The Impossibility of an Exterminatory Legality: Law and the Holocaust†

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Discussions of Nazi law in legal philosophy are most commonly concerned with how the Nazis’ use of law as a means to persecute their opponents demonstrates the essential amorality of law. Attention is often also paid to the institutional debasements and interpretive excesses that characterized the operation of the Nazi political courts. Within these discussions, however, little or no consideration is given to the specificities of the Jewish experience of Nazi law, nor to the fact that the role of law in determining the nature and quality of Jewish life stopped short of the extermination program. In this article, the author seeks to correct this neglect by exploring the questions for legal philosophy, as well as for scholarship that probes the connections between law and the Holocaust, that arise from an examination of the Jewish experience of Nazi law. Drawing primarily upon the thought of the mid-twentieth-century legal philosopher Lon L. Fuller, the author investigates what the apparent shift from legality to terror within the Nazi persecution of the Jews might reveal not only about the institutional features of that persecutory program but also about the nature of legality more generally.

Keywords: Nazi legality/law and the Holocaust/legal philosophy/Lon Fuller

1 Introduction

The Nazi legislative program against the Jews, which saw to the removal of those legally defined as Jewish from civic, cultural, and economic life in Germany, is widely regarded in legal philosophy as tragic proof that law has no intrinsic moral worth. Beyond this general diagnosis, however, the major debates of legal philosophy reveal no serious examination of the specificities of the Jewish experience of Nazi law, nor of the factual coincidence of the decline of the legal persecution of the Jews and the advent of policies, including the extermination program, that proceeded extra-legally. In fact, those debates focus on such issues as the ‘grudge
informer’ cases with which the post-war German courts had to deal in the aftermath of Nazism and on the legal travesties associated with the People’s Court system that tried those accused of so-called political crimes.

The question, then, is whether there are any qualitative differences between the characteristics of the anti-Jewish legal program, which belonged largely to the earlier, pre-war years of the Nazi regime, and the legal travesties, such as the grudge informer cases, that were typical of the later Nazi period. If such differences can be identified, an important question arises: namely, whether the dominant interpretations of Nazi law in mainstream legal philosophy are adequate to the task of enlightening the nature of the Jewish experience of Nazi law.

The argument of this essay is that such differences can be identified, and that they are differences in relation to which legal philosophy must respond. As a basis for this response, two distinctive facts of the Jewish experience of Nazism require closer examination: first, that the Nazis relied on the capacity of the Jews to respond effectively to their regulatory enactments right up until the transfer of jurisdiction over Jewish affairs to the SS; and, second, that the role of legality in determining the nature and quality of Jewish life stopped short of securing their death.

Nazi Party’s security police, the Schutzstaffel (SS), that was held in Wannsee, Germany, in January 1942. It is understood that Reynhard Heydrich, on behalf of the SS, informed those present at the meeting of the Nazis’ intention to proceed with an extermination program.

2 The term ‘grudge informer’ refers to people who, for their own personal advantage, initiated the prosecution of others under Nazi laws that made it a treasonable offence to publicly criticize Hitler or the war effort. As I elaborate further below, these cases raised significant philosophical questions in the aftermath of Nazism, as the post-war German courts had to determine whether they would accept the defence, argued by those accused of being ‘grudge informers,’ that their actions were legal at the time when they were committed.

3 I am singling out the Nazi persecution of the Jews in this analysis because, in my view, the Nazi program against the Jews was distinctive. This is a controversial claim, given the racial-biological status that was shared by the Jews and the Roma within the Nazi world view. In my view, however, the persecution of the Jews was distinctive for reasons relating to the characteristics of the social position of the Jews within the German community, rather than because of the Nazi view of the Jew as a racial-biological threat. That is, unlike the Roma, the Jews were highly embedded in all of the social structures of German life, which meant, in turn, that to remove them from society required legal steps that were not taken against the Roma (e.g., expropriation of property and removal from cultural institutions, the press, judicial appointments, the legal profession, etc.). Additionally, the systems of Jewish community governance that were created and overseen by the Nazis, such as the Reich Association of Jews and the Jewish Councils that administered the ghettos established by the Nazis, involved the Nazi system’s essentially grafting the extant regulatory structures of the Jewish community onto itself. This situation was also distinctive to the Jewish community.
In my view, these two facts hold important implications for a philosophical understanding of the Nazis’ legal persecution of the Jews. I will argue in this essay that by relying on their subjects’ capacity for rationality and self-directed agency in order to give effect to the policy goals of their laws, the Nazis necessarily recognized and relied upon the essential humanity of the Jewish legal subject even while their purpose was to secure the dehumanization of that same subject. Such a recognition and reliance, as I explain, was part and parcel of the Nazi choice to use legality as the means through which to persecute the Jews. It was also, however, a recognition and reliance that, among other consequences, made the use of legality ultimately uncongenial to the policy of extermination.

Implicit in my argument, then, is the idea that there is something about the use of law as a means of persecution that is not purely instrumental. To make such an assertion is to directly challenge the prevailing view that the Nazi use of legality against the Jews is the epitome of the use of law as a mere instrument, and proof that there is no intrinsic connection between law and morality. The argument I advance is therefore a controversial one within the discipline of legal philosophy, where the positivist analysis of law as not necessarily connected to moral questions continues to hold the dominant place.

My argument will also be controversial to those scholars who write about the connections between law and the Holocaust and who ultimately share the positivist view that law is simply an instrument for the attainment of political or other goals, including, in this case, the singling out of a group for persecution and eventual murder. According to this view, especially as it is expressed by the scholar David Fraser, law effectively led us directly to Auschwitz. Any claim that law has some intrinsic moral value must therefore surely be misplaced.

A further controversy might be provoked by the argument of this essay if I am interpreted as suggesting that because the Nazi legal program recognized the Jews as agents, the Jewish experience under Nazi law was in some way good. This, as is revealed in the analysis to follow, is clearly not my suggestion. The Nazis’ legal campaign against the Jews, in Germany and elsewhere, was flagrantly racist, persecutory, and a crime against humanity by any definition of the term. It was also a legal campaign that played a fundamental role in paving the way for

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4 Fraser’s scholarship is discussed later in this essay.
5 There is some irony to this statement, given that the Nuremberg tribunal, during the trial of major Nazi war criminals, interpreted the relevant provision of the charter that gave birth to the category of ‘crimes against humanity’ in international law as meaning that such crimes could be prosecuted only if committed during wartime. The effect of this interpretation was that the Nazi program of persecution against the Jews from 1933 through 1939 was excluded from the tribunal’s deliberations. Subsequent post-war trials, however, lifted this restriction.
the possibility of the Holocaust. Without the usefulness of the law as a means of identifying and defining Jews for the purpose of their persecution, it is extremely improbable, if not impossible, that the Nazis would have been capable of executing their extermination policy in the systematic manner, and to the level, that they did.

Yet to accept all of this is not necessarily to accept the idea that the Nazi legal program against the Jews was intrinsically exterminatory in character. Nor need we accept that the Nazi legal program against the Jews proves the essential amorality of law and its status as a mere instrument. My purpose here is to flesh out the basis of these claims by interpreting what we know about the Jewish experience under Nazi legality through the prism of certain resources that can be found in the writings of Lon L. Fuller. My primary goal is to show how these resources can help us to explore what the shift from legality to terror might reveal not only about the nature of the Jewish experience under Nazi legality but also, to borrow Fraser’s words, about ‘the constitution of the Holocaust’ more generally. My secondary goal, however, is to demonstrate how the example of the Jewish experience of Nazi law also helps to reveal the meaning of Fuller’s insistence that legality has intrinsic, non-instrumental moral value, as well as the abiding concern for the circumstances of the legal subject that animates his vision of law. Thus, by considering how practice might illuminate our philosophical deliberations, my enquiry offers a new contribution to the work of Fullerian scholars with respect to demarcating the points of difference between positivists and antipositivists within legal philosophy.

6 I should clarify here that I use the term ‘the Holocaust’ specifically to refer to the Nazi extermination program; I do not, for the purposes of this essay, include the persecutory measures against the Jews, such as the program of the Nuremberg laws, within this term. This distinction enables me to define the enquiry of this essay as one concerned with the relationship between law and the Holocaust, or the relationship of law to the Holocaust. The arguments that I advance, however, are essentially unaffected by the preference of some scholars to apply the term ‘the Holocaust’ to the entire period of Nazi persecution of the Jews, that, is from 1933 through 1945, rather than (roughly) from 1942 through 1945. If the former understanding of ‘the Holocaust’ is adopted, my enquiry should be reinterpreted as one concerned with the role of law within the Holocaust.

7 That is, it is extremely unlikely that the Nazis could have succeeded in murdering six million Jews by conventional modes of violence alone, such as the mass shootings that were conducted in parts of the Soviet Union following Germany’s invasion in June 1941. This type of mass killing did not, however, in fact occur in Germany or other parts of Western Europe that Germany occupied during the course of the war.

8 See David Fraser, ‘National Constitutions, Liberal State, Fascist State, and the Holocaust in Belgium and Bulgaria’ (2005) 6 German L.J. 291 at 294 [Fraser, ‘National Constitutions’].

9 See, e.g., Colleen Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) 24 Law & Phil. 239 [Murphy, ‘Moral Value’]; Jennifer Nadler, ‘Hart, Fuller, and the
The purpose of the Nazi legal program against the Jews was to reverse the assimilation of Jews into German society that had occurred progressively over the preceding century and had been accelerated by the egalitarian political and legal culture of the Weimar period. Hitler had made clear in *Mein Kampf* his view that the progress of Germany as a civilization was wholly dependent on preserving the purity of Aryan blood. Thus, soon after he gained power in 1933, Hitler began to give legislative expression to his vision of a German *Volk* constituted by pure Aryan blood.

The first significant enactment in service of this end was the Law for the Restoration of the Professional Civil Service of 7 April 1933. The goal of this law was to ‘purify’ the civil service by compulsorily retiring both ‘non-Aryans’ and political opponents of the regime. A regulation was then enacted on 11 April 1933 to define who was a non-Aryan for the purposes of the law. That definition, which in the result proved to be far more harsh than the 1935 definition of ‘Jew’ that became the foundation for all subsequent Nazi legal measures, deemed to be Jewish any person who had one or more Jewish grandparents – in other words, any person who was one-quarter Jewish. Both this and the 1935 definition, however, relied, in determining whether the relevant parent or grandparent was Jewish, on that person’s observance of the Jewish religion. Thus, even with the first legal attempt to define Jewishness, the Nazis confronted the need to

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10 See, e.g., Konrad Jarausch’s study of the steady increase in the number of Jewish lawyers practising at the private bar in Germany from the mid-1800s through to the beginning of the Nazi era: Konrad Jarausch, *Jewish Lawyers in Germany 1848–1938 – The Disintegration of a Profession* (1991) 36 Leo Baeck Inst. Ybk. 171.

11 Adolf Hitler’s *Mein Kampf* (‘My Struggle’), which is part autobiography and part political manifesto, was written during his term of imprisonment for high treason following his failed attempt to overthrow the Bavarian government in November 1923. Hitler’s views about the inferiority of the ‘Jewish race’ are expressed throughout the text. With respect to the alleged connection between Jewish influence and the decline of German culture, for example, Hitler argues at one point that ‘the Jewish people, despite all apparent intellectual qualities, is without any true culture, and especially without any culture of its own. For what sham culture the Jew today possesses is the property of other peoples, and for the most part it is ruined in his hands,’ as well as that ‘[n]ot through him does any progress of mankind occur, but in spite of him.’ Adolf Hitler, *Mein Kampf*, trans. Ralph Manheim (Cambridge, MA: Riverside Press, 1943) at 302–3.

12 There was, however, an exception in art. III(2), which excluded from compulsory retirement non-Aryan Germans who were civil servants in office from August 1914 and who had fought for Germany in the world war, or whose fathers or sons had fallen in that war.
combine their allegedly scientific view of Jewish inferiority with the entirely unscientific phenomenon of religious practice.

Many other laws were also enacted during 1933. They ranged from laws limiting the attendance of non-Aryan Germans in schools and universities to a particular proportion of overall students through the establishment of the Reich Chamber of Culture, which saw to the exclusion of Jews from cultural and entertainment enterprises, to laws prohibiting Jews from inheriting agricultural lands and from working in an editorial capacity on German newspapers. The net effect of these 1933 laws was to accomplish a goal that the Nazis and their sympathizers had been striving for since the formation of their movement: the exclusion of Jews from public life, government, the professions, and culture. No significant anti-Jewish legislation was enacted during 1934, however. This apparent respite likely helped to reinforce the illusion that Jewish life within Germany could be maintained, even if it involved more limited rights.

The tide shifted dramatically, however, with the introduction of the infamous Nuremberg Laws on the occasion of the annual Nazi Party congress in Nuremberg on 15 September 1935. These laws, comprising the Reich Citizenship Law and the Law for the Protection of German Blood and Honour, turned the idea of the purity of German blood into a legal category and created the foundation for a wide range of subsequent legal measures against the Jews.

13 The Law Against the Overcrowding of German Schools and Institutions of Higher Learning, introduced on 25 April 1933. The goal of this law was to limit the attendance of ‘non-Aryan’ Germans to a particular proportion across the entire Reich territory.

14 Introduced on 29 September 1933.

15 The Reich Entailed Farm Law, introduced on 29 September 1933, stipulated that only those farmers could inherit farm property who could prove that their ancestors had no Jewish blood as far back as 1800.

16 The National Press Law of 4 October 1933 placed political newspapers under state supervision and enforced ‘Aryan’ requirements on editors. Additionally, the Law for the Restoration of the Professional Civil Service was extended on 6 May 1933 to apply to honorary professors, university lecturers, and notaries, and on 28 September 1933 a law was enacted to forbid the employment by government authorities of non-Aryans or of persons married to non-Aryans.

17 Initially, the only law planned to be enacted on this occasion was one forbidding Jews from displaying the Nazis’ swastika flag, which was also made the official flag of the Reich. However, Hitler decided unexpectedly on 13 September that he wanted to introduce laws to regulate ‘German–Jewish blood relationships’ to mark the festive closing of the Nazi Party congress. This version of events is confirmed by the Nazi legislator, Bernhard LoeSener, whose memoirs are considered at length later in this essay. See Karl A. Schleunes, ed., Legislating the Holocaust: The Bernhard LoeSener Memoirs and Supporting Documents, memoirs trans. Carol Scherer (Boulder, CO: Westview Press, 2001) at 46–7 [Schleunes, Legislating the Holocaust].
The goal of the Reich Citizenship Law was to alter the status of non-Aryans within the Nazi state by disenfranchising those subjects or nationals who were not of ‘German blood.’ The law established two types of subject of German law: the Reich citizen, who was required to be of German blood, and the non-Aryan, a second-class citizen who enjoyed the protection of the Reich, and had obligations to it, but had no rights of citizenship.

In contrast, the Law for the Protection of German Blood and Honour sought to directly regulate the private relations of Jews and ‘Germans’ by pursuing the explicitly eugenic goal of forbidding marital and extramarital relations between the two social groups. The law also prohibited the employment of female German nationals less than forty-five years of age in Jewish households. The consequences of breaching the ‘Blood Law’ were punitive. Punishment for violations of the marriage prohibition were applied to women and men equally, and included lengthy prison sentences, whereas violations on the prohibition of extra-marital sex saw punishment levelled at men only.

18 The idea of making the concept of citizenship legally dependent on race had been part of the Nazis’ party platform since 1920, and, indeed, much of the policy substance of the Reich Citizenship Law was taken directly from Hitler’s discussion of ‘Subjects and Citizens’ in Mein Kampf, supra note 11.

19 It should be noted that an earlier citizenship measure, to denaturalize those Jews and Roma who had settled in Germany and received German citizenship during the period of the Weimar Republic (1918–1933), had been introduced on 14 July 1933.

20 This essay does not explore the important connection between the removal of the status of ‘citizen’ from the Jews and the aspects of persecution that were built upon that non-citizen status. This connection is especially important with respect to the relationship between the status of non-citizen and vulnerability to deportation. These connections between the loss of citizenship and legalized persecution under Nazism require a comprehensive enquiry of their own. For a consideration of how these connections played themselves out in the particular context of Bulgaria, see Tzvetan Todorov, The Fragility of Goodness: Why Bulgaria’s Jews Survived the Holocaust (London: Weidenfeld & Nicolson, 2001); Fraser, ‘National Constitutions,’ supra note 8. An enquiry into the relationship between citizenship status and persecution in the context of the Holocaust could also invite consideration of the citizenship policies of those countries who refused entry to Jews attempting to emigrate from Germany throughout the 1930s.

21 Again, a law of this kind had been on the Nazi policy agenda for some time, and had also been a preoccupation of Hitler’s in Mein Kampf, which is consistently preoccupied not only with sexual diseases, which Hitler saw as brought about by Jews, but also with a eugenic view of marriage in which marriage is understood as designed to serve the higher goal of preserving the Aryan race.

22 Research suggests, however, that although such punishment was technically meant to be applied to Aryan and Jewish men equally, the punishments ordered against Jewish men were far harsher. See generally Ingo Müller, “Protecting the Race” in Ingo Müller, Hitler’s Justice, trans. Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 1991) 90; Patricia Szobar, ‘Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933 to 1945’ (2002) 11 Journal of the History of Sexuality 131 [Szobar, ‘Telling Sexual Stories’].
Two months after the enactment of these laws, the First Supplementary
Decree to the Reich Citizenship Law introduced a new definition of
Jewishness that applied equally to the Citizenship Law and the Blood Law
regimes.23 The decree created three categories of Jewish racial status: the
Jew, the Mischling first degree (a person with two Jewish grandparents),
and the Mischling second degree (a person with one Jewish grandparent).
The decree also provided, however, that a Mischling first degree, or half-Jew,
could be raised to the status of a full Jew if any one of a number of specified
attributes was present: if the person belonged to the Jewish religious com-
nunity at the time the law was promulgated, or joined after the law was pro-
mulgated, or was married to a Jewish spouse, or was the offspring of a
marriage contracted with a Jew after the introduction of the Blood Law,
or was the offspring of extra-marital relations with a Jew.

A significant role was played by the courts in assessing the circumstantial
and definitional factors associated with the question of determining
Jewishness. As a result, and depending on the extent to which the nazifica-
tion of the judiciary had been carried out in a given setting, these cases wit-
nessed many instances of excesses in interpretation, especially at the
appellate level and especially in the middle and later years of the Nazi
regime.24 Such interpretive excesses were even more endemic in cases
decided within the Nazi People’s Court system, which dealt with crimes
deemed to be political in character. Excesses in interpretation wholly charac-
teristic of the workings of these institutions, and, moreover, the use of the
death penalty was prolific.25

23 First Supplementary Decree to the Reich Citizenship Law, 14 November 1935.
24 See generally Müller, ‘Protecting the Race,’ supra note 22, esp. at 100–2 (on the
interpretation of the meaning of ‘sexual intercourse,’ referring to such examples as
the extension of the term ‘sexual intercourse’ to include situations in which there
had been no physical contact between the relevant parties). Müller notes that the
greatest excesses in defining the meaning of ‘sexual intercourse’ emanated from the
Supreme Court in the late 1930s, and thus guided similar excesses in the decisions
of lower courts from that time onward.
25 See Ingo Müller, ‘The People’s Court’ in Ingo Müller, Hitler’s Justice, trans. Deborah
Lucas Schneider (Cambridge, MA: Harvard University Press, 1991) 140, especially
with respect to the range of actions interpreted as falling within the definition of
‘undermining morale’ in the Decree on Martial Law. These included making such
statements as ‘people ought to work more slowly, so as to bring an end to the war’
(at 146). As Müller points out, the gravity of these interpretive excesses is all the
greater because the death penalty was the rule for the crime of ‘undermining
morale’ (at 145). In the Anglo-American scholarly world, the interpretive excesses of
the Nazi judges are most famously identified with Fuller’s response to Hart in their
1958 exchange, in which he speaks of statutorily prohibited ‘public utterances’
against Hitler being interpreted to include the ‘private’ conversations between
husband and wife that provided the background for the ‘grudge informer cases.’
Lon L. Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71
Harv.L.Rev. 630 at 654 [Fuller, ‘Positivism and Fidelity’].
It is important to note, however, that the anti-Jewish legal measures were enforced through the special court system only exceptionally, because the measures against the Jews were neither criminal nor political in nature.\(^\text{26}\) Nor, therefore, was their enforcement accompanied by the death penalty. This fact might seem anomalous in light of certain notorious cases, such as the Katzenberger case, in which an elderly Jewish man was executed for his alleged sexual relationship with a sixteen-year-old German woman.\(^\text{27}\) In that case, however, the alleged offence under the Law for the Protection of German Blood and Honour had been supplemented by a political offence, which in turn caused the case not only to be processed in the special court system but also to be resolved through the imposition of the death penalty.\(^\text{28}\) Absent this link to a political crime, the death penalty was foreign to the anti-Jewish legislative program.\(^\text{29}\)

The vast majority of the anti-Jewish laws brought into effect after the Nuremberg Laws were introduced as supplementary decrees to the Reich Citizenship Law, which ultimately numbered thirteen.\(^\text{30}\) The first ten of these belong to the period from 1935 through 1939 – that is,

\(^{26}\) That is, although frequently accompanied by harsh punishments that arguably blur the line between criminal and non-criminal categorizations, the anti-Jewish laws did not form part of the criminal law of Nazi Germany in the way that, for example, the crime of homosexual relations was addressed in the regime’s criminal code. Equally, the anti-Jewish measures envisaged the Jewish legal subject as not a ‘political’ but, rather, a racial threat. The result was that legal disputes arising under the anti-Jewish laws were not generally processed in the special court system, whose jurisdiction was primarily concerned with ‘political crimes.’

\(^{27}\) The notoriety of this case has been aided by its representation as the ‘Feldenstein case’ in the 1961 Hollywood film *Judgment at Nuremberg*. See generally Müller, ‘Protecting the Race,’ supra note 22 at 113–5.

\(^{28}\) See generally Müller, ibid. The relevant ‘political’ offence was that of allegedly exploiting night-time blackout regulations. It is notable that this and similar cases were prosecuted in the ‘late’ legal period be distinguished in the following section, that is, from 1942.

\(^{29}\) Müller observes, however, that long penitentiary sentences for ‘race defilement’ often led to death, as upon completion of the sentence some defendants were handed over to the Gestapo for ‘preventative detention.’ This, Müller states, was, ‘[a]s a rule, equivalent to a death sentence.’ Ibid. at 115. It is worth noting again, however, that the instances of this practice cited by Müller belong to the later period of Nazi rule – that is, from 1941 onward. Szobar, ‘Telling Sexual Stories,’ supra note 22 at 139, comes precariously close to suggesting that death sentences were applied in race defilement cases in her statement that ‘arrest for race defilement could, and often did, result in death,’ but then appears to qualify this by observing that ‘more than a few prisoners died while incarcerated.’

\(^{30}\) Only one supplementary decree followed the Law for the Protection of German Blood and Honour, on 14 November 1935; this concerned the regulation of intermarriage between Jews and *Mischlinge* and between Germans and *Mischlinge.*
to the pre-war era – and their focus is on regulating Jewish activities vis-à-vis the ‘German’ population, as well as among the Jews themselves.31

By way of examples of the content of these decrees, the Fourth Supplementary Decree to the Reich Citizenship Law mandated the revocation of Jewish doctors’ licences and the restriction of Jewish doctors to treating Jews;32 equivalent measures with respect to the right to practice of Jewish lawyers were the focus of the Fifth Supplementary Decree.33 The Tenth Supplementary Decree of 4 July 1939 created the Reich Association of Jews. This Nazi invention replaced the indigenous Jewish community organization that had preceded it, but it nonetheless retained Jewish responsibility for promoting emigration and for operating the Jewish school and welfare systems. Similarly concerned with regulating the relations between Jews and Germans, and between Jews themselves, was the Rental Law of 30 April 1939.34 The main goal of this law, which required that Jewish landlords accept only Jewish tenants and subtenants and limited the rights of Jews against Aryan landlords, was to create Jewish residential ghettos by directing that Jews be housed in special Jewish buildings or Jewish quarters.35

Of the remaining three supplementary decrees to the Reich Citizenship Law, dating from 1941 through 1943, the eleventh and twelfth are somewhat different in character than those just reviewed.36 Both have the goal of property forfeiture, and thus join in this pursuit the campaign of property expropriation decrees that were introduced at the behest of Hermann Goering’s economic office following the events of Kristallnacht in early November 1938.37 The striking feature of these decrees, however, and most notably of the decree that ordered the Jews as a whole people to pay 1 billion Reichsmarks to the

31 According to the memoir of the Nazi legislator Bernhard Loesener, discussed in Part III below, this mode of proceeding was regarded as the ‘most convenient’ way of legislating, given the pace at which new anti-Jewish measures were being introduced. Schleunes, Legislating the Holocaust, supra note 17 at 62.
32 Introduced 25 July 1938.
33 Introduced 27 September 1938.
34 Although belonging to the same period, this law was not introduced as a supplementary decree to the Reich Citizenship Law.
35 See the account of the background to this law in Loesener’s memoir: Schleunes, Legislating the Holocaust, supra note 17 at 66.
36 Note that one function of the Twelfth Supplementary Decree of the Reich Citizenship Law of 25 April 1943 was to remove the ‘protected’ status of a state subject, which had applied to Jews, as non-citizens, since the enactment of the Reich Citizenship Law.
37 Kristallnacht, or ‘Night of the Broken Glass,’ denotes the devastating SS-organized pogrom against the Jews that took place, across Germany and Austria, on the night of 9/10 November 1938, during which hundreds of synagogues and Jewish businesses were ransacked or destroyed by fire. At least 100 people were killed, and approximately 30 000 Jewish men were rounded up and sent to concentration camps.
government by way of reparations for Kristallnacht, is that they demonstrate an increasing movement toward treating Jews as a depersonalized whole. The same quality of depersonalization is apparent in the Star of David decree of 1 September 1941, issued by the SS, which not only made the wearing of the yellow Star of David compulsory for all Jews but also placed severe restrictions on Jews’ mobility and imposed harsh punishments for violations.38 The thirteenth and last supplementary decree to the Reich Citizenship law tells a similar story in its validation of the use of discretionary punishment against Jews, at the hands of the SS rather than the courts, for breaches of the law.39

The qualitative shift in the legal treatment of the Jews can also be described in terms of the decreasing basis for an expectation on the part of the Jewish subject that he or she would be subject to predictable treatment by those in power. That is, the assumption by the SS of jurisdiction over many aspects of Jewish life lent an atmosphere of potential, if not actual, arbitrariness to the administration of these measures. The Star of David decree is a case in point, validating police punishment for breaches of its terms and declaring that ‘additional police measures’ and ‘more severe punishments’ were available at the discretion of the relevant authorities.

The anatomy of the Nazi legislative program against the Jews thus reveals two important features. First, the substance of that program, in a quantitative sense, is confined to the pre-war period; only a handful of measures were introduced in the early war years. Second, it might also be said that these later measures reflect a changing approach to the Jew as a regulatory subject, as is evident in increasing depersonalization, an increasing emphasis on harsh punishment, and an increased role for the SS in the discretionary determination and enforcement of those punishments.40 The history of the Nazi persecution of the Jews indicates that this shift away from previously declared constraints and toward the arbitrariness of terror consolidated itself quickly in the early 1940s.

38 For example, this decree, which was a police decree rather than a supplementary decree to the Reich Citizenship Law, provided that ‘Jews are forbidden to leave the local community in which they reside without the written permission of the local police’ and prescribed six months’ imprisonment for deliberate or negligent violation of the decree, with ‘additional police measures’ and ‘guidelines for more severe punishment not precluded.’ A version of the degree is reproduced in Schleunes, Legislating the Holocaust, supra note 17 at 179–80.

39 This decree, introduced on 1 July 1943, provided that breaches of the law by Jews were to be punishable by the police and that upon the death of a Jew his or her property would be forfeited to the Reich, but with the possibility of a discretionary settlement between the Reich and any non-Jewish relatives.

40 The diaries of Victor Klemperer, discussed below, provide helpful empirical evidence of this shift. See especially note 102 infra and accompanying text.
Indeed, the policy of extermination that shortly followed belonged to an extra-legal world of SS directives that remained, at all times, contingent on the whims of those who had the power to issue them.

III *But was it ‘law’?*

The enquiry of the remainder of this essay into how we might understand the philosophical character of the measures just reviewed cannot proceed until an apparent assumption of my analysis is clarified: namely, that the Nazis’ legal measures against the Jews deserve the title of ‘law.’ A consideration of this issue goes to the crux of jurisprudential debates about whether Nazi law – or, indeed, the legal output of any system that uses law for the pursuit of unjust ends – was or was not law.

In legal philosophy, this question is usually cast as an enquiry into legal *validity*: that is, as an enquiry into whether a deeply unjust law ought to be recognized as valid, and therefore authoritative and binding, law. Questions of legal validity, however, are not the primary concern of the present enquiry. I am instead preoccupied with such questions as how the Nazi legal program against the Jews worked; what the constitutive features of that program were; and when, how, and why those constitutive features ceased to be congenial to the so-called Final Solution of the Jewish Question. Still, to even suggest, as I do here, that it is possible to distinguish the legal from the non-legal Jewish experience of Nazism – and thus to make philosophical observations about the relationship between law and the Holocaust – presupposes that it is possible to identify which measures against the Jews were structured by legality and which were not.

The question of whether flagrantly unjust law deserves recognition as valid law was most famously addressed in the debate between the mid-twentieth-century legal philosophers H.L.A. Hart and Lon L. Fuller that began in the 1958 *Harvard Law Review* and dealt explicitly with the example of Nazi law. 41 Hart and Fuller’s exchange about Nazi legality takes place at two levels: first, through a discussion of the connections between law and morality with respect to the existence of legal systems generally; and, second, through an analysis of the jurisprudential quandaries presented by post-war decisions concerning people who, for their own personal advantage, had initiated the prosecution of others under Nazi laws that made it a treasonable offence to publicly criticize Hitler or the war effort. This exchange must therefore be recounted briefly in order to assess whether it offers resources capable of shedding light on the concerns of this essay.

Hart, who set the agenda of the exchange, brings to his response to the above issues the legal positivist commitment that there is no necessary connection between law and morality. That is, Hart aligns himself squarely with the view that ‘the existence of law is one thing, its merit or demerit another.’ However, although Hart clearly upholds this foundational tenet of the positivist faith, he parts ways with his positivist predecessors in his refusal to characterize the nature of legality in terms of its relationship with compulsion. As he famously expresses it in his 1958 essay, ‘[l]aw surely is not the gunman situation writ large.’

With respect to the question of whether a system of law that fails to satisfy certain moral minima can be, or ought to be, considered a legal system, Hart concedes that a legal system must have some minimum necessary content, in the sense of that which makes ‘survival in close proximity to our fellows’ possible. He also concedes that the fact that a legal system must consist of general rules, and thus treat like cases alike, suggests at least a notional connection between legality and moral value. Yet neither of these instances of a certain overlap between legal and moral standards, Hart insists, compromises the positivist claim that law and morality are distinct, because, as he expresses it, ‘a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between persons affected, laws which were hideously oppressive.’

Hart thus clearly sees the question of the connection between law and morality as turning on whether a legal system can enact and apply laws that are substantively immoral. By ‘substantive morality’ I mean the range of substantive values that are ordinarily associated with the term ‘morality,’ such as equality, autonomy, justice, and fairness, among others. Thus, any formal or procedural requirements that might attach to the character of legality as a functioning system – such as the principle of treating like cases alike, and the attendant moral principles of

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43 Ibid. at 603 (referring to the situation in which a gunman says to a victim, ‘Give me your money or your life’).
44 Ibid. at 623. To suggest that morality should be considered part of the necessary content of law is to run the risk that the morality so infused may conflict with the variety of ‘purposes men have for living in society,’ and thus undermine in practice the liberal values that positivism, according to Hart, purports to protect. Ibid.
45 Ibid. at 623. By ‘general rules’ Hart means rules that are ‘general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals.’
46 Ibid. at 624. Hart further adds, ‘Only if the rules failed to provide these essential benefits and protection for anyone – even for a slave-owning group – would the minimum be unsatisfied and the system sink to the status of a set of meaningless taboos.’
objectivity and impartiality that enable it—do not, in Hart’s view, disturb the separation of law and morality as it applies to the existence of a legal system. This is because such principles cannot, of themselves, prevent the emergence of substantively immoral laws.47

As for his treatment of the more specific question of whether Nazi law was or was not law, Hart takes as his foil the philosophy of Gustav Radbruch, a leading legal thinker both in the Weimar Republic and in the post-war effort to rehabilitate the German legal system after Nazism. Radbruch’s position, put at its simplest, was that while a duly enacted law should, in the usual case, be regarded as valid, such validity can and should be qualified if that law reaches a certain level of moral iniquity. In short, an unjust positive law can be refused the character of law if its injustice is so great that it no longer deserves the title of law.48

As Hart explains it, this philosophy powerfully influenced the practice of post-war German courts in determining the legality of certain Nazi enactments, most notably those relevant to the infamous grudge informer cases.

One such case, made famous by Hart’s recounting of it in his 1958 essay, involved a woman who denounced her husband to the Nazi authorities for insulting remarks he had made about Hitler while home on leave from the German army.49 The wife was under no legal duty to report her husband’s acts, though what he had said, as Hart describes it, ‘was apparently in violation of statutes making it illegal to make

47 Ibid. at 623.
48 As Hart explains it, prior to Nazism Radbruch was a devoted positivist who held the conviction that resistance to law was a matter for the personal conscience. Yet Radbruch apparently concluded from the ease with which the Nazi regime had exploited law, and ‘from the failure of the German legal profession to protest against the enormities which they were required to perpetrate in the name of law,’ that the positivist insistence on the separation of law as it is from law as it ought to be had ‘powerfully contributed to the horrors.’ These reflections led Radbruch to argue that ‘the fundamental principles of humanitarian morality were part of the very concept of Recht or Legality,’ and thus that no positive enactment, however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality. Accordingly, Hart concludes, Radbruch’s philosophy required that ‘every lawyer and judge should denounce statutes that transgressed the fundamental principles not as merely immoral or wrong but as having no legal character.’ Hart, ibid. at 616–7.
49 Before elaborating this point, it should be noted that, in an article published shortly after the 1958 Harvard Law Review exchange, another scholar, H.O. Pappe, argued that Hart’s analysis of the issues in dispute was significantly compromised by a misstatement of the facts of the ‘grudge informer’ cases on which his arguments rested, with the consequence, as Pappe put it, that ‘[i]t is open to argument, in the circumstances, how much of the ideological disagreement between Hart and Fuller follows from their discrepant appreciation of the facts.’ H.O. Pappe, ‘On the Validity of Judicial Decisions in the Nazi Era’ (1960) 23 Mod.L.Rev. 260 at 262.
statements detrimental to the government of the Third Reich.\textsuperscript{50} In 1949, when the wife was prosecuted for depriving her husband of his freedom, a crime under the extant German criminal law, she pleaded that because her husband’s imprisonment was pursuant to a Nazi statute that was lawful at the time, she had committed no crime. The court of appeal ultimately rejected her defence on the basis that the statute under which she acted ‘was contrary to the sound conscience and sense of justice of all decent human beings,’ and thus not entitled to the status of law.\textsuperscript{51}

To Hart, the wisdom of this outcome, which was ‘hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism,’ must be doubted for its abandonment of legal principle.\textsuperscript{52} Other options, he argues, were available to the post-war German legal system for dealing with cases of this nature, such as letting the woman go unpunished, or calling upon the legislature to enact a retrospective statute to declare actions taken under the morally impugned laws to be unlawful, ‘with a full consciousness of what was sacrificed in securing her punishment in this way.’\textsuperscript{53} The bottom line, then, for Hart, is to take the path that best serves clarity: to speak plainly and to accept that ‘laws may be law but too evil to be obeyed,’ rather than muddying the philosophical waters by suggesting that this immoral character should affect the status of such a law as law.\textsuperscript{54}

In his reply to Hart, Fuller’s main concern is to examine the implications that flow from the refusal by legal positivists to clarify what they mean to exclude when they exclude morality from their account of law. Fuller asks, for example, what – if Hart insists that the genesis of legality lies not in coercion but in ‘fundamental accepted rules specifying the

\textsuperscript{50} Hart, ‘Positivism,’ supra note 41 at 618–9.
\textsuperscript{51} See generally ibid.
\textsuperscript{52} Ibid. at 619, 618.
\textsuperscript{53} Hart, ‘Positivism,’ supra note 41 at 619. Of these options, Hart expresses a preference for a retroactive law, for the sake of ‘candour’ about the fact that the choice between two evils ‘must be grasped with the consciousness that they are what they are.’ Ibid. at 620.
\textsuperscript{54} Ibid. at 620, 621. It should also be noted that the instrumental understanding of Nazi legality has been buttressed by the dominance of debates, apparently led in the post-war era by Gustav Radbruch, about whether Nazi law, and legal actors, were distinctly ‘positivist’ in nature during this period of German legal history. As can be seen in the commentaries of Ingo Müller and David Luban on this question, this controversial line of analysis tends to be further muddied by a lack of common ground on what exactly is meant by the idea of ‘positivism’ and, thus, by the claim that Nazi lawyers and judges were ‘positivist’: see, \textit{e.g.}, David Luban’s comments, referring to Ingo Müller’s treatment of the issue, in the symposium ‘Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France’ (1995) 61 Brook.L.Rev. 1121 at 1143–9.
essential lawmaking procedure" – is then the nature of these fundamental rules? In Fuller’s view, Hart and his fellow positivists need to take this question more seriously, and to consider the implications of the fact that ‘law cannot be built on law.’ Rather, as Fuller explains it, the authority to make law ‘must be supported by moral attitudes that accord to it the competency it claims.’ Yet this acceptance, he clarifies, although crucial, cannot of itself ensure the functionality of law as law. Thus, a further moral foundation of law must be recognized: namely, the requirements associated with the endeavour of making workable law that Fuller calls the ‘internal morality’ of law.

Fuller’s discussion of the idea of internal morality in his 1958 reply to Hart is elaborated through his famous example of a monarch lawmaker whose attempts at creating workable legal order are compromised by his failure to respect the conditions that enable that order to be brought into being. The monarch, for example, issues commands that promise rewards for compliance and threaten punishment for disobedience, but then habitually punishes loyalty and rewards obedience. He also becomes slothful in the phrasing of his commands, such that ‘his subjects never have any clear idea what he wants them to do.’ Through such practices, Fuller argues, the monarch will never achieve even his most selfish aims ‘until he is ready to accept that minimum self-restraint that will create a meaningful connection between his words and his actions.’ In other words, the morality implicit to law ‘must be respected if we are to create anything that can be called law, even bad law.’ This means, in turn, that the existence of a legal system, even a bad or evil legal system, ‘is always a matter of degree.’

In his much more extensive exegesis of the idea of the internal morality of law in *The Morality of Law*, published six years after the 1958 exchange with Hart, Fuller elaborates eight principles that he argues are constitutive to legality and, thus, structure the task of law-making. These principles include...
such conditions as that laws should be publicly available to those affected by
them, that retroactivity should not be abused, and that laws should not
require conduct that is impossible. In this context, as well as in his 1969
‘Reply to Critics,’ which represents the last word of his exchange with
Hart, Fuller suggests that the principle that is arguably most crucial to
serving legality is the requirement of congruence between official action
and declared rule. As he elaborates the point, the very essence of the rule
of law consists in a commitment by government to apply faithfully those
rules that it has previously declared as determinative of the citizen’s rights
and duties.63 This commitment not only makes legal ordering effective but
also, by creating a basis for stable expectations of official conduct, provides
a stable basis for individual conduct.

In his ‘Reply to Critics,’ Fuller takes an additional step in elaborating
this idea when he argues that the principle of congruence is what dis-
tinguishes the form of social ordering that we call legality from that of
managerial direction.64 Managerial direction, he explains, is a form of
social ordering characterized by a top-down projection of power that is
directed to serve the interests of the superior, rather than, as he claims
is the case with legality, the reciprocal interests of both.65 Within a

63 ‘If the Rule of Law does not mean this, it means nothing.’ Lon L. Fuller, ‘A Reply to
Critics’ in Lon L. Fuller, The Morality of Law, rev. ed. (New Haven, CT: Yale University
Press, 1969) 187 at 209–10 [Fuller, ‘Reply’]. Fuller also frames the point in terms of
how ‘the existence of a relatively stable reciprocity of expectations between lawgiver
and subject is part of the very idea of a functioning legal order.’ Ibid. at 209.

64 The philosophical context of Fuller’s analysis of the difference between law and
managerial direction is his argument that the conception of law defended by
positivism, which in Fuller’s opinion sees the essential reality of law ‘as a one-way
projection of authority originating with government and imposing itself on the
citizen,’ is in fact a conception of managerial direction. Ibid. at 207.

65 As Fuller elaborates it in The Morality of Law, the relationship of reciprocity that he sees
as constitutive of legality is one in which government says, in effect, ‘These are the rules
managerial relation, therefore, ‘the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order,’ not only because the principle of generality has no necessary place within managerial direction but also because the demand of congruence equally has no such constitutive role. Thus there can be no expectation on the part of the subordinate within the managerial relation that the actions of the superior should conform to previously announced rules. 66

Ultimately, then, the thrust of Fuller’s analysis of the difference between law and managerial direction concerns how these respective forms of social ordering treat those at the bottom of their projections of power. This concern, as I will further elaborate, gives expression to Fuller’s overriding preoccupation with the forms of agency that are constituted – or not constituted – by different forms of social ordering. The main point for present purposes, however, is that what is of key philosophical importance to Fuller is how the principle of congruence, which is of constitutive importance to legality, has no such importance to managerial direction. 67 This means that a legal system treats its subjects – and thus mediates the power between ruler and subject – in a manner different from that which characterizes managerial direction. As I will argue later in this essay, this distinction has special importance for our understanding of the institutional character of the Nazi persecution of the Jews.

With respect to the specific issue of legality under Nazism, Fuller’s response to Hart on this question is informed by his conviction that the existence, or not, of legality is a question capable of qualitative appraisal. Fuller’s criticism of Hart on this point is that Hart approaches the question of Nazi legality as if ‘the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman.’ 68 Hart gives no attention,
for example, when condemning without qualification the judicial
decisions in the grudge informer cases, to the distinctive features of life
under Nazi legality, or to ‘the degree to which the Nazis observed what
I have called the inner morality of law itself.’ He also, according to
Fuller, gives no consideration to what implications the mutilated Nazi
legal system had for ‘the conscientious citizen forced to live under it.’

To support these criticisms, Fuller sets out a number of features of the
Nazi legal system, such as the use of the secret statute and the prolific use
of retroactivity to cure past irregularities, that represent a clear ‘deterio-
ration in that form of legal morality without which law cannot itself
exist.’ Bringing these ideas to his response to Hart on the issue of the
grudge informer cases, Fuller highlights how Hart gives no regard to
the extent to which the interpretive principles applied by the courts of
Hitler’s government were capable of determining legal meaning.

Thus, in Fuller’s view, Hart fails to consider the importance of how the
systemic qualities of a legal system influence its legitimacy and function-
ality in practice. For his own part, by contrast,

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

Several issues need to be clarified about this exchange between Hart and
Fuller as it concerns Nazi law. For example, as I implied earlier, it must be
emphasized that the two scholars are principally addressing the philoso-
phical question of how to determine legal validity, as that question was
reflected in the real-life problem of the grudge informer cases. Fuller’s
response to this question is directed primarily to an appraisal of how the
formal quality of the relevant Nazi enactments, and the decisions

69 Ibid. at 649–650.
70 Ibid. at 646.
71 Ibid. at 650–1. Fuller’s point, then, is not that no deterioration from the ideals of the
internal morality of law is ever permissible but, rather, that ‘what in most societies is
kept under control by the tacit restraints of legal decency broke out in monstrous
form under Hitler,’ and that this has consequences for whether that system, or one
similarly undermined, deserves the title of legality. Ibid. at 652.
72 Ibid. at 654
73 Ibid. at 660.
made and actions taken pursuant to them, affected their status as law. Hart’s answer, by contrast, seems exclusively concerned with how or whether the moral content of the laws affected their status as law.

On Fuller’s analysis, then, the question of legal validity is approached by considering how, and whether, a system that purports to be a legal system has the attributes necessary for it to be workable as a system of legality. This explains the nature of Fuller’s conclusions about legal validity in the grudge informer context: that is, that the legal outcomes of these Nazi prosecutions were replete with interpretive and administrative practices that involved a significant derogation from what, in his view, is necessary for a legal system to be able to perform its fundamental task of guiding human behaviour through rules. So understood, Fuller’s condemnation relates to the ways in which these forms of Nazi legality failed to serve legality itself. Following this analysis, therefore, the answer to the question of whether Nazi law was law will sometimes be ‘yes’ and sometimes ‘no.’ This is because, on Fuller’s account, legal validity is determined by looking at the conditions of law’s creation, elaboration, and administration on a context-by-context basis.

It is thus unlikely, for example, that Fuller would have denied the title of law to legal transactions between Aryan Germans concerning wills and estates, or the buying and selling of property, because the structure of such legal relations was rarely affected by the institutional transformations of the Nazi ideological program. He likely would, however, have denied the title of law to the outcomes of those cases in which the relevant interpretive methodologies lent complete arbitrariness to the application of the law. Indeed, this is what is reflected in his analysis of the grudge informer case; an analysis, moreover, that, although sympathetic to the way Radbruch might have approached the same dilemma, is qualitatively different from it.74

74 With respect to Radbruch’s position, Fuller states that he would not personally subscribe to all of Radbruch’s views, especially those relating to the idea of a ‘higher law’ that can invalidate positive law. Nevertheless, Fuller claims that Radbruch’s position is defensible, not least for how it arose from the very real dilemma that Radbruch found himself in: namely, as required to respond to the need for Germany to ‘rebuild her shattered legal institutions, and restore both respect for law and respect for justice.’ Fuller, ‘Positivism and Fidelity,’ supra note 25 at 657. While Fuller, like Hart, would have preferred a retroactive statute, he observes (unlike Hart) that the informer problem was a pressing one, and ‘if legal institutions were to be rehabilitated in Germany it would not do to allow the people to begin taking the law into their own hands, as might have occurred while the courts were waiting for a statute.’ Ibid. at 655. However, and critically, Fuller’s ultimate defence of the actions taken by the post-war German courts rests on different grounds from those advanced by Radbruch. That is, Fuller argues that ‘if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary to invoke the arguments about law being limited by substantive morality
The question for now, then, is how all of this affects the immediate enquiry into whether the specific Nazi legal program against the Jews can be lent the title of law. A number of factors need to be considered if we are to arrive at a response to this preliminary question. First, it is clear that little controversy arises with respect to how Hart would answer this question. For Hart, that is, an unjust law will still be law if it meets the technical requirements for legal validity that are prescribed by a given legal system. While Hart did not give this idea a full exposition until 1961, in *The Concept of Law*, his 1958 essay makes clear that his version of legal positivism contains no objection to declaring an unjust but duly enacted law to be valid. For Hart, therefore, the anti-Jewish laws were clearly law.

To determine how Fuller’s analysis informs an answer to this question, however, requires a more nuanced evaluation that, among other things, must include consideration of whether any significance is to be accorded to the difference between the temporal context of the anti-Jewish legal program and the temporal focus of the Hart–Fuller debate on the grudge informer cases. That is, Hart and Fuller’s exchange refers mainly, if not exclusively, to the legal treatment of those who faced charges of treason for making derogatory remarks about Hitler’s prospects for winning the war. The relevant treason statutes under which these cases were prosecuted, like the anti-Jewish laws, belonged to the early in the period of Nazi rule. But it was not until the later Nazi legal period, once the war was in progress, that prosecutions under these statutes became not only prolific but also based in justifications that moved further and further away from the ordinary understanding of a crime of treason. The excessive prosecution and execution of people whose actions or words allegedly ‘undermined German morale’ is an example in point.

that Radbruch invoked (ibid. at 659). Thus, ‘where one would have been most tempted to say, “This is so evil it cannot be a law,” one could usually have said instead, “This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law.’ Ibid. at 661.

75 See further discussion of Hart’s account of law in *The Concept of Law* in Part VI below.
76 Indeed, most were crimes that pre-existed Nazism, such as treason, high treason, the crime of attacking the president of the Reich, and so forth. The shift to this legal landscape brought about by Nazism was the transfer of jurisdiction for the prosecution of these crimes from the Supreme Court to the ‘People’s Court,’ which was established through legislation on 24 April 1934. See Müller, ‘The People’s Court,’ supra note 25 at 140.
77 Ibid. at 145. Müller explains that the change in leadership of the People’s Court from Otto Thierack to Roland Freisler, which coincided with the intensification of the war, saw an exponential increase in prosecutions and executions. For example, between 1934 and 1936 the death penalty was imposed twenty-three times; between 1942 and mid-1944, at least 2 000 death sentences were imposed. Ibid. at 143.
By contrast, as I explained in Part II above, the main thrust of the legal persecution of the Jews occurred in the first half of the Nazi era, prior to the outbreak of the war in 1939. Although the law continued to regulate Jewish life throughout the war for those in mixed marriages and those legally defined as Mischlinge, the fact is that by 1942 the SS, rather than the legal bureaucracy, held primary jurisdiction over Jewish life. The location of the anti-Jewish legal program in the earlier period of the Nazi regime thus makes it possible to suggest that the enactment, administration, and enforcement of those laws generally bore a closer resemblance to the practices of legality as it is, and was, ordinarily understood than did those practices witnessed once the Nazification of German legal institutions had reached a greater stage of maturity.

It is also necessary to consider how the Jewish experience of Nazi legality might be enlightened by the theoretical distinction between law and managerial direction that is advanced by Fuller. As I explained above, the thrust of Fuller’s analysis of the difference between law and managerial direction concerns how these respective forms of social ordering treat those at the bottom of their projections of power. The relationship between ruler and ruled is mediated differently in legality than it is in managerial direction, and this difference has a qualitative effect on the position of those who are subject to power within these two forms of ordering. Fuller’s analysis enables us, therefore, to draw a distinction

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78 See further explanation at notes 96–106 below and accompanying text, in the context of the diaries of Victor Klemperer.

79 For a fascinating contemporaneous theoretical analysis of the split between, and yet apparent coexistence of, ‘authorities bound by law and others independent of law’ in the Nazi state, see Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941) at 38. Fraenkel posits a distinction between the ‘normative state,’ which can be loosely equated with a rule-of-law order, and the prerogative state, which exists to serve the political aims of the regime: the ‘difference between a Rechtstaat (Rule of Law state) and the Third Reich may be summed up as follows: in the Rechtstaat the courts control the executive branch of the government in the interest of legality. In the Third Reich the police power controls the courts in the interest of political expediency.’ Ibid. at 40. Fraenkel’s theoretical prism would therefore suggest that Jewish legal questions were primarily addressed by the ‘normative state’ from 1933 through 1938, and by the ‘prerogative state’ from 1938 onward.

80 The judgment of the post-Nuremberg ‘Justice Trial,’ which is explained in more detail in Part IV below, is replete with examples of perversions of legality by the Nazi courts, the vast majority referring to incidents dated from 1942. Again, the great bulk of these examples relate to the workings of the ‘special’ court system: see the extracts of the tribunal’s judgment compiled in Douglas O. Linder, ‘The Nuremberg Trials: The Justice Trial’ (2000), online: University of Missouri—Kansas City School of Law <http://www.law.umkc.edu/faculty/projects/trials/nuremberg/Alstoetter.htm> [Linder, ‘Justice Trial’], esp. at pages 8, 9, 11, 13–4, and 17 of the document ‘Decision: USA v. Alstoetter et al.’
between official action referable to, and therefore guided and limited by, previously declared rules and official action referable to nothing other than the whims of those who wield power. It is this latter institutional pattern, I would argue, that dominated the landscape of the Nazi measure against the Jews from about the time of *Kristallnacht*. Prior to that time, however, the institutional design of the Nazi persecution of the Jews generally involved both the provision of declared rules and the expectation of official action in accordance with those rules. 81

In making these claims, I do not intend to discount the atrocious excesses that increasingly accompanied the administration of the Jewish legal program through the courts. 82 My point, rather, is to emphasize that the degradation of legal institutions that was the hallmark of the Nazi period was itself a degenerative process that involved successively greater departures from conventional standards of legality as time progressed. This means that the legal measures against the Jews, situated predominantly in the period 1933–1938, belonged to the era during which the attributes of the Nazi legal system bore their greatest resemblance to legality as we might ordinarily understand it.

That it was a qualitatively diminished species of legality is unquestionable. The anti-Jewish laws were enacted either by the small legislative assembly of the Reich Cabinet or simply by Hitler himself sending instructions to the government’s legislative draftsmen; the policy rationale behind them was never subject to anything approximating the kind of deliberation that is common to parliamentary democracies. 83 Further, these laws were replete with complex definitions and, as has been emphasized, were frequently elaborated through interpretive practices that were so driven by Nazi ideology as to be rendered, in terms of their connection to apparent meaning, virtually arbitrary. 84

Nonetheless, Fuller’s position in the exchange reviewed above supports the conclusion that these measures approximated an operational system of legality more than they did not. Fuller’s analysis, that is, does not oblige us to view either the whole Nazi era or the specific legal program against the Jews as *not law*, because its defining characteristic is its concern for the *workability* of law, from the perspective of the ruler and of the subject. This is a different enquiry to that of legal validity.

81 Further implications of this distinction are considered in Part VI below.
82 See discussion of Müllner’s study of the Nazi jurisprudence on ‘sexual intercourse’ under the Law for the Protection of Blood and Honour at note 24 supra.
83 As reflected in the fact that the majority of the measures took the form of supplementary decrees to the Reich Citizenship Law.
84 The predominantly appellate jurisprudence of the Nazi courts on the question of defining ‘sexual intercourse’ for the purpose of the Law for the Protection of German Blood and Honour offers the most striking example. See Müllner, ‘Protecting the Race,’ supra note 22, and text accompanying note 24 supra.
Indeed, it is important to highlight that, outside of the grudge informer discussion, to which questions of legal validity are clearly central, Fuller’s contribution to his exchange with Hart is predominantly oriented toward the question of how to understand the constitutive features of the form of social ordering that we call law and the ways in which it is brought into being and maintained.

This is not to suggest that Fuller’s account cannot, or does not, address questions of validity. His comment that a system of law infected by multiple and serial abuses of the internal morality of law can be denied the name of law is clearly intended to do just that. But what is important to understand, and what is revealed in his analysis of the grudge informer cases, is that Fuller’s account reaches such determinations of validity as the end point of an assessment of workability, such that, in essence, that which is not workable as law, or which does not serve the project of ‘subjecting human conduct to the governance of rules,’ does not exist, or is not valid, as law.85

It is precisely because of this focus on questions beyond that of legal validity that Fuller’s analysis is capable of illuminating the philosophical implications that flow from the progressive debasement of the institutional order that characterized life under Nazism. Viewed through a prism in which the existence of legality is always a matter of degree, Fuller’s concern for the workability of law enables us to view these institutional changes as involving a qualitative shift, or slide, from governance through legality to governance through some other means.86

This argument might be met with the objection that the workability of which I speak is no different from the effectiveness, or efficacy, that legal positivists insist is the only value to which legality is necessarily reducible. My answer to that objection, which I will elaborate further below, is that unlike the efficacy arguments of those who insist upon an instrumental conception of law, Fuller’s idea of workability not only has content but has content that speaks to the position of both the ruler and the ruled. Alongside the other principles of the internal morality of law that give legality its operational character, this content includes the crucial requirement of congruence that I have studied closely in the foregoing analysis. Moreover, and critically, as I will also explore further, this

85 Fuller, The Morality of Law, supra note 62 at 91.
86 Another reason to prefer this view is that it is difficult to identify with any accuracy the point at which the Nazis’ legal effort against the Jews crossed over the ‘line’ that separates law from non-law. This is not just a question about which people will disagree for philosophical reasons but also one that is rendered complex by the fact that this point might have been reached at different times in different places, making it impossible to say with any precision when the state of ‘non-law’ took hold.
content also includes the specifically moral image of the legal subject as an agent that Fuller insists is implicit in the very idea of legality.

For present purposes, however, the point that needs emphasis is that the Nazi legislative program against the Jews was intended to – and largely did – function in a manner that was not ‘the gunman situation writ large.’ Instead, it was a system, at least until the assumption of primary jurisdiction over Jewish affairs by the SS, in which there remained a general measure of congruence between official action and declared rule that is crucial to the very idea of governance through law. By functioning through means of official action mediated by rules, this system necessarily recognized and relied upon the capacities of its subjects for self-direction, and, in doing so, granted those subjects a certain room to manoeuvre within an otherwise oppressive social order.87 It is for these reasons, and as I will further illuminate through my analysis below, that I am willing to lend the early phase of the Nazi legislative program against the Jews the title of ‘law.’

IV Understanding the relationship between legality and the Holocaust: The competing views

How, then, are we to understand the relationship of this scheme of legalized persecution to the extermination program that ultimately resulted? In terms that see these measures as providing some kind of limit within which the continuity of Jewish life was possible, or in terms that see the laws as proof of the capacity of law to secure any end, including that of extermination? Both views find expression in literature about the Holocaust, and thus both need to be considered. The former view, however, is more likely to be expressed by those who directly experienced the Nazi era than by those who have analysed it in light of the history that transpired. What follows, therefore, is a preliminary attempt to gain a sense of that experience through the observations of three figures who lived through the anti-Jewish legal program, and who each occupied a distinctly different position in relation to it.

The first example is recorded in Hannah Arendt’s controversial book *Eichmann in Jerusalem*, her report on the 1961 trial of the Nazi bureaucrat Adolf Eichmann. Arendt refers the testimony of certain former officials of the Berlin Zionist organization who left Germany before the outbreak of

87 Indeed, this ‘room to manoeuvre’ on the part of the legal subject is the counterpart of the restricted room to manoeuvre on the part of the ruler that attends adherence to the strictures of the rule of law. This point has been put especially well by John Finnis, who, in general support of Fuller’s analysis, observes that ‘[a]dherence to the Rule of Law (and especially the eighth requirement, of conformity by officials to pre-announced and stable general rules) is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts their freedom of manoeuvre. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1982) at 274.
the war in the course of her discussion of the ‘frequently forgotten’ point that the Nuremberg Laws and their counterparts had failed to give full, practical expression to the Nazi Party’s violent anti-Semitism.  

The context of Arendt’s reference to this testimony is her analysis of how, and with the exception of the unprecedented prohibition on the employment by Jewish households of German female domestic servants under the age of forty-five years, the 1935 Nuremberg Laws ‘merely legalized a de facto situation.’  

That is, as Arendt explains it, the almost complete separation of the Jews from the rest of the population had already been achieved ‘through terror but also through the more than ordinary connivance of those around them.’  

The Nuremberg Laws were therefore felt to have ‘stabilized the new situation of Jews in the German Reich,’ because, according to Arendt, the Jews felt that ‘they had received laws of their own and would no longer be outlawed.’  

Thus, if they kept to themselves, as they had been forced to do in any case, ‘they would be able to live unmolested.’  

In saying that the Nuremberg Laws had legalized a de facto situation, Arendt does not appear to be suggesting that their only contribution to Jewish life was a stabilization of an existing climate of persecution that had itself been brought about by illegal means. Rather, she seems to suggest that the laws, even while overtly discriminatory, brought a significant measure of order to a state of disorder. In support of this view, Arendt cites the views of the Reichsvertretung, the national association of Jewish communities that was ultimately replaced by the Reich Association of Jews, to the effect that the Nuremberg Laws were understood as establishing a foundation from which ‘a bearable relationship between the German and the Jewish people became possible.’  

88 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (London: Penguin, 1965) at 39 [Arendt, *Eichmann in Jerusalem*]. Arendt also observes, in the same context, that the Nazis ‘lived in a fool’s paradise, in which, for a few years, even Streicher spoke of a “legal solution” to the Jewish problem,’ and from which it took the organized violent pogroms of *Kristallnacht*, ‘when seventy-five hundred Jewish shop windows were broken, all synagogues went up in flames, and twenty thousand Jewish men were taken off to concentration camps, to expel them’. Ibid. at 39.  

89 Ibid.  

90 Ibid. Note that the diary of Victor Klemperer (infra note 96), discussed in detail below, also recounts the upsurge in ‘Jew-baiting’ that closely preceded the enactment of both the 1933 Civil Service Law and the 1935 Nuremberg Laws: see, e.g., the diary entries of 31 March 1933 (at 10), 3 April 1933 (at 11), 21 July 1935 (at 128), and 11 August 1935 (at 129).  


92 Ibid.  

93 As Arendt correctly clarifies, this organization, founded in September 1933, was not a Nazi-appointed organization, unlike the Reich Association of Jews, which was formed by operation of the Tenth Supplementary Decree to the Reich Citizenship Law in July 1939. Ibid. at 39–40.  

94 Ibid. at 40
follows this statement with a quotation from one of the officials of the Berlin Zionist organization, who, in his testimony in the Eichmann trial, observed that

"Life is possible under every law. However, in complete ignorance of what is permitted and what is not one cannot live. A useful and respected citizen one can also be as a member of a minority in the midst of a great people."  

This understanding of legality as providing at least a minimum structure for ordered life activities is echoed in the diary of Victor Klemperer, which, in its record of one Jewish man’s experience of the entire period of the Nazi regime, offers invaluable insight into daily life under Nazism. Klemperer was a Jewish convert to Protestantism who escaped deportation to the death camps as a result of a combination of legal and fortuitous circumstances. These included his front-line service in World War I, which, under the Law for the Restoration of the Professional Civil Service, secured him his pension payments upon his dismissal from his employment as a university professor, and, most significantly, his marriage to an Aryan German, which placed him in the legal category of ‘privileged mixed marriage.’ Then, in February 1945, when the SS decided to ignore this legal protection and to round up the Jewish spouses in privileged mixed marriages for deportation, Klemperer, a resident of Dresden, was miraculously saved by the coincidence of this round-up with the devastating Allied bombing of Dresden, during the chaos of which he was able to escape.

95 Ibid.
97 The facts suggest that Klemperer was actually dismissed not because he was a Jew but, rather, because he was surplus to requirements as the government cut back on university funding. It was this factor that kept his pension entitlements secure, even though this entitlement was increasingly reduced and subject to draconian deductions associated with his obligation to pay additional Jewish taxes in reparation for the events of Kristallnacht. In any event, had Klemperer been dismissed from his employment on the basis of his Jewish identity, he would still have received certain protections, at least for a period, on the basis of his World War I service. See Martin Chalmers, Preface to Victor Klemperer, I Will Bear Witness: A Diary of the Nazi Years 1933–1941, trans. Martin Chalmers (New York: Random House, 1998) vii at xiv [Chalmers, ‘Preface’].
98 The ‘privileged mixed marriage’ was a status that gave legal protection to Jewish people with ‘Aryan’ spouses. See further explanation at note 111 infra and accompanying text, in the context of discussing Loesener’s memoir, supra note 17.
Klemperer’s diary gives considerably more attention to Nazi ideology and language than to the specificities of the anti-Jewish laws. Nonetheless, he makes several illuminating comments about the effect of the legal measures, including, in one entry, an interesting comment on the effect of the absence of legality. On 7 April 1933, anticipating the enactment of the Law for the Restoration of the Professional Civil Service, Klemperer’s diary records the following:

The pressure I am under is greater than in the war, and for the first time in my life I feel political hatred for a group (as I did not during the war), a deadly hatred. In the war I was subject to military law, but subject to law nevertheless; now I am at the mercy of an arbitrary power. Today (it changes) I am again less certain that the catastrophe will occur soon.¹⁰⁰

The next entry, on 10 April, brings an expression of relief:

The awful feeling of ‘Thank God, I’m alive.’ The new Civil Service ‘law’ leaves me, as a front-line veteran, in my post – at least for the time being. ... But all around rabble-rousing, misery, fear and trembling.¹⁰¹

The representation of the term ‘law’ in scare quotes – a treatment that recurs at several points throughout the diary – reveals Klemperer’s overall cynicism toward the anti-Jewish laws.¹⁰² Yet his entries, not to mention his actual experience of escaping deportation on the basis of his status as the Jewish spouse of a privileged mixed marriage, nonetheless suggest that, irrespective of the unjust content of the laws, he anticipated that their application to various aspects of his life would, despite all else that was going on around him, bring a certain degree of stability.¹⁰³

The point at which some kind of normal life under the conditions of the racist dictatorship became impossible for Klemperer was the 1938

¹⁰⁰ Klemperer, 1933–1941, supra note 96 at 12.
¹⁰¹ Ibid.
¹⁰² See, most notably, Klemperer’s reaction to the introduction of the Nuremberg Laws in his diary entry for 17 September 1935: ‘While I was writing yesterday, the Reichstag had already passed the laws on German blood and German honor: Prison for marriage and extra-marital intercourse between Jews and “Germans,” prohibition on “German” maids under 45 years of age, permission to show the “Jewish flag,” withdrawal of civil rights. And with what justification, what threats! Disgust makes one ill.’ Ibid. at 133.
¹⁰³ See, e.g., the entries for 19 November 1935, ibid. at 140: ‘A few days ago a “law” was published, according to which Jewish front-line veterans are to be retired on full pay. If that applies to me, then my troubles are at an end’; 2 December 1935, ibid.: ‘The waiting really gets on my nerves. In fact everything suggests that they will give me my full salary and even have to backdate it from August. Because so far I have always received the 480M as “part payment” and “until further notice” and I am, after all, a front-line veteran and was, indeed, dismissed as a Jew. ... But given the arbitrariness and malice of the government, who can answer for the interpretation and execution of its “laws.”'
Kristallnacht pogrom – the point at which, as Martin Chalmers, the translator and editor of Klemperer’s diaries, describes it, ‘Jews realize that there is no one and nothing to protect them.’ This qualitative shift is clearly revealed in the diary entries, which record the barrage of new and increasingly oppressive restrictions on the Klemperers’ lives. For Klemperer personally, however, the greatest assault of all was the decree that required all Jews to wear the Star of David in public. His diary entry for 15 September 1941 reveals a palpable sense of loss of agency:

The Jewish armband, come true as Star of David, comes into force on the nineteenth. At the same time a prohibition on leaving the environs of the city. Frau Kreidl Sr. was in tears, Frau Voss had palpitations. Friedheim said this was the worst blow so far, worse than the property assessment, I myself feel shattered, cannot compose myself. Eva, now firmly on her feet, wants to take over all the errands from me, I only want to leave the house for a few minutes when it’s dark.

The views of another figure, whose perspective comes from what one would assume to be the polar opposite position from that of Klemperer or of the Berlin Zionist officials quoted by Arendt, have much in common with those just outlined. For this reason, the writings of Bernhard Loesener, a Nazi legal bureaucrat, deserve close attention. Loesener was a lawyer who worked in legal affairs within the Ministry of the Interior and, in this capacity, was a co-author of the 1935 Nuremberg Laws. In a memoir written shortly after the collapse of the Nazi regime, Loesener describes the inner workings of the Nazi legal bureaucracy in its formulation of the policy and texts of the anti-Jewish legal measures. Throughout the memoir, more controversially, he insists that his work was informed at all times by a sustained attempt to minimize the scope and application of the anti-Jewish laws.

104 Chalmers, ‘Preface,’ supra note 97 at xiv.
105 From that point, measures that compromised the Klemperers’ ability to lead anything approximating a normal life came thick and fast, ranging from the ban on Jews driving cars or using public libraries, cinemas, swimming pools, or parks through the imposition of a curfew for Jews to reduced food rations and then, in May 1940, being forced to rent out their home and to move into a ‘Jew’s house.’ The ban on Jewish emigration from Germany was also introduced in the autumn of 1941, making it impossible for the Klemperers to leave. Chalmers, ibid. at xiv–xv. See especially Klemperer’s diary entries for 22, 27, and 28 November 1938, and for 2, 3, and 6 December 1938 and onward.
106 Loesener, 1933–1941, supra note 96 at 429.
107 Loesener worked under the supervision of the state secretary of the Ministry of the Interior, Wilhelm Stuckart, the better-known author of the Nuremberg Laws. Note, however, that Loesener was not an author of the earliest legal measures, such as the April 1933 Civil Service Law, which was enacted before he took up a position with the Ministry for the Interior. Schleunes, Legislating the Holocaust, supra note 17 at 53.
Loesener describes, for example, the hurried drafting of the text of the Nuremberg Laws on the occasion of the Nazi Party Congress in Nuremberg in September 1935, as well as the heated debates between the Ministry of the Interior and those with a ‘fanatical hatred of the Jews’ with respect to the legal definition of ‘Jewishness’ that would ultimately be given expression in the First Supplementary Decree to the Reich Citizenship Law. Loesener also sets out in detail the policy discussions surrounding the issue of special protection for the Jewish spouses of mixed marriages, a protection which he claims he lobbied for on the argument that it was impossible to treat a family member who was a fully Jewish parent or grandparent ‘as a complete pariah’ without jeopardizing the family – which was half ‘Aryan’ – as a whole.

108 Ibid. at 46–52.
109 Loesener names the ‘Fuhrer of Reich Physicians,’ Dr Gerhard Wagner, who initially argued for the definition of ‘Jew’ to be extended to one-eighth Jews, as the leader of this group. This represented a considerably harsher position than the Nazi Party representatives’ demand that one-quarter Jews be included within the definition. Ibid. at 57.
110 According to Loesener, Hitler’s deletion, at the time of the enactment of the Nuremberg Laws in 1935, of the condition that the legal restrictions therein apply only to ‘full Jews’ meant that the central question for determination quickly became that of whether, and on what basis, ‘half Jews’ would be caught by the legislation. Loesener claims that he and his ministerial colleagues took on the task of presenting a range of reasons against the inclusion of this group that, in their view, would be congenial to the Nazi perspective. He recounts in his memoir that the arguments advanced against extending the laws to the half Jews included the ‘completely loyal attitude of half Jews up until that point, which would come to an end abruptly’; the fact that ‘each half Jew had one Aryan parent, thus Aryan relatives and friends, all of whom would inevitably turn into enemies of the state’; ‘the loss of approximately two divisions of soldiers’; the ‘weakening the German economy through loss of many additional hard-working skilled employees’; and ‘the small number of half Jews, who would otherwise, over the course of two generations, be fully and harmlessly absorbed into the body of the German people; in other words, the senselessness of the entire risk.’ Ibid. at 57–8.
111 Ibid. at 66. Loesener explains that this policy argument could be logically linked to the fact that Hitler had decided that half Jews were not to be treated as Jews and that one-quarter Jews were to be treated significantly better than half Jews. The opportunity for securing this protection arose upon the introduction of Goering’s law regarding rental conditions for Jews in April 1939. As explained at note 35 above, the main goal of this law was to gradually separate the Jews from the rest of the population and to house them in special Jewish buildings or Jewish quarters. Thus, as Loesener recounts it, ‘I pointed out that one could not also stick the Aryan spouse [of a Jew] and the half Jewish children in a ghetto.’ In the event, the only marriages excluded from this protected designation were those in which the children were regarded as Jews, as well as those that were childless and in which the husband was the Jewish spouse. Ibid. at 67. This explains why Victor Klemperer and his wife, who did not have children, were forced to live in the Jew’s house.’ As Loesener also points out
For present purposes, however, the most striking aspect of Loesener’s memoir is his analysis of ‘the meaning of the Nuremberg Laws.’\footnote{Ibid. at 52–6.} In this context, Loesener makes a number of controversial arguments that challenge the popular view that the Nuremberg Laws marked the beginning of the actual persecution of the Jews and ‘prepared the ground for all later atrocities.’ According to Loesener, this view rests on a misreading of what actually took place under the Nazi regime and ‘reverses the relationship between cause and effect in the chain of historical events.’\footnote{Loesener adds, as a qualification to this statement, that ‘[n]othing could be further from my mind than to excuse or gloss over these laws. I regarded them as an outrage every minute of the two days it took to draft them.’ Ibid. at 52.} He argues,

It is a misjudgment of historical truth to see all the misery, all the murders and other atrocities committed against the Jews, as simply the result of the Nuremberg Laws – as thought they had, in a manner of speaking, unleashed everything Hitler’s Germany has on its conscience, or that without them none of this would have happened, or at least taken a less murderous shape. For me, given my knowledge of the facts that never became publicly known, or particularly those which have today slipped from memory, it is a simple statement of objective fact to point out the following: the completely hellish form of the persecution of the Jews in later years became horrible reality \textit{not as a result of, but rather despite the Nuremberg Laws.} Whoever sees it differently does not know the reality of it.\footnote{Ibid. at 55 [original emphasis]. Loesener prefaces this claim with the observation that in countries outside Germany, where there was less awareness of developments prior to the promulgation of the laws, they seemed to announce the beginning of the actual persecution of the Jews, especially given then tumultuous propaganda with which they had been blared out to the world. This was particularly the case in the USA. From there, this view has forced its way back to Germany and is now no longer questioned. This view is wrong.}

Loesener also states in the same discussion that the Nuremberg Laws proved to be ‘a thorn in the flesh’ of the Nazi machine, which, he claims, ‘had no intention of respecting the limits they imposed.’\footnote{The result, therefore, was a series of repeated assaults on the wording of the laws in an attempt ‘to suspend or sharpen this or that paragraph.’ Ibid. at 56. Loesener also comments on how the Ministry of the Interior was ‘completely excluded’ from the atrocities ultimately carried out by the Party, the SS, and the \textit{Sicherheitsdienst} (SD, the Nazi intelligence service), and that ‘all of its legal recommendations were disregarded.’ Ibid. at 55 [original emphasis].} He concludes, however, that although the ‘legal barrier’ erected by the Nuremberg laws was, in his view, never really an obstacle to the spiralling...
terror, its existence nevertheless served as ‘an annoying reminder that the continuing persecution was “illegal.”’

In analysing Loesener’s comments, we must take seriously the possibility that his memoir is entirely self-serving and intentionally exculpatory. This very issue is considered at length in the introductory essay written by Karl Schleunes, the editor of the English-language version of Loesener’s memoir. As Schleunes explains, the memoir was written not only with the benefit of hindsight but also after Loesener’s arrest and imprisonment at the hands of the American occupying authorities, which led eventually to his full denazification in August 1947. The sincerity of, and motivations for, the views expressed by Loesener must therefore be approached with some scepticism.

For my part, I am willing, on balance, to learn from Loesener’s memoir. My reasons for doing so relate not to whether Loesener did in fact try to limit the application of the Jewish legal measures in his capacity as a government lawyer, or to other evidence of his assistance to Jewish people, but, rather, to what is suggested by his analysis of the ‘meaning’ of the Nuremberg Laws. That is, in agreement with the views set out above of those who lived under the laws, I read Loesener as suggesting that legality has the fundamental aim of setting the parameters of a sphere of social activity within which, by definition, that activity continues. Indeed, and again echoing both Arendt’s and Klemperer’s observations, Loesener summarizes in some detail the various non-legal persecutory measures against the Jews that were occurring with increasing vigour throughout 1935 and suggests that, once promulgated, the laws

116 Ibid. at 56.
118 Schleunes, *Legislating the Holocaust*, supra note 17 at 103. Prior to this, in November 1944, Loesener was arrested and incarcerated by the Gestapo, until the end of the war, for his alleged connection to those involved in the attempt on Hitler’s life in July 1944. While Loesener insists that he was in no way involved in planning the assassination attempt, he did allow a couple who were involved in the conspiracy to hide in his apartment for several days. Ibid. at 101–2.
119 At the 1961 trial of Adolf Eichmann, Reverend Heinrich Gruber, who had in 1937 founded an agency to aid Protestants who had converted to Judaism, gave evidence that Loesener, as his contact in the Ministry of the Interior, had made efforts to delay or otherwise moderate planned actions against the Jews. Gruber also stated that Loesener ‘suffered so much, as a matter of conscience, from the whole situation.’ Schleunes, ‘Enigma,’ supra note 117 at 28. Schleunes also mentions (at 29) that Loesener provided post-war assistance to Jewish refugees.
were not always seen exclusively as laws of persecution. Many people who had in no way been adherents of the Nazi system, and even those directly affected, viewed them with a certain relief because they promised to put an end to a state of complete legal disarray. At least one knew now where one stood.121

Moreover, he claims,

in broad circles at that time, these laws were not viewed as something unprecedented and new, or the beginning of a more severe anti-Semitic harassment, but rather as the conclusion of an epoch of particularly vile harassment… Here after all was a law, announced and signed by Hitler himself in the most conspicuous setting possible; as vile as it was, it at least provided something to hold on to, a solid foundation for the future. This was the widespread view including, at first, my own.122

The point, then, is that Loesener understood the Nuremberg Laws not just as formalizing, or legalizing, the extant persecution of the Jews but as bringing some improvement to that situation by introducing a measure of order and a capacity for action to daily life. His memoir suggests that, even as the laws became more prolific and were extended to an ever-wider range of activities, the one characteristic that remained constant was that the legal framework provided a space within which agency, albeit highly and unjustly circumscribed, could be exercised.123

This foundational premise of Loesener’s analysis is illuminated especially well by his apparent disquiet over the regulatory responses to the events of Kristallnacht in November 1938. Paralleling the record in Klemperer’s diaries, Loesener’s commentary on the punitive economic measures levied against the Jews strongly implies that, in his view, a qualitative shift in the character of the Nazi regulation of Jewish life occurred at this time. This is especially apparent from his reports of how ‘legislation’ started to roll out of the office of the Four Year Plan and the Reich Ministry of Economics following Kristallnacht.124

Although subtle, the way Loesener places the term ‘legislation’ in scare quotes is instructive, not least because it is the only time in the entire memoir that he refers to a law in this way. In my view, what Loesener

121 Ibid. at 54.
122 Ibid. at 54–5 [original emphasis]. Loesener continues, ‘This conclusion, moreover, had turned out to be much milder than had been feared. Indeed Hitler himself, with the volubility he was known for, had announced to everyone that this was the conclusion of and the solution to the Jewish Question in Germany.’ Ibid. at 55.
123 It must be observed, however, that Loesener’s memoir reveals a genuine naïveté about – even ignorance of – the practices that frequently accompanied the interpretation of the laws by the courts. As I noted earlier (see note 24 supra and accompanying text), the wide interpretation often given by the courts to certain of the provisions of the laws lent an arbitrariness to the law in many cases.
124 Schleunes, Legislating the Holocaust, supra note 17 at 73.
communicates by so doing is that by the time the Nazis began ‘legislating’ that the Jewish people as a whole were responsible for violent attacks against them, and liable as a result to make a ‘contribution’ to the Reich in the order of one billion Reichsmarks, and when that ‘legislation’ appeared through channels that were not previously the site or source of legislative activity, something other than legality was now regulating Jewish life.\footnote{125}{Ibid. It should be noted the word ‘contribution’ in this context is also placed in scare quotes.}

Loesener’s reaction to this ‘legislation,’ I would argue, thus reveals something important about the expectations of a government legal bureaucrat with respect to what legality is, how it is done, and how it works.\footnote{126}{With respect to his own fate in the Nazi government, Loesener reports in his memoir that the increasing control of the Party and the SS over Jewish matters, alongside his being informed in late 1941 of the mass shootings of Jews in Riga, led to a point at which he could no longer remain in his position. His request for a transfer out of the Ministry of the Interior was agreed with Stuckart, his superior, in December 1941 and eventually put into effect in March 1943, at which time he became a judge in the Office for War Damages of the Reich Administrative Court. Ibid. at 99–100.}

Nonetheless, the view that the Nazis’ legal persecution of the Jews should be understood in the exterminatory terms that Loesener rejects remains the more popular one, whether that view is expressed explicitly or implicitly. The charges levelled against the defendants in the ‘Justice Trial’ held by the American military court in 1947, for example, are strongly infused with this exterminatory interpretation.\footnote{127}{The ‘Justice Trial’ is officially known as United States of America v. Alstoetter et al., 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948). The trial opened on 5 March 1947 and concluded on 18 October 1947, with verdicts returned in December 1947. Of those defendants who were convicted, four received life sentences and six received terms ranging from five to ten years. In the event, all defendants were released by 1956; nine of the ten were free by early 1951.}

That trial, held in the aftermath of the Nuremberg war crimes trial of major Nazi leaders, was the third in a series of criminal trials designed to cleanse different sectors of German society of their most insidious Nazi elements. The defendants, all leading judges or lawyers of the Nazi government, were indicted for crimes against humanity and other charges that the prosecutor, Brigadier General Telford Taylor, described as involving such atrocities as ‘judicial murder’ and ‘utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale.’\footnote{128}{Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. 3 (Washington, DC: US Government Printing Office, 1951) 1 at 32–3.}

Although the charges of ‘judicial murder,’ the debasement of legal institutions, and the use of ‘the empty forms of legal process’ for persecution indicate accurately the qualitative degeneration in the practice of legality witnessed during the Nazi period, it is less clear, in my view, that these judicial activities led directly to ‘extermination on a vast scale.’
Indeed, the tribunal’s own judgment seems at one point to support this view. That is, documents quoted in that judgment strongly suggest that the Nazis themselves viewed the contribution of the administration of justice to the goal of extermination to be limited. The most striking among these is an extract of correspondence, dated 13 October 1942, between the Reich Minister of Justice, Otto Thierack, and the head of the Nazi Party Chancellery, Martin Bormann. As quoted by the tribunal, Thierack informs Bormann that

> [w]ith a view to freeing the German people of Poles, Russians, Jews, and gypsies and with a view to making the Eastern territories which have been incorporated into the Reich available for settlements for German nationals, I intend to turn over criminal proceedings against the Poles, Russians, Jews and gypsies to the Reichsfuehrer SS. In doing so I base myself on the principle that the administration of justice can only make a small contribution to the extermination of members of these peoples. The Justice Administration undoubtedly pronounces very severe sentences on such persons, but that is not enough to constitute any material contribution towards the realization of the above-mentioned aim.\(^\text{129}\)

Nevertheless, the prevailing tenor of the tribunal’s judgment, and the popular view that it has helped to fuel, is that these legal actors were on trial for participating in extermination, however directly or indirectly that participation is understood.\(^\text{130}\)

As I implied in Part I above, the same instrumental view of the connections between the legislative and extermination programs can also be found in contemporary academic writings, especially those of David Fraser. Fraser is, in my view, the most important contemporary Anglo-American scholar of the relationship between law and the Holocaust.\(^\text{131}\)

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\(^{130}\) This understanding, for example, is echoed in the 1961 film *Judgment at Nuremberg*, which was based on the Justice Trial. In the film, when reading the judgment of the tribunal, the character of Judge Dan Haywood, played by Spencer Tracy, admonishes the accused judges for their enforcement of laws and decrees ‘the purpose of which was the extermination of human beings.’

\(^{131}\) Alongside Fraser I would place Vivian Grosswald Curran, a comparative law scholar who has written extensively on legalized anti-Semitism in unoccupied Vichy France and on the relationship of this legal program to extant French constitutional norms; see especially Vivian Grosswald Curran, ‘The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France’ (1999) 50 Hastings L.J. 1 [Curran, ‘Democracy’s Suicide’]. In addition to her focus on the malleability of constitutional norms in the face of persecutory goals, Curran’s work also criticizes the capacity of other legal resources, such as legal interpretive methodologies, the values of the civil or common law legal traditions, and theories about the nature of law, to address or prevent the phenomenon of legalized barbarism. She instead emphasizes the fundamental importance of the values of legal actors. See especially
official persecution of the Jews in nations either allied with or occupied by Nazi Germany during the war has been especially invaluable in exposing the mythology of the view that Jewish persecution was a strictly Nazi matter.\textsuperscript{132} It also, moreover, leads him to make significant philosophical claims about the connections between the legal persecution of the Jews and the Holocaust, given that legislated anti-Semitism in these societies either accompanied or was a direct product of the war effort.\textsuperscript{133} Indeed, in some cases the anti-Jewish laws were enacted after the extermination program had already begun.\textsuperscript{134} This apparent relationship of legality to the ultimate result of extermination thus makes compelling the view that the anti-Jewish laws were explicitly exterminatory in character, given their use and usefulness in identifying the group targeted for extermination. This, certainly, seems to be Fraser’s view.\textsuperscript{135}

Fraser’s wider concern for the extent to which the Holocaust should be viewed as ‘part of the normal continuities of history and law in the traditions of Western culture’ strengthens this line of argument within his

\textsuperscript{132} See, e.g., David Fraser, \textit{The Jews of the Channel Islands and the Rule of Law, 1940–1945: ‘Quite Contrary to the Principles of British Justice’} (Brighton, UK: Sussex Academic Press, 2000) [Fraser, \textit{Jews of the Channel Islands}]; David Fraser, ‘The Fragility of Law: Anti-Jewish Decrees, Constitutional Patriotism and Collaboration in Belgium 1940–1944’ (2003) 14 Law & Critique 253; Fraser, ‘National Constitutions,’ supra note 8; David Fraser, ‘A Passive Collaboration: Legality and the Jews of Brussels, 1940–1944’ (2005) 30 Brook.J.Int’l L. 365. Fraser’s work in this capacity joins Vivian Curran’s excellent scholarship on Vichy France. Common to the work of both scholars is their attention to the effect – or non-effect – of extant constitutional norms in such countries in minimizing the legal persecution of the Jews, and both conclude that the history of the Holocaust reveals the malleability of legal and constitutional normative structures in the face of evil. See, e.g., Fraser, ‘National Constitutions,’ supra note 8; Curran, ‘Democracy’s Suicide,’ supra note 131. Also common to the work of Fraser and Curran is their study of whether the resources of the legal traditions of civil and common law provided any bulwark against persecutory legislation: see Fraser’s work on the British Channel Islands for a study of anti-Jewish legislation in the context of traditions of the British legal system (\textit{Jews of the Channel Islands}, ibid.) and Curran’s work on France for a study of the failure of the relevant, equivalent civil law resources (see especially ‘Law’s Past and Europe’s Future,’ supra note 131 at 505).

\textsuperscript{133} For example, the laws enacted between late 1940 and mid-1941 both in occupied France, at the behest of the Nazis, and in Vichy France, at the behest of Marshal Pétain’s independent government, were introduced soon after the Nazi occupation of France but prior to the commencement of the extermination program.

\textsuperscript{134} This was true of some of the anti-Jewish laws enacted in Hungary.

\textsuperscript{135} E.g., ‘In Belgium, Jews were persecuted, identified and killed under the guise of an imposed legalized “passive” collaboration with the occupying forces.’ Fraser, ‘National Constitutions,’ supra note 8 at 292.
work.\textsuperscript{136} His major text, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust*, takes up this theme in its concern to debunk the idea of Nazi law as not law in favour of an analysis that reveals the overall ‘lawfulness of the Shoah.’\textsuperscript{137} As Fraser puts it,

the law was in fact not absent from Auschwitz. It was not a lawless time or place. Auschwitz was lawful, it was full of law – lawful prescriptions of ‘Aryan’ and ‘Jew,’ lawful sterilizations and euthanasia to protect the blood, lawful orders, from lawyers and doctors, for the removal, isolation, and then extermination of those enemies of the State, those parasites who would infect the *Volksgemeinschaft*\textsuperscript{138}

Although I am in agreement with many aspects of Fraser’s work,\textsuperscript{139} there is, in my view, more to the picture than is implied by his analysis. First, what is clear from the historical facts is that Germany’s anti-Jewish laws, which provided the model for those of other jurisdictions, were enacted at a time when the policy toward the Jews was one of emigration rather than extermination.\textsuperscript{140} As for the anti-Jewish laws that were enacted elsewhere during the war, either by Germany in its capacity as an occupying power or as a product of the indigenous legal systems of Germany’s Axis allies, I would argue that despite their often obvious administrative and temporal connection to the extermination program, these laws were also not intrinsically exterminatory in the sense suggested by

\begin{enumerate}
\item Ibid. at 10.
\item Ibid.
\item There are many points of agreement between Fraser’s views and my own. For example, we share common ground with respect to the decisive importance of the ethical attitudes of legal actors to the possibility of a humane rule of law – a concern that is, as noted earlier, obviously also shared by Curran. I also share Fraser’s reservations about the capacity of law to judge the Holocaust, which is an important theme of *Law After Auschwitz*. Further, as I will elaborate below, I agree with Fraser, though in my case tracing my view to Fuller’s thought, that there is no *necessary* connection between the use of law and the substantive morality of legal ends. However, I think there is an important insight in Fuller’s view, if difficult to demonstrate against the exacting standards of philosophical analysis, that there is nonetheless an affinity between the two. In this vein, Fuller’s arguments in his 1958 reply to Hart point to how many of the most substantively unjust and outrageous measures adopted by the Nazis against their ‘enemies’ were commonly accompanied by flagrant departures from, or abuses of, the ‘internal morality of law’: Fuller, ‘Positivism and Fidelity,’ supra note 25 at 661.
\item The widely accepted view of historians is that the Nazi policy against the Jews was not exterminatory at the outset but, rather, evolved to an exterminatory position. The approximate period in which this is said to have occurred began in mid-1941, marked by the mass killings of Jews upon Germany’s invasion of the Soviet Union, and was consolidated by the resolution of the Wannsee Conference in January 1942 to proceed with the ‘Final Solution to the Jewish question.’
\end{enumerate}
Fraser. Rather, they were facilitative of an administrative circumstance that made extermination more thinkable but not inevitable.\textsuperscript{141} As subtle as this distinction may seem – and certainly to Fraser it is so subtle as to be inconsequential – it is nonetheless, in my view, an important one for understanding the relationship of law to the Holocaust.

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

Ultimately, however, it is the different philosophical commitments that Fraser and I bring to our inquiries that most sharply distinguish our respective approaches.\textsuperscript{142} The problem with Fraser’s approach, in my opinion, is that by placing the whole Jewish experience of the Holocaust under the label of law, it makes no distinction between the constitutive qualities of a functioning system of legality and the

\textsuperscript{141} Unlike Fraser’s, Curran’s writings make the same distinction that I here assert between the institutional mechanics of legalized anti-Semitism and those of the extermination project. This is apparent from her description of the Vichy anti-Jewish enactments in terms of how they ‘defined, and progressively ostracized Jews, leading to the eventual deportation of an estimated 75,000 Jews from France’ (Curran, ‘Democracy’s Suicide,’ supra note 131 at 7) and from her comment about how these laws abrogated ‘all legal protection of Jewish persons and property, eventually and progressively subjecting every Jewish person on French soil to possible legal internment in camps, and delivery to the Germans for deportation and death’ (ibid. at 10). Curran otherwise pays no attention, however, to the lessons that might be learned from this distinction.

\textsuperscript{142} See also the review of Fraser’s \textit{Law After Auschwitz} by Thomas Mertens, who equally raises objections to Fraser’s use of the term ‘law’ when he asks whether it can ‘still have a distinguishing quality’ if it merely indicates rule-governed behaviour. Thomas Mertens, ‘Continuity or Discontinuity of Law? – David Fraser’s \textit{Law After Auschwitz: Towards a Jurisprudence of the Holocaust}’ (2007) 8 German L.J. 533 at 543. Mertens also points out, in the same vein as I emphasize here, that ‘while it is undoubtedly true that law played a key role in defining, robbing, and isolating the Jews, there is much less evidence that the actual mass killing of the Jews was governed by law too.’ Ibid. at 542.
constitutive qualities of the order of a concentration camp – or, indeed, between the anti-Jewish legal measures of the first half of the Nazi period and the police decrees and ghetto regulations that, as I have argued, marked the transition from legality to terror as the governing framework of Jewish life.143 If such a philosophical distinction can be made, as I believe it can, then more about the character of legality itself must be revealed in order to support it. Once that character is so revealed, the qualitative effect that legality had on the life and death of the Jews of Europe under Nazism is brought to light. I return again, therefore, to legal philosophy.

Understanding the Jewish experience of Nazi legality: A new perspective

As I observed earlier, the debates of mainstream legal philosophy on the subject of Nazi legality shed little direct light on the specifics of the Jewish experience within that system. It is therefore understandable that scholars interested in the connections between law and the Holocaust generally eschew these debates as being of little assistance in revealing the true character of law’s role in the Holocaust or what is needed if law is to have effective preventative or remedial capacity with respect to such atrocities.144

The purpose of the remainder of this essay, however, is to demonstrate that mainstream legal philosophy, and particularly the writings of Lon Fuller, might nevertheless have something important to offer to our understanding of the connections between law and the

143 It is fitting in this context to note that in an essay that Fuller intended to be the introduction of his ultimately unfinished ‘eunomics’ theory of ‘good order and workable social arrangements,’ he makes an explicit distinction between the quality of ‘good order’ and ‘the order of a concentration camp.’ Lon L. Fuller, ‘Means and Ends’ in Kenneth I. Winston, ed., The Principles of Social Order: Selected Essays of Lon L. Fuller, rev. ed. (Portland, OR: Hart Publishing, 2001) 61 at 61.

144 Fraser, for example, chooses to sidestep these debates completely, on the basis that arguments about natural law and positivism ‘hardly stand up to scrutiny, nor do they advance the real issues of the debate here.’ Fraser, After Auschwitz, supra note 136 at 8. Fraser points out that even those who reject the ‘legality’ of Nazi Germany ‘are still faced with the existential reality of a legal system which continued to function much as it had before’ (ibid. at 23). Curran also insists that such theoretical accounts are of limited utility, at least in terms of any remedial capacity that might be attributed to them. See, e.g., ‘Law’s Past and Europe’s Future,’ supra note 131 at 485, where Curran argues that ‘the post-war focus on judicial methodology and theory as a significant avenue for securing a humane rule of law is unlikely to bear fruit because a debate which is internal to law, to identifying the best laws, the best legal theories, and the best-defined judicial mission and methodology, cannot affect more than a fragment of the life of the law and of people, given the importance of the non-legal arena’s influence on the all-important “constitution that is written in the citizens’ minds.”’
Holocaust. To situate my claims, we must recall that Fuller advanced a view of legality as constituted by features that must be upheld and maintained, to a greater rather than lesser degree, if a workable legal order is to be possible. His model of the eight principles of the internal morality of law was designed to give expression to the basic content of those features. More controversially, however, Fuller also claimed that these features are moral in character. By so insisting, he directly challenged the dominant position in legal philosophy, advanced by legal positivism, that there is no necessary connection between law and morality.

This much about Fuller’s position is well understood. What is less well understood, especially by his critics, is the connection between this challenge and Fuller’s argument that, because the very possibility of legal order is contingent on the agency the legal subject, law must also be constitutive of agency. This claim is of a decidedly different character than that which Fuller’s critics ordinarily attribute to him. That is, when Fuller’s positivist critics approach his thinking about the internal morality of law, they bring their own theoretical commitments to their reading of his arguments. Primary among these commitments, and decisive to the positivist treatment of Fuller’s claims, is the idea that the only necessary connection between law and morality that is of serious concern to a philosophical analysis of law is the connection between the use of law for the pursuit of an end and the moral quality of the end so pursued. Thus, the legal positivists argue, so long as Fullerians are unable to demonstrate that observance of the internal morality of law can preclude the possibility of iniquitous ends’ being realized through law – a possibility, they emphasize, that has been realized on multiple occasions throughout history – then the claim that a necessary connection between law and morality is revealed in the internal morality of law must fail.

With respect to note 144 supra, it should be noted that Curran does engage extensively with the mainstream jurisprudential debates in her work. However, she restricts that engagement to the positions of Hart and Radbruch. Indeed, Curran explicitly acknowledges that, although Fuller was also a participant in that debate, she does not consider his views: Curran, ‘Law’s Past and Europe’s Future,’ supra note 131 at 496 n. 43; Curran, ‘Racism’s Past and Law’s Future,’ supra note 131 at 696 n. 43. The inference that might be drawn from this neglect of Fuller’s position is that Curran considers it to be substantially the same as Radbruch’s – a ‘natural law’ view that opposes Hart’s positivist analysis. However, as explained above, Fuller’s ultimate defence of the actions taken by the post-war German courts rests on different grounds from those advanced by Radbruch. That is, Fuller argues that ‘if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary to invoke the arguments about law being limited by substantive morality that Radbruch invoked.’ Fuller, ‘Positivism and Fidelity,’ supra note 25 at 659.

The legal systems of Nazi Germany and of South Africa during apartheid, as well as the slavery laws of the early United States, are generally cited as irrefutable practical illustrations of the truth of the positivist theoretical claim.
It is important to emphasize, not least because it is often forgotten, that Fuller actually agrees with his opponents that observance of the requirements of the internal morality of law cannot, of itself, preclude the possibility of iniquitous ends’ being pursued through law. In *The Morality of Law*, for example, he states that the internal morality of law is, at least theoretically, ‘indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy.’ Fuller does argue, however, that there is, at the very least, an ‘affinity’ between the observance of the requirements of the internal morality of law and the substantive morality of ends so pursued. Falling short of a necessary connection between law and morality, this idea has been of little interest to Fuller’s critics. Nonetheless, I hope to show below that, contrary to Fuller’s apparent concession, the internal morality of law is *not* ready to serve every aim with equal efficacy.

In any event, as I have suggested, the idea that there is some affinity between the form and the moral substance of law is not the main point that Fuller sought to advance about the moral quality of legality, even if the two are linked, in his thought, in important ways. Nor does his argument about the moral quality of law rest, at least not primarily, on his important explanation of how the internal morality of law gives expression to a model of the right conduct to be observed by those who create and administer law. Rather, a careful reading of the way in

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148 Fuller put a version of this point as early as his 1958 reply to Hart, in which he argues that when men are compelled to explain and justify their decisions, ‘the effect will generally be to pull those decisions toward goodness, by whatever decisions of ultimate goodness there are.’ Fuller, ‘Positivism and Fidelity,’ supra note 25 at 636. An even stronger formulation of the point is expressed in *The Morality of Law*, supra note 62 at 162, 184, where he states that an observance of the demands of legal morality can serve the broader aims of human life generally, because even if it is presented as a procedural variant of natural law, it nevertheless ‘affects and limits the substantive aims that can be achieved through law.’ Standing by these claims, Fuller emphasizes in his 1965 reply to criticisms raised by Ronald Dworkin and Marshall Cohen that his claim about the connection between the procedural and substantive moralities of law involves the humble contention that ‘order, coherence, and clarity have an affinity with goodness and moral behavior’ and that this is a claim concerned not with what is logically necessary or possible but, rather, with what is consistent with ‘the prosaic facts of human life.’ Lon L. Fuller, ‘A Reply to Cohen and Dworkin’ (1965) 10 Vill.L.Rev. 655 at 666, 664.
149 Many examples of this idea of ‘role morality’ are given expression in Fuller’s work. In *The Morality of Law*, supra note 62 at 145, for example, Fuller speaks of how the success of law depends on ‘the energy, insight, intelligence, and conscientiousness of those who conduct it.’ Shortly thereafter, in his ‘Reply to Cohen and Dworkin,’ supra note 148 at 660, Fuller makes the point even clearer when he states that ‘legal morality’ is ‘that special morality that attaches to the office of lawgiver and law-applier, that keeps the occupant of that office, not from murdering people, but from...
which Fuller defends his idea of the internal morality of law as both deserving moral status and demonstrating a necessary connection between law and morality reveals that his defence of the moral value of law can be traced to a claim that is separable from these other arguments. Fuller states this claim in the final chapter of *The Morality of Law*, in its original edition, in explaining why the internal morality of law is worthy of the title ‘morality’:

I come now to the most important respect in which an observance of the demands of legal morality can serve the broader aims of human life generally. This lies in the view of man implicit in the internal morality of law. I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent.150

Fuller’s argument, in short, is that the moral conception of the legal subject as a rational, autonomous agent capable of self-directed activity is implicit in legality because the workability of law, as law, depends on it. This means, in turn, that the relationship between these capacities and legality is a constitutive one, and, by extension, that the phenomenon of legality, properly understood, necessarily respects and serves these capacities.

These claims require some unpacking. To suggest that legality necessarily respects, and serves, the capacities highlighted by Fuller is not to suggest that legality also necessarily involves their full realization. Fuller makes no suggestion of this kind. His conception of legality instead involves a continuum, ranging from the lowest-common-denominator conditions necessary for legal governance to be possible at all through to the use of legality as a vehicle for the realization of human potential.

undermining the integrity of the law itself.’ Perhaps most famously, Fuller elaborates this point in the context of his criticisms of legal positivism in his 1969 ‘Reply to Critics,’ supra note 63 at 193, where he argues that since, in the positivist creed, ‘the lawgiver is not regarded as occupying a distinctive and limited role, nothing that could be called a “role morality” attaches to the performance of his functions.’ For two helpful analyses of the importance of the idea of role morality to Fuller’s approach see Daniel E. Wueste, ‘Fuller’s Procesual Philosophy of Law,’ Book Review of *Lon L. Fuller* by Robert Summers (1985) 71 Cornell L.Rev. 1205, and David Luban, ‘Natural Law as Professional Ethics: A Reading of Fuller’ (2001) 18 Social Philosophy & Policy 176.

150 Fuller, *The Morality of Law*, supra note 62 at 162.
Indeed, this idea of a continuum of legality is foundational to Fuller’s insistence that the existence of law can be qualitatively appraised and that, relatedly, such existence is always a matter of degree.

The important point for present purposes, however, and the insight common to all points along this continuum, is that giving respect to the law-subject as a responsible agent – or, to put it more strongly, constituting the legal subject as an agent – is a condition of the very possibility of a system in which people voluntarily orient their behaviour toward general rules.151 Fuller did not make this argument about the view of man implicit in the internal morality of law in any way contingent on whether the ends being pursued through law are just or unjust. Rather, it is clear that, on his view, an intrinsic respect for the moral capacities and self-directed agency of the subject simply comes with the territory of legality, even if the pursuit of an unjust legal end might involve only a minimal realization of those capacities.

It is necessary to address some likely objections to the argument just advanced. It might be said, for example, that Fuller’s argument about law’s intrinsic recognition of moral capacities is premised on the assumption that the law addresses its subjects directly, as opposed addressing officials and instructing them as to the measures they are to take with respect to the legal subject. Such Nazi legal measures as stripping citizenship from Jews or removing professional licences might be offered as examples of this circumstance, and thus as a case against Fuller’s argument. Or, in a different vein, it might be objected that no persecutory legal program that viewed its subjects as subhuman could possibly be said to have treated those subjects with any measure of respect. Again, the Nazi legal persecution of the Jews or the race laws of apartheid South Africa might be offered as examples.

My response to the first objection is that the question of to whom a law is actually addressed is ultimately of only minor importance in revealing how legality constitutes its subjects as agents. Or, at least, I would suggest that to read Fuller’s prescriptions about reciprocity between ruled and ruled in too narrow a sense is to run the risk of missing his main point about how legality secures a certain quality of

151 Fuller develops this point further in his analysis of managerial direction (but without such a label) in an essay titled ‘Irrigation and Tyranny.’ In this context Fuller emphasizes that all forms of social ordering that are meant to be continuous involve some relationship of reciprocity in order to be constituted, even if such reciprocity is in as attenuated a form as that which typically characterizes the relationship between superior and subordinate in the managerial context, for the simple reason that it is necessary to sustain the social interactions that make any form of social ordering possible. Lon L. Fuller, ‘Irrigation and Tyranny’ in Kenneth I. Winston, ed., The Principles of Social Order: Selected Essays of Lon L. Fuller, rev. ed. (Portland, OR: Hart Publishing, 2001) 207 esp. at 214.
existence for those who live within it. Thus, even if a law is addressed to
officials, rather than directly to subjects, the official action that consti-
tutes its administration – if that action is pursued in accordance with
the principle of congruence – will itself involve a relationship with
the capacities of the subjects whose status or behaviour is its focus.152
Indeed, the fundamental importance of this relationship is clearly
revealed in Fuller’s comment that every departure from the principles
of law’s inner morality is ‘an affront to man’s dignity as a responsible
agent.’153

My response to the second objection is that just as Fuller did not make
his argument about the moral conception of the person implicit in legal-
ity in any way contingent on the moral substance of the ends of law,
neither did he suggest that this conception of the person needs to be con-
sciously held by the lawmaker, in the sense of the lawmaker’s actually
respecting the legal subject as a moral being. Rather, Fuller makes
clear that the view of man of which he speaks is implicit in legality: it is
part and parcel of law’s method, even if a wholly opposing view of the
legal subject might prevail in the minds of those who seek to give

152 For an exchange on a similar point, concerning the question of the character of
modern legislation in the administrative state, see Edward L. Rubin, ‘Law and
Legislation in the Administrative State’ (1989) 89 Colum.L.Rev. 369, especially at
399–408. Rubin asserts that modern legislation can be said to fail or otherwise
render irrelevant the requirements of Fuller’s internal morality of law at multiple
levels. This is because modern legislation is, more often than not, ‘intransitive,’
meaning that it involves rules directed to officials in administrative agencies for
further elaboration with respect to its ultimate application to citizens, rather than
rules that provide a direct guide to conduct for citizens. In reply to Rubin, Peter
Strauss advances an argument similar to that which I have stated above: Peter
(1989) 89 Colum.L.Rev. 427 esp. at 441–5. Strauss emphasizes that important
internal morality ‘work,’ in terms of constraints on power and the securing of
stabilized expectations on the part of citizens, is done in the functions discharged by
administrative agencies, and that this is overlooked by Rubin. As he puts it, ‘Fuller
formulated his principles, as Professor Rubin recognizes, for “a system for subjec-
ting human conduct to the governance of rules,” and that suggests that their utility is not
to be assessed by looking at the legislative output alone.’ Ibid. at 444. Thus, Strauss
continues, an apparent breach by modern ‘intransitive’ legislation of such principles
as clarity ‘is tolerated because it exists within a system that does give legal obligations
or restrictions more precise shape before the citizen is asked to act or subjected to
penalties for unwanted behavior.’ Ibid. at 445. The gist of Strauss’s position, as
I read it, is the same one I advance in this essay: that to read Fuller’s arguments
about the requirements of legality in an unduly narrow manner is to miss the
import of those arguments as they concern the overall ambition of legality in
securing a certain quality of ordering for those at both ‘ends’ of the legal rela-
tionship.

153 Fuller, The Morality of Law, supra note 62 at 162. Further implications concerning the
relationship of congruence to the quality of agency that is expected from the legal
subject are explored in Part VI below.
effect to their persecutory policies through law.\textsuperscript{154} As my concluding analysis below will reveal, the importance of both of these points is especially well illuminated by the history of the Jews under Nazism.

A number of scholars sympathetic to Fuller’s approach to law have recognized the importance of Fuller’s argument about the conception of the person implicit in legality to his rejection of the idea that legality is a mere instrument for the efficacious pursuit of the goals of those empowered to make law.\textsuperscript{155} Fuller’s critics, however, have traditionally paid little, if any, attention to this claim as a means of understanding Fuller’s position and the challenge it poses to the positivist conception of law. As I will now explain, this neglect by Fuller’s critics not only disables their capacity to understand the content and implications of his position but also undermines the extent to which their own theoretical

\textsuperscript{154} In addition to my concluding observations, see immediately below for a further elaboration of this point in the context of what in my view is Dworkin’s misunderstanding of the point of Fuller’s argument about the moral conception of the person implicit in legality.

\textsuperscript{155} The most extensive consideration of this passage and how it might support Fuller’s belief in the connection between law and morality is that undertaken by Jeremy Waldron in ‘Why Law – Efficacy, Freedom or Fidelity?’ (1994) 13 Law & Phil. 259. Waldron, however, suggests that Fuller’s point in this passage does not establish any categorical link between law and freedom that is capable of grounding his claims about the necessary moral value of law. Instead, Waldron appeals to Fuller’s arguments about reciprocity for the basis of that conceptual claim. My own analysis departs from Waldron’s insofar as I argue that we need not pit freedom against reciprocity as the basis of Fuller’s claim about the moral value of law, because both are dimensions of how the form of legality must, of necessity, constitute its subjects as agents. See also, Murphy, ‘Moral Value,’ supra note 9; Nadler, ‘Law and Justice,’ supra note 9; Fox-Decent, ‘Rule of Law,’ supra note 9; Mary Liston, ‘Willis, “Theology,” and the Rule of Law’ (2005) 55 U.T.L.J. 767 esp. at 781. Murphy’s and Nadler’s essays in particular have much in common with the present analysis, especially as concerns their emphasis on the values of autonomy and self-determination that underscore Fuller’s conception of legality. Murphy, for example, explains how the rule of law ‘is inherently respectful of people’s autonomy,’ and thus when officials respect the rule of law, ‘they treat citizens as responsible and self-directed agents’ (at 250), while Nadler’s project explores these values of autonomy and self-determination as part of her enquiry into how to explain the moral force of the duty to obey law in both Hart’s and Fuller’s accounts of law (see especially at 23, 28–30). For earlier scholarship that has also paid close attention to Fuller’s idea of the moral conception of the person implicit in legality see Jamie Cassels, ‘Lon Fuller: Liberalism and the Limits of Law,’ Book Review of \textit{Lon L. Fuller} by Robert Summers (1986) 36 U.T.L.J. 318, especially at 334, 336, 337; Daniel Brudney, ‘Two Links of Law and Morality’ (1993) 103 Ethics 280, especially at 283–7. My own project furthers the support for Fuller’s claims provided by these studies by showing how the values that are implicit in legality also make a difference in practice. This means, in turn, that my project demonstrates how practice can illuminate the conceptual question of whether there is a necessary connection between law and morality.
approaches can illuminate the relationship between law and the Holocaust.

These obstacles to understanding flow directly from the way in which Hart drew the parameters of the debate about the connections between law and morality when he revived its discussion fifty years ago and from the way in which, during the course of his exchange with Fuller on this question, he appears to have understood Fuller’s position. Hart’s first reply to the arguments put to him by Fuller in 1958 is recorded in his 1961 text, *The Concept of Law*, where Hart gives Fuller’s account of the internal morality of law what can at best be described as a cursory treatment. Its setting is a discussion of the significance of the idea of natural law for an analytical conception of law, in which Hart addresses the question of whether certain features of ‘control by rule’ – such as the need for rules to be intelligible or generally not retroactive – reflect some minimum form of justice.156 As Hart explains it, one ‘critic of positivism’

... has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality, and suggested that they be called ‘the inner morality of law.’ Again, if this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.157

On its face, this response seems intended to dispense with the claim that the internal morality of law reveals a necessary connection between law and morality.158 In doing so, Hart’s criticism implies a distinction between what might be meant by the necessary connection claim and what he clearly thinks is meant by that claim: namely, that no necessary connection between law and morality can be demonstrated so long as it is possible to enact immoral laws. The point to emphasize, then, is that Hart’s analysis proceeds in terms that systematically exclude any consideration of the philosophical implications of the internal morality of law, beyond the parameters that Hart himself has defined. This manoeuvre, in turn, provides a likely explanation for his apparent lack of interest in Fuller’s claim that a moral conception of the person is implicit in the very idea of legality, which receives no attention from Hart in his highly critical review of *The Morality of Law*.159


157 Ibid.

158 The question of how this comment of Hart’s should be read has been considered at length by Nigel Simmonds, who suggests that it is amenable to two contradictory readings: a ‘concession’ reading and an ‘ironic’ reading. See Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) at 70–6.

Yet it becomes apparent on a close reading of Hart, and of other critics’ responses to Fuller’s idea of the internal morality of law, such as those of Ronald Dworkin and Joseph Raz, that they are much closer to Fuller in acknowledging the agency of the subject that Fuller sees as constitutive to legality than might otherwise be thought. The commonalities between Hart and Fuller on this issue require some uncovering, but they are nonetheless detectable in two central elements of Hart’s account of law: his insistence, noted earlier, that legality is something other than ‘the gunman situation writ large,’ and his analysis of the minimum content of natural law.

As I have explained, Hart’s statement that ‘law surely is not the gunman situation writ large’ prefaces the introduction of his own positivist explanation of legal normativity as based in the idea of rules rather than compulsion. Hart’s complaint against the idea of compulsion as constitutive of legal authority is that it leaves no room for the sense in which people, including legal officials, orient their actions toward the rules. Thus, by insisting that ‘law surely is not the gunman situation writ large,’ Hart seems to express a commitment to the notion that there is more to legality than a coercive, top-down projection of power.

Yet if law is not just a top-down projection of power, it follows that some constitutive importance must be given to the attitudes and actions of those at the bottom: law’s subjects. The account of legality that Hart sets out in The Concept of Law seems, however – at least on the surface – to exclude this. Hart claims, that is, that legal order is constituted by the union of two different types of rules: ‘primary rules,’ which regulate human action by imposing duties, and ‘secondary rules,’ which confer powers that enable the alteration of existing or the introduction of new primary rules. The most important of these secondary rules, in terms of establishing the existence of law, is the ‘rule of recognition,’ which has the function of determining legal validity. Hart goes on, however, to explain that this model of primary and secondary rules cannot alone constitute a system of legality. Rather, it must be supplemented by a relationship between the officials of the system and the secondary rules that concern them – what Hart describes as an ‘internal point of view’ on the part of officials that recognizes and thus establishes the authority of the rule of recognition.

160 Hart, ‘Positivism,’ supra note 41 at 603.
161 Hart’s point is that the top-down character of the command conception ignores ‘the distinction between types of legal rules which are in fact radically different,’ such as the difference between rules that are obeyed, such as the criminal law, and rules that enable individuals to make contracts, wills, or trusts. Ibid. at 604.
162 Ibid. at 603.
163 Hart, The Concept of Law, supra note 156 at 81.
164 Ibid. at 95.
165 Ibid. at 115. Thus, Hart summarizes, the minimum conditions ‘necessary and sufficient for the existence of a legal system’ are that the rules of behaviour that are valid
On the surface, then, Hart’s account of law appears to give no constitutive importance to the attitudes or capacities of the legal subject. Indeed, at one point he states explicitly that the attitudes of private citizens toward the legal order do not affect the question of whether a legal system exists, even if such a society ‘might be deplorably sheeplike’ and the ‘sheep might end in the slaughterhouse.’ Yet as clearly as this idea is expressed by Hart, it is difficult to reconcile with his suggestion, repeated in both his 1958 essay and in *The Concept of Law* that law’s distinct character lies in an orientation toward rules rather than in duress: that is, that law is something other than the gunman situation writ large.

Hart’s analysis of the minimum content of natural law in *The Concept of Law* exposes this tension most clearly. In that context, Hart notes how any method of social control ‘which consists primarily of standards of conduct communicated to classes of person,’ among which he includes ‘rules of games as well as law,’ involves the expectation that those who receive such communication can ‘understand and conform to the rules according to the system’s ultimate criteria of validity be generally obeyed and that its secondary rules of recognition be effectively accepted as common public standards of official behaviour by its officials.’

Fuller’s complaint against Hart’s account of the rule of recognition, which he articulates in his ‘Reply to Critics’ in the second edition of *The Morality of Law*, concerns precisely this point. By arguing that only the approving attitudes of legal officials toward the rule are needed to constitute legal authority, Fuller explains, Hart’s account fails to incorporate those at the ‘bottom’ in any meaningful way. The consequence is that despite its claim to move the idea of legal authority away from the ‘gunman situation writ large,’ Hart’s account continues to portray legal normativity in exclusively top-down terms. In short, Fuller’s criticism is that the rule of recognition is simply a gunman by another name. See generally Fuller, ‘Reply,’ supra note 63 at 192–3.

Hart’s overall discussion of the minimum content of natural law – by which he means the minimum content that any system of law or morals must have if it is to be viable as a form of social control – is founded on the assumption that both law and morals are directed to the minimum human aim of survival (ibid. at 193). This means, as Hart explains it, that both law and morality must be informed by certain salient human characteristics that make the pursuit of this modest aim possible. As he puts it, ‘In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rule, coercion of others who would not voluntarily conform would be impossible’ (ibid.). In saying this, Hart’s analysis concedes much to Fuller’s argument about the moral conception of the person implicit in legality. That is, Hart clearly accepts that law is not possible unless those who seek its protection as a form of social control are capable of mutual forbearance and compromise.
without official direction.' In short, legality relies, as a matter of necessity, on the moral agency of its participants. Hart's comment can therefore be read as having essentially the same content as Fuller's claim about the moral conception of the person that is implicit in legality, even if he is unwilling to give that idea the philosophical weight that Fuller attributes to it.

Ronald Dworkin's response to *The Morality of Law* is striking for the fact that, unlike Hart, he does in fact explicitly mention Fuller's argument about the moral conception of the person implicit in legality when he explains that Fuller's eight canons assume a view of man as a 'responsible agent' and that observance of these requirements upholds 'man's dignity as a responsible agent.' Like Hart, however, Dworkin ultimately chooses to evaluate the moral significance of the internal morality of law in instrumental terms, as is apparent in his description of Fuller's eight canons as 'strategic in the sense that some level of compliance is necessary to achieve whatever governmental purpose a legislator might have in mind.'

169 Ibid. at 207. The same point is implicit in the many statements made by Hart throughout *The Concept of Law* concerning how the coercive power of law cannot be established without the voluntary cooperation of the majority of legal subjects; see, e.g., ibid. at 201.

170 In a manner that supports much of what I argue here, Waldron has recently outlined the numerous points in Hart's writings where his views seem to converge with Fuller's, including Hart's discussion of the 'principles of legality' in his essay 'Problems of the Philosophy of Law,' reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), which Waldron describes as 'as close as Hart ever came to acknowledging the importance of Fuller's contribution.' Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 N.Y.U.L.Rev. 1135 at 1145. According to Waldron (at 1167), 'Hart may have tried to create the impression that Fuller's response and his later book were hopelessly confused, but Hart himself – when he thought that no one was looking – toyed with many of the positions that Fuller held.' This leads Waldron to conclude (at 1168) that there is 'a lot more fruitful work to be done in this area.'


172 Dworkin, 'Observations,' ibid. at 672.

173 Dworkin, 'Elusive Morality,' supra note 171 at 632. It is also important to note that when Dworkin sets out Fuller's argument about the moral conception of the person implicit in the internal morality of law, he misstates it. That is, Dworkin represents Fuller as contending that a legislator who holds a view of man as a responsible agent 'will not seek to affront “man’s dignity as a responsible agent” with outrageous law.' Dworkin, 'Observations,' supra note 171 at 672. Fuller's way of formulating the point, however, is different in subtle but important respects. Fuller, that is, speaks of how the internal morality of law ‘cannot be neutral in its view of man himself,’ because to embark on the enterprise of subjecting human conduct to the governance of rules...
Dworkin’s reading of Fuller’s claim, moreover, is clearly limited by his understanding of Fuller’s arguments as a reply to Hart on the assertion that observance of the internal morality of law is compatible with great iniquity.\(^{174}\) In consequence, he is able to dismiss the importance of Fuller’s claims about the moral conception of the person implicit in legality because they ‘do not involve any assertion of a necessary connection between law and substantive morality,’ nor do they conflict ‘with the classic or prototypical positivist position that law and morals are conceptually distinct.’\(^{175}\)

There are also other senses in which Dworkin does not evaluate – nor, arguably, understand – Fuller’s argument. For Dworkin, Fuller’s idea that the internal morality of law assumes a view of man as a responsible agent, and that a legislator holding this view ‘will not seek to affront “man’s dignity as a responsible agent” with outrageous law,’ rests on a proposition that Fuller has apparently already shown to be false: namely, that ‘the only reason which might lead a legislator to embrace internal morality is his respect for those he governs.’\(^{176}\) Thus, to Dworkin, such an argument seems at odds with how the history of Rex is supposed to show ‘that a ruler may be driven to internal morality, at least to the minimum level necessary to create law, out of no consideration for the governed beyond the desire to rule them.’\(^{177}\)

Yet Fuller’s point, as should now be clear, is that respect for the moral capacities of the governed, even if only in the lowest form necessary to enable a functioning system of legality to be brought into being, is not only prior to any other type of moral respect toward which the law

\[\text{‘involves, of necessity, a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults,’ with the consequence that ‘every departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent.’ Fuller, } \text{The Morality of Law, supra note 62 at 162. Thus, contrary to Dworkin’s suggestion, no mention of ‘outrageous law’ – or, at least, of outrageous legal ends – follows this statement. What actually follows it is a series of examples of outrageous legal processes – such as judging a person’s actions by ‘unpublished or retrospective laws’ or ordering him ‘to do an act that is impossible’ and thus conveys ‘indifference to his powers of self-determination.’ Ibid. at 162. It seems, therefore, that Dworkin confuses Fuller’s point about the respect for responsible agency that is intrinsic to the possibility of legality at a formal level with a different point about the relationship between the internal morality of law and respect for human dignity as an end of law.}
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\(^{174}\) Dworkin, ‘Observations,’ supra note 171 at 671. Dworkin also seems interested in Fuller’s argument about the moral capacities intrinsic to legality only insofar as that argument challenges the positivist claim that ‘the morality or immorality of a law is a matter conceptually distinct from its validity.’

\(^{175}\) Ibid. at 673.

\(^{176}\) Ibid. at 672, 673 [original emphasis].

\(^{177}\) Ibid. at 673.
might be instrumentally directed but also not contingent on any conscious respect that the lawmaker might hold for the legal subject. Dworkin misses the key to Fuller’s point, therefore, because, like Hart, he fails to take seriously the possibility that the formal characteristics of law might have moral significance beyond that of being a means to a particular legal end.178

An even closer engagement with Fuller’s argument that a conception of responsible agency is intrinsic to the idea of legality is revealed in the writings of Joseph Raz. In ‘The Rule of Law and Its Virtue,’ Raz points out that legality – or what he terms ‘the rule of law’ – is valuable because it provides ‘stable, secure frameworks for one’s life and actions’:

A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behavior through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations.179

This comment, quite apart from its obvious but unacknowledged affinity with Fuller’s claims, reflects a clear concession by Raz that the rule of law has some relationship to the moral circumstances of its subjects, even if,

178 There are, however, some curious indications in both essays that suggest that Dworkin does understand Fuller’s point in terms closer to those that I read Fuller as conveying, even though he insists on evaluating Fuller’s claims by reference to the challenge, if any, that they present to Hart’s position or otherwise rejects them for his own reasons. For example, in ‘Elusive Morality,’ supra note 171 at 638, Dworkin cites Fuller as clarifying that the connection he has in mind between procedural and substantive morality is not a necessary connection ‘but merely a “natural affinity.”’ His conclusions about Fuller’s analysis, however, clearly remain unaffected by this clarification. Similarly, in ‘Observations,’ supra note 171 at 673, commenting on how the history of Rex is supposed to show that a ruler may be driven to internal morality, at least to the minimum level necessary to create law, ‘out of no consideration for the governed beyond the desire to rule them,’ Dworkin adds in parentheses that this argument ‘must be distinguished from the argument that observing the internal morality is in itself to behave morally towards them,’ which he says is part of Fuller’s central claim ‘and not part of his ancillary arguments in reply to Hart’s observation.’ Importantly, however, Dworkin clearly rejects this argument on the basis that the authors of certain kinds of laws, such as laws providing for the enslavement of a minority, are ‘not entitled to claim that they had in any sense behaved morally, simply on the ground that their legislation amply fulfilled the demands of Fuller’s eight canons of law.’ For Dworkin, this ‘common-sense supposition is correct’ and, in its inconsistency with Fuller’s claim, causes that claim to fail, Ibid. at 671.

as he insists in the same essay, it is morally neutral with respect to the ends of law. On this latter point, Raz’s conception of the rule of law essentially follows Hart’s response to Fuller’s claim that a necessary connection between law and morality is revealed in the internal morality of law. As Raz famously argues, the virtue of rule of law is nothing more than ‘the virtue of instrument as instrument,’ and the fact that this instrument is capable of serving good and evil ends equally makes clear that it has no necessary connection to morality.

The important point for present purposes, however, is that any potential for further engagement between Raz and Fuller about the place of the subject within a conception of law, and the moral implications of this, is ultimately frustrated by Raz’s commitment to an idea that Fuller clearly rejects: namely, that we can have law without the rule of law. Although Raz admits that some minimum compliance with Fuller’s eight principles (or with principles of some similar content) is necessary for law to be brought into existence at all, he seems to insist that these minimum existence conditions can, from a conceptual standpoint, be considered separately from the idea of the rule of law. This is because the rule of law, for Raz, is a political ideal that may or may not be realized by a given legal system, even though it is constituted by the same principles as those he claims must be minimally observed for rule by law to be brought into being. Thus, on the question of whether the conception of the person implicit in legality gives law a special moral character, any agreement between Raz and Fuller is apparently dissolved by the fact that what is constitutive for Fuller is merely contingent for Raz.

Raz does concede, however, that the rule of law has moral value in that it stabilizes expectations and fosters individual planning. Yet this

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180 See especially Hart, ‘Fuller’s Morality,’ supra note 159 at 357, where he states that Fuller’s principles of legality are valuable ‘so far only as they contribute to human happiness or other substantive moral aims of the law.’

181 As Raz famously argues, just as sharpness is the virtue of a knife in providing the knife with its ability to cut, the ultimate virtue of the rule of law, in its contribution to law’s capacity to guide behaviour, ‘is the virtue of efficiency; the virtue of instrument as instrument.’ Raz, ‘Virtue,’ supra note 179 at 226.

182 The conception of ‘law’ that Raz has in mind is that advanced by Hart.

183 I say ‘seems to insist’ because there is some ambiguity about exactly what Raz considers to be constitute to law, insofar as he avoids any direct confrontation with the question of whether the rule of law is part of the concept of law.

184 Raz’s position on this point is summarized well by Colleen Murphy, who observes that ‘absent some . . . connection with a morally important purpose, the function facilitated by the rule of law, namely, guiding behavior, remains itself morally indifferent. In the Razian view, then, respecting the rule of law achieves nothing of non-instrumental moral significance.’ Murphy, ‘Moral Value,’ supra note 9 at 248.

185 Raz, ‘Virtue,’ supra note 179 at 220.
remains a contingent promise of law, for the reasons just explained: on Raz’s account, legality, or the rule of law, is not necessary for law to be brought into existence. Again, therefore, there remains a clear divide between this conception of law and that advanced by Fuller, for whom the very form of legality is conceptualized as relying upon, and thus necessarily also as constituting, the agency of the legal subject.

This idea emerges especially strongly in those of Fuller’s writings that lie outside of the sources traditionally associated with the Hart–Fuller debate: most notably, his intended introduction to his unfinished theory of ‘eunomics,’ as well as in his writings on the subject of freedom. Yet it is also clearly apparent in Fuller’s contributions to his exchange with Hart, which are the focus of the present essay. For example, Fuller’s argument about the moral conception of the person implicit in legality is, above all, an argument about the constitutive relationship between legality and agency; it is not a claim, like Raz’s, about how agency is a contingent promise of legality. This same idea is given expression in Fuller’s 1958 response to Hart, when he challenges Hart to address the implications of the mutilated Nazi legal order for the ‘conscientious citizen’ who was forced to live under it. His analysis of managerial direction in the ‘Reply to Critics’ extends this idea still further. The difference between legality and managerial direction, as Fuller presents it, is not just a structural difference between reciprocal and top-down forms of ordering but also a moral difference relating to how one form of governance constitutes and respects its participants as self-directed agents while the other does not.

I have dwelt on this issue of the status, within legal philosophy, of the idea that there is a moral conception of the person implicit in legality because I believe that it sheds important light on key points of disagreement between positivists and anti-positivists. Because positivists continue to

186 In ‘Means and Ends,’ supra note 143 at 61, Fuller explains his interest in order that is ‘just, fair, workable, effective, and respectful of human dignity.’
188 I have deliberately sought support for the arguments I advance here in the sources associated with the Hart–Fuller exchanges because this is the terrain on which the implications of Nazi law for questions of legal philosophy have been debated in the past, and thus also a terrain that I seek to unsettle by introducing the more nuanced picture that emerges if we examine the Jewish experience of Nazi law.
189 Fuller, ‘Positivism and Fidelity,’ supra note 25 at 646.
190 In this sense it might be said, in addition to the recent works of Fullerian scholars already cited, that my project has much in common with recent work by Nigel Simmonds: Simmonds, Law as a Moral Idea, supra note 158. This is certainly the case insofar as both Simmonds and I elaborate a distinctly Fullerian response to the question of the legal status of wicked legal systems and advance an idea of legality as intrinsically linked to a form of freedom. For Simmonds, this means ‘independence
channel their responses to Fuller through the parameters set by Hart in 1958,\textsuperscript{191} they continue to ignore, or to reject, the idea that I read as underscoring Fuller’s philosophical claims: namely, that law must, by necessity of its form, constitute its subjects as agents. This animating theme of Fuller’s thought brings to light a further point about the place of the legal subject within prevailing theories of law. For the positivist, the legal subject has no constitutive importance to the concept of law beyond her capacity to signal obedience. The legal subject is simply there to be regulated by the legal order that has been established through the practices and viewpoints of legal officials. Nothing about the quality – or form – of this regulatory relationship affects the existence (or not) of law. In Fuller’s anti-positivist jurisprudence, by contrast, the subject occupies a constitutive place within the very idea of law: so constitutive, indeed, that changes in how the form of legal order affects the position of the subject become pivotal to any assessment of whether legal order – as opposed to some other form of ordering – can be said to exist.

There is, in my view, something critical to be learned from the history of the Nazis’ legal persecution of the Jews with respect to evaluating these opposed philosophical positions. As I elaborate in Part VI below, the example reveals how the conception of the person implicit in legality – as a responsible agent, capable of following rules, and answerable for his defaults – does make a real moral difference to the lives of those who live within the constraints of law.\textsuperscript{192} And, from the power of others’ (at 111) and the related idea that where the law consists of followable rules, ‘citizens will enjoy certain areas of optional conduct’ (at 163). There are, however, important differences between our two projects. In terms of its philosophical terrain, the goal of Simmonds’ project is to undermine current orthodoxy in legal philosophy concerning enquiry into the nature of law. Much attention is given to the question of the effect on the moral status of law of its use as an instrument to achieve evil ends; Simmonds’ arguments in this context are principally situated in a contest between him and his contemporary positivist opponent, Matthew Kramer, on this point. By contrast, my purpose is to explore what implications follow, for our understanding of the connection between law and morality, from the moral capacities that underscore the possibility of legality. Relatedly, therefore, my primary resource for elaborating these claims is Fuller’s emphasis on the moral conception of the person implicit in the idea of legality, while Simmonds relies on the more familiar resource of the allegory of King Rex and on Fuller’s exposition of the eight principles of legality that represent the lessons of Rex’s failure to make law.

\textsuperscript{191} The responses to Fuller’s idea are striking in their consistent orientation toward the criticisms levelled by Hart. A very different understanding of Fuller’s argument, however – and one that, in my view, is much closer to Fuller’s message – is reflected in Philip Selznick, Book Review of \textit{The Morality of Law} by Lon L. Fuller (1965) 30 Am.Soc.Rev. 947.

\textsuperscript{192} Recent Fullerian scholarship has made some valuable progress toward this advance. See especially Nadler’s claim in ‘Law and Justice,’ supra note 9 at 29, that a lawgiver
moreover, the example illuminates how the form of a given mode of governance clearly brings with it certain restrictions, as well as possibilities, of treatment. In the history of the Jews under Nazism, changes in the policy approach to how the Jews were to be treated were accompanied by changes in the form that the governance of Jewish life took – changes that facilitated a steady shift away from the recognizably legal with each incremental effort on the part of the Nazis to diminish the agency of Jews within German society.

vi Concluding thoughts

Fifty years after the parameters of the modern debate about the connections between law and morality were set, and after fifty years of their being widely accepted, the time is surely ripe to reorient our discussions about the nature of law in a direction that takes Fuller’s claims more seriously and, in doing so, opens up new avenues of enquiry. Examining the relationship between law and the Holocaust is one way of moving that reorientation forward, because the Jewish experience of Nazism brings into sharp relief the fact that so long as the Nazis used law as their primary means of persecution, and thus were bound by the condition of congruence that is the defining feature of legality, they necessarily recognized, relied on, and respected the moral capacities of those whom their racial-biological program sought to dehumanize. It was only when the Nazis ended their practice of governing the Jews through legal forms, choosing instead the force of SS terror to determine the parameters of Jewish life, that this reliance and recognition ceased. In the totalitarian framework of the camps, the declared enemies of the Nazi state were no longer permitted or, indeed, required to be self-directed agents. For them, life in the camps was, in effect, the gunman situation writ large.

The most critical insight for a philosophical understanding of the Nazi legal persecution of the Jews thus flows from the fact that the presence of legality clearly had wider consequences for Jewish life under Nazism than simply providing the Nazi authorities with an efficacious tool for the pursuit of their heinous goals. That consequence was the provision of a social structure in which a degree of self-directed agency, choice, and capacity for life planning was maintained, even if that agency was

who observes the internal morality of law ‘provides citizens with an intelligible framework for the pursuit of their purposes.’ See also ibid. at 31 with respect to how the lawmakers ‘must be respectful, not only of the human capacity to incorporate external directives into practical reasoning, but more importantly, of the capacity to form life plans of one’s own and to execute them in the world.’ Nadler and I clearly share the view that to understand why Fuller’s internal morality of law is a morality, we must start with the perspective of the legal subject; see ibid. at 25.
drastically diminished by comparison to life before Nazism. Nonetheless, this space in which agency was possible – as Victor Klemperer’s example demonstrates – could mean the difference between life and death.\(^{193}\)

The problem with focusing only on the instrumental reasons for the Nazis’ use of law is that such a focus diminishes the status of any qualitative effect that these laws had on the lives of those subject to them to a mere side effect of the efficient pursuit of persecutory policies through law. Fuller’s approach, by contrast, embraces the position of all of those whose lives are brought within the constraints of legality.\(^{194}\) It is because of this orientation that his insights clearly support what has been demonstrated here: namely, that the necessary relationship between legality and the status of the agent upon which it is functionally dependent made a moral difference to the lives of those who lived under the Nazis’ anti-Jewish laws, however unjust those laws may have been. This relationship, by all appearances, also made a difference to the choices that the Nazis perceived to be available to them in

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\(^{193}\) At one point in his diary Klemperer expresses cynicism about the possibility that he could rely, in planning his life under Nazism, on congruence between official action and declared rule: ‘given the arbitrariness and malice of the government, who can answer for the interpretation and execution of its “laws”.’ Klemperer, 1933–1941, supra note 96 at 140. Nonetheless, the course of Klemperer’s life under Nazism, viewed objectively, reveals that the continued commitment of the relevant governing authorities to this condition of congruence with respect to the legal status of Jewish spouses in ‘privileged mixed marriages’ gave him the ultimate protection denied to those who could not claim this legal status: survival. To this analysis it might be objected that Klemperer’s survival was a result of luck, not legality: that is, when the SS did choose to step outside of the limits of legality and to round up the Jewish spouses in privileged mixed marriages for deportation to the death camps, the survival of Klemperer and other Dresdeners in a like position was ultimately the result of the coincidence of that round-up with the chaos of the Allied bombing of Dresden. The story, however, is more complex than this. As the English-language editor of Klemperer’s diaries, Martin Chalmers, explains, although Klemperer and his fellow Dresdeners were unaware of it at the time, the famous ‘Rosenstrasse’ protest in Berlin on 27 February 1943, led by the ‘Aryan’ wives of Jewish men, was successful in causing the Nazis to abandon their plans to deport the Jewish spouses in privileged mixed marriages: see Chalmers, ‘Preface,’ supra note 97 at xxi. The point to emphasize, then, is that the Jewish spouses in these marriages were ultimately saved from deportation to the death camps because their spouses were successful in insisting upon congruence between official action and declared rule with respect to this protected legal status.

\(^{194}\) This concern for how the forms of law realize the aspiration of all of law’s participants is especially apparent in the theoretical ambitions of the wider jurisprudential project that Fuller began prior to his exchange with Hart but never completed: his ‘eunomics’ theory of ‘good order and workable social arrangements.’ See especially Lon L. Fuller, ‘American Legal Philosophy at Mid-Century – A Review of Edwin W. Patterson’s Jurisprudence, Men and Ideas of the Law’ (1954) 6 J.Legal Educ. 457; Fuller, ‘Means and Ends,’ supra note 143, which was unpublished at the time of Fuller’s death in 1978.
proceeding with their policies toward the Jews. I will return to this point in a moment.

First, however, a possible objection must be addressed: that even when Jewish life was governed by an institutional structure that we might call legality, the only quality of agency that was expected from the Jewish subject was that necessary to secure obedience. The implication of this objection is that there was, in effect, no real difference between the SS directive of ‘assemble at the gate’ and the legal directive of ‘do not have sexual relations with a German,’ with the further implication that the distinction advanced here between the legal and the non-legal Jewish experiences is ultimately of little consequence.

My response to this possible objection again recalls the centrality to Fuller’s account of legality of the condition of congruence between official action and declared rule. The decisive issue with respect to the effect of institutional structures on life circumstances is not, in my view, whether the responsible agency of those caught within those structures is directed principally to obedience but, rather, whether the institutional context in which this takes place is one characterized by congruence between official action and declared rule. Congruence matters, in short, because it opens up a space, however small, within which self-directed agency can be exercised and, thus, within which life is made qualitatively better than it would be if such a capacity were absent. Indeed, the history of the Jews under Nazism reveals that when the quality of agency expected from the subject was no greater than that necessary to secure obedience, congruence between official action and previously declared rule was generally absent. That is to say, by the time what was

195 Robert Summers’ analysis of Fuller’s thought would suggest that there is still some moral value to such a scenario. That is, Summers suggests that the argument that seems to ‘most fully’ support Fuller’s characterization of the eight principles of legality as a ‘morality’ lies in the fact that the internal morality of law affords the legal subject a ‘fair opportunity to obey the law.’ see Robert S. Summers, Lon L. Fuller (Stanford, CA: Stanford University Press, 1984) at 37 [original emphasis]. I find this analysis of the moral value of legality only partially compelling, because it fails to go to the more important implication of this ‘opportunity,’ which is that, quite apart from its provision of a fair opportunity to obey the law, legality, through congruence, enables us to know ‘where things are’ and, thus, to plan our lives accordingly.

196 Klemperer’s diaries again provide some helpful evidence in support of this idea. Following Kristallnacht, many of the entries detail his continual effort to rework his personal budget in order to meet the increasing levels of special Jewish taxes that were imposed after November 1938. Although these taxes were oppressive, Klemperer’s diaries demonstrate how their administration according to published rules, specified amounts, and deadlines at least offered an opportunity for planning that was wholly absent in situations of random looting or wholesale confiscation of property. See, e.g., Klemperer, 1933–1941, supra note 96 at 277, 279, 281, 282, 285, and 304.
asked of the moral capacities of the Jews was mere obedience – ‘assemble at the gate’ – the power through which such directives was issued was not referable to, nor, therefore, congruent with, anything other than the expedient desires of those on whose behalf it was wielded.

The point to emphasize, then, is that even though the Nazis used law instrumentally for deeply unjust ends, this does not exhaust the factors relevant to how we should understand that legal effort, because it seems clear that so long as Nazi governance was structured by the constraints and conditions that constitute legality, life was qualitatively better than the lawless life of arbitrariness and terror that followed. The Jewish experience of Nazi legality thus presents a clear and important challenge to the argument, levelled against Fuller by Hart, that ‘[o]nly if the purpose of subjecting human conduct to the governance of rules, no matter what their content, were itself . . . an ultimate value, would there be any case for classing the principles of rule-making as a morality.’

Yet the fact that legality must constitute its participants as agents does not, at least of itself, explain the other fact emphasized at the beginning of this essay: namely, coincidence of the relative decline of legality as the governing frame of Jewish life with the advent of the extermination program. In my view, something more fundamental is at play in this coincidence than a mere contrast between the order of legality and the disorder of SS terror, as might be suggested by the explanation that the law had reached the limits of its instrumental utility as a means of persecuting the Jews. Why, therefore, did the extermination program – and, indeed, the euthanasia program for the killing of the mentally ill that preceded it – proceed extra-legally?

One way to answer this question is to invoke Fuller’s idea of the internal morality of law: that is, to suggest that the internal demands that attach to legality posed obstacles to the desired administration of the extermination policy. For example, the constitutive importance to the possibility of a functioning legal system of such requirements as laws’ being publicly available to those affected by them renders impossible the prospect of pursuing a policy goal secretly through law. The incompatibility of legality with the Nazis’ desire to proceed with the extermination program in secret thus demonstrates, in itself, a fatal incompatibility with the necessary requirements of legality.

197 Hart, ‘Fuller’s Morality,’ supra note 159 at 351.
198 Fuller himself captured this point well in a comment in his draft notes for the ‘Reply to Critics,’ supra note 63, in which he observed that ‘[T]he restraints of the Rule of Law have been found by governments of all times, democratic and autocratic, irksome and as impairing their “efficacy” in accomplishing tasks they would like to attack directly.’ Undated and untitled document in the Papers of Lon L. Fuller, Harvard Law School Library, Box 12, Folder 1 (Notes for the ‘Reply to Critics’). For a discussion of the practical improbability that a government would studiously observe the requirements
This may well have been the strategic reason that the Nazis ultimately proceeded extra-legally. Still, I have in mind a more fundamental philosophical reason that the extermination program did not proceed through law. This reason pertains not to the specific requirements of the internal morality of law, as enumerated by Fuller, but, rather, to the premise that underscores legality itself: agency. To illuminate this argument, and by way of conclusion, I present a hypothesis. What if the Nazis had, in fact, predicated their actions on law and made it a crime, punishable by death, to be Jewish? What if, in making the determination of Jewishness in each case, they had followed all the procedures that we ordinarily associate with a functioning system of legality, such as those given expression in Fuller’s idea of the internal morality of law? How might this have affected the questions of legal philosophy that have been the focus of this essay?

My intuition is that, had the extermination program been pursued under the cover of legality, the major debates of legal philosophy would have a different character than they have today. I think, that is, that we would be giving more attention to the relationship of law to life itself or, at the very least, to survival. That the law can be capable of securing ‘civil death’ is tragically well demonstrated in the Jewish experience of Nazi law. But death itself, as a goal of legal regulation, is another story altogether, and in relation to this story both sides of legal philosophy seem to be in apparent agreement. All seem to agree, that is, that the phenomenon of legality – as opposed to other modes of social ordering – is at least animated by the minimum aim of survival, or, in different terms, by the idea of ongoing life activity. This is the case even if, as legal positivists insist, law has no other necessary connection to anything of moral value.

Fuller emphasizes this idea at multiple points in his writings, as in his argument that a conception of responsible agency is intrinsic to legality and in his many references to how law creates a ‘pattern of living’ for those whose behaviour is structured by it. It is Hart, however, who

of the internal morality of law while pursuing grossly unjust ends see Murphy, ‘Moral Value,’ supra note 9, especially at 258–60.

199 See Müller, ‘Protecting the Race,’ supra note 22 at 116, on the idea of ‘civil death.’

200 The Nazis’ attempt to legally regulate intermarriage between Jews and Mischlinge, and between Germans and Mischlinge, that was given expression in the First Supplementary Decree to the Law for the Protection of German Blood and Honour of 14 November 1935 provides a good example of this fundamental orientation of legality. The aim of this complex regulation, which permitted and prohibited certain combinations of racial intermarriage, was to serve the policy goal of breeding the Jews ‘out’ of the German blood pool, and ‘in’ to the Jewish blood pool, over the course of two generations.

201 Fuller, ‘Means and Ends,’ supra note 143 at 69.
arguably captured this fundamental premise best in his statement that when we speak of legality, ‘our concern is with social arrangements for continued existence, not with those of a suicide club.’\textsuperscript{202}

The point, then, is that law, as an activity, regulates activity. Law orients our lives by convening and reconvening the spaces within which we live them. Its very form is predicated on agency: as Fuller expressed it, the law must recognize and rely upon our capacity to be or to become responsible agents, capable of understanding and following rules and answerable for our defaults. My analysis here has demonstrated, moreover, that this remains the case even when legality is used as an instrument of oppression. In short, recognition of and respect for the moral capacities of the legal subject simply come with the territory of legality itself.

It is because Fuller’s analysis foregrounds these features of legality, and emphasizes their constitutive importance to its very possibility, that it can offer us insights into the potential and limits of law that the positivist analysis cannot. This is because the positivist analysis is only tangentially concerned with the question with which Fuller, by contrast, is centrally concerned, namely, the question of how legality works. Fuller’s analysis demonstrates that an approach to law that attempts to understand this question will reveal not only that the aspiration of workability has content, and that this content imposes limits on the uses to which law can be put, but also that it has important consequences for the lives of those who live within legality.

Fuller’s view of law can thus tell us something about why the Jewish experience of Nazi legality was distinctive, because, by illuminating the qualitative effect that the link between legality and responsible agency had on how life was actually lived under Nazism, his ideas make sense of the sinister turn for the prospects of Jewish life that attended law’s exit. My goal in this essay, therefore, has been to demonstrate that we do not need the hypothesis of legal genocide just presented in order to see the necessary life in legality. The same conclusion, I have argued, is available to us if we stop and think about what a functioning system of legality tries to do, how it pursues that purpose, and what implications this method has for the possibilities and limits of pursuing a social objective through law.\textsuperscript{203}

\textsuperscript{202} Hart, The Concept of Law, supra note 156 at 192, and see generally at 191–3 with respect to the minimum legal aim of survival. Also note the comment to the same effect in Hart, ‘Positivism,’ supra note 41 at 623.

\textsuperscript{203} It follows, therefore, that had extermination proceeded legally, our philosophical debates about the nature of law might now show more interest in the death penalty, in the sense of questioning whether death, as an end of law, can be regarded as a coherent idea. The same analysis might also be applied to the institution of legalized slavery; that is, the total subjugation and removal of self-directed agency that defines the institution of slavery suggests that the idea of slavery ‘law’ is a conceptual anomaly. Both of these ideas deserve further consideration.
The Nazis’ decision to leave legality behind at the door of the cattle cars in which so many millions of people were transported to their deaths thus teaches us some important lessons not only about the constitution of the Holocaust but about the character of legality itself. Among these lessons, two in particular stand out. The first is that the relationship between legality and the lives of those who live within it is a morally valuable one. The second is that legality, properly understood, cannot be used as an instrument for any aim desired by those who are responsible for creating and maintaining it.