Introduction: The reluctance to 'glance in the mirror': 'Darker Legacies of Law in Europe' revisited

By Daniel Augenstein[*]

A. Message in a Bottle

"Why explore the era of National Socialism and Fascism while Europe undertakes such efforts to get ahead with the integration project?" The introductory sentence of Christian Joerges' and Navraj Singh Ghaleigh's *Darker Legacies of Law in Europe*[1] runs like a *Leitmotif* through the reviews collected here. Why set out to unravel possible continuities between (one of) Europe's darker legacies and its 'brighter' future, given that the European project was initiated as a reaction to and remedy against Nazi Germany and constituted, post-war, a precondition for its sovereignty and a symbol of its moral renewal? And, more interesting still, how to spell out the lessons such a 'working through the past' might entail for the constitutionalization of the European Union, a process itself still burdened with the *Erblasten* (dead hand) of the European Communities' initial deliberately non-democratic construction?

Histories of European integration often begin, as Daniel Gordon notes in his review, with a "spotless pedigree", such as Enlightenment visions of perpetual peace or Winston Churchill's 'we must re-create the European family' speech of 1946. Correspondingly, the founding narrative of European law stylizes World War II as a breaking point, that divides Europe's past as "ideology, division and violence" from its future as "economy, unity and peace" (Koskenniemi). While European law thus principally projects the past as a place from which to escape, memory politics, and for these purposes the *Darker Legacies of Law in Europe*, insists

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[*] European University Institute. Email: Daniel.Augenstein@iue.it.

[1] Preface to DARKER LEGACIES OF LAW IN EUROPE, ix (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

on the need to "face the past" in order to understand the present in the interests of the future.[2]

But *what past* should we be concerned with in the interests of the future and how should it be remembered? The methodological approach underlying the project purports an understanding of history as reconstruction of the past from the viewpoint of the present, which emphasizes the way in which common identities are forged through narratives building upon selective processes of remembering and forgetting.[3] Clearly, this alone does not suffice to justify the need to tell Europe's darker tales: if processes of selection are both constitutive and unavoidable for historical narratives, appeals to collective memories remain a double-edged sword: Successful construction depends on "certain cultural chords and conceptual tropes", on "narrative plots and discursive frames" that are themselves the "products of human creation".[4] And at a moment when the European Union undertakes such efforts to re-constitute itself in an attempt to adjust and reconcile its economic, political and social aspirations, less 'bitter experiences' might better serve to bridge the gap not merely between past and present, but furthermore between the "high political and intellectual levels and the levels of everyday life".[5] But such positive values are, as Mayo Moran remarks, very difficult to derive from Europe's dark years.

Still, the purported aim of *Darker Legacies* is to come to terms with these bitter experiences precisely in order to enhance Europe's social acceptance and precipitate a renewed engagement with democracy in the European public. And insofar as the alleged 'reluctance to glance in the mirror' is meant as a corrective to a notoriously biased appropriation of the past, the success of the project does not depend upon delivering non-dystopian lessons. Indeed, *Vergangenheitsbewältigung*, the coming to terms with a guilty past, suggests quite the opposite.

The editors watchfully guard against the instrumentalization of history, a precaution that Weiler specifies in his Epilogue as the exhortation to avoid "abusive" instrumentalization: "abusive in employing the memory of the holocaust

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[2] *Id.*, ix.

[3] In the context of the Darker Legacies project compare Bo Stråth, *Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community*, 6 G ERMAN L AW J OURNAL, 255-271 (2005).

[4] *Id.*, 257.

[5] *Id.*, 257.

for ulterior inappropriate purposes".[6] What we are then ultimately concerned with, and this is – or so it seems – the normative thrust of *Darker Legacies*, is the *right kind* of instrumentalization of historical facts; and with the right kind of instrumentalization of *historical facts*; and, eventually, with the recognition that some of these facts might have proved more enduring than commonly assumed, so that the dark shadows extend well into the present (Monateri).

It is at this point that, as many commentators note, the project's own attempt to reconstruct the past risks falling into a trap. If, as Koskenniemi points out, the meaning of political concepts is not fixed but determined by their use, by "what it is invoked for and what it is invoked against, in which context and by whom", the alleged parallels and continuities between the past and the present become much harder to sustain. As a consequence, *Darker Legacies* at times fails to distinguish clearly enough between description and prescription (Jabloner) and, beset by the "twin dangers" of a "too simple" unequivocal condemnation and a "too open-minded" approach, risks presenting a somewhat distorted image of the relation between 'us' and 'them' (Moran). This is the dilemma: either the book says too much, because "tomorrow's evil will not be exactly what yesterday's evil was" and "to examine our societies only to the extent that they resemble or deviate from Nazi Germany makes us blind to our own kinds of wrong" (Koskenniemi), or the book says too little, in that continuities are not made sufficiently explicit to significantly "advance our understanding of the institutional arrangements of the EU and the constitutional values that anchor that project" (Loughlin).

Some of the reviews reprinted here do not always manage to escape these and similar dilemmas, and it might be more than just the result of prudence if the contributions to *Darker Legacies* shy away from too definite conclusions.

In any case, the success of the book does not necessarily depend upon 'proving' such continuities or parallels between the past and the present – be it in personal, legal, or conceptual terms. Rather, its narratives claim their own present, they "can be", to borrow from Paul Celan, "a message in a bottle, sent out in the – not always greatly hopeful – belief that somewhere and sometime it could wash up on land".[7] It is, as commentators well appreciate, at least in this latter sense that the primarily historically orientated contributions to *Darker Legacies* make an important contribution to contemporary debate, even though there might be, as Detlev Vagts

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[6] JHH Weiler, *Epilogue*, in DARKER LEGACIES OF LAW IN EUROPE, 389, 391 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[7] Paul Celan, *Speech on the Occasion of Receiving the Literature Prize of the Free Hanseatic City of Bremen*, in SELECTED POEMS AND PROSE OF PAUL CELAN, 395, 396, John Felstiner, trans. (2001).

remarks regarding the chapters on Italian and Spanish law during the regimes of Mussolini and Franco, "little evidence of survival". And it is in this sense that the book's legal and conceptual reflections prove fruitful despite the fact that comparisons often function merely asymmetrically and continuities do not always engender parallels (Möllers).

B. Legal legacies

As Peer Zumbansen notes regarding the contributions to *Darker Legacies* of Lepsius[8], Fraser[9], Curran[10] and Mahlmann[11], "whether or not Nazi *law* was 'law', whether or not the Nazi state amounted to the 'total state' or, rather, whether it ought to be depicted as a complexly intertwined network of corporatist public-private governance, seemed to matter greatly after the Second World War and still does today".

But was it law? Thomas Mertens reconsiders in his review Gustav Radbruch's 'conversion' from legal positivism to natural law that issued in his famous formula according to which 'false' positive law has to yield to 'true' justice – and his problematic conclusion that formalism engendered by legal positivism rendered the German legal profession 'defenseless' against statutes that were arbitrary and criminal. There is good evidence that, as Koskenniemi states, affirming Stolleis' thesis, the problem with inter-war German lawyers was not their 'positivism' but their dearth of courage and a general compliance.[12] Furthermore, as Mertens notes himself, recent scholarship tends towards an anti-Radbruch-thesis that identifies the absence of formalism as the true culprit. And – even though Radbruch's appeal to justice still has strong normative appeal – it would indeed be somewhat

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[8] Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism*, in DARKER LEGACIES OF LAW IN EUROPE, 19-42 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[9] David Fraser, *'The outsider does not see all the game…': Perceptions of German Law in Anglo-American Legal Scholarship, 1933-1940*, in DARKER LEGACIES OF LAW IN EUROPE, 87-112 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[10] Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, in DARKER LEGACIES OF LAW IN EUROPE, 205-228 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[11] Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE, 229-242 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[12] Compare Michael Stolleis, *Prologue: Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945*, in DARKER LEGACIES OF LAW IN EUROPE, 1, 4 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

awkward *retrospectively* to disqualify fascist law as '*not law*' – be it for Radbruch's own purposes or otherwise. Although some contributors to *Darker Legacies* seem skeptical as to whether or not the national Socialist regime qualifies as a 'legal order' there is, as Engelbrekt rightly stresses, "no denying that a system of legal rules was in force during the greater part of 1933-1945, and that it displayed a significant measure of coherence" – and effectiveness.

But was Nazi law then a somewhat autonomous and arbitrary tool of evil (with positivism providing for a ready remedy), or rather just the surface manifestation of a deeper social *malaise*? Lepsius' contribution to *Darker Legacies* on the deterioration of legality in Germany and Curren's much-appreciated methodological inquiry into formalism and anti-formalism in Germany and France make clear that there are (still) no easy answers available. "A critically self-reflective lawyer" writes Jabloner, underscoring Mahlmann's endorsement of a 'moderate positivism', "needs to be aware of an interpretation that is scientifically correct." But he goes further: extra-legal influences on legal interpretation become only through their positivation part of positive law, and "it is the task of the legal interpretation to assess what the law-maker intended". Now while Jabloner's admonition to methodologically distinguish strictly between, as he has it, "*Staatsrechtslehre*" (constitutional doctrine) and "*Politikwissenschaft*" (political science) is certainly maintainable, it fails to take into account that legal doctrines – and for that purpose the national Socialist regime – are *also* socially constructed (Koskenniemi), a fact that seems to lead right back to Radbruch's call for an *übergesetzliches Recht*. Still, as Rivers maintains, the necessity to critically assess the social determination of legal meaning should not yield the conclusion that methodology does not matter, nor that the subordination of method to ideology would not be problematic.

But is it law? As Pietro Costa remarks in his review, "continuity and discontinuity, dramatic cleavages and disguised legacies usually co-exist". But even if, thus conceived, the differences between totalitarianism and democracies cannot exclude underlying continuities, more would be necessary to show that there are actual parallels between Nazi law and modern trends in criminal justice policy (Lustgarten[13]) or between Nazi notions of honor and European doctrines of human dignity (Whitman[14]). Commentators tend to align with Gerald Neuman's critical

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[13] Laurence Lustgarten, '*A Distorted Image of Ourselves*': Nazism, 'Liberal' Societies and the Qualities of Difference, in DARKER LEGACIES OF LAW IN EUROPE, 113-132 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[14] James Q Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, in DARKER LEGACIES OF LAW IN EUROPE, 243-266 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

comment on Whitman[15], thus doubting that the Nazi era can plausibly be understood as continuous with what preceded and followed it. The value of these contributions, as commentators appreciate, lies in broader considerations. Lustgarten points to similarities in justification and rhetoric involved when it comes to the abandonment of fundamental rights and freedoms in the face of vague reasons of 'public morals' and 'threats to public security' (Moran). And Whitman does not deny that European dignity law is indeed hostile to Nazi racial hierarchy, but refers to the "social dynamics of several regimes" (Costa) and underlines the way in which "the European emphasis on civility and reputation" as "old aristocratic priorit[ies] … has traveled into the present via fascist law" (Gordon). Fair enough – but does this really cast a shadow of fascism over European human rights jurisprudence?

If there is a balance to be struck between historical analysis and contemporary application, between critical engagement and scholarly detachment, comments Rivers, then Alexander Somek's essay on 'Authoritarian Constitutionalism' is particularly successful. Somek applies his 'Authoritarian Test' to the European Union, concluding that its institutions should be characterized in terms of "the authoritarian component of constitutional law" as it existed in post-war Europe generally.[16]

Authoritarianism and totalitarianism: it is, Loughlin argues, through their distinction that "we see the relevance of this history for present day purposes." And "the difficulty for the organizers of this project is that, by focusing on fascism rather than authoritarianism as a strain in European constitutional thought, their continuity/discontinuity theme is overstrained, and this distorts the overall analysis". But, as Costa maintains, the founding symbol of the European Union is the rejection of *totalitarianism*, and an historical inquiry into authoritarianism alone might neglect the former's distinctiveness: "the unlimited manipulation of the individual, the notion of emergency law and the liquidation of *lebensunwerten Lebens*, [that] were restrained in some fringe areas of liberal civilization, while they became the pivot of totalitarian ideology and practice".

The curtain drawn, and many questions unsettled, as Tom Eijsbouts recapitulates: "Is the Union basically a part of Europe's redemption or also a channel of

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[15] Gerald L Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response*, in DARKER LEGACIES OF LAW IN EUROPE, 267-274 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[16] Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, 361, 383 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

undigested repression (refoulement)? Was law an autonomous agent of malice in Nazi Germany or mostly an expression of malice and degeneration in more powerful departments of reality? Is the law subsequently an autonomous agent or mechanism for the past's dark slumbering powers?" And, crucially, "can it redeem the past by itself?"

C. Demos and demons

The contributors to *Darker Legacies of Law in Europe* do not content themselves, as David Dyzenhaus notes, with the claim that the past will repeat itself if not thoroughly confronted or remembered. Rather, what is at issue is the feasibility of "constructing a liberated legal future without paying serious attention to the past from which one hopes to be liberated."

The deliberations about the constitutionalization of the European Union have rekindled debate about both its institutional design and its normative underpinning. Is it then, Christian Joerges asks in the follow-up project to *Darker Legacies*, really too speculative to assume interdependence between the fact that nowadays popular mobilization occurs in referendums against the European project rather than for European democracy and what he calls Europe's "social deficit"?[17] Even though "the original ideals of the post-war period are by no means outdated, they seem to have lost their mobilizing strength" so that the fragile basis of the Union's legitimacy needs to be embedded in an "*acquis communutaire historique*". [18] And, as Möller maintains, the stronger the longing for a European identity and the more pressing the need to express such an identity in a constitutional text, the more inescapable will be the search for a common European political tradition.

In this vain, many of the contributions to *Darker Legacies* revolve around the heritage of Carl Schmitt that, as John McCormick has put it, "haunts the study of European integration".[19] Possible continuities are discussed both regarding the

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[17] Christian Joerges, *Introduction to the Special Issue: Confronting Memories: European "Bitter Experiences and the Constitutionalization Process: Constructing Europe in the Shadow of its Past*, 6 GERMAN LAW JOURNAL 245, 250 (2005).

[18] *Id.*, 250.

[19] John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration 1923-1955*, 133, 141; Furthermore J Peter Burgess, *Culture and the Rationality of Law from Weimar to Maastricht*, 143-166; Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the*

European Union's institutional design and Schmitt's concept of *Großraum* (sphere of influence[20]) and regarding Europe's search for a common identity and Schmitt's *völkisch* (folkish) thinking.

Are there then continuities between Schmitt's *Großraum* theory and the "technocratic model of an economic European sphere" (Zumbansen)? Contributors and commentators express different views on this point. Most certainly, Europe's multi-level system of governance differs considerably from the Schmittian *Großraum* fantasy (Kemmerer). But the structural similarities, rather than true continuities, are noteworthy in that they point right to the heart of the European legitimacy problem. At the very least, the *Großraum* concept serves well to define Europe's "negative" (Costantini), to illuminate what it should not be(come).

There still remains though Schmitt's *völkisch* question, often associated with the debate about how much demos must be plunged into the European Union to make it a true democratic polity. Engelbrekt and Scheuerman maintain in their reviews, against Ghaleigh[21], that Schmitt himself considered ethnic homogeneity a necessary pre-condition for a functioning democracy. And perhaps Dyzenhaus has a point when he claims that one "cannot simply choose Habermas over Schmitt in reaction to Schmitt's repugnant views about homogeneity, because Schmitt was right that something beyond liberal democratic values is as a matter of fact constitutive of every successful political unity and so every successful legal order". But, surely, to choose Schmitt over Habermas would prove disastrous – so again a merely dystopian value.

With or without Schmitt: what is distinctive about the European Union, introspectively and in its encounter with the "outside world" (Costa)? Weiler notes in his Epilogue to *Darker Legacies* that ideas of demos and nationalism or belonging, freed of Schmittian associations, may be of enduring importance in a post-nationalist Europe.[22] And Vagts states the obvious, namely that "the curious difficulty Europeans have in generating a European nationalism or patriotism over and above the traditional clan feelings" is intimately connected to its darker legacies.

Integration Project, 167- 192; Neil Walker, *From Großraum to Condominium – A Comment*, 193-204 all in DARKER LEGACIES OF LAW IN EUROPE (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[20] The more literal translation 'great space' or 'greater space' is also commonly used.

[21] Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'*, in DARKER LEGACIES OF LAW IN EUROPE, 43-54 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[22] Weiler (note 6), 402.

It is then to this end that the coming to terms with the demons of the past in an attempt to take the shaping of a collective memory in the European public seriously (Fischer-Lescano) might indeed increase Europe's social acceptance through and through. Such a re-working of the past must be coupled with renewed engagement in democracy because, as Brunkhorst notes, another moral of the silenced pre-history of the European Union is that "liberalism without egalitarian democracy, as practiced nowadays by the European Union and its organs, is worth nothing and is liable to fall at the first hurdle."

D. *Argumentum e silentio*

To explore the darker legacies of law in Europe is not only a "delicate" (Eijsbouts) but also a particularly difficult undertaking. The attempt to capture its significance for and its ambivalent heritage in the process of European integration can only succeed if discussion extends beyond distinctively legal considerations. Because, and this is another important insight of *Darker Legacies*, when it comes to the corruption and betrayal of the very foundations of legal systems, be it in terms of human rights, democracy or the rule of law itself, legal doctrine *alone* is of limited explanatory force. This lends some support and legitimacy to the editors' "loose multi-disciplinary, multi-issue and multi-national exploratory approach"[23] to this new field of research (Möllers). Still, as many commentators point out, the book's lack of overall coherence can be frustrating, its overly broad scope at times obscuring its message (Koskenniemi). It would have required a clearer statement of the questions it poses and the answers it offers (Loughlin) and should have made its contemporary implications more explicit (Smithey). There is room for improvement here, and the follow-up project to *Darker Legacies*[24] tries to tighten-up the agenda and refine its objectives.

Quite apart from these deficiencies, such criticism should not obscure the general importance of the project and the difficulties (not merely conceptual) that beset its realization. The reluctance to 'glance in the mirror' on the part of the legal profession, Koskenniemi writes, "testifies less to its insensitivity to problems in the European past than to its utter marginalization from the core of social and political theory". And this "communicative silence" (Fischer-Lescano) extends from the level of academia and social networks into, to use Arendt's term, "the world that

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[23] Joerges (note 17), 245.

[24] *Confronting memories: European "Bitter Experiences" and the Constitutionalization Process*, 6 GERMAN LAW JOURNAL, 245-561 (2005).

lies between people", a retreat to speechlessness that endangers this very 'in-between', at a moment where nothing has become more dubious "than our attitude toward the world, nothing less to be taken for granted than that concord with what appears in public."[25]

'Alas art', metaphors should not be overstretched, but it is noteworthy that Paul Celan faced a different obstacle to 'glancing in the mirror' in post-war Europe than the one so aptly described in Stolleis' prologue to *Darker Legacies* as a process from "self imposed *damnatio memoriae*" to the maintenance of taboo.[26] "What kind of times are these", asks Celan, "when a conversation is well nigh a crime because it includes so much that is said?"[27] What Celan refers to as, *pace* Adorno, the problem of the unspeakable for one who, "*wirklichkeitswund und wirklichkeitssuchend*" (stricken by and seeking reality), tries to go "with his very being to language"[28] returns in a different *façon* in contemporary discourse: How to point at contaminations of the European project and European law if already, and invariably, the conceptual tools and language at one's disposal suffer from the same disease? (The use of) language, too, is socially embedded and its purported meaning depends, at least to a certain extent, on what kind of claims are made or challenged by it.

"Shoah fatigue" apart – Weiler identifies different variants of such fatigues in his Epilogue: the "Walser strain – fairly repulsive even if innocuous", the "Nolte strain – angry, accusatory and sanctimonious" (Habermas reply to which the editors take as a starting point), the "pathological case of Holocaust deniers" and finally what he calls the "Garden Variety" – the readiness to exchange a burdensome task for a more agreeable one.[29] But there are still those who take the editors' rhetorical question as to the '*Why*' literally, and who do so for far less susceptible reasons. When Dough Saunders complains about the "rhetorical crime" of the "*reductio at hitlerum*" he certainly overstates the point, and the well-balanced contributions to *Darker Legacies* withstand his crude analogies. But there is something disturbingly familiar to his argument: "If you don't approve of a political position or a war,

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[25] Hannah Arendt, *On Humanity in Dark Times: Thoughts about Lessing*, in MEN IN DARK TIMES, 3, 4 (1970).

[26] STOLLEIS (note 12), 4.

[27] Paul Celan, *Ein Blatt, baumlos, für Bertholt Brecht*, in SELECTED POEMS AND PROSE OF PAUL CELAN, 343, John Felstiner trans. (2001).

[28] Paul Celan, *Speech on the occasion of receiving the Literature Price of the Free Hanseatic City of Bremen*, in SELECTED POEMS AND PROSE OF PAUL CELAN, 395, 396, John Felstiner trans. (2001).

[29] Weiler (note 6), 389.

you'll very likely be able to note some similarity to something Hitler did in the 1930's. … Your interlocutors are likely to get very quiet and walk away, which may make you feel like you've won".[30] Antifascists do not always make liberals, and the silencing of voices and the maintenance of taboo works both ways.

Is then silence the most appropriate and last hideaway? Are we thrown back to Schmitt's suggestion, as described by Fischer-Lescano, to remain quiet in order to "reflect upon ourselves and upon our divine origin"? Celan maintains against Adorno, Schmitt and Saunders:

> "It, the language, remained not lost, yes in spite of everything. But it had to pass through its own answerlessness, pass through frightful muting, pass through the thousand darknesses of deathbringing speech. It passed through and gave back no words for that which happened; yet it passed through this happening. Passed through and could come to light again, 'enriched' by all this."[31]

And Hannah Arendt aligns with Lessing's *Selbstdenken* (independent thinking for oneself) who declared in "all seriousness":

> "I am not duty-bound to resolve the difficulties I create. May my ideas always be somewhat disjunct, or even appear to contradict one another, if only they are ideas in which readers will find material that stirs them to think for themselves"[32]

This might not have been the editor's primary aim – but it is a worthwhile one nevertheless. *Darker Legacies of Law in Europe* speaks with many voices, but also with a common concern for the past and future of the pan-European enterprise. In this vein, the context-sensitivity and professionalism of its contributors stand out from the multiplicity of annoying mutual allocations of guilt in the name of '*You know who*', in Germany and beyond.

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[30] Doug Saunders, *Blah, blah, blah Hitler! Blah, blah, blah, Nazi!*, in THE GLOBE AND MAIL (Saturday, Nov. 27 2004 Page F3) available at: http://www.theglobeandmail.com/servlet/Page/document/hubsv3/tgamHub. Despite the consent of the author, the Globe and Mail refused to permit the reprint of this review.

[31] CELAN (note 27), 395

[32] Gotthold Ephraim Lessing as cited from Arendt (note 24), 8.