Penn State International Law Review

Volume 16
Number 2 *Dickinson Journal of International Law*

Article 4

1-1-1998

The Prosecution of Josef Altstoetter *et al.*: Law, Lawyers and Justice in the Third Reich

The Prosecution of Josef Altstoetter *et al.*: Law, Lawyers and Justice in the Third Reich

Matthew Lippman*

The vast literature on the Holocaust curiously contains few discussions of the role of German lawyers, judges and legal officials.[1] These largely cursory comments typically minimize the involvement of jurists in Nazi atrocities.[2] However, the fact is that the German legal profession and judiciary played a prominent role in the excesses of the Third Reich. For instance, an estimated 32,600 persons were sentenced to death during the twelve years of Hitler's regime.[3]

The tendency among German jurists following World War II was to attribute the excesses of the Nazi legal system to an exaggerated embrace of legal positivism.[4] Lawyers reacted by turning to natural law. Gustav Radbruch, a leading German professor of jurisprudence, argued in a 1945 essay that an unjust law neither merited the status of law nor rated respect or obedi-

---

* Ph.D. Northwestern; J.D., American; LL.M. Harvard; Professor, Department of Criminal Justice, University of Illinois at Chicago, Chicago, Illinois.

1. *But see* H. W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY (1989); INGO MULLER, HITLER'S JUSTICE IN THE COURTS OF THE THIRD REICH(Deborah Lucas Schneider trans., Harvard Univ. Press 1991). On the role of the National Socialist Party courts, *see* DONALD M. MCKALE, THE NAZI PARTY COURTS: HITLER'S MANAGEMENT OF CONFLICT IN HIS MOVEMENT, 1921-1945 (1974). This contrasts with the substantial literature on the Nazi medical establishment. *See* ROBERT N. PROCTOR, RACIAL HYGIENE MEDICINE UNDER THE NAZIS (1988).

2. *See* OTTO KIRCHHEIMER, POLITICAL JUSTICE THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 300 (1961).

3. *See* KOCH, *supra* note 1, at 232. Others place the number of death sentences at 16,560. *Id.*

4. *See, e.g.*, Gustav Radbruch, *Five Minutes of Legal Philosophy, in* III LAW, JUSTICE AND THE COMMON GOOD: THE GREAT DEBATE AND A SEARCH FOR MEANING 175, 177-78 (Sidney Hyman ed., 1988).

ence.[5] He went on to argue that legal doctrine must be leavened by the imperatives of the "law of reason."[6]

This natural law philosophy was reflected in a 1951 decision of a West German appellate court which was summarized in the Harvard Law Review.[7] The defendant desired to distance herself from her husband in order to pursue a sexual liaison.[8] She voluntarily reported to the authorities that her husband, while on leave from the army, had made derogatory remarks about Hitler.[9] Her husband subsequently was convicted of making statements which were inimical to the welfare of the Reich or which impaired the military defense.[10] He was sentenced to death, but subsequently was sent to the frontlines.[11] Following the war, a West German appellate court convicted the defendant-wife of unlawfully depriving her husband of liberty under the German Criminal Code of 1871.[12] The Court reasoned that the defendant-wife had accomplished this through voluntarily invoking a law which was contrary to the "'sound conscience and sense of justice of all decent human beings.'"[13]

The commentary to the case cautioned that the decision introduced a measure of uncertainty into legal obligations.[14] West Germans might reasonably fear that they would be subject to future prosecution for having obeyed the American Military Government.[15] On the other hand, the commentary noted that there was a need to counter the Third Reich's propagation of the philosophy of *Gesetz ist Gesetz* ("law is law") and to reintroduce a moral dimension into German jurisprudence.[16]

---

5. Radbruch argued that these legal principles had been embodied in international declarations on human and civil rights. *Id.* at 177-78.

6. *Id.*

7. *Criminal Law-In General-German Citizen Who Pursuant to Nazi Statute Informed on Husband for Expressing Anti-Nazi Sentiments Convicted Under Another German Statute in Effect at Time of Act,* 64 HARV. L. REV. 1005, 1006 (1951).

8. *Id.* at 1006

9. *Id.*

10. *Id.*

11. *Id.*

12. *Criminal Law-In General-German Citizen Who Pursuant to Nazi Statute Informed on Husband for Expressing Anti-Nazi Sentiments Convicted Under Another German Statute in Effect at Time of Act, supra* note 7, at 1006.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1006-07.

Oxford Professor H.L.A. Hart criticized the decision of the appellate court and argued that it would have been preferable to adopt a retroactive statute.[17] This would have stood as a frank admission that the authorities confronted a choice between two unattractive alternatives—either leaving the "self-interested wife" unpunished or compromising the precious principle prohibiting retroactive punishment.[18] The latter course would convey that the provision prohibiting comments critical of the Reich was too immoral to be obeyed while avoiding the philosophically perplexing proposition that the ordinance was too iniquitous to be acknowledged as a valid statute.[19]

Professor Lon L. Fuller of Harvard also endorsed the passage of a retroactive statute as a mechanism for distancing the contemporary German regime from its Nazi legacy.[20] But, at the same time, Fuller contended that the German legal order had so drastically departed from the requisites of the judicial process that it did not merit recognition as a legal system.[21] He explained that a legal system which relied upon the expansive interpretation of statutes, retroactive application of the law and reliance on terror in the streets, did not deserve to be denominated as lawful or merit obedience.[22]

What was the ethical and legal obligation of the German jurist who presided over the case of the "self-interested wife?" The West German Court acquitted the judge, suggesting that the appellate court determined that the jurist merely had fulfilled his legal responsibility while the defendant-wife voluntarily had reported her husband.[23] Was this distinction justified? The judge had elastically interpreted the applicable legal statutes in order to convict and sentence the husband to death.[24] This required the farfetched factual finding that the husband's statements had undermined the confidence of the German people in their leaders or had injured their will to defend the Reich.[25]

---

17. H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 620 (1958).

18. *Id.* at 620.

19. *Id.*

20. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630, 660 (1958).

21. *Id.*

22. *Id.*

23. *Criminal Law-In General-German Citizen Who Pursuant to Nazi Statute Informed on Husband for Expressing Anti-Nazi Sentiments, supra* note 7, at 1006.

24. *Id.*

25. The applicable legal statutes are quoted in Fuller, *supra* note 20, at 653-54.

The judge certainly was in a better position than the defendant-wife to appreciate the Nazi's perversion of legal principle. On the other hand, the judge merely had adhered to the precedential and interpretative principles of National Socialist jurisprudence and may have lacked criminal intent. This raises the issue of the moral and legal obligation of a legal practitioner confronting a rapacious regime. Do law and morality inhabit separate spheres? Should the jurist conform to the prevailing legal ideology? Resist? Make an effort to moderate the excesses of the regime? Refuse to participate? What penalty would the Nazi regime have meted out to the judge had he refused to convict the defendant-husband or to preside over the trial? Does the threat of a severe sanction constitute a legal defense or mitigate the jurist's guilt? Should we censure or condemn those who refuse to elevate principle over patriotism or pragmatism? Is it appropriate to subject jurists to international prosecution for having obeyed the dictates of domestic law?[26]

Initially, the Nazi regime's reorganization of the judiciary, legal profession and legal code are sketched. The judgment of an American occupation court in convicting Nazi lawyers and judges of war crimes and crimes against humanity and the disposition of individual defendants then are outlined. This provides a foundation for consideration of the causes underlying lawyers' acceptance of the perversion of legal principle in the Third Reich.[27]

I. Hitler's Legal Cosmology

Adolf Hitler, along with railway engineer Anton Dexler, in 1920, drafted the Party Program of the German Worker's Party, later renamed the National Socialist Workers' Party (NSDAP).[28] Article Nineteen demanded that "Roman law, which serves a materialistic world order, be replaced by a German common

26. The issues of the nature of law and individual obligation were raised by Fuller in his famous hypothetical question on the grudge informer. *See* Lon L. Fuller, *The Problem of the Grudge Informer, in* THE MORALITY OF LAW 245 (rev. ed. 1964). Fuller earlier raised many of the same themes in Lon L. Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616 (1949).

27. For a theoretical discussion of so-called "repressive law," *see* PHILIPPE NONET AND PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION TOWARD RESPONSIVE LAW 29-52 (1978).

28. The Programme of the German Workers' Party, *in* I NAZISM 1919-1945 A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS: THE NAZI PARTY, STATE AND SOCIETY 1919-1939 para. 19, 14, 15 (J. Noakes & G. Pridham eds., 1983).

law."[29] A number of the other provisions advocated the restructuring of legal relationships so as to insure Aryan supremacy.[30] For instance, the platform pronounced that only individuals of "German blood" were to be "citizens of the State" and "members of the nation."[31] Non-German immigration was to be prohibited and foreign nationals (non-citizens) were to be deported in the event of economic exigency.[32] The Party's ultimate aspiration was to racially purify the judiciary and other public and private institutions.[33]

The platform adopted a vigorous approach to crime, calling for the prosecution and execution of common criminals, usurers and war profiteers.[34] The party program also demanded a legal attack on false political reportage.[35] Non-Germans were to be prohibited from financial ownership or participation in German newspapers.[36] Individuals whose artistic creations were deemed corruptive of national life were to be prosecuted and their work suppressed.[37]

This inchoate legal program reflected Hitler's vicious vision of the future which was sketched in his tendentious and wide-ranging tract, *Mein Kampf*.[38] In this 1923 volume, penned from a prison cell, Hitler elaborated on the pillars of his philosophy of the "Folkish State"[39]—Aryan purity and supremacy,[40] anti-semitism[41] and anti-Marxism,[42] the unification of Germanic peo-

---

29. *Id.* This romantic invocation of a legal order which expressed German blood and soul remained the touchstone of Nazi legal ideology. Ironically, much of the Roman or Italian law which had been incorporated in Germany from the fifteenth century onwards was rooted in German folk law. *See* Karl Loewenstein, *Law in the Third Reich,* 45 YALE L.J. 779, 784-85 (1936). Roman law was attacked for having severed the connection between law and race and for having introduced an individualistic element into Teutonic law. *See* William J. Dickman, *An Outline of Nazi Civil Law,* 15 MISS. L.J. 127, 131 (1943).

30. The Programme of the German Workers' Party, *supra* note 28, at para. 4, 14.

31. *Id.*

32. *Id.* at para. 7-8, 14-15.

33. *See* KOCH, *supra* note 1, at 24.

34. The Programme of the German Workers' Party, *supra* note 28, at para. 18, 15.

35. *Id.* at para. 23, 15.

36. *Id.* at para. 23(a)(c), 15-16.

37. *Id.* at art. 23(c), 16.

38. ADOLF HITLER, MEIN KAMPF 427 (Ralph Manheim trans., 1971).

39. *Id.*

40. *Id.* at 294-300.

41. *Id.* at 57-58.

42. *Id.* at 535.

ples,[43] the expansion of living-space to the East[44] and the concentration of political power in a single gifted and great man.[45]

Hitler made little mention of the law in *Mein Kampf*. His most memorable passage portrayed the present political order as illegitimate—the true criminals were described as residing in parliament rather than in prison.[46] He wrote that "there is no use in hanging petty thieves in order to let big ones go free . . . some day a German national court must judge and execute some ten thousand of the organizing and . . . responsible criminals of the November betrayal [Versailles Treaty] and everything that goes with it."[47]

The law in the Weimar Republic, in Hitler's view, thus was supporting a corrupt, corroded and unnatural social order.[48] He wrote that this legal structure did not deserve obedience: "even if the methods of the ruling power are alleged to be legal a thousand times over, nonetheless the oppressed people's instinct of self-preservation remains the loftiest justification of their struggle with every weapon."[49]

Hitler expressed the same defiant attitude in his 1924 treason trial for having led the Bavarian Beer Hall Putsch. The future Fuhrer warned that he might be convicted, but that "'[h]istory, acting as the goddess of a higher truth and a higher justice, will one day smilingly tear up this verdict, acquitting us of all guilt and blame.'"[50] He went on to condemn those in power who have "'led our people into misery and ruin and amid the misfortune of the fatherland have valued their own ego above the life of the community.'"[51] The conservative and somewhat cowed judges sentenced Hitler to confinement for five years and he was paroled after having served six months.[52]

---

43. HITLER, *supra* note 38, at 398.
44. *Id.* at 654.
45. *Id.* at 82.
46. *Id.* at 545.
47. *Id.* at 545.
48. HITLER, *supra* note 38, at 96.
49. *Id.* at 96.
50. *Id.* at 686.
51. *Id.*
52. MULLER, *supra* note 1, at 16. The Munich Court refused to issue a mandatory deportation order against Hitler, explaining "'[i]n the case of a man whose thoughts and feelings are as German as Hitler's, the court is of the opinion that the intent and purpose of the law have no application.'" *Id.* Hitler also was received with great solicitude before the Supreme Court, in 1930, when he testified on behalf of three soldiers accused of attempting to organize a Nazi cell within the German military. *Id.* at 20-21.

Hitler viewed the imperatives of National Socialism as taking precedence over the laws of human society.[53] The Folkish State, in his view, was the natural order of the universe.[54] The notions of equality, equal rights and democracy were antiquated aspirations.[55] An individual's status depended upon their racial value and loyalty to the Reich.[56] The lower orders only were valued as beasts of burden.[57] Life was a struggle for supremacy and the law was a blunt instrument for shaping the societal structure in the interest of racial superiors.[58] Hitler, upon assuming power, immediately moved to establish a legal order based upon the principles of National Socialism.[59]

II. The Consolidation of the National Socialist Regime

On January 30, 1933, Hitler's long march to power culminated in his being sworn as Chancellor.[60] The National Socialists lacked a malleable majority and President Paul von Hindenburg was persuaded to call new parliamentary elections.[61]

Hitler's campaign was fueled by the arson of the Reichstag on February 27, 1933.[62] The historical evidence indicates that the building likely was ignited by Nazi activists.[63] The authorities, nevertheless, immediately arrested Martinus van der Lubbe, a Dutch Communist, and subsequently imprisoned Ernst Torgler, parliamentary leader of the Communist Party, as well as Bulgarian Communists Georgi Dimitroff, Blagoi Popov and Vassily Tanev.[64]

The day following the fire, Hitler persuaded President von Hindenburg to suspend various constitutional rights in order to combat the Communist conspiracy.[65] This included freedom of

---

53. HITLER, *supra* note 38, at 96-97.
54. *Id.*
55. *Id.* at 294-96.
56. *Id.*
57. *Id.* at 295.
58. The Programme of the German Workers' Party, *supra* note 28, at 474. Hans Frank, the head of the Nazi Lawyers' Association and of the Academy of German Law, in 1934, pronounced that in the National Socialist State the law was a means for the maintenance and achievement of the Folkish community. *Id.*
59. *See infra* text accompanying notes 60-92.
60. *See* WILLIAM SHIRER, THE RISE AND FALL OF THE THIRD REICH 263 (1950).
61. *Id.* at 265.
62. *Id.* at 265-270.
63. *Id.* at 270.
64. *See* GEORGI DIMITROV, THE REICHSTAG FIRE TRIAL 16-18 (1969).
65. *See* Decree, Feb. 28, 1933, by Reich President Von Hindenburg, Cosigned by Reich Chancellor Hitler and Reich Ministers Frick and Guertner, Suspending

expression and press, the right of assembly, the privacy of communications, the warrant requirement and the unrestricted right to private property.[66] A refusal to respect these restrictions was subject to criminal penalty and various crimes under the penal code were declared to be punishable by death.[67]

The National Socialists desired to dispatch the accused expeditiously to the gallows.[68] The Cabinet reluctantly deferred to the demands of international public opinion and brought the defendants to trial before the conservative Fourth Panel of the Reich Supreme Court.[69] The plan was to use the trial to persuade the public that Germany was under siege from a determined and demonic international movement which could only be countered by the Nazi Party.[70]

The police investigation relied on the testimony of minor criminals as well as individuals conscripted from concentration camps and prisons, many of whom had been subjected to mistreatment.[71] The examining magistrate led the prosecution witnesses through their testimony while maintaining four of the defendants in fetters for five of the seven month pre-trial period.[72] In the end, the magistrate returned an indictment for arson in which he conceded that he had not been able to determine the precise fashion in which four of the accused had participated in the alleged crime.[73] Minister Hermann Goring seemed unconcerned with the denial of due process during the pre-trial hearing, explaining that if the police and judicial investigations had been influenced, they had been "influenced in the right direction."[74]

The prosecution evidence at trial generally strained credulity. The mentally comatose and incompetent van der Lubbe was alleged to have climbed the icy facade of the Reichstag and to have executed 167 separate maneuvers in the space of eleven-to-fourteen minutes.[75] Another example is that the eyewitness testimony of a

---

Constitutional Rights and Instituting Other Measures, *in* III TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 160 (1951) [hereinafter JUSTICE CASE DOCS.]

66. *Id.* at 161.
67. *Id.* at 162.
68. DIMITROV, *supra* note 64, at 10.
69. *Id.* at 76.
70. *Id.* at 19-20.
71. *Id.* at 47-48.
72. *Id.* at 57.
73. DIMITROV, *supra* note 64, at 61.
74. *Id.* at 42.
75. *Id.* at 63-68.

waiter linking van der Lubbe with the other defendants was not corroborated by his co-workers and faltered in the face of evidence that the Bulgarians were absent from Berlin at the time.[76] The prosecution's presentation was punctuated by the rambunctious and rambling renditions of Hermann Goring.[77] The Reich Minister denounced the Communist conspiracy to take control of Germany, pausing to pronounce that Dimitrov was a "Communist crook who came to Germany to set the Reichstag on fire. In my eyes . . . [he is] nothing but a scoundrel, a crook who belongs to the gallows!"[78] Goring admonished the Court that "[w]hatever the verdict . . . I shall know how to deal with the guilty."[79]

Van der Lubbe was convicted of high treason and insurrectionary arson and was sentenced to death while the other accused were acquitted.[80] The Court, however, refused to exonerate these defendants, noting that the panel continued to harbor suspicions concerning their guilt.[81] The panel insisted that van der Lubbe's actions were part of a Communist conspiracy which had been frustrated by the National Socialist regime.[82] This conclusion was based on the casuistry that since the Communist Party rejected individual terrorism, the burning of the Reichstag "was not an act of individual terror, but an act of mass terror which was to be the occasion for a general strike leading to insurrection."[83]

Hitler termed the verdict "laughable"[84] while Nazi Party newspapers called the outcome a "miscarriage of justice" which confirmed that the legal system was "outmoded."[85] The trial modestly boosted the National Socialist's vote in the March 5, 1933, election to forty-four percent, which left the Nazi Party dependent on the Nationalists to form a parliamentary majority.[86] This nevertheless provided Hitler with sufficient support to pass the Enabling Act, on March 24, 1933, which authorized the government

---

76. *Id.* at 144-45.
77. *Id.* at 189.
78. DIMITROV, *supra* note 64, at 189.
79. *Id.* at 242.
80. *Id.* at 245.
81. *Id.* at 248-49.
82. *Id.* at 250.
83. DIMITROV, *supra* note 64, at 251. The Court exonerated the National Socialist Party of responsibility, reasoning that since the Nazis were assured of success in the Mar. 5, 1933, election there was no need to improve the Party's election prospects through igniting the fire. *See* MULLER, *supra* note 1, at 33.
84. MULLER, *supra* note 1, at 34.
85. *Id.* at 34.
86. *Id.* at 33.

of the Reich to "deviate from the constitution."[87] This effectively turned plenary power over to the Hitlerite regime. Hitler also acted to insure that, in the future, dissident defendants would receive an unsympathetic hearing; the trial of treason was transferred, on April 24, 1934, to the newly created People's Court.[88]

President Hindenburg succumbed to illness and passed away on August 2, 1934.[89] Three hours later, it was announced that Adolf Hitler would assume both the posts of Chancellor and President and would henceforth be referred to as Fuhrer and Reich Chancellor.[90] The armed forces were immediately required to swear an oath of loyalty to the Fuhrer rather than to the German State.[91]

III. The Nazi Judiciary

The German judiciary was the traditional preserve of the comfortable and conservative upper class.[92] Judges were committed to the maintenance of the monarchy and viewed themselves as soldiers in the struggle against internal subversion.[93]

The judiciary generally was antagonistic to the Weimar Republic and issued a series of decisions which exonerated members of opposition nationalist, right-wing and anti-semitic movements.[94] Hitler and eight of his supporters were brought to trial in February 1924 for attempting to overthrow the Bavarian and federal governments.[95] The Munich court determined that the defendants' criminal actions had been inspired by the patriotic and noble aspiration to combat those responsible for Germany's treasonous surrender in World War I.[96] Hitler, still on probation,

---

87. The "Enabling Act," *in* JUSTICE CASE DOCS., *supra* note 65, at 163.

88. *See* SHIRER, *supra* note 60, at 269. Hitler's derisive attitude was curious in that the Public Prosecutor, a civil servant under the supervision of the Nazi regime, had requested the Court to acquit the three Bulgarians. MULLER, *supra* note 1, at 34.

89. SHIRER, *supra* note 60, at 226.

90. *Id.*

91. *Id.*

92. *See* MULLER, *supra* note 1, at 6.

93. *Id.* The lengthy probationary period necessitated by the lack of turnover among sitting judges, combined with the modest remuneration and the requirements of a substantial financial deposit, limited access to the judiciary to the upper classes. Supervisory positions in the judiciary generally were filled with public prosecutors who were accustomed to complying with governmental dictates. *Id.* at 7.

94. *Id.* at 8-11.

95. *Id.* at 15.

96. *Id.*

faced a lengthy mandatory prison term and deportation.[97] He nevertheless was sentenced to six months in prison with the remainder of his sentence suspended.[98] The tribunal explained that "[i]n the case of a man whose thoughts and feelings are as German as Hitler's, the court is of the opinion that the intent and purpose of the law have no application."[99]

The conventional wisdom is that the judiciary was completely purged and purified by the Hitlerite regime.[100] But, lawyers and judges did not play a pronounced role in the National Socialist movement.[101] Following the ascendancy of the Hitlerite regime, only two long-time Nazis, Otto Thierack and Roland Freisler, held prominent positions in the judiciary.[102] Judicial posts under the Third Reich generally remained the preserve of conservative nationalists who eagerly embraced the ideology of National Socialism.[103] Judges continually struggled to maintain their professional independence and autonomy and resisted being politically subordinated to the Nazi regime.[104]

The National Socialists adopted a series of statutes which centralized judicial administration.[105] The Law for the Restora-

---

97. MULLER, *supra* note 1, at 16.

98. *Id.*

99. *Id.* In other instances, courts ruled that those targeted by the Nazi's anti-semitic slurs could not claim the protection of the libel laws. *Id.* at 18-19. For a full rendition of the judiciary's decisions, *see id.* at 10-24.

100. *See* James V. Bennett, *Notes on the German Legal and Penal System,* 37 J. CRIM. L. AND CRIMINOLOGY 368, 370-71 (1947).

101. MULLER, *supra* note 1, at 39.

102. *Id.*

103. *Id.*

104. *Id.* at 37. The judicial candidate was compelled to complete an arduous educational program. The National Socialist regime limited legal education to those males who were deemed to be ideologically fit. Following the completion of a three year law training, the candidate sat for an examination the successful completion of which qualified the individual to assume the status of a Referenda. This was followed by a period of three years of practical training. Those successfully completing this preparatory service were eligible to apply to sit for a second state examination, the Assessorexamen. The National Socialists introduced a probationary period which was to be completed prior to an Assessor's eligibility for appointment to the judiciary in order to test the candidate's political reliability. The Nazi regime also abrogated the constitutional guarantee of life tenure for judges. This process was further lengthened by the Nazi's imposition of an obligatory six month term of service in the labor service and two years in the military. In 1935, there were roughly 18,712 attorneys and 9,767 judges in the Reich. *See* Burke Shartel and Hans Julius Wolff, *German Lawyers-Training and Functions,* 42 MICH. L. REV. 521, 522-524 (1943). *See also* Stefan Riesenfeld, *A Comparison of Continental and American Legal Education,* 36 MICH. L. REV. 31, 33-37 (1937).

105. *See* Programme of the German Workers' Party, *supra* note 28, at 474-485.

tion of the Professional Civil Service of April 7, 1933, provided a legal basis for the removal of Jews as well as those whose prior political activity raised doubts concerning their capacity to act in the interests of the National Socialist State.[106] Civil servants also could be transferred or forcibly retired.[107] A second measure affirmed that civil servants legally were obligated to comply with the orders of governmental officials.[108] In December 1934, the Reich concentrated the administration of justice in the central government.[109] The Fuhrer later granted to himself the prerogative to issue pardons, a power which previously had been lodged in state governments.[110]

Karl Linz, head of the German Federation of Judges, met with Hitler in April 1933 and proclaimed that he was confident that the Fuhrer would safeguard judicial independence.[111] The National Socialist regime then proceeded to remove Social Democratic and Jewish judges; 643 Jews were expelled from office in Prussia alone.[112] The progressive Republican Federation of Judges also was dissolved.[113]

State judicial associations affiliated with the German Federation of Judges immediately placed themselves under the direction

---

106. *See* Law For the Restoration of the Professional Civil Service, (Apr. 7, 1933), *in* I NAZISM 1919-1945 A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS: THE NAZI PARTY, STATE AND SOCIETY, *supra* note 28, at 223-25.

107. *Id. See also* Decree, July 10, 1937, of the Fuehrer and Reich Chancellor Concerning Appointment of Civil Servants and Termination of Civil Service Status, *in* JUSTICE CASE DOCS., *supra* note 65, at 183.

108. *See* Extract from the German Civil Service Law (Deutsches Beamtengesetz, or "DBG"), Jan. 26, 1937, *in* JUSTICE CASE DOCS., *supra* note 65, at 182. The Civil Service Law of Jan. 26, 1937, established that civil servants could be compulsorily retired if they "could not be relied upon to support the National Socialist State at all times." This was extended to the judiciary in July 1938. *See* Programme of the German Workers' Party, *supra* note 28, at 485.

109. *See* Extracts from the Second Law Concerning the Transfer of the Administration of Justice to the Reich, Dec. 5, 1934, *in* JUSTICE CASE DOCS., *supra* note 65, at 172. Courts were to "pronounce sentence in the name of the German people." Extracts from the First Law for the Transfer of the Administration of Justice to the Reich, Feb. 16, 1934, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 1, 167, 168.

110. Decree, Sept. 3, 1939, of the Fuehrer and Reich Chancellor Concerning Execution of the Right of Pardon, *in* JUSTICE CASE DOCS., *supra* note 65, at 186. *See also* Letter from Lammers to Thierack, Oct. 23, 1942, Stating That the Opinion of the Gauleiter Has to Accompany Clemency Cases Submitted to Hitler, *in* JUSTICE CASE DOCS., *supra* note 65, at 510.

111. MULLER, *supra* note 1, at 37.

112. *Id.*

113. *Id.*

of the Federation of National Socialist Jurists and Adolf Hitler.[114] The Federation declared at its national meeting, in May 1933, that the organization's main task was to revise German law in accordance with the National Socialist ideal.[115] In October 1933, 10,000 lawyers raised their arms in the Nazi salute and swore "by the soul of the German people" that they would "strive as German jurists to follow the course of our Fuhrer to the end of our days."[116]

The basic principle that the judge was "independent and subject only to the law" remained unchanged.[117] However, Adolf Hitler now was the single source of law and the sole autonomous judge; subordinates were dutifully to conform to his commands.[118] The judges' oath of office shifted the locus of their loyalty from the State to the Fuhrer.[119]

The status and security of judges was less certain under the Civil Service Law of 1933, which abrogated life tenure for judges.[120] This apprehension was heightened by Hitler's April 26, 1942, speech to the Reichstag in which he attacked the paralysis of legal principle and procedures.[121] The Fuhrer fulminated that "Germany must not decline in order that formal law may live but Germany must live irrespective of the contradictions of formal justice."[122] He warned that he would intervene to remove judges whose decisions failed to fulfill the demands of National Socialism.[123] The Reichstag responded by authorizing the Fuhrer, as "holder of the supreme judicial power," to "impose due punish-

---

114. *Id.* at 38.
115. *Id.*
116. MULLER, *supra* note 1, at 38.
117. Friedrich Roetter, *The Impact of Nazi Law,* 1945 WISC. L. REV. 516, 535.
118. *Id.*
119. *Id.* The oath required judges to avow that "I swear: I will be loyal and obedient to the Fuehrer of the German Reich and people, Adolf Hitler, to adhere to the law, and to fulfill the duties of my office conscientiously so help me God." *Id.*
120. *See supra* notes 100 and 101 and accompanying texts.
121. Extract from Hitler's Speech to the German Reichstag, Apr. 26, 1942, Requesting Confirmation of the Right to Keep Everyone at His Duty and Expressing His Intention to Intervene Where Judges "Do Not Understand the Demand of the Hour," *in* JUSTICE CASE DOCS., *supra* note 65, at 436-37 (emphasis omitted). The case which precipitated Hitler's speech involved an individual who ill-treated his wife and received five years in prison. *Id.*
122. *Id.*
123. *Id.*

ment, and to remove anyone from his post, rank and position . . . without using prescribed procedures."[124]

In a July 1942 speech to the People's Court, Reich Minister Josef Goebbels, Head of Cultural Affairs, again warned that unsuitable judges would be removed from office.[125] He lectured that expediency, rather than a legally defensible result, should be the touchstone of judicial decisions.[126] The notion that judges were required to be convinced of a defendant's guilt was antiquated; those who threatened the State were to be "wiped out."[127] The sacrifices made by the mass of citizens during the war dictated that even minor transgressions should be met with capital punishment.[128]

The traditional role of a judge was radically revised. Judges were no longer to look to the law as an autonomous avenue of rational reasoning.[129] Legal methodology, henceforth, was to be informed by National Socialist ideology as explicated in the party program and the Fuhrer's speeches.[130]

Judicial self-government also was limited. A March 21, 1942, decree provided that various administrative decisions were to be decided by the chief judge of each court in accordance with orders issued by the Reich Ministry of Justice.[131] The chief judge was no longer expected to consult with the presidents of the various judicial senates and with the highest ranking associate judge.[132] He also was to be held responsible for his subordinate courts reaching verdicts which were in accord with National Socialist doctrine and was authorized to disregard the views of other jurists.[133] In addition, jurists were instructed to expedite proce-

---

124. Unanimous Decision of the Greater German Reichstag, Apr. 26, 1942, Concerning Unrestricted Powers of Adolf Hitler, *in* JUSTICE CASE DOCS., *supra* note 65, at 204-05.

125. Summary By Dr. Crohne of the Reich Ministry of Justice Concerning Goebbels' Speech to the Members of the People's Court, July 22, 1942, *in* JUSTICE CASE DOCS. *supra* note 65, at 452-53.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See supra* notes 121-128 and accompanying text.

130. *Id.*

131. *See* Fuehrer Decree, Mar. 21, 1942, Concerning Simplification of the Administration of Justice, *in* JUSTICE CASE DOCS., *supra* note 65, at para. III, 203 [hereinafter Simplification of the Administration of Justice].

132. *Id.*

133. *See* Extracts from Decree of Aug. 13, 1942 for the Further Simplification of the Administration of Justice in Criminal Cases, *in* JUSTICE CASE DOCS., *supra* note 65, at art. IV, 206-07. *See also* Roetter, *supra* note 117, at 537-38.

dures and to draft decisions in a clear and concise style.[134] Justice Minister Franz Schlegelberger attempted to blunt criticism of the judiciary by initiating criminal proceedings against two notaries.[135] One notary was accused of having purchased a picture postcard from a Jewish merchant.[136] The Party Court concluded that this indicated that the accused had failed to assimilate the importance of opposing world Jewry.[137]

Schlegelberger also invited Hitler to inform him of verdicts with which the Fuhrer disagreed so that Schlegelberger might educate judges into the "correct way of thinking."[138] In March 1941, Hitler objected to a district court's recognition of extenuating circumstances in a rape case.[139] The Court had reasoned that Polish farmhands lacked the sexual restraint of German workers.[140] Schlegelberger responded by dismissing the presiding judge of the penal chamber of the Lueneburg District Court as well the associate judges involved in the case.[141] The Fuhrer also disputed the thirty-month sentence meted out to Markus Luftgas, a Jew charged with hoarding 65,000 eggs.[142] Schlegelberger responded by turning Luftglass over to the Gestapo for execution.[143] Schlegelberger subsequently urged the Presidents of the

---

134. *See* Simplification of the Administration of Justice, *in* JUSTICE CASE DOCS., *supra* note 65, at para. I.

135. Two Orders Signed by Defendant Schlegelberger for the Initiation of Criminal Proceedings Against Notaries Because of Their Attitude Toward the National Socialist State, May 19, 1938 and Dec. 6, 1938, *in* JUSTICE CASE DOCS., *supra* note 65, at 363-65. The other notary allegedly had failed to support the absorption of Austria in a referendum and only had reluctantly adopted the German Salute in Court and opposed the Nazi Party. *Id.* at 364.

136. *Id.* at 363-65.

137. *Id.*

138. Letters from Defendant Schlegelberger to Hitler and Lammers, March 1941 and March 1942, Concerning Judicial Sentences Displeasing Hitler and Proposing Participation in Civil Proceedings by Public Prosecutors, *in* JUSTICE CASE DOCS., *supra* note 65, at 417. Schlegelberger also proposed that public prosecutors intervene into civil actions in order to assert the interests of the national community against the interests of the private parties. *Id.*

139. Correspondence Between the Reich Chancellery and Defendant Schlegelberger, March and April 1941, After Hitler Had Expressed Displeasure at a Sentence Granting Extenuating Circumstances to a Pole, *in* JUSTICE CASE DOCS., *supra* note 65, at 421-24.

140. *Id.*

141. *Id.* at 423-24.

142. *See* Correspondence Between Lammers, Schaub, and Defendant Schlegelberger, October 1941, Concerning Transfer of Markus Luftgas to the Gestapo for Execution, *in* JUSTICE CASE DOCS., *supra* note 65, at 429-31.

143. *Id.*

District Courts of Appeal to heed Hitler's call to impose the death penalty on individuals impeding the war effort.[144]

Otto Thierack, Schlegelberger's successor as Justice Minister, issued a series of Judges' Letters intended to assist jurists to reach decisions which served the interests of the national community.[145] Thierack described judges as the direct assistants of Adolf Hitler, who was the leader of the nation and the supreme judge.[146] Jurists were charged with aiding in the "annihilation of the unworthy" and with combating the "diseases in the body of the nation."[147] This required an "elite" corps of judges who did not "slavishly cling to the letter of the law" in developing decisions which served as the "best guide for the life of the community."[148] These judgments should be informed by an awareness of the aims and aspirations of the leadership of the State.[149]

Thierack pointed to several opinions which exemplified the judiciary's erroneous application of the law. He criticized a court's determination that the snatching of a handbag during a blackout constituted theft, rather than robbery, due to the absence of force.[150] Thierack admonished that the intricacies of legal anal-

144. *See* Circular Letter from Defendant Schlegelberger to Presidents of District Courts of Appeal, Dec. 15, 1941, Quoting from a Speech by Hitler and Stating that Judges and Public Prosecutors Must Keep Hitler's Words in Mind, *in* JUSTICE CASE DOCS., *supra* note 65, at 432. In order to insulate the judiciary from interference and intervention, Schlegelberger proposed that the authority to confirm sentences should be placed under the control the Reich Minister of Justice. The Presidents of the Courts of Appeal would be authorized to fix punishments. The Reich Minister of Justice also would be authorized to remove cases from a criminal court which evidenced an inability to preside over a case. *See* Four Communications, May-June 1942, Concerning the Authority for the Confirmation of Sentences, *in* JUSTICE CASE DOCS., *supra* note 65, at 438-39. Martin Bormann, Chief of the Party Chancellery, objected to the Fuhrer delegating the right to correct sentences and pointed to the fact that the Ministry of Justice and judicial officers could not be relied upon to correct inappropriate decisions. *See* Letter by Bormann Opposing Schlegelberger's Proposed Decree and File Note by Lammers Concerning It, *in* JUSTICE CASE DOCS., *supra* note 65, at 442.

145. Circular Letter from Thierack to Judges, Sept. 7, 1942, Explaining the Establishment and Function of the Judges' Letters, *in* JUSTICE CASE DOCS., *supra* note 65, at 523-24.

146. The First Issue of the Judges' Letters, Oct. 1, 1942, *in* JUSTICE CASE DOCS., *supra* note 65, at 525.

147. *Id.*

148. *Id.* at 526.

149. *Id.*

150. *Id.* at 529.

ysis were not decisive.[151] The death penalty, rather than two years in prison, should have been meted out to the defendant whose endangerment of the streets was tantamount to treason.[152] Invoking the familiar medical metaphor, Thierack proclaimed that it was better for the judge to exterminate the "bacillus" than confront a "contaminated multitude later on."[153]

Thierack criticized the Court of Guardians for sentencing two Jehovah's Witnesses to probation for refusing to inculcate their daughter with Nazi ideology.[154] The Court determined that the parents otherwise were raising their daughter in a responsible fashion and that it was sufficient for them to agree that they would refrain from impeding their daughter's education.[155] Thierack admonished that National Socialist jurisprudence dictated that parents exhibiting indifference to the obligations of Reich citizenship should be adjudged unfit to raise their child.[156]

Thierack also instructed judges to distinguish between German and Jewish defendants.[157] A District Court was criticized for sentencing a Jewish defendant to two years in prison for currency violations.[158] Thierack noted that the Court erroneously had imposed a punishment which was suitable for a German defendant.[159] The defendant, however, was a Jew—a member of a group which had plundered Germany and had compiled a considerable fortune.[160] The Justice Minister advised that these parasites merited the most severe punishment available.[161]

The Ministry of Justice regularly convened meetings with prosecutors and the presidents of district courts and required the presidents to submit reports in order to coordinate the judicial response to politically significant cases.[162] The judiciary also was

---

151. The First Issue of the Judges' Letters, Oct. 1, 1942, *in* JUSTICE CASE DOCS., *supra* note 65, at 529.

152. *Id.*

153. *Id.* at 530.

154. Extracts from Issue No. 3 of the Judges' Letters, Dec. 1, 1942, Summarizing Two Cases and Giving in Each Case the Opinion of the Reich Minister of Justice, *in* JUSTICE CASE DOCS., *supra* note 65, at 537-39.

155. *Id.*

156. *Id.*

157. The First Issue of the Judges' Letters, Oct. 1, 1942, *in* JUSTICE CASE DOCS., *supra* note 65, at 533-34.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See* Report from Defendant Rothenberger to Defendant Schlegelberger, May 11, 1942, Noting Rothenberger's Intention to Intensify "The International

under constant pressure and scrutiny from the Security Police[163] and intelligence agencies.[164] Judges generally relented, acquiescing, for example, in the Gestapo's demand that they refrain from inquiring into the apparent mistreatment of detainees appearing before their court.[165]

Some Nazi loyalists remained critical of the judiciary's continued independence and autonomy. The Chief of the Security Police submitted a report to the Ministry of Justice, in September 1942, which noted that the efforts to control judicial decision-making had not achieved the desired uniformity.[166] These innovations merely had succeeded in burdening, delaying and paralyzing the disposition of cases.[167] He advised that the appropriate outcomes could be achieved only through the political and ideological indoctrination of the judiciary.[168]

State Secretary Curt Rothenberger drafted a memo, in rebuttal, which articulated a vision of an independent judiciary which was compatible with National-Socialism.[169] He argued that an autonomous and respected judicial branch was essential to the creation of a strong, stable State which was free from crime and corruption.[170]

Direction and Steering of the Administration of Justice," and Enclosing Copies of Rothenberger's Instructions to Judges in His District, *in* JUSTICE CASE DOCS., *supra* note 65, at 483, 486-88.

163. *See* Report from the President of the Court of Appeal in Hamm, July 7, 1942, Concerning the Alarm Among Judges Caused by Hitler's Reichstag Speech of Apr. 26, 1942, and Certain Activities of the Gestapo and the Nazi Party Affecting Legal Matters, *in* JUSTICE CASE DOCS., *supra* note 65, at 448-51.

164. *See* Letter from the President of the Berlin Court of Appeal to Defendant Schlegelberger, Jan. 3, 1942, Commenting Upon "Influence Exerted Upon the Judges," *in* JUSTICE CASE DOCS., *supra* note 65, at 433. The President of the Berlin Court of Appeal complained that prosecutors were approaching judges during trial in order to convey the view of the Justice Ministry concerning the appropriate sentence. Judges often agreed to mete out a sentence prior to the closing arguments, reducing the attorney's arguments to a mere formality. The President of the Court of Appeals requested that prosecutors refrain from approaching judges immediately before trial. *Id.* at 435-36.

165. Roetter, *supra* note 117, at 539.

166. Secret Report of the Chief of the Security Police and SD, Sept. 3, 1942, Concerning "The Control of Penal Jurisdiction" and the Reactions of Judges Thereto, *in* JUSTICE CASE DOCS., *supra* note 65, at 454, 459-60.

167. *Id.*

168. *Id.* at 456.

169. Correspondence Between the Reich Chancellery and Hitler's Adjutant, May and June 1942, Mentioning that Hitler Had Considered "Noteworthy" the Rothenberger Memorandum on Judicial Reform, *in* JUSTICE CASE DOCS., *supra* note 65, at 467, 473-74.

170. *Id.*

Rothenberger's report, which reportedly was well received by Hitler, portrayed party activists as impatient with the impediments created by legal rules and procedures.[171] On the other hand, members of the judiciary complained about innovations in legal procedures and the decline in their position and prestige.[172]

Rothenberger, as a compromise, proposed the creation of an independent, but avowedly National Socialist judiciary.[173] He conceded that, as presently constituted, the judiciary was ill-prepared to "judge 'like the Fuehrer.'"[174] His solution was the appointment of a new breed of jurists who were capable of representing the "one law and the one justice."[175] These were to be mature individuals, recruited from outside civil service channels, and schooled to eschew logical and abstract thinking in favor of a methodology based upon "'practical everyday life.'"[176]

IV. The Legal Profession

A. Purging the Legal Profession

The Association for National Socialist German Jurists (BNSDJ) was established in 1928 under the leadership of Hans Frank.[177] The Association held little appeal for the established legal elite and, as late as 1932, had attracted only 1347 members.[178] These lawyers primarily were drawn from the ranks of young jurists and the least successful members of the profession.[179] The National Socialists' electoral success attracted an increasing number of adherents and enrollment had more than doubled by the time that Hitler was sworn in as Chancellor.[180]

---

171. *Id.* at 470.
172. *Id.*
173. *Id.* at 474.
174. Correspondence Between the Reich Chancellery and Hitler's Adjutant, May and June 1942, Mentioning that Hitler Had Considered "Noteworthy" the Rothenberger Memorandum on Judicial Reform, *in* JUSTICE CASE DOCS., *supra* note 65, at 474.
175. *Id.* at 478 (emphasis omitted).
176. *Id.* (emphasis omitted).
177. *See* Kenneth C.H. Willig, *The Bar in the Third Reich,* 20 AM. J. LEGAL HIST. 1, 3-4 (1976). On the history of the modern German legal profession, *see* Kenneth F. Ledford, *German Lawyers and the State in the Weimar Republic,* 13 L. & HIST. REV. 117 (1995). *See generally* Dietrich Rueschemeyer, *Comparing Legal Professions Cross-nationally: From a Professions-centered to a State-centered Approach,* 1987 AM. BAR FOUND. RES. J. 415 (1986).
178. Willig, *supra* note 177, at 3.
179. *Id.*
180. *Id.* at 4.

Many of these individuals were motivated by expediency and pragmatism.[181] Others joined in response to the insecurity caused by an expanding and socially diversified legal profession which was experiencing a decline in income, political power and social prestige.[182] Three-fourths of the bar was suffering from severe economic and social dislocation and the National Socialist plan to purge the legal profession of Jews, other non-Aryans and women appeared to offer an economic elixir.[183]

On March 26, 1933, the administrative council of the German Bar proclaimed its support for the Nazi regime's nationalistic program.[184] Following the National Socialist's April electoral victory, Bar President Rudolf Dix endorsed Hitler's reconstruction of the Reich and requested the Jewish members of the Bar Council to resign.[185] Membership in the BNSDJ increased to roughly 70,000 during the first few months of Hitler's ascendancy to power.[186] In March 1944, existing local and national bar associations proclaimed their desire to exclude non-Aryans from legal practice and were voluntarily incorporated into the BNSDJ.[187]

Nazi ideologue Julius Streicher issued a steady stream of anti-semitic slander which identified Jewish lawyers with corruption, the coddling of criminals, and sexual perversity.[188] Carl Schmidt—the leading conservative academic—decried the Jewish influence in legal science and organized a conference which condemned the semitic ideas which had been insinuated into bankruptcy, criminal and Roman law.[189] Hundreds of articles, court opinions and speeches were issued during the first few years of the Hitlerite regime which augmented this attack on the "Jewish features" of the legal system.[190]

The Civil Service Law of 1933 led to the purging from government of suspected dissidents and Jews who had not participated in

---

181. *Id.*
182. *Id.*
183. Willig, *supra* note 177, at 4.
184. Udo Reifner, *The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy,* 32 MCGILL L.J. 96, 116 (1986).
185. *Id.* at 116.
186. *Id.* at 105.
187. Willig, *supra* note 177, at 4-5. The exclusion of Jews did little to solve the economic exigency experienced by members of the German legal profession. *See* Reifner, *supra* note 184, at 121.
188. Reifner, *supra* note 184, at 107-08.
189. *Id.* at 122.
190. *Id.*

the First World War.[191] This resulted in roughly 1500 lawyers being expelled from the public service, ninety percent of whom were Jews.[192] In April 1933, the National Socialist regime also passed the Law Concerning Admission to The Bar which revoked the membership of lawyers discharged from the civil service and prohibited the admission of non-Aryans as well as individuals who had undertaken communist activities.[193] The statute exempted World War I veterans and those whose admission pre-dated the Weimar Republic.[194]

These legislative initiatives resulted in the exclusion from practice of a modest percentage of Jewish lawyers.[195] The remainder were expelled in 1938.[196] Law faculties also were cleansed of roughly twenty-two percent of their faculties.[197] This primarily was comprised of prominent Catholic, Jewish and politically liberal academics.[198]

B. Reorganizing the Legal Profession

The National Bar Association was reorganized into the National Lawyer's Chamber (RRAK) in 1934.[199] This resulted in the creation of a centralized and hierchical government licensing, regulatory and disciplinary agency.[200] Political purity, rather than

---

191. *See* Law, Apr. 7, 1933, Concerning Admission to the Bar *in* JUSTICE CASE DOCS., *supra* note 65, at 164-65.

192. Reifner, *supra* note 184, at 117.

193. Law, Apr. 7, 1933, Concerning Admission to the Bar, *in* JUSTICE CASE DOCS., *supra* note 65, at 164-65. In 1933, female lawyers were denied access to the legal profession and elderly attorneys were forced into retirement. Reifner, *supra* note 184, at 117.

194. Law, Apr. 7, 1933, Concerning Admission to the Bar, *in* JUSTICE CASE DOCS., *supra* note 65, at 164-65.

195. Willig, *supra* note 177, at 5. Prior to these restrictions, sixteen percent of the legal profession was Jewish. *Id.* In Berlin, Jews constituted a majority of the legal profession. *Id.* Only 487 of the city's 1998 Jewish lawyers were disbarred in 1933. *Id.* In Jan. 1937, 32.6 percent of the Berlin bar remained non-Aryan. *Id.*

196. Reifner *supra* note 184, at 118-19. In 1933, there were 19,276 advocates and 9943 judges in a German population of 70 million. *Id.* at 104. 4394 members of the German bar were Jewish. *Id.* In 1943, the number of judges and lawyers had declined to 1600 and 12,000 respectively. *Id.* at 104-05.

197. *See* Detlev F. Vagts, *International Law In the Third Reich,* 84 AM. J. INT'L L. 661, 676 (1990).

198. *Id.* at 676. *See also* James Wilford Garner, *The Nazi Proscription of German Professors of International Law,* 33 AM. J. INT'L L. 112, 114 (1939). A significant number of the prominent Jewish lawyers who had been expelled met tragic fates. *See* Reifner, *supra* note 184, at 120.

199. Willig, *supra* note 177, at 6.

200. *Id.* at 6-7.

professional competence, was established as the requisite for admission to the bar.[201]

Law students were to be inculcated with the Nazi worldview. The German statute on legal education proclaimed that "German legal science is . . . National-Socialist."[202] The core curriculum was infused with Nazi ideology and stressed the relationships between blood and soil and between race and culture.[203] The comprehensive legal examination, administered following candidates' completion of law school, was supplemented by a character test.[204] This examined candidates' ability to undergo physical hardship, devotion to the Nazi cause and comprehension of National Socialist doctrine.[205] Those who passed the character test, but flunked the academic component, customarily were permitted to retake the exam or had their results annulled by the Fuhrer.[206]

Those admitted to the legal profession were required to swear an oath of personal loyalty to Adolf Hitler.[207] The new constitution of the German Bar declared in the preamble that the lawyer was a central component of the German administration of justice and was required to subordinate his legal skills to the National Socialist cause.[208] Those who contravened their broad-ranging ethical obligations were subject to prosecution before disciplinary courts which were authorized to disbar and fine attorneys.[209] Lawyers were disbarred for failing to vote in elections and plebescites and for socializing with Jews.[210] Attorneys also were expelled for sharing fees with disbarred Jewish lawyers, neglecting to greet colleagues with the Nazi salute and for failing to contribute to the Nazi Party.[211]

---

201. *Id.*

202. Max Rheinstein, *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany,* 1938 WISC. L. REV. 5, 29 (Annex, Maxims for the Study of Legal Science, issued by the Reich and Prussian Minister of Education, Jan. 18, 1935).

203. *Id.* at sec. 4(2)-(3), 36.

204. *Id.* at 550.

205. *Id.* at 551.

206. *Id.* at 550-51.

207. Willig, *supra* note 177, at 7. For the text of the oath, *see* Roetter, *supra* note 117, at 542.

208. Willig, *supra* note 177, at 7.

209. *Id.* at 7-8.

210. *Id.*

211. Reifner, *supra* note 184, at 112-13.

Lawyers were also required to receive approval from government and party officials, as well as from the chief judge of the relevant court, prior to undertaking the representation of political dissidents.[212] Attorneys' contact with their clients and access to evidence and witnesses was subject to the consent of the prosecutor.[213] A lawyer whose client committed perjury or attacked a court's decision was considered an accomplice in his client's crime.[214] An attorney lodging a civil case against the police and security services also risked arrest and confinement in a concentration camp.[215]

In one case, an attorney withdrew from the representation of the son of a family friend who had been arrested, along with other Catholic activists, for engaging in an anti-government protest.[216] The lawyer was acquitted of contravening the common front against "political Catholicism" after explaining that he had undertaken the representation in order to discover the identity of the leaders of the agitation.[217]

The fate of well-known defense attorney Harry Litten illustrates the continuing threat confronting independent-minded lawyers and the National Socialist's conflation of political liberalism and anti-semitism. Litten had obtained the acquittal of a member of the Communist Party accused of killing a member of the Security Service.[218] The Nazi regime unsuccessfully sought to persuade Litten to testify that his client had perjured himself on the stand.[219] The police then subjected Litten to a cycle of abuse and torture and launched a public campaign against "'Jewish attorney Litten.'"[220] Although the authorities were aware that Litten was not a Jew, he was interned in the Jewish compound of a concentration camp and executed in 1937.[221]

---

212. Willig, *supra* note 177, at 8.
213. *Id.* at 9.
214. *Id.*
215. *Id.* at 8-11. The economically precarious position of lawyers placed them in a vulnerable situation. Judges refused to assign cases or to award fees to overly aggressive defense attorneys. Reifner, *supra* note 185, at 113.
216. Roetter, *supra* note 117, at 543.
217. *Id.*
218. Reifner, *supra* note 184, at 108-09.
219. *Id.*
220. *Id.* at 109.
221. *Id.*

C. Lawyers' Letters

Hitler predictably held lawyers in low regard, variously referring to attorneys as "'traitors,'" "'idiots'" and "'absolute cretins.'"[222] He noted that they were "essentially unclean" and were accustomed to resorting to the "lie" in their defense of the "'underworld.'"[223] The Fuhrer vowed, in 1942, "'[t]o make every German realize that it is a disgrace to be a lawyer.'"[224]

Justice Minister Otto Thierack assured the Fuhrer that he would insure that lawyers adhered to the dictates of National Socialist ideology.[225] He instituted a series of Lawyers' Letters which reminded attorneys that they were part of the fighting force of the Reich and that they were expected to devote themselves to the safeguarding of national security.[226]

Thierack noted that although judicial procedures had been subject to minor modification, the role of defense attorneys had been radically revised.[227] Defense attorneys were to continue as advocates for the accused, but their primary responsibility was to serve the interests of the Reich.[228]

Criminal lawyers were to strive to achieve a verdict which contributed to the welfare of society rather than an acquittal or reduction of sentence.[229] This required defense attorneys to cooperate with prosecutors and judges in properly disposing of defendants.[230] Defendants no longer were to be judged solely in accordance with legal technicalities.[231] They, instead, were to be evaluated in accordance with their character and devotion to the National Socialist cause.[232]

Thierack selected various cases which illustrated the failure of defense attorneys to appreciate that they were to function as "administrators of justice" rather than as a "unilateral representa-

---

222. Willig, *supra* note 177, at 11.
223. *Id.*
224. *Id.* at 13.
225. *See* Extracts from Lawyers' Letter No. 1 Signed by Reich Minister of Justice Thierack, Oct. 1, 1944, *in* JUSTICE CASE DOCS., *supra* note 65, at 554-55.
226. *Id.*
227. *Id.* at 561.
228. *Id.*
229. *Id.* at 564.
230. Extracts from Lawyers' Letter No. 1 Signed by Reich Minister of Justice Thierack, Oct. 1, 1944, *in* JUSTICE CASE DOCS., *supra* note 65, at 564.
231. *Id.*
232. *Id.*

tive of the interests of the defendant."[233] He pointed to the lawyer for two women accused of demonstrating kindness to Allied prisoners who had pled that he would be pleased if German prisoners were shown the same solicitude.[234] Thierack admonished that it was inappropriate to demonstrate kindness to enemies of the Reich and condemned the attorney for encouraging anti-social behavior.[235]

Defense attorneys also were warned against diminishing the significance of their client's criminal actions and burdening the courts with petitions for mitigation and mercy.[236] The proper course was to cooperate with the court in instructing the accused on the required canons of conduct.[237] In one instance, an attorney vigorously demanded the acquittal of a factory owner who had violated food regulations in order to feed his workers.[238] Thierack attacked the lawyer for having imparted the impression that a criminal conviction and sentence would be unfair and contrary to the societal interest.[239]

Thierack further criticized defense attorneys for vigorously cross-examining complainants.[240] A lawyer, in one case, disputed whether a statement to a women which denigrated her son, who had been killed in the war, constituted defamation.[241] The attorney suggested that the mother was hysterical and high-strung.[242] Thierack admonished that "[h]e who tries to cover such a criminal deed, particularly as a representative of the law, puts himself ideologically on a level with the defendant."[243]

Those lawyers deemed fit to practice thus were expected to share a unanimity of aim with prosecutors and judges. The final diminution in the independent status of the legal profession occurred in 1943, when attorneys were stripped of their distinctive status and placed under the jurisdiction of the civil service

---

233. *Id.* at 561.
234. *Id.* at 566.
235. Extracts from Lawyers' Letter No. 1 Signed by Reich Minister of Justice Thierack, Oct. 1, 1944, *in* JUSTICE CASE DOCS., *supra* note 65, at 566.
236. *Id.* at 567
237. *Id.*
238. *Id.*
239. *Id.*
240. Extracts from Lawyers' Letter No. 1 Signed by Reich Minister of Justice Thierack, Oct. 1, 1944, *in* JUSTICE CASE DOCS., *supra* note 65, at 567.
241. *Id.*
242. *Id.*
243. *Id.*

disciplinary court.[244] In addition to transforming the judiciary and legal profession, the National Socialists initiated a radical reorganization of the courts.

V. The Reorganization of the Courts

A. Special Court

A March 1933 decree created Special Courts within the district of each court of appeal.[245] The judges were drawn from the district from which the Special Court was established. The Special Courts initially were provided with jurisdiction over offenses established by the February 28, 1933, decree suspending constitutional rights. This included inciting disobedience to government orders, sabotage and the assassination of governmental officials.[246]

Proceedings were expedited. Special Courts were authorized to issue arrest warrants[247] and to commit defendants to trial without a hearing.[248] The judges also were authorized to refuse any evidence which was considered unnecessary "for clearing up the case."[249] Most significantly, legal appeals were not provided against the decisions of the Special Courts.[250] This effectively permitted the judges to conduct trials without regard for procedural requirements.[251] Sentences immediately were to be meted out in those instances in which an offender was apprehended in the course of a criminal act or in which his or her guilt was obvious.[252]

The jurisdiction of the Special Courts later was expanded to include a wide range of offenses, including listening to prohibited radio broadcasts and offenses against the war economy.[253] Jurisdiction also was provided over offenses in which prosecution was required by the "gravity or the wickedness of the act, by the

---

244. Willig, *supra* note 177, at 14.

245. Decree of the Reich Government, Mar. 21, 1933, on the Formation of Special Courts, *in* JUSTICE CASE DOCS., *supra* note 65, arts. 1, 2, 4, at 218-19 [hereinafter Special Courts].

246. *Id.* art. 9, at 219-20.

247. *Id.*

248. *Id.* art. 11, at 220.

249. *Id.* art. 13, at 221.

250. Special Courts, *in* JUSTICE CASE DOCS., *supra* note 65, art. 16(1), at 221.

251. *Id.* art. 13, at 221.

252. Special Courts, Decree of Feb. 21, 1940, Concerning Jurisdiction of Criminal Courts, Special Courts, and Additional Provisions of Criminal Procedure, *in* JUSTICE CASE DOCS., *supra* note 65, art. 23, at 222-24 [hereinafter Special Courts II].

253. *Id.* art. 13, at 223.

public excitement aroused or in consideration of a serious threat to public order or security."[254]

The increasing number of prosecutions required a continuous expansion of Special Courts.[255] Reich Minister of Justice Otto Thierack wrote a memo in 1943, pointing out that practically all criminal cases were being brought before the Special Courts. The Special Courts, as a result, no longer were able to sentence offenders swiftly and the proliferation of panels threatened the uniformity of sentences.[256] Thierack also complained that there was a shortage of politically qualified jurists to staff the courts.[257] The increasing resort to Special Courts is illustrated by the fact that in Hamburg, between 1936 and 1939, one out of every six criminal trials was conducted before Special Courts.[258] By 1943, this number had risen to two-thirds of all criminal cases.[259]

As the German war effort faltered, judges on the Special Court issued increasingly draconian decisions. For instance, in 1944, office messenger Georg Hopfe, along with two others, broke into a burning building and rescued valuables.[260] Hopfe helped himself to a bottle of perfume and placed a knockwurst in his coat pocket while his companion day laborer Fritz Nauland snatched two bars of soap.[261] Hopfe and Nauland were brought before the Weimar Special Court which, despite testimony that Hopfe was mentally challenged, sentenced both defendants to death.[262] The Court stressed that the value of the property was irrelevant; the commission of this "despicable crime" had placed the defendants "outside the bounds of society."[263]

---

254. *Id.* art. 14, at 223.

255. *See* Letter from Under Secretary Freisler to Presidents and Public Prosecutors at Courts of Appeal, Sept. 26, 1941, Concerning Handling of Certain Wartime Crimes by Special Courts to Speed Up Proceedings, *in* JUSTICE CASE DOCS., *supra* note 65, at 226. Cases were to be processed expeditiously and a Court was considered "overloaded" if a monthly average of more than forty new indictments was filed. *Id.*

256. *Id.*

257. *See* Special Courts II, Letter from Thierack, Reich Minister of Justice, to Presidents of Courts of Appeal, July 5, 1943, Discussing Development and Effectiveness of Special Courts and Proposing Limitations on Their Jurisdiction, *in* JUSTICE CASE DOCS., *supra* note 65, at 227-29. Thierack urged that the Special Courts transfer trivial cases to regular courts. *Id.* at 230.

258. *Id.*

259. MULLER, *supra* note 1, at 158.

260. *Id.*

261. *Id.*

262. *Id.* at 159.

263. *Id.*

The Special Court was particularly harsh on crimes deemed to have been committed by exploiting wartime conditions. Hugo Gohring, a railroad worker and the father of seven, was condemned to death for removing items from damaged packages which he was unloading.[264] The Special Court reasoned that the defendant's delicts had been facilitated by the fact that only low-quality packaging materials were available as a result of the war.[265]

B. The People's Court

The People's Court was established immediately following the Reichstag Fire case.[266] The Court was to adjudicate charges of treason and high treason which formerly fell within the original jurisdiction of the Supreme Court.[267] The Tribunal was to sit in five judge panels, only two members of which were required to be professional judges.[268] The lay judges generally were drawn from the military, security services and party hierarchy.[269] The Special Court was divided into six sections serving various geographic areas

---

264. MULLER, *supra* note 1, at 156-57.

265. *Id.* at 157.

266. SHIRER, *supra* note 60, at 371.

267. *See supra* note 88 and accompanying text. High treason entailed acts undertaken to incorporate German territory or to detach territory from the Reich through violence or the threat of violence. *See* Extracts from the Law, Apr. 24, 1934, Amending Provisions of Criminal Law and Criminal Procedure, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 80, 169. Treason entailed acts undertaken on behalf of a foreign government with the intention of causing a war or forcible measures against the Reich or causing other serious disadvantages. *Id.* art. 91, at 171.

268. Extract from Law of Apr. 24, 1934 Amending Regulations of Penal Law and Criminal Procedure, *in* JUSTICE CASE DOCS., *supra* note 65, at 231-233. The scope of the Tribunal's jurisdiction later was expanded to include various acts of sabotage and economic sabotage. *See* Extracts from Decree, Feb. 21, 1940, Concerning the Jurisdiction of Criminal Courts, Special Courts, and Additional Provisions of Criminal Procedure, *in* JUSTICE CASE DOCS., *supra* note 65, at 234-35.

269. Letter from the Office of the Supreme Chief of the SA, Signed by Defendant Klemm, Dec. 4, 1936, Proposing Five SA Leaders as Associate Judges of the People's Court, *in* JUSTICE CASE DOCS., *supra* note 65, at 235. By the end of 1941, the People's Court consisted of six senates with seventy-eight professional judges and seventy-four prosecutors. KOCH, *supra* note 1, at 90. These professional judges and prosecutors, with the exception of three judges and two prosecutors, were all members of the National Socialist Party. *Id.* Most had joined after Hitler's ascendance to power. *Id.* There were eighty-one lay judges—seventy-one were Nazi Party functionaries and the remainder were Wehrmacht officers of at least the rank of colonel. *Id.*

in Germany and the occupied territories.[270] A Special Senate was established to review decisions.[271]

The Court's august stature was indicated by Hitler's decree that the judges sitting on the People's Court were to wear the red robe which formerly had been reserved for the Supreme Court.[272] This symbolized the fact that the Court was to combat enemies at home in the same way that the military fought foes abroad.[273]

The decisions of the People's Court became progressively draconian.[274] In 1943 3338 sentences were meted out.[275] These sentences included 1662 death sentences and 876 sentences of between five and fifteen years of hard labor; 181 persons were acquitted and 723 cases were settled through alternative avenues.[276] The latter expression was a euphemism connoting that the defendants had been handed over to the Gestapo for execution.[277] In 1942, 1192 persons were sentenced to death; and in 1944, an additional 2097 individuals were subjected to capital punishment.[278] Death sentences comprised between forty-six and forty-nine percent of the Court's verdicts between 1942 and 1944, while acquittals ranged from between four and eleven percent.[279] Reich Justice Minister Otto Thierack, fearing a popular reaction against the Court's repressive decisions, advised Otto Freisler, his successor as President of the People's Court, that judges who were capable of calmly and clearly explaining the basis of their judgments should be selected in political cases.[280]

---

270. Memorandum from Freisler, President of the People's Court, Apr. 1, 1944, Concerning Assignment of Various Types of Cases to the Several Senates of the People's Court, *in* JUSTICE CASE DOCS., *supra* note 65, at 238.

271. Extracts from Law of Sept. 16, 1939, Amending Regulations of General Criminal Procedure, Military Procedure and the Penal Code, *in* JUSTICE CASE DOCS., *supra* note 65, at 233.

272. MULLER, *supra* note 1, at 142.

273. *Id.*

274. *Id.* at 143.

275. *Id.*

276. *Id.*

277. Letter from Freisler, President of the People's Court, to the Reich Minister of Justice, Jan. 17, 1944, Transmitting Summary of Activity of the People's Court from Jan. 1 to Dec. 31, 1943, *in* JUSTICE CASE DOCS., *supra* note 65, at 236, 237.

278. MULLER, *supra* note 1, at 143 (Table 1).

279. *See* KOCH, *supra* note 1, at 234.

280. *See* Letter from the Reich Minister of Justice to the President of the People's Court, Oct. 18, 1944, Commenting Upon Its Functions and the Selection of Presiding Judges "In Particularly Important Political Cases," *in* JUSTICE CASE DOCS., *supra* note 65, at 241-42. Thierack suggested that the Court had provided an overly expansive definition of statements which were encompassed within the delict of defeatism. *Id.* at 242.

A disproportionate number of defendants were charged with undermining morale. A statute required the imposition of capital punishment against any individual who "publicly attempts to paralyze or undermine the will of the German or an allied nation to defend itself."[281] Courts reasoned that even a private remark could potentially be transmitted to a larger audience or might influence public opinion and therefore fell within the statute.[282] Oskar Beck, a half-Jewish, Austrian radio repairman, and former Social Democrat, was sentenced to death for remarking to one of his female customers that "[d]o you know that every woman who goes out to work, sends a soldier to his death."[283] The People's Court ruled that Beck had knowingly and intentionally impaired the willingness of his customer and others to support the war effort.[284] Beck's remark had the effect of undermining the morale and will to self-preservation of the German people.[285] The Court, in its concluding remarks, noted that the purpose of the ordinance was "not merely to prevent any undermining of the people's will to self-preservation, but to prevent all possibility of undermining it."[286]

Another set of cases involved prosecutions for providing assistance to an enemy power or placing the army of the Reich at a disadvantage. Any expression of doubt concerning the outcome of the war was interpreted by the People's Court as providing aid and comfort to the enemy.[287] For example, the Dutch pianist Karlrobert Kreiten, while on a concert tour in Berlin, remarked to a family friend that Hitler was sick and mentally disturbed.[288] He was convicted of treason and executed for having engaged in a "scurrilous attack on the confidence of a member of the German nation."[289]

---

281. MULLER, *supra* note 1, at 145.

282. *Id.* at 146-47.

283. The Beck Case, Apr. 5-Sept. 21, 1943. Extracts from the Official Files Including Report of Local Nazi Official, Apr. 5, 1943; Report to the Gestapo in Vienna, June 4, 1943; Letter from Defendant Barnickel to the President of the People's Court, July 30, 1943, Enclosing Indictment Signed by Barnickel; and Judgment of the People's Court After Trial of Sept. 20, 1943, *in* JUSTICE CASE DOCS., *supra* note 65, at 873, 876.

284. *Id.*

285. *Id.*

286. *Id.* at 879. For a number of comments which constituted capital offenses, *see* MULLER, *supra* note 1, at 146.

287. *See, e.g.*, MULLER, *supra* note 1, at 147.

288. *Id.*

289. *Id.*

Roland Freisler, in a letter to Otto Thierack in 1944, captured the combative culture of the People's Court.[290] Freisler observed that the People's Court must adhere to the ideology of the National Socialist regime and that "the human fate which depends on it is only secondary . . . . [T]he accused . . . are only little figures of a much greater circle standing behind them which fights the Reich. Above all this is true in war time."[291]

C. *Health Courts*

In 1933, health courts were established to preside over the Nazi regime's sterilization of individuals with hereditary diseases.[292] Those required to submit to sterilization included individuals suffering from imbecility, schizophrenia, manic-depressive psychosis, epilepsy, Huntingtonian Chorea, hereditary blindness, deafness, physical malformation and chronic alcoholism.[293] An application for sterilization could be submitted by the individual, his or her guardian, a public health officer or a medical superintendent.[294] The authorities were authorized to conduct the operation, "even [if] against the will of the person to be sterilized."[295]

The three-person hereditary health court was attached to local civil courts and was comprised of a local court judge, a public health officer and a physician with expert knowledge of eugenics.[296] The Court possessed the discretion to exclude legal counsel from the hearings.[297] Special training courses were conducted to acquaint judges with hereditary diseases.[298]

In 1934, 191 health courts and appellate health courts were established.[299] Courts decided in favor of sterilization in over

---

290. KOCH, *supra* note 1, at 127.
291. *Id.* (emphasis omitted)
292. Law of July 4, 1933 for the Prevention of Progeny With Hereditary Diseases, *in* JUSTICE CASE DOCS., *supra* note 65, art. 1, 243.
293. *Id.*
294. *Id.* arts. 2-4, at 243-44.
295. *Id.* art. 12, at 245.
296. *Id.* art. 6, at 244.
297. *See* Third Decree for the Implementation of the Law for the Prevention of Progeny With Hereditary Diseases, Feb. 25, 1935, *in* JUSTICE CASE DOCS., *supra* note 65, art. 4, at 246.
298. *See* Law of July 4, 1933, for the Prevention of Progeny With Hereditary Diseases, *in* JUSTICE CASE DOCS., *supra* note 65, art. 1, 243. Circular of the Reich Ministry of Justice to All Presidents of the Courts of Appeal, May 11, 1936, Announcing Courses for Judges Dealing with Hereditary Disease Cases, *in* JUSTICE CASE DOCS., *supra* note 65, at 247.
299. PROCTOR, *supra* note 1, at 102, 106-08.

ninety percent of the cases and between 300,000 and 400,000 individuals ultimately were sterilized.[300] Roughly three percent of appeals were successful in reversing decisions.[301] Feeblemindedness was the leading basis for sterilization, followed by schizophrenia, epilepsy and alcoholism.[302]

The sterilization program slowed with the initiation of World War II; only about five percent of sterilizations were performed after 1939.[303] The program was suspended in November 1944 as a result of a growing dissatisfaction with the arbitrary imposition of the sterilization procedure.[304]

D. Other Judicial Tribunals

In order to safeguard national security, courts martial were established in Reich defense districts adjacent to the front lines.[305] These courts were provided with broad jurisdiction over crimes "endangering Germany's fighting power or undermining the people's fighting strength and will to fight."[306] Courts were comprised of a criminal court judge, a Nazi Party official and an officer of the armed forces.[307] Sentences were limited to acquittal, death or commitment to a regular court.[308]

The Act for Securing of the Unity of Party and State of December 1, 1933, provided that members of the Nazi Party possessed "increased obligations to the Fuhrer, the People, and the State" and that individuals who failed to fulfill this mandate were "subject to a special jurisdiction of the Party."[309] In 1934, the National Socialist Party established a system of party courts to sanction violations of discipline and the code of conduct.[310] The

---

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 114.
304. *See* Decree Signed by Dr. Conti and Defendant Klemm, Nov. 14, 1944, Temporarily Suspending Activities of Higher Hereditary Health Courts, and Automatically Legalizing Pending Contested Decisions, *in* JUSTICE CASE DOCS., *supra* note 65, at 249.
305. Decree of Feb. 15, 1945, on Civilian Courts Martial Procedure, *in* JUSTICE CASE DOCS., *supra* note 65, at 250-51.
306. *Id.* at 251.
307. *Id.*
308. *Id.*
309. MCKALE, *supra* note 1, at 118. *See* Law of Dec. 1, 1933, Concerning Special Nazi Party and Storm Troops' (SA) Jurisdiction Over Members of the Nazi Party, the SA, and Their Subordinate Organizations, *in* JUSTICE CASE DOCS., *supra* note 65, at 166.
310. *See* MCKALE, *supra* note 1, at 118-23.

courts were authorized to impose punishments ranging from expulsion to reprimand.[311] In accordance with the National Socialist's rejection of legal methodology, most of the judges were party professionals rather than trained lawyers.[312]

The party courts enabled Nazi leaders to cloak the conduct of party members behind a curtain of secrecy and extended National Socialist surveillance into the most intimate aspects of the lives of party members.[313] Once expelled from the party, an individual possessed limited career prospects and was subject to criminal prosecution.[314]

The most serious transgressions involved interactions with Jews.[315] In fact, party courts were willing to overlook the murder of a Jew,[316] but not sharing a drink with a member of this scurrilous, semitic clan.[317] The killing of Jews typically was justified on the basis of a defendant's dedication to the National Socialist cause and commendable hatred of the Jews.[318]

The Fuhrer also frequently intervened to protect party luminaries. Nazi propagandist Julius Streicher, for example, was convicted by a party court of illicitly confiscating Jewish property and of engaging in sexual immorality.[319] Hitler suspended Streicher from his party office, but permitted him to continue publishing his propaganda sheet.[320]

E. The Eastern Territories

In 1940, a separate system of German courts and law was introduced into the Incorporated Eastern Territories.[321] The ordinance provided that the instigation or incitement of disobedience to a decree or order issued by German authorities, or a conspiracy to commit such an act, was punishable by death or, in

---

311. *Id.* at 123.
312. *Id.* at 79-80, 135, 150-53.
313. *Id.*
314. *Id.* at 125-27, 139. The imposition of disciplinary procedures customarily entailed a loss of party privilege. *Id.* at 123-24.
315. *See* MCKALE, *supra* note 1, at 156-57, 165, 169.
316. *Id.* at 166-67.
317. *Id.* at 156-57. The rape of a Jewess was harshly punished as racial pollution. *Id.* at 165.
318. *Id.* at 166-67.
319. *Id.* at 174-75.
320. MCKALE, *supra* note 1, at 174-75.
321. *See* Decree of June 13, 1940, Concerning Organization of Courts in the Incorporated Eastern Territories, *in* JUSTICE CASE DOCS., *supra* note 65, at 607.

less serious cases, with imprisonment.[322] Various German racial decrees subsequently were extended to the incorporated territories.[323]

Justice was to be meted out in an expeditious fashion. The Special Court in Bromberg, in the first ten months of operation, sentenced 201 defendants to death, eleven to life imprisonment, and ninety-three to penal servitude totaling 912 years.[324]

In 1941, the Reich introduced the infamous Decree Against Poles and Jews which prohibited them from engaging in acts prejudicial to "the sovereignty of the German Reich or the prestige of the German people."[325] Acts of disobedience or violence were punished severely,[326] including any act which deserved punishment "in accordance with the fundamental principles of German criminal law and in view of the interests of the State in the Incorporated Eastern Territories."[327] The death penalty was to be applied in those instances prescribed by law and if the defendant manifested a "particularly base attitude."[328]

Defendants were only entitled to a trial if the proceedings were in the public interest.[329] Cases carrying a penalty of more than five years were to be brought before Special Courts.[330] Sentences were to be carried out without delay,[331] and only the Public Prosecutor was authorized to appeal.[332]

---

322. *See* Decree of June 6, 1940, on the Introduction of German Penal Law in the Incorporated Eastern Territories, *in* JUSTICE CASE DOCS., *supra* note 65, § 10, at 609.

323. *See* Decree of May 31, 1941, Concerning the Introduction of the Nuernberg Racial Laws in the Incorporated Eastern Territories, *in* JUSTICE CASE DOCS., *supra* note 65 at 626; Second Executive Decree, May 31, 1941, for the Execution of the Law for the Protection of German Blood and Honor, *in* JUSTICE CASE DOCS., *supra* note 65, at 627-28.

324. *See* Letter from Defendant Schlegelberger to Lammers, Apr. 17, 1941, Concerning "Penal Laws for Poles and Jews in the Incorporated Eastern Territories," *in* JUSTICE CASE DOCS., *supra* note 65, at 611-12.

325. *See* Decree of Dec. 4, 1941, Concerning the Administration of Penal Justice Against Poles and Jews in the Incorporated Eastern Territories, *in* JUSTICE CASE DOCS., *supra* note 65, art. I(1), at 632 [hereinafter Decree Against Poles and Jews].

326. *Id.* art. III, at 633.

327. *Id.* art. II, at 633.

328. *Id.* art. III(2).

329. *Id.* art. IV.

330. Decree Against Poles and Jews, *in* JUSTICE CASE DOCS., *supra* note 65, art. V(2), at 634.

331. *Id.* art. VI(1).

332. *Id.* art. VI.

Poles and Jews were not entitled to challenge a German judge on account of bias.[333] Neither could they be sworn in as witness[334] nor file private suits.[335] Poles and Jews, as a rule, were prohibited from testifying against Germans.[336] The Reich also was provided with the discretion to establish civilian court martials.[337] The Decree Against Poles and Jews was applicable to Poles and Jews who, on September 1, 1939, were residents of the former Polish State. The latter provision extended the ordinance to involuntary Polish workers residing within Germany.[338]

An example of the severe sentences imposed under the Decree Against Poles and Jews was the conviction of two involuntary Polish workers who had attempted to escape to Switzerland.[339] The People's Court determined that they had acted with a treasonous intent to prejudice the welfare of the Reich by depriving Germany of their labor.[340] Defendant Paul Stefanowicz, described as a member of the defiant Polish intelligentsia, was sentenced to death, while his young and impressionable companion received eight years in prison.[341]

In another case, a Nuremberg Special Court imposed the death penalty on a Polish guest worker, Sofie Kaminska, because she demanded that her employers compensate her for the costs of transporting her daughter to Poland.[342] A scuffle ensued in which

---

333. *Id.* art. VII.

334. *Id.* art. IX.

335. Decree Against Poles and Jews, *in* JUSTICE CASE DOCS., *supra* note 65, art. XI, at 635.

336. *See* Letter from the Reich Ministry of Justice, Signed by Freisler, to Presidents of District Courts of Appeal and Others, Aug. 7, 1942, Concerning "Poles and Jews in Proceedings Against Germans," *in* JUSTICE CASE DOCS., *supra* note 65, at 669.

337. *See* Decree Against Poles and Jews, *in* JUSTICE CASE DOCS., *supra* note 65, at XIII, 635. For statistics on prosecutions and convictions, *see* Letter of the Reich Ministry of Justice to Leading Judges and Prosecutors, Apr. 4, 1944, Transmitting a Report of the Reich Statistical Bureau on "Criminality in the Greater German Reich in the Year 1942," Exclusive of Cases Handled by the People's Court, *in* JUSTICE CASE DOCS., *supra* note 65, at 667-78, 681, 683-84.

338. Decree Against Poles and Jews, *in* JUSTICE CASE DOCS., *supra* note 65, art. XIV(1), at 635.

339. *See* Secret Judgement of First Senate of People's Court Concerning Two Poles, May 21, 1943, and Directive of Ministry of Justice to Defendant Lautz Concerning the Manner of Carrying Out the Execution of One of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 702.

340. *Id.* at 702-03.

341. *Id.* at 703.

342. *See* Opinion and Sentence of the Nuremberg Special Court, With Defendant Oeschey as Presiding Judge, Oct. 29, 1943, by Which Two Foreign Workers Were Condemned to Death, *in* JUSTICE CASE DOCS., *supra* note 65, at 705, 706-

Kaminska allegedly slapped a neighboring soldier who had arrived to subdue Kaminska.[343] She subsequently seized a hoe in self-defense and tossed a half-pound rock at the soldier as he departed on his bicycle.[344] Kaminska subsequently resisted arrest by a police official.[345] The Court concluded that the German territory and fighting men must be protected against Polish criminal elements.[346] The defendant's acts were deemed to be particularly despicable in that they were directed at security forces and exploited wartime conditions by taking advantage of the depleted German police.[347] Kaminska's conduct towards the farmer also indicated her inherently criminal nature,[348] and helped to convince the Court that she merited a sentence of death.[349]

F. Night and Fog

In 1941, the Fuhrer initiated a campaign of judicial terror in the occupied territories. Criminal acts against the occupation forces were to be punished by the death penalty.[350] Individuals only were to be prosecuted in the occupied territories in those instances in which it appeared probable that a death sentence could be carried out expeditiously.[351] In other instances, the individuals were to be removed to Germany to face a secret trial before a Special or People's Court.[352] In a memorandum Field Marshal Wilhelm Keitel, the Commander in Chief of the Armed Forces, admonished that the Fuhrer believed that the imposition of a sentence less than death was an indication of weakness.[353]

07, [hereinafter Kaminska Judgment].

343. *Id.* at 707.

344. *Id.* The stone was considered equivalent to a "cutting or thrusting weapon." *Id.* at 710.

345. *Id.* at 710.

346. *Id.*

347. Kaminska Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 710.

348. *Id.* at 710.

349. *Id.* at 712.

350. *See* Secret Night and Fog Decree of Hitler, Signed by Keitel, Dec. 7, 1941, Concerning Measures to be Taken Against Persons Offering Resistance to German Occupation, *in* JUSTICE CASE DOCS., *supra* note 65, art. I, at 775.

351. *Id.* art II, at 776.

352. *Id.*

353. *See* Keitel Letter of Dec. 12, 1941, Transmitting the First Implementation Decree to the Night and Fog Decree, *in* JUSTICE CASE DOCS., *supra* note 65, at 777-78.

The location and fate of defendants was to be kept confidential.[354] This was designed to create a sense of uncertainty with regard to the fate of arrestees in the minds of family, friends and relatives.[355] Deportees who were acquitted, whose charges were quashed, or who had completed their sentence, were to be detained by the Secret State Police.[356] The number of prisoners who perished in the Night and Fog program is unknown; an April 1944 survey, although incomplete, listed 8639 individuals as having been deported to Germany.[357]

G. Extra-Judicial Punishment

Judicial procedures ultimately proved to be too deliberate and demanding. A pervasive policy of "delegalization" of the punishment of Jews, Poles and other asocials was adopted.[358] In 1938, the Reich Ministry of Interior approved a policy of protective custody for those deemed to endanger national security.[359] The State Police were authorized to order the internment of individuals following their arrest, acquittal or service of a prison sentence.[360] Protective custody was virtually automatic in the case of Communists, Jehovah's Witnesses, Jews, race defilers, traitors and sex offenders.[361] A directive stipulated that those in protective custody be confined in concentration camps and put to productive

---

354. *See* Instructions of Reich Ministry of Justice to Prosecutors and Judges, Initialed by Defendants Altstoetter, Mettgenberg, and Von Ammon, Mar. 6, 1943, Concerning Measures Necessary to Maintain Secrecy of Night and Fog Procedures, *in* JUSTICE CASE DOCS., *supra* note 65, at 794-97.

355. *See* Letter from the SS Economic and Administrative Main Office to Concentration Camp Commanders, Aug. 18, 1942, Transmitting Instructions for Treatment of Night and Fog Prisoners, *in* JUSTICE CASE DOCS., *supra* note 65, at 787.

356. *See* Secret Directive of the Reich Ministry of Justice, Jan. 21, 1944, Ordering Transfer to Gestapo of Night and Fog Prisoners Who Were Acquitted, Against Whom Proceedings Were Quashed, or Who Had Served Their Sentences, *in* JUSTICE CASE DOCS., *supra* note 65, at 798, 799.

357. MULLER, *supra* note 1, at 172.

358. *See* Extracts from the Regulations of the Reich Ministry of the Interior, Jan. 25, 1938, Concerning Protective Custody, *in* JUSTICE CASE DOCS., *supra* note 65, at 318.

359. *Id.* at 318-19.

360. *See* Minutes of Defendant Klemm on Conferences of Reich Minister of Justice With Attorneys General and Presidents of Courts of Appeal Jan. 23-24, 1939, Concerning Protective Custody, *in* JUSTICE CASE DOCS., *supra* note 65, at 323.

361. *Id.* at 324.

work on behalf of the war effort.[362] An unusually large number of these prisoners were shot while allegedly resisting authority or attempting to escape.[363] Justice Minister Franz Guertner inquired into the curious circumstances surrounding the death of an alleged escapee who, the day before his death, was reportedly in a prison hospital with leg braces.[364]

The abuse of prisoners was common and well-known within the Ministry of Justice. The Reich Minister of Justice, Franz Guertner, wrote a memo, in 1935, protesting the beating of internees.[365] He advocated a limitation on corporal punishment and a prohibition on the infliction of force to extract confessions.[366] Guertner also condemned the starvation, torture and lashing of prisoners and called for the prosecution of the perpetrators of such practices.[367]

In October 1942, the protective custody program expanded when the Reich Minister of Justice directed public prosecutors to transfer asocial prisoners to the Secret Security Police.[368] This included Jews, gypsies, Russians and Ukrainians detained under arrest or protective custody, as well as Poles in protective custody, and Poles, Czechs and Germans serving penitentiary sentences of over three years.[369] Jews and Poles were to be transferred to concentration camps[370] where, along with other asocials, they were to be worked to death.[371] The Minister of Justice also

---

362. *See* Letter from Bouhler, Chief of the Fuehrer's Nazi Party Chancellery, to Lammers, July 26, 1939, Concerning Hitler's Decision to Place Persons in Security Detention Under Himmler for Work in Concentration Camps, *in* JUSTICE CASE DOCS., *supra* note 65, at 329, 330-31.

363. *See, e.g.*, Draft of a Proposed Letter from Guertner to Himmler, Nov. 30, 1939, Concerning the "Carrying-out of Death Sentences," *in* JUSTICE CASE DOCS., *supra* note 65, at 333, 334.

364. *Id.*

365. Letter of Reich Minister of Justice Guertner to Reich Minister of the Interior Frick, May 14, 1935, Protesting Against the "Mistreatment of Communist Prisoners by Policemen," *in* JUSTICE CASE DOCS., *supra* note 65, at 314, 316-17.

366. *Id.* at 316.

367. *Id.* at 316-17.

368. Directive on Behalf of the Reich Minister of Justice to Public Prosecutors, Oct. 22, 1942, Concerning the "Transfer of Asocial Prisoners to the Police," *in* JUSTICE CASE DOCS., *supra* note 65, at 343-44.

369. *Id.*

370. *See* Directive of Apr. 1, 1943, on Behalf of the Reich Minister of Justice Announcing that Poles and Jews Released from Prisons Pursuant to a Decision of the Reich Security Main Office, Are to Be Transferred to Concentration Camps, *in* JUSTICE CASE DOCS., *supra* note 65, at 347, 348.

371. *See* Memorandum of the Reich Minister of Justice on a Conference With Himmler, Sept. 18, 1942, Concerning "Special Treatment at the Hands of the

agreed that in those instances in which he concurred in the judgment of the Reich Leader SS that a defendant had not received a sufficiently severe sentence, the individual was to be subjected to "special treatment at the hands of the police."[372] Germans serving modest sentences in the penitentiary were to be conscripted into brigades assigned to the African Theater.[373]

One month later, Justice Minister Otto Thierack turned criminal proceedings against Russians, Ukrainians, Jews, Poles, and gypsies in the Eastern Territories over to the Reich Leader SS, the head of the Security Police.[374] Thierack explained that the imposition of severe punishments and prison sentences could only make a modest contribution to the extermination of these groups.[375] The best course was to turn individuals over to the police, "who can then take the necessary measures unhampered by any legal criminal evidence."[376] The property of Jews was to be confiscated following their death.[377]

In 1944, Martin Bormann, Chief of the Party Chancellery, distributed a circular noting that English and American fliers had been flying at low levels and strafing cities.[378] According to Bormann, this had resulted in the killing of defenseless civilians,

---

Police" Where "Judicial Sentences Are Not Severe Enough," the Working of "Asocial Elements" to Death, and Other Matters, *in* JUSTICE CASE DOCS., *supra* note 65, at 504.

372. *Id.* at art. 1.

373. *See* Notes of the Reich Ministry of Justice on a Conference of Oct. 9, 1942, on Transfer of Convicts and "Asocials" in Various Categories to the Africa Brigade, Special Commandos in the East, and to Himmler, *in* JUSTICE CASE DOCS., *supra* note 65, at 670.

374. Letter from Reich Minister of Justice Thierack to Bormann, Oct. 13, 1942, Concerning the "Administration of Justice Against Poles, Russians, Jews, and Gypsies," *in* JUSTICE CASE DOCS., *supra* note 65, at 674-75.

375. *Id.*

376. *Id.*

377. *See* Thirteenth Regulation Under the Reich Citizenship Law, July 1, 1943, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 2, 685. The isolation and evacuation of Jews and gypsies was sufficiently successful that the circulation of directives was suspended in 1944. *See* Circular Letter of Himmler to the Supreme Reich Authorities, Mar. 10, 1944, Noting that "the Accomplished Evacuation and Isolation" of Jews and gypsies Had Made Meaningless the Previous Manner of Publishing Special Directives Concerning Them, *in* JUSTICE CASE DOCS., *supra* note 65, at 713.

378. Secret Circular from Martin Bormann to Nazi Party Leaders, May 30, 1944, Concerning "People's Justice Against Anglo-American Murderers," *in* JUSTICE CASE DOCS., *supra* note 65, at 577-78. *See* Decree of Himmler to All Higher SS and Police Leaders, Aug. 10, 1943, Concerning "Controversies Between Citizens and Parachuted English and American Terror Fliers," *in* JUSTICE CASE DOCS., *supra* note 65, at 568.

including women and children.[379] In several instances, crew members had bailed out or had made forced landings and immediately were lynched by angry citizens.[380] Bormann noted that, in accordance with government policy, that criminal proceedings had not been brought against those involved.[381]

VI. National Socialist Jurisprudence

A. Legal Procedure

Hitler, in August 1942, instructed newly-appointed Justice Minister Otto Thierack to "deviate from any existing law" in order to "fulfill the tasks of the Greater German Reich."[382] The immediate task was to replace the remnants of "individualistic" and "unGerman" "Roman" law with statutory standards which reflected the collective "'racial spirit'" of the German people.[383] The pejorative "Roman law" was supplanted by the equally elastic expression "Jewish Law" following the German-Italian alliance.[384]

This new Nazi order was based on legal romanticism rather than rationality; the emphasis was on results rather reason. National Socialist legal theology contended that only those of Aryan blood were capable of comprehending and crafting a judicial code which was consistent with the commands of the unadulterated and altruistic Germanic soul.[385] Race, rather than territoriality, defined the scope of legal doctrine and the Reich criminal code was crafted so as encompass Germans at home as well as abroad.[386]

Legal statutes and judicial judgments under National Socialism were characterized by ambiguous and awkward language. These convoluted texts concealed the intent of the Nazi regime, and made legal doctrine difficult to debate or discuss.[387] Statutory texts also employed a substantial amount of superfluous language which

---

379. *Id.*
380. *Id.*
381. *Id.*
382. Hitler Decree, Aug. 20, 1942, Concerning Special Powers Authorizing the Reich Minister of Justice to Deviate from Any Existing Law in Establishing a National Socialist Administration of Justice, *in* JUSTICE CASE DOCS., *supra* note 65, at 207-08.
383. Lowenstein, *supra* note 29, at 785-86.
384. *Id. See generally* Arthur Kaufmann, *National Socialism and German Jurisprudence From 1933 to 1945,* 9 CARDOZO L. REV. 1629, 1634-35 (1988).
385. Lowenstein, *supra* note 29, at 786.
386. *See* Decree of May 6, 1940, on the Extension of the Application of German Criminal Law, *in* JUSTICE CASE DOCS., *supra* note 65, at 195-96.
387. Kaufmann, *supra* note 384, at 1646.

served to stigmatize and single out the malign motives of defendants.[388] For instance, an individual was subject to the jurisdiction of the People's Court and the death penalty if he "unscrupulously, for his won gain or for other low motives . . . smuggles property abroad . . . and thus inflicts serious damage to the German economy."[389]

The uncertainty of legal doctrine was exemplified by the so-called rule by analogy. The criminal code provided that "[i]f an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the law . . . the prosecution will examine whether the underlying principle of a penal law can be applied . . . and whether justice can be helped . . . by analogous application of that penal law."[390] One commentator notes that this vested judges with discretion to punish acts which were not explicitly prohibited within the penal law.[391] The aphorism of "no punishment without a criminal law" thus was replaced by the principle of "no crime without punishment."[392]

This doctrine was utilized in the Special Court's conviction of Jewish leader Leo Katzenberger for racial pollution in 1942.[393] Katzenberger was a sixty-eight year old leader in the Berlin Jewish community who had maintained a long-term paternal relationship with Irene Seiler, a young married woman.[394] The evidence indicated that the two frequently had greeted one another with kisses and that Seiler occasionally had sat on Katzenberger's lap.[395] Both contended that these were innocent acts which were not sexually motivated.[396] The Special Court, upon a faulty evidentiary basis, concluded that Katzenberger had engaged in sexual intercourse with Seiler through the exploitation of wartime conditions.[397] In order to further justify the imposition of the

388. *See* Extracts from the Law Against Economic Sabotage, Dec. 1, 1936, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 1(1), 182.

389. *Id.*

390. Extracts from the Law, June 28, 1935, the Code of Criminal Procedure and the Judicature Act, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 170a, 177-78.

391. *See* Roetter, *supra* note 117, at 531.

392. *Id.*

393. Opinion and Sentence of the Nurnberg Special Court in the Katzenberger Case, Mar. 13, 1942, in Which Defendant Rothaug Was Presiding Judge, *in* JUSTICE CASE DOCS., *supra* note 65, at 653-54 [hereinafter Katzenberger Judgment].

394. *Id.* at 657-58.

395. *Id.*

396. *Id.*

397. *Id.* at 661-63.

death sentence, the panel applied the rule of analogy and held that mere "petting" constituted "sexual acts in lieu of actual intercourse" and was "sufficient to charge him [Katzenberger] with racial pollution in the full sense of the law."[398]

Uncertainty was further introduced into the law by the abrogation of judicial precedent. The Reich Supreme Court was required to interpret the law in light of National Socialist ideology and legal concepts and was specifically instructed to "deviate" from any decision which had been issued prior to 1935.[399] This was intended to encourage the Court to bring the law into conformity with the principles of the Third Reich.[400]

The requirement that courts interpret statutory standards in accordance with National Socialist ideology introduced additional imprecision into legal decisions. Professor Artur Kaufmann offered the example of a wife who conceived a child in an adulterous affair with a Jew.[401] He noted that under the National-Socialist statutory canon, the husband would be provided standing to contest the legitimacy of the child despite the expiration of the statute of limitations.[402] Kaufmann explained that the German husband otherwise would be placed in the unconscionable position of supporting a half-Jewish child.[403] Legal predictability was further compromised by the adoption of retroactive laws and punishments. It is likely that over one thousand were killed by National Socialist militia in the purge of the SA—a radical para-military organization affiliated with the Nazi Party.[404] Two days later, Hitler signed the Law About the Measures Taken in Defense of the State in an Emergency, on July 3, 1934, which decreed that "'the measures taken on June 30 and July 1 and 2, for the suppression of treasonable attacks, were taken legally, in defense of the State in an emergency.'"[405] On July 13, 1934, Hitler defiantly declared to the Reichstag that "'[i]f we are reproached for not leaving matters to

---

398. Katzenberger Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 660-61.

399. Extracts from the Law, June 28, 1935, the Code of Criminal Procedure and the Judicature Act, *in* JUSTICE CASE DOCS., *supra* note 65, at sec. II, 177, 178-79.

400. *Id. See* Opening Statements for the Prosecution, *in* JUSTICE CASE DOCS., *supra* note 65, at 31, 45.

401. Kaufmann, *supra* note 384, at 1643.

402. *Id.*

403. *Id.* Kaufmann argues that National Socialism was decidedly antipositivist. *Id.* at 1644-45.

404. *See* Roetter, *supra* note 117, at 532. *See also* Frederick Hoefer, *The Nazi Penal System-I*, 35 J. CRIM L. & CRIMINOLOGY 385, 387 (1945).

405. Roetter, *supra* note 117, at 532. *See also* Frederick Hoefer, *The Nazi Penal System-I,* 35 J. CRIM. L. & CRIMINOLOGY 385, 387 (1945).

be dealt with by the ordinary courts, I can only say this: in that hour I was responsible for the fate of the German nation, and thus I was the Supreme Law Lord of the German people.'"[406]

The Nazi regime also adopted two special procedures which institutionalized double jeopardy and compromised the finality of verdicts. Under the first procedure the Chief Reich Prosecutor was authorized to lodge an extraordinary objection within one year of any final penal sentence.[407] This declaration was to be based on "serious misgivings as to the justness of the sentence" in those instances in which the prosecutor "deems a new trial and decision in the case necessary."[408]

On the basis of an extraordinary objection, the Special Penal Senate of the Reich Supreme Court was required to try the case anew.[409] Extraordinary appeals were lodged on twenty-one occasions, only one of which—involving a police officer accused of abusing a detainee—resulted in the reversal of a conviction.[410] The punishments meted out by the lower court were slightly reduced in two cases; substantially increased in four; and prison sentences were elevated to the death penalty on fourteen occasions.[411]

The Chief Public Prosecutor—in another procedure—was empowered to file a nullity plea with the Supreme Court within one year of the final judgment of a "local court, the penal chamber of [a] district court, or [a] Special Court."[412] This plea was to be based on an objection that the judgment was "unjust because of an erroneous application of law on the established facts."[413]

The Supreme Court was authorized to decide the case, with or without trial, or to remand the case for retrial before either the

---

406. Roetter, *supra* note 117, at 532. The law of treason was applied retroactively. *See* Request by Under Secretary Freisler for a "Draft on the Retroactive Effect of the More Severe National Socialist Regulations" or Treason, May 18, 1942; An Interoffice Memorandum Thereon, and a Circular Letter from Defendant Schlegelberger to Various Reich Authorities Attaching a Draft of a Proposed Law and Requesting Approval, *in* JUSTICE CASE DOCS., *supra* note 65, at 863, 866.

407. Extract from Law, Sept. 16, 1939, Amending Regulations of General Criminal Procedure, Military Criminal Procedure, and the Penal Code, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 3(1), 405.

408. *Id.*

409. *Id.* at art. 3(2). A sentence initially passed by the People's Court was to be tried before the Special Senate of the People's Court. *Id.* at art. 3(3), 406.

410. MULLER, *supra* note 1, at 129.

411. *Id.*

412. Decree of Feb. 21, 1940, Concerning the Nullity Plea, *in* JUSTICE CASE DOCS., *supra* note 65, at art. 34, 410.

413. *Id.*

court whose sentence was quashed or before any other court.[414] In hearing the appeals, the Supreme Court ignored its opportunity "to give the vague regulations more precise legal contours" and instead adopted the extreme interpretations of the Special Courts.[415] For example, the Court ruled that the death penalty was statutorily justified for a broad range of acts, including listening to a foreign broadcast of classical music,[416] making an indecent proposal to a married woman whose husband was in the army,[417] leaving the scene of a traffic accident,[418] and assaulting another through kicking or choking.[419]

B. Substantive Law

The civil and criminal codes were supplemented by various statutes which reflected National Socialism's stress on race, blood and soil. The liberal notions of equality and individualism were incompatible with Hitler's racial determinism.[420] A series of discriminatory decrees were issued which isolated Jews and prepared the path for their deportation and extermination.[421] The so-called Aryan clause threaded through National-Socialist legislation. Jews were stripped of citizenship and excluded from all economic and social privileges and ultimately were deported to their death.[422] The implementation of this system of apartheid required a complex statutory scheme which regulated the most intimate aspects of life, including marriage, sexual intercourse, the employment of domestic labor[423] and the required use of semitic names.[424]

The expansive scope of this legal regulation is illustrated by the investigation of a Jewess for selling her mother's milk to a

---

414. *Id.* at art. 35, 410-11.
415. MULLER, *supra* note 1, at 130.
416. *Id.* at 133-34.
417. *Id.* at 133.
418. *Id.* at 133-34.
419. *Id.* at 134.
420. *See* Kaufmann, *supra* note 384, at 1636-37.
421. Lowenstein, *supra* note 29, at 796-97.
422. *Id.*
423. *See* Law, Sept. 15, 1935, for the Protection of German Blood and Honor, *in* JUSTICE CASE DOCS., *supra* note 65, at 180-81.
424. *See* Letter from the Reich Ministry of Justice, Signed by Defendant Mettgenberg, to the President of the District Court and the Chief Public Prosecutor in Hamburg, Apr. 1, 1939, Concerning the Redesignation of Jewish Names In Criminal Proceedings, *in* JUSTICE CASE DOCS., *supra* note 65, at 597.

pediatrician without revealing her racial background.[425] The milk was subsequently fed to Aryan children in a nursing home and the defendant was investigated for the crime of deception.[426] The memorandum explained that the defendant's milk could not be regarded as "food for German children. The impudent behavior of the accused is an insult as well."[427]

German statutory law extended State regulation into the most intimate aspects of individuals' lives. The notion of personal autonomy and freedom was inconsistent with the totalitarian ideal. For instance, listening to foreign radio broadcasts, or spreading news from foreign radio stations, which was likely to undermine the defensive strength of the German people was punishable by hard labor.[428] So-called "political Catholicism" was deemed particularly dangerous.[429] Catholic Priest Luitpold Schosser was sentenced to fifteen months in prison for making an announcement about the burial of a Polish man in which he was determined to have "malevolently criticized" and "debased the dignity of the German people in a incredible way and . . . caused a great number of fellow Germans to behave in an undignified manner."[430]

State Prosecutors devoted substantial effort to prosecuting statements critical of the Reich; by October of 1943 an average of twenty-five such cases were presented for prosecution each day.[431] As the war progressed, prosecutors began to seek the death penalty for even innocuous remarks.[432] This was encouraged by the

---

425. Draft of Proposed Memorandum to Hitler from Ministry of Justice, April 1943, Initialed by Defendant Rothenberger and Ministerial Director Vollmer, Concerning Imminent Prosecution of a Jewess for Selling Her Mother Milk to a German Pediatrician, *in* JUSTICE CASE DOCS., *supra* note 65, at 701-02.

426. *Id.*

427. *Id.*

428. *See* Decree, Sept. 1, 1939, Concerning Extraordinary Measures with Regard to Foreign Radio Broadcasts, *in* JUSTICE CASE DOCS., *supra* note 65, at 185.

429. *See* Letter from Defendant Schlegelberger to Chief Public Prosecutors and Senior Public Prosecutors, July 20, 1935, Concerning the "Struggle Against Political Catholicism," *in* JUSTICE CASE DOCS., *supra* note 65, at 912.

430. Extracts from the Official Files in the Case Against Luitpold Schosser, a Catholic Priest, Sentenced on Dec. 19, 1942, Under the Law Against Insidious Attacks on State and Party, by a Special Court Headed by Defendant Rothaug, *in* JUSTICE CASE DOCS., *supra* note 65, at 913-14.

431. *See* Extracts from the Situation Report of Defendant Lautz, Chief Public Prosecutor at the People's Court, to Thierack, Feb. 19, 1944, Concerning the Undermining of Military Efficiency, *in* JUSTICE CASE DOCS., *supra* note 65, at 885-86.

432. *See* Circular Letter from the Reich Ministry of Justice to Leading Judges and Prosecutors, Feb. 19, 1944, Transmitting Excerpts from Reports of a

Ministry of Justice's instructions that in cases of "undermining the morale the consideration of the actual nature of the facts must not be excessive. In the fifth year of the war every German has to think about the effect of his remarks to other people."[433]

Various statutory presumptions were employed to elevate the seriousness of criminal acts. Polish defendant Stanislaw Bratek served as an involuntary worker on a German farm in Lower Silesia.[434] Bratek was apprehended while attempting to escape to Switzerland and was convicted of high treason and sentenced to death.[435] The People's Court rejected the defendant's explanation that he had been motivated by economic exigency, pointing to his adequate salary and general lack of ambition.[436] The Court concluded, without evidentiary support, that this firm and fit young Pole was intent on joining the Polish legion in Switzerland and fighting to free the former Polish territory from Germany.[437] His departure also was determined to have resulted in irrevocable injury to the Reich, which was in need of each and every worker in order to guarantee a steady agricultural supply.[438]

The broad scope of the criminal law was accompanied by an increasingly severe system of punishment. A May 4, 1944, decree virtually released judges from all restraints in the imposition of criminal penalties.[439] The law provided that a penalty could be escalated to hard labor for life or to death "if the regular penalty limits are an insufficient expiation according to the sound sentiment of the people."[440]

One author notes that, between 1934 and 1944, 13,000 individuals were sentenced to death.[441] This included a pianist who criticized National Socialism, a doctor who privately voiced doubts concerning Germany's eventual victory, and various

---

Conference of Justice Officials on Cases of "Undermining" and "Malicious Political Acts," *in* JUSTICE CASE DOCS., *supra* note 65, at 880, 883.

433. *Id.*

434. The Bratek Case, Dec. 10, 1942—July 20, 1943. Extracts from the Official Files, Including Gestapo Report of Dec. 10, 1942; Judgment of the People's Court After Trial of May 20, 1943; and Note of July 10, 1943 on the Execution of the Death Sentence, *in* JUSTICE CASE DOCS., *supra* note 65, at 867-69.

435. *Id.*

436. *Id.* at 869.

437. *Id.* at 868-70.

438. *Id.* at 871.

439. *See* Fifth Decree, May 5, 1944, Amending the Decree Concerning Special Criminal Law in Time of War and Special Emergency, *in* JUSTICE CASE DOCS., *supra* note 65, at 209.

440. *Id.*

441. KOCH, *supra* note 1, at 5.

individuals who told political jokes.[442] A memo from the President of the Court of Appeals in Hamm to the Reich Ministry of Justice indignantly rebutted Hitler's criticisms of the judiciary, noting that the sentences meted out in his district always had been severe and that the number of death sentences had more than doubled between 1940 and 1942.[443] In the first six months of 1942, six death sentences had been imposed for offenses against the war economy, ten for sexual offenses, eight for crimes of violence and twenty for theft.[444]

The criminal justice system was not uniformly harsh. There was a two-tier scheme of justice which reflected defendants' political backgrounds.[445] Party members generally received lenient sentences and benefitted from amnesties, pardons and the suspension of proceedings.[446] A critical remark, depending upon the political standing of the accused, might be considered as meriting either a mild rebuke or the death penalty.[447]

VII. The Justice Case

A. Jurisdiction

In the *Justice* case, ten Nazi prosecutors, judges and legal administrators were convicted by an American tribunal of war crimes and crimes against humanity.[448] The defendants were prosecuted under Control Council Law No. 10, which had been adopted by Allied Powers in order to provide a uniform basis for the trial of German war criminals.[449]

---

442. *Id.* at 5-6.

443. *See* Report from the President of the Court of Appeal in Hamm, July 7, 1942, Concerning the Alarm Among Judges Caused by Hitler's Reichstag Speech of Apr. 26, 1942, and Certain Activities of the Gestapo and the Nazi Party Affecting Legal Matters, *in* JUSTICE CASE DOCS., *supra* note 65, at 448-49.

444. *Id.*

445. *See* Letter from the President of the Berlin Court of Appeal to Defendant Schlegelberger, Jan. 3, 1942, Commenting Upon "Influence Exerted Upon the Judges," *in* JUSTICE CASE DOCS., *supra* note 65, at 433-34.

446. *See* Lowenstein, *supra* note 29, at 809-10.

447. Opening Statements for the Prosecution, *in* JUSTICE CASE DOCS., *supra* note 65, at 84-85.

448. *See* Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 954-55 (1951). The defendants were Franz Schlegelberger, Herbert Klemm, Curt Rothenberger, Ernst Lautz, Woefgang Mettgenberg, Wilhelm von Ammon, Guenther Joel, Oswald Rothaug, Rudolf Oeschey and Josef Altstoetter. *Id.* at 1200. The sentences ranged from five years to life. *Id.*

449. *Id.* at 957. The relevant provisions of Control Council Law No. 10 are quoted at 959-61.

The Court held that its jurisdiction was based on the Allied Powers' condominium control over Germany.[450] The Reich regime had unconditionally surrendered and completely collapsed.[451] The resulting chaos had compelled France, Great Britain, the Soviet Union and the United States to intervene in order to provide political stability, implement socio-economic reform and punish those responsible for depredations and delicts.[452] The Tribunal held that, under the circumstances, the Allies were sovereign rather than occupying powers.[453] As a result, unlike the German occupation of Europe, which was contested by armies in the field, the Allied Powers were not constrained by the international legal limitations on occupying powers.[454]

The prosecution was an exercise of legal authority by the Allied Control Council, which had established judicial machinery to punish war crimes and crimes against humanity. The jurisdictional claim of this international body ordinarily could not have been successfully asserted absent the consent of the relevant territorial State.[455] However, in this instance, there was no governing regime. The Court conceded that Germany was not the only country which had committed war crimes.[456] But, it noted that the prosecution of non-German war criminals was dependent upon the exercise of jurisdiction by either the offended State, the perpetrators' State of nationality or a recognized international authority.[457]

The Tribunal also held that the substantive provisions of Control Council Law No. 10 were neither an abuse nor an unprecedented exercise of authority.[458] Control Council Law No. 10 was merely a codification of pre-existing principles of international law which had been previously recognized by the International Military Tribunal at Nuremberg.[459]

The failure to codify these doctrines earlier was not controlling. International law was an evolving and dynamic set of

450. *Id.* at 959.
451. *Id.*
452. *Id.* at 960.
453. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 959-61.
454. *Id.*
455. *Id.* at 970-71.
456. *Id.*
457. *Id.*
458. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 966.
459. *Id.*

doctrines. The recognition of a principle as part of international law was dependent upon State practice rather than legislative enactment.[460] The authoritative acceptance of war crimes and crimes against humanity was indicated by their incorporation into the Nuremberg Charter, Control Council Law No. 10 and acknowledgement in United Nations resolutions.[461]

B. War Crimes and Crimes Against Humanity

The Tribunal noted that the war crimes provision of Control Council Law No. 10 closely paralleled the Nuremberg Charter and encompassed acts in violation of the laws and customs of war directed against non-German nationals.[462] This was supplemented by the crimes against humanity provision.[463] The text differed from the Nuremberg Charter in that it was not limited to acts undertaken "in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."[464] In addition, Control Council Law No. 10, instead of punishing atrocities committed against "civilians of or in or from occupied territory," prohibited acts committed against "any civilian population."[465] The Tribu-

---

460. *Id.* at 966-68.

461. *Id.*

462. *Id.* at 971-72. War Crimes are defined in Control Council Law No. 10 as:

> Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. at 971.

463. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 971.

464. *Id.* at 974. The Nuremberg Charter defines crimes against humanity as:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id. at 972.

465. *Id.* at 972. Control Council Law No. 10 defines crimes against humanity as:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the

nal, in surveying this language, ruled that the crimes against humanity provision of Control Council Law No. 10 expanded the Nuremberg standard, as interpreted by the International Military Tribunal, and encompassed acts committed by the Nazi regime against German nationals in periods of peace as well as war.[466]

The concluding clause of the crimes against humanity provision, under Control Council Law No. 10, provided that acts constituting crimes against humanity constituted delicts, "whether or not in violation of the domestic laws of the country where perpetrated."[467] This was interpreted by the Tribunal to mean that compliance with the rules of the Reich did not constitute a defense, regardless of the nationality of the victim.[468] The Tribunal also ruled that the use of the phrase "'civilian population,'" rather than "'civilian individual,'" limited crimes against humanity to systematically organized acts conducted by, or with the approval of, governmental regimes.[469]

The Court speculated that this extension of international jurisdiction into areas traditionally deemed to be within the domestic jurisdiction of States was a product of the historic depredations committed by countries against their own populations.[470] There was a realization that acts within a single State posed a threat to the stability of international society.[471] Global public opinion also had come to recognize the moral imperative of international intervention to protect human rights.[472]

The defendants were not charged with the commission of isolated crimes against any single individual.[473] Instead the indictment charged the defendants with involvement in an officially organized system of "cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the . . . Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist."[474] The Court limited its consideration to acts

---

country where perpetrated.

Id.

466. *Id.* at 974, 979.
467. *Id.* at 972.
468. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 972-73.
469. *Id.* at 973. *See also id.* at 982.
470. *Id.* at 979-82.
471. *Id.*
472. *Id.* at 979-82.
473. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 984.
474. *Id.* at 985.

committed subsequent to the outbreak of World War II.[475] However, it noted that acts undertaken prior to that time to transform the judicial system into an instrumentality for the propagation of Nazi ideology, the extermination of opposition, and the advancement of plans for aggressive war, were relevant to the defendants' knowledge, intent and motivation.[476]

C. *Legal Defenses*

The Tribunal rejected the claim that Control Council Law No. 10 constituted retroactive punishment, ruling that this doctrine neither constituted a legal nor moral barrier to prosecution under international law.[477] The application of the prohibition on *ex post facto* punishment to an area as diverse and fluid as international law would frustrate transnational prosecutions.[478] At any rate, the defendants were well aware that many of their acts violated the pre-existing provisions of the German domestic criminal code.[479] The Allied Powers also repeatedly warned that their intent was to bring the perpetrators of Nazi atrocities to the international bar of justice.[480] Thus, "[w]hether the crime against humanity is the product of statute or of common international law, or . . . of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."[481]

The Tribunal also rejected the applicability of the superior orders defense, pointing to the preclusion of the domestic law defense in the provision on crimes against humanity.[482] Control Council Law No. 10 also provided that "'the fact that any person

---

475. *Id.*
476. *Id.* at 985, 988.
477. *Id.* at 974-75.
478. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 974-75.
479. *Id.* at 975-76.
480. *Id.* at 974-75, 977-78. The prohibition against retroactive punishment requires proof that the accused should have known that:

> in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught . . . . [N]o person who knowingly committed the acts made punishable by C.C. 10 can assert that he did not know that he would be brought to account for his acts.

Id. at 977-78.
481. *Id.* at 983.
482. *See supra* note 269 and accompanying text.

acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.'"[483] The Tribunal conceded the validity of the defendants' contention that they had been required to follow Hitler's dictates, regardless of whether these decrees contravened international law.[484] However, the Court countered that it would be illogical to rule that the very governmental involvement which elevated the defendant's acts to international concern could be invoked as a defense.[485] The core of the prosecution's case was that the "[d]raconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime."[486]

The Tribunal also rejected the defense of judicial immunity. The Court explained that the notion that judges were not personally liable for their actions was based on the conception of an independent judiciary which autonomously and impartially issued judicial decisions.[487] Judicial immunity also traditionally had not extended to malfeasance in office.[488]

The Court noted that the judicial independence and neutrality of the German judiciary had been completely destroyed. Legal decisions were the product of the interplay between the Ministry of Justice, the Party Chancellery, Gestapo, and judicial bureaucracy.[489] Only the most ideologically zealous Nazi jurist was immune from interference. As a result, the American Tribunal determined that the Nazi courts more closely resembled administrative tribunals, which acted in a quasi-judicial manner in implementing the political directives of the Fuhrer, than independent judicial institutions.[490]

D. The Third Reich: Draconian Decrees

The Tribunal extended substantial deference to German lawmakers. The Court noted that habitual criminals were severely condemned in various countries, including the United States.[491]

---

483. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 983-84.
484. *Id.* at 983-84.
485. *Id.*
486. *Id.* at 984.
487. *Id.* at 1024.
488. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1024.
489. *Id.*
490. *Id.* at 1013, 1024-25.
491. *Id.* at 1026.

The imposition of life imprisonment on such individuals during peacetime in America could not be condoned while the infliction of the death penalty in Germany during wartime was condemned.[492] Capital punishment also appeared justified against those who exploited wartime conditions to hoard, loot, plunder and rob.[493] Severe restrictions and repression of freedom of speech in order to maintain social stability during armed conflict also could not be denounced as a crime against humanity.[494]

The Tribunal further ruled that the fact that Germany was waging a war of aggression did not color these statutes with criminality.[495] There was no evidence that those who enforced the laws were part of a conspiracy to wage an aggressive war or were aware that Germany was engaging in acts of aggression.[496] The adoption of such an expansive theory of culpability also would contravene basic jurisprudential principles, by resulting in the imposition of collective as well as strict liability.[497] The Court, however, cautioned that individuals who had enforced these statutes in a discriminatory fashion or through "arbitrary and brutal means, shocking to the conscience of mankind"[498] were subject to sanctions.

The Tribunal was less sympathetic to the Reich's application of the law of high treason to involuntary Polish workers. The Court ruled that Germany's annexation of Polish territory while indigenous armies were in the field contesting the Reich's control was invalid.[499] Although an occupying power may punish local residents who engage in subversive activities, the invocation of the term treason did not justify the imposition of punishment for the exercise of internationally protected activity.[500] Poles, for example, were prosecuted for attempting to escape the Reich to join the Polish Legion.[501] They were alleged to have been guilty of attempting to detach territory from Germany by violence or threat of violence.[502] This territory consisted of portions of Poland

492. *Id.*
493. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1026.
494. *Id.*
495. *Id.* at 1026-27.
496. *Id.*
497. *Id.*
498. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1026-27.
499. *Id.* at 1027-28.
500. *Id.*
501. *Id.*
502. *Id.*

which had been illegally annexed into the Reich.[503] The theory of the German prosecution, according to the Court, would mean that every Pole fighting for the lawful restoration of Polish territory would be guilty of high treason and could be shot on capture.[504] The Tribunal determined that this application of the law of treason constituted a war crime and crime against humanity.[505] The problem "was not merely in misnaming the offense of attempting to escape from the Reich; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offense."[506]

The Tribunal also ruled that those defendants involved in the Night and Fog program were aware that the policy contravened international law.[507] Deportees were not provided with the requisites of a fair trial.[508] They often were interned under inhumane conditions[509] and compelled to work in the armaments industry.[510] The program was suspended in 1944 and the Night and Fog prisoners were turned over to the Gestapo.[511] This was a clear violation of Control Council Law No. 10, which provided that the deportation of individuals for slave labor, or for any other purpose, constituted a war crime.[512]

The Night and Fog program also contravened the international law of belligerent occupation. The latter, as well as Control Council Law No. 10, prohibited the torture of civilians by occupying forces.[513] Those secretly transported to Germany were imprisoned under inhumane conditions, ill-treated and starved.[514] The Tribunal thus concluded that the Night and Fog tribunals had cooperated in enforcing this callous and cruel policy and were complicit in outrages against human rights and international law.[515]

---

503. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1027-28.
504. *Id.* at 1028.
505. *Id.*
506. *Id.*
507. *Id.* at 1038.
508. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1046.
509. *Id.* at 1044.
510. *Id.* at 1054-55.
511. *Id.* at 1055.
512. *Id.* at 1059.
513. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1061.
514. *Id.*
515. *Id.* at 1060-1062. *See also* Convention (No. IV) Respecting the Laws and Customs of War on Land, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 129 (Burns H. Weston, Richard A. Falk & Anthony D'Amato eds., 2nd ed. 1990).

E. The Third Reich: Discriminatory Decrees

Legal officials also participated in a plan for the persecution and extermination of Poles and Jews throughout Europe. The intent was to eliminate the Poles and Jews through killing or confinement in concentration camps.[516] As a prelude to this scheme, Jews were deprived of all civil and political rights and socio-economic privileges.[517] The defendants were found to have enacted, enforced and judicially applied these laws which "formed the subject matter of war crimes and crimes against humanity."[518]

The Tribunal observed that the part played by the legal system in the extermination of Poles and Jews was modest as compared to the mass extermination of millions by the Security Police and Gestapo.[519] Courts nevertheless substantially contributed to the "Final Solution."[520] In 1942 alone, over 61,500 persons were convicted under the Law Against Poles and Jews.[521]

The defendants avowed that they had been unaware of the activities of the Gestapo in the concentration camps and therefore lacked criminal intent.[522] The Tribunal, however, determined that it would have been impossible for anyone integrally involved in the justice system to have been uninformed of the treatment meted out to internees.[523] The defendants' profession of ignorance also contradicted their claim that they had remained in office in order to control the conduct of the Gestapo.[524]

At the very least, the Court pointed out that the defendants must have been apprised of decrees in official publications concerning the police punishment of Jews in Germany, Bohemia, and Moravia, the confiscation of Jewish property, and the Law Against Poles and Jews.[525] They certainly were exposed to party publications, listened to the radio, conversed with their colleagues,

---

516. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1063.
517. *Id.* at 1063-64.
518. *Id.* at 1063.
519. *Id.* at 1078-79.
520. *Id.* at 1079.
521. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1079.
522. *Id.* at 1079.
523. *Id.* at 1079.
524. *Id.* at 1080.
525. *Id.* at 1080-81.

heard and delivered lectures, and were aware of the broad outlines and scope of the Reich's plan of racial persecution.[526]

The Tribunal concluded that the defendants involvement in the Reich's plan of racial persecution, when carried out in the occupied territories, comprised war crimes and crimes against humanity; when carried out in the Reich against German nationals, this persecution amounted to crimes against humanity.[527]

VIII. The Justice Case Defendants: The Evil of Good Intentions

A. Franz Schlegelberger: Factual Allegations

Justice Minister Franz Schlegelberger offered the classic defense of the man in the middle; he claimed that he cooperated with the Reich regime and remained in office in order to prevent the ascendancy of lawless forces who aspired to abrogate the rule of law.[528] In fact, following Schlegelberger's removal and replacement by Otto Thierack, the Chief Judge of the People's Court, the police assumed jurisdiction over the disposition of Jews and other groups, resulting in the summary extermination of hundreds of thousands.[529] The Schlegelberger case starkly raises the issue of the responsibility of a lawyer in a repressive regime. Is the lawyer's first obligation patriotism or principle? What of Schlegelberger's claim that his complicity with National Socialism was necessary in order to preserve the legal process? At what point did the resulting harm outweigh the potential benefits?

Schlegelberger received his law degree from the University of Leipzig in 1899 and immediately entered the public service.[530] He was named an assistant judge in the local court at Koenigsberg and within fifteen years was appointed Councillor of the Berlin Court Appeals.[531] Schlegelberger eventually was elevated to the Ministry of Justice and, in 1941, was appointed Under Secretary of State in charge of civil law under Minister Franz Guertner.[532] He retained this title even after Hitler chose him to succeed Guertner

526. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1081. "This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands, never." *Id.* at 1081.
527. *Id.*
528. *Id.* at 1086.
529. *Id.*
530. *Id.* at 1081.
531. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1081.
532. *Id.* at 1081-82.

upon the latter's death in January 1941.[533] Schlegelberger held this post until August 20, 1942.[534] He also harbored intellectual aspirations: publishing, teaching and lecturing at home and abroad on commercial, comparative and family law.[535] Schlegelberger testified that he was devoted to the impartial and practical administration of justice and deliberately avoided affiliation with a political party.[536] He described himself as a progressive conservative[537] and, in 1933, refused an invitation to join the National Socialist Party.[538] However, Schlegelberger testified that he had no alternative other than to acquiesce in Hitler's order in 1938 to join the Nazi Party.[539] He stated that he nevertheless avoided involvement in Party affairs and did not favor party members in personnel decisions.[540]

Schlegelberger professed disgust and shame over the National Socialists' anti-semitic policies.[541] He testified that he had saved his best friend, a Jewish judge, from extermination and that his physician was half-Jewish.[542] Schlegelberger, however, recognized that the Nazi's were determined racists and that the best he could hope for was to moderate the Fuhrer's anti-semitic initiatives.[543]

Hitler reportedly viewed Schlegelberger as an experienced civil servant who was suited to serve as interim Justice Minister.[544] However, the Fuhrer remained distrustful of Schlegelberger and displayed a distant and dour demeanor towards his Justice Minister.[545] Schlegelberger testified that he was not intimidated by Hitler and contemptuously viewed the Fuhrer as an avowed enemy of the rule of law.[546] He claimed that he openly disputed

---

533. *Id.* at 1082.
534. *Id.*
535. *See* Extracts from the Testimony of Defendant Schlegelberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 284-86 [hereinafter Schlegelberger Testimony I].
536. *Id.* at 287.
537. *Id.* at 287.
538. *Id.* at 288.
539. *See* Letter from the Chief of the Fuehrer's Nazi Party Chancellery to Defendant Schlegelberger, Jan. 30, 1938, Stating that Hitler Has Directed that Schlegelberger be Accorded Membership in the Nazi Party, *in* JUSTICE CASE DOCS., *supra* note 65, at 363.
540. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 288.
541. *See* Extracts from the Testimony of Defendant Schlegelberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 717-18 [hereinafter Schlegelberger Testimony II].
542. *Id.* at 718.
543. *Id.* at 718.
544. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 291.
545. *Id.*
546. *Id.*

Hitler's initiatives, explaining that "I was out to fight for justice and against arbitrariness."[547] He claimed that he was subjected to constant attack and criticism from those party and political factions who desired to transfer the administration of justice to the police or who aspired to control appointments to the bench and bar and to dictate judicial opinions.[548]

Schlegelberger learned to proceed with caution. He related that he had persuaded Hitler to permit Jewish lawyers to continue to practice.[549] However, he encountered strong bureaucratic resistance, was accused of being a Jew, and acquiesced in the Fuhrer's decision to permit only a limited number of Jewish legal consultants.[550] Schlegelberger testified that "I had to content myself with making a compromise and I had to be pleased when at least I had achieved some amelioration. To use a customary phrase, if I had drawn the consequences from every defeat, I would have deprived myself of all possibility to aid the Jews."[551]

Schlegelberger's aspiration was to maintain a measure of integrity and independence in the judicial process.[552] He described a series of compromises which he had accepted in an effort to calm his critics and to prevent the police from asserting jurisdiction over criminal prosecutions and punishments.[553] Schlegelberger testified that this was his motivation for agreeing to

---

547. *Id.*

548. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 292-303, 308-09.

549. Schlegelberger Testimony II, *in* JUSTICE CASE DOCS., *supra* note 65, at 718-19.

550. *Id.* at 719.

551. *Id.* at 718. Schlegelberger's efforts at compromise are illustrated in his controversial April 1942 memo advocating the limitation of deportation to full-blooded Jews. *See* Letter from Defendant Schlegelberger to Lammers, Mar. 12, 1942, Expressing Concern About Contemplated Anti-Jewish Measures; Reply from Lammers, Mar. 18, 1942; Letter from Schlegelberger to Seven Government and Party Agencies on "The Final Solution of the Jewish Problem," Apr. 5, 1942; File Note on Situation of Berlin Jews, Nov. 21, 1941, *in* JUSTICE CASE DOCS., *supra* note 65, at 647-49. He proposed that descendants of Jewish marriages of the first degree (two non-Aryan grandparents) should be provided the alternative of submitting to sterilization. *Id.* at 648. Schlegelberger would have excluded the descendants of mixed marries of the second degree (one non-Aryan grandparent) from deportation. *Id.* at 649. He opposed the mandatory divorce of mixed-couples, but argued that the German-blooded partner should be enabled to obtain an expedited divorce. *Id.* at 649. Schlegelberger later explained that "[t]here are, after all, situations where one can only escape a larger evil by applying a smaller evil." Schlegelberger Testimony II, *in* JUSTICE CASE DOCS., *supra* note 65, at 722.

552. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 290.

553. *Id.*

limitations on judicial protections and remedies in the trials of Jews.[554] He explained that "again we were faced with a case in which a concession which in itself was immaterial but which to the outside world, nevertheless, seemed important, had to be made in order to pacify party circles."[555]

Schlegelberger testified that there had been no alternative other than to turn internees over to the police for execution.[556] He testified that resistance would have been futile and would have jeopardized the entire administration of justice.[557] Those who refused to cooperate would have been labelled as saboteurs, terminated, interned, and replaced by individuals willing to serve the State.[558] Schlegelberger also explained that he had helped draft the Night and Fog Decree in order to avoid condemning internees to the exclusive custody of the police.[559]

Schlegelberger, at times, dangerously compromised principle. In March 1942, he wrote the Fuhrer promising to educate judges into "a correct way of thinking, conscious of the national destiny."[560] He urged Hitler to inform him of any verdicts which failed to meet the Fuhrer's approval.[561] Schlegelberger later rationalized that he had hoped that Hitler's involvement would insulate the judicial process from criticism by party and political activists who wished to weaken the administration of justice.[562]

Schlegelberger continued to acquiesce in Hitler's dictates. In 1941, he complied with the Fuhrer's demand that Mark Luftgas, imprisoned for thirty months for hoarding eggs, should be executed.[563] Schlegelberger later urged judges to adhere to Hitler's

---

554. Schlegelberger Testimony II, *in* JUSTICE CASE DOCS., *supra* note 65, at 723.

555. *Id.* at 724.

556. *See* Extracts from the Testimony of Defendant Schlegelberger Concerning Transfers of Persons to the Police, *in* JUSTICE CASE DOCS., *supra* note 65, at 349-51 [hereinafter Schlegelberger Testimony III].

557. *Id.*

558. *Id.*

559. *See* Extracts from the Testimony of Defendant Schlegelberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 808, 811 [hereinafter Schlegelberger Testimony IV].

560. Letters from Defendant Schlegelberger to Hitler and Lammers, March 1941, and March 1942, Concerning Judicial Sentences Displeasing Hitler and Proposing Participation in Civil Proceedings by Public Prosecutors, *in* JUSTICE CASE DOCS., *supra* note 65, at 417.

561. *Id.*

562. *Id.* at 418 (letter of Mar. 10, 1941, to Hans Lammers).

563. *See* Correspondence Between Lammers, Schaub, and Defendant Schlegelberger, October 1941, Concerning Transfer of Markus Luftgas to the Gestapo for Execution, *in* JUSTICE CASE DOCS., *supra* note 65, at 429, 431.

admonition that defendants charged with criminally disturbing the homefront should be sentenced to death.[564] He subsequently wrote the judges in the Eastern Territories that Poles were receiving "insufficient prison sentences" which "reveal an incomprehensively lenient attitude toward the Polish nation which confronts us with implacable enmity . . . and justify the reproach that the administration of criminal law has not proved adequate to the necessities of war."[565]

In defense of his conduct, Schlegelberger pointed out that following the appointment of Otto Thierack as Justice Minister, the Secret Police virtually had usurped the function of the judiciary.[566] He testified that he felt that this vindicated his decision to "fight until the very limit" in order to contain the onset of this "chaos."[567] Schlegelberger somewhat melodramatically described himself as having been an island in the National Socialist storm.[568] He stated that he had attempted to strike a delicate balance—refraining from opposition to those initiatives which were inevitable while making an effort to amend those which remained open to negotiation.[569]

Schlegelberger was dismissed, in August 1942, when he wrote the Fuhrer that judges had been disturbed by the Fuhrer's speech to the Reichstag.[570] He reportedly lectured Hitler on the need for an independent judiciary which could command popular respect.[571] Schlegelberger stated that he chose to retire rather than work under Otto Thierack or accept a judicial post.[572] Hitler could not abide this criticism, but expressed his appreciation by giving Schlegelberger 100,000 Reichmarks and special permission to purchase agricultural land.[573]

---

564. Circular Letter from Defendant Schlegelberger to Presidents of District Courts of Appeal, Dec. 15, 1941, Quoting from a Speech by Hitler and Stating that Judges and Public Prosecutors Must Keep Hitler's Words in Mind, *in* JUSTICE CASE DOCS., *supra* note 65, at 432.

565. Circular Letter from Defendant Schlegelberger to the Presidents of the Courts of Appeal and Attorneys General, July 24, 1941, Entitled "Mild Sentences Against Poles," *in* JUSTICE CASE DOCS., *supra* note 65, at 628-29.

566. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 302-03.

567. *Id.* at 303.

568. *Id.*

569. *Id.* at 303-04.

570. *Id.* at 304-05.

571. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 306.

572. *Id.* at 305-06.

573. *Id. See* Report from the President of the Court of Appeal in Hamm, July 7, 1942, Concerning the Alarm Among Judges Caused by Hitler's Reichstag

In his closing statement, Schlegelberger denied that his conduct was criminal. He expressed bitterness that his "hard struggle for justice" was being "rewarded" by "shame and misery."[574] Schlegelberger rationalized that it had been impossible for him to resign from the Justice Ministry and that he had attempted to make the most of his position by endeavoring to serve the cause of justice.[575] He explained that a direct attack on National Socialism would have placed him in "daily danger" and would have resulted in the "opposite of what I wanted to achieve, that is an increase of the opposition against reasonableness."[576]

B. Judgment: Franz Schlegelberger

The Justice Tribunal convicted and sentenced Schlegelberger to life imprisonment.[577] The Tribunal observed that Hitler's conveyance of 100,000 Reichmarks and authorization to purchase a farm was the Fuhrer's reward for "good and faithful service rendered in the performance of . . . which Schlegelberger committed both war crimes and crimes against humanity as charged in the indictment."[578]

Schlegelberger acted as one of the chief public proponents of National Socialism's perversion of the judicial process. In a speech in 1936, he introduced and endorsed judicial decision-making through analogy and the punishment of acts which were contrary to the sound sentiments of the people.[579] The Justice Tribunal noted that these elastic concepts placed individuals at the mercy of the whim and caprice of judges and created an atmosphere of insecurity and fear.[580]

The Court noted that despite Schlegelberger's avowed concern for judicial impartiality and independence he had signed the Night and Fog Decree.[581] This single stroke of the pen involved the

---

Speech of Apr. 26, 1942, and Certain Activities of the Gestapo and the Nazi Party Affecting Legal Matters, *in* JUSTICE CASE DOCS., *supra* note 65, at 448.

574. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 941.

575. Schlegelberger Testimony II, *in* JUSTICE CASE DOCS., *supra* note 65, at 718-19.

576. Schlegelberger Testimony I, *in* JUSTICE CASE DOCS., *supra* note 65, at 289.

577. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1200.

578. *Id.* at 1082.

579. *Id.*

580. *Id.* at 1082-83.

581. *Id.* at 1083.

judiciary in the secret prosecution and disposition of individuals who had been illegally deported to the Reich.[582]

The Tribunal also observed that although Schlegelberger had opposed party and political intervention into the legal process, he personally had ordered the execution of Markus Luftgas and had assured Hitler that he would take action to alter other objectionable sentences.[583] In another act of deference, Schlegelberger responded to a request by Heinrich Himmler and quashed the conviction of police officer Wilhelm Klinzmann who was charged with beating a detainee.[584] He later pardoned Klinzmann and rationalized that this was an opportunity to express the community's gratitude and restore the sense of satisfaction associated with public service.[585]

The Justice Court also observed that Schlegelberger had instituted and supported the wholesale persecution of Jews and Poles.[586] It noted that while he may have been "less brutal" than others that he "can scarcely be called humane."[587] He acquiesced in the deportation of Jews to the East and only objected that half-Jews should be provided with the option of deportation or sterilization.[588] Schlegelberger also was responsible for drafting the Law Against Poles and Jews of December 4, 1941.[589] This led to his complicity in the persecution of Poles and Jews at home and abroad and extended German law into the occupied territories in violation of the laws and customs of war.[590]

Schlegelberger offered a novel necessity defense. He argued that the legal system was under continual attack from Himmler and other extremists.[591] Schlegelberger claimed that he had remained in office in order to combat his critics and that his resignation would have resulted in an even more repressive regime.[592] In fact, following Schlegelberger's resignation, Otto Thierack turned

582. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1083.
583. *Id.* at 1085.
584. *Id.*
585. *Id.* at 1085-86.
586. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1083.
587. *Id.* at 1083.
588. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1083-84.
589. *Id.* at 1084-85.
590. *Id.* at 1083-85. In January 1942, he issued a decree giving the Law Against Poles and Jews retroactive effect. *Id.* at 1085.
591. *Id.* at 1086.
592. *Id.*

the administration of justice over to the police which resulted in the murder of thousands of Jews and political prisoners.[593]

But did this justify Schlegelberger's complicity in the extermination of Jews and Poles and the intimidation of the inhabitants of the occupied territories? Did the costs outweigh the benefits? The Tribunal conceded that the Reich's program of "racial extermination under the guise of law" did not equal the enormity of the murders attributed to the Security Police.[594] The Court nevertheless concluded that this offered "cold comfort to the survivors of the 'judicial' process and constitutes a poor excuse . . . [t]he prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes."[595]

In summary, the Tribunal concluded that Schlegelberger had contributed to the very evil which he purportedly had desired to prevent. The degeneration of the legal system and the undermining of the rule of law paved the path for the police to exterminate thousands. After all, "[i]f the judiciary could slay their thousands why couldn't the police slay their tens of thousands?"[596] Schlegelberger, in the view of the Tribunal, was a tragic figure.[597] He loved the life of the law and the mind and doubtlessly was pained over the policies which he felt forced to pursue.[598] Yet, "he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security."[599]

C. Curt Rothenberger: Factual Allegations

Curt Rothenberger joined the National Socialist Party in May 1933 and was animated by a full commitment to the Nazi cause.[600] He slowly progressed through the bureaucracy of the National Socialist Jurist's League to President of the District Court of Appeals in Hamburg.[601] Rothenberger, in 1942, was appointed Under Secretary in the Ministry of Justice under Otto Thierack and left the post one year later.[602] He served as a member of the

593. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1086.
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.* at 1087.
598. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1087.
599. *Id.*
600. *Id.* at 1107.
601. *Id.*
602. *Id.*

Leadership Corps of the Nazi Party throughout his career.[603]

Rothenberger was a proponent of an impartial and independent judiciary[604] and complained to Schlegelberger that the attacks on jurists were having "a disastrous effect on the morale of the judges."[605] In an effort to gain Hitler's support for an autonomous judiciary, he penned a paper in which he urged the Fuhrer to radically revise the legal system to comport with National Socialist ideology.[606]

Rothenberger could not avoid the taint of Nazi criminality. Despite his protestations that he merely favored limiting the social and cultural role of Jews, Rothenberger stood silent when confronted with severe anti-semitic measures.[607] He initialed a memorandum to the Fuhrer proposing to prosecute a Jewish woman for deception who had sold her milk to a nursing home for children.[608]

Rothenberger continuously criticized courts which authorized Jews to proceed in *forma pauperis*.[609] The Ministry of Justice subsequently issued a decree, in March 1942, which limited the authority of Jews to proceed under the poor law to cases in the social interest, such as litigation over family rights and property.[610] Rothenberger immediately intervened in a proceeding to enforce this prohibition.[611] He later justified his efforts on the grounds that he desired to prevent the advancing of court costs to

---

603. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1107.

604. *See supra* notes 169-76 and accompanying texts.

605. Report from Defendant Rothenberger to Defendant Schlegelberger, July 4, 1941, Concerning Criticism of Judges by the SS Periodical, the Draft Law on "Asocials," and the Lack of Suitable Candidates for Judgeships, *in* JUSTICE CASE DOCS., *supra* note 65, at 446-47.

606. *See supra* note 169 and accompanying text.

607. Extracts from the Testimony of Defendant Rothenberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 754-55.

608. *See supra* note 431 and accompanying text.

609. *See* Undated Report from the District Court in Hamburg Concerning Granting of Benefits for Destitute Persons to a Jew, Together with Two Letters of Defendant Rothenberger and an Interoffice Memorandum, Feb. 13-May 22, 1942, *in* JUSTICE CASE DOCS., *supra* note 65, at 643. In this memo concerning a pending civil case, Rothenberger quoted a comment by a party economic official urging the presiding judge to adhere to National Socialist ideology rather than legal principle. The economic adviser noted that a decision in favor of a Jew would be contrary to the "sound sentiments of the people." *Id.* at 644.

610. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1113.

611. *Id.* at 1114.

Jews who had sheltered their assets by executing a pretextual transfer of their property abroad.[612]

In response to various complaints from judges, Rothenberger visited Mauthausen concentration camp in the company of Ernst Kaltenbrunner, who later was appointed head of the Security Police.[613] Upon viewing the camp, Rothenberger "stated that he did not observe and could not discover any abuse at Mauthausen."[614] Rothenberger testified that he had realized too late that Hitler was a tyrant and that judicial reform was bound to fail.[615] He pled that he had been placed in an untenable position in which his actions were in opposition to his aspirations and attitudes.[616] Rothenberger claimed to have openly opposed the transfer of prisoners to the police as destructive of the integrity of the judicial process and the stability of the State.[617] He also purportedly protested to Himmler that the deployment of prisoners in the war effort was the prerogative of the Ministry of Justice rather than the Security Police.[618] His memo on judicial autonomy further contributed to his being perceived as an impediment by impetuous factions within the Nazi Party.[619]

Rothenberger testified that his passion was the protection of legal principle rather than personal ambition and that he had turned down promotion to a series of prestigious positions.[620] Rothenberger claimed to have used his position to parry attacks against the administration of justice.[621] For instance, he noted that he had urged the Security Police to use informers whom he knew would safeguard the judicial system.[622]

Justice Minister Otto Thierack initially considered appointing Rothenberger to a position on the Reich Supreme Court.[623]

---

612. Extracts from the Testimony of Defendant Rothenberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 754, 757-58.

613. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1114.

614. *Id.* at 1115.

615. *See* Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 943-45.

616. *Id.* at 944.

617. *See* Extracts from the Testimony of Defendant Rothenberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 511, 513, 517-23.

618. *Id.*

619. *Id.*

620. Extracts from the Testimony of Defendant Rothenberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 387.

621. *Id.* at 387-91.

622. *Id.*

623. Extracts from the Testimony of Defendant Rothenberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 520-21.

However, Thierack reportedly became disenchanted with his subordinate and initiated an investigation into the charge that Rothenberger illegally had procured office furniture.[624] Allegations of plagiarism later also were lodged against Rothenberger.[625] These allegations were the basis for his dismissal and subsequent demotion to notary.[626] Rothenberger claimed that the underlying rationale for his termination was that his views had angered Nazi extremists.[627] He ruefully noted that following his removal "the road for the wishes of those men [Himmler, Thierack and Bormann], concerning the administration of German justice now lay open."[628]

D. Judgment: Curt Rothenberger

The Justice Tribunal observed that Rothenberger was "full of complexities, contradictions, and inner conflict."[629] He offered assistance to various half-Jews,[630] but also was a central figure in denying Jews the rights and privileges of legal litigants.[631] Rothenberger protested against the criticism of the courts, yet attempted to impose his will on judges and condemned jurists who failed to afford favorable treatment to party officials.[632] He criticized the callous treatment of inmates in concentration camps,[633] yet silently witnessed the atrocities at Mauthausen.[634]

The Tribunal also pointed out inconsistencies in Rothenberger's purported "opposition" to protective custody. In a 1939 memo, he argued that this practice should be limited to cases of social protection and should not be utilized to correct court decisions.[635] However, in 1941, Rothenberger seemingly abandoned this position, complaining to the Ministry of Justice that

---

624. *Id.*
625. *Id.*
626. *Id.*
627. *Id.* at 520-22.
628. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 945.
629. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1107, 1117.
630. *Id.* at 1117-18.
631. *Id.*
632. *Id.* at 1118.
633. *Id.*
634. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1117.
635. *Id. See* Extract from a Report on a Feb. 1, 1939, Conference at the Ministry of Justice Between Defendant Rothenberger and Various Court Presidents, *in* JUSTICE CASE DOCS., *supra* note 65, at 327.

various minor cases were being brought before the Special Court which could be better disposed of through protective custody.[636] In 1942, he protested that public prosecutors were not recommending sufficiently lengthy periods of protective custody.[637]

Rothenberger seemingly subordinated all other concerns to his goal of reconciling an autonomous judiciary with an authoritarian State. He viewed the independent jurist as a bulwark against the abuse of power and economic corruption and as a safeguard of social stability.[638] Rothenberger testified that he desired to develop "an autonomous law" which was "independent of the form of government and without temporal limitation."[639] His aspiration was to remove judges from the confines of the civil service and to insulate them from the maelstrom of competing party and political influences.[640] His antidote was the establishment of an elite corps of judges who would "judge like the Fuehrer."[641]

However, after serving in Berlin for fifteen months, Rothenberger reluctantly concluded that the Nazi regime could not countenance an independent judiciary and a separation of powers.[642] Hitler and his Nazi satraps possessed an innate distrust of the judicial branch and viewed the legal process as an impediment.[643] Rothenberger's advocacy of a judiciary which would "judge like the Fuehrer" appears to have had the ironic result of emboldening Hitler to assert his status as the supreme judge and to increasingly intervene into judicial affairs.[644] Rothenberger portrayed himself as a reformer who had courageously taken the initiative in attempting to insulate German justice from party and political influence and interference.[645] While Rothenberger conceded culpability for his own conduct,[646] he objected to

636. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65 at 1117.
637. *Id.*
638. *See* Testimony of Defendant Rothenberger Concerning His Memorandum on Judicial Reform, *in* JUSTICE CASE DOCS., *supra* note 65, at 489, 495, 497, 499.
639. *Id.* at 491.
640. *Id.* at 499-500.
641. *Id.* at 500.
642. *Id.* at 499-502.
643. Testimony of Defendant Rothenberger Concerning his Memorandum on Judicial Reform, *in* JUSTICE CASE DOCS., *supra* note 65, at 499-502.
644. *Id.* at 499, 501-02.
645. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 943-45.
646. *Id.*

accusations that he co-authored memos which called for such measures as giving the Gestapo authority over Jews.[647]

The Tribunal sympathetically concluded that Rothenberger had failed to comprehend the brutality of the National Socialist regime.[648] He was discharged because he was an anathema to Nazi zealots who were contemptuous of his unwillingness to fully cooperate with the regime's cruel and callous policies.[649] But, this did not excuse Rothenberger's crimes. The Tribunal concluded that Rothenberger had taken a modest but consenting role in the Night and Fog policy and had aided and abetted the program of racial persecution.[650] Despite his protestations, he also had assisted in the perversion and subordination of the Ministry of Justice and the legal system to the dictates of Hitler and his henchmen.[651]

Rothenberger's clearest case of criminality was his participation in enacting and enforcing the discriminatory law denying Jews the status of *forma pauperis*. The Tribunal noted that "he enforced it when enacted and, in the meantime, before its enactment, upon his own initiative he acted without authority of any law in denying to Jewish paupers the aid of the courts."[652] The Court recognized that Rothenberger's involvement in denying Jews the right to proceed in civil litigation without the advancement of costs was a modest matter compared to the extermination of millions.[653] Even so, Rothenberger's participation nevertheless constituted "part of the government-organized plan for the persecution of the Jews, not only by murder and imprisonment but by depriving them of the means of livelihood and of equal rights in the courts of law."[654]

In the end, Rothenberger was convicted of aiding and abetting the program of racial persecution and of materially contributing to the subordination of the Ministry of Justice to the demands of the Secret Police.[655] He was sentenced to seven years in prison.[656]

---

647. *See* Extract from the Testimony of Defendant Rothenberger, *in* JUSTICE CASE DOCS., *supra* note 65, at 519-20.
648. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1118.
649. *Id.*
650. *Id.*
651. *Id.*
652. *Id.* at 1114.
653. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1114.
654. *Id.*
655. *Id.* at 1118. The Tribunal noted that Rothenberger, to some extent, had been "deceived and abused by his superiors" and that evidence had been "'framed against him.'" *Id.*

The most benign interpretation suggests that Rothenberger subordinated all other considerations to his goal of insulating the administration of justice from party and political influences. He envisioned a legal system in which judges would be solely accountable to the Fuhrer. This would shield jurists from partisan political attack while encouraging the Fuhrer's confidence and support. His desire to demonstrate his own credibility and doctrinal purity may have led to his complicity in the callous and cruel policies of the Nazi regime.[657]

Rothenberger naively believed that he could convince Hitler to reform the judiciary so as to create an elite, independent corps of National Socialist judges. He viewed the Nazi's reliance upon violence as a necessary but temporary evil which was required to seize power and eliminate impediments to progress.[658] However, he failed to comprehend that the concept of an autonomous and respected judiciary which transcended partisan politics was antipodal to Nazi ideology. A large number of National Socialist politicians and party activists viewed legal procedures as an obstacle to the achievement of their aspirations.[659] Domestic and international lawlessness and terror was not an ephemeral strategy—it was a core characteristic of Hitler's ruthless regime.[660]

Rothenberger, in all likelihood, managed to impede the perversion of justice. He testified that as a jurist he could not accept the sorry state of judicial affairs. He explained that "as long as I saw the possibility of influencing him [Hitler], I considered it my duty to make this attempt; otherwise I would have been a fool."[661] But, in the end, the Tribunal refused to excuse Rothenberger's criminal conduct on the grounds that by remaining in office he might succeed in rejuvenating the rule of law.[662] The victims of his policies were not advantaged by the speculative possibility that Rothenberger might restore an autonomous and independent judiciary and benefit future generations. The suffering

---

656. *Id.* at 1200.
657. *See supra* notes 607-14 and accompanying text.
658. *See supra* notes 616-25 and accompanying text.
659. *Id.*
660. *Id.*
661. Testimony of Defendant Rothenberger Concerning His Memorandum on Judicial Reform, *in* JUSTICE CASE DOCS., *supra* note 65, at 501. Rothenberger's memorandum, ironically, may have influenced the Fuhrer's decision to assert his status as the supreme judge. *Id.* at 502.
662. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1117-18.

of the Nazi's victims was an immediate reality; the reformation of the legal system a distant dream.[663]

IX. The Justice Case Defendants: The Evil of Bad Intentions

A. Oswald Rothaug: Factual Allegations

Oswald Rothaug pursued the path of a prosecutor following his admission to practice in 1925.[664] Rothaug's career prospects noticeably improved following his enrollment in the National Socialist Party in 1935[665] and he eventually rose to Chief Justice of the Special Court at Nuremberg.[666] He then assumed the position of Public Prosecutor of the Public Prosecution at the People's Court in Berlin in 1943.[667] His major responsibility involved prosecuting cases involving high treason and the undermining of public morale.[668] During his tenure at the Special Court, he also was a member of the Nazi Party Leadership Corps.[669] Rothaug believed that the judiciary should serve the interests of the State and insisted that judges possess the proper political attitude as well as technical proficiency.[670] As Chief Justice, he regularly consulted with the Security Police and was awarded the status of a secret "honorary collaborator."[671] Ac-

---

663. *Id.* at 1117-18. Wolfgang Mettgenberg was an expert on international law within the Reich Ministry of Justice whose responsibilities included the Night and Fog program. He defended the policy on the grounds that it was preferable for prisoners to be disposed of by German courts rather than to be directly handed over to the Gestapo. This was not considered a defense to participation in the Night and Fog program. *Id.* at 1129, 1130-32.

Defendants were held liable for their criminal actions rather than their intent. Defendant Hermann Cuhorst was Chief Justice of the Special Court at Stuttgart. Affidavits and testimony affirmed that Cuhorst was a fanatical Nazi and a callous and cruel judge. The records of the Court were destroyed during the war and the Tribunal was unable to determine beyond a reasonable doubt whether the defendant was guilty of issuing discriminatory judgments and punishments. The Tribunal noted that it "does not consider itself commissioned to try the conscience of a man or to condemn a man merely for a course of conduct foreign to its own conception of the law, it is limited to the evidence before it as to the commission of certain alleged offenses." *Id.* at 1158-59.

664. *Id.* at 1143.

665. *Id.*

666. *Id.*

667. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1143.

668. *Id.*

669. *Id.*

670. *See* Extracts from the Testimony of Prosecution Witness Friedrich Elkar, *in* JUSTICE CASE DOCS., *supra* note 65, at 367, 383-84.

671. *Id.* at 375.

cording to Friedrich Elkar of the Security Police, Rothaug unapologetically believed that Jews, Poles and political dissidents should be "wiped out by severe penalties"[672] and that trials should be used as mechanisms for political education and propaganda.[673] He openly campaigned for the adoption of the Law Against Poles and Jews which merely legitimized his long-standing practice of severely punishing crimes committed by members of these groups.[674]

Rothaug opened the infamous *Katzenberger* trial by proclaiming that "'[t]he Jews are our misfortune. It is the fault of the Jews that this war happened. Those who have contact with the Jews will perish . . . [r]acial defilement is worse than murder, and poisons the blood for generations. It can only be atoned by exterminating the offender.'"[675] Rothaug then proceeded to adopt the remarkable interpretation that sexual intercourse under the racial defilement statute encompassed any form of sexual activity with a member of the opposite sex which served to satisfy the carnal instincts of one of the parties.[676] This permitted Rothaug to rule that Katzenberger's paternal affection towards Seiler constituted racial pollution.[677] Rothaug did not rest his decision solely on this interpretation. He also determined, without evidentiary support, that Katzenberger had maintained a sexual relationship with Seiler which had been carried out through the exploitation of wartime blackout conditions.[678] Rothaug, in sentencing Katzenberger to death, further demonstrated his anti-semitic animus when he lectured that "[i]f a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood."[679]

Rothaug also presided over the trial of Polish agricultural worker Jan Lopata who was charged with the sexual molestation of

---

672. *Id.* at 371.
673. *Id.* at 376.
674. *Id.* at 372.
675. Extracts from the Testimony of Defendant Rothaug, *in* JUSTICE CASE DOCS., *supra* note 65, at 747, 750.
676. Katzenberger Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 653, 660-62.
677. *Id.* 653, 660-62.
678. *Id.* at 653, 660-62.
679. *Id.* at 663. Rothenberger testified that the evidence was so clear that the panel was quickly able to reach a decision. *See* Extracts from the Testimony of Defendant Rothaug, *in* JUSTICE CASE DOCS., *supra* note 65, at 753-54.

his German employer and with attempting to escape to Switzerland.[680] The local court sentenced the defendant to two years in a detention camp. This sentence was subsequently overturned on a nullity plea by the Reich Supreme Court.[681]

The *Lopata* case was then reviewed by a Special Court, headed by Rothaug, which sentenced Lopata to death.[682] Rothaug, in accordance with the suggestion of the Supreme Court, determined that Lopata intentionally had exploited the lack of available security personnel during wartime and had undermined the security and integrity of the German people.[683] Rothaug's racism reared its ugly head in the opinion when he observed that Lopata was a "definitely degenerate personality who is distinguished by irritability and a positive propensity to lying . . . his inferiority is based on his character and the reason can obviously be found in his belonging to the Polish subhuman race."[684] Rothaug conceded, during the Justice trial, that a similar penalty would not have been imposed on a racial German: "I cannot imagine that possibility . . . because the very elements which are of the greatest importance could not be applied to a German."[685]

Rothaug also was responsible for the conviction and imprisonment of Catholic Priest Luitpold Schosser for insidious attacks against the Third Reich.[686] The trial revolved around Schosser's funeral for a deceased Polish worker as well as a sermon which he had delivered a year earlier based upon Chapter VII of Mat-

---

680. *See* the Lopata Case, April-December 1942, Extracts from the Official Files Including: Verdict of Local Court Sentencing Lopata, a Pole, to 2 Years' Imprisonment; Decision of the Reich Supreme Court Granting Nullity Plea Filed by Chief Reich Prosecutor; Verdict of the Nurnberg Special Court (Defendant Rothaug Presiding) Sentencing Lopata to Death; Thierack's Refusal to Pardon; Lopata's Last Petition for Clemency; and the Record of Execution of the Death Sentence, *in* JUSTICE CASE DOCS., *supra* note 65, at 852-54.

681. *Id.* at 852, 853-54.

682. *Id.* at 859-60.

683. *Id.* at 858-59.

684. *Id.* at 858. Rothaug testified that a considerable number of criminals inadvertently had been selected to work in Germany and that his remarks were directed at "subhumanity in Poland" rather than the "subhuman Polish race." Extracts from the Testimony of Defendant Rothaug on the Lopata Case, *in* JUSTICE CASE DOCS., *supra* note 65, at 909.

685. Extracts from the Testimony of Defendant Rothaug on the Lopata Case, *in* JUSTICE CASE DOCS., *supra* note 65, at 911.

686. *See* Extracts from the Official Files in the Case Against Luitpold Schosser, a Catholic Priest, Sentence on Dec. 19, 1942, Under the Law Against Insidious Attacks on State and Party, by a Special Court Headed by Defendant Rothaug, *in* JUSTICE CASE DOCS., *supra* note 65, at 917.

thew.[687] This verse admonished the brethren to "'[b]eware of false prophets'" in the "'cloak of lambs'" who "'in their interior are roaring wolves.'"[688] Rothaug reportedly engaged in a series of anti-Catholic diatribes during the trial.[689] He later justified Schosser's conviction on the grounds that people went to church to hear of spiritual matters rather than politics.[690]

In his closing statement at the Justice trial, Rothaug testified that he had served his nation and that there had been no indication that the State to which he was so dedicated would one day be accused of having been a criminal country which had waged a war of aggression. He noted that his only crime was having assiduously applied the laws of his country in accordance with the rulings of the Reich Supreme Court.[691] The decisions which he issued were indistinguishable from those of the other Special Courts in the Reich.[692]

Rothaug also attempted to place his actions in the context of wartime Germany. He noted that national security required the severe and swift punishment of those who preyed on the population.[693] Warfare demanded the sacrifice of thousands to save the lives of millions; the same principle was applicable in the field of criminal law. In this process, some innocents undoubtedly had been convicted in the interests of safeguarding German society. But, Rothaug insisted that he had been unaware of the extermination of Jews.[694] He bemoaned that the defeat and resulting demonization of the Nazi regime had made it futile to attempt to explain the humane impulse which had animated many of the policies of the Reich.[695]

B. Judgment: Oswald Rothaug

The Justice Tribunal pointed to numerous statements which indicated Rothaug's support for the Third Reich's racist policies

---

687. *Id.* at 919-20.

688. Extracts from the Testimony of Prosecution Witness Father Luitpol Schosser Concerning His Arrests and Trial, *in* JUSTICE CASE DOCS., *supra* note 65, at 921.

689. *Id.* at 923.

690. *See* Extracts from the Testimony of Defendant Rothaug Concerning the Case of Father Luitpold Schosser, *in* JUSTICE CASE DOCS., *supra* note 65, at 938.

691. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 947.

692. *Id.*

693. *Id.* at 947-48.

694. *Id.*

695. *Id.* at 948.

and knowing participation in the persecution and extermination of Poles and Jews.[696] Father Luitpold Schosser recounted that Rothaug jokingly had remarked during his trial that he would escape from his coffin if he was buried adjacent to a Pole.[697] Rothaug went on to note unapologetically that hatefulness was divinely ordained in the Bible.[698]

The Tribunal found that this animus was reflected in Rothaug's judicial opinions. The Court cited a case of two teenaged Polish women accused of starting a small fire in an armaments plant.[699] Rothaug immediately assigned the defendants a defense counsel and convened his court.[700] The two were denied trial under the Juvenile Act, which was available to German adolescents, and instead were tried under the Law Against Poles and Jews.[701] Rothaug relied on the young women's confessions—which one of them recanted in court—to justify imposing a death sentence.[702] The Justice Tribunal concluded that these young women had been denied a meaningful trial and had been executed due to their Polish nationality.[703] The Court also pointed to the death sentence meted out to Jan Lopata as evidence of Rothaug's discriminatory intent and practice.[704]

The same pattern was evident in the *Katzenberger* case. Rothaug instructed a doctor to examine Katzenberger prior to trial, but cautioned that this was a mere formality since Katzenberger "'would be beheaded anyhow.'"[705] The doctor's objection that Katzenberger was elderly and was not capable of race defilement was met with the retort that "'[i]t is sufficient for me that the swine said that a German girl had sat upon his lap.'"[706]

Rothaug interrupted, hectored and encouraged witnesses to incriminate Katzenberger.[707] During the recess, he directed the

---

696. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1144-45.
697. *Id.*
698. *Id.*
699. *Id.* at 1147, 1149-50.
700. *Id.*
701. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1147, 1149-50.
702. *Id.*
703. *Id.*
704. *Id.*
705. *Id.* at 1152.
706. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1152. *See supra* note 398 and accompanying text.
707. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1153.

prosecutor to request a death sentence.[708] The Tribunal noted that Rothaug then proceeded to exaggerate the evidentiary record in order to reach the desired determination that Seiler and Rothaug had enjoyed a continuous sexual relationship which had been carried out through the exploitation of wartime conditions.[709] In the end, the Justice Tribunal ruled that Katzenberger's conviction, and subsequent execution, had been undertaken in furtherance of the Nazi program to persecute and exterminate Jews; Katzenberger had been singled out for prosecution for racial pollution precisely because he was a Jew.[710]

In sum, the Tribunal determined that Rothaug was a knowing and willing participant in the Nazi policy of persecuting, torturing and exterminating Jews, Poles and Catholics.[711] The fact that fewer were exterminated as a result of Rothaug's activities than died at the hands of others was not deemed to lessen Rothaug's guilt.[712] In fact, the Tribunal noted that his transgressions may have been more terrible in that he had helped to transform the courts from an instrument of protection into a mechanism of persecution.[713] The Court concluded that "[i]t is of the essence of the proof that he identified himself with this national program [of persecution and extermination] and gave himself utterly to its accomplishment. He participated in the crime of genocide."[714]

Rothaug thus stood convicted of having used the law as an instrument to terrorize and eliminate undesirables. He was condemned as a "sadistic and evil man" who under a "civilized judicial system" would have been impeached or criminally convicted on account of the "scheming malevolence with which he administered injustice."[715]

C. *Judgment: Rudolf Oeschey*

Rudolf Oeschey was Rothaug's companion in the crime; they were the twin terrors of the Special Court. Both were sentenced to life imprisonment.[716]

---

708. *Id.*
709. *Id.*
710. *Id.* at 1155.
711. *Id.* at 1155-56.
712. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1155-56.
713. *Id.*
714. *Id.* at 1156.
715. *Id.*
716. *Id.* at 1201.

Oeschey joined the NSDAP in 1931 and rose through the judicial ranks to the position of a judge on the Special Court.[717] He then succeeded Rothaug, in 1943, as Chief Judge.[718] He also served as Chair of the Civilian Court Martial at Nuremberg during April 1945.[719]

Oeschey presided over the prosecution of Sofie Kaminska and Wasyl Wdowen—both of whom were sentenced to death.[720] Kaminksa, as noted, had resisted and subsequently threw a rock at a German soldier.[721] Oeschey analogized this to the use of a "cutting or thrusting weapon" which required the imposition of the death penalty under the Law Against Poles and Jews.[722] Oeschey conceded that the Ukranian Wdowen had used minimal force in attempting to assist Kaminska.[723] Wdowen nevertheless was deemed to have knowingly exploited wartime conditions in that he was aware that the deployment of troops at the front had left the rural population at the mercy of involuntary workers.[724] Oeschey also concluded that Wdowen had calculated that he likely would not be imprisoned due to the shortage of available workers.[725] Oeschey, in sentencing both defendants to death, pronounced that the "German nation which is engaged in a grim defensive struggle rightly expects the most severe methods to be taken against such alien elements."[726]

One of the associate judges in the case testified that the defendants had been "'eliminated in a most objectionable way by Oeschey for racial and political reasons.'"[727] The other testified that "Oeschey forced his will upon us" and characterized the *Kaminska* case as "'the most terrible of my entire career.'"[728] The Tribunal concluded that the judgment was illustrative of Oeschey's knowing and malicious participation in the Reich's system of racial persecution of Jews, Poles and Slavs.[729]

---

717. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1159.
718. *Id.*
719. *Id.*
720. *See* Kaminska Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 711-12.
721. *Id.*
722. *Id.* at 710. "The over-all behavior of the Polish woman [Kaminska] . . . proves that the crime is not alien to her nature." *Id.*
723. *Id.* at 711-12.
724. *Id.*
725. Kaminska Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 711-12.
726. *Id.* at 710.
727. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1161.
728. *Id.*
729. *Id.*

In 1945, Oeschey was named presiding judge of a drumhead court martial established in Nuremberg.[730] The Court was directed to support the embattled German Army by dampening dissent and crushing crime.[731] Oeschey managed to convene ten sessions prior to the American entry into Nuremberg.[732] Twelve defendants were disposed of during this period; ten for political offenses.[733]

The most infamous trial involved the conviction of Count Montgelas for having expressed his approval of the attempted assassination of Hitler during a private conversation.[734] The alleged remarks were overheard by an undercover police officer who had been shadowing Monteglas for several days.[735] The seriously ill Monteglas was placed in solitary confinement before being subjected to a secret trial in which he was denied the assistance of counsel as well as defense witnesses.[736] The entire process—from indictment through execution—took place within a three day period.[737]

The Justice Tribunal noted that the Monteglas' prosecution had been undertaken within a month of the American entry into Nuremberg.[738] The Court previously had ruled that the prosecution of individuals for acts and statements inimical to the Third Reich did not necessarily constitute a crime against humanity.[739] However, the circumstances and manner of Monteglas' conviction convinced the Tribunal that this was a "last vengeful act of political persecution" which constituted judicial "murder" and a crime against humanity.[740]

In another instance, a group of foreign juveniles were charged with having engaged in a minor altercation with members of the Nuremberg Hitler Youth.[741] Oeschey, without evidentiary support, ruled that the defendants constituted a resistance movement and sentenced several to death.[742]

---

730. *Id.* at 1162-63.
731. *Id.* at 1163.
732. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1163.
733. *Id.* at 1163.
734. *Id.* at 1163-64.
735. *Id.*
736. *Id.*
737. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1163-64.
738. *Id.* at 1164.
739. *See supra* notes 350-53 and accompanying texts.
740. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1164.
741. *Id.* at 1168.
742. *Id.*

The Tribunal observed that these cases were representative of Oeschey's arbitrary and repressive application of the law. He regularly berated and insulted defendants and threatened to exterminate Jews and Poles.[743] Defense lawyers feared that too fulsome a defense would result in Oeschey reporting them to the Gestapo.[744] Dr. Hermann Mueller, a prosecutor at the Special Court in Nuremberg, testified that Oeschey was "'the most brutal judge that I have ever known . . . and a . . . willing instrument of the Nazi terroristic justice.'"[745]

In his closing statement, Oeschey claimed that he had obeyed and applied the law in a conscientious fashion in accordance with the legislative intent. He contended that he had afforded each defendant a fair trial and an equitable verdict and concluded that "my conscience knows that it is clear of the crimes with which I am charged."[746]

X. The Justice Case Defendants: The Crimes of Conformists

Most of the crimes attributed to judges and lawyers were committed by bureaucratic conformists who dutifully fulfilled their responsibilities. These defendants were characterized by a lack of animation and ardor and mainly were motivated by patriotism and personal ambition.[747]

Wilhelm von Ammon had headed the section in the Ministry of Justice which supervised Night and Fog cases and was charged with involvement in the systematic abuse of the judicial process.[748] Von Ammon testified that he occasionally had implemented regulations which he had not personally supported.[749] But, he had believed that the outbreak of war was "'to be or not to be' for Germany" and that he was obligated as a German to

---

743. *Id.* at 1165-68.

744. *Id.*

745. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1165.

746. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 952.

747. *See infra* notes 748-72. Four defendants were acquitted based on a lack of available evidence: Paul Barnickel, Senior Public Prosecutor of the People's Court, *in* JUSTICE CASE DOCS., *supra* note 65, at 1156; Hermann Cuhorst, Chief Justice of the Special Court, *id.* at 1157; Guenther Nebelung, Chief Justice of the Fourth Senate of the People's Court, *id.* at 1157; and Hans Petersen, Lay Judge of the First Senate of the People's Court and of the Special Senate of the People's court, *id.* at 1156.

748. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1132-34.

749. Extracts from the Testimony of Defendant Von Ammon, *in* JUSTICE CASE DOCS., *supra* note 65, at 815-16.

"follow instructions issued by my superiors."[750] Von Ammon noted that while the Night and Fog regulations were "severe," that they were "necessary" in order to suppress resistance in the occupied territories.[751]

Herbert Klemm's unquestioning support for National Socialism resulted in his steady ascent from a minor judicial post to the Party Chancellery and then to State Secretary in the Reich Ministry under Otto Thierack.[752] Klemm was involved in denying Jews, Poles and gypsies coverage under the German juvenile law;[753] participating in drafting the law which extended and retroactively applied the law against treason to the occupied territories;[754] and was connected with quashing indictments and preventing the prosecution of civilians involved in the lynch justice of Allied airmen.[755] Klemm also advised his subordinates to execute 800 Jewish, gypsy and Polish inmates interned in Sonnenburg prison.[756] In his closing statement, Klemm avowed that he had been educated and trained in a system in which "obedience to the law and the norm created by the State has been the only task of the jurist . . . . To revoke laws and norms which had existed for years was not in my competency."[757]

Ernst Lautz was Chief Public Prosecutor at the People's Court in Berlin from September 1939 until the end of World War II.[758] At the height of the Court's activity, he was supervising seventy prosecutors and was responsible for signing all indictments.[759] Roughly 1500 cases were filed a month under the Law Against Undermining the Defensive Strength of the Reich of August 1938 alone.[760] This law imposed a mandatory death penalty for the public, attempting to paralyze or undermine the will of the German people to defend themselves.[761] The Tribunal determined that

---

750. *Id.*
751. *Id.* at 833. Von Ammon was sentenced to ten years in prison. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1200.
752. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1087, 1094.
753. *Id.* at 1093-1107.
754. *Id.*
755. *Id.*
756. *Id.*
757. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 943. Klemm was sentenced to life imprisonment. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1200.
758. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1118-20.
759. *Id.*
760. *Id.*
761. *Id.*

Lautz possessed the discretion whether to prosecute individuals under the latter statute or under the Malicious Acts Law of December 20, 1944, which carried a modest prison term.[762] Lautz expressed regret that "'many people who were otherwise all right had to lose their lives.'"[763] But, he rationalized that the prosecution and imposition of harsh penalties for treason was "'a good thing'" since "'no one . . . can claim that this war was lost only through treason.'"[764]

Lautz also was involved in roughly two hundred secret Night and Fog cases and prosecuted between 150 and 200 involuntary workers for treason for having attempted to cross into Switzerland.[765] In addition, Lautz brought prosecutions against Poles who, prior to the war, had taken action against ethnic Germans for having engaged in subversion against the Polish State.[766] Lautz recognized that these Poles had acted in accordance with domestic law and were only subject to the sovereign jurisdiction of the Polish State.[767] He nevertheless charged them with acts which were contrary to the "'sound sentiment'" of the German people.[768] The Tribunal ruled that these trials violated "justice and fair play" and constituted a "monument to Nazi arrogance and criminality."[769]

Lautz's activities against Poles and Jews were determined to be part of a governmental plan for the extermination of these races; he was "an accessory to, and took a consenting part in, the crime of genocide."[770] The Justice Tribunal observed that although Lautz was not a Nazi zealot, he had believed that he was legally required to conform to the dictates of Adolf Hitler and to relentlessly implement the policies of the Third Reich.[771] The Tribunal, in conclusion, noted that "it may be said in his favor that if German law were a defense, which it is not, many of his acts would be excusable."[772]

---

762. *Id.*
763. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1119-20.
764. *Id.* at 1119.
765. *Id.* at 1120-23.
766. *Id.* at 1127.
767. *Id.*
768. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1127.
769. *Id.*
770. *Id.* at 1128.
771. *Id.*
772. *Id.* Lautz was sentenced to ten years in prison. *Id.* at 1200.

Von Ammon, Klemm and Lautz all were deeply involved in the racial persecution of Jews, Poles, gypsies and other groups.[773] They were not Nazi zealots, but believed they were obligated to carry out the commands of the National Socialist State. These three defendants displayed a lack of conscience and concern for the consequences of their actions. This moral malleability marks them as, perhaps, the most psychologically puzzling of all the defendants.[774]

XI. Lawyers, Law and Justice in the Third Reich

A. The Guilt of the Legal Profession

Prosecutor Telford Taylor, in his opening remarks at the *Justice* trial, condemned the defendants for having transformed the legal system—a traditional safe haven for the oppressed—into an instrument of political and racial persecution.[775] Extermination and repression were directed against domestic and foreign populations under the guise of the rule of law. Lawyers and judges thus aligned themselves and stood shoulder-to-shoulder with the police and the military in annihilating Jews, Poles, gypsies and political dissidents. Taylor noted the irony of the Allied Powers providing the defendants with a fair and impartial trial—a privilege which they had denied to their victims.[776]

Many of the defendants in the Justice case, unlike other high-level Nazi policy-makers, directly confronted their victims. As

---

773. *See supra* notes 746, 763, 765-68 and accompanying text.

774. *See supra* note 757 and accompanying text. Guenther Joel was a fourth defendant who was convicted and might be included in this group. Guenther Joel joined the National Socialist Party in 1933 and entered the Ministry of Justice as a junior public prosecutor. Joel rose through the party and political ranks and served as the liaison officer between the Ministry of Justice and Security Services. In 1943, he was named Chief Prosecutor of the Court of Appeals in Hamm and supervised the prosecution of more Night and Fog cases than the combined total of all other German courts. Joel eagerly expedited and sought additional cases and was personally responsible for transferring individuals who were not guilty of any crime or who had completed their sentence to the Gestapo. The fact that he supervised rather than actually prosecuted the cases was not deemed a defense. *Id.* at 1134-40. At the same time, he was personally involved in insuring that party members were free from prosecution or only received lenient sentences. In one instance, he intervened to seek a pardon for two "'deserving National Socialists'" who had been charged with the malicious shooting of two Polish priests. *Id.* at 1139.

775. Opening Statement for the Prosecution, *in* JUSTICE CASE DOCS., *supra* note 65, at 31-33.

776. *Id.*

judges, they lectured defendants on the merits of National Socialism and were involved in imposing punitive penalties for seemingly innocent acts. At the same time, they excused the excesses of Nazi loyalists and implemented a system of judicial extermination.[777]

The judges on the People's Court seemed to harbor few doubts when they imposed a death sentence on sixteen year old Helmuth Gunther Hubener for listening to English shortwave radio broadcasts which he then transposed into anti-Nazi leaflets.[778] The Court ruled that

> [g]iven the difficulties of the times in which the Reich is struggling for its existence, in which it is a matter of to be or not to be, the full force of the law cannot be stayed, even for juveniles, when someone . . . takes a stand in a dangerous and insulting manner against his people and the Fuhrer.[779]

Hubener was guillotined.[780]

In a similar case, a group of students at the University of Munich, who were members of the self-proclaimed White Rose resistance group, were sentenced to death by the People's Court for having drafted and distributed anti-Nazi leaflets and painting walls with defamatory slogans.[781] The People's Court noted that a failure to punish these defendants with death would be the first step towards the defeat and destruction of the Third Reich.[782]

In a second trial, the students' intellectual mentor, Professor Kurt Huber, also was sentenced to death.[783] Huber declared in his closing statement that the suppression of morally justified criticism constituted a breach of the social contract and prophesized that his protest would be vindicated in the pages of history.[784] The Court condemned Huber's lack of patriotism and ruled that he

---

777. *See supra* notes 675-90, 720-42 and accompanying texts.

778. Verdict of the People's Court, *reprinted in* WHEN TRUTH WAS TREASON GERMAN YOUTH AGAINST HITLER 219, 230 (Blair R. Holmes & Alan F. Keele, trans., eds., 1995).

779. *Id.*

780. *Id.* at 241 (Letter of First Public Prosecutor Ranke, Oct. 27, 1942).

781. *See Indictment of Hans and Sophie Scholl and Christoph Probst as Drawn up by the Reich Attorney General to the People's Court, Feb. 21, 1943, in* INGE SCHOLL, THE WHITE ROSE 105 (1970).

782. *See Transcript of the Sentence of Hans and Sophie Scholl and Christoph Probst, Feb. 22, 1943*, in SCHOLL *supra* note 781, at 114, 117.

783. *Id.* at 64-65

784. *Id.*

had forfeited his membership in the National Socialist community.[785] The judgment admonished that "[t]he days when every man can be allowed to profess his own political 'beliefs' are past. For us there is but one standard: the National Socialist one. Against this we measure each man!"[786]

Professor Ulrich Klug, in reviewing the record, accuses the National Socialist legal system of having been an accomplice to murder.[787] He points to the transfer of prisoners to the Gestapo and to the failure to prosecute the crimes of National Socialists.[788] Klug, in support of his contention, cites the opinion of the Court at Buchen concerning the murder of an eighty-one year old Jewess, Susanna Stern, by a local leader of the National Socialist Party.[789]

Stern reportedly refused the defendant's order to get dressed and, in retribution, was shot three times and killed.[790] The police report indicated that the defendant was a "'decent and industrious'" individual with a "'good reputation in the community and lived a proper lifestyle.'"[791] The deceased, in contrast, was described as "'obnoxious and notoriously insolent'" and it was "'completely believable'" that she had "'resisted . . . with typical Jewish impudence.'"[792] The Court, after reviewing the record, suspended the prosecution.[793]

SS-Untersturmfuhrer Max Taubner, in another example of the judicial legitimation of murder, was prosecuted before the Supreme Police Court in Munich, in May 1943, for ordering and participating in the brutal execution of 191 Jews.[794] The Court declined to punish Taubner, explaining that the Jews had to be "exterminated"

---

785. *See Transcript of the Sentence of Alexander Schmorell, Kurt Huber, Wilhelm Graf, and Others Associated with the Resistance of the White Rose, Pursuant to the Trial Held on Apr. 19, 1943, in* SCHOLL, *supra* note 781, at 119, 126-27.

786. *Id.* at 127.

787. Ulrich Klug, *Permission for Murder: The Justice System and the Persecution of the Jews, in* THE GERMAN PUBLIC AND PERSECUTION OF THE JEWS, 1933-1945, 59, 65-66 (Jorg Wollenberg ed., 1989) (Rado Pribic trans. & ed., Eng. ed., 1996).

788. *Id.*

789. *Id.*

790. *Id.* at 65.

791. *Id.* at 67.

792. Klug, *in* THE GERMAN PUBLIC AND PERSECUTION OF THE JEWS, 1933-1945, *supra* note 787, at 59, 65-66.

793. *Id.*

794. *Verdict against SS-Untersturmfuhrer Max Taubner, 24 May 1943, in* "THE GOOD OLD DAYS" THE HOLOCAUST AS SEEN BY ITS PERPETRATORS AND BYSTANDERS 196, 201 (Ernst Klee, Willi Dressen & Voker Riess eds., 1988).

and that "none of the Jews that were killed is any great loss."[795] Taubner also was found to have acted out of an admirable "true hatred" for the Jews rather than sadism.[796] The Court, however, was less forgiving of the fact that the accused had taken photographs of the incident which might undermine the fighting spirit of the German people.[797] Taubner was sentenced to ten years in prison and was pardoned after serving a little over a year.[798] The charges against those who followed Taubner's order to kill were dismissed.[799] This included SS-Unterscharfuhrer Walter Muller who allegedly had snatched young children from their mothers and shot them at point-blank range.[800]

Klug concludes that the condonation of murder was a central component of National Socialism. He writes that the "justice system under Hitler became an accomplice by not persecuting these murders and therefore permitting them."[801]

B. The Legal Profession and the Rationalization of Evil

The most startling fact, in retrospect, is that jurists continued their involvement in the Nazi legal system despite their knowledge of the Reich's depredations. Defendant Josef Altstoetter, for instance, was Chief of the Civil Law and Procedure Division in the Ministry of Justice and remained a member of the Security Police throughout Hitler's rule.[802] The Justice Tribunal queried how Altstoetter could have maintained his membership in light of his knowledge of the deportation and extermination of Jews and the confiscation and destruction of their property.[803] The Court concluded that Alstoetter willingly lent his name as a "soldier and a jurist of note" to the Security Police in return for the power and prestige of office.[804] In this process, he knowingly helped to

---

795. *Id.*
796. *Id.* at 203.
797. *Id.* at 202.
798. *See The Pardon, in* "THE GOOD OLD DAYS" THE HOLOCAUST AS SEEN BY ITS PERPETRATORS AND BYSTANDERS, *supra* note 794, at 207.
799. *Dismissal of the Case Against the Remaining Parties 1 June 1943, in* "THE GOOD OLD DAYS" THE HOLOCAUST AS SEEN BY ITS PERPETRATORS AND BYSTANDERS, *supra* note 794, at 206.
800. *Id.*
801. Klug, *in* THE GERMAN PUBLIC AND PERSECUTION OF THE JEWS, 1933-1945 "NO ONE PARTICIPATED, NO ONE KNEW," *supra* note 787, at 67.
802. Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1170, 1177.
803. *Id.* at
804. *Id.* at

"cloak the shameful deeds of that organization from the eyes of the German people."[805]

Only a single judge resisted carrying out his duties. Dr. Lothar Kreyssig, of the Court of Guardianship, in the town of Brandenburg on the Havel River, initially engaged in modest acts of insubordination.[806] He refused to attend a judicial ceremony in which a bust of Hitler was unveiled,[807] protested the removal of politically suspect judges[808] and distributed leaflets for the Confessional Church.[809] A formal investigation was initiated into Kreyssing's suitability for office and he was reassigned, at his own request, to the Petty Court in Brandenburg.[810] Kreyssing subsequently wrote the President of the Prussian Supreme Court protesting the removal and killing of mental patients.[811] He then enjoined several hospitals from transferring wards of his Court and filed criminal charges against the local Nazi leader responsible for the euthanasia program.[812] Kreyssig refused to withdraw these legal motions and was required to retire.[813] His acts of resistance contrast with the conformity exhibited by the remainder of the judiciary, which was responsible for sentencing between 30,000 and 80,000 individuals to death.[814]

The defendants in the Justice trial pled that as lawyers and judges that they were obligated to obey the dictates of the law, regardless of their own views. Most, like defendant Von Ammon, nevertheless insisted that they had applied the law in a fair and equitable fashion.[815] Defendant Guenther Nebelung, Chief Justice of the Fourth Senate of the People's Court, proclaimed that "I was a German judge. I followed the laws of my country and my knowledge and my conscience in passing judgment . . . . Does not every soldier find himself in the same situation?"[816] Rudolf Oeschey testified that he was convinced that "I was doing right, by

805. *Id.*
806. MULLER, *supra* note 1, at 194-97.
807. *Id.*
808. *Id.*
809. *Id.*
810. *Id.*
811. MULLER, *supra* note 1, at 194-97.
812. *Id.*
813. *Id.*
814. *Id.*
815. *See* Extracts from the Testimony of Defendant Von Ammon, *in* JUSTICE CASE DOCS., *supra* note 65, at 816.
816. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 950.

obeying the law to which I was subjected . . . . it was a matter of conscience for me not to misuse the law in a criminal way, but to apply it in accordance with the will of the legislator, and to grant the offender a proper trial and a just verdict."[817] The defendants conceded, as did Rothaug, that they had favored the limitation of Jewish influence,[818] but none claimed to have been aware of the Final Solution.[819]

The defendants, like Von Ammon, rationalized that the determination whether regulations, such as the Night and Fog program, were consistent with international law was the responsibility of the executive branch.[820] They reasoned that harsh regulations often were required in order to maintain order at home and abroad and were preferable to the draconian alternatives which would have been implemented absent judicial involvement.[821]

Franz Schlegelberger claimed that resistance would have resulted in retribution and only would have encouraged additional opposition from those who wished to abrogate judicial independence and the rule of law.[822] He calculated that the best course was to avoid "a larger evil by applying a smaller evil."[823] Schlegelberger, for instance, contended that resisting the transfer of prisoners to the Security Police would have been a "useless sacrifice" which would have resulted in the purging of the Ministry of Justice and the appointment of officials eager to subordinate legal principle to politics.[824]

Defendant Josef Altsoetter was typical of the tendency of the defendants to rationalize that they had succeeded in moderating the excesses of the Nazi regime. He noted that "German judges, even in hard times . . . did their duty for right and justice up to the very end. All that could be desired was that the courage which was shown among the German judiciary . . . would have been shown everywhere."[825] Prosecutor Ernst Lautz claimed that he had

---

817. *Id.* at 952.
818. *See* Extracts from the Testimony of Defendant Rothaug, *in* JUSTICE CASE DOCS., *supra* note 65, at 752.
819. *See* Extracts from the Testimony of Defendant Rothaug, *in* JUSTICE CASE DOCS., *supra* note 65, at 391, 402.
820. Extracts from the Testimony of Defendant Von Ammon, *in* JUSTICE CASE DOCS., *supra* note 65, at 834.
821. *Id.* at 833.
822. *See* Schlegelberger I, *in* JUSTICE CASE DOCS., *supra* note 65, at 289.
823. Schlegelberger II, *in* JUSTICE CASE DOCS., *supra* note 65, at 722.
824. Schlegelberger III, *in* JUSTICE CASE DOCS., *supra* note 65, at 351.
825. Final Statements of the Defendants, *in* JUSTICE CASE DOCS., *supra* note 65, at 953.

tempered his prosecutorial role with wisdom and human understanding and that "none of the charges made against me here I feel to be more unjust than that, by filing malicious indictments, I had done injustice for the sake of injustice."[826]

The actions of these highly educated and accomplished defendants cannot solely be attributed to their embrace of National Socialism. Most received their legal training and socialization under the Monarchy or Weimar Republic and claimed to have been only titular members of the Nazi Party.[827] Ingo Muller also disputes that the pervasive legal positivism propagated in German jurisprudence explains the legal profession's adherence to National Socialist ideology.[828] He argues that the removal of one-fifth the legal profession—most of whom were Jews, Socialists and Social Democrats—left a corps of conservative and frustrated young lawyers who were inclined to elevate loyalty to the State over fealty to fundamental legal values.[829]

Professor David A. J. Richards concurs that the conduct of German lawyers was not solely due to their embrace of legal positivism.[830] He attributes the profession's cooperation with Hitler to a widespread moral corruption in German society which associated "freedom with the state, moral action with the radical sacrifice and denial of the self, and idealism with the pursuit of heroic excellence and contempt for equality."[831] This commitment to an authoritarian and elitist political system ruled by a dominant and epic personality, in the end, overwhelmed the

826. *Id.* at 945.

827. Schlegelberger's lack of early involvement with the National Socialist Party was typical. *See* Opinion and Judgment, *in* JUSTICE CASE DOCS., *supra* note 65, at 1181-82.

828. MULLER, *supra* note 1, at 296-97.

829. *Id.* German law Professor Arthur Kaufmann also dismisses the shibboleth that the perversion of the German legal process was a consequence of legal positivism. He notes that Nazi lawyers adhered to a "two-track" strategy in which laws promulgated prior to the Third Reich were applied in a broad and open fashion while laws promulgated during the Hitlerite regime were strictly interpreted. Kaufmann, *supra* note 385, at 1645. For the lingering legal legacy of the Third Reich, *see generally* Mathias Reimann, *National Socialist Jurisprudence and Academic Continuity: A Comment On Professor Kaufmann's Article,* 9 CARDOZO L. REV. 1651 (1988). H. W. Koch attributes the complicity of German jurists with the Third Reich to their infatuation with legal positivism. KOCH, *supra* note 1, at 246-47.

830. David A. J. Richards, *Terror and the Law,* 5 HUMAN RTS. Q. 171, 171-72 (1983).

831. *Id.*

demands of constitutional democracy.[832] The root of such a perversion of principle, according to Richards, was a radical separation of professional station and personal conscience—a belief that personal morality must not intrude upon service to the State.[833]

In Vichy France, the French legal profession mechanically applied a complex corpus of laws which were inspired by a vision of the Jew as lying outside the Christian community.[834] Lawyers were involved in litigating questions such as the definition of a Jew and the confiscation of Jewish property.[835] They devoted little effort to creatively crafting, challenging and interpreting anti-semitic statutes.[836] This technical fetishism enabled French lawyers to avoid confronting the larger philosophical issues of "racial persecution, arbitrary incarceration and mass pillage of property."[837] Advocates also accepted the exclusion of their Jewish colleagues from legal practice with seeming equanimity.[838]

Professor Richard H. Weisberg notes that the legal profession in Vichy France narrowly defined the scope of their professional responsibility and blinded themselves to the fact they were functioning in a legal culture which had abandoned the fundamental precepts of French legal traditions.[839] He further notes that lawyers expressed few qualms about practicing before judges and administrative agencies which they "increasingly had reason to know were culpable of not only pillage but far worse."[840]

Lawyers under the Third Reich, like their French brethren, cloaked themselves in the mantle of legal obligation in order to avoid confronting their individual and collective responsibility. They portrayed themselves as mere ciphers who were compelled to obey legal commands. Lawyers, by focusing on narrow technical

---

832. *Id.* at 183. Richards identifies five features of the lawless Reich legal system: abrogation of the separation of powers; abandonment of the principle of legality and utilization of techniques such as rule by analogy; secret laws; application of the laws in an unexpected and inconsistent fashion; and the vesting of judicial power in the secret police. *Id.* at 180.

833. *Id.* at 185.

834. *See* RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE 411-13 (1996).

835. *Id.* 411-16.

836. *Id.* at 160, 416.

837. *Id.* at 195.

838. *Id.* at 296. The Belgium legal profession was distinguished by their opposition to the exclusion of Jewish lawyers. *Id.*

839. WEISBERG, *supra* note 834, at 335.

840. *Id.*

issues, avoided confronting larger philosophical concerns and considerations. Lawyers and judges often portrayed minor cases as involving exaggerated social and political costs and consequences in order to justify the imposition of harsh punishments. Those who experienced qualms of conscience were able to rationalize that they were mitigating and moderating the excesses of Nazism.[841]

In sum, the involvement of lawyers and judges in the Third Reich is not solely explained by jurists' embrace of legal positivism. Lawyers, like others, were infected by a deep moral decay which eroded the core concepts of the liberal legal culture. The Eighteenth Century values of individual equality, dignity and checks and balances were sacrificed in favor of a racial and totalitarian ideal. Legal methodology was reduced to a harsh utilitarianism; the only relevant criteria in evaluating a legal rule or statute was whether it advanced the cause of National Socialism.[842]

Rothaug and Oschey were Nazi zealots who twisted and transformed the law into an instrument of extermination.[843] Von Ammon, Lautz and Klemm were more malleable. They mechanically followed orders while experiencing few qualms concerning the content of these commands.[844] Schlegelberger and Rothenberger expressed doubts, but ultimately seemed indifferent to the contemptible consequences of their actions.[845] The defendants acted freely and voluntarily and the regime rarely was compelled to resort to threat or force in order to obtain the defendants' cooperation. The depth of the defendants' commitment to the Reich is suggested by the fact that none expressed remorse or guilt over the hundreds of thousands whom they collectively exterminated and scarred in the name of justice. They suffered from a perverse pathology which led them to abandon the primary principles of continental legal culture and to embrace the core components of National Socialist ideology. This ultimately resulted in their complicity in murder.[846]

---

841. The seminal discussion of the resort to legal formalism to avoid moral issues is ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975). For a discussion of the response of individual members of the legal profession to National Socialism, *see* Vagts, *supra* note 197, at 678-86.

842. *See supra* notes 830-40 and accompanying text.

843. *See supra* notes 699-746 and accompanying text.

844. *See supra* notes 747-74 and accompanying text.

845. *See supra* notes 603-28 and accompanying text.

846. *See supra* notes 815-27 and accompanying text.

XII. Conclusion

The legal literature generally has failed to examine the role of jurists in the Third Reich and other repressive regimes. The Holocaust was not simply an exercise in arbitrary and anomic terror. The implementation of Nazi policies, to a significant degree, was the product of legal decrees and judicial deliberations and decisions.[847]

Hitler viewed law and lawyers with contempt and advocated a return to an unadulterated Aryan legal system based on blood, race and soil.[848] He used the Reichstag fire to promote panic and to justify the centralization of plenary power in the office of Chancellor.[849] Germany's continental criminal justice system was radically revised and replaced by a Nazi criminal code and court system which was devoted to controlling and curbing political dissent and to eliminating racially and socially repellent parts of the population.[850] The training, admission and conduct of judges[851] and lawyers was subjected to close scrutiny and supervision.[852] The enforcement of newly-adopted draconian criminal statutes[853] was centered in a streamlined court system which relied upon expedited procedures.[854] This was supplemented by the utilization of extra-legal mechanisms of punishment.[855] An even harsher version of the Nazi justice system was implanted in Poland and in other occupied territories.[856]

Various German lawyers and judges were convicted of war crimes and crimes against humanity before a post-war American tribunal. The decision made it clear that lawyers and judges may not obtain legal immunity by draping themselves in the cloak of domestic law and are internationally liable for the arbitrary and discriminatory interpretation and enforcement of draconian statutory standards. The Justice case stands as the single interna-

---

847. *See supra* notes 1-3 and 775-801 and accompanying text.
848. *See supra* notes 29-58 and 222-24 and accompanying text.
849. *See supra* notes 64-91 and accompanying text.
850. *See supra* notes 246-320 and accompanying text.
851. *See supra* notes 93-176 and accompanying text.
852. *See supra* notes 183-244 and accompanying text.
853. *See supra* notes 382-447 and accompanying text.
854. *See supra* notes 246-304 and accompanying text.
855. *See supra* notes 359-81 and accompanying text.
856. *See supra* notes 321-49 and accompanying text.

tional prosecution of jurists for the commission of transnational crimes.[857]

This discussion suggests three larger issues. First, discussions of human rights must more closely consider the domestic and international conditions which encourage and undermine the rule of law. How does a democratic legal system degenerate into totalitarianism? What are the requisites for the rule of law? Second, the conduct of German lawyers exemplifies the troubling tendency among legal professionals to reify and reverently apply the law with little attention to ethical and moral issues. This is a disturbing development for a profession which purports to serve as the guardian of justice and freedom. Third, discussions of legal ethics tend to focus on the peccadillos of daily practice. There are few efforts to address the general obligation of lawyers to insure the rule of law at home and abroad. This remains a particularly relevant task in the newly emerging global society.[858]

857. *See supra* notes 449-527 and accompanying text.

858. *See generally* DAVID LUBAN, LAWYERS AND JUSTICE AND ETHICAL STUDY 104-147 (1988).