Revisiting Carl Schmitt's The Situation of European Jurisprudence

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Carl Schmitt's "The Situation of European Jurisprudence" stands out for the relatively scant scholarly attention it has received. Mostly, legal theorists have rejected it as a failed attempt to whitewash Schmitt's controversial role in the Nazi regime. Yet, the key concepts and themes that Schmitt developed in his booklet have remained relatively obscure. In the following, I attempt to close this gap. By looking at Schmitt's return to Savigny and Roman Law, I make the case that Schmitt's work constituted a mature fruition of his central ideas regarding legal positivism, jurisprudence, and the possibility of a common European legal order. To make this argument, I situate Schmitt's work in its historical context and, relying heavily on some of Schmitt's untranslated early works, shed light on his intellectual developments through different political regimes.

"Carl Schmitt's attack on legal positivism has not delivered the promised death blow", wrote the conservative jurist Franz Beyerle in an early 1951 review of *The Situation of European Jurisprudence*.[1] The only fighting chance jurisprudence had against positivism, Beyerle opined, was to attract jurists into their cadres of a "higher moral standard"; judges who would go beyond the "convenient methodological toolkit to reach decisions", and lawyers who would be "less intellectually mediocre".[2] Men and women of this calibre were rare finds in post-war Germany. Enrolling them into the legal profession was, therefore, Beyerle observed sadly, "very unlikely".[3]

What was Schmitt's spirited attack on legal positivism that Beyerle felt had fired in the wrong direction? In *The Situation of European Jurisprudence*, Schmitt suggested four straightforward propositions. First, that there is such a thing as a common European jurisprudence that transcends national legal orders. Second, that this European jurisprudence consists of

1 Franz Beyerle, "Carl Schmitt: Die Lage der europäischen Rechtswissenschaft", *Archiv des öffentlichen Rechts* 76 (1950/51) 503.
2 Ibid., 504.
3 Ibid.

a "common vocabulary and language", which stems from Roman Law. Careful observers can, Schmitt insisted, still find traces of Roman Law in "occidental rationalism" and modern forms of constitutionalism. Third, that at least since the mid-nineteenth century European jurisprudence has been in deep crisis: legal formalism, the notion that a legal system is valid in and through itself, had eroded jurisprudence by the high-octane "speed in which laws are produced, which made it impossible for jurists to keep up with interpreting and commenting on norms". Fourth, Schmitt advised jurists that they should stop racing to catch up with the "motorised legislators"; instead jurists should distance themselves from their immediate political surroundings and, once detached, embrace the discipline as the "last asylum for legal conscience". As a real-life model for such a distancing, Schmitt dug out the nineteenth-century legal theorist Carl Friedrich von Savigny, one of the founders of the historical school of jurisprudence.

Beyerle took issue with Schmitt's call for distancing. He contended that when Schmitt first wrote his thesis as a contribution to the *Festschrift* of Johannes Popitz in 1944, it had made sense for jurisprudence to distance itself from Hitler's frequent use of the "Führerbefehle" [direct orders].[4] A close reading of Schmitt would even allow one to interpret the book as a veiled scholarly criticism of the Third Reich. But when Schmitt ultimately published *The Situation of European Jurisprudence* in 1951, Germany's intellectual climate had transformed entirely. There was no longer a totalitarian regime hammering out jurisprudence through executive orders. Beyerle, therefore, derided Schmitt's viewpoint as "blatantly wrong", "anachronistic", and – even though he seemed to have understood the arguments entirely – "just incomprehensible".[5]

By the time of the publication, Schmitt had retreated to his hometown of Plettenberg. Amongst his vast collection of legal and political tracts, *The Situation of European Jurisprudence* stands out for the relatively scant scholarly attention it has received. Largely, scholars have rejected it as a failed attempt to whitewash Schmitt's controversial role in the Nazi regime. Yet, the key concepts and themes that Schmitt developed in his booklet have remained relatively obscure. In the following, I attempt to close this gap. By looking at Schmitt's return to Savigny and Roman Law, I make the case that Schmitt's work constituted a mature fruition of his central ideas regarding legal positivism, jurisprudence, and the possibility of a common European legal order. To make this argument, I situate Schmitt's work in

4 Ibid., 503.
5 Ibid., 503.

its historical context. Relying heavily on some of Schmitt's untranslated early works, I shed light on his intellectual development through different political regimes.

In the first section, I look at the promiscuous possibilities that Schmitt offered for jurisprudence to engage with but stay detached from different political forms. Here, I show how Schmitt structured his thoughts conservatively according to a law/power distinction. In the second part, following from that distinction, I render legible Schmitt's intellectual aversion to legal positivism. Finally, I argue that Schmitt's recourses to Savigny and Roman Law were not just convenient pathways to shed Nazi-guilt, though they were undoubtedly part of that as well. I highlight that Schmitt did not see the act of interpretating legal texts as a submission to the rule of the dead over the living. Instead, he held that interpretative acts endowed jurists with the power to shape and even set laws that could meet the legal and political challenges of the day. For Schmitt, these interpretative acts ensured continuity and legal certainty, two characteristics he rolled into the Eurocentric notion "occidental rationality".

I. Jurisprudence and Political Form

In the first decades of the twentieth century, as he ascended to the top of Germany's legal academy, Carl Schmitt contemplated at length the relationship between law and power.[6] This question was pertinent.[7] In the *Methodenstreit* (controversy over methodology), an academic dispute towards the late nineteenth century, German academics fought over questions of understanding, the place of theory in making sense of human action, the normative validity of statements and, more fundamentally, the nature of knowledge production itself. While the dispute initially flared up around questions on economics, it soon permeated the emerging disciplines of sociology and anthropology and centred on questions of causation and the

6 For Schmitt's early intellectual development, see Reinhard Mehring, *Carl Schmitt: A Biography* (Cambridge: Polity Press, 2014) 3–252; Jospeh W. Benderskey, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983) 3–21.

7 Theodor Adorno, "Soziologie und empirische Forschung", in Max Horkheimer and Theodor Adorno, *Sociologica II: Reden und Vorträge* (Frankfurt am Main: Europäische Verlagsanstalt, 1962) 205–222.

composition of events. In public law departments at German universities, it played out in debates over the inter-relationship of law to power.[8]

The apocalyptic urgency of these questions mirrored Germany's historical condition. The First World War had just unspooled a process that would soon consume several European empires and, in time, torch the Weimar Republic's ideologically-charged powder keg.[9] Critics of Germany's interwar liberal democracy parodied the formalist idea that laws stood in as neutral arbiters of socio-economic conflicts. Instead, they argued that laws were convenient placeholders for the interests of the rich. Defenders of the liberal democratic order, like the social-democratic legal scholar Hugo Sinzheimer, one of the authors of the Weimar Constitution, fought back hard against such accusations. During a speech on social-reform in Mannheim, Sinzheimer countered claims that liberal democracy necessarily translated to numb neutrality. Instead, he declared forcefully that "[t]he difference between my approach and the neutral approach, lies in the following: the 'neutral' legal science does not take seriously the foundations on which it rests. But I see it as my political duty that the conditions on which our science rests have to be discussed and confronted."[10]

More reactionary accounts supplemented the leftist charge that laws purely served the rich with the accusation that rootless cosmopolitan elites were exercising a strong, yet hidden, influence over the political system.[11] A legal order incapable of producing real justice was not worth following, let alone fighting for, their demagogic view went. This sentiment catalysed a widespread disregard for both legal methodology and legal procedure. One of the founders of Germany's Communist Party, Rosa Luxemburg, captured this spirit brusquely during a passionate meeting with her comrades, where she bashed the "bourgeois juridical system" for coercing the

8 See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Band II, Staatsrechtlehre und Verwaltungswissenschaft 1880–1914* (München: Beck Verlag, 1992); *Der Methodenstreit in der Weimarer Staatsrechtslehre – ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Stuttgart: Steiner Verlag, 2001).

9 Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (London, Harper Perennial, 2014).

10 Hugo Sinzheimer, "Die Reform des Schlichtungswesen", in Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden Band 1* (Frankfurt and Köln: Europäische Verlagsanstalt, 1976) 12.

11 A selection of these positional essay is reprinted in Arthur J. Jacobson and Bernhard Schlink (eds.), *Weimar A Jurisprudence of Crises* (Berkley and Los Angeles: University of California Press, 2000).

"proletariat to submit itself to the yoke of capitalism".[12] The parties on the right went two steps further. In a series of fiery speeches given in the 1920s, Adolf Hitler rebuked Weimar's legal space as altogether "befouling [*Besudelung*] the nation's honour and greatness". Amidst jubilant cheers, Hitler hammered out a radically new vision: a peculiar system in which laws no longer encouraged the rights of the individual but regarded "the protection of race and community", as their only *raison d'être*.[13] Even after coming to power, Hitler stuck to this misguided view. For instance, on 1 April 1939, during a speech given in Wilhelmshaven, Hitler stressed the point again: "Providence created the German people. They were not created to obey a law which suits Englishmen or Frenchmen, but to stand up for their own vital right."[14]

Citing iron-clad economic laws regarding the dependence of norms and rules on class power, communists canvassed to strip Lady Justice's blindfold and force her to confront the harsh economic inequalities and the blatant legal favouritism that underpinned the lived experiences of Germany's working class. They hoped that by welding politics and social reality with the law, they would make it a lot harder for legal theorists and practitioners to plaster over workers' rights under the cover of legal dogmatism.

Leftists argued this mainly to hold at bay the constant peril of accidentally conjuring up a hazardous "political democracy", which they understood to mean a democratic system detached from the populace and therefore lacking any wholesome identitarian gasoline to keep the democratic engine running.[15] Right-wing detractors broadly endorsed this view. But

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12 Mary-Alice Waters (ed.), *Rosa Luxemburg Speaks* (New York: Pathfinder Press, 1970) 79.

13 Adolf Hitler's speech "Judenparadies oder Deutscher Volksstaat" [Paradise for Jews or a Nation State of Germans?] was given on 27 April 1923 and is reprinted in Frank Boepple (ed.), *Hitlers Reden* (München: Deutscher Volksverlag, 1933) 59–63, quote from 61.

14 British Secretary of State for Foreign Affairs, *The British War Blue Book: Documents* (New York: Farrat & Rinehart) 59.

15 Wolfgang Abendroth, "Das Problem der innerparteilichen und innervebandlichen Demokratie in der Bundesrepublik", *Antagonistische Gesellschaft und politische Demokratie: Aufsätze zur politischen Soziologie*, Wolfgang Abendroth (Neuwied and Berlin: Hermann Luchterhand Verlag, 1967) 272; It is curious to note that Schmitt, in his 1923-book *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* begins his genealogy with a lengthy citation by Pufendorf as well. Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin, Duncker und Humblot, 1923) 20f.

they were more outspoken in branding Weimar's rule of law as an elitist cosmopolitan ploy with a single purpose: to curb the authentic voice of *das Volk*. They accused Weimar of traducing the natural legal instincts of the German people. An incredibly crude spokesman of this view, the jurist Roland Freisler, lamented in the 1938 series *Schriften des Reichsverbandes Deutscher Verwaltungsakademien* that "our law has failed to meet the needs of the people. First, it was run over and subjugated by an ancient Roman-Greek-Byzantine legal order … and later, it was vandalised and infected by the egalitarian ideals of the French Revolution; which were, by their nature, foreign to our ways of being."[16]

The power dealings of the Versailles Treaty had made abundantly clear to the right that legal autonomy was a romantic delusion.[17] Versailles, they held, with its startlingly asymmetrical power balance had severely punctured the liberal theory of contracts and unmasked the petty Machiavellian power play behind the actions of the victorious powers. This view was also widely shared by leftist hubs throughout the Anglo-American world. Shortly after stepping down from his position at the British Treasury, the Cambridge economist John Maynard Keynes, who had participated at the Paris Peace Conference, fumed that the "insincerity" of the Treaty set it apart from all its predecessors in the history of "contractual justice of victors".[18]

Carl Schmitt was a realist at heart and open to both sets of arguments. But he resisted the move of the left to read domestic legal orders through the lens of economic power relations alone. On the other hand, Schmitt was also hesitant to subordinate the legal order entirely to the popular will, as the right demanded. "A large number of legal scholars have already determined that law is nothing but the expression of power", Schmitt penned in his Habilitation *Der Wert des Staates und die Bedeutung des Einzelnen* [The Value of the State and the Meaning of the Individual].[19] He acknowledged that power theory was seductive because it untangled some

16 Roland Freisler, *Nationalsozialistisches Recht und Rechtsdenken* (Berlin: Industrieverlag Spaeth & Linde, 1938) 23f; I owe this reference to Thomas Clausen, "Roland Freisler: An Intellectual Biography (1893–1945)" PhD. diss., (University of Cambridge, 2020).

17 Richard Evans, Coming of the Third Reich (New York: Penguin Books, 2005) 281–322.

18 John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Harcourt, Brace and Howe, 1920) 63.

19 Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen: J.C. Mohr, 1914) 15.

tricky jurisprudential questions. "The big fish that have the proverbial right to devour the little fish and the ruling social class—whose members had long ago conquered the land's native population—who have the right to tailor laws to their specific needs, only possess this right because they have power."[20] Schmitt took this position to be the broad scholarly consensus amongst lawyers and non-lawyers in pre-Weimar Germany. "If we were to decide the relationship of law to power on a simple headcount of followers", notes Schmitt, "power theory would win easily".[21]

On 4 July 1948, roughly a year before he published *The Situation of European Jurisprudence*, Schmitt asked himself in pensive diary note: "Do I have the right to talk about power?".[22] He answered the question in the affirmative. Schmitt found that he had "experienced different forms of power…from close and afar".[23] In the aftermath of the Second World War, in which Germany's inflated nationalism brought about the catastrophic devastation of Europe, there was a tendency to vilify the concept of power as something altogether evil. "Power is not evil", Schmitt asserted; it was "just something alien; for the person who possesses it as well as for the person who is exposed to it."[24] There was a Divine quality to power, Schmitt contended. How could liberal democrats otherwise justify that the legitimacy of the legal order derived from the people? Schmitt reasoned that their assertion would always logically involve the reciprocal link of power (for instance the command of an officer) to powerlessness ("the people" against whom the order is directed but who, at the same time, legitimise the commander and the order democratically).[25]

Yet Schmitt remained unconvinced, feeling that proponents of raw power theory lacked a sophisticated conceptual understanding of "power". They showed little interest in distinguishing sovereign power from its more brutish relatives. "In such accounts, the power of the murderer over his victim and the power of the state over the murderer", Schmitt incisively dissected, "in essence, occupy the same conceptual category."[26] Schmitt mocked this lack of conceptual clarity and philosophical reasoning. "These people tell us", Schmitt continued, "that we can only tell apart the state's violence from the murderer's violence by their outer appearance. What dis-

20 Ibid., 15.
21 Ibid., 15.
22 Ibid., 157.
23 Ibid., 157.
24 Ibid., 157.
25 Ibid., 158.
26 Ibid., 16.

tinguishes these two forms of applied power, then, is how they are received by the masses, or by their severity and specific historical development."[27]

For Schmitt, legal theorists who endorsed power theory had shied away from the hard labour of conceptual thinking. Instead, Schmitt accused them, disparagingly, of having replaced conceptual thinking with a bucketload of random historical facts. For Schmitt, this approach to legal method required no substantive thought. One could not qualify them as academic arguments. 'Facts' could always be fed into any opinion. This shying away from conceptual work, for Schmitt, was something that power theorists shared with legal formalists. But they had more in common. Both viewpoints grounded laws in factual occurrences. Be it the fact of a particular sociological constellation of any given society, whose norms power theorists would deduce from its laws, or formalisms itching to set in stone a written code mythically born from the consciousness of a "just people" and a "just individual".[28] For Schmitt, such approaches revealed a conceptual weakness because he feared that scholars could pick facts at random to sustain any argument.

Many German thinkers shared Schmitt's reluctance to adopt raw power theory or legal formalism as convenient catchall solutions to explain away public law's intricate jurisprudential problems. The jurist-turned-sociologist Max Weber, one of Schmitt's teachers during his student years in Munich, broke down this problem to a straightforward equation: law = power + x. Weber defined power as "every possibility in a social relationship to enforce one's will, even against resistance, regardless of what the possibility is based on."[29] The x in Weber's equation was something to do with legitimacy and authority. Weber suspected that legitimacy could derive from a technical, administrative apparatus that was highly rational, for instance, the famed Prussian bureaucracy. For Weber, this explained why capitalism had first taken root in Europe and not elsewhere. In Europe, he argued, the legal system had grown more differentiated and abstract, which is to say, that the organisation of rules in society was relatively free from the direct influence of the Church or the political establishment. According to Weber, this process constitutioned a new form of rationality. Still, one could derive legitimacy through other means, too. For instance, one could endow a legal system with authority beyond rationality. In such

27 Ibid., 16.

28 Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen: J.C. Mohr, 1914) 18f.

29 Max Weber, *Grundriss der Sozialökonomik: III. Abteilung Wirtschaft und Gesellschaft* (Tübingen: Verlag von J.C.B. Mohr, 1922) 28.

a scenario, it would take on the *Gestalt* of a more intimate relationship; say, the emotional affinity of the population with a charismatic leader in a dictatorship.[30]

Schmitt backed his assault on a purely formalist legal order with conceptual ammunition borrowed from Max Weber. Weber had argued that the Enlightenment had discredited value-rationality, which was prevalent in theological thought and had juxtaposed it against a new form of thinking he named "instrumental rationality". According to Weber, these two modalities of thought diverged in their assessment of value and reason. Value-rational thinking moved backwards from an ideal aim, for instance, a religious, ethical or aesthetic utopia, to specific measures that would help to move towards it slowly. The declared aim could, therefore, justify the means of this movement. Instrumentally rational decisions, on the other hand, derived their strength from recalibrating the means, which is to say that calculated expectations and conditions are turned into the sole arbiters to achieve any aim. Only the means could justify the declared aim.[31]

In a lengthy diary note, Schmitt approvingly cited Max Weber in the context of the structural transformation the legal order had undergone in the twentieth century. Weber was cautious of the dominance that instrumental-rational modes of thought enjoyed in modern societies, mainly when it came to arguments legitimising the legal order itself. Weber observed that "[c]onstituting the current legal order through instrumentally-rational forms of thought and framing it as a mere technical apparatus, devoid, as it were, of all meaningful sacredness, is the necessary fate and consequence of our current technological and economic developments."[32] Schmitt was in full agreement. In his typical self-assured manner, he scribbled next to Weber's quote: "I was the only person to publicly speak out against this mechanisation of the law – well before 1933!".[33]

But Schmitt disagreed with Weber fundamentally over their interpretation of the role of jurisprudence in the political sphere. Weber constructed jurisprudence mainly as an extension of his sociological reading of economics, whereas Schmitt, at least in his later stages, viewed jurisprudence

30 Max Weber, *Grundriss der Sozialökonomik: III. Abteilung Wirtschaft und Gesellschaft* (Tübingen: Verlag von J.C.B. Mohr, 1922) 93–99.

31 See: Max Weber, *Grundriss der Sozialökonomik: III. Abteilung Wirtschaft und Gesellschaft* (Tübingen: Verlag von J.C.B. Mohr, 1922) 13–45.

32 Max Weber as cited in Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard von Medem (Berlin, Duncker & Humblot, 1991) 116.

33 Ibid.

as the cradle of "occidental rationality"; a field that had the potential to restrain the state, technology, and the financial markets. Like Weber, Schmitt was fundamentally concerned with the course of modern European culture and civilisation. But while for Weber this was primarily a crisis triggered by modern capitalism, for Schmitt it was a crisis triggered by the modern state. Since in Schmitt's view, the contemporary capitalism of Western Europe aligned well with the intellectual currents of the liberal-bourgeois-capitalist age to escalate the crises of the modern state, Weber was correct in emphasising these aspects.

In contrast to Weber, Schmitt's focus in *The Situation of European Jurisprudence* was not on individual ethics but collective authority; not on a private initiative but a public institution of jurists; not on a formative spirit but a concrete form of organisation; not on economic correlations but political manifestations. Schmitt rejected Weber's march into the economic sphere and continued to think from the perspective of jurisprudence. He even proposed the field of jurisprudence as a restraining force against political excess. Only this explains Schmitt's scholarly endeavours to capture the state of exception, when the sovereign suspends the legal order, in a specific legal form.

II. From the Universal to the Particular and Back

Throughout his life, Schmitt was an ardent critique of positivism, both as a philosophical position and a legal doctrine. Much of his work is devoted to breaking what he considered positivism's misplaced universalist pretensions. One way of how Schmitt accomplished this was by reading positivism's emergence into a specific historical context. His main point of contention was the following: as a legal doctrine, positivism is very much rooted in the idea that laws derive from a transcendental source, despite its claims to the opposite. While in the case of natural law, this supernatural source derived from God, legal positivism promoted an ultimate recourse to rationality.

Consequently, both positivist and naturalist jurists could easily conceptualise the legal system as detached from any socio-economic or political contexts. Schmitt took issue with separating law from society. This abstraction, Schmitt predicted pessimistically, would fuel the belief that law was something universal. Soon enough, legal scholars began to regard positivism as something universal. They argued that it stood for a "pure science". Schmitt feared that these ideas of universality would revert to theological thinking that had dominated European jurisprudence for

centuries. Claims for universality were chilly reminders for Schmitt that legal scholars had failed to secularise their concepts. This process of secularisation, Schmitt believed, was Europe's most decisive accomplishment. He credited secularism for taming warfare amongst European states and preventing a large-scale loss of life. Legal positivism's embrace of theological categories of universality, Schmitt feared, would undo this process. It could bring back wars of a much more gruesome amplitude. He also found that positivism fell short of enriching the legal conversation with cultural aspects of belonging. Mainly, legal positivism ignored religion and legal history.

After the turn towards positivism in the early twentieth century, the debating culture in the legal academy changed. The legal order widely came to be celebrated as the archetype of an exclusive instrumentally rational debating sphere. Some portrayed value-rationality altogether as a marker of backwardness. Ernst Cassirer, for instance, emphasised this point in *The Myth of the State*. In this book, Cassirer classified value-rational thinking as an outcome of "primaeval stupidity" and crowned instrumentally rational thought instead as the "peak-of-civilisation".[34] Cassirer had made an earlier attempt to capture the development of mythical thought in historicist terms. He traced it back to primitive totemic belief and slowly inched forward to highly developed enlightenment rationality.[35] In a letter to Hugo von Hofmannsthal and a subsequent article on linguistic sociology, the literary critic Walter Benjamin taunted Cassirer for what he saw as a desperate attempt to grasp mythical thought rationally. Cassirer's scholarly effort left Benjamin entirely "unconvinced".[36]

Like Benjamin's push-back from the humanities, Schmitt aimed to quash the positivist trend in the legal discipline. He did so by simply holding up a mirror. When examined closely, Schmitt argued, even the legality of the highly rational legislative state that legal positivists held so dear, was always based on something resembling value-rationality. For instance, the modernist belief that rationality could stand in as a metaphysical theory of a state's foundation, was, if pushed to its theoretical edge,

34 Ernst Cassirer, *Myth of the State* (New Haven: Yale University Press, 1946) 3f.

35 Ernst Cassirer, *Die Begriffsform im mythischen Denken* (Leipzig: B.G. Teubner, 1922).

36 Walter Benjamin, "Das Problem der Sprachsoziologie", in Walter Benjamin, *Gesammelte Schriften III* ed. Hella Tiedemann-Bartels (Frankfurt: Suhrkamp Verlag, 1972) 454.

nothing more than a value judgement. Scientific rationality was thus just another intangible value.[37]

Schmitt further called into question positivism as a factual basis for a legal order. In his book *Staatsgefüge und Zusammenbruch des zweiten Reiches*, published in 1934, Schmitt traced the solidification of instrumentally-rational thinking in German jurisprudence historically.[38] Schmitt's criticism was fierce. For him, the Weimar constitution, which embodied both liberal and positivist trends, was just a "belated engagement" of a debauched bourgeoisie with an "already crumbling Prussian military state".[39] In other words, the Weimar constitution provided answers to the political and social questions of the time (parliamentary democracy and market capitalism respectively) that had not grown organically out of jurisprudence, but that had only crystallised as historical facts after the collapse of the Prussian state. This "posthumous victory" of liberal constitutionalism, Schmitt then concluded, was not a project for a sustainable future polity but rigidly "directed at the past". In Schmitt's resonant phrasing, it was "like the victory of a spectre over the shadow of its antagonist".[40]

According to Schmitt, employing the constitution as an apolitical core and hoping it would be able to bring people together as a nation was a project fated to lose steam. It even risked imploding with disastrous consequences. Schmitt thought such a construction of nationality had also diverged too far from the ethics and values of the Prussian military state. The Prussians, Schmitt marvelled, with their concept of honour, fatherland, and justice, could well justify their claim of political leadership and encourage national coherence. He found that the "dynastic feeling of evangelical Prussia" had for a while succeeded to stabilise a "national conservative power".[41] But Schmitt saw no such unifying potential in liberalism or other "philosophical social orders", merely the scaffolding for a trivial debating culture. Therefore, he denied liberal constitutionalism the ability to produce any sustainable political leadership. "The peak of liberal constitutionalism", Schmitt emphatically concluded, "is reached precisely when the will for political leadership is annihilated."[42]

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37 See only Carl Schmitt, "Begriff des Politischen", *Archiv für Sozialwissenschaft und Sozialpolitik* 58, no. 1 (1927): 1–33.

38 Carl Schmitt, *Staatsgefüge und Zusammenbruch des zweiten Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1934).

39 Ibid., 43.

40 Ibid., 43.

41 Carl Schmitt, "Donoso Cortés in Berlin (1849)", *Telos*, 2002 (155), 99.

42 Ibid., 49.

Following Weber's claim that rapid technological transformations and secularism had disenchanted the world, Schmitt feverishly searched for means by which the legal order might regain its former mature patina.[43] He hoped that such a re-enchantment might one day overcome the prevailing universalism that Enlightenment had created. Martin Heidegger thought along similar philosophical lines. On 3 November 1933, Heidegger addressed a group of German students at the University of Freiburg with the following battle-cry: "The Führer alone is the present and the future German reality and its law."[44] Both Schmitt and Heidegger promoted National Socialist ideology, by reifying law (and meaning) in the figure of a singular leader.[45] Yet as Reinhard Mehring has demonstrated, Schmitt's engagement with Nazism soured well before the end of the Second World War.[46]

In the later years of the Second World War, Schmitt focused more on a shared European legal legacy. He hoped that European jurisprudence would endure beyond the imminent breakdown of the Nazi regime. Schmitt mapped the European legal heritage from Roman Law, which he presented as an antidote to the modernist collapse into universalism. Roman Law for Schmitt undergirded not only the legal orders of Italy, France, Germany, and Portugal but also stretched much further to the East.

Schmitt left his "European jurisprudence" untied to any specific political form; instead, he argued that it could accommodate different state orders, from fascism to liberal constitutionalism. To make this point, Schmitt emphasised that European nations shared more than just their territorial proximity. They shared common values derived from the "rational" interpretive method through which they made sense of Roman texts. Their

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43 Schmitt was enrolled at the University of Munich and it is likely that he attended Weber's lectures on "Science as a Vocation", during which Weber first developed his concept of disenchantment in the winter of 1918/1919. Max Weber, "Wissenschaft als Beruf", in *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: J.C.B. Mohr, 1922) 524–555.

44 Richard Wolin, *The Heidegger Controversy: A Critical Reader* (Cambridge, MA: The MIT Press, 1998) 47.

45 Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936", *Deutsche Juristenzeitung*, vol. 41, issue 20 (1936) 1193–1199.

46 Reinhard Mehring, "Carl Schmitts Schrift ‚Die Lage der europäischen Rechtswissenschaft'", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* Band 77 (2017), 853–876.

shared heritage allowed European states to enter into relatively peaceful relations with each other. They owed this peace to the stabilising balance of their shared legal orders, which Schmitt dubbed *jus publicum Europaeum*. For Schmitt, this legal order lasted from the creation of modern nation states to the beginning of the First World War.[47] Two conceptual shifts mark the era of the *jus publicum Europaeum* for Schmitt: the first is the "overcoming of civil war" and the second the "marginalisation of colonial wars".[48]

Yet the values Schmitt employed for constructing his *jus publicum Europaeum* were not meant to carry a political union. Roman law did not undermine or challenge national sovereignty. In Schmitt's telling, the national particularities of European states ran far too deep for such a project to work. Schmitt writes that the separate sovereign states "will prove to be better than a Babylonian unity."[49] In his theorisation, Schmitt was building on his concept of space; in this case, Europe as a cultural space. Nations that belonged to a shared cultural space could more readily come together in moments of crisis, which allowed them to control corrupting influences from beyond their borders. If they harmonised their values, European states could effortlessly fight back foreign influences that otherwise may threaten their normative essence.

When Schmitt declared that European jurisprudence had become "the last asylum of legal consciousness", he did so to pit the remaining European legal system against the rapidly expanding Anglo-American order.[50] Schmitt suspected that the new global order would have to implode at some point in its expansionist zeal to swallow the earth entirely. A forceful exploration of this argument can be found in one of Schmitt's lesser-known articles, written for the journal *Marine-Rundschau* towards the end of the Second World War. In this article, Schmitt elaborates on a vision of Europe that would pierce right through the American hegemonic world

47 On the development of *ius publicum Europaeum*, see Armin von Bogdandy and Stephan Hinghofer-Szalkay, "Das etwas unheimliche Ius Publicum Europaeum: Begriffsgeschichtliche Analysen im Spannungsfeld von europäischem Rechtsraum, droit public de l'Europe und Carl Schmitt", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 73 (2013) 209–248.

48 "Was war der Kern des zwischenstaatlichen jus publicum Europaeum? Die Überwindung des Bürgerkrieges und die Ausgrenzung des Kolonialkrieges! " [What was the core of the interstate jus publicum europaeum? The overcoming of civil war and the marginalisation of colonial war!] in Carl Schmitt, *Glossarium*, 250.

49 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft* (Tübingen: Internationaler Universitätsverlag, 1950) 14.

50 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 29.

order. This vision, for Schmitt, required the "freedom-loving people" of Europe to "protect their historical, economic, and spiritual substance."[51] Only this would enable Europeans to weather American dominance stoically.

Schmitt's vision had severe practical repercussions. Though Schmitt refrains from overt anti-Semitism in *The Situation of European Jurisprudence*, the attacks against the indigenous European jurisprudence that he identifies came mostly from Jewish intellectuals. In a sinister speech that Schmitt gave to a group of Nazi jurists in 1936, he openly pointed his finger towards "Jewish jurists" for promoting a scientifically narrow and purely positivist conception of the law.[52] Somewhat obscurely for readers today, Schmitt viewed this as a Jewish ploy to distract from their historical guilt for the crucifixion of Jesus. With the scientific method, Jewish scholars could also game the legal playing field to their advantage. As a first step, they could frame their worldview as scientific, merit-based, and therefore as altogether 'just'.[53] Through Savigny, in particular, Schmitt saw himself vindicated.

III. Savigny, Representation, and Political Form

What do we need to know about Friedrich Carl von Savigny to make sense of Schmitt's turn to construct him as the saviour for European jurisprudence?[54] Law to Savigny was the labour of many generations and could thus not be at the whim of each passing generation. The legal order was the outcome of a nation's legal instincts carefully formed over long swathes of time. Savigny favoured historical continuity over breaks and ruptures in time. According to Schmitt, Savigny swooped into the methodological debates of the nineteenth century by advancing against

51 Carl Schmitt, "Die letzte große Linie", in *Marine-Rundschau* 8 (1943), fn 271 on page 527.

52 Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936", in *Deutsche Juristenzeitung*, vol. 41, issue 20 (1936) 1193–1199.

53 Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936", in *Deutsche Juristenzeitung*, vol. 41, issue 20 (1936) 1193–1199.

54 On Savigny's method see Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law", in *Juridica International* XI (2006) 55–67.

natural law the study of historical sources. Schmitt was not alone in his admiration of Savigny. The legal scholar Ernst Freud wrote an essay in the *Political Science Quarterly* of 1890, applauding Savigny for having turned a "dry and formal system of learning", into "a liberal science of infinite possibilities".[55] In Schmitt's words, Savigny had preserved and further developed the heritage of "half a millennium of European jurisprudence".[56]

European jurisprudence had fought bitterly against the dictates of the Church to establish itself as an independent scientific discipline.[57] Savigny cautioned that this autonomy had come under a new threat. Formalism had found its way into the legal academy disguised in 'naturalist' garbs. Savigny went further. Apart from shielding European jurisprudence from natural law and tending the wounds caused by scientific positivism with the balm of Roman historical sources, Savigny prophesied a ballooning of legislation. To him, this was the worrying next step of unhinged technological developments. By foretelling this historical process and by consequentially denying his age the ability to legislate, Savigny pressed for a more assertive role of jurists in determining norms. Jurists should become central players in interpreting rules and thus in producing laws.[58]

Schmitt viewed Savigny as the *katechon* of his age, calling out the bluff of Enlightenment's promise of "progress" and fiercely defending the independence and relevance of European law faculties. Schmitt is therefore quick to assert that Savigny's treatise was, above all, "the first document of the first step away from legal positivism".[59]

To make his argument, Schmitt somewhat overstated Savigny's impact. Savigny's concern was primarily to purge the exuberant Hegelianism storming into German legal faculties through the figure of Eduard Gans, a colleague of his at the Friedrich-Wilhelm-Universität Berlin. Gans regarded the study of the past as altogether crippling for youthful nations, which should instead focus on cultivating their distinct national spirit. He mourned every discovery of Roman manuscripts, even as his colleagues celebrated them. To him, such findings only translated into more useless hours spent in stuffy libraries. Some of Gans's criticism stuck. Gans was most persuasive when he emphasised the rights of the living over the rights

55 Ernst Freund, "German Historical Jurisprudence", in *Political Science Quarterly*, Vol 5 No. 4 (1890), 473.
56 Carl Schmitt, *Die Lage der Europäischen Rechtwissenschaft*, 29.
57 Carl Schmitt, *Die Lage der Europäischen Rechtwissenschaft*, 29.
58 Carl Friedrich von Savigny, *Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft* (Tübingen: J.C.B. Mohr, 1892) 3–54.
59 Carl Schmitt, *Die Lage der Europäischen Rechtwissenschaft*, 21.

of the dead and the danger that any legal order could fall into paralysis when concerning itself overwhelmingly with the past. Gans could not keep up his energetic iconoclasm throughout his lifetime. In the third volume of *Das Erbrecht in weltgeschichtlicher Stellung* [Law of Succession in World History], the first two of which scathed against Savigny's historical school, Gans penitently wrote that "it feels like I am returning to my young love but as an old man…and the youthful force out of which the first editions were born has given way to a dry soberness, that does not even remotely resemble the spirit with which I began".[60]

Concerning the content of representation, Schmitt and Savigny were on the same page. They both believed that Canon Law inherited Roman Law's conceptual core. Both identified this core as occidental rationality. For both men, finding the proper administrative framework was critical to making use of this "rationality". In his early work *Roman Catholicism and Political Form*, Schmitt argued that the Catholic Church's administration had performed this task well. Closer to home, the office of the Prussian *Staatsraat* held a specific charm for Schmitt and Savigny for this very reason. Schmitt regarded the Staatsraat as the inheritor of occidental rationality, and the beacon to radiate "European civilisation" into all spheres of society. In Schmitt's own words: "form is the essence of law. Is form not the essence of matter? It is the law itself – its visibility, its externality, its publicity."[61] Form and representation, Schmitt and Savigny agreed, could bring about new institutions to reimagine old traditions and remodel them into a new project.

This insight goes a long way to explain Savigny's scholarly reception in his time. Two trailblazing academic heavyweights of late-nineteenth-century German legal scholarship, Carl Friedrich von Gerber and Paul Laband, both devout positivists and bitterly opposed to Roman law, held Carl Friedrich von Savigny in high regard. During Laband's inaugural lecture for the chancellorship of the *Kaiser-Wilhelms-Universität Straßburg*, held on 1 May 1880, Laband blamed Roman Law for arresting the development of Germany's unification. Laband scoffed that without Roman Law, Germany would have acquired unity a long time ago. For Laband, it was the "international and cosmopolitan scholarship" coming out of England and France that had awoken Germany from her dogmatic slumber. He credit-

60 Eduard Gans, *Das Erbrecht in weltgeschichtlicher Entwicklung: Eine Abhandlung der Universalgeschichte Dritter Band* (Stuttgart and Tübingen: J.G. Gotta'schen Buchhandlung, 1829) VI.

61 Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard von Medem (Berlin, Duncker & Humblot, 1991) 235.

ed France in particular for having birthed the discipline of constitutional law. And France had done so, Laband concluded, by consciously moving away from the Roman tradition.[62]

Carl Friedrich von Gerber agreed with Laband's basic premise that Roman Law had dominated German jurisprudence for too long. During an otherwise dry lecture at Tübingen University in late November 1851, Gerber berated Roman Law for being an "alien import" that never quite suited the "legal sentiments of the German people".[63] As opposed to "elevating the life of the mind", Roman Law had "destroyed it".[64] Gerber also brushed aside centuries of scholarship on Roman Law by declaring such efforts "small-minded sophistry".[65]

Given that he had just been promoted to the chancellorship of Tübingen University, one would have suspected that Gerber may have had an interest in toning down his tirade against Roman Law; if for nothing else than to keep the peace within his faculty staff. But that he could position himself so visibly against Roman Law reveals that the learned study of digests was quickly falling out of fashion and widely regarded as a stumbling block in the progressive march of the scientific revolution. However, and somewhat surprisingly, Gerber remained remarkably civil and generous towards Savigny. Gerber saw a "specific German individuality" in Savigny. As he concluded his speech, Gerber emphasised that Savigny's exercise to conquer Roman Law was not so much a reinterpretation of Roman Law, but the production of an entirely novel body of German Law.[66]

There is plenty of space to argue that Roman Law for Schmitt and Savigny translated to the imperative 'history matters'. For both men, historical artefacts needed thorough interpretation to be put to use in the current jurisprudential paradigms. For that matter, the opinions of the jurists making the interpretations far outweigh the sources that they were interpreting. Thus for both Savigny and Schmitt, the importance of Roman Law was not to declare it the "source of law", but establish "jurisprudence itself [as] the source of law."[67] For Schmitt, Roman Law was just the

62 Paul Laband, *Rede über die Bedeutung des römischen Rechts für das deutsche Staatsrecht* (Strassburg: Universitäts Buchdruckerei von J.H.Ed. Heinz, 1880) 32.
63 Gerber uses *Volksindividualität* (national individuality), Friedrich Carl Gerber, *Zur Charakteristik der deutschen Rechtswissenschaft* (Tübingen: Laupp & Siebeck, 1851) 9.
64 Ibid., 13.
65 Ibid., 16.
66 Ibid., 21f.
67 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft*, 23.

"fabric" that jurists could "shape and refine".[68] It seems, therefore, that Schmitt and Savigny, like many conservative thinkers, sought to overcome the philosophical chaos of the modern age by way of re-subordinating the "real world" (or, in more philosophical terms, the current temporal-political order) to an older order. He derived this old order from a pre-modern golden age. In so doing, Schmitt used much creative license. There was also nothing new in this conceptual move. After all, the reinterpretation of old manuscripts tends to allow for plenty of interpretative freedom.

Hannah Arendt was clear-eyed about the creative license inherent in such acts of reinterpretation. During a speech at the American Political Science Association in the mid-50s, Arendt presciently observed that historiography amongst German thinkers altered historical reality similar to abstract philosophical approaches. Conservative reinterpretation of history, for Arendt, "is no less startlingly new, is no less 'deforming,' and does no less 'violence' to reality if judged by Alexandrine standards than is modern art's view of nature."[69] Schmitt agreed with this view. He believed that the victory of "the eternal" over "the temporal" was a victory of arguing for ends over means in the Weberian sense. When such a gesture was further cocktailed with a healthy dose of Hegelian historicism, it offered an ideal recipe to shake up any prevailing system of thought, with the legal order being no exception here. For Schmitt, this creative act of reinterpretation was also a convenient way to keep longstanding doctrines fresh.[70]

It is the same drive that moved Schmitt to side with the *Freirechtler*, an intellectual movement that sought to give more leeway to jurists by encouraging the recourse to undefined legal norms, like good faith and fairness (*Treu und Glauben*). *Freirechtler* argued for greater conceptual liberty of jurists and endorsed lawyers to adopt public sentiments as a source of law. They posited themselves against what they derogatorily labelled as the *Begriffsjurisprudenz* [jurisprudence of concepts] of legal positivism. Amongst German jurists, the term *Begriffsjurisprudenz* is heavily contested. It first emerged in an 1884 satirical book called *Scherz und Ernst in der Jurisprudenz* [Jest and Seriousness in Jurisprudence], written by Rudolf von Jhering. Here the protagonist travels through a "juristic concept heaven" to discover, amongst other things, an auditorium filled with exalted,

68 Ibid.

69 Hannah Arendt, "Concern with Politics in Recent European Philosophical Thought", in *Essays in Understanding: Formation, Exile, Totalitarianism* ed. Jerome Kohn (New York: Schocken Books, 1994) 434.

70 See Paul Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2008).

pure concepts. He finds them "devoid of any meaningful relationship to real life".[71] Many legal positivists rejected this critique as attacking a straw-man. They argued that the purity-obsessed view of concepts was just a perverted branch of legal positivism and preferred to label it 'technical *Begriffsjurisprudenz*'.[72] There is, however, some agreement amongst legal positivist to use logical methods to bring legal concepts into a consistent, gapless, and systematic whole.

Schmitt showed his disdain for *Begriffsjurisprudenz* during a lengthy scholarly discussion on a curious legal case. On 8 April 1903, the highest German court, the *Reichsgericht*, decided over the validity of a falsified cheque.[73] Someone had added a single digit to increase the cash-out sum. The local court in Freiberg, where the case was heard first, declared the cheque valid for the original sum intended. At the appeal before the regional court of Dresden, a bench of three judges ruled that the cheque was altogether invalid. In the final appeal, the Reichsgericht ruled that the cheque was valid again. The court reasoned that there was no direct legal provision that fitted the case. Only Art. 75 of the *Wechselordnung* came close, but it only encompassed fake signatures on cheques, not altering the sum.[74] After consulting several expert witnesses, the bench reasoned anyone with a pen could easily cross out the falsely added digit. Therefore the cheque continued to be valid. In the court's language, the "integrity of the cheque" was still intact.[75]

For Schmitt, the lengthy trial and the court's logic were strong indications of how arbitrary court decision had become by relying on *Begriffsjurisprudenz*. Even the best hermeneutical extraction of written laws was prone to a certain arbitrariness. The lower courts had, with pretty much the same arguments, declared the cheque valid and invalid. Schmitt advised that lawyers and judges should properly understand such examples of arbitrariness. Instead, he scorned, jurists tried to hide such cases behind

71 See Rudolf von Jhering, *Scherz und Ernst in der Jurisprudenz: Eine Weihnachtsgabe für das juristische Publikum* (Leipzig: Verlag von Breitkopf und Härtel, 1884), 277–296.

72 Joachim Rückert, *Abschiede vom Unrecht: Zur Rechtsgeschichte nach 1945* (Tübingen: Mohr Siebeck, 2015), 320–278.

73 *Entscheidungen des Reichsgerichts: Entscheidungen in Zivilsachen* (Leipzig: Beit & Comp., 1903), 386–389.

74 See S. Borchard, *Die Allgemeine Deutsche Wechselordnung und die Ergänzung und Erläuterungen derselben betreffende Novelle* (Berlin: Verlag der Königlichen Geheimen Ober-Hofbuchdruckerei, 1865) 261–262.

75 *Entscheidungen des Reichsgerichts: Entscheidungen in Zivilsachen* (Leipzig: Beit & Comp., 1903) 388.

the smokescreen of legal methodology and legal theory. Schmitt could also not restrain himself from offering his opinion on the cheque-case. The best path the court could have taken, Schmitt opined, was to explicitly declare that what made the cheque valid was not the correct interpretation of a written legal norm but merely the fact that the highest court had ruled in this specific way. Now other judges could simply follow precedent.

IV. Roman Law and Occidental Rationality

Before piecing together what occidental rationality signified for Schmitt, I will outline Schmitt's relationship with Roman Law. Like all students of German jurisprudence in the early twentieth century, Carl Schmitt studied Roman Law as a mandatory element to qualify as a lawyer. Without it, he could not have been admitted to the *Staatsexamen*, the bar examination in Germany. Schmitt took his Roman Law classes around the same time that he attended Max Weber's lectures in Munich. Connecting one to the other, Schmitt reframed Weber's distrust in Enlightenment rationality as one aspect of a more substantive paradigm shift that concluded with the supremacy of economic considerations as determining factors for all political decisions. Schmitt, therefore, saw little difference between Lenin and a free-market entrepreneur. For him, both ventured to bring about an "electrified earth."[76] Against these dominant worldviews that bickered over the "correct method of electrification", Schmitt proposed Roman Law.[77] He claimed, at the beginning of *Römischer Katholizismus und Politische Form* written during the Weimar years, that "the mythical power of Rome" was "stronger than any economic calculations."[78]

What Schmitt meant by this was that Roman Law and its encompassing rationality was substantively different from the interest-driven Enlightenment rationality that Weber explored. As one could see in Canonical Law, for Schmitt the legitimate successor to Roman Law's "occidental rationality", its concerns went well beyond economic thinking. "The rationalism of the Roman Church morally encompasses the psychological and sociological nature of man and, unlike industry and technology, is not concerned with domination and exploitation of matter."[79] Making all rational mo-

76 Carl Schmitt, *Roman Catholicism and Political Form* (London: Greenwood Press, 1996) 13.
77 Ibid.
78 Ibid., 3.
79 Ibid., 13.

tives subservient to economics, Schmitt writes in another Weimar-era essay called *Die Politische Theory des Mythos* [The Political Theory of Myth], was a great mistake. Intellectuals of the nineteenth century could have prevented from falling into the trap of "scientific-technical rationalism", Schmitt argued, by sticking to broader rationality encompassing all spheres of life.[80] One political possibility that came with an all-spheres of life encompassing "occidental rationality" was the creation of political myths. Schmitt held these myths as essential to keep a political process humane. Following instrumental-rationality would, on the other hand, lead to "rationality-driven mechanical absence of myths."[81] This absence would only increase productivity, Schmitt feared, but it would not lead to vital scientific and political discoveries.

Schmitt saw the high point of "occidental rationality" materialised in the historical turn from the sixteenth to the seventeenth century. The turn from "theology to metaphysics," as he put it in his 1929 essay called *Das Zeitalter der Neutralisierungen und Entpolitisierungen* [The Age of Neutralisations and De-Politicisations].[82] In this "heroic time", Schmitt wrote, systematic-scientific thinking peaked with "Suarez, Bacon, Galileo, Kepler, Descartes, Grotius, Hobbes, Spinoza, Pascal, Leibniz, and Newton."[83] What these thinkers had in common was a characteristically "mythological" way of approaching the world. Their "cosmic-rational superstition", like their belief in astrology, ushered in the most vital shifts in scientific thinking.[84] Schmitt chastised Enlightenment thought for bringing this historical processes of discovery and innovation to a shrieking halt through its "humanism and rationalism."[85] What had happened, Schmitt mourned, was that thinkers like Immanuel Kant had replaced myth-enabling concepts like "dogma, metaphysics and ontologism" with stale pseudo-scientific ones like "critique, pure, and reason."[86]

For Schmitt, Roman Law was a carrier which safely transported occidental rationality to the Catholic Church, from where it disseminated into modern European jurisprudence. Therefore, Schmitt, similar to legal positivist of the nineteenth century, was not keen to lobby for an outright re-

80 Carl Schmitt, *Positionen und Begriffe: Im Kampf mit Weimar – Genf – Versailles 1923–1939* (Berlin: Duncker&Humblot, 2014[1940]) 18.
81 Ibid., 18.
82 Ibid., 140.
83 Ibid., 140.
84 See Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 495.
85 Ibid., 141.
86 Ibid., 141.

turn of Roman Law in any substantive form. When looking at the broader intellectual history of the concept of Roman Law, Schmitt had once even labelled it as a "foreign raid," that had invaded Germanic jurisprudence in the late middle ages.[87]

During Nazi rule, Schmitt continued to write unfavorably about Roman Law. In *Die Lage der Deutschen Rechtswissenschaft* [The Historical Situation of German Jurisprudence], an essay he published in 1936, Schmitt criticised Savigny for having centred too much on civic *Bildung*. This insistence on education led Savigny "into the arms of Roman historiography." In so doing, Schmitt wrote at the time, Savigny had only won a sham victory over natural law and legal positivism. But the Historical School of Jurisprudence had utterly failed, according to Schmitt, to develop a "living customary law."[88]

In 1942, in the situation of European jurisprudence, when Schmitt identified occidental rationality as the substance that jurists should distil from Roman Law. To infuse life into the archaic scaffolding, according to Schmitt, jurists had to grasp the long history of occidental rationality. Already in his pre-Nazi works, Schmitt had outlined how European nation-states had inherited occidental rationality from Roman Law, filtered through the Canonical Law of the Catholic Church. In the sixteenth and seventeenth century, this occidental rationality had ushered in a period of lasting peace when secularised states came together under a new transnational European umbrella. For Schmitt, this European international law had ushered in "stability and duration", the two vital factors of occidental rationality.[89]

With the splintering of legitimacy from legality, as Schmitt observed in his book with the same title in 1932, jurists of the nineteenth century had offered blind submission to legality and forgotten that "legality was originally a substantive part of occidental rationality."[90] For Schmitt, no order could sprout out of this new technocratic understanding of legality, because jurists could no longer provide intellectual impulses to the field. They were entirely limited to a mere technocratic application of laws.[91] In this scenario, Schmitt warned, jurisprudence would lose its academic character which had historically defined Europe's concrete order and was

87 Carl Schmitt, "Aufgabe und Notwendigkeit des Deutschen Rechtsstands", 181.
88 Carl Schmitt, "Die geschichtliche Lage der deutschen Rechtswissenschaft", in *Deutsche Juristen-Zeitung* 41, no. 1 (1936).
89 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 24.
90 Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 346.
91 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 6.

the repository of "occidental rationality".[92] If legal positivism's reading of legality were to become mainstream, Schmitt predicted, Germany was fated to run into orderless legislative chaos.

V. Conclusion

Schmitt's audience for his lectures on the situation of European jurisprudence in the 1940s was brimming with foreign political leaders close to the Third Reich. His address in Bucharest, for instance, was attended by the ruthless anti-Semite Mihai Antonescu, who at the time was acting as Deputy Prime Minister, Foreign Minister, and Propaganda Minister of Romania. Schmitt seemed to have had a great time meeting him, as can be gleaned from the dedication scribbled in a book that Antonescu presumably handed Schmitt after the lecture: "Prof. Carl Schmitt, in memory of our meeting, which I will never forget 18th February 1943, Bucharest". That there was proximity in their way of thinking about the past is visible from another dedication that Antonesco wrote. "Prof. Carl Schmitt as proof of a heartfelt admiration for the man who understands the centuries."[93] Despite Germany's looming defeat of the Second World War, which enticed Schmitt to distance himself from the Nazi regime, his reasons for this departure can be explained partly through his broader legal and political theory. Regarding Roman Law, Schmitt was against "a program of excavations". His was not an instruction manual to dig out and ponder over stacks of rotting manuscripts.[94]

Instead, Schmitt aimed to give jurists the confidence that their discipline could withstand adversary political regimes as well as methodological attacks that seek to circumscribe its influence on setting norms. To accomplish this task, Schmitt took the first step himself. In his post-war work *Der Nomos der Erde: Im Völkerrecht des Just Publicum Europaeum* [Nomos of the Earth: In the International Law of Jus Publicum], Schmitt explored how jurists could normatively justify the taking, division and exploitation of land in the post-war era.[95] He urged other jurists to continue thinking

92 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 29.
93 Mihai A. Antonescu, *Le fondement de la société des nations et la crise de cet organisme*, LAV NRW RW 265 Nr. 23058; Mihai A. Antonescu, La Rome antique et l'organisation international LAV NRW RW 265 Nr. 23059.
94 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 32.
95 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1950).

along such broader lines of structuring global order infused with "occidental rationality". While he may not have done this primarily to whitewash his Nazi past, Schmitt's proximity to the Nazi regime made him the worst possible proponent of this view.