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**MEMORIAL**

# Michael Stolleis (1941–2021)

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Michael Stolleis's interests were broad, ranging from art history (his early love), to literature (his later work recounted historical narratives about law), to philosophy. His obsession throughout was law. He conveyed this deep interest to those around them, and not just to established scholars. I recall well meeting with him at the start of my career, at an Italian restaurant in Frankfurt, where we spent hours talking about Weimar jurisprudence, about politics, about public art, and in the end about the French Revolution because it was Bastille Day. His kindness and generosity, his deep and genuine interest in people and ideas, are unforgettable. With his death on March 18, 2021, we have lost one of the leading historians of early modern and modern Germany and Europe.

Stolleis framed his work as the history of the modern discipline of public law, that is, of administrative law, constitutional law, and international law. The implications of his work reached far beyond law, however. Administrative law is about how the state works. It took shape in the early modern period, along with the model of the absolutist state in Europe that it sought to describe. Constitutional law in our current sense of the term came into its own as a field in the nineteenth century in Germany in the era of liberal constitutionalism. International law extends from the era of complicated political relations in central Europe of the sixteenth to eighteenth century to the current world of private and public international law, as well as to competing laws of nations, federations like the European Union, and even corporations. Social policies from social insurance schemes to regulations to provisioning programs for specific groups were newly established or were transformed after 1880—once more through the medium of public law. Stolleis's work is nothing less than a careful examination of the body of laws and commentaries that accompanied and gave conceptual structure to the process of state-formation, constitutionalization, increasing complexity, and globalization over the last four centuries.

Stolleis's work investigates the central questions of modernity: What is state power? How is power constructed? How is an administrative apparatus constructed that enforces state power? How does language—written procedures and rules and commentaries—create something that claims to exist (to be a perduring "state") over time? No wonder that his first major published works involved the theory and philosophy of law in the transition from the medieval world to absolutism. Public law did not and does not exist in a vacuum; it is related to theology and philosophy, politics and society. In his inimitable, cool, and distanced way, Stolleis described these backgrounds to the formation of the new discipline of law between 1600 and 1800. Public law did not just reflect, it constructed. Universities in central Europe sought concepts that linked the different forms of rule, constructing a kind of mental unity on top of the welter of different early modern political forms. In the first part of the nineteenth century, they constructed the concepts that characterized the "constitutional monarchism" of the time. German law reflected power and it constructed power—hence the importance of the history of the legal profession in Stolleis's work. For Stolleis, the

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history of public law since 1600 was the internal history of the modern state itself and also the story of the words and concepts that provided that structure. His focus on these words permitted him, not least, to show how much National Socialism intended to break with and indeed "broke" the discipline of public law itself. Legal scholars, including professors with whom Stolleis studied, played a role in transforming and distorting those words and concepts.

## Power, Law, and National Socialism

Stolleis did not write much about himself. Only a few of the more than 550 publications listed on his publications list at the Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie, which he directed from 1991 to 2009, involve reflections on his own life, and these are in the context of interviews about his work.[1] These few documents do, however, give us a sense of what drove him to investigate the core problems of public law, especially where power and morality meet. Stolleis does not describe himself as a politically involved person, but as a humanist with an interest in art and literature. His father, Erich Stolleis, a member of the Nazi Party since 1929, served as Lord Mayor of Ludwigshafen under the Nazis until a fight with the party leadership. Erich joined the army in 1940. Held as a prisoner of war after 1945, he was only able to return from captivity in 1947, when son and father first met. Michael, like so many of his generation, remembered his father's unwillingness to admit Germany's evil deeds after the war. Michael Stolleis's own key encounters with the past include viewing Brecht's depiction of the Nazi leadership as criminals in *The Resistable Rise of Arturo Ui* and the Frankfurt Auschwitz trials. These opened up a critical perspective for the young Stolleis on the relationship between law and power in general and on Nazi lawyers in particular.[2] His generation's critical assessment of their parents' past obviously contributed to his first major work: his 1974 *Habilitation* on the concept of "community" in National Socialist legal scholarship.[3]

As early as 1972, Stolleis's arguments reached the West German public, in the prominent journal *Vierteljahrshefte für Zeitgeschichte*.[4] Following Bernd Rüthers's path-breaking 1968 investigation of legal interpretation under National Socialism, Stolleis focused not on the dictatorship's new laws, but rather on Nazi-era legal thinkers' reconfiguring of old laws using the idea of community.[5] "Community" is a word with many meanings, of course, not all connected with the Nazi dictatorship. A specific notion of "community" did emerge in law under National Socialism, however. It stressed that "the German people" were "no longer split into different groups, such as classes, confessions, or rulers and rules. Instead, they form a community organically structured into subcommunities."[6] Law professors, lawyers, and judges used this notion to limit individual claims related to property or damages; to assert the unity of interests between workers and owners and thereby limit workers' "individualistic" ability to assert their own interests through strikes, freedom of movement, and wage demands; and to restructure family law in the interest of racial purity. Stolleis's description of the relationship between landlord and tenant as a community oriented toward

[1] Most important: "'Rechtshistoriker sind Historiker.' Ein Gespräch über Väter, Bildungswege und Zeitgenossenschaft," in Michael Stolleis, *Nahes Unrecht, fernes Recht. Zur juristischen Zeitgeschichte im 20. Jahrhundert* (Göttingen: Wallstein, 2014), 135–64.

[2] Indeed, it is no accident that one of his first publications—and one of the first that I recall reading—dealt with these problems; see M. J. Sattler, ed., "Carl Schmitt," in *Staat und Recht* (Munich: List, 1972), 123–46; at the same time, he published his short dissertation on the little known political thinker Christian Garve; see Michael Stolleis, *Staatsraison, Recht und Moral in philosophischen Texten des späten 18. Jahrhunderts* (Meisenheim: Anton Hain, 1972).

[3] Michael Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (Berlin: J. Schweitzer, 1974).

[4] Translated as "Community and National Community (*Volksgemeinschaft*): Reflections on Legal Terminology under National Socialism," in Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago, IL: University of Chicago Press, 1998), 64–83.

[5] Bernd Rüthers, *Die unbegrenzte Auslegung* (Tübingen: Mohr Siebeck, 1968).

[6] Stolleis, "Community and National Community," 68.

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the general good is an especially valuable description of how such legal interpretation weakens rights and of how pervasive the effects of this restructuring of legal relations could be even when the written law itself was not altered.[7] Stolleis connected the changes in law with the deeper ideas (or really images) of Nazi ideology. Prominent, for example, was the distinction between "German" thinking, characterized as "organic, concrete, close to the people and true to life, oriented toward the 'whole,' ... related to values and community," and "'Roman-Jewish' thinking, characterized as liberal, rationalistic, positivistic, abstract-conceptual, individualistic, materialistic, rigid,... alien to life and the people."[8] At the heart of this notion of community was a model of power that demanded that people trust their leader. As Stolleis summed up this claim: "Since trust prevails in the community, the call for supervision of the leadership is a breach of trust. The community does not discuss, it marches."[9] Not all notions of community had to draw these ultimate conclusions—but many legal scholars under National Socialism clearly did. Legal scholars, even authoritarians, who questioned this notion of a community that trumped individual rights found themselves under attack.[10]

Stolleis's article was explosive, and it continues to provoke debate about the nature of National Socialism. His and Rüthers's works call into question, for example, the model of a "dual state" poised between normal and exceptional law as described by Ernst Fraenkel in his famous work of the same name. If legal interpretation reached so deeply into everyday law, they suggested, then one can no longer speak of "normal law" under the dictatorship.[11] Stolleis quoted "normal" legal scholars who had engaged in the reformulation of concepts in practical ways that served a terroristic police state. He cited published works not just by the major figures who had already been singled out by the Allied occupation as Nazis, such as Otto Koellreutter, Carl Schmitt, or Reinhard Höhn, but also by later leading jurists of West Germany such as Karl Larenz and Theodor Maunz. Both taught at Munich where Stolleis was studying legal history (notably under the Swedish scholar Sten Gagnér, not them).[12] After Maunz died in 1993, the far-right publisher Gerhard Frey revealed that he had met regularly with Maunz and that Maunz had provided legal opinions as well as anonymous articles for Frey's *National-Zeitung*. At the time, Stolleis was working on the volume of his history of public law dealing with the dictatorship, so he already knew Maunz's Nazi-era works well. In a widely discussed essay, Stolleis portrayed Maunz as an opportunist willing to work for a variety of regimes, yet full of resentment after his National Socialist past led to his resignation as Bavarian Minister of Culture in 1964. Stolleis came under fire from some conservatives for questioning Maunz's character, and he was compared to "stone-throwing" leftists by a leading conservative scholar. Stolleis's response to such critics revealed the normative (and hardly radical) principle that underlay his work: "Committed work for National Socialists and their modern-day intellectual successors cannot be silently accepted." A consensus regarding that principle had "sustained the Federal Republic until

[7] The examples of labor law and rent law are described only briefly in the 1972 article; the actual book dives deeply into the many areas affected by the conception of community and the common good, from property law to cartel law, energy law to law regulating water usage, and so on, all opening up the possibility for political interventions coded as ethical; see Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*.

[8] Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, 75–76.

[9] Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, 68.

[10] Stolleis discusses here the example of Otto Koellreutter, an early supporter of the Nazis who turned against them in the late 1930s in defense of the rights of individuals. In spite of Stolleis's clear discussion, Koellreutter continues to be held up as a "real" Nazi whose attacks on Carl Schmitt indicated Schmitt's distance from National Socialism.

[11] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, original trans. E. A. Shils, new trans. Jens Meierhenrich (New York: Oxford University Press, 2017[1941]); see Stolleis, *The Law under the Swastika*, 8, 13.

[12] Stolleis, "'Rechtshistoriker sind Historiker,'" 144–46; characteristically, Stolleis does not himself speak of Maunz's presence as a leading representative of public law at Munich in this article; see Thomas Duve in his obituary of Stolleis for the official webpage of the Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie (https://www.lhlt.mpg.de/michael-stolleis/obituary).

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now. Should it disappear, the basis upon which the essays in this volume [*The Law under the Swastika*] implicitly rest would also be destroyed."[13] In his subtle and ironic way, Stolleis framed his and his generation's critical investigation of the Nazi era as the foundation of the democratic Federal Republic.

## The *History of Public Law in Germany*: Stolleis's Grand Project

Stolleis's four-volume *Geschichte des öffentlichen Rechts in Deutschland*, the work for which he is best known, was informed by this normative aim of bringing greater historical self-awareness to legal education. At issue was not just National Socialism, but a wide range of influences whose traces are still apparent in contemporary German law. The first volume, on 1600–1800, deals with the formulation of new conceptions of the state and of "public" as opposed to private law. It traced the impetus for reform to absolutism in the age of the dreadful Thirty Years' War and afterward, and connected changes (including the invention of a modern administration) with controversies provoked by internationally known thinkers such as Hobbes and Machiavelli that were framed in religious, political, and moral terms. Discussion of the development of new schools of law and new subdisciplines of law, like administrative law, continued in Stolleis's second volume (1800–1914), which analyzed controversies over the Napoleonic political modernization imposed on German states, the development of constitutionalism as a response, and then the peculiar fusion of constitutionalism, absolutist remnants, and democratic oddities in the state law of unified Germany. Volume 3 (1914–1945) presents sudden breaks and dramatic change, as German lawyers tried to come to terms with war and revolution, democracy and crisis, dictatorship and genocide. Finally, volume 4 (1945–1990) describes the legal new beginnings of both the Federal Republic and the German Democratic Republic in the wake of the National Socialist disaster, comparing the explosion of detailed legal work and new legal fields in West Germany with East Germany's difficulty in reconciling the avant-garde party state with the rule of law. These four volumes do much more than list names and schools of thought. They attempt to orient German lawyers to their own profession, and to all those aspects of German legal history that make the present synthesis itself contingent and subject to future change. Stolleis's history attempts to pull law students out of a self-centered world where only current law matters, so that they can see how the current words of law are not eternal but subject to change. The volumes provide an unsurpassed systematic and deep history of the discipline cutting across more than 400 years.[14]

It is astounding how often a particular idea or development one comes across in research was in fact already covered by Stolleis, as some have noted in their obituaries. The issue may be an aspect of the theory of the state, the position of a particular lawyer, or an argument about a particular legal method. The first of those volumes lists 2,200 people in its index as well as both primary and secondary sources. In the final volume, Stolleis lists only the authors mentioned in the main text, not the authors of secondary sources; that list still amounts to more than 1,500 names, including law professors, politicians, philosophers, historians, and social theorists. This is nothing less than an attempt to comprehend the totality of debates on the nature and content of public law in Germany, as it is embedded in institutions ranging from universities to the Federal Constitutional Court.

One can follow, for example, the development of Roman law as a field, one that remains fundamental for German civil law instruction to the present day. Roman law appears in volume 1 as both a solution to and problem for understanding the fragmented law of the

[13] Michael Stolleis, "Theodor Maunz: The Life of a Professor of Constitutional Law," in *The Law under the Swastika*, 185–92, esp. 192; for an example of the criticisms, see Joseph H. Kaiser's letter to the *Frankfurter Allgemeine Zeitung*, January 29, 1994.

[14] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (Munich: C. H. Beck, 1988–2012). The second volume has been translated into English as *Public Law in Germany, 1800–1914* (New York: Berghahn Books, 2001).

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day. Concepts of Roman law provided an abstract language to articulate the legal forms developing across borders in the early modern period. But the legal organization of the early modern state differed greatly from that of the Roman Empire. Therefore, Roman law described institutions and legal relations in central Europe that differed from the institutions and legal relations of the Roman Empire, especially in the realm of public or state law. Public law in central Europe had to emancipate itself from Roman law to describe its object. Roman law's border-crossing concepts, structures, and even methods were opened to new analytical concepts, such as notions of paternal authority in the state.[15]

In the nineteenth century, the authority of Roman law came under attack by those, often in the Romantic tradition, who affirmed Germanic law (as if the German-speaking states had not already altered the content of Roman law). Otto von Gierke, a late representative of this tradition, defended "Germanic" law as the law of self-administered associations. He made use of a nearly forgotten jurist, Johannes Althusius, who (at least on Gierke's reading) had conceptualized the state as an association resting on the order created by associations below. (Stolleis more convincingly connects Althusius's notion of levels of harmonious association with medieval cosmology.) Paul Laband, Otto von Gierke's antipode, defended Roman law in 1880 as central to the development of the absolutist state: the "reception of Roman law" is "one and the same process" as that of absolutist state-formation.[16] Laband systematized and organized the public law of newly unified Germany after 1870 as a system of positive laws expressing the "will" of the new state. Neither Laband nor Gierke was especially enamored of democracy. Indeed, they were probably not very "liberal" (though the term is notoriously slippery), and their legacies would be contested. But legal methods do not directly transfer onto political positions: one can locate later German democratic lawyers in both the "positivist" and "organic" schools of legal history represented by Laband and Gierke.

A strange, new audience outside of law discovered the idea of an opposition between Roman and Germanic law at the end of the nineteenth century. These commentators included the conservative thinkers Houston Stewart Chamberlain and Oswald Spengler, who connected the Roman tradition to Jews. A few decades later, the National Socialists transformed the idea of an opposition between Germanic and Roman law into a propagandistic slogan, leaving the legal experts who actually knew something about law spinning. The paradoxical result of this development appears in volume 3 of Stolleis's work, as scholars of Roman law burrowed into the archives and specialized libraries to clarify how it had functioned and had been transformed centuries before. Franz Wieacker, who became the leading postwar expert on the history of German civil law, wrote already in the early 1940s that Roman law was part of the medieval process of transforming oral law into written law, and then written law into systematic law. Stolleis's surprising assessment is that the pressure of the Nazi attack on the discipline led to a new understanding the formal role of Roman law in creating a new, professional discipline.[17] Such assessments require a long view of the development of a discipline, a view that Stolleis and very few others could offer.

The story of Roman law in modern central Europe is part of the bigger story that Stolleis tells of how lawyers provided the concepts and legal forms through which political leaders organized their power, from the estates-based states and attempts at absolutism in the early modern period to the more or less authoritarian constitutionalism of the nineteenth century, to the chaotic and destructive National Socialist state. Stolleis's third volume describes the transformations in public law brought about by Weimar democracy and National Socialism's systematic "destruction and self-destruction" of an academic field, in which concepts became propaganda and law was transformed into a weapon.[18]

[15] Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 1:58–79.

[16] Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 1:59–60; Stolleis, *Public Law in Germany*, 323–28, for the full context of the Laband-Gierke debate on methods of public law.

[17] Stolleis, *Law under the Swastika*, 58–61.

[18] Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 3:315.

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## The Leviathan Transformed: The Law of the Welfare State

Stolleis's work was about the historical development of the state itself. That focus led him to a set of studies describing the development of "social law" (*Sozialrecht*)—that bundle of legal rights, duties, and procedures that governs the provision of social goods from education to pensions, health insurance to labor law. The notion that a polity should shape society, often for reasons of morality, was hardly new. It had been a central part of German public law long before absolutism, a point that Stolleis stressed in his account.[19] But the rise of liberal constitutionalism, with its rights-based distinction between the state and society, implied a turn away from that logic of social control. Certainly, the "nightwatchman state," in the sense of a state authority that watched over but did not control society, was never quite real; governmental authorities in fact constantly monitored the lower classes of society. But just as certainly, early nineteenth century liberalism criticized the interventionist *Policey-Staat*. Starting in the mid-nineteenth century, the old focus on direct intervention in the name of morality gave way, not to "Manchesterism" as is often assumed, but rather to new forms of intervention. Although remnants of the old, individual-oriented social assistance provided by private charities remained, the Bismarckian state began to create a new kind of social intervention. Bismarck and his aides may have justified these interventions in the language of the Hegelian ethical state, of moral intervention, and of the duty of the monarch (Stolleis is here, as so often, attentive to language). The interventions in fact created a new kind of law related to the ever more complex and interdependent world of industrial society.[20]

This big narrative of the rise and fall of doctrinaire liberalism is not surprising to us now, and after three or four decades have passed since Stolleis started to write on the topic, we may well question many of its core assumptions. His point about liberalism and law, however, was deeper. Law and legal commentaries do not simply reflect the social world. Law in the broad sense also constructs a normative understanding of the social world as it should be. Nineteenth-century legal liberalism developed concepts or images (*Leitbilder*) of the constitution, which fused authority and freedom together in some happy compromise that was to be neither revolutionary nor absolutist. These images of harmony appeared in the great legal and political texts of the day. Social critics (not least Karl Marx) called into question these notions of harmonious law, of the organic development toward representative institutions, and of a monarchical state based on historically derived laws. The Revolution of 1848 was a mess precisely because its these ideals of constitutionalism, national-democratic self-rule, and monarchism were in tension with one another. A core of illiberal and undemocratic authority remained after the failed revolution: not absolutism, but monarchical power embodied within a constitution and a constitutionalism, whose presumption of harmony within society and between state and society would from this point on be in question. Stolleis tells how state power over society increased dramatically after the 1850s, in the form of regulations and social insurance, implemented by a state seeking to preserve its autonomy from society but itself pushed by political parties toward ever more social intervention. On the way, the concept of the constitution itself changed, from one that was open to authoritarian intervention to a concept that opened the way to democratic interventions into society itself. The social democrats, at first opponents of the Bismarckian social programs, later adopted them, defended them, and called for their expansion.[21]

The development of an extensive, permanently interventionist state had major implications for law. The concept of self-administration went from being a romantic affirmation of community, to a liberal (and left) model of individual self-determination, to something

[19] Stolleis, *Origins of the German Welfare State: Social Policy in Germany to 1945*, trans. Thomas Dunlap (New York: Springer, 2013), chap. 2.

[20] See especially the introductory chapter to the republished essays in Michael Stolleis, *Konstitution und Intervention: Studien zur Geschichte des öffentlichen Rechts im 19. Jahrhundert* (Frankfurt/Main: Suhrkamp, 2001). What follows pulls together the arguments of that book.

[21] Stolleis, *Origins of the German Welfare State*, 86.

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associated with massive state obligations related to social insurance. The meaning changed with the development of massive state programs. With that came the need to ensure that the new welfare state institutions were in line with legislative and administrative aims. A statute establishing an institution does not merely specify who runs it; it also implies the institution's intent, and within social law that intent (*Zweck*) became part of legal interpretation. These new institutions became part of social life and, indeed, involved some degree of self-administration by social groups; but for all that, they were also state institutions, not fully voluntary organizations in the sense of private law.[22] It is hard to fit them into a nineteenth-century liberal view of a clearly distinguished state and society. Other new legal phenomena emerged in the final decades of the nineteenth century, such as labor law (to handle how contracts could become collective and apply across industries), the law of cartels, and more. These developments showed the state regulating society or social groups empowering themselves through the state. The clear distinction between "public" and "private" law became blurred, and this led to changes in conceptions of contract in both of those putative realms. These changes in the structure of law move us quite far from the presuppositions of liberalism. Stolleis's account brings us closer to our current moment of complex regulations and the intense interweaving of public and private actors in legislation, adjudication, and mediation. This array of new forms of law—forms different from the world of absolutism and certainly not "liberal" in the sense of the early nineteenth century—comprises what Stolleis calls social law.

Social law points us to all those aspects of state activity, from regulation to social insurance, that involve a person as an individual in society but not as a subject of the state nor as an independent author of contracts. By the end of the nineteenth century, experts in civil law were debating how to accommodate these new forms. Stolleis shows that administrative law did not really focus on this challenge to administrative law, instead relegating such development to "policy." But at a more abstract level, basic assumptions about the state were coming under fire before World War I, as "centrifugal tendencies" in constitutional law focused on the way practices, habits, and customs altered the real functioning of the constitution.[23] Rigid notions of law based on constitutional liberalism or on conservative statism were making less sense by the end of the German Empire; nonetheless, administrative law did not offer new ways of conceptualizing law.

Liberalism conceptualized state action in society as an exceptional "intervention" in society's development according to its own internal laws (e.g., the market in capitalism). During World War I, exceptions to the notion of social autonomy multiplied, whether involving the regulation of markets, the allocation of raw materials and products, or the allocation of labor. These exceptions did not disappear during Germany's first democracy, the Weimar Republic, but took different forms, as new kinds of social policy emerged related to family life, unemployment, youth, and the disabled.[24] Stolleis argued that these challenges did not yet alter the basic form of administrative law. It took the disaster of National Socialism to do that, by way of the notion of "community" in law discussed previously. Here "community" meant, of course, the turn from individual rights to collective duties, the destruction of the limitation of administrative actions by the rule of law, and the end of equality before the law, indeed "the dissolution of a formal, predictable legal order by a state taking emergency measures [*Maßnahmestaat*] to reach concrete goals, sinking ever deeper into chaos."[25]

Strangely, it was precisely this decay of legal tradition (and indeed law) that opened the way for new thinking about administrative law. Administrative law, Stolleis argues, shifted attention from "intervention" to "service," from "right" to "claim": to the notion of

[22] See especially chapters 9 and 10 of *Konstitution und Intervention*.
[23] Stolleis, *Public Law in Germany*, 2:404–06, 439–40.
[24] Overview of social policy changes in Stolleis, *Origins of the German Welfare State*, 98–113.
[25] Stolleis, *Law under the Swastika*, 108.

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"providing for the existence" of citizens, or *Daseinsfürsorge* in the terminology of the anti-democratic conservative Ernst Forsthoff. Moreover, attempts were made to connect administrative law with long-term planning at all levels, from economic planning to communal and spatial planning. Here the role of administrative law was to achieve a new condition rather than to preserve state or society. Social law was part of this project, and this project was, Stolleis notes, taking place around the world and across a variety of political systems.[26] The development of social programs pointed toward a different conception of the polity and toward a different role for law in the polity: "The foundation of legitimacy of this new state, as became apparent starting in the 1920s, was less political participation than the functional ability of the state to redistribute, the noiseless provisioning of services required every day." Stolleis located the "bridge to the science of administration in the Federal Republic of Germany" in these administrative tasks, although "the restoration of the rule of the liberal rule of law was the urgent task" after 1949.[27]

Stolleis's discussion of social law shows what the history of public law *as a discipline* can reveal. The very people who had the task of making sense of what law was and transmitting that knowledge through legal education struggled to grasp fundamental changes in the nature of the state itself over the preceding two centuries. It is notable, however, that "social law" did not establish itself as a field over the long run—to Stolleis's dismay—even though it did develop for a few decades after 1945.[28] Key concepts and guidelines for focusing on the aim of social welfare institutions and respecting rights and the rule of law did take shape, but according to Stolleis a separate field of *Sozialrecht* did not. Reading between the lines in the final volume of Stolleis's *Geschichte des öffentlichen Rechts in Deutschland*, one starts to see why *Sozialrecht* did not emerge as a distinct field. Just as it was difficult to pull the full range of social policies together into a single handbook because of the huge differences among systems of social insurance, social aid, and institutions enabling members of society, so too the range of legal fields related to "society" became ever more complex and differentiated. The big thesis that the end of the liberal age saw the compression of the state-society distinction provides some degree of insight into the transformation of public law, but no single story. In his final works on the subject, Stolleis continued to mourn the decline of a unifying notion of social law, but I suspect that his analysis points in a different direction. Legal scholarship and legal education could not gather the complex and different developments into one new, coherent legal dogma. Regardless of his own views, Stolleis's work shows the immanent limits of legal reasoning in the face of this complex intertwining of law and society.

## State, Society, and the Language of the Law

Institutions rely on language, especially written language, both to enable complexity and to enable us to navigate that complexity. Public law is just such an institution. It details the rules, procedures, and values structuring actions. Law is also necessarily about language—a particularly formal kind of language—and therefore the history of law, one of the key systems of modern society, is about language. To make sense of that history, one must focus on language, both in its everyday use and in its use in highly formalized settings such as legal scholarship. No surprise, then, that Stolleis claimed the philosopher of language Ludwig Wittgenstein as one of his chief scholarly influences.[29] Formal properties are important even when a word has the effect of reducing the precision of law—such as "community" under the National Socialists, which really provided a way for the interest of political and state actors to trump individual rights in the name of the "community." Stolleis noted

[26] Stolleis, *Geschichte des öffentlichen Rechts*, 3:366–69; Forsthoff, despite his right-radical and indeed Nazi past, plays a role across all four volumes of the *History of Public Law in Germany*.

[27] Stolleis, *Geschichte des öffentlichen Rechts*, 3:380.

[28] See his remarks in Michael Stolleis, *Geschichte des Sozialrechts in Deutschland* (Stuttgart: Lucius und Lucius, 2003), 307–13.

[29] Stolleis, "'Rechtsgeschichte ist Geschichte,'" 145; see also Stolleis, *Geschichte des öffentlichen Rechts*, IV:387.

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that the German Democratic Republic (GDR) also used words in a manner that reduced the precision of law. The GDR sought to construct a "semantic building for state law" based on constitutional thought since the French Revolution, while also insisting that the "building blocks" be components of a "Marxist-Leninist scholarship of public law." Combining "property" and "socialism" into "socialist property" left the precise nature of the institution unclear; combining "democracy" with the ultimate power of the central party apparatus led to the paradoxical "democratic centralism"; affirming a "legality" that was subordinate to the needs of "socialism" resulted in the slippery notion of a "socialist legality." The legal concepts lost their clear meaning.[30]

Indeed, combining legal concepts with political aims can lead to paradoxical outcomes, as Stolleis argued in a brilliant historical essay from nearly forty years ago. A West German court attempted to rectify the past by voiding the National Socialist People's Court's judgment condemning the White Rose resistance to death because it was not in line with morality. In so doing, the court obscured the lesson that law can most certainly be despotic and immoral, and heinous judicial acts can certainly exist and be recognized as law. "Rectifying" the past through new law threatens to obscure the injustice done not just in the name of law, but by law. "Correcting" the past obscures what really happened. Law is not eternally true and good and right.

Law is, in fact, language, and language is party of history and culture. As Stolleis noted in a posthumously published book on legal narrative, "no speech or story gets by without using verbal images or metaphors. The language of law is no exception."[31] And indeed, metaphors can be used to describe law as a part of society. As Stolleis argued in a short study from 2004, for example, the metaphor of the "eye of the law" was transformed from ancient Egyptian theocracy, to early modern absolutism, to the radical French Revolution when the virtuous watched over all in the name of all, to a constitutionalism with an eye to protecting rights, to our information-obsessed and information-soaked society in which there are cameras at every corner. We are now embedded in a pluralistic yet ubiquitous legal world that seems to have an ever-weaker connection to the grand notion of any *single* eye of justice above society.[32]

These reflections bring us back to history. Though housed in a law school and legal think tank, Stolleis was a historian. Historians make use of law in varied ways: to illustrate political moments because of the way laws reveal disagreements about ideas of rights or citizenship; to provide accounts of society and of everyday life, as narrated in court records; to reveal ideologies of specific regimes. All of these are legitimate and justifiable approaches to law. However, legal history is also a history of a discipline that has its own systematic concepts and methods that developed over long periods of time and retain traces of their past, such as traces of Roman law in absolutism; traces of Aristotelian notions of order in the modern welfare state; traces of liberal constitutionalism in democracy; or traces of a past that involved racist tyranny or the despotism of a "scientific" doctrine of historical development. Lawyers and administrators observe law, but they also organize it. Their work affects the way modern society functions. The discipline of law is not just an example. It is also an object of study itself. Legal history is, in Stolleis's work, not part of a separate world of law, but part of historical scholarship.

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[30] Stolleis, *Geschichte des öffentlichen Rechts,* 4:553–54; see also Stolleis, *Sozialistische Gezetzlicheit: Staats- und Verwaltungswissenschaft in der DDR* (Munich: C. H. Beck, 2009).

[31] Stolleis, *"recht erzählen." Regional Studien 1650–1850* (Frankfurt/Main: Vittorio Klostermann, 2021), 2.

[32] Stolleis, *Das Auge des Gesetzes: Geschichte einer Metapher* (Munich: C. H. Beck, 2004).

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