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The Tragedy of Lutheran Jurisprudence

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I Introduction

Martin Luther (1483–1546) is that great German theologian who singlehandedly launched the Protestant Reformation in the 16th century. Luther believed in the doctrine of the 'Fall', or the original sin that brought about a total discontinuity between God and humans. This discontinuity, according to him, makes it impossible for humans to provide an account of morality by reference to God's law alone. Only by faith, Luther said, can the great gulf between humans and their Creator be eliminated.[1]

However, by teaching that, in a political sense, only the state can make the law, Lutheran jurisprudence undermines any attempt to base the state on the solid foundations of 'natural law' or 'higher law jurisprudence'.[2] Indeed, Lutheran jurisprudence largely remained in the shadows of a form of German legal positivism

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[1] Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge University Press, 1996) 25.

[2] Michael Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 9th ed, 2014) 93.

whereby questions of ethics or morality were generally regarded as irrelevant to a discussion of the validity of positive law.[3]

First, this article discusses whether Lutheran teachings may have facilitated the denial of ethics and metaphysics in the application of the law in Germany. Second, this article explains whether Lutheranism may be identified as a contributing factor for the failure of the German legal profession to resist the oppression and brutality of the Nazi regime.

II The Birth of Lutheran Jurisprudence

Martin Luther was born November 1483 in Eisleben, Germany. The son of a wealthy copper miner, in his youth he studied law but soon abandoned his legal studies to join the Augustinian order of monks.[4] After this he spent most of his life serving as a theology professor at the University of Wittenberg. Gradually, however, Luther began to question the traditional ways of the Catholic Church, in particular its reliance on scholasticism. Because Luther found scholasticism to be inconsistent with 'true' biblical teaching, his theology became focused not so much on the idea of God as a judge and lawgiver, but on the idea of a God who forgives all sinners who turn to Him in true repentance and simple faith.[5] This insight

[3]Malcolm N Shaw, *International Law* (Cambridge University Press, 4th ed, 1997) 25.

[4]After taking his masters' degree, Luther was planning on studying the law and becoming a lawyer. He had even purchased his Corpus Juris, an expensive book every student needed to have in order to study law in those days. See Eric Metaxas, *Martin Luther: The Man Who Rediscovered God And Changed the World* (Viking, 2017) 27.

[5]Colin Brown, *Christianity and Western Thought – Vol 1: From the Ancient World to the Age of Enlightenment* (InterVarsity Press, 1990) 146. The doctrine of justification by faith features prominently in the Confession of Augsburg (Art 4, 1530), which became the classic statement of the Lutheran position: 'Men cannot be justified in God's sight by their own strength, merits or works; on the contrary, they are justified freely on account of Christ through faith, when they believe that they are received into grace and that their sins are remitted on account of Christ who by his own death made satisfaction for our sins. This faith God imputes for righteousness in his own sight: Rom 3 and 4'.

finds its ultimate expression in the classical Protestant doctrine of 'justification by faith'. It's an important Protestant doctrine that actually ignited the whole Reformation movement in the 16th century.[6]

It is in such a context of salvation by faith and not by work, that Luther accused Thomas Aquinas of having elevated reason above revelation in his theology. 'It is perilous to wish to investigate and apprehend the naked divinity by human reason without Christ the mediator', Luther stated.[7] Since reason has been distorted by sin, and sin is a natural condition of humanity after the Fall, reason is always flawed and revelation is necessary for us to ultimately know the truth.[8] Due to humanity's 'enfeebled state of nature', wrote the leading 16th century's German Lutheran lawyer, Johann Melanchthon (1497–1560), reason has been so darkened that our comprehension of the truth is irremediably 'distorted'.[9]

But Luther was wrong to think that Aquinas had separated reason from revelation.[10] In truth, Aquinas did not even try to separate them. Rather, he aspired to demonstrate their intrinsic unity and correlation.[11] According to Aquinas, revelation is necessary even with respect to the things we may discover by reason alone. As he put it: 'Right reason can be blotted out from the human heart, either by

[6]Ibid 147.

[7]Martin Luther, First Disputation Against the Antinomians (1537). Quoted from Ibid 150.

[8]Ibid.

[9]Philip Melanchthon, Compendaria Dialectices Ration (1520) Vol. 16, Col. 24. Quoted from Herman Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2003) 79.

[10]R. C. Sproul writes: "Thomas's view of natural theology encounters its greatest opposition from fideists (who argue that God is known only by faith) in his view of the "mixed articles" (articulus mixtus). These are truths that can be learned by either nature or grace —by either philosophy or science, or from the Bible. This class of mixed articles includes the knowledge of the existence of God. This means that philosophy, apart from the Bible, can rationally demonstrate God's existence. Of course the Bible affords a much broader and deeper knowledge of God's character, says Thomas, but his actual existence can be demonstrated apart from the Bible. With respect to the knowledge of God, philosophy and theology can work together as partners". R C Sproul, *The Consequences of Ideas: Understanding the Concepts that Shaped Our World* (Crossway Books, 2000) 68-70.

[11]Ibid 68.

evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits, as among some men, theft, and even unnatural vices, as the Apostle states (Rom. I), were not esteemed sinful'.[12] As can be seen, all Aquinas wished was to combine reason with revelation, so that 'true knowledge' becomes ultimately dependent on the latter. As noted by Aquinas:

> Human reason is very deficient in things concerning God. A sign of this is that philosophers in their researches, by natural investigation, into human affairs, have fallen into many errors, and have disagreed among themselves. And consequently, in order that men might have knowledge of God, free of doubt and uncertainty, it was necessary for divine matters to be delivered to them by way of faith, being told to them, as it were, by God Himself Who cannot lie.[13]

Luther's knowledge of Thomism was profoundly deficient and largely second-hand. His Thomism was interpreted in light of the more controversial views of grace and redemption of an Occamist theologian called Gabriel Biel, who contended that human will and intellect remained largely undamaged by the Fall.[14] Luther's view of Thomism was largely based on Biel's own theological views, which are not those taken by Aquinas. Ironically, it is possible to assume that had Luther read Aquinas's *Summa Theologica* more properly, he probably would have interpreted it far more positively. Be that as it may, it is due in great part to such a misreading of Thomist theory that, as R C Sproul points out,

> No Roman Catholic thinker has been more maligned, misunderstood, and misrepresented by Protestant critics, especially evangelical critics, than has Thomas Aquinas. It is widely accepted that Thomas's most egregious error was to separate nature [or reason] and grace [or faith]. This charge is unmitigated non-sense; nothing could be further from the truth. To charge Thomas with separating nature from grace is to miss the primary thrust of his entire philosophy, particularly with respect to his monumental defense

[12] Aquinas, *Summa Theologica* (Fathers of the English Dominican Province trans, Benzinger Brothers Printers to the Holy Apostolic See, 1947) 72, I, II, Q 94, art 6 [trans of: *Summa Theologica* (first published 1485)].

[13] Ibid 72, II, II, Q 2, art 4.

[14] David Steinmetz, *What Luther Got Wrong* (8 June 2018) Religion Online <https://www.religiononline.org/article/what-luther-got-wrong>.

> of the Christian faith ···Thomas's distinction between nature and grace was designed not to separate them but to demonstrate their ultimate unity and connection. It was particularly against the idea of separating them that Thomas strove so mightily.[15]

Whatever the case may be, Luther's scepticism of the capacity of humans to develop laws reflecting God's law is undeniable. It is a scepticism that facilitated the rise of German legal positivism: a form of legal philosophy that 'treats the law of the state as morally neutral, a means and not an end, a device for manifesting the policy of the sovereign and for securing obedience to it'.[16] Because Luther rejected the idea of 'natural law' on grounds of the fallibility of human reason as well as the illegitimacy of canon law, he went on to completely reject the Catholic view that the Church should have a separate jurisdictional function as apart from that which is exercised by the secular government. Instead, the Church should become a congregation of the faithful, and not exercise any jurisdictional role whatsoever.

In *Temporal Authority* (1523) Luther stresses that Christians should regard themselves as living simultaneously in two different kingdoms: that of the world, and that of Christ's. Whereas the former is ruled by the civil authority, the latter is ruled not by the church but directly by Christ. Thus Luther spoke of the 'two kingdoms' not so much in terms of a dualism between Church and State, but as a dualism between the secular state and the fellowship of believers in Christ. Such a Christian fellowship, however, has no outward legal form, canonical or otherwise.[17] As a result of such teachings, the Church which had grown up over the last five centuries limiting the power of the state, was suddenly cut down in all its public authority, jurisdiction, and legal system.[18] As noted by Nick Spencer,

> If there was a resulting power vacuum in this vision, it was quickly and

[15]Sproul, above n 10, 68-9.
[16]Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 29.
[17]Nick Spencer, *Freedom & Order: History, Politics and the English Bible* (Hodder, 2012) 64.
[18]Ibid 65.

> explicitly filled by temporal power. The governing authorities now had the monopoly on all use of coercive power, including over the visible Church. Kings did not become sacred, at least no more sacred than anointing already made them, nor did they have the authority to pronounce on matters of doctrine, although some tried. Rather they had the monopoly on all political power, which they derived directly from God and had a duty to use in securing religious uniformity and orthodoxy within their territories.[19]

Luther, it seems, derived most of his theological doctrine of civil government from one single passage in the Bible: St Paul's Letter to the Romans, Chapter 13. This verse states: 'Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God'. Naturally, such a passage refers to one particular kind of government: a godly government that upholds God's law and all his objective standards of justice and morality. Still, Luther applied unsatisfactory biblical hermeneutics by interpreting such a passage in isolation, conferring no legal grounds for the right to civil resistance against tyrannical government. Instead, he assumed that Christians should not overthrow a tyrannical regime even if such a regime became entirely arbitrary in its exercise of power. As noted by Spencer, 'in some ways the history of political theology in the sixteenth century is the attempt by Christians, mainly but not exclusively Protestants, to clamber out of the hole that Luther's reading of Romans 13 had dug them into'.[20]

In all fairness, Luther at least argued that the political ruler should not exercise its power arbitrarily. If such a ruler commanded his subjects to do evil, then the latter should consider their higher loyalty to God. And yet, Luther refused to support the lawful overthrow of evil rulers. Rather, he assumed the existence of a

[19]Ibid.

[20]Ibid In his defence, writes Spencer, "much of Luther's authoritarianism was derived, as it was for many of the Reformers, from the fear that his reforming programme would become mixed up with political radicalism and insurrection, thereby proving right the accusations against him and destabilising his reform. He had good reason to be concerned. The years 1524-25 witnessed a massive uprising across Europe which, although economic in origin, was exacerbated by Reformation politics and ideas".

Christian conscience that would prevent believers to be governed by non-Christian rulers.[21] Further, Luther even declared: 'If the prince seizes your property on account of this and punishes such disobedience', then, as good Christians, we should 'thank God that you are worthy to suffer for the sake of the divine word'.[22] Such a gross violation of a basic human right, wrote Luther, 'is not to be resisted but endured'.[23] Facing the obvious tension between the admonition 'one must obey human authority' in Romans, Chapter 13, and several other passages in Scripture, such as Acts Chapter 5 ('We ought to obey God rather than men'), it is rather disturbing that the latter always has the upper hand in Luther's teachings.

Luther also denied the lawmaking role of the Church. He made the legitimacy of the law rest solely on human authority. No legislation enacted by the civil ruler could be measured against principles of a higher or natural law. Of course, Luther expected that in its exercise of power the civil ruler would at least respect the conscience of their Christian subjects.[24] Nonetheless, this was nothing but an assumption and, as the late Harvard legal historian Harold Berman pointed out, such teachings by Luther became 'an important source of the modern legal positivist's definition of law as the will of the state expressed in rules and enforced by coercive sanctions'.[25] As noted by Professor Berman,

'Lutheran legal philosophy accepted the basic premise of contemporary legal positivism, namely, that law and morals are to be sharply distinguished from each other and the law that is should not be confused with what the law *ought to be*.[26]'

[21]Ibid 30.
[22]Martin Luther, Temporal Authority: To What Extension It Should Be Obeyed (1523), quoted from Quentin Skinner, *The Foundations of Modern Political Thought – Volume 2: The Age of Reformation* (Cambridge University Press, 1978) 17.
[23]Ibid.
[24]Ibid.
[25]Berman, above n 9, 76.
[26]Ibid 98.

III Lutheranism and the Rise of German Statism

Canon law is the body of laws and regulations made by ecclesiastical authority for the government of a church and its members. The word canon comes from the Greek and it means a 'measuring rod', taken figuratively to be a measure of 'right conduct'. In the broadest sense, 'canons are intended to lead men and women to act justly in the world so that they may ultimately stand before God unashamed'.[27] Inevitably, a large part of canon law provides detailed rules for the regulations of conduct by the clergy, as well as instructions for the performance of sacraments and directions for decision-making within the Church. By design, 'the canons create conditions that promote harmony within the church and freedom from interference from without'.[28]

Medieval legal scholars argued that canon law was the true source of Christian equity. Canon law was said to be flexible as it could be more easily applied to particular circumstances pertaining to the matter. Moreover, canon law appeared to afford a special care for the disadvantaged, particularly widows, orphans, the poor, the handicapped, neglected children, maltreated servants, and the like. This is because canon law provided a method by which believers could be reconciled to God, neighbour, and themselves at once. By treating both the legality and the morality of conflicts before them, the ecclesiastical courts applied remedies of the canon law that 'enabled litigants to become righteous and just not only in their relationships with opposing parties and the rest of the community, but also in their personal relationship to God'.[29] As John Witte, Jr explains,

[27] R H Helmholz, *Western Canon Law* in John Witte Jr and Frank S Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008), 71.

[28] Ibid.

[29] John Witte Jr, *Introduction* in John Witte Jr and Frank S Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008), 12.

'This was one reason for the enormous popularity and success of the church courts in much of medieval Christendom. Church courts treated both legality and the morality of the conflicts before them.[30]'

According to Luther, however, the canon law obstructed the individual's direct relationship with God. It also usurped, in his opinion, the civil ruler's primary role as God's vice-regent on earth. Surely, one might say, the church should critique instances of social injustice, but, according to orthodox Lutheran doctrine, 'law is primarily the province of the state not of the church, of the magistrate not of the [church] minister.'[31] This obviously triggered a natural shift of power in terms of property and prerogative from the Church to the state. As a result, the civil ruler was assumed to possess jurisdiction over numerous subjects that were previously governed by the Church and its canon law – marriage and family life, property and testamentary matters, charity and education, contracts and oaths, moral and ideological crimes, etc. Above all, the civil magistrate would be legitimised to exercise a direct control not only over the clergy but also over the polity and property of the Church.[32]

The impact on the institution of marriage soon became rather visible. Lutheran theology replaced the traditional sacramental understanding of marriage with a new understanding of marriage as a 'covenantal association'. On such basis, the state developed new family laws that introduced divorce on numerous grounds such as adultery, desertion, and other faults, with subsequent rights to remarry at least for the innocent party.[33] Further, Lutheranism also replaced the traditional view of education as a teaching office of the Church with a new concept of 'public education' as a form of 'civic seminary', to be controlled by the secular state.

[30]Ibid.
[31]Ibid 16.
[32]Ibid 17.
[33]Ibid.

In sum, the state was called to replace the Church as the primary provider for education, with the state law replacing Church law as the principal regulator of education.[34]

In the Protestant nations of early modern Europe, Lutheran views represented a dramatic expansion of the role of the 'secular state' and all its positive laws. Because Luther bestowed on the civil ruler the title of 'Father of the Community' (*Landesvater*),[35] it was expected of him to care for his subjects as if they were actually his children. In turn, the subjects had to 'honour' their civil ruler as if he were their father. Like a 'loving father', the civil ruler has a moral duty to protect his people and prevent them from abusing themselves through gambling, drunkenness, sumptuousness, and other vices. In this context, the state was charged with the task of educating its citizens through the creation of public schools, public libraries, public theatres, public press, etc.[36]

It is entirely fair to argue that, in Germany, state ownership over the press, arts, and education, culminated in the abuse of governmental power and suppression of personal freedom. Such an idea undoubtedly became a recipe for officious paternalism through the model of 'welfare state' conceived in 19th-century Germany by Chancellor Otto von Bismarck (1815-1898), who engendered social programs first in Prussia and then in the entire German Empire as early as in the 1880s.[37] A devout Lutheran, Bismarck had fiercely opposed the liberals in Prussia for decades by the time Germany achieved unification. He distrusted democracy and wished to rule arbitrarily through a strong, well-trained bureaucracy that could assist him in the pursuit of a state-building strategy designed to make ordinary Germans more

[34]Ibid.
[35]Ibid 19.
[36]Ibid.
[37]Tom G Palmer, *Bismarck's Legacy* in Tom G Palmer (ed), *After the Welfare State* (Jameson Books, 2012), 45.

loyal to the state.[38]

Bismarck's unification of the German nation was constituted on the basis of an authoritarian government that granted social rights in order to 'enhance the integration of a hierarchical society'.[39] His goal was to implement welfare programs that aimed at forging 'a bond between workers and the state so as to strengthen the latter, to maintain traditional relations of authority between social and status groups, and to provide a countervailing power against the forces of liberalism and [international] socialism.'[40] Hence, in November 1881, in the Imperial Message to the *Reichstag*, Bismarck opened debate using the term *Practical Christianity* to describe his social policies centred on insurance programs designed to focus the political attention of German workers on supporting the German state through programs which included sickness insurance, accident insurance, disability insurance, and a retirement pension.[41]

IV Lutheranism and National Socialism

Legal positivism and its denial of justification for lawful resistance against tyranny are not the reasons as to why Lutheranism might have contributed to the legitimacy of the Nazi regime. There are other reasons which perhaps are all the more problematic. As the great Reformer who united 'Germanness' and Christianity, Luther defined what it is to be regarded as a 'German Christian'. For much of his adult life, however, Luther suffered from poor health and several illnesses that contributed to his notorious mood swings and depression. It is in such a context

[38] Jonathan Steinberg, *Bismarck: A Life* (Oxford University Press, 2013) 416-17.

[39] Kees Van Kersbergen and Barbarr Vis, *Comparative Welfare State Politics: Development, Opportunities and Reform* (Cambridge University Press, 2014) 38.

[40] Ibid.

[41] Moritz Busch, *Bismarck: Some Secret Pages From His History – Volume 2* (Macmillan, 1898) 282.

that his tracts against the Jews such as *Von den Jüden und Iren Lügen* ('On the Jews and Their Lies') should be approached. In such a notorious tract written by Luther in 1528, the Jews are called 'a base and whoring people' as well as 'venomous', bitter worms', and 'disgusting vermins'.[42] There he explicitly recommends the burning down of Jewish synagogues and schools, as well as that the houses of the Jews should be destroyed and their prayer books confiscated. Luther also recommends all the money and property of the Jews to be taken away, and to put them into forced labour.[43]

As one can imagine, the Nazis took considerable delight in knowing that Luther had suggested these appalling things. They readily relied on such writings in order to justify their most heinous crimes against the Jews, thus attaching the imprimatur of the great Reformer to 'the most un-Christian and – one can only assume – demented ravings'.[44] For instance, in *Mein Kampft*, Hitler commends Luther as a 'great reformer' who was worthy to be classified with Frederick the Great and Richard Wagner. Of course, Hitler did not admire Luther because he proclaimed

[42]Erwin W Lutzer, *Hitler's Cross: How the Cross Was Used to Promote the Nazi Agenda* (Moody, 2016) 107-108.

[43]The following is Luther's advice as to how to treat the Jews: 'First, to set fire to their synagogues or schools and to bury and cover with dirt whatever will not burn, so that no man will ever again see stone or cinder of them. This is to be done in honor of our Lord and Christendom··· Second, I advise that their houses be razed and destroyed···. Third, I advise that tall their prayer books and Talmudic writings, in which such idolatry, lies, cursing, and blasphemy are taught, be taken from them. Fourth, I advise that their rabbis be forbidden to teach henceforth on pain of loss of life and limb. Fifth, I advise that safe-conduct on the highways be abolished completely for the Jews···Sixth, I advise that usury be prohibited to them, and that all cash and treasure of silver and gold be taken from them and put aside for safekeeping'. Martin Luther, *Luther's Works – Vol.47* (Muhlenberg, 1962) 268-72; In his book *Hitler's Cross*, Dr Erwin Lutzer, who is senior pastor of the The Moody Church in Chicago, comments: 'Needless to say, his comments are despicable and anti-Christian... Inexcusable as his remarks were, we must bear two things in mind. First, his animosity was religious, not racial. There is nothing in his writings about the purity of blood, but rather the purity of doctrine. The fact that the Jews rejected Christ made him angry. As for his comments about their wealth, he believed that it had been illegally obtained through usury and that should be confiscated and put in a fund for "believing Jews". But at the root was the medieval notion that it was the responsibility of the church to hate those who hated Christ. The Jews – the "Christ killers" – thus became the target of anger and persecution'. Lutzer, above n 42 107-108.

[44]Eric Metaxas, *Bonhoeffer: Pastor, Martyr, Prophit, Spy* (Thomas Nelson, 2010) 93.

'salvation through Christ by faith alone'. Rather, 'he saw him as a man of courage who withstood the church and, no doubt, as one who hated the Jews'.[45] According to Luther's biographer, Eric Metaxas, '[t]he constant repetition of Luther's ugliest statements served the Nazis' purposes and convinced most Germans that being a German and being a Christian were a racial inheritance, and that neither was compatible with being Jewish. The Nazis were anti-Christian but they would pretend to be Christian as long as it served their purposes of getting theologically ignorant Germans on their side against the Jews'.[46] Of course, as Metaxas also explains,

> When Luther wrote them, he had little idea that four centuries in the future a political malevolence would rise up in his beloved Germany and that its most diabolical proponents would ferret out from the mountains of his writings those few passages of his most injudicious writings to aid their cause. On that that diabolical cause would end with the murder of six million Jewish noncombatants in as cold-blooded and calculated a manner as anything in the history of the world. That the Nazis' cynical master of propaganda would find the few vile words Luther had written against Jews and broadcast them to the word, ignoring the 110 volumes of his other writings, is of course fathomlessly cynical. Even at the time, those who knew Luther's other works very well either were unaware of this pamphlet or simply ignored it, feeling that it was such a strange outlier it could hardly be understood rationally.[47]

In *Temporal Authority*, a tract written in 1523, Luther argues that Christians live simultaneously in two kingdoms, the former is ruled by coercive temporal authorities and the latter directly by Christ, spiritually and without coercion. The implication is not only a rejection of the canon law but a rejection of the Church having a separate jurisdiction. The result is also the state monopoly on coercive power, including over the visible Church. The civil authority is immediately elevated to the highest legal authority and endowed with the complete monopoly over every legal power, which is then followed only by a certain moral (but not

[45]Lutzer, above n 42, 106.
[46]Ibid 94.
[47]Metaxas, above n 4, 417.

legal) duty to use such a power in order to protect the Christian faith within the ruling territory. This is like treading into a highly dangerous territory, indeed. According to Paul Johnson,

> There was undoubtedly a monstrous danger in the line Luther adopted and consistently pursued. By the second decade of the sixteenth century the power of the state was visibly growing through all Europe: to displace clerical authority and entrust the headship of the Church, and the arbitration of doctrine, to secular rulers was massively to enforce a process already fraught with peril to other elements in society. It meant, too, a degree of dependence on the princes which implied a blind endorsement of the social order they represented – a social order as much in need of change and reform as the clerical one.[48]

The German princes obviously had much to gain from becoming Lutheran. Nearly without exception all the most autocratic rulers of Europe – princes and kings – opted for Lutheranism. This is particularly so in places where the Catholic Church had the *greatest* local power. According to Rodney Stark, it is all well and good to note the widespread appeal of the Protestant doctrine that we are saved by faith alone. And yet, as he correctly says, it must also be more fully acknowledged that 'German princes with much to gain from becoming Lutherans did so; others, such as prince bishops who already possessed control of church offices and incomes, remained Catholic.'[49]

Because his doctrine on civil government was entirely derived from Romans 13, Luther believed that civil rulers are servants of God and there was little reason for civil disobedience.[50] Of course, he committed the hermeneutical failure of inter-

[48]Paul Johnson, *A History of Christianity* (Touchstone, 1995) 283.

[49]Rodney Stark, *A Triumph of Christianity* (HarperOne, 2011) 329.

[50]The book of Acts, Chapter 5, reports on the first Christians refusal to obey the Sanhedrin – a Jewish council of priests and teachers of the law. Such a council ordered them to not preach in the name of Christ. In reply to such an arbitrary ruling, St Peter declared: "We must obey God rather than human authority" (Acts 5:29). Peter did not accept to be silenced by unjust rulers, even if such a refusal could result in arrest and execution. Instead, he thought to be bound first by God and his Law, and so he kept preaching the 'Good News' as if no legal prohibition had been made. As noted by Morris and Clark: 'In choosing God's higher law rather than man's errant restrictions, they realized that their decision would be costly. Unlike contemporary revolutionaries who break the law with impunity and then scream for amnesty, the apostles

preting Romans 13 in isolation and not in the full context of Scripture as a whole. Romans 13 instructs the civil authority to carry out its duties diligently, holding 'no terror for those who do right, but for those who do wrong' (Rom 13:3). This biblical passage concludes with the following admonition:

> Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities which exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgement on themselves. For rulers hold no terror for those who do right, but for those who do wrong.

The passage therefore instructs the civil authority to exercise its power lawfully. Such an authority must legally protect the innocent and legally punish the evildoer. However, if the authority punishes the innocent and rewards the evildoer, then it is no longer a lawful authority but an unlawful authority and we have the right to lawfully resist such a rebellious authority. This assumption can be justified in Scripture. For instance, Revelation 13 talks about a government which becomes an

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acted in obedience to God's revelation and then took the responsibility for their actions. They never griped about prison or prosecution but, rather, gloried in being counted worthy to suffer for Christ's sake (II Cor 11:23-31)". Henry M. Morris and Martin E. Clark, *The Bible Has the Answer* (Master Books, 2005) 270; The notion that the Bible justifies civil resistance against evil government constitutes an old tradition of Christian thought. In 1076, the same year Pope Gregory VII deposed the German Emperor Henry IV, the German monk Manegold of Lauterbach wrote: "Since nobody can make himself king or emperor, the people raise up some man above themselves for one purpose only, that he should rule and govern them on [biblical] principles of just government, rendering to each his due, cherishing the good and removing evil-doers, weighting out justice to all. But, indeed, if he breaks the agreement by which he is elected (is pactum, quo eligitur, infringit) and rushes to disrupt and confound the things which he was appointed to keep in order, the reasonable conclusion is that he releases the people from their duty of obedience, seeing that he was the first to abandon the bargain (cum fidem prior ipse deseruerit) which bound one party to the other in faithfulness". Manegold, *Ad Geberdardum* 47. Quoted from J.M. Kelly, *A Short History of Western Legal Theory* (Clarendon Press, 1992) 98; A century later, in 1159, John of Salisbury affirms in his tract *Policratus* the community's lawful right to resist civil authorities who "have departed little by little from the true way... so that it becomes obvious that they are stiff-necked in evil-doing". Salisbury goes even to say: "To kill a tyrant is not merely lawful, but right and just. For whosoever takes up the sword deserves to perish by the sword. And he is understood to take up the sword who usurps it by his own temerity and who does not receive the power of using it from God. Therefore the law rightly takes arms against him who disarms the laws, and the public power rages in fury against him who strives to bring to nought the public force. And while there are many acts which amount to lese majesté, none is a graver crime than that which is against the body of Justice itself". John Salisbury, *Policratus*. Quoted from Berman, above n 9, 282.

agent of the devil. Under such circumstances, the civil ruler has actually betrayed its own lawful authority and it must be resisted, even by force if necessary. Indeed, a government can never be totally autonomous and devoid of legal accountability. It was Christ himself who declared that people must 'render unto Caesar the things that are Caesar's, and to God the things that are God's' (Mat 22:21). This statement implies the existence of things that civil rulers cannot lawfully do. By logical derivation it would also imply a certain right of the people to lawfully resist any such an act of political tyranny. Because he took his faith seriously, St Isidore of Sevilla (c. 560 - 636) once declared:

> Kings get their name from ruling (*reges a regendo vocati*) and he who does not correct (*qui non corrigit*), who does not bring things into the right way' does not rule. Thus the name of king is held through doing right, and is forfeit by doing wrong. When the ancients had a proverb: You shall be king if you do right, and not otherwise.[51]

To better understand the role of the Lutheran leadership during the Nazi regime, one must also recognise how the Lutheran Church had been in the faithful service of the secular state. Lutheran clergy traditionally saw themselves first and foremost as civil servants and the faithful protectors of the status quo. Unlike their Calvinist brothers in Scotland and the Netherlands, the German Lutheran Church had not been able to develop a doctrinal position which enabled them to distinguish between being part of a national church, and totally subservient to the government. Hence once Hitler came to power, he benefited from that history of Protestant subservience towards the state in Germany.[52]

Luther's 'theology of government' made it particularly hard for this Church to resist the Nazi regime. After all, it was Luther himself who stated that 'tyranny is not to be resisted but endured'.[53] Such an idea could be used to justify connivance,

[51]St Isidore, Etymologiae 5.21. Quoted from Kelly, above n 50, 96.
[52]Johnson, above n 48, 484.
[53]Luther, above n 43.

even a tacit support, to the Nazi tyranny. In fact, on 15 September, 1935, the Lutheran Church stayed completely silence when the Nazis announced laws that initiated a 'more ordered' phase of Jewish persecution. Such laws removed the Jews from numerous jobs and prohibited them from ever marrying non-Jews. Such laws provided the perfect opportunity for the Lutheran Church (*Reichskirche*) to speak out against the evil commands of such a terrible regime.[54] Instead, it did absolutely nothing and so it became guilty of the great Lutheran error of confining itself to the narrow sphere of how church and state were related.[55]

During that period even a Nazi faction within the Lutheran Church was established. These were Nazi sympathisers who infiltrated the body of the Church. Such individuals won an overwhelming majority at Church elections in 1933. The main leader of those 'German Christians', Pastor Leutheuser, was a Nazi fanatic who elevated Hitler to the position of a new messiah for Germany. Pastor Leutheuser went to great lengths to compare Adolf Hitler to Jesus Christ, contending 'that both leaders had waited until they were 30 years old before beginning their mission, and that both promised redemption from the suffering of the moment'.[56] To support such an utterly bizarre view, not surprisingly he ignored all the historical record and claimed that Jesus was not Jewish, but a man of Nordic origin and an enemy of the Jews.

In April 1939, the official Lutheran Church published the 'Godesberg Declaration', a notorious statement defining Nazism as a 'natural continuation of the work of Martin Luther'.[57] Gautleiter Erich Koch, President of the Provincial Protestant Church, explained that Nazi ideology should be approached as a continuation of

[54]Metaxas, above n 44, 281-2.
[55]Ibid 280.
[56]Laurence Rees, *The Dark Charisma of Adolf Hitler: Leading Millions Into the Abyss* (Ebury Press, 2013) 29.
[57]Metaxas, above n 44, 324.

Luther's unfinished Reformation.[58] These Church authorities (*Reichsbischof*) went on to elevate Hitler to the position of 'ultimate interpreter of the divine will'.[59] In March 1938, Bishop Sasse of Thuringia released an official statement commanding all the pastors under his ecclesiastical authority 'to take a personal oath of loyalty to Adolf Hitler'.[60] Other bishops instituted similar measures since they wished to eagerly manifest their loyal support to the totalitarian regime. Finally, in April 1937, the German Lutheran Church (*Reichskirche*) issued an official declaration that notoriously substituted Hitler's authority for that of the Bible. It reads, in part:

'Hitler's word is God's law; the decrees and laws which represent it possess divine authority. The Führer being the only hundred per cent National Socialist, he alone fulfils the law. All others are to be regarded as guilty before the divine law.[61]'

The German Clergy justified such a twisting and bending of Scripture by directly appealing to the authority of Luther. If the great German Reformer could break away from Catholic orthodoxy, so they rationalised, then nothing is written in stone. In fact, such individuals were keen to remind that Luther had even questioned the doctrinal value and canonicity of a few biblical texts. Luther made an attempt to remove the books of Hebrews, James, Jude and Revelation from the Bible, particularly because he perceived them to go against certain Protestant doctrines such as *sola gratia* and *sola fide*. He even called the Epistle of James an 'epistle of straw' for apparently preaching 'salvation by work' and not salvation by faith.[62] Bernhard Rust, Hitler's Education Minister, was once quoted as saying: 'I

[58]Christopher J Probst, *Demonizing the Jews: Luther and the Protestant Church in Germany* (Indiana University Press, 2012) 25.

[59]Ibid.

[60]Metaxas, above n 44, 308.

[61]Aurel Kolnai, *The War Against the West* (Viking, 1938) 276.

[62]In his Preface to the New Testament, Luther stated: 'St John's Gospel and his first Epistle, St. Paul's Epistles, especially those to the Romans, Galatians, Ephesians, and St Peter's Epistle – these are the books ... that teach everything that is necessary and blessed for thee to know,

think the time is past when one may not say the names of Hitler and Luther in the same breath. They belong together; they are of the same old stamp'.[63]

As for the Nazi theologians within the German Lutheran Church, Luther had left Germany with a priceless legacy. However, the completion of the German Reformation would be found in Hitler's Third Reich.[64] Accordingly, Luther's reformation should finally be completed by means of a national reassertion of Germany's spiritual power and physical strength. For such theologians, Luther had been a sort of John the Baptist to Hitler. In line with this the Thurigian Christians declared Hitler 'the redeemer in the history of Germans ... the window through which light fell on the history of Christianity'. Their German Führer was a 'God-sent'.[65]

V Nazism and Legal Positivism

The fact that legal positivism dominated Germany in the nineteenth century went hand in hand with the unification of the German territory by the Prussians and subsequent formation of the powerful of German State. This gave force to the understanding that laws are basically commands issued from a sovereign person or body. That being so, Georg Hegel and other German philosophers of the nineteenth century proposed the doctrine that the isolated individual was part of the social body and ultimately subordinate to the 'will of the State'.[66] Such philosophies, one might say, led to disturbing results in the early twentieth century in Germany.

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even if were never to see or hear any other book of doctrine. Therefore, St James' Epistle is a perfect straw-epistle compared with them, for it has in it nothing of an evangelic kind'. – Martin Luther, Preface to the New Testament (1522), quoted from R V G Tasker, *The General Epistle of James* (Eerdmans, 1966) 14.

[63]Richard Steigmann-Gall, *The Holy Reich: Nazi Conceptions of Christianity - 1919-1945* (Cambridge University Press, 2003) 136-7.

[64]Ibid 174.

[65]Johnson, above n 48 484.

[66]Shaw, above n 3 25.

When the Nazis came into power in 1933, most of the Germans in the legal profession were Lutherans. The vast majority of these lawyers were also legal positivists.[67] They were inclined to believe that laws exist only insofar as they comprise positive commands and procedures enacted by the state. Hence, law was deemed valid as long as it satisfies a certain formal criteria that is entirely procedural and descriptive. In such a context, 'there is no human behaviour which could not function as the content of a legal norm. A norm becomes law only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule'.[68]

This is obviously a narrow legal positivism. It is about revealing a system as it stands at a given time, 'without legitimising it as just or disqualifying it as unjust; it seeks the real, the positive law, not the right law'.[69] Such a view was commonly shared by members of the legal profession in Germany both prior and during the Nazi regime. German lawyers often approached the question of legal validity from a positivist idea that law can never be entirely invalid simply because it might produce injustice or immorality.[70] The leading German legal positivist in those days, Hans Kelsen, famously argued that the commands enacted by the state are legally valid regardless of their putative nature, and for no reason other than that such laws were enacted by the recognised authority. As Kelsen put it, 'from the point of view of the science of law ... the law under the Nazi-government was law. We may regret it but we cannot deny that it was law'.[71] Kelsen concluded:

> The legal order of totalitarian states authorizes their governments to confine

[67] Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (University of Chicago Press, 1998) 226.

[68] Hans Kelsen, 'The Pure Theory of Law – Part 2' 1935 51 *Law Quarterly Review* 17 [29].

[69] Fred A Brauch, *Is Higher Law Common Law?* (Fred Rothman, 1999) 474.

[70] R A Hughes, G W G Leane and A A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (Lawbook, 2003) 32.

[71] Hans Kelsen, 'Das Naturrecht inder Politischen Theorie' (F M Schmoetz (ed) (1963)) quoted in F A Hayek, *Law, Legislation and Liberty, Vol 2: The Mirage of Social Justice* (Routledge & Kegan Paul, 1976) 56.

> in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor, even to kill them. Such measures may be morally or violently condemned; but they cannot be considered as taking place outside the legal order of those states.[72]

To deem as 'non-law' any legislation enacted by the state that violates universal principles or objective standards, one is compelled embrace a jurisprudence that is both metaphysical and substantive in its content.[73] And yet, as wrote Haldemann, this might be our best solution to the problem of tyranny because '[t]he problem of extreme injustice can only be dealt with coherently if we adopt a concept of law that incorporates some basic morality as a limiting criterion'.[74] During the Nazi period, 'all attempts at passive and active resistance to the regime were necessarily grounded on natural law ideas or on divine law, for legal positivism as such could afford no foundation'.[75] Nazi laws certainly did not satisfy even the most basic standards offered by the traditional principles of natural law. On such grounds, the likes of St Augustine would have no problem in describing the Nazi regime as being completely unlawful. The Nazi leadership would not be lawful authorities but rather a 'gang of criminals'.[76]

[72]Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) 40.

[73]Stolleis, above n 67, 5.

[74]Frank Haldemann, 'Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law' 1958 71 *Harvard Law Review* 162 176.

[75]Heinrich Rommen, 'Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany' (1959), quoted from Charles E Rice, *50 Questions on the Natural Law: What It Is and Why We Need It* (Ignatius Press, 1999) 26.

[76]It is in the context of fundamental principles ascribed to the natural law that St Augustine argues that 'a law that is unjust does not seem to be law at all'. – St Augustine, On Free Choice of the Will, Bk I, Pt 3. St Augustine also contends that if a law is not objectively just or socially desirable, then there is no substantial difference between a government and a 'gang of criminals'. Such a distinction actually disappears. The following passage in St Augustine's The City of God is particularly illuminating: "Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves but little kingdoms? The band itself is made of men; it is ruled by the authority of a prince ...; the booty is divided by the law agreed on. If, by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities and peoples, it assumes the more plainly the name of kingdom, because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of impunity. Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, "What you mean by seizing the whole earth; but because I do it with a petty ship, I am called a robber, while you

When one looks at the German legal profession in the 1930s, leaving aside those who were more fully committed to the Nazi ideology, it is apparent that legal positivism played an important role in the abject failure of these German lawyers to stand up against the Nazi atrocities. If one takes into account the 84 names on the 1922 membership list of the Association of Constitutional Lawyers, legal positivists by far were the dominant group.[77] What is more, some of these lawyers actually saw in Nazi rule the very fulfilment of the positivist dream of 'law and order', which formed the basis of German jurisprudence in that period.[78]

It was claimed by the late American legal philosopher, Lon L. Fuller, that such a positivism would have paved the way for National Socialism.[79] The same remarks were later endorsed by another American legal philosopher, Charles Rice. When the Nazis first moved against the Jews, Rice said, the 'good' German lawyers who did not agree with Nazi ideology were 'disarmed' by legal positivism.[80] This would be so if these lawyers had responded to the early Nazi injustices with a 'principled denunciation' rooted in traditional principles of natural-law philosophy. According to Rice, the classic positivist thesis that 'law is law' regardless of its substantive nature ultimately made those lawyers 'defenceless against laws of arbitrary or criminal content'.[81] More often than not those German lawyers, write Seitzer and Thornhill,

> argued that the evolution of law should be viewed as following purely positive patterns, and that law should be constructed as an internally and systemically consistent unity of principles and norms, relatively closed against normative, purposive, or directly politicised external input. Legal prescriptions, in consequence, should be viewed as nothing more than inner-juridical facts, constructs formed by the law itself to facilitate its own application.

who do it with a great fleet are styled emperor".' – St Augustine, *The City of God*, Bk IV, Pt 4.

[77]Typical of this group were Richard Thomas, Heinrich Triepel and Gerhard Anschütz.

[78]Stolleis, above n 67, 226.

[79]Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 1958 714 *Harvard Law Review* 630.

[80]Charles Rice, 'Some Reasons for a Restoration of Natural Law Jurisprudence' 1989 24 *Wake Forrest Law Review* 539 567.

[81]Ibid.

> On these grounds, they concluded that the validity of law depended on its status as an internally consistent set of rules, and it could not be reconstructed or interpreted on the basis of moral prescriptions.[82]

One prominent lawyer to be entirely disarmed by legal positivism was Gustav Radbruch (1878-1949). Radbruch was a Lutheran and a prominent jurist who once served as Justice Minister under the Weimar Republic.[83] He initially argued that the political sovereign can make any law whatsoever, so long as he consistently enforces it. Because such a jurisprudence is voluntarist, what makes an action lawful and valid is its approval by the government. Law is identified only to its source, as opposed to its merits as well.[84] After claiming that legal stability is absolutely critical to the duty to obey the law, Radbruch concluded: 'It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just.'[85]

Radbruch lived long enough to see all the horrors and brutalities of the Nazi regime. He apparently was a good man and so he became appalled by the dramatic consequences of such a terrible tyranny. Thus Radbruch began to gradually question his own legal philosophy. In particular, he began to wonder whether his philosophical approach might have offered no jurisprudential limits to the content of legal decision derived from the political process. In the fourth edition of *Rechtsphilosophie*, which was published posthumously in 1950, Radbruch finally abandons positivism (and moral relativism) so as to boldly advocate that, 'where there is not even an attempt at justice, where equality, the core of justice, is de-

[82]Jeffrey Seitzer and Christopher Thornhill, *An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context* in *Carl Schmitt: Constitutional Theory* (Duke University Press, 2008), 10.

[83]Kelly, above n 50, 379.

[84]Ibid.

[85]Gustav Radbruch, *Legal Philosophy* in Kurt Wilk (ed), *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press, 1950), 119.

liberately betrayed in the issuance of positive law, the statute is not merely 'false law', it lacks completely the very nature of law'.[86]

Radbruch called 'false law' the existence of laws that could not appeal to universal principles of 'the natural law or the law of reason'. Having established 'by the work of centuries' that those principles 'have come to enjoy such a far-reaching consensus in the declaration of human and civil rights that only the deliberate skeptic can still entrain doubts about some of them',[87] he then concluded that the Nazi commands 'did not partake of the character of law at all; they were not just wrong law but were no law of any kind'.[88] Radbruch even provided a few examples of 'false law' being enacted by the Nazi regime, such as the legislation which endorsed the treatment of some people as sub-human, and legislation that inflicted the death penalty on a wide range of offences based on merely biological considerations. According to him, when the commands of the political ruler violates more fundamental principles, or the natural sense of universal justice, 'the people owe them no obedience, and lawyers, too, must find the courage to deny them the character of law'.[89] The late Irish jurist, J.M. Kelly, commented:

> Radbruch believed the doctrine that law was whatever a statute said had rendered German justice helpless when confronted with cruelty and injustice once those wore statute vesture ⋯In his own reaction and in that of others, Radbruch saw a revival of belief in a transcendent law [however one may like to describe it: the law of God, the law of nature, the law of reason] by which evil positive laws may be condemned as 'legal injustice'. He ended his final lecture by reminding his students that, once upon a time, the title of this course [that is, Legal Philosophy] in the syllabus had been 'The Law of Nature'.[90]

[86]Gustav Radbruch, *Rechtsphilosophie*, (Stuttgart: K F Koehler Verlag, 1970), quoted from Jes Bjarup, 'Continental Perspectives on Natural Law Theory and Legal Positivism', in Jes Bjarup, *Continental Perspectives on Natural Law Theory and Legal Positivism* in Martin P. Golding and William A. Edmunson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2005), 298.

[87]Ibid.

[88]Radbruch, Rechtsphilosophie (4th ed, 1950), quoted from Kelly, above n 50, 410.

[89]Ibid.

[90]Ibid 379.

Of course, not every German lawyer living under the Nazi regime embraced positivism. In fact, German judges serving that regime often interpreted laws with a broad discretion, according to meta-legal notions derived from the Nazi ideology. Even so, and to quote Markus Dubber, 'the significance of legal positivism lay not in theory but in practice. It did not shape Nazi legal theory; it helped effectively to maintain the Nazi legal system'.[91] After all, positivism at very least 'permitted lawyers to rationalise to themselves and others their interpretation and application of laws they might, upon reflection, have considered grotesquely unjust or immoral'.[92] Arguably, such a dominance of positivist philosophy in Germany might have 'seriously inhibited any reaction against the Nazi perversion of legal forms'.[93]

But positivism was certainly not the only factor leading to the legitimisation of the Nazi regime. The statutes enacted during the previous Weimar Republic remained unchanged under the Third Reich. The application of such statutes often became drastically at odds with the overarching intention of the legislator. According to the leading Nazi legal philosopher, Carl Schmitt, rather than having a responsibility to apply the law literally, or according to the legislator's intention, judges had to demonstrate unconditional commitment to a certain view of legality that was 'more dependable, more vigorous, and more profound than the treacherous obligation to the slippery letter of thousands of statutory provisions'.[94] That being so, it is easy to conclude that, although positivist traditions as derived from Lutheran jurisprudence facilitated the denial of ethics and metaphysics in the application (and interpretation) of the law, it is undoubtedly simplistic to attribute to posit-

[91]M D Dubber, 'Judicial Positivism and Hitler's Injustice' 1993 937 *Columbia Law Review* 1807.

[92]Ibid 1826.

[93]George Breckenridge, 'Legal Positivism and the Natural Law: The Controversy Between Professor Hart and Professor Fuller' 1964-1965 18 *Vanderbilt Law Review* 945 950.

[94]Carl Schmitt, Staat, Bewegung, Volk, 1933, 46. Quoted from Stanley L. Paulson, 'Lon L Fuller, Gustav Radbruch, and the Positivist Thesis' 1994 13 *Law and Philosophy* 313 315.

ivist philosophy the failure of the German legal profession as the *only* reason to resist all the oppression and brutality of the Nazi regime.

VI Conclusion

In many ways it is not surprising that the Nazis sought to attach themselves to Luther. His teachings were said to constitute the quintessence of German Christianity.[95] In the 1930s, approximately 95 per cent of all Germans were baptised members of the Christian Church, with around two-thirds being Protestant.[96] Most of those German Protestants viewed Luther as a national hero and the very essence of the 'German spirit'.[97] Although the Nazi worldview was remarkably anti-biblical, Hitler and many other in the Nazi leadership pretended to be Christians not only to neutralise the resistance of the Church to the Nazi atrocities, but also to turn all the ideologically ignorant Germans against the Jewish community.[98]

This article has explained the possible links between Lutheranism, legal positivism and the behaviour of the German legal community during the Nazi regime. Luther's works have been described as an important source of the modern legal positivist definition of law as the will of the state expressed in rules and enforced by coercive sanctions.[99] Perhaps in great part due to Lutheran theology, legal positivism, in turn, had become an intrinsic part of the German legal culture and so it was entrenched and very well established both before and during the Nazi period. The Nazi legal system, of course, was not shaped solely by legal positivism, but

[95] John Witte Jr, *Law and Protestantism: The Legal Teaching of the Lutheran Reformation* (Cambridge University Press, 2002) 297.

[96] Doris L Bergen, 'Catholics, Protestants and Christian Antisemitism' 1994 273 *Central European History* 329 330.

[97] Probst, above n 58, 37.

[98] Metaxas, above n 44, 94.

[99] Berman, above n 9, 29.

there is little doubt that such a positivism 'helped effectively to maintain the Nazi legal system.[100] Accordingly, the role of Lutheran jurisprudence in the legitimisation of the Nazi regime lays primarily in its more practical effects. Of course, the Nazis also took great pleasure in their appropriation of Luther's controversial teachings that justify not only his own anti-Semitism but also legal positivism that could further legitimate the political persecution of Jews. It offered the Nazis a perfect justification for their brutality against the Jews, portraying themselves as the completion of the Lutheran Reformation.

[100]Dubber, above n 91, 1828.