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A jurisprudence of atrocity

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> Why, then, has Anglo-American jurisprudence remained staunchly indifferent to history? How has it been able to maintain its confident assumption that the analytical and the historical can be neatly separated; and that one can engage in the analysis of concepts whose meaning is thought to be understood independently of the historical context in which those concepts are conceived, developed and deployed in argument?
>
> Morton J. Horwitz[1]

Introduction

When trying to clarify the relationship between law and morals—a foundational question of jurisprudence—it can be worth to take the path less travelled by. *Justifying Injustice*, a book by the moral philosopher Herlinde Pauer-Studer, is evidence of this proposition.[2] It demonstrates what can be gained by grounding abstraction—by eschewing the 'genuinely philosophical jurisprudence' for which some theorists of law have been calling and, instead, taking greater cognisance than is customary in legal philosophy of the real world.[3]

Justifying Injustice is a useful introduction to the theory and history of authoritarian legalism in a much-misunderstood case. It deserves recognition for challenging old shibboleths about the nature of Nazi law—half-truths and untruths that reflect poorly not only on the jurisprudence of atrocity, by which I mean the philosophical study of 'wicked legal systems', but on the state of jurisprudence *tout court*.[4] If Pauer-Studer is to be believed, 'the distortions of Nazi law pose a challenge to legal philosophy that requires us to move beyond the legal positivism and natural law theory divide'.[5] *Justifying Injustice* embraces historicism 'as a destabilizer of monolithic meanings', to quote Morton Horwitz.[6] By taking philosophers of law—from Hans Kelsen to Gustav

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[1]Morton J Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (1997) 17 Oxford Journal of Legal Studies 552–53.
[2]Herlinde Pauer-Studer, *Justifying Injustice: Legal Theory in Nazi Germany* (Cambridge University Press 2020).
[3]Gerald J Postema, *A Treatise of Legal Philosophy and General Jurisprudence*, vol. 11: *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011) 583.
[4]On wicked legal systems, see, among others, HLA Hart, *The Concept of Law* (2nd ed, Clarendon Press 1994), esp. 206; CL Ten, 'Moral Rights and Duties in Wicked Legal Systems' (1989) 1 *Utilitas* 135–43; David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2nd edn, Oxford University Press 2010).
[5]Pauer-Studer, *Justifying Injustice* (n 2) 227.
[6]Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (n 1) 552.

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Radbruch, and from H. L. A. Hart to Lon Fuller—to task for their reductionist accounts of Nazi law, Pauer-Studer illuminates the epistemic costs of analytical jurisprudence's longstanding predilection for perfunctory illustrations. As she writes, 'we should be able to say more about the NS legal system than that it was morally odious'.[7]

Leading philosophers of law continue to resist 'the challenge of historicism'.[8] Scott Shapiro, for one, is convinced that philosophers of law, and legal positivists especially, 'have spent an excessive amount of time focusing on morally inadequate systems' and that their 'obsession with the Nazis' has 'blinded them to a basic jurisprudential truth', namely that 'a wicked regime is a botched legal system'.[9] Although so-called wicked legal systems have been proliferating in the early twenty-first century—and the relationship between law and authoritarianism has moved to forefront of legal theory—few philosophers of law have shown an interest in updating antiquated views about the concept of law.

For example, Shapiro maintains that a 'proper' theory of law 'must not be so hard-boiled that it denies the jurisprudential significance of injustice; yet it must not be so starry-eyed that it exaggerates this significance'.[10] I concur with this proposition. However, Shapiro, arguably, commits the very fallacy he rails against. For he, too, is starry-eyed about the concept of law. He may even be *more* starry-eyed than other philosophers of law. After all, Shapiro's argument about the 'inner rationality of law'—this planning theory of law—rests on a surprisingly demanding set of assumptions, certainly for a legal positivist.[11] Legally speaking, for example, Joseph Raz asked less of law. As David Dyzenhaus has pointed out, 'far from being botched in regard to its legality', for Raz, a wicked legal system was capable of being a legal system '*par excellence*'.[12] Although Shapiro claims that 'the existence of legal authority can only be determined *sociologically*', he has remained resistant to the idea 'that changing historical situations produce a change in consciousness' and also to the related argument that the meaning of a concept—including the concept of law—may, in Horwitz's parlance, 'change depending upon its historical context'.[13] Shapiro, or so it seems, is suspicious of anyone who believes—as socio-legal scholars do—in the changing character of law. His claims to the contrary are belied, in *Legality* at least, by exceedingly thin descriptions of the real world.

By maintaining, notably in his discussion of wicked legal systems, that law's identity as law hinges on the institution doing what it is 'supposed to do', Shapiro introduces a moral standard reminiscent of the '*Radbruch*'*sche Formel*', or Radbruch's formula.[14] Shapiro's formula, like Radbruch's, rests on a binary conception of law. Although Shapiro is more interested in the functions law serves than in its morals, his treatment of law is no less essentialist than Radbruch's. For him, as it was for Radbruch, law is a dichotomous variable: it either exists—or it does not. If we believe Shapiro, law, properly

[7]Pauer-Studer, *Justifying Injustice* (n 2) 222.
[8]Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (n 1) 552.
[9]Scott Shapiro, *Legality* (Harvard University Press 2011) 390.
[10]Shapiro, *Legality* (n 9) 392.
[11]ibid 183, 193–233.
[12]David Dyzenhaus, 'Legality Without the Rule of Law? Scott Shapiro on Wicked Legal Systems' (2012) 25 Canadian Journal of Law and Jurisprudence 188.
[13]Shapiro, *Legality* (n 9) 119; Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (n 1) 553.
[14]Shapiro, *Legality* (n 9) 392.

understood, ceases to exist if it fails 'to satisfy the objective that law is supposed to serve'.[15] Or, as he writes in *Legality*, 'Unjust systems have all the properties that make legal systems the things that they are, but they do not do what things of this sort are supposed to do'.[16] This argument, though, skirts the issue. It sidesteps 'the puzzle of unjust law' by denying its jurisprudential significance.[17] *Legality* bows out when it gets tricky. Or, as Pauer-Studer might put it, shouldn't we be able to say more about the NS legal system than that it was 'poor and defective'?[18] And, beyond this most notorious of cases, shouldn't we be able to say more about 'unjust regimes' than that they are like 'broken clocks', which is how Shapiro wants us to think of them?[19]

Of course, other philosophers of law think differently than Shapiro about wicked legal systems. John Finnis is one of them. He recognises what Shapiro does not, namely the jurisprudential importance of analysing—and concretely so—why, how, and when law is 'debased, or exploited or otherwise deficient'.[20] To make sense of injustice, Finnis writes, 'the most important things for the theorist to describe are those aspects of the situation that manifest this absence, debasement, exploitation, or deficiency' of law.[21] Having said that, although Finnis thinks the study of wicked legal systems to be more important for the philosophy of law than Shapiro, he, too, has, on the whole, been incurious about the phenomenology of law in odious systems.[22] *Justifying Injustice* shows why philosophers of law are remiss in ignoring—in the service of abstraction—the reality of law in wicked legal systems.

The long arc of morality

It is sometimes said that the law of the 'Third Reich' was not law, properly understood.[23] This philosophical view goes back to an influential jurisprudential argument from 1946, which the aforementioned Radbruch developed in the *Süddeutsche Juristen-Zeitung*, about the relationship between law and morals in times of authoritarianism.[24] His article, a foundational contribution to the jurisprudence of atrocity, has been hailed as 'one of the most important texts in 20th century legal philosophy'.[25] Aside from decisively influencing the jurisprudence of postwar Germany's two highest courts, that of the *Bundesgerichtshof* (Federal Supreme Court) and the *Bundesverfassungsgericht* (Federal

[15]ibid 390.
[16]ibid 392.
[17]David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press 2022) 367.
[18]Shapiro, *Legality* (n 9) 392.
[19]ibid 391. For Shapiro, broken clocks are not clocks, properly understood, because they do not function as intended. Unfortunately, Shapiro fails to elaborate on the extent to which—and the manner in which—the law of unjust regimes does not function as intended, why this law is, as he insists, 'not *really* law'. Ibid 390.
[20]John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 16.
[21]Ibid.
[22]ibid.
[23]This section and the next draw on Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford University Press 2018).
[24]Gustav Radbruch, 'Gesetzliches Unrecht und Übergesetzliches Recht' (1946) 1 Süddeutsche Juristen-Zeitung, reprinted in idem., *Rechtsphilosophie*, edited by Ralf Dreier and Stanley L Paulson (Müller [1950] 2003), 211–19. For an English translation by Bonnie Litschewski Paulson and Stanley L Paulson, see Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 Oxford Journal of Legal Studies 1. This section draws on Meierhenrich, *The Remnants of the Rechtsstaat* (n 23) 3–13.
[25]Thomas Mertens, 'Nazism, Legal Positivism, and Radbruch's Thesis on Statutory Injustice' (2003) 14 Law and Critique 277.

Constitutional Court), Radbruch's intervention sparked one of the most important debates in legal philosophy, the Hart-Fuller debate, which played out in the pages of the *Harvard Law Review* and has been revisited many times since.[26] Entitled 'Gesetzliches Unrecht und Übergesetzliches Recht' ('Statutory Lawlessness and Supra-Statutory Law'), Radbruch's article set out an idea that has shaped not only the philosophy of law but also its practice in far-reaching ways:

> Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.[27]

Radbruch's was a normative intervention designed to overcome the legacies of Nazi dictatorship by strengthening the philosophical foundations of the rule of law, in postwar Germany and elsewhere: 'In the face of the statutory lawlessness of the past twelve years, we must seek now to meet the requirement of justice with the smallest sacrifice of legal certainty'.[28] Radbruch had not doubts about what needed to be done in the wake of war and genocide: '[W]e must build a *Rechtsstaat*, a government of law that serves as well as possible the ideas of both justice and legal certainty'.[29] The prescription was reasonable, laudable even, considering that many of Radbruch's fellow citizens were not at all enamoured with the new, democratising order imposed on a defeated Germany from the outside. But the simplifying language of morality sits uneasily with the complex nature of reality. An abundance of microhistorical evidence contradicts Radbruch's metatheoretical argument about the nature of Nazi law. (Some of this evidence, though perhaps not enough of it, also features in *Justifying Injustice*.) Available data about everyday law in Nazi Germany cast doubt on the utility of Radbruch's famous formula as 'a test for the validity of statutory enactments'.[30] It has even been suggested that his philosophical intervention not only hindered analytical efforts of trying to come to an understanding of his country's legal development in the period 1933–1945, but also undermined—in practical terms—postwar efforts at coming to terms with the contribution of lawyers to dictatorship.[31] Pauer-Studer agrees: 'Clearly, the reasoning we find in the Nazi original texts suggests that Radbruch somehow missed the point in trying to pin responsibility for the German jurists pandering to the NS system on legal positivism'.[32]

[26] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630.

[27] Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (n 24) 7. For the most important examples of appellate jurisprudence from postwar Germany that turned on the application, and judicial affirmation, of Radbruch's formula, see BGHZ 3, 94; BVerfGE 3, 58; BVerfGE 3, 225; BVerfGE 6, 132; BverfGE 23, 98; BverfGE 54, 53; BHGSt 39, 1; BGHSt 41, 101; and BVerfGE 95, 96. The decisions—from 1951, 1953, 1957, 1968, 1980, 1992, 1995, and 1996, respectively—settled legal disputes relating to *both* of Germany's twentieth century dictatorships, that of Nazi Germany and that of the German Democratic Republic.

[28] Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (n 24) 8.

[29] ibid 11.

[30] Frank Haldemann, 'Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law' (2005) 18 Ratio Juris 162, 165.

[31] Manfred Walther, 'Hat der juristische Positivismus die deutschen Juristen im 'Dritten Reich' wehrlos gemacht? Zur Analyse und Kritik der Radbruch-These' in Ralf Dreier and Wolfgang Sellert (eds), *Recht und Justiz im 'Dritten Reich'* (Suhrkamp 1989) 353; Ingeborg Maus, '"Gesetzesbindung" der Justiz und die Struktur der nationalsozialistischen Rechtsnormen' in Dreier and Sellert (eds), *Recht und Justiz im 'Dritten Reich'*, 102–3.

[32] Pauer-Studer, *Justifying Injustice* (n 2) 214.

The trouble with Radbruch's formula is that it linked two questions that should not be conflated: the question of law's nature and the question of law's practice. The former is a philosophical question, the latter an empirical one. The former demands an abstract answer, the latter a concrete one. Because Radbruch was put on a pedestal in the transition from Nazi dictatorship, his voice was amplified, certainly by philosophers of law, Fuller among them: 'After World War II, Radbruch's reputation and good will endowed his reflections with gravitas. Contemporaries and later scholars have admired a revived spirit who, despite years of quiescence and physical debility, energetically engaged a dawning era'.[33] By contrast, the voices of contemporaries who had been forced into exile such as Hans Kelsen and Franz Neumann—both of whom shared Radbruch's social-democratic leanings but were more circumspect about his faith in natural law—were drowned out. Because Radbruch's formula paved the way for the kinds of reductionist representations of Nazi law at which I, and to a lesser degree, Pauer-Studer take aim in our scholarship, it deserves more opprobrium from legal philosophers than it commonly receives. It also deserves a closer look because the formula, in prescriptive terms, has global reach. It is capable of serving as a principle of transitional justice anywhere. 'In practice, the Radbruch Formula', as Brian Bix writes, 'is most likely applied where there has been some of transition in the relevant regime, such that a judge from one system or tradition is asked to apply (or not apply) the law of another system or tradition'.[34]

We now know that Radbruch's categorical statements about the nature of law in the 'Third Reich' were empirically ill-informed, his pronouncements 'far off the mark', as Stanley Paulson put it.[35] Paulson and others have persuasively shown, and Pauer-Studer builds on their findings of fact, that it was *not* judges' adherence to statutory law that led to the gradual destruction of the *Rechtsstaat* in the mid-1930s, but, rather, their departure from it: 'Statutory law that had been valid before 1933 remained for the most part on the books. Rather than waiting for the introduction of new statutory law, judges and other officials in Nazi Germany simply departed from the language of existing law whenever and wherever that was called for'.[36] The *Rechtsstaat* was hollowed out in one fell swoop, 'not legislatively, but rather in the judicial practice of the new regime'.[37] Of how this happened, Pauer-Studer gives a blow-by-blow account. She acquaints readers with the warped legal imagination of some of Nazi Germany's most influential jurists—and their morals.

[33]Douglas Morris has shown that Radbruch's formula—notably the additional claim that legal positivism had rendered the German legal profession defenseless against the injustice of Nazi law—stemmed from a 'historical misinterpretation of the Nazi judiciary', reflected 'an atrophied political imagination', and resulted in a prescription for the new democracy that, tragically, 'helped pollinate a postwar fascination with natural law thinking which served the purposes of judges who had once happily furthered Nazi discrimination, terror, and murder'. See Morris, 'Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch after the War' (2016) 34 Law and History Review 649, 686.

[34]Brian H Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 American Journal of Jurisprudence 45, 51.

[35]Stanley L Paulson, 'Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses' (1994) 13 Law and Philosophy 313, 333. For the most comprehensive refutation of Radbruch's exoneration thesis, see Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (6th edn, Mohr [1968] 2005).

[36]Paulson, 'Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses' (n 35) 331–32. Most recently, see Herlinde Pauer-Studer, 'Einleitung: Rechtfertigungen des Unrechts' in Herlinde Pauer-Studer and Julian Fink (eds), *Rechtfertigungen des Unrechts: Das Rechtsdenken im Nationalsozialismus in Originaltexten* (Suhrkamp 2014) 15–135.

[37]Paulson, 'Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses' (n 35) 332.

The Nazi conscience

Pauer-Studer's is an argument about the moralisation of law in a wicked legal system. She traces the unification of law and morals in the 'Third Reich'. By investigating the 'Nazi conscience' of jurists in the 1930s and 1940s, she forces us to rethink the Hart-Fuller debate.[38] The historian Claudia Koonz was among the first scholars to throw a spanner in the works of jurisprudence. When she drilled into 'the bedrock of Nazi morality', Koonz found, not surprisingly, that this ideology 'supplied answers to life's imponderables, provided meaning in the face of contingency, and explained the way the world works', including to the jurists of the 'Third Reich'.[39] The term 'Nazi conscience', Koonz insisted, 'is not an oxymoron'.[40] As she put it:

> Although it may be repugnant to conceive of mass murderers acting in accordance with an ethos that they believed vindicated their crimes, the historical record of the Third Reich suggests that indeed this was often the case. The popularizers of antisemitism and the planners of genocide followed a coherent set of severe ethical maxims derived from broad philosophical concepts.[41]

Koonz's take on the law of the 'Third Reich' was a little too superficial to convince. Pauer-Studer's narrative is richer. *Justifying Injustice* paints a more complete picture of the cumulative moralisation of law in Nazi Germany—if occasionally by relying on an overly broad brush. With this picture in mind, it is far less surprising that judges in the everyday operation of Nazi law tended to dispose of criminal cases 'by appeal to the precepts of the Nazi regime'.[42] Court decisions were not always substantively irrational, in Max Weber's use of the term.[43] In one of its most important judgments, postwar Germany's Federal Constitutional Court found that *even* legally invalid norms had created social facts in the period 1933–1945. For example, in 1980, a seven-judge panel declared invalid the Eleventh Decree (*Verordnung*) relating to the 1935 Reich Citizenship Law (*Reichsbürgergesetz*), dated November 25, 1941, which had led to the expulsion of the plaintiff, identified in the court documents only by the initials 'St'.[44]

The judgment reaffirmed key tenets of the court's longstanding jurisprudence on the validity of Nazi law, that is, to declare invalid, drawing on Radbruch's formula, those 'National Socialist "legal" provisions' that 'so evidently contradict fundamental principles of justice that a judge who tried to apply them, or to acknowledge their legal effects, would declare lawlessness instead of law (*Unrecht statt Recht*)'.[45] More interesting, given the issue at hand, is the judges' finding that the organs of the postwar German state were 'incapable of undoing *the facts* that the Nazis' lawless practices have created'.[46] As the judges opined: 'The "expatriation" of Jews pursuant to National

[38]For related attempts, see Claudia Koonz, *The Nazi Conscience* (Belknap Press of Harvard University Press 2003); and my *The Remnants of the Rechtsstaat* (n 23).
[39]Koonz ibid 2, 163–89.
[40]ibid 1.
[41]ibid.
[42]Paulson, 'Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses' (n 35) 332.
[43]For a discussion of Weber's ideal types of law, and its relevance to the debate over the relationship between law and morals, see Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (Cambridge University Press 2008) 15–25.
[44]BVerfGE 54, 53.
[45]BVerfGE 54, 53, 68.
[46]BVerfGE 54, 53, 69. Emphasis added.

Socialist legislation remains a *historical fact*, which, this being the case, cannot retrospectively be expunged [from the empirical record]'.[47] By highlighting and explicitly recognising not once but repeatedly the facticity of this statutory lawlessness ('*faktische[s] gesetzliche[s] Unrecht*'), the *Bundesverfassungsgericht* honoured Radbruch's formula while simultaneously transcending it. Let me explain, as the point is highly significant for the jurisprudence of atrocity.

In the proceeding in question, BVerfGE 54, 53 (the so-called *Ausbürgerung II* Case), the Constitutional Court revisited its earlier jurisprudence, notably BVerfGE 23,98 (its *Ausbürgerung I* Case) of February 14, 1968 and BVerfGE 3, 58 (the *Beamtenverhältnisse* Case) of December 17, 1953. The latter case centred on the legality of Nazi Germany's civil service law (*Beamtenrecht*), but the details need not concern us here. The judgment is significant for our purposes because the chamber introduced a distinction between a normative (what it called 'philosophical') and a factual (what it termed 'sociological') approach to Nazi law—and tried to do justice to both. It is worth quoting from the judgment verbatim, not least because key portions of it resurfaced decades later as *obiter dicta* in *Ausbürgerung II*:

> It may be the case, in this instance, as in other areas, that the law created by National Socialism, amounts, in a higher philosophical sense, to 'lawlessness'. But it would be unrealistic ('*unrealistisch*') in the highest degree to develop this idea, in a legal positivistic manner, such that the (formal) law [of Nazi Germany] would *ex post facto* be regarded as null and void […]. Such a perspective would overlook that a 'sociological' validity of legal norms exists, which only ceases to be meaningful where such provisions stand in so evident a contradiction ('*in so evidentem Widerspruch*') to the principles of justice which govern formal law, that the judge who wanted to apply them or acknowledge their legal effects, would render lawlessness instead of law.[48]

I am suggesting that BVerfGE 3, 58 was a judicial attempt at *précising* Radbruch's formula, at making it *practically* usable for adjudicating between the conflicting imperatives of morality and reality. In the case the judges found that Nazi Germany's civil service law had, in fact, constituted valid law, as defined by Radbruch. They gave three reasons for their finding: first, the constitutional foundations of the *Beamtenrecht* had been adopted in a procedurally correct manner in Nazi Germany; second, the beneficiaries of the law had accepted its authority; and, third, its rules and procedures had been in force for years and not met opposition, let alone resistance. Taken together, the chamber reasoned, these 'legally relevant facts' ('*rechtserheblichen Tatsachen*') had created legal expectations on the part of the population that the Constitutional Court could not disappoint without simultaneously violating the principle of legal certainty (*Rechtssicherheit*), which just a few years earlier had been turned into a constituent (if implicit) element of the *Rechtsstaatsprinzip*, the new and all-important constitutional principle set out in Article 20(3) of the *Grundgesetz*, or Basic Law, postwar Germany's interim democratic constitution of 1949.

A few years later the court reiterated its idea of the 'sociological validity' ('*soziologische Geltungskraft*') of Nazi law in its *Gestapo* Case (BVerfGE 6, 132) of February 19, 1957. In this ruling, it introduced further nuance into its interpretation of Radbruch's formula,

[47]BVerfGE 54, 53, 69. Emphasis added.
[48]BVerfGE 3, 58, 118–19.

this time distinguishing explicitly between the validity of a specific law and the validity of the legal order in general. The judges also pronounced on the applicability of Radbruch's formula, declaring it the 'outermost limit' for assessing the validity of Nazi law ('*äußerste Geltungsgrenze*'), thereby effectively declaring it a jurisprudential principle of last resort.[49] By trying to do justice to both facts *and* norms, the constitutional jurisprudence of postwar Germany's most important court took on a schizophrenic quality whenever it was concerned with cases arising from the operation of law in the 'Third Reich'. The *Bundesverfassungsgericht* repeatedly declared portions of Nazi law *normatively invalid*, but, on occasion, it found the same legal norms, rules, or procedures to have nonetheless been *factually valid*—and thus impossible to disregard in its adjudication of Nazi dictatorship.[50] Although this squaring of the circle was 'logically untidy', as one commentator put it, it led to an improved understanding of the everyday life of Nazi law.[51] In operationalising Radbruch's formula, the court tempered the morality of Radbruch's formula with a dose of reality, allowing for the kind of critical legal history of the Nazi dictatorship that eventually emerged in Germany in the 1980s.

Taking a leaf from the jurisprudence of Germany's *Bundesverfassungsgericht*, I believe it essential to treat Nazi law as an observable social phenomenon. I follow in a long line of scholars, the most influential of whom was the late Michael Stolleis. The eminent legal historian was one of the first postwar analysts to focus on the day-to-day operation of Nazi law rather than the question of its morality alone.[52] Convinced that moral outrage contributed little to understanding the legal determinants of Nazi dictatorship, Stolleis went archival.

To be sure, Stolleis, like Radbruch, *was* morally outraged by Nazi dictatorship, war, and genocide, as am I. But he also wanted to understand, in the Weberian sense, the legal origins of dictatorship, and therefore warned of falling prey to 'limits of perception' ('*Schranken der Wahrnehmung*').[53] Cognizant of this danger, he implored scholars, and philosophers of law in particular, to

> take into account the inner make-up of the actors, and, above all, avoid reading the texts of the period as though their authors knew or foresaw what is easy to know today. […] Analytical understanding does not exclude the question of morality, in fact it can deepen it, for example by making clear how closely related writing and doing can be. […] The conditions

[49] The same formulation also appeared in BVerfGE 3, 58, 119.

[50] This reminds of John Finnis's argument from natural law. Concerning the topic of seriously unjust laws, he offered this solution: 'If a course of reflection or discourse makes it appropriate to acknowledge the rule's "settled" or "posited" character as cognizable by reference to social-fact sources, one can say that it is legally valid though too unjust to be obeyed or applied'. See Finnis, 'Natural Law Theories', *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/. Commenting on this solution, Brian Bix makes the useful observation that Finnis's analysis is 'tied to his view that law has a "double life": as a history of official action, and as a normative system that plays a role in the practical reasoning of both citizens and judges'. I am broadly sympathetic to Bix's argument that 'the key conceptual point about unjust laws is not that they are not laws, but that they are not laws "in the fullest sense," including in the sense of creating reasons for judges to apply them (without modification) to legal disputes'. See his 'Radbruch's Formula and Conceptual Analysis' (n 34) 55. See also Finnis, *Natural Law and Natural Rights* (n 20) esp. 351–66.

[51] Carsten Bäcker, *Gerechtigkeit im Rechtsstaat: Das Bundesverfassungsgericht an der Grenze des Grundgesetzes* (Mohr 2015) 94.

[52] *Pars pro toto*, see Michael Stolleis, *Recht im Unrecht: Studien zur Rechtsgeschichte des Nationalsozialismus* (Suhrkamp 1994).

[53] Michael Stolleis, *A History of Public Law in Germany 1914–1945* (Thomas Dunlap tr, Oxford University Press 2004) 249; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3: *Staats- und Verwaltungswissenschaft in Republik und Diktatur 1914–1945* (Beck 1999) 246.

> of this dictatorship provide an especially good model for studying how traditional legal doctrine was distorted and devalued by a result-oriented vulgar jurisprudence, how […] scholarly networks were transformed, and how the individual processing of reality was deformed by external and internal pressure.[54]

Stolleis was interested in historical analysis, not philosophical judgment. Horst Dreier joined him in the quest for an empirical approach to the study of Nazi law. Dreier cautioned scholars not to be misled by outcome knowledge: 'One must not interpret everything that was written in Weimar and in the early years of the Third Reich from the knowing vantage point of those who were born later (*Nachgeborenen*), and thus from the perspective of the evil end (*bösen Ende*). Instead one must be cognizant of the contingency of the historical situation (*der Offenheit der historischen Situation bewußt bleiben*) in which, and in response to which, [historical actors] thought, spoke, wrote, and acted'.[55] The historical study quickly superseded the philosophical study of Nazi law, and rightly so. Unfortunately, the jurisprudence of atrocity has not grown more sophisticated as a result, which is precisely why Pauer-Studer's *Justifying Injustice* is so welcome. It ties in with empirical scholarship on the relationship between law and authoritarianism. By relating insights from legal philosophy to legal history, the approach is also in keeping with other advances in socio-legal studies.

New legal realism

Efforts at 'naturalizing jurisprudence' have been underway in a variety of disciplines.[56] What they have in common is a methodological belief in the importance to studying the changing character of law. From Hanoch Dagan to Brian Tamanaha, and from William Twining to Elizabeth Mertz, 'the starting point of the realist account of law is its non-positivism'.[57] Adherents of this New Legal Realism (NLR) regard the longstanding quest to locate law's essence—including searches for *the* concept of law—with scepticism. Their ambition has been to move 'the interdisciplinary discission envisioned by the original Realists forward into the new millennium'.[58] NLR scholars aspire 'to repackage the cutting-edge insights of sociolegal research, amplify their significance, and revitalize the impact for law school teaching and research'.[59] Their focus is on 'more relational, contingent, context-sensitive, or process-based understandings of law' than philosophers of law are willing to countenance.[60]

Philosophers of law have shown little interest in the phenomenology of law in odious systems. And Pauer-Studer is not a NLR scholar. But her foray into Nazi law evinces an

[54]Stolleis, *A History of Public Law in Germany 1914–1945* (n 53), 251.
[55]Horst Dreier, 'Verfassungs- und Verwaltungsrecht 1914–1945' in idem, *Staatsrecht in Demokratie und Diktatur: Studien zur Weimarer Republik und zum Nationalsozialismus* (Matthias Jestaedt and Stanley L Paulson ed, Mohr [2000] 2016) 411.
[56]Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophies* (Oxford University Press 2007).
[57]Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (Oxford University Press 2013) 4.
[58]Elizabeth Mertz, 'New Legal Realism: Law and Social Science in the New Millennium' in Elizabeth Mertz, Stewart Macaulay and Thomas W Mitchell (eds), *The New Legal Realism*, vol. 1: *Translating Law-and-Society for Today's Legal Practice* (Cambridge University Press 2016) 2.
[59]Michael McCann, 'Preface to *The New Legal Realism*, Volumes I and II' in Mertz et al. (eds), *The New Legal Realism*, xiv–v.
[60]McCann, 'Preface to *The New Legal Realism*, Volumes I and II', Xv. See also Brian H Bix, 'Jurisprudence and Legal Theory' in Shauhin Talesh, Elizabeth Mertz, and Heinz Klug (eds), *Research Handbook on Modern Legal Realism* (Edward Elgar 2021) 479–89.

openness to interdisciplinary legal theory that would stand jurisprudence in good stead. Finnis's affinity for 'explanatory descriptions' is cut from the same cloth as Pauer-Studer's, though he never used, as he argued philosophers of law must, 'all appropriate historical, experimental, and statistical techniques to trace all relevant causal relationships' that have a bearing on law's operation.[61] Shapiro's refusal to take authoritarian legality seriously is no less surprising given his declared belief in the importance of stimulating thought about law 'through the examination of anthropological and historical evidence about the formation and operation of legal systems'.[62] As he put it in *Legality*:

> Philosophers seldom look to history or other legal cultures when engaging in conceptual analysis, and for good reason. Since philosophers are usually not trained as historians or anthropologists, there is the risk that they will either misrepresent the facts or oversimplify their interpretation (or both). But while it is important to bear in mind the potential hazards of interdisciplinary research, it seems to me that ignoring legal history and anthropology also deprives philosophers of an extremely important source of inspiration and ideas.[63]

So much candour about the limits of analytical jurisprudence is rare. And Shapiro's call for an 'anecdotal strategy' in jurisprudence is admirable.[64] Although he apparently sought 'to experiment' with this strategy in *Legality* to illuminate properties of law 'that may be hiding in plain sight', Shapiro, unfortunately, made no use of it in his discussion of wicked legal systems. If the overriding task of jurisprudence, as H. L. A. Hart insisted, is to explain why, and how, law is authoritative, does it not behove legal philosophers 'to know and describe', even in wicked legal systems, how law works *before* pronouncing on its identity?[65] And if, furthermore, jurisprudence has 'profound implications for the practice of law', as Shapiro believes it does, is it not an abdication of analytical responsibility to relegate the philosophical study of wicked legal systems —what I call the jurisprudence of atrocity—to the margins of legal philosophy?[66]

Justifying Injustice underlines the importance of asking these questions anew. Although we may 'arrive where we started', it is not inconceivable, in T. S. Eliot's terms, that we come to 'know the place'—the space where law and morality meet—as if 'for the first time'.[67] Pauer-Studer has been on a jurisprudential quest that few philosophers of law dare to embark on for fear of leaving—or being perceived as leaving—the province of jurisprudence.[68] In the twenty-first century, legal philosophers are still 'rather innocent', as Martin Krygier first complained forty years ago, 'of social theory and empirical social research'.[69] Philosophers of law these days also still manifest, more

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[61]Finnis, *Natural Law and Natural Rights* (n 20) 17.
[62]Shapiro, *Legality* (n 9) 21.
[63]ibid 22.
[64]ibid 21.
[65]Finnis, *Natural Law and Natural Rights* (n 20) 16.
[66]Shapiro, *Legality* (n 9) 25. See also Nicola Lacey, 'Institutionalising Responsibility: Implications for Jurisprudence' (2013) 4 Jurisprudence 1.
[67]TS Eliot, 'Little Gidding' in TS Eliot (ed), *Four Quartets* (Faber and Faber 2001); Matthew H Kramer, *Where Law and Morality Meet* (Oxford University Press 2004).
[68]See, for example, Pauer-Studer and Fink (eds), *Rechtfertigungen des Unrechts*; and, more recently, Herlinde Pauer-Studer and J David Velleman, *'Weil ich nun mal ein Gerechtigkeitsfanatiker bin': Der Fall des SS-Richters Konrad Morgen* (Suhrkamp 2017), an expanded German-language version of their book *Konrad Morgen: The Conscience of a Nazi Judge* (Palgrave Macmillan 2015).
[69]Martin Krygier, '*The Concept of Law* and Social Theory' (1982) 2 Oxford Journal of Legal Studies 155, 157.

often than not, 'an attitude of haughty, and not always benign, neglect towards work in these fields'.[70] Pauer-Studer, who is a moral philosopher, not a legal philosopher, shares Krygier's disdain for world-weary jurisprudence. Like David Dyzenhaus and others, she is interested in what went wrong 'legally speaking' in Nazi Germany.[71] To this end, Pauer-Studer traces, in broad strokes, the evolution of 'racial legalism' in a misunderstood case, and with particular reference to the philosophical foundations of (select areas of) Nazi law.[72]

Justifying Injustice is a contribution to the jurisprudence of atrocity, as I use the term, in that it contains a genuinely philosophical argument about the nature and function of law in times of authoritarianism.[73] This treatment rests an account of *a* jurisprudence of atrocity in a *sui generis* case. In a series of very accessible chapters, Pauer-Studer chronicles, with just enough detail to also hold the attention of empirically minded socio-legal scholars, the deformation of law. She speaks to the role of legislation (such as the Gestapo Law of 1936), of case law, and of legal norms such as the *Leitsätze für ein neues deutsches Strafrecht*, the National Socialist Guidelines for a New German Criminal Law. She also parses the implications for practice of other sources of law, both new and old, from *Rechtsverordnungen* to Hitler's notorious executive decrees, the so-called *Führererlasse*.[74] Pauer Studer also reprises her well-regarded research into the Konrad Morgen, a judge with the *Schutzstaffel* (SS), who struggled to comprehend the schizophrenic nature of Nazi Germany's 'dual state', which is to say the concurrent operation, well into the war years, of a normative state and a prerogative state.[75] In short, Pauer-Studer offers a guide for the perplexed to what Nazi jurists euphemistically—but not inaccurately—dubbed a 'legal revolution'.[76]

What Pauer-Studer provides is, in essence, and especially in Chapter 2–7, 'an essay in descriptive sociology'.[77] Hart came to regret the 'famously baffling' moniker he chose to describe *The Concept of Law*.[78] Pauer-Studer could more legitimately lay claim to the label. Although her empirical analysis of the transformation of Weimar Germany's

[70]Krygier, '*The Concept of Law* and Social Theory' 157.

[71]David Dyzenhaus, 'Legality Without the Rule of Law? Scott Shapiro on Wicked Legal Systems' (2012) 25 Canadian Journal of Law and Jurisprudence 183, 183.

[72]See Finnis, *Natural Law and Natural Rights* (n 20). On racial legalism, see Jens Meierhenrich, *Lawfare: A Genealogy* (Cambridge: Cambridge University Press, forthcoming).

[73]For a related but different use of the term, see Lawrence Douglas, 'From IMT to NMT: The Emergence of a Jurisprudence of Atrocity' in Kim C Priemel and Alexa Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (Berghahn Books 2012), 276–95. Douglas speaks of a 'jurisprudence of atrocity' to describe the 'contemporary paradigm of international criminal law', by which he means the 'atrocities regime' that emerged in the late twentieth century. See also Christopher Rudolph, 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals' (2001) 55 International Organization 655. My use of the phrase, by contrast, foregrounds the meaning of jurisprudence as 'the theoretical part of law as a discipline', to quote William Twining. See his *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 8.

[74]On the latter, see, Manfred Fauser, 'Das Gesetz im Führerstaat' (1935) 65 Archiv des öffentlichen Rechts 129. See also Martin Moll (ed), *"Führer-Erlasse" 1939–1945* (Franz Steiner Verlag 1997), which contains 650 Hitler decrees from the war years, 405 of them previously unpublished.

[75]Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, with an Introduction by Jens Meierhenrich (Oxford University Press [1941], 2017); Meierhenrich, *The Remnants of the Rechtsstaat* (n 23).

[76]See, for example, Ulrich Scheuner, 'Die nationale Revolution: Eine staatsrechtliche Untersuchung' (1934) 63 Archiv des öffentlichen Rechts 166. On the ideological foundations of this legal revolution, see Meierhenrich, *The Remnants of the Rechtsstaat* (n 23) esp. 95–158. More broadly, see also Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap Press of Harvard University Press 2019).

[77]Hart, *The Concept of Law* (n 4) vi.

[78]Nicola Lacey, 'Analytical Jurisprudence versus Descriptive Sociology Revisited' (2006) 84 Texas Law Review 945, 949. It was Ronald Dworkin whom Hart left dumbfounded. See his *Justice in Robes* (Harvard University Press) 165.

legal order and of the legal origins of Nazi dictatorship is a tad too superficial to fully convince, her description of the vicissitudes of legal theory is sound. In this regard, *Justifying Injustice* is a wonderful primer on the law of the 'Third Reich'. To be sure, I do not mean this as a slight. A 'primer', as commonly understood, is an introductory text to a subject of study. In jurisprudential terms, Pauer-Studer's study is far more than that. The rigour of her philosophical argumentation would belie a characterisation of her treatment as introductory. It represents, rather, an advance on knowledge.

But *Justifying Injustice*, at its heart, also contains a comprehensive account not just of the place where law and morality met, but also of where law and *reality* met in the period 1918–1945, and with what consequences. Her account cannot rival, in empirical terms, the exacting and exhaustive accounts of legal historians. Hers is, first and foremost, a metatheoretical perspective on Nazi legality. Inasmuch as the brevity of her treatment is appealing, ultimately, Pauer-Studer's is a surface treatment of the manifold institutions and practices of Nazi law. And yet, for the case at hand, the far-ranging reconstruction of 'the moralization of law in National Socialism' in *Justifying Injustice* supersedes all extant contributions to the jurisprudence of atrocity.[79] By providing glimpses of really existing legalism, so to speak, in Germany's transition to dictatorship, Pauer-Studer makes it harder for legal philosophers to wax naively about the law of the 'Third Reich'. By taking not just philosophy seriously but history as well, she has raised the stakes in the jurisprudential debate about the meaning of lawlessness—in Nazi Germany and beyond.[80]

Conclusion

The late John Gardner once remarked that 'law (unlike morality) is something that one needs (further) reasons to obey'.[81] *Justifying Injustice* pays careful attention to what 'further reasons' exactly the Nazi dictatorship provided, why they inspired obedience, and under what conditions. Although her study would have benefitted from an even greater degree of interdisciplinarity—and an even deeper immersion in the historiography of Nazi law—Pauer-Studer, by asking questions about the concept of law alongside questions about the context of law, has made an important contribution to the philosophical study of wicked legal systems. Her book shows why the jurisprudence of atrocity needs both conceptual *and* contextual analysis.[82] This subfield, and the field of jurisprudence more generally, requires a command of theory *and* history.[83] Or, as William Twining has recently put it, 'Legal realism needs to be integrated into mainstream jurisprudence. Insofar as doctrinal legal theory excludes or marginalizes empirical dimensions of law and justice, it impoverishes the enterprise of understanding law'.[84]

[79]Pauer-Studer, *Justifying Injustice* (n 2) 228.

[80]For the 1946 opening argument in this debate, see Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (n 24) 1. For a critique, see Meierhenrich, *The Remnants of the Rechtsstaat* (n 23) 3–13.

[81]John Gardner, 'Nearly Natural Law' (2007) 52 American Journal of Jurisprudence 11.

[82]On the latter, see, for example, Robert E Goodin and Charles Tilly (eds), *The Oxford Handbook of Contextual Political Analysis* (Oxford University Press 2006).

[83]More generally, see Jonathan Floyd and Marc Stears (eds), *Political Philosophy versus History? Contextualism and Real Politics in Contemporary Political Thought* (Cambridge University Press 2011).

[84]William Twining, "Legal R/realism and Jurisprudence: Ten Theses" in Elizabeth Mertz, Stewart Macauley and Thomas W Mitchell (eds), *The New Legal Realism,* vol. 1: *Law-and-Society for Today's Legal Practice* (Cambridge University Press 2016) 141.

Justifying Injustice succeeds in marrying conceptualism and contextualism. It is a wonderful example of what can be gained—philosophically and otherwise—by paying heed to Twining's counsel. By allowing readers to see the violence of law at the point of its application, Pauer-Studer illuminates not only the legal origins of Nazi dictatorship, but also a way forward in the jurisprudence of atrocity.[85]

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[85]On law's violence, see most recently, Jens Meierhenrich, *The Violence of Law: The Formation and Deformation of* Gacaca *Courts in Rwanda* (Cambridge University Press, 2023); and Meierhenrich, *Lawfare*.