

The Conundrum of Nazi Law: An Historiographical Challenge to the Anglo-American Jurisprudential Representation of the Nazi Past

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Abstract

The question of whether Nazi law was valid law has been at the background of jurisprudential discourse since the Hart-Fuller debate in the 1950s. The enduring focus of that discourse on the validity question – the conditions of validity for law – and the separability question – the nature of the relationship between law and morality – has consigned the Third Reich to a specific jurisprudential role as a limit case for positivism and natural law. This dissertation elucidates and interrogates that role, using recent empirical and theoretical historical research to challenge its basis and assert the substantive relevance of the Nazi past for present legal theoretical concerns.

It argues that the jurisprudential representation of Nazi Germany is flawed. It relies on a hypothetical, superficial, evil straw man version of the Third Reich that bears little resemblance to its actual history. It also treats Nazi law as the paradigmatic, archetypal wicked legal system. This is informed by an underlying narrative of rupture between Nazi Germany, including its legal system, and the contemporary concept of law. The positivism/natural law dichotomy around which the discourse is structured is consequently incapable of adequately explaining and incorporating Nazi law. This dissertation draws on the legal theoretical writing of David Fraser to examine how it might be reimagined to achieve this.

The narrative of rupture that informs jurisprudence was constructed at Nuremberg and proliferated into historical understanding, public consciousness and, via the Hart-Fuller debate, jurisprudential discourse. Over recent decades it has been revised within historiography but its successor narratives have not made their way into jurisprudential discourse, which remains largely isolated from the historical discipline. This dissertation shows how the actual, historical case of Nazi law is not – but ought to be – part of the jurisprudential concept of law.

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Chapter One: Introduction: ‘the law under National Socialism is typically regarded as having constituted a complete break from modern legal norms and standards’¹

I. The Problem with Nazi Law

A Thesis, Aims and Approach

Did Nazi Germany have law, a legal system to speak of?² The answer to this question has often been taken to depend on the answer to some broader questions: what is law? How is it defined? How does it relate to morality? Is there a single, universal concept of law and, if so, what are its conditions of validity? The possibility of constructing one common, concept of law, and what that would consist of, has been an important concern for Anglo-American jurisprudence³ since the Hart-Fuller debate of the 1950s, which originated in the aftermath of the defeat of the Nazi regime at the end of the Second World War.⁴ However, the preoccupation with the necessary conditions for legal validity (the validity question) and the relationship between law and morality (the separability question) within jurisprudential discourse is, I will argue, detrimental to our understanding of the role that law played in Nazi Germany. The structuring of this discourse around the debate between natural law and positivism has reduced the concept of Nazi law to a rhetorical status and subsumed it within the generic category of wicked legal systems albeit as the paradigmatic example. As such it is continually invoked both by those who see it as the ultimate legal outlier which, because of its minimal ‘lawful’ form, demonstrates that law and morality are fundamentally separable, and those who argue that a system

¹ Patricia Szobar, ‘Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933-1945’ (2002) 11 *Journal of the History of Sexuality* 131, 133. All italicised words in quotations throughout this dissertation are in the original text unless otherwise specified. This is also the case for Americanised spellings.

² I will use terms such as ‘Nazi Germany’, ‘Third Reich’, ‘Nazi regime’ and ‘Nazism’ reasonably interchangeably in this dissertation, to refer generally to the existence of a German state under the leadership of the NSDAP during the period 1933-1945, in its various shapes and sizes. This usage and the use of related terms such as ‘Holocaust’ is dealt with further in Section II of this Chapter.

³ Throughout this dissertation, except where the context otherwise dictates, I will use the term ‘jurisprudence’ to refer to the tradition of primarily analytical, Anglo-American, English-language, jurisprudential-theoretical writing within the legal discipline, of which H.L.A. Hart is usually considered the foremost proponent and leading figure. My definition of this concept and its specific relationship to related terms such as ‘legal theory’ is outlined in more detail in Section II of this chapter.

⁴ The Hart-Fuller debate primarily consisted of H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593; and Lon Fuller, ‘Positivism and Fidelity to Law — A Reply to Professor Hart’ (1958) 71(4) *Harvard Law Review* 630.

containing such extreme wickedness can only be 'non-law', such is the necessary connection between law and morality.

Within this dialogue Nazi Germany exists predominantly at a superficial and symbolic level, as a hypothetical, simplistic, straw man version of itself, with almost no engagement with the rapidly evolving historiography of the Nazi state. Consequently, the historical reality of the nature and role of law within the state is largely overlooked. The disconnection between historical and legal constructions of Nazi Germany⁵ has left jurisprudential discourse reliant on the pre-existing, postwar narrative of a totalitarian, criminal state, a narrative constructed by and at the Nuremberg Trials,⁶ but which has been radically revised within historiography in recent years.⁷ The analytical and conceptual nature and relatively narrow focus of much English-language jurisprudence in the last half century means there has been little incentive from within for re-evaluating its current representation of Nazi law.⁸ This is exacerbated by the almost complete isolation from developments in understanding within the historical discipline which would lead this representation, and some of the jurisprudential theories tied to it, to be reconsidered.

In this context the thesis of this dissertation is that recent historical research reveals that jurisprudential discourse relies on a misrepresentation of Nazi Germany to support its theoretical paradigms, which require re-evaluation based on the historical Nazi experience of law. Its aim is therefore to use historical scholarship to challenge and reconstruct the jurisprudential representation of Nazi Germany and especially its legal system. I will use

⁵ Exceptions to this disconnection include the writing of David Fraser, whose scholarship is discussed periodically through this dissertation, and some of which is given particular attention in Chapter Four.

⁶ A detailed examination of the representation of Nazi Germany within the Nuremberg NMT and IMT proceedings is beyond the scope of this dissertation, which focuses on academic legal scholarship (this focus is fleshed out in Section II). However, the impact of the Nuremberg trials in constructing narratives about Nazi Germany on academic historical and legal discourse is discussed in Chapter Six. For recent accounts of the construction of this narrative see Kim C. Priemel and Alexa Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (Berghahn Books, 2012).

⁷ The application of the conclusions of recent historical research into Nazi Germany, dating back to the 1990s, to jurisprudence and other areas of legal scholarship is central to this dissertation and is considered at various points. In particular, Chapter Five outlines case studies of two areas of this research, revealing its significant findings and their potential impact on the current treatment of Nazi Germany within jurisprudential discourse.

⁸ Some scholars writing within the legal academy have suggested such a re-evaluation ought to take place. These include in particular David Fraser and Kristen Rundle, and their largely conflicting accounts of the relevance of Nazi law to jurisprudence are discussed in detail in Chapter Four.

historical research to show that the actual experience of law in Nazi Germany undermines some important jurisprudential claims and is highly relevant for jurisprudential issues. This research reveals the need to reassess key jurisprudential questions as they apply to Nazi Germany, because concentrating on whether a hypothetical version of Nazi law does or does not comply with an abstract conception of 'law', tied to a conceptual model of the connection between law and morality, distorts rather than advances academic understanding of it.

The atrocities perpetrated by Nazism are urgently in need of closer examination by legal scholars, not so they can be labelled as 'lawful' or 'unlawful' or so they can be used to test the boundaries of the definition of 'law', or because they somehow prove that law and morality are or are not linked. Rather it is for what they reveal about how an ostensibly modern, civilised *Rechtsstaat* at the heart of the western world was able to accomplish such things as the Holocaust with the acquiescence and often approval of much of its population, using law to do so. The role played by law in the various stages of this process can tell us much about both the history of Nazi Germany and the theoretical nature and empirical application of law. It is not a question of whether it is 'law', it is rather whether the concepts and theories used to understand law within jurisprudence help us understand Nazi law and whether the Nazi experience of law impacts on those concepts and theories.

Highlighting the possibility of continuities and similarities between Nazi law and other modern legal systems, and the relevance of Nazi law for some pressing jurisprudential issues, while improving our understanding of the role of law in Nazi Germany, is a necessary undertaking to enable us to understand better what law amounts to in times of dramatic social and political change. These are not merely historic and historical concerns. This dissertation opens up the potential for comparison by using historical research into Nazi Germany to highlight its relevance for certain legal issues and unlock a circumscribed jurisprudential discourse to create space to allow the theoretical implications of Nazi Germany to be incorporated. It un-alienates Nazi Germany from contemporary jurisprudence, and similarly historical research from areas of legal scholarship from which it is currently divorced. I do not intend to indict the whole of jurisprudential discourse, and I recognise that positivism and natural law in their various forms are highly developed theoretical constructs which are not without merit for our understanding of law. Nevertheless, a deeper and more wide-reaching jurisprudential concept of law beyond an extremely thin analytical version or

a morally based normative model requires examining the historical experience of law in regimes such as the Third Reich in more detail.

This dissertation is a contribution to the small but emerging body of legal theoretical writing that challenges the influence of a misrepresentation and under-theorisation of Nazi law within academic legal renderings of the Nazi state.⁹ As such I concentrate on issues that are not particularly emphasised currently. These include presenting an extensive account of the treatment of Nazi Germany within jurisprudential discourse now and how this treatment and the structure of the discourse are related to the legacy of the Hart-Fuller debate. I describe its reliance on and propagation of an implicit, underlying narrative of rupture and discontinuity between the Third Reich and the contemporary concept of law, notwithstanding positivism's hollow insistence that Nazi law was in fact law.¹⁰ I give explicit consideration to the importance of the conclusions of recent historical research for re-evaluating this legal scholarship, combined with an attempt to make connections between the two disciplines, along with the sub-discipline of legal history, in certain, specific ways so they do not continue to remain for all intents and purposes distinct and separate in their engagement with Nazi law. This will reveal the significance of the history of Nazi Germany for jurisprudence, in a way that suggests other areas of legal scholarship that also engage in a misconception of Nazi Germany may also benefit from re-evaluation that takes into account an historical perspective.

The following sections of this chapter will be used to introduce some important themes, explain the precise scope of the thesis and its use of terminology, and outline how the following chapters will take it forward. In

⁹ Some aspects of this emerging scholarship are considered in more detail in Section III, below.

¹⁰ This insistence is 'hollow' because its substantive implications for the legal theoretical analysis of the Nazi legal system are virtually non-existent. The fact that it is considered to be 'law' is the result of such a minimal set of common criteria that Nazi law is considered sufficiently different from other forms of law as to be legitimately excluded from relevance in jurisprudential debate beyond establishing the possibility that such a wicked regime can, in fact, be 'law'. It is also hollow because it is not based on any detailed examination of the Nazi legal system, but rather some outdated preconceptions about the nature of Nazi law and therefore wicked legal systems generally. This narrative persists in the background and rests on the failure within the discourse to explore properly the historical nature of Nazi law, which results in it being treated inaccurately as a certain type of legal system that exists factually as 'law' but has no normative correspondence to other legal systems. The misrepresentation of the Nazi legal system this engenders helps support a general consensus that Nazi law is not relevant law, whether it is law in mere form or not. While technically 'law' according to positivist accounts, therefore, the Nazi system is substantively irrelevant from a legal theoretical perspective. Some of these points are explored in more detail in chapters Two and Three.

the remainder of Section I, I will introduce the perception that the Anglo-American 'legal academy' has failed to take Nazi Germany or Nazi law seriously as a subject for research, one starting point for my critique of jurisprudential discourse. In Section II I will unpack and explain my method and approach. I will discuss and define some of the important legal and historical concepts and terminology to be used throughout. Section III will introduce some important literature, briefly outlining important aspects of the development of the historical understanding of Nazi law, and highlighting some areas where the legal academy has encountered the Nazi past. Section IV will conclude with a brief summary of how my approach will take my thesis forward in the following chapters. This chapter will therefore provide an understanding of the scope and methodology of the thesis, its key underpinning scholarship, and how it will be progressed through this dissertation.

B Challenging the Legal Academy with the Nazi Past¹¹

Writing in 2002 about race defilement in Nazi Germany, Patricia Szobar commented:

In the past several decades, an influential stream of scholarship has laid claim to the notion that the Nazi era cannot be understood purely as an aberration in modern history but needs to be interpreted within the framework of a larger German and European trajectory. However, this has not been the case for the historiography of law in National Socialist Germany, which remains largely wedded to traditional methodological and theoretical approaches. Though scholars have pointed to elements of continuity with law in Wilhelmine and Weimar Germany, and a few have made glancing comparisons to the legal systems of other authoritarian or totalitarian regimes, the law under National Socialism is typically regarded as having constituted a complete break from modern legal norms and standards.¹²

Notwithstanding the huge gains in historiographical understanding of the Nazi period generally in recent years, Anglo-American, academic legal understanding specifically of Nazi law has not undergone a parallel transformation and historical research is only now beginning to. While a great deal has been written about the functioning of the Nazi state and the implementation of the Holocaust, comparatively little attention has been paid to the specific role of law within that enterprise. As a consequence, with some recent exceptions, historians often remain reliant for their systemic

¹¹ The term 'Nazi past' is intended to refer to the enduring trauma associated with Nazi Germany, and its ongoing cultural significance in many countries, which makes it a past that is constantly breaking into the present. This term is described in more detail in Section II of this chapter.

¹² Szobar, 'Telling Sexual Stories' (n 1) 133.

theorisation of Nazi law on the competing models advanced during 1940s by Ernst Fraenkel and Franz Neumann.¹³ The ability to reconstruct the Nazi legal system in light of developments in other areas of the history of Nazi Germany in the decades since those analyses relies on an engagement between legal theorists and general and legal historians all of which in their Anglo-American manifestations have largely overlooked Nazi law for the bulk of that period.

Similarly, it is possible to connect the paucity of English-language legal historical research about Nazi Germany with the lack of focus on Nazi law as a subject of philosophical interest within jurisprudence. The necessary developments in legal historical understanding have not generally been present to spur greater interest from legal theorists as to the historical nature of the wicked legal system upon which they construct certain theoretical claims about the nature of law generally.¹⁴ Consequently a collective, multi-disciplinary imperative to generate further research and revised interpretations has not materialised outside of certain, specific pockets of attention. The embryonic upswing of interest in this area from Anglo-American historians has been triggered by the translation of legal historical texts about Nazi law from German in particular, and Anglo-American historians remain heavily reliant on the continent for revising and updating their understanding of the Nazi legal system. Alongside Patricia Szobar, historians working within the Anglo-American legal academy have noticed the lack of research and interpretive evolution in the legal history of Nazi Germany, but translated texts (supplemented by the occasional English original) now exist as a basis for further exploration of Nazi law by both historians and lawyers. This has the potential to contribute to and enhance the more sophisticated understanding of the nature and operation of the Nazi state that has been constructed since the 1990s within historiography.¹⁵

A problem with the relationship between the legal academy and Nazi Germany, which runs alongside the lack of legal historical research about Nazi law mentioned above, has been identified in general terms by a handful of legal scholars in recent years. Those who have raised theoretical questions of the legal academy have often done so in quite general terms, both in the field of legal scholarship they have challenged and the aspect of Nazism to which

¹³ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (E.A. Shils tr, Octagon Books, New York, 1969); Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944* (2nd edn, Frank Cass & Co, 1967).

¹⁴ See generally Morton Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical' (1997) 17 *OJLS* 551.

¹⁵ Certain aspects of this are discussed in Chapter Five, below, specifically in relation to recent research into the Nazi concentration camp system.

they are referring.¹⁶ Frederick DeCoste has been at the forefront of such claims over recent decades, asserting in 1999 that ‘the English-speaking academy has been especially resistant to exploring the moral, ethical, and political significance of events in Europe between 1933 and 1945’.¹⁷ A year later DeCoste referred to ‘the [legal] academy’s disdain for history, its obstinate refusal to accord to the Holocaust the special reckoning for which the murder of so many in conscience calls’.¹⁸ Again, in 2007, he remarked on the ‘absurdly thin’ condition of the post-war production of Anglo-American academic lawyers on law and the Holocaust.¹⁹ Others have expressed similar sentiments in slightly different ways. Laurence Lustgarten directs his comments to the barbarisation of Nazi law,²⁰ Pietro Costa to the need for legal scholars to take account of historiography,²¹ Martti Koskenniemi to the reluctance of ‘European law’ to confront its own past,²² and David Fraser to the failure within ‘legal discourse and practices’ to understand the Holocaust and Nazi law as historical phenomena.²³

It is telling that many of these observations come from review essays. This indicates both that some new literature has begun to address the relationship between law and Nazi Germany, but also that, with the exception of David Fraser and occasional other works, many of those making the observations are not primarily engaged in remedying the problem they identify.²⁴

¹⁶ The various scholars discussed here target different fields or aspects of law depending on their perspective and interests, but they do not always define precisely to what they are referring. I, therefore, raise them with a little caution and in order to suggest that there is an emerging albeit fragmented sense that the role of Nazi Germany in legal scholarship is coming onto the agenda, and to highlight some relevant themes from this. My own focus is much more specifically on certain aspects of Anglo-American legal scholarship, and particularly jurisprudential discourse.

¹⁷ Frederick DeCoste, ‘Law/Holocaust/Academy’ (1999) 62 *Modern Law Review* 792, 800.

¹⁸ Frederick DeCoste, ‘Introduction’ in Frederick DeCoste and Bernard Schwarz (eds), *The Holocaust’s Ghost: Writing on Art, Politics, Law and Education* (University of Alberta Press, 2000) xvi.

¹⁹ Frederick Decoste, ‘Review of David Fraser, *Law After Auschwitz*’ (2007) *King’s College Law Journal* 179, 180 (fn 2).

²⁰ Laurence Lustgarten, ‘Taking Nazi Law Seriously’ (2000) 63 *Modern Law Review* 128.

²¹ Pietro Costa, ‘Lawyers and the Vital Relationship between the Past and the Present’ (2006) 7 *German Law Journal* 87.

²² Martti Koskenniemi, ‘“By Their Acts You Shall Know Them...” (And Not by Their Legal Theories)’ (2006) 7 *German Law Journal* 155, 155.

²³ David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press, 2005).

²⁴ In 1999 DeCoste was reviewing legal scholar Richard Weisberg’s *Vichy Law and the Holocaust in France* (New York University Press, 1996) and in 2007, Fraser’s *Law After Auschwitz* (ibid). Lustgarten was discussing Michael Stolleis’ *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (University of Chicago Press, 1998). Pietro Costa

Therefore, while some of those involved express a certain degree of optimism about the potential for academic legal engagement with Nazi Germany,²⁵ progress has been extremely slow and the situation is perhaps best summed up by the unchanging mood of DeCoste's comments over a period of 13 years. In 2012, he reflected that '...surely remarkably, philosophers have had more to say about the matter [of the Holocaust] than have academic lawyers who have with very rare exception stood mute since the Hart-Fuller debate of the late 1950s'.²⁶

These remarks about the state of law in relation to Nazi Germany are somewhat disparate, but they do indicate a sporadic, emergent desire to challenge the current perception of the relevance of the history of that period for the legal discipline. Some of the characteristics highlighted include the marginalisation of Nazi Germany as a subject of inquiry, a failure to recognise the significance of historical research in this area, and a feeling that Nazism, whether manifested by its legal system or the Holocaust, is an unrecognisable 'other', because of its perceived barbaric, lawless nature. This last characteristic comprises the 'rupture thesis', the idea that Nazi Germany represented a gross departure from normal historical and legal development – an aberration – such that there on no substantive points of continuity between now and then worthy of examination. DeCoste's reference to the 1950s Hart-Fuller debate is telling because of the way the legacy of that debate has exacerbated some of these features of the discourse within jurisprudence today.²⁷ In this dissertation I will use these remarks as a point of departure to exploit the emerging sense that Nazi Germany has more to contribute to 'law' than has hitherto been thought by the majority of the legal academy. I wish to apply the themes identified to a concrete case in a specific context, particularly jurisprudence as one strand of legal theory

and Martti Koskenniemi were considering Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions* (Hart Publishing Ltd, 2003).

²⁵ Koskenniemi, for example, describes *Darker Legacies of Law in Europe* as 'standing hopefully at the outset of a widespread and intensive new research agenda for European law', Koskenniemi 'By Their Acts' (n 22) 156.

²⁶ Frederick C. DeCoste, 'Hitler's Conscience, Redemptive Political Emotions, and the Politics of Fear' (2012) 4/108 *Jurisprudence & Legal Philosophy eJournal* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180059> accessed 5 December 2012, 4, fn 5. Fraser, too, would certainly agree that some of the problems he has highlighted persist to this day within legal scholarship; see, for example, his recent articles 'Shadows of Law, Shadows of the Shoah: Towards a Legal History of the Nazi Killing Machine' (2011) 32(2) *OJLS* 401; and 'Evil Law, Evil Lawyers? From the *Justice* Case to the Torture Memos' (2012) 3(2) *Jurisprudence* 391.

²⁷ The legacy of the Hart-Fuller debate in this respect is discussed further in Chapter Three.

within the Anglo-American legal academy, to show that their criticisms are fundamentally valid when applied to this case.

II. Legal and Historical Concepts: Defining the Scope

A Legal Categories

In this section I will define the scope of this thesis and explain how key terms such as 'jurisprudence' are employed therein. I will begin this section by explaining some of the terms I use to differentiate fields within the Anglo-American legal discipline. I will then give reasons for the choices I make in terms of those areas focussed on, first generally for Anglo-American legal scholarship and then specifically for jurisprudence and ICL scholarship.²⁸ I will conclude this section by outlining some areas this dissertation is not intended to cover and why I have excluded these from its scope. I noted at the beginning of this Chapter that I use jurisprudence to mean the strand of primarily analytical, Anglo-American, English-language jurisprudential discourse within the legal discipline.²⁹ It comprises the tradition of text-based, state-centred, doctrinal and conceptual legal theory in the Anglo-American tradition, which is concerned with issues such as the validity of law, the connection between law and morality and judicial interpretation, and much of which represents the direct or indirect legacy of the Hart-Fuller debate.

I describe this field as 'primarily analytical' cautiously because it is difficult to completely isolate the analytical branch from the normative branch. Analytical jurisprudence is often described as 'an enterprise of "conceptual clarification". Its claim to a morally neutral, descriptive, status suggests a concern with the preliminary clarification of ideas, rather than an attempt directly to address fundamental questions of political philosophy'.³⁰ Normative jurisprudence, by contrast, is primarily thought of as evaluative; it 'works with the already determined concept of law, and asks what the law should be'.³¹ However, it is more accurate and useful to follow William Twining's view that, however one divides up Anglo-American jurisprudence, 'most practical questions about law involve a combination of analytical,

²⁸ The term ICL scholarship refers to international criminal law scholarship and is explained further in Part B of this section.

²⁹ See fn 3 above.

³⁰ Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (4th edn, Sweet & Maxwell, 2013) 180.

³¹ Arthur Ripstein, 'Normative and Analytic Jurisprudence' *IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law*, http://ivr-enc.info/index.php?title=Normative_and_Analytic_Jurisprudence, accessed 31 October 2013. This rigid version of the distinction is taken to be Austinian in origin and is challenged in a number of ways elsewhere in the piece.

empirical, and normative elements', with no clear distinction between them.³² Nevertheless, it is impossible to ignore the huge influence of H.L.A Hart in the Anglo-American legal academy, on setting out the main tenets of what he considered to be an analytical form of legal positivism, and on determining the main issues at stake within the discourse.³³

I treat jurisprudence as one field of 'legal theory', which refers to a wider set of those writing academically about the theoretical aspects of law.³⁴ By this I mean the general and philosophical part of legal scholarship that deals with theoretical questions of an ontological or epistemological sort, most generally about the nature of law. I limit the term to Anglo-American legal scholarship so it does not refer to, for example, continental theorists. 'Legal scholarship' refers to English language academic research and writing within the Anglo-American legal discipline and not limited to legal theory. It excludes academic writing from outside of the Anglo-American tradition as well as legal practice generally. We cannot completely isolate practice from theory in a legal context, and they naturally overlap and influence one another. However, I aim to include the latter and exclude the former as far as possible because of my concern with how Nazi law is theorised and the implications of this for philosophical academic discourses. It means, for example, that I do not directly address what Anglo-American court judgments might have had to say about Nazi law but they may become relevant inasmuch as they contribute to theoretical academic writing about the subject.³⁵

Legal practice has of course formed a broad set of responses to Nazi Germany. This is most clearly apparent in areas such as the post-1949 constitutional development of Germany, the existence of the Council of Europe and European Union and the burgeoning of universal human rights norms, the proliferation of hate crimes and Holocaust denial legislation and the development of international criminal law (ICL). These areas are surrounded by academic legal discourse and my focus is on specific theoretical parts of this discourse. The 'legal academy' is the (Anglo-American) body within which legal scholarship takes place. I define 'legal history' in the context of Nazi law as research into legal aspects of the Nazi

³² William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 13.

³³ On the influence of Hart's writing and of the Hart-Fuller debate specifically on the direction of jurisprudential discourse, see Chapter Three.

³⁴ Including, for example, feminist legal theory, critical legal theory, postmodern theory and so on.

³⁵ For example, David Fraser, "'This is Not like any other Legal Question": a Brief History of Nazi Law before UK and US Courts' (2003/04) 19 *Connecticut Journal of International Law* 59.

state or Nazi war crimes trials as a sub-discipline of history, but potentially involving scholars both historically and legally trained.³⁶

I use the term 'law' in the knowledge that it is conceptually tricky in the context of this field of study but nevertheless cannot be avoided. Its construction is inevitably entwined with jurisprudential discourse. The question of what 'law' is conceptually lies at the heart of the jurisprudential discourse subject to this dissertation's critique. It is at this level highly contested. Furthermore, it is particularly contestable in the case of Nazi Germany, where the question of whether law can ever be so wicked as to be no longer law is deemed to meet its paradigmatic case, an assertion also problematized by the arguments in this dissertation.³⁷ Even in a general sense the term 'law' is ambiguous as to whether it means legal practice, substantive law, a legal system and/or legal writing and in what context. If it is not used specifically in the context of debates about its nature, or its status within Nazi Germany, then it is usually intended broadly to mean all of those things that come within the discipline of law and sometimes specifically to mean the set of rules and norms that make up a section of the substantive law.³⁸ It will be apparent from the context which.

B Exploring Jurisprudence and ICL Scholarship

This thesis concentrates on scholarship in the Anglo-American tradition as it is a deliberate attempt to address how Nazi Germany is treated within Anglo-American legal academia, and especially certain parts of legal theory. Jurisprudence is extremely influential in the legal academy, taught almost universally on law degrees and comprising the subject-matter of many

³⁶ While the use of specific laws to implement Nazi policy in the Third Reich is amply attended to in texts about the Nazi state, Nazi law receives very little separate attention from generalist historians and the Nazi legal system is understandably not thought of as an existential issue within Anglo-American historiography. There is a paucity of specifically legal historical research into Nazi Germany stemming from the Anglo-American historical academy, with most of the English language contributions originating from German scholars. The relationship between the historical and legal theoretical aspects of this research is much closer in the German tradition (for example, in the work of Michael Stolleis) than in the Anglo-American scholarship. This is discussed in more detail in Section III below and its implications in Chapter Five.

³⁷ The employment of Nazi Germany as a 'limit case' for law against which both positivists and natural lawyers can test their theories is undermined by the actual historical nature of law in the Third Reich, which is in many ways recognisable as 'law' and in many others quite different to legal systems founded on liberal principles of legality. Both the similarities and the differences as they actually existed challenge its status a paradigmatically marginal legal system.

³⁸ Subject always to the aforementioned question about what actually constitutes valid law.

textbooks,³⁹ and the Hart-Fuller debate is a canonical reference point within this discourse. I argue, especially given the construction of current jurisprudential discourse in the aftermath of the demise of the Third Reich, that if we are to search anywhere for the reason the legal academy often neglects Nazi Germany this is an important place to look. Legal scholarship is the reference frame for this dissertation because how academic lawyers write about Nazi Germany reflects and reinforces our cultural understanding of its associated events and feeds back into other areas of legal scholarship.

My focus means continental scholarship is excluded because different parts of the European continent have very specific and quite different relationships to the Nazi past to the Anglo-American world.⁴⁰ While these issues are not completely unrelated to collective memory in Anglo-American nations, the postwar life-world of victorious and unoccupied allied powers inevitably raises some different legal and historical issues. It is difficult to avoid altogether the influence of continental legal scholarship, and particularly theory, on Anglo-American legal theory but the two systems are sufficiently separated, not least by language, to mean it is not entirely futile to focus on one and not the other. The Anglo-American focus provides the opportunity to explore the potential enduring impact on aspects of legal scholarship of the self-understanding of opposition with Nazi Germany that comes with such a stark historical conflict of values occurring within living memory.

How jurisprudence engages with Nazi Germany is important because of its connection to the postwar period through the Hart-Fuller debate, the influence its ideas and those of its pre-eminent scholars (especially H.L.A Hart) have within legal academia, and because it represents the foremost academic method of understanding the nature, norms and rules of Anglo-American, state-centred legal systems. While there are other related matters of jurisprudential interest, the central concept of law is generally tackled in connection with the validity question and the separability question, those aspects also being where Nazi Germany has played its most prominent role. There is a causal thread, pursuant to which jurisprudence was permeated by a certain postwar political, historical, cultural and legal consensus about the totalitarian and criminal nature of the Nazi state in part through its offhanded treatment in the Hart-Fuller debate. Jurisprudence cannot account for all of the perceived gaps in and difficulties with the legal academy's engagement

³⁹ For example, Twining, *General Jurisprudence* (n 32); Simmonds, *Central Issues in Jurisprudence* (n 30); and many more.

⁴⁰ For example, the politics of national identity and collective memory plays a stark role in the postwar development of many continental states, and there has often been a great deal of ambivalence about how to respond to the past, especially in Germany itself. See fn 50, below.

with Nazi Germany highlighted in Section I, but it is a significant piece in the puzzle. It is one worth investigating to try to understand the extent to which these gaps and difficulties exist, why they came about, and how best to deal with them. Its current discursive structures embody a major obstacle to overcoming the entrenched opposition between 'our' Anglo-American conception of law and 'their' Nazi criminality, which prevents Nazi law from being a serious, substantive part of the jurisprudential conversation about the nature of law.

I turn later to consider aspects of legal and historical scholarship about Nazi war crimes trials.⁴¹ The particular facet of legal scholarship I will address is termed 'ICL scholarship'. This refers to academic writing within the disciplinary area of international criminal law (ICL), in particular that which explicitly examines Nazi war crimes trials. Like jurisprudence, this is a fairly clear-cut body of scholarship. It is defined predominantly by its focus on the development, doctrines and procedures of international criminal law and more specifically by its engagement with the trials themselves. In practice, most of the academic legal writing about these proceedings is focused on the Nuremberg International Military Tribunal (IMT), with some attention paid to the Nuremberg Subsequent Military Proceedings (NMT). ICL scholarship has a direct legal and historical connection to Nazi Germany through the Nuremberg trials and other Nazi war crimes trials and provides an enlightening comparison for jurisprudence from the legal academy in terms of how it represents the Third Reich, because of the important role of Nuremberg in constructing enduring narratives of it.

The focus on jurisprudence and ICL scholarship to support my thesis leaves some potentially relevant areas of the legal discipline largely untouched, in particular international human rights law (IHRL) and international humanitarian law (IHL). There is also an emerging literature on criminology and genocide studies, which falls outside of the scope of this dissertation.⁴² There is a potential overlap between ICL scholarship and IHL and IHRL because of the shared role played by Nuremberg in particular in their development. There is a considerable amount of academic and theoretical scholarship about these subjects some of which at least makes reference to

⁴¹ See Chapter Six. The term 'Nazi war crimes trials' refers in a general sense to domestic and international efforts to use the criminal law to prosecute those involved in acts executed during the Nazi period and conceived of by the Nazi regime in association with its policies of persecution, extermination and aggressive expansion, whether as members of the Nazi party, officials of the Nazi regime or collaborators from other states.

⁴² For example, Ross Matsueda, 'Towards a New Criminology of Genocide: Theory, Method, and Politics' (2009) 13(4) *Theoretical Criminology* 495; and John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge University Press, 2009).

Nazi Germany even if only as part of a moral/historical introduction to its origins and imperative.⁴³ The practice of both areas is surrounded by a substantial academic discourse with the potential for theoretical paradigms to be influenced heavily by practice developments and vice versa. Nazi Germany has impacted this with whole systems of norms and institutions almost constructed from the ruins of the regime. However, I do not tackle scholarship in these areas in any detail for a number of reasons. Primarily, while I suspect that some of the same observations about jurisprudence can be made about academic discourse in these areas, they touch on a number of other aspects beyond the theoretical analysis of the concept of law that exercises this dissertation, all significant comparisons to which can be made using ICL scholarship.

While legitimate questions may be asked about whether IHRL discourse theorises Nazi law any more successfully than jurisprudence, human rights scholarship raises different issues that fall outside of the scope of this dissertation. There are examples of texts that crossover between the fields of ICL and human rights law and incorporate some reflection on Nazi Germany, including for example David Hirsh's *Law Against Genocide*.⁴⁴ Hirsh uses the concept of a cosmopolitan criminal law to bring together various aspects of IHRL and IHL as well as a number of international criminal and other trials, and raises cosmopolitan law as part of the concrete legal response to genocide. Hirsh's text includes some very interesting discussions in relation to Nazi Germany, including chapters on the development of individual responsibility and crimes against humanity with reference to the Nuremberg IMT and a brief analysis of some historical and sociological literature about Nazi Germany.

The scope of Hirsh's work and some of the things it excludes highlights why I am tackling certain issues within this dissertation. Hirsh attempts to show that the notion of cosmopolitan criminal law from Nuremberg onwards is not merely either a wholly utopian, unattainable dream or a mask for exercise of pure power by nation states, but rather an actual and occasionally successful, if flawed and incomplete attempt to tackle the problems of genocide and totalitarianism. It is in that sense an enlightening work. However, despite the consideration of research by Zygmunt Baumann and Christopher Browning⁴⁵ in the context of the concept of individual responsibility, it does not seek to fundamentally address how Nazi law is theorised and understood or what the

⁴³ See, for example, David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (Routledge-Cavendish, 2007).

⁴⁴ *Ibid.*

⁴⁵ *ibid* 24-37.

philosophical implications of Nazi Germany are for how law is conceptualised within academic discourse. It instead looks at a number of cases, some of which pertain to the Third Reich, to see how and when they are successful as examples of cosmopolitan criminal law. It is also unusual in its broad interdisciplinary analysis, across ICL, IHRL and IHL, and its application of relevant historical research. A comprehensive examination of human rights literature in relation to Nazi Germany and the Holocaust in particular would raise a number of additional issues and levels of complexity that do not fall within the scope of my thesis in this dissertation.

C Historical Terminology

I have noted that terms such as ‘Nazi Germany’, ‘Nazi state’ and ‘Nazi regime’ can be used interchangeably and have quite a general meaning.⁴⁶ However, some of the terms are much more contested than others (e.g. ‘Holocaust’). Their precise meaning is more significant because of the sensitive nature of the use of terminology surrounding the Holocaust and because how I conceptualise the Nazi state and its legal system is vital to the evaluation of a branch of legal scholarship, jurisprudence, which pays close attention to what is and is not legitimate as ‘law’. Terms such as ‘Nazi Germany’ or the ‘Third Reich’ do not make clear the spatial or temporal limits they are intended to indicate.⁴⁷ The extent of the state and its annexed and dependent territories altered radically over a relatively short period of time, as did the quality of Nazi rule. I am not concerned for the purposes of my thesis with the specific extent and classification of the Reich at any one time so adopt a fairly simple and generalised usage, with context and specific language indicating more detailed points of reference. Therefore, unless clearly stated or the context otherwise makes clear, the starting point for terms such as ‘Nazi Germany’, ‘Nazi State’, ‘Nazi regime’ and other similar terms is their literal meaning: the entity governed by the Nazi party from 1933 to 1945 in its various forms, or the regime comprising that government. The term ‘Third Reich’ will also be used interchangeably with these, although it implies a more precise geographical limitation as the area directly governed by the regime.⁴⁸

⁴⁶ See fn 2, above.

⁴⁷ Each or all of these might refer only to areas of National Socialist direct rule, or to this greater Germany as well as various occupied territories, such as the *General Gouvernement*, the *Reichskommissariat* territories and occupied France; or it might further incorporate unoccupied Vichy France and other dependent states in parts of Eastern Europe. Then there is the question of whether and how to include the transitory eastern front boundary in the period during the Second World War.

⁴⁸ See Mark Mazower, *Hitler's Empire: Nazi Rule in Occupied Europe* (Penguin, 2008) for some useful maps of Nazi rule, and particularly the map of Europe in 1942 on pp. xviii-xix.

The term 'the Nazi past' is intended to refer to the period of Nazi rule and some of its wider and subsequent implications for individual and collective memory and national identity. It indicates the melding of the past into the present that is observable in the case of a traumatic set of historical events which have left so many political, cultural and psychological marks on western society.⁴⁹ While the term 'Nazi past' appears somewhat ambiguous, it is helpful in attempting capture the enduring significance of Nazism for many, which makes it a past that is continually breaking into the present and whose status contributes to some of the academic historical and legal challenges with integrating it into conventional disciplinary schemas.⁵⁰ The term incorporates the phenomenon of the Holocaust, which has its own wider implications. I will generally use 'the Holocaust' to refer to the historical event of the systematic and partly industrialised killing of the European Jewish population across the territory under Nazi influence, including in concentration and death camps and on the eastern front. 'Final Solution', 'extermination of the Jews' and '*Shoah*' may also be used in this sense, but I will default to the term 'Holocaust' for ease and consistency.⁵¹ 'Holocaust' and terms such as 'Auschwitz' can also signify the Holocaust as an enduring philosophical phenomenon, which carries with it different contemporary meanings for different people beyond the merely descriptive.⁵² Context will make it clear which of these significations is intended. This dissertation is not about the semantics of how we refer to either the Nazi state or the Holocaust. These issues are dealt with elsewhere,⁵³ and I intend here to employ generally accepted terms in their generally accepted usage as straightforwardly as possible, in awareness of

⁴⁹ See, as a small sample of this highly varied, multidisciplinary literature, for example Peter Novick, *The Holocaust in American Life* (Houghton Mifflin, 2000); Katka Reszke, *Return of the Jew: Identity Narratives of the Third post-Holocaust Generation of Jews in Poland* (Academic Studies Press, 2013); Ronald J. Berger, *The Holocaust, Religion, and the Politics of Collective Memory: Beyond Sociology* (Transaction Publishers, 2013); Richard Crownshaw, *The Afterlife of Holocaust Memory in Contemporary Literature and Culture* (Palgrave 2010); Alvin H. Rosenfeld, *The End of the Holocaust* (Indiana University Press, 2011).

⁵⁰ For some examples of the use of the term 'Nazi past' in academic literature, see Alan Steinweis, Philipp Gassert, *Coping with the Nazi Past: West German Debates on Nazism and Generational Conflict, 1955-1975* (Berghahn Books, 2006); Michael Burleigh (ed), *Confronting the Nazi Past: New Debates on Modern German History* (St. Martin's, 1996); Bill Niven, *Facing the Nazi Past: United Germany and the Legacy of the Third Reich* (Routledge, 2002).

⁵¹ For a definition of the 'Holocaust', see 'Defining the Holocaust' in Donald Niewyk, Francis Nicosia, *The Columbia Guide to the Holocaust* (Columbia University Press, 2000).

⁵² See some of the literature in fn 49 as an illustration of this. Also, Fraser, *Law After Auschwitz* (n 23) for an example of the use of 'Auschwitz'.

⁵³ See, for example, Zev Garber, Bruce Zuckerman, 'Why do we Call The Holocaust "The Holocaust?": An Inquiry into the Psychology of Labels' (1989) 9(2) *Modern Judaism* 197.

but not unduly encumbered by the controversy that sometimes surrounds them.

When referring to the Holocaust,⁵⁴ I do not intend to imply that it is a phenomenon of enduring significance independent from the Nazi regime as a whole, or is somehow exceptional or unique (beyond its intrinsic historical specificity). This position is not uncontroversial,⁵⁵ but I make this position clear here because I do not at any point engage extensively with debates about the nature of the Holocaust. However, it is important to my argument about Nazi law to recognise the Holocaust as essentially sharing the characteristics of the more 'ordinary' aspects of the Nazi state, being a grotesque but natural - although not necessarily inevitable - consequence of these rather than a distinct phenomenon. Recent detailed historical studies of the implementation of the Holocaust, which there is not scope to survey here,⁵⁶ make clear the degree of complexity and interaction in the relationship between the ordinary aspects of the state and those involved in carrying out the Final Solution. The Holocaust is a vitally important event for modernity in various ways⁵⁷ and it offers a substantial amount of material for research, but it is not historically or theoretically justifiable in my view, to treat it as distinctive in character from the wider context of the Nazi state in which it is firmly rooted and the ideology and aims of which it is an extension.

Beyond the above, this dissertation is in no way an attempt to redeem Nazi law, justify Nazi ideology or underplay the wickedness or immorality of the Nazi regime and the atrocities perpetrated by it. It is not a case of saying that 'liberal' law is as bad as Nazi law, as it is readily apparent that a fully realised Nazi state would not be a desirable outcome whether or not it was considered legal. It is not a legal history of Nazi Germany or an attempt to provide a comprehensive theorisation of Nazi law. I refer to historical scholarship throughout this dissertation but do not do so in order to provide

⁵⁴ Particularly in Chapter Four.

⁵⁵ See for perspectives on the question of uniqueness, Alan Rosenbaum (ed), *Is the Holocaust Unique? Perspectives on Comparative Genocide* (Westview Press, 2008).

⁵⁶ Although see the Nazi Concentration Camp System research discussed in Chapter Five for the complex overlapping functions of camp institutions between political/ideological, criminal law, persecutory and genocidal roles, as well as the 'ordinary' nature of those involved in the perpetration of the Holocaust in the camps. See also Raul Hilberg, *The Destruction of the European Jews* (3rd edn, Yale University Press, 2003) as well as the contributions to Dan Stone (ed), *The Historiography of the Holocaust* (Palgrave Macmillan, 2004) and 'Part V: Case and Context: The Holocaust and World War II' in David Bankier, Dan Michman (eds), *Holocaust Historiography in Context: Emergence, Challenges, Polemics and Achievements* (Yad Vashem, 2008) for examples of this.

⁵⁷ On its impact on historical theory, for example, see the publications of historian and theorist Dan Stone, some of which are considered in more detail in Chapter Four.

a detailed legal map of the Nazi state, nor do I engage much directly with primary historical sources. This section has outlined what the areas I intend to focus on are and why I do so, as well as how I will use certain terminology to facilitate the communication of my argument. I will now provide a brief review of the current status of aspects of the legal historical literature by way of background to the research used in later chapters to challenge the jurisprudential representation of Nazi Germany.

III. A Selective Review of the Development of the Legal History of Nazi Germany

A The Development of the Anglo-American Understanding of Nazi Law

In setting the context for the remainder of this dissertation, this section will provide a background to the emerging Anglo-American understanding of Nazi law, and highlight some of the key literature in this area that constructs a different version of Nazi law to the one that currently prevails within jurisprudential discourse. This research demonstrates that Nazi Germany occupies a peculiar place in some parts of the legal academy, in that for jurisprudence it is very often present in some form or another, but is rarely represented as its actual historical self. Nazi law also occupies a strange place in the wider historiography of Nazi Germany in that, for all the detailed analyses of different aspects of the Nazi state, and all of the recent narrative accounts of Nazi war crimes trials, historians in the Anglo-American academy do not appear to have spent much time at all thinking or writing about the general nature or function of the Nazi legal system.

For example, historian Jane Caplan was right in 1993 to point out that ‘Nazi political theory has not been widely studied’.⁵⁸ Her citation of a noteworthy exception in the German-language *legal* history of Michael Stolleis, among others, is telling in that it reveals how legal theory (more usually constitutional theory⁵⁹) is generally treated as an aspect of political theory in the historiography.⁶⁰ This is a not untypical example. The many English language narrative histories of the Nazi state and historiographical collections of key themes that have been published over the years, while often recounting the significance of particular Nazi legislation such as the Enabling Act or the Nuremberg laws, rarely dwell on Nazi law as a distinctive feature of

⁵⁸ Jane Caplan, ‘National Socialism and the Theory of the State’ in Thomas Childers and Jane Caplan, *Reevaluating the Third Reich* (Holmes & Meier, 1993) 98.

⁵⁹ Law as such is rarely addressed in the English-language legal history of Nazi Germany, whereas the state’s constitutional nature is considered more interesting and pertinent.

⁶⁰ Caplan, ‘National Socialism’ (n 58) 98-113, 98 and endnote 2 (p 109).

the regime (although the role of legal officials is sometimes touched upon).⁶¹ Where it does come up it has been reliant on German language studies of the subject for further input.⁶²

It is only very recently that translated texts from German scholars have encouraged new specialist English-language academic research interest in law in Nazi Germany, suggesting that the subject is coming onto the agenda. At the forefront of this is Michael Stolleis' translated and original material, including his *The Law Under the Swastika*.⁶³ One or two other examples have also followed Ingo Müller's popular (also translated) 1991 volume *Hitler's Justice*,⁶⁴ including Diemut Majer's "*Non-Germans" Under the Third Reich*.⁶⁵ Very little on this subject has stemmed directly from the Anglo-American academy.⁶⁶ Most recently in 2013, however, Alan Steinweis and Robert Rachlin's edited collection *The Law in Nazi Germany*⁶⁷ was published with contributions from lawyers and historians from both North America and Europe. In the Introduction the editors recognise that 'the legal history of Nazi Germany has not attracted a great deal of attention from scholars' and 'much of the important scholarship that does exist in this area has not been translated from German into English'.⁶⁸ One reason for this, they note, is that 'scholarship may have suffered from the erroneous perception that the law

⁶¹ Martin Broszat's, *The Hitler State: The Foundation and Development of the Internal Structure of the Third Reich* (Longman, 1981) is unusual in including a chapter entitled 'Law and Justice' (pp.328-345), which is almost certainly a result of Broszat being a German historian, the book having initially been published in the German language (Martin Broszat, *Der Staat Hitlers* (Deutscher Taschenbuch Verlag, 1969)). This is much less common in English language publications. See, for example, Tim Kirk, *Nazi Germany* (Palgrave Macmillan, 2007); Christian Leitz (ed), *The Third Reich: The Essential Readings* (Blackwell, 1999); Jane Caplan (ed), *Nazi Germany* (OUP, 2008); and Detlev Peukert, *Inside Nazi Germany: Conformity, Opposition and Racism in Everyday Life* (Penguin, 1987).

⁶² Many of these are referred to in and noted at the end of Michael Stolleis, 'Law and Lawyers Preparing the Holocaust' (2007) 3 *Annual Review of Law and Social Science* 213.

⁶³ As well as *ibid*, there is Stolleis, *The Law Under the Swastika* (n 24); Michael Stolleis, *A History of Public Law in Germany 1914-1945* (OUP, 2004); and Michael Stolleis, *History of Social Law in Germany* (Springer, 2014), Ch VI of which covers 'The Nazi State'.

⁶⁴ Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press, 1991).

⁶⁵ Diemut Majer, "*Non-Germans" Under The Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe, with Special Regard to Occupied Poland, 1939-1945* (John Hopkins University Press, 2003).

⁶⁶ Apart from the occasional volume of legal history written by lawyers such as Weisberg, *Vichy Law* (n 24).

⁶⁷ Alan Steinweis and Robert Rachlin (eds), *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (Berghahn Books, 2013).

⁶⁸ Alan Steinweis and Robert Rachlin, 'Introduction: The Law in Nazi Germany and the Holocaust' in *Ibid* 1.

did not matter in Germany during the Nazi period'.⁶⁹ This perception is significant for the legal academy because if law is not relevant in Nazi Germany, then Nazi Germany is not relevant for law.

Steinweis and Rachlin simultaneously revise and reinforce an understanding of Nazi law that has permeated historical research for many years, often indirectly through studies of the state apparatus. They emphasise the role and importance of law while simultaneously assuming the juxtaposition of order and terror, chaos and control, arbitrariness and certainty, normality and genocide. The theme of a lawless Nazi regime gradually eating away parasitically at the pre-existing legal state, with increasing power going to the SS over the bureaucracy, the party over the state, *Führer* decrees over Reichstag legislation and special courts over the established judiciary, has prevailed in historical understanding of how the government functioned in the Third Reich. Its inspiration comes partly from Ernst Fraenkel's still popular 1941 account of the normative and prerogative states in *The Dual State*.⁷⁰ According to this view, the normative state, 'an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies' co-existed with the prerogative state, 'that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees',⁷¹ in a relationship characterised by 'constant friction'.⁷² Therefore, the Nazi legal system is exemplified by the presence of both forms of the state at the same time.

Fraenkel did not claim that the prerogative state necessarily eroded the normative state to the point of destruction.⁷³ The model of the 'dual state' does, however, suggest two quite distinct spheres of jurisdiction that co-exist but do not overlap or integrate with one another. The influence of Fraenkel's construction of the prerogative state within historiography was, paradoxically, reinforced by the competing model put forward by Franz Neumann's *Behemoth*, initially published in 1942.⁷⁴ Neumann's was less of an investigation into the Nazi legal system and more of a structural analysis of the political system. In it he expressly rejected Fraenkel's interpretation and with it any concept of law in Nazi Germany.⁷⁵ Neumann's alternative was thus a totalitarian state of separate, competing spheres of power within Nazi

⁶⁹ *Ibid.*

⁷⁰ Fraenkel, *The Dual State* (n 13).

⁷¹ *Ibid* xiii.

⁷² *Ibid.*

⁷³ *Ibid* 57.

⁷⁴ Neumann, *Behemoth* (n 13).

⁷⁵ *Ibid* 468.

Germany (party, state, army, industry, bureaucracy, and so on). Both of these interpretations have been extremely influential in historiography, and were important forerunners to the structuralist school of thought which was vital from the 1960s for counter-balancing 'intentionalism'.⁷⁶ Neumann's institutional analysis, which 'drew a clear line between the National Socialist Party, including the SS, and the other pillars of the Nazi state',⁷⁷ also found its way into postwar historiography and public memory as it helped to underpin the allies' prosecutorial approach in the Nuremberg IMT and especially NMT proceedings.⁷⁸ These latter proceedings, in terms of the narratives resulting from the prosecution and defence construction of the Nazi state, 'served as multipliers for empirical flaws, analytical shortcomings, and interpretative dead-ends' within the historiography.⁷⁹

This brief overview begins to reveal the entrenched view of the Nazi legal system within historiography that has often depended on narratives of rupture and opposition from and within law as it was manifested in the Third Reich. It also shows how law as such in Nazi Germany has not been a key concern for historical scholarship until recently, under heavy influence from translated German scholarship. It is questionable whether Anglo-American legal theorists with their natural and specific focus on law ought to have paid more attention to its Nazi manifestation when English language historians were not writing much about it. However, even translated scholarship can now be used to address the misconceptions and theoretical lacunae within jurisprudence about Nazi Germany. As the most developed set of interpretations about Nazi law come from this scholarship, I refer to it in support of my arguments in this dissertation. It is also in line with the general history of Nazism coming out of the English academy, which rarely pinpoints Nazi law but does understand the regime in a way that makes Nazi law intelligible as a complex and continuous system across time and space.

⁷⁶ According to Ian Kershaw, it was 'only during the course of the 1960s ... that the challenge to notions of the "monolithic", "totalitarian" State ... gradually affected writing on the Third Reich; Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (4th edn, Arnold, 2000) 74.

⁷⁷ Jan Erik Schulte, 'The SS as the "Alibi of a Nation"? Narrative Continuities from the Nuremberg Trials to the 1960s' in Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6) 142.

⁷⁸ See Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6), especially Kim C. Priemel and Alexa Stiller, 'Nuremberg's Narratives. Revising the Legacy of the "Subsequent Trials"' 6-7 on the general use of *Behemoth* in the NMT proceedings; *ibid* 142 on its influence on the *Pohl* case; and Kim C. Priemel, 'Tales of Totalitarianism. Conflicting Narratives in the Industrialist Cases at Nuremberg' 176 on its use in the *Industrialist* cases. This is discussed in more detail in Section II of Chapter Six.

⁷⁹ Priemel and Stiller, 'Nuremberg's Narratives' (n 78) 10.

B Encounters between the Academic Legal Discipline and the Nazi Past

Research into Nazi Germany within other parts of the legal academy does merit some brief attention both to contextualise the current level and nature of engagement with Nazi Germany and because I will refer to some of this scholarship and the arguments it contains where relevant throughout this dissertation as part of my critique of jurisprudence. David Fraser's work is virtually unique in its legal theoretical focus on the role of law in Nazi Germany and in incorporating legal, historical and philosophical aspects.⁸⁰ While almost all of the scholarship about Nazi law I have referred to has generally addressed itself to law in the German state itself,⁸¹ Fraser is also one of the only legal or historical scholars writing in the English language to tackle the role of Nazi law in implementing the Holocaust in territories outside of but under the influence or occupation of the Reich.⁸² He also straddles philosophical boundaries in his writing, between continental and Anglo-American legal theory, and his arguments often attend to demonstrating that Nazi law was in fact 'law' for all intents and purposes and in the eyes of the 'interpretive community' of contemporary legal officials.⁸³

It is generally the influence of continental and critical theory in the English language legal academy that has brought certain aspects of Nazi Germany to legal attention among interdisciplinary legal and social theorists.⁸⁴ I do not intend to review this line of research in detail, not least because it largely focuses on specific aspects of the Holocaust whereas I wish to address the implications of the Nazi state and legal system as a whole, of which the Holocaust is but one aspect. There are, however, pockets of scholarship dealing with the implications of other facets of Nazi Germany. This includes, for example, instances where references to Nazism and the Holocaust appear

⁸⁰ See, for example, Fraser, *Law After Auschwitz* (n 23); David Fraser, *Daviborshch's Cart: Narrating the Holocaust in Australian War Crimes Trials* (University of Nebraska Press, 2010); *The Fragility of Law: Constitutional Patriotism and the Jews of Belgium, 1940-1945* (Routledge-Cavendish, 2009); *The Jews of the Channel Islands and the Rule of Law, 1940-1945: "Quite Contrary to the Principles of British Justice"* (Sussex Academic Press, 2000).

⁸¹ With the exception of Majer, *"Non-Germans" Under The Third Reich* (n 65); and Weisberg, *Vichy Law* (n 24).

⁸² In Belgium and the Channel Islands, for example. See fn 80 above.

⁸³ Fraser, 'Evil Law, Evil Lawyers?' (n 26).

⁸⁴ Especially in recent years through the theoretical writing of Giorgio Agamben on *homo sacer* and the legal significance of the camps. See in particular Agamben's *Homo Sacer: Sovereign Power and Bare Life* (D. heller-Roazen tr, Stanford University Press, 1998); *Remnants of Auschwitz: The Witness and the Archive* (D. heller-Roazen tr, Zone Books, 1999); and *State of Exception* (K. Attell tr, University of Chicago Press, 2005). See also David Fraser, 'Dead Man Walking: Law and Ethics After Giorgio Agamben's Auschwitz' (1999) 12 *International Journal for the Semiotics of Law* 397.

in judicial decisions even though they are not a central issue at stake in the case.⁸⁵ This subject has made its way into the Anglo-American legal academy in the writing of scholars such as Vivian Grosswald Curran, who has challenged the claim that the influence of formalism on jurists in the Nazi state caused the acquiescence of the legal profession to its barbarism.⁸⁶ This feeds into her related claim about the fundamental limits of the power of law and legal theory in the face of such barbarism.⁸⁷

The wider question of the relationship between law and evil in the light of Nazi Germany has been the subject of some research in the legal academy in recent years.⁸⁸ David Seymour has also written about the Holocaust and anti-Semitism from an interdisciplinary, critical theory perspective.⁸⁹ While this scholarship shows that some legal theoretical engagement with Nazi Germany has taken place, this exists almost entirely outside of jurisprudential discourse and has not altered its fundamental structure or direction. As such, while their arguments and findings often have implications for areas of scholarship like jurisprudence, and sometimes these are explicitly stated, they appear to have had very little impact on the discourse within this field. It is also often the case that scholars addressing issues such as Radbruch's

⁸⁵ See Didi Herman, "'I Do Not Attach Great Significance To It': Taking Note of "The Holocaust" in English Case Law' (2008) 17 *Social and Legal Studies* 427 for a discussion of such references in English case law and the implications of these for remembrance and societal perceptions of Jewishness. On a similar subject see Fraser, "'This is Not like Any other Legal Question'" (n 35). This is part of a wider phenomenon of references to the Nazi past in law-making institutions and other legal forums, which do not appear to have been examined systematically by legal scholars.

⁸⁶ Vivian Grosswald Curran, 'Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law' (2001/2002) 35 *Cornell International Law Journal* 101. See also Brian Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 *American Journal of Jurisprudence* 45.

⁸⁷ Curran, 'Fear of Formalism' (ibid) 185. See also Curran's 'The Politics of Memory/Erinnerungspolitik and the Use and Propriety of Law in the Process of Memory Construction' (2003) 14 *Law and Critique* 309, where she takes a sceptical perspective on the role of postwar tribunals in the process of memory construction, again emphasising her view of the law as a limited medium. Her assessment of Nazi law walks the line between non-law, and lawfulness, describing it as interesting because it 'yields greater visibility of some of law's attributes' by 'catch[ing] law at an extreme point of rupture' (309-310) and the Nazi state as 'a nation under law, governed by law' in terms of self-understanding, but also in a sense lawless (310).

⁸⁸ On the subject of law and evil, see, *inter alia*, Ali Hirvonen and Janne Porttikivi (eds), *Law and Evil: Philosophy, Politics, Psychoanalysis* (Routledge, 2010); Thérèse Murphy and Noel Whitty, 'The Question of Evil and Feminist Legal Scholarship' (2006) 14(1) *Feminist Legal Studies* 1; ch 6 on 'Evil' in Joel Feinberg, *Problems at the Roots of Law* (OUP, 2002); and John T. Parry, *Evil, Law and the State: Perspectives on State Power and Violence* (Rodopi, 2006).

⁸⁹ David Seymour, *Law, Antisemitism and the Holocaust* (Routledge-Cavendish, 2007).

postwar assertions about the ability of natural law to resolve the problems brought to light by Nazi law remain wedded to one side of the opposition between natural law and positivism rather than questioning the terms of the debate altogether,⁹⁰ which is the argument I put forward in this dissertation.

IV. Conclusion: Taking the Thesis Forward

I will establish my thesis that recent historical research reveals that jurisprudential discourse relies on a misrepresentation of Nazi Germany to support its theoretical paradigms, which require re-evaluation in light of the Nazi experience of law, by adopting a three stage approach through the remaining chapters. The first stage will involve analysing jurisprudential discourse itself and its representation of Nazi Germany, and evaluating some of the problems with it. The second stage will involve critiquing that representation in more detail using examples from historical scholarship, and addressing the implications of reconstructing the Third Reich within jurisprudence in a more historically accurate form. The third stage will examine Nuremberg to highlight its role in constructing narratives of rupture and make connections between the representation of the Third Reich in jurisprudence and ICL scholarship. This will achieve my aim to use historical scholarship to challenge and reconstruct the jurisprudential representation of Nazi Germany and especially its legal system. I will provide a little bit more detail of how the arguments in each chapter will advance my thesis.

In Chapter Two I will show how Nazi Germany and its legal system are represented in current jurisprudential discourse by analysing references to Nazi Germany in the literature over the last fifteen years. The picture of Nazi Germany as a whole that emerges from jurisprudence is a generalised and superficial one of an evil, hypothetical straw man state. In this sense, it is not the 'real' - and certainly not the historically documented - Nazi Germany that is being alluded to. Instead the 'Nazi Germany' constructed within these debates represents a legal outlier, most conveniently called 'Nazi', which can be used in turn to trump and support different positivist and natural law conceptions of legal validity. Rather than an explicit claim of Nazi lawlessness, this (mis)representation appears founded on an implicit consensus that the actual Nazi state and legal system has no relevance for jurisprudence beyond

⁹⁰ As David Fraser and, to a lesser extent, Vivian Grosswald Curran do. Those who take sides include David Dyzenhaus and Kristen Rundle, for example. It is admittedly difficult to try to engage with the positivism/natural law debate in jurisprudence without getting caught up in its discursive tropes and structures. On Radbruch see, for example, Bix, 'Radbruch's Formula' (n 86); and Frank Haldemann, 'Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law' (2005) 18(2) *Ratio Juris* 162.

this two dimensional portrayal of the ultimate evil, reinforced by an underlying narrative of rupture.

In Chapter Three I will complete the analysis of jurisprudence by examining the representation of Nazi law in the Hart-Fuller debate and connecting it to contemporary jurisprudence, including the evaluation of two recent collections commemorating the fiftieth anniversary of the debate.⁹¹ The huge influence of the Hart-Fuller debate on the major issues, methodological approach and discursive structures of jurisprudence means how it referred to Nazi Germany is crucial to establishing how the regime would come to be treated subsequently. I will argue that neither Hart nor Fuller, while explicitly claiming to address Nazi law, advanced far beyond the wicked reputation of Nazism to explore its historical reality and philosophical nature in any depth.

In Chapter Four, I will offer a strong critique of the state of jurisprudence using both legal theoretical and historiographical scholarship. I will evaluate the competing alternative approaches to Nazi law offered recently by Kristen Rundle and David Fraser, in light of the Holocaust historiography of theorist and historian Dan Stone, who has written extensively about the dual character of the Holocaust as both ordinary historical event and existential challenge to the narrative and epistemological conventions of the historical discipline. This will demonstrate how applying the history of the Holocaust to jurisprudential issues has the potential to alter the conventional understanding of those issues promoted by the discourse. It also shows that jurisprudential unfamiliarity with the reality of Nazi state and law has had profound consequences for its understanding of the nature of law and its role in the Third Reich. I will argue that it is necessary to deconstruct the terms of the debate in order to incorporate the Nazi legal system into jurisprudence in a meaningful way.

In Chapter Five I will complete my critique of jurisprudence by using two case studies of historical research to challenge how Nazi Germany is conventionally understood and consider the jurisprudential implications of the historical analysis of law in Nazi Germany.⁹² The first case study examines

⁹¹ Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010); 'New York University Law Review Symposium: Fifty Year Later', (2008) 83(4) *New York University Law Review* 993.

⁹² In this dissertation I will not consider the primary historical discourse comprising substantive Nazi jurisprudence, the writing of legal theorists such as Carl Schmitt who lived through the Nazi period and whose scholarship contributed to Nazi jurisprudence. This scholarship can undoubtedly tell us something about the nature of Nazi law and, in the case of Schmitt, continues to contribute to academic discourse, particularly in political philosophy, around topics such as the state of emergency and its critique of liberalism (see for example David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006), especially chapter 1; Adrian Vermeule, 'Our Schmittian

recent developments in the legal historical understanding of the legal system, influenced by translated continental scholarship particularly with regard to the role of ideology in Nazi law. The second case study is of new historical research into the concentration camp system. Both sets of research will expose how attempts to construct a jurisprudential understanding of the Nazi state based on a 'rupture' from 'normal' legal development are unsustainable when confronted with the actual experience of Nazi law. Consequently, a rethink of the implications of Nazi Germany for the concept of law is required.

In Chapter Six the discursive role of the Nuremberg trials, both IMT and NMT will be considered. I will first argue that Nuremberg provides important connections between different aspects of this thesis. I will use recent scholarship to show that Nuremberg both constructed narratives of rupture about Nazi Germany and its legal system and itself acted as a moment of legal rupture through the opposition of its own law with Nazi law. Consequently, the narrative of rupture that prevails within jurisprudential representation of the Third Reich is traceable back to Nuremberg. Second, I will compare current ICL scholarship with historical research into Nazi war crimes tribunals to demonstrate their key differences in approach and expose the similarities between how ICL scholarship and jurisprudence treat the Third Reich. This is again connected to Nuremberg and illustrates that difficulties with representation of the Nazi past within the legal academy go beyond jurisprudence and are contingent on the way the discourse developed through and after Nuremberg.

In the concluding Chapter Seven, I will summarise the key arguments of the dissertation in the context of viewing Nazi law as presenting a challenge to the jurisprudential status quo. I will highlight the key contributions and limitations of this thesis and address the current state of research in the area of law and Nazi Germany. This will help to see how it is progressing as new research is published and draw attention to opportunities for potential future research. This outline shows that the dissertation will marshal disparate legal

Administrative Law' (2008-2009) 122 *Harvard Law Review* 1095; Michael Salter, *Carl Schmitt: Law as Politics, Ideology and Strategic Myth* (Routledge-Cavendish, 2012); cf. Amanda Loumansky, 'Critical Legal Theory's Turn to Schmitt: Not Waving but Drowning?' (2013) 34 *Liverpool Law Review* 1).

However, it falls outside the scope of this dissertation, which instead focuses on the analysis of current scholarship in particular areas of Anglo-American jurisprudence and aspects of current research within the historical academy, in order to critique the jurisprudential representation of Nazi Germany and highlight the relationship between the discourses. It does not visit primary historical sources in its consideration of the nature of the Nazi past. Such sources and the secondary literature they have generated would form the part of further research into the nature of Nazi legal ideology, an important offshoot of the work in this dissertation (see Chapter Seven on future research).

and historical scholarship relevant to Nazi law together as a body that can be used to critique the way the Third Reich is represented primarily in jurisprudential discourse. This includes examples from the legal academy that exist outside of jurisprudence, general historical scholarship that reveals some important aspects of the nature of Nazi Germany, and recent legal history from inside and outside of the English academy that is beginning to shift its focus towards Nazi law as a coherent system and away from narratives of rupture and discontinuity.

Chapter One has outlined the aims and key aspects of the argument of this dissertation. It has explained how its primary thesis will be advanced in the following chapters. It has summarised the approach I will adopt, the specific terminology I will use and some of the most important qualifications and caveats in respect of its scope and content. Finally it has introduced the perceived problem with the treatment of Nazi law within the legal academy and some of the key literature that will be used to challenge the hegemony of jurisprudential discourse over the dominant narrative surrounding the Nazi legal system. This has included introducing the difficulties inherent in a community of historians which has only recently begun to take Nazi law seriously, and integrate it within a broader historical framework already focused on the complexities and continuities of the Nazi state. The rupture thesis, especially in relation to Nazi law, has worked through Nuremberg, the Hart-Fuller debate, jurisprudential discourse, postwar historiography and ICL scholarship, distancing each of them from the history of the Third Reich and preventing a true jurisprudential account of its legal system being realised. Historical research is now available to challenge this account and this dissertation furthers this process.

Chapter Two: (Mis)Representing Nazi Germany in Jurisprudential Discourse: ‘especially resistant to exploring the moral, ethical, and political significance of events in Europe between 1933 and 1945’⁹³

I. Introduction

A Jurisprudence Rejecting the Nazi Past

This chapter is focused on analysing the representation of Nazi Germany within jurisprudential discourse.⁹⁴ It will evaluate the role played by the Third Reich and its legal system in the literature and show how this representation is entrenched by the way the discourse is structured and its approach to wicked legal systems as a category of law. It will demonstrate that the Third Reich is represented by a hypothetical, superficial, wicked straw man facsimile rather than its actual historical self. It will show that, to the extent that Nazi law appears, it does so as an archetypal wicked legal system. In almost all cases the representation is divorced from historical reality and isolated from historical research. In Chapter One I began to make the case that jurisprudential discourse does not take the Nazi legal system for what it actually was, historically. The one-dimensional, evil state that is represented in its place consigns Nazi Germany to substantive irrelevance in terms of major jurisprudential debates, over the conditions of validity for law and the conceptual connection between law and morality, the validity question and the separability question.

What is more, the narrowing of jurisprudential analysis of the concept of law to these questions and its structuring around the twin theoretical pillars of positivism and natural law obscures other ways in which the experience of law in Nazi Germany is relevant to the concept of law beyond mere validity. This reinforces and reproduces an implicit, underlying narrative of rupture – from both legal and historical development - within the discursive treatment of the Third Reich, which originated in the postwar period where it revealed itself in the Nuremberg Trials and the Hart-Fuller debate.⁹⁵ The predominant jurisprudential focus on abstract and analytical considerations in subsequent decades has operated in conjunction with a disciplinary disinclination to engage with developments in historical research that have fundamentally revised the way the Nazi state is interpreted and understood in the

⁹³ DeCoste, ‘Law/Holocaust/Academy’ (n 17) 800.

⁹⁴ For an explanation of how the terms ‘jurisprudence’, ‘Nazi Germany’ and so on refer to, see Section II of Chapter One.

⁹⁵ The impact of the legacy of the Hart-Fuller debate on current jurisprudential discourse in this area is addressed in Chapter Three. On the entrenchment of rupture narratives in historiographical and popular discourse through the Nuremberg Trials see generally Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6), discussed in Chapter Six.

intervening period. Consequently there has been little reason within jurisprudence to re-evaluate how it treats Nazi law, whereas in actuality the most recent historical research challenges some aspects of the jurisprudential paradigm of how the concept of law is understood, especially if law in Nazi Germany is taken to form part of that overarching concept. Therefore, while it is hard to find scholars today who explicitly endorse an avowedly lawless, 'criminal state' reading of the Third Reich, Nazi Germany is not represented in any historically accurate or legally meaningful sense within jurisprudential discourse.

The jurisprudential attention on the separability question and the validity question, and its structuring around the twin paradigms of positivism and natural law only requires for its purposes a straw-man of the Nazi past: a hypothetical representative of the worst case scenario of a legal system against which to test the limits of a particular concept of law, or which can be invoked to illustrate a point. This allows the Nazi legal system to be subsumed within a wider category of limit-case wicked legal systems, albeit as the paradigmatic example. This broader classification is bestowed with certain characteristics that in-turn facilitate the reproduction of the debates within the discourse around the same issues, while bearing little if any resemblance to Nazi law. Meanwhile, references to Nazi Germany that do not specify its legal system are frequent but similarly instrumental and unsubstantiated.

B Analysing Jurisprudential Discourse

This chapter involves analysing some of the major themes of jurisprudential discourse to establish both how Nazi Germany is predominantly represented therein, and how common discursive structures and tropes ensure the maintenance and reproduction of this representation, particularly with respect to Nazi law. To establish the jurisprudential representation of Nazi Germany I will refer to a wide range of examples from the literature to construct a set of characteristics to which the discourse in general adheres. I will illustrate these characteristics first with a single, representative example that shows up many of them. This example is an exchange between Scott Shapiro and Dimitrios Kyritsis.⁹⁶ It is not comprehensively illustrative, as no single example can be, but it makes it possible to focus on one set of scholarship to draw out a number of points. I will then address the key characteristics, using number of examples from the literature to substantiate the presence and implications of these. I will finally explore the representation of Nazi law in particular, which comprises a reasonably small

⁹⁶ Dimitrios Kyritsis, 'What is Good About Legal Conventionalism' (2008) 14(2) *Legal Theory* 135; Scott Shapiro, 'Law, Plans, and Practical Reason' (2002) 8(4) *Legal Theory* 387.

subset of the references to Nazi Germany within the literature surveyed, but is significant in how it helps to construct the category of wicked legal systems within the discourse.

The scope of this dissertation means that it is not possible to consider all references to Nazi Germany within jurisprudential discourse. However, it is imperative in order to provide a full sense of the nature of its representation, to incorporate minor and ancillary instances of Nazi Germany figuring within the scholarship. Indeed, the most common examples of Nazi reference have been of this sort. The method used to uncover references to Nazi Germany and from which I construct my understanding of the role played by Nazism within the discourse has conditional limitations of time and form of scholarship. My primary approach involved searching for specific terms relating to Nazi Germany in articles within jurisprudential journals over the period from the late 1990s to 2013.⁹⁷ I am concerned with the representation of Nazi Germany within *current* jurisprudential discourse, so limited my search to the past 15 years, in order to represent the currently evolving state of the scholarship, allowing it the opportunity to take account of the major revision in understanding of the Nazi state that has been taking place in historiography since around the early 1990s.⁹⁸ I used mainly journal articles because they are the most easily and comprehensively searchable form of scholarship and a principal method of publishing new and original material. The examples I use have been selected as indicative of the representational narrative of Nazi Germany advanced within the discourse, but are not intended to be exhaustive.

These elements will be set up by two important preliminary discussions. The first will place the observations highlighted in Chapter One about the legal academy's neglect of the Nazi past in the context of the countervailing view of Stephen Riley. Riley argues both that the 'discontinuity thesis' is not prevalent within jurisprudence and that Nazi law should not in any case be integral to its discourse.⁹⁹ I refer to Riley here because he is one of the only theorists to have responded directly to the claim that a discontinuity thesis

⁹⁷ The search terms I employed were 'Nazi', 'Third Reich', 'National Socialist', 'National Socialism', 'Holocaust' and 'Shoah', but by far the most prolifically occurring was 'Nazi'. The journals I searched were *Legal theory*, *American Journal of Jurisprudence*, *Canadian Journal of Law and Jurisprudence*, *Ratio Juris*, *Law and Philosophy*, *Legal Studies*, *Oxford Journal of Legal Studies* and *Journal Jurisprudence* (since 2008).

⁹⁸ Which included at its genesis texts such as Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (HarperCollins, 1992); and Robert Gellately, *The Gestapo and German Society: Enforcing Racial Policy 1933-45* (OUP, 1990).

⁹⁹ Stephen Riley, 'Review Essay: Contemporary Dialogues with Fascist Law and Jurisprudence' (2007) 2(4) *International Journal of Law in Context* 409.

persists within jurisprudence. The assertion that Nazi 'law' has been seen as a break from 'ordinary' law and should instead be examined as a 'normal' manifestation of law is a key one. It supports the distinction between an explicit endorsement of rupture and an underlying narrative based on the dominant theories and historical treatment of Nazi Germany within the discourse. Riley does not take account of the implicit narrative of discontinuity that informs jurisprudential treatment of Nazi Germany and, indeed, exhibits some of the same problematic characteristics in his own analysis. The second will show that positivism and natural law are widely accepted as the main theoretical paradigms within jurisprudence, and that the validity question and the separability question are two of the main issues at stake in the debate around the concept of law. This is necessary to establish that the representation of Nazi Germany gets to the heart of the discourse, so that the challenge the actual historical case of Nazi Germany presents to them can be understood as impacting at a fundamental level.

II. Jurisprudence and the Nazi Past

A Preconceptions about Jurisprudential Engagement with Nazi Germany

Chapter One highlighted some recent remarks from legal scholars and historians about the degree and nature of engagement between the legal academy and Nazi Germany.¹⁰⁰ Two themes that emerged from these comments were the view of Nazi law as 'unremitting and mindless barbarism',¹⁰¹ 'a complete break from modern legal norms and standards',¹⁰² and a failure of engagement, particularly with and through relevant historical research.¹⁰³ However, these claims do not go completely unopposed. Stephen Riley has argued both that the 'discontinuity thesis' with regard to Nazi law is not prevalent in the legal academy and that the assumption that Nazi law ought to be considered relevant or useful for how contemporary law is understood may be misguided.¹⁰⁴ While Riley concedes that law did exist in Nazi Germany and played a role in preparing for the Holocaust,¹⁰⁵ he denies David Fraser's claim that the Holocaust was 'full of law'.¹⁰⁶ Instead he argues that 'the "final solution" was not a public legal event but rather a quasi-

¹⁰⁰ See Section I of Chapter One.

¹⁰¹ Lustgarten, 'Taking Nazi Law Seriously' (n 20) 128.

¹⁰² Szobar, 'Telling Sexual Stories' (n 1) 133.

¹⁰³ In the comments of Pietro Costa, David Fraser and Frederick DeCoste. See Chapter One, Section I and footnotes 17-23.

¹⁰⁴ Riley, 'Review Essay' (n 99).

¹⁰⁵ 'Admittedly the groundwork of the "final solution" to the Jewish question was established using some legal measures'; *ibid* 413.

¹⁰⁶ 'No, it was an illicit death factory full of a shifting web of arbitrary rules'; *ibid*.

military exercise shrouded in military convention and Nazi double-speak'.¹⁰⁷ The transformation from racist legislation to death camps involved decisions which took the Holocaust outside of 'law', with the consequence that such a transformation is not an inherent part of the continuity between Nazi law and contemporary law.¹⁰⁸

Riley's contentions about the attitude of the legal academy towards Nazi law comprise not a denial that there has been a lack of engagement,¹⁰⁹ but an assertion that a lack of engagement with Nazi law including within jurisprudence cannot be assumed to imply adherence to a discontinuity/non-law thesis about the Third Reich.¹¹⁰ Indeed, Riley argues, 'there is not a great deal of evidence to suggest that there exists a group of scholars or lawyers defending this pure, unalloyed, "discontinuity" thesis'.¹¹¹ He also refutes the claim that this narrative lay at the heart of the Nuremberg trials.¹¹² Riley's explanation for the perceived lack of academic legal engagement with the Nazi past is that Nazi Germany does not represent an instance of a legal system with which we necessarily need to have an urgent dialogue:

To treat the concentration and death camps of the Second World War as somehow persisting in or animating contemporary law is poor history and even worse philosophy. The essence of human action – and the condition of politics and sovereign law-making – is beginning, being able to begin anew at any time. This is the lesson that should be learnt from totalitarianism: that law-making which hinges on an unchangeable destiny or an unerring progress can, and has, led to the worst inhuman depravity. It means a death camp is not around us (though we cannot forget them) ... There are undoubtedly resonances between fascist law and contemporary law ... but, a fortiori, we are not enchained to them.¹¹³

The extent to which aspects of Nazi law should be seen as inherent in 'contemporary law' is certainly worthy of rigorous examination. However, even allowing for the fact that Riley's arguments are presented in the form of

¹⁰⁷ *ibid* 412.

¹⁰⁸ *Ibid*.

¹⁰⁹ 'That scholars and scholarship have passed over them [those involved in Nazi law] in a "communicative silence" is embarrassing for those close to the individuals in question but is not a damning failure on the part of the contemporary intelligentsia to dispel post-war ideology'; *ibid* 418.

¹¹⁰ 'Fraser's intimation that widespread subscription to the discontinuity view can be inferred from the absence of Nazi-era German legal debates in contemporary jurisprudence classes ... seems to me a poor inference'; *ibid* 411.

¹¹¹ *Ibid*.

¹¹² 'There is no evidence that this [discontinuity thesis] position was systematically pursued at Nuremberg'; *ibid*.

¹¹³ *ibid* 417.

a review essay,¹¹⁴ they exhibit some of the characteristics in their engagement with Nazism that have been observed about the legal academy generally, and which are prevalent within jurisprudential discourse.

First, his many historical assertions about the nature of law in Nazi Germany are very sparsely sourced. There are minimal references to historical research, primary sources, or legal scholarship about Nazi Germany outside of the reviewed texts to support his claims about the nature of Nazi law, the extent of its involvement in the Holocaust, and the absence of the discontinuity thesis both at Nuremberg and in the current literature. As will be shown in Section III of this chapter, jurisprudential literature rarely relies on any historical sources or scholarship about the Nazi state or legal system to support its assertions in that respect.

Second, Riley is close to conforming to a narrative of rupture in his own interpretation of Nazi law, especially in relation to the Holocaust, which runs counter to historical research. The fact that he does not present any evidence that the transformation from law to Holocaust involved a shift to ‘non-law’ that distinguishes it from contemporary law leaves this argument potentially reliant on preconceptions about the relationship between law and genocide. The concession that legal measures were used against the Jews to lay the groundwork of the later genocide nevertheless relies on a point when law was overcome by non-law, and locates the Holocaust in the latter space.¹¹⁵ Similarly, Riley’s recognition that there are some ‘resonances’ between fascist and contemporary law does not prevent him from positing a sharp distinction between the non-law of the Holocaust and the lawfulness of contemporary law. The only appropriate response to this would not, as Riley suggests, be to accept that we are doomed to repeat the Nazi past. Rather these positions appear grounded in a view of Nazi history that overlooks the important roles of continuity and normality in the regime’s evolution from movement to power to genocide in favour of points of rupture. This is not to deny the use of ‘double-speak’ and secrecy or the military element in the implementation of the Holocaust, but it questions the prioritisation of these over other elements as those things that define the relationship between the Holocaust and the concept of law.

In addition, as is discernible in his own arguments, by apparently taking legal scholarship at face value Riley may be underestimating the role of an implicit

¹¹⁴ Riley is reviewing Fraser, *Law After Auschwitz* (n 23) and Joerges and Ghaleigh, *Darker Legacies* (n 24).

¹¹⁵ This is similar to Kristen Rundle’s claim that law tipped into non-law at a certain point in the genocidal process. The historiographical and jurisprudential problems with this are discussed in Chapter Four.

narrative of discontinuity and lawlessness in its treatment of the Third Reich. The analysis of jurisprudential references to Nazi Germany in this Chapter supports the argument that few jurisprudential scholars expressly advance the discontinuity thesis, and in fact the majority of references to Nazism are not specifically addressed to Nazi law at all. However, they do share common characteristics that bespeak an implicit narrative of rupture that is unsupported by historical scholarship, and is traceable back to the Hart-Fuller debate and more generally the postwar era of the Nuremberg trials.¹¹⁶ Once this is established, the question of the contemporary value of investigating further the legal aspects of Nazi Germany becomes paramount, and is partially to be found in the implications of a jurisprudence structured to treat the Third Reich as a legal outsider rather than an insider, making it appear philosophically irrelevant. We are not doomed to repeat the Nazi past, but it is necessary to examine Nazi law as a form of law in order to establish where the continuities lie.

B The Structure of Jurisprudential Discourse

The reason that there is an implicit rather than explicit narrative of rupture in jurisprudential discourse is a consequence of the way the discourse is structured, and the role Nazi Germany has played within the discourse. By the structure of the discourse, I refer to a combination of the major theoretical paradigms within the debate, which are positivism and natural law and their various sub-versions, and the main issues at stake in the argument, two of which are the validity question and the separability question. It also refers to how these help determine the nature of the debate rhetoric. In this Section I will establish the structure of the discourse by describing and explaining these elements in more detail, including how the major debates have been increasingly broken down into a plethora of sub-debates about specific, narrow issues and between scholars advocating particular versions of positivism and/or natural law.

In its concern with the nature of the concept of law jurisprudential discourse is preoccupied with the minutiae of arguments between and within increasingly complex, nuanced and disparate versions of positivism and natural law. The skeleton of the opposition between the two contrasting approaches to the concept of law adopted in the Hart-Fuller debate, and some of the fundamental tenets of each of those positions as elucidated therein, continue to resonate in the structure of the debate today.¹¹⁷ It is widely accepted that the two theoretical paradigms have dominated the

¹¹⁶ See chapters Three and Six respectively.

¹¹⁷ See Chapter Three on the impact of the legacy of the Hart-Fuller debate on the discourse.

discourse, ' a long-running battle between two schools of thought: the rival camps of "natural law" and "legal positivism"'.¹¹⁸ Ian McLeod differentiates these theories as follows:

The terms *natural law* and *positivism* each embrace a variety of different legal theories. Reduced to its simplest, the distinction between them is that natural law theories argue that the status of *law* depends not simply on the fact that it has been laid down in whatever way or ways are recognized by the legal system of which it is part, but also on some additional factors external to that system. Positivist theories, on the other hand, argue that the status of *law* attaches to anything which has been laid down (or *posited*) as law in whatever way or ways is or are recognized by the legal system in question.¹¹⁹

In broad terms, therefore, positivists claim that law is a social fact dependent for its status on how it has been posited, and is conceptually distinct from morality. Natural lawyers argue that other, often moral, factors are central to its status as law. The debate between and within these competing positions is deeply entrenched and oppositional: 'that the current jurisprudential scene is deeply fractioned would be no news to anyone even remotely familiar with contemporary analytical legal philosophy'.¹²⁰

The issues at stake between the different factions are part of the general interrogation of the concept of law which jurisprudence often engages in. Within this, the main parameters of the debate have become 'a discussion of the validity of the law; of the relation between validity and obedience; of whether the law consists of rules only or of moral principles as well; of whether a natural connection between law and morality exists, etc',¹²¹ i.e. the validity issue and the separability issue. On the second of these, whereas natural law generally claims a necessary connection between law and morality, positivism usually asserts that the two concepts are certainly separable and distinct if not necessarily and always separate in legal practice. However, it is no longer possible to describe the debate as simply one between fixed camps within positivism and natural law, because of the development of a number of highly technical strands within each of these theories. In recent years the division has incorporated various versions of

¹¹⁸ Simmonds, *Central Issues in Jurisprudence* (n 30) 141. Jurisprudence textbooks are sometimes predominantly given over to delineating and elucidating the various versions of positivism and natural law and the debates between them.

¹¹⁹ Ian McLeod, *Legal Theory* (6th edn, Palgrave Macmillan, 2012) 17.

¹²⁰ Kyritsis, 'What is Good' (n 96) 135.

¹²¹ Thomas Mertens, 'Review Essay – Continuity or Discontinuity of Law? – David Fraser's *Law after Auschwitz: Towards a Jurisprudence of the Holocaust*' (2007) 8 *German Law Journal* 533, 539.

‘hard’ and ‘soft’ positivism¹²² and ‘constitutive’ and ‘evaluative’ natural law (according to one classification¹²³), the differences between which have become increasingly abstract, narrow and complex.

In current jurisprudential discourse, and particularly within the positivist camp, heated debate is as likely to take place between staunch advocates of different strands of the same overarching theory as between positivists and natural lawyers. It is not uncommon to hear that ‘too much of the debate within and about legal positivism has become almost scholastic’.¹²⁴ The questions within and between the factions and sub-factions have narrowed and multiplied to become about whether it is possible for morality to be incorporated into law and whether judges appealing to moral principles are going beyond or remaining within the ‘law’. Or whether law must constitute non-legal, moral factors or whether they need only be used to evaluate the social fact of law which can exist independently from them. Consequently, it is well recognised that contemporary legal theorists engage in ‘intramural squabbles among positivists’ and ‘unending disputes over whether or not moral principles that are "incorporated" into the law should count as "legal" principles’.¹²⁵

This potential for wrangling within the positivist camp has been exacerbated by the relative dominance of that theory over natural law in the decades since Herbert Hart’s generally acknowledged ‘victory’ in the Hart-Fuller debate. Part of this has been down to the (sometimes wilful) confusion between the analytical and normative aspects and aims of the two perspectives,¹²⁶ which means they have as often as not debated past rather than to one another. This has made it easy to lodge common-sense objections against both sides. Anti-positivists can argue that ‘the law’s reasonable claim to be obeyed means that measures which are morally

¹²² Alternative categorisations of legal positivism within the discourse include, for example, a distinction between ‘methodological’ and ‘substantive’ strands; see Patrick Capps, ‘Methodological Legal Positivism in Law and International Law’ in Kenneth Einar Himma (ed), *Law, Morality, and Legal Positivism: Proceedings of the 21st World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR)* (Franz Steiner Verlag Wiesbaden GmbH, 2004).

¹²³ See McLeod, *Legal Theory* (n 119) 19.

¹²⁴ James Allan, ‘A Modest Proposal’ (2003) 23(2) *OJLS* 197, 209.

¹²⁵ Philip Soper, ‘In Defence of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All’ (2007) 20(1) *Canadian Journal of Law and Jurisprudence* 201, 202.

¹²⁶ Briefly on the potential for confusion between these aspects see Section II of Chapter One.

abhorrent ... ought not to be granted the status of law in the first place'.¹²⁷ Meanwhile anti-naturalists can contend that 'to say that all of the people in some society are mistaken about what the law in that society is seems almost as bizarre as to say that all of the English speakers are mistaken about what the English word "blue" means'.¹²⁸ The former relies at its core on a moral evaluation of the law whereas the latter depends on the internal perspective of participants in a legal system, while neither directly challenges the underlying assumptions of the other.

Positivism was not, until relatively recently, under a great deal of threat from natural law as the dominant theory within jurisprudence. Despite its relative age, Hart's brand of positivism 'remains a widely affirmed account of the nature of law'.¹²⁹ His influence is apparent in that different forms of positivism remain at the forefront of the discourse and 'form by far the biggest camp within legal theory'.¹³⁰ By contrast, 'the classical view that official directives must meet minimum moral requirements to count as "law" has largely been ignored in recent jurisprudence'.¹³¹ However, there has been a resurgence of interest in Lon Fuller's theory¹³² and natural law generally. There has arguably been a concomitant movement of some proponents of soft positivism towards some elements of the natural law programme and according to natural lawyer David Dyzenhaus, 'where positivists today differ from their critics is only in that they will deny that any particular vision of justice is inherent in the law'.¹³³

While there is potential for recent criticism of the direction of jurisprudential debate and the beginnings of a resurgence of natural law theory to alter its terms somewhat, the structure of the discourse remains fairly stable and wedded to its central tenets, and this applies equally to its representation of Nazi Germany. Nevertheless, this criticism is there. William Twining has observed that 'some of the debates about positivism ... have recently descended into unseemly wrangling'.¹³⁴ Twining cites recent criticisms of analytical positivism by 'empirically-minded jurists' who 'criticised the

¹²⁷ McLeod, *Legal Theory* (n 119) 22. I will overlook for the time being the significance of the reference to Nazi law in this passage, which I have excluded from the text using an ellipsis. It is not significant in this context.

¹²⁸ Mark C. Murphy, *Philosophy of Law: the Fundamentals* (Blackwell Publishing, 2007) 43.

¹²⁹ *ibid* 32.

¹³⁰ David Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) 20(4) *OJLS* 703, 719.

¹³¹ Soper, 'In Defence' (n 125) 202.

¹³² 'Fuller is getting some more attention these days'; Dyzenhaus, 'Positivism's Stagnant Research Programme' (n 130) 721. See, for example, the writing of Kristen Rundle discussed in Chapter Four. Fuller's own position is considered in more detail in Chapter Three.

¹³³ *ibid* 719.

¹³⁴ Twining, *General Jurisprudence* (n 32) 23.

abstraction and lack of “realism” of *a priori* analysis of legal concepts’ and postmodernists, who ‘challenged the alleged neutrality of conceptual analysis and the assumptions about the relative determinacy of language exemplified by Hart’s analysis of abstract terms in terms of core and penumbra’.¹³⁵ Such criticisms, he argues, ‘can be interpreted as symptomatic of a growing feeling that some enclaves of legal philosophy have got into a rut and there is a need to branch out in new directions’.¹³⁶

The preference for abstract and *a priori* conceptual analysis, the supposed neutrality and determinacy of such a methodological approach and the limited and recurring range of issues that inform the field are all challenged by the historical reality of the Nazi legal system which does not fit neatly into the role it has been assigned within the discourse. Kristen Rundle has criticised jurisprudence with reference to Nazi Germany and, in doing so, has highlighted the relevance of Nazi law for legal theory and the importance of legal research into the connections between law and Nazi Germany, specifically the Holocaust:

On the one hand, the study of these connections adds a dimension to our understanding of the design, dynamics and consequences of the Nazi persecution of the Jews that has been traditionally under-emphasised by historians of the period. On the other hand, there is a gain to legal scholarship in how a deeper understanding of the architecture of that persecution presents us with a valuable site from which to flesh out and test the bases for our theoretical claims about law.¹³⁷

There are problems with Rundle’s approach to the reorientation of jurisprudence towards Nazi law.¹³⁸ However, jurisprudential engagement with Nazi Germany can improve our understanding both of the historical period in question - the legal theory of Nazi Germany and the role of law in the implementation of the Holocaust – and of ‘our theoretical claims about law’, including the issues at stake for jurisprudence. The failure within jurisprudence to open up to other issues and theories has had a detrimental impact on how Nazi Germany is treated within the discourse, because ‘the debate [about the nature of law] frequently seems to degenerate into a series of rival claims about how we would or should describe certain real or

¹³⁵ *ibid* 37.

¹³⁶ *ibid* 25.

¹³⁷ Kristen Rundle, ‘Myths of Nation, Law, and Agency’ (2010) 73(3) *MLR* 494, 495-496.

¹³⁸ See the discussion of Rundle’s work in relation to that of David Fraser and Dan Stone in Chapter Four below, where I argue that Rundle’s approach has both philosophical and historical shortcomings (sections III and IV).

hypothetical instances of social ordering (Nazi Germany being a popular example).¹³⁹

The role of Nazi Germany, I will demonstrate, is actually more ‘hypothetical’ than ‘real’, and the desire to define it as ‘law’ or ‘non-law’ (as a consequence of a combination of the validity and separability questions) in order to invoke it in support of a particular theoretical position is a fundamental feature of the discourse. This detracts from understanding it as a manifestation of the concept of law on its own, historically sound terms. The desire to employ Nazi Germany as a limit case - a source of uncontroversial *moral* examples to make sometimes *legal* points - holds jurisprudence back from breaking out of its circumscribed limits. The jurisprudential examples considered in sections III and IV display the characteristics of the representation of Nazi Germany discussed above in relation to Riley, and the characteristics of the discourse outlined in this section. The fact that they do so prevents the role of law in Nazi Germany from being properly integrated into the discourse as relevant to debates about the nature of law because it is inevitably rejected as a point of rupture and consigned to the margins as archetypal wicked legal system or hypothetical evil state.

III. Jurisprudential Representation of Nazi Germany: A Superficial, hypothetical Wicked Straw Man

A Key Characteristics of the Representation of Nazi Germany

The purpose of Section III is to highlight how Nazi Germany is represented in current jurisprudential literature, first by using an example to draw out the key characteristics, then by providing additional examples of those characteristics, and finally by focusing on the representation of Nazi law. This substantiates the argument that the jurisprudential representation of Nazi Germany that emerges from the literature is that of an historically uninformed hypothetical, evil straw man, largely disconnected from the reality of the Third Reich. It is superficially employed as a source of uncontroversial examples in order to buttress pre-existing theoretical positions and trump opposing arguments. In this context the themes to highlight are its entrenchment in the discourse in a particular role, its shift from the concrete historical realm to the hypothetical realm of uncontroversial examples, its superficiality (both in terms of its relationship to the jurisprudential matter at issue and the depth of exploration into the Nazi past), its lack of specific focus, its disconnection from historical research,

¹³⁹ N.E. Simmonds, ‘Jurisprudence as a Moral and Historical Inquiry’ (2005) 18(2) *Canadian Journal of Law and Jurisprudence* 249, 262.

and its overarching wickedness.¹⁴⁰ This representation occurs in the context of a discourse that by its very nature - in its focus on the opposition between the competing theoretical paradigms of positivism and natural law and the highly conceptual and increasingly narrow issues at stake therein - is constructed to eschew empirical, historical evidence and draw on a generalised, paradigmatic wicked legal regime rather than the specific Nazi legal system, even while often labelling this paradigm 'Nazi'.

These characteristics mean that the 'Nazi Germany' portrayed within jurisprudential discourse does not resemble the actual historical case. The version of Nazi law that appears most frequently is subsumed within the category of archetypal wicked legal systems, whether it is treated as formally valid as law or not. There are very few exceptions to this impression, which is overriding within the scholarship surveyed. Nazi law *per se* simply does not appear nearly as often as the fairly frequent references to the Third Reich generally, most commonly as a source of uncontroversial evil examples. This is significant as it reveals how the *law* in Nazi Germany is not considered particularly relevant to determining the philosophical concept of law beyond whether the category of wicked legal systems do or do not meet the conditions of validity of law. The *history* of Nazi Germany is an important reference point within jurisprudence, but not in an historically justifiable or substantively significant form. The examples are drawn from jurisprudence to illustrate these points and connect them to the structure of the discourse itself.

The illustrative example from the literature incorporates a number of the key characteristics identified. It is a narrow, abstract debate over a specific jurisprudential issue that is part of the broader disagreement between positivism and natural law about the connection between law and morality. In this way it conforms to the structure of jurisprudential discourse outlined in Section II. It contains highly generalised references to Nazi Germany which reflect its moral status, are not specific to its legal system or any particular aspect of the Nazi state and which move easily between the historical and the hypothetical realms. Therefore it displays the characteristic of focusing on the general, evil history of Nazi Germany rather than its legal system. It involves assumptions about the factual content of Nazi references that are unsupported by historical evidence. This is in line with the general trend of

¹⁴⁰ It is true to say that other legal systems are sometimes referred to as paradigmatically evil alongside or instead of Nazi Germany, especially the South African Apartheid system and Stalinist Russia. It is also the case that these systems have their own complexities and historical specificity, which are rarely mentioned within jurisprudential discourse. My research is limited to the treatment of Nazi Germany, which, due to its historical link, does appear to have a particular role within jurisprudence.

not supplying evidence for historical claims and relying instead on assumptions and preconceptions about the nature of the Nazi state. It finally merges the historical Third Reich into the hypothetical 'Nazi' example for moral and rhetorical effect, which is a common trait of the way Nazi Germany is referred to in the discourse.

The example is part of a debate between Dimitrios Kyritsis and Scott Shapiro from two articles spanning six years over whether legal conventionalism¹⁴¹ is in principle compatible with natural law theory as well as legal positivism.¹⁴² Kyritsis, from a natural law perspective, contends that it is,¹⁴³ whereas Shapiro, from a positivist perspective, claims that it is not.¹⁴⁴ Shapiro makes two isolated references to Nazi Germany. The first is the example of choosing a national constitution as an 'authority structure' for all to follow among a set of possible constitutions, where he asserts that 'reasonable people would not prefer heeding the Constitution of the Third Reich under any circumstances'.¹⁴⁵ The second uses the Nazi extermination of the Jews as an example of a 'plan'¹⁴⁶ that does not arise from legal practice (a non-legal plan)¹⁴⁷ and that is moral in nature (i.e. 'morally horrendous').¹⁴⁸ Shapiro uses this to argue that plans in general need not be moral and so legal plans also need not be moral, thereby denying the natural lawyer's necessary connection between law and morality.¹⁴⁹ Kyritsis picks up on the second of Shapiro's references to Nazi Germany and turns it around to reject Shapiro's

¹⁴¹ 'the idea that law is a practice of interaction between participants occupying different roles within it'; Kyritsis, 'What is Good' (n 96) 144.

¹⁴² Ibid 387.

¹⁴³ Ibid 145.

¹⁴⁴ Ibid 146. Shapiro's contribution is from Shapiro, 'Law, Plans, and Practical Reason' (n 96).

¹⁴⁵ Shapiro, 'Law, Plans, and Practical Reason' (n 96) 390. Shapiro actually rejects the idea that the choice of a national constitution as an authority structure is necessarily merely a coordination problem.

¹⁴⁶ That Shapiro labels the Nazi extermination of the Jews as a 'plan' is a function of his own definition of what a 'plan' is. This is not related to the long-running intentionalist/functionalist debate within historiography over if and when a decision to implement the Final Solution was taken and the extent to which the Nazi leadership had a 'plan' to exterminate the Jews all along (see Kershaw, *The Nazi Dictatorship* (n 76), especially chapter 4). Shapiro's use of the Holocaust in this context in apparent ignorance of (and at least without reference to) any potential controversy over its status as a 'plan' is indicative of the tendency to refer to Nazi Germany in a way entirely divorced from our historical understanding of the period. Shapiro's own definition of a 'plan' is sophisticated and relies heavily on Michael Bratman's account of 'joint intentional activity', which it is not necessary to go further into here; Shapiro, 'Law, Plans, and Practical Reason' (n 96) 394-401.

¹⁴⁷ Ibid 439.

¹⁴⁸ Ibid 440.

¹⁴⁹ Shapiro, 'Law, Plans, and Practical Reason' (n 96) 439.

position.¹⁵⁰ Kyritsis argues it is possible to differentiate between plans of a legal and a non-legal nature in terms of their moral component.¹⁵¹ On this reading the Holocaust was a wicked, non-legal plan¹⁵² and Kyritsis can reject Shapiro's proposition because, whereas non-legal plans can be value-positive, negative or neutral, legal plans are always moral (value-positive), hence the inherent connection between law and morality.

Some of the characteristics identified of jurisprudential discourse are readily apparent in this example. Firstly, their dispute is over a narrow, abstract issue (whether legal conventionalism is compatible in principle with natural law theory), in the context of a larger point of contention between natural law and positivism (the connection between law and morality). Secondly, Nazi Germany is used superficially to provide uncontroversial examples and hypothetical scenarios in support of largely unrelated arguments and to trump opposing claims. Thirdly, the Nazi examples are from the general, evil history of the Third Reich rather than its legal system. In fact, it is a somewhat untested assumption of both Shapiro and Kyritsis that the Final Solution was a non-legal plan, so they are both specifically not talking about law when invoking Nazi Germany in the second instance. Fourthly, beyond rooting their representation at the most general level in the factual existence of the Third Reich and its genocide, there is little to connect either Shapiro's 'constitution' of the Third Reich or the plan to exterminate the Jews to what actually happened in Nazi Germany. The lack of historical detail means the examples have no substantive relevance for arguments for or against legal conventionalism as a legal theory.

Nazi Germany is considered a prime example not because of its substantive relevance but because of its extreme wicked reputation and ability to trump other arguments,¹⁵³ while ignoring the hinterland of historical reality that the term ought to be taken to signify. Shapiro and Kyritsis agree (and largely take for granted) that there was a 'plan' to exterminate the Jews, that it was a non-legal plan¹⁵⁴ and that it was a morally charged, but value-negative plan. Shapiro believes Kyritsis' only possible responses to his argument are to assert that the Final Solution is a moral, cooperative enterprise, or is a legal

¹⁵⁰ Kyritsis, 'What is Good' (n 96) 146-147.

¹⁵¹ *ibid* 147.

¹⁵² *ibid* 148.

¹⁵³ Not to mention its historical connection to the validity and separability questions through the Hart-Fuller debate. On this see Chapter Three.

¹⁵⁴ Shapiro, 'Law, Plans, and Practical Reason' (n 96) 439. 'Legal practice', according to Kyritsis who accepts Shapiro's characterization, may be defined as 'a joint activity of officials whose goal is the "creation and maintenance of a unified system of rules"'; Kyritsis, 'What is Good' (n 96) 146.

practice (and by implication, according to natural law also a moral enterprise). Therefore, only by arguing that the Final Solution did not involve a plan or that it was a moral plan, can Kyritsis adhere to his natural law principles. Kyritsis cannot make either of these claims because of the obvious immorality of the Final Solution within the moral framework of the debate and because denying it was a plan involves refuting that the perpetration of the Holocaust involved some sort of cooperative enterprise. This would also be both counter-intuitive and morally problematic.¹⁵⁵ Kyritsis instead turns the Nazi example that supposedly trumps him against Shapiro, thereby giving his counter-argument additional weight when he shows there is another way around the problem. No historical evidence or historiographical scholarship is presented for any of the claims made about Nazi Germany, including Shapiro's assertion about the desirability of the Nazi constitution.¹⁵⁶ The representation of Nazi Germany presented is sufficiently divorced from historical reality that it moves from a source of 'real', substantive examples to one of hypothetical allusion, even though, in this case, the authors at least appear always to be discussing the actual, historical case.

Notwithstanding the obvious wickedness of the Final Solution, consulting the historical sources would somewhat problematize the rather straightforward way Nazi Germany is represented in these articles. The idea that the Final Solution should be used as an example of a 'plan' at all is, notwithstanding Shapiro's specific definition, complicated by the long-running intentionalist/functionalist debate in historiography about how it was brought about in terms of the nature, degree, source and timing of any prior intent.¹⁵⁷ It is for this reason not the most appropriate example to use. Similarly, its depiction as a non-legal plan is complicated by the reality of the mixture of legal and non-legal measures that contributed to its evolution and implementation,¹⁵⁸ yet Kyritsis ultimately relies on the claim that the Final Solution was not a legal undertaking as a necessary implication of his rejection of Shapiro's dilemma, and Shapiro initially posits it as such. Equally, the assertion that reasonable people would not desire to heed the Nazi constitution must be based on the assumption either that the people in the

¹⁵⁵ Of his illustrations of a 'plan', including the extermination of the Jews, Shapiro states 'To deny their existence is absurd'; Shapiro, 'Law, Plans, and Practical Reason' (n 96) 439.

¹⁵⁶ Shapiro, 'Law, Plans, and Practical Reason' (n 96) 390. Shapiro rejects the idea that the choice of a national constitution as an authority structure is necessarily merely a coordination problem.

¹⁵⁷ See fn 146 above.

¹⁵⁸ See the discussions in Chapters One, Four and Five of the impact of different examples of historical research on our developing understanding of the Nazi legal system and its role in the Holocaust.

Third Reich were not reasonable or that they were reasonable but are so different in their fundamental proclivities from the unspecified group of 'reasonable' people to which Shapiro refers that their reasonableness is not relevant to their decision, so is essentially negated. More likely it relies on an outdated totalitarian conception of the Third Reich according to which popular consensus played no role in adherence to the Nazi state. In any case these statements are historically highly problematic, not least because many ordinary people did choose to adhere to the constitution of the Third Reich.

B From the Historical to the Hypothetical Realm

The various characteristics of the unhistorical, hypothetical, superficial, wicked straw-man representation of Nazi Germany that pervades jurisprudential discourse are also evident in a number of other examples. Together these build up a picture both of the prevailing treatment of the Third Reich in jurisprudence and the jurisprudential questions to which Nazi Germany is considered relevant. I will highlight some of the key characteristics in this part and show how they are manifested in the literature through different examples in order to demonstrate that the representation outlined applies across jurisprudential references to the Third Reich.

The leap from the actual, historical case of Nazi Germany to its figurative, hypothetical use is an important structural aspect of its representation as it allows references to be isolated from historical evidence and devoid of substantiated content. It is illustrated by the 'Sophie's choice' examples in the literature.¹⁵⁹ Silvina Alvarez, for example, uses 'Sophie's choice' as an example of symmetrical conflicts,¹⁶⁰ and it appears elsewhere in articles about conflicting rights to resources¹⁶¹ and consequentialist justifications.¹⁶² The popularity of this choice may be explained by its cultural currency, which makes it a prime target for subsequently achieving academic currency. However, it is far from unique as a category of Nazi-related examples, and illustrates how easily the genuine but highly generalised historical situation of an encounter between a Nazi officer and camp inmate can become a purely

¹⁵⁹ 'Sophie's choice' being the dilemma wherein a Nazi camp official forces a mother to choose one of her two children to be gassed and the other to work in the labour camp at Auschwitz, in order to avoid both being killed. See William Styron, *Sophie's Choice* (Random House, 1979); *Sophie's Choice* (1982), Alan J. Pakula, Universal Pictures.

¹⁶⁰ Described as 'those in which the two obligations refer to a same value or moral content'; Silvina Alvarez, 'Constitutional Conflicts, Moral Dilemmas, and Legal Solutions' (2011) 24(1) *Ratio Juris* 59, 61.

¹⁶¹ Claire Oakes Finkelstein, 'Two Men and a Plank' (2001) 7(3) *Legal Theory* 279, 296.

¹⁶² Michael Moore, 'Patrolling the Borders of Consequentialist Justifications: the Scope of Agent-Relative Restrictions' (2008) 27(1) *Law and Philosophy* 35, 79-80

hypothetical scenario for the purposes of a jurisprudential argument, without losing the weight and connotation of immorality associated with Nazism.

This trope of the morally uncontroversial Nazi example appears repeatedly in the literature, including, sometimes more than once, in articles by Michael Perry,¹⁶³ Frances Kamm,¹⁶⁴ Larry Alexander,¹⁶⁵ Matthew Kramer,¹⁶⁶ Joseph Raz,¹⁶⁷ Antonino Rotolo and Corrado Roversi,¹⁶⁸ Christian Dahlman¹⁶⁹ and Victor Tadros.¹⁷⁰ While these examples may describe either actual events or situations, such as the existence of the gas chambers or the extermination of the Jews, or explicitly hypothetical scenarios involving 'Nazis', the former is always on a superficial and generalised level and only corresponding hypothetical scenarios are given any detail or substance. In neither case do the authors involved cite historical sources in support of their references, so all details of substance are constructed hypothetically to fit the requirements of the scenario. It is therefore easy to move from general examples involving Nazi Germany, which may be based broadly in historical fact, to specific scenarios that invoke Nazism hypothetically. The effect of this is to adopt the moral weight associated with the Nazi regime and apply it to arguments derived from the specific example or scenario referred to. There also a reverse effect, which is to embed this role for Nazi Germany in the discourse and give the impression that such things are all there is to say about it in this context, the context of theoretical discourse about the conceptual nature of law.

Whereas the potential historical inaccuracy of the examples is not considered important to the argument being advanced, their clear moral message is. The wickedness of the Nazi regime is almost always the factor that lends the example drawn from it apparent relevance and weight to the jurisprudential issue, if only sometimes because of its comparative believability and

¹⁶³ Michael Perry, 'Morality and Normativity' (2007) *Legal Theory* 13(3-4) 211, 212 and 217.

¹⁶⁴ Frances Kamm, 'Terrorism and Several Moral Distinctions' (2006) 12(1) *Legal Theory* 19, 20, 25 and 29-35ff.

¹⁶⁵ Larry Alexander, 'When are we Rightfully Aggrieved' (2005) 11(3) *Legal Theory* 325, 327

¹⁶⁶ Matthew Kramer, 'Supervenience as an Ethical Phenomenon' (2005) 50 *American Journal of Jurisprudence* 173, 195

¹⁶⁷ Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 1, 11

¹⁶⁸ Antonino Rotolo and Corrado Roversi, 'Norm Enactment and Performative Contradictions' (2009) 22(4) *Ratio Juris* 455, 479

¹⁶⁹ Christian Dahlman, 'The Difference between Obedience Assumed and Obedience Accepted' (2009) 22(2) *Ratio Juris* 187, 194

¹⁷⁰ Victor Tadros, 'Independence Without Interests?' (2011) 31(1) *OJLS* 193, 200 and 202-203.

simplicity due to its reliance on historical preconceptions.¹⁷¹ While the references to Nazi Germany have perceived moral clout, they have little substantive, theoretical weight in the argument. More importantly, these hypothetical, wicked, uncontroversial examples are used to buttress arguments that a deeper historical understanding of Nazi Germany would not necessarily support. The almost complete absence of historical evidence is a general feature of abstract jurisprudential debate, but in the case of Nazi Germany it means that jurisprudential understanding of the subject has not been updated since it entered the discourse through the Hart-Fuller debate in the postwar period, and this has implications. The paradigmatic wicked regimes, which are sometimes called 'Nazi', do not in important ways represent the actual case of the most paradigmatically wicked regime that has been thought to exist. This leads one to ask, if there is no likeness between a significant basis for jurisprudential argument and actual wicked regimes, what precisely is the concept of law being scrutinised within the discourse? It is not the concept of law that was experienced in Nazi Germany, even though the Nazi legal system has been invoked as a foundational limit case to justify both positivist and naturalist arguments about what law is.

The absence of historical sources within the literature is testament to this. In all of the examples highlighted, historical research plays almost no part, and this is true of many other references to Nazi Germany within the discourse. It is not necessary to recapitulate these. The relevance of historiography for some of the references to the Nazi legal system highlights how the absence of historical engagement can distort the use of a Nazi example in a number of articles, including by Raymond Wacks and Keith Culver, both of whom use potentially unreliable secondary sources in support of their arguments.¹⁷²

¹⁷¹ Hitler is opposed by Perry to Mother Theresa because he is almost as far at the 'evil' end of the spectrum as it is possible believably to be. Kamm conjures up two evil states, one of which is defined by its killing of babies ('Baby Killer Nation') and the other of which is Nazi-controlled, with the implication that they are morally equivalent. Alexander seeks to trump an example that suggests even Pol Pot's horrendous acts should be left only to his victims to avenge, and for this he uses a version of the Holocaust. This has nothing to do with the construction of the argument, but is morally more forceful because the Holocaust was so wicked that it is difficult to argue that non-victims did not have standing to intervene. There is no need to explain further as the reputation of the Nazi regime is such that it is automatically understood that to argue against this position might be morally questionable.

¹⁷² Respectively the film *Judgment at Nuremberg* (1961) Stanley Kramer, Roxlom Films, and a *Times* obituary: Raymond Wacks, 'Injustice in Robes: Iniquity and Judicial Accountability' (2009) 22(1) *Ratio Juris* 128; and Keith Culver, 'Legal Obligation and Aesthetic Ideals: A Renewed Legal Positivist Theory of Law's Normativity' (2001) 14(2) *Ratio Juris* 176, 177. He refers to the 'powerful moral criticism' of Hitler that resulted in a number of bomb plots against him, but 'was insufficient reason for many potential sympathisers to break with their commitment to the regime' (190).

These examples, and many more, illustrate how Nazi Germany is treated superficially and unhistorically, as hypothetical and wicked - a straw man version of itself - to buttress theoretical claims about the concept of law and trump opposing arguments. The authors rely on the immoral weight associated with the Third Reich and blend this with historiographically untested preconceptions about what that state was like, to use its hypothetical manifestations for almost whatever purpose required. These instances of insufficient historical evidence are supplemented by a larger selection of cases (albeit less frequent than general references to Nazism) where claims are made about the Nazi legal system with no historical support. These are important because of the significance of Nazi law as a jurisprudential test case for the concept of law, despite a similar lack of historical evidence for the nature of the Nazi legal system. They reveal how the embedded role of Nazi Germany within the discourse has been enabled and propagated in part because no counter narrative that reflects developments in understanding in historical scholarship has been made available to challenge it.

C The Treatment of Nazi Law

There are a number of examples within the literature of how Nazi law is employed in this way. David Fagelson makes the claim that 'if the soundest theory of law in Nazi Germany could create a prima facie legal duty to enforce it, then the justifying principles that constitute the moral component of legal rights do not seem very rigorous',¹⁷³ without any analysis of what the 'soundest theory of law in Nazi Germany' might constitute. Andrei Marmor refers to 'the manifest legalism of the Nazi regime' as giving rise to postwar concerns about law and morality¹⁷⁴ without scrutinising the underlying historical assumption, that the system in Nazi was in fact legalistic. This proposition is highly dubious in light of recent research.¹⁷⁵ Aharon Barak asserts that 'one of the lessons of the Holocaust' is to ensure that democratic constitutions 'are put into effect by Supreme Court judges whose main task is to protect democracy'.¹⁷⁶ However, he does not interrogate whether the Nazi

¹⁷³ David Fagelson, 'Strong Rights and Disobedience: From Here to Integrity' (2002) 15(3) *Ratio Juris* 242, 246.

¹⁷⁴ Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26(4) *OJLS* 683, 691-692.

¹⁷⁵ See Section III of Chapter One, which refers to scholarship that calls this claim into question, particularly by Vivian Grosswald Curran. See also Herlinde Pauer-Studer and J. David Velleman, 'Distortions of Normativity' (2011) 14 *Ethical Theory and Moral Practice* 329 on the role of moral factors in the Nazi regime.

¹⁷⁶ Aharon Barak, 'Human Rights in Times of Terror – a Judicial Point of View' (2008) 28(4) *LS* 493, 493.

example suggests that it may be futile to rely on the judiciary to protect the constitution.¹⁷⁷

These examples show how the lack of good, or more often any, historical evidence to support ostensibly real historical examples from Nazi history, and assertions about the Nazi state and legal system, can be problematic for some of the jurisprudential arguments that depend on these examples and assertions. The failure to engage with historical research leaves jurisprudential scholars relying on the one-dimensional, paradigmatic wickedness of the regime rather than the complex reality. Where a misconceived version of the Nazi legal system is adopted as indicative of wicked legal systems generally, there is potential for an important category within the concept of law to be improperly represented within the discourse. The use of Nazism as an archetypal wicked regime often comes down to the question of whether Nazi law was or was not law, and what this might mean for the separability question and the validity question. Within this there is a degree of harking back to the postwar Nazi role within the Hart-Fuller debate and reproducing the understanding of its legal system that prevailed then.

This is illustrated by Danny Priel's reference to the role of the Nazi regime in the Hart-Fuller debate about the relationship between law and morality, while such issues seem 'at least in the context of the Western world, less significant today'.¹⁷⁸ The homogeneous treatment of the Nazi legal system within jurisprudential discourse reflects the embeddedness of its role as a paradigmatically evil regime that may or may not have been law, but which has nothing of substantive relevance to contribute to jurisprudential questions. The general failure to re-evaluate the nature of Nazi law in light of historical evidence to see whether it actually conforms to this role means that it is often referred to either in support of assertions it does not unproblematically substantiate, or as a leftover from a debate once had

¹⁷⁷ Other examples include in Kenneth Einar Himma, 'Positivism and Interpreting Legal Content: Does Law Call for a Moral Semantics?' (2009) 22(1) *Ratio Juris* 24, 25 and 36 and William Lucy, 'Abstraction and the Rule of Law' (2009) 29(3) *OJLS* 481, 506-507.

¹⁷⁸ Danny Priel, 'The Boundaries of Law and the Purpose of Legal philosophy' (2008) 27(6) *Law and Philosophy* 643, 694. Priel relies for his understanding of Nazism as jurisprudentially irrelevant today on the way it was interpreted as relevant for the Hart-Fuller debate in the postwar period. There are further examples of the reproduction of the treatment of Nazi law in the Hart-Fuller debate: Robert George, 'Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition' (2001) 46 *The American Journal of Jurisprudence* 249, 251. Eric Heinze, 'Epinomia: Plato and the First Legal Theory' (2007) 20(1) *Ratio Juris* 97, 115; Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24(3) *Law and Philosophy* 239, 251; and John Finnis, 'Grounds of Law and Legal Theory: A Response' (2007) 13 *Legal Theory* 315.

about the validity of the Nazi legal system, wherein it was last considered significant.

The structure of jurisprudential discourse ensures that the embedded role of Nazi law is continually reproduced, because of how it is used to support both positivist and naturalist arguments. A good example of this is Nigel Simmonds' argument about wicked legal systems in support of his natural law claim of law as a moral idea.¹⁷⁹ Simmonds discounts real, historical cases of wicked law from further consideration because he argues that it is difficult to find actual cases of rulers using law for wicked ends without recognising that the law they are manipulating is fundamentally good.¹⁸⁰ He also places all relevant real and hypothetical examples of wicked regimes used to support his argument in the category of selfish and self-serving regimes adopting the cloak of legality cynically and instrumentally in order to rely on its perceived positive values within society and achieve their repressive aims.¹⁸¹ Natural law requires that this type of wicked regime presents a challenge because it is one to which it can effectively respond, with the claim that law maintains its connection to morality under such conditions. The actual historical example of the Nazi legal system challenges this representation on a number of levels.

The prevailing representation of Nazi Germany within jurisprudential discourse outlined in this section strongly endorses one of the criticisms made of the legal academy overall in respect of the Third Reich, that of a failure of engagement with historical research. Even a cursory questioning of the ability of the history of the Third Reich to support the jurisprudential arguments it is used to service begins to reveal potential problems with some of the claims made. The representation also goes some way to countering Riley's claim that a 'discontinuity thesis' does not prevail within jurisprudence. While the scholars cited do not explicitly endorse the notion of discontinuity or rupture between the concept of law and Nazi law, it is implicit in the way Nazi law is often dealt with. Nazi law is assumed to be wicked, it is assumed to be different and it is assumed to be irrelevant beyond one narrow issue. Nazi Germany generally is used as a prime source of uncontroversial scenarios, none of which have historical foundation or substantive relevance to the issues at hand. It is not investigated in detail because its role within the discourse is assumed and fixed by its chief moral point of difference. Any and all potential similarities and continuities are overlooked.

¹⁷⁹ Nigel Simmonds, *Law as a Moral Idea* (OUP, 2007). See especially ch 3 'Evil Regimes and the Rule of Law' 69-111, as well as the immediately preceding pages.

¹⁸⁰ *ibid* 60-62.

¹⁸¹ *ibid* 85-88.

IV. The Problem with the Jurisprudential Misrepresentation of Nazi Germany

The representation of Nazi Germany within jurisprudential discourse outlined above is problematic broadly for three reasons, beyond the fact that it does not accurately reconstruct the Third Reich. Firstly, Nazi Germany is relevant to key jurisprudential issues and does challenge some of the dominant theoretical assumptions within it. I will return to this point in the following chapters. Secondly, the structure of the discourse ensures that it reproduces itself and consigns the Nazi past almost exclusively to this role. Finally, even though the discourse does allow for differences of opinion as to whether Nazi law was in fact law, as a whole in its treatment of Nazi Germany it sustains an implicit, underlying narrative of rupture and irrelevance about the Nazi state that ensures its continued substantive exclusion from jurisprudential debate and prevents us from asking important questions about the nature of contemporary law.

I have said that the conceptual analysis of the nature of law that interests jurisprudence is more concerned with a hypothetical, paradigmatic worst-case wicked legal system against which the limits of its theories can be tested, rather than any particular historical instance of law used for wicked ends. This application of Nazi law is mistaken and I will raise some objections to the general argument. Nazism is an important historical instance of a modern, civilised state using legal and other means to govern a country and implement genocide, and so it might be considered a prime case on which to base a test case of wickedness. Yet the discourse around Nazi Germany has become divorced from the specificity of Nazi law, and the characteristics of the hypothetical worst-case legal system are not those that appear to be most significant about the Nazi legal system. Indeed, the latter seems to contradict the content of the former in fundamental ways. In addition, the discourse uses the cultural cache that comes with the Third Reich as an argumentational trump card and a starting point from which to deduce ostensibly logical outcomes in support of various theoretical claims.

It may be important that legal theorists construct a theory, or competing theories, about the criteria for validity within a legal system, and how to respond when a system does not satisfy those conditions. However, that is not the same as investigating what to do with the Nazi legal system, if the only link between the hypothetical system used to construct the theory and the actual system is semantic. The actual characteristics of the Nazi legal system are now considered largely irrelevant for abstract jurisprudential debate whereas they in fact have great relevance when explored for what they say about the relationship between law and the modern state. This is

pertinent for the chief battlegrounds of the discourse as it is currently structured but more broadly to the key issues with which jurisprudence generally is concerned in respect of the concept of law, in this case its role and nature within non-democratic regimes, its use for immoral ends and its relationship to the political and moral universe of the state.

The absence of references to historical research in the discourse is problematic because of the dramatic reinterpretation of the nature of the Nazi state that has taken place within historiography since the 1990s, based on the analysis of vast archives of primary sources covering a huge array of aspects of Nazi Germany.¹⁸² I make the claim that the representation of Nazi law and state within jurisprudential discourse crystallised early on, in the context of the fairly simplistic, historical and cultural rendering that manifested itself in postwar accounts and at Nuremberg.¹⁸³ The focus on the totalitarian nature of the state, the criminal enterprise of the Nazi leadership, their barbaric intentions and apparently lawless approach made the Nazi legal system quite straightforward to deal with for jurisprudence. It either was law or it was not, but it had little material relevance beyond this because it was ostensibly such an extreme case and bore so little resemblance to the manifestations of the concept of law with which we were and are familiar. This representation of Nazi Germany embedded itself within the discourse, and helped to shape its focus to the present day. This is illustrated by the way Nazi law is often referred to in its Hart-Fuller jurisprudential context, and rarely removed from this to be explored in its own right.

The role of Nazi law within jurisprudence was set at the time of the Hart-Fuller debate, when the postwar historical understanding of the Third Reich embedded itself in the discourse. One characteristic that ensures the reproduction of this role is the absence of engagement with new historical scholarship, which means there is no alternative understanding of the nature of the Nazi legal system to counter the prevailing representation. The other characteristic that consigns Nazi law to this role is the structure of the discourse itself. The key tenets of positivism and natural law require their archetypal wicked legal systems, of which Nazi Germany is the paradigmatic case, to exist in a certain form in order to support the arguments they make, particularly in terms of the relationship between law and morality. Nigel Simmonds' treatment of evil regimes in support of his argument in favour of

¹⁸² See Section III of Chapter One and Chapters Four, Five and Six generally on the nature of this reinterpretation.

¹⁸³ See Section II of Chapter Six.

natural law shows how the representation of Nazi law is internalised and reproduced within jurisprudential discourse.¹⁸⁴

It is important to appreciate how the discourse reproduces the notion of the wicked legal system to reinforce the connection to the Hart-Fuller debate outlined in Chapter Three, and so the arguments addressed in Chapter Four about how jurisprudence ought to be re-evaluated in light of the real case of Nazi law can be properly understood. According to the competing claims of positivism and natural law, either *even* Nazi law was law, or something like Nazi law *cannot possibly* be law. Naturalist discourse relies primarily on a version of moral regimes that uphold the rule of law to varying degrees and wicked regimes who specifically and instrumentally seek to destroy it or maintain it largely for cynical purposes. Nazi Germany has long been considered to be a prime example of the latter, but is actually another case altogether.

Like positivism, natural law requires the Nazi regime to take on a particular set of characteristics and needs Nazi law to adhere to a certain type. This is of a formalistic system, which adheres to procedural but not substantive tenets of law. It can then, because of its limit case moral nature, be used as a convincing limit case legal example in support of particular versions of that theory of the concept of law. Again, this version of Nazi law is highly problematic. The requirement has become embedded in the discourse because of its involvement at the outset of the Hart-Fuller debate and because it is continually re-referenced to make the similar and related points. Both theoretical paradigms to an extent depend on the Nazi example, and both would be challenged by an historiographical elucidation of the nature of Nazi law. The internalisation and reproduction of a particular understanding of the Nazi legal system thereby constructs and is constructed by the structuring of the discourse that refracts the Third Reich through positivism and natural law, the validity question and the separability question.

V. Conclusion: An Implicit Narrative of Rupture and Discontinuity

The 'Nazi Germany' referred to in jurisprudential discourse is clearly not the historical Nazi Germany. Jurisprudence therefore misrepresents the legal and historical nature of the Nazi regime. Nevertheless, jurisprudential discourse relies on certain assumptions about Nazi Germany, particularly as it contributes to discussions about wicked legal systems, for some of its important arguments, whereas the historical reality of Nazi law does not conform well to the role it has been given. Stephen Riley is wrong to argue

¹⁸⁴ Simmonds, *Law as a Moral Idea* (n 179).

that the continuities between contemporary and Nazi law are not sufficiently important that we should examine the latter in detail to learn something profound about the former, and that a discontinuity thesis in respect of Nazi law does not prevail at least within jurisprudence. I argue that the structurally determined, discursive consignment of Nazi Germany to its specific jurisprudential role manifests an implicit, underlying narrative of rupture that effectively prevents the Third Reich from having relevance to broader jurisprudential questions and asserts the discontinuity thesis that Riley denies exists.

Until recently positivism has been the dominant jurisprudential paradigm and natural law its primary opposition. Analytical positivism is only really interested in Nazi law to the point it decides whether it is law or not, and has little interest in going beyond this to investigate further. All further questions about the wickedness of the Nazi system are moral rather than legal and go to the citizen's choice or obligation to refuse to obey the law. Natural law, because of its normative perspective, may wish to evaluate the nature of the system more thoroughly, but only if the system can be said to be lawful. The perceived overarching wickedness of the Nazi legal system prevents it from being viewed as law from this perspective. This wickedness means it is distinguishable in some way from the conception of law under scrutiny in jurisprudence. Either it is legally alien or it is morally alien, or both. To the extent that this prevents jurisprudential scholars from exploring the potential relevance of the actual, historical case of Nazi law, this is a manifestation of the discontinuity thesis, the idea that Nazi law represents a rupture from the development of 'our' law.¹⁸⁵

While jurisprudential theorists do not always explicitly rupture Nazi law from law more generally, they do so implicitly by a structural denial of its relevance to the discourse in which the concept of law is discussed. Vivian Grosswald Curran directs that examples such as Nazi Germany 'provide opportunities to observe mechanisms that may be dormant and imperceptible at other historical periods and in other judicial systems, such as our own, but that nevertheless may be embedded within them'.¹⁸⁶ This approach encourages viewing the Nazi legal system as fundamentally part of the same concept of law, while understanding that it emphasises different characteristics within that concept and puts law to radically different ends. It is instructive in this way and fits with the emerging historical understanding of that system. But it

¹⁸⁵ Hubert Rottleuthner, 'Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development' (2011) 12 *German Law Journal* 100.

¹⁸⁶ Curran, 'Fear of Formalism' (n 86) 103.

is not adopted by jurisprudence. Recent criticism of the current state of the discourse is not generally intended to bring Nazism back into the fold. Sometimes, indeed, what is criticised is the perceived over-reliance on Nazi Germany as a constructive manifestation of a legal system. However, the potential for criticism does raise the possibility that its structural limitations might be reconfigured in such a way that Nazi Germany and Nazi law might finally, as Laurence Lustgarten has implored, be taken seriously.¹⁸⁷ It is, as Rundle has observed, important both for our theoretical claims about law and for our understanding of the relationship between law and Nazi Germany that such regimes are not distinguished as irrelevant but are understood as a legitimate and *relevant* subjects for jurisprudential inquiry.

This chapter explored the jurisprudential representation of Nazi Germany as being flawed and unhistorical. It described how this is embedded and reproduced within the structure of the discourse itself and showed what this discursive structure looks like. This is connected to the wider arguments of this dissertation through the interpretation of the jurisprudential representation as manifesting an underlying narrative of rupture. It illustrated how challenges to the view that the legal academy has not engaged properly with the Nazi past, such as that presented by Stephen Riley, are susceptible to some of the same preconceptions as the discourse generally. Having established this, the specific connection between how jurisprudence now treats the Third Reich and the understanding of Nazi law that prevailed within the Hart-Fuller debate can be investigated. This is the subject of Chapter Three and will complete my analysis of how jurisprudence represents Nazi Germany and enable this to be interrogated with reference to the historical case of Nazism.

¹⁸⁷ Lustgarten, 'Taking Nazi Law Seriously' (n 20).

Chapter Three: The Hart-Fuller Debate and the Genesis of Jurisprudential (Mis)representation: ‘Nazi law should remain at the center of our jurisprudential focus today’¹⁸⁸

I. Introduction: A Restricted Form of Jurisprudence

This chapter returns to the twentieth century genesis of current jurisprudential discourse¹⁸⁹ to demonstrate the importance of the Hart-Fuller debate¹⁹⁰ in determining the main issues at stake within jurisprudential discussion of the concept of law and the prevailing representation of Nazi Germany. The Hart-Fuller debate’s brief treatment of Nazi Germany was influenced both by the cultural and historical understanding of Nazism at the time¹⁹¹ and the analytical interests of its instigator Herbert Hart. While the debate is arguably problematic in terms of its extremely narrow treatment of Nazi Germany, it was also quite limited in its theoretical focus and was not intended to examine the full extent and nature of Nazi law. However, its legacy in terms of the way it has been interpreted and the responses it has generated has defined wider jurisprudential discourse and the role of Nazi Germany therein, in a way that has isolated and distinguished it from the growing historiographical understanding of the Third Reich.

It is important to trace the prevailing jurisprudential representation of Nazi Germany to its source in order to understand how and why it has come to play the role it does within the discourse and demonstrate that this role depends on the starting point of its postwar renewal and how it has evolved over time. This is not based on a finding that Nazi law is irrelevant to key jurisprudential issues for convincing, substantive philosophical or empirical reasons. This will set up the exploration in Chapter Four of different ways of reorienting jurisprudential discourse towards Nazi Germany in the context of historical research. I therefore trace the influence of the Hart-Fuller debate on the structure of jurisprudential discourse and its treatment of Nazi

¹⁸⁸ Fraser, “‘This is Not like Any other Legal Question’” (n 35) 125.

¹⁸⁹ The way ‘jurisprudence’ and related terms are used in this dissertation is explained in Section II of Chapter One, as is the use of terms to describe Nazi Germany, such as ‘Nazi past’, ‘Third Reich’ and so on.

¹⁹⁰ Hart, ‘Positivism’ (n 4); Fuller, ‘Fidelity to Law’ (n 4).

¹⁹¹ The historical profession itself was not unaffected by the unsophisticated representation of the Third Reich in the Nuremberg Trials, and the longer term impact of this was apparent in the sterile debates that dominated the historiographical agenda such as that between intentionalists and functionalists right up to the 1990s. While orthodox historical accounts of the Nazi past arguably remain problematic for a number of reasons (see the discussion of Dan Stone’s historical theoretical arguments in Chapter Four), historians have in recent decades painted a much more complex and differentiated picture of Nazism than has made its way into legal discourse (see, for example, the recent research into Nazi concentration camps in Chapter Five). See Chapter Six on the narrative constructed at Nuremberg.

Germany through an analysis of the two initial *Harvard Law Review* articles by Hart and Lon Fuller, and two collections of articles published in recent years to commemorate the fiftieth anniversary of the debate.¹⁹² I will introduce the key, relevant issues in the debate, and how Hart and Fuller represent Nazi law, before offering a critique of this representation and linking it to the current jurisprudence discussed in the previous chapter. I will then analyse the legacy of the debate through the fiftieth anniversary collections, demonstrating that the Nazi aspect of the debate has largely disappeared and rarely merits re-evaluation, while its influence on the discourse continues through the literature.

The 50th anniversary literature will be used to exemplify the current state of thinking on the issues raised in the Hart-Fuller debate. These contributions are either explicitly outward looking, going beyond the limited issues at stake in the initial debate to consider the theories of Hart and Fuller from other angles,¹⁹³ or reinterpetative, delving into the original issues with renewed vigour.¹⁹⁴ In both cases, however, they emphasise the minimal role Nazi Germany has come to play in the myriad of philosophical dialogues that comprise the legacy of the Hart-Fuller debate. While the Hart-Fuller debate influences areas beyond analytical jurisprudence, Nazi Germany predominantly remains an example of a wicked regime that either is or is not lawful, depending on the theorist's philosophical commitments. The literature analysed will establish the importance of the Hart-Fuller debate in contemporary jurisprudence through the eyes of other legal scholars who have commented on its enduring appeal and influence, and in relation to how Nazi Germany is viewed.

II. The Hart-Fuller Debate and its Representation of Nazi Law

A Introducing the Hart-Fuller Debate

The Hart-Fuller debate has had a profound impact on jurisprudential discourse, in determining its structure and the key issues at stake, and its treatment of Nazi Germany and its legal system. While Gustav Radbruch had expounded his famous formula for invoking a higher principle when dealing

¹⁹² The two examples of this to which I will pay attention in this Chapter are the contributions to Cane, *The Hart-Fuller Debate* (n 91), and *New York University Law Review*, 'Fifty Years Later' (n 91).

¹⁹³ In the case of most of the contributions to Cane, *The Hart-Fuller Debate* (n 91).

¹⁹⁴ In the case of most of the contributions to *New York University Law Review*, 'Fifty Years Later' (n 91).

with extreme legal injustice soon after the end of the war in Germany,¹⁹⁵ it appears that Anglo-American jurisprudence addressed the implications of Nazi law for the concept of law first in the Hart-Fuller debate in the late 1950s. The debate has endured at the heart of jurisprudential dialogue for over half a century, being continually referred to and reinterpreted, a fact evidenced by its important place in the teaching of jurisprudence and, for example, the interest and scholarship ignited by academic events commemorating the debate's 50th anniversary.¹⁹⁶

The themes covered by the Hart-Fuller debate are well known so I will only recall some of its key points here in order to lay the groundwork for advancing my thesis, before going on to consider the specific role of Nazi Germany in the debate. Initiated by Hart and joined by Fuller, the debate took the example of the aftermath of Nazi Germany as an opportunity to address some of the criticisms of classical legal positivism, including those of the American legal realists. The conceptual issues raised by Hart were primarily the separability question and secondarily the validity question. Specifically in relation to the Third Reich, he considered whether Nazi law could constitute valid law. The analysis of the validity of Nazi law was based on a recent Federal Republic of Germany court judgment, an example of a 'grudge informer' trial, the first of a category of post-Third Reich cases dealing with individuals responsible for denouncing victims for criticising the regime.¹⁹⁷

Hart repudiated Austin's command theory of law and disconnected it from the other perceived pillars of classical legal positivism, the separability thesis - 'the separation of the law that is from the law that ought to be'¹⁹⁸ - and the analytical component: the idea that 'a purely analytical study of legal concepts ... was as vital to our understanding of the nature of law as historical or sociological studies'.¹⁹⁹ He argued that positivism is distinguishable from the command theory, so its critics are unable to rely on rejection of the latter to justify rejection of the former. He instead partially defended and reinterpreted the classical positivistic, utilitarian legal philosophy of Austin and Bentham to argue in favour of the separability thesis. He broadened the scope of the utilitarian approach to law by considering not whether an

¹⁹⁵ Finally published in English as Gustav Radbruch, 'Statutory Lawlessness and Suprastatutory Law (1946)' (2006) 26(1) *OJLS* 1, translated by Stanley Paulson and Bonnie Litschewski-Paulson.

¹⁹⁶ See the resulting publications in n 192, which are considered in detail later in this chapter.

¹⁹⁷ For more on such cases, see H.O. Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 *MLR* 260.

¹⁹⁸ *ibid* 606.

¹⁹⁹ Hart, 'Positivism' (n 4) 601.

individual legal rule must meet certain moral standards to be considered law, but 'whether a system of rules which altogether failed to do this could be a legal system',²⁰⁰ employing the Nazi system as his case in point.

According to Hart's version of the separability thesis, legal rules, even those that conferred rights, need not necessarily be moral rules or even coincide with morality.²⁰¹ He claimed that there is a 'hard core of settled meaning' in law,²⁰² which can be used to determine the legal outcome of most cases. This helps define the substance of the law - what law is - whereas 'the word "ought" merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all the standards are moral'.²⁰³ Hart did not deny the need to resort to 'moral judgment about what the law ought to be' when it comes to the 'penumbra of debateable cases' outside of the core of settled meaning.²⁰⁴ However, he claimed that the 'social policies and purposes' judges call upon in such cases are external to rather than part of the law. They expose the gaps in the law that require judicial creativity to fill, rather than enabling the judge to discover something that is already 'latent' within the law, i.e. an inherent morality.²⁰⁵ According to Hart, 'the hard core of settled meaning is law in some centrally important sense and ... even if there are borderlines, there must first be lines'.²⁰⁶ Consequently we should refuse the temptation to include extra-legal factors in the law itself, not least because the alternative leaves law uncertain and resolvable only by resort to morality:

To assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy.²⁰⁷

He did not consider this to be either the most desirable or the best explanation for the nature of law. It is not desirable both because the separation of law and morality enables a clear external moral evaluation to be made about evil laws, and because bringing morality into law opens up the law to negative morality (immorality) as much as it does to (positive)

²⁰⁰ *ibid* 601.

²⁰¹ *Ibid*.

²⁰² *ibid* 614.

²⁰³ *ibid* 613.

²⁰⁴ *ibid* 607-608.

²⁰⁵ *ibid* 612.

²⁰⁶ *ibid* 614.

²⁰⁷ *ibid* 615.

morality. It is not the best explanation because there is a core of legal meaning that is not amenable to manipulation by external, including moral factors.

Hart did allow for a minimum, necessary requirement of natural law within a positive legal system, in the form of certain principles that are essential for the system and society to function at all. These include a prohibition on violence and a minimum protection of property rights, and the principles of objectivity and neutrality in the administration of the law – the idea of treating like cases alike.²⁰⁸ They are accepted by Hart as vital for the operation of a legal system but are strictly limited in their scope, to the extent that only some parts of society need to fall within these principles (i.e. to be treated equally under the law, be protected from violence and have their property safeguarded) in order for these criteria to be considered met.²⁰⁹ In all other cases Hart argued that moral factors are indeed external to the law. This properly leaves it open to individuals within the system to make moral judgments about bad laws and justifiably refuse to obey them on those grounds by resort to moral considerations. Such considerations are external to and critical of a legal system that is otherwise formally valid due to its compliance with the rule of recognition, and not according to inbuilt moral standards the violation of which renders such laws invalid *per se*.

Fuller's reply to Hart involved restating their shared overarching concern within the debate as one of 'how we can best define and serve the ideal of fidelity to law',²¹⁰ and reframing the matter in issue in terms of the distinction between 'order' and 'good order'. Through these twin refashionings, Fuller was able to reject positivism based on the separability of law and morality in favour of a procedural form of natural law reliant on the inherent connection between law and morality. In terms of fidelity to law, he argued that 'law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials'.²¹¹ Fuller claimed that while the question of fidelity to law was at the forefront of Hart's mind, he had failed 'to perceive and accept the implications that this enlargement of the frame of argument necessarily entails'.²¹² These were that positivism was not able to achieve what was necessary for fidelity to law, the need to 'plan ... the conditions that will make it possible to realize the idea'.²¹³ Only natural law could underpin the

²⁰⁸ *ibid* 623-624.

²⁰⁹ *Ibid*.

²¹⁰ Fuller, 'Fidelity to Law' (n 4) 632.

²¹¹ *Ibid*.

²¹² *Ibid*.

²¹³ *ibid* 643.

conditions to inspire the requisite loyalty in the law because of the necessary role of morality in such an undertaking:

I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. This obligation seems to be conceived as *sui generis*, wholly unrelated to any of the ordinary, extralegal ends of human life. The fundamental postulate of positivism - that law must be strictly severed from morality - seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations.²¹⁴

In terms of the distinction between order and good order, Fuller defined order as the law itself and good order as 'law that corresponds to the demands of justice, or morality, or men's notions of what ought to be'.²¹⁵ He used this to assert the 'inner morality of law', which is to say that 'law, considered merely as order, contains ... its own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law'.²¹⁶ While Fuller did not actually outline the eight principles of legality comprising the inner morality of law in his *Harvard Law Review* piece,²¹⁷ the article refers repeatedly to the concept and clearly outlines his vision of a procedural natural law based on the idea that law *per se* contains its own innate morality. This morality is of the sort that makes it possible to create laws that realise the idea of fidelity to law. Hart, he argued, had touched upon the connection between law and morality without recognising it as such. Hart's failure to see the relationship between even those aspects of justice he had mentioned, such as treating like cases alike, was indicative of his failure to treat law 'as an object of human striving'.²¹⁸ Therefore, Hart's references to 'the nature of the fundamental rules that make law itself possible'²¹⁹ stopped short of conceding their inherently moral nature. By contrast, Fuller saw these as moral rules that are treated as legal rules, which are indicative of a 'merger' at that junction between law and morality.²²⁰

²¹⁴ *ibid* 656.

²¹⁵ *ibid* 644.

²¹⁶ *ibid* 645.

²¹⁷ These are that laws should: (i) be general; (ii) be publicly promulgated; (iii) not be retroactive; (iv) be understandable; (v) be consistent with one another; (vi) not require conduct beyond the abilities of those affected; (vii) remain relatively constant; and (viii) be administered in a manner consistent with their wording; Lon Fuller, *The Morality of Law* (Yale University Press, 1964).

²¹⁸ Fuller, 'Fidelity to Law' (n 4) 646.

²¹⁹ *ibid* 639.

²²⁰ *Ibid*.

Fuller acknowledged the threat posed by Hart's assertion that the inclusion of morality in the law might lead to the incorporation of undesirable morality, should we accept the necessary connection between law and morality. He repudiated this using a number of brief points. These included the argument, briefly stated here but central to his naturalism, that good aims intrinsically have more coherence than evil aims. He also claimed that the best protection against Hart's potential danger is not the positivist separation of law and morality, but the connection between the two.²²¹ This was illustrated using a rhetorical question, whether a judge intent on evil objectives would:

Be likely to suspend the letter of the statute by openly invoking a "higher law"? Or would he be more likely to take refuge behind the maxim that "law is law" and explain his decision in such a way that it would appear to be demanded by the law itself?²²²

Fuller also claimed that there is a hesitancy against writing wickedness into the law, that the greater danger in most cases comes from formalism rather than an infusion of immorality, while Hart's theory necessarily leads to formalism. Whereas Hart argued that positivism allows for a clear, external, moral criticism to be made of law, Fuller suggested that positivism could be the resort of evil lawyers. The incorporation of morality into law represents a barrier to this possibility.

In the Hart-Fuller debate, Hart understood law as open to abstract conceptual analysis, a social fact validated by its promulgation according to procedures laid down by higher legal rules.²²³ It has at its centre a stable core of purely legal interpretation that does not require recourse to external factors to determine. It is susceptible to use for both moral and immoral ends and consequently best separated from morality, which can be most usefully applied as an external standard of criticism. As a system it is dependent only on very minimal and contingent principles of morality for its functional existence. Fuller, on the other hand, saw the higher systemic rules that allowed laws to exist and encouraged people to honour them as themselves moral. The real danger arises when disconnecting law and morality, because it opened up the possibility of resorting to positivism and its cousin formalism in order to justify wicked laws. He observed an implicit connection between coherence and morality, which meant that legal rules that were coherent were also much less likely to be subject to manipulation for wicked purposes, whereas the substance of the law was easier to manipulate. Therefore a set

²²¹ *ibid* 636-637.

²²² *ibid* 637.

²²³ Hart did not describe in detail his concept of primary and secondary rules, and particularly rules of recognition, in his Harvard Law Review article; see H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon Press, 1994).

of procedural - ostensibly moral - principles worked within the law and maintained the connection between law and morality. Hart and Fuller each advocated their own theoretical paradigm as both the most desirable way of conceptualising law, especially in the wake of the Third Reich, and the best explanation for its nature, even in the Nazi legal system. In doing so, Fuller placed considerably more emphasis on the actual nature of the Nazi legal system than Hart. The next part of this section explains the role of Nazi Germany in the Hart-Fuller debate.

B The Treatment of Nazi Germany

In the 'grudge informer' case that sparked off and is referred to in the Hart-Fuller debate, a woman denounced her husband to the authorities for private remarks he had made about Hitler when home on leave from the German army. The woman was under no legal duty to report these remarks,²²⁴ but she did so apparently with the intention of getting rid of him. He was convicted and sentenced to death for undermining the regime, according to Nazi statute law.²²⁵ The woman was subsequently convicted by a provincial court of appeal in the Federal Republic of Germany (FRG) in 1949, for the unlawful deprivation of her husband's liberty.²²⁶ Hart's representation of the reasoning of the German court was inadvertently incorrect. He understood the court in question to have invalidated the relevant Nazi law on an essentially Radbruchian basis,²²⁷ because of its iniquity. In fact, the Nazi statutes were upheld by the FRG court, with the consequence that the judges in the relevant Nazi military court were not guilty, while the woman was convicted because of her personal motivation for denouncing and awareness of the likely serious consequences of her actions for her husband.²²⁸ In a similar, slightly later case before the Federal Supreme Court, which was not considered by Hart and Fuller, a defendant was found guilty as an accessory on the basis that the application of the Nazi laws at the time was illegal on positive, procedural grounds (rather than higher, natural law principles), and the general public, and therefore the defendant, was aware of the illegality of

²²⁴ According to David Dyzenhaus' account; David Dyzenhaus, 'The Grudge Informer Case Revisited' (2008) 83 *New York University Law Review* 1000, 1004. This is supported in Pappé, 'On the Validity of Judicial Decisions' (n 197) 263.

²²⁵ Dyzenhaus, 'Grudge Informer' (ibid) 1004; He was actually sent back to fight on the Eastern front after a period of imprisonment.

²²⁶ Pappé, 'On the Validity of Judicial Decisions' (n 197) 263.

²²⁷ According to Gustav Radbruch's famous postwar formula that law becomes invalid when it reaches a certain degree of extreme injustice. See Radbruch, 'Statutory Lawlessness' (n 195).

²²⁸ Pappé, 'Validity of Judicial Decisions' (n 197) 263.

the statute.²²⁹ The judges who had prosecuted the case were again immune from prosecution because of their access to a defence of intimidation.²³⁰

It is perhaps evident from the brief outline of Hart's key arguments in the previous section that, while Nazi Germany is occasionally mentioned, it is not central to his thesis, and receives very little scrutiny beyond the example of the 'grudge informer' case. This is, as much as anything else, due to Hart's abstract, analytical focus on the concept of law; a detailed examination of the workings of Nazi law was not Hart's concern. As David Dyzenhaus has commented about Hartian analytical positivism:

Hart generally did not consider problems of judicial interpretation of the law an appropriate topic for philosophy of law, which he viewed as largely descriptive analysis of the conceptual structure of law. It follows from that analysis that judicial interpretation of the law largely takes place outside of law, in that judges ultimately have to exercise a discretion based on their own sense of what law ought to be, rather than on what law currently is.²³¹

Consequently, Hart's treatment of Nazi Germany 'seem[ed] to avoid the most dramatic legal problem with which post-war courts were confronted, namely the atrocities committed by Nazi-courts and Nazi-judges ... by not even addressing the problem'.²³² This meant that 'of the actual operation of Nazi courts, Hart is blissfully ignorant. This ignorance is not just coincidental; it is intrinsic to his approach to "core" legal reasoning'.²³³

For Hart the best response to the problem of evil regimes is to pass moral judgment from the outside and recognise the limits of law, saying 'law is not morality; do not let it supplant morality'.²³⁴ In this context the history of Nazi Germany is most interesting because it 'prompts inquiry into why emphasis on the slogan "law is law," and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere ... went along with the most enlightened liberal attitudes'.²³⁵ Hart based his analysis of the legal system of the Third Reich on a number of largely unexamined assumptions about the nature of Nazi law, which he had no methodological interest in

²²⁹ i.e. the offence itself was not made out and the sentence given was harsher than was permitted by the seriousness of the offence; *ibid* 265-268.

²³⁰ *ibid* 268.

²³¹ Dyzenhaus, 'Grudge Informer' (n 224) 1001.

²³² Thomas Mertens, 'Radbruch and Hart on the Grudge Informer' (2002) 15(2) *Ratio Juris* 186, 203.

²³³ Desmond Manderson, 'Two Turns of the Screw' in Cane, *The Hart-Fuller Debate* (n 91) 204-205.

²³⁴ Hart, 'Positivism' (n 4) 618.

²³⁵ *ibid*.

investigating further.²³⁶ His preconceptions that 'law was law' in the Third Reich, that the Nazi legal system conformed to his formal notion of legal validity, that the system was represented by the limited facts of the 'grudge informer' case, and that the Nazi statutes in the case were valid law, applied properly merit further evaluation.

In his reply, Fuller highlighted Hart's cursory treatment of Nazi law and his ignorance of the system as a weakness with the potential to undermine some of his arguments. The fact that Hart considered that Nazi law was law 'in a sense that would make meaningful the ideal of fidelity to law' came without consideration of 'the actual workings of whatever remained of a legal system under the Nazis'²³⁷ was problematic in Fuller's eyes. Hart 'assume[d] that something must have persisted that still deserved the name of law',²³⁸ whereas Fuller 'thought it unwise to pass such a judgment without first inquiring with more particularity what "law" itself meant under the Nazi regime'.²³⁹ He was much more interested in the content and application of Nazi law, particularly the laws applied by the Nazi tribunal subject of the 'grudge informer' case, and spent some time examining this. His inclination to ground his arguments in this way in contrast with Hart's tendency to restrict himself to purely conceptual analysis is indicative of the methodological differences between analytical positivism and the normative tendency of natural law theory.²⁴⁰ Hart did acknowledge the importance of sociological and historical analysis for the philosophy of law.²⁴¹ He also, as we have seen, noted that the Nazi experience ought to generate exploration into why the law took a particular turn in that instance. However, he did not seek to undertake this himself, and did not consider it essential to elucidating the concept of law or jurisprudence as a field. Fuller argued that analysis of Nazi law was vital to get to the bottom of whether and how fidelity to law - itself central to the concept of law - is constructed and maintained in a wicked legal system.

Thus, Fuller considered it 'seriously mistaken' to make the assumption 'that the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman'.²⁴² Two of

²³⁶ Hart's misstatement of the case judgment was inadvertent and based on an earlier Harvard Law Review piece, and it is not material to his theory that the court in question did not in fact invalidate the Nazi statutes according to the Radbruch formula.

²³⁷ Fuller, 'Fidelity to Law' (n 4) 633.

²³⁸ *ibid* 633.

²³⁹ *ibid* 630.

²⁴⁰ See the brief discussion of this relationship in Section II of Chapter Two.

²⁴¹ Hart, 'Positivism' (n 4) 601.

²⁴² Fuller, 'Fidelity to Law' (n 4) 650.

the examples given by Fuller to illustrate the nature of the Nazi regime included retroactive legislation and secret laws, both of which were employed in the Third Reich. While he acknowledged that these features are not alien to modern legal systems elsewhere, Fuller argued that their pervasiveness in Nazi Germany erodes and compromises that legal system.²⁴³ The even more egregious ‘affronts to the morality of law’ he cited were the proclivity of the regime to bypass law entirely and resort to street violence, and the willingness of the courts to ignore legislation ‘if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure “above”’.²⁴⁴

As the extent to which a legal system, as an object of human striving, measured up to the ideal of law was a matter of degree for Fuller, the extent to which the Nazi regime flouted the moral principles at its heart is the determining factor in its status as legally valid or invalid. Based upon Fuller’s analysis of the Nazi statutes used to prosecute the informer’s husband, the fact that the Nazi judges were able to resort to turning the literal meaning of the law on its head, could by-pass legal forms entirely, and constructed a system replete with retroactivity and secrecy, meant their denigration of the morality of law was so complete that the Nazi legal system could not be called law at all:

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality - when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.²⁴⁵

For Fuller the more ‘odious by ordinary standards of decency’ a particular law was, the more it deserved to be treated as invalid, as non-law. Being at the extreme end of this odiousness, and applying it systemically across the legal system, Nazi law was not law.²⁴⁶ The important question to ask about the Nazi legal system in this context was:

How much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule,

²⁴³ *ibid* 650-652.

²⁴⁴ *ibid* 652.

²⁴⁵ *ibid* 660.

²⁴⁶ *ibid* 660-661.

and what moral implications this mutilated system had for the conscientious citizen forced to live under it.²⁴⁷

This is certainly a more sociological approach than that pursued by Hart. It involves analysing the actual legal system in question to see what if anything remained of moral law, examining how the law is interpreted by legal officials and considering the moral position of the 'conscientious' citizen. Fuller was alive to the difficult position of the latter, living within a radically altered moral and legal system, and the 'impossible' and 'truly frightful predicament' of the German courts in having to choose between the impossible alternatives of declaring all Nazi laws illegal or enforcing all such laws.²⁴⁸

Fuller argued that in cases where a judge disagreed with the moral principles of the higher court which bound her, and found the precedents she was bound to apply morally abhorrent, she would not need access to a theory of legal positivism to fall back on a formalistic application of the law as a way of reconciling the situation – applying the law in good faith but not taking moral responsibility for doing so. In effect this would be her only alternative apart from resigning.²⁴⁹ However, because of his belief in strong relationship between coherence, morality and law, he also did not:

Think that such a predicament is likely to arise within a nation where both law and good law are regarded as collaborative human achievements in need of constant renewal, and where lawyers are still at least as interested in asking "What is good law?" as they are in asking "What is law?".²⁵⁰

It seems that the mere fact of human striving to achieve law infused with morality was considered by Fuller to be enough to stave off the debasement of law that might come with wicked intentions or an over-reliance on legal positivism that effectively separated moral questions from the law.

Both Hart and Fuller's proposed remedy for states such as the FRG, when faced with a case such as that of the 'grudge informer', is somewhat counter-intuitive in light of their own theories. Indeed, both agreed, for different reasons, that a retrospective statute was the best - albeit flawed – way to deal with the situation. Hart considered there to be a candid choice between two evils, 'that of leaving her [the grudge informer] unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems', that against retrospective criminal laws.²⁵¹ This conforms to Hart's

²⁴⁷ *ibid* 646.

²⁴⁸ *ibid* 648.

²⁴⁹ *ibid* 647.

²⁵⁰ *ibid* 648.

²⁵¹ Hart, 'Positivism' (n 4) 619.

claim that Nazi law was law, but does not accept the logical implication of this, that the informer complied with valid law and should not legally be punished for doing so. It amounts instead to an external moral judgment about the informer that becomes by virtue of a retrospective statute a legal judgment. This nevertheless does remain true to the separability thesis, starting from a position of making a moral judgment about the law, and then conforming the law to the preferred morality, albeit in breach of another desirable moral principle. It has the merit, for Hart, of being done in 'full consciousness of what was sacrificed in securing her punishment in this way'.²⁵²

Following Fuller's interpretation that Nazi law was not valid law because of its serious breaches of the inner morality of law would suggest that he concurs with the erroneous understanding of the German court's judgment used by Hart and Fuller, i.e. that it had invalidated the Nazi laws using natural law reasoning. However, Fuller's focus in dealing with the situation of the 'grudge informer' was on two things, the moral abhorrence of the defendant and the difficult socio-political condition of the German state, trying to rebuild following the destruction wrought by the Nazi regime. On this first point, and consistent with his theory, he considered it 'intolerable' to validate Nazi law, because it would mean 'these despicable creatures [grudge informers] were guiltless'. It was, he argued, the 'urgency' of this situation that had moved Hart to recommend retrospective legislation. On the second, he adopted a broader perspective to explicate 'the true nature of the dilemma confronted by Germany in seeking to rebuild her shattered legal institutions. Germany had to restore both respect for the law and respect for justice'.²⁵³ This led him also to prefer the use of a retroactive statute as a symbolic break with the past, as it would act 'as a means of isolating a kind of cleanup operation from the normal functioning of the judicial process'. While such a statute was not necessary in natural law terms to invalidate Nazi law, it would make it possible to plan more effectively to regain for the ideal of fidelity to law its normal meaning'.²⁵⁴ In his solution to the problem of the grudge informer, therefore, Fuller returned to the need to plan for conditions for fidelity to law which lay at the heart of much of his argument.

III. Evaluating the Hart-Fuller Debate

A Problems with the Treatment of Nazi Germany

²⁵² Ibid.

²⁵³ Fuller, 'Fidelity to Law' (n 4) 657.

²⁵⁴ *ibid* 661.

The evaluation of how Nazi law is treated by Hart and Fuller in this section exposes problems with how it is used to support some of their jurisprudential claims and highlights a number of characteristics that are linked with how current jurisprudential discourse represents the Third Reich. Chief among these are the reliance on a moral and/or legal discontinuity between Nazi law and contemporary law, the use of Nazi law as a paradigmatic legal system, a limit-case against which to test positivism and natural law, and the mischaracterisation of the Nazi legal system as an exercise in the cynical manipulation of the population. The Hart-Fuller debate is shown to be the foundational jurisprudential moment that introduced these characteristics to the discourse; its legacy has been their repeated reproduction within the discourse.

Notwithstanding their superficial agreement over at least the form of the remedy best suited for the 'grudge informer' cases, it could be argued that Hart and Fuller have little in common when it comes to evaluating their engagement with Nazi law and their theoretical positions based on that engagement. Hart, after all, considered his concept of law to be almost purely analytical so it could stand independently of the specific nature and function of law in the Third Reich. Fuller, by contrast, criticised Hart's positivist paradigm and constructed his own claims to a degree with reference to what he saw within Nazi law. Hart's conclusion in respect of Nazi law was that it was valid as such, and the separability of law and morality provided the best explanation of its nature and the most desirable way of tackling the problem of wicked laws. Fuller's quite opposite finding was that Nazi law was not valid law, and the inherent morality of law both establishes good reasons to honour the law and provides a useful barrier to its manipulation for wicked ends.

It is true that some aspects of their analysis of Nazism need to be appraised separately. However, the approaches adopted by Hart and Fuller to Nazi Germany also share certain important characteristics. These are first that, even for Fuller, the debate is not really about Nazi law, but is about two competing visions of the concept of law, which the Nazi legal system, through its derived connection to the 'grudge informer' case, is used to exemplify. Second, the assumptions they make about the Nazi legal system are, in different ways, flawed and subject to challenge by the historiography of the Third Reich. Third, some of the philosophical conclusions drawn by reference to the Nazi regime, which is used to support them, stand on very shaky ground once their dependence on the misconceived Nazi example is exposed. Fourth, the role played by moral judgment in their respective treatments of

Nazi law is important and illuminating. I will consider these in this section, alongside some separate observations about the two approaches.

Desmond Manderson picks up on some of the problems with the way the Nazi legal system was tackled in the debate, starting with Hart's analysis:

For Hart the appearance of law is all that matters. Politics and history are irrelevant to our inquiry. We rely instead on the simple surface and clear meaning of words – with the result in this case [of the 'grudge informer'] that we are seriously misled as to what those words actually meant to the people who were sentenced to death or ... sent to the Eastern front. As we read Hart's account of the case, it surely seems plausible that the Nazi regime in fact depended on a kind of blindness to anything but the formal semblance of legality in order to gain legitimacy for its actions. Hart himself refuses to look behind the court's statements and treats as legally sufficient the mere "tinsel of legal form".²⁵⁵

He later moves on to Fuller's interpretation:

Fuller does not acknowledge Nazism did not merely corrupt a legal system. It realised a *vision* of it informed by the anti-positivist ideologies of German Romanticism up to and including Heidegger and Schmitt. Neither does he acknowledge that the problem is not that law-makers might develop an "immoral morality" or "a more perfect realization of iniquity", but rather that we disagree about what goodness is in law or in laws. By assuming a core of goodness and a core of evil, which can never be confused, he simplifies the problem which confronts many societies, those who lived during the Third Reich not least.²⁵⁶

In his comments about Hart, Manderson draws attention to his misrepresentation of the actual nature of the Nazi legal regime, in a way similar to the criticism offered by Fuller. Hart's analysis takes it at face value that the Nazi laws in question, which he barely mentions let alone investigates, functioned in a formal, positivist way and, as an internal system, relied for its validity, authority and legitimacy on a 'formal semblance of legality'. The decontextualized 'law', devoid of politics and history, is akin to the settled core of meaning, in that it is a part of law that it is possible to analyse in purely conceptual terms, without extra-legal distortion. By taking Nazi law literally without further exploration and separating it not just from morality but from politics and society as well, Hart effectively places the entire Nazi legal system in the settled core of meaning, amenable to logical, legal interpretation without reference to external factors.

Manderson's comments about Fuller, however, show that his own critique based on Nazi law goes beyond that advanced by Fuller himself. It is not

²⁵⁵ Manderson, 'Two Turns of the Screw' (n 233) 204-205.

²⁵⁶ *ibid* 212-213.

merely that Hart's assumptions about Nazi law are wrong because it did not in fact adhere to a recognisably formal, legal approach, but also because Nazi law adopted a different approach entirely. Manderson makes a vital distinction between a legal system that *corrupts* legality and one that attempts to establish an *alternative vision* of legality. When combined with the observation that Fuller's certainty about the recognisable difference between morality and immorality sociologically is misplaced, this begins to question the foundational connection Fuller draws between coherence, morality and legality.

This connection is central to Fuller's argument, because it links his procedural principles of legality creating the conditions for fidelity to law with the claim that procedure tends towards coherence which tends towards morality and acts as a barrier to the infiltration of a legal system by immorality. A lot rides on this. Recall, for example, Fuller's belief that the situation of a judge falling back on strict formalistic interpretation to resolve her fundamental moral aversion to a binding Supreme Court ruling would be unlikely to arise in a nation 'where lawyers are still at least as interested in asking "What is good law?" as they are in asking "What is law?"'.²⁵⁷ An extrapolation of Manderson's interpretation of the Nazi legal system, which is supported by recent legal historical research,²⁵⁸ refutes this defence against immorality because of the real, historical tension under the Nazi regime between those actively striving for a Nazi vision of 'good law' and those who felt that the denigration of liberal principles of legality, as Fuller would have it, already ruled out the possibility of good law. The Nazi legal ideology was not 'at least as interested' in asking about 'good law' as it was about 'law', but was only really interested in 'good law' and had very little time for what was formally 'law'.²⁵⁹

Fuller is correct, therefore, to highlight Hart's lack of consideration of the possibility of Nazi judges overturning even the literal meaning of statutes, whether through ideological zeal or pressure from above, which, alongside the resort to street violence and systemic use of retroactivity and secrecy, led Fuller to claim that the Nazi system was not law. However, notwithstanding this, he also insists that the regime clothed itself in legal form, and reiterates assumption that 'law was law' in the Third Reich. He also goes one step further by maintaining that positivism contributes to the corruption of law while natural law acts as a barrier against it. Hart's methodological disinclination to engage in detail with the history of Nazi Germany means he

²⁵⁷ Fuller, 'Fidelity to Law' (n 4) 648.

²⁵⁸ See the case studies discussed in Chapter Five.

²⁵⁹ See this discussion *ibid.*

assumes it to be a formally valid legal system that, like any other legal system, largely inhabits the settled core of meaning and can be interpreted as such. This is used to support his positivist claims about the concept of law, where this support does not actually exist in this case. Instead it suggests the possibility of a legal system with little formal validity, and almost entirely open to interpretation, which Hart might in fact also claim is not law in analytical terms, according to his theory of the concept. A legal system deeply imbued with, indeed almost entirely determined by, external factors adhering to a certain type of Nazi morality may call into question the separability of law and morality in some contexts. The question then becomes what to do with such a system.²⁶⁰

Fuller's limited engagement with some Nazi statutes equips him with a better understanding of the relevant Nazi laws but his extrapolation of this to the whole system and use of it to defend procedural natural law over positivism is flawed. The Nazi legal system may have lacked coherence, because of its openness to ideological interpretation and breach of the principles of legality, and been wicked in its aims. It does not, however, support the causal connection between coherence, morality and law on which Fuller depends, because Nazi law was infused with a different vision of natural law, not merely a corruption of the rule of law. For similar reasons it does not substantiate the claim that formalism and positivism are more consistent with wicked law than natural law. Fuller might argue that this does not completely undermine his argument, because coherence could still be viewed as correlated with the principles of his inner morality of law. I would argue that this claim is under severe threat because his conception of how morality functions in a system that strives for 'good law' is not corroborated by the historical case from which he draws his supporting evidence.

The final shared misconception about the nature of Nazi law I will highlight is the understanding that it represented little more than the cynical manipulation of the principles of legality for oppressive purposes by the Nazi elite. This links to a related shared criticism that, notwithstanding the different degrees to which they analyse Nazi law, both Hart and Fuller's uses of the Third Reich are driven by their theoretical arguments about the concept of law. Both Fuller and Hart wish to advance their preferred paradigms of the concept of law, and the Nazi backdrop - because of its recent occurrence and wicked nature - provides a useful example on which to draw. Hart does not need to explore it in much detail, because of his

²⁶⁰ This question, in terms of how jurisprudence might deal with Nazi law, is addressed in Chapter Four.

analytical methodology, and Fuller appears willing to do so only to a limited extent.

This is illustrated by an assumption made by Hart, that 'under the Nazi regime men were sentenced by courts for criticism of the regime. There the choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's effective tyranny'.²⁶¹ The assertion that punishment for criticism of the regime *might* be guided *exclusively* by tyranny is, like many of Hart's statements about Nazi law, presented at the same time as speculation and received wisdom and is not corroborated by any historical evidence. It is not possible to draw a conclusion about the sentencing policy of the whole regime on the basis of one example, that of the 'grudge informer's' victim, from a particular time, and in any event an unsubstantiated one. All of the type of defendants, the harshness of sentencing and the motivations for sentencing changed over time based on the fluctuating circumstances of the regime, and cannot be said to be guided exclusively by the need to oppress and retain power. The argument Hart draws from this presumption, that the sentencing might be taken to be purposive, rational and meeting 'ought' requirements is not necessarily undermined by the actual history in this instance. However, this example can show how even for analytical jurisprudence, references to actual historical events to build theoretical arguments ought to be substantiated, because changing the underlying example can impact the reliability of the theory.

Fuller also sees Nazi law as a cynical manipulation of legality as it provides for him a consistency between the certainty of morality and the Nazi resort to immorality to overcome the literal interpretation of the law, on which his theory partly depends. It also enables him to support his criticism of formalism as a potential facilitator for wicked regimes. A perfectly plausible and more readily substantiated alternative is that the Nazi regime was not formalistic and the tensions between different conceptions of morality were played out in the striving for 'good law' that took place throughout the Third Reich. As the debate was not about Nazi law but about the differences between and superior truth claims of positivism and natural law over the nature of the concept of law, the actual history of the Nazi legal system takes something of a back seat, even in Fuller's account. Given the aims of the debate's protagonists and their jurisprudential field of inquiry, it is unfair to suggest they ought to have had at that stage a full understanding of the workings of Nazi Germany. Indeed, Fuller's analysis is more extensive than most cases of jurisprudence invoking Nazi law. However, that does not mean we cannot challenge theoretical paradigms built to some extent on that

²⁶¹ Hart, 'Positivism' (n 4) 613.

history when it does not in fact support some of the claims made. Even the focus on the 'grudge informer' case obfuscates the issues at the heart of the Nazi legal system and represents 'almost a mockery of what is at stake'.²⁶²

It also helps to erect a sort of moral barrier between the rule of law legality that conforms to Fuller's inner morality, and underpins many modern legal systems, and Nazi law, leading to un-nuanced judgment of the latter. The correlation between *good* law and the rule of law is matched by condemnation of the 'grudge informer' and the legal system as a whole. Hart's legal endorsement of retrospective legislation to deal with the case is partly determined by his moral endorsement of punishment for the informant wife, and leaves little room for wider considerations of legality or morality. Hart does not endorse the absolute separation of law and morality as a matter of necessity,²⁶³ and his positivism does not reject the importance of morality for law in general. His position, therefore, is not contradictory from the point of view of legal positivism. However, he fails to submit the moral aspects of his argument to sufficient scrutiny, instead cloaking them within a general condemnation of the 'grudge informer', which serves to undermine even the legal status he attributes to Nazi law and maintain its complete otherness to the rule of law.

Hart's concept of law is disconnected from the Nazi legal system, and this is exacerbated by the fact that for the purposes of his conceptual arguments any hypothetical wicked legal system will do. This is filled by a perfectly understandable moral aversion, which in turn only serves to keep the realities of Nazi law at arm's length. Equally, Fuller's requirement to consider the wider context of the workings of Nazi law, and specifically the plight of the conscientious citizen, is disrupted by the 'intolerability' of failing to punish the informant, as well as the shortfall of inner morality in the Nazi legal system. Fuller may have a good case for the ideological imperative of using retrospective legislation to ensure a complete and public, symbolic break with the past, but this again encourages distance from the legal realities of Nazi Germany and posits a rupture that does not exist in historical evolution. The political imperative to exacerbate and emphasise discontinuities between the Third Reich and postwar Germany ought not to feed into how the concept of law is theorised, in a way that takes account of Nazi law. The continuities between the different systems are just as important, if not more so, for this. For Hart these continuities are limited to a semblance of legal

²⁶² Mertens, 'Review Essay – Continuity or Discontinuity of Law?' (n 121) 539.

²⁶³ And is therefore generally considered a soft rather than a hard positivist.

form and a minimal set of naturalist essentials,²⁶⁴ neither which, paradoxically, necessarily existed under the Nazi regime. For Fuller they barely appear to exist at all.

B The Jurisprudential Legacy of the Hart-Fuller Debate

The Hart-Fuller debate has had a strong and prominent legacy for jurisprudential discourse, not just in terms of its treatment of Nazi Germany but also in defining the key issues at stake. It has unwittingly set the course of jurisprudential discourse for the following five decades and entrenched the role of Nazi Germany within that discourse. In a 1999 article Frederick DeCoste made the following observation about the role of 'the defining experience of this century' - the Holocaust - in the legal academy:

Despite a few, half-hearted and misdirected concessions immediately after the War - I am thinking particularly of the unaccountably influential Hart/Fuller debate, and of the courses on totalitarianism which, for a short time, were offered in some law schools, especially in America - it is fair to say that, until very recently, the English-language legal academy has proved itself completely immune to the defining experience of this century. This attitude is all the more bizarre given the centrality of law and lawyers to European fascism generally and to the Holocaust in particular.²⁶⁵

I will extrapolate two aspects of this comment as particularly pertinent to the arguments made in this chapter. These are first the claim that the Hart-Fuller debate was little more than a 'misdirected concession' in terms of its engagement with Nazi Germany and is 'unaccountably influential' as such. The second point is that the Third Reich has relevance for jurisprudence beyond the question of whether its legal system was or was not 'law', both because of the status of the Holocaust and the 'centrality of law and lawyers' in Nazi Germany. In the case of jurisprudence, these two points are inextricably entwined. The Hart-Fuller debate - and the work of H.L.A Hart in particular - has proved to be of such enduring significance within jurisprudence that its 'misdirected' quality in respect of the Nazi past set the discourse off on a path that viewed Nazi Germany as substantively irrelevant to the key theoretical questions about the concept of law.

This enduring impairment is important, I argue, beyond the mere fact that it tends to exclude consideration of National Socialism from any more than a peripheral role in jurisprudence. The historical reality of the functioning of

²⁶⁴ Hart's minimum content of natural law incorporates alleged truisms about human nature that mandate certain provisions to ensure the survival of humanity: a restriction on violence and aggression, systems of mutual forbearance, a form of property, and sanctions to ensure compliance; Hart, *The Concept of Law* (n 223) 193-200.

²⁶⁵ DeCoste, 'Law/Holocaust/Academy' (n 17) 792-793.

law in the operation of the Nazi state and the perpetration of the Holocaust does upset attempts to label the whole system either simply 'law' or 'non-law' and in either case irrelevant for jurisprudence. It also, however, challenges the discourse at a deeper level in that it exposes contradictions inherent in the debate between natural lawyers and positivists and calls into question the very possibility of elucidating the category of 'wicked legal system' with any degree of complexity when applied to a concrete historical case.

In addition to the treatment of Nazi law, the influence of the parameters set by the Hart-Fuller debate on jurisprudential discourse should not be underestimated: 'The fact is that the exchange between Hart and Fuller really did set the agenda for modern jurisprudence: the separation of law and morality, the place of values in interpretation, and the relation between the concept of law and the values associated with the rule of law'.²⁶⁶ According to Nicola Lacey, the work of Hart and Fuller 'of course, continues to shape contemporary jurisprudence to a quite remarkable degree',²⁶⁷ and 'it is worth reflecting on the remarkable fact that it still speaks to us so powerfully today'.²⁶⁸

Some legal scholars have commented on or criticised the influence of the Hart-Fuller debate on the direction and scope of jurisprudential discourse in recent years. Jeremy Waldron has acknowledged that 'some jurists have suggested that the Hart-Fuller debate actually skewed the agenda for jurisprudence in unfortunate ways, which we are only now beginning to correct...'.²⁶⁹ Waldron probably did not have the representation of Nazi Germany in mind, but variations of this suggestion are advanced by those few scholars who do explore aspects the relationship between legal theory and Nazi Germany, and who often come to mainstream, Anglo-American jurisprudential discourse with an outsider's perspective. Thomas Mertens, for example, has drawn attention to the debate's significance:

In the Anglo-Saxon world, the discussion on the "legality" of Nazi Germany or the lack thereof took place primarily within the confines of the Hart/Fuller debate for a very long time. This mean that it could safely

²⁶⁶ 'Foreword: Fifty Years Later' (2008) 83(4) *New York University Law Review* 996.

²⁶⁷ Nicola Lacey, 'Out of the "Witches' Cauldron"?' in Cane, *The Hart-Fuller Debate* (n 91) 41.

²⁶⁸ Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83(4) *New York University Law Review* 1059, 1059.

²⁶⁹ Jeremy Waldron, 'Legal Pluralism and the Contrast Between Hart's Jurisprudence and Fuller's' in Cane, *The Hart-Fuller Debate* (n 91) 135. Waldron does not specify to whom he is referring here.

be isolated and that legal theory could restrict itself to the rule of law as something primarily “good.”²⁷⁰

Kristen Rundle argues that ‘...the history of debates about the connections between law and morality ... have seen responses to a wide range of questions about the nature of law tightly circumscribed by the declared commitments of the competing legal philosophies on the matter of whether law and morality are necessarily conceptually separable’.²⁷¹ In Rundle's view, the separability question has dictated the terms of the debate, which has played into the hands of positivists for whom this issue has more prominence than it does for Fuller, whose other philosophical insights have been sidelined as a result.

A further consequence of this, according to Rundle, is ‘the extent to which debates on the question of the separability thesis have focused on the example of the “wicked legal system” when mapping the territory that divides the respective philosophical camps’.²⁷² The positivist formal embrace of morally questionable regimes such as Nazi Germany means they have also been incorporated into a discourse dictated by the positivist standpoint, leading to ‘a lowest common denominator level of debate’.²⁷³ However, the debate in this regard is often of the lowest common denominator because it relies on a superficial (mis)representation of the Third Reich as a wicked legal system, not because, as Rundle appears to suggest, the Nazi legal system is overused within the discourse and exists at the margins of law and so is not the best case from which to explore the issues at play.²⁷⁴ It is not *per se* that there has been too much of Nazi Germany in the discourse, skewing it towards simplistic versions of how a wicked legal system impacts on key debates by virtue of its inherent wickedness. Rather it is that there has been too much of a preconceived misrepresentation of Nazi Germany at the foundation of the discourse, and not enough rigorous engagement with the law and history of National Socialism, which would invigorate the discourse with more complex accounts of so-called wicked legal systems. It might also move it beyond the strictures of positivism and natural law. It is also that such accounts undermine the debates themselves, built as they are on

²⁷⁰ Mertens, ‘Review Essay – Continuity or Discontinuity of Law?’ (n 121) 539.

²⁷¹ Kristen Rundle, ‘Law and Daily Life – Questions for Legal Philosophy from November 1938’ (2012) 3(2) *Jurisprudence* 429, 432.

²⁷² *ibid* 433.

²⁷³ *Ibid*.

²⁷⁴ Although Rundle's critique in this respect is slightly confused by her own approach to the issues, which involves a deeper historical and theoretical interrogation of the Nazi legal system. Rundle acknowledges the potential counter-intuitiveness of her approach and justifies it by her focus on anti-Jewish measures and the bearing of law on social agency. Indeed, it is in these respects a break from the previous scholarship; *ibid* 433.

fundamental misconceptions about the role and nature of law in the Nazi state.

The Hart-Fuller debate's profound legacy for jurisprudence is apparent in the connections between how Nazi law is treated in the debate and the prevailing representation of Nazi Germany today. It is ostensible in the way the key issues of the validity question and the separability question and the opposition of positivism and natural law have continued to permeate the discourse. And it is evident in the literature that, fifty years on, tackles the Hart-Fuller debate all over again and attempts to apply it to a number of different and new contexts. It is to this literature that this chapter now turns in order to demonstrate that even literature that specifically focuses on the Hart-Fuller debate does not have a great deal explicitly to say about Nazi Germany, and implicitly often reproduces its fundamental tenets.

IV. The Hart-Fuller Debate Up To Date: A Case Study of 50th Anniversary Literature

A General Themes in the 50th Anniversary Literature

The two collections discussed in this section come at the subject of the Hart-Fuller debate from slightly different angles and with slightly different aims. The colloquium that led to Peter Cane's book had the aim 'to identify themes that lay on or below the surface of the debate and to rethink them in light of social, political and intellectual developments in the past 50 years, and of changed ways of understanding law and other normative systems'.²⁷⁵ The *New York University Law Review* (NYULR) symposium meanwhile was more focused on the terms and context of the debate itself, looking further into its internal world. Between the two collections there are contributions intended to outline and enlighten the main issues at stake in the debate as they continue to be relevant, and to adapt the terms of the debate to the most pressing issues in jurisprudence today. The content of the Cane volume is much more commensurate with re-evaluating how Nazi law is understood in jurisprudential discourse both because some authors offer a critique of one or both of the debate's protagonist's treatment of the Third Reich and because others challenge the underlying theoretical assumptions of Hart and Fuller and, for example, often advance a more sociological form of jurisprudence, which might enable more investigation of how law actually functioned in Nazi Germany.

Cane's collection is characterised by attempts to explore the potential significance of one or other of Hart and Fuller's philosophies for a particular area left untouched in the original debate, or criticise or defend one or the

²⁷⁵ Cane, *The Hart-Fuller Debate* (n 91) v.

other's approach in the face of evidence from a different aspect of legal scholarship, or across disciplinary boundaries. To that extent its contributions are indicative of attempts to move beyond the limitations of strict jurisprudential discourse, the representation of the Nazi past in which was challenged in Chapter Two. They are more expansive, moving beyond the approach, issues and terms of analytical jurisprudence, and often offering a critique of these. By contrast the contributions in the NYULR symposium are more indicative of what happened in the debate itself; which of the original concerns are worthy of revisitation or reinterpretation, and how the role of Nazi Germany in the debate is now treated. While it offers a re-evaluation of the terms of the debate, it is largely on the debate's own terms that it does so, representing an internal critique more reflective for the most part of current jurisprudence and how it treats the Third Reich.

What we learn from these examples is that, while there are many insightful contributions that extend the Hart-Fuller debate in interesting ways that remain relevant to the Nazi experience, there are few attempts to explore further the specific implications of this for the Third Reich, or engage with the history of National Socialism more directly. In neither collection is the nature of Nazi law itself explicitly re-examined, even though on occasions Hart and Fuller's treatment of it is criticised. The part of the debate about Nazi Germany is virtually always treated, as it is in the debate and within jurisprudence, as an interesting and controversial backdrop and a source of examples. It is not considered a *theme* worth exploring in its own right. It touches on a whole range of other issues in its limited capacity, but is not *itself* considered worthy of re-examination on its own terms, even if some of the methodological/theoretical claims made in the Cane collection in particular would help to realise such a re-examination.

This highlights the minimal role played by Nazi Germany in the debate in the first place, especially for Hart. There is a sense that the substantive discussion often ends tied back up in the original issues, and an argument about which of Hart and Fuller's philosophical approaches is preferable and whether or not or to what extent the two theses are reconcilable. This reveals how the structure and terms of jurisprudential discourse remain fairly rigid from the debate itself, erecting barriers that are difficult to break down. The closest any author comes to putting Nazi Germany at the heart of their contribution is David Dyzenhaus in the NYULR collection.²⁷⁶ However, Dyzenhaus' piece is a revisitation of the 'grudge informer' case, not a reconsideration of Nazi law, and his analysis is very much of and within the parameters of jurisprudential discourse as it stands. He uses the historical case as little more than a

²⁷⁶ Dyzenhaus, 'The Grudge Informer Case Revisited' (n 224).

backdrop, a thing remembered for its quirkiness rather than for its substance, to look again at how positivism and natural law respond to the situation presented, but this does not involve a fundamental look at the issues at stake or the legal history of Nazi Germany.

Some of the limitations of the debate and its influence on the evolution of jurisprudence are identified, such as the failure of analytical positivism to dig deeper into the social and political context of the law. Kristen Rundle is correct to suggest that the tide has turned a little in recent years in terms of rejecting positivism and embracing less inclusive concepts of the validity of law, and this is evident in the ample endorsements and explorations of Fuller's philosophy in the collections discussed here. However, it is not clear that this will lead to anything other than greater isolation of the wicked legal system of Nazi Germany. A more normatively oriented and sociological approach to jurisprudence, as implied by many versions of natural law, may lend itself to further exploration of actual historical instances of legal systems. If, however, this is underpinned by preconceptions about the Nazi legal system and its isolation from historical research that reveals interesting insights, the Third Reich will continue to play an extremely marginal role in even a more naturalistically directed discourse. A large part of Rundle's concern about legal positivism and its influence is founded on the perception it is too *inclusive* a concept, because it provides such a minimal account of what counts as a legal system that almost all systems are included. Her evaluation of the Nazi legal system is underpinned by the claim that it is an example of why such systems ought not to be considered law, and so belong outside of how we construct the concept of law. However, subject as it is to the historiographical and philosophical criticisms outlined in Chapter Four, it shows that even a sociological approach directly concerned with the Third Reich can be led by philosophical commitments to overlook important historical characteristics of the Nazi legal system.²⁷⁷

Altogether, the NYULR symposium articles provide a conventional, jurisprudential evaluation of the Hart-Fuller debate, which illustrate and reproduce the understanding of Nazi Germany prevalent within jurisprudence generally today, as highlighted within Chapter Two. *The Hart-Fuller Debate in the Twenty-First Century*, provides more of a theoretically external critique of some of the arguments and issues from the debate, and operates at least on the borders of the constraints of jurisprudential discourse. While the two collections share some authors, Jeremy Waldron, Leslie Green and Nicola Lacey, and consequently some of the same themes and subjects come up, it is the chapters by other scholars in the Cane volume

²⁷⁷ See Section IV of Chapter Four for a critique of Rundle's argument

that offer the best critique of the debate's understanding of Nazi law and the most convincing theoretical approaches to taking jurisprudence beyond this, at least in terms of incorporating the Third Reich into its discourse.

B 'The Hart-Fuller Debate in the Twenty-First Century'

The contributions to this collection are important in the context of the current discussion in that they do often take the Hart-Fuller debate in new, interesting and relevant directions. They occasionally provide a convincing critique of the misconceptions of the jurisprudential representation of Nazi law, and of the limitations of positivism and natural law for understanding the concept of law in the context of these misrepresentations. However, they do not return to attempt to re-evaluate or re-theorise Nazi law in light of their findings, which is an important additional step to link the theoretical points made to the case of Nazi Germany. Instead it remains very peripheral and sometimes reverts to the role assigned to it in the Hart-Fuller debate and jurisprudence since, that of a source of uncontroversial examples and archetypal wicked legal system. As Nazi Germany is not often a substantive part of the analysis and there is little engagement with relevant historical research, some of the assumptions about its legal system are reproduced. The focus on the philosophical issues taken to be at the heart of the debate - rather than the marginal presence of Nazi law - sometimes results in an acceptance of the theoretical paradigms advanced by Hart and Fuller and what they entail for the Third Reich. In most cases, instead of exploring whether Nazi law complies with the role it is given, different theoretical approaches, which are often put forward and would create opportunities to explore Nazi law in a different way, stop short of returning to the historical experience that provoked the debate and working out the implications of these theories in that context.

The contributions are productive, therefore, inasmuch as they do react against the usual constraints and legacy of the Hart-Fuller debate and sometimes explicitly show how one or both of its competing paradigms do not properly tackle the Nazi legal system. This opportunity is provided by the external viewpoint of some of the contributors to jurisprudence. The collection is characterised chiefly by pairs of reflections on different subjects and aspects of law as they relate to the Hart-Fuller debate, but which were often not part of it.²⁷⁸ These include human rights law,²⁷⁹ international

²⁷⁸ Martin Krygier's contribution about transitional societies stands outside of this pattern, but has much in common with the preceding chapters on aspects of international law; Martin Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law' in Cane, *The Hart-Fuller Debate* (n 91).

criminal law,²⁸⁰ legal pluralism,²⁸¹ law as a means,²⁸² the commensurability of their competing discourses,²⁸³ the relationship between norms and normativity,²⁸⁴ and legal reasoning.²⁸⁵ Equally, the overall intention of the colloquium underpinning the collection was not:

To confine discussion to the jurisprudential issues canvassed by Hart and Fuller. Rather the plan was to identify themes that lay on or below the surface of the debate and to rethink them in light of social, political and intellectual developments in the past 50 years, and of changed ways of understanding law and other normative systems.²⁸⁶

Re-evaluating the debate in light of new developments, themes that were not part of it originally, and different conceptions of law situates *The Hart-Fuller Debate in the Twenty-First Century* at the outskirts of the body of jurisprudential literature that is the focus of this dissertation. Some of the contributions remain firmly within this discourse and some challenge it from an external perspective. However, the fact that the dominant academic legal understanding of Nazi Germany has not evolved hugely in the period since the debate, and often remains isolated from historical research, is reflected in a lack of attention to Nazi law and an intermittent reliance on some of the assumptions about it that persist in the debate and jurisprudence generally.

Those chapters that spend any time at all on the case of Nazi law do not represent the bulk of the contributions. Karen Knop's consideration of human rights, Martin Krygier's of transitional societies and Desmond Manderson's

²⁷⁹ Hilary Charlesworth, 'Human Rights and the Rule of Law After Conflict' in Cane, *The Hart-Fuller Debate* (n 91); and Karen Knop, 'The Hart-Fuller Debate's Silence on Human Rights' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸⁰ Larry May, 'International Criminal Law and the Inner Morality of Law' in Cane, *The Hart-Fuller Debate* (n 91); and Christopher Kutz, 'On Visibility and Secrecy in International Criminal Law' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸¹ Jeremy Waldron, 'Legal Pluralism and the Contrast Between Hart's Jurisprudence and Fuller's' in Cane, *The Hart-Fuller Debate* (n 91); and Margaret Davies, 'The Politics of Defining Law' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸² Leslie Green, 'Law as a Means' in Cane, *The Hart-Fuller Debate* (n 91); and Anthony Sebok, 'Comment on "Law as a Means"' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸³ Manderson, 'Two Turns of the Screw' (n 233) 197-216; and Ngaire Naffine, 'The Common Discourse of Hart and Fuller' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸⁴ Philip Pettit, 'How Norms Become Normative' in Cane, *The Hart-Fuller Debate* (n 91); and Richard H McAdams, 'Resentment, Excuse and Norms' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸⁵ Gerald J Postema, 'Positivism and the Separation of Realists from their Scepticism' in Cane, *The Hart-Fuller Debate* (n 91); and Brian H Bix, 'Legal Reasoning, the Rule of Law and Legal Theory' in Cane, *The Hart-Fuller Debate* (n 91).

²⁸⁶ Cane, *The Hart-Fuller Debate* (n 91) v.

discourse analysis are the main exceptions in this regard.²⁸⁷ Knop re-interprets the debate in terms of international human rights law as conflict between two different systems, law and morality. This is used as a lens through which to view conflicts between different legal systems, whether international and domestic, state and non-state or,²⁸⁸ where she returns to Nazi law, between the past and the present and systems that comply with Fuller's concept of legality and those that do not. Knop partly accesses Nazi law in this context through another case, *Oppenheimer v Cattermole*,²⁸⁹ where the question of whether to enforce a Nazi denationalisation law removing citizenship from German Jews was addressed by the UK courts in a tax context, but without really looking in detail at the legislation in question.²⁹⁰

Knop consequently does deal with some of the implications of Hart and Fuller's respective positions for the interpretation by other states and systems of Nazi law as valid or invalid, both contemporaneously and after the fact. This is an important historical and philosophical question and it adds substantially to the implications of Hart and particularly Fuller's concepts of law, which respectively treat Nazi law as law and non-law. However, Knop is in her analysis accepting the underlying perception of the Nazi legal system as, not just an evil system, but *evil law*, against which just law is opposed. Her approach therefore does not consider how Nazi law might be re-theorised or better understood historiographically as something more complex and difficult than this. Actual Nazi law is represented in Knop's piece variously as Radbruchian substantively unjust law, Fullerian non-legality, or Hartian law as a social fact. To this extent her perspective on Nazi law reproduces that of the debate itself even while its theoretical perspective supplies opportunities to adopt a different approach.

Krygier likewise makes connections to the Nazi backdrop of the debate and provides a good account of both Hart and Fuller's approach to Nazi law. He is also more critical, particularly of Hart's treatment of Nazi law, than Knop. His focus on the question of how to achieve the rule of law in transitional societies provides a subject link to the Nazi period and leads to an emphasis on the importance of understanding context and of balancing a one-size-fits-all approach to legal transitions with one that treats them as so unique it 'severs their moorings in institutional possibilities and limitations, and more

²⁸⁷ Respectively Knop, 'The Hart-Fuller Debate's Silence' (n 279); Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law' (n 278); and Manderson, 'Two Turns of the Screw' (n 233).

²⁸⁸ Knop, 'The Hart-Fuller Debate's Silence' (n 279) 73.

²⁸⁹ [1976] A.C. 249.

²⁹⁰ Knop, 'The Hart-Fuller Debate's Silence' (n 279) 70-72, 75.

broadly in the human condition and more general human purposes'.²⁹¹ The need to find the right point between these, or better still the right mode apart from these, resonates with the Third Reich, which is often treated as too unique for analysis but for which the temptation to address it through conventional jurisprudential means ought to be resisted as equally inappropriate. Some of this is evident in Krygier's comments on Hartian positivism:

Now one thing distinctive of Hart's approach is that he has almost nothing to say about the context in which the laws he discussed operated. He also says nothing about the *character* of Nazi laws, the way they were applied, or the specific characteristics and interrelations of the institutions applying them. He does not appear to think it necessary to examine the particular, peculiar, nature of the Nazi legal order or even the particular Nazi laws he discusses, other than to observe that the latter appear to have been formally legitimate, and they were nasty in content. Of a specific law that he does mention, he merely reports its stated aim ... It's not that what else went on is of no account to him morally, but that he thinks it counts for nothing *legally*, and he is talking about law. Nazis had laws, and they were immoral; not a happy story but a simple one.²⁹²

The observation that Hart is not interested in the context or operation of Nazi law, and places most substantively compelling issues outside of the realm of 'law' and therefore jurisprudence, is well made. Krygier recognises important 'issues of empirical and theoretical sociology, such as why so many obeyed Nazi law'.²⁹³ He is also aware of the enduring relevance of legal questions arising from states like the Third Reich and of the importance of 'questions about the "laws" of truly evil regimes, and about what adequate responses to such experiences might require. Those are not issues we have left behind us'.²⁹⁴

Krygier is much more willing to accept Fuller's approach, and appears reasonably satisfied with how he tackles the Nazi legal system. This leads to some replication, or at least lack of evaluation, of naturalistic assumptions about Nazi law. Krygier posits a large gap between functional and dysfunctional legal systems in a transitional context²⁹⁵ and uses communism as an example of how 'pre-transitional despotisms' instrumentalise law and violate its internal morality.²⁹⁶ However, it is problematic to view Nazi law as

²⁹¹ Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law' (n 278) 130.

²⁹² *ibid* 111.

²⁹³ *ibid* 125.

²⁹⁴ *ibid* 107.

²⁹⁵ *ibid* 122.

²⁹⁶ *ibid* 120.

purely an instrument in the way conceived of by natural law²⁹⁷ and it is no less problematic to underestimate the degree of continuity between the Nazi past and states with functional legal systems. Therefore, while Krygier wants Hart to look at the context and operation of Nazi law, he does not do so himself, or rather he trusts the analysis provided by Fuller despite its weaknesses. There is no re-theorisation of the Nazi legal system, even while there is a methodological approach that could result in such a re-evaluation. The only real critique of how Nazi law was treated in the Hart-Fuller debate based on a different understanding of the nature of the Third Reich is presented by Manderson. His main focus is on how the very discourses employed by Hart and Fuller are incommensurable, 'mutually contradictory, and equally necessary'.²⁹⁸

Manderson rejects an approach that attempts to endorse either Hart or Fuller's theoretical paradigm, instead asserting that both are wrong and yet both are right, that 'we need both positions to make sense of law, but it is impossible to acknowledge them both at once'.²⁹⁹ This applies to some extent to their representations of Nazi law, and Manderson criticises both in this regard. This critique was outlined in the previous section of this chapter and emphasised how Hart's approach ignores the issues and Fuller's simplifies them,³⁰⁰ which has resulted in a discourse at once polarised and irreconcilable: 'neither Hart nor Fuller is right. But neither can we mix a cocktail composed of bits of each of them. Instead the *antagonism* between them, and the anxiety that disagreement forges, captures the unique virtue of legal interpretation'.³⁰¹ Their perspectives are haunted by one another. Manderson is not clear about where his version of Nazi law comes from, as historical sources are not cited. His argument is nevertheless important for bringing a different understanding of Nazi law to the Hart-Fuller debate, questioning both Hart and Fuller's representations, as opposed to preferring one over the other, and suggesting that there is something in the discourse itself that causes problems.

These three contributions comprise the extent to which Nazi law plays something near a central role in Cane's collection, and they are not without their problems arising from the jurisprudential legacy of the Hart-Fuller debate. Apart from those authors who refer to Nazism more conventionally in the context, through a discussion of aspects of Hart and Fuller's own use of

²⁹⁷ See the discussion of the role of ideology in Nazi law in Section II of Chapter Five.

²⁹⁸ Manderson, 'Two Turns of the Screw' (n 233) 200.

²⁹⁹ *ibid* 200.

³⁰⁰ See fn 255 and 256.

³⁰¹ *ibid* 214.

the Third Reich, there is little attention on Nazi law *per se*. These chapters are willing enough to accept the *historical representation* of Nazi law offered by Hart and Fuller even if they disagree with the theory or theories it is used to support.³⁰² Sometimes a consequence of this is debates of a much more conventional jurisprudential nature that fit within the discursive paradigm and theoretical structures outlined in the previous chapter.³⁰³

The other way this collection is beneficial is in the critiques offered of the Hart-Fuller debate and the perspectives adopted aside from Nazi law, which might nevertheless offer opportunities for re-evaluating Nazism's role in jurisprudential discourse. The existence of these accounts in this volume shows the implicit influence the Hart-Fuller debate has had on other areas of law, even if now as an object for problematization. It is much harder to find in them the implicit influence of a revised understanding of the workings of Nazi law, even if the approaches and perspectives adopted are more commensurate with its nature than analytical jurisprudence. Ngaire Naffine's response to Manderson is the clearest case of highlighting concerns that are relevant to the treatment of Nazi law, with an approach amenable to exploring Nazi law, without really addressing that particular example.³⁰⁴ The forging of an ideal type of 'good' law and the opposition of archetypal wicked law to it, and the shared understanding of morality and the chasm it generates between Hart and Fuller on the one side and the historical experience of Nazi law on the other are indicative of this.³⁰⁵

Cane's collection is telling about the legacy of the Hart-Fuller debate and the current state of jurisprudential discourse in two ways, which are ostensibly in tension with one another. On the one hand it offers an external point of view on jurisprudence that highlights some of the problems with a tight focus on the philosophical paradigms of Hart and Fuller as well as with their treatment of Nazi law. Sometimes it ventures further down this path of critique than other times. On the other hand, it often accepts the representation of Nazi law from the Hart-Fuller debate even if it does not accept one or more of the theories then espoused, and it does not undertake a re-evaluation or re-theorisation of Nazi law. The prospect of doing so in a volume about the debate might appear far-fetched, but if we were to treat the Nazi legal

³⁰² For example, Sebok, 'Comment on "Law as a Means"' (n 282); Postema, 'Positivism and the Separation of Realists' (n 285).

³⁰³ The best example being Postema, 'Positivism and the Separation of Realists' (n 285) and Bix, 'Legal Reasoning' (n 285).

³⁰⁴ Naffine, 'The Common Discourse' (n 283).

³⁰⁵ Other similar opportunities are presented in different contexts in Pettit, 'How Norms Become Normative' (n 284) and McAdams, 'Resentment, Excuse and Norms' (n 284); and Margaret Davies, 'The Politics of Defining Law' (n 281).

system as *at issue* in the debate rather than as a backdrop, it would become something worth exploring in a re-examination of the theoretical paradigms involved.

C The NYULR Symposium

The articles that make up the NYULR symposium on the Hart-Fuller debate are much more typically 'jurisprudential' in their discursive structure and the issues they address, and largely contained within the internal perspective of the debate itself – rooted in the dialogue between positivism and natural law. They naturally contain criticisms of one or both of the theoretical paradigms advanced by Hart and Fuller and sometimes of the lack of sociological engagement in Hartian positivism. Indeed, with some exceptions, a slight shift is discernible away from positivism and more towards a Fullerian, natural law perspective. But they do not do so from the point of view of evaluating what Nazi law was really like and they stick closely to the issues at stake within the debate itself. Most of the contributions do not go near Nazi law as a genuine subject of inquiry, but rather assume its role as a backdrop was the extent of its importance, which renders it irrelevant for the issues that they discuss.

The internal jurisprudential perspective and positivism/naturalism partisanship is apparent in many of the contributions. Benjamin Zipursky devotes his article to defending the merits of what he refers to as Hart's 'practical positivism' against the 'practical perfectionism' of realists and natural law theorists.³⁰⁶ Frederick Schauer becomes involved with the minutiae of the 'vehicles in the park' aspect of the debate and demonstrates the extent to which it has been a major subject of jurisprudential analysis by citing a long list of articles dealing with the issue.³⁰⁷ Liam Murphy claims that 'perhaps the most important development in legal philosophy since Hart, Fuller, and Hans Kelsen has been the emergence of a number of sophisticated accounts of how a univocal answer to the conceptual dispute [about the concept of law] may be found'.³⁰⁸ This again exposes the extent to which jurisprudence has remained focused on the issues within the debate and the significance that continues to be assigned to them. Leslie Green defends Hart's approach, concluding that while 'Fuller is interested in the morality

³⁰⁶ Benjamin C. Zipursky, 'Practical Positivism versus Practical Perfectionism: The Hart-Fuller Debate at Fifty' (2008) 83(4) *New York University Law Review* 1170.

³⁰⁷ Frederick Schauer, 'A Critical Guide to Vehicles in the Park' (2008) 83(4) *New York University Law Review* 1109, 1111 and fn 10.

³⁰⁸ Liam Murphy, 'Better to See Law this Way' (2008) 83(4) *New York University Law Review* 1092.

that makes law possible; Hart is also interested in the *immorality* that *law* makes possible'.³⁰⁹ He goes on:

At a time when the rule of law is again under threat from official illegality and popular indifference, it is natural to be especially vigilant to Fuller's concerns. ... At the same time, however, this thought makes some wish for a more perfect and complete penetration of legality into political life. Hart reminds us to be careful what we wish for.³¹⁰

The desire within a symposium about the Hart-Fuller debate to re-examine the issues it generated, defend its jurisprudential importance and argue for one side over the other is understandable, but the almost complete absence of re-evaluation of the role of Nazism and what its implications for some of the issues involved illustrates the extent to which the jurisprudential and historiographical disciplinary silos remain isolated. Green describes the rule of law as 'again under threat from official legality and popular indifference', neither of which problems afflicted the rule of law in Nazi Germany. Popular fear, hostility to the rule of law and support for an alternative conception rather than indifference, and official ideology rather than legality, were much greater threats to the rule of law in the Third Reich. At the same time, returning to Hart or Fuller's understanding of the role of law in dysfunctional or immoral regimes does not account for the possibility that the regime on which they based their analysis used law in a radically different way from their understanding.

The criticisms of the debate tend to refer to one of a number of things. The mutual misunderstanding between the two sides is one. Another is the analytical bias of the debate.³¹¹ A third highlights misconceptions about Fuller's theory that have undermined its ability to challenge positivism more effectively. Dyzenhaus' claim that the development of the debate has been falsely based on the mistaken conflation of the possibility that laws can be used as an instrument of power with the idea that law can be explained as an instrument is an example of this.³¹² A fourth criticism, advanced by Jeremy Waldron, is that jurisprudence has become so embroiled in the key issues

³⁰⁹ Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83(4) *New York University Law Review* 1035, 1058.

³¹⁰ *ibid.*

³¹¹ Lacey, 'Philosophy, Political Morality' (n 268) 1062-1063.

³¹² Dyzenhaus contends that this confusion 'has had an unfortunate impact on philosophy of law, in particular on the way in which Fuller's challenge to legal positivism ... was almost wholly displaced by a debate between positivists and Dworkin about the best way to understand judicial interpretation of the law'; Dyzenhaus, 'The Grudge Informer Case Revisited' (n 224).

from the Hart-Fuller debate that it has lost its way.³¹³ All of these comments have valid arguments in their favour. Some, Waldron's or Lacey's for example, contain within them the potential to move outside of the current limitations of jurisprudence and adopt a different approach to Nazi law as part of this. None, however, attempt to do this and the most important thing appears to be to fetishize the debate itself and re-run some of its major points of disagreement.

Lacey says 'it is only through a dialogue – one between conceptual, philosophical analysis and socio-historical interpretation of the conditions of existence and the potential use of ideas – that a rounded understanding of the rule of law's potential, and limits, can be approached'. The Hart-Fuller debate, she argues, invites such a dialogue, and speaks to two questions in doing so: 'of how far, and under what circumstances, law can be invoked to constrain political power and of how far we can expect it to be a force for good, or evil, in our complicated social world'.³¹⁴ The legacy of the debate in jurisprudential discourse today, however, has not after more than 50 years been a blending of these different approaches or witnessed an attempt to tackle these questions based on such a methodology. It is true that the juxtaposition of postwar jurisprudence and the recent historical experience of law in Nazi Germany ought to have presented an opportunity to tackle some very interesting questions in light of a complex and difficult historical case. But this did not come to fruition in quite that way, and this symposium collection does not do a huge amount to break away from the discursive shackles that have contained jurisprudence for the last half a century.

V. Conclusion

This chapter explored two key points in completing the portion of this dissertation focused on understanding and elucidating the representation of Nazi Germany within jurisprudence. The first was the analysis of the issues at stake in the Hart-Fuller debate and its treatment of Nazi Germany. The second was to connect the debate to contemporary jurisprudence including by evaluating the fiftieth anniversary collections to establish the debate's explicit legacy at this time. Both Hart and Fuller's representation of Nazi law can be challenged, particularly in terms of how that law was used to inform their competing theoretical paradigms. They manifested some of the characteristics that prevail within jurisprudence and entrenched the structure

³¹³ Waldron concludes that 'jurisprudence—particularly positivist jurisprudence but, perhaps, the jurisprudence of its opponents too – is disfigured and diminished by an obsession with the separability thesis'; Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83(4) *New York University Law Review* 1168.

³¹⁴ Lacey, 'Philosophy, Political Morality' (n 268) 1087.

and issues of the debate within the discourse. The fiftieth anniversary literature presented two different ways of re-evaluating the debate, one sometimes involving an external critique of jurisprudence and the other very much in the internal life-world of the debate. However, neither saw fit on the whole to place Nazi law at the heart of the issues or re-evaluate our understanding of it in detail, despite some arguments tending in that direction. Both, especially the NYULR symposium exhibited some of the same tendencies at play within the debate and jurisprudence generally.

The implication for my wider thesis is that the jurisprudential understanding of Nazi Germany has been fixed for a long time, and the issues it is used to contribute to are narrowly defined and pre-determined, as a consequence of the legacy of the Hart-Fuller debate. The remaining chapters will be used to challenge the jurisprudential representation using recent historical scholarship. This is to understand how the historical case of Nazi Germany impacts on the paradigmatic jurisprudential theories: positivism and natural law. Having established that the jurisprudential representation of the Third Reich is based largely on outdated misconceptions, which have been embedded in the discourse since the postwar period, this is important for trying to understand how exactly jurisprudential theories are impacted by Nazi law and considering in which direction jurisprudential discourse ought to head in order to make good use of Nazi Germany as an historical experience of law. This begins in the next chapter with a discussion of the approaches offered by two historically-oriented legal theorists, David Fraser and Kristen Rundle.

Chapter Four: Reimagining the ‘Law’/‘Non-Law’ Dichotomy through Holocaust Historiography: ‘the Holocaust does not present, theoretically, problems of representation different from any other historical event’³¹⁵

I. Introduction

A Reorienting Jurisprudence towards Nazi Germany

The problems with the jurisprudential representation³¹⁶ of Nazi Germany³¹⁷ and particularly its legal system outlined in the previous two chapters highlight a need to redirect the debate within jurisprudence. It is important to investigate what the historical Nazi law actually means for jurisprudence, to encourage it to at least accept the relevance of the Third Reich to key jurisprudential questions and take full account of the implications of Nazi law for jurisprudence as it is applied to the Nazi past. The observations made open up the possibility of a new relationship between jurisprudence and Nazi Germany, which would benefit our understanding of how Nazi law worked and its status as a manifestation of the theoretical concept of law. This chapter will attempt to do this by evaluating two different legal theoretical approaches to reorienting jurisprudence towards Nazi history in the context of an example of historical theoretical scholarship. It will do this by reimagining the dichotomy between necessarily seeing Nazi Germany as a state of either ‘law’ or ‘non-law’ that is fostered and reproduced by the structure of jurisprudential discourse. This attempt is made problematic by the fact that Nazi Germany is ingrained in a certain role in jurisprudence, dictated by an abstract, unhistorical methodology and the requirements of the twin pillars of positivism and natural law, and informed by an underlying narrative of rupture. It is difficult to reconstruct this role from inside the discourse given the extent to which some of its tenets and theoretical positions are dependent on a particular understanding of the Third Reich.

David Fraser and Kristen Rundle each critique the direction of jurisprudential discourse and the legacy of the Hart-Fuller debate, but in quite different ways and adopting very different approaches to overcoming the issues they raise. Both would agree that Nazism can play a more prominent role in jurisprudential discourse than it currently does, and have sought to shift its attention back to the Third Reich. Both authors have challenged the circumscribed scope of the discourse in the wake of the Hart-Fuller debate.

³¹⁵ Dan Stone, *Constructing the Holocaust: A Study in Historiography* (Valentine Mitchell, 2001) 230.

³¹⁶ The definition of jurisprudence I use throughout this Dissertation is described in detail in Chapter One.

³¹⁷ My use of the term ‘Nazi past’ and other terms referring to the history of Nazi Germany and its legal system are explained in Section II of Chapter One.

They are each rightly sceptical about the implications of jurisprudence's general embrace of Hartian positivism, its narrow focus on the polarisation of the dialogue between positivism and natural law, and its failure to continue to engage with the paradigmatic example that initially caught the attention of Hart and Fuller, that of Nazi Germany. However, the way they each address these shortcomings is philosophically and methodologically very different. I will argue that these distinctions are fundamental and, when considered in light of the historical writing of Dan Stone, Rundle's position becomes historically and philosophically unsupportable while Fraser's more radical, critical perspective is reinforced. While Rundle's approach aims to rebalance jurisprudential discourse away from analytical positivism and reorient it towards natural law,³¹⁸ using Nazi Germany to do so,³¹⁹ I will argue that only Fraser's deeper challenge to the structure and nature of the discourse itself is sufficient to overcome the difficulties identified in the preceding chapters and enable jurisprudence to really take account of the Nazi past.³²⁰

In this chapter I will undertake a close analysis of some of the arguments of Stone, Fraser and Rundle and critique the latter two in light of the former. Through an exploration of the differences between the outputs of Fraser and Rundle I will consider how and why their approaches are so contrasting and demonstrate that the role of law in the Holocaust can be used to challenge the jurisprudential approach to the concept of law. Jurisprudence and historical theory are both faced with tensions in terms of the relevance of the Holocaust for their disciplines. Historiography continues to employ an empiricist/realist paradigm to reconstruct the Nazi past even while some of

³¹⁸ See Rundle's recent book, Kristen Rundle, *Forms liberate: Reclaiming the jurisprudence of Lon L. Fuller* (Hart Publishing, 2012); and also Kristen Rundle, 'Form and Agency in Raz's Legal Positivism' (2013) 32(6) *Law & Philosophy* 767.

³¹⁹ In this Chapter I will primarily discuss the following works of Rundle: Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59(1) *University of Toronto Law Journal* 65; and Rundle, 'Law and Daily Life' (n 271). I will also refer to her review essay of Fraser, *Law After Auschwitz* (n 23); Rundle, 'Review of Law After Auschwitz: Towards a Jurisprudence of the Holocaust by David Fraser (2005)' (2006) 28 *Sydney Law Review* 197.

³²⁰ Among those books and articles of Fraser's considered here are: *The Jews of the Channel Islands* (n 80); *The Fragility of Law* (n 80); *Daviborshch's Cart* (n 80); *Law After Auschwitz* (n 23); 'National Constitutions, Liberal State, Fascist State and the Holocaust in Belgium and Bulgaria' (2005) 6 *German Law Journal* 291; 'Shadows of Law' (n 26); 'South African Cricketers, Nazi Judges, and Other Thoughts on (Not) Playing the Game' (2000) 38 *Osgoode Hall Law Journal* 564; 'Evil Law, Evil Lawyers?' (n 26); 'Law's "Jewish Question"?: The Holocaust and Critical Theory' (2009) 72(5) *MLR* 844; and 'Book Review: *An Unfortunate Coincidence: Jews, Jewishness, and English Law* by Didi Herman' (2011) 38(3) *Journal of Law and Society* 449.

its underlying tenets have been rendered problematic by the Holocaust.³²¹ Equally, the positivism/naturalism dichotomy continues to hold sway in jurisprudence even while the history of Nazi Germany, whose laws Hartian positivism strictly validates, is treated as substantively irrelevant and infused with a narrative of rupture, and problematizes both paradigms.³²² The approach and perspective of Stone to historical theory is refreshing and relevant because our prevailing conception of law is as much part of the modern state as our prevailing conception of history, and it is as much undermined by the experience of Nazi Germany. The nod to the significance of the Holocaust within empiricist/realist historical scholarship finds its equivalent in the superficial integration represented by the jurisprudential treatment of the Nazi past. The argument that Nazi law is positive law, notwithstanding its sometime immoral content, appears to recognise some level of continuity with other forms of positive law. But jurisprudence does not delve beneath this superficial acknowledgement to reveal the deeper connections, or interrogate what these might mean for the underlying concept of law this argument manifests. This was not part of the projects of Hart and Fuller, who were addressing specific questions about the validity of immoral laws, but this approach has been reproduced consistently within the discourse in recent decades and represents an important concern for legal theorists engaging with Nazi Germany now.

B Selection of Sources and Chapter Methodology

I have chosen to explore the arguments presented by Fraser and Rundle specifically for a number of reasons. Firstly, they are two of the very few

³²¹ The term 'empiricist/realist' is used here as a broad signifier of conventional historiographical claims. Taken too literally, it overestimates the extent to which practising historians cling to a traditional Rankean philosophy of history, according to which the past itself is essentially replicated in the form of historical narrative. Nevertheless, the acknowledgement of theoretical problems with historical methodology and narrative only goes so far among most historians. As John Tosh puts it, historians 'know that the sources do not "speak" directly, that facts are selected, not given, that historical explanation depends on the application of hindsight, and that every historical account is in some sense moulded by the aesthetic and political preferences of the writer. Their defence rests on the contention that, while *in theory* these features may invalidate historical work, *in practice* they can be – and are – confined to manageable proportions', John Tosh, *The Pursuit of History: Aims, Methods and New Directions in the Study of Modern History* (3rd edn, Longman, 2000) 132. The claims of historical theorists such as Dan Stone about the impact of theoretical problems highlighted by the Holocaust on conventional philosophy also go further than those (at least in theory) broadly agreed aspects mentioned by Tosh.

³²² 'The idea of Nazi law as "not law" resonates not just at the core of the Hart-Fuller debate, but also with much common and jurisprudential understanding of the state of play which existed in German legal circles between 1933 and 1945', Fraser, "'This is Not like Any other Legal Question'" (n 35) 60.

scholars writing now in the Anglo-American legal academy who are concerned with the theoretical implications of Nazi Germany. Secondly, they both engage with jurisprudential discourse and are interested in reshaping it in a way that better accounts for the Third Reich, which they consider to be jurisprudentially relevant. Thirdly, they are interested in the role of law in the Holocaust specifically. This is relevant because it is the horror of the Final Solution that often gives the impression that the Third Reich represented a rupture from law and history. It is also an important consideration for the law/non-law dichotomy because, for example, it is common to treat it as a manifestation of Fraenkel's prerogative state,³²³ ultimately extra-legal in its implementation – distinct from the normative state. Whereas Rundle's interpretation supports this model, Fraser's challenges it. Finally, they tackle similar issues from very different perspectives. I characterise Rundle as working within jurisprudence as she seeks to use Nazi law to defend a version of natural law against positivism, and constructs a theoretical understanding of Nazi law from this. By contrast Fraser critiques jurisprudence from the outside and directed by Nazi history, with the claim that both natural law and positivism in their current form are unable to meet the challenge of conceptualising Nazi law. The similarities between the two scholars, which mean they are perhaps the only examples available for examination on this issue, highlight the differences, which enable the evaluation of two fundamentally different philosophical approaches to making Nazi Germany relevant for jurisprudential discourse.

To provide a framework for my deconstruction of the claims of Fraser and Rundle, I will utilise some of the arguments of historian and theorist Dan Stone.³²⁴ I referred to historical problems with the jurisprudential treatment of Nazi Germany in the previous two chapters. In this chapter I will specifically address Stone's historiographical approach to the Holocaust as a phenomenon of the Nazi regime, which has both empirical and philosophical implications for how jurisprudence might begin to take notice of the 'real' as opposed to hypothetical version of Nazism that currently feeds into the

³²³ Fraenkel, *The Dual State* (n 13).

³²⁴ See, inter alia, of Dan Stone's books, articles and edited volumes on these topics: *Constructing the Holocaust: A Study in Historiography* (Vallentine Mitchell, 2001); *The Holocaust and Historical Methodology* (Berghahn Books, 2012); *Histories of the Holocaust* (OUP, 2010); 'Beyond the "Auschwitz Syndrome": Holocaust Historiography after the Cold War' (2010) 44(5) *Patterns of Prejudice* 454; *The Historiography of Genocide* (Palgrave Macmillan, 2008); *History, Memory and Mass Atrocity: Essays on the Holocaust and Genocide* (Vallentine Mitchell, 2006); 'Genocide as Transgression' (2004) 7 *European Journal of Social Theory* 45; *The Historiography of the Holocaust* (Palgrave Macmillan, 2004); 'The Historiography of Genocide: Beyond "Uniqueness" and Ethnic Competition' (2004) 8 *Rethinking History* 127; and *Theoretical Interpretations of the Holocaust* (Rodopi, 2001).

discourse. I will use aspects of Stone's historically-informed theoretical argument that the Holocaust represents both an ordinary historical event, essentially like any other, and a challenge to the prevailing philosophies underlying historical theory. I will show how Stone uses the Holocaust to critique both the dominant paradigm of historical writing and the philosophical debates that have taken place within the discipline over the past couple of decades. I will suggest that this understanding of the philosophical, disciplinary implications of the Holocaust has certain significant parallels within jurisprudence, which are realised in David Fraser's writing but largely overlooked by Kristen Rundle. I use Stone in this chapter because of the parallels between his writing and the possibility of using Nazi Germany to re-evaluate jurisprudential discourse. The depth of his historical understanding of the Third Reich, his focus on the Holocaust, and his use of history to address theoretical questions within historiography are relevant for the jurisprudential treatment of Nazism and provide an opportunity to bring history into the law on a philosophical as well as empirical level.

While making connections between these scholars across different disciplines in this chapter, I am not making the claim, and do not have the scope to do so here, that historical research in this area can always be directly translated into legal scholarship about the Nazi past. Nor do I argue that the theoretical discourse in the two disciplines is necessarily interdependent, or that law and history are the same in terms of their association with Nazi Germany or the Holocaust.³²⁵ My claim is narrower than that, and more specifically significant for a jurisprudence of the Holocaust. I argue instead that there is a relationship between legal and historical theory in terms of their engagement with the Holocaust. This relationship is apparent in themes evident within the writing of leading scholars working in this area within history and law. Some similarities in the role of the Holocaust within historical theory and jurisprudence, and particularly its philosophical implications for important theoretical tenets therein, can be elucidated from these themes.

This chapter focuses mainly on the Holocaust as an aspect of the Nazi period of history and, when addressing law, the role of law in the Holocaust. This is largely because the scholars examined here have been primarily engaged

³²⁵ The inter-disciplinary relationship between law and history generally has been addressed elsewhere. See, for example, Melanie Williams, 'Socio-Legal Studies and the Humanities – Law, Interdisciplinarity and Integrity' (2009) 5(3) *International Journal of Law in Context* 243; Asher Maoz, 'Law and History – A Need for Demarcation' (2000) 18(3) *Law and History Review* 619. While I consider there to be a case for exploring further the similarities in respect of how law and history operate with regard to the Nazi past, this is a different concern to the one I am addressing here. Cf Costas Douzinas, 'History Trials: Can Law Decide History?' (2012) 8 *Annual Review of Law and Social Science* 273.

with the Holocaust, which is seen to present the most extreme point of rupture in the Nazi state, and is consequently considered the best subject for the examination of the use of law for wicked ends. However, as I have argued elsewhere,³²⁶ and the historical research carried out by Stone and Fraser indicates, it is rarely possible to separate the Holocaust from the wider Nazi state, and it is not desirable to do so if we are to understand how law operated in this context.

It is important to note that Stone's theoretical approach and rejection of the conventions of empiricism/realism in historiography tend towards postmodernism in their inclination and as such are not uncontroversial. However, he treads the line between radical postmodernism and orthodox empiricism and is keen to demystify and challenge the myths associated with both sides. Nevertheless, history for Stone is a creative and constructive rather than strictly representative process. In the context of this dissertation, while the association of the more traditionally empirical historical research used in Chapter Five with Stone's theoretical approach is not always unproblematic, Stone accepts the veracity of the basic building blocks of the past, even if these can be interpreted in a number of ways, and acknowledges the benefits of recent historical research into Nazi Germany, especially as this field within the discipline embraces theory and moves gradually away from traditional narrative accounts.³²⁷

II. Dan Stone's Holocaust Historiography: 'it makes us aware of general problems of representation that are normally passed by with ease'

A Introduction to Stone's Approach

Stone's historical theoretical insights are founded on his understanding of the history of the Holocaust.³²⁸ He highlights the complicity of western civilisation in the Nazi genocide, and thus of the historical discipline itself, as it shares many of the same modern tenets called into question by those events. He sees the ongoing cultural and philosophical significance of the Holocaust as collapsing the hitherto sacrosanct, historiographically constructed divide

³²⁶ See my brief discussion of the relationship between the Holocaust and the wider Nazi state, both in legal and historical terms, in Section II of Chapter One.

³²⁷ On Stone's approach to history see Stone, *Constructing the Holocaust* (n 324). For a more radical postmodern understanding of historiography see, for example, Keith Jenkins, *Rethinking History* (Routledge, 1991). For an example of historical writing about Nazi Germany moving towards a more theoretical informed and less empiricist approach, see Saul Friedlander, *Nazi Germany and the Jews, Volume 1: The Years of Persecution, 1933-1939* (HarperCollins, 1997); and *Nazi Germany and the Jews, Volume 2: The Years of Extermination, 1939-1945* (HarperCollins, 2007)

³²⁸ Stone has written extensively on both the history and historical theory of the Holocaust. See the selection of texts in fn 324.

between the past and the present. He argues that the dominant historical narratives and metanarratives are unable to account for or adequately represent the Holocaust in its full trauma and complexity. Most importantly, these claims do not only hold true for the Holocaust, but for other historical events too. In this respect, the Holocaust is a history like any other. Historians, therefore, should not view the Holocaust as problematic to the extent that it does not fit well with the dominant philosophy of history, but should begin to view the dominant philosophy of history as itself problematic. This historical and philosophical approach, which acknowledges the essential normality of the Nazi state, is led by a historical understanding of the period, and recognises the relationship between the 'then' and the 'now', has implications for jurisprudence. It challenges the exclusion of Nazi law from relevance and the failure to explore it in detail. It undermines the implicit narrative of discontinuity that informs the jurisprudential representation of Nazi Germany, and consequently requires the discourse to be reimagined if it is going to incorporate the Third Reich into its understanding of the concept of law. By analogy, it is not Nazi law that is the problem but the discursive structures used by jurisprudence to interpret it.

Stone situates the Holocaust as a critical event for the modern state and a challenge to the dominant empiricist/realist philosophy of history, which continues to assert a relationship of direct correspondence between orthodox historical accounts and the past they narrate.³²⁹ In his scholarship he addresses the implications of the Holocaust for how history is written, how the Nazi past is represented, and how historical knowledge is constructed from the fragments of the past. His discussion of the historical representation of Nazism includes two issues particularly relevant for this thesis, the narrative content of historical writing and the epistemological foundations of historical knowledge (the extent and nature of its truth claims). Stone's challenge to historiography is not just presented by the Holocaust, but is a problem at the heart of the inherent impossibility of historical representation. It is indicative of a general flaw in the paradigmatic understanding of the relationship between historical writing and the past, which is best exposed by reference to the Holocaust, but is by no means exclusive to it. The Holocaust merely 'makes us aware of general problems of representation that are normally passed by with ease when dealing with less traumatic or more ancient historical occurrences'.³³⁰ From this foundation of understanding Stone challenges the ability of an otherwise extremely fertile field of historical research to come to terms with its subject, and deconstructs

³²⁹ See fn 321 above.

³³⁰ Stone, *Constructing the Holocaust* (n 324) 27.

the polarised debate within the philosophy of history between those who use the Holocaust to uphold the empirical/realist historical method and those who employ it to challenge this, often from a postmodern perspective.³³¹

This approach is relevant to the way in which jurisprudence engages with Nazi Germany. He is immersed in both the historical and philosophical debates about Nazi Germany, and takes his lead from insights about the Holocaust to understand its impact on historical writing. This combination of historical understanding and philosophical approach has parallels for exploring the relationship between legal theory and the Holocaust. Taken together, it reveals the critical power of the Holocaust to provoke a re-evaluation of mainstream jurisprudential discourse and the dominant philosophical paradigms of the concept of law informing it. More simply, it both highlights the extent to which the Nazi state is within the scope of what may normally be considered 'law' and at the same time broadens the theoretical questions that can be asked about the Third Reich beyond the issue of whether or not its laws were valid.

Stone uses the Holocaust to question the ability of the debate between empiricist/realist and postmodern historians,³³² particularly at its peak of engagement of historical theoretical discourse with the Nazi period in the 1990s and early 2000s,³³³ to get to the heart of the philosophical challenges

³³¹ On the debate between postmodernism and empiricism/realism, see for example Ernst Breisach, *On the Future of History: The Postmodernist Challenge and Its Aftermath* (University of Chicago Press, 2003).

³³² Dan Stone, 'Introduction: The Holocaust and Historical Methodology' in Dan Stone (ed), *The Holocaust and Historical Methodology* (n 324). The high point of influence of postmodernism in the historical discipline was through the 1990s and early 2000s when a number of texts on the subject were produced and briefly grappled with by conventional historians, often in the context of the Holocaust. This period also produced a plethora of volumes about the nature and philosophy of history written from a range of perspectives. See, as a small selection, Ludmilla Jordanova, *History in Practice* (Arnold, 2000); Alun Munslow, *Deconstructing History* (Routledge, 1997); Alun Munslow, *The New History* (Pearson, 2003); C. Behan McCullough, *The Truth of History* (Routledge, 1998); C. Behan McCullagh, *The Logic of History: Putting Postmodernism in Perspective* (Routledge, 2004); Mary Fulbrook, *Historical Theory* (Routledge, 2002); Tosh, *The Pursuit of History* (n 321); Joyce Appleby, Lynn Hunt and Margaret Jacobs, *Telling the Truth About History* (W.W. Norton & Co., 1994); Richard Evans, *In Defence of History* (Granta, 1997); Saul Friedlander, *Probing the Limits of Representation* (Harvard University Press, 1992); Eric Hobsbawm, *On History* (Weidenfeld and Nicolson, 1997); Arthur Marwick, *The New Nature of History: Knowledge, Evidence, Language* (Palgrave, 2001); and Jenkins, *Rethinking History* (n 327).

³³³ As Stone points out, 'if there is a continued interest in the work of [Hayden] White, [Dominick] LaCapra, [Frank] Ankersmit, et al. amongst philosophers of history, this is not true of historians at large. And among Holocaust historians a feeling seems to prevail that turning one's attention to theoretical matters is a distraction from the "real" work of writing history', Dan Stone, 'Introduction' (n 332) 12.

presented by the Nazi past for historical writing. The very things about the Holocaust that are taken by many to be signs of its extreme and exceptional nature, and a safeguard for the historical method, are referred to by Stone as indicative of the deficiencies inherent in modern historiography, which prevents its adequate representation of such events. In the case of legal scholarship, the circumscribed scope of the jurisprudential dialogue between natural law and positivism and the specific and limited role it assigns to Nazi law, restrict its potential for further engagement with the Holocaust as a lawful phenomenon. As in historiography, some of the same aspects of the Third Reich that ostensibly situate it outside of 'law' provide avenues to further reflection on its implications for legal theory.³³⁴ It is therefore the potential presence of rupture – its status as a limit case - that provides the greatest opportunity for insight into the continuities and normalities within different manifestations of the concept of law.

B The Historical Holocaust

The key to Stone's relevance to jurisprudential engagement with the Nazi past lies in his use of the empirical history of the Holocaust to critique its treatment within academic discourse on a theoretical level. The historiographical dominance of the empiricist/realist paradigm carried the consequence that, to the extent that it was seen to be incomprehensible, 'it was the Holocaust that was felt to be problematical, not the concept of history'.³³⁵ The obvious difficulties with attempts to narrate the Holocaust comprehensively, represent adequately the experience of the victims, or incorporate the Third Reich into a meta-narrative of historical progress resulted in a sense that it was the Holocaust that did not fit in with 'normal' historical development and conventions. As Stone shows, the Holocaust is in reality part of 'normal' history, and it is logically necessary to address the implications of this for historical writing. This is the remaining route once the Holocaust is acknowledged as no longer an aberration, but not capable of being historicised, i.e. subsumed within pre-existing historiographical conventions. The characterisation of the Holocaust as both an ordinary historical event like any other, and a phenomenon acutely able to highlight challenges for historical theory generally, permeates Stone's writing on the subject and underlies his analysis of historical theory. According to this view, the merging of the past and the present is so apparent in the case of the

³³⁴ The connections between historical and legal theory in these regards are discussed further in the following section, where Fraser's writing is linked more explicitly with the aspects of Stone's scholarship discussed here, and contrasted with Rundle's. The claims in relation to mainstream jurisprudential discourse are fully fleshed out in Chapters Two and Three above.

³³⁵ Stone, 'Introduction' (n 332) 41.

Holocaust that the illusion of a distinction between 'history' (the past) and contemporary society is exposed. He emphasises the ordinariness of the historical agents who were involved in the genocide programme,³³⁶ and claims that 'the Holocaust does not present, theoretically, problems of representation different from any other historical event. But in this case the question is more pertinent, for cultural, moral and for philosophical reasons'.³³⁷

This interpretation of the Holocaust challenges empiricist/realist narratives on a philosophical level, on the basis that otherwise compelling historical accounts often fail to address the fundamental problem of historical representation it reveals. The application of the orthodox model of historical writing to the Holocaust 'gives rise to the paradox whereby the set of events that challenge basic assumptions about the modern state are approached with those same assumptions'.³³⁸ Those engaged in this practice '...cannot admit that its subject will not conform to notions of time (linear, progressive) or history (finished, complete, "over")'.³³⁹ Again, the problem is seen to lie with the Holocaust itself, or is ignored altogether, rather than persisting in the inherent impossibility of representation as it is conceived within this paradigm.³⁴⁰ While the Holocaust is fundamentally unexceptional in terms of the challenges it poses for historical representation, its heightened cultural and moral significance, apparent in its continuing resonances in western societies over 50 years after the event, exposes those challenges more starkly than other historical periods, and demands that they be addressed. The realisation that the Holocaust is a history like any other *and* an event that makes us rethink how history is written confronts a contradictory discourse within the historical academy that employs its limit nature in the service of arguments in favour of both conventional and postmodern philosophical positions. Meanwhile, historians write the history of the Holocaust using traditional historical method in increasing detail and complexity, which further exposes its 'ordinary' nature and the chasm that exists between

³³⁶ *ibid* 27.

³³⁷ Stone, *Constructing the Holocaust* (n 324) 230.

³³⁸ *Ibid* 1.

³³⁹ *ibid* 1-2. Likewise for other historiographical approaches to Nazism. Modernity studies, such as those of Detlev Peukert, Zygmunt Bauman, and Götz Aly and Susanne Heim, for example '...are founded on the very rationalism which they proceed to indict'. Similarly, 'narrative theory helps us to understand developments in the historiography of the Holocaust. But the Holocaust questions the representation of historical reality produced by a philosophy of history that is bound to conventional narrative structures' (230).

³⁴⁰ *ibid* 30.

narrative reconstruction and historical experience.³⁴¹ This situation is paralleled within jurisprudential discourse where the Nazi past is treated as a case of positive law *and* an aberration, outside of the scope of 'law'. The dominant positivist current within jurisprudence purports to claim Nazi 'law' as law, but is structured around such a restricted set of issues that it is entirely unequipped to address the theoretical implications of the complicity of law in the Holocaust.³⁴²

Stone uses the Holocaust to critique the contradictions within and the poverty of much of the historical theoretical discourse. Notwithstanding the perceived impact of postmodernism on the discipline, empirical historical research into Nazi Germany has rumbled on regardless of post-Holocaust, historical philosophical debate.³⁴³ To a large extent this is a symptom of the way the debate itself was conducted, and Stone addresses the nature of the discourse in his critique, emphasising its polarisation into entrenched opposing theoretical camps, each using the Holocaust as an ultimate, unassailable defence of their position. This caused the debate to stagnate, presented an obstacle to extensive engagement across philosophical frontiers, and distorted and simplified the significance of the Holocaust for the issues involved. This distortion was exemplified in how 'both those who favored postmodern approaches and those who saw the need to "defend" history used the Holocaust as a kind of "trump card."'.³⁴⁴ The entrenchment of the rear-guard action came as 'the "noble dream" of "writing up" the past *wie es eigentlich gewesen ist* [how it really was] began to recede from historians' realm of expectations. Historians started to resort to "defenses" in order, as they saw it, to "save" history as a discipline from the onslaught of irresponsible relativists'.³⁴⁵

Other historical theorists have also seen this as a reactionary response to the challenges and claims of postmodernism, observing that historians 'have

³⁴¹ 'Holocaust historiography, for all its breadth and sophistication, remains dominated by a more or less positivist—that is to say, untheorized empiricist—historical method', Dan Stone, 'Introduction' (n 332) 2. See also the discussion of recent historical research into Nazi Concentration Camp in Chapter Five below for analysis of the ways in which what this scholarship reveals about the history of the Third Reich undermines the empiricist/realist philosophical paradigm while contributing to the body of scholarship informed by it.

³⁴² See the discussion of the state of the current jurisprudential discourse as a descendant of the Hart-Fuller debate in chapters Two and Three.

³⁴³ Witness the huge body of recent historical writing about all aspects of Nazi Germany, much of which continues to be presented in traditional narrative forms, using an implied empiricist/realist epistemology. Although cf. Friedlander, *Nazi Germany and the Jews, Volume 1* (n 327); Friedlander, *Nazi Germany and the Jews, Volume 2* (n 327).

³⁴⁴ Dan Stone, 'Introduction' (n 332) 10.

³⁴⁵ *ibid* 6.

simply not welcomed the idea that they should analyze and appreciate their work from the vantage point of the linguistic turn and relinquish their claims to historical realism'. They have been 'unable to counter the relativist charge of [Hayden] White and others by presenting a compelling account of what they actually do when they write history'.³⁴⁶ Carolyn Dean has urged that '...historians and others must come to terms with the displaced effects of their own theoretical limitations', and 'historians should seek to confront the traumatic nature of genocide in a more theoretically engaged fashion'.³⁴⁷ As Robert Braun puts it '...historiography which looks at past reality as a substance to be epistemologically revealed has to be given up'.³⁴⁸ Crucially, however, 'this in no way invalidates basic empirical or archival work'.³⁴⁹ In fact 'any statement of the historian's may be empirically verified. The facts, however, are not given, but have to be "constructed" through the process of writing history – which is not incompatible with rigorous reliance upon the evidence'.³⁵⁰ This is no more than an acknowledgement that '...the meanings we give to the past ... are forged through the creative act of writing history'.³⁵¹

C Re-evaluating Historiography After the Holocaust

For Stone, then, the Holocaust is not problematical in the ways previously thought, due to its essentially ordinary nature. The dominant concept of historical theory is problematical because of the flawed potential for events such as the Holocaust to be constructed within existing, paradigmatic modes of representation. He acknowledges the developments in historical scholarship in the last twenty years, in that it has moved away from a historiography of rupture to one that integrates the Nazi past into the past more generally. However, this is only the first stage towards understanding the Holocaust as an historical event and creating disciplinary tools that enable us to interrogate and integrate it properly:

The thrust of scholarly historical work of the 1990s has been away from the postwar conception of the Holocaust as aberration ... to emphasize instead the continuities between German society before and after the Nazi period, as well as the more general implications of the Holocaust for modernity and vice versa. Vital though these works are ... they do not

³⁴⁶ Wulf Kansteiner 'Success, Truth, and Modernism in Holocaust Historiography: Reading Saul Friedländer Thirty-Five Years after the Publication of *Metahistory*' (2009) 47 *History and Theory* 28.

³⁴⁷ Carolyn Dean, 'History and Holocaust Representation' (2002) 41 *History and Theory* 249.

³⁴⁸ Robert Braun, 'The Holocaust and Problems of Historical Representation' (1994) 33(2) *History and Theory* 196.

³⁴⁹ Stone, *Constructing the Holocaust* (n 324) 4.

³⁵⁰ *ibid* 15.

³⁵¹ Stone, 'Introduction' (n 332) 2.

consider that the very excess, the rush of energy which permitted normal societal structures to become organs of mass murder, may prevent the Holocaust from being incorporated into a cognitive-rational approach.³⁵²

Historiography has begun to move away from the postwar narrative of rupture, an important step that has so far eluded jurisprudence. This would involve rejecting theses of discontinuity, of criminality and non-law, in favour of a more nuanced interpretation based on continuity and integration. It would also involve tackling the interpretive limitations imposed by the two paradigmatic theoretical models within the discourse. An acknowledgement that the Holocaust is within the scope of both what we call 'history' and what we call 'law' goes some way to overcoming rupture, but it does not necessarily anticipate an equally important further move. Part of Stone's complaint is that society 'has responded to the Holocaust primarily by normalizing it ... so that genocide is integrated as part of normality instead of becoming a reason to change it'.³⁵³ That next move is to change the normality. For jurisprudence, this would involve constructing a concept of law that sees wicked legal systems as inherent in it, because that is what historical experience requires, then re-imagining the discourse to take account of this.

There are a number of different ways of seeing the Nazi past as 'normal'. The first, which Stone rejects, is something akin to historicisation, to incorporate the Holocaust into the dominant empiricist/realist philosophy of historical representation. Such a perspective can go as far as overturning the 'rupture' thesis, both in legal and historical discourse, by placing the Holocaust within normal processes of historical development and legal continuity. However, it does not necessarily, and in practice often does not, mean overturning its ensuing incorporation within conventional historiographical metanarratives, or itself challenge the underlying reasons for rendering Nazi law as 'non-law'. The second version of normalcy, apparent in Stone's work, goes further. It acknowledges the 'ordinary' nature of the Holocaust as a history like any other, and to that extent accepts it as a part of 'normality'. What appears *abnormal* and incomprehensible became *normal* in an historical and legal context that in important ways resembles our own. This enables the deconstruction of the false opposition between the norm and the exception that tends to inform debates about the Holocaust,³⁵⁴ and founds the inclusion of the Nazi past within historical discourse and its intrinsic

³⁵² Stone, *Constructing the Holocaust* (n 324) 239.

³⁵³ *ibid* 241.

³⁵⁴ This manifests itself predominantly in a narrative of uniqueness around the Holocaust. See Rosenbaum, *Is the Holocaust Unique?* (n 55).

comparability with other historical events. It also leads to a questioning of what the implications for our dominant theoretical paradigms are, whether in legal or historical scholarship, if the Holocaust can be part of, and caused by, that normality. At the heart of Stone's reasoning is the conviction that 'in order to think through Nazism, we must recognize an inevitable complicity with it'.³⁵⁵ This complicity is central to the role of the Holocaust in critiquing jurisprudential discourse.³⁵⁶

The key aspects of Stone's scholarship that are relevant for my critique of jurisprudential discourse are, therefore, its commitment to being guided by the history of the Holocaust, the recognition that this history is fundamentally 'normal' and yet presents challenges to the dominant historiographical paradigm, and the need to reconstruct historical discourse in order to take account of the Holocaust. These features are present to varying degrees in the legal theoretical writing of Fraser and Rundle. They have resonance for a critique of jurisprudence based on the understanding that it ignores the 'real' history of Nazi Germany in favour of a hypothetical limit-case version, and which employed a moment of rupture to effectively exclude Nazi law from the discussion of the concept of law, whether based on positivist or natural law philosophical principles. The following discussion will show that even attempts to explicitly integrate Nazi law are highly problematic when they come from within jurisprudence, because they are directed and constrained by the theoretical paradigms that have underpinned its engagement since the postwar period. Only a historically-led, external critique can get to the bottom of the relationship between the concept of law and the Nazi legal system.

III. Competing Directions: 'Towards a Jurisprudence of the Holocaust' or 'The Impossibility of an Exterminatory Legality'?

A Competing Directions for Jurisprudence

I have noted that although David Fraser and Kristen Rundle share some common ground in terms of their critique of jurisprudential treatment of the Third Reich, they adopt very different approaches when it comes to refocusing its attention on Nazi law. Once the imperative of allowing Nazi Germany a fuller contribution to our understanding of the concept of law is established, the question remains which of these approaches, if either, is most effective for doing so. This section will introduce the different

³⁵⁵ Stone, *Constructing the Holocaust* (n 324) 241.

³⁵⁶ See chapters Two and Three on the nature of jurisprudential discourse and its treatment of the Nazi past. The remainder of this chapter considers how the role of law in the Holocaust can be used to critique jurisprudential discourse, particularly in the context of David Fraser's writing.

approaches of the two legal theorists and highlight some of the key similarities and differences. Section IV will then carry through the argument that Fraser's is the only option of the two that conforms to the historical understanding of the Holocaust advanced by Stone. As with Stone, I will adopt a close reading of some of Fraser and Rundle's arguments in order to reveal their key points and relationship to one another.

Fraser attempts to undermine the notion of Nazi law as non-law from both historical and legal theoretical perspectives, by outlining a more complex empirical picture of the role of law in the Nazi state and the Holocaust and by challenging the veracity of the prevailing jurisprudential discourse that frames the issue, that of positivism versus natural law. He makes the case for greater historical awareness, because, in his view, a progressive jurisprudence in relation to the Holocaust 'can only be made manifest if we actively engage in the necessary rigorous, concrete, social and political analyses of the phenomena and ideas with which we are confronted'.³⁵⁷ Equally, he rejects the conceptualisation of Nazi law as 'non-law' with the philosophical claim that 'other hermeneutics, including one that would offer a mirror image of the Nazi state as deeply imbued with a legalistic and legal self-understanding, must not be neglected'.³⁵⁸

This is partly predicated on an emphasis on the normalcy inherent in the Holocaust, which challenges the narrative of rupture that permeates jurisprudential treatment of Nazi Germany.³⁵⁹ Thus he sees the Holocaust as 'the culmination of the acts of ordinary people in the ordinary course of events within ordinary governmental and legal structures'.³⁶⁰ Fraser's theoretical arguments about law in relation to the Nazi past are inextricably entwined with this understanding of the nature of the Holocaust, which is informed by a detailed empirical analysis of historical events. Fraser's evaluation of law, and his construction of 'a jurisprudence of the Holocaust', begins with the Holocaust as history, the history of the Holocaust. At the same time the alternative, exceptionalising approach, which underpins narratives based on criminality and rupture is rendered problematic by his empirical and theoretical insights.³⁶¹ Fraser recognises the unusual and traumatic aspects of the Holocaust while remaining grounded in its essential

³⁵⁷ Fraser, 'Law's "Jewish Question"?' (n 320) 849.

³⁵⁸ Fraser, 'Shadows of Law' (n 26) 8.

³⁵⁹ See Chapter Two on the underlying narrative of rupture that permeates the representation of Nazi Germany within jurisprudential discourse.

³⁶⁰ Fraser, *Law After Auschwitz* (n 23) 5.

³⁶¹ 'We must not fall victim ... to the complex moral and ethical traps which the "unspeakable" nature of the horror of the Nazi killing machine can and does impose on judgement, both ethical and legal, today'; Fraser, 'National Constitutions' (n 320) 293.

ordinariness, which opens it up to the possibility of evaluation, and brings it within the realms of jurisprudence:

Only by positing an argument in which it is possible to at one and the same time deploy the Shoah as unique, as an ethical “extreme novelty” and to nonetheless assert that it is open and available to analysis and comprehension, to an immanent critique, is a jurisprudence of and after “Auschwitz” possible.³⁶²

This situates the theoretical challenges of the Holocaust for jurisprudence at the juxtaposition of that very normalcy with the ethical ‘extreme novelty’ of the Holocaust as a whole. The fact that such barbarism can occur within an essentially ‘normal’ legal setting and be committed by fundamentally ‘ordinary’ people provides the reason and the possibility for constructing ‘law after Auschwitz’. As with historical theory, the Holocaust exposes challenges to law that are innate to it, but could not easily be seen without it. These challenges lie within the juxtaposition of ‘normality’ and ‘genocide’, but to access them it is first necessary to deconstruct the narrative of rupture that underpins jurisprudential discourse.

Rundle’s approach draws explicit links between Nazi law, the history of the Holocaust and legal theory, and to this extent moves beyond the existing jurisprudential discourse. Her scholarship explores and connects the empirical and theoretical aspects of law and the Nazi state, and engages with historical research, or at least historical sources that shed light on the role of law in Nazi Germany. This results in a more nuanced account of natural law than has previously been applied to the Nazi legal system. Her Fullerial philosophical framework finds its concrete manifestation in the everyday life of Jews living under Nazi law before, during and after *Kristallnacht*. This is evidenced by the accounts of daily life contained in the contemporary diaries of Jewish residents of Nazi Germany. The observations of those who write about living under persecution within the Nazi state reinforce her philosophical conviction that ‘the possibility of having a “life”, or more specifically, a “daily life”, corresponds in some determinative way with the presence of law’.³⁶³

Rundle also refers to Nazi laws themselves to support her conviction that November 1938 represented a transformation from ‘legal’ persecution to ‘non-legal’ extermination of the Jews. Thus, she rejects an ‘exterminatory’ interpretation of earlier Nazi laws, exemplified by the Nuremberg Laws, as leading inexorably to the Holocaust. Rather, she argues, these laws set the parameters for the continuation of Jewish social activity, which was later

³⁶² Fraser, ‘Law’s “Jewish Question”?’ (n 320) 857.

³⁶³ Rundle, ‘Law and Daily Life’ (n 271) 430.

taken away in spite of, not because of them.³⁶⁴ From November 1938, Rundle argues that the parasitic influence of Nazism on the legal system engendered 'a degenerative process that involved successively greater departures from conventional standards of legality as time progressed'.³⁶⁵ The experience of the Jewish population under Nazi law before 1938 was one of ever decreasing circles of social activity, but always remaining above a minimum threshold below which the possibility of acting as a legal subject is expunged. Accordingly, while the Nazi anti-Jewish legislative programme took shape predominantly before the war, '...the policy of extermination that shortly followed belonged to an extra-legal world of SS directives that remained, at all times, contingent on the whims of those who had the power to issue them'.³⁶⁶

By 1938, the Jewish subject of Nazi law had been living under an oppressive, grossly discriminatory and incrementally pathological legal order for over five years. But even in the early months of 1938, there were still authorities to report to and rules to follow, forms to fill out and sign, and officials to receive and process them ... But over the course of that year, the modes of Nazi oppression expanded in their variety and escalated in their effects until, on the night of 9-10 November, there was wanton destruction and defilement, brutal violence and murder, arbitrary arrest and transportation to concentration camps for no apparent crime. This, we are told [by contemporary accounts], is when "daily life" ended.³⁶⁷

Rundle's account is more than a straightforward assertion of Nazi law as non-law founded on assumptions about Nazi history and exclusively abstract reasoning about the necessary connection between law and morality. While Rundle does endorse and develop Fuller's natural law theory, its application to the Nazi state is flexible, allowing for the possibility of Nazi law up to a point. The quantitative flexibility permitted within Fuller's account of law reaches a point of qualitative disintegration, Rundle argues, after *Kristallnacht*. At that point the elements constituting lawfulness, including the minimum of legal agency, were no longer present.

In terms of the discourse itself, therefore, Rundle's approach is to draw on and contribute to jurisprudence, attempting to develop a more sophisticated account of Fullerian natural law theory through its application to the Holocaust. Her criticism of the existing discourse does have merit. She is correct to identify that part of the problem contributing to its currently circumscribed scope is that Hart and Fuller did not deal in any real detail with

³⁶⁴ Rundle, 'Impossibility of an Exterminatory Legality' (n 319) 95-99

³⁶⁵ *ibid* 87.

³⁶⁶ *ibid* 76.

³⁶⁷ Rundle, 'Law and Daily Life' (n 271) 431

Nazi law and did not directly address the Holocaust.³⁶⁸ They were largely focused on a particular example from the Nazi past: a case that took place after the end of the war, involving an instance of Nazi law not concerned specifically with the persecution or extermination of Jews. However, this reflects the fact that there is something fundamental at stake, above and beyond the restricted scope of the debate, which Rundle attempts to expand. The legacy of the Hart-Fuller debate limited the discourse around jurisprudence and the Nazi past, but it was also ultimately not really about Nazi law.³⁶⁹

Fraser's scholarship, by contrast, is primarily concerned with highlighting and dealing with the underlying problems inherent in a discourse that perpetuates a founding misconception about the nature of Nazi law. Whereas Rundle starts with Fuller's natural law philosophy and applies it to the evolution of the Nazi legal regime, Fraser's starting point is the Holocaust itself. He uses this to critique the existing discourse as a whole, exposing it as unhelpful to the advancement of understanding of the role of law in the Third Reich, particularly as it was used to perpetrate the Final Solution. Fraser details the complexity of Nazi history and the context of Nazi law to expose the fallacy of the 'Nazi law as non-law' thesis and the deficiencies in a discourse centred on natural law and positivism when applied to the Holocaust. Consequently, Fraser's call for a 'jurisprudence of the Holocaust' is almost diametrically opposed to Rundle's claim of the 'impossibility of an exterminatory legality'. The former considers it imperative that implications of the 'law-full-ness' of the Holocaust are recognised, while the latter is equally certain that the use of law for extermination in the way of the Nazi genocide is not possible within a legal framework.

B Confronting the Jurisprudential Contradiction

The fundamental difference between the arguments of Rundle and Fraser is the extent to which Fraser assert the complicity of law with the Holocaust. This theoretical engagement, not just with the lawfulness of the Nazi legal system but with the role of the Holocaust within that system and its implications for other modern legal systems, is unusual within the legal academy. Frederick DeCoste has commented on this recently,³⁷⁰ claiming:

³⁶⁸ *ibid* 437: 'Participating in a shared neglect on the part of twentieth century legal philosophers, Fuller himself did not directly address the Nazi legal program against the Jews at any point in his writings'.

³⁶⁹ See the discussion of the Hart-Fuller debate and its legacy in Chapter Three.

³⁷⁰ See my discussion of DeCoste's other observations and comments about the state of legal scholarship in relation to the Nazi past in Section I of Chapter One.

Evil as a force in human affairs has not occupied postwar intellectual practice in the West. This is not to say that the evil revealed by the Holocaust and other Disasters of the murderous twentieth century has been ignored or forgotten. It hasn't. It is however to say that our practices of engaging and interrogating that now naked evil have been something very much less than central to our disciplines.³⁷¹

He continues, 'surely remarkably, philosophers have had more to say about the matter than have academic lawyers who have with very rare exception stood mute since the Hart-Fuller debate of the late 1950s'.³⁷² Putting to one side DeCoste's broader arguments about a general academic failure to come to terms with evil,³⁷³ it is clear that the Holocaust, as a feature of the Nazi past, has been largely absent from jurisprudential debates. Instead the discourse related to the Third Reich revolves around the philosophical dialogue between natural law and positivism that emerged from the Hart-Fuller debate.³⁷⁴ This dialogue has turned away from its origins as a response to the Nazi state and the contrasting approaches and conclusions of Rundle and Fraser comprise two ways of addressing the paradox represented by a jurisprudential discourse that does not engage with Nazi Germany even while large parts of it are devoted to an account of the validity of law that in theory incorporates such a wicked legal system as its original case.

The contradiction that lies at the heart of jurisprudential discourse about the Holocaust is central to understanding their different perspectives. In jurisprudential discourse, it is not self-evident what the implications are for applying either the positivist or opposing natural law paradigms to the case of Nazi Germany, because of the restricted parameters of the debate and the underlying narrative and isolation from historical research that excludes the historical case of Nazi law from genuine examination. Rundle's response to the jurisprudential contradiction does involve criticism of some of the limits on jurisprudential discourse imposed by the Hart-Fuller debate. She asserts, for example, that the debate has been 'tightly circumscribed by the declared commitments of the competing legal philosophies on the matter of whether law and morality are necessarily conceptually separable'.³⁷⁵

Her main concerns, however, are 'whether the dominant interpretations of Nazi law in mainstream legal philosophy are adequate to the task of

³⁷¹ DeCoste, 'Hitler's Conscience' (n 25) 3-4.

³⁷² *ibid* 4, fn 5. See the discussion of the current jurisprudential discourse in Chapter Three above. However, the extent to which the Hart-Fuller debate really dealt with the question of 'evil', as opposed to defining the parameter for the validity of law, is questionable.

³⁷³ See fn 88.

³⁷⁴ See on this Chapter Three generally.

³⁷⁵ Rundle, 'Law and Daily Life' (n 271) 432.

enlightening the nature of the Jewish experience of Nazi law',³⁷⁶ and the extent to which 'much effort is still devoted to defending, as the best account of the nature of law, legal philosophies that embrace rather than alienate the example of the wicked legal system', i.e. versions or descendants of Hartian positivism.³⁷⁷ Thus, the features of the current discourse that exercise Rundle centre on its perceived over-emphasis on the separability thesis, and how this has resulted in key aspects of Lon Fuller's argument being overlooked, especially the role of the agency and experience of those living under the relevant laws in founding legal validity. Far from rejecting the relevance of the philosophical question of the validity of Nazi law, as she claims Fraser and Vivian Grosswald Curran do,³⁷⁸ Rundle's aim is to reorient the debate to some extent towards the Third Reich, but principally towards other factors relevant to the validity question and towards a reinterpretation of Fuller's scholarship. In this context, Rundle's thesis becomes a reaction against a particular sort of positivistic constraint imposed on the discourse by the legacy of the Hart-Fuller debate. She observes:

The Nazi legislative program against the Jews, which saw to the removal of those legally defined as Jewish from civic, cultural, and economic life in Germany, is widely regarded in legal philosophy as tragic proof that law has no intrinsic moral worth. Beyond this general diagnosis, however, the major debates of legal philosophy reveal no serious examination of the specificities of the Jewish experience of Nazi law, nor of the factual coincidence of the decline of the legal persecution of the Jews and the advent of policies, including the extermination program, that proceeded extra-legally.³⁷⁹

This argument is concerned with the prioritisation within parts of the discipline of the analytical jurisprudence of Hart over an at best undernourished and at worse misleading interpretation of Fuller's natural law philosophy. Her solution is to give Fuller's writing the proper attention it deserves, and re-apply it to the Nazi past in order to reinvigorate both it and the case it makes for invalidating at least the exterminatory parts of Nazi law. Ultimately, of course, demonstrating the unlawfulness of the Holocaust renders Nazism largely irrelevant for jurisprudence, removing its alleged focus on the lowest common denominator that concerns Rundle. Similar criticisms of jurisprudence have, by contrast, led Fraser to move beyond the positivism/natural law dichotomy, and challenge whether the question of

³⁷⁶ Rundle, 'Impossibility of an Exterminatory Legality' (n 319) 66.

³⁷⁷ Rundle, 'Law and Daily Life' (n 271) 433.

³⁷⁸ Rundle, 'Impossibility of an Exterminatory Legality' (n 319) 102-103.

³⁷⁹ *ibid* 65.

validity is the most productive way of advancing understanding of the relationship between jurisprudence and the Holocaust.

While the established legal philosophies ‘embrace rather than alienate’ the Nazi legal system, and provide ‘tragic proof that law has no intrinsic moral worth’ in theory, in practice legal scholarship in this area is founded on the myth of aberration, rupture and Nazi law as ‘non-law’.³⁸⁰ The jurisprudential position is such that ‘if we are to construct an historical memory of the rule of law and the Holocaust, within an ideological and political tradition which cherishes and values law, that memory must rely on the radical discontinuity of the period 1933-1945. The Nazi state must be characterized as a “criminal state” in which “law” existed in form only’.³⁸¹ This is a false construction of history and law, because it denies the fundamental relationship between law and the Holocaust revealed by a detailed analysis of the history of Nazi Germany.³⁸² It also denies the implication for jurisprudence that ‘we are all still “evil” lawyers because we continue to exist in this collective state of legal amnesia and as beneficiaries of law’s consequent self-amnesty and self-denial’.³⁸³ In short, it denies law’s complicity in the horrific excesses of the Nazi state.

The starting point of Fraser and Rundle’s critique of the jurisprudential discourse is similar, then, in that Fraser agrees that there is ‘a general – although not universal and not without nuance – belief in Anglo-American legal theory that the separation between law and morality ... is still the best way of expounding and exploring the idea of “evil law”’.³⁸⁴ But the direction in which Fraser heads from this point is very different. Whereas Rundle does not address the underlying contradictions within the discourse in terms of the reasons why Nazi law is narrated as ‘non-law’ when the prevailing philosophical position would disagree with this categorisation, this is at the heart of Fraser’s project. When he questions ‘why law is absent from most of our discussions of the Shoah, *and most importantly why the Shoah is absent from most of our discussions about law* [italics added]’,³⁸⁵ Fraser confronts underlying questions about the concept of law: whether law can have a moral

³⁸⁰ Brought to light on many occasions in Fraser’s writing, as well as that of Frederick DeCoste, Laurence Lustgarten and others. See the brief outline of the general critique of the legal academy in Section I of Chapter One.

³⁸¹ Fraser, *Law After Auschwitz* (n 23) 22.

³⁸² ‘Nazi law was law, in one form or another, and it is at the more nuanced levels of debate that we must address these questions’, Fraser, “‘This is Not like Any other Legal Question’” (n 35) 124.

³⁸³ Fraser, ‘Evil Law, Evil Lawyers?’ (n 26) 394.

³⁸⁴ *ibid* 392.

³⁸⁵ Fraser, *The Jews of the Channel Islands* (n 80) 16.

foundation following the Holocaust, what might underpin the rule of law where both positivist and natural law accounts fail to convince, and what are the narrative limits of law.

These questions represent part of a critical examination of how and why the Holocaust is narrated as 'law-less' rather than 'law-full'. In Fraser's case, the experience of Nazi law reveals a construction of legality that forces us to reconsider the post-Holocaust legal conception of both law and the Holocaust. This refers back to the idea, referred to in earlier chapters,³⁸⁶ that an examination of the history of Nazi Germany causes us to revise both our understanding of the nature and functioning of the Nazi legal system and the jurisprudential concept of law that internalised and reproduces the pre-existing interpretation. The differences highlighted between Fraser and Rundle's approaches to how this is achieved are striking. Rundle applies an updated Fullerian framework to Nazi law, while Fraser takes the historical phenomenon of the Holocaust as a whole and assesses its theoretical implications for law. Rundle critiques the dominant positivist account from the point of view of a particular conception of natural law, whereas Fraser seeks to challenge the legitimacy of applying positivism and natural law to the Nazi case. Rundle argues that law, properly conceived and understood, can only be responsible for persecution of a certain degree, while Fraser looks to investigate and expose the complicity of law in and through the Holocaust as a whole.

Section IV illustrates that these differences mean that Fraser's approach corresponds much more closely with Stone's whereas Rundle's is undermined by some unresolved jurisprudential and historiographical problems. Whereas Rundle remains wedded to the opposition of law and non-law, and the structure of positivism and natural law, Fraser moves outside of this. Rundle's use of the history of Nazi Germany, notwithstanding her explicit attempt to reorient jurisprudence towards it, show that any attempt to reconstruct how jurisprudence understands the Third Reich is dependent on adopting an external perspective. This is a perspective that understands the history, has not internalised the positivist or naturalist representation of Nazi law, and is not committed to the debate between positivism and natural law.

IV. A Thematic Comparison of Approaches: 'academic lawyers ... have with very rare exception stood mute since the Hart-Fuller debate of the late 1950s'

A Reflecting Stone in Fraser and Rundle

³⁸⁶ In particular in Section II of Chapter Two, with reference to Rundle's writing.

I argue that jurisprudence is prevented from engaging successfully with the Nazi legal system unless it moves beyond the limitations of the existing jurisprudential discourse and disciplinary paradigm to address the ordinary nature of the Holocaust and the wider philosophical issues it raises. Fraser's project is aligned with Stone's in his pursuit of this course, in questioning 'the criteria against which the "false law" tyranny of "Nazi law" must be and is judged',³⁸⁷ and seeking to establish 'some other normative or ethical principle ... if any idea of the rule of law is to be saved from the tragic historical record of legality and the Shoah', because 'legal positivism is never enough'.³⁸⁸ Insofar as positivist accounts of law tolerate systems such as that in Nazi Germany in their advancement of positivism, they might be considered to be superficially embracing them as valid law. However, in the sense that they fail to engage both with the full complexity of Nazi law, and with the consequences of Nazi Germany for the version of law they advocate, such systems are effectively alienated from law. This is to the detriment of our understanding of how law functions under such conditions. It is as though for positivism the question is settled – yes Nazi 'law' is law by name, but not law that has anything to do with us and our laws, or can add to our debate about the nature of law, or that can say anything at all about our moral and legal universe. It is bad law. Or rather, untouchable law.

When moving beyond the question of the validity of Nazi law, the full complexity of the relationship between law and genocide become apparent and with it the fallacy of signifying particular types of law as 'law' or 'non-law'. For Fraser, but not for Rundle, the necessity of asking the question at all is displaced by what actually occurred. The legal historical reality poses enough questions about the nature of law after the Holocaust. Rundle is concerned with the jurisprudential issue of when 'law' is valid as law and remains engaged in conversation with natural law and positivism. Despite the attention Fraser sometimes gives to the issue of demonstrating that Nazi law was not 'non-law', this is a premise to a bigger claim that entirely rejects the discourse of natural law versus positivism as an unwelcome distraction to our legal theoretical understanding and interpretation of the Nazi past. On this analysis Rundle's approach shares little in common with Stone. Far from seeing the Holocaust as 'ordinary', it continues to exclude it from the realm of the lawful. Far from using the Holocaust to critique the mainstream discourse, Rundle remains part of the discourse and excludes the Holocaust from it. And instead of taking a lead from the Holocaust as a historical phenomenon, Rundle's terms of reference are dictated by a narrow aspect of

³⁸⁷ Fraser, "This is Not like Any other Legal Question" (n 35) 124.

³⁸⁸ Fraser, *The Jews of the Channel Islands* (n 80) 228.

the question of the criteria for the validity of law as revealed through Fuller's scholarship. This is again not to criticise large parts of Rundle's interesting thesis, and particularly her valuable reinterpretation of Fullerian natural law. But there is, not least in the scholarship of Stone and Fraser, much more to say about the relationship between law and the Holocaust than this.

The relationship between jurisprudence and the Holocaust cannot be explored effectively without taking into account the additional historical and theoretical issues highlighted by Stone and Fraser. To ignore these insights leads to a restricted form of jurisprudence that inevitably buys into its own contradictory narrative about the role of the Nazi past within legal theory, that it represents an aberration that exists outside of 'normal' legal development. This leads inexorably back to a jurisprudence that finds little or limited relevance in the Nazi past. Rundle's attempts to move beyond this narrative and bring Nazi Germany into the jurisprudential debate are insightful but only permit relevance of the Nazi past for a limited range of specific jurisprudential issues. Beyond this, her approach and conclusions ultimately reinforce the pre-existing discourse because they rely so heavily on its terms of reference and continue to deny the lawful nature of the Holocaust. Rundle's dismissal of the Holocaust as not law after 1938 means that she only tackles the legal theoretical implications of one part of the advancing persecution and extermination of the Jews under the Nazi legal system. This is all she intends to do but, as with jurisprudential discourse in this area generally, this initial finding prevents further exploration of the broader philosophical consequences of the Holocaust.

Fraser, by contrast, uses the Holocaust to critique the whole discourse around legal validity, which is part of the self-serving memory of law in the face of complicity in the Holocaust. He demonstrates in a range of historically oriented research that the 'interpretive community' of lawyers inside and outside of Nazi Germany treated what they were doing as law, and law was not in a position to stop them from implementing their genocidal policies. Fraser emphasises the 'ordinary' nature of the Holocaust and questions the moral foundations of law and the failure of positivism and natural law to convince on a closer examination of the Nazi state. By doing so he aligns himself with Stone in terms of asking big philosophical questions of his discipline from a point of view that includes the Holocaust as part of, not distinct from, that same discipline. Rundle's approach does not fall within the same critical framework as Stone's and pursues different philosophical commitments altogether.

Rundle is aware of the ‘different philosophical commitments’³⁸⁹ that distinguish her work from Fraser’s. The closest she comes to moving outside of jurisprudential discourse is an acknowledgement that ‘there remains a fundamental incoherence within our understanding of law that ... can only be bridged if law is required to come to terms with *itself*, at both a conceptual and ethical level’.³⁹⁰ Notwithstanding this acknowledgement, she does not really confront this problem in her writing. This is to a large extent a consequence of the different aims of their respective research. These are to some extent revealed in the way Rundle locates her research in contrast to Fraser’s:

Fraser and I both argue that the Nazi legal campaign against the Jews is capable of carrying the label of law, but we do so for different reasons, and this leads us to different conclusions. I grant the Nazi legal program against the Jews the title of law in order, first, to highlight the qualitative differences within the forms through which the persecution of the Jews was carried out and, second, to explore the philosophical implications of these differences, including what we might learn from the coincidence of the demise of law and the advent of the extermination program. Fraser, by contrast, grants the Nazi legal program against the Jews the title of law for two different reasons: to expose the self-serving legal memory of the role of law in the Holocaust that lies behind the characterization of Nazi law as not law, and to advance an instrumental conception of legality in which any outcome is ostensibly possible through the use of law.³⁹¹

Rundle suggests that her conclusions are, in one respect at least, shared with Fraser but their reasons for reaching those conclusions are different. However, her critique inevitably centres on the issue that most interests her, the question of the validity of Nazi law. Thus she says of Fraser that ‘it is clear from the deliberately broad conception he employs that his “jurisprudence” is not one that is intended to be, like the more orthodox theories, an account of what makes law “law”, in the sense of what makes law *valid*’.³⁹² This is absolutely true. Fraser is not primarily concerned with the validity question because it is not deemed to be the most interesting or important legal theoretical question to ask in respect of the Nazi past.

³⁸⁹ Rundle, ‘Impossibility of an Exterminatory Legality’ (n 319) 102.

³⁹⁰ Rundle, ‘Review of Law After Auschwitz’ (n 319) 197.

³⁹¹ Rundle, ‘Impossibility of an Exterminatory Legality’ (n 319) 102.

³⁹² Rundle, ‘Review of Law After Auschwitz’ (n 319) 202. Similarly, ‘...Fraser conceives of his project as outside of, or unrelated to, the mainstream jurisprudential debate between legal positivism and natural law’, and his undertaking is ‘squarely concerned with what perceptions of Nazi law can teach us about *how* jurisprudential understandings are constructed rather than how the example of a “wicked legal system” tests the theoretical coherence of opposing accounts of legal validity’.

The more compelling concern for Fraser is highlighted by the following statement:

We can no longer, if we ever could, find solace in some simplistic jurisprudential or historical assertion about the fundamentally and inherently flawed nature of the system under Nazi tyranny. Life and law were, and are, more complicated than that. Nazi law continues to haunt not just the continent of Europe, but casts its shadow over the world of Anglo-American law and jurisprudence.³⁹³

This is also the more vital question for jurisprudence. This is made apparent by the limitations of the current jurisprudential debate, the insights of Stone's scholarship and the lessons from historical research about the Holocaust. In her critique of Fraser, Rundle ignores the key significance of Fraser's scholarship for the natural law/positivism debate within jurisprudence. This is not, as Rundle claims, that Fraser advances 'an instrumental conception of legality'. Nor is it that Fraser should pay more attention to the existing discourse because it has included attempts 'to provide a coherent explanation of why Nazi law was "not law"'.³⁹⁴ Rather, it is that the existing discourse has taken that part of legal scholarship that might be concerned with the theoretical implications of the Holocaust down a cul-de-sac in its engagement with the Nazi past: a dead end that reveals little about law's relationship with the Holocaust, ignores the insights of historical research, and has circumscribed the development of jurisprudential understanding of the concept of law in this area.

This is further elaborated with reference to some aspects of Stone's writing emphasised in Section II. Stone understands the Holocaust as 'ordinary' in nature. He uses it to critique the limitations and contradictions within the discourse and the dominant empiricist/realist philosophical paradigm within the discipline from which its more radical implications are excluded. He also advocates a conception of historiography that comes to terms with rather than ignores the inevitable complicity between 'us' and 'them', in the theoretical tenets that underpin both orthodox historicism and the Holocaust. Historical research into Nazi Germany has largely moved from an aberration model to an integration or normalisation model. Stone would shift it again to a model that re-evaluates its own foundations in the light of the Holocaust. Jurisprudence, by contrast, remains implicitly wedded to the postwar, Nuremberg, criminal state conception of the Third Reich,³⁹⁵ and so struggles to reach the first stage of recognition of normality advocated by Stone.

³⁹³ Fraser, "This is Not Like Any other Legal Question" (n 35) 125.

³⁹⁴ Rundle, 'Review of Law After Auschwitz'(n 319) 202.

³⁹⁵ See Chapter Six on this.

A definitive answer to the question of the validity of Nazi law, even if this were possible³⁹⁶ and whichever way it went, would contribute little towards the re-evaluation of the dominant jurisprudential paradigms in light of the complicity of law with the Holocaust. Nor would it do much to integrate the Holocaust within the existing discourse, because its present exclusion is not based on jurisprudential arguments that claim wicked laws are invalid. It is based on an entrenched understanding of the role of law and the nature of the Holocaust that cannot permit the latter to encroach too far on the former. Following Stone's philosophical lead, jurisprudential scholars should heed what more recent, more sophisticated, more detailed historical research has to say and 'resist the temptation to leap ... to the conclusion that the correct, best or sole historical template for a study of the Nazi period, and even of the atrocities of the Hitler state, is that of crime, criminal law and criminalization'.³⁹⁷

Equally, current jurisprudential discourse has a similar structure to that of the historical discourse criticised by Stone. It is somewhat polarised between two entrenched competing positions, in this case natural law and positivism. This cycle of competing positions, while often extremely refined and advanced, hinders approaches that look for answers outside of the scope of the discourse. This impediment is illustrated by aspects of Rundle's analysis of Fraser's approach, particularly the way she acknowledges that he cites his project as existing outside of the issue of the validity of Nazi law and the positivism/natural law debate. At the same time she offers a critique centred on the terms of the debate, encouraging Fraser to engage with scholars who do provide a theoretical argument for the claim that Nazi law is not law. An alternative starting point of the Holocaust itself, revealed in historical research and the writing of Stone to be fundamentally ordinary, mandates that there must be a relationship with law on some level that demands exploration and explanation. It is then its more exceptional features that lead to a re-evaluation of the nature of this relationship.

The differences highlighted in this section situate Fraser's writing within a similar theoretical and empirical agenda to Stone's, as a critique of the dominant paradigm that challenges the value of the discourse altogether. By contrast they mark Rundle out as continuing within the conventional jurisprudential framework, focused on the narrow question of the validity of Nazi law as opposed to how the Holocaust may question the foundational

³⁹⁶ Fraser points out that lack of agreement about what constitutes the rule of law is 'endless because law is in reality little more than the persuasive deployment of rhetorical devices and signifiers'; Fraser, *Law After Auschwitz* (n 23) 78.

³⁹⁷ Fraser, 'Shadows of Law' (n 26) 8.

tenets of this discourse. This is primarily an external critique of Rundle's work. She is interested in the question of the validity of Nazi law and wants to contribute to the understanding of Fullerian naturalism in this area to readdress imbalances and misunderstandings within the discourse rather than to undermine it completely. However, alongside the aforementioned 'different philosophical commitments', according to which Rundle is tackling a narrow jurisprudential problem while Fraser addresses broader legal theoretical issues,³⁹⁸ it is each author's understanding of the nature of the Holocaust itself that directs them to their philosophical conclusions. Rundle applies an existing theoretical model to certain aspects of the Nazi legal system that are related to the Holocaust, and reaches conclusions about the impossibility of 'exterminatory legality'. Fraser sees the Holocaust as the same challenge to fundamental conceptions of liberal legality as Stone does for historical writing, and reaches very different conclusions about the possibility of a jurisprudence of and after Auschwitz.

This first critique of Rundle relies on the philosophical understanding of the Holocaust offered by Stone, and the legal theoretical inclinations of Fraser, to neither of which Rundle necessarily subscribes. The argument I construct with reference to these positions is that jurisprudential writing about the Holocaust, in which Rundle is engaged on some level, cannot be effectively accomplished without taking into account the full historical context and the broader philosophical questions and challenges raised by the Holocaust. This assertion has implications for Rundle's scholarship because it implies that the self-imposed limitations on the scope of her research to some extent compromise its ability to address the full range of encounters between jurisprudence and the Holocaust. This is particularly in terms of how Stone's understanding of the Holocaust - as an event that is both ordinary and which raises generally applicable challenges to our dominant philosophies - can cause us to rethink some of the theoretical tenets underlying jurisprudence when a similar understanding is applied to jurisprudence.

Rundle is not attempting to deconstruct jurisprudential discourse as a whole, or to move beyond the validity question, or get to the bottom of the inherent complicity between law and the Holocaust; quite the opposite. She instead seeks to reinforce natural law in the face of the dominance of positivism, is primarily interested in the validity question, and denies the complicity of law with the exterminatory phase of the Final Solution. However, she is attempting to re-direct jurisprudence to take better account of the history of Nazi law and this aspect offers the possibility of an internal critique of her

³⁹⁸ See the discussion of the relationship between 'jurisprudence' and 'legal theory' in this context in Section II of Chapter One.

work, based on specific historical and philosophical flaws that emerge from it. These issues mean that her thesis fails to convince fully on its own terms.

B An Internal Critique of Rundle's Arguments

The internal critique of Rundle's position is connected to the external critique by the significance of the use of the Holocaust as history by Rundle in her articles, and the implications of her conclusion that the Final Solution was not lawful. There are some problems with this jurisprudential approach to Nazi law, particularly as a historical artefact. These are caused by the limited legal theoretical frame of reference employed by Rundle, in the form of the role of legal agency in validating law according to Fuller's natural law theory, the limited range of historical sources she refers to, and her interpretation of the non-extrematory character of certain Nazi laws. There is insufficient scope to go into all of these in great detail here, but I will do so to the extent necessary to supplement the external critique advanced above. Rundle's focus on the Jewish experience in the Third Reich is an important perspective, but it overlooks the participant positions of other historical agents, which may support a different thesis from an alternative perspective.³⁹⁹ The experience of the Jewish legal, historical agent is therefore not fully contextualised, an issue contributed to by Rundle's reliance on a few contemporary diary accounts. The narrow focus and starting point of natural law theory dictates the type of historical sources Rundle refers to, those that elucidate the experience of Jews living under Nazi persecutory laws. It prohibits engagement with other perspectives that might raise additional legal theoretical issues or call her conclusions into question. Rundle is not concerned with these; only with what Fuller's concept of agency says about the validity of Nazi law when related to a few examples of the Jewish experience. This almost automatically places her arguments within the scope of the existing debates about natural law and positivism, even while redirecting their attention back towards the Nazi past.

The effect of this on Rundle's arguments is illustrated by the way her historical sources are used to support the idea that pre-1938 legislation such as the Nuremberg laws were law, and not exterminatory in character, whereas post-1938 persecution was exterminatory and lawless. This makes sense in the context of the quantitative flexibility allowed by Fuller in the scope of agency permitted within 'law', and the point of qualitative departure

³⁹⁹ The laws governing non-Jewish citizens during the war, for example, would provide a different subjectivity. Equally, the perspective of Nazi Germany's state contemporaries provides yet another viewpoint to be considered (see Fraser, *Law After Auschwitz* (n 23) ch 4: "The Outsider Does Not See All the Game...": Perceptions of German Law in the Anglo-American World, 1933-1940').

when the abuse of legal forms becomes too much. However, viewing the evolution of the Holocaust as a whole, the idea, for example, that the Nuremberg laws were not part of the exterminatory legal process requires serious examination. That leading Nazi figures may not have had extermination in mind when the laws were written, and indeed that the laws allowed some scope for social activity by the Jews subject to them, does not mean they were not part of the process of permanent revolution and cumulative radicalisation that led inexorably if not inevitably to the Final Solution. As some of the legal tools that distinguished and isolated the Jewish population from the rest of the *Volksgemeinschaft*, the Nuremberg laws certainly bear scrutiny as an important step along the way to extermination.

The route to the Holocaust revealed by historical analysis was gradual, often improvised, *ad hoc* and localised, and developed and radicalised over time, with few centralised leaps in policy.⁴⁰⁰ Similarly the Nazi legal system, which contributed to this development, involved a complex mix of measures and rules, multiple sources of law, and an evolution away from the rule of law to a Nazi conception of law as ideology.⁴⁰¹ Neither of these historical accounts fits well with positing a qualitative disconnection between important discriminatory laws prior to 1938 and an acceleration of persecution to extermination after *Kristallnacht*. The use of the absence of genocidal motivation of Nazi officials in, for example, 1935 as evidence for a qualitative leap to non-law in 1938, after which genocide moved onto the agenda, appears to require in other cases an intentionalist interpretation of historical development. The long-running dispute between intentionalists and functionalists among the community of historians of Nazi Germany up to the 1990s, which witnessed a gradual erosion of the intentionalist viewpoint, demonstrated that history does not work that way, and certainly not this history.⁴⁰² Nazi genocidal policy and law moved forward step by step, gathering momentum from individual events and collective action and in that context to claim that persecutory laws in 1935 were nothing legally to do with genocide is not in my view supportable.

In the same way, the broadly progressive nature of the persecution and extermination of the Jews by the Nazi state, which is acknowledged by Rundle at least for the period prior to 1938, calls into question the historical, and perhaps theoretical, veracity of the jump to extra-legality claimed for November 1938. This is especially to the extent to which such a jump then

⁴⁰⁰ This can be seen in microcosm in the development of the Concentration Camp system, recent scholarship about which is discussed in Sections III and IV of Chapter Five.

⁴⁰¹ On the role of ideology in the Nazi legal system see Section II of Chapter Five.

⁴⁰² See Kershaw, *The Nazi Dictatorship* (n 76), especially chapter 4.

has the radical implication of consigning the Holocaust to the realm of 'non-law' and, in doing so, foreclosing further jurisprudential inquiry. Whatever else can be said, there was a legal system in Nazi Germany, and there were an increasingly radical set of policies that resulted in the implementation of the Final Solution. These two features of the Third Reich were not completely separate, and it is equally impossible to detach pre-1938 persecution from post-1938 extermination by denying any form of legal continuity across that border. Even if one were to argue that 'extra-legal' elements dominated the anti-Jewish programme during the War, this would not deny a relationship between law and the Holocaust that raises fundamental questions about the complicity of the modern jurisprudential concept of law with the Nazi legal system. It is not justifiable therefore to posit a legal and consequently historical break along this process at an essentially arbitrary point.⁴⁰³

Rundle's selective deployment of historical sources is unconvincing as well in the wider context of historical research that exposes continuity, evolution and radicalisation, but not qualitative leaps or the notion of a need for original genocidal intent from 1935 to link what was then law with what becomes extermination after 1938. From a jurisprudential perspective Rundle's approach also recycles if not precisely the same debates then a comparable (mis)rendering of Nazi Germany and a similar paradigm of thought that is preoccupied with the separability question to the detriment of empirical examination of complex and varied forms of law. She attempts to reform jurisprudence by calling on a certain unhistorical version of the Nazi past and fails to do so in a way that properly accounts for the experience of law in Nazi Germany because of this version and by remaining wedded to a particular account of natural law theory.

This combination of the internal and external critiques of her argument about the validity of Nazi law in the Holocaust and the reorientation of jurisprudence to take account of it, show up certain flaws that mean it cannot convincingly be used to address the challenges to jurisprudential discourse highlighted in the previous chapters. Philosophically Rundle is unwilling and unable to address the complicity of law in the Third Reich when the Holocaust is understood as a seamless aspect of the Nazi state. Jurisprudentially, she is committed to demonstrating Fullerian natural law theory and does not challenge the wider problems within the discourse in how it addresses Nazi Germany. Historiographically her concept of law leaves

⁴⁰³ Central genocidal decisions were not taken in 1938, or soon afterwards. The use of the test of human agency under the law on the basis of some contemporary diarist accounts to posit a point of rupture from law to non-law around November 1938 is in this sense historically arbitrary.

no room for how historical events actually developed and is based on too selective a collection of sources to provide a full picture of the Nazi legal system. Some of these points find echoes in how her arguments clash with the interpretation of the Holocaust advanced by Stone. Furthermore, Stone's reading of the Holocaust as essentially ordinary but representing a philosophical challenge to disciplinary paradigms founded on similar modernist tenets finds no parallel in Rundle's writing. She instead aims to alienate the Holocaust from the concept of law and remain within the strictures of jurisprudential discourse. Fraser's approach, it has been shown, shares much in common with Stone's and provides compelling reasons for jurisprudence to engage much more with Nazi Germany and really try to understand the implications of its legal system for the concept of law.

V. Conclusion: Implications for Legal Scholarship

The theoretical construction and historical understanding of the Holocaust put forward by Stone and Fraser opens up its relevance for contemporary jurisprudential questions within Fraser's research, and leads to the view that 'Nazi law should remain at the center of our jurisprudential focus today'.⁴⁰⁴ It is currently not, however. The positivist conviction that continues to hold sway in Anglo-American legal circles is fatally damaged by the historical example of Nazi Germany. The conviction that Nazi law is not relevant law, if it is law at all, has, notwithstanding its exclusion from this discourse, become central to other representations of the Nazi past within legal scholarship.⁴⁰⁵ Consequently, it is not simply a matter of reintroducing the Nazi element to the existing positivist/natural law debate. Rather, the nature of the Holocaust, both as a traumatic historical phenomenon and a materialisation of Nazi law, means deconstructing this discourse altogether, moving outside of this narrow debate, and refocusing on the implications of the Holocaust for the concept of law.

This critical approach to the mainstream discourses and dominant paradigms in their respective disciplines is apparent in the writing of both Stone and Fraser. In terms of the discourse, as Stone highlights the tendency to use the Holocaust as a trump card in philosophical debates, Fraser makes a similar point with respect to legal discourse. In terms of the underlying philosophical paradigms, Stone and Fraser both use notions of continuity and complicity to break down false barriers between the past and the present, 'our' law and 'their' law. In historical practice, the bright lines drawn between opposing positions at the abstract level become untenable, as 'competing legal life-worlds, inhabited by "evil lawyers" on the one hand and "real" lawyers (or

⁴⁰⁴ Fraser, "This is Not like Any other Legal Question" (n 35) 125.

⁴⁰⁵ See the discussion of Nuremberg and ICL scholarship in Chapter Six.

just lawyers) on the other, coexist and struggle over the political and jurisprudential meaning of “law”.”⁴⁰⁶ The correlation and continuity of ideas between different legal officials in the past, lawyers now and lawyers then, and legal scholars on opposing sides of academic debates is crucial to understanding the need to rethink aspects of jurisprudence in the wake of the Holocaust. It challenges the existing periodization of post-Holocaust law, which is ‘the temporal barrier which seeks to prevent ... the essential character of the Holocaust more generally from emerging from the myths of post-war jurisprudence’.⁴⁰⁷

There is an equivalent to this in Stone’s writing. Where the Holocaust is treated as outside of the law, it is also used to uphold the orthodox empiricist/realist approach to historical writing. Where the ‘essential character’ of the Holocaust is consigned to the past, its traumatic and ongoing presence is prevented from impacting upon the dominant metanarratives underpinning the writing of law and history. By usurping the need to separate and distinguish ‘before’ and ‘after’ Auschwitz, and instead considering Auschwitz as the ‘normal jurisprudential state’, rather than the exception, Fraser mirrors Stone’s claim about the Holocaust as historical and historiographical norm. The history of the Holocaust urges us both to integrate it into our conception of jurisprudence and transform that conception in response to it. It calls on us to accept it as a ‘normal’ part of legal development and, through an acknowledgement of law’s complicity with it, to transform our appreciation of the role of law in genocide. Historiography has arguably been too successful at the first step in recent years, historicising the Nazi past to the point where its potential meta-theoretical significance is sometimes overlooked altogether. The second step, a transformative re-evaluation, is problematic for both history and law, but the adoption of a Holocaust-led, critical perspective brings these questions to light and opens them for debate. This would aid jurisprudential discourse to break out of from its present structural limitations and explore the relationship between law and the Holocaust in much greater depth and detail.

The importance of a robust evaluation of the history of the Holocaust is clear from the arguments presented in this chapter. It comes back to the point raised in relation to jurisprudential discourse that, in order for the concept of law to be truly universal, it must come to terms with the nature of law in wicked regimes including Nazi Germany. In order for this to happen, the history of the Nazi legal system needs to play a role. This chapter and previous

⁴⁰⁶ Fraser, ‘Evil Law, Evil Lawyers?’ (n 26) 393.

⁴⁰⁷ Fraser, *Law After Auschwitz* (n 23) 53.

chapters have highlighted areas where the history of Nazi Germany contradicts the jurisprudential understanding of it. The next chapter builds by exploring some of these in more detail, including the emerging English language legal history of the Third Reich and a case study of recent historical scholarship about the Nazi concentration camp system.

Chapter Five: Learning Jurisprudential Lessons from the Historiography of Nazi Germany: ‘the extent to which there was actually an internal logic to the legal system implemented by the Nazi regime is striking’⁴⁰⁸

I. Introduction

A. Taking Account of the Historiography of Nazi Germany

Chapter Four argued that the nature of the historical Holocaust and its implications for law meant that it was necessary to challenge fundamentally the assumptions of jurisprudential discourse as it applies to the case of Nazi law.⁴⁰⁹ This chapter will use more conventional, empirical historical scholarship to reinforce and expand upon these arguments. It will use case studies of historical scholarship to demonstrate how misconceived the prevailing jurisprudential representation of Nazi Germany is, and consider some of the implications for jurisprudence of a historically sound understanding of law in the Third Reich. The historical scholarship examined in this chapter through its two case studies reveals that, in order to theorise Nazi Germany properly as a legal state, it is necessary for jurisprudence to acknowledge its complex nature. It must adopt a nuanced and differentiated approach appropriate to that complexity, rather than consigning it to the role of an unhistorical source of uncontroversial hypotheticals and subsuming Nazi law within the one-dimensional category of wicked legal systems.

The case study research shows how Nazi history becomes much more interesting and relevant for jurisprudential scholars elucidating the concept of law, when its actual historical specificity is taken into account. It rejects the idea of Nazi Germany as a state of non-law without a legal framework recognisable to contemporary jurisprudence, or as representing a rupture from it. It advocates against the language of the extreme, drawing attention instead to the ordinariness of the lives and decisions of even concentration camp perpetrators. Finally it undermines the structural distinction between positivism and natural law in the context of the Third Reich by illustrating that neither adequately explains the nature of the Nazi legal system. The characteristics shown to be present in jurisprudential discourse in chapters Two and Three do not stand up to historical scrutiny in light of this research. In addition, the alternative offered by Kristen Rundle,⁴¹⁰ to reorient jurisprudence towards a natural law narrative based on the Nazi experience,

⁴⁰⁸ Harry Reicher, ‘Evading Responsibility for Crimes Against Humanity: Murderous Lawyers at Nuremberg’ in Steinweis and Rachlin, *The Law in Nazi Germany* (n 67) 143.

⁴⁰⁹ The way ‘jurisprudence’ and related terms are used in this dissertation is explained in Section II of Chapter One, as is the use of terms to describe Nazi Germany, such as ‘Nazi past’, ‘Third Reich’ and so on.

⁴¹⁰ Discussed in detail in Sections III and IV of Chapter Four.

does not adequately account for the presence of law in the implementation of the Holocaust and the complexity and evolution of the system.

The largely empirical history addressed in this chapter is complementary to the more theoretical approach adopted by Dan Stone for interrogating the jurisprudential understanding of Nazi law. Karin Orth, historian of the Third Reich, has argued that it is necessary to combine empirical and theoretical approaches across the humanities and social sciences when attempting to understand, for example, the behaviour of Nazi perpetrators. She asserts that 'this alone allows the construction of plausible ... explanations for the behaviour of the SS in the concentration camps'.⁴¹¹ Indeed, in her view 'it seems axiomatic that the empirical findings of historians should be allied to the theoretical approaches of the social sciences'.⁴¹² This assertion is equally applicable to the relationship between the history of the Nazi legal system generally (of which the role of perpetrators is one feature) and jurisprudential consideration of the concept of law.⁴¹³

To the extent both that certain jurisprudential arguments depend on a misconceived and unhistorical interpretation of Nazi law, and that the actual experience of Nazi law is continuous with the jurisprudential understanding of the concept of law, the history of Nazi Germany has something to contribute to jurisprudential debate. This history underpins the claim that the jurisprudential representation of the Third Reich is flawed, in the same way that historiographical misconceptions about Nazi Germany currently inform jurisprudential arguments about, for example, wicked legal systems. And in the same way that assumptions about the nature of the Third Reich dictate its use as an uncontroversial extreme and rhetorical trump card, the versions of positivism and natural law that are constructed on the jurisprudential understanding of the Third Reich and are then reapplied to Nazi law, can also be challenged by a different historical rendering of the Nazi past. In this context it appears self-evident that a discipline relying on theories based on concrete assumptions about a past that survives predominantly as historical record should test its assumptions against the relevant historiographical findings. The conceptions of Nazi law that endure in historical research may not be sufficiently informed by legal theory to be imported directly into

⁴¹¹ Karin Orth, 'The Concentration Camp Personnel' in Jane Caplan, Nikolaus Wachsmann (eds), *Concentration Camps in Nazi Germany: The New Histories* (Routledge, 2010) 55. Some of Orth's research is discussed in sections III and IV of this chapter as part of the case study of concentration camp system research.

⁴¹² Ibid.

⁴¹³ There is not scope in this dissertation for a comprehensive theorisation of the relationship between empirical and philosophical scholarship, and this is not necessary for what I am suggesting here.

jurisprudence or to address of themselves the questions of how to theorise Nazi law adequately. However, by taking account of this research, jurisprudential theorists can translate historiographical interpretations into legally relevant material from which answers to legal theoretical questions can be constructed for jurisprudence.

B Selection of Case Studies

The first case study is of the nascent English-language, legal historical research into the Nazi legal system itself, specifically with regard to the important role of ideology in Nazi law.⁴¹⁴ This scholarship has begun to appear in the last few years, largely thanks to the influence of translated continental research into the Nazi legal system, particularly from German legal historian Michael Stolleis.⁴¹⁵ It is not a unified, coherent body of scholarship, but is disparate because of its emerging nature. It is also not entirely contained within the historical discipline. Certain interdisciplinary influences, from philosophy in particular, are incorporated within the literature referred to in this chapter because of their legal historical focus on the role of ideology in Nazi law. This unifies the theme of the case study, the important question of how Nazi law is understood in terms of its relationship to Nazi ideology. This issue is pressing because it puts the Nazi legal system on the historiographical agenda in a disciplinary context where the importance of issues around ideology, ethics and morality in the Third Reich are increasingly recognised and examined.⁴¹⁶

⁴¹⁴ The examples of the literature that will be considered in this chapter in relation to Nazi ideology are: Stolleis, 'Law and Lawyers' (n 62); Stolleis, *The Law Under the Swastika* (n 24); various contributors to Steinweis and Rachlin, *The Law in Nazi Germany* (n 67); Carolyn Benson and Julian Fink, 'Introduction: New Perspectives on Nazi Law' (2012) 3(2) *Jurisprudence* 341; and Herlinde Pauer-Studer, 'Law and Morality under Evil Conditions: The SS Judge Konrad Morgen' (2012) 3(2) *Jurisprudence* 367. This literature incorporates a mix of Anglo-American and continental scholars and some examples from disciplines other than history, particularly philosophy, whose relevant work is focused on the legal history of Nazi Germany. The legal historical aspects of David Fraser's research are not included here because his writing is addressed separately in Chapter Four.

⁴¹⁵ The recent emergence, scope and content of a translated and original English-language legal historical scholarship of Nazi Germany is discussed in Section III of Chapter One. Stolleis' research is included here notwithstanding his German origins. While the focus of this dissertation is on the Anglo-American *legal* academy, this does not preclude it having access to English-language *historical* research that is cross-pollinated from, in this case, Germany. There is no inconsistency, therefore, in using historical material that originated from outside of the Anglo-American world to critique Anglo-American legal scholarship.

⁴¹⁶ For example, Geoff Eley, *Nazism as Fascism: Violence, Ideology, and the Ground of Consent in Germany 1930-1945* (Routledge, 2013); and Wolfgang Bialas and Lothar Fritze (eds), *Nazi Ideology and Ethics* (Cambridge Scholars Publishing, 2014).

These aspects are now considered within historiography as an important contributor to the consensual basis of the regime and an essential ingredient in the decision-making of many of those living in the Third Reich. The recognition of widespread endorsement among German society of certain ideological claims has to a significant degree revised the totalitarian, repressive model of Nazi rule according to which the all-pervasive *Gestapo* ensured the compliance of society. It has also helps provide more persuasive and comprehensive explanations for the apparently incomprehensible actions of individuals within institutions such as the SS (*Schutzstaffel*), *Gestapo*, *Wehrmacht* and *Einsatzgruppen*, particularly when implementing the Final Solution. The role of the legal system - its officials, rules and institutions - has become more important in how it contributed to both the terrorisation and regulation of the Third Reich, and its involvement in the Holocaust. The significance of ideology in shaping, underpinning and directing the Nazi legal system is particularly relevant for the jurisprudential understanding of Nazi law as it provides a framework for theorising the nature of the system as a manifestation of the concept of law. It also counteracts attempts to understand Nazi law through the paradigms of positivism and natural law, because it reveals historical features of the legal system that arguably mean it does not conform to either of these theoretical models, or the role they assign the Nazi regime as an archetypal wicked legal system.

My analysis of this case study will focus on these points. First, what the history of the relationship between law and ideology in the Third Reich tells us that undermines the representation of Nazi Germany within jurisprudential discourse. Second, how the research suggests that the system can be theorised as law infused with ideology and why this goes beyond a cynical manipulation/instrumentalisation interpretation of Nazi government, which often underpins particularly naturalist arguments about wicked regimes. And third, why the ethical guidance of the legal system by Nazi ideology, along with other features of the legal regime, is not easily amendable to the classic, modern versions of positivism and natural law. This new scholarship is beginning to overturn the application of the discontinuity thesis to the idea of Nazi law, highlighted by historians in recent years,⁴¹⁷ because its complexity and nuances prevent it from being easily labelled as the absolute other.

The second case study encompasses recent historical literature about the nature and development of the concentration camp system in the Nazi

⁴¹⁷ See the discussion in Chapter One, including of comments by Patricia Szobar.

state,⁴¹⁸ and has been selected for a number of reasons. It is relatively new scholarship so represents as far as possible the current state of understanding of the subject in the historical profession. The previous historiography of the concentration camp system in Nazi Germany has itself been subject to criticism, and awareness within the literature of these limitations is pertinent in this case. Many of the characteristics of the previous work criticised by the authors studied here, such as the insistence on points of rupture at certain times, a simplistic, totalitarian camp model, and a one-dimensional portrayal of those working in the camp system, are indicative of the underlying narrative that continues to influence the jurisprudential representation of Nazi Germany. I prefer, in my selection of materials, the general, thematic history of the concentration camp system over narratives of individual camps because the narrow focus of the latter precludes detailed engagement with the general state of previous scholarship. The broader focus of the case study is much more relevant to the jurisprudential issues highlighted in earlier chapters.

I have also chosen the second case study because it is a fairly self-contained area of historical research, with a delineated output, and yet its findings touch on a number of different areas that are directly or indirectly relevant to law. It is consequently possible to discuss this research output in some detail within this chapter, in order to make the necessary points supporting my argument. The literature raises questions that are pertinent to the underlying narrative of rupture and discontinuity that informs the jurisprudential treatment of the Third Reich and its legal system. These include the role of law in the relationship between competing institutions such as the judiciary and SS and the evolutionary, improvised and *ad hoc* development of the camp system. They also include the background and motives of those tasked with implementing Nazi policy in the camps and enforcing and upholding the Nazi justice system.

The emphasis of this historical research on the wider constellation of causes and functions of the concentration camp system, alongside its differentiated approach, is also methodologically revealing for the prevailing jurisprudential

⁴¹⁸ In particular, beyond detailed studies of individual camps, the work of Nikolaus Wachsmann, Jane Caplan and others. See, *inter alia*, the chapters in Caplan and Wachsmann, *Concentration Camps* (n 411); Wachsmann, 'Looking into the Abyss: Historians and the Nazi Concentration Camps' (2006) 36 *European History Quarterly* 247; Christian Goeschel and Nikolaus Wachsmann, 'Before Auschwitz: The Formation of the Nazi Concentration Camps, 1933-9' (2010) 45(3) *Journal of Contemporary History* 515; Jane Caplan, 'Political Detention and the Origin of the Concentration Camps in Nazi Germany, 1933-1935/6' in Neil Gregor (ed), *Nazism, War and Genocide: New Perspectives on the History of the Third Reich* (University of Exeter Press, 2005).

understanding of the Third Reich. It exposes the inherent contingency of the institutions and the agents acting within them; their inevitable reliance on the context in which they operated. As with the first case study, the application of historical methodology uncovers findings that question the preconceptions upon which jurisprudential references to Nazi Germany are based. The substantive historical findings about how the camp system actually developed and functioned expose evidence about the complexity of the system and the different forms of rules governing and influencing it. They also unearth the extent of continuity across previously erected artificial barriers at the start and end of the regime and the beginning of the war in 1939. These findings undermine pre-existing conceptions about the centralised, hyper-organised, monolithic and totalitarian character of the state. At the same time they challenge the notion of an essentially criminal and arbitrary structure of decision-making and rule enforcement, and the concept of a rupture in legal and historical time surrounding the period of Nazi rule.

Being more directly concerned with the Nazi legal system, the first case study includes literature specifically addressing the nature of Nazi law and its relationship with ideology. This research tackles head on the characterisation of Nazi 'law' as merely positive law or naturalist non-law, contradicting and confounding them both. The second case study has a different focus, on a particular operation within the state – the concentration camp system – used to implement Nazi policies against various sections of the population, and which came to be intimately involved in implementing the Final Solution. This operation intersects with the laws, officials and institutions of the legal system and is therefore able to bring to the fore some of the complexities of attempts to differentiate between 'law' and 'non-law' in the Third Reich, and undermine claims of discontinuity between 'extreme' experiences and 'normal' life. While they have different focuses and to some extent highlight different concerns about the current jurisprudential treatment of Nazi Germany, certain themes run through the literature from both case studies. These themes point to the direction of travel of historiography as a whole in its understanding of the Nazi regime.

C Terminological Pitfalls

Throughout this chapter it is important to be sensitive to the linguistic and interpretive particularities of the disciplines involved. When considering the interdisciplinary significance of historical research, the isolation between the different disciplines manifests itself in some of the terminology used within the literature. Simply put, particular words or phrases may have one meaning for lawyers and another for historians, and it is necessary to be sensitive to

this when writing across the boundary between the two disciplines. This is most apparent for two aspects of the case studies discussed here. The first terminological pitfall is in the tendency of the authors to refer to the Nazi system of 'terror' interchangeably with other phrases intended to denote oppressive rule. The term 'terror' is used quite frequently (e.g. the 'legal terror' and 'extra-legal terror' implemented in Nazi policies against German society), but would often have different meanings when applied in a specifically legal context.⁴¹⁹ Where it is unavoidable to use these phrases in this chapter, when referring to the historical literature, the term 'terror' should be understood in the sense used in the historiography (i.e. as effectively synonymous with 'repression').⁴²⁰

The second terminological pitfall lies in the use of the terms 'legal' and 'extra-legal' generally to indicate different aspects of the system of Nazi rule. This is particularly sensitive in the context of the jurisprudential validity question. In this chapter, generalised use of these terms conforms to conventions within the historiography in order to represent the scholarship accurately. This tends to distinguish between aspects of the system established according to the passage of laws pursuant to the conventional process of rule-making and aspects of the system established by other methods (such as Führer Orders). It should not be taken of itself to indicate a philosophical argument about the legal status of particular Nazi rules or actions or endorse this distinction from a legal-theoretical perspective. The application of these terms does not necessarily reflect a thoroughly argued or jurisprudentially sound understanding of these different concepts within the literature. Indeed, the 'legal'/'extra-legal' opposition in the historiography of Nazi Germany is a feature of the enduring influence of Ernst Fraenkel's 'dual state' theoretical framework, with the 'legal' conforming to the normative state and the 'extra-legal' to the prerogative state.⁴²¹ However, the substance of the research itself problematizes this construction of Nazi governance because of the amorphous nature of the legal system and the overlaps between ostensibly legal and non-legal rules, institutions and officials.⁴²²

A final pitfall exists in the juxtaposition of liberal 'morality' with Nazi 'ideology'. In this dissertation I have employed the term 'morality' when

⁴¹⁹ For example in Victoria Sentas, *Traces of Terror: Counter-Terrorism Law, Policing, and Race* (OUP, 2014).

⁴²⁰ For example, as in Eric A Johnson, *Nazi Terror: The Gestapo, Jews, and Ordinary Germans* (Basic Books, 2000).

⁴²¹ Fraenkel, *The Dual State* (n 13).

⁴²² This is elucidated further throughout the case study discussions in sections II and III of this chapter.

addressing the role of value-judgments in jurisprudential discourse⁴²³ but revert to the term 'ideology' in this chapter when tackling the value system underpinning the Nazi legal system.⁴²⁴ This differentiation primarily reflects the way the terms are used within the different discourses. Jurisprudential scholars such as Hart and Fuller and their intellectual descendants talk explicitly about the relationship between law and *morality*, while historians and philosophers will most commonly refer to Nazi *ideology*.⁴²⁵ This adherence to convention should not be interpreted as an endorsement of this distinction, especially given the claim of critical theory that liberal legality presupposes an ideological position as much as Nazi law.⁴²⁶ Its existence partly reflects the way the terms 'morality' and 'ideology' are generally understood - the former a system of values which can take on either a descriptive or normative character; the latter a system of political ideas with an often negative connotation – which tends, problematically, to locate Nazi law and the jurisprudential concept of law in distinct realms. The difficulties with evaluating continuities between these spheres presented by this distinction are beyond the scope of this dissertation, except to the extent to which they form part of the naturalist association of law with a particular, normative conception of morality to the exclusion of other value systems, including Nazi morality, and thereby contribute to the rupture thesis.⁴²⁷

II. The Implications of Nazi Law for Jurisprudential Discourse

A The Jurisprudential Problem with Nazi Law

The emerging scholarship about the role of ideology in the Nazi legal system will be used to challenge the historical understanding of Nazi law that prevails within jurisprudence, show that the experience of law in Nazi Germany is relevant in important ways to the concept of law, and expose flaws within the circumscribed scope of jurisprudential discourse and its structuring around natural law and positivism. I observed in Chapter One that the version of Nazi law that prevails within jurisprudence brings with it un-investigated assumptions about the legal system. These are on the one hand that it

⁴²³ See chapters Two and Three in particular.

⁴²⁴ I occasionally depart from this custom to refer to 'Nazi morality', precisely to emphasise the point that it reflected a system of values largely accepted by German society and which should be taken seriously as such, and highlight the relevance of the ideology underpinning Nazi law for positivist and naturalist jurisprudential positions on the separability question.

⁴²⁵ See n 416 for some examples.

⁴²⁶ See, for example, the discussion of law as ISA and RSA in the context of Althusserian state apparatuses in David Fraser, 'Through the Looking Glass: Thinking About and Working Through Fascist Criminal Law' in Stephen Skinner (ed), *Fascism and Criminal Law: History, Theory, Continuity* (Hart, 2015) 197-208.

⁴²⁷ See Section I of Chapter One for a discussion of the rupture thesis within Anglo-American jurisprudence.

fulfilled certain formal prerequisites, which would make it valid law according to positivist criteria, and on the other hand that it breached certain moral standards, which would make it non-law for many natural lawyers. Either way, both groups would have little incentive to carry out further *legal* theoretical research into Nazi Germany once its status as a limit case for their respective philosophical positions was established. This opens up the possibility of using Nazi Germany as a repository of uncontroversial examples rather than a serious object of jurisprudential examination.

In the case of natural law, a Nazi regime that moved outside of law would have no legal relevance beyond demonstrating that law and morality are in fact necessarily connected by virtue of it transcending the boundaries of law. For positivism, both the major conceptual concerns about the nature of Nazi law and the potential responses to it become moral rather than legal issues, once the social fact of formal law in the Third Reich is established in analytical terms. Chapter Two made the argument that the subsuming of Nazi law within the category of a wicked legal system, albeit as a paradigm example, consigned it to a particular role within jurisprudential discourse in relation to positivism and natural law and assigned to it certain generic characteristics determined and reproduced by the structure of the discourse. As a paradigmatic wicked legal system, Nazi law is more useful to jurisprudence as a hypothetical limit case for how bad the law could be, against which to test its theories about the concept of law, than as a complex, historical manifestation of law that challenges jurisprudential assumptions and questions its theoretical positions.

The emergent English-language legal historical scholarship introduced in Chapter One,⁴²⁸ which comprises a combination of recently translated German work and some original English research influenced by this continental scholarship, gives an impression of Nazi law very different from that assumed and represented within jurisprudential discourse. Michael Stolleis' observations have indicated that a single, universal concept of law according to which a legal system is either valid or invalid is difficult to uphold in the face of the complexity, diversity and changeability of the Nazi legal system. The dilemma he considers of 'the existence of law in a system that is on the whole unlawful and unjust or that at least commits many unlawful acts'⁴²⁹ presents the regime as a sort of legal paradox. It at the same time has law but is systemically unlawful; or is lawful but has many unlawful facets. Either way, he argues, the actual presence of law, recognised as such at the time both internally and externally, discounts potential positivist and natural

⁴²⁸ See Section III of Chapter One.

⁴²⁹ Stolleis, 'Law and Lawyers' (n 62) 214.

law arguments in support of claims that there was no law. The other solutions to this dilemma Stolleis considers are either that some regular law continued to exist beyond the reach of the state, or that 'tyranny dispenses with a substantive distinction between law and nonlaw [sic] and describes as law anything that meets certain formal criteria'.⁴³⁰ Stolleis does not appear satisfied with either of these options because of the complexity of the system, and the emerging legal historical understanding of the role of ideology in Nazi law problematizes both of them.

The first option is contested because it appears that Nazi ideology suffused the legal system and did not respect a distinction between Fraenkel's prerogative and normative states. It was not therefore the case that the state was *ideological* in nature and *prerogative* in operation whereas the remnants of the traditional system were *legal* in nature and *normative* in operation. The reliance of the second option on 'formal criteria' to make Nazi law lawful by dissolving the 'substantive distinction' between law and non-law adheres to the positivist jurisprudential view that the substantive injustice of a legal system is no detriment to its validity assuming it meets certain formal criteria. However, the Nazi leadership were not primarily concerned with formal legal criteria, which might restrict the ability of the law to implement ideologically-driven policy. It may not be too much of a stretch in fact to claim the reverse, that the distinction between law and non-law was collapsed by the equation of law with ideology rather than by its reduction to form. According to this, law that adhered to the Nazi *Weltanschauung* (worldview) was accepted as legitimate whereas law that did not was manipulated or overturned or gradually superseded by other forms of law.

I argue that the available scholarship considered in the remainder of this case study about the role of ideology in Nazi law tends in that direction.⁴³¹ This presents a further predicament for both natural law and positivism because it implies that positivistic rules were ultimately subordinated to naturalist standards (standards of Nazi morality derived from its ideology), which were used to validate rather than invalidate the legal system. The problem is that these jurisprudential models have difficulty in their current form conceptualising a system that relies for its legitimacy on natural law criteria even at the expense of positivist criteria, but not a form of naturalism recognisable to the jurisprudential concept of natural law. The role Nazi law plays for natural lawyers is largely that of an instrumentally and cynically wicked legal system, where the rule-of-law potential inherent in legality is manipulated for the repressive benefit of the regime. Its role for positivism is

⁴³⁰ *ibid.*

⁴³¹ Further historical investigation may be necessary to verify this assertion fully.

to meet certain threshold formal and minimal naturalist⁴³² standards which give it coherence as a legal system but a system which does not necessarily depend on any moral content that may be included within the system. Nazi law does not adhere in its historical form to either of these roles, both of which can rely on similar historical assumptions about that legal system to come to their conclusions.⁴³³

B Ideology in the Nazi Legal System

Building on this, it is important to reflect on what Nazi ideology intended for the legal system if it is possible to countenance that it was more than merely the barely concealed, parasitic *Realpolitik* of a criminal leadership hell-bent on barbarity, striving to achieve its egregious political aims. This suggestion is not unproblematic because it assumes that the Nazi party did have something like a coherent plan for German law and state, whereas Stolleis himself asserts that ‘there can be no real “legal doctrine” (legal philosophy, legal theory) of National Socialism’.⁴³⁴ The fragmentary philosophical origins of Nazi ideology,⁴³⁵ the often pragmatic manoeuvres of the Nazi leadership and its relatively short and dramatic period in power (nearly six years of which was shrouded in the chaos of war) mean that ascertaining a coherent theory of Nazi legality is very challenging. However, there are some things we can say about the attempted Nazi legal revolution, and these things are interesting for their implications for jurisprudence.

Nazi ideology was squarely opposed to and set on destroying the rule of law. Hitler was clearly averse to law, at least in its liberal, individualistic manifestation, and his ‘contempt for the law was matched ... by his disdain for lawyers, whom he deemed “defective by nature”’.⁴³⁶ Consequently Nazi law ‘represented a gross departure from the rule of law: the Nazis eradicated

⁴³² In the case of Hart’s minimum content of natural law.

⁴³³ i.e. both can understand the Third Reich as a repressive, manipulative, cynical totalitarian regime with a legal system that contains a certain formal consistency and which can be criticised on moral grounds, which were absent from Nazi law. In simple terms, the question then becomes whether the system can be considered valid as law when there was no moral content to its governing rules. It is not as important for positivism that the law was manipulated or had no moral content, as it does not claim that law and morality are necessarily separate, just that they are necessarily separable. It is nevertheless assumed that Nazi law had no moral content and was purely wicked in its aims, without interrogating what the implications of this may be. See the discussion of the role of Nazi law in the Hart-Fuller debate in Sections II and III of Chapter Three.

⁴³⁴ Stolleis, ‘Law and Lawyers’ (n 62) 226.

⁴³⁵ Ian Kershaw has referred to ‘the ragbag nature of Nazism’s assemblage of phobias and prejudices’; Kershaw, *The Nazi Dictatorship* (n 76) 263.

⁴³⁶ Robert D. Rachlin, ‘Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror’ in Steinweis and Rachlin, *The Law in Nazi Germany* (n 67) 67-68.

legal security and certainty; allowed judicial and state arbitrariness; blocked epistemic access to what the law requires; issued unpredictable legal requirements; and so on'.⁴³⁷ Instead of the principles of liberal legality, 'the primary Nazi standard of "good law" was taken to be the advancement, purification and collective properties thought to be essential to the flourishing of the German "Blood-community" (*Blutsgemeinschaft*)'. This witnessed, among other things, a 'denial of the *separation* between law and Nazi "morality"',⁴³⁸ a consequence of the ideal that 'ethical principles should be embedded in law'.⁴³⁹ In the Nazi *Weltanschauung* the perceived good of the *Volksgemeinschaft* (national community) was placed above the advancement and protection of the individual.⁴⁴⁰ The good of the national community was dependent on the eradication of racial impurity, which meant the abolition of equality before the law for 'racial aliens'. The national community was considered to have an ethical compass, a 'healthy popular sentiment', embodied in the person of the Führer and embedded in the interpretation of the law.⁴⁴¹ This, as a manifestation of the living, ethical will of the people, was not intended to be defined strictly but could be applied to determine who was with and who was an enemy of the *Volk*, resulting in the erosion of concepts such as certainty and non-retroactivity. The subjection of the individual to the community also meant that individual fairness was not a paramount concern, because the individual was not the main priority, and especially not the non-aryan individual.⁴⁴²

The Nazi regime was engaged in, 'reversing liberal principles'.⁴⁴³ This 'explicit rejection of principles underlying both common and Roman (civil) law systems'⁴⁴⁴ was the incarnation of a perverse view of the world.⁴⁴⁵ Its

⁴³⁷ Benson and Fink, 'Introduction' (n 414) 341-342 (see p.341, fn 2 for a serviceable definition of the 'rule of law').

⁴³⁸ *ibid* 342.

⁴³⁹ Pauer-Studer, 'Law and Morality' (n 414) 371.

⁴⁴⁰ On the use of the term 'national community' in Nazi law and other related issues see Chapter Four of Stolleis, *The Law Under the Swastika* (n 24) 64-83.

⁴⁴¹ The description of this phrase and similarly nebulous moral concepts as a form of legal interpretation used to break the shackles of original legislative intent and legal meaning can be found at *ibid* 15.

⁴⁴² See Matthew Lippman, 'The Prosecution of Josef Altstoetter et al.: Law, Lawyers and Justice in the Third Reich' (1997/1998) 16 *Dickinson Journal of International Law* 343, especially section IV.

⁴⁴³ Douglas G. Morris, 'Discrimination, Degradation, Defiance: Jewish Lawyers under Nazism' in Steinweis and Rachlin, *The Law in Nazi Germany* (n 67) 107.

⁴⁴⁴ Rachlin, 'Roland Freisler' (n 436) 80.

⁴⁴⁵ 'Of course the Nazi legal theorists had a deeply perverted conception of justice and morality. The community-oriented sentiments of the members of the *volks*-community constitute their sense of justice'; Pauer-Studer, 'Law and Morality' (n 414) 372.

perversity, however, is perhaps secondary in the jurisprudential context to its historical and legal ramifications. For example:

It is difficult to understand contagion-centred anti-Semitism – an antipathy perceiving not only heredity, but direct or indirect physical contact as a dire threat – as anything other than a form of delirious paranoia. Since this appears to have been a paranoia that many Germans shared, and that ultimately became anchored in the law, the question of delirium, at least in a clinical sense, seems unresolved.⁴⁴⁶

As the perversity of Nazi ideology became part of a legal system widely accepted as both valid as law and authoritative, highlighting its perversity alone does not tackle the problem of the implementation of the consequences of the enduring hegemony of the ideology at least somewhat on the basis of consensual politics. Nazi ideology did have profound and deliberate consequences for law and, notwithstanding Stolleis' comments, 'the extent to which there was actually an internal logic to the legal system implemented by the Nazi regime is striking. There was an underlying ideology at the heart, driving the regime'.⁴⁴⁷ This is not to say that Nazi ideology or the legal system it spawned was necessarily sustainable, or that the full scale legal revolution logically anticipated by Nazi morality could ever have successfully taken place, such was the instability and dynamism of the regime. Its inherent 'cumulative radicalisation' may have resulted in its inevitable self-destruction,⁴⁴⁸ but it is possible that some compromise of ideology, pragmatism and power would have sustained the regime over a longer period in different circumstances:

Whether the Nazi system would have had to retain a minimum of regularity in order to survive, or whether, failing that, it would have sunk into a chaos of rival power centers and become ungovernable even without the war are not questions we can answer. But there is much to suggest that the relationship between norm and prerogative (law and injustice) would not have remained stable. Instead, it would have continued to shift in one direction or another, and not necessarily in a selfdestructive one. Authoritarian regimes, too, can develop forces that stabilize the system and generate a surprisingly long life span...⁴⁴⁹

Either way, the Nazi state and its legal system did achieve many of its ideological aims, aims that are often considered unthinkable – or at least unspeakable – today. It did so in, and to a civilised *Rechtsstaat* at the centre

⁴⁴⁶ Raphael Gross, 'Guilt, Shame, Anger, Indignation: Nazi Law and Nazi Morals' in Steinweis and Rachlin, *The Law in Nazi Germany* (n 67) 94.

⁴⁴⁷ Harry Reicher, 'Evading Responsibility for Crimes Against Humanity: Murderous Lawyers at Nuremberg' in Steinweis and Rachlin, *The Law in Nazi Germany* (n 67) 143.

⁴⁴⁸ On 'cumulative radicalisation', see Kershaw, *The Nazi Dictatorship* (n 76) 263-264 and the reference to Hans Mommsen's use of the term therein.

⁴⁴⁹ Stolleis, 'Law and Lawyers' (n 62) 216.

of the western world, within living memory. This alone gives sufficient cause to wonder what it was about law and state in Nazi Germany that enabled the Holocaust to take place, and that allowed the legal system to become so completely and explicitly subordinated to state ideology such that law and injustice continued to exist, not merely side-by-side, but as inherent within one another. It also begs us to question whether this says something fundamental or different about the concept of law than expressed in the Hart-Fuller debate and the manifold versions of positivism and natural law that prevail as its legacy within jurisprudential discourse today.

C Countering Positivist and Naturalist Conceptions of Nazi Law

The understanding of the Nazi legal system antagonistic to the rule of law but infused with ideology, and dependent for its validity and authority at least to an extent on that ideology, highlights two ways of thinking about Nazi law in the context of positivism and natural law. These are mutually contradictory, at the same time making it a paradigmatic case and a powerful refutation of both schools of thought. The conclusion I draw from this is that a discourse structured around a debate between positivism and natural law is not the best way of thinking about the nature of Nazi law. If we argue that the Nazi renunciation of liberal legality is a complete rejection of legal principle, stripping law away until all that is left is power in a legal shell, it becomes the most primitive form of positive law. However, even Hart's positivist conception of law has certain formal requirements which determine how law comes into existence and how it is applied within a system:

That the law of a system is identified by criteria provided by a rule of recognition accepted in the practice of the courts, ... that the courts exercise a genuine though interstitial law-making power or discretion in those cases where the existing explicit law fails to dictate a decision, ... that there is no important necessary or conceptual connection between law and morality.⁴⁵⁰

It is highly questionable whether Nazi law meets even the formal conditions of validity mentioned here. While the Führer Principle can be seen as some sort of legal *grundnorm*⁴⁵¹ with peremptory power over other laws, legal rules in Nazi Germany emanated from so many different spheres and in such amorphous form that it is difficult to find any real rule of recognition capable of formally determining what was and was not 'law' within the system. Whether particular measures were or were not part of the law was not an important consideration from an ideological perspective or in terms of

⁴⁵⁰ Hart, *The Concept of Law* (n 223) 259.

⁴⁵¹ Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2nd edn, University of California Press, 1967).

implementing the regime's policies, even if it was at times from a pragmatic standpoint. The lines between law and politics were too blurred.

Similarly, the court system was subjected to such a combination of broad discretion and direction from above that both the genuineness of its discretion and its merely interstitial power can be challenged or at least understood in a way not conceived of within Hart's positivist model. The ideological underpinning of the Nazi legal system meant its judges were ultimately expected to come to the right ideological determinations, which were legal almost by virtue of their perceived moral rectitude, rather than implement the letter of the law in a way that might undermine the national community. This can be perceived as a broad form of discretion giving the judiciary more than merely 'interstitial' law-making power to the extent that its decisions flatly contradicted the existing, explicit written law. The judiciary was also increasingly subjected to heavy influence from the Nazi leadership, some of whom took on the power to overturn decisions viewed as ideologically incorrect. In this sense the court's discretion was very limited, but not to the extent of the enacted law. Finally, the infusion of ideology at the heart of law challenges the notion of a settled core of legal meaning existing in the Third Reich at all. Everything is potentially in the penumbra because the system itself is contingent on ideological, natural law grounds.

Nazi law then might be no law at all after all. However, the infusion of Nazi morality into the legal system such that they became inseparable makes it very difficult to claim that Nazi law represented a form of pure positivism.⁴⁵² The final Hartian requirement of 'no important necessary or conceptual connection between law and morality' is similarly obfuscated by the reality of Nazi law. While there may have been no conceptual connection between law and 'morality' in the sense meant by both Hart and Fuller, there seems to have been a strong and necessary connection between law and some form of morality outside of the strictly legal sphere, i.e. *Nazi* morality. The naturalist element was genuinely intrinsic to the legal system of Nazi Germany – law become ideology in its reformed Nazi manifestation. It may have involved a rejection of the rule of law, but this surely merely invalidates it for natural law theorists such as Lon Fuller, whose 'inner morality of law' attempts to

⁴⁵² The question of how to treat moral principles that are part of the legal system, and whether they become legal principles once defined and formalised through the interpretive process of the courts, is one of the key differences between 'hard' and 'soft' positivism. In the case of Nazi Germany, the system was such that these principles were often deliberately not formalised into strict, consistently applied concepts, which potentially causes a problem for the positivist case by undermining its premise about the role of legal reasoning within the system.

ingrain liberal legality's key principles into law's formal structure.⁴⁵³ Nazi ideology posited a set of alternative principles on which to base its legal system, which enabled it to function as law, be recognised as such and be used to implement the policies of the Nazi government. These alternative legal principles were not merely *ad hoc*, pragmatic measures to achieve and maintain power, but were a symptom of some fundamental tenets of the thankfully under-theorised and never fully realised Nazi *Weltanschauung*. This points to a form of natural law based on Nazi legal principles, as legal truth in Nazi Germany depended almost entirely on moral 'truth'. The contested nature of morality in the Nazi state challenges the conceptual possibility and the wisdom – not to mention the practicality in an evolving political context – of relying on natural law to invalidate the Nazi legal system.⁴⁵⁴

Officials and citizens and party members in the Nazi state were referring to moral principles when making choices, but an alternative version of morality that often led them to make alternative choices.⁴⁵⁵ Is a legal system so reliant on non-legal, 'ethical' principles a form of natural law or its antithesis; the epitome of positive law or no law at all? For reasons associated with both the impact of Nazi ideology on the legal system and the empirical complexity and diversity of Nazi law, this question cannot be answered in one correct way using the framework of positivism and natural law, and it is not, therefore, the right question to ask. The 'validity question' is historically moot – there was law in Nazi Germany, as legal historians such as Michael Stolleis make clear. The 'separability question' meanwhile is only further complicated by the Nazi example. The complexity inherent in the system challenges the jurisprudential characterisation of Nazi law as no more than an archetypal wicked regime as long as one is prepared to dig beneath the surface. The central role of ideology compromises the naturalistic dependence on a discourse of cynical manipulation of the rule of law for oppressive purposes. Both of these aspects counter notions of rupture from 'normal' legal systems. Recognising Nazi law as law brings it closer in the first place. Acknowledgement of its complexity forces us to get beyond the superficial layer of absolute wickedness to reveal the myriad of continuities and differences that coexist beneath. And understanding the relationship between law and politics in the Third Reich as an alternative version of that which exists in other systems allows it to be viewed as something more than just anti-law – the destruction of 'law' through an entirely alien ideology.

⁴⁵³ Fuller, 'Fidelity to Law' (n 4).

⁴⁵⁴ Pauer-Studer, 'Law and Morality' (n 414).

⁴⁵⁵ See Pauer-Studer and Velleman, 'Distortions of Normativity' (n 175).

It is much more important and relevant in light of the understanding of Nazi law emerging from recent scholarship to use it to ask other questions of the concept of law than the validity and separability questions. These are in the area of how law actually functions in a wicked regime and how it is used to achieve wicked ends accepting that it is some form of law. What impact, for example, does the legal nature of authority have on the actions and decisions of perpetrators in the Holocaust or the evolution of repressive and genocidal institutions? There is not scope to tackle such questions within this dissertation, but the academic, historical case studies analysed in this chapter are intended to create a situation where these questions can be asked within jurisprudence in respect of Nazi Germany because the current questions do not result in adequate answers that can be applied to that system. They are the sorts of questions provoked as well by the historical research into aspects of the Third Reich related to the legal system, such as those considered in the second case study.

III. The Nature and Evolution of the Concentration Camp System: ‘a process of events integrated into society’

A Responding to the Rupture Thesis

A comprehensive account of the evolution of the historiography of the concentration camp system in Nazi Germany is beyond the scope of this dissertation. However, some observations about that literature, and its previous limitations as revealed in the case study referred to here, are able to challenge the sort of preconceptions about the Nazi past that have informed historical and legal research, and remain within jurisprudence. Jane Caplan and Nikolaus Wachsmann set their research quite explicitly against the backdrop of scholarship that has gone before. I will briefly highlight the criticisms they make of the pre-existing English language scholarship before going on to suggest that the aspects of this previous literature that are most worthy of criticism are similar to the perception of the historical reality of the Nazi past that continues to inform the jurisprudential understanding of Nazi law. As Caplan, Wachsmann and others argue, despite the appearance from the 1990s of some German language scholarship on the role of the pre-war concentration camps, this literature had not been translated into English and ‘its impact on the historiography of the Third Reich and totalitarian terror has been limited’.⁴⁵⁶ Instead, ‘a steady stream of survivor memoirs, novels, newspaper articles and films has cemented the place of the camps in Western popular culture as the place of ultimate evil’, an underdeveloped interpretation not properly challenged in English language historiography

⁴⁵⁶ Goeschel and Wachsmann, ‘Before Auschwitz’ (n 418) 520.

until recently.⁴⁵⁷ The same is true of those who worked in the camps, the members of the camp SS.⁴⁵⁸

More recent research also attempts to move the camp system out from under the shadow of Auschwitz, which had previously dominated, to provide a more convincing explanation of its growth and operation.⁴⁵⁹ The Auschwitz paradigm of the extreme wartime extermination camp encouraged the view of Nazi camps during the Second World War as distinct from what came before and after, appearing in virtually complete form almost out of nowhere, and separate and conceptually distinct from legal forms of oppression and discrimination. Thus Auschwitz, and therefore the camp system as a whole, was viewed through the eyes of the rupture thesis, an analysis the scholarship in this case study confronts and moves beyond. The literature looks at both the structures of the camps and the motivations and experiences of those involved in order to produce a more complete and complex understanding of the functioning of the camp system. The overall picture of the concentration camp system in Nazi Germany that emerges is one of continuity as opposed to rupture, evolution as opposed to revolution, integration as opposed to isolation, and differentiation as opposed to standardisation.⁴⁶⁰ It emphasises the widespread nature of the camps, which were pervasive in Nazi society, the many different forms they took and the often *ad hoc* dynamism with which they were adapted and reinvented. The research reveals that 'the Nazi camps were characterized, at both ends of the Third Reich, by chaos and improvisation',⁴⁶¹ meaning any attempt to construct a 'typical' camp 'does not fully reflect the complex history of the camps'.⁴⁶²

The examples presented in the research indicate that even within the historiography of Nazi Germany, as with the English language legal history addressed in the previous case study, only relatively recently are deeper and more nuanced explanations for Nazi systems and institutions of rule being

⁴⁵⁷ Ibid. 517.

⁴⁵⁸ Wachsmann, 'Looking into the Abyss' (n 418) 253.

⁴⁵⁹ 'Nowhere was the horror of the camps more evident than in Auschwitz, which has become shorthand for concentration camps (and nazi terror more generally). But there was more to the nazi camps than Auschwitz.' Goeschel and Wachsmann, 'Before Auschwitz' (n 418) 518. It is worth noting that Auschwitz was itself a camp complex rather than an individual camp, but the term is used here as much for what it symbolises in the literature as for a factual description of the camp(s) at Auschwitz.

⁴⁶⁰ See Jane Caplan and Nikolaus Wachsmann, 'Introduction' and Nikolaus Wachsmann, 'The Dynamics of Destruction: the Development of the Concentration Camps, 1933-1945' in Caplan and Wachsmann, *The New Histories* (n 418).

⁴⁶¹ Wachsmann, 'Dynamics of Destruction' (ibid) 36.

⁴⁶² Ibid 17.

advanced based on detailed empirical evidence. The principal characteristics of the historical literature rejected by the authors in this case study include endorsement of temporal ruptures, adherence to the monolithic, totalitarian state model, mono-dimensional portrayals of Nazi perpetrators and a dismissal of Nazi Germany as essentially irrelevant. These characteristics also continue to inform jurisprudential understanding of Nazi Germany - as Chapter Two indicated - but need to be challenged as they are not based on the actual historical experience of the Third Reich.

The idea of rupture implies that Nazism can be disentangled in time from the developmental processes going on around it, whether historical, social, legal, economic or political. As such, it is reliant on the idea both that what went before and after the Nazi period have nothing of significance in common with the Third Reich, and that what existed during Nazi rule was somehow intrinsically homogenous and not amenable to empirical or theoretical deconstruction.⁴⁶³ This second assertion is contradicted by efforts to place the camp system within a framework of historical periodization, taking into account the function and nature of the camps and how they changed over time. The complex periodization of camp history proposed by Wachsmann, comprising six different phases across 12 years, is symptomatic of the high degree of improvisation, variety and dynamism inherent in the system.⁴⁶⁴ It suggests that attempts to distinguish on a fundamental level between types of camp, and the periods before, during and after Nazi rule are unlikely to represent accurately the empirical reality of the camps. In the pre-war camps, for example, there were fewer prisoners, and inmate death was uncommon rather than a regular occurrence. There was, however, 'no complete rupture in 1939. Rather the camps mutated from places of brutal abuse into sites of unprecedented atrocity' with the early examples providing a precedent for 'camps as extra-legal sites for the exercise of extreme political and racial terror'.⁴⁶⁵

The way the camps developed embedded great synchronic variety and dynamic diachronic change into the system. The powerful symbolism of Auschwitz fostered an image of the camps inevitably too narrowly concerned with one camp complex and that necessarily viewed them as fundamentally

⁴⁶³ This is even allowing, in the case of the concentration camps, for the imposition of an internal rupture in 1939 (at the start of the Second World War), to explain the emergence of the phenomenon of Auschwitz and its role in the Holocaust.

⁴⁶⁴ Wachsmann, 'Dynamics of Destruction' (n 460).

⁴⁶⁵ Goeschel and Wachsmann, 'Before Auschwitz' (n 418) 518. Note the use of the term 'extra-legal' here without a conceptual framework to underpin the relationship between the 'legal' and 'extra-legal' spheres.

distinct from what came before and after.⁴⁶⁶ Not only does this obfuscate the partial distinction between camps with different functions (for example, extermination camps and labour camps), but it also fails to acknowledge the evolutionary process by which the wartime camps came about. This point is further emphasised by Jens-Christian Wagner's research on the relationship between work and extermination in the concentration camps.⁴⁶⁷ It shows the complex periodization that applies to the development of this aspect of the camp system alone.⁴⁶⁸ The dynamism of the camps, changing and evolving as circumstances required, indicate that their function was not uniform throughout the Third Reich, and cannot be simply encapsulated in a concept such as 'annihilation through labour'. While there was a tension between their initial use for re-education and their later use for supplying productive war labour, the nature of the camps adapted over time with different aspects taking priority at different times, and their history must be seen in this context.⁴⁶⁹ The competing aims of the camp system, in this case work and extermination, cannot be seen as diametrically opposed, with only one either prevailing at any particular time or throughout the Nazi period. Rather, priorities changed according to circumstances, and were the result of a complex mix of practical, economic and ideological factors.

The scholarship dispels the notion of rupture and also provides a more nuanced picture of continuity across the boundaries of 1933 and 1945. It goes beyond the received narrative of camps having been invented before the Nazis came to power, to highlight the legal process by which detention was brought about as much as the institutions of the camps themselves. The Nazi use of the tool of protective custody had precedent in Germany, with its long history of arrest without trial, which was re-fashioned 'on a completely unprecedented level and to quite different ends'.⁴⁷⁰ Examples like this, that get to the heart of the development of the legal tools of persecution and discrimination employed in the Third Reich, demonstrate that 'in order to truly understand the significance of the concentration camps for the period

⁴⁶⁶ *ibid* 518.

⁴⁶⁷ Jens-Christian Wagner, 'Work and Extermination in the Concentration Camps' in Caplan and Wachsmann, *The New Histories* (n 418) 129-131.

⁴⁶⁸ There has been significant historical debate about the relative and absolute importance of ideology and economics in the camp system and throughout the Third Reich. For an overview of this, see 'Politics and Economics in the Nazi State' in Kershaw, *The Nazi Dictatorship* (n 76).

⁴⁶⁹ Wagner, 'Work and Extermination' (n 467) 129-131.

⁴⁷⁰ Goeschel and Wachsmann, 'Before Auschwitz' (n 418) 529.

1933 to 1939 we must look across the divides of 1933, 1939 and also, perhaps, 1945'.⁴⁷¹

This understanding of the camp system feeds into the general theme calling for greater differentiation and acknowledgement of complexity when dealing with the Nazi past. The intricate texture of the different factors involved in the system is emphasised, and with this comes the need to produce a more nuanced account of the past. Dieter Pohl's research into the role of the concentration camps in the Holocaust is an example of how a differentiated account of events, supported by detailed empirical evidence, is more convincing than fixed interpretations built around a central, simplistic interpretation.⁴⁷² Equally, Wagner's research illustrates how such an approach is more effective in explaining and understanding the Nazi past than entrenched, monolithic interpretations asserting the primacy of politics or economics.⁴⁷³ Acknowledging both the problem with overarching concepts and the temptation to express moral judgment through analytical concepts, Wagner argues:

As a metaphor for moral indignation, the use of the term "annihilation through labour" by historians may be completely understandable; but it is not particularly helpful in an analytical sense, since it implies an ideological programme and, in doing so, disregards the impetus of contingent factors.⁴⁷⁴

This emphasises the need to strike the right balance of interpretation between monolithic, centralised ideological direction and more localised 'contingent factors'.⁴⁷⁵ The concept of annihilation through labour can imply a single, unified, top-down, exclusively ideological policy, which in important ways distorts the way it actually came about and its real nature. It also bestows on it a certain moral judgment and distance that, while

⁴⁷¹ Victoria Harris, 'The Role of the Concentration Camps in the Nazi Repression of Prostitutes, 1933-9' (2010) 45 *Journal of Contemporary History* 675, 697.

⁴⁷² Dieter Pohl, 'The Holocaust and the Concentration Camps' in Caplan and Wachsmann, *The New Histories* (n 418).

⁴⁷³ Wagner, 'Work and Extermination' (n 467). For an overview of the historiographical debate on this subject, see 'Politics and Economics in the Nazi State' in Kershaw, *The Nazi Dictatorship* (n 76) 47-68.

⁴⁷⁴ Wagner, 'Work and Extermination' (n 467) 140.

⁴⁷⁵ While this can also be applied to the first case study in this chapter, about the centrality of ideology to the Nazi legal system, it does not undermine the importance of ideology as a factor within that regime. Instead it highlights how it is possible to overemphasise the degree of ideological centralisation and control from above that is symptomatic of some totalitarian interpretations. Recognition of the diffusion of ideological factors throughout the legal system and its influence on the local, improvised, everyday decisions of officials is an antidote to rather than an aspect of the totalitarian model.

understandable, can discourage attempts to get to the bottom of what really happened in such cases.

In a number of different areas of research into the functioning of the concentration camp system, mono-causal models of explanation relying on stark oppositions and homogenous groupings of events, individuals or structures, have been refuted and surpassed by more nuanced and differentiated accounts. There was not one type of Nazi camp, but rather many which changed and evolved on an ad hoc basis over time. This does not necessarily preclude any sort of general analysis, the use of larger explanatory models or the deduction of overarching interpretations. It does mean, however, that we need to be more careful when considering these to ensure that they are sufficiently differentiated to account for their different historical manifestations. Rupture and discontinuity must be applied with great care when evaluating any aspect of the Nazi regime. Of course some things were very different and in that sense discontinuous with what came before and after, and radical change did take place. The danger highlighted by the concentration camp research lies in the notion of rupture informing the whole interpretive framework that underlies the examination of the Third Reich. The assumption of rupture as the default position because of the apparently overwhelmingly alien nature of some things associated with Nazism tends towards the homogenisation of Nazi Germany and the crystallisation of our reconstructions of it around that which is most 'other' to ourselves, rather than the important continuities that flow through the remainder of the concentration camp scholarship.

B The Role of Perpetrators in the Camp System

This part specifically addresses the role of Nazi perpetrators and those complicit in Nazi acts in the concentration camp system.⁴⁷⁶ In the picture that emerges of the personnel of the camp SS and others involved in running the camps, the problems with trying to locate a 'typical' perpetrator or advance

⁴⁷⁶ The term 'perpetrator' should be understood in this section as intended to be within inverted commas, indicating the contingent nature of its application, which is as a general and descriptive term for those involved in implementing, or collaborating with the implementation of, Nazi policy in the context of the concentration camp system. It is employed in this way predominantly for simplicity, as a straightforward way of describing the different ways of partaking in the Nazi regime in this specific area of research, from which many different forms and levels of perpetration arise. It is not merely that individual perpetrators were involved in certain areas, for example in the running of the concentration camps themselves. Rather, the whole system relied on individuals and groups implementing policies intended to repress, alienate, injure and kill members of the society, and that they were also part of that society. This includes the Camp SS, legal officials, members of the Gestapo and the criminal police, denouncers, and others.

mono-causal motivations for perpetrator behaviour are exposed. The question of how to research, represent and even define Nazi perpetrators is a longstanding one within historiographical scholarship, a comprehensive discussion of which is outside of the scope of this dissertation.⁴⁷⁷ Explaining the behaviour of certain specific types of perpetrator groups within the system, and particularly the 'Camp SS', is an important part of the historiographical research that has received some attention,⁴⁷⁸ but the functioning of the system as a whole is most relevant to the issue of how jurisprudence continues to represent the Nazi past.

Many different types of Nazi 'perpetrator' emerge from the concentration camp system research. These include the archetype of the camp perpetrator, the camp SS elite, as well as the much more numerous camp guards, those who oversaw the 'death marches' towards the end of the war and members of the wider population and private business. These groups are revealed in the literature as characterised by their diversity: changing dramatically over time, representing varying backgrounds, harbouring very different motivations, and working in very diverse circumstances. The picture of perpetration in the Nazi state, even in the limited area of the concentration camp system, is very complex and because of this undercuts conceptual models that fail to take account of this high degree of differentiation. The most recent literature emphasises conditions of ordinariness rather than extremeness, and diversity rather than homogeneity of motivation, ensuring it is impossible to pinpoint a typical perpetrator or to distinguish them clearly as a group from other 'normal' people.⁴⁷⁹

Research about those who operated and worked in the camps is instructive for our understanding of Nazi perpetrators more generally, and for our general understanding of the functioning of the Nazi state. Karin Orth's

⁴⁷⁷ The issues involved do not merely go to understanding how and why the Holocaust and other Nazi policies were carried out, although these are important, but also who exactly is a perpetrator and what does this mean. Are all Germans guilty as complicit in the acts of the Nazi government? Should the Nazi elite be more responsible for the Holocaust than the many 'ordinary Germans' who took part? How much responsibility should be assigned to members of the occupied governments who helped implement Nazi policies or local non-Germans on the ground who collaborated in enforcing them? What about the bystanders, who wilfully turned a blind eye to what was going on, or looked on and did nothing; and those victims who also played a role in carrying out Nazi policies against their own communities? On the subject of the involvement of 'ordinary Germans' in the Holocaust in the East, see Christopher Browning, *Nazi Policy, Jewish Workers, German Killers* (Cambridge University Press, 2000); and Browning, *Ordinary Men* (n 98).

⁴⁷⁸ See for example Orth, 'The Concentration Camp Personnel' (n 411).

⁴⁷⁹ This impression is taken from various contributions to Caplan and Wachsmann, *The New Histories* (n 418), as discussed in this section.

findings displace ‘the old image of most SS officers as individually abnormal sadists and monsters with a perhaps more disquieting sense of them as “normal” men trained to operate in abnormal circumstances’.⁴⁸⁰ It is evident that many of these perpetrators were ordinary in nature and had an improvisational role in the system, collectively driving it forward. In the environment of the camps, the more ‘extreme’ task of mass murder intermingled with more mundane jobs to become part of the normal daily routine. This is exemplified by the juxtaposition of two orders given consecutively at Auschwitz in August 1942, one concerning safety when taking part in gassings and the other regulating behaviour on public transport.⁴⁸¹ Each is given and received in the same way, but their implications are to our minds radically different.

Even only looking at the concentration camp system, the perpetrator community as a whole was very diverse. Orth notes:

There were men and women, elderly soldiers and very young men, Germans and non-Germans, SS men and prisoner functionaries, rank-and-file sentries and highly-decorated SS leaders, Protestants, Catholics and other religious believers, ideologues and Army conscripts, some who served only a few weeks and others who served the full twelve years of National Socialism, sadistic killers and others who treated inmates comparatively humanely.⁴⁸²

The commandant staff of the camp SS, its functional elite, which was characterised by smaller numbers and a lower turnover than the camp guards generally, was a more homogeneous group, with a high proportion from the war-youth generation and the middle-classes of society.⁴⁸³ The functioning of this group was defined by a network of relationships and ‘held together by shared criminality, through a common socialisation in duty and forms of collective violence’.⁴⁸⁴ The main purpose of the community created by the SS was to engender a feeling of ‘normality and stability’. In order to achieve this, social and cultural events played an important role and connected the men to the towns surrounding the camps, and violence was integrated structurally into the system.⁴⁸⁵ The significance of the ideological context in which the camp SS functioned, ‘captures the reliance of (historical) agents on principles

⁴⁸⁰ Caplan and Wachsmann, *The New Histories* (n 418) 11.

⁴⁸¹ Wachsmann, ‘Looking into the Abyss’ (n 418) 266.

⁴⁸² Orth, ‘The Concentration Camp Personnel’ (n 411) 45.

⁴⁸³ *ibid* 49.

⁴⁸⁴ *ibid* 51.

⁴⁸⁵ *Ibid*.

deemed “normal” in their community, the validity of which was unquestioned and which could be reflexively applied’.⁴⁸⁶

The role of normality in the lives of the camp SS, emanating from the empirical research, should not be underestimated from a theoretical perspective, especially where there is a temptation to overlook it through the juxtaposition of an external concept of normality against the extreme nature of some of the tasks undertaken. So-called ‘normality’ was not oppositional to camp violence, but was deliberately fostered by the support and involvement of colleagues, families and the community to be part of the same experience, and to reinforce the ideology and morality of Nazism. Along with normality, diversity is an important characteristic of the concentration camp system perpetrator group. It is vital to understanding the complexity of the Nazi system to differentiate between perpetrators of differing types carrying out differing tasks. For example, in the so-called ‘death marches’ in the final throes of the Third Reich, the more centralised, bureaucratic forms of control that had previously guided the direction of the Holocaust gave way to individual discretion in an environment that had ‘become nihilistic and devoid of shaping principles’.⁴⁸⁷ Somewhat in contrast with the perceived wisdom about Nazi Germany, the marches occurred quite chaotically and involved many random killings.⁴⁸⁸ Consequently, it is necessary to analyse perpetration in this area on its own terms and ‘examine with precision the motivation and circumstances of the murders, the different groups of murderers, the political circumstances under which the murders took place and the social infrastructure that supported them’.⁴⁸⁹

A further area in which both normality and diversity are relevant is in the complicity of the wider population with the concentration camp system. Post-war public denials of knowledge of the camps were in part a response to the widespread complicity and wilful blindness of much of German society towards the Nazi regime revealed in recent historical research. The repressive aspects of Nazi rule relied on a combination of secrecy and openness to achieve its aims, and over time the camps became more visible and integrated within local communities, especially with the establishment of satellite labour camps in villages and towns, which were often welcomed as positive for the local economy. They were not sealed environments, but connected and synthesised with the local communities in a number of ways.

⁴⁸⁶ *ibid* 54.

⁴⁸⁷ Daniel Blatman, ‘The Death Marches and the Final Phase of Nazi Genocide’ in Caplan and Wachsmann, *The New Histories* (n 418), 182. See also Daniel Blatman, *The Death Marches: The Final Phase of Nazi Genocide* (Chaya Galai tr, Harvard University Press, 2011).

⁴⁸⁸ Pohl, ‘The Holocaust’ (n 472) 160.

⁴⁸⁹ Blatman, ‘Death Marches’ (n 487) 181.

As Karola Fings argues, models of explaining Nazi rule reliant on 'terror' overlook the level of consensus, and the existence and functioning of the concentration camps must be viewed 'not in isolation, but as a process of events integrated into society'.⁴⁹⁰

This has the potential to create a conflation, or at least a continuum, between the 'extreme' behaviour of camp perpetrators and the more 'normal' circumstances of the wider population. Once again, the need for greater nuance is revealed by the insights of the historical research. We cannot diametrically oppose normal life and extreme acts, but must acknowledge their coexistence and examine more closely the relationship between the two. It is untenable in the face of the research to rely on a single, static perpetrator model, when the reality saw the emergence of a diverse and dynamic group. It is rarely possible to reduce perpetrator motivation or character to a small number of elements, or divorce it from a wider and more complex moral universe. Instead perpetrator behaviour and decision-making should be seen as part of, and crucially influenced by, a wider context including the legal system. There is no single model of a Nazi perpetrator, but lots of groups and individuals often acting in different ways and for different reasons while contributing to the functioning of the regime.

The concentration camp research considered in this section has involved discussions of the rejection by that research of pre-existing notions of rupture within the camp system, the importance of complexity and differentiation in research about the camps, and the significance of normality in the life of camp perpetrators. All of these elements can be used to challenge the prevailing representation of Nazi Germany within jurisprudential discourse, particularly its underlying narrative of rupture and general disinclination to engage with historical research. Even where the examples presented from the concentration camp system scholarship are not specifically *legal* in nature, they interconnect with the law in various ways, and in doing so demonstrate that attempting to understand the legal system in isolation from its wider context will at best reveal only part of the legal picture. The camp institutions and perpetrators operated in the context of legal measures and extra-legal decisions, and crossed the alleged boundary between the normative and prerogative states. This complex inter-relationship between

⁴⁹⁰Karola Fings, 'The Public Face of the Camps' in Caplan and Wachsmann, *The New Histories* (n 418), particularly 110-122. In relation to the connections between the camps and the local communities: 'Social contacts between camps and their environments are represented by the contact of residents with ... SS guards and their families, the commercial relationships with the camps, and contact with prisoners working outside the camps' (120).

law and non-law is illustrated by the relationship between the SS and the judiciary in the camp system, which is discussed in the following section.

IV. Lessons for the Jurisprudential Representation of Nazi Germany

A The Complex Relationship between ‘Law’ and ‘Non-Law’

Both the legal historical and concentration camp system case studies have important implications for the jurisprudential understanding of Nazi Germany. If we understand the common representation of Nazi Germany within jurisprudential discourse to be that of a superficial, hypothetical, evil straw man largely unconnected to historical reality, and that of Nazi law to be a one-dimensional, archetypal wicked legal system, the historiography challenges this treatment. Furthermore, if it is predicated on an underlying narrative of rupture and discontinuity, the research considered here seriously questions this presumption. Finally, if the jurisprudential debate between positivism and natural law over the validity question and the separability question depends to some extent on the competing conceptions of the Nazi legal system as either ‘law’ or ‘non-law’, the ideological component of Nazi law and the institutional workings of the concentration camp system both problematize this dichotomy.

In this section I will first address the interaction between what have often historiographically been considered the legal and extra-legal aspects of the camp system, largely adhering to Fraenkel’s normative and prerogative elements of the state. In the camp research, this is best represented by the relationship between the Nazi SS and the German judiciary, a specific, concrete illustration of the function of law on the ground in the Nazi state. The scholarship dispels the idea of pure opposition between the legal system and the SS, with the former striving to maintain the (rule of) law and the latter working to carve out a law-free sphere of influence. Instead, this competitive element is better characterised in terms of institutional rivalry and the general picture that emerges is quite different from and significantly more complex than that of law versus non-law, with distinct legal and extra-legal spheres.

The notion of ‘legal’ and ‘extra-legal’ modes of ‘terror’ delineated on the basis of the normative and prerogative states conforms with Stephen Riley’s claim that, while there was a legal system in Nazi Germany, this had transformed into a ‘quasi-military exercise’ by the point of the Holocaust.⁴⁹¹ It is also potentially amenable to Rundle’s argument that there was a point in

⁴⁹¹ See Section II of Chapter Two for a discussion of Riley’s claims.

the Nazi period when lawful persecution became unlawful extermination.⁴⁹² While I disagree with both of these interpretations of the relationship between law and the Holocaust in the Third Reich, this does not necessarily amount to the claim that all actions of the Nazi state were part of the law, and therefore lawful in that sense. There is a distinction to be drawn between the jurisprudential argument that what appeared to be 'law' in formal terms was actually 'non-law' in conceptual terms because of its fundamental breach of criteria of natural justice, and the historiographical assertion that some state actions were implemented within a legal framework whereas others (such as arbitrary mass shootings) were not regulated by law at all. However, even this distinction is problematized conceptually by the potential for such incidents to conform in principle to higher natural law norms endorsed in the Third Reich. There is also a relationship between the two claims in that they both have the potential to place law in opposition to non-law, making the lawful contradictory to the unlawful. While Fuller's natural law philosophy allows for a legal system to meet the requirements of lawfulness to different degrees, there still comes a point of qualitative leap into non-law, which, according to those criteria, the Nazi regime is generally understood to have breached.⁴⁹³ The model of the prerogative and normative state encourages historians to see the legal and the extra-legal as largely separate spheres, and locate the more horrifying acts of the state in the prerogative state. Franz Neumann's *Behemoth* model meanwhile denies the existence of law in the Third Reich at all both on an empirical and philosophical basis.⁴⁹⁴

The relationship between the judiciary and the SS in the concentration camp system shows in one context that it is very difficult in the case of Nazi Germany to distinguish law from non-law - the legal from the extra-legal - because of the complex and evolving dynamic between the two. The legal historical scholarship discussed in the first case study in this chapter demonstrates the importance of ideology in Nazi law and how that element blurs the boundaries between natural law and positivism and makes it unproductive and inconclusive to focus on the validity question and the separability question. This makes it highly problematic to separate positivist

⁴⁹² Rundle's argument is different from the claim of having two forms of the state - normative and prerogative - existing alongside each other, one of which is legal and the other of which is extra-legal. It is instead that what was law became non-law when its impact was such that the human agency of those affected was effectively reduced to nothing. See the discussion of Rundle's arguments in Chapter Four.

⁴⁹³ See the discussion of Rundle's interpretation of this in Sections III and IV of Chapter Four. In Rundle's case the point of departure comes around November 1938 but this need not be the case. For example, the whole legal system might be understood as non-law, given its level of substantive injustice.

⁴⁹⁴ Neumann, *Behemoth* (n 13). This is discussed briefly in Section III of Chapter One.

formal law from naturalist moral breach of law. The historical research in this case study illustrates something similar in the case of law and non-law. The nature of the Nazi legal system and the institutions that existed within and interacted with it was such that law was both pervasive and often took on an imprecise form. Thus, the distinction between the normative state - the 'law' - maintaining features such as due process, and the prerogative state - the 'non-law' - less formal and not, for example, subject to the jurisdiction of the ordinary courts or the product of legislation, is precarious given the range of processes and functions at work, and ultimately collapses when confronted with the actual workings of the system.

The scholarship reveals a complex interrelationship between different forms of repression and exploitation, whether they are discriminatory laws, street violence, concentration camps, ordinary courts and prisons, private sector and community involvement with forced labour, or pressure to conform from within German society. The interrelationship between different aspects of the system of repression is evident from the research. It shows that in the first year of Nazi rule up to 200,000 predominantly political opponents were temporarily imprisoned in the camps, thousands of whom were brought before judicial courts, and many others who were not.⁴⁹⁵ As the SS took over coordination of the camp system, between 1934 and 1937, the numbers inside the camps increased dramatically, and by mid-1938 'asocials' began to outnumber political prisoners'.⁴⁹⁶ The early concentration camps 'formed an alternative penal system, beyond the control of the judiciary, in which revolutionary law prevailed and police-state methods were applied'.⁴⁹⁷ However, the detention of Jews in these camps followed their arrest pursuant to protective, instructive and preventive custody measures, all legal antecedents.⁴⁹⁸ They were part of a range of measures 'aimed at the gradual isolation of German Jews from social, cultural and economic life', and 'staged in such a way that the non-Jewish majority could accept it as rightful'.⁴⁹⁹

This complex interrelationship between 'legal' and 'extra-legal' modes of rule is further highlighted by research into the prevalence of 'suiciding' in the concentration camps. The practice of covering up camp murders as suicide counters the oppositional view of the judiciary and the SS, according to which legal officials worked against SS attempts to control the concentration camps

⁴⁹⁵ Goeschel and Wachsmann, 'Before Auschwitz' (n 418) 522.

⁴⁹⁶ Ibid 522-524.

⁴⁹⁷ Kim Wünschmann, 'Cementing the Enemy Category: Arrest and Imprisonment of German Jews in Nazi Concentration Camps, 1933-8/9' (2010) 45(3) *Journal of Contemporary History* 576, 578.

⁴⁹⁸ Ibid 581.

⁴⁹⁹ Ibid 582, 598.

beyond the regular reach of the law. In fact, Christian Goeschel demonstrates, their relationship was 'above all an institutional rivalry'.⁵⁰⁰ In the early camps, murders were often covered up as suicides because of the risk of legal prosecution and of revealing the brutality of the camps to the outside world, including the law-abiding German public. Such camp murders were 'illegal' according to the formal law because 'only the judiciary had the authority to pass death sentences'.⁵⁰¹ However, these actions could be authorised by alternative methods, such as Führer Orders, forming part of a competing system of laws and making it difficult to draw clear distinctions between 'legal' and 'extra-legal' conduct in such contexts.

Even after the outbreak of war, when the institutional conflict was largely resolved in favour of the SS, the legal system itself became increasingly radicalised and the regime's lack of concern with due process was 'backed by many legal officials'.⁵⁰² Officials often enforced their right to investigate dubious camp deaths in order to maintain their own power and jurisdiction rather than as a form of opposition to the government. In fact, the two institutions frequently worked together in this period. These findings point to the need to 'locate the concentration camps in a wider web of nazi terror and combine legal, social and political history to understand the pre-war origins of a system of terror, repression and mass murder on an unprecedented scale'.⁵⁰³ The concentration camp system cannot simply be classified as outside of the law and the SS and the judiciary cannot easily be placed on either side of a legal/extra-legal divide. The notion that one of the few places Jews remained alive towards the end of the war was the concentration camp system because it was the only 'legal' way for them to survive⁵⁰⁴ underscores the sterility of interpretations that categorise concentration camps as institutions without legality and external to the law. It was law - in collaboration with other institutions, policies, measures and societal norms - that forced Jews into the concentration camps, law that prevented them from existing outside of the camps, law that sometimes meant they remained alive in a specific context and law that led to their murder. The lawful exclusion of certain groups in Nazi society to particular parts of the system has jurisprudential implications, and its consequences for our understanding of the concept of law require further exploration.

⁵⁰⁰ See Christian Goeschel, 'Suicide in Nazi Concentration Camps, 1933-9' (2010) 45 *Journal of Contemporary History* 628, 629. More generally on suicide in Nazi Germany see Christian Goeschel, *Suicide in Nazi Germany* (OUP, 2009).

⁵⁰¹ Goeschel, 'Suicide in Nazi Concentration Camps' (ibid) 637.

⁵⁰² ibid 636.

⁵⁰³ ibid 640-648.

⁵⁰⁴ Caplan and Wachsmann, 'Introduction' (n 418) 12; and Pohl, 'The Holocaust' (n 472) 161.

B Why the History Challenges Rundle's 'Exterminatory Legality' Thesis

The jurisprudential relevance and implications of the picture of Nazi governance extracted from the case studies considered in this chapter are significant in other ways as well. The treatment of Nazi law as continuous both across time and with rules, institutions and acts at the edge of the legal system undermines the discontinuity thesis. The localised, improvised, evolving nature of change within state systems and institutions heavily qualifies a one-dimensional, totalitarian model of Nazi terror. The diverse backgrounds and motivations of camp perpetrators, and the inherent contingency and reliance on context of agent decisions, renders obsolete the uncontroversial, evil figure of the 'Nazi' that appears regularly within jurisprudential literature.⁵⁰⁵ The complex, multi-faceted and devolved nature of the decision-making process in many cases undermines a 'criminal state' theory of Nazism according to which a few criminal conspirators at the top of the Nazi leadership wielded virtually untrammelled, monolithic power over state and society. The sheer ordinariness of Nazi perpetrators, bureaucracy, institutions and decisions demands that we look beyond the superficial characterisation of the Third Reich as inherently extreme to find out what is 'normal' and therefore most alarming about the Nazi state, particularly in its use of law.

In the wake of these findings, analysis of the concept of law is a much more interesting jurisprudential exercise, not least because its abstract theoretical sophistication is matched by the empirical intricacy of the examples upon which it calls. This is best illustrated by considering briefly how the research addressed in this chapter impacts on Kristen Rundle's claims, based on the Nazi legal system, that Fuller's natural law theory is a good model for analysing Nazi law and that – according to it – exterminatory legality is an impossibility.⁵⁰⁶ The difficulties for natural law theory generally presented by the ideological component of Nazi law include that it contests an understanding of the Nazi regime based primarily on its evil and cynical manipulation of the rule of law and - not unrelated - that it destabilises the presumed normative basis upon which legal systems are or ought to be founded. These are addressed in the earlier sections of this chapter and will not be considered in more detail here. Specifically in relation to Rundle's claims, the particular elements of the historical research that raise the strongest objections are the innate continuities, the importance of normality,

⁵⁰⁵ See the elucidation of this representation in Chapter Two.

⁵⁰⁶ Rundle's argument is considered in detail in Chapter Four, and is elucidated by her in various articles; see fn 319.

and the embeddedness of the prerogative and normative states within one another, and the Holocaust within the rest of the Nazi state.

These elements relate to particular aspects of Rundle's argument. These are the insistence on a moment of qualitative 'leap' from law to non-law around the time of *Kristallnacht* in November 1938, the effective separation of the Holocaust from the persecution of the Jews that came before, and the claim that discriminatory laws from earlier in the 1930s such as the 'Nuremberg Laws' did not presage what came later in legal terms because the intention of those who fashioned such laws was not extermination at the time. In terms of the leap from law to non-law, the history of the evolution of the implementation of Nazi policy in different areas, and specifically the concentration camp system as it moved through its own phases of development towards extermination, makes it very difficult to sustain empirically the notion of a qualitative shift of such significance, which amounts to a moment of rupture. The concentration camp historians have drawn back from previous notions of a rupture in that system around 1939 because it over-emphasises the shift in question and underplays how the camps evolved over time dynamically, in a greater number of related phases.

This process can also be seen in the development of the institutional rivalry between the SS and the judiciary in relation to jurisdiction over the camps. Rather than the 'normative' judiciary being suddenly ousted by a 'prerogative' SS, the two institutions worked both together and in competition over time until ultimately the SS wrestled power within its own jurisdiction. A legal model based on two phases, one of pre-1938 'law' and post-1938 'non-law' must come under scrutiny in this context as an unhistorical way of understanding the incremental change and radicalisation that connected 1933 and before, to 1942 and after, and that characterised change generally in the fast-moving historical period of Nazi rule. The tightening of measures against the Jewish population subsequent to the *Kristallnacht* pogrom, which was noted by some contemporary diarists, does not appear any more worthy of threshold jurisprudential status than other important moments, also related in different ways to the legal system, such as the *Aktion T4* decree, the commencement of mass shootings on the Eastern front, the opening of the *Operation Reinhard* death camps or the Nuremberg Laws themselves. November 1938 is only pinpointed as important because of the coincidence of certain diary observations with Rundle's interpretation of the importance and scope of human agency under the law as part of Fuller's natural law theory as well as the particular interest in the agency of the Jewish population. Taken out of context, this appears a

sound conclusion to draw, but it does not fit well with the broader history of the period.

The same qualitative moment of rupture that distinguishes law from non-law and effectively renders exterminatory legality impossible also enables the Holocaust, which must be viewed as an exterminatory phenomenon, to be considered both exceptional and existing entirely outside of the realm of law. The implication of Rundle's thesis is that all actions against the Jews subsequent to the point of rupture were non-law, regardless of their source, form or nature, because they took on an exterminatory character. A further implication of this is that the Holocaust is exceptionalised in legal terms from the rest of the Nazi state, which, even within Rundle's interpretation, continued to exist with a legal framework. It is also made an exception from the concept of law, reinforcing in a different way the discontinuity thesis. Again, other aspects of the history of Nazi Germany, represented in this discussion by the concentration camp system scholarship, negate an understanding that separates the Holocaust from the rest of the state so clearly. The normalcy of the lives and environment of the perpetrators, even the elite Camp SS personnel, the *ad hoc* evolution of the entity of the camps as prison sites for political enemies to sites of extermination, the role of legal instruments in that process, and the gradual shift of legal and political jurisdiction from the judiciary to the SS illustrate that a clear break does not provide an empirically justifiable conceptualisation of the relationship between the Reich and the Holocaust.

A final aspect of rupture is ostensible in Rundle approach, in the labelling of the Nuremberg Laws and other earlier persecutory legal measures against the Jews as non-exterminatory in character because they did not intend for the foreclosure of all possibility of human agency. The idea that this is somehow qualitatively different from later measures which, in reality, continued a long sequence of increasingly stringent measures in a process of radicalisation relies, as was noted in Chapter Four, on the historically problematic notion of original intent in order for it to be considered genuinely continuous with the later period. Simply put, that the framers of the Nuremberg Laws did not intend for genocide to take place within a decade does not mean that those laws did not foreshadow that genocide in important respects. Equally, the historical reconstruction of the concentration camp system shows that its own development towards extermination was often localised, fragmentary and improvised rather than centralised, premeditated and monolithic. The contention that the lack of a deliberate and centralised move towards genocide in 1935 means that what occurred then was *fundamentally* different from what occurred in 1940

seems to neglect this significant development in our understanding of how the Final Solution came about.

Some of these arguments against Rundle's provocative natural law thesis have reprised in part some of the objections made in the context of Dan Stone's work in the previous chapter. They have done so in order to highlight a different historiographical perspective on those claims; i.e. to show how the case studies in this chapter bear on one approach to reorienting jurisprudence towards Nazi Germany. They have also done so to illustrate more broadly the relevance of the history of Nazi Germany to jurisprudential debate. Rundle attempts to do this by using contemporary sources to reinforce a reinterpreted Fullerian natural law argument. We do not disagree entirely on the use of the history of Nazi Germany in jurisprudential debate. However, the detailed and advanced historiography of aspects of the Third Reich is most relevant because it demonstrates the problems with both positivist and naturalist constructions of the concept of law, and with the representation of the Nazi past within jurisprudential discourse generally.

V. Conclusion

Law worked in complex ways in the Nazi state, and the relationship between the regime and the legal system changed over time. Rejecting rupture in favour of continuity and accepting the diverse nature of Nazi perpetration draws out much more significant aspects for jurisprudence. The acknowledgement that law functioned in the Third Reich in many respects in much the same way it functions in other states: among other things, highly politicised, responsive to societal norms, complex, dynamic and contingent on a number of factors. The trends highlighted in the two case studies considered in this chapter, of the significance of ideology as a diffuse feature within the Nazi legal system and of the importance of the context of continuity and change rather than rupture, are trends within Third Reich historiography as a whole and represent a highly sophisticated and documentarily substantiated understanding of Nazi Germany.

If we are to build jurisprudential theories that fully explore the Nazi past, which inform legal scholarship about Nazi Germany, at least in part on the empirical reality of the Nazi regime, it is necessary to comprehend fully how law was used in the Nazi state and the implications of the Nazi period for the concept of law. Historical research, in the grasp of legal theorists, can enable the construction of more convincing theories of how the Nazi legal system worked and more fully understand the nature of wicked manifestations of the concept of law. The examples from the case study explored in this chapter demonstrate the necessity of rejecting the rupture thesis, which ultimately casts Nazism as irrelevant for law, as empirically and theoretically

flawed. It encourages the acceptance of historical development as a process of continuity and change, and implores us to embrace detailed historical research as a basis around which to construct workable theories of law. This involves treating the Nazi past as a complex rather than simple history, and dictates a more nuanced set of responses to its events than jurisprudential discourse currently enables.

Historiographical observations should cause us to deconstruct the oppositions between continuity and discontinuity, the camps and the community, the SS and the judiciary, and the normal and the extreme, so we can understand the Nazi past. Nazi Germany was not simply a criminal state. It had law, its law was recognised as such, and its law was not fundamentally different in important ways from the laws of other states at the time, or today. It also had people who operated within, without and across the boundaries of the law, and those people, who did things in some parts of their lives that are extreme and incomprehensible from the outside, nevertheless acted within a strikingly familiar normative framework to that which structures our lives.

The case studies presented in this chapter built on the historical theoretical arguments presented in Chapter Four around Dan Stone's scholarship and in support of David Fraser's critique of the prevailing understanding of Nazi law. They did so by providing concrete and jurisprudentially relevant examples from historiography of how the regime and legal system functioned, and how they challenge both the presumptions about the Third Reich that underpin its jurisprudential treatment and the theoretical paradigms of positivism and natural law as they are applied to it. In this, they contested the prevailing jurisprudential representation of Nazism established in chapters Two and Three of this dissertation. Chapter Six will look to use the focal point of the Nuremberg trials to connect the historical critique of jurisprudential discourse to other areas of the legal academy. It will argue that Nuremberg can be seen as a moment of legal rupture that constructed historical narratives of rupture that resonate through ICL scholarship as well as jurisprudence, and examine how it is that legal scholarship continues to be informed by these narratives of rupture.

Chapter Six: The Importance of Nuremberg: Constructing Moments and Narratives of Rupture

I. Introduction

A Connecting Jurisprudence, ICL Scholarship, Historiography and the Nazi Past

This chapter will establish a connection between some of the elements discussed in this dissertation: jurisprudential discourse, the development of historiography about Nazi Germany,⁵⁰⁷ the Nazi past itself and international criminal law scholarship. These things are connected by and to Nazi war crimes trials, and particularly the Nuremberg trials. Nuremberg - IMT and NMT – stands at the centre of a discursive nexus between the Third Reich and aspects of Anglo-American legal and historical scholarship.⁵⁰⁸ It is significant on a number of levels and helps to explain why Nazi Germany is represented as it is within jurisprudence. This chapter will highlight two of these levels of significance and in doing so explain how the different elements mentioned above are linked. This is important for two reasons. The first is that it shows that other areas of the Anglo-American legal academy share the jurisprudential mistreatment of Nazi Germany that curtails the theoretical comprehension of Nazi law. The second is that it helps to explain why postwar historiography of the Third Reich can be seen to have contributed to some of the characteristics of the jurisprudential representation of Nazi Germany, such as the rupture thesis,⁵⁰⁹ while much more recent historical scholarship works directly against this.⁵¹⁰

The two ways in which Nuremberg is significant in the context of this dissertation will be established with reference to recent legal and historical scholarship about Nazi war crimes trials. The first is that Nuremberg constructed historical narratives and legal realities with respect to Nazi Germany, which endured within historiography and legal theory respectively. In doing so it created a discursive and philosophical rupture between law in Nazi Germany and the law in the post-war, Anglo-American world - the law which has animated jurisprudential debate about the concept of law. This is discussed in Section II of this chapter. The second way in which Nuremberg is

⁵⁰⁷ The way 'jurisprudence' and related terms are used in this dissertation is explained in Section II of Chapter One, as is the use of terms to describe Nazi Germany, such as 'Nazi past', 'Third Reich' and so on.

⁵⁰⁸ The terms IMT, NMT, 'ICL scholarship' and 'Nazi war crimes trials' are explained in Section II of Chapter One.

⁵⁰⁹ The characteristics of the jurisprudential representation of Nazi Germany are outlined in Chapter Two.

⁵¹⁰ Some examples of this scholarship and how it counters the jurisprudential representation of Nazi Germany are addressed in detail in chapters Four and Five.

significant is in its role as the symbolic focal point for ICL scholarship as the genesis of modern international criminal law and the historic forerunner of the International Criminal Court (ICC). English language ICL scholarship, to the extent it has addressed Nazi war crimes trials, has focused almost entirely on the Nuremberg IMT, and to a lesser and more recent extent the NMT, neglecting a myriad of other trials. As such, Nuremberg provides a legal prism through which this scholarship engages with Nazi Germany.⁵¹¹ Because of its specific interest in the substance and procedure of international criminal law, the flaws in the trials' reconstruction of the Third Reich are replicated in ICL scholarship, despite the existence of a growing historical literature that documents the problems with how Nazi Germany was understood through Nuremberg.⁵¹² ICL scholarship consequentially mirrors jurisprudential discourse in some aspects of its treatment of the Nazi past. This point is addressed in Sections III and IV of this chapter.

This returns us to an issue raised at the start of this dissertation, that the criticisms that have so far been made of the Anglo-American, academic legal treatment of the Nazi past go beyond jurisprudence, and have often been directed at the legal academy as a whole.⁵¹³ This dissertation focuses primarily on jurisprudence and it is not within its scope to explore all the potential aspects of these wider claims. However, this chapter will show that some of these criticisms - the propagation of a rupture thesis, a general ignorance of the Holocaust, a superficial appreciation of the governance of the Third Reich – also apply within ICL scholarship, which is interconnected with jurisprudence via the Nuremberg trials. It also returns us more precisely to the idea of a rupture thesis, which isolates the Nazi past from the non-Nazi present, specifically in terms of law. This chapter links the arguments that Nuremberg at the same time comprised a jurisprudential moment of rupture and contributed to an academic, discursive narrative of rupture within historiography, the latter of which endured for a long time and the former of which continues to influence how Nazi law is understood.

⁵¹¹ The historical scholarship discussed in this chapter does explore Nazi war crimes trials beyond those at Nuremberg, examples of which are included in Part B of this opening section. 'Nuremberg' is adopted as key discursive moment in this chapter for legal scholarship (ICL scholarship, jurisprudence and the rupture thesis generally) because of its focus and influence within ICL scholarship, its chronological location ahead of the Hart-Fuller debate and its importance in constructing enduring narratives in both law and history. However, historians raise common issues in respect of other trials, such as the Frankfurt-Auschwitz Trial, in terms of how the Nazi past is represented and the problematic impact of dual pedagogic and justice-making purposes of Nazi war crimes trials.

⁵¹² The nature and scope of this academic historical and legal literature is discussed in the next part of this section, and its content in more detail in sections III and IV respectively.

⁵¹³ See Section I of Chapter One.

B Categories of Scholarship: Law and History

There is a large body of scholarship - both legal and historical - about Nazi war crimes trials, which shows little sign of abating, and the trials themselves stretch from towards the end of the Second World War through to very recent years.⁵¹⁴ A comprehensive analysis of these trials and the scholarship that surrounds them is beyond the limitations of this chapter. Instead it focuses on examples from three strands of scholarship about Nazi war crimes trials. I will refer to recent literature that analyses the narratives constructed at Nuremberg together with its legal theoretical underpinning to expose their impact on the postwar jurisprudential and historical representation of Nazi Germany.⁵¹⁵ I will then consider the contrast between the treatment of Nuremberg in ICL scholarship and that in historical writing to highlight the parallels between ICL scholarship and jurisprudence in how the Third Reich is represented and assert some of the limitations of ICL scholarship in advancing a sound theoretical understanding of Nazi law. This latter literature is indicative of the overall content of Nazi war crimes trial scholarship over a number of decades while also representing developments and divergences that have become more apparent in the last few years.

This remainder of this section will be used to introduce the scope of these two strands of Nazi war crimes trials scholarship and differentiate between the legal and historical strands. The current sweep of scholarship can roughly be divided into two categories, respectively overarching the disciplines of law and history. Firstly, there are those texts adopting a substantive legal approach, authored by scholars usually in the legal academy, but occasionally also practising lawyers. These generally give a technical account of legal aspects of the trials they examine, often with reference to the development of international criminal law. They are almost entirely addressed to the different Nuremberg trials, with the main focus being the IMT.⁵¹⁶ Secondly,

⁵¹⁴ See for example the literature about the Nuremberg Trials alone cited in Fraser, *Law After Auschwitz* (n 23) 123, fn 2.

⁵¹⁵ This includes in particular Fraser, 'Shadows of Law' (n 26) and Fraser, 'Evil Law, Evil Lawyers?' (n 26); Christiane Wilke, 'Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case' (2009) 24(2) *Canadian Journal of Law and Society* 181; and the contributions to Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6).

⁵¹⁶ This category incorporates, among others, Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Palgrave Macmillan, 2007); Stephan Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* (University of Pennsylvania Press, 2005); Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP, 2008); Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP, 2011); and David A. Blumenthal and Timothy L.H.

there are those texts that adopt a predominantly historical methodology, and authored by scholars working primarily in university history faculties. This category includes texts that provide an historical analysis of a particular trial, and collected volumes that apply a thematic approach to a group of proceedings, both of which focus on the historical background and context. These texts do branch beyond Nuremberg to consider other Nazi war crimes trials.⁵¹⁷

The blurring of the boundaries between what might loosely be termed 'legal' and 'historical' scholarship in this research area represents a challenge to this categorisation, which is further complicated by the analysis of theoretical-philosophical aspects in both categories of scholarship. These problems, which can persist both in the research object under scrutiny and the background and methods of the scholars, must be acknowledged. Research into the subject of Nazi war crimes trials necessarily involves a certain amount of interdisciplinary fleet-footedness. Historians writing about essentially legal events generally pay heed to the law involved in prosecuting war crimes trials. Equally, lawyers investigating what are also historical events often delve into at least some of the context and background that brought them about. However, a distinction between these categories is nevertheless apparent. The ICL scholarship strand is primarily concerned with Nuremberg's doctrinal and procedural relationship to international criminal law, and the strand of historical writing is concerned with the wider history of the trials themselves and their relationship to Nazi Germany.

ICL scholarship tends to focus on substantive rules and procedures, applying a primarily legal, conventionally jurisprudential, mode of analysis to these aspects of war crimes trials. This is often reflected in the disciplinary backgrounds of the various authors. For example, Norbert Ehrenfreund was a US state Superior Court judge who had reported on the Nuremberg IMT.

McCormack, *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance* (Martinus Nijhoff, 2008). All of these have been published since 2005.

⁵¹⁷ Recent examples of this category of literature include Valerie Hébert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (University of Kansas Press, 2010); Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Harvard University Press, 2005); Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (CUP, 2006); Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History* (Cambridge University Press, 2009); Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (OUP, 2001); Patricia Heberer, Jürgen Matthäus, *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (University of Nebraska Press, 2008); and Nathan Stoltzfus and Henry Friedlander, *Nazi Crimes and the Law* (Cambridge University Press, 2008). All but one of these is published in the last ten years and half of them in the last five.

Stephan Landsman, author of *Crimes of the Holocaust*,⁵¹⁸ holds a chair in tort law and social policy and specialises in the civil jury system. Much of the academic interest in these trials unsurprisingly centres on their significance for, and impact upon, the subsequent development of international criminal law and other international war crimes trials, and this element is well represented in those involved in producing legal war crimes literature. The editor of the volume *Perspectives on the Nuremberg Trial*,⁵¹⁹ Guénaél Mettraux is a defence counsel and specialist in international criminal law, while Kevin Jon Heller, author of *The Nuremberg Military Tribunals and the Origins of International Criminal Law*,⁵²⁰ researches in criminal law and international criminal law.⁵²¹ Similarly, the editors of *The Legacy of Nuremberg*,⁵²² David Blumenthal and Timothy McCormack, are respectively specialists in criminal and United Nations law, and international humanitarian and criminal law.

The division between the broadly legal and historical categories of scholarship is evident in which war crimes trials are examined. The focus has been very limited, particularly among ICL scholarship. This legal research continues to be almost entirely directed to the Nuremberg IMT, because of its status and relevance as an international tribunal,⁵²³ while historical accounts have branched out considerably in recent years, with the emergence of specific works on individual NMT proceedings and the Frankfurt-Auschwitz trial, and some collected volumes incorporating a range of lesser known proceedings.⁵²⁴ The subject and approach of the research is another point of differentiation. Historical accounts generally look to provide a detailed narrative of the various legal and non-legal factors related to the trials, running from pre-trial machinations to the ultimate fate of the convicted defendants. They also include such reflections as on the relationship between truth and justice in history and law, and address the

⁵¹⁸ Landsman, *Crimes of the Holocaust* (n 516).

⁵¹⁹ Mettraux, *Perspectives on the Nuremberg Trial* (n 516).

⁵²⁰ Heller, *The Nuremberg Military Tribunals* (n 516).

⁵²¹ Although Heller's background in sociology might, in part, account for some of the departures apparent in his text from the bulk of legal Nazi war crimes trials scholarship. See the discussion of his text in Section III of this chapter.

⁵²² Blumenthal and McCormack, *The Legacy of Nuremberg* (n 516).

⁵²³ Note, for example, those works by Ehrenfreund, Mettraux, and Blumenthal and McCormack (fn 516 above). The Nuremberg NMT has received some attention within ICL scholarship in recent years, including Heller, *The Nuremberg Military Tribunals* (n 516). These are discussed further below but do not displace the overarching issue, because this research continues to display some of the most important characteristics outlined of the wider body of research.

⁵²⁴ For example, those by Hébert, Wittmann, Earl and Matthäus (fn 517 above).

broader historical context including public reaction to the trials. Monographs of individual trials tend to adopt a conventional chronological narrative but within this framework endeavour to place some of the issues that arise in their own context, that of the broader historiography of Nazi Germany. While the occasional legal account is somewhat comparable to this model,⁵²⁵ for the most part such works are structured around and attend to the legal rules and procedures that apply to the relevant trial generally or particular aspects of the trial.

The presentation of the scholarship in categories focused on academic discipline highlights the preoccupation of a preponderance of the existing research with certain aspects of Nazi war crimes trials, and the gaps this leaves which might be filled by other sorts of research. It emphasises differences in approach and methodology that result in different research outcomes, and reveals a paucity of collaboration between ICL scholarship and historical research into Nuremberg and other trials. Above all it shows the highly circumscribed theoretical scope of ICL scholarship, which comprises the legal discipline's primary engagement with Nazi war crimes trials. There is little academic legal consideration of the Nazi past beyond the immediate jurisprudence of the legal rules and procedures relating to the development of international criminal law. This betrays a reliance on a single conception of law as something able to deal with the problem of historical atrocity exemplified in the Third Reich, mirroring the approach manifested in many of the war crimes trials themselves. The need to engage further with this underlying legal theoretical issue is generally not acknowledged and the possibility of alternative conceptions of law being applicable to this area is accordingly ignored. The extent of legal critique of Nuremberg tends to be limited to an evaluation of claims of the imposition of victor's justice and some procedural shortcomings. The distorting impact of the representation of Nazi Germany within the trials or the jurisprudential and discursive framework applied to them is rarely addressed. The implication of these issues is explained in more detail in Sections III and IV of this chapter.

II. Constructing Moments and Narratives of Rupture

'Nuremberg' is considered an important moment in the history of the ability of international law to address gross criminal acts occurring at state level, whether in the fields of international criminal law, international humanitarian law or international human rights law. The term generally refers to the Nuremberg International Military Tribunal (IMT), the most famous of the war crimes trials relating to the Nazi regime. The term 'Nuremberg, so often

⁵²⁵ Especially Heller, *Nuremberg Military Tribunals* (n 516), which narrates the history of the NMT proceedings.

associated with these proceedings can also refer to the Nuremberg Military Tribunals (NMT), the 12 subsequent trials of various aspects of the Nazi state including its Justice system in the so-called *Justice* case.⁵²⁶ These proceedings, especially the IMT, have been assigned a certain status, symbolic as well as substantive, at the genesis of international criminal law as laying the groundwork of a precedent for international prosecutions, a procedural framework, and some substantive offences. 'Nuremberg' is significant for the legal academy in another quite different and equally important way. This is in shaping the representation of Nazi Germany that has come to primacy within jurisprudential discourse initially through the Hart-Fuller debate and, alongside constructing a narrative of lawlessness about the Nazi regime, in itself manifesting a moment of legal rupture that echoes through our understanding of Nazi law.

Kim Priemel and Alexa Stiller's edited collection *Reassessing the Nuremberg Military Tribunals*⁵²⁷ describes, among other things, how a narrative of Nazi criminality underpinned the prosecution strategy in the NMT proceedings and made its way into mainstream historiography as a prevailing interpretation of the Nazi regime in subsequent years and decades. It also shows the importance of defence narratives of Nazi governance, which themselves asserted the totalitarian power of the leadership and the influence of particular Nazi institutions in an effort to minimise the culpability of the defendants. The prosecution had little interest in emphasising the similarities and overlaps between Nazi law and the law being used to prosecute Nazi war criminals and the defence had nothing to gain by focusing on the elements of 'normality' that continued in the Nazi state notwithstanding the horrors it committed. However, the narratives constructed at and by the NMT were hugely influential. They 'made their way into historical textbooks, speeches of commemoration, and the phrasing of restitution acts' at the expense of other narratives⁵²⁸ and 'would soon become canonized historical opinion',⁵²⁹ at once impacting historical, legal and public discourse:

The Nuremberg trials established several interpretations of the Nazi regime. Most ominous from today's perspective was that, during the years of the trial program, the planning of the Nazi persecution and extermination policy were reduced to a conspiracy of Hitler, Himmler,

⁵²⁶ *US v Josef Alstoeffer et al, Trials of War Criminals Before the Nuernberg Military Tribunals*, Vol III, 'The Justice Case' (United States Government Printing Office, 1951). For a brief run-down of the 12 NMT trials, see Fraser, 'Shadows of Law' (n 26) 403.

⁵²⁷ Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6).

⁵²⁸ Priemel and Stiller, 'Nuremberg's Narratives' (n 78) 2.

⁵²⁹ Schulte, 'The SS as the "Alibi of a Nation"' (n 77) 146.

and Heydrich, and that perpetrators who carried out this policy effectively consisted of the SS. Equally crucial was that the mass murder of the European Jews was singled out from other Nazi mass violence. Institutional networks between the Nazi party and the state bureaucracy, economic interests of German industry, the cooperation between the Wehrmacht and the SS ... were poorly highlighted. Thus, connections between the persecution and extermination of the Jews and mass-killings and ill-treatment of other people, forced labour, malnutrition and anti-guerilla warfare, Germanization, population and settlement policy, eugenics, racial policy, and antisemitism were insufficiently linked with one another.⁵³⁰

The isolation of the Final Solution from other state violence and the concomitant playing down of the many connections between the normal institutions of state and those used to perpetrate the Holocaust added to the impression given by the focus on a murderous conspiracy of the Nazi leadership implemented by the SS. This was effectively that a few criminal Nazis had manipulated and controlled the German state to enable their racist and exterminatory policies to be put into effect. A narrative of criminality within general history becomes a more specific narrative of rupture in legal theoretical terms via a simple step. A government of criminality is by definition a government of lawlessness. A lawless regime is by definition a regime *without law*. Consequently the 'law' of the Third Reich is not law at all.

The construction of a narrative of rupture was particularly apparent in the trials involving the SS, the organ considered responsible for implementing the worst atrocities of the regime.⁵³¹ The myth of the SS 'state within a state' as bearing primary if not sole responsibility for Nazi extermination policy and practice was leveraged by both prosecution and defence and proved extremely persistent.⁵³² For the prosecution it fit with the model of a criminal and lawless Nazi leadership perpetrating horrendous crimes while holding the population in its totalitarian grasp. It consequently meant it was not necessary to condemn 'Germany' as a whole, but only 'Nazi' Germany, allowing the German state to rise unscathed from its ashes. For the defendants in some of the proceedings, such as those relating to the

⁵³⁰ Alexa Stiller, 'Semantics of Extermination. The Use of the New Term of Genocide in the Nuremberg Trials and the Genesis of a Master Narrative' in Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6) 124.

⁵³¹ These were the fourth case, the *Pohl* case and the ninth case, *Einsatzgruppen* case; respectively *US v Oswald Pohl et al, Trials of War Criminals Before the Nuernberg Military Tribunals, Vol V, 'The Pohl Case'* (United States Government Printing Office, 1951); and *US v Otto Ohlendorf et al, Trials of War Criminals Before the Nuernberg Military Tribunals, Vol IV, 'The Pohl Case'* (United States Government Printing Office, 1951).

⁵³² Priemel and Stiller, 'Nuremberg's Narratives' (n 78) 12.

Wehrmacht and German industry, it separated them from the crimes of the regime.

Franz Neumann's *Behemoth*⁵³³ was an influential text behind the prosecution's strategic approach and understanding of the Nazi regime, and the consequent structuring of the NMT proceedings around an institutional analysis of the Third Reich.⁵³⁴ This was reflected in the *Pohl* case as well as in the industrialist cases.⁵³⁵ Neumann's own explanation of the relationship between 'Leviathan' and 'Behemoth' highlights the extent to which legal rupture was at the heart of his analysis:

It was Hobbes who made both the Leviathan and the Behemoth popular. His *Leviathan* is the analysis of a state, that is a political system of coercion in which vestiges of the rule of law and of individual rights are still preserved. His *Behemoth* ... however ... depicts a non-state, a chaos, a situation of lawlessness, disorder, and anarchy.

Since we believe National Socialism is – or tending to become – a non-state, a chaos, a rule of lawlessness and anarchy, which has “swallowed” the rights and dignity of man, and is out to transform the world into a chaos by the supremacy of gigantic land masses, we find it apt to call the National socialist system *The Behemoth*.⁵³⁶

The contrast between a coercive political system retaining 'vestiges of the rule of law' and 'a non-state, a chaos, a rule of lawlessness and anarchy' highlights the significance of the distinction between 'law' and 'non-law' to Neumann's concept of a *Behemoth* Nazi state, which he viewed as the latter. Neumann rejected Fraenkel's 'dual state' analysis in part on a similar basis: that it allowed room for a 'normative state' alongside the 'prerogative state', whereas Neumann denied the presence of law in Nazi Germany altogether.⁵³⁷ The *Behemoth* version of Nazi Germany was that of a lawless and therefore criminal state, and this is how it was presented at Nuremberg.⁵³⁸

⁵³³ Neumann, *Behemoth* (n 13).

⁵³⁴ Priemel and Stiller, 'Nuremberg's Narratives' (n 78) 6-7.

⁵³⁵ Respectively Schulte, 'The SS as the "Alibi of a Nation"' (n 77) 142; and Priemel, 'Tales of Totalitarianism' (n 78) 169.

⁵³⁶ Neumann, *Behemoth* (n 13) vii, 'Note on the name Behemoth'.

⁵³⁷ 'We do not share this view because we believe that there is no realm of law in Germany, although there are thousands of technical rules that are calculable'; Neumann, *Behemoth* (n 13) 468.

⁵³⁸ The NMT proceedings were 'intended to reveal to the whole world the evils of international aggression, racism, authoritarianism, and contempt for the rule of law'; Devin O. Pendas, 'The Fate of Nuremberg. The Legacy and Impact of the Subsequent Nuremberg Military Trials in Postwar Germany' in Priemel and Stiller *Reassessing the Nuremberg Military Tribunals* (n 6) 251.

This failure of historical reconstruction relies on a point of rupture existing between 'lawful' legal systems and the 'anarchy' of a complete breach of the rule of law represented by the Third Reich. This impacted on the development of Nazi historiography through its influence at Nuremberg. Donald Bloxham has connected 'the earliest investigation of Nazi genocidal policy and most of the major historiographical debates about that subject in the succeeding half-century'.⁵³⁹ These investigations were 'indelibly marked by interpretive distortions that stemmed both from preconception and from the legal process itself'.⁵⁴⁰ While historians of Nazism and its war crimes trials are beginning to overcome this problematic legacy, the jurisprudence that conceived Nuremberg, and which reflects the interpretive difficulties that beset postwar historiography, remains unchallenged within influential areas of the legal academy, in particular jurisprudential discourse.

The fact that narratives of lawlessness, and therefore criminality, and therefore rupture between the Nazi state and other, 'lawful' states helped to construct enduring discourses about the Third Reich within historical writing has had consequences for jurisprudential discourse. The parallels between this interpretation and the representation of the Nazi regime within jurisprudence as a superficial, hypothetical, evil straw-man and its legal system as a paradigmatic, archetypal wicked legal system are evident.⁵⁴¹ Nuremberg shaped the public consciousness as well as the historical consciousness, and was also therefore the source of the legal consciousness of the Third Reich that underpinned the Hart-Fuller debate in the late 1950s. Nazism looms large as evil, totalitarian and criminal within jurisprudential discourse, supported by an underlying narrative of rupture. It does not come across as an in many ways 'normal' state with a complex and functioning legal system. It is often unhistorical – unsupported by historical evidence – and ahistorical –abstracted outside of 'normal' history. There appears in this context to be a connection between the prevailing representation, an apparent reliance on a cultural understanding of the nature of the Third Reich, the impact of Nuremberg narratives on this understanding, and the timing of the Hart-Fuller debate. In essence, lacking resort to alternative historical evidence, jurisprudential scholars are often left reliant on the Nuremberg paradigm of Nazi government in their references to the Third Reich – the historic historiography of the Third Reich that infused public consciousness in the post-war period.

⁵³⁹ Bloxham, *Genocide on Trial* (n 517) 13.

⁵⁴⁰ *ibid* 2.

⁵⁴¹ See Chapter Two on this representation.

The specific imposition by the NMT prosecutors of a narrative of criminality on the Nazi legal system is highlighted in recent academic commentary on the NMT *Justice* case, in which legal officials from the Nazi regime were prosecuted. The case also illustrates the intended juxtaposition of the law the allies used to prosecute the Nuremberg war crimes trials and the law – or its absence – of Nazi Germany. This reveals how the rupture between the Nazi legal system and the rule of law does not just exist in theoretical academic discourse but was also manifested as a postwar legal and historical moment. Looking at the appeals to the concept of ‘civilisation’ in the discourse of the *Justice* case, Christiane Wilke has argued that the trial ‘was not simply an exercise in judging and condemning Nazi violence; rather, it was announced as a crucial element of re-enthroning law in Germany’.⁵⁴²

The *Justice* case narrative did not deny that the Nazis *thought* that they had law, or that there was something sometimes *called* law in Nazi Germany, but rather that it was *really* law. It ‘constructed a strict categorical distinction between Nazi law as “prostitution” of law and its own law as a benevolent civilizing force’.⁵⁴³ The trial was therefore ‘meant to redeem and reconsecrate law as a response to ... the use of the *form* of law to violate what the *Altstoetter* judges deemed the essential *substance* of law’.⁵⁴⁴ According to this, Nazi Germany was uncivilised and its ‘law’ was consequently invalid. Those who implemented atrocities according to Nazi ‘law’ were acting as criminals and subject to the proper, civilised law. The opposition of Nazi law - non-law - with civilised law - international law, the law of Nuremberg – enabled the concept of law itself to be saved from the degradation and deviance of the Third Reich.

By making Nazi law ‘non-law’, the defendants could be both criminalised and demonised, placed in stark opposition to their accusers and the law upon which they called. This ‘allowed the Court to construct a narrative of Germany’s descent into barbarism that absolved law and the institutions associated with the “civilization” shared by the United States from any responsibility for the “destructive urges” exhibited by the Nazi state’.⁵⁴⁵ This attempt to ‘absolve’ the rule of law from the taint of Nazi law did not merely paint the Third Reich as unlawful, thereby distinguishing it as a matter of

⁵⁴² Wilke, ‘Reconsecrating the Temple’ (n 515) 182. It was clear that it was *Nazi Germany* that was considered the problem, not Germany as a whole: ‘Crucially, it is only *Nazi Germany* that is positioned as legality’s “other”: the image of *Germany* at large as essentially civilized remains untouched by the insistence on the Nazi state as an aberration from both civilization and the German legal tradition’ (192).

⁵⁴³ *ibid* 193.

⁵⁴⁴ *ibid* 182-183.

⁵⁴⁵ *ibid* 192.

historical narrative and periodization from the law that came before and after. In in doing so it also created a moment of rupture between the two. 'Nazi law' and 'law' at that point became fundamentally different things, and the horrific violence of the Holocaust and other Nazi atrocities became the domain of Nazi law or, more pointedly, non-law. The international law used at Nuremberg to prosecute criminal Nazi behaviour was the opposite of Nazi law – it was incapable of anything but restoring law to its rightful place.

Wilke's interpretation emphasises the resort to a mode of natural law – law with its substance – to deal with a problem with minimal positive law – law in form only. David Fraser has taken Wilke's point further to problematize the normative jurisprudential basis of the allies' authority at Nuremberg.⁵⁴⁶ While Wilke claims that the prosecution did not treat Nazi law and international law as competing systems, because Nazi law was not considered law at all,⁵⁴⁷ Fraser highlights a more subtle confusion in the allies' discourse, which included subjugating Nazi law to the higher legal norms of positive international law while at the same time invalidating it on substantive, natural law grounds. While clearly inconsistent at a legal theoretical level,⁵⁴⁸ the attempt to separate 'law' from 'Nazi law' was also intended to create a rupture between the different legal systems, to distinguish actively between Nazi law – non-law – and what came after, notwithstanding the similarities between the two, especially in the 'life-worlds' of the lawyers involved.⁵⁴⁹ Fraser argues, therefore, that the construction of Nazi law as non-law and the assertion of the fidelity of the rule of law inherent in many war crimes trial processes following Nazi Germany represented an elaborately interwoven double denial:

The primary legal-ideological function of post-Auschwitz juristic events involving the prosecution of Nazi and other war criminals is ... to attempt to convince us again and again, with each case against each perpetrator, of the discontinuity, the radical break of 1933-1945. Once that epistemological step has been accomplished, law assures us of a return to the safety of modernity, of the primacy of the rule of law.⁵⁵⁰

Wilke's analysis of the *Justice* case shows how the tribunal resorted to natural law claims in order to paint Nazi law as non-law. Fraser's exposes a number of additional layers beyond this that highlight the jurisprudential confusion inherent in the prosecution's position. Alongside this substantive invalidation of Nazi law existed a layer of positive law, according to which international

⁵⁴⁶ Fraser, 'Evil Law, Evil Lawyers?' (n 26).

⁵⁴⁷ Wilke, 'Reconsecrating the Temple' (n 515) 193.

⁵⁴⁸ Fraser, 'Evil Law, Evil Lawyers?' (n 26) 397.

⁵⁴⁹ Ibid 394.

⁵⁵⁰ Fraser, *Law After Auschwitz* (n 23) 121.

law had superiority over infringing domestic law. Not least because of the early developmental stage of international criminal law at that point, its authority over domestic law rested its own legitimacy to a degree on its inherent moral superiority, a natural law foundation. The legitimacy of the tribunal itself, however, could not be validated by positive international law norms founded on normative superiority because of the limits imposed by the Hague Convention.⁵⁵¹ Rather than positive *law*, therefore, the allies' jurisdiction to impose the tribunal at all rested on positive *power*, the power and consequently the authority and possibly the legitimacy that came with the complete destruction of the Nazi state. Even this legitimacy is arguably based on a moral claim: the higher moral principles required to justify the complete eradication of such an evil state entity as the Third Reich in the first place.

Consequently, these attempts to render Nazi law illegitimate – as non-law – were unsuccessful as a matter of legal theory.⁵⁵² The associated efforts to posit a categorical distinction between Nazi law and the law of Nuremberg also fail because of the similarities that persist between the two systems.⁵⁵³ No theoretical argument was able to invalidate the fact of Nazi law convincingly, so a simple hierarchy of legal norms was brought into play in order to categorise Nazi law as criminal. The discursive efforts to create a sharp divide between Nazi law and 'proper' law on the basis of the distinction between civilisation and criminality/barbarity were not wholly unsuccessful in terms of their legacy in academic discourse and the public consciousness, but fail empirically and philosophically because they are unable to overcome the essential correspondence of the two systems. Each layer of justification relied on the one above it, naturalism on positivism on naturalism, resting ultimately on the authority of force.⁵⁵⁴ These claims could only ever be confused and inconsistent as they had to rely all at once and equally unconvincingly on the rhetoric of naturalism, the legal authority of positivism, and the *de facto* reality of military power. The prosecution's natural law discourse was insufficient to justify its own legitimacy, as was its resort to legal positivism. Neither could, without self-contradiction, adequately invalidate Nazi law.

It would already be difficult to reconcile this confused theoretical combination with a narrative of a totalitarian conspiracy dependent on the manipulation and instrumentalisation of the bare form of law, the narrative

⁵⁵¹ Fraser, 'Evil Law, Evil Lawyers?' (n 26) 400-401.

⁵⁵² *ibid* 402.

⁵⁵³ *ibid* 393.

⁵⁵⁴ *ibid* 408.

of Nazi governance constructed by the prosecution at Nuremberg. It is virtually impossible to justify isolating it philosophically from the reality of the Nazi legal system, which employed its own confused amalgamation of positive law, natural law and pure force.⁵⁵⁵ Legislation was passed and enforced where necessary to appease the existing elites and ensure popular support, and the authority of positive law was frequently employed. At the same time, resort to higher norms both circumvented the positive law where desirable and place the legal system on a natural law footing more in line with Nazi ideology. Despite their ostensibly legal rise to power, the Nazi regime was also very willing to use pure force where necessary to achieve its aims. The absence of rigid categorisations and the lack of a clear distinction between regular law, natural law and law as pure politics – brute force – might be thought of as a defining and isolating feature of the regime. The fact that the jurisprudential foundations of Nuremberg are similarly muddled instead illustrates that a quite different analysis is appropriate, an analysis that treats the jurisprudence of the Nazi state as in fundamental ways comparable to that of Nuremberg.

Despite the apparent jurisprudential and historical problems with the approach at Nuremberg, what endures in academic legal discourse are elements of both its confused naturalist and positivist discourse. On the one hand the authority of posited international law over domestic law has been established through adherence to a positive system of international criminal law, underpinned by vestiges of its naturalist claim to moral superiority. On the other hand a narrative of Nazi law as non-law continues to prevail within ICL scholarship, which largely accepts and adopts the Nuremberg account of the Third Reich,⁵⁵⁶ parts of jurisprudence informed by Nazi law, and in the rupture thesis underpinning jurisprudential discourse generally.⁵⁵⁷ This exists within jurisprudence alongside a somewhat confused positivist conviction that Nazi law must be some sort of law, albeit law in form only, influenced by a strong sense that Nazi law is so different to the remainder of the concept of law that it is not worthy of further investigation or proper analysis. Nazi law as non-law is based on a combination of the founding of the Nuremberg narrative on Neumann's conception of the Nazi state as a criminal state – and the resulting prosecution and defence narratives of Nazi governance - and the related efforts to distinguish Nazi law from 'proper' law through appeals to internationalist concepts such as civilisation. The inherent contradiction in these positions is not reflected in the academic legal discourse that employs

⁵⁵⁵ See the discussion of the nature of Nazi law in Chapter Five, particularly the role of ideology highlighted in the first case study, in Section II of that chapter.

⁵⁵⁶ See the discussion of this scholarship in the following section.

⁵⁵⁷ See Chapter Two.

them. In the case of jurisprudential discourse, therefore, Nazi Germany is not considered substantively relevant to important theoretical issues other than as a particularly shocking and extreme example. Nazi law is little more than the paradigm of an archetypal wicked legal system.

The literature examined in this section shows that Nuremberg was vital for constructing and disseminating a narrative of Nazi law as non-law in the postwar period and manifesting ‘proper’ law as something different from Nazi criminality. It connects Nazi Germany itself - the object of scrutiny as well as prosecution in the Nuremberg trials - with the historiography of totalitarianism and the jurisprudence of rupture. Notwithstanding the absence of historical evidence in the Hart-Fuller debate, its general representation of the Third Reich is consistent with that advanced by and at Nuremberg.⁵⁵⁸ Historical writing about Nazi Germany at the time was similarly influenced by Nuremberg (as well as Fraenkel and Neumann) and would have been unlikely to posit a radically different conception of Nazi law. However, the absence of jurisprudential engagement with historiography in subsequent decades has reinforced and exacerbated this representation in the legal academy, while the historical academy has moved far away from it. As earlier chapters of this dissertation showed, the Third Reich has been used in support of theories of the concept of law from which its reality diverges in radical and sometimes unexpected ways.⁵⁵⁹

III. Nazi War Crimes Trials Scholarship

A The Triply-Limited Discourse of ICL Scholarship

The absence of engagement with historical research in certain parts of the legal academy also contributes to a lack of significant revision of the role of Nuremberg within ICL scholarship. In its case, neither the ignored complexities of the Nazi legal system, the wider political and social context of the trials, nor the confused and questionable basis of the legal position of the prosecuting powers is addressed, notwithstanding that there exists a body of historical research on which to draw about some of these points. Nuremberg is an important historical focal-point for ICL scholarship, for obvious symbolic and substantive legal reasons. However, because of their understandable interest in contemporary international criminal law rules and procedures, scholars in this area tend not to look beyond the clear connections between

⁵⁵⁸ Apart from Fuller’s limited evaluation of the particular Nazi statutes used to prosecute the husband of the grudge informer. The Hart-Fuller debate’s representation of Nazi Germany is explored and evaluated in Sections II and III of Chapter Three.

⁵⁵⁹ See Chapter Two on the jurisprudential representation of Nazi Germany, chapters Two and Three on its reproduction and Chapter Five on the challenges to this represented by more recent historical research.

these characteristics and the Nuremberg tribunals, to interrogate broader historical and theoretical questions that impact on the reconstruction of Nazi Germany within academic legal discourse. This results in a triply limited discourse, which rarely considers other Nazi war crimes trials apart from Nuremberg (and usually apart from the IMT), does not scrutinise the representation of the Nazi legal system, and adopts a very specific jurisprudential analysis, eschewing wider theoretical concerns.

Fraser's commentary on the limitations of international criminal law discourse can be used to highlight some of the key concerns that are revealed by the analysis of legal and historical scholarship of the trials that follows. As he highlights, international criminal law scholars tend to take one of two positions on the role of Nuremberg in their field. According to these accounts, either Nuremberg laid the foundation for positive international criminal law, culminating in the Rome Statute and the International Criminal Court, or it all was – and remains – a matter of victor's justice.⁵⁶⁰ This simplified dichotomy of interpretation exposes the limitations of legal categories, institutions and forms for getting to grips with what happened at Nuremberg, in the war crimes trials generally, and in Nazi Germany. The inherent contention of ICL that its objects of scrutiny must be 'criminal' by definition engenders an assumption that the accused are inevitably guilty of heinous war crimes, and a concomitant outrage accompanies acquittals.⁵⁶¹

The assertion of international criminal law jurisdiction over individuals alleged to have committed atrocities brings with it a number of automatic assumptions about how both the state in question and the trials of its agents are to be treated as a matter of legal history:

The overarching frame of our inquiries must resist the temptation to leap from a study of criminal trials of Nazi officials and German industrialists to the conclusion that the correct, best or sole historical template for a study of the Nazi period, and even of the atrocities of the Hitler state, is that of crime, criminal law and criminalization. While this was unquestionably the ideology behind the NMT trials generally ... other hermeneutics, including one that would offer a mirror image of the Nazi state as deeply imbued with a legalistic and legal self-understanding, must not be neglected.⁵⁶²

The legal academy ought not to adopt uncritically the legal and historical hermeneutic framework imposed by Nuremberg when evaluating either the tribunals or the Third Reich because that framework is jurisprudentially flawed and has since been overtaken and revised by subsequent

⁵⁶⁰ Fraser, 'Shadows of Law' (n 26) 402.

⁵⁶¹ *ibid* 406.

⁵⁶² *ibid* 408.

historiography. We cannot assume that as a matter of jurisprudence Nazi law should be treated as non-law just because that is what Nuremberg dictated. We cannot pretend to understand the nature of the Third Reich just by understanding what was said about it at a handful of its war crimes tribunals. And ‘we must neither accept nor reject the symbolic aspects of the NMT without careful, nuanced and concrete jurisprudential and historical analysis’.⁵⁶³ This speaks to one of the limitations of ICL scholarship, that it replicates rather than interrogates Nuremberg’s construction of the Nazi past because it is not concerned either with broader questions of legal theory or the operation of the Nazi regime.

ICL scholarship does tend to fall into these traps in relation to the Third Reich. Priemel and Stiller’s study shows that the Nuremberg narratives made their way into public and historical discourse in the subsequent period and remained embedded there for a considerable length of time.⁵⁶⁴ The legal reliance on this now revised post-war historiography is reinforced by the jurisprudential exclusion of Nazi law as non-law at Nuremberg to construct a barrier between academic discourse and the reality of law in Nazi Germany that is common to both jurisprudence and ICL scholarship. This barrier is maintained in part by a lack of understanding of Nazi law that will not be addressed as long as more recent developments in historical research are overlooked within the legal academy.⁵⁶⁵

There has been little effort so far to look at the NMT trials for what they were, ‘to take seriously both the epistemological premises of judicial proceedings and the dialectical tension of the historical-political trial’.⁵⁶⁶ In his own analysis of the behaviour of Nazi legal officials through the *Justice* case, Matthew Lippman notes that ‘the legal literature generally has failed to examine the role of jurists in the Third Reich’.⁵⁶⁷ These points highlight two other limitations of ICL scholarship in this area: the narrow doctrinal focus that prevents wider normative and theoretical questions being addressed, and the disciplinary, legal framework that does not engage with the political and social context of the trials. A detailed exploration of the role of law in the Third Reich, supported by an historiographical appreciation of its societal context confirms that the Nuremberg narrative of Nazi Germany ‘was in its narrow legal sense and its broader symbolic purchase the result not of an

⁵⁶³ Ibid.

⁵⁶⁴ ‘Patterns and paradigms which would determine historical research, and the evolution of international criminal law emanated from the “subsequent proceedings” and resonate until the present day’; Priemel and Stiller, ‘Nuremberg’s Narratives’ (n 78) 2.

⁵⁶⁵ Fraser, ‘Shadows of Law’ (n 26) 418.

⁵⁶⁶ Priemel and Stiller, ‘Nuremberg’s Narratives’ (n 78) 3.

⁵⁶⁷ Lippman, ‘The Prosecution of Josef Altstoetter *et al*’ (n 442) 432.

objective and verifiable historical truth'.⁵⁶⁸ Nazi Germany had a completely different *raison d'être* to that implied by a criminal conspiracy intent only on expansion through aggressive war and its legal system a different complexion altogether.⁵⁶⁹ An appreciation of Nazi law that saw it as operating at the hands of an anti-Semitic ideology, ultimately to bring about genocide, would be more historically verifiable and jurisprudentially accurate, and would call into question the narratives constructed at and by Nuremberg.

The triply limited discourse of ICL scholarship maintains its focus on Nuremberg at the expense of other Nazi war crimes trials and does not challenge at a fundamental level the legal theories underpinning Nuremberg or its representation of the Third Reich. Its tight disciplinary scope means that historical writing about the same trials is often not treated as relevant to its doctrinal and procedural focus. As a result, ICL scholarship tends to reproduce a narrow construction of the past, which it does not critique in any meaningful way. This is illustrated in Part B with reference to a number of specific examples from the literature.

B Reinforcing a Narrow Construction of the Nazi Past

What is notable about recent ICL scholarship about Nazi war crimes trials is that it continues to follow an approach that reflects preferences traditionally exhibited in this area of scholarship. It largely focuses on the Nuremberg IMT as if the many subsequent trials, both international and domestic, did not exist. To a degree this is a natural consequence of the research interest of most of those involved, which is the nature and development of international criminal law. However, this does not account for the general neglect until recently of the Subsequent Nuremberg Military proceedings, for example, nor of what other domestic Nazi war crimes trials might contribute to international criminal justice. Nor does it explain why Anglo-American legal scholars interested in other aspects of the law should not wish to tackle some of the issues raised by these other proceedings.

While research specialism may dictate the focus of the work of a number of those scholars currently writing about Nazi war crimes trials, the absence of interest from lawyers in other fields in this area is as responsible for the restricted scope of the current literature. One explanation for a lack of wider interest in the trials and other aspects of the Nazi past from ICL scholars and other legal academics is that the prevailing conception of the law as absent from and antidote to Nazi Germany constructed at Nuremberg is reinforced by the legal scholarship that does engage with Nazi-related subjects, for

⁵⁶⁸ Fraser, 'Shadows of Law' (n 26) 408

⁵⁶⁹ *ibid* 410-411.

example jurisprudential discourse. As a result of this it is perhaps not considered necessary to explore these issues further; law's role vis a vis the Nazi past is cemented. The central problem with this, exposed by historical scholarship, is that the historical picture of Nazism now emerging contradicts the legal impression of the Third Reich upon which that conception is founded.

A comprehensive and reflexive analysis of the broader legal theoretical issues raised by Nuremberg, and how these relate to the history under scrutiny is generally not provided because of a consensus around the received theoretical account of law's response to the Nazi past, which relies on the false opposition between the liberal rule of law and Nazi criminality – founded on a moment of rupture around Nuremberg. As a consequence, ICL scholarship remains predominantly focused on the most famous of the Nazi war crimes trials in the public consciousness, the Nuremberg IMT, its impact on the subsequent development of substantive international criminal law,⁵⁷⁰ and narrowly centred on the specific jurisprudence of the rules and procedures of the trial itself. These texts, with few exceptions, tend to share a version of the aim of evaluating the development of international criminal law norms and procedures. This often results in both a highly restricted and underdeveloped jurisprudential critique of the war crimes trials, and a very narrow construction of the history of the Nazi past, which essentially replicates that reflected in the proceedings themselves.

For example, in a chapter headed 'A New Meaning of Justice',⁵⁷¹ Ehrenfreund argues that in the decades subsequent to the proceedings, the term Nuremberg 'grew to represent a commitment to justice that was gradually embraced by half the nations of the world. Nuremberg stood for the highest standards of law and due process – innocent until proven guilty, an attorney for every criminal defendant, a fair trial no matter how grave the charge'.⁵⁷² While this section is a commentary on the power of the symbol of Nuremberg in subsequent international war crimes tribunals, it is also to a degree a commentary on Ehrenfreund's own appreciation of the trials, manifested in his closing assertion that the decision to hold the Nuremberg IMT 'was a splendid victory for Robert Jackson, an even greater victory for humanity'.⁵⁷³

⁵⁷⁰ For example, Ehrenfreund, *Nuremberg Legacy* (n 516); Mettraux, *Perspectives* (n 516); Salter, *Nazi War Crimes* (n 516); and Blumenthal, McCormack, *Legacy of Nuremberg* (n 516). Even some works that divert from this template, such as Landsman, *Crimes of the Holocaust* (n 516), contain a whole section on the Nuremberg IMT, although it would perhaps be more surprising given the subject matter if the IMT were not included in some way.

⁵⁷¹ Ehrenfreund, *Nuremberg Legacy* (n 516) 153-171.

⁵⁷² *ibid* 153.

⁵⁷³ *ibid* 219.

In this evaluation the philosophical antagonism between the law of the righteous and the law of the wrong that infuses the proceedings themselves is adopted virtually wholesale. Neither the legal theoretical background to the trials nor their representation of Nazism is interrogated.

The aims of this area of scholarship are typified by the need to 'asses the contemporary application of lessons learnt at Nuremberg, and to consider how the legacy of the Trial continues to influence the development of international criminal law and the concepts of justice and reconciliation'.⁵⁷⁴ Even where it is recognised that the popular perception of Nuremberg is 'perhaps too simplistic', the reason given for this is because the undue focus on its status as the first international criminal tribunal and its contribution to the doctrine of individual criminal responsibility fails to account for its contribution in other areas of international criminal law such as conspiracy as a basis for individual criminal responsibility, and the law of military occupation.⁵⁷⁵ In the context of such a restricted view of the legacy of Nuremberg, the scope of any critique of it also suffers. Such a critique often amounts to a handful of inadequacies, 'the worst of these being victors' justice and the possible application of *ex post facto* law'.⁵⁷⁶ This is a very limited account of Nuremberg and law, indeed, and one which can replicate Nuremberg's own valorisation of the return of the rule of law. For example, that 'the ideas spawned at Nuremberg-new concepts of justice and human rights-have spread across much of the world and have become more evident than ever before'.⁵⁷⁷

Similarly, some of the articles in Blumenthal and McCormack's edited volume contain fairly uncritical statements such as: 'the moral thrust of Nuremberg, in terms of upholding the rule of law, needs to be reasserted in the face of contemporary challenges to some of its key principles' in order to rediscover the 'civilising message' of Robert Jackson.⁵⁷⁸ Or that Nuremberg 'contributed to the development of the human race, by achieving another step in becoming more civilised, and thus reaching a higher level in our development as a species'.⁵⁷⁹ These declarations replicate the 'civilising' message

⁵⁷⁴ Blumenthal and McCormack, *Legacy of Nuremberg* (n 516) xxi.

⁵⁷⁵ Michael Kelly and Timothy McCormack, 'Contributions of the Nuremberg Trial to the Subsequent Development of International Law' in Blumenthal and McCormack, *Legacy of Nuremberg* (n 516) 127-128.

⁵⁷⁶ Ehrenfreund, *Nuremberg Legacy* (n 516) 215.

⁵⁷⁷ *ibid* xvi-xvii.

⁵⁷⁸ William Maley, 'The Atmospheric of the Nuremberg Trial' in Blumenthal and McCormack, *Legacy of Nuremberg* (n 516) 11.

⁵⁷⁹ Graham Blewitt, 'The Importance of a Retributive Approach to Justice' in Blumenthal and McCormack, *Legacy of Nuremberg* (n 516) 46.

constructed by Nuremberg about its own law, highlighted by Christiane Wilke in the context of the *Justice* case.⁵⁸⁰ They are only credible where the construction of history endorsed, the range of trials being examined, and the jurisprudential scope of analysis are so restricted as to exclude critical perspectives on the underlying nature of the role of law in the trials process.

Even those rare legal scholars who have branched out somewhat in terms of the trials they scrutinise, such as Kevin John Heller and Stephan Landsman,⁵⁸¹ are reluctant to address the historical context and specificity of either the trials or the history of Nazi Germany, or the legal theoretical issues raised by the imposition of 'law' on the 'criminal' Nazi past. Landsman 'traces the world's halting development of a courtroom response to the Nazis' effort to destroy all of Europe's Jews',⁵⁸² in a number of different trials across time and space. However, as Michael Marrus makes clear in his review, 'left out is the complicated political and historical context in which each of these Holocaust-related trials have taken place, the difficulties faced by the organizers of these proceedings, and the limitations of "the Anglo-American approach to adjudication through adversarial proceedings"'.⁵⁸³ The fact that a text with such an apparently ambitious scope avoids the broader historical context of the trials and focuses on narrow jurisprudential issues illustrates the extent to which ICL scholarship remains wedded to the jurisprudential framework constructed at Nuremberg. While Landsman does extend the scope of the previous scholarship in some ways, in particular by examining a greater range of proceedings, his approach remains in key ways within the existing tradition.

Heller's *The Nuremberg Military Tribunals* has a stronger historiographical focus. This is in part the result of his recognition of some of the limitations of the pre-existing ICL scholarship, especially its continuing neglect of the NMT proceedings and the need to place the trials in their wider historical context. However, notwithstanding the features of Heller's book which expand on the existing legal literature, its focus remains on the jurisprudence of the development of substantive international criminal law, matters of doctrine, procedure and evidence. Its limitations in respect of some of the issues raised here about ICL scholarship generally are well summed up by Fraser's response to the text, which mirrors in telling ways Marrus' review of

⁵⁸⁰ Wilke, 'Reconsecrating the Temple' (n 515).

⁵⁸¹ Heller looks at the subsequent Nuremberg trials while Landsman begins with the IMT but also considers some of the successor trials, of Eichmann, John Demjanjuk and Imre Finta: Heller, *Nuremberg Military Tribunals* (n 516); Landsman, *Crimes of the Holocaust* (n 516).

⁵⁸² Landsman, *Crimes of the Holocaust* (n 516) ix.

⁵⁸³ Michael Marrus, 'Review of Landsman, *Crimes of the Holocaust*' (2006) 28 *Human Rights Quarterly* 279, 279.

Landsman's book. Fraser asserts that it 'leaves the reader frustrated, wanting more – more history, more context, more detailed analysis'.⁵⁸⁴

Heller's stated aim is to provide 'a comprehensive jurisprudential and historical analysis of the NMT trials',⁵⁸⁵ and he takes on the whole of the Nuremberg Subsequent Military Tribunals. However, Heller's historical contextualisation is primarily limited to the geopolitical influences on the proceedings and specifically the impact of the Cold War. His real interest in this text appears to be how the additional substantive and procedural contribution of the NMT proceedings, over and above the IMT, has impacted on the development of international criminal law.⁵⁸⁶ His book displays a much greater interest in a fairly narrowly conceived jurisprudential analysis, than in broader historical evaluation. He does not address in detail other aspects of the historical context or tackle the issue of the construction of Nazi history put forward in the proceedings themselves. Consequently, both in the ways it represents an exception to ICL scholarship and where it is typical of other accounts, Heller's book highlights the limitations of the existing literature as much as it expands upon it.

For example, Heller's limited focus is apparent when it comes to his evaluation of the success of the NMT proceedings.⁵⁸⁷ His selection of potential success measures is synonymous with the stated aims of the trials: achieving retributive justice, educating the German people, creating a historical record, and contributing to the development of international criminal law. A detailed exploration of the documentary legacy of the NMT, or the difficulties with influencing German collective memory and national identity, or even of the application of retributive justice to such historical events would have presented many opportunities to delve further into interesting legal and historical theoretical questions. Heller's evaluation, however, is dominated by a rigorous analysis of the contribution of the NMT proceedings to international criminal law, divided into 11 sub-sections covering everything from the individual substantive offences and the general part of the criminal law, to defences and sentencing. The other success measures mentioned are represented by comparatively brief passages, and the documentary and didactic measures are combined and confined to a single paragraph.

Recent ICL scholarship on the Nuremberg trials confirms that the international legal response to Nazi war crimes remains a significant area of

⁵⁸⁴ Fraser, 'Shadows of Law' (n 26) 4.

⁵⁸⁵ Heller, *Nuremberg Military Tribunals* (n 516) 4.

⁵⁸⁶ *ibid* 3.

⁵⁸⁷ See Heller, *Nuremberg Military Tribunals* (n 516) ch 16, 369-397.

interest for international criminal law. Notwithstanding the tendency to mention the symbolic role of Nuremberg in ICL texts generally, the number of new works dedicated to Nuremberg testifies to this. However, the key limitations of the discourse, emphasised in Part A of this section, are rarely stretched, even by research that explicitly aims to move beyond what has gone before, primarily by considering proceedings other than the Nuremberg IMT. The accounts within ICL scholarship struggle to get past 'Nuremberg' and remain narrow in legal perspective and historical focus. As a consequence they tend to reproduce Nuremberg's own contradictory jurisprudential foundations and its problematic representation of Nazi Germany without subjecting them to appropriate scrutiny. This may be contrasted with the historiographical accounts of Nuremberg and other trials, considered in Part C. These generally have a much more expansive scope and raise interesting philosophical questions about the proceedings and the construction of the Third Reich that are as relevant to law as to history.

C Historiographical Accounts: Challenging the Limited Construction of the Past

There has been a burgeoning of historiographical interest in Nazi war crime trials in recent years.⁵⁸⁸ This has included the emergence of detailed accounts of individual trials other than the Nuremberg IMT and consideration of thematic issues across trials such as the relationship between history and law manifested by the proceedings and their impact on collective memory and identity. The key difference I would like to highlight between historical Nazi war crimes trials research and the ICL scholarship is that historical accounts provide a broader critical analysis both of the trials themselves and of their representation of Nazi Germany. Historians do not work within the disciplinary framework of international criminal law, or the legal academy generally. While they are interested in the laws and procedures used by the tribunals, this is in terms of their social and political origins and their impact on the history rather than how they contributed to the development of international criminal law. The triple limitation of ICL discourse does not apply, therefore, to historical scholarship. Apart from having moved earlier and further away from the Nuremberg IMT (aided by the absence of a specific commitment to 'international' tribunals), its interest in tribunal jurisprudence is much more contextualised and it is concerned with evaluating how Nazi Germany is represented.

Historiographical approaches to the proceedings develop a more detailed and contextualised historical appreciation of the trials than the ICL scholarship

⁵⁸⁸ See fn 517.

discussed above. This is not least because (re)constructing the past is what historians are trained to do. With recent developments in the historiography of the Third Reich in many areas moving in the direction of a more nuanced and complex narrative of the period,⁵⁸⁹ it is in tandem with this that new scholarship about war crimes trials both branches out and supplies us with wider context, more detail, and a variety of perspectives. However, while historical accounts certainly tackle some of the important substantive and procedural legal issues brought to light by the trials, historians have their own disciplinary conventions and research interests and do not stray into legal theoretical issues too far removed from a conventional historical narrative of the trial(s) under scrutiny. For example, historians are unlikely to engage in a jurisprudential re-evaluation of the normative foundations of Nuremberg.

The primary interest of these works is the *history* rather than the *law*. Their interest in the law is generally shaped by historiographical concerns. This manifests itself in an exploration of issues such as the dual aims of the trials - their pedagogic purpose and attempt to achieve justice, which is often considered in the context of a broader narrative of the public response to the trials. Rather than focusing on, for example, the evidential issues with using historical sources for legal purposes, historians address the impact of legal forms on history. This often results in consideration of the inherent tension between the legal and historical aspects of the proceedings, highlighting the limits of the law when it aims to achieve multiple objectives and impose justice on a history of atrocity. Where the doctrinal focus of much ICL scholarship means the trials' representation of Nazi Germany is taken for granted, historical accounts often explicitly lay bare the misrepresentation of the Nazi past that framed the proceedings, carried through into many of the trials processes and (mis)informed the perception of the wider public.

For example, in her narrative of the Frankfurt-Auschwitz trial Rebecca Wittmann is ultimately interested in the political-social-cultural question of how the trials impacted on the German public consciousness and aided or prevented their coming to terms with their recent past. Her conclusion about this is representative, that 'the sincere effort of the public prosecution to indict Auschwitz, to teach lessons about the culpability of all involved in the murder of innocents, was hindered by the law as it was defined'.⁵⁹⁰ This is mirrored in Valerie Hébert's assessment of the *High Command* case.⁵⁹¹ She is

⁵⁸⁹ See, for example, the concentration camp system research discussed in Sections III and IV of Chapter Five.

⁵⁹⁰ Wittmann, *Beyond Justice* (n 517) 6.

⁵⁹¹ *US v Wilhelm von Leeb et al, Trials of War Criminals Before the Nuernberg Military Tribunals*, Vol X and XI, 'The High Command Case' (United States Government Printing Office, 1951).

interested in the question 'did the judicial exercise help the Germans in the understanding of and reconciliation with their traumatic and contested history?',⁵⁹² concluding that ultimately 'the Nuremberg project did not achieve justice, nor did it educate the German people about Nazi crime in any nuanced or lasting way'.⁵⁹³

The conflict in the dual purpose of the trials is often emphasised in historical accounts, which in turn led to a failure of their pedagogical aspect: how the law impeded the history. Wittmann argues that the jurisprudence of the judicial system of the Federal Republic of Germany resulted in problems with the use of retroactive legislation, subjective aspects of the law relating to murder, and the statute of limitations, which impacted the trial's ability both to deliver the desired message to the public and to bring justice to the perpetrators.⁵⁹⁴ Similarly, Hébert argues that, as a result of the broader aims of the trial, the selection of its defendants and the conduct of its prosecution, the 'trial organizers had sought to use the accused as symbols of a broader and more pervasive guilt and responsibility than the trial was capable of prosecuting'.⁵⁹⁵ These sorts of arguments are common, and are reflected elsewhere in attempts to draw conclusions as to the success or failure of proceedings in terms of their claim to achieve both justice and truth.⁵⁹⁶

According to Devin Pendas, in the Frankfurt-Auschwitz trial the reliance on the 'ordinary' criminal law meant that 'the law came up against the limits of its capacity to deal adequately with systematic genocide'.⁵⁹⁷ Hilary Earl argues that in the NMT *Einsatzgruppen* trial the 'more traditional prosecution of murder' that emerged in the trials despite the use of international rather than domestic law, resulted in 'an approach that by necessity overlooked the complexities of genocide'.⁵⁹⁸ Similarly, Michael Marrus highlights 'how difficult it was to bring the Holocaust into the courtroom in a way that seems commensurate with that catastrophe'.⁵⁹⁹ With reference to the Frankfurt-Auschwitz trial, Pendas claims 'in its rush to discern individual culpability, the trial displaced and eliminated the dimension of collective responsibility', resulting in justice but not truth, which 'ultimately provides neither truth nor justice'.⁶⁰⁰

⁵⁹² Hébert, *Hitler's Generals* (n 517) 1.

⁵⁹³ *ibid* 6.

⁵⁹⁴ Wittmann, *Beyond Justice* (n 517) 7-8.

⁵⁹⁵ Hébert, *Hitler's Generals* (n 517) 5.

⁵⁹⁶ Pendas, *Frankfurt Auschwitz Trial* (n 517) 288.

⁵⁹⁷ *ibid* 2.

⁵⁹⁸ Earl, *Nuremberg SS-Einsatzgruppen Trial* (n 517) 297.

⁵⁹⁹ Michael Marrus, 'Foreword' in Heberer and Matthäus, *Atrocities on Trial* (n 517) ix.

⁶⁰⁰ Pendas, *Frankfurt Auschwitz Trial* (n 517) 304.

These comments about the failure of many of the trials in terms of their pedagogical aims reflect two important areas of historical interest in this category of scholarship. These are the misrepresentation of the Nazi past inherent in the conception and execution of the proceedings and the limitations of the legal regimes in trying to prosecute Nazi defendants while simultaneously giving a history lesson to the wider world. One of the most important implications of these recent historical accounts of trials lies in how they expose the limited construction of the past put forward in the proceedings. This is an almost universal observation, reflected in comments such as 'in many ways, the misrepresentation of Nazi crime that came out of the trial is the prevalent interpretation informing people's understanding of the Holocaust to this day'.⁶⁰¹ Erich Haberer claims that when such trials are deprived 'of the historical context that was essential to the accurate representation of the nature and dimensions of the National Socialist catastrophe', they can become 'an imposition of justice on history'.⁶⁰² Thus, in the case of Nuremberg, whatever justice was done in legal terms, it resulted in the enduring distortion of history in public perception,⁶⁰³ as well as in historical writing and in jurisprudential discourse.

The disciplinary commitments of historians are evident in how these texts approach their Nazi war crimes trial subject-matter. In ICL scholarship accounts, the history is subservient to the law. This is specifically law with a small 'l', the substantive and procedural laws employed by the tribunals, their technical failings and their impact on the development of international criminal law. In historical research, these sorts of laws are subservient to the wider historical context: their inability to adequately tackle and represent the Nazi past, and inform the public consciousness in a way that enables the coming to terms with that past. The idea of 'justice' is prevalent within both sets of accounts, but it is generally more broadly contextualised in historical narratives, so that it means more than successful prosecutions and technically satisfactory laws. It means, as Pendas suggests, achieving truth as well as more prosecutory 'success',⁶⁰⁴ but historical 'truth' was rarely achieved.

Historical accounts are necessarily limited by this approach in terms of legal theory. Historians are not really concerned with how the misrepresentation of Nazi Germany within the trials has impacted the jurisprudential concept of

⁶⁰¹ Wittmann, *Beyond Justice* (n 517) 274.

⁶⁰² Erich Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes' (2005) 19(3) *Holocaust and Genocide Studies* 487, 492-493.

⁶⁰³ *ibid* 493-494.

⁶⁰⁴ Pendas, *Frankfurt Auschwitz Trial* (n 517) 304.

law, whether the legitimacy of the allied powers was founded on positivism or naturalism, or whether Nazi law is similar to the law of Nuremberg. Consequently, historians are also sometimes drawn into the normative framework of the trials themselves in their evaluation. This is most apparent when drawing conclusions as to the success of trials. These can continue to reflect faith in the return of the rule of law in a similar way to that manifested in the ICL scholarship. One of the forms of justice Hébert uses to measure success in the *High Command* case is ‘the reintroduction of the rule of law through trials’, including ‘the reintroduction of a moral order’, at which she argues it was successful.⁶⁰⁵ Hébert maintains that:

Successful prosecution reinforces the rule of law and reintroduces a sense of justice. Justice is completed by the imposition of punishment. Adherence to punishment signals the depth of society’s collective memory of the crime. And memory honors the value of the victim, sustaining rejection of the perpetrators’ acts.⁶⁰⁶

While this virtuous circle may have superficial validity, it overlooks significant issues which have the potential to disrupt its flow. These include the extent to which the ‘rule of law’, and the way it was imposed, was valid, more valid than the legal system of the Third Reich; and the assumption that successful prosecution instigates justice, collective memory, the value of the victim and rejection of the perpetrators. Only in a basic sense does a successful prosecution reinforce the rule of law and justice, is justice ‘completed’ by punishment, and does punishment signal collective memory. In order for this to have any value, any meaning, it is necessary to interrogate the nature of the rule of law upheld (particularly in relation to that against which it is juxtaposed), the integrity of the moral system underlying the sense of justice that is reinforced and completed, and the content of the society’s collective memory. This formulation comes close to suggesting that failed prosecution by definition undermines both the *law* and the *history*, which is highly problematic in the context of the discussion of Fraser and Wilke in Section II of this chapter.

This last point is revealed elsewhere too. Hilary Earl suggests that ‘perhaps the worst outrage’ perpetrated in the trial process she accounts, is the early release of many of those convicted ‘to live out their lives as ordinary Germans’.⁶⁰⁷ This is considered a failure born of political necessity rather than a legal problem,⁶⁰⁸ which is primarily the case when viewed in terms of the failure of the trial’s pedagogical aims and the impact of the resulting political

⁶⁰⁵ Hébert, *Hitler’s Generals* (n 517) 201-203.

⁶⁰⁶ Hébert, *Hitler’s Generals* (n 517) 207.

⁶⁰⁷ Earl, *Nuremberg SS-Einsatzgruppen Trial* (n 517) 299. See also pp.265-295.

⁶⁰⁸ *ibid* 299.

context. However, it also touches on other issues to do with the wider legal theory of the trials process and the attempt to impose a conception of the rule of law on the defendants. The issue of early release can be seen in the context of how the whole trial process was run and whether it was ever in a position to judge a past in which it had so much invested. When Marrus considers various 'legal and conceptual inadequacies' of the trials he examines, his categories of inadequacy narrow the issues down to fairly specific and practical difficulties, while ignoring to some extent the wider implications of categories of conceptual inadequacy within the law.⁶⁰⁹ He mentions problems such as the impossibility of prosecuting all of the potential perpetrators, disagreements over the jurisdiction of the authorities and the misrepresentation of the past, but these all contribute to bigger legal theoretical questions about the relationship between law *after* Auschwitz and law *before* Auschwitz.⁶¹⁰

Drawing a broader perspective on the issues raised by Marrus might mean reframing the question as: what does it mean, for the functioning of law and its relationship to the past, for it to be 'inadequate' to the crimes committed and how can law deal with its inherent limitations in these respects? Historical accounts of Nazi war crimes trials lay the groundwork for addressing legal theoretical issues such as these. The construction of a complex and comprehensive historical narrative of war crimes trials, and the Third Reich generally, is a necessary condition for exploring some of the legal theoretical issues touched on in this chapter and that are relevant to jurisprudence. Pendas cites the importance of recent 'efforts at a more thorough, empirically grounded, and archivally researched analysis' of war crimes trials.⁶¹¹ These efforts are the starting point for legal analysis of Nuremberg as a point of contact between current law and jurisprudence and the Nazi past. However, historians are unlikely to make the philosophical leaps necessary to turn a critique of the representation of Nazi Germany at Nuremberg into a legal theoretical evaluation of Nazi law.

Donald Bloxham argues that 'long-term philosophical developments in the law in no way equate to a short-or even medium-term collective consciousness of, or confrontation with, genocide'.⁶¹² The point is that the development of the doctrines and procedures of international criminal law does not equate to a broader, collective coming to terms with, for example, the events of the Holocaust. However, these essentially doctrinal

⁶⁰⁹ Marrus, 'Foreword' (n 599) xi.

⁶¹⁰ as Fraser might frame it; Fraser, *Law After Auschwitz* (n 23).

⁶¹¹ Pendas, *The Frankfurt Auschwitz Trial* (n 517) 3.

⁶¹² Bloxham, *Genocide on Trial* (n 517) 2.

developments also do not mean the philosophy of law has come to terms with the Holocaust, meaning Bloxham's 'confrontation' must take place within the legal academy as well as elsewhere. Historical research into Nazi war crimes trials is outward looking as far as legal theory is concerned. It raises possibilities to be further explored, even if it does not explore them because of its own disciplinary limitations. The contrast with ICL scholarship in the same field is that it is generally inward looking. Consequently it not only inhibits broader theoretical exploration but also overlooks and occasionally replicates the problems of the past.

IV. Conclusion

Nuremberg is a significant legal and historical point of contact between the Nazi past and the present. It constructed false narratives about the Third Reich and specifically Nazi law that resonated in academic and public consciousness, through the Hart-Fuller debate and into current jurisprudential discourse. It relied on the essential difference of its law framers and Nazi law, without exploring the problematic basis of the former or understanding the functioning of the latter. It endorsed the idea of discontinuity in order to separate the victors from the vanquished and postwar Germany from Nazi Germany, the consequence of which has been an enduring rupture thesis within areas of the legal academy. Nuremberg is also an important point of connection for this dissertation. The misrepresentation of Nazi Germany and its legal system in the trials is the same misrepresentation that infuses jurisprudential discourse. The normative confusion that underpins the trials faces the same difficulties that jurisprudence faces in its attempts to explain Nazi law entirely within the positivist or naturalist paradigm. The problematic historiography that historians have more recently started to revise, with access to new archives and interpretive frameworks, was to a large extent constructed at Nuremberg.

This chapter has used Nuremberg to emphasise these connections, to highlight the difficulties at the location in time and space where all of these things come together. It has also used it as a point of departure for a comparison of two different but related aspects of academia; ICL scholarship and historical Nazi war crime trials research. This comparison revealed that both historians and legal scholars carry disciplinary 'baggage', but the absence of political, social and historical contextualisation within ICL scholarship means that it tends to reproduce rather than critique some of the more problematic aspects of Nuremberg. These include the way Nazi Germany is narrated and the jurisprudential flaws it exhibits. Because of this, and their shared roots in the same historiographical understanding of the

Third Reich, ICL scholarship and jurisprudential discourse share many characteristics in common when it comes to the representation of Nazi Germany.

Jurisprudence was found to be superficial in its treatment of the Nazi regime. ICL scholarship is similarly superficial in that it does not investigate further how the Third Reich is represented, rather taking it at face value. Its focus on legal doctrine and procedure - the jurisprudence of the trials themselves – at the expense of the wider context, alongside its disinclination to move beyond the Nuremberg trials, means that its treatment of the trials is also in some respects superficial. Jurisprudence was found to be unhistorical; lacking in historical evidence for its claims about Nazism. The examples of ICL scholarship discussed in this chapter tend to stick quite rigidly to legal questions, and consequently do not take great account of the parallel historical research. Jurisprudence regards the Nazi legal system as the paradigm of a wicked legal system, while ICL scholarship often uncritically accepts the characterisation of Nazi law as non-law and criminality that informed Nuremberg, with a concomitant welcoming of the return of law as civilisation. There is an underlying narrative of rupture in jurisprudential discourse, which is replicated in ICL scholarship's failure to scrutinise Nuremberg's role in establishing this narrative.

The common point of departure for many of the detrimental narratives about Nazi Germany in both law and history ensures that those who have criticised the legal academy's lack of engagement with the Third Reich in general terms need not necessarily have been more specific.⁶¹³ It is not limited to jurisprudential discourse, but is also discernible elsewhere within the legal academy, including in ICL scholarship. It takes on a specific legal theoretical form when it comes to questions of the concept of law - the validity question and the separability question - but has parallels in other areas. I have argued that Nazi Germany is relevant to jurisprudence, that it does matter that jurisprudential discourse misrepresents Nazi law.⁶¹⁴ One might ask whether it is up to scholars researching in international criminal law to follow through on all of the theoretical and historical issues raised in this chapter, when they are most concerned with how the doctrines and procedures of ICL came about, function and can be improved. Apart from the fact that the reinforcement of preconceptions about Nazi Germany within this scholarship is not of itself meritorious, it also does have relevance for international criminal law. Fraser has drawn some important connections between the past

⁶¹³ See Section I of Chapter One for a brief account of recent examples of such criticisms.

⁶¹⁴ See, in particular, the discussion of the first case study in Section I of Chapter Five.

and the present in this regard,⁶¹⁵ and the idea that international criminal law continues to be based on the rupture of the law of Nuremberg from the law of a genocidal state has resonance.

It is ultimately up to legal scholars of various types to respond to the challenge presented by historians who produce more comprehensive narratives of Nazi war crimes trials but are not concerned with developing this into broader legal theoretical analyses. This will probably involve legal academics from a more diverse range of specialism, substantive and theoretical, writing about the significance of Nazi Germany for their subject. Many possible unexplored areas of research are open to scholars willing to widen their research focus and cross the disciplinary divide between law and history more readily. From a theoretical perspective, it is worth exploring how law deals with 'perpetrators' and responds to the Nazi past when it was also complicit in the actions of those perpetrators and the shaping of that past. This might lead us to ask what it actually means for law to be in this tripartite role: assisting in the construction and execution of the Nazi state, judging the acts and events of that period in legal proceedings, and continuing to be a crucial part of the modern state even as it continues to try to escape the shadow of the Nazi regime and the Holocaust.

⁶¹⁵ See, in particular, Fraser, 'Evil Law, Evil Lawyers?' (n 26) and 'Shadows of Law' (n 26), as well as aspects of Fraser, *Law After Auschwitz* (n 23) and *Daviborshch's Cart* (n 80).

Chapter Seven: Conclusion

I. The Conundrum of Nazi Law

Did Nazi Germany have law? To return to the question that opened this dissertation is to return to the problem that has historically been at the heart of the relationship between jurisprudential discourse and the Nazi past.⁶¹⁶ This is a problem that has persisted since the Hart-Fuller debate brought Nazi Germany briefly to the attention of Anglo-American jurisprudence in the late 1950s, both because of the way it employed Nazi law and its incredible, enduring influence on the field in terms of the validity question and the separability question. However, while since then jurisprudential discussion of these issues has frequently referred to Nazi Germany, it has not been at the centre of the debate and the version of it that does make an appearance generally is far removed from the historical reality.

Hart and Fuller were not attempting through their debate to discover the precise nature of Nazi legality. This was ancillary to their primary purpose, which was to elucidate the conditions of validity for a generic concept of law, including the relationship between law and morality, and to support either a positivist or natural law conception of such conditions. It did not ultimately matter that the concrete case with which they begin, that of the 'grudge informer' has a connection to Nazi Germany. The Third Reich acts as a stand in for a hypothetical wicked legal system, required to be immoral only because this tests the point of contention between the two theories, that over the separability thesis. Nazi law began jurisprudential life as a limit-case, but without having been properly investigated for whether it in fact existed at or beyond the limit of the law.

Consequently, as far as jurisprudence has defined the question 'did Nazi Germany have law?' this dissertation has not sought to answer it. Instead it has traced and critiqued how jurisprudence has approached this issue and with it how it has represented Nazi Germany generally.⁶¹⁷ Neither positivism nor natural law is capable in current form of explaining or accommodating the Nazi legal system, because of its combination of extreme politicisation and its breach of basic forms in the service of higher, moral norms.⁶¹⁸ The discursive structures of jurisprudential debate in this area are circumscribed to the extent that the role of Nazi Germany is embedded and consistently and uncritically reproduced. Some legal scholars have challenged the

⁶¹⁶ The way 'jurisprudence' and related terms are used in this dissertation is explained in Section II of Chapter One, as is the use of terms to describe Nazi Germany, such as 'Nazi past', 'Third Reich' and so on.

⁶¹⁷ Primarily in chapters Two and Three.

⁶¹⁸ See the discussion of the first case study in Section II of Chapter Five.

increasingly abstract, elaborate and inward-looking nature of jurisprudence, but there have been from within few attempts to re-evaluate the status of Nazi Germany. Such as they are, these calls have come from outside of the jurisprudential field. Kristen Rundle's revision of Fuller's natural law theory ultimately suffers from theoretical and historical shortcomings, in part because it stays largely within the realm of the existing discourse, albeit reintroducing to it limited aspects of the historical Nazi Germany.⁶¹⁹

Recent historical scholarship has exposed how 'normal' the process of governance and extermination was, how interconnected the regular law was with the institutions and implementation of the Holocaust, and how important ideology was to the Nazi legal project.⁶²⁰ Crucially it shows that there was law in Nazi Germany. For all its differences and horrific consequences, legal rules were created and enforced, respected and followed, within and without the Third Reich. They were used in the service of the mundane and the genocidal, and sometimes both of these outcomes were the same. The existence of legal rules in the early part of the Third Reich is not so much in dispute among scholars such as Rundle and Riley, who nevertheless question the lawfulness of the regime overall and specifically in implementing the Holocaust. In a similar way to Fraenkel's juxtaposition of the dual normative and prerogative aspects of the state, they have accepted that aspects of the old legal regime remained, and legislation created even for discriminatory purposes might be considered valid.

The existence of valid law at the alleged margins, beyond the point of rupture, is more controversial: where Führer Orders could intervene on an arbitrary basis to upset rule of law principles, where judges and the letter of the law were overruled by invoking the popular healthy sentiment, or where law was used as a weapon to conduct extermination on a grand scale. However, this relies on an essential schism - a rupture - that prises the Holocaust from the rest of the state and overlooks important legal continuities. In Nazi Germany, historical research reveals increasingly often the extent to which the 'extreme' was part of the 'norm' and *vice versa*, the limit persisted at the centre. This was the same for law which, in any event, cannot itself be easily separated from the rest of the state, especially in Nazi Germany where its parameters cannot always be rigidly defined.

The historical picture of the Third Reich challenges jurisprudential discourse specifically on a fundamental level, because it refuses to conform to the major tenets of either positivism or natural law. Jurisprudence is framed as a

⁶¹⁹ Rundle's work is evaluated in Sections III and IV of Chapter Four.

⁶²⁰ See respectively the discussion of Dan Stone's work in Section II of Chapter Four and the second and first case studies in Chapter Five.

primarily conceptual and theoretical branch of legal scholarship.⁶²¹ However, to the extent that it seeks to establish a universal concept of law, or evaluate the legal (and sometimes moral) quality of legal systems, it must properly take into account all possible manifestations of 'law', one of which is Nazi law. The historical research problematizes the dominant treatment because it reveals both the continuities between Nazi and other law and the sense that the Nazi legal system is more legally complex and morally problematic than an archetypal wicked regime. It does not reveal it as lawless (as claimed in Neumann's *Behemoth*⁶²²) or as entailing distinct and isolated components that can be described in turn as 'law' and 'non-law' (as claimed by Fraenkel's 'dual state' analysis).⁶²³ Rather, it reveals it as a complex system, with a rich mixture of legal and non-legal measures contributing both to 'normality' and 'genocide', and which influenced the decisions of otherwise 'ordinary' moral and legal agents. It also posited an alternative legal value system, based on an ideology of the 'racial community', which runs counter to attempts to label it as simply a self-serving, totalitarian, instrumental regime.⁶²⁴

Under the detailed gaze of historians, therefore, the Nazi legal system becomes much more interesting for jurisprudence because the question of what Nazi law is does not boil down to its contribution to conceptual validity criteria, but opens out into how the historical assortment of traditional legislation, *Führer* orders, emergency decrees, impromptu shootings and organised mass gassings that comprised Nazi governing interacted with and used the law. Consequently, there is not just one question about whether evil legal systems as such are valid but many questions about the legal nature of all of the rules, norms and institutions used to govern the Third Reich. Law was always present in Nazi Germany somewhere,⁶²⁵ but how can we understand and continue to work with law that was capable of being used for such egregious purposes. And is it even possible in principle to distinguish 'law' from 'non-law' in any meaningful way in such circumstances.

The Nazi vision of law was undoubtedly and deliberately a huge (and catastrophic) departure from liberal legality, but it cannot merely be seen as parasitic on it and an instrumentalisation of it. It was an ideological reaction against it, but one that cannot be dismissed as so different, so antithetical to law as to be irrelevant. David Fraser makes the case of Nazi law as law over

⁶²¹ See the brief discussion of the nature of jurisprudence in Section II of Chapter One.

⁶²² Neumann, *Behemoth* (n 13).

⁶²³ Fraenkel, *The Dual State* (n 13). The interpretations put forward by Neumann and Fraenkel are addressed in more detail in Section III of Chapter One.

⁶²⁴ See Michael Burleigh and Wolfgang Ipperman, *The Racial State: Germany 1933-1945* (Cambridge University Press, 1991).

⁶²⁵ Stolleis, 'Law and Lawyers' (n 62) 213-231.

and over in his scholarship and the analysis of some of his arguments in the context of Stone's historical and theoretical writing shows that Fraser's jurisprudential claims most convincingly account for the historiography.⁶²⁶ Fraser also interrogates one of the well-springs of the rupture thesis, the Nuremberg trials.⁶²⁷ Nuremberg constructed enduring but misleading narratives about the Nazi state that influenced historiography, public consciousness, and the legal academy through both the Hart-Fuller debate and today's ICL scholarship. The representation of the Third Reich as the product of a conspiracy of criminal minds continues to resonate through aspects of legal scholarship precisely because they exist in disciplinary isolation from historical research. This is not, of course, helped by legal history itself only recently turning to the subject of Nazi law, to a large extent prompted by translated German works.⁶²⁸

The work of one of these German scholars brings us to another question, what to do with Nazi law once we have it. Michael Stolleis' conundrum about how to treat the Nazi legal system brings this issue into sharp focus.⁶²⁹ It cannot be discounted by either positivism or natural law, but neither can it be straightforwardly explained. The easiest thing to do in the face of this is to treat it as irrelevant except as a limit case and not explore it in any depth. However, this was a case of a modern state succumbing to radical political and social - and legal - change with catastrophic consequences. The jurisprudential concept of law ought to accommodate this as something other than an aberration and the legal academy generally must see it as more than merely criminal behaviour. It was historically more complicated than that, a point made throughout this dissertation. Consequently, more research is needed on both sides, historical and legal. One important question, for jurisprudence as well as legal history, is how to define and understand Nazi law as a particular manifestation of law, beyond the validity question rather than as the validity question itself. What is it about the structure, the theory, the normativity of Nazi law that enabled the state to be put to certain ends and what are the implications of this for jurisprudence. We need to know more about Nazi law and its wider context, including fascist law. We also need to explore the continuities and similarities between law then and law now, freely and diligently, and taking heed of their implications. We can no

⁶²⁶ See Chapter Four, particularly sections II, III and IV.

⁶²⁷ See fn 515 and Section II of Chapter Six.

⁶²⁸ See Section III of Chapter One.

⁶²⁹ This was what to do with 'the existence of law in a system that is on the whole unlawful and unjust or that at least commits many unlawful acts'. It was previously discussed in Section II of Chapter Five.

longer shut Nazi law away, notwithstanding the political expediency of doing so in decades past.

II. Contribution and Limitations

This dissertation is intended as a contribution to the emerging interdisciplinary literature from legal and historical scholars on the relationship between law and Nazi Germany. The general critique of the legal academy's engagement with the Third Reich has rarely manifested itself in specific and detailed exploration of some of the issues brought into play by that critique.⁶³⁰ Concerns about the lack of engagement with historical research, jurisprudential endorsement of the rupture thesis and ignorance of the Holocaust have often been made in review articles but have rarely moved beyond these to contribute to a more substantial body of research. Historians have begun to focus more specifically on the legal system in Nazi Germany, and scholars from disciplines such as philosophy have begun to explore some of the theoretical aspects of Nazi law and society.⁶³¹ Legal theorists have also occasionally engaged with these subjects. One major exception from within the legal academy is the work of David Fraser, and I have drawn on this where appropriate throughout this dissertation.⁶³² Fraser has written extensively, particularly on the role of law in implementing the Holocaust and the use of law to prosecute alleged war criminals in relation to the Holocaust.⁶³³ While commenting and building on this research in places, I have primarily sought to expand on other aspects of the relationship between law and Nazi Germany and it is in these areas that I believe this dissertation has the most to offer to our knowledge and understanding.

The key points of focus in this dissertation have been twofold. First, an investigation of the nature and genesis of the problematic representation of Nazi Germany within jurisprudence, how it came about, and what its implications are. Second, a detailed exploration of specific recent examples of historical research in certain fields related to the Third Reich in order to analyse the jurisprudential representation and understand how Nazi law functioned within its wider context, as a manifestation of the concept of law.⁶³⁴ One of its key contributions therefore is in the focus on how Nazi Germany is treated within one particular area of legal scholarship. This

⁶³⁰ See Section I of Chapter One.

⁶³¹ In particular through 'A Symposium on Nazi Law' (2012) 3(2) *Jurisprudence* 341.

⁶³² Especially in Chapter Four in relation to jurisprudence and Chapter Six in relation to Nazi war crimes trials.

⁶³³ See fn 320 on Fraser's work.

⁶³⁴ Through the writing of Dan Stone in Chapter Four (particularly Section II) and the case studies addressed in Chapter Five.

provides a specific and concrete illustration of some of the general criticisms of the academic legal engagement with the Third Reich. It shows clearly that Nazi Germany plays a role within the discourse that is not closely related to its historical reality.

Another contribution is in synthesising a range of very recent historical research and using it to challenge how Nazi Germany is represented within the legal academy. The emerging English-language scholarship about the Nazi legal system provides a clear counterpoint to narratives of rupture, and accusations of Nazi law as legal form only and the cynical exploitation and instrumentalisation of the rule of law. The innovative use of other historical research is also valuable for understanding Nazi law and its relevance for legal discourse. Scholarship such as the concentration camp system case study and Stone's historical theoretical writing has not been employed in this way before, but provides useful insights into both the historical nature of the Third Reich and the philosophical legacy of the Holocaust. Stone provides an alternative perspective from which to question Fraser and Rundle's jurisprudential arguments in Chapter Four, and exposes merits in the former and problems with the latter that might otherwise not have been obvious. The concentration camp research reveals the deep links between different aspects of the Nazi state, mundane and genocidal, legal and extra-legal. The academic focus, to the extent there has been a focus at all, has often been on law and the Holocaust, but this research shows that the Holocaust cannot be separated from the institutions, personnel and governance of the wider state, and this applies equally to the legal system.

This dissertation has therefore sought to make and explore some connections that have either not been made before, have not been investigated in detail or have not been investigated in the same way, in the particular context of Nazi Germany. These are connections between legal and historical research, between the jurisprudential concept of law and new empirical and theoretical, historical research, between jurisprudence and ICL scholarship, and between the Hart-Fuller debate and the current discourse. I hope and intend that these connections will be examined further in the future and can stimulate further connections, particularly across the disciplines of law and history. They are, in my view, extremely important for advancing our understanding of the role of law in Nazi Germany, and the relevance of this for legal theory and discourse.

However, these connections also highlight some of the limitations of this dissertation. Its scope has been limited in a number of ways. The narrow focus on a particular aspect of jurisprudence as an area of legal scholarship throughout most of it was a necessary choice but one which restricted the

analysis of the undoubtedly widespread impact and potential relevance of the Third Reich for law. Even when considered as research about legal discourse, it was only possible to examine a small part of this. It was further limited by the use of exclusively English-language sources, both legal and historical. This was a conscious choice, and supported its concentration on Anglo-American scholarship in the legal academy, but much more could be said about the subject of Nazi law if other historical sources were brought into play.

Also in relation to sources, this dissertation has used almost exclusively academic literature in carrying out its aims. Its 'primary' sources, to the extent it is necessary to refer to them as such, are those aspects of discourse coming under scrutiny, particularly in relation to their representation of Nazi Germany. The clearest examples of these are the Hart-Fuller debate, more recent examples from jurisprudential discourse, and pockets of ICL scholarship. Its 'secondary' sources have predominantly consisted of the historical research that has been used to critique aspects of legal scholarship. It is very difficult to place some of the literature in either camp, especially the legal theoretical writing of Fraser and Rundle, discussed mainly in Chapter Four. Ultimately the difference between sources used to critique and sources that are critiqued, if it exists at all, is that some are more reliably and deliberately placed in one category than the other. For example, most jurisprudential discourse that makes reference to Nazi Germany does so without support from historical evidence, and can be clearly challenged on that basis. However, this distinction is not always clear cut and the way different scholarship is used can be confusing.

Maintaining fluidity for academic discourse between primary and secondary source status is arguably more reflective of the reality of the dual role it plays and provides more scope for analysis. A limitation it disguises is in the absence of sources from the Third Reich itself. This dissertation consciously focused in all of its facets on academic discourse, but there is inevitably much more to explore about Nazi law in particular from historical documents, which it was not possible to incorporate. This hints at perhaps the biggest difficulty with this research project, which has been reducing its scope to a manageable level. It touches on so many broader issues, which could not be contained within it. Apart from the question of the general relationship between modern law and Nazi Germany, the questions of how law and history relate to one another as disciplines and how empirical and philosophical methodologies contribute to one another are relevant to the themes of this dissertation, but are substantial and enduring and could not be tackled adequately here. In particular, I believe there is an interesting

comparison to be made between how the Third Reich is used within philosophical debates in history and law.

III. The State of Scholarship: Questions for Further Research

As this dissertation was being researched and written, the nascent literature on law and Nazi Germany grew in a number of directions, most of which I have attempted to incorporate into my analysis at various stages. Some of the English-language historical research on the Nazi legal system appeared in that time, as did some philosophical writing on the role of ideology in Nazi law. Additional legal and historical works about Nazi war crimes trials were published and highly relevant legal theorists such as Fraser and Rundle produced new material.⁶³⁵ While there is not a large and coherent body of legal theoretical writing on the subject of Nazi Germany, there are evidently emerging pockets of interest and it appears to be a potentially fruitful period for this field of research.

However, the scholarship remains fairly limited. One of the edited collections to have been published during the writing of this dissertation summed up the situation quite well. Alan Steinweis and Robert Rachlin stated:

A book about the law in Nazi Germany might strike some readers as an exercise in contradiction. They understand the Nazi regime as a tyranny, characterized by arbitrary rule, enforced through intimidation and terror. The hallmark of Nazi society, as they understand it, was not law, but lawlessness. In many respects they are correct. Under Nazi rule, Germany largely ceased being a Rechtsstaat – a nation of laws – as millions of people, both German and non-German, were deprived of their property, their freedom, and their lives as the result of measures implemented entirely outside of the framework of traditional, codified German law. At the same time, however, much of the German legal system continued to function in a manner that would have been recognizable to observers before 1933.⁶³⁶

This contains the recognition that the fact there was law in Nazi Germany might be considered surprising, as this is not usually thought to be the case. It simultaneously moves things forward by making reference to the fact that there was a Nazi legal system. However, while both historians and lawyers contributed to this volume, it is very clearly in its methodology and focus a contribution to the legal history of the Third Reich. That important elements

⁶³⁵ In particular, between 2011 and 2014, Fraser, 'Shadows of Law' (n 26); Fraser, 'Evil Law, Evil Lawyers?' (n 26); Rundle, 'Law and Daily Life' (n 271); Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals* (n 6); Steinweis and Rachlin, *The Law in Nazi Germany* (n 67); Heller, *Nuremberg Military Tribunals* (n 516); 'A Symposium on Nazi Law' (n 631); and DeCoste, 'Hitler's Conscience' (n 25).

⁶³⁶ Steinweis and Rachlin, 'Introduction' (n 68) 1-2.

of legal theory are not within its scope is revealed by the fact that the editors' acknowledgement that the collection's contributions 'have important implications for our own time'⁶³⁷ is not taken up elsewhere.

The potential connections between the Nazi use of law and the potential for the rule of law to be eroded in modern societies are mentioned but not pursued because of the disciplinary strictures of the volume. The subject-matter of the contributing essays is thoroughly legal historical in most cases, exploring the role of institutions and individuals within the legal system in the furtherance of the state, particularly towards genocide.⁶³⁸ Therefore while the evidence constructed in its chapters is indispensable for understanding how Nazi Germany impinges on this contemporary concern, its systemic philosophical implications remain outside of the scope of an essentially historiographical approach and methodology.

The scholarship on Nazi law, therefore, is growing but continues to cut across different disciplinary silos, which often do not interact much with one another or address the same research interests. Research in this area has been significantly enhanced since I began this project but many gaps remain, particularly in the area of legal theory. Consequently a number of questions for further research emerged from the writing process, on top of those areas mentioned at the end of the previous section of this chapter. A wider examination of the relationship between legal theory and Nazi Germany appears promising given the role the latter plays in jurisprudence. How specific is this role to analytical jurisprudence and what is the role of Nazi law in more critical aspects of the field? This dissertation has not tackled the critical theoretical exploration of the Holocaust and its relationship to law, influenced by continental theory and particularly embodied in the writing of Giorgio Agamben.⁶³⁹ Including this and related scholarship in a broader analysis would raise further interesting issues, particularly in terms of how to theorise encounters between the law of the camps and the law of the state.

In the analysis of the representation of Nazi Germany in jurisprudential discourse in Chapter Two, it was noted that some other regimes such as those in apartheid South Africa and Stalinist Russia are sometimes mentioned as part of the category of wicked legal systems. A broader examination of the role of that category within jurisprudence would discern the extent to which

⁶³⁷ *ibid* 12.

⁶³⁸ For example, the complex cooperation of the largely legally trained professional bureaucracy, the role of civil service lawyers, the contribution of the *Volksgesichtshof* (People's Court) under Roland Freisler, and the treatment of Jewish lawyers; Steinweis and Rachlin, *The Law in Nazi Germany* (n 67) ch 1, 2, 3 and 5 respectively.

⁶³⁹ See fn 84.

such systems are automatically subsumed within this category alongside Nazi Germany and shed further light on how both positivist and naturalist paradigms leverage the concept of wicked law in support of their arguments. The brief discussion of the role of perpetrators in the concentration camp system in Section III of Chapter Five raises additional issues worth exploring when considered alongside the role of ideology in Nazi law and in the regime generally in influencing the moral behaviour of legal and other officials. Nazi Germany appears to be a fruitful source of evidence about how societal norms – together with their legal manifestations – impact on the decisions that people make, especially when those decisions have such horrific consequences.⁶⁴⁰

Other areas of legal scholarship with a particular relationship to the Nazi past, including international human rights, are worthy of investigation to establish whether the same concerns exist there as within jurisprudential discourse. A general theorisation of Nazi law, and particularly its relationship to ideology, is a project requiring much more attention than I was able to provide it, and would both contribute to historical understanding and challenge further the imposition of the conceptualisations of law advanced by positivism and natural law on the Third Reich. On top of this there remains a significant amount of historical research to be done in the English-language, into the functioning of Nazi law, its role in the Holocaust and its place in society. On both historical and theoretical levels, exploring Nazi law in the context of inter-war European fascism would be particularly interesting, bringing Nazi Germany out of isolation and enabling the examination of the role law plays in such movements and transitions. This would also help us to move beyond the rupture thesis.

IV. Understanding Nazi Law

Of the areas for potential further research arising from this dissertation, it is pertinent to say a little more about the aspects of Nazi law I believe jurisprudence must confront following the critique advanced in this dissertation. The research presented here provides the foundation for a closer analysis of the Nazi legal system in order to establish its legal theoretical character and, consequently, how it ought to be understood and represented by contemporary jurisprudence. If it was not merely a ‘wicked legal system’, but was used to commit undoubtedly wicked acts; if it was not a cynically repressive instrument but lacked the characteristics of the rule of law; if it could not be said either to exemplify pure positivism partly because of its ideological component, and yet that component is radically different

⁶⁴⁰ In this area see Pauer-Studer and Velleman, ‘Distortions of Normativity’ (n 175).

from that envisaged by natural law; if it was imbued with ideology but that ideology was not entirely coherent or comprehensively elucidated; if the Holocaust was both 'normal' and 'law-full', but involved military power, arbitrary killing and death camps. Then what was Nazi law and what does it tell us about the theoretical nature of law in general?

The historiographical case studies surveyed in Chapter Five begin to reveal a number of important things about the Nazi legal system. The significance of an anti-Semitic ideology lending an underlying anti-liberal direction and normative coherence to Nazi law is threefold.⁶⁴¹ It must be considered as more than only a pragmatic instrument of repression; it cannot be treated simply as a manifestation of positivism or refutation of natural law; and a clear connection exists between the use of law in the everyday running of the state and its application to the genocidal project of the Holocaust.

The concentration camp system case study reinforces the last of these points, in particular, further.⁶⁴² In highlighting elements of continuity instead of rupture, emphasising the normality and diversity of the character and motivation of many camp perpetrators, and revealing the interdependency of the development of the relationship between the SS and the judiciary, the opposition between the 'normative' and 'prerogative' spheres of the legal system is collapsed. Together these case studies problematize the most enlightening naturalist account of Nazi law, put forward by Kristen Rundle.⁶⁴³ They also point to the aspects of Nazi law that jurisprudence needs to confront in order to overcome its current intransigence in respect of the Third Reich. These are some of the most challenging qualities of the Nazi legal system, both for this thesis and for jurisprudence.

In order to encourage a jurisprudence built upon its difference from Nazi law to confront its complicity and continuity with that law, it is necessary to construct a more complete theoretical picture of the legal system. This is something that is being made easier by the new legal theoretical and legal historical research into Nazi Germany that has been appearing in recent years.⁶⁴⁴ I have suggested that the multi-sourced nature of Nazi law makes it difficult to place within a Hartian positivist framework of primary and secondary rules. This needs further exploration to understand the relationship between the different levels and types of rule, law, regulation and decree that existed in the Third Reich. I have argued that Nazi ideology provided a foundation that takes Nazi law beyond its characterisation in the

⁶⁴¹ See Section II of Chapter Five on the role of ideology in the Nazi legal system.

⁶⁴² See sections III and IV of Chapter Five on the concentration camp system.

⁶⁴³ See the discussion of Rundle's argument in Section IV of Chapter Five in particular.

⁶⁴⁴ See the discussion of new scholarship in the previous section, for example.

Hart-Fuller debate and subsequent jurisprudential accounts. We need to appreciate better how Nazi ideology acted as a moral system inherent within the legal system, through the creation, implementation and enforcement of laws. We also need to ascertain the role played by law as a vehicle for Nazi ideology, a mechanism for dissemination and reinforcing ideological imperatives among the population, and how it impacted on the decisions made by perpetrators and others living within the system. I have said that the Holocaust cannot be separated from the remainder of the Nazi state, and indeed is integral with it. Analysing the way law functioned in the key centres and institutions of the Holocaust would develop this claim and help dispel the notion of rupture between normal and exceptional (genocidal) law. A better comprehension of these aspects of the Third Reich would enhance our understanding of the many and varied manifestations of the concept of law and enable Nazi law a role at the centre of jurisprudential discourse.

V. A Jurisprudence of Nazi Law

Anglo-American culture and collective memory certainly do not forget or ignore the dark days of National Socialism. Those addressing the dominant jurisprudential questions within that culture often do, notwithstanding the historical links between the development of academic discourse and public consciousness in this area. This ostensible contradiction points to the reasons behind the ineffectiveness of mainstream jurisprudence in accessing the heart of the Nazi past. If National Socialism is etched so firmly into our collective memories because of its sheer moral horror, situation at the centre of western civilisation and enduring traumatic presence, it is also because of the portrayal of totalitarian, remorseless, criminal evil advanced by the Nuremberg Trials. This combination, which makes us so fascinated by the Third Reich, has also precluded other perspectives than that of the wicked legal system from entering jurisprudential discourse, by the creation at the outset of a narrative structured around the substantive exclusion of Nazi Germany from our legal world.

A jurisprudence of Nazi law that overcomes this dominant narrative can only be achieved through twin manoeuvres: the recognition that the prevailing representation and the discourse that supports it does not account for the Third Reich; and an engagement with the historical research that works to reconstruct a more accurate picture of the Nazi legal system. A universal, analytical concept of law has little meaning if it does not genuinely embrace a system such as Nazi Germany. Equally an evaluative concept of law has to understand the legal systems it attempts to critique, to tackle its objects as they actually are rather than as they are perceived to be. Nazi law is therefore not sufficiently well understood within jurisprudence for a

jurisprudence of Nazi law to exist within mainstream scholarship, but it is hoped that this dissertation will play some part in assisting the process of understanding.

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