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Nazi Law as Non-law in Academic Discourse

SIMON LAVIS

Introduction: Non-law and the Third Reich

The purpose of this collection is to reflect more deeply on the ideology – the ideas, beliefs and political principles – that shaped the criminal law of fascist and authoritarian regimes. One of the premises underpinning the existence of this collection, therefore, must be that such regimes – including Nazi Germany – had a criminal law, and a legal system more generally; something we can identify and signify as ‘law’ in order to examine and evaluate it historically and jurisprudentially in terms of its operation and interconnection with state ideology. In the case of Nazi Germany, however, this very premise is disputed by decades of post-war English language historiography and jurisprudence, in which the systemic understanding and interpretation of Nazi law is largely informed by the idea, not that it had a criminal law, but that it was a criminal state, and therefore a lawless one.¹

The idea of Nazi law as a criminal state finds its conceptual underpinning in the ‘rupture thesis’, that ‘the Nazi state is said to be a state so brutal, so criminal, so perverted, that it constitutes a radical, atavistic rupture in the otherwise largely benign process of law and politics, at least in the West’.² With regard to the legal system, these ideas of a chronological and philosophical break manifest themselves in the representation of Nazi law as ‘non-law’; of the governance of the Third Reich as one conducted through arbitrariness, violence, terror, barbarity and criminality, as opposed to through law. According to this interpretation, the rupture in question is between Nazi rule and the very concept of law itself: the Nazi regime was not a lawful or ‘law-full’ (full of law) regime,³ but a lawless one (both arbitrary and lacking in law).

The roots of this interpretation of the regime and its legal system, as well as where and why it is embedded in various academic discourses, have occasionally been noted, but not

¹ See D Fraser, ‘Evil Law, Evil Lawyers? From the Justice Case to the Torture Memos’ (2012) 3(2) *Jurisprudence* 391; C Wilke, ‘Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case’ (2009) 24 *Canadian Journal of Law and Society* 181.

² F DeCoste, ‘Hitler’s Conscience, Redemptive Political Emotions, and the Politics of Fear’ (2012) 3 *Passions in Context* 1, 6–7. See also D Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham NC, Carolina Academic Press, 2005).

³ Fraser, *Law After Auschwitz* (n 2).

entirely elucidated. Equally, the implications of this approach are not always fully assessed. As long as a prevailing interpretation continues to view Nazi law as non-law there is little need for jurisprudential and legal historical consideration of the Nazi regime as a legal system (because it did not have a legal system); historical comparison with the legal regimes in other fascist and authoritarian regimes (because of its purported *sui generis* nature as non-law); or more general comparisons with democratic, liberal legal orders past and present in order to understand the points of continuity and difference between them. Nor, crucially, to the extent that that interpretation is accepted, is it necessary to examine the process of transformation from one sort of regime to the other (because the rupture thesis implies only absolute difference).

This chapter is focused on exploring and interrogating key elements of the interpretation of Nazi law as non-law that has been constructed in English language scholarship, in order to establish how that interpretation has become an important narrative of Nazi law, and what its consequences are for understanding law in the Third Reich and the concept of law in general from the perspective of that body of research and reflection. The chapter focuses on English language scholarship about Nazi law, including translated literature, for two reasons. One is that a great deal of research into the Third Reich is carried out within the Anglo-American historical academy in English and yet studies of the Nazi legal system in English are not common, and this fact is considered to merit further attention. The second is that the dominant approaches of the Anglo-American legal and historical academics' discourses around the concept of law and its manifestation (or not) in Nazi Germany have followed their own distinct path, despite some cross-fertilisation with related continental discourses, and so are worthy of separate evaluation. Translated texts have influenced and continue to influence these discourses, so need to be incorporated into the discussion.

On that basis the chapter makes two related arguments. First, that the predominant approach of legal and historical work produced and available in English in the decades since the collapse of Nazi Germany has consistently characterised its legal system as non-law, and as reflecting a period of rupture from normal legal-historical development. Second, that this characterisation has meant that such approaches have prevented a full coming to terms with the legal system in Nazi Germany, and a comprehensive examination of the systemic nature of Nazi law. This chapter thus focuses on the construction of a discursive position and how it omits and precludes engagement with Nazi law, rather than addressing the nature of that law itself; that is, the chapter emphasises the need for such engagement and establishes rationales to support it.

However, before turning to this discussion, it is essential to note that nothing in this chapter should be taken as an endorsement of Nazi law or ideology, nor should it be considered that 'Nazi law', 'Nazi ideology' or 'Nazi legal theory' are settled and agreed terms. There is disagreement about what constitutes Nazi law, and Nazi ideology and legal philosophy were to varying degrees lacking in coherence and full of disparate and sometimes contradictory ideas, such that both are very difficult to identify or define accurately. It is, in part, because of these complexities that it is important to reflect critically on how the Nazi legal system and its underlying principles have been examined in academic discourse, so as to identify where they need closer theoretical and empirical analysis.

In order to make these arguments, this chapter examines some of the key points of discursive construction of Nazi law as non-law in English language legal and historical

writing, both in the past and in recent years, demonstrating both the academic reproduction of that thesis over time and its continuing acceptance. Therefore, in the next section it will consider the academic genesis of the Nazi law as non-law thesis for both historiography and jurisprudence, first in the in-war seminal studies of the Nazi state by Ernst Fraenkel and Franz Neumann (in their influential English translations), and second in the 1958 Hart–Fuller debate. It will then examine some more recent academic writing to illustrate the continuing reproduction of this narrative in current English language discourse. The final section reflects on the implications of this analysis for the study of Nazi law.

Constructing the Rupture Thesis: The Genesis of Nazi Law as Non-law

It is accepted by those now writing about Nazi law that it has generally been viewed as an aberration from normal legal development, in the same way that the Third Reich in general, and particularly the Holocaust, were for a long time viewed as aberrations from normal historical development, because of their extreme and allegedly unique nature.⁴ However, the enduring influence of the non-law narrative, together with a normative imperative to focus on points of difference when considering something as abhorrent as the Nazi regime, mean that the currents of the rupture thesis run deep in academic writing and remain strong today.

German historian Thomas Vormbaum noted in 2014 that ‘[t]he agreed-on version in general historiography seems to be: the twelve years of National Socialist rule are twelve dark years that represent a rupture in German history’.⁵ Similarly, in 2013 Alan Steinweis and Robert Rachlin observed that ‘[a] book about the law in Nazi Germany might strike some readers as an exercise in contradiction’.⁶ Finally, Kristen Rundle stated in 2006 that ‘[w]e are simply told (for whatever reason) that Nazi law was “not law” or, as was proclaimed at Nuremberg, it was “criminal”’.⁷ The fact that these comments come from historians, lawyers and legal theorists demonstrates the range of disciplinary concern and interest generated by the subject of Nazi law. It also gives some insight into the breadth and depth of influence that both the ‘validity question’ – the question of whether Nazi law was valid law – and the particular claim that it was not law have had on English language academic engagement with the Third Reich. The academic construction of Nazi law as non-law can be traced through key moments of discursive development and is ostensible in influential academic works in both jurisprudence and historiography. In order to understand the nature and enduring influence of the rupture thesis, and to lay a foundation for incorporating Nazi law in a comparative framework with other anti-democratic and authoritarian regimes,

⁴ See the historiographical discussions in I Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation*, 4th edn (London, Arnold, 2000); and D Stone, *Histories of the Holocaust* (Oxford, Oxford University Press, 2010).

⁵ T Vormbaum, *A Modern History of German Criminal Law* (Berlin, Springer, 2014) 172.

⁶ A Steinweis and R Rachlin (eds), *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (New York, Berghahn Books, 2013) 1–2.

⁷ K Rundle, ‘Review of Law After Auschwitz: Towards a Jurisprudence of the Holocaust by David Fraser (2005)’ (2006) 28 *Sydney Law Review* 197.

as well as within discussions about the concept of law generally, it is important to identify and scrutinise those key moments of development that constructed the paradigm of Nazi law as non-law.

There are three early stages in the narrative of Nazi law as non-law, which became the rupture thesis, which are (in chronological order): the 1940s publication of two important structural studies of the Nazi state; the post-war Nuremberg Trials – both the more famous International Military Tribunal (IMT) and the subsequent 12 Nuremberg Military Tribunals (NMT); and the 1958 Hart–Fuller debate. As it is focused on academic discourse, and because of other relevant writing about the Nuremberg Trials,⁸ this chapter will focus on examining the other two discursive moments in some detail.

A. Non-law in the *Behemoth* and the Dual State

The 1940s writing of Ernst Fraenkel and, in particular, Franz Neumann had an important influence on how the Third Reich was framed and the proceedings structured at the NMT,⁹ and in the adoption of ‘non-law’ as a central concept for evaluating and interpreting the legal system within the Third Reich.¹⁰ The competing paradigms of the Nazi state offered by Fraenkel and Neumann were also very influential in decades of post-war historical research into Nazi Germany, and remain so today.¹¹ They both, in different ways, offer a vision of Nazi governance in which non-law has been seen to play an important role. Neumann’s *Behemoth* presents the clearest example of this, as it denied the existence of a legal system in the Third Reich at all, ‘[s]ince we believe National Socialism is – or tending to become – a non-state, a chaos, a rule of lawlessness and anarchy’.¹²

It is clear from the pages Neumann devotes to the Nazi legal system in *Behemoth*,¹³ that he does not consider that a system of government that is ‘merely the will of the sovereign’,¹⁴ ‘nothing but a technique of mass manipulation by terror’,¹⁵ and only ‘a means for the stabilization of power’¹⁶ can be considered law at all. He argues that there are a number of features of Nazi law that make it non-law, chief among which is the absence of two inherent legal characteristics: abstractness and the independence of the judiciary.¹⁷ The legal standard of conduct¹⁸ under Nazism is very vague, enabling the introduction of political considerations into legal interpretation and adjudication in order to change the meaning of

⁸ eg, Wilke (n 1); Fraser, ‘Evil Law, Evil Lawyers?’ (n 1); K Priemel and A Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York, Berghahn Books, 2012).

⁹ Priemel and Stiller (n 8) 6–7.

¹⁰ E Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York, Octagon Books, 1969 [1942]); F Neumann, *Behemoth: The Structure and Practice of National Socialism 1933–1944*, 2nd edn (London, Frank Cass & Co, 1967).

¹¹ eg, R Hilberg, ‘The Relevance of Behemoth Today’ (2003) 10 *Constellations* 256.

¹² Neumann (n 10) vii, ‘Note on the name Behemoth’.

¹³ *ibid* 440–58.

¹⁴ *ibid* 458.

¹⁵ *ibid*.

¹⁶ *ibid* 447–48.

¹⁷ *ibid* 444.

¹⁸ By ‘legal standard of conduct’, Neumann is referring to general legal principles as opposed to specific legal rules: *ibid* 441.

the positive law.¹⁹ This results in Nazi legality becoming no more than ‘a technical means for the achievement of specific political aims’ and losing the ‘specific character of law’.²⁰

The specific character of law that Neumann argues is absent from Nazi law is reason. In his view therefore law goes beyond positivistic notions of its technical status as a rule or the command of the sovereign. While he acknowledges that any number of ‘technical rules’ continued to exist in Nazi Germany, these do not constitute law as he is referring to it.²¹ Instead, law must be ‘comprehensible by reason, open to theoretical understanding, and containing an ethical postulate, primarily that of equality. Law is reason and will’.²² The idea of law as reason is absent in the Third Reich because of a combination of the apparent arbitrariness of Nazi law, according to which ‘[e]very rule was at the disposition of the Führer’s will’,²³ and the replacement of rational and calculable liberal standards of conduct with irrational and ambiguous Nazi legal standards of conduct, which lacked an ‘unequivocal content’, making the system ‘a shell covering individual measures’.²⁴ On this basis, ‘if law is not only *voluntas* but also *ratio*, then we must deny the existence of law in the fascist state’.²⁵

In his adherence to a specific character of law based on rationality, Neumann arguably adopts a natural law framework for invalidating law in the Nazi state.²⁶ He applies an ethical standard of equality and formal requirements such as predictability to determine whether Nazi law is valid or not, notwithstanding his acceptance of the Nazi dissolution of law into morality.²⁷ It is the quality of the ethical standards of conduct in question that is key for Neumann in denying Nazi law the status of law.

There are potential problems with Neumann’s interpretation of the Nazi legal system, in particular his dismissal of its explicit ideological foundations as incapable of constructing it as a form of legality, which will not be addressed in detail here. The primary aim is to highlight the predominance of an interpretation based on non-law in *Behemoth*, and from the foregoing discussion it is clear both that Neumann denied Nazi law the status of law and that this characterisation was a central aspect of his analysis of the nature of the Third Reich, such that the title of his book was closely related to it.

Fraenkel’s analysis of the Third Reich also views some of the central features of the Nazi state through a non-law prism, even while his overall conclusion about the validity of Nazi law is different from Neumann’s. Fraenkel famously labelled the Third Reich the ‘dual state’, which was constructed out of two distinct spheres he observes in the Nazi legal system, the normative state and the prerogative state. The relationship between these two states is characterised by ‘constant friction’, with the latter somewhat parasitic on the former, although with the idea that they are able to co-exist more or less permanently, rather

¹⁹ *ibid* 447.

²⁰ *ibid* 447–48.

²¹ *ibid* 440.

²² *ibid*.

²³ H Jasch, ‘Civil Service Lawyers and the Holocaust: The Case of Wilhelm Stuckart’ in A Steinweis and R Rachlin (eds), *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (New York, Berghahn Books, 2013) 40–41.

²⁴ Neumann (n 10) 442.

²⁵ *ibid* 451.

²⁶ D Morris, ‘Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny’ (2015) 42(3) *New German Critique* 197.

²⁷ Neumann (n 10) 454.

than the prerogative state inevitably taking over and ultimately destroying the normative state.²⁸ For Fraenkel, in contrast to Neumann, it remains on some level a *legal* state in that normal law continued to function in many spheres, but this is overlain with a layer of arbitrariness that constitutes the prerogative will of the Nazi regime:

The entire legal system has become an instrument of the political authorities. But insofar as the political authorities do not exercise their power, private and public life are regulated either by the traditionally prevailing or the newly enacted law ... Normal life is ruled by legal norms. But since martial law has become permanent in Germany, exceptions to the normal law are continually made. It must be presumed that all spheres of life are subjected to regulation by law. Whether the decision in an individual case is made in accordance with the law or with 'expediency' is entirely in the hands of those in whom sovereign power is vested.²⁹

Fraenkel identifies many of the same elements of Nazi governance as Neumann in his analysis but reaches a different conclusion about how to interpret them to explain how the state operated and what this means in relation to the concept of law.

Fraenkel, like Neumann, highlights three main elements as characteristic of Nazi law: the undermining of principles of formal justice; the subjugation of law to the political will of the sovereign; and the repudiation of natural law. Of the first, he argues that the inviolability of law is eliminated from Nazi legality.³⁰ Of the second, he refers to the imposition of a permanent state of emergency that is accounted for by the presence of the prerogative state. The removal of certain groups – most notably the Jews – from regulation within the legal realm to a place outside the law in which 'only political imperatives are valid'³¹ means that 'martial law is the constitution of the Third Reich'.³² This goes hand-in-hand with the elevation of the Nazi political order over the legal order in the prerogative state.³³ Of the third point, Fraenkel argues that the Third Reich represents the 'repudiation of every trace of rational Natural Law'.³⁴ Again, similar to Neumann, the focus here is on the absence of a rational basis for law and the rejection of specific, formal principles in favour of ambiguous, political values.

These three elements are clearly related in Fraenkel's analysis: the rejection of formal justice represents the undermining of (rational) natural law and enables the subjugation of law to politics on an arbitrary basis. Whereas, however, Neumann is minded to dismiss the rational application of technical rules that comprise the normative state (and is also ostensible in the prerogative state) as secondary for characterising the nature of Nazi law as a whole, Fraenkel considers the normative state to be a substantial part of the system, which contributes significantly to its overall operation. As a result, Fraenkel is unwilling to label the entire Nazi legal system as non-law.

Notwithstanding some similarities to Neumann's analysis, therefore, Fraenkel spends more time considering a theorisation of Nazi law that incorporates it within the conceptual realm of 'law', not least in his discussion of the doctrine of 'communal natural law'.³⁵

²⁸ Fraenkel (n 10) 57.

²⁹ *ibid.*

³⁰ *ibid* 107.

³¹ *ibid* 141.

³² *ibid* 96.

³³ *ibid* 94.

³⁴ *ibid* 114.

³⁵ *ibid* ch 3 of Part II.

This, he argues, ‘is not in conflict with the arbitrary regime of the Prerogative State. Rather it presupposes its existence, for only the community and nothing but the community is of value’.³⁶ It is a version of law that attempts to account for both the role of Nazi ethical values, particularly the *Volksgemeinschaft* (national community), in Nazi legality, and the presence within the overall system of the prerogative state, a sphere of governance apparently outside the legal realm.

Nevertheless, non-law remains an important presence in his analysis, and an enduring aspect of its significant influence within subsequent academic discourse about Nazi law, for a number of related reasons. First, the prerogative state is arbitrary and unchecked by legal guarantees, a sphere in which political imperatives reign and which governs those who have been removed from the legal system altogether – ‘outlawed, *hors la loi*’.³⁷ If you are in the prerogative state, you are by definition outside the regular legal system. It is consequently, on this level at least, a realm of non-law. Secondly, whereas the normative state is the residue of the pre-existing *Rechtsstaat*, true *Nazi* law resides in the prerogative state, which both expands and is parasitic on the normative state. The prerogative state – and therefore arguably non-law – is central to what characterises Nazi law, and the most significant and devastating Nazi policies are seen to be enacted by the prerogative state. This aspect of the dual state analysis has been particularly influential in our historical understanding of the Nazi state.³⁸

Finally, the dual state is sometimes interpreted as two quite distinct domains existing in parallel to one another: the normative state largely untouched by Nazi ideology, and the prerogative state largely devoid of anything recognisable as law. This is an empirically problematic characterisation of the way the system operated and one that enables us to construct a false separation between the two states, which has the potential to reinforce the dichotomy between law (normative state) and non-law (prerogative state), rather than creating space for an interrogation of the complex connections between the normative and prerogative states and similarly between the Holocaust and the more mundane aspects of Nazi rule.³⁹ While Fraenkel does attempt to theorise a version of law that incorporates and explains his model of how the Nazi state operated, arguably the more enduring and influential features of the dual state for historiography have been its separation of the normative and prerogative states and the allocation of the nadirs and excesses of Nazi criminality to the prerogative state: the sphere of terror and arbitrariness, not law.⁴⁰

Neumann does provide a theoretical and empirical rationalisation of his position, while Fraenkel does provide an account of the normative and prerogative aspects of the state that explains how they operated in relation to one another and how they may be encompassed within a broader understanding of the concept of law. Nevertheless, it is the non-law implications of the ‘behemoth’ and ‘dual state’ paradigms that influenced the NMT proceedings and, partly because of this influence, continued to resonate throughout historical writing in the subsequent decades. The impact of the conclusion (in some cases) that law in Nazi

³⁶ *ibid* 141.

³⁷ *ibid* 96.

³⁸ Steinweis and Rachlin (n 6) 2.

³⁹ *ibid*.

⁴⁰ Indeed, this allocation helps to enable the problematic description of prerogative actions as ‘Nazi crimes’, because they can be more readily viewed as falling outside the legal framework.

Germany was merely an instrument of terror, and of the denial of the validity of the system or elements of it, has been to excuse the legal academy from proper evaluation of Nazi law and to make systemic analysis of Nazi legality very sparse within historical research for a long period, and the subject of marginal interest today. The shifting of the focus of the Anglo-American jurisprudential debate to the validity question – Nazi law or non-law – has often encouraged an abstracted and simplified understanding of the nature and operation of Nazi law, in an effort to answer a question that is not central to understanding Nazi legality. As David Fraser has argued, ‘Nazi law was law, in one form or another, and it is at the more nuanced levels of debate that we must address these questions’.⁴¹ This is mirrored in legal theory by the role of the Hart–Fuller debate, which provided a far less detailed examination of the Third Reich than Neumann and Fraenkel, with comparatively little interest in the empirical history of Nazi law, and resulted in the effective exclusion of serious discussion of Nazi law as law from jurisprudential discourse.⁴²

B. Non-law in the Hart–Fuller Debate

The 1958 debate between HLA Hart and Lon Fuller is an important moment in the entrenchment of a non-law narrative in the Anglo-American legal academy for a number of reasons. First, because of the enduring influence of both protagonists, and Hart in particular, for legal theory.⁴³ Secondly, because of the importance attributed to the Hart–Fuller debate and the two competing concepts of law it advanced – (Hartian) positivism and (Fullerian) natural law – within jurisprudence.⁴⁴ Thirdly, and most importantly, because of the way the Third Reich and its legal system were represented in the debate – the non-law component that, in different ways, infused both theoretical approaches. This chapter will not recapitulate the context of the debate or its main arguments in detail, as these are well addressed elsewhere,⁴⁵ but it will offer some analysis and observations about the representation of Nazi law and the prevalence of the rupture thesis within the two articles that constituted its initial engagement.⁴⁶

The main questions raised for legal philosophy in the debate were the validity question – what the conditions of validity for law are – and the separability question – whether law and morality are necessarily connected to one another. These two issues, and the competing paradigms used by Hart and Fuller to answer them, determined how Nazi law was treated in the debate, and have continued to dominate the agenda within analytical

⁴¹ D Fraser, ‘“This is Not like any other Legal Question”: A Brief History of Nazi Law before UK and US Courts’ (2003) 19 *Connecticut Journal of International Law* 59, 124.

⁴² ‘Jurisprudential discourse’ refers to the tradition of primarily analytical, Anglo-American, English language, jurisprudential-theoretical writing within the legal academy.

⁴³ See N Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford, Oxford University Press, 2004).

⁴⁴ eg, P Cane (ed), *The Hart–Fuller debate in the Twenty-First Century* (Oxford, Hart Publishing, 2010); ‘New York University Law Review Symposium: Fifty Year Later’ (2008) 83.4 *New York University Law Review* 993.

⁴⁵ See the edited collection and journal special issue indicated above (n 44).

⁴⁶ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593; and L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630. See also S Lavis, ‘The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the “Rupture Thesis” in the Anglo-American Legal Academy’ (2018) 31 *International Journal for the Semiotics of Law* 745, available at: doi.org/10.1007/s11196-017-9538-5.

jurisprudence in the period since. In particular, the way Nazi law was represented then has led to its all but complete exclusion as a serious topic of discussion for mainstream jurisprudential discourse today.

The two paradigms of the concept of law constructed through the debate – Hartian positivism and Fullerian natural law – have both been extremely influential, but it is the relationship these have to the way Nazi law was represented in the debate that has had a particularly powerful impact on the subsequent legal theoretical understanding of, and engagement with the Third Reich. This can be highlighted through a discussion of three related aspects: the level of analysis of Nazi law and the areas of Nazi law considered; the extent to which Hart and Fuller’s conclusions about Nazi law conform to their own theoretical frameworks; and the role of non-law in each of their analyses.

In terms of the degree and nature of engagement with Nazi laws, Hart – in line with his abstract, analytical methodological approach – presented very little by way of evidence or discussion of Nazi law in his debate article, instead relying on a number of assertions about the system. Chief among these was that ‘law is law’ in the Third Reich⁴⁷ and that the Nazi legal system was primarily an instrument of state tyranny.⁴⁸ On the first of these, Hart refers appropriately to the way in which the Nazis ‘exploited subservience to mere law’ to achieve their aims,⁴⁹ but this statement also implies a formalistic and positivistic understanding of how the law operated within the system, which is open to dispute.⁵⁰ On the second, Hart does not explore the use of law for purposes beyond repression and tyranny, or consider examples of Nazi law outside the particular area covered by the case of the grudge informer at the centre of the debate. The principal issue is that Hart showed little interest in how the Nazi legal system actually operated, and presented no evidence of its nature or purpose under the regime.⁵¹

Fuller recognised and criticised Hart’s lack of engagement with Nazi law,⁵² but his own examination was not comprehensive and fundamentally his picture of the legal system in the Third Reich is not very different from what we can ascertain of Hart’s impression. It is the difference in theoretical approach rather than empirical interpretation that results in the difference in labelling of the system as law or non-law. Fuller relied for his understanding of Nazi law on limited information about the general nature of the system and a specific, brief discussion of parts of the two statutes that were engaged in the grudge informer case, which, he argues, involved ‘uncontrolled administrative discretion’ and questionable interpretive principles.⁵³ To this he adds a reference to the ‘exploitation of legal forms’ at the outset of the regime, which ‘started cautiously and become bolder as power was consolidated’.⁵⁴

On the face of it, Fuller’s analysis of Nazi law – the prolific use of secret and retroactive laws, the resort to street violence and a tendency for the courts to ignore or reinterpret

⁴⁷ Hart, ‘Positivism’ (n 46) 618.

⁴⁸ *ibid* 613.

⁴⁹ *ibid* 617.

⁵⁰ eg, VG Curran, ‘Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law’ (2001–02) 35 *Cornell International Law Journal* 101.

⁵¹ See D Manderson, ‘Two Turns of the Screw’ in P Cane (ed), *The Hart–Fuller debate in the Twenty-First Century* (Oxford, Hart Publishing, 2010) 204.

⁵² Fuller (n 46) 633.

⁵³ *ibid* 653–55.

⁵⁴ *ibid* 659.

legislation,⁵⁵ and even the exploitation of legal forms – is not erroneous. These things did happen in the Third Reich. However, the limited use of evidence, and from specific periods of Nazi rule, means his representation of the operation of the law is incomplete. For example, while the laws he considers were pre-war statutes, it should be noted that the events of the grudge informer case took place in 1944, near the end of the war, when the regime was at its most desperate and draconian. Similarly, Hitler's gradual and pseudo-constitutional rise to power meant the Nazis inherited a system of legal and political checks and balances that they had to try to work within and exploit during the consolidation of power, which has the potential to skew the operation of law in the power-consolidation phase of the regime. Nazi legal ideology was arguably not fully or accurately manifested in the approach the leadership adopted to secure power within the pre-existing constitutional framework. The conclusions that we may draw from these examples, therefore, that Nazi law was only brutally repressive and tyrannous, and involved only the exploitation and undermining of the pre-existing *Rechtsstaat*, may be misleading. Among other things, both Hart and Fuller eschew any examination of the most distinctive and consequential aspect of Nazi law, the persecution of the Jews and other outside groups, that ultimately led to the Holocaust. As has been stated elsewhere, 'Fuller does not acknowledge Nazism did not merely corrupt a legal system. It realised a vision of it',⁵⁶ and this is entirely overlooked in the Hart–Fuller debate.

For Fuller, it was the extent to which Nazi law breached the inner morality of law that rendered aspects of it non-law:

When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality – when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.⁵⁷

As has already been mentioned, Fuller draws on nothing about the Nazi legal system that would cause Hart to concede that, based on his own concept of law, it should be considered non-law. Their disagreement is not over the nature and operation of Nazi law, but rather the philosophical issues informing the validity question and the separability question. Hart uses Nazi law to make the basic point that what makes law valid or invalid is not a question of how evil it is, but is dependent on other factors such as whether it is posited correctly according to the rules of the system. Fuller's evaluation is slightly more dependent on the historical dimension because it is the extent of breach of the morality of law that renders Nazi law non-law in his view, but the plane of the argument is also primarily on a theoretical level. Indeed, it is apparent from examining references to Nazi law in jurisprudential discourse since the Hart–Fuller debate that, because of its apparent and obvious wickedness, it is an excellent rhetorical touchstone for both positivism and natural law: *even* something as evil as this can be law because morality is not a condition of validity; or something as morally repugnant as this *cannot possibly be law* because law and morality are necessarily connected on a fundamental level.

⁵⁵ *ibid* 650–52.

⁵⁶ Manderson (n 51) 212.

⁵⁷ Fuller (n 46) 660.

Hart's minimal engagement with Nazi law, and the general agreement between the two over the nature of the Nazi legal system, means that it is overlooked that Hart's own criteria for validating a legal system cannot be so readily said to incorporate Nazi law. In order for Nazi law to be valid law according to Hartian positivism, it would, among other things, need to both adhere to a minimum content of natural law that acts as a prerequisite to a functioning legal system, and comply with certain formal requirements that determine how law comes into existence and how it is applied within a system.⁵⁸ It may be possible to find, in a combination of the *Führerprinzip* (leader principle) and the 1933 Enabling Act a sort of rule of recognition that can be used to establish the conformity of other legal provisions within the system, but these are so general and, in the case of the former, so arbitrary, that it is difficult to do so while continuing to give some sort of coherence to the idea of a rule of recognition. Other aspects are also problematic. In the case of formal requirements, for example, the merely interstitial nature of judicial discretion that Hart requires is questionable, given the extent of politicisation of the judiciary and the infusion of the law with ambiguous, moral language.

Hart's naturalist elements, minimal though they are, are also potentially difficult to align with the Third Reich. Of the principles of objectivity and impartiality in the administration of the law, Hart clarifies that these principles need not apply to the whole of society, and indeed may only apply to a very small group, but if they are systemically absent for everyone this would invalidate the legal system. However, there is a good case to be made that objectivity and impartiality were systemically absent from Nazi law, because the alternative Nazi vision of law did not consider these to be beneficial principles and because the ideology underpinning this infused the normative as well as the prerogative aspects of the system.⁵⁹

This criticism of Hart's application of positivism to Nazi law is also relevant in terms of the role of non-law in the Hart–Fuller debate. It may be noted that the principles comprising the inner morality of law in Fuller's natural law are not very different from Neumann's rational concept of law in *Behemoth*, or Fraenkel's notion of formal justice in *Dual State*, in that formal concepts such as generality, non-retroactivity and inviolability are placed at the heart of what constitutes law. Fuller's conclusions about Nazi law are particularly similar to Neumann's in that he interprets Nazi law as a cloak of law: an arbitrary instrument of terror that, in its violation of certain fundamental principles of legality, cannot be considered law. The importance of non-law as an interpretation of Nazi law in Fuller's concept of law is, therefore, clearly evident. It is a concept of law which cannot incorporate as valid a regime so contrary to the inner morality of law as the Third Reich. This is also important on the level of academic discourse, because of the authority of the Hart–Fuller debate within Anglo-American jurisprudence, in which Fuller's natural law theory has remained generally influential and has arguably undergone a specific resurgence in recent years.⁶⁰ As the focus of the Hart–Fuller debate and subsequent elucidations of his paradigm is on the theoretical concept, the issue of Nazi law has largely been taken as settled for natural law; it is perhaps the worst case of non-law. It is not difficult in principle, then, to link Fuller's role in the Hart–Fuller debate to the enduring prevalence of the rupture thesis.

⁵⁸ HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994) 259.

⁵⁹ M Stolleis, 'Law and Lawyers Preparing the Holocaust' (2007) 3 *Annual Review of Law and Social Science* 213.

⁶⁰ eg, D Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) 20 *Oxford Journal of Legal Studies* 703, as well as Rundle's work, discussed below.

It is more problematic, on the face of it, to assert that Hart's validation of Nazi law as law has also contributed to the non-law narrative, especially as Hart is generally considered within jurisprudence to have 'won' the Hart–Fuller debate and his writing and brand of positivism has consistently been extremely influential within the field. This claim can nevertheless be argued in two ways. The first is to take the preceding critique of the application of Hartian positivism to Nazi law to its logical conclusion, which is to say that in fact Nazi law is non-law according to Hart's own paradigm, properly applied. This is the more straightforward argument, but it runs into difficulty because this is not a prevalent interpretation of the Hart–Fuller debate. Scholars have rarely taken the view that Hart was mistaken about the application of his theory to Nazi law and so its influence on the discourse in this respect is insignificant.

The second way of making this claim is less obviously the advancement of a non-law interpretation but is arguably more consequential for how Nazi law is understood. This builds on the representation of the nature of Nazi law in Hart's contribution and the enduring impact this has on how that body of law is understood and portrayed in legal theory. As such, this second way takes the idea of the rupture thesis at its broadest, as the rupturing of Nazi Germany from the concept of law, and considers the legacy of the Hart–Fuller debate through the positivist tradition within jurisprudence from this perspective to make the argument that Nazi law is not considered a serious subject of legal theoretical research into the concept of law today in large part as a result of its treatment in the debate. As Hart's very methodology for elucidating the concept of law is abstract, historical manifestations such as Nazi law are used as illustrative exemplars to support an argument rather than concrete case studies to be explored in detail. The lack of an empirical historical component to analytical jurisprudential research means the academic discourse often relies heavily on pre-existing representations of an example case. Nazi Germany, because of the Hart–Fuller debate, is often taken as read in its implications for the concept of law.⁶¹ Both Hart and Fuller employ the case of Nazi law quite sparsely as an example, but imply clear, and sometimes questionable, conclusions about the nature and operation of the Nazi legal system to which they attach their own arguments about the separability of law and morality and the conditions of validity for law.

Following the Hart–Fuller debate, the case of Nazi law is considered settled and, particularly for Hart, it appears to be a simple case: an immoral legal system that says nothing new about the concept of law. This conclusion performs its own act of rupture on the Third Reich because it divorces it from serious discussion about the nature of law. Subsequent decades of jurisprudential discourse demonstrate that, while the Third Reich reappears repeatedly as an archetypal wicked legal system or repository of shocking (sometimes hypothetical) examples, it does so almost exclusively on these terms: it is as Hart and Fuller represented it, and there is nothing new or complex to learn from it. The rupture thesis is not only about saying Nazi law is not law, but also about a related lack of engagement with the subject: the 'absurdly thin' condition of the post-war production of Anglo-American academic lawyers on law and the Holocaust,⁶² and the fact that 'academic lawyers ... have with very rare exception stood mute since the Hart–Fuller debate of the late 1950s'.⁶³

⁶¹ eg, Lavis (n 46).

⁶² F DeCoste, 'Review of David Fraser, *Law After Auschwitz*' (2007) 17 *King's Law Journal* 179, 180.

⁶³ DeCoste, 'Hitler's Conscience' (n 2) 4.

Reproducing the Rupture Thesis: The Persistence of the Non-law Paradigm

The representations of Nazi law in history and law manifested in the writing of Fraenkel and Neumann, Hart and Fuller constructed an interpretation of Nazi legality with non-law as a significant element and prepared the ground for the development of the rupture thesis. It has been noted that this understanding of Nazi law continues to resonate today, even while in some areas of academic research there is evidence that more attention is starting to be paid to the role of law as law in Nazi Germany, and how it relates to law in other sorts of states and to the concept of law generally. The existence of this volume and the conference that led to it is an example of this, and there are other examples, most notably from an Anglo-American perspective, as well as works in English originating from European scholars.⁶⁴

However, despite the acknowledgement in some of these works of the prominence of the rupture thesis and non-law paradigm in our understanding of Nazi law, there is a tendency in these texts to reproduce or reinforce aspects of this approach, or at least an apparent readiness to accept the application to Nazi Germany of a language of criminality and lawlessness, which supports a non-law narrative. For example, Steinweis and Rachlin reiterate that ‘Germany largely ceased being a Rechtsstaat – a nation of laws’.⁶⁵ Similarly, at the same time that Vormbaum seeks to place a greater emphasis on continuity of law than most previous studies of Nazi law, he also explicitly employs the language of the rupture thesis, with reference to ‘the *manifest unlawfulness* of the National Socialist regime and its *exorbitant crimes*’.⁶⁶ Finally, notwithstanding her acknowledgement of the non-law view’s prevalence, Rundle’s own writing about law and the Holocaust employs a revised version of Fuller’s natural law to argue that the Holocaust was an essentially non-lawful event, as after November 1938 ‘the policy of extermination ... 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’.⁶⁷

This is not to say that these recent studies simply reproduce the rupture thesis without critical reflection or modification. Steinweis and Rachlin largely favour Fraenkel’s dual state model which, as we have observed, incorporates the extra-legal, prerogative state into a broader framework of Nazi law as law. In doing so, they implicitly acknowledge the disproportionate influence on our understanding of Nazi law of the distinction between the two states, and the consequent location in the discourse of Nazi repression in the realm of the prerogative state. Their acknowledgement of the limitations of the dual state model is accompanied by use of the language of criminality in relation to Nazi law, reflecting a willingness to view the prerogative state as a lawless sphere, notwithstanding the attempted partial deconstruction of the conceptual separation of the two realms.

⁶⁴ eg, Vormbaum (n 5); HP Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Berlin, Springer, 2015); M Stolleis, *History of Social Law in Germany* (New York, Springer, 2014). See also Steinweis and Rachlin (n 6).

⁶⁵ Steinweis and Rachlin (n 6) 1–2.

⁶⁶ Vormbaum (n 5) 264 (emphasis added).

⁶⁷ K Rundle, ‘The Impossibility of an Exterminatory Legality: Law and the Holocaust’ (2009) 59 *University of Toronto Law Journal* 65, 76.

This results simultaneously in a questioning and a reinforcement of the dual state theory, which is not then followed through with a longer and deeper evaluation of how the Nazi legal system operated within and between the two states. The majority of the chapters in their volume focus on the role of different professional groups in Nazi rule or at the post-war trials. With one exception, little attention is paid to the overall nature of Nazi law and its connection to the ideology of the regime,⁶⁸ and so a revised application of the dual state paradigm is not established.

Vormbaum also employs the language of criminality and lawlessness, in this case in the context of arguing that there are recognisable legal continuities through the Third Reich, and he does attempt to situate Nazi law within the longer continuities in German history implied by the subject of his work. However, there is a similar tension between the assertion of particular doctrinal and conceptual continuities running from before the Third Reich into the regime and on into the post-war period, and the clear declaration of the ‘manifest unlawfulness’ of the regime as a whole. The most straightforward reading of this is that it has a natural law underpinning, according to which the manifest *injustice* of actions of the Nazi regime naturally result in their manifest *unlawfulness*. This interpretation is supported by an apparent distinction drawn in the text between the legal status of particular laws and the (un)lawfulness of the legal system as a whole.

Vormbaum also arguably goes further in assimilating aspects of the rupture thesis when referring to what is described as the specific pathology of the Nazi regime, that ‘we are here concerned not with the state as the creator of laws, but with the state as the breaker of laws, with “state-encouraged crime”’.⁶⁹ In support of this, he cites a number of examples from the Third Reich.⁷⁰ This adopts the perspective of the Nuremberg Trials by implying that Nazi acts were in breach of positive laws as well as natural law, meaning they are to be considered criminal from the outset. Notwithstanding his elucidation and analysis of Nazi legal concepts and principles as well as specific Nazi laws, and the various continuities and similarities between those and other laws, little more is said about this claim, which appears to site key aspects of Nazi rule and policy within the realm of non-law.

It is difficult to know how best to interpret Vormbaum’s various constructions of Nazi law as non-law, not least because he also does not delve any further into the issue or specify his theoretical rationale. However, the influence of both Neumann and Fraenkel is discernible in his analysis. The general attribution of lawlessness to the regime and its central acts on the basis, at least in part, of a repudiation of certain principles of legality, seems to fit within the concept of lawlessness asserted by the *Behemoth* model. Fraenkel’s influence, meanwhile, can be seen in the implied distinction to be made between some of Vormbaum’s comments that appear to accept the legality and status as law of a number of Nazi criminal laws, and his labelling of the systematic extermination of the Jews and other acts as examples of state crimes. On this analysis, Vormbaum’s reference to the ‘exorbitant crimes’ of the regime becomes the focus of its ‘manifest unlawfulness’, leaving a distinction between ordinary criminal legislation and the tools used to carry out the Holocaust that might find its foundation in Fraenkel’s description of the dualstate.

⁶⁸ R Gross, ‘Guilt, Shame, Anger, Indignation: Nazi Law and Nazi Morals’ in A Steinweis and RD Rachlin (eds), *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (New York, Berghahn Books, 2013).

⁶⁹ Vormbaum (n 5) 207.

⁷⁰ *ibid* 208.

It is, however, not made completely clear on what theoretical basis Vormbaum constructs his case for manifest unlawfulness, or precisely how he sees that unlawfulness intersecting both with lawful aspects of the regime, and with doctrinal and conceptual continuities with lawful systems both preceding and following the Third Reich. Consequently, a reproduction of at least some aspects of the non-law paradigm are apparent in Vormbaum's analysis, as they are in Steinweis and Rachlin, even where the overall thesis purports to question, or at least acknowledges as problematic, the notion of rupture.

It may, of course, still be possible to stake out a 'dual state' position, where law and non-law both co-existed in the Nazi regime. However, in a field of study acknowledged to be dominated by the rupture thesis, if one is to make this case it is important to conceptualise on a systemic level how the legal and the extra-legal worked together, on the basis that it is now understood that inferring a clear separation of the normative and prerogative states from Fraenkel is not sustainable.⁷¹ Vormbaum appears to acknowledge the prevalence of the rupture thesis, to explain many elements of the Nazi system in terms of conceptual and doctrinal continuities as if it were law, and then to describe that system as lawless.

A similar approach is adopted by Michael Stolleis, who has grappled with the issue of resolving the law/non-law paradox in evaluating Nazi law: 'the dilemma of the existence of law in a system that is on the whole unlawful and un-just or that at least commits many unlawful acts'.⁷² In scoping out possible solutions to this paradox, Stolleis concedes that they either cannot be sustained or they run into a reality of Nazi law that was complex, diverse and changed over time,⁷³ and in so doing he refers to Fraenkel's dual state and the coexistence of 'normality and terror'.⁷⁴ It is necessary to question, in response to Stolleis's framing of the issue, whether the regime was in fact systemically unlawful, or systemically unjust, or whether it 'only' committed many unlawful acts. What is the distinction between these statuses – because surely they are different – and, beyond the undeniable attribution of unjust-ness, how can we justify any of them empirically? Like Vormbaum, Stolleis appears to make a good case in his analysis of the legal system for treating specific Nazi laws as law, and at the same time appears not to identify a jurisprudential basis on which to invalidate Nazi law,⁷⁵ but he nevertheless refers to its overarching unlawfulness.

Whereas general historians of the Third Reich have arguably been understandably inattentive to the broader issue of how to interpret the nature of the Nazi legal system as a whole in a way that is both historically and theoretically intelligible as law, the non-law paradigm continues to be reproduced in legal theory. To make her argument about the transformation of Nazi law into non-law around November 1938 when *Kristallnacht* took place,⁷⁶ Rundle applies aspects of Fuller's theory to different areas of the Nazi regime, specifically the Nazi persecution programme against the Jews. This can be interpreted as a version of the dual state paradigm if the fault line between the normative and prerogative states is drawn across

⁷¹ M Stolleis, 'Law and Lawyers Preparing the Holocaust' (n 59) 216: 'it is a myth that some areas remained entirely untouched by the political claims of the system. Neither the frequently cited land register law, nor the social security or tax laws, nor the law concerning debts, property, family, and inheritance was in any way immune'.

⁷² *ibid* 214.

⁷³ *ibid* 215.

⁷⁴ *ibid* 216.

⁷⁵ *ibid* 214–15.

⁷⁶ See Rundle, 'Review of Law After Auschwitz' (n 7) 197; Rundle, 'Impossibility' (n 67); K Rundle, 'Law and Daily Life – Questions for Legal Philosophy from November 1938' (2012) 3(2) *Jurisprudence* 429.

time rather than space; ie, the lawless prerogative state followed the normative state in time rather than the two coexisting at once. To reinforce this analogy, it should be remembered that Fraenkel's dual state model is itself not without a temporal aspect. If the normative state is the area of the legal system that continued to operate with the checks and guarantees of the pre-existing *Rechtsstaat*, the claim is that this was not because of any Nazi desire to maintain the principles of legality in certain areas of rule, but because of the need to work with the existing system for pragmatic reasons and because of the absence of a revolutionary moment in the seizure of power. The prerogative state represents the gradual imposition of Nazi legality onto the normative framework, which naturally occurred more rapidly and comprehensively in some areas than in others. Rundle in effect, and underpinned by natural law philosophy, argues that the prerogative state ultimately completely took over and invalidated the legal system after 1938, although it is worth noting that Rundle's inquiry is limited to anti-Jewish persecution measures, so it is not completely clear if she considers that other aspects of the state continued to function lawfully, or indeed whether that matters in terms of the validity of the whole system.

Two further key points about Rundle's argument require attention here. First, her approach reproduces the non-law paradigm as the main way through which key aspects of the Nazi legal system should be understood and, in doing so, posits a rupture between the period before November 1938 and afterwards. This is particularly apparent in the way the 1935 Nuremberg laws are interpreted, denying their proto-extermiatory character because of the absence of any lethal intention among the Nazi leadership at the time of their passage and because they continued to leave some room for Jewish agency under the law. However, while it is now generally accepted by historians that there was no exterminatory intention at that stage, it is difficult to use this as evidence for a qualitative break between law and non-law in 1938 because it was an early but significant step in a process of radicalisation that resulted in the Holocaust. To require exterminatory intention among the Nazi leadership in 1935 in order to connect early persecutory laws with the Holocaust would entail a problematic rejection of the interpretive school of functionalism and a return to intentionalism as a way of understanding the Third Reich.⁷⁷

Secondly, and picking up from this point, Rundle's analysis specifically places the Holocaust in the realm of non-law by labelling all measures against the Jews after around November 1938 as legally invalid. Consequently, a fairly consistent element of the rupture thesis that denies the complicity of law with the Holocaust, ostensible in the work of Neumann and Fraenkel, Fuller, Steinweis and Rachlin, Vormbaum and possibly Stolleis, is also present in Rundle's work. Once again, it may be possible to make the case that some aspects of the Holocaust took place in the extra-legal realm, and it is not a principal argument of this chapter that the Holocaust was entirely a lawful enterprise,⁷⁸ but it is important when advancing a non-law thesis to construct such an argument on a solid historical and theoretical basis, not least because of the implications of the rupture thesis for academic research into Nazi law. Rundle's work represents a high point of engagement with the issue of Nazi law from within mainstream Anglo-American jurisprudence, but it nevertheless reproduces key aspects of the rupture thesis and some of the underlying historical and theoretical understandings of Nazi law that support this.

⁷⁷ See Kershaw (n 4).

⁷⁸ See David Fraser, ch 2 in this collection.

Conclusion

The consequences of the rupture thesis for the scholarly study of Nazi law are apparent for the legal academy as well as the historical academy. Efforts to exclude the Nazi period from normal historical development and more particularly from normal legal development have their purposes, but they have often resulted in a lack of engagement with Nazi law as a serious subject of enquiry, both from lawyers and historians. For legal theorists, the impact of the Hart–Fuller debate on jurisprudential discourse has been discussed, and for the legal academy generally the exhortations of DeCoste, Fraser and others about the failure to address the Holocaust as a matter of law are telling. For historians, the continued underlying presence of the non-law paradigm in the most recent works reflects a long period during which, while individual Nazi laws were part of historical narratives of the rise to power and rule, systemic studies of the Nazi legal system were rare, the models advanced by Neumann and Fraenkel held sway, and most investigations of law in relation to the Third Reich concerned Nazi war crimes trials rather than Nazi law itself.

Returning to the key theme of this collection – the connections between ideology and law – some of this neglect of Nazi law can be related to a general reluctance within historiography to consider Nazi ideology as an important factor for Nazi rule. As Dan Stone has observed:

Where early scholars of the Third Reich like Fraenkel identified a ‘dual state’, so much of the recent literature stresses the cynical, ‘nation-building’ aspect of Nazism over its ideological commitments. The notion of the Third Reich as a gangster regime is apparent in studies of looting, for example, or in the operation of the various levels of bureaucracy in the state, for example, in the failure of the civil authorities to rein in Party organizations in the occupied east.⁷⁹

In this instance, the absence of even a dual state model of the Third Reich within historiography is lamented because of the extent to which ideology, particularly as a consensus-building element, was overlooked in favour of a ‘gangster’ or criminal state interpretation of the regime. This can be related to the neglect in much of the discourse of the connections between ideology and law in the Third Reich. If law is viewed as simply an instrument of terror, it becomes both easier to invalidate it on grounds of natural law and to consign the Third Reich to irrelevance for other legal systems and the concept of law generally. In the absence of an overarching legal ideology, while the role of individual laws in repression and persecution is certainly worthy of attention, there appears little need to consider the systemic nature of the law further.

However, among historians of the Third Reich, an ideological turn took place from the 1990s, which looked beyond the explanatory power of terror alone and took the role of consent, and consequently ideology, in Nazi state and society more seriously. Historians started to consider ideology as an important aspect of consensus building in the regime. Despite these general developments, however, Nazi law has still had limited exposure to the new attention given to ideology and continues to be treated in many studies of the Third Reich as only an instrument of terror rather than also as a reflection of the regime’s ideology. In this respect Nazi legal history lags behind other historical developments and

⁷⁹ Stone (n 4) 134.

requires further examination. The rupture thesis has operated over a long period of time to guard against such an engagement, and it is this discursive cooling effect, rather than the individual merits of the nuances of analysis in particular manifestations, that is most noteworthy about the non-law paradigm and its reproduction today.

This chapter has attempted to unpack and elucidate key moments in the genesis, reproduction and continuing influence of the rupture thesis – the non-law paradigm – so that its underlying tenets can be understood and its ambivalent impact on academic discourse around Nazi law can be appreciated. The hope from this is that more lawyers and historians are willing to engage seriously with Nazi law both as a historically specific legal system and in a comparative framework alongside studies of other anti-democratic and authoritarian regimes.