WHAT BOTH HART AND FULLER GOT WRONG

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I. INTRODUCTION

The debate between H.L.A. Hart and Lon Fuller, waged in 1958 over eighty pages of the *Harvard Law Review*, is one of the best known and most important jurisprudential debates of our time[1] Pitting the leading proponent of legal positivism against one of the staunchest advocates of natural law, it saw Professor Hart arguing that the concept of law was distinct and separate from the concept of morality and that the validity of a positive legal order did not depend on its conformity with moral dictates.[2] Thus, "[a] law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."[3] For his part, Professor Fuller argued that legal validity depended on the internal morality of law, which a system of rules ought to meet if it were to be considered a legal system. Any law that did not satisfy such threshold principles of legality could not be called "law" at all.[4]

Nowhere has the schism between legal positivists and natural law scholars been more pronounced, more visible, and more critical than in their treatment of "wicked legal systems"[5]—the paradigmatic example of which was the legal system that existed under National Socialism. In the aftermath of the horrors perpetrated by the Nazis during the Third Reich and particularly during World War II ("WWII" or "War"), the question of what to do about morally evil laws became the litmus test for any legal theory. Whereas for Hart, "laws may be

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1. H.L.A Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

2. HANS KELSEN, PURE THEORY OF LAW 66–67 (Max Knight trans., 2d ed. 1967).

3. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184 (Isaiah Berlin et al. eds., 1954).

4. Fuller, *supra* note 1, at 652–61.

5. *See generally* DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY (2d ed. 2010) (discussing "wicked legal systems" that promote unethical agendas in light of natural law and legal positivism).

law but too evil to be obeyed,"[6] for Fuller, morally repugnant laws were simply not law at all.[7]

This Essay argues that while Hart and Fuller's responses to the challenges presented by wicked legal systems in general, and the experiences pertaining to the Nazi "legal system" in particular, diverged sharply, both scholars were in agreement with respect to one crucial piece of legal history pertaining to the state of legal theory in pre-Third Reich Germany and its impact on Nazi law. Yet, it is precisely with respect to that shared understanding that both theorists got it wrong. Part II of this Essay demonstrates Hart and Fuller's shared understanding of the state of legal theory in pre-WWII Germany, accepting that legal positivism was "practiced and preached"[8] as the main legal theory before the Nazis' seizure of power in Germany. Part III challenges that shared understanding and argues that not only was legal positivism not the prevalent theory in Germany before the rise to power of Adolf Hitler, but that, in fact, the Nazis adopted a perverted version of natural law to support their actions.

II. DEFENSELESS LAWYERS

As soon as WWII had ended, the charge was made that the majority of the German legal profession were positivists and that their unwillingness to inquire into the morality of law "led to an easy capture of the legal system by the Nazis and facilitated its modification to meet evil Nazi goals."[9] Positivism, the argument went, had not provided a basis on which to reject evil laws and immoral legal systems. For the positivist, an evil legal system, such as that put forward by the Nazis, was still a valid legal system and a law, which was morally evil but that was procedurally appropriately promulgated, was still a valid law.[10] For legal positivists, the charge that positivism promotes "obsequious quietism,"[11] i.e., that positivism is "corrupting in practice, at its worst apt to weaken resistance to state tyranny or absolutism, and at its best apt to bring the law into disrespect,"[12] is at least, if not more, damning than the charge that it was intellectually misleading.

In *Positivism and Fidelity to Law*, Lon Fuller argues that "in the seventy-five years before the Nazi regime the positivistic philosophy

6. Hart, *supra* note 1, at 620.
7. Fuller, *supra* note 1, at 652–61.
8. *Id.* at 658.
9. JAMES E. HERGET, CONTEMPORARY GERMAN LEGAL PHILOSOPHY 2 (1996).
10. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 33–34 (8th ed. 2019).
11. Hart, *supra* note 1, at 598.
12. DYZENHAUS, *supra* note 5, at 16 (quoting Hart, *supra* note 1, at 595).

had achieved in Germany a standing such as it enjoyed in no other country."[13] In his essay, H.L.A. Hart comments that the passionate arguments from experience offered by individuals such as Gustav Radbruch, who argued that the German legal tradition of positivism and formalism facilitated Nazism, cannot be "read without sympathy."[14] Conceding that the distinction between law and morals "acquired a sinister character in Germany,"[15] Hart goes on to suggest that, the German experience notwithstanding, "elsewhere . . . [the distinction between law and morals] went along with the most enlightened liberal attitudes,"[16] and that the way to deal with morally evil laws was to introduce retrospective laws that would override their legal consequences, rather than hide the moral quandary that such instances invoke.[17] In line with this approach, Hart rejects the post-WWII German courts' resolution of the case of the Grudge Informer.[18] In a 1949 decision, the German Court of Appeals had to decide whether a German woman ought to be punished for denouncing her husband to the Nazi authorities for insulting (and under Nazi law, illegal) comments he had made about Adolf Hitler.[19] The woman argued in her defense that her actions had been lawful under Nazi law that existed when she informed the authorities.[20] The German Court of Appeals found the woman guilty of "deprivation of [] liberty," holding that Nazi laws were "contrary to the sound conscience and sense of justice of all decent human beings."[21] Hart argued that rather than declaring the Nazi statutes null and void, it would have been better to enact a new statute after WWII, which would apply retrospectively to the informer's case.[22] He suggested that:

> [I]f the woman were [sic] to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It

13. Fuller, *supra* note 1, at 658.
14. Hart, *supra* note 1, at 616–17.
15. *Id.* at 618.
16. *Id.*
17. *See id.* at 619–20.
18. *See id.* at 618–20 (suggesting an alternative approach of implementing a "retrospective law" in order to punish the informer).
19. *Id.* at 618–19 (citing Oberlandesgericht ["OLG") the Higher Regional Court] July 27, 1949, 5 Suddeutsche Juristen-Zeitung 207).
20. *Id.* at 619.
21. *Id.*
22. *Id.*

> would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.[23]

Accepting the (uniquely German, according to him) sinister character of such separation, Hart reminds his readers that reflections by those "who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings,"[24] could not be "read without sympathy."[25] His main reference in this context is Gustav Radbruch, who had served as a Minister for Justice in the Weimar Republic and as a professor of law in Heidelberg before he was dismissed from that position as part of the purges of the legal profession in 1933.[26]

In a famous essay published in 1946, Radbruch wrote that legal positivism could not, in and of itself, justify the validity of law.[27] For such justification, recourse must be had to moral values.[28] "[L]aw, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice."[29] A former leading legal positivist, Radbruch now poignantly recanted and called for a modified return to a natural law legal thinking, having concluded that legal positivism was responsible for the conduct of jurists during the Nazi era.[30] Legal positivism, with its central theory that "[a] law is law," he argued, "has rendered jurists and the people alike defenceless [sic] against arbitrary, cruel, or criminal laws, however extreme they might be. In the end, the positivistic theory equates law with power; there is law only where there is power."[31]

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23. *Id.*

24. *Id.* at 615.

25. *Id.* at 617.

26. Oren Gross, *Hitler's Willing Law Professors*, *in* THE BETRAYAL OF THE HUMANITIES: THE UNIVERSITY DURING THE THIRD REICH (Bernard Levinson & Robert Eriksen eds.) (forthcoming 2021) (on file with author).

27. Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Laws (1946)*, 26 OXFORD J. LEGAL STUD. 1, 6 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006).

28. *Id.*

29. *Id.* at 7.

30. Hart notes that Radbruch's "appeal to other men to discard the doctrine of the separation of law and morals has the special poignancy of a recantation." Hart, *supra* note 1, at 616. Others have argued that Radbruch's pre- and post-WWII writings "reflect [merely] different aspects of a single position." Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 L. & PHIL. 313, 319 (1994).

31. Gustav Radbruch, *Five Minutes of Legal Philosophy (1945)*, 26 OXFORD J. LEGAL STUD. 13, 13 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006); *see also* Kenneth F. Ledford, *Judging German Judges in the Third Reich: Excusing and Confronting the Past*, *in* THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE 161, 172 (Alan E. Steinweis &

The German legal tradition of positivism and formalism—which rejected any concept of extralegal justice—had thus, according to Radbruch, facilitated Nazism.[32] Radbruch's answer, adopted by the post-WWII German *Grundgesetz* ("Basic Law"),[33] was the formulation of a legal order based on extralegal values. Law could only be valid if its ultimate purpose was "to serve justice."[34] Ronald Dworkin, while focusing less on the question of law's validity, and more on the constructive interpretation of "law as integrity," proposes that judges have to assume

> so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.[35]

But what then ought to do a judge adjudicating cases in an evil legal system such as Nazi Germany? Dworkin's invented "Judge Siegfried," finding himself in precisely such circumstances, was, therefore, supposed to "ignore legislation and precedent altogether, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means are available to him,"[36] including by direct resort to moral considerations.

At the same time, recognizing that positivism also contributed to legal certainty, consistency, and security, which could not be fully accomplished by mere reference to an elusive notion of justice, Radbruch came up with what has become known as the "Radbruch formula":[37] Positive law would be held as valid even when it was

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Robert D. Rachlin eds., 2013); Frank Haldmann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, 18 RATIO JURIS. 162, 162 (2005).

32. Radbruch, *supra* note 27, at 8.

33. Rudolf Geiger, *The* German Border Guard Cases *and International Human Rights*, 9 EUR. J. INT'L L. 540, 545 (1998).

34. Radbruch, *supra* note 27, at 7; *see also* Radbruch, *supra* note 31, at 14 ("Law is the will to justice . . . . If laws deliberately betray the will to justice—by, for example, arbitrarily granting and withholding human rights—then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character . . . . There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason.").

35. RONALD DWORKIN, LAW'S EMPIRE 243 (1986).

36. *Id.* at 105.

37. *See* Radbruch, *supra* note 27, at 6–8; Joseph Raz, *The Argument from Justice, or How Not to Reply to Legal Positivism*, *in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 17, 28–29 (George Pavlakos ed., 2007); *see also* Robert Alexy, *A Defence of Radbruch's Formula*, *in* RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 15, 15–16 (David Dyzenhaus ed., 1999);

deemed unjust, unless the contradiction between the law and justice reached an "intolerable" level.[38] Extreme injustice equals "no law"[39] in the sense that "the statute is not merely 'false law,' it lacks completely the very nature of law."[40] The Radbruch formula was, thus, invoked by the courts of the Federal Republic of Germany and, after unification, those of Germany, in dealing with the problem of the "grudge informer"[41] and with soldiers of the German Democratic Republic, who had shot and killed East German citizens who attempted to flee to freedom across the Berlin Wall.[42]

Radbruch's basic position could be understood as offering two distinct theses. One thesis, which Stanley Paulson calls the "causal thesis,"[43] suggests that legal positivism, "as practiced and preached in Germany, had . . . [a] causal connection with Hitler's ascent to power."[44] The second, called the "exoneration thesis," posits that legal positivists were "compelled to recognize even the most unjust statute as law."[45] Hence, judges (as well as lawyers and law professors) in Nazi Germany were not to be held personally liable "for the injustice

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Brian Bix, *Radbruch's Formula and Conceptual Analysis*, 56 AM. J. JURIS. 45, 46 (2011); *see generally* CLEA LAAGE, GESETZLICHES UNRECHT: DIE BEDEUTUNG DES BEGRIFFS FÜR DIE AUFARBEITUNG VON NS-VERBRECHEN: DIE REZEPTION DER RADBRUCHSCHEN FORMEL IN RECHTSPRECHUNG UND RECHTSLEHRE NACH 1945 (Peter Lang ed., 2014) (discussing the Radbruch formula in its entirety); Douglas G. Morris, *Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War*, 34 L. & HIST. REV. 649 (2016) (same).

38. *See, e.g.*, Torben Spaak, *Meta-Ethics and Legal Theory: The Case of Gustav Radbruch*, 28 L. & PHIL. 261, 272–73 (2009).

39. DYZENHAUS, *supra* note 5, at 16.

40. *Id.* at 18 (quoting Radbruch, *supra* note 27, at 6–7). For a discussion of the Radbruch formula and its use by German courts after the war, see Thomas Mertens, *Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice*, 14 L. & CRITIQUE 277, 286–95 (2003).

41. *See, e.g.*, David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000 (2008); Thomas Mertens, *Radbruch and Hart on the Grudge Informer: A Reconsideration*, 15 RATIO JURIS. 186 (2002).

42. *See, e.g.*, Peter E. Quint, *Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command*, 61 REV. POLITICS 303, 320–24 (1999); Manfred J. Gabriel, Note, *Coming to Terms with the East German Border Guards Cases*, 38 COLUM. J. TRANSNAT'L L. 375, 403–07 (1999).

43. Paulson, *supra* note 30, at 314.

44. Fuller, *supra* note 1, at 658; HERGET, *supra* note 9, at 2 (arguing that the "unwillingness to inquire into the morality of law by judges, lawyers, and legal scholars led to an easy capture of the legal system by the Nazis and facilitated its modification to meet evil Nazi goals"). *But see* Mark J. Osiel, *Dialogue with Dictators: Judicial Resistance in Argentina and Brazil*, 20 L. & SOC. INQUIRY 481, 489 (1995); Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 827 (1993).

45. Paulson, *supra* note 30, at 314, 327.

of a sentence based on an unjust statute."[46] This position, which extended not only to members of the legal profession but to ordinary Germans as well,[47] served the political purposes of both post-WWII Germany as well as of the Allies. It enabled the Allies to find "good Germans" to govern and run their respective zones of occupation, even where those had formerly been aligned with the Nazi state.[48] It facilitated the decision by the government of Chancellor Adenauer to "put the past behind,"[49] adopt a clean slate policy, end denazification first practically and then, in May 1951, formally,[50] and enact amnesty laws. It also allowed former members of the Nazi Party to keep or regain positions in the civil service, while the German government administered "the sleep cure" to a willing and receptive German public.[51] It enabled German lawyers, judges, and law professors to argue that their engagement with the Nazis "was not . . . a crime of

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46. *Id.* (citation omitted). Unlike Radbruch who opposed National Socialism, the "exoneration thesis" was adopted after the war mainly as a means of self-exculpation by former supporters of the Nazi regime. *Id.* at 357–59; Helmut Kramer, *Juristisches Denken als Legitimationsfassade zur Errichtung und Stabilisierung autoritärer Systeme*, *in* KONTINUITÄTEN UND ZÄSUREN: RECHSTWISSENSCHAFT UND JUSTIZ IM 'DRITTEN REICH' UND IN DER NACHKRIEGSZEIT 141 (Eva Schumann ed., 2008); Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L. J. 101, 151–52 (2002).

47. Radbruch himself noted that legal positivism has rendered jurists "and the people alike" defenseless against arbitrary, cruel or criminal laws. Radbruch, *supra* note 31, at 13. An editor for a Berlin newspaper covering the Nuremberg Trials before the IMT noted that:

> The murderers are right there in the dock. With every document the prosecution produces, another blemish on the soul of the average German disappears, and while the gallery, from Göring to Keitel, looks black as pitch, the average German looks as pure as a romantic full moon over the Heidelberg Castle.

ANNE SA'ADAH, GERMANY'S SECOND CHANCE: TRUTH, JUSTICE, AND DEMOCRATIZATION 156–57 (1998).

48. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 410 (2007).

49. FREDERICK TAYLOR, EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY 352 (2011) (quoting Adenauer's speech to the Bundestag on Sept. 20, 1949).

50. *Id.* at 354.

51. *Id.* at 345–83; *id.* at 351 ("So what did the population of . . . the Federal Republic of Germany, feel when it came to confronting the past, almost five years after Zero Hour? The answer was, in most cases, nothing at all. The country had decided to take the sleep cure."); DAVID ART, THE POLITICS OF THE NAZI PAST IN GERMANY AND AUSTRIA 53–55 (2005); NORBERT FREI, ADENAUER'S GERMANY AND THE NAZI PAST: THE POLITICS OF AMNESTY AND INTEGRATION 1–91 (Joel Golb trans., 2002).

conviction but rather one of compliance."[52] At the same time, the exoneration thesis enabled Western powers to embrace West Germany as a key ally against Communist expansionism. It also suggested that the descent to Fascism and Nazism was a unique phenomenon that could only be explained against Germany's particular history and traditions of state idolatry and unquestioning obedience.[53]

Both the causal and the exoneration theses, as well as much of the debate about positivism's role in the shift from the Weimar Republic to the Third Reich and during the twelve years of the Nazi regime, however, are ahistorical and offer, at best, confusion rather than clarity. While Radbruch's characterization of the historical reality under the Third Reich was adopted wholly uncritically by both Hart and Fuller as well as by Anglo-American jurisprudence ever since, Radbruch's assertions reflected a historically distorted view of legal experience in both the Weimar Republic and the Nazi state. Others, such as Franz Neumann and Ernst Fraenkel, who had been on the receiving end of the Nazi horrors and had no less descended into hell than Radbruch yet derived precisely the opposite conclusions from their and their nation's experiences,[54] were, for the most part, ignored by post-WWII legal scholars both in Germany and abroad.

III. LAW, MORALITY, AND NATIONAL SOCIALISM

Fuller's argument that "in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a

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52. Clara Maier, *The Weimar Origins of the West German Rechtsstaat, 1919—1969*, 62 HIST. J. 1069, 1075 (2019); *see also* LENA FOLJANTY, RECHT ODER GESETZ: JURISTISCHE IDENTITÄT UND AUTORITÄT IN DEN NATURRECHTSDEBATTEN DER NACHKRIEGSZEIT 35–36 (2013). See also Konrad H. Jarausch, *The Conundrum of Complicity: German Professionals and the Final Solution*, *in* THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE 26–27 (Alan E. Steinweis & Robert D. Rachlin eds., 2013), noting that the Federal Republic of Germany ("FRG") and the German Democratic Republic ("GDR")

> adopted competing versions of anti-Fascism, with the GDR emphasizing the Third Reich's structural roots in the landed and business elites, and the FRG instead stressing the criminal disposition of the Nazi leadership. Ironically, both interpretations opened the door to exculpation, since the former ignored the question of individual guilt while the latter held only a small minority responsible, thereby absolving the majority of accomplices.

53. *See, e.g.*, WILLIAM MONTGOMERY MCGOVERN, FROM LUTHER TO HITLER: THE HISTORY OF FASCIST-NAZI PHILOSOPHY (1941); SIR ROBERT VANSITTART, BLACK RECORD: GERMANS PAST AND PRESENT (1941).

54. Douglas G. Morris, *Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny*, *in* NEW GERMAN CRITIQUE 197, 199 (2015) (stating that Fraenkel and Neumann departed from legal positivism).

standing such as it enjoyed in no other country"[55] was supported by Radbruch, who had earlier commented that legal positivism "almost unchallenged, held sway over German jurists for many decades."[56] It is not surprising, then, that after the War, the American Military Government attempted to reform German legal education and the perspectives of legal practitioners away from legal positivism and towards greater appreciation of law's role in the service of higher values.[57]

However, legal positivism was not, in fact, the dominant theory in Germany prior to the Nazi seizure of power. Quite the opposite. As Rottleuthner comments, "[o]ne could group together those authors who called themselves at that time 'positivists.' Besides Hans Kelsen, however, there would not be many. When one says 'positivist'—one means most often the Others."[58] Rather than constituting a sharp break with Germany's past, the anti-positivist attitude of the post-WWII era and the concomitant "renaissance of natural law"[59] corresponded both with the Weimar period and, paradoxically and disturbingly, with the law under National Socialism. The bitter irony is that the revival of natural law thinking in post-WWII Germany and its combination with the myth of positivism and the defenseless lawyers led to figures, such as Hans Kelsen, who actually opposed National Socialism and was one of its many victims, being castigated as facilitators of Nazism.[60]

The rejection of the Weimar Republic, certainly by Germany's elite, was shared by most members of Germany's legal community who, for their part, acted diligently to undermine the edifice of the Republic and its laws.[61] Law professors, judges, and lawyers incessantly challenged the Weimarian authority.[62] Two main tools which they deployed to do so were the notion of rights that existed

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55. Fuller, *supra* note 1, at 658.

56. Radbruch, *supra* note 27, at 1.

57. EDITH RAIM, JUSTIZ ZWISCHEN DIKTATUR UND DEMOKRATIE: WIEDERAUFBAU UND AHNDUNG VON NS-VERBRECHEN IN WESTDEUTSCHLAND 1945–1949, 336–42 (2013).

58. Hubert Rottleuthner, *Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development*, 12 GER. L.J. 100, 102 (2011). Rottleuthner also argues that "[p]ositivism as a philosophy or theory of law . . . was by no means the dominant perspective during the Weimar period, and also not in the public law theory." *Id.* at 106.

59. Stephan Kirste, *Natural Law in Germany in the 20th Century*, *in* 12 A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 91, 92 (Enrico Pattaro & Corrado Roversi eds., 2016); *see also* FOLJANTY, *supra* note 52, at 4–6.

60. *See* FOLJANTY, *supra* note 52, at 38–39.

61. *See* Mertens, *supra* note 40, at 282–84.

62. *See* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 72 (2d ed. 1986).

outside, indeed above, the constitution, and judicial review. Against what legal professionals, mostly coming from the conservative middle and upper classes, considered to be Weimar's positivist and formalist bend, they argued that the law ought to be construed in light of a set of extralegal rights.[63] The legal order is founded on, and legitimated by, that nebulous set of rights and values that exist outside of positive law. Superimposed on such notions of extra (indeed supra-) legal rights was the introduction of judicial review by the *Reichgericht*.[64] In the absence of any formal, positivist law pertaining to judicial review, the court derived that power from a principle of "good faith and trust," which itself existed "outside of any positive-legal norm."[65] The law in itself was not sacred and would always be subject to the demands of justice. Since judges were the only ones who "serve[d] justice alone," theirs was to be the final word.[66] The potent combination of extralegal rights and judicial review enabled the judiciary, whose members were mostly appointed from within the conservative middle and upper classes,[67] to challenge and resist the "possibility that the popular legislature would transform the liberal *Rechtsstaat* into a social *Rechtsstaat* through the right of judges—in their overwhelming majority from the ruling class—to review the laws."[68] Thus, antiformalistic, antipositivistic attitudes allowed highly conservative judges, lawyers, and law professors to challenge and undermine the legal structures of the Republic.[69] As one commentator has noted, "the conceptualizations of the *Rechtsstaat* from the Weimar period show a decisive mistrust towards the democratic process of government. Indeed, they exhibit an impatience with the fluctuation and constant change of government under popular sovereignty."[70] Thus, "[t]he same judges who applied

63. *See* CARL SCHMITT, VERFASSUNGSLEHRE 163 (8th ed. 1993).

64. Bernd J. Hartmann, *Das richterliche Prüfungsrecht unter der Weimarer Reichsverfassung*, *in* 8 JAHRBUCH DER JURISTISCHEN ZEITGESCHICHTE 154 (2007).

65. Maier, *supra* note 52, at 1086.

66. *Id.*

67. INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 6–7 (Deborah Lucas Schneider trans., 1991). *See generally* Ernst Fraenkel, *Zur Soziologie der Klassenjustiz*, *in* 1 GESAMMELTE SCHRIFTEN: RECHT UND POLITIK IN DER WEIMARER REPUBLIK 177 (Hubertus Buchstein ed., 1999) (discussing the role and place of capitalist values in the education of German judges).

68. Hermann Heller, Rechtsstaat *or Dictatorship?*, 16 ECON. & SOC'Y 127, 131 (Ellen Kennedy trans., 1987); *see* Peter Caldwell, *Legal Positivism and Weimar Democracy*, 39 AM. J. JURIS. 273, 275–76 (1994).

69. *See* Curran, *supra* note 46, at 152–53.

70. Maier, *supra* note 52, at 1090.

eugenic laws after 1933 had not felt compelled by their sense of loyalty to the Weimar government to apply the laws of the republic."[71]

In contradistinction, during the Weimar years the proponents of legal positivism, rather than their adversaries, were the ones who attempted valiantly to defend the Republic and democracy and who ultimately refused to support the new regime that came to power in 1933.[72] Indeed, as post-WWII literature has undermined the causal link between "Weimar legal positivism" and the rise of National Socialism, a growing number of scholars began to identify the culprit not with positivism but rather with positions, such as those advocated by the Free Law school that challenged positivism during the Weimar years.[73]

There is another and more significant problem with blaming legal positivism for the failure of German law professors, judges, and lawyers to oppose the Nazi regime. The Nazis themselves called for the unification of law and morality, a stance in direct opposition to the positivist worldview which, so they argued, was reflected in the Weimar Republic and upheld by its advocates.[74] For National Socialists, the separation between law and morality was a "mere liberal prejudice."[75] The law, as an overtly political tool, was to be

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71. Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUMBIA L. REV. 1807, 1824 (1993) (reviewing MÜLLER, *supra* note 67); *see also* FRANZ L. NEUMANN, *Deutsche Demokratie*, *in* WIRTSCHAFT, STAAT, DEMORKATIE AUFSÄTZE 1930–1954, at 327, 333 (1978); Paulson, *supra* note 30, at 353–55.

72. *See* Eric Hilgendorf, *Rechtsphilosophie Zwischen 1860 und 1960*, *in* HANDBUCH RECHTSPHILOSOPHIE 160, 165 (Eric Hilgendorf & Jan C. Joerden eds., 2017) ("The main theoretical opponent of all Nazi legal philosophers was legal positivism, whose representatives (especially Kelsen and Radbruch) were expelled from Germany or at least silenced immediately after the seizure of power.") (translation by author); Caldwell, *supra* note 68, at 278. As Caldwell argues: "[A]s long as the Weimar Constitution remained in force, legal positivism served, not as a handmaiden of fascism, but as a bulwark against it in theoretical discussions, and a guarantee that social forces had access to the process of state will-formation." *Id.*; *see also* Paulson, *supra* note 30, at 345–48.

73. *See* Okko Behrends, *Von der Freirechtsbewegung zum konkreten Ordnungs–und Gestaltungsdenken*, *in* RECHT UND JUSTIZ IM "DRITTEN REICH" 34 (Ralf Dreier & Wolfgang Sellert eds., 1989); Stephen J. Lubben, *Chief Justice Traynor's Contract Jurisprudence and the Free Law Dilemma: Nazism, the Judiciary, and California's Contract Law*, 7 S. CAL. INTERDISC. L.J. 81, 82, 98–100 (1998); Curran, *supra* note 46, at 158–66.

74. Caldwell, *supra* note 68, at 276–77. Caldwell writes that, "[f]ar from excluding natural law from judicial practice, the Nazis developed a kind of secular, biological 'natural law' of race and nation . . . ." *Id.*

75. GUSTAV RADBRUCH, *Strafrechtsreform und Nationalsozialismus*, *in* 9 STRAFRECHTSREFORM 331, 334 (Rudolf Wassermann ed., 1992) ("National Socialism calls for a new understanding of the relationship between law and morality. The separation of law and morality, this great feat of the philosophy of

established, validated, construed, and applied within the four corners of the community of the people ("*Volksgemeinschaft*"), whose will was revealed and mediated by the will of the Führer in accordance with the Führer principle in the Führer state.[76] Nazi legal theorists had made the claim that law must conform to a substantive concept of justice reflected in the values of National Socialism, calling for the elimination of the distinction between law and (Nazi) morality. Positivism was castigated as responsible for the "ethical disorientation" of Germany under the Weimar Republic,[77] and as a theory manifesting "spiritual alienation,"[78] separating law from its connectedness to "national [i.e., German] mores."[79] Rather than maintain the gap between law and morality, legislators and adjudicators must be guided by the *völkisch* idea of the law ("*völkische Rechtsidee*") and by the spirit of the people ("*Völksgeist*").[80] Such ethical disorientation was inherent not only in positivism's association with liberalism and its value-neutrality, but also in its promotion of decadent individualism at the expense of the ethnically homogeneous German *Volk*. As Carl Schmitt declared, "[t]he spirit of the German people had long resisted the liberal 'Ideas of 1789' and their disintegration of order thinking."[81]

National Socialism embraced the antipositivist ideologies of German Romanticism that far preceded the rise of Nazism.[82] Carl

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German idealism, is for the National Socialists a mere liberalistic prejudice (*ein bloßes liberalistisches Vorurteil*).") (translation by author).

76. Curran, *supra* note 46, at 174:

> The idea that the leader would be ineffably, synecdochically fused with his people, and henceforth would define the will of the people through his decisions, involves an inevitable *abandonment* of deference to that very will . . . . [T]he *Führer* was to define the *Volk*, and not vice versa.

77. ERNST FORSTHOFF, DER TOTALE STAAT 13 (1934*); see* Herlinde Pauer-Studer, *Kelsen's Legal Positivism and the Challenge of Nazi Law*, *in* 17 EUROPEAN PHILOSOPHY OF SCIENCE – PHILOSOPHY OF SCIENCE IN EUROPE AND THE VIENNESE HERITAGE 237 (Maria Carla Galavotti et al. eds., 2014*)* (providing translation of "ethical disorientation").

78. KARL LARENZ, DEUTSCHE RECHTSERNEUERUNG UND RECHTSPHILOSOPHIE 11 (1934) (translation by author).

79. *Id.* at 12 (translation by author).

80. KAI AMBOS, NATIONAL SOCIALIST CRIMINAL LAW: CONTINUITY AND RADICALIZATION 65 (Margaret Hiley trans., 2019).

81. CARL SCHMITT, ON THE THREE TYPES OF JURISTIC THOUGHT 77 (Joseph W. Bendersky trans., 2004); *see also* KLEMENS VON KLEMPERER, GERMANY'S NEW CONSERVATISM: ITS HISTORY AND DILEMMA IN THE TWENTIETH CENTURY 47–69 (1957); Curran, *supra* note 46, at 167 (noting that "[a]nti-individualism in repudiation of Weimar legal values was a common thread of Nazi legal writing").

82. Desmond Manderson, *Two Turns of the Screw*, *in* THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 197, 212–13 (Peter Cane ed., 2010); Walter Ott & Franziska Buob, *Did Legal Positivism Render German Jurists*

Schmitt celebrated the end of the era of legal positivism while Karl Larenz argued that, "[a]ccording to the German view, law [was] . . . a live order closely connected with the moral and religious life of the community."[83] Morality was not left as a matter for individuals as such, but rather it was a matter for the whole community to whom individuals were subservient. It was with the mores of the *Volk*, with the "healthy popular sentiment" ("*gesundes Volksempfinden*") of the German people, that all positive legal norms must align and comport.[84] In turn, the people's justice and mores were irrefutably encapsulated in, and reflected through, the will of the Führer.[85] Since *der Führer hat immer recht*, everything he wished became law.[86]

At the same time, the intrinsic link between Führer and *Volk* allowed Nazi ideologues to deny claims that the former's will amounted to nothing more than rank arbitrariness, since the Führer's decisions were seen as but an expression and reflection of the communal will of the *Volk*.[87] Thus, it was possible for Koellreutter to proclaim that "the National Socialist *Rechtsstaat* is a just state as well

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Defenceless During the Third Reich?, 2 SOC. & LEGAL STUD. 91, 98 (1993); Curran, *supra* note 46, at 151; Manfred Walther, *Hat der Juristische Positivismus die Deutschen Juristen im 'Dritten Reich' Wehrlos Gemacht?*, *in* RECHT UND JUSTIZ IM "DRITTEN REICH," *supra* note 73, at 336–37.

83. LARENZ, *supra* note 78, at 5 (translation by author).

84. *See* Hubert Rottleuthner, *Volksgeist, gesundes Volksempfinden und Demoskopie*, 2 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 20, 23–24 (1987); AMBOS, *supra* note 80, at 45. On the use of the term *gesundes Volksempfinden* in German criminal law under National Socialism see, e.g., John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 1073, 1102 (1961); Caldwell, *supra* note 68, at 276.

85. Curran, *supra* note 46, at 174 ("The idea that the leader would be ineffably, synecdochically fused with his people, and henceforth would define the will of the people through his decisions, involves an inevitable *abandonment* of deference to that very will . . . the *Führer* was to define the *Volk*, and not vice versa.").

86. As Radbruch notes in the second of his *Five Minutes of Legal Philosophy*:

> [A]rbitrariness, breach of contract, and illegality—provided only that they benefit the people—are law. Practically speaking, this means that whatever state authorities deem to be of benefit to the people is law, including every despotic whim and caprice, punishment unsanctioned by statute or judicial decision, the lawless murder of the sick. . . . [I]t was the equating of the law with supposed or ostensible benefits to the people that transformed a *Rechtsstaat* into an outlaw state.
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> No, this tenet does not mean: Everything that benefits the people is law. Rather, it is the other way around: Only what law is benefits the people.

Radbruch, *supra* note 31, at 13–14.

87. FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933–1944, at 83 (1942).

as an order-based one."[88] For him, as for many of his colleagues, the National Socialist *Rechtsstaat* was the purest form of *Rechtsstaat* and it stood in opposition to a state of positive laws ("*Gesetzesstaat*") that was represented by Weimar.[89] After 1933,

> [i]nstead of [positivism's] value-blindness we find the most abundant adjuration of law and justice by the legal philosophers, an ecstasy of values in face of the German legal state of Adolf Hitler. Instead of defenselessness we find efforts to ingratiate themselves in the form of declarations of loyalty . . . . Instead of defenselessness, one should rather speak of lack of contradiction—on the ground of inclination, agreement or "to prevent something worse."[90]

Indeed, "[t]he fusion of law and morality serve[d] the NS-jurists as a welcome means to extend the authority and power of the Nazi regime."[91] Such ethicization of law, fusing it together with and indistinguishably from morality, meant that the former could not exist independent of the latter.[92] National Socialism rejected positivism and, instead, embraced its own unique and particularistic, distorted and depraved, variant of "irrational and communal Natural Law, founded in biology."[93]

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88. OTTO KOELLREUTTER, DEUTSCHES VERFASSUNGSRECHT: EIN GRUNDRISS 56 (3d ed. 1938) (translation by author).

89. SCHMITT, *supra* note 63, at 138. On the debate whether "*Rechtsstaat*" was inescapably a liberal term or whether it could have been applied to the National Socialist state, see, e.g., Peter Caldwell, *National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate Over the Nature of the Nazi State, 1933–1937*, 16 CARDOZO L. REV. 399, 399–400 (1994).

90. Rottleuthner, *supra* note 58, at 108.

91. Pauer-Studer, *supra* note 77, at 236. *See* AMBOS, *supra* note 80, at 58; *see generally* Herlinde Pauer-Studer, *Law and Morality Under Evil Conditions: The SS Judge Konrad Morgen*, 3 JURIS. 367, 373 (2012) (discussing the "blurring of the distinction between law and morality" and its impact on the Nazi regime).

92. AMBOS, *supra* note 80, at 62 ("[T]he aim was an anti-positivist (substantive) justification of the law charged with ethicising, *völkisch* ideals—that is, based upon a mystical understanding of the German nation and race and a metaphysical, being- and life-oriented conceptualisation [sic] . . . ."). For a brief overview of the claims that justice has substantive content as given by National Socialism, see *id*. at 63.

93. ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP 134 (E. A. Shils et al., trans., 2006); Curran, *supra* note 46, at 171 ("Nazism adopted natural law principles in theorizing an absolute and immutable character to biologically determined attributes. It rejected natural law principles, however, in denying human-wide universality."). *See also* AMBOS, *supra* note 80, at 64–65 (observing that National Socialism's understanding of natural law was "charged with racist, *völkisch* ideas and oriented towards the will of the Führer (which is itself equated with the law).").

Even in areas where the statutory terrain after 1933 has not changed from that which existed before the rise of National Socialism to power, the courts "were always ready to disregard any statute, even those enacted by the Nazis themselves, if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure 'above.'"[94] Thus, for example, the entrenched understanding of the German Civil Code's notion of legal capacity entailed that it could not be lost, except by death. While the relevant provision of the Civil Code was neither amended nor repealed by the Nazis, legal scholars were quick to opine that the traditional understanding of legal capacity was out of touch with the spirit of the *Volk* and that such legal capacity was the exclusive province of members of the German *Volk*.[95] Jews and other non-Aryans could not, therefore, have any legal capacity under the law.[96] The judiciary followed suit with delegalization ("*Entrechtlichung*"), analogizing Jews to the dead, and as such not enjoying legal capacity.[97] Through the judicial concept of the "civil death" of Jews, the Civil Code "could be nazified without needing to be repealed."[98]

Similarly, legal scholars and the German courts were able to abuse open-ended legal terms such as "good faith," "honor," or "good morals" as well as broad and ambiguous criminal offenses such as "criminal malicious mischief" and construed them in line with the spirit of National Socialism.[99] Here, too, they were following

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94. Fuller, *supra* note 1, at 652.
95. Curran, *supra* note 46, at 169–70.
96. *Id.* at 170.
97. *Id.*
98. *Id.*
99. AMBOS, *supra* note 80, at 65 (footnotes omitted):

> For Schaffstein, the "broad definition of crimes" that raises concerns from a liberal perspective mindful of the rule of law is a "necessary and inevitable evil" of NS criminal law, the law becoming merely a "guideline for interpretation"; an "unlimited interpretation" in line with the NS *Weltanschauung* is called for, the end to the "enslavement by paragraphs. . . ."

See also Hilgendorf, *supra* note 72, at 165 (citations omitted) (translation by author):

> By means of vague, morally charged terms such as "*Volksgemeinschaft*," "Honor," "Duty," "wholeness" and (embodied by the Führer) "the people's will," the traditional law was made more flexible and its binding nature abolished. Unclear concepts such as "concrete orderly thinking" served as a new source of law. Pompous empty formulas and supposedly "deep" phrases replaced clear terms and stringent arguments;

Raphael Gross, *Guilt, Shame, Anger, Indignation: Nazi Law and Nazi Morals*, *in* THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF

guideposts laid down by German legal scholars and judges during the interwar years, rejecting the dictates of formalism and positivism where those clashed with notions of justice.[100]

Law professors and judges alike followed a two-track strategy: "If one were dealing with 'prerevolutionary' laws, then the rigors of positivism did not prevail; if one were dealing with National-Socialist laws, then the judge had to obey, even when the laws were flagrantly unjust."[101] In this way, they operated under a combination of a perverted natural law thinking, with respect to the former, and a perverted legal positivism, with respect to the latter.[102] It is thus that the pronouncement by the Federal Constitutional Court ("*Bundesverfassungsgericht*") in a 1958 case that the Basic Law did not establish a value neutral order but rather "'an objective order of values with its section on basic rights'" and that all laws had to be "'interpreted in its spirit,'"[103] standing alone, could have been authored, without a single change, by the courts of the Third Reich. At the end of the day, it was not inattention to values that marred the post-WWII reputation of the German legal profession, but it was rather devotion to a base and odious set of values.[104]

IV. CONCLUSION

National Socialism benefitted from a perfect storm of legal theory. While legal positivists were, by and large, supportive of the Weimar Republic and democracy, they had been "unable to respond"[105] effectively when the constitutional order crumbled and the Nazi Party seized power. Moreover, positivism then "permitted lawyers to rationalize to themselves and others their interpretation

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JUSTICE 89, 94–102 (Alan E. Steinweis & Robert D. Rachlin eds., 2013); Curran, *supra* note 46, at 173.

100. See Curran, *supra* note 46, at 171–72, for a discussion of the 1920s inflation cases.

101. Arthur Kaufmann, *National Socialism and German Jurisprudence from 1933 to 1945*, 9 CARDOZO L. REV. 1629, 1645 (1988); *see also* AMBOS, *supra* note 80, at 29, 51.

102. RALF DREIER ET AL., GUSTAV RADBRUCH: RECHTSPHILOSOPHIE: STUDIENAUSGABE 248 (1999).

103. Maier, *supra* note 52, at 1080 (quoting and translating to English the language used by the German Federal Constitutional Court in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 1 BvR 400/51, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html).

104. "By assuming a core of goodness and a core of evil, which can never be confused, [Fuller] simplifies the problem which confronts many societies, those who lived during the Third Reich not least." Manderson, *supra* note 82, at 213.

105. Caldwell, *supra* note 68, at 278.

and application of laws they might, upon reflection, have considered to be grotesquely unjust or immoral."[106] It was the antipositivists, however, who hailed the unity of law and morality who undermined the foundations of the Weimar constitution by "grant[ing] legitimacy to the judiciary and president as they usurped power from the Reichstag."[107] Furthermore, once the Nazis seized power, the same jurists were quick to tie the law to the mast of Nazi morality. Thus, in the words of Rottleuthner:

> It would be naïve to appeal to natural law against the Nazis, realizing that the Nazis had their own natural law . . . . It would be naïve to speak of the *Rechtsstaat* as a guarantee against injustice without taking into consideration what the Nazis meant by the "*Rechtsstaat Adolf Hitlers* . . . ." We can learn from the Nazi era that everything can be justified.[108]

106. Dubber, *supra* note 71, at 1825–26.
107. Caldwell, *supra* note 68, at 287.
108. Rottleuthner, *supra* note 58, at 113.