THE ASSASSIN'S DAGGER: AN EXPLORATION OF THE GERMAN JUDICIARY IN THE THIRD REICH

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This thesis explores the complicit role the German judiciary played in the rise of the National Socialist Party—known as the Nazis—the legalization and enablement of the Holocaust, and other programs to purify the German Volk. After World War I, Germany forcibly evolved to a democracy. During this period of chaos, the German judiciary was extremely anti-republican and their verdicts reflected this bias. After Hitler's rise, the judiciary legally enabled the Nazis. The judiciary was ultimately complicit in legalizing murder, stripping individual rights, regulating marriage, and supporting all Nazi discriminatory practices. In 1942, Hitler formally stripped the judiciary of its independence, announcing the removal of judges if they failed to uphold the law to his satisfaction. For the remainder of the war, the judiciary complied with all laws and directives. In January 1947, the senior jurists faced the same charges as the primary leaders of the Nazi government, the armed forces, and the medical community. During the Nuremberg Military Tribunals, , the high-ranking judiciary members raised the defense that they were only enforcing the laws of the state as their sworn duty. Ten of the sixteen tried were convicted and sentenced to prison sentences. All were released by 1956.

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

THE ASSASSIN'S DAGGER: AN EXPLORATION OF THE GERMAN JUDICIARY IN THE THIRD REICH, by Major Laura-Jane R. Freeland, 125 pages.

This thesis explores the complicit role the German judiciary played in the rise of the National Socialist Party—known as the Nazis—the legalization and enablement of the Holocaust, and other programs to purify the German Volk. After World War I, Germany forcibly evolved to a democracy. During this period of chaos, the German judiciary was extremely anti-republican and their verdicts reflected this bias. After Hitler's rise, the judiciary legally enabled the Nazis. The judiciary was ultimately complicit in legalizing murder, stripping individual rights, regulating marriage, and supporting all Nazi discriminatory practices. In 1942, Hitler formally stripped the judiciary of its independence, announcing the removal of judges if they failed to uphold the law to his satisfaction. For the remainder of the war, the judiciary complied with all laws and directives. In January 1947, the senior jurists faced the same charges as the primary leaders of the Nazi government, the armed forces, and the medical community. During the Nuremberg Military Tribunals, the high-ranking judiciary members raised the defense that they were only enforcing the laws of the state as their sworn duty. Ten of the sixteen tried were convicted and sentenced to prison sentences. All were released by 1956.

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A final thanks to all the people associated with legally conferring justice in the aftermath of the most brutal and documented inhumanity. In a time when 'Victor's Justice' was most feasible, these individuals took careful time and consideration to impart fairness and impartiality within the fallen Nazi Germany. Justice is rarely perfect, but to pursue it in its purest form is always honorable.

For the dead and the living, we must bear witness.

—Elie Wiesel

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ACRONYMS

BG	Brigadier General
CC Law 10	Control Council Law Number 10
IMT	International Military Tribunal
NMT	Nuremberg Military Tribunal
VGH	Volksgerichthof (People's Court)

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CHAPTER 1

INTRODUCTION

"My contestants, summon your trusted witnesses and proofs, your defenders under oath to help your cause. And I will pick the finest men of Athens, return and decide the issue fairly, truly – bound to our oaths, our spirits bent on justice."[1] The Greek goddess, Athena, speaks these stirring words from the iconic play, *The Oresteia* by Aeschylus. It encapsulates the very essence of justice and illustrates the higher calling of those called judge. This ideal is beautifully translated to the big screen in the 1961 Academy Award winning film, *Judgment at Nuremberg*. Spencer Tracy plays Dan Haywood, a Maine judge called up to service to preside over the Justice Trial, as part of the war crimes program. In his initial scenes, he speaks reverently about the need for the Justice Trial, "I think the trials should go on, especially the trials of German judges. I hope I am up to it."[2]

The International Military Tribunal (IMT) of 1945-1946 captivated the world. The highest-ranking Nazi officials were on trial before an international panel and the sinister crimes and nature of the Third Reich were laid before the world. These men were the ultimate personification of evil and the perceived lack of remorse, shame, or even humility reinforced this perception. After the verdict and sentencing were announced, many in the world were satisfied and shifted focus to more pressing matters. However, in

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[1] Aeschylus, *The Oresteia: Agamemnon, The Libation Bearers, The Eumenides,* trans. Robert Fagles (London, England: Penguin Books, 1966), 253.

[2] *Judgment at Nuremberg,* Metro Goldwyn Mayer, 1961, DVD. The film focuses on specific aspects of the Justice Case and is the only popular culture film about the trial. It was nominated for eleven Academy Awards and won two.

the US occupied territory, a series of twelve subsequent trials were held, the Nuremberg Military Tribunals (NMT).

These trials pursued justice within the bureaucratic realm, including the industrialists who utilized inexpensive slave labor to build their coffers, the government ministries who supported and enabled all manner of horrors, and the jurists who perpetrated a host of crimes under the guise of law. Their perversion of the temple of justice was unparalleled in western history. The trials never received much external attention and most people were unaware until the release of *Judgment at Nuremberg*, which featured footage from the liberation of the concentration camps which had not been previously distributed.[3]

However, these subsequent trials were necessary and arguably more important than the original IMT in 1946. The IMT was easy to support; it was the tangible execution of the Moscow Declaration of 1943 and the London Charter in 1945. Moreover, those on trial were feared men, their wicked crimes annotated by their own record keeping, witness testimony, and countless documents and speeches. There was little doubt to their guilt and easy to lay the responsibility of the Holocaust, a costly world war, and the destruction of Germany at their feet.

The leading military counsel, Brigadier General (BG) Telford Taylor, and his chain of command knew that justice had not been fully served at the conclusion of the IMT. Through the collection of evidence, it became obvious that the Nazi elite could not have acted alone. They required the support of the government, military, and civilians for

[3] You Tube, "Maximilian Schell Remembers 'Judgement at Nuremberg'," 11 October 2011, accessed 26 April 2015, https://www.youtube.com/watch?v=QY9WNNRIf3M.

success. The Justice Trial held in 1947 is a particularly salient example of this support. The opinion summarizes the primary charge against the jurists as "conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of the law by the authority of the Ministry of Justice, and through the instrumentality of the courts."[4]

There is little written on the Justice Trial despite the plethora of documents, the court proceedings, writings on justice in the Third Reich, and even the personal writings of the trial judges. This work seeks to explore the necessity and obligation of the Justice Trial and draw modern lessons from this period in history. Additionally, the author looks to underscore the absolute necessity of a functional, independent judiciary. At the end of *The Oresteia,* Athena speaks once more, to her judges and the people: "Untouched by lust for spoil, this court of law majestic, swift to fury, rising above you as you sleep, our night watch always wakeful, guardian of our land – I found it here and now."[5]

The German Judicial Construct before 1933

To address the evolution of justice in Germany, a common understanding of the existing structure is necessary. The system has similarities to the U.S. judicial system, but it is important to denote the divergence between the two and understand that at no time is the German judiciary on equal footing with any other part of the government. In the United States, the judiciary is a part of a three pronged government system balanced with the legislative and executive branches. The Supreme Court has the ability to overturn

[4] *Trials of War Criminals before the Nuernberg Military Tribunals: Volume III, "The Justice Case"* (Washington, DC: Government Printing Office, 1951), 985.

[5] Aeschylus, 262.

laws and protect the country from its elected officials, if necessary. A much different system operated in Germany during the German Empire and the Weimar Republic. Criminal activity was classified into three categories of crimes, derelicts, and contraventions. 'Crimes' are those "punishable by death or imprisonment for more than five (5) years" are called '*verbrechen;*'[6] lesser offences are referred to as "derelicts" (*vergehen*) and defined as "punishable with imprisonment or substantial fines."[7] Finally, the lowest classifications are "contraventions" (*uebertretungen*) and are considered "minor offenses."[8]

The court system followed a similar approach, with subsequent levels handling the appropriate criminal classification. The court system encompasses three levels of courts. Starting with the "petty court" or "*Amtsgericht*," this court "functions as a trial court with a jurisdiction that is limited to the less serious cases, both civil and criminal."[9] The "*Landgericht*" or county court handles slightly more series issues than the Amtsgericht and can serve as the initial appeals court from the lower court.[10] Generally, appeals proceed to the *Oberlandesgericht* for adjudication.[11] The "court of final appeal"

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[6] *Trials of War Criminals,* 34.

[7] Ibid.

[8] Ibid.

[9] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge, MA: Harvard University Press, 1991), x.

[10] Ibid.

[11] Ibid.

was the "*Reichsgericht*" or Supreme Court.[12] The role of the *Reichsgericht* included determining important legal questions in the interpretation of Reich laws and acted as an appellate court from decisions and cases that originated in the Landgerichte. Finally, the court heard significant treason cases.[13]

A critical component of the system was the selection of the judges that ran these courts. The *Reichsgericht* panels were "appointed by the President of the Reich."[14] The respective local governments appointed the lower court judges.[15] Finally, the most important principle was judicial independence. Under the German Empire and the Weimar Republic, once appointed a judge could only be removed by "formal action before a disciplinary court" of his peers.[16] This independence granted the judiciary the ability to be objective and, ideally, not swayed by political pressures.

Other Legal Differences

The conduct of court cases is also important. Within the Anglo-American procedures, a jury of local citizens decides trials, most with little to no legal experience. In Germany, cases were tried in front of a panel of jurists, usually the same panel for an established period.[17] The decisions were written, provided without authorship, and there

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[12] Müller, x.

[13] *Trials of War Criminals*, 35.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Müller, x.

were no dissenting opinions, as is seen in the U.S. system.[18] Some cases were heard using both jurists and laypersons; however, the laypersons were specifically selected "for their supposed judiciousness, and serve for a long period of time."[19] The jurists and laypersons deliberated together in order to determine the verdict.

The path to become a jurist was similar to that of a civil servant. After law school, potential jurists would work their way up internally through the courts system.[20] Those who selected private practice would remain there and would not be competitive for selection to the *Reichsgericht*. This may prove to be pivotal in the eventual collapse of the judiciary in the Third Reich, as these were jurists experienced in a bureaucracy and generally ignorant of outside perception.

Finally, legal education is of paramount importance when examining the role of the judiciary in German life. Potential legal scholars proceed directly from high school to legal studies at university.[21] This differs from the United States, where students are required to complete an undergraduate course of study before attending law school. Once through law school, the German law students could pursue a doctorate in law, but this was unusual at this juncture. Generally, they would take two exams through the state authorities, comparable to the bar exam in the United States.[22] Following this, there is a

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[18] Müller, x.

[19] Ibid., xi.

[20] Ibid.

[21] Ibid.

[22] Ibid., xi.

mandatory period of internships with the courts, government agencies, and lawyers to provide breadth of experience and they would then proceed with their careers.[23]

The German judiciary has much to account for in the early years of the Weimar Republic and it capitulated completely to the ideals and goals of the Third Reich. This thesis studies the trajectory of the law and judges during the Weimar Republic, a time of much upheaval within German society, followed by a review of the laws and cases of the 1930s after the Nazis came to power; this is a critical connection between the judiciary and the emboldening of the Nazis. Finally, this exploration provides analysis of the judiciary during World War II and links earlier legal decisions as concessions of power. It is imperative to study this fall from legal grace to educate and build awareness to prevent it from occurring again. In the words of BG Telford Taylor, "Great as was their crime against those who died or suffered at their hands, their crime against Germany was even more shameful. They defiled the German Temple of justice, and delivered Germany into the dictatorship of the Third Reich, 'with all its methods of terror, and its cynical and open denial of the rule of law'."[24]

The Weimar Republic

After the armistice in November 1918, Germany found itself lost and yearning to regain a familiar identity. Many Germans, especially those in the military, felt betrayed by the politicians in Berlin who ceded victory to the Allies. In the months that followed, after the indignity of the Treaty of Versailles, the once proud German people found little

[23] Müller, xi.

[24] *Trials of War Criminals*, 181.

to celebrate. The fledging Weimar Republic struggled to win the support of the people and the deteriorating conditions imbued little confidence in the government. The storm was brewing for a shrewd and ambitious individual to emerge and offer honor and dignity to the German people by overthrowing the weak and ineffective republic.

The Origin of the Weimar Republic

The armistice in 1918 not only ended a costly war with the Allies, but also opened the floodgates of previously dammed tensions. The outbreak of war in 1914 had temporarily hidden the many issues and stresses among the German people. However, the agony and shame of losing the war and the realization of the cost reinvigorated those tensions with a vengeance.[25] The fall of 1918 was a difficult time for the leaders of Germany. It was obvious that the defeat was rapidly approaching and many of the German Allies were looking for a way out.[26] The military leaders finally recommended the government pursue an armistice and laid the groundwork for the scapegoats. "I have advised His Majesty to bring those groups into the government whom we have in the main to thank for the fact that matters have reached this pass. We will now therefore see these gentlemen move into the ministries. Let them now conclude the peace that has to be negotiated. Let them eat the broth they have prepared for us."[27] This bold and largely untrue statement from General Erich Ludendorff began the shifting of blame from the

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[25] Edgar J. Feuchtwanger, *From Weimar to Hitler: Germany, 1918-33* (New York: St. Martin's Press, 1993), 1. Its important to highlight that anti-semitism was not a new concept in Germany. The Nazis would exploit a known bias to gain a foothold.

[26] Ibid., 8.

[27] Ibid., 9.

military (him) to politicians, including social democrats, Jews, Communists, and others; this illustrates the evolution of the stab in the back myth, which so inflamed a confused Adolf Hitler.

Once the Allies were notified of a request for an armistice, President Woodrow Wilson "demanded clear signs that Germany now had a democratic government and had turned its back on authoritarianism and militarism."[28] Between the request for the armistice and this demand from President Wilson, the German monarchy ceased to exist. A comprehensive government transition is difficult in the best of circumstances, let alone in a country that has just lost a costly war, fears for the future, and whose population has little reason to trust the government that presided over the country's defeat.

From late 1918 until the elections in January 1919, Germany was in a complete state of unrest. The monarchy had abdicated, the politicians were attempting to establish a parliamentary republic, and the military was reeling from defeat and the impending change. This led to a series of revolutionary attempts throughout Germany to establish control and restore German pride.[29] Those attempts were thwarted and on 19 January 1919, Germany held its elections for the constituent assembly. The newly elected assembly faced its first major issue, negotiating the terms of peace following the armistice.

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[28] Feuchtwanger, 10.

[29] Ibid., 19-32.

The Treaty of Versailles

On 7 May 1919, the Treaty of Versailles was presented for signature to the German representatives and this treaty would prove far more destructive than any peace it hoped to accomplish. "Viewing Germany as the chief instigator of the conflict, the European Allied Powers decided to impose particularly stringent treaty obligations upon the defeated Germany."[30] Germany was required to concede many identified territories, maintain a limited Army and Navy, and was prohibited from developing or maintaining an Air Force. Finally, and most destructively was the "War Guilt Clause" forcing Germany to accept full responsibility for the war and requiring reparations for the entire monetary cost for World War I.[31] Not only humiliating for the proud country, the reparations were astronomical and had significant economic impacts in the coming years.

Left with no option, the German leaders signed the treaty and solidified their place in German history as the November criminals. This treaty did not broker peace, it was a punishing document designed to humiliate and weaken Germany. The Allied powers collectively failed to realize that such a polarizing treaty would only serve to further isolate Germany within Europe, exacerbating old tensions, and would also provide a sensational platform for aspiring politicians to lobby for a return of honor and pride to Germany, regardless of the price.[32]

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[30] United States Holocaust Memorial Museum, "Treaty of Versailles," *The Holocaust Encyclopedia,* accessed 12 January 2015, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005425, 1.

[31] Ibid., 2.

[32] Ibid., 3.

The Judiciary

The German judiciary was a unique entity during the rise of the Weimar Republic. "Coming from a longstanding authoritarian, conservative, and nationalist tradition, judges believed deeply in reinforcing government authority, ensuring public respect for the law, and guaranteeing state actions had a legal basis (Rechtsstaat)."[33] Mirroring the issue facing the German public, the judiciary found itself at a crossroads. The monarchy they had loyally served was gone and the rising Weimar Republic was potentially illegitimate due to its revolutionary birth. Unwilling to evolve and support the new republic, the judiciary determined its own separate path neither supporting nor seditiously undermining the government.

The Weimar Constitution represented a quagmire of convoluted issues leaving the country in a precarious situation. Described as "indecisive,"[34] the Weimar Constitution attempted to satisfy everyone and in doing so satisfied no one. This tainted document endeavored to enact a republic while maintaining the benefits of the monarchy. In the eyes of many Germans, and especially the judiciary, the Weimar Constitution was not only enacted by the "November Criminals," but was done so at the behest of the Allied powers, specifically the United States.[35]

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[33] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," *Holocaust Encyclopedia,* accessed 28 September 2014, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887, 1.

[34] J. Peter Burgess, "Culture and the Rationality of Law from Weimar to Maastricht," in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions*, ed. Christian Joerges and Navraj Singh Ghaleigh (Oxford, UK: Hart, 2003), 143.

[35] Ibid.

However, the role of the judiciary did not change between the fall of the Kaiser and rise of the Weimar Republic. The court systems and laws were kept in the same paradigm, to include the 1871 penal code. Laws were passed through the Reichstag and approved by the president, whereby his signature validated the legal and just passage of the law.[36] The most critical carryover was the judicial independence, guaranteed the seventh chapter of the Weimar Constitution.[37] Specifically, article 102 states, "Judges are independent and subject only to the law."[38] Article 104 states, "Judges serving ordinary jurisdiction are appointed for lifetime. Against their will they can only be suspended temporarily or forced into early retirement or transferred to another location if a judge decided so, based on reasons, and according to procedures determined by law. Legislation may establish an age limit, at which judges retire."[39] Simply understood, the framers of the Weimar Constitution understood and upheld the concept that the judiciary needed the independence to make appropriate decisions that were not influenced by political ties and job security.

The Application of Laws

The standing judiciary after World War I was nationalistic and very set in their monarchial ways. "[D]uring the First German Republic of Weimar the judiciary actively circumvented legal regulations when it seemed justified according to their predominantly

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[36] *Trials of War Criminals*, 255.

[37] Ibid., 257.

[38] Weimar Republic, "The Weimar Constitution," PSM Data, accessed 28 January 2015, http://www.zum.de/psm/weimar/weimar_vve.php#Seventh%20Chapter.

[39] Ibid.

anti-republican outlook."[40] The loose application of the law would highlight this paradigm. The judiciary supported any faction that was against the republic. The war reparations were causing an economic crisis and resulted in rising tensions in Germany.[41] Extreme views became more common, characterized by attempted murder and assassination attempts on the government's officials and its supporters.

As political murder became common within Germany, the judiciary had an opportunity to show loyalty and leadership to try to stabilize the reeling country. Unfortunately, the judiciary lacked the vision and motivation to look beyond the 'wounds of the war' and engaged in a dangerous precedent. "According to the statistics of J Gumbel, from 1919 to 1922 for 354 right wing killings the perpetrators were convicted to one lifelong imprisonment and 90 years imprisonment and some pecuniary penalties. The perpetrators of 22 left wing killings were in contrast convicted to 10 death sentences, three life long imprisonments and 248 years of imprisonment."[42] The left wing was protected, while the right was left to fend for itself. In 1922, the republic passed the "special Law for the Protection of the Republic," levying severe punishments for political terrorism.[43]

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[40] Matthias Mahlmann, "Judicial Methodology and Fascist and Nazi Law," in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions*, ed. Christian Joerges and Navraj Singh Ghaleigh (Oxford, UK: Hart, 2003), 232.

[41] William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York: Simon and Schuster, 1990), 51.

[42] Mahlmann, 232, footnote.

[43] Shirer, 51.

The early 1920s were difficult times for the fledgling Weimar Republic and the German people. The disgrace of Versailles, the deteriorating economy, and the harsh terms from the French for war reparations, all wore heavily on the burdened republic and provided ample opportunity for the smaller anti-republican factions to gain power and traction. The people were losing faith in the government and more importantly in the values so imbued in the German culture.

Hitler and the Law

On 9 November 1923, Adolf Hitler, head of the Nationalist Social German Worker's Party, attempted an ill-advised putsch to take over Bavaria. The putsch ultimately ended in bloodshed, with sixteen party members and three police officers killed.[44] Hitler was arrested and charged with treason. He effectively used his trial in 1924 as a vocal platform, aided by the lenient judges who shared elements of his opinion.[45]

Throughout the trial, Hitler stood by his actions yet craftily implicated the very Bavarian government that accused him of treason. He cavorted, expounded, and raised the nationalistic fervor within the courtroom for hours on end. He even turned his disdain onto the seated judges proclaiming: "[y]ou may pronounce us guilty a thousand times over, but the goddess of the eternal court of history will smile and tear to tatters the brief of the state prosecutor and the sentence of this court. For she acquits us."[46] In addition,

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[44] Shirer, 74-75.

[45] Ibid., 75.

[46] Ibid., 78.

the indulgent judges failed to admonish the derogatory terms of "Jew Government" and its members as "November Criminals."[47] The judges should have immediately stopped such outbursts and inflammatory language to preserve the equity of the court.

The guilty verdict handed down was broken into three parts encompassing the required types of punishments. Hitler and the defendants were found guilty and the sentence was the minimum of five years with various parole possibilities.[48] In direct conflict with the law, "Article 81 of the German Penal Code—which declared that 'whosoever attempts to alter by force the Constitution of the German Reich or of any German state shall be punished by lifelong imprisonment'."[49] Next, a fine of 200 marks was imposed, as was required by law; however, there was no limit to the fine.[50] Finally, due to Adolf Hitler's status as an Austrian citizen, by law, he should have been deported from Germany.[51] However, once again the jurists made excuses for the behavior stating, "In 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."[52] Essentially, the judiciary determined that Hitler was such a nationalistic German his behavior was

[47] Müller, 15.

[48] Shirer, 78.

[49] Ibid.

[50] Müller, 16.

[51] Ibid.

[52] Ibid.

driven by a need to right the wrongs of 1918 and therefore was a true German, not a foreigner.[53]

The putsch and subsequent trial had made Hitler internationally recognized. He would depart from that courtroom to the old fortress at Landsberg to serve his sentence in relative luxury, treated with deference, and hosted many visitors during his nine-month incarceration.[54] Hitler emerged from prison as a party hero. He capitalized on the momentum and set his sights on the government and providing a sense of national identity to the German people.

Although not unique to Adolf Hitler, the conduct of judiciary in his trial is important to highlight. The judiciary disliked the Weimar government and its perceived associations; they completely undermined the laws of the German state. The judicial panel showed complete weakness through their inability to control the courtroom and Hitler's outbursts. There is no doubt this conduct deepened the poor impression Hitler had of the profession and made it that much easier to wrest control from the feeble government entity.

The Path to the Third Reich

Throughout the rest of the 1920s, the judiciary continued to support the anti-republic factions. The judiciary maintained their practice of severely punishing

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[53] Müller, 16.

[54] Shirer, 78-79. During this time, Hitler drafted his manuscript, published in 1925 as *Mein Kampf*. It initially sold well, but profits slumped from 1927 to 1933. The rise of the Nazi party correlated to rejuvenated book sales and made Hitler a prosperous author. *Mein Kampf* was commonly given as a wedding or graduation gift and sold six million copies in Germany.

communists and liberals while protecting those working towards a different, more authoritarian government. Meanwhile, there were other political transactions ongoing that would lead directly to Adolf Hitler being named Chancellor of Germany. In the late 1920s and early 1930s, there was a deepening divide between the Reichstag and the president.[55] Using the legal loopholes of the Weimar Constitution, President Paul von Hindenburg and his chancellors decided to dismiss the Reichstag in order to try to revise the constitution to increase the power of the president and his chancellors and relegate the Reichstag to a supervisory role.[56] In pursuing this goal in 1930, Hindenburg and his chancellors saw an opportunity to exploit the apparent popularity of the National Socialist Party to help realize their vision.[57] However, Hitler was unwilling to be used as a pawn; he had his own goals for himself and his party. After the dissolution of the Reichstag in 1930, the precarious balance of power between the Reichstag and the president had been effectively tipped to the president.[58] In 1932, Hindenburg was re-elected, beating Hitler, and named Franz von Papen as the new Chancellor of Germany.[59] Hitler's defeat highlighted that the party did not have the necessary clout to assume power on its own. In January 1933, Hindenburg and Hitler came to an uneasy alliance, as the government needed popular support, which the National Socialists could provide. Hitler wanted

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[55] Detlev Peukert, *The Weimar Republic: The crisis of classical modernity* (New York: Hill and Wang, 1992), 260.

[56] Ibid., 260-261.

[57] Ibid., 261-262.

[58] Ibid., 262.

[59] Ibid., 265.

power, which Hindenburg could provide.[60] On 30 January 1933, Hindenburg announced Hitler as the new Chancellor of Germany. The Weimar Republic had ended, lasting only fourteen years.

[60] Peukert, 269-270.

CHAPTER 2

LEGAL FOUNDATIONS OF THE THIRD REICH

From the onset, Hitler and the Nazis came into the government with a plan. Once named chancellor, there was no way to contain either Hitler or his goals. Within sixty days, he unleashed discriminatory measures in the Enabling Act and laid the groundwork for his future attacks on the Communists, Jews and other undesirables. In collaboration, the legal community, comprised of educators, judges, and the Ministry of Justice fully supported Hitler's objectives and worked tirelessly to build a legal foundation to support his political agenda.

The Reichstag Fire and Trial

On the night of 27 February 1933, the Reichstag went up in flames. Amidst the paralyzing disbelief of those around the Reichstag that evening, a perpetrator was captured on scene: Marinus van der Lubbe, a 24-year-old Dutchman.[61] As the Reichstag burned, Van der Lubbe was taken to the Brandenburg Gate Police Station for further questioning.[62] Van der Lubbe readily spoke to his motives, describing his act as encouragement to the German workers to fight back against the new establishment.[63] The fire Van der Lubbe set was meant to be a rallying cry for Germans; instead, a political battleground emerged that enabled a swift transition from a republic to a dictatorship.

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[61] Fritz Tobias, *The Reichstag Fire* (New York: Putnam, 1964), 28.

[62] Ibid.

[63] Ibid., 32.

Van der Lubbe was rapidly identified as a communist from his statements and was legally established as such by the Dutch authorities in his hometown.[64] Armed with this information, the Nazis immediately capitalized on the event as a Communist plan to overthrow the government. The police investigators were under significant pressure to identify and locate the accomplices responsible for the loss of the Reichstag. That very night, many members of the Communist Party were dragged from their beds and arrested, as were Social Democrats, pacifists and other political foes.[65] Hermann Goering shouted to Rudolf Diels, the Gestapo Chief, "We will show no mercy. Every Communist official must be shot where he is found."[66] The Nazis understood the criticality of this moment and worked feverishly to ensure their version of the truth endured.

As the newly appointed chancellor, Hitler had an obligation to protect the German people and on 28 February 1933 issued the Decree of the Reich President for the Protection of the People and the State. It immediately suspended many elements of the German constitution specifically regarding individual rights and due process.[67] It also restricted freedom of speech, freedom of the press, the right to assemble, and removed all restrictions on police investigators.[68] This decree would lead to the one of the foundational acts of the Nazi state, the ability to arrest without warrant or judicial review,

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[64] Tobias, 33.

[65] Müller, 29.

[66] Shirer, 192.

[67] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 10.

[68] Ibid.

or more simply, preventative police action.[69] Although many would recoil at the concept of such draconian measures, Article 48 of the Weimar Constitution in fact allowed the Reich President to suspend certain rights.

> The Reich President may, if the public safety and order of the German Reich are considerably disturbed or endangered, take such measures as are necessary to restore public safety and order. If necessary, he may intervene with the help of the armed forces. For this purpose, he may temporarily suspend, either partially or wholly, the fundamental rights established in articles 114, 115, 117, 118, 123, 124, and 153.[70]

There are many vague elements of this article, but regardless, Hitler issued various decrees, removing these and other protections. The Reich President did not overturn them or establish limits on them. Temporary was an undefined term that allowed such decrees to remain in effect for as long as the German people were in danger from undesirables. Hitler legally eroded the protections of the constitution and paved the way to totalitarianism.

The next day, the parliamentary Communist leader, Ernst Tobler turned himself into police while Georgi Dmitroff, a Bulgarian Communist, and two other Bulgarian communists were captured in the subsequent weeks.[71] The investigation was assigned to Judge Paul Vogt and would be tried by the Fourth Criminal Panel of the Supreme Court in Leipzig, responsible for high treason.[72] Judge Vogt received specific instructions not to pursue leads to implicate any member of the Nazi Party and ensured he maintained a

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[69] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 13.

[70] *Trials of War Criminals*, 986.

[71] Shirer, 193.

[72] Müller, 30.

close relationship with the Prussian state government to guarantee the appropriately minded panel of judges was appointed to the case.[73] While awaiting their trial, the five defendants endured many cruelties that belied the future tortures of the Reich, including remaining chained day and night.[74] Additionally, many foreign attorneys proffered their services to the accused. Every request was denied even though it was legally permissible.[75]

On 21 September 1933, the Reichstag fire trial began in the Supreme Court in Leipzig. Two weeks later, it was moved to Berlin, into one of the undamaged rooms of the Reichstag.[76] There was much witty banter between the defendants and the witnesses, most notably between Hermann Goering and Georgi Dimitrov. More than once, Dimitrov unsettled Goering to the point of inflammatory outbursts and he accused Dimitrov of being an animal deserving to be hanged.[77] As a testament to the transition, rather than reprimand the witness for insulting the defendant, Judge Wilhelm Bünger chastised the defendant for agitating the witness with his Communist propaganda.[78]

The trial would continue as such, but unfortunately, for both the Nazi leadership and the judiciary, the trial was not going the way the leaders had intended. There was no evidentiary support that the Communist defendants had any knowledge or complicity in

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[73] Müller, 30.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Ibid.

the Reichstag fire. There was even less of a case against Ernst Torgler, made mostly of suspicions and false statements.[79] Finally, although the case against van der Lubbe was air tight regarding the fire, his Communist affiliation was on much shakier ground. Although a previous member of the Communist Party, van der Lubbe had resigned years earlier and there was no proof he had any contact with the Communists in Germany.[80]

Torgler, Dimitrov and the two Bulgarian Communists were acquitted, but to save face, the court declared that even though the defendants were not convicted, there was no doubt that the Communist Party participated in the seizure of power because it was a party objective.[81] Meanwhile, the judges also sought to reduce any suspicion of the Nazi Party by reinforcing the false perception that the Nazis had already solidified their majority in the elections.[82] Although acquitted, Ernst Torgler was taken into police protective custody following the trial until 1935. Finally, Marinus van der Lubbe was found guilty and condemned to death under the retroactive clause of the Decree of the Reich President for the Protection of the People and the State and subsequent laws.[83] The judges justified this decision because arson was a previously punishable offense and the only alteration was the punishment for the crime, which could be changed at any time without any constitutional violation.[84]

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[79] Müller, 32-33.

[80] Ibid., 33.

[81] Ibid.

[82] Ibid.

[83] Ibid.

[84] Ibid., 34.

Although the panel of judges came to the only legally possible verdict, it was met with derision from the Nazi leadership. The press referred to it as "miscarriage of justice," and an antiquated judicial system that was ripe for modernization.[85] Hitler was particularly unhappy referring to the verdict as a "laughable outcome."[86] It cannot be forgotten that the even though the outcome was not palatable to the Nazis, it was not for lack of trying. The court authorities allowed the witnesses to verbally attack the Communist Party, kept the defendants completely in check and generally kowtowed to the demands of the Nazi party. However, the inability of the Supreme Court to find the communist leaders guilty would fracture the relationship between state and judiciary.

Changing the Laws

After the Reichstag fire, there was a small window of opportunity for Hitler to gain control of the country in ways the constitutional chancellorship would not normally allow. In less than a month, Hitler presented the Law to Remedy the Distress of the People and the Reich of March 24, 1933 also referred to as the Enabling Act.[87] The Enabling Act is described as the foundation on which Hitler and his cabinet legally orchestrated the dictatorial coup of Germany. Under the law the "cabinet was now empowered to pass laws on its own authority and even the right of the Reich President to draft and promulgate laws was abandoned."[88] Essentially, the Enabling Act transferred

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[85] Müller, 34.

[86] Ibid.

[87] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 18.

[88] *Trials of War Criminals*, 109.

the constitutional powers of the Reichstag to Hitler and his cabinet for four years.[89] In order to accomplish this, Hitler required a two-thirds approval vote from the Reichstag as this would change the constitution. After the previous election, the Nationalist Socialist Party did not gain the majority and had to contend with the other dissenting parties.

This would not be a detractor for Hitler. The Reichstag fire provided him the legal advantage he needed to rig the Reichstag vote. Preventive police detention was used to preclude the attendance of all eight-one Communists and twenty-six of the 120 Social Democrats for the Reichstag vote.[90] With this advantage, the Enabling Act was easily passed with more than the required numbers and only the Social Democrats dissenting.[91] The Supreme Court accepted the validity of the vote and the new law, not challenging one iota of the questionable circumstances of its passage.[92] Once again, the Supreme Court had its own concepts and ideas about the state, and those determined any actions of the court. Unlike the Weimar government, which was born of revolution, the Nazi Reich was considered legitimate and therefore under the paradigm of positivism, and the judiciary owed their allegiance and support to the state.[93]

After the success of the Enabling Act, Hitler and his cabinet now had the legal authority to fashion the government and its laws to their vision. Hitler approved the Law

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[89] Shirer, 196. President Hidenburg also signed the Enabling Act.

[90] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 17.

[91] Ibid.

[92] Ibid.

[93] Ibid.

for the Imposition and Implementation of the Death Penalty.[94] This law changed the penalty for crimes such as treason and arson to death and made the law retroactive to the day Hitler was named chancellor.[95] This backdated law violated the ex post facto rule, which is defined as the change to a law or punishment that is retroactively applied to a person accused of those crimes.[96] "An ex post facto law is considered a hallmark of tyranny because it deprives people of a sense of what behavior will or will not be punished and allows for random punishment at the whim of those in power,"[97] something that became characteristic for the Nazi regime. The true intent of the law was to ensure that if the accused of the Reichstag fire were found guilty, they would be sentenced to death.[98] The Supreme Court acquiesced to this new law quickly, sentencing the one convicted defendant to death.

Having gained control of the legislative arm of the government, the chancellor had to create his government staff in the image appropriate to representing the values and ideals of the National Socialist Party. He enacted the Law for the Restoration of a Professional Civil Service on 7 April 1933.[99] It stated that all non-Aryans and political

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[94] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 19.

[95] Ibid.

[96] The Free Dictionary, "Legal Dictionary," Farlex, accessed February 14, 2015, http://legal-dictionary.thefreedictionary.com/.

[97] Ibid.

[98] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 19.

[99] Joseph W. Bendersky, *Carl Schmitt, Theorist for the Reich* (Princeton, NJ: Princeton University Press, 1983), 202.

undesirables were to be removed from public service.[100] This law was passed along with a so-called coordination policy for the legal bar banning all Jewish attorneys from practicing law or gaining admission to the bar. There was an exception for Jewish attorneys who had fought in the war or lost a direct male relative in World War I.[101] The judiciary, not wanting to be seen as unsupportive after the Reichstag fire trial, went above and beyond establishing binding criteria for acceptable professional conduct. The policies targeted firms that had non-Aryan partners, taking cases of or hiring disbarred Jewish attorneys.[102] The policy finished with, "Every professional contact with the disbarred, non-Aryan attorneys is a violation of standards."[103] With a sweeping policy, the judiciary aligned themselves with Hitler and his goals, ousting undesirable members, and slowly acquiescing their power to the new chancellor and the legal profession went along.

Hitler and his cabinet, moving rapidly and exploiting their legal momentum, passed the Law against the Founding of New Parties on 14 July 1933.[104] This was a pivotal law that facilitated the transition from democracy to dictatorship. Having already gained control of the media and large gatherings through the Decree for the Protection of the People and the State, Hitler now set his sights on limiting any other political ideas besides Nazism. The law explicitly stated, "The Nationalist Socialist German Workers

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[100] Müller, 60.

[101] Ibid., 60-61.

[102] Ibid., 61.

[103] Ibid.

[104] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 21.

Party is the only political party in Germany."[105] Within seven months of being named chancellor, Hitler had managed to completely and in his mind, legally, dismantle the Weimar Constitution and erode any concept of the separation of powers between the Reichstag and the government.

Legal Educators

John Kotter's final step of change management is to root the change into the culture of the organization so that it will continue to evolve within the organization.[106] Hitler's change to the fabric of the German government was rapid and ruthless. The alignment to Nazi goals was referred to as "*gleichschaltung*."[107] In order to cement these ideas of discrimination and the need for an Aryan or master race, the Nazis received a significant amount of support from the university law professors. Perhaps not realized at the time, but for the next twelve years, these professors would influence and teach a new generation of legal professionals and steep them in the requirements and desires of the Third Reich. This would be the only educational influence many of these legal minds would have due to the stove piped nature of the legal education system; as soon as these students completed high school, they went directly to law school. Similar in practice as

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[105] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 22.

[106] John P. Kotter, *Leading Change* (Boston, MA: Harvard Business Review Press, 1996), 21.

[107] United States Holocaust Memorial Museum, "Law and the Holocaust," 1. Gleichschaltung is a massive coordination effort to align with Nazi objectives. Within the legal community, this included discipline and indoctrination throughout the legal profession.

the Hitler Youth, the legal professors molded the next generation of lawyers and judges in the National Socialist image Hitler required.

Purging the universities in compliance with the Restoration of the Professional Civil Service, "120 of 378 scholars who had been teaching at German law schools in 1932 were dismissed."[108] The vast majority of these professors were Jewish, but a few were more liberally minded. There was no major outcry, no anger at watching their colleagues lose their livelihoods; rather this was a necessary action in order to allow for promising new faculty of "nationalistic orientation."[109] One professor, Gerhard Anschütz, grasped the issue and decided not to sit idly by. Dr. Anschütz requested early retirement explaining he was unable to "muster the intellectual 'solidarity with new German constitutional law as it is now taking shape'" in order to teach students "in accord with the intent and spirit of the current government."[110] In short, Dr. Anschütz was unable to ally himself legally to the new doctrine and requirements of the government and chose to leave. He was not imprisoned or persecuted for leaving the university; he exercised moral courage and survived the Third Reich.

Conversely, the Association of German Institutions of Higher Education, representative of the universities, greeted the new chancellor as a "fulfillment of their longings and confirmation of their undying and heartfelt hopes."[111] Now that the education system was free of the Communist and Jewish influence, the educators could

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[108] Müller, 69.

[109] Ibid.

[110] Ibid.

[111] Ibid.

turn their attention to adjusting the curriculum to reflect the new government's leanings specifically removing that "the requirements of legal learning be disinterested, objective and autonomous."[112] Rather than exercising independent critical thought, the legal education system changed to teach the values of National Socialism, allowing no deviation or argument for anything that went against those virtues. Legal conversation became stagnant. German legal theorist, Carl Schmitt summarized, "The whole of German law today . . . must be governed solely and exclusively by the spirit of National Socialism . . . Every interpretation must be an interpretation according to National Socialism."[113] No longer was critical thinking admired or encouraged, rather the rote memorization and application of the law according to the discriminatory practices of the National Socialist Party.

The legal professors, new and old, worked ardently to coordinate the legal communities and education system to parallel the current changes.[114] In fact, many of the tenured professors strove to show their fervor through publications and fiery lectures to ensure there was no doubt of their devotion to Hitler. Unfortunately, in their eagerness, many of these brilliant minds failed to realize that in order to meet the requirements of Hitler's objectives, the legal clock would have to turn back, and many previous legal accomplishments abolished. Joseph Goebbels remarked that it was the chore of National

[112] Müller, 69.

[113] Ibid., 70.

[114] Ibid.

Socialism "to erase the year 1789 from German history."[115] In efforts to accomplish this, Friedrich Schaffstein said in his first teaching lecture, "almost all the principles, concepts, and distinctions of our law up to now are stamped with the spirit of the Enlightenment, and they therefore require reshaping on the basis of a new kind of thought and experience."[116]

The reach of the changing government was insidious and welcomed at every juncture. It became a requirement for all law students to learn and build their legal foundation on the principle that the "chief aim of criminal law, 'the protection of German society' would be achieved 'by eliminating individuals who are degenerate or otherwise lost to society and by allowing petty offenders who can still perform useful social functions to atone'."[117] This maxim identified the core of the National Socialist goal to rid the German society of all those degenerates and useless members, but more importantly, this concept was accepted into legal thinking. It also provided the foundation using the positivist paradigm allowing these dangerous legal precedents to be developed and enforced.

The legal educators of the Third Reich did everything in their power to align themselves with the new government supporting the ousting of peers and colleagues, but also in changing the entire concept of the legal profession. They changed their approach

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[115] Müller, 70. The French Revolution occurred in 1789 resulting in the demise of the French monarchy and the establishment of modern legal frameworks. This spread through Germany and Goebbels' is reinforcing the requirement for Germany to revert to the old methods.

[116] Ibid.

[117] Ibid., 76.

from objective analysis to focus on the betterment of German society. The professors drilled this concept into their pupils until the new legal professionals could quote their requirement to fulfill the Führer's objective to cleanse society. The educators facilitated and even preempted this coordination in order to cement the necessary changes in the coming generations, and to establish the legal community's support of the future of Germany.

The Oath

The early years of Hitler's chancellorship were ones of significant change and consolidation of power. However, President von Hindenburg remained the one legal entity that kept Hitler from assuming complete power. On 2 August 1934, the venerable von Hindenburg died and Hitler took full control. In a decree passed by the cabinet on 1 August 1934, the title of president was abolished and the authority of the president and the chancellor's respective offices were combined.[118] Adolf Hitler was now the Führer and his consolidation of power absolute.

Hitler's first order of business as Führer was to secure the loyalty of his government. From 14 August 1919, all state officials swore the following oath: "I swear my loyalty to the Constitution, obedience to the law, and conscientious fulfillment of the duties of my office, so help me God."[119] On 20 August 1934, the oath of loyalty was changed to: "I swear I will be true and obedient to the Führer of the German Reich and

[118] Shirer, 226.

[119] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 24.

people, Adolf Hitler, observe the law, and conscientiously fulfill the duties of my office, so help me God."[120]

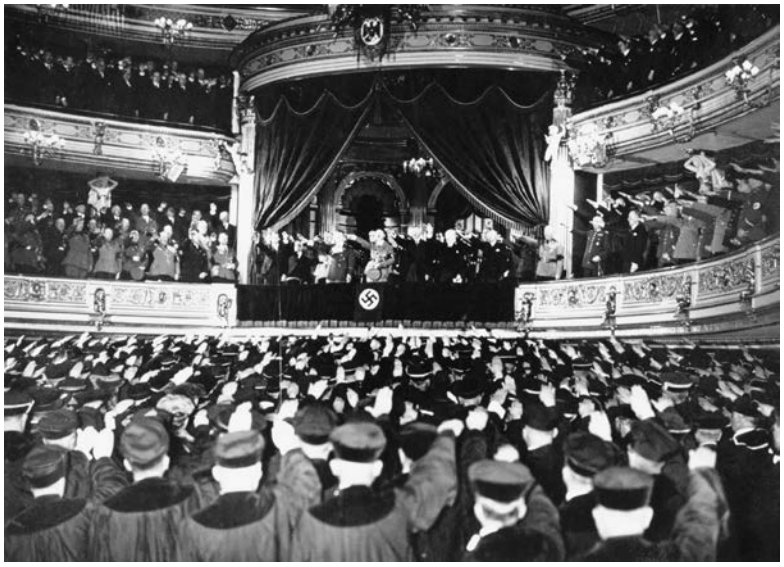

Figure 1. German Judges take the Loyalty Oath to the Führer, Kroll Opera House, Berlin, Germany

Source: United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," *Holocaust Encyclopedia,* accessed 28 September 2014, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887, cover.

There is much to consider in this singular but definitive change in the oaths of loyalty. First, all members of the state including members of the military swore this or a similar oath. The fact that it is an oath makes it extremely difficult to violate and thus those who swear, in fact, legally and personally bind themselves to the future of the Führer. Some historians see the change in the oath as a final consolidation of power and

[120] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 24.

acceptance, and the final step in assuming absolute control over the German people. Other historians believe that the oath conveyed that Hitler's will was the will of the people and that will would not violate the law nor would it extend beyond the boundaries of the office.[121] It is crucial to note that not every member of the legal profession swore the oath. The State's Attorney of Wuppertal, Martin Guager, submitted his resignation stating, "After careful consideration I find, in good conscience, that I am not able to swear the loyalty oath to the Reich Chancellor and Führer, Adolf Hitler, as required of all officials by Reich law of August 20, 1934."[122] This highlights there were some members who anticipated the dangerous road and took a stand by simply not agreeing to follow.

The actions of the Führer and his cabinet illustrates that he had no qualms about bending or changing the law to meet his needs or goals. This personal oath was meant to ensure complete and unquestioning loyalty to the Führer. Within the government, there would be no dissension with his decisions, therefore eliminating the stalemates rife within bureaucracy. For the judiciary that swore this oath, it removed the loosely defined independence the judges wished to maintain, and they now would have little choice but to enforce his will or risk losing their positions, or even their lives.

Prisons, Penitentiaries, and Concentration Camps

The legal punishment for most crimes centered on prisons, penitentiaries, and fines. This focus is the transformation of the penal system from the Weimar Republic to the Third Reich. There were two types of incarceration facilities. The first, prison

[121] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 23.

[122] Ibid., 74.

sentences, were short-term, lasting no more than five years.[123] The second, penitentiary sentences were generally harsher and tougher than prisons and incarcerated severe criminals with sentences with a minimum of one year to life imprisonment.[124] Throughout the Weimar Republic, the general opinion was that the prison and penitentiary system was too lenient to criminals, affording them far too much comfort, and not effectively reducing the recidivism rate.[125]

In the late 1800s and early 1900s, a new criminal sentencing concept began circulating. If a crime was committed and guilt proven, the purpose of the punishment was retribution and deterrence.[126] In order to protect individuals from arbitrary punishment from the state, fixed punishments would be set against crimes maintaining a predictable punishment that was known before the offender committed a crime.[127] The new idea focused more on the offender versus the crime and postulated that the punishment should fit the criminal not the crime. It looked to the future, in an attempt to ensure the appropriate offenders were offered rehabilitative means to return and become productive members of society.[128] It could be argued this thinking influenced the judiciary panel in Hitler's trial in 1924, leading to a particularly light punishment.

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[123] Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven, CT: Yale University Press, 2004), 2.

[124] Ibid.

[125] Ibid., 7-18.

[126] Ibid., 21.

[127] Ibid.

[128] Ibid.

Additionally, significant advances in medicine had led to an idea that social issues could be diagnosed and cured as well. Emil Kraepelin, a leader in German psychiatry, explained crime as "an illness of the social body."[129] He went on to explain that as a psychiatrist his primary duty was the prevention of crime, to reform the criminal, and "incapacitate the incorrigible."[130] It is not hard to anticipate how quickly these concepts would be transformed under the Third Reich.

Franz von Liszt, a liberal law professor, had many similar ideas and published many articles before his death in 1919. These themes would carry over and would come to fruition. Liszt explained that offenders that could reform would do so through a routine grounded in discipline, work, and education.[131] Conversely, those incorrigible and habitual offenders should be "isolated indefinitely under an extremely harsh disciplinarian regime in special institutions, in almost all cases until their deaths."[132] Liszt's assertion was these criminals could never be reformed and would be a danger to society, so it was for the betterment and safety of society that these individuals be incarcerated before they could inflict severe damage on the populous.

Although life in either the prisons or penitentiaries was far from easy, public opinion that it was soft made the system an easy target; the Nazis used this as a platform during their rise. They believed that retribution and deterrence in the sentencing must be

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[129] Wachsmann, 21.

[130] Ibid.

[131] Ibid., 22.

[132] Ibid.

brought to the forefront and that education and reform were expendable.[133] The Nazis attacked all ideas of weakness through "sentimental humanitarianism" about the incarcerated criminals.[134] This firm stance on prison reform inspired the other political parties to rally around this concept and not be outdone. The interesting aspect is the significant number of members of the Nazi Party, both in the leadership and rank and file, had been incarcerated before their ascension to power. They had no qualms whatsoever about the lenient sentences, comfortable accommodations, and relative freedom they had maintained during their prison sentences—they would refer to these times as the "time of struggle."[135] However, as they gained power and prestige, those systems were too weak, and the penal system became a political ploy to rally support from the German people.

Deterrence was a central theme under the Nazi regime and the tool for deterrence was terror. A main goal of the Third Reich was the reconstitution of the Aryan race and by that logic, the elimination of non-Aryans. Various forms of deterrence were enforced under this umbrella. The concept of the prison and penitentiary system did not radically change after the Führer came to power. The biggest transition was the increase of discipline and certainly an increase in violence on inmates.[136] Additionally, after the establishment that laws and punishments could be retroactively changed the population within the prison and penitentiary system increased exponentially.

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[133] Wachsmann, 59.

[134] Ibid.

[135] Ibid., 67.

[136] Ibid., 86. The author postulates this increase in violence due to the nature of incarceration in Nazi Germany and a lack of scrutiny. There was little external interest in life inside prisons reducing any pressure to maintain social norms.

These legal changes ensured that judicial punishment was harsher and more severe than in the Weimar years and was encapsulated in the Law against Dangerous Habitual Criminals and on Preventive and Rehabilitative Measures established on 24 November 1933.[137] This law brought about much stricter punishments for repeat offenders and provided the courts sweeping powers to indefinitely incarcerate "selected recidivists, vagrants, beggars, mentally ill individuals as well as sex offenders."[138] The German judges keenly applied new law to crack down on perceived and real opponents. The role of the judiciary cannot be underscored in this time. The moment the Minister of Justice allowed the will of the politician to outweigh the rule of law in the Reichstag Trial; a precedent was set within the Third Reich. It became easier to allow the traditional rule of law and legal principles to fall by the wayside in order to more closely conform to the Führer's desires.

The establishment of protective police detention, which allowed for the indefinite detention of any person of interest without hearing or trial, brought about a new type of detention facility. Separate from the prison and penitentiary system, the Germans built concentration camps where prisoners under indefinite detention would be held under the singular supervision of the Schutzstaffel (known as the SS).[139] These initial camps generally housed political opponents and other such undesirables, and became the underpinnings of the future Holocaust.

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[137] Wachsmann, 70.

[138] Ibid.

[139] Ibid., 68.

Hitler's first two years as chancellor and then Führer were marked with significant achievement. He was able to assume absolute power over Germany, legally unified the states, and through legal decree changed German law. The judiciary had many choices early on and could have made a significant stand against Hitler's aspirations and ideas. However, the legal profession instead distorted the law to support his requirements and stood by as their colleagues were forcibly ousted from the profession and German law became a tool for political retribution and racial reordering. Although hailed by some as a decisive stand against the Nazis, the judiciary's inability to legally find the Communists guilty of the Reichstag fire resulted in verdicts that did not exonerate them, but rather made excuses for why they could not be found guilty. Finally, the entire legal profession, and the government, swore an oath directly to Hitler to dutifully follow his orders and directives. They yielded their most precious power of being an independent judiciary. In the years leading to World War II, the Ministry of Justice and judiciary would work with the Nazi leadership to create and maintain the Aryan race while legally removing all undesirables from German society.

CHAPTER 3

LAW IN THE THIRD REICH

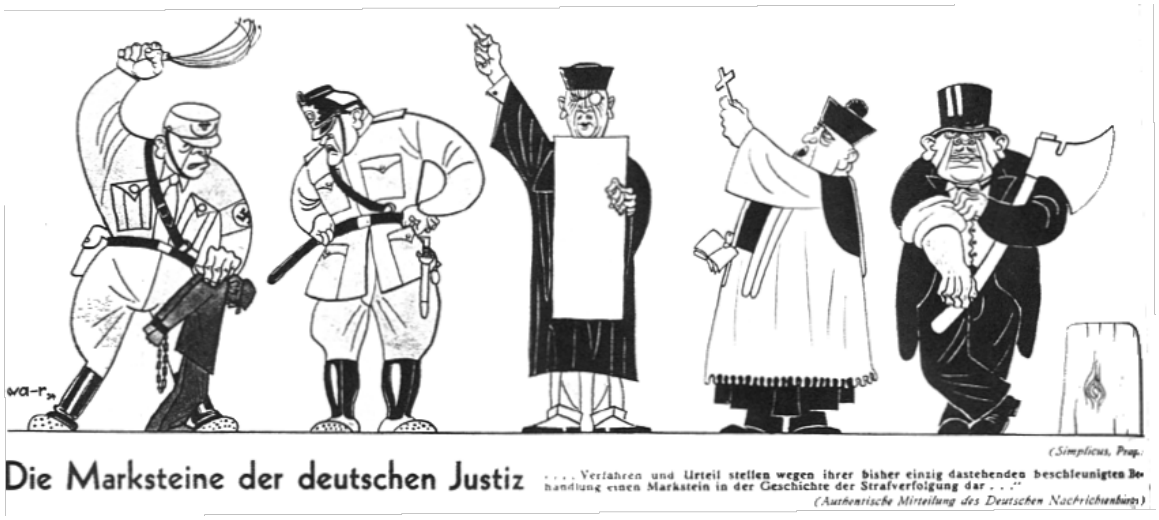

Figure 2. The Touchstones of German Justice

Source: United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," *Holocaust Encyclopedia,* accessed 28 September 2014, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887, 56. This political cartoon which appeared in *Arbeiter-Illustrierte Zeitung* in 1934 is captioned The Touchstones of German Justice because of the appearance of a uniquely expedited process, proceedings, and sentences in German criminal justice represent a touchstone for justice.

After Hitler's ascension as chancellor and following President von Hindenburg's death, the Führer's initial goal was to legally consolidate power. In addition, he removed any potential political ideology threat and initiated his program for the development of the Aryan race. Once all that was achieved, Hitler shifted and implemented a racial agenda. The rapid evolution and escalation of the race laws, the legal explanations of the laws, and the support the courts provided in cementing the discriminatory racial concepts

in German society were critical events. Further, the continued erosion of the rule of law in the face of the Nazi leadership enabled a court system that was devoid of critical thinking and logical application of the laws. The administrators in the Ministry of Justice did all they could to support the demands of the Führer, some more enthusiastically than others did. Finally, the relationship between the judicial arm and Hitler was dismantled in 1943, and the People's Court took center stage for the duration of the Third Reich. The German judiciary, through various poor decisions, and lack of effective leadership and moral conviction, conceded their power to the Third Reich.

The Nuremberg Laws

Many organizations, in their fervor to exhibit enthusiastic support for the party's goals, often overstepped the contemporary legal limits of acceptability. The need for legislation and legal direction was at a tipping point. The Ministries of the Interior and Justice were working towards such legislation, but their efforts were stymied by attempting to find legally agreed upon language and outcomes. Julius Streicher, publisher of *Der Stürmer*, used his publication to print particularly visceral images of the stereotypical Jew taking sexual liberties with Aryan German women in efforts to defile the Aryan bloodlines.[140] This succeeded in complimenting Goebbels' propaganda machine and stirring emotions in the people. In September 1935, during the "Party Conference of Freedom" Hitler decided to end the conference with landmark legislation. The Reichstag passed three laws that would mark a new phase of the Jewish campaign:

[140] Müller, 96.

(1) a flag law; (2) a citizenship law; and (3) the Law for the Protection of German Blood and German Honor.[141]

Initially, only the Flag Law was to be announced at the conference, but Hitler decided two days prior that something more significant must be passed.[142] The flag law simply "established the swastika as the emblem 'of the Reich and the people'."[143] Next Hitler, through the tainted and subservient legal authority of the Reichstag, "legalized the biological-racial anti-Semitism of the Nazis."[144] The Reich citizenship laws were primarily summarized in two articles. Article 1 articulates: "1. A subject of the State is a person who enjoys the protection of the German Reich and who in consequence has specific obligations towards it. 2. The status of subject of the State is acquired in accordance with the provisions of the Reich and State Citizenship Law."[145] This initial portion of the law is innocuous and it establishes that anyone who enjoys protection from the Reich government has requirements to support it. Generally, this would refer to paying taxes, compulsory military service, and adherence to the laws of the country.

Article 2 pronounces: "1. A Reich citizen is a subject of the State who is of German or related blood, who proves by his conduct that he is willing and fit to faithfully serve the German people and Reich. 2. Reich Citizenship is acquired through the granting

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[141] Müller, 97.

[142] Karl A. Schleunes, *The Twisted Road to Auschwitz: Nazi Policy toward German Jews, 1933-1939* (Urbana: University of Illinois Press, 1970), 121.

[143] Müller, 97.

[144] Bendersky, 228.

[145] United States Holocaust Memorial Museum, "Law and the Holocaust," 17.

of a Reich Citizenship Certificate. 3. The Reich citizen is the sole bearer of full political rights in accordance with the Law."[146] The final article articulates that the Minister of the Interior will issue all legal and administrative policies to enforce this law.[147] The very first part of Article 2 is the most critical and establishes the legal concept of German blood.

The third law decree from 15 September 1935 was The Law for the Protection of German Blood and German Honor. In 1933, Hitler decreed the Restoration of the Professional Civil Service, and under this, the legal profession and education system ousted all undesirables, but specifically all of known Jewish descent or practice and Communists. Now, in 1935, blood became a key element of German citizenship. There were five primary articles under the Protection of German Blood legal decree:

> Moved by the understanding that purity of the German Blood is the essential condition for the continued existence of the German people, and inspired by the inflexible determination to ensure the existence of the German Nation for all time, the Reichstag has unanimously adopted the following Law, which is promulgated herewith:
>
> Article 1
>
> 1. Marriages between Jews and subjects of the state of German or related blood are forbidden. Marriages nevertheless concluded are invalid, even if concluded abroad to circumvent this law.
>
> 2. Annulment proceedings can be initiated only by the State Prosecutor.
>
> Article 2
>
> Extramarital relations between Jews and subjects of the state of German or related blood is forbidden.

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[146] United States Holocaust Memorial Museum, "Law and the Holocaust," 17.

[147] Ibid.

Article 3

Jews may not employ in their households female subjects of the state of German or related blood who are under 45 years old.

Article 4

1. Jews are forbidden to fly the Reich or National flag or display Reich colors.

2. They are, on the other hand, permitted to display the Jewish colors. The exercise of this right is protected by the State.

Article 5

1. Any person who violates the prohibition under article 1 will be punished with a prison sentence.

2. A male who violates the prohibition under article 2 will be punished with a jail term or to a prison sentence.

3. Any person violating the provisions under articles 3 or 4 will be punished with a jail term of up to one year and a fine, or with one or the other of these penalties.[148]

This law, signed not only by the Führer, but also by the Minister of Justice, Dr. Franz Gürtner, required significant legal explanation for enforcement. The very first article establishes that not only are Jews not of German blood, but due to that distinction, they are not citizens of the Reich, and therefore are not afforded protections. Further, it outlaws all marriages between Germans and Jews not just within the sovereign state of Germany, but also among Germans abroad. The next article forbids any type of extramarital relationships between Jews and Germans. The third article, which was delayed until 1 January 1936, outlaws Germans from serving in Jewish households.[149] This had two-part intent. The first was to protect German blood from the temptation the

[148] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 18.

[149] Ibid., 19.

Nazis imagined. The second ensured that Germans would not subjugate themselves by serving Jewish households.

The fourth article denied Jews the right to display the swastika flag, national flag, or the Reich colors. However, it did protect their right to display Jewish flags and colors, thus providing a simple method to identify the enemies in their midst. This law continues to highlight and reinforce that the Jewish people were not Germans and were not part of the Reich. The final critical article addresses the punishments to be meted out if found guilty of a violation of this law. These punishments included jail sentences, prison sentences, and fines that could be conferred separately or in tandem.[150] The linguistic uniqueness of this law emphasizes the government change and desire to establish German citizenship and identify those who did not belong in the Volksgemeinschaft. This law ensured "race was no longer an ideological concept but a formal legal category."[151]

The two primary Nuremburg laws created significant legal and administrative issues for the application of these laws. Specifically, what was the definition of a Jew? Nazi medicine had thus far been unable to identify a particular blood type or genetic marker to identify Jews scientifically, much as one would diagnose cancer or illness.[152] Due to this, Nazi legislators and legal minds transitioned to tracking the Jewish religion, even in an ancestral sense, as synonymous with race.[153] On 14 November 1935, six

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[150] United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," 32.

[151] Bendersky, 228.

[152] Schleunes, 129.

[153] Ibid.

weeks after the Nuremberg Law decrees, the First Supplementary Decree to the Reich's Citizenship Law was published.[154] This decree defined a full or three quarters Jew was "legally Jewish and subject to the Nuremberg Laws."[155]

Then the math to determine Jewish legality became significantly more complicated. A half Jew, defined as a person with two Aryan grandparents and two Jewish grandparents would be declared legally Jewish if, "he was adherent to the Jewish faith, he was married to a Jew, he was the child of a marriage with one Jewish partner, or if he was the off-spring of an illegitimate union between a Jew and Aryan."[156] In this case, if the individual did not meet the four conditions above, he was legally classified as a "Jewish Mischling."[157] Critical to this definition was the establishment of religious practice. The decree continued on stating that even if someone had only one Jewish grandparent, making them one-quarter Jewish and if they were practicing the Jewish faith they were legally Jewish. Anyone with less than one-quarter Jewish blood was considered to be "of German or closely related origins."[158]

Once the questions of categorizing Jews were solved, the courts moved on to define intercourse. The "first administrative decree for the 'Blood Law' had stated in paragraph 11 that 'extramarital intercourse, in the sense specified in paragraph 2 of the

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[154] Schleunes, 128.

[155] Ibid.

[156] Ibid.

[157] Ibid., 129. A Jewish Mischling denotes a half-breed or half-Jewish. The Nuremberg Laws included specific instructions on determining if a mischling was a Jew or an exempted German.

[158] Ibid.

law, is limited to sexual intercourse'."[159] This was a new legal term, prior to the courts had used the terms "cohabitation," "coition," and "fornication."[160] The legal world erupted in debate to define sexual intercourse. This debate ranged from a very restrictive view that sexual intercourse was equivalent to coitus to a very broad view that any potential sexual perversion, even in the absence of coitus, was a dishonor to the race.[161] The Grand Panel, the senior legal body, declared on 9 December 1935: "The term 'sexual intercourse' as meant by the Law for the Protection of German Blood does not include every obscene act, but is also not limited to coition. It includes all forms of natural and unnatural sexual intercourse—that is, coition, as well as all those sexual activities with a person of the opposite sex which are designed, in the manner in which they are performed, to serve in place of coition to satisfy the sex drive of at least one of the partners."[162] This very wide and broad definition eliminated the use of the more restrictive definition of simple coitus and sent the message to the lower courts of the importance to protect German blood. Elaborating, the Grand Panel goes on to insist the courts not remain glued to the specificity of the law, "but rather penetrate its inner core in their interpretations and do their part to see that the aims of the lawmaker are realized."[163] For the body of the government that was so fearful of losing their independence, the Grand Panel clearly communicates that the law must conform to the will of the Führer.

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[159] Müller, 100.

[160] Ibid.

[161] Ibid.

[162] Ibid.

[163] Ibid.

This thought echoes the legal theorist, Carl Schmitt, who often said "autoritas, non veritas facit legem" or "authority, not virtue makes the law."[164]

It is important to consider the ramifications of the judiciary taking such pains to fully discuss and determine this legal definition. Obviously, the intent provided clarity and thus standardization of court decisions regarding this law. However, looking deeper, this sends a particularly loud message to those courts that are away from the Berlin headquarters. Initially, it could be perceived as a lack of trust from the Ministry of Justice and the Grand Panel. Intonating the definition is required so the law is properly applied. More nefariously, it emanates the necessity to consider the Führer's aims in making decisions. Reading between the lines is critical in the Third Reich, because as seen in later events, not enabling the Führer's will leads directly to his involvement.

The lower courts started hearing cases under the newly defined citizenship and blood laws. The blood law became a "fundamental law" for the German courts, meaning that it was one of the most important laws of the National Socialist state.[165] A 1939 case makes this apparent. A German man and a Jewish woman who had maintained a relationship well before the Third Reich and had discontinued coitus in 1925. However, the court found that he had maintained "unnatural sexual relations" with her until 1937,

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[164] Bendersky, 228. Carl Schmitt was an intriguing minor character within the legal circles of the Third Reich. Known as neither an anti-semite or a racist, he struggled to solidify footing within the Reich leadership, justifying his actions in that his allegiance was to authority, regardless of who held it. His leverage in the Third Reich was short lived due to constant scrutiny of his beliefs and evidence he had Jewish friends prior to the ascension of the Nazis, thereby undercutting his Nazi ideology.

[165] Müller, 105.

in direct violation of the law and found guilty.[166] On appeal, the Supreme Court found no issue with the conduct of the trial or the verdict. Although the court stated, "one sided 'misconduct of a sexual nature' was not sufficient as an offense," the panel went on to define that active or passive activities from the other party would meet the legal statutes.[167] The court's opinion became a principle that violations of the blood law did not require physical contact between the participants.[168] This principle further broadened the definition and would ensure the furthest possible application of the blood laws.

The unraveling of this law would continue throughout the Third Reich and the lower courts responded with gusto. In 1938, Leon Abel was a Jewish merchant who went to a German therapist to have his stomach massaged. In the first session, he was naked, but the lower part of his body was covered with a towel. The police arrested him when he arrived for his next appointment. The masseuse steadfastly told the police that nothing had occurred, but under Gestapo interrogation, Mr. Abel confessed that he had been excited during the massage.[169] During his trial, Mr. Abel recanted his confession, but the court determined the confession was more honest than his testimony. Mr. Abel was sentenced to two years in the penitentiary for violating the blood laws.[170] The judges' opinion articulated their belief that the defendant had sought out the massage for lascivious purposes without the masseuse's awareness. The opinion went on to describe

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[166] Müller, 101.

[167] Ibid., 101-102.

[168] Ibid., 102.

[169] Ibid., 102-103.

[170] Ibid., 103.

the defendant as an inferior human being and derided his impudence to flagrantly violate the established blood laws.[171] The courts had devolved from providing objective rulings to derision and providing legal examples of the mediocre nature of the Jew.

The Nuremberg Laws were far more subversive than the casual observer would understand at the time. These laws forced the government and specifically the court system to provide legal definitions for races that became oriented in religious practice. Further, these laws brought the government into the privacy of the home and punished those in perceived violation of the law. Finally, these laws opened up a Pandora's Box of legal maneuvering and vague explanations that encouraged lower courts to pursue the law as aggressively as they desired. The senior judicial leaders ensured the laws would adjust to the whim of the government because it was their sworn duty to support the authority of the Führer. Therefore, the development and enforcement of these laws served as the figurative end of the independent judiciary in the Third Reich.

Establishment of the Volksgerichtshof

The German court system remained relatively unchanged in structure during the Third Reich; however, established responsibilities and the application of law evolved. Loyalty to the country, to the National Socialist Party, and above all to Hitler became the cornerstone of life in Germany. In April 1934, the Volksgerichtshof (VGH) or the People's Court was established, with exclusive jurisdiction over treason cases.[172]

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[171] Müller, 103.

[172] Hannsioachim W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (London: Tauris, 1989), 2-3.

Many attribute the introduction of the People's Court to the publics perception that the regular criminal court failed in the Reichstag fire trial.[173] The VGH was not of Hitler's invention; it was created in Bavaria in 1919 to deal with various cases and expanded to treason cases.[174] Article 105 of the Weimar Constitution outlawed the courts. However, they remained active in Bavaria and known for the limited protection of the accused and the massive police powers.[175] Therefore, its institution on 24 April 1934 was merely bringing a necessary legal measure to punish what the Reich considered its worst criminal offenders.

The make up of the VGH diverged from the standard courts of Germany. It was comprised of three panels with five judges per panel and only two judges were required to meet the normal legal requirements of a judge. The remaining members could be lay personnel appointed to the court.[176] As early as 1922, treason cases were not allowed appeals and therefore verdicts were final, this legal precedent was continued in the VGH.[177] The purpose of this court was to ensure the loyalty of the Volk to the Führer and harshly punish those who broke with that faith. Members were appointed to this court due

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[173] Müller, 140.

[174] Ibid., 12. Bavaria initiated the People's Courts after the Communists attempted a coup in Bavaria and martial law was declared to re-establish order. The law was applied so brutally, it is described as a bloodbath in which 1,100 people were killed. The People's Courts were used to try traitors and this appealed to the Nazi's because they identified with Bavaria's situation and required an efficient method to rid the country of traitors.

[175] Koch, 16.

[176] Müller, 141.

[177] Koch, 4.

to their unquestionable loyalty to the state and continued ties to the state. Judicial independence was not an objective.

Legal Sterilization and T4 Programs

The overarching objective of the Führer was the establishment, development, and maintenance of the Aryan race or Volk. The concept of the Volk was a superior German people, a national community. When building a superior people having mentally disabled, mentally ill, or mentally retarded people undercuts the entire plan and potentially risks its completion due to diluting the strong blood of the master race. The Nuremburg Laws of 1935 readily established this concept of thinking, outlawing the marriages of Germans and Jews and allowing a platform for annulment. Targeting the infirm of all ages would be especially difficult, especially because these people were above all, Germans. This was not a unique concept to the Nazi regime, racial hygiene, as it would become known, was taking root in many other western cultures, including the United Kingdom and the United States. The Third Reich was unique in its terrible prosecution to implement racial hygiene and their employment of draconian measures.

Racial hygiene was a crucial topic in the 1920s, especially after World War I. Racial scientists were specifically concerned about the declining birthrates, increases in mental health patients, and concerns that feminism and the mobilization of World War I had destroyed the family.[178] The goal of racial hygiene was the development of optimal population growth emphasizing the need for national strength and linking racial health to

[178] Robert Proctor, *Racial Hygiene: Medicine Under the Nazis* (Cambridge, MA: Harvard University Press, 1988), 20.

national efficiency.[179] The Weimar government took this warning seriously and in 1927 established the Kaiser Wilhelm Institute for Anthropology, Human Genetics, and Eugenics. Their charter was to provide research knowledge useful to prevent "the physical and mental degeneration of the German people."[180]

Highlighting the importance of racial hygiene to the Nazis and specifically to Hitler, racial policies were enacted very quickly. Simultaneously, Hitler struck down all other political parties and established a strong German race as the main priority of his government. On 14 July 1933, the Law for the Prevention of Genetically Diseased Offspring or the sterilization law was passed. Under this law, any person could be sterilized if a genetic health court determined the individual had any hereditary genetic diseases.[181] "Whoever is not bodily and spiritually healthy and worthy, shall not have the right to pass on his suffering in the body of a child."[182] Adolf Hitler's summation of the importance the sterilization law was a logical continuation of his goals to create the master race and improve the Volk. Likewise, it is important to note that many western cultures were concerned about racial health and passed similar legislation. In fact, Indiana was the first state to pass sterilization laws for the mentally ill and criminally insane.[183]

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[179] Proctor, 20.

[180] Ibid., 39.

[181] Ibid., 96. This included such illnesses as feeblemindedness, schizophrenia, manic-depressive insanity, genetic epilepsy, Huntington's chorea, genetic blindness or deafness, or severe alcoholism.

[182] Ibid., 95.

[183] Ibid., 97.

The hereditary health court is a particularly interesting legal concept to explore. The term 'court' belies a legal institution and Hitler's consistent need for legality, ensured the involvement of the judiciary. In this case, a panel of three professionals, one judge and two physicians, one of whom must be well versed in the study of eugenics would review sterilization cases.[184] These hearings were closed to the public for the privacy of those testifying. The hereditary health courts were assigned at every level of the German judicial system, with the petty courts acting as the primary court for adjudication and the higher courts acting as appellate authorities. The composition of the panels always remained the same.[185]

These hereditary health courts initially were not considered punitive in nature, nor were those individuals brought before the court considered criminal. This was an act of humanity, a necessary device to rid the race of any ailments and those sterilized as an act of sacrifice for the betterment of the Volk.[186] However, after a time, the idea that sterilization might help reduce or eliminate crime took root. On 24 November 1933, the Law against Dangerous Career Criminals or castration law was passed. The hereditary health courts had effectively moved from the civil considerations to the criminal realm.

The entire process for adjudicating an individual was kept completely secret, even from the individual. Physicians were required to levy the charges if they found any of those hereditary illnesses present. If they failed to bring charges, the physicians were

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[184] Müller, 121.

[185] Ibid.

[186] Proctor, 102.

fined various amounts.[187] The courts even gained the right to subpoena medical records without the consent of the person.[188] The law would be adjusted to meet the intent of the Führer and justified by the immense goal of creating the master race.

The judges would often defer their opinion to those of the sitting physicians and did not question even logically unsound cases. In 1937, the hereditary health court in East Prussia ordered the sterilization of a young deaf woman whose condition was environmentally caused and who had given birth to a healthy baby. From the verdict, "Although no further cases of deafness can be documented among blood relations, nevertheless the Hereditary Health Court is convinced on the basis of the medical specialist's opinion that it must be a case of hereditary deafness."[189] The judiciary became a willing partner in these hearings, ensuring all the legal requirements were met, but little else. Once a sterilization order was given, the individual had two weeks to voluntarily report to a clinic for the procedure. If they did not present themselves, then the police would forcibly compel their compliance.[190] In the 1962 film, *Judgment at Nuremberg*, this practice was devastatingly portrayed. Montgomery Clift played Rudolph Peterson, a young man who was sterilized by the Nazi regime, for either being a Communist or for feeble mindedness; both counsels, with defense counsel attempting to prove the legality of the practice, voraciously argued this point.[191]

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[187] Proctor, 103.

[188] Ibid., 103-104.

[189] Müller, 123.

[190] Ibid., 121.

[191] *Judgment at Nuremberg*.

The widespread nature of these courts and their decisions cannot be understated. In the first year of implementation, the courts heard 84,525 cases. Of those 84,525 applications, 64,499 were fully adjudicated, a completion percentage of seventy-six percent. The courts found 56,244 were legally sufficient for sterilization, eight-seven percent of the determinations were in favor of sterilization.[192] Generally, those who appealed the decisions usually failed, although in 1935, the sterilization of a decorated World War I soldier was revoked on the premise that achieving multiple promotions in the military spoke "against the presence of congenital feeblemindedness."[193] The sterilization law and its widespread application created many concerns for the medical community, specifically the development of patient distrust. For the judiciary, ensuring the 'appropriate' application of the laws was their sworn duty and they ensured their compliance.

As sterilization became an established legal precedent, the logical process was not complete yet. Sterilization was utilized to prevent further generations from these illnesses, but what to do about the mental institutions in which thousands suffered daily at significant cost to the state. The concept of mercy killing continually crept into conversation providing solutions to free individuals and their families from the pain, potential cost savings, and freeing doctors, nurses, and institutions for other concerns of the Reich. In 1939, the initial workings of the program, Aktion T-4, began in earnest.[194]

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[192] Proctor, 106.

[193] Müller, 122.

[194] Michael Burleigh, *The Third Reich: A New History* (New York: Hill and Wang, 2000), 384-385.

This program did not come through legislation, rather directly from Hitler as a policy. The intent of this program was to kill approximately 70,000 people housed in German mental hospitals and asylums.[195] The processes and methods employed during this time are the precursors to the systematic elimination of the undesirables already housed at concentration camps.

The legal courts were not directly associated with the selection or the killing; judges did not have to participate before the killings. However, there is no doubt that the judiciary was legally complicit in these pre-meditated murders due to their knowledge of the happenings and the post-death paperwork. However, as the deaths began to mount, the public became concerned lodging complaints and potential charges. Lower level prosecutors, not knowing the larger plan, even opened investigations into these deaths.[196]

One such judge was Lothar Kreyssig, a judge in Brandenburg am Havel. He became alarmed when psychiatric wards of the court were transferred without cause and were suddenly dying. He protested to Minister Gürtner and the ministry held a meeting to explain the situation to the jurists. Meanwhile, Kreyssig was scheduled for a meeting with Roland Freisler, who explained Hitler ordered the deaths and was therefore law.[197] Kreyssig did not accept this legal paradigm and immediately set to writing the psychiatric institution directors informing them that transfers to the killing centers was illegal and that he would take legal action if any others from his jurisdiction departed in such a

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[195] Burleigh, 384.

[196] Müller, 127.

[197] Richard J. Evans, *The Third Reich at War* (New York: Penguin Press, 2009), 91.

manner.[198] Kreyssig felt that it was his legal duty to protect the people in his jurisdiction. The Ministry of Justice's futile attempts at influencing him otherwise, led to his compulsory retirement in 1941.[199] Although others shared his doubts and concerns, Kreyssig is the only known vocal detractor from the Nazi Aktion T-4 program, or any other subversion of justice during the Third Reich.

Meanwhile, the acting Minister of Justice, Franz Schlegelberger, called the most significant gathering of judicial personnel in the Third Reich. The conference, running 23-24 April 1941, brought in the highest members of the judiciary, the Ministry of Justice, the presidents of all thirty-four Courts of Appeals, and all thirty-four of the chief public prosecutors.[200] The first point of the conference was to educate everyone on the Akrion T-4 Program, agenda, and the decisions of the Führer. This ensured "judges and public prosecutors would not cause grave damage to the legal system and the government by opposing measures which they believed sincerely, but mistakenly to be illegal, and would not place themselves in opposition to the Führer through no fault of their own."[201]

Virtually all those who attended understood the goal of this conference; do not question the death certificates and information flowing through the legal process. This was a policy directly from the Führer and therefore, based on the oath the judiciary had sworn, must be upheld and not questioned. Although it was the medical professionals and other civil servants who physically took the lives of these ill Germans, the legal system

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[198] Evans, 91.

[199] Ibid., 91-92.

[200] Müller, 127.

[201] Ibid.

stood to one side and efficiently processed any paperwork required afterwards thereby sanctioning the program. The next legal evolution was on the horizon, methodically predicated on the success of the Aktion T-4 program.

The Final Evolution of the German Legal System

The VGH struggled initially to find its place within the German legal structure. Although legally established, there was no additional funding for the court and all the judges had been pulled from other courts. Minister of Justice Gürtner realized that a more stable foundation for the VGH was needed. In 1936, a new law established the VGH as an institution of the Reich complete with an appointed president and judges that were appointed for life. Lay members of the VGH were still appointed for five years.[202]

Although this solved funding issues and provided the court with more legitimacy, members of the Ministry of Justice were still dissatisfied with the law. A primary dissident was Secretary of State Roland Freisler, who argued that the VGH must be the Supreme Court of Germany.[203] The current president of the VGH, Dr. Georg Thierack, worked exhaustively to showcase the efficient and ruthless application of the law to meet the Führer's objective. "Not the individual, but the Volk, should be the centre of legal concern. Landes-und Hochverrat [Traitors] must henceforth be expurgated ruthlessly."[204]

In line with this, the Ministry of Justice, the VGH, and the Gestapo began developing a very close relationship. On 11-12 November 1936, a conference was held

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[202] Koch, 47.

[203] Ibid.

[204] Ibid., 49.

for the principal leaders of these organizations to discuss the issues stemming from treason. The Gestapo presented information on the nefarious activities of the Communists and about the role of the Gestapo in trials.[205] The conference notes indicate a mutual understanding between all parties for the need for close cooperation between the Gestapo and the courts.[206] This alliance protected the Gestapo and provided legitimacy for their actions as the courts backed it. As evidenced earlier, a confession extracted by the Gestapo held more weight than any court testimony.

The jurisdiction of the VGH was limited to acts of treason. Four portions of the penal code describing those cases for the VGH to adjudicate defined treason: (1) active involvement in an illegal political party; (2), intent or successful infiltration of the police or military; (3) production or publication of materials directed against the National Socialists; and (4) listening to illegal broadcasts, especially Communist ones.[207] This was later expanded to include anyone who failed to report known treasonous activities.[208] As the People's Court continued to grow in power and prestige, other events in the Ministry of Justice foreshadowed major changes.

Acting Reich Minister Dr. Franz Schlegelberger maintained a tenuous hold of power in the Ministry of Justice. Hitler became more aggravated about the Ministry of Justice's lack of understanding. He began interfering with sentences, communicating his displeasure to Schlegelberger. Schlegelberger dutifully did his job, in one situation a

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[205] Koch, 56.

[206] Ibid., 56-57.

[207] Ibid., 59.

[208] Ibid., 60.

Polish Jew was accused of removing a large number of eggs and hiding them. In his trial, he was found guilty and sentenced to two and a half years imprisonment.[209] The following communiqué was sent to Schlegelberger from the head of the Reich Chancellery Hans Lammers about the case. "Dear Mr. Schlegelberger: The enclosed newspaper clipping about the sentencing of the Jew Markus Luftgas to imprisonment for 2 ½ years by the Special Court of Bielitz has been submitted to the Fuehrer. The Fuehrer wishes Luftgas to be sentenced to death. May I ask you urgently to instigate what is necessary and to notify me about the measures taken so that I can inform the Fuehrer."[210] This letter was sent on 25 October 1941; on 29 October 1941, Schlegelberger responded that he had "handed over to the Gestapo for the purpose of execution, the Jew Markus Luftglass."[211] In that singular act, Schlegelberger invalidated the entire judiciary process and in his desire to try to protect the ministry and/or himself, merely solidified Hitler's low opinion of the law.

After this interaction, Schlegelberger distributed a circular letter to highlight the importance of following the Führer's lead. "Every judge and every public prosecutor while doing his duty must keep these words of the Fuehrer in mind. This will enable him to fulfill his task in such a manner as is demanded by the Fuehrer."[212] Following this, Schlegelberger, in an attempt to satisfy the Führer, implored Hitler to please "let me

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[209] *Trials of War Criminals*, 431.

[210] Ibid., 430.

[211] Ibid., 431.

[212] Ibid., 432.

know if a verdict does not meet with your approval."[213] The head of state was now truly running the judicial system—appropriate sentencing and true rule of law meant nothing.

In one of his final acts as the acting Reich Minister of Justice, Schlegelberger, perhaps realizing his time in charge was ending, yielded another responsibility of the judiciary. He received a request from the Reich Chancellery in January 1942, to transfer the Ministry of Justice's power of granting amnesty to the Eastern Reich governors and provincial presidents.[214] The purpose of the request was to reduce time required to adjudicate punishment and thereby bring these regions firmly under Nazi rule. In May 1942, Schlegelberger acquiesced and sent a directive out to all the subordinate courts that the Eastern Reich governors and provincial presidents had the right of granting amnesty to Jews and Poles in their regions for the duration of the war.[215] This would be one of Schlegelberger's final acts as the acting Minister of Justice and it highlights just how far afield the judiciary had gone to support the Führer.

Finally, Hitler decided the time had arrived. In a Reichstag speech on 26 April 1942, he announced his desire to have the power to remove anyone from judicial office. "From now on I shall intervene in these cases and remove from office those judges who evidently do no understand the demand of the hour."[216] This speech marked the symbolic end to judicial independence in the Third Reich, for it had been eroded over the years and final capitulation occurred with Schlegelberger's acquiescence to Hitler's demands.

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[213] *Trials of War Criminals*, 1015.

[214] Ibid., 666.

[215] Ibid., 667.

[216] Ibid., 1012. Hitler's speech to the Reichstag on 26 April 1942.

Schlegelberger was allowed to retire and was even given a gift of 100,000 reichsmarks and a note of appreciation from Hitler.[217] Hitler named Dr. Otto Georg Thierack, current President of the People's Court, as the new Minister of Justice. In a decree in 1942, Hitler outlined his demands of the Ministry of Justice and empowered Thierack to accomplish every goal.

> A strong administration of justice is necessary for the fulfillment of the tasks of the great German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from existing law.[218]

This began a new, even darker chapter of the German judiciary and any light that had been in the legal system was now snuffed out.

Figure 3. Dr. Otto Thierack, August 1942

Source: United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," *Holocaust Encyclopedia,* accessed 28 September 2014, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887, 53.

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[217] *Trials of War Criminals*, 1082.

[218] Ibid., 993. Hitler Decree on 20 August 1942.

Dr. Thierack came into the Justice of Ministry like a lion, immediately making changes and laying out a plan to convert the ministry to a National Socialist Administration. Dr. Roland Friesler succeeded Thierack as the new President of the People's Court. When Thierack became the minister, he also became the President of the German Academy of Law, and of the National Socialist Association of Jurists.[219] In an initial letter to the academy, Thierack writes, "The formulation of law is not a matter of science and a goal in itself, but rather a matter of political leadership and organization. Therefore the activities of the Academy relating to the formulation of law must be coordinated with the aims of political leadership."[220] Essentially, law will be derived from here forward by the will and desire of the Führer.

In September 1942, Thierack established his intent to publish "Judges Letters (Richterbiefe)" throughout the German legal system.[221] In his announcement of these letters, Thierack outlined the intent and his desire for them. The letters included completed trial proceedings which Thierack would either uphold as an example or illustrate how to derive appropriate sentences.[222] His ultimate goal was to "tell how judicial authorities think National Socialist justice should be applied and therefore give the judge the inner security and freedom to come to the right decision."[223] Influence was the word used, but the insidious intent was far too clear, Hitler had put Thierack in charge

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[219] *Trials of War Criminals,* 52.

[220] Ibid.

[221] Ibid., 53.

[222] Ibid.

[223] Ibid.

to ‘fix’ what he deemed was broken, therefore the jurists had but one choice: conform or leave.

The final piece of resistance fell when Thierack aligned the Ministry of Justice even closer with Heinrich Himmler’s police. Schlegelberger actively tried to prevent this alliance, but in September 1942, Thierack met with the Schutzstaffel to better understand their needs. On 22 October 1942, Thierack issued a new directive “concerning the ‘transfer of asocial prisoners to the police’.”[224] This directed the associated list of prisoners to be transferred to police custody with no concern about what would happen to the prisoners. By April 1943, such specific concerns were long past, and a new directive instructed that all released Jews and Poles would be handed over to the police for transport to concentration camps, specifically Auschwitz or Lublin, for the rest of their lives.[225] Finally, on 1 July 1943, Reich Minister Thierack signed a decree “denying Jews any recourse to the criminal courts and committed any Jews accused of an undefined ‘criminal action’ to the police.”[226] Under Thierack, the Ministry of Justice began to meet the expectations of Hitler, but the jurists were relegated to the role of pass through. To maintain their jobs, they had to pass sentences that would please Thierack and ultimately Hitler. There was no legal thought or discourse, merely robotic adjudication imposing defined punishments.

Dr. Roland Freisler’s assumption as the President of the VGH was not his first choice; however, he steeled himself to mete out the appropriate and necessary

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[224] *Trials of War Criminals*, 343.

[225] Ibid., 348.

[226] Ibid., 81.

punishments required in such a position.[227] Under Thierack, the VGH gained a fearful reputation and annually increased its brutal sentencing for treasonous violations (see Appendix A). Of all the charges brought to the VGH from 1939 to 1944, an overwhelming majority, approximately eighty-eight percent in 1944, were high treason, with the only appropriate sentence being death.[228] Although some records from 1944-1945 were destroyed, according to Thierack's and Freisler's reports the following sentences were imposed:

Table 1. Reproduction of VGH Sentencing

				Hard Labour						
Year	No. of Accused	Death	Life	10-15 yrs	5-10 yrs	Under 5 yrs	Prison	Conc. Camp	Fine	Acquittal
1937	618	32	31	76	115	101	99	-	-	52
1938	614	17	29	56	111	91	106	-	-	54
1939	470	36	22	46	100	89	131	-	-	40
1940	1,096	53	50	69	233	414	188	-	-	80
1941	1,237	102	74	187	388	26	143	-	-	70
1942	2,572	1,192	79	363	405	191	183	45	-	107
1943	3,338	1,662	24	266	586	300	259	42	-	181
1944	4,379	2,079	15	114	756	504	331	22	2	489

Source: Hannsioachim W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (London: Tauris, 1989), 132.

Although not perfect math, this chart shows the mindset shift in regards to long prison sentences versus death, and illustrates the evolution of the 1933 Law against Dangerous Habitual Criminals and on Preventive and Rehabilitative Measures. The VGH

[227] Koch, 126.

[228] Ibid., 131.

took this law to the brink highlighting that those convicted of treasonous activities were a danger to the Volk and must be eliminated.

Figure 4. Roland Freisler, President of the People's Court, Pronounces judgment in Berlin, August 1944

Source: United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," *Holocaust Encyclopedia,* accessed 28 September 2014, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887, 51.

Under Friesler's leadership, the VGH became even more ruthless. As laws were passed removing more rights, the VGH was there to enforce such laws and present examples to serve as deterrents. One such case centered on a doctor who was caring for a German soldier's pregnant wife. In his appointments with her, he voiced concern for her future with so many children to look after, especially if the war were to end poorly for

Germany.[229] As the dutiful wife, she voiced her undying faith that Germany would prevail and the doctor disagreed citing potential for defeat in Italy and urged her and her husband to leave the Nazi Party.[230] The judgment concluded with, "People like him had to be expelled and eliminated from the German Volksgemeinschaft, so there could only be one sentence: death."[231]

In another case, a priest was denounced after telling an artisan a political joke about a dying soldier. In the joke, the soldier was shown pictures of Hitler and Goering and as dying said that "now he was dying like Christ."[232] The judgment once again eviscerated the priest ending with, "To deter others anxious to do the same, such an attack on the morale of our war effort can be punished with nothing other than death."[233] Such was common during the waning years of the Third Reich, unknown whether such laws were driven from a deep sense of denial or an acute aversion of criticism, but one rule was certain—trust no one.

Although these types of trials did occur and increased in the final years of the war, most of the business of the VGH was focused on treason, and more specifically, resistance efforts. Resistance was common throughout the Third Reich, in occupied countries and even in the camps. The VGH dealt with many such cases, one of the most tragic ones, was the resistance group known as The White Rose.

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[229] Koch, 135.

[230] Ibid.

[231] Ibid.

[232] Ibid., 141.

[233] Ibid.

The White Rose was largely made up of local university students, under the supervision of Professor Kurt Huber of the University of Munich.[234] In February 1943, two members of the group, Sophie and Hans Scholl, distributed leaflets in the university inciting the students to rebel against Nazi Germany.[235] A janitor denounced them to the authorities and they, along with a fellow member, Chrisoph Probst, were arrested on 18 February 1943.[236] Although the police questioned the three to discover the rest of the group, little was revealed. On 21 February 1943, the treason indictments were issued and the trial began on 22 February 1943.[237] In the proceedings, Freisler acted accordingly, there were no political rants, no demeaning of the accused or witnesses, other than the short time to prepare the defense, and the trial was by the book.[238] Due to the nature of the offense and the surrounding facts, the guilty verdict and death sentence were unsurprising. As an example to the efficiency of the system, and that convicted traitors had no right to appeal, the three were executed by guillotine that day.[239] There were follow-on trials as the police ferreted out the other members of the White Rose, but the efficiency of the VGH cannot be understated.

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[234] Koch, 136.

[235] United States Holocaust Memorial Museum, "The White Rose," *The Holocaust Encyclopedia,* accessed 5 April 2015, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007188, 1.

[236] Koch, 136.

[237] Ibid.

[238] Ibid.

[239] Ibid.

In direct contrast to the calm rationality of the White Rose proceedings, the prosecution of the 20 July 1944 Führer assassination attempt was almost comical. This attempt was most recently brought back to relevancy with the film *Valkyrie* starring many well-known actors. In the final scenes of the movie, there are cutaways featuring the VGH and specifically the red clad figure of Freisler. The plot itself was simple, but had a lot of moving parts. Colonel Claus von Stauffenberg placed a briefcase full of explosives against the leg of a table where Hitler was holding a conference. As von Stauffenberg departed the conference, he witnessed the blast, confident that few, if any survived. Upon his arrival back to Berlin, he issued the order to attempt to seize control of the government. The attempt failed miserably as Hitler was only slightly hurt and quickly re-established control.[240]

Once the investigation was complete, the VGH had the duty to try the remaining conspirators, as some were summarily executed in the aftermath of the failed attempt. The proceedings were recorded for Goebbels' propaganda machine. Unlike in the White Rose trial, Freisler used every opportunity in the conspirator's trial to demonstrate his political passion. "Politically schizophrenic people we cannot use, those who think they can separate loyalty to the Führer from loyalty to the Volk."[241] None of the conspirators was allowed to discuss their motivations for involvement; as such, ideas were dangerous to the Third Reich and could not reach public consumption, lest more people adopt such ideas.[242] The trials continued well into 1945, with Freisler pontificating at every

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[240] Koch, 188.

[241] Ibid., 201.

[242] Ibid., 200.

opportunity and defendants deciding to stand by their convictions or cultivate small hope for leniency. One uncorroborated statement from a senior defendant foreshadows the fall of the Third Reich, "You may hand us over the hangman; in three months time the disgusted and tortured people will you to account and drag you alive through the mud in the streets."[243] Well said, but the conspirators were aware of their fate when they walked into the VGH, death by hanging, carried out the same day as sentencing.[244]

The judiciary in the Third Reich went through many evolutions that consistently removed the standard obligations and expectations of legal proceedings and replaced them with draconian requirements based on political priorities and National Socialist ideology. Although there is an argument, that Güertner and Schlegelberger worked to try to slow the submission of the judiciary, they would fail and by the end of 1942, the independent judiciary was gone. They became a front, disguised as a legal body, but in reality were puppets subjected to enforce the directives and whims of the Führer. Neither Thierack nor Freisler would stand in the docket and face the consequences. Thierack followed the example of many Nazi leaders and committed suicide on 22 November 1946, while in custody awaiting trial.[245] Freisler was killed in an air attack in February 1945. Many other high-ranking judicial officials would soon stand to account for their actions and the devastation their compliance enabled.

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[243] Koch, 210.

[244] Ibid., 211.

[245] *Trials of War Criminals,* 94.

CHAPTER 4

NUREMBERG AND BEYOND

On 8 May 1945, the Allies rejoiced in the victory in Europe. Now, they set their sights on implementing the Moscow Declaration of 1943; but most importantly, reintegrating the millions of prisoners they had freed from concentration camps across Europe. The once great nation of Germany had been reduced to rubble in many areas and the people were immediately employed to begin the massive clean up effort. Two questions remained; first, how to legally and judiciously try to punish the perpetrators of not only another major world war, but the systematic genocide of identified undesirables? The second and far more difficult question was how to determine the culpable parties because it would be impossible to determine every culpable individual.

Historical Background to Nuremberg

Throughout World War II, information provided illustrated a horror few believed was possible. These alleged crimes were so extraordinary that the realization of war crimes was indisputable. As early as 1940, the exiled governments of Poland and Czechoslovakia released joint statements outlining the brutality of the Nazis describing it as "unparalleled in human history."[246] This statement described instances of "expulsion of population, banishment of hundreds and thousands of men and women to forced labor

[246] United Nations War Crimes Commission, "Chapter V: Various Developments in the Concept of War Crimes During the Second World War, 1939-1943," in *History of the War Crimes Commission* (London, England: His Majesty's Stationary Office, 1948), 87, accessed 1 March 2015, http://www.unwcc.org/wp-content/uploads/2014/11/UNWCC-history-ch5.pdf. Hereafter referred to as *History of the War Crimes Commission,* Chapter V.

camps, mass executions, and deportations to concentration camps, plundering of public and private property, extermination of the intellectual class and of cultural life, spoliation of treasures of science and art and the persecution of all religious belief."[247] Almost a year after these statements, both President Franklin Roosevelt and British Prime Minister Winston Churchill denounced these happenings and retribution became a goal of the war effort.[248] Even the Soviet Union began sending diplomatic cables alerting all countries about the brutality the Nazis were committing across Eastern Europe and especially in the Soviet Union. V. M. Molotov, the People's Commissar for Foreign Affairs, sent word of Red Army prisoners being tortured, executed through various means, and even crushed by tanks. The German Army raped women serving as nurses or medical assistants and the notes concluded with Molotov laying "all responsibility for these inhuman actions of the German military and civil authorities on the criminal Hitlerite Government."[249]

In response to the criminal actions of the Nazi government, representatives from Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland, and Yugoslavia signed the Declaration of St. James on 13 January 1942. The intent was to serve notice that these crimes would not go unnoticed or unpunished and were in violation of the Hague Convention signed in 1907.[250] However, there were early

[247] United Nations War Crimes Commission, *History of the War Crimes Commission,* Chapter V, 87.

[248] Ibid., 88.

[249] Ibid., 89.

[250] Ibid., 90.

discussions about the legality of the war crimes concept, but many representatives stressed that these were common law violations and therefore not ex post facto law.

By June 1942, the list of atrocities committed by the Nazis in foreign areas was rising and the members of the St. James Declaration sent letters to the great powers: the United States, the United Kingdom, the Soviet Union, and the Holy See. The three major powers immediately responded with support, condemning the acts of brutality and pledging their commitment to hold the guilty accountable after the war.[251] Meanwhile, two unofficial legal entities in England began subcommittees to determine the legality and legal issues with pursuing punishment for war crimes. Their research and recommendations were developed and implemented after the war.[252] The major recommendations specifically included that crimes should be tried in the country they were committed and heavily endorsed the establishment of an international criminal court parallel to the Versailles Treaty.[253] What is truly interesting is that as early as July 1942, the enabling role of the judiciary was known. In an interim report from the United Kingdom unofficial bodies, there was a recommendation that municipal courts would not maintain jurisdiction of "the deliberate starvation of people, the segregation of portions of the population and judicial murder."[254] Even to the outside world and without the court

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[251] United Nations War Crimes Commission, *History of the War Crimes Commission,* Chapter V, 93-94.

[252] Ibid., 94. The two semi-official bodies were the Cambridge Commission on Penal Reconstruction and Development and the Long International Assembly. These bodies were largely responsible for the initial recommendations of conducting an international war crimes trial.

[253] Ibid., 95.

[254] Ibid., 97.

documents explicitly damning the jurists, it was obvious the judiciary played a role in crimes committed on a massive scale.

On 1 November 1943, a meeting between President Roosevelt, Prime Minister Churchill, and Marshal Joseph Stalin yielded the Moscow Declaration. The declaration provided warning to Germany as a whole that upon unconditional surrender, all those who had committed brutal acts would be punished and urged those who were still innocent to remain so.[255] It went on to explain that Germans would be taken back to the scenes of their alleged crimes, tried, and punished in accordance with local laws. In addition, the declaration announced that the "Allies reserved to themselves the right to deal with the major criminals whose offences had no specific location."[256]

Nuremberg Tribunals

By the end of 1944, the United States established a War Crimes Office and began staffing directives to address the apprehension of war criminals. As the war concluded, U.S. Supreme Court Justice Robert Jackson was appointed as the representative for the United States and was responsible for all the policy in the war crimes field.[257] He also served as the U.S. representative to the London Charter, issued on 8 August 1945. The

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[255] United Nations War Crimes Commission, *History of the War Crimes Commission,* Chapter V, 107.

[256] Ibid., 108.

[257] Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington, DC: U.S. Government Printing Office, 15 August 1949), 3.

purpose of the London Charter was to provide a "Constitution of the International Military Tribunal" and outlined the tribunal procedures.[258]

The London Charter was a particularly difficult document to design and develop, specifically because it had to be an amalgamation of four nations and their legal systems and requirements. The ex post facto law and its gray area yielded long disagreements, and the assembled jurists understood the necessity of reaching an agreed consensus in order to proceed with the tribunal. Justice Jackson stated, "What we propose is to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code."[259] Essentially, Justice Jackson is describing customary international law or laws based on established, acceptable behavior through history, treaties, and law. Then came the discussion about the proceedings of the trials, specifically whether to use the adversarial method common to the United States and the United Kingdom, or the French and Russian method of judicial inquisition. Additionally, potential defense tactics were evaluated and two were eliminated from use. They were the following orders defense and the "tu quoque" or "so did you" defense.[260] After many

[258] Lillian Goldman Law Library, "Avalon Project-The International Military Tribunal for Germany," Yale Law School, accessed 23 March 2015, http://avalon.law.yale.edu/subject_menus/imt.asp.

[259] Doug Linder, "Nuremberg Account," University of Missouri-Kansas City, School of Law, accessed 2 April 2015, http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html.

[260] Doug Linder, "Nuremberg Indictments," University of Missouri-Kansas City, School of Law, accessed 2 April 2015, http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html.

days of discussion, the adversarial approach was selected and Nuremberg was established as the base for the IMT.[261]

The International Military Tribunal (IMT)

The first Nuremberg Tribunal was the trial of the major war criminals, those remaining high-ranking Nazis, military and political leaders. The tribunal was conducted from November 1945 until October 1946, with complete media coverage and much scrutiny. The indictment was provided to defendants and the world on 19 October 1945.[262] The reactions were varied worldwide, but most enigmatic was the German public. Some felt the charges were an extension of 'victor's justice.' Others felt relief that the Allies were punishing some, rather than all, though many felt apprehension that the trial would stir up virulent anti-German feelings.[263] The charges against the defendants were as follows: "Count 1: Conspiracy to Wage Aggressive War, Count 2: Waging Aggressive war or 'Crimes against the Peace', Count 3: War Crimes, Count 4: Crimes against Humanity."[264] Table 2 summarizes the defendants, charges, and verdicts of the IMT.

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[261] Linder, "Nuremberg Indictments."

[262] Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 121.

[263] Ibid.

[264] Linder, "The Nuremberg Indictments."

Table 2. Reproduction of Counts, Verdicts, and Sentences

Defendant	*Count 1*	*Count 2*	*Count 3*	*Count 4*	*Sentence*
Hermann Goering	Guilty	Guilty	Guilty	Guilty	Hanging
Rudolf Hess	Guilty	Guilty	Innocent	Innocent	Life
Joachim von Ribbentrop	Guilty	Guilty	Guilty	Guilty	Hanging
Wilhelm Keitel	Guilty	Guilty	Guilty	Guilty	Hanging
Ernst Kaltenbrunner	Innocent	—	Guilty	Guilty	Hanging
Alfred Rosenberg	Guilty	Guilty	Guilty	Guilty	Hanging
Hans Frank	Innocent	—	Guilty	Guilty	Hanging
Wilhelm Frick	Innocent	Guilty	Guilty	Guilty	Hanging
Julius Streicher	Innocent	—	—	Guilty	Hanging
Walther Funk	Innocent	Guilty	Guilty	Guilty	Life
Hjalmar Schact	Innocent	Innocent	—	—	Acquitted
Karl Doenitz	Innocent	Guilty	Guilty	—	10 Years
Erich Raeder	Guilty	Guilty	Guilty	—	Life
Baldur von Schirach	Innocent	—	—	Guilty	20 Years
Fritz Sauckel	Innocent	Innocent	Guilty	Guilty	Hanging
Alfred Jodl	Guilty	Guilty	Guilty	Guilty	Hanging
Martin Bormann (in Absentia)	Innocent	—	Guilty	Guilty	Hanging
Franz von Papen	Innocent	Innocent	—	—	Acquitted
Arthur Seyss-Inquart	Innocent	Guilty	Guilty	Guilty	Hanging
Albert Speer	Innocent	Innocent	Guilty	Guilty	20 Years
Constantin von Neurath	Guilty	Guilty	Guilty	Guilty	15 Years
Hans Fritzche	Innocent	—	Innocent	Innocent	Acquitted

Source: Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 504. Martin Bormann's death was a mystery in the aftermath of World War II. He was tried and sentenced in absentia, but was declared legally dead by West Berlin officials in 1973. Any area annotated with—means the defendant was not charged.

These verdicts resolutely established the previously identified charges as crimes, providing a foundation for subsequent trials and potentially for an international criminal court. After this major accomplishment, the NMT initiated the prosecution of additional groups, such as the medical profession, the ministries, the industrialists, and the senior German jurists. The Justice Trial is intriguing for many reasons, but not the least of which is the fact that judges were sitting in judgment over fellow judges, the ultimate policing of the profession.

Nuremberg Military Tribunals

Once the IMT began, questions arose about how to handle all the other alleged criminal activities, generally perpetrated by lower ranking individuals. On 20 December 1945, merely three months into the IMT proceedings, representatives of the four major powers signed Control Council Number 10 (CC Law 10). This law is the foundation upon which the NMT were established and implemented. The preamble of CC Law 10 states: "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts."[265] CC Law 10 provided direct instruction to occupied areas on the legal limits allowed by those leaders to pursue, detain, try, and sentence alleged war criminals. Article II of CC Law 10 establishes and defines crimes of which the occupied powers held jurisdiction.

[265] Taylor, 250.

> *(a) Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
>
> *(b) War Crimes.* Atrocities or offenses 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.
>
> *(c) Crimes against Humanity.* 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 country where perpetrated.
>
> *(d)* Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.[266]

Article II further defined the meaning of principal including as an accessory through physical commission or order, had a consenting role, connected via "plans or enterprises," and enrollment in a criminal organization.[267] Part 3 of Article II annotates the available punishments to befall any conviction and Part 4 reinforces the London Charter in that following orders is not a defense, but is a potential mitigating factor.[268] This charter provides the jurisdictional authority for additional tribunals.

Within the U.S. sector, plans to enact CC Law 10 were developed and compiled into Executive Order Number 9679. This drafted executive order recommended methods

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[266] Taylor, 250.

[267] Ibid., 251.

[268] Ibid.

and organizations to implement CC Law 10. These recommendations included that the Theater Judge Advocate would remain responsible for pursuing trials for all crimes against U.S. nationals and atrocities committed in concentration camps liberated by U.S. forces.[269] The Office, Chief of Counsel for the Prosecution of Axis Criminality would be the parent organization and as such, Justice Jackson would select a deputy whose responsibility was to "organize and plan" for additional trials.[270] These recommendations were accepted and on 16 January 1946, President Truman signed Executive Order 9679, providing the necessary authority to conduct additional tribunals.[271]

BG Telford Taylor was made the Deputy Chief Counsel subordinate to the U.S. Military Governor and Mr. Justice Jackson. It was his responsibility to plan and organize additional tribunals in accordance with CC Law 10 and Executive Order 9679. The first hurdle for Taylor was recruiting a robust staff to support the investigations, the trial preparations, court reporting, and documentation to continue the tribunals. Once the staff was established in May 1946, he divided them into different legal teams; three were responsible for preparing for cases involving "military leaders, SS and police officials, and diplomats and other high government functionaries."[272] The fourth group was tasked with the I.G. Farben chemical combine and the fifth team was to make a "general study

[269] Taylor, 10.

[270] Ibid.

[271] Ibid.

[272] Ibid., 15.

of the structure of German Industry and finance, in order to determine the impact of Nazism on the German business community."[273]

On 18 October 1946, the Office of Military Government, U.S. established that the subsequent tribunal membership should "be lawyers who have been admitted into practice, for at least five years, in the highest courts of one of the United States or in the United States Supreme Court," implemented as Military Ordinance Number 7.[274] Taylor recommended this course of action for four understandable reasons. The first that due to the complicated legal nature of the trials established and experienced judges would be prudent; and second, the decisions must be rendered in judicial decisions, different from those generated by military courts-martial.[275] The third reason was that professional, civilian judges would be held in higher esteem in Germany than military judges would. The fourth reason was basic logistics, not enough senior military judges could be procured for the additional tribunals.[276]

As the program of the additional tribunals progressed, the charge of membership in a criminal organization became a topic of discussion. An interesting practice was established, that no one ever stood trial on the sole count of belonging to a criminal organization. If this was the only crime, those people were handled by the denazification program developed by the Office of Military Government, U.S.[277] The sheer bulk of

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[273] Taylor, 15.

[274] Ibid., 29.

[275] Ibid., 28-29.

[276] Ibid., 29.

[277] Ibid., 17.

individuals who were members of the Nazi Party made the concept of holding individual hearings impossible. However, defendants charged with any of the other three crimes could also be charged with membership in a criminal organization.[278]

As evidence was gathered, analyzed, and categorized, Taylor's division moved towards determining which individuals would stand trial for various crimes. This was a major and difficult task undertaken by his team, Taylor knew he could not indict every person associated with the atrocities committed, but he had to select those whose involvement was undeniable and would serve as an infamous example to future generations. Taylor was especially careful to avoid "even the appearance of either favouring or vengefully pursuing any individual or class, category, or group of individuals."[279] Additionally, the office policy was not to move forward on an indictment without substantial evidence to corroborate allegations. In addition, there were scenarios when there was substantial evidence of wrongdoing, but the individual in question was of minor importance or should be handled in the denazification proceedings.[280] There were even scenarios where people were returned to zones in which the allegations had occurred for local litigation. Taylor's entire division was trained on the inner workings of Reich to enable them to deduce levels of responsibility, likelihood of knowledge, and influence spheres. This method was constantly reviewed and revised to ensure appropriate selections were made.[281]

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[278] Taylor, 17.

[279] Ibid., 74.

[280] Ibid., 75.

[281] Ibid.

There were three unwieldy taskmasters in the selection of defendants: time, staff, and money. Time was critical, as Taylor reports; it is a best practice to conduct "trials while the evidence is still fresh."[282] After such a costly war, many witnesses wanted to settle and attempt to regain a normal life. This difficulty was brilliantly portrayed in the film, *Judgment at Nuremberg*, when Judy Garland is a necessary witness, but she and her husband want nothing to do with the ongoing trials. The U.S. prosecutor convinces her that she has a duty to testify and she does. In addition, the further removed individuals are from an act, the more potential there is for lost evidence. The staff concern is understandable considering the finite number of people working to determine defendants, there are limitations. Finally, money reigns supreme and Taylor found it more and more difficult to justify additional trials to his chain of command.[283] This element had a more noticeable impact in future tribunals.

The Justice Trial

BG Taylor was the senior Army legal mind in Germany during the NMT and the selection of defendants was one of his many responsibilities. Taylor determined that Hitler and his conspirators could not have enacted such destruction without cooperation from multiple influential elements. "When they, with knowledge of his aims, gave him their co-operation, they made themselves party to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were

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[282] Taylor, 76.

[283] Ibid. It is apparent from Taylor's writings that as a lawyer himself, he had a personal and professional stake in this trial, in addition to his military and moral responsibilities.

doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility of their acts."[284] In reference to the Justice case, Taylor identifies the plan for such a trial from the beginning. "The very nature of the Third Reich was totally incompatible with any 'law' worthy of the name, and German jurists bore a heavy share of the blame, both for what they did and what they failed to oppose."[285]

The Justice Case, as it was referred to, was officially named the *United States vs. Josef Altstoetter, et al* and was conducted from January to December 1947, concluding with sentencing. Initially there were sixteen defendants, but one official committed suicide after the indictment and another's physical condition precluded his presence during the proceedings yielding a mistrial.[286] The remaining fourteen defendants faced four counts:

> (1) Conspiracy to commit war crimes and crimes against humanity. The charge embraces the period between January 1933 and April 1945.
>
> (2) War Crimes, to wit: violations of the laws and customs of war, alleged to have been committed between September 1939 and April 1945.
>
> (3) Crimes against humanity as defined by Control Council Law No. 10, alleged to have been committed between September 1939 and April 1945.
>
> (4) Membership of certain defendants in organizations which have been declared to be criminal by the judgment of the International Military Tribunal in the case against Goering et al.[287]

The defendants were: Josef Altstoetter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg,

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[284] Taylor, 74.

[285] Ibid., 78.

[286] *Trials of War Criminals*, 3.

[287] Ibid., 955.

Guenther Nebelung, Rudolf Oeschey, Hans Peterson, Oswald Rothaug, Curt Rothenberger, and Franz Schlegelberger.[288] Many of the defendants were judges or Justice Ministry officials and simultaneously many held ranking offices in the Sturmabteilung (known as the SA) or Schutzstaffel. After the indictment was read, all the defendants, through their defense counsel, pleaded "Not Guilty" to the presented charges.[289]

Figure 5. German Jurists in the Defendant Dock during the Justice Case, 1947

Source: United States Holocaust Memorial Museum, "Law, Justice, and the Holocaust," *Holocaust Encyclopedia,* accessed 28 September 2014, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007887, 60.

[288] *Trials of War Criminals*, 15-16.

[289] Ibid., 28.

Three weeks after the arraignment, the Justice Trial commenced. The original presiding judge had taken ill and Judge James T. Brand assumed the responsibility for the duration of the case. On 5 March 1947, BG Taylor gave his opening remarks. His scathing and merciless condemnation of both the actions and inactions of the defendants was marked at the onset of his remarks, stating early on their conduct was a "dishonor to the profession."[290] Expounding on each of the charges specifically, Taylor emphasized the indisputable fact that the Third Reich "could not live under law and the law could not live under it."[291] He went on to describe probable scenarios when a Jew was erroneously brought to court, but an outcome that favored a Jew was unthinkable under the Nazi legislation.[292] Through this example, Taylor was able to effectively illustrate the perversion of the rule of law within the Third Reich and lay the blame at the feet of the defendants. He concluded his statement with, "it is by trying these charges under law, and in the quest of truth, that Nuernberg will find its full measure of justification."[293]

Dr. Egon Kubouschok, defendant Schlegelberger's attorney, presented all the defendants' opening statement. The first element was a discussion on positivism and insistence that "no new system of jurisdiction" was developed during the Third Reich.[294] He would go on to discuss the differences between Anglo-American law and German

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[290] *Trials of War Criminals*, 32.

[291] Ibid., 41.

[292] Ibid.

[293] Ibid., 107.

[294] Ibid., 108. A reminder that positivism is a legal theory, which identifies that the role of law is for the betterment of state.

law, specifically that the jurists follow codified law and "not general ideas on morals and rights."[295] Essentially, the defense for judicial homicide and other travesties was that the jurists were executing the laws of their country as required by their positions as judges. They did not have the luxury of principles and morality and were bound by their oath to Führer.

The next phase of the prosecution's case examined the development of German law during the Nazi period. It covered the various decrees, Special Courts, the People's Court, and the Heredity Health courts. Renowned Professor Hermann Jahrreiss provided his expert opinion on German law during this period. Professor Jahrreiss' testimony emphasized, "no judge was entitled to doubt the constitutional validity" of any law passed by the Reichstag.[296] Jahrreis was further questioned on this point by presiding Judge Brand, specifically regarding the issue of applying a state law that was in direct conflict of international law. The response remained the same, the jurist's responsibility was to study and understand the law so it could be implemented, not question the legality or morality of any passed law.[297] This portion of the case well established the precarious position the jurists found themselves in Hitler's Germany.

However, Dr. August von Knieriem, a distinguished attorney, disagreed with Professor Jahrreis' opinion. Highlighting that judges had in fact "established their power

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[295] *Trials of War Criminals,* 109.

[296] Ibid., 255.

[297] Ibid., 282-284.

to check the substantive constitutionality of a statute."[298] Knieriem went on to argue that the idea that "it might be their duty to refuse obedience to a statute" on this basis had not occurred to the jurists.[299] He acknowledges that many passed sentences reluctantly, not seeing any other way around the offensive statutes. But this does not exonerate the judge from his responsibilities: "the judge who knew that he was acting wrongly is now punishable for defeating the ends of the law, for false imprisonment, or even for murder, as the case may be, provided he cannot avail himself of the plea of state of necessity."[300] Essentially, a judge is punishable when he uses the law to defeat the ends of the law to bring about unlawful imprisonment or murder.[301] Dr. Knieriem highlights this in the example of the Special Courts' presiding judges, who "passed sentences of death for the exclusive reason of doing away with human beings whom they regarded as devoid of value and fit for annihilation simply as Poles or Jews."[302]

Following this, the cases moved to the indictments against the fourteen defendants, the prosecution and defense each arguing how the justices failed in their duty or did what they had to do for honor and survival. Very early on, Taylor introduced many communiqués between the Justice Ministry and other ministries, with the Justice Ministry

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[298] August von Knieriem, *The Nuremberg Trials* (Chicago: H. Regnery, 1959), 284. Dr. Knieriem was also the Chief Counsel for I.G. Farben, infamously known for providing the Zyklon B used in the gas chambers to kill millions of people. He stood trial in I.G. Farben's tribunal in 1947 but was acquitted.

[299] von Knieriem, 284.

[300] Ibid., 285.

[301] Ibid., 285-286.

[302] Ibid., 286.

requesting opinions on potential judgments for particularly critical cases, especially those concerning Nazi Party members.[303] An independent judiciary would have no reason to receive approval of pending legal decisions, unless there was reason to garner support for such decisions. The circular logic ties directly back to Taylor's opening remarks when he highlights the one-sided nature of Third Reich law.

Many of the defendants, perhaps attempting to curry favor with the Nazi elite in the late 1930s and early 1940s, made many inflammatory statements about the role of law in the Third Reich. Curt Rothenberger stated, "this reaction of antagonism toward the law is justified because the present moment absolutely demands a rigid restriction of the power of law. He who striding toward a new world order cannot move in the limitation of an orderly administration of justice."[304] Rothenberger was appointed a State Secretary within the Justice Ministry after this speech. Another defendant, Rudolf Oeschey, a judge in the Special Courts, wrote a letter to his brother about the Nazi interference with the judiciary.

> Now it is an absurdity to tell the judge in an individual case, which is subject to his decision, how he has to decide. Such a system would make the judge superfluous; such things have now come to pass. Naturally it was not done in an open manner, but even the most camouflaged form could not hide the fact that a directive was to be given. Thereby the office of judge is naturally abolished and the proceedings in a trial become a farce. I will not discuss who bears the guilt of such a development.[305]

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[303] *Trials of War Criminals*, 352-361.

[304] James T. Brand, "Crimes against humanity and the Nürnberg Trials," *The Oregon Law Review* 28 (1948-1949): 103, accessed 15 December 2014, http://heinonline.org.

[305] Ibid., 104.

As ardently, as the jurists defended their actions in the Third Reich legal machine, many had acknowledged in the early years of National Socialist rule that something was wrong, but they continued to serve the regime.

One particular case was vigorously argued during the proceedings, Lehmann Israel Katzenberger, a 68-year-old Jewish businessman accused of race defilement.[306] He was accused of having an illegal relationship with a married German woman, Irene Seiler. Although the police worked diligently to find some proof of sexual relations between the two, nothing could be found and both swore it was not a sexual relationship.[307] When Katzenberger's attorney filed a motion to dismiss the indictment, Judge Oswald Rothaug ordered the case transferred to the Nuremberg Special Courts. The original indictment was thrown out and a new one drafted including the race defilement charge and a new charge of under the Decree of Public Enemies, a capital charge.[308] The indictment also included a perjury charge against Mrs. Irene Seiler. According to the Justice Trial opinion, this was done to preclude Mrs. Seiler from testifying on Katezenberger's behalf.[309]

Many aspects of this judicial travesty were covered in the opinion, including defendant Rothaug's documented intent to execute Katzenberger. "This examination, Rothaug stated, was a mere formality since Katzenberger 'would be beheaded

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[306] *Trials of War Criminals*, 86.

[307] Ibid., 86. This change to the indictment indicated the intention for a death penalty sentence and initiates what is defined as judicial homicide.

[308] Ibid., 1151.

[309] Ibid.

anyhow'."[310] The proceedings themselves were described as similar in nature to a political demonstration, including the attendance of high-ranking party members and propagandistic language.[311] During testimony of the Katzenberger trial, many witnesses found it problematic to give testimony as Rothaug consistently "anticipated the evaluation of the facts and gave expression to his own opinions."[312]

The verdict was always going to be guilty, and Rothaug used far-reaching legal theory to establish race pollution and to further establish Katzenberger was a public enemy. However, because Katzenberger was Jewish, the imposed death sentence was positively received. Mrs. Seiler received a two-year penitentiary sentence and a loss of her civil rights.[313] In the Justice Trial opinion on Rothaug, the justices conclude, "one undisputed fact, however, is sufficient to establish this case as being an act in furtherance of the Nazi program to persecute and exterminate Jews."[314] Further, the justices determine, "the defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination."[315]

The justices continue further, acknowledging that such proceedings yielded a smaller number of victims, than the mass exterminations within the concentration and death camp system, but smaller numbers did not mitigate the responsibility of the

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[310] *Trials of War Criminals*, 1152.

[311] Ibid.

[312] Ibid.

[313] Ibid., 650.

[314] Ibid., 1155.

[315] Ibid.

defendants. “His [Rothaug’s] acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.”[316] This statement highlights the higher master the legal system represents, often depicted with a blind Athena holding scales, anyone should enter a court free of discrimination and prejudice. This particular case was a major element of the 1961 film, *Judgment at Nuremberg*; Judy Garland portrays the character of Irene Seiler. In her performance, one could feel the pain and guilt she continued to carry in the death of her friend. It also presented a moment of reflection watching the reactions of the defendants during her testimony. One has to wonder what was truly going through their minds at this time.

[316] *Trials of War Criminals*, 1156.

Figure 6. American Judges (L to R) Mallory B. Blair, Justin W. Harding, Carrington T. Marshall, and James T. Brand

Source: United States Holocaust Memorial Museum, "American Judges," accessed 16 April 2015, http://digitalassets.ushmm.org/photoarchives/detail.aspx?id=1058537&search=&index=5.

After the 18 October 1947 closing statements, the court was in recess until judgment was delivered on 3-4 December 1947.[317] The decision and sentencing from the panel of judges was thorough and well conceived. Each element of the indictment was explained and presented evidence applied to illustrate violations. The opinion began with a brief synopsis of administrative portions of the trial including providing the exhibits to the defendants, hearing from all 138 witnesses, and explaining the two defendants who were not tried.[318] The judges also explained that the first indictment of conspiracy was

[317] *Trials of War Criminals*, 5.

[318] Ibid., 954.

not possible in this trial, as none of the defendants had any role in planning the atrocities committed. Specifically stating, "neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense."[319] However, the judicial complicity in enacting Hitler's decrees and plan made them "connected with the plan, scheme, or conspiracy in aid of waging the war and committed those war crimes [and crimes] against humanity as charged in the indictment."[320] The opinion would go on to explain the judicial authority the tribunal has and its derivation from the IMT Charter and the CC Law No. 10. Specifically taken from the IMT judgment, the opinion establishes the validity of the charges. "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."[321] Bringing further evidence, the opinion quotes a German law professor in 1878, "States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race."[322] This succinctly eliminated any consideration that the charges and tribunals were ex post facto law.

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[319] *Trials of War Criminals*, 956.

[320] Ibid., 1199.

[321] Ibid., 969.

[322] Ibid., 982.

This was followed by a complete review of the relevant decrees and actions illustrating how the judicial systems enabled an unlawful government and ideology. It includes the decrees and inquiries from Hitler about various sentences and then acting Minister of Justice Schlegelberger's actions to meet Hitler's approval. Then "the law in action"[323] section which completely outlined specific actions taken by the judges. First, the opinion identified the two overarching principles that guided all legal practices. "The first concerned the absolute power of Hitler in person or by delegated authority to enact, enforce, or adjudicate law. The second concerned the incontestability of such law." [324] The impact of these principles left the defendants in a legal quandary. "In German legal theory Hitler's law was a shield to those who acted under it, but before a tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Führer himself nor to his subordinates, if in violation of the law of the community of nations."[325] The opinion continues to weave through all the various laws, decrees, sects of the Nazi Party as a criminal organization, and finally concluding with crimes against humanity. Perhaps the most damning testimony came from Dr. Ferdinand Behl who stated, "In Berlin it would have been hardly possible or anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice."[326] This was completely contrary to the defendants' defense and statements indicating they were unaware of the atrocities occurring within the camps. The justices

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[323] *Trials of War Criminals*, 1010.

[324] Ibid.

[325] Ibid., 1011.

[326] Ibid., 1079.

concluded by dismissing any belief that the defendants were unaware. “This Tribunal is not so gullible as to believe these defendants so stupid that they did now know what was going on. One man can keep a secret, two may, but thousands, never.”[327]

The justices provided the above opinion and then individualized opinions for each of the defendants, explaining how they reached their verdict. Table 3 is a compiled list of the verdicts and sentencing of all the defendants.

[327] *Trials of War Criminals*, 1081.

Table 3. Justice Trial Verdicts and Sentencing

Defendant	Verdict	Sentence	Release Date
Josef Altstoetter	Guilty on count four	Five Years (Time Served applied)	1951
Wilhelm von Ammon	Guilty on counts two and three	Ten Years (Time Served applied)	1951
Paul Barnickel	Not Guilty		
Hermann Cuhorst	Not Guilty		
Guenther Joel	Guilty on counts two, three, and four	Ten Years (Time Served applied)	1951
Herbert Klemm	Guilty on counts two and three	Life Imprisonment	1951
Ernst Lautz	Guilty on counts two and three	Ten Years (Time Served applied)	1951
Wolfgang Mettgenberg	Guilty on counts two and three	Ten Years (Time Served applied)	1951
Guenther Nebelung	Not Guilty		
Rudolf Oeschey	Guilty on counts three and four	Life Imprisonment	1951
Hans Peterson	Not Guilty		
Oswald Rothaug	Guilty on count three	Life Imprisonment	1951
Curt Rothenberger	Guilty on counts two and three	Seven Years (Time Served applied)	1956
Franz Schlegelberger	Guilty on counts two and three	Life Imprisonment	1950 (Health Reasons)

Source: Created by author using information from *Trials of War Criminals before the Nuernberg Military Tribunals: Volume III, "The Justice Case"* (Washington, DC: Government Printing Office, 1951), 1081-1083; Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge, MA: Harvard University Press, 1991), 273.

The Justice Case highlights the destruction allowable when there are no checks or balances in a government. Presiding Judge Brand and his fellow judges took their responsibilities seriously, and found guilt where it was proven and exonerated where it was not. The opinion succinctly encapsulated the complicity of the German jurists. "The charge, in brief, is that of conscious participation in a nation wide government-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 authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist."[328]

De-Nazification of the German Legal System

The conclusion of the Justice Case was the end of the Allies' punishment of the atrocities by the judicial system. The concern at hand was how to ensure such behaviors and discrimination did not occur again. The newly emplaced German government could scarcely afford to rehire those leaders of the legal profession during the Third Reich; rather, lower ranking judiciary members or those who were forcibly retired were brought back to run the ministry and the courts.[329] Surprisingly, the defendants found guilty in the Justice Case were generally provided their pensions, even after serving only a fraction of their prison sentences.[330] The simple answer is there was no possible way to guarantee the 'de-Nazification' of the judicial system. The Nazi ideals had pervaded the ministry, the courts, and even the law schools due to the insular nature of the legal profession.

The Allies initiated the need for de-Nazification through rescinding the Enabling Act, the Race Laws, and many other specifically fascist laws.[331] BG Taylor discussed the impossibility of trying everyone involved in the German judiciary not only due to time,

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[328] *Trials of War Criminals,* 985.

[329] Müller, 208.

[330] Ibid.

[331] Ibid., 225.

but also to prevent the perception of victor's justice. However, he strongly encouraged the court proceedings "which expose the true nature of Third Reich are circulated throughout Germany."[332] Through this, future generations of Germans could learn and know what their country had committed, not for purposes of guilt, but rather vigilance. This echoed the opening statement of Justice Jackson on Nazi crimes that, "civilization cannot tolerate their being ignored because it cannot survive their being repeated."[333]

Although formal de-Nazification was attempted, there was no effective way to fully vet and remove all those who shared Nazi beliefs. The United States built bases all over Germany and over time established itself as an ally of the German government. In the end, this was probably the best way to prevent the pervasion of the Nazi culture from rising out of the ashes and re-establishing its hold in Germany.

The development of the Cold War hostilities with the Soviet Union and the establishment of an East and West Berlin overruled any further attempts to root out the Nazi poison. "Historian Richard Evans writes that by 1948 'the eagerness of the Western Allies to prosecute, condemn, and execute Nazi War Criminals was diminishing. The new priorities of resisting Communism and fighting the Cold War were casting the crimes and criminals of the Third Reich into a new light'."[334] The United States required West Germany as an ally and West Germany needed the protections the United States could offer. When John J. McCloy, former Assistant Secretary of War, assumed his

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[332] Taylor, 106.

[333] Ibid., 103.

[334] Joshua M. Greene, *Justice at Dachau: The Trials of an American Prosecutor* (New York: Broadway Books, 2003), 353.

position as the first American high commissioner for Germany, he agreed with current West Germany Chancellor Konrad Adenauer "that keeping convicted war criminals behind bars conflicted with Germany's integration into the West."[335] Officially, the pardons were granted with the discovery of mitigating evidence by 1951, over half those convicted of war crimes were released. This was not enough for Adenauer; he withheld West Germany defense contributions, as the German rearmament against the Soviet Union was crucial.[336] The United States capitulated and by 1958, the last of the prisoners was released, the efforts of the war crimes program now part of history.

[335] Greene, 353.

[336] Ibid., 353-354.

CHAPTER 5

CONCLUSION/LESSONS LEARNED

Primo Levi said, “Monsters exist, but they are too few in number to be truly dangerous. More dangerous are the common men, the functionaries ready to believe and to act without asking questions.” In the NMT, this quote bears true significance. The government and many other professional entities enabled and even wholly embraced the Nazi ideology, leading to the documented atrocities. Many of the defenses relied upon establishing the evilness of the Nazis and describing the totalitarian system under which the country had to survive. In the Justice Case, it was the explanation that they were imposing the law, as was their sworn duty and that they had no ability to confront or change the laws. The lessons from these government officials are many and acutely applicable even sixty-eight years after the fact; society must be humble enough to study and use history wisely.

The complicity of the judiciary is not in question; the terrible actions of the Third Reich would have been considerably more arduous and time consuming without their acquiescence. The question remains would resistance have done any good? There are some examples of individuals retiring, either voluntarily or forcibly, because they were unable to align themselves with the purpose and direction of the Führer. These people were able to live their lives in virtual anonymity; there was no Gestapo hunting them and no instances of them being sent to the camps. Those who remained found themselves in an untenable position of rapid conformance and the ultimate dismantling of the independent judiciary. If they too had resisted this totalitarian rule, it is doubtful it would have made an impact on the regime’s ultimate goals. Hitler would have found other

legally trained, Nazi indoctrinated minds to assume the administration of the Ministry of Justice, just as he did in 1942 with Dr. Otto Thierack. Perhaps the actions of the old regime, like Dr. Gürtner and Dr. Schlegelberger, were the brakes on a careening train, unable to stop the pending destruction, but delaying it for as long as possible. This should not equate to absolution of the significant role played by the judiciary; however, the previous leadership remained in place until 1942 and slowed elements of the Nazi indoctrination. However, the entire judicial community swore a fealty oath to Hitler and 100 percent of the practicing judges and lawyers were members of the Nazi Party or Nazi Party organizations, so the leadership acquiesced too many demands.

However, there are many lessons from the actions of the German judiciary. First, the lessons for Germany and the role positivism played in their susceptibility must be considered; second, the external considerations of other states and their respective legal systems, and finally, the consideration of the importance of all this to the contemporary military officer.

Germany faced the perfect storm of events in the aftermath of World War I. This led to a great many missteps and personal bias' becoming legal verdicts and precedence. This stemmed from the legal paradigm of positivism, which identifies that the role of law is for the betterment of the state. Unlike in the U.S. judicial system, which has a responsibility to adjudicate and ensure the constitutionality of passed laws, the German legal structure was tasked only to enforce the laws. The theory of positivism was certainly a critical element to the Third Reich. This theory directed how the judiciary was to apply the validated laws of the German state. Within the Third Reich, this became the foundation of the legal maneuvering required to legalize the goals of regime. Essentially,

the judiciary was reduced to a pass through element of the bureaucracy. It was not required nor expected that the legal professionals would give their opinion or openly question the regime. Rather, they were to check the legal box and subjugate themselves to the leaders. The situation in Germany's legal system from 1919-1945 highlights the necessity for judiciaries to be independent, and freed from any political affiliation. A judiciary must be able to evaluate cases based on merit and legality and not be coerced by the desires of the state leadership.

Another important aspect highlights the actions of the judiciary an overall lack of moral courage. In a profession such as law, moral courage must be a bedrock, that courage and conviction that empowers judges to make the legally correct decision and not weigh public opinion. Imagine if the U.S. Supreme Court had not supported desegregation, woman's reproductive rights, and most recently gay rights. These decisions were not generally met with widespread support, but the courts displayed prudent courage in interpreting the laws of the country. From an individual perspective, the concept of moral courage resonates even deeper. A few jurists and legal professionals walked away from their careers when they realized the path of Hitler. These men were not prosecuted or injured, but their careers were cut short. One could argue these jurists chose to leave rather than become complicit. Military officers must recognize what is wrong and possess the fortitude to stand against evil. To stand by, is to acquiesce and be complicit in both crimes and evil.

As identified earlier, many of the laws and practices within the Third Reich were not unique to Germany. In fact, the theory of eugenics was highly popular in both Europe and the United States. The United States was especially worried that with the continued

influx of immigrants from less affluent areas, the future population was at risk. After Germany passed their sterilization law, many prominent Americans sent their congratulations.[337] Furthermore, although only Germany went as far as killing their mentally ill patients, both some US states and the United Kingdom maintained forced sterilization laws for many years. Perhaps one of the saddest cases was that of Dr. Alan Turing, a genius mathematician, who broke the Enigma code and designed the world's first computer. In 1952, he was convicted of a homosexual act and was provided the choice of imprisonment or sterilization. He elected sterilization and arguably died by his own hand in 1954.[338] Almost a decade after the fall of the Third Reich, and such practices were still administered and would continue for many years.

Justice Jackson described the atrocities of the Third Reich as "so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[339] This opening to the initial Nuremberg tribunal set the tone and emphasized the importance of the court. Due to the actions of the Third Reich, many additional activities occurred to attempt to prevent such cruelties from occurring again. The United Nation War Crimes Commission, initiated in 1942, identified, classified, and aided governments in conducting trials of potential war crimes. This evolved into multiple bodies comprising of the International Court of Justice, the

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[337] *In the Shadow of the Reich: Nazi Medicine* (First-Run Features, 1997), Documentary Film. German doctors quickly determined that to achieve success, one had to be active within the Nazi Party and associated organizations.

[338] B. Jack Copeland, *Essential Turing: Classic Writings on Minds and Computers* (Oxford: Oxford University Press, 2004), 3, accessed March 4, 2015, http://site.ebrary.com.lumen.cgsccarl.com/lib/carl/reader.action?docID=10263724.

[339] Taylor, 103.

General Assembly Sixth Committee (Legal), and the Internal Law Commission.[340] Although the scope of responsibility has widened, the world saw a need to have such a forum to enforce international law. Unfortunately, many feel that the lessons of Nuremberg have never been adequately applied and that the United Nations has not provided the strength needed to dampen the occurrences of genocide. The perpetrators of genocides since 1945 have generally gone unpunished, with the exception of Slobodan Milosovich, but even that trial required coercion. The original hope of Nuremberg was that it would provide a framework that could be refined and improved to ensure international justice. Sixty years later, the Nuremberg Tribunals do not have the intended legacy of its authors.

Finally, BG Taylor highlighted the need for the documents and lessons of the Third Reich to be circulated throughout the educational system within Germany. Although many people can identify the primary Nazis such as Hitler, Goering, Himmler, and Adolf Eichmann, and the medical profession was tainted and touched by Dr. Josef Mengele's infamy, the judiciary remained removed from public culpability, aside from the tribunals. To most people, the names of Freisler, Thierack, and Schlegelberger are unfamiliar, even though they all had a direct role in aiding and enforcing the horrors of the Third Reich. The history of Nazi Germany, the documents, and the trials transcripts still hold much to be discovered. Historians must continue the work of discovering even more about the collapse of the Weimar government giving way to such a destructive force. Did it occur from fear of violence? Did personal bias create the foundation for

[340] United Nations, "Uphold International Law," accessed 4 March 2015, http://www.un.org/en/law.

discrimination that spiraled out of control? Most importantly, were those laws truly legal and enforceable?

The final lesson this provides is the concept of following orders. Early in the development of the processes for the tribunal, the various entities wrestled with the following-orders paradigm. When do people have the right or responsibility to be civilly disobedient? Many resistance movements took to this call and a number of members lost their lives in the pursuit of freeing Germany from the Nazis. The Justice Trial highlighted more so than any other, that orders are not limited to the military. The trial highlights how critical a malleable judiciary was to the success of the Nazis. Those who said no and walked away did not lose their lives. If the judiciary as a whole had made a stand not to allow such blatant discrimination, not to make the laws fit the needs of the Führer, and not to make judicial homicide a common practice, who knows what would have happened.

Since the conclusion of the Nuremberg Tribunals, the world has experienced a great many things. Senator Joseph McCarthy, an attorney, went on a Communist witch-hunt in the 1950s that was frighteningly reminiscent to the early Nazis. His destructive crusade was finally brought to an end although many lives were destroyed in the process. BG Taylor was a critical player in McCarthy's downfall. Alarmed by similar themes of his Nuremberg Trial experiences, Taylor made speeches and wrote, warning that McCarthy was a "dangerous adventurer."[341] He took considerable risk being so

[341] Richard Servero, "Telford Taylor, who Prosecuted Nazis at Nuremberg War Crimes Trials is dead at 90," *The New York Times*, 25 May 1998, accessed 25 April 2015, http://www.nytimes.com/1998/05/25/nyregion/telford-taylor-who-prosecuted-nazis-at-nuremberg-war-crimes-trials-is-dead-at-90.html?pagewanted=1, 2.

outspoken, and McCarthy attacked Taylor's actions in Germany. It was obvious in the later years of Taylor's life, the impact the trial experience had on him. Taylor never backed down when he saw something immoral or wrong. Then were the years of the United Soviet Socialist Republic with its programs and the gulags, things made possible by legal Soviet practices. The world is far from free of genocidal tendencies or actions, and although the International Criminal Court of Justice (United Nations) conducts genocide trials, no hearing has ever been so much in the limelight as the IMT.

The relevancy of this study crosses many dimensions. Certainly, those covered above in regards to the responsibility of the jurists in maintaining their higher path. As Athena charged, "never pollute our law with innovations."[342] However, this study goes deeper than just the quantifiable judicial responsibility. Much like *The Orestreia*, this exploration illustrates the constant struggle to achieve unimpeachable justice, it is almost an ethereal quest that no culture has yet mastered. And yet, the human drive to achieve such justice is explicitly seen in today's popular culture. Television shows, films, and literature, especially for young adults, have specific themes about discrimination through law and the corresponding justice. Both the *Divergent* and *Harry Potter* series have similar compelling themes, with scenes reminiscent of those from the Third Reich. This understanding and pursuit of equitable justice is so widespread, it remains a common subject. The study of the judicial actions in the Third Reich is important because their coordination and support of the regime's objectives illustrate the destructive power of justice gone awry. This example should embolden every citizen to be vigilant and protective of justice within their country.

[342] *The Oresteia*, 262.

This journey has provided unparalleled insight into the importance of knowledge, critical thought, and discussion. Many people today remain completely unengaged from the actions of the federal government. However, it is imperative for all citizens to read, discuss, and understand what the government is doing, both within and outside our borders. The study of the judiciary highlighted this gap of the author's personal development. In the United States, citizens are represented by elected officials, and thus have a distinct responsibility in shaping the future of the country. The recent actions of the Department of Justice opening additional investigations into cleared individuals is reminiscent of the dialogues between Hitler and Schlegelberger on sentences. It is a fine line to be sure, and the system does not always yield the right decisions; however, the integrity of the judicial system must be maintained at all times so that it is not again manipulated for the aims of political leaders. Once was enough.

APPENDIX A

LAWS, CRIMES, AND PUNISHMENTS

Law	Decree	Crime	Punishment
StGb	Para 80	Territorial or constitutional high treason	Death
StGb	Para 81	High treason by force	Death or Hard Labor
StGb	Para 82	Preparing high treason	Death or Hard Labor
StGb	Para 83	Incitement to high treason	Death, Hard Labor, or Prison
StGb	Para 84	Lesser cases of high treason	Hard Labor or Prison
StGb	Para 89	Landesverrat	Death or Hard Labor
StGb	Para 90	Espionage	Death or Hard Labor
StGb	Para 90a	Fraud by Landesverrat	Hard Labor
StGb	Para 90b	Betrayal of former state secrets	Prison
StGb	Para 90c	Complicity with Landesverrat	Prison
StGb	Para 90d	Handing over of state secrets	Prison
StGb	Para 90e	Careless handling of state secrets	Prison
StGb	Para 90f	Treason against the people by propagation of lies	Hard labor
StGb	Para 90g	Disloyalty by Landesverrat	Death or Hard Labor
StGb	Para 90h	Destruction of Evidence by Landesverrat	Hard Labor
StGb	Para 90i	Bribery to commit Landesverrat	Hard Labor
StGb	Para 91	Bringing about danger of war	Death or Hard Labor
StGb	Para 91a	Armed assistance to the enemy	Death or Hard Labor

StGb	Para 91b	Acts aiding the enemy	Death or Hard Labor
StGb	Para 92	Agreement to commit Landesverrat	Hard Labor
StGb	Para 94 Sec.1	Verbal attacks on the Führer	Prison
StGB	Para 139 Sec. 2	Serious cases of failure to denounce high treason, Landesverrat, or damage to defence materiel	Death or Hard Labor
Defense Power Protection Decree (25 November 1939)	Para 1 Sec. 2	Serious cases of damage to defence materiel	Death or Hard Labor
"	Para 5	Endangering allied forces	Hard Labor or Prison
Decree for protection of prople (sic) and state (28 February 1933)	Para 5 Sec. 2	Attempt to kill president or government member	Death or Hard Labor
Law against economic sabotoge	Para 1	Illegal transfer of economic assets abroad	Death
KSSVO	Para 2	Espionage	Death
Decree to protect arms economy	Art 1	False evidence on requirements and stocks	Death, Hard Labor or Prison
KSSVO Supplement (29 January 1943)	Para 5	Public Wehrkraftzersetzung (undermining of national defence)	Death, Hard Labor or Prison
"	Para 5	Intentional Wehrkraftzersetzung	Death, Hard Labor or Prison

Source: Hannsioachim W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (London: Tauris, 1989), 128-130.

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