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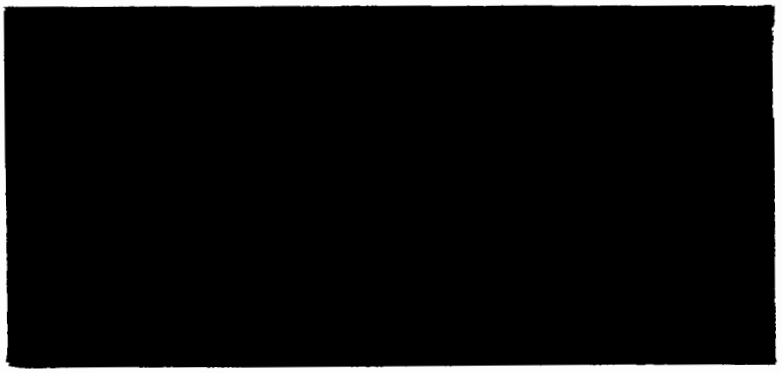

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"Decisionism and Legal Indeterminacy: The Case of Carl Schmitt"

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"Decisionism and Legal Indeterminacy: The Case of Carl Schmitt"[1]

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Let me begin with a claim that at first glance surely seems polemical in character: Carl Schmitt, twentieth century Germany's infamous right-wing authoritarian jurist, was also the first identifiably deconstructionist legal theorist of our times. Moreover, the deconstructionist strands in Schmitt's theory culminated in his embrace of fascist legal and political practice.

Now that I have probably irritated a substantial portion of the audience, let me try to explain exactly what I mean by this claim.

Radical jurisprudence today comes, as it should, in many different shapes and sizes. But for at least one group of radical jurists, a profound and unavoidable indeterminacy necessarily characterizes all elements of the legal system. In the words of critical legal scholar Mark Kelman:

> All rules will contain within them deeply embedded, structural premises that clearly enable decision makers to resolve particular controversies in opposite ways...[A]ll law seems simultaneously either to demand or at least allow internally contradictory steps.[2]

Notwithstanding traditional liberal aspirations for a binding and relatively determinate set of legal norms, law turns out to contain an irrepressible moment of arbitrariness. Legal categories are nothing but "empty vessels" (Claire Dalton) filled by acts of power that force meaning into categories otherwise lacking any semantic substance.[3] Judicial discourse making use of the concept of the

rule of law primarily serves as a mask for highly discretionary exercises of power which tend to favor the politically and socially privileged. In Stanley Fish's particularly drastic version of this argument, the inherently ad hoc character of legal experience stems from a "discourse of power" located at the core of all legal experience: law is a "discourse whose categories, distinctions, and revered formulas are extensions of some political program that does not announce itself as such."[4] Accordingly, we would do well to delight in the element of willfulness intrinsic to legal experience, and not bother trying to limit or counteract it. Indeterminacy in law is a reminder of the virtues of "creative rhetoricity," and it would be silly to regret the arbitrariness in which this rhetoricity inevitably culminates. For Fish, unregulated power at the core of law is something to celebrate, not lament.

If I am not mistaken, very few contemporary North American writers sympathetic to radical deconstructionist accounts of the rule of law are even remotely familiar with the fact that surprisingly similar ideas were employed by the authoritarian right in Germany in the 1920s and 1930s. Today, I hope to shed some light on this historical blindspot by revisiting Schmitt's reflections on the nexus between power and legal indeterminacy. Although my comments today are primarily intended as a contribution to the history of twentieth century legal theory, I hope that they prove of more than antiqurian interest. In my view, the case of Schmitt suggests that a certain type of one-sided "deconstruction" of liberal ideas of legal determinacy may have far more <u>indeterminate</u>

political implications than radical jurists seem aware. It was Carl Schmitt who, in the years preceding the Nazi takeover in Germany, debunked the rule of law by arguing that it could never successfully contain the unavoidably arbitrary character of political power; it was also Schmitt who suggested that his preference for dictatorship followed systematically from his grasp of the inherently ad hoc character of all legal experience.

Let me try to be as clear as possible: my aim today is <u>not</u> to attribute proto-fascistic tendencies to contemporary radical jurisprudence. But I do believe that a reexamination of Schmitt's legal theory raises difficult questions for those today rushing to discard even the most minimal elements of the liberal rule of law. At the very least, it is incumbent upon radical jurists today to do a better job explaining why their claims about legal indeterminacy need not succumb to the ills so evident in Schmitt's theory.

I.

In what follows, I describe three stages in the development of Schmitt's reflections on the problem of legal indeterminacy. In an initial stage, Schmitt criticizes traditional liberal jurisprudence by examining its failure to grapple adequately with the enigma of legal indeterminacy. In a second stage, Schmitt radicalizes his early reflections on the enigma of legal indeterminacy by arguing that the problem of indeterminacy is <u>pervasive</u> within the legal system, in part because it is rooted in an inevitable and unavoidable willfulness that lies at the basis of all legal experience. In the final stage, Schmitt emphasizes the problem of

legal indeterminacy in order to justify an authoritarian alternative to Weimar democracy.

(1) In the first stage, Schmitt offers an oftentimes persuasive criticism of traditional mechanical interpretations of judicial decision making, influenced by Montesquieu, according to which every conceivable case and situation can be unambiguously subsumed under a set of crystal clear general norms. As Max Weber famously described this traditional view, the judge is nothing but "an automaton into which legal documents and fees are stuffed at the top in order that [they] may spill forth the verdict at the bottom along with the reasons, read mechanically from codified paragraphs."[5]

But as Schmitt notes, only if laws could always be perfectly clear and transparent in character could this mechanical view of judicial action claim to possess real value. In light of the indisputable fact that only a tiny number of cases involves adequately clear legal norms and acts obviously meant to be determined by them, mechanical concepts of "subsumption" only apply to unusual legal cases. Notwithstanding the claims of traditional liberal jurisprudence, the overwhelming majority of cases inevitably are what Ronald Dworkin more recently has described as "hard" cases. Indeed, for the young Schmitt, as for Dworkin, early liberal conceptions of a "mechanical and automatic binding" of the judge to the legal norm are profoundly misleading for one simple reason: they obscure the complexity of judicial decision making and thereby exaggerate the number of "easy" cases facing judges.

Schmitt then proceeds to offer a critique of various attempts to compensate for the inadequacies of mechanical jurisprudence. To those who admit that judges necessarily are forced to downplay the letter of the law and instead should focus on legislative intent, Schmitt responds that such views rest on a misleading conflation of state organs with concrete individual human beings: for Schmitt, the homogeneous, unified will implicitly presupposed by attempts to focus on the "intent of the legislator" is a fiction, a misleading personalization of state activity that fails to capture the complexity of legislative politics. When relying on concepts of legislative intent, judges inevitably construct an ideal legislator with little real relationship to the actual historical legislative process. "A 'will' suspended in the air above the judge is always first and foremost the result of an interpretation," and not, as is often claimed by those trying to get as much mileage as possible from concepts of legislative intent, an objective state of affairs that a judge merely concretizes when engaging in legal interpretation (GU:27). Ideas of legislative "will" or "intent" are the product of legal interpretation, not its starting point. A creative interpretive act first makes possible those standards which judicial decision makers then, misleadingly, claim compose the basis of their decisions.

What then of those who claim that the overall determinacy of legal decisionmaking can be salvaged by supplementing traditional legal concepts with new and more flexible legal standards? According to this (common) view, some judicial discretion is

unavoidable; nonetheless, its scope can be defined and delineated by means of a reliance on relatively open-ended legal standards that, in effect, "tell" a judge or administrator when discretion is appropriate.

For Schmitt, those who hope to salvage the rule of law ideal by means of this strategy make things too easy for themselves. In his interpretation, proponents of this view implicitly assume that judges still "subsume" individual legal acts under a set of legal rules, albeit under a set of rules that has been substantially broadened. But the addition of vague standards into the legal system necessarily robs the concept of legal subsumption of any real substance: vague standards (e.g., "the needs of commerce") inevitably permit a rich diversity of alternative --and potentially contradictory-- answers to a particular legal case (GU: 20-21, 40-41). Despite claims to the contrary, reliance on such standards necessarily contradicts the normative core of the liberal rule of law, namely the idea that law should effectively bind or constrain judicial actors.

Reliance on vague legal standards thus cannot save liberal concepts of legal determinacy. The most important conclusion of the young Schmitt's legal theory is that legal decision making is always characterized by what he describes as a "moment" of "indifference in reference to the content of the law" (GU: 67). That is, the relationship between the legal norm and the judicial actor inevitably involves an element of "indifference" or indeterminacy. An unbridgeable "gap" inevitably separates legal

actors and legal texts. Within this gap, discretion is unavoidable.

(2) The second stage of Schmitt's reflections on legal indeterminacy takes a more radical texture. Whereas Schmitt initially focussed on debunking liberal views of judicial action in order to demonstrate the unavoidability of legal indeterminacy, his subsequent writings locate the fundamental source of the "indifference in reference to the content of law" in an act of arbitrariness or willfulness --in an expression of "pure power" unrestrained by legal norms.

Crucial here is a 1914 monograph, The Value of the State and the Significance of the Individual. Here, Schmitt first seems to endorse some typically liberal ideas. But he does so only in order to suggest that their implications, in fact, are profoundly anti-liberal. Schmitt now writes that views of law that reduce it to nothing but a "game" among competing power interests obscure law's normative character. Power-realist accounts of law provide no place for making sense of the tasks of legal argumentation and justification. By reducing law to an epiphenomenon of power, they deny the integrity of legal experience; they can only speak coherently about the "facts" of empirical power, but hardly of the legal system as consisting of a set of "norms" requiring justification. "If law is to exist, it cannot be derived from power, for the gap between law and power simply cannot be bridged" (WSBE: 29). Echoing elements of Hans Kelsen's "pure theory of law," Schmitt then insists on a clear delineation between legal experience and empirical power relations. The sphere of facticity,

of concrete power relations, cannot ground normativity, the sphere of legal norms. Thus, law and power need to be seen as constituting two distinct spheres. Law constitutes a "pure" set of norms, the realm of "ought" (Sollen), in stark contrast to the facticity (Sein) of empirical power struggles. In this view, "pure law" (untainted by power) initially stands opposed to "pure (that is, legally unregulated) power."

But according to Schmitt, it is precisely the function of the state to try to link the two spheres of power and law. State organs undertake to translate the norms of the abstract legal universe into concrete reality. The state acts as a transmission belt between the legal sphere and the world of everyday power politics, between normativity and facticity. By undertaking to realize abstract legal norms, state institutions find themselves situated fruitfully between the realms of facticity and normativity, and thus capable of mediating between the two spheres. Yet this mediation comes at a price. To the extent that the state makes it possible to render the "heavenly" realm of legal normativity relevant for the mundane sphere of "earthly" facticity, law is forced to surrender its heavenly character. More specifically, law is forced to make concessions to a universe (the sphere of pure power) to its own internal dynamics. What form must this compromise take? Schmitt's answer is unambiguous: law inevitably contains elements of that universe which it has been forced to enter into a compact with, namely the sphere of empirical power. When realized by governmental bodies, law includes a moment of normatively

unregulated facticity, of pure power or willfulness. In Schmitt's own more familiar terminology from the 1920s, a sovereign decision "not based on reason and discussion and not justifying itself...an absolute decision created out of nothingness," is essential to legal experience (PT:66).

However idiosyncratic, Schmitt's argument here is crucial for understanding the quite radical assertions about legal indeterminacy which he makes in the 1920s and early '30s. In 1912, Schmitt originally spoke of a mere "moment" of "indifference in reference to the content of law." The term "moment" might suggest that indeterminacy is nothing but one among a number of distinct elements constitutive of legal experience, maybe even that law for the most part can be rendered determinate and predictable. Yet if the "indifference in reference to the content of law" initially described by Schmitt derives, as he now openly argues, from an act of "pure power" or perfect willfulness underlying all legal experience, it makes little sense to speak merely of a "moment" of arbitrariness within law. If the element of power within law is genuinely "pure" or perfectly willful, it would seem to follow that it is potentially unlimited: by definition, pure power or pure willfulness probably must remain an untamed and (normatively) unregulated form of power. Thus, what was first described as a "moment" of legal indeterminacy is likely to become truly pervasive --in fact, law's most striking feature. Arbitrariness seems destined to make up a ubiquitous facet of every feature of legal experience.

Indeed, this is precisely the position sketched out in many of Schmitt's Weimar era writings. Schmitt writes in Political Theology that "[a]ll law is 'situational law'" (PT: 13). In its very essence, all legal experience is permeated by indeterminacy, deriving from the ever-changing political imperatives of those who realize, enforce and interpret the law. Notwithstanding liberal myths to the contrary, even the most unambiguous legal concepts remain "infinitely pliable" (PT:17); every judicial act is an intrinsically political act in which judges make unregulated "sovereign decisions" in favor of a particular political agenda (PT: 31). As Schmitt infamously comments in The Concept of the Political, "the sovereignty of law means only the sovereignty of men who draw up and administer the law" (CP: 67).

(3) In a third stage, Schmitt explicitly links the problem of legal indeterminacy to his preference for political authoritarianism. Beginning in the 1920s and culminating in Schmitt's enthusiastic embrace of Nazism in 1933, he argues that dictatorship and legal indeterminacy exist in a relation of "elective affinity." Just as the liberal faith in clear, determinate law is intimately related to parliamentary democracy, so too are dictatorship and legal indeterminacy the closest of allies. For Schmitt, dictatorship is that political form most appropriate to the experience of legal indeterminacy. The concept of dictatorship thus constitutes nothing less than the "missing link" of modern jurisprudence: dictatorship alone provides a practical "answer" to the riddle of legal indeterminacy.

In his 1921 study on dictatorship, Schmitt restates his position that an "opposition" inevitably exists between a legal norm and the method of realizing it. But he now makes the additional claim that the omnipresent possibility of a gap between legal norms and their realization in the concrete world is precisely "where the essence of dictatorship lies" (D: viii). "To speak in abstract terms, the problem of dictatorship, which far too rarely has been systematically analyzed, is the problem of the concrete exception within legal theory" (D:ix).[6] For Schmitt, essential to a dictatorial regime is its reliance on situation-specific acts that cannot be legally ascertained beforehand. In this interpretation, a dictator is given a free hand to make use of individual or concrete measures in accordance with the imperatives of a specific political task at hand; he breaks through the "crust" of the legal system in order to undertake power decisions incapable of gaining proper legal codification. In short, the legal core of dictatorship is profoundly discretionary.

In light of Schmitt's simultaneous reflections on the pervasiveness of legal indeterminacy, the conceptual marriage of dictatorship to legal indeterminacy here inevitably has radical implications. To the extent that legal actors inevitably engage in discretionary "power decisions" when they interpret and apply legal norms, "dictatorial" power would seem to be a pervasive facet of everyday legal experience. By the same token, that regime type which makes the possibility of far-reaching discretion its very core --in other words, an unambiguously and self-consciously

dictatorial regime-- would seem best attuned to the imperatives of a legal universe defined by the experience of legal indeterminacy.

In the late '20s Schmitt complements this somewhat abstract claim with an empirical argument about legal development. He argues that the widely discussed proliferation of vague, open-ended legal standards ("in good faith," ""in the public interest," "public order") in twentieth century law provides the best concrete evidence for the anachronistic character of liberal conceptions of legal determinacy --and the inevitability of dictatorship. Schmitt sides with those who believe that the unavoidable growth of extensive state intervention in the modern capitalist economy necessitates non-classical forms of law. Vague legal standards become "unavoidable and indispensable" as state activity inevitably becomes increasingly ambitious in character (SBV: 43). In this view, new, open-ended legal forms necessitate corresponding postliberal forms of governmental decision making: specifically, they require judicial and administrative discretion on a scale unheard of within liberal democracy. For Schmitt, only a dictatorship is likely to prove up to the task of providing for discretion on this scale: as he openly declares in 1932, the growth of "the administrative state which manifests itself in the 'praxis' of measures" --in other words, a system of indeterminate, situation-oriented law like that required by the contemporary interventionist state --"is more likely appropriate to a 'dictatorship' than the classical parliamentary state" (LL: 87).

But in light of the "elective affinity" between legal

indeterminacy and dictatorship as well as the unavoidability of the former, why not simply dump liberal democracy for a dictatorial alternative better suited to the demands of legal indeterminacy?

Of course, Schmitt ultimately opted to do just that. Although he probably preferred an alternative authoritarian solution to Weimar's crisis before 1933, he showed few reservations about embracing the Nazis in the immediate aftermath of their takeover. In a series of shocking anti-semitic apologies defending the Nazis in the early and mid-1930s, Schmitt repeatedly relies on his previous reflections on the problem of legal indeterminacy in order to defend the new dictatorship. "All existing legal concepts are 'indeterminate' legal concepts," Schmitt writes in 1933 (SBV: 43-44). Because the demand for determinate law is the very core of the ideal of the rule of law, for Schmitt the emerging Nazi legal order would do well to distance itself from anachronistic ideas of a so-called "rule of law." And because the ubiquity of legal indeterminacy points to the unavoidability of arbitrary political power, for Schmitt only a dictatorship --like that sought by the Nazis-- is suitable to the legal dictates of our times.

CP= Concept of the Political, trans. George Schwab (New Brunswick: Rutgers University, 1976).

D= Die Diktatur (Munich: Duncker & Humblot, 1928).

GU = Gesetz und Urteil. Eine Untersuchung zum Problem der Rechtspraxis (Munich: C.H. Beck, 1968 reprint of 1912 study).

LL= Legalität und Legitimität (Munich: Duncker & Humblot, 1932).

PT= Political Theology, trans George Schwab (Cambridge: MIT Press, 1985).

SBV= Staat, Bewegung, und Volk (Hamburg: Hanseatische Verlagsanstalt, 1933)

WSBE= Der Wert des Staates und die Bedeutung des Einzelnen (Tübingen: Mohr, 1914.

1. I have developed some of the arguments found in this paper in greater depth in: "Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt," History of Political Thought Vol XVI (forthcoming, 1996).

2. Mark Kelman, A Guide to Critical Legal Studies (Cambridge: Harvard University Press, 1987), pp. 59-61, 258.

3. I am thinking here of what Andrew Altman has described as the "radical indeterminacy" thesis within Critical Legal Studies. Andrew Altman, Critical Legal Studies: A Liberal Critique (Princeton: Princeton University Press, pp. 90-98.

4. Stanley Fish, There's No Such Thing as Free Speech (Oxford: Oxford University Press, 1994), p. 175, also 178-179.

5. Max Weber, Economy and Society (Berkeley: University of California, 1979), p. 979.

6. The concept of the "concrete exception" is intimately related to the idea of "indifference in reference to the content" of the law. For Schmitt, "[t]he exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element --the decision in absolute purity. The exception appears in irs absolute form when a situation in

which legal prescriptions can be valid must be brought about" (PT: 13).

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