

# **The Legacy of Nuremberg: Knowledge as Power and the Malleability of Morality**

## **I INTRODUCTION**

In viewing knowledge as essentially value-neutral, legal positivism holds that law protects its subjects through the objectivity and consistency of the rule of law.<sup>1</sup>

Accordingly, positivism negates the necessity of a guiding moral component to law.<sup>2</sup> The Nuremberg Trials, in enforcing the individual responsibility of defendants to disobey the genocidal yet legally valid legislation enacted under Nazism, held defendants to a standard of morality that extends beyond positivist conceptions of law. However morality, history and knowledge are revealed by postmodern analysis to be highly subjective and liable to exploitation.<sup>3</sup> In concentrating on the unofficial sites of power, the discourses and interactions of society,<sup>4</sup> Foucault provided an alternative vision of the reciprocity of power<sup>5</sup> and, in it, hope for a more just approach to law. Through critique, the concept of value free knowledge, and therefore objective power, is challenged, restraining law's violence, delimiting society and infusing law, if not with morality, at least with integrity.<sup>6</sup>

## **II POSITIVISM**

The legal positivist distinction between law and morality is derived from positivism's genesis in the Enlightenment, wherein writers such as Auguste Comte uncritically accepted humans' capacity for objectivity and rationality, believing that ultimate knowledge of society could be achieved empirically.<sup>7</sup> Because positivism situates law's authority in implied consent to dispense law built on the shared values of humankind,<sup>8</sup> it distinguishes what law 'is' from what it 'ought to be', denying any link between law and morality.<sup>9</sup>

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<sup>1</sup> M Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2<sup>nd</sup> ed, 2002), 67-8.

<sup>2</sup> A Schillmoller, *Philosophy of Law Study Guide* (1st ed, 2008), 1.36.

<sup>3</sup> M Davies, above n 1, 302.

<sup>4</sup> M Foucault in M Davies, above n 1, 330.

<sup>5</sup> *Ibid.*

<sup>6</sup> M Davies, above n 1, 5-9, 303-4.

<sup>7</sup> A Schillmoller, above n 2, 1.34. See A Comte, *Introduction to Positive Philosophy* (1848).

<sup>8</sup> A Schillmoller, above n 2, 4.28.

<sup>9</sup> A Schillmoller, above n 2, 1.36.

The positivist concept of the rule of law is designed to ensure fairness through the consistency of a precedent-based application of the law and the objectivity of judges.<sup>10</sup> Through the view of law as a creation of humankind, rather than as a product of natural or metaphysical forces,<sup>11</sup> law maintains an appearance of detachment and unfailing correctness, and therefore its authority.<sup>12</sup> From within this positivist paradigm, moral and ethical concerns are made obsolete by faith in a purportedly neutral, 'scientific' understanding and regulation of human behaviour.<sup>13</sup> Consequently, a legally constituted law is deemed valid despite any moral objections to it or the onerous consequences it promotes.<sup>14</sup> However in revealing the subjective basis of knowledge and morality, and the consequential partiality of law,<sup>15</sup> the Nuremberg Trials revealed the need for critique of the conditions establishing knowledge, and therefore power, through which law's amorality may be restrained.<sup>16</sup>

### III THE NUREMBERG TRIALS

Upon the surrender of the European Axis powers<sup>17</sup> at the close of the Second World War,<sup>18</sup> many of the political, economic and social engineers of the Holocaust were brought to trial at the Nuremberg Palace of Justice before the International Military Tribunal,<sup>19</sup> comprised of representatives of the United States, United Kingdom, the Soviet Union and France.<sup>20</sup> The Nuremberg Trials revealed that while the positivist tenets of objectivity and empiricism are necessary in maintaining a consistent application of law, without the underpinning of morality the purported neutrality of positivist law can lead to great suffering.

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<sup>10</sup> A Schillmoller, above n 2, 3.25.

<sup>11</sup> A Schillmoller, above n 2, 1.34.

<sup>12</sup> A Schillmoller, above n 2, 3.25.

<sup>13</sup> A Schillmoller, above n 2, 1.20.

<sup>14</sup> M Davies, above n 1, 105.

<sup>15</sup> See M Davies, above n 1, 108.

<sup>16</sup> *Ibid.*

<sup>17</sup> E Borgwardt, 'A Tribute To Professor Richard M. Buxbaum: Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms' (2005) 23 *Berkeley Journal of International Law* 401, 442.

<sup>18</sup> Hereinafter 'WWII'.

<sup>19</sup> Hereinafter the 'IMT'.

<sup>20</sup> United States Holocaust Memorial Museum, *Holocaust Encyclopedia* (8 September 2006) 'The Holocaust' <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005143> at 23 May 2008.

#### IV THE LEGALITY OF THE HOLOCAUST

Although much of the cruelty enacted by the National Socialist German Workers Party,<sup>21</sup> was carried out in secret<sup>22</sup> and therefore without observance of even the Führer's decree that constituted legal validity under Nazism,<sup>23</sup> much of Nazism's devastation, particularly in the early stages of the Reich, was legally authorised.<sup>24</sup> The 'euthanasia' program began with the legally enacted *Law for the Prevention of Hereditarily Diseased Offspring*,<sup>25</sup> which was administered through Hereditary Health Courts and backed by a bureaucratic structure of mandatory reporting of serious congenital illnesses, as well as a register of the state-institutionalised mentally ill and physically disabled.<sup>26</sup> Although the later stages of the 'euthanasia' program were not legally authorised, the early stages were backed not only by law but also by propaganda campaigns aimed at garnering public support.<sup>27</sup> The early stages of the Holocaust demonstrate the capacity for legally enacted legislation to support atrocities that can lead to far greater abuses of power under appropriate social conditions, no longer requiring the sanction of law.

Ultimately, the Nuremberg Trials can be seen as an assertion of morality over law as well as a reflection of the malleability of law toward dishonourable ends. In expecting individuals to disobey the harmful laws of the Third Reich despite the fact that many were validly enacted pursuant to the German legal system,<sup>28</sup> the IMT privileged morality over law. In doing so, the IMT overturned the positivist presumptions that law is based on universal norms and that law and morality may validly be discrete. Accordingly, the

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<sup>21</sup> Hereinafter the 'NSDAP' or 'Nazi Party'.

<sup>22</sup> S Samples, 'African Germans in the Third Reich' in CA Blackshire-Belay (ed), *The African German Experience* (1992) 62.

<sup>23</sup> R Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (1986) 64.

<sup>24</sup> M Davies, above n 1, 109.

<sup>25</sup> *Law for the Prevention of Hereditarily Diseased Offspring* 1933. Hereinafter the 'Hereditary Law'. RJ Evans, *The Third Reich in Power* (2005) 507.

<sup>26</sup> C Browning, *The Origins of the Final Solution* (2005) 185; I Kershaw, *Hitler*, Volume II (2000) 259.

<sup>27</sup> AC Ivy, 'The History and Ethics of the Use of Human Subjects in Medical Experiments' (1948) 108 *Science*, 1-5. For example, an advertising campaign decrying the cost of providing state support to those suffering 'hereditary defects' was run in 'A New People', the NSDAP Bureau for Race Politics magazine (around 1938). I Kershaw, above n 26, 230.

<sup>28</sup> *Ibid.*

Nuremberg Trials have been cited as sparking reevaluation of the tenets of positivism.<sup>29</sup>

## V THE SLIPPERY SLOPE

The genesis of the positivist separation of law and morality was Jeremy Bentham's utilitarian premise that law should concern itself only with acts inflicting pain on society or diminishing the pleasure of those within it.<sup>30</sup> While many of the early laws of the Nazi Regime appear to have little initial direct effect on the pleasure or pain of subjects - the [\*Law for the Protection of German Blood and Honor\*](#),<sup>31</sup> for example, simply enabled the German Government to classify citizens according to race -<sup>32</sup> these laws allowed attacks on the citizenship and rights of subjects which enabled the later human rights abuses of the Holocaust.<sup>33</sup>

The exponential progression from morally vacant law to dictatorial, and consequentially genocidal law has been seen not only in Nazi Germany but also in Australia during the Stolen Generations period of history, and Apartheid South Africa. As Leo Alexander says of crimes committed by physicians in aiding the Holocaust, 'whatever proportions these crimes finally assumed... they had started from small beginnings.... merely a subtle shift in emphasis in the basic attitude of physicians.'<sup>34</sup> While Hartmut Hanauske-Abel warns that the 'slippery slope' concept dilutes accountability by lending inevitability to history,<sup>35</sup> the perpetually incremental erosion of human rights throughout modern legal history highlights the necessity of a moral component to positive law.

## VI NATURAL LAW

The doubts raised about positivism by the Nuremberg Trials, however, cannot be seen as a triumph for positivism's 'rival', natural law.<sup>36</sup> In an attempt to ally law with some form

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<sup>29</sup> EL Muller, 'Constitutional Conscience' (2003) 83 *Boston University Law Review* 1017, footnote 153.

<sup>30</sup> A Schillmoller, above n 2, 3.5.

<sup>31</sup> [\*Law for the Protection of German Blood and Honor\*](#) 1935.

<sup>32</sup> H Arendt, [\*The Origins of Totalitarianism\*](#) (1951), 66.

<sup>33</sup> *Ibid.*

<sup>34</sup> L Alexander, 'Medical Science Under Dictatorship' (1949) 241 *New England Journal of Medicine*, 39.

<sup>35</sup> HM Hanauske-Abel, 'Not a Slippery Slope or Sudden Subversion: German Medicine and National Socialism in 1933' (1996) 313 *British Medical Journal* 1453.

<sup>36</sup> A Schillmoller, *Philosophy of Law Study Guide, Appendix* (1st ed, 2008) 27.

of guiding morality, Lon Fuller's naturalist theory of the 'inner morality' of rule of law demands that law be clear, prospective and possible to obey, and that law be focused on the population generally, rather than aimed at individuals.<sup>37</sup> However this 'inner morality' would not preclude the operation of many of the Nuremberg Laws of 1935, such as the [\*Reich Citizenship Law\*](#)<sup>38</sup> which enabled the denaturalization of 'non-Aryans' and prevented interracial marriage,<sup>39</sup> as it was prospective, clear and, due to the large 'non-Aryan' population, could be construed as fairly general in application.

However, together with the separation of state and police from the judiciary in 1933 and the exclusion of proscribed groups from professional practice as lawyers,<sup>40</sup> midwives and doctors, and from participation in the military and education systems,<sup>41</sup> the Nuremberg Laws helped create a culture responsible for the death of 9 to 11 million people. Due to law's power to foster a culture of exclusion, in 1930's Germany on the grounds of race, religion, disability, ethnicity and sexual orientation,<sup>42</sup> the inner morality of law is revealed as not only inadequate but highly dangerous in practice.<sup>43</sup>

Naturalist John Finnis' theory of practical reasonableness claims the existence of a form of universal 'reasonableness' of action, upon which ethical and legal systems may be based.<sup>44</sup> However Davies stresses that adherence to one mode of behaviour, no matter how 'reasonable', is motivated by social norms, necessitating the exclusion of other valid forms of action.<sup>45</sup> In the harsh economic climate imposed by the *Treaty of Versailles*<sup>46</sup> upon Germany following the First World War,<sup>47</sup> the potential for slippage of social norms

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<sup>37</sup> A Schillmoller, above n 2, 3.25-26.

<sup>38</sup> [\*Reich Citizenship Law\*](#) 1935.

<sup>39</sup> H Arendt, above n 32, 26.

<sup>40</sup> United States Holocaust Memorial Museum, above n 20.

<sup>41</sup> United States Holocaust Memorial Museum, *Holocaust Encyclopedia* (8 September 2006) 'Examples of Anti-Semitic Legislation 1933-39' <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007459> at 22 May 2008.

<sup>42</sup> M Berenbaum, *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990) 12.

<sup>43</sup> M Davies, above n 1, 110.

<sup>44</sup> M Davies, above n 1, 109-10.

<sup>45</sup> M Davies, above n 1, 110.

<sup>46</sup> *Treaty of Peace between the Allied and Associated Powers and Germany*.

<sup>47</sup> DF Vagts, 'International Law in the Third Reich' (1990) 84 *American Journal of International Law* 664.

abounded. Nazi Party appeals to the economic rationality of citizens during the 1930's, such as those seen in the 'euthanasia' propaganda campaign, along with the fear generated in the citizenry by mounting Governmental persecution, resulted in just such an exclusion of more compassionate modes of thought and behaviour, particularly within pivotal professions such as medicine and the judiciary.<sup>48</sup> Although the 'euthanasia' campaign was one of the few Nazi campaigns to counter intensive resistance within Germany,<sup>49</sup> 70,000 people<sup>50</sup> were killed before the program was officially ended in 1941,<sup>51</sup> while another 130,000 were secretly killed before the end of WWII.<sup>52</sup> Moreover, the inherent *unreasonableness* of the actions of many professionals when subjected to such social pressure is exemplified by the fact that the *Hereditary Law* was used to sterilise women believed to be capable of transmitting such 'hereditary' conditions as schizophrenia, 'imbecillity' and chronic alcoholism, and was occasionally administered punitively, for example to sterilise convicted sex workers.<sup>53</sup>

## VII LAW'S PROTECTION

The extent of the tragedy caused by the legislation of the Third Reich has highlighted the ineffectiveness of law to prevent its own misuse and, consequently, to protect its subjects. In the absence of the protection of positive law, the Nuremberg Military Tribunal<sup>54</sup> called upon the judiciary to provide that protection. Positivism's assertion, echoed by Finnis,<sup>55</sup> that judges must apply the law even when the result is unjust<sup>56</sup> was authoritatively contradicted in *The United States of America v Josef Altstötter, et al.*<sup>57</sup> The so called

<sup>48</sup> Interpretations of Darwinism which advocated 'improvement' of the population through the prevention of the proliferation of 'harmful' genes flooded German and international medical journals of the period. R Lifton, above n 23, 47. After the expulsion of Jews from medicine and the judiciary the professions were largely acquiescent with Hitler's regime. R Lifton, above n 23, 74, 80.

<sup>49</sup> I Kershaw, *Hitler*, above n 26, 253.

<sup>50</sup> This included children and adults suffering intellectual and physical disabilities and mental illness as well as 'juvenile delinquents'. M Burleigh, 'Nazi "Euthanasia" Programs' (2004) D Kuntz and S Bachrach (eds) *Deadly Medicine: Creating the Master Race*, 38.

<sup>51</sup> Ernst Klee, *"Euthanasia" in the SS-State: The Extermination of "Life Unworthy of Life"* (1983) 212.

<sup>52</sup> United States Holocaust Memorial Museum, *Holocaust Encyclopedia* (8 September 2006) 'Holocaust Euthanasia' <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005200> at 30 May 2008.

<sup>53</sup> RJ Evans, above n 25, 507.

<sup>54</sup> Hereinafter the 'NMT'.

<sup>55</sup> M Davies, above n 1, 110.

<sup>56</sup> M Davies, above n 1, 71.

<sup>57</sup> *The United States of America v Josef Altstötter, et al* (1947) 2 L Rep Trials War Crims 1.

'Judges' Trial', one of the Subsequent Nuremberg Trials held before the NMT, tried prosecutors and judges of the Special Courts and People's Courts of Nazi Germany, as well as officials of the Reich Ministry of Justice, for their role in implementing the Reich's program of 'racial purity'. Ultimately the NMT found ten of the sixteen defendants guilty of, among other charges, 'committing war crimes through the abuse of the judicial and penal process, resulting in mass murder, torture and plunder of private property',<sup>58</sup> a powerful challenge to the positivist belief that a judge must obey a legally constituted yet immoral law.

Iris Murdoch argues that merely distinguishing between fact and morality may cause morality to be marginalized in favour of purportedly observable 'facts', when in reality 'almost all our concepts and activities involve evaluation and moral discrimination'.<sup>59</sup> The 'scientific' methods used to classify citizens according to race in Germany, South Africa and Australia exemplify the partisanship of such knowledge,<sup>60</sup> while the consequential pseudoscientific theory of Eugenics underlying the jurisprudence of the Third Reich exemplifies the subjectivity of science.<sup>61</sup> In the light of Nuremberg, the positivist distinction between law and morality may be seen to provide the guiding principle of consistency necessary for very basic societal regulation, but when 'issues of human identity and dignity' are at play<sup>62</sup> some form of moral compass is necessary in guiding and evaluating the validity of law.

## VIII MORALITY

### *A The 'Categorical Imperative'*

However morality itself is subjective, changeable and liable to be co-opted and abused. Whether based in duty, equality, God, conscience or ethics, theories of morality fall short in supplying an adequate safeguard by which to check the amorality of positive law.

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<sup>58</sup> Count 2 of the indictment. United States Holocaust Memorial Museum, *Holocaust Encyclopedia* (8 September 2006) 'Subsequent Nuremberg Proceedings, Case # 3, The Justice Case' <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005143> at 27 May 2008.

<sup>59</sup> I Murdoch in A Schillmoller, above n 2, 2.21.

<sup>60</sup> M McDonell, 'Racism' in *Law and Cultural Diversity Study Guide* (2003) 43.

<sup>61</sup> HM Hanauske-Abel, above n 35.

<sup>62</sup> Hon Justice M Kirby, 'Law and Economics in the Courts: Is There Hope?' in A Schillmoller, above n 2, 7.21.

Immanuel Kant's 'categorical imperative', demanding individual observance of a rule only when it could appropriately be applied universally,<sup>63</sup> would certainly demand that individuals disobey the laws enabling the Holocaust, however his deontological view of humans as rational beings capable of observing a moral norm out of a sense of duty assumes a shared sense of rationality and discounts the contextuality of morality.<sup>64</sup> The deep entrenchment of destructive laws in German society, academia, professional circles and government agencies, the lengthy period during which these laws were enacted and the scale of the ensuing harm, were revealed during the Nuremberg and Subsequent Nuremberg Trials. Such normative absorption of dissolute law seriously questions the capacity of individuals to disobey the moral culture of a society, and highlights the human desire for preservation of social standing, living standards and, above all, life. Although there were cases of resistance to the laws of the Third Reich,<sup>65</sup> the population generally put up little resistance.<sup>66</sup> Through the lens of the Holocaust, Kant's duty-bound 'categorical imperative' is highlighted as inadequate to motivate moral choices.

### ***B A 'State of Nature'***

Early libertarian Thomas Hobbes recognized the inability of humans to resist social pressure, advocating a supreme leader to protect subjects from themselves and others, and from the 'brutish' consequences of an ungoverned 'state of nature'.<sup>67</sup> Hobbes insisted law's violence must be based in equity rather than formalistic notions of consistency and need only provide effective protection to its subjects to fulfill the social contract, requiring no standard of morality to validate it.<sup>68</sup> Although Hobbes would have found the laws of the Third Reich unacceptable on the grounds that they did not protect all citizens equally, rather than for moral or anti-totalitarian reasons,<sup>69</sup> a standard of equality when applied to

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<sup>63</sup> A Schillmoller, above n 2, 2.22.

<sup>64</sup> M Davies, above n 1, 81.

<sup>65</sup> For example [Lothar Kreyssig](#), a German district judge, wrote to the Government protesting the illegality of the 'euthanasia' program. I Kershaw, above n 26, 254. Further, Professor [Hans Gerhard Creutzfeldt](#) managed to save nearly all of his patients, rediagnosing them to fit outside of the criteria of the program. R Lifton, above n 23, 82.

<sup>66</sup> R Lifton, above n 23, 80.

<sup>67</sup> A Schillmoller, above n 2, 3.9.

<sup>68</sup> A Schillmoller, above n 2, 3.9-10.

<sup>69</sup> A Schillmoller, above n 2, 3.9.

law as an arbiter of justice is no less malleable than a standard of morality. Margaret Thornton states that the libertarian concept of formal equality has been used to maintain an inequitable social status quo through prioritising the appearance of equality over equality itself.<sup>70</sup> Accordingly formal equality's adherence to the rule of law<sup>71</sup> offers no moral guidance beyond the tenets of positivism, instead perpetuating inequality.<sup>72</sup> In turn substantive equality principles, although endorsing the necessity of righting society's structural inequalities in ensuring justice,<sup>73</sup> are an ineffective guardian against legislation that actively deteriorates the rights of subjects, such as much law of the Third Reich.<sup>74</sup>

Further, Hobbes' tenet of the 'natural' right of self-preservation could be interpreted to justify any harmful act, due to the imprecise source of natural law's authority.<sup>75</sup> The [\*Law for the Restoration of the Professional Civil Service\*](#)<sup>76</sup> banning Jews from government service, and indeed much of the 'Final Solution', was predicated upon the pseudoscientific notion that such legislation was necessary to protect the German 'racial community' from 'damaging' hereditary traits.<sup>77</sup> Further given the crime indicted before the IMT of waging 'aggressive war',<sup>78</sup> encapsulating Axis, but not Allied, wartime actions, the entirety of Allied actions during WWII could be justified by the malleable imperative of self-preservation.

### ***C The Conscience***

Reliance on a higher power, whether of God or nature, transcending human consciousness and prescribing law necessitates a human intermediary in translating the

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<sup>70</sup> M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1991) 21.

<sup>71</sup> AV Dicey in M Thornton, above n 70, 24.

<sup>72</sup> D Trubeck in M Thornton above n 70, 23.

<sup>73</sup> M Thornton, above n 70, 19.

<sup>74</sup> For example the [\*Reich Citizenship Law\*](#) 1935.

<sup>75</sup> A Ross in A Schillmoller, above n 2, 4.33.

<sup>76</sup> [\*Law for the Restoration of the Professional Civil Service\*](#) 1933.

<sup>77</sup> E Ehrenreich, *The Nazi Ancestral Proof: Genealogy, Racial Science, and the Final Solution* (2007) 165-167.

<sup>78</sup> 'Aggressive war' may not have been a new concept. The IMT found that 'aggressive war' had been outlawed prior to WWII by international agreements such as the 1928 *Kellogg-Briand Pact*. PE Quint, 'The Border Guard Trials and the East German Past - Seven Arguments' (2000) 48 *American Journal of Comparative Law*, 541, footnote 36. The concept of aggressive or unjustified war was prosecuted under the Nuremberg Charter as 'crimes against peace'. E Borgwardt, above n 17, 402.

will of that power, leaving itself vulnerable to political deviance and exploitation.<sup>79</sup> The Nazi Party itself exploited the power of esoteric ritual as a propaganda tool, utilising myths, flags and uniforms in military ceremonies<sup>80</sup> and creating secular rites of birth, death and marriage for public use, which the party aimed would eventually replace their religious counterparts.<sup>81</sup> In grounding his theories in the notion of natural rights,<sup>82</sup> John Locke, like Hobbes, professed a belief in a 'state of nature' that transcended societal constructs.<sup>83</sup> Locke's concept of inalienable rights to equality of life, liberty and property was based in a belief in a Christian god that provided rationally discoverable rules.<sup>84</sup> Locke's theocentric absolutism echoes Sir William Blackstone's reliance on the conscience as arbiter of actions offending natural law, *mala in se*, and those merely transgressing human made law, *mala prohibita*.<sup>85</sup> While Blackstone's reliance on the conscience is seen reflected in the IMT's imposition of morally grounded individual responsibility on the protagonists of the Holocaust,<sup>86</sup> Locke's ideas about natural human rights were echoed in the historical context of Nuremberg, a time in which the *United Nations Charter*<sup>87</sup> was being finalised<sup>88</sup> and human rights rose to the fore of international jurisprudence. However, despite the fact that both the *Genocide Convention*<sup>89</sup> and the *Universal Declaration of Human Rights*<sup>90</sup> were drafted in the light of the conclusions of the Nuremberg Trials,<sup>91</sup> subsequent history, in the form of the South African apartheid regime for example, demonstrates that neither the inner voice of the conscience nor the international imperative of human rights is enough to impose a rights-based moral component upon positivist jurisprudence.

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<sup>79</sup> M Davies, 'The Limits of Law' in M Davies *Delimiting the Law: Postmodernism and the Politics of Law* (1996) 29.

<sup>80</sup> HA Bosmajian, 'The Use of the Symbol "Unknown" in Nazi Persuasion' (1966) 77 (2) *Folklore* 116.

<sup>81</sup> R Bytwerk, *German Propaganda Archive* (2004) <http://www.calvin.edu/academic/cas/gpa/> at 26 May 2008.

<sup>82</sup> A Schillmoller, above n 2, 3.8

<sup>83</sup> A Schillmoller, above n 2, 3.8-9.

<sup>84</sup> A Schillmoller, above n 2, 3.10.

<sup>85</sup> A Schillmoller, above n 2, 3.3-4.

<sup>86</sup> E Borgwardt, above n 17, 456.

<sup>87</sup> *Charter Of The United Nations Act* 1945.

<sup>88</sup> E Borgwardt, above n 17, 449.

<sup>89</sup> *Genocide Convention Act* 1949.

<sup>90</sup> *Universal Declaration of Human Rights* 1948.

<sup>91</sup> E Borgwardt, above n 17, 449.

In viewing citizens as distinct from their social environment, positivism attributes them with individual agency and willpower undeterred by societal pressures.<sup>92</sup> By this rationale, individuals are able to make moral choices within the boundaries of a system of law based on universal norms.<sup>93</sup> Yet Davies highlights the position of individuals as subject to their legal, moral and social environments,<sup>94</sup> while Vivian Curran argues that the very notion of a legal system that stands distinct from its social context is itself ethnocentricity.<sup>95</sup> Whereas Blackstone interpreted feelings of guilt as evidence of moral transgression,<sup>96</sup> social relativism casts morality as creation and creator of a society's culture, a product of group consensus<sup>97</sup> and of individuals' treatment of each other.<sup>98</sup> The experiences of Maoist China and the Stalinist Soviet Union, as well as Germany under Nazism, demonstrate that when the government of a nation is dedicated to fostering a culture of fear, exclusion and hatred, the power of socialization can transform collective concepts of guilt and morality so that, regardless of whether an individual experiences guilt, she may carry out acts she would normally deem unacceptable.<sup>99</sup>

## **D Ethics**

In the contemporary absence of the 'coercive ethical authoritarianism' of religious ethics, legal ethical studies have focused on consequentialism in prescribing moral codes of behaviour.<sup>100</sup> However, like Hobbes' tenet of the natural right to self-preservation,<sup>101</sup> the consequentialist utilitarian principle prescribing pursuit of the course of action likely to

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<sup>92</sup> A Schillmoller, above n 2, 3.36.

<sup>93</sup> A Schillmoller, above n 2, 4.28.

<sup>94</sup> M Davies, above n 1, 11.

<sup>95</sup> V Curran, 'Deconstruction, Structuralism, Antisemitism and the Law' (1994) 37 *Boston College Law Review* 1, 97-98.

<sup>96</sup> A Schillmoller, above n 2, 3.4.

<sup>97</sup> RE Creel, 'Ethics and Morality' in RE Creel, *Thinking Philosophically: An Introduction to Critical Reflection and Rational Dialogue* (2001) 168.

<sup>98</sup> RE Creel, above n 97, 166.

<sup>99</sup> See, for example, Historical Atlas of the Twentieth Century, [Source List and Detailed Death Tolls for the Twentieth Century Hemoclysm](http://users.erols.com/mwhite28/warstat1.htm#Mao) (27 February 2007) <http://users.erols.com/mwhite28/warstat1.htm#Mao> at 23 May 2008; B McLoughlin and K McDermott (eds) *Stalin's Terror: High Politics and Mass Repression in the Soviet Union* (2002) 41.

<sup>100</sup> A Schillmoller, above n 2, 2.8.

<sup>101</sup> A Schillmoller, above n 2, 3.9-10.

bring the greatest overall good<sup>102</sup> is highly liable to interpretation, and therefore exploitation. Instead, a contemporary ethical approach demands an awareness of the assumptions underpinning moral prescriptions of good.<sup>103</sup> Michel Foucault, however, denies the possibility of true awareness of one's assumptions or of the 'universal structures [underlying] moral action',<sup>104</sup> while Jurgen Habermas discounts ethics as contingent upon societal constructions of virtue, separating them from the morality of universalisable norms.<sup>105</sup> Further, in the contemporary Western reality, in which anomic desires pass unrestricted by social norms and the pursuit of individual desire is encouraged by egoistic societies,<sup>106</sup> a form of 'ethical egoism' is facilitated, in which morals are dictated by self-interest.<sup>107</sup> In the contemporary, libertarian context of Western capitalism, the highly subjective nature of ethics is a dubious basis for morality.

## **E History**

History itself is often invoked as a cautionary tale as, whether remembered or reinvented, history shapes social norms and standards, informing society's malleable moral basis and restructuring its laws.<sup>108</sup> These laws in turn affect a society's collective conscience, influencing its norms, adjusting its perspective of morality, and authorising future action.<sup>109</sup> However *Irving v Penguin Books Ltd v Deborah Lipstadt*,<sup>110</sup> and in Australia the 'history wars', demonstrate the subjectivity of historical interpretation, calling to question the value of historical 'fact' as a basis for morality.<sup>111</sup>

## **IX IN PRAISE OF POSITIVISM**

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<sup>102</sup> A Schillmoller, above n 2, 2.25.

<sup>103</sup> C Taylor in A Schillmoller, above n 2, 2.3.

<sup>104</sup> M Foucault in A Schillmoller, above n 2, 2.8.

<sup>105</sup> A Schillmoller, above n 2, 2.19.

<sup>106</sup> E Durkheim in R White and F Haines, *Crime and Criminology: An Introduction* (3rd ed, 2004), 64.

<sup>107</sup> A Schillmoller, above n 2, 2.9.

<sup>108</sup> L McNamara, 'History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past' (2004) 26 *Sydney Law Review* 353, 391-2.

<sup>109</sup> L McNamara, above n 108, 385-7.

<sup>110</sup> *Irving v Penguin Books Ltd & Deborah Lipstadt* [2000] EWHC QB 115. L McNamara, above n 108, 383.

<sup>111</sup> P O'Connor, 'History on Trial: *Cubillo and Gunner v The Commonwealth of Australia*' (2001) 26 (1) *Alternative Law Journal* 29; L McNamara, above n 108, 360.

Although heralded as causing a reevaluation of positivism,<sup>112</sup> the Nuremberg Trials were steeped in positivist tradition. In fact the judges of the IMT effectively paid tribute to John Austin's positivist conception of law 'properly so called'<sup>113</sup> in declaring many of the laws of the Third Reich so abhorrent that they were deemed to be not law at all.<sup>114</sup> Davies terms such mental acrobatics the Western 'dichotomising habit',<sup>115</sup> which designates the 'property of law',<sup>116</sup> including such concepts as law and morality, thereby oppressing the population through limitations placed on thought and action.<sup>117</sup> The judges of the IMT proved apt practitioners of the 'dichotomising habit', ironically demonstrating that the positivist dismissal of morality as a guiding principle is not entirely misplaced. Conducted amid the human rights-centered chaos of post WWII Europe,<sup>118</sup> the focus of the Nuremberg Trials on German crimes alone shows that even idealistic, very public displays of morality are subject to the interpretation of the lawmakers. Gerry Simpson questions the purity of the motives of the Allies at Nuremberg, attributing to them the desire to distance the undeniable immorality of the laws perpetuating the Holocaust from atrocities of their own,<sup>119</sup> claiming that the act of defining war crimes partially exonerates acts not so defined.<sup>120</sup> In finding fault with 'aggressive war' only, despite the inability of the Nuremberg Charter's drafters to define the concept,<sup>121</sup> and in failing to try Allied war

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<sup>112</sup> However while the Nuremberg Trial caused many positivists to reevaluate their positions on law and morality, not all were convinced. HLA Hart viewed the laws enabling the Holocaust as malevolent yet legally valid, considering their disregard by the IMT to be an undesirable confusion of law and morality. Other metanarrativists, such as naturalist Lon Fuller, adopted a middle ground. Rather than the IMT's version of law under Nazism as 'not law' or Hart's positivist conception of it as 'law', naturalist Fuller viewed the legal system supporting the Holocaust as an 'exploitation of legal forms', which he believed ceased once the 'proper' functioning of the German legal system was restored after WWII ended. See, for example, L Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1958) *Harvard Law Review* 630, 659.

<sup>113</sup> M Davies, above n 1, 93.

<sup>114</sup> K Rundle, 'Review of "Law after Auschwitz: Towards a Jurisprudence of the Holocaust" by David Fraser' (2005) 28 *Sydney Law Review* 197.

<sup>115</sup> M Davies, above n 79, 15.

<sup>116</sup> M Davies, above n 79, 24.

<sup>117</sup> M Davies, above n 79, 13, 29.

<sup>118</sup> GJ Simpson, 'Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Didactic and Dissident Histories in War Crimes Trials' (1997) 60 *Albany Law Review* 801, 804.

<sup>119</sup> GJ Simpson, above n 118, 806.

<sup>120</sup> GJ Simpson, above n 118, 929.

<sup>121</sup> E Borgwardt, above n 17, 439.

crimes at Nuremberg,<sup>122</sup> Borgwardt claims the Allied powers effectively held Germany responsible for WWII itself.<sup>123</sup> Thus even in this grand public assertion of morality over law, the subjectivity of morality is evident.<sup>124</sup>

## **X POSTMODERNISM**

The Nuremberg Trials engendered a paradox. Without the purported objectivity of positivist rule of law, law cannot provide its subjects with consistent protection, however without morality to restrain law's neutrality grave human rights abuses are allowed to flourish. From a postmodern perspective there is no absolute answer to the impossibility posed by the Nuremberg Trials.<sup>125</sup> However because postmodernism does not attempt a neat distillation of the complex machinations of law and morality<sup>126</sup> it can provide insight where the metanarratives and their contemporary counterparts have failed. In 'destabilising' the assumptions underpinning traditional jurisprudence,<sup>127</sup> deconstruction reveals that the search for ultimate truth is unattainable.<sup>128</sup> The search, therefore, for a form of morality with which to check law's violence is futile.

Drawing on Jean-Francois Lyotard's conception of knowledge and power as inextricably linked,<sup>129</sup> Davies states that those with the power to determine the conditions by which knowledge is defined hold the power of self-legitimation.<sup>130</sup> Through the act of classifying citizens according to race or registering those who were ill or disabled, the NSDAP created a form of knowledge that empowered the Government to legislate regardless of the lack of any basis for their claims.<sup>131</sup> In fact, through the exploitation of

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<sup>122</sup> GJ Simpson, above n 118, 803.

<sup>123</sup> E Borgwardt, above n 17, 422.

<sup>124</sup> In a final cruel irony on 8th August 1945, the day the Nuremberg Charter was finalized establishing the IMT and heralding a new era of accountability for human rights violations, the United States dropped the atomic bomb on Nagasaki, instantly killing 70,000 people. GJ Simpson, above n 118, 804-5.

<sup>125</sup> M Davies, above n 79, 296.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> M Davies, above n 79, 302.

<sup>129</sup> J Lyotard in M Davies, above n 79, 302.

<sup>130</sup> M Davies, above n 79, 303.

<sup>131</sup> M Davies, above n 79, 302.

the 'metanarrative of science',<sup>132</sup> the NSDAP essentially created such a basis.

Postmodernism recognises that all science, like history or law, is subjective, producing knowledge and thereby harnessing power. Through the postmodern lens any possibility of an objective, empirical system of law, and in fact the Enlightenment itself which generated positivist neutrality,<sup>133</sup> is absurd.

Foucault recognised that power is situated beyond, as well as within, the traditionally recognised sites of authority such as the judiciary.<sup>134</sup> This suggests the power to infuse positivist law with some form of integrity lies in the complex, ever changing institutions, groups and individuals comprising society. In critiquing the criteria defining knowledge, and in particular the concept of knowledge as neutral, traditional power-bases and the limits they impose can be challenged, holding law's violence in check through the recognition of the fallacies underpinning power in a contemporary positivist legal system.

<sup>135</sup> As Davies states, in recognising the complexity of power, its reciprocity is revealed.<sup>136</sup>

## **XI CONCLUSION**

The alarming progression under Nazism from legally sanctioned human rights abuses to unthinkable atrocities highlights the shortcomings of positivism's separation of law and morality. In imposing individual responsibility upon the agents of the Holocaust, the IMT delineated a standard of morality that reaches far beyond the bounds of positivist conceptions of law. While positivism's purported neutrality and the quest for a form of morality with which to check law's violence are undermined by the malleability of knowledge,<sup>137</sup> the critique of law's subjectivity brings hope for a more principled approach to law as the unofficial sites of power, the discourses and interactions of society, reveal an alternative vision of the reciprocity of power.<sup>138</sup>

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<sup>132</sup> M Davies, above n 79, 303.

<sup>133</sup> A Schillmoller, above n 2, 1.34. See A Comte, *Introduction to Positive Philosophy* (1848).

<sup>134</sup> M Foucault in M Davies, above n 79, 330.

<sup>135</sup> M Davies, above n 79, 303-4.

<sup>136</sup> M Davies, above n 79, 331.

<sup>137</sup> M Davies, above n 79, 81, 302.

<sup>138</sup> M Foucault in M Davies, above n 79, 330.

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