

## Spirit without letter

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DOI:

[10.1080/2049677X.2018.1469274](https://doi.org/10.1080/2049677X.2018.1469274)

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*Citation for published version (Harvard):*

Byrne, G 2018, 'Spirit without letter: how *volkish* Nazi law falls outside Fuller's and Hart's concepts of law', *Comparative Legal History*, vol. 6, no. 1, pp. 65-96. <https://doi.org/10.1080/2049677X.2018.1469274>

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**Title Page:**

**Spirit Without Letter: How *Volkish* Nazi Law Falls Outside Fuller's and Hart's**

**Concepts of Law**

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Wordcount: 16,098

### **Abstract**

National Socialism never achieved its vision of 'law'. The 1958 debate between Fuller and Hart, and subsequent literature in the Anglo-American legal philosophical tradition has thus never addressed the question of what concept of law is compatible with Nazism's ultimate goals and what we might learn from such a concept about the relationship between law and evil. This essay first shows how law reform was far from complete by the time the war ended. It then demonstrates how the mystic, '*volkish*' movement informed the Nazi vision for law. It will then be seen that this concept simply does not fit with some very basic shared assumptions from which the Fuller and Hart debate proceeds. This reveals the degree to which concepts of law within the Anglo-American jurisprudential tradition must accept that law has a specific moral content. Such concepts of law are incompatible with a bullying form of oppression that was at the core of Nazism's moral bankruptcy.

## **Spirit without Letter: How *Volkish* Nazi Law Falls Outside Fuller's and Hart's**

### **Concepts of Law**

The 1958 debate between Lon Fuller and HLA Hart is the most influential in Anglo-American legal philosophy. Among other issues, it addressed the possibility of 'writing cruelties, intolerances, and inhumanities into law', taking up a theme central to Gustav Radbruch's later work.<sup>1</sup> Aspects of the legal system in place during the Second World War in Nazi Germany were used to unpack this problem. A subsequent, vast, literature in the Anglo-American jurisprudential tradition has taken the law of Nazi Germany as a starting point for discussion as to the possibility of a 'wicked legal system' more generally. The subtext is that if the Nazis had law, then law itself must be compatible with the worst kinds of evil.<sup>2</sup> This thought experiment is incomplete. Nazi senior command (and Nazi legal philosophers) did not see the legal system in place during this era as compatible with their specific form of moral bankruptcy. It tells us little about the relationship between evil and law if the legal system in place was considered unfit for purpose by the evildoers themselves. If we really wish to know whether the very concept of 'law', as understood by either Fuller or Hart, can persist in a morally reprehensible regime, we must look not to the decaying form of

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<sup>1</sup> HLA Hart 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, Lon Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630. For a sense of how profoundly this debate changed the intellectual landscape for legal academics in the United Kingdom and North America see Nicola Lacey *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) 155-243.

<sup>2</sup> See, for example, David Dyzenhaus *Hard Cases in Wicked Legal Systems: Pathologies of Legality* 2<sup>nd</sup> Edition (Oxford University Press, 2010).

an existing legal system that remained in Nazi Germany, but to the concept of ‘law’ that was guiding its efforts to replace that system. Once we do this we will see that neither Fuller nor Hart could have accepted the Nazi ideal of a legal system as truly falling within their conception of law at all. This highlights a very specific form of evil that mainstream, Anglo-American legal philosophy cannot accept within its concept of law. As such, any concept of law within the tradition of Hart or Fuller has a specific moral content.

### **1. The Meaning of a “Concept” of Law**

In his debate with Fuller, Hart warned against ‘the arid waste of inappropriate definition’, when it comes to a concept as ‘vague’ and ‘many-sided’ as a legal system.<sup>3</sup> If we rigidly define ‘legal system’ in advance, if we claim that any legal system worthy of the name must display a certain set of characteristics there is a risk that we will exclude legal systems that might fall outside a ‘standard case’. Later he would discuss so-called ‘primitive law’ and International Law as just such examples. It is largely for this reason that Hart wrote of a *concept* of law instead of a *definition*. Hart was far more amenable to the notion that we might genuinely investigate law as a concept if we make the more modest claim that ‘no such system has ever existed or could long endure’.<sup>4</sup> Later, he would take the system with which he is most familiar, that of municipal law, as a starting point to unpack some essential features that would help when it comes to analysis of less standard cases. Yet it is largely on the basis of a roughly shared common understanding of a concept of law that Hart’s debate with Fuller can proceed at all. Otherwise, they would simply have talked past each other. Each assumes that law is rule-based and that it governs human behaviour; as Fuller notes, he

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<sup>3</sup> Hart (n 1) 622

<sup>4</sup> Ibid

and Hart also agree that law is conceptually distinct from ‘a simple fiat of power’, and that the notions of ‘rule of law’ and a sense of ‘fidelity to law’ are vital elements within that concept.<sup>5</sup> Their debate is around a penumbral example, the legal system in place in Nazi Germany. For Hart, this falls within the concept of law; Fuller had no objection to the notion that this system fell outside the concept. Here, we are interested in the type of legal system that Nazism itself would have considered compatible with its evil ends. As we will see, that system falls outside the assumptions about ‘law’ as a concept shared by the positivist Hart and the natural lawyer Fuller.

In the next section, I show how Nazism never created a legal system with which it was satisfied, or even came close to doing so. Then, I provide a loose outline of the system that the dominant version of Nazism needed to build. I go on to argue that under the shared features of Hart’s and Fuller’s working concept of law “no [such] system...has ever existed or could endure”.

## **2. The Nazi System by 1945**

When ‘Nazi law’ is invoked in Anglo-American legal philosophy, there is a tendency to treat this phenomenon as though it emerged, fully formed, in 1933. This is an error. For sure, law ‘reform’ allowed the Nazi party to establish a totalitarian state and eliminate opposition from power. Crucially for our purposes, however, none of this was considered enough. The relationship between the legal profession and senior command was fractious to the end. Yet the profession was fully ‘Nazified’ by the ‘Bringing-into-line’ legislation; Jews and political opponents had been systematically removed. It was not crass racism or dictatorial powers to which the judiciary objected. What they were increasingly being asked to do was

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<sup>5</sup> Fuller (n 1) 632

incompatible with what they thought of as legal practice. All of this serves to show how very different Nazi senior command's vision of a legal system was from anything in existence at the time, even by the later stages of the Nazi regime.

The Reichstag Fire of 27<sup>th</sup> February 1933 provided the party with the opportunity to pass *The Law to Remedy the Distress of the Volk and the Reich* (better known as 'The Enabling Act') on 23<sup>rd</sup> March that year. This act in effect granted dictatorial powers to Hitler as Chancellor.<sup>6</sup> Various pieces of 'Bringing into Line' legislation were then passed by the cabinet with no need for parliamentary assent. These Acts radically altered all facets of public life from the civil service to the medical profession. This included radical reform of the legislative process, court system, membership of the judiciary, education of lawyers and permission to practise law. It also included reform to family law and tax law, each of which was used as a means of disenfranchising Jews and other 'enemies'.<sup>7</sup> These reforms, though sweeping, were unfinished. In speeches to the *Reichstag* Hitler repeatedly promised a new constitution as part of 'comprehensive reform of the Reich'.<sup>8</sup> This constitution never materialised, nor did the 'People's Code', sketched by Hans Frank in 1934.<sup>9</sup>

Tension between Nazi high command and the judiciary was evident during the proceedings of the Reichstag fire trial. Even a judiciary utterly, farcically, biased in favour of

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<sup>6</sup> Gesetz zur Behebung der Not von Volk und Reich (Ermächtigungsgesetz) (23. März 1933), *Reichsgesetzblatt*, 1933 discussed in Ingo Müller *Hitler's Justice: The Courts of the Third Reich* (Deborah Lucas Schneider tr, Harvard University Press, 1991) 27-35, it was already established that law could be broken in times of emergency, a provision relied on by Nazi jurists. Nonetheless, much 1933 terror took place without the 'Reichstag Fire Decree' justification, *ibid* 50-58.

<sup>7</sup> Michael Stolleis, *The Law Under the Swastika: Studies in Legal History in Nazi Germany* (Thomas Dunlap tr, University of Chicago Press, 1998). For discussion of the impact on day-to-day existence see Kristen Rundle 'Law and daily life: Questions for legal philosophy from November 1938' (2012) 3(2) *Jurisprudence* 429.

<sup>8</sup> See especially his speeches of 23<sup>rd</sup> March, 1933, 30<sup>th</sup> January 1934, and 30<sup>th</sup> January 1937, excerpts from which are reproduced in Norman Baynes (tr. and ed.) *The Speeches of Adolf Hitler Volume 1: April 1922-August 1939* (Oxford University Press, 1942) 424-425. In effect the Weimar constitution was superseded by 'the will of the Führer' *ibid*, 413, 419, see also Carl Schmitt, *State, Movement, People* (Simona Draghici tr, Plutarch Press, 2001).

<sup>9</sup> Manchester Guardian, 10 Sept. 1934, the same was true of a new Military Criminal Code, which had civil jurisdiction, see Müller (n 6) 183-184. Multiple legislative reforms were drafted but never ratified, see Stolleis (n 7) 14-21.

the party struggled to act as anything resembling a judiciary yet still satisfy Nazi leadership.<sup>10</sup> This discontent culminated in a meeting of senior officialdom, including Hitler, in March 1934. It was agreed that a Special People's Court should be established to hear treason cases.<sup>11</sup> This 'People's Court' ought to have been the Nazi legal vehicle *par excellence*. It was created by the party. The bench included lay-judges, drawn from Nazi officer classes.<sup>12</sup> The *Law for the Restoration of the Professional Civil Service 1933* guaranteed that all surviving members of the professional judiciary were loyal to the Führer and movement. Furthermore, the scope of this court increased throughout its eleven years so that virtually all criminal offences were considered instances of 'treason'.<sup>13</sup> Yet, neither The People's Court nor the court system generally ever fully functioned in line with what came to be dominant Nazi ideology. Émigrés like Karl Lowenstein opined that Nazi efforts to simplify the judicial system had the opposite effect.<sup>14</sup> The demarcation between police powers and judicial authority was also uncertain, a point raised by the President of the Higher State Court in Hamm in a letter to Roland Freisler, then Secretary of State in the Ministry of Justice, on 31<sup>st</sup> March, 1941.<sup>15</sup> In the same year, the British historian Norman Baynes noted that the courts remained one area of civic life which had yet to be governed by 'the principle of decision by the single Leader-personality'.<sup>16</sup> At that point, Freisler, was calling for this very reform.<sup>17</sup> One year later Freisler became President of the *Volksgerichtshof* or 'People's Court'.

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<sup>10</sup> See Müller (n 6) 30-33

<sup>11</sup> H.W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (St Martin's Press, 1989) 44-45 see also Müller (n 6) 140-145.

<sup>12</sup> Koch (n 11) 48 such lay judges would become predominant, with very few pre-1933 professional members of the judiciary left by 1945.

<sup>13</sup> Ibid 4-6, 58-60 and 133. For data, see Jeremy Noakes (ed) *Nazism 1919-1945 Volume 4: The German Home Front in World War II, A Documentary Reader* (University of Exeter Press, 1998) 123 see generally Koch, above n 10, 11-69 and Matthew Lippman 'They Shoot Lawyers Don't They? Law in the Third Reich and the Global Threat to the Independence of the Judiciary' (1993) 23 (2) *California Western International Law Journal* 257, 268-272.

<sup>14</sup> See Karl Lowenstein 'Law in the Third Reich' (1936) 45 *Yale Law Journal* 779, 794, 809.

<sup>15</sup> *Bundesarchiv Berlin* R 58/990 translated into English in Noakes (n 13) 143. See also the monthly report of the General State Prosecutor in Berlin from 31<sup>st</sup> March 1942, *Bundesarchiv Berlin* R 22/3367 *ibid* 143.

<sup>16</sup> *Speeches* (n 8) 418.



A 1942 decree by Hitler illustrates the dissatisfaction. He sought ‘confirmation’ of his power to ‘intervene directly in [certain] cases and remove judges who are obviously not aware of the necessity of the hour’ in a speech to the *Reichstag*, on 26<sup>th</sup> April.<sup>18</sup> This was followed by sweeping reforms to senior personnel, including the appointment of a new Reich Minister of Justice, a new Secretary of State, a new President of the Academy for German Law, and a reshuffle that moved Freisler to the position of Judge President of the People’s Court. All of this was conducted in order to create greater cooperation between the Ministries of Justice and Propaganda as Goebbels attested.<sup>19</sup>

This was a clear usurpation of legal autonomy and it trampled the last vestiges of a separation of powers.<sup>20</sup> It occurred less than three years before the end of the regime, yet it was not radical enough. On the 20<sup>th</sup> August, 1942, Hitler held a private meeting with the newly appointed Reich Minister for Justice, Otto Thierack, new State Secretary Curt Rothenberger, and Reich Minister Hans Lammers. During a lengthy discussion, Hitler remarked that:

...very far-reaching reforms are required in our judicial system. But they must be introduced gradually, and concurrently with the gradual reorganisation of the whole legal profession.<sup>21</sup>

He further stated that Thierack was ‘empowered to diverge from the existing law’. Thierack began to issue ‘*Richterbriefe*’ to all sitting judges in the autumn of 1942. Several of

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<sup>17</sup> Roland Freisler ‘Etwas über Führertum in der Rechtspflege’, *Schriften der Akademie für Deutsches Recht, Sonderdruck* No. 1, Berlin, 1935.

<sup>18</sup> Max Domarus *Hitlers Reden und Proklamationen 1932-1945: Vol 4* (Wiesbaden, 1973) 1874 English translation in Koch (n 11) 113-114.

<sup>19</sup> *ibid* 118. A study by Otto Peter Schweling into military justice during the National socialist era suggested that decisions were largely free from Nazi spirit until 1939, see *Die deutsche Militärjustiz in der Zeit des Nationalsozialismus* (Elwert, 1978). As Stolleis notes, however, this study is highly unreliable for a number of reasons, see Stolleis (n 7) 145-149.

<sup>20</sup> During the Weimar period, an activist judiciary *had* intruded upon legislative powers. Nevertheless, this judiciary was often sympathetic towards Nazism, Koch (n 11) 14-18.

<sup>21</sup> Norman Cameron and RH Stevens (trs and eds) *Hitler’s Table Talk 1941-44: His Private Conversations* (2<sup>nd</sup> ed., Weidenfield and Nicholson, 1973) 645.

these would appear, every year, until the end of the war, each with a reformist agenda. Recurring themes included the need to have training and decision-making conform to the wishes of the Führer and the notion that punishment should be more severe, in particular for non-Aryan defendants.<sup>22</sup> The final *Richterbrief* was issued in December 1944, a mere six months before Hitler took his own life. In 1944, Thierack also established an indoctrination centre for judges, devised to offer ‘a new method of guidance’ according to his remarks at a conference for German legal academics.<sup>23</sup> As late as 15<sup>th</sup> February 1945 Thierack issued the ‘Decree for the Establishment of Summary Courts in Areas of the Reich Threatened by the Enemy’. An entirely new level of court was thereby added to the judicial system wherein the only possible verdicts were death, acquittal or transfer to another court.<sup>24</sup>

The image that emerges is one of constant, sweeping reform, right up until the end of the regime.<sup>25</sup> None of this is to absolve the judiciary and other enforcers of Nazi law for their parts in the evil that was achieved.<sup>26</sup> Existing legal provisions and the Weimar Constitution played vital roles in Nazism’s acquisition and consolidation of power.<sup>27</sup> Yet, whatever the depths of our disgust for how law was used to achieve heinous ends, the dominant form of Nazism never came close to achieving its vision for law. At a dinner on the 22<sup>nd</sup> July 1942, Hitler expressed the view that it would take at least one generation before this would be the case.<sup>28</sup> Meanwhile, the bench remained hostile to non-lawyers telling it

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<sup>22</sup> For examples see Lippman (n 13) 272-278.

<sup>23</sup> 16<sup>th</sup> September 1944, in Heinz Boberach (ed) *Richterbriefe: Dokumente zur Beeinflussung der deutschen Rechtsprechung 1942-1944* (Boppard, 1975) 469-472, English translation by Noakes (n 13) 152-153, 153.

<sup>24</sup> *Reichsgesetzblatt* (1945) I 30, for analysis see Müller (n 6) 189-191, Lippman (n 13) 286-287.

<sup>25</sup> Koch describes it as ‘a permanent atmosphere of crisis’, (n 10) 86 see also Kristen Rundle, ‘The Impossibility of an Exterminatory Legality: Law and the Holocaust’ (2009) 59 *University of Toronto Law Journal* 65, 73-4

<sup>26</sup> Ibid 68, see generally *US v Josef Alstoetter et al, Trials of War Criminals Before the Nuremberg Military Tribunals, Vol III, ‘The Justice Case’* (United States Government Printing Office, 1951). Freisler died in a bombing raid in 1944, Thierack was arrested but killed himself before trial. Schlegelberger was the most senior judge convicted. His brief tenure as Minister of Justice suggests that his vision of law was less acceptable to senior leadership than that of his replacement, Thierack. Sentences were lenient. It was accepted that these judges, though guilty, provided something of a check against the regime.

<sup>27</sup> Koch (n 11) 19-27, 32-37. Some judges tried to preserve constitutional principles until around 1941, in particular the Prussian Administrative High Court, see Stolleis (n 7), 137-138

<sup>28</sup> *Table Talk* (n 21) 585

how to judge. This was exemplified in the monthly report to the Reich Justice Ministry from the President of the Higher State Court in Cologne, in December 1942.<sup>29</sup> A true evaluation of the Nazi vision for law requires us to look at what judges were being asked to do and the understanding of a *volkish* legal system demonstrated by those who were asking them to do it.<sup>30</sup>

### **3. Mystic, Volkish Nazism and its Concept of Law**

#### **3.a. Mystic, Volkish, Nazism**

In 1941, Baynes translated and compiled a collection of Hitler's speeches. In doing so, he made the following observation:

[I]t is no easy thing for an Englishman to state the National Socialist theory of law, for its basis is fundamentally mystical: law rises like a well-spring from the consciousness of the German people, from the people's soul...<sup>31</sup>

The origins of National Socialism go back centuries, its influences further still. These roots are multifarious. It is a point of debate as to whether Nazism really ought to be afforded the term 'ideology', given its internal inconsistencies.<sup>32</sup> Baynes alludes to what is often referred to as the 'mystic' side of the Nazi movement. This aspect was pervasive and it grew

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<sup>29</sup> *Bundesarchiv Berlin* BAB R 22/3370, English translation by Noakes (n 13) 154-155. Nazi criticisms of the legal system display inability to understand basic concepts. In this respect, Hitler's private conversations or *Table Talk* (n 21), are illuminating. See his failure to grasp the need for a document to be witnessed on 29<sup>th</sup> March, 1942, *ibid* 375, or the idea of criminal defence, *ibid* 585-586.

<sup>30</sup> I do not deny the possibility of legalized evil, nor do I suggest that the 'last vestiges of law were destroyed by 1940', the claims that David Fraser argues against in *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press, 2005) 42, 79.

<sup>31</sup> *Speeches* (n 8) 513, see also Lawrence Preuss 'Germanic Law Versus Roman Law in National Socialist Legal Theory' (1934) 16(4) *Journal of Comparative Legislation and International Law* 269. Nazism claimed scientific bases, but the central tenets are preposterous – see Preuss' explanation of the notion that 'mystical' German law is passed down through the blood, *ibid*, 269-273. Lowenstein, a German émigré, also noted the anti-rationalist, anti-scientific roots of Nazi law, (n 14) 779-780.

<sup>32</sup> See Georg Lukács *The Destruction of Reason* (Peter Palmer tr, Merlin Press, 1980). Private correspondence among senior Nazis and some statements in *Mein Kampf* reveal that they would use any argument to achieve their ends, *ibid* 720-733, 740-741. This issue outside the scope of our investigation. For a summary of debates see Karl Dietrich Bracher *The German Dictatorship: The Origins, Structure and Consequences of National Socialism* (Jean Steinberg tr, Praeger, 1985) 15-66, 72-80.

in influence throughout the twelve years in which National Socialism remained in power. By the time the war ended, Nazi senior command was largely made up of individuals that were sympathetic to this side of the movement. Most notable among these were Heinrich Himmler, Alfred Rosenberg, and Adolf Hitler himself. The war-era writings of Nazism's most acclaimed philosophers, Martin Heidegger and Carl Schmitt, broadly belonged within this side of the movement.<sup>33</sup> The only vociferous 'anti-mystic' in Nazi senior leadership was Ernst Röhm. There would be none after his execution in 1934.<sup>34</sup> It would be wrong to claim that Rohm's anti-mysticism was the reason for his execution, but a 'mystic', *volkish* form of Nazism was either endorsed or accepted by Nazi leadership from that point onwards. We cannot fully understand the direction in which Nazism was moving, and thus understand Nazism's unrealised Nazi concept of law, without an appreciation of this strand within Nazism. This is the main point that Baynes' is making; it is a claim supported by the voluminous German literature on this subject, not least the works of Bernd Rüthers and H. W. Koch.<sup>35</sup>

Mystic Nazism is rooted in the *volkish* movement; this, in turn, largely grew out of the romantic anti-rationalist movements and philosophy of the nineteenth century.<sup>36</sup> Its rise as a movement has echoes in contemporary Europe and North America. At the start of the twenty first century, the forces of globalisation left many behind socially and economically, creating

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<sup>33</sup> See Carl Schmitt *On the Three Types of Juristic Thought* (Joseph W. Bendersky tr, Praeger, 2004) 15 We will only discuss Schmitt's most 'pro-Nazi' works for the purposes of this essay. Schmitt's relationship with the Nazi movement was complex, but ultimately damning, see Bernd Rüthers *Carl Schmitt im Dritten Reich* (CH Beck, 1990) Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (Oxford University Press, 1944). A more sympathetic reading is provided by Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton University Press, 1983). For an argument that the dominant 'legal philosophy' within the existing system was Heidegger-inspired see Ian Ward *Law, Philosophy and National Socialism* (Peter Lang AG, 1992).

<sup>34</sup> See Joachim Fest, *The Face of the Third Reich: Portraits of the Nazi Leadership* (Michael Bullock tr, Da Capo, 1999) 136-150. The motivation behind 'The Night of the Long Knives' remains a contested issue, we are reliant on highly propagandist sources, see Eleanor Hancock 'The Purge of the SA Reconsidered: "An Old Putschist trick?"' (2011) 44 (4) *Central European History* 669.

<sup>35</sup> Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (C. H. Beck., 1988), 1-30

<sup>36</sup> See generally George Mosse *The Crisis of German Ideology: Intellectual Origins of the Third Reich* (Weidenfeld and Nicholson, 1966) 13-30, Nazi 'youth movements' were very *volkish*, *ibid* 193

a vacuum for the far right in contemporary democracies. Similarly, at the start of the twentieth century, the forces of rationalism and modernity left those wedded to a more traditional lifestyle behind. The *volkish* movement grew out of a reaction to such forces. It sought to preserve traditional ways of life. This was said to be a ‘spiritual’ movement. Rationalism and modernity saw nature as a ‘calculable coherence of forces’, in the words of Heidegger, a ‘standing reserve’<sup>37</sup> in the service to ‘doing and making’<sup>38</sup>. The *volkish* movement sought to reunite German people with their ‘soil’, to become more at one with nature. There was merit in a traditional life that was more in harmony with one’s surroundings, but this was not reducible to any finite, tangible, resource. It was a spiritual benefit. Much of the *volkish* movement’s activities centred on the organization of various ‘robust’ outdoor pursuits, particularly among the young. For example, the various ‘youth movements’ of the Nazi era grew out of the *volkish* tradition.

None of this, by itself, would lead one towards a far-right political position. Nevertheless, it requires no great leap of the imagination to see how the existence of *volkish* ideas more generally in the culture might be politicized in a far-right direction. If one is committed to the idea that the ‘true German’ has a spiritual connection to the soil of the country, then outsiders simply do not have this connection; they do not belong spiritually. For this faction within Nazism, Jews had no connection to *any* soil. As such, the Jew was spiritually lacking and thus not fully human, according to the outlook of people like Alfred Rosenberg.<sup>39</sup> Among other roles, Rosenberg was ‘Commissar for Supervision of Intellectual and Ideological Education of the NSDAP’. The *volkish* movement wished to replace increasing reliance on

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<sup>37</sup> Martin Heidegger *The Question Concerning Technology and Other Essays*, (William Lovitt, tr, Harper & Row, 1977) 23-24

<sup>38</sup> Martin Heidegger *Letter on Humanism* reproduced in full in David Farrell Krell (ed), *Basic Writings: Martin Heidegger* (Routledge, 1996), 217-265, 218

<sup>39</sup> See Alfred Rosenberg, ‘The Earth Centred Jew Lacks a Soul’ in George Mosse (ed) *Nazi Culture: Intellectual, Cultural and Social Life in the Third Reich* (Salvator Attanasio et al. trs, W.H. Allen, 1966) 75-79. Mosse explains how Nazism made this aspect of *volkish* and ‘new romantic’ movements the focal point, Mosse (n 36) 294-311. Not every *volkish* philosopher supported Nazism; see discussion of Kurt Huber in Yvonne Sherratt *Hitler’s Philosophers* (Yale University Press, 2013) 207-228

science with spiritual ‘authenticity’, a key theme throughout Heidegger’s work.<sup>40</sup> In the political sphere, this was became a distrust of ‘materialism’, capitalist *and* communist. Nazism’s ‘German Revolution’ described itself as an alternative to liberal democracy and Marxist socialism. This ‘third way’ was a revival of medieval concepts. Arthur Moeller van den Bruck (who coined the phrase ‘The Third Reich’) most clearly articulated this notion. He died in 1925, but his work influenced Nazism and similar ‘young conservative’ movements of the time<sup>41</sup>. For those who came to Nazism via a *volkish* ethos, the movement was a spiritual quest wherein the German *volk* would fulfil its destiny. There was a readymade association between German identity, a robust, outdoor lifestyle, and ‘health’ in contrast to the increasingly indoors, multiracial, urban lifestyles. As Hitler put it to Himmler in a conversation about public service, ‘what kind of role can a nation play when it is governed by people who weigh and analyse everything? I need rough, courageous people’.<sup>42</sup> Mystics even tried to establish a uniquely ‘Germanic [Christian] faith’.<sup>43</sup>

The notion of the *volk*, “true” Germans, defined by a spiritual connection to the very soil of Germany would be invaluable to Nazism. It allowed for a public that would be more receptive to many of Nazism’s core ideas, especially when combined with at least some pre-existing anti-Semitism and crude, popular, understandings of genetics and race. Lengthy (and costly) efforts to establish the notion of a pure German race through *de rigueur* fields of study such as genetics and anthropology failed.<sup>44</sup> The notion of a *volk* allowed Nazism to perpetuate the idea of Germanic ‘purity’ in ways that were not hostage to the latest advances

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<sup>40</sup> See Mosse (n 36) 64-66 and Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson, trs, Basil Blackwell, 1980), 304-382. For more on Heidegger’s commitment to Nazism and how it influenced his work see Emmanuel Faye *Heidegger: The Introduction of Nazism into Philosophy* (Michael Smith tr, Yale University Press, 2009).

<sup>41</sup> *Das Dritte Reich* (Allen and Unwin, 1934)

<sup>42</sup> Conversation of 2<sup>nd</sup> November, 1941, *Table Talk* (n 21) 108

<sup>43</sup> Mosse (n 36) 31-51, see also Fritz Stern *The Politics of Cultural Despair* (University of California Press, 1961).

<sup>44</sup> See Eric Ehrenreich *The Nazi Ancestral Proof: Genealogy, Racial Science and the Final Solution* (Indiana University Press, 2007) and Hans-Walter Schmuhl *The Kaiser Wilhelm Institute for Anthropology, Human Heredity and Eugenics 1927-1945* (Springer, 2008) 117-400.

in science and medicine. In various speeches Hitler referred to the *volk* as the foundation of his authority and that of the state.<sup>45</sup> *Mein Kampf* is replete with references to the ‘volkischer Staat’ or *volk* state.<sup>46</sup> The Führer principle itself was ‘mystical’, based on a national ‘spirit’, embodied in the Führer.<sup>47</sup> This allowed Hitler to claim democratic support with an “overwhelming majority” in his proclamation at the Nuremberg *Parteitag* of September 1934, in spite of the fact that the party never won a majority vote in a democratic election.<sup>48</sup> Power was consolidated by the extension of emergency powers. Yet the supposed threat was an ‘internal enemy’, the notion of which was also ‘spiritual’ and never defined. There was thus no need to provide physical evidence of a threat from organized groups such as mass civil protest or persistent physical attacks against authorities, neither of which existed.<sup>49</sup> *Volkish* spirit was distinguished from measurable, popular opinion, so the Führer could act contrary to the express views of the majority and still claim to have authority emanating from the people. It allowed Carl Schmitt to claim that Hitler had won a ‘popular referendum’ on who should lead.<sup>50</sup> As the definition was spiritual, conversion to Judaism rendered an individual just as ‘Jewish’ as any other, a vital component given the number of German Jews who had converted in the 1700s.<sup>51</sup> The notion of ‘*volk*’ enabled Nazis to exclude political enemies and dissenters on the basis that they were not true Germans, regardless of their genetic make-up, appearance or where they were born.<sup>52</sup> Conversely, it allowed them to

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<sup>45</sup> See his speech to the *Reichstag* on 30<sup>th</sup> January, 1937, *Speeches* (n 8) 434, and his closing speech to the Nuremberg *Parteitag* of 1935, *ibid.* 440 and 450. Hitler spoke of Nazism as a spiritual calling and an expression of ‘inmost being’ *ibid.* 477. As Rundle notes “we the people” is important to Fuller’s association of “good order” with morality. It is *inclusive* and agency-based. “Volk” is a very different, *exclusionary*, ‘mystical’ concept wherein the individual as “agent” has no place, *Forms Liberate* (Hart Publishing, 2012) 49.

<sup>46</sup> See, Adolf Hitler *Mein Kampf* (Ralph Manheim tr, Hutchinson & Co, 1977), 402-421.

<sup>47</sup> Early attempts to base ‘the Führer principle’ on rationality were short-lived, *volkish* sentiment became the main justification, see Koch (n 11) 38-9.

<sup>48</sup> *Speeches* (n 8) 457, see also Hitler’s speech at Kiel, 6<sup>th</sup> November, 1933, *ibid.* 457-458, and his ‘Proclamation to the German People’ on 30<sup>th</sup> January, 1935, *ibid.* 458.

<sup>49</sup> See Müller (n 6), 52-57.

<sup>50</sup> See *Speeches* (n 8) 414-5

<sup>51</sup> Ehrenreich (n 44)

<sup>52</sup> Wilhelm Stuckart and Hans Globke ‘Civil Rights and the Natural Inequality of Man’ in *Nazi Culture* (n 39) 327, 333-334. Academic critics were considered ‘White Jews’, i.e. Jewish “in character”, see Alan Beyerchen *Scientists under Hitler* (Yale University Press, 1977) 157-158

disregard ‘*volkish* traits’ displayed by Jews as ‘mimicry’ of Aryans; Jews like Spinoza and Einstein were said by some to be not really (that is, spiritually) Jewish.<sup>53</sup> This got Nazism out of another bind. Jewish ‘mimicry’ offered an excuse *volk* who had married Jews or *mischlinge* without realizing it, and thereby breached laws against miscegenation.<sup>54</sup> Dangers to the economy presented by ‘The Jew’ required no concrete, real proof as the dangers were ‘spiritual’, and ‘ethical’.<sup>55</sup> It justified land confiscation on the basis that ‘The Jew’ had no spiritual connection to the soil, seeing it merely as a resource for exploitation; Heidegger decried this attitude as ‘technological’.<sup>56</sup> As Stolleis notes, even where elements of Weimar land law were preserved, the notion of the ‘common good’ allowed for a broad interpretative approach by the judiciary, which invariably prejudiced minority groups.<sup>57</sup> Since ‘state’, ‘individual’ and ‘community’ made up a spiritual union, the notion of different public and private spheres disappeared as did the idea of individual rights against that state.<sup>58</sup> It allowed the Nazis to claim that ‘mental characteristics’ were hereditary, in spite of clear evidence to the contrary, and thus compulsorily sterilize, work to death, or exterminate not only Jews but alcoholics, the disabled, and many others.<sup>59</sup>

In the above ways, and many more, the *volkish* influence in Nazism facilitated what Adorno referred to as “the jargon of authenticity”.<sup>60</sup> By invoking the notion of a spiritual or inner

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<sup>53</sup> See Erwin Baur, Eugen Fischer, and Fritz Lenz, *Human Heredity* (Cedar Paul and Eden Paul trs, George Allen and Unwin, Ltd, 1931), for an overview see Robert Proctor, *Racial Hygiene: Medicine under the Nazis* (Harvard University Press, 1990) 53-55.

<sup>54</sup> *Reichsgesetzblatt I* (1935) 1146-7. Müller (n 6) 94-95, courts in such cases wrongly suggested that science was on the side of Nazism in this respect and that Germans should be excused for not being up to date.

<sup>55</sup> Mosse (n 36) 247, 286.

<sup>56</sup> *ibid* 295 and Heidegger (n 37) 20-23.

<sup>57</sup> Michael Stolleis *Gemeinwohlformeln im nationalsozialistischen Recht* (= *Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung. Bd. 15*) 115

<sup>58</sup> Stuckart and Globke (n 52) 327-335, 331, see also Müller (n 6) 146-7, Lowenstein (n 14) 780, Lukács (n 32) 744-745, Rüthers (n 35) 28, 43. On ‘anti-individualism’ in Nazi jurisprudence generally see Raymond Critch ‘Positivism and Relativism in Post-War Jurisprudence’ (2012) 3(2) *Jurisprudence* 347, 357-364

<sup>59</sup> Ehrenreich (n 44) 6-7, judges never challenged Nazi ‘medics’ on these, no matter how spurious the claim, see Müller (n 6) 122-5. All this is to say nothing of the crazier sounding aspects of Nazi mysticism, perpetuated throughout the regime by the likes of Rosenberg and Himmler, see, for example, the ‘children of the light’ myth, Mosse (n 36) 131, 308.

<sup>60</sup> Theodor Adorno *The Jargon of Authenticity* (Knut Tarnowski and Frederic Will, trs, Routledge, 2003)



truth, Nazism appealed to something that could not be verified through observation. Stolleis notes how this vagueness allowed Nazism to achieve many of its early goals, through law; the notion of the *volksgemeinschaft* as the ultimate justification for all law allowed for sweeping reforms in labour and tax law on the basis of this single, nebulous, appeal.<sup>61</sup> Nazism twisted the meanings of various terms - “science”, “threat”, “race”, “democracy” – so that they meant something very different from conventional understandings. A similar appeal to a spiritual basis was made when it came to reform of the legal system. As we will see, the *volkish* concept of law that guided these reforms was utterly distinct from the concept under debate between Fuller and Hart.

### 3.b. Towards a *Volkish* Nazi Legal System

As with their claims about global Jewish economic conspiracies or links between Nordic races and great empires of the past, National Socialist theories of law lack specifics. Rosenberg’s *Myth of the Twentieth Century* contains an entire chapter on ‘Nordic German Law’. He distinguishes Nordic law from Roman, Jewish, Marxist or liberal conceptions, each of which is criticised. ‘True German law’ is said to be based on a sense of ‘honour’, stemming from the pure German heart.<sup>62</sup> But there is little detail beyond this. Similarly, Schmitt’s focus during his Nazi era writings, was to criticise ‘liberal’ and ‘anti-German’ regard for due process and fact. In a move typical of Nazi ‘jargon’ there was virtually no positive explanation. Schmitt only hints at how judges ought to act - a judge should not be ‘spiritually hapless’ and should ‘emotionally grasp the political sense of...juridical demands’.<sup>63</sup> Mysticism was also central to the removal of competing ideas from academia. In

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<sup>61</sup> Stolleis (n 7) 127

<sup>62</sup> Alfred Rosenberg *The Myth of the Twentieth Century* (Vivian Bird tr, Noontide Press, 1982) Book 3, Ch IV. Schmitt’s writings from the era are similar; even his ‘examples’ from Weimar law, are vague, general assertions, see (n 7) 29-31.

<sup>63</sup> Carl Schmitt ‘The Führer Protects the Law’ (Timothy Nunan, tr.) in Anson Rabinach, and Sander L. Gilman (eds) *The Third Reich Sourcebook* (University of California Press, 2013) 63-67, 66. For a selection of similar claims, see Rüthers (n 33) 28-30.

the early 20th Century German constitutional theory considered itself a ‘science’. ‘Anti-scientism’ allowed Nazism to remove or undermine those that wished to preserve traditional legal concepts in academia. As Stolleis put it in this context, ‘a science that proves utterly adaptable and malleable must develop doubts about its own character as a science’.<sup>64</sup> Legal scientists argued that the *Rechtsstaat* of the Weimar period (and hence rule of law) remained in operation in the Nazi era. By 1938 they had given up.<sup>65</sup> From then on, Nazi legal scholarship was avowedly anti-rationalist.<sup>66</sup>

The idea of ‘*volk*’ provides the most obvious point of entry for mysticism into substantive law. As Schmitt put it ‘[a]ll law stems from the *volk*’s right to exist. Every legal statute, every judicial decision only contains justice insofar as it flows from this source...’<sup>67</sup> Similarly, Rosenberg claimed that ‘justice is that which Aryan men hold to be right’.<sup>68</sup> Protecting and preserving the ‘*volk*’ was thought of spiritually; all of the laws against racial admixture, promoting racial purity and disenfranchising non-Aryans from civic life were at least influenced by this outlook.<sup>69</sup> The same preservation of the *volk* was used to deprive Jews and Poles of legal protection in 1941; Freisler claimed that ‘harshness against the enemy of the *volk* means the well-being of the *volk*’.<sup>70</sup> Yet Nazi mysticism had a pervasive impact on the legal system, way beyond the racial laws, even if the ultimate vision of a mystic Nazi

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<sup>64</sup> Stolleis (n 7) 87, see generally 87-98

<sup>65</sup> Hans Frank and Otto Koellreutter were prominent defenders of the idea that the *Rechtsstaat* remained, Schmitt and Freisler saw Nazi law as a ‘new way’, see Stolleis (n 7) 102-105, 112-114. The same happened anyone expressing concern for due process, see Müller (n 6) 174-5, or seeing merit in Roman law, see Koch (n 11) 24-5.

<sup>66</sup> Müller (n 6) 68-72.

<sup>67</sup> Schmitt (n 63) 65, see also Lowenstein (n 14) 802-812.

<sup>68</sup> Lukács (n 32) 745.

<sup>69</sup> See Lawrence Preuss ‘Racial Theory and National Socialist Political Thought’ (1934) 15(2) *The Southwestern Social Science Quarterly* 103, 108-118 and Ernst Forsthooff ‘The Total State’ in *Third Reich Sourcebook* (n 63) 59-62. Debates between those that saw the German State as a ‘moral idea’ and those that saw it as a rational contract pre-date Nazism, see Stolleis (n 7) 95 and Schmitt (n 33) 75-80.

<sup>70</sup> See Roland Freisler ‘Kriegsdienststapel deutscher Rechtswahrer’ (1941) *Deutsche Justiz*, 441, 449, Koch (n 11) 85. A ‘biological basis’ was referenced repeatedly as justification, but the science employed was spurious at best. On use of the term ‘biological’ in law reform, see *ibid* 80-81, Fuller’s point about lack of congruence between law as stated and as enforced is relevant, see Lon Fuller *The Morality of Law* (Yale University Press, 1964) 33-37, 81-91. Laws against racial admixture ostensibly prohibited behaviour by both Jew and non-Jew; in fact they were primarily used to prosecute Jews, see Müller (n 6) 90-111

system was never fully realized. As Rüthers has charted, this meant that Nazi reform of law could impact areas of private law without the legislative changes that were required in public and criminal law.<sup>71</sup>

A key feature of reform was the notion that ‘Roman-Jewish Law’ had corrupted ‘German Common Law’. The former was to be removed in favour of the latter since Roman Law was too based in ‘reason’ and not enough in ‘soul’ or ‘spirit’<sup>72</sup>; ‘true law’ could only be produced by the inner-feelings of ‘Aryan, Nordic men’.<sup>73</sup> In reality, the systems had become so fused that it may have been impossible to identify which elements had their roots in Roman Law and which in German Common Law.<sup>74</sup> It is a moot point as no such task was attempted. Just as Nazi claims about race were dubious scientifically, even at the time, Nazi claims about traditional, German culture were dubious historically. Their main source was Tacitus’ *Germania*; a work that must be read with some scepticism. Its author probably never set foot in Germany and may have had political reasons for exaggerating the strength and unity of the “Germans outside Rome”. Even then, less flattering aspects of Tacitus’ ethnography (supposed tendencies towards drunkenness and laziness) were ignored.<sup>75</sup> The distinction was used as an excuse for the removal of rules, principles and legislation if and when these obstructed Nazi goals, with no identifiable pattern beyond this.<sup>76</sup> Equally dubious was the claim that this was the revival of an ancient Germanic peasant model. Nazi ‘loyalty’ to the Führer bore little relation to *Treue um Treue* (‘loyalty for loyalty’), which was

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<sup>71</sup> See Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* 7<sup>th</sup> ed., (Mohr Siebeck, 2012)

<sup>72</sup> Preuss (n 31) 274, see also Mosse (n 36) 33-46.

<sup>73</sup> Preuss (n 31) 272

<sup>74</sup> See Lowenstein (n 14) 784-785

<sup>75</sup> *ibid*, 785-787, Mosse (n 36) 68-69, and Christopher Krebs *A Most Dangerous Book: Tacitus’ Germania From The Roman Empire to the Third Reich* (Norton and Company, 2011). Krebs downplays aspects that are inconsistent with Nazi propaganda. For a more general discussion of its complications as a source see J.B. Rives *Tacitus: Germania* (Clarendon Press, 1999). On Nazi pseudo-history generally see Lukács (n 32) 742-744. Similarly, Nazism promoted an image of itself as ‘efficient’ and ‘strong’. It became clear that the regime was neither, Detlev JK Peukert, *Inside Nazi Germany: Conformity, Opposition and Racism in Everyday Life* (Richard Deveson tr, Yale University Press 1993) 67-76.

<sup>76</sup> Preuss (n 31) 277, 278, Lowenstein (n 14) 785, Stolleis (n 19) 76-77, see also Lippman (n 13) 261-272.

reciprocal.<sup>77</sup> But in many respects, seeking historical accuracy is to miss the point. The underlying premise in the *volkish*, mystic side of Nazism was that we should be less concerned with empirically verifiable fact and should focus more on ‘spirit’ and sentiment.

Our difficulty in pinning down the meaning of “law” in a *volkish* sense is thus not accidental. As with much in *volkish* philosophy more generally, true German Law was supposed to defy definition. Indeed it is one of the very features of the *volkish* or mystic strands within Nazism that precise definition is impossible; the spiritually authentic will intuitively ‘feel’ the concept. The rest of us will not. Heidegger repeatedly claimed that ‘true thinking’, with which he was hoping to replace ‘philosophy’, could not be captured in writing.<sup>78</sup> We see the same notion in Nazi legal and political philosophy. Only the *volk* could grasp ‘true German law’ and they do so instinctively or intuitively. I am not a member of the *volk*, so I am not supposed to understand true German Law, much less articulate it. The same is true of both Fuller and Hart.<sup>79</sup> Nevertheless, we can see two, clear, substantive changes that mystic Nazism sought in relation to the administration of justice. The first relates to rule-following, the second to fact-finding. These two aspects are enough for us to see how the Nazi concept of law falls entirely outside the Fuller/Hart paradigm and legal philosophy that remains within it.

### 3.b.i Normativity

Nazism was influenced by the ‘*bund*’ leadership model, used throughout the *volkish* movement.<sup>80</sup> Combined with the crude social Darwinism of writers such as Hermann Graf Keyserling, this paved the way for the introduction of the *Führerprinzip* or ‘Führer

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<sup>77</sup> See Koch (n 11) 75-77, for further discussion see Walter Kienast ‘Germanische Treue und ‘Königsheil’’ (1978) *Historische Zeitschrift* 265.

<sup>78</sup> See Martin Heidegger *What is Called Thinking?* (J. Glenn Gray, and F. Wieck trs, Harper and Row, 1968) 17-18

<sup>79</sup> As a Jew, Hart was expressly excluded. One assumes that Fuller was unaware of this fact when he claimed that neither he nor Hart belonged to a ‘minority group’ in their respective countries, see Fuller (n 1) 637.

<sup>80</sup> See Mosse (n 36) 204-233.

principle'.<sup>81</sup> The *bund* was a medieval, spiritual union. It was believed that a 'heroic' leader would naturally emerge from the group. This leader would epitomize a common set of intuitions or feelings.<sup>82</sup> Nazi reform of the judiciary aimed to follow this model. Judicial independence, a 'liberal', 'Bolshevik', 'Roman' or 'Jewish' idea, was to be eliminated. The judge was to become a civil servant in all but name. Crucially, however, the administration of Nazi 'justice' did not take the form of *rules*. Judges were to decide according to 'national socialist spirit'. The system under construction was expressly non-normative in contradistinction to what Schmitt described as 'existentially normative' 'Jewish' law.<sup>83</sup> This was so in two ways.

First, Nazi reforms installed committed Nazi judges instead of generating new rules for judges to follow. The *bund* model was not based upon a series of top-down orders; *bundish* conceptions of state saw it as a spiritual guide rather than an order-issuing authority.<sup>84</sup> Similarly, there was to be 'no reform of justice, but a reform of jurists'.<sup>85</sup> The judge was 'not bound by instructions' so that he could 'fulfil his task in the racial community'.<sup>86</sup>

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<sup>81</sup> More generally on this point see Rütters (n 71) 105.

<sup>82</sup> See Mosse (n 36) 208-9, Lawrence Preuss 'Punishment by Analogy in National Socialistic Penal Law' 26(6) *Journal of Criminal Law and Criminology* 847, 854, this feudal notion of a court setting is evident in Thierack's *Richterbrief* of 12 October 1942, discussed and translated in Koch (n 11) 159-160.

<sup>83</sup> Quotations from Carl Schmitt, 'National Socialist Legal Thought' (Timothy Nunan, tr.) in *Third Reich Sourcebook* (n 63) 134-137, 135, see also Schmitt (n 33) 65, (n 8) 36, 44 and 'Führer protects' (n 63) 65

<sup>84</sup> See Mosse (n 36) 283-5, cf Freisler's model for the People's Court, Koch (n 11) 81-2. This included the role of 'defence attorneys' who were to help secure convictions, see Müller (n 6) 63.

<sup>85</sup> This statement is Freisler's, quoted by Schmitt (n 8) 50. See also Hitler's comment that he 'desire[d] only judges that would have the requisite personality', instead of ones that 'hide behind excuses' like jury decisions and the 'interests of the individual', *Table Talk* (n 21) 375.

<sup>86</sup> Hans Frank 'On the Position of the Judge before National Socialist Law and in the National Socialist State' in *Third Reich Sourcebook* (n 63) 67. By 1942 Frank was critical of Nazi law, and offered his resignation as governor of Poland. Frank noted in his diaries that extensions to police power lead to "complete deprivation of the protection of the law to individual" citizens, in Werner Prag and Wolfgang Jacobmeyer (eds) *Das Diensttagebuch des Deutschen Generalgouverneurs in Polen* (Deutsche Verlags-Anstalt, 1975), 553 English translation of the relevant extract in Koch (n 11) 120-1. On the 'antinormativism' of Nazi law generally, see Rütters (n 35) 20-27. Pre-war *volkish* 'utopias' had courts of 'honour' in which disputes were typically resolved through hand-to-hand combat, see Mosse (n 36) 112-5. David Fraser ignores or downplays how the judiciary felt their system looked less and less like law, see 'Evil Law, Evil Lawyers? From the *Justice Case* to the Torture Memos' (2012) 3(2) *Jurisprudence* 391, 402-408.

Senior command, including Thierack, felt that judges should be so spiritually connected to the *volk* that they could give expression to ‘inner’ German law without direction. For his part, Hitler remarked to Thierack, Lammers, and Rothenberger his ideal system would eliminate the need for legislation altogether.<sup>87</sup> This ethos is seen in the decree of June 28, 1935, which introduced ‘punishment by analogy’. It allowed judges to convict and sentence on the basis of acts that were not prohibited, but nonetheless ‘deserved of punishment according to...the sound perception of the people’.<sup>88</sup>

Second, judges were to ignore specific legal rules if they went against ‘*volkish* spirit’, epitomized by state and party. ‘Observance of forms’ was to take a backseat to ‘the measure in which [one] defends *volkish* life’ as Hitler indicated in his closing speech to the Nuremberg *Parteitag* of 1935.<sup>89</sup> As Goebbels put it, judges ‘should proceed less from the law than from the basic idea that the offender was to be eliminated’.<sup>90</sup> The wording of laws mattered less and less as the regime consolidated power.<sup>91</sup> Consistency from one case to another was no concern.<sup>92</sup> There was no need for policy and judgments to display internal logic; while racially, pre-determined character traits were a cornerstone of Nazi ideology, the courts still found legal culpability for having such traits. So, for example, The Schoenberg Petty Court evicted a Jewish tenant on the grounds of his ‘racial qualities’ on the basis that he is ‘at fault’ for being a ‘foreign body’, while accepting that ‘the fact that the tenant is a Jew

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<sup>87</sup> English translation provided in Cameron and Stevens (n 20) 642. Stolleis argues that even the term ‘system’ is misleading, as this implies ‘obligations and commitments’ for the state, (n 6) 98.

<sup>88</sup> *Reichsgesetzblatt* (1935) I 839. This notion is also rooted in mysticism, Preuss notes how these ‘analogies’ were so stretched as to be meaningless, (n 82) 848, 853-854.

<sup>89</sup> *Speeches* (n 8) 438-457, 450 see also Roland Freisler ‘Anchoring the Civil Service in the Nation’ in *Nazi Culture* (n 39) 337-339, 338 wherein Freisler argues against ‘rules and regulations’ in favour of ‘unconditional faith’.

<sup>90</sup> Goebbels’ ‘Speech to The Members of The People’s Court’, 22 July 1942, reprinted in *The Justice Case* (n 26) 452-453

<sup>91</sup> Stolleis (n 7) 14-15 Nazism co-opted reformist language from the Weimar era, in which judicial interpretation was very formal, see also Lowenstein (n 14) 781-783. Schmitt built his position from a critique of a crude positivism, (n 33) 48-65 –he did not ascribe the position attacked to a specific theorist. No major twentieth century figure would have defended it.

<sup>92</sup> Even chief counsel for the Gestapo expressed this concern, Müller (n 6) 49.

does not mean that he is himself at fault in the normal sense'.<sup>93</sup> Civilians could be charged under military law.<sup>94</sup> As a result, any remark made in *private* was potentially a 'public attempt to...undermine the will of the German...nation'.<sup>95</sup> This is exemplified by the 'Grudge informer case' discussed by Fuller and Hart.<sup>96</sup> Many lower courts still felt a sense of obligation to the letter of legislation and established principle, but this mattered little as *volkish* mysticism in superior courts invariably overturned any first instance normative approach.<sup>97</sup> In a typical example, the Special Court in Breslau found a defendant guilty of a 'violent act committed with a firearm', on appeal, in a decision of 23<sup>rd</sup> April 1941. The defendant had punched the victim with his fists, using no weapon.<sup>98</sup>

'Spirit' was to be given such priority over 'letter' in Hitler's vision for law, that citizens might be prosecuted *for* following or enforcing prescribed rules.<sup>99</sup> Appeal to specific legislative wording was derided as a 'Jewish and liberalistic moral and legal mentality'.<sup>100</sup> In place of rule-following, the *bund* model for the administration of justice was based on shared spirit and common intuition. The role of judge, in Nazi legal philosophy, was to give effect to the 'common sense of the people' exercising 'healthy prejudice'. He was to avoid 'rationalistic dissection of facts', in favour of 'essential [i.e. spiritual] truth' and the will of his racial community.<sup>101</sup> To accept a *volkish*, Nazi concept of law, then, is to accept the

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<sup>93</sup> *ibid* 117

<sup>94</sup> Verordnung des Reichspräsidenten zum Schutz von Volk und Staat, *Reichsgesetzblatt* (1933) I S. 83 s.5 see Müller (n 6) 181-185.

<sup>95</sup> *ibid* 145-148.

<sup>96</sup> Oberlandesgericht Bamberg July 27, 1949, 5 *Sddeutsche Juristen-Zeitung* 207 (207-10), 1950 (Ger.), for a full English translation see the appendix to David Dyzenhaus 'The Grudge Informer Case Revisited' (2008) *NYU Law Review* 1000, 1032.

<sup>97</sup> *Ibid* 96-111 the state itself was to provide "spiritual guidance" only, see Mosse (n 36) 283

<sup>98</sup> *Höchstrichterliche Rechtssprechung* 1942, No. 330, parts of the decision are translated in Noakes (n 13) 132-134. Further examples from the appellate courts are included in Müller (n 6) 47-139. Stolleis charts how a unique vocabulary was central to Nazi legal reform, (n 7) 65-85.

<sup>99</sup> There are numerous examples of these sorts of claims in Hitler's private conversations, see his remarks about a port official that had seized goods black market bound food, brought back from the Eastern front, *Table Talk* (n 21) 636, see also his remarks on the night of 1<sup>st</sup> November, 1941, *ibid* 103-106.

<sup>100</sup> Müller (n 6) 92

<sup>101</sup> *ibid* 72-73

possibility of a non-normative (or minimally normative) legal system. We will return to this issue in section four.

### *3.b.ii Facts*

This ‘mystic’ basis had another important consequence for how Nazism viewed judicial decision-making. The facts of a case were subordinate to the interests of state, movement and *volk*.<sup>102</sup> This mirrors the Nazi attitude towards both historical accuracy and scientific evidence. The same worldview lead Nazism to glorify racist pseudo-scientists like Lagarde precisely *because* of his ‘rejection of things as they are’ in favour of the ‘projection of will’<sup>103</sup>. The same mindset prompted the Bavarian State Minister for Education to tell Munich professors, ‘From now on the question for you is not to determine whether something is true, but to determine whether it is in the spirit of National Socialism’.<sup>104</sup> ‘Materialism’, a term used by Nazism to mean desire for material proof, was considered a Jewish trait, the result of lack in spirituality.<sup>105</sup>

Similarly, Nazi judges were encouraged to decide cases on the basis of personality ‘types’ of the parties involved rather than the facts at hand.<sup>106</sup> Goebbels instructed judges of the People’s Court that ‘[t]he idea that the judge must be convinced of the defendant’s guilt must be discarded completely’.<sup>107</sup> Thierack gave similar direction on sentencing.<sup>108</sup> The best

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<sup>102</sup> See Schmitt (n 8) 22-23. Talk of ‘concrete order’ in Schmitt’s work of that era should not be confused with any sort of appeal to empirically verifiable fact; it was based on an intangible notion of spirit, largely drawn from the Hegelian notion of primacy of forms, see Rütters (n 33) 78-84.

<sup>103</sup> Quotations from Mosse (n 36) 207

<sup>104</sup> Beyerchen (n 52) 51-52

<sup>105</sup> Mosse (n 36) 306

<sup>106</sup> For numerous examples of this in German law at the time see Noakes (n 13) 122-135. Academia, once ‘brought into line’ was firmly behind this notion, espousing a feudal version of criminal law based on ‘overall behaviour’, ‘loyalty’ and ‘honour’ rather than facts and culpability, see Müller (n 6) 76-79 and Stolleis (n 7) 87-102.

<sup>107</sup> Lippman (n 13) 284, quoting Goebbels’ Speech to The Members of The People’s Court, 22<sup>nd</sup> July 1942, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 Vol. III* (United States Government Printing Office, 1951) 452-453. In reference to the defendant in a forthcoming murder trial, Hitler stated ‘whether responsible or not, the author of that crime should disappear’ on 2<sup>nd</sup> August, 1941, *Table Talk* (n 21) 21. In *Bundish* style, Freisler lead by example; intending to commit a crime



known example of this approach concerned labourers from the ‘Eastern Provinces’, forced to work inside Germany. Such workers often attempted escape into Switzerland. Many were executed on the basis that their flight was to join ‘guerrilla forces’. In fact, virtually all had fled in order to avoid harsh working conditions and nothing more. During the Nuremberg trials it emerged that their prosecutors had been fully aware of this fact.<sup>109</sup> Another clear illustration of this *volkish* attitude towards fact in Nazi law reform can be seen in the various laws against defeatism – even as the war was clearly unwinnable for Germany, it was a crime to say so.<sup>110</sup> After Hitler had taken his own life, it was (supposedly) criminal to report his demise. For the same reason; in the trial of General Hoepner, Freisler asked the defendant ‘who gave you the right to know that the Führer was dead?’<sup>111</sup>

Even the express decisions of the court were not what they appeared. One of Thierack’s first acts in 1942 was to oversee an agreement that Gestapo could ‘correct’ any punishment considered too lenient by both he and Himmler.<sup>112</sup> A later decree, 20 July 1944, allowed the Ministry of Justice to circumvent courts entirely and submit cases directly to the Führer, if it felt that a trial was ‘unnecessary’. This decree, BDC, NG-646 was unpublished, but no less ‘binding’.<sup>113</sup> All of this was introduced in spite of collusion between the Gestapo and the judiciary throughout the regime.<sup>114</sup> Gestapo also re-arrested those found innocent in court. Protective custody, for an indefinite time, pending a trial that in all likelihood would never take place, was outside of the remit of the judiciary. Later, re-arrest became a practice of internment in concentration camps. Most state deprivation of liberty thus became the

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or having a particular political attitude was treated as severely as carrying out prohibited activity, Koch (n 11) 231

<sup>108</sup> *Bundesarchiv Berlin R 22/4692* translated in Noakes (n 13) 158

<sup>109</sup> Lippman (n 13) 296

<sup>110</sup> Nuremberg Document 3881-PS, discussed in Koch (n 11) 171

<sup>111</sup> *ibid* 231

<sup>112</sup> Conference of September 18<sup>th</sup>, 1942, minutes reprinted in Ilse Staff (ed) *Justiz im Dritten Reich* (Fischer Taschenbuch-Verlag, 1964) 117, discussed in Müller (n 6) 181-2.

<sup>113</sup> See Koch (n 11) 164-5

<sup>114</sup> Koch explains how this practice moved from unofficial, to sanctioned, to crisis point as re-arrests became more regular. This created tension between Gestapo and The People’s Court, *ibid* 56-87.

responsibility of police rather than judiciary. The punishment of the court may or may not have been the punishment in fact. A finding of innocence was meaningless; in all likelihood, the defendant would be treated as guilty.<sup>115</sup> State, movement and *volk* were a spiritual union, so one could not challenge this authority without challenging oneself. A verdict of ‘innocent’ simply meant that the accused was worked to death instead of executed, if this was the outcome sought by the Gestapo. Furthermore, judicial decisions were hostage to ‘correction’ by direct intervention from Hitler or Thierack. In a further illustration of how little the regime cared for fact-finding, it appears that Hitler never read the judgements that he overturned. Instead, intervention was based on brief, sensationalized media accounts of both facts and trial.<sup>116</sup>

Crucially for the discussion at hand, we must recall that Nazi senior leadership was far from pleased at how far the legal system had moved towards its ideal. Helmut Nicolai, author of *The Doctrine of Racial Laws* and the principle architect of this aspect of Nazi law reform, was forced out of party in 1935 on the basis of his espousal of rule of law. Freisler may have discouraged decisions made on the basis of ‘rules and regulations’ and ‘formalistic rigidity’ in favour of ‘a living and dynamic attitude’ and ‘unconditional faith’, yet Hitler privately described him as a ‘nothing but a Bolshevik’<sup>117</sup>. Schmitt may have railed against ‘liberal’, ‘democratic’ law in favour of the *volkish* state and non-normative German law, but he too fell out of favour with the senior administration for being too ‘liberal’ and ‘legalistic’. Perhaps most surprisingly, even Thierack was said to be ‘too in thrall to [pre-existing] law’. As discussed, Thierack agitated for constant reformation of the judiciary and conceded vast amounts of power to the Gestapo. In addition he arranged a secret deal with Himmler to keep

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<sup>115</sup> Müller (n 6) 176-9, incursions into jurisdiction of administrative courts was another source of tension. Unsurprisingly, the Gestapo supplanted the ‘liberal’, ‘reactionary’ judiciary, see Stolleis (n 7) 129-143.

<sup>116</sup> Noakes (n 13) 141 more generally on this point see Martin Broszat ‘Zur Perversion der Strafjustiz im Dritten Reich: Dokumentation’, (1958) *Vierteljahrshefte für Zeitgeschichte* 6, 422

<sup>117</sup> On 29<sup>th</sup> March, 1942, *Table Talk* (n 21) 375.

law out of the eastern territories.<sup>118</sup> Thierack even described the judicial role as ‘immediate vassals of the Führer and aides of the political leadership’<sup>119</sup>. Lowenstein’s prediction in 1936, that National Socialism’s anti-rational experiment would end and German law fall back into a combination of mysticism and rationality was wrong. Even as the war ended, the system was not mystic enough for Nazism.<sup>120</sup> To imagine the *volkish* Nazi concept of law in action is to imagine a system that places even less emphasis upon prescribed rules and even more on ‘spirit’. It is to imagine a system that placed even less faith on the notion of empirically verifiable fact and even more on intuition.

#### **4. The Fuller/Hart Paradigm**

We are now in a position to consider how this vague, mystic, Nazi concept of law might fit within the Hart/Fuller paradigm. In doing so, we will be mindful of a suggestion that Hart made. Instead of trying to lay down fundamental features that must be present before we are willing to afford the name “law” to a particular system, let us consider instead the notion that we might say of a particularly wicked system that “no such system has existed or could endure”. We see, with few complications, that neither Hart nor Fuller imagined that a system such as that under construction by *volkish* Nazism “could long endure”. Even the loose outline features of *volkish* Nazi law fall outside the very basic assumptions that Hart and Fuller make about “law”. From a comparative and historical perspective, this prompts us to consider whether such a system *has* existed in the past. If this could be shown to be the case,

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<sup>118</sup> See his discussion with Himmler on 18<sup>th</sup> September 1942, in the presence of Rothenberger, *SS Gruppenführer* Streckenbach and *SS Obersturmbannführer* Bender, in Nuremberg Document PS-654, translated in Noakes (n 13) 160-1.

<sup>119</sup> *Ibid* 152

<sup>120</sup> Lowenstein (n 14) 815

then the Hart/Fuller concept is very narrow indeed. As such, it would be of little use when we try to contemplate whether “law” is compatible with great moral evil as it would exclude a great many concepts of law (both real and hypothetical) from the very start. A version of this argument has been made in some recent literature; in what follows I will offer a response. The *volkish* Nazi understanding of law appears to be the historical outlier, not that of Fuller and Hart.

#### 4.a. Normativity

It is common ground between Hart and Fuller that ‘the foundation of a legal system is... [f]undamental accepted rules specifying the essential law making procedures’<sup>121</sup>. The assumption that law is about rule-making and rule-following is also seen in critical responses to that debate.<sup>122</sup> Of course, it is imperative that both comparative lawyers and jurists should avoid the trap of assuming that ‘law’ as a concept is exhausted by twentieth century Anglo-American paradigms such as that of the debate between Fuller and Hart. But even where we resist the temptation to equate ‘law’ with ‘*state-created* normative order’, it is hard to escape the notion that any system of social order we would identify as ‘law’ is at least somewhat normative.<sup>123</sup> The ultimate vision of Rosenberg, Schmitt, Thierack, and Freisler was not what Fuller or Hart had in mind, whatever about the system that actually was in force during the Second World War. It is not even a ‘gunman situation writ large’, unless the

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<sup>121</sup> Fuller (n 1) 639.

<sup>122</sup> Kramer’s claims that evil regimes have to adhere to Fuller’s precepts; perhaps this is so, but in the (unrealised) Nazi vision for a legal system this was not the case – they wished to create a judiciary that needed no direction, rather than ones that would ‘follow directives’, ‘Scrupulousness without the Scruples: A Critique of Lon Fuller and his Defenders’ (1998) 18 (2) *Oxford Journal of Legal Studies* 235, 252-3 and 256

<sup>123</sup> For a collection of essays that assiduously avoid this trap, but still assume that law is normative see Seán Patrick Donlan and Lukas Heckendorn Urscheler eds, *Concepts of Law: Comparative, Jurisprudential and Social Science Perspectives* (Routledge, 2016) The ‘normativity’ of law as a concept was at the core of pre-war writings of Gustav Radbruch and Hans Kelsen, let alone the modified positions adopted by each in the light of Nazi atrocities, see Gustav Radbruch *Legal Philosophy*, in *The Legal Philosophies of Lask, Radbruch and Dabin* (Kurt Wilk tr., 1950) 43, 108-119 and Hans Kelsen *Introduction to the Problems of Legal Theory*, (B.L. Paulson and S.L. Paulson, trs, Clarendon Press, 1997)

gunman is a deranged, double-crossing variety that may or may not still shoot his hapless victim after the money has been handed over.<sup>124</sup> Even if we lower the normative requirement to something like the consistent application of general principles, this Nazi vision would fail. The need for consistency between cases was also seen as alien to ‘true German law’. Ronald Dworkin suggested that his notion of law as ‘interpretive’ might allow us to accept wicked systems such as that in Nazi Germany as ‘law’ (in a pre-interpretive sense), while also claiming that Nazi law was not law in a ‘full’ sense (that is, interpretatively). Here, we are concerned with the unrealised Nazi concept of law. In Dworkin’s terms, it seems likely that this is not law *even* in a pre-interpretive sense; there are no ‘rules and standards’ to provide a ‘tentative content of the practice’.<sup>125</sup>

We must be careful, however, to avoid a false dichotomy. *Volkish*, Nazi, conceptions of law may have been expressly non-normative, but there is a big difference between a system that has no rules at all, and one that is only minimally rule-based. Since Hart and Fuller never debated exactly how normative a legal system would have to be to count as ‘normative enough’, we cannot say, for certain, where that tipping point lies within their shared assumptions about law. Perhaps it is not beyond imagination that Hart might be willing to grant the name ‘law’ to a system for dispute resolution that is normative only in a very crude and basic sense. In spite of anti-normative rhetoric, the *Bund* model involved at least one norm - ‘what the *Führer* says, goes’. This is not far off the account that Rüthers provides of judicial interpretation in the relevant era; the judiciary was encouraged to

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<sup>124</sup> Evil regimes may have other reasons to uphold rule of law, a theme explored in the debate between Simmonds and Kramer, see Nigel Simmonds ‘Straightforwardly False: The Collapse of Kramer’s Positivism’ (2004) 63 *Cambridge Law Journal* 98; ‘Law as a Moral Idea’ (2005) 55 *University of Toronto Law Journal* 61; ‘Freedom, Law and Naked Violence’ (2009) 55 *University of Toronto Law Journal* 381; ‘Kramer’s High Noon’ (2011) 56 *American Journal of Jurisprudence* 135; and Matthew Kramer ‘On the Moral Status of the Rule of Law’ (2004) 63 *Cambridge Law Journal* 65; ‘Incentives, Interests and Inclinations: Legal Positivism Defended’ (2006) 51 *American Journal of Jurisprudence* 165; ‘Once More Into the Fray: Challenges for Legal Positivism’ (2008) 54 *University of Toronto Law Journal* ; ‘Freedom and the Rule of Law’ (2009-10) 61 *Alabama Law Review* 827; ‘For the Record: A Final Reply to NE Simmonds’ (2011) 56 *American Journal of Jurisprudence* 115.

<sup>125</sup> Ronald Dworkin *Law’s Empire* (Fontana Press, 1986) 65-66, 103-104.

interpret the words of the *Führer* literally, but all other areas of law loosely and in light of the *Führer's* will.<sup>126</sup> Hart was willing to call this “law”; for Rüthers this was *Entartetes Recht* or “degenerated law”. Had the *Reich* lasted another thousand years, it seems likely that it would have had to remain at least this normative; it is a *conditio sine qua non* of authoritarianism. Hypothetically, an elder in a small, close-knit community, might resolve disputes in this way without express rules or a sense of being bound by past decisions. This elder may be good or evil, fair or unfair, wise or foolish. Those of us subject to this ‘lawgiver’ would find it hard to arrange social affairs. It is difficult to imagine such a system expanding to anything like a state level yet remaining effective. Furthermore, even the most basic legal systems that we know about have much more regard for due process and are far more normative than the Nazi concept.<sup>127</sup> Nevertheless, Hart (if not Fuller) may still be willing to say of such a (hypothetical) community that it has a concept of ‘law’, provided that the elder in question affords priority to the notion that her judgements are dependent on the facts of the matter at hand, facts which may contradict her initial intuitions.<sup>128</sup> There may be no identifiable, prescribed rules or even a ‘custom’ beyond the notion that this one individual is in charge. But there is at least a fetter on the power that this elder can wield; she is still be bound by *something*. In a very loose sense, then, we might be willing to say that such a community has ‘rule of law’, albeit that its features are very different to our normal understandings. Let us assume, for the moment, that the issue of whether to call this ‘law’ falls within the parameters of disagreement between Fuller and Hart. There is a more fundamental reason to doubt that the Nazi concept cannot be afforded the name ‘law’ at all under the basic assumptions made by both Fuller and Hart.

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<sup>126</sup> Rüthers (n 35)

<sup>127</sup> See E Adamson Hoebel *The Law of Primitive Man* (Harvard University Press, 1954)

<sup>128</sup> Hart’s allusions to ‘primitive legal systems’ are notoriously scant. It is, thus, an matter of debate as to whether the system just described would even be ‘normative enough’, given Hart’s remarks about the need for something like ‘custom’ in such a small, tight-knit, community, see H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed., (Oxford University Press, 1994) 91-93.

#### 4.b. Facts

In the minimally normative, tribal system that we considered in the previous section, imagine if the elder charged with dispute resolution did not care about fact – if there were nothing that could, even hypothetically, count as evidence against her initial instinct. There may be that single norm “what the lawgiver says, goes”, but this time, even if I have demonstrable evidence that I followed the will of the lawgiver, I will still be punished if the lawgiver wills it.

Some may accept this is an example of ‘law’. Such a position cannot distinguish ‘law’ from ‘power’ conceptually – one is just a sub-category of the other. Some contemporary positions in Anglo-American legal philosophy hold this very position – “law” is the exercise of unfettered power, dressed up in the language of reason and rationality.<sup>129</sup> If one holds such an understanding of law as a concept, then it tells us nothing to discover that unfettered and arbitrary power facilitates the worst forms of oppression and immorality. Of course it does. This option is open to neither Fuller nor Hart. Their subject matter, their concept of ‘law’, was distinct from unfettered and arbitrary power.<sup>130</sup> For them, it *was* both meaningful and worthwhile to question the possibility of a ‘wicked regime’ and the relationship between ‘law and morality’. For both Fuller and Hart a sense of fidelity to law was an important part of the concept. We show this fidelity through our actions. There is nothing to which one could

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<sup>129</sup> See Stanley Fish *Doing What Comes Naturally* (Clarendon Press, 1989) and *The Trouble with Principle* (Harvard University Press, 2001) and Pierre Schlag *The Enchantment of Reason* (Duke University Press, 1998). It is telling that each acknowledges the influence of Heidegger. See Gary A. Olson, *Fish Tales: A Conversation with ‘The Contemporary Sophist’* in Stanley Fish, *There’s No Such Thing as Freedom of Speech and It’s a Good Thing Too* (Oxford University Press, 1994) 299-300, 281 and Pierre Schlag *Normativity and the Politics of Form* (1981) 139(4) *University of Pennsylvania Law Review* 801, 829, 833.

<sup>130</sup> As a result, the issue barely attracts discussion. Moore is one of few jurists to articulate the centrality of empirically verifiable fact for his concept of law, see especially Michael S. Moore, ‘Moral Reality’ (1982) *Wisconsin Law Review* 1061, ‘A Natural Law Theory of Interpretation’ (1985) 58 *Southern California Law Review* 277, ‘Moral Reality Revisited’ (1992) 90 *Michigan Law Review* 2424, ‘Legal Reality: A Naturalist Approach to Legal Ontology’ (2003) 21 *Law and Philosophy* 619.

show fidelity if the facts of ones actions (what one did or did not do) do not matter in the eyes of the so-called 'legal system'.

It is thus implicit in the Fuller and Hart concept of law that facts matter in legal decision-making and that the very concept of law involves a central concern with fact. Although Hart never articulated this underlying assumption, it is a recurring theme in his work that law cannot help but reflect 'obvious truisms about human nature and the world we live'.<sup>131</sup> It is only by making such a commitment that Fuller and Hart can retain their distinction between law and arbitrary power, make their claims about the centrality of fidelity to law, and take seriously the question of 'great evil written into law'. The same is true of the entire jurisprudential tradition that has followed these writers and, one suspects, a great deal of other concepts of law too. This conclusion means one of two things. Either the Fuller/Hart concept of law is fundamentally flawed because it assumes a feature that is absent in legal systems, or the *volkish* Nazi concept of law, one that sees facts as trivial is a genuine outlier. *Volkish* Nazism may have had in mind a concept referred to as 'law', but this is yet another example of what Adorno called 'jargon', a word used in a way that twists the meaning to something that is utterly different from the manner in which it is used elsewhere. To this end, we can recall Hart's notion of a starting point for this sort of analysis; 'no such legal system has existed or could endure'. Of course, one could not hope to survey all legal systems within a lifetime, let alone within a single essay. Instead, let us go straight to the heart of the matter. We will look first, briefly, at a weak form of this argument, specifically the suggestion that legal systems unlike our own are often far more 'mystic'. We will then examine various versions of a stronger form, that is, the argument that the legal systems Fuller and Hart took as their starting point, those of the United Kingdom and the United States of America, are not so dissimilar to the Nazi system in their treatment of fact.

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<sup>131</sup> See Hart (n 128) 91, 185-193



## **5. 'No such system has ever existed'?**

If we take it that any meaningful concept of law must place some priority on the notion of empirically verifiable facts about which our intuitions might be wrong, this raises an obvious issue. It seems likely that every legal culture has failed to afford due priority to fact to at least some extent and at some point in its history (probably even now). One might object that if we are to deny the name 'law' to any system that prioritizes intuition and prejudice over fact, there would be no system worthy of the name. That the *volkish* concept of law falls outside that of Fuller and Hart might tell us that their debate is entirely wrongheaded, in this scenario. There are several possible variations on this point, some of which have been employed by writers like David Fraser to claim that the Nazi legal system was just as 'legal' as ours. I shall now deal with a number of the more important of these objections.

First, other societies may have placed more stock in superstition, faith or intuition. If we discount the Nazi 'concept of law' on the basis of its hostility to empirically verifiable fact, one might suggest that we must also reject the notion that these societies had a concept of law.

This suggestion is based on a false analogy. These sorts of legal systems do not (or did not) ignore available evidence in the manner of Nazism. There are various examples of expressly 'anti-enlightenment' language within Nazi writings<sup>132</sup>; in his diaries, Victor Klemperer noted that "the regime sees education, scholarship, enlightenment as its real enemies and attacks them accordingly".<sup>133</sup> Others, such as Adorno and Horkheimer have

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<sup>132</sup> See Müller (n 6) 70-72, for discussion see Bracher (n 32) 40-41.

<sup>133</sup> *I Shall Bear Witness: The Diaries of Victor Klemperer 1933-1941* (Martin Chambers tr, Weidenfeld and Nicholson, 1998) 52. Klemperer was a Jewish academic, living and working in Nazi Germany.

argued instead that “reversion to mythology” is inherent in post-enlightenment thinking.<sup>134</sup> The forces of modernity did play an important role in creating the environment in which Nazism was able to attain power. Detlev Peukert argues that several elements of crisis, combined with the failure of the Weimar Republic as a first experiment in modern democracy, lead to the rise of Nazism – modernity created an environment for reactionary forces to grow, question and ultimately attack it.<sup>135</sup> Yet this debate is slightly off our topic. Nazism’s overt hostility to empirically verifiable fact, rational explanation, and causality is hostility to something far older. Few contemporary legal systems adhere to a ‘spiritual’ notion of adjudication that we have seen in the *volkish* concept of law. Such systems may have existed in the past. These appeals to spirituality in decision-making seem irrational now. But these appeals were typically efforts to explain facts about the physical world in the absence of anything better and available. For example, trial by ordeal may seem utterly irrational to readers. Yet in many ancient cultures it was considered a judgment of the relevant god. As such it was premised on the notion that the world is the product of divine intervention. In Ugaritic civilizations, for example, efforts to explain why some people drowned at sea in accidents and others survived led to the conclusion that ‘Yam’ was both the river-god and the judge-god. Those that drowned were being punished. It was no huge leap, therefore, to conclude that Yam would spare the innocent and drown the wicked if there was no human way of determining guilt or innocence.<sup>136</sup> Such a basis is demonstrably false now, but the practice fit with available evidence in Ugaritic cultures for explaining how things are.

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<sup>134</sup> Theodor Adorno and Max Horkheimer *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott, tr, Stanford: Stanford University Press, 2002), see also Zygmunt Bauman *Modernity and the Holocaust* (Cornell University Press, 1989).

<sup>135</sup> Detlev JK Peukert *The Weimar Republic: The Crisis of Classical Modernity* (Richard Deveson tr, Hill and Wang, 1991). As Peukert notes elsewhere, an important part of the movement’s rise to power was the manner in which it successfully garnered support from the rising middle class by using ‘modernising’ propaganda to tap into the new consumer culture. The movement was ‘modern’ when it came to harnessing the power of advertising, see Jeffrey Herf *Reactionary Modernism: Technology Culture and Politics in Weimar and the Third Reich* (Cambridge University Press, 1984), Herbert Marcuse *Negations* (Jeremy Shapiro trs, Beacon Press, 1968) 3-42, Peukert (n 75) 38-42, and Bracher (n 32) 189-204.

<sup>136</sup> See Mark Smith, *The Ugaritic Ba'al Cycle; Vol. I: Introduction with Text, Translation & Commentary of KTU 1.1-1.2*, (E.J. Brill, 1994)

Ordeal was also typically used as a last resort, that is, in the *absence* of evidence and where there are competing and credible accounts of the relevant facts.<sup>137</sup> On the mystic, Nazi ‘concept of law’, intuition was to be *preferred* to evidence. There was also a genuine possibility that a trial by ordeal could produce either result – an individual could point to something considered ‘proof’ in order to establish guilt or innocence.<sup>138</sup> No such possibility existed in the ‘spiritual’ notion of criminality that we see in Nazi mysticism. The fact that we have become less superstitious as our scientific explanations acquire greater predictive validity only proves the point. That our ability to empirically verify facts is imperfect is entirely separate from the claim that we must attempt to do so in order to have law. *Volkish* Nazism deliberately ignored evidence, preferring superstition when so much better was commonly available, and had been for some time. Most of Nazism’s core claims about German Jews, from physical appearance to character traits, had had been disproven in the anthropologist Maurice Fishburg’s comprehensive 1913 study, the results of which were readily available and widely known in academic circles.<sup>139</sup> As noted, Nazism used a ‘jargon’ of scientific terminology to justify some of its claims. The movement also employed scientific methods in the development of weaponry, compulsory sterilization, and in human experimentation.<sup>140</sup> Gas chambers, weaponry, and trains require biology, chemistry, and physics. But any evidence that did not reinforce stereotypes or fit with *volkish* instinct would be disregarded or ignored (in the manner of evidence regarding race or historical evidence of earlier German civilizations)<sup>141</sup>. This response leads us directly to a second objection.

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<sup>137</sup> See Peter Leeson ‘Ordeals’ (2012) 55 *Journal of Law and Economics* 691

<sup>138</sup> *Ibid.*

<sup>139</sup> See Ehrenreich (n 44) 4. For an example of radical anti-rationalism in court see Müller’s account of a trial at the Posen Special Court in 1941. A Polish man was sentenced to death for injuring an army dog; the only ‘evidence’ was that he appeared afraid of the dog when it barked at him in court, (n 6) 166-167.

<sup>140</sup> Justification of this paradox was a key distinction between Nazism and various counter-enlightenment movements that preceded it, see Herf (n 135) 1-17.

<sup>141</sup> See Ehrenreich (n 44) 5-13. On how *volkish* presumptions forced theories like ‘racial hygiene’ into the practice of medicine see Michael H Kater *Doctors Under Hitler* (University of North Carolina Press, 1989) 111-

Terrible moral wrongs were committed by Allied States in the same era. Fraser provides a number of useful illustrations in this respect, including eugenics projects, the compulsory sterilization of the disabled and racial segregation, each of which was far from unique to Nazi Germany.<sup>142</sup> The reasoning behind segregation in The United States and elsewhere was informed by similarly outmoded (or dubious) ‘science’. The argument thus proceeds that if one were to deny the status of law to the Nazi concept, on the basis that it deliberately contradicted available scientific evidence, then, the same must be true of American ‘law’ (until *The Civil Rights Act of 1964* at very least).

This is an important challenge. By implication, the legal system of the United States in that era would also fall outside the Fuller/Hart concept of law. Yet there is a clear distinction to be drawn. Evil legal systems can and do exist; perhaps we ought to regard the United States under segregation, or Sweden in an era of compulsory sterilization, as such regimes. Nevertheless, those states had capacity to change underlying assumptions, in light of demonstrable fact, and hence to change their laws. Opposition to Nazi ideology also played a significant part in the re-evaluation of domestic attitudes towards race and the legislative and judicial changes that followed.<sup>143</sup> There may have been a lag between the scientific paradigm shift, a corresponding shift in popular opinion and, eventually, changes to substantive law. In societies in which such attitudes are deeply ingrained, increasing levels (and standards) of education would appear to be a pre-requisite; the populace at large needs access to the aforementioned paradigm shifts before they can influence personal attitudes.<sup>144</sup> It is no comfort to those who suffered under segregation that change came too late. Nevertheless, the system was open to correction of whatever misguided beliefs about race

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126. See also the fate of academic scientists in Germany when instructed to forsake objectivity for ‘the spirit of National Socialism’ Beyerchen (n 52) 51-56.

<sup>142</sup> Fraser (n 30) 104-117.

<sup>143</sup> See Michael J Klarman ‘Brown, Racial Change and the Civil Rights Movement’ (1994) 80(1) *Virginia Law Review* 7.

<sup>144</sup> See Bernard Caffrey, Simms Anderson II & Janet Garrison, ‘Change in Racial Attitudes of White Southerners After Exposure to the Atmosphere of a Southern University’ (1969) 25 *Psychology Reports* 555

underlay segregation. As Fraser notes, apologies continue to this day, as do attempts to somewhat rectify these past wrongs. Nazism had no such capacity for change, apology, and correction.<sup>145</sup> No evidence could have amended its preconceptions. It is impossible to envisage a world in which a Nazi state might have admitted it was wrong about race, repealed all of the relevant legislation and yet remained ‘Nazi’. This capacity is a central assumption within the Fuller/Hart concept of law, constitutionally, legislatively and judicially; empirically verifiable facts about the world might cause us to radically rethink preconceptions.<sup>146</sup> Hart included ‘rules of change’ within his concept of law expressly for this reason; Fuller seems to assume that it is part of law’s very nature that its rules should be hostage to change over time.<sup>147</sup> Furthermore, at a judicial level, when new evidence comes to light cases can be re-opened and decisions reversed. This basic notion distinguishes legal systems which have made catastrophic errors in the past from a system that requires us to see law and unfettered, arbitrary power as the same thing. Even a ‘wicked’ legal system, which fits within the Fuller/Hart concept of law, has this capacity for self-reflection and self-improvement. It can recognise and right its wrongs. A system in which law and arbitrary, unfettered power are the same thing cannot; it has nothing to correct to and no amount of fact-finding and truth revelation will change its course. In the *volkish* Nazi ‘concept of law’ this is reflected both in the notion of ‘*volk*’ as a would-be constitutional *grundnorm* and in the hostility towards fact-finding in court.

Fraser provides an interesting parallel between the treatment of Nazi propagandist Julius Streicher at Nuremberg and the Nazi legal system. As editor of *Der Stürmer*, Streicher played a significant role in promoting virulent anti-Semitism prior to the Holocaust, using

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<sup>145</sup> There is no possible Nazi equivalent to the Clinton apology noted by Fraser (n 30) 421. The same response meets each of Fraser’s examples of shameful instances in the histories of liberal democracies for which states apologise and from which they attempt to distance us through safeguards and policies. For more on this distinction between Nazism and rationality, see Beyerchen (n 52) 389.

<sup>146</sup> This is also the core difference in the thought experiment Fraser invites, (n 86) 401-408; any claim by the Chicago School about economic efficiency is disprovable on the basis of fact.

<sup>147</sup> Hart (n 128) 92-93, 95-96, Fuller (n 70) 33-38, 79-81.

what we would now readily identify as ‘hate speech’. In the Nuremberg trials Streicher was found guilty of crimes against humanity on the basis of ‘incitement to murder and extermination’ and subsequently executed. Fraser argues that this verdict is problematic. No evidence was introduced at trial to show that Streicher knew of ‘exterminatory’ practices. It was not firmly established that his various racist rants had a causative effect. In fact, by the commencement of The Holocaust, Streicher had fallen from grace (and influence) to the extent that he was under house arrest. Fraser’s assessment is that Streicher was ‘convicted and executed because of who he was and not because of what he did’.<sup>148</sup> As such, Fraser contends, Streicher was treated in a manner similar to defendants in Nazi courts towards the end of the regime.

If we extend Fraser’s logic further, this might suggest that International Law falls outside the Fuller/Hart concept of law for precisely the same reason that I have argued the *volkish* concept falls outside. Fraser’s point about the Streicher verdict is defensible and in some ways convincing. Telford Taylor, Chief Prosecutor at Nuremberg, expresses serious misgivings about the verdict.<sup>149</sup> Again, however, there is a crucial distinction to be drawn between the *volkish* concept of law and the Fuller/Hart concept in this respect. This distinction allows International Law to fall within that concept of law, while the *volkish* concept remains outside.<sup>150</sup> Fraser’s critique makes sense precisely because fact was against Streicher’s sentence. This is a serious criticism of a particular trial. By way of contrast, Nazi jurisprudence wished to make this a basis for all criminal prosecutions. In our legal systems this sort of thing *could* happen, but this is wrong or at least highly problematic; Nazi reform

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<sup>148</sup> Fraser (n 30) 131-138, quotation at 133.

<sup>149</sup> See Telford Taylor, *Anatomy of the Nuremberg Trials* (Bloomsbury, 1993) 269, 492-493, 496, 590, 598-599. It should be noted that good arguments have been made in defence of the verdict as part of an emerging set of principles, see Margaret Eastwood “Hitler’s Notorious Jew-baiter: The Prosecution of Julius Streicher” in Predrag Dojcinovic (ed.) *Propaganda, War Crimes Trials and International Law: From Speakers’ Corner to War Crimes* (Routledge, 2012) 203.

<sup>150</sup> On International Law more generally within Hart’s concept see (n 128) 213-237. Fuller wrote little on this topic apart from his discussion of the relationship between International Law and “customary” law, see Lon L. Fuller “Human Interaction and the Law”(1969) 14(1) *American Journal of Jurisprudence* 1

of the legal system was in large part an effort to ensure that that this sort of thing *would* happen and should be held up as an example of ‘true German law’.

Of course, failure to pay due attention to empirical evidence is not a thing of the past in law and policy-making. In 2008, Professor David Nutt was appointed Chair of the Advisory Council on the Misuse of Drugs in the United Kingdom, a body with a mandate to advise government on illegal drug use and to make recommendations on classification. Nutt’s findings in relation to the harm caused by various illicit substances undermined existing policy, as did his suggestion that such substances should be reclassified. This led to clashes between Nutt and Cabinet members, culminating in Nutt’s dismissal on the basis that he ‘cannot be both a government adviser and a campaigner against government policy’.<sup>151</sup>

In this example, the UK government denied empirical evidence in favour of entrenched belief. Nevertheless, this does not require us to hold that there was no law in the UK at the time, even if one wishes to hold that law must be fact-led. The Nutt example is instructive for two reasons. First, as Fuller notes that the difference between good legal order and order that does enough to count as law at all is likely to be a matter of degree. Perhaps an ideal legal system would always pay due regard to fact, and consistently demonstrate willingness to change received notions on the back of evidence. Existing legal systems are likely to have a patchier record. There is a gulf between a less than perfect legal system and the sort of wanton disregard for evidence at every level that Hitler, Goebbels et al desired. The idea that law is fact-led also gives us a criterion for what good law, and good policy, ought to do. We may point to cases where fact is ignored in favour of a politically expedient outcome. But this does not mean that such a practice is endemic within a system, let alone its governing principle. The precise distinction between ‘very bad law’ and ‘not law at all’ may be fine within the Fuller/Hart concept. As a tentative suggestion, we might take it that the

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<sup>151</sup> See then Home Secretary Alan Johnson’s letter to *The Guardian*, 2<sup>nd</sup> November 2009.

scales automatically tip from ‘bad law’ to ‘not law at all’ wherever the notion of whom we consider a citizen (something like ‘the *volk*’) defies any sort of objectively verifiable test, even hypothetically. Second, to hold that a commitment to the notion of empirically verifiable facts about the world about which our intuitions may be wrong is part of the concept of law is not to say that this is the only consideration. Fact-tracking and due regard for scientific evidence are not *all* that matter. They will not solve all legal and ethical issues. The episode involving David Nutt comes from a consultation period. Unlike under Nazism, government policy is not ‘law’ without enactment in the United Kingdom. While the argument from harm, presented by Nutt, ought to be given due regard, there are other issues to consider in matters of drug classification. Many counter-arguments are also fact-led. Increasing the number of widely available, legal intoxicants may place a greater strain on already over-burdened health services, for example. No one fact determines policy. A good system will balance these arguments and reach the best policy that it can; a system of oppression will have a firmly held dogma that cannot be reversed.

Finally, to believe that one’s experience of legal systems shows them to be inherently fact-led might be accused of naivety. It might be proposed that government, policymakers and judges pay lip service to fact, but actually do something else. The body politic thus falls for a trick, as do jurists within the Fuller and Hart traditions (and probably a great many others). According to this position, law *is* the intuitions and sentiments of the powerful and absolutely nothing more.<sup>152</sup> Our political and legal systems use fact and science as a ‘stamp of legitimacy’ when it is politic to do so, the argument continues, just as Nazism did from time to time, with no real commitment to the revision of hypotheses on the basis of experiment and observation. Space prohibits a full response to this proposition. But it has the weight of history against it. Law often corrects itself on the basis of empirical evidence; legal

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<sup>152</sup> (n 129).



definitions are altered in light of scientific advancement; decisions are overturned in light of new evidence or discoveries; governments fail to secure convictions that would have been politically useful. It is not only a fundamental feature, but also a great strength that law affords priority to empirically verifiable facts about the world about which our intuitions might be wrong. Uncertainty is required for progress in science; it only develops by constantly doubting and reflecting upon its underlying assumptions. The same is true of law. Our capacity to question and doubt our preconceptions, in the light of discoverable facts, is a prerequisite for social and legal progress. We have seen recent and profound change when the Supreme Court of the United States and a referendum in the Republic of Ireland recognised that the principle of equality before the law should extend to same-sex marriage. This has happened in spite of millennia of irrational bigotry and pseudo-scientific arguments to the contrary. We do not know for certain the motivations behind these sorts of advancements. Judges could lie and referenda do not come with an explanation from the populace as to why they have voted the way that they have. My point instead is that the burden of proof is surely with those who would hold that we are just as superstitious and irrational as ever. They are arguing against the general arc of history in spite of the occasional, atavistic, blip. Legal and political systems in advanced Western Liberal Democracies are far from perfect. The ‘will of the people’ might well be based on something other than fact and rationality, as the recent success of various populist movements suggest.<sup>153</sup> Yet, as scientific knowledge has improved our legal systems have looked less oppressive over the longer term. We no longer justify slavery, deny women the right to vote, or allow discrimination on the basis of gender, race, ethnicity and sexual orientation because of some spurious pseudo-science as we did in the past. The contemporary rise of the new right, with its distaste for fact-based argument, should not blind us to the direction in which

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<sup>153</sup> See Julia Shaw, ‘Brexit and Trump: When Fear Triumphs over Evidence’ <http://blogs.scientificamerican.com/mind-guest-blog/brexit-and-trump-when-fear-triumphs-over-evidence/> accessed 28<sup>th</sup> June, 2016.

we have been moving. To ignore all of this, to insist that law and unfettered power are the same, is to cling to an intuition and ignore fact. It is to accept the same mystic, anti-rational ideology that we saw as central to *volkish* Nazism.

## **6. Conclusion – Substantive Moral Content in the Fuller/Hart Concept of Law**

Any concept of law whereby the legal system must be centrally concerned with fact brings with it a commitment to law's substantive moral content. The incompatibility that we have seen between Nazism and the concept of law under discussion between Fuller and Hart has a direct relation to the moral bankruptcy of the regime. This is not to leap from 'is' premise to 'ought' conclusion. It is simply to say that whenever a society shares the basic features of a concept of law with Fuller *and* Hart, there is a promise made to those who are subject to it that facts will lead outcomes. In the same way that we might honour any commitment well, minimally or not at all, we might have a legal system that upholds this promise well, minimally, or abandons this pledge in favour of unfettered, arbitrary power. *Volkish*, mystic Nazism had the third of these possibilities in mind; the moral bankruptcy of its vision and its concept of 'law' went hand in hand.

The commitment to being fact-led is far from a panacea for all ills in law. The argument presented here leaves untouched the possibility that certain types of evil regime might have law, even in the sense in which Fuller and Hart understood the term.<sup>154</sup> Nevertheless, there is one specific type of oppression that this concept cannot support. Consider the following extract from *Portrait of the Artist as a Young Man*:

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<sup>154</sup> See, Kramer (n 124).

— Tell us, Dedalus, do you kiss your mother before you go to bed?

Stephen answered:

— I do.

Wells turned to the other fellows and said:

— O, I say, here's a fellow says he kisses his mother every night before he goes to bed.

The other fellows stopped their game and turned round, laughing. Stephen blushed under their eyes and said:

— I do not.

Wells said:

— O, I say, here's a fellow says he doesn't kiss his mother before he goes to bed.

They all laughed again...What was the right answer to the question? He had given two and still Wells laughed.<sup>155</sup>

There *is* no right answer. Anything Stephen Dedalus does will produce the same response.<sup>156</sup> It is no coincidence that Freisler humiliated defendants at trial, much like Joyce's schoolyard bully.<sup>157</sup> Freisler was the nearest thing that we had to the Nazi 'ideal', the blueprint for how senior officialdom wanted its judges to behave. If we accept that a system is only law if it is committed to the possibility that fact might be in one's favour, this particular type of evil cannot govern even a poor legal system. It has been beyond the scope of this paper to discuss how we should weigh up competing, valid arguments that are rooted in existing human knowledge. This is a question of what we mean by reason and justice, the central issues in western legal theory. They remain our most important.

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<sup>155</sup> James Joyce *A Portrait of the Artist as a Young Man* (First Published in *The Egoist* 1914-1915, reproduced 2000) 10-11.

<sup>156</sup> See the inability of Jewish youth organizations to assimilate with early *volkish* movements, Mosse (n 36) 144-145.

<sup>157</sup> See Koch (n11) 126-174; even Freisler realized that many of his activities scarcely counted as legal, *ibid* 69, 143.

