PROFESSIONAL ETHICS IN DARK TIMES

Drawing Lessons from Positivism and the Ambivalent Legacy of Bernhard Loesener

By: Alan Grose

> Professional ethics must guide us precisely where we are told the situation is exceptional.
>
> Timothy Snyder (2017)[1]

> Positivism, on its own thesis, stops short of just those puzzling, hard cases that send us to look for theories of law. When we reach these cases, the positivist remits us to a doctrine of discretion that leads nowhere and tells nothing.
>
> Ronald Dworkin (1967)[2]

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[1] Timothy Snyder, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 41 (2017).
[2] Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 46 (1967) [hereinafter Dworkin].

Introduction

In discussions of professional ethics, it is something of a commonplace to say that lawyers are members of a "learned profession."[3] Clearly, becoming a lawyer does require a substantial level of specialized education. One might wonder, though, whether this learning instills anything of an ethical character. Perhaps the lawyer's training is merely technical and amoral in nature. In his classic essay "Lawyers as Professionals: Some Moral Issues," Richard Wasserstrom examines the apparent amoral attitude of the legal profession regarding its involvement in the world.[4] This apparent amoralism is deeply tied to the fact that lawyers are bound to a very great extent by professional ethics to defer to the client on fundamental choices of the objectives of the legal representation. A lawyer's vigorous and successful defense of a guilty client may be virtuous from point of view of professional ethics, even though it might also produce the morally unfortunate result that a criminal might walk free. While this kind of result is often defended as worthy tradeoff for the integrity of a healthy adversarial system of justice, Wasserstrom tips his hat to his larger worries about the system as a whole when he relates early in his article an anecdote from a Senate hearing investigating Watergate in which John Dean noted the predominance of lawyers among the individuals involved in the cover-up, and Wasserstrom conjectures that this was "not accidental."[5] Against this critique of amoralism, I aim to provide at least a partial vindication of the importance for professional ethics of law's status as a learned profession.

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[3] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT Preamble 2 (asserting in the Preamble that "[a]s a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education); *Hickman v. Taylor*, 329 U.S. 495, 516 (noting in regard to the protection of attorney work product from that "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary").
[4] Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, HUMAN RIGHTS 1 (1975).
[5] *Id.* at 3.

To this end, I consider a parallel complaint of amoralism that has been asserted both theoretically and historically against the theory of legal positivism. Positivism is a theory of the nature of law that observes a strict separation between law and morality.[6] John Austin famously captured this in his 1832 dictum that "[t]he existence of law is one thing; its merit or demerit is another."[7] To this extent, positivism stands as a plausible reconstruction of the amoral technician's conception of the nature of law. Positivism also adheres to a conception of legal rules as very limited in nature, which Ronald Dworkin succinctly captures in his famous critique of that theory:

> The set of these valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule … then that case cannot be decided by "applying the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.[8]

Positivism, then, claims that law consists of a self-contained system of rules that also offer no guiding moral content. This is the basis of Dworkin's critique that when we face legal questions for which we need moral guidance positivism offers us no resources.[9] The German legal scholar Gustav Radbruch took this critique to the historical level when he found in legal positivism, which was the dominant view in the time leading up to the Nazi regime, a reason why so many German judges were apparently complicity in Nazi crimes.[10] He asserted that "[p]ositivism, with

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[6] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD L. REV. 593 (1958).
[7] John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble, ed., 1995).
[8] Dworkin at 17.
[9] Dworkin at 46 (asserting that "Positivism, on its own thesis, stops short of just those puzzling, hard cases that send us to look for theories of law. When we reach these cases, the positivist remits us to a doctrine of discretion that leads nowhere and tells nothing."). Dworkin's own response is that law also contains principles that are moral in character and do offer guidance in challenging cases. *Id.* at 22-23.
[10] *See* Gustav Radbruch, *Statutory Lawlessness and Super-Statutory Law* (Bonnie Litschewski Paulson and Stanely L. Paulson, trans.), 26 OXFORD J. LEGAL STUD. 1 (2006).

its principle that 'a law is a law', has in fact rendered the German legal profession defenseless against statutes that are arbitrary and criminal."[11]

In this essay, I do not dispute that the lawyer's training is marked by a certain amoralism. I will, however, argue that the training of this learned profession does equip the lawyer with a sensibility that is in an important sense foundational to other deliberations of professional ethics. To build this argument, I start with an assumption that something like the merely technical positivist sensibility of the nature of law is all that is instilled by a legal education. Positivism's fundamental ambition is to reconstruct the workings of legal systems as they might be if they were rational and orderly. That this vision of law is purely descriptive and does not try to instill any essential moral orientation to the lawyer's practice perhaps even facilitates the amoralism of the lawyer's devotion to the goals of the client. It is when we examine how lawyers with a positivist sensibility respond to the most extreme challenges to the rule of law, however, that we can see more clearly the importance of this sensibility. To make this case, I examine specifically the legacy of Bernhard Loesener, a lawyer who was tasked by the Nazi regime with helping to draft the so-called Nuremberg Laws that helped open the way for the Holocaust to follow.[12] The memoir he penned in the years following World War II provides us with a unique, if not also self-serving, account of how this early legal framework came about.[13] My goal in studying Loesener's legacy is to try to build a conception of what lawyers might watch for as they address the perplexities of when ordinary legal amoralism might properly give way to exceptional efforts of personal responsibility.

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[11] *Id.* at 6.

[12] *See, generally*, Karl A. Schleunes, *Introduction, in* LEGISLATING THE HOLOCAUST: THE BERNHARD LOESENER MEMOIRS AND SUPPORTING DOCUMENTS (Karl A Schleunes, ed., Westview Press, 2001) (assessing Loesener's career from a historical point of view) [hereinafter Schluenes].

[13] Bernhard Loesener, *At the Desk for Racial Affairs in the Reich Ministry of the Interior* (Carol Scherer, trans.), *in* LEGISLATING THE HOLOCAUST: THE BERNHARD LOESENER MEMOIRS AND SUPPORTING DOCUMENTS (Karl A Schleunes, ed., Westview Press, 2001) [hereinafter Loesener].

I proceed in this effort in the following steps. First, I offer some framework to assist in the challenging task of thinking through these exceptional issues from the point of view of hindsight. Then I turn to a sketch of Loesener's legacy. In this, the fact that Loesener also wrote about his experience will require special attention, and I will argue that in it we can see some general features of the legal positivist's sense of the nature of law. Finally, by reflecting on this example, I suggest three general imperatives that should guide a lawyer confronting a similar kind of collapse of the rule of law. We live at a time when some commentators believe the United States has experienced what might be characterized as an "autocratic attempt" at subverting our constitutional order.[14] To the extent this reading of Loesener's memoir helps us to identify specific threshold principles and tactics garnered from a legal training characterized by nothing more than a positivist's sensibility we will have reason to hold that belonging to a learned profession is foundational for the lawyer's professional ethics.

The Holocaust, Hindsight Bias, and the Perplexity of Dark Times

In thinking about moral issues related to the Holocaust, the dangers of hindsight bias are real. In her book *Moral Clarity*, Susan Neiman observes that the Holocaust has become so "universally acknowledged as a paradigm" of evil that it may become harder to recognize anything less as also evil.[15] A dimension of this is that "the use of the Holocaust has not only given us one kind of clarity at the expense of others, it has also served to externalize evil as something other people do."[16] The project of this paper, however, requires that we examine what

[14] *See, e.g.*, Masha Gesson, *By Declaring Victory, Donald Trump Is Attempting an Autocratic Breakthrough*, THE NEW YORKER, Nov. 5, 2020, https://www.newyorker.com/news/our-columnists/by-declaring-victory-donald-trump-is-attempting-an-autocratic-breakthrough (borrowing from the Hungarian sociologist Balint Magyar an analysis that "divides the autocrat's journey into three stages: autocratic attempt, autocratic breakthrough, and autocratic consolidation" and arguing that Trump's declaration of victory was an attempt to achieve an autocratic breakthrough).

[15] Susan Neiman, MORAL CLARITY: A GUIDE FOR GROWN-UP IDEALISTS 341 (2008).

[16] *Id.* at 342.

it must have been like to confront the Holocaust when it was still an incrementally developing set of events that had not yet reached its full expression.[17] To cut against the grain of this hindsight bias, I want to push back on two tendencies in the ways we might think about moral questions as they unfolded in the context of the Holocaust.

The first tendency lies in an ideal of personal responsibility that seeks to avoid entanglement with morally wicked affairs by simply refusing to be involved. Philosophically, we see this ideal of action in the Kantian imperative that we should aim first to act only on morally worthy principles.[18] Closely associated is the idea that the only thing fully under our control morally is the purity of our own will and that acting from such a good will offers genuine moral satisfaction, even if nothing results from it. In Kant's words:

> Even if it were to happen that, because of some unfortunate fate …, this will were completely powerless to carry out its aims; if with even its utmost effort is still accomplished nothing, so that only the good will itself remained…, even then would it still, like a jewel, glisten in its own right, as something that has its full moral worth in itself.[19]

While this sense of moral integrity might offer comfort to the agent who withdraws from a morally fraught situation such as the Holocaust, it offers little consolation to those who perish. To the extent that the work of a professional is to apply skills or even a sensibility acquired through specialized training to accomplish something for others, this position of moral purity is also by definition unavailable to the professional. The moral clarity that seeks to avoid getting its hands dirty is, of course, also much easier to achieve from the distance of hindsight. If for no other reason than this, it is an almost inevitable fate for those who confront—even heroically—

[17] *See generally*, Doris L. Bergen, WAR AND GENOCIDE: A CONCISE HISTORY OF THE HOLOCAUST 3 (2016) [hereinafter Bergen].
[18] *See, e.g.*, Immanuel Kant, GROUNDWORK FOR THE METAPHYSICS OF MORALS 222 (Thomas E. Hill, Jr. & Arnulf Zweig, eds., Arnulf Zweig, trans., Oxford University Press, 2002) (stating the first formulation of this "categorical imperative").
[19] *Id.* at 196.

moral challenges like those posed by the Nazi regime that their legacies in hindsight will be marked at best by ambivalence about not having done more.[20] At any rate, an important point of professional ethics is to provide a code of conduct to stand between the professional's personal preferences and the interests of the client whose interests the professional should vigorously represent. Accordingly, we must distinguish between the points of view of personal moral responsibility, on the one hand, and professional responsibility, on the other.

The second tendency is one that assumes that it must have been easy to see the writing on the walls, so to speak. To push back on this, it is helpful to consider what it might have been like to have been a legal professional at work as the Nazi regime began its ascent and journey toward war and genocide. For this, I borrow from Hannah Arendt her conception of "dark times," which she describes as follows:

> If it is the function of the public realm to throw light on the affairs of men by providing a space of appearances in which they can show in deed and word, for better or worse, who they are and what they can do, then darkness has come when this light is extinguished by "credibility gaps" and invisible government," by speech that does not disclose what is but sweeps it under the carpet, by exhortations, moral and otherwise, that, under the pretext of upholding old truths, degrade all truth in meaningless triviality.[21]

The point of this political "darkness" is precisely to make it harder to discern the proper course of action. This presents a practical epistemological challenge that might easily overwhelm ordinary citizens, but that we might hope a professional might be more equipped to confront.

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[20] *See, e.g.*, Mark Hallam & Jens Thurau, *Hero of Nazi war criminal? 'Good German' Hans Calmeyer's legacy debated*, DEUTSCHE WELLE/DW.com, July 7, 2020, https://www.dw.com/en/hero-or-nazi-war-criminal-good-german-hans-calmeyers-legacy-debated/a-54197408 (describing recent challenges to the legacy of Hans Calmeyer who was designated "Righteous Among the Nations" by Yad Vashem for having helped save over 3,000 individuals from deportation during the Holocaust, but whose legacy has also recently been challenged by the children of an Auschwitz survivor whom he declined to spare from deportation).

[21] Hannah Arendt, MEN IN DARK TIMES viii (1968), *quoted in* Richard J. Bernstein, WHY READ HANNAH ARENDT NOW 2 (2018).

Though darkness may have fallen on Nazi Germany quickly, it did not happen in one fell swoop. Instead, it happened incrementally—step by step. The challenge of this paper is not to look back upon dark times from a comfortable historical distance, but to attempt to recover what it might have been like for a professional working at the heart of the Nazi apparatus. It is here that I turn to the legacy of Bernhard Loesener.

Bernhard Loesener

Bernhard Loesener's legacy as a lawyer is deeply troubled, particularly when we view it from the point of view of personal moral responsibility as seen with the clarity of hindsight. Beginning in late April 1933, Loesener was employed by the Nazi Reich Interior Ministry, where he became known as the "Jewish expert."[22] As Karl A. Schleunes notes in the "Introduction" to the volume *Legislating the Holocaust: The Bernhard Loesener Memoirs and Supporting Documents*, Loesener

> is best known for his role in drafting the infamous Nuremburg Laws of September 1935. These laws robbed Germany's Jews of their citizenship rights and became the backbone of the Nazi legislative assault upon their position in German society. Loesener must, therefore, be counted among the perpetrators in the Nazis' search for a solution to what they called the "Jewish question."[23]

Though Loesener was a relatively low-level official—Schleunes describes him as "third level"[24]—and though these laws were drafted five years before the organized violent pogrom against the Jews that came to be known as *Kristallnacht*, there can be no doubt that Loesener helped to construct the legal apparatus that made the Holocaust possible. To the extent that his legacy is to be evaluated as ambivalent at all, this ambivalence must be achieved by some accomplishment against the weighty backdrop of Loesener's role in bringing the Holocaust into

[22] Schleunes at 1.
[23] *Id.*
[24] Schleunes at 4.

existence. Loesener's memoir contributes to achieving this sense of ambivalence in two ways. First, it recounts the efforts he undertook that ultimately spared at least some individuals from destruction in the Holocaust—employing along the way the moral logic of numbers that makes at best for an ambivalent balance between individuals saved against the backdrop of genocide. Second, his memoir has come to serve as something of a public record—albeit one of contested motives—that gives us "an insider's insights into the workings of the decision-making process in the Third Reich."[25] But it also adds a layer of complexity to his legacy by exhibiting a sense of responsibility that is professional in nature. Before we turn to Loesener's legacy as a professional, it will be useful to consider his presentation of the ways in which is position allowed him to save at least some individuals from the full force of the Holocaust.

When Loesener took up his official position in the Reich Ministry of the Interior on April 27, 1933, Hitler was well on the way to consolidating his power, and the hostility of his regime toward the Jews was already clear.[26] The "Law for the Restoration of the Professional Civil Service" had already been adopted earlier in the month and contained provisions that would force Jews from their livelihoods.[27] This is a period that Bergen describes as one of routinization aimed at bringing about the "social death" of the Jews.[28] When Loesener was hired to become the Ministry's "Jewish expert," and he claimed that his job consisted of initially of clearing the desk of proposals about how to address the so-called "Jewish question."[29] His involvement escalated rapidly, however, on September 13, 1935 when he was summoned from Berlin to Nuremberg to assist in drafting the infamous Nuremberg laws.[30] These laws included both the

[25] *Id.* at 21.
[26] Loesener at 35.
[27] Schleunes at 8-9.
[28] Bergen at 90-95.
[29] Schleunes at 3.
[30] Loesener at 46.

"Reich Citizenship Law," which redefined German citizenship, and the "Law for the Protection of German Blood and German Honor," which aimed to prevent marriage or sexual relations between members of the Aryan and Jewish groups.[31] These laws were initially vague in scope (if not intent), with their full reach to be determined by further decrees that would also pave the way for their disastrous implementation, and Loesener played a role in drafting both. Against this baseline of responsibility, he attempts to rehabilitate his legacy by accounting for the ways in which his efforts may have prevented the genocide from destroying even more lives, and at least three merit attention here.

The first accomplishment Loesener claims for himself is to have exerted an ameliorating influence over the initial wording and subsequent clarification of the "Reich Citizenship Law." This law redefined the categories of German citizenship to "elevate [Aryan] Germans to the status of 'Reich citizens' (*Reichsbürger*) and classify non-Aryans as 'state subjects' (*Staatsangehöriger*)."[32] The difficulty, however, was to determine precisely to whom these categories applied, and this was not decided until November 7, 1935.[33] Along the range of options up for consideration was the most extreme, which would have held any hint of Jewish ancestry—the so-called "'one drop of Jewish blood' principle"—was enough to remove a person from Reich citizenship, but Loesener positioned himself at the other end, preferring that only those with four Jewish grandparents should be so classified.[34] That is, Loesener's efforts were aimed at protecting as many individuals as possible who might be categorized as "*Mischlinge*,"

[31] Schleunes at 10.
[32] Schleunes at 13.
[33] Schleunes at 20.
[34] Schleunes at 18-19. *See also* Schleunes at 21 (noting "[t]he inescapable irony in all of this was that the definition of Jewishness, allegedly a racial attribute, was still rooted in the religious background of an individual's forebears rather than in biology").

persons of mixed or hybrid ancestry.[35] In advocating for this position, Loesener's various appeals included considerations of bad press abroad that might have economic consequences, personal impacts within Germany that might generate new political opposition, and the exclusion "from military service the equivalent of two divisions of young men."[36] In the end, Hitler seems to have been moved by the desire to preserve numbers for military service, but the line of exclusion for *Mischling* was drawn to exclude not only those with either three or four Jewish grandparents, but also those with two Jewish grandparents who was either married to a Jewish person or a member of a Jewish congregation.[37] With numbers this big, it is perhaps fairly obvious that Loesener's influence in shaping this decree had a significant impact.

Beyond this, Loesener was particularly proud that his efforts in the process of drafting the subsequent implementing decrees were successful in creating protections for individuals living in "mixed marriages."[38] As he describes his effort, it was "to lay the groundwork for providing preferential treatment for full Jews of both sexes who were, or had been married to those of 'German blood.'"[39] The initial occasion for this effort occurred in the process of refining the decrees that would "force Jews into ghetto-like buildings or neighborhoods."[40] The ultimate impact, though, was "to exempt Jewish men and women living in privileged mixed marriages from the deportations to Auschwitz and other sites of murder; that is, to keep them from immediate death."[41] Though he notes that it cannot be know with certainty, Loesener calculates

[35] Schleunes at 18-20. *See also* Bergen at 92 (noting that this was "a category that would remain in dispute throughout the entire Third Reich).
[36] Schleunes at 19.
[37] Schleunes at 20
[38] *See generally* Loesener at 65-68.
[39] Loesener at 65.
[40] Schleunes at 24.
[41] Loesener at 68 (emphasis omitted).

the number of individuals saved, saying "I estimate it to be *around 20,000* for the entire area subject to German Racial laws, including the Protectorate, Holland, and other occupied areas."[42]

Finally, Loesener makes a point toward the end of his memoir to describe—and even to present an accounting of—the assistance he provided to particular individuals over the entire course of his employment with the Reich Ministry of the Interior. In addition to "the constant advice I dispense to individuals who turned to me seeking help, both in and outside of my official capacity[,]"[43] Loesener also had the "responsibility to prepare petitions for clemency direct to Hitler whenever they involved hardship cases" under the apparatus of the Reich Citizenship Law.[44] These were attempts by individuals "to be assigned to a more favorable racial classification than that allowed by the letter of the provisions," and Loesener reports that his guiding principle was that "where there was the lease prospect of success, I attempted to obtain the necessary approval."[45] He calculates that by September 1942, shortly before he left Reich Ministry, Hitler had approved request for "991 person total."[46]

The event that Loesener says led him to seek reassignment out of the Reich Ministry of the Interior was hearing in late 1941 from "an eyewitness to the mass murder of German Jews."[47] He recounts, "[f]or the first time I learned that my worst fears for the fate of the deportees had come to pass—or better put, had been far exceeded."[48] In 1944, Loesener was arrested by the Gestapo for having offering shelter briefly to friends who had been involved in a conspiracy to assassinate Hitler.[49] Even as Berlin fell, he remained in prison because of his civil service record

[42] Loesener at 68 (emphasis in the original).
[43] Loesener at 95.
[44] Loesener at 98.
[45] *Id.*
[46] *Id.*
[47] Loesener at 99.
[48] *Id.*
[49] *Id.* at 101.

until October 19, 1946, whereupon he applied for Denazification and was certified "Rehabilitated" in August 1947.[50]

The Professional Significance of Loesener's Memoir

Loesener's memoir itself, however, adds an additional layer of complexity to his legacy, and it is here that we can see the importance of a professional sensibility that might be consistent with a positivist's sense of the order of law. As Karl A. Schleunes observes, though, "[m]emoirs are by definition self-serving, and Loesener's is no exception."[51] Indeed, it is hard to imagine that we could ever fully trust a memoir written by a collaborator is so great an atrocity. Nevertheless, we can also find in Loesener's memoir the outline of a contribution to the field of professional ethics, quite apart from its attempt to recalculate the measure of his personal responsibility. A memoir can serve as a public record, and Loesener's unique contribution might be that he shows us something about the challenges of acting with moral clarity in times that are falling into darkness. To make this case, I want to cut against the grain of Hannah Arendt's analysis in her essay "Personal Responsibility Under Dictatorship,"[52] and argue that in his memoir Loesener emerges as a professional witness speaking with legal insights to the consciences of future professionals. In Arendt's analysis, those who, like Loesener, participated in the apparatus of the Third Reich gave more than simple obedience; they gave also their political consent.

> The nonparticipators in public life under a dictatorship are those who have refused their support by shunning those places of "responsibility" where such support under the name of obedience, is required. And we have only for a moment to imagine what would happen to any of these forms of government if enough people would

[50] *Id.* at 103.
[51] Schleunes at 4.
[52] Hannah Arendt, *Personal Responsibility under Dictatorship, in* RESPONSIBILITY AND JUDGMENT 17-48 (Jerome Kohn, ed., 2003) [hereinafter Arendt, *Personal Responsibility*].

> act "irresponsibly" and refuse support, even without active resistance and rebellion to see how effective a weapon this could be.[53]

The implication is that someone like Loesener must be judged responsible for the crimes of the Third Reich simply. As Bergen's historical account demonstrates, when individual Germans did withdraw from their participation in the events of the Third Reich and the Holocaust other willing volunteers always seemed to emerge.[54] In this historical perspective, Arendt's imagined analysis of a society of nonparticipators rings hollow.

The key to unlocking the sense in which Loesener's memoir might be an act of professional responsibility lies in clarifying a distinction that Arendt's analysis elides, viz., that between civil disobedience and conscientious refusal. Arendt moves from her imagined world in which nobody consents to the rhetorically sweeping grouping that "[i]t is in fact one of the many variations of nonviolent action and resistance—for instance the powers that is potential in civil *dis*obedience—which are being discovered in our century."[55] John Rawls, by contrast, distinguishes the two analytically. While both civil disobedience and conscientious refusal involve noncompliance with law or an administrative system, civil disobedience requires a public appeal to the sense of justice of one's fellow citizens, something that is lacking in the more private act of conscientious refusal.[56] Importantly, an act of civil disobedience is also

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[53] *Id.* at 47. This argument parallels and is perhaps intended to support Arendt's earlier assertion that Jewish leaders in the so-called "Jewish councils" also contributed to the fate of the Jews in the Holocaust, where she asserts "[t]he whole trust was that if the Jewish people had really been unorganized and leaderless, there would have been chaos and plenty of misery but the total number of victims would hardly have been between four and a half and six million people." Hannah Arendt, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 125 (1963). *But see* Bernstein *supra* note 14, at 60 (calling this "one of the most inflammatory and irresponsible claims made in Arendt's report"); Bergen at 150-51 (noting both that "many Jews at the time were bitterly critical of the Jewish councils" and that "the autonomy of the Jewish councils was more apparent than real").

[54] *See, e.g.*, Bergen at 144 (citing only one example, in Poland, of an official who objected to harsh tactics and was reassigned elsewhere with no major lose to the Nazi regime as, "[o]thers were happy to take over his powerful position in occupied Poland").

[55] Arendt, *supra* note 52, at 47-48.

[56] John Rawls, A THEORY OF JUSTICE 364 (1971).

political in the sense that it is undertaken from that sense of justice.[57] Loesener's memoir, of course, is written after the fact and, accordingly, is not directed at those Germans who could have stopped the Nazi regime from its genocidal path. But in addressing the future, it entails something like the public appeal to the sense of responsibility of future professionals that is also arguably motivated by a sense of professional responsibility.[58]

If we are reading Loesener's memoir for indications that it is the work reflecting a sense of professional responsibility as a member of the legal profession, the first thing that should strike us is that it is self-conscientiously an act of testimony. He presents it as a follow-up to the testimony he gave in June 1948 against his former boss, the Secretary of the Reich Ministry of the Interior, at the International Military Tribunal at Nuremberg.[59] Of the information he will present in his memoir, he says "[t]his record consists of personal memories."[60] But he says of his desired goal of his memoir that there is "a certain value as a contribution to uncovering the truth—provided that it is presented objectively."[61] In this effort, he also notes that he was "able to save a number of reference files and notes from this time[,]" which might serve to support the accuracy of his recollections.[62] In all of this, he demonstrates a professional sensibility about what counts as evidence in a public legal proceeding. This witness is someone who is seems familiar with the operation of rules of evidence and their all-important role in framing what counts as evidence for the purpose of establishing a public record.

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[57] *Id.* at 365 (specifying that civil disobedience "is an act guided and justified by political principles, that is, by principles of justice which regulate the constitution and social institutions generally").
[58] *Cf.*, Avishai Margalit, THE ETHICS OF MEMORY 147-82 (2002) (explicating the somewhat different, but relevant figure of the "moral witness" as an individual who witnesses both evil and the suffering it causes and who nevertheless bears witness in the hope that the future will bring individuals who will listen).
[59] Loesener,
[60] *Id.* at 34.
[61] *Id.*
[62] *Id.*

Beyond this framing, Loesener's narrative of events nevertheless exhibits the sensibilities of a legal professional, and in at least three ways this sensibility reflects insights that might be articulated by reference to central aspects of positivism. First, we see evidence in the memoir of a keen, even painful, awareness of the separation of law and morals. Positivism rejects the idea that morality or justice are in any way criteria of legal validity. This tenet of positivism is perhaps most memorably stated by John Austin in dictum that "[t]he existence of law is one thing; its merit or demerit is another."[63] When he describes his understanding of the kinds of considerations that might be available to him to influence the Nuremberg laws, he relates that his

> countering measures could not be those of open opposition. Nor could I use the only real arguments of basic humanity, ethics, and above all religion, which for upright individuals would have been persuasive, because my opponents were not upright individuals. Any such attempt and I would have been thrown out of the saddle. I thus had to limit myself to arguments that might make an impression on people of this sort.[64]

Second, Loesener's descriptions of his strategy in attempting to shape the essential contents of the Nuremberg laws and the subsequent decrees that defined their implementation reflects also a positivist's sensibility that when one reaches the boundaries of what the law clearly is discretion based on extra legal considerations become fair game. In these situation, as Dworkin notes, does not recognize an obligation to be guided by any principles already intrinsic to the law.[65] Loesener describes his strategy of trying to influence the implementation of the Reich Citizenship Law as an attempt "to attack on the most marginal front" by addressing the situation of those who were not already squarely within the brunt of the law.[66] In his advocacy for the non-exclusion of *Mischlinge*, he emphasized political and strategic considerations that

[63] Austin *supra* note 12, at 157.
[64] Loesener at 40.
[65] Dworkin at 17.
[66] Loesener at 40.

might be persuasive to those who would make the final decision. Similarly, in his preparation of petitions for clemency for individuals classified as Jewish, Loesener seems to have sought out anything that would put a person in a position where the rule no longer clearly applied and discretion might be available. Loesener quotes at length from an affidavit filed on his behalf after the war by a former colleague, "we often gave the examinee or his legal representative the correct tip by asking if they perhaps had reason to believe that their documented Jewish ancestry did not accord with their biological ancestry."[67] It is as if Loesener were pointing his examinees to the edge of the law where extra-legal considerations could drive discretion.

Third, we see in Loesener's narrative a perplexity at the chaotic nature of the adoption and promulgation of the Nuremberg laws that would resonate strongly with the positivist's commitment to the rationality of the ordinary in the rule of law. The positivist implicitly holds the orderly functioning of the system as an ideal of the rule of law. Loesener narrates, however, the chaotic process by which the Nuremberg laws were drafted and promulgated. This is evident, first, in Loesener's description of the frenzied, late-night pressured under which the initial drafting took place. Though Loesener's narrative sticks mainly to relatively bureaucratic details, he describes the scene in Nuremberg the night before the laws were to be announced when his superior returned at midnight from a meeting with Hitler and

> informed us that the Führer wished to have fresh copies of 4 drafts by the next morning, ranging from the most severe version A, with two intermediate versions B and C, to the mildest version D, the one we supported. But, he said, the Führer also wished to round out the legislation of the coming day with *another basic law, a law for Reich citizenship* … which he wanted to see immediately. Shocked, [Loesener's colleague] asked him in a tone stripped of all politeness what that was supposed to mean; why he hadn't opened the Führer's eyes … to the fact that such a law … would require careful deliberation and preparations, etc.?[68]

[67] Loesener at 96-97.
[68] Loesener at 49.

Adding further chaos to this scene, the following day when Hitler announced the new law a key sentence that would have applied the exclusion only to full Jews was at first omitted, then reinserted for the press, then omitted again in versions that were represented as facsimiles of the original.[69] These episodes present a vision that is markedly incongruent with the orderly and rational operation of a system of clear rules that is the aspirational vision of law when it is reconstructed and reduced to its analytical core.

To be clear, the question of whether or not Loesener could have done more to prevent the atrocities of the Third Reich must remain open. It is probably true that he could not have foreseen in 1933 the full genocidal destruction that was to follow, so we perhaps do not need to doubt the shock he reports at learning of the extent of the death camps. As he frames it in his memoir, though, by the time he arrived at the Reich Ministry of the Interior it was too late to save the Jews from horrible persecution. But if the Nazi progression toward the full evil of the Holocaust developed incrementally, in 1933 it was still relatively early. He did not marshal his professional insights to appeal to the consciences of his fellow Germans in anything like an act of civil disobedience (let alone one of political persuasion) in a way that might have saved additional lives; the clarity offered to hindsight came too late for those who perished. However intellectually satisfying it may be (or not), in our estimations of the moral worth of the insights Loesener's memoir offers we must weigh them as glib in comparison to the full moral evil of the genocide we struggle to explain. If his memoir positions him as a moral witness cautioning the future about what happened when dark times fell on Germany with the rise of Hitler, it is, at any rate, for future generations to vindicate his insights by using them to avoid the repeat of the disasters of the Third Reich.

[69] Loesener at 51.

Drawing Lessons from Dark Times

I now return to the question of what sensibility legal training as preparation for membership in a learned profession contributes to the lawyer's preparedness for ethical challenges. As commentators like Wasserstrom make clear, even in ordinary times, lawyers sometimes work at the boundaries of the ethical.[70] Bernhard Loesener's memoir, by contrast, provides us with a window into the perils of a dutiful commitment to a client in a position of power who is beginning to exhibit tendencies toward autocracy. The question now is whether the perspective of professional responsibility, even with its appearance of amoralism, nevertheless contains resources for navigating the perplexities of dark times beyond whatever resources may come along with one's individual sense of morality.

In what follows, I draw from Bernhard Loesener's memoir three imperatives of professional ethics that might help lawyers to navigate dark times. These imperatives are drawn from the generally positivist sensibilities about the nature of law exhibited in Loesener's narrative. These imperatives, though, are not the kind of clear rules that are easily applied to individual cases that the positivist might prize in ordinary circumstances. Instead, they are orienting principles to help lawyers recognize the onset and identify resources for responding to dark times. As orienting principles, these imperatives are preliminary or even foundational to more specific choices of action. They signal when a lawyer should perhaps be less guided by an amoral commitment to the law and more by a sense of personal responsibility.

Attend to the broader functioning of the legal system as a whole

First, Loesener provides in his memoir of the drafting of the Nuremberg laws and their subsequent implementing decrees perhaps the clearest lesson that lawyers should remain vigilant

[70] Wasserstrom, *supra* note 3.

to the overall functioning of the legal system. When things become too chaotic—perhaps even by design—it is a sign that one should be cautious of where those who generate the chaos are headed. Moreover, when the law is marshalled to grant impunity to acts that previously would have been illegal or produced great outrage, there is perhaps even greater cause for concern. Timothy Snyder advises that "[p]rofessional ethics must guide us precisely where we are told that the situation is exceptional."[71] The Nazi success, however, should remind us that there is a point at which the norms underlying the ordinary rule of law might no longer be in effect. In that situation, ordinary professional ethics might be of limited guidance. The positivist's idealized conception of the law as an orderly system of rules at least provides a point of comparison for discerning when the actual legal order has become anything but. If the lawyer's professional perspective does not provide clear guidance as to what exactly to do in such a situation, it at least does equip the lawyer with a frame of reference for recognizing when such conditions might be unfolding.

Be wary of pre-existing prejudices

Second, in the lead up to the Nazi rise to power, pre-existing anti-Jewish sentiments were common. Historian Doris Bergen includes these prejudices in her analysis of the social preconditions in Germany that made it ripe for Nazi success; they provided "dry timber" for the eventual Holocaust.[72] Loesener's memoir is an important historical document precisely because it gives us a first-hand account of when this pre-existing prejudice became enshrined in law—a decisive moment legally that opened the way for the Holocaust. In such a social setting, the positivist's analytical perspective that law and morals are two different things can help make a lawyer more keenly aware of the goals toward which legislators direct the operation of law. In

[71] Snyder, *supra* note 1, at 41.
[72] *See* Bergen 13-24.

particular, when law begins to advance the agenda of pre-existing prejudice, the lawyer should be particularly guarded not to be unwittingly a part of that drive.

Exploit the limited and general character of legal rules

Finally, Loesener used his legal skill at interpreting or construing legal language to identify opportunities to assist at least some of the individuals who were in harm's way. Of particular note, he seemed to have a keen sense of where the scope of the rules with which he was working came to its limits. In these situations, he seems to have drawn on the positivist's sensibility that law does not contain guiding principles as an opportunity to make room for the exercise of discretion. When a regime with autocratic tendencies attempts to put the apparatus of the legal system to work for its own dubious ends, insisting strictly upon the technicalities of the law, including in the adjudication of hard cases, may provide a mechanism for mitigating—at least to some extent—the worst of that regime's devastation.

Conclusion

By way of conclusion, the very limited nature of these imperatives for lawyers who might be facing dark times should perhaps speak to perils of confronting injustice (or worse) as a legal professional committed to acting in the world. Ronald Dworkin's critique of positivism saw as flaws in the theory both the positivist's rigid distinction between law and morals and the positivist's corresponding belief that legal rules offer us no guidance in hard cases.[73] He argued, instead, that law should be understood as containing principles that have weight to guide us in hard cases.[74] But Dworkin was also writing at the height of the American Civil Rights movement when legal challenges had been instrumental in promoting greater justice. I have tried here, by contrast, to recontextualize the positivist's insistence on the moral limitations of

[73] Dworkin at 46.
[74] Dworkin at 22-23.

legal rules and to show how it might be of assistance when the arc of the moral universe turns sharply toward injustice.

I asserted as a preliminary assumption that the positivist's sensibility about the orderly workings of a legal system is something that is acquired through the process of a legal education. To the extent this assumption is sound, it may be said to be one engrained in lawyers as a part of their training for membership in the profession. For those who contemplate that lawyers might be called upon to defend the legal system against autocratic attempts and to the extent that a positivist sensibility about law might help them in such an effort, it is indeed fundamental to their professional ethics that lawyers are members of a learned profession.