Towards a Jurisprudence of Evil Law

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Preface

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or, is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee**.**

Abstract

This dissertation examines the link between law and extreme moral iniquity, seeking to provide a first comprehensive account of the nature of evil law. It consolidates existing philosophical discussions associated with evil law and enriches these debates by testing their arguments against the historical examples of the evil legal systems of Nazi Germany and Stalin's Soviet Union, as well as the law of slavery in the antebellum United States. Firstly, it narrows down the category of evil acts and practices as necessary for its application to law and defends using the term 'evil' against those seeing it as redundant, empty, subjective, and even dangerous. Secondly, it identifies evil law as qualitatively distinct from bad or unjust law, and defines evil law as law, which, if interpreted in its best light, will cause or enable infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors. It also describes different types of evil laws – duty-imposing, power-conferring, permissive, and legitimating – and provides an account of evil legal systems as those containing a significant number of evil laws central to their material identity. Thirdly, it claims that evil law is law in the fullest sense of this word, notwithstanding objections from such law's external and internal immorality. Fourthly, it posits that law does not hinder but helps evil regimes by securing coercion, coordination, legitimation, education and propaganda, and identity building. Fifthly, it grounds a right and a duty to resist evil law in participatory equality, human dignity, and autonomy, and limits them when resistance involves intolerable harm on others or oneself. Sixthly and finally, it argues that successful resistance can take many forms, but is ultimately only possible if one moves beyond the confines of legal interpretation, or resists from the outside and not from the inside. These conclusions paint a fuller picture of evil law, aiding both those who seek to understand it and those who aim to oppose it.

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All mistakes remain my own.

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List of Abbreviations

CPSU – The Communist Party of the Soviet Union (*Коммунистическая партия Советского Союза*)

DNVP – The German National People's Party (*Deutschnationale Volkspartei*)

GULAG – The Main Directorate of Correctional Labour Camps (*Главное управление исправительно-трудовых лагерей*)

Komsomol – The All-Union Leninist Young Communist League (*Всесоюзный ленинский коммунистический союз молодёжи*)

NKVD – The People's Commissariat for Internal Affairs (*Народный комиссариат внутренних дел*)

NSDAP – The National Socialist German Workers' Party (Nazi Party) (*Nationalsozialistische Deutsche Arbeiterpartei*)

OGPU – Joint State Political Directorate (*Объединённое государственное политическое управление*)

Politburo – The Political Bureau of the Central Committee of the Communist Party of the Soviet Union (*Политическое бюро Центрального комитета Коммунистической партии Советского Союза*)

RSFSR – Russian Socialist Federative Soviet Republic (*Российская Социалистическая Федеративная Советская Республика)* in 1918-1936, Russian Soviet Federative Socialist Republic (*Российская Советская Федеративная Социалистическая Республика)* in 1936-1991

SA – Storm Troopers (*Sturmabteilung*)

SS – Protection Squadron (*Schutzstaffel*)

USSR – The Union of Soviet Socialist Republics (Soviet Union) (*Союз Советских Социалистических Республик*)

Table of Cases

Dred Scott v Sandford (1857) 60 US 393 (US Supreme Court)

Farwel v Boston & Worcester RR (1902) 62 NE 751 (Supreme Judicial Court of Massachusetts)

Howes v Steamer Red Chief (1860) 15 La Ann 321 (Louisiana Supreme Court)

Johnson v Wideman (1839) 24 SCL 316 (Supreme Court of South Carolina)

Louisville & Nashville RR v Yandell (1856) 17 B Mon 586 (Court of Appeals of Kentucky)

Marbury v Madison (1803) 5 US 137 (US Supreme Court)

Northern Securities Co v United States (1904) 193 US 197 (US Supreme Court)

Prigg v Pennsylvania (1842) 41 US 539 (US Supreme Court)

State v John Mann (1829) 13 NC 263 (Supreme Court of North Carolina)

Trotter v Blocker (1838) 6 Port 269 (Alabama Supreme Court)

United States v The Amistad (1841) 40 US 518 (US Supreme Court)

White v Smith (1860) 46 SCL 201 (South Carolina Court of Appeals)

Table of Legislation

Nazi Germany

Decree of the Reich President for the Protection of People and State (Reichstag Fire Decree) (*Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*)1933

Four-Year Plan Memorandum (*Denkschrift zum Vierjahresplan*) 1936

Hereditary Farm Law (*Reichserbhofgesetz*) 1933

Law Against the Formation of Parties (*Gesetz gegen die Neubildung von Parteien*) 1933

Law Amending Provisions of Criminal Law and Criminal Procedure (*Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens*) 1934

Law for the Prevention of Genetically Diseased Offspring (Sterilisation Law) (*Gesetz zur Verhütung erbkranken Nachwuchses*) 1933

Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935

Law for the Restoration of the Professional Civil Service (Civil Service Law) (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) 1933

Law on the Measures of State Self-Defence (*Gesetz über die Maßnahmen der Staatsnotwehr*) 1934

Law on the Reconstruction of the Reich (*Gesetz über den Neuaufbau des Reichs*) (1934)

Law on the Trustees of Labour (*Gesetz über Treuhänder der Arbeit*) 1933

Law to Remedy the Distress of People and Reich (Enabling Act) (*Gesetz zur Behebung der Not von Volk und Reich*) 1933

Police Decree on the Identification of Jews (*Polizeiverordnung über die Kennzeichnung der Juden*) 1941

Provisional Law on the Coordination of the States with the Reich (*Vorläufiges Gesetz und Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) 1933

Reich Citizenship Law (*Reichsbürgergesetz*) 1935

Reich Citizenship Law: First Regulation (*Reichsbürgergesetz: Erste Verordnung*) 1935

Second Law on the Coordination of the States with the Reich (*Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) (1933)

The Constitution of the German Reich (Weimar Constitution) (*Die Verfassung des Deutschen Reichs*) 1919

Stalin's Soviet Union

Circular oft he NKVD oft he USSR No. 65 (*Циркуляр НКВД РСФСР № 65*) 1938

Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936

Constitution of the RSFSR (*Конституция РСФСР*) 1918

Constitution of the RSFSR (*Конституция РСФР*) 1925

Criminal (Penal) Code of the RSFSR (*Уголовный кодекс РСФСР*) 1926

Criminal Procedure Code of the RSFSR (*Уголовно-процессуальный кодекс РСФСР*) 1922

Instructions on Issuing and Registering Passports in Moscow, Leningrad and Kharkiv, in a 100-Kilometer Strip around Moscow and Leningrad and in a 50-Kilometer Strip around Kharkiv (*Инструкция о выдаче и прописке паспортов в Москве, Ленинграде и Харькове, в 100-километровой полосе вокруг Москвы и Ленинграда и в 50-километровой полосе вокруг Харькова*) 1933

Law 'On the Judicial System of the USSR, Union and Autonomous Republics' (*Закон СССР 'О судоустройстве СССР, союзных и автономных республик'*) 1938

No. 1 From the Resolution of the 17th Congress of the CPSU 'On the Second Five-Year Plan for the Development of the National Economy of the USSR (1933-1937)' (*№ 1 Из резолюции XVII съезда ВКП(б) 'О втором пятилетнем плане развития народного хозяйства СССР (1933- 1937 гг.)*') 1934

Operational Order of the NKVD of the USSR No. 00447 'On the Operation to Repress Former Kulaks, Criminals and other Anti-Soviet Elements' (*Оперативный приказ НКВД СССР № 00447 'Об операции по репрессированию бывших кулаков, уголовников и др.. антисоветских элементов'*) 1937

Operational Order of the NKVD of the USSR No. 00486 'On the Operation to Repress the Wives and Children of Traitors to the Homeland' (*Оперативный приказ НКВД СССР № 00486 'Об операции по репрессированию жен и детей изменников родины'*) 1937

Regulations on the Bar of the USSR *(Положение об адвокатуре СССР)* 1939

Resolution of the Politburo of the Central Committee of the CPSU 'On Bringing to Justice Traitors to the Homeland and Members of their Families' (*Постановление политбюро ЦК ВКП(б) 'О привлечении к ответственности изменников родине и членов их семей'*) 1940

Antebellum United States

Act Prohibiting Importation of Slaves 1807

An Act for the Gradual Abolition of Slavery 1780

An Act To Prevent All Persons From Teaching Slaves To Read Or Write, The Use of Figures Excepted 1831

Constitution of the United States 1788

Fugitive Slave Act 1793

Fugitive Slave Act 1850

Pennsylvania Personal Liberty Law 1826

Miscellaneous

Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 1945

Proclamation 95 (Emancipation Proclamation) 1863

Slavery Abolition Act 1833

I. Introduction

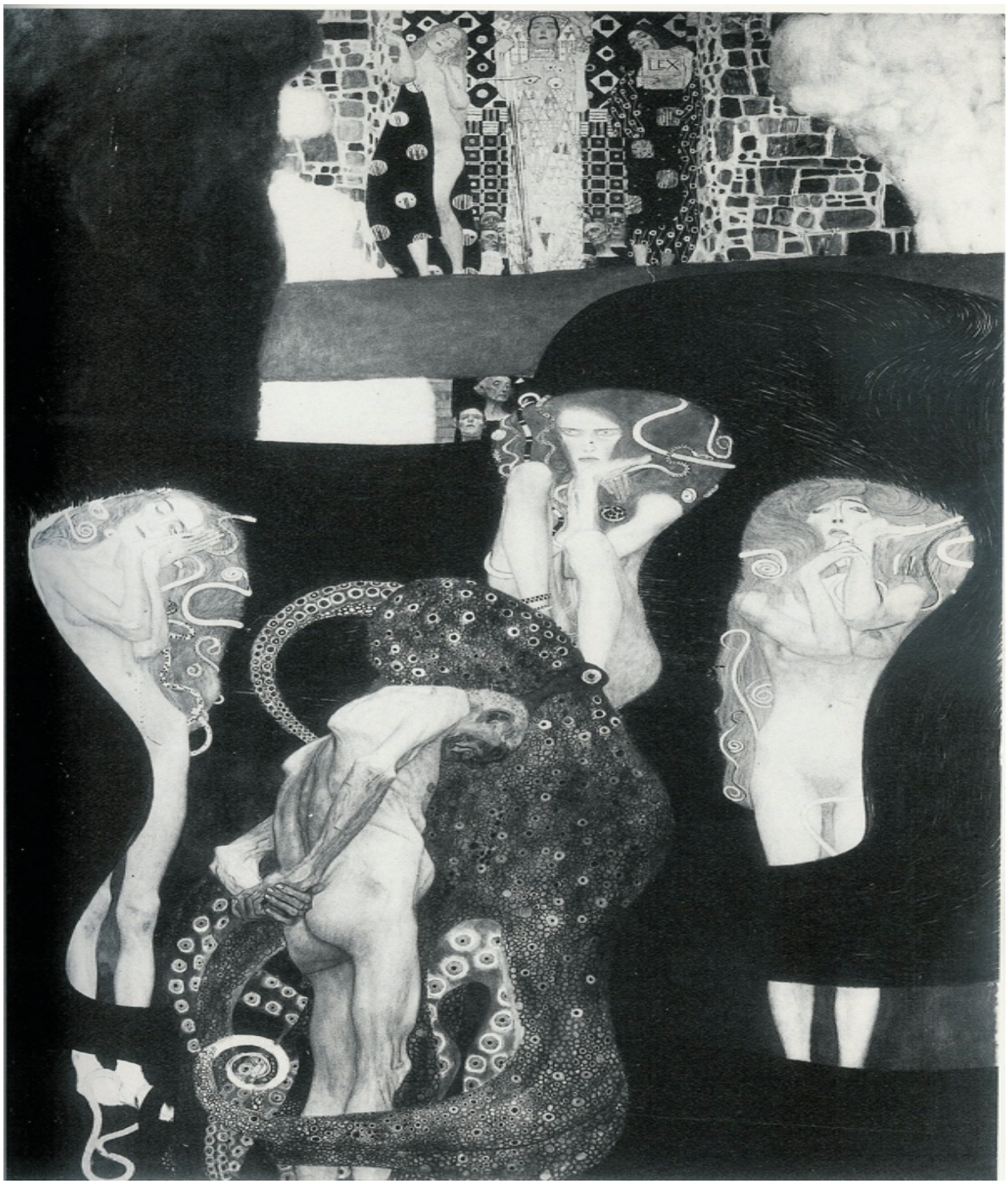

Image 1:
Gustav Klimt, *Jurisprudence* (1903)

1. Prelude: An Uncomfortable Truth about Law

In 1903, Gustav Klimt, an Austrian symbolist artist, unveiled *Jurisprudence*, one of the murals (together with *Philosophy* and *Medicine*) that he was commissioned to produce for the ceiling of the Great Hall of the University of Vienna. The painting depicted, in its centre, a naked and withered old man standing with his back turned to us. We cannot see his face as he bows his head in submission. The man is entrapped by the Kraken, a mythical octopus-like creature reminiscent of the State[1], whose tentacles, despite not touching his body, form a barrier around him. The man and the Kraken are surrounded by three women, reportedly the Furies (also known as Erinyes or Eumedines), Ancient Greek deities of vengeance[2], who, rather fittingly, do not take any sympathy in the man's plight. The other three female figures at the top of the painting representing the three Virtues – Truth, Law, and Justice[3] – look on, equally indifferent.

Following a public outcry, the triptych was never displayed at the University. Klimt's contemporaries primarily objected to the depiction of nudity that they found obscene[4], however, many scholars argue that the causes of such a negative reaction were much deeper and stemmed from the challenge the work posed to the conventional understanding of law. As Manderson notes in his essay on Klimt's work,

> 'For centuries, the figure of justice had been idealised, and the State legitimated as its embodiment. Klimt produces something quite different: law from the point of view of its victims[5].'

Rather than protecting the man in the painting, the Kraken-State makes him suffer. Even more significantly, Truth, Law, and Justice, instead of rendering him his due, remain unbothered and wilfully so – they 'stand and watch; they give it the thumbs up[6].'

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[1] Rafael Simioni, 'Gustav Klimt's "Jurisprudenz": Law, Public Sphere and Sovereign Violence' (2019) 5 ANAMORPHOSIS - Revista Internacional de Direito e Literatura 37, 47–48, 55. Desmond Manderson, 'Klimt's Jurisprudence—Sovereign Violence and the Rule of Law' (2015) 35 Oxford Journal of Legal Studies 515, 520.
[2] Simioni (n 1) 42, 51. Manderson (n 1) 525. Carl E Schorske, *Fin-de-Siècle Vienna: Politics and Culture* (Vintage Books 1981) 251.
[3] Simioni (n 1) 38, 42. Manderson (n 1) 520, 525; Schorske (n 2) 250.
[4] Simioni (n 1) 41.
[5] Manderson (n 1) 521.
[6] ibid 526. See also Simioni (n 1) 50–51.

In other words, *Jurisprudence* can be read as exposing a certain uncomfortable truth about law. Although law is often venerated as a valuable tool of resisting extreme injustice, suffering, and dehumanisation, it can be used to inflict them, often in new, more efficient ways, manifesting what Green termed the 'immorality that law makes possible[7].' In Green's own words:

> '[W]herever there is law, new moral risks emerge as a matter of necessity. There are not only more efficient forms of oppression, there are also new vices: the alienation of community and value, the loss of transparency, the rise of a new hierarchy, and the possibility that some who should resist injustice may be bought off by the goods that legal order (in some cases, necessarily) brings[8].'

Law not only can be used to further moral iniquity, but, historically speaking, has also been utlised in this manner. In 1945, *Jurisprudence,* together with *Philosophy* and *Medicine*, was destroyed, most likely in a fire set by the retreating Nazi forces[9]. It seems quite apt that *Jurisprudence* met its fate in this way, as it had foreshadowed the rise of Nazi dictatorship[10], where law took on the sinister role depicted in the painting. As Neiman has argued, Nazi atrocities, which she refers to collectively as *Auschwitz*, were 'conceptually devastating because [they] revealed a possibility in human nature that we hoped not to see[11].' I shall add that it revealed a possibility in *law* that we hoped not to see. Like Klimt's painting, *Auschwitz* has awakened us to law being not just compatible with, but also, which is even more damning, conducive to great iniquity. While there is no implication that the work was destroyed for its subversive depiction of the nature of law, one would agree with Manderson that '[t]he tentacular State, the lofty idealists, the venal Furies—everyone must have breathed a sigh of relief when *Jurisprudence* went up in smoke[12].' This makes remembering – and further examining – the uncomfortable truth it displayed even more important.

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[7] Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035, 1035, 1058.
[8] ibid 1054.
[9] Simioni (n 1) 42, 64–65. Manderson (n 1) 516–518, 541–542.
[10] As argued by Manderson. Manderson (n 1) 527.
[11] Susan Neiman, *Evil in Modern Thought* (Princeton University Press 2015) 254.
[12] Manderson (n 1) 542.

2. Evil Law Introduced

Just like Klimt, I aim to be expressive, if not provocative (albeit not in the same way as his *Goldfish: To My Critics* (1902)), in unpacking this surprising alliance between moral iniquity and legality. To me, in its most palpable manifestation, this relationship can be best understood by introducing and examining what I shall call '**evil law**', or law that is particularly morally iniquitous, of the kind we see in *Auschwitz*. Some may reject the invocation of the term 'evil' as too emotionally charged and even quasi-religious, which makes it hard to square its use with a dispassionate analysis a legal theorist ought to undertake. Nevertheless, in this thesis I shall claim evil law as a legitimate object of study, pursuing the **research objective** of investigating the nature of this phenomenon.

I should note that the problem of morally iniquitous law is hardly unexamined. References to 'bad', 'unjust', and 'evil' law[13] date back to the ancients. The oft-quoted maxim *lex iniusta non est lex* ('unjust law is not a law') was foundational for the natural law theory prevalent at the earliest stage of development of legal-philosophical thought. Spanning more than 1500 years, it appeared in the writings of Plato[14], Aristotle[15], Cicero[16], and, most famously, Augustine[17] as well as, with some reservations, Aquinas[18]. The advent of legal positivism in the XIXth century, drawing a clear line between law and morality, demoted the discussion of evil law from its central place in the jurisprudential discourse. However, the interest in the theoretical and practical problems posed by evil law was rekindled in the middle of the XXth century. This turn can be attributed to the experience of Nazism and, to a slightly lesser extent, Stalinism. Contemporary debates about evil law can be roughly slotted into three categories, each dedicated to debating a possible meaning of *lex iniusta non est lex*. The first one answers the

[13] While 'bad', 'unjust', and 'evil law', for the purposes of this dissertation, are different terms, they often roughly describe a similar phenomenon. For more detail see Chapter III, Section 3.
[14] Plato, *The Laws* (Trevor Saunders tr, Penguin Classics 2005) IV: 715b. Cited in John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011) 363.
[15] Aristotle, *The Politics* (Ernest Barker tr, Revised ed, Oxford University Press 2009) III.4: 1279a17–22; III.5: 1280b7–9; IV.4: 1292a31–34. Cited in Finnis, *Natural Law and Natural Rights* (n 14) 363.
[16] Cicero, 'On the Laws' in Clinton W Keyes (tr), *On the Republic. On the Laws* (Harvard University Press 1928) II, v, 11. Cicero, 'On the Republic' in Clinton W Keyes (tr), *On the Republic. On the Laws*, vol 213 (Harvard University Press 1928) III, xxxi, 43. Cited in Finnis, *Natural Law and Natural Rights* (n 14) 363.
[17] Aurelius Augustine of Hippo, *On Free Choice of the Will* (Thomas Williams tr, Hackett Publishing Co, Inc 1993) I, v, 11.Cited in Finnis, *Natural Law and Natural Rights* (n 14) 363.
[18] As per Finnis, Aquinas referred to unjust law being law *simpliciter* (in a primary sense). To him, unjust law is still law *secundum quid* (in a secondary sense). Thomas Aquinas, *Summa Theologica* (Dominicans. English Province tr, Benziger Bros 1947) Part I-II Q92 A1 ad. 4 <https://aquinas101.thomisticinstitute.org/st-index>. Cited by Finnis, *Natural Law and Natural Rights* (n 14) 363–364. See also Chapter III, Section 3.B.(i).a; Chapter IV, Section 3.B.

question of whether evil law is law in the first place, taking the maxim literally, and has been exemplified by the foundational debate between Hart and Fuller on the identity of Nazi law[19]. The second, originating from a series of exchanges between Simmonds and Kramer, deals with whether there is reason for wicked regimes to make use of law in the first place, relating to whether the Rule of Law, thinly construed, would be serviceable to evil regimes[20]. The third examines the practical effects of the saying in question – in particular, whether the reasons there may be to obey good law apply to evil law.

Still, even though the phenomenon of evil law has been extensively studied, there is nevertheless an original contribution to be made. Quite surprisingly, the investigation of evil law in existing literature has been quite patchy, with some key questions – including, most notably, what evil law is in the first place – having been left unanswered. Aiming to fill this niche, my thesis will thus deal with the nature of evil law more comprehensively in what shall be the first monograph-length account of evil law in all its different aspects. In furthering this goal, my thesis will integrate different facets of the theory of evil law into a unified whole. My **research question**, *what is the nature of evil law*, will thus be broken down into the following sub-questions: (i) *what is evil*; (ii) *what is evil law*; (iii) *whether evil 'law' is law*; (iv) *how law helps and hinders evil regimes*; (v) *what rights and obligations we have in response to evil law*; and (vi) *how we can resist evil law in practice*.

[19] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630. See further Chapter IV, Section 4.

[20] Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell 1986) 115–125. Matthew H Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford University Press 1999) 62–71. Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell 2002) 223–253. Matthew H Kramer, 'On the Moral Status of the Rule of Law' (2004) 63 Cambridge Law Journal 65. Nigel E Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism' (2004) 63 The Cambridge Law Journal 98. Nigel E Simmonds, 'Law as a Moral Idea' (2005) 55 The University of Toronto Law Journal 61, 77–85. Matthew H Kramer, 'The Big Bad Wolf: Legal Positivism and Its Detractors' (2004) 49 American Journal of Jurisprudence 1. Matthew H Kramer, *Where Law and Morality Meet* (Oxford University Press 2008) 182–216; Matthew H Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007). Nigel E Simmonds, *Law as a Moral Idea* (Oxford University Press 2008). Nigel E Simmonds, 'Kramer's High Noon' (2011) 56 The American Journal of Jurisprudence 135; Matthew H Kramer, 'For the Record: A Final Reply to N.E. Simmonds' (2011) 56 The American Journal of Jurisprudence 115. This list was partially compiled in Matthew H Kramer, 'Freedom and the Rule of Law' (2010) 61 Alabama Law Review 827; Hamish Stewart, 'Incentives and the Rule of Law: An Intervention in the Kramer/Simmonds Debate' (2006) 51 The American Journal of Jurisprudence 149, 149 (note 1).

3. Why Study Evil Law

The question remains as to why a scholarly investigation of evil law is not just possible, but also worthwhile – why does the identified gap in the literature need to be filled? One can point out that evil regimes are outnumbered by those that are merely unjust, benign, or even good. Or, even more strongly, one can suggest that evil law is insignificant when it comes to deciphering the nature of law more generally as it rejects everything law, in our imagination, should be standing for. This makes it necessary to spell out the reasons, both theoretical and practical, for why one should pay attention to evil law.

The first, theoretical, reason to study evil law is that general, or universal, jurisprudence necessarily claims comprehensiveness. This sentiment goes back to Austin's distinction between general jurisprudence, 'the science concerned with the principles, notions, and distinctions which are common to systems of law[21]' and particular jurisprudence, 'the science of any such system of positive law as now actually obtains, or once actually obtained, in a specifically determined political society[22].' In other words, general jurisprudence is not a study of individual legal systems. It harbours an aspiration to describe law in most general terms. Therefore, excluding evil law from the assessment of law at large will make one's theory impoverished. Incorporating evil law into one's theory thus serves the same function as including power-conferring as well as duty-imposing rules, statutory as well as just judge-made law, and continental as well as common law legal systems. The first four chapters of this thesis aim to further this theoretical goal by dealing with topics such as the nature of evil more generally (by answering the question of *what is evil*) and evil law more particularly (*what is evil law*), as well as the compatibility of evil and law, both conceptual (*whether evil law is law*) and practical (*how law helps and hinders evil regimes*).

The second reason for researching evil law is that comprehending its operation is important for dealing with evil law in practice. We recognise that theoretical scholarship, for better or worse, is not sealed away from the practical operation of law and can influence it. Consider, for instance, Radbruch's assertion that legal positivism was partly to blame for the subversion of

[21] John Austin, *Austin: The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, Cambridge University Press 1995) 213.
[22] ibid 210.

law in Nazi Germany[23] or Dyzenhaus's claim that Apartheid-era South African judges were able to render just sentences if they had adopted Dworkin's interpretivism[24]. Regardless of the truth of either of these conclusions, they are important here as arguments that legal theory matters practically. This dissertation is, of course, a contribution to legal theory rather than an activist manifesto. Still, despite operating on a certain level of detachment, studying evil law's nature can aid us when we are confronted with evil law in the practical arena. To address these pragmatic implications of the study of evil law, the last two substantive chapters of this thesis will focus on whether and how evil law is to be responded to by answering the question of *what rights and obligations we have in response to evil law* and *how we can resist evil law in practice*.

4. Methodology: Legal Theory and Legal History

A. Uniting legal history and legal theory

With the research objective framed and justified, I still need to explain how it will be realised, or what methods I shall use in this thesis. My investigation is not simply of a theoretical nature, as it draws on legal history as well as legal theory. At first sight, these two disciplines are strange bedfellows. Legal theory seeks to make *universal* claims that apply to a wide range of legal systems – past, present, future, and even imaginary[25]. Conversely, legal history investigates the *particular* features of law in a specific temporal and spatial context[26]. Moreover, while legal theory seeks to identify *necessary* characteristics of all legal systems, legal history emphasises the *contingency* underlying the legal phenomena it concerns itself with[27]. In my view, those differences are a reason for, rather than against, a closer interdisciplinary dialogue between the two objects of study, including when it comes to examining the phenomenon of evil law.

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[23] Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 Oxford Journal of Legal Studies 1, 6.
[24] David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2nd ed., Oxford University Press 2010).
[25] See, *e.g.*, Raz's discussion of his 'society of angels' thought experiment that sought to prove that a sanctionless legal system would be 'humanly impossible but logically possible'. Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 159–160.
[26] Maksymilian Del Mar, 'Beyond Universality and Particularity, Necessity and Contingency: On Collaboration Between Legal Theory and Legal History' in Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart Publishing 2016) 24–25. See also, making the same point, Charles L Barzun and Dan Priel, 'Jurisprudence and (Its) History' (2015) 101 Virginia Law Review 849, 849.
[27] Del Mar (n 26) 24–25.

First, legal theory needs legal history. This is contrary to a rather dismissive view of history that some legal theorists hold according to which 'it is, at best, an optional extra – a charming source of illustrations perhaps – but nothing more than a gloss, the froth; useful potentially (though only in the drawing room of legal theory, after all the "real" conceptual work has been done), but not vital[28].' However, this attitude, despite its apparent prevalence, seems puzzling for the following four reasons. Firstly, turning to history in legal reasoning is inevitable since it depends on law-creating acts and legal principles forged in the past in both non-evil and evil legal systems[29]. Secondly, a philosophical project aspiring to reach universal truths about law should be open to considering which form law took in various societies, including those that no longer exist, history 'pos[ing] a challenge to see whether the data it provides can be explained by the model[30].' In the context of evil law, this can be claimed with an even stronger force, as most jurisprudential inquiry focuses on legal systems that are not tainted with moral iniquity that permeates its goals and its methods. Thirdly, the same applies, for a similar reason, not only to law, but also to theories of law developed in evil legal systems. After all, intellectual history is important in our theorising about law, especially when it comes to theories 'emerging in worlds whose social, political, and religious dimensions are very different from our own[31].' Fourthly and finally, normative jurisprudence would benefit from grounding its claims in legal history. We can draw lessons from the past to solve contemporary problems[32]. This includes thinking of what rights and obligations we have in response to evil law and what would be the preferred way – both morally and pragmatically speaking – to fulfil them.

Second, just as legal theory is enriched by legal history, being aware of the legal-theoretical standpoint can help legal historians in their investigation of evil laws and legal systems. Firstly, evil law is a species of law in general and therefore can be examined using the theoretical toolkit developed in general jurisprudence. Barrozo writes that law is 'the one universal institution[33]' and legal history ought to reflect that[34]. As a result, 'legal historians need to

[28] ibid 23.
[29] Nicola Lacey, 'Jurisprudence, History, and the Institutional Quality of Law' (2015) 101 Virginia Law Review 919, 922.
[30] Michael Lobban, 'Legal Theory and Legal History: Prospects for Dialogue' in Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart Publishing 2016) 16.
[31] Lacey (n 29) 924. See also Lobban (n 30) 16–17.
[32] Lobban (n 30) 17. Lacey (n 29) 920.
[33] Paulo Barrozo, 'Law in Time: Legal Theory and Legal History' (2021) 31 Yale Journal of Law & the Humanities 320–321.
[34] ibid 321.

ground unavoidable determinations of historical relevance in 'a theory of nature and evolution of law[35]', lest they risk 'dilettantism[36]'. For instance, in Del Mar's words, 'every observation and description made by a historian raises "classificatory" <…> questions[37] [such as, according to Gardner, "what it takes to qualify as law[38]"].' Secondly, Barrozo points out that 'legal actors orientate and operate in the world through concepts[39]', and hence tools for conceptual analysis provided by legal theory are relevant when creating a narrative about them and their legally significant acts[40]. There is no reason why this should not apply to evil regimes that use distinctively legal vocabulary and methods to achieve their predominantly morally iniquitous aims.

As a result, conscious of the danger of over-reliance on both legal theory and legal history – each at the expense of the other – I plan to unite them in this project, aspiring to produce general insights about evil law's nature as well as how this kind of law should be responded to, while also testing these conclusions against particular experiences of morally iniquitous legal systems. Invoking history when discussing evil law, much like the examination of evil law itself, is not new. The foundational Hart-Fuller debate occurred against the backdrop of Nazi law[41], and contributions such as Graber's[42] and Dyzenhaus's[43] place a theoretical discussion of evil law in the context of the *Dred Scott* decision in the antebellum United States and of law in Apartheid South Africa respectively. My study of evil law, while building on this literature, will go further than it in the following respects. Firstly, my invocation of legal history will go deeper than a lot of writing on the subject, considering historical evil regimes in their entirety rather than focusing on legal rules abstracted from their context. Otherwise, I risk falling into the same trap as Hart and Fuller, both of whom happened to misrepresent the Grudge Informer Case at the heart of their debate[44]. Secondly, unlike Graber's and Dyzenhaus's contributions, which are more historically informed and attentive to detail, mine will aspire to integrate the

[35] ibid 322.
[36] ibid.
[37] Del Mar (n 26) 34.
[38] John Gardner, 'Law in General', *Law as a Leap of Faith: Essays On Law In General* (Reprint edition, Oxford University Press 2014) 277.
[39] Barrozo (n 33) 323.
[40] ibid 323–324.
[41] Hart (n 19); Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19).
[42] Mark A Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press 2006).
[43] Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (n 24).
[44] The incorrect interpretation of the case was pointed out in HO Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 The Modern Law Review 260, 268. See also David Dyzenhaus, 'The Grudge Informer Case Revisited' (2008) 83 NYU Law Review 132–134.

test cases into my theoretical discussion instead of separating them out. Thirdly, my examination of evil law will be focused not on one, but on three historical evil regimes. While this thesis is not explicitly a comparative study, as comparative law requires its own methods and approaches, considering multiple (and diverse) evil legal systems will enrich my conclusions.

B. Test cases of evil law

(i) Justifying the choice of test cases

The three examples of evil legal systems I will consider are Nazi Germany, Stalin's Soviet Union, and the regime of slavery in the antebellum United States. The choice of these examples should not be taken for granted and has to be justified. The main reason why I opted to cover the regimes in question is that they are nearly universally described as 'evil'. These legal systems are central cases of evil law. In order to understand a phenomenon, one needs to focus on its most obvious cases to ascertain its meaning and only then move onto peripheral cases, describing how they deviate from this understanding[45]. The central case method is helpful when it comes to talking about evil law, as it saves us from potential controversy caused by applying this label to less obvious cases that can derail my focus from the exploration of how evil law operates to discussing whether the laws and legal systems in question are in fact evil.

One can argue that, when utilising the central case method, focusing on historical cases rather than contemporary examples robs my investigation of evil law of relevance. However, illustrating my theoretical conclusions with examples of past legal systems does not mean restricting them to their particular historical contexts. These examples have much more in common with modern cases of evil law than one may think. Even though one might argue that focusing on history puts us in danger of making anachronistic judgments about supposedly evil regimes that were not thought of as such at the time of their operation, I will claim that there are some non-contingent objective moral values against which one can measure the evil of the

[45] Aristotle, *The Eudemian Ethics* (Anthony Kenny tr, Oxford University Press 2011) VII.2: 1236a16–30. Aristotle, *The Politics* (n 15) III.1: 1275a33–1276b4.; Aristotle, *The Nicomachean Ethics* (David Ross tr, Oxford University Press 2009) VIII.4: 1157a30–3. As cited by Finnis. Finnis, *Natural Law and Natural Rights* (n 14) 9–11. Before Finnis wrote an extensive account of the Aristotelian central case method, that method appeared in Hart's work. HLA Hart, *The Concept of Law* (3rd ed., Oxford University Press 2012) 15 ff. Finnis, *Natural Law and Natural Rights* (n 14) 10. As further explored in Matthew H Kramer, *H.L.A. Hart: The Nature of Law* (Polity Press 2018) 5 ff. This dissertation accepts the central case method, but reaches different conclusions when applying it to mark the distinction between evil and non-evil laws. See Chapter IV, Section 3.B.

regimes considered in this dissertation[46]. In addition, historical cases of evil law have been reflected upon and rest on fewer contested claims. This makes them better suited than any contemporary examples to the purpose of constructing a central case of evil law.

Further, I need to explain why to use these historical cases and not others. Here, Apartheid-era South Africa, Fascist Italy, and various colonial regimes such as the British Empire immediately come to mind. A somewhat underwhelming answer is that, in order to make my inquiry manageable, I need to limit myself to a few test cases. That said, the cases I have selected for my enquiry are not random. My first reason for choosing them is that they share some *similarities* which allows us to subsume them under the same category of evil legal systems, as they have similarly morally iniquitous aims that they achieve in similar, distinctly legal, ways. As a testament to that, all three cases have been extensively referenced in legal-theoretical and adjacent discussions surrounding evil law[47]. My second point is that these examples are *different* enough to render the comparison between them illuminating. One important consideration I have in mind is that the test cases I use need to reflect the way evil law operates in a diverse range of legal systems. The legal system of the United States is a common law system. In contrast, Nazi Germany operated in a civil law context. Finally, the law of the Soviet Union has its roots in the civil law tradition that pre-revolutionary Russia belonged to, yet it deviated from it enough to be described as a *sui generis* 'socialist' legal system. In addition, while Nazi Germany and Stalin's Soviet Union were totalitarian states, the same cannot be said about the antebellum United States. By incorporating this example into my analysis, I make a point of using 'evil law' as transcending the usual totalitarianism / democracy binary that often mistakenly substitutes judgment on individual legal systems' moral merit and demerit.

[46] Chapter II, Section 3.C.

[47] Nazi Germany, my first case study, is the paradigmatic example of an evil legal system that has been a feature of most discussions surrounding evil and unjust law such as the debate on 'Radbruch's Formula' and the Hart-Fuller debate. Radbruch (n 23). Hart (n 19); Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19). Both Nazi Germany and the Soviet Union during the Great Terror are referred to in Arendt's seminal work 'The Origins of Totalitarianism'. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973). The regime of slavery in the antebellum United States has also generated a lot of traction as both abolitionists at the time and later historians have engaged in a thorough examination of whether the Constitution permitted or prohibited slavery. See, *e.g.*, Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Harvard University Press 2018).

(ii) Introducing the test cases

a. Nazi Germany

The NSDAP, or Nazi Party, came to power in 1933, after its leader, Adolf Hitler, was appointed the Chancellor of Germany by President Paul von Hindenburg. Arson at the *Reichstag* by a Communist sympathiser gave von Hindenburg an excuse, on Hitler's advice, to exercise powers vested in him by the emergency provision in Article 48 of the *Weimar Constitution*[48] and to pass the so-called *Reichstag Fire Decree* on the 28 February 1933[49]. The Decree suspended a number of the articles of the *Weimar Constitution*: 114 (individual rights and *habeas corpus*), 115 (inviolability of the home), 117 (privacy of correspondence), 118 (freedom of expression), 123 (assembly), 124 (freedom of association), and 153 (right to property) and allowed the federal government to override the states if public order was endangered. As Evans noted, the Decree 'provided the legal pretext for everything that was to follow in the next few months[50].' As a consequence of these provisions, elections on the 5 March 1933, conducted in the atmosphere of 'terror, repression, and propaganda[51]' across the country, resulted in a victory of the Nazi Party alongside the German National People's Party (DNVP), its coalition partner. Shortly after this, the *Reichstag Fire Decree* was followed by an even more egregious piece of legislation, the *Enabling Act*. The *Enabling Act* was passed by the use of the procedure for the amendment to the constitution by the *Reichstag* on 23 March 1933, allowing the Chancellor (Hitler) and his cabinet to issue statutes bypassing the *Reichstag*[52], *de facto* abrogating the *Weimar Constitution*[53]. Both the *Reichstag Fire Decree* and the *Enabling Act* were in force till the end of Nazi Germany, placing it under a permanent Article 48 state of emergency – as per Evans, 'a temporary piece of emergency legislation with some limited precedents in the Weimar period now became the legal, or pseudo-legal basis for the permanent removal of civil rights and democratic liberties[54].' A series of further political

[48] The Constitution of the German Reich (Weimar Constitution) (*Die Verfassung des Deutschen Reichs*) 1919.
[49] Decree of the Reich President for the Protection of People and State (Reichstag Fire Decree) (*Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*)1933.
[50] Richard J Evans, *The Coming of the Third Reich* (Penguin Press 2009) 333.
[51] ibid 339.
[52] Law to Remedy the Distress of People and Reich (Enabling Act) (*Gesetz zur Behebung der Not von Volk und Reich*) 1933.
[53] At least this was the way the *Act* was contemporaneously interpreted by Schmitt in Carl Schmitt, 'Das Gesetz Zur Behebung Der Not von Volk Und Reich' (1933) 38 Deutsche Juristen-Zeitung 455. Cited in Joseph Bendersky, 'The Expendable Kronjurist: Carl Schmitt and National Socialism, 1933-36' (1979) 14 Journal of Contemporary History 309, 311.
[54] Evans, *The Coming of the Third Reich* (n 50) 354.

changes cementing the Nazi dictatorship followed: within a year's time Germany was centralised[55], the trade unions were abolished and replaced by the German Labour Front[56], and all political parties other than the Nazi Party were banned[57]. After the death of President von Hindenburg in 1934, Hitler assumed the powers of the President and adopted the title of Führer and Reich Chancellor. The *Führerprinzip*, a political doctrine recognising the will of the Führer as the highest law[58], blossomed, giving Hitler even more power.

After Hitler and the Nazi Party seized power, they utilised it to suppress the groups that they saw as enemies: primarily Jews, but also other ethnic minorities (such as 'Gypsies' (nomadic peoples such as Romani, Sinti, and Lalleri)[59], Black people[60], and, later, Slavic peoples), ideological rivals (predominantly Communists – the very first targets of the regime[61]), religious minorities such as the Jehovah's Witnesses[62], the disabled[63], those who were LGBTQ+[64], or anyone who was perceived as a threat to the *Volksgemeinschaft* (the Nazi ideal of a 'peoples' community' also translated as 'blood community'). This suppression often took place via legal channels. One example was the 1933 *Law for the Restoration of the Professional Civil Service* that banned non-'Aryans' from being civil servants[65]. Moreover, again in 1933, a *Law for the Prevention of Genetically Diseased Offspring* was enacted to sterilise people afflicted with certain disabilities[66]. In 1935, the Nazi state issued the *Nuremberg Laws*. One of them, the *Law for the Protection of German Blood and German Honour*, forbade marriages (Article 1) and extramarital intercourse (Article 2) between Jews and Germans under harsh penalties[67].

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[55] Provisional Law on the Coordination of the States with the Reich (*Vorläufiges Gesetz und Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) 1933. Second Law on the Coordination of the States with the Reich (*Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) (1933). Law on the Reconstruction of the Reich (*Gesetz über den Neuaufbau des Reichs*) (1934).
[56] Law on the Trustees of Labour (*Gesetz über Treuhänder der Arbeit*) 1933.
[57] Law Against the Formation of Parties (*Gesetz gegen die Neubildung von Parteien*) 1933. All described in Saul Friedlander, *Nazi Germany and the Jews: The Years of Persecution, 1933-1939* (Phoenix 2014) 17.
[58] As per Evans, 'Hitler's word <…> was thus law, and could override all existing laws. He was not given powers by the state, but by history.' Richard J Evans, *The Third Reich in Power, 1933-1939* (Penguin Press 2006) 44.
[59] ibid 524 ff.
[60] ibid 254 ff.
[61] 'The primary political targets of the [Nazi] regime and of its terror system, at least during the first months after the Nazi accession to power, were not Jews but Communists.' Friedlander (n 57) 17 ff. See also Evans, *The Third Reich in Power, 1933-1939* (n 58) 67 ff.
[62] Evans, *The Third Reich in Power, 1933-1939* (n 58) 254 ff.
[63] ibid 506 ff.
[64] ibid 529 ff.
[65] Law for the Restoration of the Professional Civil Service (Civil Service Law) (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) 1933.
[66] Law for the Prevention of Genetically Diseased Offspring (Sterilisation Law) (*Gesetz zur Verhütung erbkranken Nachwuchses*) 1933.
[67] Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935.

The other, the *Reich Citizenship Law*, stripped Jews of German citizenship and introduced a second-class legal status for them instead, stating that '[a] Reich citizen is a subject of the state who is of German or related blood[68].' There are more examples of legal repression that will be discussed in this thesis.

The persecution did not just occur through legal channels as Nazis, as Evans noted, 'had always held the letter of the law and the institutions of the state in contempt <…> [and] [f]rom the very beginning <…> operated extra-legally[69].' To them, 'the bullet and the ballot-box were complementary tools of power, not alternatives[70].' The political dealings and legal reforms were often accompanied by random acts of violence conducted by the Nazi Party paramilitaries such as the *Schutzstaffel* (SS) and the *Sturmabteilung* (SA) both before and after the Nazis took power. One of the most vivid examples was *Kristallnacht* (The Night of the Broken Glass), an anti-Jewish pogrom carried out by Nazi thugs on the night between 9-10 November 1938, and often regarded by historians as a turning point from the policy of persecution to the policy of extermination[71]. Even more strikingly, mass killings of the aforementioned 'enemies' of the Nazi state and concentration camps, where they were imprisoned, forced to work, experimented on, and, eventually, (either directly or indirectly) killed, occurred in addition to the aforementioned legal reforms. These practices gradually developed, from the early years of Nazi rule when the concentration camps were built for political dissidents[72] to the race-based terror that was finally entrenched at the Wannsee Conference on 20 January 1942, where the Nazi leadership planned the details of the 'Final Solution' with regards to Jews.

The Nazi regime met its end by being defeated by the Allies in the Second World War in 1945. Since then, there has been a lot of effort to reckon with its bloody past. The legal responses to this problem took two forms. Firstly, prominent Nazis were put on trial both in international and domestic settings. On the international level, the central stage was the International Military Tribunal in 1945-1946 where top Nazi officials faced charges of crimes against peace, war crimes, and, with most relevance to this dissertation, crimes against humanity[73]. There were other Nuremberg trials, including the famous Judges' Trial in 1947. The most well-known

[68] Reich Citizenship Law (*Reichsbürgergesetz*) 1935.
[69] Evans, *The Third Reich in Power, 1933-1939* (n 58) 44.
[70] ibid.
[71] See, *e.g.*, Friedlander (n 57) 270.
[72] ibid 17. Evans, *The Third Reich in Power, 1933-1939* (n 58) 81 ff.
[73] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 1945.

example on the national plane was the belated Eichmann trial in Israel in 1961-1962. Secondly, the Allies set out to implement 'denazification' in former German territories, aiming to rid them of Nazi influence, although this project was abandoned as the Cold War began[74].

b. Stalin's Soviet Union

After the death of Vladimir Lenin in 1924, Joseph Stalin, who had already been the General Secretary of the CPSU since 1922, succeeded Lenin in the position of the *de facto* head of state. Stalin's rule represented, in some way, a departure from the previous regime - instead of pushing to export the Communist revolution to the rest of the world, Stalin shifted the policy direction to 'socialism in one country' and prioritised the strengthening of the Soviet state as a necessary first step towards Communism. Naturally, this shift demanded a revival of legality in some shape or form. While the early to mid 1920s were still full of the talk of the 'withering away of the law and state[75]', the late 1920s and early 1930s signified the return to statism and legalism. One of the promoters of this shift was Andrey Vyshinsky, later infamous as the prosecutor at the Moscow Show Trials. According to Vyshinsky, law was needed in order to accustom Soviet citizens to the new reality, capitalism being 'annihilated in human consciousness[76].' Vyshinsky never denied the 'withering away' thesis, but in effect he 'crystallised' arrangements that had earlier been seen as the transitional solutions between capitalism and communism into a fully-fledged legal system. Vyshinsky's theory was swiftly put into practice – a series of legal reforms followed in the early 1930's. Firstly, the Soviet state focused on providing legal education to judges and prosecutors, the majority of whom had no such credentials. Secondly, these reforms were oriented towards the centralisation of power and the strengthening of legal institutions such as the Procuracy, vesting in it the power to hunt down departures from 'socialist legality', the Soviet version of the rule of law. Thirdly, Soviet law was used to enhance the reputation of the Soviet state both internally and externally[77]. This period culminated in adopting the new *Constitution* of 1936, often referred to as *'Stalin's Constitution'*, boasting an extensive catalogue of rights that rivalled its Western counterparts.

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[74] See, *e.g.*, Frederick Taylor, *Exorcising Hitler: The Occupation and Denazification of Germany* (Bloomsbury Press 2011).
[75] Originally appeared in Frederick Engels, 'Anti-Dühring', *The Collected Works of Marx and Engels (Volume XXV)* (Lawrence & Wishart 1987) 268.
[76] Andrey Vyshinsky, *The Law of the Soviet State* (Hugh W Babb tr, Macmillan 1948) 50.
[77] Peter H Solomon, *Soviet Criminal Justice under Stalin* (Cambridge University Press 1996) 153 ff.

In popular imagination the Stalinist era is, however, not associated with this renewed emphasis on legality, but, quite deservedly, with the persecutions that culminated in the Great Terror of 1936-1938. While there is a lot to say about Stalin's rule before or after that period, seeking depth over breadth, I have decided to focus most of my inquiry on this period as it provides us with a lot of material from which to build an integrated legal-theoretical and legal-historical account of the nature of evil law. Even though political terror in the Soviet state was not unheard of before and had been a feature of the Soviet landscape since the October revolution of 1917, the 'purges' of the mid to late 1930s are rightly regarded as exceptional in their magnitude. The legal base for those purges can be found in the Article 58 of the *Criminal Code of the RSFSR* 1926 (as revised in 1934) that criminalised numerous 'counter-revolutionary activities' including treason, espionage, 'wrecking', and sabotage[78], as well as in *Stalin's Constitution* that, for all its liberal appearance, introduced the widely used term 'the enemy of the people' into the legal landscape in its Article 131[79]. Show trials such as the Moscow Trials of 1936, 1937, and 1938 represented the public façade of political terror. Stalin's old Bolshevik political rivals were accused of conspiring to undermine the Soviet state, and most were sentenced to execution or long terms in labour camps (*Gulags*). The trials were far from adversarial: judges, defence attorneys and even defendants themselves were put under pressure to conform to a narrative[80] put forward by the prosecution.

The public terror was also accompanied by secret terror conducted behind closed doors, kickstarted by the 1937 *NKVD Order* that signified a beginning to the 'repression operations' against 'anti-Soviet elements', including former kulaks (wealthy peasants persecuted during Collectivisation), members of disgraced political parties such as the Socialist Revolutionaries (SRs), and 'Whites' (who fought Bolsheviks during the Civil War)[81]. The 'most dangerous' of these 'elements' were ordered to be shot, while the rest sent to *Gulags* and prisons for 8 to 10 years. The *Order* included numerical targets detailing how many of such 'elements' were to be persecuted per region. These cases were to be investigated in an 'accelerated and simplified manner' and to be overseen by *troikas* – extralegal tribunals consisting of three members, usually a regional NKVD chief, a prosecutor, and a regional secretary of the Communist Party.

[78] Criminal (Penal) Code of the RSFSR (*Уголовный кодекс РСФСР*) 1926.
[79] Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936.
[80] I discuss this 'Soviet legal narrative' in Anna Lukina, 'The Semenchuk Case of 1936: Storytelling and Propaganda above the Law in the Soviet Criminal Trial' (2016) 41 Review of Central and East European Law 63.
[81] Operational order of the NKVD of the USSR No. 00447 'On the Operation to Repress Former Kulaks, Criminals and Other Anti-Soviet Elements' (*Оперативный приказ НКВД СССР № 00447 'Об операции по репрессированию бывших кулаков, уголовников и др.. антисоветских элементов'*) 1937.

Moreover, the families of those persecuted as outlined above also suffered various social and legal impediments. For instance, in relation to one of the counter-revolutionary crimes, treason, Article 58-1v of the aforementioned *Criminal Code of the RSFSR*[82] stated that in case of defection of a military member accused of treason, 'adult members of his family, if they in any way aided the preparation or carrying-out of treason, or only knew about it and failed to report it to authorities, shall be punishable by deprivation of liberty for a term of 5 to 10 years, with confiscation of all property', and, even more strikingly, that the '[r]emaining adult members of the family of the traitor, living together with him or as his dependents at the moment of the perpetration of the crime, shall be deprived of voting rights and exiled to remote districts of Siberia for 5 years', even if they had no knowledge of either treason or defection. In 1940, these provisions extended to family members of those 'traitors' who were not in the military[83]. Moreover, in 1937 a new *NKVD Order* called for the repression of wives and children of 'enemies of the people', stating that the former be imprisoned in *Gulags* for not less than 5-8 years and that 'socially dangerous children' be sent to *Gulags*, corrective labour colonies, or 'special-regimen' orphanages[84]. As in the case of Nazi Germany, these examples do not represent the entirety of Stalinist evil laws and more will subsequently be considered.

The Great Terror ended in 1938, yet Stalin continued to rule the Soviet Union till his death on 5 March 1953. The so-called destalinisation followed in 1956, after Nikita Khrushchev, upon gaining power, gave a secret speech 'On the Cult of Personality and its Consequences' sharply criticising Stalin's leadership. Whether destalinisation was sufficient in its reach has been hotly debated, but for now we shall assume that at least some level of reckoning took place.

c. Slavery in the antebellum United States

From the time of the American Revolution, there was a stark division between the free states, largely in the North, where slavery was abolished by 1804, and slave states, mostly in the South, where it was retained. The *Constitution of the United States*, aiming to strike a

[82] Criminal (Penal) Code of the RSFSR (*Уголовный кодекс РСФСР*) 1926.
[83] Resolution of the Politburo of the Central Committee of the CPSU 'On Bringing to Justice Traitors to the Homeland and Members of Their Families' (*Постановление политбюро ЦК ВКП(б) 'О привлечении к ответственности изменников родине и членов их семей'*) 1940.
[84] Operational order of the NKVD of the USSR No. 00486 'On the Operation to Repress the Wives and Children of Traitors to the Homeland' (*Оперативный приказ НКВД СССР № 00486 'Об операции по репрессированию жен и детей изменников родины'*) 1937.

compromise between 'free' and 'slave' states, contained several articles entangled with slavery, even though it omitted the word 'slavery' itself. One was the *'Three Fifths' Clause* under Article I, Section 2, Clause 3 that stated that 'Representatives <…> shall be apportioned among the several States <…> according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years <…> three fifths of all other Persons[85].' The *Clause*, while on the face of it refusing to treat slaves as full persons, was backed by the Northerners to temper, albeit not fully, the power of Southern states that demanded all slaves to be included in the population count. If the Southern proposal had been accepted, slaveholding states would have been getting more seats in the House of Representatives in Congress than non-slaveholding ones, albeit with fewer votes cast, as enslaved persons could not participate in elections. Another infamous clause was the *Fugitive Slave Clause* of Article IV, Section 2, Clause 1 stating that '[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due[86].' In other words, runaway slaves in 'free States' did not gain freedom and had to be returned back to their masters. Finally, the *Slave Trade Clause* of Article 1, Section 9, Clause 1 prohibited Congress to forbid '[t]he Migration or Importation of such Persons [*i.e.,* slaves – addition mine] as any of the States now existing shall think proper to admit[87]' prior to 1808. Unlike the other two Clauses, this Clause was rendered ineffectual as an 1807 *Act* prohibiting slave trade went into effect in 1808[88].

Within the Southern slave states enslaved persons were significantly disadvantaged by law. The conventional view is that slaves were considered mere chattels, however, that is not fully true as slaves were considered *both* chattels and persons[89]. On the one hand, slaves lacked some of the legal powers attached to personhood: to obtain citizenship (across the Union as per the infamous *Dred Scott* opinion by Chief Justice Taney[90]), to vote, to own property[91], to enter

[85] Constitution of the United States 1788.
[86] ibid.
[87] ibid.
[88] Act Prohibiting Importation of Slaves 1807.
[89] Eugene D Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (Vintage Books 1976) 28–30. Kenneth M Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (Vintage Press 1989) 192–193.
[90] *Dred Scott v Sandford* (1857) 60 US 393 (US Supreme Court) [26] (Taney CJ).
[91] Stampp (n 89) 197.

contractual relations[92], to be party to a suit[93], to inherit[94], to marry[95], and so on. Moreover, slaveholders had a 'nearly absolute[96]' dominion over their slaves, who could be bought, sold, or gifted at will[97]. Most shockingly, they were also allowed to chastise their slaves in any manner as long as they survived[98]. For instance, in *State v Mann*, where the slaveholder shot a slave and wounded her, it was decided that the master could not be charged with committing a battery upon a slave because of 'the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute[99].' On the other hand, like non-enslaved persons, slaves could be tried for criminal offences[100]. Basically, enslaved persons got 'the worst of both worlds' – chattel-hood and partial personhood[101].

While free States abolished slavery within their borders, they were still, by sharing the federal structure with slave states, forced to participate in slavery, albeit in a more indirect way. Most notably, the *Fugitive Slave Acts* enacted by Congress in 1793 and 1850, provided measures for enforcing the Fugitive Slave Clause. Firstly, the *Acts* allowed the slaveholders and their agents to seize the fugitives (Section 3 of the 1793 *Act*[102] and Section 6 of the 1850 *Act*[103]). Secondly, Section 5 of the 1850 *Act*[104] went even further in summoning further aid to slaveholders and slave catchers, by *imposing* duties to assist in capturing the runaways on (i) marshals and deputy marshals, (ii) Commissioners (a new office established by Section 1 to try fugitive slave cases outside of court), and (iii) ordinary bystanders (summoned into a *posse comitatus*). Thirdly, Section 6 of the 1850 *Act* prohibited the testimony of the alleged fugitive slave to be used as evidence in proceedings under the Act[105], which meant that anyone suspected of being a runaway slave – usually on account of their race – could be seised without due process. Fourthly, both the 1793 and 1850 *Acts* established criminal responsibility for obstructing the

[92] ibid.
[93] ibid 197–198. As cited in Darlene C Goring, 'The History of Slave Marriage in the United States' (2005) 39 John Marshall Law Review 299, 303.
[94] *Trotter v Blocker* (1838) 6 Port 269 (Alabama Supreme Court). As cited in Goring (n 93) 304.
[95] Stampp (n 89) 198. See further Goring (n 93).
[96] Stampp (n 89) 197.
[97] ibid.
[98] Andrew Fede, 'Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six *Southern* States' (1985) 29 The American Journal of Legal History 93, 132.
[99] *State v John Mann* (1829) 13 NC 263 (Supreme Court of North Carolina), 268 (Ruffin J).
[100] Stampp (n 86) 206.
[101] Kurki, quite aptly, calls this combination of 'legal responsibility' and lack of 'capacity to perform acts-in-the-law' 'purely onerous legal personhood'. Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019) 145 ff.
[102] Fugitive Slave Act 1793.
[103] Fugitive Slave Act 1850.
[104] ibid.
[105] ibid.

process of capturing and returning slaves (Section 4 of the 1793 *Act*[106] and Section 7 of the 1850 *Act*[107]). Even though some free States tried to introduce their own legislation circumventing *the Fugitive Slave Clause* and the *Acts*, they were not successful in maintaining it because of the supremacy of both the *Constitution* and Acts of Congress over state law. Consider *Prigg v Pennsylvania* (1842), where a Pennsylvania law prohibiting kidnapping of Black persons with the intent of keeping them slaves was found contrary to both the Fugitive Slave Clause of the *Constitution* and the *Fugitive Slave Act* 1793, which was affirmed as constitutional[108].

Despite the concessions made to the South, the Southern States attempted to secede after the presidential election of 1860, triggering the Civil War that would last for more than 4 years. In the course of the war, President Lincoln issued the *Emancipation Proclamation* of 1 January 1863, freeing all slaves within the Southern territories[109]. However, the ultimate rejection of slavery happened when the North defeated the South, and when the 13th, 14th, and 15th amendments to the *Constitution of the United States*, often referred to as the 'Reconstruction Amendments', were adopted between 1865 and 1870, respectively outlawing slavery[110], guaranteeing equal treatment regardless of race[111], and extending the right to vote regardless of race, colour, or previous conditions of servitude[112]. This was not the end of the struggle for racial justice, but the institution of slavery was gone for good.

5. Structure of the Thesis

To answer the central research question – What is the nature of evil law? – this thesis will address the following sub-questions, corresponding to its substantive chapters: (i) *what is evil*; (ii) *what is evil law*; (iii) *whether evil 'law' is law*; (iv) *how law helps and hinders evil regimes*; (v) *what rights and obligations we have in response to evil law*; and (vi) *how we can resist evil law in practice*. This legal-theoretical inquiry will be supported with illustrations from the three central cases of evil law – Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States.

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[106] Fugitive Slave Act 1793.
[107] Fugitive Slave Act 1850.
[108] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court).
[109] Proclamation 95 (Emancipation Proclamation) 1863.
[110] Constitution of the United States 1788, 14th Amendment.
[111] ibid, 14th Amendment.
[112] ibid, 15th Amendment.

In **Chapter II**, '**The Concept of Evil'**, I will give an account of *evil* in general, with a view to making it useful for the examination of evil law and its instantiations in the historical case studies at the heart of this inquiry. Firstly, I will construct an integrated account of evil acts or practices that combines an inquiry into the state of mind of the evildoer with an investigation of the consequences of their acts. I will define an evil act or practice as one that *intentionally or recklessly causes or enables the infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors.* Secondly, I will respond to four potential criticisms of this definition. My first claim will be that evil, contrary to what some may argue, is qualitatively distinguishable from mere, even grave, injustice. The second proposition will state that 'evil' is not an empty notion and that its use aids our understanding of evil acts, persons, and practices. The third argument will rebut moral relativism – the claim that the concept of evil, while not devoid of content, is necessarily a result of subjective rather than objective judgments. The fourth point will be that the term 'evil' is not dangerous in that it can be used for persecution of oppressed groups, but, on the contrary, is conducive to these groups' empowerment. Thirdly and finally, I will make a positive case for using the concept of evil as using this term provides conceptual and moral clarity to the concept of deeply iniquitous law, helping us both make sense of such law and to confront it.

In **Chapter III**, **'Evil Law, Evil Laws, and Evil Legal Systems'**, I will seek to develop the concept of evil *law*. Firstly, I will start by defining law more generally as *the product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*. Secondly, I will look at evil law more particularly, surveying different positions with regard to its distinctiveness from bad and, more importantly, unjust law, concluding that a qualitative distinction can be drawn between law that is merely unjust and law that is evil, even while evil law does not cease to be law as a result. Thirdly, I will uncover the root cause of this difference, arguing that evil law, unlike mere unjust law, does not create even *prima facie* rights or duties. I will explain this claim by the fact that evil law is not manageable through legal interpretation, and I will therefore define evil law as *law, which, if interpreted in its best light, will cause or enable infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors***.** Fourthly, building on the historical cases of evil law considered here, I will talk about four different kinds of evil laws. Some evil laws are duty-imposing rules that demand intolerable harm to be inflicted or inflict intolerable harm as punishment. Evil laws, however, can also take the form of power-

conferring rules that disempower some groups or empower others to inflict intolerable harm onto them, of permissive rules permitting intolerable harm to be inflicted without granting any new legal powers, and of legitimating rules that justify, distract from, and hide intolerable harm. Fifthly and finally, I will give an account of an evil legal system that fits the historical examples considered in this dissertation and that defines an evil legal system as *a system of legal rules recognised by the primary law-applying organs that these rules institute as belonging to this system that contains a significant number of evil laws central to its material identity.*

In **Chapter IV**, **'Is Evil "Law" Law?'**, I will argue that, despite its distinct character, evil law is still law. Firstly, I will establish that recognising evil law's law-like nature is important for understanding both evil and law as well as for responding to the moral and practical challenges posed by evil law. Then, I will proceed with considering two critiques of this position. Secondly, I will reject the argument from external morality according to which evil law is not law as it is morally iniquitous. In doing so, I will argue that, notwithstanding its wickedness, evil law retains certain features that are characteristic of law in general and that make it law, not just in a secondary but in the primary sense. Thirdly, I will establish that the attack from internal morality, which states that evil law is not law as it does not follow the rule of law desiderata, is likewise indefensible. There is no reason to think that there could not be evil laws that follow the precepts of the rule of law. The historical case studies provide numerous actual examples of evil laws that did conform to those precepts.

In **Chapter V**, **'Why Evil Regimes Need Law'**, I will explain why evil regimes need law. Firstly, I will make a negative case against the position that it is preferable for evil regimes to resort to extra-legal means rather than to govern by law, so as to secure compliance and stay in power. I will also argue that evil regimes need law not just to secure compliance, but also to pursue their evil projects as well as non-evil aims. Secondly, I will turn to a positive case for why evil regimes have a strong reason to govern legally, which is informed by the three historical case studies at the centre of my thesis. Just like any other law, an evil law can perform the following functions useful to any regime: coercion, coordination, legitimation, education and propaganda, and identity building.

In **Chapter VI, 'Right and Duty in the Face of Evil Law'**, I will seek to argue that we have both a right and an obligation to resist evil law. Firstly, I will define such resistance as *acting*

intentionally in order to prevent or mitigate infliction of intolerable harm (including atrocities) to the victims themselves enabled by evil law. Secondly, I will show that one has a right (meant as a Hohfeldian liberty) to resist in this way, even if doing so will mean disobeying the law. I will argue that the grounds on which one can found an obligation to obey some law – substantive, procedural, and hybrid - do not apply to evil laws and legal systems. Thirdly, I will find instead that there is a duty, and not just a right, to resist evil law, derived from participatory equality, human dignity, and autonomy – key features of the hybrid account of the obligation to obey. Fourthly, I will argue that the right and duty in question would be limited when resistance involves inflicting intolerable harm on others or the resisting agent themselves if not pre-empted by external factors.

Chapter VII, 'Resisting Evil Law', will investigate how the right and the duty to resist work in practice, and suggests that the effectiveness of resistance depends on which agents are resisting and what strategy of resistance they choose, building heavily on the experience of resistance in the three historical case studies of evil law central to this thesis. Firstly, I will compare legal officials (belonging to the judiciary, the legislature, and the executive) and ordinary law-subjects (including those oppressed by evil regimes and those left untouched). I will argue that even though many believe that legal officials in evil regimes ought to resign, it is not always the best tactic. I will instead suggest that their entanglement with evil creates a stronger obligation to resist. Then, I will proceed with focusing on capabilities of different subtypes of legal agents and law-subjects, highlighting that the best way of executing one's obligation to resist is highly contextual and depends on the legal system in question. Secondly, I will consider whether evil law can be resisted from the 'inside' (by way of legal interpretation), or only from the 'outside' (by seeking to change rather than interpret the law), concluding that only some forms of the latter would be effective, which reaffirms my prior observation that it is impossible to interpret evil law in a way that would reduce and prevent intolerable harm being inflicted if not pre-empted by external factors. Thirdly, I will reflect on the fact that the three archetypal evil legal systems collapsed in part due to external factors, noting that one should not overestimate the power of resistance.

All in all, investigation of evil law as a distinctive and, at the same time, familiar phenomenon is valuable for addressing key theoretical and practical questions brought forward by its existence. This dissertation, by answering the questions brought forward above, aims to make a step in advancing our understanding of evil law, which is crucial to both those who seek to

inquire into its nature it and those who aim to defend themselves and others when facing it. With that goal in mind, an investigation into evil law in general and the evil legal systems of Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States in particular can begin.

II. The Concept of Evil

1. Introduction

A discussion of evil law requires a clarification of the concept of evil itself. My aim is not to produce a complete philosophy of evil that will subsume as many cases of putative evils as possible, but to address evil in the manner that will be most helpful for the purpose of examining evil law. This has the following three implications. Firstly, when talking about evil law, I am interested in what makes laws evil in themselves rather than in evils arising from their application. Secondly, for the same reason I will focus on evil acts or practices rather than evil persons such as evil law-makers, let alone law-appliers or law-followers. Thirdly, I aim to construct a concept of evil that will be conducive to asking and answering certain questions about evil law that are addressed in this thesis, such as *what it is* (Chapter III), *whether it is law* (Chapter IV), *how it helps and hinders evil regimes* (Chapter V), *what rights and obligations do we have in response to it* (Chapter VI), and *how can we resist it* (Chapter VII). Certain well-trodden questions about evil, such as whether one can reconcile the presence of evil with the existence of an omnipotent and benevolent God (theodicy), why evils occur (psychological and sociological inquiry), and whether those producing or otherwise participating in evil are to be called evil themselves (personal responsibility) are therefore orthogonal to my present investigation and will not be explicitly discussed.

Hence, this chapter will focus on three strands of inquiry. Firstly, in Section 2, it will attempt to set out a concept of evil which is narrow, moral, and integrated. I then proceed by defining an evil act or practice as one that *intentionally or recklessly causes or enables the infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors*, dealing with the three elements of the definition – relevant state of mind, relevant measure of harm, and relevant nexus between the two – one by one.

Secondly, in Section 3, this chapter will deal with four objections to the use of the concept of evil: that it does not qualitatively distinguish evil from mere wrongness; that it is empty; that it is subjective, and hence unworkable; and that it is dangerous as it can be used to suppress marginalised groups. I shall argue, after critically examining these three objections, that all those counterarguments fail – using the concept of evil is neither impossible nor undesirable.

Thirdly, I will turn to a positive case in favour of using the concept of evil, arguing, in Section 4, that adopting the vocabulary of 'evil' is desirable for two reasons. First, using the term 'evil' is productive, and not disruptive, to the purpose of both making sense of evil acts and practices, such as evil law, theoretically speaking. Second, even more so, deeming some of these acts and practices to be evil may aid us in confronting them.

2. What is Evil: An Integrated Account

A. Broad and narrow evils

In order to define 'evil', I will draw several distinctions between different renditions of this concept, and say what evil, for the purposes of this dissertation, is *not*. While this narrowing of the concept of evil may not capture all phenomena that might be deemed evil, it is a better framing for the study of evil law. The first distinction is between a broad and a narrow concept of evil[113]. The broad concept 'picks out any bad state of affairs, wrongful action, or character flaw[114].' In this sense, white lies and minor pains are evil[115]. This is the concept of evil that was dominant in medieval theology. For instance, to Augustine[116] and Aquinas[117], evil is any absence, or 'privation', of the good. Under this definition of evil any human[118] legal system, being necessarily coercive, would contain evil. For instance, Aquinas names two types of evil - fault (*culpa*) and penalty (*poena*). The evil of penalty is the evil imposed upon those committing the evil of fault. Even if this penalty is just, it is still an evil in Aquinas's sense, as it involves withdrawal of good from the wrongdoer[119]. Similarly, centuries later, Bentham, who equated good and evil with pleasure and pain[120], would express the same thought as 'all punishment is mischief; all punishment in itself is evil[121].' Likewise, to Mill, 'evils of life'

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[113] Todd C Calder, 'The Concept of Evil' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/sum2020/entries/concept-evil/>; Todd C Calder, 'Is the Privation Theory of Evil Dead?' (2007) 44 American Philosophical Quarterly 371, 371.
[114] Calder, 'The Concept of Evil' (n 113).
[115] This example was given by Calder. Calder, 'Is the Privation Theory of Evil Dead?' (n 113) 171. And Calder, 'The Concept of Evil' (n 113).
[116] Aurelius Augustine of Hippo, *The Enchiridion on Faith, Hope, and Love* (Thomas S Hibbs tr, Regnery Gateway 1996) Chapter 11.
[117] Aquinas (n 18) Part I, Q48, A1.
[118] And not, for instance, angelic. Raz's famous thought experiment describing a sanctionless 'society of angels' can be traced back to Aquinas's angelology, as I argued in Anna Lukina, 'Angels, Demons, Us: Raz and Aquinas on Law's Necessity' (3 October 2020) <https://papers.ssrn.com/abstract=3704242>.
[119] Aquinas (n 18) Part I, Q48, A5. Colleen McCluskey, *Thomas Aquinas on Moral Wrongdoing* (Cambridge University Press 2017) 43.
[120] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1965) 102.
[121] ibid 170.

included 'indigence, disease, and the unkindness, worthlessness, or premature loss of objects of affection[122].'

However, the laws I am looking at in my dissertation – both generally and particularly when it comes to the test cases of Nazi law, Stalinist law, and the law of slavery in the antebellum United States - are not merely coercive but stand out as particularly grievous violations of morality. This is true of the Nazi *Law for the Protection of German Blood and German Honour*, that imposed criminal penalties on marriage and extramarital intercourse between Jews and Germans, Article 58 of the *Criminal Code of the RSFSR* that imposed criminal punishment for 'counter-revolutionary activities', and the two *Fugitive Slave Acts* that made assisting runaway slaves a criminal offence in the antebellum United States. The distinctive mark of these laws is not in their methods, but in their effect on Jews and their German partners in Nazi Germany, those falsely accused of treason and other related crimes in Stalin's Soviet Union, and enslaved people and those willing to rescue them in the antebellum United States. As a result, while the broad concept of evil can have its legitimate uses in the abstract, adopting it will fail to tell us anything about the distinctive character of laws and legal systems that are evil in the sense of being exceptionally morally iniquitous. Thus, a narrow concept of evil that 'refers to only the most morally despicable sorts of actions, characters, and events[123]' is a better one for thinking about the issue at hand.

B. Natural and moral evils

In this dissertation, I also focus on moral, rather than natural, evils. Natural evils, to be more precise, 'are bad states of affairs which do not result from the intentions or negligence of moral agents' and include, for instance, the damaging and even deadly consequences of natural disasters such as earthquakes and hurricanes[124]. Moral evils are those that 'result from the intentions or negligence of moral agents' and incorporate acts such as murder[125]. There are three reasons as to why, in the examination of evil law, one must turn to the concept of moral evils. Firstly, since evil law, the focus of my inquiry in this dissertation, is a human artefact, it seems ill-suited to be examined as a natural evil. Laws are not made accidentally, but are a

[122] John Stuart Mill, 'Utilitarianism' in Mark Philp and Frederick Rosen (eds), *On Liberty, Utilitarianism and Other Essays* (2nd edition, Oxford University Press 2015) 128.
[123] Calder, 'Is the Privation Theory of Evil Dead?' (n 113) 171. Calder, 'The Concept of Evil' (n 113).
[124] Calder, 'The Concept of Evil' (n 113).
[125] ibid.

result of a conscious legislative, executive, and judicial effort, even if they might have inadvertent effects. Secondly, the narrow concept of evil[126], by referring to evil acts and persons as 'morally despicable[127]', entails moral condemnation that can only be applied to moral agents as well as their acts and practices[128]. It would be strange to talk about moral failures when it comes to, say, natural disasters as opposed to acts of persecution of political opponents and / or groups marginalised by evil regimes like the ones this dissertation focuses on. Thirdly, the condemnation of an act as evil should be applied to culpable moral agents and their acts and practices, otherwise this characterisation of them would not be justified. Using the concept of natural evils would miss the mark of what is wrong with evil acts and practices such as evil law. The consequences of evil law can be, strictly speaking, natural on their face – like the death of someone trapped in a Nazi concentration camp, Stalinist Gulag, or a slave plantation in the antebellum South. However, intuitively, one would believe that framing said tragedies as natural evils will miss the fact that they are a product not of some unfortunate accident, but rather intentional or reckless acts.

C. 'Stoics' and 'utilitarians' on evil

The third relevant distinction is highlighted by Card, who talks about two 'extreme' conceptions of evil that she labels 'utilitarianism' and 'stoicism'[129]. 'Stoics' such as Kant, who 'equates evil with having a will that is not fully good[130]', on her view, 'focus on the human will and find all wrongful uses of the will, and only wrongful uses of the will, evil[131].' 'Utilitarians' such as Bentham, to whom evil, as demonstrated above[132], equated to pain[133], and Mill, who, similarly, spoke of 'evils of life' as 'the great sources of physical and mental suffering[134]', on

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[126] See Section 2.A.
[127] Calder, 'The Concept of Evil' (n 113).
[128] ibid.
[129] Hereinafter I will use Card's language although the designation of the 'stoic' category is a misnomer. Card 'understand[s] stoicism as fundamentally the idea that good character, good willing, or good agency, is the most important value (for extreme stoics, the only thing that is truly good), along with the corollary that it is a mistake to place great value on contingencies, on what eludes or exceeds our control.' Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford University Press 2002) 66. This is, to her, applicable to Aristotle and Kant, neither of whom was a stoic in the narrower sense of the term.
[130] In Calder's words, Calder, 'The Concept of Evil' (n 113). Citing Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor and Jens Timmermann trs, University Press 2012) 7–11.For Card's treatment of Kant, see Card (n 129) 52–54. Card also classifies Aristotle as a stoic, who, by her own admission, did not have a theory of evil, so I will omit this discussion. See ibid 52.
[131] Card (n 129) 4.
[132] See Section 2.A.
[133] Bentham, *An Introduction to the Principles of Morals and Legislation* (n 120) 102.
[134] Mill (n 122) 128. See also Section 2.A. For Card's treatment of Betham and Mill, see Card (n 129) 50–52.

the contrary, 'regard all harm as evil, regardless of its source, and maintain that some evils are justified[135].' In other words, 'stoics' define moral evil by reference to the state of mind of the wrongdoer, while 'utilitarians' – define it by reference to harm caused to its victims. Both 'stoics' and 'utilitarians' express what has been described as a broad concept of evil, and are criticised by Card, who finds 'neither all harms nor all wrongful uses of the will evil[136].' However, it is possible to imagine narrower versions of both the 'stoic' and 'utilitarian' viewpoints, under which only *some* harms or wrongful uses of will qualify as evil.

Still, in my view, this option is not sustainable. The vocabulary of 'evil' implies strong moral condemnation that would be inappropriate in the two cases exemplifying the 'tail ends' of 'stoic' and 'utilitarian' views – one of despicable plans that are nevertheless not put into practice, and the other of great harm caused by accident. Moreover, each of the two competing views seems unsuited for the examination of evil law. Firstly, imagine that the Nazis, Stalin's acolytes, or pro-slavery forces in the antebellum United States had despicable plans to institute evil laws but failed, either by not producing such laws or creating laws that are not followed by any officials or law-subjects. While these individuals or groups could be characterised as evil, there would be no laws to deem evil. As a result, one comes to the conclusion that evil law – like all evil acts or practices – should exist in the first place and be at least minimally efficacious, which makes the 'stoic' view over-inclusive. Secondly, as examined above[137] and below[138], evil laws are a product of a certain state of mind. If we did not keep that in mind, we would fail to capture what makes evil law evil. Hence, the 'utilitarian' concept of evil is also too broad as it may include laws that do not appear evil on their face. These two reasons are why I seek to combine the 'stoic' and 'utilitarian' views into an integrated account of evil, looking at both the relevant state of mind and the relevant measure of harm, an approach also taken by Calder[139], Card[140], Kekes[141], Kramer[142], and Thomas[143].

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[135] Card (n 129) 4.
[136] ibid.
[137] See Section 2.B.
[138] See Section 2.D.(I).
[139] Todd C Calder, 'Is Evil Just Very Wrong?' (2013) 163 Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 177, 187–188. Todd Calder, 'The Apparent Banality of Evil: The Relationship between Evil Acts and Evil Character' (2003) Journal of Social Philosophy 364, 364–367.
[140] Card (n 129). Cited in Calder, 'Is Evil Just Very Wrong?' (n 139) 188.
[141] John Kekes, *The Roots of Evil* (Cornell University Press 2005) 1–3. Cited in Calder, 'Is Evil Just Very Wrong?' (n 139) 188.
[142] Matthew H Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford University Press 2014) 188–189.
[143] Laurence Mordekhai Thomas, *Vessels of Evil: American Slavery and the Holocaust* (Temple University Press 1993) 77. Cited by Calder, 'Is Evil Just Very Wrong?' (n 139) 188.

D. An integrated account of evil

(i) Relevant states of mind: intention and recklessness

The first element I will consider is the state of mind required for an act to be evil. To Card, whose account I build on, to be evil, an act must be perpetrated 'culpably[144]', and culpability is determined by 'whether the agent's choices were wrongful and how much control the agent had[145].' How do we define culpability? Thomas offers the narrowest formulation, stating that 'a person performs an evil act <…> if he *delights* [emphasis mine] in performing a harmful act that has a certain moral gravity to it and if the person is not animated by understandable considerations[146].' Kekes might think along similar lines when he talks about the 'malevolent motivation of evildoers[147]' as a key component of his account of evil. Kramer, employing a broader account of evil states of mind, names a whole array of such states: sadistic malice (defined as 'deriving pleasure <…> from somebody else's suffering[148]'), heartlessness ('a frame of mind in which someone's lack of inhibitions about causing or witnessing other people's adversities is due to his regarding their woes as instrumentally gratifying[149]', such as the attitude of a 'steely contract killer[150]'), and extreme recklessness that characterises, for example, a man firing a machine gun into the crowd for his own amusement[151]. Kramer's account does not include negligence, which is distinguished from recklessness by the fact that risks engendered by it are 'inadvertent' rather than 'knowingly hazarded'[152]. Card's account of the evil state of mind is the broadest, understanding 'culpability' as including negligence[153]. 'An evil intender,' she points out in direct contradiction to Kramer's concept of evil[154], 'may not foresee harm, owing to culpable recklessness, negligence, or even a choice to ignore[155].' In a similar way, Calder defines evil acts as acts 'result[ing] from the intentions or negligence of moral agents[156].'

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[144] Card (n 129) 55.
[145] ibid.
[146] Thomas (n 143) 77.
[147] Kekes (n 141) 2.
[148] Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (n 142) 189.
[149] ibid 191.
[150] ibid.
[151] ibid 199.
[152] ibid 202.
[153] Card (n 129) 14, 20, 21.
[154] As Kramer points out in Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (n 142) 213–214.
[155] Card (n 129) 20.
[156] Calder, 'The Concept of Evil' (n 113).

I agree, of course, that intentionally committing evil acts or participating in evil practices – whether motivated by sadistic malice, heartlessness, or – my addition to Kramer's typology – extreme devotion to a person or a cause (which involves neither taking pleasure from one's wrongdoing nor experiencing instrumental gratification) – should be included within the scope of culpable behaviours. It does not matter which one of the motives (either suggested by Kramer or going beyond his list) are present –the condition of intention is satisfied if an act is committed with a deliberate view to cause harm for whatever reason. Recklessness, or committing an act knowing that it will cause harm, should also be incorporated under the umbrella of evil states of mind – it is hard to imagine that the aforementioned shooter who fires into the crowd while not intending to kill anyone would not be committing an evil act.

However, this definition of a required state of mind is not universally accepted. Firstly, one can argue that providing this standard of culpability makes the definition of evil too narrow. Consider the archetypal bureaucrats in evil legal systems who make evil laws to 'just follow the orders' – the 'banality of evil', which, even though it was described by Arendt[157] in the Nazi context, is similarly applicable to some Stalinist functionaries. Likewise, as Dawson underscores, there was a level of what he calls the 'banality of horror' in the 'sheer business-like way the law [in the antebellum United States] treated the slaves[158]' by, without any qualms, referring to them as property in the most mundane transactions. One is tempted to follow McBride, who, building on Milgram's famous experiment, where the participants were told to administer (unknowingly fake) electric shocks to their peers, claims that this conduct 'did not involve <…> any element of "heartlessness or extreme recklessness or sadistic malice[159]."' However, what is this conduct if not heartless? The participants in the experiment – like the historical evil bureaucrats – did what was 'instrumentally gratifying[160]' for them; they were willing to hurt their peers to avoid the disapproval of the authority. Therefore, the objection

[157] As explored in Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006). One should, however, note that Arendt's characterisation of Eichmann as embodying this attitude has been questioned. See, for instance, Bettina Stangneth, *Eichmann before Jerusalem: The Unexamined Life of a Mass Murderer* (Vintage Digital 2014).
[158] Patrick A Dawson, 'Slaves, the Law, and the Banality of Horror' (2015) 23 Journal of Southern Legal History 161, 161.
[159] Nicholas McBride, 'The Nature of Evil' (10 September 2022) 3 <https://papers.ssrn.com/abstract=4215556>. Milgram himself connects his experiment to Arendt's theory in Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper Perennial Modern Classics 2009) 6. As cited in Paul Hollander, 'Revisiting the Banality of Evil: Contemporary Political Violence and the Milgram Experiments' (2016) 53 Society 56, 56.
[160] Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (n 142) 191.

that my definition of evil is defective as it does not include the cases of nonchalantly committed evil acts described in this section does not stand.

Secondly, one may argue that the definition of a requisite mental state for evil acts and practices is underinclusive and should be extended to incorporate negligence. Laws that are framed with the most benign of intentions often have inadvertent harmful effects in the long run that the framers of such laws were not aware of, even if they should have been able to predict them. Consider three examples from the test cases at the centre of this dissertation hinted at above[161]. First, Article 48 of the *Weimar Constitution* gave the President of the Weimar Republic powers to do whatever necessary in the face of an emergency[162] that, later on, contributed to the Nazis' rise to power. Second, in 1922, the Russian Communist Party created a position of the General Secretary that was swiftly occupied by Stalin, which enabled Stalin to establish dictatorial rule in the Soviet state at a later point[163]. Third, liberating the thirteen colonies from British rule, culminating in the 1776 Declaration of Independence, formed the United States, which can be construed as giving the new emerging polity powers to preserve the institution of slavery in the Southern states even after its abolition in Britain in 1833[164]. One can make an argument that these three acts of law-creation could be plausibly characterised as negligent, as their creators were able, albeit to a differing extent, to be aware of their future negative consequences. However, it would be considered far-fetched to claim that they were evil. This shows that, in the context of evil law, only intention or recklessness will do.

Thus, it is a necessary (but not a sufficient) condition of the act being evil that it is *intentional* or *reckless*.

(ii) Relevant measure of harm: intolerable harm (including atrocities) to the victim themselves

The second element of the integrated account of evil is the relevant measure of harm, as not every intentional and reckless infliction of harm is evil – say, if one intentionally slapped another person on the face, one's act might warrant moral condemnation, but not of that special

[161] See Section 2.C.
[162] The Constitution of the German Reich (Weimar Constitution) (*Die Verfassung des Deutschen Reichs*) 1919.
[163] Even though formally the Party was considered to be external to the legal system, in fact its rules fit the definition of law from Chapter III, Section 2.D: *a product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*.
[164] Slavery Abolition Act 1833.

sort. The question of what constitutes the sufficient threshold of harm is fraught with difficulties. Some forms of harm, such as physical or financial harm, are more easily quantified. Others, such as mental or emotional harm or moral harm – a deformation of character that arises as a result of witnessing or perpetrating acts that are at odds with one's morality, or as a result of a violation of one's rights – are more tricky. And even if we are able to measure this harm, not all inflictions of harm can be components of evil. As Card, whose integrated account of evil I take as a baseline, noted, 'for judgments of evil, it is <…> important what was harmed or destroyed, how essential it is to the possibility of a tolerable or decent life[165].' The three test cases of evil legal systems considered in this dissertation provide the following illustrations that might help refine Card's broad formulation. Killing individuals and inflicting serious physical harm on them – characteristic of all three case studies of Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States – falls squarely under Card's conception of evil. However, other putative evils – for instance, refusing to allow Jews to marry or have extramarital intercourse with Germans under the Nazi *Nuremberg Laws*, refusing to let 'class enemies' settle in major cities in Stalin's Soviet Union under the passportisation reforms[166], or refusing to grant citizenship and all associated rights to enslaved persons in the antebellum United States – might be harder to explain as evil, despite the intuition to the contrary. To cover all those instances, I state that there are two relevant necessary features of harm that are appropriate for the definition of evil. One is that the requisite harm should be of a specific type, targeting the victims themselves. The other specifies the necessary magnitude of harm – its intolerability.

Firstly, the relevant type of harm that would subsume the examples stated above involves harm to the victims *themselves* as expressed in the concept of horrific violations developed by Merrihew Adams and McCord Adams. On their account, these are defined as attacking the person seriously and directly[167]. Seriousness will be addressed further on in this section – for now, let us talk about directness. Stanton-Ife, in his application of Merrihew Adams's and McCord-Adams's theory to criminal law, distinguishes horrific crimes that involve violating

[165] Card (n 129) 48.
[166] See Chapter III, Section 5.c.(i).
[167] Robert Merrihew Adams, *Finite and Infinite Goods: A Framework for Ethics* (Oxford University Press 2002) 107–112. Marilyn McCord Adams, 'Horrendous Evils and the Goodness of God' in Marilyn McCord Adams and Robert Merrihew Adams (eds), *The Problem of Evil* (Oxford University Press 1990) 209.As cited in John Stanton-Ife, 'Horrific Crime' in RA Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010) 148–149.

victims themselves and not just their interests from crimes that just damage the latter[168]. Most instances of horrific violations, including horrific crimes such as, per Stanton-Ife, murder, torture, maiming, and rape[169], involve physical destruction or damage. However, the notion of horrific violation is broader, focusing on the self, rather than just the body[170]. To go beyond the mere intuitive account of this notion that the surveyed authors seem to employ, I suggest the following elaboration on what counts as harm to self. To violate the person herself is to objectively (in the eyes of an impartial observer) undermine the attributes that make that person who they are, and, if taken away, will transform them into someone else. These attributes range from the integrity of the victims' body and mind (which would apply to murder and other similar crimes identified by Stanton-Ife) to their status as equal holders of rights and obligations (which would cover the aforementioned deprivation of the marginalised groups of statuses granted to the rest). Actions that do not do so, such as, per Stanton-Ife, vandalism and theft[171], are thus not horrendous, horrific, or evil, even if they significantly interfere with their victims' rights. Some may feel that say, their possession of a certain property is integral to their selfhood, but this does not make its destruction or asportation an evil act unless this is something that is crucial to their identity, which is possible but highly unlikely.

Secondly, even if we successfully delimit the type of harm needed to characterise a certain act or practice as evil to mean harm to the victims themselves, we can still run into some difficulties when it comes to finding a degree of harm that qualifies for it to be a component of evil. This answers another tension in Stanton-Ife's account, as he saw assault as an ordinary rather than a horrific crime[172] despite the fact that assault is a rather conventional violation of the self, probably because the required violation had to be not just 'direct', but also 'serious'[173]. As a result, harm sufficient for the 'evil' label only covers the most, in Kramer's words, 'severe[174]', in Kekes' 'serious [and] excessive[175]' or, in Card's, whose terminology I hence adopt, '*intolerable* harm[176]'. This term can be unpacked by claiming, as Thomas did, that there should

[168] Stanton-Ife (n 167) 148, 162. Stanton-Ife does not doubt the fact that horrific crimes can affect victims' interests, but states that they violate victims themselves *in addition* to impacting their rights. ibid 148–149.
[169] Stanton-Ife (n 167) 148.
[170] Merrihew Adams (n 167) 108. As cited in Stanton-Ife (n 167) 148.
[171] Stanton-Ife (n 167) 157.
[172] ibid.
[173] Merrihew Adams (n 167) 108. As cited by Stanton-Ife (n 167) 147.
[174] Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (n 142) 215.
[175] Kekes (n 141) 2.
[176] Card (n 129) 3.

be a 'certain moral gravity' to the harmful act on top of the harmfulness of that act for it to be rightly seen as an evil act[177] - namely 'inherent hideousness' or the gravity of harm caused to the victims, or 'quantitative hideousness', or the scale on which that harm is inflicted[178]. For example, inherent hideousness would reflect the brutality of the three evil legal systems surveyed in this dissertation, as their victims were killed, maimed, and sent to concentration camps, GULAGs, and slave plantations. This type of hideousness would also be present in the fact that those victims were marked as legitimate targets of mistreatment on grounds outside of their control, whether ethnic (most explicitly in the cases of Nazi Germany and the antebellum United States, although Stalin's Soviet Union also partook in targeting ethnic minorities for mistreatment), class-based (in the case of Stalin's Soviet Union), or others (such as disability when it came to Nazi eugenics). Quantitative hideousness would apply to the scale on which this persecution was done, each of the three regimes targeting millions of victims.

To further flesh these concepts out, some authors have developed lists of paradigmatic harms. These lists do not pretend to be exclusive, but rather provide an indication of what intolerable harms may look like. Kekes diverts his attention to 'simple cases of physical harm whose seriousness is as obvious as the seriousness of losing life, limb, or eye-sight, or suffering prolonged excruciating pain[179].' Hampshire, more broadly, refers to 'Great Evils' such as '[p]hysical suffering, starvation, imprisonment and the destruction of one's home and family[180].' Card, in the broadest treatment of potential central cases of evil, albeit not all possible ones, builds her account of evil on an '*atrocity* paradigm', focusing on

> 'genocide, slavery, torture, rape as a weapon of war, the saturation bombing of cities, biological and chemical warfare unleashing lethal viruses and gases, and the domestic terrorism of prolonged battery, stalking, and child abuse[181].'

I find the term 'atrocities' the most apt for my purposes and shall use it to describe the most vivid, albeit not all, examples of evil. It is also adequately descriptive of some core evil laws in Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States involving

[177] Thomas (n 143) 77.
[178] ibid 78–79.
[179] John Kekes, *The Roots of Evil* (Cornell University Press 2014) 1.
[180] Stuart Hampshire, *Innocence and Experience* (Harvard University Press 1991) 106. Cited in Stephen de Wijze, 'Defining the Concept of Evil: Insights From Our Pre-Cognitive Responses' in Thomas Nys and Stephen de Wijze (eds), *The Routledge Handbook of the Philosophy of Evil* (Routledge 2019) 210.
[181] Card (n 129) 8.

murder or torture inflicted on their targets. Focusing on atrocities, however, does not rule out other evil laws that, despite stopping short of being atrocities, still undermined the downtrodden selves to a serious extent, such as the measures of discrimination in refusing to grant citizenship, forbidding to participate in marriage, and not allowing residence characteristic of the paradigmatic cases of evil law considered in this dissertation.

The intolerability of harm, especially its inherent hideousness limb, is apt at filtering out harm to self that is not evil. For instance, while killing someone wantonly is unquestionably evil, doing so in self-defence is not, despite the fact that an act of self-defence fits other necessary features contained in my definition of evil. Or, to turn to an example that is more applicable to evil law, both incarcerating perceived enemies of the regime for no reason and rightfully imprisoning those who committed a universally recognised crime may appear similar in terms of intentionality / recklessness and type of harm caused. Still, the former, and not the latter, appears to be evil. This is explained by the fact that some of the purportedly evil acts or practices would not be intolerable or, more specifically, inherently hideous as each of them is a proportional response to a greater evil. There are, of course, acts and practices that can never be justified this way, such as the aforementioned paradigmatic atrocities that form the explanatory core of the concept of evil acts or practices. However, this subcondition of intolerability still needs to be kept in mind when it comes to more marginal rather than central cases.

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

(iii) Relevant nexus: causing or enabling harm barring external factors

A natural way to connect the two foregoing elements of the definition of evil – *intention or recklessness* and *intolerable harm (including atrocities) to the victims themselves* – would be to talk about causation. However, I believe that defining the nexus between the intentional or reckless act and its consequences in this way would be too narrow. The classic 'but-for' causation, as well as the more elaborate NESS standard under which something is a cause of a certain consequence 'if and only if it was necessary for the sufficiency of a set of existing

antecedent conditions that was sufficient for the occurrence of the consequence[182]', do not capture all evil acts and practices.

Firstly, they would not account for, for example, cases under which intolerable harm would be inflicted regardless of the act. This insight is particularly pertinent when one talks about evil law. Some, if not most, cases of those violations of some person's or group's self would have happened regardless of being couched in legal form. While, as will be argued in Chapter V, evil legal regimes benefit from law and thus rely on it, it is hard to imagine that Nazis, Stalin's henchmen, and slavers would have abandoned their evil plans if the legal form had not been available to them. This conjecture is further supported by the fact that, despite their adherence to legality, these actors all resorted to some measure of extralegal terror, although there were fewer of such practices than is often suggested[183]. Consider examples such as the Night of the Long Knives (1934) and the *Kristallnacht pogrom* (1938) in Nazi Germany, extrajudicial executions of suspected traitors, spies, and 'wreckers' in Stalin's Soviet Union, and slaveholders 'disciplining' the slaves in the antebellum South. This does not mean that law was useless. As will be again discussed in more detail, evil law does not just include legal rules that command infliction of intolerable harm (duty-imposing rules) that would more easily correspond to but-for causation, but also rules that confer powers that are then used to inflict intolerable harm (power-conferring rules), rules that permit that intolerable harm to be inflicted (permissive rules), and rules that justify, hide, and distract from the infliction of intolerable harm (legitimating rules)[184]. In all of these cases, the nexus between the act and its consequences is more indirect. As will be discussed later, these rules, despite not strictly speaking causing the relevant harm, were helpful when it came to the pursuit of the evil regimes' goals not just by way of coercion and coordination, but also by way of legitimation, education and propaganda, and identity building[185]. Therefore, to accommodate this variety of evil laws and their uses, I shall refer to *causing or enabling* harm in my definition of an evil act or practice, where 'enabling' is read as significantly contributing to that harm being possible.

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[182] Richard Wright, 'Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility' (2001) 54 Vanderbilt Law Review 1071, 1102–1103..As quoted and elaborated on in Matthew H Kramer, *The Quality of Freedom* (Oxford University Press 2003) 277 ff.
[183] See Chapter IV, Section 4.D.
[184] See Chapter III, Section 5.
[185] See Chapter V, Section 3.

Secondly, sometimes the existence and the scale of intolerable depends not merely on the evil act, but also on additional external factors. First, one can commit acts that are intrinsically evil, but fail to cause intolerable harm. Kramer gives examples of a sadist, a terrorist, and a gangster being stopped from committing the evil deeds they intended or knowingly hazarded, remarking that those attempts would still be considered evil[186]. In the context of this dissertation's inquiry into evil law, suppose, for instance, that a Jew in Nazi Germany is able to avoid persecution by disguising their identity, a Soviet citizen criticises the state but is not reported to the secret police by his interlocutors, or a fugitive slave in the antebellum United States escapes the slave catchers and is not returned under control of their master. It would be rather odd to claim that the laws under which those individuals could have faced intolerable harm to themselves were not evil as that harm was not suffered.

Second, Kramer talks about 'overdetermined' harm, citing a situation in which two rival contract killers murder not just the desired target, but also bystanders just because they happened to be on the same mission. Equally, he claims their acts would nevertheless be evil[187]. When it comes to evil laws, one can imagine a Nazi concentration camp prisoner, a Gulag inmate, or a slave on the plantation dying as a result not only of confinement alone, but also of a pre-existing illness. It would be equally strange to deny the evil character of these laws just because the resulting harm was contingent on the health of those persecuted.

Our intuition that both failed attempts and acts causing overdetermined harm are still evil can be explained by the problem of moral luck[188]. As Nagel claims, this problem occurs '[w]here a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment[189].' Judgments based on moral luck, while in some way all-pervasive and inevitable[190], are nevertheless intrinsically problematic as they hold responsible or, conversely, let off the hook their subjects because of

[186] Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (n 142) 204–206..
[187] ibid 206–207.
[188] Bernard Williams, 'Moral Luck' in Daniel Statman (ed), *Moral Luck* (SUNY Press 1993). Thomas Nagel, 'Moral Luck' in Daniel Statman (ed), *Moral Luck* (SUNY Press 1993).
[189] Nagel (n 188) 59.
[190] As Nagel puts it quite powerfully: 'I believe that in a sense the problem has no solution, because something in the idea of agency is incompatible with actions being events, or people being things. But as the external determinants of what someone has done are gradually exposed, in their effect on consequences, character, and choice itself, it becomes gradually clear that actions are events and people things. Eventually nothing remains which can be ascribed to the responsible self, and we are left with nothing but a portion of the larger sequence of events, which can be deplored or celebrated, but not blamed or praised.' ibid 68.

circumstances beyond their control. This contradicts the Control Principle, under which we are morally assessable only to the extent that what we are assessed for depends on factors under our control[191]. As a result, moral luck should be minimised when possible. The way to tackle failed attempts and overdetermined harm would be not to dismiss their evil, but to try to explain it by further reflecting on the degree of causation between the relevant state of mind and the relevant type and degree of harm. I follow Kramer's lead in bringing in a clause according to which an act or practice, such as an evil law, is evil if it would cause or enable intolerable harm *if not pre-empted by external factors*[192].

Thus, *causing or enabling infliction of* harm *if not pre-empted by external factors* ought to be the nexus between the foregoing two elements – *intention or recklessness* and *intolerable harm (including atrocities) to the victims themselves*.

E. Definition of evil

Therefore, I shall define an evil act or practice as an act or practice *intentionally or recklessly causing or enabling infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors.*

3. Criticism of 'Evil'

A. 'Evil' is simply 'very bad / wrong'

Evil can be defined, but it is a separate question whether this term should be used. This brings us to the discussion surrounding the utility of the concept of evil in moral philosophy. Let us start with a smaller objection to the use of the term 'evil'. Some say that what we describe as evil is already covered by other overlapping terms, namely 'badness' or 'wrongness'. According to Russell, a qualitative distinction between 'evil' and 'wrong' obtains only if 'evil actions differ from ordinary wrongs by virtue of possessing some particular property or

[191] Dana K Nelkin, 'Moral Luck' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2023) <https://plato.stanford.edu/archives/spr2023/entries/moral-luck/>.
[192] Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (n 142) 207.

properties not possessed to any degree by ordinary wrongs[193].' On the account considered here, there is no such property or properties. Evil, one may say, is only quantitatively and not qualitatively distinct from mere badness and wrongness and can be easily rendered as 'very bad / wrong' or 'very very bad / wrong'. Therefore, 'evil' ought not to be used as a separate term especially since 'evil' is perceived as 'ambiguous[194]' and/or 'dangerous[195]' by some voices[196].

Russel's argument is, however, flawed. First, the assumption that, if two categories are distinct in quantitative terms, then we should not adopt different terms to identify them, is fundamentally flawed. Saying that one should not call very bad or very wrong acts and practices 'evil' is analogous, to draw on the sorites paradox, to claiming that a pile of grains can never become a heap as the difference between the two is purely quantitative and one cannot identify the precise moment when the transition between them occurs[197].

Second, one can question his account of qualitative distinctiveness of concepts. Calder, in particular, advances an alternative 'moderate' thesis that states that 'evil is qualitatively distinct from ordinary wrongdoing provided the concept of evil and the concept of wrongdoing do not share all of their essential properties[198].' I submit that my definition of evil acts or practices passes this test. There are wrongful non-evil acts and practices that lack the requisite state of mind, type and magnitude of harm, or the nexus between them. Evil acts or practices, on the contrary, have *all* these elements. This is what helps to distinguish evil acts or practices from wrongful ones.

The third way to counter Russell's argument is to emphasise that, contrary to what he concluded, there are some features in my adopted definition of evil acts or practices that are not present in their less dramatically labelled counterparts. In particular, evil law, central to this dissertation, is an example of evil act or practice that differs in quality from its non-evil, even bad or unjust, counterparts. In my further exploration of evil law, I will turn away from theories

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[193] Luke Russell, 'Is Evil Action Qualitatively Distinct From Ordinary Wrongdoing?' (2007) 85 Australasian Journal of Philosophy 659, 661. As cited by Calder, 'Is Evil Just Very Wrong?' (n 139) 179.
[194] See Section 3.B.
[195] See Section 3.D.
[196] Calder, 'Is Evil Just Very Wrong?' (n 139) 178. Todd C Calder, 'Evil and Wrongdoing' in Thomas Nys and Stephen de Wijze (eds), *The Routledge Handbook of the Philosophy of Evil* (Routledge 2019) 218.
[197] I thank Professor Matthew Kramer for this idea.
[198] Calder, 'Evil and Wrongdoing' (n 196) 223. Previously expressed in Calder, 'Is Evil Just Very Wrong?' (n 139) 181.

that consider evil law as very unjust law. Instead, I will name what I see as a crucial qualitative difference between the two – that the former, unlike the latter, creates no *prima facie* reasons for action on account of it being unsalvageable by interpretation[199]. This in itself warrants evil law to have a special designation.

Therefore, evil is more than just very bad and very wrong, and deserves its own designation when we talk about it.

B. 'Evil' as a black hole

Another critique of the term 'evil' is that it is useless and does not contribute to our understanding of persons, deeds, and institutions we characterise this way. As Cole says, '"[e]vil" is a black-hole concept which gives the illusion of explanation, when what it actually represents is the failure to understand[200].' He even states that the idea of evil belongs in the realm not of philosophy, but of mythology[201], since 'when we describe someone as evil <…> we do away with any need to understand their history, their motives, their psychology[202].'

Firstly, one can question Cole on his own terms. To look at whether 'evil' is explanatorily satisfactory, we need to define what exactly needs explaining. Generally, when looking for the explanatory power of the concept of evil, we seek to answer two questions – what makes evil special and why such acts are performed[203]. Taking the first question, 'evil' is far from being a black hole – it is possible to say what evil *is*. As it was stated before, evil acts or practices can be defined as acts of practices that *intentionally or recklessly cause or enable infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors*. There is conduct that falls short of this standard: negligent (as opposed to intentional or reckless) acts[204] and acts that result in harm that is not intolerable to the victims themselves[205]. As a result, I submit that there is a way we can tell the difference between non-evil acts and evil acts or practices, or, in other words, what makes evil acts evil and not merely

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[199] See Chapter III, Section 4.
[200] Phillip A Cole, *The Myth of Evil: Demonizing the Enemy* (Praeger 2006) 236.
[201] ibid.
[202] ibid 237.
[203] Eve Garrard, 'Evil as an Explanatory Concept' (2002) 85 The Monist 320, 321. See also Eve Garrard, 'Does the Term "Evil" Have Any Explanatory Power?' in Thomas Nys and Stephen de Wijze (eds), *The Routledge Handbook of the Philosophy of Evil* (Routledge 2019) 190.
[204] Section 2.D.(i).
[205] Section 2.D.(ii).

very bad. Moreover, as will be argued later on, this distinction not only can be drawn, but *has* to be drawn, specifically when it comes to evil law. As will be argued in the next Chapter, evil law specifically is different from bad or unjust law not just in degree, but also in kind[206]. This makes the category of evil law worth distinguishing – and recognising this clarifies rather than muddles our knowledge.

As to the second question – why evil acts are performed – I reply that an answer to this question is not necessary, neither in general nor specifically for the inquiry in this dissertation. Just because the use of the term 'evil' does not explain evil's origins, it does not render the concept useless. The notion of evil cannot explain why acts characterised as evil were committed. However, it does not need to do so as this inquiry may not be the intended purpose of using this term. This dissertation is focused on evil acts and practices. It particularly focuses on one type of such practices, evil law, rather than on evil persons that are at the centre of Cole's inquiry. As a result, questions regarding the motives and psychology of evil-doers are superfluous. Instead, the concept of evil can be useful in answering questions of what evil law is and how it is distinguished from its counterparts, whether it is law in the first place, how it assists evil regimes in the pursuit of their goals, and what we should and can do in response to it.

Secondly, another way to counter Cole's argument is to dispense with the search for a particular kind of explanation he has in mind entirely. Cole does not distinguish causal explanations from moral explanations, and falsely presumes that if a reference to moral properties is irrelevant to the former, it is also irrelevant to the latter[207]. *Contra* that, I agree with Russell's observation that '[m]any moral concepts, such as the concepts of good, right, bad, and wrong, appear to be purely evaluative or prescriptive, and hence appear not to serve the explanatory function identified by Cole [and that], [n]onetheless, we could not build an ethical theory without such basic, non-explanatory concepts[208].' While uses of the term 'evil' do not directly answer the question, for example, why evil acts and practices such as evil law exist, that term is crucial in understanding, for instance, why evil law is wrong. As will be discussed later in Section 4,

[206] Chapter III, Section 3.B.(iii).
[207] The need for distinguishing between the two is expressed in Matthew H Kramer, *Moral Realism as a Moral Doctrine* (Wiley–Blackwell 2009) 190 ff.
[208] Luke Russell, *Evil: A Philosophical Investigation* (Oxford University Press 2014) 197. See also Garrard, 'Evil as an Explanatory Concept' (n 203) 323.

there are both conceptual (theoretical) and moral (practical) reasons as to why the use of the concept of evil while explaining morally iniquitous acts and practices is valuable.

C. 'Evil' and moral relativism

One can also claim that while the concept of evil is not altogether empty, when trying to approach a universal understanding of 'evil', we reach a dead end. This is a variant of metaethical moral relativism which argues that '[t]he truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons[209].' This form of moral relativism is directly relevant to discussion of evil as it 'entails that there is no "absolute" evil or proper designation of evil across cultures[210]' and 'the one definitive and conclusive factor [in such a judgment] is the societal attitude of one's society toward such an act[211].' Therefore, one cannot talk about acts and practices as evil unless they are condemned by the society in which those acts and practices developed.

This moral relativist argument is particularly relevant when it comes to considering evil law and its historical instantiations. These cases are not just spatially, but also temporally removed from today's reality. Slavery in the antebellum United States ended with the passage of the Thirteenth Amendment in 1865, more than 150 years ago. The Stalinist Great Terror, ending in 1938 and condemned in the process of destalinisation commencing in 1953, and Nazi rule, ending in 1945, are more proximate in time, but still remain products of the last century. It is thus tempting to argue that calling these regimes 'evil' is ahistorical, imposing contemporary values on drastically different societies where supposedly evil conduct was not perceived as such. In Nazi Germany the persecution of Jews, culminating in their extermination, was framed as a defensive measure in anticipation of Jewish attack on the German state and its people[212]. At the same time, quite paradoxically, it was believed that Jews were racially inferior to

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[209] Chris Gowans, 'Moral Relativism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/spr2021/entries/moral-relativism/>.

[210] James Kellenberger, 'Moral Relativism' in Gerome Gellman (ed), *The History of Evil from the Mid-Twentieth Century to Today 1950–2018* (Routledge 2018) 347. Kellenberger states that the same applies to the 'subjective form' of moral relativism, which states that the morality of an act depends on moral beliefs of individual persons. Here, only the 'cultural' version of moral relativism that focuses on morality relative to different groups of persons will be considered. ibid 346–347.

[211] Kellenberger (n 210) 374.

[212] See a detailed explanation of this conspiracy theory in Jeffrey Herf, 'The "Jewish War": Goebbels and the Antisemitic Campaigns of the Nazi Propaganda Ministry' (2005) 19 Holocaust and Genocide Studies 51.

Germans. Similar reasoning sanctioned Nazi atrocities against the disabled, sexual minorities, and racial groups other than Jews (such as Roma and Slavic peoples). In Stalin's Soviet Union the political terror was, similarly to Nazism, justified on the grounds of the supposed threat to the Soviet Union from those working to undermine it – various 'wreckers', 'anti-social elements' and 'enemies of the people'[213]. In the antebellum South, it was widely believed that slavery was not even a necessary evil, but a positive good for the enslaved people *themselves*. Similarly to Nazi logic, this paternalism was supported by the belief of racial inferiority of Black slaves[214]. These beliefs are rightly deemed shocking now, but they were sincerely held by many key actors in those evil legal systems at the time[215].

Is it therefore wrong to judge the actions and practices based on those beliefs as evil? My answer would be an emphatic 'no'. The first reason is that the justifications provided by perpetrators of evil do not matter, even if we accept metaethical moral relativism, unless they are shared by the given society as a whole. The relativist challenge outlined above presumes that the wider population shared the views on evil regimes' targets that were held by those in power. As we are removed from that period in time, it is hard to establish what public opinion really was at the time, but it does not mean that we are to presume the worst. One argument in favour of a more nuanced approach would be that at least two of the aforementioned evil regimes, Nazism and Stalinism, were totalitarian societies that set out to quell opposition, which meant that those who did not speak out, or even those who actively supported the terror going on at the moment, were not necessarily in agreement with their ideological agenda. Even more so, this suppression of dissent did not extinguish private opposition to evil laws and policies in in Nazi Germany and Stalin's Soviet Union. In his study about popular opinion in Nazi Germany, Kershaw argued that '[t]here is too much evidence of daily dissent and even manifestations of limited opposition and protest—limited in significance, certainly, but noteworthy just the same—to support notions of a society terrorised by a totalitarian state into meek submission and automaton-like obedience and compliance[216].' In a work on popular

[213] See a brief account in Ekaterina Mishina, 'Штрихи к Портрету Врага в Российском Нормотворчестве 2010–2020 Гг. Советские Истоки' (2023) 6 Palladium 2, 2–5.
[214] William Sumner Jenkins, *Pro-Slavery Thought in the Old South* (University of North Carolina Press 1935) 65 ff. Larry E Tise, *Proslavery: A History of the Defense of Slavery in America, 1701–1840* (University of Georgia Press 2004) 67 ff.
[215] On the creation of an outgroup through evil law, see Chapter V, Section 4.F.(ii).
[216] Ian Kershaw, 'Consensus, Coercion and Popular Opinion in the Third Reich: Some Reflections' in Paul Corner (ed), *Popular Opinion in Totalitarian Regimes: Fascism, Nazism, Communism* (University Press 2009) 42. However, compare David Bankier, *The Germans and the Final Solution: Public Opinion Under Nazism* (Wiley-Blackwell 1996) 77. Cited in Friedlander (n 57) 162–164.

opinion during Stalinism, Davies similarly concludes, analysing mainly *svodki*, or 'reports on the population's mood' produced by the NKVD and party or Komsomol information departments, that 'the Stalinist propaganda machine failed to extinguish an autonomous current of popular opinion[217].' Moreover, there were documented cases of vocal dissent, especially among the abolitionist movement in the antebellum United States, especially in Northern states, where opposition was not quelled, but even in Nazi Germany, despite the negative consequences such deviation from the official agenda carried there. Finally, the antebellum United States specifically did not merely exhibit a minority of dissenters, but, even more so, were famously *divided* on the question of slavery, the Northerners perceiving it as an evil, even though many believed it was a necessary one to preserve the Union. As a result, it is difficult for moral relativists to talk about past societies having a different morality, where historical evidence shows there was no relevant consensus. It is hard to treat officials' and ordinary citizens' acceptance of evil legal systems as merely a product of their time when many of their contemporaries were engaged in struggle against these wicked regimes.

As for the second, more theoretical rather than empirical reason for why the notion of evil survives the relativist challenge, one can argue that while genuine moral disagreement on various issues exists, there are still some clear cases of what is objectively moral and immoral. Foot pointed out that 'some moral judgements are perfectly objective [even though] there may be others whose truth or falsity is not easily decidable by criteria internal to the subject of morality[218].' Specifically, Foot argued that 'it is clearly an objective moral fact that the Nazi treatment of the Jews [was] morally indefensible[219].' This claim can be read in three ways. First, one can say that evil acts considered in this dissertation are morally indefensible because their justification is based on wrong premises. As Foot put it, '[t]he Nazis' moral opinions had to be held on grounds either false or irrelevant or both, as on considerations about Germany's "historic mission", or on the thought that genocide could be a necessary form of self-defence[220].' Hence, what is wrong with the evil laws described in this dissertation is that they were grounded in paranoia about being endangered by enemies (in the case of Nazism and Stalinism) and race 'science' (in the case of Nazism and slavery in the antebellum United

[217] Sarah Davies, *Popular Opinion in Stalin's Russia: Terror, Propaganda and Dissent, 1934–1941* (Cambridge University Press 1997) 183.
[218] Philippa Foot, 'Moral Relativism', *Moral Dilemmas: and Other Topics in Moral Philosophy* (Oxford University Press 2002) 31.
[219] ibid 32.
[220] ibid.

States). However, this does not seem to capture what is wrong about actions and practices of evil regimes – if we suppose that race science was true, treating those who are deemed inferior worse would still not be justified.

Second, one can argue that there are certain acts and practices that can be deemed objectively evil on account of being detrimental to self-preservation. This argument was made by Brandt, who said that '[e]ven perfectly selfish persons would want a moral system which provided protection against unprovoked assault on person or reputation, <…> a system fostering self-restraints, mutual trust, openness, the absence of need to be on one's guard against malicious attacks[221].' In legal theory, a similar idea was expressed by Hart, in his discussion of the 'minimum content of natural law', 'without [which] laws and morals could not forward the minimum purpose of survival which men have in associating with each other[222].' However, the argument that one can invoke the interest in self-preservation to rebut moral relativism does not seem convincing. First, it ignores that self-preservation is not the only motivating factor. Self-interest is not the same as self-preservation and may include, for instance, putting destruction of undesirable groups above one's own safety[223]. Second, even if we assume that all legal actors are motivated by self-preservation, one is tempted to agree with Hart's acknowledgment that his argument applies only when 'no individual is so much more powerful than others, that he is able, without co-operation, to dominate or subdue them for more than a short period[224].' However, while humans as a species might enjoy 'approximate equality', the power-relations in real human communities in general, and, even more importantly, in evil regimes, are different as everybody already holds a certain pre-determined status in society. Those singled out for Nazi persecution, targeted in Stalin's Soviet Union, and enslaved in the antebellum United States did not possess the ability to defend themselves on the legal arena on par with more privileged groups. Therefore, as Hart would himself agree, self-preservation of individuals and groups in power does not necessarily entail protecting those who are downtrodden, so their plight will be of no interest to those who rule. As a result, the appeal to self-preservation fails to rebut moral relativism.

[221] Richard B Brandt, 'Relativism Refuted?' (1984) 67 The Monist 297, 303. Richard B Brandt, *A Theory of the Good and the Right* (Revised edition, Prometheus 1998) 200 ff.
[222] Hart (n 45) 193.
[223] This will be further discussed in Chapter V, Section 2.C.
[224] Hart (n 45) 195.

Instead, third, there are some acts and practices that are objectively moral or immoral, grounded in some universal human values. This view is particularly convincing when my concept of evil is situated within the context of my inquiry in this dissertation. I focus on three evil legal systems: Nazi Germany, Stalin's Soviet Union, and the antebellum United States. I also use Card's 'atrocity paradigm', a non-exclusive, but indicative list of evil acts and practices including evil law that forms part of my definition of evil: genocide, slavery, torture, *etc*[225]. Focusing on these examples seems to help one avoid the metaethical moral relativism pitfall as there is some shared intuition that these legal systems and their laws are evil. When it comes to deciphering what exactly makes these examples evil, we find that one need not appeal to contentious questions of morality. My definition of an evil act or practice, including evil law – *intentionally or recklessly causing or enabling infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors* – is not based on any contingent precepts. It does not matter, for identifying evil, whether the evildoer saw their conduct as justified – the key elements are instead the relevant measure of harm (intolerable harm, including atrocities), the mental element (intention and recklessness), and the nexus between them (enabling infliction in not pre-empted by external factors). Even more so, when it comes to the mental element, I refer to intention and recklessness regardless of the motive behind it, which might as well be benign or noble[226]. My definition of evil shows that it is indeed possible to shake the grounds of the moral relativist charge against the term 'evil', especially when talking about evil law.

D. The dangers of 'evil'

The final argument a sceptic about the use of 'evil' can make is that even if 'evil' is a useful concept, one cannot deny that this term is fraught with emotion, and not of the mild or pleasant kind. For this reason, Cole says that invoking the concept of evil necessarily means engaging in 'a highly dangerous and inhumane discourse[227].' This idea can be traced back to Nietzsche's *On the Genealogy of Morality*, claiming that the concept of evil arose as a result of *ressentiment* (envy, resentment, and hatred) of the strong ('nobles') by the weak ('slaves')[228]. Despite the controversies surrounding this text, Cole still sees some truth in it as it expresses how 'morality

[225] Card (n 129) 8. See also Section 2.D.(ii).
[226] See Section 2.D.(i).
[227] Cole (n 200) 21.
[228] Friedrich Nietzsche, *'On the Genealogy of Morality' and Other Writings* (Keith Ansell-Pearson ed, Carol Diethe tr, Cambridge University Press 2006) 20–22.

can control the masses[229]', *i.e.*, how naming the nobles 'evil' helps slaves revolt against them. Cole argues, however, that rather than being directed at the strong, in practice the discourse of evil, motivated not by *ressentiment* but fear[230], has often been weaponised against the weak by invoking a 'threatening "evil" figure – the vampire, the witch, the Jew, the migrant, the asylum seeker, the Gypsy, the "Islamicist" [*sic*] terrorist – and claiming to protect the "genuine" members [of the dominant group – *addition mine*] from these deviant and dangerous threats[231].' Those who are deemed evil are seen as 'not *really* human[232],' foreclosing any interaction with them on human terms – including negotiation, reform, redemption[233], understanding, and communication[234].

To what extent does Cole's argument apply to the concept of evil in the context of the discussion about evil law? One can argue that calling a person or a group of persons 'evil' is different from calling a legal system 'evil' and accepting the latter, but not the former. Organisations, unlike persons who create them, as Card points out, do not have dignity or inherent worth[235]. As a result, while 'hostility against [individual] evildoers need not be total, all-out, or unforgiving[236]', the same does not apply to social practices and institutions where '"evil" really is a totalizing judgment[237].' However, one can respond that law is not depersonalised – it is a human artefact. The evil quality of law necessarily reflects on at least some of those involved in drafting, applying, and following it. Moreover, 'demonization of the enemy' can occur on a global scale – not just legal officials, but whole political communities may be deemed evil. Cole cites wrongs committed under the banner of the Iraq War and the War on Terror as a direct consequence of non-individual demonisation of this kind[238].

A better argument would be that, as Russell notes, contrary to what Cole claims, it is *abuse* (or misuse) of the concept of evil and not its proper *use* that creates 'moral errors'[239]. The fact that there are mistaken attributions of the property of evil does not mean that there are no correct

[229] Cole (n 200) 74.
[230] ibid 75.
[231] ibid 81.
[232] ibid 236.
[233] ibid 233, 236.
[234] ibid 233.
[235] Card (n 129) 177.
[236] ibid 102.
[237] ibid.
[238] Cole (n 200) 224 ff., 215 ff.
[239] Russell (n 208) 222.

ones[240]. The same applies to other ways of talking about morality at large. In Card's words, '[i]f the likelihood of the ideological abuse of a concept were sufficient reason to abandon the concept, we should probably abandon all normative concepts, certainly "right" and "wrong"[241].' This is, however, not possible, as making judgments about others and their deeds is inescapable even for evil-sceptical thinkers like Nietzsche[242]. The term 'evil', used in good faith, is therefore legitimate.

What is this legitimate use of the concept of evil that is neither irrational (based on *ressentiment* or fear) nor harmful (promoting wrong values or demonising outsiders)? Following Card, I argue that we ought to centre on the victims' perspective, coming to the conclusion that proper 'judgments of evil' stem neither from *ressentiment* (as per Nietzsche) nor fear (as per Cole), but reflect the perspective of those who are wronged[243]. Negotiation, reform, redemption, understanding, and communication are not the only legitimate ways of responding to the harm of enormous magnitude that evil law causes. Acknowledging harm, assigning blame, and demanding remedies is just as important.

Going further than that, one can agree with Saunders that evil legal systems not only can but ought to be feared and resented (and maybe even 'demonised'), as that is conducive to the victims getting their just due[244] and all of us establishing a positive peace[245]. As to the first, one would probably speak of Cole's approach as what Saunders calls 'reframing', undeservedly focusing on empathising with the perpetrator, often at the expense of recognising the harm caused by their actions and suffering felt by the victim[246]. To return to one of the test cases of evil law, Cole's position would mean that the fears of Jewish, or gay, or disabled, or Roma peoples' perception of Nazi Germany as an evil regime would be seen as imaginary[247]. This view is both factually incorrect, as the threat posed by the Nazis to these groups was undoubtedly real, and immoral as 'it trivializes and degrades the rational and justified apprehension felt by those who correctly foresee a terrible future[248].' The same applies to those

[240] Eve Garrard and David McNaughton, 'Speak No Evil?' (2012) 36 Midwest Studies In Philosophy 1, 11.
[241] Claudia Card, *Confronting Evils: Terrorism, Torture, Genocide* (Cambridge University Press 2010) 15.
[242] Garrard and McNaughton (n 240) 9–10.
[243] Card (n 129) 46.
[244] Rebecca Saunders, 'Questionable Associations: The Role of Forgiveness in Transitional Justice' (2011) 5 International Journal of Transitional Justice 119, 120, 130 ff.
[245] ibid 120.
[246] ibid 120, 133 ff., 141.
[247] Garrard and McNaughton (n 240) 11–12.
[248] ibid 11.

victimised by Stalinism and the slavery regime in the antebellum United States. As to the second argument advanced by Saunders through engagement with Butler, feeling enraged and resentful towards cruelty or injustice, vice or wickedness helps form common bonds within society[249]. What is true in the transitional justice context is twice appropriate when it comes to resisting evil law in real time, when calling a spade a spade is particularly crucial.

4. Why Using 'Evil' is Valuable

A. Preliminary matters

I have not yet given a positive account as to why using the term 'evil' is valuable. I say that this term brings conceptual, or theoretical, and moral, or practical, clarity to the discussions of the phenomenon of evil as well as the narrower concept of evil law at the heart of my thesis. It is indispensable to an informed discussion of law in Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States.

B. Conceptual (theoretical) clarity

The integrated account of evil presented in this Chapter brings conceptual clarity to the study of evil in general and evil law in particular. Firstly, it captures something that is a very specific and distinct phenomenon that cannot be adequately described using other, even adjacent, terms. Evil is something for which, as we feel, other terms conveying moral disapproval – such as 'bad' or 'unjust' – might be an understatement. Or, as Haybron puts it, 'prefix your adjectives [such as those] with as many "very's" as you like; you still fall short [as sometimes] [o]nly "evil", it seems, will do[250].' This applies to evil law more specifically, the characteristics of which, as will be suggested in the following Chapter, do not seem to be captured by terms such as 'wrong', or 'bad', or 'unjust' law[251].

Secondly, talking about evil in the way presented in this Chapter and the dissertation at large further aids us conceptually as it does not only track the intuitive view that evil is distinctive

[249] Joseph Butler, 'Sermon VIII: Upon Resentment and Forgiveness of Injuries', *Fifteen Sermons Preached at the Rolls Chapel* (Virginia Theological Seminary 2005) <http://anglicanhistory.org/butler/rolls/>. As cited in Saunders (n 244) 133.
[250] Daniel M Haybron, 'Moral Monsters and Saints' (2002) 85 The Monist 260, 260.
[251] For more on that in the context of law, see Chapter III, Section 3.

and different, but gives us an opportunity to consider its further applications. This is particularly relevant to the discussion of evil law. Specifically, it will subsequently be argued that 'evil law' is a more precise term than 'bad law' as it unambiguously conveys moral discontent[252]. Evil law can be distinguished from unjust law on the grounds of its inability to be rendered neutral through the process of legal interpretation[253]. These distinctions are important as evil law, unlike its counterparts, does not just fail to create *prima facie* reasons to follow it[254], but, even more strikingly, generates an obligation, albeit limited, to resist it[255]. Thus, delimiting evil law and its counterparts – which the term 'evil' helps to do – is necessary to understand their nature and the moral consequences they generate.

Thirdly, the concept of evil is important beyond mere philosophical investigation as abandoning it robs not only philosophers, but ordinary individuals of vocabulary needed to express their moral judgments. I agree with Russell that '[a]s moral philosophers our aims ought to include those of engaging with non-philosophers, making sense of their moral claims, and helping them understand the relationship between moral concepts and the nature of moral judgements[256].' Discarding the term 'evil' – as well as 'evil law' more specifically – which has an established place in folk discourse would hamper these goals. This, however, does not mean that the dissertation will accept the common usage of 'evil' and 'evil law', as patchy and self-contradictory it often is, uncritically – I seek only to try and find value in it as a starting point, hopefully helping non-philosophers to further reflect on it beyond what would be an initial intuition.

C. Moral (practical) clarity

Let us now turn to the moral clarity that better conceptual clarity leads to. Using the term 'evil' has a normative advantage. Firstly, as I have shown above in my response to Cole's argument about the danger posed by the rhetoric of 'evil'[257], retaining the concept of evil helps us articulate the harm evil acts and practices, such as evil law, inflict on those marginalised and corrupted by them. The Nazi's *Nuremberg Laws*, Stalinist repressions directed towards the

[252] See Chapter III, Section 3.A.
[253] See Chapter III, Section 4.
[254] See Chapter III, Section 3.B.(iii).
[255] See Chapter VI, Section 4.
[256] Russell (n 208) 220.
[257] Section 3.D.

families of 'enemies of the people', and laws designating people as property under the antebellum United States' slavery regime appear to have been more than very unjust. These horrors are something for which talk of 'bad' or even 'unjust law', as per above[258], might be an understatement, as these terms blur the distinction between laws that are merely morally imperfect and those that are properly wicked. Preserving such a distinction is not just conceptually important, but morally valuable. Equipping those who are, in one way or another, affected by evil acts or practices – evil laws included – with adequate linguistic tools to describe their experiences is crucial to coming to terms with the evil they suffered. The work of philosophers in elucidating the concept of evil is therefore helpful, in addition to reasons provided by Russell, almost in a therapeutic way.

Secondly, being frank and honest about evil is important when resisting evil acts and practices such as evil laws in real time as one needs to clearly assess what is at stake in those scenarios. First, referring to certain acts and practices – including law– as 'evil' evokes a powerful sentiment and serves as a rallying cry not only to those who are downtrodden, but other members of the community who may not be directly affected by evil acts or practices such as evil law, but will be further motivated to oppose them due to their natural disposition against evil[259]. Second, as Card and Calder highlight, designating some acts or practices as evil helps us to prioritise fighting against them as opposed to other injustices, directing our resources where they are needed the most[260]. Therefore, actors such as citizens, officials, and the international community would do better fighting evil law first as opposed to spreading themselves thin, which will happen if they do not see it as different from law that is merely unjust.

Thirdly, using the term 'evil' aids us in determining how we resist such morally iniquitous practices, providing both practical and moral fetters on actions one can undertake in response to it. Firstly, evil law, as it will be argued, is uniquely unmanageable through legal means[261], which limits the tactics by virtue of which it can be dealt with. In the context of contemporaneous resistance, evil law cannot be neutered on the inside, that is, via instituting legal proceedings aiming to serve that purpose. It therefore must be responded to from the

[258] Section 4.B.
[259] As per Card, 'a <…> task guiding my inquiries <…> is to facilitate the identification of evils, in the hope that once they are identified, people who currently support a number of evil practices might cease to do so.'
[260] Card (n 241) 7. Calder, 'The Concept of Evil' (n 113).
[261] See Chapter III, Section 4.

outside, or through political action of various degrees of civility, ranging from legislative reform to full-on revolution. Secondly, contrary to what Cole claimed as discussed earlier[262], employing a concept of evil does not empower others to do everything (no matter how morally tainted) to stop evil acts and practices, but, on the contrary, places limits on how one responds to evil[263]. To put it simply, one cannot permissibly fight evil with evil, and this is more starkly conveyed by this term rather than the more slippery language of injustice. Specifically, one can argue that some responses to evil might be just– in the sense of being commensurate to the evil done – but at the same time evil. In relation to evil law, this is important when deciding on what one ought to do in the face of evil law – as will be argued, both the right (meant as a Hohfeldian liberty) and the obligation to resist evil law does not obtain if resistance would itself enable infliction of intolerable harm to the victim themselves if not pre-empted by external factors[264].

5. Conclusion

This chapter dealt with establishing what I mean by 'evil' in the context of my thesis's inquiry into some aspects of evil law and defended the use of this admittedly loaded and controversial term. In Section 2, I produced a definition of evil acts or practices as those that *intentionally or recklessly cause or enable infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors*. Then, in Section 3, I rebutted three potential critiques of using the term 'evil'. Firstly, I argued that evil acts or practices were something other than just very bad / wrong ones, rendering the concept meaningful. Secondly, replying to Cole, I established that this term is not empty and has explanatory power. Thirdly, I challenged moral relativists' claim that this term is necessarily subjective, and hence unworkable. Conversely, I stated that there was a space for an objective conception of evil. Fourthly, again engaging with Cole, I claimed that using the term 'evil' is not necessarily harmful despite its potential of being abused to suppress marginalised persons and communities. Abuse of this term does not negate its legitimate use, and it can be employed, conversely, to better address injustices suffered by minorities. Fifthly and finally, in Section 4 I continued this thread by giving a positive case for why one ought to use the term 'evil' despite the objections – it brings both conceptual and moral clarity to the conversations about evil and resistance against it. This

[262] See Section 3.D.
[263] Card (n 241) 7–8. As cited by Calder, 'The Concept of Evil' (n 113).
[264] Chapter VI, Section 5.B.

is the end of my investigation of evil in general, but only the beginning of the exploration of evil law.

III. Evil Law, Evil Laws, and Evil Legal Systems

1. Introduction

The previous chapter set out that there are certain evil acts or practices that can be appropriately called 'evil', both with theoretical and practical considerations in mind. This chapter, building on that prior discussion, will provide an account of those of them couched in the legal form – what I shall call 'evil law'. My underlying question is *what makes evil laws and evil legal systems evil*.

Firstly, in Section 2, I will elaborate on the way I use the term 'law' throughout this chapter and my dissertation at large. I will develop what I call the lowest common denominator definition of law in order to make my conclusions as widely applicable as possible, ultimately defining law as *the product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*.

Secondly, in Section 3 I will try to outline the different jurisprudential positions on the nature of evil law in order to distinguish it from its counterparts – bad and unjust law. First, I will dismiss the use of 'bad law' to describe evil law as unhelpful as it is unable to capture evil law's distinct character. Second, I will survey the available positions on the distinction between evil and unjust law in more detail. While Augustine and Aquinas, Hart, and Fuller argued that evil law is indistinguishable from unjust law, Radbruch and Dworkin perceived evil law as a *sui generis* category qualitatively and not just quantitatively distinct from its counterpart. Summing up, I will agree with the latter position, although also noting my disagreement with Radbruch and Dworkin on whether evil law is law proper as explored in the next chapter.

Thirdly, in Section 4 I will argue, fleshing out the distinctions made by Radbruch and Dworkin, that evil law, unlike unjust law, is uniquely wicked in that it does not create even *prima facie* rights and duties. Building on this observation as well as the definition of evil developed in the previous Chapter, I shall define evil law as *law, which, if interpreted in its best light, will cause or enable infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors***.** The 'in its best light' requirement draws on the Dworkinian distinction between two types of morally objectionable laws, ones that can be changed by being subject to legal interpretation and ones that cannot, meaning that only the former (unjust) and

not the latter (evil) could provisionally generate rights and duties.

Fourthly, in Section 5 I will illustrate the many different ways in which legal norms can be evil by providing a taxonomy of evil laws. I will identify four types of evil legal rules: duty-imposing, power-conferring, permissive, and legitimating, and illustrate this theoretical taxonomy with examples drawn from the central cases of evil law considered in this dissertation – Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States.

Fifthly and finally, in Section 6 I will talk about what makes a legal system, as opposed to individual laws, evil, defining an evil legal system as *a system of legal rules recognised by the primary law-applying organs that these rules institute as belonging to this system that contains a significant number of evil laws central to its material identity.*

2. What is Law: The Lowest Common Denominator

In order to make sense of evil law, one needs to at least provisionally postulate what 'law' means. This is not a small feat as many, sometimes overlapping, at other times conflicting definitions have been advanced in the history of jurisprudence. To sidestep committing to a view of law that is contentious or controversial, in this project I need to look for the lowest common denominator that all jurisprudential traditions would accept as true, albeit with some qualifications. This is the enterprise of 'integrative jurisprudence', a term coined by Hall[265] and furthered by Berman[266], that seeks to bring together legal positivism, natural law, and the historical school. On Berman's account, positivists define law as *rules* posited by officials, natural lawyers qualify positive law by reference to universal moral *rules*, and historicists conceive of law as customary *rules* influenced by the social mores of the time[267]. Different as they are, the three schools would agree that law has something to do with *rules*. Thus, a definition of lawmaking proposed by Fuller – 'the enterprise of subjecting human conduct to the governance of rules[268]', law being a product of that enterprise, would be most apt for the

[265] Jerome Hall, 'From Legal Theory to Integrative Jurisprudence' [1964] 33 University of Cincinnati Law Review 153 (1964).
[266] Harold J Berman, 'Toward an Integrative Jurisprudence: Politics, Morality, History' (1988) 76 California Law Review 779.
[267] ibid 781–782.
[268] Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 106.

purpose of finding the lowest common denominator of legality.

Fuller's definition can, however, be seen as too broad as it in no way distinguishes law from its fellow rule-based practices – such as international organisations, religious institutions, private clubs, or even organised crime bands[269]. Schauer notes that 'these universally have primary rules governing the conduct of their members and have secondary rules of recognition, change, and adjudication, as well as, often, elaborate institutions for interpreting the rules and judging violations <…> [as well as] an effective power of coercion through their ability to expel[270].' A possible way out of this conundrum would be to deny that the other rule-based practices subject human conduct to the governance of rules in the same way as law. Law does not merely regulate human conduct in parallel to other rule-based practices, but positions itself on top of them, only allowing them to generate rules when permitted, either explicitly (by delegation) or tacitly (by refusing to regulate). As Schauer argues, compared to law, '[other rule-based practices] do not, to be sure, typically have the *ultimate* [*emphasis in the original*] coercive power[271].' This difference was also captured by Kelsen, who argued that 'law makes the use of force a *monopoly* [emphasis mine] of the community[272].' Or, as Raz put it, law can be defined as 'a system of guidance and adjudication claiming *supreme* [emphasis mine] authority within a certain society and therefore, where efficacious, also enjoying such effective authority[273].' One can question whether Raz's characterisation is accurate in the context of federal legal systems, such as the antebellum United States, one of this dissertation case studies, as there, in certain specified domains, state law gives the way to federal law and therefore does not purport to be supreme[274]. However, this clarification can be accommodated by stating that laws claim supreme authority *in aggregate* while individual laws can be limited in their power vis-à-vis other legal rules within the legal system.

A revised version of Fuller's definition of law, used to delimit the scope of this dissertation, is therefore *a product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*.

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[269] On this particular example, see Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 96. Frederick F Schauer, *The Force of Law* (Harvard University Press 2015) 136–137.
[270] And he adds '[a]nd the Mafia no doubt has the power of coercive enforcement.' All Schauer (n 269) 136.
[271] ibid.
[272] Hans Kelsen, *General Theory of Law and State* (Transaction 2006) 21.
[273] Joseph Raz, 'The Obligation to Obey the Law', *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 43.
[274] I thank Professor Matthew Kramer for this suggestion.

3. Evil Law in Jurisprudential Thought

A. Bad law

After law has been defined, my first task is to disentangle evil law (as well as its cousin, unjust law), from bad law[275]. A law can be bad in multiple ways. Firstly, 'bad law' can simply refer to law that is no longer good as law as it has lost its legal validity. Secondly, a law can be bad in that it is not effective in the light of its proposed objectives, whether those are moral or immoral[276]. Thirdly, a bad law can be morally bad, or be in contradiction with some moral precepts. This third sense is also conveyed by the phrases 'unjust' or 'evil law'. It is my position that if we seek to understand the relationship between immorality and law, these phrases are preferable to 'bad law' as they express this sense of moral condemnation more straightforwardly. A description of the test cases examined in this dissertation – the *Nuremberg Laws*, the 'enemy of the people' laws, and the *Dred Scott* decision – as bad law, or even very bad law is likely to result in a valid charge of underestimating their immorality. Moreover, it will preclude engagement with their badness in different senses, such as, *e.g.*, *Dred Scott* being no longer 'on the books' as effectively repealed by the 13th Amendment to the *Constitution of the United States* (first sense of badness) or the inadequacy of Soviet criminal law in identifying real (if there were any) perpetrators of 'anti-revolutionary crimes' (second sense of badness). It is for these two reasons that this dissertation will henceforth speak of unjust or evil law rather than bad law.

B. Unjust law

(i) Evil law as very unjust law

a. Classical origins

Let us now turn to 'unjust law'. This concept dates back to the classical legal tradition. In that mode of legal thought, evil (*malum*) was a broad[277] concept including any absence of good[278]

[275] I thank the audience at the Maastricht Law and Philosophy Graduate Colloquium (2021) for alerting me to this concern.
[276] It is in this sense that Oliver Wendell Holmes Jr. has famously proclaimed '[g]reat cases like hard cases make bad law.' *Northern Securities Co v United States* (1904) 193 US 197 (Supreme Court), 400 (Holmes J)
[277] As opposed to 'narrow', in Calder's terminology. Calder, 'The Concept of Evil' (n 113).
[278] Augustine of Hippo, *The Enchiridion on Faith, Hope, and Love* (n 116) Chapter 11. 'Therefore it must be that by the name of evil is signified the absence of good.' Aquinas (n 18) Part I, Q48, A1.

and did not connote extraordinary culpability or harm[279]. Most strikingly, at least any human[280] legal system, being necessarily coercive, would contain the evil of *poena* (punishment)[281]. Unjust law was also central to many discussions. To Augustine[282] and Aquinas[283] belongs the famous formulation *lex iniusta non est lex* ('unjust law is no law') [284]. For Aquinas, unjust laws were laws contrary to the Divine good or to human good. Laws contrary to the Divine good included 'the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law[285].' Laws contrary to human good could be unjust 'either in respect of the end, as when an authority imposes on its subjects burdensome laws, conducive, not to the common good, but rather to the ruler's own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good[286].' Laws that are contrary to human good do not bind in conscience, except when it may be necessary to obey them 'in order to avoid scandal [*scandalum*] or disturbance [*turbationem*][287]' or if disobedience will give a bad example to others or create any kind of public disorder, broadly speaking[288]. Later, Aquinas uses an even broader phrase *in lieu* of 'disturbance': 'inflicting a more grievous hurt[289].' In other words, in deciding whether to obey or disobey unjust law, one must weigh up moral and pragmatic reasons for and against doing so. This puts unjust laws on a spectrum: from more to less tolerable.

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[279] See also Chapter II, Section 2.A.
[280] And not, for instance, angelic. Raz's famous thought experiment describing a sanctionless 'society of angels' can be traced back to Aquinas's angelology, as I argued in Lukina, 'Angels, Demons, Us' (n 118).
[281] Aquinas distinguished between fault (*culpa*) and penalty (*poena*) as the two types of evil found in voluntary things. The evil of penalty is imposed upon those committing the evil of fault. Even if it is deserved, it is still an evil in Aquinas's sense, as it involves withdrawal of good from the wrongdoer. Aquinas (n 18) Part I, Q48, A5. McCluskey (n 119) 43.
[282] More precisely, '*nam mihi lex esse non videtur quae iusta non fuerit* ' ('a law that was unjust wouldn't seem to be law.') Augustine of Hippo, *On Free Choice of the Will* (n 17) I, v, 11. I use the translation given by Finnis in Finnis, *Natural Law and Natural Rights* (n 14) 363.
[283] Aquinas (n 18) Part I-II Q96 A4.
[284] As emphasised by Finnis, this phrase refers to unjust law not being law *simpliciter* (in a primary sense), unjust law is still law *secundum quid* (in a secondary sense). Finnis, *Natural Law and Natural Rights* (n 14) 363–364. Quoting Aquinas (n 18) Part I-II Q92 A1 ad. 4. See also Introduction, Section 2 and Chapter IV, Section 3.B.
[285] Aquinas (n 18) Part I-II Q96 A4.
[286] ibid.
[287] ibid.
[288] On this particular meaning of *scandalum* and *turbatio*, see J Budziszewski, *Commentary on Thomas Aquinas's Treatise on Law* (Cambridge University Press 2014) 387–388.
[289] Aquinas (n 18) Part I-II Q96 A4, ad. 3. As noted in Budziszewski (n 288) 393.

b. Hart

Even though the concept of evil evolved[290], 'injustice' talk remained the predominant expression of moral-formal dilemmas, or conflicts between law and morality[291], until the middle of the twentieth century when Nazi (and, to some extent, Soviet) terror forced theorists to pay more attention to legalised evil. This was something that Augustine or Aquinas could not yet comprehend as they focused on more familiar cases of a tyrannical government serving the self-interest of a ruler instead of a program of full-on extermination of certain categories of human beings. Thus, the concept of evil now entered onto the jurisprudential scene. For instance, Hart adopted the vocabulary of 'evil' rather than 'unjust' law. However, like classical jurists, he treated evil law as a category distinct from unjust law only in degree, not as one distinct in kind or forming a separate domain. Hart's answer to moral-formal dilemmas – that evil law is law but does not have to be obeyed, since law is distinct from morality[292] – built on the thought of Bentham and Austin[293]. The 'problem posed by the existence of morally evil laws[294]', according to them, could be solved by weighing up the evil of compliance with law against the evil of disobedience[295], rendering the phrases 'unjust law' and 'evil law' interchangeable and different only in degree.

c. Fuller

Even though Fuller opposed Hart on the question of whether Nazi law – and evil law at large – was law, his use of the category of evil law is strikingly similar to Hart's. According to Fuller, any legal system, even a bad one, has to at least minimally satisfy the following eight desiderata ('internal morality of law' or 'principles of legality'[296]) to count as law: rules of law must be general, publicly promulgated, prospective, clear, free of contradictions, stable, possible to

[290] As per Neiman's seminal study of the concept, philosophers turned their attention to moral rather than natural evils, or evils as culpable wrongdoings, starting with Rousseau's response to the 1755 Lisbon earthquake. Neiman (n 11) 55.
[291] 'Moral-formal dilemmas' is Cover's term for a dissonance between 'the demands of role' and 'voice of conscience' faced by judges who had to apply the Fugitive Slave Act requiring that runaway slaves be returned to their 'masters'. Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press 1975) 6, 197–199.
[292] As paraphrased from Hart (n 19) 618.
[293] ibid 616–617.
[294] ibid 616.
[295] ibid.
[296] Henceforth I will refer to them as the latter to sidestep the debate about whether these desiderata are in fact inherently moral.

obey, and administered in a way that does not diverge from their apparent meaning[297]. To Fuller, Nazi law was not only externally or substantively unjust, but also negated these requirements, as much of it consisted of retroactive secret ordinances that were often disobeyed by Nazi courts themselves out of fear[298]. As a result, he arrived at the conclusion that these rules had not been laws. However, he also claimed that the 'existence of a legal system, even a bad or an evil one, is always a matter of *degree* [emphasis mine][299]', opening up a possibility for there to be evil law that is not yet a failure as law. However, given that Fuller believed that 'external and internal moralities influence each other; a deterioration of the one will almost inevitably produce a deterioration in the other[300]', he would not consider the notion of evil law that is not yet a failure as law theoretically or, indeed, practically important.

(ii) Evil law as a sui generis category

a. Radbruch

Therefore, Augustine and Aquinas, Hart, and Fuller all conceived of evil law as merely very unjust law. The first move towards a distinct concept of evil law was made by Radbruch in his essay, *Statutory Lawlessness and Supra-Statutory Law*[301], written in the aftermath of Nazi rule. While he agreed with classical natural law that 'law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice[302]', to him laws serving injustice were not a monolith. As Alexy points out, the famous 'Radbruch Formula' consists of two parts[303]. In what Alexy calls the 'intolerability formula[304]', when it comes to the moral obligation to obey legal ordinances, positive law takes precedence over morality 'unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law", must yield to justice[305].' This part of Radbruch's essay is consistent with the classical understanding of unjust law as a site of a proportionality inquiry and is

[297] Fuller, *The Morality of Law* (n 268) 33.
[298] Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19) 650–652.
[299] ibid 646.
[300] ibid 645.
[301] Radbruch (n 23).
[302] ibid 7.
[303] Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing 1999) 16. There can be an alternative reading under which law described in the second part ('disavowal formula') is merely an instance of the class of laws defined in the first part ('intolerability formula'). However, the fact that in the second part 'the statute [in question] is not merely 'flawed law', it lacks completely the very nature of law' supports Alexy's interpretation.
[304] ibid.
[305] Radbruch (n 23) 7.

nothing extraordinary. However, later, in the 'disavowal formula[306]' (to use Alexy's phrase), Radbruch writes 'where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law[307], then the statute is not merely "flawed law", it lacks completely the very nature of law[308].' As a result, he concludes, 'whole portions[309]' of Nazi law 'never attained the dignity of valid law[310].' While other unjust law is still law, that kind of law[311] – what I shall call 'evil law' – was not law even in this marginal sense.

b. Dworkin

Similarly, Dworkin insisted that some morally iniquitous (or merely unjust) law is law in the sense of creating rights and duties, though its effect can and ought to be negated via judicial interpretation in light of the legal system's background principles and policies[312]. The aforementioned *Fugitive Slave Act* was one such example[313]. On the one hand, as the United States government was sufficiently legitimate, the 'structuring principle of fairness' – political authority, precedent, and reliance – argued in favour of enforcing the Act. However, it should have been overridden by a stronger moral argument of human rights of enslaved persons[314]. As a result, the purported dilemma between law and one's moral conviction would be resolved using this calculation. But this is not the case with evil law. '[T]he hideous Nazi edicts,' Dworkin said, 'did not create even *prima facie* or arguable rights and duties' as 'the purported Nazi government was fully illegitimate, and no other structuring principles of fairness argued for enforcement of those edicts[315].' While Dworkin had earlier conceded that the Nazi law was

[306] Alexy (n 303) 16.
[307] Note that Radbruch, quite paradoxically, refers to such a statute as 'positive law' despite claiming, in the same sentence, that it 'lacks completely the very nature of law'. Radbruch (n 23) 7.
[308] ibid.
[309] As Meierhenrich notes, Radbruch did not go as far as to declare the totality of laws made by Nazis devoid of legal validity. Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford University Press 2018) 12.
[310] Radbruch (n 23) 7.
[311] I recognise a certain awkwardness in expressing that Radbruch or Dworkin recognised a category of evil law, since neither of them believed that such 'law' was law. Here and elsewhere, I use the term 'law' in a placeholder sense of norm-formulations such as texts of statutes rather than genuine legal norms – what Radbruch would refer to as 'positive law' and Dworkin as 'preinterpretive law'. On the distinction between norms and norm-formulations, see Matthew H Kramer, *Rights and Right-Holding: A Philosophical Investigation* (OUP Oxford 2024) 34–39.
[312] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 410–411.
[313] ibid 410.
[314] ibid 411.
[315] ibid.

law in a preinterpretive sense[316], he later concluded that 'it is morally more accurate to deny that these edicts were law[317].' The same, he argued, applied to law in Stalin's Soviet Union[318]. It is not that Dworkin considered Nazi and Stalinist laws so burdensome as to always outweigh the structural concerns (as at the end of the spectrum of unjust law) – they are (as evil law) of a kind that defies this balancing. While I disagree with Dworkin's characterisation of *Fugitive Slave Acts* as merely unjust, instead reading them as another instance of evil law on a par with Nazi and Soviet examples as explained below[319], it does not make the distinction between unjust and evil rules Dworkin proposes any less insightful for demarcating evil from merely unjust law.

(iii) Summing up

I thus ask two questions – whether the thinkers surveyed believe that evil law is distinct in kind from unjust law or, alternatively, see evil law as very unjust law, and whether they grant that evil law is law. Only Radbruch and Dworkin answer the first question affirmatively. At the same time, neither of them fully assents to the second proposition, even though both end up affording morally iniquitous law some degree of likeness to law; Radbruch describing it as 'positive law[320]', and Dworkin (at least in his earlier work) awarding it a status of 'preinterpretive law[321].' My position takes the intuition that evil law is a kind of law, which I take to be correct, a step further and carves out a new niche in the literature on evil law, presenting a view that accepts Radbruch's and Dworkin's claim about the distinctiveness of evil law (as I will argue in this Chapter, Section 4) yet sees such law as law in the primary sense (as I will argue in Chapter IV).

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[316] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 103.
[317] Dworkin, *Justice for Hedgehogs* (n 312) 411. This is perfectly compatible with his earlier statement that Nazi law was law in a preinterpretive sense. As Dworkin said earlier: 'we have no difficulty in understanding someone who does say that Nazi law was not really law <…> [f]or he <…> is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion.' Dworkin, *Law's Empire* (n 316) 103–104.
[318] Dworkin, *Justice for Hedgehogs* (n 312) 322.
[319] See Section 4.
[320] Radbruch (n 23) 7.
[321] Dworkin, *Law's Empire* (n 316) 103.

4. Distinguishing Evil Law

To Radbruch and Dworkin (as opposed to Hart and Fuller), the main distinction between unjust and evil law, thus, is as follows: evil law is law that can never create even *prima facie* moral rights and duties. Unjust law, on the other hand, *can* create them, but the reasons supporting said rights and duties can be defeated by countervailing considerations, in which case the related rights and duties *do not* obtain, all things considered. In Dyzenhaus's words, unjust law is 'manageable' by law, while evil law is 'unmanageable' by legal means, which, on my reading, refers to the ability to resist such law using legal mechanisms, and has to be dealt with in a separate moral domain[322]. One may question whether this distinction is important. After all, our response to both evil and unjust laws is the same – the law is not to be followed. However, the question of the grounds on which that happens is significant, not just philosophically, but also practically. Most importantly for the purposes of my dissertation, the existence or absence of a *prima facie* duty to obey the law determines how we ought to respond to evil law (as will be elaborated on in Chapter VI) and what we can realistically do to resist it (Chapter VII). To provide a brief advance account of these arguments: if we follow the line of thought underpinning Radbruch's and Dworkin's conceptions of evil law, we conclude that evil law requires resistance that ought to be facilitated via extralegal means to be successful.

Thus, it is imperative to ask what triggers these disparate normative consequences produced by unjust laws and evil laws. To Radbruch, the turning point arises when there is a deliberate failure to deliver justice and equality[323], however, this formulation does not seem sharp enough to make a distinction between evil law from unjust law as unjust laws can also deliberately generate unjust outcomes, albeit on a smaller scale. After all, Radbruch's description of evil law seems to be a *sui generis* appraisal of some Nazi laws rather than to produce a test that can be used to identify and distinguish other instances of evil law. Hence, we need a definition of evil law that explains why only those laws fail to create even *prima facie* rights and duties.

In developing this definition, I shall, of course, draw on my account of evil. In the previous Chapter, I have defined evil acts and practices as *intentionally or recklessly causing or enabling the infliction of intolerable harm (including atrocities) to the victims themselves if not pre-*

[322] David Dyzenhaus, 'Dworkin and Unjust Law', *The Legacy of Ronald Dworkin* (Oxford University Press 2016) 137.
[323] Radbruch (n 23) 7.

empted by external factors[324]. This is a definition of evil acts and practices in general, so it needs to be modified when applied to law. The main problem lies in its reference to states of mind – intention and recklessness. While these are somewhat, even if not perfectly, discernible when it comes to acts of evil perpetrated by individuals, they become harder to apply when it comes to social institutions such as law. It is impossible to say whose state of mind we should look at, as developed legal systems, even evil ones, tend to have a rather sophisticated governmental apparatus. Should we pay attention to intention or recklessness on behalf of the legislature, the executive, or the courts? And is it even possible to decipher their state of mind as these legal institutions' decisions are an aggregate of the ones of their individual members? And, finally, do these intentions of individuals working in a legal system actually aggregate into a single will? Laws, as Gardner notes, 'like <…> other highly complex webs of human activity, are the unintentional by-products of many actions performed with other (more modest) intentions[325].'

The way to sidestep these questions is to ground the definition of evil law not in intention or recklessness, but in purpose, with the help of Dworkin's interpretivism. According to Dworkin, judges construe legal materials in the light of their best background principles and policies[326]. To him, the judge is directed to produce a set of principles that, firstly, clears the 'threshold' of fitting existing legal materials[327], and, secondly, best justifies them by 'show[ing] the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality[328].' While the second step inevitably involves moral judgment on the part of judges, it is clear that the justification stage is restrained by the legal materials in question. As Dworkin says, an interpretivist judge 'does not first find the limits of law and then deploy his own political convictions to supplement what the law requires <…> [h]e uses his own judgment to determine what legal rights the parties before him have[329].' To build on the previously discussed argument Dworkin made about the *Fugitive Slave Acts*, he claims that the judges ought to have rejected them through interpretation, not

[324] See Chapter II, Section 2.E.
[325] John Gardner, 'How Law Claims, What Law Claims', *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 130.
[326] Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057, 1082–1101. Dworkin, *Law's Empire* (n 316) 254–258.
[327] Dworkin, *Law's Empire* (n 316) 254–256.
[328] ibid 256.
[329] Dworkin, 'Hard Cases' (n 326) 1104.

because their personal convictions ought to have demanded dismissing the Acts as morally wrong, but because an interpretation of the *Constitution* that rejected them was available[330].

Dworkin's theory demonstrates how evil law is distinct from merely unjust law for the reason that only the latter can be rendered harmless through the process of interpretation. As he notes,

> '[g]overnments can be legitimate [even if their laws and policies are unjust] if their laws and policies can […] *reasonably be interpreted* [emphasis mine] as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life[331].'

Conversely, judges and other key legal actors in an evil legal system would fail to interpret its law to alleviate the harm it appears to cause, therefore making it unsalvageable if the judge sticks to their duty to apply the law. To preserve their moral integrity, the judge (or any other legal official) needs to resign or lie[332] and the citizen must pursue change through revolutionary instead of legal means[333]. As a result, I shall refer to the law's *interpretation in its best light* as key part of my prospective litmus test for what counts as evil law.

Let us turn to some illustrations from the three historical test cases considered in this dissertation. As previously highlighted, Dworkin considered some Nazi and Soviet laws as unmanageable by law. It was impossible to interpret legislation such as the *Nuremberg Laws* as something other than what they said, targeting Jews and those who associated with them by imposing legal disabilities and criminal punishment that in many cases could amount to intolerable harm. Unlike the *Nuremberg Laws*, the 'counter-revolutionary activities' Article 58 of the *Criminal (or Penal) Code of the RSFSR* of Stalin's time was not that explicit in targeting real and perceived political enemies of the regime. However, it provided a legal ground for political persecution and there was nothing in the surrounding legal rules or principles underpinning them to reinterpret this rule in a more benign way. Finally, while Dworkin, in his response to Cover, as has been previously remarked[334], discussed the *Fugitive Slave Acts* in the antebellum United States – another archetypal evil law – as potentially unconstitutional and

[330] See Section 2.B.(ii).b.
[331] Dworkin, *Justice for Hedgehogs* (n 312) 321–322.
[332] ibid 410. See also Chapter VII, Section 2.B.(ii).c.
[333] ibid 323. See also Chapter VII, Section 3.C.
[334] See Section 3.(ii).b.

thus as capable of being rendered toothless via the right interpretation[335], this position, on my view, is incorrect. *The Constitution of the United States* explicitly permitted slavery. Interestingly, Dworkin changed his mind on the legality of the *Fugitive Slave Acts* in *Law's Empire*, stating that 'perhaps the law of the United States, properly interpreted in deference to integrity, did include a *Fugitive Slave Act*[336] enacted by Congress before the Civil War[337].' In that case, the *Acts* in question were properly evil and not merely unjust.

One may argue that forgoing intention and recklessness and replacing it with the possibility of reinterpretation makes my definition of evil law overinclusive. After all, we can say it might not filter out the previously discussed[338] cases of Article 48 of the *Weimar Constitution* and its counterparts in Stalin's Soviet Union (creation of a General Secretary position) and the antebellum United States (separation of the thirteen American colonies from the British Empire). I have previously argued that as the subsequent sinister use of these, on their face, benign laws was originally neither intended nor foreseen, they were not evil[339]. However, some may say that they nevertheless enabled intolerable harm to their victims themselves. Still, I submit that there is a way out of this contradiction. While the laws mentioned at the beginning of this paragraph, as argued above, were not evil at the moment of their creation, they became such when applied in a new interpretive context – Hitler's Germany, Stalin's Soviet Union, and the antebellum United States respectively. This transition to an evil legal system changed the benign laws' surrounding rules and, subsequently, their underlying principles and purposes. These laws hence only became evil when interpreted against that new background. The evil in law is thus something that is fluid and malleable rather than set in stone.

As a result, evil law is to be defined as *law, which, if interpreted in its best light, will cause or enable the infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors.*

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[335] Ronald Dworkin, 'The Law of the Slave-Catchers (Book Review)' [1975] Times Literary Supplement. Dworkin responded to Cover, who, in turn, had argued that 'the Fugitive Slave Act of 1850 evinced clear congressional policy favoring harsh and summary enforcement of rendition policy over any solicitude for procedural or substantive rights of alleged fugitives <…> there was substantively less room for the outlet of principled preference for liberty, which operated in more amorphous doctrinal situations.' Cover, *Justice Accused: Antislavery and the Judicial Process* (n 291) 121.
[336] Dworkin is referring specifically to the 1850 *Act*, but his sentiment applies to the 1793 *Act* as well.
[337] Dworkin, *Law's Empire* (n 316) 219.
[338] See Chapter II, Section 2.D.(i).
[339] See Chapter II, Section 2.D.(i).

5. Taxonomy of Evil Law

A. Preliminary matters

The 'enabling' element of the given definition[340] highlights the complexity of evil law, as evil laws may not cause infliction of intolerable harm, but merely enable them. In this section I attempt to further elaborate on this notion by providing a taxonomy of laws as applied in the context of evil law. Hartian duty-imposing rules that command the infliction of intolerable harm are the rules of the usual evil law archetype. However, these are not the only legal rules serviceable to evil. Power-conferring rules, also recognised by Hart, in evil regimes, work to disempower marginalised persons or groups from taking part in social institutions or to empower officials or supporters of the regime to inflict intolerable harm on those marginalised people. Going further than Hart's distinction[341], one should recognise two further types of evil legal rules. Permissive rules permit the infliction of intolerable harm if not pre-empted by external factors without vesting any new legal powers in those who inflict such harm. Finally, legitimating rules justify, hide and distract from the looming intolerable harm.

B. Duty-imposing rules

The most obvious example of evil legal rules are rules that require that intolerable harm be inflicted either by the individual perpetrator (in either a personal or professional capacity) who is to follow the rule, or by state officials if the rule is not followed. These are the rules that Austin talked about, defining laws as commands given by the sovereign to the subject to do something or abstain from doing something under a threat of sanction[342].

Consider, for instance, the Nazi *Law for the Protection of German Blood and German Honour*[343]. The *Law* prohibited marriages (§1(1)) and extramarital intercourse (§2) between Jews and Germans, employment of female Germans under 45 years old in a Jewish household (§3), and Jews flying the Reich or National flag (§ 4(1)). Section 5 of the statute provided

[340] See the full discussion in Chapter II, Section 2.D.(iii).
[341] It is important to note that Hart never claimed the power-conferring and duty-imposing rules were exhaustive of all legal rules, he just said that the latter rules were neglected by scholars such as Austin. Hence, my project here does not go against Hart, but, rather, continues his important work.
[342] Austin (n 21) 21–22.
[343] Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935

punishment for not complying with the laws – respectively prison sentence with hard labour, prison sentence with or without hard labour (for males only), and prison sentence of up to one year or a fine, or with one or the other of these categories for the last two offences. As such, the law mandated state officials to impose punishment that directly affects one's sense of self as it quite dramatically restricts one's liberty. While this alone does not make it evil, it is, in this context, an unjustified and excessive and hence intolerable punishment[344].

Likewise, the *Criminal Code of the RSFSR*[345] criminalised numerous 'counter-revolutionary activities' including treason, espionage, 'wrecking', and sabotage. Those found guilty of counter-revolutionary crimes, both by courts and ad hoc extralegal bodies (*troikas*), were sentenced to death or lengthy imprisonment in labour camps. This is similar to the *Nuremberg Laws* outlined above in that the *Criminal Code* compelled legal officials to harm its targets themselves by killing or incarcerating them. Unlike the Nazi *Law*, the *Code* provision was, on its face, not disproportionate and banned truly wrongful conduct, but as we now know, in practice the prevailing majority of those accused of such crimes were innocent. They were convicted on the basis of denunciations and confessions under torture, and in most cases – especially strikingly when they were tried by *troikas* – denied the right to fair trial.

The final vivid examples are the *Fugitive Slave Acts* of 1793 and 1850 that not only guaranteed the slaveholders' rights to capture enslaved persons they claimed a legal right over, but also prohibited any person from aiding the fugitives under a threat of fine or imprisonment (Section 4 of the 1793 *Act*[346] and Section 7 of the 1850 *Act*[347]). The 1850 *Act* went even further, allowing court marshals to compel bystanders to assist in the capture of the slaves as parts of a *posse comitatus* (Section 5[348]). Again, like the Nazi Law, the *Acts* were evil in a twofold way. Firstly, they created a duty for ordinary citizens not to obstruct, and, in case of conscription into a *posse comitatus*, to assist in harming the runaways themselves by putting them back in bondage. Secondly, they imposed a duty on the officials to harm those who declined to commit that wrong – the self-evident nature of imprisonment being a harm to those persons themselves has been described above.

[344] See further Chapter 2, Section 2.D.(ii).
[345] Criminal (Penal) Code of the RSFSR (*Уголовный кодекс РСФСР*) 1926.
[346] Fugitive Slave Act 1793.
[347] Fugitive Slave Act 1850.
[348] Fugitive Slave Act 1850.

C. Power-conferring rules

(i) Disempowering rules

In further developing a taxonomy of evil law, I will in part rely on Hart's distinction between duty-imposing and power-conferring rules. Pushing back against the previously indicated Austinian tradition, Hart argued that some legal rules confer powers rather than impose duties and obligations. These rules 'provide individuals with *facilities* for realising their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law[349].' The powers in question can be conferred both on ordinary citizens ('powers <…> to make wills, contracts, or marriages[350]') and officials ('to a judge to try cases, to a minister to make rules, or a county council to make by-laws[351]'). Power-conferring rules can be used by an evil regime in two ways. The first way is by making rules that do not empower but *disempower* certain persons or groups by denying them important facilities, such as the ability to marry or to enter contracts either already available or newly granted to other legal agents. This is more characteristic of laws that grant powers to law-subjects rather than officials.

One example is the Nazi *Law for the Protection of German Blood and German Honour*. The first provision of the first section thereof stated: 'Marriages between Jews and subjects of the state of German or related blood are forbidden. Marriages nevertheless concluded are invalid, even if concluded abroad to circumvent this law[352].' If we bracket the punishment inflicted on those who disobeyed the prohibition for some time, there is another, power-conferring (or, rather, power-stripping or disempowering) rule that does not fit the Austinian mould. While denying the right to marry might not be as obviously harmful to the victim themselves as the examples of imprisonment and death penalty described above, I nevertheless think that it can be subsumed under Stanton-Ife's definition as further commented on in Chapter 2. The right to choose whom to marry is different from an interest one you can have in their property in that it is central to one's very self. Moreover, denying Jews a right to marry Germans indirectly

[349] Hart (n 45) 27–28.
[350] ibid 26, 28.
[351] ibid 26, 29 ff.
[352] Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935.

contributed to their marginalisation, by designating them as an out-group, thus creating an excuse for further abuse of them by both ordinary citizens and officials[353].

In Stalin's Soviet Union, disempowerment of certain groups occurred through passportisation. According to Baiburin, passports were introduced in 1932 to distinguish between 'near' and 'alien' ('*свои*' and '*чужие*')[354] and deprive the latter of their rights to live in major cities. For instance, under the 1932 OGPU Instruction on passportisation in Moscow, Leningrad, and Kharkiv, those whose social background belonged to the 'foe' category (such as persons who did not work, *kulaks*, recent emigrees) and their families could not get a passport and hence were forbidden to remain living in these cities or within 100 kilometres of them when it came to Moscow and Leningrad and 50 kilometres – when it came to Kharkiv[355]. Even though most might see a passport as an empowering document, in the Soviet Union the displacement triggered by passportisation was decisively disempowering. This is an evil law for similar reasons as described in the previous paragraph, as the ability to continue living where one was previously entitled to live is just as fundamental to one's self as marriage. There is also collateral damage, both short-term and long-term that makes this harm intolerable. First, being forced to suddenly relocate would impose undue hardship on the displaced groups by suddenly breaking their social and economic ties. Second, by not living in a major city, the displaced groups and their descendants would miss out on important economic and social opportunities.

It is well known that slaves in the antebellum United States did not have many legal rights and powers reserved to free persons. By analogy to the example of the *Nuremberg Laws* referred to above, I will focus on marriages. As Goring notes, '[w]hile the institution of slavery existed [in the antebellum United States – *addition mine*], it was generally held, in the slaveholding States, that the marriage of slaves was *utterly null and void* [emphasis mine]; because of the paramount ownership in them as property, their incapacity to make a contract, and the

[353] For more on that, see Chapter V, Section 4.F.(ii).
[354] Albert Baiburin, *Советский Паспорт: История, Структура, Практики* (Издательство Европейского Университета 2019) 94–95. Translated in Albert Baiburin, *The Soviet Passport: The History, Nature and Uses of the Internal Passport in the USSR* (Stephen Datziel tr, Polity 2021). See also David Shearer, 'Elements Near and Alien: Passportization, Policing, and Identity in the Stalinist State, 1932–1952' (2004) 76 The Journal of Modern History 835.
[355] Instructions on Issuing and Registering Passports in Moscow, Leningrad and Kharkiv, in a 100-Kilometer Strip around Moscow and Leningrad and in a 50-Kilometer Strip around Kharkiv (*Инструкция о выдаче и прописке паспортов в Москве, Ленинграде и Харькове, в 100-километровой полосе вокруг Москвы и Ленинграда и в 50-километровой полосе вокруг Харькова*) 1933. Cited in Baiburin (n 348) 103–107.

incompatibility of the duties and obligations of husband and wife with the relation of slavery[356].' As in in the cases of the *Nuremberg Laws* and Stalinist passportisation reforms, the invalidity of slave marriages, as well as other legal disabilities imposed on enslaved persons, affected their core rights and contributed to their marginalisation.

(ii) Empowering rules

Secondly, in assessing the usefulness of power-conferring rules to evil regimes, one can turn to power-conferring rules that empower the rule-subject to inflict intolerable harm. In Nazi Germany, the most vivid example of empowering rules was the adoption of the *Enabling Act* in 1933, Article 1 of which gave the German Cabinet, represented, as per Article 3, by the Chancellor, the power to enact rules bypassing the Parliament (*Reichstag*)[357]. As a result, Hitler assumed dictatorial powers that he then wielded to advance the Nazi agenda. The same point can also be illustrated by the creation of the People's Court (*Volksgerichtshof*) later in 1934. The People's Court was set up by the *Law Amending Provisions of Criminal Law and Criminal Procedure* on the 24th of April 1934[358] to try cases of high treason and state treason (Article III, § 1, paragraph 1). From the outset, the Court was made to provide an alternative to the pre-existing court system headed by the Supreme Court (*Reichsgericht*) after it failed to convict all defendants in the Reichstag Fire Case. The new Court was therefore distinctive in bypassing procedural rights that made 'successful' (from the Nazis' point of view) prosecution of acts of political resistance difficult at all stages of criminal proceedings – pre-, during-, and after trial. On the pre-trial stage, the preliminary investigation was to be omitted if not judged necessary by the prosecuting authority (Article IV, § 4, section 1). During the trial, the accused could only bring a defence counsel under the presiding judge's approval (Article IV, § 3). After the decision was made by the Court, there was no right to appeal (Article III, § 5, paragraph 2). The Court was therefore empowered by law to order infliction of intolerable harm on the victims themselves by way of imprisonment and execution while bypassing standard judicial procedures that would have otherwise made such proceedings fairer.

[356] Goring (n 93) 307, note 38. Cites (1871) 50 Tenn 653.
[357] Law to Remedy the Distress of People and Reich (Enabling Act) (*Gesetz zur Behebung der Not von Volk und Reich*) 1933
[358] Law Amending Provisions of Criminal Law and Criminal Procedure (*Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens*) 1934.

In the context of Stalinist Great Terror, one may recall the aforementioned 1937 *NKVD Order*[359]. Among other things, it created special tribunals – *troikas* – that were tasked to carry out 'repressions' of enemy 'contingents'. The *Order* in question, apart from obliging the *troikas'* members to have certain targets – the number of persons to be repressed (Section II, Article 2) – in mind, imposed duties on officials appointed to *troikas* and conferred powers on them to be able to meet these objectives: to go through the materials on the accused, review them, and sentence the accused to death or imprisonment (Section V, Articles 4, 5). In a similar way to the Nazi People's Court, *troikas* were granted powers that they then used to terrorise the population.

In the antebellum United States, the 1793 and the 1850 *Fugitive Slave Acts* utilised the power of the federal government to help capture runaway slaves, effectively enforcing the so-called Fugitive Slave Clause of the *Constitution of the United States* (Article IV, Section 2, Clause 3[360]). The 1793 *Act* gave the power to judges to try suspected runaway cases and issue warrants to slaveholders whose proprietary rights were proven (Section 3[361]). The 1850 *Act* created special commissioners, appointed by federal judges to issue rhe warrants on a par with courts (Section 1, Section 6[362]). Therefore, courts and commissioners were given powers to bring the runaways back into slavery, violating their core interests integral to their self.

D. Permissive rules

In addition to the two types of rules enumerated by Hart, there exist two others. One of them, which will be the focus of my discussion here, is permissive rules[363]. Permissions are different from power-conferring rules in that they do not generate new normative powers, but simply allow actions that could have been performed anyway. Von Wright identifies two types of permission – weak, 'if [an act] is not forbidden[364]', and strong, 'when the authority has considered its normative status and decided to permit it[365]', a distinction that was later

[359] Operational order of the NKVD of the USSR No. 00447 'On the Operation to Repress Former Kulaks, Criminals and other Anti-Soviet Elements' (*Оперативный приказ НКВД СССР № 00447 'Об операции по репрессированию бывших кулаков, уголовников и др.. антисоветских элементов'*) 1937.
[360] Constitution of the United States 1788.
[361] Fugitive Slave Act 1793.
[362] Fugitive Slave Act 1850.
[363] The term 'permissive rules' was famously used by Austin, but he has in mind laws that repeal pre-existing laws imposing obligation-imposing rules, which is narrower than the rules I have in mind here. Austin (n 21) 32.
[364] GH von Wright, *Norm and Action* (Routledge & Kegan Paul PLC 1963) 86.
[365] ibid.

reaffirmed by Bulygin[366] and Kletzer[367]. To give an example, suppose that there are armed thugs beating up dissenters or minority groups, and the legal system either explicitly acknowledges their right to do so (strong permission) or does not prohibit their actions (weak permission). While these thugs might be empowered by permissive rules to continue their dirty work in a layman's sense of the word, these permissions do not give rise to any new normative powers, even though they can obviously change the normative situation, in that they allow the thugs to act with impunity. Therefore, permissive evil rules can be defined as rules either tacitly or expressly allowing the infliction of intolerable harm if not pre-empted by external factors without granting any new legal powers to do so.

One can easily draw parallels between the given 'armed thugs' example and the rise of the *Schutzstaffel* (SS), a paramilitary organisation in Nazi Germany that initially served as Hitler's bodyguards in the Weimar Republic. After Hitler took power, the organisation gradually assumed control over policing, intelligence, and the management of concentration camps. While these new functions are probably better contextualised as legally granted powers, the original 'jurisdiction' of the SS, the use of violence in protection of the Nazi Party, was retained via a strong permission as the SS was authorised to use violence that would otherwise have been illegal. A particularly striking example concerned the role of the SS during the Night of the Long Knives on June 30, 1934, when the SS men murdered the leaders of the much larger Nazi paramilitary group *Sturmabteilung* (SA) that Hitler feared was going to become disloyal, in what looked like the continuation of their initial bodyguard function. They were, of course, never punished for those murders, which was argued to be justified not just in terms of pure political expediency, but also in legal doctrine. One can, for instance, recall Schmitt's contemporaneous defence of the purge that was based on the *Führerprinzip*, or recognition of Hitler's will as the source of supreme law[368]. In addition, as will be further explored below[369], Hitler himself also passed an *Act* retroactively legitimating what happened during the purge. Therefore, sanctioning violence perpetrated by the SS allowed them to inflict harm on the victims themselves, thus enabling it.

[366] Eugenio Bulygin, 'On Norms of Competence' (1992) 11 Law and Philosophy 201, 210–211.
[367] Christoph Kletzer, 'Philosophy, Law, and Permission' (2021) 66 The American Journal of Jurisprudence 373, 373–374.
[368] Carl Schmitt, 'The Führer Protects the Law: On Adolf Hitler's Reichstag Address of 13 July 1934' in Anson Rabinbach and Sander L Gilman (eds), Lilian M Freidberg (tr), *The Third Reich Sourcebook* (2013).
[369] See Section 5.E.

In the context of Stalin's Soviet Union, especially during the Great Terror, one can refer to tacitly allowing and, in some cases, actively encouraging the writing of denunciations. Denunciations are defined by Fitzpatrick as 'written communication[s] to the authorities [not only to the secret police agencies[370] – *addition mine*], *voluntarily* [emphasis mine] offered, that provide[d] damaging information about another person [not just crimes, but other moral and political transgressions such as belonging to an 'exploiter' class[371]][372].' As Fitzpatrick noted, during the Great Terror 'citizens were exhorted to watch out for spies and saboteurs and to unmask hidden "enemies of the people"[373]', this exhortation sometimes took a legal form, as in Articles 18, 58.1.d, 58.12, and 59.12, which criminalised failing to inform the authorities of a range of (mostly 'counter-revolutionary') offences. However, beyond these duty-imposing rules, there was a scope for permissive rules as well. Soviet law provided an infrastructure for denunciations, as the authorities wielding power over those who had been denounced had to exist for the denunciation to be effective. Still, it is hard to determine what new legal rights Stalinist law bestowed on the denouncers as it did not oblige the relevant authorities to consider them, so this set of rules seems more like of a permissive rather than of a power-conferring type. Once again, through permitting denunciations, the organs of the Soviet state allowed intolerable harm to be inflicted on the targets of those denunciations as they were tried and imprisoned or executed.

In the antebellum United States, the law often turned a blind eye on the abuse of enslaved persons perpetuated by their masters, plantation overseers, or even strangers. Even though the so-called 'slave codes' enacted in 1600s and 1700s prohibited killing or maiming enslaved persons in certain circumstances, this stemmed from the desire to protect them as property rather than from recognition of their humanity. This is why, as Fede observes in his important study, while the law gradually became stricter, especially when it came to offences perpetuated by strangers[374], 'a fixed principle of slave law granted masters the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived[375].' For instance, in *State v Mann*, the North Carolina Supreme Court found that a slaveholder could not be prosecuted for shooting and maiming his slave, recognising 'the full dominion of the

[370] Sheila Fitzpatrick, 'Signals from Below: Soviet Letters of Denunciation of the 1930s' (1996) 68 The Journal of Modern History 831, 834.
[371] On class denunciations, see ibid 841 ff. On moral denunciations, see ibid 849 ff.
[372] Fitzpatrick (n 370) 837.
[373] ibid 833–834.
[374] See the summary on how slave codes evolved in Fede (n 98) 149.
[375] ibid 132.

owner over the slave, except where the exercise of it is forbidden by statute[376].' The Court hence articulated a strong permissive norm allowing slaveholders to inflict violence (short of murder) onto slaves. Furthermore, there were ways for the slaveholders to get off the hook even in the event of the enslaved person's death, if the case involved 'rebellion' or 'moderate correction'[377]. Thus, Southern slaveholders were permitted by law to violate the slaves themselves by injuring or killing them, rendering the permissive norm at hand evil.

E. Legitimating rules

Finally, one can identify another type of rules that are neither duty-imposing nor power-conferring. They neither, unlike duty-imposing rules, demand nor, unlike power-conferring rules or permissive rules, allow the infliction of intolerable harm if not pre-empted by external factors, but work to justify, distract from, or hide it.

In Nazi Germany, one can perceive this legitimating function in the piece of legislation passed by Hitler immediately after the aforementioned Night of the Long Knives, on July 3, 1934. The *Law on the Measures of State Self-Defence* consisted of a single sentence: '[t]he measures taken to suppress treasonous attacks on June 30, July 1 and 2, 1934 [during the Night of the Long Knives – *addition mine*], are legal as state self-defence[378].' Hitler's orders and the implementation of them by the SS were not just justified, but were justified retroactively, making the Act a rare example of purely legitimating evil law as opposed to a permissive law that would have prospective application.

Stalin's Constitution of the USSR of 1936 contains other vivid examples of legitimating rules. Chapter X of that *Constitution* detailed a lengthy catalogue of fundamental rights of Soviet citizens. Moreover, even more strikingly, unlike the previous RSFSR *Constitutions* of 1918 and 1925 under which electoral rights were denied to former 'exploiting classes[379]', Article 135 established universal suffrage[380]. Needless to say, the Soviet people did not get what they were promised on paper. In the first election of the Supreme Soviet of the Soviet Union in 1937, the top legislature, the Plenum of the General Committee, banned contested elections in

[376] *State v John Mann* (1829) 13 NC 263 (Supreme Court of North Carolina), 268 (Ruffin J).
[377] Fede (n 98) 118, 121, 124, 134, 149.
[378] Law on the Measures of State Self-Defence (*Gesetz über Maßnahmen der Staatsnotwehr*) 1934
[379] Constitution of the RSFSR (*Конституция РСФР*) 1925.
[380] Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936

the upcoming voting – only one candidate would stand for each position. Nevertheless, the *Constitution* was important, even if it was widely flouted. In his study of *Stalin's Constitution*, Getty emphasised its obvious 'propaganda value[381]'. This propaganda was directed both to within and to the outside of the Soviet Union. Firstly, at home, the *Constitution* served as yet another proof of success of Stalin's new 'Socialism in one country' policy and was, at least publicly, received with great enthusiasm by its subjects[382]. Secondly, the *Constitution* was also used to gain the support for the Soviet Union from abroad – which was, quite interestingly, specifically needed in response to the rise of another paradigmatically evil regime – Nazi Germany (together with Fascist Italy)– by providing a contrast to Nazi (as well as Fascist) political terror[383]. The *Constitution* lent the Stalinist regime support by distracting from intolerable harm of the kinds outlined in the above sections committed during the Great Terror, therefore enabling it. Consequently, while not directly causing harm to the victims of Stalinist terror, it still falls under the category of evil law.

In the antebellum United States, the toleration of slavery by the North was fuelled by the appeal of two legal concepts – federalism and property rights. Firstly, interfering with slavery was presented as an illicit infringement by the federal government on the domain that the *Constitution* did not explicitly delegate to it, leaving it to the States as per the 10th Amendment[384]. Secondly, anti-slavery proposals were perceived as a wrongful encroachment on the property rights of the slaveholders themselves as secured in common law and the 5th Amendment of the *Constitution* – both the Due Process Clause ('[no person shall] be deprived of life, liberty, or *property* [emphasis mine], without due process of law') and the Takings Clause ('nor shall private property be taken for public use, without just compensation')[385]. The two explanations often went together – for an example, see Justice Story[386] in *Prigg v Pennsylvania*, a case affirming the constitutionality of the *Fugitive Slave Act* of 1793: 'the design [of the Fugitive Slave Clause of the *Constitution*] was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling

[381] J Arch Getty, 'State and Society Under Stalin: Constitutions and Elections in the 1930s' (1991) 50 Slavic Review 18, 19.
[382] Olga Velikanova, *Mass Political Culture under Stalinism: Popular Discussion of the Soviet Constitution of 1936* (Palgrave Macmillan 2018) 52–61.
[383] Getty (n 381) 19. See also Velikanova (n 382) 49–52, 61.
[384] Constitution of the United States 1788.
[385] ibid.
[386] Story was strongly opposed to slavery, but nevertheless authored a pro-slavery opinion in a quest to preserve the Union.

with, or obstructing, or abolishing the rights of the owners of slaves[387].' Or consider Justice Taney in *Dred Scott*, another piece of the pro-slavery 'anti-canon', on an unsuccessful challenge of an enslaved person living in a free territory to get constitutional protection, directly citing the 5th Amendment, 'an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property [*i.e.*, an enslaved person] into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law[388].' Therefore, these parts of the law of the United States were used to justify prolonging slavery, even if they did not bear on it directly.

6. Evil Legal Systems

A. Preliminary matters

In this dissertation, I engage not just with evil laws, but also with evil legal systems. Giving an account of legal systems and not just laws is crucial in any investigation of the latter both theoretically and practically. First, turning to a theoretical reason, as per Kelsen, 'it is impossible to grasp the nature of law if we limit our attention to the single isolated rule[389].' In his study of the concept of a legal system, Raz goes even further, saying that 'a theory of legal system is a prerequisite of any adequate definition of "a law"[390].' This is because legal rules do not exist in a vacuum but operate in conjunction with their counterparts belonging to the same legal system. Even more so, talking about legal systems is particularly relevant to my overall project – that of investigating evil law. To recap some of the previous sections in this Chapter, I define evil law partially in relation to it being 'interpreted in its best light[391]'. This interpretation cannot be done without examining the purported evil law as a part of a legal system it belongs to. Second, when it comes to practical considerations, as will be demonstrated below, the notion of an evil legal system will be relevant when talking about what rights and obligations we have in response to evil legal systems (Chapters VI) and how we can resist these legal systems most efficiently (Chapter VII). With these two goals in mind, in this section I will explore both the concept of a legal system at large and an evil legal system in particular,

[387] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court), 540 (Story J).
[388] *Dred Scott v Sandford* (1857) 60 US 393 (US Supreme Court), 450 (Taney J).
[389] Kelsen (n 272) 3.
[390] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 1980) 2.
[391] See Section 4.

defining the latter as *a system of legal rules recognised by the primary law-applying organs that these rules institute as belonging to this system that contains a significant number of evil laws central to its material identity.*

B. Defining legal systems

To proceed with my analysis of evil legal systems, I must state what a legal system is in the first place[392]. This question deserves its own separate treatment so I will not cover all of its complexities, instead looking for what may serve as a starting point for the subsequent discussion of what makes a legal system evil.

One can identify two key features of a legal system. First, quite obviously, a legal system is comprised of *legal rules*[393]. Second, in a legal system, these laws should be united according to some rule or rules. As Raz claims, the problem of the identity of a legal system is closely intertwined with the problem of membership, or the question of 'what are the criteria which determine the system to which a given law belongs[394].' The same view was also expressed, more recently, in Spagnolo's work aiming to provide a 'dominant account' of a legal system as 'a sequence of sets of laws that form a system – both at each given point and across time – in view of some unifying criterion or feature (other than the fact that they comprise norms)[395].' However, this definition is underdeveloped as more specification as to what this criterion or feature is appears to be needed. In that respect, I shall adopt the positivist stance that individual rules belong to a legal system in that they are recognised by the primary law-applying organs that they institute in it[396].

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[392] As opposed to the problem of existence of a legal system that he and other theorists also cover in detail, but that is irrelevant to the question at hand. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (n 390) 1.

[393] As noted by Raz in Joseph Raz, 'The Identity of Legal Systems' (1971) 59 California Law Review 795, 813. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (n 390) 78, 100.

[394] Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (n 390) 1.

[395] Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing 2015) 3–4. Spagnolo cites the following: Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (n 390) 187. Raz, *Practical Reason and Norms* (n 25) 9. G MacCormack, '"Law" and "Legal System"' (1979) 42 The Modern Law Review 285, 285; John Finnis, 'Revolutions and Continuity of Law', *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press 2011) 407, 426 (but compare 428).

[396] Originated from Hart's Rule of Recognition and carried forward by Raz. Hart (n 45) 100 ff. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (n 390) 192.

Therefore, a legal system can be provisionally defined as *a system of legal rules recognised by the primary law-applying organs.*

C. Narrow approach

With this account in mind. I will argue against two approaches to the definition of an evil legal system. The first, a narrow one, would define evil legal systems as those containing solely evil laws. The second, a broad one, would claim that a legal system is evil if it contains at least one evil law. I shall argue that the approaches are respectively underinclusive and overinclusive, before proceeding to develop a middle ground definition of evil legal system. Defining an evil legal system as a system of solely evil rules is underinclusive. It might feel tempting to assume that all laws in an evil legal system must be evil, however, this would make the category of evil legal systems an empty set. We can look, by way of example, at morally beneficial legal rules such as prohibition of murder and morally neutral ones such as traffic rules. These rules are present in most, if not all, legal systems, including the ones this dissertation focuses on.

One can try to go around this objection by classifying these good or neutral rules as evil. Firstly, it is probable that the prohibition of murder is evil if it does not extend to protecting the lives of individuals and groups persecuted in the aforementioned evil regimes. In other words, we can read this norm to contain exceptions – it does not apply, for instance, to Jews killed in Nazi concentration camps, supposed enemies of the people condemned to death by Stalinist courts and tribunals, and slaves killed in the antebellum South as a result of being chastised by their masters. One can classify these exceptions, following the aforementioned taxonomy, as permissive rules[397]. However, this way of conceptualising these laws is inapposite. The evil lies not in the rule prohibiting murder, but in exceptions to it – which are separable from the initial rule.

Secondly, one can argue that the rule prohibiting murder is crucial for the functioning of an evil regime as it prevents it from disintegrating into a Hobbesian war of all against all. Similarly, neutral rules such as traffic rules are central to the evil regime's survival. As a result, these rules aid the functioning of an evil regime and hence might be evil. Following my definition of evil law, one might argue that they enable the functioning of an evil legal system

[397] See Section 5.D.

and hence its evil deeds. One can even imagine advocating for breaking the rules in question because of the moral depravity of a legal system one belongs to – such as killing an evil regime's official to protect the downtrodden contrary to the rule against murder or engaging in civil disobedience by violating traffic rules. However, we would still be mistaken to declare good or neutral laws as evil on their own. As a result, this kind of rule would not belong to any subspecies of evil laws named in the preceding Section[398].

D. Broad approach

The foregoing discussion demonstrates that legal systems that we would understand as evil can contain non-evil legal rules. As a result, defining an evil legal system as a system consisting exclusively of such rules would be problematic. However, the reverse – defining it as a system containing at least one evil legal rule – would risk being overinclusive. One can, of course, argue that one evil rule is an evil rule too many. However, taking this stance, as morally pure as it might seem to be, leads, quite paradoxically, to less and not more moral clarity. Take the following example. Some may argue that on my definition of evil law the imposition of the death penalty can be classified as an evil legal rule as it, even if interpreted in its best light, inflicts the highest grade of harm onto the sentenced individual – their total annihilation. Still, even one strongly opposed to the death penalty would not consider all legal systems that retained the death penalty as akin to Nazi Germany, Stalin's Soviet Union, and the United States in the antebellum era. In order to capture this moral complexity, we should not adopt such a broad definition of an evil legal system.

E. A middle ground

Since both the narrow and the broad attempt at defining an evil legal system fail because of their respective under- and overinclusiveness, I seek to search a middle ground by producing a definition that would both cover and distinguish evil legal systems such as those at the heart of this dissertation. Specifically, I will talk of such legal systems as systems *that contain a significant number of evil laws central to their material identity*. Hence, I operate across three dimensions.

[398] See Section 5.

As for the first one, I argue that an evil legal system should contain a proportion of evil laws that is *significant*. To pick up on an example from the previous paragraph, the retention of the death penalty is just one facet of some contemporary legal systems that we will be reluctant to call evil. On the contrary, Nazi Germany, Stalin's Soviet Union, and the antebellum United States contained whole constellations of evil laws that permeated the respective legal systems.

Second, I posit that these laws have to be central to the *identity of an evil legal system*. As per Raz, there are two ways in which this concept can be unpacked that he calls 'formal unity' and 'material unity'. The formal unity of a legal system is defined by reference to the putative laws of a legal system that are recognised by the primary law-applying organ as belonging to that legal system without regard to their content. The material unity of a legal system, is concerned with more substantive questions about its content, obtaining when 'all-pervasive principles and the traditional institutional structure and practices that permeate the system and lead to its distinctive character[399]' remain the same. It is *material* and not formal unity that is relevant to the question of what constitutes an evil legal system, as what matters is not how these laws enter a legal system, but what rules they establish.

Let us turn to the three test cases of evil legal systems considered in this dissertation. The formal continuity between the Weimar Republic and Nazi Germany was damaged after the Nazi takeover of power, the Rule of Recognition changed as the primary law-applying organs employed different criteria when determining which laws were valid. One particularly stark example was the *Führerprinzip*, a legal doctrine under which Hitler's words were law in themselves. However, these two legal systems were also radically different when it came to their content – only Nazi Germany's legal system and not its predecessor had laws enabling harm to various minorities it targeted on a scale that made such laws central to the material identity of that legal system if not pre-empted by external factors. While formal changes turned Germany into a dictatorship, it was the material discontinuity that made Nazi Germany – as opposed to the Weimar Republic – evil in the sense employed in this dissertation.

Stalin's Soviet Union, even more starkly so, emerged out of a revolutionary struggle that gave birth to the new state ideologically opposed to the Russian Empire and the short-lived Provisional Government. But it is not that change in the formal identity that rendered Lenin's

[399] Raz, 'The Identity of Legal Systems' (n 393) 796.

and then Stalin's rule oppressive, but rather the substance of Red Terror and Great Terror-era laws supporting, in one way or another, the extermination and subjugation of the regime's opponents, real or perceived. This is further proven when one looks at the transformation of the Soviet legal order after Stalin. Khrushchev's destalinisation, unlike the October Revolution, did not change the Rule of Recognition at all. Still, one can see it as a break from the years of terror and a switch to a new, less immoral, legal system, even while this change was not as complete as one would want.

The example of the antebellum United States and the post-Civil War United States – similarly to Stalinist law emerging as a result of a revolution – is also instructive for the purposes of teasing out the distinction between formal and material discontinuity. What makes it so is that after the Civil War, in the era of Reconstruction – just like Soviet law in the era of Destalinisation – the law of the United States retained the same Rule of Recognition, as most of the formal provisions of the *Constitution* were preserved, but differed materially in that the legal system was stripped of the vice of slavery that made it evil. This is underscored by Ackerman, who saw the sea change in material aspects of both constitutional and lower-order law as a sign that the Reconstruction was a transformation period rivalling the founding, challenging some 'well-established norms[400]' and going beyond the 'established modes of constitutional revision[401]'' by 'changing the substance of fundamental values <…> from slavery to freedom[402].'

Third, I will define the *centrality* of evil laws to the legal system's material identity. On my view, a law is central if you cannot imagine the same legal system without these laws without thinking of it as a different legal system, regardless of whether formal identity is preserved. Or, in other words, evil laws are central to the material identity of a legal system when we can conceive of evil laws as a 'feature' and not a 'bug' of the latter. Again, building on the death penalty example considered above, legal systems could retain the death penalty while not altering their material identities, but it would be harder in cases of evil laws and legal systems considered in this dissertation. As shown, evil laws were not just incidental to the legal systems of Nazi Germany, Stalin's Soviet Union, and the antebellum United States, but defined and distinguished them.

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[400] Bruce Ackerman, *We the People, Volume 2: Transformations* (Belknap Press 2000) 11.
[401] ibid.
[402] ibid.

F. Definition of evil legal systems

I shall thus define an evil legal system as *a system of legal rules recognised by the primary law-applying organs that these rules institute as belonging to this system that contains a significant number of evil laws central to its material identity.*

7. Conclusion

This chapter dealt with distinguishing and defining evil law. I described law as *a product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*. After defining law in general, it has been argued, first, that evil law is distinct from bad or unjust law in that it does not create even *prima facie* rights and duties. Second, with this distinction in mind, I defined evil law as *law, which, if interpreted in its best light, will cause or enable the infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors.* Third, I provided a taxonomy of evil laws, positing that evil law goes beyond merely causing intolerable harm directly (as in the case of evil duty-imposing rules) by also enabling this harm through power-conferring rules, permissive rules, and legitimating rules. Fourth, I stated that an evil legal system should be understood as *a system of legal rules recognised by the primary law-applying organs that these rules institute as belonging to this system that contains a significant number of evil laws central to its material identity*. Making all this clear helps us ask the questions posed by the following chapters: *is evil 'law' law* (Chapter IV), *why evil regimes need law* (Chapter V), *what obligations we have in response to evil law* (Chapter VI), and *how can we resist evil law* (Chapter VII).

IV. Is Evil 'Law' Law?

1. Introduction

The previous Chapter III has argued that evil 'law' is distinct not just from normal but even from bad or unjust law, building on Radbruch's and Dworkin's writings to that effect. However, both thinkers treated evil 'law' as *too* different from its counterparts to be called 'law' in the first place. Following Lavis, I will refer to this position as the 'rupture thesis[403]', by which 'the [evil[404]] state is said to be a state so brutal, so criminal, so perverted, that it constitutes a radical, atavistic rupture in the otherwise largely benign historical process of law and politics, at least in the West[405].' While ordinances produced by these states may be called 'laws' in a placeholder sense, as they are superficially perceived as such, upon closer examination they fail to attain the status of law proper[406]. This is a position I will set out to oppose.

Before arguing against the rupture thesis, in Section 2 I will investigate why the discussion surrounding it does not amount to a mere 'verbal dispute[407]', as Dworkin claimed. In doing so, I will aim to present a positive argument for recognising evil 'law' is law – claiming that doing so is important to understanding both evil and law, as well as to figuring out how one should deal with evil 'law' on the ground.

I will then consider two arguments for the rupture thesis. One of them, unpacked in Section 3, supports it due to the non-conformity of evil ordinances with what Fuller called the external morality of law, the morally desirable substantive content of laws[408]. There are two versions of this argument. The first, stronger version is associated with Radbruch, and it posits that if those ordinances are extremely unjust, they fail to be law entirely. I will argue that this view fails because evil rules retain some central law-like characteristics. The second, weaker view, building on classical and new natural law theories, states that such 'law' would only be law in

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[403] Simon Lavis, 'The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the "Rupture Thesis" in the Anglo-American Legal Academy' (2018) 31 International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique 745, 746. Citing FC DeCoste, 'Law After Auschwitz: Towards a Jurisprudence of the Holocaust by David Fraser' (2007) 18 King's Law Journal 179, 179.
[404] Lavis and DeCoste referred specifically to Nazi Germany, however, I believe that his thesis can be expanded to all evil legal systems.
[405] DeCoste (n 403) 179.
[406] For clarity, I shall refer to them as 'laws' in quotation marks.
[407] Dworkin, *Justice for Hedgehogs* (n 312) 412.
[408] Fuller, The Morality of Law, 42, 44, 153.

a secondary rather than a primary sense. I will again claim that this view is wrong, as the distinction between primary and secondary senses of 'law' can and should be drawn by defining the central case as a system of rules compliant with the rule of law desiderata.

The other argument for the rupture thesis that will be considered in Section 4 is Fuller's claim that evil regimes' 'laws' are not laws as they violate the internal morality of law, or eight desiderata of legality[409]. While the claim that the Fullerian principles are hallmarks of liberal legality and not of legality at large ultimately does not stand scrutiny, there is another reason why the argument from internal morality is flawed. Evil legal systems preserve legality alongside political terror as Fraenkel pointed out when developing his dual state model: morally iniquitous regimes utilise legal mechanisms, and, in doing so, comply with principles of legality, even when managing the prerogative or political sphere. As a result, the rupture thesis will be rejected – evil 'law' is still law in its fullest sense.

2. Why Evil 'Law' is Law

A. Preliminary matters

Before moving onto the issue of whether evil 'law' is law, one ought to explain whether and why this question matters at all. Dworkin espoused scepticism about the debate surrounding 'evil 'law's' purportedly legal nature, concluding that 'the ancient jurisprudential problem of evil 'law' is sadly close to a verbal dispute[410].' To him, both positions – that evil 'law' is law and that it is not – lead to the same normative conclusions, namely that we ought not to obey evil 'laws' as citizens and that we ought not to apply them as legal officials[411]. Therefore, there is seemingly no difference between the two routes a legal theorist can take in response to evil 'law'. So why does the question at the heart of this Chapter matter? I shall claim that recognising evil 'law' as law is theoretically important for understanding the nature of both *evil* and *law* in general and *evil 'law'* in particular, and practically crucial to resisting morally iniquitous 'laws' contemporaneously as well as dealing with evil 'law's' aftermath when evil regimes fall.

[409] Fuller, The Morality of Law, 42, 44, 153.
[410] Dworkin, *Justice for Hedgehogs* (n 312) 412.
[411] As explained by Dyzenhaus, 'Dworkin and Unjust Law' (n 322) 133.

B. Theoretical importance

(i) Nature of evil

In the first place, recognising evil 'law' as law highlights an important fact about the nature of evil - that it operates by taking what is good and using it for a morally iniquitous purpose[412]. This insight, dating back to Augustine and later expressed, among others, by Aquinas, is that evil is not a thing in itself, but a privation (or absence) of good[413]. From that claim, it follows that there can be no absolute evil as total evil would collapse into nothingness, and therefore all evil in some sense retains the goodness of being. To exist, evil needs to retain some features of the good, even if this good is limited or instrumental. This line of thinking is, of course, a way theologians dealt with the problem of co-existence of evil in the world with an omnipotent, omniscient, and omnibenevolent God who created and controlled the Universe. However, it is also relevant beyond this theological context. From a secular perspective, one can gain a more general insight that evil often involves subversion of what is recognised as a positive good.

This insight is evident when it comes to evil legal systems and evil 'laws'. Evil regimes have to make use of law's capacities that could otherwise be used benevolently. As I will explain in Chapter V, evil regimes often need to employ distinctively legal tools to achieve their aims, needing law to exist in the first place. By subscribing to the rupture thesis, one, at worst, wrongly dismisses this interplay between the chaos of evil and the order of good (if one makes the strong argument for external morality[414] or the argument from internal morality[415]) or, at best, undersells the complexities of this relationship (if one makes the weak argument from external morality[416]). As a result, recognising evil 'law' as law matters for elucidating the nature of evil and its relationship with good by providing an example in which they co-exist.

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[412] This point was made by Kramer in his discussion of Aaron in Shakespeare's *Titus Andronicus* and Iago in *Othello*. Matthew H Kramer, 'Shakespeare, Moral Judgements, and Moral Realism' in Craig Bourne and Emily Caddick Bourne (eds), *The Routledge Companion to Shakespeare and Philosophy* (Routledge 2018) 239.
[413] Aquinas (n 18) Part I, Q48, A1; Aurelius Augustine of Hippo, 'Confessions' in Rev Marcus Dods (tr), *The Works of Aurelius Augustine, Bishop of Hippo*, vol 2 (T & T Clark 1871) Book 7, Chapter 12, Sections 18-19.
[414] See Section 3.A.
[415] See Section 4.
[416] See Section 3.B.

(ii) Nature of law

Moreover, acknowledging evil 'law's' legal nature helps our understanding of the nature of law itself. If we accept that evil 'law' is law, we avoid conflating law and morality and therefore do not overlook that law is a dangerous tool that can be used to inflict violence. This point was made by Cover, whose article on the topic begins with observing that '[l]egal interpretation takes place in a field of pain and death[417].' He adds: 'A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life[418].' This apparent juxtaposition between law and violence is most visible if one takes law to be separable from morality. While Cover himself admitted that the violence in question can be justified, albeit dismissing it as 'not now the point[419]', talking about it nevertheless remains even more valuable when there is no such justification.

More particularly, the problem identified by Cover has bearing on our understanding of when we are talking about evil legal regimes. The present inquiry is, in other words, concerned not with the broad understanding of violence that Cover adopts, but with the narrower notion of evil (and hence evil 'law') developed in Chapters II and III that is made possible by the law's violent potential as theorised by Cover. This concept of evil 'law' – what Green called 'the immorality that law makes possible[420]' – lies at the heart of the debate about the separation between law and morality. Identifying this immorality is hard if one collapses the distinction between what is legally valid and what is morally good. Yet it remains a very important feature of law as a phenomenon.

Finally, accounting for evil 'law' as law proper makes us better appreciate the fact that evil regimes, in the pursuit of their goals – or even in the maintenance of their very existence – rely on certain forms and functions specific to law. Evil 'laws', like any laws, as per Chapter III, take the form of different types of rules: namely duty-imposing, power-conferring, permissive, and legitimating ones. Further, as outlined above and elaborated on in Chapter V, evil 'law' and good law share various functions performed by those rules – coercion, coordination, legitimation, education and propaganda, and identity building. In that Chapter, I will argue that the way these functions are exercised is not through a negation of legality, but, conversely, via

[417] Robert M Cover, 'Violence and the Word' (1986) 95 Yale Law Journal 1601, 1601.
[418] ibid.
[419] ibid 1986.
[420] Green (n 7) 1035, 1058.

conformity to its principles. As Green puts it, 'wherever there is law, new moral risks emerge as a matter of necessity[421].' Placing evil 'law' outside of the domain of legality, wholly or partially, does not serve to give a satisfactory account of this truth about law that is morally iniquitous in this way.

C. Practical importance

(i) Negative argument

Starting from the premise that evil 'law' is law thus helps us realise that law harbours within itself a danger that we might overlook if we associate it solely with goodness. This is important not only theoretically, as recognising evil 'law' as law also has some practical benefit. I shall argue that to recognise evil 'law' for what it is helps to resist evil regimes. As for the first point, many theorists believe that a conclusion as to whether evil 'law' is law, either way, can affect the stability and longevity of evil regimes. On the one hand, scholars such as Radbruch believed that the positivist position on morally iniquitous 'law' impaired legal resistance against Nazism. He explicitly stated that '[p]ositivism, with its principle that "a law is a law", has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal[422].' A similar criticism was made by Cover in his exploration of the law of slavery in the antebellum United States. Specifically, he argued that '[t]he notion that out beyond lay a higher law to which the judge *qua* judge was responsible was never a part of the mainstream of American jurisprudence <…> [this] tradition of positivism meant that the judge ought to be will-less[423].'

There are three reasons why one should reject Radbruch's and Cover's view. Firstly, what they call 'positivism' is better described as a formalist theory of adjudication rather than a positivist theory of law, to use Leiter's distinction between the two[424]. Legal positivists think that what counts as law is determined by social facts (social thesis) and what the law is and what the law should be are separate questions (separability thesis)[425]. Legal formalists believe that the law

[421] ibid 1054.
[422] Radbruch (n 23) 6.
[423] Cover, *Justice Accused: Antislavery and the Judicial Process* (n 291) 29. As cited in Christopher LM Eisgruber, 'Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism' (1988) 55 The University of Chicago Law Review 273, 293.
[424] Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Columbia Law Review 1138, 1144, 1150.
[425] ibid 1141–1142.

is rationally determinate, judging is mechanical, and legal reasoning is autonomous[426]. As Leiter also notes, adherence to the formalist theory of adjudication is not necessarily demanded by one's commitment to a positivist theory of law, giving an example of Hart's more realist approach to adjudication in hard cases[427].

Secondly, it does not map onto the historical reality of any of the test cases surveyed in this thesis. Radbruch's argument misrepresents both the theory and practice of law in Nazi Germany. Both anti-positivist and anti-formalist ideas were present in the Weimar Republic[428], and some of these were carried forward by the Nazis. According to Pauer-Studer, contrary to what Radbruch claimed, 'National Socialist legal theorists firmly rejected legal positivism and endorsed the unity of law and morality[429].' In legal practice, moreover, Nazi judges often bent the legal sources to the ideology's demands[430], which was hardly reminiscent of the formalist slogan 'a law is a law'.

Stalinist lawyers claimed to reject the legal nihilist tendency to move away from the legal form altogether which had characterised the early years of the Soviet state, instead returning to a more formalistic approach[431]. However, they did not re-embrace both the legal positivism and the legal formalism of pre-revolutionary times in practice. As Kühn notes, there was a certain contradiction within the legal system of that era. On the one hand, as has already been noted, 'the Stalinist theory of law developed clear textualist, positivist, and formalist features[432].' On the other, 'the judicial application of law was clearly activist and anti-formalist[433]', since, as Antonov noted, 'the disrespect of rights which permeated the legal system and justified anti-legal practices in situations considered as exceptional (be it a struggle against "enemies of the

[426] ibid 1145–1146..
[427] ibid 1150.
[428] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Bd.3, Staatsrechtswissenschaft und Verwaltungsrechtswissenschaft in Republik und Diktatur. Weimarer Republik und Nationalsozialismus* (CH Beck 2002) 153–186. Cited by Lars Vinx, 'Pauer-Studer and Radbruch's Second Thesis' (2023) 14 Jurisprudence 282, 284. See also Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press 1997).
[429] Herlinde Pauer-Studer, *Justifying Injustice: Legal Theory in Nazi Germany* (Cambridge University Press 2020) 230 ff. The second part of Pauer-Studer's argument – the one essentially claiming that Nazi legal theory was a natural law one – was contested by Vinx. However, this is orthogonal to my discussion as the only part of it that matters consists of Nazi rejection of legal formalism. Vinx (n 428) 287 ff.
[430] Bernd Rüthers, *Die Unbegrenzte Auslegung: Zum Wandel Der Privatrechtsordnung Im Nationalsozialismus* (JCB Mohr 2012). Cited by Vinx (n 428) 283–284. See also Ingo Müller, *Furchtbare Juristen: Die unbewältigte Vergangenheit der deutschen Justiz* (Knaur 2020).
[431] As explored earlier in Introduction, Section 4.B.(ii).b.
[432] Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Brill Nijhoff 2011) 94.
[433] ibid. See also ibid 95 ff.

people" or building a socialist society) prevailed[434].' This anti-formalist tendency has been described in different terms. Kelsen labelled Soviet legal theory as a species of natural law theory[435]. Antonov, on the other hand, conceived of it as a cross between legal realism – the theory that legal outcomes are motivated by extralegal considerations, be they prudential, ideological, or moral – and Schmittian decisionism, the theory that the state necessarily goes beyond the confines of the law in the circumstances of emergency[436]. Regardless of which interpretation is true, it is clear that Stalinist law, not unlike Nazi law, at least partly eschewed legal positivism and legal formalism.

When it comes to slavery in the antebellum United States, unlike in the other two test cases of evil legal systems, there was no explicit rejection of legal positivism or legal formalism either in theory or practice. Still, Cover's characterisation of that period is not entirely correct. The Northern judges did not face a strict 'moral-formal dilemma' as their adherence to the 'formal' rules was underpinned by 'moral' considerations. Eisgruber argues to this effect in relation to Justice Story's opinion in *Prigg v Pennsylvania*[437] which upheld the *Fugitive Slave Act* 1793[438]. Instead of merely saying 'law is law' (in Radbruch's vocabulary), Story argued that keeping the *Act* intact would serve desirable normative ends underpinning the preservation of the Union, such as '[an] exclusive system of property rights, the legal resolution of disputes, <…> protection against oppression by foreigners [and] <…> freedom to pursue diverse religious and philosophical speculations[439].' In this way, his reasoning was similar to Stalinist and Nazi judges in being goal-oriented, even though he did not frame it as explicit departure from law.

Thirdly, even if Radbruch's statement were not wrong conceptually or historically, it would still be troublesome as a critique of legal positivism proper, as authentic legal positivism should be distinguished from its purported abuse by the Nazis and other evil legal regimes. A legal positivist would find no qualms judging an evil 'law' as morally iniquitous and concluding that it ought to be disobeyed, they would just treat this iniquity as immaterial to the question of its

[434] Mikhail Antonov, 'Legal Realism in Soviet and Russian Jurisprudence' (2018) 43 Review of Central and East European Law 483, 483.
[435] See Hans Kelsen, *Communist Theory of Law* (Frederick A Praeger 1955). For an elaboration on Kelsen's account, see Anna Lukina, 'Opening the Pandora's Box: Kelsen and the Communist Theory of Law' (2020) 11 Jurisprudence 1.
[436] Antonov (n 434). On the connection between Soviet law and Schmitt see also Anna Lukina, 'Between Exception and Normality: Schmittian Dictatorship and the Soviet Legal Order' (2022) 35 Ratio Juris 139.
[437] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court)
[438] Fugitive Slave Act 1793.
[439] Eisgruber (n 423) 320.

legal validity. As Hart points out in his response to Radbruch, a positivist answer to the slogan 'a law is a law' would be: 'Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality[440].' This is hardly the meek acquiescence Radbruch thought accepting evil 'law' as law would produce.

(ii) Positive argument

There is another, positive, argument for why treating evil 'law' as law is more appropriate than adopting the rupture thesis[441]. If we accept that positive law is law proper only if it conforms to morality, this acceptance may lead us to believe, conversely, that all positive laws, even in fact morally questionable ones, are congruent with morality. As a result, we are at risk of granting positive law, as Kelsen worded it, 'uncontested [moral] validity[442]' without inquiring into other, extralegal, grounds upon which it can be classified as good or evil[443]. As Hart argued later, referring to evil 'law' as law, by decoupling law and morality, thus helps to be rightly sceptical about the 'the aura of majesty or authority[444]' characteristic of law. To some, like Kramer, this argument appears to be largely speculative[445], however, one can give a quick gloss of how historical examples considered in this dissertation can demonstrate its plausibility.

Firstly, equation of legal validity with moral bindingness may make all positive law appear morally binding, which in turn can be exploited in a transition from a benign to an evil regime. Notably, Bentham warned that recognising the existence of natural rights can lead to anarchy[446]. I shall move beyond this argument stating that the primary danger lies not only, as per Bentham, in the possibility of rejecting the current legal order in favour of lawlessness. Even more dangerously, mixing law and morality can lead to replacing the current legal order with new, more unjust or even evil, one. The Nazis and the Soviets (both at the moment of the Russian Revolution and during the takeover of power by Stalin) operated, as mentioned just

[440] Hart (n 19) 617.
[441] I further investigate this type pf argument, that I call the Pandora's Box Objection, in Lukina, 'Opening the Pandora's Box: Kelsen and the Communist Theory of Law' (n 435).
[442] Kelsen (n 272) 417. As cited in Lukina, 'Opening the Pandora's Box: Kelsen and the Communist Theory of Law' (n 435) 5.
[443] Lukina, 'Opening the Pandora's Box: Kelsen and the Communist Theory of Law' (n 435) 4–5.
[444] Hart (n 45) 210.
[445] Kramer, *H.L.A. Hart* (n 45) 21 ff.
[446] Jeremy Bentham, 'Nonsense upon Stilts, or Pandora's Box Opened', *Rights, Representation, and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution* (Clarendon Press 2002) 320. As cited in Lukina, 'Opening the Pandora's Box: Kelsen and the Communist Theory of Law' (n 435) 4.

above, according to their own moral codes that challenged the legitimacy of legal systems that came before them.

Secondly, adherence to the natural law position on the relationship between law and morality may be used for justifying and hence sustaining already burgeoning or existing evil regimes. Kelsen used the Soviet Union as an example and wrote a whole volume on the *Communist Theory of Law*[447] to that effect, stating that '[t]he deplorable status of Soviet legal theory, degraded to a handmaid of the Soviet government, should be a grim warning to social scientists that true social science is possible only under the condition that it is independent of politics[448].' Kelsen linked the excesses of the Soviet state – including Stalin's Soviet Union – to its rejection of legal positivism and legal formalism in favour of an approach that was sensitive to the goal of building a new Soviet state as a transitional point before Communism and crushing its perceived enemies. Similar observations can be made about Nazi Germany, as the justification of its many laws' wickedness can be attributed to its approach to law putting the racially tinged (as opposed to the Stalinist class-oriented) spirit of the Nazi legal order above its letter. When it came to slavery in the antebellum United States, the departure from legal positivism and legal formalism was not that strong, as the goal-orientedness of many judicial decisions concerning slavery appeared to be concealed. However, the other two examples of evil legal system nevertheless show the importance of recognising the legal nature of evil 'law'.

3. Rupture Thesis I: External Morality of Law

A. Strong argument

The section above presents a strong positive argument as to why one should talk of evil 'law' as law. In the following discussion, I shall consider and rebut the negative argument against classifying evil 'law' in this way – namely, the aforementioned rupture thesis according to which evil 'law' is too different from non-evil law to be considered law in the first place. One way this thesis can be unpacked is through focusing on the nonconformity of evil rules with external morality, by referring to the substantive content of putative laws, as opposed to focusing on the supposed internal morality of law, by referring to whether these laws satisfy

[447] Kelsen (n 435).
[448] ibid 193.

the principles of legality outlined further on[449]. Radbruch claimed, for instance, in his famous 'disavowal formula[450]', that 'where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law <…> [f]or law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice[451].' Radbruch pointed out that Nazi 'law' violated the principle central to justice – 'the equal treatment of equals[452].' He gave three examples of such violations: statutes that facilitated the Nazi rejection of democracy ('those enactments by means of which the [Nazi] Party claimed for itself the whole of the state, flouting the principle that every political party represents only a part of the state[453]'), statutes that persecuted minority groups ('statutes that treated human beings as subhuman and denied them human rights[454]'), and statutes disproportionally punishing those flouting the rules ('caveats that, governed solely by the momentary necessities of intimidation, disregarded the varying gravity of offences and threatened the same punishment, often death, for the slightest as well as most serious of crimes[455]'). As a result, Radbruch described Nazi statutes as 'lack[ing] completely the nature of law[456].' While Radbruch was only talking about Nazi Germany, this line of argument can also be applied to other examples of evil 'laws' in evil legal systems, including Stalin's Soviet Union and the antebellum United States. First, the Communist Party in Stalin's Soviet Union, similarly to National Socialists, rejected democracy by usurping power. Second, both Stalin's Soviet Union and the antebellum United States treated certain classes of humans – perceived class enemies and enslaved persons respectively – as beyond the protection of human rights. Third, in Stalin's Soviet Union, dissidents or perceived dissidents were disproportionately punished with high sentences in labour camps (GULAGs) and even death. In a similar way, the 'law' of the antebellum United States did not stand in the way of slaveholders inflicting any punishment on slaves that stopped short of killing them.

Radbruch's claim that law necessarily serves justice is, however, contestable. There exist alternative – and, as will be argued, preferable – concepts of law, including the definition of

[449] This distinction is attributed to Fuller, who introduces both terms at Fuller, *The Morality of Law* (n 268) 42, 44, 153.
[450] As it was called by Alexy (n 303) 16.
[451] Radbruch (n 23) 7.
[452] ibid 8.
[453] ibid.
[454] ibid.
[455] ibid.
[456] ibid 7.

law used and defended in this dissertation – namely *the product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*[457]. On this understanding, justice and morality have no bearing on the validity of law as law – the enterprise described can be directed towards both moral and immoral ends. In other words, law can be conceptualised as morally malleable. Moreover, so can the judgment as to the validity of specific laws. This is expressed very well by Finnis, to whom evil 'laws' are (at least) law-like in the sense that they 'satisfy the criteria of validity laid down by constitutional or other legal rules[458].' However, just because alternative candidates for the concept of law exist, it does not necessarily mean Radbruch's understanding of law is inferior – this should be proven separately.

I shall provide three potential reasons to this effect. Firstly, my broader definition of law and Finnis's criterion of legal validity are shared by participants in the legal system. Finnis observed that '[evil] rules are accepted in the courts as guides to judicial decision[459].' In other words, these rules are legally valid from what Hart calls the internal point of view – the point of view of members of the group (such as actors within the legal system), as contrasted with an external point of view of a moral observer[460]. Even if we, as moral observers, argue that evil 'law' should not be followed, this 'law' is still recognised as valid and binding, at least legally rather than morally, by those inside the evil regime. As law is a social construct rather than a natural phenomenon, the way it is perceived by those who create and sustain it matters.

Secondly, excluding evil 'law' from the category of law entirely would be overlooking how these laws might be similar to non-evil ones. To cite the previously adopted definition of law, both evil and non-evil laws could be described as *the product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*. This is true of, for example, both the antebellum Fugitive Slave Clause of the *Constitution of the United States* and the 13th and 14th Amendment thereof adopted during the Reconstruction. The key similarity lies in the fact that both evil and non-evil ordinances often purport to create legal obligations. In other words, we should bear in mind that legal rules, even evil ones, as Hart put it, are rules and not just regularities of behaviour[461].

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[457] See Chapter III, Section 2.
[458] Finnis, *Natural Law and Natural Rights* (n 14) 365.
[459] ibid.
[460] Hart (n 45) 89.
[461] ibid 89–90.

Thirdly, criteria of legal validity do not necessarily include compliance with morality and might be even clearer than those contingent on justice and morality and hence are a better instrument for distinguishing between law and non-law both in legal theory and legal practice. This was highlighted, again, by Hart, who argued that the position converse to Radbruch's, 'laws may be law but too evil to be obeyed' is 'a moral condemnation which everyone can understand and <…> makes an immediate and obvious claim to moral attention[462].' On the other hand, asserting that evil ordinances are not law will have the effect of muddying the waters when making this point[463]. One can, however, question whether Hart's observation is true as law-subjects can confuse what the law requires and what ought to be done, treating the former as a foolproof indicator of the latter. But even if this is true, conflating law and morality is bound to create even more confusion as it does not even attempt to separate moral and legal validity. As a result, an approach that would recognise the interplay between evil and law would be beneficial both analytically, when it comes to developing a theory of evil 'law' – especially when trying to explore the three examples central to this dissertation, and practically, when it comes to criticising existing evil 'law' or devising a plan as to what to do when the evil regime falls.

Therefore, Radbruch's strong argument against evil 'law' being recognised as law ought to be rejected as it does not acknowledge the fact that law is – and should be – understood as morally malleable, and evil 'law' as law at least in some sense of the word. In the next section, I will argue that this sense ought to be primary.

B. Weak argument

The weak argument from external morality states that while evil 'law' is law, it is law only in a limited, or secondary sense. This position, put forward by Finnis, builds on the 'central case method' of discerning the conceptual nature of phenomena, originally adopted by Aristotle, but in no way limited to his philosophy. According to this method, in order to make sense of a concept, one must focus on its least controversial cases and move onto more borderline instances by describing how they deviate from their central counterparts[464].

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[462] Hart (n 19) 620.
[463] ibid.
[464] Aristotle, *The Eudemian Ethics* (n 45) VII.2: 1236a16–30. Aristotle, *The Politics* (n 15) III.1: 1275a33–1276b4.; Aristotle, *The Nicomachean Ethics* (n 45) VIII.4: 1157a30–3. As cited by Finnis. Finnis, *Natural Law and Natural Rights* (n 14) 9–11.

In exploring this method, Finnis takes the Aristotelian discussion of friendship – comprising both central cases (genuine friendship) and peripheral ones (such as business friendship or friendship of convenience[465]) – and applies it to law. In that, he follows Hart, who has argued for searching for the central instances of law rather than giving a strict definition that will fit all its instantiations, even peripheral ones[466]. However, unlike Hart, Finnis writes that the main task of the legal theorist is to attend to why it is significant to have law 'from a practical viewpoint[467].' There can be many such practical viewpoints based on one's reasons for following the law, but, to Finnis, the central viewpoint that should be the focus of one's inquiry is a viewpoint 'in which a legal obligation is treated as at least presumptively a moral obligation[468]', as only this viewpoint explains the importance of law previously discussed[469]. Even more so, Finnis adds that the viewpoint of those whose views on morality or practical reasonableness are practically reasonable should be centred[470].

Next, as Finnis claims, one should define the central case of law based on this central viewpoint. Building on Aquinas, Finnis concludes that law strictly speaking has to be oriented towards the common good[471]. Therefore, unjust law (including evil 'law') is not law proper, as it stands in contradiction with the orientation towards this common good. Many see this view as no different from Radbruch's[472]. However, this perception is misleading. Evil 'law', despite not being law *simpliciter* (in a primary sense), is still law *secundum quid* (in a secondary sense)[473] rather than not being law in any sense of the word, which appears to be Radbruch's position. Thus, to Aquinas, such a law is 'not a law, *absolutely speaking*, but rather a perversion of law', yet is '*something in the nature of a law*[474].' In other words, as per Finnis, these are peripheral cases of law, including the law of such evil regimes such as Hitler's Germany, Stalin's Russia, and Amin's Uganda[475]. As Finnis says further, one ought not deny that they are examples of law[476], which alleviates the concern that adopting the argument from external

[465] Finnis, *Natural Law and Natural Rights* (n 14) 11.
[466] Hart (n 45) 15 ff. Finnis gives credit to Hart on Finnis, *Natural Law and Natural Rights* (n 14) 10. As further explored in Kramer, *H.L.A. Hart* (n 45) 5 ff.
[467] Finnis, *Natural Law and Natural Rights* (n 14) 16.
[468] ibid 13–15.
[469] ibid 15.
[470] ibid.
[471] ibid 276–277.
[472] See, *e.g.*, Hart (n 45) 156.
[473] Finnis, *Natural Law and Natural Rights* (n 14) 363–364.
[474] Aquinas (n 18) I–II, Q92, A1 ad. 4.
[475] Finnis, *Natural Law and Natural Rights* (n 14) 11.
[476] ibid.

morality may fail to capture evil 'law's' normativity. Both evil and non-evil law, after all, share some common features. Still, Finnis believes that evil 'laws' should nevertheless be designated as peripheral, otherwise the central case will lose its character as a moral ideal[477].

The fact that Finnis succeeds in side-stepping the objection to Radbruch does not, however, mean that we should adopt his weaker version of the argument from external morality and treat evil 'law' as law in only a secondary sense. I shall provide three potential reasons why this approach is unsustainable. Firstly, one can reject the central case method entirely and instead adopting a definitional approach that would try to find a decisive list of common features of all different instantiations of law as a phenomenon, as Bentham[478], Austin[479], Kelsen[480], and Kramer[481] aimed to do. However, as Hart points out that no definition, in the sense of necessary and sufficient attributes, can be made that will accommodate all possible cases of law as a phenomenon including, on his framework, 'primitive' and international law[482]. Therefore the central case approach should be preferred to a purely definitional one[483]. One should note, to precipitate accusations of inconsistency, that rejecting the definitional approach does not preclude giving a definition of central cases of law (or evil, or evil 'law') as this dissertation does. Both Aquinas and Finnis accept that 'laws' falling short of their criteria for the central case can still retain, although partially, their status as laws.

Secondly, we might question the relevance of the central case method for defining 'law' specifically as different phenomena may be better analysed differently. One can, for instance, adopt Rodriguez-Blanco's argument that 'law' should not be determined by its central case, as, unlike 'life', which she suggests is a better example of a central case than 'friendship', its instances do not share the same 'intentional system'[484]. To her, Finnis's purported central case

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[477] ibid.
[478] Jeremy Bentham, *Of Laws in General* (University of London, Athlone Press 1970) 1–3, 251–252, 278, 294. Jeremy Bentham, *A Fragment on Government* (Cambridge University Press 1988) ch V, para, vi, note 1(6). As cited in Finnis, *Natural Law and Natural Rights* (n 14) 4–5.
[479] Austin (n 21) 77–78. As cited in Finnis, *Natural Law and Natural Rights* (n 14) 5.
[480] Kelsen (n 272) 19. As cited in Finnis, *Natural Law and Natural Rights* (n 14) 6.
[481] Kramer, *Objectivity and the Rule of Law* (n 20) 103 ff.
[482] Hart (n 45) 15–16. One should note, however, that Hart's account of these peripheral instances of law was flawed. See, on 'primitive' law, Matthew H Kramer, *Legal Theory, Political Theory and Deconstruction: Against Rhadamanthus* (Indiana University Press 1991) 128–131. See, on international law, Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 European Journal of International Law 967.
[483] Besides the definitional approach and the central case method, there are other approaches such as family-resemblances method, a cluster-concept method, an interpretive method, *etc.* However, further discussion of them will be omitted for brevity.
[484] Veronica Rodriguez-Blanco, 'Is Finnis Wrong?' (2007) 13 Legal Theory 257, 274–275.

of law as practical reasonableness and positive law, understood to encompass both Finnis's central and peripheral cases, have different goals: 'pursuit of the common good' and 'coordination of activities of the legal participants' respectively[485]. The two concepts are therefore different, with the coordination function capable of being satisfied 'even though some laws are unjust or against practical reasonableness[486].' This argument, however, misses an important point. Pursuit of the common good and coordination are often intertwined. Good regimes need coordination precisely because of their common good-advancing mission. Bad regimes, by Rodriguez-Blanco's own admission, also seek coordination, albeit for more nefarious purposes[487]. Therefore, both good and evil regimes can be described as sharing one common intention – that of coordinating the activities of legal participants (both legal officials and law-subjects). As a result, one can build a central case of law that will treat both evil and non-evil legal orders as core examples of legality.

Thirdly, with the two arguments against the central case method rejected, I will embrace the central case methodology. However, to do so does not commit one to agreeing that the central case of law can only be the one defined by Finnis or, more generally, is to be described with reference to some moral value under which evil 'law' is to be relegated to the periphery. To show this, Dickson draws a distinction between directly evaluative and indirectly evaluative judgments. Directly evaluative judgments 'examine, and take a stance on, whether and to what extent some X, or some feature of some X, is good or valuable[488].' Indirectly evaluative judgments 'state that a given X has evaluative properties but do not entail directly evaluative propositions[489]' such as the one of importance. Similarly, as Leiter says, one can demarcate the central and peripheral cases of phenomena based on 'epistemic values' (evidentiary adequacy, simplicity, methodological conservatism, explanatory consilience, *etc.*) and not just moral values (Finnis's practical reasonableness[490]). Therefore, there are alternatives to Finnis's directly evaluative approach, as one can imagine an indirectly evaluative (or descriptivist) version of the central case method that will have nothing to do with external morality[491]. Hart's

[485] ibid.
[486] ibid 276.
[487] See further Chapter V, Section 3.C.
[488] Julie Dickson, *Elucidating Law* (Oxford University Press 2022) 137–138. See also Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) 51–52.
[489] Dickson, *Elucidating Law* (n 488) 138. See also Dickson, *Evaluation and Legal Theory* (n 488) 53.
[490] Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' (2003) 48 The American Journal of Jurisprudence 17, 34–35.
[491] ibid 35–37.

approach that influenced Finnis is one such prominent example[492]. Once we adopt the indirectly evaluative version of the central case method, there is no longer any reason to regard evil 'law' as peripheral as that law is morally deficient will no longer be a reason to regard it as marginal.

Why is the indirectly evaluative approach not just possible, but preferable? There are two reasons – one theoretical and one practical. The theoretical reason is that adopting Finnis's argument means misunderstanding the nature of law. I am in agreement with Shapiro, who notes that Finnis is wrong to describe unjust (and therefore evil[493]) 'laws' as peripheral cases of law[494]. According to Shapiro, Finnis conflates the two senses of how a particular law can be an ideal instantiation of law as a class – what law is and what it should do. Evil 'laws' are ideal as they possess the essence of law – namely that 'legal institutions are planning organizations of a very special kind and that laws are plans or plan-like norms created by them[495].' However, this line of argumentation appears to be rather circular as it assumes that natural law theorists would subscribe to Shapiro's planning theory. Instead, I shall turn to Kramer's more developed argument that Finnis's emphasis on the central case viewpoint as a moral, rather than prudential one, is wrong, as self-interested officials are just as likely, if not more likely, to be interested in governing by law[496]. As a result, provided that legal officials in evil regimes think prudentially[497], evil law will be law proper. The practical reason – that treating evil 'law' as a peripheral case of law would mean running a risk of forgetting that law can be immoral – was given by Dickson and has been discussed earlier in this Chapter[498].

This is how the central case method can be reconciled with treating evil 'law' as law in a primary sense. Let us consider the indirectly evaluative criteria for constructing a central case of law that make sense in the context of this dissertation. Law, as defined earlier, is *the product of the enterprise of subjecting human conduct to the governance of rules*[499]. This conceptualisation is closely tied to the principles of the rule of law – in that rules of law must be general, publicly promulgated, prospective, clear, free of contradictions, stable, possible to

[492] Hart (n 45) 15 ff. Kramer, *H.L.A. Hart* (n 45) 15–16.
[493] Shapiro prefers to use the term 'unjust' as it better reflects the notion that they still possess the property of legality and can be assessed in this way. I consider evil law as a subspecies of unjust law in this sense, so Shapiro's conclusions equally apply to it. Scott J Shapiro, *Legality* (Harvard University Press 2011) 390–392.
[494] ibid 390–391.
[495] ibid 195.
[496] Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 235–236.
[497] This will be further explored in Chapter V.
[498] Section 2.C.(i).A.
[499] Chapter III, Section 2.

obey, and congruent with their official administration[500]. If lawmaking activity does not conform to these eight desiderata to a sufficient degree, it means that it fails to create law[501]. This thesis is at the centre of an account of the central case of law developed by Kramer that he attributes to Hart[502]. Kramer notes that a central case of a legal regime is one that 'governs in accordance with the rule of law requirements to a significant extent[503].' Talking specifically about evil regimes, Kramer contends that, drawing on his argument against Finnis as laid down before, 'since the long-run selfish interests of evil officials can be a solid basis for the existence and continuation of a vibrant legal regime (albeit an oppressive regime), a situation in which those interests perform such a role is a central case of legal institutions[504].' While some, like Simmonds[505], might argue that evil regimes have little reason to abide by the aforementioned principles, this will be contested further on as evil regimes need to abide by the principles of legality to function[506]. As a result, an evil legal system can be a central case of legal order, while the real borderline cases would be located elsewhere. For instance, the legal systems of failed states that might present as states and have laws on the books, but cannot govern at all are merely peripheral.

4. Rupture Thesis II: Internal Morality of Law

A. Fuller's argument

Another line of argument against classifying evil 'law' as law that I will reject is that this 'law' is not law-like enough. It was most famously advanced by Fuller[507] in his polemic against Hart[508]. Law, to Fuller, has to at least minimally conform to the eight desiderata of legality cited above[509]. To Fuller, Nazi 'law' represented a rupture from legality so defined, as it openly defied such requirements as non-retroactivity[510] (as illegal executions were later made 'legal' by retroactive ordinances[511]) or publicity[512] (as there were 'repeated rumours of "secret laws"

[500] Fuller, *The Morality of Law* (n 268) 33. See further Section 4.A.
[501] See Section 4.A.
[502] Kramer, *H.L.A. Hart* (n 45) 16.
[503] Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 239.
[504] ibid 236.
[505] See, for instance, Simmonds, *Law as a Moral Idea* (n 20) 85 ff.
[506] See Chapter V.
[507] Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19).
[508] Hart (n 19).
[509] Section 3.B. Fuller, *The Morality of Law* (n 268) 33.
[510] Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19) 650–651. Fuller, *The Morality of Law* (n 268) 40.
[511] Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19) 650.
[512] ibid 651–652. Fuller, *The Morality of Law* (n 268) 40.

[513].') In addition, Fuller noted that Nazi 'laws' were often 'bypassed' by judges and other officials if they became inconvenient, in violation of the requirement of congruence[514]. As a result, these ordinances lost their legal character. While seeing these procedural irregularities as the only or the main evil of Nazi laws would sideline the main way in which they were immoral – that of enabling atrocities – there is something to be gained, arguably, from recognising them as an alternative way in which Nazi 'law' and 'laws' of other similar regimes may be deficient as law. Fuller's argument complements some treatments of evil regimes in post-WW2 political theory. Most notably, Arendt's seminal work *The Origins of Totalitarianism* describes 'totalitarian lawfulness' (in both Nazi Germany and Soviet Union) as 'defying legality[515]', including 'even its own positive laws[516].' Neumann, similarly, referred to Nazi Germany as *Behemoth*[517] – 'a non-state, a chaos, a Rule of Lawlessness and anarchy[518].' In the same vein, Neiman singles out contingency – the opposite of Fullerian legality – as one of the hallmarks of what she calls 'modern evil.' During the Great Purge, as Neiman says, 'Soviet terror functioned […] at random, making it impossible to predict what actions could lead to arrest or execution[519].' This contingency was magnified when it came to groups targeted by evil regimes and occupying a second-class status[520] within the legal system: '[f]or non-Aryan victims of Nazi terror life and death were so often dependent on matters of accident that every attempt to seek reason in them stopped short[521].'

B. Beyond liberal legality?

One way to counter Fuller's thesis would be to argue that compliance with Fuller's desiderata is a feature of some but not of all legal systems. Sargentich argues, in this vein, that '[t]he

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[513] Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 19) 651.
[514] ibid 652. Fuller, *The Morality of Law* (n 268) 40.
[515] Arendt (n 47) 462.
[516] ibid.
[517] Behemoth is a chaos-monster from the Book of Job (*Job 40:15-24*). Neumann borrowed this allegory from Hobbes, who used it to describe the Long Parliament during the English Civil War of 1642–1651, as opposed to Leviathan – another Biblical monster representing the state proper. Thomas Hobbes, *The Clarendon Edition of the Works of Thomas Hobbes, Vol. 10: Behemoth, or The Long Parliament* (Oxford University Press 2009). Thomas Hobbes, *Leviathan* (Clarendon Press 1909). Franz L Neumann, *Behemoth: The Structure and Practice of National Socialism* (Victor Gollancz Ltd 1942) 5.
[518] Neumann (n 517) 5.
[519] Neiman (n 11) 259. Neiman speaks about the 'Soviet terror' more generally, but her remarks are limited to those couple of years when Stalinism took was at its peak.
[520] To Dyzenhaus, this 'second class' status – in which the law-subject 'is legally recognized as having status as a responsible agent for some purposes but not for others' – is particularly problematic. Dyzenhaus, 'Dworkin and Unjust Law' (n 322) 158.
[521] Neiman (n 11) 259.

nomological conception of law's perfected condition [*i.e.,* adherence to the rule of law desiderata] is a liberal[522] conception of what law should be[523]', not a necessary condition for the existence of legal order. While some evil legal systems – such as the antebellum United States – partially embraced liberalism and therefore the rule of law as a standard of good law, others, such a Nazi Germany and Stalin's Soviet Union, did not. This move would refute Fuller by taking the rupture thesis to its extreme – evil 'law' is so unlike regular law that its standard of legality is not even formulated in the same way. However, eventually this argument will be rejected and the universality of principles of legality reaffirmed.

The historical case studies might give the impression that Sargentich's point is persuasive. In the early days of Nazi Germany, the future of the concept of *Rechtstaat* (rule of law) was subject to a ferocious debate. There were some legal theorists who wanted to preserve this practice in the context of a new state, but also others who rejected it entirely[524]. Benson *et al.* argue that 'upon the Nazi seizure of power, liberal ideas were degraded in legal scholarship <…> [i]nstead, the primary Nazi standard of "good law" was taken to be the advancement, purification and development of those collective properties thought to be essential to the flourishing of the German "blood-community" (*Blutsgemeinschaft*)[525].' *Gesetz* (statutory law) was considered inferior to *Recht* (law and justice as such) that was framed with regard to such sources as the National Socialist ideology, the party platform of the NSDAP, the will of the *Führer*, and the 'sound perception' of the people[526]. As a result, as Lavis notes, Fuller made a mistake in assuming that Nazi law was 'merely instrumentalizing and undermining the rule of law for oppressive purposes' rather than 'aim[ing] to realise an alternative vision of law, infused and informed by ideology[527].' Equally, in the Stalinist period, Soviet legal scholarship was concerned with developing a distinct Soviet concept of law that was 'bigger, better, and purer[528]' than its 'bourgeois' counterparts. Instead of the Western rule of law, it adopted its own standard of 'socialist legality[529]'. This standard had more in common with the internal

[522] 'Liberal' in the sense of 'liberal democratic', and not 'leftist'.
[523] Lewis D Sargentich, *Liberal Legality: A Unified Theory of Our Law* (Cambridge University Press 2018) 14.
[524] A comprehensive account of this debate can be found in Meierhenrich (n 309) 95 ff.
[525] Carolyn Benson and others, 'A Symposium on Nazi Law' (2012) 3 Jurisprudence 341, 342.
[526] ibid 343.
[527]Lavis (n 403) 760. Lavis makes a similar critique of Hart, and analytical jurisprudence at large.
[528]Lon L Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory' (1949) 47 Michigan Law Review 1157, 1163.
[529] 'Soviet state activity is carried into effect on the basis of socialist legality, its most important principle.' Vyshinsky (n 76) 369.

morality of law as described by Fuller than the Nazi concept of 'good law'[530], but it still allowed the state to diverge from the confines of legality when it came to advancing socialist policy. The outward rejection of the rule of law by Nazist and Stalinist regimes was thus not a 'bug', but a 'feature' of the Nazi and Soviet legal systems, where legal theorists and officials eschewed the rule of law as an alien, liberal, concept.

Still, this does not mean that adherence to the rule of law should be a distinctly liberal idea. Even though the Nazi and Stalinist dictatorships outwardly rejected the principles of legality, they ended up conforming with them to a certain extent. As will be argued in the following Chapter V, every legal system, even an evil or illiberal one, is ultimately (although often begrudgingly) invested in Fuller's eight desiderata. This is explained by the fact that conformity with the rule of law is key to securing both the evil and the non-evil goals of evil regimes. The minimum self-restraint of the internal morality of law needs to exist in order for any government – liberal or illiberal, Western or non-Western, good or evil – to be effective. As I will claim later, this argument is so powerful it ends up exploding in the face of Fuller's denial that Nazi 'law' (and, potentially, other evil 'law') is law.

C. The dual state I: normative

One can also rebut the argument from internal morality by saying that Fuller, as noted above, only gives an argument as to why some Nazi statutes were not law, rather than addressing evil legal systems in their entirety. There is therefore a space for substantively evil 'laws' – real or imagined – that do not fail to comply with the Fullerian desiderata. Moreover, Fuller's analysis bears little relevance to the actual historical experience of the three examples of evil legal systems referenced in this dissertation, as these systems contained not just rules violating Fuller's principles of legality, but also – and predominantly so – rules that that did not violate Fuller's principles of legality. In fact, as Kramer notes, while one can make a case that evil regimes may have an interest in deviating from the rule of law, in particular its eighth desideratum, in malign ways, they may still be inclined not to deviate from the rule of law and

[530] Remarkably, Vyshinsky fervently criticised the Nazi approach to law: '[i]nviolability of a person and dwelling, and legality are ideas eliminated in fascist [*i.e.,* Nazi – comment mine] Germany, as in all countries of the fascist dictatorship. An instruction for judges issued in Germany teaches that their duties do not include defense of the accused from arbitrariness; the judge should base his decision on what should be the national spirit.' ibid 552.

that desideratum in benign ways[531]. Fuller's argument thus applies, at most, only to some, and not all, evil 'law'.

Let us consider some examples. One can confront the account of the Nazi state given in Neumann's *Behemoth* with Fraenkel's dual state model. Fraenkel argued that Nazi Germany combined both a 'prerogative state' – '[t]hat governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees[532]' and a 'normative state' – an 'administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies[533].' Therefore, Fraenkel's view entails that there was some – normative – law that satisfied the Fullerian desiderata, even in the most fragrantly evil legal regime. Even more so, while some of these rules might have appeared to be benign, they supported the prerogative state, as Fraenkel observed, and thus enabled the wickedness caused through it, which made them evil.

When it comes to the Nazi state, Meierhenrich notes, Neumann's position, unlike Fraenkel's, did not match the way Nazi law actually operated on the ground. Noting that Fraenkel, unlike Neumann, practised law in Nazi Germany until 1939, Meierhenrich states that '[h]ad Neumann had the opportunity to delve into the thorny thicket of Nazi law, the chance to experience for years on end the everyday life of dictatorship, he would have found incontrovertible evidence that aspects of the law, regardless of its fractured appearance, mattered in the Third Reich[534].'

Similarly, as Sharlet notes, consciously applying Fraenkel's concept beyond its intended bounds, the same pattern has been observed with regard to Stalinist law, torn between legality (*законность*) and party-orientation (*партийность*)[535]. Smith similarly says, albeit talking about the later period in Soviet history, that there were 'two legal systems', the first 'maintain[ing] law and order, enact[ing] and enforce[ing] the law, and adjudicat[ing] the

[531] Matthew H Kramer, 'Looking Back and Looking Ahead: Replies to the Contributors' in Mark McBride and Visa AJ Kurki (eds), *Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer* (Oxford University Press 2022) 417.
[532] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press 2017) xiii.
[533] ibid.
[534] Meierhenrich (n 309) 44.
[535] Robert Sharlet, 'Stalinism and Soviet Legal Culture' in Robert C Tucker (ed), *Stalinism: Essays in Historical Interpretation* (Transaction Publishers 1999) 155 ff.

disputes that inevitably arise among citizens and institutions in modern societies' and the second being 'an arbitrary and repressive system used to punish critics of the regime[536].'

With regard to the antebellum United States, the dualism of law and terror is just as stark. Young and Meiser, while not explicitly drawing on Fraenkel[537], write that it was 'a "predatory state" in its dealings with non-white Americans, but a "contract state" in respect to the internal governance of the dominant group, Anglo-American males[538].'

D. The dual state II: prerogative

As a result, evil legal systems, including the ones surveyed in this dissertation, rely on the largely law-like normative sphere in 'non-political' domains, which demonstrates a problem in Fuller's argument. On top of that, political terror did not always assume a prerogative form and was often supported by the normative state. There were many instances when evil regimes attacked their victims by using law compliant with the rule of law desiderata, therefore further challenging the Fullerian idea that these were predominantly non-laws on the grounds of their incompatibility with internal morality.

When it comes to Nazi Germany, Rundle acknowledged the existence of repressive ordinances that were contrary to the internal morality of law. However, she also asserted that, despite their obvious external immorality, some measures that were a part of the early Nazi anti-Jewish legal program before the *Kristallnacht* were law even under Fuller's view as they 'intended to – and largely did – function in a manner that was not "the gunman situation writ large"', as 'there remained a general measure of congruence between official action and declared rule that is crucial to the very idea of governance through law[539].' Even though these laws were

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[536] Gordon B Smith, *Soviet Politics: Continuity and Contradiction* (Macmillan Education UK 1988) 137.
[537] One can doubt that Young and Meiser describe the same kind of state as Fraenkel, as legal authorities could not freely switch between the two states as racial categories underpinning slavery were quite stringently entrenched. Perhaps, it is closer to what Dyzenhaus called an 'Apartheid State', or a state that 'carve[s] out vast exceptions to the rule of general law <…> subjecting [a marginalised group, in Dyzenhaus's example – Black South Africans during Apartheid] to severe discrimination.' David Dyzenhaus, 'Legal Theory and the Politics of Legal Space' (Social Science Research Network, 31 May 2020) 14 <https://papers.ssrn.com/abstract=3615175>.
[538] Richard Young and Jeffrey Meiser, 'Race and the Dual State in the Early American Republic' in Joseph Lowndes, Julie Novkov and Dorian T Warren (eds), *Race and American Political Development* (Routledge 2008) 33.
[539] Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 The University of Toronto Law Journal 66, 89. However, one should bear in mind that the law was often bent to Nazi interpretation.

substantively evil and therefore unworthy of obedience, they still complied with Fuller's desiderata.

With regard to Stalinist terror, Cercel claimed that

> 'both the legal and para-legal, administrative, executive, and military machinery put in motion by the Stalinist turn are not part of a lawless, irrational, and excessive use of state power directed at simply instilling fear and supporting the domination of the party <…> [o]n the contrary, the process was law-full to its core[540].'

Sharlet describes two forms of this 'jurisprudence of terror': positing of vague rules malleable to different interpretations, such as the aforementioned Article 58, and making 'abrupt, undiscussed, or unannounced changes in legal rules (or their application)' such as the amendments to the 1922 *RSFSR Criminal Procedure Code* following the assassination of Sergei Kirov and the functioning of the NKVD special boards[541]. The political show trials were 'the epitome of the jurisprudence of terror[542].' One should, however, bear in mind that in the prerogative sphere, official ordinances often 'pretended to be a law very much at odds with our own purportedly liberal understanding of legality[543] and might not be classed as law by someone who adopts a liberal understanding of the rule of law. Still, they were more law-like than often thought, fitting the Fullerian desiderata.

In the antebellum United States, similarly, slavery was explicitly supported by law from Slave Codes on the state level up to the federal level Fugitive Slave Clause of the *Constitution of the United States*[544], *Fugitive Slave Acts*[545], and *Prigg*[546] and *Dred Scott*[547] rulings.

As a result, evil 'law' can be and often is compatible with the principles of legality, contrary to what Fuller claimed. The rupture thesis cannot be substantiated – evil 'law' still remains law.

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[540] Cosmin Cercel, *Towards a Jurisprudence of State Communism: Law and the Failure of Revolution* (Routledge 2018) 110–111.
[541] Sharlet (n 535) 164–165.
[542] ibid 166.
[543] Cercel (n 540) 111.
[544] Constitution of the United States 1788, Article IV, Section II, Clause 3.
[545] Fugitive Slave Act 1793, Fugitive Slave Act 1850.
[546] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court).
[547] *Dred Scott v Sandford* (1857) 60 US 393 (US Supreme Court).

5. Conclusion

In this Chapter, I dealt with the question of why evil 'law' should be characterised as law proper. I began with challenging Dworkin's claim that the whole question is uninteresting from the outset as Dworkin claims, countering it with positive reasons for why we must see evil 'law' as law. Firstly, I argued that recognising evil 'law' as law was paramount to understanding the nature of both evil (Section 2.B.i) and law (Section 2.B.ii). Secondly, I claimed that taking the position defended in this Chapter was important practically by helping us fight evil 'law' at the time of its operation (Section 2.C). Thirdly, I considered three main arguments to the contrary – or in support of the rupture thesis – the argument from external morality in its stronger (Section 3.A) and weaker (Section 3.B) iterations and the argument from internal morality (Section 4). I established the following. First, one cannot make judgments as to whether something is law based on its substantive immorality as this distorts the way the law operates by ignoring the fact that morally iniquitous laws are seen as having legal force by relevant officials (Section 3.A). Second, even if one accepts the central case methodology (as I do), evil 'laws' are laws in the primary sense, unless, independently of being substantively immoral, they egregiously violate the principles of legality (Section 3.B). Third, evil 'laws' can indeed be consistent with the rule of law so the Fullerian argument against Nazi (and, by extension, other) evil 'laws' being laws does not stand (Section 4). Therefore, evil 'law' is law in a primary sense. Where does this take us? I shall wrap up this discussion by pointing out that the arguments against the rupture thesis considered in this Chapter have a common thread as they allude to law's practical necessity. Even evil governments have goals, albeit wicked ones. Therefore, not only do evil regimes have law, they *need* law in order to successfully achieve their ends. This is the line of inquiry that will be further explored in the following Chapter V.

V. Why Evil Regimes Need Law

1. Introduction

In the previous Chapter it was established that evil law is indeed law. However, this insight would not be of much consequence if such law were not an important phenomenon. The notion of evil law presents a certain paradox. On the one hand, empirically, evil regimes appear to make significant use of the legal form. On the other hand, it has been argued that these regimes have no reason to do so. I will attempt to resolve the contradiction by contesting the latter claim, arguing that evil regimes need law much more than is commonly recognised.

The claim that evil regimes must rely on law strains against jurisprudential views that see law or the rule of law as constraints on wicked rule that evil regimes have reason to cast off if they can. Exploring and responding to this argument, in Section 2, I will take, as a starting point, the view of Simmonds, who argued that evil regimes will be hindered by legality, in particular the rule-of-law desideratum of congruence between laws as written and their implementation by officials, leading them, at times, to abandon legal governance in favour of extra-legal terror. I will then make a *negative* case against this position. Firstly, I will argue that the goal of evil regimes Simmonds identifies – securing conformism through terror – is better achieved through law. Secondly, I will point out that evil regimes are not merely interested to preserve themselves by terrorising their subjects. They also pursue projects beyond mere survival which are aided by law. Thirdly, I will claim that making use of legality is key to pursuing non-evil aims of evil regimes such as coordination of their day-to-day life.

Further, in Section 3, I will focus on a *positive* argument in favour of law's utility to evil regimes, further supporting the claim that law is needed for pursuit of an evil regime's goals indicated above. This is due to the fact that, in evil regimes as well as non-evil ones, law performs the following important functions: coercion (or 'incentive-securing regularity[548]') and coordination[549] as identified by Kramer in his retort to Simmonds, as well as three additional ones – legitimation, education and propaganda, and identity building.

[548] Kramer, 'On the Moral Status of the Rule of Law' (n 20) 69.
[549] ibid.

As a result, I will conclude that since evil governments have goals, albeit often wicked ones, not only do they have law, they *need* law in order to successfully achieve their ends. Law may constrain evil regimes, but at the same time it empowers them.

2. Negative Argument

A. Simmonds' Opening

The point that evil regimes have a strong reason to depart from legality was made particularly strongly by Simmonds. At the centre of Simmonds' claims is the rule of law[550] – as identified by Fuller by reference to eight desiderata of legality, namely that the rules of law shall be general, publicly promulgated, prospective, clear, free of contradictions, stable, possible to obey, and congruent with their official administration[551]. Simmonds says that adhering to these principles may be undesirable to evil regimes. While he makes the point that some of them, such as publishing rules and enforcing them[552], are advantageous even to evil regimes, he argues that this does not apply to all of the Fullerian desiderata. Evil regimes 'will have no good reason for respecting one of the most fundamental requirements of the rule of law: confining the use of official violence against citizens to circumstances where a legal rule has been violated[553]', corresponding to the eighth, or final, principle of the rule of law identified by Fuller. In other words, these morally iniquitous legal systems will have strong prudential reasons for extra-legal violence.

Simmonds gives the following four reasons why officials in evil regimes may prefer not to comply with the aforementioned desideratum of congruence and eschew governance through law. The first one is 'the chilling effect[554]' extralegal violence has on the law-subjects – essentially deterring the law-subjects from acting in ways that might jeopardise the regime's goals, even when this conduct is not prohibited by law[555]. In his textbook, *Central Issues in Jurisprudence: Justice, Law, and Rights*, Simmonds states:

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[550] See Fuller, *The Morality of Law* (n 268) 33.
[551] ibid 39.
[552] Simmonds, *Law as a Moral Idea* (n 20) 84. This echoes Fuller's own writing on the topic. When Fuller discusses managerial direction as mode of governance opposed to the rule of law, he mentions that the requirements of generality, congruence between official action and declared rule, and retrospectivity would be superfluous in the context of managerial direction. Fuller, *The Morality of Law* (n 268) 208–209.
[553] Simmonds, *Law as a Moral Idea* (n 20) 84.
[554] ibid 85.
[555] ibid 85–86.

> '[i]f social control is merely a matter of preventing widespread violence and revolutionary dissent, it is unlikely that Fuller's eight principles [of the rule of law – *addition mine*] will be a good guide to the most effective techniques. A regime of terror where officials act unpredictably or on the basis of secret directives is much more likely to succeed in quelling opposition. Where clear rules are published, the citizen is given advance notice of those areas of conduct where he can act without fear of official interference. In the absence of such rules, any action that worries or annoys the officials is likely to be interfered with: the only way of avoiding interference is to maintain a compliant and conformist attitude and lifestyle[556].'

To illustrate his position, in a later edition of the same textbook, Simmonds imagines religious fundamentalists who want to stop the spread of atheism through discouraging its propagation. Under a regime of arbitrariness, he says, '[a]theists and potential atheists would be deprived of the opportunity to exploit the interstices of liberty that are inherent in any meticulously enforced set of rules; they would know that the only way to be safe was to avoid doing anything that might annoy the regime's supporters, or arouse their suspicions[557].'

The next reason for engaging in extra-legal violence that Simmonds mentioned is 'blocking visibility' or making it difficult for the regime's opponents to recognise one another[558]. Simmonds argues that when prohibition of, say, atheist cultural symbols is congruent with the rule of law, it makes it easier for atheists to look for new ways to express allegiance that are not covered by this prohibition, necessarily limited to satisfy Fuller's criteria[559]. While this reason for adopting extra-legal violence as opposed to legal coercion makes sense, I do not see how it differs from the 'chilling effect' one – in both cases, extra-legal violence squelches 'new and therefore non-prohibited ways of subverting the regime's agenda[560].'

The same can be said for the third reason Simmonds mentioned, 'blocking visibility by requiring enthusiasm[561].' The legal form, once again, cannot be trusted to proscribe cases of,

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[556] Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights (1986 Edition)* (n 20) 119–120.
[557] Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights (2002 Edition)* (n 20) 230.
[558] Simmonds, *Law as a Moral Idea* (n 20) 86.
[559] ibid.
[560] ibid.
[561] ibid 87.

for instance, a military salute done mockingly, and extra-legal violence is needed to fill the gap[562].

Finally, Simmonds mentions a fourth, distinct reason, 'dealing with strategic behaviour among supporters[563].' An evil regime is not a monolith – it consists of different actors whose vision of the regime's objectives and how they ought to be achieved may differ[564]. As a result, Simmonds says, '[t]here will consequently be occasions when reliance upon Party thugs might seem preferable to reliance upon the judges[565]' as, for instance, giving judges the power to 'use their role within the institutions of law to extract large personal gains; or to shape the Party's agenda in ways that would not be favoured by the non-judicial members of the regime[566].' This is a distinct reason from the 'chilling effect' which the previous two reasons ended up being subsumed under and needs separate treatment. For now, I claim that Simmonds' intuition here is misguided – the fact that evil regimes involve many actors working at cross-purposes, is a reason *for*, rather than against, legal regulation. As will be argued below[567], coercion and coordination provided by law will be able to address the compliance and coordination problems more efficiently than extra-legal violence.

As a result, the claim that I set out to respond to is that evil regimes have little reason to commit to the desideratum of congruence and thus to the rule of law, as they often need to resort to extralegal rather than legal means of governing due to its goal of quelling dissent.

B. Law and 'conformism'

Let us return to the chilling effect that governing by extralegal means allegedly preserves. One can respond to this thesis of Simmonds in two ways. The first one is to reject it entirely, stating that governing by a regime of terror does not in fact lead to a more compliant and conformist attitude and lifestyle. Firstly, such a lifestyle requires that one ought to comply with or conform to *something* – a standard of behaviour that should be clearly communicated to the subject of such conformity. This standard is, in turn, most certainly and efficiently communicated in the form of legal rules. Kramer, in opposition to Simmonds, gives the following illustration of this:

[562] ibid.
[563] ibid.
[564] ibid 88.
[565] ibid.
[566] ibid.
[567] See Sections 3.B and 3.C.

> ‘Suppose a group of gunmen have subjected a number of people to their control. Although the gunmen might initially <…> deem it advisable to engage in the sorts of random violence to which Simmonds adverts, they will not be able to direct their victims’ behavior effectively unless they issue commands that accord with Fuller’s principles to a significant extent[568].’

Secondly, I concur with Kramer that for there to be an incentive to comply with or conform to the rule, its subject needs to be able to link non-conformity to negative consequences that will obtain once they do not conform and which will not be inflicted if they do conform[569]. These two facts make a case that it is not blind extra-legal terror, but a system of rules and sanctions complying with the Fullerian desiderata that evil regimes need to secure conformism.

This position is not only convincing on its own, but also dovetails with Fuller’s treatment of the subject. Fuller described an absolute monarch (Rex), whose word is law. From time-to-time Rex issues commands backed up with sanctions. However, he is ‘a dissolute and forgetful fellow, who never makes the slightest attempt to ascertain who has, in fact, followed his directions and who have not.’ As a result, Fuller concludes, ‘this monarch will never achieve even his own selfish aims, until he is ready to accept that minimum self-restraint that will create a meaningful connection between his words and his actions[570]’, alluding specifically to the eighth desideratum later singled out by Simmonds. The ‘minimum self-restraint’, or self-discipline, of governing through law that Fuller talks about when explaining the necessary minimum of adherence to the rule of law for effective political rule is integral to success of any, even a ‘selfish’ (in Fuller’s terms) or ‘evil’ (in my terms), ruler. Therefore, a regime neglecting one of the core desiderata of legality would not be able to stay in power.

C. Law and other evil goals

The second argument against the position that adhering to the principle of congruence is detrimental, rather than beneficial, to evil regimes is that securing compliance through fear is only *one* of the reasons legal officials might consider when deciding how to govern. Real as

[568] Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 67.
[569] I thank Professor Matthew Kramer for this observation.
[570] Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (n 19) 644.

opposed to hypothetical evil regimes, *contra* Simmonds, are not just interested in staying in power via quashing dissent. In addition, they often pursue evil projects such as the extermination or subjugation of political rivals, class enemies, or ethnic or religious minorities, and they sometimes persist in pursuing these projects even where this has no positive effect on or even undermines a regime's stability. Simmonds in particular assumes a lot about how evil regimes look and operate, but he does not refer to any real-world examples to support the claim that his model of a society of religious fundamentalists applies to all, or at least most, evil regimes. In Simmonds' example, the governing regime does not care about whether the suspected atheists are in fact atheists. This does not map easily onto the reality of three paradigmatic evil regimes considered in this thesis – Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States – for whom the main interest was not to secure compliance, but to target 'undesirable' groups for either extinction or subservience. The use of the legal form, to specify which particular individuals or groups are to be targeted while avoiding indiscriminate terror, is uniquely positioned to play this role.

In Nazi Germany, after the passing of the *Nuremberg Laws* that prohibited Jews and Germans from marrying and engaging in sexual intercourse (*Law for the Protection of German Blood and German Honour*[571]), and stripped Jews of German citizenship (*Reich Citizenship Law*[572]), 'the most pressing matter was to find a legal definition of "Jew" and to draw a clear line separating him from the "non-Jews"[573].' A lively debate between the Nazi Party and the Nazi Ministry of the Interior ensued about whether the definition of a 'Jew' should include those pejoratively referred to as *Mischlinge*, or one-quarter Jews (those with one Jewish grandparent), as well as whether half-Jews (those with two Jewish grandparents) were to be considered full-blooded Jews or *Mischlinge*. Bureaucrats such as Bernhard Lösener and Wilhelm Stuckart insisted on a more restrictive approach, while party radicals such as Adolf Wagner and Arthur Gütt (the latter formerly belonging to the Ministry of the Interior) wanted to define 'Jew' as broadly as possible [574]. The former position prevailed as the *First Regulation* of 14 November 1935 finally took care to define Jews, for the purposes of the *Nuremberg Laws*, as persons with at least three Jewish grandparents (Article 5[1]) or two Jewish parents under

[571] Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935.
[572] Reich Citizenship Law (*Reichsbürgergesetz*) 1935.
[573] Bernhard Lösener, *Legislating the Holocaust: The Bernhard Loesener Memoirs and Other Documents* (Karl A Schleunes ed, Carol Scherer tr, Westview 2001) 56.
[574] Friedlander (n 57) 148–149. For a first-person account, see Lösener (n 573) 56 ff.

certain circumstances (Article 5[2])[575]. This level of detailed discussion about who exactly had to be stripped of their rights was far from the waging indiscriminate terror of the kind Simmonds describes, as the Nazis cared about persecuting the 'right' victims and how to do so more efficiently, which could only be done through law.

Similar observations apply to Soviet law during the Stalinist Great Terror. In his work on the Soviet passport system, Baiburin explains how the ethnicity of all passport holders was meticulously recorded. In the time of the Great Terror, when ethnic minorities were targeted as potential saboteurs and spies[576], the 'correct' identification of such status – similarly to disputes among high-ranking Nazis about who counted as a Jew – was paramount and subject to a detailed discussion. Since 'the chekists [the colloquial name of the secret police – *addition mine*] needed clarity in the question of ethnic origin', the 1938 *NKVD Circular No. 65* introduced a definition of ethnic origin based on the ethnic origin of one's parents[577] rather than, as previously, leaving the matter to self-identification[578]. The bulk of the Stalinist terror campaign, however, mostly rested not on ethnic, but on political and class-based foundations. The NKVD *Order* of 30 July 1937 famous for creating *troikas*, the *ad hoc* extra-legal tribunals having the power to sentence those within their reach to death or imprisonment, featured a list of 'contingents that have to be persecuted' in its very first Article. The Article included not just conduct-based criteria for falling under the remit of *troikas* (such as 'conducting anti-Soviet activities'), but also a list of relevant identities (such as *kulak,* White, and clergyman)[579]. Even though the NKVD *Order*, unlike the Nazi *First Regulation*, was a secret internal document rather than a public proclamation, and its definitions more imprecise, it similarly limited the range of terror to ideologically undesirable groups. Instead of perceiving members of the groups in question as subjects who needed to be rendered compliant, Nazi Germany and Stalin's Soviet Union treated them as *objects* to be removed irrespective of their behaviour.

[575] Reich Citizenship Law: First Regulation (*Reichsbürgergesetz: Erste Verordnung*) 1935.
[576] Baiburin (n 348) 293 ff. On ethic terror, see also Terry Martin, 'The Origins of Soviet Ethnic Cleansing' 70 The Journal of Modern History 813. I thank Professor Matthew Kramer for this suggestion.
[577] Baiburin (n 348) 295.
[578] ibid 293.
[579] Operational order of the NKVD of the USSR No. 00447 'On the operation to repress former kulaks, criminals and other anti-Soviet elements' (*Оперативный приказ НКВД СССР № 00447 'Об операции по репрессированию бывших кулаков, уголовников и др.. антисоветских элементов'*) 1937.

While, unlike in Nazi Germany and Stalin's Soviet Union, in the antebellum United States there was no imperative to exterminate the enslaved persons – quite the opposite in fact – the legal system cared about their status as slaves in a similar way. As the enslaved were, legally speaking, property as well as persons[580], it mattered in law whether individuals in question were in fact slaves to protect that property interest. Finkelman, illustrating this feature of slave law, cites *United States v The Amistad*[581], where most of the purported rebellious slaves were eventually freed because they had been illegally sold into slavery and imported into Cuba, while a cabin boy born there remained in bondage[582]. As Finkelman writes, '[l]auded as a great human rights case and an antislavery victory by some modern Americans, the decision did not threaten the institution of slavery or even challenge the legitimacy of slavery[583].' Instead, it focused on matters of legal ownership. This alternative goal of evil regimes – preserving property relations – was therefore achieved by means of congruent legal action.

D. Law and non-evil goals

Moreover, evil regimes can also have non-evil goals that they share with neutral or benign regimes, such as ensuring that they continue to exist. In order to pursue their wicked goals such as the extermination of certain groups, evil regimes must stay in power, and they can only do so through governing by law. In Simmonds' religious fundamentalists thought experiment, the society in question 'has the sole aim of discouraging the propagation of atheism, being content to leave all other aspects of social life (such as the operation of markets and the protection of property rights) to be sustained (or not, as the case may be) by informal customary practices unsupported by official rules and sanction[584].' The question is whether it is possible to ensure the longevity of the regime in this way – I contend that it is not. Even if it was true that a fundamentalist regime like the one described by Simmonds would not need law, contrary to the arguments advanced above, another problem would arise. As Kramer remarks, Simmonds' fundamentalists do not seem to have a governing regime as '[t]hey are not regulating most aspects of life in their society in any way, and they are not providing an infrastructure that

[580] On the complexity of this status, see Paul Finkelman, 'Slavery in the United States: Persons or Property?' in Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press 2012).
[581] *United States v The Amistad* (1841) 40 US 518 (US Supreme Court).
[582] Finkelman (n 580) 124.
[583] ibid.
[584] Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights (2002 Edition)* (n 20) 230.

facilitates any basic governmental function[585].' This scenario therefore only gives insight into dynamics within bands of robbers or failed states, rather than in functional, even if heinous, legal systems.

This conclusion is supported if we look at the way the paradigmatic evil legal systems considered in this dissertation functioned. The Nazi Party pursued a policy of *Gleichschaltung*, translated as 'bringing things into line', slowly gaining control of all the facets of society in two ways – assuming more powers and eliminating actual or potential opponents. This rise to power was facilitated via legal mechanisms that cemented its success. It started with the *Reichstag Fire Decree* (1933) that suspended core civil liberties and allowed the Party to terrorise political enemies in the wake of an election[586]. Subsequently, the capture of power continued through the *Enabling Act* (1933) that allowed Hitler to make laws without the Reichstag's involvement[587]. Two further laws, the *Provisional Law on the Coordination of the States with the Reich* (1933)[588] and *Second Law on the Coordination of the States with the Reich* (1933)[589] put states under the direct control of the NSDAP, and the *Law on the Reconstruction of the Reich* (1934) officially made Germany a unitary state[590]. In addition, the *Law for the Restoration of the Professional Civil Service* (1933) discharged civil servants of non-Aryan descent[591] and those 'whose previous political activities afford no assurance that they will at all times give their fullest support to the national State[592]' from their positions. Finally, the *Law Against the Formation of Parties* (1933) declared the NSDAP the only political party in Germany[593]. This shows how the legal form paved the way for the fusion between the Nazi Party and the German state.

In the Soviet Union, Stalin pursued the policy of 'socialism in one country', aiming to strengthen the Soviet state and protect it against its domestic and foreign enemies. Some of

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[585] Kramer, 'On the Moral Status of the Rule of Law' (n 20) 80.
[586] Decree of the Reich President for the Protection of People and State (Reichstag Fire Decree) (*Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*) 1933.
[587] Law to Remedy the Distress of People and Reich (Enabling Act) (*Gesetz zur Behebung der Not von Volk und Reich*) 1933.
[588] Provisional Law on the Coordination of the States with the Reich (*Vorläufiges Gesetz und Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) 1933.
[589] Second Law on the Coordination of the States with the Reich (*Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) (1933).
[590] Law on the Reconstruction of the Reich (*Gesetz über den Neuaufbau des Reichs*) (1934).
[591] Law for the Restoration of the Professional Civil Service (Civil Service Law) (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) 1933.
[592] ibid, Article 4(1).
[593] Law Against the Formation of Parties (*Gesetz gegen die Neubildung von Parteien*) 1933.

those, as in Nazi Germany, were eliminated via legal channels. During the Great Terror, so-called 'Trotskyites', the alleged followers of Leon Trotsky, who famously contested Stalin's policy, were accused of conspiring against the Soviet State and had to appear before what would later be known as the Moscow Show Trials. Not only were they sentenced to death or time in labour camps; they were also publicly tarnished by the prosecutor, the judges, and sometimes even themselves through self-confessions. As a result of putting those who threatened Stalin through this ordeal, Stalin, like Hitler, cemented his power in the state, making sure that nobody would question him anymore.

The antebellum United States, unlike the two examples above, were not concerned with maintenance of totalitarian power, but another goal – the protection of existing economic conditions. Slavery was, without exaggeration, foundational for the Southern economy. Recognising the property interest in slaves and associated legal obligations therefore was at the centre of protecting it. In addition, as Yanochik, Ewing, and Thornton claim, legal and policy measures such as slave codes and *Fugitive Slave Acts* were intended not just to reduce slaves' rights, but also to prevent their escape and hence to stabilise the price of the slaves[594]. For example, the prohibition on teaching slaves to read or write in slave codes was such an insurance measure, as '[s]laves that could read could better understand maps, road signs, train schedules, and the like and therefore were better equipped for successful escape <…> [and] [s]laves that could write could draw effective maps, write themselves passes to get away from the plantation, and pass written information among slaves from different plantations[595].' The researchers found a statistically significant relationship between two such public policies – manumission laws and state patrol statutes – with slave prices, arguing that the proliferation of both increased the latter[596]. As a result, legal measures aimed to protect the interest in slaves made slavery-based economic activities more profitable. This shows that the law of slavery successfully pursued not only extraordinary evil, but also comparatively mundane goals, even though the latter, of course, cannot be fully decoupled from the former.

[594] Mark A Yanochik, Bradley T Ewing and Mark Thornton, 'A New Perspective on Antebellum Slavery: Public Policy and Slave Prices' (2001) 29 Atlantic Economic Journal 330, 331.
[595] ibid 337 note 3.
[596] ibid 330, 334 ff., 337.

3. Positive Argument

A. Preliminary matters

Real evil regimes such as Nazi Germany, Stalin's Soviet Union, and the antebellum United States, unlike Simmonds' imaginary fundamentalists, need law. Thus, the position that evil regimes have little to gain from the use of legality can be successfully contested. While I have made a negative case against the position that legality only hinders evil regimes, I am yet to present a positive case for why evil regimes need law. In exploring this, I will try to supplement the theoretical arguments that Kramer makes with empirical exploration of how the three evil regimes considered in this dissertation – Nazi Germany, Stalin's Soviet Union, and the antebellum United States – made use of law for their ends. With this in mind, I intend to show how legality can be used – or, some might say, abused – by evil regimes, considering the following instruments or techniques the law provides: coercion and coordination, and, additionally, legitimation, education, and identity building. None of these are unique to evil law – they can be seen as ancillary prudential reasons for why an evil regime pursues its objectives by the use of law[597]. I will show how these instruments motivate the evil regime to use law, even if this may come at a certain cost to their ambitions. I also aim to give an account of why law, as opposed to its close counterparts such as morality or religion, is uniquely suited to help evil regimes operate in a more efficient way.

B. Coercion

When we talk about why we need law, coercion is often the first thing that comes to mind. While it might not be a feature of all conceivable legal systems[598] and is not a direct feature of all laws[599], its importance in the specific context of evil law cannot be overstated. If, as we may hope, a significant proportion of law-subjects are virtuous and are thus inclined to disobey evil laws, coercion is needed in a wicked legal system to elicit their compliance with its laws' demands.

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[597] Kramer, 'On the Moral Status of the Rule of Law' (n 20) 74–76, 80.
[598] See Raz's 'society of angels' thought experiment. Raz, *Practical Reason and Norms* (n 25) 67–68. Additionally, I argue that this experiment resembles a much older rumination on the same topic by Aquinas. Lukina, 'Angels, Demons, Us' (n 118).
[599] See what Hart calls 'power-conferring rules' as opposed to coercive 'duty-imposing rules'. Hart (n 45) 26 ff.

One can retort that coercion is not unique to law. Firstly, an evil regime can coerce its subjects by virtue of pure brute extra-legal force as discussed above – however, in the previous Section it has been established that this would not be very effective. Secondly, morality, religion, or ideology also include sanctions, such as social shunning, excommunication from the Church[600], or expulsion from the ruling Party. Why cannot an evil regime rely solely on these sanctions to avoid the pitfalls that might befall it if it subjects itself to a system of law? I answer that, for an individual sanction to work well, it is better for it to be couched in a legal form rather than remaining a site of arbitrary violence. As explored above, the law-like character of sanctions is paramount for their greater efficiency. To that effect, Kramer cites Fuller's claim that '[i]f the citizen knew in advance that in dealing with him government would pay no attention to its own declared rules, he would have little incentive himself to abide by them[601].' In order to have a desired effect – securing conformity of rule-subjects with rules – these rules and the sanctions backing them up need to be in line with Fuller's desiderata.

In the test cases of evil law considered in this dissertation, regimes employed legal coercion to prevent certain activities they regarded as undesirable. In Nazi Germany, the *Nuremberg Law for the Protection of German Blood and German Honour*[602] imposed penalties for marriage and sexual intercourse between Jews and Germans, acts repugnant to the Nazi race ideology and threatening to the Nazi state's end goal of cleansing the German population. The *Law* provided a deterrent to anyone who wanted to engage in such relationships.

In Stalin's Soviet Union, Article 58 of the *Criminal Code of the RSFSR* ('counter-revolutionary activities') was used to quell dissent[603]. Even though its application ended up being broader in its scope and more random than might be expected from the text, it nevertheless provided strong incentives not to do anything which could be construed as opposing the regime.

While abolitionist rhetoric was not prohibited by law in the antebellum US, legal mechanisms were nevertheless used to prevent more direct interference with slaveholders' supposed

[600] While religious texts also refer to divine punishment, such as going to hell in the afterlife, I will focus here on more law-like rules, such as those exemplified by the Canon Law, governing inner church structure and discipline.
[601] Fuller, *The Morality of Law* (n 268) 217. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 69.
[602] Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935.
[603] Criminal (Penal) Code of the RSFSR (*Уголовный кодекс РСФСР*) 1926.

proprietary rights. Specifically, the *Fugitive Slave Acts*[604] imposed penalties on individuals who obstructed the process of capturing and returning the runaway slaves under the procedure established by those ordinances (Section 4 and Section 7 respectively).

C. Coordination

The second purpose of law that evil regimes can benefit from is coordination. There are two ways of looking at this issue. One is that coordination provided by law benefits ordinary citizens, as 'a system of legal governance presents [them] <…> with definite indications concerning what is demanded of them[605].' Briefly, legal authority addresses the problem of expertise and game-theoretical coordination problems. First, it may aid its subjects in making judgments in domains where it might he difficult due to the lack of knowledge or skills, such as regulating dispensation and use of dangerous chemicals[606]. Second, it helps in situations when there are multiple right answers but it is necessary to reach consensus one way or another such as whether to drive on the left or the right side of the road[607].

Therefore, authorities – including legal authorities – make their subjects' life easier. But what, if anything, does that have to do with evil law? A critic may say an evil regime will not care for the good life of its citizens, and hence have no need to coordinate their affairs. While this critique is valuable, coordination still matters in a second way – this time, not to citizens, but to evil regimes, where coordination is needed to further their own evil plans. As demonstrated above, evil regimes can and always do have goals other than merely securing compliance, served mainly by the coercive function of law. Even if a regime's collaborators are willing to cooperate in their pursuits, or, as indicated above, are coerced into doing so, they still need to converge on the best way of proceeding with them. This is exacerbated by the fact that, as Kramer writes, contrasting legal systems with a gunman's hostage-taking, legal norms need to coordinate both the actions of numerous officials (as opposed to one gunman) and the rule over numerous subjects (as opposed to a small group of a gunman's victims)[608].

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[604] Fugitive Slave Act 1793, Fugitive Slave Act 1850.
[605] Kramer, 'On the Moral Status of the Rule of Law' (n 20) 69.
[606] This example is taken from Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003, 1014.
[607] This example taken from Scott Shapiro, 'Authority' in Scott Shapiro and Jules L Coleman (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 400–401.
[608] Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 70.

One final question remains: why law? Why cannot coordination be achieved by other means? I side with Finnis, who, drawing upon the procedural features of law, put forward three reasons why law is a superior coordination tool. His first argument is that 'law's legislative capacities' provide a clear and definite guide to who we must consider an authority and what we must see as their pronouncements in order to solve coordination problems as they appear[609]. Finnis's second argument is that law's 'modes of application and enforcement' can ensure that the coordinating directives will be adhered to by all, even those who have some misgivings about taking part in a coordinating scheme, and that there are no free riders[610]. Finally, Finnis notes that the coercive capacities of law help to 'minimize the unfairnesses' involved in the process of coordination[611]. Unlike the other reasons for choosing law as the instrument for coordination, this reason would not have much sway among the actors of an evil regime as they would be interested in fairness only as a means to an end, for example to benefit from its usefulness for coordination, legitimisation, or education purposes, while it is clear that for Finnis the fairness in question would be an end in itself. Still, Finnis gives a compelling account of how the law is particularly powerful when it comes to resolving coordination problems, but we must not forget that this power can be wielded not just for the good that Finnis aspires to, but also for great evil.

A striking example of coordination in Nazi Germany was its effort towards rearmament and revitalisation of the economy. In August 1936, Hitler, willing to expand *Lebensraum* ('living space') for Germans by force and convinced of the inevitability of the war with the Soviet Union, issued a secret *Four-Year Plan Memorandum*. The *Memorandum* determined that 'I. The German army must be operational <…> [and] II. The German economy must be fit for war within four years[612].' Hitler put Göring in charge of executing the plan as his general plenipotentiary, 'present[ing] decrees empowering him to take responsibility for virtually any aspect of economic policy[613].' Since Hitler was known not to be fond of putting his orders on paper, the *Memorandum* demonstrates how important he considered the task at hand to be[614]. While not a typical legal source, the *Memorandum* can be read as law, especially since Hitler's

[609] John Finnis, 'Law as Coordination', *Philosophy of Law: Collected Essays*, vol IV (Oxford University Press 2011) 71.
[610] ibid.
[611] ibid.
[612] As reproduced in Adam Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (1st Penguin Edition, Penguin 2007) 222.
[613] ibid 223.
[614] ibid 219.

will, according to the *Führerprinzip*, was seen as lawgiving. The Memorandum, as well as Göring's subsequent decrees, are therefore a good example of law serving coordinative purposes in pursuit of what Hitler saw as necessary for the German state to exist and be capable of pursuing its evil aims.

In Stalin's Soviet Union, law was needed to further another large-scale project – namely the building, as mentioned before, of 'socialism in one country'. Strengthening the new state required a large-scale reform of both agriculture (collectivisation) and industry (industrialisation), as well as the annihilation of potential enemies who might sabotage those efforts – *i.e.* coordination for both good or benign and evil aims. A series of Five-Year Plans, in 1928, 1932, and 1938, were adopted to serve these purposes. The Plans were adopted via Resolutions of the Congresses of the All-Union Communist Party (Bolsheviks). While these Congresses represented the Party rather than the state, as the Party and the state were fused together, the Plans had the force of legal documents. They included goals set for a five-year period that were often specified down to precise numbers of goods that were to be produced and determined ways of achieving them. As an example, consider the Second Five-Year Plan (1933) that was in place during the Great Terror. The *Resolution of the XVII Congress of the All-Union Communist Party (Bolsheviks)* stated that the overall production should reach 92.7 billion roubles by 1937, or 214.1% of the value of goods manufactured in 1932. To achieve that goal, manufacturers were tasked with improving their technical capabilities, energy production, and so on[615]. While there plans were not followed faithfully as there was a great degree of falsification of data, they were nevertheless a good illustration of how laws can be used to attempt pursuing coordination necessary to secure a future of any regime, evil or not.

In the antebellum United States, slavery itself was a project requiring coordination. The institution of slavery could only be supported by laying down the status of the slave and spelling out associated rights and obligations of enslaved persons, slaveholders and third parties in sufficient detail. As Finkelman argues, sometimes taking into account the institution of slavery required the Southern courts to re-assess some common law principle that was not compatible with the nature of the institution[616]. For instance, the fellow servant rule in tort, which states

[615] No. 1 From the Resolution of the 17th Congress of the CPSU 'On the second five-year plan for the development of the national economy of the USSR (1933-1937)' (*№ 1 Из резолюции XVII съезда ВКП(б) 'О втором пятилетнем плане развития народного хозяйства СССР (1933- 1937 гг.)*') 1934, Articles 1, 3.
[616] Paul Finkelman, 'Exploring Southern Legal History' (1985) 64 North Carolina Law Review 77, 93–94.

that a worker injured by another worker (fellow servant) can sue only that worker and not the employer[617], was held to be inapplicable if the injuring party was a slave. This was explained by the fact that a slave could not do what a free man could to prevent injuring his co-workers, such as negotiate the work contract, leave work, or report or reprimand their fellow workers[618]. This example illustrates how the institution of slavery needed not just devices to keep slaves subservient, but coordinative mechanisms for goals such as the distribution of civil liability.

D. Legitimation

There are three further ways in which law can be serviceable to evil regimes, in addition to coercion and coordination as outlined by Kramer in his seven year-long debate with Simmonds. The first one is legitimation. Fallon distinguishes three senses of legitimacy – as a legal concept, as a moral concept, and as a sociological concept[619]. In this Section, I will focus on the last – sociological, or thin concept of legitimacy as 'an active belief by citizens, whether warranted or not, that particular claims of authority deserve respect or obedience for reasons not restricted to self-interest[620].' The legal form, I argue, bolsters this kind of legitimacy. This was noted by Weber, who recognised 'legal-rational authority' among four ideal types of legitimate authority, alongside 'charismatic authority', which derives from the authority's personal leadership qualities, 'traditional authority', which is built on long-standing custom, and '*Wertrational* ('goal-rational' or 'value-rational') authority', which arises from control of the rational means to purse some goal which need not be rational. Legal-rational authority, by contrast, is described by Weber as follows:

> '[T]here is domination[621] by virtue of "legality," by virtue of the belief in the validity of legal statute and functional "competence" based on rationally created rules. In this case, obedience is expected in discharging statutory obligations. This is domination as

[617] *Farwel v Boston & Worcester RR* (1902) 62 NE 751 (Supreme Judicial Court of Massachusetts)
[618] *Howes v Steamer Red Chief* (1860) 15 La Ann 321 (Louisiana Supreme Court). *Louisville & Nashville RR v Yandell* (1856) 17 B Mon 586 (Court of Appeals of Kentucky). *White v Smith* (1860) 46 SCL 201 (South Carolina Court of Appeals). Cited by Finkelman (n 95) 94.
[619] Richard H Fallon, 'Legitimacy and the Constitution' (2005) 118 Harvard Law Review 1787, 1792–1801; Finkelman (n 616) 94.
[620] Fallon (n 619) 1795. See also Max Weber, *The Theory of Social and Economic Organization* (Talcott Parsons ed, Alexander Morell Henderson and Talcott Parsons trs, Free Press of Glencoe 1964) 382.
[621] In the original, '*Herrschaft'*, which is better translated as 'rule'.

exercised by the modern "servant of the state" and by all those bearers of power who in this respect resemble him[622].'

Weber writes that '[i]t is obvious that technically the great modern state is absolutely dependent upon a bureaucratic basis <…> the larger the state, and the more it is or the more it becomes a great power state, the more unconditionally is this the case[623].' This is why legal-rational authority, the only mode of authority possessed by a bureaucrat devoid of either traditional or charismatic power, becomes uniquely important. Where does the legitimacy of this kind of authority come from in the eyes of those who recognise it? Matheson writes that there are two bases of Weberian legal legitimacy. One is convention, which 'is present in so far as power holders claim legitimacy upon the basis of "legality"[624].' The other is the rationality of law, which 'is present in so far as power holders claim legitimacy on the basis that laws which prescribe command and obedience have been "enacted", that is, rationally established[625].' For these two reasons, law is legitimising. Even more so, it is *self*-legitimising, as the legal norms are seen as worth following purely because they are *legal*.

The legitimating function of law is particularly needed when it comes to evil law. Firstly, in evil regimes citizens who are not committed ideologues might have relatively few (if any) non-prudential reasons to conform with morally iniquitous legal rules. Such citizens may be a majority or a substantial minority to still be reckoned with. Law's perceived inherent legitimating force adds to their reasons, therefore tipping the balance. The common trope of actors in such a regime 'just following orders' speaks to the effect legitimation can have on one's free will, eventually causing the law-subjects to do anything this order-giving authority asks them to do on account of accepting its legitimacy. Secondly, legitimacy brought in by law makes it harder to criticize and resist the legal system as a whole. While recognising that some laws in such a system might be morally iniquitous, someone taken by its claims to legitimacy can at the same time dismiss them as mere 'bugs' in, rather than 'features' of the otherwise legitimate system.

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[622] Max Weber, 'Politics as a Vocation' in Hans Gerth and C Wright Mills (eds), Hans Gerth and C Wright Mills (trs), *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 79.
[623] Max Weber, 'Bureaucracy' in Hans Gerth and C Wright Mills (eds), Hans Gerth and C Wright Mills (trs), *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 211.
[624] Craig Matheson, 'Weber and the Classification of Forms of Legitimacy' (1987) 38 The British Journal of Sociology 199, 211.
[625] ibid.

Some may disagree that the authority of evil legal systems is indeed legal-rational, especially when it comes to the two major totalitarian states of the 20th century – Nazi Germany and Stalin's Soviet Union. When it comes to Nazi Germany, the application of Weberian categories was, once again, a site of dispute between Fraenkel, who believed that rational-legal authority was present in the normative as opposed to the prerogative state (where charismatic authority reigned)[626], and Neumann, who characterised the legitimacy of the Nazi regime as purely charismatic[627]. The latter view was accepted by some other scholars[628], together with, on fewer occasions, claims that the Nazis' authority belonged to other, non-legal rational categories, such as traditional[629] or value rational[630] authority. A similar disagreement can be observed regarding the Soviet Union. Beetham notes[631] that some scholars categorise the Communist model of government as charismatic[632], others classify it as traditional[633], while some see it as a value rational[634] authority. Beetham claims that this ambiguity makes Weber's typology 'incoherent[635]', however, I believe that the typology – and the 'legal-rational' label – can be salvaged. One should bear in mind that Weber's categories are ideal types rather than mutually exclusive categories in which all authorities can neatly fit in. As Weber himself confesses, '[t]o be sure, the pure types are rarely found in reality[636].' It is possible for a legal order to exhibit charismatic, traditional, and legal-rational features at the same time – a stance taken by Fraenkel in relation to the Nazi regime. In other words, despite containing charismatic, traditional, and value rational features, Nazi Germany and Stalin's Soviet Union vested a lot, even if not all, of their authority in law and hence relied on legal-rational legitimacy. This has

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[626] Fraenkel (n 532) 205–206.
[627] Neumann (n 517) 75–85. As cited in Paul Brooker, 'The Nazi Fuehrerprinzip: A Weberian Analysis' (1985) 37 Political Science 50, 63.
[628] See also similar claims in Brooker (n 627) 61. Joseph Nyomarkay, *Charisma and Factionalism in the Nazi Party* (University Of Minnesota Press 1967) 17. As cited in Brooker (n 627) 63.
[629] Robert Koehl, 'Feudal Aspects of National Socialism' (1960) 54 The American Political Science Review 921, 154, 158. As cited in Brooker (n 627) 61.
[630] Brooker (n 627) 71.
[631] David Beetham, 'Max Weber and the Legitimacy of the Modern State' (1991) 13 Analyse & Kritik 34, 37.
[632] Graeme Gill, 'Personal Dominance and the Collective Principle: Individual Legitimacy in Marxist—Leninist Systems' in TH Rigby and Ferenc Fehér (eds), *Political Legitimation in Communist States* (Palgrave Macmillan UK 1982). Cited by Beetham (n 631) 37.
[633] Christel Lane, 'Legitimacy and Power in the Soviet Union through Socialist Ritual' (1984) 14 British Journal of Political Science 207, 211 ff. Cited by Beetham (n 631) 37.
[634] TH Rigby, 'Introduction: Political Legitimacy, Weber and Communist Mono-Organisational Systems' in TH Rigby and Ferenc Fehér (eds), *Political Legitimation in Communist States* (Palgrave Macmillan UK 1982). Cited by Beetham (n 631) 37. While Rigby names this type of authority as additional to the ones outlined by Weber, Weber refers to a similar concept of 'value rationality' in his other work. Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth, Claus Wittich and Ephraim Fischoff eds, University of California Press 1978) 399–400.
[635] Beetham (n 631) 37.
[636] Weber, 'Politics as a Vocation' (n 622) 79.

a lot to do with the fact that the bureaucratic apparatus that could not be legitimised via appeal to tradition, charisma, or goals, had to be backed up by the legal system.

The *Law on the Measures of State Self-Defence* was passed on the 3 July by Hitler, Reich Justice Minister Franz Gürtner, and Minister of the Interior Wilhelm Frick after the Night of the Long Knives, is a particularly vivid example of the legitimating function of evil law. The incredibly concise Law, referring to extrajudicial killings of Hitler's intra-party political enemies by the SS, Security Service, and *Gestapo*, included only one Article, which stated that '[t]he measures taken on June 30, July 1 and 2, 1934 to suppress high and treasonous attacks are legal as state self-defence[637].' Apart from sending a signal of approval to those involved in the Night of the Long Knives and from communicating to the relevant organs of the state that they should not be punished, it is hard to conceive of any other purpose of such a *Law* than to use the legal form to retroactively legitimise the political purge that had taken place days before. As such, it remains a rather rare example of a predominantly legitimating legal provision.

Stalin's Constitution of the USSR (1936) is another, albeit less blatant, example of legitimating rules. Chapter X of that *Constitution* detailed a lengthy catalogue of fundamental rights of Soviet citizens. Moreover, even more strikingly, going beyond the previous RSFSR *Constitutions* of 1918 and 1925 under which electoral rights were denied to former 'exploiting classes[638]', Article 135 of the *Constitution* of 1936 established universal suffrage[639]. Needless to say, the Soviet people did not get what they were promised on paper. One can most clearly see this by juxtaposing the declared personal and political rights with the terror campaigns of 1936-1938. In the first election of 1937 – of the Supreme Soviet of the Soviet Union, the top legislature – the Plenum of the General Committee banned contested elections in the upcoming voting. Despite the previous indication that as many candidates as possible could be freely nominated by citizens and organisations, only one candidate was allowed to stand for each position[640]. Nevertheless, the *Constitution* was important. In his study of *Stalin's Constitution*, Getty emphasised its obvious 'propaganda value[641].' This propaganda was directed both to the

[637] Law on the Measures of State Self-Defence (*Gesetz über die Maßnahmen der Staatsnotwehr*) 1934.
[638] Constitution of the RSFSR (*Конституция РСФСР*) 1918,Article 65; Constitution of the RSFSR (*Конституция РСФР*) 1925,Article 69.
[639] Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936.
[640] See in more detail Getty (n 381) 29 ff..
[641] ibid 19.

inside and the outside of the Soviet Union. Firstly, at home, the *Constitution* served as a yet another proof of the success of Stalin's new 'Socialism in one country' policy and was, at least publicly, received with great enthusiasm by its subjects[642]. Secondly, the *Constitution* was also used to gain support for the Soviet Union from abroad - which was, interestingly, required to counter the rise of another paradigmatically evil regime – Nazi Germany (together with Fascist Italy) – by providing a contrast to Nazi (as well as Fascist) political terror coinciding with the *Constitution's* enactment[643].

In the antebellum United States, the toleration of slavery by the North could be partially explained not just by prudential reasons such as the fear of the breakdown of the Union and Civil War, but also by legal-rational reasons that circle around two legal concepts – federalism and property rights. Firstly, according to this logic, interfering with slavery would have been an audacious and illegal infringement by the federal government of a domain that the *Constitution* did not delegate to it, leaving it to the States as per the 10th Amendment[644]. Secondly, it would have been an encroachment on the property rights of the slaveholders themselves as secured in common law and the 5th Amendment of the *Constitution* – both the Due Process Clause ('[no person shall] be deprived of life, liberty, or *property* [emphasis mine], without due process of law') and the Takings Clause ('nor shall private property be taken for public use, without just compensation')[645]. The two explanations often went together – for an example, see Justice Story in *Prigg v Pennsylvania*, a case affirming the constitutionality of the *Fugitive Slave Act* of 1793: 'The design [of the Fugitive Slave Clause's of the *Constitution*] was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves[646].' Or consider Justice Taney in *Dred Scott*, another piece of the pro-slavery 'anti-canon', on an unsuccessful challenge of an enslaved person living in a free territory to get constitutional protection. Taney said that granting this protection would violate the 5th Amendment's Due Process Clause prohibiting the deprivation of 'life, liberty and property, without due process of law[647].' Taney stated that

[642] Velikanova (n 382) 52–61.
[643] Getty (n 381) 19. See also Velikanova (n 382) 49–52, 61.
[644] Constitution of the United States 1788.
[645] ibid.
[646] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court) 540 (Storey J).
[647] Constitution of the United States 1788, 5th Amendment.

> 'an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property [*i.e.*, an enslaved person – clarification mine] into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law[648].'

Therefore, these parts of the law of the United States were used to justify prolonging slavery, even if they did not mention it directly.

E. Education and propaganda

Kramer writes that 'education and the dispensing of information and advice are legitimate and vital functions to be fulfilled by any decent system of governance[649]' – and, as I will argue, this vitality (albeit not legitimacy) extends to those legal orders that are not decent. This educative function of law – which is not to be confused with legal education or laws about education – was recognised even at the time of the ancients. As Burge-Hendrix notes, according to Plato, Aristotle and Cicero, law was 'necessarily an educator[650]'. As Aristotle argued in the *Nicomachean Ethics*, 'lawgivers make the citizens good by training them in habits of right action[651].' In other words, law helps us become better citizens by compelling us to behave virtuously, which becomes a habit once repeated a sufficient number of times.

Education can therefore be distinguished from coordination and legitimation as explored above. Firstly, to Burge-Hendrix, '[t]here is a difference between simply learning from something and being taught by it – we can distinguish the inadvertent educational effects of law from the idea that a legal system is an educator whose effects are deliberate and intentional[652].' The habits acquired in the process of coordination are akin to the 'inadvertent educational effects' Burge-Hendrix mentions. Education, on the other hand, is a result of a conscious strategy adopted by the lawmaker. Secondly, unlike legitimation, education aims not

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[648] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court) 450 (Taney J).
[649] Matthew H Kramer, *Liberalism with Excellence* (Oxford University Press 2017) 227.
[650] Brian Burge-Hendrix, 'The Educative Function of Law' in Michael Freeman and Ross Harrison (eds), *Law and Philosophy* (Oxford University Press 2007) 245.
[651] Aristotle, *The Nicomachean Ethics* (n 45) 1103b3-6. As cited in Zena Hitz, 'Aristotle on Law and Moral Education' in Brad Inwood (ed), *Oxford Studies in Ancient Philosophy: Volume 42* (Oxford University Press 2012) 265.
[652] Burge-Hendrix (n 650) 245.

to provide additional reasons for action on top of the reasons that already apply to the law-subject but change the latter. In this way, the educational function entails law going deeper, penetrating the law-subject's very psyche. To Aristotle, education 'is the aim of all legislation, and if it fails to do this it is a failure; this is what distinguishes a good form of constitution from a bad one[653].' This habituation can be extended as not just into virtues, but also vices. Therefore, the educational function of law remains relevant even for evil regimes.

The educational function of law in Nazi Germany was particularly vividly exemplified by the *Nuremberg Law for the Protection of German Blood and German Honour*, the application of which fashioned a new sexual morality. As Szobar notes, '[l]egal rhetoric enforced a normative definition of sexuality that was racist and sexually conservative in its implications, condemning as "perverse" all sexuality not designed to produce racially pure offspring within the bonds of marriage[654].' In the courtroom, this ideal was promoted by creating images of Jewish men and women accused of defilement as sexually promiscuous and cunning[655], of Aryan men involved in mixed-race relationships – or even those accused of 'letting' their wives pursue extramarital relations with Jews[656] – as unintelligent and weak-willed[657], and of Aryan women as intrinsically pure, but at the same time similarly corruptible[658]. All these deviations from the Nazi mores were not just punished by law (in the case of male defendants), but also criticised by judges (in the case of both male defendants and female witnesses) in construction of a racialised 'legal narrative[659].'

Similarly, in the Soviet Union, as Berman famously noted, law performed a nurturing function, according to which the law-subject is 'treated less as an independent possessor of rights and duties, who knows what he wants, than as a dependent member of the collective group, a youth, whom the law must not only protect against the consequences of his own ignorance but must also guide and train and discipline[660].' This emphasis on nurturing, according to Berman,

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[653] Aristotle, *The Nicomachean Ethics* (n 45) 1103b3-6. As cited in Hitz (n 651) 265.
[654] Patricia Szobar, 'Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933 to 1945' (2002) 11 Journal of the History of Sexuality 131, 158.
[655] ibid 147–148.
[656] ibid 149.
[657] ibid 148–149.
[658] ibid 149–152.
[659] As I call it, in relation to the Soviet criminal proceedings, in Lukina, 'The Semenchuk Case of 1936' (n 80).
[660] Harold J Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (Rev ed, Harvard University Press 1963) 283.

'presupposes a new conception of man[661].' This 'New Soviet Man' was constructed through various legal means, including the court system – which I will focus on now[662]. Article 3 of the 1938 *Law 'On the Judicial System of the USSR, Union and Autonomous Republics'*, stated that the Soviet court, in addition to deciding cases,

> 'educates Soviet citizens in the spirit of faithfulness to their Motherland and the task of socialism, in the spirit of precise and steady obedience of Soviet laws, careful attitude towards socialist property, honest attitude to state and public duties, and respect for the rules of socialist society[663].'

The timing of this statute coincided with the infamous Stalinist show trials that were the epitome of the educational function of law during the Great Terror, where the judges were aided by the trial participants – including the defendants themselves through forced confessions – to create a legal narrative favourable to the Soviet Union that stated, among other things, how a Soviet citizen ought to behave.

In the antebellum United States, quite curiously, law was concerned not just with the character of enslaved persons, but also with that of slaveholders. Gross points out that in cases where the initial slaveholder was alleged to have made misrepresentations as to whether the slave being sold was a 'good' one, the character of the master was often interrogated since, as aptly put in *Johnson v Wideman,* '[l]ike master like man [is] ...too often the case, in drunkenness, impudence, and idleness[664].' A 'good' slaveholder should have acted with what Genovese called 'paternalism[665]', or assuming the role of a 'prudent father of the family[666].' As Gross reports,

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[661] ibid 284.
[662] I give a fuller account of these in Anna Lukina, 'Legal Nurturing: The Educational Function of Law in the Soviet Union' (2021) 2 (18) The Ideology and Politics Journal 57.
[663] Law 'On the Judicial System of the USSR, Union and Autonomous Republics' (*Закон СССР ' О судоустройстве СССР, союзных и автономных республик'*) 1938.
[664] *Johnson v Wideman* (1839) 24 SCL 316 (Supreme Court of South Carolina), 343. As cited in Ariela J Gross, 'Like Master, Like Man: Constructing Whiteness in the Commercial Law of Slavery, 1800-1861 Bondage, Freedom and the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography' (1996) 18 Cardozo Law Review 263, 264.
[665] Genovese (n 89) 5. Cited in Gross (n 664) 264–265.
[666] Gross (n 664) 272 ff., 285 ff.

> 'Witnesses pointed to, sometimes without even being asked or prodded to do so, certain favourable aspects of the treatment of slaves, such as a sick slave being brought to the plantation house, the employment of good physicians, and good food and work hours for all of the slaves[667].'

However, a 'good' master would also need to 'disciplin[e] his slaves with a firm hand[668]', as '[l]axity by masters was of far greater concern than harshness[669].' A good master had to act not only like a father, but also like a 'statesman'[670]. Moreover, under the law of slavery, slaveholders could not only treat slaves too badly[671], but also too well. Legislation of 'slave states' prohibited teaching enslaved persons how to read or write. The preamble of one of those statutes, enacted in North Carolina in 1831, justified this ban by claiming that 'teaching of slaves to read and write <…> has a tendency to excite dis-satisfaction [*sic*] in their minds, and to produce insurrection and rebellion, to the manifest injury of the citizens of this State[672].' A white man or woman caught teaching enslaved persons was to be fined or imprisoned[673], and non-white, both free[674] or enslaved[675], could also be whipped. Quite ironically, by denying enslaved persons education, the law performed an educational function, creating a model of ideal master-slave relations that would be useful to the slave-holding society.

F. Identity building

(i) In-group

The final function of a legal system I consider is identity-building[676]. Law, like other social tools, can be used to either bring different actors together in a unified society, or, conversely, to distinguish different groupings within it and set them against each other. In cases of evil law both these mechanisms become even more important – as we will see, quite paradoxically, they coexisted and reinforced each other. Firstly, any legal system needs to convince law-subjects

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667 ibid 267.
668 ibid 276.
669 ibid 283 ff.
670 ibid 275 ff.
671 As also seen in the prohibition of murder of slaves by the slaveholders.
672 An Act To Prevent All Persons From Teaching Slaves To Read Or Write, The Use of Figures Excepted 1831.
673 ibid Section 1.
674 ibid.
675 ibid Section II.
676 I thank Dr. Khomotso Mashikaro for raising this point at the Cambridge Legal Theory Discussion Group (February 2022).

to coordinate in pursuit of a common goal. Sharing a common identity is not the only means of doing so, but it provides law-subjects with a reason to set aside their individual prudential reasons and moral convictions against complying with the legal authority's directives. Identity-building via law for the purpose of smoothing legal coordination is particularly important when it comes to evil law which needs to persuade the law-subjects to behave immorally, contrary, at times, not just to critical, but also to positive morality. Of course, law is not the only way of building a common identity, just as law is not the only way to coerce, coordinate, or educate, but it is a particularly efficacious one. One way law can build communal identities is inherent in the nature of law itself as a set of rules enforced in a particular community. Campbell describes this dynamic as follows: '[q]uite apart from the organisational and other instrumental benefits of rules, adherence to the same set of rules is an important bonding mechanism which constitutes membership of a group and gives communal identity to the individuals concerned[677].' This is just as true of evil law as it is of non-evil law. Another way law can build identities is by introducing them into law.

In Nazi Germany, the notion of *Volksgemeinschaft*, or 'people's community', performed this function. It was essentially a utopian promise where everyone belonging to the *Volk*, or the German people, would no longer be divided along social or political lines, producing a single will embodied by the *Führer*. This was not only a part of political rhetoric, but also elevated law to a special status. As Glungler, a Nazi legal theorist, said, '[l]aw's purpose is not to secure the so-called individual sphere and thus private life <…> [t]he law of the state as the foundation of life for the *Volksgemeinschaft* has priority[678].' This tendency was reflected not just in legal theory, but also in legal practice. One relevant example is the *Hereditary Farm Law* (1933)[679]. The law converted over 20% of the land to *Erbhöfe*, hereditary farms that could not be bought or sold (Section IV, §37), but only be passed on to the owner's heirs (as per the procedure in Section III). The *Reichserbhofgesetz* opposed the economic freedom of the farmer and favoured the collective interest of 'preserv[ing] the farming community as the blood-source of the German people' as noted in the preamble. In addition, the unity promised by the *Volksgemeinschaft* was grounded in the exclusion of certain groups – Jews, Roma, homosexuals, and the disabled – and political opponents, such as Communists. For example,

[677] Tom D Campbell, *The Legal Theory of Ethical Positivism* (Routledge 1996) 56–57.
[678] Wilhelm Glungler, *Theorie Der Politik: Grundlehren Einer Wissenschaft von Volk Und Staat* (Voglrider 1941) 301. As cited and translated by Meierhenrich (n 309) 100.
[679] Hereditary Farm Law (*Reichserbhofgesetz*) 1933. For a more extended discussion of the law, see JK Galbraith, 'Hereditary Land in the Third Reich' (1939) 53 The Quarterly Journal of Economics 465.

the *Reichserbhofgesetz* only granted *Erbhöfe* to those of German or 'equal' race (Section II. §13). Thus, the law was mandated to demand this exclusion for the sake of protecting the *Volksgemeinschaft*.

The Stalinist policy of 'socialism in one country' similarly demanded there to be unity among the Soviet people. Vyshinsky, the most influential legal scholar at the time, as well as the infamous prosecutor in the Moscow Show Trials, wrote that, unlike the bourgeois states, where 'allusions to the will of the people served as a screen which veiled the exploiting nature of the bourgeois state', in the Soviet Union, 'there has been formulated among us, a single and indestructible will of the [S]oviet people[680].' This was one of the instances of the 'swing from class discourse to the supranational discourse of *narod* (people)[681]'. However, class divisions still remained. Most strikingly, the very first article of *Stalin's Constitution*[682] read as follows: '[t]he Union of Soviet Socialist Republics is a socialist state of workers and peasants.' Vyshinsky attempted to address the need to reconcile the promotion of universalism with the preservation of class-based politics by stating that '[a]mong us, the will of the working class merges with the will of the entire people <…> [t]his provides the basis for speaking of our [S]oviet socialist law as an expression of the will of the whole people[683].' This move, while inelegant, highlights how social unification and social stratification were not fundamentally opposed in the Soviet context. As in Nazi Germany, this unity demanded that the perceived enemies of the Soviet state be crushed.

In the US, the 1787 *Constitution of the United States* brought the different states together under a single government. While there is nothing sinister about it as such, the desire to create and then maintain a successful Union made the Northern states compromise with Southern states on the issue of slavery both in the original *Constitution* (namely the 'Three Fifths' Clause, the Fugitive Slave Clause, and the Slave Trade Clause[684]), and in subsequent legislative developments such as the federal *Fugitive Slave Acts* of 1793[685] and 1850[686]. In the infamous decision in *Prigg v Pennsylvania* that upheld the first of the *Fugitive Slave Acts* as putting the

[680] Andrey Vyshinsky, 'Fundamental Tasks of Soviet Law' in Hugh W Babb (tr), *Soviet Legal Philosophy* (Harvard University Press 1951) 339.
[681] Velikanova (n 382) 53.
[682] Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936.
[683] Vyshinsky (n 680) 339.
[684] Constitution of the United States 1788, Article I, Section 2, Clause 3; Article IV, Section 2, Clause 1; Article 1, Section 9, Clause 1.
[685] Fugitive Slave Act 1793.
[686] Fugitive Slave Act 1850.

Fugitive Slave Clause into action, Justice Story emphasised the importance of that compromise for forming the Union[687].

(ii) Out-group

Secondly, evil legal systems often need to identify not just an in-group, but also an out-group. The importance of the latter was particularly well captured by Schmitt, who famously argued that the political relation is organised according to two opposing categories – friend and enemy[688]. While, to Schmitt, this is a higher-order political claim that does not always map onto legal distinctions (such as the distinction between a citizen or non-citizen), here I focus on laws that tap into and support that division. Identifying an out-group not only justifies the mistreatment of those belonging to that group, but also strengthens the in-group sense of belonging by creating a sense of a common threat that the community has to be protected from.

In Nazi Germany, as early as 15 September 1935, the *Reichstag* enacted the *Reich Citizenship Law*[689], Article 2(1) of which stated that 'a citizen of the Reich may be only one who is of German or kindred blood, and who, through his behaviour, shows that he is both desirous and personally fit to serve loyally the German people and the Reich.' In the *First Regulation* of November 14, 1935, it was clarified that 'A Jew cannot be a citizen of the Reich. He cannot exercise the right to vote; he cannot hold public office (Article 4(1))'. In a particularly visceral rendering of friend-enemy politics, in 1941 the Nazi government enacted the *Police Decree on the Identification of Jews*[690], 'Jews <…> who have reached the age of six years, [were] forbidden to appear in public without a Jewish star' (§ 1 (1)). The labelling continued even in concentration camps, where different categories of inmates – Jews, homosexuals, political prisoners, criminals and so on – had to wear an identification badge recognising their category. '[That] system of categories,' Sofsky writes, 'acted as a mechanism for differentiation. It

[687] In his words, '[t]he Constitution was presented to the States for adoption with the understanding that the provisions in it relating to slaves were a compromise and guarantee, and, with such an understanding, in every State it was adopted by all of them. Not a guarantee merely in the professional acceptation of the word, but a great national engagement in which the States surrendered a sovereign right, making it a part of that instrument which was intended to make them one nation within the sphere of its action. The provision, then, must be interpreted by those rules of construction assented to by all civilized nations as obligatory in ascertaining the rights growing out of these agreements.' *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court), 630 (Story J).
[688] Carl Schmitt, *The Concept of the Political* (George Schwab tr, University of Chicago Press 1996) 26.
[689] Reich Citizenship Law (*Reichsbürgergesetz*) 1935.
[690] Police Decree on the Identification of Jews (*Polizeiverordnung über die Kennzeichnung der Juden*) 1941.

created distances, intensified antagonisms and drew lines of social demarcation that none could cross[691].'

In a similar manner, the Soviets cared about categorisation of their citizens. Firstly, there was the issue of national identification for the purposes of the persecution of ethnic minorities as potential dissidents as outlined above. Secondly, the Soviets embraced class categorisation as a path to class abolition through the elimination of the bourgeoisie. One's social background was tremendously important for the interaction of the Soviet citizen with the state. In the context of passportisation, this social stratification, as per Baiburin, was reinforced on two levels. First, only those who could be described as having an 'appropriate' background – toilers, white-collar workers (*служащие*), peasants working in collective farms (*колхозы*) and so on – were entitled to have such a passport in the first place[692]. Many others, such as *kulaks*, former members of exploiting classes (*бывшие*), and those who did not work ('*дармоеды*' or 'parasites'), were denied that privilege[693]. Having a passport was essential for living in cities, and the system described above was used to filter out those whom the Soviet state wanted to exclude[694]. Second, social status, just like ethnicity, was recorded in passports, creating an 'official social hierarchy, on top of which were the toilers[695].' Thirdly, an even starker illustration of the Soviet friend-enemy politics was the infamous category of the 'enemy of the people' featured in *Stalin's Constitution*[696] which, in contradiction to its surprisingly liberal bent, stated in its Article 131 that '[p]ersons committing offenses against public, socialist property' are such enemies.

In the antebellum United States, enslaved people were not even regarded worthy enough to be enemies – they were reduced to an even more humiliating role as mere chattels. This was firmly established in the infamous decision in *Dred Scott*, where Justice Taney said, worth quoting in full, that

> '[people of African descent] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or

[691] Wolfgang Sofsky, *The Order of Terror: The Concentration Camp* (William Templer tr, Course Book, Princeton University Press 2013) 123. See generally ibid 117–130.
[692] Baiburin (n 348) 241–242.
[693] ibid 243.
[694] ibid 241.
[695] ibid 242.
[696] Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936.

political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the [person of African descent] might justly and lawfully be reduced to slavery for his benefit <…> [h]e was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it[697].'

4. Conclusion

Overall, I intended to argue that evil regimes have a strong reason to resort to governing through law despite the fetters that embracing legality places on their operation. Firstly, in Section 2, I responded to Simmonds' challenge that adherence to the Fullerian desiderata of legality means limiting some options that an evil regime might wish to employ in service of its goals as it does not allow indiscriminate terror. I argued that evil law, while constraining morally iniquitous regimes, is also instrumentally useful to their goals – from quashing dissent they might face to pursuing their evil projects to sustaining their day-to-day functioning. Secondly, I sought to deepen this argument by pointing out that this minimum self-restraint, in evil legal systems just as much as non-evil ones, performs multiple functions – not just coercion and coordination, but also legitimation, education, and identity building. Both findings show that as onerous as the burden of subscribing to the legal form may be for evil regimes, the use of law is coupled with significant benefits such regimes can reap from the legal form. To make the point in terms of Raz's apt analogy[698], law is akin to a knife in that it can be used both to protect and to kill.

[697] *Dred Scott v Sandford* (1857) 60 US 393 (US Supreme Court) 407 (Taney J).
[698] Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (Clarendon Press; Oxford University Press 1979) 225–226.

VI. Right and Duty in the Face of Evil Law

1. Introduction

Having dedicated the previous discussion to identifying what evil law is, as explored in Chapters II-IV, and how it benefits morally iniquitous regimes, as per Chapter V, I will turn to what we should do in response to it – both in general and when it comes to the specific historical case studies of Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States. My claim is as follows – there is a right, as well as a duty, to resist evil law. This applies to individual evil laws rather than evil legal systems, as the latter may contain neutral or benign laws that one should not disobey.

For preliminary purposes, in Section 2, I will begin with giving an account as to what counts as resisting evil law. I will define resistance to evil law *acting intentionally in order to prevent infliction of intolerable harm (including atrocities) to the victims themselves*. Resistance can be justified – when the perception of harm is true – and unjustified – when it is, conversely, based on false premises.

Section 3 of this Chapter will deal with the right to resist. To prevent any ambiguity, by 'right' I will hence mean a Hohfeldian liberty or privilege, or having no duty not to resist[699]. Resistance takes many shapes and forms and does not have to include disobeying evil law – but the fact that it sometimes does makes it necessary to establish such a right. To do so, I will try to explain three grounds under which there might be an obligation to obey some law – substantive, procedural, and hybrid. The substantive argument is that one ought to obey the law when it enables us to live autonomously by protecting us from peril and helping us make the most of our decision-making capacities for the sake of both ourselves as individuals and the common good. The procedural argument recognises the authority of law if it is democratically enacted. On hybrid grounds, there is a duty to follow the law when it is not just a product of democratic procedures and also satisfies the requirements of participatory equality, human dignity, and autonomy. It will be established that evil law does not pass any of these tests and therefore does not generate an obligation to obey. As a result, there is a right to resist evil law.

[699] Hohfeld moved beyond the dichotomy of 'right' and 'duty', and recognised four pairs of legal relations: right and no-right, privilege and duty, power and disability, and liability and immunity. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (David Campbell and Philip Thomas eds, 1st edition, Routledge 2001) 35. On liberties, see ibid 38 ff.

In Section 4 of this Chapter, I will argue, going even further, that one has not just a right but also a duty to resist evil law. I will make the case for an obligation to resist evil law by appeal to the natural duty to further the realisation of participatory equality, human dignity, and autonomy. Fulfilling this duty demands that action be taken to prevent or mitigate infliction of intolerable harm enabled by evil law.

Finally, in Section 5, I will focus on circumstances under which the right and the duty to resist do not obtain. I argue that the right to resist is limited when resistance involves inflicting intolerable harm (including atrocities) onto another person, while the duty is limited when it involves inflicting such harm onto the agent themselves, in accordance with the definition of evil law developed earlier in this dissertation.

2. Defining Resisting Evil Law

Before proceeding with grounding a right and an obligation to resist, we need to answer what resistance is in the first place. In her work grounding a duty to resist, Delmas remarks that '[r]esistance can designate a broad range of dissident activities, which all express an opposition and/or refusal to conform to a dominant system of values, norms, rules (including law), and practices[700].' Bridging the gap between the literature focusing on either just lawful or just unlawful resistance[701], she argues for a 'capacious concept of resistance encompassing lawful dissent, principled disobedience and, at the limit, revolution[702].' In order to capture what would make these non-conforming activities, whether lawful or unlawful, acts of resistance in the face of an evil legal system, I shall define resistance to evil law as *acting intentionally in order to prevent infliction of intolerable harm (including atrocities) to the victims themselves*.

One key element of this definition is *preventing infliction of intolerable harm (including atrocities) to the victims themselves*, a notion that lies at the centre of the previously given definition of evil in general[703] and of evil law in particular[704]. I focus on this effect of evil law rather than all other possible consequences for the reason that it is central to what makes evil law evil. Affecting implications of evil law other than harm, such as improving its certainty,

[700] Candice Delmas, *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press 2018) 16.
[701] ibid 41.
[702] ibid 40–41.
[703] See Chapter II, Section 2.E.
[704] See Chapter III, Section 4.

will not count as resistance, unless this prevents infliction of the harm in question if not pre-empted by external factors[705]. Consider Lösener campaigning within the Nazi Cabinet to pass a regulation defining who counts as a Jew for the purposes of *Nuremberg Laws*[706]. Lösener engaged in political action to resist the vagueness of the Laws and did in fact make them more determinate. However, his actions can be hardly called resistance as harm to Jews and other groups targeted by Nazis still persisted, and, even worse, the Laws' greater clarity contributed to the Nazis' success in their discriminatory enterprise.

Next, while I use the word '*acting*' in the definition, it includes both acts and omissions. This broader notion of resistance can encompass 'a broad range of dissident activities[707]' that can be subdivided into active resistance, *i.e.* resistance via acting in a certain manner, and passive resistance, or resistance via refusing to act in a certain manner. For instance, in the context of Stalin's Soviet Union, Viola writes how resistance to Stalinist rule was both active – including 'rebellions, mutinies, and riots; demonstrations and protest meetings; strikes and work stoppages; incendiary or oppositional broadsheets (*listovki*), threat letters, and petitions; and arson, assaults, and assassinations[708]' – and passive resistance – such as 'foot dragging, negligence, sabotage, theft, and flight[709].' One can, of course, question Viola's application of this distinction as, for instance, strikes mean refusing to act and theft or sabotage involve acting. Still, Viola nevertheless demonstrates the diversity of resistance tactics in that particular historical context.

The next element of the definition of resistance employed in this dissertation is *intention*. As Delmas put it, '[r]esistance is, by definition, principled—that is, morally or politically motivated <…> [r]esistors basically share an urge to respond to (if not also to change) perceived injustice[710].' Or, as Lai writes, 'being motivated by one's deeply held moral convictions, rather than mere self-interest or recklessness, the breaching of law in an attempt to respond to the political values that otherwise ground the duty to obey the law is distinct from "mere criminality"[711].' Turning to resistance to evil law, while evil law itself can *cause or*

[705] For instance, providing legitimacy for evil regimes, as discussed in Chapter V, Section 4.D.
[706] As discussed in Chapter V, Section 3.C.
[707] Delmas (n 700) 16.
[708] Lynne Viola, 'Popular Resistance in the Stalinist 1930s: Soliloquy of a Devil's Advocate' in Lynne Viola (ed), *Contending with Stalinism: Soviet Power and Popular Resistance in the 1930s* (Cornell University Press 2002) 18.
[709] ibid 19.
[710] Delmas (n 700) 40.
[711] Ten-Herng Lai, 'Justifying Uncivil Disobedience' (2019) 5 Oxford Studies in Political Philosophy 90, 109.

enable the infliction of intolerable harm (including atrocities) on the victims themselves if not pre-empted by external factors both intentionally or recklessly[712], resistance to evil law can only be done with an intention to prevent infliction of harm in question. Actions that prevent or mitigate intolerable harm merely accidentally, such as when an official in an evil legal system does not act in accordance with an evil directive simply because they have forgotten about their duty or misunderstood its demands, cannot be classified as resistance.

Moreover, I have to add that while this intention is relevant, the motive need not be pure – the resisting agent does not have to be solely motivated by the genuine desire to address harm caused by evil law. This will include, for instance, arguing for slavery to be abolished not just because it is harmful to its victims but also because it is economically inefficient. We might perceive this additional focus on economics as morally deficient in comparison to a focus on more humanitarian reasons for the abolition of slavery, but we cannot deny that this intervention qualifies as resistance despite the fact that is driven by mixed motives.

Finally, the definition of resistance does not demand that resistance is in fact justified. Resistance can be misguided, such as when a resisting agent responds to a perceived actual or potential infliction of harm that in fact does not exist. This will still count as resistance, though one would not have a moral right and obligation to engage in it.

3. Right to Resist and Disobey Evil Law

A. Preliminary matters

My first task is to explain why there is a right to resist evil law. Establishing this right is particularly important when this resistance does not limit itself to challenging evil law through legal channels but involves disobeying[713] the law. Thus, one ought to establish that there is a right to disobey evil law, correlative to the assertion of there being no - even *prima facie* - moral obligation to obey evil law as stated in Chapter III. While saying that one has such a right appears to be trivial, discussing *why* it is the case, on the contrary, is of great importance.

[712] As discussed in Chapter II, Section 2.D.(i).
[713] Here, I shall treat 'obedience' as 'conformity' and not 'compliance'. This distinction was explained by Raz. To conform with a reason for a certain act, according to him, means acting this way because of this reason. To comply with a reason for a certain act, on the other hand, means doing so for whatever reason. Raz, *Practical Reason and Norms* (n 25) 178.

Specifically, it helps us determine what is so evil about evil law, which, in turn, will help with discerning the subsequent stronger claim in this Chapter – that there is an obligation to resist evil law. With this goal in mind, in this Section, I will cover reasons why an obligation to obey some laws[714] may arise that are recognised by many thinkers across the jurisprudential spectrum and explain why these reasons do not apply to evil laws.

Here, I will limit myself to only some grounds of this political obligation – others, such as the Rawlsian duty to support just institutions[715], obviously do not apply in the context of evil law. There are three types of reasons as to why one might have an obligation to obey some laws that are relevant to the present inquiry – most lucidly distinguished by Hershovitz –- substantive, procedural, and hybrid[716].

B. Substantive reasons

(i) An argument from order

The first ground for why there might be an obligation to obey some law I would like to focus on I call 'substantive'. This is a ground that, as per Hershovitz, 'confers legitimacy on the basis of content of the directives an authority issues[717].' There are, therefore, ways in which accepting the authority of law is conducive, and not obstructive, to one's autonomy. One, considered here, is that recognising legal authority serves as protection from violence. This argument has a moral and a pragmatic dimension. Morally speaking, we have a Samaritan duty to aid persons in peril at no unreasonable cost to ourselves. Wellman claimed that in order to perform this duty, the state needs to be obeyed[718]. This, however, quite obviously, does not apply easily when it comes to evil law that does not aid its subjects when they are at risk of suffering harm, but, by definition, creates or adds to that harm.

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[714] I do not intend to set out either a general or a presumptive obligation to obey the law, as this kind of obligation, even if it exists, is orthogonal to my exploration of evil law.
[715] John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971) 99.
[716] Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 Legal Theory 201, 212.
[717] ibid.
[718] Christopher Heath Wellman, 'Toward a Liberal Theory of Political Obligation' (2001) 111 Ethics 735; Christopher Heath Wellman, 'Liberalism, Samaritanism, and Political Legitimacy' (1996) 25 Philosophy & Public Affairs 211. Christopher Heath Wellman and John Simmons, *Is There a Duty to Obey the Law?* (Cambridge University Press 2005) 3–90. As noted by Delmas. Delmas (n 700) 140.

Prudentially speaking, recognition of an obligation to obey some laws is crucial to prevent what Hobbes described as war of all against all – a state of nature under which no one will be safe from others' violence[719]. This equally sits uneasily with evil law that that puts its victims in a vulnerable state comparable with the anarchy proponents of this view decry. Those victimised by evil law often face existential threats that, to Hobbes, the state should prevent and not create or compound. One can argue, of course, that living under law's guidance is better than complete chaos. For instance, Rundle argued that during the early Nazi anti-Jewish legal program, due to maintaining congruence between law and its administration, 'a degree of self-directed agency, choice, and capacity for life planning was maintained[720].' Still, I believe that while a similar argument might be true of law that is merely unjust, when it comes to evil law, the harm to those victimised by evil regimes like the one Rundle describes is so extreme that improved certainty is cold comfort. It would be analogous, as Kramer notes in his critique of Fuller, to a bank robber offering a 'free choice' between handing them the money or being shot[721]. There is little difference between being victimised through extralegal terror and through law – given that legal techniques, due to their efficacy to evil regimes, may further increase the suffering of victims, as discussed in Chapter V.

(ii) An argument from service

Turning to a different argument, complying with the law may be conducive to the law-subject in question better conforming to reasons that apply to them. This argument was most famously made by Raz, who stated that authority is 'not a denial of people's capacity for rational action, but simply one device, one method, through the use of which people can achieve the goal *(telos)* of their capacity for rational action, albeit not through its direct use[722].'

Raz seeks to respond to anarchists like Wolff who see a fundamental contradiction between authority and autonomy. Wolff writes that there is a conflict between autonomy, 'the refusal to be ruled', and authority, 'the right to rule[723].' To be truly responsible for their actions, a person ought to be autonomous, or to make decisions for themselves without outsourcing this task to others. As Wolff says, '[h]e may do what another tells him, but not *because* [*emphasis in the*

[719] As in Hobbes, *Leviathan* (n 517).
[720] Rundle (n 539) 119, 121–122.
[721] Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (n 20) 59. Generally, see ibid 58 ff.
[722] Raz, 'The Problem of Authority: Revisiting the Service Conception' (n 606) 1017.
[723] Robert Paul Wolff, *In Defense of Anarchism* (University of California Press 1998) 18.

original] he has been told to do it[724]', which one does if one accepts authority, including state authority. In the legal context, an autonomous person 'will deny that he has a duty to obey the laws of the state *simply because they are the laws* [*emphasis in the original*][725].'

In response to Wolff's argument, Raz argues, *inter alia*, that the authority is justified when 'the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly[726]' (what is also known as the Normal Justification Thesis). There are two categories of examples of how this thesis plays out. One of them deals with when the authority's judgment is superior to that of its individual subject in that it can exceed the latter in knowledge, be less biased and prone to passions, have more available resources, or demonstrate better capability at indirect strategy or more complex planning[727]. The other category of examples expanding on the Normal Justification Thesis deals with situations when the authority is not cognitively superior to its subjects but should nevertheless be deferred to in order to solve game-theoretical coordination problems – games in which players win if they choose to do the same thing, regardless of what it might be. In this context, 'deciding for oneself what to do causes anxiety, exhaustion, or involves costs in time or resources[728]', so there should be some indication as to how to behave. Therefore, if an authority – including a legal authority – satisfies the Normal Justification Thesis, one ought to defer to its instructions, that is, to act in the way indicated by the authority because the authority so indicates[729].

I shall reject an observation that one of the problems with Raz's argument is that it does not distinguish between just and unjust (let alone evil) law. This is because some law-subjects are motivated by considerations that are not good or benign but involve imposing harm on others – such as destruction of groups that are perceived as dangerous or otherwise undesirable. For instance, May argues that the only check Raz imposes on the authority's reach is the

[724] ibid 14.
[725] ibid 18.
[726] Joseph Raz, *The Morality of Freedom* (Oxford University Press 2003) 53.
[727] ibid 75.
[728] ibid.
[729] Raz's conception of authority was continuously criticised by thinkers such as Darwall, Hershovitz, Perry, Himma, Quong, and Kramer. For an overview, see Kenneth Ehrenberg, 'Critical Reception of Raz's Theory of Authority' (2011) 6 Philosophy Compass 777. See also Kramer, *Liberalism with Excellence* (n 649) 193 ff. and Matthew H Kramer, *Freedom of Expression as Self-Restraint* (Oxford University Press 2021) 171 ff. This will, however, not be discussed in this thesis for the reason of brevity.

Dependence Thesis, the notion that '[t]he directives issued by the authority should be based (at least in part) on reasons which apply to the subjects of those directives in the circumstances covered by the directive[730].' This check, to May, is merely a test of 'proper pedigree[731]', as 'a dependent reason is not one which does in fact reflect the balance of reasons on which it depends: it is one which is meant to do so[732].' While May's statement can be read as just covering cases where the authority may get the reasons that apply to its subjects wrong without any maliciousness in play, it can be extended to the case of evil directives, as the pedigree test does not rule them out either.

However, I submit that this extension of May's argument is wrong as Raz's argument should not be conflated with one based on self-interest. May himself admits that an authoritative directive needs at least to *attempt* to be based on reasons that independently apply to the addressee(s) of the directive[733]. For example, May talks about a directive procured by bribery as failing to satisfy the Dependence Thesis[734]. The same would apply to evil law. The sheer irrational will to harm certain individual groups does not make a reason. And, more strikingly, even if there is a rational prudential reason to cause such harm – such as that one will benefit from it – other reasons may include countervailing considerations. These can be both prudential and, more importantly, moral. If these reasons are ignored, the directive issued by the purported authority will not pass the Dependence Thesis test. As a result, Raz's service conception imposes fetters on the reasons of action that can ground legal authority's legitimacy. Accepting the Normal Justification Thesis as a ground for an obligation to conform with law means that claims to authority will be unjustified when it comes to some unjust – and even more so – to evil laws.

(iii) An argument from the common good

The final argument for why one should obey some laws is that following legal directives might be necessary for pursuing the common good. It dates back to the classical natural law tradition.

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[730] Thomas May, 'On Raz and the Obligation to Obey the Law' (1997) 16 Law and Philosophy 19, 26.
[731] ibid 27.
[732] Raz, *The Morality of Freedom* (n 726) 41. As cited in May (n 730) 27.
[733] May (n 730) 26–27.
[734] ibid 26.

For example, Aquinas described law as 'an ordinance of reason for the common good[735], or, as Goyette put it, 'a good that is one in number and is able to be shared by many without being diminished[736].' This common good consists of two elements – peace, both between the community members and in their mind[737], and justice, or rendering each other their due[738]. These values matter not only for their own sake but are important for 'ordering and directing men towards the good life, the life of virtue lived in common with other members of the city (*civitas*)[739].'

Human or positive law plays a special role in securing the common good – Aquinas even goes as far as saying '[i]n order that man might have peace and virtue [justice], it was *necessary* [emphasis mine] for laws to be framed[740].' This happens in two ways. Firstly, law acts to stop those who are prone to vice – an inescapable element of human society after the Original Sin – by stopping them from acting on their immoral dispositions for the sake of others and themselves – as they become more virtuous as a result of being subject to legal coercion[741]. Secondly, it acts to coordinate virtuous people's actions in approximating moral perfection. To Aquinas, positive (or human law) includes not just rules derived from natural law as 'a conclusion from premises' (for instance, that 'one must not kill'), but also rules derived 'by way of determination of certain generalities' or *determinationes* (say, 'the law of nature has it that the evil-doer should be punished, but that he be punished in this or that way, is a determination of the law of nature')[742]. *Determinationes* are needed because 'the general principles of the natural law cannot be applied in the same way on account of the great variety of human affairs[743]' and hence a certain specification of them is required 'to respond to specific coordination problems of communal life[744].' Therefore, Aquinas makes a rather compelling

[735] Aquinas (n 18) Part I-II, Q 90, A 4. The following discussion of Aquinas has been borrowed from my argument in Lukina, 'Angels, Demons, Us' (n 118).
[736] John Goyette, 'On the Transcendence of the Political Common Good: Aquinas versus the New Natural Law Theory' (2013) 13 The National Catholic Bioethics Quarterly 133, 138.
[737] Aquinas (n 18) Part II-II Q96 A1.
[738] ibid Part II-II Q58 A1.
[739] Goyette (n 736) 141.
[740] 'In order that man might have peace and virtue, it was necessary for laws to be framed.' Aquinas (n 18) Part I-II Q95 A1.
[741] ibid.
[742] ibid Part I-II Q95 A2.
[743] ibid Part I-II Q95 A2 ad.3. See also ibid Part I-II Q91 A3 ad.1.
[744] Finnis, *Natural Law and Natural Rights* (n 14) 28. See also John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1998) 265. See also Goyette describing the same rationale in Goyette (n 736) 143–144.

case as to why human law's authority is necessary for the attainment of the common good for all. Finnis went even further, claiming that there is a presumptive, and not just occasional, obligation to obey the law. In doing so, he built on Aquinas, arguing that 'the stipulations of those in authority have presumptive obligatory force <…> because of what is needed if the common good is to be secured and realized[745].'

Accepting Aquinas's and Finnis's argument means not extending the obligation to obey the law to laws that are contrary to the common good. This was reinforced by the natural law tradition's treatment of unjust law that is defective in that way. Even if we do not share Finnis's disposition that unjust law is not law *simpliciter* or in the primary sense of the word, as has been explored above in some detail[746], we may still agree with him that it does not 'bind in conscience[747].' The foregoing applies, with an even greater force, to evil law at the centre of this dissertation. Aquinas admits that unjust law can be binding when it is necessary 'in order to avoid scandal or disturbancee' or for the sake of preserving the peace element of the common good[748]. Similarly, Finnis writes about a situation when one's disregard of an unjust law will undermine the overall respect for law in general, including just laws. In this scenario, he says, there will be a moral reason to obey the law in question, although it would stem not from law's authoritativeness *qua* law, but from additional moral considerations[749]. However, even this secondary ground of obligation is inapplicable to evil law, since the damage such law causes to the common good is so high that preserving the peace is not worth it. This observation dovetails with the distinction between merely unjust and evil law that I expressed earlier in the dissertation[750], namely that only the former and not the latter creates *prima facie* reasons for obeying the law that might outweigh the countervailing considerations. In case of evil law, as these reasons, a calculation of the kind that Aquinas or Finnis make is not possible.

[745] Finnis, *Natural Law and Natural Rights* (n 14) 359. See also S Aiyar, 'The Problem of Law's Authority: John Finnis and Joseph Raz on Legal Obligation' (2000) 19 Law and Philosophy 465.
[746] See Chapter IV, Section 3.B.
[747] Aquinas (n 18) Part I-II Q96 A4.
[748] Aquinas (n 18) Part I-II Q96 A4. As interpreted by Keith D Wyma, 'When and How Should We Respond to Unjust Laws? A Thomistic Analysis of Civil Disobedience' (2014) 43 Christian Scholar's Review 157.
[749] Finnis, *Natural Law and Natural Rights* (n 14) 361 ff.
[750] See Chapter III, Section 4.

C. Procedural reasons

Another way in which we can argue that there is a right to disobey an evil law is by pointing out that it does not satisfy the criteria for legal authority demanded by the procedural argument for obedience. The procedural theory of legitimacy, concerned with *how* and not with *what* the authority decides, was particularly strongly formulated in Hershovitz's response to Raz. Hershovitz argued that political authority is different from the authority possessed by experts in the following way. While it does not matter to us when it comes to experts what procedure of decision-taking is used as long as the decision-makers have expertise, we care about the way governments make their decisions[751]. More specifically, we want authoritative directives to be issued democratically – we want them to be made, as Hershovitz points out, through the 'rule by the people[752]' or 'a class of political systems that are participatory, where each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy[753].' While some may argue that decisions made democratically are valuable only insofar as they are authoritative in tsubstantive sense[754], to Hershovitz democracy is valuable in itself and not just instrumentally. Firstly, democratic procedures instantiate a form of procedural justice as they allocate power to make decisions fairly[755]. Secondly, seeking democratic input conveys 'respect for the dignity of people as rational agents[756].' Thirdly and finally, democracy enhances autonomy as it allows people to make their own decisions on how to order their lives[757], although, as will be shown later, this is not necessarily applicable to political minorities.

How does the foregoing apply to evil law? Obviously, many of the instances of evil law considered in this thesis would fail the procedural legitimacy test as they were not democratic. Nazi Germany and Stalin's Soviet Union were totalitarian regimes that did not pass Hershovitz's test as the power to make laws was located not with the people or their elected representatives, but with the governing parties and their leaders. In addition, any political

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[751] Hershovitz (n 716) 213.
[752] ibid.
[753] ibid.
[754] See, for instance, Raz's notion that '[democracy] relies, for its legitimacy, on its ability to deliver sound decisions.' Joseph Raz, 'Liberalism, Scepticism, and Democracy', *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1995) 117. Cited in Hershovitz (n 716) 218–219. This reflects Raz's more general moral perfectionism as criticized by Kramer. Kramer, *Liberalism with Excellence* (n 649) 227 ff.
[755] Hershovitz (n 716) 214.
[756] ibid.
[757] ibid 213–214.

activity of the citizens that deviated from the official governmental line was banned and penalised. Even though the Nazi Party and Hitler came into power partly by manipulating Weimar Germany's democratic procedures, as the Party had a plurality at Reichstag elections in 1933, and Hitler was appointed Chancellor before he assumed dictatorial rule by relying on vast emergency powers embedded in Article 48 of the *Weimar Constitution*, one can hardly call them the possessors of democratic legitimacy. Firstly, one can argue that the Nazis abused the democratic process, going beyond what the democratic procedure intended. Secondly, the new Nazi government totally abandoned even the pretence of democracy as they started to rule.

The same applies, with an even stronger force, to Stalin and the Communist Party under him, who never participated in a genuine democratic process. Stalin succeeded Lenin while usurping his power as a General Secretary of the Communist Party, the position that was *de jure* not even governmental, let alone democratically elected. In 1937, the first elections to the new legislative organ created by the 1936 *Stalin's Constitution*, the Supreme Soviet, were announced. But these elections were not even worthy of being called 'elections' in the first place – the candidates ran unopposed and the voters were clearly intimidated by the atmosphere of the Great Terror[758]. Stalin himself never bothered to run for office even in such conditions. As a result, even the minimum of procedural legitimacy was not fulfilled.

However, it would be wrong to conclude that the problem of evil law can arise only in non-democratic political regimes. It is conceivable that a democratic state might enact laws that are evil. Studying the regime of slavery in the antebellum United States presents this kind of challenge. Unlike the other two archetypes of evil legal systems at the centre of my thesis, the antebellum United States was close to being a democratic country, especially in the context of the time. The United States was not governed by a totalitarian leader, but by elected officials, and permitted ordinary citizens to engage in political deliberation – both within and outside state institutions – as well as to vote. Still, one can wonder whether this legal system satisfied Hershovitz's criteria. To discriminate against certain groups within the democratic process and to exclude them from the democratic process violates justice, human dignity, and autonomy all at once. Such violations took place in the antebellum United States, where not everyone could 'participate <…> in the creation of government and policy[759].' Most strikingly, of course,

[758] Getty (n 381).
[759] Hershovitz (n 716) 213.

slaves, the main victims of the regime, were excluded from the political process as they were not even considered full-fledged citizens. In addition, women, non-land-owning white men (a restriction that gradually fizzled out by the time of the Civil War), and non-Christians were also denied suffrage. It is on this account that one could claim that the law of slavery did not possess procedural legitimacy. The groups that were excluded from suffrage could not be bound by the law of the land as they did not have a part in making it.

Finally, even if the concern about disenfranchisement is offset, I would still be wary of relying on the procedural argument too strongly. One can imagine a state that is more democratic than the antebellum United States and that is still oppressive to minorities for the simple reason that they do not hold enough political power. Turning to a famous thought experiment, the purely procedural criteria of legitimacy would not stop the Parliament from enacting law that authorises and requires the murder of all blue-eyed babies[760] – although it is unlikely that such a law would ever pass. Or, in Christiano's more plausible example, we ought to consider '[h]ow can we countenance a democratic choice to introduce slavery for those who are among the minority[761].' The claim that such laws should have to be obeyed just because they were enacted through the democratic process is implausible. As Dworkin states, any strictly majoritarian conception of democracy must fail, since democracy itself must be justified by appeal to substantive considerations such as the value of equality. As a result, democratic procedures cannot legitimate decisions that fragrantly violate those values[762]. Thus, the purely procedural argument for an obligation to obey the law is deficient and should be supplemented by substantive considerations. A more sophisticated proceduralist will adopt a hybrid argument and argue that democratically enacted law is binding, but only presumptively, that is, as long as it does not contravene the relevant substantive fetters.

D. Hybrid reasons

(i) Introductory remarks

As a result, I need to set out to explain why a stronger, hybrid, argument for why some law is authoritative likewise could not apply to evil law. The hybrid argument occupies a middle

[760] Leslie Stephen, *The Science of Ethics* (GP Putnam's Sons 1907) 137.
[761] Thomas Christiano, 'The Authority of Democracy' (2004) 12 Journal of Political Philosophy 266, 287.
[762] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1999) 18–19.

ground between substantive and procedural theories of legitimacy when it comes to framing a right to disobey evil law. It combines the considerations expressed in both the substantive and procedural views. Taking the procedural argument as a starting point, it claims that there will be an obligation to obey the law only if laws are made democratically and if they satisfy certain substantive moral conditions. In choosing which substantive requirements to consider, I shall build on an approach suggested by Christiano, who argued that 'limits to democratic authority can be derived from the same principle that underlies democratic authority[763].' While Christiano grounds these limits in participatory equality[764] (what Hershovitz would call 'justice[765]'), they can also be drawn from other ways in which we might justify democratic legitimacy – including those discussed above in the exposition of Hershovitz: human dignity and autonomy[766]. As I will argue, evil law fails any plausible version of a hybrid test and can thus legitimately be disobeyed.

(ii) Participatory equality

While evil laws may be passed in democratic ways, they by their very nature violate some of the values, outlined by Hershovitz[767], we ascribe to democracy. Firstly, evil law, in flouting democracy, may be detrimental to participatory equality and justice. The regimes surveyed in this dissertation tended, as identified above, to deprive minorities and, in the cases of Nazi Germany and Stalin's Soviet Union, the citizens at large of involvement in lawmaking. What is more, those subjected to actual or potential intolerable harm would be less able or wholly unable to participate in the decision-making affecting their lives on an equal basis, even if they were formally granted some semblance of equality of participation in the political process. If the majority in the democratic process threatened even rights of a minority that have nothing to do with political representation, that minority may still be disempowered and their whole livelihood – and sometimes their lives themselves – might be put at risk. While the surveyed evil regimes are, at best, imperfectly democratic, one can nevertheless imagine an evil regime that can crush the political aspirations of minorities without depriving them of suffrage.

[763] Christiano (n 761) 287.
[764] ibid 287 ff.
[765] Hershovitz (n 716) 214.
[766] ibid 213–214.
[767] ibid.

(iii) Dignity

Secondly, as Dworkin emphasised, a preferable conception of democracy should not be purely procedural, but make sure 'that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community with equal concern and respect[768].' Elaborating on this, Hershovitz underscores the importance of dignity, defining it as one's status as a 'rational agent[769]' 'in their own self-government[770]'. By *causing or enabling the infliction of intolerable harm (including atrocities) to the victims themselves*[771], evil law is detrimental to this dignity, as subjecting someone to actual or potential intolerable harm is at odds with treating them as someone whose rationality should be respected. As has previously been discussed[772], the measure of harm that is one of the keys to identifying evil law and distinguishing it from unjust law is closely tied to the violation of one's self as opposed to just one's interests. This violation can be traced in the historical examples of evil law considered in this dissertation. First, attempts to exterminate perceived political enemies and marginalised groups took place in both Nazi Germany and Stalin's Soviet Union. Extermination was not part of the agenda in the antebellum United States as slaves were considered valuable economic assets. Nevertheless, the law sometimes turned a blind eye to harming, and sometimes even to killing, of enslaved people as long as the acts in question could be justified with reference to legitimating purposes such as 'rebellion' or 'moderate correction'.

Second, other forms of harming those targeted by evil law such as torture broadly speaking, including, *inter alia*, mutilation, sexual violence, and imprisonment in dire circumstances, were characteristic of all the surveyed examples of morally iniquitous legal systems. From Nazi concentration camps to Stalinist Gulags to slave plantations, those marginalised by these evil regimes faced significant dignitary harm inflicted through physical and mental suffering.

Third, and finally, one's dignity could be harmed not only by physical acts but also by discriminatory treatment on its own. Being excluded from various spheres of everyday life (including political processes) as well as lacking protections the law affords others simply by virtue of one's identity is in itself harmful to one's dignity. Take, for instance, the *Nuremberg*

[768] Dworkin, *Freedom's Law* (n 762) 17.
[769] Hershovitz (n 716) 214.
[770] ibid 212.
[771] As per the definition of evil law in Chapter III, Section 4.
[772] See Chapter II Section 2.D.(ii).

Law banning Jews from being civil servants[773], the denial of the right to reside in big cities in Stalinist times to certain categories of individuals[774], and the position of a slave as someone who is not fully human in the sense of being deprived of rights and powers characteristic of ordinary law-subjects[775] in the antebellum United States. To conclude, evil laws do not create an obligation to obey as they damage the dignity of their victims.

(iv) Autonomy

Thirdly, evil law undermines autonomy, as grievously endangering someone will limit their ability to make fully free decisions, both with regard to participation in the political process – as explained above – and with regard to ordinary choices one can make in everyday life. Evil law can impede these processes in three ways.

First, evil law might limit the choices one has by discouraging certain acts either through credible threats of harm or by the refusal to offer legal protections. This applies both in the context of morally neutral choices and in the context of morally beneficial choices. As an example of the former, take the 1935 Nazi *Law for the Protection of German Blood and German Honour* which annulled existing marriages of 'Aryans' to Jews and prohibited entering into such marriages as well as being involved in extramarital miscegenation[776]. With one's family and sexual life being, to many, the primary stage on which autonomy plays out, this limit on one's ability to choose their partner was particularly stark. The same applied to the prohibition on slaves to enter marriages altogether[777]. While no such provisions existed in Stalinist times, it is possible to make an analogy with the legal disabilities incurred by the families of the 'enemies of the people'[778] that acted as incentives for them to denounce their spouses or parents. Moreover, evil law restricted morally beneficial choices, including various forms of what I will call resistance to evil law – both from the inside and from the outside. One

[773] Law for the Restoration of the Professional Civil Service (Civil Service Law) (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) 1933.
[774] Instructions on Issuing and Registering Passports in Moscow, Leningrad and Kharkiv, in a 100-Kilometer Strip around Moscow and Leningrad and in a 50-Kilometer Strip around Kharkiv (*Инструкция о выдаче и прописке паспортов в Москве, Ленинграде и Харькове, в 100-километровой полосе вокруг Москвы и Ленинграда и в 50-километровой полосе вокруг Харькова*) 1933. *Cited in* Baiburin (n 348) 103–107.
[775] Stampp (n 89) 192–197.
[776] Law for the Protection of German Blood and German Honour (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*) 1935, Articles 1 and 2.
[777] Stampp (n 89) 198. See further Goring (n 93).
[778] Operational order of the NKVD of the USSR No. 00486 'On the Operation to Repress the Wives and Children of Traitors to the Homeland' (*Оперативный приказ НКВД СССР № 00486 'Об операции по репрессированию жен и детей изменников родины'*) 1937.

example from the Nazi era was the *Law Against the Formation of Parties* (specifically Article 2 thereof) that provided for imprisonment of those 'undertak[ing] to maintain the organizational cohesion of another political party [other than the NSDAP – clarification mine] or to form a new political party[779].' Or one can turn to Stalin's persecution of his numerous – perceived and real – political opponents by the use of the infamous 'counter-revolutionary' Article 58 of the Criminal (or Penal) Code of the RSFSR 1926[780]. Another good illustration is the prohibition on intervening with the capture of a runaway slave in the *Fugitive Slave Acts* in the antebellum United States[781].

Second, evil law might create a general sense of dread that incapacitates those subject to evil to act in the way they desire by fear of intolerable harm. A particularly striking example is what Primo Levi described as the creation of 'gray zones' – when prisoners at Nazi concentration camps were forced to inflict intolerable harm on other inmates under the threat of punishment[782]. Some of them even performed that role as official prisoner-guards, or *Funktionshäftling*, or, as they were known pejoratively, *kapos*. There were no explicitly stated laws motivating them to behave in that way, yet the very creation of the concentration camps by itself perpetuated this dynamic. The same can be said not just about similarly situated Stalinist Gulags, where some prisoners exercised a *de facto* brutal rule over their fellow inmates, compounding their suffering[783]. Another example from that era is the frenzy that spearheaded a wave of personal denunciations among the general populace, turning members of the public, of whatever social standing, against each other[784]. Moreover, some slaves were equally forced by their circumstances to be subservient to the slaveholders and even acted as overseers on plantations.

Third, if one is subject to harm, they might be incapacitated from living a normal life. Victims of Nazi and Stalinist terror, as stated just above, often faced extreme physical harm and psychological trauma that limited their life choices.

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[779] Law Against the Formation of Parties (*Gesetz gegen die Neubildung von Parteien*) 1933.
[780] Criminal (Penal) Code of the RSFSR (*Уголовный кодекс РСФСР*) 1926.
[781] Fugitive Slave Act 1793, Section 4. Fugitive Slave Act 1850, Section 7.
[782] As described in Primo Levi, 'The Gray Zone', *The Drowned And The Saved* (Abacus 2013).
[783] As mentioned in Mark Vincent, 'Cult of the "Urka": Criminal Subculture in the Gulag, 1924-1953' (University of East Anglia 2015) 17. See further Mark Vincent, *Criminal Subculture in the Gulag: Prisoner Society in the Stalinist Labour Camps* (1st edition, Bloomsbury Academic 2020).
[784] See more in Fitzpatrick (n 370) 833–834.

4. Obligation to Resist Evil Law

A. Introductory remarks

It has been established that standard arguments for obeying the law do not apply when the law is particularly morally iniquitous. But is there a duty to resist evil law? Delmas points out that such a duty has long been recognised by political activists such as Henri David Thoreau, Mahatma Gandhi, Martin Luther King, Emmeline Pankhurst and others[785] and tries to provide a principled basis on which to explain this intuition. She says that '[her] account could be seen as either an alternative to or an extension of defences of the duty to obey the law[786].' I shall therefore further build on Delmas' theory and propose reasons why one has a duty to resist evil law that can be matched to the three values, discussed in the previous Section, invoked by Hershovitz to ground an obligation to obey some law: participatory equality (or justice), human dignity, and autonomy[787]. It will be argued that since there is a natural duty to support these values[788], there is an obligation to resist evil law.

B. Participatory equality

The first value I shall examine is participatory equality. If one wants to truly advance participatory equality, one needs to reassess one's rights and obligations with regard to laws and legal systems that violate this principle. I agree with Delmas that 'many democratic states' institutions and procedures are insufficiently egalitarian, and shaped by unequal power <…> [they give] citizens reason to scrutinise the content of these procedures' outcomes (rather than accepting blindly their supposed content-independence), and to include consideration of other reasons for action besides the one provided by the law (thereby challenging their preemptiveness)[789].' Even more so, when it comes to regimes that are not democratic and hence illegitimate, she claims that '[t]he central political obligation of citizens in such states is to resist [their] illegitimate authority—be it autocratic or colonial—and establish in its place a government based on self-determination[790].' Building on Delmas, I suggest that one should resist evil law where it undermines the principle of participatory equality.

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[785] Delmas (n 700) 5 ff.
[786] ibid 11.
[787] Hershovitz (n 716) 213–214.
[788] In Rawlsian terminology, natural duties are 'duties that apply to us without regard to our voluntary acts [and] <…> have no necessary connection with institutions or social practices'. Rawls recognises a number of such duties, including, most notably, a duty to support just institutions. Rawls (n 715) 98 ff.
[789] Delmas (n 700) 86–87.
[790] ibid 105.

The lack of participatory equality can be a pressing concern motivating resistance to evil law on the part of those disenfranchised by an evil regime and others. As noted before[791], political representation was curtailed in all three test cases considered in this dissertation. With regard to the totalitarian regimes of Nazi Germany and Stalin's Soviet Union, this representation was *de facto* stripped from everyone. There were no elections in Nazi Germany past 1933, and elections conducted in the Soviet Union were democratic in name only as the two dominant parties were not contested. When it comes to the democracy, albeit flawed, of the antebellum United States, participation in the political process was significantly restricted to certain groups, with women, non-land-owning white men, and, of course, slaves denied the vote.

Therefore, the subjects of the evil regimes explored here – both those who did not have political representation and those not affected by the disenfranchisement but nevertheless sympathetic to the plight of their fellow citizens who were – not only had a good reason to engage in resistance to fight for their or others' enfranchisement, but an imperative to do so.

C. Dignity

Another reason why we should resist evil law is that evil law violates its victims' dignity. As per Delmas's elaboration of this argument, when faced with an institution (such as, for the purposes of this dissertation, law) that does not treat some people as 'equal and valuable members of their community[792]', one has four reasons to resist (or purposes of resistance): rectification (fixing flawed institution), communication (publicly condemning it), assertion (asserting one's dignity), and solidarity (expressing solidarity with the oppressed)[793]. While rectification is the most direct way to prevent the infliction of intolerable harm if not pre-empted by external factors, the rest of the purposes of resistance may also be conducive to alleviating the plight of the victims of evil law. Therefore, referring to the concept of dignity provides a moral reason to resist evil law. This dignity-based explanation of a duty to resist applies in two situations – when protecting the dignity of others and the dignity of oneself.

[791] See Section 3.C.
[792] Delmas (n 700) 176.
[793] ibid 177.

The first way of conceptualising resistance to evil law through dignity is rather straightforward and can be grounded in the Samaritan duty. This duty, Delmas argues, 'may obligate one to protest injustice or break unjust laws, under certain conditions, when unjust laws, institutions, and practices endanger people, by prohibiting Samaritan rescues or facilitating the incidence of violence on members of a social group[794].' The Samaritan duty, while being an argument of its own, also reflects a tail end of protection of another's dignity, applying when the dignity violations are so great that they represent a threat to their victims' existence. Just as one would judge someone for not saving a drowning baby – a classic illustration of Samaritanism – the same can be said, albeit with some qualifications discussed below[795], about not shielding a Jewish civilian like Anne Frank under Nazi occupation to save them from persecution, failing to interfere when someone is wrongly accused of crimes against the state in Stalin's Soviet Union, and stopping a *posse* from capturing a fugitive slave in the antebellum United States. In all these cases, not resisting the law will lead to another's dignity – and even their life – being endangered.

However, turning to the second formulation as to the relevance of dignity, what is unusual about Delmas's account is that she goes beyond the original boundaries of Samaritanism as identified by Wellman, stating that this obligation extends from resisting others' mistreatment to resisting one's own mistreatment. The goals mentioned above may create reasons for resisting evil that might apply to privileged members of society, oppressed members of society, or both[796]. Indeed, as stated just above, asserting one's own dignity is an important explanation for why one ought to resist evil, which specifically motivates resistance by the downtrodden[797]. This even greater extension of Samaritanism seems to be a welcome addition as, as per Boxill, protest, even in dire conditions with no prospect of succeeding, is necessary to fulfilling the duty of self-respect one owes to oneself[798]. Boxill mostly focuses on the subsequent debate on civil rights between Washington and Dubois, but occasionally references the antebellum era. Indeed, he argues that when a slave acts with servility, even if this servility is only a pretence, it is detrimental to their self-respect unless it somewhat 'betrays him[799].' Similarly, the actions of *Funktionshäftling* or, more colloquially, *kapos*, prisoner guards in Nazi concentration

[794] ibid 140–141.
[795] Section 5.
[796] Delmas (n 700) 177.
[797] ibid.
[798] Bernard R Boxill, 'Self-Respect and Protest' (1976) 6 Philosophy & Public Affairs 58. As cited in Delmas (n 700) 186.
[799] Boxill (n 798) 68.

camps, as well as grovelling apologies issued by the defendants in Stalinist show trials might provoke the same level of moral condemnation.

D. Autonomy

Delmas does not address autonomy head on when it comes to her discussion of an obligation to resist injustice, however, one can build on her account by indicating that resisting evil law can serve this value. Autonomy is not just something that can be used to justify following the law, but also a value that can pull us in the opposite direction. I shall argue that resisting evil law means fully realising one's moral potential by thinking for oneself and using this critical capacity to protect one's own or others' equality and dignity.

Firstly, while doing so one demonstrates that one's allegiance to law is not blind and that one is able to make a decision to rise against it if one believes that it is evil, asserting one's status as an autonomous agent who cannot be subjugated. In this case, one escapes the trap of uncritically accepting law as a given, particularly hazardous when it comes to evil law. This is the danger that Wolff warned against[800]. While it has been argued that recognising law's authority often does not hinder but enhances one's autonomy, certain lessons can nevertheless be drawn from Wolff's argument. Whether it is for the reason of protection of others or oneself, the ability to resist laws that one perceives as evil by changing or disobeying them is critical. This is one of the reasons why many show justified distaste of attempts to excuse acts that enable the infliction of harm on others if not pre-empted by external factors in the context of unjust and evil regimes as just following orders. This trope is, of course, mostly associated with Nazi Germany. Its foremost criticism appears in Arendt's discussion of 'banality of evil' in the context of Eichmann's trial for crimes committed during his time as a Nazi official[801]. While it is evident that her description of that particular figure was erroneous[802], Arendt's condemnation of thoughtlessness in the face of a morally iniquitous regime as a distinct and particularly pernicious kind of evil still rings true. The same would apply to those who acquiesced to evil law in Stalin's Soviet Union and the antebellum United States.

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[800] Wolff (n 723) 18.
[801] Arendt (n 157).
[802] See, again, Bettina Stangneth, *Eichmann before Jerusalem: The Unexamined Life of a Mass Murderer* (Vintage Digital 2014).

Secondly, many argue that autonomy matters not just for its own sake, but for the betterment of oneself and the world in general. As Raz pointed out, '[w]e value the ability to exercise one's judgment and to rely on it in action, but it is a capacity we value because of its purpose, which is, by its very nature, to secure conformity with reason[803].' Therefore, autonomy is important only insofar as it is conducive to better choices. Raz uses the notion to advocate for the potential reasonableness of a limited forfeiture of one's autonomy, by outsourcing some of one's decision to an authority, including legal authorities. However, his insight can also be relevant when justifying a converse decision – the one to go against the tide of existing legal norms by seeking to revise or ignore them. This rather intensely rings true in the context of evil law. As the laws one is supposed to be rebelling against are not only subjectively, but also objectively evil, choosing to resist them involves making the best of one's autonomous capacity. One can do so by, as argued above, seeking either to improve the plight of others who are targeted by evil law or to protect one's own future in the light of threats to participatory equality and dignity indicated above. In either case, one would make good use of one's capacity to make moral decisions for oneself.

5. Limitations on Resistance

A. Introductory remarks

As a result, one, once again, has not just a right, but also an obligation to resist evil law as this serves participatory equality, dignity, and autonomy more so than obeying it. Neither the right nor the duty to resist evil law is limitless. There are certain circumstances under which one might question that the right and the duty to resist exist, grouped respectively under the headings of harm to others and harm to self. I argue that, for both limitations, the line should be drawn by borrowing from the definitions of evil[804] and evil law[805] as given in this dissertation. More specifically, there is no right to participate in such resistance when resisting evil law *causes or enables the infliction of intolerable harm (including atrocities)*, and no duty to resist if that resistance would bring about that measure of harm to oneself.

[803] Raz, 'The Problem of Authority: Revisiting the Service Conception' (n 606) 1017.
[804] See Chapter II, Section 2.E.
[805] See Chapter III, Section 4.

B. Right to resist and harm to others

The first consideration I shall ponder is that there is no right to resist when resistance would be significantly harmful to other individuals than the resisting agent. This potential limit goes back to the idea of civil disobedience, as it is understood in Rawls's influential account, which portrays civil disobedience as disobedience that is a conscientious, nonviolent, public, respectful breach of law intended to protest and call for the reform of a law or policy, and for which the agent takes full legal responsibility[806]. One should note, however, that Rawls was talking about what counts as civil disobedience in a reasonably just state, and his argument ought to be reassessed when applied in other contexts, for example when it comes to evil regimes. According to my account of the limits on the right to resist evil law, it is more prudent to focus on one of the elements of civil disobedience – nonviolence. While 'violence' can be interpreted in many ways[807], I shall stick to an account that defines it through appeal to imposing harm on others as arguably implied by Rawls's words 'likely to injure or hurt[808]', in parallel with my definition of evil law[809]. It will be argued that while the fact that a resisting act is violent in this way is not sufficient for declaring this act impermissible, enabling harm if not pre-empted by external factors is nevertheless necessary for making this judgment.

There are two reasons why one, moving beyond Rawls, may see this consideration as a limitation on the right to resist evil law. Firstly, violent resistance can be seen as less efficient than its non-violent counterpart. This is relevant since I agree with Delmas that '[r]esistors should generally seek the least harmful course of action feasible to achieve their (legitimate) goal, that is, from among those courses of action that have a reasonable chance of success[810].' In other words, one should only resort to violent methods of disobedience when they are more effective than non-violent ones. It has been argued that non-violent resistance indeed fares better and ought to be preferred. Chenoweth and Stephan conducted empirical study to that effect, surveying 323 violent and nonviolent resistance campaigns between 1900 and 2006. They found that nonviolent resistance campaigns were nearly twice as likely to succeed as

[806] Rawls (n 715) 320.
[807] See, for a useful overview, Candice Delmas and Kimberley Brownlee, 'Civil Disobedience' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2023) <https://plato.stanford.edu/archives/fall2023/entries/civil-disobedience/>.
[808] Rawls (n 715) 321.
[809] See Chapter III, Section 4.
[810] Delmas (n 700) 49.

violent ones[811]. The authors argued that these findings could be explained by the fact that 'nonviolent campaigns have a participation advantage over violent insurgencies' as '[t]he moral, physical, informational, and commitment barriers are much lower for the [former][812].' Chenoweth's and Stephan's study provides a valuable insight into how resistance works. However, we should not overestimate their findings. Firstly, while Chenoweth's and Stephan's findings show that nonviolent resistance is more effective on average, they make it clear that in some individual circumstances violent resistance can succeed and nonviolent resistance – fail. Resistors' success depends on a wide range of factors with regards to the nature of both the evil law in question and the resisting act. Secondly, even more importantly, the study is not specific to evil regimes and might be flawed when addressing the peculiar characteristics of such regimes, for two reasons. The first reason is that evil regimes, especially authoritarian or totalitarian ones (like Nazi Germany and Stalin's Soviet Union as opposed to the antebellum United States), often restrict options for non-violent resistance, making violent resistance the only available effective form of resistance. This dovetails with an observation that evil law, as will be argued further in Chapter VII, can only be resisted from the outside, or by going beyond legal interpretation, as battling it from the inside, or within the confines of the law, is impossible. While resisting evil law from the outside need not be violent or harmful to others, restriction of available options of resistance may nudge putative resistors towards employing more extreme tactics. The second reason to challenge the study is that evil regimes involve special sorts of incentives that might increase participation in resistance even if this resistance takes violent form. Specifically, the magnitude of harm inflicted by evil law compels putative resistors to be more ready to resort to violent means of resistance as there is more at stake. As a result, the practical argument for restricting a duty to resist evil law to methods that are not harmful to others is less solid than one may think.

Secondly, understandably, many may find violent resistance uncomfortable even if it is practically advantageous. As Lai points out, one of the arguments against violent resistance is that the harm caused by it is never proportionate to the threat posed by morally questionable law[813]. Lai successfully argues that this claim is false. Firstly, some forms of non-violent disobedience are more costly than some forms of violent disobedience[814]. Acts of non-violent

[811] As summarised in Erica Chenoweth and Maria J Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (Columbia University Press 2011) 6–7.
[812] ibid 10. As referenced in Delmas (n 700) 58.
[813] Lai (n 711) 95–96.
[814] ibid 96.

disobedience such as blocking the road in protest, causing ambulances and fire engines to be stuck can have detrimental consequences to those needing these emergency services. On the contrary, some acts of violent disobedience, such as physically attacking a slave patrol in the antebellum United States to prevent the slave from being captured or attacking a Nazi concentration camp guard or a member of the Soviet secret police for a similar purpose, save lives and freedoms instead of endangering them, albeit at some cost. Secondly, violent disobedience can be proportionate if directed towards culpable actors[815]. To build on the juxtaposition of blocking a road with sabotaging a slave patrol, putting innocents at risk through the former direct action can be seen as less proportionate than harming those complicit in the injustice of the legal system in the latter case. As a result, Lai confidently asserts that 'It is simply not true, however, that under *no circumstances* [*emphasis in the original*] is violence in line with the grounds of political obligation[816].' This is especially poignant, Lai notes, as the Rawlsian view of civil disobedience is only applicable to near-just and democratic societies[817]. In the context of evil law, the duty to resist is stronger, allowing for the use of a broader range of methods.

However, some forms of violence create a more difficult moral dilemma in that they would sit uneasily with the right and the obligation to resist. For example, Delmas, whom I have quoted as a defender of uncivil disobedience, felt the need to provide a certain limitation on how one ought to resist. Specifically, she stated that '[r]esistors must act with respect for other people's interests, including, but not limited to, their basic interests in life and bodily integrity; their interests in non-domination and in choosing the values that shape their lives; and their interest in protection by a stable, secure system of rights[818].' This contention, she said, affects both ends and means of putatively justified resistance[819]. Turning to the ends first, reducing or mitigating the infliction of intolerable harm enabled by evil law if not pre-empted by external factors, if based on the right premises, as discussed in Section 2 above, appears to be a sufficient goal.

As for the means, the problem gets more complicated. Violence, even in pursuit of noble goals, is intrinsically problematic and ought to be limited, even if not cancelled out altogether. Using

[815] ibid 96–97.
[816] ibid 99. See also ibid 105–106.
[817] Rawls (n 715) 335. As highlighted by Lai (n 711) 110–111.
[818] Delmas (n 700) 49.
[819] ibid.

Delmas's criteria listed above as the starting point and adapting them to the concept at the heart of this dissertation, I shall build on the yardstick developed in my definition of evil[820] and evil law[821]– namely *enabling the infliction of intolerable harm (including atrocities) to the victims themselves*. It is no wonder that Card, as discussed above, emphasised the importance of using the concept of evil for the reason that doing so might preclude wicked responses to similarly morally iniquitous deeds[822]. Acts of resistance that cross the threshold of intolerable harm violate the aforementioned core values of participatory equality (or justice), human dignity, and justice just as much as laws they are trying to counter. The above is the reason why enabling intolerable harm by the resisting agents as a response to an act to the same effect is at least presumptively morally wrong and should not, by default, ground a right to resist. There can, of course, be circumstances when there is an overwhelming necessity to prevent harm, as in a classic case of self-defence or when killing an evil official who cannot otherwise be stopped in order to put an end to their deeds. But they belong to the category of exceptions and need to be justified separately.

C. Duty to resist and harm to self

Another consideration I shall ponder is whether the duty to resist stands when resisting evil law involves incurring harm to self. I will not, however, be talking about self-harm as it is commonly used in this context – self-violent tactics including 'lip-sewing, self-cutting, hunger strikes, self-exposure to the elements, and self-immolation[823].' Instead, I will be talking about the duty to resist being limited where resisting evil law may put the resisting agent in danger of a response from evil rulers that is harmful to the resistor. In evil regimes, the possibility of suffering was often a motivation not just for refusing to resist them, but for actively assisting them in their evil deeds. Consider the following three examples from Nazi concentration camps, Stalinist Gulags, and antebellum United States slave plantations. First, one can turn to *Funktionshäftling* prisoners in Nazi concentration camps who aided in the administration of the camps, as mentioned above. The same can be said about some of the prisoners in the Gulag who suppressed the 'political' inmates and thus performed unofficially the same function as Nazi prisoner-guards. Finally, on slave plantations in the antebellum United States, some slaves were promoted to the rank of 'drivers' or overseers of the daily functioning of the plantation.

[820] See Chapter II, Section 2.E.
[821] See Chapter III, Section 4.
[822] Card (n 241) 7–8. As cited by Calder, 'The Concept of Evil' (n 113). See Chapter II, Section 4.C.
[823] Delmas and Brownlee (n 807).

On the one hand, some may say that collaborators in concentration camps, Gulags, and plantations failed in their duty to resist the law. On the other hand, it is hard not to feel at least some moral ambivalence towards their actions, as they were simply trying to survive in the face of a threat of harm or even extinction.

What should we make of that? On the first sight, while one undoubtedly has a right to sacrifice oneself in order to resist evil law, it would be wrong to impose a duty on individuals to suffer grave harm for the same, morally good, reason. However, two critical remarks can be made. Firstly, almost every moral obligation carries a certain risk. To use a *reductio*, someone complying with a duty not to lie incurs the loss of benefits one might secure by lying. In the context of this dissertation, to fully subscribe to the view that there is no duty to resist wherever there is any risk would mean rejecting any obligation to resist evil law. Even acts of resistance that are within the bounds of lawfulness and civility may be risky, whether they are legal or not, as they will always displease evil rulers and create a risk of retaliation. Secondly, the appropriate measure of risk depends on the context. If a rescue is taken to prevent particularly dire consequences, perhaps we should expect the rescuer to undertake rescue missions that are more risky. Therefore, once again, one cannot argue that the duty to resist is thwarted by any amount of harm potentially suffered by the resistor.

However, there is a certain threshold of harm beyond which it would be unconscionable to uphold an obligation to resist. The agents of resistance should not have a duty to resist, but not because they might incur *some* harm to themselves – instead, it is because of a principle sensitive to a certain type and magnitude of harm. I submit that this principle can, once again, be derived from the definition of evil[824] and evil law[825]. It will read as follows: there is no obligation to resist evil law if the agents of resistance will risk *intolerable harm (including atrocities)*, especially when done in the name of preventing harm to others. Unlike harm to others, this, however, does not impair one's right to resist. In fact, self-sacrifice is something that is rightly applauded. Still, while heroism is inspiring, it cannot be demanded as a matter of general moral obligation.

[824] See Chapter II, Section 2.E.
[825] See Chapter III, Section 4.

6. Conclusion

As a result, I have established the following with regard to the question of how we ought to respond to evil law morally speaking, advocating for both a right and a duty to resist evil law. First, I defined such resistance as *acting intentionally in order to prevent infliction of intolerable harm (including atrocities) to the victims themselves.* Second, in order to establish a right to resist, even when resistance means disobeying law in question, I considered whether there can be an obligation to obey an evil law on substantive, procedural, and hybrid grounds. I concluded that while these grounds are able to generate obligations to obey the law, albeit with varying levels of strength, they are inapplicable when it comes to evil law. Specifically, evil law does not lead to better protection from harm, improved conformity with one's individual reasons for action, or better attainment of the common good. It often contravenes essential elements of democratic legitimacy and departs from the key values central to the hybrid account – participatory equality, human dignity, and autonomy. Third, I focused on the notion that not only does evil law not trigger an obligation to obey its precepts; it also creates an obligation to resist them. I grounded the obligation to resist in a natural duty to support the three values of participatory equality, dignity, and autonomy. Fourth, building on the definition of evil law developed in this dissertation, I considered two limitations on the right and duty to resist evil law, arguing that the right and duty do not hold when it comes to resistance involving the infliction of intolerable harm if not pre-empted by external factors onto, respectively, others or self. One may wonder, however, how the established obligation to resist evil law can best be implemented. This question shall be at the centre of discussion in the following Chapter VII.

VII. Resisting Evil Law

1. Introduction

In the previous Chapter, it has been shown that there is both a right and a duty to resist evil law, both lawfully and unlawfully, albeit subject to some limitations. The question remains as to what form this resistance should take to be maximally effective. This is not an issue about moral limitations of the kind considered in the earlier chapter, but rather a matter of pragmatic considerations, though the two questions may interact. This latter discussion – supplemented with insights from three historical case studies at the heart of this dissertation, Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States – will form the substance of the current Chapter, divided into three parts.

In Section 2, I will begin by examining which different agents of resistance, grouped into legal officials and ordinary law-subjects, are more likely to have success at resisting, and I will make clear that the answer to this question is highly contextual. With regard to legal officials, I will first respond to the argument that they ought to resign in protest and argue that this is not the most effective way of resisting open to them. However, I will also argue that officials can contribute to legitimating evil regimes they belong to by not abandoning their offices, which grounds a stronger obligation to resist evil law for them than for ordinary citizens. Then, I will attend to the different forms resistance by legal officials can take other than resigning. I will first subdivide officials into judges, legislators, and members of the executive. Afterwards, I will consider different types of legal systems – common law (antebellum United States), civil law (Nazi Germany), and socialist law (Stalin's Soviet Union). Finally, I will account for a variety of institutional setups when it comes to the independence of judges and other legal officials. When it comes to law-subjects, I will draw a dividing line between those who are oppressed by evil law and those who are left untouched, and I will argue, for reasons similar to the ones that apply to legal officials, that the obligation to resist evil law is stronger for those who are not targeted by morally iniquitous regimes.

Next, in Section 3, I argue that out of the two types of resistance that both legal officials and law-subjects can undertake – from the 'inside' and from the 'outside' or, respectively, involving and not involving legal interpretation – only the latter is possible. In the surveyed evil regimes, resistance from the inside did not work. This reaffirms that, as expressed in the

definition of evil law developed in this dissertation, evil law cannot be interpreted in a way that will render it less harmful. When it comes to resistance from the outside, I will also claim that covert resistance, that is, resistance that pretends to be engaged in the interpretive enterprise, is not as effective as overt resistance that involves openly rejecting available legal interpretations and setting out to create a new set of legal materials. While covert resistance is often mentioned in legal-philosophical literature, it has not been commonly used, probably because covert resistance is often practically difficult. It is overt resistance in its various forms, ranging from judicial and jury nullification and lawmaking to lawbreaking and overthrowing the evil regime in power, that is most effective.

Finally, in Section 4, I will underscore the need for realism when considering different resistance tactics. In some scenarios, resistance is indeed futile till a right moment comes along. In explaining this point, I will briefly reflect on the fact that evil regimes considered in this dissertation – Nazi Germany, Stalin's Soviet Union, and the antebellum United States – came to their end not due to resistance efforts, but due to external factors. Examining this claim in more detail, however, would require further elaboration outside of the thematic scope of this dissertation.

2. Agents of Resistance

A. Preliminary matters

In sketching out how evil law can be resisted in practice, I will first address *who* can undertake an act of resistance most effectively. I will focus on two groups of potential agents of resistance – legal officials from all three branches of power, judicial, legislative, and executive, and law-subjects, the latter subdivided into those who are targeted and those who are not targeted by evil regimes.

The distinction between legal officials and law-subjects might be blurry as legal officials can also be law-subjects, both in a private and in an official capacity. The distinction is further complicated when the despotic character of their government puts officials in a privileged position vis-à-vis their not-so-powerful counterparts even when they act in personal capacity. This can be seen in totalitarian evil regimes such as Nazi Germany and Stalin's Soviet Union, where Hitler and Stalin – albeit not all of their subordinates – were clearly considered, at least

in practical terms, to be above all law. However, it is still possible to demarcate the individual from their official role in that context. To do so, I take legal officials as individuals making decisions in their professional, as opposed to their personal, capacity.

Adopting that distinction, I shall argue two things. First, resignation is not a promising form of resistance for legal officials despite their entanglement with evil legal systems. Still, that entanglement means that they should incur a heightened duty to resist through other means. This resistance can be effectuated in multiple ways, depending on the type of legal official and the institutional arrangements determining the scope of their powers. Second, law-subjects who are not targeted by evil regimes similarly face a heightened duty to resist, for a range of moral and pragmatic reasons, compared to their marginalised counterparts.

B. Legal officials

(i) Duty to resign?

I should turn to the notion that legal officials, including, but not limited to, judges, face duties to resist evil law that differ from those falling on other resisting agents. One might go as far as to argue that officials in evil legal systems ought to resign from their posts. Dworkin suggested that '[i]f a judge's own sense of justice condemned [the *Fugitive Slave Act*] <…>, he would have to consider whether he should actually enforce it <…> or whether he should resign[826].' Dworkin was aware, however, that resignation is only one of the options available to legal officials in wicked legal systems, and he mentioned others, including lying about what the law is to then make a morally acceptable decision[827]. Resigning is thus a choice a judge – or any other official – must make based on the circumstances they are in, taking into account both moral and prudential reasons.

Some authors claim that resignation is always the preferable option. The most powerful argument to this effect would be that legal officials, by continuing to work for evil regimes, participate in the injustice evil legal systems propagate. Wacks, writing in the context of the dilemma faced by judges in the legal system of the Apartheid South Africa, framed this problem as follows:

[826] Dworkin, *Law's Empire* (n 316) 219.
[827] This option will be further discussed in Section 3.C.(ii)

> '[W]hat is [the judge] doing <…> in a system he finds morally indefensible? Might it not be thought to suggest that his appointment to the bench of an unjust legal order constitutes acquiescence to the laws which he now, *ex hypothesi*, purports to find unjust[828]?'

As Wacks went on to note, not only do '[t]he courts become vehicles for the enforcement of unjust laws', but also 'by their exercise of the judicial method they lend respectability and legitimacy to injustice[829].' While it would be foolish to say that all officials' positions align with the ones of the person or the political party in power, remaining in office conveys a certain message about one's belief in legitimacy of the regime in question. It indicates the position that the regime is not beyond the pale, as one can successfully use the powers granted by it for good and not for evil. As a result, conversely, resignation can be a powerful statement highlighting the injustice suffered by evil law's victims, what Wacks calls a 'clarion call[830]' that might 'echo, albeit faintly, through the halls of government[831].'

Similar arguments have been made in relation to the historical test cases of evil law beyond Apartheid. Consider Justice Scalia's statement that, if forced to follow the Nazi *Nuremberg Laws*, he would have resigned, as following the law would have been against his conscience and abandoning it by lying about what it says beyond his powers[832]. While no one called for Stalinist judges and other officials to resign, one can imagine a similar argument to that effect. A call on judges to resign, albeit hardly successful, was also made by Wendell Phillips and his fellow Garrisonians in the 1840's in response to the evils of slavery[833].

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[828] Raymond Wacks, 'Judges and Injustice' (1984) 101 South African Law Journal 181–182. Dyzenhaus places Wacks' statements in the historical context, juxtaposing them with statements by South African judges who refused to resign in David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) 55 ff.
[829] Wacks (n 828) 198.
[830] ibid.
[831] ibid 197.
[832] Antonin Scalia, 'Of Democracy, Morality and the Majority: Address at Gregorian University (May 2, 1996)' 26 Origins 82, 89. As cited by Paul Butler, 'When Judges Lie (And When They Should)' (2007) 91 Minnesota Law Review 1785, 1810.
[833] Bruce Ledewitz, 'An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil' (1988) 27 Duquesne Law Review 1, 1. See also Henry David Thoreau, 'Slavery in Massachusetts' in Brooks Atkinson (ed), *Walden and Other Writings of Henry David Thoreau* (Modern Library 1937) 673. As cited in Robert M Cover, 'Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression' (1968) 68 Columbia Law Review 1006 note 21.

However, there are equally reasons for officials in evil legal systems not to resign. One should not overestimate the impact of this kind of resignation on evil regimes, especially when resignations are isolated instead of being part of a broader collective protest. They may well be ignored both by evil officials and by the public at large. In that case, resignations may not just be useless, but harmful. As Wacks considers, by resigning, a legal official forfeits their powers that can be used for resisting evil law[834] – something a legal official might be better placed to do than an ordinary law-subject. Moreover, as Wacks also admits, a resigning legal official might be replaced with someone who is less morally scrupulous and who does not have the same anxieties about their role[835]. In this way, resigning can not only lead to a failure to resist evil law, but also indirectly prop it up. One is thus tempted to agree with Dworkin, to whom resignation 'ordinarily [was] of very little help[836].' Some may even say that the official in question might have a converse moral duty – to stay in power and sabotage the evil regime's wicked activities.

These arguments are supported by the experience of the archetypal evil regimes considered in this thesis. As Lothar Kreyssig, a judge widely recognised as one of the faces of judicial resistance in Nazi Germany, wrote in his memoirs:

> 'In the spring of 1933 I drafted my letter of resignation. I recounted numerous instances of breaches by the prosecutors of the most elementary legal rules, both in acts and omissions. After a sleepless night, I realized that this was too simple. It would let the contradictions sink into oblivion and leave the field open to those who been led astray[837].'

Similarly, in the antebellum United States, Richard Henry Dana, a prominent anti-slavery lawyer, likewise argued that the strategy of resignation is fruitless, for the similar reason, in Paulsen's words, of 'abandon[ing] the moral arena to judges who have no qualms about enforcing unjust law[838].'

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[834] Wacks (n 828) 197–198.
[835] ibid 197. See also Michael S Paulsen, 'Accusing Justice: Some Variations on the Themes of Robert M. Cover's' (1989) 7 Journal of Law and Religion 33, 73. As cited in Butler (n 832) 1811.
[836] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 389.
[837] Lothar Kreyssig, *Aufsätze, Autobiografie und Dokumente* (Evangelische Verlagsanstalt GmbH 2011) 114. As translated and cited in Hans Graver, 'Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State' (2018) 19 German Law Journal 845, 851.
[838] Paulsen (n 835) 73. Cover, *Justice Accused: Antislavery and the Judicial Process* (n 291) 181.

One might wonder how to balance these two pulls in opposite directions. To his credit, Wacks does not make a claim about all morally iniquitous legal systems, limiting his conclusions to Apartheid South Africa. This is right as balancing reasons for and against resignation can only be done in the context of a particular evil legal system. Turning to Nazi Germany and Stalin's Soviet Union, Wacks's words about the power of principle may sound naïve as these were totalitarian regimes, regimes that were largely insulated from, even though not completely free of, such political gestures. As to the antebellum United States, the southern portion of the United States resembled Apartheid South Africa in the sense that public gestures made by judges and other officials were not pointless and could have had some effect, as Wacks noted. Dyzenhaus argued that one would be mistaken in thinking that the South African Parliament was interested in the rule of law[839]. Still, he also claimed that South African judges were 'privileged' as '[t]hey could carry out their duty without fear of serious personal repercussions[840]', which is more than we can say about Nazi and Stalinist judges. Therefore, while judges in South Africa and the antebellum United States arguably could not overturn the system, they were nevertheless able to make a difference to the parties appearing before them. The duty to resign, I conclude, should not be imposed on legal officials in evil regimes without qualification. Whether resignation is called for depends on the circumstances.

(ii) Types of legal officials

Another point of contention with the prior scholarly discussion of legal officials' duties and powers in response to evil law is that Dworkin and Wacks were focused on judges rather than legal officials in general. While the duty to resist evil law is the same for the members of the judiciary, the legislature, and the executive, the toolkit available to them is different.

Let me turn first to judges. Judges' functions are often more limited than those undertaken by legislatures. First, in many legal systems, but crucially not in all, judges can only pronounce on the cases before them rather than on any matter. This limits both the scope of judicial proceedings and their impact. Second, it is often accepted that judges, as Dworkin highlighted, rule on matters of principle rather than matters of policy[841], or, in other words, are concerned with interpretation rather than creation of law. While Dworkin's statement can be read as a

[839] Dyzenhaus, *Judging the Judges, Judging Ourselves* (n 828) 85.
[840] ibid 89–90.
[841] Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 22 ff.

claim about what judges' powers *should* be, it can also be interpreted as a claim about what judges *can* do as judges, even if they *de facto* transcend their role. It is no wonder that, as indicated later in more detail[842], Dworkin advocated for judges to abandon the confines of their role and to 'lie[843]' when confronted with law that is evil and not merely unjust, thus assuming the functions of the legislature by issuing judgments based on independent moral grounds. There are two implications of the observations above. Firstly, these two features of the judicial role, depending, of course, on the constitutional arrangements in a given evil legal system, may constrain the power of judges to inflict evil through law. This is the reason why the Soviets tried to move past the distinction between the legislature and the judiciary, unlike Nazi Germany and the antebellum United States. Secondly, and more relevantly for the purposes of this discussion, limiting the judicial role vis-à-vis the role of the legislature may also curtail the available opportunities for judges to resist. The truth of this picture, however, depends on what constitutional arrangements are in place, as will be explained in the following subsection.

A legislator, on the contrary, has more leeway to resist evil law by being able to change it. This power might not be absolute – especially in legal systems with strong judicial review – but it is nevertheless significant. This is especially true in totalitarian regimes, where the dictator is the supreme legislator, endowed with almost unfettered lawmaking activity. In democracies, however, legislators have to muster the challenge of shifting the popular will before they take office and/or the inclinations of their fellow legislators after they take office in favour of a certain legislative reform through a combination of persuasion and political manoeuvring. Moreover, while a judge can act immediately to resist evil law, even at the risk of being punished for it, the legislative process in democratic states is more cumbersome since it often involves multi-party coordination. Therefore, many resisting officials in such a context may choose not to pursue the legislative route.

One should also think about public officials in the executive branch, often neglected by legal theorists who tend to focus mostly on the judiciary and, occasionally, the legislature. While the constitutional arrangements in different states – even those united by their wickedness – vary, these bureaucrats' role is usually dual. Firstly, the executive often acts as a legislature, producing various by-laws to supplement legislative enactments, making it susceptible to the

[842] See Section 3.C.(ii).
[843] Ronald Dworkin, 'The Model of Rules II', *Taking Rights Seriously* (Duckworth 1978) 326–327.

same concerns that, as described above, apply to law-making power. Second, the executive is tasked with implementing the law, which puts executive officials into the same category as judges for the purposes of the present inquiry. Some may argue that, in exercising this function, administrators may possess even fewer opportunities to challenge evil law than judges, as their task is typically narrower and more technical. However, one must bear in mind that the executive power should not be underestimated as its actions determine whether the legislative and judicial pronouncements actually take effect on the ground. Equally, executive officials often gatekeep the law-subjects' very access to judicial proceedings. A conscientious member of the executive may therefore have some sway over the impact of evil law on law-subjects. It is no wonder that evil regimes, especially totalitarian ones, generally rely on a strong executive, seeking not only to secure its support, but also to increase its powers. Two stark examples of this trend are the Nazi *Enabling Act* that practically replaced legislation in parliament with executive decision-making, and the Stalinist creation of *troikas* that served as an alternative to the ordinary judiciary.

As a result, the forms in which the duty to resist can best be exercised depend on the type of legal official we are concerned with. There are some peculiar obstacles that judges, the most frequently discussed putative agents of resistance, will face compared to their counterparts in the legislature and the executive. I will further develop this thought in the next subsection and argue that these constraints are contingent on the legal system in question.

(iii) Institutional and practical constraints

The foregoing conclusions about the different roles of judges and other officials in resistance are further complicated by the fact that the functions of these different kinds of legal officials might vary depending on the legal system in question. Let us start with the antebellum United States, which most closely resembled the legal context Dworkin and Wacks were talking about. Firstly, it was an instantiation of the common law legal system, where judges add to law via the power of setting precedent. Secondly, since *Marbury v Madison*[844], the legal tradition of the United States has been characterised by the power of strong judicial review, with judges being capable of overturning decisions of other branches of government, including, most importantly, of the legislature, on grounds of their incompatibility with the *Constitution*.

[844] *Marbury v Madison* (1803) 5 US 137 (US Supreme Court).

Therefore, in that context, the judges possessed significant power to act in response to evil law – although they were, as will be shown, limited by the fetters placed by the *Constitution* and other legal materials they sought to interpret. The third characteristic that expanded the resistance options available not just to judges, but other legal officials, was that regime's democratic – as opposed to authoritarian or totalitarian – character.

The Nazi legal system remained an outgrowth of the legal system of the Weimar Republic. In the latter, a nascent form of judicial review was in place – in ordinary litigation[845], under Article 13, Section 2 (establishing a procedure for regulating compliance of regional law with national law)[846], and under Article 19, Section 1 (establishing procedure for resolving 'constitutional controversies' between the states and the federal governments)[847] of the *Weimar Constitution*[848]. After the Nazis took power, the judicial role was both extended and curtailed. On the one hand, judges were instructed to go beyond the existing statutes for the sake of protecting the national – and the racial – interest. On the other hand, this exact interest was imposed on them as a limitation on their prior independence[849]. This was echoed by the totalitarian curtailment of powers of other – legislative and executive – officials who were equally forced to toe the line set by the Party and Hitler himself. As a result, legal officials, while formally having power that could be leveraged for resistance, were also placed in a difficult position as they were threatened by the autocratic character of the Nazi state. Firstly, during the Nazi era the judiciary, together with other similar legal institutions, was thoroughly purged of those of 'non-Aryan' origin – through the infamous *Law for The Restoration of the Professional Civil Service* (1933), as well as political dissidents. For instance, as Lippman wrote: 'Among the 122 judges sitting on the various panels of the Supreme Court, only one, Hermann Grossman was a Social Democrat. In April 1933**,** Grossman was dismissed on the grounds that he was politically unreliable[850].' Secondly, many judges who refused to toe the line faced professional discipline. For instance, Konrad Morgen[851], an SS judge and an oft-

[845] JJ Lenoir, 'Judicial Review in Germany under the Weimar Constitution' (1939) 14 Tulane Law Review 361, 365 ff.
[846] ibid 370 ff.
[847] ibid 375 ff.
[848] The Constitution of the German Reich (Weimar Constitution) (*Die Verfassung des Deutschen Reichs*) 1919.
[849] See further Robert D Rachlin, 'Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror' in Alan E Steinweis and Robert D Rachlin (eds), *The Law in Nazi Germany* (Berghahn Books 2013).
[850] Matthew Lippman, 'They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary' (1993) 23 California Western International Law Journal 269.
[851] Herlinde Pauer-Studer and J David Velleman, *Konrad Morgen: The Conscience of a Nazi Judge* (Palgrave Macmillan 2015).

referenced, albeit not unproblematic, figure of Nazi judicial resistance, was removed from his post and sent to the front for prosecuting and convicting many SS officers for corruption between 1942-1943[852]. However, as underscored by Graver[853], quite unusually from a layman's perspective, dissenting Nazi judges were sometimes not punished. One of the cases cited by him was the 1936 refusal of the three judges of the *Oberlandesgericht* (higher court) of Cologne to convict a group of monks of homosexuality, citing flaws in the evidence provided by the Gestapo. Despite the case being 'highly profiled and supported by the Party propaganda apparatus and Goebbels himself', they did not face any reprimand[854]. Graver even went as far as to say that '[a] particular fact of the Nazi and fascist regimes was their tolerance of judicial opposition and their recognition of the independence of the judge to decide the individual case[855].' This claim should not be overstated – that 'independence' was of a limited kind as it was only granted post-purge, and most judges at least tolerated Nazi ideology. However, it is still important to note that some leeway for judicial resistance still existed.

In Stalin's Soviet Union, the state of play was as follows. The Soviet legal system was *sui generis*, but it drew heavily on the continental approach to jurisprudence[856]. As a result, there was no doctrine of precedent in place, the judges being only able to apply law to specific cases at hand rather than to develop new legal principles. In addition, there was no judicial review at the time, even in a limited form like the one provided by the *Weimar Constitution* described above. Similarly to their counterparts in Nazi Germany, Stalinist judges also faced practical fetters on the actions they could undertake. Formally, judges were granted independence under *Stalin's Constitution*, the Article 112 of which stated that 'judges are independent and only bound by the law[857].' However, while, as Solomon notes, some judges took this article seriously[858], most were not so naïve, opting instead to go with the flow when it came to participating in the political terror campaigns of the mid-1930s. This can be attributed to the fact that the consequences of dissent were potentially devastating. Many judges and other legal officials fell victim to the Great Terror, and this looming threat increased the pressure on

[852] Graver (n 837) 857–858.
[853] ibid.
[854] ibid 854–855.
[855] ibid 875.
[856] See, for instance, Rene David, *Major Legal Systems in the World Today* (3rd Revised edition, Stevens & Sons Ltd 1985) 26–27.
[857] As highlighted in Solomon (n 77) 192.
[858] ibid.

officials who were not persecuted. Unlike most of the dissenting Nazi judges, Stalinist judges and procurators lost not only their jobs, but their freedom and even their lives[859].

As a result, to assess the prospects of acts of resistance to evil law on the part of legal officials, one should be keenly aware of the context of the evil legal system in question, both in drawing normative conclusions and in making pragmatic observations. Firstly, it is hard to attribute an obligation to resist evil law to Stalinist judges and legal officials, as opposed to their counterparts in the antebellum United States and Nazi Germany, as deviating from the party line could put them at risk of being a victim of intolerable harm themselves. Secondly, both the fact that officials' powers differed across the three surveyed evil legal systems and the risk of being removed from one's post as an official upon noncompliance – something that Stalinist and, sometimes, Nazi judges faced – affected the practical possibility of resistance.

C. Law-subjects

(i) Introductory remarks

The discussion about the duty of law-subjects, or those individuals who are not legal officials, to resist evil law is also not uniform and can be bifurcated. The dividing line lies between law-subjects who are targeted by the evil regime and those who are not.

However, it should be noted that this distinction, depending on the evil legal system in question, can be more or less pronounced. The antebellum United States would be an example in which it is most evident, as the dividing line between enslaved and free persons was drawn quite starkly, the slaves being subject to a totally different set of rules that did not recognise them as full legal persons. Likewise, it was equally important for Nazi officials to target Jews, but those who were not Jewish also faced persecution if they dissented or were perceived to dissent from the precepts of law and official ideology. The Stalinist regime was even more chaotic. The criteria by virtue of which the law-subjects could be targeted for ill-treatment – both innate, such as belonging to an undesirable class background (the bourgeoise and not the proletariat), and behavioural, such as participating in counterrevolutionary crimes – were notoriously blurry and broadly applied. This put almost every law-subject at risk of suffering intolerable harm.

[859] ibid 244 ff.

Therefore, before dividing the law-subjects into two groups, one needs to appreciate the reach of the evil regime in question.

Let us suppose, however, that at least in some evil regimes, one can distinguish law-subjects who are considered as part of the out-group and those who are regarded as forming the in-group by the evil regime. I will not be arguing that the former have no duty to resist evil law at all. Resistance is crucial for the sake of their fellow oppressed persons. It is also, as Hay notes, building on Kant, important for the putative victimised agent of resistance themselves, as conformity with oppressive rules impairs their capacity for acting rationally[860]. However, I submit that those who are oppressed and those who are untouched face different rights and obligations to resist evil law. There are two reasons why – one is normative, dealing with why it is more ethical to impose a stronger obligation to resist evil law on those who are not targeted by it, and the other is pragmatic, related to how the untouched law-subjects' resistance can prove more effective for reducing or preventing the intolerable harm caused by evil regimes.

(ii) Normative reasons

The moral reason builds, in turn, on the following propositions. One draws from the limitation to the obligation to resist described above – the undesirability of mandating harm to self. If the law-subject in question is targeted by an evil regime, they will face a greater possibility of suffering such harm. It is therefore irresponsible to morally require groups marginalised by evil law to put their lives on the line, even if it ultimately is for their own good. I shall repeat, once again, that this does not mean there is no space for self-sacrifice in the face of evil law, but sacrifice should at most be encouraged, and not be held to be morally obligatory[861].

The second moral reason that I will consider is that the law-subjects who are not targeted by the evil regime are often complicit in those regimes unless they resist. An evil regime depends on the acquiescence or support of those who are not targeted by it. Even though one can argue that victims' silence also contributes to propping up an evil legal system, as they are comparatively powerless, the responsibility to dismantle an evil regime lies in the first instance with those whose voices have more power in that system. As a result, those who are not

[860] Carol Hay, 'The Obligation to Resist Oppression' (2011) 42 Journal of Social Philosophy 21, 24 ff.
[861] See Chapter VI, Section 5.C.

marginalised by evil law have a heightened duty to sever the tie between themselves and the horrors they support or even merely tolerate.

Thirdly, those not marginalised by an evil regime are often that regime's beneficiaries and therefore have a duty to disentangle themselves from it. Sometimes, these benefits will be more explicit – take, for instance, the economic guarantees slavery laws provided to slaveholders. These benefits belong to those law-subjects who are not targeted by evil regimes. In addition, evil legal systems often benefit their law-subjects in more oblique ways – the very legal form making it easier for them to organise their lives due to its coordinative potential[862]. While these benefits often extend even to those who are endangered by evil law, when comparing aggregate benefits and disbenefits, the victimised law-subjects would be worse off, while those who are not victimised would be better off.

(iii) Pragmatic reasons

The next group of reasons for a heightened obligation to resist evil law placed on non-targeted as opposed to targeted law-subjects is based on pragmatic foundations. Those who are not targeted by evil regimes have more opportunities, and thus more responsibilities, to resist evil law. That connection could be made formally and informally. First, some marginalised law-subjects were denied basic rights and liberties that facilitate resistance to evil laws that unduly burdened them. In Nazi Germany, Jews were deprived of political rights as their German citizenship was annulled by the *Reich Citizenship Law*[863]. In the antebellum United States, the situation was rather similar. Slaves were denied political participation as they were deprived of voting rights. They could, however, sue for their freedom in state courts, provided that certain conditions were satisfied. Still, the situation in federal courts differed – recall the infamous judgement of *Dred Scott v Sandford* that denied people of African descent, whether enslaved or free, citizenship and thus the right to bring a federal suit[864].

Second, there were also some more informal effects of evil law that impaired the marginalised law subjects' ability to resist across the three test cases considered in this dissertation. Some of these had to do with the overall inevitable emotional impact that being subject to evil law has

[862] As argued in Raz, 'The Rule of Law and Its Virtue' (n 841).
[863] Reich Citizenship Law (*Reichsbürgergesetz*) 1935.
[864] *Dred Scott v Sandford* (1857) 60 US 393 (US Supreme Court).

on its victims. Others had to do with depriving the oppressed of tools of resistance. For instance, in the antebellum United States there existed bans on slaves being taught to read or write, which contributed to their subjugation as they had fewer ways of framing their experiences and protesting them.

3. Ways of Resisting

A. Preliminary matters

Having dealt with *who* should exercise the right and duty to resist evil law, we are moving on to *how* it can be done, or the appropriate ways to resist. I shall argue that the distinction between non-effective and effective resistance maps onto that between resistance involving an attempt to interpret the law (which I will refer to as resistance from the 'inside' of law) and resistance that does not (which I will refer to as resistance from the 'outside' of law). This is more effective than the other two ways of drawing a dividing line between effective and non-effective resistance of evil law, which will be considered and discounted.

One is the distinction between civil and uncivil resistance, building on Rawls's influential account of civil disobedience, which defines civil disobedience, as opposed to uncivil disobedience, as 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government[865].' The category of civil disobedience will, however, be underinclusive for the purposes of the present inquiry, since resisting evil law does not have to involve breaking the law. Still, one may say the rest of Rawls's definition can still be drawn upon for the purposes of creating an account of civil *resistance*[866]. However, this distinction still does not appear fruitful. This is because the effectiveness of civil and uncivil resistance would be contingent on which specific resistance tactics are employed by resisting agents as well as the circumstances in which they are deployed. For instance, public protest (an example of civil resistance) and sabotage (an example of uncivil resistance) cannot be easily described as more or less effective. Therefore, the civil or uncivil character of a particular method of resisting evil law does not determine whether it works well.

[865] Rawls (n 715) 320.
[866] As outlined in Delmas and Brownlee (n 807). See also Delmas (n 700) 47.

Perhaps we should be talking about resistance that does and does not involve breaking the law. However, this distinction is also unhelpful when it comes to investigating different ways of resisting evil law. First, both lawful resistance and unlawful resistance include a rather capacious assortment of resistance tactics that might work differently in different circumstances. Second, what is legal and what is illegal is contingent on the legal system in question. For example, various forms of public protest might be illegal in totalitarian states such as Nazi Germany and Stalin's Soviet Union, but would be permissible in democracies, even in democracies with evil laws, such as the antebellum United States. As a result, employing this distinction is unlikely to yield any generally applicable insights into what makes an act of resistance to evil law effective.

The 'inside' / 'outside' distinction remains the most feasible one as it is clear and does not create ambiguities of the kind outlined above. Even more importantly, it tracks my previous discussion of evil law and highlights the importance of what makes it evil and not merely unjust. In short, it will be argued that it was not possible in the central cases of evil legal systems considered in this dissertation to mitigate evil law's effects by way of interpretation, which shows that my definition of evil law, explicitly rejecting this option, captures something crucial about these examples. I shall therefore provide a more detailed account of both types of resistance to establish that resistance from the inside is ineffective compared to some forms of resistance from the outside.

B. Resistance from the inside

(i) Introductory remarks

The first type of resistance I will consider is resistance from the inside, or resistance through interpreting the law. I shall give examples of attempted resistance from the inside, both by legal officials and law-subjects, drawing on the three case studies at the centre of this dissertation – Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States. Moreover, I will point out that these attempts were largely unsuccessful, which shows that evil law is indeed unmanageable by legal means, and that resistance from the inside is unfeasible.

(ii) Attempts

a. Legal officials

When it comes to legal officials, the most well-explored ones are, of course, judges. As noted above, judges, at least in the three legal systems surveyed in this dissertation, were primarily tasked with resolving controversies brought before them by applying the existing law. In order to do so, judges need to engage in interpretation of these legal materials as the application of these materials is bound to require a certain amount of judgment. This is one of the cornerstones of Dworkin's interpretivism that this thesis heavily draws from – courts approximate towards the role of the judge Hercules, who delivers solutions based on the principles drawn from legal materials[867]. To build on Dworkin further, the same analysis applies to executive officials, and not only when they act in a judicial capacity, insofar as they perform the function of applying, and not making the law – otherwise their act of resistance would belong to the 'outside' category explored below. The decision of executive officials to perform a certain action as instructed by law, as in the case of judges, necessarily involves performing the Herculean task Dworkin attributed to the courts. On a quick gloss, therefore, both the courts and the executive look like they might be capable of tackling the infliction of intolerable harm by evil law if not pre-empted by external factors by way of interpretation.

I shall present some historical examples of such attempts. Some legal officials in Nazi Germany indeed attempted to minimise the impact of evil law when applying it in practice. The most famous of them was the aforementioned Konrad Morgen, a self-described *Gerechtigkeitsfanatiker* ('fanatic for justice'), an SS judge who was known for his meticulous attempts at investigation of misconduct of its members[868]. One need not be under an illusion that Morgen was motivated by good will. His attempts to root out espionage and financial corruption were not intended to weaken but to strengthen the Nazi legal order. However, some of Morgen's quests involved genuine, albeit limited, resistance, as he sought to investigate and eventually punish illegal killings – those that could not be construed as euthanasia or executions of prisoners of war, at the Buchenwald and Auschwitz-Birkenau concentration camps[869]. For example, in 1944 he attempted to take down Maximilian Grabner, Head of the Auschwitz

[867] See Chapter III, Section 4.
[868] A comprehensive account of his life and the dilemmas he faced can be found in Pauer-Studer and Velleman (n 851).
[869] As explained in ibid 67 ff.

Gestapo, on whose order 'over 2000 prisoners had been shot solely for the purpose of making room in the Auschwitz arrest bunker when it became overcrowded[870].' A less known but perhaps better example of a dissenting judge is that of Kreyssig, who, in 1940, issued an order obstructing *Aktion T4*, the program of euthanising those who were deemed to be 'mentally defective' and initiated proceedings for murder against those involved in it[871].

Equally, some Soviet judges attempted to mitigate the excesses of Stalinist terror, as highlighted by Solomon, by handing down lighter sentences[872], requalifying charges to nonpolitical crimes[873], or even dismissing the prosecutions altogether[874]. Alexander Vinokurov, the Chairman of the RSFSR Supreme Court, even issued a directive in 1935 urging judges to be vigilant against groundless prosecutions 'in order to preserve cadres for socialist construction[875].' Some procurators, exercising the prosecutorial discretion granted to them by law, refused to act on orders of the NKVD[876]. One of them, Aron Solts, went as far as demanding evidence from the Procurator General Vyshinsky himself when it came to cases of political nature, like that of Iuri Trifonov, whose son documented Solts's resistance in his memoir[877].

In the case of slavery in the antebellum United States, judges and other officials could also be seen engaging in resistance against the evil legal practices of their time by trying to use interpretation of the existing legal materials rather than wholly rejecting them. The dissenting opinions in the infamous *Dred Scott* case by Justices Curtis and McLean are particularly stark examples. These opinions attacked the majority opinion written by Justice Taney in its claim that Black Americans could not be citizens[878]. They deployed two arguments to this effect. One of them, made by Justice McLean, was that the question of Black Americans' citizenship was orthogonal to the issue at hand, and therefore Justice Taney's finding was merely *dicta*[879]. The other, put forward by Justice Curtis, was that, even if it was relevant, Justice Taney's claim as to the citizenship of Black Americans was legally incorrect as there was nothing in the

[870] ibid 94, 107 ff.
[871] Graver (n 837) 870.
[872] Solomon (n 99) 232.
[873] ibid 234.
[874] ibid 232–233, 234.
[875] As cited in ibid 232.
[876] ibid 234, 237.
[877] Iuri Trifonov, *Отблеск Костра. Исчезновение.*(Sovetskii Pisatel' 1988) 21.As cited in Solomon (n 99) 248.
[878] *Dred Scott v Sandford* (1857) 60 US 393 (US Supreme Court), 399 (Taney J).
[879] ibid 529 ff. (McLean J).

Constitution that indicated that they were deprived of this status[880]. The other infamous historical case of *Prigg v Pennsylvania* upheld the *Fugitive Slave Act* 1793 and overturned the conviction of a slave-catcher, Prigg, under a Pennsylvanian statute that prohibited capture of slaves[881]. Justice McLean, once again, authored a dissent stating that Prigg violated the Act's requirement to bring the slave before a judge or a magistrate[882].

b. Law-subjects

Resistance from the inside has also been attempted by law-subjects who participate in judicial and administrative proceedings and make their case based on what they see is an interpretation of law most advantageous to their claim. They can make their petitions themselves or enlist the help of a legal professional. Regardless of that choice, they decide to confine their resistance within the bounds of legal interpretation. Even if they challenge existing laws, these agents' arguments are not moral or political, but legal – such as claiming that the laws in question are unconstitutional. While resisting some evil regimes, mostly those belonging to the class of totalitarian states, is obviously dangerous, one can nevertheless find examples of such citizen resistance in their historical record.

In Nazi Germany, Ernst Fraenkel, already mentioned as the author of *The Dual State*[883], was such a resistor. Apart from being a scholar documenting the role of law in Nazi Germany, Fraenkel was a practising lawyer who, though he was Jewish, did not desist from his professional activities even after Hitler took power. On April 8th 1933, he wrote to the Minister of Justice, stating that, if allowed to resume his legal practice on the grounds of having served in the World War I, in spite of being of Jewish descent, he would 'conscientiously fulfil his duties as a lawyer, faithful to his legal oath and according to the applicable law[884].' As one of the activist lawyers prominent in that period, he channelled this opportunity into defending some of the early victims of the Nazi regime in court, mostly fellow socialist activists, and he was able to continue do so for five years before he had to emigrate[885].

[880] ibid 564 ff. (Curtis J).
[881] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court).
[882] ibid 658 (McLean J).
[883] Fraenkel (n 532).
[884] As cited in Douglas Morris, *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* (Cambridge University Press 2020) 52.
[885] ibid 53.

In the Soviet Union, some lawyers were also quite keen on protecting the political prisoners marked for imprisonment or death. As Kaminskaya notes in her memoir, many defence attorneys (*advocates*) 'retained an old conception of legal defence[886]', which, as Huskey strongly implies, drove them to go against the grain during the times of terror[887]. Shemanov names two such advocates who were able to secure acquittals for political crimes – Ilya Braude (who was, however, otherwise known as the acquiescent defence attorney at the Moscow Trials), who secured the acquittal of political prisoner Nikolai Khrennikov in court, and Georgy Guliyev, who successfully defended Mikhail Astashin, who had been accused of 'counter-revolutionary propaganda[888].' Perhaps the defendants in the two cases were just lucky – in the former, the prosecution witnesses refused to testify, and in the latter the prosecutor was not present as the case seemed 'obvious[889]'. Yet, we should not underestimate the effort of the defence attorneys who chose to perform their ethical duties even in unforgiving times.

Probably because they had the opportunity to engage in resistance from the inside without having to fear punishment, lawyers and individual claimants tried to mitigate the impact of pro-slavery laws in the antebellum United States. Farbman documents this 'resistance lawyering' following the introduction of the *Fugitive Slave Act* 1850 in detail[890]. As he notes, these lawyers 'used the limited and unfriendly procedural tools of [this] hated [Act] to frustrate, oppose, and, if possible, dismantle the operation of that law[891].' The efforts of resistance lawyers were somewhat effective, with 47.7% of the cases under the *Act* ending up in letting alleged slaves free when a lawyer was involved compared to just 23.3% when where was no legal representation[892]. Therefore, participation in the legal process could pave a way for resisting evil.

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[886] Dina Kaminskaya, *Final Judgment: My Life As a Soviet Defense Attorney* (First Edition, Simon & Schuster 1983) 26–28. As cited by Eugene Huskey, *Russian Lawyers and the Soviet State: The Origins and Development of the Soviet Bar, 1917-1939* (University Press 1986) 212–213.
[887] Huskey (n 886) 212–213.
[888] Ivan Shemanov, 'Devil vs. Advocate: The Amazing, If Rare, Triumphs of Legal Defense in Stalin's Soviet Union' *The Insider* <https://theins.info/en/history/267570>.
[889] ibid.
[890] Daniel Farbman, 'Resistance Lawyering' (2019) 107 California Law Review 1877.
[891] ibid 1977.
[892] ibid 1903.

(iii) Failures

As a result, one can find some isolated instances of successful resistance from the inside. However, on a more detailed analysis of the three paradigmatic cases of evil legal systems considered in this dissertation, it turns out that most resisting agents acting from within failed to meaningfully challenge evil law. One of the reasons for that may be that those seeking to interpret the evil in law away often were not free to do so, due to the repercussions they would have faced as a result. However, this pragmatic reason tells only a part of the story. More interestingly, resistance via interpretation is often rendered impossible by the wording of evil laws that precluded a benign interpretation of those ordinances. This illustrates an important observation that has previously been made in this thesis. One of the features of evil law I highlighted when attempting to define it is that it enables infliction of intolerable harm if not pre-empted by external factors even if interpreted according to its best purposes, being the main reason to draw a distinction between evil and merely unjust law. The foregoing analysis of historical case studies will further affirm the truth of this claim.

Nazi judges such as Morgen could not transcend the limits of the law. Even if we believe that Morgen was genuinely concerned about the program of mass extermination in Nazi concentration camps, he could convict the perpetrators only, as stated above, for illegal killings or unrelated charges such as embezzlement. For instance, to use a rather stark example, while at Auschwitz, he tried to get Eichmann arrested for mishandling a pouch of diamonds[893]. Later, in his 1964 testimony at the *Auschwitz-Process*, Morgen stated: 'The prosecutor, the judge can only apply the law as he finds it, and [cannot] make up his own. If he steps outside the constraints of the law, then he becomes a criminal himself[894].' As far as legal interpretation goes, one's hands are tied. Morgen, by choosing to remain within the system, was not able to stop the mass killings. The aforementioned case against Grabner for his authorisation of extralegal killings in Auschwitz failed – even though the defendant could not prove the exonerating claim of having higher orders to do the killings, the trial was put in recess and never resumed[895]. Sometimes the limitations on resistance were dictated by the limits of the judicial role. Kreyssig's efforts to halt *Aktion T4* did not eventually succeed, as the programme

[893] Pauer-Studer and Velleman (n 1001) 106.
[894] As cited in ibid 88.
[895] Susan Neiman, 'Konrad Morgen: The Conscience of a Nazi Judge' (2017) 126 Philosophical Review 541, 111; Pauer-Studer and Velleman (n 851) 111.

was retroactively rubberstamped by Hitler himself[896]. As Morris admits, Fraenkel and other resisting lawyers in Nazi Germany, while possessing more clearly noble motives than the likes of Morgen, were equally constrained by the letter of the law. By performing resistance from the inside, they possessed a limited scope of argument:

> 'Leftist lawyers had to make their arguments to the court, not in a court of public opinion. They had to limit their political representation to defending political defendants, not to advancing political views. They had to keep on the defensive, not gamble on some offensive strike[897].'

Moreover, as noted above, officials who tried to challenge evil law in Nazi Germany faced practical difficulties when trying to use their powers to resist evil law from the inside. Consider, for instance, the tribulations suffered by Morgen, as he temporarily lost his position of influence and appeared to be at the risk of death as he was forced to fight on the battlefield. Kreyssig, surprisingly, did not face consequences of that magnitude, but applied and got approved for retirement, making future judicial resistance on his part impossible[898]. The same pattern could be noticed when it came to ordinary citizens participating in legal proceedings that challenged the Nazi terror. On September 27, 1938, Hitler disbarred all Jewish lawyers by decree, removing the exceptions that made it possible for those like Fraenkel to stay in the profession[899]. Following this decision, Fraenkel was forced to emigrate, moving to London and then Chicago. In other words, theoretically and practically, the agents of resistance in Nazi Germany had little opportunity to change evil laws, at best they succeeded to give some protection to their clients. This reveals certain significant limitations on what can be done in seeking to resist evil law from the inside.

The same could be noted with regard to resistance from the inside in Stalinist times. Here, the limitations of resistance from the inside concerned not the theoretical limits set to interpretation by the law, but rather the practical unworkability of interpretive resistance. In case of legal officials, their loyalties were kept in line by their superiors and colleagues who chose to follow the party line. Conscientious judges and prosecutors were guaranteed to be subject to removal

[896] Graver (n 837) 870.
[897] Morris (n 884) 54.
[898] Graver (n 837) 870.
[899] As cited in Morris (n 884) 146.

from their positions and even become defendants themselves. Solts, for instance, was removed from the Central Control Commission and the Procuracy, and involuntarily confined to a psychiatric hospital[900]. The same was true of defence attorneys who wished to represent their clients faithfully – they had disciplinary cases brought against them, sometimes even resulting in expulsion from the profession[901]. Moreover, during the Stalin era, new quasi-judicial entities were created to supersede traditional judicial proceedings, not just because the latter were deemed to be too formal and lengthy, but also because their outcomes might have been influenced by the judges' moral convictions and by the hard work of defence attorneys. The NKVD, on 30 July 1937[902], established *troikas*, small tribunals consisting of three regional officials: the NKVD chief (who acted as the chairman), the procurator, and the Party secretary. As the majority of cases during the Great Terror went through troikas, the introduction of these tribunals undermined the efforts of resistance from the inside on behalf of both legal officials and the public. Finally, by 1939, the Soviet Bar had been brought into line and 'sovietised' by, *inter alia*, endowing the USSR Justice Commissariat, the republican justice commissariats, and the departments of justice at the regional level with supervision powers over the attorneys[903], which made them less likely to engage in resisting evil law, even from the inside.

With regards to slavery in the antebellum United States, the limitations of resistance from the inside were of a slightly different kind. Anti-slavery officials and lawyers were not subject to campaigns of terror and intimidation like their counterparts from totalitarian states, so they did not face the same practical difficulties. However, theoretically speaking, their hands were still similarly tied as they could not be as ambitious in resisting slavery as they wanted to, as they were limited by the legal materials they sought to interpret. To illustrate this, in both *Dred Scott* and *Prigg v Pennsylvania*, as demonstrated above, the dissenting Justices did not try to challenge slavery as such, instead basing their dissents on relatively minor points of law. When it came to *Dred Scott*, the dissents did not challenge the existence of slavery, but only whether Black Americans – not just enslaved, but also free – could enjoy the protection of their rights according to the *Constitution of the United States*. As for Justice McLean's dissent in *Prigg*[904],

[900] Trifonov (n 877) 21. As cited in Solomon (n 99) 248.
[901] Huskey writes about 61 such cases, with one expulsion, in Moscow in 1936. Huskey (n 886) 213.
[902] Operational order of the NKVD of the USSR No. 00447 'On the Operation to Repress Former Kulaks, Criminals and other Anti-Soviet Elements' (*Оперативный приказ НКВД СССР № 00447 'Об операции по репрессированию бывших кулаков, уголовников и др.. антисоветских элементов'*) 1937.
[903] Regulations on the Bar of the USSR *(Положение об адвокатуре СССР)* 1939,Article 2. As cited in Huskey (n 886) 220.
[904] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court).

he was only concerned about the status of free Black Americans who might, by mistake or malice, be turned into slaves. The Pennsylvania statute, to him, protected them from that fate. However, he envisioned no such protection for those who were enslaved, recognising their masters' interest in them as property. A similar observation can be reached with regards to anti-slavery lawyering as described by Farbman. He writes that the activist lawyers did not seek to obtain suspected fugitives' freedom through the intended legal route, but used their skills as a cudgel to bring about 'delay, procedural entanglement, and building public attention[905].' This is because the legal machinery that they faced came with its own limitations that could not be surmounted via the proper use of law alone.

C. Resistance from the outside

(i) Introductory remarks

Therefore, it has been shown that resisting evil law from the inside was hardly ever successful in evil legal systems investigated in this dissertation, indicating that the infliction of intolerable harm enabled by evil law if not pre-empted by external factors could not be interpreted away. As a result, one who chooses to resist evil law has to resort to methods of resistance that involve going beyond the confines of interpretation. My discussion will focus on what I shall term, following Goldsworthy[906], covert and overt methods of this type of resistance[907]. The first, covert, type of resistance involves, practically, going beyond available interpretations of law, while claiming to operate within the limits set by it. The second, overt way of resistance explicitly refuses to be bound by the principles derived from existing legal materials. I shall argue that covert resistance, while valorised in theory, was not, as far as we can tell, very common in Nazi Germany, Stalin's Soviet Union, and the antebellum United States, as it was rather difficult to execute. Conversely, overt resistance in its various forms outlined with reference to the test cases was more effective, though it is subject to limitations. However, these limitations are largely contingent and do not always militate against these techniques of resistance.

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[905] Farbman (n 890) 1905.
[906] Jeffrey Goldsworthy, 'Should Judges Covertly Disobey the Law to Prevent Injustice' (2011) 47 Tulsa Law Review 133. Goldsworthy wrote about judges, but the covert / overt dichotomy applies to other types of officials and ordinary citizens as well.
[907] This typology was also employed in Graver (n 837).

(i) Covert resistance

The first type of resistance from the outside that I call 'covert resistance', occurs when either a legal official or an ordinary citizen claims to be engaged in interpretation, but in fact attempts to secure an outcome that flouts what is necessitated by proper interpretation. One of the most discussed forms of such resistance is what Butler, citing Cover, describes as 'subvert[ing] the law by pretending that it supports the outcome that the judge, or any similarly situated official normally engaging in legal interpretation, desires, even though the judge does not actually believe that it does[908].' This tracks Dworkin's indication that judges, if faced with evil, and not merely unjust law, ought to lie[909]. The strategy of lying also opens up possibilities of resistance for ordinary citizens, who can convince legal officials to lie by appeals to morality and provide ideas as to how to camouflage the moral calculations those officials engage in as legal deliberation.

However, this strategy of lying, while strongly recommended by Dworkin, was never explored by him in any detail. What is more, I have been unable to identify any instances of covert resistance in the historical examples of Nazi Germany, Stalin's Soviet Union and slavery in the antebellum United States considered in this dissertation. This can be explained by appeal to several factors. Firstly, covert resistance, when it is effective, is difficult to detect as it mimics resistance from the inside. However, secret acts of resistance in general are often exposed after some passage of time, especially when an evil regime is deposed. As a result, if covert resistance had been commonly employed, it would have been revealed by the resistors themselves or those examining their legacy. This is why we should look for other explanations of the absence of covert resistance from the historical record other than mere stealthiness on the part of its practitioners.

Secondly, as Cover observed, 'the legal arguments [employed for covert resistance – *addition mine*] must be at least plausible even if unsupported by precedent[910].' In other words, effective lying is difficult. This is especially true when there are whole constellations of evil laws that

[908] Butler (n 832) 1785. Citing Cover, 'Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression' (n 833).
[909] Dworkin, *Taking Rights Seriously* (n 836) 389. Dworkin, *Law's Empire* (n 316) 219. Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 18–19. As cited in Goldsworthy (n 906) 134 note 7.
[910] Cover, 'Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression' (n 808) 1007.

ought to be subverted rather than individual morally iniquitous laws here and there. In order to undermine whole evil regimes by 'lying' about the law, one needs to be incredibly skilful in manipulating multiple legal rules. Perhaps a Dworkinian Hercules might be able to do that, but judges, lawyers, and litigants are not perfect, no matter how good they are.

Thirdly, as Butler claims, this kind of resistance should be employed only 'when applying the law results in extreme injustice[911].' Otherwise, there are certain dangers. One is that 'the court's legitimacy may be eroded[912]', which ought to be of little concern when it comes to evil law, but could nevertheless be one of the reasons motivating the judges failing to covertly resist even when an extreme injustice occurs as a result of the application of an evil law. A lot of judges, lawyers, and litigants who operated in evil regimes believed in the sanctity of their roles, as misguided as they might have been about what was at stake. Therefore, they were inclined not to lie out of a sense of personal honour and respect for the enterprise of litigation.

Fourthly, the other, more pragmatic, consideration would be that being caught lying would impede the judges' and similarly situated officials' ability to continue resisting evil law, therefore jeopardising the enterprise of resistance undertaken by lawyers and litigants. A lying judge, as Butler points out, 'might begin to lose her power as other courts look at her opinions with more scrutiny and view her decisions with less respect[913].' The opportunity to subvert the law must therefore be exercised economically in order to preserve the judges' power. This might be one of the reasons why judges in the archetypal evil legal systems considered in this dissertation appear to have been wary of 'lying'. The second reason would be that renegade judges in totalitarian evil regimes like Nazi Germany and Stalin's Soviet Union can lose more than the force of their decisions, subversion potentially costing them their position, their freedom, and even their life. Any of these consequences would, of course, present a threat in itself – which would be a consideration for many judges operating in evil legal systems.

Therefore, while covert resistance in the form of lying about the law might, at first glance, appear to be a fruitful avenue for judges, lawyers, and litigants in evil legal systems, in practice this form of resistance was not commonly used. This can be explained by the fact that covert resistance is practically difficult for both resisting officials and law-subjects, is likely to be seen

[911] Butler (n 832) 1686.
[912] ibid 1721.
[913] ibid 1820–1821.

as morally ambiguous by the relevant actors, and carries a certain risk, both to judges and similarly situated individuals themselves as well as to their ability to carry on with the enterprise of resistance.

(ii) Overt resistance

a. Judges and juries

The next type of resistance from the outside I will consider, one that is hopefully more promising, is overt resistance, or resistance from the outside that does not mask as legal interpretation. It can be practised by the same actors who might offer covert resistance, including judges. For instance, Cover writes about what he calls 'judicial civil disobedience' and claims that a judge confronted by a morally iniquitous law 'can simply refuse to follow law and authority and send resisters free[914].' This will be different from the scenario outlined in the previous section, as instead of pretending to engage with legal arguments, the judge may issue 'naked acts of power without an opinion or <…> "opinions" citing only the moral reasons for the decision[915].' Like the above discussion of covert resistance, discussion of overt resistance can be extended to ordinary citizens, including lawyers, in that they can convince the judge to engage in the described judicial nullification.

Whether this is an option depends on the legal system in question. In the US, for instance, judges have never been able to nullify. The same was true of Nazi Germany and Stalin's Soviet Union. As a result, as Wacks briefly points out, relying only on moral argument in this way 'is unlikely to offer itself to a lawyer as either an attractive or effective way of resolving a dispute[916].' If judicial nullification is not possible, the undoubtedly courageous decisions of judges choosing to nullify might be ineffective as they would be at risk of being reversed and it could lead to disciplinary measures against judges who dared to oppose evil law in this particularly palpable way[917]. In addition, judges, as argued just above, will face additional pressure regardless of whether they follow established procedures and act within their powers.

[914] Cover, 'Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression' (n 808) 1007. See also Butler (n 832) 1808.
[915] Cover, 'Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression' (n 833) 1007.
[916] Wacks (n 828) 192.
[917] Butler (n 832) 1808.

A better illustration of effective overt resistance when faced with unjust laws is thus jury nullification, which, again, can only be applicable where it is permitted by law. A particularly stark example can be found in the activities of anti-slavery jurors who refused to convict those who aided the slaves' escapes in violation of the *Fugitive Slave Acts* in the antebellum United States[918]. This example may be seen as borderline covert / overt resistance, and it is indeed classified by Butler as the former[919]. However, I perceive it as overt resistance since juries, at least under the law of the United States, are not supposed to interpret the law but make judgments of fact. In addition, these juries could be taken to be following the doctrine of jury nullification that explicitly allowed juries to refuse to convict the defendant under a morally iniquitous statute. As a result, their actions were not only overt, but legal, proving that overt resistance is not synonymous with violating the law. Ordinary citizens, including lawyers, can appeal to jurors' sense of morality and induce jury nullification through their advocacy.

Therefore, the resistance toolkit for judges, juries, lawyers, and litigants is rather limited and the ability to counter or mitigate the effects of evil law using it highly context-dependent. However, while the risks of such resistance should not be understated, in certain circumstances it can work, as demonstrated by the successful story of jury nullification in the antebellum United States.

b. Lawmakers

One can also engage in resisting evil law outside of courts and other similarly situated institutions. Consider, for instance, the position of legislators – and sometimes executive officials who participate in lawmaking – rather than bodies that merely interpret the law, as indicated above. For example, the debate over the definition of a Jew in the context of the Nazi *Nuremberg Laws* points at the lawmakers' ability to significantly reduce the scope of repressive laws. To recap, the Nazi bureaucrats, while not being legislators *per se*, succeeded in lobbying for a narrower definition of a Jew that was included in the *First Regulation* of November 14, 1935[920], an appendage to the Acts aiming to clarify this question, against the wishes of more radically minded Nazis. While this can hardly be called justice and was not done out of any

[918] Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy: The Jury System and the Ideal of Democracy* (Harvard University Press 2000) 64. As cited in Butler (n 832) 1790 note 25.
[919] Butler (n 832) 1790.
[920] Reich Citizenship Law: First Regulation (*Reichsbürgergesetz: Erste Verordnung*) 1935.

noble concern, it provides a good illustration as to how morally iniquitous laws can be cabined via attempts to influence the exercise of legislative power.

In the Soviet Union, this kind of legislative initiative was similarly scarcely seen. The closest example one can think of is the *Stalin's Constitution* that guaranteed some core personal and political rights, such as the aforementioned right of universal suffrage, in Article 135, and the right of inviolability, in Article 127, according to which one could only be placed under arrest by decision of the court and/or by sanction of the procurator[921]. In appearing to guarantee these rights, the *Stalin's Constitution* broke with the tide of past political repression and rebuked those who envisioned a future devoid of legality for the growing Soviet state. However, it did not do anything to quell the campaign of Great Terror launched with full force shortly after. Rather, as stated above, the *Constitution* acted to camouflage these acts and garner support for the Soviet state.

The most vivid examples of legislative resistance are found in the antebellum United States, where slavery was opposed by some legislators, some of whose efforts succeeded. On the federal level, the slave trade was abolished, and the importation of slaves was criminalised in 1807[922]. When it came to the domestic dimension, examples of legislative resistance to federal-level evil law can be found in the anti-slavery statutes promulgated in free states. Some of them focused on phasing slavery out. One well-known example is the *Act for the Gradual Abolition of Slavery* passed in Pennsylvania in 1780. One of the key provisions of the *Act* granted every child born of an enslaved mother freedom at the age of 28 (Section 4)[923]. The *Act* did not go far enough to abolish slavery entirely, but it set the scene for gradual change both in Pennsylvania and other Northern states. An even starker illustration were personal liberty laws enacted to counter the *Fugitive Slave Acts*. As an example, the 1826 *Pennsylvania Personal Liberty Law* stating that no person, under the threat of punishment, could be taken out of the state of Pennsylvania to be held as a slave[924]. This law, however, was successfully challenged in *Prigg v Pennsylvania*[925]. The success of a state-centred legislative scheme aiming to oppose the law was contingent on what was happening on the federal level.

[921] Constitution (Fundamental Law) of the USSR (*Конституция (Основной закон) СССР*) 1936.
[922] Act Prohibiting Importation of Slaves 1807.
[923] An Act for the Gradual Abolition of Slavery 1780.
[924] Pennsylvania Personal Liberty Law 1826.
[925] *Prigg v Pennsylvania* (1842) 41 US 539 (US Supreme Court).

Ordinary law-subjects can also take part in the political process by voting and petitioning the lawmakers, and even by engaging in acts of protest and disobedience to sway those in charge. One example from Nazi Germany is the challenge the public posed to the secret *Aktion T4* program aimed to kill the disabled and mentally ill, officially justified by Hitler's retrospective order in 1939, which was considered, despite not being released to the public, as a source of law. This undoubtedly evil policy, when uncovered, quickly attracted opposition, most notably from medical professionals and Christian leaders such as, particularly notably, the Bishop of Münster, Clemens August Count von Galen. This resulted in what Evans characterised as 'the strongest, most explicit and most widespread protest movement against any policy since the beginning of the Third Reich[926].' What is remarkable is that these efforts were successful – in 1941 Hitler suspended the program, arguably due to this public pressure.

Similarly, law-subjects who expressed discontent at Soviet policies in the Stalinist era, often tried to change the law, addressing those they saw as having powers to do so. Rossman writes about The Vichuga Uprising, a workers' strike in April 1932. The workers were protesting the decrease of food rations under the new policy of collectivisation, leading to a violent clash with the police (*militsia*) and the OGPU and the arrest of some of the strikers. In response, the workers sent a telegram to Mikhail Kalinin, nominally the head of state[927]. The petition was unsuccessful, and the strikers were contained, arrested, tried, and sentenced to time in GULAGs or exiled[928]. This failure could be attributed to the fact that the success of such petitioning was contingent on whether it could convince those in power to mend their ways, which is one of the vices of overt resistance from the outside as opposed to resistance from the inside and even covert resistance. Another possible explanation is that the petitioners chose the wrong destination, as Kalinin's sway in the affairs of the Soviet State was not in fact as great as imagined.

Finally, the aforementioned legislative challenges to slavery in the antebellum United States could not have been successful without the widespread and well-documented activities of abolitionists. These activists, taking advantage of their political freedoms, were outspoken about their opposition to slavery. While some abolitionists, such as Charles Sumner and

[926] Richard J Evans, *The Third Reich at War, 1939-1945* (1st American ed., Penguin Press 2009) 98.
[927] Jeffrey J Rossman, 'A Workers' Strike in Stalin's Russia The Vichuga Uprising of April 1932' in Lynne Viola (ed), *Contending with Stalinism: Soviet Power and Popular Resistance in the 1930s* (Cornell University Press 2002) 69–70.
[928] ibid 77–78.

Thaddeus Stevens, as were legislators, those who were not nevertheless campaigned against the institution of slavery. In that, they delivered speeches and writings to as large of the audience as possible, targeting both those in power and fellow citizens. These movements were numerous and diverse in their views. By the 1850, two camps of abolitionists emerged. One, represented by, among others, Lysander Spooner[929] and Frederick Douglass[930], argued for the unconstitutionality of slavery, aiming to use the *Constitution of the United States* as a tool to end the condition that enslaved persons were in once and for all. This was, of course, a stance that favoured resistance from the inside that, as explained above, was not quite effective. The other position was expressed by William Lloyd Garrison, who famously called the *Constitution of the United States* 'a covenant with death and an agreement with hell[931]' as it sanctioned slavery. With the main legal document compromised in this way, there was no way, Garrison held, to continue battling slavery via legal interpretation. Garrisonians therefore sought to change the *Constitution* itself through political means. This effort, however, was not successful either – abolitionists, as demonstrated just above, did not secure many victories on the federal level.

Overall, this instantiation of resistance from the outside is, however, once again contingent on what kind of evil regime is considered. One obvious limitation is that not all lawmakers are in fact empowered to make decisions on any matter. Their legislative capacities can be hampered by the primacy of other *de iure* or *de facto* powers. The other consideration at play is that, especially when it comes to authoritarian and totalitarian evil legal systems, the options for political participation are significantly limited and often risky. As a result, both of these factors reduce the potential impact both officials (unless they are the locus of real power) and ordinary citizens can have on resisting evil law.

c. Saboteurs and revolutionaries

Finally, even if resisting evil law through other means fails, one can engage in acts that do not rely on the operation of the law. Such resistance can take place either on a smaller scale, through individual acts against specific evil laws, or on a bigger scale, by aiming to take the

[929] Lysander Spooner, *The Unconstitutionality of Slavery* (BMarsh 1847).
[930] Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Tand W Birtwhistle, printers 1860).
[931] *Resolution adopted by the Antislavery Society,* Jan. 27, 1843.

whole evil legal system down. The success of these methods is even more context-dependent than that of the methods of resistance previously considered, as lawbreaking and revolutionary tactics are just as diverse as the evil laws and legal systems they are trying to counter. Nevertheless, some observations can be made in relation to the central cases considered in this dissertation.

When it comes to Nazi Germany, acts of resistance through lawbreaking were diverse in nature. Resistance movements emerged not only within the state, but also in countries occupied by the Third Reich. Their acts varied in form, so they can hardly be given justice within the confines of this very limited discussion. However, a short gloss can be made. Firstly, on both German and occupied territories there was everyday nonviolent resistance such as hiding those marked for extermination (such as Anne Frank and her family) within one's homes or spreading anti-Nazi messages by leafleting and graffitiing (the White Rose Movement), both in direct contravention of the law. Secondly, there was violent resistance, such as fighting undertaken by guerilla fighters such as the Maquis on occupied territories or uprisings like the 1943 Warsaw Ghetto Uprising. Thirdly, there were several, albeit unsuccessful, assassination attempts against Hitler throughout his staying in power, from Georg Elser trying to murder Hitler on 8 November 1939 to the famous 20 July 1944 attempted *coup d'état* within the military. These acts of resistance were, however, of limited application as they were not numerous enough to dismantle the whole architecture of Nazi state and, which is more pertinent to this discussion, Nazi law.

In Stalin's Soviet Union, resistance through lawbreaking or revolutionary activities was surprisingly rare. While numerous individuals were, as indicated above, convicted, tried, imprisoned, and executed or sent to labour camps for supposed coups against the Soviet State and Stalin in particular, there is little evidence that such coups actually occurred. The best-known attempt to lead a revolutionary effort against Stalinism was the Ryutin affair in 1932, when Martemyan Ryutin, an Old Bolshevik, circulated a manifesto opposing collectivisation, industrialisation, and Stalin's expulsion of those who disagreed with him, including his arch-nemesis Leon Trotsky, from the Bolshevik Party. Ryutin even went as far as arguing for removing Stalin by force. His effort to garner support for a *coup d'état* against Stalin was, however, unsuccessful, and Ryutin was arrested in 1932 and eventually executed in 1937 during the Great Purge.

Under the regime of slavery in the antebellum United States, anti-slavery activists did not confine themselves to the ample range of tactics they were legally allowed to use. Forms of resistance through lawbreaking included efforts to help those enslaved escape from bondage and prevent them from being recaptured. There were also, in parallel with what has been discussed in relation to Nazi and Soviet cases, multiple slave rebellions aiming to overthrow the slaveholders. One of the most famous cases of violent resistance to slavery was a revolt that took place on October 16-18, 1859, where rebels of mixed backgrounds led by John Brown took over the Harpers Ferry Armory. The rebellion was, however, crushed, with most participants killed or executed, including Brown himself. Therefore, the revolutionary abolitionist action, while succeeding at rescuing individual slaves and retaliating against individual slaveholders, did not manage to undermine the institution of slavery as a whole.

As a result, the activities of lawbreakers and revolutionaries resisting evil legal systems were often present and somewhat effective. Nevertheless, when examining the historical record, one can make a correct observation that they were limited in nature. Rather than dismantling the legal system as a whole, at best, they successfully prevented smaller inflictions of harm through it. This is not to denigrate the efforts of resisters who, often at a high risk to themselves, chose that fact, but to point out that even resistance from the outside was not a foolproof tactic.

6. The End of Evil Law

As a result, in Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States, there were some attempts to resist evil laws by deliberately breaking them, with various degrees of success. However, they ultimately did not lead to the dismantling of whole evil legal systems. Instead, these morally iniquitous regimes were ended by a range of exogenous events – the Allies' victory in World War II over Nazi Germany, Stalin's death in the Soviet Union under his rule, and the Northern defeat of Southern troops during the Civil War in the United States that brought the end of slavery. Of course, some of these events – the outcomes of wars in particular – are not entirely a product of chance. Even more so, their implications were down to acts of will on behalf of officials of successor legal regimes. Yet, examining them proves that the success of resistance movements in their ultimate goals of destroying an evil regime, even if calibrated in the light of factors considered in this Chapter, can be highly contingent on factors beyond their control.

When it comes to Nazi Germany, despite the efforts to subvert the regime as documented above, the regime finally collapsed only after the Allies' victory on the Eastern Front in World War II and Hitler's subsequent suicide. This set the stage for bringing high-ranking Nazi officials to justice – through the International Military Tribunal and other Nuremberg Trials – and the overall denazification of the formerly evil state, although these measures' success was, of course, varied. The forces opposing the Axis powers (which included Stalin's Soviet Union), both during the War and its aftermath, were at least partially motivated by the desire to stop the evil, including evil done through legal mechanisms, inflicted by the Nazi state and its allies. Nevertheless, it would be wrong to attribute the fall of the Nazi regime to resistance, either from the inside or the outside.

In the Soviet Union, the situation was similar. Shortly after Stalin's death in 1953, Nikita Khrushchev began destalinisation, firstly by 'silent destalinisation' through non-publicly rehabilitating some of the victims of Stalinist terror, and then a more active phase after giving his famous secret speech 'On the Cult of Personality and Its Consequences' delivered at a closed session of the 20th Party Congress of the CPSU where he officially denounced Stalin's terror. Khrushchev's speech, however, had nothing to do with the meagre attempts to resist Stalinist terror as chronicled above. It was motivated by other reasons, some of them, like opposition to Stalinism, more idealistic and some, like the desire to stay in power, more pragmatic. This is supported by the fact that the speech and the course Khrushchev undertook were a huge shock to the delegates and later the public at large (both within and outside the Soviet sphere of influence).

In the United States, the cause of the collapse of the regime of slavery was the South's loss in the Civil War (1861-1865), a result of the tensions between the North and the South which could be attributed to abolitionists' success in keeping the abolition of slavery on the agenda. In that respect, the situation in the United States contrasted with the situations in Nazi Germany and Stalin's Soviet Union. The desire to eradicate slavery manifested in practical steps, from Abraham Lincoln's *Emancipation Proclamation* handed down on 1 January 1863 during the War to the antislavery Reconstruction Amendments to the *Constitution of the United States* adopted shortly after the North's victory. More specifically, the 13th Amendment abolished slavery and the 14th granted citizenship rights and legal protection to everyone after the victory of the North. While the Civil Rights Movement and other similarly situated political actors had

to fight even more till the full promise of the 14th Amendment came into fruition, that was a welcome start.

The observations made in this section, of course, warrant a separate, more detailed inquiry. However, they demonstrate that perhaps sometimes what is needed when it comes to evil law is taking advantage of the broader political processes. However, to subscribe to an extreme level of fatalism by denying the impact of resistance altogether would be wrong. First, it would mean to dismiss the value of incremental resistance in the interim that, though it is unlikely to succeed in overhauling the whole legal system, may nevertheless make a difference to some of those targeted by evil law. Second, it would underestimate the (albeit limited) role incremental resistance plays in bringing down the evil legal system or forming a vision of the future in its aftermath. We should therefore be not optimistic or pessimistic, but realistic about the place of resistance when it comes to dealing with evil regimes.

7. Conclusion

In the last substantive chapter of my thesis, I considered the question of how exactly one can resist evil law practically speaking. Firstly, in Section 2, I considered different resisting agents, subdivided into categories of legal officials and law-subjects. With regard to the legal officials, I talked about how resignation in protest of evil law, despite frequently being viewed as an attractive option, is ultimately contextual, as quitting will often be unlikely to lead to any significant change. Moreover, as I demonstrated by my analysis of different types of legal officials in different kinds of legal systems, the prospects of success of resisting officials depend on contextual factors and on the powers the officials have. When it comes to ordinary law-subjects, I considered both those who are targeted by evil law and those who remain unscathed, arguing that the latter have a stronger obligation to resist the law because of their privileged status and their being in a better position to counter evil law effectively. Secondly, in Section 3, I considered the different forms which resistance – by both officials and law-subjects – can take. My key distinction was between resistance from the inside – through interpreting the law – and resistance from the outside – or going beyond those interpretive confines. I argued that resisting evil law from the inside was not very promising in evil legal systems considered in the dissertation, which reaffirms the previous observation that evil law is harmful even when interpreted in its best light. Resistance from the outside can be covert, masking as interpretation, and overt, explicitly going beyond it. While covert resistance is often

cited as a possible option in the jurisprudential literature, it has not been used very much, as far as one can tell, in historical example cases of evil law, which I attribute to it being difficult to practice both morally and pragmatically speaking. Overt resistance by various state and non-state actors is more promising, but its effectiveness again depends on the context it is exercised in, Thirdly, in section 4, I have briefly indicated that often the downfall evil law is secured not by resistance, but by external factors such as wars – both interstate and civil – and / or the passing of those at the top of evil regimes.

VIII. Conclusion

1. Goals Revisited

The goal of this dissertation was to address the phenomenon of law's entanglement with extreme moral iniquity, conceptualised by me as 'evil law'. Employing this category, as has been repeatedly acknowledged, is bound to give rise to controversy. Often, upon mentioning the direction of my research, I was met with wonder and even disbelief. The very word 'evil' may seem to be too laden with religious baggage or, if it can indeed be interpreted in secular terms, to be too emotional for a dispassionate academic inquiry into the nature of impersonal social institutions such as law. Nevertheless, I set it as my mission to establish that, on the contrary, drawing on the philosophical category of evil when making an inquiry into the relationship between law and extreme moral iniquity is not just coherent, but, even more so, generative of important theoretical and practical insights. This dissertation aimed to establish this point by building a comprehensive theory of evil law. Answering the question about the nature of evil law, it unpacked its following aspects: (i) *what is evil*; (ii) *what is evil law*; (iii) *whether evil law is law*; (iv) *how law helps and hinders evil regimes*; (v) *what rights and obligations we have in response to evil law*; and (vi) *how we can resist evil law in practice*. My method combined legal-theoretical inquiry into each one of these questions with legal-historical analysis of three central cases of evil law – Nazi Germany, Stalin's Soviet Union, and the antebellum United States – to ground my conclusions in real-world experiences of evil laws and legal systems.

2. Summary of the Conclusions

(i) Chapter II – The Concept of Evil

I have reached the following conclusions. In Chapter II, answering the question of what is evil, I sought to introduce, define, and defend the concept of an evil act or practice in the context of its subsequent use in the study of evil law more generally and its historical incidences more particularly. Firstly, after cabining my inquiry to a narrow (as opposed to broad), moral (as opposed to natural), and integrated (as opposed to solely 'utilitarian' or 'stoic') concept of evil acts or practices, I provided a working definition of evil acts or practices. Specifically, drawing

on close examination of evil as manifested in the three historical test cases I examined, I defined an evil act or practice as an act or practice *intentionally or recklessly causing or enabling infliction of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors*.

Secondly, I defended this concept from four potential attacks. First, I argued that evil is qualitatively and not simply quantitatively different from mere wrongness as only evil acts contain all, and not just some, of the characteristics of evil outlined in my definition, something that becomes even more evident in the examination of evil law's distinctiveness from unjust law in Chapter III. Second, I added that the term evil is not a 'black hole' devoid of any substance, as my definition of evil supplies sufficient explanation of what makes it special, if answering this question is necessary for the utility of the concept of evil at all. Third, I took a stance against moral relativists' potential attack against bringing the category of evil into an analysis of morally iniquitous law – namely that such a use of the concept of evil would employ anachronistic judgments of legal cultures separated from us both in time and space. I argued that, historically speaking, even in the three historical evil legal systems considered in this thesis, there were actors who recognised these regimes' moral iniquity and stood against it. Moreover, on a philosophical level, I presented a case for there being objective moral concepts that those legal systems could be judged against, focusing ultimately on general – as opposed to context-specific - notions of right and wrong encapsulated in my definition of evil. Fourth, I addressed the claim that the term 'evil' should be discarded as it makes the demonisation of marginalised groups possible, arguing that this fact does not delegitimise the proper use of the concept of evil that can in fact prove helpful to those oppressed by evil regimes.

Thirdly and finally, I provided positive reasons for utilising the concept of evil. This category is useful conceptually, as it captures the distinctiveness of evil acts and practices such as evil law, paves the way for considering the reasons for this distinctiveness, and provides a theoretical toolkit for non-philosophers to make more sense of their basic moral convictions by infusing them with these reasons. Moreover, talking about evil is important practically speaking as it gives victims of evil law tools for conceptualising their suffering, helps these victims and those who seek to defend them to resist evil regimes, and makes us keenly aware of the practical and moral limitations of this resistance.

(ii) Chapter III – Evil Law, Evil Laws, and Evil Legal Systems

In Chapter III, I built on this previous exploration by developing the concept of evil *law*. Firstly, for the purposes of this dissertation's inquiry, I defined law in general as *the product of the enterprise of subjecting human conduct to the governance of rules that, in aggregate, claim supreme authority*.

Secondly, I sought to develop a concept of specifically evil law as distinct from bad or unjust law. First, I dismissed the category of bad law as being too imprecise to capture what I was interested in – its moral iniquity as opposed to its lack of authority or practical unworkability. Second, I considered two positions on the difference between evil and unjust law – that the difference between the two is a matter of degree (or, to recap one of the points above, that evil law is just very unjust law) and that they can be distinguished on qualitative grounds, which is the position that I seek to take.

Thirdly, I traced the roots of this difference to the fact that evil law, unlike unjust law, does not create even *prima facie* rights and duties. This difference in normative consequences, I argued, can be explained by the fact that unjust law can be rendered harmless through the process of legal interpretation, while evil law is unmanageable by such means. As a result, I defined evil law as *law, which, if interpreted in its best light, will cause or enable infliction or of intolerable harm (including atrocities) to the victims themselves if not pre-empted by external factors*.

Fourthly, I argued that, as evidenced through the examination of the three historical case studies, such enabling does not just take the form of duty-imposing rules requiring that intolerable harm be inflicted either by a law-subject, in discharging an obligation, or by state officials as a sanction. Evil laws can also be power-conferring, setting out to disempower individuals or groups by denying them access to the benefits produced by law or empowering legal officials and ordinary citizens to inflict intolerable harm on others. Moreover, there are permissive evil laws that tolerate this infliction of harm without granting powers to do so. Finally, one should not forget about legitimating laws that justify, distract from, or hide infliction of intolerable harm.

Fifthly, I moved from a notion of an evil law to the concept of an evil legal system, with legal systems, for the purposes of my inquiry, defined as *systems of legal rules recognised by the*

primary law-applying organs. To be characterised as evil, legal systems should not be required to contain only evil laws, which is too narrow. Equally, it is not enough for them to include merely occasional instances of evil law, which is too broad. As a result, a legal system is evil when it *contains a significant number of evil laws central to their material identity*. This is true of the historical evil legal systems considered in this dissertation.

(iii) Chapter IV – Is Evil 'Law' Law?

Turning to Chapter IV, I aimed to answer another question arising from examining a range of positions on evil law previously considered in Chapter III – whether evil 'law' (in a placeholder sense) can be called law in the first place. Firstly, I examined the importance of calling evil 'law' law, arguing that to do so is crucial for two reasons. Theoretically speaking, recognising evil 'law' as law helps us in appraising the nature of evil as involving subversion, rather than rejection, of good, and the nature of law as an institution that can be dangerous as it is susceptible to such subversion. Practically speaking, recognising this danger by talking about evil law as 'law' not only is not obstructive to, but is in fact conducive to resisting evil laws and legal systems when encountering them firsthand.

Secondly, I began my rebuttal of the two positions on why evil 'law' should not be recognised as law, the first one focusing on evil 'law's' external immorality in light of substantive requirements of what is good and just. This argument was, in turn, expanded on and hence addressed in two ways. First, I rejected the notion that evil 'law' is not law at all, since adopting this strong argument is suboptimal even though it tracks a commonly accepted understanding of the relationship between law and morality. The equation of morality with legality will lead us to understate evil 'laws'' law-like features, such as the fact that they are perceived as legally binding from the internal point of view, and to distinguish inadequately between law and non-law. Second, I responded to the argument that evil 'law' is law only in a secondary sense. As I argued, the central case method distinguishing between primary and secondary senses of 'law' should not be rejected altogether or be discarded when examining law more particularly. However, laws' compliance with moral precepts is not a good criterion for delimiting law in the primary sense and in the secondary sense. Instead, adherence to the precepts of legality under which law should be general, publicly promulgated, prospective, clear, free of contradictions, stable, possible to obey, and congruent with their official administration, is a better option when it comes to distinguishing law in the primary and the secondary sense.

Thirdly, I rejected the second justification for not calling evil 'law' law, based on a purported internal morality. However, I dismissed the potential argument that these criteria only describe a legal system based on liberal foundations that are defied by some evil legal systems, especially those evil legal systems considered in this dissertation, for the reason that Fuller's principles of legality instead describe a legal system more generally. Instead, I established that these legal systems contained norms that fit these precepts, both in the normative sphere, concerned with day-to-day functioning of these regimes, and in the prerogative sphere, or when it comes to the site of political cases, laws, and policies.

(iv) Chapter V – Why Evil Regimes Need Law

The explanation of why evil regimes need law in the first place – was considered in Chapter v Firstly, I argued against the position that evil modes of governing need to eschew law as extra-legal methods are more efficient for quelling dissent. First, I claimed that this goal is better achieved by law, as one needs its guidance to successfully conform with the regime's demands. Second, drawing on the three case studies of evil law, I argued that evil regimes are not driven just by the desire to remain in power, but have other evil projects for which law is needed, such as singling out individuals and groups for ill treatment. Third, I recognised that evil legal systems have goals that they share in common with their non-evil counterparts, primarily including their flourishing and, ultimately, general survival, that are best achieved by legal means.

Secondly, I sought to examine how law aids evil regimes in pursuit of those goals in particular, building extensively on the three historical case studies at the heart of this investigation. I outlined the following functions of evil law. First, I pointed out that evil law, in exercising its coercive function, incentivises the desired behavior of law-subjects in their personal and institutional capacities. Second, I argued that law is important to evil legal systems for its coordinative capacity in the face of the law-subjects' lack of expertise and game-theoretical coordination problems these law-subjects – in their capacity as individuals and officials - encounter. Third, I stated evil law performs a legitimating function, making the evil regime and its directives seem worth obeying or at least tolerating. Fourth, I indicated that evil law can be used for education and propaganda, going beyond the incentives that law-subjects consider to moulding their whole outlooks. Fourth, evil law engages in identity building by designating

both an in-group, bringing the law-subjects together, and an out-group, singling out the evil regimes' targets and providing further grounds for their oppression.

(v) Chapter VI – Right and Duty in the Face of Evil Law

Having established that evil regimes have many reasons to resort to law in furthering their aims, I turned, in Chapter VI, to the other side of the phenomenon of evil law, namely the perspective of those who seek to resist it. Firstly, I defined resistance as *acting intentionally in order to prevent infliction of intolerable harm (including atrocities) to the victims themselves*. I pointed out that resistance, as considered further on in Chapter VII, can take many forms and may involve explicit disobedience of evil legal rules, although it does not have to.

Secondly, I sought to focus on this disobedience as it is important for establishing whether there is a right (meant as a Hohfeldian liberty) to resist. I claimed that there is such a right notwithstanding arguments for why some law needs to be obeyed. In doing so, I considered three arguments in favour of obedience and argued that they are inapplicable in the context of evil law. First, I referred to the substantive argument that obeying some law protects us from violence or helps us to make better choices either for the sake of the law-subjects' individual interests or for the common good. The argument from order, I determined, does not stand when it comes to evil law, because such law creates or compounds violence rather than eliminates it. As for the claim that obeying some law is valuable as it saves us from chaos and enhances our decision-making capacities, I concluded that evil law is not helpful in this way, but is, conversely, conducive to its subjects' self-destruction as opposed to self-preservation and leads to immoral as opposed to virtuous choices. When it comes to the argument advocating for following the law as a path towards achieving the common good, I applied similar considerations, and pointed out that evil law is antithetical to that value. Second, I focused on the procedural claim that some law should be obeyed as it is a product of democratic decision-making. Drawing upon the three test cases of evil law, I argued that since some evil regimes either sabotage democratic decision-making procedures or restrict the right of suffrage to certain groups, they lack this legitimacy. Moreover, speaking more generally, relying solely on procedural considerations leaves no fetters on the potential tyranny of the majority at the expense of minority rights in evil regimes. As a result, third, I considered a hybrid approach combining both substantive and procedural considerations as the most balanced one when it comes to establishing a duty to obey some law. However, I argued that even this justification

– grounded in the values of participatory equality, dignity, and autonomy – is not applicable in evil regimes.

Thirdly, I moved on from establishing the right to resist evil law to making a different claim – that there is a duty to do so. In making a positive argument for such a duty, I referred to the natural duty to realise the same values that underpin the hybrid account of the obligation to obey some law - participatory equality, dignity, and autonomy. I argued that the proper realisation of all those values required there to be a duty to resist. First, I claimed that when it comes to participatory equality, resistance is needed to restore that right taken away from either the population as a whole or, as it frequently happens in evil regimes, some groups within that population. Second, I pointed out that resisting evil law is important to protect the dignity of one's neighbour impaired by such law as well as to prevent the indignity involved in being complicit in its operation. Third, I emphasised that full realisation of one's autonomy is incompatible with uncritical compliance with law, especially when it comes to legal rules and legal systems that are particularly morally iniquitous.

Fourthly and finally, I argued that the duty to resist, unlike the right to resist, is limited. First, I posited that this duty, in good conscience, should not extend the right (and hence the duty) to resist to acts of resistance that involve the infliction of intolerable harm on others if not pre-empted by external factors. Some argue that this resistance is not effective, and even if that claim is false, allowing one to resist in this way is morally wrong. Second, I pointed out that establishing a moral duty to resist evil law when this duty may involve inflicting intolerable harm to oneself if not pre-empted by external factors is similarly immoral. While no one should be denied the right to sacrifice themselves in order to put an end to evil law, there should be no duty to do so.

(vi) Chapter VII – Resisting Evil Law

In Chapter VII I explored what form the resistance that is permitted and sometimes even demanded in the face of evil law should take, with lessons drawn from the three historical case studies considered in this thesis. Firstly, I subdivided potential resisting actors into legal officials and ordinary law-subjects and considered their rights and duties in turn. First, when it comes to legal officials, I assessed moral arguments for a duty of such officials to resign as the very act of staying in office may legitimise evil legal systems and their laws. I disagreed with

that position, arguing instead that, conversely, officials' vast powers, which make them the potentially most powerful resisting agents, should be utilised rather than discarded. However, I emphasised that, by virtue of risking legitimation through the occupation of their offices, legal officials have a stronger duty to resist than individuals. Then, I turned to different types of legal officials – judges, legislators, and members of the executive to argue that all of them have different capacities when engaging in resistance acts. Afterwards, I talked about institutional and practical constraints placed on these officials by virtue of working in a legal system of a certain kind. These constraints become most explicit when surveying and comparing the three historical case studies this dissertation builds on. Again, I argued that the more granular specification of the officials' duty to resist is highly contextual. Second, I considered narrowing down the duty to resist when it comes to ordinary law-subjects, subdivided into those who are targeted by evil legal systems and those who are not. I argued that the latter have a stronger duty to resist for two reasons. Morally speaking, these law-subjects are less likely to put their lives on the line and, even more so, more likely to benefit from evil regimes. Pragmatically speaking, they would have more capacities to resist due to their privileged position in the system and less physical and emotional strain compared to their compatriots who are victimised by evil law.

Secondly, I considered different ways of resisting evil law. I subdivided them into resistance from the inside, *i.e.*, resistance involving engaging in legal interpretation, and resistance from the outside, *i.e.*, resistance going beyond those bounds. To discuss resistance from the inside, I stated, based on the historical case studies, that this resistance is not sustainable, reaffirming the previous observation about evil law's inability to be managed through legal interpretation. When it comes to resistance from the outside, covert resistance, or resistance under the pretence of interpretation, and overt resistance, or resistance under no such pretence, equally differ in their success. Covert resistance features very sparingly in the historical case studies, which might be explained by the fact that it is particularly hard to execute. Overt resistance, on the contrary, is more promising. I argue that it can take place in the form of action undertaken by judges and jurists, lawmakers, and, most controversially, lawbreakers and revolutionaries. The expectation of success of each group is contingent on factual circumstances but not wholly unrealistic.

Thirdly, I briefly remarked that, in the three evil regimes considered in the dissertation, the fall of evil legal systems could be attributed to extraneous factors such as wars or deaths of political

leaders, which should make one cautious about the role resistance can play in dismantling evil regimes. Ultimately, in the grand scheme of history, the power of resistance should not be overestimated.

(vii) Overall summary

All in all, this dissertation aimed to give an account of the nature of evil law. In the first four substantive chapters (excluding the Introduction), it has been established that evil law has unique characteristics as a product of a dangerous alliance between the power of the legal form and aspirations towards extreme moral iniquity. In the last two substantive chapters, it has been argued that this phenomenon, as a result, generates both distinctive rights and obligations as well as determines practical ways in which these rights and obligations can be exercised. This comes out in the investigation of evil law as a legal- philosophical category as well as the legal-historical analysis focusing on Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States.

3. Significance and Future Steps

A. Understanding evil law

Having established what this dissertation has argued, I shall give a brief account of why the results of this project matter. Firstly, it is a contribution to moral, political, and, of course, legal philosophy that enriches our understanding of the nature of evil, law, and evil law. By focusing on different aspects of evil law, it provides a novel comprehensive analysis of the phenomenon that was on various thinkers' minds for centuries. It sets out a framework for future discussion of various theoretical debates around evil law. This future direction of work on evil law may include, for instance, going beyond investigating evil law at the moment of its existence by considering its past and its future. This will involve investigating how evil legal systems and evil laws emerge and how they are to be treated in the process of transitional justice after they fall.

First, when it comes to evil law's past, one can apply the aforementioned conclusions to discussion of how evil governments come to power. As it has been established that evil regimes need legality to function, one can claim that the act of transfer of power, while not needing to be fully couched in a legal form, still needs to contain a legal element to be successful. This

can be demonstrated in relation to the evil legal systems considered in this dissertation. In Nazi Germany, the NSDAP came to power by manipulating the democratic system rather than overthrowing it, and their authority was crystallised via legal instruments such as the *Reichstag Fire Decree* and the *Enabling Act* (both 1933). When it came to the early days of Soviet Russia, while the 1917 October Revolution was a forceful transfer of power from the Kerensky's Provisional Government that briefly replaced the Tsarist regime, the Bolsheviks quickly proceeded to pass various legal documents (Decrees) changing the pre-revolutionary legal landscape. Later, Stalin continued using the law to secure his power, reverting to pre-Soviet legal ideals, culminating in his 1936 *Constitution*. Equally, in the antebellum United States, while the formation of the new state was a result of the revolutionary struggle, its founders cared about anchoring their position legally through documents such as the 1789 *Constitution*. The regime of slavery in particular was protected constitutionally via the 'Three Fifths' Clause, the Fugitive Slave Clause, and the Slave Trade Clause. This demonstrates that law is paramount not only for the functioning of evil legal systems, but also for establishing such regimes.

Moreover, transitioning between a non-evil and an evil legal system, one should bear in mind that not all laws in an evil legal system are evil, and, even more importantly, not all evil laws in an evil legal system are irredeemable since they can change their character depending on their surrounding legal materials. Law becomes evil when it enables infliction of intolerable harm if not pre-empted by external factors even *when interpreted in its best light*. During the transition from one legal system to another, one need not overhaul the entirety of the body of laws of that system. One can turn existing laws to evil purposes by supplementing them with new legal materials that change the background principles the interpreter takes into account. This can be observed when it comes to Nazi Germany and Stalin's Soviet Union. The Nazis built on a lot of Weimar-era law, including the 1919 *Weimar Constitution*. Instead of tearing it down, they supplemented it with new legal acts and political offices that changed the main political structures within that framework, turning the federal state into a unitary one, and consolidating the power into Hitler's hands at the Parliament's expense. The history of the Soviet state is similarly complex. On the one hand, after the October Revolution, Lenin and his allies tore the existing legal system down entirely to establish a new 'dictatorship of the proletariat'. On the other hand, Stalin's succession from Lenin was different. The new laws that were introduced – such as the aforementioned 1936 *Constitution* or the 1927 *Criminal Code*, did not fully replace all pre-existing laws, but merely changed the direction in which that legal system was going from legal nihilism to fetishisation of law.

Second, the same can be observed when it comes to the evil regimes' demise. While it has been established that evil legal systems are unlikely to be displaced via law alone as one is not able to effectively resist evil law from the inside, building a new legal system after an evil legal system has been displaced involves legal action. Law plays a number of roles at that point in time – from holding perpetrators of extreme moral iniquity to account to supporting a new successor state. After Nazi Germany suffered defeat in World War II and fell, there was a considerable effort, initially led by the Allies, to try at least its key functionaries for their crimes, both under international and domestic law. There was also a plan to effectuate lustration by making sure ex-Nazi functionaries left their offices, although it was soon abandoned. Moreover, the break from the previous legal system was marked by the adoption of the Basic Law (*Grundgesetz*) in 1949, characterised, among other things, by proclaiming the inviolability of human dignity in its Article 1. To compare, during destalinisation, while some of the perpetrators of the Great Terror were investigated and punished, there was no organised judicial or lustration campaign on the same scale. However, the 1953 amnesty and rehabilitation (including posthumous rehabilitation) of political prisoners signalled a break, albeit not a clean one, from Stalin's rule. There was, however, no attempt to restructure the legal system beyond that. Finally, in the post-Civil War United States, despite the fact that former slaveholders were not punished apart from indirectly suffering financial loss as the slaves were set free, there was an attempt to establish a new legal order. To that effect, three new constitutional amendments were introduced, abolishing slavery and involuntary servitude, except as a punishment for a crime (13th Amendment), guaranteeing equal citizenship, privileges and immunities, due process, and equal protection of the laws to everyone (14th Amendment), and banning denying any citizen a right to vote based on race, colour, or previous condition of servitude (15th Amendment).

In addition, those effectuating transitional justice at that moment in time need not operate under an impression that they have to build a new system from scratch. While this was more or less the case in Nazi Germany, at least on the constitutional level, the other two case studies demonstrate that this need not be a universal pattern. Destalinisation did not require a break from the Stalinist legal framework entirely, the new *Criminal Code* appearing much later in 1961, and the *Constitution* only in 1977. Some may even say that Khruschev's speech changed little, if at all, as the Soviet law and state retained some of their repressive features. The most striking example was the Reconstruction era following the Civil War that marked the end of

slavery. Instead of creating a new Constitution, the 13th, 14th, and 15th Amendments mentioned above were introduced, supplementing the rest of the constitutional text and therefore generating new legal principles moving on from the era of slavery.

B. Surveying evil law

Secondly, this dissertation not only paves the way for future research of evil law in general, but is conducive to improved analysis of specific evil laws and legal systems. While it is not primarily a legal-theoretical work, it brought a new angle to analysing the three real-life examples of evil regimes – Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States.

First, this thesis's aspiration is to not to limit its conclusions to these cases but to provide a general framework for the study of evil law applicable to other historical examples of evil legal systems of varying remoteness and controversiality, from the Roman Empire to the Apartheid South Africa. This examination is bound to be fruitful for making sense of both these legal systems and evil law in general. For one thing, the questions posited in this dissertation may be applied to these legal systems, enriching the understanding of the interplay between evil and law within them. Moreover, examining some further historical case studies according to the framework developed in this thesis is also bound to raise additional questions about the universality of this dissertation's conclusions or about their temporal and geographical reach, especially if such further examination goes beyond relatively recent and Western instances of evil legal systems.

Second, the findings of this thesis can aid us not just in inquiry about other historical cases of evil laws and evil legal systems, but also when it comes to contemporary examples. There are many contemporary laws that are seen as involving different types and levels of moral iniquity: those involving the death penalty, torture, abortion (both pro- and anti-), euthanasia (same), suppression of personal and political liberties, discrimination, and so on. While the application of the framework in this dissertation might be tricky, due to the fact that it is more controversial to frame less historically remote cases as evil, this investigation is not impossible and, will be aided by this project in the following two ways. First, applying the framework developed in this dissertation to less historically remote cases of laws and legal systems is important for both appraising these laws and legal systems more specifically and for developing one's

understanding of evil law more generally. Second, as some of my conclusions relate to how evil law ought to be resisted and can be resisted, they can aid us in responding to contemporary evil regimes during their rise and after they fall – a point that will be further developed in the next subsection.

C. Resisting evil law

Thirdly, while this thesis is a work of theory and does not aspire to be a political manifesto or a practical manual, I have repeatedly emphasised the pragmatic significance of its conclusions. Both the legal-philosophical and legal-historical inquiry in this project may aid those facing evil law by helping them to recognise that a law or a legal system is evil, to frame their opposition to it in terms of utmost urgency, to justify their response to the threat it poses, and to think about both moral and practical limitations of their resistance to it. In addition, the theoretical toolkit developed in this dissertation can aid us in exploring issues of practical significance that this thesis does not cover. Two salient questions corresponding to avenues for future research flagged above that come to mind are how to stop evil legal systems from emerging and how to deal with them in their aftermath.

First, when talking about preventing evil regimes from spawning, one needs to return to the discussion about the role of interpretation in framing the concept of evil law. By acknowledging that evil legal systems may take advantage of existing legal structures, we may be driven to think of the most efficient ways to prevent that. Turning to the three examples of evil legal systems considered in this dissertation, one would thus lay at least some of the blame for their predecessors' demise on their failure to introduce insurance mechanisms against their descent into evil. In the case of the Weimar Republic, the grant of broad emergency powers in Article 48 of the *Constitution* is generally considered as one of its deficiencies that were used by Nazis for taking power. In the Soviet Union, Stalin equally abused powers granted to him by the creation of the position of General Secretary. The antebellum United States, even more so, explicitly enshrined the evil of slavery in its constitutional design by incorporating the Three Fifths Clause, the Fugitive Slave Clause, and the Slave Trade Clause in its *Constitution*. As a result, building on that experience, one may be driven to try to insulate existing legal systems from potential abuse by making laws more precise and clear about their underlying principles. This can take various forms. A legal system interested in preventing a slide into evil may include an explicit declaration of key principles in sources of law of constitutional import.

What is more, it may put additional layers of protection on these values by stating they cannot be overridden by other considerations, even in emergencies or by determining that the provisions fixing them cannot be amended. One should of course keep in mind that the actors attempting to install evil regimes would not necessarily be deterred by those considerations from availing themselves of legal powers they need for the pursuit of their aims, as they only have a limited interest in following the legal rules. Still, since it has been established that evil regimes benefit from legality, the success of such measures is not as improbable as one may think.

Second, a similar insight applies when it comes to transitional justice. It has been indicated that it is indeed possible to establish a new legal system without a total overhaul of its predecessor's laws. Not all laws in an evil legal system are evil and some may become more or less evil in the process of interpretation depending on the other materials comprising the legal system. This knowledge is useful when considering the transaction costs involved in preparing and passing new laws, as well as making sure both that law-subjects and legal officials accept them and that they are sufficiently accustomed to them to rely on them in the day-to-day functioning of a legal system. In that scenario, preserving the remnants of the previous legal framework may be a good way to make the transition to a new legal system smoother. This is probably a reason why two out of the three legal systems surveyed in this dissertation, the Soviet Union and the United States, as stated above, did not abandon the previous evil regime entirely, but saved some of the key components of the previous legal system while trying to effectuate a break from the evil it created. However, on the other hand, one needs to be aware of the risk this cost-cutting can bring, as this approach may address mere symptoms rather than causes of intolerable harm enabled by law. One has to pay attention to the reasons why transitional justice in the surveyed legal systems has not always been as successful as intended, with halted denazification in Germany, lack of reckoning with the Stalinist past in the Soviet Union, and preservation of anti-Black animus and policies – up to sharecropping, disenfranchisement, lynchings, and racial segregation – in the United States post-Civil War. As in the case of resistance to evil law, one needs to accept that no strategy of transitional justice is a silver bullet. Any strategy's success depends on contextual factors.

4. The End

All in all, this dissertation, as emphasised in its title, is therefore not the end of investigation of the link between law and evil, but a step *towards* a comprehensive jurisprudence of evil law. Instead of declaring the horrors inflicted by evil legal systems such as Nazi Germany, Stalin's Soviet Union, and slavery in the antebellum United States to be beyond comprehension, it aims to aid their greater understanding. Such reflection is not just possible, but desirable, not merely for us as theorists, but for us as human beings. Keeping these evils comprehensible makes us more powerful against them.

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