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LEGAL OUGHTS, NORMATIVE TRANSMISSION, AND THE NAZI USE OF ANALOGY

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Abstract

In 1935, the Nazi government introduced what came to be known as the *abrogation of the prohibition of analogy*. This measure, a feature of the new penal law, required judges to stray from the letter of the written law and to consider instead whether an action was worthy of punishment according to the 'sound perception of the people' and an 'underlying principle' of an existing criminal statute.

In discussions of Nazi law, an almost unanimous conclusion is that a system of criminal law ought not to contain legislation of this sort. This conclusion is often based on how the abrogation relates to the normative claim that the law ought to be predictable. In particular, it has been argued that the Nazi use of analogy diminishes the law's predictability such that the fact that the law ought to be predictable transmits its normativity to a prohibition of a Nazi type of analogy legislation.

In this paper, we argue that this argument is not entirely correct. While we believe that the law ought to be predictable and that there is evidence for the claim that the Nazis' introduction of analogical reasoning implied, caused, or contributed to a diminution of predictability, this fact is logically too weak to ground the conclusion that necessarily a penal system ought not to contain legislation of this kind. Despite the undeniable wickedness of the Nazi penal system, this type of analogical reasoning can be made consistent with the predictability of the law. We argue that consistency of this sort depends on whether the use of analogy is supplemented by certain contextual background conditions. The occurrence of these conditions blocks an inference from the fact that the law ought to be predictable to the conclusion that a penal system ought not to allow for this type of analogical reasoning.

Introduction

On June 28th, 1935, the Nazi government enacted a crucial amendment to the German penal law. According to the act's first article,

> Whoever commits an act which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal statute and according to the sound perception of the people shall be punished. If no determinate penal statute

> is directly applicable to the deed, it shall be punished according to the statute, the fundamental idea of which fits it best.[1]

As a result of this amendment, judges were no longer required to provide a strict interpretation of a criminal statute according to the 'mere' letter of the law. As the act states, they were now required to consider whether an action was worthy of punishment according to (i) the 'sound perception of the people' and (ii) an underlying principle of the existing criminal law. This law came to be known as the *abrogation of the prohibition of analogy* (APA) as defined by the Criminal Code of 1871.[2]

The APA instructed judges to construct *extensive* or *non-literal interpretations* of existing criminal statutes: where an act deemed punishable according to the 'sound perception of the people' did not fully fall within a given statute's wording, a judge could turn away from the letter of that statute and focus instead on its grounding sense or spirit (its 'underlying principle') as a guide to determining whether the act ought to be sanctioned.[3] In reasoning this way, a judge would be applying an existing statute, *L*, to an unregulated case which is condemned by the 'sound perception of the people' and which, because it is covered by the fundamental idea of *L* (but not its letter), is deemed analogous to those cases in fact covered by the wording of *L*.[4]

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[1] 'Gesetz zur Änderung des Strafgesetzbuchs vom 28. Juni 1935', Art. 1, §2. *RGBl*. I, p. 839. Like amendments were inserted as §§170a and 267a of the *Strafprozessordnung* ('Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes vom 28. Juni 1935', *RGBl*. I, p. 844). The original German reads as follows: 'Bestraft wird, wer eine Tat begeht, die das Gesetz für strafbar erklärt oder die nach dem Grundgedanken eines Strafgesetzes und nach gesundem Volksempfinden Bestrafung verdient. Findet auf die Tat kein bestimmtes Strafgesetz unmittelbar Anwendung, so wird die Tat nach dem Gesetz bestraft, dessen Grundgedanke auf sie am besten zutrifft'.

[2] *Strafgesetzbuch für das Deutsche Reich* (1871), §2.

[3] We can call non-extended or literal interpretation an interpretation of the written statute. At the time of the introduction of this law, there was a question about whether the use of analogy was really just a form of extended interpretation. It was in any case an increasingly popular idea that existing 'pre-revolutionary' laws ought to be interpreted broadly, according to the spirit of the new order (see, e.g. Huber, *Verfassungsrecht des Großdeutschen Reiches*, 2nd ed. (Hamburg: Hanseatische Verlagsanstalt, 1939) p. 245.)

[4] By 'application', here, we mean either the broadening of a pre-existing rule by removing a condition or the creation of a narrower rule meant to exist alongside the previous rule (where a condition is added) (see Joseph Raz's discussion of legal analogy in 'Law and Value in Adjudication', *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009) p. 204. At the time of the introduction of the APA, some commentators argued for the authorising of what was called *Rechtsanalogie* ('analogy of the law'): the application of a principle underlying the legal system as a whole to an unregulated case which is condemned by the 'sound perception of the people'. The majority of commentators argued, however, that the Nazi criminal law ought only to license *Gesetzesanalogie.* According to W. Becker, *Gesetzesanalogie* is only used when a direct application

This outcome was a direct result of a shift in German legal thinking concerning the purpose of criminal law. Where the bygone liberal era had emphasised the need to protect the freedom of the individual against intrusion by others, the new order underscored the unmatched importance of protecting society against attack. The task of Nazi criminal law, according to the ideology, did not include the safeguarding of the freedom of lawbreakers. Instead, its purpose lay in safeguarding the national community by combating those who supposedly offended against its interests and who shirked the social responsibilities to which they were duty-bound.[5]

With this shift in emphasis followed the abandonment of the principle *nullum crimen, nulla poena sine lege*, which had been included among the basic protections guaranteed by the Weimar Constitution.[6] According to Nazi legal theory, observance of this principle had been grounded, in part, in a conception of the importance of a person's being able to predict with accuracy and assurance the legal consequences of her actions. The problem, according to the Nazi view, was that strict observance of this principle would sometimes require that those who had endangered the national community or who had shirked their social duties not be punished. To give the principle priority would thus offend against the

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of the law is impossible. As he describes it, '[i]t constitutes the turning away from a purely literal interpretation and permits the application of the fundamental underlying idea contained in a written statute to cases which in fact do not fall under its wording, but which, however, are analogous to cases that are covered by laws and which are distinguished from these cases only in irrelevant particulars' ('Die richterliche Rechtsschöpfung in der strafrechtlichen Praxis' *Deutsche Justiz* 99 (1937), p. 457). As it does not affect our arguments here, we will not engage in this discussion. For further information on this distinction, please see Ackermann, *Das Analogieverbot im geltenden und künftigen Strafrecht*, Series: *Strafrechtliche Abhandlungen*, ed. Aug. Schoetensack, Heft 348 (Breslau-Neukirch: Alfred Kurtze, 1934). See also Karl Siegert, 'Nullum poena sine lege: kritische Bemerkungen zu den Vorschlägen der amtlichen Strafrrechtskommission', *Deutsches Strafrecht* I (1934): pp. 376-86, 380; Karl Schäfer, 'Nulla Crimen Sine Poena', *Das kommende deutsche Strafrecht: Allgemeiner Teil. Bericht über die Arbeit der amtlichen Strafrechtskommission*. Ed. Franz Gürtner. 2nd ed. (Berlin: Verlag Franz Vahlen, 1935), pp. 200-218, 204; Roland Freisler, *Schutz des Volkes oder des Rechtsbrechers? Fesselung des Verbrechers oder des Richters? Deutsches Strafrecht* (Sonderdruck), Heft 1-2 (1935) p. 9); and Karl Klug, 'Drei Grundprobleme des kommenden Strafrechts', *Zeitschrift der Akademie für Deutsches Recht* 2 (1935), pp. 98-102, 99).

[5] See, e.g. Erich Schinnerer, *German Law and Legislation* (Berlin: Terramare Office, 1938), pp. 18-19. See also Freisler, *Schutz des Volkes*, p. 3.

[6] Article 116. A version of this principle was also included in the Penal Code of 1871 (*Reichsstrafgesetzbuch*, §2, par. 1): 'An act may be visited with a penalty only if the penalty was determined by law prior to the commission of the act'. According to K. Klee, the idea that 'what is not forbidden is allowed' was a product of a 'liberal epoch', which did not correspond to the National Socialist conception of law ('Straf ohne geschriebenes Gesetz', *Deutsche Juristen-Zeitung*. 39. 1 (1934): pp. 639-643, 639.

National Socialist conception of 'material justice' (*materielle Gerechtigkeit*), which demanded that *all* acts contrary to the interests of or duties to the national community be punished, whether covered by a pre-existing statute or not. The common conclusion was therefore the following: to the degree that the function of criminal law finds its core meaning in the implementation of material justice, the principle *nullum crimen, nulla poena sine lege* has no priority in the regulation of criminal legal processes.[7]

Given the importance of *nullum crimen, nulla poena sine lege* in the German legal tradition, supporters of the APA anticipated that they would run into normative criticism. They expected, often implicitly, that the APA would face criticism to the effect that it undermined the predictability of the penal law such that the normativity of the principle that the law ought to be *predictable* transmitted and gave rise to the legal ought that the law ought not to contain the analogy legislation.[8] As it turns out, contemporary and later criticism of the 1935 amendment did in fact centre on a perceived threat to the law's predictability.[9]

Predictability has of course been treated as a normative concept in traditional legal thought – as a feature that the law *ought* to have. Such legal 'oughts' as predictability,

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[7] Many German commentators were eager to point out that this principle had no root in Roman law; rather, it could be traced to the Enlightenment era and was introduced into German law via the influence of French revolutionary philosophy (see Lawrence Preuss, 'Punishment by Analogy in National Socialist Penal Law', *Journal of Criminal Law and Criminology* 26.6 (1936): pp. 847-856, 849-50; Klee, 'Strafe ohne geschriebenes Gesetz', pp. 639-41). A common strategy for dealing with criticism of the departure from '*nulla poena sine lege*' involved arguing that, due to the National Socialist revolution in legal thinking, the words in §2 of the old Criminal Code had changed their meaning and that the old meaning no longer applied (see, e.g. Hubertus Bung, 'Legalität und Analogie im Strafrecht', *Jugend und Recht* 9.10 (1935): pp. 228-232, 229). In addition, at the heart of the NS 'revolution' was a newfound prioritisation of the interests of the community (which supplied the content of 'true' justice and genuine *Recht*) over those of the individual, and it was this conception in particular which provided support for the shift away from an understanding of the judge as strictly bound to the written statute. See, e.g. Hans Frank, 'Die nationalsozialistische Revolution im Recht', *Zeitschrift der Akademie für Deutsches Recht* 2.7 (1935): pp. 489-92, 492. On the implications of this shift for the concept of legal security and the legal status of the individual, see, e.g. Scheuner, 'Die Rechtsstellung der Personlichkeit in der Gemeinschaft' *Deutsches Verwaltungsrecht*, ed. Hans Frank (München: Zentralverlag der NSDAP, Franz Eher Nachf., 1937) pp. 82-98, 95-96.

[8] See, e.g. Schäfer, 'Nullum crimen sine poena'; Ackerman, *Das Analogieverbot im geltenden und zukünftigen Strafrecht*, esp. pp. 37-44; Freisler, *Schutz des Volkes*, esp. pp. 13-16; Hermann Göring, 'Die Rechtssicherheit als Grundlage der Volksgemeinschaft' *Schriften der Akademie für Deutsches Recht*, ed. Hans Frank (Hamburg: Hanseatische Verlagsanstalt, 1935).

[9] See n. 11 for examples.

action-guidingness, consistency, and stability perform two essential functions.[10] First, they pick out aspects of a legal system that are essential for that system to be *ideal*. (A legal system is ideal in virtue of having the properties it ought to have.) Second, legal oughts function as normative guidance for those who create, administer, and implement the law (in short: the lawmakers). In creating the law, the lawmaker ought to be directed by legal oughts so that a legal system ends up having the properties it ought to have.

It is common practice to think that legal oughts permit 'normative transmissions', as we will put it. That is, legal oughts may transmit or extend their normativity (i.e. their 'oughtness') to particular measures or aspects of a legal system. For example, suppose that the laws of a particular legal system ought to be knowable to those who are subject to them. Call this the 'knowability ought'. Suppose further that there is a legal system in which legal regulations are not publicised. Surely, in such a system, the law seems less than knowable. It thus seems plausible to suppose that in this situation the *knowability ought* transmits its oughtness to publicising laws. That is, the law of an ideal legal system will be one that is publicised; plus, the lawmaker ought to ensure that laws are made public.

In just the same way, it is tempting to suppose that the normativity of the law's predictability transmits swiftly and unproblematically to a prohibition of analogy legislation such as that introduced by the Nazis in 1935.[11] However, in this paper we argue that we should resist this temptation. In fact, the relation between the law's predictability and the Nazi use of analogy is unsuitable for inferring unconditionally that a legal system ought not to contain a Nazi type of analogy legislation. Instead, we suggest that such a transition is correct only for legal systems in which (i) a Nazi type of analogy legislation is part of a necessary or non-defeasible explanation of why there is too low a

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[10] Such principles are often associated with certain rather minimal conceptions of the state governed by the rule of law. See, e.g. Lon L. Fuller's *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969) pp. 33-94. See also Joseph Raz, 'The Rule of Law and its Virtue', *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009) pp. 210-229.

[11] For versions of this way of thinking, see, e.g. Gerland, 'Einige Anmerkungen zu der Denkschrift des Preußischen Justizministers', *Deutsche Justiz* (1934): pp. 224-28; Anon. 'The Use of Analogy in Criminal Law', *Columbia Law Review* 47.4 (1947): pp. 613-629; Jerome Hall, 'Nulla Poena Sine Lege', *The Yale Law Journal* 47.2 (1937): pp. 165-93; C. H. McIlwain, 'Government by Law', *Foreign Affairs* 14.2 (1936): pp. 185-198; 'Advisory Opinion: Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City', *Publications of the Permanent Court of International Justice*, Series A/B – No. 65.

degree of predictability; and (ii) the only way the lawmaker can raise predictability *qua* lawmaker is to abandon the Nazi type of analogy legislation.

Our argument in this paper proceeds as follows: Section 1 considers a theory of correct normative transmission. In particular, we will argue that for a legal ought to transmit its normativity to an aspect of a legal system, it does not suffice that the aspect in question implies, causes, or contributes to an infringement of the legal ought. Instead, we argue that such a transmission takes place if that aspect *explains non-defeasibly* the violation of the legal ought in question. Section 2 then outlines a preliminary model of the law's predictability and investigates whether the Nazi type of analogy legislation affects the law's predictability. We will argue that the relation between the Nazi use of analogy and the infringement of a predictability ought is logically too weak unconditionally to transmit its normativity to a prohibition on a Nazi type of analogy. Section 3 then explores further possibilities of normatively criticising the Nazi use of analogy.

(1) Normative transmissions of legal oughts

In our introduction to this paper, we said that 'legal oughts' perform two essential functions: (i) they pick out properties that are essential for a legal system to be ideal; and (ii) by transmitting their normativity to particular measures and aspects of a legal system, they guide the lawmaker in how to make adjustments to the law.

Given the first function, it is beyond doubt that the entire Nazi legal system – and, in particular, the system of criminal law enacted in Germany between 1933-1945 (in short: the Nazi penal system, or 'NPS') – represents a prime example of an excessively non-ideal legal system.[12] This can be made clear by pointing to the degree to which the NPS infringed upon the core normative principles of ideal law. By issuing *unclear*, *indeterminate*, *secret*, and *retroactive* laws[13], the NPS (i) eradicated legal security and certainty; (ii) disabled and obstructed the action-guiding function of the law; (iii) allowed

[12] At times in what follows, we will refer to the 'Nazi legal system' or to the principles and features of 'Nazi law'. In every case, though, our focus is more strictly the Nazi *penal* law.

[13] For accounts of these aspects of Nazi governance, see, e.g. Ian Kershaw, *Hitler, the Germans, and the Final Solution* (New Haven: Yale University Press, 2008), esp. chs 1-4; Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlop (Chicago: University of Chicago Press, 1998), esp. pp. 5-22; Bernd Rüthers, *Die Unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1968), esp. ch. 3. See also Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship,* trans. E. A. Shils et al. (New York: Oxford University Press, 1941) esp. ch. 1.

for judicial and state arbitrariness; (iv) blocked the epistemic access to legal norms necessary for making legal norms knowable; (v) licensed irrational and incorrect legal reasoning, *etc*. There is thus an overwhelming set of facts that make it the case that the NPS was non-ideal.

Given the second function of legal oughts, the interesting question becomes this: in what ways does the normativity of the infringed legal oughts transmit to aspects of the NPS? Put differently, what, concretely, should lawmakers at the time have done to make their legal system more ideal? Which of these facts should have been changed to make the system more ideal?

Before we answer this, we need to discuss and clarify two things: (i) we need to establish when precisely the normativity of a particular legal ought transmits to other aspects of a legal system; and (ii) we need to elucidate whether or not the Nazis' analogy legislation relates to the legal ought of *predictability* such that it can or cannot be said that a penal legal system ought not to contain a Nazi type of analogy legislation. Let us turn to the first of these tasks.

Suppose the law of a legal system ought to have a certain property. In what ways must a legal measure or aspect of that legal system relate to this legal ought for it to transmit its normativity? For example, suppose the law ought to be action-guiding. Call this the 'guiding ought'. In what ways must a given aspect of a legal system relate to the *guiding ought* for it to be the case that the law ought (or ought not) to have that aspect?

A first plausible answer to this question might be this: suppose, for the sake of argument, that the feature or aspect in question is the existence of secret laws, and suppose that the existence of this feature *implies*, *causes*, or *contributes* to the infringement of the *guiding ought*. Then, the law ought not to have secret laws. If this is sound, the following inference is correct:

A legal system ought to be action-guiding; (1a)

and

the fact that a legal system contains secret laws (a) implies, (b) causes, or (c) contributes to an infringement of the ought expressed in (1a). (1b)

So,

A legal system ought not to have secret laws. (1c)

However, we argue that this inference is not correct. Though the disjunction of (a), (b), and (c) in (1b) ranges over a broad variety of relations between the existence of secret laws and the infringement of (1a), (1b) is logically too *weak* to transmit the obligation of (1a) to (1c).

To see why, let us consider a parallel example. Assume that a legal system ought to issue legal requirements that can be jointly satisfied. That is, it ought not to be the case that the law requires you to X and, at the same time, requires you to not-X. Call this the 'joint-satisfaction ought'. Suppose also that, when applied to the concrete circumstances, the law of a particular legal system imposes upon you two conflicting legal requirements: it requires both that you fulfil the terms of a contract between you and your neighbour and, at the same time, that you *refrain* from fulfilling these terms. Now it would seem to be true that *both* requirements individually (a) *imply*, (b) *cause*, and (c) *contribute* to the infringement of the *joint-satisfaction ought*. If we read 'implies' as material implication, then the requirement to fulfil the contract implies the infringement of the joint-satisfaction ought just in virtue of the fact that it infringes the joint-satisfaction ought. The same holds true for the requirement not to fulfil the contract.[14] If we are to conceive of causality as a counterfactual relationship, then it also follows that both requirements individually cause the infringement of the *joint-satisfaction ought*: if, *ceteris paribus*, the legal system in question had not issued the requirement to fulfil the contract, there would have been no transgression of the *joint-satisfaction ought*. Also, if, *ceteris paribus*, the law had not issued the requirement to refrain from fulfilling the contract, there would be no infringement of the *joint-satisfaction condition*. These just stated counterfactual conditionals surely also show that both the requirement to fulfil and the requirement not to fulfil the terms of the contract individually *contribute* to the infringement of the *joint-satisfaction ought* in the legal system in question.

In brief, the existence of a requirement to fulfil the terms of the contract in question can be said to imply, cause and contribute to the infringement of the *joint-satisfaction ought*.

[14] Suppose 'if p, q' represents a material implication. Then this implication comes out as true whenever *q* is true. Hence, either requirement implies the infringement of the *joint-satisfaction ought* materially simply because it holds true that it infringes the *joint-satisfaction ought*.

The same holds for the requirement to refrain from fulfilling the terms. Does this imply that the legal system in question ought not to issue either requirement? That is, ought lawmakers in that legal system to abandon *both* legal requirements? This would surely be an absurd result. Abandoning one of these two requirements would, *ceteris paribus*, be enough to redeem joint satisfiability. But if we agree with this, then we must reject the straightforward inference sketched above concerning the example of secret laws and action-guidingness. In particular, we must conclude that the disjunction of (a), (b) and (c) in (1b) is too weak to transmit the normativity of (1a) to (1c).

The incorrectness of this inference already proves significant for a normative evaluation of the Nazis' APA. For we cannot validly argue that the Nazis' APA ought not to have been part of the Nazi legal system on the basis of the fact that the APA *implied*, *caused*, or *contributed* to an infringement of a legal ought. These relations are logically too weak to allow us to infer that the APA ought not to have been a part of the Nazi legal system.

To infer that a legal system ought not to contain a certain feature from a conjunction containing a general legal ought of the sort stated in (1a), we need to replace (1b) with a premise that is logically stronger than (1b). Consider again the example of a legal system that both requires you to fulfil the terms of a given contract and requires you not to fulfil them. Although both legal requirements individually imply, cause, and contribute to the infringement of the *joint-satisfiability ought*, there is a context in which either requirement fails to explain the infringement. This is intuitive: not every legal system that issues a requirement to fulfil the terms of one's contracts necessarily infringes the *joint-satisfiability ought*. The infringement stems from simultaneously requiring that one fulfil *and* that one not fulfil the terms of one's contract.

Given these observations, a logically stronger middle premise might therefore appeal to the idea of a legal feature's ability to explain the infringement of a legal ought in *all possible contexts*. As we shall want to put it, in a correct inference linking a legal ought to the conclusion that a legal system ought not to contain a certain feature, the middle premise might therefore refer to the feature's role in "*non-defeasibly*" explaining the infringement of the legal ought in question.

In this paper, we use 'non-defeasible explanation' as a primitive relation. By 'non-defeasible' we mean that if in a specific context some fact *e* explains non-defeasibly some other fact *f*, then it holds for *all* contexts *c* that if *e* obtains in *c*, *e* explains *f*. Put succinctly,

the explanation obtains in *all* possible contexts in which *e* obtains. 'Adding' something to a context where a non-defeasible explanation obtains cannot cancel or defeat the explanation. In this sense, non-defeasible explanations are thus not restricted to a particular context.

Here is an example of a non-defeasible explanation. Suppose it is true in the actual context that (i) John has one sibling and (ii) Mary has no siblings. Then, the conjunction of (i) and (ii) does not only explain in the actual context why John has more siblings than Mary. It explains this in *all* in contexts in which (i) and (ii) obtain. There could not be a context in which (i) and (ii) obtain, and yet the conjunction of (i) and (ii) fails to explain why John has more siblings than Mary. Thus, conjoining (i) and (ii) forms a non-defeasible explanation for why John has more siblings than Mary.[15]

The relation of non-defeasible explanation can bridge the normative gap between a legal ought and the conclusion that an ideal legal system would lack a certain feature because of its logical strength. We assume that if, for example, the existence of secret laws in a given legal system constitutes a non-defeasible explanation as to why the normative principle of action-guidingness is infringed, then this implies the truth of the strict

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[15] It is of critical importance *not* to try to reduce them to expressions of alethic modal logic. For example, suppose again that some fact *e* explains non-defeasibly some other fact *f*. Call this non-defeasible explanation 'E'. *E* cannot be analysed in terms of alethic modality, such as the following statements: necessarily, *e* explains *f* (A); necessarily, if *e*, then *e* explains *f* (B); necessarily, if *e*, then *f* (C).
Consider *A*: *E* does not entail *A* because explanations are *factive* relations. That is, at *w*, *e* explains *f* only if, at *w*, *e* and *f* obtain. So, if *E* entailed *A*, then *E* could hold true only if *e* and *f* obtain *necessarily*. Yet this does not hold for all non-defeasible explanations, as our example shows: the fact that John has one sibling and Mary none explains non-defeasibly why John has more siblings than Mary. But this implies neither that necessarily John has one sibling and Mary none, nor that John necessarily has one sibling. Hence, *E* does not imply *A*.
However, unlike *A*, *E does* imply *B*. This is almost trivial. For example, if the fact that John has one sibling and Mary none explains non-defeasibly why John has more siblings than Mary, then, necessarily, *if* John has one sibling and Mary has none, this will explain why John has more siblings than Mary.
Also, *E* implies *C*. Explanations are factive relations. So if John having one sibling and Mary having none explains non-defeasibly why John has more siblings than Mary, then, necessarily, if John has one sibling and Mary none, then John has more siblings than Mary.
But even though *E* implies *B* and *C*, we can reduce neither *E* to *B* nor *E* to *C*. For neither *B* nor *C* strictly entails *E*. It is simple to show why. *B* and *C* state strict conditionals. So, by replacing *e* with a necessary falsehood, both *B* and *C* will turn out to be true. However, if *e* necessarily explains *f*, replacing *e* with something impossible will not guarantee the correctness of the explanation relation. So, for a non-defeasible explanation to be correct, its explanans must obtain in some possible contexts. In sum, though non-defeasible explanations come with some modal commitments, they cannot be fully analysed in terms of modal necessity.

conditional that necessarily, if secret laws exist, then the legal ought of action-guidingness is infringed. That is, there is no situation in which secret laws obtain and the principle is *not* infringed. Consequently, what ought to be the case *can* only be the case in the absence of secret laws. So, ensuring the absence of secret laws is a necessary means of bringing about what ought to be the case. An ideal legal system is possible only without secret laws. This licences an inference that a legal system ought not to contain secret laws.[16]

In summery, we assume that the normativity of a legal ought transmits via non-defeasible explanations. That is, if the law of a legal system ought to have a certain aspect and something, say *F*, explains non-defeasibly why the law is not entirely the way it ought to be, then the law of a legal system ought not to contain *F*. If, however, *F* only implies, causes, or contributes to the infringement of a legal ought, this does not imply necessarily that the legal system ought not to contain *F*.

(2) The APA and the ought of predictability

With this technical analysis in hand, we are ready to look more closely at the idea that the APA related to the *predictability ought* in such a way that the normativity of the latter transmits to the former's prohibition. But before we can explore this idea, we need to render more precise what the predictability of the law consists in.

It is generally accepted that the law ought to be predictable.[17] That is, an ideal legal system will have the property of being predictable.[18] It seems evident why predictability is normatively significant. First, *primary predictability* (i.e. one's ability to predict what the law requires of *oneself*) will be significant for a correct guidance of the law. In order for the law to guide a person towards the fulfilment of the law, one must be able to form correct views as to what the law requires. Second, *secondary predictability* (i.e. one's ability to predict what the law requires of *others*) will be significant for the correct

[16] We claim that this is true, it must be emphasized, only on the condition that the existence of secret laws constitutes a non-defeasible explanation of why a legal system is not as it fully ought to be.

[17] Compare, for example, Fuller, *The Morality of Law*, ch. 2; Scalia, 'The Rule of Law as a Law of Rules', *University of Chicago Law Review* 56 (1989) pp. 1175-81, 1179.

[18] To be sure, predictability will not be sufficient for a legal system to be ideal. A drastic example to support this point is the following. Suppose a society has no legal provisions. Suppose too that this is a well-known fact. That is, within this society, the law requires nothing of anyone. Presumably, it will be very easy to predict what the law is.

application of the law by legal officials. A judge can apply the law appropriately (i.e. impose a sentence only if a violation against a legal requirement was committed, *etc*.) only if she can form correct views about what the law requires of *others*.

But what does predictability of the law consist in? In the following, we will concentrate exclusively on *primary* predictability.

We suppose that to say that the law ought to be predictable is just a shorthand formulation for saying that the law ought to have a *certain* or *high-enough grade* of *predictability*. What determines the grade of predictability? Roughly, we argue that it consists in the degree to which an individual, with average information about the law and an average reasoning ability, can reach correct conclusions as to what the law requires of her.[19]

Let us assume that legal requirements govern propositions.[20] That is, suppose someone asserts in a certain context that Peter is legally required to obey the speed limit. Then, this assertion is true in a given context only if there is a proposition *that Peter obeys the speed limit* whose truth is required by the law in that context. Furthermore, the law does not simply require that Peter obey the speed limit. Instead, it assigns the truth-making responsibility to *Peter*, thus requiring *of* Peter that he obey the speed limit. Consequently, for all legal subjects, there is a set of propositions that contains all and only propositions, the truth of which is required of that subject by the law.[21] Let us call this a person's *requirement set*.

Of course, this set will vary along two dimensions: *location* and *time*. Where there are different locations, there will be different laws[22]; where different times, also different laws[23]. Furthermore, even by fixing time and location, this set will be different for each particular legal subject, since the law demands different things of different individuals.

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[19] Another way of defining predictability is to say that one can reach correct conclusions about the legal consequences (i.e. punishment, *etc*.) of one's potential actions.
[20] In fact, we know of no argument against this assumption.
[21] Let *X* be a placeholder for all possible types of *acts* and *omissions.* Let *S* be a placeholder for *individuals*. Furthermore, assume that *S* and *X* are such that there is a correct syntax by which 'S Xs' forms a *proposition*. 'S Xs' thus represents a generic proposition expressing an individual's act or omission. The set of propositions that contains all and only propositions whose truths are required of the legal subject by the law will have the form 'S Xs'.
[22] Compare, for example, the laws of Norway and Saudi Arabia.
[23] Compare the example of the German laws in effect in 1871 and 1940.

Legal requirements usually vary with a person's age, job, personal history, *etc*. A member of parliament, for example, is subject to a different set of legal obligations than is a physicist. A mother or a father is subject to a different set of legal obligations than is a person with no dependents.

Given this characterisation, we can begin to define the *grade* of the law's predictability. As we wish to attach one general grade of predictability to a particular legal system, and not one individual grade for each person, we will first need to define a *hypothetical reference person*. The degree to which this reference person can predict the law will then represent the law's general predictability. Two features of our reference person will be crucial: first, her information or data about the law; second, her ability to reason correctly. For simplicity, let us assume that she is equipped with an average or reasonable knowledge about the law. We do not wish to define 'average' or 'reasonable' here, yet we assume that her legal knowledge contains some legally relevant concepts (e.g. 'murder', 'judge', 'sentence', *etc*.). Also, she has some information concerning the written statutes of the law, legal procedures, court-rulings, *etc*.[24] In addition, she is equipped with an average reasoning ability. That is, she has an average ability to make correct inferences based on her existing set of beliefs.

Let us now assume, hypothetically, that our reference person (call her RP) is asked what the law requires of her. Utilising her information about the law and her ability to reason correctly, she writes a list of *all* and *only* propositions that she concludes to be required of her by the law. This list, we imagine, will include propositions like 'RP refrains from throwing stones at animals'; 'RP drives on the right-hand side of the road'; 'RP refrains from wearing hats on Sundays'. There are three significant possibilities as to how a given proposition on this list relates to her requirement set: (i) the set contains the proposition; (ii) the set does *not* contain the proposition, but the proposition does not contradict another proposition belonging to it; (iii) the set does not contain the proposition *and* this proposition contradicts a proposition belonging to it.

Given these three relations, the grade of the law's predictability will be a function of three measures: first, *positive convergence* of RP's list with RP's requirement set (that is,

[24] On a scale of knowing things about the law, RP is somewhere located between a fully ignorant person regarding the law and a trained lawyer.

how many of the propositions on RP's list match a proposition in her requirement set). Second, it will be a function of *negative*, yet *non-contradicting convergence*. That is to say, it will be a function of how many propositions on RP's list fail to match a proposition in her requirement set, but which also do not contradict a proposition in the set. Third, the grade of predictability will be a function of the degree of *negative,* yet *contradicting convergence*. That is, it will be a function of the number of propositions on RP's list that fail to match the propositions on the set of legally required propositions *and* that contradict a proposition in that set. The grade of the law's predictability will correlate *positively* with positive convergence. It will correlate *negatively* with negative convergence. In addition, negative, yet contradicting convergence will arguably be a more severe impediment to the law's predictability than negative, yet non-contradicting convergence.[25]

With this model of legal predictability at hand, we can now turn to the following question: does the legal predictability-ought transmit its normativity to a prohibition of the APA?

Recall that our argument in section 1 entails that such a transmission does not occur if the APA only implies, causes, or contributes to the fact that a legal system does not possess a high-enough grade of predictability. Instead, one instance in which such transmission would occur is if the APA *explains non-defeasibly* why a legal system does not possess a high-enough grade of predictability.

Why would introducing a piece of legislation like the APA with the content that an act is punishable if it offends against (i) the fundamental idea of an existing law and (ii) the sound perception of the people non-defeasibly explain a low and inaccurate level of the law's predictability? Does inserting the clause that an act is punishable if it goes against (i)

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[25] Suppose RP's list contained that S carries a pencil, yet this does not, we assume, contradict a proposition of her requirement set. Then, if RP is practically guided by her conclusion to carry a pencil, this will not do any legal harm. The law did not require her not to carry a pencil. With regard to carrying pencils, the actual law is simply laxer than she had concluded. However, suppose RP's list contains that she steals a pencil. This is not in her requirement set, we assume. Furthermore, it also contradicts a proposition of that set, namely that it is not the case that RP steals a pencil. If RP is then practically guided by her conclusion to steal a pencil, she will infringe the law. RP thus potentially faces legal consequences. In this sense, reducing negative but contradicting convergence seems more significant for predictability than reducing negative, yet non-contradictive convergence.

and (ii) into a legal system necessarily diminish the match between RP's list and her requirement set?

RP, we said, is averagely educated about the law and possesses an average reasoning ability and degree of rationality. The law's predictability is a matter of positive and negative convergence of her list of legally required propositions with the set of *actually* required propositions. So, the question is this: does introducing the APA into a legal system, *ceteris paribus*, explain non-defeasibly why RP no longer reaches accurate enough conclusions about what the law requires of her? Or more precisely: does the enactment of (i) and (ii) explain non-defeasibly why the *ratio* of positive to negative convergence of her list with her requirement set (as defined above) is *too low* to ensure a high-enough degree of the law's predictability?[26]

Of course, we could envisage many situations in which inserting (i) and (ii) into a legal system would diminish the match between RP's hypothetical requirement list and the set of actual requirements. Suppose, for example, that it is commonly known within a legal system that one is legally required to refrain from performing an action if it offends against (i) and (ii), yet there exists no public or shared conception of (i) and (ii). By this we mean that there is no publicly accessible information with which an averagely rational person, such as RP, could infer reliably which types of acts and omissions fall under the category of being against (i) or (ii). This is likely to be the case where, for instance, neither the legal statute itself defines (i) or (ii), and nor are these concepts defined via, for example, the publicity of the court-rulings that rely on an act's being against (i) and (ii).

In such a situation, it is likely that introducing (i) and (ii) implies, causes, or contributes to an increase of the negative and a decrease of the positive convergence between RP's list and her requirement set. For example, it is possible that for many acts and omissions RP will face *equal* degrees of evidence for its being the case that the act in question does and does *not* offend against (i) and (ii). If RP is rational to the degree that she remains agnostic about any proposition *p* for which her evidence for *p* equals her evidence for

[26] Strictly speaking, if negative and contradicting convergence of RP's list with her requirement list reduces the law's predictability to a higher degree than negative yet non-contradicting convergence, this difference in 'weight' would need to be incorporated into the ratio. However, this technicality does not make a difference to our broader argument.

not-*p*[27], it may be true for many acts and omissions that RP remains agnostic whether or not the law requires of her that she perform that act or omission. If (i) and (ii) legally regulate many of the acts and omissions RP remains agnostic about, her agnosticism will diminish the positive convergence between her list of requirements and the set of actual legal requirements.

Here is a further example: suppose that there is a public or shared conception of (i) and (ii), and that RP possesses this conception. However, suppose also that legal officials employ a different conception of (i) and (ii) in their legal reasoning. Consequently, people like RP and legal officials will diverge in their judgement as to what the law requires. As the judgement of legal officials, via their legal rulings, usually affects what the law actually requires (via, for example, the setting of a precedent, etc.), this divergence will have a negative effect on the law's predictability. It will diminish positive and increase negative convergence of RP's list with her requirement set.

Or suppose again that there is a public and shared conception of (i) and (ii). However, this time, people like RP and legal officials share this conception, yet they vary extensively in their reasoning ability. That is, though they start from the same premises, they arrive at different, or even contradicting conclusions about what the law requires. Again, as the officials' conclusions as to what the law requires determines partly what the law *actually* requires, the discrepancy in reasoning ability makes the law less predictable. It will decrease positive and enlarge negative convergence between RP's list and her requirement set.

So, surely, there are many situations in which using (i) and (ii) as standards of legality implies, causes, or contributes to the lowering of the predictability of the law. Yet the question we are asking is: does tethering legal outcomes to (i) and (ii) *explain non-defeasibly* a low grade of the law's predictably?

In Section 1, we defined non-defeasible explanation. We said that if one thing non-defeasibly explains another, then it holds true that necessarily, if the former obtains, so does the latter. Consequently, if there is a possible situation in which the former holds, yet the latter does not obtain, it cannot be the case that the former non-defeasibly explains the latter. In relation to (i) and (ii), that is to say, if there is a possible situation in

[27] We assume that this response is rationally required of RP.

which the APA is consistent with a high-enough grade of legal predictability, then legal provisions like the APA cannot explain non-defeasibly why the law is not predictable.

Consequently, in order to show that the APA does not explain non-defeasibly the infringement of the law's predictability, we need to find one possible situation in which a penal code threatens to punish acts and omission if they go against (i) and (ii), yet the introduction of this law does not diminish the convergence of RP's list with her requirement set.

Such a situation is surely conceivable. For example, suppose that there is a publicly shared conception of (i) and (ii). This may be established through supplementing the legal statute with a definition of (i) and (ii) and by publicly announcing and discussing it. Suppose further that an averagely informed and rational person such as RP possesses enough conceptual competence correctly to apply the concepts involved in (i) and (ii) to individual types of acts and omissions. Furthermore, RP's level of information and conceptual competence is shared by legal officials. Then, it seems conceivable that employing (i) and (ii) in a legislative context will not necessarily pose an impediment to the predictability of the law. With regard to the application of (i) and (ii), legal officials and RP will reach matching conclusions as to whether an act or omission is legally required.

For example, imagine that one fundamental and overriding idea of a law in a particular legal system is to protect children from grave harm. Let us suppose further that this idea is grounded in 'the sound perception of the people' in a certain context. Assume that RP's definition of 'children' equals that held by the majority of legal officials. Suppose the same holds for RP's and the officials' conception of 'grave harm'. In addition, they also share an equal ability to reason correctly and to apply concepts. In such a situation, it seems plausible that both RP and officials will reliably pick out the same acts and omissions as offending against (i) and (ii). Consequently, regarding 'children and grave harm', their views as to what the law requires will converge.

It is certainly conceivable that the same will hold not only for harming children but also for other types of acts and omissions that are grounded in the sound perception of the people and the fundamental ideal of the law. Consequently, this suggests that the APA alone does not represent a non-defeasible explanation of the infringement of the

normative principle that the law ought to be predictable. Legal provisions like the APA are, in principle, consistent with ensuring that the law remains predictable for the public.

(3) Constitutive detachment and normative guidance

So far, we have refuted the claim that an APA type of legislation can explain non-defeasibly the infringement of the normative legal principle that the law ought to have a certain degree of predictability. Whilst it seems plausible to think that, in many contexts, an APA type of legislation is likely to *imply*, *cause* or *contribute* to the diminishment of the law's predictability, we can conceive of a context in which the APA does not diminish predictably. Thus, a legal system can, in principle, contain an APA type of legislation *and* fulfil the normative claim that the law ought to be predictable.

This result leaves those who want to criticise the APA with the following dilemma: though for some contexts *c* it is relatively easy to establish that the APA implies, causes, or contributes to the diminishment of the law's predictability, this does not licence the conclusion that the law ought not to contain an APA type of legislation. So how can we then normatively criticise the APA? In this section, we will try to develop a concise normative criticism of the APA.

In principle, there are two possibilities. So far, we have shown that the *predictability ought* does not transmit its normativity to the prohibition of the APA, as the APA does not explain non-defeasibly the diminishment of the law's predictability. This does not exclude, of course, the possibility that the APA might relate to the predictability ought in such a way that the normative transmission occurs. As we argued in section 1, this relation must be *logically stronger* than the relation of (material) implication, causation, or contribution. Otherwise, the transmission is not guaranteed. Moreover, this relation must be logically weaker than the relation of non-defeasible explanation, or else it is not applicable to the relation between the APA and the predictability ought. However, we do not know of any relation that fits this bill. So, this is not a plausible argumentative route – or so it seems to us.

Nevertheless, we think that there is a second possibility when it comes to normatively criticising the APA. Though *on its own* the APA does not explain non-defeasibly an infringement of the predictability ought, the APA may be a part of a *set* of features that, if considered together, non-defeasibly explains the predictability ought. In other words, we

might suggest that the APA, in conjunction with other features of a legal system, explains non-defeasibly why a legal system lacks a certain degree of predictability.

Which set of features that contains the APA could constitute an infringement of the law's predictability? In fact, we have already identified a set of those features indirectly. Recall our argument concerning the conditions under which the APA would not infringe upon the law's predictability. We argued that a legal system containing the APA does not necessarily infringe upon predictability if it is embedded in a context in which

(a) there is a publicly shared conception of the fundamental ideas of the existing laws and the sound perception of the people;
(b) this public conception is also shared by legal officials; and
(c) legal officials and the public share an equal reasoning ability and an equal ability for concept application.

In the following, we will refer to (a), (b), and (c) jointly as the 'shared conception'. That is, if the *shared conception* is present in a legal system, then implementing the APA in that legal system does not necessarily lead to a violation of the predictability principle.

In addition, another relation between the APA, the *shared conception*, and the *predictability ought* seems plausible. The occurrence of the *shared conception* seems *necessary* to ensure that a legal system containing the APA does *not* infringe upon the predictability principle. That is, suppose a legal system issues legal requirements on the basis of (i) the fundamental ideas of the law and (ii) the sound perception of the people. Suppose further that the legal system is such that those who create, administer, and implement the law do not share a conception of the fundamental ideas of the law or the sound perception of the people with the public or those subject to legal requirements. In such a legal system, the ability of an averagely educated person to predict what the law requires of her will be significantly obstructed. We will assume that this obstruction will reach a degree such that the system necessarily infringes the predictability ought. In other words, the system can contain the APA and satisfy the predictability ought only if the shared conception is a part of it. Without the shared conception, the legal system in question cannot contain the APA and still be fully ideal.

Moreover, we will assume that a legal system that contains the APA and which lacks a shared conception violates the predictability principle in virtue of containing the APA

without the shared conception. That is, the *conjunction* of the APA and the absence of the shared conception constitutes a non-defeasible explanation as to why a legal system violates the predictability principle. In every legal context that contains (a) the APA, and (b) no shared conception, (a) and (b) will explain why the degree of the law's predictability in that context is too low for it to satisfy the predictability principle. Consequently, the conjunction of (a) and (b) explains non-defeasibly an infringement of the law's predictability.

This conclusion is normatively significant. Recall our conclusion from section 1: if the law *ought* to have a certain property *P*, and some aspect of a legal system, say *I*, explains non-defeasibly the infringement of this normative principle, then it follows that the law *ought not* to have *I*. Consequently, if the conjunction of two aspects (i.e. the APA *and* the absence of the shared conception) explains non-defeasibly an infringement of the predictability ought, it follows that the law ought not to contain [the APA *and* no shared conception]. An ideal legal system cannot thus contain the APA *without* the shared conception. The lack of the APA *in conjunction* with the *absence* of the shared conception is an essential feature of ideal law. Furthermore, given the guiding function of legal oughts, this entails an obligation for the lawmakers, namely to ensure either the presence of the shared conception or the absence of the APA.

Let us focus on the latter aspect of the legal ought. This legal ought puts lawmakers under an obligation which involves a choice. They can discharge this ought in two different ways: either by ensuring that the law does not contain an APA type of legislation or by seeing to it that the shared conception obtains. Given this choice, can we say what the lawmaker *practically* ought to do? In other words: can we *detach* a further *non-disjunctive* (and thus *guiding*) ought from this disjunctive ought?

Put abstractly, the question that needs answering here is this: suppose that the law ought to have [either *A* or *B*]. Suppose that this entails that the lawmaker should see to it that either *A* or *B* obtains. Are there circumstances in which we can detach from this disjunctive obligation a *non*-disjunctive, and thus *practical* and *guiding* obligation, i.e. a practical obligation to *A*, or a practical obligation to *B*?

In the following, we will focus on one detachment criterion that, we assume, applies to the obligation to avoid the situation wherein a legal system contains the APA without containing the shared conception. To guarantee that disjunctive legal oughts fulfil their

guiding function, the following modal detachment schema seems necessary. Consider the set of all acts the lawmaker can instigate. The lawmaker can issue a procedural rule, drive home, boil an egg, *etc*. There will be a subset of acts the lawmaker can instigate *qua* being the lawmaker or legislator. That is, only some of the things a lawmaker can do will count as genuine lawmaking or legislating.

Assume again that the law ought have [A or B]. Suppose, however, that only one of these options, say *A*, can be brought about by an act that counts as genuine lawmaking or legislating. That is, *B* can only, if at all, be brought about by an *extra*legal act. In this situation, the fact that the law ought to have [A or B] seems to entail the following obligation for the lawmaker, namely that the lawmaker is under an obligation to *A*.

Apply this to the disjunctive ought that the law of a particular legal system ought [either not to contain the APA or to contain the shared conception]. Ensuring that the law does not contain an APA-like piece of legislation clearly falls within the realm of *lawmaking* and *legislating*. It is something the lawmaker can ensure *qua* lawmaker. In contrast, to ensure that the public of a particular legal system shares a certain concept or reasoning ability with those creating, administering, and implementing the law does not seem to fall within the realm of legislating. This seems to be an *extra*legal aspect of a society or legal system and nothing the lawmaker can implement directly through lawmaking. Consequently, if the law ought [either not to contain the APA or to contain the shared conception], then this entails an obligation for the lawmaker not to issue APA-like legal provisions.

This conclusion is limited by one restriction, however. It only applies to contexts in which the shared conception is not already present. If a legal system contains the shared conception, the non-disjunctive obligation of the lawmaker to avoid an APA type of legislation in the name of predictability seems no longer to apply. As far as predictability is concerned, the lawmaker is then permitted to issue an APA type of legislation. Installing an APA type of legislation would then, *ceteris paribus*, not violate a legal ought.

To summarise, Nazi analogy legislation cannot be normatively criticised by only looking at its relation to the normative principle that the law ought to be predictable. The relation between the APA and the predictability ought is logically too weak to permit such a normative transmission. However, the APA is part of a disjunction of facts that bear the right relation when it comes to transmitting the normativity of the predictability ought to the avoidance of this disjunction. In particular, we argued that the absence of the shared

conception in conjunction with the presence of the APA explains non-defeasibly an infringement of the predictability ought. This entails that the law ought not to contain [the APA and no shared conception]. In principle, this leaves the lawmaker with a choice: either she ensures the avoidance of the APA or she instantiates the *shared conception*. However, for this ought to be guiding, it needs to entail a non-disjunctive or guiding obligation of the lawmaker. We argued that a disjunctive ought permits the detachment of a non-disjunctive ought if the disjunctive ought contains at least one disjunct whose truth the lawmaker cannot make true *qua* lawmaker. In other words, if the lawmaker ought to [A or B] and the only way for the lawmaker to make true this disjunction via genuine lawmaking is to A, then the lawmaker ought to A. However, this conclusion comes with one restriction. It only holds in contexts in which the disjunction 'A or B' is not made true in virtue of B's being true. For if B is already in place, the disjunctive ought is already discharged. Detaching a non-disjunctive ought to guide the lawmaker thus seems unnecessary.

Concluding remarks

The Nazis themselves did not suppose that German society in the 1930s was such that a publicly shared conception had in fact been realised. The notion of a shared, infallible conception of the requirements of law did, however, play a central role in the Nazi ideal of a racially 'pure' German society. As shown above, the legal element of this ideal was formulated against the backdrop of a critique of liberalism. In particular, it was portrayed as an alternative to the liberal state's prioritisation of the written statute (*Gesetz*) over the substantive principles of justice and right, which constituted law as such (*Recht*). *Recht*, on the Nazi view, was conceived as a race-specific phenomenon. In the German case, it was thought to have its ultimate source in the 'legal conscience' of the national community.[28] Further, because the law was conceived as being so deeply connected to the underlying 'racial spirit' or consciousness of the German people, reliable epistemic access to the principles of German *Recht* and to their correct application in the concrete circumstances was thought to be available to members of the 'pure' German community alone (an ideal community towards which, according to the ideology, German society was developing under Hitler and the Nazi regime).

[28] See, e.g. Karl Siegert, 'Nulla poena sine lege', p. 377.

The means by which access could be had, however, was thought to be sentimental rather than rational. True members of the ideal national community were meant to be able to *feel* their way to correct conclusions of what was right and wrong in accordance with the principles of *Recht*, to decide on the basis of an inborn and spontaneous outpouring of legal sentiment – and this no less when it came to the powers and abilities of the true National Socialist judge. Although *Recht* could be given a general, rule-like formulation by the *Führer* in its expression as *Gesetz*, in accordance with which rational subsumption was possible, primary access to its dictates was thought to be both innate and irrational.[29]

Thus the Nazi ideal included the notion of a shared sentimental capacity, which, when used properly, would ensure accurate and reliable conclusions about the requirements of *Recht*.[30] Where the ideal had not yet been realised (as was the case, it was admitted, in the still 'racially' heterogeneous Germany of the early 1930s), it was supposed that the interest in material justice (punishing wrongdoing no matter what its relation to the standing written law) was strong enough to overshadow traditionally liberal concerns for general predictability.[31] It was thought, however, that upon the realisation of an ideal shared legal sensibility, the use of analogy in the criminal law would pose no risk to predictability in the slightest. Indeed, it was largely supposed that the use of analogy would in fact do for Nazi criminal law what adherence to *nulla poena sine lege* could not: to connect legal outcomes to the legal-ethical norms to which *all* members of the German *Volk* had direct, unmediated epistemic access and by which they in any case guided their everyday lives.

No matter the dubiousness of the intellectual climate in which it was put forward, what this line of thinking supposes, and what we have argued in this paper, is that the Nazi introduction of analogical reasoning into the criminal law and pieces of legislation like it

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[29] Nazi scholars often spoke of their triumphant overcoming of the liberal separation of *Recht* and *Gesetz*, but this must be interpreted carefully. The general idea seems to have been that the new (Nazi) written law would constitute an expression, via the will of the *Führer*, of the legal conscience of the national community. Criticism of rejected liberal laws (particularly those protecting basic civil liberties) hinged on the idea that they did not accurately express (or 'develop') the basic principles of German *Recht*. See, e.g. Manfred Fauser, 'Das Gesetz im Führerstaat', *Archiv des öffentlichen Rechts* 26.2 (1935): pp. 129-154, 132.

[30] The true spirit, or legal conscience, of the national community (*Volksgeist, das Rechtsgewissen des Volkes*), in which German *Recht* was thought to be grounded, was generally conceived both as having been realised in the past and as awaiting a future revival as a result of the eventual success of the Nazi project. See, e.g. Siegert, 'Nulla poena sine lege', p. 377.

[31] See, e.g. Siegert, 'Nulla poena sine lege', p. 380.

can in theory be made consistent with the satisfaction of the normative claim that the law ought to be predictable. In this paper, we have identified key background conditions under which such consistency can be realised. We have argued that the possibility of these conditions blocks an inference from the fact that the law ought to be predictable to the conclusion that a penal system ought not to contain a Nazi type of analogy legislation. With this said, however, we have attempted to show that the APA *is* part of a *disjunction* of facts that bear the right relation when it comes to transmitting the normativity of the predictability ought to the avoidance of at least this disjunction. The absence of the shared conception in Germany the early 1930s in conjunction with the APA explains non-defeasibly an infringement of the predictability ought. This entails that something was normatively amiss in the situation in which both the APA and no shared conception obtained. Lawmakers ought either to have ensured the avoidance of the APA or to have instantiated the as yet unrealised shared conception. To the degree that the latter option was not open to the Nazi legislators of the 1930s *qua* lawmakers, satisfaction of the predictability principle requires that they ought not to have introduced the APA. This is the popular and intuitive conclusion we have been tracing all along. What we hope to have shown in this paper, however, is that this criticism cannot follow directly from the observation that the introduction of the APA implied, caused or promoted the unpredictability of the criminal law in Germany in the early 1930s. The normative transmission at stake requires a stronger relation – one that, in this case, existed only between the law's predictability and a *combination* of facts which included the APA. It is from this more complicated normative basis that critical conclusions of the sort found in the literature on Nazi criminal law can legitimately be constructed.[32]

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