

# The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the ‘Rupture Thesis’ in the Anglo-American Legal Academy

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**Abstract** It has been remarked that the ‘rupture thesis’ prevails within the Anglo-American legal academy in its understanding of the legal system in Nazi Germany. This article explores the existence and origins of this idea—that ‘Nazi law’ represented an aberration from normal legal-historical development with a point of rupture persisting between it and the ‘normal’ or central concept of law—within jurisprudential discourse in order to illustrate the prevalence of a distorted (mis)representation of Nazi law and how this distortion is manifested within the discourse today. An analysis of the treatment of Nazi law in two major 50th anniversary publications about the 1958 Hart–Fuller debate, and a review of representations of the Third Reich within literature from the current discourse, demonstrates that the rupture thesis continues to be reproduced within jurisprudence. An examination of the role of Nazi law in the Hart–Fuller debate itself shows that it can be traced back to the debate, where it was constructed through a combination of conceptual determinism and historical omission. It concludes that the historical Nazi law has great significance for the concept of law, but neither positivism nor natural law has properly theorised the nature of the real Nazi legal system.

**Keywords** Third Reich · Jurisprudential discourse · Nazi law · Natural law · Positivism · Hart–Fuller debate

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## 1 Introduction

It has been remarked that a ‘rupture thesis’ prevails within the Anglo-American legal academy in its understanding of the legal system in Nazi Germany. This term refers to the idea 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 historical process of law and politics, at least in the West’ [8: 179]. This article explores the existence and origins of this idea—that Nazi ‘law’ represented an aberration from normal legal-historical development with a point of rupture persisting between it and the ‘normal’ or central concept of law—within jurisprudential discourse. It does so through an analysis of the treatment of Nazi law in the discourse in and related to the 1958 Hart–Fuller debate, a foundational moment in modern Anglo-American jurisprudential discourse. This analysis encompasses the initial *Harvard Law Review* contributions of the debate’s two protagonists [17, 20], two major collections of reflections on the ongoing significance of the debate that emerged from events to mark its 50th anniversary in 2008: the *New York University Law Review* special issue ‘Fifty Years Later’ (henceforth ‘NYULR symposium’) [53] and Peter Cane’s edited volume *The Hart–Fuller Debate in the Twenty-First Century* [3], and a consideration of how Nazi law is represented within the discourse today.

The representation of Nazi Germany as an unrecognisable ‘other’, because of its perceived barbaric, lawless nature, which contributes to the rupture thesis has occasionally been asserted [9, 14], but is rarely explored in terms of its concrete manifestations within the legal academy, the specific place of Nazi Germany within academic legal discourse it entails, or its relationship with its historical antecedents; the reasons it persists today as it does. Beyond their link to the Hart–Fuller debate itself, the works considered in this article are connected by the enduring way the Nazi legal system is represented within jurisprudential discourse; its entrenched role as a source of eye-catching examples in elaborate debates between proponents of positivism and natural law, rather than a manifestation of law with anything of substantive note to contribute to our theoretical understanding of the general concept of law. This article is concerned with the creation and reproduction of a distorted representation of Nazi law within Anglo-American jurisprudence over almost six decades since the Hart–Fuller debate, and its consequent failure to engage with the historical reality of Nazi law and assess its implications for the central concept of law, on which jurisprudence focuses much of its attention.

The Hart–Fuller debate represents a foundational moment in Anglo-American jurisprudence because of its framing of the debate about the concept of law around new strands of Hartian positivism and Fullerian natural law and around the central issues of the conditions of validity for law (the validity question) and the relationship between law and morality (the separability question), as well as for its unparalleled, enduring influence on jurisprudential discourse, which continues to this day. The influence of the parameters set by the debate on jurisprudential discourse should not be underestimated: ‘The fact is that the exchange between Hart and Fuller really did set the agenda for modern jurisprudence: the separation of law

and morality, the place of values in interpretation, and the relation between the concept of law and the values associated with the rule of law' [52: 996]. Nicola Lacey has argued that their work 'of course, continues to shape contemporary jurisprudence to a quite remarkable degree' [26: 41], and 'it is worth reflecting on the remarkable fact that it still speaks to us so powerfully today' [25: 1059].

This article will focus on the impact that the debate has had on the representation of Nazi law within Anglo-American jurisprudence, both as a concrete example of the rupture thesis persisting within the legal academy and to demonstrate how the marginalisation of Nazi law in the Hart–Fuller debate continues to dictate how it is treated within jurisprudential discourse today. It will make the argument that Nazi law has been too hastily overlooked as having nothing fundamental to say for the central concept of law in Anglo-American jurisprudence in the period since the Hart–Fuller debate, and this is primarily as a consequence of how it was treated in the debate's initial exchanges. Nazi law represented little more than a springboard into the philosophical issues that really concerned Hart and Fuller, and the enduring preoccupation with these issues within the jurisprudential community has established the role of Nazism within the discourse as a piece of extreme historical marginalia, a paradigm of wicked law with no substantive significance for the concept of law. It is used within jurisprudence primarily as a source of examples and hypothetical scenarios in intricate theoretical debates between advocates of various strands of positivism and natural law, substantively unconnected to the philosophical arguments being advanced. This interpretation of the relevance of Nazi law for the concept of law is flawed because this representation of Nazi law is largely erroneous, based very limited historical evidence, and the actual Nazi legal system is much more interesting, complex and worthy of legal theoretical consideration than is understood within this discourse. Crucially, the limitations of positivism and natural law in their representation and use of the Third Reich may mean that neither paradigm is able to properly explain Nazi law or facilitate a productive jurisprudential debate about its true nature and significance.

The ongoing significance of the Hart–Fuller debate is also apparent in the series of reflections on the debate on its 50th anniversary in 2008. One of the issues that received very little attention in these two publications was the earth-shattering era that brought about the very case that prompted Hart's initial reflections on the concept of law in the debate: the legal system of the Third Reich. The case of the grudge informer in the Federal Republic of Germany raised the question of whether a post-war German court should treat Nazi laws as valid or not and this led Hart to consider some of the issues he felt are at the centre of the concept of law: the conditions of validity for law and the nature of the connection between law and morality. The general failure to re-evaluate the trigger for these ruminations in the 50th anniversary literature and beyond should not surprise anyone who has taken note of the way Nazi law was represented in the initial *Harvard Law Review* exchange, particularly by Hart: as a piece of historical ephemera employed as a hook from which to hang broader conceptual arguments, but with little substantive contribution to make to them. This is the approach mirrored by its treatment in most of the commemorative contributions, which are understandably concerned with revisiting or extrapolating the issues that most concerned Hart and Fuller. These did

not ultimately include the historical nature of Nazi law or its substantive implications for the concept of law. The current jurisprudential discourse about positivism and natural law, the validity question and the separability question, also follows and reproduces this approach, although often lacking even the limited degree of historical appreciation of the Third Reich shown by the Hart–Fuller debate.

In order, therefore, to illustrate how Nazi law is represented within jurisprudential discourse, and demonstrate the connections between current jurisprudential treatment of Nazi law and the Hart–Fuller debate, this paper will first interrogate the representation and significance of Nazi law in the contributions to the two 50th anniversary collections. These publications are particularly useful as a snapshot of the Anglo-American jurisprudential community, incorporating papers from some of the field's most prominent legal philosophers, as well as being an excellent indication of which aspects of the Hart–Fuller are thought worthy of reflection and consideration today. Interestingly, they also include some perspectives on the debate that are external to the field of jurisprudence (narrowly defined) which gives some sense of the extent to which the dominance of the rupture thesis in relation to Nazi law is confined to jurisprudential discourse. It should be noted that more attention in this article is devoted to the Cane collection than the NYULR symposium precisely because the former is more challenging to the thesis advanced in this article than the latter. The NYULR symposium contributions almost exclusively follow the theoretical lead of the Hart–Fuller debate—reconsidering questions and issues that have occupied the discourse around positivism and natural law in the decades since 1958—while omitting its historical aspect. Consequently, that Nazi law is barely mentioned in these articles means that the most notable point for the purposes of this paper is the fact of its neglect. By contrast, while many of the Cane chapters also do not mention Nazi law, its relative prominence in some contributions, and particularly those that come from perspectives outside of traditional jurisprudence, requires some unpacking and analysis.

This article will then review and evaluate the treatment of Nazi law in the initial contributions to the Hart–Fuller debate itself, to demonstrate how irrelevant the historical specificity of Nazi law was to the substantive issues in the debate and how peripheral its significance was as a matter at issue between Hart and Fuller. Following this, the article will bring the analysis of the discourse back up to the present day, by considering how Nazi law is represented in illustrative examples from jurisprudence since 2008. Finally, it will briefly highlight some of the problems caused by viewing Nazi law through the twin competing theoretical paradigms of positivism and natural law and without historical context and evidence, to begin to show why in fact Nazi law may be more of a central, complex and problematic case of the concept of law than is generally thought.

Prior to this, it is important to say a few things about the approach adopted here. First, where this paper uses the terms 'jurisprudence' and 'Anglo-American jurisprudential discourse', it refers to the strand of primarily analytical, Anglo-American, English-language jurisprudential discourse within the legal academy, which comprises the tradition of text-based, doctrinal and conceptual legal theory, which is most concerned with issues such as the validity of law, the connection

between law and morality and judicial interpretation, and much of which represents the direct or indirect legacy of the Hart–Fuller debate. Second, this paper does not offer a thorough historical analysis of the nature of the legal system in the Third Reich, but is focused instead on emphasising aspects of Nazi law to further the critique of the role and representation of Nazi law within jurisprudence presented herein. While some historiographical studies about Nazi law are cited, therefore, it does not make use of primary sources of Nazi law for this purpose. It is not possible within the scope of this article to provide a thorough account of the Nazi legal system, although some recent legal historical studies have contributed to developing such an account, including placing it within a broader temporal frame [43–47]. It is also not possible within the scope of this article to provide a comprehensive analysis of the representation of Nazi law within Anglo-American jurisprudential discourse. Instead, the commemorative collections and examples from the subsequent discourse are used as imperfect but suitably illustrative exemplars for how the field characterises and uses Nazi law. Finally, the arguments presented here are in no way an endorsement of Nazi law or legality, nor do they amount to a claim that Nazi law is necessarily paradigmatic of the central case of law or is the same in all respects as other instances of law.

## 2 The 50th Anniversary Literature: A Lacuna Where the Abyss Ought to Be

It has been noted that the Anglo-American legal academy propagates the idea that Nazi Germany represented a gross departure from normal historical and legal development—an aberration—such that there are no substantive points of continuity between now and then worthy of examination. At the forefront of this commentary has been Frederick DeCoste, who argued in 1999 that ‘the English-speaking academy has been especially resistant to exploring the moral, ethical, and political significance of events in Europe between 1933 and 1945’ [7: 800]. On that occasion DeCoste made a connection between this claim and the Hart–Fuller debate:

Despite a few, half-hearted and misdirected concessions immediately after the War - I am thinking particularly of the unaccountably influential Hart/Fuller debate ... it is fair to say that, until very recently, the English-language legal academy has proved itself completely immune to the defining experience of this century. This attitude is all the more bizarre given the centrality of law and lawyers to European fascism generally and to the Holocaust in particular [7: 792–793].

He also added more recently that ‘academic lawyers ... have with very rare exception stood mute since the Hart–Fuller debate of the late 1950s’ [9: 4]. This association, asserted but not explored, of the rupture thesis with the Hart–Fuller debate is interesting because the debate might otherwise be thought of as the forum that brought Nazi Germany to the attention of the legal academy and jurisprudence in particular, and attempted to tackle some of the thorny—not to say horrifying—issues it raised for law. On that basis, if parts of the legal academy do manifest a

rupture thesis in their representation of Nazi Germany, this could hardly be related to the otherwise esteemed and enduring contributions of Professors Hart and Fuller.

However, an omission at the heart of the debate's 50th anniversary literature belies the notion that the debate really tackled Nazi law, or that the treatment of the Third Reich therein is unconnected to what followed in terms of Nazism's representation in jurisprudential discourse today. This is the absence of Nazi law and the Third Reich generally, as having anything meaningful to contribute to reflections on, analyses about, or reinterpretations of the issues considered central to the debate. If the darkest corner of Nazi Germany, the Holocaust, represents the abyss, then there is in the anniversary literature a lacuna where the abyss ought to be. Of all of the researchers who returned to the Hart–Fuller debate in order to revisit its fundamental components and reconsider its enduring significance five decades later, very few had anything to say about Nazi Germany or its legal system.

The two anniversary collections each adopt a different approach to the Hart–Fuller debate. Whereas the NYULR symposium was focused on re-evaluating the terms and context of the debate and so examined its internal world, the Cane collection aimed to reinterpret issues in the debate and 'rethink them in light of social, political and intellectual developments in the past 50 years, and of changed ways of understanding law and other normative systems' [3: v], so adopted a more external and outward-looking jurisprudential perspective on the debate. This difference in approach has potential significance for the representation of Nazi law one is likely to find in each collection. An internal re-examination of the debate might be expected to reflect the role and importance of the Third Reich in the original debate, whereas an attempt to critique, or move outside of the terms of the debate and its key issues might include an alternative or deeper evaluation of something like Nazi law, which was part of the debate but increased reflection on which has not been one of its major legacies.

The point has already been made that the internal perspective adopted by the NYULR symposium resulted in a collection that paid little attention to Nazi law. However, even while in some ways the contributions to the Cane volume do take the themes of the Hart–Fuller debate in new directions, more relevant to wider contemporary legal issues today, contributions to both volumes exhibit a number of similar characteristics, which are both representative of jurisprudential discourse generally and can be connected to the Hart–Fuller debate. First, they marginalise Nazi law, failing to treat it as an important feature of the debate or as substantively relevant to the main issues at stake. Second, where they use the case of Nazi Germany, they often do so in the service of theoretical debates between positivism and natural law rather than as an object of inquiry itself. Third, they replicate the rupture thesis, overwhelmingly (with one exception) assuming that the version of Nazi law adopted by the debate is the real, historical version of Nazi law.

## 2.1 Nazi Law in *The Hart–Fuller Debate in the Twenty-First Century*

The Cane collection is characterised by matching pairs of essays on different legal subjects and themes as they relate to the issues raised by the Hart–Fuller debate. These include human rights law [4, 22], international criminal law [24, 29], legal

pluralism [6, 49], law as a means [19, 42], the commensurability of the debate's competing discourses [28, 32], the relationship between norms and normativity [30, 37], and legal reasoning [2, 38]. Within this, references to Nazi law are not completely absent. It is important first to engage in some detail with the one exceptional, albeit brief, analysis of the use of Nazi law in the Hart–Fuller debate, offered by Desmond Manderson [28]. Manderson's main point is that the discourses employed by Hart and Fuller are incommensurable, 'mutually contradictory, and equally necessary' [28: 200], but a secondary aspect of his argument is that Hart and Fuller both misrepresented the nature of Nazi law. For Hart, he says:

the appearance of law is all that matters. Politics and history are irrelevant to our inquiry. We rely instead on the simple surface and clear meaning of words – with the result in this case [of the 'grudge informer'] that we are seriously misled as to what those words actually meant to the people who were sentenced to death or ... sent to the Eastern front. As we read Hart's account of the case, it surely seems plausible that the Nazi regime in fact depended on a kind of blindness to anything but the formal semblance of legality in order to gain legitimacy for its actions. Hart himself refuses to look behind the court's statements and treats as legally sufficient the mere 'tinsel of legal form' [28: 204–205].

This critique centres on the misrepresentation of Nazi law engendered by Hart's refusal to look beneath of the surface of the relevant law (in fact he hardly discusses actual Nazi laws at all), and instead only to rely on its formal characteristics to draw his conclusions. The absence of political and historical context actually distorts the meaning of the legal language employed, something to which Hart's analysis seems oblivious.

Manderson's critique of Fuller is encapsulated in the following:

Fuller does not acknowledge Nazism did not merely corrupt a legal system. It realised a *vision* of it informed by the anti-positivist ideologies of German Romanticism up to and including Heidegger and Schmitt. Neither does he acknowledge that the problem is not that law-makers might develop an 'immoral morality' or 'a more perfect realization of iniquity', but rather that we disagree about what goodness is in law or in laws. By assuming a core of goodness and a core of evil, which can never be confused, he simplifies the problem which confronts many societies, those who lived during the Third Reich not least [28: 212–213].

This critique centres on Fuller's claim that the Nazi regime simply undermined the pre-existing German *Rechtsstaat*, and the crude assumption this implies, that we can draw a clear distinction between the good of law and the evil that corrupts law. Again, this results in a distortion of the way the Nazi legal system operated, omitting its role in attempting to realise an alternative vision of legality.

The argument Manderson offers with respect to the discourses of the debate is that 'we need both positions to make sense of law, but it is impossible to acknowledge them both at once' [28: 200], which has resulted in a jurisprudential discourse that is both polarised and irreconcilable. This is an important point, and

the polarised nature of a jurisprudential discourse centred on the twin paradigms of positivism and natural law as competing conceptions of law in the wake of the Hart–Fuller will be discussed further in the context of the current discourse later on in this article.

Despite his own observations about the representation of Nazi law in the Hart–Fuller debate, however, three characteristics are apparent in Manderson’s own piece, which are repeated in even starker form in many of the other anniversary collection contributions. The first is the absence of any historical evidence or sources for the claims made about the Nazi past. In this case the representation of Nazi law assumed by Manderson’s critique has some merit, but no sources are presented to support this view. The analysis of Nazi law is, consequently, inevitably quite brief and superficial, and there can be no deeper or more detailed discussion of the nature of Nazi legality and its relevance for the concept of law. In other cases within jurisprudence, claims are made about the nature of Nazi law that are less supportable and are used to buttress theoretical arguments to which they have little relation and offer scant evidence, which reinforces the misrepresentation of Nazi law and impacts on our understanding of law both as a normative system and as a social discourse.

The second is that Manderson appears to assume that there is no other way of interpreting Nazi law, external to the debate’s paradigms, which might pose new or different questions for the concept of law. Despite rejecting both Hart and Fuller’s representation of Nazi law, his conclusion is that both are necessary and it is the foil that they each offer one another that energises legal interpretation and moves it forward. While the issues in the Hart–Fuller debate have founded many energetic philosophical debates within jurisprudence in the subsequent period, Manderson’s endorsement of this dialogic framework is potentially problematic. The more natural response to the jurisprudential misinterpretation of Nazi law would be to question the ability of positivism and natural law as paradigmatic constructions of the concept of law to come to terms with the real historical case of Nazi law, whereas Manderson comes close to the rationale adopted by the Hart–Fuller debate and jurisprudence, that the key to understanding law lies in the dialectical opposition of positivism and natural law.

This is perhaps a product of Manderson’s own superficial treatment of Nazi law. A deeper examination of Nazi legal history might lead his argument in the direction hinted at by his critique, that perhaps the real Nazi law says something fundamental about the concept of law that is not unique to the Third Reich and should not be easily dismissed. Ultimately, while his critique is useful, Manderson’s contribution is primarily about the relationship between the discourses employed by Hart and Fuller and not about Nazi law and its role and importance in the Hart–Fuller debate. Consequently, he is pulled back into the paradigms employed in the original debate.

The final characteristic is that Nazi law is not the main subject of discussion in Manderson’s paper. This is best illustrated with reference to the contribution paired with Manderson’s, Ngaire Naffine’s assertion of the absolute commensurability of the discourses of Hart and Fuller. Naffine’s theoretical approach is also quite promising for re-evaluating the role Nazi law plays in jurisprudential discourse, because it claims that in fact a shared understanding of morality underpins the



discourses of Hart and Fuller, one based on constructing an opposition between an ideal type of good law and an archetypal evil law, of which Nazi law is the paradigmatic case. This analysis suggests that an alternative understanding of morality might be required to offer a different perspective on the concept of law and, consequently, properly engage with a case like Nazi law. Naffine, however, never really tackles the Nazi case, which is not the main object of her analysis. This is, it is argued, because of its peripheral status and minimal representation in the original debate, which gives the strong impression that Nazi law, despite its apparent import, is not particularly significant for the central concept of law under discussion.

Within the Cane volume, Manderson's piece, even to the limited extent that it addresses Nazi law, is somewhat isolated, primarily a counterpoint to the themes occupying the other chapters rather than a companion; the only piece that comes close to elucidating anything of an alternative version of Nazi law. That its brief critique of the representation of Nazi law in the Hart–Fuller debate is a marginal issue even within its own dialogue with Naffine's paper, is indicative of the lack of seriousness and depth with which Nazi law is treated within Anglo-American jurisprudence generally; such that even if Hart and Fuller did not quite get it right about the Third Reich, this is not of critical importance when we seek to understand the nature of law and legality, nor should we upset the paradigmatic bases of the discourse or the central issues at play.

Other contributions in the Cane collection that at least refer to Nazi law or the Third Reich are Karen Knop's consideration of human rights [22] and Martin Krygier's of transitional societies [23], but in these cases similar characteristics persist. A lack of historical depth and evidence, a marginal role in the argument, and a willingness to accept the framing terms of the Hart–Fuller debate. Knop's chapter is part of a dialogue with Hilary Charlesworth, and analyses international human rights law debate from the perspective of conflicts between two different systems, law and morality, an approach then used to explore conflicts between other different sorts of legal systems [22: 73]. This is applied to Nazi law as a system in conflict with systems that comply with Fuller's conception of legality. While the question of the implications of Hart and Fuller's positions on the conditions of validity for law for different types of legal systems is an important and interesting one, Knop accepts the premise of the Hart–Fuller debate in relation to Nazi law, which is that it is evil law against which a system of just law can be opposed. The case of Nazi law is represented variously as substantively unjust law in the Radbruchian mode, illegality according to Fuller, or Hartian law as a social fact. The Nazi legal system is not analysed in more depth to question these accepted possible interpretations, and reveal some of the legal and moral complexities of the system that may challenge such orthodoxies.

Krygier's contribution is about how to achieve the rule of law in transitional societies. He offers something of a critique of Hart's use of Nazi law, similar in its themes to Manderson's in raising Hart's failure to dig beneath the formal surface to analyse the specific nature of Nazi laws, and his exclusion of most substantively significant aspects of the Third Reich to outside of the realm of law:

Now one thing distinctive of Hart's approach is that he has almost nothing to say about the context in which the laws he discussed operated. He also says nothing about the *character* of Nazi laws, the way they were applied, or the specific characteristics and interrelations of the institutions applying them. He does not appear to think it necessary to examine the particular, peculiar, nature of the Nazi legal order or even the particular Nazi laws he discusses, other than to observe that the latter appear to have been formally legitimate, and they were nasty in content. ... It's not that what else went on is of no account to him morally, but that he thinks it counts for nothing *legally*, and he is talking about law. Nazis had laws, and they were immoral; not a happy story but a simple one [23: 111].

Krygier's theoretical approach might again be promising for conducting a deeper legal historical examination of the Nazi legal system, to the extent it advocates for the need to find the right balance in a transitional context between adopting a universal approach and treating each case as unique, as well as emphasising the importance of understanding and incorporating the context of the law. However, he does not attempt to analyse Nazi law further himself because, again, that is not central to his essay. Krygier instead tends to assimilate a Fullerian natural law interpretation of Nazi law for his own critique of Hart, including with references to how 'pre-transitional despotisms' instrumentalise law and violate its internal morality [23: 120]. The tendency to use Nazi law to discredit the position of the other side in the positivism-natural law debate, in order to make room for one's own arguments in return, rather than as a authentic comment on the nature of Nazi law, is a common theme within jurisprudential discourse that will be discussed further in Sect. 4 of this article.

In these other two contributions which, together with Manderson's, comprise the extent to which Nazi law is really debated at all in the Cane collection, the same characteristics are in evidence. There is no historical evidence to back up claims made about Nazi law, and instead the representations of Hart or Fuller in the debate itself are accepted. Even while an external theoretical perspective on the debate is sometimes adopted, often the paradigms of Hart and Fuller, as they represent Nazi law, are taken as the appropriate lens through which to view Nazi law. And Nazi law itself is not the main subject of discussion, so is never subject to the sort of close scrutiny that might challenge some of the claims made in the Hart–Fuller debate about it on a more fundamental level.

References to Nazism in other contributions in the collection do no more than indicate Hart and Fuller's own use of the Third Reich, and accept Hart and/or Fuller's representation of Nazi law as accurate even if they scrutinise aspects of the theories they advance in other ways [for example, 38, 42]. Nazi Germany is considered an intriguing and noteworthy background to the debate, but not a relevant issue requiring dedicated re-examination. These criticisms may appear unfair: the book's contributions are focused on re-interpreting the Hart–Fuller debate, and it is natural that they would focus their attention on the theoretical paradigms and key issues of the debate and, to the extent Nazi law is referenced, consider it as it is represented by Hart and Fuller. The failure to return to the core

historical example that underpins the debate, nevertheless, merely reinforces the role and representation of Nazi law within the debate, and within jurisprudential discourse since the debate. This role is so marginal and its representation so distorted that it is necessary to question the theories and arguments that are overlaid on top of it and which it is used to support. Instead, even in cases where the theoretical approach adopted in a contribution would be commensurate with a re-examination of the nature of Nazi law and its significance for the concept of law, the representation of the Third Reich within jurisprudence is so entrenched that this does not begin to be realised. This possibility is not even on the agenda, and that is the omission, the lacuna, at the heart of the anniversary literature.

## 2.2 Representing Nazi Law in the NYULR Symposium

This omission is even more apparent in the NYULR symposium contributions, which are focused on what happened in the debate itself and revisiting the issues it raised. Its sophisticated re-evaluations of the terms of the debate are (and are intended to be) an internal critique operating within the debate's discursive parameters. One contribution in this collection does focus on the Nazi-related example on which the debate is based; David Dyzenhaus' revisit of the case of the grudge informer [12]. Dyzenhaus has written extensively on the nature of wicked law and emergency situations [see 10, 11, 13], but this piece, too, best serves to illustrate how remote Nazi law actually was from the Hart–Fuller debate. The grudge informer cases, of which the case discussed by Hart and Fuller is one example, took place in the post-Nazi context and were about Germans who informed on their partner to the Nazi authorities for violating draconian legal provisions, in order to get rid of them,<sup>1</sup> rather than about the nature of Nazi law itself. Therefore, even while the debate is generally understood as dealing directly with Nazi Germany, this is viewed through the prism of an entirely separate post-war legal case, and has very little to say about the nature of the Nazi legal system in important areas central to its systemic functioning such as constitutional law or the use of law for the persecution of Jews and other groups. The grudge informer case is centrally concerned with, while also at one remove from, a very specific type of law in the Third Reich, that under which the informant's victims were prosecuted, rather than the nature of the Nazi legal system as a whole, and exploration of it is more specifically limited to what a post-war court should do about such cases.

It is telling that Dyzenhaus recalls the grudge informer case for its drama rather than for its substance, in order to look again at how positivism and natural law respond to the case, and goes no further into Nazi law than this. This reflects the tenor of the other contributions to the NYULR symposium. Most of the articles focus on the central issues raised in the debate and refer to Nazi law only as the background rather than as an independent subject of inquiry. Their fidelity to the conflict between positivism and natural law at the heart of the debate is reflected in a number of the papers. These include the defences of Hart's approach offered by

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<sup>1</sup> For more on such cases, see [34].

Benjamin Zipursky [51] and Leslie Green [18], and Frederick Schauer's account of the influence of the 'vehicles in the park' aspect of the debate [41].

Where the debate comes under criticism in the NYULR symposium, the focus is on areas such as the fundamental misunderstanding between its protagonists, and its analytical bias [25: 1062–1063]. Where subsequent jurisprudential discourse comes under scrutiny in light of the undue influence of the debate, this is for its misunderstanding of Fuller's natural law theory [12], or its preoccupation with the issues raised by the debate, to its own detriment [48]. Some of these criticisms are certainly well founded, but their weddedness to one or other of the positions advocated by Hart and Fuller typically results in a version of a re-run of the debate. It is this jurisprudential preoccupation with the conflict between natural law and positivism, the validity question and the separability question that has resulted in the enduring misrepresentation of Nazi law within the discourse. For positivism, it is the archetypal wicked legal system that demonstrates law can be both valid and used for evil ends, but says nothing more about law because all of its other features fall outside the realm of law. Meanwhile, positivist analysis hardly touches on the legal provisions themselves and certainly does not explore underneath their surface. For natural law, it is the archetypal wicked legal system that demonstrates law can be so unjust as to be invalid, non-law; but as an extreme case of non-law it need not trouble the concept of law any further. Both theoretical paradigms rely on a strikingly similar understanding of the Nazi legal system, one that is historiographically problematic and finds its jurisprudential roots in the Hart–Fuller debate.

The NYULR Symposium and the Cane collection both in important ways reproduce fundamental features of the way the Hart–Fuller debate represents Nazi law, and also reflect jurisprudential discourse in these aspects. Nazi law is marginalised from relevance to the concept of law, its representation is frequently adopted from the debate without question or reference to historical sources, and it is not considered an aspect of the debate worthy of re-examination. Consequently, the potential of the real case of Nazi law to usurp its marginal position within jurisprudential discourse, and challenge the role it is given in support of both positivism and natural law, is perpetually unrealised. There is an absence within the literature where the historical case of the Nazi legal system—which has increasingly come to light in more recent historical studies—might otherwise be, and it is a lacuna founded in the Hart–Fuller debate.

### 3 Hart–Fuller and the Representation of Nazi Law

It has been noted that the anniversary literature reinforces a number of characteristics of the Hart–Fuller debate's representation of Nazi law. Nazi law was not discussed in great depth, particularly by Hart; where it was, its nature and characteristics were often misrepresented and their implications consequently misinterpreted; it was marginal to the main issues in the debate, which was demonstrably not about Nazi law; and the way it was used rendered it substantively irrelevant to the debate's key questions—the conditions of validity for law and the connection between law and morality—as well as the protagonists' key conclusions

about which theoretical paradigm is to be preferred. It was an intriguing, somewhat alien, backdrop against which to set a dispute about whether positivism or natural law best explains the concept of law, but not a key player in the debate itself.

The context and key terms of the Hart–Fuller debate are well known and do not need repeating, so this section will instead focus on the role and representation of Nazi law within the debate. Through this evaluation, it is argued that the debate’s profound influence on jurisprudence extends to the trivial role played by Nazi law within the discourse, as an example used to support one or other strand of argument within the paradigms of positivism and natural law, and the reproduction of its historically uninformed misrepresentation. The presence of these elements within the current discourse will then be considered, in the next section.

It is, however, helpful to outline in the briefest terms the high level arguments of Hart and Fuller in order to assess their relationship to Nazi law. Hart claimed law is a social fact validated by its promulgation according to procedures laid down by higher legal rules within the legal system,<sup>2</sup> and is thus amenable to abstract, conceptual analysis. It contains within it a stable core of purely legal interpretation not determined by reference to external, non-legal factors. This means that law is separable from morality and is susceptible to use for both moral and immoral ends. It consequently does not rely on morality as a condition for its validity, which is instead determined by other, formal and procedural features of the legal system. This is presented as the most accurate description of the concept of law, and also the most desirable: it is best to separate law from morality, as the latter can then be discretely adjudicated by agents within the legal system, and applied as an external standard of criticism to the law. As a system it is dependent only on very minimal and contingent principles of morality for its functional existence, relating to a prohibition on violence and a minimum protection of property rights, and the principles of objectivity and neutrality in the administration of the law—the idea of treating like cases alike [20: 623–624].

By contrast, Fuller argued that the higher systemic rules that allow laws to exist and encourage people to honour them can be considered moral rules. These procedural rules work within law and manifest an intrinsic connection between law and morality. Compliance with them is also a condition of validity for a legal system, and therefore it is possible for law to be so unjust as to be considered invalid as law, or non-law. Fuller also observed an implicit connection between coherence and morality, such that legal rules that are more coherent, in line with the principles of the ‘inner morality of law’, are also more likely to be moral rules and less likely to be susceptible to manipulation for nefarious purposes. The real danger for Fuller arises when law and morality are disassociated because it makes it possible to resort to mere formalism in order to justify the validity and application of wicked laws.<sup>3</sup> For Fuller, this theoretical paradigm represents both the most accurate and desirable way of conceptualising law, especially in the wake of the Third Reich.

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<sup>2</sup> Hart did not describe in detail his concept of primary and secondary rules, and particularly rules of recognition, in his *Harvard Law Review* article; see [21].

<sup>3</sup> Scholars such as Vivian Grosswald Curran have convincingly challenged the claim that the influence of formalism on jurists in the Nazi state caused the acquiescence of the legal profession to its barbarism. See [5].

The case of the grudge informer referred to by Hart and Fuller involved a woman denouncing her husband to the authorities under the Nazi regime for private remarks he had made about Hitler. The woman reported his remarks apparently with the intention of getting rid of him. He was convicted and sentenced to death for undermining the regime, according to Nazi statute law [12: 1004]. After the war, the woman was convicted by a provincial court of appeal in the Federal Republic of Germany (FRG) in 1949, for the unlawful deprivation of her husband's liberty [34: 263]. In the initial debate, Hart's representation of the reasoning of the German court was inadvertently incorrect due to an erroneous case report. He understood the court in question to have invalidated the relevant Nazi law on an essentially Radbruchian basis because of its degree of substantive injustice. In fact, the Nazi statutes were upheld by the FRG court, but the woman was convicted because of her personal motivation for denouncing and her awareness of the serious consequences of her actions [34].

The conclusions of Hart and Fuller's deliberations about the nature of the concept of law are focused on what would be the most appropriate way for the court to respond to a situation where an undesirable law was used in the past to achieve unjust ends. However, the case really only represents a framing of the arguments involved, and does not offer a transparent window on the nature of the Nazi legal system. The fact that the misreading of the grudge informer case has no impact on their ultimate arguments exemplifies its lack of direct relevance to the arguments made. The secondary background case, that of Nazi law itself, is of even less significance to the main points of contention in the debate. This is evident from both the relative lack of attention given to the Nazi legal system, particularly by Hart, and the fact that the actual characteristics of Nazi law, over which Hart and Fuller do not disagree, make no difference to their arguments. Their use of Nazi law is determined by their desire to advance a claim about the nature of the concept of law based on respectively positivism and natural law.

Hart claimed to be interested in Nazi Germany because it 'prompts inquiry into why emphasis on the slogan "law is law," and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere ... went along with the most enlightened liberal attitudes' [20: 618]. However, the first misinterpretation of Nazi law is already apparent here. Despite some claims to the contrary, there was not a clear distinction between law and morality in Nazi Germany, and so law was not actually 'law' in the sense implied [35, 36, 45]. This is an example of Hart basing his analysis of Nazi law on unexamined claims about its nature. His assertions that 'law was law' in the Third Reich, that the Nazi legal system conformed to his formal notion of legal validity, and that the system as a whole could be encapsulated by the case of the grudge informer, are not referenced to historical or historiographical sources and do not fit well with the prevailing historical evidence.

Fuller raised this in his criticisms, that Hart 'assume[d] that something must have persisted that still deserved the name of law' without inquiring further into the Nazi legal system [17: 633]. He considered it 'seriously mistaken' to make the assumption 'that 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' [17:

650]. However, while Fuller was more interested in the content and application of Nazi law, at least the particular laws subject of the FRG court case, how Nazi law actually worked does not really impact on the arguments made within their respective theoretical paradigms. For Hart, whether or not Nazi Germany ultimately had a positivist, formalist approach to law and legal interpretation would not alter his position, because he was concerned in this contribution with abstract, conceptual analysis and not sociological, historical analysis. Equally, any moral content of Nazi law would not be considered relevant to its conceptual nature—law and morality are separable but not always separated.

Fuller did delve a little further into some Nazi laws, and gave examples to illustrate principles considered to be utilised in the Nazi legal regime. These included retroactive legislation and secret laws, both of which were employed in the Third Reich, and Fuller argued that their pervasiveness in Nazi Germany erodes and compromises the validity of its legal system [17: 650–652]. He also cited the tendency to bypass law entirely and resort to street violence, and the willingness of the courts to ignore legislation ‘if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure “above”’ [17: 652]. Consequently he appeared to recognise that it is not so simple to say that ‘law is law’ in Nazi Germany, because Nazi judges could overturn the literal meaning of the law and by-pass legal forms if necessary. Taken together, Fuller argued that these characteristics meant the denigration of the morality of law was so complete that the Nazi legal system could not be called law at all:

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 [17: 660].

However, at the same time, there are important underlying similarities in the way Hart and Fuller characterise the Nazi legal system. Notwithstanding the above, Fuller insists that the regime clothed itself in legal form, and actually reiterates the assumption that ‘law was law’ in the Third Reich. He uses this to maintain that positivism contributes to the corruption of law while natural law acts as a barrier against it, without addressing in this context the challenge posed to this assertion by aspects of his own analysis: law is not simply law in a system where its meaning and forms could be readily by-passed.

Meanwhile, Hart’s methodological disinclination to engage with the history of Nazi Germany means he assumes it to be a formally valid legal system that, like any other legal system, largely inhabits the settled core of meaning within law, with only the usual minority of hard cases falling within the outlying penumbra. Fuller does not challenge Hart’s claim that the Nazi legal system did exhibit the characteristics of a formally valid legal system; that laws were created in a certain way using certain procedures inscribed within the legal system. Hart, on the other hand, is not



concerned by Fuller's claim that Nazi laws were substantively unjust, or that they had certain undesirable formal characteristics.

Aside from this, there are some important ways in which Fuller inadvertently misrepresents the nature of Nazi law. The first, already mentioned, is that Nazi law aimed to realise an alternative vision of law, infused and informed by ideology, rather than merely instrumentalising and undermining the rule of law for immoral and oppressive purposes [45]. The laws Fuller looks at mean that—while he acknowledges that their literal meaning was sometimes ignored, or their requirements by-passed, and that retroactivity and secrecy were employed within the legal system—he implies that these characteristics existed simply as a matter of corrupting the legal system, to retain power and repress dissent. He does not appear to consider that these characteristics were symptoms of the implementation of a Nazi ethic, including a legal ethic, that sought for a positive (as in proactive) change in the relationship between law and morality, and not simply of an effort to do whatever was necessary to retain power [see 1]. A more thorough examination of Nazi legality, beyond the laws that were pertinent to the FRG case, would have revealed a different picture to that painted by Fuller.

The second misrepresentation is relevant to the association Fuller makes between coherence and morality. This is important for Fuller because the claim that procedure tends towards coherence which tends towards morality, links his procedural principles of legality to the conditions for fidelity to law. Fuller uses this to argue that the situation of a judge falling back on strict formalistic interpretation to resolve her fundamental moral aversion to a binding superior court ruling would be unlikely to arise in a nation 'where lawyers are still at least as interested in asking "What is good law?" as they are in asking "What is law?"' [17: 648]. However, this defence against immorality is reliant on a clear distinction being drawn between morality and immorality, that legal actors are able to recognise 'good law', possibly because of its correlation with coherent law. The real, historical tension under the Nazi regime between those actively striving for a Nazi vision of 'good law' and those who felt that the denigration of liberal principles of legality already ruled out the possibility of good law, however, means that it was not always easy to recognise what was good law, because of the ideological conflict internal to the system. Yet many Nazi lawyers were very interested in asking about 'good law' and not very interested in what was simply 'law', even though some had a very different idea of 'good law' to that endorsed by Fuller.<sup>4</sup> This fundamental feature of the Nazi legal system is apparently not recognised by Fuller at all. The connection between coherence, morality and law asserted is not straightforwardly supported by the Third Reich, because Nazi law was infused with a different vision of natural law, not merely a corruption of the rule of law. For similar reasons it does not unproblematically substantiate the claim that formalism and positivism are more consistent with wicked law than natural law. Fuller's claim about coherence is under threat because his conception of how morality functions in a system that strives for 'good law' is not necessarily corroborated by the historical case from which he purports to draw his supporting evidence.

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<sup>4</sup> On the role of normativity and its relationship to law in Nazi Germany, see [35, 36].



Equally, Hart's acceptance of Nazi law as the cynical manipulation of the principles of legality for oppressive purposes by the Nazi elite is illustrated by his contention that 'under the Nazi regime men were sentenced by courts for criticism of the regime. There the choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's effective tyranny' [20: 613]. The assertion that punishment for criticism of the regime might be guided *exclusively* by tyranny is also not corroborated by any historical evidence. It is not possible to draw a conclusion about the sentencing policy of the whole regime on the basis of one example, that of the 'grudge informer's' victim, from a particular time, and in any event an unsubstantiated one. The type of defendants, the harshness of sentencing and the motivations for sentencing changed over time based on the fluctuating circumstances of the regime, and cannot be said to be guided exclusively by the need to oppress and retain power, even while acknowledging that this would have been one element.

One of the key problems with the way the Hart–Fuller debate represents Nazi law, which also comprises one of its enduring legacies for jurisprudential discourse, is in its reliance on a moral and/or legal discontinuity between Nazi law and the central concept of law. This assertion of discontinuity is at the heart of the rupture thesis, and results within jurisprudential discourse in the use of Nazi law as a paradigmatic wicked legal system, a limit-case set-out in order to demonstrate the veracity or alternatively the erroneousness of aspects of positivism and natural law. The jurisprudential combination of ahistorical methodology and commitment to particular paradigms of the concept of law and issues for consideration, mean that there is no attempt to question whether the case of Nazi law really can be explained by, or used to support, the positions advanced within these parameters.

Fuller asserts a clear legal discontinuity, or rupture, between Nazi 'law' and the concept of law, in the straightforward sense that the latter has the characteristics of valid law whereas the former did not. This approach leads to a series of further denials about the nature and implications of Nazi Germany, chief among which is that law was in any way complicit with the Nazi regime. This carries with it a range of implications: that less wicked forms of law have nothing to do with Nazi law, and that law, good law, was able to return after the fall of the regime in 1945, to condemn the Nazi perpetrators and 'reconsecrate the temple of justice' [50], saving us from the wicked aims of a criminal regime [see 15, 16]. Fuller's approach also helps to erect a sort of moral, and therefore legal, barrier between the rule of law legality that conforms to Fuller's inner morality, and underpins many modern legal systems, and Nazi law. The correlation between *good* law and the rule of law is matched by condemnation and crucially *theoretical exclusion* of the Nazi legal system as a whole.

Hartian positivism is also disconnected from the Nazi legal system, notwithstanding its formal embrace of Nazi law as law and, counterintuitively, this rupture is the more apparent in the anniversary literature [e.g. 23]. Hart's justifiable moral aversion to Nazism works together with his analytical methodology to keep the realities of Nazi law at arm's length. This is exacerbated by the fact that Nazi law is so remote from Hart's arguments that any wicked legal system would suffice for his purposes, which disregards the specificities of Nazi law. Hart is interested in the fact

that Nazi law is an example of such extreme evil and yet can still be a case of valid law, as a result of the separability of law and morality, but he does not test the nature of the relationship between law and morality within the Third Reich, nor even whether Nazi law actually conforms to the procedural or (minimal) substantive validity requirements of Hartian positivism. He is simply not interested as a matter of *law* in the moral/ideological aspects of the Nazi legal system, and so it is almost a premise of his argument that a regime like Nazi Germany can be by-passed without deeper examination. On closer inspection, however, there are good reasons for arguing that Nazi law does not comply, at least not straightforwardly, with the sociological aspects of Hart's version of positivism: the minimal content of natural law and the operation of the rule of recognition to validate the other laws within the system [45]. And such is the connection between law and morality (the Nazi ethic) that there is reason to believe Nazi law has something to add to the debate about the separability of law and morality too. Hart's legal and moral approach shuts down these avenues of inquiry before they have begun, which constructs a discontinuity between Nazi law and the concept of law that is the object of Hart's analysis. For Hart the continuities with Nazi law are limited to nothing more theoretically substantive than a semblance of legal form. For Fuller, continuities, whether legal or moral, do not appear to exist at all.

Both Hart and Fuller in their standpoint on Nazi law appear to be rooted in paradigms of the concept of law founded upon, and primarily suited to evaluation of, liberal, democratic, rule of law-based legal systems. This is more readily apparent in Fuller's case because the morality of the 'good law' to which he opposes the Nazi system is closely related to liberal principles of legality and the eight principles of the inner morality of law he subsequently described are key tenets of the rule of law. In Hart's case, as Naffine has argued, he too is on the same moral page, concerned with opposing an ideal good law and an archetypal evil law [32], whether or not the latter is bestowed the formal status of law. The failure to take a broader perspective on the nature of unjust law and of law in the Third Reich in particular, that moves outside of the rule-of-law paradigm of law, is ostensible in many of the contributions to the anniversary literature as well as in subsequent jurisprudential discourse.

The insertion of points of legal rupture around Nazi Germany prevents us as a matter of legal theory from examining the Nazi regime further to see whether there is anything in its use of law and legality that ought to concern us about the concept of law generally. Its cursory treatment in the Hart–Fuller debate and consequent marginalisation, which is demonstrated to have endured by the anniversary literature and will be assessed in subsequent jurisprudential discourse below, means it is not taken seriously as a matter of law [27]. This leads on to the use of Nazi Germany as a limit-case, not to test the concept of law, but to prove one or other concept of law. If Nazi Germany is seen only as a limit-case—the absolute paradigm of an archetypal wicked legal system—then it can also be treated as, at most, a peripheral example of law. Once it has been subjected to scrutiny once and found to be at the outer limits of law, then it does not really merit further jurisprudential consideration. However, the Hart–Fuller debate, it is argued, does not properly consider the Nazi legal system in order to establish that it is a limit-

case, and nor do jurisprudential scholars today. Such is the notoriety of the Nazi regime, that the starting point is that it is a case at the margins of both morality and legality, and this is never really questioned. The only question that relates to Nazi law is whether it can possibly be law, and this has been answered and is rarely opened up for further examination. What is left for jurisprudential discourse today is a lack of historical rigour in references to the Third Reich, and the outrageous moral potential of Nazi-related examples.

#### 4 Representing Nazi Law in Current Jurisprudential Discourse

Throughout this paper, certain key characteristics of the representation of Nazi law in the Hart–Fuller debate and in the 50th anniversary literature are highlighted as also being present in general jurisprudential discourse which, it has been claimed, represents Nazi law as a limit-case, the absolute paradigm of an archetypal wicked legal system. These characteristics include representation of the Third Reich without reference to supporting historical or historiographical evidence; resort to Nazi law generally to discredit an opposing claim or further one's own argument about an element of positivism or natural law when it has no real connection to the theoretical arguments made; its use primarily as a source of evil examples or hypothetical scenarios; and its marginalisation from substantive relevance to questions about the concept of law. It has also been claimed that jurisprudential discourse is both polarised around the twin competing theoretical paradigms of positivism and natural law and continues to be primarily concerned with the validity question and the separability question.

These characteristics will now be briefly explored for their presence in jurisprudential discourse generally in recent years, in order to demonstrate the ongoing reproduction of key features of the Hart–Fuller debate within the discourse, primarily in terms of its treatment of Nazi law, but also secondarily in terms of how the discourse is structured and operates to reproduce this treatment. The scope of this article does not allow for a comprehensive analysis of representations of the Third Reich within current jurisprudential discourse, or a detailed examination of the representation of Nazi Germany within a particular example of scholarship. Nevertheless, a review of how Nazi Germany is treated in jurisprudential scholarship in recent years enables the selective elucidation of certain characteristics and highlights points that are illustrative of the ongoing marginalisation of Nazi law.<sup>5</sup>

It is evident that validity and separability continue to remain key jurisprudential questions within the literature and positivism and natural law, in various forms and versions but with Hartian positivism and Fullerian natural law still prominent examples, are the overarching paradigms within which much of the debate is held. What is more, the combination of the focus on these issues and the dominance of

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<sup>5</sup> The review of the treatment of Nazi law involved searching for the use of a range of terms related to the Third Reich in journals primarily representing jurisprudential scholarship over a period since the late 1990s, and reviewing and analysing the results for what they reveal about the treatment of Nazi law within the discourse.

these paradigms has resulted in the proliferation of a large number of sub-questions and issues, each of which is intensely debated between proponents of the two theories of the concept of law, and which feed into the broader struggle for supremacy between the two paradigms. Within these discursive parameters, the case of Nazi Germany continues to have a strong presence, being referred to fairly often, if only typically in passing. Interestingly, however, much as with the anniversary literature, there are very few references to the Nazi legal system or Nazi law specifically, and those that there are tend to subsume Nazi law within the broader category of wicked legal systems, albeit as the archetypical example. The fact that Nazi Germany in general is represented much more commonly than its legal system specifically, begins to explain the extent to which Nazi law is treated as irrelevant to the substantive theoretical issues under discussion in most cases where the Third Reich is referenced. When jurisprudential texts refer to Nazi Germany, they generally do so because of its status as an especially evil historical subject, and as such it is a rich source of extreme examples which, because of the moral weight it carries, can be used simply and effectively to support a particular theoretical position or, more often, discredit an opposing argument. Indeed, it is common for representations using terms such as 'Nazism' or 'Hitler' to be referring to hypothetical scenarios rather than actual examples, with certain words employed to convey moral weight without the historical reality of the Third Reich being engaged at all.

In this context, and with respect to the analytical methodology prevalent within the discourse, it is not surprising to find that historical and historiographical sourcing for claims about Nazi Germany and its legal system are virtually non-existent within the discourse. The various references to, representations of, and examples extracted from Nazi Germany are as substantively divorced from the historical situation as they are from the philosophical issues under discussion. Indeed, it is not generally the point of such references to capture the reality of the Third Reich or to investigate Nazi law in order to say something profound about the concept of law. Their purpose is much more instrumental, and treats any relevant implications of the actual case of Nazi law as at best a marginal issue. This is possible, it is argued, because of the way the Hart–Fuller debate directed the current discourse at its inception over 50 years ago.

The Hart–Fuller debate resolved the question of the relevance of Nazi law for modern jurisprudence with the answer 'not very', by settling its status as a marginal case of wicked law with little of relevance to contribute to the central concept of law. It also set the pattern for the treatment of Nazi law in its relative lack of historical engagement with examples of law from the Third Reich and their inability to concretely influence the central arguments being advanced by its protagonists. This position within the debate itself is apparent in the absence of reflection on Nazi law within the anniversary literature examined above, and now understanding that Nazi law is not to be taken seriously as a jurisprudential matter [27], current jurisprudence has reproduced and exacerbated its marginalisation by both unquestioningly accepting this status and being intrinsically uncommitted to revisiting it.

This section has begun to show the extent to which the representation of Nazi law in the Hart–Fuller debate continues to be reproduced in jurisprudential discourse

today. The treatment of Nazi law, when it is considered at all, is as the paradigmatic archetypal wicked legal system, with the Third Reich generally used as a source of extreme examples and evil hypotheticals to support intricate theoretical arguments over various sub-strands of the validity question and the separability question, in the service of the overarching paradigms of positivism and natural law. Such representations are rarely historically or historiographically sourced, often unconnected with the reality of the Third Reich, especially in the case of hypothetical scenarios, and not substantively or directly connected to the theoretical issues being discussed. The reproduction of key tenets of the way Nazi law was dealt with in the Hart–Fuller debate leads to its ongoing exclusion from the realm of the concept of law within Anglo-American jurisprudence, and has contributed to the general prevalence of the rupture thesis within the legal academy's dealing with Nazi Germany.

## 5 Conclusion: Nazi Law, Positivism and Natural Law

It is important to uncover and challenge the prevalence of the rupture thesis within jurisprudential discourse, and the enduring influence of the Hart–Fuller debate on the representation of Nazi law, for three broad reasons. Firstly, from a historical perspective, because legal theory can help us to better understand the nature and operation of the Nazi legal system and the role it played in structuring society and implementing the worst excesses of the regime. Secondly, from a legal-theoretical perspective, because historical cases of law, and specifically the Nazi legal system, do have something relevant to contribute to our theoretical understanding of the concept of law. Thirdly, with reference to legal discourse, because Nazi Germany was used, and continues to be used, in the service of philosophical arguments about the nature of law that it simply does not support, both by positivists and natural lawyers, whereas it could instead be used as evidence to disrupt the dialogic dominance these paradigms currently enjoy.

The historical case of Nazi law that has increasingly become apparent through historical and legal historical research into the Third Reich in recent decades, has implications for both philosophical paradigms. For natural law, one of these is that the very prominent ideological, not to say *ethical*, content of Nazi laws challenges some of its central features, notably that there is a recognisable morality associated with law that can be used to resist wicked regimes, and, with regard to Fuller in particular, that coherence, morality and law have a correlative connection. For positivism, the Nazi legal regime does not straightforwardly adhere to Hart's minimal content of natural law or his procedural mechanisms for ensuring validity, and normative ideology becomes such an important part of Nazi law that it is questionable what it means for law and morality to be separable in this specific context. It may be argued that Nazi law is not a helpful case for either Hartian positivism or many versions of natural law, because it defies many of the tenets that underlie both paradigms and the merits of a discourse structurally based around the opposition between the two. A discourse that is founded on and rooted within a liberal, democratic, rule-or-law understanding of the concept of law is arguably

inherently unsuited to evaluating the nature of extreme unjust law that departs from this paradigm. This is particularly apparent when the case of unjust law in question is manifested in a previously democratic legal system that was itself a strong exponent of the *Rechtsstaat*. The discourse perhaps does not intend to connect with unjust law—or legal systems based on different paradigms of good law—in the rest of the world but it encounters a potentially impassable obstacle in such a grotesque wicked legal system having persisted right within its intended sphere of explanatory influence. In that sense Nazi law is a limit-case for Anglo-American jurisprudence, because it challenges the assumptions of its discourse at every turn, and disrupts the established role it has been assigned within it.

There is a strong connection between the role and representation of Nazi law in the Hart–Fuller debate, and that in the anniversary literature and subsequent jurisprudential literature. Given the enduring significance of the debate, it is no coincidence that the contributions in the two anniversary collections analysed herein do not focus much attention on Nazi law, attempt to re-evaluate its significance for the concept of law, or make much reference to historical sources to support their critique of Hart’s and Fuller’s treatment of Nazi law on the few occasions such a critique arises. While the historical Nazi case is asserted at the heart of the Hart–Fuller debate, the actual weight it is given in the arguments supporting the two paradigmatic theories of the concept of law advanced in the debate is minimal, and its systemic legal nature is never properly examined. This is, in fact, not primarily a criticism of Hart and Fuller because at the time of the debate a lot less was known about the Nazi regime than is now known, and the idea of the Third Reich being a lawless and criminal state was prevalent in the post-war period [see 15, 16, 33, 39]. However, it is a criticism of the discourse because the role and representation of Nazi law in the Hart–Fuller debate has become entrenched within jurisprudence to such an extent that even a series of papers analysing all manner of aspects of the debate do not have much to add about the Third Reich and its legal system. It is not of contemporary relevance because its potential for jurisprudence was considered exhaustively examined in the original debate itself.

To conclude, we can return to two aspects of DeCoste’s comments about Nazi Germany and the legal academy noted earlier. These are first the claim that the Hart–Fuller debate was little more than a ‘misdirected concession’ in terms of its engagement with Nazi Germany and is ‘unaccountably influential’ as such. Second is that the Third Reich has relevance for jurisprudence beyond the question of whether its legal system was or was not ‘law’, because of the ‘centrality of law and lawyers’ in Nazi Germany. In the case of jurisprudence, these two points are inextricably entwined. The Hart–Fuller debate has proved to be of such enduring significance within jurisprudence that its ‘misdirected’ quality in respect of the Nazi past set the discourse off on a path that viewed Nazi Germany as substantively irrelevant to the key theoretical questions about the concept of law that have come to dominate the discourse.

This enduring impairment is important beyond the mere fact that it tends to exclude consideration of National Socialism from any more than a peripheral role in jurisprudence. The historical reality of the functioning of law in the operation of the Nazi state does upset attempts to label the whole system either simply ‘law’ or ‘non-

law' and in either case of no further substantive interest for the central concept of law. It also challenges the discourse at a deeper level in exposing contradictions in the debate between natural law and positivism and calling into question whether these are the most effective theoretical paradigms for constructing and evaluating the concept of law in wicked legal systems.

In addition to the treatment of Nazi law, others have drawn attention to the Hart–Fuller debate's significance in relation to Nazi Germany. Thomas Mertens has said:

In the Anglo-Saxon world, the discussion on the 'legality' of Nazi Germany or the lack thereof took place primarily within the confines of the Hart/Fuller debate for a very long time. This meant that it could safely be isolated and that legal theory could restrict itself to the rule of law as something primarily 'good' [31: 539].

The isolation of Nazi law from the substantive theoretical issues that occupy the concept of law, and the accompanying ability of both positivism and natural law to distance it from unjust law and maintain the connection between law, the rule of law and positive morality, is one of the main points elucidated in this article. Equally, Kristen Rundle has expressed concern over 'the extent to which debates on the question of the separability thesis have focused on the example of the "wicked legal system" when mapping the territory that divides the respective philosophical camps' [40: 433]. According to Rundle's critique, the positivist formal embrace of morally questionable regimes such as Nazi Germany means they have been incorporated into a discourse fixated on the separability question and dictated by the positivist standpoint, leading to 'a lowest common denominator level of debate' [40: 433]. This has resulted in other philosophical positions, specifically Fullerian natural law, being side-lined. Rundle's concern is that Nazi Germany, as the paradigmatic wicked legal regime, has played too great a role in jurisprudential discourse and been overemphasised in mapping the differences between the two jurisprudential camps.

While Rundle's general criticism of the disproportionate influence of the Hart–Fuller debate is well founded, her concerns about this appear somewhat misdirected. The debate is often of the lowest common denominator because it relies on a superficial (mis)representation of the Third Reich as a wicked legal system, not because, as Rundle appears to suggest, the Nazi legal system is overused within the discourse and exists at the margins of law and so is not the best case from which to explore the issues at play. It is not, per se, that there has been too much of Nazi Germany in the discourse, skewing it towards simplistic versions of how a wicked legal system impacts on key debates by virtue of its inherent wickedness. Rather it is, as this article has sought to demonstrate, that there has been too much acquiescence to a particular misrepresentation of Nazi law, and not enough rigorous engagement with the law and history of National Socialism.

The Hart–Fuller debate's profound legacy for jurisprudence is apparent in its enduring fascination, manifested by the extensive 50th anniversary literature and ostensible in the way the key issues of the validity question and the separability question and the opposition of positivism and natural law have continued to permeate the discourse. However, its profound legacy for the jurisprudential



representation of Nazi law is also evident in the same places. The Holocaust, the culmination of Nazi ideology, policy and law, is considered an abyss because of its earth-shattering and perceived incomprehensible nature. This abyss too often leads us to posit a breach between the Third Reich and ‘normal’ law and history, and should not result in a lacuna in jurisprudential discourse, where the rupture thesis predominates the representation of Nazi law and few serious attempts are made to understand the relationship between law, legality and morality in the Nazi regime, and its implications for the central concept of law.

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### Compliance with Ethical Standards

**Conflict of interest** The authors declare that they have no other conflicts of interest.

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