claims of those persecuted for racial, religious, and political reasons are like the claims of preferred creditors in a fraudulent bankruptcy case.").

44. While not given sufficient honor at the time, this was a perfectly understandable position. Of the three major powers, only France was occupied and suffered industrial demontage by German forces and industries. *See, e.g.*, Superior Military Government Court of the French Occupation Zone In Germany, Judgment of 25 January 1949 In The Case Versus Hermann Roechling And Others Charged With Crimes Against Peace, War Crimes, And Crimes Against Humanity. Decision

its post-World War I experience. The United States wanted to keep a defeated Germany capable of some level of self-sufficiency, lest the country's inability to meet its population's minimum needs would again lead to an American obligation to return, through aid, what the reparations policy had given the Allies.

With the surrender of Germany and the convening of the Potsdam Conference in May of 1945, formation of both the policies and institutions concerned with reparations and restitution became more urgent. These priorities are apparent from the formal Presidential instructions issued to the U.S. Representative on the Allied Commission on Reparations:

> In determining the size and character of reparation in accordance with [the Yalta Agreement] Reparation Protocol and the allocation thereof among the various claimant nations the following principles are advocated by this Government: . . .
>
> (d) This Government opposes any reparation plan based upon the assumption that the United States or any other country will finance directly or indirectly any reconstruction in Germany or reparation by Germany . . . . (j) It will be inevitable that the German standard of living will be adversely affected by the carrying out of the Reparation Plan. However, . . . (k) [t]he Reparation Plan should not put the United States in the position where it will have to assume responsibility for sustained relief to the German people.[45]

The other principal of this policy—the bankruptcy analogy—became equally clear at the time. After the failure of the mid-1945 pre-Potsdam Moscow Conference on Reparations, the U.S. Representative on the Allied Commission on Reparations instructed the U.S. Military Governor for Germany (General Eisenhower) on the U.S. goals for restitution activities in the U.S. Zone:

> [A]ny removal of . . . [restituted] property should be made only if the government of the receiving country agrees, by executing a formal receipt stating that the property in question may ultimately be deemed 'restitution,' 'reparation,' or an 'export' for which payment shall be made [to the contingent status of that removal]. . . .[46]

This was not only a rebuff to the Soviet Union, which was proceeding with *demontage* reparations in the Soviet Zone and would continue with reparations from current German production for some time. In addition, this principle was aimed at the French government, which had all but given up on expecting future reparations and saw its interests better served by upgrading to a separate concept of restitution as its preferred definition of reparations instead of equal treat-

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On Writ Of Appeal, *in* Trials Of War Criminals Before The Nuernberg Military Tribunals 14 T.W.C. 1097 (1950). France therefore could, with some justification, argue that a broadly defined definition of what property could be used as restitution was appropriate. On the other hand, given the devastation the Soviet Union had suffered, it is understandable that even the U.S. authorities on the ground were very critical of the French "intransigence" that threatened to reduce legitimate flows of industrial equipment to the Soviets. For example, see the strong comments made by General Clay reported in WOLFGANG KRIEGER, GENERAL LUCIUS D. CLAY UND DIE AMERIKANISCHE DEUTSCHLANDPOLITIK, 1945-1949 at 145-47 (1987).

45. Instructions for the United States Representative on the Allied Commission on Reparations (Pauley) (May 18, 1945), in FRUS-III, *supra* note 41, at 1222-24 (footnote omitted).

46. FRUS-III, *supra* note 41, at 1260.

ment.[47] This battle continued throughout 1945 and 1946, but for our purposes it suffices to confirm that throughout this period the U.S. Military under General Clay maintained its position. He held that exorbitantly defined restitution claims by formerly occupied Allied Powers could not compromise or prejudice the priority of reparations, especially in the context of diminishing the German economy's capacity to generate a level of production sufficient to keep further U.S. subsidization of the population to a minimum.[48]

While the "bankruptcy-administration" reason for categorizing restitution as a subset of reparations diminished over time,[49] it survived long enough to become a bridging argument for the subordination of restitution (as well as of personal compensation for other delicts affecting life, liberty, health, or property) within the framework of the later London Debt Agreement.[50] First, however, it played a large role in the eventually frustrated effort to provide a fair share of reparations to those Allied countries that did not have the benefit of self-help enjoyed by the Occupying Powers.[51]

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47. *See* MAI, *supra* note 28, at 349 ("France insisted on the separate treatment of restitutions and reparations; first, to win a veto power against the reparations decisions of Potsdam; second, because it expected a more expeditious fulfillment of its demands in this arena [of restitution]."). This position should be viewed within the context of France's exclusion from the Potsdam Conference and its efforts to "renegotiate" those aspects of the Conference's decisions that had particular relevance to its policy wishes. *See, e.g.,* KÜSTERS, *supra* note 28, at 269.

48. In addition, the United States reluctantly accepted the addition of goods to the concept of reparations:

> To the extent that for political reasons it may become necessary in the negotiations to agree that reparations be collected in the form of deliveries of goods from current production over a period of years, such goods should be of such a nature and in such amounts as not to require . . . the continued dependence of other countries on Germany after reparations cease.

FRUS-III, *supra* note 41, at 1223. Given the exiguous situation in the formerly occupied countries, this became an important component of reparations in the first years, and thus, unavoidably, an element of U.S. policy even in its own zone.

49. The argument in favor of restitution did play an important role during the negotiations of the Paris Agreement of 1946 and on the form and division of reparations. *See, e.g.*, The Netherlands Government, Memorandum of the Netherlands Government Containing the Claims of the Netherlands to Reparations from Germany 5 (1945) (citing U.S. bankruptcy law to support the claim that "the people of the Netherlands have the undoubted right to the earliest possible restitution of identifiable looted property taken from the country by the Germans, when such property is found outside the Netherlands, either in Germany or elsewhere," and defining this to include "all goods by their nature fit for restitution . . . [whether removed] either directly by acts of transfer or of dispossession, or indirectly by purchases or by transactions effected by means of payment which were created, imposed or extorted by the enemy due to the occupation.").

50. Another aspect of this early controversy bears on another issue of recent importance: that of the exclusivity of interstate handling of individual damage (at least in terms of property). It was understood at the time that even the restitution of private property was to be dealt with, on behalf of the owners, by the state of which the owner was a subject.

51. This self-help was legitimated by the United States in the instructions, though they excepted that all property removals would eventually be accounted for:

> As an interim program, . . . [d]uring the initial period following the collapse of Germany each of the four occupying powers—Great Britain, Russia, France and the United States—may remove from its zone of occupation in Germany plants, equipment and materials (including current output) of such a nature and not in excess of such amounts as may be determined by the Reparation Commission . . . . Records should be kept of all deliveries . . . and such deliveries should be made without prejudice to the final allocation of reparation

Defining (prioritized) restitution as narrowly as possible should not, however, obscure a larger point: the U.S. policy on the issue of reparations, including the restitution side issue, was based on an early realization that its own interests would not be served by a radical *demontage,* and an equally radical forced export of such German products as the Western Zones' diminished industrial plants could produce. Between the heavy burden of supporting displaced persons and supplying sufficient food imports for its share of the German population, the need for German production as a major factor in European reconstruction was clear. It was this recognition of conflicting needs that led the United States to play a moderating role against the larger demands of the British and especially of the French governments.[52] This moderation became clear at least as of late 1946, and was confirmed by the failure of the 1947 Moscow Conference,[53] which in turn confirmed the Cold War as an enduring reality. Thus, any future reparations would be relevant only to the Western occupying powers and to the other formerly occupied Western allies.

B. The Development of State Expectations of Reparations and Compensation

In order to put this stage into perspective, a brief review of the wartime planning for the postwar situation of the European Allies is necessary. The occupied Allies, as well as the smaller nations that were combatants-at-arms with Soviet, U.K., and U.S. forces, participated in this planning through their governments-in-exile. The broadly defined costs of war and occupation these nations suffered, and the role of reparations in making them whole, were major concerns for these governments and nations. The outcome at Yalta, which seemed to address their concerns, also encouraged engagement with these issues.

1. Early Legislation and the Occupied Countries

As a result of the focus of the Yalta Conference on issues of reparations and compensation, a number of these countries, especially those occupied by Axis forces during the war, enacted legislation both at the time of their occupation and immediately after the war, providing a domestic-law basis for the restitution of, or compensation for, loss of property. This legislation also included some compensation, often under wider social-insurance schemes, for loss of life or liberty and damage to health and other personal elements. In 1951, Nehemiah Robinson classified the policies as follows:

(a) those in which a registration of such losses has been made but no action taken

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shares.

Instructions for the United States Representative on the Allied Commission on Reparations (Pauley), *supra* note 45, at 1225-26.

52. While a number of excellent secondary works support these conclusory assertions, I rely largely on MAI, *supra* note 28.

53. *See* KÜSTERS, *supra* note 28, at 375-76.

> to assess, let alone compensate, the damage; (b) those where the principle of war damage compensation is recognized but no legislation has yet been enacted to provide for actual compensation payments; (c) those which carry on their statute books partial measures of compensation; (d) those which, in addition to insurance schemes, have certain regulations for common war damage compensation; and (e) those which have enacted and implemented comprehensive legislation to this effect.[54]

Much of this legislation was enacted in anticipation of reparations that would flow from the defeated Axis countries to the Allied powers whose territories had been occupied, or which had been at war on the side of the Allies. Some of this legislation was a natural extension of coverage that the Scandinavian countries had established under comprehensive social welfare legislation to victims of war and occupation, but these policies did not contradict the expectation of reimbursement through reparations as well. That expectation, to the extent it rested on the immediate postwar recoupment process established by the Allied Paris Agreement of 1946 and contemporaneous bilateral arrangements for the return of property located in neutral countries such as Switzerland, was at first disappointed, as the following account will clarify. Eventually, some payments were made, primarily by Germany, as a result of the Federal Republic's later ability to bear these outlays. So far as distribution to the intended beneficiaries is concerned, that too is necessarily included in any account that explores the interplay of domestic and international legal and political issues.

2. The Early Postwar Reparations Program of the Western Allies

For the purposes of this legal-historical narrative, then, the road now leads to the effort of the Western Allies, led by the three Occupying Powers, to find agreement on the amount, relative shares, and procedures to extract reparations from Germany and the other European Axis powers. While France and Great Britain were already actively engaged in self-help reparation activities, all three Powers agreed that the others could satisfy their claims only out of those German assets (including financial assets) that could be marshaled in other countries. Except for the restitution of specific identifiable equipment and inventory removed during the German occupation, they would not be entitled to join in the direct claim to in-country industrial facilities, capital goods, or current production that represented the bulk of the Occupying Powers' receipts.

Before a review of this next stage, however, a preliminary comment about the relationship between interstate reparations and the later direct compensation for victims' personal and property injuries is necessary. The constant if constantly challenged argument of the postwar German Federal government is that all issues of compensation and restitution for the benefit of non-German subjects were properly subsumed exclusively under the heading of interstate repara-

54. Nehemiah Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 LAW & CONTEMP. PROBS. 346, 347 (1951); *see also*, H.R. Doc. No. 83-67, at 29-32 (1953) (providing a brief description of the war claims arising out of World War II).

tions.[55] This view is better contextualized by considering the centrality of interstate reparations to the three Western members of the Four Powers, not to mention the Soviet Union, during this early postwar period.[56] Indeed, while this is not within the purview of this article, it should be noted that reparations were so critical that their priority represented the only intra-Western counterargument against the zonal division of Germany.[57] It was not until March of 1948 that the intentional abandonment of the Four-Power Allied Control Council signaled a total abandonment of German unity; until then, a united country was considered an essential prerequisite to a successful reparations policy.[58]

Now, however, it is appropriate to return to the division of reparations among the Western Allied Powers, a division made necessary by the failure of the Potsdam Agreement.

C. The Road to the Paris Reparations Conference

1. The Position of the States

With the separation of the Soviet Union's reparations from those of the three Western Occupying Powers,[59] the United States turned to deal with the strongly presented reparations claims of the Western Allies, especially those occupied by German forces during the war. In July of 1945, while in Moscow preparing for the Potsdam Conference, George Kennan submitted to the State Department a list of thirteen countries with justified reparations claims against the resources available from the three Western zones.[60] After first resolving the

55. For a good recent example, see generally ALBRECHT RANDELZHOFER & OLIVER DÖRR, ENTSCHÄDIGUNG FÜR ZWANGSARBEIT?: ZUM PROBLEM INDIVIDUELLER ENTSCHÄDIGUNGSANSPRÜCHE VON AUSLÄNDISCHEN ZWANGSARBEITERN WÄHREND DES ZWEITEN WELTKRIEGES GEGEN DIE BUNDESREPUBLIK DEUTSCHLAND (1994) (providing a general argument that interstate reparations covered non-German reparations as well). The specific argument on this topic focuses on the interpretation of reparations treaties and related agreements; that is, whether they commit the claimant states to waive further claims for themselves and for their subjects, whether against the paying state or against its subjects. For an articulate argument for this position, see Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 BERKELEY J. INT'L L. 296, 318-21 (2002).

56. It was, obviously, less central to the interests of the United States.

57. *See* Paris Reparations Agreement, *supra* note 16.

58. The best recent treatment of this interplay of reparations policy, the role of the Allied Control Council, and their respective impacts on the pre-1948 unification debate, is that of MAI, *supra* note 28. For an English-language treatment, see EISENBERG, *supra* note 28. *See also* KUKLICK, *supra* note 27. However, the drive to establish U.S. responsibility for the slide into the Cold War has given rise to some challenges; these challenges are only partly rebutted by Eisenberg. An impression of the effort of the American and Soviet Military Governors (Clay and Sokolovsky) to maintain the possibility of a united Germany against the political winds of Cold-War division can be garnered from JOHN H. BACKER, WINDS OF HISTORY—THE GERMAN YEARS OF LUCIUS DUBIGNON CLAY 169-77 (1983).

59. Paragraph three of the Protocol on German Reparations signed at Potsdam on August 1, 1945, provided, "The reparations claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets." FRUS-II, *supra* note 32, at 1485.

60. FRUS-III, *supra* note 41, at 1238.

United Kingdom's opposition to the inclusion of Denmark because it had not resisted the German takeover,[61] the Allies agreed that non-military Allies, such as the Latin American countries, could satisfy their costs by using German assets found in their territories.[62] Accordingly, on August 28, the United States, United Kingdom, and France sent an invitation to Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, the Union of South Africa, and Yugoslavia. The invitation called upon these countries "to submit data relating to [your] reparation claim . . . against Germany and the value of prewar German assets situated in [your] territory."[63] In the accompanying "Draft Memorandum" of that Commission, the Western Allies announced a conference to agree upon and finalize the allocation of reparations from the Western Zones of Germany among the countries entitled thereto. This became the Paris Conference, which was held during the last three months of 1945 and led to the Paris Agreement of January 1946.[64]

The "suggestions" (which were, in fact, instructions) given each invited country concerning the claims it could present at the reparations conference are noteworthy as they forged both state and individual expectations for compensation. Five major categories of claims were created: damage to and loss of property (excluding military property); budgetary expenditures ascribed to the prosecution of the war; the broadly defined "man-years" expended or lost in connection with the war—including "loss of life or health and injuries sustained by civil and military victims of the war and occupation;"[65] the cost of German occupation including forced payments and credit extensions; and, finally, "all other [war-connected] claims of a governmental or private nature."[66] Separate instructions called for data concerning prewar holdings of German governmental and private-sector assets in the claiming country, since their marshalling and distribution were expected to become a significant proportion of the reparations process.[67]

At this early stage, at least, the presentation of personal and property claims of individual and legal subjects of the claiming state was seen as a function of the state; direct presentation of claims by those subjects was not then contemplated. Nevertheless, the fact that subjects might, at least indirectly through state reparations, receive compensation for loss from their state marked a departure from the reparations practices of earlier times.[68]

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61. *Id.* at 1266, 1299.

62. *Id.* at 1266; *see also*, Paris Reparation Agreement, *supra* note 16, at 3157.

63. *The Secretary of State to the Australian Minister* (Eggleston) (Aug. 28, 1945), *in* FRUS-III, *supra* note 41, at 1268.

64. *Id.* at 1357; Paris Reparation Agreement, *supra* note 16, at 3157.

65. Memorandum of Allied Commission on Reparations, Annex A of FRUS-III, *supra* note 41, at 1268-70.

66. *Id.*

67. *Id.*, at Annex B, 1270-72.

68. Unlike the Mixed Commission between the United States and Germany that was established after World War I to receive and adjudicate private property claims for war-related losses (*see*

Also important was the immediate subordination of the other Western Allies' claims to the interests and policies of the three major players, especially the United States.[69] Indeed, from the outset, the United States made no pretense of equal treatment for other claimants. Secretary of State Byrnes went so far as to characterize their expectations as illusory.[70] A major reason for this subordination, however, was the ongoing debate with the Soviet Union over the Occupying Powers' self-help policies. These included the Soviet demands, accepted in principle by the Big Three (United States, United Kingdom, and France), for a continuing share in the Western Zones' productive output given the Soviet Union's higher wartime losses. From the Occupation perspective, the reparation discussions in Paris were a subset of the new policies necessary to dismantle German war capacity, as tempered by the survival needs of the population. Therefore, the procedures established in Paris had to be coordinated with, and even subsumed within, the reparation component of those policies.[71]

This subordination was expressed most clearly in the structure of the Inter-Allied Reparations Agency (IARA). The United States, United Kingdom, and France would nominate three of the five members of the Agency, and the other two seats would rotate among the other countries. However, the power to appoint Agency executives was vested in only the three permanent seats of the United States, United Kingdom, and France. The IARA would resolve disputes, especially over the allocation of reparation shares that the Paris Conference could not resolve. In essence, this guaranteed the Big Three a veto power at Paris and, consequently, an affirmative allocation power via the IARA. While the motive for control of the allocation process was, in part, the relationship with the Soviet Union, the overriding concern was with the appropriate control policies toward Germany and their implementation.[72] The process of implementation over the next decade bears centrally on the theme of this study.

Mixed Claims Commission, United States and Germany, First Report (Bonynge) (1925)), those commissions established after World War II were creations of the Paris Reparations Agreement intended to deal with the conflicting restitution and reparations claims of the Western Allies as states, and only indirectly involved private claims. Agreement on Settlement of Indebtedness of Germany for Awards Made by the Mixed Claims Commission, Feb. 27, 1953, U.S.-F.R.G., 4 U.S.T. 1953. For a brief review, see Ernst Féaux de la Croix, *Interalliierte Reparationsagentur*, *in* 2 WÖRTERBUCH DES VÖLKERRECHTS 29-31 (Hans-Jürgen Schlochauer ed., 1961). A detailed legal-historical study of the Mixed Commission appeared only recently. *See* BURKHARD JÄHNICKE, WASHINGTON UND BERLIN ZWISCHEN DEN KRIEGEN (2003). However, contemporaneous reviews were published variously in the 1920s. *See e.g.*, Edwin Borchard, *The Opinions of the Mixed Claims Commission, United States and Germany*, 19 AM. J. INT'L L. 133 (1925).

69. The United Kingdom was apparently more concerned about the procedural if not the substantive rights of the smaller Allies. *See* FRUS-III, *supra* note 41, at 1313.

70. *See id.* FRUS-III, *supra* note 41, at 1389.

71. The Four-Power Allied Control Council continued to endeavor to establish those policies both during, and even after the failure of, the Potsdam Meeting (and the later Four-Power Foreign Ministers' London Meeting) to harmonize Soviet and Western positions on these matters.

72. This is the recurrent theme of the many exchanges between French, British, and American cabinet-level officials during the preliminary discussions that preceded the diplomatic conference that eventually led to the conclusion of the Paris Reparations Agreement. Paris Reparation Agreement, *supra* note 16. *See generally* FRUS-III, *supra* note 41, at 1169-1506.

The first outcome of 1945 was agreement on the style of the negotiations themselves and the forms of reparations. Reparations were framed as an interstate matter and individual losses and expectations of compensation were moved offstage, except to the degree domestic politics influenced state positions.[73] The second outcome was setting the stage for the eventual disappointment, over the next decade, of the smaller Allies' reparations expectations.[74]

The first ground for these outcomes lies in the decision of the Big Three, reflected in the Paris Treaty, to relegate the smaller Allies largely to German external assets marshaled in their own countries and in the neutral countries, such as Switzerland.[75] The second lies in the initial insistence of the Big Three on the exclusivity of the reparations arrangement reached at Paris. Angell, leader of the U.S. delegation, explained in the minutes of the Drafting Committee:

> [A]ll claims, of whatever nature, by a government for reparation from Germany are, in effect, consolidated into a single claim which has been considered at this Conference, and furthermore that the German reparation which is made available to each government in accordance with its agreed quota shall be the sole source of satisfaction of its consolidated reparation claim against Germany.[76]

A number of delegations, including the French, objected to this understanding of the relevant passage of the Agreement. They insisted that they had the right either to participate in the Allied Control Commission's later determination of the amount and duration of German reparation transfers, or at least participate in political negotiation of a "final reparation settlement."[77] The latter, which Angell felt was implied in the phrasing of the official text, became the leitmotif of the next decades. In particular, it resurfaced during the prolonged debate over the terms of the critical elements of the London Debt Settlement Agreement of 1953,[78] especially of the moratorium imposed on any further efforts to hold the Federal Republic or its private sector responsible for payment of any reparations

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73. Except for the United Kingdom's concern with the protection of its export markets from future German competition, domestic actors' concerns (in the modern parlance) were sublimated into more general national policies, especially the U.S. policy of fostering a postwar climate of a liberal international economic regime.

74. While it would not advance this narrative to provide the details of the bargaining structure or the arguments over percentage shares of the overall allocation (which was not finally determined by the Conference but by the coordinated work of the IARA and the Allied Commission on Reparations of the Allied Control Council), suffice it to provide the following example:

> Shares as proposed . . . [were] presented to Conference . . . . Serious objections were stated by delegates of Belgium, Albania, Luxembourg and Egypt . . . . Gutt spoke for Belgium . . . and demanded, as a minimum, a one percent increase in B category . . . . At subsequent meeting . . . the adjusted shares were presented after distribution of Canadian renunciation and a renunciation of 0.8% by South Africa . . . . The Belgian share was increased only 0.4% . . . . Gutt still remained obdurate and finally US, UK and France each reduced its share in category B by 0.15% so that Belgian share could be increased in total by 0.50% of which 0.10% was released to Luxembourg . . . . Additional 0.05% was released by US, UK and France to make possible increase of Greek share in total by 0.25%.

Report of Angell to Secretary of State, December 24, 1945, FRUS-III, *supra* note 41, at 1489-90.

75. Paris Reparation Agreement, *supra* note 16, at 3157.

76. FRUS-III, *supra* note 41, at 1479.

77. *Id.* at 1480.

78. *See* Agreement on German External Debts, Feb. 27, 1953, 4 Stat. 443, 333 U.N.T.S. 3.

outside the framework of the Agreement itself.[79]

At the Paris Conference, the objecting Allies were less concerned with the future of reparations than the fact that the allotments agreed to in Paris amounted to little more than recommendations to the IARA. The IARA's ability to enforce reparations was extremely limited because it was dominated by the three Western Occupying Powers. Any of the IARA's policy efforts would be subordinate to the Allied Control Commission's future plan of action, which included industrial *demontage* and restitution. Angell understood these concerns, and considered them justified.[80] His proposed response was to provide "that the acceptance of the reparation quotas by the various governments represented at the Conference shall be without prejudice to the rights which the signatory governments may have with respect to the final settlement of German reparations."[81] Some of the governments that later objected to the moratorium language of the London Debt Agreement, together with the French government that was still concerned about its concept of restitution, instead proposed a specific right to "present claim[s] against future German Government[s] for [the] unsatisfied balance of its total reparation claim."[82] This would have implied a yet-unspecified denominator in each case, one that would by definition involve the later reopening of arguments about relative shares. Even in the immediate context of Control Commission reparation determinations, the United States rejected direct participation of the objectors in that activity.[83] Angell's decision to exclude these countries had future repercussions on, specifically, their political participation in a final reparations settlement, which he advised the delegates was "implied in the phrasing adopted."[84] With this official gloss on the Paris Agreement, subsequent arguments that its terms included a waiver of future or further claims deprived it of much textual legitimacy.[85]

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79. *See id., supra* note 78, art. 5 at 14.

80. He reported to the State that these countries felt that:

> inasmuch as it is the Control Council, under the direction of the four occupying powers which in practice determines the forms, duration and total amount of German reparation, they are not prepared to renounce their reparation claims against Germany in advance of the actual receipt of their respective shares in the total amount of reparation to be made by Germany.

Note of December 18, FRUS-III, *supra* note 41, at 1479.

81. *Id.* This phrase, "without prejudice . . . with respect to the final settlement of German reparations," became the disputed term of art throughout the later era.

82. *Id.* at 1480.

83. *Id.* at 1478.

84. *Id.* at 1480.

85. This was the same result obtained by a different route. Those among the Allied negotiators who read the Potsdam Declaration as including this waiver, and the Paris agreement as implementing it, agreed that the failure to implement the Paris Agreement over the next five years negated the waiver as of that time. For a contemporaneous account of public international law principles as bearing on these waiver issues (in the context of the 1947 peace treaties with former Axis members), see G. G. Fitzmaurice, "The Juridical Clauses of the Peace Treaties," 1948:II Rec.Cours 255 (1948), at 339ff. The implications of this (not quite unanimous) consensus are discussed below. For the resonance and rejection of the waiver argument in U.S. courts, see, for example, the class action lawsuit Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 458 (D.N.J.

2. The Position of Individual Survivors and the Displaced Persons Community

At this earliest postwar stage, compensation for individual suffering, especially of those persecuted under the National Socialist regime, was only indirectly touched upon in the reparations negotiations. Relief for the multitudes of Displaced Persons was a major issue, especially for those who had been subjects of the Third Reich and those who could not or would not return to the devastated regions of their origin in Central and Eastern Europe. These groups were essentially stateless and could not expect to benefit, even indirectly, from the distribution of welfare benefits that the subjects of those Western Allies present in Paris might receive from the reparations paid to their states. The only reference to compensation of individual victims at this time was a comment by Secretary of State Byrnes to the U.S. delegation in Paris in early December when the final text of the Paris Agreement was under negotiation. Byrnes emphasized that the separate allotment for Displaced Persons (discussed immediately below) would not suffice to compensate victims fully. He added, in cablelese:

> [O]ccupying powers, United Nations (thru UNRRA and otherwise) and private charities thruout world recognize their obligations. Because reparations will consist largely of payments in kind and will leave Germany with economy capable only of paying for essential imports, Germany cannot be made to compensate in full victims of Nazi persecution who have left or will leave Germany. Proposal therefore is simply to add small amount liquid assets, which can be made available to supplement other arrangements. Restitution of property taken from victims of Nazi persecution will, of course, be made in Germany, but can hardly be expected to benefit refugees substantially.[86]

As a result of these sentiments, an ad hoc solution to the problem of statelessness and lack of representation was cobbled together in the weeks of the Paris negotiations; it was no more than an embarrassing sop to conciliate the demands of the Displaced Person's "community" and its representatives, especially those among Jewish relief organizations.[87] Nevertheless, the episode is important, both for why and how it occurred, and for what it established in the way of standing for non-governmental organizations to become subjects and actors within an evolving international regime. It therefore deserves to be described in some detail. At the same time, however, it needs to be separated from an impor-

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1999). The principal case dismissing the class actions brought in the 1990s, Burger-Fischer v. Degussa, 65 F. Supp. 2d 48 (D.N.J. 1999), deemed these state-exclusivity and waiver issues "revived" by later treaty and statutory actions that rendered the failure of the Paris Agreement moot. The court considered that the transfer of sovereignty to the new Federal Republic, requiring it to enact legislation to compensate victims of persecution, indicated acceptance by the U.S. government of the exclusivity doctrine. *Id.* at 273. This result should be seen in the larger context of the "political-question" non liquet abstention that led to the court's dismissal of all claims. For a litigator's critique of these courts' use of the historical record, see Stephen Whinston, *Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases*, 20 BERKELEY J. INT'L L. 160 (2002).

86. Cable of December 10, 1945, to Angell, FRUS-III, *supra* note 41, at 1452.

87. *See, e.g.*, Seymour Rubin & Abba Schwartz, *Refugees and Reparations*, 16 LAW & CONTEMP. PROBS. 377 (1951).

tant parallel argument concerning compensation for the Jewish victims of Nazism and its institutional implementation, even though both lines converged in Paris.

The first official broaching of the concept of using German assets to support the stateless refugees at Paris was a proposal sent to Angell by the State Department for preliminary discussion with France and the United Kingdom. Edwin Pauley was appointed by Truman as a kind of roving ambassador to work (or interfere) with the development and implementation of reparations policies before and after Potsdam. He made a proposal that probably arose from his direct observation of the problem of Displaced Persons in the U.S. Zone of Germany. After some policy disagreements about the implications that support of Displaced Persons would have for their eventual repatriation,[88] an agreement was reached to reserve a percentage of German external assets (principally those located in neutral countries, plus non-monetary gold)[89] for the support of this community. This was institutionalized in a parallel "Five Power Conference on Non-Repatriable Refugees," which convened in Paris later in 1946 to implement Part I Article 8 of the January Agreement; its members included France, the United Kingdom, the United States, Czechoslovakia, and Yugoslavia. Discussions with representatives of the American Jewish Committee present at the Conference resulted in limiting the concept of "non-repatriables" to those who had been in concentration camps.[90] This formulation met the concerns of delegates such as the Yugoslavs, who wished to avoid support of those of its subjects among the Displaced Persons who had been on the German or Royalist side.[91] Also, the absolute sum of $25,000,000, earlier proposed by Angell, was accepted more because it was considered a feasible amount to collect than because of its adequacy.[92]

Administration of the funds was left to the Inter-Governmental Committee on Refugees, which also had its plenary meeting in Paris, parallel with the Reparations Conference.[93] In a final proposal before the Conference moved to the

88. "[The] British are fundamentally opposed to plan on general ground that it may discourage voluntary repatriation and commit British to general aid for non-repatriables with attendant complications for British Palestine policy." Angell to State, FRUS-III, *supra* note 41, at 1438.

89. This poorly defined term has its own history. *See* ARTHUR LEE SMITH, JR., HITLER'S GOLD: THE STORY OF THE NAZI WAR LOOT 158 (1989), and an earlier review by Elizabeth B. White, *The Disposition of SS-looted Gold During and After World War II*, 14 AM. J. INT'L. L. 213 (1953).

90. Even this was protested by some formerly occupied country delegations, which feared it would give more to Displaced Persons than to persons injured in their home country during the Nazi occupation. FRUS-III, *supra* note 41, at 1451.

91. Representatives of these countries on the Inter-Governmental Committee on Refugees had veto power over distributions to such classes of persons. *Id.* at 1459.

92. *Id.* at 1437.

93. *Id.*; *see also* ELI GINZBERG, MY BROTHER'S KEEPER 74-75 (1989). Ginzberg, the U.S. Representative at this meeting, adds:

> [T]he British were unfriendly, since they had other ideas about the money (looking to use it as a down payment of their dues to the International Relief Organization) and were afraid that if the Jewish Agency and the Joint Distribution Committee were the beneficiaries it would put additional pressure on . . . [them] to issue additional immigration visas for refu-

horse-trading of allocation percentages and eligible assets among the state delegations, Angell added that "claims of individual refugees against [the] future German government were to be preserved."[94] That comment, too, has its own ties to the future.

While this aspect of the reparations arrangement began to support a group of persons who had no state to support them, nor a place to which they could reasonably be expected to return, its limitation to only concentration camp survivors changed the direction of the relief effort. This sum of $25,000,000, a sum considered "pitifully small" by the United States even then,[95] had been reserved originally for the rehabilitation of the stateless survivors gathered together under the rubric of Displaced Persons. In this context, a displaced person included former German survivors who were obviously not represented by a German state. Its redefinition of eligibility, however, meant that this Fund was primarily intended for Jewish persecutees,[96] as Seymour Rubin emphasized shortly thereafter.[97] In other words, those stateless (overwhelmingly non-Jewish) Displaced Persons who were the remnants of forced laborers brought to Germany during the war, and who did not return to their countries of origin, were not the focal point of this arrangement.

On the other hand, both groups, whatever the expected source of assistance, were from that point on the objects of public and private social welfare support. Although interest was limited, it was this support that engaged the Paris delegates, not the concept of compensation or restitution. In short, much of the early compensation efforts, including collective social welfare, took place in an international framework that saw the effort in terms of social welfare rather than compensation. The expected result of the special "external German-assets" collection effort, on the other hand, conceived as a way to assure a reasonable amount of reparations for the smaller Allies, foundered on the resistance of neutrals such as Switzerland. This postwar conflict between the Allies and the Swiss was an integral part of the reparations story, the significance of which would only be apparent later on. The failure to resolve that conflict in a politically satisfactory way bore indirectly on the reopening of victim-compensation

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> gees to enter Palestine .... The key to my successful negotiations were the Yugoslavs whom I sought out and who were acting as the leader of the Eastern bloc. Once they were assured that I had no intention of having any of the reparation money go to anti-Tito refugees, they were willing to go along with the U.S. proposals.

Id. at 75. Ginzberg's leading role in these repatriation discussions is confirmed in U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II, U.S. State Department Preliminary Study, 10468, 91-96 (1997) [hereinafter USDS-I].

94. FRUS-II, *supra* note 32, at 1450.

95. Rubin & Schwartz, *supra* note 87, at 379 n.11.

96. On the other hand, it also was a brute fact that a very substantial portion of the non-repatriable Displaced Persons (at least in the U.S. Zone) were Jewish. USDS-I, *supra* note 93, at 95. Thus, the redefinition did not so much ignore the non-Jewish Displaced Person's as narrow that small component to those who had suffered racial, religious, and political persecution rather than those who were held in wartime Germany or who made their way to the Western zones of Germany in the aftermath of the war.

97. Rubin & Schwartz, *supra* note 87, at 379.

issues with Swiss governmental and financial institutions, even in the 1990s.[98]

Presently, two other points are important to note. The first, necessarily implied in the above account, is that the redefinition of the stateless population brought with it, for the first time, the important distinction between forced (non-incarcerated) laborers and slave laborers. The second is to highlight the connection between this special fund and the efforts of the representatives of European Jewry to gain standing to claim these and possible later funds to help resettle the few survivors of wartime extermination programs, whether in Israel or in the Diaspora, and to help revive Jewish religious and communal institutions in the liberated regions.

3. The Position of Jewish Organizations and the Jewish Agency of Palestine

Representatives of Jewish organizations attended the Paris talks as observers, and were finally heard in early postwar Washington following the U.S. government's relative neglect of their voices and concerns during the prosecution of the war. On September 12, 1945, Nahum Goldmann, U.S. Representative of the Jewish Agency for Palestine, presented a letter from the Agency President, Dr. Chaim Weizmann, to Dean Acheson, Under Secretary of State, for consideration at the impending Paris meeting.[99] It was the first formal presentation of its expectations "as the representative of the Jewish people."[100] Excerpts from this document were important signs of the future relationship between this precursor to the State of Israel and the entire reparations and compensation regime of the future:

> The first declaration of war by Germany . . . was made against the Jewish people . . . . Its aim was . . . the complete physical extermination of the Jews, the utter destruction of their spiritual and religious heritage, and the confiscation of all their material possessions . . . . This war against the Jews has created a three-fold problem—of reparation, of rehabilitation, and of restitution.
>
> Of the surviving Jews of the European Continent, some may desire to settle in their countries of origin, and some to seek a new life in other countries of the Diaspora, but the vast majority desire to make their permanent home in Palestine. Such assets as may be recovered by way of indemnification . . . for Property confiscated or destroyed, or deposited and rendered available by the extinction of ownership, for the several purposes of Jewish rehabilitation should be applied to all these tasks [of reparation, of rehabilitation, and of restitution]. In so far as they are applied to the settlement of Jews in Palestine, they should be placed under the trusteeship of the Jewish Agency for Palestine.
>
> But the means likely to be derived from this source will fall far short of what is needed for the rehabilitation of Jews anxious to settle in Palestine. The main part

98. A separate presentation of these issues is planned for future publication. The most direct link, of course, lies in the fact that the Paris Agreement also called separately for the collection of non-monetary gold and heirless assets in neutral countries. Again, this primarily involved Switzerland, and, to a lesser extent, Sweden, Spain, and Portugal.

99. FRUS-III, *supra* note 41, at 1302-05.

100. *Id.* at 1302.

> of the funds for this purpose should, in justice, be provided from the reparations due from the enemy states for the infinitude of murder, suffering and destruction which they have inflicted on the Jewish people. . . .
>
> It is therefore submitted that a proper percentage of the reparations to be obtained from Germany should be allotted for the purpose of the resettlement in Palestine of Jewish victims of racial and religious persecution, and granted, in the form of suitable assets (e.g., plant, machinery, equipment, and materials), to the Jewish Agency for Palestine, as the body charged by international authority with the duty of developing the Jewish National Home.[101]

Weizmann's proposal was the product of two strands of contemporary discussion within Jewish circles. These discussions had begun, some private initiatives aside,[102] in 1941 when the full scale of Nazi aims for the social and economic, if not yet physical, extermination of Jewish life in Europe became clear.[103]

At this time, the new Institute of Jewish Affairs of the World Jewish Congress developed a fact-finding program and an initial argument for direct compensation by postwar Germany for material losses.[104] Under classic principles of public international law, this would have depended on each European state's representation of its Jewish subjects; in other words, these losses would have been part of an overall reparations demand.[105] For the German Jews, the earliest group persecuted, this would have presented an anomalous situation in traditional interstate relations.[106] This fact was recognized by those working on this issue, who understandably turned to other, newer concepts that would justify direct claims. At roughly the same time, Palestinian Jews who had been involved in the prewar negotiations with Third Reich agencies controlling capital transfers from Germany by German Jews immigrating to Palestine, began to work on future restitution issues. They recognized, according to Nana Sagi, three relevant factual situations and the institutional problem of their resolution:

> [I]ndividual property for which claims could be made; individual heirless property; and property of Jewish communities and organizations that had been destroyed and for which it was not possible to make any claims. [Schreiber] also called attention to the fact that . . . a Jewish organisation that could appear before the respective authorities as the official claimant of the Jewish people for its lost properties [had not] been established.[107]

The Palestinian Jews also appreciated and debated the question of representation and made clear distinctions between the losses suffered by Jewish (former) subjects of Germany and similar losses by individual victims and Jewish communal institutions in other countries.[108] In particular, the issue of direct standing to

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101. FRUS-III, *supra* note 41, at 1303-05, 1437.

102. NANA SAGI, GERMAN REPARATIONS: A HISTORY OF NEGOTIATIONS 14-15 (1980).

103. The following review relies heavily on the work of Nana Sagi. *See* SAGI, *id.* at 102.

104. *Id.* at 21.

105. *See, e.g.*, HUGO MARX, THE CASE OF THE GERMAN JEWS VS. GERMANY (1944).

106. SAGI, *supra* note 102, at 16 (quoting comments made by Nahum Goldmann at that time); *see also* NAHUM GOLDMANN, AUTOBIOGRAPHY: SIXTY YEARS OF JEWISH LIFE 216 (1969).

107. SAGI, *supra* note 102, at 16.

108. SIEGFRIED MOSES, JEWISH POST-WAR CLAIMS 411 (Wolf-Dieter Barz ed., 2001).

present claims involved a bitter irony due to the internally divisive role Jewish organizations played in the formulation of the specifically Jewish elements of the Minorities Treaties negotiated before and upon the conclusion of World War I.[109] While reluctantly adopted and substantially failing in later implementation,[110] these treaties, and some domestic legislation, accepted some guarantees of religious freedoms of worship, education, and partial civic autonomy in Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia.[111]

These treaties provided both Jewish and linguistic-minority groups limited standing to report violations to the League of Nations committees. However, recourse to the permanent court's advisory and the obligatory jurisdiction was limited to states, including, as was essential for even rudimentary protection of state minorities, third states.[112] Indeed, based on this mix of provisions and on the British Palestine Mandate,[113] a considerable discussion ensued during the pre-1933 interwar years as to the status of the "Jewish people" (*das jüdische Volk*) as right- and duty-bearing subjects of public international law.[114]

Nonetheless, Jewish organizations present at these conferences did not press for the addition of Jewish minority rights to the linguistic-minority rights Germany accepted in the Versailles Treaty. Imperial Germany had earlier been seen as a guarantor of Eastern (Russian) Jewish civil, political, and religious rights during World War I, so much so that this was a concern of the Allies be-

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109. For a recent history of the intra-Jewish aspect of the Versailles-era negotiations, see MARK LEVENE, WAR, JEWS, AND THE NEW EUROPE 284-302 (1992).

110. For more about the Treaties and their minimal influence on the political developments during the interwar years, see JACOB ROBINSON ET AL., WERE THE MINORITIES TREATIES A FAILURE? (1943). A more optimistic but earlier assessment, emphasizing the relatively assertive role of the Permanent Court of International Justice, is given by HERSH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 72 (1934). For the current echo of this period, now at the regional rather than international level, see the review of similar controversies in Gaetano Pentassuglia, *Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee*, 46 GERMAN YB INT'L L. 401 (2004).

111. *See* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, at 440-41 (1943).

112. For a contemporaneous review of the sparse case law, see Nathan Feinberg, *La Juridiction et la Jurisprudence de la Cour Permanente de Justice Internationale en Matière de Mandats et de Minorités*, 59 REC. COUR 587 (1937). Especially interesting is a case most analogous to Jewish issues, Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64, requiring absolute rather than only national treatment of Greek Christian schools in Albania after the latter closed all private schools.

113. For a general overview of this Mandate, see DAVID FROMKIN, A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST (2001).

114. *Compare* Hugo Wintgens, *Der völkerrechtliche Schutz der nationalen, sprachlichen, und religiösen Minderheiten*, *in* II:8 HANDBUCH DES VÖLKERRECHTS 279 (1930) *with* GEORG LANDAUER, DAS GELTENDE JÜDISCHE MINDERHEITENRECHT MIT BESONDERER BERÜCKSICHTIGUNG OSTEUROPAS 54 (1924). Wintgens describes this as the first debatable instance of this extension in classic public international law; thus, we might indeed trace the Weizmann proposal directly and not only symbolically back to the Versailles context. Not surprisingly, this congeries of issues has come again to the attention of contemporary writers. For both her own treatment and her review of other recent works, see CAROL WEISBROD, EMBLEMS OF PLURALISM 119-37 (2002).

fore the United States entered the war.[115] Under the circumstances, German Jewish political organizations saw no reason to accept the "stigma" of minority classification in Germany.[116] It probably would have made no difference in the end,[117] just as, in the converse situation, the imposition of the bitterly resented Minorities Treaties in countries that later were Axis members did not seem to affect whatever limited protection they offered their Jewish subjects against Nazi deportation and extermination programs.[118] The only case in which treaty-based protection made even a temporary difference was Upper Silesia. Articles 66-72 of the May 1922 post-plebiscite Agreement between Germany and Poland concerning the German region, copied from the relevant Articles 1, 2, and 7-12 of the analogous protective provisions of the 1919 Allied-Polish Minorities Treaty, protected Silesian Jews from measures of discrimination based on religion.[119] Only after the expiration of that Agreement in 1937 did the racial measures of the German Reich become applicable to Silesian Jews.[120]

In any event, these issues depended upon a new approach that Siegfried Moses, a leading figure in the Association of Central European Immigrants in

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115. *See* LEVENE, *supra* note 109, at 175-76.

116. Responding to reports that a German Jew had appealed to the League of Nations in 1933 to challenge the initial discriminatory legislation of the new National Socialist regime, the President of the League of Jewish Combat Veterans [Reichsbund Jüdischer Frontsoldaten] wrote the Chancellor, Hitler, assuring him that:

> in the name of the Jewish combat veterans I reject, with the utmost sharpness, any solution of Jewish questions that might lead us out of the society [Verband] of the German nation. I raise particular objection to the involving of foreign political groups in the handling of inner-German Jewish questions.

Letter of Bundesvorsitzender Löwenstein, May 23, 1933, *reproduced in* KLAUS J. HERRMANN, DAS DRITTE REICH UND DIE DEUTSCH-JÜDISCHEN ORGANISATIONEN 1933-1934, 156 (1969); *see also* Marcus Funk et al., *Was It All Just a Dream? German-Jewish Veterans and the Confrontation with Völkisch Nationalism in the Interwar Period, in* SACRIFICE AND NATIONAL BELONGING IN TWENTIETH-CENTURY GERMANY (2002) (providing a sense of the context in which this response should be understood).

117. For succinct current overviews of the fate of this entire effort at Versailles, see Capotorti, *Minorities, in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 410 (Bernhardt ed., 1997); PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 38-54 (1991).

118. The important cases to examine from this perspective would be those of Hungary and Romania, as nominally independent Axis members. *See* RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 485, 509 (1985) (providing a classic overview of both countries' experiences). On Romania, see THE DESTRUCTION OF ROMANIAN AND UKRAINIAN JEWS DURING THE ANTONESCU ERA (Randolph L. Braham ed., 1997); Irina Livezeanu, *The Romanian Holocaust: Family Quarrels*, 16 E. EUR. POL. & SOC'YS 934 (2003). On Hungary, see generally RANDOLPH L. BRAHAM, THE POLITICS OF GENOCIDE: THE HOLOCAUST IN HUNGARY (1994). Bulgaria's is a different story, since the Holocaust did not rage there. *See* FREDERICK B. CHARY, THE BULGARIAN JEWS AND THE FINAL SOLUTION, 1940-1944 (1972).

119. 16 Martens Nouveau Recueil (ser. 3), 668-73.

120. On the complaint of one of these German-Silesian subjects, Franz Bernheim, an ad-hoc Legal Committee of the League Council recommended acceptance of his argument that the application of the new racial legislation of Germany in Upper Silesia violated his treaty rights. This resulted in a formal finding of violation (and a remit to assess damages) against Germany at the June 6, 1933 session of the League Council. The two German statutes bracketing this period, Law of June 11, 1922, RGBl. II at 237, and Law of June 30, 1937, RGBl I. at 717, are briefly discussed in "Die Sonderstellung der Juden in Oberschlesien Zwischen 1933 und 1937," I Gutachten des Instituts für Zeitgeschichte 87 (1958).

Palestine, developed. His political views, gathered in a recently reprinted 1944 publication,[121] adumbrated almost all of the issues that were aired during the early postwar years and that culminated in the Luxembourg Agreement of 1951. A postwar student's review of his role makes this clear:

> Indeed, the crystallization of postwar Jewish claims owed much to this booklet, which covered all the most important features of the claim submitted eight years later by the State of Israel: the Jewish claim as an innovation in international law; the collective claim regarding heirless Jewish property and in respect of the damage inflicted on the Jewish people; payment of compensation by Germany in the form of commodities for the development of Palestine; [and] the establishment of a Jewish umbrella organization to represent world Jewry in its claims for reparation from Germany.[122]

Most significantly, Moses argued that for both heirless and communal claims, the Jewish Agency representing the Jewish community of Palestine was the appropriate international organization to present claims.[123] This publication "played no small part in encouraging Dr. Weizmann to present the Allies with the [September] 1945 statement of Jewish claims."[124] Moreover, his book helped to clarify the position of Jewish survivors as a subset within the group of Displaced Persons. It also helped obtain the Conference's creation of the (inadequate) separate fund for their rehabilitation, thus legitimating the connection between rehabilitation and migration to Palestine.[125]

The issues concerning the support of Jewish survivors returning to their home countries or emigrating to countries other than Palestine, and the separate issue of supporting the reconstruction of Jewish religious and communal organizational life in the Diaspora, was emphasized in a parallel program carried out by the Institute of Jewish Affairs under the leadership of Dr. Nehemiah Robinson.[126] This approach, along with that of Siegfried Moses and an additional project commissioned by the Jewish Agency in 1943 and presented to its Executive in April of 1945,[127] comprise the essence of the Weizmann Proposal.

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121. MOSES, *supra* note 108, at 7-80 (summarizing the proposed approaches). For background on Moses, see the introduction of the work. *Id.* at xvii (Heuberger's Bio-bibliographic Appreciation Section).

122. SAGI, *supra* note 102, at 20.

123. MOSES, *supra* note 108, at 80.

124. SAGI, *supra* note 102, at 20 (citing the oral history of Gershon Avner, Secretary of the Government of Israel's Delegation to the 1950 Oudkasteel Conference that led to the Luxembourg Agreement between Israel and the Federal Republic of Germany).

125. One other aspect of this interwar history as it bore on legitimating the Jewish Agency for Palestine as representative of its Jewish community, however, also should at least be mentioned: its role in working with the early (i.e., pro-emigration) National Socialist regime to establish the financial basis of Jewish emigration from Germany to Palestine—the Haavara Transfer scheme. For a full review, see SAGI, *supra* note 102, at 16; WERNER FEILCHENFELD ET AL., HAAVARA-TRANSFER NACH PALÄSTINA (1972).

126. *See generally* NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS – JEWISH ASPECTS (1944). This program was a notable exception to the otherwise modest public demands of U.S. Jewish organizations; see the critical comments to that history in Schalom Adler-Rutel, *Aus der Vorzeit der kollektiven Wiedergutmachung*, *in* ZWEI WELTEN [FESTSCHRIFT SIEGFRIED MOSES] 200, 209 (Hans Tramer ed., 1962).

127. SAGI, *supra* note 102, at 26-27.

Thus, these early initiatives indirectly but clearly laid the foundation for the eventual structure of the Luxembourg Agreement between Germany and Israel, and its pendent Protocol with the new Diaspora umbrella organization, the Conference on Jewish Material Claims Against Germany.[128] While Weizmann only represented the Jewish Agency for Palestine,[129] the U.S. delegation's simultaneous presentation of the Displaced Persons program in Paris brought these two strands into a common political discourse.

III.
THE PARIS REPARATIONS AGREEMENT

From the issues of individual expectations and stateless person claims we now return to the chronology of events and disputes that the Paris Treaty engendered. The formal conclusion of the Paris Agreement depended on a number of remaining issues: the horse-trading of allocation shares, the assignment of separate reparations expected from the lesser Axis Powers to those Allies that had been occupied or otherwise detrimentally affected by the former, the final drafting of the earlier-reviewed institutional mechanism that ensured retention of real power over reparations and their allocation to the Occupation Powers, and finally, the (incomplete) specification of the procedures for pursuing German assets in neutral countries for both the Stateless and Displaced Persons and some of the Allies.

The Paris Agreement established three separate reparation tracks.[130] First, specific assets found in the Western Zones of Germany were subject to return to any signatory country that could prove that it or its subjects had had a significant financial interest in either the particular asset or group of similar fungible assets. These returned assets would be charged against that country's percentage allocation of real assets (or their monetary value if liquidated) granted under the agreement.

The allocation of non-restitutable assets comprised the second track, and consisted of two types of assets. One, category (B), was industrial (productive capital) equipment taken from Germany, as well as German merchant ships and inland water transport, all under the decision-making authority of the IARA that was itself subject to the actual asset removal determinations of the Allied Control Council. The other, category (A), consisted of all other assets, the principal component of which was German external assets located in neutral and signatory Allied countries. This category also included dwindling and eventually il-

128. Luxembourg Treaty with attached Protocol on Jewish Claims, Sept. 10, 1952, 162 U.N.T.S. 205 (1952).

129. Weizmann did so at a time when the possible creation of the State of Israel still was vigorously opposed by the United Kingdom. *See generally* CHAIM WEIZMANN, TRIAL AND ERROR: THE AUTOBIOGRAPHY OF CHAIM WEIZMANN (1949).

130. Paris Reparations Agreement, *supra* note 16, at 3191. It was in the form of an Executive Agreement, a point that recently became a major pillar of the majority opinion in American Insurance Association v. Garamendi, 539 U.S. 396, 403 (2003); *see also* LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 15-16 (1986).

lusory assets such as deliveries from the Soviet Zone to the West.[131] At one point, the United Kingdom argued that the value of forced labor by German prisoners of war held after the termination of hostilities should also be included as a debit against the benefiting country's allocation; this focused primarily on France, which claimed the right to require this service, and exercised it until 1947.[132] Not surprisingly, a bitter and sensitive political battle erupted over this proposal, and the United States finally sided with France in rejecting this category, though under the condition that they hasten repatriation of these prisoners of war and that they be exempt from performing any dangerous service such as mine clearing.[133] Finally, it is important to recall that, of the above outlined German external assets, $25,000,000 was set aside to support the stateless victims of Nazism. The third track involved gold looted by or wrongfully removed from the occupied countries by Germany during the war.

Finally, the Axis members and co-belligerent Finland were to pay some reparations, but only to specific victim-states, pursuant to the Peace Treaties that the Paris Agreement anticipated. The treaties were signed in 1947 by Bulgaria, Finland, Hungary, Italy, and Romania. Austria, which came into the enjoyment of victim status for reasons not immediately obvious, is a different story. Its Treaty of Peace was signed in 1955, when its unique quasi-occupation status by the Western Allies and the Soviet Union ended, and did not require it to make general reparation payments (as distinguished from restitution of identifiable property found there after the war).[134]

Thus, from January 1946 to mid-1949, three collection efforts took center stage. The first process implemented the smaller Western Allies' effort to collect their share of reparations. In particular, searching for identifiable assets located in the Western Zones to which a plausible claim of direct restitution could be made. The second involved the search for German monetary gold[135] looted by German occupation forces, which was to be shared by all Allies under the monetary-pool arrangement.[136] The above efforts were also intended to imple-

131. Paris Reparation Agreement, *supra* note 16, at 3157.

132. FRUS-III, *supra* note 41, at 1382-83; *see also* Treaty of Peace with Bulgaria, Feb. 10, 1947, art. 26, 61 Stat. (2), 41 U.N.T.S. 21; Treaty of Peace with Hungary, Feb. 10, 1947, art. 30, 61 Stat. (2) 2065, 41 U.N.T.S. 135; Treaty of Peace with Italy, Feb. 10, 1947, art. 77, 61 Stat. (2), 49 U.N.T.S. 3; Treaty of Peace with Romania, Feb. 10, 1947, art. 28, 61 Stat. (2) 1757, 42 U.N.T.S. 3.

133. For an account of the retention of German POWs in France and the relatively late date of their release, see Kurt Willi Boehme & Horst Wagenblass, *Die deutschen Kriegsgefangenen in französischer Hand*, *in* 13 ZUR GESCHICHTE DER DEUTSCHEN KRIEGSGEFANGENEN DES ZWEITEN WELTKRIEGES (Erich Maschke ed., 1971).

134. For a review of Austrian compensation of its own persecuted subjects, including the recent legislation enacted in consequence of United States-Austrian negotiations, see Eric Rosand, *Confronting the Nazi Past at the End of the 20th Century: The Austrian Model*, 20 BERKELEY J. INT'L L. 202 (2002).

135. For a definition of this category, see the Paris Reparations Agreement, *supra* note 16.

136. The related search for non-monetary gold and similar valuables (so-called victims' gold) belongs to the implementation story and thus to later review. The disposition of German private sector assets, whether located in Allied countries and frozen there by wartime legislation, or frozen in neutral countries under similar legislation, is also a separate issue, though it overlaps to some degree with the searches called for by the Paris Agreement.

ment the promise to support the redefined Displaced Persons communities through the collection of assets that, as categories, coincided with those being sought by the smaller Allies as reparations. Third, there was an effort to procure German private-sector assets in neutral and Allied countries.

The fruits of those efforts were an important prelude to the next stage of the postwar story—the expansion of reparations, restitution, and compensation claims to encompass private claimants, and the resolution of prewar debt claims and postwar state occupation-cost claims. In a subsequent article I provide the separate treatment this issue requires. There I argue that the emphasis on settling prewar debts of the Reich to foreign creditors led to the absolute ban on state as well as private claimants' further efforts to achieve payment of reparations and compensation. The removal of the litigation barrier after the unification of Germany in 1990 revived the efforts of private claimants[137] to achieve their long-deferred compensation for old losses in the entirely new political and legal climate of the 1990s.

CONCLUSION

This article reviewed the legal and political nature of the ground rules the Allied Occupation Powers created to serve as the underlying basis for the actual effort to collect reparations. The implementation of those rules during the period before both East and West Germany regained sovereign status in 1949 is by and large anticlimactic. The major powers took what they wished, although somewhat constrained, especially with regard to the United States, whose view of the repercussions of reparations overshadowed other powers' considerations. The formerly occupied Allied governments (other than France)[138] searched for identifiable and restitutable assets,[139] while pursuing their increasingly frustrated hopes of participation in the reparations allocations of German and Axis public and private property. This aim was further frustrated in increasing degree by the policies of the United States.

The narrative of the Paris Agreement's implementation is accompanied by a different component of interstate reparation claims. It began in 1950, when the major Allies' claims to reimbursement of their postwar expenditures, and the perceived need to resolve Germany's prewar public debts to its lenders, led to the London Debt Agreement of 1953. The 1953 Agreement not only brought in

137. The reparations claims of states unsatisfied at the time of the London Debt Agreement were largely satisfied by a number of bilateral reparations agreements the Federal Republic of Germany, in the healthier economic climate of the 1960s, entered into during that decade.

138. Standing marginally under their governments' umbrellas, some private parties did so as well.

139. A particularly good example is that of the Government of the Netherlands seeking to increase its allocative share of the gold pool by claiming full restitution (or equivalent compensation) of ingots looted by German occupation forces and transferred to Italy as a result of wartime transactions with Germany and Sweden, respectively, under the Italian Peace Treaty. The claim was rejected, and the Netherlands limited to its share of the pool. *See* The Case Concerning Gold Looted from the Netherlands, 44 I.L.R. 448 (Decision of the Italy-Netherlands Conciliation Commission of August 17, 1963) (1972).

its wake yet another era of interstate reparations, but also a set of bilateral (West) German treaties with each state that raised such claims. Interstate reparations stretched through another decade, and were followed in the 1970s by new interstate discussions with the socialist countries of Central Europe.

More importantly, however, the 1953 Agreement also set the stage for four decades of instability between Germany and the millions of victims seeking compensation for the wrongs inflicted on their person and property during the reign of the Third Reich. A variety of confrontations and negotiations persisted throughout those years, taking a sharp turn with the unification of Germany in 1990, but only after the litigation of the 1990s and the creation of the described foundation did some sense of closure arrive. [140]

140. Indeed, this Agreement has now become one building block leading to the majority opinion in American Insurance Association v. Garamendi, 539 U.S. 396, 403-05 (2003); *see also* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 48 WM. & MARY L. REV. 825 (2004).

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The Historian and Holocaust Restitution: Personal Experiences and Reflections

Gerald Feldman

The Historian and Holocaust Restitution: Personal Experiences and Reflections

By
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Before turning to the subject at hand, I would like to express my appreciation to the Alexander von Humboldt Foundation for making this wonderful year possible, for organizing this symposium, and for inviting me to speak to so distinguished an audience. I find myself in the odd situation of being the only humanist-social scientist among the four speakers and the only person who is working on Germany and Central Europe. As is so often the case, historians feel themselves a bit like impostors when they are referred to as "scientists." And while for good historical reasons that can be explained—both natural scientists and scholars of the humanities and social sciences are all referred to as Wissenschaftler in German—some find what we have to offer more akin to "unorganized soft matter" than to "real science." Nevertheless, historians often do deal with problems of very contemporary relevance that affect us all and become involved in political issues and debates, and this has been the case with myself during the past decade. I have a special interest in German business history, a field that has been at the center of recent efforts to deal with the problems of the role of business in the National Socialist dictatorship between 1933 and 1945 and with the questions of restitution and compensation for Jews—but not only Jews—for property and various assets stolen by the Nazi regime and for forced labor. Historians do not normally become involved in such "hot" issues directly—the Owl of Minerva, in Hegel's famous phrase, normally being heard at sunset—and I thought it might be of interest to discuss some of my experiences in the "real world" of a historian suddenly caught up in these emotionally charged and highly political issues.

As some of you may know, the issue of Holocaust assets came to the fore in 1996-1997 thanks to charges emanating from Jewish groups angry about unpaid Swiss bank accounts, the mobilization of the U.S. government to put pressure on the Swiss to open their banking files, and the mobilization of various American legislative and regulatory authorities to put the heat on the Swiss. The

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issue rapidly exploded beyond Switzerland and beyond banks to include practically all of Europe and, of course, Germany in the effort to investigate, locate, and restitute stolen Jewish assets, an effort now made possible by the availability of the archival materials previously behind the Iron Curtain but also the demand that private companies open up their archives as well. One government after the other set up commissions of historians to investigate these issues and individual firms felt impelled to make their documents available to historical researchers. Deutsche Bank, Dresdner Bank, and Commerzbank, for example, have set up such commissions, and Krupp, Degussa, Bertelsmann, and many other companies have commissioned historians to look into their past during the National Socialist period. It has been an unparalleled work creation program for historians, and it has led to an explosion of new knowledge and a transformation of our understanding of how the Nazi economy functioned and how Jews were robbed in the Nazi period throughout Europe. While the public interest in this subject has now probably peaked thanks to the settlements with the victims and the reports of some of the larger national commissions that have been completed, a great deal of new information and important new insights are going to be made available in the next couple of years and new problems are going to arise in connection with restitution.

My major involvement with the historical investigation of business in the Third Reich has been the production of a book on the Allianz Insurance Company in the Nazi period that was published in 2001 and had been commissioned by Allianz.[1] In this instance, I was a commission of one, although I did benefit greatly from the help of a team of young historians in the research and in the organization of research materials. This was a commissioned history rather than the work of a historical commission. Nevertheless, I have also been involved directly and indirectly with more collective efforts and commissions, since I am the Chairman of the Bank Austria/Creditanstalt Independent Historical Commission to write the history of the big Austrian banks in the National Socialist period, a member of the Deutsche Bank Historical Commission, a member of the Advisory Council of the Dresdner Bank Historical Commission, have served as an advisor to the Presidential Commission on Holocaust Assets in the United States, and have served or will serve as a reviewer of the commissioned histories of a number of companies. I have also reviewed manuscripts for the Swiss Bergier Commission and have worked with members of the Austrian Commission. I am also on the advisory council of the history of the Deutsche Forschungsgemeinschaft. I am not presenting this list for the purposes of bragging, or advertising my services, or demonstrating my inability to say "no," but rather to set the background for my discussion of the things that can happen to a historian who becomes involved in a hot political issue to the extent that I have.

But let me now go back to the beginning and recount some of the more

[1] GERALD D. FELDMAN, ALLIANZ AND THE GERMAN INSURANCE BUSINESS, 1933-1945 (Cambridge; New York: Cambridge University Press, 2001).

relevant of my experiences, beginning with Allianz. I was asked to consider writing this history of Allianz in the National Socialist period in the spring of 1997. Allianz had done very little about its history prior to that time, even though it is Germany's largest and most important insurance company. In 1990, it commissioned a history to celebrate its centenary filled—as is so often the case with such productions—with self-praise, numerous pictures, and a presentation of its role in the Nazi period as an organization that did the best it could to resist the Nazis. While it is necessary to note that the leadership of Allianz in 1997 was unhappy about this history and thought that more should have been done to deal with the National Socialist period, there was no intimation that there was any intention to do anything about the matter until the spring of 1997, when one of the directors called me and asked if I would be interested in doing such a history, either as the leader of a team of historians or by myself. The reasons for wanting to commission such a work were quite straightforward. On the one hand, Allianz, which has important holdings in the United States, was being sued for allegedly failing to fulfill its obligations to its Jewish customers or their heirs. On the other hand, documents were found showing that Allianz had insured the facilities of SS-owned factories in the concentration camps and this had been reported in the Spiegel. Obviously the concern was that Allianz had been more involved with the Third Reich than previously realized. Furthermore, its general director from 1921 to 1933, Kurt Schmitt, was Hitler's Second Reich Economics Minister from June 1933 to June 1934 and made a practice of wearing his honorary SS uniform, while another of its directors, Eduard Hilgard, was head of the Reich Group Insurance, which acted as the link between the insurance industry and the regime. In any case, it now appeared not only historically desirable but also politically important for the management of Allianz to have as full and accurate an account as possible of its role in the National Socialist period.

The reasons why Allianz asked me to do the job were fairly obvious. My scholarly work was well known in Germany and the United States, and I was experienced in business history. Certainly the fact that I am an American was important since much of the "inspiration" for the historical work being done on German enterprises was emanating from the U.S. Finally, the fact that I am Jewish undoubtedly played a role and would presumably add to the credibility of whatever I produced.

In the course of my negotiations, I was very insistent that my task be viewed as that of an independent historian of the company during the period in question and not as someone engaged in actual restitution work, be it the discovery of uncompensated insurance policies or investigating individual cases of current concern. I was willing and, indeed, considered it important to describe and analyze the ways in which Jewish insurance assets were confiscated and to provide a description and analysis of the restitution after 1945, insofar as it took place, but I did not want to become involved in current cases and debates. Allianz accepted this approach and indeed accepted all the conditions I laid down. Since the situation seemed right—Allianz offered me as much assistance as I

needed in finding materials, collecting them, and organizing them and complete independence in the presentation of my findings—I decided to take on the task.

Let me just conclude this part of my remarks by saying that Allianz has indeed done everything possible to help me and actually supported the building-up of an archive to compensate for the materials lost in Allied bombing raids and they also provided me with a first-rate research team. At no time did they ever interfere negatively in any aspect of my work or try to influence my findings.

This is not to say that I enjoyed anything like undisturbed scholarly seclusion in my work. The fact that I had undertaken this project hit the press almost immediately because Allianz publicized the fact. It was perfectly proper for it to do so, but it meant that while the company left me in peace, others did not. To begin with, people began contacting me, and they continue to contact me about insurance policies or the insurance policies of their relations, so that I was regularly called upon to refer them to where they might get some help. Far more important, however, was that I simply could not be oblivious to public priorities in defining my research agenda. In December 1997, for example, I was invited as an "expert" attached to the U.S. delegation at the London Gold Conference. Since insurance was not an issue at the conference but the entire event looked very interesting, I decided to go. What I discovered, however, was that insurance was on the agenda for the next international conference in Washington. scheduled for December 1998, and on the last morning about 45 minutes before the last plenary session, I was suddenly asked by U.S. Undersecretary of State Stuart Eizenstat to make a brief statement on insurance as a Holocaust assets issue. Since I had not even begun my research in any serious way at this point, I was in an extraordinarily difficult position and produced a "statement" that was as general and uninformative as possible but was nevertheless somewhat misleading because it suggested that insurance assets were far more significant as a restitution problem than they really were.

In any case, while the normal way to research and write a company history is to begin with the company structure and its leadership, my initial research focused almost entirely on the problems of the confiscation of Jewish insurance assets and on the insurance implications of the Pogrom of November 1938. Thus, by November 1998, I was in a position to write an article on the insurance issue for the F.A.Z. (Frankfurter Allgemeine Zeitung Daily) and then to make presentations at the Holocaust Assets Conference in Washington, D.C. the following month, on which occasions I actually knew what I was talking about. I had willy-nilly become the world's expert on these matters, which was not very difficult since I had no competition at the time.

Whether my historical findings and analysis were terribly welcome to claimants and their lawyers, above all in the case of German claimants, is another question. What I discovered was that the confiscation of insurance assets was embedded in the expropriation of a host of other assets, from real property to pots and pans. In general, the Reich could do nothing with life insurance policies per se since a life insurance policy is an asset only to the holder and his or her beneficiaries and its value depends on the continued payment of premi-

ums and the appreciation of the policy's value. Both policyholders and insurance companies had an interest in keeping policies in force so as to maximize their returns, while the Nazis were anxious to force Jews to repurchase their policies so that they could steal their money. The problem for Jews in Nazi Germany during the 1930s was that they found it harder and harder to hold on to their insurance investments because of loss of income, the costs of emigrating, and the various taxes and impositions they confronted. The problem became extreme after the November 1938 Pogrom against the Jews, when huge tax burdens were placed upon them and the combination of increased disabilities and terror made them seek to leave Germany as soon as they could. As a result, there was a huge effort to monetize their insurance assets. Insurance companies had no choice but to pay out, which was precisely what the regime wanted them to do so that the authorities could expropriate the money by one means or another. What this meant, in effect, however, was that the insurance companies had discharged their obligation to their Jewish customers. What was subsequently done with the money was of no account to the insurers. In short, in this situation, the confiscation of insurance assets, insofar as it occurred, was indirect. The insured person received his money, and the State then robbed him of his money from this and any other source it could. The record shows that most Jewish insurance assets were lost in this manner and especially between 1937 and 1939. A substantial number were later lost by the 11th decree to the Reich Citizenship Law of November 1941, which required the insurers to turn over the repurchase value of Jewish policies to the Reich. This was a direct confiscation of Jewish assets, although its implementation was difficult because it was hard to identify who was Jewish and who was not and both the insurance companies and the Gestapo lacked the manpower to do the job under wartime conditions.

Let me now say something about what I learned about restitution. The insurance companies were technically bankrupt after the war, having been forced to invest in Reich war bonds, so that the German government had ultimately to guarantee their obligations by compensating a large percentage of their payouts. Naturally, the life insurance companies paid out claims made by persons whose policies were still active. They took a very hard line, however, when it came to claimants wanting the insurance assets that they had repurchased or that had been seized under the 11th Implementation Decree. The argument simply was that they had paid off the policies, either to the policyholder or to the government, and thus had no further obligation. This position was formally correct, although the style in which customers were so informed often left much to be desired. Ultimately, restitution was regulated under the German Federal Compensation legislation of 1956-1957. The German government, in its legislation, recognized that Jews who ceased paying premiums and who bought back their policies were doing so under duress and deserved compensation just as did those, the value of whose policies were taken by government order under the 11th Implementation Decree. It was the government that took over the task of compensating such policyholders, although the insurance companies were assigned the task of calculating exactly what the entitlement was. Whatever was

then owed in Reichsmark was reduced to ten percent of the amount by being converted into Deutschmark under the 1948 currency reform. Obviously, getting restitution for lost insurance assets was not the road to wealth.

This account, which I gave at the Washington conference, marked the beginning and, by and large, the end of my involvement in the restitution question. I learned from one lawyer that the concepts of indirect and direct confiscation were helpful in their understanding of what had happened but that there was considerable irritation at the implications of my work, namely, that most of the policies were repurchased by their owners in the late 1930s and that the restitution of the late 1950s, whatever one might think, probably left few unpaid German policies that could be easily found or documented. A commission of claimant lawyers and organizations and insurance companies, headed by Lawrence Eagleburger, was launched just around the time of the Washington Conference, and although I was told they would consult with me, I have not had contact, either official or unofficial, with that Commission and have basically followed its history in the press or through personal contacts. As is clear from recent reports, it has been a very troubled effort with a good deal of unreasonableness on all sides, and while I have been overjoyed not to be directly involved, I have not held back in expressing some of my views as a citizen as well as historian in public debates.

I have been very critical, for example, of the demand made especially by the State of California and its courts against the wishes of the U.S. State Department, that Allianz be forced to computerize and list the 1.3 million old policies in its possession to enable survivors or their families to discover themselves as insurance policy holders in these files. Quite aside from the fact that this would be a violation of German privacy laws, it also strikes me as an immense amount of time and money-wasting and that the money would be better spent on worthier Jewish causes. A compromise has now been reached on this issue, but what I think underlies the entire effort is what the Israeli historian Ronald Zweig has called the fantasy of Jewish wealth and the failure to realize that Jewish wealth depended to a great extent on Jewish life and activity. Much of what was Jewish wealth, therefore, was destroyed with the expulsion and extermination of European Jewry and can never be restituted.

There has, in my view, been a fantasy about the amount of insurance held by Jews and the value of their policies, and this has been terribly disappointed. Rather than accept this reality, there has been a strong tendency to seek unrealistic solutions. One of these is the aforementioned computerization program. Another is the notion that one might be able to do something about the disappointing findings of historical research. I first became aware of this last year when a prominent Jewish leader suggested to me at a conference in Vienna that Allianz and the other insurance companies were rich enough to afford to re-do the post-war restitutions under the German compensation legislation in a fairer manner. In response, I simply pointed out that this was really unimaginable, which it is. This past November, at another conference, however, the same person, whom I deeply respect and admire, responded to my talk on the indirect

confiscation of Jewish insurance assets by suggesting that the companies might be liable to lawsuits because they often put the money involved into blocked accounts and thus allegedly violated their fiduciary responsibility to their policyholders. At this point, I must confess I began to wonder whether any of the historical work I had done mattered at all. It is well known that Jews intending to leave Germany had to put all their money in a blocked account and that it was unhappily a very good idea for Jews to leave Germany. If an insurance company refused to put money in such a blocked account, the officials involved were likely to end up in a concentration camp but, most importantly, they would have been depriving the Jewish policyholder of the money desperately needed to get out of Germany alive and violating their legal obligation to the policyholder. I received no response to this point, but to me this was a clear signal that while historical investigation and open archives were always demanded, the results were not always welcome.

My own work on Allianz, however, concentrated elsewhere, and my book's contribution, I believe, has had very little to do with restitution per se and much more to do with the deterioration of business ethics and the increasing implication of Allianz—and other firms and concerns—in the crimes of the Nazi regime as well as their efforts to deny or rationalize away that implication after the war.

What, then, is the relationship between historical narration of the type found in my book and the political issues involved in restitution? In turning to this question, I would like to broaden the discussion to include my work in other areas of this problem as well as that of other professional historians who have produced or are doing work in this area. I think at the very beginning of the study of assets questions in the Holocaust there was a genuine belief that the opening of archives and historical investigation and analysis would provide a basis for judging the responsibility and liability of the firms and concerns involved in what might loosely be called a scientific manner. This was simply naïve, and for three reasons. First, it operated under the assumption that serious historical work could be done to order and be produced in something of the style of a report to the Chief Executive Officer of a company or a lawyer's brief. Historians simply do not work that way, at least not good and responsible ones. Second, it operated under the assumption that the political and human realities of the restitution issue and the forced labor question could and would wait upon the completion of historical research and writing. In reality, it was impossible to allow the political issues to fester without causing considerable political rage on the part of all parties, unpleasant surprises and, most important of all, the passing away of those who were supposed to benefit from restitution in the first place. As is now clear, the settlements that have been made have by and large been based on global sums and direct payments to persons and organizations through the German Industry "Remembrance, Responsibility, and Future" Foundation and similar arrangements. While historians have helped in defining some of the issues and categories for restitution and compensation, Allianz, the Deutsche Bank, and other companies have joined the Foundation without waiting for the historical works about themselves to be published. Third, the histori-

cal examination of a company in the Nazi period cannot really have as its sole or central focus issues of restitution because concerns and firms and banks have to be considered in their totality. When this is done in the case of Allianz, for example, the central issues involve the political behavior and role of its leaders, their treatment of their Jewish employees, the actions of its leaders during the November 1938 Pogrom, the role of Allianz in Germany's expansion, and its involvement in insuring the facilities and production of places like the Lodz Ghetto and the SS factories in the concentration camps.

One can certainly make the argument that the revelation of these activities can serve to justify a moral obligation for joining the fund and making restitution. While it surely is welcome when historical investigation makes a case for the restitution of stolen assets and the compensation of victims, the implications of historical investigation should also in certain cases be decoupled from specific issues of restitution per se. Indeed, I would make, and have made, the argument that the commissioning of independent historical studies itself forms a form of restitution, an owning up to a company's implication in the misdeeds of the National Socialist regime.

Is it, however, legitimate to go so far? A case certainly can be made from the perspective of past practice by German industry and banking. Not only did German business make a concerted public relations effort after 1945 to paint itself as a victim of National Socialism, but it also closed its archives to independent scholars and produced jubilee volumes and other works that presented the history of German business in very rosy colors. The clash of Marxist and capitalist ideologies prior to 1989 certainly played some role in this along with the Marxist-left liberal assumption that the capitalists brought Hitler to power and that the regime was an instrument of capital. This is hardly the whole explanation, however, and there is plenty of evidence that the post-war generations of business leaders were anxious to cover up their engagement with National Socialism, even after serious research in the West demonstrated that the Nazis had not brought Hitler to power. Indeed, the archives were simply closed until a few years ago, some firms even denying that they had the materials in which we are now swimming. I think it would be unfair to attribute the new openness solely to the lawsuits I have mentioned. It also reflects a massive change from one generation to another in German business and the greater historical understanding and sophistication of today's businessmen. Nevertheless, it is difficult to imagine that these archives would have been opened this quickly in this manner were it not for the lawsuits and the public pressure on the business world and, one should add, on governments, to open their files and to produce uncensored histories.

One can, of course, make the argument that it is too late for these recovered histories to matter very much. One historian has gone so far as to argue that the attitude of business until now constituted a "productive silence" that enabled German industry to rebuild without having to confront the past, an extension of

the philosopher Hermann Lübbe's argument that the Federal Republic's repression of the past enabled it to create a stable democracy.[2] I detested this argument when I heard Lübbe make it back in 1983, but I must confess that I now have a more differentiated view, knowing as much as I have learned about the implication of nearly every group in German society. A genuine purge would have been tantamount to a civil war. Nevertheless, I am not prepared to go so far as to say that the economic miracle would have not been what it was if Friedrich Flick and many others like him in many professions would have sat in prison for somewhat longer while the miracle was taking place. It is also possible to argue that the new policy of openness is simply the other side of the coin of the "productive silence" of the past, namely, a "productive openness" in which the story is told by professional historians who contextualize historical events in a very professional, sometimes passionless manner and thus enable the present-day German business community to open but also to close the books on a chapter in its past with which it had to deal with for political reasons. It is all, thus, part and parcel of the belated confrontation with the past—at best, a somewhat costly catharsis, at worst, a new triumph of public relations efforts to deal with this history.

The author of a commissioned history of an enterprise is in a very difficult position when confronted with such an argument and, while I have no cause to complain about the reviews of my Allianz book, I have not been spared, and some of my colleagues have not been spared, criticisms arising from such claims that we are ultimately serving the interests of big business. Some journalists and muckrakers have accused us of being paid "spin doctors" for the banks and companies, although in most cases they have seldom done any historical research themselves or seriously read our books. It is hard to take such people seriously, but the fact is that they gain access to respectable journals like the *Times Literary Supplement* and that there are people who are quite prepared to believe everything they say, especially on the political left, and they are allied to other tabloid historians of the same type who have no interest whatever in historical evidence but who do have a market for their work. They are, of course, always demanding that the archives be opened to them, but they do not visit them when they are open or spend a minimal amount of time in them.

I do take more seriously the criticisms of other journalists and more serious persons. Thus, one critic, in an otherwise very favorable review of my book, nevertheless concluded that "Feldman does not shy away from calling the crime by its name, but he finds it hard to call the originators of the crime criminals, especially when those involved are the heads of Allianz."[3] She then went on to ruminate whether the authors of commissioned historians do not compromise

2. Hermann Lübbe, Der Nationalsozialismus im politischen Bewußtsein der Gegenwart, *in* DEUTSCHLANDS WEG IN DIE DIKTATUR: INTERNATIONALE KONFERENZ ZUR NATIONALSOZIALISTISCHEN MACHTÜBERNAHME 329-44 (Martin Broszat et al., 1987).

3. Franziska Augstein, *Auschwitz Versichern*, SÜDDEUTSCHE ZEITUNG, No. 233, Oct. 10, 2001, at 35.

their independence by taking such commissions. In another instance, a major historian suggested that historians who are paid for such studies must inevitably be influenced by the fact, even if they are not fully aware of it, and that it would be best if the government would subsidize such studies.

My own response to such arguments is twofold. First, I do not think that historians are, or should pretend they are, state prosecutors. Certainly, the two chief protagonists of my study, Kurt Schmitt and Eduard Hilgard, do not come off well by any standard in my book. I think no purpose is served, however, by calling them criminals and dumping them in the same category as the radical Nazis who also appear in the book. Second, historians have a responsibility to differentiate and to explain in a historical context, not to act like the investigators who were assigned the task of making a case for the Nürnberg trials.

Insofar as the question of being commissioned is concerned, there is of course no answer to the charge since the judgment must ultimately be left up to the reader. Such criticisms are an illustration of the old practice of asking when did you stop beating your wife and, as I have argued on numerous occasions, I see no reason why historians should not be paid for their work like other professional people. My experience has been that I was able to work in complete freedom and without the feeling that I have made any compromises, a feeling I have very often not had in my role as a university administrator and professor, where I have been subjected to all kinds of pressures, especially those of political correctness, and have had to make all kinds of compromises. Also, why is no one disturbed that Edwin Black's bizarre study of IBM should become something of a best-seller in the United States and Germany, thanks to a well-organized publisher campaign despite the fact that his work does not meet elementary historical standards? I would like, however, to go a step further with respect to the commissioning of independent studies by business enterprises. It certainly is true that enterprises covered-up their past for a long time and that they have been compelled to change this attitude. Having done so in important cases, however, it seems to me to be unfair to place them in a no-win situation and treat positive actions as something other than what they are.

Finally, let me conclude with some general remarks about historians and political debates, since the subject is an important one and is likely to become more perplexing in the coming years. In Germany, of course, history plays a very important role in political debates because of National Socialism. We have had a variety of examples of late, all of them quite absurd, in which politicians at home and abroad have been compared to Hitler or Göring, and where the current situation in Germany has been compared to that of the late Weimar Republic. To make matters worse, at least some of those making these comparisons have been trained as historians. All this is extremely unfortunate because, at least to my mind, it reflects an increasing detachment from the persons and things one is actually talking about. This is not to be confused with "historicization" but rather with what might be called "dehistoricization," that is, the loss of both the context in which persons lived and of the events that took place and with their concrete reality. It is not only absurd to compare Bush to Hitler, but it

also reflects a profound ignorance of Hitler's ideology and foreign policy goals to suggest that the likeness can be made because of Bush's alleged efforts to deflect attention from domestic politics by concentrating on Saddam Hussein. Similarly, whatever one thinks of the Schroeder government and the contemporary situation, present-day Germany has nothing remotely resembling a presidential government and the condition of the unemployed in contemporary Germany is totally different from that of the Weimar Republic. In any case, the abuse of historical analogy is likely to get worse rather than better and historians should take some responsibility, first, for not contributing to such practices and, second, for publicly and forcefully criticizing them.

As I have indicated, historians are often part of the problem rather than the solution, and there have been notorious examples of historians turning their work into political issues in ways that, at least to my mind, have not been productive and have often been destructive. The case of Ernst Nolte obviously comes to mind, but so does that of Daniel Goldhagen, both of whom present radical theses with inadequate historical evidence and create discussions that are not very fruitful from the perspective of advancing historical knowledge and end up in scholarly dead-ends but nevertheless stir up political emotions and debates. If political problems can be created by unsubstantiated theories, problems can also be created by the tendentiously presented, even if undeniable, facts. Some of the current literature on the bombing of Germany during the Second World War and the expulsion of the ethnic German population from the Sudetenland and Poland falls into this category. Certainly, these are important historical phenomena that deserve investigation, discussion, and reflection. At present, many of those involved claim that they are not relativizing the Holocaust and not overlooking those responsible for the war, but the end result is often precisely that. What else can be the effect of using the language of the Holocaust to describe what was done to Germans and to suggest that Churchill and other Allied leaders were war criminals because they gave the orders to bomb German cities and planned the expulsions. Furthermore, at this time of considerable anti-Americanism in Europe, or anti-Anglo-Americanism, some of the interviews given by Jörg Friedrich are obviously designed to relate his book to current American-European conflicts. In any case, these examples demonstrate that historians do contribute to political debates and even help to create them in ways that are sometimes very problematic. Certainly, historians have a responsibility to recognize the political implications of what they are writing and the positions they are taking, to be careful with analogies, to strive for objectivity, which of course can never be perfect, and to resist the temptations to act as advocates, state prosecutors, or as tabloid historians.

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Developing a Theory of Democracy for the European Union

Martin Nettesheim

Developing a Theory of Democracy for the European Union

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The number of books and articles expounding upon the problem of whether or not the European Union (EU) presents a "Democratic Deficit" and if so whether and how this may be overcome, has become nearly too numerous to count.[1] It is a characteristic of many of the contributions that they postulate the

1. *See, e.g.*, A. Peters, *European Democracy after the 2003 Convention*, *in* 41 COMMON MARKET LAW REVIEW 37 (2004); M. Aziz, The Chinese Whispers of Constitution-Making in the EU (Nov. 2004) (Paper presented at CIDEL Workshop, London); B. KOHLER-KOCH ET. AL., EUROPÄISCHE INTEGRATION – EUROPÄISCHES REGIEREN (2003); E. Rumler-Korinek, KANN DIE EUROPÄISCHE UNION DEMOKRATISCH AUSGESTALTET WERDEN? *in* EuR 327 (2003); Ch. Lord, *Assessing Democracy in a Contested Polity*, *in* 39 JCMS 641 (2001); L. SIEDENTOP, DEMOCRACY IN EUROPE (2001); A. PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 657 (2001); P. C. SCHMITTER, HOW TO DEMOCRATIZE THE EUROPEAN UNION . . . AND WHY BOTHER? (2000); F. Decker, *Demokratie und Demokratisierung jenseits des Nationalstaats: Das Beispiel der Europäischen Union*, 10 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 585 (2000); B. Kohler-Koch, *Regieren in der Europäischen Union. Auf der Suche nach demokratischer Legitimität*, *in* B 6 AUS POLITIK UND ZEITGESCHICHTE 30 (2000); J. Coultrap, *From Parliamentarism to Pluralism. Models of Democracy and the European Union's "Democratic Deficit,"* 11 J. THEORETICAL POL. 107 (1999); F. Brosius-Gersdorf, *Die doppelte Legitimationsbasis der Europäischen Union*, EUR 146 (1999); J.H.H. WEILER, THE CONSTITUTION OF EUROPE (1999); N. MACCORMICK, QUESTIONING SOVEREIGNTY. LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH (1999); H.-P. FOLZ, DEMOKRATIE UND INTEGRATION (1999); J.H.H. WEILER, THE CONSTITUTION OF EUROPE. "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999); A. Benz, *Ansatzpunkte für ein europafähiges Demokratiekonzept*, *in* REGIEREN IN ENTGRENZTEN RÄUMEN 345 (1998); DEMOCRACY AND THE EUROPEAN UNION (A. Follesdal & P. Koslowski eds., 1998); D. BEETHAM & C. LORD, LEGITIMACY AND THE EUROPEAN UNION (1998); C. LORD, DEMOCRACY IN THE EUROPEAN UNION (1998); H. ABROMEIT, DEMOCRACY IN EUROPE (1998); M. KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP (1997); K. Doehring, *Demokratiedefizit in der Europäischen Union?*, DVBl. 19 (1997); E. Grande, *Demokratische Legitimation und europäische Integration*, 3 LEVIATHAN 339 (1996); M. NEWMAN, DEMOCRACY, SOVEREIGNTY AND THE EUROPEAN UNION (1996); P. Zürn, *Über den Staat und die Demokratie im europäischen Mehrebenensystem*, 37 POLITISCHE VIERTELJAHRESSCHRIFT 27 (1996); DEMOCRACY AND CONSTITUTIONAL CULTURE IN THE UNION OF EUROPE (R. Bellamy et. al. eds., 1995); W. KLUTH, DIE DEMOKRATISCHE LEGITIMATION DER EU (1995); S. Oeter, *Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der EU*, ZAÖRV 659 (1995); D. Grimm, *Braucht Europa eine Verfassung*, *in* JURISTENZEITUNG 581 (1995); A. Randelzhofer, *Zum behaupteten Demokratiedefizit in der Europäischen Gemeinschaft*, *in* DER STAATENVERBUND DER EUROPÄISCHEN UNION 39 (P. Hommelhof & P. Kirchof eds., 1994); C.-D. Classen, *Europäische Integration und demokratische Legitimation*, 119 AÖR 238 (1994); F. Ossenbühl, *Maastricht und des Grundgesetz – eine verfassungsrechtliche Wende*, DVBl. 629, 634 (1993); I. Pernice, *Maastricht, Staat und Demokratie*, *in* DIE VERWALTUNG 449 (1993); P. Häberle, *Verfassungsrechtliche Fragen im Prozeß der europäischen Einigung*, EUGRZ 429 (1992); P. M.

normative validity and applicability of a certain model of democracy. This model then serves as the standard against which the democratic character of the EU—mainly with regard to its institutional structure but also its constitutional ideals or the social and psychological conditions prevalent among Europeans—is measured. On the basis of such an approach, it is easy to come to the conclusion that the EU has a "deficit in democracy"[2] and thus to note that its constitutional order is "defective."[3] This kind of approach is furthermore facilitated when, as in the discussion pertaining to the "democratic deficit," idealized concepts of democracy, which go even beyond the aspirations of democratic theory within the nation states, are juxtaposed against the EU. Such analyses frequently lead to the conclusion, if not the demand, that the EU ought to acquire the attributes and characteristics of a nation-state democracy—be it by transforming the decision-making system into a parliamentary democracy,[4] by creating a "European people,"[5] a "European identity" or via other steps—in order to gain democratic "dignity." Of course, in formulating such conclusions or demands many authors are at least in part aware of the difficulties the EU faces in implementing these suggestions and proposals. Therefore the notion of a "dilemma of democracy"[6] has entered the discourse, a notion which intends to convey that the EU expresses structural characteristics which may either hinder a more ambitious democratization or render it altogether impossible.[7]

Yet while there has been much said on the shortcomings of the EU as measured against conventional models of nation-state democracy, the degree to which the process of European integration may itself lead to a modernization,

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Huber, *Die Rolle des Demokratieprinzips im europäischen Integrationsprozeß, in* STAATSWISSENSCHAFTEN UND STAATSPRAXIS 293 (1992); H. Steinberger, *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft*, 50 VVDSTRL 9 (1991); G. Ress, *Über die Notwendigkeit der parlamentarischen Legitimierung der Rechtsetzung der Europäischen Gemeinschaften, in* GEDÄCHTNISSCHRIFT FÜR GECK 625 (1989).

2. W. Merkel, *"Eingebettete" und defekte Demokratien: Theorie und Empirie, in* DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 43 (2003).

3. *Cf.* H. ABROMEIT, DEMOCRACY IN EUROPE. LEGITIMIZING POLITICS IN A NON-STATE-ENTITY (1998); ERIK O. ERIKSEN & J. E. FOSSUM, DEMOCRACY IN THE EUROPEAN UNION (2000); A. Héritier, *Elements of Democratic Legitimation in Europe: An Alternative Perspective*, 6 J. EUR. PUB. POL'Y 269 (1999).

4. *See* S. Oeter, *Föderalimus, in* EUROPÄISCHES VERFASSUNGSRECHT 59, 93 (A. von Bogdandy ed., 2003).

5. TH. SCHMITZ, DAS EUROPÄISCHE VOLK UND SEINE ROLLE BEI EINER VERFASSUNGSGEBUNG IN DER EUROPÄISCHEN UNION, *in* EUROPARECHT 217 (2003). *But see* A. AUGUSTIN, DAS VOLK DER EUROPÄISCHEN UNION. ZU INHALT UND KRITIK EINES NORMATIVEN BEGRIFFS (2000).

6. P. Graf Kielmansegg, *Integration und Demokratie, in* EUROPÄISCHE INTEGRATION (Markus Jachtenfuchs & Beate Kohler-Koch eds.), 2. AUFL. 49, 53 (2003); W. Steffani, *Das Demokratie-Dilemma der EU, in* DEMOKRATIE IN EUROPA: ZUR ROLLE DER PARLAMENTE 33 (U. Thaysen ed., 1995); *see also* M. Höreth, *No way out for the beast*, 6 J. EUR. PUB. POL'Y 258 (1999); M. HÖRETH, DIE EUROPÄISCHE UNION IM LEGITIMATIONSTRILEMMA (1999).

7. *See* Ph. C. Schmitter, *Is it really possible to democratize the Euro-Polity?, in* DEMOCRACY AND THE EUROPEAN UNION 13, 32 (A. Follesdal & P. Kosłowski eds., 1997); PH. C. SCHMITTER, *supra* note 1; Adrienne Héretier, *Elements of democratic legitimation in Europe: An alternative perspective*, 6 J. EUR. PUB. POL'Y 269, 278 (1999); P. Craig, *Democracy and Rule-Making within the EC: An Empirical and Normative Assessment*, 3 EUR. L.J. 105 (1997).

supra-nationalization or "Europeanization" of democratic theory has for a long time not received much attention in juridical and constitutional discussions.[8] This is astonishing. Democratic theory is not static; theoretical models of democracy react to political and constitutional impulses, functional necessities, political interests, and the expediencies of political reality. New impulses and developments are frequently, if not mostly, the result of developments initiated by functional or political developments. There exists a close relationship between theories of democracy and the bodies by which they are implemented that is characterized by interactions and cross-effects requiring the observation of each side in strict and equal conjunction with that of the corresponding other side.

In light of this interdependence, the progress of European integration prompts us with good reason to ask how far the EU corresponds to normative models of democracy; it prompts us further to pose the question to what extent the advancing process of integration, until today mainly driven by functional considerations and political interests, has influenced the current state of democratic theory. Democratization of the EU and Europeanization of democratic theory—these are not alternatives but rather imply the emergence of a process of interaction, which may veer at times more in one and at other times more in the other direction.

The formulation of the content of a normative principle of European democracy (understood as a legally binding norm, incorporated into the EU law as a judicially enforceable principle)[9] will therefore unfold as a dialectic process in which traditional conceptions of the democratic legitimacy of public power, insights into the institutional, historical and socio-economic particularities of the EU, and—last but not least—considerations regarding the functional necessities and imperatives of supranational institution-building enter into a fertile process of interchange. While one should not expect this process to lead to the emergence of a European principle of democracy which would have shed all reference to and similarity with nation-state concepts of democracy, one equally should not expect that democracy within the EU will be the equivalent of a nation-state democracy.

It should be noted that this paper is not intended to contribute yet another aspect or position to an increasingly complex and heterogeneous debate.

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8. There have been important contributions, however, from DEIRDRE M. CURTIN, POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY (1997); H. ABROMEIT, WOZU BRAUCHT MAN DEMOKRATIE? DIE POSTNATIONALE HERAUSFORDERUNG DER DEMOKRATIETHEORIE (2002); Rainer Schmalz-Bruns, *Demokratisierung der Europäischen Union—oder: Europäisierung der Demokratie? in* WELTSTAAT ODER STAATENWELT? 260 (M. Lutz-Bachmann & J. Bohman eds., 2002); Ph. C. Schmitter, *Wie könnte eine "postliberale" Demokratie aussehen? Skizzenhafte Vermutungen und Vorschläge, in* DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 152 (C. Offe ed., 2003).

9. It is now acknowledged that there is a legal principle of democracy enshrined in the founding treaties; the Court of Justice has relied on this principle in several decisions. In the interpretation and application of this legal principle, ideas and theoretical concepts of democracy play a decisive role.

Instead, it will attempt to give an overview of the current debate while seeking to show its many facets and the dynamic developments they represent. It thus focuses on one aspect of the current debate about the constitutionalization of the EU ("European Constitutionalism").[10] Part I provides an overview of major historical developments in the debate regarding democratization of the EU. Part II reviews some of the important variations on the idea of democracy. Part III examines the extent to which traditional democratic theory has been successfully applied to the EU. Part IV considers the strains which the unique characteristics of a supranational, European governing body place on democratic concepts and evaluates the ways in which these may shape the development of democratic theory.

I.
THE THREE PHASES OF DISCUSSION WITH RESPECT TO DEMOCRACY IN EUROPEAN INTEGRATION

The debate regarding the "democratization of the EU" originated, not surprisingly, in the early years of European integration. In the subsequent decades, three rather distinct though largely concurrent phases within that debate can be identified and differentiated. The central question of this paper, however—namely, to what extent the emergence and development of the EU as a source of public power has influenced normative aspects of democratic theory—naturally only emerged at a more recent point in time.[11]

The first phase of discussion about the question of democracy in Europe can be characterized by its approach to democratization of the European

10. *See, e.g.*, P. Craig, *Constitutions, Constitutionalism, and the European Union*, 7(2) EUR. L. J. 125 (2001); G. Amato, *La Convenzione Europea. Primi approdi e dilemmi aperti*, 22 QUADERNI COSTITUZIONALI n.3 (2002); D. BLANCHARD, LA CONSTITUTIONNALISATION DE L'UNION EUROPÉENNE (2001); P. Cassese, *La Costituzione europea: elogio della precarietá*, 22 QUADERNI COSTITUZIONALI n.3 (2002); R. DEHOUSSE, UNE CONSTITUTION POUR L'EUROPE? (2002); L.M. DÍEZ-PICAZO GIMÉNEZ, CONSTITUCIONALISMO DE LA UNIÓN EUROPEA (2002); LYNN DOBSON & ANDREAS FØLLESDAL, POLITICAL THEORY AND THE EUROPEAN UNION (2004); C. Dorau & P. Jacobi, *The debate over a "European Constitution:" Is it Solely a German Concern?*, 6 EUR. PUB. L. n.3 (September, 2000); DEVELOPING A CONSTITUTION FOR EUROPE (Erik O. Eriksen et al. eds., 2004); J. Habermas, *Why Europe needs a Constitution*, NEW LEFT REV. n.11 (September-October, 2001); C. JOERGES ET AL., "WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY?" RESPONSES TO J. FISCHER (2000); J. Kokott & A. Rüth, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate answers to the Laeken question?* 40 COMMON MARKET L. REV. 1315-45 (2003); K. Lenaerts & M. Desomer, *Bricks for a Constitutional Treaty of the European Union: values, objectives and measures*, EUR. L. REV. (August, 2002); I. Pernice & F.C. Mayer, *De la constitution composée de l'Europe*, 36 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN (octobre-décembre, 2000); J.C. Piris., Does the European Union have a constitution? Does it need one?, (Harvard Jean Monnet Working Paper 5/00) (2000); M. Poiares Maduro, *Europa: el momento constituyente*, REVISTA DE OCCIDENTE 1 (January, 2002); J. Schwarze, *La naissance d'un ordre constitutionnel européen. L'interaction du droit constitutionnel national et européen* (2001); RETHINKING EUROPEAN CONSTITUTIONALISM (J.H.H. Weiler & M. Wind, eds., 2000); J.H.H. Weiler, *A Constitution for Europe? Some hard choices*, 40 J. COMMON MARKET STUD. 563-80 (2002).

11. *See* S. Oeter, *Souveränität und Demokratie als Probleme in der Verfassungsentwicklung der Europäischen Union*, 55 ZAÖRV 659 (1995).

Communities as a means of advancing European integration. In this first phase, which can be dated roughly speaking from the fifties to the seventies, the securing of democratic legitimacy was not considered to be precarious. The European Communities themselves were regarded as international organizations; their legitimacy rested on the will and consent of the Member States, which had not only ratified the founding treaties, but also controlled the political process within the EC. Proposals for the incorporation of democratic institutions and mechanisms into the decision-making process of the EC were based on the assumption that the process of integration might be advanced by such modifications, bringing the EC closer to its final destination as a European Federal State. It was believed, for example, that by upgrading the European Parliament, the process of European integration would accelerate towards a federation. The institutionalization of parliamentary democracy was to serve as a lever of integration. From this perspective, the introduction of the direct vote for the European Parliament in 1976 was regarded as a tremendous success of integration.

These early suggestions differed profoundly from the discussion that surfaced in the late eighties and early nineties. During that period, the goal was not to advance the entire process of "democratization" by strengthening the European Parliament. Instead, the debates of that era were motivated by concerns about a growing gap between the accelerating integration process, measured in terms of powers and competencies, and the more static nature of the legitimizing substructures. While the EC gained strength and influence and pushed that of the Member States backwards, its decision-making process maintained an imbalance in favor of technocratic and bureaucratic institutions. The EC continued to turn its back on its citizens. Surely, the traces of this discussion lead back to the early years of integration; at the negotiations of the ECSC Treaty of 1951, the German negotiators suggested that the supranational decision-making High Authority ought to be democratically controlled by a body directly responsible to the electorate. While an "assembly" was indeed installed, French resistance and indifference on the part of the Benelux states did not permit a transfer of genuine competencies to this body. Upon the entry into effect of the EC Founding Treaties, discussions about the effectuation of democratic control and the nature of the responsibilities of the emerging supranational power continued unabated. When the Common Agricultural Policy was put on a solid footing in 1970, with significant budgetary means, the demand for sufficient parliamentary control and the creation of a right of co-determination resurfaced. Despite such arguments, however, most observers took the view that, on the basis of limited competencies and the de facto applicability of the Member States' veto right, no genuine deficit of democratic control could be observed.

The real turning point in these debates occurred in the context of the Single European Act, which caused not only a significant expansion of the competencies of the EU, but also lead to the destruction of the notion that the EC was merely an international organization legitimized indirectly through the

democratic processes of its Member States. Due to the transition to the majority principle, Member States lost their ability to block decisions that they were unwilling to support; they became subjected to a supranational power that could be exerted against their will. The significance of this change remained widely unnoticed at first. The Single Market program, "Europe 1992," which was the material dimension of the Single European Act, continued to be portrayed as a non-political enterprise that was so amply justified on the basis of economic and social welfare considerations that it could not reasonably be subjected to political debate or even challenge. This portrayal, which was in line with former justifications of EC actions, was broadly accepted by the public at large. The profound shifts in the nature of the newly created competencies as well as regulatory effects remained unnoticed to a rather large extent until the early nineties.[12] Only the renewed and even more accelerated deepening of European integration instituted by the Treaty of Maastricht stirred up public interest and led to a growing concern regarding questions of democratic accountability and control of the EU.

Since then, discussions about a European principle of democracy—frequently closely tied to the discussion about the constitutionalization of the EU and the question of European "Good Governance"[13]—have not ceased. If the discussion of the early nineties had one particular characteristic, it was the fact that traditional elements and concepts of nation-state constitutionalism and democratic theory were applied to the EU and served as the theoretical background of critique and normative postulations. It is certainly not surprising that in a situation where new forms of public power such as those of the EU are emerging, traditional conceptions of legitimate public power serve initially as a reference point and normative standard. Indeed, the ease with which the terms and concepts of nation-state democratic theory can be transplanted to the EU makes analogies between the two fairly inevitable. By the same token, the complex process of adapting democratic theory to the challenges and normative requirements of new forms of public power will be much more gradual; solutions and new standards of legitimacy can only emerge over the course of time.

Thus, it was only in the second half of the nineties that the discussion entered its third phase. By then, the EU had been transformed from a rather technical organization with a clearly defined mandate (establishment of a Single Market, Customs Union, and Common Agricultural Policy) to a genuine bearer of political public power, operating on the basis of political considerations that encompassed value conflicts and other distributive implications. It was

12. S. Weatherill, *Is Constitutional Finality Feasable or Desirable? On the Cases for European Constitutionalism and a European Constitution*, ConWEB No. 7/2002, 16 *at* http://les1.man.ac.uk/conweb.

13. On the meaning of Good Governance and the relationship to democracy, see Vincent Della Sala, *Constitutionalising Governance: Democratic Dead End or Dead on Democracy?* ConWEB No. 6/2001 *at* http://les1.man.ac.uk/conweb.

acknowledged that the EU had reached a point in which its legitimation could no longer rest on the fact that the Member States had assented to the founding treaties and had a say in the decision-making process. Increasingly, observers agreed that a model that had been developed to control and legitimize forms of international cooperation between sovereign states no longer satisfied the requirements of democratic theory, and should thus be seen as an unsuitable and deficient means of holding a supranational public power with state-like clout accountable. This conclusion would have become inevitable even if the Member States had retained their veto power in all areas and spheres of decision-making. Even then, they would only have been able to block, not determine, supranational decisions; they would still have lacked proactive power in those areas in which the EU had exclusionary powers or had already adopted prevailing EU law. Such a deficit is even more obvious in a situation where the principle of majority decision-making applies and decisions against the will of the institutions of the Member States are possible. In light of such considerations, the decision of the German Constitutional Court on the Maastricht Treaty[14] is not necessarily wrong,[15] but it appears oddly beside the point. In this decision, the German Court reconstructs the structure of legitimacy of the EU almost solely by reference to the legislative assent of the German parliamentary bodies to the treaty and by reference to the decision-making powers of German representatives in the Council of Ministers. Other "levers" of legitimacy, such as the role of the directly elected European Parliament, are mentioned but remain in the view of the German court rather

14. 89 BVerfGE 155.

15. Discussion of the decision by Joseph H.H. Weiler, Der Staat "über alles:" Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts (Jean Monnet Working Papers No. 7) (1995); Albert Bleckmann & Stefan Ulrich Pieper, *Maastricht, die grundgesetzliche Ordnung und die "Superrevisionsinstanz." Die Maastricht-Entscheidung des Bundesverfassungsgerichts*, RIW 969 (1993); H.-J. Cremer, *Das Demokratieprinzip auf nationaler und europäischer Ebene im Lichte des Maastricht-Urteils*, EuR 21 (1995); Jochen A. Frowein, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, 54 ZaöRV 1 (1994); Volkmar Götz, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, JZ 1081 (1993); Ulrich Häde, *Das Bundesverfassungsgericht und der Vertrag von Maastricht—Anmerkungen zum Urteil des Zweiten Senats* BB 2457 (Dec. 10, 1993); Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"*, 31 CMLR 235 (1994); Hans-Peter Ipsen, *Zehn Glossen zum Maastricht-Urteil*, EuR 1 (1994); Juliane Kokott, *Deutschland im Rahmen der Europäischen Union—Zum Vertrag von Maastricht*, 119 AöR 207 (1993); Doris König, *Das Urteil des Bundesverfassungsgerichts zum Vertrag von Maastricht—ein Stolperstein auf dem Weg in die europäische Integration?*, 54 ZaöRV 17 (1994); Carl Otto Lenz, *Der Vertrag von Maastricht nach dem Urteil des Bundesverfassungsgerichts*, NJW 3038 (1993); Karl M. Meessen, *Maastricht nach Karlsruhe*, NJW 549 (1994); Meinhard Schröder, *Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der europäischen Integration—Bemerkungen zum Maastricht-Urteil*, DVBl. 316 (1994); Jürgen Schwarze, *Europapolitik unter deutschem Verfassungsvorbehalt. Anmerkungen zum Maastricht-Urteil des BverfG vom 12.10.1993*, NJ 1 (1994), Ernst Steindorff, *Das Maastricht-Urteil zwischen Grundgesetz und europäischer Integration*, EWS 341 (1993); Rudolf Streinz, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, EuZW 329 (1994); Christian Tomuschat, *Die Europäische Union unter Aufsicht des Bundesverfassungsgerichts*, EuGRZ 489 (1993); Albrecht Weber, *Die Wirtschafts—und Währungsunion nach dem Urteil des Bundesverfassungsgerichts*, JZ 53 (1994); Joachim Wieland, *Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht*, 5 EJIL 259 (1994).

insignificant.

At the same time, more and more observers realized that not much is to be gained by a straightforward and unmodified transfer of the concepts, models and ideas of democratic theory in the nation state context. As a result, the discussion regarding the repercussions of European integration on theoretical conceptualizations of democracy finally began in earnest in the second half of the nineties.

II.
VARIATIONS ON THE IDEA OF DEMOCRACY

Even though there may be little doubt on an abstract level as to the interactive relationship between normative democratic theory and the development of public power, the difficulties that arise when attempting the description and analysis of these interactions in a concrete historical setting are formidable. This is largely due to the fact that the idea of democracy—beyond a solid core—demonstrates a great spectrum of characteristics and variations.[16] As simple as Lincoln's statement of "government of the people, by the people, and for the people" may sound, the possible interpretations of this idea are quite diverse. If one moves beyond the solidly established, unquestioned core of the principle, the idea of democracy proves to be diverse, iridescent and fragmented. A wide spectrum of normative notions and institutional models of enactment opens up between Schumpeter's idea of an elite democracy and the current popular concept of a deliberative democracy.[17] Thus, every attempt to examine the influence of European integration on the concrete normative substance of democratic ideas will lead to great heterogeneity and multifaceted dichotomies.[18] At this point, it suffices to sketch out four variations of the idea:

A. Form of Public Power or Way of Life

Democracy may be understood as an institutionalized form of public power; it might as well be regarded as a way of life. Whoever claims the task of determining what exactly is meant by democracy, will first come upon the

16. Overview of various theories of democracy by: R. A. DAHL, DEMOCRACY IN THE UNITED STATES, PROMISE AND PERFORMANCE, 1996; G. SARTORI, DEMOKRATIETHEORIE, 1992; A. LIJPHART, PATTERNS OF DEMOCRACY, 1999; D. Held, *Models of Democracy*, 2. AUFL. 1996; G. Schmidt, *Demokratietheorien*, 3. AUFL. 2000.

17. *See generally* J. DRYZEK, DISCURSIVE DEMOCRACY 1990; DELIBERATIVE DEMOCRACY, (J. Elster ed., 1998); DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (J. Bohman & W. Rehg eds., 1997); J. Bohman, *Survey Article: The Coming of Age of Deliberative Democracy*, 6 J. POL. PHIL. 400-25 (1998). For a discussion specific to the EU, see DEMOCRACY IN THE EUROPEAN UNION: INTEGRATION THROUGH DELIBERATION? (E.O. Eriksen & J.E. Fossum eds., 2000); C. Closa & J.E. Fossum, *Deliberative constitutional politics in the EU*, ARENA Report (2004); J. Cohen & C.F. Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L. J. 313-42 (1997).

18. Rainer Schmalz-Bruns, *Demokratisierung der Europäischen Union—oder: Europäisierung der Demokratie? in* WELTSTAAT ODER STAATENWELT? 260, 265 (M. Lutz-Bachmann & J. Bohman eds.).

approach that democracy is to be understood as a set of normative standards that provide for the institutionalization of public power in a way that accords with perceptions of what constitutes a legitimate exertion of public power. This approach can be considered to be the ruling approach in legal and political sciences, certainly in Germany.

However, juxtaposed against these approaches are notions—and these remain valid—according to which the idea of democracy is primarily if not exclusively conceived as a just and good way of life. The most well-known elaboration of this latter theory—the idea of a republican democracy, dating back to Aristotle and more recently called for by Hannah Arendt—understands democracy as an order or structure that enables the citizens, politically active and concerned for the welfare of their collective society, to find in it their social role and personal fulfillment. This republican idea contemplates that the citizen will find a fulfilling role in society only when he is actively involved in the political process. Democracy, from this perspective, may be construed as offering a normative standard for the evaluation of the behavior of individuals, and therefore of the interactions between private individuals. It provides such behavior its normative content and direction. Such concepts of democracy thus far have not gained much significance in the legal discussion about the democratization of the EU. Recently, some commentators have taken the view that the EU should identify itself with normative conceptions of a particular good, namely the Christian religion. The implications for the role of the citizens, however, have not been elaborated. These advances ought to be treated carefully. There are good reasons to differentiate between the normative standards that have been developed for the assessment and valuation of just and right public governance, on the one hand, and those standards that seek to orient the behavior of private persons and define their roles in society on the other hand.

B. Democracy as an Aggregate Process or as a Deliberation

Democracy may be understood—along the lines of the traditional liberal tradition—as a method by which concrete preferences and the interests of private persons may be identified and balanced appropriately. Viewed from this perspective, democratic institutions provide for the aggregation and settlement of the unchanging positions of private persons. This understanding—characterizing many contributions in the discussion about European democracy—results in a model of democracy that has at its core mechanisms for the aggregation of interests. Thus, democracy is meant to be an instrument with which individuals may state their will. From this perspective, any constitution is held to set up institutions and processes that identify and reciprocate, balance and correct these expressions of interests. For the traditional liberal position, independent and impartially acting holders of public office, as well as the process of majority decision-making, are at the core of any institutional makeup, having proven themselves as an effective means of identifying and negotiating

various interests. Seen from this point of view, governmental institutions cannot do more than reproduce a pre-existing and static public good.

Against this traditional liberal position, the theory of deliberative democracy has recently been formulated. Most of the supporters of this theory take the position that the preferences of individuals are not fixed, but are rather formed in light of concrete socio-economic situations and problems; they are thus contingent and variable. According to these theories, democratic theory must aspire to be more than a mechanism for reproducing and calculating the existing interests of individuals in such a way that a collective good emerges. Rather, democracy emerges from the process of stimulating and organizing deliberations of the citizen, thus attaining just and right decisions by rational arguments between the individuals concerned. Democracy is seen as a process of argumentation, leading to just and mutually agreeable positions which can be taken as representing the common good. The process of deliberative argumentation is seen not only as a means of discovering and reproducing existing interests and positions, but also as a means of enabling concerned individuals to develop and take up a rational position.[19] Democracy—and the process of democratic creation of mutual understanding—is thus ascribed an "epistemic function."[20] In a reflexive and at the same time balancing process, so the expectation goes, a situation is finally approached in which the correct decision will be recognized and approved by all. The majority decision itself proves not to be a genuinely democratic rule of decision-making, but rather a necessary tool, or a break-out rule, needed for reasons of effectiveness for which in an ideal world there would be no need. The process of deliberation, however, only suffices with respect to the ideal, and thus only leads to the right decision if it corresponds to certain basic demands and criteria. These include not merely opportunities for the free and equal participation of all concerned persons to count in the deliberative process, but also certain demands for fair treatment.

The idea of deliberative democracy relies not only upon the fact, indisputable from the point of view of social psychology, that people are able to and continually do change their preferences and stance within the argumentative process. The idea also reflects the fact that in the pluralistic modern society the existence of a substantial common good, identifiable and recognizable by the representative holders of public office, seems to be receding. The idea of representative governance, understood as the realization of a preexisting substantial common good or social welfare, is replaced by the idea that holders of public office are liable to develop positions of common good in a process of deliberative governance. This change in perception leads to the question of how the idea of deliberative governance should be institutionally conceptualized so that the imperatives of effectiveness and efficiency of governance will not suffer. There cannot be, from an ideal point of view, any doubt that a

19. *Cf.* U. K. PREUß, *Die Bedeutung kognitiver und moralischer Lernfähigkeit für die Demokratie, in* DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 259 (C. Offe ed., 2003).

20. Schmalz-Bruns, *supra* note 18, at 266.

deliberative reconceptualization of decision-making would reconsider the role of representative holders of public office, stressing the importance of deliberative consultation and argumentation leading to a mutually agreed upon and rational decision. The question of which constitutional setting would be appropriate in order to advance, maintain and order such deliberative process is, however, as unclear as the question of what form the synapses between the institutions of public governance and the sphere of the civil society should take.

C. Democracy between Collective Self-governance and Individual Self-Determination

Lodged within the idea of democracy is an old and tense relationship between the idea of collective self-governance and that of individual self-determination. This is particularly noticeable in German scholarly contributions to the debate on European democracy. Many of those contributions rely on the notion that democracy must first and foremost be understood as the idea of collective self-governance of a democratic subject. According to this school of thought, the collective in a democracy governs itself. It is well-known that in the history of political ideas very diverse expectations were developed as to what holds the collective together: nationality, ethnicity, and common political principles, to name but a few. Differences exist, however, as to the question of how the "miracle of the fusion of individual wills into the collective will"[21] is construed and explained. In addition, ideas differ with regard to the parameters that determine the role of the individual, both ideally and in the practice of decision-making. In their strongest form, these positions assume an irreconcilable gap or divide between the collective actor, the people, and the individual. It is a consequence of this perspective that democratic self-governance of the people and the fundamentally protected actions of the individual are seen not as expressions of the same underlying principle (the autonomy of the individual), but rather as standing next to one another if not in opposition.

The counter-position to such notions is of much less significance in German legal debates: democracy understood as the realization of the idea of individual self-determination within the setting of collective governance. From this perspective, *democratic sovereignty* is understood as an expression of the self-determination of those governed.[22] When conceived of as individual self-determination within a collective, democracy demonstrates a normative superiority as opposed to every other well-known concept of legitimacy. In a democracy, the holders of public office comprehend their powers and competencies as fiduciary trusts, to be used in light of the interests and the will of those being governed. Democratic governance does not serve the realization

21. NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 366 (2000) ("Wunder der Verschmelzung des Individualwillens zum Gemeinwillen").

22. Hermann Heller, *Die Souveränität, in* GESAMMELTE SCHRIFTEN 96, 98 (1971).

of an ideology, a promise of salvation or even the realization of a "Volkswillen," or "will of the people." The goal is also not seen as striving for a better world for the future—perhaps even against the will of those concerned. Democratic governance is demonstrated by the acceptance of those governed; in their diversity and plurality they must find themselves reflected in the decisions of the holders of public office. While non-democratic concepts of public power revolve around the idea that certain notions of truth, justice or benevolence are to be realized—and if called for even imposed upon those governed—there is a lack of such a guiding principle in democratic governance. Democratic rule is therefore the normatively most demanding of all well-known sovereign rules. Niklas Luhmann has advanced the argument that the idea of "democratic" sovereignty will become a "self-opposing" concept, due to the questioning of any differences between the rulers and those ruled.[23] This argument is hardly practicable; the transfer of public power to accountable and controlled holders of public office is unavoidable and moreover reasonable in order to solve collective problems. However, the idea puts public power under constant pressure with respect to legitimacy. It is in this light that Rainer Schmalz-Bruns speaks of the "parasitic effect" associated with democratic legitimacy.[24]

D. Models of Democratic Legitimacy

Democratic governance can be equated with legitimate governance. Legitimacy may be comprehended in the empirical sense as the recognition of the subjects to sovereign rule; normatively speaking, public power is legitimized when and if it corresponds to an accepted idea of justified governance. There are direct interactions between empirical and normative legitimation. Stable public power will not exist if there are sustained developments in differing directions between empirical and normative legitimacy.

Both the empirical expectations of the subjects of public power and the normative theory of justified governance demonstrate a direct reference to the actual consequences of exercised power: legitimacy depends on the ability of the institutions of public power to further the collective well-being of individuals. Institutional provisions that secure the production of common goods, or are conducive to the collective well-being, thus participate in the evaluation or assessment of democratic legitimacy. While some observers focus mainly on and uphold the importance of the voting system and the position of the Parliament ("electoral democracy"), others maintain that only models of complex democracy are reasonable and appropriate.

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23. NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 357 (2000) ("Die durch die Verfassung rechtlich zugelassene, ja vorgeschriebene Demokratie wird zum Parasiten—zum Parasiten, der an der Differenz von Herrschenden und Beherrschten ansetzt, sich von hier in das System hineinfrißt und sich schließlich selbst zum herrenlosen Herren erklärt [. . .]. Mit der Formel, Demokratie' wird Herrschaft als Selbstwiderspruch inszeniert, also wenn nicht negiert, so doch delegitimiert.").

24. Schmalz-Bruns, *supra* note 18, at 265 (discussing the "parasitärer Effekt").

In the social sciences, several models of "complex democracy" are currently under discussion. The most well-known model takes into account both input and output legitimacy—a model that was first presented by Fritz Scharpf in 1970, and was later applied to the EU.[25] The term "input-legitimation" or "input-legitimacy" refers to the question of whether and to what extent the decision-making processes of the EU open up for those concerned perceivable chances or opportunities for political participation and control over value allocations. "Output-legitimacy," by contrast, asks whether and to what extent the decisions of the EU prove to be effective with regard to factors such as problem adequacy, efficiency, consensus creation and the ability of implementation.

Recently, the perception has gained ground that this "input/output" model needs to be enriched by several factors. In particular, it has become apparent that the distribution of competencies in a multi-level system of governance has direct relevance to the choice of an appropriate theoretical democratic model. Which model promises the highest degree of democratic legitimacy will depend on the sort and scale of the allocation of the competences between the different levels of governance. The greater the political weight and importance of the competencies that are allocated on the higher level, the more precarious will be the models that aim at the production of legitimacy through indirect channels of lower level participation. Similarly, the more substantial the allocated competencies are in terms of political content, the less room should be given to the element of technocratic-functionalistic governance, distanced from the exercise of individual autonomy. In the past several years it has become apparent that the choice of an adequate model of democratic legitimization is also dependent upon the structure of the political community; the rules of democratic decision-making must reflect the homogeneity or heterogeneity of a society, the scope of solidarity, and the existence of value consensus. Even the density and character of the political community must be taken into consideration.[26]

III.
THE TRADITIONAL THEORY OF DEMOCRACY: CONCLUSIONS FOR THE DEMOCRATIZATION OF THE EU

In the discussions regarding the interaction between the idea of democracy and the democratization of the EU, the initial question arose regarding which assets, elements and parts of the traditional nation-state models of democracy could be used most fruitfully in the context of European integration. From the point of view of constitutional theory, it was beyond doubt that the emerging

25. FRITZ W. SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG, 1970. For an application to European governance, see FRITZ W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? (1999) [GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC].

26. N. MacCormick, *Democracy, Solidarity and Citizenship in the Context of the European Union*, 16 L. & PHIL. 331 (1997).

supranational EU power (which had, between the middle of the second half of the twentieth century and the nineties, assumed a mature form of acceptable and distinct, albeit not sovereign, public power) had to answer to the normative demands of democratic theory. This would have been true even in the event of a reversal in the depth or scope of EU competencies or that of the application of EU primary law (in particular that of the fundamental freedoms).[27]

There existed and continues to exist complete agreement that supranational power has to answer to and legitimize itself under the criteria required by the concept of democratic self-determination. The uneasiness felt by many people looking at the EU and at the emergence of new forms of international governance on the global international level[28] renders apparent that the call for the development of normative standards of supranational democracy must not be considered to be an abstract normative postulate or a mute academic debate: supranational governance will only gain socio-psychological acceptance within the population when it corresponds to the demands of democratic governance.

A. Conceptual and Institutional Analogies

It has already been mentioned that concepts and models of nation-state democratic theory carry such a weight and are of such importance (due to the preponderance of the nation-state form of public power) that they tend to be seen as the quasi "natural" standards of democratic legitimacy in early discussions surrounding the handling of the deficit of democracy. Thus, within the German debate, the question was raised whether the EU had "a people" at all. This question had to be answered negatively not only in reference to the common usage of language, but also due to the insight that Europeans were not bound together by the kind of political identity characteristic of nation-states. Consequently, there is a formulation of the EU Treaty, in which the "peoples of Europe" are to be joined in the EU. The idea of a "will of the European people" that has played such a significant role in nation-state theories of democracy and also in the jurisprudence of the German Constitutional Court on questions of democracy could not simply be transferred to the EU. It is impossible therefore to recognize the European Parliament as the "representative of the European people." Some observers thus came to the conclusion that any attempt to democratize the EU would be futile as long as a European people do not exist.

At the same time, the institutional model of the nation-state theory of democracy was nevertheless used. Thus, the model of parliamentary democracy played and continues to play a significant role in the discussion—at times affiliated and associated with separate fragments of other provenance, such as

27. C. Calliess, *Optionen der Demokratisierung der Europäischen Union, in* P. M. Huber et al., Demokratie in Europa (unpublished manuscript) (2003).

28. *See, e.g.*, H. Brunkhorst, *Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism*, 31 Millenium 675-90 (2002); M. Zürn, *Democratic Governance Beyond the Nation State: The EU and other International Institutions*, 6 EUR. J. INT'L RELATIONS 183 (2000).

the model of a directly elected head of government. It is evident that any recourse to such models would confirm that the EU suffers from serious democratic defects; at the same time, such models can be used relatively easily as the basis for proposals on how to solve the existing deficits.

Thus, one recurring and politically important position stipulates that the European Parliament should have the central function in the legislative and budgetary process and should assume the position of an equal, if not primary actor. This point of view stipulates that the European Parliament ought to gain the right to initiate legislation in legislative and budgetary matters. Furthermore, this position maintains that the process of co-decision must be extended to include all fields of action. Others foresee a development in which the European Parliament might overrule by qualified majority the voice of the second chamber, in which representatives of the Member States are assembled. One resulting consequence of this view would be that the European Parliament would be assigned the final decision-making power in all matters pertaining to the budget.

In addition, it is evident that a model of parliamentary democracy would necessitate institutional modifications that would give the European Parliament decisive power in the selection of the head of a European government. According to this concept the leader of the government, the President of the Commission, would have to be elected by the European Parliament, but could at the same time be decommissioned by a vote of no confidence. This model leaves plenty of room regarding the essential question whether the rest of the members of the government should be responsible to direct parliamentary assent or vote of confidence, as evidenced in the constitutions of the German states. If this model were to be adopted, the second chamber, representing the Member States, could well be deprived of influence in the nomination and election of the members of the government.

Apart from these ideas, various other institutional proposals have been made. However, many of these are not analyzed either with regard to their relative institutional effectiveness and efficiency or in regard to their compatibility with other institutional elements of the European constitution. Even so, some of those proposals have gained widespread attention.[29] Just recently, a lively debate emerged with respect to the introduction of plebiscite elements. Many expect that the realization of such proposals will strengthen the

29. For example: the strengthening of the principle of majority; a rebalancing of the distribution of powers; the creation of a court on issues of subsidiarity or an implementation of a Commissioner on fundamental rights; a restructuring of the membership in the European Parliament; expansion of the European rights of the citizen; the creation of a European referendum; a Europeanization of the competency to the right of citizenship; the strengthening and extension of the transparency; and so on. *See, e.g.*, E. Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 522 nn.184, 187-91 (2001); G. Lübbe-Wolff, *Europäisches und nationales Vefassungsrecht*, 60 VVDSTRL 246, 278 (2000); C. SOBOTTA, TRANSPARENZ IN DEN RECHTSETZUNGSVERFAHREN DER EUROPÄISCHEN UNION (2001). For a discussion on the duty to lay down the justification of normative acts, see T. MÜLLER-IBOLD, DIE BEGRÜNDUNGSPFLICHT IM EUROPÄISCHEN GEMEINSCHAFTSRECHT UND DEUTSCHEN RECHT (1990).

democratic legitimacy of the EU. Proposals of this sort are rather easily made, albeit frequently without further consideration of their actual implications;[30] indeed, it would not be difficult to produce more than a dozen additional proposals. Yet the problems with such proposals are apparent. As pointed out recently by Heidrun Abromeit, many proposals have institutional implications that are dependent on the surrounding institutional environment, especially the conditions and the framework of the society upon which they are founded.[31] This leads to the general difficulty produced by the transfer of elements from models of nation-state democratic theory to the EU. It is relatively simple, even for the legal scholar, to formulate institutional demands. Implementing such an institutional proposal in the unique situation of the EU is much more difficult to carry out. For example, while some observers have promoted the creation of a European party system, arguing in favor of a subsidization of European parties, the question of whether Europe even has the preconditions that are necessary for European parties to prosper and make sense is extremely difficult to answer. Another example is found in proposals to promote and strengthen the identity of European citizens; such proposals necessarily require consideration of the very particular socio-economic environments within the EU and the fragmented political identities of the Europeans. In the realm of normatively charged discussions without concrete reference to empirical facts,[32] it is difficult to find an empirically supported yet normatively feasible middle path.

B. Fundamental Normative Principles

On a second level, the discussion circles around positions that call for adherence to the basic normative principles that lie at the core of any theory of democracy: self-determination, equality, and accountability. As a theory of public power as "fiduciary trust" ("*treuhändische Herrschaft*"), and irrespective of the differences among various forms of democratic theory stemming from disparate conceptions of human nature, all democratic theory shares a common normative core.

When democratic public power is defined as an expression of self-determination by those ruled, then it must respect the will of *all* those ruled. Normatively speaking, all those ruled are to be given a voice in *the same manner*. Any theory of democracy additionally posits that those ruled must be able to develop their own will *freely*; democracy without the fundamental protection of human rights is therefore unthinkable. The essential and indispensable minimum of any democratic order is the acknowledgement of all citizens as free and equal. Without such a recognition and acknowledgement, one might not even call a political order a democracy. Finally, it is beyond

30. *See* Weatherill, *supra* note 12, at 18.

31. H. ABROMEIT, DEMOCRACY IN EUROPE (1998).

32. *See, e.g.*, M. Greven, *Sind Demokratien reformierbar? Bedarf, Bedingungen und normative Orientierungen für eine Demokratiereform, in* DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 72, 81 (C. Offe ed., 2003).

doubt that the postulate of democratic legitimacy must cover every form and area in the practice and exercise of public power; the existence of residual areas, in which non-democratic ideologies might continue to exist, ought to be excluded.

An evaluation of current EU structures in light of these fundamental normative principles reveals several areas of concern. It is obvious, for example, that tensions exist between the principle of equality of all citizens and the current system of voting rights in the European Parliament; the distribution of parliamentary seats among the Member States does not correspond to the relative size of their populations.[33] In the distribution of voting rights, the EC-Treaty also expresses strong concern for the equality of Member States. Constitutional history and constitutional theory clearly prove that in the realization of democratic legitimacy both the principle of equal proportional weight of individual voices and the principle of sovereign equality of all Member States count. Both must be squared and aligned. It would also be important to overcome the currently strong influence of a technocratic bureaucracy within the law making process.[34] In addition, many observers call for increased transparency in the creation and implementation of EU law; in this context it can be argued that both the decision-making process as such, but also the deliberative process within institutions such as the Council, do not demonstrate the necessary transparency.

While these criticisms of the EU are significant, it is difficult to arrive at clear solutions in light of the normative vagueness of democratic theory. Frequently, there are limitations of feasibility and practicability. Additionally, various colliding goals and aims exist. This same difficulty arises with respect to concerns over accountability and control.[35] Much could be said for the assumption that non-accountability and weak mechanisms of control may perhaps pose the greatest risk to democratic legitimacy in today's EU.[36] Some remedies have been taken. For instance, the newly created Treaty on a Constitution for Europe aims at creating more accountability. Yet compared to the situation within the Member States, decision-making "in Brussels" remains astonishingly unaccountable, not least due to the complexity created by the linkages between the different levels of government in Europe.

There have even been discussions as to whether additional institutions at the EU level should be implemented: for example, a chamber for representatives of the national parliaments. Many national parliamentarians complain about their lack of voice in the legislative process or in other decision-making

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33. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) Art. 190 [hereinafter EC Treaty].

34. A. Moravscsik, *Warum die Europäische Union die Exekutive stärkt: Innenpolitik und internationale Kooperation, in* PROJEKT EUROPA IM ÜBERGANG 211(D. Wolf ed., 1997).

35. C. Offe, *Introduction* to DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 16 (C. Offe ed., 2003).

36. Greven, *supra* note 32, at 82.; *See also* V. Mehde, *Responsibility and Accountability in the European Commission*, 40 CMRL 423 (2003).

processes of the EU. There are likewise proposals to strengthen the role of the national parliaments within the decision-making process on issues of European integration, especially with regard to the definition of the position a Member State government will occupy within the framework of the European decision-making process. Indeed, it is hard to stay on top of the numerous proposals focusing on the development of the EU architecture.[37] It can be doubted, however, whether additional gain of input and voice always outweighs the loss of accountability and control.

C. Functional Conditions of Democratic Governance

On a third level, the current discussion circles around the fact that many underlying conditions necessary to the functioning of democratic self-determination have thus far been unfulfilled on a European level. Three conditions in particular are of special importance.

First, democracy, defined as self-determination within a collective, requires the existence of a basic consensus among the citizens concerned; namely, that certain material values and specific rules of procedure are taken for granted and remain outside the political process. The consensus defines this as the so-called "non-controversial sector." This sector is primarily characterized by solidarity and trust:

> The need for trust arises under circumstances of mutual dependence where the regular co-operation by each depends on their conscious or unreflected expectation of the regular cooperation of others—the "confidence of the future regularity of their conduct," as David Hume put it. Widespread mistrust—the suspicion that others will exploit one's cooperation rather than reciprocate, can prevent or unravel complex rule—governed practices of co-operation.[38]

One errs, however, if one equates this postulation (as is frequently done especially within the German debate) with the exigency of "homogeneity" among all citizens involved. The functioning of democracy does not depend—beyond an absolute minimum—on common cultural or moral norms. It is not necessary that the members of a group share a common conception of the "good life," or in other words, that they subscribe to similar moral and normative standards.[39] Democratic institutions can be adjusted to accommodate a highly heterogeneous population. Federalism is one option to cope with such a

37. *See, e.g.*, J. Shaw, *Process, Responsibility and Inclusion in EU Constitutionalism: A Contribution to the Debate on a Constitutional Architecture*, 9 EUR. L.J. 45 (2003) (reviewing debates over the proper EU "constitutional architecture").

38. A. Follesdal, *Union Citizenship: Unpacking the Beast of Burden*, 20 L. & PHIL. 313, 315 (2001).

39. The idea of the "good life" dates back to Aristotle and is often equated with an individual's personal sense of morality. As it is used here, however, the term has a somewhat broader meaning. In this article, the idea of the "good life" is used to circumscribe the normative standards which a person adheres and to which that person conforms her conduct. An individual's conception of the "good life" may be contrasted with principles of justice, which are assumed to be universally shared.

situation, for example; in a socially or politically fragmented setting, in which political identities are still coined by their role as Member State citizen, less power might be transferred to the upper level of governance than in a politically homogenous setting. In addition, the rules of procedure, such as the right to veto or elements of direct democracy, must ensure that one part of the group is not in the position to continually overrule the interests or the will of a minority. From the liberal point of view, there is no need for the establishment of a comprehensive ("thick") European political identity among individuals living in the EU. A deficit of European identity is no matter of concern, as long as the policy and the decisions of the EU take into account the fragmentations and divisions within the electorate. This in turn limits the necessity of the EU to ask for solidarity among its citizens.

Second, there is agreement that democratic self-determination in a collective requires a priori the existence of an area of communication,[40] in which citizens may discuss questions of politics freely.[41] While some observers assume that these deliberations will cause the transformation of the will of all ("volonté de tous") into a general will ("volonté générale"), others remain much more reticent and see them as providing an indispensable communicative background for representative decision-making. Any holder of a public office depends on the production of information and needs orientation as to the articulation and justification of interests and opinions. Others posit the existence of an area of communication as the foundation of a deliberative process. Even those who do not idealize the possibilities of communication among citizens and between citizens and the holders of public office, and who recognize the existing deficits within the nation-state arena, would agree on the existence of particular deficits at the European level. They would also agree that any attempt to overcome these causes specific difficulties of implementation and realization. Although there are today some forums of horizontal communication within the European citizenry, and the EU institutions aim at the establishment of a transnational area of communication, these forums comprise mainly particular elites and are limited to certain themes. They are also inhibited by language diversity.[42]

Finally, there is also agreement that legitimate democracy requires the existence of a civil society, whose actors—groups, associations and political parties—act as the voice and representatives of individual interests and

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40. H.-J. TRENZ, ZUR KONSTITUTON POLITISCHER ÖFFENTLICHKEIT IN DER EUROPÄISCHEN UNION (2002).

41. BÜRGERSCHAFT, ÖFFENTLICHKEIT UND DEMOKRATIE IN EUROPA, (Ansgar Klein et al. eds., 2003); K. EDER & H.J. TRENZ, *The Making of an European Public Space, in* LINKING EU AND NATIONAL GOVERNANCE, (B. Kohler-Kach ed., 2003).

42. On the thesis of "Öffentlichkeitsdefizit"or "publicity deficit," see Jürgen Gerhards, *Westeuropäische Integration und die Schwierigkeiten der Entstehung einer europäischen Öffentlichkeit*, 22 ZEITSCHRIFT FÜR SOZIOLOGIE 96 (1993) (discussed by Maurizio Bach, *Beiträge der Soziologie zur Analyse der europäischen Integration. Eine. Übersicht über theoretische Konzepte, in* W. Loth/W. Wessels (Ed.), THEORIEN EUROPÄISCHER INTEGRATION 159 (W. Loth & W. Wessels eds., 2001)).

positions.[43] Without the coordination and representation provided for by such actors, the exchange of opinions in the communicative area would remain meaningless and arbitrary; it would be impossible to assess the relevance and weight of individual interests and positions. Without these actors there would also be nobody who could effectively ask for accountability. At the same time, anyone would agree that while such actors act on the European stage today, they have not yet achieved the stature of their counterparts within the nation-state setting. In the genuine political domain, tremendous deficits continue to exist as to the existence of pan-European political parties, and attempts of the EU to promote such parties, by either financial or other means, have been unsuccessful so far.

However, the fact remains that social structures are neither static nor "self-determining," but rather develop as the product of institutional incentives. Thus, actors of civil society on a European level have already emerged, and will continue to emerge at such a time and at such places where possibilities of influence and contribution open up.

IV.
EUROPEANIZATION AS A CHALLENGE TO DEMOCRATIC THEORY

The diffuse uncertainty that many observers have sensed and continue to sense at the sight of the emerging instances of supranational governance should be attributed, in part, to the fact that there is frequently little clarity regarding the matter, scope and procedure of such governance: who claims to know exactly which competencies the EU has in the domain of Police and Judicial Cooperation in Criminal Matters, or by use of which procedure decisions of the environment of the EU are enacted? With regard to this uncertainty, a second factor seems to be equally important; even an observer who is not familiar with the subtleties of constitutional theory realizes that the formulation of adequate normative standards determining the legitimacy of democratic supranational governance raises difficulties. This can be attributed to several factors. To any democratic theorist, it is self-evident that democratic legitimacy is dependent on the context in which a model is applied. Even if a certain model fits within a particular nation-state constellation, this does not imply that it is transferable to a completely different social context. If the U.S. system were to be imposed on Switzerland, for example, the democratic profit resulting from this imposition would not be considered significant. The simple transfer of a democratic model successful in the nation-state context to the EU—albeit frequently observable—is therefore rather naive. Even for those who are not as familiar with the

43. On the role of civil society in democracy, see N.R. Rosenblum, *Civil Societies: Liberalism and the Moral Uses of Pluralism*, 61 SOC. RES. 539 (1994); L. Diamond, *Rethinking Civil Society. Toward Democratic Consolidation*, 4 J. DEMOCRACY (1995); B. Barber, *Three Challenges to Reinventing Democracy, in* P. HIRST & P. KHILNANI, REINVENTING DEMOCRACY 151(1996); *see also* TOWARDS A GLOBAL CIVIL SOCIETY (M. Walzer ed., 1995); D. ARCHIBUGI & D. HELD, COSMOPOLITAN DEMOCRACY (1995).

subtleties of democratic theory, it should be readily apparent that such a step might not make sense and may even be counterproductive. Attempts at securing and protecting democratic legitimacy in the EU will only be successful when the applied democratic model takes account of the federal context in which the EU operates, and reflects the diversity of cultural and moral perspectives within the EU as well as the nascent political identity of the Europeans. The difficulties are aggravated by the fact that, thus far, it has been impossible to determine the constitutional character and the political finality of the EU.

Furthermore the question must be raised, whether the democratic legitimation of supranational governance necessitates the development of new models of democratic legitimacy distinct from the set of models developed within the nation-state context. A supranational public power has been created with the EU. The EU cannot be defined as a classic state (at least at present)[44], but rather as a para- or pre-state entity, which is widely considered to be an entity continually fluctuating between the form of an international organization and that of a state. The fact that there is no closed and homogeneous model of nation-state democratic theory is thus not the only difficulty confronting efforts to solve the problems of democratic legitimacy within the EU by taking recourse to and applying the nation-state theory of democracy. Simple transposition of models developed within the nation-state context could also fail to raise the important question of whether supranational governance requires new forms and models of democratic input, process and accountability. Certainly, it is not the basic normative stipulations and functional goals of democratic theory that must be formulated anew: these basic goals are so deeply enshrined in our political culture that a renewal or reformulation is not even in sight. However, the development of new institutional systems is much more important in this matter, reflecting the imperatives of democratic legitimacy within the framework of a federal multi-level system of governance.

Finally, it must be remembered that any meaningful concept of democracy, in order to satisfy the fundamental claim of self-determination, must identify both the role of the individual in the political community and the appropriate relationship between the holder of public power and the individual. In its understanding of democratic theory, then, the EU decides on the issue of how to conceptualize and materialize the relationship between the Union and her citizens. Yet this understanding also has significant repercussions on the further development of the EU as an entity between an international organization and a state. Thus, the particular conception of democratic theory employed by the EU will be influenced not only by principles of self-determination, but by strategic political considerations as well. Talking about democratic theory within the context of the EU, without revealing the underlying strategic implications, misses the point.

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44. *See* M. Nettesheim, *Die konsoziative Föderation von Europäischer Union und Mitgliedstaaten*, 5 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 507 (2002).

The history of democratic theory was and continues to be a history of the search for institutions that guarantee that the claim and the normative duty of the public power to be an expression of the self-determination of those ruled is truly fulfilled. It is apparent that this search is a never-ending one, and that the history of democratic theory will not end with European integration. In part, this open-endedness results from the fact that any theory of democracy reflects our views of a humane and fully accountable exercise of public power, which in turn is predicated on our notion of what it means to be human. In a pluralistic world, it is evident that there will be differing expectations as to what demands a just and benevolent public power must meet. As diverse as the portraits of just governance are within a pluralistic society at any given time, equally so are the different expectations regarding how and what democracy should be. Further, the functional dependency of democratic models on their socio-economic environment requires a constant adaptation and adjustment of democratic models; other factors, such as socio-psychological, historical, and ideological environments[45] are also of relevance. Any institutional model might honor democratic claims in one or even several aspects, but may at the same time prove completely inadequate in others.

Yet not every form of public power and not every form of governance is legitimate. Democratic theory must not give up its normative requirements with respect to European integration. Some observers, however, seem to be of the opinion that European integration is legitimate and good *per se*; they seem to welcome any institutional development as an important step in the creation of a "post-national" and "post-modern" theory of democracy.[46] This approach cannot be welcomed. On the other hand, democratic theory must not overlook the fact that the EU, stimulated by ambitious goals and driven by functional necessities, has become an institution entrusted with public power, whose existence and success demonstrate a vast amount of "output" legitimacy. Democratic theorists ought to examine the structures and institutions of the EU in light of their claim to secure individual self-determination within a collective. The development of a theory of supranational democracy, and thus of the crystallization of the European principle of democracy, must be set within a dialectical process in which traditional expectations regarding democratic legitimacy of public power and insights as to the characteristics of the EU and the underlying functional imperatives of supranational integration evolve together in an interactive process.

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45. Whoever sustains the idea of a homogenous and closely understood will of the people that must be aroused to life by democratic authority and expressed correspondingly, will come to completely differing institutional conclusions than someone who relegates such ideas to the domain of senseless fiction. Whosoever is of the opinion that undisturbed deliberation of representative delegates leads to a decision serving the common welfare, will arrive at different institutional consequences than someone who emphasizes the significance of the interested cititzen at participating in a procedure.

46. *See, e.g.*, D. Chalmers, *The Reconstitution of Europe's Public Spheres*, 9 ELR 127 (2003).

A. The Amorphous and Dynamic Character of the EU

In light of these considerations, democratic theory must face the question of where to open up and where to acclimatize, in order to capture and accompany the normative process of integration—even in light of the assumption that the process as such is legitimate. It must expound in which areas the institutional order of the EU has developed features that are better able to redeem the normative entitlement of political democratic self-determination than those derived from the context of the nation-state. In doing so, however, democratic theory faces the difficulty of coping with the amorphous structure of the EU. An even greater difficulty arises from the fact that the EU is itself developing rapidly and situated in a rapidly developing context. As has already been mentioned, not too long ago the perception dominated that the EU was in a stage of development between state and international organization.[47] This assessment was based mainly on the fact that the EU has been assigned only thematically limited competencies. Furthermore, it was impossible to refer to the EU as a political actor, an organization responsible for the realization of an open and as of yet undefined idea of common values. Instead, the EU was a technocratic partnership of convenience that was bound by a predefined teleology and was mainly committed to liberalization and harmonization. Moreover, it was possible to point out that the sovereignty in the federal union of the EU and the Member States remained with the latter.

In particular, it appeared that the EU would move in a direction that would result in the adoption of a final form that was different and distinct from the traditional features of a state. For a while, the development of the EU was not understood as the emergence of a territorially defined public power, founded upon its citizens united in a political community, but rather as the emergence of a functionally defined, problem-oriented bearer of public power that developed functionally satisfying solutions to problems arising among Member States. This model, based on the notion of functional (instead of territorial) rule and the idea of flexibility, was appropriately denoted "functional sovereignty," in opposition to the classical concepts of territorial or personal sovereignty. Many expected, and partially hoped, that the EU would develop into a post-national public power, in which political community was no longer founded upon the idea of a common ethnicity.[48] Many observers have adamantly and powerfully emphasized that the EU is not developing into a state and that traditional categories of the state may not be transferred to the EU.[49] However, all too

47. *See, e.g.*, R.M. Lepsius, *Die Europäische Union als Herrschaftsverband eigener Prägung, in* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? 203 (C. Joerges et al. eds., 2002).

48. *See, e.g.*, E. Eriksen & J. Fossum, The EU in Motion. From poly-centric governance to poly-cephalous government in the European Union, (Nov. 2004) (paper presented at CIDEL Workshop London); J. E. Fossum, *The European Union In Search of an Identity*, 2 EUR. J. POL. THEORY 319-40 (2003).

49. There are at least four options (Federal State; intergovernmental cooperation, economic community, network governance), which are currently discussed.

frequently the model of "functional sovereignty," as opposed to statehood, dissolves in vague abstractions. To quote Jo Shaw's reference to the emergence of post-national European power:

Hence a dialogic and procedural conceptualization of constitutionalism in the EU is . . . fundamental precisely to conceiving of the EU's constitutionalism as post national. This is not meant to indicate that the EU is 'after' the nation state, in either legal or political terms, but precisely to capture the 'open-ended, indeterminate, discursive, sui generis and contested' nature of the project. [50]

This is worrisome; the danger exists that important constitutional accomplishments of the modern era will be gambled away into post-modern arbitrariness. Furthermore, this emphasis on avoiding traditional concepts of statehood surprises and disappoints equally, since the proposals submitted by many of the post-modern constitutional theoreticians are already known from nation-state democratic theory. It is inevitable to conclude that a genuinely new concept of supranational democracy that does not limit itself to the transfer and adjustment of concepts that were developed in a national context to the supranational level has as yet not been developed.

In the meantime, however, a new development can be observed. The EU is in the process of increasingly losing characteristics in the constitutional process that could be taken as non- or post-statehood. The EU finds itself purposely en route to statehood. Not only is it in the process of adopting a constitution, albeit in the form of an international treaty, but some authors are targeting the creation of a European identity, based upon a rich and culturally significant idea of "European." Furthermore, it becomes ever more apparent that the idea of functional sovereignty can no longer be sustained; the territorial anchorage of the European public power emerges ever more clearly (even in areas such as competition law). Damian Chalmers notes his disappointment in such developments with the following statement:[51]

> Europe is something multiple, transformative, but also, insofar as it is always applied to very material settings, something very practical. It is precisely when this has been lost sight of, and the European idea has tried to model itself upon a more monolithic model that apes that of the Nation State that it comes across as on the one hand shallow and insincere, the world of European anthems and flags, in its attempts to be something that historically it is not, and, on the other hand, as exclusionary and repressive in that it seeks to impose a single set of meanings and singular definitions of 'Us' and 'Them.'

Does that mean that the notion of the EU proceeding in the direction of post-nationalism and post-statism beyond the realm of the current theory of national constitutionalism is not applicable after all? The discussions in the European Convention regarding the constitution, limited as they are to the balancing of conflicting interests and the transferal of elements of national constitutionalism, are at any rate sobering. There was no apparent sign of the

50. Shaw, *supra* note 37, at 9.
51. D. Chalmers, *The Reconstitution of Europe's Public Spheres*, 9 ELR 127, 174 (2003).

competing notion of post-national constitutionalism in the debates of the European Constitutional Convention.[52]

B. The Contribution of the European Judiciary

The scholar of constitutional law is accustomed to hope for inspiration and direction not only from academic discussions or the statements of legal philosophers but also from the organs of the constitutional judiciary, which play an important role in questions of doctrinal development as well as the formation of constitutional theory. Without the direction, imagination and courage of the German Constitutional Court, for example, the theory and doctrine of German Basic Law would not have been able to develop its present richness and structural maturity. Thus, the jurisprudence of the European judiciary too must be analyzed to determine whether or not it is fundamentally based on innovative notions of democratic theory.[53] The European judiciary would certainly be in a good legal position to develop such an innovative understanding today.

Until the early nineties, there were significant disagreements regarding whether the treaty foundations of the European Community included a normative principle of democracy at all. On the one hand, it is well known that the European Court of Justice (ECJ) had postulated in various decisions that the treaties included—albeit in an implicit manner—a commitment to the principle of democracy.[54] This led the ECJ to conclusions in particular regarding the role of the European Parliament in the legislative process and the competencies of the Parliament with respect to the administrative implementation and enforcement of EU law. However, apart from these rather abstract and purely institutional advancements, and aside from the fact that the ECJ has from the early seventies on developed a challenging and—from the point of view of democratic theory—important jurisprudence on fundamental rights, the principle of democracy did not play a significant role in the jurisprudence of the ECJ.

Nevertheless, the EU is explicitly "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."[55] This normative orientation is also enshrined in the preamble to the treaty. However, the normative importance of the provision has remained until recently rather insignificant. The specific characteristics of the Union's constitutional democracy are found in the specific, institutional provisions of the treaty—whether with respect to the Union's citizenship, the significance of European

52. *But cf.* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind eds., 2003); N. Walker, *Constitutionalism, in* UNDERSTANDING DEMOCRATIC POLITICS 47 (R. Axtmann ed., 2003); C. Closa, *The Convention Method and the Transformation of EU Constitutional Politics, in* DEVELOPING A EUROPEAN CONSTITUTION (E.O. Erikssen, et al. eds., 2004).

53. F. Mancini & D. T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175 (1994).

54. K. Doehring, *Demokratiedefizit in der Europäischen Union?*, DVBL. 19 (1997).

55. TREATY ON EUROPEAN UNION, Dec. 24, 2002, O.J. (C 325) art. 6.

political parties, the role of the European Parliament in the process of law making, or parliamentary control of the Commission. Consequently, the number of cases in which the general principle has relevance has remained rather small.

Even in cases, however, in which Article 6 of The Treaty on European Union could have played a role, the European judiciary has—notwithstanding its at least partially grandiose statements about the role of democracy in the EU—not developed a sense of the challenge and the interpretive possibilities of the principle of democracy, nor has it developed an independent or sustainable conception of European democracy. A conspicuous example of this is the decision of the Court of First Instance of April 10, 2003, in which the Court had to decide a lawsuit of the French representative of the European Parliament, Jean Marie Le Pen.[56] Le Pen was sentenced by a French Criminal Court, and French law set forth that this conviction led to the deprivation of any parliamentary eligibility. Once this matter was communicated to the President of the European Parliament, the EP waited six months until Le Pen had exhausted his legal recourse under French law. Finally, the President of the EP "acknowledged" the deprivation of Le Pen's eligibility and determined that the French decision had led to the loss of the parliamentary seat of Le Pen. Le Pen filed a lawsuit against this decision at the EU Court of First Instance. Le Pen lost his case due to the fact that the decision of the EP was assumed to have no legal significance. The European judiciary did not recognize, or at least did not acknowledge, the democratic dimensions and potentials of the case; it refrained from discussing the question of whether the EP should be given the power to scrutinize or even overrule Member State decisions leading to the deprivation of a mandate of a Member of the European Parliament. The decision of the Court reflects an understanding of European democracy—in placing the competency of allocating and withdrawing the Parliamentary mandate into the hands of the Member States—which considers the representatives of the European Parliament as representatives of the Member States and not representatives of a European electorate. The reserve of the Court is all the more lamentable, since the Act concerning election of the representatives of the Assembly by direct universal suffrage of August 10, 1976 did indeed leave enough interpretative room for the development of substantive European guidelines for national decisions aiming at the withdrawal of European parliamentary mandates. It would also have provided the option of developing procedural standards for an examination of such Member State measures by the EP. In light of this decision, there is much to be said for the assumption that, even within the circle of European Judges, a complete and comprehensive understanding of European democracy has not been developed.[57]

56. *See generally* M. Nettesheim, *Zum Status der Mitglieder des Europäischen Parlaments. Anmerkung zu EuG, 10.4.2003 - Rs. T-353/00 Le Pen ./.* Europäisches Parlament, Juristenzeitung, 950-55 (2003).

57. This ascertainment also pertains to the European Commission. The perplexity of the Commission with respect to "governance" is reflected in the White Book on European Governance

C. Elements and Perspectives of a Theory of Supranational Democracy

It is thus more profitable and stimulating to look towards the lively discussions between constitutional scholars, political scientists, and philosophers. Here, between the airy demand for "post-national" democracy and concrete institutional proposals, the most interesting and important elements and perspectives regarding a theory of supranational democracy are beginning to crystallize. There are four areas of particular importance where democratic theory has already "adjusted" itself to the realities of a successful exercise of supranational power.[58]

1. The Role of the Citizen

Perhaps the most important and surely the most extensive discussion of the past several years concerned the question of which type of political community the EU ought to be based on and which type, correspondingly, it ought to sustain.[59] Whoever is interested in the workings of European democracy has to admit, as mentioned above, that the citizens of the EU do not conceive themselves as citizens of a European nation.[60] Furthermore, significant doubts exist as to how far Europeans are united by a common political identity; in other words, it is still uncertain whether European citizens form a political community at all.[61]

The discussion in the past several years has demonstrated that European history, European culture, and especially the European understanding of values contain enough similarities to offer the potential for the foundation of a political community of Europeans. It is equally well known that political identity must not be taken as an unchangeable and predetermined "inscription" into one's self,[62] but rather as a social construct whose formation is in the hands of both the individual and society.[63] Given the constructed character of social identity,

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(European Commission - Europäische Kommission, "European Governance" of 25.07.2001, COM (2001) 428), that was justly criticized and furthermore never reached the intended prominence. The technocratic approach adopted by the Commission led to disappointment and to estrangement among academics. *See, e.g*, WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? (C. Joerges et al. eds., 2002).

58. It is possible to differentiate between normative principles, legitimate conceptions, institutional models, and constituent models.

59. *See* Rainer M. Lepsius, *Nationalstaat oder Nationalitätenstaat als Modell für die Weiterentwicklung der Europäischen Gemeinschaft, in* STAATSWERDUNG EUROPAS? OPTIONEN FÜR EINE EUROPISCHE UNION 19 (R. Wildenmann ed., 1991).

60. C. Gusy, *Die Nation in der supranationalen Gemeinschaft* 53 EUROPA ETHNICA 7 (1996); Grimm, *supra* note 1, at 587.

61. *See, e.g.*, M. Nettesheim, *Identity and Democratic Legitimacy in the EU, in* STUDI SULLA COSTITUZIONE EUROPEA. PERCORSI E IPOTESI, 89-104 (Alberto Lucarelli & Andrea Patroni eds., 2004); M. Nettesheim, *Die politische Gemeinschaft der Europäer, in* VERFASSUNG IM DISKURS DER WELT. LIBER AMICORUM FÜR PETER HÄBERLE 193-206 (A. Blankenagel et al. eds., 2004).

62. This is the position taken by the so called "essentialists." *See, e.g.*, ANTHONY D. SMITH, THE ETHNIC REVIVAL IN THE MODERN WORLD (1981).

63. B. ANDERSON, IMMAGINED COMMUNITIES (1991); E.J. HOBSBAWM, NATIONEN UND NATIONALISMUS (1991); E. GELLNER, NATIONS AND NATIONALISM (1983). *See also* Bach, *supra*

one might concede that political institutions should have the possibility and—however limited by fundamental rights—the freedom of exerting some influence on this process of identity formation. Since the displacement of religion as the primary form of the construction of identity in Europe, the political system has become the central focus of the cultivation of a political identity. As it is generally known, the European nation-state has successfully produced histories and other narratives which might serve as the basis of identity building. At the same time, it uses such means as compulsory public schools, the military draft and the unification of the administration, as well as the politics of the welfare state, in order to reinforce these narratives. From this perspective the expectation does not seem unrealistic that the EU could manage to create a genuinely supranational "European" identity, perhaps in an even normatively enriched and "improved" substance.[64] If the EU takes precedence in the formation of a European identity, an unavoidable side effect would however be the homogenization and standardization of the different European cultures.[65]

Any scholar will concede, however, that this will only happen as the result of a difficult, lengthy and—especially regarding the danger of indoctrination—not unproblematic process. No one doubts that the mechanisms used by nation-states in forming the identity of their own citizens are not at the disposal of the EU at the present time, nor may they be available in the future.[66] Apart from educational policies, liberal modern public powers, respecting the freedom of the individuals, have only limited scope anyway. Nonetheless, there are those who wish to see in the recently maturing interest of the EU in social policy a profound impetus for the integration of European citizens.[67] Indeed, the constitutional treaty seems to be drafted with such an aspiration in mind.[68]

Needless to say, the nature of the principle that ought to comprise the foundation of a European identity-forming policy is at present at the center of much scholarly debate.[69] At issue are questions such as the kind of political community that ought to form the foundation of the EU. What type of identity should Europeans develop? The practical implications are obvious. For

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note 42, at 161 ("The creation of collective identity presumes an objective and meaningful system of orientation that allows the self-description of a unity, the distinction from others and the enabling of symbolic identification.").

64. E. Bakke, Towards a European Identity? (Arena Working Paper Nr. 10/1995).

65. *Cf.* RICHARD MÜNCH, DAS PROJEKT EUROPA 15 (1993).

66. *See* Lars-Erik Cederman, *Nationalism and Bounded Integration*, 7 EJIR 139, 152 (2001); *see also* N.W. Barber, *Citizenship, Nationalism and the European Union*, 27 EUR. L. REV. 241 (2002).

67. On the role of the draft of the constitution, see A. von Bogdandy, *Europäische Verfassung und europische Identität*, JZ 53 (2004).

68. A. von Bogdandy, *Europäische Verfassung und europische Identität*, JZ 53 (2004).

69. For a good overview, see Cederman, *supra* note 65, at 146; I. Ward, *Beyond Constitutionalism: The Search for a European Political Imagination*, 7 EUR. L. J. 24 (2001); DANIELE ARCHIBUGI ET AL., RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY (1998); Anton Leist, *Nation und Patriotismus in Zeiten der Globalisierung, in* POLITISCHE PHILOSOPHIE DER INTERNATIONALEN BEZIEHUNGEN 365 (C. Chwaszca & W. Kersting eds., 1998).

example, such a discussion is directly relevant to the issue of Turkey's membership, given its cultural, historical and religious traditions. These questions are also applicable to the EU policy towards citizens of third states. Furthermore, the EU has to address such questions when formulating its Single Market policies, which need to keep in mind regional and cultural particularities.

On one side of the debate are those who conceive of the political community of Europeans as a "thick" cultural community, based on a particular notion of the "*beata vita*." [70] This view holds that specific ("European") ways of life possess an inherent value, which needs to be recognized and protected. They argue that the EU, as a legitimate supranational power, depends on the existence of a political community whose social and political integration in turn rests upon the adherence of its members to a common value system. Under this view, the EU political community depends on social unity, which emerges whenever there is a consensus between the moral orientation of the subject and that of the collective. A political community therefore can only be conceived of as a "thick"—that is, deeply culturally integrated—community. Otherwise, social unity, democratic self-governance and solidarity are inconceivable. A political community's ethos, in this view, necessarily rests upon a particular pre-political ethical community, which may be generated by tradition, common history, and a shared notion of the "good life." Should the political community constitute itself via the common substantive ethos, then the duties of its members toward each other outweigh normatively all other principles of justice. Patriotism and solidarity become the highest political virtues. The EU would, accordingly, be legitimated if and when its actions could be seen as the expression of a collective identity; when, in other words, Europeans may see it as an expression of their "own self." Recently, the most eminent European Law scholar, Joseph Weiler, has argued in favor of a stronger role of the Christian religion with the EU.[71]

According to this point of view, to bring forth a "European Nation," the EU must convey this specifically European ethos through cultural and educational measures, such as a harmonization of the syllabi in primary and secondary education over the next several decades. It must construct a historical community which the individuals can transform into the focus of their loyalty and reverence. This construct must imbue a sense of community. It is noteworthy that in the European social, cultural and scientific communities, many at times brilliant (if at times in their constructive effect not yet fully elaborated) efforts have recently been made to construct such a substantive European identity in light of European history, culture and religion. The

70. *See, e.g.*, P. Kirchof, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, EUROPARECHT BEIH. 11 (1991); E.-W. Böckenförde, *Die Nation - Identität in Differenz, in* IDENTITÄT IM WANDEL 129 (K. Michalski ed., 1995); E.-W. Böckenförde, *Grundlagen europäischer Solidarität*, 20 FRANKFURTER ALLGEMEINE ZEITUNG (June, 2003); T. Schmitz, *Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union*, EUROPARECHT 217 (2003).

71. J.H.H. WEILER, UN'EUROPA CRISTIANA (2003).

religious roots of European culture, in this view, have to be respected and can become the roots and a focal point of the community of Europeans. Those who hold this opinion oppose Turkey's EU membership simply because they cannot imagine its seamless and tension-free integration. The proposed adoption of references to the religious, cultural and historical roots of Europe in a Constitutional document is a further consequence of this view.[72]

The opposing side in the debate is represented by those who argue that the European political community ought to be based on universal principles of justice alone, in particular the principles of freedom, equality, neutrality, and *neminem laedere* ("do no harm to others").[73] This viewpoint does not deny that "anthropos zoon politikon estin," or in other words, that humans are contextual individuals. One scholar, for instance, notes that: "Our sense of identity arises from our experience of belonging within significant communities such as families, schools, workplace communities, religious groups, political associations, sports clubs—and also nations, conceived as cultural communities endowed with political relevance."[74] However, advocates of this position argue that issues such as the "good life" may not play any role in European policy and jurisprudence. One must differentiate between a social or cultural identity and a political identity. Integration must occur only via the mutual assurance of fundamental rights and principles of due process. Political identity is based on the mutual acknowledgement of citizens as fellow citizens, against whom one has to justify one's own demands and interests rationally, and who have likewise the right to have their own rationally justified demands heard. According to this normative ideal, Europe's citizens should see themselves as members of a political community, which has constituted itself because it is beholden to these universal principles. This is the root of the European sense of community. It is therefore a political community, open to each and every one willing and prepared to accept and acknowledge these principles. As long as this acceptance is in place, the citizens' attitudes towards the "good life" are irrelevant. It has to be the aim of such a political community to form members who accept each other with tolerance whenever personal issues, such as cultural and religious preferences, are concerned. This community may be characterized by

72. The treaty establishing a Constitution for Europe, O.J. (C 310) (December 16, 2004), shows reluctance to identify with a certain idea of the "good life." It includes a reference to "the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law," but it does not mention the Christian religion.

73. *See* Z.B. J. HABERMAS, FAKTIZITÄT UND GELTUNG 643 (1992); J. HABERMAS, DIE EINBEZIEHUNG DES ANDEREN 185 (1998); M. Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union*, 45 AJCL 505, 524 (1997); U.K. Preuss, *The Relevance of the Concept of Citizenship for the Political and Constitutional Development of the EU, in* EUROPEAN CITIZENSHIP, MULTICULTURALISM, AND THE STATE 11, 22 (F. Requejo ed., 1998).

74. N. MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 186 (1999).

considerable heterogeneity.[75]

In light of the cultural and social differences between its citizens, the EU would most probably fail in an attempt to foster political cohesiveness through the formulation of a stringent and "thick" idea of the "good life." In so doing, it seems impossible that the EU could gain acceptance among its citizens, who are themselves all members of heterogeneous and pluralistic societies, in which each person may construct her own way of life freely. To the contrary, the EU owes its success to the fact that it has abstained from cultural value judgments. It would be a mistake to abdicate this neutrality. Efforts on the part of EU organs or private organizations towards a common ethos tend to be rather abstract or to descend into mere sloganeering. Of course, it is possible to recall certain historical or cultural facts, but it remains highly dubious whether these may become crystallizing points or catalysts for a common European identity. Similar criticism may be raised in response to Juergen Habermas' and Jacque Derrida's recent attempt to delineate a European identity against outsiders (in this case, the U.S. policy vis-à-vis Iraq and its market-oriented social construct).[76] The authors' emphasis on the different concepts of the "good life" does not suffice as the foundation of a separate and durable political identity.

A weakening of mechanical, predisposed, or geographically defined identity-forming mechanisms is a sign of modernity. Identity is more and more organically defined through individual decisions. Identity formation is thus made dynamic and individualized. Thus, not only are modern societies more heterogeneous than ever before; it is also important to note that individuals increasingly define themselves through self-created and self-maintained social networks. It does not appear very fruitful to long for the idea of a rich culturally constructed Europe, when it must be noted at the same time that an open network society is gaining currency, in which each and every single person is creating his or her own associations and commitments. The EU ought therefore to recognize this tendency and guarantee openness and inclusion.

Solidarity and mutual support do not only grow in the context of a "thick" cultural community; they may also result from a political community of citizens who share common ideas of justice, freedom, and equality. As one scholar notes:

> This account is based on individuals' sense of justice and mutuality, expressing respect for others, rather than a sense of community or 'thick' identity, or empathy. Liberal contractualism, as several other theories, assumes that institutions can socialize individuals into a "sense of justice." Individuals can come to see themselves as free and equal participants in a joint European scheme of co-operation that requires the compliance of a large proportion of the population.[77]

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75. With regard to the role of the constitution in the process of identity formation, see J. Lacroix, *For a European Constitutional Patriotism*, 50 POL. STUD. 944 (2002).

76. J. Habermas & J. Derrida, *Nach dem Krieg: Die Wiedergeburt Europas*, 31 FRANKFURTER ALLGEMEINE ZEITUNG (May 2003).

77. A. Follesdal, *supra* note 35, at 313.

For those supporters of this perspective it is beyond doubt:

> . . .that every citizen in the new century must learn to become a 'cosmopolitan citizen:' that is a person who is able to arbitrate between national traditions, fate of *communities*, and alternative lifestyles. Citizenship in a democratic form of the state of the future should be able to play a growing negotiating role: a role, that combines dialogue with the traditions and discourses of others in pursuit of the goal, to expand the horizons of the proper fundamental structure of significance from prejudice.[78]

This perspective envisions a political community that is open for everyone who is willing to acknowledge the validity of these principles. As long as such principles are respected and accepted, the personal values and convictions of citizens are irrelevant. According to this view, the goal would be to create a political community in which each member is tolerant of the cultural and religious views of other members.[79] Such a community may display a considerable degree of heterogeneity. For the individual, this view implies that the traditional and mechanical collective identity will weaken in the process of European integration. Although individual identity remains somewhat predetermined by birth, the formation and construction of the constituent parts of one's identity, particularly through relationship networks, will increase in significance.[80]

Thus, under this view a European identity should be cultivated that is founded upon freedom and equal opportunity, as well as a commitment to ensuring that all citizens meet their basic needs. It would be a duty of the EU to protect the foundations of this "open networking society," whose social dimension lies in its openness. Equal opportunity and inclusion, as well as the establishment of a "protective network,"[81] would form the underlying foundation of this identity. It would be missing the point, however, to equate this form of polity with the product of the so-called "social welfare state"[82] targeted at an all-embracing welfare reallocation. [83]

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78. D. Held, *Das kosmopolitische Projekt, in* WELTSTAAT ODER STAATENWELT 115 (M. Lutz-Bachmann & J. Bohman eds., 2002).

79. For a discussion of EU citizenship, see M. Nettesheim, *Die Unionsbürgerschaft im Verfassugnsentwurf – Verfassung des Ideals einer politischen Gemeinschaft der Europäer?*, 26 INTEGRATION 428 (2003); J. Shaw, *The Problem of Membership in European Union Citizenship, in* Z. BANKOWSKI & A. SCOTT, THE EUROPEAN UNION AND ITS ORDER: THE LEGAL THEORY OF EUROPEAN INTEGRATION 65 (2000); G. de Búrca, *Report on the further Development of Citizenship in the European Union, in* DER BÜRGER IN DER UNION. REFERATE FÜR DEN 1. EUROPÄISCHEN JURISTENTAG 39 (2001).

80. Richard Münch, *Demokratie ohne Demos. Europäische Integration als Prozess des Institutionen- und Kulturwandels, in* THEORIEN EUROPÄISCHER INTEGRATION 177, 189 (Wilfried Loth & Wolfgang Wessels eds., 2001).

81. *Id.* at 194 (citing J. RAWLS, A THEORY OF JUSTICE (1971)).

82. On the application of the idea of a "social contract" to the EU, see H. Abromeit, *Volkssouveränität in komplexen Gesellschaften, in* DAS RECHT DER REPUBLIK 25 (Hauke Brunkhorst & Peter Niesen eds., 1999); Heidrun Abromeit & Tanja Hitzel-Cassagnes, *Constitutional Chance and Contractual Revision: Principles and Procedures*, 5 EUR. L.J. 23 (1999). For an abstract discussion of this idea, see JULIAN NIDA-RÜMELIN, DEMOKRATIE ALS KOOPERATION (1999).

83. H. Brunkhorst, *Ist die Solidarität der Bürgergesellschaft globalisierbar? in*

It is not astonishing that existing EU law is already deeply imprinted by the universal principles which offer themselves as a basis for a European identity. One such example would be the increase in freedom that now unites Europeans as a result of the fundamental freedoms of the Common Market. In the same context belongs the freedom of movement within the EU, now guaranteed by Article 18 of the EC Treaty. Equal treatment has been assured through the anti-discrimination law of Article 12,[84] and through many supplementary directives with anti-discriminatory content. Equality is the foundational principle regarding regional and structural aid; the solidarity embedded in these policies aims at implementing equality. Furthermore, the emerging and developing responsibility of the EU for external and internal security of its citizens seeks to enforce the *neminem laedere* principle.[85]

2. The Transition to a Complex Model of Democracy

In many circles, European political scholars currently discuss the development of new models of democracy. It is conspicuous; however, that almost no one is to be found who defends those popular conceptions of democracy that are of such importance in Germany and in the U.S., respectively. I refer specifically to the idea of equating democracy with sovereignty of a people, understood as a holistic entity, which is important and influential in Germany, and to the claim of equating democracy with the rule of the majority that is popular in the U.S. All influential contributions rely on a complex model of democracy. These positions are based on the assumption that democracy must not only concern itself with the input-side. Although there exist considerable differences between those who adhere to this view, such positions have in common the assumption that legitimacy is produced both by input (for example, the possibilities of the individual to participate)[86] and by output (for example, efficiency, advancement of the public good, justice). They assume that it is not the people who serve as a reference point for participatory mechanisms and a focal point of any definition of public good, but instead the individual. Transparency and control form, according to this view, are important aspects of democratic sovereignty. In the federal setting of the EU and the Member States, questions of distribution and limitation of competencies also assume an important role in the production of democratic legitimacy.

The significance of this position will only be understood if it is contrasted with the prevailing view among German constitutional scholars and the concept of democracy applied by the German Constitutional Court. This approach has been developed by the German Constitutional Court (Bundesverfassungsgericht)

GLOBALISIERUNG UND DEMOKRATIE 274 (H. Brunkhorst & M. Kettner eds., 2000).

84. EC TREATY, art. 12.

85. The *neminem laedere* principle may be stated as "Do not cause foreseeable harm."

86. *See generally* B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984).

in its decisions on foreigners' right to vote[87] and on workers' representation.[88] The view takes as a starting point of democratic legitimization the German citizens, whose *will* ought to be reflected and reproduced in *any decision of the organs of the state.*[89] The model implies that any bearer of a public office must trace back her appointment directly or indirectly to the "will" of the people. The same applies to any substantive decision of the holders of public office and the distribution of competencies between the governmental institutions. The model asks for processes, through which the "will" of the people is introduced into each and every aspect of public power; in the words of the German Constitutional Court, the "chain of legitimacy"[90] must not be broken. The Court also distinguishes between personal legitimacy, substantive legitimacy, and functional legitimacy, and requires that the interaction of "personal," "substantive" and "functional" legitimization must ensure a sufficiently close linkage to the will of the people.[91]

This model is applied by both the Constitutional Court and members of academia not only with regard to domestic constitutional issues, but also to the reconstruction of democratic legitimacy in the EU. There is a "hard-core" position according to which any act of the EU must be seen as an act to be attributed to the German people. This leaves little room for majority decisions, and excludes the possibility of any reevaluation and redefinition of the legitimizing function of the European Parliament. In light of this position, the European Parliament is to be regarded as a "nobody" in the process of democratic legitimization. The strengthening of the decision-making power of the European Parliament would indeed lead to a de-democratization of the EU. In the view of the moderate faction, among which the German Constitutional Court ranks,[92] the legitimation of EU public power can either be effectuated through Member State "channels" or through direct democratic control by the European electorate. The concentration on the "input" dimension is, however, the characteristic facet of these positions as well. It is evident, though, that a model of democratic legitimacy of supranational power that supports itself solely on the input-side (the will of the people) is not very useful in the context

87. 83 BVerfGE 37.

88. 93 BVerfGE 37.

89. For an elaboration of this view, see E. W. Böckenförde, *Demokratie als Verfassungsprinzip, in* 1 HANDBUCH DES STAATSRECHTS § 22 (J. Isensee and P. Kirchhof eds., 1987); E. TH. EMDE, DIE DEMOKRATISCHE LEGITIMATION DER FUNKTIONALEN SELBSTVERWALTUNG 386 (1991); H. DREIER, HIERARCHISCHE VERWALTUNG IM DEMOKRATISCHEN STAAT, TÜBINGEN (1991).

90. For a critique of this approach, see J.H.H. Weiler, *"Der Staat über alles"*, 44 JÖR 91 (1996); B.-O. BRYDE, 5 DIE BUNDESREPUBLIKANISCHE VOLKSDEMOKRATIE ALS IRRWEG DER DEMOKRATIETHEORIE, STAATSWISSENSCHAFTEN UND STAATSPRAXIS 305 (1994) ("Legitimationskettenfetischismus"); R. Lhotta, *Der Staat als Wille und Vorstellung: Die etatistische Renaissance nach Maastricht und ihre Bedeutung für das Verhältnis von Staat und Bundesstaat* 36 DER STAAT 189 (1997).

91. For a critique of this position, see A. von Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, KRITV 284 (2000).

92. *See* 89 BVerfGE 155.

of European democracy.

Within the field of theories of complex democracy, there exists a wide range of elaborations. It is not possible here to commence a discussion of the relative usefulness and suitability of these different models; the usefulness of these models cannot to be discussed in an abstract manner. Rather the effectiveness of any particular model of complex democracy may only be determined in light of a specific context. One remark, however, is possible: modern democracies must not be comprehended as closed regimes, but are constructed by the combination of various "building blocks." Their ability to function, and more importantly their legitimacy as a form of public power, depends on the allocation of various "building blocks" and their consolidation into one regime. The various parts of the regime are in close interrelation with one another. They may serve the goal of advancing the public good, but are not necessary conducive to such a goal. It is sometimes overseen in the discussion about the modernization of democratic institutions that the connection of different "building blocks" into one regime may be counter-effective. The interaction between the parts of a democratic regime must be viewed in consideration of its total effects. Only then may it be possible to determine with sufficient security whether the complete system does not only restrain the sources of power always prone to abuse, but also provides decisions that satisfy the demands for sufficient effectiveness and legitimacy. Furthermore, it is clear that the empirical and normative views on the question of which model is most effective in a given situation change with the times.

Almost forty years ago, Fritz Scharpf developed his model of democratic legitimacy, differentiating between input and output. Today, this model is in need of reformulation and adjustment. According to my view, there is no need to juxtapose input and output. Instead, the ultimate goal of any model of legitimate democratic power ought to be the advancement of the public good—understood as a normative concept regarding justice and fairness within a political community. The realization of this goal lies in the hands of institutions, the legitimization of which depends on input, procedure and control. Any efficient model of democracy will need to put all three elements in a proper relationship. In other words, this model differentiates between the direct participatory role of the individual, the arrangement of the process of public decision-making, and the control mechanisms that are ascribed both to the individual and other organs. In the European debate, it is the latter aspect of control that has not yet received adequate recognition of its important role in the establishment of democratic legitimacy. The combination of these three elements allows for the development of models which ensure that public power is exercised in accordance with the postulates of self-determination of the individual within the collective and responsiveness of public sovereignty to the individual. In this respect, this model of democracy extends far beyond the

"empirical theory of democracy" developed by Schumpeter.[93] This understanding of democracy may not be reduced to considerations of procedure,[94] nor might it be equated with the considerations of a philosophy of pure reason.[95]

3. European Democracy between Technocratic Governance of the Elite and Deliberative Discursiveness

In the current discussion about democratic legitimacy, there are widely varying views about the relative weight to be attributed to the various elements of the model of democratic legitimacy just outlined. Initially, a "realistic" conception of the integration process dominated, comprehending European integration as an enterprise of cooperating states. After the extension and the broadening of the EU's powers, along with its increased capacity for independent decision-making power as a result of the principles of direct effect and supremacy of EU law and the acceptance of the principle of majority voting, this earlier, "real-political" notion lost its explanatory power. A new conception of European integration emerged—the idea that the supranational institutions were charged with the functional and apolitical task of realizing the goals formulated in the founding treaties. According to this point of view, it is the Member States that define the tasks and responsibilities of the EU institutions; the European institutions then realize them in an apolitical and technocratic manner. In large parts of the political and academic discussion about the legitimization of the EU, the notion of efficient, neutral and technocratic expertise plays an important role.[96] The attempt, according to this perspective, to solve transnational problems through professional experts may thus be normatively welcomed.[97] From this viewpoint, the functional distancing of European holders of public office from the political processes in their Member States and their release into technocratic independence is necessary and justified. According to Giandomenico Majone, "the democratic deficit, in the literal sense, is democratically justified."[98]

On the basis of the Schumpeterian theory of democracy, others also doubt whether a strengthening of the participatory rights of European citizens would indeed contribute to the effectiveness and legitimacy of European governance. Those observers stress the importance of independent decision-making on the part of an elite group of European politicians and bureaucrats as more efficient given the complexity of the tasks to be mastered. Adrienne Heritier, for

93. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942).

94. *See* Abromeit, *supra* note 1, at 176 (2002).

95. As, for example, in the most elaborate versions of the theory of deliberative democracy.

96. For an elaboration on this point, see FRITZ W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? (1999).

97. *Cf.* F. W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL'Y 29 (1997).

98. G. Majone, *The Regulatory State and its Legitimacy Problems*, 22 W. EUR. POL. 1, 21 (1999).

example, expresses a skeptical view of the idea of democratic participation: "Measuring the empirical elements described above against both the procedural and substantive model of national democracy may miss the mark."[99] Some scholars have openly questioned whether the time is ripe in light of the experiences of European governance for democratic theory to make a turnaround and reconsider the importance of independent and apolitical governance by experts. For example, Phillippe von Parijs raises the question: "Granted that we need a more powerful union for the reasons just mentioned, do we also need a more democratic Union?"[100] These authors stand for an influential and widely accepted view, according to which the quality of the supranational problems to be solved, and the expectations of the citizens in terms of effectiveness and efficiency of problem solving as well as the actual effectiveness of supranational governance, all lead to one conclusion: instead of focusing on the input and control dimension of a model of democracy, one should rather strengthen the output capacities of supranational governance. This is noticeable, for example, in the increasingly important discussion about the desirability and feasibility of a European social welfare system.[101] The ability to solve problems is seen by many observers as an achievement of European integration[102]—especially if compared to the structures of the nation-state and their inability to act in situations of political blockades.

While the previously discussed approaches dominated the discussion in the nineties, the situation has changed recently. At present, the discussion has actually arrived at a point that justifies the use of the term "turnaround." In light of the fact that the EU today commands political power in areas of value conflicts and of colliding goals and interests, trust in the "expertise" and knowledge of independent experts and the quality of their decisions might be deceiving, perhaps even irresponsible. Significant as the knowledge of experts in a particular field of expertise may be with respect to the question of how conflicts regarding aims or values may be resolved, they do not enjoy an advantage or special capabilities over and above genuine political decision-making mechanisms, which must apply in such cases as well. The attempt to solve political problems through recourse to independent expertise leads to corrosion, perhaps even a derision of the normative ideals of the idea of self-determination.[103]

Recently the question has gained increasing significance as to how the

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99. Adrienne Heritier, *Elements of democratic legitimation in Europe: An alternative perspective*, 6 J. EUR. PUB. POL'Y 269, 279 (1999).

100. P. von Parijs, *Should the European Union become More Democratic?, in* DEMOCRACY AND THE EUROPEAN UNION 292 (Andreas Follesdal & Peter Koslowski eds., 1997).

101. For a discussion about the idea of a European "public good," see M. Heintzen, *Die Legitimation des Europäischen Parlaments*, ZEUS 377, 381 (2000); *see also* EC Commission, White Paper on European Governance, SEC (2000) 1547/7 final (Oct. 11, 2000).

102. *See* WIE PROBLEMLÖSUNGSFÄHIG IST DIE EUROPÄISCHE UNION? REGIEREN IM EUROPÄISCHEN MEHREBENENSYSTEM (E. Grande & M. Jachtenfuchs eds., 2000).

103. *But see* Schmalz-Bruns, *supra* note 18, at 265.

stipulations of the theory of deliberative democracy—understood as a philosophical idea ensuring the rightness of political decisions—could be integrated into the model of supranational democracy. Two challenges have attracted attention here. On the one hand, it would be necessary to establish and protect a free and permanent discourse among free and equal citizens, the existence of which forms the center of the theory of deliberative democracy. One of the prerequisites of this discourse is the mutual recognition of all citizens as free and equal.[104] Another is the demand that members of the political community are aware of "their mutual dependence, their vulnerability and their obligation to regard the solution of their problems in light of the implications for their neighbors."[105] Yet another prerequisite would be to translate into law the elaborate conditions of reciprocity within the public debate formulated by the theory of deliberative democracy. Principles of procedure must be formulated that justify and substantiate the expectation of rational, acceptable results. Interests and reasons can only be furthered and enforced if they have been subjected to a critical examination in a public forum in which they have been proven mutually acceptable to all participants.[106] This open discourse, in which reason will only prevail when it may be generalized, must be protected by foundational rights guaranteeing freedom and equality. The parties concerned must forego the application of power and the establishment of inequality. The subsidies of the welfare state are assumed to play a significant role.[107]

Equally important is the question of how the idea of deliberative democracy might be implemented in supranational decision-making institutions, so that the efficiency of supranational governance is maintained but at the same time the expectation of rational and fair decisional outcomes is realized. It would be necessary to develop proposals as to how the process of supranational decision-making and the process of deliberative deliberation within the citizenry should be intertwined. This is difficult for constitutional theory, since two clearly conflicting principles must be balanced. In addition, one ought to remain conscious of the fact that debate among holders of public office does not always represent an expression of deliberative democracy. This observation is provoked by a current trend to label each form of communication and each advisory task as deliberative. For example, there is little doubt that the procedure of comitology,[108] through which officials of the European

104. Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 321 (1997); RAINER FORST, KONTEXTE DER GERECHTIGKEIT, 1997.

105. F. W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? 181 (1999).

106. Deliberative practice is assumed to have an "epistemic fuction." *See* David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 173 (James Bohman & William Rehg eds., 1997).

107. O. Depenheuer, *Setzt Demokratie Wohlstand voraus?, in* DER STAAT 329 (1994).

108. *See generally* C. Joerges & N. Neyer, *From Intergovernmental Bargaining to Deliberative Political processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273-99 (1997); EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (C. Joerges & E. Vos eds., 1999).

Commission and Member States officials are brought together, does not display the openness and discursiveness required by the idea of deliberative democracy.[109] Doubts also exist as to the question of whether the negotiation of the draft constitutional treaty by the European Convention in the time between spring of 2002 and June 2003 would have fulfilled these requirements.[110] In light of the fact that the debates in the Convention turned frequently into open or disguised negotiations about the fulfillment of conflicting interests, and on the basis of the fact that the governing bodies of the Convention have heavily structured and influenced the deliberations, the method of the Convention may be seen as a rough approximation at best to the idea of deliberative decision-making.

4. Institutional and Procedural Aspects

It has been noted above that any model of democracy builds on a combination of different "building blocks" or elements. The question must thus be raised how far the process of European integration has produced elements, which would enrich and broaden democratic theory. It is difficult to come to a conclusion here, since the institutional structure of the EU can obviously be seen from varying perspectives. Frequently, the EU is perceived as an entity characterized by polycentricity, fragmentation and institutional heterogeneity unknown on the national level. As a consequence, the EU is considered to demonstrate attributes of institutional complexity that render her a singular type of public governance. This contention, however, seems to rely on an idealized view of the nation-state institutional orders; it seems to compare this idealized picture with the real features of the EU. The complexity of the institutional structures of a federal state such as the Federal Republic of Germany, in which over 1,000 administrative offices work together, does not fall behind the complexity of the institutional structure of the EU. In a nation-state system of governance, the functional differentiation and specialization is certainly not smaller than within the EU. From the institutional point of view, the EU demonstrates a real particularity in the combination of a body reflecting the idea of a classic international cooperation of states (the Council) with an independent authority, a Court of Justice and a parliamentary assembly. Not the individual elements, but the combination of these is innovative. The currently debated institutional modifications, such as the setting up of a parliamentary two-chamber system or a stronger reliance on independent administrative agencies, are reproductions of nation-state developments. Currently, there is no development that could lead to institutional changes on the scale of a qualitative

109. *Cf.* C. Joerges & J. Neyer, *Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector*, 4 J. EUR. PUB. POL'Y 609 (1997).

110. Daniel Göler & Hartmut Marhold, *Die Konventsmethode*, 26 INTEGRATION 317 (2003); Andreas Maurer, *Die Methode des Konvents— ein Modell deliberativer Demokratie?* 26 INTEGRATION 130 (2003); C Closa, *Improving EU Constitutional Politics? A Preliminary Assessment of the Convention*, ConWEB No. 1/2003, *at* http://les1.man.ac.uk/conweb.

leap.

Surely, the EU decision-making system demonstrates peculiarities that are not found on a national level. For example, the open conflict between the European Court of Justice and some national constitutional courts as to the question of whether EU law takes precedent even over national constitutional law has a dimension touching upon the question of democratic self-determination and control. It is against this background that the decision of the German Constitutional Court in the banana saga is particularly significant.[111] In this case, the highest German Court repeated its willingness to accept the supremacy claim of EU law in principle, but reserved its right to declare EU law inapplicable in Germany if it does not correspond to the fundamental criteria formulated in Article 23 of the German Constitution.[112] While the European Court of Justice relies on a hierarchical reconstruction of the relationship of EU law and national law, the German Court's reasoning is based on the idea of a balance of power between EU and national authority. Equally significant is the discussion about the role of European fundamental rights within the legal orders of Member States. Additionally, European integration must be looked at as a process of enhancing and strengthening democratic input, in the sense that individuals are secured a right to be heard with respect to problems that are beyond the reach of their nation-state power.[113] There is also debate regarding the nature of the EU treaties that were until now based upon the idea of contract between a political community of joint citizens.

Irrespective of the above, the conclusion is inevitable that the process of European integration has thus far not led to an institutional or procedural development that would have to be considered as an innovative and lasting contribution to democratic theory. The novel constitution of well-known institutional elements is not able to provide this thrust, since democratic theory already comprehends a multitude of options in light of the wide variance of Member State settings. Multi-level governance, as found in the federation of the EU and the nation-states,[114] has been a well-known aspect of democratic theory for a long time.[115] Political networks and negotiating systems, considered by many the symbol of political decision-making on the EU level, exist in the nation-state context in several ways. As in the nation-state context, in the EU it is necessary to capture these systems within a legal framework that ensures that the idea of self-determination by all individuals in the collective is not

111. 102 BverfGE 147 (June 6, 2000).

112. *See* Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas*, ConWEB No. 3/2003, p. 21-23, *at* http://les1.man.ac.uk/conweb.

113. *See* S. Weatherill, *supra* note 12, at 26.

114. *See* M. Nettesheim, *Die konsoziative Föderation von Europäischer Union und Mitgliedstaaten*, 5 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 507-39 (2002).

115. *See* Schmalz-Bruns, *supra* note 18, at 260-307; *see also* D. Thürer, *"Citizenship" und Demokratieprinzip: Föderative Ausgestaltungen im innerstaatlichen, europäischen und globalen Rechtskreis, in* GLOBALISIERUNG UND DEMOKRATIE 177 (H. Brunkhorst & M. Kettner eds., 2000).

undermined.[116] The recently advanced suggestion of conceiving "disaggregation as a functional equivalent of democracy"[117] endangers the idea of democracy. Constitutional pluralism[118] must not be equated with post-modern irreverence. The creation of a legal framework for political networks and negotiating systems within the EU is not only necessitated by considerations of transparency; it is also required for purposes of equal participation and control. It is therefore necessary to strengthen the powers of institutions such as the European Parliament,[119] which represents all members of the political community,[120] and to ensure that the Parliament is in the position to steer and control the specialized authorities, the increasingly important public-private partnerships, and other forums of decision-making.[121] This does not raise problems specific to European integration, however; it is no indication of a "Europeanization" of democratic theory.

Furthermore, it is evident that, within such a heterogeneous environment as the EU,[122] democratic legitimacy will only exist if it is ensured that no single group dominates minorities by majority rule. This concern for the rights of minorities not only underscores the importance of a federal construction of the EU[123] and of associative forms of democracy,[124] but also calls for the institution of a "concordance democracy" in order to ensure that latent conflicts between parts of the segmented political community do not erupt into the open.[125] The creation of veto positions (whether by plebiscitary

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116. For reference to possible models, see A. Benz, *Compounded Representation in EU Multi-Level Governance, in* LINKING EU AND NATIONAL GOVERNANCE 82 (Beate Kohler-Koch ed., 2003).

117. James Rosenau, *Governance and Democracy in a Globalizing World, in* REIMAGINING POLITICAL COMMUNITY 28, 40 (D. Archibugi et al. eds., 1998).

118. N. Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002).

119. M. Heintzen, *supra* note 99, at 377.

120. For options for the future development of the European Parliament see J. Coultrap, *From Parliamentarism to Pluralism,* 11 J. THEORETICAL POL. 107 (1999) (discussing options for the future development of the European Parliament); *see also* P. Hix, *Elections, Parties and Institutional Design: A Comparative Prospective on European Union Democracy,* 21 W. EUR. POL. 19 (1998).

121. On the idea of soft forms for linking the heterarchical and hierarchical systems of decision-making, see Artur Benz & Burkhard Eberlein, *The Europeanization of Regional Policies: Patterns of MultiLevel Governance*, 6 J. EUR. PUB. POL'Y 329, 333 (1999) ("[T]hey enable actors to circumvent the rigidities of formal decision-making; they can mobilize the power of policy ideas; they can give expertise-based policy entrepreneurs a better chance of overcoming conflicts; and finally, they allow the introduction of competition between arenas as a way of encouraging innovation.").

122. *Cf.* H. Abromeit, *Volkssouveränität in komplexen Gesellschaften, in* DAS RECHT DER REPUBLIK 22 (Hauke Brunkhorst & Peter Niesen eds., 1999) (es gehe darum, Verfahren zu ersinnen, die auch einem komplexen, segmentierten, unterschiedlich betroffenen .... Demos erlauben, souverän zu sein.").

123. M. Burgess, FEDERALISM AND EUROPEAN UNION: BUILDING OF EUROPE 1950-2000 (2001); D. MACKAY, DESIGNING EUROPE: COMPARATIVE LESSONS FROM THE FEDERAL EXPERIENCE (2001); THE FEDERAL VISION, (K. Nicolaidis & R. Howse eds., 2001).

124. *See* P. HIRST, ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE (1994); R. Eising, *Assoziative Demokratie in der Europäischen Union? in* VERBÄNDE UND DEMOKRATIE IN DEUTSCHLAND 293 (B. Wessels & A. Zimmer eds., 2000).

125. For a detailed discussion, see D. Grimm, *Läßt sich die Verhandlungsdemokratie*

mechanisms,[126] by the strict application of the idea of subsidiarity, or by an interweaving of the levels of governance) would ensure that minorities cannot be dominated by majorities. These are, however, again not problems exclusive to European integration. The same is true with regard to the problem of how to restrain economic imperatives, which might at some point become strong enough to endanger democratic self-determination. Likewise, the concern to prevent blockades and abuse is not only a European concern.

This overview illustrates that, in the current discussion, the primary concern is to reassemble well-known elements of nation-state democratic governance into a new, functionally-appropriate architecture.[127] At the same time, the process of European integration has not yet produced an institutional perspective that would lead to advancements of democratic theory.[128] This need not be the end result and, indeed, should not be the end result; rather, it seems likely that the process of European integration will have a long-term impact even from an institutional perspective. This impact will develop rather minutely, and the novelties and successes will only become apparent in retrospect. The process of European integration should also lead to a discussion of truly new approaches to democracy, such as the idea of an economicalization of democracy[129] or the idea of undoing territorial structures of democracy.[130] However, as of yet, no recognizable consequences for democratic theory have evolved.

VI.
CONCLUSION

It has already been frequently emphasized that the idea of democracy, beyond its solid core, manifests a variety of characteristics. In light of this observation, any attempt to answer the question of how the process of European integration will affect democratic theory seems presumptuous, or at least rather burdened with difficulty. There are, however, clear signs to be observed of the impact of European integration within the discourse of democratic theory. These manifestations become even more apparent when the discussion

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konstitutionalisieren? in DEMOKRATISIERUNG DER DEMOKRATIETHEORIE 193 (C. Offe ed., 2003).

126. *See* H. Abromeit, WOZU BRAUCHT MAN DEMOKRATIE? (2002); *But see* R. Schmalz-Bruns, *Deliberativer Supranationalismus: Demokratisches Regieren jenseits des Nationalstaats, in* 6 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN (1999).

127. *See generally* Shaw, *supra* note 37 (examining the debate over EU Constitutional architecture).

128. On the idea of experimental democracy, see DEMOKRATISCHER EXPERIMENTALISMUS (H. Brunkhorst ed., 1998).

129. For examples of new approaches, see Schmitter, *supra* note 8.

130. *See* REGIEREN IN ENTGRENZTEN RÄUMEN, POLITISCHE VIERTELJAHRESSCHRIFT (B. Kohler-Koch ed., 1998); I. Maus, *Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie, in* M. LUTZ-BACHMANN & J. BOHMAN, WELTSTAAT ODER STAATENWELT 226, 228. With respect to the philosophy of international relations, see J. Ruggie, *Territoriality and Beyond: Problematising Modernity in International Relations*, 47 INT'L ORG. 139 (1993).

concerning "global governance"[131] is also taken into consideration. However, the impact of European integration is still small. Until now, the emerging process of European integration has not left much more than negligible traces in constitutional theory; nor have the debates on the normativity of supranational democracy been able to significantly influence the constitutional development of the EU. The constitutional system of the EU ambles slowly—as if weighted down by lack of fantasy and inspiration—towards parliamentary democracy. Politically influential opposing positions do no more than to complement this model with elements of a presidential democracy or with forms of direct democracy. Even the constitutional treaty drafted by the Convention does not change anything substantial in this regard. The institutional foundations of the EU will remain intact; the changes are limited to those necessary to secure the ability of its organs to function in light of the upcoming expansion.

In the end, the traditional experience that the status and normativity of democratic theory manifests itself also as a product of political expedience is reproduced and confirmed at the European level. The political process is advanced by interests and ideas, actors and institutions; the results are not always predictable and are rather infrequently determined by considerations of political philosophy or constitutional theory. Satisfactory results affect the theory. Still, as a result of these realities, it is clear that the process of European integration will not only revolutionize the legal and economic orders of the Member States, but that, in the long run, it will inevitably have a profound influence on democratic theory as well. Some are pessimistic in light of this perspective and fear a turn for the worse, perhaps even the "end of democracy."[132] This is a valid concern; the risk should not be ignored entirely that democratic theory will succumb to the emergence of a European public power which no longer deserves to be called a democracy.[133] Politicians and scholars are called upon to combat the regression of democratic theory into a purely descriptive theory under which the term "democratic" is stripped of its normative content altogether and affixed as a stamp of approval to whatever form of governance is most politically expedient.

131. D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 596 (1999); *see also* WELTSTAAT ODER STAATENWELT (M. Lutz-Bachmann & J. Bohman eds., 2002).

132. For a skeptical view of the process of integration, see U. Haltern, *Gestalt und Finalität*, *in* EUROPÄISCHES VERFASSUNGSRECHT 803 (A. von Bogdandy ed., 2003).

133. P. Allott, *European Governance and the Re-Branding of Democracy*, 27 EUR. L. REV. 60 (2002).

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By
Elizabeth Borgwardt*

Major Airey Neave, famous at age twenty-nine for his multiple escapes from Nazi prisons, noticed the unusually brilliant shine on Colonel Burton Andrus' helmet, as the two officers stood waiting outside the prison wing of the Palace of Justice at Nuremberg on the afternoon of October 19, 1945. Neave was a German-speaking London barrister whose wartime heroics with the clandestine British intelligence service, MI-9, had involved disguising himself variously as a Dutch electrical worker, a German corporal, and a German artillery lieutenant.[1] The afternoon before, Francis Biddle, former U.S. Attorney General and the American judge at Nuremberg, had cavalierly informed Neave that the young major was to serve copies of the Nuremberg Charter, along with a detailed criminal indictment, on the Nazi leaders incarcerated in the Palace of Justice.[2]

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1. Major Neave had escaped from the supposedly escape-proof Nazi prison in Colditz Castle, Saxony, a feat which so impressed the senior members of London's Middle Temple that they waived his final Bar examinations. He learned German as an exchange student in Berlin in 1933, where he unwittingly participated in a Nazi youth march. His memoir, although not published until the late 1970s, was based on his contemporaneous notes and on a memo he filed with the Nuremberg Tribunal in 1945. *See* Airey Neave, *Memorandum for the General Secretary of the International Military Tribunal* (Oct. 24, 1945), PRO/LCO 2 2982 x/LO6978; AIREY NEAVE, NUREMBERG: A PERSONAL RECORD OF THE TRIAL OF THE MAJOR NAZI WAR CRIMINALS IN 1945-46, at 19-22 (1978) [hereinafter PERSONAL RECORD].

2. Throughout this study, "Nuremberg" refers to the trial of twenty-two top-ranking Nazi leaders held in the Palace of Justice at Nuremberg in 1945-46. Transcripts published as 1-42 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 10 OCTOBER 1946 (1947-49) [hereinafter IMT NUREMBERG]. Twelve other U.S.-sponsored war crimes trials were held at Nuremberg between 1946 and 1948 of roughly two hundred so-called second-tier Nazis, such as judges, industrialists, police, doctors, and scientists, resulting in eighteen executions and thirty-eight acquittals, with the remainder receiving lesser sentences. The transcripts of these trials are published as 1-15 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, OCTOBER 1946 - APRIL 1949 (1946-49). *See also* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON

Major Neave's initial assignment in post-surrender Germany was to gather evidence on the Krupp family's wartime use of slave laborers in its armaments factories. When this project stalled due to questions about the declining health of the Krupp patriarch, Neave was reassigned as an aide to the justices at Nuremberg. "You look remarkably young," the nasal-voiced Biddle observed in passing. Upon receiving these instructions, the young British war hero recalled, "I had several moments of unreasoning panic. I felt as if I were suddenly invited to sing at Covent Garden. It was like a nightmare in which I was endeavouring to lecture on higher mathematics."[3]

Disgusted by the abundant evidence he had already reviewed in connection with his Krupp assignment, not to mention his own wartime imprisonment and interrogation at the hands of the Gestapo, Neave dreaded his imminent personal encounter with these "high priests of Nazism."[4]

I.
"THE VICTOR WILL ALWAYS BE THE JUDGE AND THE VANQUISHED THE ACCUSED"

The Nuremberg Charter that Neave was to deliver spelled out the charges against twenty-four individual defendants and seven "defendant organizations" under three counts: crimes against peace, war crimes, and crimes against humanity.[5] Each of these three counts had a specialized content. Crimes against peace encompassed both the "planning, preparation, initiation, or waging of a war of aggression" and "participation in a common plan or conspiracy" to wage such a war, in violation of treaties and international agreements such as the 1928 Kellogg-Briand Pact. In other words, the Nazi leaders were being charged with

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NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 159-217 (1949). With minor variations, these "secondary" Nuremberg trials were governed by the same charter as the main trial. In the Far Eastern theater, the Tokyo Trial of twenty-eight Japanese leaders was also governed by a virtually identical charter to the one at Nuremberg.

3. PERSONAL RECORD, *supra* note 1, at 53.

4. *Id.* at 39. Major Neave's perception of the defendants was clearly influenced by his preliminary Krupp investigation, which indicated that the Krupp family and its business directors had enthusiastically abused over seventy thousand foreign-born workers, many of them Hungarian-Jewish children. Neave was especially shocked to learn that the exploitation of this forced labor had been voluntary—"even Hitler was surprised that a company like Krupp would insist on doing so"—and that the Krupp family and its senior employees "expressed no regret for anything" at any time. *See id.* at 39-41. Gustav Krupp von Bohlen und Halbach had been named as a defendant at the main Nuremberg trial, but did not appear due to ill health. *Motion on Behalf of Defendant Gustav Krupp von Bohlen for Postponement of the Trial as to Him* (Nov. 4, 1945), *reprinted in* 1 IMT NUREMBERG, *supra* note 2, at 124. Krupp's son, Alfried, was ultimately tried and convicted of crimes against humanity at one of the later Nuremberg trials in 1947-48.

5. The Nuremberg Charter is appended to the London Agreement of August 8, 1945. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of Major War Criminals of the European Axis (Aug. 8, 1945), *reprinted in* 1 IMT NUREMBERG, *supra* note 2, at 8-16. "Criminal organizations" was intended to denote identifiable groups with voluntary membership, such as the *Geheime Staatspolizei* (Gestapo), the *Schutzstaffeln der Nationalsozialistichen Deutschen Arbeiterpartei* (SS), and most controversially, the German General Staff and High Command of the German Armed Forces.

waging an illegal war, since the international community had outlawed aggressive war during the interwar era. The second count, alleging "war crimes," referenced violations of the traditional laws of war, such as battlefield atrocities and mistreatment of prisoners, as codified in international agreements such as the Hague and Geneva Conventions of 1907 and 1929.

The Nuremberg Charter defined the third and final count, of crimes against humanity, as:

> murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds . . . in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.[6]

Crimes against humanity was the most innovative and controversial of the three counts. Its plain language suggested that it could be employed against the Nazis' mass atrocities against German Jews—a domestic, civilian population—going back to the early 1930s, before the outbreak of international armed conflict in 1939.

The Nuremberg Charter offered a concrete example of how the interaction among politics, ideas, and institutions pushed American diplomacy toward multilateral solutions as World War II drew to a close, even where such multiparty approaches imposed constraints or had awkward implications for the future projection of American power. The Charter was the product of a contentious drafting process. The two key issues under debate were, (1) could the charges be designed to assign individual guilt for the waging of aggressive war, in order to "establish the initiation of aggressive war as a crime under universally applicable international law," as one assistant prosecutor put it; and (2) would it be feasible, or indeed desirable, to prosecute pre-war anti-Jewish atrocities and harassment, even though these depredations were directed against a domestic population within Germany before the outbreak of war?[7] Holding the leaders of a nation-state responsible for human rights-related transgressions—even atrocities as outrageous as those suffered by German Jews under the Nazi regime—could have uncomfortable implications for any country with a minority population that regularly endured harassment and discrimination.

The Charter's broad wording allowed the tribunal to answer in the affirmative to both of these questions—"yes" to prosecuting individuals, and "yes" to a count capacious enough to include domestic and international crimes. However, while the tribunal agreed to criminalize aggression for individuals, it declined to hold the defendants responsible for pre-war atrocities against domestic populations, even though the Charter gave it the scope to do so.

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6. Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S 279, 286-88 [hereinafter Nuremberg Charter] .

7. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 76 (1992). Taylor was an Assistant Prosecutor at Nuremberg and later the Chief Prosecutor of the "secondary" Nuremberg Trials. *See supra* note 2.

Controversies over these issues were both internal, within the U.S. government, and external, among the Charter's signers—Britain, France, the U.S.S.R., and the United States.

Somewhat like the Atlantic Charter, the Nuremberg Charter was framed in general language and described fairly abstract guidelines. It was paired with a rambling sixty-seven page Indictment meant to apply the Charter's principles in a specific way to each individual defendant. The Indictment was diplomatically described by one of its authors as "a polygenetic document."[8] Opening with a virtually incoherent narrative of Germany's wartime transgressions, the Indictment cross-referenced the Charter provisions and then re-parsed the three charges into four, spelling out the alleged responsibility of each defendant. It concluded by listing each treaty or agreement alleged to have been violated by Germany's wartime leaders.[9]

For the ceremonial serving of the Nuremberg Charter and Indictment on the defendants, Major Neave's entourage included: the prison warden, Colonel Andrus; the General Secretary of the Tribunal, Harold B. Willey, who was on leave as the Chief Clerk of the United States Supreme Court; one of the two prison psychiatrists, Dr. Douglas M. Kelley; as well as an interpreter and two guards armed with revolvers and blackjacks. As Colonel Andrus opened the iron doors at the end of the low-ceilinged corridor connecting the court building to the prison wing, Neave intoned under his breath the beginning of the brief speech that Harold Willey had helped him draft the night before over Spanish brandies in the bar of the Grand Hotel: "I am Major Neave, the officer appointed by the International Military Tribunal to serve upon you a copy of the indictment in which you are named as defendant."[10]

The former Nazi leaders were confined to separate cells on the ground floor of a three-tiered structure designed to accommodate about one hundred prisoners.[11] Each thirteen-by-nine foot cell contained a steel bed bolted to the

8. TAYLOR, *supra* note 7, at 116. As Taylor delicately elaborated: "Flawless, the Indictment was not." *Id.* Taylor's characterization of the Indictment refers to the astonishing lack of coordination among that document's four drafting committees. *Id.* at 116-17. See also his description of the vicissitudes of the Indictment's drafting process. *Id.* at 79-118. The New Deal lawyer and former intelligence officer's main criticism concerned not so much the text of the Indictment itself, but rather his sense that the underlying "task of selecting the defendants was hastily and negligently discharged." *Id.* at 90. For example, he calls the confusion about indicting the ailing Gustav Krupp, and then the crude eleventh-hour attempts to substitute Gustav's son Alfried, as "a first-rate snafu." *Id.* at 92.

9. *Indictment*, *in* 1 IMT NUREMBERG, *supra* note 2, at 27-92. As noted, twenty-four individual defendants were listed in the Indictment, but the industrialist Krupp was soon declared to be unfit; former leader of the Labor Front Robert Ley committed suicide; and Hitler's Deputy for Nazi Party Affairs, Martin Bormann, was never captured and was tried in absentia.

10. PERSONAL RECORD, *supra* note 1, at 60, 70.

11. Nuremberg's Palace of Justice complex included a courthouse, an office building, and three prison wings, capable of accommodating a total of about 1,200 prisoners. The complex had formerly served as the Court of Appeals for the Nuremberg region. Somehow, it had evaded severe damage from the numerous Allied bombing sorties, which had all but leveled the rest of the old city. The main building filled two acres and comprised a dusty warren of "endless stone and marble corridors, mysterious nooks and crannies, and 650 rooms." Roughly half of the remaining cells were

floor, a chair, a toilet, and a small, perpetually-open observation grille in the heavy oak door. As a precaution against suicide, the chair was removed at night, and its companion cardboard desk was designed to collapse if anyone were to stand on it; none of the furniture was allowed within four feet of the window wall.

After the Nazi labor leader Robert Ley nevertheless found a way to hang himself, the guard detail was quadrupled and a sentry was permanently stationed at each window, with instructions to shine a light on the defendant at night. The prisoners were ordered to sleep with their hands visible outside their bedding.[12] Before the start of the trial, the defendants were allowed to talk to each other only during their twenty-minute exercise period in a grim and treeless courtyard. A wild-eyed Rudolf Hess's insistence on "goose-stepping" around the courtyard at exercise time enhanced the surreal quality of this environment.[13]

Colonel Andrus was the American Chief of Security at the Nuremberg prison, directing a staff of guards made up of extremely tough-looking and suspicious, gum-chewing American GIs who couldn't wait "to go home to Wisconsin and Cincinnati."[14] To raise morale, Andrus personally designed a flashy insignia for the guards' uniforms: a heraldic-looking shield of azure with a key at the top, symbolizing prison security, a rendering of the scales of justice in the center, and a broken Nazi eagle at the bottom. This insignia was painted on Andrus' helmet, to which the prison warden had applied layers of shellac to give it a high shine. Modeling his appearance on his idol and former

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occupied by potential future defendants, including a number of women concentration camp guards, individuals detained for interrogation and as possible witnesses, as well as some ordinary German felons who were guarded by "Nazi wardens who had not yet been replaced." The courtroom for the Nuremberg trial was created by knocking down a wall between two of the twenty or so courtrooms on the second floor of the main building. Rooms were often commandeered for unofficial purposes, including American journalist Victor Bernstein's office, for which he made a facetious official-looking placard reading "Ministry of Ruritania." ROBERT E. CONOT, JUSTICE AT NUREMBERG 21, 35, 60 (1983); PERSONAL RECORD, *supra* note 1, at 70, 77; Interview with Edith Simon Coliver, Nuremberg Interpreter (Apr. 24, 1998).

12. Ley, an alcoholic, had shredded his towel into a rope and attached it to the pipe above the toilet in his cell. *See* G.M. GILBERT, NUREMBERG DIARY 8 (1947) [hereinafter NUREMBERG DIARY] (entry by prison psychologist); TAYLOR, *supra* note 7, at 132, 229-30; *see also* RONALD SMELSER, ROBERT LEY: HITLER'S LABOR FRONT LEADER (1988).

13. PERSONAL RECORD, *supra* note 1, at 45. Rudolf Hess, Hitler's deputy for Nazi Party matters, had famously flown himself across the English Channel in a stolen Messerschmidt on May 10, 1941 and crash-landed in Scotland. Hess claimed he had undertaken his daring flight in order to broker a behind the scenes peace, after he became convinced that Germany's situation was hopeless. His story was discounted and he was confined to house arrest in Britain for four years before being turned over to Allied captors at Nuremberg for trial. British lawyers and doctors advised the American warden that Hess was "as crazy as a Betsy bug." Hess insisted that the British had been trying to poison him and that he was unable to remember events more than two weeks in the past from any given present day. For more on Hess' assertions of memory loss, which he later recanted as fraudulent, see Psychiatrists' Report and accompanying Petition, *in* 1 IMT NUREMBERG, *supra* note 2, at 155-67; *see also* ROBERT G. STOREY, THE FINAL JUDGMENT? PEARL HARBOR TO NUREMBERG 141-46 (1968) (This idiosyncratic memoir by the U.S. Executive Trial Counsel and Document Chief at Nuremberg, although published in 1966, was compiled from notes taken at the time, according to its author.).

14. PERSONAL RECORD, *supra* note 1, at 72.

commander, fellow cavalryman General George Patton, Andrus also often carried a leather riding crop. German inmate Hermann Goering, at one time Hitler's second in command, would sneeringly refer to Andrus as "the Fire Brigade Colonel," apparently a reference to the warden's shiny helmet.[15]

The legendary vanity of Reichsmarschall Goering—"part Machiavelli, part Falstaff"—was of course more than a match for the self-regard of the comparatively lowly Colonel Andrus.[16] Goering's titles since 1933 included President of the Reichstag, Reich Minister for Air, President of the Council of Ministers for the Defense of the Reich, Supreme Leader of the SA, General in the SS, Minister of the Interior of Prussia, Chief of the Prussian Police and the Prussian Secret State Police, Trustee of the Four Year Plan, head of the Hermann Goering Industrial Combine, Successor Designate to Hitler, and, for good measure, Germany's Chief Forester. Once the trial was under way, lacking a mirror in his cell, the fifty-three year old Goering would instruct his dark-suited defense counsel to stand behind the glass partition separating them during their consultations to make the glass more reflective so he could style his receding brown hair.[17] Such vanity was not, apparently, entirely misplaced. Several weeks into the proceedings, women correspondents covering Nuremberg voted Goering their "overwhelming choice" as the defendant they would most like to sleep with.[18]

Having duly surrendered on V-E Day to the commander of the U.S. 36th Infantry Division in the Austrian Alps, "Goering still believed that he would be treated like a captured emperor and confined to some convenient palace."[19] The Reichsmarschall was initially incarcerated with other top-ranking Nazis in an improvised detention center at the Palace Hotel, at Bad Mondorf, near the Luxembourg border. Hitler's former number-two man arrived at the detention center, code-named "Ashcan" by American service personnel, with a private valet, sixteen pieces of monogrammed ostrich-skin luggage, and a red hatbox in tow. Cached in the luggage was evidence of two of his more portable addictions: a trove of looted jewelry and over twenty thousand tablets of a "morphine substitute."[20] Goering was addicted and took forty of the pills a day.[21] The impression of a dissolute voluptuary—"infinitely corrupt . . . recall[ing] the madam of a brothel . . . a sexual quiddity"—was enhanced by his

15. *See* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 57 (1994); PERSONAL RECORD, *supra* note 1, at 59, 70, 76; *see also* TAYLOR, *supra* note 7, at 230.

16. CONOT, *supra* note 11, at xi.

17. EUGENE DAVIDSON, THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG 59 (1966); *see also* G.M. Gilbert, *Hermann Goering, Amiable Psychopath*, 43 J. ABNORMAL & SOC. PSYCHOL. 211 (1948).

18. VICTOR H. BERNSTEIN, FINAL JUDGMENT: THE STORY OF NUREMBERG 3 (1947). Bernstein, an American journalist who covered the Nuremberg trial for the liberal New York newspaper *PM*, went on to observe dryly that "[t]he competition is not great, it is true." *Id.* at 4.

19. PERSONAL RECORD, *supra* note 1, at 73.

20. BURTON C. ANDRUS, THE INFAMOUS OF NUREMBERG 30-32 (1969).

21. *Id.* at 30.

red lacquered finger and toe-nails and the three hundred and forty pounds he carried on his five-foot-six inch frame.[22] General Carl Spaatz, commander of the American Strategic Bombing Force, promptly threw a party for him, where the former World War I flying ace presented an autographed photograph of himself, inscribed: "War is like a football game, whoever loses gives his opponent his hand, and everything is forgotten."[23]

Given his initial handling, Goering was understandably slow to realize that the post-surrender exigencies of total war would be different, even for "gentlemen" officers and high-ranking political figures, than the aftermath of combat in the First World War. In that earlier conflict, as a flying ace in World War I and successor commander to Baron Manfred von Richthofen's legendary "flying circus," the young Hermann Goering would famously dip his wings to disabled opponents and fly on, rather than administer an unsporting *coup de grace*.[24]

Goering most likely first became aware of this new post-surrender ethos at his interrogation in Augsburg in June 1945. At this session, U.S. General Alexander Patch, commander of the Seventh Army, unceremoniously demanded the Reichsmarschall's jeweled marshal's baton, inlaid with twenty golden eagles. "General, I can't give this to you," snapped Goering, offended by what he perceived as an impertinent request. "It is a symbol of my authority." "You have no more authority," came the sharp reply from Patch. "Hand it over!" Goering wrote promptly to General Eisenhower, as Supreme Commander of the Allied Forces in Europe, insisting that the baton be returned to him, and asking to keep his valet. Both requests were refused.[25]

Major Neave's first stop was at Goering's cell, where he served the Indictment and Charter on the former Reichsmarschall. Neave then handed Goering a third document, a list of names and addresses of German lawyers who might serve as defense counsel. Neave recalled feeling surprised that anyone in devastated Germany still had a home address. Judge Biddle and others had

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22. REBECCA WEST, A TRAIN OF POWDER: SIX REPORTS ON THE PROBLEM OF GUILT AND PUNISHMENT IN OUR TIME 6, 67 (1955); *see* PERSONAL RECORD, *supra* note 1, at 69-70. Colonel Andrus, who had also been the commandant of the Bad Mondorf prison, immediately put Goering on a diet and weaned him off his addiction to codeine. By the end of the trial, he had lost 160 pounds. United Press Wire Service, *Goering Cured of Drugs as Trial Nears: In Perfect Health for Ordeal at Nuernberg*, ROCKY MOUNTAIN NEWS, Sept. 8, 1945, at 2; STOREY, *supra* note 13, at 137, 139-40.

23. CONOT, *supra* note 11, at 31-33.

24. Goering had been awarded the coveted *Pour le Merite* for his service in the First World War, Germany's highest wartime honor. *See* EDWIN P. HOYT, ANGELS OF DEATH: GOERING'S LUFTWAFFE 34-36 (1994) ("The air war [in the First World War] was marked by gentlemanly, almost courtly, behavior on both sides."); *see also* PERSONAL RECORD, *supra* note 1, at 65-66; Alfred Kube, *Herman Goering: Second Man in the Third Reich*, *in* THE NAZI ELITE 62-71 (Ronald Smelser & Rainer Zitelmann eds., Mary Fischer trans., 1993). Nor was this "courtliness" confined to the air war. *See generally* STANLEY WEINTRAUB, SILENT NIGHT: THE STORY OF THE WORLD WAR I CHRISTMAS TRUCE (2001).

25. HOYT, *supra* note 24, at 31-32; PERSICO, *supra* note 15, at 50-51; PERSONAL RECORD, *supra* note 1, at 73.

impressed upon Neave the importance of urging the defendants to choose defense counsel.[26] Goering commented that he knew no one on the list, and asked if he could defend himself. "I think you would be well advised to be represented by someone," Neave persisted. Goering shrugged his shoulders. "It all seems pretty hopeless to me." He continued, "I must read this indictment very carefully, but I do not see how it can have any basis in law."

Goering next requested his own private interpreter, and Colonel Andrus reportedly could not suppress a smile at yet another request for special treatment. After Neave had left Goering's cell, Dr. Gustave M. Gilbert, the prison psychologist, asked the former Reichsmarshall to autograph a copy of the Indictment. Goering obliged—he was used to Americans asking for his autograph. He wrote, "The victor will always be the judge and the vanquished the accused."[27]

The rather astonishing fact that Goering was even asked to "crystallize" his reactions to the Indictment by the prison psychologist—there were also two prison psychiatrists—highlights one pervasive American vision of the trial, as a kind of public social science experiment that would serve as a national therapy for the German people. In a delightful cross-cultural vignette, British Major Neave observed that "the two psychiatrists and the psychologist were essential to the American way of life at Nuremberg. They constantly interviewed the prisoners about the evidence against them."[28] He continued in this deadpan mode: "In the eccentric atmosphere of Nuremberg, they seemed to be necessary. They supplied learned reports about tensions, blocks and depressions regarded as necessary for understanding the Nazi mind."[29]

Lieutenant Colonel Murray C. Bernays, the brilliant attorney and War Department official who drafted the original memo outlining the "conspiracy" theory for the trial and punishment of Nazi leadership, wrote in a June 1945 letter to his wife, "Not to try these beasts would be to miss the educational and

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26. *See* Minutes of the Opening Session of the Tribunal, at Berlin (Oct. 18, 1945), *reprinted in* 1 IMT NUREMBERG, *supra* note 2, at 24-26 ("Notices will also be served upon [the defendants] in writing drawing their attention to Articles 16 and 23 of the Charter which provide that they may either conduct their own defense or be defended by any counsel professionally qualified . . . . [A] special clerk of the Tribunal [Major Neave] has been appointed to advise the defendants of their right and to take instructions from them personally as to their choice of counsel, and generally to see that the rights of defense are made known to them."). This preliminary session of the Tribunal had been held in Berlin as a sop to the Soviet delegation, which had unsuccessfully lobbied both for Berlin to serve as the seat of the entire proceedings and for the presidency of the Tribunal to rotate among the four judges. The Soviet representative on the Tribunal, Major General Ion Timifeevich Nikitchenko, an army judge advocate and Vice President of the Soviet Supreme Court, served as Tribunal President for this lone session in Berlin, while Lord Justice Lawrence, the British Judge, served as President for the duration of the actual trial in Nuremberg. *See id.* at 24; PERSONAL RECORD, *supra* note 1, at 74-75; TAYLOR, *supra* note 7, at 64-65, 98-99, 123-26.

27. "I asked each of the defendants to autograph my copy of the indictment with a brief statement giving his opinion of it" in order to "crystallize . . . [t]heir first spontaneous reactions." NUREMBERG DIARY, *supra* note 12, at 4.

28. PERSONAL RECORD, *supra* note 1, at 59.

29. *Id.*

therapeutic opportunity of our generation."[30] The defendants were considered to be singularly psychotic exemplars of a deeply disturbed dystopia, and discussion of their crimes was replete with imagery of disease and dementia.[31]

This sketch of Goering's initial incarceration captures several related themes of the Nuremberg trial as a legal, political, and even cultural event. The bizarre eccentricity of the atmosphere of the trial in the gutted provincial city was evoked most vividly by British author Rebecca West, whose three essays on the trial, originally published in the *New Yorker*, were collected in the volume *A Train of Powder*. Of the British delegation, which numbered some 170 people, West wrote colorfully:

> Anybody who wants to know what [the British] were like in Nuremberg need only read the early works of Rudyard Kipling. In villas set among the Bavarian pines, amid German modernist furniture, each piece of which seemed to have an enormous behind, a triple feat of reconstitution was performed: people who were in Germany pretended they were people in the jungle who were pretending they were in England.[32]

The hothouse atmosphere was further intensified by the overwhelming amount of work necessary to prepare and present the trial. "The entire preparatory work for the Nuremberg proceedings was attended by a kind of frenetic madness," writes Nuremberg chronicler Robert Conot, "as if the lunacy of the Nazi regime were a virus that had lingered in the atmosphere and infected those who had come to Germany."[33]

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30. Letter from Murray C. Burnays to wife (June 10, 1945), *cited in* BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945, at 36 (1982) [hereinafter DOCUMENTARY RECORD]; *see also* Memorandum, Trial of European War Criminals, from Murray C. Burnays (Sept. 15, 1944), *reprinted in id.* at 34. Bernays, whose legal ideas are discussed below, was a nephew by marriage of Sigmund Freud.

31. For example, "[t]he Nazis were maniacs who plastered history with the cruelty which is a waste product of man's moral nature, as maniacs on a smaller scale plaster their bodies and their clothes with their excreta." WEST, *supra* note 22, at 69. This kind of language, in turn, is remarkable for how reminiscent it is of Nazi language about the role of Jews in German society. See, for example, entries relating to Nazi propagandist and former Gauleiter of Nuremberg, Julius Streicher, in NUREMBERG DIARY, *supra* note 12, at 9-10, 38, 41, 73-74, 117, 125-26. For a more sensationalist treatment, see for example RANDALL L. BYTWERK, JULIUS STREICHER: NAZI EDITOR OF THE NOTORIOUS ANTI-SEMITIC NEWSPAPER DER STURMER (2001).

32. WEST, *supra* note 22, at 9. The French and Soviet delegations were smaller than the British one; but note that the American delegation numbered over 600 people, including 150 lawyers, and totaled well over a thousand counting the military personnel. Telephone Directory, International Military Trials, Nürnberg, December 1945, Katharine B. Fite Letters, HSTPL [hereinafter Fite Letters]; *see* TAYLOR, *supra* note 7, at 213; CONOT, *supra* note 11, at 60. Assistant Prosecutor Taylor has also described what he saw as the "colonialism" of the atmosphere of the Nuremberg enclave, an evanescent international community of judges, lawyers, interpreters, secretaries, journalists, military officials of all ranks, a local German population, and, of course, the defendants themselves, with a smattering of visiting VIPs thrown in for good measure. TAYLOR, *supra* note 7, at 208. West explained that among the Allied forces at all levels, "eccentrics . . . were replacing the more normal types as they were demobilized." WEST, *supra* note 22, at 33. Note that West spent only the equivalent of about two weeks at the year-long trial. Nevertheless, her evocative accounts of the trial's atmosphere are unsurpassed.

33. CONOT, *supra* note 11, at 58. Katharine Fite, a State Department lawyer specializing in "Nazi criminality" at Nuremberg, educated at Vassar and Yale Law School, wrote to her parents about how "we are in a wild rush with briefs due a week from tomorrow . . . . I don't see how we can

Once the trial was underway, however, Nuremberg rapidly became something of "a citadel of boredom" for its foreign visitors, and in the grip of the "extreme tedium" of the year-long assize, there was a pronounced tendency for residents of the Nuremberg enclave to drink excessively. One young American interpreter ascribed the pervasive loosening of peacetime standards of personal conduct to "a very strange mentality, the mentality of the conquerors."[34] Indeed, Neave concluded that, for the Soviet contingent especially, frequent "public drunkenness was part of the Nuremberg scene. It was intended to express the triumph of the Soviet peoples over Hitler and bid defiance to bourgeois convention."[35]

Beyond these quotidian factors, part of Nuremberg's eccentric atmosphere was linked to the trial's anomalous position as an event on the cusp of the transition from war to peace. The Palace of Justice was situated in the heart of a bomb-blasted Nuremberg, where the stench of the thirty thousand dead entombed in its ubiquitous rubble was still pervasive. This location emphasized what a reversion the trial experience was to wartime conditions, as did the idiosyncratic security measures imposed by the American prison staff.[36] The trial staff nevertheless saw themselves as striving to lay the juridical groundwork for a future peace. As West put it in a stark metaphor:

> A machine was running down, a great machine, the greatest machine that has ever been created: the war machine . . . . It was a hard machine to operate; it was the natural desire of all who served it, save those rare creatures, the born soldiers, that

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be ready for the 20th . . . . [W]e are carrying the mammoth share." Letter from Katharine Fite to parents (Nov. 3, 1945), Fite Letters, *supra* note 32. Assistant prosecutor Taylor similarly wrote of the frenetic madness of the trial's preparatory work. *See* TAYLOR, *supra* note 7, at 174.

34. Edith Simon Coliver, a Nuremberg interpreter and German-Jewish refugee who emigrated to the United States as a child and graduated from the University of California at Berkeley in 1944, described how she and other Nuremberg colleagues freely "liberated" desirable items such as clocks and books from the German households where they were billeted. She remembered wishing she could swipe Goering's braid-trimmed hat as a souvenir. Simon discussed another pervasive practice at Nuremberg, also described by Rebecca West, namely how cadres of middle-aged married men, who tended to populate the more senior echelons of the Nuremberg community, were notorious for seeking comfort in the arms of various female members of the administrative staff and press corps, many of whom were young and single. (Both Simon and West spoke from personal experience: Simon had an affair with Victor Bernstein, a married American journalist twenty-one years her senior; she ghostwrote large portions of his book, *Final Judgment: The Story of Nuremberg*. *See* BERNSTEIN, *supra* note 18. West had an affair with Francis Biddle, former U.S. Attorney General and the American judge at Nuremberg.) Interview with Edith Simon Coliver, *supra* note 11; Edith Helga Simon, Judgment Day: Justice: My Trip to the Nuremberg Trials, 9, 16, 26-27 (unpublished manuscript, on file with the author) [hereinafter Simon Diary] (entries for Oct. 21, 1945; Oct. 27, 1945; Nov. 10, 1945; and Nov. 12, 1945); WEST, *supra* note 22, at 13-14; TAYLOR, *supra* note 7, at 547.

35. PERSONAL RECORD, *supra* note 1, at 54.

36. For example, the ever-vigilant Colonel Andrus had noticed that one of the so-called "VIP" observers in the gallery "had crossed her ankles and was showing her shins and a line of petticoat, and he conceived that this might upset the sex-starved defendants, thus underestimating both the length of time it takes for a woman to become a VIP and the degree of the defendants' preoccupations. But, out of a further complication of delicacy, he forbade both men and women to cross their ankles . . . . These rules were the subject of general mirth in Nuremberg" where "eccentricity prevailed." WEST, *supra* note 22, at 43-44; *see also id.* at 10, 45.

> it should become scrap. There was another machine which was warming up: the peace machine, by which mankind lives its life . . . . All over the world people were sick with impatience because they were bound to the machine that was running down, and they wanted to be among the operators of the machine that was warming up.[37]

This vignette offers a window into the immediate cultural context of the trial, as an event that was both forward- and backward-looking. In seeking a more nuanced picture of the troubled legitimacy of the trial and its charter, this study analyzes the proceedings as an example of what some legal scholars and political scientists call "transitional justice"—an event simultaneously marking the end of the war and attempting to lay useful juridical groundwork for the peace. One premise of this study is that legal ideas cannot be analyzed in a vacuum, divorced from the context and texture of even the most ordinary events. To the contrary, the details of context—both world-historical and quotidian—are essential for understanding the highly contingent and "eccentric" world of the Nuremberg Charter.

II.
THREE CONTEXTS FOR NUREMBERG: "THE HARD FACTS OF DEFEAT AND OF THE NEED FOR POLITICAL, ECONOMIC AND SOCIAL REORIENTATION MUST BE THE TEACHERS OF THE GERMAN PEOPLE"

The Charter of the Nuremberg trial lies at the intersection of three different sets of contexts in the international law and relations of the postwar world. The first was the political question of how the Allies sought to handle defeated Germany as a whole. Key legal issues at the Nuremberg trial, such as individual accountability, were implicated in a broader Allied policy debate over reparations, disarmament, and, especially, "denazification"—the reeducation and rehabilitation of ordinary Germans and their leaders. One perspective on Nuremberg is thus to view it as part of the political history of the treatment of defeated states in wartime.

The second relevant context for the trial is the development of its legal ideas. In the field of public international law, the Nuremberg Charter was attempting to accomplish three goals at once. First, it sought to crystallize pre-existing trends in international law regarding the outlawry of aggressive war, especially regarding individual responsibility for violations of this emerging norm. Second, the trial sought to herald landmark innovations in law such as charges for mass atrocities, itemized in the charter as "crimes against humanity." Third and finally, the Charter was a treaty in its own right, consolidating and building on traditional treaty law regarding the laws of war.[38] Nuremberg had

37. *Id.* at 11.

38. Political scientist Gary Bass has argued compellingly that the term "crimes against humanity" was first formulated as an indictable offense at the abortive 1920 British-run courts martial of so-called Young Turks for massacres of Armenians in 1915. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 106-08 (2000). However, none of the preparatory legal memos I have reviewed for the Nuremberg Charter mention

many architects, and they differed over the relative priorities of these legal ideals. Examining this intellectual context draws particularly on the legacy of World War I-era developments in ideas about international law and organization.

The third important context for Nuremberg is institutional. The trial was intended to play a significant role in a wider postwar international order of multilateral organizations. Many contemporaries saw it as a first step on a road to a permanent International Criminal Court. The contours of the Nuremberg Charter emerged from a series of informal negotiations at the San Francisco Conference of June 1945, itself convened to finalize the United Nations Charter. The Nuremberg Charter, the United Nations Charter, and the Bretton Woods Charters collectively embodied the ideology of the Atlantic Charter declaration of war and peace aims.[39] The architects of Nuremberg saw themselves as contributing to a new, integrated idea of "security," encompassing all four of President Roosevelt's so-called Four Freedoms.[40] Together with proposals for comprehensive disarmament, Nuremberg was designed primarily to be about freedom from the fear of aggressive war.

Most of the existing literature about Nuremberg either fails to develop or misconstrues at least one of these three contexts. As a result, previous treatments tend to be organized around a rather sterile debate about whether the trial was "good law" or "just politics." To some critics, Nuremberg was either "the most majestic forensic drama ever enacted on the stage of History"[41]—albeit with what assistant prosecutor Telford Taylor conceded were a few

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this precedent (including the British materials), and Bass notes as much in his own analysis of Nuremberg. It seems more likely that the Nuremberg legal advisors believed they were deriving the term directly from the so-called Martens clause of the Fourth Hague Convention of 1907, which invoked "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble, 36 Stat. 2277, 2280, 1 Bevans 631, 633 [hereinafter Fourth Hague Convention].

39. The "Atlantic Charter ideology" might be summarized as (1) updated Wilsonian ideals, such as self-determination, disarmament, and international organization; (2) so-called Four Freedoms ideals, including the rhetorical flourish that "all the men in all the lands may live out their lives in freedom from fear and want," with its suggestion that individuals might have a direct relationship with some kind of supra-national legal order; and (3) anti-imperial, free trade provisions.

40. The "Four Freedoms" were freedoms of speech and of religion, and freedoms from fear and want. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), *reprinted in* [1940] THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 672 (Samuel I. Rosenman ed., 1941) [hereinafter PPA]. Together with the Atlantic Charter, the so-called Four Freedoms were part of a constant refrain of U.S. wartime propaganda regarding war aims and postwar aspirations, both within the United States and internationally. *See, e.g.*, OFFICE OF WAR INFORMATION, TEXTES DE LA LIBERTÉ DECLARATIONS OFFICIELLES FAITES AU COURS DE L'HISTOIRE DES ÉTATS-UNIS (1944) (featuring "Les Quatres Libertés" and "La Charte de l'Atlantique"); N. BEN-HORIM, THE AMERICAN SOLDIER'S MORAL GUIDE (1943) ("as endorsed by the War Department and the Vice-President," and including both the Atlantic Charter and the Four Freedoms speech among its seven reprinted documents).

41. J.H. MORGAN, THE GREAT ASSIZE: AN EXAMINATION OF THE LAW OF THE NUREMBERG TRIALS 1 (1948).

"political warts"[42]— or it was, to many others, a cynical power play, a product of "pseudo-legalized vindictive retribution."[43] Of course, these quotations capture two colorfully expressed extremes. Yet even the more sophisticated and dispassionate assessments of Nuremberg's legitimacy tend to be organized around the question of how "legal" the proceedings really were. By contrast, this study analyzes the underlying sources of Nuremberg's legitimacy from political, legal, and institutional perspectives. Such an approach portrays Nuremberg in historical context, as a projection of a peculiarly American, New Deal-style approach to problem solving onto the international stage. It is also suggestive of the strong relationship American approaches to international institutions have to domestic political culture.

III.
HANDLING DEFEATED GERMANY

"Dear Winston," wrote President Franklin Roosevelt to Prime Minister Churchill in February of 1944, "I have been worrying a good deal of late on account of the tendency of all of us to prepare for future events in such detail that we may be letting ourselves in for trouble when the time arrives."[44] The president was objecting to "detailed instructions and appendices" regarding planning for the postwar world in general, and the prospective defeat of Germany in particular, which he regarded "as prophecies by prophets who cannot be infallible."[45] FDR continued, "Now comes this business of what to do when we get into Germany. I understand that your Staff presented a long and comprehensive document . . . . My people over here believe that a short document of surrender terms should be adopted [instead] that would conform more to 'general principles.'"[46]

One of the lessons 1940s American policymakers had drawn from the planning experience of the First World War might be summarized as "do not wait until the war is over to plan the peace." This insight had been mined from the ordeal of Woodrow Wilson in Paris, where the American president had been walled-in by pre-existing secret agreements among the European allies.[47] Yet many students of FDR's decision-making style have noted that Roosevelt's usual response to bureaucratic controversy "was almost invariably to procrastinate, usually by either promising all things to all parties or by openly

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42. TAYLOR, *supra* note 7, at 639.

43. JOHN GANGE, AMERICAN FOREIGN RELATIONS: PERMANENT PROBLEMS AND CHANGING POLICIES 258 (1959).

44. Letter from Franklin Roosevelt to Winston Churchill (Feb. 29, 1944), *reprinted in* U.S. DEP'T OF STATE, [1944] 1 FOREIGN RELATIONS OF THE UNITED STATES: GENERAL 188 (1966).

45. *Id.*

46. *Id.* at 189.

47. *See* HERBERT HOOVER, THE ORDEAL OF WOODROW WILSON 191-92 (1958); *see also* JOHN MILTON COOPER, JR., BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS (2001).

putting off any decision."[48] The cabinet's push for prior planning accordingly tended to produce proposals that were quite abstract and general, often based on competing philosophies. Combined with the Rooseveltian tendency to back-off in the face of controversy, the resulting directives were largely determined by the negotiating skills and agendas of second- and third-tier administration officials.

Bureaucratic controversy in great abundance confronted Roosevelt in late 1944 and early 1945 around the initial post-surrender plans for Germany. This debate distilled into three competing approaches. First, State Department planners advocated an economically sound and self-supporting Germany as essential to the economic rehabilitation of Western Europe and as a bulwark against communism. The State Department's post-surrender planning memos embodied Secretary Hull's longstanding approach of emphasizing economic issues, especially trade. This emphasis continued even after the ailing Hull's resignation three weeks after the November 1944 election.[49]

Second, the War Department, under the venerable Republican Henry L. Stimson, focused on the immediate problems of administering the postwar occupation of Germany. The War Department's "Handbook of Military Government," circulated in late August of 1944, emphasized relying on existing authority structures within Germany to maintain order. The Handbook's avowedly short-term approach would likely have longer-term ramifications, favoring a "soft peace."[50] The third approach to denazification was centered in the Treasury Department, under New Dealer and Roosevelt confidant Henry Morgenthau, Jr. The Treasury approach aimed at eliminating a future resurgence of German militarism and aggression by demolishing Germany's military and industrial capabilities, and by imposing policies aimed at thoroughgoing social and even psychological reform.[51]

Historians have ascribed the vehemence of these disputes within the Executive branch to a variety of factors, such as differences in the ideology or organizational culture of the various departments, personality clashes among the respective cabinet members, or strains and uncertainties in their personal

48. WARREN F. KIMBALL, SWORDS OR PLOUGHSHARES? THE MORGENTHAU PLAN FOR DEFEATED NAZI GERMANY, 1943-1946, at 44 (1976).

49. Although Hull had indicated to FDR that he wished to retire earlier, the president had prevailed on his longest-serving Cabinet member to stay on until at least until after the election. Hull's resignation was accordingly announced on November 27. He was succeeded by Edward R. Stettinius, Jr., first as Acting Secretary and then as Secretary. DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 87 (1969).

50. War Department Handbook of Military Government for Germany (Aug. 1944), attached to Morgenthau's Memorandum for the President, August 25, 1944, *in* Presidential Diaries Files, Morgenthau Papers, FDRPL, 1394-96 [hereinafter Morgenthau Papers]; *see also* Memorandum from Franklin D. Roosevelt to Henry Stimson, Secretary of War (Aug. 26, 1944) (noting that "[t]his so-called 'Handbook' is pretty bad"); SUBCOMM. TO INVESTIGATE THE ADMIN. OF THE INTERNAL SEC. ACT & OTHER INTERNAL SEC. LAWS, COMM. ON THE JUDICIARY, 90TH CONG., 1 MORGENTHAU DIARY (GERMANY) 443 (Comm. Print 1967) [hereinafter MORGENTHAU DIARY].

51. *See generally* HENRY MORGENTHAU, JR., GERMANY IS OUR PROBLEM xi-xiii (1945); KIMBALL, *supra* note 48, at 4.

relationships with Roosevelt. Later commentators have tended to emphasize the personal social attitudes and background of the cabinet members, as well: Stimson's patrician anti-semitism, for instance, or Morgenthau's German-Jewish heritage. The case of Treasury Secretary Morgenthau, however, illustrates the dangers of armchair psychologizing about motives. Morgenthau's views about the "pastoralization" of Germany—the term was actually Churchill's—and the peace-loving virtues of the yeoman farmer were just as likely to be the result of the Treasury Secretary's background as a gentleman farmer who idealized Jeffersonian values as to have anything to do with his ethnic background. Also, Roosevelt often expressed complete accord with Morgenthau's outlook on the treatment of defeated Germany, particularly the aspect of focusing on a cultural transformation of the German people as a whole, rather than exclusively on the Nazi party.[52]

The press and public opinion played a pivotal role in how these Cabinet-level disputes played out. Debate over the postwar treatment of Germany spilled over into an acrimonious public dispute shortly after Roosevelt publicly supported the Treasury Department's approach at the Quebec Conference of September 1944. Together with Churchill, FDR approved a version of the so-called "Morgenthau Plan" for the treatment of post-surrender Germany.[53] The proposal emphasized social and educational reforms to effect a "reform of the German character," to be complemented by complete disarmament, deportations of Nazi Party officials to help rebuild the countries they had devastated, and the partition of industrial areas of the country into internationalized zones so they could no longer serve as "the caldron of wars."[54]

Although the vast majority of accused war criminals were to be tried, a top layer of "arch-criminals" was to be summarily executed by Allied firing squads upon capture and identification. In the autumn of 1944, Roosevelt himself favored summary execution quite explicitly. An aide's notes of a September 9, 1944 conversation indicate that "[w]ar criminals, the President hoped[,] might be dealt with summarily. His principal preoccupation was that they be properly identified before being disposed of, but he expressed himself as very much opposed to long, drawn-out legal procedure."[55]

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52. Even after publicly backing away from Morgenthau's approach as the 1944 election neared, Roosevelt still encouraged the Treasury Secretary privately, even urging him to write a book on the subject. In his forthcoming biography of Henry Stimson, Sean Malloy argues that FDR's support was so wholehearted that the so-called "Morgenthau Plan" should more accurately be known as the "Roosevelt-Morgenthau Plan." Sean Malloy, The Reluctant Warrior: Henry L. Stimson and the Crisis of 'Industrial Civilization' (2002) (unpublished Ph.D. dissertation, Stanford University) (on file with author); *see generally* MORGENTHAU, *supra* note 51.

53. U.S. Treasury Dep't, Program to Prevent Germany from Starting a World War III (Sept. 9, 1944), *reprinted in* U.S. STATE DEP'T, [1944] FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE AT QUEBEC 131-40 (1972) [hereinafter FRUS QUEBEC]; *see also* Memorandum, Suggested Post-Surrender Policy for Germany, from Henry Morgenthau to Franklin Roosevelt (Sept. 5, 1944), *reprinted in id.* at 101-06.

54. Memorandum from Henry Morgenthau to Franklin Roosevelt, *supra* note 53, at 101-06.

55. Robert Murphy, *Memorandum of Conversation with President Roosevelt* (Sept. 9, 1944), *in* Papers of Robert Murphy, Roosevelt File, Box 52, Hoover Institution Archives [hereinafter

The Morgenthau Plan shared a certain reformist sensibility with the New Deal. Morgenthau explained for a popular audience how, "[I]n discussions of what to do with Germany, she has been compared to a mental patient, a problem child case of retarded development, a young girl led astray, a slab of molten metal ready for the molder and much else besides."[56] These similies, Morgenthau explained, merely emphasized how thoroughgoing was "the educational or evolutionary problem that must be faced."[57] The Treasury program concluded that, "[t]he hard facts of defeat and of the need for political, economic and social reorientation must be the teachers of the German people."[58]

As Roosevelt historian Warren Kimball argues, Morgenthau's approach was part and parcel of "the belief of many New Dealers in the efficacy of grand plans as the solution to problems" and it assumed "that an entire nation could be restructured and redirected by outside agents."[59] Morgenthau even used New Deal parlance and analogies in some of his diary entries when discussing plans for German reeducation. Referring to Germans over the age of 20 who had been thoroughly inculcated with Nazi ideology, he wrote, "I am convinced that you could change them [although] you may even have to transplant them out of Germany to some place in Central Africa where you can do some big TVA project."[60]

Privately, Secretary of War Henry Stimson muttered that the Treasury Department's plan was "Semitism gone wild for vengeance."[61] His public response was much more canny, however. The day after the Quebec Conference, Stimson sent an influential memo to Roosevelt, arguing that the Treasury program violated American principles, and explicitly invoked the 1941 Atlantic Charter.[62] The Secretary of War asserted that "the proposed treatment

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Murphy Papers] (Robert Murphy was a State Department official who later became the political and diplomatic advisor to General Lucius D. Clay, chief administrator of the U.S. Occupation Zone in post-surrender Germany); *see also* JOHN MORTON BLUM, FROM THE MORGENTHAU DIARIES, YEARS OF WAR, 1941-1945, at 397 (1967) (diary entry for September 2, 1944).

56. MORGENTHAU, *supra* note 51, at 144.

57. *Id.*

58. FRUS QUEBEC, *supra* note 53, at 137-38.

59. KIMBALL, *supra* note 48, at 31. Note that the premise of a thoroughgoing restructuring of society by outside agents was in fact largely realized in the case of the U.S. Occupation of Japan. *See generally* JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II (1999).

60. BLUM, *supra* note 55, at 353 (quoting Morgenthau diary entry for Sept. 2, 1944). The "TVA" was the Tennessee Valley Authority, one of the most ambitious public works programs of the New Deal.

61. *Diaries of Henry L. Stimson* (microfilm edition), Green Library, Stanford University, original in Manuscripts and Archives Division, Sterling Memorial Library, Yale University (entry for Sept. 16-17, 1944). Stimson was likely the first to refer to Morgenthau's approach as "Carthaginian," an adjective that clung to the plan thereafter, and was an evocation of John Maynard Keynes' assessment of the peace provisions of the First World War in Keynes's 1920 *Economic Consequences of the Peace. Id.*; *see also* JOHN MAYNARD KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE (1920). Surprisingly little has been published on Secretary Stimson, a lawyer, statesman, and pillar of the Republican establishment who joined the Roosevelt administration in 1940. Sean Malloy offers a detailed and nuanced account in his forthcoming *Reluctant Warrior*, *supra* note 52.

62. Memorandum from Stimson to Roosevelt (Sept. 15, 1944), *reprinted in* FRUS QUEBEC,

of Germany would, if successful, deliberately deprive many millions of people of the right to freedom from want and freedom from fear."[63] Stimson pointedly reminded Roosevelt that "under the Atlantic Charter victors and vanquished alike are entitled to freedom from economic want."[64] He elaborated that it would be "a crime against civilization" to force poverty on the "educated, efficient, and imaginative" German people.[65] Perhaps coincidentally, the controversy simultaneously leaked from an Administration source to allies in the press, Drew Pearson and Arthur Krock of the *New York Times*.[66]

Stimson's approach was really a shorter-term version of the equally conciliatory State Department approach, and was favored by officials at the State Department such as the young George Kennan, then serving as an aide to John Winant, ambassador to Britain. Kennan opposed even the mildest denazification programs as eliminating "the people upon whom Germany had to depend for future leadership" and as likely to promote "disharmony."[67] Stimson and his assistant secretary, John J. McCloy, insisted that their plans were focused only on establishing law, order, and efficiency.[68] Irate Treasury Department staff responded that the complementary War Department and State Department approaches were predicated on the Allies' assuming responsibility for the quality of life in Germany. The inevitable result would be a higher standard of living among the defeated Germans than in the hard-bitten Allied European nations, which had sacrificed so much for victory.

Morgenthau's approach was actually a rather close approximation of American public opinion in the autumn of 1944. A Gallup poll released in November 1944, for instance, showed that 34 percent of Americans wanted to destroy Germany as a political entity, 32 percent wanted continuing supervision and control over Germany, and 12 percent wanted to "rehabilitate" Germany.[69] After the cabinet controversy was leaked to the press, however, public opinion began to shift, and the Treasury proposals never again regained the initiative.

The dynamics of this shift had several components, and illustrate the

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supra note 53, at 482-85.

63. *Id.* at 484.

64. *Id.* at 483-84.

65. *Id.* at 483.

66. Drew Pearson broke the story on September 21, 1944. *See* Drew Pearson, *Morgenthau Plan on Germany Splits Cabinet Committee*, N.Y. TIMES, Sept. 24, 1944, at 1, 8. There is some debate about whether the leaker was Stimson himself, Cordell Hull, or James F. Byrnes. *See, e.g.*, KIMBALL, *supra* note 48, at 41, 43 (suggesting it was most likely Byrnes). Historian Steven Casey believes that it was most likely Hull, while political scientist Gary Bass seems to find the circumstantial case against Stimson to be more than suggestive. STEVEN CASEY, CAUTIOUS CRUSADE: FRANKLIN D. ROOSEVELT, AMERICAN PUBLIC OPINION, AND THE WAR AGAINST NAZI GERMANY 183 (2001); BASS, *supra* note 38, at 168-69. Stimson biographer Sean Malloy believes that the leaker was unlikely to have been Stimson personally, but could have been a War Department subordinate such as John J. McCloy.

67. GEORGE F. KENNAN, MEMOIRS, 1925-1950, at 175 (1967).

68. *Id.*

69. [1935-48] 1 THE GALLUP POLL: PUBLIC OPINION 1935-1972, at 426, 460, 463, 470, 472 (George H. Gallup ed., 1972).

complex workings obscured by the label of "public opinion" in mid-1940s America.[70] In the wake of the initial *New York Times* coverage, the influential *Wall Street Journal* and then the nationally syndicated Associated Press quickly took up the Morgenthau story.[71] Newspapers across the political spectrum were soon concurring with the *Washington Post*'s assessment that the Morgenthau plan was "the product of a feverish mind from which all sense of reality had fled."[72] The Treasury plan would ensure that Germany remained "a festering sore . . . in the heart of Europe, and there would be installed a chaos which would assuredly end in war."[73] The *Post* further emphasized that Nazi propaganda minister Josef Goebbels was already using the story "as a threat to spur Germans to greater resistance against the Allies."[74]

Indeed, the American press was running stories about the Morgenthau controversy in parallel columns with stories of a serious Allied setback around Arnheim, in the lower Rhine, due to a rallying of German resistance. Commentators at the time emphasized the coincidence. By the end of September, legislators on Capitol Hill were attacking the Treasury Department approach, and the White House was receiving quantities of unfavorable mail. "Prior to the announcement [of the Morgenthau Plan]," noted Senator Edwin Johnson, "the Germans were surrendering in droves; now they are fighting like demons."[75]

With the presidential election seven weeks away, an embattled and annoyed Roosevelt withdrew his support for the Treasury proposal, favoring the "middle road" of the short-term War Department approach almost by default. The president fired off a memo to the Secretary of State:

> Somebody has been talking not only out of turn to the papers or on facts which are not fundamentally true.
>
> No one wants to make Germany a wholly agricultural nation again, and yet somebody down the line has handed this out to the press. I wish we could catch and chastise him.[76]

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70. The material in this paragraph and the next closely follow the excellent analysis of American public opinion in CASEY, *supra* note 66, at 184-87, which also guided me to useful sources. I thank Susan Ferber, editor with Oxford University Press, for calling my attention to Casey's important work.

71. Arthur Krock, *Why Secretary Morgenthau Went to Quebec*, N.Y. TIMES, Sept. 22, 1944; Alfred F. Flynn, *Post-War Germany*, WALL ST. J., Sept. 23, 1944. Steven Casey notes that "[t]he AP article was a page-one lead story on September 24 in a number of papers, including *Baltimore Sun*, *Chicago Tribune*, *New York Herald Tribune*, and *Washington Evening Star*." CASEY, *supra* note 66, at 263-64 n.8.

72. Editorial, Samson in the Temple, WASH. POST, Sept. 26, 1944.

73. *Id.*; *see also* Editorial, *Morgenthau's Plans for Germany*, WASH. TIMES-HERALD, Sept. 26, 1944; *The German Industrial Machine*, PM, Sept. 27, 1944.

74. *Germans Are Aroused by Morgenthau Proposal*, WASH. POST, Sept. 26, 1944.

75. Ted Lewis, *Morgenthau Plan Blamed for Stiffening of Nazis*, WASH. TIMES-HERALD, Sept. 30, 1944 (quoting Senator Edwin Johnson); *see also* Ernest Lindley, *Future of Germany: Reaction to the Morgenthau Plan*, WASH. POST, Sept. 29, 1944. On presidential mail, see Casey's assessment in CASEY, *supra* note 66, at 186-87.

76. Franklin D. Roosevelt, Memorandum for the Secretary of State (Sept. 29, 1944), *in* Murphy Papers, *supra* note 55. As late as October 20, 1944, the President forwarded a memo to the

The aggregate term "public opinion" is a shorthand caption for this dynamic relationship of activist public officials, press leaks, down-to-the wire electioneering, journalistic editorializing, and congressional and citizens' advocacy for their favored interpretations of public events. Astonishingly, several treatments of the demise of the Morgenthau Plan do not even mention the impending U.S. presidential election. In saying that the Treasury Department's approach was defeated by public opinion, it is important to examine why decision-makers might have been especially sensitive to such opinion. A more richly contextualized approach brings the relationship of ideas and events into sharper focus.

The British and even the Soviet leadership never took a particularly hard line about post-surrender partition, deindustrialization, or summary execution of war criminals in Germany, although they favored all three policies at one time or another. For example, at the Teheran Conference of December 1943, Stalin famously remarked to Churchill at a formal dinner that between 50,000 and 100,000 Germans ought to be summarily executed. Roosevelt apparently tried to turn the comment into a joke by counterproposing that only 49,000 members of the German General Staff be executed.[77] The British and the Soviets were more concerned about extension of Lend Lease loans and about arrangements for Eastern Europe, respectively. (In historian Warren Kimball's quaintly gendered terms, "Conflicts between the Americans and the British were more on the order of family quarrels; quarrels which could, if necessary, be resolved almost peremptorily by the Americans—the breadwinner.")[78] Uncertainty still reigned among the so-called Big Three even as late as the February 1945 Yalta Conference, just two months before Roosevelt's death.

A statement released for public consumption at Yalta is worth quoting at length because it still lies so very close to the Morgenthau approach: "It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world," the Yalta statement began.[79] It continued:

Secretary of State arguing that, as regards "the treatment of Germany . . . speed on these matters is not essential at the present moment . . . . I dislike making detailed plans for a country which we do not yet occupy." Franklin D. Roosevelt, Memorandum for the Secretary of State (Oct. 20, 1944), *in* Murphy Papers, *supra* note 55.

77. *See* Minutes of Tripartite Political Meeting (Dec. 1, 1943), *reprinted in* U.S. STATE DEP'T, [1943] FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT CAIRO AND TEHRAN 602-04 (1961). But note that all the major-decision makers, including Stalin, at one time or another also supported trials. See, for example, Excerpts from a Telegram sent by Prime Minister Churchill to the President, Telegram No. 801 (Oct. 22, 1944), *in* Murphy Papers, *supra* note 55, where Churchill notes:

> On major war criminals Uncle Joe [Stalin] took an unexpected ultra-respectable line. There must be no executions without trial otherwise the world would say that we were afraid to try them. I pointed out the difficulties in international law but he replied that if there were no trials there must be no death sentences but only life-long confinements.

78. KIMBALL, *supra* note 48, at 17.

79. Report of the Crimea Conference (Feb. 11, 1945), *reprinted in* U.S. STATE DEP'T, [1945] FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE AT YALTA AND MALTA 970 (1955)

> We are determined to disarm and disband all German armed forces; break up for all time the German General Staff that has repeatedly contrived the resurgence of German militarism; remove or destroy all German military equipment; eliminate or control all German industry that could be used for military production; bring all war criminals to just and swift punishment and exact reparation in kind for the destruction wrought by the Germans; wipe out the Nazi party, Nazi laws, organizations and institutions, remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people; and take in harmony such other measures in Germany as may be necessary to the future peace and safety of the world.[80]

The main difference between this Yalta statement and the thrust of the original Treasury Department proposal was that the Yalta language explicitly distinguished between Nazis and the German people. This distinction is underlined by the concluding sentence of the Yalta statement on war criminals: "It is not our purpose to destroy the people of Germany, but only when Nazism and Militarism have been extirpated will there be hope for a decent life for Germans, and a place for them in the comity of nations."[81] This distinction, between Nazis and Germans, was one that FDR consistently refused to make himself, however. Roosevelt often expressed his opinion "that all Germans, and not just the Nazis, were guilty of aggression and crimes against humanity." The president added numerous handwritten notes to his own copy of the Treasury Department plan aimed at the cultural reform of ordinary Germans, including a proposed prohibition on the "goose step" march.[82]

Even the most basic outlines of Allied denazification policy remained ambiguous until after Roosevelt's death. In May 1945, officials in charge of implementing these policies soon found themselves at sea among overlapping committees. General Lucius Clay, soon to be put in charge of the American sector of a quadripartite Allied Control Authority (Britain, France, the U.S.S.R., and the U.S.) for the administration of Occupied Germany, lamented the proliferating post-surrender bureaucracy. In a letter to a War Department official, Clay saw a bumpy ride ahead for more ambitious Allied approaches to multilateralism. "We understand here that consideration is being given to separate Commissions for Restitutions, for the Trial of War Criminals, for the Internationalization of the Ruhr and for other purposes," he wrote resignedly.[83]

[hereinafter FRUS YALTA].

80. *Id* at 970-71. In addition, parallel secret protocols, not released until years later, apparently envisioned a dismemberment almost as thoroughgoing as that in the Treasury Department proposal, along with high reparations. Confidential provisions reprinted as Protocol of the Proceedings of the Crimea Conference (Feb. 11, 1945), *in id.* at 978-79.

81. *Id.*

82. KIMBALL, *supra* note 48, at xiv; Robert Murphy, Memorandum of Conversation with President Roosevelt (Sept. 9, 1944), *in* Murphy Papers, *supra* note 55; Henry Morgenthau, Memorandum of Conversation with President Roosevelt (Aug. 19, 1944), *in* Morgenthau Papers, *supra* note 50, at 1386-88; *see also* Memorandum of Conversation with Roosevelt and State Department Officials, *reprinted in* U.S. STATE DEP'T, [1943] 1 FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS: GENERAL 542 (1963) [hereinafter FRUS 1943].

83. General Lucius D. Clay to General John Hilldring, Director of the War Department's Civil Affairs Division (May 7, 1945), *reprinted in* 1 THE PAPERS OF GENERAL LUCIUS D. CLAY:

Administering these occupied areas was a kind of microcosm for broader cooperative projects: "We are going to face many difficulties in making the Allied Control Authority work. To me it seems clear that if it doesn't work we might as well throw the idea of a United Nations out the window."[84]

By the early spring of 1945, the State Department position had prevailed on questions of economic policy, that is, against dismemberment and deindustrialization and in favor of the rapid rebuilding of productive resources as a bulwark against communism. The moderate positions of the War Department won out on political, legal, and administrative questions, including policies relating to the treatment of war criminals. In sum, the Allies had three options for handling high-ranking Axis authorities as part of implementing their "unconditional surrender" policy.[85] They could deal with leading war crimes suspects by executive fiat (which would have involved shooting them upon identification, as per the Morgenthau plan, or confining them in political imprisonment); they could let them go free under an amnesty policy; or they could put them on trial.

All three choices were problematic. Summary execution without trial would have been ideologically awkward for the democracies in light of the Allies' contemporaneous pronouncements on the nascent United Nations and the rule of law. A widely-publicized pronouncement from the Yalta Declaration linked multilateral action on war crimes to the principles of the 1941 Atlantic Charter itself:

> By this declaration we affirm our faith in the principles of the Atlantic Charter, our pledge in the [1942] Declaration by the United Nations, and our determination to build in cooperation with other peace-loving nations a world order under law, dedicated to peace, security, freedom and the general well-being of mankind.[86]

The Allies rejected as politically unworkable the option of confinement in a remote area by executive fiat, along the lines of the "Elba solution" for Napoleon.[87] And given the rhetoric (and reality) of Nazi leaders as enemies of

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GERMANY, 1945-1949, at 12 (Jean Edward Smith ed., 1974).

84. *Id.*; *see also* LUCIUS D. CLAY, DECISION IN GERMANY (1950); Lucius D. Clay, *Proconsul of a People, by Another People, for Both Peoples*, *in* AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND IN JAPAN, 1944-1952, at 103-13 (Robert D. Wolfe ed., 1984); *see generally* JOHN H. BACKER, WINDS OF HISTORY: THE GERMAN YEARS OF LUCIUS DUBIGNON CLAY (1983) (detailing General Clay's role as the U.S. Military Governor of Germany during American postwar occupation).

85. Roosevelt had called for the "unconditional surrender" of the Axis regimes at a January 24, 1943, press conference in the wake of the Casablanca Conference with Churchill. *See* ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-1945, at 373-76 (1979); *see, e.g.*, Brian L. Villa, *The U.S. Army, Unconditional Surrender, and the Potsdam Proclamation*, 6 J. OF AM. HIST. 92 (1976). For the legal implications of unconditional surrender, see the discussion below on the drafting of the Nuremberg Charter.

86. FRUS YALTA, *supra* note 79, at 971.

87. Former U.S. Secretary of State Henry Kissinger wrote approvingly of Tsar Alexander of Russia's decision to banish Napolean to Elba. In Kissinger's estimation, the Tsar and his fellow architects of the Concert of Europe system successfully "resisted the temptation of a punitive peace. This may have been due to the very quality which is usually considered their greatest failing: their

civilization, granting any kind of outright amnesty was never seriously considered either, as it ran the risk of seeming to imply that the sacrifices of millions of Allied soldiers and civilians had been in vain. As with the resonant phrases of the Atlantic Charter—resonant because they echoed with people's aspirations and in turn helped shape their expectations—Allied leaders found themselves constrained by their own propaganda and rhetoric. Ambiguous public pronouncements on the future treatment of war criminals, as well as the Atlantic Charter's own language that its terms would apply to both victor and vanquished, had already contributed to a vision of the future that proved difficult simply to abandon.[88]

An important perspective on the ensuing legal disputes over what to do with war criminals is thus to see them primarily as diplomatic donnybrooks, microcosms of this wider denazification debate, rather than as debates over the intrinsic merits of abstract legal theories. One might argue that, at least as regards the symbolic role of the Nuremberg defendants as surrogates for wider groups of Nazis in German society, the Nuremberg trial itself could be portrayed as a vestigial and largely symbolic embodiment of the Morgenthau Plan, with its focus on "reform of the German character."[89] The choice to stage a high-profile trial for selected Nazi leaders can best be understood when set in this context of possible alternative approaches.

IV.
TRANSLATING IDEAS ABOUT INTERNATIONAL LAW INTO ACTION

The ideas about international law embodied in the Nuremberg Charter were a new combination of older conceptions regarding just and unjust wars, mixed with positivist ideas about traditional crimes of war that had been codified by previous treaties. These precedents were then combined with innovative arguments about the scope of a "living" international customary law, through an

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indifference to popular pressures." HENRY A. KISSINGER, A WORLD RESTORED: METTERNICH, CASTLEREAGH AND THE PROBLEMS OF PEACE 1812-22, at 139 (1957). Napoleon escaped from his initial banishment and was not truly exiled until he was dispatched to St. Helena. *See, e.g.*, HENRY HOUSSAYE, 1815: LA PREMIERE RESTAURATION, LE RETOUR DE L'ÎLE D'ELBE, LES CENT JOURS (1911); *see also* CHARLES K. WEBSTER, THE FOREIGN POLICY OF CASTLEREAGH, 1812-1815: BRITAIN AND THE RECONSTRUCTION OF EUROPE 479 (1931); C.K. WEBSTER, THE CONGRESS OF VIENNA 136-37 (1919). Webster, a professor of international history, served as a member of the British delegation to the Dumbarton Oaks Conversations in the summer of 1944. His 1919 monograph on the Congress of Vienna had been officially commissioned by the British delegation to the Paris Peace negotiations, for which Webster also served as a delegate, "in the hope that knowledge of 1814-15 would save the peacemakers of 1918-19 from misjudgments or errors" made by their predecessors; but Webster admitted in the 1930s that "the monograph had no observable effect whatsoever." P.A. REYNOLDS & E.J. HUGHES, THE HISTORIAN AS DIPLOMAT: CHARLES KINGSLEY WEBSTER AND THE UNITED NATIONS, 1939-1946, at 2 (1976).

88. See Gary Bass' argument about how domestic norms in liberal states also constrain international action. BASS, *supra* note 38, at 21-23.

89. See the opening section of this article, discussing the American vision of Nuremberg as a "national social science experiment." *See also* MORGENTHAU, *supra* note 51 (Morgenthau's own defense of his approach written with Roosevelt's encouragement for a popular audience.).

analogy to the growth of Anglo-American common law. The precise contours of this synthesis can only be explained as a political negotiation.[90] Yet the negotiators and their aides saw themselves as harnessing the pre-existing legitimacy of persuasive legal precedents in order to create something new.

The Nuremberg trial and its Charter were designed to mark "the reestablishment of the principle that there are just and unjust wars and that unjust wars are illegal," in the words of the chief American negotiator of the Nuremberg Charter, Supreme Court Justice Robert H. Jackson, who would later serve as the U.S. Chief Prosecutor.[91] In his June 1945 Report to the President on "Atrocities and War Crimes," Jackson explained:

> Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare.[92]

The Report concluded that if the underlying conflict were an illegitimate use of force, however, this mantle of protection would be removed, and the killings, destructions, and oppressions would revert to their normal status as ordinary crimes.[93]

The Jackson Report's reasoning captures the Nuremberg Charter's conception of a war crime, as a label referring to an act which remained criminal even though committed in time of war, and which presupposed the existence of laws of war. The whole concept of "civilized warfare" rested on the assumption that the ravages of battle ought to be mitigated as far as possible by prohibiting needless cruelties. The practice of regulating the conduct of war can be traced to the emergence of knightly chivalry in Europe, and back before that to the *jus fetiale* of ancient Rome.[94]

The early Christian conception of a war crime was linked to the moral

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90. A later section of this article summarizes some of the political maneuvering around finalizing the contours of the Nuremberg Charter, but note that this story is well told in a variety of secondary sources, both scholarly and popular. *See, e.g.*, ARIEH J. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT (1998); CONOT, *supra* note 11; ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL (1983); DOCUMENTARY RECORD, *supra* note 30. See also accounts by participants, such as TAYLOR, *supra* note 7, at 78-118, and Sydney S. Alderman, *Negotiating the Nuremberg Trial Agreements, 1945*, *in* NEGOTIATING WITH THE RUSSIANS (Raymond Dennet & Joseph E. Johnson eds., 1951). *See also* PETER CALVOCORESSI, NUREMBERG: THE FACTS, THE LAW, AND THE CONSEQUENCES (1947).

91. ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 6 (1949) [hereinafter REPORT OF ROBERT H. JACKSON].

92. *Id.* at 8.

93. *Id.* at 9.

94. The *jus fetiale* constituted a part of the unwritten law of the Roman Constitution whereby a special group of priests would determine whether a foreign nation had waged unjust warfare against the Romans. *See, e.g.*, ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 17 (1947); *see also* COLEMAN PHILLIPSON, 2 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 315-48 (1911).

status of the conflict as a whole—whether it was just or unjust. Theologians such as Saint Augustine (354-430), Saint Thomas Aquinas (1225-1274) and Francisco Suarez (1548-1617), as well as jurists such as Hugo Grotius (1583-1645), were largely concerned, in their writings that touched on the laws of war, with establishing criteria for just and unjust wars. They tended to concur that the situations that might justify forcible resistance were the defense of life, property, or of a third party unjustly attacked.[95]

As the temper of international law became increasingly laicized during the course of the 18th century, this moralistic just war tradition, known as the *jus ad bellum*, came to be overshadowed by a more pragmatic, rule-oriented vision of warfare in which the state of war itself was assumed to be a neutral context for actions which could be subject to regulation (the *jus in bello*). The Hague Conventions' central premise is that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[96] The aftermath of the First World War encouraged a revival of the moralistic tradition of folding the *jus in bello* into the *jus ad bellum*, as part of the wider agenda of outlawing aggressive war. The two concepts, in practice never entirely distinct, became increasingly intertwined.

This trend was particularly pronounced in the war-torn countries of Allied Europe, largely because of the general public's moral outrage at widely-publicized atrocities from World War I such as the execution of British nurse Edith Cavell, the destruction of French and Belgian towns such as Lille and Louvain by rampaging German troops, the Zeppelin bombing of British cities, and civilian deaths from German U-boat attacks on the high seas.[97] At the 1919 Paris Peace Conference, British prime minister Lloyd George and French premier Georges Clemenceau had insisted that war crimes be the very first agenda item at the Conference's first official session.[98] An official commission of fifteen prominent international lawyers took up this question, and concluded

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95. See, for example, St. Augustine's assessment that, while every war is lamentable, particular kinds of wrongs suffered at the hands of adversaries resulted in "the necessity of waging just wars." ST. AUGUSTINE, DE CIVITATE DEI CONTRA PAGANOS 150-51 (W. Greene trans., 1960); *see also* ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 80-83 (Blackfriars 1965); FRANCISCO SUAREZ, SELECTIONS FROM THREE WORKS, DE TRIPLICI VIRTUTE THEOLOGIA: CHARITATE 817 (G. Williams trans., 1944); HUGO GROTIUS, DE JURE BELLI AC PACIS 565-66 (F. Kelsey trans., 1925). This note and the following one, and the accompanying text, are drawn from my article, Elizabeth S. Borgwardt, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial* (1991), *reprinted in* 2 WAR CRIMES LAW 145-213 (Gerry Simpson ed., 2004).

96. *See* Fourth Hague Convention, *supra* note 38, art. 22, 36 Stat. at 2301, 1 Bevans at 647-48.

97. *See, e.g.*, Ebba Dahlin, *French and German Public Opinion on Declared War Aims, 1914-1918*, *in* IV HISTORY, ECONOMICS, AND POLITICAL SCIENCE, 193-341 (1933); PIERRE MIQUEL, LA PAIX DE VERSAILLES ET L'OPINION PUBLIQUE FRANÇAISE (1972). See also political scientist James F. Willis's excellent monograph, JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 27-28 (1982).

98. Council of Ten Meeting (Jan. 17, 1919), *reprinted in* U.S. DEP'T OF STATE, [1919] 3 FOREIGN RELATIONS OF THE UNITED STATES, PARIS PEACE CONFERENCE 169 (1943) [hereinafter FRUS PARIS].

two months later that the Central Powers had "premeditated" the war.[99] A subcommittee of this group then recommended that "for the future, penal sanctions should be provided for such outrages."[100] In other words, the commission determined that Germany should be held responsible, not just for violations of specific laws regarding the conduct of the war, but for the very state of war itself.

Yet the phrase "for the future" is quite telling as well, expressing the legalist hesitations of the Commission's chair, U.S. Secretary of State Robert Lansing. Lansing and the other American member of the Commission, international legal scholar James Brown Scott, refused to sign the Commission's report. They submitted a minority report objecting to the proposal to treat as grounds for legal liability "violations of the laws of humanity, as to which there was no fixed and universal standard, but it varied with time, place, circumstance and conscience of the individual judge." The American duo also doubted the feasibility of pursuing penal sanctions because of the "difficulty of finding whether the act was in reality one of aggression or defense."[101] Gary Bass explains succinctly that these legalist objections "were not based on a lack of faith in law, but on an excess of it"—a positivist rigidity born of a direct generalization of domestic legal standards to the international level.[102]

Popular pressure played a large role in these developments, as shown by Lloyd George's 1918 election year cry that "[t]he Kaiser must be prosecuted."[103] The prime minister's election polemic continued; "The war was a hideous, abominable crime, a crime which has sent millions of the best young men of Europe to death and mutilation, and which has plunged myriads of

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99. INT'L LAW DIV., CARNEGIE ENDOWMENT FOR INT'L PEACE, PAMPHLET NO. 32, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORT OF THE MAJORITY AND DISSENTING REPORTS OF THE AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION ON RESPONSIBILITIES AT THE CONFERENCE OF PARIS, 1919, at 18-21 (1919).

100. *Id.* at 22-23.

101. *Id.* at 58; *see also* James Brown Scott, *The Trial of the Kaiser*, *in* WHAT REALLY HAPPENED AT PARIS: THE STORY OF THE PEACE CONFERENCE, 1918-1919, at 231-58 (Edward M. House & Charles Seymour eds., 1921). Interestingly, Lansing does not mention his minority report in his own memoir, ROBERT LANSING, THE PEACE NEGOTIATIONS: A PERSONAL MEMOIR 33 (1921). Before becoming Secretary of State in 1914, Lansing had "had one of the largest private practices in international law in the United States and had participated in more international arbitrations than any other American," while Professor Scott had served as a U.S. delegate to the Second Hague Peace Conference of 1907. WILLIS, *supra* note 97, at 69.

102. BASS, *supra* note 38, at 59. I use the term legalism here following Judith Shklar's definition of legalism as "rule-oriented thinking." Bass, however, sometimes uses legalism as a synonym for idealism. The result is that under Bass's analysis, the legalist position *favored* trying the defeated Germans. By contrast, I see the anti-trial arguments of Lansing and Scott as better expressing Shklar's (and my) conception of legalism—*i.e.*, subjecting the Kaiser to trial would necessitate too many innovations and disruptions to established expectations, and so legalists such as Lansing and Scott opposed it. On legalism as idealism, see GEORGE F. KENNAN, AMERICAN DIPLOMACY, 1900-1950, at 95 (1953).

103. David Lloyd George Speech (Nov. 29, 1918), *in* TIMES (London), Nov. 30, 1918, at 6. Lloyd George denied ever saying "Hang the Kaiser!" but the popular election slogan has been widely attributed to him. *See* DAVID LLOYD GEORGE, I MEMOIRS OF THE PEACE CONFERENCE 109 (1939).

homes into desolation. Is no one responsible? Is no one to be called to account?"[104]

Article 227 of the Treaty of Versailles explicitly provided that "a special tribunal will be constituted to try [German Kaiser Wilhelm II] . . . . [It] will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality."[105] The Allied plan proved abortive, however, because the Kaiser fled to the Netherlands, which refused to surrender him for trial.[106] Some of the putative backup plans for addressing the Kaiser's act of impunity seemed to have been drawn from the libretto of a comic opera. None was successfully implemented, including a proposal that the British government officially urge him to commit suicide; plans for banishment to less comfortable venues such as Chile, Java, and the Falkland Islands, presumably after a kidnapping; and an actual abduction attempt by a team of American veterans led by Colonel Luke Lea, former senator and publisher of the Nashville *Tennessean*.[107] Encouraged by his advisors to feign illness in order to garner public sympathy, the former monarch bought a castle twenty-five miles from the German border where he lived in comfortable exile until his death from old age in 1941.

Article 228 of the Versailles Treaty called for prosecution of those Germans who had "committed acts in violation of the laws and customs of war."[108] Belgium, France, Britain, and Italy each produced a list of suspects, totaling about 3,000 names. Even allowing for group arraignments for crews of particular U-boats or staffs of individual POW camps, these numbers still suggested close to a thousand separate trials.[109] By 1920, British politicians in

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104. Lloyd George, *supra* note 103.

105. Treaty of Peace Between the Allied and Associated Powers of Germany, June 28, 1919, art. 227, 225 C.T.S. 188, 285, 2 Bevans 43, 136-37 [hereinafter Treaty of Versailles]; *see also* Quincy Wright, *The Legal Liability of the Kaiser*, 13 AM. POL. SCI. REV. 120-28 (1919).

106. The Netherlands had an "immemorial tradition" of sheltering asylum-seekers. WILLIS, *supra* note 97, at 67 (internal quotation omitted); *see also* ALAN PALMER, THE KAISER: WARLORD OF THE SECOND REICH 212-13 (1978).

107. After concluding that their planned abduction would not succeed due to a bridge that was unexpectedly washed out at a strategic point, the self-appointed group of American commandos:

> determined to persuade the kaiser to go with them voluntarily to face his accusers manfully. They continued on to the [kaiser's] estate on the night of January 5 [1919], bluffed their way inside the house, and demanded to see Wilhelm II. After a two-hour standoff, during which the kaiser refused to meet with the Americans, Dutch troops surrounded the estate with spotlights and machine guns, forcing Colonel Lea and his men to depart.

WILLIS, *supra* note 97, at 101; *see also* T. H. Alexander, *They Tried to Kidnap the Kaiser and Brought Back an Ash Tray*, SATURDAY EVENING POST, Oct., 23, 1937, at 5. See BASS, *supra* note 38, at 77-78, for a summary of the even less-plausible alternative plans.

108. Treaty of Versailles, *supra* note 105, art. 228, 225 C.T.S. at 285-86, 2 Bevans at 285-86.

109. *See* British, French, and Italian Meeting, Paris (Jan. 15, 1920), *reprinted in* DOCUMENTS ON BRITISH FOREIGN POLICY, 1919, at 886. An important part of Bass's thesis is what he calls the " rough mathematical ratio of wartime suffering," namely, that for victorious countries in World Wars I and II, "[t]heir passion for war crimes trials matched their relative death tolls," with Belgium and France leading the pack in the wake of World War I, followed by Britain and Italy.

particular were worrying about the destabilizing effects of so many trials on Germany's shaky Weimar government, particularly where suspects would need to be handed over to an Allied tribunal by the already unpopular German authorities. "To try very large numbers," according to meeting minutes paraphrasing Lloyd George, "would be to create great difficulties for the German Government, which he believed to be better than either a Bolshevist Government or a Militarist Government."[110] Perhaps it would be better to try to prosecute a smaller number, just to "make an example."[111]

The United States, as an Associated rather than an Allied power, had not submitted a list of suspected criminals. President Wilson, in particular, felt that the war crimes provisions of the Versailles Treaty were a "weak spot" in that agreement, and distracted from the more important work of the League of Nations in establishing the rule of law worldwide.[112] Even after the joint Allied list was boiled down to just over 400 defendants, plans for trials under the so-called "war guilt" clauses of the Treaty of Versailles served as flashpoints for popular resentment in Germany.[113] In 1920, German Chancellor Hermann Müller approved a secret fund to pay the expenses of the defendants, while German diplomats in Paris warned that no police force in Germany would be willing to execute the warrants.[114] Confronting these difficulties, the Allies reluctantly accepted a German suggestion to try forty or so suspects before the German Supreme Court (*Reichsgericht*) sitting at Leipzig, in a series of test cases grouped by the victims' country of origin.[115]

By the time the trials got underway, in May 1921, several suspects had mysteriously escaped. Others who stood trial received sentences of less than a year, or escaped from jail, while their wardens received public congratulations. Still other defendants, including some accused of torturing Belgian children, were acquitted completely, usually on the grounds that they were only following orders.[116] French and Belgian witnesses withdrew from Leipzig in protest amid jeering German crowds. In 1922, France sought to impose sanctions under the

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BASS, *supra* note 38, at 58, 78. For Bass, this shows how closely calls for war crimes trials were allied to political acts of vengeance. By contrast, Bass argues that the fact that the United States proved to be an exception to this rule in the World War II era—as a supporter of trials that had not endured occupation or widespread civilian casualties—demonstrates the power of a competing norm of American legalism instead of political vengeance. *Id.* at 58.

110. Notes of a Meeting of the Heads of Delegations of the Five Great Powers (Sept. 15, 1919), *reprinted in* 8 FRUS PARIS, *supra* note 98, at 214.

111. *Id.*

112. *See* Notes of a Meeting Held at President Wilson's Home (May 5, 1919), *reprinted in* 5 FRUS PARIS, *supra* note 98, at 470-71; *see generally* ERNEST R. MAY, THE WORLD WAR AND AMERICAN ISOLATION, 1914-1917, at 40-41 (1959).

113. *See, e.g.*, WILLIS, *supra* note 97, at 137.

114. *See* BASS, *supra* note 38, at 89.

115. Bass notes how the breakdown of even this small number of test cases was "proportionate to Allied suffering: sixteen from the Belgian list, eleven from the French, seven British, five Italian, and four from smaller countries." *Id.* at 80.

116. *See id.* at 81, 89; *see also* Editorial, *Convicting Itself*, N.Y. TIMES, July 9, 1921 ("[T]hus the German mentality is shown to be unaltered: and the proposed punishment of war criminals is a farce.").

Treaty of Versailles, in large part over German non-compliance on war crimes provisions, and in early 1923, France reoccupied the Ruhr to protest violations of additional articles of the Versailles treaty.[117]

Continuing Allied demands for legitimate trials produced widespread protest demonstrations in Germany, while public celebrations greeted German Chancellor Josef Wirth's announcement in 1922 that no further suspects would stand trial. The dashing young flying ace Hermann Goering attended one of these protest meetings and was particularly impressed by one of the speakers he heard there. After the electrifying speech ended, the decorated war hero Goering made a point of introducing himself to the rumpled and sweaty speaker, Adolf Hitler.[118] Alexander Cadogan, later to serve as the British permanent undersecretary for foreign affairs during World War II, was already a foreign office official during the First World War. Commenting on the Leipzig trials, Cadogan concluded tersely that the "experiment has been pronounced a failure."[119]

In the interwar era, a number of diplomatic efforts attempted to reassert the moralistic principle of the *jus ad bellum*, whether the underlying conflict was "just" or not. The Covenant of the League of Nations asserted that governments could wage war unjustly.[120] Using war as an instrument of policy meant the aggressive or discretionary use of armed force; a defensive use of force was still understood as a justified response to attack. The 1925 Locarno treaties banned aggression among their signatories,[121] and the 1928 Pact of Paris also explicitly condemned war.[122] After 1928, "war was no longer to be the source and subject of legal rights, and in that sense became an illegal thing," argued a 1946 article in the *South Atlantic Quarterly*, further asserting that "[a]n aggressor and a victim were no longer equals under international law."[123] By implication, then, legal rights in wartime could become dependent, at least in part, on the side for which one fought, with the aggressor responsible, not just for individual atrocities, but also for the state of war itself.

The Nuremberg approach was an innovation in the world of legal ideas, but the trial's design was also an attempt to learn from the history of the failure of the World War I-era approaches. In the wake of the First World War, the

117. *See, e.g.*, W. M. JORDAN, GREAT BRITAIN, FRANCE AND THE GERMAN PROBLEM, 1918-1939: A STUDY OF ANGLO-FRENCH RELATIONS IN THE MAKING AND MAINTENANCE OF THE VERSAILLES SETTLEMENT 70-71 (1943).

118. WILLIS, *supra* note 97, at 141.

119. BASS, *supra* note 38, at 81 (quoting British Foreign Office, FO 371/ 7529/ C17096, Allied-German Negotiations on War Criminals, Dec. 9, 1922).

120. The Covenant of the League of Nations, June 28, 1919, art. 16, *in* 13 AM. J. INT'L L. 128, 134-35 (Supp. 1935).

121. Treaty of Mutual Guarantee Between Germany, Belgium, France, Great Britain, and Italy, Oct. 16, 1925, 54 L.N.T.S. 289.

122. General Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

123. Willard N. Hogan, *War Criminals*, 45 S. ATLANTIC Q. 418 (1946). This quotation echoes the discussion in chapter 3 of Henry L. Stimson's position on the illegality of aggressive war in the interwar era.

legalistic power of positivism had eclipsed more moralistic "just war" conceptions when it came to the trial and punishment of Germany's wartime leaders. To Nuremberg's critics, the revival of the just war framework suggested another, and in their view more alarming, corollary: that victims of such illegal aggression could now be presumed to have virtually unlimited rights, including the right to resort to atomic weapons.[124] To Nuremberg's proponents, however, the development of the Nuremberg Charter was simply a search for a pragmatic, New Deal-style middle way that could support a conception of the progressive development of international law, while avoiding the pitfalls of the past.

At a November 1943 meeting in Moscow between the chief foreign affairs officers of the Big Three, the Allies called for the punishment of those who later came to be known as "conventional" war criminals—"those who have been responsible for, or who have taken a consenting part in . . . atrocities, massacres, and executions."[125] Significantly, the leading diplomats then officially broadened the term to include "[t]he major criminals, whose offences have no particular geographical localisation."[126] Whatever the meaning of this phrase, it signaled that the Allies would be enlisting legal ideas regarding wartime culpability as part of their larger postwar policy edifice.

The 1943 Moscow Declaration is the traditional departure point for many accounts of the negotiation of the Nuremberg Charter, mainly because the jurists assembling in London in the summer of 1945 described their task as implementing the Moscow Declaration.[127] Moscow was not the first high-level evocation of Axis criminality, however. Earlier examples included a 1942 statement by Roosevelt, noting that "the time will come when [perpetrators of atrocities] shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts."[128] In January 1942, the nine

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124. The Indian judge at the 1946-48 Tokyo Trial of defeated Japanese leaders, Rhadbinod Pal, made this point with particular poignancy in a fascinating 1,235 page dissent (the published version, of 735 pages, was illustrated with photographs of atomic destruction). *See* RHADBINOD PAL, INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGMENT 38-40 (1953). More recent critics, notably the international legal scholar Richard Falk, have pointed to what Falk calls "the irony of August 8, 1945," the day of the signing of the London Agreement, containing the Nuremberg Charter. Richard A. Falk, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law: Remarks by Richard A. Falk*, 80 AM. SOC'Y INT'L L. PROC. 65 (1986). As Falk explains it, "on the very day the Allies were sitting down to sign the London Charter, one of their members was engaged in what in retrospect may be the most notable act of criminality committed during at least the international phases of the war: the atomic bombing of Nagasaki." *Id.* See also the headlines on the front page of the New York Times for August 9, 1945, where "4 Powers Call Aggression Crime in Accord Covering War Trials" competes unsuccessfully for space with "Atom Bomb Loosed on Nagasaki."

125. Anglo-Soviet-American Conference, Declaration on General Security (1943), *reprinted in* U.S. DEP'T OF STATE PUB. NO. 2423, THE AXIS IN DEFEAT: A COLLECTION OF DOCUMENTS ON AMERICAN POLICY TOWARD GERMANY AND JAPAN 4 (1945) [hereinafter Moscow Declaration].

126. *Id.*; *see also* U.S. Dep't of State, *Declaration of German Atrocities*, 9 DEP'T ST. BULL. 311 (1943); CORDELL HULL, 2 THE MEMOIRS OF CORDELL HULL 1289-91 (1948).

127. *See* Nuremberg Charter, *supra* note 6, Preamble, 59 Stat. at 1544, 82 U.N.T.S at 280.

128. [1942] PPA, *supra* note 40, at 330.

governments in exile in London issued the Inter-Allied Declaration of St. James's Palace, asserting that they would "place among their principal war aims the punishment, through the channel of organized justice, of those guilty and responsible for these [war] crimes, whether they have ordered them, perpetrated them, or in any way participated in them."[129]

The Declaration of St. James's also repudiated the idea that perpetrators of atrocities against civilians could be properly punished by "acts of vengeance on the part of the general public." The signers relied on "the sense of justice of the civilized world" for their authority.[130] One product of this Declaration was the establishment of a United Nations War Crimes Commission (UNWCC) in London in October 1943, an evidence-gathering organ that specifically excluded Holocaust-related atrocities from its purview. The Soviet Union, although a victim of massive German atrocities, refused to participate in the UNWCC, complaining that the commission was dominated by former British colonies. This London-based War Crimes Commission was not under American control either, and one of the factors shaping U.S. war crimes policies throughout 1944 was the effort to fend off unwelcome proposals by the UNWCC as that organization became more assertive.

Warning statements to Germany before late 1944 were likely deliberately framed in rather vague terms in order to avoid creating a propaganda tool that might stiffen Axis resistance. Nevertheless, fear of reprisals cannot alone explain the astonishingly perfunctory public discussion of Axis atrocities in 1942, 1943, and throughout most of 1944. Prime Minister Churchill, for instance, believed that Allied threats about inevitable future punishments might actually *discourage* atrocities, if they served to "make some of these villains reluctant to be mixed up in butcheries now [that] they realize they are going to be defeated."[131] Given that the outlines of the Final Solution had been verified by credible evidence received in the United States as early as the autumn of 1942, other factors were likely at work as well.[132]

Forces shaping American attitudes toward information about mass atrocities during World War II included lingering skepticism induced by inflated atrocity stories from the First World War, which some World War II-era commentators had come to see as having manipulated the American public to favor involvement in that earlier conflict. Furthermore, fears of an influx of refugees who might take newly available jobs and dilute the stock of "native" workers strengthened anti-immigrant sentiment in the United States. Anti-

129. Inter-Allied Info. Comm., *Aide-Memoire from the United Kingdom*, *in* PUNISHMENT FOR WAR CRIMINALS: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES'S PALACE, LONDON, ON JANUARY 13, 1942, at 4 (1945).

130. *Id.* at 5-6.

131. Letter from British Prime Minister (Churchill) to President Roosevelt and the Chairman of the Soviet Council of People's Commissars (Stalin) (Oct. 12, 1943), *reprinted in* 1 FRUS 1943, *supra* note 82, at 556-57.

132. *See* DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945, 42, 72 (1984).

semitism likely played a role in these "native stock" arguments. Yet the U.S. was also just emerging from a decade-long Depression where unemployment had skyrocketed. Even plentiful wartime jobs had failed to erase relatively recent memories of bread lines and soup kitchens. Wartime public opinion polls often showed that a majority of Americans predicted another economic depression after the war, with unemployment spiking as millions of young people were demobilized. The prospect of government programs admitting floods of destitute immigrants played into these fears of higher postwar joblessness, whatever the likely ethnic background of those immigrants.[133]

In addition, State Department officials such as Breckinridge Long argued that waivers of U.S. immigration quotas would be especially undesirable in the case of Jewish refugees, and that a deliberate policy of delay would better accomplish State Department objectives.[134] Most unsettling of all, perhaps, was the role played by highly assimilated American-Jewish leaders such as presidential advisor Samuel I. Rosenman, who consistently sought to water down the president's public statements on war crimes, and insisted that FDR refuse meetings with groups advocating on behalf of Holocaust victims.[135] The present author's admittedly charitable theory about Rosenman is that his interpretation of American pluralism meant denying the relevance of ethnicity in every context. Government officials of Jewish background were also sensitive to the accusation that they might be using their professional positions for the purpose of "special pleading" on behalf of their persecuted co-religionists. Treasury Secretary Henry Morgenthau's 1945 book for a popular audience, *Germany Is Our Problem*, did not refer to its author's religious background, for instance; nor—much more astonishingly, given its subject and date of publication—does it mention Jews at all. Rosenman may also have believed that large cohorts of manifestly alien-seeming co-religionist refugees would encourage the growth of American anti-semitism.[136] While representatives of Jewish groups were active and persistent, they failed to influence policymakers in any executive department except the Treasury, let alone penetrate mainstream

133. See, for example, the August 1944 response to a FOR poll asking a sampling of Americans if a "widespread depression" should be anticipated within 10 years, with just over 50% responding "yes, we will have a depression" and only 35.9% indicating "we will avoid it." PUBLIC OPINION 1935-46, at 65-66 (Hadley Cantril ed., 1951). When Republicans were asked this same question in January 1945, 62.1% predicted widespread depression between 1945 and 1955. *Id.*

134. WYMAN, *supra* note 132, at 190.

135. *Id.* at 75, 256. Rosenman's lengthy political memoir does not mention Jews, the holocaust, or the fact that its author was Jewish. *See* SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT (1952). This omission is particularly notable given that over half of the memoir focuses on the shaping of policy in the White House during the years 1941-45, during which time Rosenman had almost daily access to the president. Furthermore, in January and February of 1945, Rosenman headed a review team of war crimes prosecution policies, and in May and June of 1945, the former state court judge was one of the primary negotiators for the United States of the draft war crimes policy that led to the Nuremberg Charter. *Id.* at 518-19, 545.

136. *See, e.g.*, THE GERMAN-JEWISH LEGACY IN AMERICA, 1938-1988: FROM BILDUNG TO THE BILL OF RIGHTS (Abraham J. Peck ed., 1989).

American consciousness.[137]

An innate human tendency simply to deny the reality of such shocking news of such mass slaughters likely played a role as well.[138] Even the November 1943 Moscow Declaration referred to what would become known as the Holocaust incredibly obliquely, as "the slaughters inflicted on the people of Poland."[139] Nuremberg assistant prosecutor Telford Taylor remembered that the establishment of the War Crimes Commission in London "made astonishingly—indeed shamefully—little impact on the public mind. I myself did not become aware of the Holocaust until my exposure to the relevant documents and witnesses at Nuremberg."[140]

In the wake of the Moscow Declaration, officials in the War Department developed several general plans, starting with the Handbook on Military Government for Germany, which included an annex on war criminals. The Handbook included a table listing "categories of Nazi officers" to be "arrested and detained upon the Allied Occupational Forces' entry into Germany," estimated to add up to well over 100,000 potential detaineees in the Western Zone of occupation alone.[141] In the summer of 1944, however, with overall denazification policy still unsettled, it was not possible to be more specific about the fate of those detained. Plans for their processing would most likely have grown out of the guiding principles of this War Department Handbook, as summarized by its admonition to occupation authorities:

> Your main and immediate task, to accomplish your mission, is to get things running, to pick up the pieces, to restore as quickly as possible the official functioning of the German civil government in the area for which you are responsible . . . . The first concern of military government will be to see that the machine works and works efficiently.[142]

In large part, this War Department approach of treating defeated Germany like a nice WPA job—i.e., like a New Deal project or agency—was what had sparked Treasury Secretary Morgenthau to develop his famously controversial alternative.[143] This dynamic of stimulus and response continued through the autumn and winter of 1944, as controversy over the Morgenthau Plan became a

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137. *See, e.g.*, Statement on War Criminals Submitted by the American Jewish Conference to the Secretary of State (Aug. 25, 1944), *reprinted in* DOCUMENTARY RECORD, *supra* note 30, at 17-20.

138. For example, War Department official John J. McCloy and Supreme Court Justice Felix Frankfurter discounted first-hand evidence of Holocaust-related atrocities as late as early 1944. See the nuanced account of their skepticism in DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 796-97 (1999). Frankfurter professed himself "unable to believe" the testimonials, more out of what he readily conceded at the time was a failure of imagination than any doubts as to the witnesses' veracity.

139. Moscow Declaration, *supra* note 125, at 4.

140. TAYLOR, *supra* note 7, at 26.

141. War Department Handbook, *supra* note 50, at 1394-96. Table D, Nazi Police, Party, Para-Military, and Governmental Officers to be Interned.

142. *Id.* at 1394.

143. 1 MORGENTHAU DIARY, *supra* note 50, at 414 (statement of Henry A. Morgenthau, Jr., Aug. 17, 1944).

major impetus for the War Department to develop its own plans regarding Germany's suspected war criminals.

V.

"HOWEVER MUCH A MAN LOVED THE LAW HE COULD NOT LOVE SO MUCH OF IT AS WOUND ITS SLUGGISH WAY THROUGH THE PALACE OF JUSTICE AT NUREMBERG"[144]

Lieutenant Colonel Murray C. Bernays was the thoughtful and bookish chief of the Special Projects Office in the Personnel Branch of the War Department. Bernays developed a plan for prosecution of war criminals that turned on charging the leaders of the Nazi regime with "conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war."[145] Traditionally an Anglo-American legal doctrine, the conspiracy approach would also criminalize "everything done in furtherance of the conspiracy . . . [including] domestic atrocities induced or procured by the German Government to be committed by other Axis nations against their respective nationals."[146] Groups as well as individuals could be conspirators, and Bernays envisioned an initial trial of the top echelon of Nazi leaders along with representatives of groups such as the Gestapo and German General Staff.

Once the group had been declared criminal, it would merely be a matter of showing whether any given individual was a member of that group, thus purging large numbers of Nazis using judicial processes rather than summary execution. Other War Department attorneys, notably Colonel Ammi Cutter, refined the "Bernays Plan" before Secretary of War Henry Stimson enthusiastically endorsed it in late October of 1944. The criminal conspiracy approach was especially appealing, Stimson later told associates, because he himself had litigated some trust-busting conspiracy cases as a young lawyer, against sugar combines, and had found the doctrine to be both rigorous and efficient.[147]

American planning for Axis war crimes trials bogged down in the winter of 1944-45 in the face of inter-departmental opposition, mostly from the offices of the Judge Advocate General and, later, the State Department Legal Advisor. Officials in these offices, as well as Herbert Weschler in the Justice Department (later a supporter and advisor at Nuremberg), objected to the concept of including pre-war atrocities against a domestic population, since the strictures of the laws of war were presumably triggered only by an underlying international armed conflict. They also expressed concerns about guilt-by-association problems presented by the conspiracy scheme. But in late January 1945, an unexpected infusion of popular fervor dramatically cut through these

144. WEST, *supra* note 22, at 17.
145. Trial of European War Criminals, *supra* note 30.
146. *Id.* at 36-37.
147. HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 586-87 (1947).

bureaucratic debates, galvanizing plans for an ambitious and high-profile trial of Nazi leaders.

On December 17, 1944, during the Battle of the Bulge, the First SS Panzer regiment had machine-gunned seventy American prisoners at Malmédy, Belgium. This event convinced Attorney General Biddle that the Nazis were indeed perpetrating a criminal conspiracy to violate the laws of war.[148] "Malmédy fever" started slowly in late December, but continued heating up through January and February.[149] The Malmédy fever syndrome is a stark vindication of political scientist Gary Bass's famous thesis that countries are only galvanized to pursue the remedy of war crimes trials when enemy atrocities are directed against their own nationals. While the slaughter of these seventy American prisoners in late 1944 was doubtlessly very shocking to American sensibilities, it is equally amazing, in its own way, that the slaughter of millions of non-combatant European Jews of all ages and both genders over the preceding three years had failed to generate even a small percentage of the same kind of outrage. The Bass thesis is at root a commentary on the limits of empathy and the links between empathy, mobilization, and policy. "Malmédy fever" gave the proponents of the modified Bernays Plan the advantage they needed to push through their model of the trial of Axis leaders and organizations. It also gave administration officials charged with negotiating war crimes policy enough confidence to push their plans through over British objections that the proposed trials would be too innovative and complicated. American attitudes toward Axis atrocities thus shaped how such atrocities came to be defined and prosecuted at Nuremberg.[150]

Recalled from his diplomatic mission in London to impose an American-style war crimes policy by the unexpected death of President Roosevelt, Sam Rosenman continued refining blueprints for what became the Nuremberg Charter in a series of informal negotiations at the UN San Francisco Conference. He was joined in some of these discussions by the recently appointed "Chief Prosecutor for Axis Criminality," Supreme Court Justice Robert H. Jackson. A consummate New Dealer since his days as a small-time practitioner in upstate New York, a junior colleague observed that "Robert H. Jackson was not one of the legal Brahmins typical of the Stimson group."[151] Jackson had not attended college, and after a year at Albany Law School, he "read articles" in a law office before sitting for the New York Bar. Telford Taylor noted that Jackson was "probably the last nationally prominent lawyer to gain admission to the bar by serving an apprenticeship rather than by a law school degree"—a common

148. *See* Francis Biddle, *Memorandum re Punishment of Criminals* (Jan. 5, 1945), *reprinted in* DOCUMENTARY RECORD, *supra* note 30, at 91-92. Biddle also notes, "I think we should eliminate, at this point at least, any attempt to punish crimes committed *before the war*. We will have our hands full with crimes after the [declaration of] war." *Id.* (emphasis in original).

149. *Id.* at 52.

150. See the narrative in BASS, *supra* note 38, at 177-90.

151. TAYLOR, *supra* note 7, at 43.

nineteenth-century practice for impecunious aspiring attorneys.[152]

In the 1930s, this self-made professional had attracted the attention of leading New York State politicians, including Franklin Roosevelt, Herbert Lehman, and Henry Morgenthau, Jr. Robert Jackson was soon serving ably in a series of increasingly prestigious legal posts in the first three Roosevelt administrations, first as General Counsel of the Bureau of Internal Revenue in 1934, then as Assistant Attorney General in 1936, Solicitor General in 1938, and Attorney General in January 1940, before being nominated as Associate Justice of the Supreme Court in July 1941.

Jackson had been a supporter of the idea of individual responsibility for war crimes since the so-called Saboteur's Case had come before the Supreme Court in 1942, piquing his interest in the laws of war.[153] He had also made several speeches expressing his belief that the 1928 Kellogg-Briand Pact had outlawed international aggression.[154] "Thus, when Samuel Rosenman entered Justice Jackson's office on April 26, 1945, to convey President Truman's wish to appoint Jackson as his country's Representative and Chief Counsel for war crimes, he was talking to a man who already had a considerable public record on the subject and who would be a strong advocate of a charge based on the illegality of aggressive war," explained Taylor.[155]

An excerpt from one of these after-dinner speeches offers a window into Jackson's vision of a growing and changing role for multilateral organizations generally, which would later parallel his vision of a dynamic "common law" theory of public international law at Nuremberg. Of the inadequacy of the interwar League of Nations system, Jackson observed:

> We now see that such an instrumentality, if it is to compose the world's discord, must have flexibility. Neither maps nor economic advantages nor political systems can be frozen in a treaty. Peace is more than the fossilized remains of an international conclave. It cannot be static in a moving world. Peace must function as a going concern, as a way of life with a dynamic of its own.[156]

In these comments, Jackson espoused a common anti-imperialist orientation which he shared with many other New Dealers, such as Harold Ickes. Jackson continued his history lesson:

> Unfortunately, however, the internal structure of the League loaded the dice in favor of the perpetuation of the *status quo* which was also the policy of the dominant powers and the governing classes within them. Any peace that is indissolubly wedded to a *status quo*—any *status quo*—is doomed from the beginning. The world will not forego movement and progress and readjustments

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152. *Id.*

153. *See ex parte* Quirin, 317 U.S. 1 (1942). Chief Justice Stone wrote for the Court that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as of enemy individuals." *Id.* at 27-28.

154. *See, e.g.*, Robert H. Jackson, The Challenge of International Lawlessness, Address Before the American Bar Association, Indianapolis (Oct. 2, 1941), *in* 27 A.B.A. J. 690 (1941).

155. TAYLOR, *supra* note 7, at 45.

156. Jackson, *supra* note 154, at 692.

as the price of peace.[157]

This November 1941 speech also mentioned the international security provision of the Atlantic Charter—that one of the Atlantic Charter peace aims was to be the "establishment of a wider and permanent system of general security"—while warning that:

> such happy days wait upon great improvement in our international law and in our organs of international legislation and adjudication. Only by well considered steps toward closer international cooperation and more certain justice can the sacrifices which we are resolved to make be justified.[158]

VI.
NEGOTIATING THE NUREMBERG CHARTER

There were three main "legal" controversies growing out of the plan for trying the Nazi leaders, soon to be known as the Nuremberg Charter, which was finalized at a conference in the summer of 1945 among legal delegations from Britain, France, the Soviet Union, and the United States.[159] Jackson was the head of the American group, and Taylor argued that his bombastic style and inability to manage a team made each of these differences of perspective even more contentious.[160] Bradley Smith noted delicately that "[a]mateur negotiating teams, such as Jackson's, tended to embody . . . national characteristics undilutedly; and with little experience in diplomacy, they plunged forward recklessly."[161]

The first question was whether aggressive war was *already* illegal under a traditional, positivist approach to legal analysis. The jurists agreed that the 1928 Kellogg-Briand Pact had outlawed aggressive war, even though that treaty did not provide specific sanctions for violations of its provisions. Critics of the Nuremberg approach often noted that this argument was significantly weakened by the inability of the Charter's drafters to agree on a definition of aggression. The drafters rejected the idea that they were charging the defendants under a retroactive, *ex post facto* charge, since as Jackson had explained in an earlier memorandum, they were charging the defendants with crimes that had been

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157. *Id.*

158. *Id.* at 693 (internal quotation omitted).

159. The London Conference began on June 26, 1945, the day the United Nations Charter was signed in San Francisco, and ended August 7, 1945, the day news reports were published describing the previous day's explosion of an American atomic weapon over Hiroshima. The memoranda and summaries of negotiation sessions of the London Conference are reprinted in REPORT OF ROBERT H. JACKSON, *supra* note 91. The other most active negotiators were Professor André Gros of France; Sir William Jowitt and Sir David Maxwell-Fyfe of Britain; and Ion T. Nikitchenko and General Roman A. Rudenko of the Soviet Union. Note that three of the major negotiators of the Nuremberg Charter, Jackson, Maxwell-Fyfe, and Rudenko, were soon to become prosecutors, while another, Nikitchenko, would soon become one of the judges.

160. On Jackson's management skills and negotiation style, see generally TAYLOR, *supra* note 7, at 116-64.

161. BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 47 (1977).

recognized since the time that Cain slew Abel.[162] The judgment noted that the prohibition on *ex post facto* legislation had its origin in principles of equity, and it did not seem reasonable to the Allies that the Axis leaders could not have known they were doing wrong before they were actually indicted.[163] Still, at the London Conference, the cautious and legalistic British and French delegates were troubled by the unusually blunt language in the American draft of the Charter about the pre-existing illegal status of aggressive war.[164]

The second major controversy at London, which continued through the trial, was the scope of application of the conspiracy charge. Was the legal doctrine of conspiracy really going to serve as the new broom that would sweep up thousands of Gestapo members, as Murray Bernays and his boss, Henry Stimson, had hoped in the autumn of 1944? At the Charter negotiations, this controversy was also a cross-cultural issue, since conspiracy was a purely Anglo-American legal doctrine. The French were particularly unenthusiastic and periodically revived their argument that the Charter should not embrace this theory. The British also considered its application against groups to be particularly suspect.[165] The Nuremberg court later expressed its continuing discomfort with the concept by making sure that no defendant was convicted for the crime of conspiracy alone. It also threw out the charge against particular organizations it considered to be lacking the requisite cohesion and decision-making integrity to function as a criminal organization, or whose membership had thoroughly changed over time, such as the German General Staff.[166]

The third major legal issue the Charter needed to address was the rationale and legitimacy of treating "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations" as an indictable category of criminal activities known as "crimes against humanity." The genesis of this term is somewhat obscure. Most commentators depict the idea as originating with Nuremberg itself, but this is clearly not the case. In his 1904 State of the Union Message, President Theodore Roosevelt had explained that:

> there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it . . . . [I]n extreme cases action may be justifiable and proper."[167]

Roosevelt was using this rationale to justify American intervention in

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162. *See* Atrocities and War Crimes, Report of Robert H. Jackson to the President (June 7, 1945), *reprinted in* 12 DEP'T ST. BULL. 1075 (1945).

163. 1 IMT NUREMBERG, *supra* note 2, at 219.

164. *See* Revision of American Draft of Proposed Agreement (June 14, 1945), *reprinted in* REPORT OF ROBERT H. JACKSON, *supra* note 91, at 58.

165. Minutes of Conference Session (July 2, 1945), *reprinted in* REPORT OF ROBERT H. JACKSON, *supra* note 91, at 129-42; *see also* Ferdinand A. Hermes, *Collective Guilt*, 23 NOTRE DAME LAW 431 (1948).

166. 1 IMT NUREMBERG, *supra* note 2, at 255-78.

167. Theodore Roosevelt, State of the Union Message (1904), *reprinted in* THE HUMAN RIGHTS READER 147 (Walter Laqueur & Barry Rubin eds., 1979).

Panama and Cuba. Interestingly, he also mentioned "intolerable conditions" suffered by Armenians and Jews in his catalogue of "systematic and long-extended cruelty and oppression."[168]

Theodore Roosevelt was one of the initiators of the 1907 Hague Conference, convened to revise and extend the Hague Conventions of 1899. The Hague Conventions on the Laws and Customs of War on Land of both 1899 and 1907 had the following clause in their preambles:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[169]

This was the famous Martens Clause, named after its drafter and advocate, the Russian legal scholar Feodor Martens, and designed to cover both the kind of unconscionable but non-traditional situation Roosevelt described in his 1904 speech, as well as the development of weaponry with new and unanticipated capacities.[170]

Another provision of this same treaty, however, contained a clause that seemed radically to restrict the expansive implications of the Martens clause. This was the so-called *si omnes* clause, specifying that "[t]he provisions [of this Convention] do not apply except between contracting Powers, and then only if all belligerents are parties to the Convention."[171] In other words, if two nations are at war and only one is a signatory to the Hague Conventions, then that treaties' provisions would not apply to either party, and if several warring countries are at war at once, the Convention would not apply to any of them unless all were signatories.

The competing legal theories of prosecution and defense at Nuremberg can be seen as a struggle between the expansive, organic "Martens" approach to legal interpretation—extending protections drawn from the "principles of the laws of nations, . . . the usages established among civilized peoples, . . . the laws of humanity, and the dictates of the public conscience" to situations where no formal law yet applied—and the narrow, positivist *si omnes* approach. German defense counsel made good use of the *si omnes* clause at Nuremberg, arguing that several of the combatant nations in World War II had not signed the Hague Conventions, for example, and so none of the combatants, including Germany, could appropriately be bound by the Hague rules.

In its judgment, the Nuremberg court "brushed aside this contention."[172] The tribunal determined that, "by 1939 these rules laid down in the [Hague]

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168. *Id.* at 147-48.

169. Fourth Hague Convention, *supra* note 38, Preamble, 36 Stat. at 2280, 1 Bevans at 633.

170. *See* THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100-27 (James Brown Scott ed., 3d ed. 1918).

171. Fourth Hague Convention, *supra* note 38, art. 2, 36 Stat. at 2296, 1 Bevans at 644.

172. TAYLOR, *supra* note 7, at 582.

Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of wars which are referred to in Article 6(b) of the [Nuremberg] Charter."[173] The tribunal recognized the 1907 Hague Convention as declaratory of customary international law and framed its judgment on innovative charges, such as crimes against humanity, on the flexible basis of the Martens clause.[174]

The leading French negotiator at the August 1945 London Conference, Robert Falco, had doubted the existence of a separate category of "crimes against humanity," preferring to construe German atrocities as an extreme example of the more traditional concept of conventional war crimes. But by the time the French prosecutor, François de Menthon, came to present his case, the French team had undergone a philosophical shift. Crimes against humanity, de Menthon now argued, were "crimes against the spirit," and the source from which all the other crimes in the Charter flowed:

> I propose . . . to prove to you that all this organized and vast criminality springs from what I may be allowed to call a crime against the spirit, I mean a doctrine which, denying all spiritual, rational, or moral values by which the nations have tried, for thousands of years, to improve human conditions . . . . This monstrous doctrine is that of racialism.[175]

De Menthon then linked institutionalized racism to violations of individual human dignity. "Race is the matrix of the German people; proceeding therefrom this people lives and develops as an organism . . . . National Socialism ends in the absorption of the personality of the citizen into that of the state and in the denial of any intrinsic value of the human person."[176]

Jackson based the crimes against humanity charge on Martens clause precepts by means of an analogy with the growth of Anglo-American common law. His peroration in his Opening Statement harked back to his 1941 speech to the Bar Association of Indianapolis, with its image of law as an evolving, organic entity:

> The real complaining party at your bar is Civilization. In all our countries it is still a struggling and imperfect thing. It does not plead that the United States or any other country has been blameless . . . . Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you [the Tribunal] can make war impossible. It does expect that your juridical action will put the forms of international law, its precepts, its prohibitions, and most of all, its sanctions, on the side of peace.[177]

The Tribunal agreed, explaining in its judgment that:

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173. 1 IMT NUREMBERG, *supra* note 2, at 254.

174. Revised Draft of Agreement and Memorandum Submitted by American Delegation (June 30, 1945), *in* REPORT OF ROBERT H. JACKSON, *supra* note 91, at 121 (American Memorandum at the London Conference mentioning the Martens clause).

175. 5 IMT NUREMBERG, *supra* note 2, at 373.

176. *Id.* at 373-74.

177. INT'L MILITARY TRIBUNAL, THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: OPENING SPEECHES OF THE CHIEF PROSECUTORS 34 (1946) [hereinafter OPENING SPEECHES].

> The law of war is to be found not only in treaties, but in the customs and practice of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.[178]

Another contentious aspect of the idea of crimes against humanity was the scope of its application: would this charge apply to pre-war atrocities inflicted on Germany's own domestic population? The text of the Judgment reflected the Nuremberg court's decision not to address pre-war atrocities against domestic minorities despite some ambiguous language in the Charter.[179]

The prosecution at Nuremberg argued that, under the terms of the Charter, the count of crimes against humanity should indeed encompass German atrocities committed within Germany and against German nationals. Even before the German invasion of Poland in 1939 transformed the status of this state-sponsored violence into an international armed conflict, crimes against humanity, wherever committed, ought to be considered a violation of international law. What the prosecution argued, in effect, was for the conspiracy charge in 6(a) to be applied to all three sections of the Charter—an especially plausible contention given the last sentence of Article 6. The pre-war atrocities would be considered an early part of the "conspiracy" phase of waging aggressive war or committing crimes against humanity.

But the British prosecution team had overreached in arguing that this

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178. 1 IMT NUREMBERG, *supra* note 2, at 221.

179. Article 6 of the Nuremberg Charter provided that:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> A. CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> B. WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
>
> C. CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, or other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Nuremberg Charter, *supra* note 6, art. 6, 59 Stat. at 1547, 82 U.N.T.S. at 286-88.

conspiracy stretched back to the creation of the Nazi Party in 1919. The French judge, Donnedieu de Vabres, had never been comfortable with the conspiracy charge to begin with, and he balked at the prospect of an international court applying this strange Anglo-American concept to twenty additional years of German national life.

The tribunal's decision on pre-war atrocities was a compromise awkward even by legal standards, based on a very strict reading of Article 6. The judgment held that the atrocities mentioned in section 6(c) were only meant to include acts that were carried out "in connection with, any crime within the jurisdiction of the Tribunal," meaning the provisions described in sections 6(a) and 6(b), for which the specified starting date was September 1, 1939.[180] Before the invasion of Poland, in other words, it "ha[d] not been satisfactorily prove[n] that [these atrocities] were done in execution of, or in connection with, [the crimes against peace specified in section 6(a).]"[181] The tribunal therefore declared itself as having no jurisdiction over these "domestic" German atrocities: "The Tribunal cannot make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter."[182]

The Nuremberg judges were apparently troubled by some of the same domestic jurisdiction issues that had alarmed American critics of the original Bernays "conspiracy" approach. This cautious view was best articulated by Jackson himself at the London Conference, when he was speaking as a representative of the Roosevelt administration and not yet serving as an active prosecutor:

> It has been the general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems.

Here, Jackson articulated the standard U.S. interpretation, reaffirmed during the World War I and interwar era.[183] "The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war."[184]

Jackson thus foreshadowed the Nuremberg judgment's approach to Article 6, of requiring a tight nexus between crimes against humanity and the aggressive war charge—a nexus not necessarily indicated by the plain language of the Article itself. Jackson also went on to offer this unusually candid elucidation:

> [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at

180. 1 IMT NUREMBERG, *supra* note 2, at 254.
181. *Id.*
182. *Id.*; *see also* TAYLOR, *supra* note 7, at 583.
183. Minutes of Conference Session (July 23, 1945), *reprinted in* REPORT OF ROBERT H. JACKSON, *supra* note 91, at 331.
184. *Id.*

> times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[185]

Prewar atrocities could not be "reached" by the Tribunal because of fears over the implications of international bodies sitting in judgment on domestic practices, even when those practices were clearly crimes against humanity by any reasonable criteria. There was no principle available that could capture *Kristallnacht* in Germany but spare the lynching of thousands of African-Americans in the American South.

In a 1946 letter to the *New York Times*, Raphael Lemkin, a former Nuremberg prosecution advisor who had coined the term "genocide," wrote wonderingly of this "lack of reach" argument: "It seems inconsistent with our concepts of civilization that selling a drug to an individual is a matter of worldly concern,"—the regulation of transborder flows of narcotics had long been subjected to international oversight through treaties and multilateral institutions—"while gassing millions of human beings might [merely] be a problem of internal concern."[186]

VII.
OTHER TRIAL ISSUES

The prosecution staff thought it essential that the Tribunal base its judgment on the Nuremberg Charter. The Charter was a treaty in its own right, they argued, legitimately filling the legal vacuum created by Germany's unconditional surrender. The Tribunal agreed and denied all defense motions challenging its jurisdiction.[187] Other types of controversies based on the Nuremberg approach included criticisms of the overall design of the trial; the Charter's treatment of conflicting, pre-existing legal ideas such as the "act of state" doctrine; criticism of the trial as an American or Jewish show trial; and how the Nuremberg model came to be generalized and applied to other trials in the wake of World War II.

The major criticism of the overall design of the main Nuremberg trial related to the uncomfortable presence of uniformed Soviet officers on the bench, judging Axis defendants for the crime of aggression, when the Soviets had themselves invaded Poland in 1935 and Finland a year later. Furthermore, one of the counts of the Indictment charged the German defendants with the massacre of thousands of Polish officers in the Katyn Forest, an atrocity widely

185. *Id.* at 333.

186. Raphael Lemkin, Letter to the Editor, *Genocide Before the U.N.*, N.Y. TIMES, Nov. 8, 1946, at 22.

187. 1 IMT NUREMBERG, *supra* note 2, at 218-19.

suspected at the time (and subsequently confirmed) to have been committed by Soviet forces. Similar criticisms were leveled against the other Allies for using the same type of unrestricted submarine warfare for which the defendants had been indicted; for the Allied use of terror bombing against civilians; and, especially, for the American use of atomic weapons against civilian targets. Posed starkly, these concerns amounted to an accusation of hypocrisy—of "unclean hands," or what in international legal parlance is known as *tu quoque*—"you did it, too." Another facet of this charge of hypocrisy was the only slightly less virulent criticism that the trial lacked legitimacy because only victor nations were represented on the bench.

The *tu quoque* objection to the Nuremberg proceedings was stated most clearly by the perennial U.S. presidential candidate, socialist Norman Thomas, writing in 1947. "Our socialist proposals never precluded the trial and punishment of those guilty of atrocities against civilians and prisoners of war"—that is to say, for conventional war crimes—"[f]or that [crime] there was sufficient law already recognized."[188] But, Thomas continued, such principles:

> did preclude trials of the sort that are dragging along in Nuremberg and Tokyo as this is being written. Aggressive war is a moral crime but this will not be established in the conscience of mankind by proceedings such as those at Nuremberg, where Russians sit on the bench and exclude evidence of Hitler's deal with Stalin. What was the latter's war against Finland, Poland and the Baltic states but aggression?[189]

He continued:

> Indeed, what major power had not in comparatively recent years been guilty of acts of aggression? Mr. Justice Jackson makes much of the analogy of the growth of common law to justify the Nuremberg proceedings. The very composition of the court by victors who are at once judges and prosecutors refutes his analogy.[190]

It did not help when U.S. Admiral Chester Nimitz provided a deposition to the German defense team in support of Admiral Karl Doenitz, attesting that the Germans' conduct of submarine warfare was the same as the Americans'.[191] The prosecution's unsatisfactory response was that simply because some robbers went unpunished did not mean that stealing wasn't a crime. More to the point was Jackson's poetic vow about the future legitimacy of such charges, which would go on to become the trial's most hollow legacy: "We must never forget that the record on which we judge these defendants to-day is the record on which history will judge us to-morrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."[192]

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188. NORMAN THOMAS, APPEAL TO THE NATIONS 68 (1947).

189. *Id.* at 68-69.

190. *Id.* at 69.

191. Doenitz was acquitted. *See* CONOT, *supra* note 11, at 68; *see also* WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIME TRIALS, 168-69 (1970); HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 58 (1999).

192. OPENING SPEECHES, *supra* note 177, at 5.

The traditional legal idea of sovereign immunity, also known as the "act of state" doctrine, protected heads of governments and other high officials from individual liability for their political decisions. Lower level officials, especially soldiers and other military subordinates, relied on a complementary traditional legal idea, that they were insulated from personal culpability by a doctrine of "superior orders."[193] The combination of the two doctrines negated the responsibility of all actors high and low, and meant that no one was responsible.

Unsurprisingly, given the deaths of the top echelon of Reich officials, defenses claiming incontrovertible superior orders were extremely popular at Nuremberg. This was true even though, for any given defendant, asserting the defense of superior orders inevitably involved listening to a defense attorney downplay one's personal influence, authority, access to Hitler, and overall competence. Psychologist Gilbert noted in his diary that "[t]he innocence of the 'white lambs' was beginning to become a sort of joke" in the defendants' lunchroom.[194] He noted wearily:

> It was apparent that nobody had anything to do with anything. The Foreign Minister was only an office boy; the Chief of Staff of the High Command of the Wehrmacht was only an office manager; the rabid anti-Semites were all in favor of chivalrous solutions to the Jewish problem and knew nothing about the atrocities, including Gestapo Chief Kaltenbrunner.[195]

The Nuremberg Charter explicitly discarded the "act of state doctrine" as part of its mission to bring the idea of individual responsibility into the purview of international law.[196] But the discounting of sovereign immunity made American and other Allied military officers nervous; they were unenthusiastic about the possible precedent that the Nuremberg prosecution staff was laying down, which would presumably restrict the scope of future claims of "superior orders." Isolationist Senator Burton K. Wheeler, as well as Admiral William Leahy, chief of staff under Roosevelt and Truman, raised concerns that congressional representative George A. Dondero of Michigan expressed succinctly. Citing a section of the Nuremberg judgment, to the effect that a subordinate was bound to obey only the *lawful* orders of a superior, Dondero urged his listeners to "[f]ollow the implications of this statement through to a logical conclusion. In effect, it encourages mass disobedience of superior officers within our armed forces."[197]

The trial's defenders were particularly impatient with these arguments. Political scientist Nicholas Doman wrote:

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193. Guenter Lewy, *Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age*, 55 AM. POL. SCI. REV. 3, 19 (1961).

194. NUREMBERG DIARY, *supra* note 12, at 409 (entry for July 12, 1946).

195. *Id.*

196. Nuremberg Charter, *supra* note 6, art. 7, 59 Stat. at 1548, 82 U.N.T.S. at 288; *see also* John Foster Dulles, *International Law and Individuals: A Comment on Enforcing Peace*, 35 A.B.A. J. 912 (1949); Ernst Schneeberger, *The Responsibility of the Individual Under International Law*, 35 GEO. L.J. 481, 489 (1947); Lawrence Lauer, *The International War Criminal Trials and the Common Law of War*, 20 ST. JOHN'S L. REV. 18, 24 (1945).

197. 94 CONG. REC. A-2369 (1948).

> No responsible military leader of any nation can contend that his role is merely that of a concierge or custodian of the war machine under his command and that he bears no responsibility for the use to which that machine is put .... [The defendants] are on trial not because they lost the war but because they started it. And if recognition is given to the claim of the prosecutors, then this will mean that the collective security of world society attained supremacy over the personal security of the militarists.[198]

Military commentators remained skeptical, however, explaining that civilian lawyers could never understand the dynamics of battlefield decisions. Lieutenant Colonel P.F. Gault argued that, "[t]he basic difficulty with the whole procedure is that Nuremberg is entirely a civilian show and strictly amateur at that."[199]

Nuremberg was not only a civilian show, it was also a show produced and directed almost entirely by Americans. One American journalist proudly explained:

> From the very beginning of this joint effort, the United States carried the ball. Although the cooperation of other nations was genuine and sincere, there is ample proof to show that Nuremberg was a 100 per cent American concern. It was American initiative, American persistence, and American idealism that produced the final result in the face of serious difficulties .... [S]tarting from a shoestring, American enterprise has produced a powerful machine, well equipped to hand down the historic verdict and to open a new age in international good conduct.[200]

The Nuremberg show was also a Robert H. Jackson production. It was Jackson who told Francis Biddle that he, Biddle, should stand aside in the election of chief judge of the tribunal, in favor of the British judge, Sir Geoffrey Lawrence, so that the trial would not be perceived as being so totally dominated by the United States.[201]

Jackson also fretted about the appearance of having "too many Jews" on the prosecution staff, as a public relations problem that the American jurist believed would further reduce the trial's legitimacy, in the eyes of both German and American public opinion. Jackson's efforts on this score were of little avail. Many of the defendants as well as large numbers of ordinary Germans believed that Jews were running the trial, anyway. Defendant Streicher, the Nazi propagandist, explained to psychologist Gilbert that, "[t]he prosecution is made up almost entirely of Jews."[202] When asked how he knew this, Streicher replied that there were distinctive Jewish physical characteristics, "although there were many exceptions, and it took a real expert like himself to detect them."[203]

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198. Nicholas Doman, *Political Consequences of the Nuremberg Trial*, 246 ANNALS OF AM. ACAD. OF POL. & SOC. SCI.. 81, 88 (1946).

199. P.F. Gault, Letter to the Editor, *The Nuremberg Trials*, ARMY & NAVY J., Dec. 15, 1945, at 522.

200. Ernest O. Hauser, *The Backstage Battle at Nuremberg*, 218 SATURDAY EVENING POST 18, 138 (1946).

201. TAYLOR, *supra* note 7, at 123-24.

202. NUREMBERG DIARY, *supra* note 12, at 411 (entry for July 13, 1946) (internal quotation omitted).

203. *Id.* at 410-11.

When pressed, he mentioned that "one could frequently tell by the eyes," and that "[m]ore significant than Jewish eyes, however, was the Jewish behind, he had discovered."[204]

Isolationist elements in Congress also suggested that Nuremberg was about Jewish vengeance. Representative John E. Rankin, Democrat of Mississippi, speaking of the so-called "secondary" Nuremberg trials, drew an unfortunate parallel between the defeated Nazis and the American South, when he urged the United States to:

> put a stop to the racial persecution of the people of Germany who are now helpless at out feet . . . . If we people of the Southern States had been treated in the same manner after the War Between the States as those people have been treated under the pressure of a certain racial minority, you would not have heard the last of it until doomsday.[205]

He urged that the United States should "treat the people of Germany . . . with humanity and decency, and not permit racial minorities to vent their sadistic vengeance upon them and charge it up to the United States."[206]

VIII.
ADDITIONAL TRIALS

The other flagship international criminal trial staged in the name of the Allies was the International Military Tribunal for the Far East, commonly known as the Tokyo Trial.[207] Meant to serve as Nuremberg's Far Eastern counterpart, and based on an almost identical charter, the Tokyo Tribunal sat from June 1946 until April 1948, reading out its verdict over the course of nine days in early November 1948.[208] The Tokyo Trial presented additional cross-cultural challenges based on differing Western and Japanese legal conceptions; ideas about procedures, such as the proper role of the defense attorney; as well as more difficult translation problems. (One reason the Tokyo Trial took twice as long as Nuremberg, for example, was that it could not take advantage of IBM

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204. *Id.* at 411. For the curious, Streicher elaborated, "you can tell by the way it wobbles when they walk." *Id.* (internal quotation omitted); *see also id.* at 41 (entry for Nov. 21, 1945). An idiosyncratic sampling of ordinary Germans polled informally at the time of the trial agreed with Streicher that the trial was dominated by Jews. *See* WEST, *supra* note 22, at 53.

205. 93 CONG. REC. 9054 (1947) (statement of John E. Rankin).

206. *Id.*

207. This brief account of the Tokyo Trial relies on Borgwardt, *supra* note 95.

208. The main difference between the Nuremberg and Tokyo charters was that the prosecution at Nuremberg was handled by an international team that shared responsibility equally, whereas the Tokyo Charter provided for a single American chief of counsel, chosen by Supreme Commander General Douglas MacArthur, who would lead an "International Prosecution Section." Other differences included that the Tokyo Charter provided for eleven judges rather than Nuremberg's four, with no alternates; and the Tokyo Charter provided for review of the sentences by MacArthur while Nuremberg made no provisions for review of the sentences. The text of the Tokyo Trial Judgment itself read that, "in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical." *See* Special Proclamation: Establishment of International Military Tribunal for the Far East (Jan. 19, 1946), *in* THE TOKYO WAR CRIMES TRIAL, 16-18 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981) [hereinafter TRANSCRIPTS].

simultaneous translation technology, used to great effect at Nuremberg.)

Another important difference with Nuremberg was the number of separate and dissenting opinions at Tokyo.[209] Three of the eleven judges—Rahadbinod Pal of India, Henri Bernard of France, and Bernard Röling of the Netherlands—filed dissents or partial dissents. Pal maintained in his 701-page dissenting opinion that the distinction between just and unjust war belonged to the theory of legal philosophers, and that the rule concerning the crime against peace—that aggression was illegal—was *ex post facto* legislation.[210] Röling, on the other hand, stated that crimes against peace were not real legal crimes, but they could nevertheless be used as political safety measures to eliminate persons who were dangerous for world peace. Bernard argued that the verdict could not be valid because the procedure was defective and that the Japanese emperor should also have been punished.

Justice Pal, in addition, offered the fascinating anti-imperialist argument that had been foreshadowed by the so-called revisionist powers at the Paris Peace Conference in 1919: indicting leaders for "crimes against peace" served only to protect an unjust international order if there were no other workable provisions for peaceful adjustment of the status quo.[211] Two additional judges, including the Tribunal's chief justice, filed separate opinions. Chief Justice William Webb of Australia called for a trial of the emperor and commutation of the death sentences to life imprisonment; Delfin Jaranilla of the Philippines, himself a survivor of the Bataan Death March, argued alternatively for harsher sentences.[212]

The twenty-five Tokyo defendants were known as "Class A" war criminals, meaning that part of their indictment was for crimes against peace.[213] Class A

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209. The Soviet judge at Nuremberg, General Ion Timifeevich Nikitchenko, had dissented on the limited basis that he felt that the sentences were too lenient regarding those defendants who were acquitted or given prison sentences, and that in his opinion the German General Staff and Reich Cabinet were cohesive enough groups to be appropriately deemed "criminal organizations." He concurred in the tribunal's judgment on its jurisdiction and on points of law, however.

210. PAL, *supra* note 124. This published version of Pal's Dissent, which includes a number of elaborations and an Appendix not included in the original version, is 701 pages. The original typescript version, reproduced in 21 TRANSCRIPTS, *supra* note 208, is 1,235 pages.

211. Pal wrote:

> The part of humanity which has been lucky enough to enjoy political freedom can now well afford to . . . think of peace in terms of political status quo. But every part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is face with not only the menace of totalitarianism but the actual plague of imperialism.

PAL, *supra* note 124, at 115. See also the discussion in Borgwardt, *supra* note 95, which remains the only scholarly analysis of Pal's dissent.

212. Separate and dissenting opinions in the judgment of the Tokyo Tribunal are reprinted in 21 TRANSCRIPTS, *supra* note 208. RICHARD MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 161-62 (1971) offers a trenchant, if somewhat polemical and oversimplified, critique of the legal basis of the trial. There is as yet no full-length scholarly treatment of the Tokyo Trial, although a massive narrative in several volumes, authored by Tokyo assistant prosecutor and Stanford Japanologist Kurt Steiner, has recently been completed. KURT STEINER, THE TOKYO TRIAL (forthcoming 2005).

213. The Tokyo Indictment had named twenty-eight Japanese leaders, but during the course

defendants were tried separately from Class B and C suspects, who were arraigned for violations of the conventional laws of war. From 1945 to 1951, approximately 5,700 Japanese were tried as "conventional" war criminals for perpetrating, allowing, or ordering atrocities. Of this number, roughly 1,000 were executed and 3,000 were imprisoned.[214] Most controversially, the Japanese commanding general of the Philippines, Yamashita Tomoyuki, was convicted and hanged by a U.S. Army court in Manila. Yamashita's conviction was based on a theory of negative criminality; that is, that he "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities."[215] The decision was controversial in large part because Yamashita's American opponents had successfully disrupted the General's lines of communication, only to hold him accountable later for having failed to control his troops.[216]

For nationals of European Axis countries, there were also 2,116 known military tribunal hearings of lower-level defendants, not including those conducted in the Soviet Union. All told, more than 5,000 Nazis were condemned by all the Allied war crimes tribunals taken together, with 806 death sentences. The United States Supreme Court held that the writ of habeas corpus did not apply for appellants from these war crimes trials.[217] In addition, over twelve thousand people were tried in hearings before German national courts (*Spruchkammern*), with sixty-eight given life terms and 5,178 given very limited prison terms.[218] While the German courts applied German national law, the new postwar penal codes had incorporated legal ideas from the Nuremberg Charter regarding individual responsibility and absence of an obligation to obey orders that were illegal under international law.[219]

International legal scholar Robert Woetzel has noted that:

> [a]ll these tribunals show a uniformity of approach to the substantive rules of

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of the proceedings, two of the defendants, Matsuoka Yosuke and Nagano Osami, had died and one, Oakawa Shumei, had been declared insane and unfit to stand trial. *See* Borgwardt, *supra* note 95, at 442.

214. *See* PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE FAR EAST, 1945-1951, at 213, 263 n.10 (1979).

215. *In re* Yamashita, 327 U.S. 1, 13-14 (1946).

216. On appeal to the U.S. Supreme Court, Justice Murphy in dissent noted that "[n]owhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command." *Id.* at 34 (Murphy, J., dissenting). "The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history." *Id.* at 40 (Murphy, J., dissenting). An editorial in the *Army and Navy Journal*, by contrast, applauded the verdict because the scale of atrocities had been such that the commanding general had "profaned the profession of arms, threatened the very fabric of international society, and failed utterly the soldier's faith." Editorial, ARMY & NAVY J., Feb. 9, 1946, at 744 (1946); *see also* A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949).

217. *See, e.g.*, Hirota v. MacArthur, 338 U.S. 197 (1949) (Douglas, J., concurring).

218. *See* ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 230, 245 (1962).

219. *Id.* at 230.

> international law involved. This was undoubtedly due to the lead given by the Charter of the International Military Tribunal at Nuremberg which can be regarded as the pre-eminent tribunal in the history of modern war crimes trials.[220]

This assessment, written in 1962, is double-edged: Nuremberg was "pre-eminent" because it was the first successful synthesis and application of a wide variety of pre-existing legal ideas and political impulses. It continued to be pre-eminent, however, because it was also the last such attempt, at least until a revival of multilateral criminal prosecutions in the post-Cold War era.

IX.
"PERHAPS THIS IS NEW DEAL JUSTICE . . . TRANSFERRED TO THE INTERNATIONAL SCENE"

The Nuremberg Charter is an example of what this study has been calling the "*Zeitgeist* of 1945," the multilateralist sensibility that briefly gripped the United States as World War II drew to a close. "Security, welfare, and justice are the pillars of the world order for which we fight," argued the Commission to Study the Organization of Peace, a multilateralist pressure group, in 1944.[221] These aspirations "embody the hopes and dreams of countless millions of ordinary folk who yearn for a world in which their children may grow up free from the fears (and from the costs and consequences) of recurrent wars. This is what is meant by Security—freedom from the fear of aggressive war."[222] The ideological roots of the Nuremberg Charter lie in the Atlantic Charter and the virtually contemporaneous United Nations Charter.[223]

It was largely a matter of chance that the preliminary negotiations over the provisions of the Nuremberg Charter took place at the San Francisco Conference (April-June 1945) where the United Nations Charter was being finalized. "But the coincidence is meaningful," wrote assistant prosecutor Taylor in his memoirs, quoting Robert H. Jackson's son, William, himself a lawyer and aide at Nuremberg.[224] The younger Jackson later explained that "it is perhaps not commonly apprehended that the principles of Nuremberg . . . go hand in hand with the organization of the United Nations as the twin foundations of an international society ordered by law."[225]

The Nuremberg tribunal asserted that its Charter was contributing to a broad historical trend affirming the universal value of international moral and legal sanctions, which had been a growing force in international affairs since at

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220. *Id.*

221. Fourth Report of the Commission to Study the Organization of Peace, *in* 22 INTERNATIONAL CONCILIATION 68 (1944).

222. *Id.*

223. The United Nations Charter was being drafted from April-June 1945; the Nuremberg Charter, part of the London Agreement of August 8, 1945, was being drafted from June-August 1945.

224. TAYLOR, *supra* note 7, at 42 (quoting William Jackson).

225. *Id.*

least the end of the First World War, and which had achieved the status of positive law with the promulgation of the 1928 Kellogg-Briand Pact. President Truman expressed his hope that "we have established for all time the proposition that aggressive war is criminal and will be so treated."[226] The Nuremberg Charter, and the tribunal's judgment based on that Charter, had been conceived by its authors as a means of lifting international justice to a new and higher level. Shortly after the judgment was announced, Judge Biddle wrote:

> [Nuremberg's] judgment has formulated, judicially for the first time, the proposition that aggressive war is criminal and will be so treated . . . . [N]ow that it has been so clearly recognized and largely accepted, the time has come to make its scope and incidence more precise . . . . I suggest that the time has now come to set about drafting a code of international criminal law.[227]

Even more lyrically, the usually more circumspect Walter Lippmann weighed in with an assessment that he had pointedly withheld from "thinner" multilateralist statements such as the Atlantic Charter:

> For my own part, I do not think it rash to prophesy that the principles of this trial will come to be regarded as ranking with the Magna Charta, the *habeas corpus* and the Bill of Rights as landmarks in the development of law. The Nuremberg principle goes deeper into the problem of peace, and its effect may prove to be more far-reaching than anything else that has yet been agreed to by the peoples of the world.[228]

Attorney General Tom C. Clark echoed Lippmann in observing that "[t]he Ten Commandments, Magna Carta and the Constitution of the United States, have been giant forward steps on the slow and dreadful path to human justice. This age has just given us the judgment at Nuremberg."[229] Historian Eugene Davidson explained the sources of this hyperbolic rhetoric: "The [Nuremberg] trials were intended not only to bring the guilty to justice . . . . In addition, the trials, especially as the Americans saw them, were to be a projection of the new world order that would justify the universal suffering [of wartime] . . . . [This was what] the Allies had been fighting for."[230] Here were war and peace aims made real: Nuremberg as embodying and institutionalizing the Atlantic Charter.

Few others were quite so enthusiastic. Critics argued that the trial's controversial design, basis in law, and "streamlined" procedures so undermined the enterprise's legitimacy that the assize itself was an exercise in hypocrisy. Theologian Reinhold Niebuhr worried that the trial might plunge the defeated Germans into existential despair.[231] Others noted with disfavor the likely effect

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226. Harry S. Truman, *Prosecution of Major Nazi War Criminals*, 15 DEP'T ST. BULL. 954 (1946).

227. Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMPLE L. Q. 27, 54-55 (1947) (quoting Francis Biddle); *see also* Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813, 887 (1949).

228. Walter Lippmann, *The Meaning of the Nuremberg Trial*, 63 LADIES' HOME J. 32 (1946).

229. *Nuremberg Hailed as Barrier to War*, N.Y. TIMES, Oct. 21, 1946, at 15 (quoting Attorney General Tom C. Clark) (internal quotation omitted).

230. DAVIDSON, *supra* note 17, at 2 (1966).

231. Reinhold Niebuhr, *A Report on Germany*, *in* 2 CHRISTIANITY & CRISIS 13 (1946).

of the trial on the victors themselves:

> For the plain citizen of every country, [the trial] serves to reduce the vast and infinitely complex tragedy of the Second World War to the simple abstraction of a movie melodrama, so that with the final titillating scene on the gallows or before the firing-squad, he can relax in an untroubled moral glow, confirmed in his abiding faith that 'crime never pays,' that his own country is the fount and citadel of all the virtues.[232]

Legal positivists, who understood "law" as growing exclusively from the formal consent of sovereigns to be bound, also understood the Nuremberg Charter and the Tribunal's verdict as challenging traditional ideas about sovereignty. Legal scholar Quincy Wright argued that, "[Nuremberg's] principles if generally accepted may reduce the unity of the state, increase the difficulties of maintaining domestic order, and deter statesmen from pursuing vigorous foreign policies when necessary in the national interests."[233] Another widely-respected authority on international legal affairs, Manley O. Hudson of the inter-war Permanent Court of International Justice, noted pessimistically in 1943 that international judicial agencies set up to deal with war criminals probably had few prospects for developing "a continuing character," at least until some future time when "the need for international action is clearly demonstrated."[234]

Journalist Ernest O. Hauser saw a link between Nuremberg's legal innovations and the loose "New Deal" approach to problem solving. Early in 1946, he explained:

> The ambitious project of creating rather than merely applying international law, and of setting a new standard for good conduct in the family of nations, is essentially Rooseveltian. It can be traced directly to the late President, and it is fascinating to observe how the grandiose concepts as well as the vagueness characteristic of Franklin D. Roosevelt, are in evidence at Nuremberg.[235]

Military historian Alfred A. Vagts developed a similar analogy in his later, more

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232. Waldo R. Browne, Correspondence, *The Nuremberg Trial*, 113 NEW REPUBLIC 872 (1945); *see also* Reinhold Niebuhr, *Victors' Justice: The War Crimes Trial*, 15 COMMON SENSE 6 (1946); Paul W. Tatge, Letter to the Editor, *The Nuremberg Trials: 'Victor's Justice'?* 36 A.B.A. J. 247 (1950) (arguing that the United States demonstrated a "Jehovah complex" at Nuremberg).

233. Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 45 (1947). For additional unfavorable comments, see generally the coverage in the *Chicago Tribune*, such as *The Nuremberg Blunder*, CHIC. TRIB., Oct. 16, 1946, at 22.

234. Manley O. Hudson, Confidential Memo No. 7, *in* 2 INTERNATIONAL TRIBUNALS IN THE POST-WAR WORLD: A PROPOSED INTERNATIONAL CRIMINAL COURT 7 (1943). This memo was prepared as part of a series for an informal wartime working group of American and Canadian lawyers "attempting to arrive at a community of views with reference to the future of international law." By the spring of 1943, the group was trying to reach out to include more participants with policy experience and, accordingly, included invitations to Dean Acheson, Hamilton Fish Armstrong, Adolph Berle, Isaiah Bowman, Ben Cohen, Oscar Cox, Isador Lubin, Archibald McLeish, Samuel Rosenman, Sumner Welles, and Harry Dexter White to the May 2, 1943 meeting. Draft invitation, March 1943; container 10; folder: Manley Hudson, International Courts 1942-45, Benjamin V. Cohen Papers (memos and replies were forwarded to Cohen by Hudson's assistant, Louis Sohn, soon to inherit Hudson's mantle as a leading scholar of international law at Harvard, and mentor to many of today's senior scholars in the field).

235. Hauser, *supra* note 200, at 18.

clearly unfavorable assessment written roughly a decade after the trial.

> Perhaps this is New Deal justice—the overriding of precedent, the fight against the 'nine old men' who successfully stood out for precedent against administrative absolutism—transferred to the international scene, where no carefully administered law stood in its way. It is also New Deal jurisprudence without the tempering of justice with humanitarianism in which it usually prided itself.[236]

These criticisms highlight how the Nuremberg Charter might also be seen as a New Deal-style institution; an example of a Rooseveltian synthesis of the legalistic and moralistic idioms of American multilateralism. At first glance—and perhaps even at second—the Nuremberg trial hardly seems like an internationalization of the New Deal. Yet a fresh take on Nuremberg might portray the trial as a pragmatic administrative pastiche—an innovation in international organization as well as in international law.

The Nuremberg Charter, in particular, appeared to many contemporary commentators as a concrete realization of the hitherto unsupported, moralistic ideas of the post-World War I era, while also serving as an expression of the positivist strain of legalism from the earlier Hague era as well. Nuremberg was an attempt to express moralistic ideas in a legalistic manner, and in so doing, it teemed with internal contradictions. In true, pragmatic New Deal style, however, the trial also got the job done, while generating a minimal level of legitimacy denied to both the sterile Hague approach and the sentimental Pact of Paris approach. On a visit to Nuremberg to observe the trial, internationalist Senator Claude Pepper, Democrat of Florida, toasted Robert Jackson as "America's international district attorney."[237] Sending the defeated Nazis down the river was to be the international version of busting trusts and tackling American organized crime.[238]

Signature snafus of the New Deal, such as ham-handed attempts to export domestic norms, personality clashes from unclear lines of authority, and haphazard, ideologically incoherent but ultimately pragmatic legal theories were abundantly present at the trial as well. Indeed, the colloquial term "snafu" was constantly on everyone's lips at Nuremberg.[239] Major players designing, administering, and advising behind the scenes were prominent New Dealers—Jackson himself, of course; the American judge, Francis Biddle; senior presidential aide and Roosevelt speechwriter, Judge Samuel Rosenman; and other, more peripheral advisors such as Harry Dexter White, Harry Hopkins, and Supreme Court Justice Felix Frankfurter. In addition, many of the second-tier participants designing and implementing the trial had served as aides and assistants to New Deal bureaucrats. Examples included assistant prosecutor Telford Taylor; designer of the original "conspiracy" structure, Murray Bernays;

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236. ALFRED VAGTS, DEFENSE AND DIPLOMACY: THE SOLDIER AND THE CONDUCT OF FOREIGN RELATIONS 327 (1956).

237. TAYLOR, *supra* note 7, at 216 (quoting Senator Claude Pepper).

238. *Id.*

239. Simon Diary, *supra* note 34 (entry for Nov. 12, 1945) ("As usual it's snafu.").

former general solicitor of the Southern Railway, Sidney B. Alderman; Columbia law professor Herbert Weschler; Adrian S. Fisher, a Harvard law graduate who had clerked for Justices Frankfurter and Brandeis; and James H. Rowe, former confidential assistant to FDR and another Harvard law graduate who, like Judge Biddle, had clerked for Justice Oliver Wendell Holmes.[240]

While the jurisprudence underlying Nuremberg's Charter was an unstable amalgam of natural law, common law, and traditional positivist reasoning, the Tribunal's main contribution to postwar multilateralism was arguably through its quasi-administrative, fact-finding role—another cherished objective of New Deal-style institutions. It told the truth about the Nazis, even if it fell short of serving as "the greatest history seminar ever held in the history of the world."[241]

X.

NUREMBERG AS A HUMAN RIGHTS INSTITUTION: "I AM A HUMAN BEING, AND I BELIEVE THAT NOTHING THAT IS HUMAN IS ALIEN TO ME"[242]

In his memoir of the Nazi concentration camps, *If This Is a Man*, Italian chemist Primo Levi recounted how he sought to escape the grueling outdoor labor brigade that was slowly killing him in the winter of 1943-44. A low-level position had opened up in one of the chemical laboratories that supported the forced-labor factory system at Auschwitz. Having earned a doctorate in chemistry from the University of Turin only two years before, Levi desperately hoped to secure one of these coveted laboratory jobs, guaranteeing indoor work and exemption from monthly selections for the gas chambers.

In a famously vivid scene, the young Italian-Jewish partisan was interviewed by the director of the chemical department, a German "Doktor Ingenieur" named Pannwitz. In his filthy inmate uniform, Levi stood awkwardly in Pannwitz's shining office, fixating on the German's manicured hands and feeling "that I would leave a dirty stain whatever I touched."[243] After a few moments, the seated scientist stopped writing and raised his eyes to look at Levi.

It was a gaze which Levi would remember all his life, the author later explained, "[b]ecause that look was not one between two men; and if I had known how completely to explain the nature of that look, which came as if across the glass window of an aquarium between two beings who live in different worlds, I would also have explained the essence of the great insanity of

240. On the junior New Dealers at Nuremberg, see TAYLOR, *supra* note 7, at 119, 127, 143.

241. IAN BURUMA, THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN 144-45 (1994) (quoting Nuremberg assistant prosecutor Robert M. Kempner).

242. Publius Terentius, Rome, c159 B.C. This was a favorite saying of Tokyo War Crimes Trial Assistant Prosecutor Kurt Steiner. Dr. Steiner was an interview subject for this study and a mentor of the author.

243. PRIMO LEVI, IF THIS IS A MAN AND THE TRUCE 111 (Stuart Woolf trans., Penguin Books 1979) (1947) (originally published as *Se questo è un uomo*). *The Truce*, which was an account of Levi's eventful homeward journey from Poland, was originally published in 1963 as *La tregua*; today, the two short memoirs are often published together.

the third Germany [Third Reich]."[244]

Human rights expert Michael Ignatieff has written brilliantly of this scene: "Here was a scientist [Pannwitz], trained in the traditions of European rational inquiry, turning a meeting between two human beings into an encounter between different species."[245] Ignatieff continues: "Progress may be a contested concept, but we make progress to the degree that we act upon the moral intuition that Dr. Pannwitz was wrong: our species is one, and each of the individuals who compose it is entitled to equal moral consideration."[246]

Nuremberg embodied the first institutionalized, multilateral attempt to use the ideals of the rule of law to give voice to this moral intuition. It was the flagship event of what Ignatieff calls "'the juridical revolution' in human rights since 1945."[247] While the bare language of the Nuremberg Charter was not phrased using modern human rights terminology, the trial's context of genocide and atrocity transformed how the proceedings came to be understood over time. The focus thus far has been on how contemporary planners saw the trial and how commentators received their efforts in the short term. However, an important paradox of Nuremberg as a human rights institution is the gap between what the architects of Nuremberg thought they were doing, and how the perceived human rights lessons of the trial have changed over time. While a full review of changing interpretations of Nuremberg in the postwar era is beyond the scope of this article, some human rights-related implications of this paradox are touched on below.

Law professor Martha Minow describes as "devastating" the yawning gap "between the capacity of the trial form with its rule of law and the nature of mass atrocities."[248] The existence of such a gap may go a long way toward explaining the paradox of the Nuremberg legacy. One of the main reasons that the trial is often overlooked as a fountainhead of human rights culture is the strange divergence between what the Nuremberg Charter purported to be about—primarily, the outlawry of aggressive war—and what the trial is in fact remembered for today—namely, the landmark delineation of crimes against humanity in a context of holocaust and genocide. To say, as historian William Bosch did as late as 1970, that "[t]he Tribunal's most significant legal innovation was its legal definition of aggression as the 'supreme crime,'" now reads as a singularly off-key interpretation of what was actually going on

244. *Id.* at 111-12.

245. MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 3 (Amy Gutmann ed., 2001) (delivered as the Tanner lectures on Human Values at Princeton University, 2000).

246. *Id.* at 3-4. Such arguments about innate human dignity were the polar opposite of the cultural and scientific orientation of the Third Reich. See generally, for example, the accounts of Nazi philosophy in ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1986); JAMES M. GLASS, LIFE UNWORTHY OF LIFE (1997).

247. Amy Gutmann, *Introduction*, to IGNATIEFF, *supra* note 245, at vii (quoting Michael Ignatieff).

248. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 47 (1998).

beneath the trial's rhetorical surface.[249]

Recent commentators are sometimes surprised that the word "genocide" does not appear in the Nuremberg Charter, although the term does appear in some of the supporting court papers, including the Indictment—the first use of that term in an international legal instrument.[250] As with the 1941 Atlantic Charter (a document which does not use the phrase "human rights"), the Nuremberg Charter was instrumental in crystallizing a pre-existing concept in a new way, for which a modern vocabulary rapidly developed.

An advisor to the American prosecution staff, the Polish-Jewish refugee and Yale international legal scholar Raphael Lemkin, had coined the term "genocide" in the course of his wartime research, writing, and advocacy on behalf of victims of the Third Reich.[251] Lemkin's formulation first appeared in his massive 1944 volume, *Axis Rule in Occupied Europe*, published by the Carnegie Endowment for International Peace. Lemkin defined genocide as:

> [an intentionally] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence, of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups .... [T]he actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[252]

The *New York Times Book Review* featured a full page on Lemkin's dense and technical tract on the cover of its January 21, 1945 issue.[253] "For out of its dry legalism," wrote reviewer Otto Tolischus, "there emerge the contours of the monster that now bestrides the earth."[254] Lemkin commented in a draft of his next book, begun in 1944 but never published, that acceptance and use of a new term can only happen "if, and so far as, it meets popular needs and tastes."[255]

Part of the impetus for developing this new vocabulary was the experience

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249. *See* BOSCH, *supra* note 191, at 14.

250. "[The defendants] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."

Indictment, *in* 1 IMT NUREMBERG, *supra* note 2, at 43-44.

251. See Taylor's account of preparing the Indictment, where he notes that over the objections of a member of the British prosecution team, "we used the word 'genocide,' newly coined by Raphael Lemkin." TAYLOR, *supra* note 7, at 103.

252. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (1944).

253. Otto D. Tolischus, *Twentieth-Century Moloch: The Nazi-Inspired Totalitarian State, Devourer of Progress—and of Itself*, N.Y. TIMES BOOK REV., Jan. 21, 1945, at 1.

254. *Id.*; *see also* Waldemar Kaempffert, *Genocide is the New Name for the Crime Fastened on the Nazi Leaders*, N.Y. TIMES, Oct. 20, 1946, at E13.

255. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 44 (2002) (quoting Raphael Lemkin, History of Genocide, reel 3, 1:7, Lemkin Papers). See *id.*, at 29-78 for Power's excellent account of Lemkin's influence.

of actually litigating the trial itself, exposing flotillas of articulate young attorneys to the numbing details of vast numbers of atrocities. The evidence underlying the charge of crimes against humanity at Nuremberg was simultaneously vivid to the point of luridness and so unimaginable that, ordinarily, the mind must draw a veil over their particulars. Such a psychologically self-protective response was not always possible for the prosecution staff at Nuremberg, as well as for those members in charge of prisoners, documents, and exhibits. The French doctor in charge of the trial exhibits relating to atrocities fingered a set of decorative objects made out of flayed, tattooed human skin—exhibits which have since become iconic symbols of Nazism—and observed ruminatively to Rebecca West:

> These people where I live send me in my breakfast tray strewn with pansies, beautiful pansies. I have never seen more beautiful pansies, arranged with exquisite taste. I have to remind myself that they belong to the same race that supplied me with my exhibits, the same race that tortured me month after month, year after year, at Mauthausen.[256]

It was this deep substratum of horror, as much as the superficial atmospherics of legal improvisation, administrative chaos, and ersatz "colonialism" that underpinned the eccentric atmosphere at Nuremberg, remarked upon by so many commentators. Even at a remove of three generations, it induces a kind of mental short-circuit to ingest even the smallest quantities of this kind of evidence.[257] In a 1946 letter to Karl Jaspers, Hannah Arendt wrote that the Nazi crimes exposed the limits of law, for no punishment could ever be sufficient.[258] As the historian Lawrence Langer has recently written, "the logic of law will never make sense of the illogic of extermination."[259]

Yet this substratum of horror itself became an engine of cultural transformation, reshaping how the trial's legal ideas were understood. British barrister and human rights advocate Geoffrey Robertson vividly elaborates how "the spontaneous drama of the [Nuremberg] courtroom provided the defining moment of de-Nazification on the afternoon when the prosecutor showed newsreels of Auschwitz and Belsen and the defendants, spotlit for security in the dock, averted their eyes ."[260] While the charges of waging aggressive war were

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256. WEST, *supra* note 22, at 21.

257. *See* Naomi Mor, *Holocaust Messages from the Past*, 12 CONTEMP. FAM. THERAPY 371 (1990). This exposure took a psychological toll on the Nuremberg staff, arguably contributing to the bizarre suicide in the exact manner of Goering of prison psychiatrist Douglas Kelley.

258. Arendt speculated that this is why the Nazis in the dock seemed so smug. Letter from Hannah Arendt to Karl Jaspers (Aug. 17, 1946), *in* HANNAH ARENDT—KARL JASPERS CORRESPONDENCE, 1926-1969, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992).

259. LAWRENCE L. LANGER, ADMITTING THE HOLOCAUST 171 (1995). Consider, for example, this summary of the aftermath of the sporadic British bombing of the factories and railroad yards around Auschwitz in September of 1944: camp inmates wounded by the bombardment "were given first-class medical treatment and even received flowers and chocolate from the SS. Then, with consistent incongruity, the Nazis exterminated the recovered inmates." CONOT, *supra* note 11, at 9.

260. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL

arguably the focus of the Nuremberg Charter on paper, in practice it was the evidence regarding crimes against humanity that soon became what political theorist Judith Shklar termed "the moral center of the case."[261]

XI.

"[I]T WAS OBVIOUS THAT THE TRIBUNAL MUST SIT TO DISPROVE JOB'S LAMENT THAT THE HOUSES OF THE WICKED ARE SAFE FROM FEAR."[262]

Human rights legacies of Nuremberg that were immediately apparent included legitimating the idea of individual responsibility for crimes against international law; offering a jurisprudential underpinning for political or philosophical assertions of the dignity of the individual, irrespective of local, domestic laws; and providing an example of the importance of documenting and narrating the specifics of atrocities to create a detailed and enduring record. Even the trial's least successful legacy, its attempt to consolidate the status of aggression as an international crime, shaped the direction of human rights-related legal ideas, away from policing the political context of armed conflict, and more towards the protection of civilians.

Another important facet of the trial's rule of law legacy was procedural, exemplified by the opportunity for those facing criminal charges to be heard individually, to defend their actions, and to be confronted with the specific evidence against them. Robertson argues that, "the most astonishing feature of Nuremberg" was in fact the German defendants' own evolving perception of this procedural fairness; the gradual process through which "the adversary dynamics of the Anglo-American trial sucked in the defendants, who played an earnest and polite, [and] at times desperate, part in making it work."[263]

Robertson explains the link between human rights ideas regarding individual dignity and Nuremberg's development of the pre-existing, although somewhat inchoate, idea of crimes against humanity:

> [Nazi atrocities] were crimes that the world could not suffer to take place anywhere, at any time, because they shamed everyone. They were not, for that crucial reason, crimes against Germans [;] . . . they were crimes against humanity, because the very fact that a fellow human could conceive and commit them diminishes every member of the human race.[264]

He argues that Nuremberg earned its status as a human rights landmark "for this precedent alone."[265]

JUSTICE 215 (1999).

261. JUDITH N. SHKLAR, LEGALISM 170 (1964).

262. WEST, *supra* note 22, at 50.

263. ROBERTSON, *supra* note 260, at 216 (noting that, "[the defendants'] leader, Goering, had initially advised them to confine their evidence to three words: 'Lick my arse'—the defiant catchcry of one of Goethe's warrior heroes"); *see also* Benjamin B. Ferencz, *Nurnberg Trial Procedures and the Rights of the Accused*, 39 J. CRIM. LAW & CRIMINOLOGY 144, 146-50 (1948-49).

264. ROBERTSON, *supra* note 260, at 220.

265. *Id.*

Ideas about individual dignity also had a collective element, elaborating this sharper sense of the shared qualities of all humanity. Author and columnist for the liberal daily *PM*, Max Lerner, saw Nuremberg as a kind of public ritual, where the international community could attempt, through "an immense and revolutionary effort to give utterance to a collective human conscience, to bring into being a collective standard by which gross violations of that conscience can be punished."[266] Lerner continued:

> [S]ome may gibe that I am speaking of a 'human conscience' and a 'moral sense' that are vague and formless, things on which no body of law can be built. I submit that they are the only things that a body of law ever rests on. The surest basis of a future world society lies in the sense of our common plight. When a Negro is lynched, all of us are strung upon that rope. When the Jews were burned in the Nazi furnaces, all of us were burned.[267]

Law professor Thomas Franck explains succinctly how the Nuremberg ideas served to reconfigure the individual's relationship to his or her own national law:

> The international war crimes trials which followed the demise of Hitler's Evil Empire gave powerful impetus to the notion that there is a global system-based duty to disobey positive law when it serves demonic ends. This episode briefly succeeded in focusing attention on an international rule system which is the repository of inalienable rights, rights that may even have the capacity to invalidate the duty to obey national laws.[268]

The Nuremberg judges themselves explained that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[269] This idea of the supra-national quality of certain rights was incorporated into the constitution of the Federal Republic of Germany; under Article 25, general rules of international law took precedence over German federal law, while Article 26 decreed it unconstitutional to prepare for acts of aggression.[270] These human rights legacies "sit at the foundation of the rule of law," as they reinforce norms that constrain governments against arbitrary conduct, a notion that Minow terms "fundamental fairness."[271]

The idea of an individual owing obedience to laws based on what this study has termed general "Martens clause" standards—laws that may or may not be codified, are constantly changing, and that stand in for ideas of "civilization" with alarming racialized antecedents—troubles many commentators.

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266. MAX LERNER, ACTIONS AND PASSIONS: NOTES ON THE MULTIPLE REVOLUTIONS OF OUR TIMES 263 (1948).

267. *Id.*

268. THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 12 (1990).

269. 1 IMT NUREMBERG, *supra* note 2, at 223.

270. See the description of constitutional provisions in WHITNEY R. HARRIS, TYRANNY ON TRIAL, 568 (rev. ed. 1999) (1954). On codification of the so-called Nuremberg Principles at the United Nations level, see U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950), *reprinted in Report of the International Law Commission Covering Its Second Session, June 5-July 29, 1950*, 44 AM. J. INT'L L. Sup. 105, 125-34 (1950).

271. MINOW, *supra* note 248, at 29.

Philosopher Peter Haas notes:

> One area of human endeavor that claims to stand above individual choices and institutional vagaries is the law . . . . But what about a law that transcends individual political structures? Can an 'international law' be invoked that might pass judgment on national legal systems that have run amok?[272]

Haas is doubtful: "Like individual state laws . . . [i]nternational law no more than any other law can transcend its origins."[273] He continues:

> The assumption behind the [Nuremberg] trials was apparently that 'international law' could somehow establish a reference point that would provide the fulcrum needed to prevent similar events. It is also probably true that the trials were motivated at least in part by an attempt ex post facto on the part of the Allies to distance themselves, after years of silence and inaction, from the deeds of the Nazis.[274]

This search for such a "fulcrum" remains the central problem of modern human rights theory. Philosopher Michael Perry has recently argued that ideas about human rights based on theories of innate human dignity must ultimately be based on religious cosmologies.[275] Other scholars, such as the Kantians Alan Gewirth and Christine Korsgaard and the legal theorists Ronald Dworkin and Eric Blumeson, have developed ideas about human dignity based on secular arguments about the human capacities for reason, suffering, or empathy.[276] Several of these theorists have argued that another such secular base for the unique sanctity of the human might indeed be simple intuition.[277]

Whatever the competing merits of these arguments, at some point our philosophical spade is turned, and always before striking the satisfying bedrock

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272. PETER J. HAAS, MORALITY AFTER AUSCHWITZ: THE RADICAL CHALLENGE OF THE NAZI ETHIC 203 (1988). Haas' question implicates a fascinating postwar debate in American jurisprudence, between the positivist H.L.A. Hart and the natural law theorist Lon Fuller. Questions at the secondary Nuremberg trials about the validity of defenses resting on prior Nazi laws sparked the Hart-Fuller debate about the nature of law itself. Hart argued that antecedent laws must be construed as valid until replaced, while Fuller argued that the rule of law meant that Germany had to restore "both respect for law and respect for justice" even though "painful antinomies were encountered in attempting to restore both at once." *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 657 (1958); *see also* H.L.A. HART, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957).

273. HAAS, *supra* note 272, at 203.

274. *Id.*

275. MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 16 (1998).

276. *See* Eric Blumenson, *Who Counts Morally?* 14 J.L. & RELIGION 1-40 (1999-2000); ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 19 (1996); Christine Korsgaard, *Two Distinctions in Goodness*, 92 PHIL. REV. 169 (1983); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

277. On the role of intuition, Blumenson cites Thomas Nagel, Pierre Schlag, and, of course, Ludwig Wittgenstein for the proposition that:

> the human rights idea might be fully legitimate without any intellectually articulable foundation at all . . . . Clearly this is true of some other kinds of knowledge—the kind of intuitive knowledge we draw on when we recognize a family resemblance, anticipate a musical progression, or speak grammatically without knowing the rules.

Blumenson, *supra* note 276, at n.6. Recent anthropological evidence also points to certain kinds of universal human reactions that may have moral overtones, such as expressions indicating disgust. *See* Malcolm Gladwell, *Annals of Psychology: The Naked Face*, NEW YORKER, Aug. 5, 2002, at 38.

of what Richard Primus skeptically calls "the true grounds underlying a claim of rights."[278] Recent work in the new field of "transitional justice" also suggests that it may be fine simply to stop digging. As Judith Shklar observed, "[i]n fact, although it is philosophically deeply annoying, human institutions survive because most of us can live comfortably with wholly contradictory beliefs."[279] Scholars arguing for transitional justice approaches use ideas about value pluralism to do an end-run around static foundationalist debates about rights. Instead they emphasize the importance of history; specifically, the context of fluid political moments that highlight how "the social understanding behind a new regime committed to the rule of law" can be created. In the case of Nuremberg, part of the political context was the inevitable chaos involved in the transition from war to peace.

The emerging transitional justice paradigm posits an alternative way of thinking about the relation of law to political transformation. This school of thought asserts that justice is distinctive in times of transition—partial, contingent, and shaped by social understandings of prior injustice rather than by abstract, idealized conceptions of the rule of law. An approach emphasizing the transitional nature of the Nuremberg approach would suggest re-situating the trial in a political and cultural context of broader denazification programs, and not just as an isolated event in the world of legal ideas.[280]

The Nuremberg criminal trial might best be understood as an alternative to competing schemes such as the Morgenthau Plan, which emphasized the reparatory justice approach of disassembling industrial plants and the exporting of German labor to rebuild war-torn Allied countries. The transitional justice perspective sees international legal institutions as mediating "between facts and norms," that is, between the horrifyingly concrete realities of wartime events and aspirational abstractions such as "justice" and "security."[281] Legal scholar Ruti Teitel sees international law itself as a "bridge" in transitional situations, "[g]rounded in positive law, but incorporating values of justice associated with natural law."[282]

Nuremberg as a human rights institution is one example of this value pluralism. Along with the internally contradictory beliefs that Shklar found so annoying is the irritating fact that one of the more compelling sources of legitimacy for Nuremberg has always been the unappealing nature of the alternatives. While some commentators, such as Robertson, saw vindictiveness or hypocrisy in the use of the death penalty, this outcome was surely less vindictive than the alternatives of drumhead court martials or summary executions. Such an argument freely concedes the flaws embedded in the

278. RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 8 (1999).
279. SHKLAR, *supra* note 261, at x.
280. RUTI G. TEITEL, TRANSITIONAL JUSTICE 13-15 (2000).
281. *See* William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969 (1998).
282. TEITEL, *supra* note 280, at 20-21.

controversial issues such as the victors' justice and *tu quoque* arguments. A contemporary editorial in the *Christian Century* explained:

> The court was itself a guilty court and the prosecution was a guilty prosecution. This terrible fact has to be admitted. The trial at Nuremberg was like an angel born in a brothel . . . . [T]he plain truth is that if justice of any kind is to be done anywhere in the world of today it will have to be done by the guilty.[283]

In his opening statement, Sir Hartley Shawcross, British chief prosecutor at Nuremberg, confidently expressed a widely-held aspiration for what Nuremberg would come to stand for: "[T]his Tribunal", he asserted, "will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning."[284] While this "impartiality" was certainly contested, Rebecca West noted with uncharacteristic plainness that, "[w]e had learned what they did, beyond all doubt, and that is the great achievement of the Nuremberg trial."[285]

Goering himself acknowledged the importance of the seemingly modest objective of getting the facts out, as psychologist Gilbert recounted. "Brooding in his cell, Goering admitted that his attempt to build a heroic legend had been a failure. 'You don't have to worry about the Hitler legend any more,' he told me. 'When the German people learn what has been revealed at this trial, it won't be necessary to condemn him. He has condemned himself.'"[286]

Yet Nuremberg was more than a catalogue of facts. It was an attempt, however flawed, to approach William Butler Yeats's ideal of holding "reality and justice in a single vision."[287] A trial itself is a kind of dialogue, and essayist Elie Wiesel has argued that this act of dialogue has intrinsic value. "What emerges for Wiesel," writes Haas, "is the recognition that true comfort and reconciliation come only when the victim is able to share the pain with others . . . . [Only in] dialogue with fellow human beings is there any foundation for hope and reconstruction."[288] For Wiesel, "acquiescence . . . is the greatest danger, the silent onlooker the most troubling character."[289]

The alternative of amnesty—"silence," as Minow terms it—would have been similarly unconscionable, itself "an unacceptable offense, a shocking implication that the perpetrators in fact succeeded, a stunning indictment that the present audience is simply the current incarnation of the silent bystanders" who

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283. Editorial, *Majestic Justice*, 63 CHRISTIAN CENTURY 1239-40 (1946).

284. 3 IMT NUREMBERG, *supra* note 2, at 92.

285. WEST, *supra* note 22, at 60.

286. Gilbert, *supra* note 17, at 228.

287. James Ryerson, *The Quest for Uncertainty: Richard Rorty's Pragmantic Pilgrimage*, LINGUA FRANCA 48 (2000-01) (quoting William Butler Yeats) (internal quotation omitted).

288. HAAS, *supra* note 272, at 226.

289. *Id.* at 227. Haas argues further that one of the intellectual underpinnings of this discursive approach is a specifically theological strand of human rights philosophy, which he traces to Jewish traditions of enlightenment through dialogue. "Jewish thinking has always dealt with these tensions through the midrashic method, that is, by creating stories and myths that allow the individual to find meaning within the tensions." *Id.* at 223. Such an approach arguably adds a new layer of irony to Hitler's famously contemptuous reference to "[c]onscience, this Jewish invention." HERMANN GLASER, THE CULTURAL ROOTS OF NATIONAL SOCIALISM 221 (1978) (quoting Hitler).

had been complicit in the Nazi regime.[290] President Truman overstated the case in 1946 when he indicated that the trial had realized his "high hope that this public portrayal of the guilt of these evildoers will bring wholesale and permanent revulsion on the part of the masses of our former enemies against war, militarism, aggression, and notions of race superiority."[291] But the essence of the human rights point about Nuremberg was that through measured judicial retribution—not silent amnesty or indiscriminate vengeance—"the community correct[ed] the wrongdoer's false message that the victim was less worthy or valuable than the wrongdoer."[292]

290. MINOW, *supra* note 248, at 5.

291. Harry S. Truman, Message to the Congress on the State of the Union and on the Budget for 1947 (Jan. 21, 1946), *in* PUBLIC PAPERS, JANUARY 1 TO DECEMBER 31, 1946, at 46.

292. MINOW, *supra* note 248, at 12.

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Mass Claims Proceedings in Practice - A Few Lessons Learned

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Mass Claims Proceedings in Practice

A Few Lessons Learned

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Every mass claims process is different from the next. Mass claims proceedings are set up by usually complex political processes. Legal and moral issues come to the fore. Money matters, but it is particularly important to see that somebody still cares. The relevant facts are difficult to establish and are often traumatic.

Still, as one goes from one mass claims process to the next, a few lessons may be learned and may be worth recording.[1]

1. SHOULD MASS CLAIMS COMMISSIONS BE ARBITRAL TRIBUNALS?

1.1.

No. They should, however, be composed and operate to some extent like arbitral tribunals.

1.2.

To be composed in arbitral fashion gives a mass claims commission legitimacy. The two sides of the controversy, or at least the champions of two sides of a controversy which may involve many more players, have a say about the composition of the commission.[2]

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1. For a presentation of the Property Claims Commission's work which is now ending, see Karrer, "Mass Claims to provide rough justice", in Festschrift Peter Schlosser, 2005. *See also* www.iom.int; www.compensation-for-forced-labour.org.

2. For instance, two members of the Property Claims Commission were appointed by the Governments of the United States of America (Prof. David Caron, soon replaced by Prof. Richard Buxbaum) and Germany (Prof. Gerold Hermann, later replaced by Ministerial Director emeritus Eberhard Hubrich), and the chairman by the two members so appointed. The victims and their organizations, German enterprises and their organizations, and others were all represented in the Foundation's 27-member Supervisory Council (Kuratorium), but not in the Commission, which had

1.3.

A larger number of interested parties is a feature also encountered in investment protection and in sport arbitration. This may lead a mass claims commission to accept *amicus curiae* briefs.[3]

1.4.

If an arbitral approach is taken, using a larger number of decision-makers to deal with numerous claims may seem an obvious solution,[4] but often this approach will not be adequate. The numbers are far too large. Moreover, using many decision-makers leads to coordination problems, especially if the approach is not well defined from the start, as often happens with mass claims.

1.5.

The way mass claims commissions operate is quite remote from arbitral procedure. Using experienced arbitrators as commissioners will, however, help shape the process to its specific needs since arbitrators regularly design procedure.

1.6.

The arbitral agreement must, of course, comply with the requirements of the arbitration law at the seat of the arbitration and with the requirements of the New York Convention.

There must be an arbitral agreement in each case decided. One could think of a preexisting arbitral agreement open for acceptance.[5] An arbitration agreement may also be pre-formulated in the claim form which is accepted at the time of the filing of the claim.[6]

1.7.

By agreeing to arbitration, a claimant waives his or her right to go to other fora. The decision becomes *res judicata*. However for practical purposes, finality may also be achieved without arbitration.[7] One may indeed ask how important

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just three members.

3. For instance, at an early stage, the Property Claims Commission invited victims' organizations to make submissions, which they did. There comes, however, a moment when a mass claims commission must decide. Later *amicus* submissions are difficult to handle. The Property Claims Commission received an *amicus* brief in the middle of its primary decisions process which led to a change of its decision pattern in one area. During the reconsideration phase, the Commission received a further *amicus* brief which duplicated an earlier brief and led to no change.

4. Because of the large number of cases, some programs such as U.S./Iran Claims Tribunal, CRT I or UNCC, operate with pools of decision-makers constituted by champions of two sides, plus a pool of neutrals.

5. This is the method used in investment protection arbitration.

6. This is the method used with athletes at Olympic Games, where the arbitration agreement is included in the registration form.

7. Thus, in the Property Claims Commission process, the original claimants in Federal Court in New Jersey withdrew their original claims against some German enterprises as part of the overall settlement which led to the establishment of a Property Claims Commission in the first place. This

finality is in practice.[8]

1.8.

An arbitral process is, moreover, necessarily inserted in the *lex arbitri* of the seat of arbitration. This opens it up to admittedly limited opportunities for challenge before state courts in that place.[9]

1.9.

Work in mass claims should be subject to the same tax treatment as arbitration. If the administrative support is provided by an international organization which enjoys special tax treatment this has obvious tax advantages.

1.10.

Many important elements of a true mass claim proceeding do not fit the arbitral pattern: there is only one claimant party, and no representative of the respondent, unless the entity which has the money pool may be described in this way. No adversarial proceedings are instituted.

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operates as a waiver with respect to various original claimants, but of course not in respect of the many more claimants to whom the Property Claims Commission process was opened.
All claimants file a waiver declaration that merely suspends their claim. They do not waive their rights simply by going before the Commission. The Commission has no judicial or arbitral function. Its decisions do not make law in any system. If the claimant's claim is not simply denied, the claimant receives an additional claim to an ascertainable sum of money (to be established through a particular process) which the particular claimant may then collect. A waiver only occurs when a successful claimant accepts payment and thus fulfills the condition triggering the waiver declaration. *See* Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" (Law to Establish the Foundation "Memory, Responsibility and Future") [hereinafter "Foundation Law"], v. 2.8.2000 (BGBl. I 1263) § 16(2). This means that claimants who were not original parties before the federal court in New Jersey and were unsuccessful - or were successful but did not accept the payment (if that happens, the money will be paid to the JCC) - retain whatever right they have to sue German enterprises in courts all over the world.
In the United States, there is something special. As part of the settlement, the United States Government undertook to issue a declaration that it was in the national interest of the United States that legal peace would be maintained as far as the United States were concerned towards German Enterprises. *See* Executive Treaty, Art. 2, Art. 3(3). For the purpose of legal peace, German enterprises were those that had their headquarters within the 1937 borders of the German Reich (before the "Anschluss" of Austria or other World War II–era expansions) or had their headquarters in the Federal Republic of Germany, or enterprises owned by Germans from the 1937 Reich, or in which German enterprises situated in the 1937 Reich had a stake of 25% or more, at any time between seizure of power by the Nazis in 1933 and the entry into force of the Foundation Law in 2000. Foundation Law § 12(2).

8. It would be expensive to pursue property claims for relatively small amounts (to be sure, well in excess of the payments resulting from the Property Claims Commission process, but still relatively small). The chances of success would be doubtful in view of the statute of limitations and the difficulty of sufficiently proving a case to conform to standards applicable in courts of law.

9. It is somewhat surprising that the CRT-I arbitration agreement, which provides for arbitration in Zurich, Switzerland, did not provide for a waiver of remedy to the Swiss Federal Supreme Court as permitted under Art. 192 PIL Statute. Nevertheless, no challenge of CRT-I decisions to the Swiss Federal Supreme Court was ever made. One can only speculate as to the reasons, but it is likely that the chances of success were seen as extremely limited (generally only one challenge on the merits is successful in two years).

Rather, the process is administrative in nature. If only limited funds are available, mass claims processes resemble bankruptcies. The amount ultimately awarded is then determined essentially by the money available in a pool, which is divided among the recipients. The amounts originally certified as amounts to which claimants are entitled may then be subject to pro rata reduction.[10]

2. How can a small commission deal with an enormous number of cases?
It must analyze the problem as a whole and avoid partial solutions.

2.1.

The numbers have a significant impact. Quantity rules quality. The precise numbers make little difference.[11] They will, in any event, largely exceed what can be handled by a limited number of decision-makers in the classical arbitral tribunal mode.

2.2.

How should the money available for the process be spent? Ideally, the funds available for the process should bear some realistic relationship with the number of transactions that must be considered.[12]

2.3.

The cost of the process should be budgeted separately from the money to be distributed in the process. An open budget is dangerous. [13]

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10. The Property Claims Commission thought of flagging this to claimants by certifying "points" rather than money amounts, but rejected the idea because claimants would find this too abstract and difficult to understand. To minimize psychological problems, the Property Claims Commission sought to approximate or slightly overshoot the amounts that it would ultimately pay out. It accordingly preferred to certify EUR 1,000 subject in the end to a 15% reduction rather than certifying EUR 10,000, only to implement in the end a 91.5% reduction, even though both methods lead to the same result—EUR 850 in the successful claimant's pocket. The reductions of the amounts certified by the Property Claims Commission were ultimately about 15% for one group and about 35% for the other.

11. The total claims in the Property Claims Commission process were 34,955.

12. For example, to deal with a EUR 100 million case of high complexity, an international arbitral tribunal will have arbitration costs of roughly EUR 1 million, and the party representation costs for both parties, taken together, may go up to EUR 5 million. This will mean that for 100 claimed items, the overall costs per item will be around EUR 60,000. Compare this with the costs of the Property Claims Commission which operated at a cost of less than EUR 100 per item. It is obvious that for a cost that is but a small fraction of what is normally spent in international commercial arbitration, one can only expect a much rougher approximation of justice.

13. The experience of the CRT-I and ICHEIC shows that where there is an open budget, as must be expected, the mentality of "no stone unturned" will take over, with grotesque results. The process will cost substantial money to those who fund it (in our two examples, the banking and the insurance industries). It will bring enormous profits to those who carry it out (accounting firms and law firms). It will necessarily take a long time. This cannot be in the interest of the claimants. If a common fund is set up, as was for the Property Claims Commission process, the commission is faced with the additional difficulty of finding the right level of funding for the process in relationship

2.4.

It is very difficult for many to accept this, but rough justice is inevitable in mass claims. The only question is, how rough? How can one maximize justice for the available money?

2.5.

Arbitral tribunals are expected to work essentially without staff or only with clerical staff whom they pay individually. Chairmen of arbitral tribunals do not, of course, type out the awards themselves, but arbitral institutions notoriously discourage the use of legal assistants by arbitral tribunals.

By contrast, in mass claims, a large infrastructure is indispensable. If costs must bear a reasonable relationship to the amount of money distributed, paramount attention must be given in a mass claim process to staff and computerization.

To deal with large numbers, a mass claims process must necessarily operate with a steep staff hierarchy.

The main role of the commission is to design the overall process. Even a large portion of that work will not be performed by the commission acting alone It will receive suggestions from its top legal officers on this. Rather than deciding individual cases, a meeting of a commission will focus on recurrent issues encountered by the staff.[14]

The commission's chief staff officers must be experienced specialists of mass claims.[15]

The next level are highly qualified younger lawyers with a hands-on approach and superior linguistic skills.[16]

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to the money to be distributed, but it is well equipped to make that decision.

14. For example, the question will arise whether, when a value for a particular type of asset is assessed, there should be a premium in those cases where the claimant collected particularly good and convincing evidence, or a reduction for cases where the evidence is so particularly poor that the chances of obtaining compensation in a court of law appear much less. This poses an essentially philosophical question about the nature of the compensation which must be decided by the commission itself. In this particular instance, the Property Claims Commission's decision was that no such difference should be made. The payments that it certified were not exclusively in the nature of damages. They were not designed to anticipate the outcome before a state court of law. It further appeared that the reasons why in some select cases reliable evidence still existed, but in most cases did not, were essentially fortuitous. This reflects the subsequent fate of various archives in the sometimes unfaithful hands of former employees, as well as owing to the effects of war damage.

15. The Property Claims Commission had Dr. Norbert Wühler who in the course of the process became head of IOM's programs, and as its top officer for property claims, Ms. Anke Strauss.

16. The Property Claims Commission had such persons from Poland, the Czech Republic, Germany, the United States, and other countries. The actual staff officers were lawyers and historians ready to do some of the inevitable administrative work as well. Such staff must be people who have an excellent understanding of history, the necessary empathy and willingness to deal with difficult and unforeseen problems, and the ability to work in teams. All these people were put together on the same floor in an office building where it was easy to contact a colleague across the hall who had knowledge of a particular language or the specific conditions in a particular region at a given time.

At an early stage, telephone hotlines should be manned by people with specific interpersonal and language skills. Throughout, the necessary administrative support must be in place with sophisticated computer programs to deal with complicated texts in many different languages.

2.6.

One must computerize whatever one can. The internal budget for transferring information to a computer data base must be substantial from the very beginning.

2.7.

To design a claims form requires an understanding of the entire process and the specificities of the program. The emphasis should be on times, places, names, and relationships among persons. This is information that should be entered into a database through an automatized process. The forms that we all fill out at the border when we enter certain countries provide a good example: some countries are better than others in designing these forms.[17]

Why is this important? It is not so much for the primary decisions in individual cases. These must be made on the basis of a decision handbook and evaluation matrix established by the commission. Instead, this matters for the purpose of developing the decision handbook in the first place.

A claim form, even well designed and properly filled out, does not tell the whole story. One cannot enter everything in a claim file into a database and use it to decide cases. Staff members must actively take the case into their hands.

It is in the interest of the process to have well-presented claims and claim forms properly filled out. It is hard to achieve this without special assistance to claimants.[18] Many mass claims processes discourage the use of lawyers as claimant representative, for instance by the simple device of not providing compensation for party representatives. Some lawyers work hard and prepare well-

17. For the Property Claims Commission process, it would have been extremely useful to receive not only the names of places, but also the postal codes, the name of the districts in which they were situated, the name of the nearest larger village or city, the full name of the person, written in all ways in which it may have appeared on other documents, and a precise indication of the time periods during which a particular person was at a particular location, the particular time when a person emigrated to another country (which?), when that person acquired citizenship in another country, lived in a particular country, et cetera. Likewise, the relationships among people (son/daughter, father/mother, brother/sister) must be given. Further elements possibly relevant for the decision of the claim should be provided on the claim form in a separate and objective manner independently from the claim. For instance: Does somebody describe himself as Jewish, a Jehovah's Witness, Sinti or Roma? On which grounds? Was somebody expelled from his or her home? When, and by whom? How many floors did the house have? Were there similar houses in the neighborhood? How many head of cattle were on the farm? Was somebody in a concentration camp? Which camp and from when to when? How would the camp be described? All this relatively objective information, once entered into a database, makes it possible to group cases efficiently.

18. The Property Claims Commission organized telephone hotlines in numerous languages. It also encouraged victim organizations in various countries to assist claimants. This is a task that should not be neglected by organizations once a process is in place following a lengthy legal and political struggle which may have put a substantial demand on an organization's resources.

documented, individualized claims. Many legal representatives however regrettably face a numbers problem, especially if they operate on a contingency fee basis. They may initiate "mass claims" by entire groups of claimants or even dump their entire worldwide client population into the program. This simply makes unnecessary work for others – the commission's staff.

3. HOW SHOULD A MASS CLAIMS COMMISSION DEVELOP ITS APPROACH?

Step by step.

3.1.

In an initial phase, the commission must study a representative sample of claims files, the raw material that will be put into the hands of its case officers. This will help it reach its first important decision; namely, the decision of where it must set-up its administration and what the working language of the administration must be.[19]

3.2.

The importance of drafting supplemental procedural rules may easily be overestimated. Drafting procedural rules is an exercise which brings people together as they develop their working procedures, but drafting something else will be at least as useful.

Procedural rules are usually helpful for the parties in arbitral proceedings. They provide a general background on the procedure adopted. By contrast, in a mass claims process, after a first claim has been submitted, there normally are no further exchanges with claimants, and thus there is no need for procedural rules as such. Where by way of exception a deficiency letter is sent to a particular claimant, the procedure becomes so highly individualized that rules are of little help.

3.3.

The next task of a mass claims commission is then to develop an internal decision handbook and evaluation matrix. It should determine how it will operate, e.g., whether a file will be translated and the extent to which the commission will supplement the file with information from other sources. It should finally describe the end result of its work, how its decisions will be presented.

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19. For example, the Property Claims commission had this decision practically made when it came into operation. It spent little time in deciding that its seat should be Geneva and not, for instance, Berlin. It also was clear without discussion that it should work in English, and not in German, though its members were fluent in both languages. The Property Claims Commission could never have assembled the qualified staff that it had in a place less international than Geneva, with fewer expatriate families living locally. It could not have worked in another language than English, not just for psychological reasons, but also for staff recruiting reasons.

3.4.

Above all, a mass claims commission must make a fundamental decision as to the standard of proof to be applied. Shall it be the normal standard used by State courts and arbitral tribunals? In many cases, a relaxed standard of proof will apply.[20]

3.5.

Moreover, a mass claims commission will establish presumptions of fact; namely, the presumption that if a particular fact was established under the applicable standard of proof, then another relevant fact is rebuttably presumed to have been present. To achieve some measure of fairness, these decisions must be made on the basis of historical research. The notion that a mass claims commission could investigate each individual case in inquisitorial fashion, thus doing the work that the parties and the organizations assisting them did not do, is an illusion.[21]

3.6.

Before issuing any primary decisions, one should test one's approach on a sample. The sample must of course be representative of the entire claims population, and it must be large enough to allow a reliable forecast of the entire outcome.[22] This may be necessary for further purposes, for instance if the amount of money to be distributed is pre-set.[23]

3.7.

Then only, at long last, should the primary decisions be issued without delay.[24]

4. SHOULD THE PRIMARY DECISIONS BE ISSUED IN GROUPS AND IF SO, HOW SHOULD THE GROUPS BE COMPOSED?

Yes, the groups should be composed depending on psychological factors.

4.1.

It may be important to issue a first batch of decisions which, in numbers and in money distributed, is representative of the entire claims population as deter-

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20. The Property Claims Commission announced that it would apply a relaxed standard of proof.

21. The Property Claims Commission covered the entire territory of Nazi-occupied Eastern Europe.

22. The Property Claims Commission used a sample of 1,000 claims out of its total of 34,945 claims.

23. Since the Property Claims Commission was using about one eighth of the available funds for the process, it could expect to have seven eighths to distribute. From this, the value of a "point" could be determined. *See supra* note 12.

24. The Property Claims Commission rendered its primary decisions over a year and a half.

mined by the sample just mentioned. It may be sensible nevertheless to issue the first batch of decisions in cases not identical with those in the sample. It may be preferable to group the decisions in the first and in later batches following special considerations, such as whether the claimants are individuals, particularly elderly people, or legal entities, or in the same geographical location, or whether the same issues are raised.[25]

4.2.

The period over which decisions are rendered should be as short as possible for reasons that will become evident forthwith. Still, because of limited manpower and the need to use the staff efficiently, the decisions cannot all be issued at the same time.

5. WHAT IF THE COMMISSION CHANGES ITS MIND?

The long decision-making period makes it inevitable that, on some issues, the thinking of the commission may evolve. In newly considered cases, issues not included in the sample or new evidence may surface. New historical research or new *amicus* briefs may lead to new ideas. This may lead to an adjustment of the approach that the commission takes.

This conjures up a dilemma which is well known to state courts but unfamiliar to arbitral tribunals, which are all set up to decide just one case. Three routes are possible, none of which appears particularly attractive.

5.1.

First, the commission may choose to continue its practice and decide, for the sake of consistency, as it had decided in earlier cases—in other words, persist in the error against better knowledge. This is a course sometimes taken by state courts before they change their case law to allow the participants in a legal process to adjust their behavior in the future, but without surprising them with a change of practice which may be unfair to them if they rely on an earlier practice.[26]

5.2.

The second position would be that, once the commission changes its mind on an issue, it would revisit the issue in already-decided cases. While there is no difficulty with the correction of clerical errors in a decision, done *sua sponte* by the commission once the error is discovered, the position is far more difficult here: there is no clerical error. There is a change of view on a legal issue, or new facts have emerged.

The question of a *reformatio in peius* arises. This is perhaps not a legal

25. The approach just described was taken by the Property Claims Commission.

26. A typical example is the shortening of deadlines or changes in the recognition of public holidays. There, the judiciary may be led to make an announcement of a future change.

problem if the parties are on notice that a *reformatio in peius* might occur *sua sponte* by the commission under certain circumstances. Still, psychological difficulties remain.

Another difficulty is simply practical: with a claim form designed with this possibility in mind, it may become possible to identify claims arising from conditions at a particular time and place, but identifying cases involving the same issue of law or a similar pattern of facts if the difficulty was not anticipated is extremely costly and the process will generate further unequal treatment. Above all, with complex cases, issues could be revisited and reconsidered again and again. There must be an end, subject to legal remedy.

5.3.

The third possibility is to leave the earlier decisions unchanged but to adopt the new policy from then onwards. This admittedly results in unequal treatment. In the cases where the new policy worsens the position of claimants, a claimant who benefited from the earlier practice will simply be lucky in an administrative process because there is no counterparty interested in overturning the earlier decision. Conversely, if earlier decisions favored claimants less than the new policy now provides, the unlucky claimants may have a remedy against the decision that burdened them. If that remedy is timely taken, the case will be reconsidered in the light of the new policy, which will bring it in line with the later decisions. The difficulty, however, is that the time within which a decision may be challenged is limited. It would not be a satisfactory solution to lengthen that time too much since it must be the same in all cases and the time within which the last decisions may be challenged may then seem very long indeed. In fact, the entire process may be held up if payment is made only once the entire process is completed. This makes it necessary that decisions on the same issue be rendered in as short a time as possible.

On balance, this third approach appears best for primary decisions.[27]

6. SHOULD THERE BE A REVIEW OF DECISIONS BASED ON A LEGAL REMEDY?

Yes.

6.1.

Some mistakes happen that should be corrected, particularly when the administrative burden of a correction is not particularly heavy. This suggests that the grounds for review should be strictly limited, and limited to easily ascertainable cases.[28]

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27. The Property Claims Commission rejected the first and second possibilities and chose this approach.

28. For instance, the Property Claims Commission reviewed decisions only for alleged

6.2.
The question arises again whether a correction once made should be subject to a further correction. The answer should be no.

6.3.
For the same practical reason as for the primary decisions, decisions raising the same type of issues should be made at the same time.[29]

7. SHOULD THERE BE CONFIDENTIALITY OR AN EFFORT TO PUBLICIZE THE WORK OF A MASS CLAIMS COMMISSION?

7.1.
In each individual case, confidentiality is required.

7.2.
The work should not be publicized while the primary decisions are still rendered since interference in individual cases by interested circles or even high-placed backers should not be encouraged, and one should avoid giving an unfair advantage to claimants who have not yet received their decisions.

7.3.
However, once the first phase has been completed, namely from the time when all primary decisions have been rendered, an effort to publicize the work of a mass claims commission must be made to advance the acceptance of its decisions by the parties involved and by wider circles.

As part of this effort, it is a particular pleasure for me to dedicate this article to my co-commissioner and friend, Richard Buxbaum, at the close of the work of the Property Claims Commission and on occasion of his special birthday.

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manifest error of facts, manifest error of law, or new evidence not reasonably available before. It adopted, also on review, the third of the three approaches just discussed.

29. The Property Claims Commission followed this method. It rendered all its reconsideration decisions over a period of only four months.

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German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement

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German Legal Culture and the Globalization of Competition Law:

A Historical Perspective on the Expansion of Private Antitrust Enforcement

By
Hannah L. Buxbaum*

I.

One major focus of studies regarding Germany's post-war history is the country's economic development following 1945.[1] Particularly the evolution of modern competition law—a process at the intersection of political, economic and social goals—provides a window into the forces propelling the country's reintegration into the international economic community. From the occupation period through the development of modern German competition law to the regionalization of competition law within the European Union, one can trace the various external influences at work in post-war Germany and the ultimate emergence of a local regulatory culture. Today, competition law continues to evolve, responding to globalization's challenges with a variety of transnational and regional mechanisms. For instance, recent years have brought a sharp increase in legal instruments used to coordinate enforcement efforts across national boundaries,[2] as well as various initiatives focused on achieving some level of substan-

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1. This is a theme touched on in much of the honoree's scholarship. *See, e.g.*, RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE (1998); Richard M. Buxbaum, *Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community*, 52 CAL. L. REV. 56 (1964); Richard M. Buxbaum, *Antitrust Regulation Within the European Economic Community*, 61 COLUM. L. REV. 402 (1961).

2. These include Memoranda of Understanding between regulatory agencies in different jurisdictions, as well as treaties providing for mutual legal assistance in cases with cross-border elements. *See* ABA SECTION OF INTERNATIONAL ANTITRUST LAW, INTERNATIONAL LAW ANTITRUST CORPORATION HANDBOOK 305-70 (2004) (compiling such instruments).

tive harmonization across national laws.[3] Because these forms of regulation intersect with existing national competition regimes, they raise the question how local regulatory cultures and preferences affect the development of global regulatory strategies. This essay will take up one specific aspect of global competition regulation: the growing role of private antitrust litigation. It examines Germany's resistance to that development, and considers the extent to which that resistance has roots in the country's legal and economic history.

In recent years, two developments in particular have indicated the expansion of private enforcement in ways relevant to Germany's domestic regulatory scheme. One arose in the regional context, in the form of a new European Council Regulation modernizing competition law enforcement.[4] The other arose in the transatlantic context, in the form of a series of cases that threatened to expand further the jurisdiction of U.S. courts over extraterritorial anticompetitive conduct.[5] In both contexts, Germany strongly protested the potential undermining of its local competition enforcement philosophy. At one level, these protests seemed unnecessarily strident, as neither the E.C. Regulation nor the relevant provisions of U.S. antitrust law challenged the substance of German competition rules with respect to particular conduct. The U.S. cases considering expanded jurisdiction, for instance, addressed hard-core price fixing—conduct that violates German and E.U. law as well as U.S. law. Similarly, the material objectives of the E.U. modernization program—primarily to preserve European Commission resources for the prosecution of the most economically harmful anticompetitive behavior—are consistent with Germany's own interests. In this light, the German response seemed an overly abstract statement about the role of sovereign states within the international community and the need to respect national regulatory authority within an increasingly globalized regulatory framework. It therefore raised the legitimate question whether certain substantive regulatory goals outweighed the interest in protecting national sovereignty per se.[6]

At another level, however, the German response suggests something more than insistence on sovereign authority as an abstract concept. It raises echoes of the development of modern German competition law following World War II. During both the occupation era and then the stage of European regionalization, the country struggled to shape an indigenous competition enforcement regime. The combination of internal and external forces at play during those periods affected the substantive orientation of the resulting legal regimes. In addition, the process by which those forces were reconciled established certain patterns—

3. These include the Draft International Antitrust Code and also, more broadly, suggestions to bring competition issues under the umbrella of the World Trade Organization.

4. Council Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2002 O.J. (L 1). *See* discussion *infra*, Part III.A.

5. *See* discussion *infra*, Part III.B.

6. *See, e.g.*, Ralf Michaels & Daniel Zimmer, *US-Gerichte als Weltkartellgerichte?*, IPRax 2004, Heft 5, 451, 456 (noting that it is somewhat difficult to understand why a country would protest litigation in the United States against a cartel whose conduct that country was itself prosecuting).

particularly of pressure and resistance with respect to the American influence—that create the backdrop to these current developments in competition regulation: on the one hand, jurisdictional expansion of U.S. law itself, and on the other, a modernization of regional law that brings E.U. law closer to the U.S. model.

This essay examines the process by which Germany crafted its competition regime in the post-war period, focusing on the emergence of an indigenous regulatory philosophy within the framework of the transatlantic relationship. It then turns to current German attitudes toward protecting the country's system of competition regulation, as well as associated elements of its civil justice system, from the recent trend toward increased reliance on private enforcement. The essay attempts to uncover some of the specific perceptions that lie behind assertions of sovereignty or territorial authority in international discourse regarding global competition regulation. It thereby suggests more generally that the search for transnational regulatory systems capable of addressing global conduct must continue to account for the diversity of historical and cultural contexts that underpin various national regimes.[7]

II.

Following World War II, German competition law developed against the backdrop of U.S. influence, exerted in part directly, during the occupation years, and in part indirectly, through U.S. involvement in the subsequent shaping of both German and E.U. competition policy. The law's development is a story of the successful integration of that influence into a local philosophy regarding competition enforcement. Part A of this section traces two stages of that history. It begins by addressing the transition from occupation law to modern German competition law, a process that reflects the absorption of U.S. influence, but with an important interweaving of German priorities and philosophies regarding market regulation such that a national regulatory identity can be seen to emerge. It then considers the subsequent regionalization of competition law within the E.U., examining the extent to which the German regulatory identity withstood complete subsumption within the regional framework. Part B then turns to one substantive aspect of competition enforcement: the role of private antitrust litigation. This issue touches on Germany's civil justice system as well as its competition regime, revealing the limits of U.S. influence where that influence was inconsistent with local competition enforcement philosophy.

A.

In the pre-war era, U.S.-style antitrust regulation was unknown in Ger-

7. For a reminder of the importance of legal culture to the successful coordination or harmonization of laws in the global context, see Richard M. Buxbaum, *Die Rechtsvergleichung Zwischen Nationalem Staat und Internationaler Wirtschaft,* 60 RABELS ZEITSCHRIFT 201 (1996).

many. Early German judicial opinions confirmed the legality of cartel agreements, prohibiting only certain abusive effects;[8] even the cartel law enacted in 1923 was designed to control, rather than eliminate, such agreements.[9] The German regulatory regime thus recognized cartels as a fundamental component of the Germany economy.[10] U.S. influence on modern German competition law began with the period immediately following World War II. U.S. occupation law was in force in the U.S. zone, and U.S. hegemony quickly led U.S. economic policies to dominate the reconstruction process in the other western zones as well.[11] At the earliest stage of the occupation, the goal of many U.S. policymakers in shaping laws related to competition was not to facilitate the emergence of an indigenous regulatory system, but rather to eliminate elements of the German economy that had played a role in the war.[12] The most extreme view of competition policy's role in this regard was embodied in the short-lived Morgenthau plan, which proceeded from the assumption that stamping out Nazism would require not only the elimination of cartels but the elimination of German industry in its entirety.[13] Even more moderate U.S. views, however, saw the role of anti-cartel law not only as protecting conditions of free competition, as in the United States, but also as limiting Germany's military capability. The restrictive aspect of U.S. policy during this period was reflected in occupation law itself: thus, for instance, Law 56, intended to eliminate "concentrations of economic power . . . which could be used by Germany as instruments of political or economic aggression."[14]

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8. KNUT WOLFGANG NÖRR, DIE LEIDEN DES PRIVATRECHTS: KARTELLE IN DEUTSCHLAND VON DER HOLZSTOFFKARTELLENTSCHEIDUNG ZUM GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 8-9 (1996) [hereinafter NÖRR, LEIDEN DES PRIVATRECHTS] (discussing the 1897 decision of the Reichsgericht in the Saxon Woodpulp case, which recognized reasonable cartels as lawful); *see also* Ivo E. Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 U. PA. L. REV. 617, 626-31 (1957).

9. NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 56-65. *See also* DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 124-25 (1998) [hereinafter GERBER, PROTECTING PROMETHEUS] (describing the goal of the law as "rely[ing] on *administrative* measures to combat the *abuses* of power" and not to "eliminate or even harm cartels.").

10. For an examination of German competition law in the decades preceding the war, *see generally* NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 31-100 (analyzing the role of cartels in Germany's political, economic and legal framework between 1918 and 1933).

11. *See* MARIE-LAURE DJELIC, EXPORTING THE AMERICAN MODEL: THE POSTWAR TRANSFORMATION OF EUROPEAN BUSINESS 79-81 (1998) (describing the hegemony of the United States in the Trizone).

12. *See* John C. Stedman, *The German Decartelization Program—The Law in Repose*, 17 U. CHI. L. REV. 441, 443 (1950) (discussing early decartelization policy and "[t]he extent to which these evil practices participated in bringing about World War II"); *see also* JOHN O. HALEY, ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947-1998 15 (2001) (describing the emergence in the United States of the view "that cartels and industrial concentration were intrinsic to German fascism and vital to Germany's capacity for military aggression").

13. RICHARD MAYNE, THE RECOVERY OF EUROPE: FROM DEVASTATION TO UNITY 75-76 (1970) (describing Morgenthau's proposal that Germany "be 'pastoralized.").

14. U.S. Military Government Law No. 56, Jan. 28, 1947, preamble. Law 56, applicable in the U.S. zone, was mirrored by similar laws enacted in the British and French zones. *See* DJELIC, *supra* note 11, at 80.

Within a relatively short time, the goal of economic policymakers in the United States shifted away from this negative orientation. Germany's economic recovery was important to the United States for numerous reasons, including minimizing the possibility of Germany's lapse into communism and anchoring the emerging economic stability in Western Europe.[15] The country's industrial capacity was clearly critical to successful recovery, and competition regulation came to be viewed not as a tool of repression but as a necessary element of a functional economic system.[16] Thus, while the anti-cartel elements of German economic law may initially have been imposed for repressive purposes, they were eventually embraced as part of the foundation for Germany's reintegration into the international economic community.

Following the founding of the West German Republic in 1949, although occupation law remained in force, West German and U.S. policymakers participated jointly in the process of developing a national competition law. The United States continued to influence the law's formation in a variety of ways—not only by making the enactment of a competition law a condition of turning over sovereignty, but also by providing direct advice as to substantive provisions and by educating its drafters about the U.S. system.[17] During this period, however, Germans had increasing control over the legislative process, and the influence of German policymakers became stronger. Most importantly, an indigenous strain of economic theory became the intellectual foundation of the developing competition law: the minister of economics guiding the legislative process, Ludwig Erhard, drew on the ideas of the Freiburg school of "ordoliberalism."[18]

Ordoliberalism, a theory developed in the 1930s that focused on the interrelationships between the economy and the legal and political systems, provided

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15. *See generally* VOLKER R. BERGHAHN, THE AMERICANISATION OF WEST GERMAN INDUSTRY 1945-1973, 88, 109 (1986) [hereinafter BERGHAHN, AMERICANISATION]; *see also* HALEY, *supra* note 12, at 39.

16. *See* BERGHAHN, AMERICANISATION, *supra* note 15, at 88 ("there emerged, ever so slowly, not only the idea not to destroy Germany's industrial potential but to use it as the engine of material reconstruction in Europe; more crucially, it also produced the concept of using the West German economy as the lever for a restructuring of the whole of Western Europe's industry . . . according to the American 'model' of capitalism."); *see also* Volker Berghahn, *Resisting the Pax Americana? West German Industry and the United States, 1945-55*, *in* AMERICA AND THE SHAPING OF GERMAN SOCIETY, 1945-1955, at 85 (Michael Ermarth ed., 1993) [hereinafter Berghahn, *Pax Americana*].

17. *See* Schwartz, *supra* note 8, at 688-89 ("The American influence has been effective . . . by direct theoretical and practical studies of American antitrust law" by German commissions and study groups.); LISA MURACH-BRAND, ANTITRUST AUF DEUTSCH: DER EINFLUß DER AMERIKANISCHEN ALIIERTEN AUF DAS GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (GWB) NACH 1945 133-40 (2004) (detailing U.S. involvement in the law's development).

18. *See* David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994) [hereinafter Gerber, *Constitutionalizing the Economy*] (discussing ordoliberal thought and its role in the reconstruction of the German economy). As Gerber points out, members of the ordoliberal school, as some of the few economists not involved with Nazism, were well positioned to work with U.S. economists. *Id.* at 31. *But see* BERGHAHN, AMERICANISATION, *supra* note 15, at 158-59 (questioning the link between Erhard's own regulatory philosophy and ordoliberalism).

the theoretical underpinning for the new competition law.[19] It rested on the concept of an "economic constitution" (*Wirtschaftsverfassung*) that would embody the country's political choices regarding the shape of its economy, and would thereby establish the conditions within which market forces would operate.[20] Competition law was the centerpiece of this system, as it would constrain the exercise of private economic power that threatened to undermine conditions of complete competition.[21] Most directly through the work of Franz Böhm, a legal scholar, and Walter Eucken, an economist, ordoliberal theory informed the emerging legal system.[22] Thus, as one scholar put it, while the U.S. occupation provided the political impetus for the development of German competition law, "the intellectual origins of the law were domestic."[23]

It is indisputable that the Law Against Restraints of Competition (GWB), ultimately enacted in 1957,[24] reflects strong U.S. influence—seen perhaps most clearly in the general prohibition of contractual cartel arrangements.[25] Nevertheless, a comparison of U.S. antitrust laws and the GWB reveals significant differences. To begin with, the GWB contains a number of exceptions, unfamiliar to U.S. law, that were critical to its passage in the 1950s. These exceptions authorize, among other arrangements, "rationalization cartels" (agreements designed to promote technological progress or increase the efficiency of the members) and "structural crisis" cartels (agreements designed to prevent the loss of

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19. For a discussion of the development of the GWB, and the particular influence of the ordoliberal school in that process, see GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 233-61. On the principles of Ordoliberalism, see also WOLFGANG FIKENTSCHER, WIRTSCHAFTSRECHT, BAND II 42-50 (1983); NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 112-14 (outlining Böhm's work and its connection to economic theory).

20. *See* NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 114-15; GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 245-46.

21. *See* Gerber, *Constitutionalizing the Economy, supra* note 18, at 43 (stating that "complete competition" in the ordoliberal sense meant "competition in which no firm in a market has power to coerce other firms in that market."); *see also id.* at 43 n.86 (distinguishing "complete competition" from "perfect competition").

22. *See* NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 140-58. On Böhm in particular, see KNUT WOLFGANG NÖRR, AN DER WIEGE DEUTSCHER IDENTITÄT NACH 1945: FRANZ BÖHM ZWISCHEN ORDO UND LIBERALISMUS (1993) [hereinafter NÖRR, BÖHM].

23. *See* JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW 7 (1986); *see also* Gerber, *Constitutionalizing the Economy, supra* note 18, at 64 ("U.S. ideas have been absorbed into an intellectual tradition with its own dynamics—they did not provide the structures of that tradition.").

24. Germany's Gesetz Gegen Wettbewerbsbeschränkungen (Law Against Restraints of Competition) was enacted on July 27, 1957, shortly after the signing of the Treaty of Rome, and went into effect on January 1, 1958. Gesetz Gegen Wettbewerbsbeschränkungen, v.27.7.1957 (BGBl I S.1081), as amended by Acts of Sept. 15, 1965, Aug. 3, 1973, June 28, 1976, April 26, 1980, December 22, 1989, and August 26, 1998 [hereinafter GWB].

25. *See* GWB § 1 (prohibiting "agreements between competing undertakings . . . which have as their object or effect the prevention, restriction or distortion of competition."); MARTIN HEIDENHAIN ET AL., GERMAN ANTITRUST LAW 107 (1999). One historian describes the GWB as "profoundly influenced by the American experience," and cites its development as an example of how "economic integration . . . concentrated on . . . those elements [of the German industrial system] which were deemed to be dysfunctional to the multilateral 'Open Door' world trading system and to the dominant American model." Berghahn, *Pax Americana*, *supra* note 16, at 85, 97.

business due to short-term declines in demand).[26] The inclusion of such provisions reflected the political compromise reached between proponents of a more U.S.-modeled system and supporters of cartels as a sometimes-necessary institution of the German economy.[27] More generally, the GWB has a different substantive focus than U.S. antitrust law: while U.S. law prohibits firms from deliberately attaining (or attempting to attain) monopolistic power, the GWB condemns only the abusive use of market-dominant power.[28] In addition, the systems have substantially different theoretical orientations. U.S. antitrust law constitutes a set of justiciable rules enforced in the courts as well as by administrative agencies; the GWB, on the other hand, grants the Federal Cartel Office discretionary authority to regulate conduct that amounts to abuse of market-dominant power. [29] These differences highlight the extent to which the GWB is not a mere transplantation of U.S. law, but an expression of the German competition philosophy built on the ordoliberal foundation.[30]

The legislative process, and the GWB itself, thus bear witness to the tension between U.S. influence and local control in the transition from occupation law to the domestic competition regime, and reflect the ultimate resolution of that tension in a way that absorbed but also diluted U.S. influence. That resolution took years to achieve: whatever the mix of motivations underlying early occupation law, the first steps taken toward decartelization and deconcentration of the German economy understandably generated lasting hostility toward the United States. Some industry representatives criticized early U.S. policy as an attempt to de-industrialize the entire economy,[31] some politicians attacked it as a step toward the re-destruction of the country, [32] and some commentators cast it as a wholesale imposition of victor's justice.[33] These reactions carried over into opposition to the continued influence of U.S. policy in the subsequent drafting of the GWB, and to the perceived importation of laws that were inconsistent

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26. *See* MURACH-BRAND, *supra* note 17, at 234-49 (Appendix C) (including excerpts of a 1952 letter from the Office of the U.S. High Commissioner for Germany to the Secretary of State, evaluating these exemptions).

27. *See* Gerber, *Constitutionalizing the Economy*, *supra* note 18, at 65-66.

28. *See generally* CORWIN D. EDWARDS, AMERICAN AND GERMAN POLICY TOWARD CONDUCT BY POWERFUL ENTERPRISES: A COMPARISON (1977).

29. *Id. See also* GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 278 (describing the approach as an "administrative-juridical mix").

30. *See* Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 217 (1998) (noting that the Freiburg School "provided for the philosophy of German economic recovery after World War II in general, and German antitrust and its Law Against Trade Restraints of 1958 in particular.").

31. *See generally* BERGHAHN, AMERICANISATION, *supra* note 15, at 80-84 (analyzing these views).

32. *See* HALEY, *supra* note 12, at 4 (noting that with the exception of Ludwig Erhard, German political leaders in the post-war period viewed these laws not as a development that would be positive for the nation's economy but as "antithetical to economic recovery and growth."); *see also* Stedman, *supra* note 12, at 450-51.

33. *See, e.g.*, Oskar Klug, *Die Problematik der amtlichen deutschen Kartellpolitik, in* KARTELLE IN DER WIRKLICHKEIT: FESTSCHRIFT FÜR MAX METZNER 153, 155 (Ludwig Kastl ed., 1963) (criticizing Law 56 and describing it in part as "antideutsch").

with the country's own regulatory experience, economic practices and policies.[34] The ultimate emergence of a system incorporating indigenous elements of competition enforcement policy was therefore a successful compromise by which Germany crafted a national identity against the backdrop of U.S. influence. As one historian describes it:

> As is well known, the history of the Federal Republic began under foreign auspices, under the patronage of the Western Occupying Forces. But from the beginning, there flowed into this history so much of indigenous substance, indigenous convictions and values, so much was based on indigenous contributions, that the new governmental structure, if initially under the caveat of its provisional status, was soon widely accepted by the population and won its approval....[I]n other words, an identity arises....[35]

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Like the transition from occupation law to national law, the regionalization of competition law exposed Germany's enforcement regime to external influence. Regionalization began with the development of the European Coal and Steel Community ("ECSC"), a process which raised some of the same issues regarding Germany's military and economic situation that had been raised in the early post-war period. One of the goals of the ECSC was to continue the deconcentration of the German steel industry, begun under British occupation law,[36] by bringing the production of the Ruhrgebiet under some level of external control. More broadly, as one of the architects of the Treaty of Paris later expressed, European integration was viewed as "the real way to solve the German problem" because "[she] will have defended herself against an individualism that too rapidly takes the form of nationalism, whose effects we know."[37] As during the occupation period, U.S. influence in forming cartel policy was pronounced. Concerns on the part of U.S. policymakers that a regional coal and steel union would simply function as a big cartel led them to remain involved—if often behind the scenes—during the region's formative period.[38] The United

34. *See* BERGHAHN, AMERICANISATION, *supra* note 15, at 155-81 (describing the legislative planning process). Berghahn recounts in particular the resistance of German industry to "American-style capitalism." *Id.*

35. NÖRR, BÖHM, *supra* note 22, at 5. *See also* NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 3, 139 (noting the contribution of ordoliberalism's legal aspects to the formation of an identity for the new German republic).

36. *See* DJELIC, *supra* note 11, at 165.

37. *See* MAYNE, *supra* note 13, at 251 (quoting a 1956 letter by Paul-Henri Spaak, one of the architects of the European Coal and Steel Community, in which he outlined some of his reasons for supporting European integration: "First of all, this I believe is the real way to solve the German problem . . . . A Germany which is integrated in European entities, and, through them, in the Atlantic Pact, will have defended herself against an individualism that too rapidly takes the form of nationalism, whose effects we know, and at the same time against the temptation to approach the Russians by herself in an attempt to solve with them, directly, the problems in dispute, without taking account of the general interests of the West . . . ").

38. *See* BERGHAHN, AMERICANISATION, *supra* note 15, at 134-54 (describing the United

States supported a version of the ECSC's constitutive treaty more restrictive of horizontal agreements than various competing proposals, including Germany's, and the treaty incorporated general principles of free competition more prevalent at the time in the United States than in European countries.[39] Nevertheless, the competition provisions of the ECSC did not mirror U.S. law precisely. They contemplated significant central control by the High Authority; in addition, due to the need for enhanced production of materials necessary for reconstruction, the High Authority retained both the power to intervene in emergency situations and the authority to approve horizontal agreements when necessary to ensure productivity.[40] As in the development of Germany's domestic law, then, U.S. influence was present but not determinative.[41]

In subsequent stages of European integration, German influence played an increasingly substantial role in the development of competition policy. This was partly due to the fact that at the time, of the member states, Germany had the most substantial experience with competition regulation.[42] Its Federal Cartel Office had been actively involved in enforcement (although it was at that stage still enforcing Allied law); in addition, parallel with the development of the treaty forming the European Community (E.C. Treaty), Germany was drafting the GWB.[43] Thus, while the architects of regional law recognized the need to suppress the national policies of individual states in the service of regional goals,[44] it was also inevitable that the German experience would influence the emerging law.[45] Indeed, Germans were active participants in the formation of the European Community, and proponents of ordoliberalism, in particular, promoted that theory's principles during the formation of European economic institutions.[46]

States' use of its leverage in Europe to influence the treaty's provisions, as well as the feeling at the time of some German commentators that the ECSC had its roots in American ideals and the protection of American interests rather than in European ideals).

39. *Id.* at 134, 140.

40. *Id.* at 144-45. Berghahn examines the "interventionist powers" of the High Authority, concluding that "it is important to emphasise that the anti-cartel clauses of the ECSC treaty were not an exact replica of the American model." *Id.*

41. *See* Sullivan & Fikentscher, *supra* note 30, at 226-27 (discussing this blend of influences).

42. *See* D.G. GOYDER, EC COMPETITION LAW 28 (4th ed. 2003).

43. *See supra* notes 19-30 and accompanying text.

44. *See, e.g.*, Eberhard Günther, *Europäische und Nationale Wettbewerbspolitik*, *in* WIRTSCHAFTSORDNUNG UND RECHTSORDNUNG: FESTSCHRIFT ZUM 70. GEBURTSTAG VON FRANZ BÖHM 279, 318 (Helmut Coing et al. eds., 1965) (noting that the effectuation of European competition policy would depend on the willingness of member states to subordinate their own interests to those of the community).

45. *See, e.g.*, Eberhard Günther, *Kann das deutsche Kartellgesetz Vorbild einer Wettbewerbsregelung im Gemeinsamen Markt sein?*, *in* WIRTSCHAFTS- UND FINANZPOLITIK IM GEMEINSAMEN MARKT 101, 104 (Friedrich-Ebert-Stiftung. ed., 1963); *see also id.* at 115-17 (concluding that of the competition laws of the six member states, Germany's was the best suited to influence the developing European law); GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 332 (noting that "German ideas [had] a natural 'headstart'" in serving as a source of experience within Europe).

46. *See* Gerber, *Constitutionalizing the Economy*, *supra* note 18, at 71 (describing European

Of course, the German experience and German theory were not the only forces shaping the developing European regime, and in the end the E.C. Treaty's competition articles reflected a blend of various influences. These include the influence of the United States: Articles 85 and 86[47] in many respects resembled Sections 1 and 2 of the U.S. Sherman Act,[48] and were perceived at the time as resting at least in part on the U.S. model. Despite this substantive similarity, however, the E.C. competition regime had from its inception a different rationale than the U.S. system. As part of the treaty establishing a common market, Articles 85 and 86 were intended to protect not only competition itself, but also regional integration policy.[49] In addition, through Article 85(3)'s review and exemption mechanism, the Article established an administrative apparatus for the review of all arrangements and practices affecting free trade.[50] In this focus on administrative control, it is quite unlike the Sherman Act's conception of judicially enforceable law that prohibits outright certain arrangements.[51] Within this architecture, one can trace certain aspects of the German regulatory approach, including in particular the focus on abuse of market-dominant positions rather than the creation of monopolistic power.[52] The intellectual foundation of German antitrust law was therefore present, though tempered, in the regional approach. While a great degree of Germany's regulatory authority shifted to the regional level, then, the national identity reflected in Germany's domestic regime survived the process of regionalization.

B.

Defining the role of private antitrust litigation in the enforcement of competition law is an exercise that reveals Germany's preservation of a unique competition culture, as well as its ambivalence toward U.S. influence. As noted

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unification as "the main vehicle for disseminating the ordoliberal version of neo-liberalism outside of Germany"). *See also* GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 263-65 (describing the involvement of Walter Hallstein, Hans von der Groeben and Alfred Müller-Armack in crafting European policy).

47. In its historical discussion, this paper uses the original numbering of these provisions; they have subsequently been re-numbered Articles 81 and 82, respectively.

48. 15 U.S.C. §§ 1, 2 (2004).

49. *See* Barry E. Hawk, *Antitrust in the EEC—The First Decade,* 41 FORDHAM L. REV. 229, 231-32 (1972).

50. Julian M. Joshua & Sarah Jordan, *Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law*, 24 NW J. INT'L L. & BUS. 647, 650 (2004).

51. *Id.* at 657. *See also* HALEY, *supra* note 12, at 50; David J. Gerber, *Europe and the Globalization of Antitrust Law*, 14 CONN. J. INT'L L. 15, 25 (1999) [hereinafter Gerber, *Europe and Globalization*] ("While U.S. antitrust law operates primarily according to a judicial model, European systems place primary responsibility for enforcing competition law in the hands of administrators . . . [who] often operate within legal frameworks and according to legal constraints that are very different from those in the United States.").

52. *See* Ernst-Joachim Mestmäcker, DIE VERMITTLUNG VON EUROPÄISCHEM UND NATIONALEM RECHT IM SYSTEM UNVERFÄLSCHTEN WETTBEWERBS 171 (1969); HALEY, *supra* note 12, at 50 (concluding that "[t]he result . . . was to extend both American and ordo-liberal influence beyond German borders as European institutions and competition law have expanded.").

above, the German system is control-based and assigns enforcement responsibility to government administrators. Although the GWB does permit private actions based on certain violations of competition law,[53] the concept of *Schutznormen* (protective standards) greatly limits that right. If the provision in question is intended to protect the general public, rather than a specific individual interest, it cannot be the basis of a private remedial action.[54] Thus, a court may award private damages in cases of "targeted infringement," but not when the anticompetitive conduct in question affects an entire market.[55] In sum, although the GWB technically permits private antitrust litigation, it has never been a substantial component of competition law enforcement in Germany. Relatedly, Germany's civil justice system does not incorporate the procedural rules that would facilitate meaningful private enforcement. Mechanisms that are central to the success of private attorney general actions in the United States, including broad pre-trial discovery, contingency fees and class actions, in Germany appear not only undesirable, but often as contrary to public policy.[56]

While differences between civil justice systems often create problems in other types of international litigation,[57] they have particular salience in antitrust litigation. The post-war period brought increasing conflicts between Europe and the United States regarding the extraterritorial application of U.S. antitrust law. In 1945 the Second Circuit recognized effects-based jurisdiction, holding in the *Alcoa* case that U.S. antitrust law could be applied to conduct taking place abroad as long as that conduct caused harmful effects within the United States.[58] Since that decision, U.S. courts have been active in using domestic law to counter foreign anticompetitive conduct.[59] While other countries, including Germany, [60] also recognize effects-based jurisdiction, it is not used frequently

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53. Section 33 provides in part that "[w]hoever violates a provision of this Act or a decision taken by the cartel authority shall, if such provision or decision serves to protect another, be obliged vis-à-vis the other to refrain from such conduct; if the violating party acted willfully or negligently, it shall also be liable for the damages arising from the violation." GWB § 33 (English version available in HEIDENHAIN ET AL., *supra* note 25, at 147).

54. RAINER BECHTOLD, KARTELLGESETZ, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 348-49 (2002). The reference in section 33 to the "protect[ion of] another" is interpreted in accordance with the general principle stated in § 823(2) of the German Civil Code, which allows damages stemming from the infringement of a statute "intended for the protection of others." For comparative analysis of the conditions under which U.S. law recognizes private rights of action implied from regulatory statutes, *see* RICHARD M. BUXBAUM, DIE PRIVATE KLAGE ALS MITTEL ZUR DURCHSETZUNG WIRTSCHAFTSPOLITISCHER RECHTSNORMEN 30-36 (Juristische Studiengesellschaft Karlsruhe, No. 105, 1972).

55. This limitation was relevant in litigation arising from the vitamins cartel itself. *See infra* note 122 and accompanying text.

56. *See generally* HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 371-74 (2002).

57. Products liability litigation is one such area.

58. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

59. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 584-607 (1996).

60. *See* GWB § 130(2): "This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." HEIDENHAIN ET AL., *supra* note 25, at 259. For an early examination of extraterritoriality

outside the United States.[61] Moreover, antitrust litigation in the United States carries with it the possibility of treble damages awards, the availability of which exacerbates disputes over divergent procedural rules.[62] Some countries have responded to this conflict by adopting blocking statutes designed to limit the effect of U.S. litigation within their borders, and sometimes to recover any amounts paid by their nationals to satisfy multiple damage awards.[63] While Germany is not among them, its courts have applied Section 328 of the Civil Procedure Code to limit the effect of U.S. judgments in such cases. That section provides in part that recognition of a foreign judgment may be denied if it would "lea[d] to a result that is irreconcilable with material principles of German law, especially if recognition is irreconcilable with constitutional rights."[64] Courts have invoked this provision to deny recognition of multiple damages awards in antitrust cases, on the basis that under German law civil awards must be purely compensatory.[65]

As the preceding paragraph indicates, Germany is not alone in rejecting the U.S. civil litigation model and resisting the application of U.S. procedural and remedial rules in cross-border litigation. But because there is a legal cultural context for this dispute as well, the German position on this transatlantic debate relates to the country's particular legal history. One commentator has identified the continuity of the American legal culture, as compared to the disrupted legal history in Europe, as one of the sources of the perennial *Justizkonflikt* between Europe and the United States.[66] He argues that due to political events, no continental European system[67]—particularly not the German system—was able to maintain and perpetuate its "consciousness of legal cultural identity."[68] In his view, therefore, U.S. judges do not, and perhaps might not be expected to, respect the European legal practice as a consolidated whole; in short, the European legal culture does not stand on equal footing historically with the U.S. culture.[69]

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of anti-cartel law in particular, *see generally* ECKARD REHBINDER, EXTRATERRITORIALE WIRKUNGEN DES DEUTSCHEN KARTELLRECHTS (1965).

61. For a discussion of the extraterritoriality of E.U. competition law, see GOYDER, *supra* note 42, at 498-502. *See also* JÜRGEN BASEDOW, LIMITS AND CONTROL OF COMPETITION WITH A VIEW TO INTERNATIONAL HARMONIZATION 27-29 (2002) for a discussion of effects jurisdiction in various national regimes.

62. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 150-66 (1996) (describing some of the high-profile cases in this area).

63. *See* BORN, *supra* note 59, at 586-87 (discussing blocking statutes).

64. Zivilprozebordnung (Code of Civil Procedure) § 328(1)(4), *translated in* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 536 (2004).

65. *See* SCHACK, *supra* note 56, at 373 (noting the continuing debate about this question); Joachim Zekoll & Nils Rahlf, *US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public,* JURISTENZEITUNG 8/1999 384 (1999).

66. DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA 36-37 (Walther J. Habscheid ed., 1985) (contribution of Rolf Stürner).

67. *Id.* at 37 (noting the possible exception of Switzerland).

68. *Id.* at 61.

69. *Id.* at 37-38. Professor Stürner refers in his English summary to this partly as a matter of "historical self-confidence." *Id.* at 62. *But see* MURRAY & STÜRNER, *supra* note 64, at 580-81 (suggesting that the "[s]uspicion of German institutions" that may have colored U.S. views of German

On this view, the conflict over civil justice systems—like the conflict over competition rules themselves—touches on the historical context of particular relationships within the international community.

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World War II exposed Germany's economic law framework to forces beyond its sovereign control. The modern German competition enforcement culture was therefore shaped by a process of influence and resistance. With respect to the transatlantic relationship, in particular, it is possible to construct competing narratives of this process. Analyzing modern German competition law, some scholars tell a story of an indigenous theory defeating the attempted transplantation of a foreign system;[70] others, a story of the United States' co-optation of a local group in order to achieve its own geopolitical aims.[71] From either reading, though, two conclusions emerge. First, Germany has retained, to a substantial degree, a distinct national regulatory culture. Second, the German experience in shaping this culture—in navigating shifting regional and global political currents in order to form domestic competition policy—involved both the absorption of and partial resistance to external influence, particularly that of the United States.[72]

III.

The direction of global competition law and policy is not yet clear. Policymakers and commentators disagree about the means by which to make the transition from a system based on the coordination of diverse national regimes to one based on convergence or harmonization of national laws.[73] The past five

civil procedure in the past should be diminished by now).

70. *See, e.g.*, NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8; GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 340; HALEY, *supra* note 12, at 39 (noting that "the Germans, led by Ludwig Erhard . . . seized the moment to provide their country with an authentically German approach to competition policy.").

71. *See, e.g.*, DJELIC, *supra* note 11, at 108 (describing the process as one in which U.S. authorities co-opted the Freiburg School, only after which the school "gained a legitimacy of [its] own and economic reforms were, in time, appropriated locally."); *see also* Reinhard Neebe, *Optionen westdeutscher Außenwirtschaftspolitik 1949 – 1953*, *in* VOM MARSHALLPLAN ZUR EWG: DIE EINGLIEDERUNG DER BUNDESREPUBLIK DEUTSCHLAND IN DIE WESTLICHE WELT 163, 165 (Ludolf Herbst et al. eds., 1990) (outlining the U.S. foreign policy goals regarding Germany).

72. This is especially true because theories regarding the Americanization of Germany—including in the economic arena, but more broadly as well—have become such a focal point for thinking about German society. *See* Michael Ermarth, *The German Talks Back: Heinrich Hauser and German Attitudes Toward Americanization After World War II*, *in* ERMARTH, *supra* note 16, at 101, 103 ("Whether employed with favor, disfavor or nonpartisan neutrality, Americanization has been a defining *topos* for Germany in the twentieth century.").

73. *See* ANTITRUST DIVISION, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (2000), at www.usdoj.gov/atr/icpac/finalreport.htm; *see also* THE FUTURE OF TRANSNATIONAL ANTITRUST—FROM COMPARATIVE TO COMMON COMPETITION LAW (Josef Drexl ed., 2003) (a recent collection of essays on these issues).

years have brought one development, however, that is particularly relevant to the transatlantic debate over these questions: an enlargement of the role of private antitrust litigation within the panoply of enforcement mechanisms. This section discusses two forces—one regional, one American—behind this development, and analyzes the German reaction to them.

A.

A recent Council Regulation has implemented long-planned changes to modernize the enforcement of competition law within the European Union.[74] The Regulation's goal is to decentralize regulatory authority within the E.U.'s competition law framework. This shift was deemed necessary to achieve a better allocation of enforcement resources at the Commission level, largely by reducing the administrative burden associated with the existing notification and exemption procedure.[75] It will permit the Commission to focus on larger policy questions and on pursuing the most economically damaging violations, in particular those involving cartel activity.[76]

Under the previous regime, national authorities were permitted to apply Article 81(1) of the E.C. Treaty—that is, to conclude that an agreement was prohibited as a restraint of trade.[77] However, only the Commission had the authority to grant exemptions to notified agreements under Article 81(3);[78] therefore, the administration of the *ex ante* notification and exemption procedure rested entirely at the Commission level. The Regulation re-allocates this authority, making all of Article 81, including Article 81(3), directly applicable in member states. It thereby eliminates the Commission's exemption monopoly and replaces the system of notification and authorization with an *ex post* enforcement system in which both the Commission and national authorities will play a role.[79]

One anticipated concomitant of the move to an *ex post* system of competition enforcement is an increase in private antitrust litigation. As then-

74. Council Regulation, *supra* note 4.

75. Claus-Dieter Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 COMMON MARKET L. REV. 537, 541 (2000) [hereinafter Ehlermann, *Modernisation*] (describing the then-draft Regulation).

76. *See generally* White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 COM (1999) 101, Apr. 1999 [hereinafter White Paper] ¶¶ 7, 8, 45 (noting specifically the need for stronger cartel policy within the enlarged Union). *See also* Walter van Gerven, *Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts*, *in* EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 53 (2003), 70-73 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003). Van Gerven concludes that "the overall effect of the [then-]draft Regulation should be to enable the Commission to concentrate on its policy function and to limit its involvement in the enforcement of competition rules by following up complaints, or acting on its own initiative, only in matters which have a clear Community interest." *Id.* at 72.

77. Council Regulation (EEC) No. 17/62, OJ[1962] L 13/204, Art. 9(3).

78. *Id.* at art. 9(1).

79. *See generally* Ehlermann, *Modernisation*, *supra* note 75, at 586-88; Philip Lowe, *Current Issues of E.U. Competition Law: The New Competition Enforcement Regime*, 24 NW. J. INT'L L. & BUS. 567 (2004).

Commissioner Mario Monti stated, "[I]t is our aim that undertakings and individuals should increasingly feel encouraged to make use of private action before national courts in order to defend the subjective rights conferred on them by E.C. competition rules."[80] Despite longstanding recognition of the right of parties harmed by violations of competition law to bring private actions under Articles 81 and 82,[81] private enforcement has to date played only a minor role in the E.U. The Commission's monopoly of the power to declare exemptions under Article 81(3) meant that a defendant in judicial proceedings could stop those proceedings simply by initiating a procedure before the Commission.[82] Under the Regulation, however, national courts may apply Article 81 directly in its entirety. They will therefore retain jurisdiction in such cases and be able to provide prompt civil enforcement against restrictive agreements.[83] In addition, the Regulation explicitly requires the competition authorities and national courts of member states to apply Articles 81 and 82 of the E.C. Treaty when they consider conduct that falls within the scope of those articles; in such cases, member states may no longer rely on national law alone.[84] This change too will facilitate private enforcement, as the availability of damages in private actions has been defended more strongly at the regional level than it has been in most member states. Indeed, recent jurisprudence of the European Court of Justice has specifically reinforced the availability of damages in private actions under Article 81. In the 1999 case of *Courage v. Crehan*, the Court held that even a party to a contract violating Article 81 could sue its counterparty for damages.[85] The decision reflected a commitment to realizing the "full effectiveness" of Article 81, recognizing the importance of private remedies in serving that goal.[86]

It is true that the Regulation, standing alone, cannot (and is not designed to) establish a full-scale private attorney general-type mechanism. The national

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80. Mario Monti, *Effective Private Enforcement of EC Antitrust Law*, *in* EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 3 (2003). For general discussion of these developments, see Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the E.U. Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004).

81. *See, e.g.*, Belgische Radio en Televise v. SV Sabam, Case 127/73 (No. 1), 1974 E.C.R. 51 (1974); *see also* [1999] OJ C39/6 (discussing coordination between the national courts of member states and the Commission in this regard).

82. *See also* White Paper, *supra* note 76, ¶ 100; *see generally* Wouter P.J. Wils, *The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17*, 24 FORDHAM INT'L L.J. 1655 (2001) [hereinafter Wils, *Modernisation*].

83. *See* White Paper, *supra* note 76, at ¶ 100.

84. Council Regulation, *supra* note 4, art. 3(1); discussed in Lowe, *supra* note 79, at 568-69. Pursuant to the older Walt Wilhelm case, national competition law and E.U. competition law were viewed as creating two independent barriers to anticompetitive conduct; more stringent national law could therefore be applied unless the Commission had granted an exemption to the conduct concerned.

85. Case C-453/99, Courage Ltd. v. Bernard Crehan, 2001 E.C.R. 1 (Eng. C.A. 1999). The decision made an exception for cases in which the plaintiff bore "significant responsibility" for the violation in question. *Id.*

86. *See* GOYDER, *supra* note 42, at 468-69; articles collected in EUROPEAN COMPETITION LAW ANNUAL 2001, *supra* note 76.

laws of E.U. member states continue to govern civil litigation procedure, often presenting substantial barriers to private enforcement.[87] Most member jurisdictions, for instance, do not permit the sort of evidentiary discovery that would enable a plaintiff to meet the burden of establishing the facts leading to a finding of prohibited behavior.[88] In addition, they do not recognize various procedural mechanisms, such as class action suits and contingent fee arrangements, that would create the necessary incentives for private litigation. Nevertheless, the drafters of the Regulation stated clearly their objective to promote private enforcement, and therefore to seek the additional procedural reforms necessary "in order to instil real life" into the private right of action in Europe.[89] These reforms will be substantial, and indicate a significant reorientation in competition enforcement within the E.U.

German competition agencies, and many commentators, initially responded[90] with strong criticism of the change in enforcement philosophy reflected in the Regulation.[91] Some of these objections addressed not the new approach per se, but rather the process the Commission chose—challenging the Regulation's compatibility with the Rome Treaty, for instance, and stressing the need for uniform competition enforcement within the E.U.[92] Others, however, indicated a resistance to the cultural change of course that the new enforcement model embodied.

Perhaps the most negative statement was made in the 1999 report of the German *Monopolkommission* (Monopoly Commission), responding to the White Paper in which the European Commission had first proposed the modernization plan.[93] The Monopoly Commission criticized the move to *ex post* enforcement, not only because it disagreed with the change as a matter of competition pol-

87. Wouter P.J. Wils, *Does the Effective Enforcement of Articles 21 & 82 EC Require Not Only Fines on Undertakings, But Also Individual Penalties and in Particular Imprisonment?*, *in* EUROPEAN COMPETITION LAW ANNUAL 2001 411-52 (2003).

88. *See* ERNST-JOACHIM MESTMÄCKER, WIRTSCHAFT UND VERFASSUNG IN DER EUROPÄISCHEN UNION 237 (2003).

89. Mario Monti, *supra* note 80, at 5. The EC also sponsored a survey of member states regarding their capacity for private enforcement actions, further indicating a desire to move in that direction. *See* STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES, *available at* http://www.europa.eu.int/comm./competition/antitrust.

90. *See* discussion *infra* at notes 104-08 and accompanying text (discussing the subsequent moderation of this response).

91. *See, e.g.*, ERNST-JOACHIM MESTMÄCKER, *supra* note 88, at 228-46; Arved Deringer, *Stellungnahme zum Weissbuch der Europäische Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)*, 1/2000 EuZW 5 (2000); *see also* Karsten Schmidt, *"Privatisierung" des Europakartellrecht—Aufgaben, Verantwortung und Chancen der Privatrechtspraxis nach der VO Nr. 1/2003*, 4/2004 Zeitschrift für Europäisches Privatrecht 881, 881 (2004) (summarizing by noting that the Regulation was not welcomed by the Germans).

92. MESTMÄCKER, *supra* note 88, at 228-35. *See also* Ehlermann, *Modernisation*, *supra* note 75, at 559 (summarizing arguments that because the Rome Treaty requires the exercise of administrative discretion, direct effect in member states is improper).

93. *Kartellpolitische Wende in der Europäischen Union?*, 28 SONDERGUTACHTEN DER MONOPOLKOMMISSION ZUM WEIßBUCH DER KOMMISSION (1999), *at* http://www.monopolkommission/de/sg_28/text_d.htm.

icy,[94] but also on the grounds that the proposed system could not be instituted without amending the E.C. Treaty.[95] To some degree, it cast its objections as opposition to the U.S. enforcement model. The report notes that the Commission's change in direction "may have been influenced by U.S. antitrust law,"[96] and at various points outlines broad differences between the U.S. and E.U. economic and legal landscapes that would make a transplant of the U.S. system unviable.[97] In some respects, these passages quite clearly echo the debates over the drafting of the GWB, in which recognition of the particular historical and economic role of cartels in Germany was reflected in the exceptions permitting various cartel arrangements.[98]

The Monopoly Commission directed some of its strongest criticism at the move toward more substantial reliance on private actions.[99] The report outlines the German preference for administrative control and discomfort with the various civil and criminal penalties that private enforcement would require.[100] It discusses the aspects of U.S.-style civil procedure that would be necessary to effective private enforcement, noting that many of them, such as pre-trial discovery and contingent fee arrangements, would counter German conceptions of civil justice.[101] The report also argues that the more entrepreneurial role played by attorneys in U.S. private litigation is inconsistent with the German conception of an attorney's role.[102] In some respects, the report states, the changes that would flow from the modernization would violate German public policy: for instance, the institution of multiple damages awards (which it refers to throughout as "punitive damages").[103]

Following the Council's adoption of the Regulation in 2002—and, perhaps, acceptance of the inevitable—German resistance to these changes faded.[104] In 2001, the Monopoly Commission, under largely new membership, submitted a

94. *Id.* at ¶¶ 22-32.

95. *Id.* at ¶¶ 14-18 (arguing that the proposed system would both violate the competition articles of the EC Treaty and conflict with jurisprudence of the European Court of Justice regarding the application of Article 81(1)). In this section, the report also warned of potential conflict with the German Constitution under the German Constitutional Court's Maastricht decisions. *Id.* at ¶ 19.

96. *Id.* at ¶ 36. *See also* Ehlermann, *supra* note 75, at 586-88 (describing criticism of the White Paper for its apparent reliance on the U.S. model).

97. *Kartellpolitische Wende, supra* note 93, at ¶¶ 26, 37. The report discusses both regulatory differences (for instance, the U.S. rule of reason approach) and economic differences (for instance, the linkages between major companies and between those companies and their banks that enable cartel formation in Europe).

98. *See* discussion *supra* at footnotes 26-27 and accompanying text.

99. *Kartellpolitische Wende, supra* note 93, at ¶¶ 36-40.

100. *Id.* at ¶ 37.

101. *Id.* at ¶ 39. *See also* Arved Deringer, *Reform der Durchführungsverordnung zu den Art. 81 und 82 des EG-Vertrages*, 2/2001 EuR 2001, 306, 306 (stating that drawing from the U.S. system would be inappropriate, as that system is "supported by an entire set of procedural rules unknown to [Germany].").

102. *Kartellpolitische Wende, supra* note 93, at ¶ 39 (stating that a German attorney is seen as an agent for the administration of justice and not as a profit-seeking entrepreneur).

103. *Id.* at ¶ 38.

104. *See* Schmidt, *supra* note 91, at 882 (noting that the reforms are moving beyond the German objections).

second report that focused less on challenging the modernization program and more on identifying and describing potential difficulties that would arise in its implementation.[105] Germany prepared the necessary amendments to its own competition law, bringing the GWB into conformity with the regional approach.[106] In 2004, the Monopoly Commission published an additional report supporting the GWB revision, and in some respects calling for even more substantial change—including the introduction of double damages—in furtherance of the new regime.[107] While debate remains over the extent to which private actions will play a role,[108] German regulators and commentators seem to have accepted the shift in the enforcement culture within Europe.

B.

The second challenge to Germany's system of competition enforcement came from a series of U.S. cases addressing the application of domestic antitrust law to foreign conduct.[109] The decisions in these cases generated a split among the circuit courts, which then reached the U.S. Supreme Court in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*[110] This case arose out of the activities of an in-

105. *Folgeprobleme der europäischen Kartellverfahrensreform*, Sondergutachten der Monopolkommission, 2001. This report details further the aspects of material and procedural German law that provide local alternatives for private actions, and suggests that further inspection of the procedural framework for private actions is necessary in order to ensure the effective strengthening of that form of enforcement. *Id.* at ¶ 66. It also notes that greater incentives for private plaintiffs will also likely be necessary—which to date have been permitted in Germany only in very narrow circumstances (outside antitrust). *Id.* at ¶¶ 72-73.

106. Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BR-Drucksache 15/3640, August 12, 2004. Draft Section 33, for instance, clarifies that private claims for damages may be asserted even when the alleged violation was not targeted at a particular entity. *See also* Karl Wach et al., *Germany Report*, *available at* http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports/germany_en.pdf (describing the draft legislation); Rolf Hempel, *Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle*, 4/2004 WUW 362 (2004) (same).

107. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*, March 2004. In particular, *see* ¶¶ 75-83 (discussing multiple damages as an incentive to private suits). For commentary supporting the introduction of multiple damages, *see also* Jürgen Basedow, *Private Enforcement of Article 81 EC: A German View*, *in* EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 143 (2003) ("If the [European] Commission wants to use private initiative for the purposes of enforcing competition laws in the public interest, it should consider the US model of a private attorney general who is spurred to enforce the law by the expectation of treble damages."); JÜRGEN BASEDOW, WELTKARTELLRECHT 100 (1998).

108. *See* Karsten Schmidt, *Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedures*, *in* EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 253, 256 (2003) ("In my view, direct applicability of Article 81(3) EC will not bring about a strengthening of private enforcement, but rather the contrary."); Hempel, *supra* note 106, at 368-69.

109. Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003); Den Norske Stats Oljeselskap As v. Heeremac V.O.F., 241 F.3d 420 (5th Cir. 2001); Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002).

110. 124 S. Ct. 2359 (2004). For a discussion of the case, see Hannah L. Buxbaum, *National Courts, Global Cartels: F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 5 GERMAN L. J. 1095 (2004) [hereinafter Buxbaum, *National Courts, Global Cartels*].

ternational price-fixing cartel in the vitamin industry. Unlike traditional extraterritoriality cases, in which domestic law is applied to foreign conduct that has effect locally, *Empagran* contemplated jurisdiction over foreign conduct that caused *foreign* harm: the plaintiffs were foreign purchasers who had suffered damages in purchase transactions taking place outside the United States.[111] Many foreign governments were concerned that the availability of U.S. actions in such cases would threaten their own enforcement regimes, as foreign plaintiffs would choose to sue in the United States rather than under local law in their home countries.[112]

Germany filed an amicus brief in the case, together with Belgium, in which it argued strenuously against the exercise of extraterritorial jurisdiction in contravention of foreign competition enforcement rules.[113] The brief argues primarily for limiting the exercise of prescriptive jurisdiction by national courts in order to recognize the competing interests of sovereign states within the international community. Thus, Germany's major objection is that permitting litigation in U.S. courts would result in "the encroachment of other countries' laws," including Germany's, regarding competition law enforcement.[114] If foreign civil litigants could bring lawsuits in the United States, the brief reasoned, they would circumvent the remedial schemes established in their home jurisdictions and in effect override the regulatory interests of other sovereign states.[115] In addition, of course, foreign defendants would be increasingly subject to litigation in U.S. fora, with its associated burdens.[116]

The brief suggests that respect for foreign sovereignty alone is sufficient basis for denying jurisdiction.[117] However, it strengthens its argument by emphasizing the differences between German and U.S. competition law. Because German and U.S. law agreed on the illegality of the conduct of the vitamins cartel, it is issues of enforcement philosophy that here differentiate them. For in-

111. *Hoffman-LaRoche*, 124 S. Ct. at 2364. The theory for extending U.S. jurisdiction to such claims rested on connections alleged between the harm caused by the cartel in foreign countries and the harm caused within the United States. The case has been remanded for consideration of that issue. *See* Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 388 F.3d 337 (D.C. Cir. 2004).

112. In addition to Germany and Belgium, Canada, Ireland, Japan, the Netherlands and the United Kingdom filed amicus briefs.

113. Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A., 124 S. Court. 2359 (2004) (No. 03-724), 2004 WL 226388 [hereinafter Brief]. *See also* Otto Graf Lambsdorff, *Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft*, 7/8 WIRTSCHAFT UND WETTBEWERB 710 (2003).

114. Brief, *supra* note 113, at *2. Germany also objected to the potential application of treble damages awards in lawsuits against German companies (*Id.* at *2, *28) and to the possibility that U.S. jurisdiction would undermine the leniency programs established in other countries (*Id.* at *28-*30).

115. *Id.* at *14.

116. In the vitamins litigation itself, the German company BASF was a defendant. *See* Clifford A. Jones, *Foreign Plaintiffs, Vitamins, and the Sherman Antitrust Act After Empagran*, EUR. L. REP. JULY/AUGUST 270, 275 (2004).

117. Brief, *supra* note 113, at *14 ("[I]rrespective of whether a different outcome may result under the various systems, U.S. law should not trump Germany's and Belgium's sovereign rights . . . .").

stance, while the brief concedes that hard-core cartels of the type at issue "are prohibited almost universally,"[118] it then turns to other areas of competition law, unrelated to the case, in which differences remain (distinguishing, for instance, the U.S. "rule of reason" analysis from the German evaluative approach).[119] Its strongest arguments highlight the different orientation of German enforcement efforts: "[T]he German system sets a different balance between the civil and administrative punishment of violations of competition law. While in Germany private parties can also claim damages, . . . Germany's focus in obtaining the desired deterrent effect of illegal restraints of trade is on prosecution through its competition authorities."[120] This passage notes the limitation placed on private enforcement by the concept of *Schutznormen*.[121] (If anything, in fact, the brief understates this limitation on private actions. At the time the brief was filed, three German courts had heard cases brought by companies harmed by the vitamins cartel. Each court held that because the violations harmed the market generally, and were not targeted infringements, no damages were available.[122]) In addition, the brief focuses on the procedural differences between U.S. and German law, citing again the public policy against multiple damages and contingency fees.[123] Indeed, the brief contains a warning in this regard: "One consequence of foreign disapproval with U.S. encroachments on other nation-states' antitrust enforcement efforts will be a refusal to enforce judgments obtained in U.S. lawsuits."[124]

The Supreme Court was receptive to these sovereignty-based arguments, citing in its opinion the briefs filed by Germany and other nations.[125] It noted specifically the right of foreign countries to make their own choices regarding remedies and enforcement policy, and the obligation of the United States to respect those choices.[126] To that extent, then, the opinion stands for the proposition that the international regulatory community must accommodate different regulatory systems built on different legal and political decisions. However, it is important to note that the Court predicated its opinion on the assumption that the

118. *Id.* at *12.
119. *Id.* at *14.
120. *Id.* at *11-*12.
121. *See* discussion, *supra* at notes 54-55 and accompanying text.
122. *See, e.g.*, LG Mannheim, Urt. V. 11.7.2003—7 O 326/02, summarized in GRUR 2004 182 (concluding that the vitamins cartel's goal was to maintain artificially high prices in the entire market, and not to affect particular market participants); LG Mainz, Urt. V. 15.1.2004—12 HK O 52/02, summarized in NJW-RR 2004 478 (accord). *See also* Friedrich Wenzel Bulst, *Private Kartellrechtdurchsetzung durch die Marktgegenseite—deutsche Gerichte auf Kollisionskurs zum EuGH,* 31/2004 NJW 2201 (2004) (discussing these cases and noting their inconsistency with the European Court of Justice's holding in Courage v. Crehan). Since the brief's filing, one court has awarded damages in related litigation: LG Dortmund, Urt. v. 1.4.2004, 13 O 55/02, summarized in 11/2004 WuW 1182 (2004) (viewing the cartel's effect on ascertainable market participants as a sufficient basis for liability).
123. Brief, *supra* note 113, at *11.
124. *Id.* at *26.
125. *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.* , 124 S. Ct. 2359, 2368 (2004).
126. *Id.* at 2368-69.

harm suffered by foreign purchasers of the price-fixed goods was independent of the harm caused in the United States, and ultimately remanded the case for a determination of that factual point.[127] Whether respect for the regulatory authority of foreign countries will be enough to restrain U.S. jurisdiction in cases involving interdependent harms flowing from global cartels remains to be seen.[128]

Considered together with the recent developments in the E.U., Germany's brief in the *Empagran* case is an interesting statement about the country's right to maintain its chosen system of competition enforcement in the face of global misconduct. Germany filed the brief after its criticism of the E.U. modernization program had been overridden, after the Monopoly Commission's second, more moderate report had been issued, and, indeed, after the draft amendment to the GWB had been prepared.[129] The brief's point that private antitrust litigation in U.S. courts would override different substantive and remedial policies observed in Germany is therefore somewhat inconsistent with the trend developing in the E.U.,[130] and signals that Germany's acceptance of an increased role for private enforcement does not necessarily translate into acceptance of civil litigation in U.S. courts as a vehicle for that enforcement. For that very reason, the brief serves as a reminder that the process of convergence of laws has a cultural as well as an instrumental component,[131] which may affect attitudes toward particular means chosen to effect that convergence.

IV.

One plan for achieving—or at least approaching—a truly global competition law regime focuses on identifying the fundamental policies that are shared across systems and building a harmonized system outward from that base. Cartel law has become the standard illustration of an area in which such shared policies already exist, and which might therefore serve as a foundation for future convergence. Anti-hard core cartel policy is one of the "core principles" of the Doha Declaration, intended to draw competition law under the umbrella of the WTO;[132] similarly, an anti-cartel program is a policy priority of the Organisa-

127. *Id.* at 2372. On remand the circuit court indicated its intent to review as a matter of law the question "whether the nature of the alleged link between foreign injury and domestic effects is legally sufficient" to support U.S. jurisdiction. Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 388 F.3d 337, 339 (D.C. Cir. 2004).

128. *See* Buxbaum, *National Courts, Global Cartels*, *supra* note 110, at 1102-03; Peter Hay & Tobias Krätzschmer, *Begrenzt der U.S. Supreme Court die extraterritoriale Anwendung US-amerikanischen Antitrust-Rechts?*, 9/2004 RIW 667, 671 (2004).

129. *See* discussion, *supra* notes 105-06 and accompanying text. The brief does cite the draft parameters for the then-planned Seventh Amendment of the GWB, but not in connection with the shift toward facilitating private enforcement. Brief at *12 n.6.

130. Clifford Jones speculates that this is the reason the Commission itself did not file an amicus brief in the *Empagran* litigation. Jones, *supra* note 116, at 274.

131. Buxbaum, *Rechtsvergleichung*, *supra* note 7, at 205.

132. *See* Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 913 (2003).

tion for Economic Co-operation and Development.[133] Commentators also regularly refer to anti-cartel policy as a platform for the construction of international antitrust law.[134] However, as this essay has attempted to demonstrate, even this sort of accretive convergence requires the fitting together not only of discrete substantive rules but also of broader enforcement policies and philosophies woven into the fabric of different legal systems. This is a difficult process, and it is not surprising that attitudes toward it reflect the historical and cultural conditions of the countries involved.[135] Identifying those conditions will be a necessary step in the globalization of competition law and enforcement strategies.

133. *See* Organization for Economic Cooperation and Development, *Council Recommendation Concerning Effective Action against Hard-Core Cartels* (1998) (initiating the OECD's anti-cartel program), *at* http://www.oecd.org/dataoecd/39/4/250131.pdf.

134. *See, e.g.*, GOYDER, *supra* note 42, at 514 (including hard-core cartels in the group of "'motherhood and apple pie' issues" on which everyone agrees); Sullivan & Fikentscher, *supra* note 30, at 232 ("Perhaps the strongest reason for thinking that the time is right for international antitrust is the nearly world-wide proliferation of anti-cartel policies."); Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L. J. 711, 727 (2001) ("were the argument over international competition law limited to whether there should be some international agreement on 'hard core' cartels, those in favor of such an agreement could declare victory now.").

135. *See* David J. Gerber, *The U.S. —European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123 (1999) (identifying some current perceptions and preferences that affect development of global solutions).

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German Reunification in Historical Perspective

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With his roots in the German-speaking world, for much of his distinguished career, Professor Richard Buxbaum has been a student of Germany in the context of international law. His scholarship has been recognized and honored by his colleagues in German Universities. As Dean of Berkeley's Department of Area and International Studies from 1993 to 1999, he consistently encouraged and supported the Center for German Studies at the University. This paper, dedicated to him, is a reflection of conversations he and I have had over the past few years concerning the future of Germany.

Throughout the history of both the German states that comprised Germany after 1949, it was taken as an article of faith that Germany would one day be reunified. Because its founders considered the Federal Republic of Germany (FRG) to be a temporary state, the preamble to their constitution, the Basic Law of May 23, 1949, declared that it was a transitional document. It guaranteed citizenship to Germans living outside the FRG upon their arrival there, thus intending to serve those Germans in the East who could not participate in its creation. In his inaugural address in 1960, the Federal Republic's second President, Heinrich Lübke, declared that German reunification "remains *the* question of our national life . . . on which we are all united, irrespective of party and religious affiliation. In the long run, Germany will not remain separated, whether by absurd boundaries or by brutal disruption of personal ties."[1] He considered the reunification of the two Germanys to be a "natural right."[2]

For conservative politicians in the West, maintaining the vision of a reunified Germany served to cultivate support from the thousands of voters who had been expelled from the eastern territories lost to Germany at the end of World War II; while it was politically expedient, it also helped to forestall any further growth of right-wing nationalist sentiment.[3] As late as the 1960s, placards with a map of pre-war Germany divided into three parts—West Germany, East Germany, and the lands east of the Oder-Neisse line—were

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1. GORDON CRAIG, THE GERMANS 303 (1982).
2. *Id.*
3. *Id.*

posted throughout West Germany, with the slogan, "*Dreigeteilt—Niemals!*" ("Three-part division—Never!").

Undoubtedly, leaders of the German Democratic Republic (GDR) also looked forward to the ultimate reunification of Germany. For instance, in 1953, Socialist Unity Party (SED) leader, Walter Ulbricht, told his fellow party members, "We are for the unity of Germany, because the Germans in the west of our homeland are our brothers, because we love our fatherland, because we believe that the restoration of the unity of Germany has an irrefragable legal validity."[4] Central to Marxist doctrine was the belief in the inevitability of a revolution that would wipe away the capitalist structure of the West, opening the way to a unified socialist state in Germany. Perhaps ironically, even after the construction of the Wall between the East and West portions of Berlin, the 1963 program of the SED set "the restoration of German unity" as a goal for the party; continued division was merely attributed to the western powers "in conspiracy with West German monopoly capitalism."[5] The confidence expressed by communist leaders in the ultimate collapse of western capitalism continued into the last decade of the East German state's existence. In 1981, Eric Honecker, the leader of East Germany, warned West Germans:

> One day Socialism will knock at your door, and, [sic] when the day comes on which the workers of the Federal Republic go about the socialist transformation of the Federal Republic of Germany, then the question of the unification of the two German States will be posed in completely new form. As to how we would decide then, there should be no question of doubt.[6]

Despite the persistent political rhetoric about a reunified Germany, and the initial conservative critique of Chancellor Willy Brandt's effort in the 1970s to normalize relations between the East and West German states (*Ostpolitik*), the political reality of divisions hardened over time. It was likely this hardening of the division between East and West that led few to think that reunification would be possible in the near future. Indeed, in 1988, Chancellor Kohl publicly expressed doubt that reunification would happen in his lifetime. Later, in January 1989, just months before its fall, Eric Honecker insisted the Wall would remain in place for 50 or 100 more years.[7] Most Germans agreed; only 9 percent believed they would live to see reunification.[8]

Thus, the dramatic events of November 9, 1989, when exuberant East and West Germans danced together on the Berlin Wall, caught nearly all by surprise.[9] German reunification did not come as the consequence of political leadership on either side of the Wall; it came as a result of a truly peaceful popular revolt, the only such revolution in modern German history.

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4. *Id.* at 307.
5. *Id.*
6. *Id.* at 308.
7. LEWIS J. EDINGER & BRIGITTE L. NACOS, FROM BONN TO BERLIN: GERMAN POLITICS IN TRANSITION 11, 12 (1998).
8. *Id.* at 11.
9. *Id.*

It began in May 1989, when Hungarian border guards began to permit East Germans to cross the border into Austria, from where they entered the Federal Republic. Other East Germans appealed to West German embassies in Budapest, Prague, and Warsaw. In September, Hungary officially opened its borders with Austria and the westward flood from the GDR began;[10] eight thousand crossed the border in the first twenty-four hours and by the end of the month 30,000 East Germans had fled to West Germany through Hungary and Austria.[11] When the East German government restricted travel—first to Hungary, then to Czechoslovakia—mass protest demonstrations took place in major East German cities.[12] The popular outrage demanded extensive reform. Honecker resigned on October 17, and the new government, led by Egon Krenz, attempted to regain control by revising travel restrictions without, in fact, opening the borders.[13] More demonstrations followed until November 9, on which date a press announcement promised that applications for travel abroad would be approved immediately.[14] A crowd of thousands overwhelmed officials at the Berlin checkpoints, who finally stopped stamping passports and allowed free passage to West Berlin.[15] The demands for reform, under the banner "We are *the* people," quickly changed to demands for reunification, with the slogan "We are *one* people."[16]

German reunification came about as a result of the people's actions. Yet, various political leaders could not resist the opportunity to take credit for reuniting Germany. Chancellor Kohl, hoping to claim a place in the pantheon of German heroes next to Bismarck, saw himself as the great unifier. Willy Brandt saw it as a culmination of the *Ostpolitik* he had initiated two decades earlier. Admirers of Presidents Reagan and Bush saw it as a consequence of their defeat of the Soviet Union in the Cold War. But, in fact, the hero of the story was the German people as a collective, who acted at nearly every stage of the process in advance of their leaders, who merely recognized the reality created by popular protest.[17]

Three weeks after the Wall had fallen, and assured that the Soviet Union would not engage in aggressive diplomatic or military actions, Chancellor Kohl ignored popular demands for full German reunification by offering a cautious

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10. *See* Mathias Reimann, *Takeover: German Reunification Under a Magnifying Glass*, 96 MICH L. REV. 1988, 1989 (1998) ("On September 11, Hungary punched a hole in the iron curtain through which East Germans could escape when it broke rank with the Warsaw Pact states and opened its border with Austria. So many took advantage of the opportunity that the resulting hemorrhage threatened the very survival of the GDR.").

11. FRANK TIPTON, A HISTORY OF MODERN GERMANY SINCE 1815, 619 (2003).

12. *Id.* at 619-20.

13. These attempted reforms failed to quell the hunger for freedom and democracy. *See* Reimann, *supra* note 10, at 1989 ("[I]t turned out that all efforts to save the GDR—mocked by English speakers as the 'Gradually Disappearing Republic'—in its current form had come too late.").

14. TIPTON, *supra* note 11, at 620.

15. *Id.*

16. *Id.* at 622.

17. *See generally* KONRAD JARAUSCH, THE RUSH TO GERMAN UNITY (1994).

ten-point proposal to gradually link the two German states together. This plan would proceed so long as the East German government continued on a course of reform.[18] His boldest proposal called for "confederate structures" that would have continued to recognize East German sovereignty;[19] for Kohl, full governmental unity remained a distant vision. In both the East and the West, where increasing majorities of the people favored reunification, popular events overtook political leadership as the flow of people continued, with 138,000 moving westward in the first two months of 1990.[20] In July, the monetary union of both states took place, further eroding the legitimacy of the East German government. Moderate political voices in the GDR, who hoped to retain a separate state based on socialist principles, lost all leverage. In the discussions for a Treaty of German Unity that began in July 1990, the West German Minister of Interior, Wolfgang Schäuble, made it clear that reunification would be undertaken on terms defined by the FRG. He bluntly declared:

> This is the accession of the German Democratic Republic to the Federal Republic of Germany and not the reverse. We want to do everything for you. You are cordially welcome. We do not want to trample coldly on your wishes and interests. But this is not the unification of two equal states.[21]

The treaty was ultimately signed on August 31, and the two states became one on October 3, 1990.[22]

The fall of the Berlin Wall was welcomed throughout the West for all that it represented: the end of a dictatorship, the disintegration of the east bloc, the triumph of market capitalism, and the end of the Cold War. Not everyone, however, was completely enthusiastic about German reunification. A French observer noted that:

> Germany, a big nation, is again becoming a great nation . . . . [A]ll it lacks is the military arm. From the height of its power, its industrialists and merchants are looking far beyond the West, at the wide world. And France looks at Germany. It is the season of suspicion—thoroughly foreseeable after all.[23]

Other public figures, many of whom aggressively worked to oppose the Soviet Union, nevertheless hesitated to approve of the idea of German reunification. Margaret Thatcher openly expressed her disagreement with Kohl's plans.[24] The British Trade and Industry Secretary, Nicholas Ridley, spoke strongly against Germany's hegemony in the European Economic Community (EEC).[25] At a conference between Prime Minister Thatcher and a

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18. TIPTON, *supra* note 11, at 662.
19. *Id.*
20. *Id.* at 623.
21. *Id.* at 624.
22. *Id.*
23. EDINGER & NACOS, *supra* note 7, at 10-11.
24. *See* Evgenios Michail, *After the War and After the Wall: British Perceptions of Germany Following 1945 and 1989*, 3 University of Sussex Journal of Contemporary History 7 (2001), *available at* http://www.sussex.ac.uk/history/documents/3._michail_after_the_war_and_after_the_wall.pdf (last visited April 26, 2005).
25. *Id.*

group of British and American historians in March 1990, it was observed that Germany had succeeded in its century-old objective of dominating Europe, against which Britain had fought two costly wars.[26] In Germany itself, a number of liberal intellectuals, including Jürgen Habermas and Günter Grass, expressed reservations about reunification.

Undeniably, German reunification revived persistent questions about continuity and change in Germany. It pushed to the surface, once again, the multidimensional "German question." In the context of international relations in Europe, the German question was whether Germany, with the largest population, most robust economy, and potentially the strongest military, would be fully integrated into Europe and provide stability, or whether it would pursue its traditional aim of establishing hegemony over the continent.

But in the context of German politics, the "German question" was whether the burden of its history had been overcome and the residue of the past abandoned. In no other country has the effort to come to terms with the past been as much a part of the contemporary discourse as in Germany; the memory of the Holocaust and the tyranny of the Nazi regime cast a deep shadow over all discussions of German history. In the 1980s, the so-called *Historikerstreit* (historian's conflict) erupted when conservative historian Ernst Nolte argued that it was time to reassess German guilt for the Holocaust and the Nazi regime.[27] He saw the roots of the Holocaust not in German anti-Semitism or Nazi ideology, but in Germany's defense against Bolshevism and Russian aggression. "Auschwitz is not primarily a result of traditional anti-Semitism," he wrote. "It was in its core not merely a 'genocide,' but was above all a reaction born out of the anxiety of the annihilating occurrences of the Russian Revolution."[28] Jürgen Habermas responded to Nolte, criticizing him for offering Germans a history that would alleviate their sense of guilt and for practicing a selective history that focused on the sufferings of Germans without recognizing their own responsibility.[29] The ensuing debate, involving numerous historians of Germany, took on more compelling political meaning in the context of German reunification, for the control of the future was, in part, predicated on who controlled the past.

Historical references to the Weimar Republic sprang to mind when skinheads, radical right-wing groups, and neo-Nazis acted out their xenophobia and intolerance by harassing foreign refugees. Their threatening behavior, parroting the Weimar street gangs and Nazi behavior by declaring the former GDR town of Hoyerswerda to be a "Foreigner Free Zone," prompted calls for tough action by the government.

In examining the prospects for the new Germany, it is fair to ask whether

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26. *Id.*

27. Benjamin B. Weber, *Shades of Revisionism: Holocaust Denial and the Conservative Call to Reinterpret German History*, *in* 6 History Review (1994).

28. *Id.*

29. TIPTON, *supra* note 11, at 607.

the basic lineaments of the old Germany—not merely the Third Reich of Hitler, but also Bismarck's Second Reich—have been set aside. In this respect, it is instructive to examine the historical forces—above all anti-democratic authoritarianism, German nationalism, and Prussian militarism—that combined to unify Germany in 1871, and compare them to those elements present in 1990.

The first broadly popular expression of the impulse for German national unification came during the revolutions of 1848. These revolutions, happening nearly simultaneously in Western and Central Europe, were driven by liberal and national ideals, which were both seen as forces of liberation. Liberalism sought to overthrow the constraints of the traditional order dominated by the nobility while introducing constitutional government; nationalism sought to allow people bound together by common language and culture to form national states reflecting those commonalities. Individual self-realization depended upon national self-realization. Thus, proponents of German nationalism, lacking a common political experience, defined the nation by its cultural and ethnic dimensions—a common people, divided into separate states and principalities, seeking a common national state. But the revolutions of 1848 failed in Germany partly because of the conflict between the national claims of Germans and those of other nationalities within the boundaries of the German states. Monarchical rule recovered.

It was Bismarck's genius to recognize that nationalism was not inherently connected to liberalism, that it could be detached from its alliance with liberalism and be put to the service of conservative ends. This is what he meant with his famous statement of 1863: "Not through speeches and majority decisions will the great questions of the day be decided—that was the great mistake of 1848 and 1849—but through iron and blood."[30] In three successful wars, 1864, 1866, and 1870-71, he united Germany under Prussian domination,[31] forcing liberal nationalists to choose between their liberal ideals and their national ideals. They accepted national unifications at the expense of a liberal constitutional government, acceding to a Germany united under Prussian monarchical authority. The German constitution provided a parliament, but the Chancellor and other ministers remained responsible only to the Emperor. During the first two decades of the German Empire, Bismarck repeatedly confronted the national liberals with the choice between their nationalism and their liberalism, knowing they would choose the former. First, he exploited their anti-clericalism in the *Kulturkampf* to suppress the Catholic elements dissatisfied at being absorbed into a Protestant nation. Then, he employed their fear of socialists to attack the socialist party as an enemy of the state.[32]

Germany's stunning military victories over Austria and France in the wars of unification also laid the foundation for the militarism that characterized the German Empire, especially after 1890 under Emperor William II. The defeat of

30. TIPTON, *supra* note 11, at 119.
31. *Id.* at 120.
32. *See generally id.*

France and the seizure of Alsace-Lorraine created the enduring French-German enmity that ultimately surrounded Germany with enemies and prompted the arms race leading up to World War I. German society became suffused with military values and deference to the army.

The Nineteenth Century unification of Germany may consequently be described as a revolution from above. It was based on a combination of an authoritarian monarchy, illiberal constitutionalism, German nationalism, and Prussian militarism. As a result, Germany entered the modern industrial era and became the dominant economic and military force in Europe with a social structure that retained a dominant aristocracy and military caste. German industry competed aggressively for markets under the protection of this conservative, authoritarian national state. This social, economic, and political constellation constituted what historians of Germany have called the German *Sonderweg*—the German "special route" to modernization. The continued domination of Germany by this pre-modern structure has been seen as setting the stage for the tragedies of the twentieth century.

Regardless of whether one believes that German development was unique, or that it laid the foundation for the disasters of the twentieth century, the circumstances of German reunification at the end of the twentieth century were vastly different. Consequently, the course which Germany is likely to follow will be very different.

German reunification took place in an entirely different geopolitical framework than any that had existed since Germany was first unified in 1871. At the end of the nineteenth century, the national state was the primary agency of international interaction and competition; it was the primary object of allegiance. The decades that bracketed the turn of the twentieth century were the heyday of nationalism. By contrast, the decades bracketing the turn of the twenty-first century have witnessed strides toward a unified Europe and a structural transformation entailing the internationalization of financial markets, labor markets, and production. This transformation has weakened the national state and, in a sense, the primacy of the economic state has replaced that of the political state. Germany has emerged from reunification as a great power, but in an entirely different setting. Its economic power will be exercised through trans-European institutions.

It is notable that, as was the case after 1871, German reunification did not result in a fully integrated society. Throughout the provinces of the former GDR, the early ebullience over reunification ultimately disappeared in the harsh reality of life in new circumstances. With the closure of their uncompetitive industries, easterners encountered staggering levels of unemployment. Similar conditions exist in some locations today. More than a decade after reunification, income and employment levels in the East remained well below those in the West. Easterners felt "Deceived and Sold Out," as one slogan put it.[33] They

33. EDINGER & NACOS, *supra* note 7, at 18.

expressed resentment at having been "colonized" by West Germany.[34] Some even expressed nostalgia for the GDR, referred to as "Ostalgie," in visible ways.[35]

To their credit, German leaders refrained from exploiting intense nationalism or fear of foreigners, even when faced with challenges over methods to achieve greater integration of the two Germans states. For example, the debate over the nationality law, the definition of citizenship, and what it meant to be German, challenged the traditional assumptions about the composition of the German nation. As we have noted, German nationalism developed prior to the creation of a German nation state; until 1871, the German nation was an ethnic, cultural, and linguistic entity, but not a political reality. Nationality was considered a matter of descent and blood, based on the principle of *jus sanguinus*; in contrast, in France and the United States, the principle of *jus soli* prevailed, in which citizenship or nationality was derived from the place of birth. While the principle of *jus soli* is culturally inclusive, the principle of *jus sanguinus* is culturally exclusive.

Initially, after 1871, the various German states comprising the Second Empire retained their own laws on citizenship, although they were all derived from the principle of *jus sanguinus*. In 1913, Germany adopted a uniform law defining nationality. This law had two fundamental purposes: first, to include all Germans living abroad in the colonies (even those living in the United States) who chose to return to Germany; and second, to exclude the growing immigrant population in Germany, primarily migrant workers from Poland settling in the industrial Ruhr valley, from national citizenship. The law thus provided an exclusionary, ethno-cultural definition consistent with the principle of *jus sanguinus*. This exclusionary principle provided the foundation for the explicitly exclusionary anti-Jewish laws during the Nazi era. *Jus sanguinus* remained the basis for German nationality laws until after German reunification.

Several factors made it necessary to address the question of citizenship in the new German state. First, a large number of non-German citizens now lived in Germany, many of whom had immigrated to West Germany decades before as "guest workers" and whose children had grown up there. Berlin, for example, had become the third largest Turkish city in the world. Others had come to Germany from eastern and southeastern Europe in search of political asylum. By the 1990s, foreigners comprised 10 percent of the population of Germany. Moreover, the European Union had introduced the concept of "European citizenship," and allowed the free movement of people across national boundaries. Finally, the declining birthrate of Germans meant that to sustain the economy, Germany would need to attract 300,000 immigrants annually. However, the conservative Christian Democratic Union/Christian Social Union government opposed changes in nationality law, insisting that nationality was a

34. *Id.*

35. *See generally* DAPHNE BERDAHL, WHERE THE WORLD ENDED: REUNIFICATION AND IDENTITY IN THE GERMAN BORDERLAND (1999).

matter of blood descent. It was therefore not until 1998, when the coalition led by the Social Democratic Party of Germany (SPD) came to power, that fundamental changes could be considered. The new law that came into effect on January 1, 2000, set aside the principle of *jus sanguinus* and adopted *jus soli* for the first time in German history. It allowed children born in Germany of non-German parents to become German citizens; children granted citizenship under the provisions of this law could maintain dual citizenship until age twenty-three, at which point they were required to choose their nationality. The law shortened the period of time required for naturalization from fifteen years to eight years. As a concession to the traditional cultural definition of nationality, persons seeking German citizenship were required to pass examinations on German language and culture.

This nationality law was a substantial break with the German past; it brought German practice into closer alignment with that of Western Europe and the United States, and it demonstrated Germany's willingness to combat the fear of foreigners that had dominated so much of its past.

Although many feared that German rearmament might once again lead to the resurgence of a militarist spirit in Germany, considerable evidence suggests that the historical record of two world wars and the total destruction of Germany in 1945 have broken the thread of militarism in German history. The strength of German pacifism during the Cold War could easily be explained by the fact that any hostilities between NATO and the Soviet Union would lead to a war fought initially on German soil. But pacifist attitudes in Germany have continued since the end of the Cold War and German reunification. Although German troops have participated in various peace-keeping missions under UN general auspices, and Germany provided material support to the broad coalition in the Gulf War of 1991, a significant percentage of Germans opposed the war. As the war began, 200,000 demonstrators from all parts of Germany gathered in Bonn to protest the war. These demonstrations, however, were dwarfed by the anti-war demonstrations directed against the American invasion of Iraq in 2003. The anti-war sentiment was so strong in Germany that Chancellor Schröder was reelected in 2002 because of his opposition to the American determination to invade Iraq, despite widespread dissatisfaction with Germany's sagging economy.[36] Behind these views lies a growing suspicion that the United States itself has become a reckless military presence in the world.

The half century of stable democracy in West Germany, now complemented by the popular movement in East Germany that ultimately produced the new German state, suggests that democratic values have taken root in Germany, overturning the long tradition of authoritarianism. Skeptics and pessimists point to the extreme right-wing parties and the nationalist expressions

36. *See German Politics: Playing it Long*, THE ECONOMIST, 10/30/04, at 31 ("In his first six years in office, Mr Schröder seemed a lightweight who changed course easily. Yet his opposition to the Iraq war (resented in Washington but liked at home) and his refusal to ditch labour-market reforms—the so-called Hartz laws—have changed his image.").

of xenophobia,[37] suggesting that democratic values may not have sunk roots as deeply as we would wish. They also point out that the German commitment to democratic values has not been tested by crises of the magnitude of the hyper-inflation and the Depression that contributed to the collapse of the Weimar Republic. It is admittedly true that German democracy has not yet been tested by crisis. Yet, it is also true that the free institutions and civil liberties essential to democracy are always vulnerable in crises, as the history of the United States demonstrates from the Civil War, to the internment of Japanese, and to the Patriot Act. Fear and uncertainty nearly always undermine confidence in democratic values. But the anti-democratic forces that characterized the first German reunification—authoritarianism, militarism, and exclusionary nationalism—do not fundamentally characterize the reunified Germany, and there is every reason to believe its democratic system is as stable and secure as any in the world today.

37. *See Neo-Nazis Hi-Jack Commemoration*, DAILY POST, 2/14/05, at 10 ("The 60th anniversary of the World War II Allied bombing of Dresden was overshadowed yesterday by one of the largest public, post war gatherings of neo-Nazis. [T]he milestone was upstaged by a march of around 5,000 neo-Nazis through the streets of the eastern German city."); *but see* Tony Czuczka, *Germany Muzzles Neo-Nazi Rallies*, ST PAUL PIONEER PRESS, 3/12/05, at 6A ("[T]he changes [in German law] are meant to make it easier for authorities to ban neo-Nazi gatherings near memorials to victims of the Nazis, such as former concentration camps . . . . Anyone who publicly 'condones, glorifies or justifies' the Nazis risks fines or up to three years in prison.").