Response: Legal Ethics in Authoritarian Legality

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ABSTRACT

In "Complicity and Lesser Evils: A Tale of Two Lawyers," David Luban considers the dilemma of a decent person employed by the government or offered a government position in an evil regime. Through an analysis of two legal advisors in the Third Reich, Bernhard Lösener and Helmuth James von Moltke, who remained on the job and arguably saved lives, Luban challenges Hannah Arendt's contention that remaining in office in these conditions is necessarily to support the regime. In this response, we remain within Luban's primarily consequentialist perspective, and ask, like him, whether any good can be done by lawyers staying on the job. However, we challenge his analytical framework for being overly individualist and agentist. We argue that, if we expand our perspective to the structure of evil regimes and the ways they inflict harm, we will notice important consequences of remaining and leaving that Luban fails to take into account. In particular, we argue that understanding the complex part played by legal institutions and legal discourse in authoritarian and semi-authoritarian regimes would lead to the realization that lawyers face a particularly sharp dilemma in such regimes, as both their possibilities of doing good and of strengthening the regime are strong. We proceed in three steps. First, we show that Luban's analysis is narrowly focused on individual agency. We then draw on scholarship on the Third Reich, bureaucratic crimes, and authoritarian uses of law to outline the structural characteristics and legal foundations of authoritarian wrongs. Finally, equipped with this theoretical background, we analyze anew the lawyer's dilemma. Applying a structural perspective cognizant of the role of law in repression to the stories of Lösener and Moltke as well as of two other lawyers in the Third Reich, Ernst Fraenkel and Georg Konrad Morgen, we argue that the lawyer's dilemma is more difficult to resolve than Luban suggests.

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INTRODUCTION

We are currently witnessing a global phenomenon of democratic erosion, facilitated by legislation and constitutional amendments that incrementally curtail individual rights, competitive elections, and executive accountability.[1] The rich literature in comparative constitutional law and political science describing these developments tends to contrast contemporary forms of authoritarianism with Nazi totalitarianism by pointing out that, while the Third Reich quickly and completely destroyed democracy when it replaced the Weimar Republic, the endpoint of more recent processes of democratic erosion is typically a hybrid regime with some space preserved for the rule of law, rights, and political competition.[2] In "Complicity and Lesser Evils: A Tale of Two Lawyers," David Luban rejects this rigid demarcation of Nazism from contemporary developments, instead suggesting continuities between officials' experiences in the Third Reich and under contemporary authoritarianism. Luban considers the dilemma of a decent person employed by the government or offered a government position in an evil regime. Remaining on the job entails the risk of supporting, collaborating, or even perpetrating evil; but quitting might represent the loss of an opportunity to mitigate the regime's harms from the inside. Through an analysis of two legal advisors in the Third Reich who remained on the job, he challenges Hannah Arendt's contention that remaining in office in these conditions is necessarily to support the regime. Additionally, he draws implications from this analysis for individual conduct beyond the Third Reich. Indeed, Luban proposes viewing the dilemmas of officials in the Third Reich and officials in contemporary non-democratic regimes on a continuum: "If it turns out that Arendt is wrong, and there was room to do good

1. Larry Diamond, *Facing Up to the Democratic Recession*, *in* DEMOCRACY IN DECLINE?, 98, 102–04 (Larry Diamond & Marc F. Plattner eds., 2015); Marc F. Plattner, *Is Democracy in Decline?*, 26 J. DEMOCRACY 5 (2015); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. OF CHI. L. REV., 545–83 (2018).

2. *See, e.g.*, Landau, *supra* note 1, at 198–99.

even serving in the Third Reich, it would follow that she is wrong about serving in less evil and repressive regimes."[3]

Luban argues that the stories of Bernhard Lösener and Helmuth James von Moltke, two lawyers who held important positions in the Third Reich, show that Arendt's position is too simple. His fascinating retelling of the lives of these two individuals under the Third Reich suggests that it may be morally defensible to remain in the employ of even the most despicable regime when doing so will accomplish some good. This is particularly the case, argues Luban, where there is *Spielraum*, or "oppositional maneuvering room,"[4] and such room allows for the saving of lives or alleviation of suffering. One task Lösener participated in as *Judenreferent* (Jewish expert) in the Third Reich's Ministry of Interior was the drafting of the Nuremberg laws. In this capacity, he successfully argued to narrow the law's definition of a Jew to those with at least three Jewish grandparents. By doing so, Lösener claimed to have saved 100,000 individuals from persecution.[5] Moltke was a lawyer in the international law department of the Abwehr, the intelligence service of the military high command, known as a "center of underground resistance among German officialdom."[6] This position provided Moltke with "unusual *Spielraum*" even though, of course, the Abwehr contributed to the war effort and hence Luban insists that working there had moral ambiguity.[7]

Based on the stories of Lösener and Moltke, Luban offers a set of criteria for evaluating the morality of remaining on the job in an evil regime. Drawing on Chiara Lepora and Robert Goodin's framework for analyzing complicity, he urges us to view the government lawyer as a secondary agent and ask: how grave is the principal's wrongdoing? How voluntary and knowledgeable were the secondary actor's actions? How much of a contribution did the secondary agent make to the principal's wrongdoing? To what extent does the secondary agent share the purposes of the principal?[8] Though Luban asks these questions, his analysis is overwhelmingly consequentialist, and he concludes that "the only thing that justifies staying in the job is continually trying to accomplish some good or at least prevent some concrete evil."[9]

In this brief response we remain within Luban's primarily consequentialist perspective, and ask, like him, whether any good can be done by lawyers staying on the job. However, we challenge his analytical framework for being overly individualist and agentist. We argue that, if we expand our perspective to the structure of evil regimes and the ways they inflict harm, we will notice consequences of

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3. David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers,* 34 GEO. J. LEGAL ETHICS [add page when we receive printer proofs] (2021).

4. *Id.*

5. *Id.* at 24.

6. *Id.* at 31.

7. *Id.*

8. *Id.* at 46.

9. *Id.* at 50.

remaining and leaving that Luban fails to take into account that must be accounted for in order to assess the individual lawyer's possibilities of doing good. In particular, we argue that understanding the complex part played by legal institutions and legal discourse in authoritarian and semi-authoritarian regimes would lead to the realization that lawyers face a particularly sharp dilemma in such regimes, as both their possibilities of doing good and of strengthening the regime are strong.

Although Luban analyses the stories of two lawyers in the civil service of the Third Reich, he devotes little attention to the role of law in the Nazi regime, and does not explore the possibility that this role creates unique dilemmas for lawyers as opposed to other civil servants. In this response, we wish to place law at the center of the dilemma. While Luban offers the stories of two lawyers to illustrate the moral dilemmas of government officials generally, we argue that a more structural understanding of authoritarianism and of the key part in it played by law compels lawyers to ask themselves a longer set of questions than other government officials.

We begin in Part I by showing that Luban's analysis is narrowly focused on individual agency. In Part II we draw on scholarship on the Third Reich, bureaucratic crimes, and authoritarian uses of law to outline the structural characteristics and legal foundations of authoritarian wrongs. Equipped with this theoretical background, in Part III we analyze anew the lawyer's dilemma. Applying a structural perspective cognizant of the role of law in repression to the stories of Lösener and Moltke as well as of two other lawyers in the Third Reich, Ernst Fraenkel and Georg Konrad Morgen, we argue that the lawyer's dilemma is more difficult to resolve than Luban suggests.

I. LUBAN'S AGENTIST FRAMEWORK: THE DILEMMAS OF THE PUBLIC OFFICIAL

In viewing Nazism on a continuum with other forms of non-democratic regimes and being open to the possibility of *Spielraum* under Nazism, Luban might seem to follow in the footsteps of Ernst Fraenkel, the German-Jewish political scientist and lawyer. Fraenkel famously rejected the equation of Nazism with totalitarianism, proposing instead that the Nazi state was a "dual state," a single regime composed of two parts deploying very different uses of law.[10] The dual state was comprised on the one hand of the Normative State, which contained remnants of the Weimar Republic's legal order, protected some rights, and provided some legal predictability; and on the other hand the Prerogative State,

10. ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (E.A. Shills trans., 2017) (with a new introduction by Jens Meierhenrich). For an excellent explanation of the Dual State and its conceptual relevance to more current forms of authoritarianism, see Jan Christoph Suntrup, *Between Prerogative Power and Legality – Reading Ernst Fraenkel's The Dual State as an Analytical Tool for Present Authoritarian Rule*, 11 JURIS. 335 (2020).

where arbitrary executive orders applied to those identified as threats. Fraenkel described the dynamic interactions between the two parts of the regime, in particular the fact that the legal protections of the Normative State were always at risk, conditional upon the political will to allow the Normative State to operate.[11] Yet contrary to Fraenkel's analysis, Luban's openness to the possibilities of doing good under Nazism is not linked to the ways in which power was organized and exerted in the Third Reich, or to the legal openings in the regime's structure for protecting individuals. Instead, adopting expressly moral language, he considers the possibility that individuals may be able to save lives and alleviate suffering, presumably because of the direct consequences of their individual actions. *Spielraum*, in Luban's telling, depends not on the characteristics of the political regime, but on the confluence of personal allies one encounters at work, and the individual's ability to create such alliances. Luban tells us that "*Spielraum* is made, not just found."[12]

Because of its focus on individual agency, Luban's analysis reduces the explanatory force and moral relevance of legality to the questions he is exploring. Though he draws on rich examples from the history of two lawyers and focuses on their legal work, his analysis could largely apply to any public servant, and is expressly framed as a question about functionaries.[13] To the extent that he attends to the fact that his protagonists are lawyers, he treats law as a limitation on the individual's power to do good, and as a professional culture that may muddy the individuals' assessment of the situation. He assigns to Lösener a naïve faith in the power of formal legal definitions to make a difference, especially when the Nazi regime had "rejected legal formalism on principle, and substituted the 'healthy feeling of the Volk' as a kind of natural law that trumps legality, especially in matters of race."[14] Yet this critique does not change Luban's moral assessment of Lösener: "There are far worse sins than wishful thinking and self-deception, and far worse superstitions than faith in the law. Nothing I have said rebuts Lösener's claim that by staying on the job he saved lives."[15]

Luban again downplays the law as a factor when analyzing Moltke's story. He argues that:

> [U]nlike Lösener, legalism does not seem to figure in Moltke's conscience. Of course, his advocacy efforts must have relied on legal arguments given that he was the international law specialist. But strikingly, in all his wartime letters to [his wife] Freya, he never once mentions a legal issue or argument. This is not because she wouldn't understand. Freya von Moltke had a doctorate in law, a credential Helmuth himself lacked, as he was fond of pointing out when he

11. Suntrup, *supra* note 10, at 8–12.
12. Luban, *supra* note 3, at 40.
13. *See* Luban, *supra* note 3, at 11–12.
14. *Id*. at 23 (footnote omitted).
15. *Id*. at 24.

> introduced her to people. It would have been natural to at least mention in passing what his legal arguments were–if they mattered to him. Evidently, they didn't, at least not very much. Morality and religion were what mattered.[16]

What if we asked the questions posed by Luban—should the government lawyer in an evil regime stay or go, in light of the good they might be able to achieve?—after having expanded our lenses beyond the individual's workplace and taken into account how power and violence are structured in that regime, and the particular role played by law therein?

II. THE STRUCTURAL CHARACTER OF VIOLENCE UNDER AUTHORITARIANISM AND THE ROLE OF LAW

In this response we urge expanding the analysis to structural factors, in particular the political role of law and lawyers in authoritarian regimes. Once we broaden our perspective to structure, it becomes apparent that a decent individual contemplating working as a lawyer faces a more complex dilemma than Luban portrays. Because law plays an important role in legitimating and solidifying authoritarian regimes, the potential of the lawyer's work to strengthen the regime—even as they save lives—is great, and there is no simple way to assess, especially in advance, the extent of bad consequences that will follow. At the same time, history teaches us that, even in authoritarian regimes, there is often some remnant of legal integrity. Lawyers can leverage such remnants of legal integrity to expand their *Spielraum* not only for saving lives but also for challenging the regime. This is particularly true in the numerous authoritarian regimes that deploy legalism as a central tool of repression. It is therefore imperative to understand the pathologies of law in non-democracies in order to elucidate both what lawyers can do and what the consequences of their actions might be.

By bringing attention to the interplay between structure and agency, we follow the lead of the historiography of Nazism. In the 1970s, two historiographical schools developed to explain Nazi crimes: the intentionalist or programmatist school (which centered on Hitler and his intentional program to exterminate the Jews), and the functionalist or structuralist school (which emphasized the structural factors leading to the crimes). Since the end of the twentieth century, the two perspectives have become integrated, with historians acknowledging the importance of both individual agency and structure.[17] In our view, the methodology of Complicity and Lesser Evils—a biography of individuals holding influential positions—leads to an excessively agentist approach to the moral dilemma of

16. *Id*. at 41 (footnote omitted). Luban further insists on Moltke's Christian awakening. *See id*. at 41–42.

17. Richard Bessel, *Functionalists vs. Intentionalists: The Debate Twenty Years On or Whatever Happened to Functionalism and Intentionalism?*, 26 GERMAN STUD. REV. 15 (2003); Dan Diner, *Varieties of Narration: The Holocaust in Historical Memory*, *in* BEYOND THE CONCEIVABLE – STUDIES ON GERMANY, NAZISM, AND THE HOLOCAUST 173, 178 (2006).

staying or leaving. We therefore suggest an integrated approach, locating individual agency in Third Reich officialdom in the context of the structure of the regime's crimes. Scholars who analyzed the specificities of crimes committed through bureaucracy, like the sociologist Zygmunt Bauman, showed how the bureaucratic division of labor contributed to the blurring of individual moral judgment among perpetrators, and even managed to blur the line between perpetrator and victim, as the execution of many crimes required the victims' collaboration.[18] In fact, within this scholarship, collaboration has come to be understood as central in operating the entire system of criminal bureaucracy.[19] It is for this reason that Arendt strove to expose the structure of bureaucratic crimes, and pointed out that when an individual begins to make distinctions between courses of action within the system, they are actually trapped within that system. Though Luban disagrees with Arendt's categorical rejection of mitigating evil from within, a wholly individualist perspective that only assesses *Spielraum* at various nodes of the system and after the full extent of violence is known obscures from view the broader set of constraints and possibilities within which actors operate, ex-ante, under conditions of uncertainty.

What is the structure within which lawyers perform their work in non-democratic regimes? No single, comprehensive answer can be given to this question—as different types of authoritarian regimes are structured differently. Nevertheless, a few recurring authoritarian uses of legality have been identified by historians, political and social scientists, and lawyers in the twentieth and twenty-first centuries.[20] Indeed, since at least Fraenkel's *The Dual State* analyzing the Third Reich, scholars have grappled with the puzzle of why a regime not committed to democracy and individual rights would bother to legislate, preserve some degree of independence in its judiciary, and grant individuals rights of petition and remedies for

18. ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 83–149 (3d ed. 2000); *see also* RICHARD RUBENSTEIN, THE CUNNING OF HISTORY: THE HOLOCAUST AND THE AMERICAN FUTURE (1978); GUY B. ADAMS & DANNY L. BALFOUR, UNMASKING ADMINISTRATIVE EVIL (1998); Gerald D. Feldman & Wolfgang Seibel, *The Holocaust as Division-of-Labor-Based Crime–Evidence and Analytical Challenges*, *in* NETWORKS OF NAZI PERSECUTION: BUREAUCRACY, BUSINESS AND THE ORGANIZATION OF THE HOLOCAUST 1–13 (Gerald D. Feldman & Wolfgang Seibel eds., 2005).

19. *See, e.g.*, RAUL HILBERG, THE DESTRUCTION OF EUROPEAN JEWS (3d ed. 2000). Research since the 1990s has further demonstrated the centrality of local collaboration to the crimes of the Nazis in occupied countries; *see also* Martin Dean, *Local Collaboration in the Holocaust in Eastern Europe*, *in* THE HISTORIOGRAPHY OF THE HOLOCAUST 120–40 (Dan Stone ed., 2004); MARTIN DEAN, COLLABORATION IN THE HOLOCAUST: CRIMES OF THE LOCAL POLICE IN BELORUSSIA AND UKRAINE, 1941–44 (1999).

20. Huq & Ginsburg, *supra* note 1, at 94–95, 117–43; Landau, *supra* note 1, at 189; Scheppele, *supra* note 1, at 545; Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW – THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1–22 (Tom Ginsburg & Tamir Mustafa eds., 2008); JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW – LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE (2012); ALBERT F. CELOZA, FERDINAND MARCOS AND THE PHILIPPINES: THE POLITICAL ECONOMY OF AUTHORITARIANISM (1997).

some violations, as even some of the worst authoritarian regimes have done and continue to do to this day.[21]

One reason authoritarian regimes operate through legal institutions is that law and legal discourse serve important legitimating functions. Many authoritarian regimes cannot function on the basis of brute force alone; they require the compliance of their populations, as well as the collaboration of regime officials, in order to survive. Legal institutions and discourse provide the appearance of rationality, authority, morality, and—to the extent that legislation is produced by an elected body—democracy. Moreover, the existence of courts and other legal institutions may create the impression that rights are protected and power restrained, preempting criticism and opposition.[22] A striking illustration can be found in one of Himmler's infamous speeches given in Pozen on October 4, 1943, in which he insisted on the moral superiority of the Nazis in terms of their commitment to the rule of law. Speaking of the victims of the gas chambers, he stated:

> We have taken from them what wealth they had. I have issued a strict order . . . that this wealth should, as a matter of course, be handed over the Reich without reserve. We have taken none of it for ourselves. Individual men who have lapsed will be punished in accordance with an order I issued at the beginning, which gave this warning; Whoever takes so much as a mark of it, is a dead man. A number of SS men—there are not very many of them—have fallen short, and they will die, without mercy. We had the moral right, we had the duty to our people, to destroy this people which wanted to destroy us. But we have not the right to enrich ourselves with so much as a fur, a watch, a mark, or a cigarette or anything else.[23]

A related benefit of legalism for an authoritarian regime is that it allows market-based economic activity, which can not only provide the regime with material resources, but also legitimate it in the eyes of both the local business community and foreign actors. In fact, Fraenkel's central explanation for the existence of the Normative State in the Third Reich is that it preserved capitalism within National-Socialism, providing businesses and individuals certainty by protecting private property and the sanctity of contracts.[24] In their survey of more recent authoritarian uses of courts, Tom Ginsburg and Tamir Moustafa explained

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21. *See, e.g.*, Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37, 38–45 (2015); Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139–44 (2012); Carlos de la Torre, *Latin America's Authoritarian Drift: Technocratic Populism in Ecuador*, 24 J. DEMOCRACY 33, 34 (2013); Anna Sledzinska-Simon, *The Polish Revolution: 2015–2017*, INT'L J. CONST. L. BLOG (July 25, 2017), http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017 [https://perma.cc/T2ZC-XVJK].

22. *See* Ginsburg & Moustafa, *supra* note 20, at 5–6.

23. HERLINDE PAUER-STUDER & JAMES DAVID VELLEMAN, KONRAD MORGEN: THE CONSCIENCE OF A NAZI JUDGE 42 (2015).

24. Fraenkel, *supra* note 10, at 185; Suntrup, *supra* note 10, at 11–12.

how establishing autonomous legal institutions allows governments to make credible economic commitments internationally, especially when the establishment of such institutions is required by international regimes of economic liberalization.[25] Thus, legalism has historically been key to the existence of capitalist activities in authoritarian regimes, ensuring regimes' survival through pacts with domestic and foreign economic actors.

Luban does not ignore the risk of legitimating the regime by remaining on the job. He considers "the intangible harm of normalizing a criminal regime by one's mere presence."[26] Yet this risk is not central to the dilemma in his account; the harm is "intangible," and the main criteria is the very tangible objective of saving lives. Moreover, he presents this legitimating risk in narrow, individualist terms. The audience in whose eyes the regime may be normalized is composed of the individual government official's colleagues in public service and other individuals around them, not business leaders or international institutions. And the normalization that the official contemplates is not the legitimating function of law or the smooth running of economic activity, but the sense of normality that emerges from seeing an individual government official going to work every day. Yet as indicated above, legal institutions can legitimate evil in a deeper and broader sense. The existence of legal justifications for injustice and violence can legitimate evil in the eyes of perpetrators (including the public servant), interfering with their moral judgment and their assessment of the need to mitigate injustice. Legal distinctions can also numb the victims and their leadership or induce them to collaborate with the regime in the hope of avoiding bigger harm.[27] In addition, law's legitimating function is geared towards a larger national and international audience: the public at large. Such was the case in some authoritarian regimes during the Cold War, which adopted, alongside formal democratic institutions, a legalist discourse pleasing to their own populations as well as the United States and foreign investors.[28]

In addition to legitimacy, law can provide authoritarian rulers an efficient tool of control over the population, political rivals, and government agents themselves. Ginsburg and Moustafa point to the social control effected by criminal courts over the general population, especially where courts are subservient to the regime.[29] They also discuss cases where the executive used judicial bodies to

25. *See* Ginsburg & Moustafa, *supra* note 20, at 8–9.

26. Luban, *supra* note 3, at [add page number when we receive printer proofs].

27. See the previous debate between David Luban and one of the authors on the question of the collaboration of the Jewish leadership with the Nazi regime in particular in the case of Rudolf Kastner in Hungary. *Compare* Leora Bilsky, *Judging Evil in the Trial of Kastner*, 19 LAW & HIST. REV. 117 (2001), *with* David Luban, *A Man Lost in the Gray Zone*, 19 LAW & HIST. REV. 161 (2001).

28. *See, e.g.*, NATALIE DAVIDSON, AMERICAN TRANSITIONAL JUSTICE: WRITING COLD WAR HISTORY IN HUMAN RIGHTS LITIGATION 111–12 (2020); *see also* Ginsburg & Moustafa, *supra* note 20, at 8–9 (explaining the existence of independent courts as a way to create credible economic commitments internationally).

29. Ginsburg & Moustafa, *supra* note 20, at 4–5.

check majoritarian institutions that posed a challenge to it.[30] Finally, the availability to citizens of petition mechanisms against low-level bureaucrats, adjudicated by courts enjoying a degree of independence, allows authoritarian regimes to maintain control over government agents in the absence of a free press and other democratic mechanisms that check government behavior.[31] Courts, whether subservient or somewhat independent, therefore help authoritarian regimes persist.

These authoritarian uses of law are a far cry from liberal understandings of the rule of law.[32] Legal discourse and formality are used to mask the overall arbitrariness of the regime, subdue criticism, and eliminate political opponents. Therefore, they cannot fall under even a narrow definition of the rule of law as "a government bound by fixed rules applicable to all."[33] Nevertheless, even in the least democratic regimes, reliance on legal institutions and discourse comes with a risk for those in power by providing openings to challenge the regime. As Otto Kirchheimer famously pointed out in his discussion of political trials, in order for authorities to enjoy the legitimacy provided by trials, they must grant some independence to courts.[34] Indeed, a completely farcical version of legality would fail to legitimate the regime. The existence of independent courts in turn creates the possibility of the authorities losing in legal proceedings. The prevalence of formal legal discourse in an authoritarian regime similarly provides openings for the opposition to invoke law and rights in ways challenging to power.[35] Thus, while legality is a powerful tool of authoritarianism, it paradoxically produces tools of resistance in the form of legal proceedings, institutions, and discourse. These tools are key weapons deployed by the regime, but they contain a limited capacity for subversion. As such they create a unique form of *Spielraum*, in Luban's terms. Yet, contrary to Luban's account, such *Spielraum* derives not from alliances with individual colleagues, but from the possibilities within the legal profession.

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30. *Id*. at 5 ("In Turkey, the secular power elite used unelected judicial institutions to check the Islamist AK Party, which controls the Turkish Grand National Assembly. In Iran, the religious power elite similarly used unelected judicial institutions to effectively check majoritarian institutions that were controlled by reform-oriented politicians. In both cases, courts served as the linchpin of regime control over the popular will.").

31. *Id*. at 7.

32. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) ("The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.").

33. NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 8 (2003).

34. OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 50 (1961); Otto Kirchheimer, *Politics and Justice*, *in* POLITICS, LAW AND SOCIAL CHANGE: SELECTED ESSAYS OF OTTO KIRCHHEIMER 408–27 (1969); *see also* Ginsburg & Moustafa, *supra* note 20, at 6 (referring to E.P. Thompson 1975: "the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation").

35. Hence the force of appeals to human rights and international law to challenge right-wing authoritarian regimes in the Southern Cone at the end of the Cold War. These regimes had espoused to various degrees of formal legal discourse to justify declarations of states of emergency and exceptions to formally proclaimed rights. For a discussion of Paraguay, see DAVIDSON, *supra* note 28, at 43–44, 80.

Extending Luban's concept of *Spielraum* in this way does not eliminate the dark sides of legalism.[36] The legalist authoritarian regime will continue to enjoy greater public legitimacy than without the law, and thus strengthen its power. And so, the dilemma is sharpened for the lawyer—who has to consider whether the localized, short-term successes they may obtain for individual clients in court or in a particular measure limiting persecution will strengthen the regime in the long term, by legitimating it and solidifying its control over the general population.

Equipped with this understanding of the unique and complex role of law in many authoritarian regimes, we can now reconsider the lawyer's dilemma and analyze it in a way that takes structure more into account.

III. RECONSIDERING THE LAWYER'S DILEMMA FROM A STRUCTURAL PERSPECTIVE

Analyzing the lawyer's dilemma from a more structural perspective does not itself resolve the question of whether to stay or to go. It does, however, suggest that determining whether the consequences of staying or going are positive or negative is much more complex than tallying saved lives.

The individual lawyer has first and foremost to consider the risk that they are legitimating the regime by taking part in the operation of its legal system. Towards the end of his article, when Luban asks whether there was any reason for either Lösener or Moltke to quit, he considers the possibility that staying "contributes to the moral breakdown of those around you."[37] His answer is that "in our two cases, the intangible contribution to moral breakdown seems far outweighed by the concrete good these two did."[38] However, under the more structural viewpoint offered here, the analysis should consider not only the lawyer's colleagues and acquaintances, but also public opinion at large. Is it not possible that Lösener's success in softening the language of the Nuremberg laws contributed to legitimating the persecution of Jews in the eyes of the German public? Might it have avoided a general revolt against a more broadly-framed version, that would have targeted many more individuals and hence created opposition within some segments of the German population? Furthermore, regardless of the precise way in which persecution was phrased in the Nuremberg laws, by participating in the drafting of such legislation, was Lösener not taking part in strengthening the regime's legitimacy in the eyes of German industrials and financiers, as well as the German public, as a regime operating through law? As to Moltke, might the very existence of a department in the Abwehr tasked with verifying the compliance of the military with international law, and staffed with lawyers

36. We draw inspiration for this expression from DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2005).

37. Luban, *supra* note 3, at 50.

38. *Id.*

of repute such as himself, have contributed to the beliefs among the German public—and military—that atrocities were not being committed systematically?

When considering legitimation, we have also seen that foreign public opinion may be relevant, especially that of foreign economic actors. Though the role of foreign actors in supporting the Third Reich is less clear, it is possible that Swiss banks may have been more hesitant to grant extensive credits to the Nazi regime if it had been characterized by brute force lacking the cloak of rationality and stability provided by legality.[39] A decent lawyer should therefore also consider the way remaining on the job may strengthen the regime's image towards investors and other international partners.

In addition, our lawyer should take into account the risk that participating in authoritarian legality may lead them to become a victim of the legitimating effect of law, and to herself view the regime's injustice as justified. In contrast to the naiveté of legalism that Luban describes, the risk here is not to overestimate the good one can do by remaining on the job, but the much graver risk of losing the faculty to identify injustice when it is before you, and thus to find oneself eventually participating in perpetuating such injustice. This danger is illustrated in the story of S.S. judge Georg Konrad Morgen. Konrad Morgen's task was to investigate corruption among the S.S. employed in the Auschwitz and Buchenwald concentration camps.[40] This jurist considered himself deeply committed to justice and the rule of law, and sought to protect these values through his work targeting corruption. However, his very focus on corruption, and the *Spielraum* his position offered him to constrain S.S. officers, led him to contribute to much more horrible injustice. Distinctions between legal categories can blind the lawyer to immorality. While Konrad Morgen vigorously opposed corruption, he convinced himself that certain executions were permissible, among them the execution of 8,000 Soviet prisoners of war at Buchenwald. Operating within a legal system that distinguished between "legal killings" and "criminal murders", he saw those executions as falling in the category of legal killings. This, he explained, was due to the fact that the Soviet government had treated its German prisoners with utmost brutality, and it was likely that the executed prisoners had themselves taken part in violations of international law.[41] His claim that international law allowed reprisals in such circumstances is of course incorrect; what matters for our purposes is that the legal categories of legal/illegal killings offered him a way to view atrocities as acceptable. Similarly, the focus on one's area of legal expertise can obscure how one contributes to the regime more generally. When he discovered the existence of gas chambers, Konrad Morgen considered acting against them, for instance, by revealing them to the foreign press.[42] Yet he convinced himself

39. Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349, 371 (2012).
40. PAUER-STUDER & VELLEMAN, *supra* note 23.
41. *Id*. at 70.
42. *Id*. at 70–71.

that he would be more effective by remaining in his position and investigating corruption among the officers operating the gas chambers.[43] In his testimony during the Auschwitz Trial conducted in Germany in 1964, he stated:

> I suddenly saw a possible way of proceeding. Where the highest legal right, life itself, counts for nothing and is dragged in the mud, destroyed en masse, there too must all other legal rights. . . . [W]hether of property or fidelity or whatever, must also collapse and lose their value. And therefore[—]and I had already convinced myself of this[—]these people, to whom these tasks had been delegated, could not help but become criminals. And so my job and the criminal code gave me the chance to pursue these crimes[—]that is, the ones that hadn't been ordered. And that's what I did.[44]

This plan to "subvert the system [of concentration camps] from within," of course, failed.[45] What is important for our purposes is to realize that Konrad Morgen's error of judgment was the result of an analysis focused on the individual's immediate *Spielraum* without taking into account the broader structure through which violence is exerted. Put differently, when considering the best course of action in the face of mass murder, Konrad Morgen forgot the dual structure of the Nazi regime, according to which at any given moment, the Prerogative State could take over the remnants of the rule of law and grant immunity to the heads of concentration camps from prosecution for corruption.

In addition to legitimation, we saw that legal institutions can very concretely help the regime control the population, political rivals, and government officials themselves, by prosecuting and otherwise constraining them. This is also something that should be taken into account by decent lawyers in their dilemma. However, we also saw that it is now well recognized that for law's legitimating function to have a chance to succeed, courts need some independence, and legal institutions some bite.[46] As a result, even the most pathological form of legality may offer some tools of resistance. Assessing the potential for such resistance requires engaging in comparisons among the various pockets of legal resistance offered by the structure of injustice in the regime. What alternative possibilities for resistance exist in legal work outside of government, for instance as a private lawyer representing victims? Might those possibilities be more effective in protecting individuals, all the while creating less legitimation for the regime?

The story of Ernst Fraenkel demonstrates that it is possible for a private lawyer living in an evil regime to help individuals in the short-term while challenging the system as a whole. During Nazi rule, Fraenkel, who was previously a labor lawyer, worked as a private lawyer representing criminal defendants. He succeeded in protecting several of his clients from the Prerogative State, the special

43. *Id*. at 96.
44. *Id*. at 90.
45. *Id*. at 124.
46. Ginsburg & Moustafa, *supra* note 20, at 5–7.

'People's Court' set up to prosecute political offences, by retaining them under the Normative State, the common courts—where their due process rights were better respected, and they had a better chance of remaining alive.[47] Although Fraenkel won some cases in the early years of the Reich, he soon realized that formal legal victory could enhance the overall risk for his clients of being taken by the Gestapo. Understanding that the system allowed for only localized victories that could be easily overturned by the Prerogative State, he preferred losing legal battles in the ordinary courts, and even advised his clients to admit to conduct of which they had been falsely accused, in order to be convicted and imprisoned rather than sent to a concentration camp.[48] This hands-on experience with the legal procedures of the Third Reich led him to understand the duality of the regime, enabling him to write his groundbreaking work. In this way, Fraenkel managed to combine limited agency as a defense lawyer to exploit openings in the legal system in the early years of the regime, with a structural analysis of the role of law in Nazi Germany. As explained by one author: "In public, he practiced law, representing political defendants. In private, he wrote underground essays, and ultimately his classic theory of the National-Socialist legal system, *The Dual State*."[49] If the legitimacy of Nazi Germany was connected to the role of law and the structure of the Dual State, Fraenkel found a way to both utilize the judicial space offered by the Normative state to hold off the prerogative onslaught, all the while working to undermine the legitimizing effect of law by publishing his book abroad in 1941 and exposing the structure of the dual state.

Through these examples, we can see that taking law seriously requires attending to differences between areas of law that may offer a range of opportunities for protecting victims and challenging the regime. Criminal law tends to target injustice in very narrow terms that focus on individual cases and agency, and as the example of Konrad Morgen suggests, may be least promising for affecting the system as a whole. Legislative work such as Lösener's may have the broadest impact, though its legitimating function is also comparatively high. Yet no categorical answers to these questions can be provided in advance. Different regime structures will create different opportunities for resistance, and different risks of legitimating the regime.[50] And like Fraenkel, exceptional individuals may be able to leverage their criminal law work to combine short-term mitigation of evil with profound challenges to the structure of the regime.

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47. Douglas G. Morris, *The Dual State Reframed: Ernst Fraenkel's Political Clients and his Theory of the Nazi Legal System*, *in* 58 LEO BAECK INST. YEAR BOOK 6 (2013).

48. *See id.* at 15–16.

49. *Id.* at 6.

50. On different forms of duality in authoritarian regimes, see David Dyzenhaus, *Legal Theory and the Politics of Legal Space* (May 31, 2020), https://ssrn.com/abstract=3615175 [https://perma.cc/QF3P-N5B9].

CONCLUSION

Lawyers are not the only professionals to experience sharp moral dilemmas when they are employed by an unjust regime. Any individual living in a state ruled by such a regime potentially faces the difficult question of where their behavior fits on the spectrum between collaboration and resistance. Because of this common conundrum, Luban's *Complicity and Lesser Evils* can fruitfully mine the lives of two government lawyers in the Third Reich to draw lessons relevant to a wide range of actors. In this response, we have tried to show that, for lawyers, the dilemma is particularly sharp—and that confronting this dilemma requires taking into account a complex set of structural factors. In regimes relying significantly on legality for legitimacy and control—as most non-democratic regimes today do—legal work can strengthen the regime at the same time as it offers real opportunities to challenge it.

While the central thesis of this response—namely that the lawyer's dilemma is especially acute—is ambiguous in terms of providing practical guidance, one implication is clear: legal education should impart to future lawyers tools with which to address the dilemma of remaining on the job, and in particular the ability to recognize when legality is used for repressive ends. Thus, while legal education should emphasize the normative ideals and promise of the rule of law, it should also include historical examples and theoretical tools to understand authoritarian legalism and how law fits in structures of power. It is our hope that Luban's article and this collection of responses can contribute to a more frank engagement of legal education with the dark side of legality, and the moral and political dilemmas created for the lawyer.