

**“This is not like any other legal question”: A Brief History of Nazi Law Before
UK and US Courts**

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Abstract

In the forty-five years since the appearance of the Hart/Fuller debate in the pages of the *Harvard Law Review*, the question of the correct classification of “Nazi law” has been at the centre of Anglo-American jurisprudence. The idea of “Nazi law” as “not law”, derived from the work and intellectual biography of the German legal theorist

Gustav Radbruch, appears to be the dominant view today. This article places these theoretical debates into the concrete historical context of decided cases in which courts in Britain and America were faced with the practical question of what effect, if any, to give to so-called “Nazi laws”. I argue that courts operating in the Anglo-American tradition have always reflected the tensions between natural law and positivism and that any simple characterization of “Nazi law” as “not law” is not tenable.

1. Introduction

This year, 2003, marks the forty-fifth anniversary of the appearance of the Hart/Fuller debate in the pages of the *Harvard Law Review*.¹ The central tenets of the arguments, which continue to this day, between legal positivism and natural law, are staked out in the pages of this leading American journal. In this article I attempt to add to the mix and complexity of these jurisprudential debates by exploring the issue at the core of the Hart/Fuller disagreement about “law” in the concrete context of a series of decided cases. I explore the implications for current jurisprudence of our historically and discursively constructed images of “Nazi law”. In what follows, I offer an examination of most of the cases which have compelled British and American courts to confront “Nazi law”. In these decisions, courts in these common law jurisdictions were forced to apply the categories of recognizable causes of action and the principles of private international law to instances involving direct appeals to the laws operating under the Nazi regime. By taking the Hart/Fuller debate out of the potentially sterile atmosphere of esoteric academic debate and placing the issues arising out of their interventions into the world of “real law”, I hope to demonstrate some of the ways in which “Nazi law” has always raised basic questions about what judges and lawyers do and what they should do.

¹ H.L.A. Hart, “Positivism and the Separation of Law and Morals”, 71 *Harvard L.R.* 593 (1958); Lon Fuller, “Positivism and Fidelity to Law- A Reply to Professor Hart”, *ibid.*, at 630.

Central to the disagreement between Hart and Fuller, and more generally between positivists and proponents of natural law theories, was and is

... the problem posed by the existence of morally evil law.²

For Hart, the problem of a morally evil law is still a problem of law, while for Fuller, such a “law” is in the end “not law”. Thirteen years after the defeat of Hitler’s Germany and the restoration of democracy and the rule of law in Europe, Hart and Fuller focused their disagreement in practical terms on the jurisprudence of Nazi law. Was “Nazi law” law or was it law in form only? Of course, this formula obscures the subtleties and complexities of the argument between the two legal philosophers and between the two schools of thought which for convenience sake I shall simply (and simplistically) label positivism and natural law. Yet, the idea of Nazi law as not law does resonate not just at the core of the Hart/Fuller debate but also with much common and jurisprudential understanding of the state of play which existed in German legal circles between 1933 and 1945.³

Both Hart and Fuller engaged with the writings of German legal philosopher Gustav Radbruch. Radbruch’s intellectual journey through the trials of Nazi law and jurisprudence is relatively well-known. His transformation on the road to the

² Hart, *ibid.*, at 616.

³ See David Fraser, “‘the outsider does not see all the game’: Perceptions of German Law in Anglo-American Legal Scholarship, 1933-1940’, in Christian Joerges and Narvaj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, (Oxford and Portland: Hart, 2003) and David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust*, (Durham: Carolina Academic Press, 2003) (forthcoming) for examinations of the historical construction of the Nazi law/German law debate.

Damascus of legal philosophy from an adherent of German legal positivism to a supporter of the idea of a moral core or justice as a prerequisite for valid law is at the heart of debates even today about these issues. Legal positivism, a distortion of fidelity to law, or at least the legal form, was for Radbruch and others, a key factor in what was for them the destruction of German legality after 1933. It is not my intention here to address again the debates and issues arising from legal positivism and natural law theories generally or in the particular context of Germany from 1933 until 1945. Others have done so in this context and in the context of other contemporaneous pernicious legal systems.⁴ But it is important for the purposes of the specific topic of this essay, the treatment of Nazi law in cases before British and American courts, to nonetheless touch on these and related issues, however briefly, in order to set some sort of preliminary framework for what follows.

The Radbruch formula, which again central to the Hart/Fuller debate and to many substantive legal decisions before German courts on the question of the recognition and/or application of “Nazi law”, and upon which I believe some of the cases which I examine in the following sections of this essay were implicitly based, is at first blush, a rather simple one. He wrote that:

The conflict between justice and legal certainty should be resolved accordingly: Preference is given to the positive law, duly enacted and secured by state power as it is, even when it is unjust and fails to benefit the people,

⁴ See e.g., Walter Ott and Franziska Buob, “Did Legal Positivism Render German Jurists Defenceless During the Third Reich?”, 2 *Social & Legal Studies* 91 (1993); Richard Weisberg, *Vichy Law and the Holocaust in France*, (New York: New York University Press, 1996); Vivian Grosswald Curran, “The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France”, 50 *Hastings L. J.* 1, (1998).

unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, “false law” (*unrichtiges Recht*) and must therefore yield to justice. It is impossible to draw a sharper line between cases of statutory injustice and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the promulgation of positive law, then the statute is not merely “false 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.⁵

Hart and Fuller choose to examine the strengths and weaknesses of the Radbruch approach in the specific context of one important German legal decision, which has become known as the grudge informer case. For Hart, a morally iniquitous law and legal system, under which a wife informed on her husband for base motives about a traitorous statement he allegedly made about Hitler, and pursuant to which judges sentenced the husband to death, was still law. Everyone acted under and was therefore faithful to, law. For Fuller, the “not law” nature of the whole situation was equally obvious. He wrote:

⁵ “Gesetzliches Unrecht und übergesetzliches recht”, 1 *Süddeutsche Juristenzeitung* 105, (1946); Reprinted in *Der Mensch inm Recht*, (Göttingen, 1957), 111-124 at 119. I take most of the translation from Thomas Merten’s excellent discussion of Radbruch’s jurisprudence, “Nazism, Legal Positivism and Radbruch’s Thesis on Statutory Injustice”, (unpublished manuscript) 2002.

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality law itself that it ceases to be a legal system.⁶

Before moving on to the more directly relevant discussion of the context of the Hart/Fuller debate in practical legal terms, one important, if somewhat parenthetical issue, is raised by the articles in the pages of the *Harvard Law Review*. It might strike some as perhaps bizarre or idiosyncratic that the authors should chose to focus their efforts on a case like the grudge informer question. For many, the central issues and dilemmas of Nazi legality were and are posed most starkly in the various legal mechanisms, statutes, regulations, police orders etc. deployed by the state against Jewish Germans. Surely the question raised by the almost unique case of the grudge informer was raised more clearly in the series of anti-Jewish laws which were at the core of the ideological, jurisprudential and practical reality of Nazi legality.⁷ Why then, did they choose to focus on the grudge informer case? Was it because the case was relatively recent and featured in Fuller's jurisprudence course? Was it because anti-Jewish laws were so clearly not law that they created no basis for debate? That seems unlikely given the basic tenor of Hart's position? Could it be that they provided no basis for debate from the natural law position? America still suffered from race

⁶ Op. cit., at 660.

⁷ I do not wish to assert here that informing was in any way a "one off" or limited phenomenon under the Nazis. It was in fact a key element in the system of Nazi law enforcement. See e.g. Robert Gellately, *The Gestapo and German Society: Enforcing Racial Policy 1933-45*, (Oxford and New York, Oxford University Press, 1990) and *Backing Hitler*, (Oxford and New York: Oxford University Press, 2001); Eric A. Johnson, *Nazi Terror: The Gestapo, Jews and Ordinary Germans*, (New York: Basic Books, 1999).

based laws in the South, the exclusion, *de facto* if not *de jure*, of American Jews from Ivy League Universities was of a recent vintage. Where did Fuller stand on these questions? Was it perhaps that in the shadow of the Holocaust, anti-Jewish laws were more likely to give rise to passionate and emotional debate than to reasoned jurisprudential discourse? For Hart, the entire Radbruch debate could be and was characterized exactly thus.

... it certainly is less an intellectual argument against the Utilitarian distinction than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience.⁸

In the end, it is probably impossible to discover why the two academics chose the grudge informer case as a paradigm of Nazi legality and did not address anti-Jewish laws. In a strange and important way, however, this choice does bring us to the most important aspect, from both the practical and the more theoretical jurisprudential perspectives, of the question of the treatment of Nazi law cases and the judicial systems of the United Kingdom and the United States. Just what is “Nazi law”? Whether Nazi law is law or “not law” or “false law”, this basic taxonomical, definitional, boundary setting, issue must first be addressed. The fate of Nazi law, and of litigants who for whatever reason sought to invoke its substantive norms and applicability before British and American courts, must first and foremost, depend on whether it is, or was, Nazi law. A German law, dated between 1933 and 1945, is not, except in a literal, temporal sense, a Nazi law. Is this enough to settle or to end any jurisprudential inquiry into the nature of Nazi law? If the responsive is affirmative,

⁸ Op. cit., at 615.

this would mean that all laws passed in Germany at the relevant time would be “Nazi law” and potentially then “false law”. Legal relationships formed and created under such measures would be rendered at least problematic and at most, void *ab initio*. The question of practical and jurisprudential import here then is whether there is a semiotically and legally synonymous relationship between and among, Nazi law, German law and false law. A law passed in Germany between 1933 and 1945 is, without doubt, a German law. Does that make it *ipso facto* a false law or is something more required? In jurisprudential and practical terms can a law be a Nazi law if, and only if, at some level, it is impregnated with Nazi ideology? While the temporal factor may serve as a starting point for process of correct legal classification, it has never, except for the most simpleminded or obtuse lawyer, been the conclusive element. Any deeper analysis into the proper way of characterizing Nazi law, would not, of course, be without its jurisprudential and practical difficulties? What is Nazi ideology? Is all Nazi ideology necessary and inherently “evil”? For example, we know that Nazi ideology saw the creation of a master race of Aryans as central to the function of the state and of the law. At some level, one could argue that any legal measure put in place to concretize this ideological goal would be “Nazi” law. Yet, we also know that the Nazis used measures such as financial payments to mothers who produced healthy Aryan babies as part of the practical implementation of their eugenic view of the world. Does this mean that any and all payments by the German state to German mothers were null and void *ab initio* as “false law”? Are all marriages entered into for the avowed purpose of serving the “public welfare” by allowing for the propagation of the “Aryan race” to be annulled? Similarly, the purely historical or temporal approach to Nazi legality would have serious consequences for certain categories of victims of Nazi persecution. In fact and

in law, victims of Nazi persecution became common criminals as they were rendered outside the taxonomy of “Nazi” law. The two most well-known examples of such victims of post-Nazi legality are of course, male homosexuals and Roma and Sinti peoples targeted by the Nazi special police. Because the legal basis for the arrest and trial of those enemies of the *Volksgemeinschaft* who posed a threat for wasting valuable German seed, was the preexisting Paragraph 175 of Penal Code, which the Nazi regime simply modified, male homosexuals were for the most part not considered to be victims of the Nazis.⁹ Similarly, because the history of persecution and criminalization of Roma and Sinti in Germany predated the Nazi rise to power, Gypsies were also legally placed outside the category “victim of Nazi persecution”.¹⁰ Thus, the problems posed by any simplistic rendering of the category “Nazi law” can and did lead to substantive injustice through the effect of taxonomical limiting readings of jurisprudential imperatives. We must not be limited in our ultimate Radbruchian inquiries, if that is our goal, by any assertion that “evil laws” are limited by and to the rubric “Nazi law”.

At the time the Hart/Fuller articles were written and Radbruch’s formula was at the centre of academic jurisprudential debate, the same issues took on an importance in practical terms. German courts continued to be faced with a series of decisions relating to the legal consequences, if any, arising out of various aspects of Nazi legality. Again, it is beyond the scope of this paper to pursue the detail of post-war German decisions concerning various Nazi law and judicial decisions during the Nazi

⁹ On the legal persecution of homosexuals, see Günter Grau, (ed.), *Hidden Holocaust*, (London and New York: Cassell, 1995).

¹⁰ See e.g., Gilad Margalit, “The Justice System of the Federal Republic of Germany and the Nazi Persecution of the Gypsies”, 11 *Holocaust and Genocide Studies* 330, (1997).

period. Article 123 of the Basic Law (*Grundgesetz*) of the then Federal Republic provided that all law which existed prior to the coming into force of the Constitution in 1949 would remain in effect unless they were contrary to the provisions of the Basic Law. But this applied to all pre-existing laws and not just those of the Nazi period. While there were cases which arose questioning the validity of some Nazi era laws, there was never in German legal circles a “coming to terms with the past” (*Vergangenheitsbewältigung*) in the sense of a thorough and complete “deNazification” of Nazi era laws.¹¹

As I shall highlight in the next section, the German solution to problems of Nazi law would have a direct impact on later decisions in Britain in particular. We must also bear in mind that the German courts from the earliest days adopted a careful juridical taxonomy of Nazi law and of law of the Nazi period in order to obey, what was for them the most important Radbruchian injunction, to serve justice. Thus, one German legal scholar, commenting on the Hart/Fuller debate wrote

Altogether, administrative and judicial abuses of law appear to have accounted for more of the knotty legal problems of the post-Hitler era than did the legislative enactments of the régime. Moreover, not all decisions arrived at on the basis of objectionable statutes were objectionable *per se*, while many decisions based upon pre-Nazi statutes were. Neither a purely legislative nor a purely judicial review of the legal Nazi legacy could offer a comprehensive solution. The Federal Constitutional Court has therefore developed and applied a sociological theory of law with a view to a compromise solution, i.e.,

¹¹ Thanks to Christian Joerges and Thorsten Keiser for clarifying many of the points raised by this aspect of German and Nazi law.

a solution which permits the courts to weed out the unwholesome, while preserving such legal relationships as, though based upon Nazi enactments, require preservation in the interest of legal continuity and order.¹²

In addition to the key point that the issues of legal categorization posed in the Radbruch formula are practically and jurisprudentially complex and contingent, it is also important to note at this juncture, however cursorily, the reason why “the legislative enactments of the régime” did not pose, at this point in time, “knotty legal problems” for the German courts.

From the earliest days following the Allied victory in Europe, the deNazification of Germany was at the heart of efforts to restore democracy and the rule of law. While the primary focus of the deNazification efforts was on the personnel of the Nazi state and economic apparatus, some steps also centered on the purification or restoration of the German legal system.¹³ The instructions issued to General Eisenhower in April 1945 concerning the military rule to be established in Germany specifically provided in paragraph 6b that:

¹² H. O. Pappé, “On the Validity of Judicial Decisions in the Nazi Era”, 23 *MLR* 60 (1960) at 274.

¹³ On the deNazification trial process aimed at purging and punishing the most guilty individuals, see Frank M. Buscher, *The U.S. War Crimes Trial Program in Germany, 1946-1955*, (New York: Greenwood Press, 1989); Elmer Plischke, “Denazification Law and Procedure”, 41 *Am. J. Intl. L.* 807 (1947). On the restoration of German society more generally, see Lucius D. Clay, *Decision in Germany*, (Garden City, N.Y.: Doubleday & Company, 1950); Richard L. Merritt, *Democracy Imposed: U.S. Occupation Policy and the German Public, 1945-1949*, (New Haven and London: Yale University Press, 1995).

The laws purporting to establish the political structure of National Socialism and the basis of the Hitler regime and all laws, decrees and regulations which establish discriminations on grounds of race, nationality, creed or political opinions should be abrogated by the Control Council. You will render them inoperative in your zone.¹⁴

Eisenhower's *Proclamation No. 1*, issued before the formal end of the war promised that his forces would pursue a policy and jurisprudence of deNazification.

We shall overthrow the Nazi rule, dissolve the Nazi Party, and abolish the cruel, oppressive and discriminatory laws and institutions which the Party has created.¹⁵

The joint allied powers also indicated their plan to deNazify the German legal system. Paragraph 4 of the *Potsdam Agreement* declared:

All Nazi laws which provided the basis of the Hitler regime or established discriminations on the grounds of race, creed, or political opinion shall be abolished. No such discriminations, whether legal, administrative or otherwise shall be tolerated.

Control Council Law No. 1 finally enshrined the abolition of twenty-five identified Nazi laws, and various other measures adopted in each zone of occupation had either

¹⁴ United States Department of State, *Bulletin*, 17 October 1945.

¹⁵ Para. 1.

already done so, or followed suit.¹⁶ While legal instruments such as the Nuremberg Laws and subsequent Decrees which embodied the essential anti-Jewish laws of the Nazi state were among the list of the “Nazi laws” abrogated by the occupying forces, other so-called Nazi laws posed the more difficult taxonomical questions. Several practical issues arose for the lawyers charged with the task of deNazification of German law. Professor Karl Lowenstein describes in detail the legal process and structure of allied occupation government and his recitation of the problems is perhaps the best contemporary account.¹⁷ First, the omnipresence of law in the Nazi mode of rule and the concomitant omnipresence of Nazi ideology in the legal form posed important problems.

Without always being advertised by crude discriminations (which any judge may recognize as forbidden without much study), Nazi concepts had been carried into every legislative nook and cranny, and into legal fields of seemingly neutral character politically, such as corporation law, family law, insurance, cooperatives, patents, agriculture, and public health, to name only a few at random.¹⁸

Secondly, allied lawyers also found that there was not a necessary direct and irrefutable connection between “Nazi law” on the one hand and Radbruchian “false law” on the other.

¹⁶ See Control Council Law No 1, OG/CC No. 1 at 6, October 29, 1945 and Military Government Law No. 1 and Regulation No. 1, for the US zone, OG/MG, Issue A at 3 and 5, June 1, 1946.

¹⁷ See, “Law and the Legislative Process in Occupied Germany: 1”, 57 *Yale L. J.* 724 (1948) and Part II at p. 994.

¹⁸ *Op. cit.*, at 735 (footnotes omitted).

In addition, a study of legal transformations since 1933 revealed that the Nazis had introduced many technical and substantial improvements not derived from their ideological premises.¹⁹

In addition, the idea of democratizing German law to bring it into conformity with understandings of justice and equality had to confront both pre-Nazi laws which contained injustices or Nazi laws which might have otherwise been found to be acceptable, for example, tax exemptions for prolific families.²⁰ Finally, the entire project raised a basic jurisprudential question which brings us back to the pages of the *Harvard Law Review* and the Hart/Fuller debate. Should the changes effected to German law as it was purged of its Nazi content be prospective or retrospective? Could one re-establish the rule of law by imposing retrospective penal and other consequences? For Hart, this posed fewer problems than the idea of pretending that Nazi law was not law. For those, like Fuller, to whom “fidelity to law” requires an adherence to ideas of both form and content, the idea of retroactive legislation is

¹⁹ Ibid., at 736-37.

²⁰ Id., at 737. In addition, of course, lawyers then and subsequently in the Federal Republic had to confront the actual legal status of the Control Council and the occupation government. Generally accepted rules of international law, especially those embodied in the Hague Convention, placed strict limits on the legislative power and legitimacy of occupying military forces. Indeed, the policies and practices of German occupation authorities in many European countries had been strongly criticized for their lack of conformity with these norms and limits. Like the “coalition” which currently controls Iraq, the Allied authorities in Germany, while acting in what they saw as the interests of “justice”, may well have been acting in violation of the very legal norms they sought to “re-establish” in Germany. On this point, see the useful discussion in W. Friedmann, *The Allied Military Government of Germany*, (London: Stevens & Sons, 1947) especially Chapter 3 at 62 et seq..

abhorrent. Again, it is beyond the scope of this project to enter into detailed examinations of the occupation jurisprudence or of the legal practice of the Federal Republic's courts under the provisions of the Basic Law. Instead I want to focus in the following sections of this article on the ways in which these issues were confronted and dealt with within the practical confines of the judicial systems in Britain and the United States.

I hope that this inquiry will highlight several issues which I believe remain relevant to the process and self-understanding of law and lawyers today. First, I believe that the issues of the Hart/Fuller debate are of an importance which goes beyond the closed environs of the legal academy and of Jurisprudence classrooms. Second, I want to have at least raised the possibility that the invocation of "Nazi law" as an *in terrorem* argument in support of a public policy exception to rules of comity or the recognition of foreign law in conflicts of law cases as well as in other situations in legal cases in which one wishes to characterize one's opponents as beyond redemption,²¹ does not in fact pay due attention to the real questions of what we mean by "Nazi law" and/or by "false law". Finally, I believe that against the background of the cases in which courts in the United States and Britain have been confronted with issues of "Nazi law" can serve to bring us full circle in the jurisprudential world of the legal academy. As I hope to demonstrate in sections which follow, Anglo-American law has never unanimously or consistently treated Nazi law as bad law, as evil enshrined and cloaked in legal clothing or as juridical terror. Legal history is more complex than ideological or jurisprudential reductionism would have us believe.

²¹ See e.g. *Kuwait Airways Corp. v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; *Islam v. Secretary of State*, [1999] 2 AC 629; *Pearce v. University of Aston in Birmingham*, [1991] 2 All ER 461.

To pick but one example, in the 2003 revised edition of his jurisprudence text, Professor Roger Cottrell again exposes the difficulties which arise in relation to any present and future debate about Nazi law. He writes, in his discussion of the Hart/Fuller debate:

The historical example of Nazi Germany provides material to illustrate Fuller's thesis. To assume, as Hart does, that the only difference between Nazi law and English law was that the Nazis used their laws to achieve purposes odious to English people is, Fuller argues to ignore the much more fundamental moral differences between legal regimes. Nazi law made frequent and pervasive use of methods that show, in terms of Anglo-American standards, a most serious perversion of procedural regularity.²²

The "historical example of Nazi Germany", like the jurisprudential trope "Nazi law", and the gross characterization of Nazi law as a system fundamentally embodied in procedural irregularity and executive fiat, are at the heart of another historical reality and jurisprudential world. In the sections which follow, I hope to illustrate that it is time to escape the comforting generalizations of traditional and even critical jurisprudence and to begin to take Nazi law seriously.

2. *Oppenheimer v. Cattermole*, Nationality and Nazi law in the House of Lords

²² *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, (2nd edition, revised), (London: Lexis-Nexis UK).

Perhaps the best known instance in which British courts have had to deal with the Radbruchian dilemma of Nazi law, bad law and false law, is the case of *Oppenheimer v. Cattermole*.²³ This case raised and I believe continues to raise, central questions about Nazi law, public policy analysis in conflicts of laws doctrine and finally about the intellectual and ideological coherence of the jurisprudence of false law.

The facts of *Oppenheimer* are relatively straightforward. Oppenheimer, then a German Jew, had come to England in 1939, fleeing Nazi persecution. In 1948 he became a naturalized British citizen. From 1953, he received payments from the Federal Republic of Germany under the compensation scheme set up there to aid surviving victims of the Nazis. The British taxation authorities of the Inland Revenue issued an assessment for amounts owing arising out of the German payments. Oppenheimer applied for relief under the double taxation agreement between Germany and the United Kingdom. In order to succeed in his claim for relief, Oppenheimer needed to have been a dual national when he received his compensation payments for the German government as a victim of Nazi persecution.

We come to the crux of the issue and to the question of Nazi law before British courts. Clearly under the terms of his naturalization in 1948, Oppenheimer was a British subject. The only question for determination here was whether he had retained his German citizenship in the years of his taxation assessment. The House of Lords accepted the unproblematic general principle of private international law that the question of nationality was to be determined under the operative provisions of German domestic law. The question was whether under German law, Oppenheimer was a citizen of that country.

²³ [1976] AC 249.

Three individual German laws were potentially applicable in this instance. Under the German *Nationality Law* of 1913, a German citizen who was neither resident nor domiciled in Germany lost their citizenship upon gaining another nationality.

Arguably, then, if Oppenheimer had been a German citizen in 1948, he would have lost that capacity upon obtaining naturalized status in the United Kingdom. Of course, to arrive at this conclusion the Court would have to concede that as a matter of German law, and therefore of British law, the reasons for which the person was no longer resident or domiciled in Germany would be irrelevant. In other words, on the facts of this case, Oppenheimer ceased to be resident (and possibly domiciled although that is a more complex question) in 1939 when he was forced to flee Germany in the face of the impending war and ongoing anti-Jewish policies of the government of that country. The Court, were it to adopt the position that the 1913 *Nationality Law* applied, would not be directly invoking Nazi law, but it would be giving legal effect to Nazi persecution of German Jews. Thus, at this level, the position of the British taxation authorities was that the Court should accept this practical judicial consequence of Nazi anti-Jewish policies.

But the position of the Inland Revenue was even more pernicious. In 1941, the German government adopted the 13th Regulation (or Decree in some translations) under the *Reich Citizenship Law*. The *Reich Citizenship Law* was part of the infamous Nuremberg laws under which Jews were reduced to a second class status.²⁴ The 13th Regulation provided that

²⁴ Under the *Reich Citizenship Law*, of September 15, 1935, the Nazi state created a new bifurcated ideal of German nationality. It divided Germans into “subjects” and “citizens”. (§1 and 2). Only a Reich citizen could be a “bearer of full political rights in accordance with the Law.” (§2 (3)). The *First Regulation to the Reich Citizenship Law*, November 14, 1935, stated that “A Jew cannot be a Reich citizen. He has no voting rights in political matters; he cannot occupy a public office.” (§ 4(1)). § 5 of

§ 1. A Jew who has his normal residence abroad cannot be a German national.

The term normal residence abroad applies when a Jew remains abroad under circumstances which indicate that he is not staying there temporarily.

§ 2. A Jew loses his German nationality with the coming into effect of this decree:

(a) If, on the coming into effect of this decree, he already has his normal residence abroad.

§ 3 provided for the forfeiture of all property belonging to Jews who lost their nationality under the operation of the Regulation.

If this legal measure was recognized as operating as part of the relevant German law, then Oppenheimer lost his German nationality not in 1948 when he became a naturalized British subject, but in November 1941 when his British residence, which was no doubt marked by “circumstances which indicate that he is not staying there temporarily”, caused him to come within the terms of the 13th Regulation. He could not benefit from the double taxation agreement because he was after November 1941, no longer a German national.

However, the case did not end there. The Court engaged into further inquiries about the state of German law as it might apply in this case. The House of Lords found as a matter of fact, and thence as a legal conclusion, that the Constitutional Court of the

the same Regulation created the definition of “Jew” and of people of mixed Jewish blood (*Mischlinge*) which would serve as the legal basis for all subsequent legal persecutions under Nazi antisemitic practices.

Federal Republic had in a 1968 decision decided that German law considered the 1941 Decree to be void *ab initio*. In other words, it had never had the effect, in German law, of depriving Oppenheimer of his German citizenship. The 13th Regulation was “false law”. However, the German Court’s decision, because of the particular jurisprudence under the *Basic Law* concerning pre existing legal norms, did not have a retrospective effect. Indeed, the *Basic Law* further complicated Oppenheimer’s position. Article 116 (2) of the *Grundgesetz*, as interpreted and applied in relation to the Nazi Regulation did not impose German citizenship on those who might have had good historical, existential reasons to reject that status. The Constitution provided that:

- (1) A German person within the meaning of this Basic Law, is, subject to further legal provisions, any person who possesses German nationality or has been admitted into the sphere of the German Reich according to the position on December 31, 1937, as a refugee or exile, member of the German people or as a spouse or descendant of such a person
- (2) Former German citizens who were deprived of their German nationality between January 30, 1933 and May 8, 1945 for political, racial or religious reasons, and their descendants, are to be renaturalized on application. They shall be considered as not having been deprived of their nationality, provided that they have taken up their residence in Germany since May 8, 1945 and have not expressed any wish to the contrary.

German law declared the 13th Regulation void *ab initio*, without retrospective effect, and allowed those who might have been affected by the practical operation of that

legal instrument to “regain” German nationality by applying for it. In other words, German Jews had not lost their nationality but they did not have German nationality imposed on them by the Constitution of the Federal Republic either. They could apply for recognition of their status and it would be granted virtually automatically.

It seems that on the most appropriate reading of the German legal position, German Jews in Oppenheimer’s position did not lose their German nationality under Nazi law, but at the same time they were not considered German citizens unless and until they indicated their willingness to adopt that status. Here, Oppenheimer falls into a constitutional legal limbo created as a result of the desire both to abolish and banish Nazi law and at the same time to recognize the existential reality of “former” German citizens.

From this point, the solution of the House of Lords to Oppenheimer’s status under German law is simple. He had not sought “to be renaturalized” under the provisions of Article 116 of the *Grundgesetz*. He had not lost his citizenship (or more precisely his nationality) under the provisions of the 13th Regulation. He was, between November 1941, or May 1945, and 1948, in some kind of legal no man’s land, both literally and figuratively. The occupation authorities, as we have seen, abolished the Nuremberg Laws and Regulations under Control Council Law No. 1, but without retrospective effect. For Lord Pearson, dissenting, the effect of the November 1941 Regulation was to render Oppenheimer stateless. For the members of the majority, the decision could rest on other grounds. Whatever his status either in November 1941, or May 1945, Oppenheimer became a British subject in 1948. When the compensation payments were made to him beginning in 1953, he was still a British subject. Because he had not made any application under the provisions of Art. 116 of the *Grundgesetz*,

and had not reestablished his residence in Germany, he had not been “renaturalized” as a German.

Instead, the legal situation which obtained was that either the 1913 *Nationality Law* came into effect or the *Basic Law* did not come into effect because he had not availed himself of its provisions. His tax liability was not determined by the 13th Regulation but by democratic German law, either under the *Kaiserreich* or under the Federal Republic’s *Grundgesetz*. As Lord Salmon wrote:

It was not the odious Nazi decree of 1941 but his own failure to apply in time under the benevolent article 116 (2) of the Basic Law enacted in 1949 which deprived him of exemption from United Kingdom income tax for the tax years in question.²⁵

Compensation payments to victims of Nazi persecution are taxable because Nazi law does not apply. The victims of Nazi persecution must pay their lawful impost as citizens of British democracy. The interpretive strategy of the Court here is intriguing since it permits itself to at one and same time read out and condemn “odious” Nazi law as “false law” while applying domestic democratic German law which in practice had the same effect on Oppenheimer. He was not a German citizen not because of what the Nazis had done, but through his own negligence. He had not transformed himself back into a German by the jurisprudential magic of Article 116. He fled to England as German Jew persecuted by the Nazis. He may have believed he had lost his nationality as a result of Nazi law, but “his own failure” deprived him of the benefit of double taxation status exemptions. The House of Lords finessed Nazi law

²⁵ Op. cit., at 284.

and yet made the victim of Nazi persecution pay for that status. As a matter of jurisprudential and legal reality, of course, Lord Pearson's "dissenting" position, which would have recognized the legal impact of the 13th Regulation, would have arrived at the same result. Oppenheimer would have been stateless after November 1941, until he acquired British citizenship in 1948. The 1913 *Nationality Law*, Control Council Law No. 1, the *Grundgesetz* and the Constitutional Court decision would have operated in exactly the same way whether the House of Lords recognized Nazi law as law or not. Oppenheimer has no one to blame but himself. The practical impact of accepting Nazi law as law, or of declaring it to be not law, had in these circumstances, exactly the same result.

It is perhaps of jurisprudential and comparative import to refer briefly here to a decision of the Supreme Court of Israel which dealt with similar questions of law. In *Casperius v. Casperius*, the Israeli court was asked to adjudicate in a succession matter.²⁶ Under Israeli law, the validity of a will made by a non-citizen is determined by the law of the testator's nationality, or if the deceased was a stateless Jew, by Jewish law. In the instant case, the testator had made, in Palestine, an unwitnessed holograph will. The deceased was at the time a German national and such a will was valid under German law. The testator died after the coming into effect of the 13th Regulation which as we have seen, deprived Jews like the testator, on its face, of German nationality. The question before the Court was one as to the applicable law, an issue to be determined by the testator's status at the time of death. In other words, would the Israeli court recognize the validity of the Regulation, pursuant to which the

²⁶ (1958) *International Law Reports* 197. For other earlier comparative law perspectives, see H. Lauterpacht, "The Nationality of Denationalized Persons", *Jewish Yearbook of International Law* 164, (1949).

deceased would be rendered stateless at the time of death, and as a consequence of which Jewish law would apply, or conversely would it refuse to acknowledge Nazi law and give effect to the will under German law? Obviously, the Court was urged to reject the Nazi law as “false law”. Yet, the Israeli Court refused to do what the House of Lords would do some twenty years later.

... this idea, in itself, is sound; however, it is not competent to enable our testator to acquire the nationality of the Nazi State. This is not like any other legal question. Otherwise, we would reach the ridiculous conclusion that, precisely because of the barbarism of the Nazi laws, a man in Israel will have to be regarded as a citizen of that barbarian state. It goes without saying that all the Nazi racial laws stand condemned in our eyes., but we are not prepared to rely on that invalidity in order to recognize, so far as concerns a Jew, the legal nexus with that base régime. Our opinion, therefore, is that despite the unconcealed anti-semitic motives of that Law, it was capable of snapping the legal tie between the State and the citizen.²⁷

The Court in Israel, for clearly enunciated public policy reasons, opts to recognize the effect, and thus the validity and operability of the Nazi law. Despite its pernicious and base motivation and informing ideology and content, which in Radbruchian terms should render it as “false law”, the Nazi law is recognized as law. To do otherwise would mean for the Court that it would have to recognize as a matter of law that a Jew was at the operative time, a citizen, or national, of the Nazi state. Ironically, the idea that a Jew could legally be a national of Nazi Germany was as abhorrent to the Israeli

²⁷ Ibid., at 197-98.

judges as it was to Nazi lawyers. principled decision-making, in the search of justice, apparently permitted the Court to recognize the binding impact and effect of a legal provision at the core of Nazi legalized antisemitism. As we shall see below, such jurisprudential ironies are far from unknown in cases involving Nazi law and common law courts.

What is also worthy of note here from the public policy perspective and from the jurisprudential standpoint can be highlighted by a return to the position of Mr. Oppenheimer. The important issue is not just that Nazi law had the same effect on Oppenheimer as the laws of the *Kaiserreich* and *Bundesrepublik*, but also that Crown law officers or lawyers acting for the government and the Inland Revenue invoked in pursuit of Oppenheimer's tax liability, the validity and binding character of Nazi law. For them, and for the Courts of England which heard this case from trial to final disposition in the House of Lords, this was a legally accepted and for some acceptable argument to make. Nazi law was not false law. It was perhaps odious but it was law nonetheless. The House of Lords somewhat disingenuously rejected the notion that Nazi law was law. The Israeli Supreme Court was at one and the same time able to reject as immoral and odious the basis of the 13th Regulation, while giving it a legal effect which avoided the conclusion that a Jew remained bound to the German state under Nazi rule. For the House of Lords, the democratic rule of law triumphed, Nazi law was rejected. The final outcome of the case, the fact that Oppenheimer had to pay tax on his German compensation monies, was perhaps secondary. For the House of Lords the ideology of law, and the jurisprudence of the rule of law was the most important point. Nazi law must be not law; it must remain always "false law". The practical symmetry of the legal fate of Mr. Oppenheimer under whatever legal rule

happened to be applied was beside the point. Mann embodies this dominant jurisprudential position.

According to true German law, the whole Hitler regime was, in matters of the relevant kind, no more than a regime of gangsters, incapable of creating law, able only to inflict invalid acts of wrong and injustice. This is not a case in which the law of Germany or, indeed, the law of mankind attributes any vindicating authority to facts or effectiveness.²⁸

Again this ideology of Nazi law and the Nazi state is well-known. It is the stuff of jurisprudential and Hollywood legend. The Gestapo in the middle of the night, SS thugs, barbarism and madness. Terror in the guise of law. Yet, for the Israeli Supreme Court, the legality and effectiveness of the Nazi anti-Jewish laws could be and was, given judicial recognition. As we have seen, for those like Karl Lowenstein who worked on a daily basis with the deNazification of German laws, the taxonomy was difficult and challenging. It is perhaps the case that the Nuremberg Laws and their progeny were the most obvious and most odious of “Nazi laws”. But that does not, as Mann and others would assert, necessarily render them not law. Nor is the characterization of the Nazi state and legal system as a bunch of judicial gangsters of much assistance either in understanding the legal reality of the Nazi regime or in analyzing the cases in which so-called Nazi law was placed under the jurisdiction of British and American courts. I now turn to a discussion of those cases, a discussion I hope will be somewhat more enlightening and useful than Mann’s jurisprudence of

²⁸ F.A. Mann, “The Present Validity of Nazi Nationality Laws”, 89 *LQR* 194 (1973) at 209.

calumny and the House of Lords' judicial legerdemain which removed Nazi law from open consideration.

3. Nationality, Nazi Law and British Courts

Oppenheimer v. Cattermole was not the first time British law and lawyers had to concern themselves with the implications of Nazi citizenship policy and other related legal issues. Indeed, shortly after the implementation of the 13th Decree, exiled German law experts in England began to consider the legal issues arising out of the legal instrument which sought to deprive German Jews of their nationality. None of them, at this stage resorted to Mann's argument about the gangster nature of Nazi law. Instead they limited themselves to technical analysis of the Regulation as if it were (as it was) just another piece of German legislation.

Dr. Alfred Kauffmann, in a publication widely circulated to the profession and judiciary, examined the basic provisions of the Regulation and offered a careful consideration of the rules of private international law as they might apply in an English court faced with interpreting or applying the law.²⁹ He considered, what, for example, would be the position of English law, in dealing with the forfeiture provisions of the Regulation under which denationalized former German Jews lost their property along with their national status? For him, normal conflicts of laws rules would apply. The forfeiture would not have extra-territorial effects but refusal to enforce foreign penal laws would not necessarily, as a matter of English law, mean

²⁹ "Denationalisation and Expropriation", 92 *The Law Journal* 93, (March 21, 1942).

that courts would not as part of normal comity recognize the transfer of title pursuant to the law should such a case arise.³⁰

More tellingly perhaps, Kauffmann argued quite simply that the law would in fact have practical effects on those it targeted. They would lose their German nationality and become stateless. He asserted that under normal conflicts of law principles operating in English courts, since under German law, a Jewish man would no longer be considered a German citizen or subject, an English woman who would in normal circumstances lose British nationality upon marriage to a German, would not suffer such a consequence, should she marry a German Jewish refugee, who by the effect of the operating and ruling law of status, would be stateless.³¹

Similarly, Dr. Paul Abel argued that the Regulation was valid domestic legislation even if one could assert, and he found this problematic and unlikely, that it violated international law.³² In other words, contemporary English academic writing, for the profession and the Bench, from experts in German and international law, on the status of the 13th Regulation, treated the Nazi law as an odious but valid piece of legislation, binding and effective as a part of German domestic law and to recognized a such pursuant to ordinary and long-standing rules of private international law before English courts.

The question of nationality under the Nazis and of the impact of those rules under British law arose first in an indirect fashion before the Patents Appeal Tribunal in 1943.³³ The issue for adjudication was whether, in an application for a patent, the

³⁰ *Ibid.*, at 94.

³¹ *Ibid.*.

³² “Denationalization”, 6 *MLB* 7 (1 942).

³³ *In the Matter of Application for Patents by A.B.*, 61 Reports of Patent, Design, and Trade Mark Cases 89, (1944).

applicant could complete the appropriate form lawfully by asserting “Austrian” nationality. In the early stages of the proceedings, the Patent Examiner had rejected the application. He argued that with the incorporation of Austria into the *Reich* in 1938, the applicant, an “Austrian”, could lawfully describe himself either as “of German nationality” or as of “no nationality, formerly Austrian”. The applicant insisted first in inserting in the appropriate place in the form “formerly a citizen of Austria”. He subsequently changed the entry to “of Austrian nationality”. While specifically limiting himself to the issues of the case, Morton J. relied on statements of official government policy at the time to find that the applicant’s wish to describe himself as “Austrian” was acceptable. The British political view was that Austria continued to exist and to suffer under the yoke of Nazi oppression. The Court echoed, at the technical level of patent application forms at least, the government line.

It does not seem to me that I have to determine in this case the nationality of this Applicant. I have only to decide whether in an application for a patent it is open to the applicant to describe himself as being “of Austrian nationality”. In my view, having regard to the statements of the Government which I have read, it is right to say that anyone who was, immediately prior to the 11th of March, 1938, a person of Austrian nationality, and who has not since that date voluntarily changed his nationality, is entitled to describe himself as “of Austrian nationality” on an application for a patent.³⁴

³⁴ *Ibid.*, at 91.

Complex issues of citizenship and nationality, of the *Anschluss* and Austria's status in international law were indirectly, at least, at play in this first British court faced with the question of adjudicating on the legality of the *Anschluss* and of the *Law on the Reunification of Austria with the German Reich*, of March 13, 1938, ruled that it would not give force and effect to those legal phenomena. The judge sitting as the Appeal Tribunal did recognize at least the theoretical possibility that an individual could voluntarily accept the legality of the "reunification". Arguably then, such an individual would not have been entitled to describe himself before an English tribunal or in a patent application as "Austrian". This raises the intriguing hypothetical possibility that an Austrian Jew, say, who was lucky enough to get out of that country after the *Anschluss*, who would have had to carry a German passport, could have been considered as someone who had "voluntarily changed his nationality". The issue for determination there would perhaps have been the "voluntary" nature of accepting German nationality when the individual had no other choice if s/he had wished to escape the Nazis. Such issues did not substantively arise in this case but the question of nationality, the 13th Decree and the status of Austria and Austrians did come directly before the Courts in the most important cases involving British justice and Nazi law in this period.

These cases follow the peregrinations of Leopold and Olga Hirsch through the British court system.³⁵ The Hirsch family were Austrian Jews. They fled Austria in 1936 and remained in France until 1941, when they left that country on a ship bound for South America. They were arrested by British authorities off Port of Spain, Trinidad, brought to the United Kingdom and interned as enemy aliens. In the original

³⁵ See *R. v. The Home Secretary, Ex parte L. and Another*, [1945] K.B. 7; *Hirsch and Another v. Somervell*, [1946] 2 All E R 27; *Hirsch and Another v. Somervell*, [1946] 2 All E R 430.

case they applied for a writ of *habeas corpus*, claiming that they had been unlawfully arrested and detained by the officials in the West Indies, when their ship was boarded in international waters some ten miles off the coast. Their capacity as a matter of British law to bring a suit of *habeas corpus* was in turn dependent on their nationality. Enemy aliens, interned during war time had no right to seek the assistance of this prerogative writ.³⁶

The Court, and it would appear the parties, accepted the validity as a matter of domestic and international law of the incorporation of Austria into the German *Reich*. This meant that as a matter of legally binding fact all parties to the proceedings accepted that at the outbreak of the war in September 1939, the Hirschs were “enemy aliens”.³⁷ Therefore, their internment was *prima facie* lawful and in any event they could not seek the relief in question. If, on the other hand, they were stateless and not therefore “enemy aliens” their complaint was at least one which could proceed. Here, again somewhat ironically from some jurisprudential perspectives, the Hirsch family relied on the provisions of the 13th Regulation. In other words, they argued that even if they had been German nationals as a result of the incorporation of Austria into Germany in March 1938, in November 1941 they were deprived of that status by the operation of German law. Here, German (or Austrian) Jews, assert before the British judicial system that the Courts of the United Kingdom should apply the provisions of Nazi Law. Nazi Law, “false law” for some, here embodied in the central antisemitism

³⁶ See *R. V. Bottrill, Ex parte Kuechenmeister*, [1947] K.B. 41. They did however, have access to other legal mechanisms and rights. See the discussion below of *Hirsch v. Somervell*. See also, *Weiss v. Weiss*, 1940 S.L.T. 447 (enemy alien having the right to seek a divorce in Scotland) and *Unger v. Preston Corporation*, [1942] 1 All ER 200 (right to sue for breach of contract of employment).

³⁷ It is an intriguing historical puzzle at this stage as to why the Hirsch family would have made such a concession.

of the Nazi state and of German legality at the time, is invoked as good law, in both senses of the term, by Jewish applicants. Nazi law will set them free.

Unfortunately, for the Hirsch family, the Court was having none of this. The question for Viscount Caldecote was not the iniquity or otherwise of Nazi law. For him, it was enough that the law was a German law and that Britain was at war.

My reply is that such changes of nationality are not recognized for very obvious reasons. If such changes were to be permitted in time of war enemy agents might acquire facilities which could be used in a way very much to the prejudice of this country.³⁸

To recognize the 13th Regulation specifically or Nazi law on nationality more generally would open the floodgates of the internment camps and set Nazi agents at large. Of course, in retrospect one might criticize the court on this instance and British internment policy in general for its lack of political *nous*, insight, concern, and discretion in treating German and Austrian Jews fleeing Nazi oppression like all “other” German or enemy aliens. The Hirschs were on a ship to South America when they were snatched by British officials based in Trinidad. They were not spies or Nazi agents. They did not come to Britain voluntarily. They were trying to get as far away from Europe as possible.

At the same time, however, it is necessary to recognize the broader principle enunciated in the case. In time of war, British courts can not be bound to follow German legislation which in theory could have decreed that all captured soldiers, for example, were traitors and were no longer German citizens. Indeed, most academic

³⁸ *Ex parte L.*, op. cit., at 10.

commentary on the case and the issues raised by it recognized at that time and later, that the principle set out therein was one which was necessary and limited to time of war. Nazi law would have set the Hirschs free, but preserving democracy required that the essential legal tool of democracy justice, the writ of *habeas corpus*, be refused them.³⁹

One final question remains at this stage. Why did the Hirschs agree to accept that the incorporation of Austria into the German *Reich* and the consequences which apparently flowed from it were lawful? We have already seen that at some level British courts, following the government's stated position, at the time might have been willing to recognize that one could be "Austrian" or at worst stateless and "formerly Austrian". The statement of facts which introduces the report of the judgment declares:

The applicants were at one time Austrian nationals but became German nationals in consequence of a German decree of July 3, 1938, the effect of which was recognized by His Majesty's Government, and therefore, when war broke out they became enemy aliens as subjects of Germany.⁴⁰

Again this raises intriguing and important questions, many of which unfortunately cannot be examined here. We know from the same statement of facts that the Hirsch family left Austria in 1938 for France. Can they have been said to have "voluntarily"

³⁹ See e.g., F. A. Mann, "Note", 61 *LQR* 126, (1945); Paul Abel, "Effect of the German Denationalization Decree of November 25th, 1941", 8 *MLR* 7, (1945); S.W. D. Rows on, "Some Private International Law Problems Arising Out of European Racial Legislation, 1933-1945", 10 *MLR* 23 (1947).

⁴⁰ *Ex parte L.*, op. cit., at 8.

acquired or accepted German nationality? That seems on the facts a significant stretch of the legal imagination. Both Mann and Abel, writing contemporaneously with the judgment raised the question of Austria. For Mann, the Moscow Declaration of the Allies concerning Austria in November 1943 clearly indicated that the British government considered the annexation of Austria to be null and void. Austria was, and remains, for many, “the first victim of the Nazis”, however counterfactual this may be in an historical or sociological sense. If the Court were acting of its own accord in recognizing and giving judicial effect to the *Anschluss*, this would, as Mann argues, raise significant question about executive and legislative relations with the judicial branch of government.⁴¹

Similarly, Abel questions why the parties consented to the idea that they were “Germans”.

If the applicants had chosen to plead the case... in that direction, this might have been an opportunity of obtaining an express judicial decision on the question of Austrian nationality.⁴²

Perhaps unfortunately for the applicants, the Hirsch family and their legal representatives chose not to pursue this line of attack in this case. Instead they opted for other tactics which brought them before the English courts again. This time they brought an action in damages against certain officers of the Crown for wrongful arrest

⁴¹ Mann, “Note”, op. cit., at 127.

⁴² Abel, “Effect of the German Denationalization Decree of November 25th, 1941”, op. cit., at 80.

and detention.⁴³ In this case, however, they did refuse to recognize in their pleadings that they were German nationals. Instead, according to Roxburgh J.,

... they now claim to be Austrian nationals as formerly.⁴⁴

Unfortunately, that part of their legal claim was simply rejected by the judge on the *res judicata* grounds that they had been found to have been German nationals in the previous case. Because they were still German and enemy aliens, the judge consequently found that their statement of claim was bad on its face. If they could not bring an action for *habeas corpus*, they were equally barred from bringing a suit for damages based on the same facts. Before the Court of Appeal, counsel for the Hirschs admitted for the limited purposes of the case that the appellants were still enemy aliens. Again, the declaration which they had originally sought that they were in fact and in law Austrian citizens was not followed through before the English courts.⁴⁵

The question of Austria did arise, again in an unsatisfactory manner, both in terms of the correct substantive legal rule and from the historical, jurisprudential perspective in 1950. In this case, a holder of a patent sought to extend his original rights on the basis of war loss. The applicant was Austrian and as such could not claim the benefit of the statutory provisions in question if he were a national subject of a country with which

⁴³ *Hirsch and Another v. Somervell*, op. cit.

⁴⁴ {1946} 2 All ER 27 at 29.

⁴⁵ However, the Court of Appeal did allow their statement of claim to stand and overturned the decision of Roxburgh J. to strike out the entire case [1946] 2 All ER 430. Because their claim against the agents involved sought to invoke not actions taken by Crown agents under the Royal prerogative, which like a *habeas corpus* action would have been refused an enemy alien, but actions under the statutory instruments of Defence Regulations, the court allowed the statement of claim to stand.

His Majesty was at war.⁴⁶ The Court at this stage simply proceeded on the preliminary basis that the British government had recognized the annexation of Austria as lawful. Lloyd-Jacob J. found that the stage of proceedings with which he was faced

It appears, therefore, to follow that the enquiry can be narrowed down to the simple question whether or not the Applicant was a subject of Germany, by reason of the recognized annexation of Austria by that power in March, 1938. If by German municipal law he should be so regarded, the recognition of the annexation in my judgment denies the existence of any right on the part of the Applicant himself to elect either to remain Austrian or to become stateless.... It is, moreover, to be noted that the relevant German municipal law for this purpose must be that in operation prior to the outbreak of hostilities.⁴⁷

This case, which permitted the Applicant further time to gather the appropriate evidence as to the existing state of law at the relevant period, again evidences the confusion in English law not just as to the nature of Nazi law in general but more specifically in relation to the status of Austria in both public and private international law after 1938 and here before September 1939. The Court asserts as a matter of fact and law that the annexation of Austria was recognized by the British government as lawful. As a result, British law would recognize German law as the applicable municipal law for any determination of the Applicant's citizenship or nationality, until

⁴⁶ *In the Matter of Mangold's Patent*, 69 RPC 1 (1950).

⁴⁷ *Ibid.*, at 2.

the war began, at which point the principle in *Ex parte L.* would apply.⁴⁸ What is important here is that at this stage of the proceedings at least, five years after the defeat of Nazi Germany, after the foundation of the Federal Republic and the reemergence of Austria as a newly independent state, a British Court asserts that the nationality of the Applicant in this instance will be determined according to the operating German law.

The incorporation of Austrian territory into the German dominion in March 1938 and the German law of July 1938 making all Austrians German nationals, clearly establish at this stage of proceedings, that the state of German law not only fulfilled the dreams of a German *grossraum*, under Hitler, but for British law made the Applicant a German national. This annexation declared by the Allied powers in Moscow to be null and void is here given legal effect as part of English law by an English court. Whether as a matter of international law, Austrian national mythology, or historical and sociological fact, Austria was part of Germany at the relevant time, what is clear is that for this court at least, German law was to be applied. What remains unclear from all these cases is where, in the final analysis, British law stands on the question of Nazi law? Did the Court accept Nazi law as binding, or did it accept German law as binding? The jurisprudential taxonomy is everything. And as we shall see in the next section, the classificatory system of British law when faced with “Nazi” or “German” law remains problematic.

⁴⁸ British courts have applied this principle consistently. Thus, when a group of German Jews applied for a similar extension to their patent rights as was at issue in Mangold’s case, tried to argue that they had lost German nationality under the November 1941 Regulation. The Court refused to recognize any change in national status brought about by a German law passed during wartime and because the plaintiffs remained German nationals, they remained in a category of patentees who could not apply for an extension of their rights. See *Lowenthal and Others v. Attorney-General*, [1948] 1 All ER 295.

4. More Nazi Law/More German Law/More British Law

As can be seen from the cursory examination of “Nazi law” cases dealing with issues of nationality and citizenship in the preceding sections of this essay, British courts dealt with complex and important issues of private and public international law as they related to the legal system of Germany extant between 1933 and 1945 both during and after World War II. But it is also true that British jurisdictions dealt with German law issues from the very earliest days of the Nazi rise to power. Again, the key question for determination, the analysis which would in many cases prove to be determinative, centered on the issue of the basic jurisprudential taxonomy. In other words, British courts concerned themselves primarily with determining whether they were dealing with “German” law or with “Nazi” law.

The first case with which I shall deal here came before the Court of King’s Bench in May 1934, a little more than a year after Hitler’s consolidation of power in Germany. The issue in *Sommer v. Matthews* revolved around the interpretation of an English contract of insurance covering property owned by the policy holder and situated in Germany.⁴⁹ The policy holder, Dr. Albert Sommer, was a German Jew, with many overseas business interests. Dr. Sommer went on an overseas trip in February 1933 and after events in Germany in the spring of that year, he did not return to his native country. Instead he went to Switzerland and set up a “temporary” residence in Zurich. In May of that year, local police and other officials in Nazi uniforms who remained unidentified at the time of trial, entered Dr. Sommer’s primary residence in Dresden and his country house outside that city. They remained there for some time, keeping

⁴⁹ (1934) Ll. L. Rep. 154.

members of his staff there “under surveillance”. According to some testimony, the Swastika flag was flown from the Dresden premises.

Dr. Sommer claimed for compensation under a Lloyd’s policy which covered him for losses as a result of “requisition and/or confiscation or willful destruction of his property”. Under the terms of the same policy, the insured agreed to and warranted all payments of “taxes, duties and charges”. The policy exempted any seizure etc. of the property for non-payment of such taxes from coverage. In its defence, the insurer claimed that Sommer’s property had not in fact been subjected to any confiscation or forfeiture but had merely been occupied for investigative purposes by police and tax authorities on a temporary basis. At the same time, the insurer argued that if the property had been confiscated, any such confiscation had been the result of Dr. Sommer’s tax liability to the German authorities. Herein lay the crux of the issue in this case and herein lies the central taxonomical question of “Nazi” law as it first presented itself to the British courts.

In 1931, the Weimar government had introduced a special tax which imposed extra levies and duties on wealthy tax payers who wished to leave or had left Germany. The purpose of the legislation was to prevent the loss of capital in the troubled financial and fiscal climate of Germany in the Depression. According to the defendant in this case, Dr. Sommer’s failure to return from his business trip and his decision to “settle” in Zurich, had alerted government authorities and triggered the operation of the “Flight Tax”. In other words, the confiscation of his property, if it did occur, was the result of Dr. Sommer’s tax liability and was excluded from the policy in question.

The trial judge gave credence to the defendant insurer on each of the grounds of the defence. He found in effect that the occupation of the Dresden residence was in reality

a temporary occupation for purposes of a tax investigation and that any subsequent loss or seizure was solely the result of Dr. Sommer's failure to return and the consequent implementation of the German tax laws. In effect, then, the judge in this case reached his decision by a two-fold taxonomical exercise. First, he found that the presence for several weeks of Nazi officials in the residence, and the confinement of the household staff, of a wealthy German Jew, was nothing more than the normal exercise of an investigative function. Second, he found that the invocation of the "Flight Tax" in these circumstances was covered by the exclusion contained in the insurance policy and was not therefore a confiscation under the terms of the contractual agreement between the parties. For him, this was a case of "law", of British law and of German law. Neither the reality of the domestic situation in Germany, nor Dr. Sommer's status as German Jew, could be relevant to the disposition of the legal issues. In terms of legal positivism, the law is the law. Thus,

The circumstances giving rise to this case might well excite great pity at what has befallen Dr. Sommer, but Dr. Sommer does not come to this Court for pity or sympathy; he comes for the determination of his rights upon a contract of insurance contained in a policy underwritten by English underwriters against certain events and happenings. Apart from that, this case involves questions of domestic order and domestic concern in Germany, and whoever else is concerned with them, it is certainly most undesirable that a British Court should travel at all outside the task that lies before it, namely the determination of the rights of the parties, into questions which are matters of controversy and concern in Germany itself.⁵⁰

⁵⁰ *Ibid.*, at 158.

Again, the jurisprudential taxonomical strategy of the Court is clear. This is an English case, involving an English contract and Dr. Sommer's fate and position as a German Jew pursued by the Nazi/German government are not relevant for the successful completion of the judicial task. It is not difficult to see at work here a narrow legal positivism and judicial conservatism. Indeed, it is important that this case is at this level and from this perspective, not particularly remarkable, either in historical terms or even from a present-day perspective. Ideas of judicial conservatism, of narrow interpretive readings of legal issues before the courts in private litigation etc. were and are part and parcel of the common law world. Moreover, it also important to refrain here, as much as is possible in the circumstances, from the imposition of an *ex post facto* reading of the case which would impose an historically unfair and decontextualized burden of the court. In 1934, there was no Holocaust. There were the beginnings of persecution but such was the state of play in the Anglo-American legal world, that Nazi law was not characterized as "not law". For the Court here, this was nothing more and nothing less than a legal case like any other to be decided and determined according to traditional legal analyses and categories.

Of course, the jurisprudence and interpretive lesson does not necessarily end with an invocation of the ethical and legal injunction to read the case in a contextualized manner. One might equally assert, for example, that the Court could very well have characterized the occupation of a residence owned by an exiled German Jew by Nazis, even in 1933-34, as a confiscation and not as a simple tax investigation. The testimony of the witnesses for the plaintiff would certainly have supported such a view. Similarly, one might ask why, given the conflicting approaches not just of the

two sides in the case, but of the witnesses called upon to characterize the “occupation” of the Dresden residence in particular, did the Court seem to ignore the *contra preferentem* rule in interpreting the insurance contract? Why was not the potentially ambiguous interpretation of “taxes” in the contract and on the facts read in favor of the insured here? Again, the answer will not be found in debates about legal positivism. As between possible legal interpretations, positivism is of no use.

The case again comes down to something perhaps more complex or jurisprudentially more interesting. This early British case embodies the central role of the “Nazi law” versus “German law” taxonomy in helping us read and understand these judicial decisions. The taxation statute in question was brought into being by the government of the Weimar republic. Its purpose was to prevent capital flight in times of hyperinflation and economic chaos. This was part of the evidence clearly set out before the Court. The law under which the actions in question occurred in other words fit without much difficulty on its very face into the category “German” law. More simply, or more complexly if we want it that way, it was “law” and everything else about the reality of life in Germany for Dr. Sommer was politics. The choice of taxonomical category here easily solved the case and eliminated any need for the Court to tread in territory with which it was uncomfortable and with which it preferred not to deal. Indeed, as we shall see in discussions of several other cases in what follows, this ability to classify laws in question not just as “German” versus “Nazi”, but as laws which served recognized and recognizable public policy and legitimate legislative purposes would be the main characteristic of many instances in which “Nazi law” came before British, and American, courts.

Thus, for example, in a case involving the action for wrongful dismissal brought by a Jewish employee of the London branch of a German company in late 1936, while it

was recognized that it would be practically impossible for the employee to return to Germany and argue his case before a German court because of the active persecution of Jews, the Court was nonetheless still willing to accept that as a matter of substance, German law governed the contractual relations between employer and employee and that such law would serve as the basis of any judgment before an English Court.⁵¹ Here, the reality of Nazi policies against Jews could be recognized by British Courts while at the same time the substantive content of German law was still seen to be the law governing contractual relations between the parties. For English Courts dealing with the fundamental jurisprudential crisis of democratic modernity, there were “Nazis” and there was “German” law. The two could and did co-exist not just as a matter of political and social reality but as part of the equitable and legal jurisdiction and positive legal norms of English law.

Three years later, in *Ellinger v. Guinness, Mahon & Co, Frankfurter Bank A G, and Metall Gesellschaft A-G*,⁵² the Chancery Division was faced both with an evolved factual situation and the same legal issue of the applicability of German law. Here again, the Plaintiff was a German Jew resident in England. He lost his University position in 1933 under the *Law for the Restoration of the Professional Civil Service* and came to England in 1936.⁵³ He instituted legal proceedings in that country in

⁵¹ *Oppenheimer v. Louis Rosenthal & Co*, [1937] 1 All ER 23.

⁵² [1939] 4 All ER 16.

⁵³ April 7, 1933. This was the first legal prohibition imposed upon Jews after Hitler came to power in February 1933. § 3 provided for the compulsory retirement of all “civil servants who are not of Aryan descent. § 2 (1) of the *First Regulation for the Implementation of the law for the Restoration of the Professional Civil Service*, April 11, 1933 defined non-Aryan to include anyone “ if he is descended from non-Aryan, and especially from Jewish parents or grandparents. It is sufficient if one parent or

relation to certain gold mortgage bonds. In 1932, while still a Professor of Pharmacology in Germany, Dr. Ellinger had purchased the bonds through Metall-Gesellschaft who entered the name of the Frankfurter Bank on the register of the holders of the bonds at Guinness, Mahon. Payments were made to Metall-Gesellschaft and duly credited to the account of Dr. Ellinger. When he left Germany, he sought to have his name entered on the London register as the true holder of the bonds. The German defendants sought to have the notice of service outside the jurisdiction entered by the English Court set aside on the grounds that any action between them and the Plaintiff was governed by the terms of their contract which under its specific provisions made German law the proper law of the parties and which afforded sole jurisdiction to the District or Provincial Courts of Frankfurt.⁵⁴

The Chancery Division rejected this motion on two grounds, each of which would have been dispositive on its own. First, the Court resorted again to the well-known and essential strategies of interpretation and taxonomy. In essence, the Court recognized that the terms of the contract were in fact binding and that German law regulated the contractual relations between Dr. Ellinger and Metall-Gesellschaft. Under English conflicts of law norms, therefore, the Frankfurt Courts had jurisdiction under the contract. But for the Court, this was irrelevant given the nature of the Plaintiff's claim and the relationships between the parties. In essence, the claim here

grandparent is non-Aryan". This definition was much broader than the later one found in the *Law for the Protection of German Blood and Honor*, which required three grandparents.

⁵⁴ In other cases, however, English courts continued to accept that the proper law could be German and that German courts continued to be vested with jurisdiction in many matters, e.g. German nationals married in New York and resident in London, were bound by a German Court's decision to annul a marriage even when the nullity was based in grounds not recognized in English law. See *Mezger v. Mezger*, [1937] P. 19.

was one which called upon the English bank, Guinness, Mahon & Co, which was within the jurisdiction and which had been properly served, to change its register to reflect Dr. Ellinger's title in the bonds.

In order to decide this claim it is necessary for the two German defendants to be given the opportunity of putting their views to the court. There is not, however, a contest as to the ownership between the plaintiff and Metall, or between the plaintiff and the Bank. The submission to the exclusive jurisdiction of the German courts is a submission only as between the plaintiff and Metall.⁵⁵

The second ground for allowing the case to continue in London lies squarely in the decision of the Court to accept the political reality of the situation obtaining in Germany and to refuse to compel the plaintiff to return there on public policy grounds. In other words, the Court refused to send the plaintiff, a German Jew, back to Germany to pursue a claim which he could pursue before an English court. The double taxonomy deployed is intriguing. First, the real case is defined in legal terms as one involving a plaintiff resident in England and an English bank. While the two German companies have an interest in presenting their views, the real issue of the litigation is the information which must be registered in bank documents in London. This is not a case of German or of Nazi law, but of English law. Secondly, given the findings on the first ground it would offend the conscience of the Court to require a Jewish plaintiff to attempt to return to Germany. This was obviously also influenced by the temporal element at play. While the case began in July 1939, it ended with

⁵⁵ *Ellinger v. Guinness, Mahon & Co*, [1939] 4 All ER 16 at 23.

final hearing and judgment on October 6 1939, after the two countries were at war. The question of service on Frankfurter Bank and Metall-Gesellschaft out of jurisdiction had become moot and the idea of sending the plaintiff to Germany was equally absurd. German law here was rendered irrelevant while the “Nazi” legal system became a dominant factor as war had begun.

Yet the coming of the war did not see the end of German or Nazi law cases arising within the British judicial system. Nor did it see the end of the debates over how to deal with the applicability of “Nazi” versus “German” law. The case of *Ginsberg v. Canadian Pacific Steamships Ltd.*⁵⁶ is typical not just of the case which continued to raise these issues but also of a whole spate of cases which would emerge before the courts of the United States as well.⁵⁷ This case, like those in America concerned an action brought by Jews lucky enough to have escaped from Europe for breach of contracts of carriage against various shipping companies based in Europe.

In *Ginsberg*, the plaintiff, a German Jew, had purchased and paid for accommodation and carriage on a British steamship for himself and his family. The agreements between the parties were entered into in Berlin through the auspices of Thomas Cook who acted as the representatives of Canadian Pacific in Germany. The contractual history is a complex one, involving several changes to the terms and conditions, questions as to Thomas Cook’s status as an “agent” or otherwise and issues as to the nature of the contracts for carriage and other agreements relating to the payment of on board expenses. In the end, however, the case raised, while war was raging, the question of the applicability of German law to the contractual relations between the parties. This was important for two interrelated reasons. First, some provisions of

⁵⁶ (1940) 66 L.L. Rep. 206.

⁵⁷ See discussion below.

some of the documents relating to the legal relations of the parties carried with them specific provisions which might have made German law the proper law of contract between the parties. Second, the defendant argued that German law prevented it from making any payment to the plaintiff either outside Germany in other than Germany currency or at all.

In summary, if German law applied to the relationships between the parties, German currency regulations in effect at the time of the contract either limited all reimbursements to payments in *Reichsmarks*, or forbade any payment outside Germany. The permission of the German currency control authorities, the *Devisenstellen* was required for any foreign currency payments and any payments to taxation “outlanders” i.e. Germans who had left Germany, essentially had to be made within Germany. The Defendant claimed first that it was bound by German law as to the contract and second that even if there were a debt they were legally compelled not to pay any reimbursement without the permission of the *Devisenstellen*. In other words, the British Court was faced with a Defendant which claimed that it was bound by German law, as law of the contract, not to pay.

The Court was able to avoid the dilemma apparently posed by the issue of German law by a complex interpretation of the facts of the case. The result of this judicial reasoning was that the Court could and did assert and conclude that as a matter of law, the final contractual relations between the parties in fact were governed by English law. But the Court went further. It concluded that even as a matter of German law, the position asserted by the Defendant was incorrect. It adopted the position, based on expert evidence of German lawyers that

Money had been finally appropriated and I am satisfied the Devisenstelle did not, and had no power to, forbid the carrying out of that contract. In any event, performance was not to be in Germany at all: it was to be performed on a British ship under a contract which was subject to English law by its terms and even the German Government, let alone a currency department, cannot forbid a Canadian company to perform a contract of that kind. I am satisfied that its performance would have involved no illegality under German law, and the defendants repudiated this contract wrongfully and without any justification whatever.⁵⁸

The *Ginsberg* case then is somewhat of a hybrid. English law becomes the proper law of contract. In any event German law was not what the Defendants asserted. Since this claim was one for breach of an English contract, the English court could allow the Plaintiff to succeed. Still, in this case, to some extent at least, a Canadian Defendant appearing before a British court did not hesitate to invoke terms and provisions of German law as legally binding and to the same extent the British court did not characterize the German law in question as “not law” or “false law”. Indeed, it would have been difficult to do so. Instead the entire discourse of the case took place in a world of legal meaning in which the law was discussed and interpreted as the law, as it always had been. Nazi law was not part of the hermeneutic universe in which the parties debated the effects of German currency regulations on a family of Jewish Germans attempting to flee the country. Nazi law is simply defined out, or more precisely, not defined at all.

⁵⁸ *Ibid.*, at 228.

In *Graumann v. Treitel*, the King's Bench Division had earlier been faced with a damages claim in a case involving two German nationals.⁵⁹ The parties had been business partners in Berlin. The partnership was dissolved in 1937, and the final accounting of the partnership resulted in a sum being due to the plaintiff, who by then had gone to England, where the partners had previously established a company. The terms of the partnership agreement under which final payments were to be paid to the plaintiff stated that the contract was to be performed in Germany, under German law and that any payments were to be made in German currency. The Defendant, who by that time had left Germany for England, argued that the court had no jurisdiction to hear the case because the proper law was that of Germany and that there had been no breach of contract under German law because the existing German currency regulations made it unlawful for a German to pay a debt to an "outlander". Here again, the Court was able to at once avoid the application of German law and yet to accept it as "law". Legal taxonomies and the jurisprudence of classification determined the outcome of the case. Instead of characterizing the dispute as one for breach of contract, the court found that the claim was one in debt. By this simple maneuver, the question became not just one over which the court had jurisdiction since both parties were physically present before it, but it also became one in which the currency question could be turned into a simple mathematical one of calculating exchange rates for payment in sterling. Again, the discursive deployment of traditional and easily recognized legal forms of action, debt and contract in particular, renders Nazi law, and even German law, moot. This is a case of debt owed to someone in England by someone else in England. There is no "German" element which has any legal significance once the signifier "debt" is utilized.

⁵⁹ [1940] 2 All ER 188.

The Court went further and interpreted the currency exchange regulations of Germany as if the provisions were in fact good and potentially binding law. The Court found that at the time the debt became due, the Defendant had left Germany. This meant that each of the parties to the case was, in the terms of German law, a currency or tax “outlander”. The German currency restrictions regulated payments between currency or tax “inlanders” i.e. persons resident in Germany and “outlanders”.

There is no doubt that, once they both became currency foreigners, there were no currency restrictions which prevented Treitel from paying his debt.⁶⁰

As in *Ginsberg*, English law dominates but German law is interpreted in such a way as to reinforce the justice and legality of the decision. Two points are of interest here. First, both parties in *Graumann v. Treitel* were German Jews. In other words, in this case the party seeking to invoke the terms and provisions of “German” or “Nazi” law was a Jew. As in *Ex parte L*, this must necessarily complicate any argument or assertion about the jurisprudence of Nazi law as “false law” which we might wish to make today. If for the pragmatic purposes of being released from confinement or avoiding a debt, Jewish individuals were willing to rely on the provisions of legal norms invoked by Nazi government agencies in Germany at the time, we must at least be willing to accept that a legal positivist argument is open and must be considered. While Nazi law may have been immoral, this does not mean that it could not, in particular fact situations such as those we have seen so far, be invoked in legal argument, recognized by all those participating in the debate as a legal argument, in order to serve some definition of justice. If this is the case, then blanket assertions

⁶⁰ *Ibid.*, at 195.

about the inherent evil and therefore “not law” status of Nazi law are brought starkly into question by the practical legal history of Nazi law before British courts of law. This then brings me to the second issue of importance here. We return again to the question of legal and jurisprudential taxonomy i.e. to the issue of “German law” versus “Nazi law”. It is quite obvious on the facts of both *Ginsberg* and *Graumann*, and from the broader historical record, that the currency regulations were in practice used to hamper Jewish emigration and to punish through indirect expropriation any Jew who wished to leave Nazi Germany. At this level, the *Devisenstellen* system was an essential part of the complex Nazi anti-Jewish legal and administrative bureaucracy. In other words, one might here assert that the law which the British Courts to some extent recognized as law and the legal norms which the defendants sought to invoke in these cases was “Nazi law”. Even the brief discussion in the Introduction of the difficulties faced in Germany in the immediate post-war era in identifying “Nazi” as distinct from “German” law, indicates that such a characterization is not necessarily completely and unproblematically accurate. In the context of Anglo-American case law, those Courts which were faced with currency control laws were directly confronted not just with important jurisprudential issues but with historically contextualized and complex situations. Simplistic characterizations of “Nazi law” were not either useful or accurate.

Currency exchange regulations had been introduced under Weimar, as we have seen, to prevent capital flight. They were a common, and are today still used as a, legislative tool to protect the national interest in times of economic instability and emergency. While they were used and adapted by the Nazis for use against Jewish emigration, they were not either in their legislative origin or as a matter of

jurisprudential epistemology, “Nazi” law. Avraham Barkai in his history of the economic war waged by the Nazis against German Jewry describes the situation.

The difficulties in transferring assets abroad originally had no connection with the Nazi policy of persecution of the Jews. In 1931, the Brüning government had imposed legal restrictions on currency export to prevent the calamitous flight of capital during the Depression. Even the Reich Flight tax (*Reichsfluchtsteuer*), later utilized by the Nazi regime to rob and despoil departing Jews, had already been introduced at that time.⁶¹

Nonetheless,

The Flight Tax, special blocked accounts in marks for prospective emigrants, and the arbitrary manipulation of exchange rates were several of the means by which even those German Jews who were able to escape with their lives were systematically plundered by the German government.⁶²

Barkai here highlights not just the tragic history of Nazi persecution and exploitation of German Jewry, but the epistemological bind which confronted the courts and parties in cases like *Ginsberg* and *Graumann*. The German law here predated the Nazi

⁶¹ *From Boycott to Annihilation: The Economic Struggle of German Jews, 1933-1945*(Boston: University Press of New England, 1989), at 49.

⁶² *Ibid.*, at 100.

regime. The idea of foreign currency restrictions during times of national emergency was not historically unique nor would it be outside the substantive content of the British legal system itself.⁶³

Moreover, English courts did not hesitate to recognize that in appropriate circumstances they might and should give effect to such currency control regulations, even as they existed in Nazi Germany. Thus, in *Helbert Wagg & Co. Ltd.*⁶⁴ the Court held with no jurisprudential remorse that

In my judgment these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law of the contract or where the movable is situate within the territorial jurisdiction of the State. That, however, is subject to the qualifications that this court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is, a law passed with the genuine intention of protecting its economy in times of national stress and for the purpose of regulating (inter alia) the rights of foreign creditors, and is not a

⁶³ In *Boissevain v. Weil*, [1950] A.C. 327, the House of Lords rejected a claim made by the plaintiff for recovery of a loan of foreign currency made during the war. The Defence Finance Regulations which applied at the time of the loan prohibited such foreign currency transactions. The Defendant was a Jew resident in Monaco during the Occupation. She borrowed the money, in French francs, from the Plaintiff, a Dutch citizen, in order to pay bribes to prevent her son from being deported to Germany. She promised to repay the money in sterling after the war. The House of Lords found that the borrowing of money in a foreign denomination violated the regulations and could give rise to no claim before British courts. Compare, *Liebman v. Rosenthal*, 185 Misc. 837; 57 N.Y.S. 875, (1945).

⁶⁴ [1956] Ch. 323.

law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations.

... there are limits in the recognition to be afforded to such legislation; and this court must be entitled to consider whether, looking at all the circumstances, the law is so far-reaching in its scope and effect as really to offend against considerations of public policy of this country.⁶⁵

In the end, Upjohn J found that

... the intention of the German law was to ensure so far as possible that when the storm had passed trading and debtor and creditor relationships might be resumed in an orderly manner. In my judgment, this was foreign exchange control legislation which must be recognized by this country as effective to modify contractual obligations where the proper law is German.⁶⁶

Important questions arise out of this case, and out of cases which I consider below. Does the public policy analysis of legislative intent followed by Upjohn J. allow for an inquiry into the practical impact of such laws as they evolve in practice or is it an inquiry into legislative origins? Here he writes of both legislative intent and the scope and effect of the law, but it remains to some extent unclear whether he would allow an English judicial analysis of policy implementation or simply an exegesis of the text.

⁶⁵ Ibid., at 351-52.

⁶⁶ Id., at 353-54.

In the circumstances, if not of this case, then of subsequent developments in Germany, as we have just seen, an apparently neutral foreign exchange and currency regulation system became an element in the economic war against German Jews. Does the inquiry outlined in *Herbert Wagg* allow for this to be taken into account? The second important issue which will arise again is one which goes to the jurisprudential and positive law basis and nature of the analysis in question. In the end, finding that for example an apparent foreign exchange law is in fact a form of disguised expropriation and is violative of English public policy, does not mean that the law in question is “not law”. It means rather that the law in question will not be enforced or given effect in England in relation to property situate there. This is a much more limited and jurisprudentially limiting position than a finding that a law is a “false law”, or no law at all. Such public policy discussions in conflicts of laws cases have no impact on the “law” in question. They are limited, as they must be, to a decision as to whether full force and effect will be given to such a law, and it is a law, in the jurisdiction in question.

How can we, how could the British courts at the time, proceed with a jurisprudentially complete and accurate analysis of the norms in question in order to proceed to some point at which the questions of “Nazi law”, “German law”, “false law” etc. can be properly elucidated and understood? Is it possible to arrive at an ethically and legally principled position on these questions without simply resorting to some absolutely relativist position that would assert that “context” is everything? In any event, such a position would not help us either to solve the dilemma presented by the general legal philosophical questions or to reach any coherent position in relation to any individual case. Foreign exchange laws can be in one and the same case, German laws, Nazi

laws, good law, bad law, inapplicable law and “false law”. The only thing which we might be able to say as a tentative matter at this stage is that in *Ginsberg* and *Graumann*, the English courts appear to have attempted to treat German law as law and to have finessed the Nazi question by the well-worn and traditional common law techniques of classificatory and interpretive slight of hand. English law applies; German law does not really help the party who seeks to invoke it in any event. The question of Nazi law is best left to the pages of the *Harvard Law Review*.

5. Exchange Control, Aryanization, Nazi Law and English Law

The question of Nazi law continued to appear in the English legal system. Still more cases involving important questions of law and legal theory arose out of the legalized terror of the Nazi regime. Once again, the common law was called upon to deal with questions which were, or were not, like any other legal questions. In *Frankfurter v. W. L. Exner*, for example, we find the first careful examination of the characterization of Nazi Aryanization policies under the principles of English private international law.⁶⁷ Frankfurter was a Viennese Jew who acted as the Austrian agent for Exner, an English company dealing in leather and leather goods. The normal business practice between the two parties was for Frankfurter to accept goods on consignment from the English company and to remit payments, minus his commission, upon sale. As the situation in Austria worsened, Frankfurter began to remit sums to Exner before the sale of the goods, in an attempt to shield some monies from the Nazis. Shortly after the annexation of Austria, Frankfurter’s business was placed in the hands of an administrator (*verwalter*) as the first stage of Aryanization. He wrote to Exner

⁶⁷ [1947] Ch. 629.

informing them of the new legal situation and stating clearly that no dealing with any sums credited to his business could be legally binding without the express consent of the Administrator. The *verwalter* continued to sell the consigned goods but failed to remit any monies to Exner. The English company simply deducted the sums owing from the sales from the amount in Frankfurter's credit account i.e. from the monies he had sent in fact for safeguarding against the Nazis. After the war he sued Exner for the amount he claimed had been wrongly debited.

The questions which arose for determination by the English court in considering Frankfurter's claim were related to the proper characterization of the Austrian decrees appointing Administrators for Jewish businesses and as a consequence the legal position of the *verwalter* in relation to the monies and debts in England. On the first question, the Chancery Division arrived at the most obvious and acceptable legal conclusion based simply on traditional conflicts of laws categories. The Aryanization decrees were "confiscatory" and therefore penal laws.

... if the expulsion by the state of a man both from the direction and the beneficial ownership of his business without compensation, coupled with the transfer of control to the state, for the benefit of the state, is not confiscation within the ordinary usage of that word, it is difficult to know what is.⁶⁸

English private international law rules, as far as the court was concerned, held that such laws are not recognized as having effect in relation to property held in England

⁶⁸ Ibid., at 636.

and will not be enforced by English courts.⁶⁹ Similarly, the court held that in so far as the rights of the *verwalter* Herr Schober, to the amounts credited in London

... as between Schober and the plaintiff, our courts would not recognize or enforce the claims of Schober under Decree Number 80 to the property in question here. It is true that our courts would recognize Schober's title to property in Austria acquired by virtue of the decree, or his rights of control in relation to that property, conferred by that decree, even though such property was subsequently transferred over here, but, in my judgment, Schober would appeal in vain to the courts of this country to assist him in establishing his claim to property which was and always had been, situate within the jurisdiction.⁷⁰

Because the *verwalter* had no claim to the monies deposited by Frankfurter prior to the Aryanization of the business, Exner had no lawful basis for extracting payment for the consigned goods from those monies and Frankfurter was entitled to the amount sought.

This case is noteworthy for several reasons. First, as a matter of law and justice, ordinary principles of private international law, which reject the enforcement of foreign penal and confiscatory laws, are deployed here for the protection of the victim

⁶⁹ A similar characterization had been applied by an English court during the war in relation to a procedural question in relation to the appointment of a *verwalter* in the Sudetenland. See *Böhm v. Czerny*, 190 *The Law Times* 54 (August 3, 1940).

⁷⁰ *Frankfurter v. Exner*, op. cit., at 644. On the inapplicability of any foreign legislation purporting to transfer property situate in England, see *Bank voor Handel en Scheepvaart v. Slatford*, [1953] 1 Q.B. 248.

of Nazi persecution. Second, the Court was willing to go beyond the face of the Austrian Decree, which asserted that the appointment of the *verwalter* was undertaken to protect vital public interests, and to engage in a more detailed analysis of the real purpose and impact of the legislation in order to give to it what it felt was the most accurate characterization. Again, this is consistent with the emergence of the “public policy” and “confiscatory” jurisprudence of English conflict of laws adjudication. Third, the Court again is able to characterize the amounts in question as “present” in England and therefore as monies which would not have been subject to expropriation under the operation of the same principles of English law, principles and rules which do not recognize the applicability of foreign confiscations on property located in England.

Fourth, however, we come to what I believe is the most important aspect of the jurisprudence of this case as one dealing with “Nazi” law. This aspect relates not just to Nazi law cases but more generally to the same rules of private international law which the Court was able to invoke here to render justice to the victim of Nazi persecution. As far as the Radbruchian question of Nazi law as “false law” is concerned, English conflicts of law principles do not, in fact or in law, enter into the debate. Here, the Austrian Decree, in the analysis developed and accepted by implication in the judgment of the Court itself, embodies the very core of Nazi legal practice. It is an essential element of the policy of the Aryanization property identified as “Jewish” and therefore a threat to the very essence of the *Volksgemeinschaft*. Yet the Court accepts, as it must, that the Decree had legal and lawful effect within Austria i.e. that it was law. Indeed, Romer J. accepts, again as he must, that the *verwalter*, once appointed pursuant to the Decree, is a position to acquire legal title

and interests in the property of the undertaking and indeed to assert such claims before an English court in relation to property originating “legally” in Austria. In other words, what saved Mr. Frankfurter’s legal rights here was his own foresight in sending the monies out of Austria. All subsequent transactions relating to the business, expropriated by the Nazis pursuant to their policy of economic exclusion and persecution of those identified as Jews, would be considered by English courts to be lawful, binding and as conferring rights upon the *verwalter*. Even at its ultimate level of application, the English private international law rule that a Court will not enforce a foreign law which violates “public policy” always operates on the concrete level of an individual case and not as a Radbruchian characterization of the law which makes it “false law”. Even in *Frankfurter v. Exner* English law did not, nor could it, condemn Nazi law as “not law”.

Similar questions of both practical and jurisprudential import arose, this time in another post-war case, *Kahler v. Midland Bank*.⁷¹ As in Ginsberg, the issues for adjudication centered around the legal status and effect of Nazi era currency control mechanism. In 1938, Kahler, a Czechoslovak national, purchased securities through his bank, the Zivnostenska Bank. The Czech bank dealt directly with Midland which held the securities on deposit for them in London. With the invasion and conquest of Czechoslovakia, Kahler decided to leave the country. He was allowed to do so but only after placing all of his securities in the hands of the Bohemian Bank, an institution controlled by the Nazis. He did so. In April 1939, Zivnostenska wrote to Midland requesting them to transfer the securities in question from their name to that of Bohemian. After his arrival in the United States, Kahler sought to have the securities transferred to his personal account by Midland. In his various pieces of

⁷¹ [1950] A.C. 24.

correspondence and finally in his legal pleadings he accepted as lawful the transfer of the deposit of the securities held by Midland to the account of the Bohemian Bank. Midland did not dispute that Kahler was the true owner of the securities. Instead it claimed that it had no privity of contract with him and that its contractual obligations in so far as the securities were concerned were owed to the Bohemian Bank. That bank could not agree to the transfer of the securities to a currency *auslander* without the consent of the Nazi controlled central banking authorities. Therefore, as the bailee of the Bohemian Bank, Midland's hands were tied by Czechoslovak currency regulations. Issues were joined and the House of Lords was faced with determining the correct legal outcome of the dispute.

As we have already seen, the idea of legislation restricting foreign currency transactions and capital flight did not originate with, nor was it limited to, the Nazis. This was the dilemma faced by the House of Lords. Their Lordships found that there was indeed no contractual nexus between Kahler and Midland. His action, if he had one, was to be found in *detinue*. Again, the nature of the cause of action at common law would determine the ways in which the taxonomy of foreign law was to be deployed. This meant that his claim became dependent on the nature of his right to claim the securities and this in turn meant that his rights had to be determined in accordance with the nature of his relationship with the Czech bank(s) which made the deposit with Midland. While the Law Lords were closely divided on the substantive outcome of the case, they agreed that the issue which would determine Kahler's action would be based in the proper law of contract. In other words, the first question to be decided was whether English law or Czech law was the proper law of his relationship with the bank(s). If it were the latter, then the Czechoslovak law in relation to currency regulations would have to be characterized.

For the majority, the solution was relatively straightforward. At the time of the purchase of the securities, Kahler was a Czechoslovak national, resident in that country. His bank, Zivnostenska, was also a legal subject of that country. In the absence of any specific or implied contractual term to the contrary, which the majority did not find, the proper law of contract was the law of Czechoslovakia. The consequence for the claim was obvious. For Lord Simonds,

It is necessary only to say that the relevant law relating to foreign exchange, under which the delivery without a consent that was in fact withheld would be illegal, is not in my opinion a law of such a penal or confiscatory nature that it should be disregarded by the courts of this country.⁷²

In the end, the narrow majority of the House of Lords found that Kahler's claim was not valid. The dilemma for the Court, again both in practical and jurisprudential terms, was that their decision gave legal effect to the policies and practices of the Nazi regimes which ruled over the various parts of Czechoslovakia. While the judges of the majority were keenly aware of this, they attempted to limit their moral and ethical implication in such a surrender through a variety of legal arguments. In the end of course, the basis for their assertions of non-liability in the ethical sense can be found solely and totally in the world of legal positivism. For Lord Simonds, escape from culpability and responsibility can be found in the dual technique of invoking legal taxonomy and of placing the blame on the plaintiff. By characterizing the law in question as non-confiscatory, he is then compelled to give it full legal effect.

⁷² Ibid., at 27.

Yet we know that as a matter of historical fact and legal interpretive technique, it was open to him to create any number of legal arguments, as did the two Lords in the minority, to avoid the moral dilemma. He could have argued that by implication the plaintiff and the original depositing bank wished the question of any claim over the deposit of foreign securities held in London to be settled by the law of the place in which the securities were held. He could equally have found that, through an analysis of the facts of the case, including the circumstances surrounding the surrender of Kahler's deposit with the Bohemian Bank, that the apparently neutral, non-confiscatory currency control laws were being deployed as indirect confiscation, thereby classifying the legal restrictions as of a type which English courts would not recognize as binding over property, the securities, held in England.

Instead, the learned Law Lord placed the blame for the situation on the pleadings by Kahler. By failing to contest the legality and validity of the transfer from Zivnostenska to Bohemian, a transfer which was clearly a form of legalized extortion, for Simonds, Kahler

... is driven to the admission that he is in the same position, no better and no worse, as he would be in, if no transfer had taken place.⁷³

For Lord Normandy, it is not just Kahler's ratification of the transfer to Bohemian which seals Kahler's fate, but the operation of the law itself.⁷⁴ He can then characterize the extortionate nature of the transfer to Bohemian as such and deplore

⁷³ Id..

⁷⁴ Id., at 34.

the reality in which Kahler found himself, but this does not help Kahler, because the law is the law, and the proper law of the contract will remain that of Czechoslovakia.

The appellant, it is true, was no longer resident in Czechoslovakia on April 17, 1939, but it appears to me unreal to inquire whether his change of residence should be taken as affecting the proper law of the bailment. The reality was that he had been allowed to change his residence only on condition of surrendering all right to the shares and neither that surrender nor the consequent change of residence were voluntary acts, for both were the result of German abuse of power and intimidation. They can lead to no inference of intention. I therefore come to the conclusion that the proper law of the bailment between the appellant and the Bohemian Bank must be taken to be the same law as the law which governed the bailment between the appellant and the Zivnostenska Bank. But that was a contract between parties who were resident in Czechoslovakia and subject to its laws. The proper law of that contract was clearly the law of Czechoslovakia.⁷⁵

Again, it is not the House of Lords which recognizes Nazi law, but Kahler.

My Lords, I should greatly regret that this House should come to a decision which might be represented as giving even the shadow of a figment of recognition to the German oppression of helpless people in territories lawlessly overrun by them. Let me therefore say without ambiguity that I give no recognition to the acts of the German authorities and that I recognize the

⁷⁵ *Id.*, at 35.

existence of a contract between the appellant and the Bohemian Bank only because the appellant himself has dissociated it from the confiscatory measures of which he was the victim and has himself voluntarily recognized and ratified it.⁷⁶

In other words, the appellant made me do it. Nazi law is not law except in so far as Kahler had himself agreed to it. And even if he had not agreed to it, English law would recognize the first contract with the Zivnostenska bank as being governed by the same laws, or at least by laws which were not Nazi laws but which had the same effect in practical terms as Nazi laws on Kahler's claim. Lord Normand wants to have his Radbruchian jurisprudential cake and eat it too.

First, he asserts that Nazi law can have no effect. It is, at this stage at least "false law". But if that is the case, difficulties arise. One cannot ratify, generally speaking something which is an absolute nullity. If he gives no effect to it, neither can Kahler. Here we return to the dilemma which faced first the occupying authorities and the German domestic court system. How can we deal with "false law", law which is and was void *ab initio*, not just voidable, not simply a relative nullity in continental terminology, but in a manner which is not retrospective and therefore destructive of pre-existing "legal" relations based on the nullity? If Nazi law is as pernicious as is claimed, what does that say of a system of English law which would conclude that a recognition of the validity of that juridified evil in legal pleadings could give full legal force and effect to that system of "law"?

Moreover, we must also face, as should have Normand, LJ, the perhaps even more fundamental and now re-visited taxonomy, Nazi law and other law. He does not wish

⁷⁶ *Id.*, at 36.

to give effect to Nazi law, yet he gives effect to law which has exactly the same practical impact. Is the learned Lord Justice acting in a jurisprudential and ethical vacuum in which positive law can be immoral on the one hand and perfectly acceptable on the other, simply on the basis of the source of the rule, and not on the rule itself? Is he asserting a question of legitimacy in public international law which will have this Radbruchian theoretical impact in positive law?

This then brings us back to the case of Mr. Frankfurter. The Court there held that as far as internal rights and rules within Austria were concerned, any actions of the *verwalter* Schober after his appointment would have been legally valid. Does Lord Normand reject this apparently well-established rule of public and private international law? Or must we turn here to a complex analysis, beyond the scope of this essay, of the difference in public international law terms, between the legitimacy (and legally binding character) of German actions in annexed Austria and actions in the Protectorate of Bohemia and Moravia, in Slovakia and in the Sudetenland in so far as the British government was concerned at all relevant times?⁷⁷ Unfortunately for the jurisprudentially and historically curious among us, Normand LJ offers no insights into his position on the occupation of the Sudetenland, the Hedrick regime in Bohemia and Moravia or the Church based domestic fascist government in Slovakia or on the legal consequences of the acts of these rulers.

I am not asserting here that the majority were actually wrong in law in the conclusion they reached. Indeed, I am not willing to assert to any extent that Nazi law was not law. It seems to me to be clearly established that even in those cases where the Radbruchian position has apparently been embodied in occupation government orders and proclamations, in Constitutional norms and in judicial decisions in the Federal

⁷⁷ On the Sudetenland, see provisionally, *Böhm v. Czerny*, op. cit., above.

Republic, and in some public judicial declarations in English case law, in reality, the basic legal normativity of Nazi law, either in form or in substance remains the specter which continues to haunt the law of these jurisdictions. The decision of the majority of the House of Lords in *Kahler* reflects and enforces this ghost in the machine of our jurisprudence which was and is “Nazi law”. The period from 1933-1945 can not simply be erased for legal historical memory either by Lord Normand’s declaration of distaste or by the deployment of a legal system of interpretive taxonomies which are incapable of exorcising our legal history.

6. Law, Family and the Family of English and Nazi Law

If more evidence in support of the idea of the haunting of English law by the shadows of Nazi jurisprudence is required, I shall conclude with a brief examination of two cases in the realm of family law which I believe illustrate many of the points which have emerged from the preceding analysis.

In *Igra v. Igra*, the English court was asked to adjudicate on the validity of a decree of divorce pronounced by a court in Berlin in 1942. The husband in the case was a Jew of Polish origin who had become domiciled in Germany at the time of the marriage. His wife was a non-Jewish German. They were married in Berlin in 1926. In 1938, as a Polish-born Jew, the husband was exiled to Poland while the wife remained in Germany. At some time after the husband’s departure, the wife began living with another man and sought a divorce which she obtained before a Berlin Court in 1942. The husband was obviously not present at the proceedings.

The central issue here is what effect the English Court would give to this divorce decree pronounced against a Jew by a German court in 1942. At the first level of any

possible analysis, the court had to consider the question of the grounds on which the divorce had been sought and awarded. There was evidence as a matter of expert testimony that the German Marriage Law of 1938 permitted divorce on the grounds of three years of separation without reasonable grounds of resuming the marriage. There was also evidence that the wife had received some input from the Gestapo that she would be well-advised to divorce her Jewish husband. The Court was convinced, by implication at least, that the motivation for the divorce, both by the wife, and as legal basis for the Berlin court's decision was likely to have been racial. But the court also found that since the wife had in fact been cohabiting with another man for some time, the Gestapo advice did not in fact have the coercive effect of forcing her to act contrary to her wishes. In other words, the court was asked to give effect and recognition to a racially motivated divorce decree granted by a Nazi court, in Nazi Germany under Nazi race laws. And it concurred.

Of course, it did not do so by explicitly accepting the validity of Nazi jurisprudence. Instead, it pointed out that the husband, who had remarried had treated his marriage as legally dissolved. It also gave due recognition to the provisions of Control Council Law No 16 dealing with the mitigation of hardships caused in family matters as a result of racially motivated discriminations within the legal system. § 4 of that same Law specifically provided that no claim for the restoration of a marriage dissolved by divorce could be accepted. In other words, the occupation legal authorities had already engaged in a complicated public policy and justice based calculation of the pros and cons of the divorce of Jewish spouses and had decided that the best interests of all concerned, including the legal system required the recognition of this divorce under Nazi law.

The court concluded, if we were left in any doubt as follows

In those circumstances, it would be unfortunate if this court felt bound to reject its validity, with the result that the wife would have a married status in England and an unmarried status in Germany. It has long been accepted that the court of the domicile is the proper tribunal to dissolve a marriage. Its decisions should, as far as reasonably possible, be acknowledged by other countries in the interests of comity. Different countries have different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile.⁷⁸

Again, I do not choose to offer a Radbruchian critique of the decision in *Igra*. What is important for the limited purposes of this article is the fact of positive law and of practical historical jurisprudence that each one of the possible classifications available on the facts of the case- Nazi law, occupation law, the family law of the Federal Republic, private international law principles of English law, and the wishes of the Jewish victim of Nazi persecution, leads to the same legal result. A divorce motivated by Nazi antisemitism is given full force and effect as law. Once more, any notion of taxonomical purity and of a deNazified legal existence in Germany or elsewhere remain, at this stage of our existing historical and jurisprudential analyses, epistemological and existential impossibilities.

This does not mean of course that English law accepts as a matter of principle that Nazi law was good law, or even more specifically that all Nazi divorce decrees should

⁷⁸ *Ibid.*, at 405.

be recognized. Indeed, in the case of *In re Meyer*,⁷⁹ the Court came to exactly the opposite conclusion. In a succession case, they were called upon to determine whether the marriage between the surviving “spouse” and her deceased partner had been dissolved by a divorce decree issued by a German court in 1939. Again, the husband was Jew and the wife a non-Jewish German. The husband escaped to England just before the outbreak of war but his wife remained in Germany. On the face of the divorce decree the legal reason was the irretrievable breakdown of the marriage, as evidenced by the husband’s decision to emigrate. The issue for determination as a matter of law for the English court was whether the duress to which the wife claimed to have been subjected vitiated her consent and therefore the entire proceedings which resulted in the dissolution of her marriage.

There was no debate before the court as to the jurisdiction or proper law of the marriage. In other words, there was no question that as a matter of private international law, the German court as the court of the parties’ domicile, had jurisdiction. The wife asserted that her will had been overborne and that therefore the decree was a nullity. Bagnall J found that

... this court will declare a foreign decree of divorce invalid if the will of the party seeking the decree was overborne by a genuine and reasonably held fear caused by present and continuing danger to life, limb or liberty arising from external circumstances for which that party was not responsible.⁸⁰

⁷⁹ [1971] P. 298.

⁸⁰ *Ibid.* at 307.

The judge distinguished the decision in *Igra* on the grounds that in that case there was no allegation of duress. Indeed, that same kind of interpretive maneuver also allowed him to disregard the provisions of the Control Council which had been central to the decision in *Igra*. That law was part of the internal law of Germany and was not relevant here since the question to be determined was the issue of coercion, which went to the question of consent to the proceedings as opposed to the validity internally of the proceedings themselves.

... the doctrine of comity should have no application where the foundation of the attack upon the foreign decree does not lie in the conduct of the foreign proceedings, or even, if this be relevant, in the merits of the decision, but lies outside them as it does where duress overbears the will of the party instituting the proceedings.⁸¹

He went on to conclude that the state of mind of the wife had indeed been overborne by the circumstances of external danger in which she found herself.

He wrote:

... in 1939 the wife had a general fear of danger from the attentions of the Gestapo as the persecutions of Jews, and those who, like herself, were treated as Jews, intensified and on that account she feared for her liberty and her health; that she had specific fears of losing her job and her flat, and that if either of those losses occurred she feared serious deterioration of her health and that of her daughter, and that they might not even survive; that the dangers

⁸¹ *Id.*, at 310-11.

that the wife feared were serious and continuously existing and in particular that the danger of suffering at the hands of the Nazi authorities would be intensified if the wife became unemployed and/or homeless; that the wife was not herself responsible for those dangers; that her fears were genuine and reasonably held and that she would not have sought to obtain the 1939 decree if her will had not been overborne by those fears.⁸²

We find in *Meyer* a conclusion not that Nazi law was not law but that a particular decision of a particular court in a particular case was invalid because of the circumstances of the wife. There is at first blush little surprising or novel about this case. There is the traditional common law technique of treating each case on its own merits, of incremental decision-making, or distinguishing *Igra* on the facts and of classifying the question as one which goes not to the court case in Berlin itself but to the circumstances surrounding it and effecting the decision to proceed in the first place.

Faced with *Igra* and general principles of comity, the judge was forced at some level probably against his better judgment to swallow the positivist legal pill and accept the validity of the German proceedings as a matter of law and at the same time compelled to find a taxonomical system which would allow him to escape the legal consequences. He found this in the idea of duress as tainting the proceedings but as not being “of the proceedings”. Of course, one might at this stage wish to argue that this is a distinction without a difference, a form of specious legal reasoning of the worst kind. To say that the legal proceedings in Berlin were valid, but that the state of mind of the wife rendered them juridically meaningless and without effect, on the

⁸² *Id.*, at 317.

facts of the case, smacks of a tortured logic determined not by legal principle but by judicial revulsion at the idea of recognizing Nazi law.

The entire underlying implication of the judgment, which is made more explicit as the judge summarizes the testimony as to the state of life in Germany at the relevant time, is redolent of the thesis of the Nazi terror state and of Nazi law as not law which continues to resonate to this day. I do not wish to reiterate the practical or theoretical objections which can be raised against this paradigm, Instead I wish to conclude this section of the essay by pointing out two important considerations which might make some want to reconsider the reasoning, the outcome and the jurisprudential impact of *Meyer*.

Before jumping in with applause for the judge's decision, those who might persist in the characterization of Nazi law as the "law" of the terror state, might wish to enter into inquiries not just into the historical accuracy of his assertions concerning the circumstances of duress in this case, but also into the juridical consequences which flow from this. The idea on the facts, as reported and interpreted by the judge in *Meyer*, is that non-Jewish spouses of German Jews lived in fear and terror and indeed that they were victimized and treated themselves as Jews by the German/Nazi authorities. This I think would require and demand a much more thorough and contextualized historiographical and jurisprudential process than the one which occurred here. I do not wish to be seen to be disputing the circumstances of the individuals concerned, in the absence of a fuller factual record. But it must be stated in order to ensure a more complete analysis and understanding that the judge's apparent conclusion that non-Jewish partners in so-called mixed marriages universally

and inevitable suffered at the hands of the Nazis is simply not accurate on the record of history.

The leading Holocaust historian Raul Hilberg has written of mixed marriages as follows:

Nazi Germany and its allies did not dissolve mixed marriages by decree. The non-Jewish partner in these marriages was not going to be treated as a Jewish person, lest gentile family members and churches protest in chorus....

Moreover, not many mixed marriages were dissolved as a result of a court action initiated by the non-Jewish partner. Divorce was not yet a style of life in the first half of the century and the intermarried Jews were not going to be deserted in large numbers by their husbands or wives.⁸³

Similarly Nathan Stoltzfus documents the history of mixed marriages under the Nazis and of the successful street protests by non-Jewish spouses against the internment and potential deportation of their Jewish spouses as late as 1943.⁸⁴ Indeed, the very fact of being in a marriage with a non-Jew was an important factor in the survival of many German Jews.⁸⁵

⁸³ "Mixed Marriages" in, *Perpetrators Victims Bystanders: The Jewish Catastrophe 1933-1945*(New York: HarperCollins, (1992) at 131.

⁸⁴ *Resistance of the Heart: Inter-marriage and the Rosenstrasse Protest in Nazi Germany*, (New York: W.W. Norton & Co., 1996).

⁸⁵ Nathan Stoltzfus, "The Limits of Policy: Social protection of Inter-married German Jews in Nazi Germany", in Robert Gellately and Nathan Stoltzfus, (eds.), *Social Outsiders in Nazi Germany*, (Princeton: Princeton University Press, 2001) at 117.

Again, regardless of the true facts of duress or not in the instant case, and despite the clear implication by the court to the contrary, it was equally true that under the Nazi regime, mixed marriages did not, certainly in 1939, universally and inevitably result in coercion and violence aimed at the non-Jewish spouse with the object of compelling a legal end to their union. This does not just mean that we must be more fully aware of context and history before we can begin to fully assess the impact and place of Nazi law in our own legal systems and in our own understandings of the jurisprudential issues which arise therefrom. There are other potential consequences of adopting the reasoning and conclusions in *Meyer* as the expression of some broader or deeper legal and historical truths. The primary victims of Nazi anti-Jewish policies and legal practices were those identified as “Jews”. A careless or non-contextualized reading of law, history and the Court’s decision in this case might lead the unsuspecting lawyer to the conclusion that the “real” victims of Nazi persecution were the non-Jewish spouses in such cases.

Whatever the truth of this individual case, it is simply not one which can be generalized without great ethical, jurisprudential and factual danger.

The second problem which might result from a reading of *Meyer* and its findings as to Nazi law and its impact in English law brings us back to the point at which I began—the persistent taxonomical dilemma. If one accepts the judge’s reading in *Meyer* of *Igra* and the state of the law as it now appears, we are faced with a stimulating jurisprudential irony. English law will reject and refuse to apply Nazi law in those cases where the Nazi terror system informed the process. On the other hand, English law will recognize Nazi law when the terror system did not operate. This means, after *Meyer* and *Igra*, that a divorce obtained on racial grounds, in violation of the Radbruchian *grundnorm*(if such a Kelsenian admixture is permitted here), will not

be recognized in England if the non-Jewish spouse was acting under compulsion by the Nazis; but such a divorce will be recognized and given legal force and effect if it is the result from the beginning of Nazi racial ideology. Nazi divorce for willing and cooperative Nazis (or Germans) as in *Igra* is lawful. When then, is Nazi law “not law” when applied to Nazis and non-Nazis alike? Perhaps the courts of the United States can shed much needed light on the jurisprudence of Nazi law.

7. Nazi Law/American Law and the Case of Mr. Schwarzkopf

Many, if not all, of the issues of “Nazi law” which presented themselves for adjudication before the Courts of the United Kingdom, can also be found in a series of disputes litigated in the United States- enemy alien status and *habeas corpus*, the nature and extent of recognition of German and other foreign currency regulations, the legal effect of Aryanization policies etc.. Once again, the basic and fundamental dilemma which emerges from these cases is the vexing issue of the jurisprudential categorization of “Nazi law”.

Perhaps the most intriguing American decision, at least as a point of departure for this section of the study, is one which combines in one instance several of the crucial points of law and jurisprudence which I have already examined in relation to British law. Questions of the annexation of Austria, and the 13th Regulation of November 1941 depriving all exiled German Jews of their nationality, as well as policies relating to the internment of enemy aliens and access to writs of *habeas corpus* can be found in the intriguing facts and legal analyses of *United States ex rel. Schwarzkopf*.⁸⁶

⁸⁶ 137 F. 2d 898 (1943).

The relator, Schwarzkopf, had been arrested as an enemy alien and sought release by way of a writ of *habeas corpus*. He was a Prague-born Jew. At the time of his birth, Bohemia was part of the Austro-Hungarian Empire. In 1919, Prague became part of Czechoslovakia and Schwarzkopf became a citizen of that country. In 1925 he was naturalized as a German citizen and in 1933 he again changed his nationality, becoming an Austrian citizen. By the operation of the 1913 German nationality legislation, he thereby lost his German citizenship. In 1936 he left Austria and entered the United States, somewhat bizarrely under the Czechoslovak immigration quota. In 1938, he declared his intention to become an American citizen and made a formal application for naturalization in September 1941. Two days after Pearl Harbor, in December 1941, he was taken into custody as an enemy alien.

The question for determination was the meaning under the relevant statute, the *Alien Enemy Act*, of the word “citizen”. Was Schwarzkopf, as the government maintained, a “citizen” of Germany when he was arrested and therefore lawfully in custody? In support of their case, the United States Attorney asserted in an argument which has been seen before, that the incorporation of Austria into the *Reich* after the *Anschluss* in March 1938 and subsequent German legislation in July of the same year making all Austrians German nationals, meant that in December 1941, Schwarzkopf was, under German law, a German national and therefore an enemy alien liable to incarceration. Much weight was given, in the government’s action, to the *de facto* recognition of the *Anschluss* and of German sovereignty over Austria by the Department of State. At this stage of the proceedings, there are striking and obvious similarities and parallels with the issues confronted by British courts in several cases we have examined.

But Swan J. was not deterred from engaging in his own inquiries as to the factual situation and legal consequences relating to the situation of Mr. Schwarzkopf. For him, the public international law question and political consequences of the recognition of German power over Austria did not determine the issue of giving meaning to the term “citizen” under an Act of the United States Congress. For him, the statute, like all legislation, was informed by a particular purpose and legislative intent and that intent was not to be interpreted according to the political decisions of the State Department.

The obvious purpose of the Act was to include within its ambit all aliens who by reason of ties of nativity or allegiance might be likely to favour ‘the hostile nation or foreign government’ and might therefore commit acts dangerous to our public safety if allowed to remain at large.⁸⁷

While recognizing that the determination of the question of the citizenship of Mr. Schwarzkopf had to be made with due and proper reference to the principles of international law, Swan J found that a correct interpretation of those principles was that collective nationalization as a result of the German annexation of Austria could only effect those present in Austria at the time. Thus, Schwarzkopf, who had left Austria prior to the German takeover and who subsequently declared his intention to become an American, was at all relevant times, under international law a stateless person and not a “citizen” of Germany under the Act. In other words, the Judge here adopts the position which others asserted at the time should have been the position at

⁸⁷ Ibid., at 902.

least argued by the applicants in *Ex parte L*⁸⁸ that Austrians who had left the country and who had not voluntarily accepted the effect of the July 1938 German law were to be considered stateless under international legal rules.

But even more interestingly, the Judge here is willing to go one step further. If, as the government claimed, Schwarzkopf became a German citizen, (or more accurately a German national given the effect of the *Reich Citizenship Law*) under German law in July 1938, then he lost that status under the operation of German law in November 1941.

There is no public policy of this country to preclude an American court from recognizing the power of Germany to disclaim Schwarzkopf as a German citizen.⁸⁹

An American court recognizes as a matter of American law that the 13th Regulation under the Nuremberg laws depriving German Jews of their nationality was in effect, “good law” i.e. a measure of a sovereign power having legal force and effect. Nazi law was law as far as the court was concerned. Once more, the facts and context of the case make the jurisprudential classification system of “law” “not law” (or “false law”) much more complex than one might think at first blush. By recognizing the impact of the German anti-Jewish law, Swan J. allows a “German Jew” to obtain his freedom. By arguing that Nazi law is law, a “German Jew” becomes a stateless person

⁸⁸ See discussion above.

⁸⁹ 137 F. 2d 898 at 903.

and gains his freedom.⁹⁰ The truth, or at least Nazi law, set Mr. Schwarzkopf free. At least one concrete manifestation of “justice” was achieved through the acceptance of “false law” as “good law”. Once again, the easy and comforting Radbruchian notion that justice is embodied in the distinction between law and “not law” is belied by the reality and complexity of life. What, if anything, would Professors Hart and Fuller make of this?

8. Nazi Law and American Law- The Story Continued.

As was the situation before the Courts of the United Kingdom, many of the instances in which the question of the status and nature of German or Nazi law arose were in circumstances relating to commercial transactions between the parties, one of whom claimed to be bound by the strictures of German or related legal prohibitions. Again as in the British case, American courts deployed a number of interpretive techniques and classificatory standards in order to determine, as a matter of law, whether to give effect to the German provisions.

Thus, in *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*,⁹¹ the Court was able to conclude that since the payment on bond issues was specifically identified in the relevant deeds and documents as being in the

⁹⁰ It is important to underline here, as does the Court, that the 13th Regulation or a more sweeping piece of German legislation as hypothesized by the British courts, would not have had the automatic practical effect of allowing all “Germans” interned to walk free as stateless persons. The Act also covered those who were ‘natives’ of Germany. In *Schwarzkopf* this did not arise since the US Attorney limited his arguments to the question of the relator’s citizenship. Ibid, at Footnote 3.

⁹¹ 15 F. Supp. 927 (1936).

New York, the defendant's invocation of the restrictions on foreign payments then in effect in Germany were of no avail.

It is the law of the place of performance that controls matters relative to legality of performance, and other excuses for non-performance.⁹²

As was the case in British law, American courts simply applied standard and accepted techniques and norms of judicial decision-making in dealing in such cases with assertions of the binding nature of German legal restrictions on foreign transactions. No fundamental dilemmas or difficulties in relation to the taxonomy of German versus Nazi law arose at this stage. Courts continued in a line of cases to characterize German currency restrictions as irrelevant when the proper law of contract could be said to be law of another (non-German) jurisdiction.⁹³ For example, as under English law, the case and cause of action could be classified as one in debt for monies had and received. Then German law could be characterized as inapplicable because it concerned only cases of actual payment as opposed to a decision declaring the legal existence of a debt.⁹⁴ Courts were also in some instances willing to look beyond the

⁹² *Ibid.*, at 929. For similar interpretive technique see, *Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, (1938) and *Pan-American Securities Corporation v. Fried, Krupp Aktiengesellschaft*, 169 Misc. 445, 6 N.Y.S. 2d 993, (1938); Affirmed 10 N.Y.S. 2d 205 (1939); *Irving Trust Co. v. Deutsch-Atlantische Telegraphengesellschaft*, 22 N.Y.S. 2d 581, (1940).

⁹³ See e.g., *Kassel v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 177 Misc. 92, 24 N.Y.S. 450, (1940); *Rosenbluth v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 27 N.Y.S. 2d 923, (1941); *Translateur v. United States Line*, 179 Misc. 840, 42 N.Y.S. 2d 114, (1942); *Kleve v. Basler Lebens-Versicherungs-Gesellschaft in Basel*, 182 Misc. 776, 45 N.Y.S. 882, (1943).

⁹⁴ *Branderbit v. Hamburg-American Line*, 29 N.Y.S. 2d 488, (1941).

letter of German law and engage in a substantive and “equitable” inquiry. In *Loeb v. Bank of Manhattan*⁹⁵ the Court did exactly that. It found that the refusal by German authorities to grant permission for the release of securities to the plaintiff, who had recently been released from a German concentration camp and fled to the United States, was a bad faith refusal which would not bind the courts of New York.

Similarly, the Supreme Court of New York was willing to find that the Aryanization process which involved the appointment of a *verwalter* was nothing but “sheer confiscation” which would not be given effect in New York.⁹⁶

Such machinations, within the bounds of common law judicial decision-making often settled the case, although in some instances, the appellate court opted to restore a more literal reading of the contract and of the applicable proper law.⁹⁷ In some instances, the Court found itself in a position to render Solomon-like justice. Thus in *Spiegel v. United States Lines*⁹⁸ the Court held that the contract for passage between the plaintiff and the defendant was evidenced by the steamship ticket and was governed by the law of Germany

... however objectionable we may consider it.⁹⁹

⁹⁵ 18 N.Y.S. 2d 497, (1939).

⁹⁶ *Anniger v. Hohenberg*, 172 Misc. 1046; 18 N.Y.S. 2d 499, (1939) at 1047; 500.

⁹⁷ *Translateur v. United States Lines Co.*, 179 Misc. 843, 42 N.Y.S. 2d 117, (1943). “Plaintiff under the evidence was not entitled to recover as the law of the place where the contract was made was impliedly a part thereof and controlled and limited the rights of the parties thereunder.”

⁹⁸ 178 Misc. 993, 37 N.Y.S. 2d 31, (1942).

⁹⁹ *Ibid.*, at 994; 33.

At the same time, the court also held that the parties had entered into a separate contract relating to “on board money” i.e. monies to be used for additional expenses not covered by the contract of passage, and that since the only evidence of that contract was a receipt, there was no indication that the proper law of that contract was German. In that event, a New York plaintiff was entitled to make a claim under New York law to recover the monies paid in dollars.

The natural consequence of the positivist and formalist approach to these issues was, as was the case in the United Kingdom. At the higher or more general level of jurisprudential classification, German law was accepted as law. It was in a practical sense not applied because the courts could determine that some other legal principle meant that the proper law was that of another country. At the more specific level of positive law in decided cases, of course, this would also inevitably mean that some instances would present themselves in which German law was indeed the proper and applicable law governing the relations and legal situations of the parties.

Thus, other courts continued to follow the more traditional and restrictive view both of their function and of the positivist nature of law. When it was unable to characterize the proper law of contract as anything other than German law, the court was compelled by its own logic and by the logic of the common law, to accept the defendant’s claim that it was lawfully barred from offering reimbursement outside Germany.

As the deposit with the defendant was made in Germany in reichsmarks restricted by German law and the contract and the only refund thereunder which the plaintiffs can collect is in reichsmarks similarly restricted, which must be repaid in a Jewish Auswanderer blocked account in Germany, having

no market value here, plaintiffs were not entitled to judgment against defendant in dollars.¹⁰⁰

Not only does the court here give full effect to the proper law of contract in traditional conflicts of law terms, but it more explicitly than most recognizes Nazi law as law which a United States Court will permit to be pleaded. Of course, at this time, the United States continued to recognize the Nazi regime in Germany and had not yet entered the war. On the other hand, the currency regulations which the court was willing to enforce here are clearly not of the “neutral” Weimar Republic variety meant to protect the general German public interest in times of economic crisis. War was raging in Europe. The account in question, into which the *Devisenstellen* would require payment, was not an ordinary blocked foreign exchange account. It was one of a special category aimed at Jews who were outside the country. This was currency regulation which by this stage clearly and explicitly targeted Jews as a category yet the New York court was willing to give full and complete effect to the proper law of contract.

A series of cases, including some we have just seen, came before the courts of New York involving claims for breach of contract for contracts of passage for individuals, mostly Jews, who had fled the Nazi onslaught in Europe. Again, as in *Ginsberg* in Britain and *Kassel*, *Rosenbluth* and *Zimmern* in the United States, the defendants attempted to invoke currency control laws enforced by the *Devisenstellen*, while the plaintiffs attempted to assert non-German law as the proper law of contract. In *Steinfink v. North German Lloyd S.S. Co.* for example, the court found it

¹⁰⁰ *Zimmern et al v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 177 Misc. 91, 28 N.Y.S. 2d 824, (1941), at 824-25.

unproblematic to declare that the proper law of contract, for a sea voyage booked and paid for in Austria, was the law of Germany.¹⁰¹ Moreover, it was willing to conclude that the exchange control legislation was at this stage, still a law of general application and not one which was penal or confiscatory in nature, nor was it aimed at the plaintiff because he was a Jew.

Plaintiff stresses the fact that he is a victim of German oppression. But the regulations apply to all nonresidents and foreigners, and our courts cannot disregard them.¹⁰²

Once more, positive law triumphs, as it inevitably must in such cases. Furthermore, we can note yet again that the *Anschluss* is rendered legally unproblematic as far as American law is concerned. The Court simply asserts and assumes, without apparent contradiction on this point from the plaintiff, that German law is the law of Austria. Thus,

I fail to see anything violative of the public policy of this state in enforcing the agreement of the parties and the law of Germany, requiring the refund to be made in Vienna and in reichsmarks.¹⁰³

¹⁰¹ 176 Misc. 413, 27 N.Y.S. 918, (1941).

¹⁰² Ibid. at 415, 919.

¹⁰³ *Ornstein v. Compagnie Generale Transatlantique*, 31 N.Y.S. 2d 524, (1941) at 526.

Even after America had entered the conflict, courts persisted in this view of the proper law of contract question, and the nature of the restrictions and the incorporation of Austria.¹⁰⁴

The contract was made in Austria and is governed by the German Currency regulations.¹⁰⁵

These questions arose and were addressed specifically in *Eck v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*.¹⁰⁶ Here the plaintiff specifically pleaded the inapplicability of German law on the basis of a Statement by the Secretary of State in July 1942 that the government of the United States had never taken the position that the *Anschluss* was lawful. The Appellate Court rejected this as a basis on which determinations of the proper law of contract could be made in accordance with conflicts of law principles. The majority found that

The government may be objectionable in a political sense. It is not unrecognizable as a real governmental power which can give title to property within its limits.

Further in currency legislation the policy of the sovereign governs the medium of payment, even though such payment is provided for outside of the territorial jurisdiction of that sovereign.¹⁰⁷

¹⁰⁴ See e.g. *Schlein v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 34 N.Y. S. 2d 720, (1942).

¹⁰⁵ *Lowenhardt v. Compagnie Generale Transatlantique*, 35 N.Y.S. 2d 347, (1942).

¹⁰⁶ 183 Misc. 691, 52 N.Y.S 2d 367, (1944).

¹⁰⁷ *Ibid.*, at 698; 369.

Once more, the Austrian case raises important issues of law, politics, history and jurisprudence. As in the British cases I have already examined on this subject, the courts were called upon, directly and indirectly to adjudicate on the thorny issue of the legal status of “Austria” and “Germany”. The key point here is not necessarily the particular outcome of any individual case or of a series of cases. The dynamics and dilemmas which the case of Austria posed for courts and for our jurisprudential understandings of law, “Nazi law” and “false law” are central to any understanding of the meaning and implications of the jurisprudential issue of “Nazi law”.

In addition to the findings as to the state of positive law and to its relationship, if any to justice, and then to any possible overriding principle of public policy in domestic law in the United States (and in Britain), these instances also provide useful historical jurisprudential insights into the intersections and interactions between and among public and private international law norms (assuming that such a distinction continued to be relevant at the time). As in the case of the Hirsch family in England, the reactions of the courts in these Austrian cases in the United States raise intriguing questions (which are sadly largely beyond the scope of this essay) about the interactions between executive and judicial branches when these problems of public policy arise. Should the Court be bound by executive declarations about government policy or the legal position adopted in relation to a particular issue?¹⁰⁸ If they are not

¹⁰⁸ See e.g. *Amstelbank v. Guaranty Trust Co. of New York*, 177 Misc. 548, 31 N.Y.S. 2d 194, concerning the Court’s decision to give legal effect to the refusal by the United States to recognize German sovereignty in the Netherlands. See also, *State of the Netherlands v. Federal Reserve Bank of New York*, 99 F. Supp. 655, (1951), 201 F. 2d 455, (1953); Note, “Right of an Exiled De Jure Government to legislate for its Territory Occupied by a De Facto Government”, 100 U. Pa. L. R.764, (1952).

legally bound, should the judiciary at least be guided by such policies? If not, can we say that the courts like the one here in *Eck* draw, as a matter of principled positivist jurisprudence, a line between what is good politics and what is good law? I shall return in another context to at least some of these questions later in the article. As in some of the leading currency regulation cases, the Appellate Division of the New York Supreme Court, in *McCarthy v. Reichsbank*,¹⁰⁹ rejected an action for conversion brought against the Reichsbank in New York in relation to a seizure of property by the Nazis in Europe. The Court found that

Under settled principles of law and policy, our courts are powerless to review the acts of another government in dealing with its citizens within its territory or to call such acts into question.

...

It is legally immaterial that such acts are unjust morally.¹¹⁰

These cases and judgments embody the essential jurisprudential dilemma and debate which has characterized the world of jurisprudence from the days of the Hart/Fuller debate. Indeed, it seems to me that cases such as *Zimmern* and *McCarthy* are even better exemplars of the Nazi law question than the grudge informer case discussed by

¹⁰⁹ 259 A.D. 1016, 20 N.Y.S. 2d 450 (1940) at 450. Affirmed 284 N.Y. 739, 31 N.E. 2d 508, (1940).

¹¹⁰ *Ibid.*. Leave to appeal was granted. 260 A.D. 809, 22 N.Y.S. 2d 928, (1940). Cf., *Bures v. The Reichsbank*, 23 N.Y.S. 2d 234, (1940); Reversed, 260 A.D. 843, 23 N.Y.S. 2d 478, (1940); Reinstated, 261 A.D. 1067, 27 N.Y.S. 2d 780 (1941).

Hart and Fuller in the pages of the *Harvard Law Review*. The question here about Nazi law, “false law”, law and/ law/or morality is posed not in the context of post-war, post-Holocaust, post-Occupation Government, post-democratic restoration of the rule of law in Germany, but instead in the context of the rule of law in New York, in 1940 and 1941, before the US entered the war and while its diplomats continued to recognize the legitimacy of the Hitler regime. This is not *post hoc, post facto* jurisprudence after Auschwitz; this is judicial decision-making in the shadow of what we can only assume to be Aryanization.

The Courts here opt, as in fact they must, for positive law. They recognize the traditional divide between law and morality which informed common law, commercial litigation. They enforce and uphold the doctrines and practices of a legality which recognized the sovereignty of nation states over its own citizens, even when, or perhaps especially when, the nation state chooses to despoil its own subjects. Nazi law here is treated as law because the court could find no other choice. Nazi law was law because everybody knew it was law.

The whole of the Hart/Fuller debate, the very question of the Radbruchian point at which law becomes “not law”, had been played out in the New York courts several years earlier. In *Holzer v. Deutsche Reichsbahn Gesellschaft*, a Jewish former employee of the state railway in Germany brought an action against his former employer for breach of contract.¹¹¹ Holzer had been dismissed under the operative provisions of the *Law for the Restoration of the Professional Civil Service and Regulations* which, as we have already seen, banned Jews from most forms of state

¹¹¹ 159 Misc. 830, 290 N.Y.S. 2d 181 (1936).

employment.¹¹² The defendants resisted the claim on the basis that they had been compelled by the binding laws of Germany to dismiss the plaintiff and therefore should not be held liable for any damages.

Such asserts Reichsbahn, is the law of Germany. A human being is discharged from his employment because of his religion and jailed. And we are called upon to sanction the act. I say that our public policy does not compel us to give the act reinforcement. To give recognition to such conduct--- though it pass for law in Germany—would lacerate our conscience, traduce our Declaration of Independence, rend asunder our Constitutions, Federal and State, antagonize our traditions, mock our history, and outrage our whole philosophy of life.¹¹³

The decision could not be any clearer. Nazi law is not law- it is everything which our law and our society as whole abjures and abhors. Of course, there is no mention of slavery, *de facto* and *de jure* race discrimination or of a Constitution which would continue to legitimize antimiscegenation statutes at least as base as Nazi anti-Jewish laws. And, of course, there is the Court of Appeals.¹¹⁴ While Lon Fuller might have applauded the lower court's decision in *Holzer* as evidencing true loyalty and fidelity to law. H.L.A. Hart would have supported the New York Court of Appeals decision as

¹¹² April 7, 1933. Article I (4) declared: "The Reich Bank and the German State Railway are empowered to make corresponding regulations."

¹¹³ *Ibid.*, at 829, 194.

¹¹⁴ *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E. 2d 798, (1938). Compare, *Sabl v. Laenderbank with Aktiengesellschaft*, 30 N.Y.S. 2d 608, (1941) and *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 348 Pa. 335, 35 A. 2d 346, (1944).

a return to real law. The Court found that the proper law of the contract was German law, that it was not contrary to New York public policy to hold foreign citizens to the law of the jurisdiction of their own country and that the defence of the *Law for the Restoration of the Professional Civil Service* was sufficient on its face to constitute a complete answer to the plaintiff's claim of wrongful dismissal.

Defendants did not breach their contract with plaintiff. They were forced by operation of law to discharge him.¹¹⁵

The law, is the law, is the law. If the discharge of an employee because he is legally defined as a Jew is a legally acceptable and binding fact of German law, it is not surprising then, that when faced with litigation concerning the operation of currency control legislation in Czechoslovakia, the Courts of New York appear to have gone down the path of legal positivism.

On the proper law question and the concomitant issues of whether currency control restrictions could lawfully prevent the performance of a contract, American courts were faced, as were British jurisdictions, with cases arising out of the situation in Czechoslovakia. Again, the problem here was the Nazification of the banking system in that country and the consequence that had for all assets belonging to Jews there. In *Ida Werfel v. Zivnostenska Bank*,¹¹⁶ we confront again a familiar defendant and a

¹¹⁵ *Ibid.*, at 478; 800. The New York courts went so far as to recognize French laws stripping a citizen of that country of his nationality and forfeiting his property and to give effect to the forfeiture found in New York. See *Bollack v. Societe General Pur (sic) Favoriser Le Developpement du Commerce et De L'Industrie en France*, 177 Misc.136, 30 N.Y.S. 2d 83, (1941).

¹¹⁶ 174 Misc. 67 (1940). See to the same effect, *Kraus v. Zivnostenska Banka*, 187 Misc. 681, 64 N.Y.S. 2d 208, (1946).

familiar situation. In 1938, the Plaintiff, an Austrian Jew who had left her country for Czechoslovakia en route to the United States, had deposited monies with the defendant bank for the purpose of arranging a subsequent transfer of funds to the United States. At the time of the deposit, a Czechoslovak law required the permission of the National Bank for any withdrawals from accounts by non-residents, inside or outside the country. The National Bank was abolished and replaced by the conquering Germans by the “National Bank of Bohemia (and Moravia)”, another familiar actor in the drama of Nazi law.

The Supreme Court of New York had no difficulty in recognizing the pernicious circumstances of the Plaintiff. If the proper law of the contract were Czechoslovak law, then she was in an impossible position since the Nazi controlled bank would never “consent” to the delivery of her funds to the United States. She was in New York; the defendant had some assets in New York. No problem.

Problem, at least according to the Appellate Division.¹¹⁷ Practical impossibility and injustice are not bars to a legitimate defence based on the proper law of contract. The Germans exercise *de facto*, if not *de jure*, power over the territory in question and the courts of the United States, as we have seen, would and did give effect to laws of such governments. Even worse for the plaintiff was the nature and history of the laws in question. Once more, the entire taxonomical dilemma here raises its ugly legal positivist head.

This case presents a situation where the decrees made by the *de facto* government, which are objected to are not confiscatory in their nature at all but are regulatory of foreign exchange transactions only to approximately the

¹¹⁷ *Werfel v. Zivnostenska Banka*, 260 A.D. 747, 23 N.Y.S. 2d 1001, (1940).

same degree as existed under the old Czechoslovakian government and such as exist to common knowledge in the United States today in so far as certain belligerent countries are concerned. It is impossible to treat such decrees as violating the law of nations as not subject to respect by the courts of the United States.¹¹⁸

“Nazi law” or even “German law” is fundamentally irrelevant as taxonomical categories here since were in effect dealing with “law”. The application of a national label, be it “United States”, “Czechoslovak” or “German” can have no impact since the court is compelled by reference to its own internal legal norms to classify the foreign exchange regulations as regulatory law. The law to be applied in the instant dispute

... has nothing to do specifically with any anti-Jewish regulations...¹¹⁹

The court can put forward this argument since at the time the contract was entered into by the plaintiff, she would have been bound by the general regulatory Czech foreign exchange restrictions. The fact that she is Jewish and the fact that the laws are now being enforced by Nazis against Jews cannot be allowed to interfere with the inevitable legal consequences of applying the law. Here, we see a clear statement of some idea that a “Nazi” practice cannot transform a “law” into a “false law”. Again, I am not suggesting that this is the only position which is available in such cases. I have given examples of cases in which American courts were perfectly willing to engage in

¹¹⁸ Ibid., at 752, 1005.

¹¹⁹ Id., at 753, 1006.

a more detailed and contextualized analysis of the practice informing, and the real impact of, apparently neutral laws in order to come to exactly the opposite conclusion. My point is rather one which is confirmed by the confusion in the American cases I have looked at so far. There was not then, and there is not now, a magic legal interpretive wand which can be waved about to allow us to reach invariably correct classifications of “Nazi” law. And even if there were, we would still need to be willing to take the next Radbruchian step and declare Nazi law to be “false law”. In fact, the Appellate Division in *Werfel* underscores the point of the requirement of a two stage jurisprudential classificatory system.

The case ... could not in any event be decided on the theory that anti-Jewish regulations were so oppressive as to require that the courts of this community should disregard them. However, as to that point, see the decision of the Court of Appeals (in *Holzer*) by which we are bound.¹²⁰

What was good law for the German Jewish employee dismissed under the *Law for the Restoration of the Professional Civil Service* was good law for the Austrian Jew trying to get her money back from a Nazi bank in the German Protectorate of Bohemia and Moravia. The law was the law and any issue of Nazi law was, in New York at least, just like any other legal question.

¹²⁰ Id.. The case was reversed in part in *Werfel v. Zivnostenska Banka*, 287 N.Y. 91; 38 N.E. 2d 382, (1941).

9. Nazi Law/American Law: Giving Effect to Nazi Law in the United States

Other cases from other American jurisdictions continued to grapple with the reality and legality of the various anti-Jewish juridical practices. A series of disputes dealing with the right of Americans and non-Americans to inherit property once more highlights not just the different areas of law which raise intriguing questions about “false law” but also the difficult and intriguing taxonomical questions which arise. During the war, in the case of *In re Diehn’s Estate*, the New York Surrogate’s Court was faced with an issue arising out of the death of a German national in Berlin in January 1942.¹²¹ The son, who was present in the United States, but not naturalized, sought a declaration that he was the sole and rightful heir of his father’s estate. As in most of the cases of succession law and “Nazi law”, the matter involved questions relating to public administrators or administrators of enemy property under operative wartime legislation and regulations. What is interesting for the subject of my examination here is that one of the reasons given for delaying the adjudication on the distribution of the estate until the end of the war was precisely the potential applicability of Nazi law to the case. Again, while the outcome here depended on a number of other issues, it is, I believe, worth highlighting what the Court had to say about the legal regime which ruled, as a matter of private international law principles.

Moreover, the expert who testified for the son was unable to carry his knowledge of the law of inheritance or to produce copies of the statutes beyond the year 1939. It will be recalled that the death of the decedent

¹²¹ 182 Misc. 751, 48 N.Y.S. 902, (1944).

occurred on January 17th 1942. Substantial alterations in the German statutes may have taken place in the intervening period prior to the death of the decedent which may have changed the class of persons entitled to inherit.¹²²

Nazi law, the law of the Nazi state, even during time of war, remained as far as the Surrogate was concerned and at this stage of the proceedings, the proper law of the domicile of the decedent, under which normal rule of private international law would require the rights of heirs to be determined. Again, there is no concern evidenced here as to the substantive content of the legal rules in question. Indeed, it is precisely because the substantive content of the German legal system is unknown at the time that the Court reaches the decision it does. But as far as that goes, it does not eliminate the main point of concern and study here. As far as this decision is concerned, Nazi law was the proper law of succession. It was properly law. It was precisely this principle of general application in conflicts of law cases which arouse again in a series of judgments in California both during and after the war. Under the *Probate Code* of that state, the rights of aliens resident abroad to inherit in California were limited by the principle of reciprocity. Aliens could inherit under California law if American citizens and residents could likewise inherit under the laws of the country of the foreign citizen in question. Thus, a Dutch citizen could inherit in California because an American could inherit property under the Netherlands legal system.¹²³ On the surface, and again on ordinary conflicts of law principles, the same statutory limitation applied to German residents and citizens. If Americans could inherit in Germany, Germans had the same rights under the *Probate Code*. They had

¹²² *Ibid.*, at 753, 904.

¹²³ *Blak v. Doest*, 65 Cal. App. 232, (1944).

only to adduce evidence of the present state of German law and meet the burden of proof incumbent upon them in order to avail themselves of their rights. No presumption, which might operate under other circumstances in private international law as to the identity of foreign law with that of California, was set out in the statute.¹²⁴

The problem for such potential heirs resided in the state of German law.

... in Germany and Austria the taking of estates by will or succession depended upon the variable concepts of the Nazi Party as to ‘anti-social conduct’. Under such circumstances, citizens of the United States as ‘nationals of an enemy nation’, could not inherit because of race, religion, and ‘aims which are inimical to the nation and state’.¹²⁵

When more specifically anti-Jewish measures were concerned, the absence of reciprocity was *a fortiori* evident.

If a Jewish person, a resident of Germany, died, his American heir would take nothing because the Jewish person’s property would escheat to the Reich. ... Thus, the 13th decree was in effect without amendment at the time of her demise. In addition, the decree of September 1, 1944, purports to eliminate the escheat provision insofar as a non-resident Jew leaving property in Germany is

¹²⁴ *In re Knutzen’s Estate*, 161 P. 2d 598, (1945).

¹²⁵ *In re Schluttig’s Estate*, 36 Cal. 2d 416, 224 P. 2d 695, (1950), at 419, 697. See also, *Estate of Alice A. Miller*, 104 Cal. App. 2d 1, (1951).

concerned, but the statute would still apply to the estate of a resident German Jew s as to defeat the rights of his American heirs.¹²⁶

Under a similar reciprocity requirement in Oregon legislation, the Supreme Court of that state did not hesitate to reiterate the finding that Nazi law did not allow all Americans to inherit German property.

It is clear that from the date of that decree, no person, whether American or otherwise, and whether Jew or Gentile, could inherit under the will of any Jew dying in Germany.¹²⁷

I return once more to the point and basic jurisprudential taxonomy which has underscored much of this essay. What is important here is not whether a particular potential heir was able to claim his or her rights in property, or whether the property went to the residual legatees or heirs, or whether the property fell under the jurisdiction of the Administrator of Enemy Property. What is crucial is that the courts in these cases recognize and in doing so give legal effect to, Nazi law. Indeed, the various provisions of Nazi anti-Jewish laws, including the infamous 13th Regulation/Decree are acknowledged by the American courts as constituting the laws of Germany and as having full force and effect at the time. Nazi law was law in Germany between 1933 and 1945 and it continued to have an impact on the outcome, as law, of American court cases long after the war ended. Nazi law is law because

¹²⁶ *Estate of Marie W. Peters*, 110 Cal. App. 2d 723, (1952). To a similar effect, see *Estate of Richard Leefers*, 127 Cal. App. 550, 274 P. 2d 239, (1954)..

¹²⁷ *In re Krachler's Estate*, 199 Or. 448, 263 P. 2d 769, (1953), at 502, 797.

Nazi law was law and it was legitimated as such in any number of English and American court cases.

10. Nazi Law/American Law: The “*Bernstein* Exception”

The nature of function of Nazi law within the American law is, as we have seen, complex and controversial. Nowhere are these issues better finally highlighted and exemplified than in the series of cases instituted by Mr. Arnold Bernstein.¹²⁸

Bernstein was the owner of many shipping interests in pre-war Europe. He was also a Jew. In the late 1930s Bernstein’s holdings were subject to “Aryanization” by the Nazis. Many of his assets were then acquired by third parties from the German government or from the administrator (*verwalter*) of the properties. After the war had ended, Bernstein instituted a number of legal proceedings before the Federal Court in New York in order to recover his despoiled assets or to obtain monetary compensation for his losses.

While there was some dispute as a matter of fact on the pleadings as to the notice which the purchaser of the Aryanized assets may have had of their “Jewish origins”, the Court recognized the basic truthfulness of Bernstein’s assertions that

‘In January 1937 the plaintiff was taken forcibly into custody by Nazis officials in Germany and imprisoned in a jail in Hamburg, Germany.’ During the time of his imprisonment he had reasonable cause to believe that the ‘said

¹²⁸ *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (1947).

Nazi officials had designs on his life as well as his liberty and business interests.’¹²⁹

Unfortunately for Mr. Bernstein, these allegations proved to be his downfall. For the majority of the Second Circuit Court of Appeals, the fundamental barrier to recovery in United States’ Courts in such actions founded in acts of the Nazi regime was that the acts alleged were in law and in fact precisely acts of the Nazi regime. Bernstein here falls afoul of the public/private distinction as then understood in the domestic international law jurisprudence of America. Had he alleged for example that domestic German law recognized the private despoliation of Jews and their property, Bernstein might have been able to successfully invoke the standards of justice and public policy under private international law in the state of New York pursuant to which a court would have refused, as a result shocking to the judicial conscience, to give effect to this legalized theft of property. Of course, he might equally have been confronted with competing rules and rulings which would have constituted and constructed Nazi law as law which could and would give title over goods, chattels and other property to any purchaser. As we have seen, the simple characterization of law as “Nazi law” has not always been the practical trump which natural law jurisprudence would have it be. However, Bernstein alleged that the seizure and forced transfer of his assets had occurred as a result of the acts of the Nazi state and its officials. This fundamentally changed the taxonomical classification of the issues at bar. Learned Hand J. summarized the situation as follows:

¹²⁹ Ibid., at 247.

We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under municipal law of another state of acts of officials, purporting to act as such.¹³⁰

Bernstein's claim failed in United States law because United States law would not permit a court to examine the validity under German law of the acts of state of the German regime. Thus, even if the Nazi seizure had been illegal under German law the time, a proposition which the Court seems to accept for the sake of argument, (although incorrectly I believe), an American court was barred by its own rules from making such an inquiry.

The problem for Mr. Bernstein did not, however, end there. Even the new legal regime in Occupied Germany with the various Control Council and other regulations and orders abolishing Nazi laws and refusing to give effect to them in the zones of Occupation, could not help him. First, as we have seen, most of the provisions upon which Bernstein sought to rely were prospective only; they did not have retroactive effect in the sense of restoring the *status quo ante*. At best, for example, Law No. 52 in the American Zone did not effect a restoration of Aryanized property but subjected such property to an action in seizure by the Military Government. The only thing that could save Mr. Bernstein would be a clear and unambiguous expression, under American public international law norms, of an intention by the executive, of an intention to restore such property and to render the Aryanization process null and void. No such intention emerged in the opinion of the Court from the various actions of the occupation authorities or the government at home.

¹³⁰ *Ibid.*, at 249.

... the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary. Certainly, it is no indication of such intent, that although the Executive has provided for the adjudication locally of all controversies where for the most part they will arise, it has not accompanied this by the redundant declaration that in other cases the ordinary doctrine still obtains.¹³¹

The American government recognized the German Nazi regime at the time of the acts which deprived Bernstein of his assets because he was a Jew and this was enough to bring into operation the accepted principle of American law that a United States court would make no inquiries into the legality of any acts of that foreign government.¹³²

United States gave full force and effect, as a matter of legal principle, to the Nazi practice of stripping those identified as Jews of their possessions.

Bernstein attempted to circumvent the application of this principle of public international law by invoking the taxonomies and principles of private law. In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, he pursued another legal recourse against a defendant we have already encountered in

¹³¹ *Id.*, at 251.

¹³² On the general acceptability of the decision, see L. H. Woolsey, "Editorial Comment: Nazi Laws in United States Courts", 44 *Am. J. Intl. L.* 129 (1950). "While at first blush it seems incongruous that the United States policy in Germany should favour restitution and indemnification for Nazi atrocities to the Jews and that the court in the Van Heyghen case should deny relief here for the same kind of Nazi acts, yet considering the complex international considerations involved in this case, it seems on the whole better for the court to recognize its limitations than to try a case in which it lacked competence to do full justice in an international sense. At 135.

another Nazi law context in relation to other issues of Nazi law.¹³³ In these pleadings, he alleged that the defendant had come into possession of property which had been taken from him through the private actions of the German administrator/owner. In other words, he abandoned his previous allegations about “Nazi officials”. In doing so, he attempted to avoid the application of the principle enunciated by Learned Hand J. in the *Van Heyghen* case. Unfortunately, this dissimulation led him to fall afoul of the operation of another principle of private law, the statutory limitation period and later of the principles of legal pleadings which “estopped” a plaintiff from seeking to circumvent principled adjudication on questions of public international law jurisdiction of American courts by such subterfuges.¹³⁴

In the end, however, Bernstein was in fact and in law saved by the operation of the public/private distinction which operated in international law terms here. As Learned Hand J indicated, the courts were engaged, at one level of the proceedings and legal principles involved, in the search for an expression of executive intention to make a special rule of the legal tests which should operate in such Aryanization cases.

Bernstein finally got such an expression which satisfied the legal test. Here we find the “*Bernstein* exception” to the general operating principle set out by Hand J. that courts will not engage in inquiries as to the legality of the actions of a state or its agents. A State Department Press Release offered proof of the executive position and the Second Circuit Court of Appeals gave effect to it. In that Press Release, the executive branch of the United States government wrote that a letter from a legal advisor to the Department of State embodied a binding legal principle.

¹³³ 76 F. Supp. 335 (1948).

¹³⁴ 173 F. 2d 375 (1949).

The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of either jurisdiction to pass upon the validity of the acts of Nazi officials.¹³⁵

The decision in this case and the creation of the *Bernstein* exception raise many intriguing questions for international lawyers and jurists alike. At the practical level of Aryanization related issues, American courts were thereafter capable of entering into examinations as a matter of ordinary trial proceedings of the legal and factual impact of the process on title, claims for restitution and damages etc..¹³⁶ We know from recent debates surrounding questions of Swiss gold, insurance policies, slave labor claims, the questions of Nazi law, anti-Jewish policies and American law, continue to be litigated before United States courts. I want to focus here, however, on one key aspect of the *Bernstein* exception, an issue which has arisen in other contexts which I have already mentioned earlier in this essay.

¹³⁵ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (1954).

¹³⁶ See e.g., *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S. 804, (1966); 28 A.D. 2d 516, 279 N.Y.S 2d 608, (1967); 24 N.Y. 2d 91, 246 N.E. 2d 742; 298 N.Y.S. 979, (1969); *Dreyfus v. Von Fink*, 534 F. 2d 24 (1976); *Kalmich v. Bruno*, 450 F. Supp. 227 (1978).

The key question which I want to allude to here, albeit briefly, is the idea of the inter-relationship between the executive and judicial branches in Nazi law cases. In the instances of the status of Austria and Czechoslovakia, the questions of the nature, role and effect of the recognition of various acts of the German state by the United States or Britain, were important in arguments about the determination of different legal questions arising thereafter. It is not my intention here to enter into a discussion of the rules of international law relating to recognition, legitimacy, *de facto* versus *de jure* governments etc.. These questions are substantively beyond the primary focus of my interest here as well as being beyond my technical legal capacities. Instead I shall raise here the jurisprudential issue of the taxonomical impact of the role played by the executive branch and its policy declaration in this case.

I am not among those who question the very validity or existence of international law because it is subject to political whim and lacks a “real” enforcement mechanism. Nor do I wish to be understood to be arguing that public international, which depends upon the acts of the sovereign executive branches of governments of nation states is inherently Nazi or analogous thereto. But it is the case nonetheless that the litigation in Bernstein’s cases depended ultimately upon a declaration, it might even be argued, a direction, by the executive branch of government to the supposedly independent judicial branch of the state apparatus in a democracy. Again, there are obvious technical and case specific arguments which arise because of the fact that these cases involve questions of “public international law”. Nonetheless, here a private litigant, arguing for claims based in assertions about the “illegal” excesses of a sovereign government of an independent nation state, can succeed in these claims only because the executive branch issued a statement of policy which the judiciary felt, by rule of law standards, compelled to follow. Surely at some level this must raise questions, if

not about the rule of law in America, then at the very least about the criteria against which the “false law” tyranny of “Nazi law” must be and is judged. Executive policy pronouncements, the embodiment of the will of the *Volksgemeinschaft* in statements of the Fuhrer, the foundation of law in Germany in such pronouncements, these are essential elements in today’s jurisprudential arguments against the lawful character of Nazi law and the criminal nature of the Nazi state. This does not mean that the Federal Court was acting as Nazi Court, or that the Truman administration was a tyrannical dictatorship, nor does it have anything to do with the “justice” of Bernstein’s claims for the return of his property. It simply means that we must be constantly aware of the tendency in both positive law today and in the debates of the past and present, to deploy the signifier “Nazi law” as a jurisprudential trump which ends any and all conversation, controversy or debate. Nazi law was law, in one form or another, and it is at the more nuanced levels of debate that we must address these questions.

9. Nazi Law: Not Like Any Other Legal Question?

As the discussion throughout this article has indicated, English and American courts were beginning in the 1930s confronted with the reality of the jurisprudential dilemma which emerged in Anglo-American legal academia with the Hart/Fuller debate in the *Harvard Law Review*. Was Nazi law law? Can a system of “law” so far exceed the norms of civilized law that it is “false law”? If so, how and when will we recognize it? If not, what does this moral failure of law mean for law and for those of us who identify as lawyers and judges?

The answers which the courts have given to these questions are often as confused and confusing as the arcana of debates between legal positivism and the supporters of natural law. Nazi law has been variously law, not law, Nazi law, false law, bad law. In some instances, courts have scathingly rejected Nazi legality as a sham and as bringing shame on right-thinking people and jurists everywhere. In other cases, they have accepted Nazi law as the manifestation of the sovereign will of the German government of the day and have recognized and given effect to it.

Yet, the taxonomy of Nazi law as it presents itself in jurisprudential debate was as complicated and nuanced as it was when it is presented in the practical circumstances of litigation. Failure to recognize Nazi law as law meant that Jews remain in internment camps. Recognizing Nazi law as law results in other injustices, as the “victims” of Nazi law become the victims of Anglo-American law. Throughout this essay I have attempted to point out, both explicitly and by implication, the ways in which the law/morality *nexus* asserted by Fuller and Radbruch in their own ways is both confirmed and denied by the case of Nazi law before Anglo-American courts. No simple taxonomy, no complex and nuanced temporal or theoretical analysis will allow us to resolve the dilemma unless and until we can sort out the epistemology both of “Nazism” and of “law”. The theoretical and practical difficulties which confronted American lawyers in the occupation government in the days following the German surrender, continue to confront us today when we are faced with practical issues surrounding the abstract “Nazi law”. When these practical legal questions arise in the contexts of the cases I have outlined here, the distanced and distancing effects of jurisprudential debates are abolished. We can longer, if we ever could, find solace in some simplistic jurisprudential and/or historical assertion about the fundamentally and inherently flawed nature of the legal system under Nazi tyranny. Life and law were,

and are, more complicated than that. Nazi law continues to haunt not just the continent of Europe, but casts its shadow over the world of Anglo-American law and jurisprudence.¹³⁷

Nazi law should remain at the center of our jurisprudential focus today. After the “liberation” of Afghanistan and Iraq, questions of tyranny, and of law, and of lawful tyranny are, or should be, back on the jurisprudential agenda, if they ever went away.

¹³⁷ See Christian Joerges and Navraj Ghaleigh, *op.cit.*.