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The Jargon of 'Law and Order': From Nazism to the Trump Campaign via Heidegger

> …it isn't only Nazi actions that have to vanish, but also the Nazi cast of mind, the typical Nazi way of thinking and its breeding-ground; the language of Nazism.[1]

The atrocities of the Second World War were supposed to be the greatest scar on the conscience of Western, liberal, democracies. Nazism is so etched in our minds as a byword for the evil that human beings are capable of inflicting on others as to be cliché. Yet the far-right is more powerful, globally, than at any point since the 1930s.[2] How is this possible?

Many elements have contributed to this extraordinary moment. The respective roles of economic factors,[3] social media,[4] and a general sense of 'fear'[5] are well-documented. Academia has played an important part in the creation of this environment too. While Nazism was defeated militarily and its political apparatus destroyed, the works of its most celebrated philosophers have flourished in the post-war era. This paper is a call to those of us who have used writers like Martin Heidegger as philosophical guides in the past to reassess how we engage with this tradition. When we perpetuate these ideas, even in abstract, philosophical discussions, we unwittingly perpetuate a conception of the relationship between human beings and the world that is conducive to far-right political and legal goals.

In the first section, I explore how the 'language of Nazism' twisted concepts such as 'law' and 'order' towards Nazi political ends. In the second, I explain how Donald Trump's self-description as the 'law

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[1] See Victor Klemperer *The Language of the Third Reich*, translated by Martin Brady, (London and New Brunswick: Athlone Press, 2000) 2

[2] "'White Europe': 60,000 Nationalists March on Poland's Independence Day" *The Guardian* November 12, 2017.

[3] See Ronald Inglehart and Pippa Norris "Trump and the Populist Authoritarian Parties: The Silent Revolution in Reverse" *Perspectives on Politics* 15 (2) (2017) pp.443-454

[4] See Brian McNair "From Control to Chaos and Back Again" *Journalism Studies* 18(1) (2017) p.1

[5] See, Mathew C. MacWilliams "Intolerant and Afraid: Authoritarians Rise to Trump's Call" in *Why Irrational Politics Appeals – Understanding the Allure of Trumpism* in Mari Fitzduff, ed., (Connecticut: Praeger Publishers, 2017) pp.121-138, and Karen Stenner *The Authoritarian Dynamic* (Cambridge: Cambridge University Press, 2005).

and order candidate' only makes sense if understood as a contemporary form of the same exercise. In the third, I illustrate how Heidegger-inspired analysis of Nazi law normalizes not only Nazi law itself, but the underlying philosophy that justified Nazi law. Academia thus plays a part in the creation of a political culture that is conducive to far-right politics. We have normalized the underlying philosophical commitments; and so we normalize the conclusions even if we disagree with them.

The point in all of this is not to dismiss Heidegger's work. He remains among the most important philosophers of the twentieth century. We could not remove this tradition from our intellectual landscape if we tried; it is far too deeply embedded. My point instead is that we must re-evaluate how we engage with work within the Heideggerian tradition. Heidegger scholars (including me) have tended to introduce his work in terms of its qualities and its possibilities for enriching discourse; we should not do so without also contemplating its flaws. We must present this tradition through a prism of coming to grips with the reasons why such a conception of the relationship between human beings and the world should lend itself towards far-right positions in law and politics. In my conclusions I suggest that we should place the notion of 'being-wrong' at the core of our engagement with this tradition.

I. Jargon, Law, and Order

Nazism had a philosophical wing. Heidegger was the most notable figure.[6] This wing aimed to provide a philosophical grounding for the *volkish* ideology that came to dominate Nazism. Such grounding required a perversion of language. Nazi philosophy turned every debate into an imposition of will. To do so, it forced out typical understandings of concepts and inserted radically different ones

[6] Heidegger's relationship with the Nazi party was complex; though as more evidence comes to light, it has been increasingly difficult to defend, see in particular Martin Heidegger *Ponderings II-VI: Black Notebooks 1931-1938* translated by Richard Rojcewicz, (Bloomington, IN: Indiana University Press, 2016) and Ingo Farin and Jeff Malpas, eds., *Reading Heidegger's Black Notebooks 1931-1941* (Cambridge, MA: Massachussetts Institute of Technology, 2016). There is a vast literature on this issue, see Emmanuel Faye *Heidegger: The Introduction of Nazism into Philosophy* translated by Michael Smith (New Haven, CT: Yale University Press, 2009), Richard Wolin *The Politics of Being: The Political Thought of Martin Heidegger* (New York: Columbia University Press, 1990), Richard Wolin *The Heidegger Controversy: A Critical Reader* (New York: Columbia University Press, 1991), Rüdiger Safranski *Martin Heidegger: Between Good and Evil* translated by Edward Osers (Cambridge, MA: Harvard University Press, 1999) pp.225-389, and Hans Sluga, *Heidegger's Crisis: Philosophy and Politics in Nazi Germany* (Cambridge, MA: Harvard University Press 1993).

in their place. I borrow from Adorno by referring to the Nazi versions as 'jargon', but other writers have referred to the same phenomenon in different ways.[7]

It is difficult to pin exact commitments to this philosophical form. The style deliberately rambles and there is little attempt at consistency (rebelling against such qualities was, in part, the point). There are five broad steps. Let us use this as a rough initial outline before we discuss specific issues:

1. The most important step is an abandonment of any sense that word meaning is fixed.. In twentieth century analytical philosophy of language, theories of word meaning fall into two broad camps. Some hold that word-meaning is a matter of 'reference' to some object or phenomenon in the 'external' world.[8] Others hold that the meaning of a word is determined by ordinary or conventional 'use'.[9] The first step in the creation of jargon is to deny each of these. Jargon painstakingly discusses the meaning of individual words. But 'meaning' resides in the subject.[10] With nothing to fix meaning – no object and no convention –literal and figurative use of words is blurred.[11]

2. Since nothing acts as ultimate arbiter of meaning, alternative positions are 'negated' rather than 'refuted'. That is to say, there is no argument on the basis of the relevant issues or substantive points.[12] Counter-arguments are dismissed on the grounds of some personal

[7] Theodor Adorno *The Jargon of Authenticity* translated by Knut Tarnowski and Frederic Will (London: Routledge 2003). Klemperer, a philologist, referred to this as *Tiefenstil* (stylistic profundity), see *The Language of the Third Reich* pp.256-257, see also Pierre Bourdieu, *The Political Ontology of Martin Heidegger* translated by Peter Collier (Cambridge: Polity Press, 1991)

[8] See Gottlob Frege "On Sense and Reference" in *Translations from the Philosophical Writings of Gottlob Frege* Max Black and Peter Geach, eds., (Oxford: Basil Blackwell, 1960) pp.56-78

[9] See John L. Austin *How to do Things with Words* (Oxford: Clarendon Press, 1962), Ludwig Wittgenstein *Philosophical Investigations* (Oxford: Basil Blackwell, 1953).

[10] Adorno, *Jargon*, p.71, 102.

[11] Op. cit. p.28. Sporting analogies were used similarly, Klemperer, *Language of the Third Reich*, pp. 230-236. For a contemporary example see Oren Ben-Dor, *Thinking About Law: In Silence With Heidegger* (Oxford and Portland, OR: Hart Publishing, 2007). As I discuss elsewhere, these false equivalences trivialize real suffering, see **[REDACTED]**. This 'humanism' was radically dehumanizing, a jargon of 'Human' replaced humanity, see Adorno *Jargon* pp.53-54, see also Bourdieu, *Political Ontology* p.68.

[12] See Adorno *Jargon* pp.1-2, 76 and Bourdieu *Political Ontology* p.23, 82.

attribute, from race to a general 'lack of spirituality'.[13] Debate is thus avoided.[14] If meaning is relative, this is to be expected. There is nothing to debate. All matters are 'personal'.

3. Jargon avoids definitions. The vocabulary is very 'matter-of-fact' and 'down-to-earth'. Yet no definition is put forward. Concepts are explained almost entirely negatively, with emphatic statements about how wrong existing understandings are.[15]

4. Firmness of belief (or 'strength') is prioritized for its own sake. This is often equated with 'spirituality'. If there is no objective or conventional meaning, as per step one, there is nothing to which one might appeal by way of support for a position. This undermines the notion of demonstration via evidence. Those who require proof – scientists and other experts - are said to lack 'authenticity'. Critical self-reflection is seen as a 'subjective deviation', a sign of weakness.[16]

5. Finally, all quests for and claims about 'true' meaning are seen as political. Everything is part of an agenda. The solution to multiple, competing interests is always a strong figurehead or a commanding source from 'the Greeks' to 'German tradition' to Heidegger's claim that 'only a God can save us'.[17] Supposedly radical approaches to meaning are thus resolved in authoritarian, retrograde ways.

While the reader may already have identified some similarities between 'jargon' and contemporary political discourse, it may be difficult to imagine how all of this would work in the abstract. The idea of law as 'order' provides a simple illustration. It is common in mainstream legal philosophy.[18]

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[13] See Adorno *Jargon* pp.48-49 and Bourdieu *Political Ontology* p. 64.
[14] Klemperer provides a good example, from personal experience op. cit., n. 9, pp.103-124.
[15] See Adorno *Jargon* pp.67-68 and Bourdieu *Political Ontology* p.36, 90.
[16] See also Klemperer on the term 'fanatical', which used to have negative connotations, *Language of the Third Reich* pp.57-61. Similarly, evolution of the term 'historic' mirrors that of Nazism, op. cit., p.221.
[17] Adorno, *Jargon* pp.28-9**,** see also Faye *Heidegger: The Introduction of Nazism* pp.113-150.
[18] There are multiple further examples of 'jargon' in law, for which Heidegger was largely responsible. Ian Ward notes Heidegger's warped version of 'freedom' (equated with 'responsibility') in *Law, Philosophy and National Socialism: Heidegger, Schmitt and Radbruch in Context* (New York: Peter Lang, 1992) pp.101-103.

Writers such as Lon Fuller and John Rawls, broadly (and non-controversially) took law as order to mean a system that is rule-based, and at least partly prescribed. Carl Schmitt equates law with 'concrete order' in his Nazi-era writings.[19] But Schmitt's concept contains little by way of system, is non-normative, and its basic principles are un-enumerated. To create this twisted concept of order, Schmitt takes each of the steps that we have identified as key features of 'jargon'.

1. Schmitt relativizes 'order'. For Schmitt, concepts of law vary according to 'peoples', 'race' and 'era'.[20] In an anti-Semitic allusion, he claims that certain peoples "exist only in law", because they have no church, no territories and no land. As a result, they would find the 'Germanic' concept of concrete order 'inconceivable, mystical, fantastic and ridiculous'.[21] Even this 'Germanic' concept is not fixed by anything measurable – popular opinion or common use, for example.

2. Next, Schmitt negates more conventional understandings of order. Consider the following claim:

> For concrete-order thinking, "order" is also not juristically primarily "rule" or a summation of rules, but, conversely, rule is only a component and a medium of order….The norm or rule does not create the order; on the contrary, only on the basis and in the framework of a given order does it have a certain regulating function with a relatively small degree of validity.[22]

Schmitt does not point out flaws in the notion that public order is fundamentally rule-based. He does not consider counter-arguments, or note any specific scholar. Throughout, he talks of

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See also Heidegger's claim that Germany's exit from the League of Nations was a 'turning towards' the 'community of peoples', op. cit., pp.107-08.

[19] For analysis of the link between Heidegger war-era Schmitt see Ward *Law, Philosophy and National Socialism* pp.117-20 and Faye *Heidegger: The Introduction of Nazism* pp.151-172. Schmitt's position fluctuated greatly. Shortly before the 1932 elections he warned against voting for the National Socialists, see "Der Missbrauch der Legalitaet" *Taegliche Rundschau* July 19, 1932. Here, we are only concerned with his Nazi writings.

[20] Carl Schmitt *On the Three Types of Juristic Thought* translated by Joseph W. Bendersky (Westport, CT: Praeger, 2004) p.45

[21] Op. cit.

[22] Op. cit. pp.48-49

'overcoming' the notion of order as rule-based.[23] He never sets out reasons why this might be flawed. Relativizing the concept by 'peoples' in step one, has led to this second feature. One's understanding of the concept is predetermined by one's race: there is no point in trying to convince, as there is no fixed 'real' meaning either objectively or inter-subjectively.

3. Schmitt provides no definition of 'concrete-order' in any of the publications in which he discusses the term. Insofar as we can glean a loose description, concrete order is non-normative. It is organic, hence 'organization' rather than 'system';[24] it naturally occurs within institutions and communities, without the need for prescription from outside. It is 'spiritual'; only "initiates" who directly experience it can actually feel it.[25] Yet this 'concrete order' is said to be 'down-to-earth'. Adorno notes that this aspect masks an instruction behind the language of factual description, or the prediction of something that will 'inevitably' happen – "that is the way it is done here" actually tells people to "do it this way".[26] It was a hallmark of Nazism that many atrocities were conducted via such double-entendre. Heidegger's philosophy refers to listening to 'the unsaid'.[27] A favourite claim of Holocaust deniers is that there is no evidence of a command to execute Jews.[28] There did not have to be. Loyal Nazi 'initiates' were, by law, the only ones that could hold positions of power in the legal system, the police force, the judiciary, the government or the army.[29] Nazi senior officialdom banked on the notion that such party loyalists could be trusted to act in the interests of the cause without express direction.

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[23] Op. cit. p.48.

[24] As Klemperer notes, the term 'system' carried connotations of the Weimar Republic; Nazism spoke of an 'organization' instead. See Klemperer, *Language of the Third Reich* pp.97-102. Trump talked of a 'rigged'/'broken' system and highlighted the 'Trump Organization' as evidence of his leadership.

[25] Heidegger uses the term 'initiate' in a different context, but it captures Schmitt's meaning, see Schmitt *Three Types,* pp.45-50 and Martin Heidegger "Letter on Humanism" reproduced in full in *Basic Writings: Martin Heidegger* translated by David Farrell Krell (London: Routledge, 1996), pp.217-265, at 263.

[26] See Adorno *Jargon* p.71, 86.

[27] Martin Heidegger, *An Introduction to Metaphysics,* translated by Ralph Manheim (New Haven, CT: Yale University Press, 1959) 134

[28] See David Irving *Hitler's War* (New York: Viking Press, 1977)

[29] See the "Law for the Restoration of a Professional Civil Service" (Gesetz zur Wiederherstellung des Berufsbeamtentums) *Reichsgesetzblatt* (April 7, 1933)

4. Schmitt repeats these ideas forcefully. The term 'concrete' suggests something tangible and defined. Yet no evidence is introduced for this 'order' – Schmitt does not point to any aspect of German civic life at the time that operates more smoothly than the equivalent in 'liberal' societies. The quest for 'evidence' itself is described as a product of 'normativistic' thinking.[30] The closest Schmitt comes to factual support are references to German culture of the pre-Roman era. He repeatedly claims that law reform should be a matter of removing Roman laws from German law. This became a common Nazi claim, but it had no basis in fact. Their picture of pre-Roman German society was wildly inaccurate.[31] In addition, German Common Law and Roman law systems had become so intermixed by the twentieth century that extracting one from the other would have been impossible; it was not even clear by that point which elements had their origins in which source.[32]

5. Finally, the result is a recommendation to preserve power structures. Schmitt justifies the existing regime - an authoritarian one – and he does so explicitly. Just as Heidegger appealed to German Tradition, a God and The Greeks, Schmitt appeals to German Tradition and a Führer. Various outcomes that were, in fact, the imposition of individual wills, are portrayed as the products of a naturally occurring 'concrete order'.[33] The dictatorship is thus 'natural'.

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[30] Schmitt *Three Types* p.52, see also Martin Heidegger, *What is Called Thinking?* Translated by Glenn Gray and Fred Wieck, (New York: Harper and Row, 1968) and *The Question Concerning Technology, and other essays*, translated by William Lovitt (London and New York: Harper and Row, 1977).

[31] It relied on Tacitus' discredited account, *The Agricola and the Germania* translated by Harold Mattingly, 2nd ed. (London: Penguin, 2009), for problems with this source see J.B. Rives *Tacitus: Germania* (Oxford: Clarendon Press, 1999). I discuss this matter in more detail elsewhere, see **[REDACTED].**

[32] See Karl Lowenstein "Law in the Third Reich" *Yale Law Journal* 45 (5) (1936) p.779, pp.784-785. On Nazism's perversion of history see George Mosse *The Crisis of German Ideology: Intellectual Origins of the Third Reich* (London: Weidenfeld and Nicholson, 1966), pp.67-87, 154, 163, 301, 310, 311, Georg Lukács *The Destruction of Reason* translated by Peter Palmer (London: Merlin Press, 1980) pp.742-744, Alan Beyerchen *Scientists under Hitler* (New Haven, CT: Yale University Press, 1977) p.123 and Hannsjoachim W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (New York: St. Martin's Press, 1989) pp.22-25.

[33] See Schmitt *Three Types*, pp.48-54, 65, Adorno *Jargon*, pp.4-5, Bourdieu *Political Ontology* pp.75-76, and Hannah Arendt *The Origins of Totalitarianism* (San Diego, New York and London: Harcourt, Inc., 1966) pp.348-350, 460-463. For discussion of case law examples see Koch *In the Name of the Volk* pp.15, 55, 82, 87, 119. Michael Stolleis notes how this "concrete order" was neither "concrete" nor "order" *The Law Under the Swastika: Studies in Legal History in Nazi Germany*, translated by Thomas Dunlap (Chicago, IL: University of Chicago Press, 1998) pp.70-71, 98, 110-11.

Once these steps have been taken, Schmitt is free to twist two further concepts that are vital to Western Liberal Democratic ideas of law. The jargon of these concepts is the exact opposite of more typical understandings; a common move in Nazi philosophy.[34]

First, for Schmitt, 'rule of law' has been misunderstood. 'Normativistic' understandings of 'law' and 'order' would have it that 'rule of law' is the opposite of 'rule of man'. But the 'concrete', 'German' and 'kingly' notion of order has actually been 'destroyed' by this conception according to Schmitt. This is so, because various rules can be used against the 'king', 'master' or 'overseer'. 'Rule of law', in Schmitt's jargon, actually is rule of man via *Fuhrerordnung* – or 'leadership order'.[35]

Next, Schmitt does the same thing with 'order' itself. "Normativity" and "concrete order" are on "completely different planes".[36] Norms are "naturally always in order" and so miss the "disorder" that may exist in a "concrete situation".[37] 'Liberal' understandings of 'order' mask or interfere with 'concrete order'. Schmitt does not reference specific writers. But something like Fuller's notion of order – a functioning system, that regulates behaviour, in a rule-based, and public way[38] - Schmitt would call disorder. Similarly, anything Fuller might point to as a failure of the minimum standards of order (any of his eight failures to make law),[39] Schmitt would regard as a failure on Fuller's part to 'overcome' normativistic thinking. There *is* "order". But western, liberal, writers such as Fuller just do not understand it because they are the wrong sorts of 'peoples'.

All of this is done using jargon, in the manner exposed by Adorno and others. Here, 'overcoming' what we normally think of as 'order' and 'rule of law' is used to justify disorder and rule of *Führer*. By all accounts, this so-called 'concrete order' actually led to fluidity and disorder.[40] Many of the

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[34] See Heidegger on 'life' as 'being-towards-death', Martin Heidegger, *Being and Time*, translated by John MacQuarrie, and Eugene Robinson (Oxford: Basil Blackwell, 1980) pp.279-304, see also Faye's analysis of Heidegger's 'Bremen Lectures', *Heidegger: The Introduction of Nazism*, pp.302-315.

[35] Schmitt *Three Types*, p.50. Antiquated terms replaced rule of law with unregulated, medieval notions of loyalty, see, for example Klemperer's analysis of the term *Gefolgschaft* (followers), *Language of the Third Reich* pp.236-237. Koch notes further historically inaccuracy here, *In the Name of the Volk* pp.75-77

[36] Schmitt *Three Types*, pp.52-3.

[37] Op. cit.

[38] See Lon Fuller *The Morality of Law* (New Haven, CT: Yale University Press, 1964), 106 and "The Forms and Limits of Adjudication" *Harvard Law Review* 92 (2) (1978) p.353, p.357

[39] Fuller *Morality of Law* pp.33-38.

[40] See Stolleis, *Law Under the Swastika*.

terms and institutions were given solemn-sounding names that evoked long-standing and tradition. For example, the Nazi equivalent contemporary Germany's "Lawyers Association" (*Vereinigung der Rechtsanwälte*) was given an old German name that translates as "Alliance of defenders of the law" (*Rechtswahrer Bund).* This was a public relations exercise. It was used to mask the erosion of both rule of law and separation of powers.[41] Textbook writers at the time found it difficult to provide an account of public law as a coherent system.[42] Hans Sluga argues that the quest for a 'more fundamental' order, prevalent in Nazi philosophy, was largely an attempt to justify a state that was increasingly disordered on any conventional understanding.[43] In this brief account, we see Schmitt embark upon the same quest with specific regard to law.

II. Trump: The 'Law and Order Candidate'

Every major far-right group in America endorsed or supported Trump's candidacy.[44] His campaign employed jargon as a means of encouraging that support. One example is Trump's self-description as 'law and order candidate'. This slogan originated in the presidential campaigns of Barry Goldwater and George Wallace in the 1960s. Goldwater's was regarded as racist and divisive (even within his own party). Wallace was an overt anti-integrationist, who ran as an independent. This was an era of great social change. In addition to the civil rights movement, the anti-war movement, and urban race riots, there was a rise in juvenile delinquency and street crime (commensurate with increasing urbanization). The concept of a threat to 'law and order' was used by Goldwater as a way of lumping each of these diffuse elements together and running in opposition to them all. Often, civil rights protests of the era were instigated precisely *because* of illegal activity by police or other officials. But Goldwater and Wallace never used the term 'law and order' to mean a due regard for the civil rights of black citizens. They were no defenders of an increasing body of legislation and judicial decisions that

[41] See Klemperer *Language of the Third Reich* pp.237-238.
[42] See Stolleis, *Law Under the Swastika* pp.98-111
[43] Sluga, *Heidegger's Crisis* pp.186-205.
[44] Neo-Nazi newspaper *The Daily Stormer* endorsed Trump on June 28, 2015. The American Nazi Party Report of September 20, 2015, described Trump's candidacy as a 'wonderful opportunity'. The Ku Klux Klan also supported, see Pastor Thomas Robb "Make America Great Again!" *The Crusader: The Political Voice of White Christian America* (Fall, 2016), p.1.

outlawed discrimination.[45] Indeed, Wallace first became prominent through his attempts to resist de-segregation, long after the decision in *Brown vs The Board of Education* (1954). In 1963, as Governor of Alabama, he led a blockade against black students admitted to the University of Alabama. In doing so he fulfilled a campaign pledge to "stand in the schoolhouse door".[46] Instead of demonstrating a commitment to settled law, then, this phrase was used as a code to placate anti-segregationists and the white 'backlash' against civil rights. At the same time, the term preyed on the fears of other members of the electorate that the social fabric of the country was threatened by rapid social, political and economic change.[47]

Against this backdrop, Trump's claim that he is 'the law and order candidate' only makes sense if understood as 'jargon'.

> 1. The phrase as used by Trump has no settled sense, whether by 'ordinary' use or by reference to some external concept. He accused others of 'criminal' behaviour, in a way that blurs the distinction between breach of criminal law and a colloquial expression for morally repugnant behaviour that may or may not actually involve breaking any specific law. He repeatedly referred to his opponent Hillary Clinton as 'criminal' and often described asylum seekers as 'illegals'. Literal and figurative meanings are thus conflated. If something sounds a bit like it ought to be criminal, that is close enough.[48]
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> 2. More typical understandings of law as social 'order' are negated, they are not refuted. Trump dismissed protesters' chants of 'black lives matter' with the popular far right response 'all lives matter'; he said very little on this matter beyond such dismissal. As with Goldwater and Wallace, Trump campaigned at a time of racial tension. Like Goldwater and Wallace, the platform of restoring 'law and order' does not extend to the regulation of law enforcement, in

[45] Goldwater denounced *Brown v Board of Education of Topeka* 347 *US* 483 (1954) long after it was established precedent. See Barry Goldwater *The Conscience of a Conservative* (Kentucky: Victor Publishing Company, 1960)

[46] See Dan T. Carter *The Politics of Rage: George Wallace, the origins of the New Conservatism, and the Transformation of American Politics* (Baton Rouge, LA: Louisianna State University Press, 2000) pp.110-155

[47] See Michael W. Flamm *Law and Order: Street Crime, Civil Unrest and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005) pp.31-50

[48] The Nazi concept of 'law' operated in a very similar way, see below, notes 81-83.

the context of its treatment black citizens. 'Police lawlessness' is, of course, one of the more fundamental ways in which public order might break down.[49]

3. Trump did not define 'law and order'. Campaigning politicians rarely provide such definitions. In this respect, Trump's campaign was unremarkable to the unwitting voter – it is 'matter-of-fact', 'plain-speaking', or 'common sense'. There is nothing intellectual or unusual sounding in it. But the far right, as per Heidegger, listens to that which is 'murmuring in the unsaid'.[50] In contemporary parlance it is a 'dog whistle'. The phrase avoids overtly racist language, which might put off moderate voters. Yet for those that are aware of the relevant history the Goldwater and Wallace allusions are clear. Covert reference to overtly racist movements of the past, was, itself, a feature of Nazism; the term 'The Third Reich' was just such a reference.[51] Throughout Trump's campaign the far-right explicitly made these connections. Richard Spencer coined the term 'Alt-Right'. In his address given at the *Annual Conference for the National Policy Institute* on 19th November 2016, he spoke of 'psychic link' between Trump and 'the movement'.[52] This was a popular way to refer to the 'spiritual connection' or 'calling' or 'unsaid' during the Nazi era, the non-normative foundation for Schmitt's jargon of 'order'. Spencer's address ended, notoriously, with the lines "Hail Trump! Hail our people! Hail victory", followed by Nazi salutes from some attendees.[53] Throughout the speech Spencer alluded to Nazi mythology, including the 'people of the sun' myth.[54] He also used Heidegger's term 'overcoming'.[55]

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[49] See, for example, Fuller's discussion of this point *Morality of Law* pp.81-82.
[50] *Introduction to Metaphysics* p.134.
[51] Reference is to Arthur Moeller van den Bruck's *Das Dritte Reich* (London: Allen and Unwin, 1934), see Klemperer *Language of the Third Reich* pp.116-17
[52] See Alfred Rosenberg *The Myth of the Twentieth Century* translated by Vivian Bird (Newport Beach, CA: Noontide Press, 1982) pp.11-17. Installing a 'true Germanic faith' was a major part of the *volkish* movement that influenced Nazism, see Mosse *Crisis of German Ideology* pp.31-51.
[53] *National Policy Institute: Become Who We Are Conference 2016*, text at <http://www.radixjournal.com/journal/2016/11/21/long-live-the-emperor>
[54] Nazism (and neo-Nazism) often reference sun myths see Nicholas Goodrich-Clarke *Black Sun: Aryan Cults, Esoteric Nazism and the Politics of Identity* (New York: New York University Press, 2002), Savitri Devi *The Lightening and the Sun* (Calcutta: Temple Press, 1958)
[55] Op. cit., (n. 53). See also use of the phrase 'Lügenpresse' ("lying press") among Trump supporters, "The ugly history of 'Lügenpresse,' a Nazi slur shouted at a Trump rally" *Washington Post* October 24, 2016.

4. There is forceful repetition of the phrase, with no further elaboration. 'Law and order' is equated with 'strength' and little else. There was no attempt to address thorny issues as to how much of his platform might work legally. But such challenges did not deter the campaign from repeating the 'law and order' claim. Many of his policy proposals were illegal. Some attacked First Amendment rights such as freedom of expression and freedom of religion. He proposed strengthening libel laws, in particular against the press, in ways that are beyond the power of a president.[56] And he made various (vacillating) proposals that specifically discriminate against Muslim Americans.[57] Elsewhere, his proposals violated international law and human rights. He was in favour of torture, both as an interrogation technique and as a punishment.[58] His policy towards national security involved targeted killing of the innocent family members of terror suspects.[59] In each of these last two examples he ignores due process. These are far from the only Trump policies to show such disregard.[60]

5. All is politics. Trump sees 'law and order' as inherently biased in favour of some interest. Any legal outcome with which he disagrees is seen as politically (or personally) motivated. It cannot possibly be the case for Trump that a proper application of law to fact might lead to an outcome that disadvantages him. Infamously, when Judge Curiel decided a preliminary issue against Trump in a fraud case, Trump claimed bias on the basis of the judge's ethnicity.[61] When the Federal Bureau of Investigation decided not to prosecute Hillary Clinton, Trump claimed that this was evidence of a 'rigged system'.

Given all of this, Trump only makes sense as a candidate that will stand up for 'law and order' if one accepts jargon. Otherwise, he is a candidate of sweeping law reform (at most generous). Trump's

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[56] See John M. Greabe "Can President Trump 'Open Up' the Libel Laws?" *Concord Monitor*, February 26, 2017 and Adam Liptak "Can Trump Change Libel Laws?" *New York Times*, March 30, 2017.

[57] On Executive Order 13769 see *State of Washington and State of Minnesota v. Donald J. Trump et al.*, No. 2:17-cv-00141 (W.D.Wash. 2017), on Executive Order 13780 see *State of Hawaii and Ismail Elshikh v. Donald J. Trump et al*, 1:17-cv-00050-DKW-KSC (D Hawai'i 2017).

[58] 11th Republican Presidential debate, Fox Theatre, Detroit, Michigan March 3, 2016. See also Trump's first television interview as president, ABC News, World News Tonight, January 24, 2017

[59] Op. cit. See also comments on *Fox and Friends*, Fox News, December 2, 2015.

[60] See, for example, his lamentation that terror-suspect Ahmad Khan Rahami would receive medical treatment and legal representation, Germain Arena Rally, Estero, Florida, September 19, 2016.

[61] See "The Lead with Jake Tapper" of CNN June 3, 2016, full transcript available online at <http://cnnpressroom.blogs.cnn.com/2016/06/03/tapper-to-trump-is-that-not-the-definition-of-racism/>.

speechwriters made numerous other 'unsaid' references to the history of far right American politics. The very slogan 'America First' has Anti-Semitic connotations.[62] Trump referred to his support as 'the movement'[63], alluded to 'global conspiracies of bankers'[64] and pledged to 'stand up for America', another Wallace slogan.[65] The 'intellectual' wing of the contemporary far right understood each of these phrases (and many more) as 'psychic' indications of support throughout the campaign.[66] Trump's success is but one example of a contemporary far-right political movement in a western liberal democracy that employs language in this way.

How are we still falling for this? Part of the reason is the manner in which the underlying philosophy behind this jargon is deeply embedded in our culture. We see this most clearly in 'critical' reflections on Nazi law.

III. Normalizing Jargon through Critical Theory

Certain contemporary far-right figures cite Heidegger as a direct influence.[67] But overtly far-right positions are still outside the academic mainstream; we are concerned with something far more central to our intellectual landscape. Heidegger was one of the most influential philosophers of the twentieth

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[62] This was the name of an anti-war organization associated with Anti-Semitism, largely due to prominent member Charles Lindbergh. Anti-Semite Gerald Smith later formed the 'America First Party', which became the 'Christian Nationalist Crusade', see Glen Jeansonne *Gerald L.K. Smith: Minister of Hate* (New Haven, CT: Yale University Press) 1988, Wayne S. Cole, *America First: The Battle against Intervention, 1940-41* (Madison, WI: University of Wisconsin Press, 1953). Phillip Roth *The Plot Against America* (London: Vintage, 2004) imagines the life of a Jewish family under a Lindbergh presidency.

[63] Nazism called itself "The Movement", see Carl Schmitt, *State, Movement, People* translated by Simona Draghici (Corvallis, OR: Plutarch Press, 2001). This is also true of contemporary far-right groups, see Arno Michaelis *My Life After Hate* (Milwaukee, WI: Authentic Presence Publications, 2012).

[64] See "Trump Accuses Clinton of Guiding Global Elite Against U.S. Working Class" *New York Times*, October 13, 2016, see also television advertizement "Donald Trump's Argument for America"; Seymour felt that he had inspired this, see "In Trump's 'global interests' ad, echoes of overtly anti-Semitic 'alt-right' video?" *Times of Israel* December 4, 2016.

[65] George C. Wallace *Stand Up for America: The Story of George C Wallace* (Washington, D.C.: Liberty Lobby, 1968).

[66] See Hannibal Bateman 'Whose America First?' *Radix* January 4, 2017 accessed online at <http://www.radixjournal.com/journal/2017/1/4/whose-america-first>

[67] For an account of this direct influence, see Ronald Beiner "Dangerous Minds: Nietzsche, Heidegger, and the Return of the Far Right" (Philadelphia, PA: University of Pennsylvania Press, 2018). For an example, see Alexander Dugin *Martin Heidegger: The Philosophy of Another Beginning* translated by Nina Kouprianova, (Whitefish, MT: Radix/Washington Summit Publishers, 2014). Heidegger's work is in Radix's list of "must read Alt-Right Titles", Editorial, August 11, 2016.

century. The breadth of his influence on scholarship means that Nazi jargon has been normalized as a form of discourse, in various ways, across a multitude of disciplines. It is part of a firmly established tradition in hermeneutics and philosophy. It would be difficult to imagine a course on literary theory in the United States, for example, that did not include discussion of writers like Stanley Fish, Jacques Derrida and Hans-Georg Gadamer. Their ideas are so embedded that even those who have not attended university are likely to have been exposed to them in popular culture[68]. This normalization of method leads to a normalization of substance. Even scholars who express abhorrence for Nazism on moral grounds, draw conclusions that normalize far-right claims when they employ this methodology. We can see a very clear example of this in relation to the Nazi concept of law.

David Fraser's *Law After Auschwitz*[69] is a highly influential text. Kristen Rundle describes Fraser as 'the most important contemporary Anglo-American scholar of the relationship between law and the Holocaust'.[70] His fundamental claim is that nothing conceptually distinguishes the Nazi notion of law from western, liberal, democratic notions. For Fraser, Nazi law was "perfectly normal".

In what follows, I will show that Fraser's conclusion only follows from his analysis if one accepts Nazi jargon as valid. Fraser draws on the work of Fish and approvingly cites Derrida. Each considered Heidegger his biggest influence. Fraser also positively refers to both Heidegger and Schmitt.[71]

At the very start of Fraser's argument he claims that "law is in reality little more than the persuasive deployment of rhetorical devices".[72] In other words, it has no correlative or objective meaning – it is what the powerful say that it is. But Fraser's acceptance of Nazi jargon goes far deeper. At every stage in his analysis of Nazi law the arguments that he makes require us to accept a broadly Heideggerian metaphysics.[73] Without such an acceptance, his claims do not stand up to even brief

[68] *The Doors* allude to Heidegger's concept "throwness" in the 1968 single "Riders On The Storm".
[69] David Fraser *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (Chapel Hill, NC: Carolina Academic Press, 2005)
[70] Kristen Rundle, "The Impossibility of an Exterminatory Legality: Law and the Holocaust" *University of Toronto Law Journal* 59 (1) (2009) pp.65-125, p.99.
[71] Op. cit., pp.40-41, 73, 435-443, and David Fraser "Evil Law, Evil Lawyers? From the *Justice Case* to the Torture Memos" *Jurisprudence* 3(2) (2012), p.391
[72] Fraser, *Law after Auschwitz*, p.8.
[73] On Heidegger's 'jargon' of metaphysics itself, see Adorno, *Jargon*, pp. 24, 30, 76, 95, 115, see also Heidegger, *Introduction to Metaphysics*, *Kant and the Problem of Metaphysics* translated by James S. Churchill,

scrutiny. Fraser thus normalizes much more than just Nazi law in his conclusion, he also normalizes the Nazi 'way of thinking' in his method. In what follows, I show how this is the case in relation to four key concepts 'health', '*volk*', 'death' and 'community'.

1. *Health*

Fraser correctly notes that Nazi Germany was far from the only nation to engage in morally repugnant behaviour against the disabled on the basis of 'public health'. Compulsory sterilization was not unique to Nazi law and policy. Neither was underlying racism. Neither was "eugenic discourse". Fraser highlights examples in Canada, Sweden and The United States. He then makes the following claim:

> If lawyers in the United States…considered "eugenics", or "racial hygiene" to be an acceptable normative underpinning for operative and operating legal measures with and upon the body politic, then it cannot simply be asserted, *tout court*, that Nazi law, with its *grundnorm* insuring the health and survival of the *Volksgemeinschaft* was a criminal aberration, unworthy of the name "law".[74]

This was no *grundnorm*. In Hans Kelsen's jurisprudence, the 'grundnorm' is the fundamental building block for a normative system. Prescribed legal norms stem from it.[75] By contrast, the jargon of 'health' was used as a way of avoiding express rules in Nazi Germany. Its power lay in the 'unsaid' message that it sent to judges, lawyers, and police officers, without the creation of a normative system.

'Health' in a Nazi context alluded to "the Hale life".[76] It was an example of how jargon conflated literal and figurative meaning. We can see this in Nazi legislation. *The Law for the Restoration of the*

(Bloomington, IN, and London: Indiana University Press 1962), *The Metaphysical Foundations of Logic* (Bloomington, IN: Indiana University Press,1984), *What is a Thing?* Translated by W.B. Barton Jr, and Vera Deutsch (Lanham, MD and London: University Press of America, 1967).

[74] Fraser, *Law after Auschwitz*, p.109

[75] Hans Kelsen *Pure Theory of Law* 2nd ed. Translated by Max Knight (Berkeley, CA: The University of California Press, 1967).

[76] See Adorno, *Jargon*, p.47, Klemperer notes how 'health' was used to undermine intellectuals; academics were 'unhealthy', indoor types unlike true, *volkish*, Germans, *Language of the Third Reich* p.3. There are contemporary far-right parallels, see Tom Nichols "How America Lost Faith in Expertise (And Why That's a Giant Problem)" *Foreign Affairs* 96(2) (2017) p.60

Professional Civil Service 1933 involved a purge of the judiciary.[77] One aim was to instate judges who "seek justice where it is born, in the healthy common sense of the people".[78] Far from being 'perfectly law-ful', as Fraser claims, this was used as a means of by-passing prescribed legal rules if and when it suited the regime; as with Trump's claims on the campaign trail in reference to his political opponents, if something sounded like the sort of thing that the regime would like to be illegal, then this was close enough.[79] Reich Minister of Justice Otto Thierack encouraged judges to ignore specific rules and to judge instead on the basis of "a healthy prejudice".[80] This was put on a statutory footing with an amendment to the penal code known as the "*Volk* pest law" which justified 'punishment by analogy' according to the *gesundem Volksempfinden* or 'healthy perception of the *Volk*'.[81] 'Health' in these contexts did not mean 'of sound mind' or 'physically able'. The term was used in reference to the myth of 'racial hygiene' – the German as 'healthy', Jews, homosexuals, and the Romany as 'unhealthy'. But it also carried a connotation that only those who adhered to *volkish* populism were 'healthy'. The 'unsaid' direction to judges was to ignore rule of law in favour of the outcome that 'we' would like, the 'healthy' outcome.[82]

'Health' thus meant something like 'loyalty to the regime' in Nazi law. This jargon of health was fostered by the philosophical side of the movement. In Heidegger's Rhectoral address to the Faculty of Medicine at Freiburg, he claimed that the meaning of 'health' is entirely relative to 'peoples'. He went on to claim that for Germans, as for the ancient Greeks the true 'spiritual' notion of 'health' meant "being ready and strong to act in service of the state".[83] Fraser refers to Nazi claims about

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[77] Op. cit. (n.29)

[78] Emil Niethammer, "Das Reichsgericht als Schrittmacher der Entwicklung des Strafverfahrens nach geltendem Recht und in Zukunft" *Deutches Strafrecht* (1937) p.135, translated in Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* translated by Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 1991) p.72

[79] Op. cit. (n. 48).

[80] Müller, *Hitler's Justice* p.73.

[81] "Gesetz zur Änderung des Strafgesetzbuchs", Art 1, s 2. *RGBI* I 839. *Reichsgesetzblatt* (June 28, 1935) I 839 and Lawrence Preuss "Punishment by Analogy in National Socialistic Penal Law' *J. Criminal Law and Criminology* 26(6) (1936), p.847

[82] See Carolyn Benson and Julian Fink "Legal Oughts, Normative Transmission and the Nazi Use of Analogy" *Jurisprudence* 3(2) (2012) p.445. Benson and Fink translate 'gesundem Volksempfinden' as 'sound perception of the people'. In the context of their argument, it made sense to use a translation that works better in English. I use a literal translation.

[83] "Reden und andere Zuegnisse eines Lebensweges", Hermann Heidegger ed., in Dieter Thomä, *Heidegger Handbuch: Leben – Werk – Wirkung* (Stuttgart, Weimar: J.B. Metzler, 2003) the relevant section is translated

public health as 'medico-legal judgment *par excellence*'.[84] This is only a 'medico-legal' judgment if you accept not only Nazi law as genuine law, but also Nazi 'medicine' as genuine medicine. Fraser does not distinguish between public health concerns on the basis of a real virus, and persecution in the name of public health on the basis of a metaphorical 'parasite'. He does not even question whether Nazi medicine should really be afforded the term 'medicine'. As with law, it is enough that the powerful use the term.

The notion of (public) health was used to achieve terrible, racist, objectives both in Allied jurisdictions and under Nazi law. But Fraser's failure to identify and distinguish the specific jargon of 'health' disguises a raft of further wrongs. Nazism used 'health' to also target political enemies, pacifists, and anyone else who disagreed with the regime. Allied misuse of health as a justification for racial prejudice was wrong on its own terms. As Fraser notes, there was no legitimate justification in terms of mental or physical wellbeing for their actions.[85] The Nazi jargon of public "health" was used for the very purpose that it was introduced, to target enemies of the *volk*.

2. Volk

'Health' was thus inextricably linked to *volk* and *Volksgemeinschaft*. These terms were key pieces of Nazi jargon. Fraser again equates Nazi jargon with its English translation. He describes Nazi use of the term '*volk'* as a simple equivalent to 'we the people' in the American Constitution. This is not the case.

'People' is an acceptable, literal, translation of 'volk'. The concept of *volk* was indeed the main justification for state power. It was referred to as the ultimate 'source of all law' by both Schmitt and Alfred Rosenberg ('Commissar for Supervision of Intellectual and Ideological Education of the

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into English in Faye *Heidegger: The Introduction of Nazism* p.68. Heidegger claimed that this was the original, pre-Aristotelian, meaning. This was a typical move, see his Rhectoral address in Wolin, *The Heidegger Controversy* 29-39, Martin Heidegger, *Early Greek Thinking,* translated by David Farrell Krell & Frank A. Capuzzi (New York: Harper & Row, 1975), and *Introduction to Metaphysics*, pp.79-172. See also Tom Rockmore *On Heidegger's Nazism and Philosophy* (Berkeley, CA: University of California Press, 1991) pp.122-175, Rüdiger Safranski, *Martin Heidegger: Between Good and Evil*, translated by Ewald Osers (Cambridge, MA: Harvard University Press, 1999) pp.233-290.

[84] Fraser *Law after Auschwitz* p.13

[85] Op. cit., pp.107-120.

NSDAP').[86] Similarities end there. If Fraser had seen these terms as anything other than empty vessels into which one can pour whatever meaning one wishes, he would have seen the differences clearly.

A vital distinction in liberal democracy is that between 'public' and 'private'. In an American Constitutional context, this is the distinction between 'people' and 'state'. One enjoys rights against the other. The state pledges to protect the rights of its citizens. 'The people' are, therefore, inherently distinct from the state apparatus. In sharp contrast, Schmitt justified Nazi power on the basis of a 'triadic structure'.[87] Under this structure, 'state', 'movement', and '*volk*', were unified. The notion of being an 'individual' with 'individual rights' was negated as a 'materialist', 'liberal', 'non-German' notion.[88] Rights came through membership of the *volk* – one could not, therefore, assert a right against the *volk*, without either asserting a right against oneself or admitting that one is not a member of the *volk*. The notion of having a right against the state thus disappeared.[89] An example will already be familiar. The so-called 'grudge-informer case' was discussed in Fuller's debate with H.L.A. Hart. In that case a man had been found guilty in Nazi courts of 'publically denouncing the Führer'.[90] The remarks in question were alleged to have been made at home and between husband and wife. Under any meaningful understanding of the term these remarks were private. Nazi law's jargon of 'public', however, rendered the distinction meaningless. As there is no distinction between *volk* and individual, any statement to one person is a statement to all. Any discussion was 'public'.[91]

[86] Carl Schmitt 'The Führer Protects the Law' translated by Timothy Nunan, in Anson Rabinach, and Sander L. Gilman, eds., *The Third Reich Sourcebook* (Berkeley, CA: University of California Press, 2013), Lukács *Destruction of Reason* p.745.
[87] Schmitt, *State, Movement, People*.
[88] Op cit.
[89] Op. cit., see also Wilhelm Stuckart and Hans Globke "Civil Rights and the Natural Inequality of Man" in George Mosse, ed., *Nazi Culture: Intellectual, Cultural and Social Life in the Third Reich* translated by Salvator Attanasio et al. (London: W.H. Allen, 1966), pp.327-335, Lowenstein "Law in the Third Reich" p.780, Lukács *Destruction of Reason* pp.744-745 and Raymond Critch "Positivism and Relativism in Post-War Jurisprudence" *Jurisprudence* 3(2) (2012) p.347, pp.357-364
[90] See the "Law against Treacherous Attacks on the State and Party and for the Protection of Party Uniforms", ("Gesetz gegen heimtückische Angriffe auf Staat und Partei und zum Schutz der Parteiuniformen") *Reichsgesetzblatt* I 1269 (December 20, 1934).
[91] See Müller *Hitler's Justice*, pp.146-148.

The phrase 'we the people' does have a chequered history. It refers to 'free' American citizens in the constitutional preamble. At the time of drafting this was an exclusionary term.[92] Yet *volk* was more exclusionary still. In a war-era work, Heidegger discusses the phrase 'we the people'. He emphasizes the definite article – "we are *the* people". Heidegger goes on to describe '*the* people' as (variously) a 'body' a 'soul' or a 'spirit'. It is to be part of the natural 'concrete order' to which Schmitt also referred.[93] *Volk* did not mean 'German citizens' in the way that we might use the term now. It specifically and exclusively referred to those Germans who had a sufficiently spiritual connection to 'the soil'. "Volk" as "*the* people" excluded Jews, the disabled, travellers, communists, liberals, traditional conservatives, pacifists, intellectuals, Catholics, and 'materialist' (that is to say evidence-based) scientists.

Public justifications of state power, 'emergency' measures and disregard for prescribed rules were made by senior Nazi leaders on the basis of the 'will of the *volk*'.[94] But the reality was dictatorship. The *volk* as ultimate source of law actually meant an absence of any individual rights against the state.

Fraser sees no difference between *volk* and people. He therefore sees no difference between a concept that was exclusionary, but salvageable, in a US context and a concept that was inherently even more exclusionary in a Nazi context. He also sees no difference between people with constitutionally protected rights against a government, and a dictatorship that uses the term 'people' in its propaganda.

3. Death

Fraser concludes that The Holocaust was 'legalized killing'. He claims that Auschwitz is best understood as a process of de-humanization of 'the Jew'. There we see the culmination of Nazi efforts to turn Jews into '*muselmanner'*, a concept Fraser borrows from Giorgio Agamben.[95]

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[92] See Thurgood Marshall "Reflections on the Bicentennial of the Constitution of the United States" *Harvard Law Review* 101(1) (1987) p.1.

[93] Space prohibits full analysis; Faye summarizes, *Heidegger: The Introduction of Nazism* pp.96-101.

[94] See Norman Baynes, ed., *The Speeches of Adolf Hitler Volume 1: April 1922-August 1939* (Oxford: Oxford University Press, 1942) pp.434, 440, 450

[95] Agamben's argument about the *Homo Sacer* as typical within law is outside the scope of this essay, see Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1995) and *Remnants of Auschwitz: The Witness and the Archive. Homo Sacer III* (New York: Zone Books, 1999). Agamben often criticizes Heidegger. He does not adhere to Heidegger's notion of meaning, for

Concentration camp inmates used to refer to those that were too frail to work anymore as '*muselmanner*'.[96] Such inmates were resigned to their fate. For Agamben, the *muselmann* represents a dead being in a human form. The killing at Auschwitz was thus seen as extermination of the deceased instead of murder. This is a powerful example of Nazi jargon, a jargon of 'death'.[97] As such, it illustrates how Nazism self-justified by conflating the literal and the figurative. But Fraser uses this jargon to argue that The Holocaust was 'lawful, scientific and ordinary'[98].

Since *New York v. Eulo* common law systems have defined death as the cessation of brain-stem function. Previously the test was cessation of heartbeat.[99] But when the *muselmann's* brain-stem ceases to function and his heart ceases to beat this is to be understood "not a loss of life but a loss of death".[100]

The 'death' of the *muselmann* is clearly not 'death' in a medico-legal sense, if 'medicine' and 'law' have either correlative or objective meaning. As with Fraser's claims about 'health' we are require to accept the Nazi jargon of medicine. But Fraser's claim that the The Holocaust is legalized killing, requires an acceptance of not only a jargon of "death", but a great deal more besides.

In his analysis, Fraser identifies the 'myth' involved in Nazi distinctions on racial grounds:

> The physical attributes of "the Jew" become inscribed in myth, legend and eventually science and law as the paradigmatic traits of the Other.[101]

Fraser then points out how the myth of racial purity and the myth of racial health became entangled in the narrative of "the Jew" as unhealthy. In Adorno's terms, Nazism included a jargon of "Jew". But

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discussion of how to situate Agamben relative to Heidegger and Derrida see Gert-Jan van der Heiden "The Letter and the Witness: Agamben, Heidegger, and Derrida" *Journal of the British Society for Phenomenology*, 46(4) (2015) pp.292-306.

[96] 'Muselmann' (German) or 'musulmann' (Persian) means 'Muslim'. It is unclear why this term was used. Some suggest muscle wastage led inmates to sway as they moved, or adopt a prone position while seated, either of which might resemble aspects of Muslim worship. Agamben interprets the literal meaning of 'Muslim' - 'one who submits unconditionally to the will of God', see Agamben, *Remnants*, pp.42-45.

[97] See Heidegger *Being and Time*. Nazism referred to concentration camp killing as *liquidieren* (liquidation), but mass killing in battle as *niedermachen* (massacre), see Klemperer *Language of the Third Reich*, pp.149-150.

[98] Fraser *Law after Auschwitz* p.420

[99] 63 N.Y.2d 341

[100] Fraser *Law after Auschwitz* p.59

[101] Op. cit., 30

Fraser goes on to treat such embrace of 'mythology' as compatible with 'science'. He does not consider, even briefly, more conventional notions of 'science' that would see myths to be debunked and self-doubt to be embraced.

Fraser refers to 'what was *for them* a scientific ideal of racial purity' [emphasis added].[102] On a more typical understanding of science, the practice can (and does) abandon certain beliefs over time, as we discover more. In this respect, we might reasonably refer to a claim that was scientifically valid at one time but has since been disproven. Thomas Kuhn's notion of 'scientific revolutions' operates in this way.[103] But Fraser espouses something far more relativist than Kuhn's concept of 'science'. He claims that Nazism had 'the *latest* discoveries of racial science'[104] on its side [emphasis added]. He does not question whether racial 'science' was truly science even once.

Nazi 'science' flew in the face of available evidence.[105] Each of the core tenets of Nazi racial policy had been proven false long before 1933, let alone by the time transport trains began to arrive in Auschwitz in 1942. To take one example, Maurice Fishburg's 1913 work *The Racial Characteristics of the Jews* demonstrated that there were no physical traits to distinguish German Jews from non-Jewish Germans.[106] Nevertheless, judgements as to ethnicity for the purposes of Nazi racial laws were typically made on the basis of 'physical traits'. The 'science' or 'biology' behind this means of applying the law would not have had the 'latest findings' on its side in 1913, let alone 1942. The same is true of every central claim that Nazism made about race and genetics, from criminal behaviour as 'inherited' to claims about racial purity.[107] The majority of German Jews were 'Aryan', by any defensible scientific means of testing such things.[108]

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[102] Op. cit., 31

[103] Thomas Kuhn *The Structure of Scientific Revolutions* 3rd ed, (Chicago, IL and London: University of Chicago Press, 1996)

[104] Fraser *Law after Auschwitz* p.437

[105] See Eric Ehrenreich, *The Nazi Ancestral Proof: Genealogy, Racial Science and the Final Solution* (Bloomington, IN: Indiana University Press, 2007) pp.1-13 and Alan Beyerchen "What We Now Know about Nazism and Science" *Social Research* 59 (3) (1992) p.615.

[106] See Ehrenreich *Nazi Ancestral Proof* 4.

[107] Fraser *Law after Auschwitz* p.8, 30-35, 420, 437

[108] Op. cit., p.55

Fraser's claims about 'science' and 'scientific evidence' only make sense if you accept the Nazi claim that science, itself, is relative to a 'peoples' – that there is 'liberal science', 'Jewish science', and 'Aryan science'. Heidegger expressed that view, so did Adolf Hitler.[109] Throughout, Fraser claims that Auschwitz was "scientific"[110] and "biological"[111]. But "Aryan-science" was a jargon of science. Similarly the "biological state" was a jargon of biology just as "racial purity" involved a jargon of "race" and "German physics" was a jargon of physics.[112]

Fraser has not simply omitted the jargon of terms from his analysis. He has accepted its underlying features. 'Science' is relative to 'peoples' on this worldview; it is a political tool with no objective or inter-subjective meaning. So, for Fraser, 'myth' and 'science' are not mutually exclusive. Using terms like 'race', 'biology', and 'medicine' in propaganda is enough to make a claim scientific. In Heidegger's terms, these are just 'pieces of equipment' that the powerful can fill with whatever definition suits their ends. 'Scientific evidence' of 'death' is indistinguishable from 'mythological evidence' for a 'dead person in human form'.

4. Community

The closest that Fraser comes to identifying an arbiter for word meaning is the notion of an 'interpretative community', a term borrowed from Fish.[113] Like Fish, Fraser holds that relevant community standards determine the meaning of a legal concept. Everything from the meaning of a statute to what counts as scientific evidence is 'interpretative'. On this account, whatever is most persuasive to the relevant community decides the matter rather than some 'objective' truth or set of facts. Following Fish, Fraser holds that if Nazi lawyers felt that they were practicing law, then Nazi law was no less legal than any that of any contemporary Western liberal democracy. Fraser claims that this is how Nazi practitioners felt about their legal system.

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[109] Faye *Heidegger: The Introduction of Nazism* pp.96-99 Beyerchen *Scientists Under Hitler* p.134.
[110] Fraser *Law after Auschwitz* p. 32, 69, 420, 437
[111] Op. cit., pp.105, 106, 218
[112] See generally Beyerchen *Scientists Under Hitler*.
[113] Fraser "Evil Law" p.28

Fraser's claim about practitioner acceptance is inaccurate. Many Nazi lawyers and judges expressed increasing levels of doubt about whether they were truly practicing law any more. Even the most committed Nazi members of the judiciary complained that the system was becoming chaotic.[114] There is, however, a more fundamental problem. Unless we commit to some objective or inter-subjective identifier for the term 'community' this term cannot do the work that Fish and Fraser demand of it.[115] If we do so, however, it becomes clear that the Nazi "community" is, once again, jargon.

Without doubt, there was a legal community of the Weimar era. But Nazi 'bringing into line' legislation dramatically altered the make-up of that community. The 'Law for the Restoration of the Professional Civil Service' concerned the judiciary and academia, among other professions. It operated to remove non-Aryans[116] and "[o]fficials who, on account of their past political activities cannot guarantee that they have always acted wholeheartedly for the national state"[117]. The 'Law Concerning Admission to the Legal Profession', passed on the same day, excluded the same groups from legal practice.[118] Shortly afterwards, a decree guaranteed that each remaining member would have "the respect owed to him as a member of his professional community".[119] This was a jargon of "professional community" in relation to the practice of law. It renders the notion of a "professional community standard" jargon. This is so in two ways.

First, consider the notion of a 'community standard'. 'Communities' have internal debates and their own norms of behaviour. 'Community standards' emerge from within. Practice governs rules more than any external, prescribed, rules might govern practice, according to the Fish paradigm.[120] All of Fish's work on law is premised on this notion. But the Nazi 'professional community' was culled so as

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[114] Hans Frank's diary is illustrative, *Das Diensttagebuch des Deutschen Generalgouverneurs in Polen* Werner Prag and Wolfgang Jacobmeyer, eds., (Stuttgart: Deutsche Verlags-Anstalt, 1975). See also, Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (Munich: Verlag-C.H. Beck, 1988). At the start of the regime there were successful legal challenges to various acts see Müller *Hitler's Justice* p.127.
[115] Fraser "Evil Law" p.402.
[116] Op. cit., (n. 29), Section 3 (1).
[117] Op. cit., S.4 (1).
[118] ("Gesetz über die Zulassung zur Rechtsanwaltschaft") *Reichsgesetzblatt* (April 7, 1933) Section 2 and Section 3.
[119] See also Müller *Hitler's Justice* p.61.
[120] Stanley Fish, *Doing What Comes Naturally* (Oxford: Clarendon Press, 1989) in particular "Denis Martinez and the Uses of Theory" pp.372-398, and his critiques of Ronald Dworkin, pp.87-119 and pp.356-371, see also *The Trouble With Principle* (Cambridge, MA: Harvard University Press, 1999).

to reflect the standards of a political movement external to that practice. Fish's concept is on the horns of a dilemma.

Fish could accept that there was a Nazi legal community. Fraser does. But the notion of a self-governing community, immune to external efforts to constrain interpretation, is meaningless if we accept the Nazi legal community as a 'community'. Interpretation *has* been constrained (even dictated) by external forces through the removal of those that might disagree. So Fish (and Fraser) would have to accept as a 'community' one that has been manufactured in order to generate the interpretations desired. If this is so then 'community standard' is not the ultimate arbiter of meaning at all.

Alternatively, Fish and those that follow him could accept that the Nazi legal 'community' is not really a community. This would be to distinguish a jargon of community from a genuine community. But doing so would mean that the notion of a 'community' does have a discoverable, objective, meaning, independent of the practice. Fish is clear that there can be no objective description of what counts as a 'community' for these purposes.

So this is the first problem. 'Community standard' is meaningless unless we accept a set of criteria for community.

Second, consider the more specific notion of a *legal* community. The commonalities in this interpretive 'community' had more to do with their political persuasion than their profession. Fish's theory of an interpretive legal community is made up of individuals who instinctively see the world legally; they make sense of terms like 'contract' or 'negligence' because they have used them in practical contexts, multiple times. This is inspired by Heidegger's claims about how we 'Understand' the world as pieces of 'equipment' that exist in-order-to.[121] But much of the 'community of Nazi lawyers' had none of this 'know-how'. A prime example is the 'People's Court',[122] wherein lay appointees, chosen from military, police, and party, came to vastly outnumber professional judges.[123]

[121] See "Force", in Fish *Doing What Comes Naturally* pp.503-524
[122] The *Volksgerichtshof* had jurisdiction over 'political' offences, so broadly interpreted as to be meaningless, see Koch, *In the Name of the Volk* p.37.
[123] Op. cit., p.48

It is also worth noting that Fish (and Fraser) take the relevant interpretive community for standards of legality to come from the judicial branch and the 'lawyers' that argue before it. But the Nazi executive had far more power in this respect. The Gestapo[124] was granted authority to 'correct' or otherwise nullify judicial decisions on appeal to Thierack and Heinrich Himmler.[125] A later decree allowed the Ministry of Justice to submit cases directly to Hitler, if it felt that a trial was 'unnecessary'.[126]

The interpretive community was the Nazi party, not a distinct legal profession wherein standards of meaning emerged organically. The Western, liberal, notion of 'legal community' has values that serve as checks on political power. But the Nazi jargon of a 'legal community' was created in order to support the regime in anything that it wished. To point to the support of such a 'community' in these circumstances is meaningless. Heidegger was the principal architect of the philosophy that created this jargon. His philosophical descendants, Fish and Fraser, cannot distinguish between a community and a jargon of community.[127]

Neither Fraser nor Fish are Nazi sympathizers (or even close to it). Fraser repeatedly emphasizes the moral bankruptcy of Nazism.[128] Fish is highly critical of the decision in *Collin v. Smith*, which afforded Neo-Nazis the right to march through a predominantly Jewish area.[129] They are not anti-Semites. They are not racists. Nevertheless, their Heidegger-influenced methodology has led to substantive claims about law that serve to normalize far-right positions. These are far from the only examples. Heidegger was the main inspiration behind Fish's claim that freedom of speech is an illusion.[130] Oren Ben-Dor argues that Heidegger's silence is a more 'ethical' response to The Holocaust than any active response through law.[131] Philippe Nonet uses Heidegger's later work to claim that modern law is nothing more than a 'terrible power' (presumably this includes civil rights

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[124] Op. cit., pp.164-165, see also Müller *Hitler's Justice* pp.176-82.
[125] Conference of September 18, 1942, minutes reprinted in Ilse Staff, ed., *Justiz im Dritten Reich* (Frankfurt am Main: Fischer, 1964) 117, discussed in Müller *Hitler's Justice* pp.181-82.
[126] BDC, NG-646, see Koch *In the Name of the Volk* pp.164-65
[127] This applies to any 'professional community'; see Beyerchen *Scientists Under Hitler*.
[128] *Law after Auschwitz* p.7, "Evil Law" p.402, Fraser adds no relativist caveat to his moral disapproval.
[129] Fish, *Trouble with Principle* pp.46-55, 79-92.
[130] Stanley Fish, *There's No Such Thing as Freedom of Speech And It's A Good Thing Too*, (New York: Oxford University Press, 1994).
[131] Ben-Dor *Thinking about Law*.

and due process).[132] Academia has normalized jargon. For Fish, Fraser, (and others) Trump's 'law and order' is no less valid than that of Fuller. Each may be accepted by different interpretative communities. But the interpretative community of alt-right, Neo-Nazis is no less valid than a community of jurisprudents.

These are the clearest examples of a much broader phenomenon. In subtler ways, the normalization of this sort of discourse must be more pervasive than we could possibly imagine. In its 'ways of thinking' and its 'language', our culture is Nazified; even those that disagree with such forms of analysis are unlikely to see them as unusual. This is part of the intellectual 'background' of our lawyers, journalists, politicians, business leaders, and, of course, voters. Schmitt and Heidegger tried to make future generations think of philosophy, reality, understanding, law, and order, in ways that facilitated National Socialist goals. They succeeded. The Trump campaign's ability to appeal to the far-right, while not alienating a mainstream audience with its discourse, is in part a product of this success. Learning the lessons from history in relation to Nazism must, therefore, include lessons at the most abstract philosophical levels. It is not enough to keep reminding the next generation that they ought to be tolerant or ought not to be racist. It is not enough to hope that those who experience the dire effects of violence and oppression will take the lessons from it. As we have just seen, acceptance of the underlying philosophy leaves us powerless to identify right-wing propaganda, distortion, and lies as anything out of the ordinary. In my concluding remarks I make a suggestion as to how we might continue to present this material in a way that places its most basic defect at the forefront. In this way, perhaps, our discourse on law and policy might become less susceptible to jargon.

IV. 'Being Wrong' as a Fundamental Existentiale

To reject philosophical jargon we must reject its very first step – the abandonment of objective or inter-subjective word meaning. Each further step is premised on acceptance of this first one. If words

[132] Philippe Nonet, 'Judgment' *Vanderbilt Law Review* 48 (1995) p.987, pp.1004-1007.

have an objective or inter-subjective meaning then we can immediately reject racial 'science' as science, Nazi 'health' as health or Trumpian 'law and order' as law and order.

For analytical philosophers, this rejection is straightforward even without taking a position as to whether word meaning is objectively or inter-subjectively determined. We get things wrong. This is so in spite of how convinced we may be, or how badly we may wish to believe something. The radical relativism of jargon does not allow for this. Heidegger provides no account of when we are simply incorrect in our beliefs, even in his early, pre-Nazi, work.

For Heidegger, knowledge is typically 'know-how' rather than 'knowledge of'. He uses the term 'Understanding' to distinguish his position. Most of us, most of the time, do not attempt to 'Understand' by examination. Instead, we Understand by doing – if we want to understand a hammer, we pick it up and use it.[133] In Heidegger's terms, our world appears fundamentally ready-to-hand for us. In fact, the more that we stare at the 'hammer-thing' (in the manner of René Descartes with his ball of wax) the less we Understand it. We make things part of *our* "world".

There is an obvious flaw in this starting point. What of those moments when we do *not* understand something, when things appear *un*certain, or downright confusing? Heidegger describes such moments as 'present-at-hand'. Here he extends his analogy; if we normally Understand the world around us as various pieces of equipment, the present-at-hand moment that Descartes experienced occurs when such equipment appears broken. In such moments we put the broken equipment back together, by seeing how it fits with the 'totality' of other pieces of equipment in our lives. This is as close as Heidegger gets to the notion of belief justification in epistemology. It bears some similarity to 'coherentist' accounts – a belief is justified if it 'fits' with my pre-existing beliefs.[134] But Heidegger does not acknowledge the possibility that a belief (or 'Understanding') could be so utterly wrong that it ought to be jettisoned.[135] On the Heideggerian account we can never be *that* wrong about the world

[133] Heidegger *Being and Time*, pp.98-104.
[134] Perhaps the earliest account is that of Brand Blanshard, *The Nature of Thought*, (London: Allen & Unwin, 1939). For an overview see, Jonathan Dancy *Introduction to Contemporary Epistemology*, (Oxford: Blackwell Publishing Ltd, 2003), pp.110-142.
[135] Gilbert Ryle raised similar objections; 'know-how', must presuppose 'knowledge of', see "Reviewed Work: *Sein und Zeit* by Martin Heidegger" *Mind* 38 (151) (1929) p.355.

around us. His later work does not address this issue at all; the concept 'Thinking' that emerges in his later focuses on 'uncovering' further possibilities for our Being through a non-instrumental, 'draft' of pure Thoughtfulness' – the possibility that we are entirely in error plays no part in his account.[136]

What if I were under the impression that Lyon was the capital of France? Under a coherentist account of belief justification I would soon find out that my belief was unjustifiable. I might look to various sources that I believe to be credible, ask people that I believe have the appropriate knowledge, and decide that I was, simply, wrong. For Heidegger, on the other hand, this broken equipment would be made to fit with the totality of my other pieces of equipment. That might look something like the following: Lyon may not be the official capital, but it is widely considered to be the gastronomic capital. Since France is world-renounced for its cuisine, Lyon is really more of a capital than Paris. I do not confront my wrongness here. I certainly do not admit to a mistake. I 'overcome' it.[137] I find a way to make my position defensible all along.

The Heideggerian account is unsatisfactory to the analytical philosopher. It does not really accept that we are flat out incorrect. This fundamental flaw on a theoretical level is a natural bedfellow for 'post-fact' public discourse; every claim is right on some level. But this, analytical, objection only gets us so far as a response to jargon for two reasons. First, Heidegger's influence is far less pronounced in that tradition. Even those that expressly admit some influence, do so in a very qualified way; Donald Davidson's broadly anti-Cartesian position is only vaguely Heideggerian and does admit to flat out error; Richard Rorty is as much a critic of Heidegger as a follower. None simply follows Heidegger unquestioningly and to the letter (in the manner of Ben-Dor or Nonet). The sorts of philosophers that explore issues around philosophy of language and belief justification are not really keeping Heidegger's philosophy alive. To address the perpetuation of his ideas, we need to address those that speak to his fundamental concerns. Second, and more substantively, this analytical objection might

[136] *What is Called Thinking* p.17. Perhaps the best introduction to this concept for lawyers is that of Linda Ross Meyer "Is Practical Reason Mindless?" *Georgetown Law Journal* 86 (1998), 647. For an attempt to 'Think' about Law see Ben-Dor *Thinking About Law.*

[137] This Heideggerian term became common in Nazism, see Bourdieu *Political Ontology* pp.vii, 60-65, 67-68, 94-96, 99, Schmitt *Three Types*, pp.48-49. Rosenberg claimed that the movement was 'doing God's work'; contradictory messages from church and scripture should be 'overcome' *Myth of the Twentieth Century* pp.117, 204-211, 247-249, 280-288, 309-386, 426-427. Spencer, speaks of how 'Europeans' are 'meant to overcome' history, regulation and politics, op. cit.,(n.53).

highlight how perpetuating this philosophy allows our politics to become 'post-fact' or 'post-truth'. But it does not explain why it this is so amenable to a rise in far-right authoritarianism. Why does a lack of truth lead to a lack in humanity?

For Heidegger, once we 'overcome' mind-world issues, the important questions in philosophy are revealed to be questions of Being. Many have found this step tremendously liberating.[138] But Heidegger never considered what we might lose in terms of our Being if we 'overcome' wrongness in the way that he imagines. As Hannah Arendt pointed out, the 'chief qualification' of an authoritarian leader is 'infallibility'. He or she 'can never admit an error'.[139] Heidegger should have added 'Being-wrong' to modes of "Being" that he addresses. Instead of some aberration, limited to the foolish mistakes of silly philosophers, "Being-wrong" is as much part of the essence of human experience as "Being-with others", "Being-in-the-world" or "Being-towards-death".[140] 'To err is human'. We need to accept this. We need to embrace self-doubt. All of the best Heidegger inspired work gives us something to fill this wrongness void. Levinas, for example, takes our encounter with 'the Other' as primordial in the face of which I am 'faulty'. Ethics thus takes priority over ontology.[141] As with our over-reliance on 'technology',[142] to ignore our own wrongness, our own fallibility, is to make us less human. Heidegger claimed that 'only a god can save us'. Gods are never wrong. Gods are never human. It is no coincidence that many of the most tyrannical despots in history have deified themselves. It is no coincidence that they rarely, if ever, admit to mistakes. It is no surprize that a so-called humanism that fails to identify 'being-wrong' as a central part of the human condition should be appeal to dictators and authoritarians.

We must place this 'fallibility challenge' at the centre of engagement with Heidegger-influenced theory. Such engagement takes many forms, from the manner in which we present such accounts to students to the demands that we make of colleagues who espouse this tradition in their work. If our

[138] See Richard Wolin *Heidegger's Children: Hannah Arendt, Karl Löwith, Hans Jonas, and Herbert Marcuse* (Princeton, NJ: Princeton University Press, 2015).
[139] Arendt, *Origins of Totalitarianism* pp.348-349.
[140] *Being and Time* pp.78-311.
[141] Emmanuel Levinas, *Otherwise than Being or Beyond Essence* (Pittsburgh, PA: Duquesne University Press, 1981) pp.1-11, and Emmanuel Levinas, "Is Ontology Fundamental?" in translated by M B Smith & B Harshav, *Entre Nous: On Thinking-of-the-Other* (London: The Athlone Press, 1998).
[142] See *Question Concerning Technology*

approach to philosophy can have broader effects through culture and education then accepting the fact that we get things wrong might impact out political culture for the better. We might, eventually, create a culture in which reassessment in light of evidence is seen as a virtue in public figures, instead of a 'lack of conviction' or 'weakness'. Perhaps public debate might become more about the best argument and less about who can shout loudest.