

Books

Review of LAW AFTER AUSCHWITZ: TOWARDS A JURISPRUDENCE OF THE HOLOCAUST by David Fraser (2005)

KRISTEN RUNDLE*

For many years, David Fraser taught a jurisprudence course entitled 'The Holocaust, Moral Responsibility, and the Rule of Law' at the University of Sydney Law School. I was fortunate to inherit the course from Fraser in 2003, and have had the opportunity to teach it on a number of occasions since. The course examines law's relationship to the origins, implementation and aftermath of the events known as the 'Holocaust', as a prism through which to explore fundamental questions about the nature, possibilities and limits of law. The chronological manner through which the course explores these questions enables the relationship between law and the Holocaust to be viewed along a continuum, which, critically, operates to reveal a conceptual and ethical disconnect at the point where law's relationship to the events changed direction from causal to remedial. Yet how to explain that point of disjuncture between law's role of inscribing 'the Jew' and others as the legal enemies of the Aryan body politic, and law's role of bringing justice in the aftermath of that persecution, is a matter that is rarely (if ever) adequately explored in legal scholarship.

Instead, it is as if, despite the constant and active presence of law, we have been asked to accept that there was little or no connection between the law that was so pivotal to bringing in the atrocities and that which rescued us from them. We are simply told (for whatever reason) that Nazi law was 'not law' or, as was proclaimed at Nuremberg, it was 'criminal'. Teaching Fraser's course has revealed to me just how urgently these unsatisfactory conceptualizations need to be addressed. In the meantime, however, there remains fundamental incoherence within our understanding of law that I believe can only be bridged if law is required to come to terms with *itself*, at both a conceptual and ethical level.

Fraser's *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* is an invaluable contribution to the growing body of scholarship that examines law's relationship to the Holocaust, precisely because it offers a bridge across that gap. While a number of excellent works explore the post-Holocaust self-understanding and future of *German* legal institutions and traditions (especially Michael Stolleis's *Law under the Swastika* and Ingo Muller's *Hitler's Justice*), no

* SJD candidate, University of Toronto. I would like to acknowledge the food for thought for this review that was provided by the outstanding essays of two of my graduate students, Tom Molloy and Jayne Jagot, in the course 'Law, Lawyers and the Holocaust' which I taught at Sydney Law School in semester 2 of 2005.

comparable work exists that explores what the Holocaust can teach us about how different constructions of law, justice and the rule of law come into being. *Law after Auschwitz* thus begins to fill a much-neglected niche, and in its robust and often controversial assertions, invites others to join with the author in refocusing jurisprudential scholarship towards an investigation of these critical questions.

The greatest strength of the work lies in how it squarely confronts the question of *why* we appear to have accepted the idea that ‘law before’ and ‘law after’ Auschwitz are conceptually and ethically distinct. To conduct that confrontation, Fraser seeks both to rethink law’s record of itself in relation to the Holocaust, and to map how that record has been created and consolidated. His argument is that the apparent point of rupture between law before and law after the Holocaust is in fact the product of a self-serving ‘legal memory’ that has been authored and sustained by the legal interpretive community of lawyers, judges and scholars. That legal memory has been constructed as a means to shield law and lawyers from the possibility that we might ‘be more deeply implicated in the theory and practice of genocide than my colleagues in law would have us believe’ [p3] Thus, the author argues, law after the Holocaust ‘can only ever be self-regarding but self-regarding in a process of systematic and systemic bad faith’ [p336], as it persistently avoids the kind of introspection that would reveal the Holocaust as ordinary, as unexceptional, and as ‘perfectly lawful and legal’ [p5]. To borrow Fraser’s formulation:

I will argue throughout that the historicity of the Holocaust, in legal discourse and practices concerning the killing of European Jewry, particularly in perpetrator trials, has almost always played a secondary role to other ideological, political, cultural and legal goals and concerns. Ideas and ideologies about the rule of law, justice, the fate and place of ethnic immigrant communities, Jewish and non-Jewish, citizenship and identity, the Cold War struggle against capitalism or communism, etc., have all been present in legal attempts to construct a collective memory of the Holocaust. In all of this contextualization and positing of the Holocaust within other frameworks yet within the overarching context of the legislative and judicial processes, the key and essential elements of the legality of the Holocaust have been deliberately elided [p4].

The objective of the book is therefore to transform the Holocaust from ‘not law’ to ‘legally relevant’, and, in doing so, to reverse the long-established trend in which the relevance of and continuities between the Holocaust and contemporary life have been viewed as beyond our comprehension. Fraser’s project thus rethinks systemic and semiotic processes that construct law and are prior to any normative evaluation of it. Indeed, the author himself is sceptical about whether his ‘recovery of the Holocaust for and within law will in fact ever lead to any collective, professional re-thinking of lawyers’ or judges’ roles and functions as ethical and morally responsible human beings’ [pp6–7]. Nevertheless, he is adamant that any such ethical reappraisal cannot be undertaken until we have begun to meaningfully confront the professional and institutional continuities between law and the

Holocaust, and, at a conceptual level, have come to accept ‘the impossibility of a law after Auschwitz which is not a law of Auschwitz’ [p218].

The structure of the book guides the reader through a continuum of conceptual constructions of law, justice and the rule of law that together have contributed to the ‘legal memory’ that Fraser is so determined to counter. The book’s initial chapters are predominantly theoretical in focus, and introduce Fraser’s central concern with how lawyers have constructed a memory of the Holocaust as an event ‘outside’ of law. Some especially fascinating research on this question is contained in the fourth chapter, “‘The outsider does not see all the game’: Perceptions of German law in the Anglo-American World, 1933–1940’,¹ which examines what 1930s Anglo-American legal scholarship reveals about the then contemporary external perception of Nazi law. A particularly sobering read for academic lawyers, the chapter draws attention to the importance of legal scholarship in influencing how law should be perceived, and thus also in identifying whether (and how) a society’s legal system might be said to have passed over from ‘legal’ into a state of ‘non-law’ or ‘criminality’. Although the study might be criticized for its apparent emphasis on the writings of private law scholars at the time (when the deterioration and perversion of law under Nazism was felt most radically in the realm of public law), it nevertheless provides an excellent centrepiece for the author’s project in so far as it confronts the law/not law question from a temporal as well as conceptual angle.

The bulk and remainder of the book is dedicated to a series of case studies of various post-war ‘perpetrator trials’ and other legal mechanisms that have reflected law’s response to the Holocaust. These studies – like other recent works by the author² – read like an exposé of national myths and legal myths, and highlight the multiple ways in which these legal events have attempted to reinvent notions of the rule of law and justice in a manner that might both disassociate law from its past, and render it meaningful to the present. The 1961 trial of Adolf Eichmann in Israel is, however, notably absent.

The argument that underpins these case studies is that the primary legal–ideological function of post-Auschwitz juristic events has been ‘to attempt to convince us again and again, with each case against each perpetrator, of the discontinuity, the radical break of 1933–1945’ [p121]. Thus, as Fraser argues in the first of these case studies, much of the Nuremberg trial was spent establishing not the illegitimacy of Nazi legality, but the legitimacy of international legality, precisely because the illegitimacy of Nazi legality depended on the legitimacy of

1 An earlier version of this chapter is published in Christian Joerges & Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Traditions* (2003).

2 See, for example, David Fraser, ‘National Constitutions, Liberal State, Fascist State and the Holocaust in Belgium and Bulgaria’ (2005) 6 *German Law Journal* 291; David Fraser, ‘The Fragility of Law: Anti-Jewish Decrees, Constitutional Patriotism and Collaboration in Belgium 1940–1944’ (2003) 14 *Law and Critique* 253; David Fraser, ‘A Passive Collaboration: Bureaucracy, Legality and the Jews of Brussels, 1940–1944’ (2005) 30 *Brooklyn Journal of International Law* 365.

the norms that were alleged to have been violated [p125]. The author's examination of the French prosecutions of Klaus Barbie and Paul Touvier looks critically at the issue of the legal construction of French collective memory of the Holocaust and, more specifically, of French collaboration and resistance. The chapter's critical analysis of French legal memory joins an increasingly sophisticated area of recent scholarship on Vichy France and the Holocaust,³ and is complementary to other recent works by Fraser which investigate the connections between the professional, constitutional and administrative cultures in nations like Bulgaria and Belgium, and their participation (or not) in the Nazi extermination program.⁴

Fraser's examination of the American denaturalization and deportation cases in the 1980s, when attempts were made to remove suspected resident Nazi war criminals from the United States, explores how these immigration cases further developed the legal construction of the Holocaust as an 'un-American' event that was born at Nuremberg. The offence in question in these cases was not that the defendant was a Nazi war criminal, but rather, that he had lied about being one when entering the United States. Thus, as Fraser observes, the American legal memory of the Holocaust is one in which the Holocaust is not an American legal problem, but 'lying about it to come to the United States is an American legal problem' [p235]. The chapter also highlights the important influence of the anti-communist discourses and ideologies of the period, under which inaction on such questions as extradition of alleged war criminals to the Soviet Union to face prosecution was justified by a refusal to collaborate with nations that did not live under the 'rule of law'.

The same ideologies underpinned discussions about Nazi war criminals in Australia in the early decades after the Second World War. However, as Fraser explains, the intersections of law, memory and justice that have surrounded public discourse about the prosecution (or not) of alleged Holocaust perpetrators in Australia have had other characteristics that relate specifically to Australian conceptions of justice [p364]. For example, a legal and popular perception of 'war crimes' as those atrocities suffered by Australians in the Pacific theatre at the hands of the Japanese, alongside the idea of Australia as a place where immigrants could forge a 'new life', all contributed to a construction of the Holocaust as remote from questions of Australian justice and identity. Further, with influential media personalities such as broadcaster Alan Jones questioning why Australia was subjecting old men of ill health to 'show trials' at enormous cost to the taxpayer, and asking 'why the focus is on the Nazi war crimes rather than the Japanese' [p400], it is not hard to see why the prosecutorial zeal of the late 1980s and early 1990s was eventually defeated by the sentiment that it was simply 'time to close the chapter'. Fraser's studies of the comparable attempts to prosecute alleged Nazi

3 See especially works by Vivian Curran, including 'The Legalization of Racism in a Constitutional State: Democracy's Suicide' (1998) 50 *Hastings Law Journal* 1 and 'Racism's Past and Law's Future' (2004) 28 *Vermont Law Review* 683.

4 See above n2.

war criminals in Canada and the United Kingdom reveal similar stories, albeit with different legal, political and cultural nuances.

Additionally, there is a special emphasis throughout the book on the continuity of parts of Nazi medical-eugenic ideology within today's legal institutional discourses and practices. Thus, a critical feature of the post-Auschwitz jurisprudence that Fraser propounds is that it is one that 'remains aware of its own historical and institutional implication in the legalizing of eugenic normality' [p443]. He asserts, for example, that what we find in a variety of instances in which law and medicine intersect in the field of 'progress' is that 'we have advanced little from the 1930s', leading him to boldly conclude that 'many, if not all, of the factors which created the legality of Auschwitz, continue to inhabit today's legal universe' [p419]. The development of this theme of eugenic continuities is an especially valuable aspect of the work as a whole, as it takes up issues of concern to modern bioethics and explicitly places them on a continuum that links accepted contemporary values and practices to the 'extreme' of Nazism. Fraser points out how, for example, the science of 'eugenics' that became so notorious under Nazism has reinvented itself under the name of 'genetics'; how the practice of compulsory sterilizations of the 'mentally defective' continued for several more decades in nations like Sweden (among many others) than in Germany; and how in recent judicial reasoning on the issue of the legally-mandated surgical separation of conjoined twins (at the cost of the death of one) we see an unmistakable inference that some lives are more worthy of life than others.⁵

Fraser's 'new jurisprudence' is therefore one in which the Holocaust is viewed as 'part of the normal continuities of history and law in the traditions of Western culture' [p12]. The fact that Fraser does not attempt to clarify precisely what he means by 'jurisprudence' is almost certainly designed to draw attention to the multiple ways through which law constructs a record of itself. However, what is clear from the recurring emphasis on *how* the legal record of the Holocaust is created is that Fraser wishes to highlight the critical conceptual and ideological role played by the professional community, whom he charges with constructing and reconstructing law's vocabulary and meaning.

Just how Fraser borrows the concept of an 'interpretive community' from literary theorist Stanley Fish deserves a moment's attention. Fish's theory contends that a defined community of readers invests a text with its particular meaning because, by dint of professional training or other common characteristics, they share interpretive strategies for reading and interpreting the properties of that text.⁶ By contrast, the idea of the 'legal text' that correlates with Fraser's use of the concept of the interpretive community refers to *all* legal texts, however explicitly or implicitly inscribed, that together brought the legal order of the Holocaust into being. Thus, Fraser's 'law' ranges from the various state-enacted texts of the 1930s

5 See Fraser's excellent discussion of these issues in his concluding chapter: 'Law after Auschwitz: The Embodied Future and Holocaust Jurisprudence'.

6 See generally Stanley Fish, *Is there a Text in this Class?: The Authority of Interpretive Communities* (1980).

eugenics and anti-Jewish legislation, through to the orders and decrees that constituted the everyday functioning of the death camps.

One criticism that might be made of the work is how Fraser conceives of his project as outside of, or unrelated to, the mainstream jurisprudential debate between legal positivism and natural law. It is clear from the deliberately broad conception he employs that his 'jurisprudence' is not one that is intended to be, like the more orthodox theories, an account of what makes law 'law', in the sense of what makes law *valid*. Indeed, Fraser states openly that he does not wish to engage with those debates because, in his view, natural law and positivism 'hardly stand up to practical scrutiny, nor do they advance the real issues of the debate here' [p8]. Thus, Fraser avoids an engagement with the substantive arguments of those debates, choosing instead to focus on his own interest in the fact that even those who reject the 'legality' of Nazi Germany 'are still faced with existential reality of a legal system which continued to function much as it had before' [p23].

However, it remains the case that such debates – most particularly the exchange between HLA Hart and Lon Fuller in the 1958 *Harvard Law Review* – have attempted, however imperfectly, to do precisely that which Fraser argues is impossible: to provide a coherent explanation of why Nazi law was 'not law'. Although Fraser's project might be considered as lying on a separate plane altogether, in so far as it is concerned with the challenge to law's conceptual and ethical coherence that arises from its complicity with 'lawful' atrocity rather than with questions of legality *per se*, a greater engagement with the mainstream debates would, in my view, have strengthened the work. Such an engagement could, for example, have drawn more explicit attention to the various points of differentiation between the author's 'jurisprudence' and the orthodox accounts, which include the fact that Fraser's project is squarely concerned with what perceptions of Nazi law can teach us about *how* jurisprudential understandings are constructed, rather than how the example of a 'wicked legal system' tests the theoretical coherence of opposing accounts of legal validity.

Yet, by declaring mainstream jurisprudence to 'not advance the real issues of the debate here' [p8], Fraser sidesteps positions within those debates that arguably do need to be reconciled with his own thesis. These include, most notably, the 'middle ground' between the idea of Nazi law as 'law' or 'not law' that argues that what occurred under Nazism was an *exploitation* of legal forms.⁷ Thus, according to such a position, what was witnessed 'after Auschwitz' was a reinstatement of the 'proper' use of law and its institutions. By avoiding a more substantial engagement with such positions, irrespective of the criticisms that might be levelled against them, Fraser avoids producing a clearer account of where his own work might be positioned in relation to them. This, in my opinion, is something that deserves criticism given the common preoccupation between the author and these mainstream theorists with the conceptualization (or not) of Nazi law as 'not law'.

⁷ See, for example, Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) *Harvard Law Review* 630 at 659.

Other criticisms that might be levelled against the book include the relatively minor matter of the unfortunate number of typographical errors throughout the text, as well as the author's tendency to use certain terminology interchangeably without early clarification (such as 'criminal' being used interchangeably with 'not law', or 'Holocaust' with 'Auschwitz'). A more substantive criticism, however, concerns the author's penchant for overstatement. The boldness of Fraser's assertions is arguably his 'trademark' characteristic as a scholar, and indeed is likely deliberately employed to invoke reaction and response from his readers. Nevertheless, in *Law After Auschwitz* this boldness at times borders on inaccuracy, or at least may be slightly misleading.

For example, Fraser's insistence that Nazi legality took place within ordinary governmental and legal structures arguably understates some of the more radical transformations of legal method that occurred during the period 1933–1945. An illustration in point is the transformation of the basic methodology of legal reasoning from one involving the application of general, previously-declared laws to specific individuals (and thus one consistent with general understandings of the 'rule of law'), to a radical, purposive interpretive approach that prioritized the *Volk* (or community interest) over that of the individual. Famous examples include the creation of criminal offences by analogy if the individual was considered to be 'deserving' of punishment, or if 'healthy *Volk* feeling' required it. Such radical departures from pre-existing standards might therefore at least qualify the assertion that law under Nazism took place within 'ordinary governmental and legal structures'.

Nevertheless, the participation and adaptation of ordinary legal and governmental personnel to the structures of the new order is one of the most disturbing aspects of the Holocaust. Further, as Fraser rightly argues, it is difficult to deny that many examples of the Nazi legal-administrative apparatus (such as the Hereditary Health Court system that decided questions of compulsory sterilization of the 'mentally defective') bear strong resemblance to 'many of the best elements of today's modern administrative quasi-judicial system' [p424].

Ultimately, therefore, the above are small criticisms of a work that genuinely breaks new ground in the realm of scholarship concerned with the connections between law and the Holocaust, and with the question of 'lawful' atrocity more generally. In its bold, thought-provoking and rigorously researched exploration of the idea that 'there is no inherent, epistemological, ontological juridical set of ideas, concepts or practices which distinguish Nazi law from our law' [p438], *Law After Auschwitz* is an achievement for which the author deserves great commendation and for which his scholarly community should be grateful. The fundamental and fundamentally troubling insight that the law cannot judge that which it has itself inscribed is sure to challenge other thinkers to join with Fraser in attempting to resolve the conceptual and ethical disconnect that lies at the heart of law's engagement with the Holocaust.

