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ANNA LUKINA

MAKING SENSE OF EVIL LAW

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ABSTRACT. In this paper, I seek to introduce, define, and ultimately defend the concept of 'evil law'. Firstly, I look at the reasons – both theoretical and moral – why using the concept of evil law is valuable. Secondly, I argue that evil law is distinct from merely bad or unjust law and can be defined as *law, which, if interpreted in its best light, will inflict or enable intolerable harm (including atrocities) to victims themselves*. Thirdly, I claim that evil law is indeed law despite objections based on both its external and internal immorality. Fourthly and finally, I reject the challenge that using the vocabulary of evil law is empty at best and dangerous at worst.

I. INTRODUCTION

On September 15, 1935, the German Reichstag enacted two laws known collectively as '*Nuremberg Laws*'. One of them, the Law for the Protection of German Blood and German Honour, forbade marriages and extramarital intercourse between Jews and Germans. The other, the Reich Citizenship Law, stripped Jews of German citizenship.

Article 58 of the 1927 Criminal Code of the Russian Soviet Federative Socialist Republic criminalised numerous '*counter-revolutionary activities*' including treason, espionage, '*wrecking*', and sabotage. Those found guilty of counter-revolutionary crimes, both by courts and ad hoc extrajudicial bodies ('*troikas*'), were sentenced to death or lengthy imprisonment in labour camps, while their families endured the stigma of association with the 'enemies of the people'.

In its 1857 decision, Dred Scott v. Sandford, the Supreme Court of the United States found a constitutional right to capture runaway slaves even in '*free states*'. The majority opinion stated that people of African descent ''[were] not included, and were not intended to be

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included, under the word *'citizens'* in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.''

Despite belonging to different settings in time and place and to different types of legal systems (continental, socialist, and common law), these historical cases highlight the same uncomfortable truth about law: that it has the capacity not only to deter, but also to produce evil. In this paper, I argue that this apparent paradox is best explored through introducing a concept of evil law as a conceptually distinct – and, at the same time, still law-like – phenomenon.

Firstly, In Section II I submit that using the concept of evil law is particularly apt when talking about this that needs to be both investigated theoretically, due to its conceptual clarity, and resisted practically, due to its moral clarity. Despite these positives, however, there are obviously objections to this idea, three of which I will counter in the rest of the paper.

Secondly, I will address the first counterpoint – that evil law is something which is already captured by the neighbouring concept of unjust law. In Section III, I will first set out the evolution of the concepts unjust law and evil law, leading us to two opposing camps – those who believed the two terms were interchangeable and those who did not. I agree with Radbruch and Dworkin, who, unlike Hart and Fuller, saw evil law as a distinct category from unjust law. To address the driving force behind this distinction, in Section IV I propose a definition of evil law as distinct from unjust law: *law, which, if interpreted in its best light, will inflict or enable intolerable harm (including atrocities) to victims themselves*.

Thirdly, I will respond to the second opposing argument – that the use of the concept of evil law is to be rejected as evil law is not law in the first place. In Section V, departing from Radbruch and Dworkin on this front, I counter two of these critiques – from external morality (Radbruch, Aquinas, and Finnis) and from internal morality (Fuller). I argue that the external immorality of evil law is of no consequence to its status as law.

Fourthly, I consider a third potential reason for hesitation in adopting the concept of evil law – Cole's critique of the concept of evil that dismissed it as useless at best and dangerous at worst. Applying Cole's thesis to evil law, in Section VI I argue against him

and claim that using the heavily loaded concept of evil is productive, and not disruptive, to making sense of evil law and confronting it.

II. WHY 'EVIL LAW' IS VALUABLE

A. *Conceptual Clarity*

There are two broader reasons why using the concept of evil law is valuable – in that it provides conceptual (theoretical) and moral (practical) clarity when dealing with the phenomenon described through it.

Let us start with conceptual clarity. Firstly, the concept of evil law identifies evil law as a distinct phenomenon, different in kind to all other forms of law, even bad or unjust, law. In doing that, this article appears to track the folk intuition that 'evil' refers to something distinct. When it comes to our intuitions, as Delbanco notes, if we eschew 'evil', ''we feel something that our culture no longer gives us the vocabulary to express[1]''. Evil is thus something for which other terms conveying moral disapproval might be an understatement. As Haybron puts it, ''prefix your adjectives [such as 'wrong' or 'bad' or 'unjust'] with as many 'very's' as you like; you still fall short. [Sometimes] [o]nly 'evil', it seems, will do[2]''. This applies to evil law more specifically, the characteristics of which, as will be suggested in the following Sections III and IV, do not seem to be captured by term 'unjust law'.

Secondly, the concept of evil law acknowledges that evil law is operating within the bounds of legality. As Hart argues, ''study of [the law's] use involves study of its abuse[3]'' and so recognizing evil law as law allows us to learn more about law as a phenomenon.[4] Describing morally iniquitous ordinances as evil *laws*, which would

[1] Andrew Delbanco, The Death of Satan: How Americans Have Lost the Sense of Evil (New York: Farrar, Straus, and Giroux, 1996), p. 9. Cited in Stephen de Wijze, ''Defining the Concept of Evil: Insights From Our Pre-Cognitive Responses'', in The Routledge Handbook of the Philosophy of Evil, ed. Thomas Nys and Stephen de Wijze (Abingdon: Routledge, 2019), p. 205.

[2] Daniel M. Haybron, ''Moral Monsters and Saints'', The Monist 85, no. 2 (2002): p. 260. As quoted in Todd C. Calder, ''The Concept of Evil'', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2020), https://plato.stanford.edu/archives/sum2020/entries/concept-evil/.

[3] H. L. A. Hart, The Concept of Law, 3rd ed., Clarendon Law Series (Oxford: Oxford University Press, 2012), pp. 209–210.

[4] Hart, The Concept of Law, pp. 209–210.

be done in Section V, therefore provides us with an insight about the nature of law more generally, supporting the positivist understanding of its relationship with morality.

Thirdly, a legal theorist needs to build on this framework in order to ask further questions about evil law such as why evil regimes need law and how evil law operates, the answers to which might be different for this category of legal phenomena as opposed to its less evil – and less legal – counterparts. Delimiting evil law from merely unjust law in Sections III and IV and highlighting its legal character in Section V is necessary to describing their nature.

B. Moral Clarity

On top of these theoretical reasons, the concept evil law is important beyond mere philosophical investigation. Firstly, retaining the concept of evil helps us articulate the horror evil acts and practices, such as evil law, inflict on those marginalised and corrupted by them. These horrors are something for which talk of unjust law might be an understatement, as these terms blur the distinction between laws that are merely morally imperfect and those that are properly wicked. This is a good in itself as equipping those who, in one way or another, are affected by evil acts or practices – evil law included – with adequate linguistic tools to describe their experiences is crucial to coming to terms with these experiences. The philosophers' work in elucidating the concept of evil law and distinguishing it from unjust law – as attempted in Sections III and IV – is therefore critical in an almost therapeutic way.

Secondly, recognizing evil law as evil is important to ground a right and an obligation to resisting it in real time and effectuating transitional justice after an evil regime falls, as one needs to clearly assess what is at stake in those scenarios. Referring to some law as evil rather than merely unjust as per Sections III, IV and VI evokes a powerful sentiment and serves as a rallying cry not only to those who are presently or recently downtrodden, but other members of the community who may not be directly affected by evil acts or

practices, but who will be further motivated to oppose them due to their natural disposition against evil.[5] In addition, designating some acts or practices as evil helps us to prioritise fighting against them as opposed to other injustices, directing our resources where they are needed the most.[6] Therefore, we would do better fighting evil law first as opposed to spreading themselves thin, which will happen if we do not see it as different from law that is merely unjust.

Thirdly, utilizing the concept of evil law may allow for this resistance to be more effective. As will be argued in Section IV, evil law, unlike unjust law, is uniquely ''unmanageable'' through legal means, which limits the tactics by virtue of which it can be dealt with. In the context of contemporaneous resistance, evil law cannot be neutered 'on the inside', or via instituting legal proceedings aiming to serve that purpose. It therefore must be responded to 'from the outside', or through political action of various degrees of civility, ranging from legislative reform to full-on revolution. When it comes to transitional justice, recognizing evil law's nature as interpretation-dependent, conversely, broadens rather than limits one's opportunities. Some evil laws, especially those that are power-conferring and legitimating, will be able to be preserved in the successor legal system by changing the other constitutive parts of it and thus redefining its interpretation. In that way, those pursuing transitional justice can minimise transaction costs associated with the legal order's total overhaul.

III. LITERATURE REVIEW

A. Evil Law as Very Unjust Law

1. *Classical Origins*

While this paper seeks to introduce a fully developed concept of evil law into the literature for the first time, it would be a mistake to presume that extremely morally iniquitous law has not been contemplated by thinkers across centuries. Here, I give an account of the treatment of evil law over time by thinkers such as Augustine and

[5] As per Card, ''a <...> task guiding my inquiries <...> is to facilitate the identification of evils, in the hope that once they are identified, people who currently support a number of evil practices might cease to do so''. Claudia Card, *Confronting Evils: Terrorism, Torture, Genocide* (Cambridge: Cambridge University Press, 2010), p. 8.

[6] Card, p. 7. As cited by Calder, ''The Concept of Evil''.

Aquinas, Hart, Fuller, Radbruch, and Dworkin. I appreciate that these theories are complex and, to do them justice, one should treat them at more length. However, this brief survey succeeds in establishing a certain trend – some of the thinkers believe that evil law is distinct in kind from unjust law, while others see evil law as 'very unjust law'.

The discussion of morally iniquitous laws is generally considered to date back to the thought of Augustine and Aquinas. However, they did not draw a distinction between unjust and evil law. In their work, the term 'evil' (*malum*) had a different connotation from now, reflecting a broad as opposed to narrow concept of evil. *Malum* was understood as any absence or privation of good,[7] and did not connote extraordinary culpability or harm. Most strikingly, at least any human legal system, being necessarily coercive, would contain the evil of *poena* ('punishment'), imposed on one for committing *culpa* ('fault').[8] Unjust law, on the contrary, was central to many discussions of that time. To Augustine[9] and Aquinas[10] belongs the famous formulation *lex iniusta non est lex* (''unjust law is no law[11]''). For Aquinas, unjust laws were laws contrary to the Divine good –violations of Scripture ''such as the laws of tyrants inducing to idolatry[12]'' – or laws contrary to human good – that could be unjust in respect of the end, when laws are conducive not to the common good, but the ruler's own interests; in respect of the author, in the case of laws made by someone who does not have power to do so; or in respect of the form, or when burdens are imposed disproportionately.[13] Both laws that are contrary to divine good and human good do not bind in conscience.[14] The former do not do so without

[7] Aurelius Augustine of Hippo, *The Enchiridion on Faith, Hope, and Love*, trans. Thomas S. Hibbs (Washington, D.C.: Regnery Gateway, 1996), Chapter 11; Thomas Aquinas, *Summa Theologica*, trans. Dominicans. English Province (New York: Benziger Bros, 1947), Part I, Q48, A1, https://aquinas101.thomisticinstitute.org/st-index.

[8] Aquinas, Summa Theologica, Part I, Q48, A5.; Colleen McCluskey, Thomas Aquinas on Moral Wrongdoing (Cambridge: Cambridge University Press, 2017), p. 43.

[9] Aurelius Augustine of Hippo, On Free Choice of the Will, trans. Thomas Williams (Indianapolis: Hackett PubCo, 1993), I, v, 11.; John Finnis, Natural Law and Natural Rights (Oxford: Oxford University Press, 2011), p. 363.

[10] Aquinas, Summa Theologica, Part I–II Q96 A4.

[11] As emphasised by Finnis, this phrase refers to unjust law being law simpliciter (in a primary sense), unjust law is still law secundum quid (in a secondary sense). This will be further explored later in Section V.A.(ii).

[12] Aquinas, Summa Theologica, Part I–II Q96 A4.

[13] Aquinas, Part I–II Q96 A4.

[14] Aquinas, Part I–II Q96 A4.

any qualification, while the latter could be obeyed if it is necessary "to avoid scandal [*scandalum*] or disturbance [*turbatio*][15]" or if disobedience will give a bad example to others or create any kind of public disorder, broadly speaking.[16] In other words, in deciding whether to obey or disobey unjust laws contrary to human good, which seem to resemble those laws considered in this paper more closely, one must weigh up moral and pragmatic reasons for and against doing so. This puts unjust laws on a spectrum: from more to less tolerable.

2. *Hart*

Even though the concept of evil evolved, as philosophers turned their attention to moral rather than natural evils, or evils as culpable wrongdoings,[17] the language of 'injustice' remained the predominant expression of moral-formal dilemmas, or conflict between laws and morality.[18] That persisted until the middle of the twentieth century when Nazi (and, to some extent, Soviet) terror forced us to pay more attention to legalised evil. This was something that Augustine or Aquinas could not yet comprehend as they focused on more familiar cases of a tyrannical government serving the self-interest of a ruler instead of a program of full-on extermination of certain categories of human beings. Thus, the concept of evil as we know it now entered onto the scene. Hart in particular adopted the vocabulary of 'evil' rather than 'unjust' law, acknowledging the existence of evil and recognising evil law as a viable category. However, he treated evil law as a category distinct in degree from unjust law, not as distinct in kind or as forming a separate domain. Hart's answer to the moral-formal dilemmas – that evil law is law but does not have to be obeyed, since law is distinct from morality – was, in his mind, consistent with the thought of Bentham and Austin.[19] According to them, one faced with morally iniquitous laws could weigh up the

[15] Aquinas, Part I–II Q96 A4.

[16] J. Budziszewski, Commentary on Thomas Aquinas's Treatise on Law (Cambridge: Cambridge University Press, 2014), pp. 387–388.

[17] Susan Neiman, Evil in Modern Thought (Princeton: Princeton University Press, 2015), p. 55.

[18] Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975), pp. 6, 197–99.

[19] H. L. A. Hart, "Positivism and the Separation of Law and Morals", Harvard Law Review 71, no. 4 (1958): pp. 616–617.

[20] Hart, p. 616.

evil of compliance with law against the evil of disobedience,[20] rendering the phrases 'unjust law' and 'evil law' as either interchangeable or different only in degree.

3. *Fuller*

Even though Fuller opposed Hart on the question of whether Nazi law – and evil law at large – was law, his use of the category of evil law is strikingly similar to Hart's. According to Fuller, any legal system, even a 'bad' one, has to at least minimally satisfy the following eight desiderata ('internal morality of law' or 'principles of legality') to count as law: rules of law shall be general, publicly promulgated, prospective, clear, free of contradictions, stable, possible to obey, and administered in a way that does not diverge from their apparent meaning.[21] Nazi law was thus not only 'externally' or substantively unjust, but also negated these requirements, as much of it consisted of retroactive secret ordinances that were often disobeyed by Nazi courts themselves out of fear.[22] As a result, he arrived at the conclusion that these rules were not laws. However, he also claimed that the ''existence of a legal system, even a bad or an evil one, is always a matter of *degree* [emphasis mine][23]'', opening up a possibility for there to be evil law that is not yet a failure as law. Fuller believed that external and internal moralities were linked in that harm to one inevitably produced harm in the other.[24] Therefore, he would not consider the category of evil law that complied to the eight desiderata theoretically or, indeed, practically important. As a result, he did not really discuss whether evil law of this type would be distinct from unjust law in degree or in kind. Yet, the only criterion of evil law he expands on – failure of internal morality – shows that he did not regard such law to be different from the rest of law in kind but as distinct only in its degree of departure from the principles of legality.

[21] Lon L. Fuller, The Morality of Law (New Haven: Yale University Press, 1969), p. 33.

[22] Lon L. Fuller, ''Positivism and Fidelity to Law: A Reply to Professor Hart'', Harvard Law Review 71, no. 4 (1958): pp. 650–652.

[23] Fuller, p. 646.

[24] Fuller, p. 645.

B. *Evil Law as a Sui Generis* Category

1. *Radbruch*

Therefore, Augustine and Aquinas, Hart, and Fuller all conceived of evil law as merely very unjust law. The first move towards a distinct concept of evil law was made by Radbruch in his essay, *Statutory Lawlessness and Supra-Statutory Law*,[25] written in the aftermath of Nazi rule. While he agreed with classical natural law that ''law, including positive law, cannot be otherwise defined then as a system and an institution whose very meaning is to serve justice[26]'', to him laws serving injustice were not a monolith. The famous 'Radbruch Formula' consists of two parts.[27] In what Alexy calls the 'intolerability formula', positive law takes precedence ''unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice[28]''. This part of Radbruch's essay is consistent with the classical understanding of unjust law as a site of a proportionality inquiry and is nothing extraordinary. However, in the 'disavowal formula[29]', Radbruch writes: ''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[30]''. As a result, he concluded, ''whole portions'' of Nazi law ''never attained the dignity of valid law[31]''. While unjust law was still law in a secondary sense, the kind of law the Nazis had – that I shall call evil law – was not law even marginally.

2. *Dworkin*

Similarly, Dworkin insisted that some morally iniquitous law is law in the sense of creating rights and duties, since its effect can be

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[25] Gustav Radbruch, ''Statutory Lawlessness and Supra-Statutory Law (1946)'', trans. Bonnie Litschewski Paulson and Stanley L. Paulson, Oxford Journal of Legal Studies 26, no. 1 (2006): pp. 1–11.

[26] Radbruch, p. 7.

[27] Robert Alexy, ''A Defence of Radbruch's Formula'', in Recrafting the Rule of Law: The Limits of Legal Order, ed. David Dyzenhaus (Oxford: Hart Publishing, 1999), p. 16.

[28] Radbruch, p. 7.

[29] Alexy, ''A Defence of Radbruch's Formula'', p. 16.

[30] Radbruch, p. 7.

[31] Radbruch, p. 7.

negated via judicial interpretation in light of the legal system's background principles and policies.[32] The Fugitive Slave Act was one such example.[33] On the one hand, as the United States government was sufficiently legitimate, the ''structuring principle of fairness'' – political authority, precedent, and reliance – argued in favour of enforcing the Act. However, judges could and should have overridden it using a stronger legal and moral argument of human rights of enslaved persons.[34] But this weighting of competing rights and duties, as Dworkin thinks, could not be performed when it comes to some other cases of morally iniquitous law. Nazi law, as Dworkin said, ''did not create even *prima facie* or arguable rights and duties'' as ''the purported Nazi government was fully illegitimate, and no other structuring principles of fairness argued for enforcement of those edicts[35]''. While Dworkin had earlier conceded that Nazi law was law in a very limited, preinterpretive, sense,[36] he later concluded that ''it is morally more accurate to deny that these edicts were law[37]''. The same, he argued, applied to law in Stalin's Soviet Union.[38] It is not that Dworkin considered Nazi and Stalinist laws so burdensome as to always outweigh the structural concerns (as at the end of the spectrum of unjust law) – they are (as evil law) of a kind that defies this kind of balancing.

IV. THE DISTINCTIVENESS OF EVIL LAW

A. Best Interpretation

The key question raised by the survey above is what, if anything, distinguishes unjust law and evil law. To Radbruch, the key feature of evil law is its ''deliberate failure to deliver justice and equality[39]'', however, this criterion does not seem sharp enough to draw a distinction between evil law and unjust law as the latter would fail to deliver justice and equality too, but on a smaller scale. After all,

[32] Ronald Dworkin, Justice for Hedgehogs (Cambridge: Belknap Press of Harvard University Press, 2011), pp. 410–411.

[33] Dworkin, pp. 410–411.

[34] Dworkin, p. 411.

[35] Dworkin, p. 411.

[36] Ronald Dworkin, Law's Empire (Oxford: Hart Publishing, 1998), p.103.

[37] Dworkin, Justice for Hedgehogs, p. 411.

[38] Dworkin, p. 322.

[39] Radbruch, ''Statutory Lawlessness and Supra-Statutory Law (1946)'', p. 7.

Radbruch's description of evil law seems to be a rather brief *sui generis* appraisal of some Nazi laws rather than a more developed test that can be used to identify other evil law. As a result, there is a gap in defining what evil law is that I aim to fill. The first distinguishing element is that evil law remains evil even if it is interpreted in its best light. According to Dworkin, judges ought to construe legal materials in the light of their best background principles and policies.[40] The judge is directed to produce a set of principles and policies that, firstly, clears the 'threshold' of fitting existing legal materials,[41] and, secondly, best justifies them by "show[ing] the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality[42]". Dworkin notes, applying this insight to morally questionable laws,

> "[g]overnments can be legitimate [even if their laws and policies are unjust] if their laws and policies can […] *reasonably be interpreted* [emphasis mine] as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life[43]".

Conversely, a judge in an evil legal system would have to interpret its law in the light of available principles that may still point to a harmful outcome, therefore making it unsalvageable if the judge sticks to their duties. To preserve their moral integrity, the judge needs to resign or lie[44] and the citizen must pursue change through revolutionary instead of legal means.[45] In Dyzenhaus's words, unjust law is 'manageable' by law, while evil law is 'unmanageable' by legal means and has to be dealt with in a separate, moral, domain.[46] As a result, I shall refer to the *'interpretation in its best light'* as key part of my prospective litmus test for what counts as evil law.

[40] Dworkin, Law's Empire, pp. 254–256.

[41] Dworkin, pp. 254–256.

[42] Dworkin, p. 256.

[43] Dworkin, Justice for Hedgehogs, pp. 321–322.

[44] Dworkin, p. 410.

[45] Dworkin, p. 323.

[46] David Dyzenhaus, "Dworkin and Unjust Law", in The Legacy of Ronald Dworkin (Oxford: Oxford University Press, 2016), p. 137.

B. Intolerable Harm to the Victims Themselves

Moreover, evil law involves more harm than unjust law. The relevant measure of harm required for law to be classified as evil is best understood by combining both a deontological and a consequentialist sense –requiring both a certain type and a certain degree of harm to be present. Firstly, evil law involves harm to the victims *themselves* and not just their interests as expressed in the concept of horrific violations. On Merrihew Adams's and McCord Adams's account, these are defined as attacking the person seriously and directly.[47] Accordingly, Stanton-Ife, in his application of this theory to criminal law, distinguishes horrific crimes as involving violating victims themselves as well as their interests as opposed to just damaging the latter.[48] Murder, torture, maiming, and rape[49] are therefore considered horrific crimes. As demonstrated by this list of examples, most instances of violation of a victims' self include their physical destruction or damage, but this notion is broader than that, ''the self and the body taken as an integral whole[50]''. What unites many diverse instances of a type of harm required for the concept of evil law – from killing and maiming its victims to denying them privileges afforded to their fellow citizens – is thus the attack on their very personality. Actions that do not fit this test, such as vandalism and theft,[51] are not evil.

Secondly, even if we successfully delimit harm to mean harm to the victims themselves and not just their interests, we can still run into some difficulties when it comes to finding a threshold of harm that qualifies for it to be a component of evil. This answers another tension in Stanton-Ife's account, as he saw assault as an ordinary rather than a horrific crime[52] despite that being a rather conventional violation of the self. As a result, harm sufficient for such judgement

[47] Marilyn McCord Adams, ''Horrendous Evils and the Goodness of God'', in The Problem of Evil, ed. Marilyn McCord Adams and Robert Merrihew Adams (Oxford: Oxford University Press, 1990), p. 209; Robert Merrihew Adams, Finite and Infinite Goods: A Framework for Ethics (Oxford, New York: Oxford University Press, 2002), pp. 107–112; John Stanton-Ife, ''Horrific Crime'', in The Boundaries of the Criminal Law, ed. R.A. Duff et al. (Oxford: Oxford University Press, 2010), pp. 148–149.

[48] Stanton-Ife, pp. 148, 162.

[49] Stanton-Ife, p. 148.

[50] Stanton-Ife, p. 148; Merrihew Adams, Finite and Infinite Goods, p. 108.

[51] Stanton-Ife, p. 157.

[52] Stanton-Ife, p. 157.

only covers the most, in Kramer's words, ''severe[53]'', in Kekes' words, ''serious [and] excessive[54]'' or, in Card's words, that I hence adopt, ''*intolerable*'' harm.[55] In a similar vein, to Thomas, there should be a ''certain moral gravity'' to the harmful act on top to the harmfulness of that act for it to be rightly seen as an evil act.[56] The moral gravity of the act in question is ''a function of hideousness of the act'', either ''inherent hideousness'' or the gravity of harm caused to the victims, or ''quantitative hideousness'', or the scale on which this harm is inflicted. To flesh these concepts out, many refer to a set of paradigmatic harms, such as Card's account of the ''*atrocity* paradigm'', focusing on

> ''genocide, slavery, torture, rape as a weapon of war, the saturation bombing of cities, biological and chemical warfare unleashing lethal viruses and gases, and the domestic terrorism of prolonged battery, stalking, and child abuse[57]''.

It is thus reasonable to frame the type and degree of relevant harm involved in evil acts or practices as *intolerable harm (including atrocities) to the victims themselves as opposed to merely their interests*.

C. Enabling

As a result, laws are evil and not unjust if they license the infliction of intolerable harm (including atrocities) to victims themselves (that I will also refer to as 'intolerable harm'), even if they have been interpreted in their best possible light. However, this link should be explored further. Card's definition of evil institutions required intolerable harm to ''*result from* [emphasis mine] said institutions' ''normal or correct' operation[58]''. However, I argue that this formulation does not encompass all main degrees of causation. Evil law subsumes a variety of cases that go beyond laws that command that intolerable harm be inflicted (that I will call duty-imposing rules), where the causation is most direct. These direct causation cases are,

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[53] Matthew H. Kramer, The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences (Oxford: Oxford University Press, 2014), p. 215.

[54] John Kekes, The Roots of Evil (Ithaca, New York: Cornell University Press, 2005), p. 2.

[55] Claudia Card, The Atrocity Paradigm: A Theory of Evil (Oxford: Oxford University Press, 2002), p. 3.

[56] Laurence Mordekhai Thomas, Vessels of Evil: American Slavery and the Holocaust (Philadelphia: Temple University Press, 1993), p. 77.

[57] Card, The Atrocity Paradigm, p. 8.

[58] Card, p. 20.

of course, central to the concept of evil law, but they are not the only manifestations of evil law, so an examination of more peripheral cases should be included. Therefore, one should keep in mind that in addition, evil law can give discretionary powers that will be later be used for inflicting intolerable harm (power-conferring rules) – here, more remote causation is involved. Moreover, evil law can justify, distract from, or hide this infliction of intolerable harm – not causing it, but removing disincentives to inflicting it by minimizing the consequences for the wrongdoer (legitimating rules).

Let me illustrate this point with historical examples. When analyzing the Nazi regime, one should pay attention not just to the Nuremberg Laws, but also to the Enabling Act (1933) that gave the German Cabinet and its Chancellor powers to enact laws bypassing the *Reichstag*. Moreover, one can, as an example of the legitimating function of evil law, focus on the piece of legislation passed by Hitler immediately after the Night of the Long Knives, when the SS men murdered the leaders of the much larger Nazi paramilitary group *Sturmabteilung* (SA) that Hitler feared was going to become disloyal on July 3, 1934, retroactively making those acts legally sanctioned.

Meanwhile, in the Soviet Union under Stalin, the Great Terror was sanctioned by the NKVD (the People's Commissariat of Internal Affairs) Order No 00447 (1937) that established extrajudicial tribunals known as 'troikas', that in turn condemned hundreds of thousands of people to the death penalty or imprisonment. In addition, the 1930s reforms and, in particular, Stalin's Constitution (1936), emphasised socialist legality and human rights, as per Fainsod, presenting the Soviet Union as authoritative, legitimate, and respectable both at home and abroad.[59]

Similarly, in the antebellum United States, it was not only punishment for aiding the fugitive slaves under the Fugitive Slave Act that was key to maintaining the regime of property rights of slaveholders over enslaved persons. The Act also gave powers to judges and special commissioners to issue warrants for claiming the runaways. Finally, the regime of slavery co-existed with the promise of freedom and equal right to free men, legitimating the *status quo* similarly to the way Stalin's Constitution did. Consequently, I think

[59] Merle Fainsod, How Russia Is Ruled, 11 (Cambridge: Harvard University Press, 1953), pp. 349–350; Peter H. Solomon, Soviet Criminal Justice under Stalin (Cambridge: Cambridge University Press, 1996), p. 191.

the relationship between law and intolerable harm is better expressed as the former not just *inflicting*, but also *enabling* the latter, as evil legal rules take many forms.

All in all, evil law *is law, which, if interpreted in its best light, will inflict or enable intolerable harm (including atrocities) to victims themselves*.

V. IS EVIL 'LAW' LAW?

A. *External Morality of Law*

1. *Strong argument*

The previous Section has demonstrated the distinctiveness of evil law from 'normal', even bad or unjust law. The question remains as to whether it is *too* different from it to be called 'law' in the first place so the term 'evil law' at the heart of this paper is adequately defended, as both authors I relied on when distinguishing and defining evil law – Radbruch and Dworkin – supported that position. One way this ''rupture[60]'' can be explained is by arguing that evil law is not law as it does not conform with external moral standards. Another way to do so is to say that evil law is not law due to evil law's divergence from the internal (or inner) morality of law.[61]

Radbruch, adopting the first kind of view, would describe evil law as not law at all. He claimed that ''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 <...> [f]or law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice[62]''. As a result, he pointed out that Nazi law was not law at all as it violated one principle central to justice – ''the equal treatment of equals[63]''. Radbruch's followers have subsequently tried to put forward reasons why this is the case, connecting law's immorality to its inefficiency. Alexy argued that law loses its legal character when it is ''unjust in the extreme[64]'' as it necessarily ''lay[s]

[60] Simon Lavis, ''The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the ''Rupture Thesis'' in the Anglo-American Legal Academy'', International Journal for the Semiotics of Law – Revue Internationale de Sémiotique Juridique 31, no. 4 (2018): p. 746.

[61] Fuller, The Morality of Law, pp. 42, 44, 153.

[62] Radbruch, ''Statutory Lawlessness and Supra-Statutory Law (1946)'', p. 7.

[63] Radbruch, p. 8.

claim to correctness[65]''. Crowe, similarly, stated that extremely morally iniquitous laws would fail as laws as they would be rejected by the general public and thus fail to govern.[66]

There are at least two reasons to reject the strong view. Firstly, Alexy's and Crowe's empirical observations are not true of a lot of examples of evil legal systems. First, as Crowe himself admits, ''[t]here are, of course, numerous examples in human history where heinous and repugnant laws have nonetheless succeeded in gaining widespread acceptance within the community[67]''. Second, evil regimes may utilise coercion to suppress resistance to evil law on moral grounds – and have in fact done so quite effectively. Secondly, independently of that, as Finnis claims, ''[evil] rules are accepted in the courts as guides to judicial decision, or on the ground'' and ''satisfy the criteria of validity laid down by constitutional or other legal rules[68]''. Excluding evil law from the category of 'law' entirely may cause us to overlook the fact that those laws were perceived as creating rights and duties. At first sight, there is no direct contradiction between this claim and Radbruch's argument, as one can imagine Radbruch accepting the fact that the legal officials in the Nazi legal system treated Nazi laws flouting equality as morally binding. However, claiming that these laws are not laws in the first place might be challenging for the inquiry about the way these officials reasoned by muddying the investigation into how these laws might be similar to non-evil ones.

2. *Weak argument*

To legal positivists such as Hart, the perception that those rights and duties existed and, as we will see below, the regularity of their functioning are enough to equate evil legal systems to their 'normal' counterparts lest we allow an inappropriate conflation of law and morality.[69] However, Finnis, in his weaker argument from the perspective of external morality – as juxtaposed to the previously ref-

[64] Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford, New York: Oxford University Press, 2009), pp. 40 ff., 128–129.

[65] Alexy, pp. 35 ff., 127–128.

[66] Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge: Cambridge University Press, 2019), pp. 176–177.

[67] Crowe, p. 176.

[68] Finnis, Natural Law and Natural Rights, p. 365.

[69] Hart, ''Positivism and the Separation of Law and Morals'', pp. 619–621.

erenced strong argument, thinks otherwise. He writes that, since the main task of the legal theorist is to describe reasons for why having law is important from the practical viewpoint[70] and identify the systems in which these things are missing as defective,[71] one cannot help but engage in evaluation. There can be many internal points of view (or ''legal viewpoints'') based on one's reasons for following the law, and it is a viewpoint ''in which a legal obligation is treated as at least presumptively a moral obligation'' that should be the focus of one's inquiry.[72] Even more so, this ''central case'' should be the viewpoint of those whose views on morality or ''practical reasonableness'' are themselves practically reasonable.[73] As a result, quoting Aquinas, he claims that despite unjust, including evil, being law *secundum quid* (in a secondary sense), it is not law *simpliciter* (in a primary sense).[74]

However, one can accept the central case methodology and not agree that the central case of law is the one defined by Finnis or, more generally, is to be described with reference to some moral value. One can demarcate the central and peripheral cases based on ''epistemic values'' (evidentiary adequacy, simplicity, methodological conservatism, explanatory consilience, *etc.*) and not ''moral values'' (Finnis's ''practical reasonableness:).[75] Or, in other words, a theory of law can (and even must) be indirectly evaluative though it need not be directly evaluative.[76] Therefore, one can imagine a descriptivist 'central case' of law that will have nothing to do with external morality.[77] In his reconstruction of the central case of law, Kramer notes that, to him, a central case of legal institutions is one where governance takes place in accordance with the rule of law requirements to a ''significant'' extent,[78] including even cases when this regime is evil.[79] In other words, both just and unjust (evil) legal

[70] Finnis, Natural Law and Natural Rights, p. 16.

[71] Finnis, p. 16.

[72] Finnis, pp. 13–15.

[73] Finnis, p. 15.

[74] Finnis, pp. 363–364; Aquinas, Summa Theologica, Part I–II Q92 A1 ad. 4.

[75] Brian Leiter, ''Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence'', The American Journal of Jurisprudence 48, no. 1 (1 January 2003): pp. 34–35.

[76] Julie Dickson, Evaluation and Legal Theory, Legal Theory Today (Oxford: Hart Publishing, 2001), pp. 52–53.

[77] Leiter, ''Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence'', pp. 35–37.

[78] Matthew H. Kramer, In Defense of Legal Positivism: Law Without Trimmings, In Defense of Legal Positivism (Oxford: Oxford University Press, 1999), p. 239.

systems may thus be central cases of law, while the real borderline cases of law would be, for instance, the legal systems of 'failed' states that cannot govern by law.

B. *Internal Morality of Law*

Another argument against classifying evil law as law is that evil law is not law-like enough. It was most famously advanced by Fuller, to whom law had to at least minimally conform to the eight principles of legality.[80] Nazi law, on his account, represented a 'rupture' from legality so defined, as it openly defied such requirements as non-retroactivity[81] – as illegal executions were later made 'legal' by retroactive ordinances[82] – or publicity[83] – as there were ''repeated rumours of 'secret laws'[84]''. In addition, Fuller noted that Nazi laws were often 'bypassed' by judges and other officials if they became inconvenient.[85] In other words, Nazi law was not legally binding even from the internal point of view. To use two common metaphors, the 'law' of the Nazi state was more like a collection of disparate gunman's orders,[86] and the 'state' itself – a band of robbers.[87]

Fuller's argument complements some treatments of evil regimes in post-WW2 political theory. The 'totalitarian' model claims that evil states wholly reject legality. Most notably, Arendt's seminal work *The Origins of Totalitarianism* describes ''totalitarian lawfulness'' (in both Nazi Germany and Soviet Union) as ''defying legality'',[88] including ''even its own positive laws[89]''. Neumann, similarly, referred to Nazi Germany as *Behemoth* – ''a non-state, a chaos, a rule of lawlessness and anarchy[90]''. In the same vein, Neiman singles out

[79] Kramer, p. 236.

[80] Fuller, The Morality of Law, p. 33.

[81] Fuller, ''Positivism and Fidelity to Law'', pp. 650–651; Fuller, The Morality of Law, p. 40.

[82] Fuller, ''Positivism and Fidelity to Law'', p. 650.

[83] Fuller, p. 652; Fuller, The Morality of Law, p. 40.

[84] Fuller, ''Positivism and Fidelity to Law'', p. 651.

[85] Fuller, p. 652; Fuller, The Morality of Law, p. 40.

[86] Hart, The Concept of Law, pp. 19 ff.

[87] Aurelius Augustine of Hippo, The Works of Aurelius Augustine, Bishop of Hippo, trans. Rev. Marcus Dods, vol. 1 (The City of God) (Edinburgh: T. & T. Clark, 1871), IV, 4, https://www.gutenberg.org/files/45304/45304-h/45304-h.htm.

[88] Hannah Arendt, The Origins of Totalitarianism (New York: Harcourt Brace Jovanovich, 1973), p. 462.

[89] Arendt, p. 462.

contingency – the opposite of Fullerian legality – as one of the hallmarks of what she calls 'modern evil.' Soviet terror, she says, ''functioned […] at random, making it impossible to predict what actions could lead to arrest or execution''.[91] This contingency was magnified when it came to groups targeted by evil regimes and occupying a 'second-class' status within the legal system, such as non-Aryan victims of Nazi terror.[92]

Fuller's analysis, however, bears little relevance to actual historical experience of referenced evil legal systems that contained not just rules violating Fuller's principles of legality, but also – and predominantly so – rules that were unproblematic from the Rule of Law standpoint. Neumann's position was not corroborated by the way Nazi law actually operated on the ground.[93] To Neumann's 'Behemoth' account of the Nazi state one can juxtapose Fraenkel's 'dual state' model. Fraenkel wrote that Nazi Germany combined both the 'prerogative state' – ''[t]hat governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees[94]'' - and the 'normative state' – an ''administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies[95]''. The same pattern has been observed with regard to Stalinist law, torn between legality (*'zakonnost''*) and party-orientation (*'partiinost''*).[96] When it comes to the antebellum United States, the dualism of law and terror is just as stark. Young and Meiser, while not explicitly drawing on Fraenkel despite using the term 'dual state', write that it could be best described as an amalgam of a 'predatory state' in its dealings with non-white law-subjects that were dispossessed (in case of Native Americans) or enslaved (in case of African Americans) and a 'contract state', when it comes to the

[90] Franz L. Neumann, Behemoth: The Structure and Practice of National Socialism (London: Victor Gollancz Ltd., 1942), p. 5.

[91] Neiman, Evil in Modern Thought, p. 259.

[92] Neiman, p. 259.

[93] Jens Meierhenrich, The Remnants of the Rechtsstaat: An Ethnography of Nazi Law (Oxford: Oxford University Press, 2018), p. 44.

[94] Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship (Oxford: Oxford University Press, 2017), p. xiii.

[95] Fraenkel, p. xiii.

[96] Robert Sharlet, ''Stalinism and Soviet Legal Culture'', in Stalinism: Essays in Historical Interpretation, ed. Robert C. Tucker (New Brunswick: Transaction Publishers, 1999), pp. 155 ff.

dominant group of Anglo-American males who enjoyed the benefits of ''a prosperous, expanding, liberal democratic society[97]''.

Even more so, political terror did not always assume a 'prerogative' form and was often supported by the normative state. Despite its obvious immorality, the early Nazi anti-Jewish legal program before the *Kristallnacht* was 'law' even under Fuller's view. As Rundle noted, the legalised terror against Jews until the 'Final Solution' did not function as ''the gunman writ large'', but was a system ''in which there remained a general measure of congruence between official action and declared rule that is crucial to the very idea of governance through law[98]''. The Stalinist terror was equally ''not part of a lawless, irrational, and excessive use of state power'', but ''law-full to its core[99].'' Sharlet described two forms of this 'jurisprudence of terror': positing of vague rules malleable to different interpretations, such as the aforementioned Article 58, and making ''abrupt, undiscussed, or unannounced changes in legal rules (or their application)'' such as the amendments to the RSFSR Code of Criminal Procedure following the assassination of Kirov and the functioning of the NKVD 'special boards'.[100] The political 'show trials' were ''the epitome of the jurisprudence of terror[101]''. In the antebellum United States, similarly, slavery was explicitly supported by law from 'Slave Codes' on the state level up to the federal level 'Fugitive Slave Clause' of the US Constitution, Fugitive Slave Acts and the *Dred Scott* ruling.

VI. USE AND ABUSE OF 'EVIL'

A. Evil Law as a 'Black Hole'?

Even if evil law is a distinct form of law, 'evil' still might not be the right label. One critique of the use of the concept of evil is that it is useless and does not contribute to our understanding of persons,

[97] Richard Young and Jeffrey Meiser, ''Race and the Dual State in the Early American Republic'', in Race and American Political Development, ed. Joseph Lowndes, Julie Novkov, and Dorian T. Warren (New York: Routledge, 2008), p. 33.

[98] Kristen Rundle, ''The Impossibility of an Exterminatory Legality: Law and the Holocaust'', The University of Toronto Law Journal 59, no. 1 (2009): p. 89.

[99] Cosmin Cercel, Towards a Jurisprudence of State Communism: Law and the Failure of Revolution (Abingdon, New York: Routledge, 2018), pp. 110–111.

[100] Sharlet, ''Stalinism and Soviet Legal Culture'', pp. 164–165.

[101] Sharlet, p. 166.

deeds, and institutions we deem as such, representing, as per Cole, a 'black-hole concept' belonging to the realm of mythology rather than philosophy,[102] failing to understand the evil-does' history, motives, and psychology.[103]

To look at whether evil law has explanatorily relevance, we need to define what exactly needs explaining. Garrard argues that, when looking for the explanatory power of the concept of evil, we seek to answer two questions – what makes evil special (*i.e.*, different from mere badness) and why such acts are performed.[104] Taking just the first question, evil law is far from being a 'black hole' – it is possible to say what evil law *is*, as it has been defined before. Moreover, as was also argued above, 'evil' law is more than just 'very bad' law, as it is not 'manageable by law' in Dyzenhaus's sense.[105] This makes this category of law worth distinguishing – and recognizing this clarifies rather than muddles our knowledge.

As to the second question posed by Garrard, the one that Cole was mainly preoccupied with, I reply that an answer to this question is not necessary. Firstly, using 'evil law' in no way forecloses discussions about ''history, motives, and psychology'' behind it. This paper is focused on one type of evil institution (evil law), rather than on evil persons that are at the centre of Cole's inquiry, so the questions of ''motives'' and ''psychology'' are superfluous unless we are talking about evil law from the perspective of officials that administer it, subjects that follow it, or other agents.

Secondly, just because the use of the concept evil law does not explain these questions, it does not render the concept useless. As Russell says,

> ''Many moral concepts, such as the concepts of good, right, bad, and wrong, appear to be purely evaluative or prescriptive, and hence appear not to serve the explanatory function identified by Cole. Nonetheless, we could not build an ethical theory without such basic, non-explanatory concepts[106]''.

[102] Phillip A. Cole, The Myth of Evil: Demonizing the Enemy (Westport: Praeger, 2006), p. 236.

[103] Cole, pp. 236–237.

[104] Eve Garrard, ''Evil as an Explanatory Concept'', The Monist 85, no. 2 (2002): pp. 321.

[105] See Section IV.A. David Dyzenhaus, ''Dworkin and Unjust Law'', in The Legacy of Ronald Dworkin (Oxford: Oxford University Press, 2016), p. 137.

[106] Luke Russell, Evil: A Philosophical Investigation, Evil (Oxford: Oxford University Press, 2014), p. 197.

I contend that evil law belongs to this family of concepts. Garrard writes that, despite the contested explanatory power of such concepts, in the context of atrocities such as the Holocaust, as our assessment of such without drawing on the concept of evil is ''hopelessly inadequate[107]''. As has been argued before in Section II, while the concept of evil law does not aid us in understanding *why* actors within[108] evil legal systems act as they do, it provides us with requisite vocabulary needed to for a theoretical inquiry into this question or more, as well as adds moral clarity to the conversation surrounding these matters.

B. The Dangers of 'Evil'

Even if evil law is a useful concept, one cannot deny that it is fraught with emotion, and not of the mild or pleasant kind. For this reason, Cole says that invoking the concept of evil necessarily means engaging in ''a highly dangerous and inhumane discourse[109]''. This idea can be traced back to Nietzsche's *On the Genealogy of Morality*, where he claims that the concept of evil arose as a result of *ressentiment* (envy, resentment, and hatred) of the strong ('nobles)' by the weak ('slaves').[110] Ultimately, *ressentiment* created a distorted view of life that ''judges relief from suffering as more valuable than creative expression and accomplishment[111]''. Despite the controversies surrounding this text, Cole still sees some truth in it as it expresses how ''morality can control the masses[112]'', *i.e.*, how naming the 'nobles' 'evil' helps 'slaves' revolt against them. Cole says, however, that rather than being directed at the strong, in practice the discourse of evil, motivated not by *ressentiment*, but fear,[113] has been weaponised against marginalised groups who do not threaten those in power.[114] Those who are deemed evil – ''the vampire, the witch, the Jew, the

[107] Garrard, ''Evil as an Explanatory Concept'', p. 323.

[108] Cole, The Myth of Evil, p. 21.

[109] Cole, 21.

[110] Friedrich Nietzsche, ''On the Genealogy of Morality'' and Other Writings, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2006), pp. 20–22.

[111] Calder, 'The Concept of Evil'. Nietzsche, pp. 26 ff.

[112] Cole, The Myth of Evil, p. 74.

[113] Cole, p. 75.

[114] Cole, p. 74.

migrant, the asylum seeker, the Gypsy, the 'Islamicist' [*sic*] terrorist[115]'' – are seen as ''not *really* [emphasis mine] human[116]'', foreclosing any ''negotiation, reform, or redemption[117]'' or ''understanding or communication[118]''.

To what extent, however, does Cole's argument apply to the concept of evil *law*? One can argue that calling a person or a group of persons evil is different from calling a legal system evil. Card argues that organizations, unlike persons, ''need have no dignity or inherent worth[119].'' As a result, ''it is fair to say that 'evil' really is a totalizing judgment[120]'' in case of the former, and not the latter. However, Cole could respond that law is not depersonalised – it is a human artefact. The 'evil' quality of law necessarily reflects on those involved in drafting, applying, and following it. Moreover, 'demonization of the enemy' can occur on a global scale – not just individuals and groups, but whole political communities may be deemed 'evil'. Cole cites atrocities committed under the banner of the Iraq War and the War on Terror as direct consequence of such demonization.[121]

A better argument would be that ''[i]f the likelihood of the ideological abuse of a concept were sufficient reason to abandon the concept, we should probably abandon all normative concepts, certainly 'right' and 'wrong'[122]''. In other words, *abuse* of the concept should not be a reason to abandon its proper *use*. According to Card, there is a proper use to the discourse of evil that is neither irrational (based on *ressentiment* or fear) nor harmful (promoting wrong values or demonizing outsiders). She, quite boldly, asks: ''[h]ow much mythology surrounding hatred <...> comes from those who have earned others' hatreds?[123]'' As a result, she decides to center on the victims' perspective and comes to the conclusion that 'judgments of evil' stem neither from *ressentiment* (as per Nietzsche) nor fear (as per

[115] Cole, p. 81.

[116] Cole, p. 236.

[117] Cole, p. 236. See also Cole, p. 233.

[118] Cole, The Myth of Evil, p. 233.

[119] Card, The Atrocity Paradigm, p. 177.

[120] Card, p. 102.

[121] Cole, The Myth of Evil, pp. 224 ff., 215 ff.

[122] Claudia Card, Confronting Evils: Terrorism, Torture, Genocide (Cambridge: Cambridge University Press, 2010), p. 15.

[123] Card, The Atrocity Paradigm, p. 49.

Cole), but express the ''perspective of those who find themselves <...> wronged[124]''. Negotiation, reform, redemption, understanding, and communication are not the only legitimate ways of responding to harm of enormous magnitude that evil law causes. Acknowledging harm, assigning blame, and demanding remedies is just as important. In the transitional justice context, Saunders argues that uncritically valorizing forgiveness over these may stand in the way of the victims getting their just due.[125] Going further than Card, she even claims that evil legal systems *ought* to be feared and resented (and maybe even ''demonized''), as these sentiments ''are not necessarily threatening and may indeed contribute to the establishment of a positive peace[126]''. ''The indignation raised by cruelty and injustice, and the desire of having it punished,'' she quotes Butler, as well as ''resentment against vice and wickedness'', are what binds society together.[127] Finally, Saunders would probably speak of Cole's approach as ''reframing'', undeservedly focusing on empathizing with the perpetrator, often at the expense of recognizing the harm caused by their actions and suffering felt by the victim.[128] What is true in the transitional justice context is twice appropriate when it comes to resisting against evil law in real time, when calling a spade a spade is particularly crucial.

VII. CONCLUSION

All in all, I have made a case for introducing the concept of evil law when describing law's relationship with extreme moral iniquity, both in positive and negative terms. Specifically, I have come to the following conclusions. Firstly (as per Section II), I outlined that using the concept of evil law can yield significant conceptual and moral benefits. Secondly (Sections III and IV), I established that evil law is conceptually distinct from unjust law and can be defined as *law, which, if interpreted in its best light, will inflict or enable intolerable harm (including atrocities) to victims themselves*. Thirdly (Section V), I suc-

[124] Card, p. 46.

[125] Rebecca Saunders, ''Questionable Associations: The Role of Forgiveness in Transitional Justice'', International Journal of Transitional Justice 5, no. 1 (1 March 2011): pp. 120, 130 ff.

[126] Saunders, p. 120.

[127] Joseph Butler, 'Sermon VIII: Upon Resentment and Forgiveness of Injuries', in Fifteen Sermons Preached at the Rolls Chapel (Alexandria, VA: Virginia Theological Seminary, 2005), http://anglicanhistory.org/butler/rolls/. Saunders, 'Questionable Associations', 133.

[128] Saunders, ''Questionable Associations'', pp. 120, 133, 141.

cessfully argued that evil law is law despite critiques from external and internal morality. Fourthly and finally (Section VI), I have refuted the objection that the vocabulary of evil that my paper employs is empty and dangerous. My work here is not fully done yet – while bringing a category of evil law to the forefront as a valuable heuristic tool, more needs to be said about how evil law aids wicked regimes, how it can be resisted, and how to move on from it in the course of transitional justice. Evil law should be studied more carefully – for the sake of jurisprudence and the world at large.

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