Nazi Law

From Nuremberg to Nuremberg

Edited by John J. Michalczyk

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Cover image: Adolf Hitler delivers a speech to the German Reichstag at the Kroll Opera House, Berlin, Germany, April 28, 1939. (Photo by Hugo Jaeger/The LIFE Picture Collection/Getty Images)

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To Susan, a woman of incredible brilliance and integrity,
and Raymond G. Helmick, S.J., our mentor.

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Foreword

May 8, 1945 appeared to be a new start for Germany, as was the subsequent formation of the *Bundesrepublik* (Federal Republic) in the West and the *Deutsche Demokratische Republik* (German Democratic Republic) in the East, which were followed by the introduction of a new currency, the soon powerful German Mark of West Germany. There is no reset button in life, however, and the people who survived the Second World War were still Germans. The intellectuals who wrote fancy books, priests who celebrated Mass and preached sermons, the police, lawyers, and judges who represented justice, the industrialists who controlled the economy, the professors who taught their subjects, and to a larger degree than imaginable from today's perspective, the politicians who controlled the levers of power, were the same people who supported, acquiesced to, or even constituted significant portions of the Nazi regime. I could provide plenty of stunning examples of how the occupying forces both in the West and to a lesser degree in the DDR suffered from a huge blind spot dealing with the Nazi past. For reasons of convenience and seeming lack of alternatives, the legal and political infrastructure resembled, more than we wished, that of the Nazi apparatus barely disguised under a thin coat of democratic or communist paint. How else can we explain that only in the 1970s, and ironically still today, more than seventy years after the fall of the Nazi regime, some of the worst Nazi perpetrators have not been confronted with their atrocious history and made to pay some token price for the cruelty and suffering they perpetrated on millions of innocent victims and martyrs. The large majority lived out their lives peacefully and comfortably with all the social, health, and pension benefits provided by welfare states. Priests and preachers who glorified Hitler and his regime from the pulpit continued to function as "spiritual leaders" in the postwar period, often without a word of apology about their despicable record. Nazi lawyers and judges were assimilated into the West German legal system.

All these postwar injustices and obvious perversions of course were not illegal, as were the previous detention of people in concentration camps and Gestapo protective custody based on solid but manipulated legislation. It took two generations of postwar Germans to come to grips and deal with the transformation of a dictatorship into a democracy. Some reactions of right-wing parties to the recent immigration crisis seem to indicate that not all Germans' roots are deeply imbedded in constitutional concepts but mirror those of the late 1920s that lead to Hitler's unexpected empowerment. Let us not become legally blind again in recognizing and dealing with these momentous events that Germans witnessed and failed to challenge.

Growing up as a child of Jehovah's Witnesses in postwar Germany was a unique experience. Rather than recognizing the enormous contribution this religious group made in the context of Nazi resistance, large segments of the postwar German society chose to view them as traitors or *Nestbeschmutzer,* denigrators of one's own family. So

my Jewish friend, the only Jew in my school, and I were often exposed to the ridicule of our classmates, amazingly tolerated by the instructor, a Catholic priest. However, not only did teachers and bureaucrats discriminate against children of Jehovah's Witnesses during and even after the war, but also in the Soviet-occupied DDR many Jehovah's Witnesses walked right from the concentration camps into Stasi torture and long prison terms. As we now understand, the treatment of these German citizens, during and after the Second World War, constituted not only legal abuse but also complete moral failure. My parents had brought me up believing that the kingdom of God, also called the Messianic Kingdom, a spiritual world-government, was the only solution to mankind's problems with war, injustice, prejudice, and nationalism. I am thankful to them for taking a firm stand on these issues, making me more aware of the prevalence of hypocrisy, bias, and outright persecution of religious, ideological, and ethnic minorities. Much of that still goes on right before our eyes today.

Looking back over more than a decade of working together with John Michalczyk, and the many events and symposia we organized during that period, I consider the conference on Nazi law, documentary film, and publication as one of the milestone events, similar to the 2004 symposium "CONFRONT! Resistance in Nazi Germany" and the subsequent publication of a book bearing the same title. Rarely has the failure of the legal system been so broadly and deeply analyzed as during the three-day conference regarding the Nazi perversion of justice. The ramifications of the tragic breakdown of the legal system during the Nazi regime reverberated through virtually all aspects of society, and the echoes of this period are still noticeable to a degree in the present German legal system. More work remains to be done.

Had it not been for the courage, faith, and determination of Nazi resisters, such as the White Rose student movement, the Kreisau Circle, the Red Orchestra, the Jehovah's Witnesses, and others who confronted the Third Reich's manipulation of power, the legal protection of basic human rights, not only in Germany, but also in the United States, might not be as comprehensive as we know it today.

Just recently new cases were opened in Germany against employees of the Struthof concentration camp near Danzig built in 1944. The perpetrators are between 87 and 93 years old. Many similar cases have been dismissed in the late 1950s and 1960s for lack of proof of willful and direct participation in murder. As the camp was not only an extermination but also a labor camp, all the accused had to say was that he was in the labor section and had nothing to do with the slaughter, shooting, and disappearance of countless thousands! How much more of a legal protective wall can be created? Most cases of cruelty other than intentional murder were beyond the statutes of limitation anyway just after a short ten years.

This book focuses on the use and abuse of law during and after the demise of Third Reich. It originated with the idea of offering a companion piece to the book, conference, and PBS documentary, John Michalczyk's *In the Shadow of the Reich: Nazi Medicine.* In Nazi Germany, medicine and law went hand in hand. During the Third Reich, Jewish physicians, as well as Jewish lawyers and judges, added prestige to their professions and represented the best in their respective professions. In 1934, a Nazi law prohibited them both from practicing their professions, which were soon totally controlled by National Socialist ideology.

As noted above, to address sociopolitical issues with respect to the manipulation of the law by the Third Reich, Boston College hosted an international conference "Legally Blind: Law, Ethics and the Third Reich" in March 2015. The fifteen panelists, each with a scholarly approach to Nazi Germany and the Holocaust, were invited to speak on relevant and historical issues of the legal profession as expressed in myriad forms. These well-published presenters offered rich insights in their respective fields for the extensive audience and offered interviews for the PBS documentary *Nazi Law: Legally Blind* (2016), along with a chapter for this book. Writers from Boston University's 2014 conference "Dispossession: The Plundering of German Jewry, 1933–1945 and Beyond" and other scholars have also contributed essays.

To supplement the 2015 Boston College conference, the American Bar Association and German Federal Bar sponsored an exhibit during the program, "Lawyers without Rights: Jewish Lawyers in Germany under the Third Reich." It traveled to more than seventy cities in the United States, offering a visual education about the major loss in the German legal system by the elimination of the Jewish attorneys and judges.

Recently, at the sixtieth anniversary of Berthold Brecht's death the Paraguayan linguist Mercedes Hempel eloquently said the following: "Many people all over the world walk *supposedly with open eyes* right into the direction of repeating the worst of crimes which were committed in the course of (recent) history. It is high time to do something against that. *I believe this to be a struggle of life and death*!" (Italics added).

It is our hope that these essays help contribute to the opening of our eyes to the importance of law for any civilization to survive. Justice Robert H. Jackson's words at the Nuremberg Trials reiterate the significance of our confronting injustice: "The wrongs which *we* seek to condemn and punish have been *so* calculated, *so* malignant, and *so devastating* that *civilization cannot tolerate their being ignored*, *because* it *cannot survive* their being repeated."

Lorenz Reibling

Acknowledgments

I am first of all indebted to my colleague and mentor, the late Rev. Raymond Helmick, SJ (+2016). Since 1997, on a documentary film production dealing with "The Troubles" in Northern Ireland, he collaborated with me and our film crew on our conflict-resolution documentary which resulted in further films and publications. He inspired us to learn more about "The Other," and about not demonizing the enemy but engaging them. Fr. Helmick appears in our companion documentary, *Nazi Law: Legally Blind* (2016) discussing the Nuremberg Laws.

Further gratitude is due to the generous contributors to this book on diverse aspects of the law as manipulated by the Third Reich. Many of them spoke at the Boston College conference "Legally Blind: Law, Ethics and the Third Reich" and appear in our recent documentary. For continued assistance with details pertaining to the content of this publication, I am also deeply grateful to Paul Bookbinder, Melanie Murphy, Michael Resler, Charles Lutcavage, Douglas Morris, Michael Bryant, and Oleksandr Kobrynskyy, besides the other generous authors, some coming to my aid at the last minute. Tetyana Kloubert of Ausburg provided me with invaluable resources from the Ausburg archives. For technical editing support, Jeffery Howe has been my savior, while Jeffrey Gutierrez has been a dedicated, long-time editor of my work, improving it at each stage. Christopher Soldt and other graphic artists have added a rich visual dimension to the book as they did for the original conference on Nazi law. Boston College has generously supported the entire project dealing with the study of Nazi law, including the Pasquesi and Salmanowitz grants, secretarial support, and the research assistance. Amanda Ross assisted with the tedious task of editing and proofing, while Audra Hampsch, Matthew Michienzie, Marilyn Smith, and Solina Jean-Louis contributed with their research skills. For detailed German translations I relied on Michael Resler. The Photo Archives at the United States Holocaust Memorial Museum generously supplied the photos to illustrate the chapters of this book. At Bloomsbury, Rhodri Mogford, Grishma Fredric and Beatriz Lopez have been most insightful guides, both for our earlier publication *Filming the End of the Holocaust* and this present work.

My long-suffering family, especially my wife Susan, have provided me with the most day-to-day support in this three-year project now coming to fruition, with our grandsons Noah and Benjamin offering us all a fresh perspective on the beauty of Life.

Introduction

John J. Michalczyk

Following the First World War and the Versailles Treaty of 1919, the Weimar Constitution with all of its strengths and weaknesses offered Germany a legal foundation to rebuild a civilized, democratic society. The Preamble states, "The German people, united in all their **racial** elements, and inspired by the will to renew and strengthen their Reich in liberty and **justice**, to preserve peace at home and abroad and to foster social progress, have established the following constitution." Adolf Hitler bluntly stated, however, "I will use the Constitution to destroy the Constitution." During his five-month imprisonment in the Landsberg prison, for his role leading the evolving National Socialist Party through the failed Beer Hall Putsch of November 8–9, 1923, Hitler expressed a specific ideological agenda in his political and racial blueprint for Germany, *Mein Kampf*, which would defy the Constitution protection of all Germans. Unity of the races would be the farthest concept from the mind of the Führer, and justice would have no place in the German courts. Jews would play no part in the well-being of the country, although many Jewish attorneys and judges had served in the First World War and offered prestige to the profession. They would be eliminated in the Protection of Civil Service Act of 1934, opening the floodgates to laws based on Nazi policies and not on justice. Hitler fulfilled his desire to destroy the Constitution by manipulating the legal system to wreak havoc on the German community and bring down devastation on Europe while almost completely annihilating its Jews in the Shoah. Through the myriad of racial-based laws, both the Jewish people and the justice system came under siege, as the traditional notion of Roman law was replaced with Nazi law.

The first part of this book focuses on the role of Jews and others caught in the political turmoil during the rise of the National Socialist Party. Douglas Morris lays the foundation with Chapter 1 dealing with the concept of political thought and natural law prior to the First World War, during the Weimar Republic (1918–33), and in the postwar era. This theory advocated the idea that some universal principles are ultimately more important than statutes. Morris points out that many leading jurists were Jewish and entered into the discussion of natural law.

Chapter 2 on pro-Nazi Carl Schmitt (1988–85) shows the controversial thinker wearing many hats: "Legal theorist, intellectual historian, political theorist, political propagandist, political theologian, and activist." Schmitt had great influence within the legal profession during the early years of the Nazi rule as editor of the leading legal periodical, *Deutsche Juristenzeitung,* as head of the Association of German Jurists, and as a member of Göring's Prussian State Council. In great part Schmitt was responsible

for providing the groundwork for Nazi racial theory as promulgated in law, and in an indirect sense, feeding Goebbels's propaganda theories about targeting the enemy. In this case, the enemy was "the Jew" who had to be eliminated for the health and unity of the nation. His prevalent antisemitic writings and belief in a two-tiered justice system reflect a brilliant legal mind of a person going over to the dark side of the law during the Nazi era. He supported the idea of the Führer's will as the new standard for determining the justness of a legal decision. He also advocated a legal system in which those who were not racially pure Aryans and those whose actions or very existence threatened the new Nazi German State had no rights and no legal protections. His work reflected the general political tone of the National Socialist Party in office and furnished the basis for the total abuse of the judicial system.

The Nuremberg Laws, promulgated by a hastily organized session of the Reichstag at the 1935 Nuremberg rally, put into effect the essence of Schmitt's ideological and personal beliefs, designating German citizenship by race. Jews were soon categorized by gradations in Jewish blood and labeled "full," "half," or "quarter" Jews. Depending on their genealogical roots, Jews were denied citizenship and forbidden to marry Aryans. Chapter 3 on Nuremberg details the basis and establishment of these laws, while Chapter 4 indicates how the Nuremberg Laws were applied beyond the borders of Nazi Germany and were promulgated in Vichy and the Occupied Zone of France. The postwar trials of Marshal Philippe Pétain brought to light the complicity of the Vichy government in enforcing the Nazi racial laws in its marginalizing and then relocating (read "deporting") of the Jews from detention centers such as Drancy "to the East," a euphemism for an extermination camp like Auschwitz.

At the outset of the German occupation of Poland in September 1939, Reinhard Heydrich stated in a letter to the heads of the *Einsatzgruppen*, the mobile killing squads, that a council of Jewish elders had to be established in Jewish communities to carry out the instructions of the Nazis. The *Judenrat* has been viewed in various lights, one seeing them as administrators of the Germans' "dirty work," and the other as providing as much physical and moral support possible to the community in a severely restricted environment. Chapter 5 elaborates on the controversial perspective of the Judenrat in the Terezin ghetto as described in an interview with Rabbi Benjamin Murmelstein recorded in 1975 by Claude Lanzmann for the more recent film, *The Last of the Unjust* (2014).

Chapter 6 focuses on two diverse cases of the People's Court as Roland Friesler, "the Hanging Judge," sentences the defendants to death for "defeatism" in wartime. Freisler insisted on "Total Victory," and anyone even "thinking" of a Germany possibly losing the war was guilty of treason and subject to capital punishment. A priest, Fr. Max Josef Metzger, and a lawyer from an elite Prussian family, Helmuth James von Moltke, faced the judge's wrath and met their early demise.

Part 2 of the book concentrates on legal issues as they pertain to medicine. Starting with the mindset that one race, the Aryan peoples, was superior to all others, the Third Reich applied principles of Eugenics in racial and disability policies to foster the strength and supremacy of the German *Volk*. From forced sterilization to a euthanasia program and from government support of unethical experimentation to extermination, the Third Reich went down a path that led to the loss of millions of lives. Chapter 7 addresses the medical and spiritual resistance to Nazi law. Offering

a view of the diverse army of physicians and medical workers in the Third Reich, the authors show how each group faced the challenges in the Nazi regime where the nation was considered a biological organism. The Nazi doctors, Jewish doctors in the ghetto, and the Jewish rabbis and leaders in the ghetto had differing views on how medicine was to be administered. The Nazi doctors shared in the process of elimination of the Jews from Germany through their inhumane experiments and selection processes at the concentration camp ramps. In the ghetto Jewish doctors offered both a sense of dignity and physical assistance to the incarcerated Jewish community. Laws against the Jews were extensive, but the Jewish religious and secular figures offered spiritual hope and resistance to the Nazi laws that attempted to suffocate them physically and metaphorically through their restrictive policies.

Paragraph 175 of the German criminal code on homosexual activity established in 1871 existed in law until 1994 when it was stricken due to more open acceptance of gay relationships. Approximately 100,000 men were arrested on suspicion of homosexuality during the Third Reich, with 90,000 of those arrests occurring from 1937 through 1939, facilitated by a revision to Paragraph 175, which was hardly publicized but made almost any physical contact between men grounds for arrest. After 1934 the Nazi regime did not make public their sentencing statistics; however, best estimates suggest 50,000 convictions from 1933 to 1944, including 4,000 juveniles. Statistics for imprisonment in concentration camps are estimated at between 10,000 and 15,000. Chapter 8 describes how the Third Reich treated homosexuals in an inhumane manner as perverted degenerates whose failure to father children was the most obvious but not the only way they undermined the Reich. The Regime propagated sexual defamation and other hate speech against homosexuals, giving Germans the right to feel contempt and express abuse toward gay men as a way to foster support and consensus. The true believers in the drive against homosexuals, and in particular Himmler, assiduously sought to save the Reich from homosexuals. Gay men were treated with cruelty and contempt during the Third Reich while at the war's end they were still considered criminals. It took two decades or more in postwar Germany for them to find their voice and for their stories to be told. Most did not receive government compensation for their incarceration, since for years they were not regarded as victims. This view was generally held by the Allies and other European powers after the Second World War; despite his brilliant work on the Enigma project during the war, Alan Turing faced conviction for homosexuality and punishment of chemical castration which is only one dramatic instance of the revulsion for homophobia in the postwar years. Even in the United States until 1973, the American Psychiatric Association classified homosexuality as a mental disorder, and later, until 1987, registered it as "sexual orientation disturbance."

Chapter 9 delves into the dark past of Nazi human experimentation in the name of science, indicating how the Nuremberg Doctors' Trial of 1946–47 help set the standard for humane and ethical experimentation in the establishment of the Nuremberg Code. The authors make their narrative especially relevant in describing how the United States was guilty of prior human experimentation and the use of black ops sites where torture was, until more recently, acceptable by the American government. In both cases, the end justified the means, as in Abu Ghraib.

Chapter 10 adds a pertinent dimension of medicine to our work in indicating how medicine and the Holocaust are related. As a pediatrician and professor who deals with the subject of medicine during the Holocaust, Ashley Fernandes is most aware of the crucial need to educate medical students about the importance of maintaining a moral compass throughout challenging ethical decisions. Using concrete examples from the Shoah, he indicates that Holocaust education today can provide a fine template for grasping issues that humanity faces on a daily order.

Part 3 of this book briefly lays out two areas of economic exploitation of Jews, in Germany and other countries such as Poland. From September 1939, Nazi Germany extended its influence with respect to race and enrichment throughout occupied Europe. Although German Jews suffered most extensively from 1933 on, other European Jews soon fell under the jurisdiction of Third Reich policies. Chapter 11 offers specific details on how the General Government in Poland, set up by the Germans, considered Polish Jews as nonhumans and Polish Christians as subhumans. The Jews were eventually stripped of all their rights, possessions and then, in the case of approximately 90 percent of the Jewish population, of their lives. Those who survived faced insurmountable odds in attempting to reclaim what little property they owned prior to the Nazi occupation.

The engaging narrative of the Monuments Men (Monuments, Fine Arts, and Archives Program) in film and literature acknowledged the widespread looting by Nazis of art collections owned by Jews throughout Europe, as well as the complex issue today of clarifying the provenance of such stolen works for the return to rightful owners. Chapter 12 depicts the process that the Nazi legal system used to strip Jews of their possessions, including valuable art, to fill the Third Reich coffers and also to be distributed among the government leaders. The passage of time and the lack of material evidence have created major hurdles in obtaining restitution for the stolen artwork.

Part 4 of this book studies the debilitating effects on religion by the Third Reich. Although many Nazis were practicing Christians, their traditional, established spiritual beliefs became secondary to the religious fervor they expressed through National Socialist ideology. The Nazi Party became the worshipped false god, which is detailed here through chapters on the Protestant and Catholic churches functioning in a Nazi nation, as well as on the struggles of the Jehovah's Witnesses persecuted for their antimilitarist resistance. Chapter 13 offers insights into the range of Catholic stances in Germany with regard to the National Socialist Party ideology. Once the Third Reich came into power, Roman Catholics faced a dilemma—to support the government or refrain from anything to do with the Nazi Party, including membership.

Protestants in Nazi Germany fell primarily into two groups. Those who found the National Socialist policies compatible with their religious beliefs maintained membership in the National Reich Church. The other dissenting group, the Confessing Church, resisted government attempts to Nazify the Protestant Church. Chapter 14 chronicles the actions of two lesser-known members of the Confessing Church, Julius von Jan and Heinrich Fausel. Like Dieterich Bonnhoeffer and Martin Niemöller of the Confessing Church, both pastors von Jan and Fausel courageously spoke out against the interference in the religious sphere of German citizens and the treatment of Jews.

In this triptych of religious complexity during the Nazi era, the Jehovah's Witnesses, "Bible Students," were persecuted for their refusal to give the Hitler salute, join Nazi organizations like the *Hitler Jugend,* and serve in the military. Chapter 15 describes the hostile treatment of the Bible Students who were sent to concentration camps in large numbers. Unique among the victims of camp inmates, these believers had the opportunity to procure their freedom by signing a form renouncing practice of their beliefs. Few, however, if any, took that option.

The final part of this book leads up to the prosecution of the war criminals who brought about the apocalyptic destruction of Europe and the deaths of countless millions of Jews, gypsies, homosexuals, and political dissidents, besides engaged military and innocent civilians caught in the crossfire. Following the trial by the International Military Tribunal (IMT) of the major war criminals, there ensued a series of further trials of those involved in criminal deeds during the Third Reich, such as the SS, judges, doctors, and others. Michael Bryant describes the court system in handling such cases in the post-Nuremberg era. West German courts found it a daunting challenge to prosecute concentration camp personnel, for example, due to lack of evidence and the disappearance of witnesses. Opting in favor of a "collective guilt" theory, or a common plan, to try personnel for aiding and abetting murder opened the door to more convictions.

The industrialization of mass murder by the Third Reich remains an astonishing complex labyrinth of those who collaborated with the perpetrators, from the suppliers of weaponry like Krupp, to the chemists who produced the lethal Zyklon B gas. Chapter 17 on the I.G. Farben trial reveals the problematic participation of the I.G. Farben conglomerate of Germany's eight leading chemical producers, including Bayer. This post-IMT trial reinforced the US goal of the political, social, and industrial management of Germany in the years following Germany's surrender.

Of the twelve postwar Nuremberg Trials, the results of the Doctors' Trial in the establishing of the Nuremberg Code with respect to human experimentation have made the most serious impact on society and especially the medical profession. Chapter 18 traces the evolution of human experimentation in Nazi Germany as well as in the United States, indicating how the Doctors' Trial set a precedent for ethical norms used in human experimentation that has resonance today in the responsibilities of the Institutional Review Boards. Sandra Johnson also demonstrates that racialized medicine was not pursued solely in Nazi Germany but that even in the United States pseudoscientific beliefs informed medical practice and medical research resulting in a pattern of abusive experimentation with African American subjects even at the time of the trial.

With this book, the authors hope to engage in the continual dialogue about the importance of law for any civilization to survive and prosper. At the same time, the writers fully understand that since the demise of the Third Reich with its abuse of law and power, numerous examples of genocide, ethnic cleansing, and atrocities have occurred from Cambodia to Rwanda and from the Balkans to South Africa. Destroying the mindset that one race, ethnic group, or religion is superior to another offers an initial, major step in the right direction.

Part One

A Judicial System Without Jews and Without Justice

In the United States, the terrorist attack of September 11, 2001 resulted in the passing of the Patriot Act, "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." Signed into law on October 26, 2001, the law enforced emergency powers and restricted basic freedoms guaranteed by the Constitution such as speech, assembly, legal representation, and the like. Although challenged by the American Civil Liberties Union shortly afterward, the American government during the administration of George W. Bush felt obliged to prevent further terrorist acts through legal means. In Nationalist Socialist Germany, the Reichstag fire of February 27, 1933 offered a rationale for launching a similar ripple through the legal system but with much more dire, global consequences. The unfolding news of the three stages of the alleged Communist arsonists' trial of Dutch Communist Marinus van der Lubbe, along with German and Bulgarian Communists, filled the German and international press in 1933. At the close of the trial, the convicted van der Lubbe was beheaded in 1934 and the others acquitted, much to the dismay of Hitler who soon perceived himself as the Supreme Judge and wished to enact stronger laws to prevent similar acquittals.

The resulting February 28, 1933 Reichstag Fire Decree (Decree for the Protection of People and State) enacted by President Paul von Hindenburg, upon the insistence of Hitler, suspended civil liberties guaranteed by the Weimar Constitution in Articles 114, 115, 117, 118, 123, 124, and 153, such as freedom of expression, assembly, and the press. With the dissolution of the Constitution passed by the German Parliament or Reichstag through a vote of 441 votes to 84, elections were suspended and any trace of a system of check and balances abolished. The decree marked the first of the step-by-step establishment of new laws that soon physically and metaphorically strangled the Communists, Jews, and others perceived as enemies of the State.

Following the First World War, the Weimar government had put into place a Constitution that certainly had its problems, but it was a legitimate rule of law. Law had been a most respected entity, with the country thriving on its most capable lawyers and judges, many who were Jewish. In a gradual process, however, the National Socialist government, after dismantling constitutional law, then usurped justice and created a lethal totalitarian system that soon engulfed Germany and all of Europe. Stating that

the nation exists as a pure political and biological organism, united under the Führer, the Nazi government imposed legislation that reinforced its ideological program in all aspects of German life, especially targeting race, business, religion, and medicine. Racial law guided the community (*Volk*) replacing the traditional European notion of law that protects individual rights and provides a system of checks and balances.

When Hitler came to power the sense of justice was lost to the National Socialist Party's political ideologues who first denounced its archenemies, the Communists, and then especially embarked on an antisemitic crusade with the Nuremberg Laws of 1935. The legislation dealing with blood laws, citizenship, and marital status marginalized the Jews. The Nuremberg Laws encoded the conclusions of "race science" and pseudo-social science. Although expressed in absolutist terms and enacted by terror, they were sometimes enforced unevenly. The regime always left itself some leeway, even to seemingly go against its reason for being, and occasionally made compromises such as downplaying its overt antisemitism. With respect to the then imminent hosting of the 1936 Berlin Olympics, Hitler attempted to hide any traces of antisemitism after an international uproar.

The destruction of perceived enemies of the regime aimed to secure the health of the *Volk* as well as the strength and preeminence of the Aryan people's state. Legal principles, individual rights, documents, and legal procedure—the hallmark of a constitutional, parliamentary state—were not to impede the Nazis in their quest to rid Germany of its internal enemies and endemic impurities. Once in power, the Nazis were zealous to achieve their revolutionary goals, and yet many of their more mainstream supporters originally sought social peace and order from NSDAP rule. Thus the Nazis could not dispense with the entire legal and judicial system, which was needed for conducting business and punishing common crime. They simply engineered the legal system for their own ends through an endless stream of laws that curtailed the liberties of the people. This was rarely challenged, since the Führer was creating for them "a greater Germany" in the wake of the First World War and the Treaty of Versailles's demeaning sanctions. Furthermore, the assault on the judicial system had to respect the people's dislike of public violence. Allegedly the government envisioned itself as an institution anchored by so-called law and order.

The Hitler state had to enforce its "fanatical will" in stages. Once the Jewish lawyers, and subsequently judges, were purged through the Law of the Restoration of the Professional Service of April 7, 1933, the way was open to manipulate the system and appoint judges subservient to Nazi policy. To secure SS and Gestapo autonomy in their terror state, the Nazis first had to destroy the fanatical paramilitary SA under Ernst Röhm, an overt homosexual, which they accomplished in a brutal massacre of over seventy SA personnel, including Röhm, during the Night of the Long Knives of June 1934. Then they had to resist the various legal challenges that came in the early years of the regime, for example, against the arrests of certain individuals, or the high number of "suicides" in concentration camps. With a combination of violence, contempt, and declarations of an emergency situation, not to mention the support of some prominent intellectuals such as Carl Schmitt, and the stunned silence of many professionals, the regime effectively destroyed judicial independence. The government regarded constitutional law as an obstacle to the reshaping of society by the state, not an

achievement of German civilization. The enjoyment of personal power and discretion for the top leadership, as well as for camp guards or administrators, was not entirely circumscribed even in the face of theoretically complete racism. In Germany, we see power and sadism for power and sadism's sake, even concurrently with a complete theory of race and degeneration of populations. In France, the easy fulfillment and sometimes over-fulfillment of the Nuremberg Laws suggests that despite all the well-documented origins of Nazi ideology in German history and culture, some prime concepts of its characteristic offenses against humanity were well distributed beyond Germany.

Of the four judges heading up the People's Court from 1934 to 1945, Roland Freisler, a committed Nazi, maniacally ruled the court, sentencing many, at times arbitrarily and in a predetermined manner, to their death. Thus, in the end, the Nazis had an unjudicial, unjust legal apparatus and, having destroyed modern German courts, they established their own reactionary, arbitrary echo chambers, which ranted at the accused as Hitler did to the people as a whole. Vital to the success of the Third Reich's establishment of their system of law and punishment was the bold and ruthless application of violence and terror to all who thought to resist their alternative modes of justice. The primary arbiters of justice included the SS and the Gestapo who with great fervor delivered the alleged state's enemies to the courts.

Year by year justice became eroded as the Third Reich enacted law after law. Following the attempted stranglehold on the Jewish community targeting their economy with the April 1, 1933 boycott of Jewish businesses, the government passed additional laws six days later: the Law of the Restoration of Professional Civil Service, the Law Concerning Admission to the Legal Profession, the Law Concerning Admission to the Medical Profession. The apathy of the Aryan professionals allowed this to occur, as they passively watched their competition eliminated. The suppression of unions placed more power in the hands of the government. Security forces rounded up thousands of Communists and opponents to the regime, transporting them to the newly opened concentration camp at the former ammunition factory at Dachau. Communists were banned from Parliament and the Social Democrat Party was outlawed, making the National Socialist Party the only "legitimate" party. Once in place, the Third Reich promulgated laws that bled the German *Volk* until the government's last gasp in May 1945.

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Politics, Ethics, and Natural Law in Early-Twentieth-Century Germany, 1900–50[1]

Douglas G. Morris

Introduction: Was Germany's post–Second World War renaissance of natural law a renaissance?

At the end of the Second World War, Germans who wanted to restore their country had to confront the shocking ethical lapses under the Nazi regime among professionals. In the field of law, some jurists revived theories of natural law—the idea that some universal principles of justice are ultimately more important than statutes, and at times can even override statutes, cast them aside, and nullify them. The highly respected Social Democrat and legal philosopher Gustav Radbruch helped energize this revival with his article in 1946, "Statutory Injustice and Suprastatutory Law," which set forth his famous formula: judges must adhere to positive or statutory law, except in rare circumstances when such law violates fundamental principles of justice. In his words, "Positive law, secured through legislation and power, prevails, even if it is substantively unjust and inexpedient, unless the tension between positive law and justice reaches such an intolerable level that the law as 'false law' must yield to justice."[2]

Post–Second World War German discussion of natural law became so widespread that some dubbed it a "Renaissance."[3] That term implied the happy revival of important lost principles knocked from sight by a dark interruption. But the happiness of the revival was not necessarily clear since natural law could accommodate various meanings and further conflicting ethical values. For example, Hans Welzel, a law professor who advanced his career during the Nazi era and then quickly reestablished himself afterward, denied that natural law forbade Nazi murder through euthanasia.[4] The darkness of the interruption was no clearer. During most of the nineteenth century and into the twentieth century, German jurists thought of Germany as the land of legal positivism—a legal realm that extolled adherence to man-made statutory law. The post–Second World War converts to natural law claimed that they had erred during the Nazi era because of their indoctrination in such positivism. In making this claim, these jurists deflected inquiry into their own past conduct, or misconduct, by misconstruing the nature of the Nazi legal system. During the Third Reich, Nazi officials politicized the legal system to serve Nazi ideology, policies, and goals, and

non-Jewish jurists, judges, and bureaucrats collaborated. The Nazi legal system had much less to do with positivism than with the evils of tyranny—the delusions of hate-filled politics, the thrills of fanaticism, and the ambitions of opportunists.[5]

Germany reached its golden age of legal positivism not in the Nazi era, nor in the preceding Weimar Republic, but at the turn of the century. So how did Germany's legal mainstream move from its foundation in legal positivism then to the inclusion of so many enthusiasts for natural law after the Second World War? As an abridged version of that story, we simply highlight here some moments along the way when natural law thinking surfaced. The story in any form is somewhat elusive since natural law, like many grand concepts, has varied uses and shifting meanings. As orientation for our brief account, we offer three guideposts. First, under the influence of Thomas Aquinas, Roman Catholic theologians have construed natural law as God's eternal laws that are apparent in human nature and understandable through reason. Second, since the Enlightenment, many thinkers have understood natural law as universal principles of reason that bind everyone everywhere. Third, some jurists refer to natural law as virtually identical with basic notions of justice. But there is much nonnatural law outside these guideposts—or straddling the hazy boundaries. On the near side of Catholic doctrine is divine law through revelation. On the far side beyond notions of justice is law outside of written statutes found in history, sociology, philosophy, psychology, and the like.

With these guideposts, we look at early twentieth-century German jurists of different stripes who mentioned natural law in discussing law and ethics. Not to hold anyone in suspense, the story has a moral. Natural law is not the same as ethical law. Ethics, itself a grand concept, can appear in various ways in different theories of law, including in both natural and positive law. Natural law in particular may include the ethical but even more often expresses the political. Indeed, post–Second World War German jurists often had a self-interested political purpose in their newfound devotion to natural law, as if it proved that they and their colleagues were men of high ethics, regardless of their Nazi-era conduct, which they often carefully concealed.

The turn of the century: Remembrances of natural law during the golden age of legal positivism

The widespread association of modern German legal thought with positivism obscures a more complex history of positivism's ascendancy, staying power, and critiques. Two long-range trends were clear enough. First, during the century before the First World War, the concept of natural law had fallen into disrepute as German legal thinkers grappled with theories compatible with legal positivism, such as Hegelianism, historicism, and the doctrine of the *Rechtsstaat* (the German variant of the rule of law). Second, after Germany's unification in the 1870s the era of legal positivism reached a golden age under the influence of Paul Laband, a towering figure who taught that statutes were central to defining the state. Jurists conceived of a self-contained system of norms—hierarchically arranged and precisely crafted, unified and coherent, formal and logical.[6] Germany's influential Civil Code, which took effect in 1900, marked the

pinnacle of legal positivism.[7] But, like any golden age, this one shone only for a glorious moment. With the turn of the century, the positivist paradigm began losing its aura of invincibility.

In the early twentieth century critics appeared. They were not concerned that legal positivism laid its foundations in human authority rather than in divine law or natural law. Rather, they struck at legal positivism's formality, such as its doctrine of a self-contained legal system. The jurist Georg Jellinek set the groundwork by insisting on attention to political, economic, and social processes outside the law and by doubting that legal positivism adequately accounted for them.[8] Two schools of thought then tackled head-on the nature of a judge's adherence to the law. The school of so-called interest jurisprudence wanted laws interpreted according to not only their language but also the social and economic purposes that lawmakers originally intended.[9] The "free law" school questioned whether legal positivism could ever close the gap between norms and their application, that is, whether it could adequately explain, based on logic alone, how judges could use abstract laws to resolve concrete disputes. In arriving at decisions, judges needed to reach beyond laws and resort to their own discretion based on an extra-legal factor, whether ethics, sociology, or something else.[10]

Some critics mentioned natural law. The young iconoclastic left liberal (and Radbruch's lifelong friend) Hermann Kantorowicz—who popularized the term "free law" in a sensational pamphlet attacking legal positivism—cautioned that natural law reflected historical conditions rather than eternal principles but praised its independence from state power.[11] In an article entitled "The Renaissance of Natural Law," in a Social Democratic newspaper, one Richard Engländer agreed that natural law played a historic role in facing down the state. But he also warned that if "the judges . . . are worse than the laws," then "free law" would cast "us from the frying pan into the fire."[12] In fact, both authors thought that the prevailing doctrine, which disingenuously focused on legal logic at the expense of human decision-making, slighted the importance of judges. Since so many factors beyond logic framed the thinking of judges, they could rule fairly only if they grasped social issues and were selected from a broader cross-section of the populace. Neither author thought that the solution for the problems of judicial power lay in natural law.[13]

Before the First World War, legal positivism faced serious intellectual challenges. After the war, the attacks turned ferocious.[14]

The Weimar Republic, part 1: Disputes about legal positivism without natural law

What caused this postwar ferocity? Why did legal positivism in Germany come under siege? With Germany's defeat in the First World War and the creation of the Weimar Republic, the earlier critique of positivism as a legal theory was swept up into a larger political debate about the nature and legitimacy of Germany's new democracy. Two famous antagonists, the Viennese positivist Hans Kelsen and the Catholic authoritarian Carl Schmitt, while idiosyncratic as influential thinkers often are, epitomized this new debate.[15]

Both jurists coined sterling names for controversial theories. In his famous "pure theory of law," Kelsen gave legal positivism its most rarefied expression. According to Kelsen, people create laws, which set forth social expectations but do not describe social realities. Thus the legal system consists of a set of norms floating freely above society—autonomous and abstract.[16] Kelsen, an unabashed relativist, thought that a legal system, because it is a human creation, could take a variety of forms, including inhumane ones. But he favored democratic governance because people cannot know absolute truths, must recognize that they might err and others might have a point, and should be ready to compromise. Thus his thinking highlighted how legal positivism served Germany's nascent democracy, rooted in statutes drafted by elected representatives.[17]

Kelsen's intellectual antagonist, Schmitt, rejected legal positivism. In his signature ideas—his "political theology," obsession with emergency powers, and hyperbolized distinction between "friends and foes"—Schmitt subordinated legal norms to politics, and neutral principles to power. The legitimacy of a sovereign and its laws depended on political power, not the other way around. A concrete personality would gain authority through victory, not adjudication or rational discussion. As the political scientist William Scheuerman has noted, Schmitt replaced Kelsen's "pure theory of law" with the notion of a "pure decision," that is, the sovereign act of will that gives rise to constitutional legitimacy.[18]

However divergent their jurisprudence, Kelsen and Schmitt agreed on one thing: the rejection of natural law. For both men, natural law lost sight of the critical role of human decision-making, which Kelsen thought critical for laws and Schmitt for power.[19]

Kelsen's rejection of natural law followed from his view that people mold laws into a coherent, self-contained, and autonomous system, which exists separately from outside influences. Those influences—such as sociology, political analyses, and moral values—have their own legitimate spheres but should not guide, or infect, the legal system. One unwanted influence is natural law. Its proponents pretend to advance eternal principles, even though nobody can agree what those principles are or how they might take effect. When they turn their attention to content, natural law proponents wind up expressing their own subjective and irrational religious beliefs. Overlooking practice, they invariably fail to confront the reality that real people must convert the principles into a usable form by applying them to concrete cases. But for both its content and effectuation, natural law requires human acts. It thus behaves like what it is: positive law. Providing neither a valid alternative nor a supplement to positive law, the concept of natural law tends to legitimate an aristocratic, autocratic, or authoritarian state.[20]

Schmitt's problem with natural law was different from Kelsen's. Schmitt located the essence of the state in the person or persons who, embodying the people, exercise political power. Leaders establish themselves by acting decisively in an emergency and sorting out friends from foes, not by exemplifying morality, claiming access to the truth, or embracing the principles that might guide laws in normal circumstances. Schmitt's paradigm was the decisive political act of will. If that act of will corresponded with a religious model, it was not natural law but revelation, not reason but irrationality and faith.[21] While the ultimate principle for Kelsen was the rationality in man-made

law and for Schmitt the irrationality in political power, both jurists saw the driving force in political actors, not some form of natural law.

The fault lines between Kelsen and Schmitt capture, at least in part, two different (even if related) clashes during the Weimar Republic, one between the jurisprudence of legal positivism and its critics, and another between the values of liberal democracy and conservative authority.[22] The positivists generally defended the Weimar Republic, believing that democracy depended on the supremacy of the legislative process in creating laws.[23] Positivism's conservative critics generally relied not on natural law but on an authoritarian concept of the state, which would renew the imagined strengths of the lost monarchy, cure Germany's stinging defeat, and bind together the state and *Volk* (or people). The state's relationship was with the whole *Volk*, not separate individuals. The infatuation with the state and *Volk* easily degenerated into grandiosity and mystification.[24] In trying to muster the strength to reformulate legal doctrine or reframe political debate in the service of the state, the right had little reason to turn to natural law, so long out of favor.

Still, natural law had not fallen into oblivion. Some Roman Catholic legal thinkers remained committed to the concept.[25] Nor had other German jurists, even as its critics, ever stopped discussing natural law.[26]

The Weimar Republic, part 2: New uses of natural law by the political right

While Schmitt, like most conservative jurists, slighted natural law, Kelsen affirmatively attacked it in responding to a new minority who expressed emerging sympathy, if not outright support.[27] He was especially targeting its most prominent Weimar proponent, the chauvinistic international law scholar Erich Kaufmann.[28]

In a paper delivered at a conference of "The Association of German Constitutional Law Professors" in Münster in 1926, Kaufmann stirred a lively debate by promoting natural law. Positivism, according to Kaufmann, fit an earlier, stabler, and more prosperous time but could not survive the German people's experiences of war, collapse, revolution, and the Versailles Treaty.[29] Instead he asserted a "belief in legal principles beyond statutory law, which also bound the legislator"—"the knowledge of a higher order of something eternal and inevitable."[30] What was this higher order? Roundly rejecting the Enlightenment's concept of natural law as rational and abstract, Kaufmann identified the higher order with a personal God, in "the certainty that there is a real personal being that judges us justly and that the concept of justice is inextricably linked to an absolute personality."[31] How could justice be reached? The path lay not in formal methods of discussion, that is, legal technicalities, but rather through conscience, that is, intuition. Rather than being subjective, such conscience is the "direct certainty of a higher objective order."[32] Who can render justice in this world according to this higher order? The answer is the ethically trained judge who develops the "whole personality" necessary for being "a pure vessel" that voiced not his own "impure subjectivity" but rather "the objectivity, which is above us all."[33] Near the end Kaufmann declared, in what the historian Peter Caldwell has described as "fighting

words," that "merely technical legal scholarship is a whore, who is to be had by all, for all [things]."[34]

Kaufmann's paper revealed a natural law that paradoxically was both vacuous and powerful. Its natural law terminology, almost archaic and quaint, advanced less a legal argument than an underlying illiberalism. Attuned to Weimar conservatives, he left no doubt which concepts were in perfect pitch: irrational values, whatever involved spirit, feelings, intuition, personality, action, and creativity. And he left just as little doubt which concepts were badly off key: Enlightenment values, that is, whatever was rationalistic, normative, abstract, mechanistic, individualistic, autonomous, and isolating.[35] The illiberalism was just as clear from Kaufmann's facile assumption that the high priests for divining and enforcing natural law must be the judges, who consisted of the relatively well off and after the First World War had taken a sharp turn to the right. Twenty years earlier Kantorowicz had mocked the very notion that Kaufmann revived with a vengeance, namely that the intentions of an "inaccessible being" are "hidden from . . . the profane masses: a privileged cast of theologian-jurists conveyed its revelations."[36] In a contemporary response to Kaufmann's paper in 1926, the constitutional law scholar Richard Thoma pointed out that its natural law premise did not necessarily imply that judges rather than legislators themselves must enforce it.[37] But in its political illiberalism, Kaufmann's paper exposed a deeper natural law impulse in the authoritarian jurisprudence corroding the Weimar Republic's democratic foundations. Instead of shunning natural law from force of habit, a few conservatives, like Kaufmann, realized that they could muster it for pressing their own views of fundamental justice over statutory law, really a right-wing agenda against democratic control. "The state," Kaufmann wrote, "does not create justice; the state creates laws; and the state and laws are subject to justice."[38]

The surprise was that the jurist who lifted the fortunes of natural law was none other than Kaufmann. He specialized in international law, a field that almost unanimously rejected natural law.[39] In his dissertation of 1906, he did, too. But in that very dissertation he staked out his ethics and the relationship of his ethics to political power. He scorned an Enlightenment version of natural law as ahistorically rational and lifelessly abstract, and instead supported the monarchical state. God-given, the monarchical state happily suited an irrational and life-affirming world, appropriately joined individuals into a moral community, and rightly subordinated those individuals and that community to a higher political power and personal God.[40] In 1911, Kaufmann made a name for himself in a book on international treaties that idolized the state and glorified war. Using power to achieve its moral purpose, he wrote, the state reveals "its true being" in war. "Victorious war," according to Kaufmann, "is the social ideal."[41] In the midst of the First World War, he persisted: "For us . . . war is part of the divine ordering of the world, . . . in which the true power of the state is revealed, . . . which alone can be carried by moral energy."[42] By the time Kaufmann promoted natural law in 1926, he was, in large part, restating his old positions—still rejecting the Enlightenment ideal of universal reason, still promoting the state as embodying morality, and still seeing God's revelation as animating his politics. His new move was to redefine the way he used the term natural law—decoupling it from reason and binding it to revelation. With his redefinition, Kaufmann recruited the term for its shock value. What he actually did

was draw attention to his long-held ethics of power, which resonated with the political thrust of the ideas of Carl Schmitt.

Kaufmann's paper aroused controversy. But it also reflected a trend within the judiciary—or a temptation. In 1924, as Germany was still reeling from the effects of the previous year's runaway inflation, the Association of Supreme Court judges gratuitously issued a resolution that "good faith and morals" was a basic principle that must prevail over a proposed statute to revalue the currency because that statute was immoral in failing to adequately protect creditors.[43] Here was a warning that judicial review could cut off democratic legislation at the knees. Looking back from the mid-1930s, the Social Democratic labor lawyer and constitutional theorist Franz Neumann described "a disguised revival of natural law . . . fulfilling counterrevolutionary functions."[44] For him the reactionary purpose was to limit "the will of the people" when "a democratic era . . . has a so-called renaissance [of natural law]."[45]

The Weimar Republic, part 3: Social Democratic skepticism about natural law

As advanced by right-wing law professors and judges, the type of natural law surfacing in the Weimar Republic showed more irrationality than Enlightenment principles.[46] The trend was significant enough to worry not only Kelsen but other Social Democrats as well.[47]

Franz Neumann was quick to identify the class character of natural law arguments and their repressive uses. In 1923, his German legal dissertation construed natural law as a tool for political ideology rather than social good. He cautioned that in theory all groups could invoke its claims to eternal truth to promote their particular demands and that historically groups out of power used its "revolutionary core" to challenge state authority.[48] Six years later, in a 1929 article opposing the judicial review of the constitutionality of laws, he warned that the ideology of natural law in general facilitated "justification for the political acts of every political party, every estate, every class, every religion, every community," and that at the moment a conservative administration of justice and reactionary constitutional jurisprudence used it as "cover for its thirst for power."[49]

Compared with Neumann, Gustav Radbruch offered during the same Weimar years a gentler view of natural law. Like Kelsen, he acknowledged the impossibility of knowing natural law's content and thus of translating its high principles into concrete statutes, regulations, and decisions (a problem that his post–Second World War jurisprudence never solved).[50] While he recognized the need for a substantive notion of justice and its importance in guiding both legislators and citizens, he insisted that judges must apply the laws, even those that they thought unjust. That is to say, judges must subordinate natural law to legal positivism.[51]

The one jurist thinking about a possible left-wing variant of natural law was the unconventional Social Democrat Hermann Heller. Straddling the divide between natural law and law beyond statutes, and echoing Kantorowicz's integration of ethical law into cultural development, Heller tried to work out a legal theory that preserved

moral ideals without losing a grasp of social realities. He conceived of law as imperfect but still ethical.[52] Such ethical law arose from human reason as expressed in social and cultural practices, which are always evolving, rather than from transcendental beliefs, which claim eternal validity. Law, while neither transcendental nor eternal, is ethical because reasoning is inherent to human nature. And ethics are critical if law is both to maintain legitimacy and to provide subjects with reason for obedience. A constantly evolving legal system can accomplish those two ends of maintaining legitimacy and encouraging obedience when citizens participate in creating laws. Thus law has to be democratic to maintain both its ethical standards and the loyalty of its citizens. In his day, the legitimacy of the law required expanding its claims for adherence by becoming more inclusive, mainly by incorporating the working class.

The range of views of Social Democratic jurists on natural law—from Kelsen's sharp rebuff to Neumann's hard-nosed critique to Radbruch's sympathetic skepticism to Heller's imaginative reworking—was a matter of nuance. These men subordinated natural law to their fundamental commitment to both legal positivism and political democracy.[53] A democratic legal theory could not allow an elite minority to claim exclusive access to higher principles for smothering democratically enacted laws.

The Third Reich: Natural Law characteristics of Nazi law

In 1933, Nazi leaders took power and consolidated it without worrying about natural law.[54] The Roman Catholic version of natural law did not restrain Germany's Catholic Center Party from voting in favor of the Nazi Enabling Act in March and the Vatican from entering into the Concordat with Nazi Germany in July. The regime summarily discarded the Enlightenment notion of natural law and dashed the hopes of those, like Heller, who believed in ethical law based on an active and expanding citizenry. Instead, the regime eliminated democratic participation, warped the citizenry into a *Volk*, or people, defined by race, and excluded outsiders, such as Jews. Did Nazi Germany rely on its own notion of natural law? In explaining its emerging legal system, its legal theorists, jurists, and judges turned away from the term.[55] But, more importantly, they rejected legal positivism. Giving some weight to statutes, as any legal system must, they exalted Nazi measures while belittling Weimar legislation.[56] Nonetheless, their legal thinking resembled natural law by construing all written law in light of outside considerations. But the outside considerations that drove Nazi legal thinking differed from the transcendental principles of Catholic doctrine or the universal principles of Enlightenment reasoning. They were immanent, as in the notion of the biological foundations of the *Volk*, and they were irrational, as in the insistence on the unquestioned authority of the Führer. Occasionally a Nazi jurist, tickled by the notion that a *Volk* founded on race was a matter of nature, argued explicitly that Nazi law expressed natural law.[57] Thus, as in the Weimar Republic, the right-wing attacks on legal positivism made a frontal siege with doctrines of political power, such as Schmitt's, but included a natural law flank.[58]

At least one perceptive opponent of the regime caught the two sides of natural law thinking in prewar Nazi Germany. He was Neumann's friend and former law partner

Ernst Fraenkel, a Social Democrat who remained in Berlin through September 1938, represented political defendants in the open, and worked with members of the anti-Nazi underground in the shadows. He realized that some Nazi jurists justified the regime based on their own theories of natural law—subordinating statutes not to transcendental or reasoned values of human equality but rather to an idea of a concrete, biologically conceived, racial community.[59] He condemned such natural law as perverse. He did so in part because he developed his own argument in favor of an emphatically rational natural law, which he enlisted as a legal justification, and a unifying principle, for anti-Nazi resistance.[60]

At the same time, Neumann grappled with similar issues from a different vantage point, from his exile first in England and then in the United States. Neumann analyzed the role of natural law as he set forth his views on how to uproot Nazi rule and restore and secure the democratic rule of law. He concluded that natural law had served its historical purpose and that the democratic rule of law incorporated its own ethical dimension, most importantly in the foundational concept of equality before the law.[61] In 1940, Neumann shifted his position when he distilled the most progressive elements from the natural law tradition, probably in response to how some Nazis were reworking natural law and certainly in light of what Neumann described as its recent "renaissance."[62]

Whether in Fraenkel's notion of rational natural law or Neumann's notion of the rule of law, these two Social Democrats argued that law needed ethics—but a very different ethics from the racist and discriminatory type in Nazism, including its natural law variant.

The immediate post–Second World War years: Some characteristics of the renewed discussion of natural law

Unlike Fraenkel, Radbruch never framed natural law as justifying anti-Nazi resistance. Nor, in his eyes, did natural law provide a basis for holding to account Nazi-era judges who perpetrated deadly injustice.[63] Instead, after the Second World War Radbruch used natural law for setting forth an approach for future judicial decision-making. In this regard, he resembled, in a maybe unexpected way, the thinking of the bete noire of progressives, Carl Schmitt, and his famous theory of the exception.

For Schmitt, as discussed earlier, the essence of the state depended on the leader who is able to exercise political power, to act decisively in an emergency, and to sort out friend from foe, not on who is moral, has access to the truth, or acts according to legal principles for normal times. His paradigm was the act of political will in an exceptional circumstance. Radbruch's formula, like much of Schmitt's thinking, also turned on the exception. While Schmitt theorized the political exception of a leader making decisions as necessary for securing national order and sovereignty, Radbruch theorized the judicial exception of a judge rejecting an extraordinarily unjust law by resorting to natural law. While Schmitt's state relied on a leader who could ultimately act arbitrarily, willfully, and decisively, Radbruch's judiciary depended on judges who could ultimately render decisions that were ad hoc, moral, and just.

Lacking Schmitt's cunning, Radbruch missed two paradoxes that are common to theories of the exception and bedeviled his own formula as well. First, while acknowledging that typical rules govern normal circumstances, theories of the exception invariably focus on the exception itself. This focus turns the exception into the driving force. Second, the exception, with a characteristic indeterminacy, eludes precise definition. It is easier to describe historically. These two paradoxes in theories of the exception—the exception becoming the driving force and taking shape in historical examples—lurk in Radbruch's formula. The formula derives its power from insisting that the historical example of Nazi Germany justifies the exceptional use of natural law. Radbruch promoted the exception (that is, natural law) by rejecting its antithesis (that is, Nazi tyranny), rather than by providing any clear definition (such as, of justice). But his natural law exception has the appearance of a clear definition, even though it actually lacks clarity, because Radbruch placed it within a formula. Furthermore, his natural law exception, although inherently indeterminate, feels stable because Radbruch incorporated it into a pronouncement that sounds like positive law. At the same time, he set forth a standard for judicial decision-making whose real significance lay in its future use,[64] even though the natural law component lacked the precision necessary for providing future guidance. His approach was influential, at least in part, because his formula is the type that judges are accustomed to using in applying rules to specific cases.

In setting forth his theory of the exception, in offering future judges a formula that was structured like positive law while propelled by natural law, Radbruch lost his historical moorings. He misread the moment. He thought more about the historical example of Nazism, which inspired his formula, than the history of the German judiciary, which would put his formula into effect. He lacked the political acumen of someone like Neumann, who remembered well those Weimar jurists who had used the language of morality and absolutes to advance their own often reactionary politics. Thus, Neumann gave natural law no place in thinking about postwar reconstruction and the German judiciary. In his article, "German Democracy 1950," he warned that West Germany's new constitutional order could not effectively protect civil rights by too much reliance on "judicial protection against arbitrary acts."[65] Such over-reliance arose from a good enough intent: to demonstrate both the "revulsion to the police-state character of National Socialism" and "the utter rejection of totalitarian methods."[66] But the approach missed the actual loci of power. It ignored both institutional traditions and political realities, that is, it ignored the institutional traditions of a German civil service "callous in its attitude towards civil rights," and the political realities of a judiciary with less power than the executive.[67] Germany's immediate task—which hardly involved natural law—was to suppress the revival of former Nazis and "Nazi-oriented organizations," to democratize the civil service, and to insure that the United States rigidly supervised the German judiciary and bureaucracy[68] (the last point echoing Neumann's wartime belief in the need for the Allies to defeat Nazi Germany).[69] Compared with Radbruch, Neumann exerted little influence among postwar German jurists, but he had a better grasp of contemporary power relationships—and was just as ethical.

Conclusion: Ethics in the post–Second World War renaissance of natural law

In the German discussions about natural law between 1900 and 1950, many participants were born Jewish, including Kantorowicz, Kelsen, Heller, Neumann, Fraenkel, and Kaufmann (although several of those at some point converted, namely, Kantorowicz, Kelsen, and Kaufmann).[70] The range of their contributions fell into no particular intellectual pattern and may simply reflect the growing prominence of Jews in the legal profession from the time of German unification to the Weimar Republic.[71] But the contributions of Jewish-born jurists, as well as Protestant ones (such as Radbruch), showed a wider trend: the breakthrough of natural law into Germany's secular national legal debates. Its very breakthrough, however, exposed one of the concept's weaknesses. It seemed to sag at the middle, between the pole of religious Christians, who focused more on revelation than natural law, and the pole of secularists, who objected to any religious element in the fundamental and decidedly non-theocratic ideal of the German *Rechtsstaat*. That very weakness may have added to the wide range of uses and misuses of the concept of natural law.

When Radbruch helped revive natural law in postwar Germany, he functioned like the movement's Brutus, lending his good name to a problematic cause. The lesser lights, who dubbed their use of natural law a "Renaissance," seemed to be proudly declaring themselves the soul-mates of old masters who had once revisited classical arts as inspiration for a great cultural awakening. But postwar German jurists deployed natural law as part of their attempt to regroup and to protect their own self-interests.[72] Their uses, of course, were not the only ways to use natural law, although natural law typically does seem to have more potential than historical reality can bear. The history of the previous half-century had shown that, in the hands of legal philosophers and practicing lawyers, of reactionaries and leftists, the concept could be legally obscure, morally ambiguous, and politically expedient. And after the Second World War, natural law was not the only way to address the legality and justice of Nazi murder—or its ethics.

2

Our Enemies Have No Rights: Carl Schmitt and the Two-Tiered System of Justice

Paul Bookbinder

Herbert Marcuse called Carl Schmitt the smartest person to support the National Socialists. That was high praise for Schmitt's prodigious intelligence but raises many questions about how Schmitt chose to use that intelligence. Schmitt addressed the problem of adopting nineteenth-century institutions, designed for a stable middle-class-dominated society, to the realities of twentieth-century life characterized by instability and mass participation. As a committed Catholic, he wrestled with the question of what role religion and theology could play in the new century. He wrote early about the nature of guilt, judicial decisions, and the nature of politics. He was unsympathetic to nineteenth-century liberalism and individualism, saw liberal democracy as a contradiction in terms, and was a critic of parliamentarianism. By the 1930s, he advocated for a legal system in which constitutional and other protections would extend only to members of a homogeneous racial community. He argued that the enemy who was outside that community had no rights and was entitled to no protections of the law.

As a legal theorist, intellectual historian, political theorist, political propagandist, political theologian, and activist, Schmitt used words and actions, which were always relevant. He was caught up in the conflicts that resulted from attempts to impose the nineteenth-century institutions of liberal-parliamentary democracy upon twentieth-century mass democratic society. Schmitt argued that the problem was particularly acute in Germany where strong aristocratic traditions embodied in autocratic governmental practices basic to Bismarckian-Wilhelmine institutions clashed head-on with the pressures for mass participation. All of the pre–First World War Wilhelmine political parties reconstituted themselves during the early Weimar years and chose names reflecting the need for popular appeal. Even parties such as the Conservative and Free Conservative Parties responded to the call of the masses and reconstituted themselves as the German National People's Party and the German People's Party, respectively.

Suddenly in the twentieth century, everyone was a democrat. Russian Bolsheviks, Italian Fascists, and English Liberals claimed the title of true democrats. All political forces claimed to be working toward the creation of a democratic society. Schmitt was

deeply concerned with the problems of democracy. He investigated the problems of equality, of participation, and of identity between the ruler and the ruled. He charged that the elitist, bourgeois society of the nineteenth century had invented the term "liberal democracy." For Schmitt, as for such others as Marcuse, liberalism was anything but democratic. Schmitt searched for a new, more consistent ideal of democratic rule rooted in Rousseau's concept of the General Will, a form of government that J. L. Talmon called, "totalitarian democracy."[1] This search took Schmitt into many fields of investigation involving the nature of the individual, the nature of the laws by which people govern themselves, and the circumstances that affect people, law, and society. Such Schmitt scholars as George Schwab and Joseph Bendersky often have dismissed Schmitt's earliest published works, but they are crucial to understanding his path of development and foretell the ideas he would put forth in the service of Hitler and the National Socialists.

Schmitt began his active intellectual career with the publication of *Über Schuld und Schuldarten—Eine Terminologische Untersuchung* (*About Guilt and the Nature of Guilt—An Investigation of Terminology*) in 1910 and thus began the journey that would lead to his concept of the two-tiered system of justice that he developed to assist the Nazis to reorient the German judicial system.[2] In this early work, he declared that guilt for the jurist was not psychological or, for that matter, philosophical or religious, it was primarily political. Citing Rudolph Stammler, one of the principal early-twentieth-century legal scholars, he argued that an individual was guilty if he acted in a way that was inconsistent with the goals of the state and the purposes of the collective will.[3] It was in the sense of the purpose of the collective unity of the state that one could talk about guilt. Referring to the work of his mentor, Fritz van Calker, Schmitt argued that "the criminal jurist can not in truth use words like good or bad, right or wrong."[4] The judge could decide only whether the accused acted in a way that was consistent or inconsistent with the purposes of the state. Actions that were inconsistent with the purpose of the state were evidence of what van Calker called "*böse Willen*" or bad will. But, as Schmitt pointed out, this was not "bad" in the moral sense.[5] The extent of guilt was determined by the value to the state of the person or object damaged by an individual's action. Citing van Calker, Schmitt declared:

> The value of the protected object . . . as van Calker has said, must be determined directly by the constitutive significance of its role in the state's purposes. That is as far as it [the significance of the object] concerns the jurist. Naturally it follows that the more valuable the object to be protected, the greater the damage caused by the divergence between the individual and the state's purposes, therefore the greater the guilt.[6]

It is interesting to note that in all societies the value placed on the damaged person or object plays a role in determining degrees of guilt. The nature of guilt and its types and their relationship to the state were to remain significant issues for Schmitt for many years, and they were to take on a new and far-reaching significance when he worked to help the National Socialists transform the German legal system.

For Schmitt, defining the enemy was fundamental to understanding the nature of guilt. He argued that friends, the loyal members of the society, must unify against the enemy who threatened the very existence of the society. The critical role of the enemy was most clearly articulated in his 1932 study *Der Begriff des Politischen* (*The Concept of the Political*) but its roots were already present in his earliest works, including *Über Schuld und Schuldarten* (*About Guilt and the Nature of Guilt*).[7] In a recent study of Schmitt's legal theory, Mariano Croce and Andrea Salvatore note the centrality of the enemy to Schmitt's concept of political unity: "The enemy is therefore whoever is actually perceived by someone as 'the totally other' if compared with their own traditional way of life, whose security and independence is threatened, at least potentially, by the existence of the enemy."[8] The ideal enemy whom Schmitt described in the 1920s and saw in the Fascism of Mussolini was one who existed within as well as outside of the society. For Mussolini and the Italian Fascists that enemy was the Bolsheviks. Scholars such as Franz Neumann and Matthias Schmitz argued that what Schmitt would term in *Der Begriff des Politischen* "the friend-foe concept" was the overwhelming essence of his doctrine.[9]

Schmitt's concept of politics was based on his belief that the way to create political unity, and therefore rule effectively, was by identifying an enemy and using that enemy to rally support. This enemy who threatened the unity of the state represented those who incurred the greatest guilt and thereby merited the greatest punishment. Those political figures who recognized the key role that the enemy played in effective acquisition of power and rule, itself, were those leaders whom Schmitt most admired. By the later 1920s, Schmitt would call this belief in the force that made for the most effective politics "the friend-foe principle." He saw Benito Mussolini and Adolf Hitler as its two most effective practitioners.

Who was the foe in Germany? There were several likely choices. As George Mosse has argued, with rare exception all the anti-Weimar thinkers selected the Jew as one, if not the foremost enemy of the German people.[10] The Jew would be Schmitt's choice as well. For Schmitt the true test of political unity was the willingness of the friends to kill the foe. Heinrich Meier states, "It is the real possibility of physical killing to which the concepts of friend-foe, enemy, and battle must defer which guarantees the scholarly implementability [*sic*] of Schmitt's criteria."[11] The development of his friend-foe basis for politics occurred as Schmitt attacked the liberal-parliamentary Weimar Republic. This attack on the parliamentary government placed him in the camp of the opponents of the Republic many of whom were conservatives.

Such historians as Armin Mohler have termed a major aspect of the period of the Weimar Republic whose life extended from 1919 to 1933 the "conservative revolution."[12] The poet Hugo von Hofmannsthal coined this phrase during the Weimar period when various groups fought against the Republic in the name of an idealized vision of a bygone period in German history.[13] Even though their ideal often had no relation to any actual historical epoch, these intellectuals worked toward the realization of their conception of an authentic German way of life rooted in the past. Some of these Weimar foes desired a return to the monarchy of the pre–First-World-War years. Others, like Arthur Moeller van den Bruck who was close to Schmitt, longed for a German ideal that found its original expression in the Middle Ages. Yet in his influential book *Das*

Dritte Reich (*The Third Reich*), van den Bruck acknowledged the reality of modern industrial society.[14] While he tried to blend it into a precapitalist framework, he was at least aware of the reality of modern civilization. This realization made him more in touch with his times than were any of his contemporaries and brought him closer to Schmitt.

The fact that many of Weimar's opponents were conservatives led to the unfortunate labeling of all non-communist enemies of Weimar as conservatives. Most members of the legal profession during the prewar and Weimar eras identified with the political right, which was composed of conservatives and radicals. While Schmitt has often been called a conservative and had many contacts among conservatives, he was much less a conservative than a right radical. A study of his ideas, which were already apparent in his earliest work but more fully developed during the Weimar years, reveals that he was motivated not to conserve but to transform. Radical jurists like Schmitt would move much closer to the Nazis in the 1920s and were willing to make sweeping changes in the legal system. The radical aspects of Schmitt's ideas determined the work he would do for the Nazis. The recent study of the German Right during the Weimar Republic edited by Larry Eugene Jones paints a complex picture of those groups that constituted the radical right.[15] They embraced some common values that Schmitt shared, including hostility to republican government, nationalism, racism, and antisemitism.

Schmitt's radical convictions were most clearly articulated in his advisory opinions for Hermann Göring, president of the Prussian State Council during the early Nazi years, and earned Schmitt the epithet "Göring's Crown Lawyer." Although Dirk Blasius, in his study of Schmitt's work for the state council, tries to identify conservative and revolutionary tendencies in his pronouncements and concludes that Schmitt was "a conservative freely serving the National Socialist revolution,"[16] he was, in fact, much closer to the National Socialists than most of the conservatives who helped the Nazis achieve power. Many conservatives thought they could use Hitler as a front man but control the new government and attune it to conservative principles. Schmitt, however, welcomed Hitler's crucial role in the radical transformation of German society, and he perceived that the Führer's totalitarian agenda was based in the friend-foe doctrine. He supported National Socialism as true democracy in contrast to the parliamentary democracy of the Weimar state that he strongly opposed. Conservatives did not like this National Socialist "democracy" and only supported it as a means of destroying the Weimar Republic until they could impose a conservative framework on post-Weimar Germany.

Schmitt's critique of parliamentarianism, which he expressed in his 1923 work *Die Geistesgeschichtliche Lage des Heutigen Parliamentarismus* (*The Intellectual History of Contemporary Parliamentarianism*), was in part based on the idea that the form of liberal democracy he opposed was predicated on inequality. He argued: "Every actual democracy [existing liberal-parliamentary state] is based upon the fact that not only are the equal treated equally but also the unequal are treated unequally. However [genuine] democracy first requires homogeneity and second if need be, the elimination or destruction of heterogeneity."[17] Therefore Weimar Germany was not "real" democracy as Schmitt envisioned it. Hugo Preuss, the principle writer of

the Weimar Constitution, took issue with Schmitt on his thesis of the contradiction between parliamentarianism and democracy. Preuss argued:

> There are false prophets who teach the principle of opposition between Parliamentarianism and Democracy. Certainly there are aristocratic and plutocratic parliaments. Whether they are one or the other [democratic, aristocratic, or plutocratic] depends less on constitutional questions than on the social, economic structure of the society. But for a people and a State, parliamentarianism is the best and most fruitful government form for the promotion of democracy.[18]

Preuss's statement notwithstanding, Schmitt did not see any of the political parties active in the early Weimar years as capable of creating the homogeneous basis for a "true democracy" that he could endorse.

As a Catholic of conviction and one who had studied at Munich and Strasburg—universities that had strong Catholic influences—Schmitt supported the Catholic Center Party in the early years of the Weimar Republic. During this period he wrote several works in which he discussed the doctrines of the Catholic Church and their relationship to politics. Political Catholicism was an important consideration in *Politische Theologie* (*Political Theology*) and in *Römische Katholizismus und Politische Form (Roman Catholicism and Political Form*).[19] The latter work appeared with a bishop's imprimatur. Ironically Schmitt supported the Catholic Center Party, in part, for the same reason that many of the "republicans of reason" (*Vernunft Republikaner*) supported the Weimar Republic: as the lesser of evils or, in more positive terms, as far from ideal but the best alternative under the circumstances. As Schmitt became convinced that there were other real possibilities of political groups and governmental forms closer to his ideals, he abandoned his support for the Catholic Center Party. Internationally he was attracted to the Italian Fascist Party under Benito Mussolini. By the later twenties he saw the possibility at home of a new government led by the National Socialists.

Schmitt's right-wing radicalism and totalitarianism had great significance for his work for the Nazis. By 1926, Schmitt's writings reveal what Karl Bracher calls "the perversion of democracy through totalitarian thought."[20] This development is particularly clear in Schmitt's insistence on homogeneity as the basis of the society he envisioned and in his willingness to sacrifice the individualism that conservatives valued but that Nazis rejected. Although Jürgen Manemann sees him as a representative of what he calls "die neue Recht" ("the new Right") that served as a *Scharnier* (hinge) between conservatism, neoconservatism, and right extremism,[21] I see Schmitt firmly in the camp of the right radicals. Early in his work he rejected individualism in favor of a society based on a homogeneous "general will." He argued as early as 1914: "The average man is of the opinion that his age is a free, skeptical, and thoroughly individualistic age. This [modern] individualism has generally been discovered and given a place of honor while ancient tradition and authority have been overcome."[22] He claimed that actually "our age is not an individualistic age"[23] and explained that while the nineteenth century had been the age of individualism, the mass man, to the contrary, characterized the twentieth century. This conclusion did not disturb Schmitt, and he perceived no

limitations because the period was not individualistic. "There have been great ages," he declared, "that were outspokenly non-individualistic."[24] Citing Rome as an example of a great non-individualistic civilization, he enthusiastically anticipated the totalitarian states of the twentieth century.

Schmitt's radicalism and totalitarianism impelled him to reject political pluralism and to oppose the competing loyalties that lessened the individual's total commitment to the state. He endorsed a concept of totalitarian democracy like the one Talmon would articulate in the 1960s and that Martin Pilch has more recently described: "Homogeneity is a necessary component of democracy [for Schmitt] and thus [requires] the removal or destruction of heterogeneity. The political strength of a democracy shows itself when the friends identify those who threaten the homogeneity of the society."[25] Schmitt withheld his support of the National Socialists until they demonstrated that they could take power; however, their commitments to a homogeneous racial society, to the friend-foe principle of politics, and to antisemitism, that is the clear identification of the enemy, had created a strong basis for his sympathy and his eagerness to work with a National Socialist government.

With great pride, therefore, Schmitt embraced his appointment to the Prussian State Council in 1933 when Göring became the leader of Prussia. Schmitt had come a long way from the insecure young scholar of the prewar and the First-World-War eras, struggling in a disastrous marriage, short of money, constantly berating himself for his failings, and expecting a short and tragic life.[26] He was now a successful scholar and university professor. He was an accomplished lawyer and had an opportunity to play a key role in reorienting the legal system to conform to the policies and goals of the new Nazi regime. In addition to his role on the Prussian State Council (*Preussischer Staatsrat*), he became the editor of the prestigious legal periodical *Deutsche Juristenzeitung* (*German Legal Journal*). He was also the head of the Union of National Socialist Jurists (*Vereinigung nationalsozialistischer Juristen*), an organization that included 80,000 individual lawyers, 5,799 notaries, and 10,528 administrative magistrates.[27] In his speeches to this organization, he talked of his struggle against the Jews and their influence, and he quoted Hitler's *Mein Kampf*.[28]

In these positions, Schmitt was able to adapt his theory of guilt to the new political order and affect the changing ideas of guilt and punishment. He applauded the new National Socialist state that valued most highly the *Volksgemeinschaft,* the homogeneous community. He argued that any individual or group that threatened that community incurred the maximum amount of guilt. The idea of the imposition of guilt, so basic to Schmitt's thought and to the changes he advocated in German law, would play a crucial role in the fate of the Jews because Schmitt believed that their very existence threatened the creation of the racially homogeneous state. Thus Schmitt and the judiciary he influenced would find them guilty of what I call, "the crime of being."

The category of guilt that went beyond criminality and threatened the *Volksgemeinschaft* and the state itself demanded the most extreme effort to combat and required all the state's resources to respond effectively without limits on its actions. Schmitt argued that people who incurred this kind of guilt did not deserve the protections accorded to other members of the state. Why, he wondered, should the laws protect those whose goal it was to destroy the law? Thus Schmitt proposed a

two-tiered concept of law. Those who committed crimes of violence or destruction of property did not threaten the community or the state, itself. These ordinary criminals still merited the protection of the law, while those who threatened the existence of the community or state did not. The protections that the enemies of the community forfeited included the right to be charged with a specific crime, the requirement of a trial, access to a lawyer, and if convicted the imposition of a specific sentence, as well as freedom from cruel and unusual punishment.[29] This two-tiered system of justice also raised the question of whether the presumption of guilt, rather than its demonstration, was sufficient to free the state authorities from adhering to standard protections. Schmitt concluded that the dangers to the state allowed the presumption, rather than proof of guilt, to be sufficient.

The largest single group that was to be the main target of the two-tiered system of justice was the Jews. Schmitt's relationship to Jews was a multilayered one. As a young, struggling legal scholar, he had strong friendships with Jews, particularly with the Eisler brothers, Fritz and Georg, who helped him during the lowest period of his life. He mourned Fritz's death in combat in the First World War and eagerly awaited visits and letters from Georg that often included small gifts of money. As close as he might

Figure 1 Carl Schmitt (1888–1985): German jurist, statesman, and political theorist. Photo by ullstein bild/ullstein bild via Getty Images.

have been to Georg, Schmitt never failed to include the qualifier "Jew" in any reference to him in his diaries.[30] Schmitt always made it clear that Jews were different. Many of his discussions with Eisler focused on "the Jewish question." Georg accepted German stereotypical ideas about Jews, among them that, no matter how far back Jews could trace their roots in Germany and no matter what sacrifices they and their families might have made for Germany, they were not really Germans. As Schmitt related in one of his diary entries, "Georg Eisler came this evening, bringing me great joy. He said at the table he wished he was no Jew but a German."[31] Eisler had earlier described his shock at the power of Jews and saw psychoanalysis as just one area in which they had total dominance: "The purist expression of Jewishness."[32] Thus, Eisler also bought into the exaggerated notion of Jewish power.

By the 1920s, Schmitt's ideas about Jews were adopting an overtly antisemitic tone, and by the 1930s, he had become an outspoken racist anti-Semite. By the 1930s, he described as a "horrid Eastern Jew" an editor who happened to be Albert Einstein's son-in-law.[33] He called Hans Kelsen, one of his major intellectual rivals, "*Scheissjude*" ("shit Jew")."[34] As the head of the Association of German Jurists, he made frequent speeches about the baneful influence of Jews. While being editor of the legal periodical *Deutsche Juristenzeitung*, he proposed that all books by Jews be catalogued under "J" for "*Jude*" no matter what the subject.[35] By 1938 when he published his book on Thomas Hobbes,[36] his rhetoric was hard to distinguish from that of the most virulent Nazi ideologues.[37]

While his defenders have tried to dismiss Schmitt's antisemitism, the evidence does not support their claims. Raphael Gross has noted, "In 1982, the editor of the second edition of Schmitt's book [*Leviathan*] referred to 'antisemitic remarks that for their time were very tame indeed,' while in contrast Paul Bookbinder confirmed in 1991 that 'the vicious and vituperative character' of Schmitt's prose might have stemmed from a Julius Streicher or Joseph Goebbels. A look at remarks preserved in the Schmitt archives would seem to support Bookbinder's assessment."[38] Reinhardt Mehring argues that Schmitt's aggressive antisemitism was part ideological, part personal animosities, and in part the product of the influence of his second wife, Dushka, who was highly antisemitic.[39] Heinrich Meier sees Schmitt's hatred of the Jews stemming from Christian anti-Judaism and strains basic to National Socialism. "It [Schmitt's antisemitism] stands in the terror-filled tradition of Christian anti-Judaism, which by no means induces him to keep his distance from National Socialist enmity toward the Jews, an enmity that gains its substance from a quite different source. Considered more closely, one has to say on the contrary that enmity toward 'the Jews' is what binds Schmitt to National Socialism the longest."[40] This enmity toward Jews impelled Schmitt to construct his two-tiered framework of justice. This obvious "other" became the enemy who threatened the homogeneous racial society and the totalitarian ideal that Schmitt embraced.

As Schmitt used his own antisemitism to ground a Nazi construct of guilt and justice, he also drew on deep roots in his early writings to redefine the criteria for making judicial decisions and determining if a judicial decision is just. As early as 1912 in *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxsis* (*Law and Decision Making: An investigation into the Problems of Legal Practice*) he pondered

the key question: "What makes a judicial decision just?" and concluded that in 1912 in Germany the "other judge" was the criterion for a just decision. He defined the "other judge" as the normally trained judge using the word "normal" in this context in a quantitative sense, not as the designation for an ideal type and not in a qualitative, teleological sense.[41] The "other judge" was the typical product of German legal education and, more importantly, of German legal practice.[42] Schmitt approved of the idea that a just decision was designed to convince the "other judge." This concept embodied an aristocratic or mandarin belief in the superiority and directive mission of the educated elite. It was even more restrictive because only the law-educated elite who had been through a working apprenticeship could understand and approve of a judicial decision.

By 1933, Schmitt appeared to have altered his thinking concerning what was and what should be the standard by which legal decisions were made. He concluded that, in National Socialist Germany, decisions had to further the mission of the *Volk*.[43] They had to conform to the will of the German people as set forth by the Führer Adolf Hitler. The title of one of Schmitt's editorials, "The Leader Safeguards the Law," makes Hitler the arbiter of German justice.[44] However, the basis for this concept of a leader who in his person embodies the hopes, aspirations, and values of a homogeneous population was already in evidence in the early 1920s long before the Nazis came to power in such works as *Die Geistesgeschichtliche Lage* (*An Intellectual Historical Account of Contemporary Parliamentarianism*).[45] Schmitt had argued then that he was awaiting a leader who could play that role. When such a leader did appear, Schmitt believed, the judge would no longer have to walk a line between positive law and sociological jurisprudence because the leader's pronouncements, by articulating the worldview of the homogeneous society, would supersede positive law. Sociological jurisprudence, in harmony with the leader, would triumph but be redefined as the judicial response to one man. As Blasius states, Schmitt had come to see himself as a "vassal of Hitler."[46]

In actuality, the change in Schmitt's criterion for judicial decision-making was much more fundamental than a swing from positive law to sociological jurisprudence. The Social Democrat Hermann Heller, one of Schmitt's archrivals, claimed that, by embracing sociological jurisprudence as articulated by the leader, Schmitt was destroying law and juridical values.[47] Heller charged that the judge whom Schmitt described in *Deutsche Juristenzeitung* had become merely a rubber stamp, a servant of the Führer who had replaced the "other judge" as the criterion for a judicial decision. Schmitt now argued that legal training received in Germany prior to 1933 was useless to a judge because it had been relevant to a society that had lived under the delusions of liberal-democratic values.[48] In this period, he was defining Hitler's will as the "Nomos [power and will] of the German people."[49] By granting this unlimited power to Hitler there would be no challenge to the new basis of Nazi justice.

As a representative of the Führer and the General Will that the new National Socialist state embodied, the judge would become an instrument in the creation of a new unity. Schmitt rejected the multiple, elaborate codes of law and law school curricula that had existed in pre-National Socialist Germany because they had been set up by a liberal bourgeois society to protect particular interests. He charged that these law codes and courses served to emphasize the inequalities and conflicts among members of society and contributed to a condition of divisiveness.[50] Unity and homogeneity were clearer

and less elaborate concepts than individuality and heterogeneity. It was the former that National Socialism strove to attain; the judge served this end as a spokesman for the new law. Schmitt admonished judges to unlearn all that they had learned so that they could become dutiful servants of the new order. Serving the new order did not require complex training; it required only the proper sympathies, the proper attuning to the will of the *Volk* as embodied by the Führer.

Schmitt put this new Nazi legal framework into action in his role on the Prussian State Council. The most important of the decisions that Schmitt participated in while he served on the council concerned Nazi expropriation actions and denial of civil rights to racial and political enemies. Schmitt's positions on Nazi expropriation and denial of civil rights are evident in the advisory opinions he wrote in which he argued that a society could offer protection only to those whose hopes, aspirations, and background conformed to (what this historian will call) the "other German." The "other German" was a quantitative cross-sectional representation of the *Volk* as embodied in the Führer. Schmitt reasoned that any person who did not fit into this pattern placed himself outside the society and, therefore, was not eligible for the protection of the society. In the case of expropriation, this outsider was robbing German society of its unity and strength. Therefore, Schmitt concluded, to take his possessions was not expropriation but merely the recovery of stolen property.[51] The enemy's very existence within society threatened the homogeneity and unity of the society and thus did not merit the protection of civil liberties. Schmitt was even willing to sacrifice the independence of judges to the will of Hitler and the policies of the National Socialists in cases involving the most intrusive decisions of forced sterilizations.[52] The individual judge could not, in Schmitt's view, challenge policies that embodied the will of the *Volksgemeinschaft* (the racial community) as embodied in the ideas and actions of the Führer.

His enthusiastic membership on the Prussian State Council places Schmitt firmly within the Nazi camp and indicates his willingness to act in its support. As a member of the Prussian State Council, he joined prominent jurists, business leaders, top scientists, and highly placed bureaucrats, as well as key Nazi leaders such as Göring, Röhm, Ley, Himmler, and Heydrich in their work for the Nazi state.[53] Blasius concludes that Schmitt saw himself as belonging to the inner circle of the *Führerstaat*, and Schmitt exulted in his role as a vassal of Hitler.[54]

How did Carl Schmitt reconcile his Catholic identity with his embrace of the Nazi regime? Specifically how did his Catholic beliefs influence his jurisprudence and the directions his ideas and actions took? Schmitt's Catholicism had been an important aspect of his life and his thought. Many of his early writings appeared in such Catholic publications as *Hochland*,[55] and he often dealt with the relationship between Catholicism and the law, Catholicism and politics, and Catholicism and modernity.[56] Many of his writings can be classified as political theology, and he used theological concepts to advance his political theories.[57] His Catholicism would later also play an important role in his relationship to the Nazis.

His connection to the Benedictine monastery Maria Laach and its theologians had a continuing influence on Schmitt's life and work. This monastery was the major Catholic institution whose theologians attempted to create a blend of Catholic and National Socialist ideas, a blending that appealed to Schmitt. Reinhardt Mehring

emphasizes the connection of Maria Laach to National Socialism and to Schmitt.[58] Maria Laach's abbot, Ildefons Herwegen, was a significant theologian who believed in the compatibility of Catholicism and National Socialism. Schmitt valued his close relationship with Herwegen and the abbey. His personal belief that Jesus is the Christ, as well as his wrestling with the concept of the *Katechon* (anti-Christ), is the basic idea that Schmitt returned to during many phases of his professional and personal life. Schmitt worried that modern society had abandoned faith, that most Christians no longer really believed that Jesus was the Christ, and that they no longer accepted the concept of the *Katechon*. He argued that these lapses reflected the materialistic nature of modern society, and he blamed the French Revolution and the Enlightenment for society's lack of faith.[59] It is my contention that Schmitt saw Hitler and the Nazi state as potentially the force that would reverse these unfortunate historical and quasi-religious developments.

Schmitt's evolving political philosophy organized around the friend-foe principle was strongly influenced by his religious and theological searching. One of the most poignant examples of his feelings of guilt and his trying to come to terms with a pessimistic view of the world is most clearly revealed in his references to Machiavelli's views particularly when Machiavelli writes, "that if people were good, then what I write and what I do would be morally objectionable, but since they are evil that is not the case."[60] This early diary entry helped to lay the foundation that later allowed Schmitt to rationalize some of his most extreme writings and actions for the Nazi regime. His belief in human evil, coupled with his convictions that Western civilization, as most glaringly represented by the Weimar Republic, had gone in disastrous directions, convinced Schmitt that drastic actions were required to reverse these developments.

Schmitt also discerned affinities between the National Socialist regime and the Catholic Church. For him, the church was a monolithic, homogeneous body that had an absolute leader who at least in certain areas was infallible.[61] In spite of the decline in faith and crusading zeal among Catholics, he believed that the totalitarian state had much to learn from the church. He hoped that Hitler and the new Nazi state would fill some of the voids that this decline in religious faith and zeal had created.

The ideas and writings that moved Schmitt to work for the Nazis and the work he produced for them have considerable relevance today for the United States and its allies, particularly in the "War Against Terrorism." Actions taken today in our society that strengthen government authority and limit personal liberty echo Schmitt's ideas on emergency powers and on the state's responses to the enemy, ideas that challenged the liberal concepts of the Weimar Republic and contributed to justifying the actions of Hitler and the National Socialists. As Shapiro has written,

> Global liberalism is challenged by left- and right-wing nationalists, as well as radical groups who come to power outside regular channels, organizing their own economic networks, propaganda and violence. A war on the latter, indeed a war on unconventional war as such (the "War on Terror") has been declared. The expansion of executive emergency powers in its name has been justified using some of the same arguments Schmitt put forward.[62]

Lyndon Larouche and his followers, who characterize the policies of George W. Bush, Richard Cheney, and Donald Rumsfeld as "Schmittlerian," articulate in its most bizarre form the connection of Schmitt's ideas and the American government's "War on Terror." But they may not be totally wrong.[63] In a more sober analysis, Pilch sees the possibility that a "democracy" today, based on Schmitt's homogenous community, could easily result in ethnic genocide.[64]

The "democratic" state Schmitt envisioned also challenged the conventions of international law and the laws of war. In his post–Second-World-War writings, particularly *Der Nomos der Erde* (*The Spatial Ordering of the Earth*), Schmitt argued that the world order that had been dominant since the Treaty of Westphalia had gradually broken down, super powers now dominated, and diplomacy predicated on the balance of power was no longer feasible. Among the casualties of this momentous change were the laws of war.[65] Identified particularly with Hugo Grotius, these laws formulated in the seventeenth century, although never perfectly adhered to, put limits on the conduct of wars and on the behavior of combatants. They also made clear distinctions between combatants and civilians and how each group should be treated.[66] Their growing irrelevance in the twentieth century had consequences for the ways that enemies could be treated, and continue to raise such questions in the twenty-first century as what constitutes an enemy combatant and what legal and judicial protections, if any, does the enemy have. Although Schmitt's post–Second-World-War writings focused frequently on the changing nature of the international situation and its effects on the laws of war, in his work for the Nazis long before his later writings on the new world order, he had proposed treatment of enemies that already was at odds with anything Grotius had advocated.

Schmitt's work on guerrilla warfare, *Der Theorien des Partisan: Zwischenbemerkung zum Begriff des Politischen* (*The Theory of the Partisan: Supplements to the Concept of Politics*) published in 1963, connects his earlier ideas to today's challenges of dealing with terrorist enemies.[67] In this book, he traced the history of guerrilla warfare from the Spanish fighters against Napoleon to anticolonial forces in his own day. It demonstrated that Schmitt remained keyed into the major events of his time, and it continues to resonate today. He argued that the partisan defies the conventional rules of war and thus is not covered by such international laws as the Geneva Conventions that deal with combatants and with prisoners of war. As William Scheuerman points out, Schmitt tended to conflate guerrilla fighters and terrorists.[68] Scheuerman distinguishes between the terrorist who crosses more lines and the guerrilla fighter who retains more of a sense of humanity and more often respects the distinction between combatant and civilian. However, he argues, even when dealing with terrorists, democratic governments must set limits on how they are treated. Schmitt, in contrast, argued that these irregular fighters (both guerrillas and terrorists) used what he called "unmitigated prerogative powers," which disqualified them from the protections of international laws or the laws of war, and that, therefore, there are no limits to how they can be treated.[69] Scheuerman correctly perceived that Schmitt's analysis about the treatment of guerrilla fighters and terrorists led to the procedures at the US military-administered prison at Abu Ghraib, Iraq.[70]

Schmitt never recognized the distinctions between what liberal republics like the United States and totalitarian dictatorships like Nazi Germany would be willing to do in their fights against their enemies or whether they would consider what actions would be consistent with their values. Clearly American actions have not always been based on what most Americans consider our basic principles or the norms of international law. When American actions against "terrorist enemies" violate those principles and approximate Carl Schmitt's ideas, they compromise our values and are often unsuccessful. A study of Schmitt's work can serve as a primer on policies that democracies need to avoid and procedures they need to implement to maintain their humanity and integrity. It is also a warning about how nations must not sacrifice the universal applicability and protections of the law. When the US military defies the Geneva Conventions and puts aside the "old-fashioned rules of war" in places like Guantanamo and Abu Ghraib, we play into the hands of such terrorist organizations as Al Qaida or the Islamic State, as argued by Annas and Crosby in this book.

Schmitt's ideas had powerful effects during his lifetime, and his legacy continues to reverberate into the present. He often inspired such superlatives as Marcuse's extreme comment that Schmitt was the smartest person to support the National Socialists. Hans Morgenthau, the prominent German and later American political scientist, was also moved to extremes when he met with Schmitt in the late 1920s because he hoped to discuss their shared interest in political theory. Morgenthau came away feeling he had just met a calculating, mean-spirited careerist and declared, "When I walked down the stairs from his apartment, I stopped on the landing between his and the next floor and said to myself: 'Now I have met the most evil man alive.'"[71] Carl Schmitt may not have been the smartest man to support the Nazis or the most evil man alive, but his views on a two-tiered system of justice certainly helped the Nazis to create a lawless state with categories of people who had no rights. His manipulation of concepts of law and justice should serve today's nations as a cautionary tale about pitfalls to avoid if they wish to be true democracies.

3

Defining the Jew: The Origins of the Nuremberg Laws

Oleksandr Kobrynskyy

In memoriam Raymond G. Helmick, SJ

The purpose of this chapter is to explain under which historical premises Nazi antisemitism was translated into law.[1] Among other regulations, the Nuremberg Laws of 1935 and the supplementary decrees that followed shortly after made Jews second-class Reich residents, outlawed marriage contracts between Jewish and non-Jewish Germans, and prohibited sexual relationships of mixed couples. Notoriously, the agenda for a "racially pure" national community had been set by Adolf Hitler's *Mein Kampf* and by the Nazi Party's program. Accordingly, the race laws of 1935 were a legislative pillar of the Nazi social engineering scheme, which was premised on pseudoscientific teachings of racial hygiene and the phantasm of a contaminating influence of "Jewish blood." Yet the decision by the Nazi leadership in favor of pronouncedly anti-Jewish citizenship and marriage laws not only followed ideological considerations but also responded to the demands of administrative practicality. The question of how "the Jew" should be defined by law was the subject of heated debates in the first years of the Nazi regime, before in 1935 the Nazi leadership seized an opportune historical moment to settle the issue.

The Nuremberg Laws of fall 1935 meant a new stage of escalation in the calamitous history of anti-Jewish politics of the Nazi regime. They deeply intruded into the private lives of persons affected and led to further exclusion of people defined as Jews from public life. As Lothar Gruchmann points out, the Nuremberg Laws destroyed a basic principle of constitutional state by suspending the equality of all citizens before the law.[2] Through the Reich Citizenship Law and the Blood Protection Law, together with supplementary decrees, which supplied important clarifications and definitions, National Socialist race theories obtained juridical authority. The origin of the legislation in late 1935 was a convoluted political process that involved a multitude of agents of the Nazi state and has been the subject of extensive historical research.[3] The discursive emergence of the Nazi definition of "the Jew," which became law shortly after the Nuremberg Reichstag, still deserves more thorough examination. In the following, I will sketch out the significant historical lines.

The destruction of Leo Katzenberger

On March 14, 1942 Lehmann (Leo) Katzenberger, the chairman of the Jewish community of Nuremberg, was found guilty of race defilement and *Volksschädigung*, or damage to the German people, and sentenced to death by the *Sondergericht Nürnberg*, Nuremberg Special Court. In his verdict, the presiding judge, Oswald Rothaug, eagerly described minute details of a liaison, whose sexual nature the court saw as proven beyond any reasonable doubt, between the Jew Katzenberger and Irene Seiler, a woman "of German blood." The extent of suggestive detail in Rothaug's verdict must have reminded the courtroom audience of sensationalist stories featuring lustful Jews defiling German women, which were published in Julius Streicher's popular antisemitic propaganda rag *Der Stürmer*:

> The court is . . . convinced that in the time period between the institution of the Nuremberg Laws and March 1940 Katzenberger and Seiler repeatedly had sexual intercourse on a not identifiable number of occasions. . . . According to the Blood Protection Law, the category of extramarital relations includes, apart from coitus, any kind of sexual activity with a person of the opposite sex which serves to replace intercourse and to satisfy the sexual drive of at least one of the involved partners. In the case of the defendant the following occurred: Katzenberger pulled Seiler toward himself, kissed her, touched and stroked her calves above her dress. Carried out by Katzenberger upon Seiler in a particularly uncouth manner, these actions, which the defendant admitted, equal what is popularly known as "rubbing off." It is apparent that the motivation for such undertakings could only be of sexual nature. Even if the Jew had only performed upon Seiler these so-called "substitute actions," it would have sufficed for an indictment on the count of race defilement.[4]

Judge Rothaug was hardly keen to give the show trial the semblance of an orderly judicial procedure. Obfuscating an obvious lack of evidence,[5] he subjected his judgment to a perverse reasoning aimed at annihilating the defendant: even if there was no proof for sexual intercourse, the court had no doubt that a Jew's hands on a woman "of German blood" could only mean illicit intimacy. At the same time, the unforgiving diction of the verdict sent out a clear message to the attendant party bigwigs in the front row: to serve the ideals of the movement, the judicial system was more than eager to distort justice and to destroy individuals, especially if they were Jewish.

The extent of law-distortion in the Katzenberger case is clear in the way the court deliberately juggled with jurisdiction in order to achieve capital punishment. The race defilement charge was based on the Law for the Protection of German Blood and German Honor, also known as the Blood Protection Law, which was passed on September 15, 1935 in Nuremberg. In paragraph 2, it banned "extramarital relations between Jews and subjects of the state of German or related blood."[6] On November 14, 1935, the Nazis issued a supplementary decree to the Blood Protection Law, which clarified that "extramarital relations" within the sense of paragraph 2 meant "only intercourse."[7] Rothaug's assertion was misleading in that, according to the Blood Protection Law, "substitute actions" already constituted race defilement,

but his decision to find Katzenberger guilty of this charge followed established legal practice. The corresponding phrase in Rothaug's judgment is a verbatim quote from a decree by the Joint Senate for Criminal Law Issues of the Imperial Court from December 9, 1936. In this decree, the Senate argued that, because the legislator had intended to protect not only the "blood" but also the "honor" of the German people, courts should base their decisions on the widest possible concept of "extramarital relations."[8] Likewise, the severity of the judgment is not explicable solely by the Blood Protection Law. The Nuremberg Special Court chose not to apply paragraph 5 of the law, which ruled that males who violated paragraph 2 should be punished "with a jail term or a prison sentence." In order to make use of death penalty, an additional allegation of damage to the German people was pinned on Katzenberger. Thus, the court argued that the defendant had willfully exploited the state of war to commit his deeds—a felony that deserved an exceptionally severe punishment. Even contemporaries brainwashed by Nazi propaganda must have recognized the judgment's disproportion. Repulsive and bigoted per se, Nazi legislation was interpreted and applied by the Nuremberg Special Court in the harshest possible manner against the defendant.

Katzenberger was one of the most famous victims of the judicial application of race laws instituted by the *Reichstag der Freiheit* (Reichstag of Freedom) in Nuremberg. The reference to freedom in the propaganda name of the extraordinary session of the Reichstag, which had been turned by the Nazis into a pseudo-parliament, is cynical, given the discriminatory content of the laws instituted on that day. Called in by Führer Adolf Hitler, the deputies resided in Nuremberg's *Kulturvereinshaus*. During its last session, which took place on September 15, 1935 from 9:00 to 9:50 p.m., the Nuremberg Laws were announced by Hitler, declaimed by Hermann Göring, and unanimously passed by the delegates. While the Reich Citizenship Law instituted a dual classification of citizens, robbing Jews of most political rights, the Blood Protection Law forbade mixed marriages and introduced the notion of race defilement into criminal legislation of the Third Reich. Another law that was passed on that day in Nuremberg was the Reich Flag Law that defined the colors of the Reich flag and banned Jews from raising it. While not conventionally listed among the Nuremberg Race Laws, this law provided the occasion for the Reichstag in Nuremberg. The anti-Jewish legislation was added to the Reichstag agenda on fairly short notice.[9]

A closer look at the verdict against Leo Katzenberger reveals that the Nazi method of identifying whether an individual was a Jew hardly met the demands of their own racist ideology. A large part of the judgment was dedicated to an inquiry into the defendant's Jewish identity. Particular attention was paid to his grandparents' religious affiliation. The grandparents' marriage dates could be found in official records of Jewish communities in Thundorf (April 3, 1832) and in Aschbach (August 14, 1836); his grandfathers were buried in Jewish cemeteries; and, although the grandparents' religious affiliation could not be established on grounds of any further documentation, the defendant certified that, like himself, all four were of Jewish faith.[10] There was a substantial reason why the court was compelled to examine Katzenberger's family history in such detail: clarifying the question of the defendant's "race" was necessary to substantiate a conviction on the count of race defilement. The Blood Protection Law

applied only if it could be proven that one (and one only) of the participants in the forbidden extramarital act was Jewish.

The legal formula for defining Jewishness was provided in paragraph 5, section 1 of the first supplementary decree to the Reich Citizenship Law from November 14, 1935: "A Jew is anyone who is descended from at least three grandparents who are racially full Jews. Paragraph 2, section 2, second sentence will apply." Paragraph 5 contains further specifications for the treatment of so-called *Mischlinge* (mixed-breeds with two and fewer Jewish grandparents). The significance of the reference to paragraph 2 of the supplementary decree is that it specifies the method of identifying the grandparents' identity as "full Jews": "A grandparent shall be considered as *volljüdisch* [fully Jewish] if he or she belonged to the Jewish religious community."[11] In other words, the racial identity of given individuals was to be defined via the membership of their grandparents in a Jewish community. Thus, the Nuremberg Special Court could use existing documentation about Katzenberger's four grandparents, as well as the defendant's statement about his own faith, as sufficient evidence to classify him as a Jew.

In 1935, the Nazis ignored the traditional Jewish matrilineal delineation, establishing their own definition of "Jew," and turning Germany into, what Cornelia Essner refers to as, an "anti-Semitic Apartheid state."[12] Based on a fairly simple arithmetic formula, the definition of "the Jew," instituted by the first supplementary decree to the Reich Citizenship Law, provided court bureaucrats with a watertight method of applying the Nuremberg Race Laws. However, the confusion of religion and race intrinsic to this method must have appeared as utterly inacceptable to all those who shared Hitler's credo that Jewish identity should be conceived in racial rather than in religious terms. What were the origins of this ideologically deficient legal compromise?

Racial hygiene and the National Socialist concept of nation

The Nazi mindset lacked a systematical scientific foundation, a circumstance which, as Uwe D. Adam points out, made the dyad of *Mein Kampf* and the Party program of 1920 the ideological common denominator of National Socialist politics.[13] Both documents were integrative in many discussions concerning the establishment of the unity of the German national community. Such debates emerged when Hitler was Reich chancellor and the Nazis found themselves under growing self-imposed pressure to realize their party program at the operational level. Because the so-called Jewish question was inseparably tied up with notions about the racial purity of the national community, bureaucrats and legislators were soon busy finding a method to define Jewishness in legal terms. Different attempts of achieving this goal were made in the years between the institution of the Aryan Paragraph in 1933 and the Nuremberg Race Laws in 1935. They elucidate the terminological, ideological, and political complexities of what Peter Longerich refers to as Nazi *Judenpolitik*—the Third Reich's goals, intentions, and political activity in respect of the Jews.[14] Yet the seeds for the Nuremberg Race Laws had been planted years before the Nazi movement began its rise to power.

The idea that a German government should set limits to the procreative decisions of its citizens originated in the last decade of the nineteenth century, when teachings of racial hygiene grew increasingly popular in nationalistic circles. The term *Rassenhygiene* was coined by the eugenicist Alfred Ploetz. A vehement critic of philanthropy, Ploetz believed that support for the poor and the disabled should be cut to the minimum, going as far as proposing that weak newborns should be euthanized. His influential book *Die Tüchtigkeit unserer Rasse und der Schutz der Schwachen* (*The Efficiency of Our Race and the Protection of the Weak*, 1895) describes a utopian technocratic society of healthy individuals, in which a powerful board of doctors controls the family planning of its citizens. In order to maintain the principles of racial hygiene, the board authorizes only marriages between two genetically apt partners (an idea that the Nazis made a policy by introducing in 1935 *Ehetauglichkeitszeugnisse* (health certificates as prerequisites for marriage licenses)). Regarding the Jews as a separate race, the leading theoreticians of racial hygiene did not share the Nazis' violent antisemitism. Fritz Lenz, Ploetz's coeditor of Germany's first racial hygiene journal and cofounder of the secret society *Nordischer Ring*, admits in *Menschliche Auslese und Rassenhygiene*, his influential book on eugenics published in 1921, that mixed marriages with Jews have brought forth "excellent minds." Nevertheless, Lenz advises against mixed marriages, expressing the hope that "due to the strengthening of the Germanic-Nordic racial consciousness on the one hand, and the Jewish-Zionist on the other, mixed marriages will become rarer in the future."[15] Lenz was pleased to learn that Adolf Hitler most likely had read his book in Landsberg prison, and eagerly called attention to the fact that phraseology in *Mein Kampf* reflected some of its passages.[16]

Indeed the leader of the National Socialist movement was a promising candidate to head the first German government sensitive to issues of racial hygiene. Eugenicists like Ploetz and Lenz hoped that Hitler would take decisive action against what they saw as detrimental influences upon public health and racial unity. By allowing for violent measures to be taken in order to ensure public health, racial hygiene theoreticians effectively created fertile ground for Nazi euthanasia. Their vision of racial purity was far from suggesting genocidal measures against Jews, but this was exactly the consequence that was finally drawn during the Wannsee Conference in January 1942. While Ploetz and Lenz were concerned about the future of the "Germanic-Nordic" race, they believed that its existence would not be endangered by the assimilation of a marginal share of "racially foreign blood." Yet the Nazis, adhering to their own notion of a national community, took a much more radical stand on the issue of racial mixing.

Along with racial hygiene and antisemitism, a *völkisch* conception of national community was one of the main ingredients in the National Socialist ideological brew. The Nazis understood the Germans as a *Volk,* a people whose identity is defined not primarily by a shared language, culture, or values but first and foremost by a blood bond. The wholeness of this unity was considered to manifest itself in the ideal of the *Volksgemeinschaft*, a racially unified, classless national community of *Volksgenossen*, or German nationals. To introduce a legal distinction between *Volksgenossen* and all those who did not belong to the community of "German blood" became a central demand of the National Socialist political agenda. Thus, the chief Nazi Party ideologist Alfred Rosenberg called for a prohibition of mixed marriages, as long as Jews were allowed to

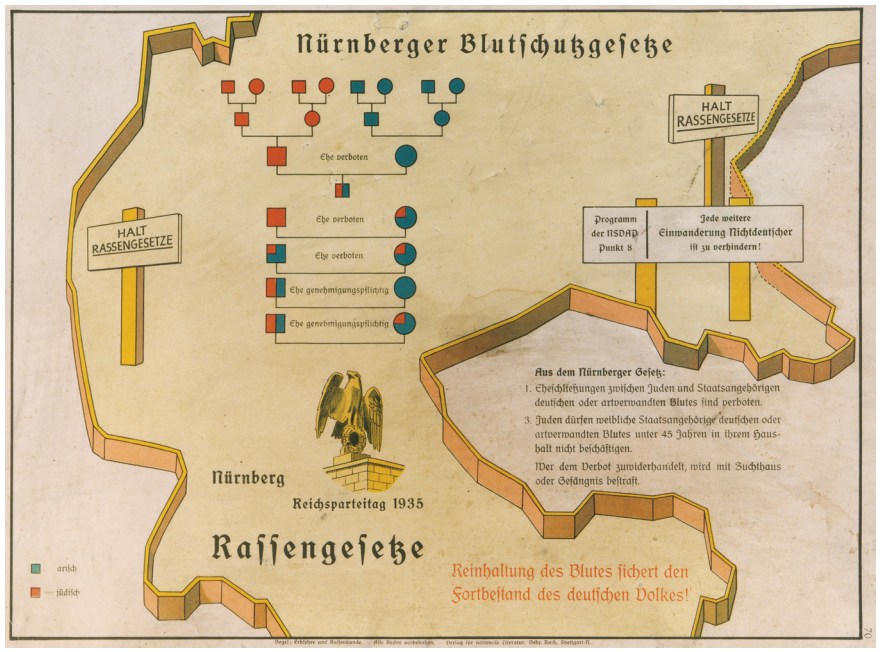

Figure 2 Eugenics posters entitled "The Nuremberg Law for the Protection of Blood and German Honor." Courtesy of the United States Holocaust Memorial Museum.

live "on German soil."[17] In paragraph 4 of the party program from February 24, 1920 the racist logic at the foundation of a new, *völkisch*, concept of citizenship rights was presented: "Only those who are *Volksgenossen* can become citizens. Only those who have German blood, regardless of denomination, can be our *Volksgenossen*. Hence no Jew can be *Volksgenosse*."[18] The Nazi plan to make the *Volksgenosse* status prerequisite for holding citizenship rights had far-reaching consequences for later legislation. Not only did this *völkisch* understanding of nation entirely ban individuals conceptualized as "racially foreign" from becoming or remaining German citizens, it also explicitly precluded any relevance of their religious affiliation. The emphasis laid on the claim that Jews could not have "German blood" illustrates that an antisemitic conception of Jews as a race rather than a religion was eminently significant for the definition of a racially homogenous *Volksgemeinschaft*. Without stating it explicitly, the party program suggested that Jewish national subjects should lose their citizenship rights, setting the agenda for later legislative drafts on the "Jewish question."

Blueprints

As early as in March 1930, the Nazis, who held twelve seats in the Reichstag, tried to gain publicity for their programmatic ideas about the exclusion of "Jewish blood"

from the German *Volksgemeinschaft*. Amid the worldwide economic downturn and the ensuing social unrest, the Reichstag discussed a draft for a *Law for the Protection of the Republic and Pacification of Public Life*. The National Socialist parliamentary group under Wilhelm Frick, the later Reich minister of the Interior, moved an amendment to the draft, proposing that the name be changed into *Law for the Protection of the German Nation*. Among other regulations, the Nazis demanded criminal prosecution of all those who "by mingling with members of the Jewish community of blood or with colored races contribute or threaten to contribute to racial deterioration and degradation of the German *Volk*." The crime of *Rasseverrat*, racial treason, should be punished with a penitentiary sentence or, in aggravated cases, with death.[19] The Nazis, who greatly lacked majority in the national parliament, were aware that the chances of their radical demands becoming a law were poor. Yet in view of their considerable upswing in local elections, the Nazis cunningly used Reichstag debates for such propagandistic motions without having to think through their administrative practicality. In particular, they did not feel any pressure to specify how an individual's Jewishness should be determined in legal terms or in actual bureaucratic contexts. Only after assuming governmental responsibility in 1933 did the Nazis have to elaborate on the implications of their racial policies for civil and criminal law.

Shortly after Hitler's ascent to power, Jews in Germany were subjected to palpable discriminatory regulations. As Saul Friedländer points out, "For the first time since completion of the emancipation of the German Jews in 1871, a government, by law, had reintroduced discrimination against the Jews."[20] The anti-Jewish measures of 1933 were in line with the demands of the party program but they did not serve to deprive all Jews in Germany of their citizenship rights. Paragraph 3 of the Law for the Restoration of the Professional Civil Service from April 7, 1933, known as the *Aryan Paragraph*, determined that "civil servants not of Aryan origin" must retire.[21] Exemptions, introduced as a result of Hindenburg's intervention, applied to the First-World-War veterans as well as to those whose fathers or sons had been killed in action. On July 14, 1933, the Law for the Repeal of Naturalization and Recognition of German Citizenship enabled the state to revoke naturalizations of East European Jews that had taken place between 1918 and 1933.

While the regulations of 1933 had a decidedly anti-Jewish orientation, they made clear distinctions within the Jewish population. For example, by exempting those "non-Aryans" who had rendered outstanding services to the fatherland from the enforcement of the Aryan Paragraph the Nazis acknowledged that merit, rather than "blood," could safeguard a certain status in the social fabric of the German nation. Depriving naturalized East European Jews of their citizenship was a politically uncontroversial move. However, the Nazis had not yet gathered enough political momentum to impose similar regulations upon Jews who had lived in Germany for generations. Whereas the organized April boycott against Jewish businesses, the violent assaults against Jewish individuals organized by the SA (Sturmabteilung, paramilitary wing of the Nazi party), and occupational bans against Jewish lawyers and physicians left little doubt about the antisemitic zeal of the new government, the Nazis still had to rely upon their conservative allies of the DNVP, German National People's Party, a circumstance which delayed the implementation of more radical regulations against German Jews.

Thus, the anti-Jewish regulations of 1933 were effectively pushing German Jews into the legal status of a marginalized but still-acknowledged national minority. For Nazi Party functionaries, who called for a racially homogenous *Volksgemeinschaft*, such state of affairs could only be of a transient nature.

One of these functionaries was Achim Gercke, a fervent anti-Semite running the *NS-Auskunft*, an agency issuing Aryan certificates to Nazi Party members. Together with Helmut Nicolai, a lawyer, he wrote in 1932 or 1933 a draft for a *Rassenscheidungsgesetz*, Race Separation Law. In a memorandum adjoining the draft, Gercke tackled the question whether children of a "racially mixed" descent should have full citizenship rights, introducing the notion of a *Judenstämmling*, a Jewish descendant. This notion stemmed from the belief, which Gercke shared with demagogues like Julius Streicher, that Jewish blood is infinitely passed on throughout generations. Accordingly, it did not matter whether a *Judenstämmling* had two Jewish parents or only one Jewish great-grandfather; with contagious Jewish blood in their veins, *Judenstämmlinge* threatened to forever pollute the racial integrity of the *Volksgemeinschaft*. Referring to Article 4 of the party program, which stated that those who have Jewish blood could not be citizens, Gercke argued that *Judenstämmlinge* should not have full citizenship rights. Furthermore, he felt that intermarriages with *Judenstämmlinge* should be categorically banned as those born from relations with Jews would always have a share of "Jewish blood." Therefore, the "Jewish question" could only be solved by a complete emigration of all Jews from Germany. In order to initiate this emigration, a gapless registry of all Jews in the Reich had to be created—an ambitious data collection project, which Gercke himself had started years before writing the memorandum.[22]

The suggestion to create a list of all Jews in Germany was taken up by a group of Prussian lawyers in a draft formulated on the day before the institution of the Aryan Paragraph. Unlike Gercke, the Prussian working group did not believe in the infinite contagious influence of Jewish blood and suggested a ranked classification: (1) *Jews* are individuals who confess Mosaic faith, or individuals whose both parents or all four grandparents confessed Mosaic faith; (2) *Half-Jews* are offspring from marriages with one Jewish partner, as defined in (1); (3) Jew-spouses are individuals married to Jews as defined in (1) or divorced individuals who have children from a marriage with Jews. This classification envisaged no *quarter-Jews*, which meant that non-Jewish children would originate from a marriage of a half-Jewish and a non-Jewish partner. Whereas Gercke argued that Jewish Reich residents threatened to permanently contaminate the German *Volksgemeinschaft*, the Prussian lawyers suggested a neat taxonomy, combined with according legislation, that would help to keep the two population groups apart. Though the Prussian draft envisioned an Apartheid state, in which Jews would be registered and banned from certain professions and mixed marriages would be declared invalid, the lawyers avoided entirely excluding Jews from the German national community. Outstanding services to the fatherland could qualify an individual otherwise classified as a Jew to be exempt from the Jew registry and recognized as a full-fledged member of the *Volksgemeinschaft*. While this concept of "the Jew" made the religious characteristic hereditary, it significantly departed from a deterministic understanding of race as a fixed trait.[23]

Neither Gercke's passionate "contagionism" nor the cold arithmetic of the Prussian suggestion won legislative validity.[24] However, these two initiatives exemplify the hardening fronts between *völkisch* party radicals who called for total purification of the German *Volksgemeinschaft* and antisemitic conservatives who wanted to push Jews back into ghettos but were willing to grant them the legal status of a national minority. Available as early as in 1933, these drafts contained many of the ideas that two years later would be modified to form the Nuremberg Race Laws and the supplementary decrees.

Thus, the method of establishing whether somebody was a Jew on the grounds of their grandparents' religious affiliation, as suggested by the Prussian lawyers, provided a pragmatic solution for the establishment of later administrative procedures. This heuristic principle was the core of the first supplementary decree to the Aryan Paragraph from April 11, 1933, which allowed state officials to define as "non-Aryan" "anyone descended from non-Aryan, particularly Jewish, parents or grandparents. It suffices if one parent or grandparent is non-Aryan. This is to be assumed in particular where one parent or grandparent was of the Jewish religion."[25] Without equating race and religion, this regulation moved the two categories into instant discursive proximity. From then on, an individual's parent's or grandparent's affiliation to Jewish faith sufficed for a legal assumption about the individual's "non-Aryan" status. At the same time, however, the category "non-Aryan" had a fairly broad scope. In other words, the Aryan Paragraph could easily be applied to different "racially foreign" groups: being "a Jew" was merely the prototypical example for being "non-Aryan." Thus, while the *Law for the Restoration of the Professional Civil Service* imposed discriminatory regulations, its broad conception of the class "non-Aryan" was not specific enough to serve as a legal basis for the total exclusion of Jews from the *Volksgemeinschaft*. Addressing the ideological inadequacy of this law, the minister of Interior Wilhelm Frick explained in a letter to high-ranking executives that whether somebody was "Aryan" depended not on religion but on "the *descent*, the *race*, the *blood*."[26] Frick's use of three different concepts in one phrase elucidates the prevailing indecisiveness about such categories. Thus the state officials, while bent on casting into law a racial concept of Jewishness, failed to agree upon a satisfactory method of defining "the Jew" other than by the detour over the grandparents' Jewish faith.

Radical Nazis deplored the fact that terminological insufficiencies impeded legal measures against racial mixing. In "National Socialist Criminal Law," a memorandum published in September 1933 by Hanns Kerrl and Roland Freisler, both high-ranking officials in the Prussian Ministry of Justice, the authors argued that racial improvement of the German nation could not succeed without decisive legal measures. They criticized the concepts of Aryan and non-Aryan as too vague. In order to achieve the objectives of racial hygiene they instead suggested to use the notion "members of foreign communities of blood." *Rasseverrat*, that is, sexual intercourse with "members of foreign communities of blood," was to be prosecuted and punished by criminal law. Freisler was acutely aware of the practical convolutions which a purely scientific definition of race would entail. Therefore, when the memorandum was discussed in June 1934 by a criminal law panel chaired by the conservative Reich minister of Justice

Franz Gürtner, Freisler pleaded for straightforward judicial procedures that would premise a pragmatically viable method of identifying Jews. Freisler failed to push through his suggestions.[27]

The fiasco of Freisler's initiative shows how tightly intertwined *Judenpolitik* was in the Third Reich with other political considerations. The motion in favor of introducing *Rasseverrat* as a new statutory offense was rejected by the criminal law panel on two grounds: first, a prohibition of sexual relations based on ideas of racial hygiene necessitated a simultaneous regulation by civil law that would ban interracial marriages. The responsibility for the design of such a far-reaching regulation resided not with criminal law experts but was the responsibility of the political leadership. Second, the prosecution by criminal law of "members of foreign communities of blood" was likely to generate angry protests abroad, especially among Asian trade partners. Because the Reich could not afford a sweeping boycott of German goods in important markets, Freisler's reform of criminal law materialized as a political impossibility.[28] Considerations about foreign and economic policy ultimately led to the conviction that the *Aryan Paragraph* must be reformed in order to avoid discrimination of economically significant "foreign communities of blood" overseas. In December 1934 representatives from ministries that were involved in the "Jewish question" met in the headquarters of the deputy führer Rudolf Hess. After this meeting, the attitudes of Nazi lawmakers were streamlined for the formulation of decidedly anti-Jewish citizenship and marriage laws that would apply only for Jews and exempt other "racially foreign" individuals.

The window of opportunity

In 1935, the year of Germany's return to the geostrategic map of Europe, the "Jewish question" reappeared with new urgency. While no practicable solution had been found for the identification of "non-Aryan descent," "race," or "blood," political pressure was growing upon lawmakers to institute workable regulations that would irreversibly separate Jews from Germans. In January, an overwhelming referendum majority in Saarland decided to disband their territory from France and join the Reich, causing a reemergence of German national pride that correlated with the rising popular acclaim of Nazi rule. Spurred by the referendum success, the German government officially announced the reintroduction of general conscription, which had been forbidden by the Versailles Treaty. While the Military Service Law of May 1935 made use of the Aryan Paragraph, banning Jews from military service, the issue was raised whether mixed-breeds should be excluded, too. Finding an answer to this burning question had direct ramifications for Germany's future military strength because it involved making a decision about a considerable number of potential recruits. At the same time, calls from party radicals like Julius Streicher to stop sexual relations between Germans and Jews and to ban mixed marriages became louder; several civil servants unlawfully refused to issue marriage certificates to mixed couples.

In July 1935, the minister of Interior Wilhelm Frick ordered civil servants to suspend consideration of marriage license requests from couples of different racial descent.[29] Accordingly, state officials anticipated a legal ban on mixed marriages. Concomitant consultations of lawmakers coincided with a new wave of anti-Jewish violence, which forced the administration to find ways of protecting owners of "Aryan" businesses during outbreaks of antisemitic violence. On August 20, high-ranking state and party officials met in the Reich Ministry of Economy to discuss the economically damaging effects of the pogroms. Minister of Economy Hjalmar Schacht sharply criticized Streicher's propaganda for its harmful economic ramifications and pleaded to quickly end chaotic assaults in the streets.[30] Thus, in the summer of 1935 a speedy solution to the definition question was on the wish list of several decision-makers. It was before the world would turn its eyes to Germany in 1936, the year of the Olympic Games, that Hitler must have seen an opportune moment to push through race-based citizenship laws entailing a conclusive definition of "the Jew."[31]

During the Reichstag session in Nuremberg the details of the Reich flag law were discussed, namely who would be allowed to touch the Reich flag. There was no doubt that Jews should be banned from setting it up, and the conversation unavoidably returned to the open question about who should be classified as a Jew. Hitler seized the opportunity for a legislative coup and made an ad hoc decision to put anti-Jewish laws on the agenda of the Nuremberg Reichstag.[32] Following the Führer's extemporized order, ministry clerks and lawyers were flown in from Berlin to design drafts for laws that would sanction "race defilement," ban mixed marriages, and introduce a new category of *Reichsbürger*, Reich citizens, from which Jews would be excluded. Hitler's impromptu decision to end the internal tug of war about the definition of "the Jew" led to a series of intense negotiations that resulted in a legal compromise. Building upon previous blueprints, Hitler's lawmakers reached a settlement that provided the terminological foundation for the Nuremberg Laws and the supplementary decrees.[33] The vague concept of "Aryan descent" was substituted in paragraph 2 of the *Reich Citizenship Law* by "citizens of German or kindred blood."[34] Accordingly, the indistinct characterization of Jews as "non-Aryans" was replaced by a workable definition that exhaustively regulated the legal status of Jews and mixed-breeds.

Conclusion

The legal definition of "the Jew" in the Third Reich was instituted at an opportune historical moment. While antisemitic militants within the Nazi Party called for quick and decisive action against the mixing of "Jewish" and "German blood," state officials were working toward finding a way of defining Jewishness that would be both practicable and in line with racial antisemitism. After the political successes of 1935 and before the Olympic Games of 1936, a narrow window of opportunity opened for the institution of race-based citizenship laws. Given the lack of alternative solutions to date, a pragmatic decision was made to legalize the ideologically inadequate but practically workable method of identifying the "Jewish" racial characteristic by means

of the religious affiliation of grandparents. By providing the courts with a viable legal procedure that facilitated race-based jurisdiction, this method struck a compromise between the demands of party activists and the requirements of administrative practicality, ending an old tussle about the proper way of defining "the Jew" and opening the gates for the ensuing radicalization of anti-Jewish measures.

The 1942 Katzenberger trial in Nuremberg took place in the late stage of the history of race defilement cases. In the summer of 1943 the Third Reich decided to shake off the burden of judicial procedures against Jews. The thirteenth supplementary decree to the Reich Citizenship Law from July 1, 1943 withdrew criminal cases against Jews from regular jurisdiction, subjecting Jewish defendants to police despotism.[35] By then, the Nazi killing machine had already been running at full speed.

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4

Vichy France and the Nuremberg Laws

John B. Romeiser

Overrun in May 1940 by the German military machine, a humiliated France was quickly split into two administrative zones or regions. Paris, the emblematic capital city, became the center of what was called the occupied zone, under military control of the Nazi administration and German army. To the south and west the so-called free or non-occupied zone was established with its capital in Vichy and under French administrative control. The frontier between the two zones stretched along a line from Switzerland to the east and ran south parallel to the Atlantic coast, to the Pyrenees Mountains and the Spanish border. However, coastal regions stayed firmly under German control to head off possible Allied attacks from the sea. The perennially contested provinces of Alsace and Lorraine were once again annexed into the German Reich, as they had been following France's painful loss in the Franco-Prussian war of 1870–71. After the Allied landings in North Africa in November 1942, the distinction between the two zones effectively vanished, and German military control was extended to the entire country.

As time went on, there was increasingly close administrative coordination between the German occupiers to the north and the Vichy government to the south. Nevertheless, in the early stages of the war the Vichy government, headed by its president and the First-World-War hero, Marshal Philippe Pétain, and prime minister, Pierre Laval, demonstrated a special zeal and dedication in identifying, disenfranchising, and eventually extirpating French Jews, as part of their "National Revolution," promoting "Travail, Famille, Patrie" (Work, Family, and Homeland), as well as in punishment for what was their perceived duplicity in weakening France politically and financially, making it vulnerable to defeat. The right-wing, nationalistic, and racially infused rhetoric of Vichy was not a new development in France, for such pressures and beliefs had been part and parcel of the tormented interwar period, especially after the collapse of the Popular Front government headed by the Socialist Jewish prime minister Léon Blum in 1938. Indeed, overt antisemitism nearly brought down the Third Republic with the revelation of the Dreyfus Affair in the late 1890s, and Charles Maurras's *Action française* a generation later stirred up further discontent and rage. Jacques Adler, a former member

of the French Resistance, who last saw his father at the age of fourteen in a 1941 Vichy internment camp, commented:

> The Third Republic had a mixed record on Jewish issues. Despite strong pressure from the Right and the harsh, economic conditions, measures introduced between 1933 and 1938 aimed at the wave of immigration to France in general and were not directed particularly at Jews. Moreover, under the Republic no legislation was ever considered that would have affected native Jews. When the Third Republic collapsed in June 1940, the newly created Vichy state carried out previous policies directed at foreigners, but now proceeded to transform them into a policy primarily directed against Jews, foreign-born and native French alike.[1]

The distinction between the two Jewish populations in France is a crucial one and underlies the intensifying divisions and persecutions in the first two years of the Occupation. According to Lucy Davidowicz, the Jewish population in prewar France was 350,000 of a total population of 45,000,000 or less than 1 percent of the country, of which 150,000 were native born.[2] The others were naturalized citizens and refugees from Germany, Austria, Czechoslovakia, and Eastern Europe, having come to France in the 1920s and 1930s. After France was split into two zones, there was considerable movement of Jews from the occupied zone to the Vichy zone. In occupied France, some 12,000 Jews remained in Paris and in smaller communities. Before the Occupation relatively few Jews lived in what became the unoccupied zone. By mid-1940s, however, 195,000 Jews lived there, comprising, it is believed, 145,000 native-born Jews, 20,000 East European Jews, and some 30,000 Jewish refugees from Germany and Austria.[3] The Vichy government's first concern was with foreign-born Jews, many of whom had been admitted in the 1930s as refugees from Nazism in Eastern Europe. On July 17, 1940, one week after assuming power, the Vichy regime ruled that entry into public service jobs would be restricted to those with French fathers. Similar laws affecting the medical and legal professions followed in August and September. Three days later, on July 22, a commission was established to review all naturalizations granted since 1927, when criteria had been relaxed, in order to strip "undesirables" of their citizenship; 6,000 of the 15,000 naturalized citizens affected were Jews.[4]

Here it is important to acknowledge that the Vichy government's antisemitic laws and statutes were fundamentally homegrown, although German pressure became more of a factor after 1942.[5] Another disruptive element was the profound cleavage within the French Jewish community itself, with native-born French Jews distancing themselves from the recent transplants from Eastern Europe. According to Adler:

> The huge wave of immigration between 1919 and 1939 gave the French case a unique character. Jews in France were divided along social and cultural lines largely predetermined by their country of origin. Foreign Jews were seen as an autonomous group and were treated differently from the native Jews. No study

> of the holocaust in France can do justice to the situation unless one proceeds on the basis of such a fundamental distinction, that is, the existence of separate communities, each concerned for its own defense and survival.[6]

For the old Jewish French families who had lived in France for generations, the Jewish identity "only expressed itself, if ever, in religious terms." They considered themselves fully assimilated.

Many native French Jews believed they might escape truly serious consequences. "Jews whose families had lived many years in France, including men who had won distinction fighting on the battlefield of WWI and in the recent Battle of France, often thought of themselves as French first and Jews only by religious profession."[7] Moreover, according to contemporary eyewitness Henri Sinder writing in "Lights and Shades of Jewish Life in France" published in 1943, nonnative Jewish refugees in the so-called free zone of Vichy found "employment difficult because of a mass of administrative requirements and limitations,"[8] whereas Jews already living there had a somewhat easier time, at least initially. Sinder goes on to recount that the Jews who escaped to the non-occupied zone had more freedom to move about but a more oppressive atmosphere of antisemitism: "The occupied zone had the antisemitic laws but little antisemitic feeling among the French population; the free zone had few laws, but a terrific amount of hatred was in the air."[9]

It would not take long for the hatred and rancor to crystallize into legislation that steadily eroded the situation of Vichy's Jews, French born and foreign alike. The first step was August 27, 1940, when Pétain's government repealed the *loi Marchandeau* (Marchandeau Law), an executive order of April 21, 1939, which had outlawed press attacks on ethnic or religious groups, therefore declaring "open season for mass media" vitriol.[10] For Adler, the ensuing chain of events that were so cataclysmic for the French Jewish community produced

> some four hundred laws, amendments to laws, decrees, and policy measure directed at Jews. It began with a definition, went on to counting, dispossession, ration books and identity papers stamped "Juif"; the obligation to wear a distinctive sign in the occupied zone, isolation from the rest of the population, and ended with transfer to camps for deportation.[11]

A seminal event in the early phase of Vichy's anti-Jewish zealousness took place on October 3, 1940 when its first *statut des Juifs* (Jewish Statute) was issued, a mere week after the German Reich established its own in the occupied zone. It defined Jews residing on the French mainland (known as the "métropole" or "metropolitan France") and in Algeria by race, based on the religion of their grandparents. In Algeria, as in metropolitan France, Jews were forbidden to exercise any public functions: they could no longer work for the government, teach except in Jewish schools, serve in or work for the military, or even be employed by businesses with public contracts. Moreover, Jews were not allowed to participate in political activities. There were a few exceptions, mainly for Jewish war veterans. Sadly, "the first country to emancipate Jews abandoned the revolutionary, egalitarian principles stemming from 1789."[12] The law established a

definition of "Jewishness" and excluded those so defined from higher levels of public service and such professions as the media and teaching that would influence public opinion. Jews were also banned from the judiciary, military, banking, and real estate. According to Adam Rayski, the new statute was totally French in origin and initiated a process of exclusion and isolation, which preceded equivalent German initiatives in the occupied zone:

> The speed with which exclusionary laws for the Jews were passed leads one to believe that these plans were already in the works with certain politicians well before the debacle. A veritable legislative fever took hold of Vichy's "justice" apparatus. From the beginning of October 1940 to September 16, 1941, the *Journal Officiel* would publish 26 new laws, 24 decrees, 6 orders and 1 regulation concerning the Jews. "No one ran out of work in France: 57 laws and regulations in less than a year, that's quite an anti-Semitic performance," wrote one observer at the time.[13]

Most tellingly, the Vichy statute exceeded even the Nazis' own "Nuremberg Laws" enacted in 1935: "The Vichy 'legislators,' by introducing the criterion of 'race' [based on grandparentage] went further than those at Nuremberg, whose principal consideration was whether one observed the Jewish religion."[14]

Later, after the Liberation, when Marshal Pétain was put on trial for treason in 1945, some of his defenders pleaded that he had tried to protect French-born Jews from

Figure 3 An array of posters announcing the arrival of Marshal Pétain to Marseilles. Courtesy of the United States Holocaust Memorial Museum.

the roundups, deportations, and death camps. Recent documents have surfaced that point the finger directly at Pétain and no one else, including the occupying Germans.[15] The unpublished document, now at the Mémorial de la Shoah in Paris, implicates the marshal directly. In it the original text, which would have spared French Jewish descendants of those born or naturalized before 1860, had been crossed out. According to Serge Klarsfeld the penciled annotation was clearly that of Pétain, which, he stated, directly incriminates the Vichy leader for targeting all Jews in France, whether of French ancestry or not.[16] A closer examination of the draft of the document and its published official version in the *Journal Officiel* yields some intriguing insights. The consequential Article 3, in its final text, eliminates the possibility of being exempted by reason of naturalized or native birth in France, yet somewhat surprisingly does offer protection to French Jews who served in the First World War if holding a combatant's identity card or having served in the brief campaign of 1939–40 or having been decorated with the Legion of Honor for military service. Such recognition was perhaps a hollow tribute to those French Jewish soldiers who had served with Pétain at Verdun.

The Vichy statute was firmly French and not beholden to the German one in that it offered different details and interpretations. Ousby points out:

> The crucial differences, moreover, identify Vichy's anti-Semitic policy as harsher than the policy the Germans began by adopting in the Occupied Zone. The German ordinance defined Jewishness by religious practice; the Vichy statute spoke more broadly of race. The German ordinance defined Jews as people having more than two Jewish grandparents who had observed Jewish religious practices. The Vichy statute included people with only two Jewish grandparents who had been Jewish by race, if they themselves were also married to a Jew. In other words, someone who did not count as a Jew in the Occupied Zone could count, and suffer, as a Jew in the Southern Zone.[17]

In his review of the recently published book on the Holocaust by Timothy Snyder, *Black Earth*, in the September 21, 2015 *New Yorker*, Adam Gopnik references this anomalous situation for the Jews in France: "In France, recently arrived eastern Jews, without friends or history, were easier to get at and deport than native French ones"[18] and then rightly concludes that "Vichy passed anti-Jewish laws and hastened its Jews toward [the concentration camp of] Drancy almost before they were asked for."[19]

While not exonerating the Vichy regime for the creation of the Jewish Statute, recent scholarship has begun to point to a more complex scenario. In his article, "The Genesis of Vichy's Jewish Statute of October 1940," published in *Holocaust and Genocide Studies*, French scholar Laurent Joly questions whether the statute owed more to "German pressure" or to domestic concerns and traditions. Challenging the American historian Robert Paxton's claim (see his *Vichy France, Old Guard, New Order, 1940-1944*) four decades ago that the statute was mainly inspired by France's indigenous antisemitism, Joly argues that German policy in the occupied zone "nearly disappears from the field of analysis."[20] He further contends that

what was at work in the early months of the Vichy government was a xenophobic antisemitism that sought to denaturalize recent Jewish immigrants or, at the very least, apply a strict quota for granting citizenship. The final version of the statute, drafted at the end of September and the beginning of October, "was the interaction between certain key ideas of French antisemitism and the requirements imposed by the threat of a possible German 'intervention in this question.'"[21] More revealingly, Joly reminds us that the Vichy laws were not conceived in a vacuum. Instead, they reflected currents and trends that were in the wind beginning with the Nazi regime in 1933. He concludes,

> Articulated in this manner, the law of October 3, 1940, was not without similarities to measures adopted elsewhere in Europe during the previous decade. Three Nazi laws targeting Jews were promulgated in 1933: in April, "non-Aryan" civil servants were dismissed in accordance with the law on the "Restoration of the Civil Service"; in September, the law of the Reich Culture Chamber excluded non-Aryans completely from German cultural life; and in October, newspaper editorial positions were placed off limits to Jews (with the exception of those who had fought at the front during the First World War). These were essentially the same sectors that the French state decided to de-Jewify in 1940.[22]

Just one day after the first Vichy statute, on October 4, 1940, Vichy prefects were authorized to intern foreign Jews in special camps or have them moved to remote areas under police surveillance; many were interned in Gurs, a camp that had been established for Spanish Loyalist refugees fleeing Franco at the end of the Spanish Civil War. Soon thereafter, internees were forced into labor brigades where large numbers died of hunger, cold, and disease. In the German zone, by October 18, all Jewish businesses had to be registered, with expropriation and Aryanization of management and control to follow. A significant episode around this time exposed the fissures and understandable self-preservation instincts for many Jews in Vichy-controlled France. In November 1940, Jacques Helbronner, a distinguished and well-connected French Jew, sensing an approaching storm that would imperil the native-born French Jews, took action by proposing a "counter-statute." Helbronner was vice president of the Israelite Central Consistory, created by Napoleon in 1808 to administer and institutionalize the Jewish religion in France. He would later go on to become its president. The Consistory, now installed at Vichy, submitted to Pétain and the *Conseil d'État* (Council of State) a bill that would replace the previous month's "statut des Juifs." Clearly, its intention was to act as a lightning rod that would deflect the wrath of the new law away from the native Jewish community toward foreign-born Jews. Carefully and judiciously navigating the treacherous waters of Vichy's call for national renewal, Helbronner essentially appealed for a singularly xenophobic interpretation of the statute:

> The government's objective is "not to engage in racial policy but eliminate from public and political life the foreign elements who had not assimilated themselves

> to 'l'esprit national.'" The reaction against the [prewar] invasion of foreigners is expressed by an understandable anti-Semitism of which the victims are today families who had long resided in France. The legislation [October 1940] has understood the origins of the problem and the series of laws promulgated since July directed at the foreigners and . . . it is in this sense that they have to be understood.[23]

This is a remarkable statement by a high-level Jewish official allowing for "an understandable anti-Semitism" to placate or pander to Vichy government officials. Furthermore, Helbronner then offered a pseudoscientific explanation for the origin of longstanding Jewish communities in Western Europe, asserting that they had not descended from the ancestral homeland of Palestine but from "Latins, Gallo-Romans, Iberians, and Franks."[24] Despite Helbronner's many appeals and a longstanding friendship with Pétain himself, his pleas fell on deaf ears, and he and his wife were eventually deported to Auschwitz where they perished in November 1943. The distinction for many French Jews between themselves (*Israélites français*) and foreign Jews (*Juifs étrangers*) was meaningful and significant to themselves, at least initially.

There was a lull in new legislation by Vichy through the winter months of 1940–41. However, March 20, 1941 brought the creation of a special department for Jewish Affairs, the *Commissariat Général aux Questions Juives* (General Commission on Jewish Questions). Its function was to implement existing decisions with regard to Jews, propose further legislation as needed, supervise the liquidation of Jewish property where "legally prescribed" in accordance with the needs of the national economy, and, most ominously, take all police measures with regard to the Jews.[25] Meanwhile in the zone under German control, Jews were forbidden to engage in a wide variety of occupations and were forced to limit public contact as of April 26, 1941. Under the direction of SS *Hauptsturmführer* Theodor Dannecker, Paris police began compiling a card index of Paris Jews by name, street, occupation, and nationality.[26] In May, and then August 1941, the first roundups began. On June 2, 1941, a Vichy statute basing itself on measures taken by the Germans in the occupied zone replaced that of October 3, 1940. It defined Jews more rigidly and set in motion the expropriation and "Aryanization" of Jewish property while also calling for registration of the Jews. "Jews were those people who, *irrespective of religion*, had at least three grandparents of Jewish race, or two if the spouse was also Jewish."[27] The same day, another Vichy law extended the census of Jews to the whole of France, Algeria, and other French overseas possessions.

On July 22, 1941, another Vichy law calling for a census of Jews and Jewish property was promulgated, and the general commissioner was given wide latitude in the process of expropriating that property and those businesses.[28] Some months later, on November 17, 1941, a new law governed the acquisition by Jews of real estate and "forbade them to hold, even on lease exceeding nine years, any property other than that intended for their personal dwelling, or that of their parents and children, or that which was to be used exclusively for the practice of their profession."[29] On November 29, 1941, a Vichy decree was issued establishing the *Union Générale des Israélites de France* (UGIF).

Its purpose was to provide representation for all Jews vis-à-vis state authorities; all existing Jewish organizations were abolished except for religious associations. Eighteen French-born Jews would govern the organization with nine coming from each zone and under the authority of the General Commissariat for Jewish Affairs. Ironically, this organization actually facilitated the roundups and served as a direct conduit for the Nazis from France to the death camps.

Increasingly, the repression and persecution were becoming equally harsh in both zones. In December 1941, the Paris Police Prefect issued a decree requiring any person giving shelter to a Jew, even for a single night, to declare that fact to the police under pain of serious punishment.[30] Recent Nobel Prize for Literature Laureate Patrick Modiano captured the fear and panic of that unusually cold and snowy December exceptionally well in his 1997 historical novel, *Dora Bruder*. The narrative was based on the actual story of a Jewish adolescent's plight as a runaway from a Catholic boarding school, the Saint-Coeur-de-Marie in Paris, where she had been placed by her parents in May 1940. Her escape took place December 14, 1941. Dora, the only child of Eastern European immigrant parents, somehow managed to survive in the city while eluding capture by the authorities for a number of months. She was only sixteen and had not been part of the October 1940 census of Paris Jews.[31] Modiano writes:

> The last month of the year was the darkest and most stifling period that Paris had experienced since the beginning of the Occupation. The Germans decreed a curfew beginning at 6 p.m. between December 8–14 as a reprisal for two attacks. Then there was the roundup of seven hundred Jews on December 12; the one billion franc fine imposed on Jews on December 15. And that same morning, the seventy hostages shot at Mont Valérien. On December 10 an ordinance by the Paris police chief required French and foreign Jews from the Seine region to submit to a periodic check by showing their ID's with the "Jewish" stamp.[32]

By February 1942, new decrees were published prescribing curfew, yellow-star armbands, and badges.[33] At the same time, plans for deportation to the East began. Paris' Jews were forbidden from leaving their residence after 8:00 p.m. and changing their address.

The pace of arrests, new anti-Jewish measures, and deportation intensified in spring 1942. On March 28, 1942, the first *Nacht und Nebel* (Night and Fog) deportation trains left Drancy for Auschwitz. Several weeks later, April 17, 1942, Modiano records that Dora Bruder returned home from her four-month odyssey as a runaway to learn that her father, Ernest, had been imprisoned in Drancy one month earlier.[34] On July 2, 1942, the Vichy Council of Ministers, with Pétain's approval, decided to make a distinction in their zone between French and foreign Jews, providing a shred of hope to French Jews who would remain under the sovereignty and protection of the French government.[35] During two frightful days, July 16–17, 1942, 12,884 non-French Jews, including women and children, were rounded up. Those without families were sent to Drancy. The remaining 9,000, including 4,000 children, were penned up in deplorable

conditions in the Vélodrome d'Hiver before being shipped off to Auschwitz. Dora Bruder was picked up by French gendarmes on July 19, 1942, and later transferred on August 13 to Drancy.[36]

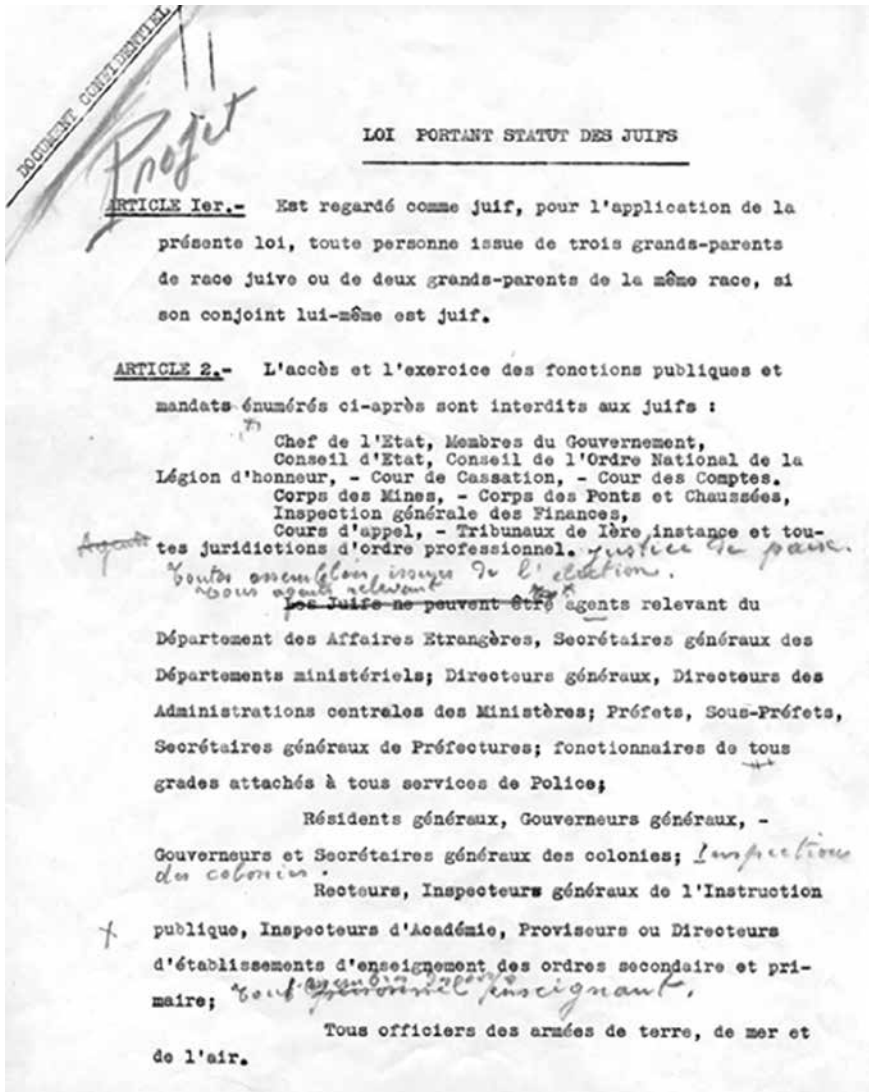
German authorities pressured Laval and Vichy to hand over foreign-born Jews in the unoccupied zone and to take additional measures against both French and foreign-born Jews. Accordingly, in August 1942, 15,000 Jews in the unoccupied zone were handed over to the Germans for deportation.[37] Many of them were already in internment camps ("*camps d'hébergement*") that had been created to house Spanish refugees from the civil war and "enemy aliens" considered to be mostly the Jewish and anti-fascist refugees who had fled Nazism. Vichy did not close those camps. It should be pointed out as well that Vichy also enacted racial laws in its French territories in North Africa, including Morocco, Algeria, and Tunisia, where there was a substantial Jewish presence.[38] In his monumental 1991 work, *The Vichy Syndrome: History and Memory in France since 1944*, Henri Rousso reports that "the French governmental apparatus, together with parties in the pay of the Germans, abetted the deportation of 76,000 French and foreign Jews, fewer than 3 percent of whom survived."[39]

On September 18, 1942, Dora and Ernest Bruder were put on a train convoy to Auschwitz.[40] After November 11, 1942, the Germans began rounding up Jews throughout France following the Anglo-American landings in North Africa as part of Operation Torch, resulting in the effective demise of the Vichy government and German control of the entire country. Drancy was finally liberated on August 24, 1944. The number of French native or foreign-born Jews deported, executed by the Germans, or who perished in internment camps is estimated at 90,000, about 25 percent of France's prewar Jewish population. Tellingly, about 32 percent (24,500) were French native Jews, compared with 68 percent (56,500), who were foreign.[41] Rousso further comments: "France had been a refuge for Jews before the war, so the wartime anti-Semitism of the French government had a terrible demoralizing effect."[42]

In the end, it is painfully evident that the short-lived Vichy regime contributed enormously, both directly and indirectly, to the Shoah as it is called in French, not only by their own policies, but also by their collusion with Nazi Germany's stated goal of a Final Solution. With its tradition of liberty, political asylum, and religious tolerance, forged in the French Revolution and maintained despite strong crosscurrents for a century and a half, France's so-called National Revolution brought endless shame and opprobrium to a country that is still searching for answers and explanations for their "Années noires."

Addenda:

TABLE 1: DRAFT VERSION OF THE FIRST TWO PAGES OF THE "STATUTE OF JEWS" WITH ANNOTATIONS ATTRIBUTED TO PHILIPPE PÉTAIN:



DOCUMENT CONFIDENTIEL

Projet

LOI PORTANT STATUT DES JUIFS

ARTICLE Ier.- Est regardé comme juif, pour l'application de la présente loi, toute personne issue de trois grands-parents de race juive ou de deux grands-parents de la même race, si son conjoint lui-même est juif.

ARTICLE 2.- L'accès et l'exercice des fonctions publiques et mandats énumérés ci-après sont interdits aux juifs :

Chef de l'Etat, Membres du Gouvernement, Conseil d'Etat, Conseil de l'Ordre National de la Légion d'honneur, - Cour de Cassation, - Cour des Comptes. Corps des Mines, - Corps des Ponts et Chaussées, Inspection générale des Finances, Cours d'appel, - Tribunaux de 1ère instance et toutes juridictions d'ordre professionnel. Justice de paix.

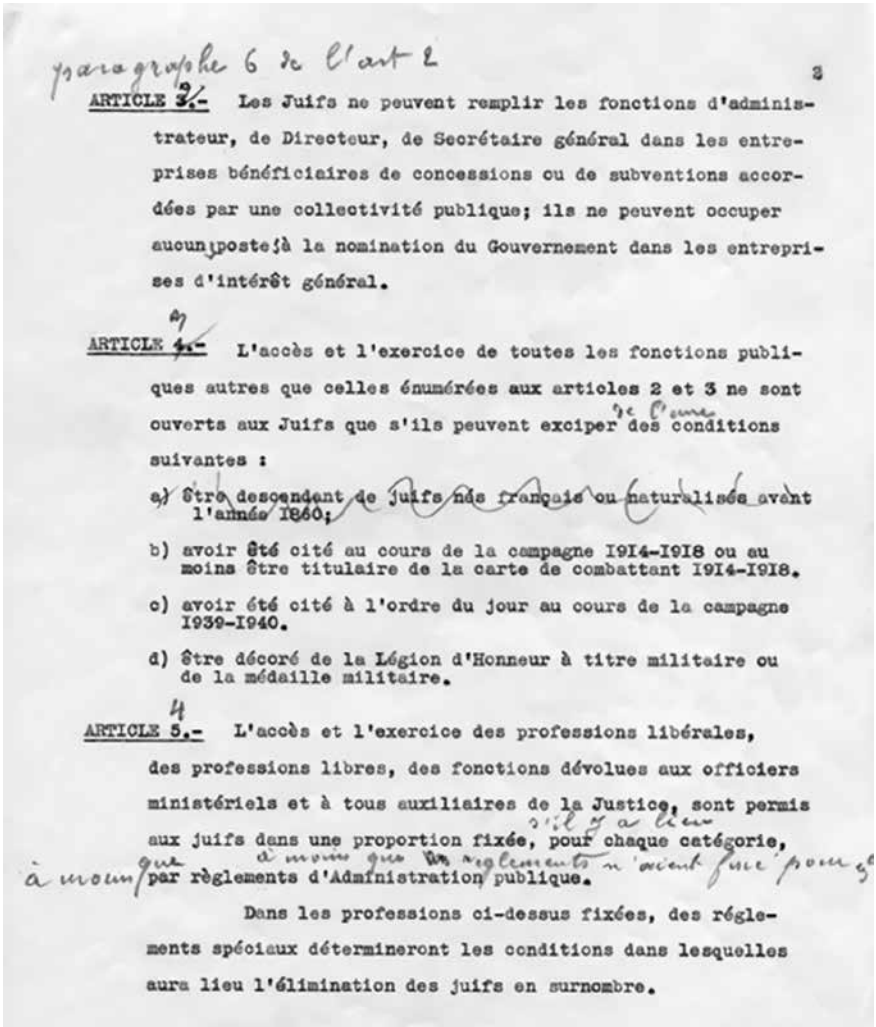
Toutes assemblées issues de l'élection.

~~Les Juifs ne peuvent être~~ agents relevant du Département des Affaires Etrangères, Secrétaires généraux des Départements ministériels; Directeurs généraux, Directeurs des Administrations centrales des Ministères; Préfets, Sous-Préfets, Secrétaires généraux de Préfectures; fonctionnaires de tous grades attachés à tous services de Police;

Résidents généraux, Gouverneurs généraux, - Gouverneurs et Secrétaires généraux des colonies; Inspection des colonies.

Recteurs, Inspecteurs généraux de l'Instruction publique, Inspecteurs d'Académie, Proviseurs ou Directeurs d'établissements d'enseignement des ordres secondaire et primaire; Tout personnel enseignant.

Tous officiers des armées de terre, de mer et de l'air.



paragraphe 6 de l'art 2

3

ARTICLE 3.- Les Juifs ne peuvent remplir les fonctions d'administrateur, de Directeur, de Secrétaire général dans les entreprises bénéficiaires de concessions ou de subventions accordées par une collectivité publique; ils ne peuvent occuper aucun poste à la nomination du Gouvernement dans les entreprises d'intérêt général.

ARTICLE 4.- L'accès et l'exercice de toutes les fonctions publiques autres que celles énumérées aux articles 2 et 3 ne sont ouverts aux Juifs que s'ils peuvent exciper de l'une des conditions suivantes :

a) Être descendant de juifs nés français ou naturalisés avant l'année 1860;

b) avoir été cité au cours de la campagne 1914-1918 ou au moins être titulaire de la carte de combattant 1914-1918.

c) avoir été cité à l'ordre du jour au cours de la campagne 1939-1940.

d) Être décoré de la Légion d'Honneur à titre militaire ou de la médaille militaire.

ARTICLE 5.- L'accès et l'exercice des professions libérales, des professions libres, des fonctions dévolues aux officiers ministériels et à tous auxiliaires de la Justice, sont permis aux juifs dans une proportion fixée, pour chaque catégorie, s'il y a lieu à moins que par règlements d'Administration publique.

Dans les professions ci-dessus fixées, des règlements spéciaux détermineront les conditions dans lesquelles aura lieu l'élimination des juifs en surnombre.

Translation of the draft version of the first two pages of the "Statute of the Jews" (penciled-in changes or crossed out words are highlighted and were adopted in the final version)

LAW BEARING ON THE STATUTE OF THE JEWS (**Confidential Document**)

We, Marshal of France, head of the French State,
With the approbation of the council of ministers,
Decree:

Article I—Is considered to be a Jew, for the application of the present law, any person born of three grandparents of the Jewish race or two grandparents of the same race if his or her spouse is Jewish.

Article 2—Access to and the exercise of public functions and responsibilities enumerated hereafter are forbidden to Jews:

1° Head of State, member of the Government, Council of State, Council of the Legion of Honor, Appeals Court, Exchequer, Mines, Bridges, and Roads, Inspector General of Finance, the Courts and Tribunals. (added: Justices of the Peace, all jurisdictions of a professional nature and all those chosen by election.)

2° (Crossed out: Jews cannot be . . .) Employees of the Ministry of Foreign Affairs, Executive Secretaries of Ministerial Departments, Executive Directors, Directors of the Ministries' Central Administrations, Prefects, Sub-Prefects, Executive Secretaries of the Prefectures, Inspectors General of Administrative Services for the Interior Ministry, Civil Servants at all Levels for the Police Departments.

3° Residents General, Governors General, Governors, and Executive Secretaries for the colonies, (added: Inspector for the colonies.)

4° (Eliminated from the draft version: Rectors, General Inspectors for Public Instruction, Academy Inspectors, Principals, or Directors of Teaching Establishments for Primary and Secondary Education and replaced with: Members of the teaching profession.)

5° Officers of the Army, Navy, and Air Corps.

6° Administrators, Directors, Executive Secretaries in Corporations benefiting from concessions or subventions granted by a public agency, positions of Governmental responsibility in Corporations for the Public Good.

Article 3—Access to and the exercise of all public functions other than those enumerated in Article 2 are open to Jews only if they fulfill (added: one of the following conditions):

(Crossed out in the final version: To be a descendant of Jews born or naturalized in France before 1860.)

a. To be a holder of the 1914–1918 Combatant Card or to have received an honorable citation for the 1914–1918 campaign;
b. To have received an honorable citation for the 1939–1940 campaign;
c. To have been decorated for military service by the Legion of Honor or to have been awarded a military medal.

Article 4—Access to and the exercise of other professions and of ministerial officers and auxiliary legal duties are allowed for Jews (added, but not in final version: based on a fixed quota system, if established, for each category,) unless the public administration has established its own quota system. In this case, the same regulations will determine the conditions by which an excess number of Jews will be eliminated.

Article 5—Jews will not under any circumstances exercise any of the following professions:

Executive director, Manager, Editor of a Newspaper, Review, Agency, or Periodical, with the exception of publications of a strictly scientific nature.

Director, Administrator, Manager of Corporations who are involved with the production, filming, distribution, and presentation of films; directors, cameramen, scriptwriters, administrators, managers of theaters and movie theaters, producers of shows, directors, administrators, managers of all businesses relating to broadcasting.

Regulations from the public administration will determine for each category the circumstances under which the public authorities can guarantee respect by the interested parties for the restrictions announced in this article, as well as the penalties that may be incurred.

Article 6—Under no circumstances can Jews be part of organizations responsible for representing the professions targeted in articles 4 and 5 of the present law or be involved with its application.

Article 7—Jewish civil servants targeted in articles 2 and 3 will cease and desist from their duties within two months of the promulgation of the present law. They will be able to make a claim for their retirement pension if they meet the requirements in terms of length of service; for a proportional retirement pension if they have at least fifteen years of service; those unable to meet these requirements will receive a salary for a period of time that will be determined, for each category, by a regulation of the public administration.

Article 8—By decree made individually and duly considered by the Council of State, Jews, who in the fields of literature, science, the arts, have given exceptional service to the French State, may be exempted from the bans provided for in the present law.

These decrees and their justifying authority will be published in the *Journal Officiel*.

Article 9—The present law is applicable in Algeria, the colonies, countries under protectorate, and mandated territories.

Article 10—The present act will be published in the *Journal Officiel* and executed as law of the French State.

Executed at Vichy, October 3, 1940.
PH. PÉTAIN
By the Marshal of France, head of the French State.
(Signatures follow.)

TABLE 2:THE FINAL PUBLISHED VERSION:

LOI

PORTANT STATUT DES JUIFS.

Nous, maréchal de France, chef de l'Etat français,

Le conseil des ministres entendu,

Décrétons :

Art. 1er. — Est regardé comme juif, pour l'application de la présente loi, toute personne issue de trois grands-parents de race juive ou de deux grands-parents de la même race, si son conjoint lui-même est juif.

Art. 2. — L'accès et l'exercice des fonctions publiques et mandats énumérés ci-après sont interdits aux juifs :

1° Chef de l'Etat, membre du Gouvernement, conseil d'Etat, conseil de l'ordre na-

tional de la légion d'honneur, cour de cassation, cour des comptes, corps des mines, corps des ponts et chaussées, inspection générale des finances, cours d'appel, tribunaux de première instance, justices de paix, toutes juridictions d'ordre professionnel et toutes assemblées issues de l'élection.

2° Agents relevant du département des affaires étrangères, secrétaires généraux des départements ministériels, directeurs généraux, directeurs des administrations centrales des ministères, préfets, sous-préfets, secrétaires généraux des préfectures, inspecteurs généraux des services administratifs au ministère de l'intérieur, fonctionnaires de tous grades attachés à tous services de police.

3° Résidents généraux, gouverneurs généraux, gouverneurs et secrétaires généraux des colonies, inspecteurs des colonies.

4° Membres des corps enseignants.

5° Officiers des armées de terre, de mer et de l'air.

6° Administrateurs, directeurs, secrétaires généraux dans les entreprises bénéficiaires de concessions ou de subventions accordées par une collectivité publique, postes à la nomination du Gouvernement dans les entreprises d'intérêt général.

Art. 3. — L'accès et l'exercice de toutes les fonctions publiques autres que celles énumérées à l'article 2 ne sont ouverts aux juifs que s'ils peuvent exciper de l'une des conditions suivantes :

a. Etre titulaire de la carte du combattant 1914-1918 ou avoir été cité au cours de la campagne 1914-1918;

b. Avoir été cité à l'ordre du jour au cours de la campagne 1939-1940;

c. Etre décoré de la légion d'honneur à titre militaire ou de la médaille militaire.

Art. 4. — L'accès et l'exercice des professions libérales, des professions libres, des fonctions dévolues aux officiers ministériels et à tous auxiliaires de la justice sont permis aux juifs, à moins que des règlements d'administration publique n'aient fixé pour eux une proportion déterminée. Dans ce cas, les mêmes règlements détermineront les conditions dans lesquelles aura lieu l'élimination des juifs en surnombre.

Art. 5. — Les juifs ne pourront, sans condition ni réserve, exercer l'une quelconque des professions suivantes :

Directeurs, gérants, rédacteurs de journaux, revues, agences ou périodiques, à l'exception de publications de caractère strictement scientifique.

Directeurs, administrateurs, gérants d'entreprise ayant pour objet la fabrication, l'impression, la distribution, la présentation de films cinématographiques; metteurs en scène et directeurs de prises de vues, compositeurs de scénarios, directeurs, administrateurs, gérants de salles de théâtres ou de cinématographie, entrepreneurs de spectacles, directeurs, administrateurs, gérants de toutes entreprises se rapportant à la radiodiffusion.

Des règlements d'administration publique fixeront, pour chaque catégorie, les conditions dans lesquelles les autorités publiques pourront s'assurer du respect, par les intéressés, des interdictions prononcées au présent article, ainsi que les sanctions attachées à ces interdictions.

Art. 6. — En aucun cas, les juifs ne peuvent faire partie des organismes chargés de représenter les professions visées aux articles 4 et 5 de la présente loi ou d'en assurer la discipline.

Art. 7. — Les fonctionnaires juifs visés aux articles 2 et 3 cesseront d'exercer leurs fonctions dans les deux mois qui suivront la promulgation de la présente loi. Ils seront admis à faire valoir leurs droits à la retraite s'ils remplissent les conditions de durée de service; à une retraite proportionnelle s'ils ont au moins quinze ans de service; ceux ne pouvant exciper d'aucune de ces conditions recevront leur traitement pendant une durée qui sera fixée, pour chaque catégorie, par un règlement d'administration publique.

Art. 8. — Par décret individuel pris en conseil d'Etat et dûment motivé, les juifs qui, dans les domaines littéraire, scientifique, artistique, ont rendu des services exceptionnels à l'Etat français, pourront être relevés des interdictions prévues par la présente loi.

Ces décrets et les motifs qui les justifient seront publiés au *Journal officiel*.

Art. 9. — La présente loi est applicable à l'Algérie, aux colonies, pays de protectorat et territoires sous mandat.

Art. 10. — Le présent acte sera publié au *Journal officiel* et exécuté comme loi de l'Etat.

Fait à Vichy, le 3 octobre 1940.

PH. PÉTAIN.

Par le maréchal de France, chef de l'Etat français.

(*Suivent les signatures.*)

Translation of "Statute of the Jews"—Official Document

LAW BEARING ON THE STATUTE OF THE JEWS

We, Marshal of France, head of the French State,

With the approbation of the council of ministers,

Decree:

Article I—Is considered to be a Jew, for the application of the present law, any person born of three grandparents of the Jewish race or two grandparents of the same race if his or her spouse is Jewish.

Article 2—Access to and the exercise of public functions and responsibilities enumerated hereafter are forbidden to Jews:

1° Head of State, member of the Government, Council of State, Council of the Legion of Honor, Appeals Court, Exchequer, Mines, Bridges, and Roads, Inspector General of Finance, the Courts and Tribunals, Justices of the Peace, all jurisdictions of a professional nature and all those chosen by election.

2° Employees of the Ministry of Foreign Affairs, Executive Secretaries of Ministerial Departments, Executive Directors, Directors of the Ministries' Central Administrations, Prefects, Sub-Prefects, Executive Secretaries of the Prefectures, Inspectors General of Administrative Services for the Interior Ministry, Civil Servants at all Levels for the Police Departments.

3° Residents General, Governors General, Governors, and Executive Secretaries for the colonies, Inspector for the colonies.
4° Members of the teaching profession.
5° Officers of the Army, Navy, and Air Corps.

6° Administrators, Directors, Executive Secretaries in Corporations benefiting from concessions or subventions granted by a public agency, positions of Governmental responsibility in Corporations for the Public Good.
Article 3—Access to and the exercise of all public functions other than those enumerated in Article 2 are open to Jews only if they fulfill one of the following conditions:

a. To be a holder of the 1914–1918 Combatant Card or to have received an honorable citation for the 1914–1918 campaign;
b. To have received an honorable citation for the 1939–1940 campaign;
c. To have been decorated for military service by the Legion of Honor or to have been awarded a military medal.

Article 4—Access to and the exercise of other professions and of ministerial officers and auxiliary legal duties are allowed for Jews, unless administrative regulations have established a quota system. In this case, the same regulations will determine the conditions by which an excess number of Jews will be eliminated.

Article 5—Jews will not under any circumstances exercise any of the following professions:

Executive director, Manager, Editor of a Newspaper, Review, Agency, or Periodical, with the exception of publications of a strictly scientific nature.

Director, Administrator, Manager of Corporations who are involved with the production, filming, distribution, and presentation of films; directors, cameramen, scriptwriters, administrators, managers of theaters and movie theaters, producers of shows, directors, administrators, managers of all businesses relating to broadcasting.

Regulations from the public administration will determine for each category the circumstances under which the public authorities can guarantee respect by the interested parties for the restrictions announced in this article, as well as the penalties that may be incurred.

Article 6—Under no circumstances can Jews be part of organizations responsible for representing the professions targeted in articles 4 and 5 of the present law or be involved with its application.

Article 7—Jewish civil servants targeted in articles 2 and 3 will cease and desist from their duties within two months of the promulgation of the present law. They will be able to make a claim for their retirement pension if they meet the requirements in terms of length of service; for a proportional retirement pension if they have at least fifteen years of service; those unable to meet these requirements will receive a salary for a period of time that will be determined, for each category, by a regulation of the public administration.

Article 8—By decree made individually and duly considered by the Council of State, Jews, who in the fields of literature, science, the arts, have given exceptional service to the French State, may be exempted from the bans provided for in the present law.

These decrees and their justifying authority will be published in the *Journal Officiel*.

Article 9—The present law is applicable in Algeria, the colonies, countries under protectorate, and mandated territories.

Article 10—The present act will be published in the *Journal Officiel* and executed as law of the French State.

Executed at Vichy, October 3, 1940.
PH. PÉTAIN
By the Marshal of France, head of the French State.
(Signatures follow.)

TABLE 3: KEY DATES

Vichy Zone Laws	German-Occupied Zone Laws
July 17, 1940: entry into public service jobs restricted to those with French fathers	
July 22, 1940: commission established to review all naturalizations granted since 1927	**August 12, 1940**: *Judenreferat* (police branch for Jewish Affairs) established in the occupied zone
August 27, 1940: repeal of the *loi Marchandeau*	**September 27, 1940**: first *statut des Juifs* by Reich
October 3, 1940: *statut des Juifs*	**September 1940**: German order forbidding return to occupied zone of all "Jews, half-castes, and Negroes"
October 4, 1940: Vichy préfets authorized to intern foreign Jews in special camps or move to remote areas under police surveillance	**October 18, 1940**: all Jewish enterprises had to be registered with expropriation and Aryanization to follow
March 20, 1941: creation of special department for Jewish Affairs, the *Commissariat Général aux Questions Juives*	**April 26, 1941**: Jews forbidden to engage in a wide variety of occupations and were forced to limit public contact
June 2, 1941: a statute basing itself on measures taken by the Germans in the occupied zone (cf. **October 18, 1940**) replaced the statute of **October 3, 1940**	**May and August 1941**: first roundups begin
July 22, 1941: law calling for a census of Jews and Jewish property	
November 17, 1941: law governed the acquisition of real estate by Jews	
November 29, 1941: Vichy decree establishing the UGIF	**December 1941**: Paris Police Prefect issued a decree requiring any person giving shelter to a Jew even for a single night to declare that fact to the police under pain of serious punishment
	December 12, 1941: 1,000 French lawyers and doctors rounded up for deportation to the East as reprisal for unsuccessful assassination attempt on a German Air Force officer
	February 1942: decrees prescribing curfew, yellow-star armbands, and badges begin. Plans for deportation get underway
	March 28, 1942: first deportation trains leave Drancy for Auschwitz

(*Continued*)

Vichy Zone Laws	German-Occupied Zone Laws
July 2, 1942: Vichy Council of Ministers, with Pétain's approval, decides to make distinction in their zone between French and foreign Jews. French Jews would remain under sovereignty and protection of French government	**July 16–17, 1942**: 12,884 non-French Jews, including women and children, rounded up
August 1942: 15,000 Jews in unoccupied zone handed over to Germans for deportation	
Vichy decree n°1775 of **September 5, 1943**, denaturalized a number of French citizens, in particular Jews from Eastern Europe	

After **November 11, 1942**, the German military, SS, police, and French Milice began rounding up Jews throughout France in the wake of the Allies' Operation Torch in North Africa.

The Drancy detention camp was liberated on **August 24, 1944**; the number of Jews deported, executed by the Germans, or who perished in internment camps is estimated at 90,000.

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5

The Judenräte and the Nazi Racial Policies: Ethical Issues in Claude Lanzmann's *Last of the Unjust* (2013)

Yvonne Kozlovsky Golan

The general atmosphere in Israel of the 1950s regarding the image of the Judenrat was negative, without exception. People argued that the Council members were collaborators with the Nazis. The survivors, mostly members of Zionist youth movements in the ghettos, who arrived in Israel in the early years of the state, began sweeping vilification of the Judenräte, from Ephraim Barash (Bialystok) through Czerniaków (Warsaw) and Rumkowski (Łodz). The general accusation was that all of the Judenräte preferred collaborating with the Germans over working together with the Zionist youth movements, and consequently created difficulties for the Jewish resistance fighters. This stance was adopted wholeheartedly by the political parties in the new state of Israel, fitting perfectly with the perception held by Israelis in the 1950s that the Jews of Europe went "like sheep to the slaughter."

The change in the sociopolitical atmosphere in Israel came only with the Kastner trial.[1] From a discussion of an individual, the trial quickly became a public argument on principle, and a piercing discussion on Jewish resistance and the Judenrat. The verdict was that Kastner had "sold his soul to the Devil." This phrase became a well-known expression in Israel, which intensified the already negative attitude from the Jewish public toward the Jewish leadership during the Holocaust.

Rabbi Dr. Benjamin Murmelstein of Vienna was the last surviving member and head of the Terezin Judenrat—the Jewish Council of Elders, established by the Nazis in each ghetto to manage and to mediate all of the steps in the "Final Solution," partly so that the Jews could be blamed for their own demise. He was not allowed to testify in the Eichmann trial in Jerusalem, although Murmelstein had worked very closely with Eichmann, and contacted Israeli authorities with a proposal to provide testimony, which was rejected as "unneeded." The main reason was that the prosecution believed that his testimony would have been interpreted as an admission—in the eyes of the Israeli and world public—that the Jews collaborated with the Nazis, and the prosecution had no intention of allowing him to be heard. He wrote a book, but no one treated it seriously and it did not reach a broad public.[2]

Claude Lanzmann interviewed Murmelstein in 1975, but archived the three-hour film—distilled from nine hours of footage—until 2013. Originally, the interview was to become part of his monumental work, *Shoah*. But at the time, Lanzmann felt that it was inappropriate to include Murmelstein's controversial figure in the film.[3] Lanzmann's recording of Murmelstein's public testimony and its release at a much later date reveals the mysterious story of the Judenräte, from a long-term perspective of what occurred in Theresienstadt in contrast to the short-term viewpoint of events expressed during the Eichmann trial in 1961. Murmelstein's visual testimony is likely to change the opinion formulated from research based on secondary sources or learned opinions on the Judenräte: that the Jewish Elders worked for the Nazis in the ghettos and were at their disposal (e.g., as expressed by Raul Hilberg,[4] Gerald Reitlinger,[5] or Hannah Arendt).[6] Some scholars thought that the issue should not be raised for discussion so as not to impugn the dead and in light of the complex role each Elder of the Jews had to play.[7]

Lanzmann's interview is presented during an era in which visibility trumps essence—whether onscreen in film or television, smartphone or computer, whether in museums, cultural institutions, or galleries[8]—two shifts in consciousness are being generated in the viewer: the moving image dances across the digital format, bearing its emotional, cognitive, and narrative load. It changes in verisimilitude from a 2D photograph into a coherent narrative of an event and historical insight. The projected image captures body and form, infiltrating the viewer's brain, crossing the barriers of criticism and distinction. Fiction takes on the concreteness of the pure truth, what Hayden White has called "metahistory."[9] Clearly, therefore, cinematic or other audiovisual materials, such as Alain Renais's film *Night and Fog* or Ophuls's *The Sorrow and the Pity,* constitute testimonies constructing human memory and restructuring the historical consciousness of the past. Such materials do so even more strongly when creating the experience of the Holocaust and Holocaust research.[10]

Lanzmann's *Last of the Unjust* presents three "protagonists" who raise ethical issues: first, Murmelstein as chief protagonist, represents himself alone, without witnesses to support or contradict his statements; second, Murmelstein's relationship with Lanzmann, the film's alter ego, whose mid-1970s' portrait was shaped by his mission and artistic output; and the third—Murmelstein's "demonic" side and his contacts with Eichmann. The film is therefore a film of "doubles," a kind of look into the mirror.[11]

But we must remember that a filmmaker is not a history-scholar, and as "readers" of his works, it is proper that we consider him as a visual-historian. We must treat the primary sources he gathered very seriously since they are materials seen by the public for the very first time. The stance, research, and camera work are in the "talking heads" format commonly used in Yad Vashem's filmed firsthand testimony from survivors and in Spielberg's Holocaust Oral History Project. The filming, therefore, can serve as testimony in the full sense of the word. Such testimony from a former Judenrat head is unprecedented, and cross-examination is impossible. (Murmelstein passed away in 1989.)

In Lanzmann's previous film, he was careful to avoid using archival materials, arguing that only solid testimony from survivors should be taken into consideration, in

contrast to historians who consider survivor testimony as a secondary one. However, in *Last of the Unjust* he does use archival material to tell the story of Theresienstadt, but in practice, he manages the historical narrative with his camera. In this sense, *Last of the Unjust* is both a continuation and a divergence from Lanzmann's oeuvre: from a formal viewpoint, the film moves between past and present. The filmmaker/director visits the site of the Theresienstadt ghetto and reads aloud from a page of its history from texts supplying the historical context to Murmelstein's narrative[12] or taken from Murmelstein's own book, *Theresienstadt: Eichmann's Model Ghetto,* which he published in Italy in 1961.[13]

Unlike his other films, Lanzmann places himself at center stage telling the Jewish tragedy like a Greek chorus. The scenes seem unformulated, such as the unsuccessful shots at the beginning with the noise of the trains preventing him from reading his text for several minutes.[14] For the first time, Lanzmann gives in to pathos—as in his visit to the Prague synagogue or the Yom Kippur prayer or the *Kaddish* for the dead sung by the cantor in Vienna's restored synagogue, clearly intended to prepare the viewer emotionally to meet the man who was the rabbi of Vienna's largest Jewish district at the time of the Anschluss: Rabbi Dr. Benjammin Murmelstein. The strongest part of the film is precisely the interview with Murmelstein, and it is doubtful whether such an overly demonstrative tone serves the film well, especially since it is in utter contrast to the practical tone of the interview.[15]

The relationship between the interviewer and interviewee in the film is seen first of all in their visual reflection, obvious through the cinematography. At first, the camera is hesitant, a bit distant, as if it is an eye seeking an object on which to focus. Lanzmann seems at first to recoil from his subject. The camera then transitions from the medium shots to a more intimate shot with a medium close-up focusing on Murmelstein's face. His full face, with its double chin, red stains on the neck, protruding tongue, and loud voice add their visual interpretation to the figure of the man accused by the Viennese and the inmates of the Theresienstadt as an informer and collaborator.

The description of the bond and the trust formed between Eichmann and "his Jew" are unsettling to both interviewer and viewers, moving between disgust at the interviewee to have empathy for the human being who had a gun to his head to make him carry out what was asked of him. "For me, it was serious. I had to do it. It was very serious. . . . And although I needed three hours, the job had to be done in one. Because of that, it was very serious."

As the interview proceeds, and Murmelstein proudly explains his actions against the backdrop of documentary photographs and artwork made in the camp to illustrate life in the ghetto, and the bond between interviewer and interviewee becomes closer. Lanzmann, who experienced the terror of the site and becomes captured by the horror of his own narrative, begins to empathize with Murmelstein and begins to identify with and understand the absurdity of his situation. He has still not forgotten his role of the interviewer and poses more difficult questions, but their physical closeness as seen by the camera reflects their growing emotional rapprochement.

In the second part of the film, they talk about life in the "model ghetto." Lanzmann enters the frame, his back to the family, and filmmaker and subject share the same sofa. Gradually, Murmelstein creates a convincing impression of sincerity: his painful

truth, testifying to the tremendous difficulty in making decisions under coercion; his rational, emotionless explanations create the illusion that he did the right thing; his chronological and historical recital provides a case-by-case explanation of the Germans' methods and basic assumptions about the role of the Judenrat. He explains, "The Germans were concealing the truth from other countries . . . . If possible; the Jews should handle the whole departure process. It was to take place in such a way that the Jews deported themselves." Thus he intended to state that the Jewish leadership was entrapped by the Nazis into assisting in the "resettlement" so that the Jews would blame the leadership with the act and lessen the Nazis' blame.

Murmelstein's own explanations on the Nazi method cause both viewer and interviewer to understand his messages: his part in the "resettlement" was part of the sophisticated stratagem of the Reich, the role was tailored to the Judenrat, and it was impossible to escape from it: "I was a marionette who had to operate itself in a place where there was no room to act or with anyone." In a high, excited tone he stated, "Where Theresienstadt begins, the lie begins, too. People cannot rid themselves of that lie. It was all a lie, from top to bottom . . . . The town 'as if,' inspired by the famous 'as-if' philosophy. The town 'as if.' One acts 'as if.' One didn't eat, one didn't work, nothing like that. It was all made up."

Lanzmann confronted him with what people said about him: that he acted like a dictator to people, starved them, and embellished the town so it would look like an ideal place before the Red Cross visit in 1942, as the Nazis wanted. "The circus that took place during their first visit, was conducted by the one who was in charge at the time, Eppstein," Murmelstein corrects him, reminding Lanzmann that he was in charge of the technical and health departments.

Murmelstein is well aware of the criticism of him after the Nazi propaganda film *Hitler Gives the Jews a City* was made in 1944, and said that he compares himself to Sancho Panza since "he's a calculating realist . . . while others tilt at windmills." He argues that he contained typhus by forcing people to be vaccinated as a condition for receiving food, and thus protected the residents. "Embellishing" the town also led to the film being made in 1944: "The ghetto had to continue to exist, to have people visit, to know about it and so it would be impossible to destroy it." He continued: "Eichmann wanted to make something of Theresienstadt. If we could bring him to show Theresienstadt to someone, that would be an anchor. Theresienstadt could no longer vanish. It was a safety factor . . . . If they showed us, they couldn't [kill us]. Logical! That was my logic and I hope that my logic was right."

Nevertheless, he does admit that the preparations for the film led to the transport of the TB patients and the disabled to Auschwitz, since they did not "fit in with the scenery" that was planned. With deep regret, he states, "I must admit that in this sphere, the responsibility still lies heavily on me today." Because Edelstein and Eppstein with whom he could have shared responsibility were no longer among the living, it was clear to him, and now clear to the interviewer and viewers as well, that he paid the price for his survival, not only because of his own deeds, but also because of the actions of all three. He is the only living Elder and so the only one left to blame. Edelstein and Eppstein were shot in the back of the head. Perhaps this, too, is the paradoxical logic that was behind the decision of the head of the Warsaw Ghetto

Judenrat Adam Czerniaków's decision to commit suicide: if he remained alive, even if he were to help the Jews, he would be accused of collaboration and blamed for the deaths.

Murmelstein's tone is mechanical and lacking in emotion. Lanzmann attacks him for this: "Anyone would think you feel nothing as you talk about Theresienstadt." Murmelstein chokes up. "It was hell," he says. "I had to find ways for the ghetto to survive." At first, he decided to take initiatives to banish the despair. "When the community leaders were ordered to appear in the commandant's office, they came in pairs, so that one of them would be a witness. Each leader understood German differently," Murmelstein argued. When typhus broke out, he "revised" the medical reports to report diarrhea. "We have to defeat the enemy with his own weapons."

Murmelstein's testimony touches upon several acute historical and moral issues accompanying the history of the memory and representation of the Holocaust, while at the same time breaks out of them. The strength as well as the weakness of the film is that Murmelstein is the last Elder, and the only one whose testimony was filmed in full. Everything he said in 1975 revealed what had been repressed by "the source" itself. His nine hours of interviews edited down to three hours, is a personal defense. Under the circumstances, no prosecutor could counteract it. On the other hand, his testimony is rare and sheds light on dark corners, which may be illuminated through the perspective of time. That was the perspective missing in 1961 during the Eichmann trial, which constituted the reason for many differences of opinion for and against the trial, which we know from many studies written over the years since. It would therefore be correct to see Murmelstein, the last Elder of the Jews, as a test case for the role of the head of the Judenrat, held by other individuals who represented Jewish communities throughout Nazi-occupied Europe.

The opening text quotes Lanzmann: "These long hours of interviews, rich in firsthand revelations, have continued to dwell in my mind and haunt me. I knew that I was the custodian of something unique but backed away from the difficulties of constructing such a film. It took me a long time to accept the fact that I had no right to keep it to myself." Murmelstein states in the film that his talks with Lanzmann, thirty years after the war, were "a later epilogue to my activities during that period." The film raises ethical questions about the interviewer and issues of ethics and morality, Murmelstein's responsibility and guilt. Lanzmann, the interviewer, the man searching for the truth, is supposed to be objective, and not identify with the interviewee. He is supposed to ask the difficult questions and sharpen unclear areas which need a deeper explanation.

Benjamin Murmelstein, the subject, is presented as a solo player with no witnesses, without any ghetto survivors to disprove or support his claims. His testimony is subjective, although as the last of the leaders to survive the Holocaust, his testimony in the perspective of so many years, is reminiscent of the testimony provided by Josephus Flavius on the Wars of the Jews, who like Murmelstein was a prisoner, and who "voluntarily" served his masters in exchange for the "freedom" to live. Their testimonies were vital to understand the historical process of the national catastrophe by an enemy intent on destroying the Jews. The essential difference between the two is the issue of responsibility and blame in relation to their communities. Josephus's

testimony found a stage, but no one wanted to hear Murmelstein's, which is why they knew so little about him.[16]

He opens by describing the double meaning of his job, which was not properly understood by those who judged him as harshly as possible: first, he argues that he could not testify as the Elder of the Jews since there was no such category. "It was an invented job." He criticizes the way the state of Israel behaved during the Eichmann trial and explains that there was a basic misunderstanding of the role of the Jewish Elders. The attitude to the Judenrat was based mainly on the distinction between those who died, such as Edelstein and Eppstein, and those who survived. The Council heads who died were either cleared of blame and considered heroes or remembered as criminals and collaborators, but obviously were not present to defend themselves.

And yet, questions are inevitable: Could Murmelstein be blamed for his conduct? Was it subversive? Did he collaborate or manipulate to preserve his community and survive personally? How can we examine whether he made his decisions himself or with his colleagues?

There are many differences of opinion among historians and philosophers. Some historians, like Raul Hilberg, argued that the Jews collaborated with their enemies in order to survive, as they had throughout all of Jewish history.[17] Hilberg's arguments—based only on German documents which were available at the time of writing and the history of Jewish efforts in medieval times to "get along" with non-Jews—aroused rage at the comparisons between different eras with their different circumstances. Gerald Reitlinger, in *The Final Solution,*[18] argued that Eastern European Jewry has always been characterized by acceptance of its fate, which leads to paralysis during crisis: this is how the Nazis managed them for their own needs. Philosopher Hannah Arendt put forth an even more extreme argument when as a non-historian she wrote about the Eichmann trial based only on her personal impressions. She argued that the Judenräte knowingly and actively collaborated with the Nazis and should pay the price. If the Jewish leaders had agreed on creating chaos instead of organizing themselves in the service of the Nazis, there would have been fewer Jews murdered.[19]

These three thinkers were considered the most important in their field at the time, and for many years their books were the basic texts in teaching about the Holocaust. Their influence was obvious for many years. A short time after their books appeared, Nafali Blumenthal joined the prosecution and argued that the Judenräte were not knowingly criminal, since the Nazis fooled them to the extent that they could not distinguish the true purpose of their appointment. Nevertheless, they became one of the agencies in the killing machine.[20] (Documents from the Jewish Councils, undiscovered or in closed archives immediately after the war but which have become available in recent years, show evidence to the contrary.)

Already by the beginning of the persecution processes, the leaders understood the ruse but were helpless to provide escape from the noose. Within their coercive circumstances, they attempted to find ways to alleviate their coreligionists' stressful situation, not always successfully, but with good intention. At least, they innocently thought they were doing good, or, as historian and survivor of Theresiendstadt Ruth Bondy wrote, some did collaborate while others resisted, depending on the place in which they were placed by the Nazis. Publication of Isaiah Trunk's book on the

Judenräte[21] provided a gradual release from the generalized stigma of all of the Jewish Councils as a whole. Aharon Weiss's differential view took into consideration the various stages of the Nazi policy, the personality and conduct of the leaders, and the options (if any) remaining at their disposal.[22] Dan Michman of Yad Vashem explained the Judenräte's structure and lack of concrete authority, attempting to respond to and explain the actions of the Elders.[23] He concluded that it was impossible to judge them, since they acted in such a horrific historical era. Or, as Primo Levi wrote: "In general, what was the significance of collaboration? Providing the names of Jews to be deported? Or the Sonderkommando putting Jews into the gas chambers? Who of the two supported the Final Solution?"[24]

Assuming that these issues are not capable of being examined, measured, or judged, we can still look carefully at how the Elders were suited to the role of the Judenrat through the issue of blame and responsibility. The question was asked whether the issue of blame is at all relevant to the Judenrat or to the survivors in general. Is there blame here? Is there criminal culpability? Does death clear one from blame?

Murmelstein's detailed testimony, even if providing only a small fragment of the Judenrat's overall role, raises the issue of the Judenrat's responsibility: Does the terror that paralyzes the victim and makes him accept his loss make him worthy of the title "collaborator"?[25] Is it even possible to define the limits of responsibility of the individual to his community? Can there be responsibility in certain situations, and is it possible to judge actions in these situations?[26] Is Arendt's argument true that without Jewish cooperation there would have been fewer Jewish deaths?[27]

Figure 4 Group portrait of the administrative staff of the Kielce ghetto Judenrat (Jewish Council) in their office. Courtesy of the United States Holocaust Memorial Museum.

We shall examine these issues through four thinkers: responsibility and altruism according to Emmanuel Levinas; the release from responsibility according to Hannah Arendt ("the banality of evil"); and the individual's responsibility for the collective according to Karl Jaspers and Primo Levi.

Responsibility

Levinas bases his theory on phenomenology,[28] arguing that absolute responsibility for others is incumbent upon each human being. The fundamental human experience is structured on responsibility for others whether we want it or not. When we see the face of the other, we intuitively identify things familiar to us, but there will always be a mysterious part of the person facing us which we will seek to know. This curiosity already binds us to the person and makes us responsible for the other. Levinas argues that this is what distinguishes human beings from animals. Humans are social creatures, essentially responsible for one another. Usually, they do not kill others without a specific reason. In contract, to be responsible for the other needs no reason: it occurs naturally because we are human beings. This is the meaning of humanism, an absolute human value according to Levinas, built into the human being as an infinite value of responsibility for one's fellow man, even more than the responsibility of a person to the self (altruism).

Lanzmann refers to this in the context of asking Murmelstein what he did for his community, that is, those for whom he was responsible vis à vis the Nazi authorities, and brings up his cooperation with the Germans in embellishing the town in 1942 for the Red Cross visit, and for the propaganda film of 1944. Despite the difficult circumstances, he decided to do his best to preserve the ghetto. For Murmelstein, embellishing the ghetto meant keeping the residents alive a while longer. Murmelstein had his eyes not on the future but only on the present. He did not abandon his people but attempted through stratagems to manage the ghetto, confront the commandant, and achieve what he could. The question of responsibility becomes more acute when Murmelstein's actions are examined through the question of "how": How did he fulfill his responsibility, and is he guilty as a collaborator for doing so?

Jaspers focused on the question of German guilt for war crimes and the horrors of war. He argued that the issue should be examined according to four types of guilt: *criminal, political, moral,* and *metaphysical.* His essay did not deal with Jewish collaborators; Arendt was furious at this, and argued that the four parameters should also be applied to Jews. Although her statements seem logical on the surface, they require a deeper study.[29] Assuming that Murmelstein was living in two worlds, as prisoner and guard, he should, therefore, be included in one or more of the categories. Yet before doing so, we should clarify whether it is at all possible to quantify "cooperation" and "action" and to judge them. To the same extent, how should we address abstract concepts such as "extermination" and "humanism"? How should we refer to testimony as objective truth if only the dead are the ones who could have testified about their torture and annihilation?

Survivor and author Yehiel De-nour (writing under the pen-name "Ka-Tsetnik") stated at the Eichmann trial that Auschwitz (like all of the camps and ghettos) was "a different planet." Thus, he argued, that not only should every discussion of Auschwitz enfold the assumption that no one who was not in a death camp can attempt to understand or perceive fully what went on there. Above all, he demanded that people recognize that language was too poor to encompass the experience. Israeli philosopher Yeshayahu Leibowitz considered the Shoah "a horror without meaning and without sense." As for testimony, Giorgio Agamben, in *Remnants of Auschwitz: The Witness and the Archive* (1998), bases himself on the concept of the differend, discussed in writings by Jean-François Lyotard, who presented the logical paradox of testimony on the gas chambers, arguing that all of this is the testimony of "those who are left."[30]

Scholars of history engaged in historiography of the Holocaust became confused when faced with the philosophical discourse on these issues. Arguments about the insufficiency of language and inability to "explain" events sound entirely rational and even convincing. Boaz Neumann devoted an entire book to his attempt to decode the internal language of the camp, the Nazi logic of the camp, its language, and conduct. The conclusion was that even if it were possible somehow to elicit statements and explanations for the lives and deaths of those present in the spaces of the ghettos and death camps, the concealed remains greater than the revealed.[31] Thus, too, the search for the concept of "guilt" among the victims seems like a quest without a chance of success.

Criminal guilt

Criminal guilt refers to a person's responsibility to obey the law, the breach of which sees him punished in court. Jaspers referred to the Nazis and their deeds only when setting his parameters. No law applied to Theresienstadt since it was the territory within a territory of the Nazi state. There was no written codex; laws were invented ad hoc.[32] The laws of Theresienstadt were unique unto itself and changed daily, with temporary validity only.

To "judge" Murmelstein, the concept of "collaboration" must be defined in the context of "resistance" (armed resistance of members of underground groups that led in the end to the destruction of ghettos such as in Warsaw or Nieśwież), or "standing up" in the meaning of dying for the sanctification of life and preserving humanity under all conditions. Which of these concepts was more successful in saving lives, and which was the right thing to do at any specific time? What were his motives?[33]

By what law should Murmelstein be judged? Today's laws are irrelevant to that time, or are yesterday's laws irrelevant today? There is a need to present the concealed laws to understand that once upon a time the actions he took were "legal," according to Nazi law, and at times "criminal" if he bypassed it and took action to subvert the Nazis' orders.[34] Furthermore, we must examine the context of Murmelstein's actions and circumstances. Was it even possible to make wise decisions in a place of draconian laws that he did not make but to which he was subject? Murmelstein was a prisoner

like all of the other Jews. He carried out the Nazis' orders to the letter of the law, but not always in the spirit of their law, and was not afraid to answer back.

In contrast to the Nazis, he did not have the choice or the option except to use secrecy or trickery. Arendt put forth her argument about "the banality of evil" and therefore releases the Nazis from guilt, instead blaming the Jews for their own fate. As a liberal modernist, she normalizes all of the crimes made as part of Nazism.[35] But Murmelstein, who knew Eichmann personally for years, states: "The fact is that the image of Eichmann during the trial, was totally distorted. For example, Mrs. Arendt's theory about Eichmann's banality was laughable!" and he mocks her. Eichmann's actions were not at all banal: he consciously planned the looting of Jewish assets several times, gaining huge amounts of money in a "Colombian operation." Murmelstein describes the bureaucratic net that Eichmann designed for the Jews, taking their money and withholding exit visas through various ploys. When they complained about Eichmann's fraud, the response was that "the party program said, 'Jew, perish,' not 'Jew, travel' (*jude freke, nicht jude freise*)."

Murmelstein calls Eichmann "a demon." The tribunal in Jerusalem was unable to prove that Eichmann knew that the concentration camp whose construction the Judenrat was to supervise was designated for death. Murmelstein and his colleagues were present at Eichmann's speech at Zarzecze (and not at Nisko as the Israelis thought). There he spoke explicitly about the objective of the camp. Because Murmelstein was not invited to testify at the trial, where he could have given decisive evidence, they called Eichmann (hinting at Arendt) that he was "a banal, little man" and allowed him to be seen in such a light. Murmelstein describes his relationship with Eichmann as having been "correct" and well mannered. Eichmann preferred to work with Murmelstein over Edelstein and Eppstein, which led to suspicions about him from the start. It is clear, therefore, that the complicated relationship with Eichmann also built up Murmelstein's leadership vis à vis his community as well as vis à vis the prisoners in Theresienstadt. On the other hand, this was not necessarily to the detriment of the other two leaders.

Murmelstein describes the ugly camp politics, and becomes angry as he talks about how Edelstein and Eppstein "watched each other's back." But their caution did not help them manage the day-to-day affairs. They feared Murmelstein, thinking that he would go to Eichmann behind their backs. Murmelstein argued that he was more practical than the others were, more sober and realistic.

Lanzmann's film succeeds in presenting Murmelstein as a dominating personality, even in his advanced age. When asked why he did not escape when it was possible, hinting that he fell in love with his position, he responds: "I had offers from England several times to emigrate there, with job offers, too." His body language expresses distress, and finally he admits that he returned to Vienna because he felt he had a mission to accomplish. On the surface, these statements are in his favor, since he did not know what would be his fate, or perhaps this shows that he had a good relationship with Eichmann and he trusted him not to harm him. However, it is difficult to accept such an explanation since he witnessed the worthless Nazi "promises" to the Jews of Vienna. He actually did receive two Certificates—immigration visas to Mandatory Palestine-Eretz Israel—and gave them to one of his students.

About his relationship with Eichmann, Murmelstein explains that as they were both Austrian, he clearly preferred to work with an Austrian rather than the other two elders, and it was not due to flattery, as his colleagues claimed. There was a struggle between the Gestapo and the SS, as each wanted to appoint "his" Jew as the community representative. The Gestapo disliked Murmelstein and preferred Dr. Josef Loewenherz. The ethical argument arising from Murmelstein's statements is that no normal relationship could have existed as long as he had a gun at his head (figuratively and literally at times). Murmelstein was forced to neutralize Eichmann as best as he could, using his own tactics and understandings.

Here we must examine and focus on the meaning of the "banality of evil." In democratic regimes with a Weberian governmental order, operating in a commonly accepted bureaucratic framework with a clear, orderly hierarchical structure, with division of roles and decentralized responsibility and authority according to rank, distinguishing the bureaucrat from the bureaucracy could have been correct. However, neither Murmelstein nor Eichmann operated within such an organizational environment. Laurence Rees provides an extensive description of the organizational chaos during the period of the Reich, the decisions made on behalf of Hitler by various agencies working at cross-purposes. Matters in the ghettos, concentration camps, and death camps were even more chaotic.[36] Eichmann, as one of the senior officials, was among those who created the chaos as part of the framework they constructed and managed cynically for personal gain without being accountable to anyone. This is the source of their criminal guilt, in terms of Jaspers's categories. Furthermore, the Nazi "organization" was forced upon Murmelstein and so he operated in the chaotic space in an organization in which decisions changed daily. In order to survive and fulfill his job, he zigzagged between official orders, commandants' whims, taking responsibility as he saw it, and taking care of the needs of his ever-diminishing community.

It is therefore difficult to blame him for the absolute acceptance of the Nazi directives, since there was no absolute definition of these directives and they were open to interpretation. In this context, it is possible to argue that Murmelstein bears criminal guilt, but it does not leave Eichmann blameless. After all, the end result was not at all banal.

Political guilt

Political guilt refers to the responsibility of the individual in relation to the country to which he belongs, and the punishment when the country is defeated. Jaspers (like the Americans) does not believe in collective guilt of the entire system but in individual guilt.[37] At the Nuremberg war-crimes trials, individuals were tried for their own actions, while the German state was not tried. Thus, Nazis whose personal guilt was not proven were acquitted, although they were part of the system. Jaspers does not mention the Jews as the objects of the "Final Solution" put forth by the German government. Arendt demanded that he mention the Jews and the Jewish leadership (the Judenrat). She did not demand that the Germans and their helpers—as system and society—bear responsibility for the survivors in the present and future, and refused

to distinguish between countries that committed crimes and criminal liability for the survivors in the present and the future.

Murmelstein was a stateless person since he was stripped of his citizenship and had no other country; he took action where the code of laws was extra-legal, heterotopic, and nonexistent.

Moral guilt and metaphysical guilt

While criminal guilt and political guilt are public—and the atonement for them takes place in the public space—moral guilt and metaphysical guilt are private: atonement for these crimes takes place on the level of the conscience. In the case of moral guilt, Jaspers states that the individual must address his own moral failure after the act, and failures of this type may be judged only by the individual's conscience.[38] The immediate context in which Jaspers formulated his idea of moral guilt was the Germans' choice to subject their individual conscience to the demands of the state and obey it. In contrast to the commonly heard version of the war criminals and Arendt's argument, who found the bureaucracy and not the bureaucrat guilty, that Eichmann and others were only clerks, Jaspers states that following orders is insufficient to release them from moral guilt, even though it is impossible to judge them in court. Murmelstein had no choice as to whether to subject himself to the Germans or not; circumstances forced him to do so. "The Jewish Council is a category which changed according to circumstances. Problems differed in each camp, but deep down it was the same. The Jewish Council was between the hammer and the anvil, between the Jews and the Germans." "Are you saying that you were more successful than others?" asks Lanzmann. "Can one say that you had a taste for power?" "I don't want to be hypocritical by saying that I didn't, that's not true. But the accusation that I abused my power, that's. . . that's a step too far. . . . But what was the reason I 'abused' my power? . . . To help people."

Metaphysical guilt refers to a human being's responsibility toward humanity, reflected in cases in which the person does nothing and allows horrors to take place. In all matters referring to metaphysical guilt, the human being justifies himself only before his God. The place of moral and metaphysical guilt lying outside the sphere of punishment by the legal system creates an individual aspect for crimes committed on behalf of the collective. In this case, the moral blame lies like a dark shadow on the conscience of the guilty and haunts their memories, at least Jaspers hoped so immediately after the German defeat.

Consequently, he rejected the idea of "collective blame," but did demand of the Germans a stringent soul-searching. The nearly absolute absence of the Jewish victims from his book is therefore not by chance. His purpose was to create a free public space in which Germans who did not deny their identity could come to terms with the past so as to preserve both the individual and the national dimensions of guilt. Murmelstein states the opposite: humanity is to blame for the situation, and humanity is the one who should have been responsible for its actions. In actual practice, the situation was "every man for himself," and the responsibility fell on the victims instead of on the Nazi leadership. Individuation of the German collective into individuals disperses the

blame and distances the testimony from the truth, as if saying after spreading the ashes of the murdered in the river that it was never human ashes.

As for the entire issue of metaphysical guilt, according to which the human being is answerable only to God, Arendt argues that there is a "banality of evil," thus releasing people from responsibility for humanity. At the Eichmann trial she called him "a nobody," based on his own testimony that he was only a "specialist," an expert on emigration and transportation only. His arguments were disproved in subsequent years by Murmelstein, who argued that Eichmann was no emigration expert, but studied the subject from summaries of basic data that Murmelstein and his assistants brought to him. Changing direction, she attempts to understand the source of evil stating, "by refusing to be a human being, Eichmann absolutely waived the most unique human quality—the ability to think. As a result, he lost his ability of moral judgment," meaning, we cannot judge him for this. Nevertheless, according to this index, we can say that it is impossible to judge anyone who crossed the line and committed a banal act of evil. She added that the "lack of ability to think enabled many normal people to carry out evil deeds on a tremendous scale, never before seen in the past." She did not blame the Jews for their own destruction.

Armed revolt in Theresienstadt was impossible. However, perhaps there is something between revolt and collaboration, and "only in this sense do I argue that perhaps some of the Jewish leaders could have behaved differently." It is extremely important to present these questions because the role that the Jewish leaders fulfilled provides the most earthshaking insight in understanding the general moral collapse that the Nazis caused to respectable European society. However, according to this logic, if they did evil and collaborated with Eichmann, then they, like him, only followed orders, and, like him, absolved themselves of their responsibility. In this context, Primo Levi wrote: "The privileged prisoners were a minority in the camp's population, but in contrast, they represent the vast majority of the survivors."[39]

He explains further: "In a place where the minority rules, or a single person rules the many, it is there that privilege grows and flourishes, and even against the desire for power." The concentration camp as a test case can be a good "laboratory" to examine the status of those in control and their role. According to Levi, the mixed status of prisoners who were functionaries constituted the backbone of the camp, and yet, it was the most disturbing characteristic. This is the "gray zone," with its undefined borders, "a separation zone yet one which unifies the two camps of masters and slaves."[40] "The gray zone of protection and collaboration grows out of many roots: the narrower the area of control, thus it needs more external aides."[41]

According to Levinas's philosophy, it would have been expected of Murmelstein that he would be attuned to his fellow man in the full sense of the word. Although under ideal conditions perhaps we could have expected this, it was unreasonable to ask him to fulfill such a demand. The situation in which Murmelstein found himself did not enable the phenomenological gaze. It was a mechanism which perpetuated dehumanization, erased the face and the gaze. It operated in an environment with multiple identities and many faces: today's murderer could be the angel who tomorrow would save children. The living was a dead-alive creature living on "another planet." If so, then the major question is choice and responsibility not between good and evil, not

between blame and willing collaboration as might be expected, but the choice between life and death.

Murmelstein describes life in the ghetto as a constant striving for life in a place where the command to implement "the final solution to the Jewish problem" dominated. Eichmann worked within a modern system that limited his own freedom of choice, but which gave free rein to his dark desires. The banality of his deeds, according to Arendt, sociologists, and historians in the immediate postwar years, sloughed off responsibility when it defined the Nazi system as a modern faceless collective, and individualized it in such a way that it was impossible to accuse a specific person of criminal action, and, of course, not to expect that person to admit to blame.

According to them, and as also implied by Jaspers, Murmelstein—as the only surviving member of the Judenräte—is expected to bear the blame as the representative of the Devil who assisted in the slaughter of his countrymen. The film shows him as the main figure in the tragedy whom human history has put to the test. Murmelstein summed it up by saying, "They all were martyrs but not all were saints." All of the leaders were involved in criminal acts and politics; the borders of morality were expanded or contracted as needed. At times children were transported, at other times the ill and disabled; one's conscience was the compass of truth at any given moment.

All of Jaspers's four parameters are suitable for denouncing Murmelstein in a well-structured and orderly system, but the deeds took place in a chaotic system Eichmann made sure to have in place. Therefore, according to the principles of modernism, which make no distinction between evil deeds and evil policy, Murmelstein's guilt lies in what Primo Levi called the "gray zone," a zone of relativity on the thin line between life and death.[42]

We must locate the symbolic and quintessential figure of Murmelstein on this continuum. According to his logic, Murmelstein finds justification in his actions with chilling sincerity. His autosuggestion was so intensely powerful that he succeeded in convincing Lanzmann. At the beginning of the interview, the director recoiled from his respondent, but at the end, considered him a friend. Now they are side by side; Lanzmann places his hand on the sofa armrest, and seems to embrace Murmelstein. They then set out together to walk through the Roman Forum.

The "Verdict"

We can summarize the film as a psychological drama between two protagonists: researcher and researched. Their process of becoming better acquainted turned into a fast friendship. As a legal drama of a single accused versus the ghosts of his past, the millions who watched and will watch his testimony are searching for the correct formula with which to observe events, yet it is doubtful it can be found. Lanzmann turns into judge instead of prosecutor, finding Murmelstein "not guilty" in the following statement in the film's opening silent titles:

> Murmelstein had a striking appearance and was brilliantly intelligent, the cleverest of the three [Elders] and perhaps the most courageous. Unlike Jacob Edelstein,

> he could not bear the suffering of the elderly. Although he succeeded in keeping the ghetto going until the final days of the war, and saved the population from the death marches ordered by Hitler, the hatred of some of the survivors came to be focused upon him. He could easily have fled. He refused; preferring to be arrested and imprisoned by the Czech authorities after a number of Jews accused him of collaborating with the enemy. He spent 18 months in prison before being acquitted of all charges. . . . All the Elders of the Jews met a tragic end. Benjamin Murmelstein is the only Jewish Council Elder who survived the war, making his testimony infinitely precious. He does not lie; he is ironic, sardonic, and harsh with others and with himself.

Murmelstein also felt that the director was open to what he had to say. It seems that he projected his relationship with Eichmann onto Lanzmann, who was captivated by his personality. Like him, he scorns Arendt's description of the essential nature of the Holocaust and for using historical standards in addressing the Holocaust without taking other factors into consideration.

Marek Lilla stated that Lanzmann violently objected to what Arendt said on understanding the Holocaust: "To understand totalitarianism is not to condone anything, but to reconcile ourselves to a world in which these things are possible at all." Lanzmann stuck to his refusal to understand what happened, feeling that this was his only ethical pathway, as Primo Levi wrote about the "law" at Auschwitz taught to him by an SS guard upon arrival at the camp: "Hier ist kein Warum": "Here there is no 'why.'"[43]

This makes Lanzmann's difficulty clear. Could Lanzmann have felt manipulated by Murmelstein, or perhaps he truly believed in Murmelstein's sincerity, and agreed with the latter that he had acted as best he could in a chaotic world, from the Nazis' rise to power through liberation? But we may still wonder whether Murmelstein applied his same manipulative skills to his colleagues and to Eichmann at the time. Is this how he succeeded in surviving? On the other hand, perhaps as Lanzmann felt, the audience of 1975 was not ready to see Murmelstein's testimony with the historical objectivity he would have liked. No matter what the reason, Lanzmann's *Last of the Unjust* leads us from the labyrinths of the past to contemporary times, and back and forth.

The interview ends with filmmaker and friend taking a tour of the Arch of Titus to remember the man who razed Jerusalem and captured Josephus Flavius. Murmelstein had published an anthology on Josephus in 1938, in which he summed up his subject: "His divided and ambiguous nature turned him into a symbol of the Jewish tragedy."

6

High Treason in the People's Court: Postwar Plans of Fr. Max Josef Metzger, Peace Activist, and Helmuth James Graf von Moltke of the Kreisau Circle

John J. Michalczyk

To further curtail constitutional law following the Reichstag Fire Decree of February 1933 and the March 1933 Enabling Act, as well as other legal restrictions on German society, especially on Jews and Communists, the Third Reich government established Special Courts, (*Sondergeriche*). One such court was the People's Court (*Volksgerichtshof*), a result of the April 24, 1934 Law Amending Criminal Law and Procedure. This court, formally set up on May 2, 1934, first under the presidency of Fritz Rehn (July 13 to September 18, 1934) and then Otto Georg Thierack (1936 to August 1942),[1] would in itself become the key link in the chain of "legal" terrorist acts by the Nazi Party as it attempted to eradicate the "enemies of the State." The goal was to crush any opposition to the National Socialist movement. Hitler appointed only the most loyal devotees of the Nazi Party to the court.[2] During his term as judge-president, Roland Freisler (August 20, 1942 to February 3, 1945) stripped the Constitution of any remaining rights of the alleged criminals while sentencing thousands to their untimely death.

The jurisdiction of the People's Court encompassed any act of treason, which in essence meant any deviation from viewing the Nazi Party as sovereign. The swastika-bedecked courtroom was set up with three presiding judges and two Nazi officials to ensure the application of National Socialism in its judgments. The People's Court served as the absolute power of the Third Reich, the Supreme Criminal Court in the nation. Party doctrine and mandates functioned as so-called guidelines of the law with nonconformist judges being prohibited from serving in the court. The suspected criminal entering the court, flanked by two police officers, rarely possessed any legal rights. Justice was left at the entrance to the court, for it heard no appeals, with the verdict of "guilty" almost certainly predetermined, foremost during wartime. Very rarely, an acquittal would be handed down, but soon afterward the Gestapo assured that the acquitted would be interned in a concentration camp. Hitler demanded of his judges absolute severity in sentencing. The verdicts in the courtroom, filled with

hand-picked Nazi officials, officers, and sympathizers, ignored the facts of the case while character witnesses were never called to testify on behalf of the accused. The court appointed the defense attorney, further eliminating the right of the alleged traitor to a fair trial. This injustice led to the executions by the People's Court of approximately 5,000–6,000 assumed political criminals whose attitudes toward the Reich, at times more often than their actions, led to their demise.

In August 1942, Hitler appointed a rising star in the legal system, Roland Freisler, as chief of the 27 courts and 258 court judges, all of whom interpreted the law according to Nazi policies. The Führer wanted someone without a conscience, and Freisler appeared ideal for this position. In Hitler circles, Freisler earned the name "the old Bolshevik" due to his time as a Russian POW and camp commissar following the First World War. In the early formation of the National Socialist Party Freisler switched his allegiance from a pro-Bolshevik belief and, like a new religious convert, became totally committed to, even fanatical in, the ideological struggle of the evolving National Socialist Party. In the 1930s, the ambitious and calculating attorney Freisler rose precipitously through the ranks of the legal system. With Adolph Eichmann, Reinhard Heydrich, and other Nazi administrators, he represented the Ministry of Justice in the Wannsee Conference on January 20, 1942 as Reich state secretary (*Staatssekretär*), a position he held at the time of his appointment to the People's Court. His legal theories, often based on antisemitic beliefs, reinforced racist ideals and buttressed the Nazification of the court system.

As president of the People's Court, Freisler took on the role of judge, jury, and often prosecutor. Alluding to Daniel Goldhagen's concept, he became one of "Hitler's willing executioners." His badgering and humiliating of the alleged criminals paralleled the

Figure 5 President Roland Freisler of the People's Court. Courtesy of the Bundesarchiv.

infamous show trials of Stalinist Russia, while his trail of death sentences earned him the label of "the Hanging Judge" or "Raging Roland" ("*rasende Roland*"). According to John Toland, Hitler referred to Freisler as "our Vishinsky," alluding to judge and legal theorist Andrey Vishinsky who presided with great vitriol over Soviet show trials and also represented the Soviets at the Nuremberg Trials.[3] In late 1938, Freisler witnessed firsthand Vishinsky in action during a show trial in Moscow. Robert D. Rachlin succinctly describes Freisler's similar treatment of the perceived traitors: "Freisler abandoned all pretense of judicial impartiality, cast off any veneer of judicial dignity, and remorselessly hectored his hapless defendants with a savagery that actually embarrassed some of the Nazi leadership."[4] To destroy the individual in the eyes of a potentially sympathetic courtroom, Freisler humiliated each with a vehemence possibly never seen before or after his appearance in the People's Court. The so-called trial became a parody of justice. In his vitriolic rage he attempted to strip the "traitor" of his dignity, labeling one or the other as "scum," "pile of dregs," "miserable scoundrel," "draft-dodger," "misfit," and the like. When the July 20 conspirators appeared in his court some were shabbily dressed, without belts, and at times without dentures, roughed up during interrogation by the Gestapo. As one fidgeted with his beltless trousers Freisler called him a "dirty old man."

Freisler further stifled the voice of any defense lawyer, preventing any chance to air the true facts of the case. Seated fifteen feet from the defendants, the attorney provided no opportunity for consultation. Allen Dulles of the Office of Strategic Services during the war summarized the tenor of the court very succinctly: "His court was such a mockery of justice that reputable lawyers did everything possible to avoid the necessity of defending cases before him."[5] Dulles regarded Freisler as a most sinister personality: "Cruel and cynical, quick-witted and eloquent, Freisler epitomized the brutality of the strange thing the Nazis called 'justice.'"[6] As judge of the People's Court Freisler believed that suspected enemies should be tried not only for treasonable acts but also for "seditious thoughts," which would be the case of the Kreisau Circle members.

The court legal proceedings of the People's Court, more a theater of evil with Freisler, the dark angel of the law, constantly stressed the notion of the *Volk*. For him, as it was for Hitler, the *Volk* represented the physical and metaphorical body of the German national community. The people comprised the body, with Hitler as the titular head of the abiding organism. In a totalitarian state, everyone must be united with one voice and belief in the leadership, reinforcing the motto: *Ein Reich, Ein Volk, Ein Führer*. The idea and goal of Nazi totalitarianism was to destroy the idea of individuality or separateness and create a *Volksgeist* or community spirit, as one omnipotent and infallible body and spirit bonded primarily through ideology. An individual who veered from this ideology would be alienated from the community and considered an "enemy of the people."[7]

During Freisler's presidency in the time of war any hint of defeatism or demoralization of the war effort was considered high treason. In February 1943, during the trial of the White Rose students, Sophie and Hans Scholl and Christopher Probst, Franz Müller, a young member of the movement also tried in the People's Court, observed Freisler's rejection of all legality: "I don't have a statute book here. I don't need a statute book. Sir, the People speak here. . . . We can pass sentence without the law."[8] The People's Court, in its miscarriage of justice, in this way imposed the death sentence on many

prominent figures, including the members of the White Rose student movement and those caught in the web of the attempted July 20, 1944, assassination attempt on Hitler. The latter "trial" could be considered Freisler's "finest" performance. Our focus will be on two distinguished, alleged criminals accused of treason for defeatism, Pater Max Josef Metzger and Helmuth James von Moltke.

Father Max Josef Metzger before the People's Court

The case of Pater Metzger (Bruder Paulus), a diocesan priest, serves as an example of Freisler's vehemence toward anyone, especially clergymen, who dared challenge the Führer's military objectives.[9] Serving as a chaplain during the First World War, Metzger closely witnessed the horrors of war. With images of the bloody battlefield etched in his mind and heart, he became an ardent pacifist, reinforcing his nonviolent beliefs through theological studies at Freiburg in Switzerland. In May 1933, just a few months after Hitler became chancellor, Metzger dared to print a critique of the new government on the front page of his "Christ the King" publication, *Christkönigsbote,* chastising it for its abuse of power in the name of blood and race. Although early on in the existence of the Third Reich he believed that Hitler may still have had the courage to rebuild Germany, his idea of the Führer changed radically. In his December 1933 pamphlet "Die Kirche und das Neue Deutschland" ("The Church and the New Germany"), Metzger outlined the essential differences between Catholicism and National Socialism for which the Gestapo arrested and jailed him. In March 1935, when Hitler renounced the Treaty of Versailles and continued an arms buildup, Metzger again published an article that would incite animosity in the government as he called for "peace in our times."[10] The Reich Press Chamber, just as it did with other Catholic and confessional publications, shut down his *Christkönigsbote*.[11]

While in prison at various times Metzger described his career of pacifism and wrote letters and poems, especially promoting international peace, a policy abhorrent to Judge Freisler, who constantly adhered to the Nazi policy of "Total War" and, above all, "Total Victory." Metzger, a pioneer in ecumenism and global peace, founded the organization of "Una Sancta Brotherhood,"[12] an act cited against him in the People's Court. Not too long after the failure of the Stalingrad campaign with General von Paulus's surrender on January 31, 1943, a positive turning point for many elements of German resistance, Metzger wrote a letter to Lutheran archbishop Erling Eidem of Uppsala, Sweden outlining a strategy for peace in a postwar society. Metzger wished that Eidem would circulate it among others in his ecclesiastical circles. In his Memorandum or "Manifesto" Metzger described a quasi-utopian vision for Germany, referred metaphorically to as "Nordland," envisioning Germany's place in Europe as one in a united continent, a forerunner of the European Union. The raison d'être of this union of countries would be based on "world peace, social welfare, religious peace and tolerance."[13] The Memorandum, to be delivered by a Swedish convert to Metzger's Una Sancta Brotherhood, Dagmar Imgart, never reached the archbishop, since she served as a Nazi informant known under the code name "Babbs."[14] Arrested on June 29, 1943 for aiding and abetting the enemy during wartime, Metzger was once again sent to prison. Archbishop Gröser attempted to intercede on his behalf

by writing to Dr. Metzger's attorney, Dr. Rudolph Dix, and stressing the priest's commitment to the *Volk:*

> Concerning his relation to the German Volk and state it should be noted he has his roots in a loyal German family of teachers. I believe he would be prepared to make sacrifices out of love for the Volk and Fatherland similar to those made for his other ideals. I have seldom known a man who has had such a poverty of means to oppose the existing order as he.[15]

Metzger was brought to trial before Freisler on October 14, 1943, indicted on the charges of pacifism and doubting Germany's "Total Victory." The typewriter that Imgart loaned him to use for the Memorandum had a faulty letter and helped prove the case against Metzger. During a little more than an hour of harsh reprimands and bitter sarcasm, the judge reproached the clergyman for his study abroad, as well as defeatism and anti-military stance, both considered high treason described by Article 91 of the criminal code.

Freisler, infuriated about Metzger's actions against the *Volk*, upbraided him on these grounds:

> Metzger says he thought that upon a German collapse Archbishop Eidem, whom he considers a Germanophile, would propagate such lines of thought among our enemies so as to "save" Germany with such a government rather than an enemy government. A completely monstrous thought as only a complete defeatist could conceive it. An outrageously traitorous thought as only one who thoroughly hates our National Socialist Germany would be able to articulate. A thought of High Treason because it proceeds from and pursues as a goal the replacing of our own National Socialist way of life with long since surpassed "ideas" which are hostile to the **Volk.** [16] (Author's emphasis)

The judge referred to the Criminal Code under which Metzger's "crime" falls:

> For the whole course of Metzger's action was so outrageous that it does not matter whether it should now be labelled in legal terms as treason . . . or whether it is to be considered encouraging the enemy . . . —all this is of no consequence because every member of the German people knows that such a deviation of a single German from our battle front is a monstrous outrage, a betrayal of our people in their struggle for life, and that such a betrayal is worthy of death; it is a betrayal tending toward high treason, a betrayal tending toward defeatism, a betrayal tending to encouragement of the enemy, a betrayal which our healthy popular sentiment considers deserving of death (§ 2 of the Criminal Code).[17]

Using the harshest of condemnations, Freisler pronounced the verdict of death not based on justice but on the dogma of National Socialism:

> This act is so evil and criminal that the accused must be **eradicated**. (Author's emphasis) I have never until this moment in my career used the word "eradicate" (!) but I use it here. Such a plague-boil must be eradicated. It does not depend on

> the interpretation of individuals; if that were the case then someone 175 years old could believe that his sexual activity was normal and natural. The national socialistic state claims total competence and it alone determines what should happen. Moreover, the accused has acted on the basis of doubt, on the premise that Germany could be defeated in this struggle. Only one thought can be in our minds, the belief in final victory and the total dedication of all energies toward this goal. Every person must allow himself to be measured against the German, National Socialistic standard. And it says very clearly that a man who so acts is a **traitor to his own people.** (Author's emphasis)[18]

Detlev Puekert comments on the Nazi Party's concept of creating a unified nation that had to ensure absolute fidelity: "The goal was a utopian *Volksgemeinschaft*, totally under police surveillance, in which any attempt at nonconformist behaviour, or even any hint or intention of such behaviour, would be visited with terror."[19] This follows the thought of Nazi jurist Carl Schmitt as argued by Paul Bookbinder, who outlines the two-tiered system in this book. It is noteworthy that Metzger appeared before the court, where he was convicted under a Nazi "standard" and not German constitutional law. In a bellicose Third Reich militarized since 1933, Metzger became an "enemy of the people." The second judge at the trial, Hans-Joachim Rehse, further commented on Metzger's anti-military views in his *Democratic Manifesto*:

> It is, therefore, the draft of a system of government for Germany, which was to be democratic-pacifist, unarmed state, subject to the terrorist armies of our enemies, not a unitary state, not even a state, but merely a confederation of states, thus the realization of the worst wishful thinking of our enemies! . . . A totally monstrous idea, which only an utterly defeatist person could entertain. A shameful, treacherous idea, which only a person who profoundly hates our National-Socialist Germany could possibly conceive.[20]

The final written verdict of the court reads:

> **IN THE NAME OF THE GERMAN VOLK**
>
> In the criminal proceedings against the Catholic priest Dr. Max Josef Metzger of Berlin, born 3 February 1887, in Schopfheim (Baden),
>
> At present in police custody
>
> Because of conspiracy to commit High Treason
>
> The People's Court, First Senate, on the basis of the trial of 14 October 1943, at which participants were as Judges:
>
> President of the People's Court Dr. Freisler, Chairman. . . . Has justly recognized:
>
> Max Josef Metzger, a Catholic diocesan priest, who, convinced of our defeat, in the fourth war year attempted to send a "Memorandum" to Sweden to prepare the way for an inimical pacifistic-democratic, federalistic "government," with the personal defamation of the National Socialists. As a traitor of the people, forever without honor, he will be punished with death.[21]

The court obliged Metzger's defense attorney, Dr. Dix, to remain silent. Although interrupted on several counts, Metzger stood undaunted by the screeches of the presiding judge, responding in a calm and rational manner. Following the death sentence, Metzger's close associates immediately sent letters requesting a reprieve to the Papal Nuncio in Berlin, the Reich's Minister of Justice and even to Judge Freisler himself, but all to no avail. Metzger's letters from prison during incarceration reflect a strong individual who believed that he was only thinking of what was best for the German people. To that end he acted in good conscience, especially in drafting the Memorandum, which had parallels to the postwar plans of the Kreisau Circle whose members—like Helmuth James Graf von Moltke—appeared before the People's Court in January 1945, also accused of defeatism.

Fr. Metzger, a victim of Freisler's wrath, was executed in Brandeburg-Görden Prison on April 17, 1944; since that date, he has been viewed as a martyr for his faith.[22] Ironically, his death sentence included a mandatory payment of approximately 740 *Reichsmarks* for his incarceration and beheading.

The Kreisau Circle in the People's Court

Following the failed July 20, 1944 assassination attempt on his life, the vengeful Adolf Hitler saw that the alleged conspirators got their day in court, but a day in which justice would not prevail. The government cast its net wide to entrap any individual who may have had the slightest contact with the key conspirators in the plot. The Kreisau Circle participants, primarily from two elite Prussian families, von Moltke and von Wartenburg, included two Jesuits—Provincial Augustin Rösch, S. J., and his representative in the resistance circle, Alfred Delp, S.J.—two Protestant pastors, professors, diplomats, landowners, and a cross-cut of political society. In small and large discussion groups they met covertly in various locations in Berlin and at von Moltke's estate Kreisau (then Silesia, now Krystowa, Poland). They deliberated on future plans for a defeated Germany in a postwar democracy guided by personal social responsibility. This elite group of "thinkers" used ethical and Christian values to establish a new future government following the Hitler nightmare.[23] Their vast interests and affiliations, both social and political, provided insights on how to recreate a nation reeling from an evolutionary Nazification process that destroyed any semblance of law, justice, and democracy. Peter Hoffmann documents Moltke's fundamental constitutional ideas, already substantial in 1940, in *Behind Valkyrie*, in which he notes that the Kreisau Circle developed numerous drafts as the political situation in Germany and abroad evolved.[24] The resulting "Basic Principles for the New Order" provided a blueprint for a new nation, dealing with a myriad of topics including law, religion, education, labor, economy, and culture. The opponents of the Nazi regime in their July 23, 1943 Second Draft of "The Basic Principles" especially called for the restoration of law and order:

> Under National Socialist rule, many violations of the law have been committed. In their character, extent, and intent, they are grave and abominable. Their

> punishment is an urgent commandment for the resurrection of the rule of law and thereby of internal and external peace. If the law is to be assisted to be victorious again, it can only happen through the method of law itself and not through measures determined by political ends or by passion.[25]

Although many of the members of the Kreisau Circle did not advocate the assassination of Hitler, the failed coup on July 20, 1944, included several of the Kreisau planners. This attempt unleashed a vicious attack on the plotters and anyone remotely associated with them. William Shirer quotes an officer who had been present at a conference when Hitler "seized by a titanic fury and an unquenchable thirst for revenge," ranted against the plotters. The Führer insisted: "This time . . . the criminals will be given short shrift. No military tribunals. We'll hail them before the People's Court. No long speeches from them. The court will act with lightning speed. And two hours after the sentence it will be carried out. By hanging—without mercy."[26]

The trials of the alleged conspirators began in the People's Court in the Great Hall of the Berlin Supreme Court within a few weeks of the attempt, with the first eight on August 7 and 8, including Count Peter Yorck von Wartenburg of the Kreisau Circle. The court sentenced them to death by hanging, and the filmed footage of their excruciating last gasps on meat hooks was to be delivered to Hitler for him to revel in as part of the vendetta. The Führer personally requested a slow death for his enemies. As a propaganda ploy and a wish to have their executions serve as an example of treason, Goebbels had the film footage—30 miles long reduced to 9 miles—shown to German army units, according to Allen Dulles. The grisly events depicted in the film created the opposite reaction desired, one of repulsion.[27] The film was confiscated and destroyed by the government; however, one copy survived, which portrays many of the helpless 200 victims caught up in the net.[28]

Helmuth James Graf von Moltke, a lawyer in Berlin and a jurist experienced in international law, studied law in England from 1935 to 1938. Because of his legal experience abroad, from the outset of the Second World War he collaborated closely with Admiral Wilhelm Canaris in international security as part of the German military intelligence office, the *Abwehr*. With his extensive European contacts and firsthand knowledge of Nazi atrocities in Europe due to his foreign responsibilities, he came to the realization that the pre-Reich Germany his family knew and loved was bent on self-destruction. As an anti-nationalist and founding member of the visionary Kreisau Circle in January 1940, he met several times at the estate and most often in Berlin with a small number of "thinkers" to avoid suspicion. Through their discussion and planning they produced twenty drafts of possible postwar governmental accommodations, hoping to eventually bring about a form of socialist Christian democracy after the demise of the Third Reich. In Moltke's October 1940 Constitutional Concepts his basic ideas opposed everything that National Socialism stood for as a perverse ideology. Instead Moltke idealized: "To provide freedom to the individual is a fundamental task of the state. This requires keeping the individual free from oppression by others, and giving him the opportunity to acquire economic commodities through his own activity, which let him become master over nature and take him from his reason for hate and fear."[29] Much of his inspiration derived from an Anglo-American worldview.

In his plan, Moltke indicated specific individuals for key positions in this structure, which included areas of education, housing, and other social services. Beyond the overall democratic governmental structure, he focused on "small communities," which he saw as the strength of his plan, according to Hans Mommsen.[30]

The Gestapo arrested Helmuth von Moltke on January 19, 1944, six months prior to the July 20 failed assassination attempt. They jailed him not for involvement with the Kreisau Circle nor for the suspicious activity of Canaris' office of the *Abwehr,* but for warning German foreign diplomat and chief of the Reich Press Otto Kiep and others of their impending arrest. Kiep, who worked against Nazi policies from within the government, had simply uttered some anti-Nazi remarks at what was referred to by the Nazis as "the Frau Solf Tea Party," hosted by School Director Elisabeth von Thadden. Unfortunately a Nazi agent from Switzerland, Dr. Reckse, reported the conversations at the September 10, 1943 tea party to the Gestapo.[31] Most of the attendees at the party were executed, with the exception of Frau Solf and her daughter, saved through the intervention of the Japanese government. Following the arrests, the police wished to learn who had first alerted Moltke of the arrests and kept him under protective custody. Moltke spent his year-long imprisonment writing almost daily to his wife Freya, also involved in the Kreisau plans, offering insightful details at times in coded language about the political situation at hand. His biographers Balfour and Frisby explain Moltke's attitude toward the July attempt on Hitler's life: "His capacity for analysis led him to see clearly the objections in behaving in the very way in which the Nazis were denounced, the danger of making Hitler a martyr, the importance of demonstrating the consequences of National Socialism so as finally to strip it of its attractions for the German people."[32]

Following the July 20 failed plot and the multiple arrests of those associated with the alleged conspirators based on the "kith and kin" or *Sippenhaft* law,[33] Moltke's name became linked with some of the participants of the attempted coup. This policy insured that any relative exposed to an alleged traitor is guilty by association and should be arrested. From January 9 to 11, 1945, like others, especially the Jesuit in the Kreisau Circle, Fr. Alfred Delp, S. J., and former Bavarian officer Franz Sperr, Moltke was brought before the People's Court on Bellevue Strasse in Berlin for treason, in Freisler's eyes, tyrannicide. Throughout Delp's trial, the name of Moltke was constantly cited with scorn by the judge, "in every other sentence," according to Moltke, referring to "the Moltke circle," "Moltke's plans," and the like.[34] "It [his name] ran thorough everything like a red thread . . . it was clear that I was to be done away with."[35] Allen Dulles was alerted early to the assassination plot and also further learned of the inner workings of the Kreisau Circle from one of the lone survivors. He depicts how the Gestapo and then the People's Court showed grave concerns about the power of the Kreisau Circle:

> The Nazis came to have a wholesome fear of the men of the Kreisau Circle because the opposition was based on moral and religious grounds. In the course of the trials of the conspirators in the People's Court Presiding Judge Roland Freisler declared: "The Moltke Circle made the political preparation for the 20th of July." The motivating force in the plot, he added, was in the men of Kreisau, rather, even than in [anti-Nazi plotter Carl Friedrich] Goerdeler.[36]

With both stoicism and courage, and armed with his legal and intellectual acumen, Moltke objected sharply to Freisler's accusations. In return, the judge reacted vehemently. As Moltke recounted: "A hurricane was unleashed: he banged on the table, turned as red as his robe, and roared: 'I won't stand for that sort of thing, I won't listen to that kind of thing.'"[37] Ranting on, Freisler brought up the two charges with respect to Kreisau, "defeatism" and the "selection of regional commissioners" in the postwar plans. Moltke defended himself by stating that everything he did was for the business of the *Abwehr,* at which Freisler began his tirade, emphasizing victory: "All Adolf Hitler's agencies base their work on the foundation of victory, and that isn't any different at the OKW from elsewhere; I simply won't listen to anything like that, and even if it were not so, every single man has the duty to spread the faith in victory on his own."[38]

When asked by Freisler if he saw that he was guilty, Moltke responded, "No," whereupon the judge retorted with his concept of a unified *Volk*: "You see, if you still don't recognize it, if you still need to be instructed on it, it shows that you think differently and have excluded yourself from the fighting community of **the people**."[39] (Author's emphasis.) Since he was in protective custody prior to and during the coup attempt, the court could not accuse him of being intimately involved in the plot. It had to contrive other reasons for high treason and did so perfunctorily. Moltke was sentenced to death, as he wrote in his letter to Freya, "for thinking." According to his biographers Balfour and Frisby, someone wrote on his sentence, "He did more than think."[40] The inscription was correct, for, according to Freya, he made contacts in Holland and Norway to forward messages on to England as a liaison for the German resistance, only to have England remain skeptical of any German resistance.[41] He further assisted in safeguarding Jews by helping them escape, forbidden by the regime. Moltke was hanged in the Berlin-Plötzensee prison on January 23, 1945, dying as a man of conscience, feeling that he in God's eyes had accomplished his mission on earth. In writing to his wife Freya, Moltke viewed himself as dying as a martyr with Jesuit priest Alfred Delp, S. J., since their fates were so similar to each other. As a Catholic and a Protestant they were both targets of state-run persecution and "died for the holy Ignatius of Loyola."[42]

On March 11, 2007, at the centenary of Moltke's birth in the presence of his widow Freya at a concert in his honor, Chancellor Angela Merkel offered a tribute to Moltke's relevant and prophetic belief in a stable Europe:

> We have gathered here today to commemorate with you a man who, like few others, stood up for his convictions in resisting the Nazi regime. His resolve, his willingness to pay a sacrifice in the fight against the National-Socialist terror will never be forgotten. What's more, Helmuth James Graf von Moltke's free democratic ideals and vision for Europe are still relevant today, on March 11, 2007—as President of the European Council, I would say, especially relevant today, 100 years after his birth on March 11, 1907. They continue to serve as a warning and, above all, are a mission for us.[43]

Merkel concluded by noting the memory of Moltke for today: "It is a legacy of peace, of freedom, of tolerance, of respect for human rights, and a legacy of personal courage."[44]

Only a few weeks following Moltke's execution, Freisler met his untimely death in the same dramatic manner as he held court. During an allied bombing of Berlin on February 3, 1945, while the People's Court was still trying members of the July 20 conspiracy, including Fabian von Schlabrendorff, a beam apparently crushed Freisler as he tried to safeguard the files of the court. He died fanatically committed to his role as Hitler's grim reaper.

William Shirer wisely observes about the German nation's resilience: "The German people had not been destroyed, as Hitler, who had tried to destroy so many other peoples and, in the end, when the war was lost, had wished.

"But the Third Reich had passed into history."[45]

History reveals that Metzger and Moltke were victims of the Nazi law based on unethical, political machinations to usurp human and civic rights by the government that drew the German people farther and farther away from justice . . . and justice became the other victim.

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Part Two

Hippocrates Abandoned by Nazi Doctors

Starting with the mindset that one race, the Aryan peoples, was superior to all others, the Third Reich applied principles of Eugenics in racial and disability policies to foster the strength and supremacy of the Aryans. In a step-by-step process, using the racially based legal system to enact laws, the Third Reich eventually obliterated millions of lives. The party state positioned itself as the arbiter of scientific and racial knowledge and expertise. The pursuit of their unitary goal of a politically, militarily, economically, and artistically flourishing Third Reich, on the basis of extreme racial hygiene, was centrally directed by party authorities. Whatever discretion was available to the local agents enacting cruel and extreme policy, the traditionally recognized academic, religious, professional, and cultural experts who in the empire and republic would have a voice, influence, and authority over the behavior of officials, physicians, and others, were mocked, attacked, and largely silenced by the Nazi regime. The well-established and experienced Jewish physicians prospered in the Weimar Republic. Hitler and the party elite, however, distrusted and despised academic and professional experts, and could not believe that there was any area where their power should acknowledge respected professional practice and knowledge. They attacked Jewish physicians as violators of the body of the *Volk*, particularly of German women. By 1938, Jewish doctors were prohibited from treating Aryan patients. The Aryan doctors stood by while various government policies stripped the Jewish physicians of any remaining rights. With noncompliant physicians forbidden to practice, the state had a relatively malleable medical community at its disposal. This group would help engineer the legal apparatus that led to the Final Solution.

Resistance to terrorist biopolitics appeared in many forms, whether by then Bishop von Galen who protested the euthanasia policy, or the Jewish religious leaders of the ghetto who used rabbinic law to guide the incarcerated Jews. Jewish physicians and health professionals sought to provide care in the ghettos, in the absence of resources; they encouraged hygienic efforts based on notions of group responsibility; and they tried to make some use of their horrifying circumstances, for example, by conducting nutritional deprivation studies in the Warsaw Ghetto or creating an underground medical school. Even when they could not save people, they stood with them, as did Dr. Janusz Korczak, who demonstrated an ethic of care by traveling with his charges

to an extermination camp, despite the authorities not requiring him to do this. Not nearly enough German physicians referred to an internalized professional, religious, or ethical standard separate from National Socialist regime programs and demands.

In the camps like Dachau, Ravensbruck, and Auschwitz, doctors not only used unethical experiments on the prisoners but also acted immorally during the selection process, as they determined who should live and who should die. Using humans as guinea pigs, physicians supported by the T-4 headquarters in Berlin created high-altitude and freezing water experiments while companies such as Bayer and I.G. Farben tried out their pharmaceutical products with dangerous results. It is only with the Nuremberg Code established at the Nuremberg Physicians' Trial that more humane standards exist for informed, voluntary consent on the part of the human subject.

As the documentary *Paragraph 175* shows, the Nazi drive to eliminate homosexuality was not the Führer's pet project but rather that of Heinrich Himmler who saw homosexuality as detrimental to population growth and thus to racial health, and as a communicable disease. In the Weimar Republic, Germany had been in the forefront of research on sexuality and efforts at civil rights for homosexual men and women. Magnus Hirschfeld (1868–1935), a German Jewish physician and sexologist, established the Scientific-Humanitarian Committee and advocated for homosexual rights. The Third Reich destroyed and outlawed these efforts. It had a somewhat eclectic theory of homosexuality and did not regard lesbianism as important or even real. Various penalties and prescriptions for the punishment and rehabilitation of offenders were employed, such as harsh labor in camps or later, service at the front. The regime expended a great deal of effort to define behavior of those accused of homosexuality—is it evidence of an inborn disposition? Or is it situational, or perhaps an overstepping of comradely love? SS judges varied in their sentencing. In camps, those with the pink triangle (or blue bar in Alsace) were fair game for gratuitous cruelty by guards and even fellow inmates.

Physicians' treatment of homosexual prisoners was largely of a piece with the sadism of the general camp staff. Some physicians refused to treat homosexual inmates. Others experimented on them, but these experiments were not actually scientific, with poor record keeping and few results. Castration was callously executed after brief interviews with the candidates. The medical treatment of homosexuals in the Third Reich was egregiously unethical but occurred at the end of a long train of political, social, and legal failures.

As abhorrent as the behavior of Nazi doctors was, it was not so dissimilar to the disregard for the rights and humanity of the patient or the subject in American and other European contexts as the opponents of the Third Reich might have expected. The Tuskegee syphilis experiments and other projects such as the unethical Guatemala syphilis experiments from 1946 to 1948 prove this. It is not enough to document the crimes of physicians in the Third Reich. What are the safeguards to prevent repeats of medical terrorism? Finally, we ask today, has society gone down the slippery slope as doctors who have sworn the Hippocratic Oath preside at torture sessions or at illegal assisted suicides?

7

Resistance or Complicity: Medical and Religious Responses to Law under the Third Reich

Johnathan Kelly, Erin Miller, and Michael A. Grodin

Introduction

Nazi law constrained the choices open to everyone living under Nazi rule, but the choices made by some groups proved more decisive than others. This chapter compares and contrasts the responses of the German doctors, the Jewish physicians, and the rabbis and religious Jews to oppressive Nazi rule. The activities of these groups demonstrate the various reactions to Nazi law concerning the Jews, and reveal the different ways that the "health" and well-being of the community was conceived by German physicians, Jewish medical workers, and Jewish religious leaders. While German doctors assisted in the design and implementation of Nazi law to create a pure and healthy German community (the *Volk*), Jewish health professionals and religious leaders defied Nazi law to preserve the Jewish community and the lives of as many members as possible.

The first section of this chapter discusses the responses of the German medical professionals who embraced Nazi actions against the Jews and other persons deemed "life unworthy of life" (*Lebensunwertes Leben*). German physicians were some of the first to enthusiastically join the Nazi Party. They played primary roles in shaping Nazi ideology and propaganda by using the framework of public health to identify, isolate, and ultimately murder Jews under the guise of preserving the life of the German people. This section examines the symbiotic relationship between the Nazi leadership, which needed physicians to legitimize Nazi law and policy concerning the Jews, and German physicians, who needed Nazi political and legal support to carry out their racial hygiene programs.

The next section explores the role of the Jewish health professionals who defied Nazi laws to combat starvation, disease, and death in the ghettos and camps. Despite persecution, heroic Jewish doctors and nurses created Jewish hospitals, as well as schools to train Jewish physicians and nurses, distributed smuggled goods and medical supplies, and implemented public health measures to improve sanitation and health—all in defiance of Nazi attacks on their lives and spirit.

The final section of this chapter analyzes the responses of Jews who continued to observe traditional Jewish law in resistance to Nazi policies prohibiting Jewish religious practice. Jews in the ghettos and camps faced terrible dilemmas concerning religious life and Jewish law. Examples of questions that Jews were forced to address include whether it is permissible to have an abortion when German policy was to murder any Jewish woman found to be pregnant, whether one may risk one's life or the life of another to save a group of people, and whether the Jewish Council (*Judenrat*) may distribute labor cards in the ghetto, knowing that those without such status as laborers would be sent to their deaths.

One of the main purposes of this chapter is to correct the inaccurate portrayal, prominent in the accounts of many leading historians of the Holocaust, of a very limited degree of Jewish resistance to Nazi law and persecution. This portrayal depends on accepting a predominant understanding of resistance as armed, violent resistance, a definition which fails to recognize that Jewish resistance to Nazi law and policy took many forms. Because Nazi ideology envisioned a Europe *Judenrein* ("cleansed of Jews"), the Third Reich's persecution of the Jews aimed not only at the annihilation of the Jewish people but also the destruction of all traces of Jewish self-worth and dignity which had been sustained by Jewish cultural, religious, and communal life. Because the Nazi persecution of the Jews targeted all aspects of Jewish existence, Jewish resistance to Nazi law took many forms, including that of medical and spiritual resistance. As we will show in this chapter, the daily activities of Jewish medical workers and Jewish religious leaders in the ghettos and camps deserve to be understood as a significant form of resistance to Nazi law and practice. Aimed at preserving the physical and spiritual life of the Jewish community, the Jewish medical and spiritual resistance repeatedly defied Nazi laws and policies aimed at the destruction of the Jewish community. We hope that this study of the activities of Jewish medical workers and religious leaders serves to further a growing understanding of Jewish resistance during the Holocaust, a subject which deserves fuller exploration by historians.

Physicians in the Third Reich: Law and medicine for the purpose of death[1]

The role of medicine and physicians in conceptualizing, initiating, and implementing the Nazi genocide of European Jewry remains an unparalleled case of physicians' participation in mass murder. It is important to remind ourselves, more than seventy years since the liberation of Auschwitz, that the Holocaust was not inevitable. Nor was it inevitable that by the end of the war, half of the German medical profession would join the Nazi Party and participate in the identification, persecution, and murder of the Jewish people under the guise of public health and racial hygiene.

At the center of many of the laws, policies, and actions that furthered the Nazi regime's goals were physicians. Physicians were among the first of the Nazi Party's most ardent supporters and were among the first to join the Nazi Party in large numbers. In 1929, a group of doctors formed the National Socialist Physicians' League with the stated mission to purify the German medical field of "Jewish Bolshevism." Poor

employment rates in the medical field and the decline in honor and prestige of the medical profession, largely a result of the aftermath of the First World War, had led physicians to be particularly dissatisfied with their position in Weimar Germany. The Nazi Party seemed like an organization that could help physicians reclaim the power and status they had lost. Even before Hitler came to power in January 1933, 3,000 physicians, or 6 percent of the entire medical profession, had joined the National Socialist Physicians' League. The SS (*Schutzstaffel*), the elite force seen by Hitler and Himmler as fit for only the most racially pure and whose members were responsible for carrying out the "Final Solution," was heavily populated with doctors from the beginning. Relative to their proportion of the male German population, doctors were seven times more represented in the SS. By 1942, 38,000 physicians were Nazi Party members, and by the end of the war close to half of all German physicians had joined the party.[2]

Drawing on the theory of "racial hygiene" (*Rassenhygiene*), Nazi ideology aspired to make Europe a society of full-blooded Aryans purified of the inferior races, and doctors were mobilized to turn this vision into a reality. German physicians and Nazi ideology complemented each other, physicians providing the science and claim to authority of the medical field, and Nazi ideology providing the framework and justification for the work that Nazi physicians would later undertake. Viewed as experts for treating the physically and mentally ill, physicians and government officials were called on to cleanse German society of imperfections and weakness. German physicians rose to power and prestige as they used their skills to treat "inferior races" who threatened to contaminate the health of the German people (the *Volk*). The cooperation between the Nazi leadership and physicians, which only grew as the Third Reich advanced, added powerful justification to actions that would have been much harder to accomplish without the imprimatur of medicine. What began as the treating of a public health problem to "purify the community" would ultimately lead to genocide.

A series of recurrent themes arose for those German physicians who undertook the mission of cleansing the state: the devaluation and dehumanization of classes deemed undesirable; the medicalization of social and political problems; the training of physicians to identify with the political goals of the state; compliance and cooperation with various Nazi offices; the bureaucratization of the medical role; and a lack of concern for medical ethics and human rights. Nazi physicians failed to see themselves as physicians first, with a calling and an ethic dedicated to preserving life and caring for the welfare of individual human beings. Hardly apolitical, doctors were seduced by power and ideology to view the state as their primary client and to see the extermination of an entire people as a "treatment" required for the state's health. These physicians thought of themselves as researchers, government officials, and "biological soldiers" instead of healers and caretakers.

The gradual acceptance of the eugenics idea of "life unworthy of life" divorced physicians from the Hippocratic ethos by arguing that moral principles required doctors to value the German state or race over the individual. These notions of prioritizing certain lives over others grounded the movement for forced legal sterilization, because degenerate and unfit populations were seen as parasites on the state.

In order to understand the stamp of medicine on Nazi law, it is important to recognize the role that medicine played in the promulgation of some of the earliest and most influential pieces of Nazi law. When Hitler signed the sterilization law in 1933 and the Nuremberg Laws in 1935, medicalized definitions of whose lives had value became official German policy. One of the first major laws constructed after Hitler became chancellor was the "Law for the Prevention of Hereditarily Diseased Offspring," signed into law by Hitler on July 14, 1933. This law mandated the compulsory sterilization of those in the general public with certain diseases or who were deemed "feebleminded." Patients were referred to eugenics health courts by their primary care doctors, further integrating the state and doctors into Germany's eugenics mission. The eugenic health courts consisted of three-person panels, including two physicians, one of whom had to be an expert in eugenics, and a judge. Physicians forcibly sterilized between 360,000 and 375,000 persons between 1933 and 1939.

The Nuremberg Laws of 1935 also carried the unmistakable mark of the role physicians played in the development of Nazi law. As Robert Proctor notes, the Nuremberg Laws "were considered public health measures and were administered primarily by physicians."[3] One of the two measures regarding the Jews set down at Nuremberg and later passed by the Reichstag, "The Law for the Protection of German Blood and German Honor," authorized the systematic process of medicalized racial discrimination against the Jews. The law prohibited marriage and any sexual relations between Jews and Aryans, deemed threats to "German blood." The second measure, the Reich Citizenship Law, put into law a definition of the Jew and made Jews non-citizens and stateless persons. By stripping Jews of German citizenship and banning marriage between Jews and non-Jews, the Nuremberg Laws also introduced the measure by which Jewish physicians would later be banned from treating non-Jewish patients. The Nuremberg Laws' medicalized discrimination against the Jews was introduced across Europe as the Nazi conquest grew, turning Jews into non-citizens and stripping them of all legal protections in each country that the Nazis occupied.

The influence of physicians can be seen not only in the shaping of Nazi laws concerning the Jews, but also in every step along the way to the mass murder of the Jewish people. The "Euthanasia Program," or "T4" as it was called in Nazi correspondence to refer to the program's headquarters at Tiergartenstrasse 4 in Berlin, is now being more widely understood as what set in motion the system of medicalized mass murder that would be adopted in the camps.[4] "Euthanasia" began as a clandestine effort in Germany in 1939, when Hitler commissioned doctors to murder those deemed "life unworthy of life." The first series of mass murders under the guise of "mercy killing" was committed against 5,000 children who were killed by starvation, exposure, and hypothermia, or by cyanide and other poisons. By August 1941 over 70,000 patients, most of them Aryan by Nazi definition, were murdered at small mental health facilities throughout Germany. This model of medicalized killing by gassing and cremating would later be put into effect on a large scale when methods were sought to exterminate millions of Jews in the death camps. Physicians were present in every part of the machinery of mass murder. Physicians in white coats

stood at the railway platforms at each camp to perform the initial "selection," judging who would live and who would die; they supervised the killing in the gas chambers and declared when the victims were dead; and they were involved in the broader administration and operation of the death camps.

One of the still widely discussed topics in bioethics concerning physicians' involvement in torture and genocide is the Nazi doctors' experimentation on prisoners in several concentration camps and how their findings have been used. In the camps, at least seventy medical research projects were conducted on human subjects, often in what were deemed "lethal experiments." Jews, Gypsies, Slavs, homosexuals, and persons with disabilities were all used for human experimentation. Many experiments were conducted with the ultimate goal of benefiting the military, the pharmaceutical industry, and to support the eugenics movement. Beginning in 1941, experiments were performed on prisoners at Dachau to find ways to increase the survival of German troops, including placing prisoners under the conditions meant to simulate high-altitude and hypothermia conditions. At Auschwitz, in service of the Nazi plan to repopulate Europe with Aryans, prisoners were subjected to experiments to find new, more efficient ways to sterilize and castrate patients. Nazi doctors conducted bone and muscle experiments on Jewish women at the Ravensbruck concentration camp by inflicting wounds that mimicked war wounds to study how to heal the broken bones and damaged muscles of soldiers. Doctors experimented on women at Ravensbruck using X-rays as a possible means of sterilization. At Buchenwald, prisoners were purposely infected with diseases like typhus, yellow fever, smallpox, and cholera to test different vaccines. Josef Mengele, the camp doctor of Auschwitz, became infamous for his study of 1,500 twins. He selected twins, dwarfs, and "unique physical specimens" for experimentation to discover ways to decrease the births of undesirable people and increase the births of valuable Aryans.

One of the most troubling unanswered questions about the Third Reich concerns the participation of physicians in human experimentation, torture, and murder and how it was possible that physicians could have so willingly participated. Physicians are viewed as having special moral standing as protectors of health and well-being. They are also thought to be students of science, apolitical or at least immune to purely ideological indoctrination. So the question arises whether physicians were true believers in Nazi racial ideology or instead were willing and enthusiastic opportunists, who, like those in many other professions, joined the Nazi Party for the purposes of career advancement. In dealing with this problem, some bioethicists postulate that the medical profession itself includes elements of dehumanization and numbing, as means of coping with the suffering of patients. Others ask whether the modern medical profession encourages group obedience to authority and the diffusion of responsibility. Physicians may be particularly vulnerable to these pressures, as they have a tendency to compartmentalize, justify, and rationalize problems as a way of coping with what the profession requires.[5] Regardless of whether one finds any of these theories of the perpetrator convincing, there is no denying the far-reaching role that physicians played in shaping and implementing the worst genocide the world has ever witnessed.

Jewish medical resistance[6]

While the role and power of German physicians grew with the rise of the Third Reich, the many Jewish physicians who had made vital contributions to German medicine soon found themselves banned from the profession. When Adolf Hitler rose to power in 1933, Jewish medical personnel were restricted in their ability to obtain medical education, practice medicine, and work in the public health system. This marginalization made prevention and treatment services as well as access to health-care resources increasingly scarce for the Jews. By 1938, Jewish doctors were forbidden to treat non-Jewish patients altogether.[7] These decrees isolated the Jewish people. Such disregard for the life of German Jews created the environment in which the "Final Solution" emerged. Ghettoization followed in September 1939 with the invasion of Poland. Ghettos became breeding grounds for disease and starvation caused by extreme overcrowding, limited medications, inadequate clothing, and restricted food, soap, and heating fuel. Jewish doctors, nurses, and public health professionals fought to minimize disease, starvation, and suffering in the ghettos and camps. In order to improve community survival, Jewish health professionals had to be resourceful, creative, and courageous.

In some ghettos, the *Judenräte* (Jewish Councils) were an important component of the Jewish medical resistance. They were established by the Nazis to ensure that all orders from the German officers were implemented. The members of the *Judenräte* were appointed by Nazi officials or in some cases by fellow Jews. They often had to make tragic decisions, forced upon them by the German authorities, regarding who would remain in the ghetto and who would be deported to the labor or death camps. The *Judenräte* remain one of the most controversial and misunderstood topics from the Holocaust, as detailed earlier by Yvonne Kozlovsky Golan. Some argue that the *Judenräte* were accomplices in the Final Solution by complying with Nazi orders. Others argue that regardless of this participation all of the Jews would have been murdered just the same. The *Judenräte* faced tremendous pressure in their responsibility, and noncompliance often resulted in Nazi reprisals.[8] In many cases, they truly believed that the sacrifice of some would save many or that the Nazis would not murder the Jews as long as they contributed valuable work. Despite this difficult and controversial role, the *Judenräte* provided many ghetto services for the public good and helped enforce public health measures.

The Warsaw, Vilna, and Kovno ghettos provide examples of the public health and medical initiatives that occurred during the Holocaust. The city of Warsaw in Poland had the largest ghetto in Europe, established in October 1940. The population of the ghetto, about 450,000 people, represented over one-third of the population of Warsaw and was forced to live in 2.4 percent of the city's area.[9] An average of six to seven people were living in each room, and each person was forced to survive on approximately three hundred calories a day. In an attempt to combat typhus and typhoid epidemics that occurred, the Warsaw *Judenrat* formed a health department. Previously, in 1922, a group of Jewish physicians created the Towarzystwo Ochrony Zdrowia Ludności Żydowskiej (TOZ), a society established to protect the health of the Jewish population. In the spring of 1940, the TOZ hired roughly two hundred doctors, one hundred nurses,

sixty-five pharmacists, fourteen dentists, and eight laboratory workers. They acquired two surgical institutions, three maternity hospitals, four establishments for infants, the Warsaw Otwok hospitals, and establishments for sanitation and disinfection.[10] Although health organizations were overwhelmed with the spreading epidemics, health workers served to assist the public while they also struggled to survive.

The Vilna Ghetto, one of the most renowned for its medical resistance efforts, was established in August 1941. Before the war, Vilna had been a center for Jewish medicine with a notable Jewish hospital. The Jewish hospital in Vilna dated back to 1765 and, in 1919, became Vilna's largest city hospital, treating over a thousand patients every year. In the 1920s and 1930s, the hospital developed many departments and had an organized training program for young doctors. In 1936, the Vilna government restricted the hospital to solely treating Jews.[11] Prior to the establishment of the ghetto, the Vilna Jewish doctors met to plan public health measures in extreme conditions.[12] Uniquely, Vilna's distinguished Jewish hospital continued to function throughout the ghetto's existence and served as a vital resource. Why the Nazis kept the hospital within the ghetto walls is unclear, but it provided many services including an outpatient clinic, house calls, and emergency services. Later, departments of internal medicine, pediatrics, gynecology, surgery, neurology, ophthalmology, otolaryngology, and radiology were added.

In addition to the wide range of medical services provided in Vilna, there were many successful strategies to improve the public health of the community. By 1942, few ghetto inhabitants had access to clean water, so the Sanitary-Epidemiological Section established six "teahouses" which provided hot water for crucial purposes, such as cooking, cleaning, laundry, and washing children.[13] Additionally, a sanitation commission oversaw the distribution of food and organized soup and milk kitchens, public laundry services, and public baths.[14] Public health education was implemented, leaflets were distributed about various diseases, and mass immunizations were conducted for typhoid, paratyphoid fevers, dysentery, and cholera.[15] The system successfully organized the smuggling of goods necessary to implement these measures. Astonishingly, there were no major epidemics in the Vilna Ghetto—evidence that the medical and public health actions were successful.[16]

The Kovno Ghetto in Lithuania was created in August 1941 and originally contained 29,760 Jews. Twelve thousand were murdered within the first two months. The head of the Kovno Ghetto *Judenrat*, Dr. Elchanan Elkes, established a hospital, medical clinic, elder-care center, soup kitchen, school, and even an orchestra. In November 1942, a delousing institute opened in the ghetto to destroy lice and other forms of insect pests, which were the source of many diseases.[17] This form of resistance through medical care, public health, and cultural expression was coupled by the Kovno Jewish community's desire to maintain religious life and observance.

Nazi concentration camps came into being in 1933 and remained operational until 1945. Few documented stories of camp resistance survive, as those who resisted were often murdered. The few stories that do remain originate mainly from Auschwitz, the largest concentration camp in operation during the Second World War. These accounts highlight individuals who combated the inhumanity of the Nazis by caring for others. The horrendous conditions, strict control, and overwhelming despair made

it nearly impossible to implement any system of public health in the camps, including the three which composed Auschwitz. There was, despite all odds, a minimal health system. In some cases, doctors helped others at the Auschwitz hospital by changing patients' charts or propping them up and pinching their cheeks to avoid selection for the gas chambers. The hospital lacked vital supplies and was notoriously filthy and overcrowded. In the camp, some individuals helped by isolating prisoners with infections within the blocks or hiding prisoners who were sick or pregnant. One Jewish gynecologist, Dr. Gisella Perl, performed abortions on pregnant women in secret to save their lives. If the pregnancy was discovered by the Nazis the women would have been murdered.

These stories illustrate the inventive ways that Jews maintained their humanity, dignity, and spiritual strength during the Holocaust. Jewish medical and public health professionals worked heroically to help in the ghettos and camps while they were suffering themselves. Their initiatives to preserve human lives contrasts sharply with the Nazi doctors' efforts to exterminate life that Nazi law deemed unworthy. The *Judenräte,* burdened with challenging dilemmas, helped implement and support the efforts of leaders who wanted to improve life in the ghetto. The will of the Jewish people was to do more than merely survive. The Jews of the Holocaust resisted dehumanization and murder in a world where resistance often ended in death. The organization, assistance, and compassion of the Jewish health professionals exemplify the brave Jewish struggle for survival and the desire to establish a next generation after the Holocaust.

Spiritual resistance as a response to Nazi Law

After occupying a newly conquered territory in Europe, the Germans wasted no time in introducing and implementing Nuremberg-type laws to strip the Jewish population of all rights and legal protections. Soon thereafter, local Jewish populations would be the targets of an extensive set of Nazi laws and decrees whose ultimate aim was the destruction of European Jewry. Religious Jews were singled out in particular by a set of prohibitions on all forms of Jewish religious life. In addition to closing down all houses of worship, study, and prayer and prohibiting all religious gatherings, the Germans and their collaborators made religious Jews a special target of persecution and violence. Across Europe, rabbis were forced to dance and sing before jeering mobs, and desecrate Torah scrolls and other sacred objects. The beards of Orthodox Jews were cut off, pulled out, or set on fire. In many towns and villages on *Kristallnacht,* and then later in Poland and Lithuania, synagogues were burned to the ground as the first stage of bloody pogroms.

In his contributions documenting Jewish religious life in the ghettos for the famous Warsaw Ghetto archive, *Oneg Shabbat*, Rabbi Shimon Huberband provides a firsthand testimony of the degree of persecution religious Jews endured:

> If a bearded Jew was caught, his life was put in danger. They tore out his beard along with pieces of flesh, or cut it off with a knife and bayonet. *Mezuzahs* were torn off doorposts and ripped apart. Woe unto the Jew who was found with *tefilin*

> [the small, black leather boxes containing passages from the Torah worn by Jewish men around their neck and arm] and religious books! . . . When a Jew was caught, he was immediately examined to see if he was wearing a *talis koton* [a traditional religious garment worn by Jewish men]. If he was, there was no envying him. He was beaten cruelly and horribly. The same for any Jew caught wearing a Jewish hat. Jews therefore removed their Jewish hats and long coats, shaved their long beards, and kept their religious books and *tefilin* hidden. The Germans collected . . . holy garments and these holy garments were given to Jews to wash floors, automobiles, and windows. To clean the filthiest of places, Jews were given pages from the Talmud and other religious books.[18]

Despite being singular targets, religious Jews had their own way of resisting Nazi law's targeting of their lives and dignity. Of ultimate significance to the religious Jew, before and during the Holocaust, was the standard of conduct demanded by Jewish law (*halakhah*).[19] The religious Jew's dignity lay in his/her relationship to God and to the Jewish community, expressed in his day-to-day conduct, which Nazi rule could never fully control even in the ghettos and camps. Thus, for the religious Jew, ultimate resistance lay not in armed conflict with the persecutor, but in the strength to continue to conduct oneself according to Jewish law, to endure brutality without becoming brutalized or dehumanized or giving up Jewish identity. This abiding adherence to Jewish law in defiance of Nazi law should be understood as a form of active, though unarmed, resistance, perhaps in its ultimate form.

Figure 6 Mordechai Chaim Rumkowski, chairman of the Jewish Council, meets with a group of rabbis around a dining hall in the Lodz Ghetto. Courtesy of the United States Holocaust Memorial Museum.

Testifying to the enduring power of Jewish religious life and *halakhah*, countless Jews in the ghettos and camps continued to observe the full range of Jewish law governing daily life. Nazi law and decrees made observance of Jewish law and ceremonies punishable by death, waging a campaign to destroy all signs of Jewish religious life in Europe. All gatherings for prayer or study were totally prohibited under punishment of death. The ferocity with which the Germans and their accomplices pursued this task makes clear that Nazi ideology aimed at not only the physical destruction of European Jewry but also the total destruction of all signs of Jewish life and culture in Europe.

The city of Kovno, where over 25,000 Jews (two-thirds of the Jewish population of Lithuania) lived when the Germans invaded Lithuania in 1941, provides us with perhaps the most striking and well-documented example of how Jews responded to Nazi prohibitions of Jewish religious life. The Germans wasted no time after occupying Kovno in 1941 in attempting to destroy all signs of the Jewish religious life that had long flourished there. Synagogues were vandalized and made to serve as stables, work sites, and for other purposes. Soon after occupying Kovno the Germans issued an edict requiring all Jewish men to shave their beards or be killed.[20] When asked by a skeptical man why Jewish law might permit him to shave his beard under the circumstances, Rabbi Ephraim Oshry, only twenty-seven years old when he took leadership over religious life in the ghetto, told the man that he could comply with the law and shave using a razor (which *halakhah* forbids Jewish men to use). R. Oshry judged that the longstanding prohibition on shaving the beard could be broken for the overriding purpose of *pikuach nefesh*, to preserve life.[21] According to the principle of *pikuach nefesh*, man is created in God's image, making life sacred and necessitating protection. Thus, as a rule in Jewish law, life must be preserved. R. Oshry's rulings on these difficult cases, where the questions involved risking one's life or the lives of many, testify to the commitment in Jewish law to preserve life.

Despite vicious pogroms and round after round of seeing their fellow Jews being sent to their deaths, the Jewish community of Kovno was able to maintain a robust Jewish religious life. Standing firm on the great tradition of learning and religious life in Kovno, every day children were gathered in secret for Torah study, and at night there were regular study groups in many homes in the ghetto. After the closing of the Slobodka Yeshiva, one of the greatest centers for the training of rabbis and scholars in Europe, and the destruction or occupation of many smaller Jewish schools, work began in secret to build a new religious school in the ghetto and was soon completed by a group of Jewish youth led by R. Oshry.[22]

The Jewish community of Kovno also defied Nazi orders by continuing to celebrate Jewish holidays. On the first Jewish New Year's celebration (Rosh Hashanah) after the German invasion, just weeks after the German occupation began, Rosh Hashanah services were held in the ghetto. As R. Oshry recorded, the members of the community prayed with greater intensity than ever that first Rosh Hashanah in the ghetto, because "the Germans could not extinguish their spirit."[23] On the first Day of Atonement (Yom Kippur) following the German occupation, many Jews in the ghetto spent the day fasting and praying. But that morning, the German authorities threatened to round up and kill a countless number of Jews unless a quota of 1,000 Jewish men was produced for work at labor sites. The *Judenrat* complied with this order and 1,000 men were

found to work. The Germans bombarded those forced to work worse than usual on this holy day and beat and killed several of the men. But despite the Germans' attempt to reduce their spirit on the holy day, the workers endured the backbreaking labor, prayed throughout the day, and made it back to the ghetto that night.[24]

A problem that concerned all Jews in Kovno who wished to observe Yom Kippur was whether it was obligatory for those in the ghetto to fast that day. This was of particular concern for the sick and the elderly who wished to fast despite the risk to their lives. R. Oshry ruled after consulting the legal sources and a doctor at the Jewish hospital in the ghetto that since it would be endangering their lives further, the Jews of the ghetto were in fact forbidden to fast. R. Oshry reported that he was told of only one person who didn't follow his ruling, a man who died the day after Yom Kippur after spending the whole day weeping and confessing so that he could die a repentant Jew.[25]

Shabbat observance also continued in secret and was supported by a special committee. Many people also came to R. Oshry with questions about observing Shabbat, for example, regarding the candles, the Shabbat meal, and other difficulties that arose in celebrating Shabbat. R. Oshry also recorded that he gave a sermon every Shabbat at one of the many gatherings that continued in secret.[26]

As R. Oshry stressed again and again in his memoir, daily religious life continued in full force in the ghetto. As Oshry wrote, "When death threatened every Jew every minute—still Kovno's Jews continued to go to houses of worship to study and to pray, to recite Psalms, and to pour out our hearts to the world's Creator. This recharged our energies, enabling us to continue living until the One Above would take pity on Jewry and rescue us from our horrifying situation."[27]

In his memoir, R. Oshry connects the unflappable observance of daily study and prayer to what Jews had always done throughout their many years of persecution. He writes, "Throughout history, even during times of terrible persecution, the sounds of Torah study could be heard emanating from the homes and synagogues of the Jewish People. Our ghetto joined in this sacred tradition. One outstanding place of study was the home of my revered teacher, Rav Avrohom Grodzensky, the spiritual dean of the Slobodka Yeshiva. In his home, Torah study never ceased."[28] As R. Oshry stressed, Jewish spiritual resistance played an essential role in keeping the community alive and hopeful: "We still had some resources left. Eternal Jewish faith, our trust in God, sustained us and kept us alive."[29] As R. Oshry aptly summed up, "That is how the light of Torah and Judaism was spread in those deep, dark days, the most abysmal period in Jewish history."[30]

Conclusion

This chapter has demonstrated three different ways that individuals responded to the promulgation of Nazi law against the Jews. The responses of these three groups demonstrate how medicine and law can be forces for the taking or saving of lives, of compliance or resistance, of good or evil. The purpose of Nazi law concerning the Jews was to isolate, persecute, plunder, and annihilate the Jews of Europe. German physicians, as a group, played an essential role in turning Nazi law and policy against

the Jews into a reality. Jewish physicians and religious leaders, on the other hand, used all their resources to preserve the physical, psychological, and spiritual health of the Jewish community. These heroic Jewish physicians and rabbis worked tirelessly in extremis to preserve what they could of Jewish life. The Jewish physicians strived to save lives in the face of death all around them, and they treated their patients with the utmost care, dignity, and compassion. The rabbis provided spiritual support, hope, and guidance in resistance to the attack on Jewish religious life and existence. The active resistance to Nazi law performed on a daily basis by Jewish leaders testifies to the unbreakable commitment to life that forms the core of Jewish law and practice. As R. Oshry stated in an interview with the *New York Times* in 1975, "one resists with a gun, another with his soul."[31]

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8

Homosexuality and the Law in the Third Reich

Melanie Murphy

Paragraph 175, the section of the German Criminal Code concerned with male homosexuality, was the Prussian state anti-sodomy statute which was incorporated into the Imperial Criminal Code of the new German Empire in 1871. In 1935, with the addition of Paragraph 175a, grounds for conviction were expanded to include erotic acts between men that fell short of intercourse. The unmodified Paragraph 175 required proven intercourse for a guilty verdict. Under 175a, many forms of physical contact or even a look deemed lewd between men were a basis for detaining a suspect. Paragraph 175 remained in effect in the Federal Republic of Germany until 1969, while the German Democratic Republic dropped Paragraph 175 in 1968. "In 1994, four years after unification, Paragraph 175 was finally stricken completely from the German Criminal Code."[1]

Prosecution for homosexuality had a long history in Germany. It was particularly brutally and intensively enforced under the Third Reich but did not originate with the regime nor was it, as the chronology indicates, definitively repudiated in the immediate postwar era. Laws against homosexual behavior were part of state attempts to regulate personal behavior and social norms during the imperial, republican, Third Reich, and postwar eras. "The German state constructed and rapidly expanded a relatively coherent system for policing morality, sexuality, and reproduction in the decades before 1900; that system persisted for something over half a century and then was cut back quite suddenly to something probably rather like the level of the 1870s."[2] However, a comparison of arrest records from the first decade of the Nazi regime with those from the 1920s shows that "while the development of the criminality rate for moral offenses seems to track reasonably well with general criminality in the 1920s, under the Nazis the former surged while the latter collapsed."[3] 1936 and 1937 were peak years for arrests of suspected homosexuals in Nazi Germany. Starting from an earlier date, "between 1933 and 1938 the number of men convicted under Paragraph 175 increased by almost exactly one order of magnitude, from 857 to 8,559. . . . In 1929 men convicted under Paragraph 175 had made up 6.3 percent of all those convicted of crimes against morality; by 1938 they made up 38.7 percent."[4] Thus, there is both continuity and marked difference between the legal treatment of homosexuals in the Third Reich and that in the previous and later German regimes.

Ultimately, the Nazi regime conducted unprecedented terror against gay men. It did so following periods of unusually free public discussion of homosexuality, the Weimar Republic, and the Second Reich. Robert Beachy asserts a "German invention of homosexuality" during the Second Reich, because propagation of academic research, public discussion, and advocacy for the removal of Paragraph 175 spurred scientific and social scientific experiment and investigation. The issue was a live one for scholars, officials, and the literate public. "The world's first self-consciously homosexual political organization, the Scientific-Humanitarian Committee (*Wissenschaftlich-humanitares Komittee* or *WhK*) was founded in Berlin in 1897."[5] This Committee articulated the view that an inborn biological basis for homosexuality was the origin of individual same-sex acts and desire. It aligned with Magnus Hirschfeld's theory of the homosexual man as a member of the "third sex," who had feminine tendencies, be it a female soul or female glands, in a male body. *WhK* was the leading organization in the late-nineteenth and early-twentieth-century efforts toward the "decriminalization of homosexual acts and the social emancipation of homosexuals. The political discourse of the emancipationists drew upon and influenced medical theories that homosexuality was a congenital anomaly and, therefore, neither a crime nor a disease."[6] Researchers disagreed about the specific origins or indications of homosexuality, and on approaches to political issues. However, the *WhK* consistently advocated for the repeal of Paragraph 175. This was not achieved under the Empire but seemed close to being accomplished during the Weimar Republic, particularly in 1929.

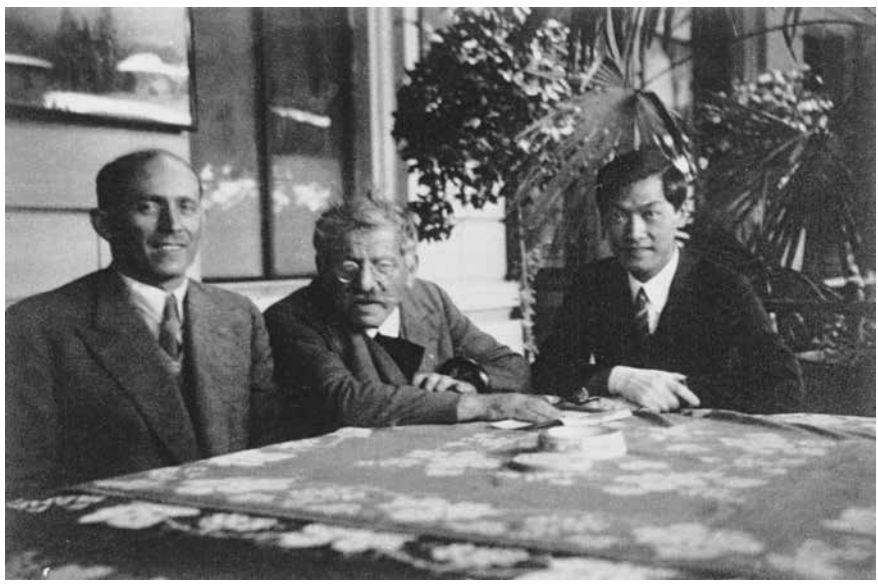

Figure 7 Magnus Hirschfeld (center) with his coworker Bernhard Schapiro (1885–1966) and his Chinese friend Tao Lee, sitting at a garden table. Courtesy of the United States Holocaust Memorial Museum.

The high regard in Germany for scientific research meant that homosexuality was reported on openly. Thus, the print and public discussion of homosexuality was less censored than in France or England and reached a wide public. Even the fact that homosexuality was illegal in Germany meant that investigators could interview subjects from a variety of walks of life, albeit often after their arrest. Beachy quotes Laure Murat on this paradox: "In France the third sex was decriminalized and concealed, it was a literary subject for writers and moralists; in Germany it was a serious object of scientific and political study, it was criminalized but openly exposed."[7] Gay enclaves in major cities, notably Berlin, constituted community, sociability, and a base for activism for German homosexuals. As a result, awareness of nonheterosexual lifeways was widespread in Germany and through the twentieth century up to the rise of the Third Reich, an increasing percentage of the population, although never a majority, was in favor of decriminalizing homosexuality. At the same time, Germans who rejected decriminalization of homosexuality were "susceptible to Nazism's promise to restore a wholesome Germany."[8]

Campaigning in 1928, the National Socialist Party declared itself against love between men since it weakened the German people.[9] The party's objection presumed the "third sex" paradigm of homosexuality. (In contrast, known homosexuals in the party, above all Ernst Röhm, understood their sexual preference as the basis for their hypermasculinity, which was in almost all respects, except for preferred sexual partner, normative among the right-wing after the Great War.) Yet anti-homosexuality had not been a defining aspect of the Party's program. Rooting it out was not a prime concern of Hitler's; *Mein Kampf* does not address the topic. Nonetheless, in power, they did "destroy the most developed homosexual emancipation movement the world had yet seen."[10] Raids on pubs and other social meeting places for same-gender-loving persons commenced with the new regime, but numbers of those arrested escalated over time and at different rates in different regions of Germany, reaching the highest point in the three prewar years. Immediately, public discourse changed. In both professional journals and popular media, there was no more "positive representation of homosexuality."[11] Enforcing Paragraph 175, Nazis claimed that they were against homosexuality but not homosexuals. "Although 'being homosexual' was not against the law, the National Socialist propaganda implied that the mere 'inclination' was itself a crime," and defamed the gay community by a steady drumbeat of stories linking them with crime, disorder, seduction, and child molestation.[12] Restrictions on "all Sexological work, progressive or conservative" ensued "because it was largely conducted by Jews."[13] Eventually doing such "Jewish science" could have repercussions even for Aryan, heterosexual Germans.

The SPD, the Social Democratic Party of Germany which supported socialism through legality and the Weimar Republic, and many on the German left, favored the repeal of Paragraph 175. Yet during the Weimar Republic opponents of Nazism called the SA, members of the *Sturmabteilung* or Storm Troopers, "Röhm Boys," and other epithets, despite the fact that "such broad attacks conflicted with socialism's broad mission of liberation and modernization."[14] To undermine the SA and the National Socialists, some leftists would condemn them as homosexuals at the same time that their party espoused equal rights for homosexuals. Publicity on this theme, such

as by the *Munich Post* in a series of articles in June 1931 on "The Brown House," the SA headquarters highlighted Röhm's homosexuality. The series included selections from Röhm's private letters, which referenced clearly his erotic activities, and claims that the SA propagated homosexuality.[15] Such domestic commentary ceased shortly after Hitler assumed the chancellorship on January 30, 1933.

Early in the regime, a strong anti-Fascist response to the February 27, 1933 Reichstag fire, the precipitating event for the Enabling Law which created the Nazi dictatorship, linked National Socialism and homosexuality. *The Brown Book of the Reichstag Fire and Hitler Terror* asserted that the fire was not the work of "a lone, misguided Communist but was instead a premeditated conspiracy of homosexual stormtroopers."[16] This widely read exposé, authored by German Communist Willi Munzenberg and others, described the fire not as the sole work of Marinus van der Lubbe, a Dutch Communist, but rather as a Nazi plan for which Marinus was the dupe. Although Marinus had been a Communist, so the *Brown Book* went, he was persuaded to set the fire because he was both weak-minded and a homosexual prostitute for Röhm. This claim was pure fabrication, in stark contrast to the *Brown Book*'s information about the existence and conditions of concentration camps in the Third Reich, and was one more manifestation of the "left's presumption of an inner identification between homosexuality and fascism."[17] Marinus van der Lubbe and five other Communist political opponents were tried for the crime. Immediately, and for decades after, the Nazis themselves were suspected of the arson, because it played so well into their aim of dictatorial control of the government. At the trial's conclusion in December 1933, the Leipzig court found van der Lubbe alone guilty, since there was insufficient evidence to convict the other defendants. In direct response to the court's failure to achieve a desired verdict because they followed actual legal norms, the government established the "People's Court," where "facts did not prevent convictions."[18]

In May 1933, young Nazis from the Berlin School of Physical Education pillaged Magnus Hirschfeld's Institute for Sexual Science. Eventually over 12,000 volumes from the Institute were burned. This was a dramatic show of party, and for that matter popular, resistance to the study and advocacy of sexual minorities, which was termed "Jewish science." Three elements moved the regime to step up persecution of homosexuals—responsiveness to public opinion against equal rights for homosexuals, instrumentalization of anti-gay actions to deflect criticism from the regime, which cannot be entirely separated from the first reason, and the agenda of Party leaders, especially Heinrich Himmler, who believed that homosexuals could undermine Aryan health by spreading their sexual orientation through seduction and thus foster degeneracy while undermining German birth rates. Himmler regarded the elimination of homosexuality from the German population as a personal mission of great intrinsic import. Additionally, Himmler credited the notion that homosexual men were tightly in league with one another, could communicate in ways hardly legible to heterosexuals, and were good at plotting and forming cabals, thus weakening the Third Reich from within. Although on the whole, Nazi ideas about gay men were different from their views of Jews, primarily in that a Jew was a Jew but a homosexual might be incorrigible or able to change, both groups were feared and credited with an ability to conspire with almost preternatural effectiveness. In the first years of the regime, as it sought

mainstream respectability and the security of public approval, it went on the offensive against same-gender-loving men, through propaganda, arrests, and even the only purge the regime ever conducted—the Röhm purge.[19]

Ernst Röhm, a decorated veteran of the Great War, had helped put down the 1919 Revolution in Munich and was active in the 1923 Beer Hall Putsch. Afterward, he had built up an SA-substitute when it was outlawed in 1923 and then was head of the reconstituted SA. For a time he left public life in Germany and served with the Bolivian Army until called back to Germany by Hitler in 1931. Röhm was close and intensely loyal to Hitler who recognized his skill and courage. Hitler knew of Röhm's private life and seemed to agree with Röhm that it was irrelevant to the performance of his duties. Hitler, Himmler, and others relied on Röhm's high valuation of "the soldierly virtues of courage, honor, honesty, obedience, comradeship."[20] Röhm belonged to the *Bund fur Menschenrecht*, or BMR, which in contrast to the above-described *WhK*, was "volkisch . . . and emphasized the normality of homosexual life and love."[21] He subscribed to the thinking of Hans Bluher that "all organizations outside the family, including the state, were based on male homoerotic drives, and on homoerotic feelings transferred from followers to leaders."[22] The idea that "male homosexuals might be a purer form of their respective sex, ultramen because of their genuine emotional bonds with other men and rejection of all things feminine" resonated with Röhm.[23] In contrast, for the thirteen years younger Heinrich Himmler, Bluher's *Die Rolle der Erotik in der mannlichen Gesellschaft* was a compelling but troubling work that he discussed with other students as an undergraduate. Both men believed in the value of a close, supportive male community for the good of its members and for the nation, with its origins in "the fraternity of the trenches of the first World War . . . a school for devotion to duty and sacrifice . . . . [It was] . . . an alternative to politics that was based on putatively prosaic social and economic self-interest."[24] Although Röhm and Himmler shared numerous convictions, such as that women should not be part of the political sphere, they held opposed views on what Harry Ooserthuis (and earlier George Mosse) identifies as the "tension between homosocial and homoerotic tendencies" in the National Socialist movement.[25]

The Röhm purge was encouraged by Himmler, Goering, Heydrich, and others to take down an SA that was making status and financial demands of the party, and was disturbing to private citizens because its favored mode of self-expression was activism leading to violence, and to business interests because it spoke for poor relief and reducing income inequality. It was somewhat threatening to the *Wehrmacht* as a potentially rival military body. These, more than the putsch the SA was supposedly planning, were the factors leading in June–July 1934 to the bloody attack on the SA, who were at the time scattered on vacation, in obedience to Hitler's directive. (The party took advantage of this "Night of the Long Knives" as the purge has since been known, to assassinate non-SA who had offended them, such as Gustav von Kahr.) Some publicity at the time of the purge covered homosexual activity in the SA, and Hitler's directive to the new leader of the SA was that it should be morally blameless, and that no German mother should fear her son joining it or any other National Socialist group indicated his concern for the reputation of the SA and party. However, a purported putsch, not sexual activities of Röhm or others, was the ostensible reason for the purge.

As time passed, party propaganda, confirmed by increased arrests and convictions of suspected homosexuals, as well as new laws and stricter punishment, redefined the purge as intended to eliminate an anomalous and dangerous homosexual cabal from the SA and hence party, and to signal that same-gender-loving men were unacceptable in the Reich.

In a speech shortly after the Night of the Long Knives, Hitler asserted that he had to step in and remedy the SA's evil. He proclaimed a doctrine that amounted to "pseudo-legality, [that he] . . . and the Nazi security officials could define crimes and punish criminals as they saw fit, and only later concern themselves with covering their actions with a legal veneer," which in this case the Reichstag compliantly did.[26] Franz Gurtner, Reich minister of Justice, reiterated this radical innovation in German legal practice in August 1935 "at an international conference on criminal law" where he brought Feuerbach up to date. Gurtner rejected "Feuerbach's standard formula, which had been viewed as unchallengeable for over a century: *nulla poena sine lege* (no punishment without a law)." He defined the new version as: *nullum crimen sine poena* (no crime without punishment)."[27] The regime undertook a law reform project (ultimately unfinished), but some changes were announced in July 1935. Included in it was the expansion of Paragraph 175, which cast a wide net and signaled a more vigorous campaign against homosexuals. Geoffrey Giles however notes that the new legislation against homosexuality was not simply a reactive observance of the Röhm purge, as some historians have assumed, based on Hitler's tendency to remake the public meaning of a date. (Hitler was wont to mark anniversaries to redefine dates, by, for example, unleashing *Kristallnacht* on November 9, the day the Empire fell in 1918. The Beer Hall Putsch likewise occurred over November 8 and 9, 1923.) The July 1935 announcement included a number of changes to the criminal code. Regardless, at two critical junctures when the regime shores up its dictatorial nature by undermining positive law—Hitler's 1934 assertion of himself, of his will and judgment, as the embodiment of law and the subsequent 1935 partial redrafting of the criminal code with a view to "finding a punishment for every crime," included in which was Paragraph 175a—the party is engaged in purging itself or the Reich of homosexuality, and on that basis seeking to appeal to the German public as having clean aims which necessitate extreme powers over the judiciary and legislature. Homosexuality was an issue that could provoke strong feeling, attention, and reaction. It is no exaggeration to say that the regime manipulated the intense emotional response to homosexuality; it stimulated "moral panic," to destroy German law and strengthen the Führer state.[28] Perhaps no other issue lent itself to being thus leveraged.

Hitler and his advisers had known that they must solidify the support of conventional, right-wing Germans by persuasion through propaganda and image, in tandem with their police campaign against homosexuality. Despina Stratigakos describes the conscious efforts by Hitler and his inner circle to publicize a mainstream image for him, beginning after the election of 1928, when he "remodeled his public persona from radical firebrand to bourgeois politician."[29] He bought (after a lifetime of renting) a Munich apartment and first rented Haus Wachenfeld, the Obersalzberg retreat he would eventually own and rename the Berghof. His first purchases were intended to display his rootedness, culture, taste, and solidity as well as his feeling with the *Volk*,

simplicity and morality. When his niece Geli Raubal committed suicide in 1931, his bachelor lifestyle was questioned in the popular press. Unmarried, he could not project an image of conventional heterosexual domesticity in the face of the steady stream of speculation and rumor in regard to homosexuality or heterosexual licentiousness in the party. In 1932, his "photographer and publicist Heinrich Hoffmann published a book, *The Hitler Nobody Knows*. It marked the beginning of a profound transformation—realized through images, text, and architecture—that shifted Hitler's domestic space from a site of rumored sexual and moral perversity to the anchor, in the public's view, of his humanity and honor."[30] Besides some pictures from Hitler's early life, there were many of him in the country especially outside of Haus Wachenfeld, with his dog, walking, greeting a child, and even one of him "grinning" reading the newspaper outside, "amused by the 'fables' printed about him by the hostile press: champagne feasts, Jewish girlfriends, a luxury villa, French money" according to the caption.[31] The message is a mise-en-abyme, a miniature of the larger effort of Hoffman's book and the regime itself to convince people that their version of Hitler, not the version that says he is an immoralist, is correct. *The Hitler Nobody Knows* makes an "appeal to values rather than to ideology."[32] The effect continued to be burnished with the interior decoration of the Berghof, the newly remodeled and renamed Haus Wachenfeld, that is completed in July 1936, the two-year anniversary of the Night of the Long Knives. The "public or semi-public spaces of the Berghof . . . communicated [Hitler's] 'correct' masculinity, an important part of the appearance of 'normality' that he performed in the mid-1930s."[33]

Geoffrey Giles observes that while "homophobia was widespread but not universal" in the Third Reich, "it was the attitude of a handful of leaders who shaped the crusade against homosexuals."[34] If for Hitler and his advisers, anti-homosexuality was instrumentalized as part of a values campaign, for Heinrich Himmler above all and for bureaucrats and jurists such as Josef Meisinger and Rudolf Klare to name but two, eliminating homosexuality was indeed an ideologically driven campaign which they pursued relentlessly even through the War years. Though Himmler, probably in response to the wishes of arts lovers Goering and Hitler, issued an exception for homosexual actors and performers that allowed them to continue to perform publicly and pursue their private lives so long as they were not flamboyant. In 1937, he said any planned arrest of such persons must be cleared by him. Himmler as head of the police established a Reich Central Office for the Combating of Homosexuality and Abortion in 1936; the two issues being attacked in tandem because they both undermined the size of the Reich's population. The Central Office, headed by Josef Meisinger, was located at Gestapo headquarters in Berlin and had originated as a Gestapo department but grew to an autonomous agency. It kept records on those suspected or arrested for homosexual acts and expected submissions of names from throughout the Reich by Gestapo and police. German police had since the Imperial period kept "pink lists" of suspected homosexuals. Fewest arrests came from stalking suspects, more from raiding known social meeting places. Interrogation of the arrested, often including physical abuse, yielded new names of likely homosexuals; also searches of rooms, calendars, and address books of suspects allowed the police and Gestapo to formulate networks of purported homosexual connections. But most names came to them more easily—from denunciations. Confining any suspect was not difficult. In

1934, "protective custody" was defined as allowing the detainment of anyone without trial and for as long as the state deemed necessary, who was an enemy of the state. In 1937, "preventive detention" of people with known criminal tendencies was allowed. Although not focused solely on same-gender-loving men, these regulations facilitated the arrest of many homosexuals.

At times, such as the 1936 Olympics, there would be a halt to arrests and interrogations, but the Central Office continued to study the causes of homosexuality, the best deterrence and punishment, and possible ways of eliminating it entirely from the *Volk*. Meisinger was reassigned to Poland in 1939 in part because of the inadequacy of his theorizing on homosexuality—in a 1937 speech he asserted that it originated in Asia.[35] Also, under his administration, the show trial for alleged homosexuality of Baron Werner von Frisch, who had criticized Hitler's war plans at the Hossbach Conference in November 1937, failed. Von Frisch had an able lawyer and the eyewitness had actually seen Captain Achim von Frisch engage in homosexual acts in a dark alley. Hitler had hoped to intimidate the armed forces and the trial was a surprising insult to them. With Baron von Frisch's acquittal on all counts, however, this naked attempt to manipulate the law for power politics failed.[36] Meisinger was replaced. In this instance true believers in the crusade against homosexuality cooperated fully in dirty politics.

Earlier, the regime conducted a drive against the Roman Catholic Church in Germany "which started in 1935, culminated in several trials in 1936 and 1937, and continued on a much smaller scale until 1945."[37] Himmler, Hitler, and Goebbels in particular hated the Roman Catholic Church for its pervasive influence in education and youth formation, and its international connections. Baldur von Schirach, head of the Hitler Youth, in his study for internal use, *Criminality and Delinquency of Youth*, described monasteries and parochial schools as hotbeds of homosexual activity. Monks and priests either participated in these, ignored them, or through their admonishment against homosexual acts, tempted their hearers to engage in them.[38] The Nazi elite had the same view and propagated it. They had other objections to the church besides ostensible widespread homosexual relations Catholic clergy and religious members had with each other and with youth (and illicit heterosexual relations), but, as with the Röhm purge, they felt an attack based on homosexuality would be the most effective way to undermine the institution.

Before the 1936 trials, Heydrich informed Gestapo headquarters in involved districts of the aim—to bring before the public a large number of clerics convicted of unnatural sex acts in order to discredit the church as a haven for degenerates and enemies of the state.[39] Flawed evidence and the insistent self-defense of the clergy, religious orders and lay brothers resulted in few convictions. The trials were suspended for the 1936 summer Olympics, but begun again in 1937. A memorandum from Reich Central Office for the Combating Homosexuality and Abortion says that propaganda should "give as concrete details as possible about each individual trial, because it is these which make the greatest impression on people. Mixed in with them, scientifically based synthetic articles with a propagandistic slant would have to be published again and again."[40] Goebbels spoke on Catholic clerical perversion "as the father of a family whose four children are the most precious wealth I possess—as a father who therefore fully understands how parents are shocked in their love for the bodies and

the souls of their children, of parents who see their most precious treasure delivered to the bestiality of the polluters of youth. I speak in the name of millions of German fathers."[41] Although convinced Nazis were enthusiastically receptive to descriptions of the Roman Catholic clergy as traitorous homosexuals, the message seemed to fail with the population at large. Hitler called off the trials and stepped back from the publicity campaign, for foreign policy reasons (relations with Mussolini who did not want at that time to be connected with an overt attack on the church) but primarily because this "values" campaign was not well received by people who had too long and deep an experience with the church and who thus did not resonate emotionally with the story they were told. The Nazi Party and the Third Reich purifying the Roman Catholic Church was not engaging; it was not even entirely plausible to many. Anti-homosexuality campaigns as a legitimating and prestige-enhancing tactic could be potent, as the regime had already seen, but needed to be well calibrated.

After a Himmler decree of July 1940, the campaign against homosexuality was radicalized by the policy of removing to concentration camps, upon the conclusion of their prison term, men who had seduced more than one partner. (In actuality prisoners would be illegally kept or moved anywhere almost from the beginning of the regime, but this decree in the National Socialist fashion legitimated that practice belatedly and increased it.) In concentration camps, homosexual inmates stood a higher than 50 percent chance of dying and were considered fair game for cruelty by fellow prisoners and sadism on the part of guards. For example, they were kicked away from work areas in Sachsenhausen, so that they would roll down a hill toward the perimeter fence, and then be shot for "trying to escape," or they were drowned or subject to any number of deadly humiliations.[42] They were favored subjects for human experimentation. Homosexuals were particular targets for dog attacks as well. Pierre Seel, arrested in German-occupied Strasbourg in May 1941, was sent to Schirmeck-Vorbruch, a camp about twenty miles west of the city. There he saw his "loving friend" Jo executed; Jo was naked with a tin pail over his head. The SS "sicced their ferocious German shepherds on him: the guard dogs first bit into his groin and thighs, then they devoured him right in front of us. His shrieks of pain were distorted and amplified by the pail in which his head was trapped."[43] Toward the end of the war Gad Beck was arrested in Berlin. One man caught in the same sweep happened to reveal in interrogation that he was gay. "The Gestapo set two specially trained dogs on him—specialists in testicles and ears. He lost those body parts entirely."[44] There was no persecution of lesbians as such in the Third Reich, although occasionally the true believers discussed whether they should in fact institute such laws. One reason not to was that women were not affected by a same-gender sexual experience as men were. They would not necessarily seek it out again and thus would not be lost as procreators. A reason it would be difficult was that female gestural and social norms would make it difficult to tell who were friends and who were lovers. Men were arrested for kissing; jails and courts would be overburdened if women were arrested for kissing or caressing each other. Nonetheless women suspected of lesbianism were specially ill-treated in camps, for example, being made available for rape or forced to work in camp brothels.[45]

Histories and memoirs now offer many examples of egregious sufferings meted out to homosexuals in detention and camps. Perhaps the earliest study of the concentration

camp system, by former political inmate Eugen Kogan, *The Theory and Practice of Hell*, (English title) was published in German in 1946 and included, unlike many later histories and reports, information about homosexual prisoners and the severe abuse to which they were subject.[46] Then followed almost total silence on the subject, in part because homosexuality was still illegal in Germany, most of Europe, and the United States. Published in 1972, Heinz Heger's *The Man with the Pink Triangle* (English title), is regarded as the first memoir of a gay inmate.[47] For years after the war ended, the mentality or will to understand the abuse of homosexuals by the Third Reich was lacking.

While homosexual camp inmates were isolated and scorned, another version of same-gender relations proliferated. Sexual relations between Kapos or Block Chiefs and young boys enabled the boys, referred to as "pipels," "dolly boys," or another term, to be well-fed, freed of onerous or killing labor, and protected. "Situational homosexuality . . . the phenomenon of relationships between heterosexual partners in which the (feminine-looking) boy plays the female part in the relationship, while the older, mostly hierarchically-superior partner lives out his masculine sexuality was widespread in Nazi concentration camps."[48] Regardless of the sexual identity of the Kapo, for the boy, becoming a pipel was a survival strategy. Although these relationships are a textbook case of the Nazi view of how homosexuality is propagated, since they occurred between prisoners they were of minimal interest to authorities. If a boy reported a Kapo to an SS officer for making sexual advances, on occasion that Kapo was punished. But that is as far as they went to enforce the law of the Reich within the camps on that issue.

German occupiers were not concerned to "cleanse" conquered populations of homosexuality, rather this was regarded as a sign of their degeneracy and a self-undermining, which served the occupiers to leave unchecked. Burleigh and Wippermann observe that with "almost half of the 50,000 convictions for homosexuality occurring between 1937–1939 . . . the regime's persecutory drives were not fueled solely by the 'radicalizing' impact of war."[49] During the Second World War the regime's attack on the Jews was radicalized. That war was as Lucy Dawidowicz long ago termed it, "a war against the Jews," as numbers of their detained, deported, and murdered increased dramatically in the course of it. In contrast, for the Third Reich, being at war against non-Germans did not necessitate arresting, punishing, or killing their sexual minorities, who in the Nazi view offered the advantage of undermining their enemies from within. Until the war was won, Aryan German homosexuality was the issue.

A radicalization occurred in the severity of the treatment of homosexuals if not in the numbers arrested, however. "Medical" procedures to which homosexual inmates were subject resulted in their debility and often death, and the war years saw steady increases in numbers castrated. From 1933, judges could order compulsory castration for some categories of sex offenders.[50] With the expansion in the law on homosexuality in 1935, many more men were subject to prosecution. A promise of leniency, combined with threats and often physical abuse, compelled many civilians to sign a voluntary castration agreement. Men in camps too signed these agreements, often in response to vague and often unmet promises of freedom. Medical experts, physicians, and psychiatrists argued the results and efficacy of castration for the entirety of the regime.

One physician, in regard to a 1934 case, asserted that castrating the accused "would not change the defendant's homosexual attraction for teenage boys," since "the seat of this attraction . . . [is] not in the gonads, but rather in the brain and the central nervous system. Nonetheless, the physician recommended castration, as a means of reducing . . . [the defendant's] sex drive."[51] A number of physicians pushed "for more general and widespread use of compulsory castration against violent criminals, asocials and 'obstinate homosexuals.'"[52] In so doing they sought recognition and respect as experts in criminal biology, which they believed would be valuable to a regime, which had found most of the previous generation of experts in sexual science repugnant.[53] Ernst Kaltenbrunner, Gestapo chief, pushed in the summer of 1943 for involuntary castration for all moral offenders, including "ordinary homosexuals." Hitler did not want new legislation on such issues at the height of wartime. Kaltenbrunner requested an Emergency Edict to allow immediate involuntary castration. When the Interior Ministry revoked its prior ban on voluntary castration for the duration of the war, Kaltenbrunner withdrew his request, confident that the Gestapo had the means to elicit prisoner agreement to a "voluntary" castration.[54] Some castrated homosexuals and other asocials in 1944 were subjects at Buchenwald to an experimental operation where a hormonal capsule was inserted in their groins. The claim was that the hormones would release into the prisoners' bodies, gradually reversing their homosexuality. The author of this experiment, the Danish doctor Carl Peter Jensen, also known as Carl Vaernet, was approved by Himmler to conduct his experiments at the recommendation of an SS physician. Some of Vaernet's patients died after the operation. At the end of the war, Vaernet was able to leave Germany because of a heart condition that he claimed required treatment in Sweden. From there he escaped to Buenos Aires.[55]

Prompted by regime defamation and policies, Germans engaged in denunciation of suspected nonconformists. Laurie Marhoefer's micro-history of Ilse Totzke, a female gender nonconformist by virtue of her grooming and attire including an Eaton hair style and a men's cut suit jacket and tie, addresses the situation of risk, the "real suffering and terror" experienced by outsiders who are nonetheless not subject to a "state campaign against a targeted group" as is more clearly the case for male homosexuals.[56] Ilse Trotzke was sent to Ravensbrück in 1943, and fortunately survived after a failed attempt to escape to Switzerland. She was brought to the attention of the Gestapo through denunciations over her appearance and seeming lack of National Socialist feeling, and potential treachery. These denunciations were instrumental in her surveillance although her female masculinity aroused the suspicions of her neighbors rather than the official interest of the Gestapo who did not pursue Ilse Trozke based on her dress and putative sexual relations with women. "Yet the amorphous suspicions [the denunciations and more importantly the witnesses] . . . voiced kept the investigation alive."[57] Because she admitted under questioning that she kept company with Jews, as informers had indicated, Ilse Totzke was warned by the Gestapo. The warning in turn so terrified her that when she was unable to manage an underground existence in Berlin she decided to flee to Switzerland and asked three Jewish women and men with whom she was close, to go with her. Only one, Ruth Basinski, who also survived the War after having been sent to Auschwitz, did. Action was taken by the Gestapo against forbidden social relations between an Aryan and a Jew: "This case demonstrates the

Gestapo's disinterest in lesbianism, on the one hand, and how witnesses who did care about lesbianism could drive the Gestapo to act, on the other."[58] The virulent propaganda against those who did not fit the mold of proper Aryan femininity and masculinity normalized and accelerated processes of exclusion, personal, social, and ultimately penal.

John Connolly describes the campaign against homosexuality as "undertaken not as an end in itself, but always as a means to another."[59] This is true for Hitler and his circle and their "values" campaign, and even in a sense true for the ideologues to a degree in that their aim was population growth for Germany. They were however radically intolerant of violations of their gender norms and in that sense were against homosexuals as homosexuals. In contrast, the war against the Jews was emphatically against the danger Jews posed to Aryan life and living space. Extermination of the Jewish people did not stop for military emergency and there was little to no doubt about what a Jew was and who was a Jew. The elimination of the Jewish threat was the core mission of the regime. Antisemitic propaganda included, among other tropes, the image of Jewish men as sexually corrupting to Aryan women and Jewish women as promiscuous temptresses who spread sexually transmitted diseases. "Sexual defamation" was a tactic used against both Jews and homosexuals; it was the primary form of argument against homosexuals and only one of a number against Jews.[60] (The contention that Jews supported or promoted homosexuality was a major connecting point for the defamatory arguments.) Continued reiteration of the defamations validated this type of argument as well as the apparent need to isolate and penalize Jews and homosexuals. Slanders against both groups became part of standard public discourse.

Yet few National Socialists were as committedly anti-homosexual as antisemitic. Although Nazi ideologues such as Rudolf Klare among others theorized the urgent need to eliminate the homosexual danger, and Heinrich Himmler and Alfred Rosenberg avidly pursued the project of extirpating homosexuality from the *Volk*, for many in the party including Hitler, the campaign against homosexuality was a second- or third-tier objective. For them it was a sop to conservative or, what would today be termed, homophobic Germans, and as noted, a response to criticisms of the party that it was itself a hotbed of homosexuality. The true believers wished to understand and root out homosexuality. The others capitalized on the anti-homosexual agenda to burnish the National Socialist image while playing on the fears and inciting the disgust of the German people, all for the benefit of the Nazi Party. The upwelling of emotions would bind them to the Party as the organization that would diminish homosexual panic. This worked well with the Röhm purge and not well with the attack on the Roman Catholic Church. In the trial of Baron Werner von Frisch, the accusation of homosexual acts was to discredit him as a punishment for disagreeing with Hitler; it is a contained action that does not aim at arousing consequential emotion among the people. By the same token, when in November 1941 Himmler decreed that any SS man found guilty of homosexual acts stands to be executed, Hitler said that this should not be publicly announced. Anti-homosexuality for him was a tactic not a cause and he ceased to be interested in it during wartime. Making such an announcement might lessen the image of the SS as an elite, almost invulnerable fighting force. SS men were to

be told about the prospective death sentence privately and sign statements to the effect that they knew about this law. Hitler was intensely, it is fair to say, to use a favored Nazi term, fanatically, interested in his public image and the flow of loyalty and adoration from the people to him and his regime, but felt that this effect was best achieved in wartime not by stressing the regime's intolerance for homosexuality in the SS but rather by protecting the image of the SS.

The issue between the true believers and the instrumentalists is joined when the 1935 expansion of the definition of acts against Paragraph 175 is radically expanded with Paragraph 175a, according to which, for example, two men kissing on a park bench or a male nurse who puts his arm around a male patient can be (and were) arrested for homosexuality. German people did not grasp the change in the law, because Nazi papers were silent. "Time and again those arrested expressed surprise at the charges. The general public appears to have remained relatively unaware of the wider scope of the law."[61] The ideologues saw the law expanded such that almost any physical contact between men was reason for arrest. The party's concern for the wholesome image they wished to portray and thus bind the people to them precluded real comment on the details of the legal change. Himmler, Heydrich, and others at the top of the anti-homosexual movement were glad of the expansion of Paragraph 175 to include almost any physical contact or indication of involvement between two men. The Party press did not want to elucidate this because it might seem to connect them in the public mind to homosexuality.[62] The regime's interest in its public image far outweighed the need for people to know the law under which they could be detained, imprisoned, mutilated, tortured, and killed. The Judiciary upheld the application of the 1935 amendment to Paragraph 175 even before it went into effect to acts committed years before 1935. The 2000 documentary *Paragraph 175* brings together five homosexual survivors of the Nazi era, and one lesbian woman who left Germany because she was Jewish. One man, Heinz F., says he did not know why he was being arrested.[63] Men had not been arrested for meeting another man in a park and touching them in some manner for years prior to the Nazi regime. Sexual intercourse between men was the standard for accusation under Paragraph 175 and the 1935 change in the law was not well known, especially beyond major urban areas.

The regime's assessment of the magnitude of the respective threats posed by Jews and homosexuals was different, but techniques for discrediting and vilifying each group were quite similar and connected the two groups in the public mind. [64] Each may well have inflamed the other. Geoffrey Giles, in a series of articles on the attack on homosexuals under the Nazi regime, concludes that not only some people fighting homosexuality were indeed true believers but that had Germany won the Second World War, they may have turned eliminationist toward homosexuals as well. The results of a Third Reich victory for homosexuals cannot be stated with certainty, but the conquered living space would need inhabitants and the removal of the "Jewish threat" would leave them without that enemy to campaign against, but with the expectation and need of such an enemy. Lawyers and judges had supported the expansion of the criteria for being incarcerated and increased the potential for being castrated for a presumed homosexual. Physicians were engaged in judging the particular homosexual and the social group for its ability to be reformed or remade

as a useful citizen. Ordinary Germans had been exposed for years to a language of dehumanization and sexual defamation both for Jews and homosexuals and they could continue to find such language normal or meaningful when it was mainly or solely against homosexuals. People had learned the habit of denunciation. Was this then the basis for a new, expanded campaign of against homosexuals? Counterfactual history has its critics; asking this question about the future of Nazi anti-homosexual policy is a way to identify the defining aspects of their policy and the direction in which it appeared to be headed.

While the Third Reich's terror campaign against same-gender-loving men was unique, homophobia was common to the Allied and Axis powers. Britain and West Germany mirror each other in that they both ceased prosecution of homosexual offenses within two years in the late 1960s, and both countries have recently sought to annul their post–Second World War prosecution of homosexuals. The recent Alan Turing law, as it is called, pardons all convicted under the British gross indecency statute, those deceased automatically and those living upon application, and offers some financial compensation to them. Similarly, Germany's cabinet in early 2017 has forwarded a measure to pardon the victims of their discriminatory law. In 2000 Germany expressed regrets for retaining Paragraph 175 and in 2007 moved to compensate those prosecuted under it. The Allied conceit of being the opposite of their former enemy does not hold in the postwar years. When the Nazi regime was active, however, their policies were singularly vicious. Lawyers and physicians who jockeyed for place in the cause of solving homosexuality helped heighten the relentless campaign wrought by those ideologues, especially Himmler, who identified homosexuality as a defect to be rooted out rather than an integral element of human sexuality. Legal process was often unstable and dependent on the needs of the regime but particularly on the issue of homosexuality when the law, in its widening and in the repression of its terms, was almost entirely correlated to the political trumpeting of the Nazi values campaign. Homosexuality was a very live issue for the Nazis both in the propaganda about it directed toward them and especially in that produced by them. They felt largely free to create what we today regard as a terror campaign. Michael Burleigh and Wolfgang Wipperman put it succinctly: "In the Third Reich, homosexuals were treated without parallel in any other state in the civilized world."[65]

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9

Physicians, Psychologists, and Lawyers as Torturers: From the Second World War to Post 9/11[1]

George J. Annas and Sondra Crosby

Shortly after 9/11, the CIA opened secret prisons (black sites) to conduct interrogations of terrorist suspects to obtain information that might prevent another attack on the United States. In March 2002, their first prisoner, Abu Zubaydah, who was thought to be a high-ranking member of Al Qaeda, was captured by Pakistan authorities and turned over to the CIA. While recovering from gunshot wounds suffered during his apprehension, Zubaydah was questioned in the hospital by FBI agents. Upon his release from the hospital, his interrogation at a black site was turned over to two contract psychologists. They built upon the concept of "learned helplessness" to develop a strategy to break Zubaydah's will to resist. Zubaydah's cell was blasted with "loud rock music" or noise to develop a "sense of hopelessness" and he was "typically kept naked and sleep deprived." In June and July, he spent forty-seven days in isolation while an interrogation plan was developed and approval to use it was sought by the CIA, whose attorneys worked to obtain prior legal immunity from torture accusations from the US Department of Justice. The methods sought for this approval were the attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, waterboard, use of diapers, use of insects, and mock burial. Zubaydah's description of his treatment is available in a statement released at an August 23, 2016 appearance before a Guatanamo Periodic Review Board.[2]

In December 2014, the US Senate Intelligence Committee's report on torture was released to the public. The 600-page report (a redacted summary of the still-classified 6,000-page report) documents in disturbing detail the use by the Central Intelligence Agency (CIA) of physicians, lawyers, and psychologists in its post-9/11 torture program at more than a dozen "black sites," or secret prisons, around the world.[3] The United Nations High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, called the report "courageous and commendable," while condemning the torture program it details and notes that "torture cannot be amnestied" and should not be permitted to recur.[4] To begin to understand the torture, it is necessary to understand how physicians, psychologists, and lawyers collaborated to overcome their professional inhibitions.

Medical professionals, primarily private contractors, filled four basic roles at the black sites: clearing terrorist suspects as "medically fit" for torture; monitoring torture to prevent death and treat injuries; developing novel torture methods; and torturing prisoners. All these actions were taken only after CIA and US Department of Justice attorneys assured the medical professionals that they had immunity from prosecution and would not be held legally responsible for violating US and international laws against torture as long as they used the techniques approved in legal memos (since withdrawn) written to justify their actions. Government lawyers agreed to provide immunity assurances that specific torture techniques were legal "enhanced interrogation" methods only if the physicians assured them that they would be present to prevent permanent harm to prisoners. The CIA opened more than a dozen black sites around the world after 9/11, in which at least 117 prisoners were held; at least 39 of these prisoners were subjected to one or more torture techniques.

From the Senate report and the documents on which it builds, the physicians involved appear initially to have had, at best, mixed feelings about direct involvement in torture, but they evolved into active participants. In August 2002, CIA email messages included lines such as "I want to caution [the medical officer] that this is almost certainly not a place he's ever been before in his medical career" and the comment that viewing videotapes of the waterboarding of Abu Zubaydah (the first terrorist turned over to the CIA) "has produced strong feelings of futility (and [il]legality)." Seven months later, in March 2003, one onsite physician questioned the plan to waterboard the alleged 9/11 mastermind, Khalid Sheikh Mohammed (referred to as KSM), for the fourth time in 24 hours, because the draft guidelines of the CIA's Office of Medical Services (OMS) stated that three waterboarding sessions in 24 hours was the acceptable maximum. The Counterterrorism Center's attorney assured the site personnel that the medical officer was incorrect in thinking that this limit had been approved. Later the same day, the medical officer wrote to the OMS, saying, "Things are slowly evolving from OMS being viewed as the institutional conscience and the limiting factor to the ones who are dedicated to maximizing the benefit in a safe manner and keeping everyone's butt out of trouble."[5]

The waterboarding of KSM, like almost all the CIA torture conducted, was directly overseen by two contract psychologists, former supervisors of the US Air Force's SERE (survival, evasion, resist, escape) course, who were hired to develop an interrogation program by "reverse engineering" the SERE program, to get the suspected terrorists to talk. Instead, the CIA relied almost exclusively on what they called "learned helplessness." This technique, based on research on dogs, was now used to try to break down a prisoner's resistance to the point where he feels helpless enough to confess to whatever his torturers want. Before KSM's waterboarding, the two psychologists (their CIA cover names were Swigert and Dunbar; their real names are James Mitchell and Bruce Jessen) had used nudity, standing sleep deprivation (for up to 180 hours), the attention grab and insult slap, the facial grab, the abdominal slap, the kneeling stress position, and walling (pushing into a wall "quickly and firmly"). The Department of Justice had approved these methods as long as they were done with a physician present.

The use of unapproved torture methods illustrates the impossibility of confining torture to legally defined methods. For example, CIA agents threatened KSM's

children, a universally condemned method that was nonetheless later declared "legal" by the Counterterrorism Center, so long as the threats were "conditional." Another unapproved method called "water dousing" (a variation on waterboarding) "was developed with guidance from CIA [Counterterrorism Center] attorneys and the CIA's Office of Medical Services" working together. Physicians and lawyers consistently gave themselves permission to do whatever they agreed among themselves was important to do (to "save lives"). Yet another unapproved technique, described as "rectal feeding," consisted of delivering food rectally to demonstrate dominance over the prisoner (though no nutrition can be delivered through the rectal mucosa). This torture technique was used, for example, on Majid Khan, who was on a hunger strike. CIA medical officers had "discussed rectal rehydration as a means of behavior control." Three weeks into a hunger strike, nasogastric feeding was replaced with a "more aggressive treatment regimen." "Majid Khan was subjected to involuntary rectal feeding and rectal hydration, which included two bottles of Ensure. Later that same day, Majid Khan's 'lunch tray,' consisting of hummus, pasta with sauce, nuts, and raisins, was 'pureed' and rectally infused. Additional sessions of rectal feeding and hydration followed."[6]

There is, of course, no medical indication for rectal feeding, and the fact that it was done by or under the supervision of a physician cannot convert this torture technique into a medical procedure. Nonetheless, medical justifications were used as the cover story to legitimize its use when it became public. For example, responding to the Senate report, Vice President Dick Cheney said rectal feeding was not approved but that he believed "it was done for medical reasons."[7] We think it is more accurate to describe rectal feeding as a technique of sexual assault. Seen in the context of the constant state of nudity of most black-site prisoners, it seems reasonable to conclude that the goal of rectal feeding is dominance and punishment—that it is about vengeance, not medicine. In US prisons, medicine (and public health) has also been used to justify demonstrating dominance by forced nudity of prisoners, in the form of routine mandatory strip searches.[8]

The Senate committee's Republican minority (currently the majority) published a rebuttal to the report, arguing that it was incomplete because it relied exclusively on documents and did not involve interviewing participants. The minority also disagreed that no useful information was obtained by torture, correctly noting that there is no way to recreate a non-torture scenario to see what information could have been discovered without torture. On the other hand, whether torture "works"—like whether slavery "works"—is simply the wrong question. Both have been internationally recognized as crimes against humanity that have no justification, at least since the Second World War and the Nuremberg Trials.

In 2004, Robert Jay Lifton, acclaimed for his pioneering work *The Nazi Doctors: Medical Killing and the Psychology of Genocide*, wrote that it is possible to get physicians to become torturers by putting them in "atrocity-producing situations."[9] One such situation is certainly a CIA black site, a site with no official existence that is created for the primary purpose of extracting information from suspected terrorists. The Senate report supports Lifton's conclusion and suggests that one way to try to prevent a repetition of the torture program is to eliminate black sites altogether. The report adds

to our knowledge of how lawyers and physicians can collaborate with each other to rationalize torture—a dynamic that has also played out in military prisons, including Abu Ghraib and Guantanamo, and even in some US prisons, especially supermax prisons and others that rely heavily on solitary confinement.

The legal context for torturing terror suspects post 9/11

International human rights law was born from the ashes of the Second World War. The most notable post–Second World War products are the United Nations, the Nuremberg Trials, the Universal Declaration of Human Rights, and the Geneva Conventions of 1949. However, international human rights law continued to develop and expand right up to September 11, 2001, including, most notably, the International Covenant on Civil and Political Rights, the Convention against Torture, and the establishment of the International Criminal Court. With the exception of the criminal court, the United States has consistently been the leader of the international human rights movement.

September 11 stopped our nation's human rights momentum and caused our leaders to believe that we must barter our human rights for security and adopt measures to protect ourselves—methods like torture that we have, at least since the Second World War, consistently insisted are always immoral and illegal. In his inaugural address, President Obama rejected the antihuman rights policies of the previous seven years, saying "We reject as false the choice between our safety and our ideals." Instead the new president noted:

> Our Founding Fathers, faced with perils we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.[10]

The president, of course, has more power than any other government official, and as president is also commander in chief of the military. Nonetheless, as President Obama insists, we are a country of laws, including international human rights laws. That is why, two days after he became president, he reaffirmed our country's support of both the Geneva Conventions and the Convention against Torture, and vowed to close Guantanamo within a year. He did not succeed.

How did we get to the point that a new American president had to take these steps; and how is it possible that he could not succeed in implementing them in eight years in office? How did America become a human rights outlaw? There are many possible explanations, but there is no longer any doubt that it would have been impossible for the administration of George W. Bush to embrace harsh interrogation amounting to torture, and the establishment and operation of an off-shore interrogation center at Guantanamo, without the active cooperation of lawyers and physicians. The lawyers and physicians who counseled or cooperated in using torture, ignoring the Geneva Conventions, and disregarding the Nuremberg principles, can reasonably be labeled

as human rights outlaws. Understanding their role is critical to preventing similar derelictions of professional duty in the future.

A "new kind of war"

In *State of Denial*, Bob Woodward describes the January 18, 2002 meeting at the White House in which the decision not to follow the Geneva Conventions with respect to Al Qaeda or the Taliban was made. Secretary of State Colin Powell asked the president to honor our commitments to Geneva, and he was backed by General Richard Myers who said:

> "Mr. President, you may notice I'm the only guy here without any backup. I don't have a lawyer. [The other principles on the National Security Council present had their legal advisers there.] I don't think this is a legal issue. And I understand technically why the Geneva Conventions do not apply to these combatants [regarding POW status]. I got that. But I think there is another issue we need to think about that maybe hasn't gotten enough light. You have to remember that as we treat them, probably so we're going to be treated. We may be treated worse, but we should not give them an opening." Terrorists or other future enemies could easily use the US policy against the Taliban as an argument that they too could ignore the Geneva Conventions.[11]

Perhaps the most disastrous mistake in the "global war on terror" was to designate it a war at all, instead of a police action. War metaphors not only immediately give credibility to the "enemy," but they also call for absolute solutions, such as "unconditional surrender," and suggest that the country is in a constant state of emergency, with representatives of the good challenged by "evil doers." And there is more to our metaphorical declaration of war against terror (a method, not an enemy): this was a "new kind of war," a war of good versus evil, that required the good guys to adopt, at least temporarily, the methods of the savage evil-doers.[12]

Shortly after the White House meeting, on February 7, 2002, the president signed a memorandum on the "Human Treatment of al Qaeda and Taliban Detainees" which specifically determined that the Geneva Conventions of 1949 would not be applied to Al Qaeda and Taliban detainees. The rationale presented in the memorandum, which had been prepared by White House Counsel Alberto Gonzales, was: "The war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of States. Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war." The memo continues, specifically, I "accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"[13]

The White House meeting and the wording of this memorandum provide support for the opinion of the general counsel of the Navy, Alberto Mora, that administration lawyers did not seem to know or care much about the laws of war, including the Nuremberg principles and the Geneva Conventions. Had they had even a rudimentary knowledge of history, for example, they would have known that the United States was not the first government to use the excuse that engagement in a new kind of war justified suspension of the Geneva Conventions. Winston Churchill gives an especially disturbing example in Volume 3 of his memoirs of the Second World War in which he refers to what he characterizes as a "terrible decision of policy" adopted by Hitler on June 14, 1941 at the outset of the war between Germany and the Soviet Union, which led to "many ruthless and barbarous deeds."[14] Churchill quotes directly from the evidence produced at the Nuremberg Trial from the two generals at the meeting with Hitler, Generals Franz Halder and Wilhelm Keitel. Keitel's testimony at Nuremberg includes the following:

> The main theme [of Hitler's instructions] was that this was the decisive battle between two ideologies and that this fact made it impossible to use in this war methods as we soldiers knew them and which were considered to be the only correct ones under International Law. The war could not be carried on by these means. In this case completely different standards had to be applied. This was an entirely new kind of war, based on completely different arguments and principles.[15]

The statement of General Halder was similar:

> At this conference the Fuhrer stated that the methods used in the war against the Russians will have to be different from those used in the war against the West. . . . He said that the struggle between Russia and Germany is a Russian struggle. He stated that since the Russians were not signatories to The Hague Convention [the precursor of the Geneva Conventions] the treatment of their prisoners of war does not have to follow the Articles of the Convention.[16]

The point is not that President Bush was acting like Hitler. The point is that the president's advisers seemingly knew nothing of the history of the Second World War, or the opinion of Winston Churchill (who the president often referred to as his model of a wartime leader) on the specific subject of the legal advice.[17] It is unimaginable that President Bush would have modeled his actions on Hitler rather than Churchill, so ignorance must be the explanation. Among other specific items, Common Article 3 of the Geneva Conventions prohibits "cruel treatment and torture" as well as "humiliating and degrading treatment."[18] The issuance of the Bush Geneva Conventions memorandum began the process of institutionalizing torture in the United States but the president could not institutionalize torture by himself. Sociologist Elaine Scarry is surely correct in noting that the institutionalization of torture in a society requires the active cooperation of doctors and lawyers. In her words:

> It is in the nature of torture that the two ubiquitously present [institutions] should be medicine and law, health and justice, for they are the institutional elaborations

> of body and state. These two were also the institutions most consistently inverted in the concentrations camps, though they were slightly differently defined in accordance with Germany's position as a modern, industrialized mass society: the "body" occurring not in medicine, but in its variant, the scientific laboratory; the "state" occurring not in the process of law, the trial, but in the process of production, the factory.[19]

Torture is a particularly horrible crime and any role of physicians (or lawyers) in conducting or enabling it has always been difficult to comprehend. As General Telford Taylor, the prosecutor, explained to the US judges at the trial of the Nazi doctors in Nuremberg, Germany (the "Doctors' Trial"), "To kill, to maim, and to torture is criminal under all modern systems of law . . . yet these [physician] defendants, all of whom were fully able to comprehend the nature of their acts . . . are responsible for wholesale murder and unspeakably cruel tortures."[20] Taylor told the judges that it was the obligation of the United States "to all peoples of the world to show why and how these things happened," with the goal of trying to prevent a repetition in the future. The Nazi doctors defended themselves primarily by arguing that they were engaged in necessary wartime medical research, and were following the orders of their superiors. These defenses were rejected because they are at odds with the "Nuremberg Principles" articulated in the prior multinational war-crimes trial: that there are crimes against humanity (like torture), that individuals can be criminally responsible for committing them, and that obeying orders is no defense.[21]

Torture in wartime

Seventy years later the question of torture during wartime, and the role of physicians and lawyers in it, is again a source of consternation and controversy. Steven Miles, for example, relying primarily on government documents, has noted that at Abu Ghraib and Guantanamo, "at the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogators to use medical records to develop interrogation approaches, falsified medical records and death certificates, and failed to provide basic medical care."[22] The Red Cross has alleged that the physical and mental coercion of prisoners at Guantanamo is "tantamount to torture," and specifically labeled the active role of physicians in interrogations "a flagrant violation of medical ethics."[23] Psychiatrist Robert Jay Lifton has suggested that the reports of US physician involvement in torture from Iraq, Afghanistan, and Guantanamo have echoes of the Nazi doctors who were "the most extreme example of doctors becoming socialized to atrocity."[24] The muting of criticism concerning torture in the wake of Abu Ghraib prompted Elie Wiesel to ask why the "shameful torture to which Muslim prisoners were subjected by American soldiers [has not] been condemned by legal professionals and military doctors alike."[25]

Since the Second World War, the United States has grown accustomed to setting the world standard in condemning torture as always criminal and always an inexcusable human rights violation. Nuremberg, for example, was quickly followed by the drafting

and adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Article 5 of the UDHR is unequivocal, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The UDHR is a declaration, but it was followed twenty years later by a treaty that the United States has always supported, the International Covenant on Civil and Political Rights. Article 7 adopts the language of Article 5, and adds a sentence (inspired by the Doctors' Trial) to it: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Many of the provisions to the Covenant can be suspended in a national emergency; but some cannot. These obligations include protection of the "inherent right to life," the prohibition of slavery, the application of ex post facto criminal laws, the recognition of legal personhood, freedom of thought and religion, and, most centrally for this discussion, honoring the absolute prohibition against the use of "torture" or "cruel, inhuman or degrading treatment or punishment."

Given this legal history, it was especially disturbing to watch Attorney General-designee Alberto Gonzales being repeatedly questioned about the administration's policy on torture by a US Senate panel at hearings on his nomination in January 2005. The first question he was asked by Chairman Arlen Specter was, "Do you approve of torture?" Gonzales replied, "Absolutely not, Senator."[26] Two weeks later, Secretary of State designee Condoleezza Rice pointedly refused to characterize forced nudity and waterboarding as torture techniques; instead she insisted that "the determination of whether interrogation techniques are consistent with international obligations and American law are made by the Justice Department."[27] Her comment mirrored an earlier one by Secretary of Defense Donald Rumsfeld, and she may have taken her lead from him.

At a White House meeting to discuss the rules to be used in setting up military tribunals at Guantanamo, the president had brushed off suggestions from then attorney general John Ashcroft and his then national security adviser Rice. As reported by Bob Woodward, Bush interrupted Rice to ask Rumsfeld, "Don, what do you think about this?" Rumsfeld replied, "They are bad guys," who we have to keep off the battlefield. Bush, Woodword writes, agreed, but asked how. "I'm not a lawyer," Rumsfeld replied. Not only did Rice and Rumsfeld have no legal training, but, neither had the president or the vice president. The Rumsfeld-Rice "I'm not a lawyer" excuse for not knowing the law greatly increased the value of the legal advice they were given, and, we think, increased the obligation of the administration lawyers who gave it to faithfully and fairly interpret the law. Rumsfeld certainly understood this, and continually took steps to get his generals to rely on his civilian lawyers in the Pentagon rather than on the Judge Advocate Generals (JAGs) who, among other things, consistently opposed marginalizing the Geneva Conventions and argued instead for following the *Army Field Manual* that followed Geneva.[28]

Any knowledgeable lawyer would have had to give the president a legal opinion that torture was absolutely prohibited by US law. This is not only because of Nuremberg and the International Covenant on Civil and Political Rights (ICCPR), but also because of the US ratification of the International Covenant Against Torture (CAT), and the

subsequent enactment of a US criminal law against torture. "Torture" is defined in the CAT, as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[29]

Torture is prohibited in the United States by the 5th Amendment (whose prohibition against self-incrimination was adopted specifically to prohibit torture to extract confessions), 8th (which prohibits "cruel and unusual punishment"), as well as the 14th Amendment of the Constitution. Torture is also a crime under state criminal statutes prohibiting assault and battery. The federal statute which followed ratification of the CAT, makes torture a crime for any person "outside the United States" (including, of course, Guantanamo and Abu Ghraib) to commit or attempt to commit torture, defined for this purpose as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control." It is primarily this federal statute that has been the subject of conflicting interpretations from the US Department of Justice. In the wake of the September 11 attacks, Justice Department lawyers argued that the president as commander in chief had the authority to order torture of prisoners, and that, contrary to the Nuremberg principles, obeying such an order would be a valid defense to a war crime or crime against humanity charge.[30]

Torture and the Justice Department

The August 1, 2002 memorandum from the Justice Department to Alberto Gonzales also concluded that to constitute torture under the statute, the intensity of the pain inflicted "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[31] This memorandum, in which the Justice Department lawyers acted more like mafia attorneys by advising their clients (in this case government officials) how they might avoid prosecution under the anti-torture statute (rather than how to follow the law), has been widely and rightly criticized—and the US Department of Justice withdrew it shortly after it became public in June 2004.

One week before the hearing on the nomination of Alberto Gonzales for attorney general, December 30, 2004, the US Justice Department issued a replacement memorandum setting forth its new interpretation of the anti-torture law, which is much more consistent with both the language of the law and US policy. This

memo begins by expressing the overriding theme of US law on torture: "Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law . . . international agreements . . . customary international law, centuries of Anglo-American law, and the longstanding policy of the United States, repeatedly and recently affirmed by the President."[32] Unfortunately, the memorandum also raises significant problems of hypocrisy and secrecy, stating as it does in footnote 8 that prior opinions—still secret—that approved various interrogation techniques "for detainees" were not affected by the new memorandum. One such memo was prepared for the CIA and is reported to authorize the use of some twenty interrogation techniques, including waterboarding, a torture technique in which a person is made to believe they might drown.[33]

In contrast to its own continued equivocation, the new Justice Department memorandum quoted statements the president made on June 30, 2003, including, "Torture anywhere is an affront to human dignity everywhere," and on July 5, 2004, "America stands against and will not tolerate torture . . . torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere." Unfortunately, few people believed the president, perhaps because he was never clear on what he meant by torture. The president had been forced to repeatedly declare that the United States "does not torture," just before the 2006 November elections when he repudiated a statement by the vice president that seemed to approve the use of waterboarding.[34]

Aside from his fascination with waterboarding, the "ticking time bomb" had been Dick Cheney's favorite rhetorical device in promoting the use of torture, at least for the CIA, if not the military, in the Congress. He is not alone. In the immediate aftermath of 9/11, Americans almost immediately seem to have abandoned their post–Second World War stand on absolute rejection of torture, causing David Luban to observe, "American abhorrence to torture now appears to have extraordinarily shallow roots."[35] Luban not only attributes this to a primal urge to be cruel to our enemies, but also states, paradoxically, that "liberalism's insistence on limited governments that exercise their powers only for instrumental and pragmatic purposes creates the possibility of seeing torture as a civilized, not an atavistic, practice, provided that its sole purpose is preventing future harms." It is in this context that the power of the "ticking time bomb" scenario can be understood. In Luban's words, and we rely heavily on Luban because we believe that his analysis of the "ticking time bomb" case is the best thought out to date, "This jejune example has become the alpha and omega of our thinking about torture."

Luban raises five questions concerning "the ticking time bomb" hypothetical to demonstrate why we should not base public policy on torture on it, which can be summarized as: (1) How sure do you have to be that you have captured a man who actually knows about the bomb plot? With what likelihood (1 percent) will you justify torturing him until he talks? (2) Do you make your decision by the numbers, that is, does a 1 percent chance of saving 1,000 lives mean you can torture ten people with a 1 percent chance of discovering information? (3) If you think one out of fifty persons at Guantanamo knows where Osama bin Laden is hiding, can you torture them all to

find out? (4) What if there was no certainty that capturing Osama would save any lives? Does the war on terror itself justify torture?, that is, can't we torture "in pursuit of any worthwhile goal?" And, (5) Finally, if you are willing to torture forty-nine innocent persons to identify one guilty suspect, why stop there? Why not torture the loved ones, especially the spouse and children, in front of the suspects? They are, after all, no more innocent than the forty-nine. Luban continues,

> Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible. . . . As [Bernard] Williams says, "There are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane," and "to spend time thinking what one would decide if one were in such a situation is also insane, if not merely frivolous."[36]

Although we find Luban completely persuasive, we recognize that others do not. Alan Dershowitz, for example, has not changed his post-9/11 position that we should set up an official government system to sanction torture, complete with the requirement to get a "torture warrant" signed by a high responsible government official (most likely the president), in the same way we seem to sanction a presidential order to shoot down a commercial airline if it is endangering others.[37] Aside from being a complete abrogation of our treaty obligations, and turning torture from an absolutely prohibited criminal activity into an officially sanctioned one, Dershowitz unravels his own argument by attempting to place strict limits on the torturer—limits that would be (and should be) impossible to sustain in a real life situation. Specifically, he would confine the torturer to using a "sterilized needle" placed under the fingernails. The sterilized needles seemed designed to make sure no lasting physical harm is induced, but of course raise the primary issue of this article: Is it true that as atavistic as we may be, Americans need both lawyers' and physicians' active involvement to approve of torture? Dershowitz certainly seems to believe this, and his adjective "sterilized" harkens back to an old saying of the Nazis, who used physicians on submarines to administer the death penalty by lethal injection: "The needle belongs in the hands of the physician."[38]

There are other objections to making policy based solely on the "ticking time bomb" hypothetical, including (1) you can't get by with just one trained torturer—you will need enough to span the globe so they will be readily available when you capture the suspect (since time is of the essence, you will need many places of torture as well). You will become a torture society; (2) *24* and its hero Jack Bauer provide entertainment (some, like Steve Miles, think it is pornographic), and we should not make policy based on fictional heroes or antiheros. For Jack, torture often works, but even for him it becomes completely corrupting, leading to treason on the part of the US president who conspires to kill large numbers of innocent Americans. Whether you like Jack Bauer or not, there is no such person in the real world who is always on the scene and can move from city to city and even country to country in minutes; and (3) From a purely pragmatic perspective, there is no scientific evidence that torture works.

Torture and the Geneva Conventions

Almost overshadowing the US government's public views on US torture law has been its view on international law, specifically the Geneva Conventions.[39] It seems to have been assumed that if neither the US Constitution nor international law applied in Guantanamo, the administration could write its own rules of conduct for the prison, and it did. Secretary of Defense Donald Rumsfeld, for example, specifically approved types of torture that could be used in the interrogations there.[40] He also specifically involved physicians by requiring that prisoners obtain "medical clearance" prior to having these techniques applied to them. In the words of his directive, the new techniques can only be used after, among other things, "the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination)." These torture techniques made their way to Abu Ghraib when the commander of Guantanamo, General Geoffrey Miller, was transferred to Iraq.[41]

The Geneva Conventions were to apply in Iraq, according to the Bush administration. Had they been followed, the torture and abuse of prisoners at Abu Ghraib would not have occurred. Even if the administration sincerely believed that there was some emergency exception to torture and cruel and degrading treatment, a pure pragmatist would have known that public knowledge of treatment of prisoners like that photographed at Abu Ghraib would have done more to injure the cause of America in the war on terrorism than any terrorist organization could do itself.

Physicians also had the opportunity to stop what the lawyers had promoted by acting as human rights monitors. Not only do the conventions prohibit torture and abusive and humiliating treatment of prisoners, they also specifically protect physicians who follow medical ethics by reporting and refusing to participate in torture and abuse of prisoners. The Department of Defense's Independent Panel highlighted professional ethics as the core consideration in torture and abuse prevention, recommending that "all personnel who may be engaged in detention operations, from point of capture to final disposition, should participate in a professional ethics program that would equip them with a sharp moral compass for guidance in situations often riven with conflicting moral obligations." As to physicians specifically, "The Panel notes that the Fay investigation cited some medical personnel for failure to report detainee abuse. As noted in that investigation, training should include the obligation to report any detainee abuse."[42]

In March 2009, two closely related events occurred. First, former vice president Cheney reaffirmed both his support of torture, if required to prevent an attack, and his total reliance on law and lawyers for his position. His position came in response to John King's question of whether he thought President Obama's positions on waterboarding and closing Guantanamo had made Americans "less safe":

> CHENEY: I do. I think those programs were absolutely essential to the success we enjoyed of being able to collect the intelligence that let us defeat all further attempts to launch attacks against the United States since 9/11. I think that's a great success story. It was done legally. It was done in accordance with our constitutional practices and principles.[43]

The other event involved the release by writer Mark Danner of the secret (and meant to be secret) report of the International Committee of the Red Cross on the torture of the fourteen "high value" detainees who were kept in the CIA black sites until their transfer to Guantanamo. The report was based on interviews with the fourteen, and sent to the acting general counsel of the CIA, John Rizzo, on February 14, 2007. The conclusion of the report was, as properly described by Danner, "stark and unmistakable":

> The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel, inhuman or degrading treatment.[44]

The report—a precursor to the 2014 US Senate Report—detailed the specific torture techniques applied to individuals, including Abu Zubaydah, and chillingly made references to physicians involved at almost every step along the way—including treatment to prepare the prisoner for prolonged torture sessions, and monitoring the sessions themselves to make sure that the prisoner was not actually killed. In short, the CIA program relied on lawyers for its justification, and physicians and psychologists for its implementation.

The US Supreme Court ultimately decided that prisoners at Guantanamo could challenge their imprisonment in US courts, as well as bring civil claims for injury and abuse under the Alien Tort Statute.[45] The Court thus rejected the position of the Bush administration, as stated in the oral argument before the Ninth Circuit that even if the United States was engaged in "murder and torture" at Guantanamo, US courts could not interfere.[46] Two years later in dicta the US Supreme Court cited provisions of the Geneva Convention III (relative to prisoners of war) as authoritative on the "law of war."[47] In all of these cases, the judicial branch of government has been much more articulate than the executive in condemning torture and upholding both US and international laws. As Telford Taylor argued at Nuremberg, prevention of war crimes and crimes against humanity, like torture, must be our primary goal.

Closing Guantanamo

Abu Ghraib and the torture debate gained worldwide attention on the web primarily because of the photographs of cruel and inhuman treatment of prisoners by American soldiers.[48] This documentation made denial impossible. In Guantanamo, the only emblematic photograph was taken on the first day that prisoners arrived there: unable to see because of goggles, and dressed in orange jumpsuits, they were all made to kneel before their American guards.[49] Since that day, however, information from Guantanamo has been carefully guarded, the names of only a few physicians serving there are known, only a handful of incomplete medical records have become available, and no prisoner has ever been given a physical or psychiatric examination by an independent physician.

President Bush said in mid-2006 that he would like to see Guantanamo "closed," but took no steps to do so.[50] President Obama pledged to close Guantanamo, and when he left office had released all but about fifty prisoners. Nonetheless some of them continue on hunger strike and continue to be force-fed by military physicians. Obama did not succeed in closing Guantanamo, and President Trump has said he wants to keep it open and operational. Whatever the fate of Guantanamo, it is past time for the US military to abandon its policy of ignoring internationally accepted medical ethics on torture and force-feeding, and take the formal position that military physicians should always follow medical ethics precepts. The DOD's (Department of Defense) Guantanamo-driven position that its physicians need not follow internationally accepted medical ethics represents a major policy change. Until now, and at least since Nuremberg, the US military has consistently operated under the assumption that its physicians are required to follow not only US medical ethics, but internationally recognized medical ethics as well. And at Nuremberg, the US military went even further, asking the American Medical Association (AMA) to select an expert witness to explain the standards of medical ethics to the judges at the Nazi Doctors' Trial.

Under existing military practice, ethics enforcement seems to have been left primarily to the state medical licensing boards. Thus far, the licensing boards have tried not to investigate ethics complaints against active duty military physicians. Unless and until there is a special federal medical license to practice medicine in the military (not, we think, a good idea), state licensing boards should take their responsibility to the public to uphold state, national, and international medical ethics principles, including those articulated at Nuremberg, in the Geneva Conventions, and in basic international human rights law, much more seriously than they have to date.

There are battlefield and prison conflicts that military physicians must resolve, but these conflicts are not captured by oversimplified expressions such as "mixed agency" or "dual loyalty." These frames set up a false choice. As US judges at the Nuremberg Doctors' Trial ruled, basic human rights violations, including torture, inhumane treatment, and experimentation without consent, can never be justified. Other conflicts should be analyzed as possible exceptions to the rule that medical ethics are universal and apply equally to military and civilian physicians, in both war and peace. Military physicians should no longer be required to abandon medical ethics than military chaplains are to renounce their religion or military lawyers to shred the Constitution. The "physician first" guidance is only half the story; the other half should be "last and always."

10

Nazi Medicine and the Holocaust: Implications for Bioethics Education and Professionalism

Ashley K. Fernandes

They were all doctors.

—Anonymous Auschwitz survivor

The Holocaust as a corruption of moral philosophy

Medicine and law are intimately connected to one another, and, since the professionalization of medicine in the United States and Europe in the latter half of the nineteenth century, even more so. One discipline that connects both is moral philosophy; for both law and medicine involve reason and the will, directed toward the good of the person. As a matter of both logical and temporal priority, morality precedes law and medicine. The law is the codification of a people's moral viewpoint.

Thus, the story of the Holocaust is a tragedy that unfolded because of the corruption of *moral philosophy first*, and medicine and law second. The Holocaust simply could not have happened without the moral cooperation and active participation of leaders in both disciplines. Why is this important? The reason is that there are those who argue *against* the contemporary application of lessons learned from the horrors of Nazi medicine. Some say that "Nazi medicine" was not real medicine or science: we cannot even call what the Nazis did "medicine," since medicine contains *within it* an assumption of rigor and beneficence. This is an objection I hear from medical scientists, who point to safeguards such as the Nuremberg Code (1947), the Declaration of Helsinki (1964), and the Belmont Report (1978)[1] as proof of the radically different nature of science today. But, this argument is circular. It defines science as "good science," (relegating anything unethical to "bad science" or "pseudoscience"), when in fact these very safeguards were borne out of abuses from the most scientifically advanced country in the world (Germany). We should be cautious about taking for granted our ethical current standards; medicine (then, as now) is not somehow immune from this abuse, as the horrific postwar abuses at Tuskegee and elsewhere make clear.[2,3,4] We need only ask ourselves: Is *everything* we're doing in science now morally right, and just?

Other scholars have suggested that the real cause of the Holocaust was an economic, political, or racial one—not a moral one—and that, since the United States has a radically different political, economic, and cultural system, the use of the "Nazi analogy" should be restricted. Medical abuses today are somehow less likely because economic, political, and cultural considerations are highly specific. One prominent bioethicist, for example, noted:

> A key component of Nazi thought was to rid Germany . . . of those deemed economic drains on the state . . . a fear rooted in the bitter economic experience after the First World War. . . [These themes] have little to do with contemporary debates about science, medicine, or technology.[5]

While I agree with this and other authors[6] that the so-called Nazi analogy has been misused and even abused, and therefore should be used with restraint and precision, denying the risk of backsliding steps too far. It may be (falsely) reassuring to suggest that the Holocaust was "merely" politically motivated, for we believe that in our Western democracies, no government is *that* racist, and our economic conditions never *that* unstable. Yet, Jacques Maritain pointed out in *The Person and the Common Good* (1947) that race, state interests, or even profit can be dangerous substitutes for the highest good that we value.[7] Even granting the (disputable) claim that the primary motivation for the Holocaust was economic or political, the Nazis somehow made the leap from identifying persons as "economic drains" to becoming completely and utterly *disposable*. What's missing in this leap? The answer lies in a moral derangement of philosophical anthropology.

Finally, it should be noted that just as philosophy has a decisive impact on both medicine and law, medicine and law exert important effects on one another. The Nazi legal abuses documented in this book were critical in transforming the culture of medicine; the sterilization laws, Nuremberg marriage laws, and euthanasia directives all changed irrevocably the nature of the physician-patient or physician-subject relationship, and gave license and purpose to craven ideas that hitherto were discussed but not technically allowed. Laws that banned Jewish physicians from the medical profession or restricted their practice shattered practitioner diversity (of both race and thought). We should also be wary of the quick adoption of a positivistic theory of law—where the law as the "will of the people" supplants the natural moral law[8]—for this same mutual influence between law and ethics occurs today. For example, euthanasia programs in the Netherlands (including pediatric euthanasia[9]) began with the *medical practice* of euthanasia being tolerated, and the law following suit—giving positive sanction to the practice and the lax enforcement of its "safeguards."[10] Likewise, medical students today often look to the legality of a practice as a justification for its ethics, or are unsure how to act in the face of something they feel is ethical but illegal.[11]

I am not a world-renowned Holocaust scholar, nor even an historian; hence, I promise to break no "new ground" in historical analysis. This chapter is written from the point of view of a physician, medical educator, and bioethicist who sees the deplorable fact of physician involvement in the Shoah as an opportunity to highlight enduring moral lessons for the medical professions. In this chapter I shall outline physician

involvement in the Holocaust and then underscore the serious ethical lessons to be learned. I will then prescribe and give an example of medical ethics education, with a course focused on the Holocaust, as an achievable and effective "preventative remedy" against future ethical transgressions by our profession.

Why should physicians study the Holocaust?

Studying the Shoah from an historical perspective is crucial but medicine is a discipline of *action*, and we also need to know how this event is applicable at the bedside. So the call for study must transcend history, and translate into the practical application for ethics and professionalism in medicine.

We must start with this question, which has been posed to me by both faculty and students: *Why study the Holocaust?* Sometimes this question has been posed angrily by colleagues—"What are you trying to prove?" I was once asked. A negative reviewer of an essay of mine suggested: "Can't we just *get over* the Holocaust?" Another faculty member, in offering her help in teaching, suggested we rename "Medicine and the Holocaust," to "Medicine and *Genocide*." Some of my medical students have also sought to equate the Holocaust with the Palestinian or Native American "genocide," or the genocide in Rwanda in the 1990s.

Norman Geras, in a short but powerful blog post titled "The memory of the offence,"[12] articulates beautifully what sets the Holocaust apart. He argues for the moral "singularity" of the Holocaust in a way that does not trivialize the suffering of others. First, the Holocaust showcased the "industrialization and bureaucratization of death" like no other genocide has. A human life is a human life, but they can be lost in chaotic ways, or in cold, calculated ways. Yet evil acts done by calculation are more insidious than those borne of rage. I would also add to Geras's description that the Holocaust demonstrated an unprecedented "medicalization of death." Martin Bormann, the secretary to Adolf Hitler, famously said, "The Fuhrer holds the cleansing of the medical profession far more important than that of the bureaucracy, since in his opinion the duty of the physician is or should be one of racial leadership."[13] We have yet to have another genocide in which medicine provided not only the means but also the *justification* for mass murder.

Second, the Holocaust, from its inception, had a "comprehensiveness of intent" that went beyond mere punishment for those perceived as "subhuman." What sets the Holocaust apart is planning the *complete extermination* of a people, not merely its suppression.

Third, Geras notes that the Nazis committed "spiritual murder." The killing agents (including physicians) "displayed an extraordinary ingenuity and thoroughness in trying to reduce and destroy the humanity of their victims even before killing them, seeking to deprive them of everything, material, intellectual or moral, that a human being needs in order to affirm him or herself."[14]

It is worthy of emphasis that although many professions (including law) were "taken in" by Nazi philosophy, doctors and nurses had a peculiarly strong attraction to it. Robert N. Proctor (1988) notes that physicians joined the Nazi Party in droves

(nearly 50 percent by 1945), much higher than any other profession. Physicians were seven times more likely to join the SS than other employed German males.[15] Nurses were also major collaborators.[16,] The Holocaust should be studied by every health-care professional as a reminder of how sacred the substance of our craft is, and what the consequences may be if we forget the dignity of persons again.

The Holocaust's bioethical assault on the person

Between 1933 and 1945, the Nazis established a "biocracy" which ultimately murdered millions of innocent persons. The notion that doctors were somehow "forced" to participate has been shattered as myth; Proctor's (1988) unparalleled volume[17] makes this vividly clear; Robert J. Lifton's *The Nazi Doctors* (2000) meticulously traces both the medicalization of death, from eugenics to euthanasia to Auschwitz, and the stories of physicians who perpetrated genocide, were subjected to it, and resisted it.[18] Thus, with a wealth of historical research on the subject, a full accounting of this progression from trusted healers to state-sanctioned killers is beyond the scope of this chapter.

In 1859, Charles Darwin published *The Origin of Species*.[19] This scientific theory elucidated the theory of evolution in a pre-genetic era but made no broad claims about philosophical anthropology. Darwin's work was decidedly descriptive, not prescriptive. Later, Francis Galton coined the term "eugenics" in his work *Inquiries into Human Faculty and Its Development* (1883),[20] and the application of "evolution" on a societal level was born. Social Darwinists such as Charles B. Davenport in the United States and Karl Pearson in England, for example, made the case, in different ways and utilizing the "language of science," that the genes of the "fit" should be promoted, and the genes of the "unfit" discouraged. Daniel J. Kevles (1995) traces the origins of the eugenics movement through Europe and the United States, and the powerful influence on social policy in the prewar era, including resistance to it, notably from the Catholic Church and its intellectuals (such as G. K. Chesterton), as well as a minority of brilliant secular scientists.[21]

Still, German eugenicists took "discouragement of the unfit" further, cooperating eagerly with the Nazi Party—as they were willing to support *forced* sterilization of the "unfit."[22] They had been primed. More than a decade before the Nazis, Alfred Hoche and Karl Binding (1920) published their influential book, *Die Freigabe der Vernichtung Lebensunwerten Lebens* (*The Authorization of the Destruction of Life Unworthy of Life*).[23] The book had spoken of the "incurable feebleminded" who should be killed—but for now, sterilization was a good start.

Most know how the tragic story unfolded from here: the Nazis came to power in Germany in 1933, through a democratic process, and that same year, laws for compulsory sterilization of the mentally ill were passed. The Law for the Prevention of Genetically Diseased Offspring was based on American laws passed in the 1920s, and required 50,000 sterilizations annually.[24] By 1939, 350,000 persons had been sterilized against their will. In 1935, the Nuremberg Laws were passed, forbidding sexual relations and intermarriage between Germans and Jews and establishing "genetic health courts." The sterilization laws led to rapid advancement in the science

and technology of sterilization, as well as a major financial gain for many German physicians—racial hygiene had become a veritable cottage industry.[25]

For Hitler and the Nazi physicians, the state became analogous to a living organism—a supreme political vitalism. In fact, it was much more than an analogy. Nazi doctors and scientists, in conceiving the biological *metaphor*, created a powerful, easily understood concept for the general populace: the German Reich *is* a body; whatever contributed to the health and well-being of the racial state was to be preserved, that which did not, could be labeled a "disease." The Jews *are* a disease; disease must be *completely* cut out (not merely suppressed), for it will otherwise poison and kill the body. This is a powerful, easily understood metaphor by laypeople, even today. We call political or ideological enemies and criminals a "cancer," or the economically deprived "parasites." A "biological organism" is one that is predictable, empirical, material. There is no mystery that we cannot discover. We *own and control* science, but we do not own the metaphysical, the mysterious. The body, even with its complexities, is something that cannot be wholly dominated. Today, when physicians can "do no more" for a patient, many seem to have a difficult time accepting this—for mystery is not in our playbook.

Thus, sterilization would never be enough. Suppression of a disease is inferior to ridding the body of it. In October 1939, Hitler authorized euthanasia of the "incurably sick." The right to life now had to be "justified" under a Nazi program to euthanize "lives not worth living." The program began secretly with disabled children, and between 1937 and 1945, the Nazi physicians organized and implemented more than thirty euthanasia centers for children. The history of the move to euthanasia from sterilization, its cruelty and efficiency, and its impact on the progression to the Holocaust is well documented in Michael Burleigh's dense and disturbing book, *Death and Deliverance* (1994).[26]

Euthanasia for these persons was justified, publically, with four main arguments.[27] First, ridding Germany of the unfit was simply "good science." The groundwork, as we have seen, had already been laid down. Who better to determine what constituted good science than German physicians, who were already the best in the world? The experts knew what was best for the German body.

Second, euthanasia was deemed humane. Since it was supported and implemented by a profession with a long tradition of healing and caring, the argument was even more persuasive. Pediatric euthanasia was often supported by many parents of disabled children for this reason; yet, with mixed motivation, for many wanted to avoid the strong stigma of having a disabled child. This conflict of interest shows how medical culture, so powerful, can influence the ethics of both individuals and society at large.

Karl Brandt, the infamous Nazi doctor, gave this worryingly persuasive defense at Nuremberg—a defense I still challenge my students and faculty with:

> The human beings who cannot help themselves and whose tests show a life of suffering are to be given aid. This consideration is not inhuman. I never felt that it was not ethical or was not moral. But one thing seems necessary to me—that if anybody wants to judge the question of euthanasia he must go into an insane asylum and he should stay there with the sick people for a few days. Then we can ask him two questions: the first would be whether he himself would like to live like

Figure 8 View of the defendants in the Nuremberg Doctors' Trial with Karl Brandt seated in the first row on the left. Photo by Keystone-France/Gamma-Keystone via Getty Images.

> that, and the second, whether he would ask one of his relatives to live that way—perhaps his child or his parents.[28]

This was no "monster's defense." But if Brandt's words are persuasive, we must have a remedy—both intellectual and experiential—to rebut it. Still, Dr. Brandt's challenge combines the "humaneness" justification with a third.

Especially in the case of children and the mentally disabled, euthanasia was deemed "rational," that is, if they could only choose it themselves, they would. It should be noted that physicians at the time were more concerned about the "legality," not the morality of euthanasia, and many insisted that euthanasia was a "private matter" between patients and doctors.

Finally, killing through euthanasia was justified independently on the premise that it was good for the racial state. That "good" eclipsed the good of this individual being. It should be fairly obvious that there are strong parallels between these reasons and contemporary arguments in favor of euthanasia today. This has not

been unnoticed by both sides in the debate. A full accounting of these parallels is beyond the scope of this chapter, but readers should note Professor Peter Singer's justifications for euthanasia,[29] and Michael Burleigh's sharply critical response in *Death and Deliverance*. [30]

By the end of the "T4" program to euthanize disabled adults and children, between 70,000 and 100,000 persons had lost their lives. The culture now knew and accepted the science of who was weak and who was strong; stigma for the vulnerable in attitude and language had become codified in law. According to Proctor, these three programs—forced sterilization of the "unfit," the Nuremberg Laws, and the euthanasia laws—were the primary means the Nazi physicians and scientists used to accomplish "racial hygiene," and led directly to the technological and medical surge responsible for genocide at the death camps.[31]

But degradation and death were not limited to the clinical aspect of medicine. Research abuses by physicians and scientists, conducted in hospitals as well as in the camps, ranged from the scientifically frivolous (injecting prisoners with typhus) to the malevolent (amputation of limbs and "transplantation" onto other bodies), and are well documented elsewhere.[32] Physicians were held in such high esteem, and thought to be of such high moral character, that experimentation was justified in that it benefited society, added to a burgeoning body of knowledge (a good in itself), and often (but not always) benefited the patient. The notion of patient autonomy had yet to be unraveled and championed. So it should come as no surprise that other populations (such as African Americans in the United States,[33] and prisoners of war in Japan[34]) were also subjected to grotesque and unethical human experimentation during this period, and beyond. All it took was another "good" to obscure the true good of the individual person, and easier still if not considered a person at all.

In 1942, and as a direct result of a deep-seated tradition of antisemitism within the German medical community, the Christian churches, and Europe in general,[35] the "Final Solution" was proposed—the murder of the entire European Jewish population. Nazi medicine, through what can only be called, in modern terms, "advocacy," had a profoundly negative effect on culture. Physicians, dressed in white coats, gave the imprimatur that indeed, those who were to be gassed were not human persons at all:

> At every turn, the annihilation procedures were supervised—and, in a perverse sense, dignified—through the presence of medical staff. . . . We may say the doctor standing at the ramp represented a kind of omega point, a mythical gatekeeper between the worlds of the dead and the living, a final common pathway of the Nazi vision of therapy via mass murder.[36]

The killing of six million Jewish persons and nine million "others"—could only have been accomplished through a buy-in into a twisted *philosophical* anthropology. Science alone could not accomplish this destruction, because science never stands alone. So, although we may not kill *persons*, we may kill animals, vegetables, and subhumans. What the Nazis needed was a philosophy to define out of lives inconvenient to the goals of the Race, and then science to do the killing. This is why the Holocaust can be deemed a "bioethical assault" on human personhood itself.

Five lessons for the medical profession and for medical educators

Nearly two decades ago, the late Edmund Pellegrino, MD, one of the fathers of modern bioethics and my own personal mentor, gave us a starting point for procuring valuable, enduring lessons after Nuremberg:

> We see here the initial premises that law takes precedence over ethics, that the good of the many is more important than the good of the few. . . . The lesson [from the Holocaust] is that moral premises must be valid if morally valid conclusions are to be drawn. A morally repulsive conclusion stems from a morally inadmissible premise. Perhaps, above all, we must learn that some things should *never* be done.[37]

Pellegrino was correct. The Holocaust is not merely a lesson in history, it is an enduring lesson in philosophical ethics. These lessons are perhaps more important to remember today, as personal memories of the Shoah fade, survivors and liberators themselves become a part of history, and young physicians graduate medical school with less empathy and moral resilience than when they began.[38]

Physicians and health-care professionals must, therefore, remember the Holocaust, but remember, as Pope John Paul II said on his visit to Yad Vashem, to "remember with a purpose."[39] I will briefly articulate five lessons of the tragedy of Nazi medicine that we must remember and integrate into our medical practice, if medicine is to survive as a profession of healing.

First, and perhaps most fundamentally, we must affirm a strong personalism. This anthropology has been described briefly above, and extensively elsewhere, by Maritain,[40] but it also has adherents as diverse and important as Mohandas Gandhi, Martin Luther King Jr.,[41] and the late philosopher Karol Wojtyla (Pope John Paul II).[42] Personalism posits the ultimate unit of value of human life is the individual person herself. Society is and ought to be built around this value. In short, society is created for the person, not the person for society, and hence the dignity and integrity of the person and her freedom cannot be sacrificed for the sake of society, for "the person as such is a whole, an open and generous whole. In truth, if human society were a society of pure persons, the good of society and the good of each individual person would be one and the same good."[43] No contingent factor—race, religion, economic status, disability, or actions of the past, present, or future—can rob a person the dignity she is owed. Integrating this kind of rigorous, universal philosophical anthropology is an antidote to the corruption of medicine, and vital for the prevention of future genocides.

However, disturbing parallels in our contemporary medical, academic, and social culture now argue, for example, for abortion as a form of eugenics and crime reduction;[44] the coerced sterilization of prisoners;[45] preimplantation genetic diagnosis as a way of promulgating "good genes";[46] and tours of Auschwitz as a "learning experience" for supporters of euthanasia.[47] Targeted abortion for unborn children with genetic conditions such as Trisomy 21[48] and cystic fibrosis[49] have reduced populations by more than 90 percent, and are justified on utilitarian grounds. But if a person is the fundamental unit of value of our society, then no "other good" can eclipse her.

Politically, legally, and medically, this would mean an expansive and firm definition of person, for it is a far smaller risk to give protection to an entity where personhood is possible, than to destroy the life of a person who in the end deserved our protection. Practically, this must mean the end of physician involvement in state-sponsored torture, capital punishment, euthanasia, and eugenically motivated sterilization and artificial reproductive technologies.

Second, we must have rigorous conscience protection for physicians and health-care providers. Contemporary literature in bioethics favors the removal of conscience protection laws particularly on "hot button issues" such as abortion, contraception, sterilization, and now euthanasia.[50] Yet, a physician's oath to her patient is only as strong as her conscience; allow (or even force) her to break it, and we have forgotten: one day, it may be our turn to stand against the tide. On this issue of conscience protection in medicine, of which volumes have been written, eloquent defenses (while still in the minority) made by Dan Sulmasy[51] and others[52] make clear the point that conscience is an active, driving force that is part of who we are as persons, and warn of the danger of a positivistic bioethics.

A medical student once asked me what was the most important lesson I wanted them to know. My answer was this: between good and evil, there is no "safe space" to stand. There is no neutral void from which a physician can escape his ethical duties, referring it to another. If we hide the light of our conscience, then the darkness will advance. In the time of the Nazis, courageous leaders from opposite ends of the spectrum—Cardinal von Galen, Dietrich Bonheoffer (tortured and murdered), and the Association of Socialist Physicians (whose leaders were arrested or exiled in 1933, and many murdered in Austria and Czechoslovakia in 1938)—would not stay silent. Bonheoffer's words still challenge us today:

> We have been silent witnesses of evil deeds: we have been drenched by many storms; we have learnt the arts of equivocation and pretence; experience has made us suspicious of others and kept us from being truthful and open; intolerable conflicts have worn us down and even made us cynical. Are we still of any use? What we shall need is not geniuses, or cynics, or misanthropes, or clever tacticians, but plain, honest, straightforward men. Will our inward power of resistance be strong enough, and our honesty with ourselves remorseless enough, for us to find our way back to simplicity and straightforwardness?[53]

Here we see again how vital the conceptual and practical supremacy of morality to law truly is. If morality does not assert its dominion over the law, the reverse shall happen, and radical positivism, with its morally inadmissible premises, will reach its equally inadmissible conclusions.

The third lesson to be learned from the study of medicine and the Holocaust is this: science is not a "god." Science relies on hypothesis, experiment, and validation or falsification of the hypothesis to progress. But it is science's own methodology that also highlights its limitations. Science cannot answer of itself—using its own empirical methodology—whether a particular medical practice is *morally* good. It must rely on philosophy to do so. Moral philosophy extracts truths from reality based on reason

and "lived experience." The ethical enterprise is therefore both objective (rational) and subjective (experiential). Albert Einstein once said:

> And certainly we should take care not to make the intellect our god; it has, of course, powerful muscles, but no personality. It cannot lead, it can only serve; and it is not fastidious in its choices of a leader. This characteristic is reflected in the qualities of its priests, the intellectuals. The intellect has a sharp eye for methods and tools, but is blind to ends and values. So it is no wonder that this fatal blindness is handed from old to young and today involves a whole generation.[54]

We must therefore shed the belief that science alone is our god, the one true thing that cannot be questioned. The physicians who actively aided the Holocaust believed that they were practicing "good science." But scientific truth alone does not "grasp" the reality of life, and if we believe it so, we are further on the road to what the late Jean Bethke-Elshtain called "scientific fundamentalism."[55]

Fourth, as physicians and health professionals we must resist the desensitization to *dehumanization* that is so prevalent in medicine's culture. Every clinician can tell you about the terms used to describe patients behind closed doors: "Vegetable" (comatose); "P.O.S." (piece of sh*t); "squirrel farm" (neonatal intensive care unit); "breeder" (a woman with more than 2–3 children); "useless"; "parasite"—the list could go on. For it is far easier to kill a "vegetable" than a human person; to not resuscitate a "squirrel" than a little baby; to feel no pang of conscience for disrespecting a "parasite" rather than a person with an addiction.

The medical literature supports these widespread anecdotal references. Omar Haque and Adam Waytz (2012) discuss the causes of dehumanization alluded to previous empathetic erosion and moral disengagement in training and practice,[56] but another that particularly rings true is *dissimilarity* between physician and patient. Dissimilarity "manifests in three primary ways. First is through dissimilarity in illness—patients, by their very nature of being ill, become less similar to one's prototypical concept of human. Second is the labelling of the patient as an illness, rather than as a person who has a particular illness. Third is through power asymmetries common to the physician–patient dyad."[57] Whatever the reason—dissimilarity or something more sinister—language alters perception, and perception affects our ethical calculus. For example, to build support for euthanasia of the disabled, Nazi filmmakers deliberately altered lighting on the faces of the disabled, to make them more "inhuman" in their appearance.[58] Purposeful and dramatic dehumanization has the same ultimate outcome on our perception as slow, chronic dehumanization. Simple gestures—such as standing up against such language publically when people dehumanize, or showing *personalistic leadership* through examples of patience and even tenderness at the bedside—will do much to begin reversing this narrative. If we want to work toward the aspiration of solidarity with another in medicine—what Karol Wojtyla once called a *communio personarum*,[59] then we must strive to remember the source of what makes our profession noble in the first place—this *particular* patient in front of us.

Finally, a fifth lesson to be learned is that, as a physician, you must serve the patient exclusively. Physicians and health professionals in the Holocaust decided that the

good of the racial state took precedence over the good of individual persons. "Nazi doctors hailed a move 'from the doctor of the individual to the doctor of the nation.'"[60] The justification for the euthanasia program, in large part, was couched in economic terms—a cost-saving measure for society in a time of scarcity.[61] These "goods" (the economic, genetic, and social survival of the state) became the legitimate end of medicine. Today, we seem to be losing more of our commitment to the individual patient—for there are other "gods" in medicine. "Quality of life," "public health," or even "patient satisfaction" have become ends in themselves, not a means to an end. Physicians and mental health professionals in this century have been (and continue to be) complicit in torture,[62] in racial discrimination,[63] and in capital punishment.[64] In all of these examples, the physician obscures the value and dignity of the person for some other goal—some even laudable ones, perhaps (security, order, public health, etc.) Yet, the power of the "white coat" demands, if we are to fulfill our obligations of trust, that we do not serve the state (and its economic interests), nor the patient's family (however compassionate our motivations), nor any other "just cause" or goal, including our own. We must strengthen our commitment to the vulnerable person, and to virtue. That commitment must begin with the medical education of our trainees.

A "Medicine and the Holocaust" course as an educational "Remedy"

Over the past two decades medical and legal ethics courses have been prominent in universities and professional schools. For many medical schools, the bulk of this training occurs in the preclinical years (years one and two), although curricular reform has begun to integrate ethics training across all four pre-professional years.[65] However, calls in the literature for physicians to study the Shoah from an ethical perspective, while passionate,[66] have been scattered, and few medical schools have instituted Holocaust studies as either a required or elective portion of the formal curriculum. Wynia and his colleagues (2015) reported the results of a Liaison Committee for Medical Education (LCME) survey of 140 medical schools in the United States and Canada that showed only 22/140 (16 percent) schools "have any required curricular elements on the roles of physicians in the Holocaust, and half of these (11/22) teach this material using a lecture format only."[67]

Still, some successful educational efforts to teach medical students and other trainees about the Holocaust have been made, notably the American Medical Association-United States Holocaust Memorial Museum Educational Collaborative (2005–2007)[68] and the Yale University Fellowships at Auschwitz for the Study of Professional Ethics program (2009).[69] Recently, calls in the academic literature by physicians[70] and even medical students[71] themselves to study medicine's role in the Holocaust have also grown. The Center for Medicine After the Holocaust (CMATH), for example, has free online educational lectures and an edited volume "Medicine After the Holocaust"[72]—which features essays by prominent physician-scholars in bioethics that make the case for the Holocaust's relevance in contemporary medicine. Holocaust

education for professionals, where it is found, has thus far—both in the United States and internationally—been quite innovative, diverse in its methodology, and effective.[73]

Inspired by these educational efforts, and a graduate school course I had taken at Georgetown University on Medicine and the Holocaust, I was determined to begin a Holocaust course for medical students at Wright State University School of Medicine (Dayton, Ohio, United States). Thus, in 2010, I began teaching[74] a one-hour required lecture to all 110 first-year medical students as an "introduction" to the subject of the Holocaust. As an extension of the introductory preclinical session, a fourth-year medical student longitudinal elective entitled "Medicine and the Holocaust" was initiated. This course ran from 2010 to 2014, when I left Wright State University for my current institution, the Ohio State University (Columbus, Ohio, United States).

I brought the course with me, and in 2016, we[75] relaunched an Advanced Competency (AC) for fourth-year medical students in bioethics, entitled "Medical Ethics after the Holocaust." ACs are intended to provide experiences for medical students that encompass activities that offer more depth, organization, and knowledge than previously designated electives, but are specific in their breadth and can establish expertise in order to bring about competence in a specific area. The goal of the course was to provide an in-depth study of the principles and practice of medical ethics, seen through the lens of the Holocaust.

Our course utilized a curricular design methodology following L. Dee Fink's (2003) "Taxonomy of Significant Learning."[76] Fink's "backward design" approach begins with determining what you want students to be able to *do* as a result of the course, in contrast to traditional curricular design that might begin with the instructor's agenda and a list of readings and facts. Can we build greater empathy, insight, and attitudinal change by connecting "theoretical" bioethics with the historic? Significant learning (foundational knowledge, application, integration, connecting to the human dimension, caring, and learning how to learn)[77] allows medical students to transcend the "historical facts" through a variety of learning modalities and through reflection, refined moral thinking, and ethical action.

The course has ten to twelve three-hour interactive, student-run, faculty-facilitated seminars scheduled throughout the year. These sessions require significant graduate-level pre-reading and cover the following topics: (1) Why the Holocaust?; (2) Eugenics and the Objectivity of Science; (3) Antisemitism; (4) Medical Research Abuses; (5) Euthanasia, Children, and the Disabled; (6) Psychiatric Abuses; (7) The Final Solution; (8) Counter-movements and Conscience; (9) Theodicy; (10) Nuremberg and the Liberation; and (11) Lessons Learned.

In addition, we utilize a wide variety of learning modalities including (1) pre-session readings and online modules; (2) student-led discussions; (3) reflection journals; (4) Holocaust films; (5) local Holocaust survivors and camp liberators; (6) "field trips" to a Holocaust museum or synagogue; (7) a "book review"; and (8) clinical or service experience with a "historically oppressed" population—Jews, frail elderly, disabled, mentally ill, etc.—which are meant to complement discussion and increase empathy. There is no monetary cost to the course, since all reading materials are widely available to students, and many are free on the internet.

My co-teachers and I wanted medical students to not only absorb the historical facts of the Holocaust, but also apply those lessons to practice, and to hear directly from those who experienced it. There are a few hundred thousand Holocaust survivors left worldwide; in Israel, as of 2012, there were 198,000 dying at the rate of one per hour.7[8] Survivors are our greatest educational resources, and in Ohio, particularly scarce. We therefore attempt to reach out to local persons whose lives were directly touched by the Holocaust, and record these conversations for perpetual use. During the course, medical students will also read physician-survivor's personal accounts (Gisella Perl,[79] Mikos Nyiszli[80]), and the anguished ethical dilemmas they faced in the camps; they will take field trips to Holocaust memorials and museums, synagogues and temples. In Midwestern United States, contact with Jewish people and culture is not as common as in other parts of our country; so we wish to try to bridge that gap, bringing the "other" closer to the "I" (to use the language of Martin Buber[81]). Most importantly, perhaps, we allow students to bring to class what is on their minds—what is *already* affecting them in the "underbelly" of medicine—and to view it in intimate discussion settings, through the microscopic lens of the Holocaust, that at once exposes both the fragility and sanctity of not merely the medical profession, but of all human life.

Informal evaluations from students in our "alpha class" (n = 6) at Ohio State have been very strong, and corroborate highly with formal evaluations in prior iterations of our course (2010–2014). Likert scale rating (1 = Poor, 5 = Excellent) from that time period (n = 45) had an overall course rating of 4.5/5. Qualitative comments included one student who said:

> [The course] was a valuable and life-changing class for me. The guest speakers and documentaries gave the class a unique perspective that could not be gotten from a book. The information presented stimulated in-depth conversation . . . regarding the importance of ethics in [medical students'] lives and how this information could be incorporated into current medical practice.

Another remarked that "this course will forever remain impactful in my life. What a wonderfully unique and enriching way to end my medical school career. . . . I enjoyed it more than almost any other class I have taken in 4 years."

When asked *"What is the most important thing you learned in this course?"* one medical student noted that "[the course] forced introspection into ethical challenges that would necessarily be encountered in everyday practice. . . . [It] arms the student with the tools necessary to make a stand for positive societal change." Perhaps this student summed up the impact of the course best when she declared that she learned

> the importance of speaking up. . . . Evil starts as small things—slandering colleagues, maligning obese patients, choosing sterilization as easier than caring relationships with patients, or drugging depressed patients. . . . Speak up and save a life!

We feel our Medicine and the Holocaust course can be offered as a model for inexpensive, engaging, and impactful medical education in bioethics. Strengths included connecting

clinical/service experience with vulnerable populations with its relevance to the Shoah; multimodal asynchronous approaches to learning; and firsthand Holocaust accounts where possible—and where not, video-taped narratives—to supplement ethically directed readings.

From our five-year experience, medical education focused on the Holocaust comes with two main caveats. First, medical schools in the United States and across the world suffer from "curricular squeeze"—and increasing amount of "required" material to cover, with less and less time. In particular, formal ethical training is particularly vulnerable to getting "squeezed out." Thus, medical educators must make the case that Medicine and the Holocaust courses are a viable way to teach much of the basic canon of bioethics. In this way, they can serve multiple purposes and even replace traditional medical ethics courses that exist. For example, our students learn about advanced issues in research ethics through an extended "case study" of Holocaust medicine. The development of Holocaust courses should at least be encouraged on an elective basis in the clinical years; ideally, it should be integrated within existing ethics curricula in medical school.

The second caveat for medical education specific to the Holocaust is that teachers may perceive that they have limited material and human resources to teach a course, or even a lecture, on this subject. It should be noted that neither my co-teachers nor I are historians. Our backgrounds are diverse (Jewish, Catholic, Protestant, and Buddhist), and we possess graduate degrees that range from medicine, to law, to philosophy, and to bioethics. Our modest course demonstrates that one does not need tremendous financial resources or formal historical expertise in order to establish a successful Holocaust course in medical school. Medical educators in "resource poor" areas must endeavor to be creative in their teaching methodologies, utilizing, where available, free online modules and asynchronous learning from reliable sources.[82] They must also capitalize on what they *do* have. For example, we discovered a veteran's museum in the small town of Germantown, Ohio, in which many veterans of the Second World War gathered monthly. Among these were five liberators of the death camps, who could speak directly to medical students about their experiences. We have since recorded their oral histories, and those of local Jewish Holocaust survivors on audio and video, and converted these recordings into formats available for an online course.

Conclusion: Reclaiming the white coat as a symbol of hope

The white coat derived its significance in the last century from the physician as laboratory scientist, surgeon, and hospital doctor—but ultimately, its power rests in its symbolic value of the physician as healer.[83] As black's opposite, which often signified darkness and death, the white coat conveys the pull toward light, and life. This is not to ignore the controversies surrounding the white coat and its contemporary use, misuse, or disuse; it is only to point to a reality of the physician: that our profession was meant to always uphold the life and dignity of the human person, even if we could not preserve it.

What will become of us? Will we kill each other again in waves of ethnic revenge with machetes, as in Rwanda? Or will we physicians kill others again with words—declassifying our brothers and sisters as not worthy of living? At the bedside of the "neurologically devastated" child—is this really a "life unworthy of life?" Is it right to call a premature baby in the intensive care unit a "squirrel"?

My experience in studying and teaching about the role of physicians in the Holocaust has pushed me to face this reality of life in clinical practice: human persons, in all their diversity, are meant to flourish, to build bonds of solidarity with one another, to see oneself in the other. We are caretakers in a truly sacred task. When we teach medical students, physicians, and others about the role of our profession in the Holocaust, and, most importantly, when we lead by exemplifying the opposite—an unafraid, conscience-driven, kinder, and more life-affirming medicine—only then may we reclaim, day by day, the white coat which we once freely gave up.

Part Three

Economic Policies and the Stripping of the Jewish Community

The Depression in Weimar Germany inflicted a major blow to the country's economy with millions unemployed, food scarce, banks folding, and hyperinflation taking its toll on all sectors of society. Disgruntled with the traditional political parties, the people turned to the National Socialist Party and Adolf Hitler as potential solutions to this financial quagmire. Once in power in 1933, Hitler, with his economic policies, enabled the economy to be gradually revitalized during the twelve-year Reich. Initially he utilized the German manpower as seen in the laborers of the 1934 Nazi rally film *Triumph of the Will* to rebuild a crippled nation. From 1936 on he rejected the disarmament aspect of the Treaty of Versailles and prepared for a war economy with his Four-Year Plan. Following upon the invasion of Russia on June 21, 1941, the Führer maintained a "total war" strategy, a war on two fronts, in retaliation for the negative criticism of the country emanating from international reporters. On April 1, 1933, just a few months after the establishment of the Third Reich, Propaganda Minister Joseph Goebbels addressed a rally in Berlin's Lustgarten to launch a national boycott of Jewish businesses; storm troopers held large signs advising Germans not to buy from Jews—"Kauft nicht bei Juden." They painted a large Star of David on Jewish storefronts and confronted those attempting to enter the shop. Many Germans did not heed the threats of the SA and the boycott failed after a day of intimidation.

In late September 1933, Jewish government employees and their spouses lost their jobs, which put a major financial burden on the family. At the same time Jews were banned from participating in the cultural life of Germany, and later in 1938 prohibited from activities dealing with film, literature, theater, and art, and shortly afterward from engaging in journalism. The Nazi government then took full control of the press and all other media.

The well-off but vulnerable Jewish community soon fell prey to the Nazi government through extensive legislation that aimed at strengthening the nation's economy. The government took action after the antisemitic Nuremberg Laws of 1935 by putting a stranglehold on the Jewish economy. An onerous 25 percent tax was imposed on Jewish wealth, and when the national banks were prohibited from offering credit to Jews, the community faced a shrinking economy. The Decree on the Registration of the Property of Jews of April 26, 1938, mandated that any Jewish enterprise had to be

registered, marking it as a prime target when the confiscations began. By that year of radicalizing antisemitic laws the government had already appropriated two million marks worth of Jewish property, claimed Walter Funk, minister of economics. In the same year, the Reich Supreme Court legislated that just by claiming Jewish heritage one was summarily eliminated from employment.

The fall and winter of 1938 brought further devastation to the economic life of the Jewish community. The extensive, coordinated assault on Jewish shops on November 9–10, *Kristallnacht* or "Night of Broken Glass," lay waste to storefronts throughout Germany. On November 12, Hermann Göring's Decree on the Elimination of the Jews from Economic Life prohibited Jews from engaging in business and two weeks later, on November 21, the Nazi government Aryanized all businesses owned by Jews, transferring them to non-Jewish owners or shuttering them.

The systematic process of expropriation of Jewish businesses, goods, and wealth over the next several years through antisemitic laws took its toll on the Jewish community. The Nazis needed little or no legislation, however, to confiscate "Jewish" or "degenerate" art from the collections of German museums or wealthy families like the Rothchilds and Rosenbergs for the private collection of Hermann Göring or for the future Führermuseum in Linz, Austria. Their voracious appetite for plundered art extended throughout Nazi-occupied Europe.

Not only did the Nazis take the German Jews' businesses and possessions, but the pensions of the transported Jews were assumed by the government as well, on the grounds that their "normal" residence was abroad. Stripped of every source of livelihood and financial assets, the Jews would eventually be stripped of their lives.

As the war, Nazi occupation, and deportation of Jews to concentration camps continued to engulf more European countries, the Eleventh Decree of November 25, 1941, called for automatic expropriation of Jewish property held in Germany. Whether in Germany or abroad Jews and their heirs would meet steep challenges for restitution, unfortunately even until the present.

11

The German Plunder and Theft of Jewish Property in the General Government

David M. Crowe

The German conquest of Poland in the fall of 1939 unleashed the full horror of Nazi racial ideals that saw the gradual evolution of policies that ultimately led to the mass murder of 90 percent of prewar Poland's 3.3–3.5 million Jews. The geographical center for what the Germans would ultimately call the Final Solution—a plan that Alfred Rosenberg explained meant "the biological eradication of the entire Jewish people"—was the *Generalgouvernement für die besetzten polnischen Gebiete* (General Government for the Occupied Areas of Poland). Over time, the General Government would become not only Nazi Germany's principal racial laboratory but also what its leadership considered a "dumping ground" for those in Europe deemed *untermensch* or *Lebensunwertes Leben* ("subhuman" or "lives unworthy of living"). As such, it would become the site for four of Nazi Germany's six death camps once the Final Solution became operational in late 1941.[1]

Given all of this, it is not surprising that the five-week conquest of Poland was brutal. The Nazis' long-range plan was to empty Polish territory of Jews, Poles, and other racial undesirables, and transform it into new settlement areas for *Volksdeutsche* (ethnic Germans). Himmler would oversee this "colonization" program as well as the Germanization of 3 percent of the Polish population deemed racially fit for such an "honor." During the course of the war, the Germans forced hundreds of thousands of Jews and Poles into the General Government from western Poland to make room for 400,000 to 750,000 ethnic Germans from throughout German-occupied Europe.[2]

Once the *Wehrmacht* conquered Poland, it turned the eastern half of the country over to the Soviets, who had become German allies in late August, and the remainder of Poland to civilian and Party administrators. Berlin integrated portions of western Poland directly into the Greater Reich as the *Reichsgau Danzig Westpreussen* and the *Reichsgau Wartheland*. What remained of German-occupied Poland, the districts of Warsaw, Radom, Lublin, and Krakow, became the General Government. After the invasion of the Soviet Union in June 1941, a fifth district, Galicia, with its capital in Lemberg (Lwow), was added to the General Government. The Germans chose Krakow as its capital to rob Warsaw of its historical and nationalistic importance to Poles.

In late September, Alfred Rosenberg, the head of the *Aussenpolitisches Amt der NSDAP* (Foreign Policy office of the NSDAP [Nazi Party]), noted in his diary a recent conversation he had with Hitler about Poland. The Führer told Rosenberg that he considered Poles as

> a thin Germanic layer, underneath frightful material. The Jews, the most appalling people one can imagine. The towns thick with dirt. He's learnt a lot in these past few weeks. Above all, if Poland had gone on ruling the old German parts for a few more decades everything would have become lice-ridden and decayed. He wanted to split the territory into three strips: 1. Between the Vistula and the Bug: this would be for the whole of Jewry (from the Reich as well) as well as all other unreliable elements. Build an insuperable wall on the Vistula—even stronger than the one in the west. 2. Create a broad cordon of territory along the previous frontier to be germanized and colonized. This would be a major task for the whole nation: to create a German granary, a strong peasantry, to resettle good Germans from all over the world. In between, a form of Polish state [*Staatlichkeit*]. The future would show whether after a few decades the cordon of settlement would have to be pushed further forward.[3]

On October 10, Goebbels noted in his diary that

> the Führer's verdict on the Poles is damning. More like animals than human beings, completely primitive, stupid and amorphous. . . . They are to be forced into their truncated state and left to their own devices . . . now we know the laws of racial heredity and can handle things accordingly.[4]

A week later, Hitler told *Wehrmacht* and Party leaders that Poland was not to be treated like a German province nor was it to have a strong economy. He intended that the quality of life for the Poles was to be low, and viewed the General Government as a primary source of forced labor. "Carrying out the work there would involve a hard ethnic struggle (*Volkstumskampf*) that will not permit any legal restrictions." Nazi control of this part of Poland, he added, would "allow us to purify the Reich area too of Jews and Polacks." This "devil's work," Hitler concluded, "must save us from again having to enter the fields of slaughter on account of this land."[5]

On October 26, Hitler appointed Dr. Hans Frank as *Generalgouverneur* (governor general) of the General Government. There soon emerged three competing centers of power in the General Government—the civilian government, the *Wehrmacht*, and the SS. The latter, which considered the General Government its special racial laboratory, wielded immense power there. And though Frank could hold his own against the *Wehrmacht*, he was, according to Hans Umbreit, "on a losing ticket from the start," when it came to Himmler and the SS.[6]

This was due in large part to the vast power that Himmler wielded when it came to racial matters. In late September 1939, he had masterfully consolidated his control over all of the central offices of the *Sicherheitspolizei* (Sipo), which included the Gestapo, Kripo, the *Grenzpolizei* (green or border police) and the *Sicherheitzdienst*

(SD; Security Service), into the newly created *Reichssicherheitshauptamt* (RSHA; Reich Main Security Office), which he placed under Reinhard Heydrich. Several weeks later, Himmler also became the *Reichskommissar für die Festigung des deutschen Volkstums* (RKFDV; Reich commissioner for the Fortification of the German Volk—Nation), which gave him considerable authority to press his claim as the principal police and political authority in the General Government.[7]

Himmler's top official in the General Government was the *Höhrere SS- und Polizeiführer Ost* (HSSPF OST; Higher SS and Police Leader; Friedrich-Wilhem Krüger, 1939 to November 1943; Wilhelm Koppe, November 1943–1945), who oversaw the various branches of the RSHA there.[8] During the war, Himmler tried to expand the role and powers of the HSSPF OST to include authority over all political and racial matters in the General Government, which made Krüger, and later Koppe, Frank's principal competitors for power and authority in what commonly became known to many Nazi leaders as the "Frank-reich."[9]

The war against the Jews in Poland

Within a week after the invasion began, the Germans ordered Jewish businesses in areas under their control to begin to display the blue Star of David. In late October, authorities ordered Jews in Breslau (today, Wroclaw, Poland) to wear a yellow triangle, a regulation extended to Lodz and Krakow in mid-November. On November 23, 1939, Frank decreed that all Jews in the General Government begin wearing a four-inch-wide white armband with the Star of David on the right sleeve of all clothing by December 1, 1939. A few weeks earlier, Frank's subordinate, *SS -Gruppenführer* (Major General) Otto Wächter, the governor of the Krakow district, ordered that all Jews in his district above age twelve had to wear a highly visible white band with a blue Star of David sewn on it. Wächter added that the white band had to be 10 centimeters wide and the star 8 centimeters in diameter. He considered anyone "who is or was a believer in the Jewish faith" or whose mother or father "is or was a believer in the Jewish faith" as a Jew. This included not only permanent Jewish residents of Krakow but also temporary ones.[10]

Two months earlier, Reinhard Heydrich met with *Einsatzgruppen* leaders in Berlin and followed it up with a *Schnellbrief* on September 21, the "Jewish Question in Occupied Territory," that became the blueprint for future German policies toward Jews in Poland. Heydrich began by reminding everyone who attended the meeting that "the planned total measures (i.e., the final aim—*Endziel*) are to be kept secret." These measures, he went on, "require the most thorough preparation with regard to technical as well as economic aspects."[11] The first task of *Einsatzgruppen* commanders, Heydrich wrote, was quickly to move Jews in small towns and villages in the countryside to larger cities. A distinction, he added, was to be made between Danzig, West Prussia, Poznan, and eastern Upper Silesia from other occupied areas, which were as far as possible to be cleared of Jews; at least the aim should be to establish only a few cities of concentration.[12]

This was to be followed, he went on, by the creation of *Judenräte* (Council of Jewish Elders) in each new Jewish community. They were to be made up of "the

remaining authoritative personalities and rabbis."[13] The *Judenräte* were not only to conduct a census of Jews in their specific areas of responsibility, but also to oversee the evacuation of Jews from the countryside, and once relocated, find "appropriate housing" for them. The councils also had to insure adequate food for the Jews while in transit. All that the Jews were allowed to bring with them, he added, was "their movable property insofar as that is technically possible." *Einsatzgruppen* commanders were to explain to the *Judenräte* that the reason they were being moved was that the Jews had taken a "decisive part in sniper attacks and plundering."[14] These were some of the same excuses used by *Einsatzgruppen* commanders in their reports on the mass murder of Jews and others during the early months of the invasion of the Soviet Union in 1941.

Heydrich devoted the latter part of his *Schnellbrief* to economic matters. One of the key issues was to insure that the resettlements did not affect the economic needs of the military. Consequently, it would be necessary, he argued, not to immediately evacuate some "trade jews" who were "absolutely essential for the provisioning of the troops." But when this was no longer necessary, he went on, plans were to be made for the "prompt Aryanization" of Jewish businesses involved in such trade.[15] He added that

> it is obvious that Jewish-owned war and other essential industries, and also enterprises, industries and factories, important to the Four-Year Plan must be maintained for the time being.[16]

He also ordered that "land owned by Jewish settlers be handed over to neighboring German or Polish farmers on a commission basis to ensure the harvesting of all crops and replanting." *Einsatzgruppen* chiefs were also to conduct "surveys of all the Jewish [owned] war and other essential industries and enterprises, or those important to the Four-Year Plan." These surveys were to be quite specific about the "type of enterprise" being surveyed and its value to "war-important enterprises" or the Four-Year Plan. They were also to indicate which should "be most urgently Aryanized" and whether such Aryanization should involve just Germans or also Poles. The surveys should also indicate the number of Jews working in such enterprises and if they would be able to continue to operate once Jews were resettled. Moreover, they also had to determine if they needed German or Polish workers to replace them. All of this was to be coordinated with different branches of the military and other institutions or authorities responsible for such issues and planning.[17]

The idea, of course, of asking *Einsatzgruppen* commanders to take charge immediately of any sort of inventory of Jewish property in occupied Poland was ludicrous. To do this effectively would have meant creating a stable environment where such surveys could take place. In reality, what actually took place was an *Einsatzgruppen* and Wehrmacht-sponsored "orgy of atrocities" that led to the widespread theft of Jewish property.[18] Both now shared responsibility for the terror "unleashed" by the "poorly prepared" occupation of Poland.[19]

Heydrich further clarified Nazi goals in a meeting with RSHA department heads six days later. Hitler, he told them, had approved the creation of the foreign Gau

(General Government). He expected that it would take about a year to move all Jews into the "foreign Gau," where they would be put in ghettos "in order to ensure a better chance of controlling them and later of removing them." He repeated what he had already told *Einsatzgruppen* commanders—that the RSHA's most urgent task was the removal of Jews from the countryside as "small traders," with the exception of those involved in provisioning *Wehrmacht* units. Heydrich ended the meeting with the following orders:

1. Jews out of the towns as quickly as possible.
2. Jews out of the Reich into Poland.
3. The systematic evacuation of the Jews from German territory via goods trains.[20]

The economic exploitation of the Jews in the General Government

The German economic exploitation of Poland's Jews, of course, began immediately after they invaded Poland. On September 21, Dr. Marek Bieberstein, the head of Krakow's new *Judenrat*, told the city's Jews that they would have to fill in the various anti-aircraft ditches throughout the city. This was the beginning of the German forced and slave-labor practices that transformed the General Government's Jews into slaves of the Third Reich. Once Hans Frank was in power, he decreed that all Jews between twelve and sixty years were obligated to work for a two-year term in a forced labor camp.[21]

But the worst was yet to come. What followed were a series of decrees and regulations that stripped Jews of their homes, businesses, and personal property. Jews had already lost a lot of their possessions during the random military and civilian plundering that took place during the invasion and occupation of Poland in September and early October 1939. On September 29, for example, the military issued a decree that allowed the immediate seizure of property owned by absentee owners or that was improperly managed. This became a pretext for the seizure of a lot of Jewish property.[22]

Göring and Himmler also claimed that they had the authority to seize property for the good of the Reich without the prospect of compensation. Consequently, the military and the police, and occasionally bold civilians, had no qualms about raiding a Jewish business, factory, or home and stealing everything inside. Stella Müller-Madej tells of one such incident in her memoirs. Early one November morning in 1939, three SS men entered her family's modern, spacious apartment in a predominantly Polish neighborhood. At first, the Germans thought they had the wrong apartment because of its elegance and the fact that Stella's mother, Bertha, a German Jew with blond hair and green eyes, spoke "impeccable" German. Bertha politely informed the SS officer that she was Jewish. After a moment of hesitation, the SS officer informed Bertha that her family had half an hour to vacate the apartment. They could take nothing with them. The officer assured the family that they would receive a detailed inventory of

everything they left behind. The family quickly dressed and put on extra layers of clothes. Bertha was also able to sneak a few items from her jewelry box, though she was sure that the Germans would keep their word about a receipt for the confiscated items. They, of course, never got a receipt and lost everything they owned that day. Such tragic stories were repeated time and again throughout German-occupied Poland during the first year of the war.[23]

In November, the Germans froze all Jewish and foreign assets in banks and other financial institutions and permitted them to keep only 2,000 zlotys ($625) in cash. In Krakow, the Germans entered Jewish homes throughout the city in early December and brutally confiscated anything collectively valued above 2,000 zlotys. Several days earlier, the Germans seized all Jewish motor vehicles. On January 24, 1940, authorities gave Krakow's Jews five weeks to register their remaining property. They were also told not to change their addresses.[24]

On November 1, 1939, *Reichsmarschall* Hermann Góring, who oversaw wartime economic planning as chairman of the *Ministerrat für die Reichsverteidigung* (Ministerial Council for the Defense of the Reich) and head of the *Vierjahresplan* (Four-Year Plan), created the *Haupttreuhandstelle Ost* (HTO; Main Trusteeship Office East), which would have offices throughout German-occupied Poland. Göring's directive, which he later clarified in early 1940, recognized two different methods of property seizure based on property rights—*beschlagnahmt* (taking over) and *einzeihung* (confiscation). It would give the HTO the right to "take over" or "confiscate" any property deemed important to the public interest. Local HTO offices would then be responsible for overseeing the stolen property and putting it in the hands of carefully selected German *Treuhänder* (trustees).[25] A separate office, the *Treuhändverwaltung für den jüdische Haus- und Grundbesitz* (Trust Administration for Jewish Houses and Land) would handle Jewish property. The best factories, apartments, and land were reserved for German firms, while lesser ones were reserved for *Volksdeutsche* or Polish Christians. By the end of 1941, Germans only owned 157 privates businesses in Krakow, while Polish Christians owned or leased the rest—2816 firms.[26] Any Polish property that was not officially registered with the Germans was considered "ownerless" and was subject to HTO seizure. All Jewish property which was seized by the military, or other organs of state for the benefit of the Reich was not bound by Göring's directives. For Jews, the only things exempt from seizure were invaluable personal items.[27]

Initially, there was some effort to compensate Jews for their extensive property losses. In the early months of the occupation, the Germans seemed only interested in larger Jewish businesses and homes though, over time, the Jews in the General Government lost everything. In Krakow, for example, the HTO initially agreed to pay former apartment house owners 75 percent of the property's value, though by the summer of 1940 the HTO reduced these payments to 50 percent. Jews who had money in the state-owned Polish Post State Savings Bank (*Pocztowa Kasa Oscz dnonci*) were only allowed to take out 10 percent of their savings, while their total withdrawals from their individual accounts could be no more than 1,000 zlotys ($312.50). Those who had money in the Jewish credit unions after November 18, 1940, lost everything because they were liquidated.[28]

Much of this became moot once the Germans began to create ghettos throughout the General Government. Envisioned as temporary measures to isolate the Jews from the rest of the region's population, the Germans also saw ghettos as a way further to dispossess Jews of what they stereotypically believed was hidden Jewish wealth. They also saw ghettoized Jews as a potential source of slave labor in what they hoped would become a network of German and Polish factories set up in and outside of the ghettos.[29] This latter idea was controversial, particularly after Hitler approved of the implementation of the Final Solution in the summer of 1941. "Attritionists" like Himmler saw ghettos as slow methods of death prior to the creation of the death camps, while "productionists" argued that the Jews were a valuable source of slave labor that was important to the struggling war economy.[30] In the end, Himmler won out, and, with some exceptions, sent 3–3.5 million Jews to their deaths in the six death camps that dotted the former Polish countryside. The other 2.5–3 million Jews died in the ghettos or in transports to death camps.[31]

On February 18, 1941, the General Government's Trustee Office issued new guidelines for compensating former Jewish property owners, most of whom were now in ghettos. Initially, the Germans felt that the Jews could sustain themselves in the ghettos with their hidden wealth. But it soon became apparent that the Jews were impoverished, which forced the Germans to look for other ways to make the ghettos self-sustaining. In some ways, the Trustee Office's new guidelines seemed partially to address this problem, though, in reality, they offered little real hope of such compensation. The first criterion for payment was that the former Jewish owner could not support himself from other sources of income. Second, if compensation was given, it could be no greater than a quarter of the former property owner's net income. Moreover, German compensation could not exceed 250 zlotys ($78) a month, far below the 1,300 zlotys ($406.25) needed monthly to meet basic cost of living expenses in the General Government. A third HTO requirement stipulated that any compensation given could not affect the value of the seized property. Finally, and this was the most damaging to any Jewish hopes of compensation, the HTO directive stated that any Jewish property seized for the benefit of the Reich was not subject to compensation. If this were not bad enough, once the property was taken over, the new German owner was not obligated to pay any of the confiscated property's prewar debts to Polish creditors. At the same time, the new owners had the right to demand payments from any Pole for debts owed the former owners.[32]

Six months earlier, Göring ordered the immediate confiscation of all remaining Jewish property in Poland with the exception of personal belongings and 1,000 Reichsmarks ($400) in cash. These regulations were enforced unevenly throughout German-occupied Poland. In Krakow, for example, the new rule was only applied to homes that brought in rent of over 500 zlotys ($156.25) a month. During the same period, the HTO expanded its powers to include the expropriation of all property owned by the Polish state or by those deemed ethnically and politically unfit to own such property.[33]

Much of the stolen property remained in the hands of Frank's government, in large part because of an ongoing struggle between Frank and HTO officials, who wanted to set up an AE (*Altreich*) TO in Warsaw to oversee the property seizures.

Frank, concerned about the pillaging efficiency of the HTO's operations, wanted his own Aryanization operations in Krakow.[34] This dovetailed nicely with Deutsche Bank's takeover of HTO operations in the General Government in 1941. One of the bank's first moves was to try to take over Bank Handlowy (today Citi Handlowy), Poland's foremost financial institution, whose capital totaled about 25 million zlotys. About half of its deposits "came from Jews."[35]

Another bank, Austrian-based Creditanstalt, which had a branch office in Krakow, played a particularly strong role in the sale of expropriated property. By 1942, the HTO or Frank's trustees oversaw 3,296 businesses in the General Government. Of this number, 1,659 were industrial firms and 1,036 were trade or artisanal businesses. Creditanstalt played a lucrative role in providing loans to potential buyers of most of this stolen property. According to a 1942 report in the *Krakauer Zeitung:*

> The sale of the trust businesses can proceed only slowly in view of the state of prewar indebtedness and the poor performance ascertained particularly in connection with formerly Jewish businesses. Where at all possible, the sale will take account of the interests of German soldiers at the front. This presupposes, however, that the businesses are developed in such a way that they are able, after the war is over, to standing comparison with corresponding enterprises in the Reich.[36]

The Austrian bank was also deeply involved in the "transfers of money from relatives of concentration-camp inmates." Its offices were well aware of the mass deaths in these camps, since the Plaszow concentration camp was just a few miles from the center of Krakow, and Auschwitz 45 miles to the southwest. Creditanstadt also "administered some of the accounts of the trustee administration, which dealt with confiscated Jewish-owned property."[37] In the end, while both Deutsche Bank and Creditanstalt played a limited role in the overall General Government economy, they were both actively engaged in the "lucrative side business generated by the occupation regime, at the expense of the Poles (including the Polish Jews)."[38]

There were also other ways to acquire Jewish property. One could, for example, acquire a lease on bankrupt Jewish property through the Polish trade courts (*Okregowy*), though one still had to work with the HTO's *Treuhänders für Handel und Gewerbe* (Trustees for Trade and Industry) in Krakow. Oskar Schindler, for example, did just that when he leased a bankrupt Jewish factory, *Pierwsza Malpolska Fabryka Naczyn Emaliowanych i Wyrobow Blaszanych Rekord, Spolka, z ograniczon odpowiedzialnosci w Krakowie* (First Little Polish Limited Liability Factory of Enamel Vessels and Tinware, Record, Limited Liability Company in Krakow), on November 13, 1939.[39] The next day, Schindler signed a hastily prepared handwritten document acknowledging his lease of the factory. He got the keys to the buildings and machinery but did not sign a formal lease for it until January 15, 1940. Dr. Roland Goryczko, the trade court's attorney (*Adwokat*), handled all of this for Schindler. The Czech German bought *Rekord*'s equipment for 28,000 zlotys ($8,750) and paid the court a quarterly rent of 2,400 zlotys ($750). The reason for this hasty arrangement was Schindler's desire to avoid dealing with the cumbersome HTO bureaucracy, which was just beginning to seize Jewish property in the General Government.[40]

Figure 9 Oskar Schindler poses with his office employees at the Emalia enamelworks. Courtesy of the United States Holocaust Memorial Museum.

> According to the lease agreement, Oskar Schindler was obliged to run the factory in an efficient way according to its social and technical requirements. Also, he is supposed to use all means possible to produce enamelware vessels and hire as many workers as possible.

The lease added that Schindler was to determine the salary of his employees "in a just and appropriate way." He could not change the type of goods that he produced without the permission of the trade court judge responsible for the leased factory. He could also use the name of the former factory, *Rekord, Ltd.*, though he decided to rename it the *Deutsche Emalwarenfabrik Oskar Schindler* (German Enamelware Factory Oskar Schindler). For convenience, Schindler and his workers referred to the renamed German factory simply as *Emalia*. The address of Emalia remained the same as *Rekord Ltd*., 4 Lipowa Street. Since he was only leasing the former company, it was decided to use a different address in all Polish court matters dealing with the former Jewish factory. That address was Ulica Romanowicza Tadeusza 9, a street that ran along one side of the factory.[41]

Several days before the lease deal was finalized, Dr. Goryczko did an in-depth analysis of *Rekord*'s finances and assets. At the time there were still a number of Polish employees living at the factory and making exorbitant salaries as guards of its machinery. After going through the company's records, Dr. Goryczko prepared a list of *Rekord*'s creditors in anticipation of a sale of the company's finished enamelware. Once Schindler entered the picture, Dr. Goryczko prepared a detailed, twenty-seven page inventory of the factory's machinery and stores in preparation for Schindler's lease of the factory buildings.[42]

In 1942, Schindler decided to purchase *Emalia* and worked again with a representative of the Polish trade court, Dr. Boleslaw Zawisza. But there was a problem—a dispute over the ownership of the machines that arose before Schindler purchased them in the fall of 1939. Consequently, in the spring of 1942, Zawisza contacted Natan Wurzel, a Jew at the center of the dispute. At the time, Wurzel was living in the ghetto in the small Polish town of Brzesko about 40 miles east of Krakow. After receiving a letter from Zawisza about the dispute, Wurzel wrote back on April 20, 1942, giving his side of the controversy. Though he now renounced his claims to the machines, he explained that he had purchased them as part of a ploy to pawn them and use these funds to keep the factory running. Wurzel followed this up with two more letters to Zawisza on July 24 and August 3, 1942. He now claimed that he had sold the machines in question on the eve of the war to an engineer named Brulinski. Wurzel added in his final letter that he had made a statement in August 1939 giving up his claim to the machines, which he had bought for *Rekord Ltd*. He explained that he had decided to make this final statement because he heard that the factory was about to be sold.[43]

The postwar struggle for reparations and restitution of stolen Jewish property

Wurzel survived the war and later moved to Israel, where he accused Schindler of theft and abuse, and sought compensation for his lost property.[44] But like most Jews after the war, his efforts were unsuccessful, particularly when it came to Poland. By 1946, there were only about 240,000–300,000 Jews in Poland, and three years later, 100,000. Most had fled to escape rising antisemitism and the communization of the country. By 1993, there were about 5,000–10,000 Jews in Poland, a figure that has risen to 20,000 over the last 25 years.[45]

The dramatic decline in postwar Poland's Jewish population explains, in part, why there have been so few efforts by survivors and their families to seek and gain restitution for the vast properties stolen during the Shoah. Estimates are that Polish Jews owned 300,000 properties before the outbreak of the Second World War, which included 10,000 temples and synagogues as well as 1,056 cemeteries. According to a 2010 study, the dispossessed Jewish property is worth about $35 billion, with the cost of restitution and compensation anywhere from $11–47 billion.[46]

While postwar demographics certainly had an impact on the entire question of compensation and restitution, it was further complicated by a series of Polish laws in 1945 and 1946 that nationalized abandoned property and assets. Though aimed principally at property owned or seized by the Germans, these laws also effectively nationalized property owned by Poland's Jews.[47] After 1989, these laws were considered unconstitutional, which helped pave the way for legislative discussions about compensation and restitution for properties lost during the Nazi and communist eras. This was a complicated issue that pitted former Jewish property owners who had not lived in Poland for decades and those who now owned or lived in the said properties.[48]

In 1997, the Sejm, the lower house of the Polish parliament, passed the first major piece of legislation dealing with this question—*The Law on the Relationship between*

the State and Jewish Communities in the Republic of Poland—which created a complex, five-year window for the country's Jewish communities to file claims for the return of Jewish religious, educational, and communal properties stolen after September 1, 1939. The complex, expensive process laid out in the law created considerable problems for Poland's small, underfunded Jewish communities. Nine of them, along with the new Foundation for the Preservation of Jewish Heritage, filed 5,504 claims for the return of Jewish property. By 2013, the government had only reached decisions on 2,398 of these claims, and less than half (1,074) "resulted in the return of property, monetary compensation, or an allocation of replacement properties." Unfortunately, in instances where former Jewish properties were returned to the communities, they were often in extreme disrepair, dilapidated, or, in the case of cemeteries, untended. Moreover, some in Poland's Jewish community have been critical of the fact that financial compensation was often chosen instead of the return of Jewish community properties, and that on occasion the said properties were sold after restitution, which affected plans to restore them as part of a larger effort to memorialize Poland's rich Jewish heritage.[49]

Sadly, the question of the return of or compensation for the loss of private Jewish property and assets is even more disappointing. Since 2001, successive Polish governments and politicians have promised laws that would deal with this issue, though such legislation was never submitted to the Sejm. Yet in 2009, Poland, along with scores of other nations, signed the Terezin Pledge, which promised that each of the signatory powers would "make every effort" to deal with Jewish religious and communal property claims, and "address" the private property and asset claims of individual Holocaust survivors. They also pledged that they would make the "process of such restitution or compensation . . . expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant."[50]

Yet three years later, Polish officials called such efforts "superfluous" and stated that anyone who wanted to seek compensation or restitution should do so through the "Polish legal system." Unfortunately, the difficulties of dealing with such matters in Poland are "complex, expensive and time-consuming," particularly for "foreign, elderly applicants." They must begin the process by filing a claim with the "appropriate administrative agency and exhaust all administrative procedures before bringing a lawsuit to the civil courts." In addition, "such claims must be for property or assets nationalized during the communist era since Polish law does not permit claims for property stolen during the Holocaust."[51]

In 2014, members of the British parliament, working with the World Jewish Restitution Organization (WJRO), which was founded in 1993 to deal specifically with restitution and compensation for Holocaust survivors in Central and Eastern Europe, urged Polish prime minister Donald Tusk, who would later become president of the European Council, to address his country's failure to adopt legislation dealing with restitution and compensation for the loss of private property during the Shoah.[52] Later that year, the WJRO urged Poland's new prime minister, Ewa Kpoacz, to pass legislation to "make history and finally end the wrong caused by Poland's continued use of property plundered by the Nazis and/or nationalized by the Communist regime."[53]

The Sejm finally passed a restitution and compensation law on June 25, 2015, though it only dealt with personal Jewish property in Warsaw. President Bronislaw

Komorowski refused to sign it because it "would have set a six-month deadline for rightful owners or their heirs to participate in administrative proceedings for property claims filed by December 1988."[54] It also limited the right of former owners to seek "the return of large categories of properties, including those used by the government," and required that everyone who met the criteria to file claims had to do so by the end of 2016 with proof that they had a "right to the property." Komorowski sent the law to Poland's Constitutional Tribunal, which on July 27, 2016, upheld the restitution law, which went into force the following month.[55] According to the ruling Law and Justice Party, such legislation was unnecessary "because the past is the past."[56] For all practical purposes, the barriers set up by the law essentially made it "nearly impossible" for survivors and their families to successfully file restitution[57] and compensation claims in Poland. In the end, the failure of the Polish government to establish a fair, simple process for such claims adds to the humiliating injustice and pain suffered by Polish Jews during the Shoah.

12

Nazi Laws Used to Plunder Art and the Current Legal Tools Used to Unwind Looting

Leila Amineddoleh

The Nazis used art as a weapon

Just as the brutality of the Nazi Party is unprecedented in terms of loss of life and destruction of property during the modern era, the legal tools used to remedy past wrongs are complex and nuanced. The Nazis used art and cultural heritage as weapons; art became a tool in the war against discriminated people and a means of empowering the ruling class. In addition to creating works to spread propaganda, Hitler's regime destroyed art for self-promotion and seized objects for financial gain.

The Third Reich created art to spread propaganda

When Adolf Hitler rose to power he created the Third Reich, intended as a successor to the Roman Empire. The Führer revered imperial Rome and emulated its art and heritage, and thus he exploited art and architecture as a way to link Nazi Germany with the power of Ancient Rome.[1] Like the Roman emperors, Hitler commissioned monuments like triumphal arches, columns, and trophies.[2] One aspect of Third Reich architecture was its imposing size to awe spectators, symbolize victory, propagate Nazi ideology, and display power, while degrading demographic groups and opponents. Artists like Paul Troost and Albert Speer constructed monumental edifices in a sterile classical form meant to convey the "enduring grandeur" of the National Socialist movement.[3] The efforts of Nazi authorities to regulate, direct, and censor German arts and culture corresponds to what the late German historian George Mosse called an effort "toward a total culture."[4]

The Nazis destroyed art for self-promotion

In addition to creating propagandistic works, the Nazis destroyed art in violent acts of self-promotion. The Nazis targeted artworks like criminals. They assembled art that did not reflect their sensibilities, and labeled it "degenerate." As a failed artist, Hitler had a clear agenda for art; he hated modern art, and under his command, anything modern

or abstract was considered "un-Germanic" and deemed "degenerate." This degenerate art was seized, displayed as lacking merit, or destroyed by fire.[5] Destruction of cultural objects is potent propaganda because it instills fear.[6] As destruction degrades enemies and suppresses opposition, the objects themselves become symbols of the ways in which a perceived enemy can, and will, be destroyed. The objects come to symbolize the irrelevance of the past or the weakness of an enemy.[7]

The Nazi's seized art for financial gain

Hitler's party also seized public and private art collections to raise funds. Nazi officials understood the monetary value of the confiscated objects and used them for their personal coffers or for the advancement of the Third Reich.[8] However, the seizure of

Figure 10 General Dwight D. Eisenhower, supreme Allied commander, accompanied by General Omar N. Bradley and Lieutenant General George S. Patton, Jr., inspects art treasures stolen by Germans and hidden in salt mine in Germany. Courtesy of the United States Holocaust Memorial Museum.

objects went beyond degenerate works. Many historians view the Nazi plunder of art as the greatest "displacement of art in human history."[9] It is estimated that upward of 20 percent of the art in Europe was looted by the Nazis,[10] with France, Italy, the Netherlands, Poland, Russia, and other war-ravaged countries treated as targets.[11] A specialized group of art advisers, the Einsatzstab Reichsleiter Rosenberg (ERR), filled volumes of books with records of its plunder to be shipped back to Germany to be "safeguarded."[12] Hitler was not protecting works, but committing one of the biggest thefts in history.

The Nazis used the law to justify theft and destruction

Although art theft and destruction have occurred for millennia, the Third Reich was unique in its systematization of criminality and then attempts to justify these actions through legal means.

The Nazis classified types of art as "degenerate"

The Nazis enacted a series of laws relating to the permissibility of art. Nazi law deemed particular types of art to be inferior and subject to destruction and seizure from both private and public collections. The government purged cultural organizations of Jews and others alleged to be politically suspect.[13] In September 1933, the Reich Culture Chamber was established with Joseph Goebbels, Reich Minister for Public Enlightenment and Propaganda, at the helm.[14] Goebbels was tasked with promoting German culture within the Third Reich.[15] Art valued by the Nazis stood in stark contrast to the modern art movement of the time, which embodied abstract, expressionist, or surrealist tenets. The Nazis viewed these works as immoral.[16]

In July 1937, the "Great German Art Exhibition" opened, displaying the cultural bent of National Socialist artistic taste.[17] Hitler declared, "It is not the mission of art to wallow in filth for filth's sake, to paint the human being only in a state of putrefaction, to draw cretins as symbols of motherhood, or to present deformed idiots as representatives of manly strength."[18] According to the Führer, art should be modeled on classical Greek and Roman art, a form that embodied an inner racial ideal.[19] In a commission led by Adolf Ziegler, Hitler's favorite painter, the artist was tasked with emptying German museums of degenerate art. The term "*Entartete Kunst*," German for "degenerate art," indicated works touted by Nazi literature as "the decadent work of Bolsheviks and Jews,"[20] essentially modern, abstract, and unfinished works. Offending works were gathered and displayed in "The Degenerate Art Exhibition," only a few meters away from the "Great German Art Exhibition."[21]

In May 1938, the Law on the Confiscation of Products of Degenerate Art was passed, allowing the Nazis full access to offending art. It does not clearly define "degenerate art," but provides a classification that is vulnerable to the broad discretion of Hitler and his staff.[22] It states, "The products of degenerate art, which have been seized in museums and publically accessible collections before the passing of this law and have been identified by authorities appointed by the Führer and Reich Chancellor can be seized

without compensation on behalf of the Reich provided that they were guaranteed to be owned by nationals or domestic legal entities."[23]

Under the retroactive law, works unilaterally deemed by Hitler to be "degenerate" were subject to appropriation without compensation. At least 15,997 works of fine art were confiscated from 101 German museums.[24] The majority of these "degenerate" works were sold on the international art market as a source of foreign currency or as barter, while unsaleable ones were dramatically burned in massive bonfires.[25] Unlike antisemitic laws that were revoked after the fall of the Third Reich, the laws permitting seizure of degenerate works from public collections are still valid.[26] Under German law, there is no obligation to return state-owned works seized from a museum; restitution is only required when the items were loaned by private individuals or belonged to foreign owners. The German government and professionals in the art world are hesitant to repeal the law for fear that it would open Pandora's Box, unraveling an intricate web of agreements involving Nazi-looted art, determinations about state actions versus illegal seizures, and complex ownership disputes that involve entities no longer in existence.[27] These considerations make it unlikely that museums will be able to successfully reclaim works.

The Nazis used laws to allegedly seize property legitimately

Besides degenerate art, the Nazis desired objects for their treasure troves, and this motivated the enactment of seizure laws. As with most Nazi actions, Hitler's thugs hid behind Third Reich laws to justify confiscations. On July 14, 1933, the Nazi Party passed a decree, the Law on the Seizure of Assets of Enemies of the People and the State.[28] The law was passed in conjunction with a denaturalization law, the Law on the Revocation of Naturalization and the Deprivation of German Citizenship (the two laws were passed on the same day).[29] The seizure law functioned as a tool for the Third Reich to gather assets of emigrants by permitting confiscation of property owned by Communists and others resistant to the regime. Jews who saw the writing on the wall and fled Nazi-occupied territory before being gathered for their imminent deaths were subject to this law, having works seized in their homelands and then handed over to the German government.

The following year, the German government amended the Reich Flight Tax (Reichsfluchtsteuer)[30] to discourage the wealthy from leaving the nation and to control the currency exchange. This law, in its initial passage dated to 1931, subjected citizens of the Weimar Republic to this tax. The Nazis eventually used the taxation as an antisemitic tool; Jews who left Germany were forced to pay a 25 percent tax on their assets which they were compelled to register, beginning in 1938, under the Decree on the Registration of Jewish Property. Cruelly, even individuals forced into concentration camps outside the Reich's borders were forced to pay the Reichsfluchtsteuer.

The aforementioned 1938 Decree on the Registration of Jewish Property ordered that Jews possessing more than 5,000 RM worth of assets register their property. The index enabled the Nazi Party to easily track Jewish-owned property, creating a wish list of items ripe for the taking. There were dozens of laws related to the treatment of Jewish-owned property that passed before the official start of the Second World War,[31]

including the 1939 Decree on Guardianship for Absentees that allowed Germany to act as guardian/trustee for property owned by exiled Jews. As one can imagine, guarding the property meant that it was confiscated by the government and treated as a federal asset. The fact that so many Jews were killed or vanished without a trace meant that these assets were easily absorbed into the Nazi Party's coffers.

By 1940, the Einsatzstab Reichsleiter Rosenberg was founded; the "Special Task Force," headed by Hitler's leading "philosopher" Alfred Rosenberg, was one of the main agencies engaged in the plunder of cultural goods in Nazi-occupied territories.[32] By the war's conclusion, the Third Reich amassed hundreds of thousands of cultural objects. The works were intended for the Führermuseum planned for Hitler's hometown of Linz in Austria.[33] However, not all of the objects were destined for public display; some were given to Nazi officials for their personal collections. Officials like Hermann Göring amassed enviable collections from the objects gathered by allegedly legitimate seizures. Even when officials threatened victims and coerced them to forfeit property, the Nazis assumed an air of legality. When pressuring individuals and families to part with their belongings by withholding exit visas, the Nazis often paid for works so that they could obtain a bill of sale and create a provenance (a history of ownership). Although Hitler's agents were essentially requiring their victims to either gift their objects or sell them for nominal prices, they were asserting that they were "purchasing" the works. They used the guise of legal transactions to legitimize their thefts, claiming that the works belonged to the officials who had paid for them. As victims fled, the Nazi Party kept records of "sales" to demonstrate the validity of their takings.[34]

The world grappled with theft and destruction after the war

European nations and the United States cooperated to return art to rightful owners

During the war, in 1944, US Military Government (MG) Law No. 52 made all property in Germany subject to seizure and management by the Allied military government.[35] The law severely restricted transactions in cultural materials of value or importance.[36] Accordingly, Allied forces determined rightful owners to return property to the deserving parties. Immediately following the war, the Allies undertook property forfeiture initiatives through international legal instruments and military laws. Joint Chiefs of Staff Order 1067 was signed in April 1945 and contained key features of US postwar occupation policy.[37] Part 6 of the Order contained denazification provisions that provided for property seizure from active Nazi officials ("more than nominal participants in its activities") and organizations.

The individuals tasked with the collection, research, and physical handling of the property were the Monuments Men, members of the Monuments, Fine Arts, and Archives (MFAA) program. They were a group of approximately 345 individuals from fourteen countries, with most members coming from the United States and the United Kingdom.[38] Many of these men and women were members of the art community.[39] The group's initial assignment was to mitigate damage to structures and heritage sites

during combat, primarily churches, museums, and other important monuments.[40] As the conflict progressed and the German border was breached, the mission altered, and the focus shifted to locating and recovering movable art.[41] The Monuments Men famously uncovered extensive mining systems in Germany and Austria where the Nazis stored vast amounts of loot. One, the Altaussee, housed art intended for the Führer Museum. When the MFAA took an inventory of the mine, it listed 6,577 paintings, 2,300 drawings or watercolors, 954 prints, 137 pieces of sculpture, 129 pieces of arms and armor, 79 baskets of objects, 484 cases of objects thought to be archives, 78 pieces of furniture, 122 tapestries, 1,200–1,700 cases apparently books or similar, and 283 cases of which the contents were completely unknown.[42] Besides the sheer number of recovered items, the Monuments Men handled some of art history's most famous works, including eight panels of *The Adoration of the Lamb* by Jan van Eyck and Michelangelo's *Madonna of Bruges*.[43]

There were obvious difficulties involved with returning loot. As with many art restitution cases, it is difficult to accurately identify works from conflict zones, as many artworks are untitled or unlabeled. The aftermath of war and the death of millions meant that many owners perished, leaving no way to restitute works or identify legal heirs. Luckily, the Nazi Party's meticulous records and compunction for "legality" helped Allied officials trace ownership. Unfortunately, the Monuments Men were only able to return a fraction of the looted items during their tenure in Europe during the 1940s and 1950s. The task of restitution continues today.

At the same time, postwar Europe grappled with difficulties related to restitution of property. Not only were nations in disarray, populations dispersed, cities destroyed, and economies in ruins, but ownership rights were not the priority of war survivors attempting to reconstruct some semblance of normalcy. Some European restitution efforts have been criticized, particularly as governments were reluctant to return property, but rather claimed objects as national heritage property. For example, the postwar Dutch government was criticized for creating nearly impossible, and cost prohibitive, hurdles for victims to overcome during the restitution claims process.[44] Austria faced similar criticism after it passed unsympathetic restitution laws that were full of loopholes, making it difficult for victims and their heirs to reclaim property.[45] Nations such as Italy, Hungary, Russia, and Spain have all faced ire for not more readily returning loot.[46] And Germany has come under heavy criticism, particularly in light of an art discovery announced in 2013.[47]

US courts played an important role in the restitution process

Across the sea, legal cases involving Nazi loot trickled into American courtrooms. The first litigation to address Nazi plunder was *Menzel v. List*, a case before the NY court in 1966.[48] Ms. Menzel sought to recover a Chagall gouache that she and her husband left in their apartment in Brussels when they fled in March 1941. The owners at the time of the suit, the Lists, bought the work from a well-known Parisian gallery in 1955. The whereabouts of the gouache from 1941 to 1955 were unknown, and the Lists were unaware of the work's past. The Lists argued that the Menzels abandoned the Chagall when they fled, but the court wisely considered the context of the situation, ruling

that there is no abandonment and no relinquishment of title when an owner leaves behind property while under duress. The court also ruled that the taking of art by invading forces (in this case, German forces entering Belgium) is pillage because it is unnecessary for the war effort. When pillage occurs, the rightful owner's title is not extinguished and the seizing party does not gain ownership. However, the court faced a difficult decision. Although the Menzels had their work seized by the Nazis, the Lists were innocent owners unaware of the work's history. In determining who should get the painting, the court realized that "one of two innocent parties must bear the loss." The court chose to protect the original owners instead of the good faith purchasers, and ruled that the Chagall be returned to the Menzels. *Menzel v. List* established two important holdings. First, works left behind by victims of the Nazis were not abandoned. Second, Nazi seizure was pillage. The unique circumstances surrounding Nazi occupation and theft motivated the court to protect the original owners over the good faith purchaser; doing otherwise would defeat concerted international efforts to restitute Nazi confiscations.

Decades later, in 2008, a Rhode Island court examined a similar issue in *Vineberg v. Bissonneette*.[49] The case involved a German Jewish art collector, Dr. Stern, who was forced to sell his collection under a Nazi directive. He was ordered to consign his inventory and private collection to an auction house where the works were sold far below their market value. In reality, the auction was a front for looting; the Nazis attempted to show that the works were legitimately purchased through the guise of an auction. After the war, Dr. Stern took great measures to find and recover his collection. One of his works was eventually found, and the possessor refused to return the painting. The Rhode Island court ruled that the painting be restituted because the auction held by the Nazis was a distressed sale in which Stern was forced to participate. Dr. Stern never voluntarily sold his property. The case marked the first time that a US court equated a distressed sale to a theft. The original owner's title was not extinguished; rather, the title remained with Stern over the decades.

The recognition by courts that forced sales are equivalent to thefts may in part be due to developments in how the international community, in the 1990s, began reexamining Nazi plunder. The reunification of Germany and influx of information from the Soviet Bloc resulted in the release of records concerning Nazi loot. In 1998, Austria amended its laws to address challenges facing Holocaust victims and their heirs. Under the revised legislation in Austria, selling under duress for diminished prices no longer provides a good faith purchaser the right to legal ownership.[50] During this same decade, nonbinding legal instruments were drafted. In 1998, the US Department of State hosted the Washington Conference on Holocaust-Era Assets in which international organizations and delegates from forty-four nations participated. The conference resulted in a set of eleven principles aimed to assist claimants recover Nazi loot. The principles tackled difficulties facing rightful owners, but as the name suggests, the Washington Principles are only principles, not laws. They are nonbinding—that is, intended to provide guidance in the resolution of claims. The signatory nations are bound to differing legal regimes, and their participation merely signifies their recognition of the importance of the values articulated in these principles. Although admirable in their purpose, the articles are vague. The convention calls for "a just and

fair solution," and recognizes that justice and fairness will vary "according to the facts and circumstances surrounding a specific case."[51]

Legal actions with binding effect and precedent have occurred that advanced the standard for restitution. One of the most famous cases is *Altmann v. Austria*,[52] known for the battle of the *Portrait of Adele Blach-Bauer*, now known as the "Woman in Gold." The Bloch-Bauer Family owned six Gustav Klimt paintings. Adele Bloch-Bauer bequeathed them to her husband, Ferdinand Bloch, when she died in 1925, requesting that he leave them to the Austrian State Gallery upon his death. Unbeknownst to Adele, Austria would fall under Nazi rule after her death. Fleeing for his life, Ferdinand departed Austria, leaving behind his property. Upon his death, he left his estate to surviving nieces and nephews; however, the Austrian State Gallery took the family's paintings and claimed that their actions were based upon Adele's wishes. Even though Adele was featured in two of Klimt's works, she never actually owned the paintings—they were commissioned by her husband, and he owned title to them. Decades later, one of Ferdinand's nieces, Maria Altmann, chose to pursue ownership for the works.

Bringing a case in Austria was prohibitively expensive due to filing fees in the millions of dollars. Instead, she sought an alternative venue. Altmann filed suit in the United States under the Foreign Sovereign Immunities Act (FSIA). The principle of sovereign immunity stands for the proposition that a sovereign nation is immune from a civil suit or criminal prosecution, meaning that a foreign nation cannot be brought into a foreign court.[53] However, the FSIA, established exceptions that allow a US court to exercise jurisdiction over a foreign nation.[54] As the FSIA was signed into law in 1976 and became effective in 1977, the country of Austria argued that it could not establish jurisdiction because the wrongdoings alleged by Altmann occurred in the 1940s. The US District Court disagreed, and the matter made its way to the US Supreme Court. In a precedential case, the Supreme Court ruled that the FSIA could be applied retroactively, allowing Altmann to sue Austria in the United States. Altmann pursued the case in the United States, but she and the Austrian representatives agreed to a binding arbitration instead of litigation. As a result, Altmann was awarded ownership of the paintings stolen from her family, including the famous "Woman in Gold."

Claimants still face tremendous hurdles with restitution

Restitution challenges are illustrated in the discovery of the "Gurlitt Collection"

There are success stories of claimants recovering Nazi-looted art, but recent events are testament to the challenges. On November 2, 2013, a shocking announcement was made: over 1400 pieces of art were discovered in the Munich apartment of Cornelius Gurlitt. Although part Jewish, his father Hildebrand Gurlitt worked for the Nazis in collecting "degenerate art." Hildebrand Gurlitt hailed from a culturally prominent family and he was active in the museum world. He was fired for exhibiting "degenerate art," but Hildebrand was a modern art specialist and was recruited to

raise cash for the Third Reich by selling art.[55] Thus, Hildebrand was permitted to buy pieces at fire-sale prices from Jewish collectors. Instead of destroying or selling them, he kept the art.

After the war, Hildebrand Gurlitt was arrested and interviewed by the Allies, at which time he denied handling confiscated art. He claimed that his collection and documentation were destroyed during the firebombing of Dresden. The supposedly only "surviving" 139 works were seized and studied by the Monuments Men. Hildebrand convinced them that they were legally acquired, and so the objects were returned to him. He failed to mention that he had some 1,250 other pieces hidden. When Hildebrand Gurlitt died, the works were passed to his wife. Upon her death, the works secretly passed to their son, Cornelius. The works' miraculous survival from the war was unknown until 2012 when German authorities searched Cornelius Gurlitt's apartment as part of a tax evasion investigation.

The discovery of the long-hidden art trove made international news, and it was announced that a German provenance researcher would begin examining the collection to commence the restitution process. The art stash contained works that were legitimately owned by the Gurlitt Family (a few hundred works were properly acquired by his father). As active members of the art world, Gurlitt had rightfully purchased works. However, Hildebrand also passed "degenerate" works from museums to his family, and some were purchased by Hildebrand from victims under duress. Legal precedent dictates that works sold under duress are stolen; therefore, Hildebrand Gurlitt never owned legal title and could not pass title to anyone. Yet it is difficult to determine which works were taken from victims. One of the difficulties in categorizing these works is the lack of information available.

A formidable task facing claimants is proving ownership, but more troubling is that rightful heirs may not know about works that were stolen decades ago. Ownership issues may be further complicated by questions involving inheritance disputes. This is particularly difficult for heirs who lost their families and all traces of their family histories during emigration. What is more is that victims of the Nazis were forced to escape in fear, and thus the ownership records of their art collections were not of the utmost importance. People fled for their lives and individuals lost every worldly possession. For this reason, rightful heirs will face an uphill battle to recover property. These individuals face a tremendous hurdle—proving ownership without documentation.

Ironically, hope may be found in Nazi records. Even as Germany was collapsing, officials kept records of their thefts. However, procedural hurdles still get in the way, as was demonstrated by Gurlitt's stance. Cornelius Gurlitt insisted that he was the rightful owner of the art cache and that he would not voluntarily return any art. He claimed to be unaware of their origins. He stated, "I've never committed a crime, and even if I had, it would fall under the statute of limitations. If I were guilty, they would put me in prison." Gurlitt was correct; there were statutes of limitations facing claimants as the thefts and seizures by the Nazis and his father took place over seven decades ago. The procedural difficulties caused by statutes of limitations are often used as a defense to dismiss restitution demands.

Statutes of limitations set a time period during which lawsuits must be initiated. These periods are established to avoid fraudulent and stale claims from arising

after evidence has been lost or facts have become blurred with the passage of time, death, or disappearance of witnesses. In the United States, it is possible for the original owners to toll the statute of limitations (to stop the clock from ticking). Depending on the jurisdiction, one of two rules may apply: (1) the Demand and Refusal Rule or (2) the Discovery Rule. The Demand and Refusal Rule, under which the statute of limitations begins at the time that the original owner demands the return of the work and the current possessor refuses to return it, is applied in New York. This rule is tempered by laches, which provides that the original owner cannot unreasonably delay in making his demand. The second tolling doctrine is the Discovery Rule that tolls the statute of limitations until the owner knew or reasonably should have known the whereabouts of the object. If the Gurlitt case was litigated in the United States, courts would likely toll the statute of limitations under either of these regimes to allow claimants to timely file a lawsuit. Under the Discovery Rule, it would have been impossible for the original owners to know of their works' hidden location. And under Demand and Refusal, owners could not have demanded return of works because they were intentionally concealed.

Not only do private owners struggle with restitution, but museums do as well

The German statute of limitations does not provide extensive tolling exceptions; the statutes of limitations for civil matters generally run for three years. In some instances, they can extend to ten or thirty years, but may not extend over that time. American representatives and influential art market players insist that German courts reform these rules and disregard the time constraints for cases involving Nazi loot. In fact, the Gurlitt discovery motivated German lawmakers to address the nation's time limitations. In early 2014, a bill (unofficially known in Germany as "Lex Gurlitt") was introduced by a Bavarian justice minister to eliminate the limitations period for certain cases involving stolen property, such as Nazi-looted art.[56] The legislation would apply retroactively to prevent someone from acquiring an object in bad faith (including inheritance) and then invoking the limitations period.[57] That bill has not passed into law. In 2015, Federal Minister of Justice and Consumer Protection Heikko Maas addressed the need to amend German law in reference to Nazi loot.[58] In the meantime, claimants may prefer bringing cases before US courts to overcome some of the procedural hardships.

Similar to the statute of limitations is adverse possession, a method of acquiring title to property by possession for a given time, under specific conditions. Whereas US courts are remiss to apply adverse possession to movable property, like art, other nations allow a broader concept of adverse possession to transfer title. Under this framework, a court may determine that someone like Cornelius Gurlitt is the actual owner of an art treasure trove. Gurlitt possessed the art for decades. Under the German doctrine of prescription (the nation's law of adverse possession), title to another party's property can be acquired without compensation by holding the property for a set time in a manner that conflicts with the true owner's rights. In Germany, this period is ten years, and the law applies broadly to include artwork.

Gurlitt and the German government reached an agreement in early 2014 that allowed provenance researchers to investigate the works suspected of having been confiscated by the Nazis. Fortunately for claimants, the agreement bypassed the damning thirty-year statute of limitations and avoids transfer of title by prescription. Artworks suspected of being Nazi loot remained in secure custody and were publicized on a German government database. Then in May 2014, Gurlitt passed. In his will, he bequeathed his collection to the Bern Museum in Switzerland. The Swiss museum accepted all works whose provenance is unproblematic, and agreed to publish Mr. Gurlitt's business ledgers, along with a complete list of the inherited artworks, in an effort to supply information to rightful victims. This decision complies with Article 5 of the Washington Principles, which states "Every effort should be made to publicize art that is found to have been confiscated by the Nazis."

With so many hurdles, claimants have opted to overcome restrictive statutes of limitations and lack of information by raising claims in a jurisdiction with more forgiving procedural and substantive restrictions. Lawsuits filed in the United States may potentially apply limitations rules and tolling exceptions that are more favorable to victims (such as the Demand and Refusal or the Discovery Rules). Yet bringing forth litigation in foreign jurisdictions will depend on the individual facts of each case. For example, some of the works seized by the Allies, which were subsequently returned (based upon Hildebrand's misrepresentations), had been in the United States for some period of time. Those works could potentially have a connection to the United States, allowing claimants to file suit in the United States. In 2014, one claimant, David Toren, sued Germany in federal court in Washington DC, contending that by failing to disclose the discovery of the art collection for nearly two years, the authorities had "perpetuated the suffering of victims of the Holocaust."[59]

Filing in the United States does not guarantee success. Unlike Maria Altmann, the rightful heir of a Pissarro painting was unsuccessful in recovering art when he filed suit in the Ninth Circuit in *Cassirer v. Thyssen-Bornemisza Collection Foundation*.[60] Claude Cassirer was the grandson of Lilly Cassirer Neubauer, a German Jew who inherited the Pissarro work. Lilly was forced to sell the work to a Nazi art appraiser in 1939, at which time she was "paid" a nominal amount far below actual value into a blocked account that she could not access. Lilly survived the war, but was unable to locate the painting afterward. Decades later, in 1976, Baron Hans-Heinrich Thyssen-Bornemisza purchased the painting from a New York dealer. The baron sold his collection to the Kingdom of Spain in 1992 and it now hangs in the Thyssen-Bornemisza Museum. Claude Cassirer, Lilly's heir, learned of the Pissarro's whereabouts in 2000 and began his restitution battle, demanding the return from the Thyssen-Bornemisza Collection Foundation (the Foundation) and petitioning the Ministry of Culture of Spain to recover the work. These attempts were unsuccessful, and Cassirer filed suit in California in 2005.

Cassirer asserted that the Pisarro was taken from his grandmother in violation of international law. In response, the Foundation filed to dismiss the case for lack of jurisdiction due to sovereign immunity. The court rejected the dismissal and allowed the matter to go forward under Foreign Sovereign Immunities Act, the same act that allowed Altmann to hail Austria into US court. The case took many turns during a

decade of litigation. Then in June 2015, the US District Court in Los Angeles ruled that the museum acquired full title to the painting by adverse possession. Contrary to the US treatment of adverse possession, Spanish law permits its application to art. Spanish Civil Code Article 1955 provides: "Ownership of movable property prescribes by three years uninterrupted possession in good faith. Ownership of movable property also prescribed by six years of uninterrupted possession, without any other condition." Since the Foundation purchased the painting from the baron in 1993, the Foundation obtained title to the painting in either 1996 (if acquired in good faith) or 1999 (if not acquired in good faith). The California court applied Spanish law in this case; under that law, title vested in the museum. Yet, in the court opinion, Judge Pregerson appealed to a sense of justice by requesting the parties to "pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles and the Terezin Declaration, and, specifically, its commitment to achieve 'just and fair solutions' for victims of Nazi persecution." Although the case was decided in favor of the Foundation, the judge recognized the moral considerations balancing in favor of the Cassirer heir.

Even though *Cassirer* was decided in the United States, the court did not favor the claimant. Hope for Holocaust victims and their heirs is the possibility of new legislation directing appropriate solutions for Nazi-era loot. Interest groups are engaging diplomatic discussions and the political process, and urging collectors to appeal to morals rather than financial interests. For cases in which litigation has failed, diplomatic relations and public image may influence the outcome of a dispute. In early 2016, the University of Oklahoma settled a dispute over a painting, again by Pissarro.

The university fought the restitution of *La Bergère Rentrant des Moutons (Shepherdess Bringing in Sheep)* on mostly procedural grounds for three years. The Nazis stole the Impressionist work from a French family. The family of Léone Meyer, a Holocaust survivor, asserted that she was entitled to the painting because it belonged to her father when it was seized by occupying forces. Records indicate that Meyer's father owned the painting, but a Swiss court ruled that its postwar possessors properly established ownership and thus rejected Meyer's claim.[61] The university moved to dismiss Meyer's case on procedural grounds. Meyer argued that the university possessed the masterpiece despite knowledge of its Nazi-tainted past.

One of the interesting aspects of the case was the involvement of the public and government entities. During the dispute, in May 2015, Oklahoma legislators signed a nonbinding resolution calling on the university to conduct provenance research on its collection.[62] Then in September 2015, during a football game, university students staged a protest over the painting's ownership.[63] Public interest in the dispute was high and the perception of the university was presumably damaged over the dispute. Perhaps this negative perception affected the outcome of the case. After years of litigation, the university agreed to a settlement in February 2016 which transferred title to Meyer. According to the terms of the agreement, the painting will split its time between a French museum and the university's Fred Jones Jr. Museum of Art. After that point, it will rotate between museums in Oklahoma and France bearing a label that explains

the painting's dark past. The settlement also requires that after the title is transferred to Meyer, she will donate the painting to an art institution in France either during her lifetime or in her will.

The world still works to overcome the actions taken by the Nazis

Although Nazi looting and destruction took place over seventy years ago, it was so brutal and extensive that the world is still grappling from its effects. The Nazis were systemic with their looting and destruction, making it challenging to return works to rightful owners and provide justice to victims of the Nazi regime.

Part Four

A God Subverted by Nazi Policy

The Nazi state considered any rival institution, especially one with international ties, a threat to the *Volksgemeinschaft*. Many leading Nazis viewed the Christian churches in just such a light. Though their actions did not always fulfill the gospel command to "love thy neighbor," especially toward German Jews, the Christian churches' worldview and connections with institutions and organizations outside of Germany made them suspects, and they were ultimately deemed a menace to the spread of National Socialism and its values among the German "Aryan" population. To counteract the influence of international religious institutions, National Socialists and their supporters took steps to control the churches. For example, in 1933, through a series of coercive maneuvers, Ludwig Müller, a former military chaplain from the First World War and one of the few Protestant clergymen known to Hitler, became Reich bishop of the German Protestant Church as part of an effort to consolidate German Protestants into a hierarchical united church.

The Third Reich's interference in Protestant Church affairs led many of its members, who were at first supportive of National Socialism, to challenge the authority of Reich bishop Müller, charged by Hitler to consolidate the churches. The end result was the birth of a "Confessing Church" whose adherents called for the end of state interference in religious matters. Members of the "Confessing Church" met at a synod in Barmen and established the "Barmen Declaration" under the leadership of noted theologian Karl Barth. The rebellious Protestant religious leaders opposed Reich bishop Müller, stating that the Protestant Church was not an organ of the state and in no way should it control the church. Among these pastors was the eminent Martin Niemöller who subsequently spent several years in a concentration camp.

The hierarchical authoritarian nature of the Catholic Church enabled the state to interfere less directly with church affairs. Cleverly, the Hitler government saw the gains it would receive by concluding a Concordat with the Holy See in 1933 to promise protection of Catholic interests and to ensure Catholic allegiance to the National Socialist government. By contrast, the Catholic Church viewed the Concordat as a means to protect its salvific mission in Germany. Despite the conclusion of such a treaty, it held little authority in the day-to-day operations of the German state and in its policing agencies that diligently worked to limit the activity of the church even in the pastoral realm. The Catholic Church attempted to make its way safely through the

political minefields of Nazism, but those faithful to the church often failed to resist the negative effects of the National Socialism regime.

This section will further examine the resistance of the Jehovah's Witnesses to the Reich's interference in the practice of their faith. Early on as "Bible Students" they refused to offer the Hitler salute and be conscripted into the German Army. Once in the concentration camps they admirably practiced their faith despite constant pressure to abstain. Only within the past few decades has their Holocaust history been explored in depth.

13

The Hereafter versus the Here-and-Now: Catholicism under National Socialism

Kevin P. Spicer

During the turbulent years of Hitler's rule, Roman Catholicism did not escape the encroaching tentacles of Nazism. Both ordained and lay members of the German Catholic Church had to deal with the harsh realities of their new government. Thus, their public and private lives were deeply affected. As German citizens, these same Catholics also had to make choices about the new order: whether to reject it or support it and, if the latter, whether to join the National Socialist German Workers' Party (NSDAP) and/or one or more of its organizations. In the political whirlwind of 1933, amid the voices of hope for a revitalized Germany, one that legal authorities sanctioned and a new charismatic leader led, German Catholics had to make their choices, both personal and political.

From late fall 1930 through late March 1933, the German bishops one by one moved to oppose National Socialism in one form or another with many bishops declaring that Catholics could not join the Hitler movement.[1] Inherent in National Socialism's racial ideology was a rejection of the efficacy of the church's sacrament of baptism for Jewish converts. Individual Nazis also questioned the church's adherence to the so-called Jewish Old Testament. Other issues of conflict originated from preexisting anti-Catholic biases such as allegiance to Rome, which individuals brought with them into the Nazi Party. After receiving assurances from Hitler, on March 28, 1933 the German bishops finally lifted their opposition and allowed Catholics to join the Nazi Party.[2] Despite the preceding period of opposition, some Catholics supported the NSDAP,[3] but to a degree much less than their Protestant counterparts.[4]

One of the consequences of lifting the membership ban was a resumption of talks between the Holy See and the German government regarding a treaty that would guarantee the Catholic Church's rights to operate freely in Germany. On July 20, 1933, the Holy See and the Reich government concluded a Concordat, a papal treaty on ecclesiastical affairs, which recognized and promised to protect the Catholic Church and its institutions in Germany, something the German government had never done before.[5] The document stipulated that the bishops henceforth would be able to challenge the state only in those areas where its actions ran counter to church teaching and encroached upon the bishops' freedom to exercise their ministry. In subsequent years, when the bishops protested that the state had not kept its end of the bargain,

Figure 11 A portrait of Pope Pius XI is saved from the destroyed church in besieged war. (Pius XI was pope at the Vatican signing of the 1933 Concordat with Nazi Germany). Courtesy of the United States Holocaust Memorial Museum

they usually achieved little except to alarm and dismay governmental and party authorities. Essentially the bishops viewed the church-state relationship legalistically, an approach that many historians have perceived "as capitulation or, at the very least, lack of resistance," though it was viewed differently by Nazi leaders "as posing a very serious threat."[6]

Although it is easy today to criticize the bishops for placing so much importance on pastoral issues instead of the political events and situations that surrounded them, in the 1930s observance of Roman Catholicism's concern for the afterlife took precedence over the church's solicitude for the here-and-now. At that time, the German Catholic Church had a different set of priorities that determined its mode of action. These priorities were based upon the current theology of the day. This theology placed the issue of salvation and availability of sacramental care to baptized Catholics above all other concerns. An example of this is found in an article from the *Katholisches Kirchenblatt für das Bistum Berlin* entitled "Ideology and Dogma: A Confrontation with Political Catholicism" that stated:

> The Church and her members do not know political hatred, because hatred of any kind and in any connection, is incompatible with Christian conscience. . . . The Church only wishes to fulfil the obligations of her instructional, priestly, and pastoral office. The individual Catholic strives for nothing more than to be

> allowed to live and die in accordance with his Christian conscience. His struggle for Christianity and Church has nothing whatever to do with the intentions of partisan politics. He thus stands firmly on the freedom of conscience repeatedly announced even by the highest authorities and solemnly reaffirmed for Catholics by the state in the Concordat when the freedom to choose one's denomination was stipulated in it. . . . The author correctly asserts that the Church resists any attack on her dogma.[7]

The focus of theology and church leaders was primarily not on the natural world, but rather on the supernatural and hereafter. In their preaching and writing, church leaders often viewed suffering as a condition that humans must endure in this life to achieve eternal life after death. Naturally, church leaders worked to ease people's misery through their *Caritas* programs, which attempted to address the needs of anyone who came to the church for material assistance, such as for food, clothing, and shelter. However, rarely did church leaders concern themselves solely with political issues that affected a community other than their own. Public criticism or conflicts with the state normally arose only when the church's freedom to reach its own members through established channels, such as worship, sacraments, associations, or religious education, was disrupted or suppressed.

In no manner did church leaders in their official capacity seek to overthrow the Nazi regime. Rather, church leaders sought to adapt to the new regime because their institution had not been forced underground.[8] In this process of adaptation, the bishops and the hierarchy only sought to challenge the state in those areas where state officials or policy challenged official church teaching or encroached upon the freedom of church pastoral activity. Through these actions, the church hierarchy continually returned to the stipulations of the Reich-Vatican Concordat as a means for legitimate protest. At times, bishops and priests lodged such protests and complaints publicly in their sermons or pastoral letters. However, often many German bishops made their opposition known through private letters addressed to individual government ministries. Such paths of protest followed the example of Cardinal Adolf Bertram, the archbishop of Breslau and head of the German bishops' conference, who engaged in what historians have labeled *Eingabenpolitik* (policy of suggestion). This policy placed great trust in the German state's willingness to abide by the Concordat and in the church's prerogative to write letters to high-ranking Nazi officials as a means of redressing violations.[9] Despite the private nature of this approach, the government continually viewed any protest as a threat to the implementation of Nazi policy. In the mind of the state, there was to be only one worldview in Nazi Germany.

By simply conducting its daily rituals and educating the faithful in the Catholic faith, the church provided a worldview that stood in contradiction to National Socialism. Vesna Drapac has emphasized this point in her works on the French Catholic Church under German occupation. According to Drapac, Catholic teaching went beyond a narrow parochialism through the proclamation of the gospel and its moral values that ran counter to National Socialism. She argued that French Catholics' faith often translated beliefs into action.[10] Although Drapac was dealing with a church

and a people under occupation with more reasons and motivation for resistance, her argument, which has also been proposed by German scholars, is equally valid for German Catholics. Historians such as Heinz Hürten and Ulrich Hehl and individuals such as Walter Dirks, who lived during the Nazi regime, have suggested that the church, through its teaching and associations, enabled German Catholics to maintain a critical distance from the worldview of National Socialism.[11] Hehl identified this distance as a "place of ideological immunization."[12] Even historians more critical of the near absence of active resistance by church leaders have conceded that the church through its teaching and preaching afforded its members an estrangement and ideological distancing from the National Socialist worldview.[13]

Despite the hesitation of some historians, this act of proclaiming the Christian Gospel, and, therefore, of creating the capacity for "ideological immunization" among the Catholic population toward the National Socialist worldview, forced many German Catholics in leadership positions to make statements and become involved in actions that state officials judged as acts of resistance. Most Catholic priests rejected any label associated with resistance. Rather, they argued that their actions were initiated solely to protect the interests of their church and the right to minister to the Catholic faithful. Many of these individuals also, despite persecution, pledged their allegiance to the German state and continued to hope and to strive for good relations with state officials. Thus, the average German priest was not prepared to break totally with the state and work for its demise. Instead, most parish priests limited their criticisms to situations that directly affected their freedom to confect the sacraments or to challenge ideological attacks against church doctrine and teaching.

Examples of this phenomenon may be seen in the cases of Fathers August Froehlich and Bernhard Kleineidam, both priests of the Berlin diocese. On July 1934, Father Froehlich made a bold, but accurate, statement in his sermon: "For us there is only passive resistance. If the government demands something that does not agree with the Ten Commandments, we shout a 'No' against it and say: one must obey God more than mankind."[14] In making this statement, Froehlich walked a fine line between urging his parishioners to internalize dissent against the state and exhorting them to rebuff the state publicly when it infringed upon their religious beliefs. Of course, a Catholic was free to interpret his pronouncement in multiple ways. Perhaps this was exactly what Froehlich wanted: an open-ended response that was not locked into one form of resistance. Such a response would enable Catholics to listen to his words and assess them per each person's political acumen. Similarly, in his memoir, Father Kleineidam noted that, although he never politically opposed the Nazi state, conflicts with the state grew out of his pastoral ministry as a youth leader. Accordingly, Kleineidam concluded that it was a prophetic act simply to profess the Catholic faith before the world.[15] More often than not, the Gestapo saw such bold religious avowals as political acts falling outside the realm of purely religious activity and moved to suppress them. The Gestapo wanted priests to limit their sphere of influence to predictable comfort zones.

In carrying out their precarious ministerial duties, such as preaching critically—often with the use of allegory—at public liturgies in an effort not only to create new approach to rebutting Nazi ideology but also to oversee a reorganization of disbanded associations, Catholic priests, from their perspective, were merely fulfilling the duties

of their ordained ministry as instituted by Christ. These duties included proclaiming the gospel, administering the sacraments, ministering to the sick and dying, and ensuring that a new generation would be instructed in the truths of the Catholic faith. Any limitation placed on the execution of these ministries would be regarded as hostile and a threat to the mission of the church and its existence and continuation in Germany. In no way, however, did church leaders perceive the role of the Catholic Church as political. Nor did they freely take upon themselves, in their official capacity as ministers of the church, the responsibility of speaking directly about political issues that did not expressly concern the welfare of their church.

The average Catholic priest's primary responsibility was to the parishioners of his parish. As their spiritual leader, he was responsible for guiding them in the Catholic faith and providing them with the means to enjoy eternal salvation—participation in the sacraments. The priest was the individual who confected and administered the sacraments and who also led or oversaw local religious education programs and associations, which, in turn, directed the Catholic faithful to participation in and promotion of the sacraments. In this role, the priest generally directed all his efforts to those duties that immediately affected the Catholic Church. Everything that fell beyond this limited scope was normally viewed as outside the church's sphere of concern. According to this worldview, Catholics took care of Catholics, Protestants took care of Protestants, and Jews took care of Jews. Their worlds rarely met, except when similar issues or events overlapped and affected more than one religious group.

The events of June 30, 1934—"the Night of the Long Knives" or the "Röhm Purge" in which SS men heeding the orders of Hitler, Göring, and Himmler murdered nearly two hundred individuals, including SA official Ernst Röhm, in a successful bid to consolidate the Nazi regime's power, help us to concretely understand the church's approach to the National Socialist state. In Berlin, the mandate not to publicly criticize the regime was even more apparent because, while the execution of the SA offenders was being carried out, members of the SS also murdered Erich Klausener, the former head of the police division of the Prussian Interior Ministry and the Berlin director of Catholic Action, then arbitrarily ruled it a suicide after cremating his body. The SS had singled out Klausener for his outspokenness as director of Catholic Action even though he had earlier telegrammed Hitler on behalf of the Catholics in attendance at the *Katholikentag*, a Catholic Convention (held in June 1934 in Berlin's Hoppegarten), to avow his willingness to work "for the *Volk* and Fatherland."[16]

Nicholas Bares, bishop of Berlin, refused to accept the government's claim that Klausener had committed suicide. Not unexpectedly, on July 3, Bishop Bares celebrated a memorial Mass for the deceased in the House Chapel of the Cathedral Chapter's residence. According to the Canon Law at the time, ecclesiastical burial and any additional Mass were prohibited for anyone who deliberately committed suicide. Pastorally, many would argue that an individual who committed suicide suffered mental illness and therefore would make a pastoral decision to bypass this penalty.[17] In the highly publicized case of Klausener, the Nazis claimed that he had intentionally taken his own life. However, the church's decision to celebrate a memorial Mass for him and to provide him with a Christian burial signified that the Catholic authorities did not accept the claims of the state regarding the details of Klausener's death. Four days later,

Bishop Bares attended a Requiem Mass for the deceased held in the cemetery chapel of Klausener's home parish St. Matthias. Afterward, the bishop accompanied Klausener's pastor, Father Albert Coppenrath, and family with the priests of the Cathedral Chapter to the parish cemetery to bury Klausener's ashes. On July 12, 1934, infuriated by the charge of treason by state officials against Klausener, Bishop Bares addressed a letter directly to Hitler in which he stated that Klausener "was capable of neither suicide nor treason or even an illegitimate action against the present state."[18] Three days later, Bares publicly addressed the death of Klausener on the front page of the Berlin Catholic newspaper dedicated to the former Catholic Action leader. Bares's letter, dedicated to the deceased, was printed in a bold clear typeface and signed by him. The bishop's words proclaimed Klausener's loyalty to his church and to his country. Bares described Klausener as a "faithful Catholic and true German" whose name was "enrolled with gold letters in the history of Berlin Catholicism." Bares exalted Klausener's character to dispel the charge of treason and claim of suicide, recalling "his love for Church and Fatherland," "his firm principles," and "his iron will," which enabled him always to stand firm in times of difficulties. Bares promised the faithful that on the urn, containing the deceased's ashes, "a beam of eternal light" shone, that same light of faith that led St. Bernhard to say "for the just life is changed, not taken away." Bares also portrayed Klausener as one who died for the faith, reminding the members of his diocese of the true nature of accepting the cross of Christ. Bares wrote, "Whoever is pulled into the spell of the cross, is also clouded by its somber shadow," thereby receiving "a temporal reward for Christ's true disciples." The front page of the newspaper also contained a portrait of the deceased with his date of death in bold letters. This was followed on the next page by a description of the memorial Masses held for Klausener since his death. An additional six pages included the bishop's letter, along with articles and pictures that highlighted and praised Klausener's activity in Catholic Action.[19]

The Klausener murder caused great unrest among Catholics throughout the Reich, especially in the diocese of Berlin. Most Catholics were extremely puzzled and dismayed at the government's claims that Klausener was a traitor who had committed suicide. To many Catholics, this story was not in sync with Klausener's personality or recent promises to work for *Volk* and Fatherland. Nor could they grasp that a practicing Catholic of Klausener's stature would choose to commit suicide rather than be arrested and tried in court. According to the reports of the Berlin *Sicherheitsdienst* (SD), the Security Service of the SS, Klausener's death became the central point of discussion for both clergy and laity following the Röhm purge. A July 1934 report particularly noted that many places that sold Catholic publications, such as the gift shop in the vestibule of St. Hedwig, offered postcards with the imprint of Klausener, Bishop Bares, and other Catholic clergy offering the Hitler salute during the 1934 *Katholikentag* in the Hoppegarten. The SD feared that such actions fostered rumors that were "suitable to endanger public law and order."[20]

Klausener's death greatly altered the climate of trust between church and state. To many Catholics, especially in the congregation of St. Matthias, Klausener's home parish, the former Catholic Action leader died a martyr's death. The feisty Father Albert Coppenrath, pastor of St. Matthias, whose relationship with the state was ambivalent, would not allow the government to dispel the murder so easily and for years worked to

construct a memorial to Klausener in his parish's cemetery. Despite this strong support for Klausener and refusal to accept the government's "official" line surrounding his death, Bishop Bares did not publicly condemn the events of June 30. Nor did any of his colleagues in the German bishops' conference speak out strongly against the murders. Instead, in a semi-private manner, Bishop Bares preferred to focus on Klausener's murder as if to redeem Klausener from the charge of suicide and give him more weight as a faithful Catholic.

Though church leaders would at times boldly speak out when the state infringed on freedoms the church traditionally enjoyed in the state, seldom did church leaders speak out for Jews. Among the 26,000 plus diocesan and religious priests in Germany[21] within its pre-1938 borders, fewer than 120 publicly spoke out for Jews or acted in their behalf.[22] Of these, fewer than thirty hid Jews from the Gestapo, provided for their material needs, or facilitated their escape from Germany. In addition, most individuals receiving assistance were Catholics of Jewish heritage whom the Nazi state continued to classify as Jews and subjected to anti-Jewish state measures.[23] As Herta Kasserra, a Holocaust survivor and Catholic of Jewish heritage testified after the war, "Before my baptism the priests hardly concerned themselves with us."[24] Generally, Catholic clergy and laity viewed Jews as "the other" and "untrustworthy." Such notions were rooted in centuries of Christian antisemitism and continued to remain strong.

There were, however, noble, enlightened individuals such as Father Dr. Engelbert Krebs, professor of dogmatic theology at the University of Freiburg, and Monsignor Bernhard Lichtenberg, the rector of the Berlin Cathedral, who condemned antisemitism and the mistreatment of Germany's Jews. In 1926, Father Krebs published *The Early Church and Judaism*. In this work and in subsequent publications, Krebs criticized attempts to separate Christianity from its Jewish origins while at the same time condemned antisemitism. For his stance, in 1936 the National Socialist government stopped him from teaching and forcefully made him retire.[25] Monsignor Lichtenberg took a more outspoken stand. Prior to Hitler's appointment as chancellor, Lichtenberg publicly criticized National Socialism on several occasions. In late March 1933, he pushed Cardinal Adolf Bertram, archbishop of Breslau and head of the German bishops' conference, to speak against the planned boycott of Jewish-owned businesses in Germany on April 1. Bertram refused to intervene. Lichtenberg was not dissuaded by Bertram's stance and continued his oppositional path. Following the November 1938 *Kristallnacht* pogrom, Lichtenberg took to the pulpit and preached: "We know what happened yesterday. We do not know what tomorrow holds. However, we have experienced what happened today. Outside the synagogue burns. That is also a house of God." Lichtenberg continued his public intercessory prayers on behalf of persecuted Jews from this point onward until he was denounced and arrested in 1941. On November 5, 1943, he eventually died from malnourishment and physical mistreatment en route to Dachau.[26]

Individuals such as Lichtenberg and Krebs were few and far between. While most bishops and priests were unwilling to support overt hatred toward any group, they typically among themselves viewed Jews as threats to Christian society and moral order. In turn, these same clergymen neglected to condemn antisemitism in any bold or lasting way. Even Cardinal Michael von Faulhaber, the archbishop of Munich and

Freising and a biblical scholar, failed to stand in public solidarity with persecuted Jews. Evidence of this may already be seen in November 1932, when Faulhaber wrote to Rabbi Dr. Lehmann of the Jewish Reform Community of Berlin to thank him for his kind words concerning a recent pastoral letter on "The Ten Commandments in the Life of the German People and Other Peoples."[27] Rabbi Lehmann promptly wrote back to Faulhaber to thank him for his letter and asked if he might reprint the letter that spoke so eloquently about the "worthy of the Old Testament and the overcoming of hatred through love" in his synagogue's newsletter.[28] In turn, Faulhaber declined the request, stating that his remarks were private, between the rabbi and himself, as if his comments had been shuffled forgetfully in some brief inattentive exchange.[29] In 1934, after Hitler came to power, Faulhaber would offer a similar response when members of the Third World Jewish Conference in Geneva (August 1934) passed a resolution praising Faulhaber for a recent sermon against the National Socialist racial policy. The delegates at the Conference were unaware that they had grounded their praise on a phantom sermon that Faulhaber had never preached, though the *Sozialdemokrat* newspaper of Prague and the *National Zeitung* of Basel had inaccurately attributed it to the cardinal. However, it was quite true that the year before (in December 1933), Faulhaber had preached a series of Advent sermons on the importance and significance of the Old Testament, primarily as a defense against recent calls by "German Christians," a group that aggressively supported National Socialism and pushed to remove the Hebrew Scriptures from the biblical canon.[30] Upon receiving word of the World Jewish Conference's resolution, Faulhaber instructed his secretary to write to the Conference and inform its members that he had not preached the sermon reported by the Prague and Basel newspapers. In addition, the letter stressed that in his Advent sermons, Cardinal Faulhaber had only "defended the biblical literature of Israel, and not however taken a position on the Jewish Question of today."[31] Ultimately, most German bishops and the Vatican itself followed suit.

While Germans and their collaborators funneled Jews into deadly gas chambers, the German Catholic Church continued its public silence. In 1943, a few German bishops lent their signature to what has become known as the Decalogue letter that spoke against gross infractions of human rights witnessed daily in Nazi Germany. Jews were not mentioned. At the same time, most bishops had turned inwardly focused on their own dioceses amid the harsh realities of war both on the battlefield and on the home front. In a wartime sermon, Konrad von Preysing, bishop of Berlin, preached: "We Christians have another point of view. We know that we are on the road, that we have no permanent dwelling place here, but rather aspire for a future life; life is for us less a gift than a task; to fulfill God's will is the actual calling of humanity." He concluded this passage by quoting Paul's letter to the Romans: "All the sufferings of this present time are not worth comparing with the glory about to be revealed to us" (Rom. 8:18).[32]

Along with his most German bishops, Preysing viewed earthly existence as nothing but a stepping-stone to eternal life. It was a time of testing, a time of turmoil that also might be filled with joy and peace—signs of the coming kingdom of God. In 1944, even amid inevitable military defeat and rumors of atrocities on the eastern front, Preysing asked Berlin Catholics to turn to the mercy of God and reconsecrate their diocese

and each parish to the most sacred heart of Jesus.[33] The German bishops had not yet moved to a theology that encouraged Catholics to use the gospel to confront both the social and political ills of their society. Instead, they emphasized a pietistic sharing in the sufferings of Christ. This piety, in part, helps explain why the bishops were not more forthright in their protests against the state. However, in the war years it became clearer to Preysing and a few other members of the German hierarchy that the state had no intention of abiding by the provisions of the 1933 Concordat or maintaining its Christian foundations. This knowledge sparked the makeshift pastoral letters that ensued. Whether for pastoral or national reasons, the bishops, Preysing included, did not feel compelled to speak more forcefully against the persecution and deportation of Jews. What they did do was provide German Catholics with a clearly different worldview than that of the Nazi Party and its minions. This Catholic worldview called on Christians to love and care for their neighbor and provided them with the means to analyze for themselves the outright anti-Christian propaganda of National Socialism. Unfortunately, this limited stance failed miserably in the face of the murder of six million Jews.

14

Nazi Persecution of German Protestants

Christopher J. Probst

Dietrich Bonhoeffer's name is likely known so broadly today because of a very ironic fact—that very few of his German Protestant coreligionists, even within the largely Nazi-wary Confessing Church wing, raised their voices on behalf of German Jews. Bonhoeffer's primary actions in helping Jews seem to have had a twofold thrust. The first part was indirect—his participation in the July 1944 "Operation Valkyrie" assassination attempt against Hitler; the second, his part in an intricate but successful plot to rescue about a dozen Jews ("Operation Seven"), was more direct.[1] In October 1940, Bonhoeffer began working as a confidential agent for the *Abwehr* (Office of Military Intelligence). Acting as a courier, he was tasked with engaging in secret talks with foreign church leaders who would in turn communicate with Allied leaders. Under this cover, he instead used his contacts to further the resistance movement in which he had become involved. Living an extraordinary double life, he sought, together with other members of the *Abwehr* resistance, to bring down Hitler and the Nazi regime. Bonhoeffer and fellow resisters were arrested in April 1943.[2]

Initially detained for corruption, the Gestapo soon discovered Bonhoeffer's involvement in "Operation Seven." He was charged with "conspiring to rescue Jews; of using his travels abroad for non-intelligence matters; and of misusing his intelligence position to keep Confessing Church pastors out of the military and for his own ecumenical work."[3] It was months after the failed assassination attempt on Hitler that the Nazis realized that Bonhoeffer had been involved in the plot. In October 1944, Bonhoeffer was moved to the Gestapo prison in Berlin. In February 1945, he was taken to Buchenwald. He was later moved to the Flossenbürg concentration camp where, on April 9—just weeks before Hitler's suicide, the fall of Berlin, and the Nazi surrender to the Allies—he was hanged, together with several other co-conspirators.[4]

In March 1935, more than 700 pastors from the Old Prussian Union Church were arrested and briefly detained for planning to read a statement critical of the religious aspects of Nazism from their pulpits.[5] On July 1, 1937, Martin Niemöller, pastor of a prestigious church in Berlin-Dahlem and one of the founders of the Confessing Church, was arrested for publicly criticizing the Nazi regime's policy toward the church and charged with stoking unrest. Though acquitted the following March after a highly publicized trial, he was rearrested at Hitler's behest and incarcerated in a Berlin prison

before being sent first to Sachsenhausen and later to Dachau, where he languished until the end of the Third Reich.[6]

While the exploits of Bonhoeffer and Niemöller are known to most, this chapter will focus on the narratives of two far lesser-known figures and one organization. Their stories are no less fascinating and they are also instructive of a very rare form of Protestant resistance during the Third Reich. Julius von Jan was the pastor of the Protestant congregation at Oberlenningen, a small village southeast of Stuttgart with a population of scarcely two thousand. One week after *Kristallnacht* (the Night of Broken Glass), von Jan preached a searing sermon to his Oberlenningen flock in which he forthrightly condemned as unjust the grave injustices that Germans had inflicted upon the Jewish minority.

Like von Jan, Heinrich Fausel was a member of the Nazi-wary Confessing Church and pastor to a small village community in Württemberg (southwest Germany). In 1934, Fausel gave a lecture titled "*Die Judenfrage*" (The Jewish Question) at a packed town hall in Leonberg, a town roughly halfway between his parish at Heimsheim and Stuttgart. In it, Fausel affirms many of the anti-Judaic and antisemitic stereotypes in German Protestant reformer Martin Luther's writings. Fausel also defends early Nazi measures against Jews, calling immigration of Jews to Germany a "threatening

Figure 12 Pastor Martin Niemöller poses in a doorway with two other clergymen from the Confessing Church in Berlin during the Third Reich. Courtesy of the United States Holocaust Memorial Museum.

invasion" by a foreign people—"decadent Judaism." Yet, nine years later, as the Final Solution was taking place, he and his wife Helene sheltered a Jewish woman named Hertha Pineas. Due to the efforts of the Fausels (as well as other like-minded Christians in Württemberg), Hertha and her husband Hermann survived the Holocaust.[7]

The "Grüber Office" was cofounded in 1938 by Heinrich Grüber and Hermann Maas, both of whom were Confessing Church ministers. Based in Berlin, the office provided Jews who were under grievous threat from the Reich advice about emigration, helped find them employment abroad, rendered them social assistance, and gave them support with both legal and educational matters.[8] Very few of its members survived the war and the Holocaust.

The persecution (and the threat of persecution) of non-Jewish Protestant Christians was thus very real for those few who opposed openly the Nazi state and/or its laws. Yet, the issue of Protestant resistance and/or opposition to the regime must be considered against the wider backdrop of attitudes that were much more broadly held by Protestants: apathy, consent, even complicity in the face of the state-directed persecution and mass murder of Jews. Further, Nazi persecution of Protestants paled in comparison to their persecution of Jews, as well as Roma and Sinti, who were targeted for complete annihilation, leading to the addition of two terrible new words to public discourse—Holocaust and genocide.[9]

Pastors Julius von Jan and Heinrich Fausel acted and/or spoke out on behalf of persecuted Jews in Nazi Germany, as did those who labored in the Grüber Office. They did this in opposition to laws enacted by the regime as well as to extra-judicial forms of terror which had become routine during the Third Reich. Fausel and von Jan were pastors in the Confessing Church, a wing of the Deutsche Evangelische Kirche (German Protestant Church), which had descended into factiousness shortly after Hitler and the Nazi regime came to power.[10] Despite their many similarities, von Jan and Fausel held distinct views about Jews and Judaism. They did not act from precisely the same motives. Notwithstanding their heroic efforts, some prominent members of the Grüber Office viewed the Nazi regime favorably, at least in its early years. In order to appreciate more fully their words and actions, their shared context—as Protestants living in 1930s Germany—is worth exploring, if rather briefly.

German Protestants in the Third Reich

During the Third Reich, Protestants comprised approximately 60 percent of the total population in Germany. The rise to power of Hitler and the Nazi regime led the German Protestant Church to splinter into three groups: the Confessing Church, the German Christians, and those who did not join either of these groups.

The German Christians promoted both enthusiastic German nationalism and bald antisemitism. They remained enthusiastically pro-Nazi throughout the Third Reich, but this support increasingly was not reciprocated by the regime. While representing a small minority of German Protestants overall (roughly 2 percent of the Protestant population), their presence was fully felt throughout Germany. At perhaps their weakest point, there were 600,000 in their ranks. In 1937, they held more than two-

thirds of the deanships in Protestant theology as well as more than a third of the total number of posts in the theology faculties in German universities. Over the course of the Third Reich, German Christians made up between 30 and 40 percent of the 18,000 pastors in the German Protestant Church.[11]

Members of the Confessing Church often exhibited vigorous opposition to Nazi infringement on the independence of their churches, but only scattered opposition to actions against Jews. While the Barmen Declaration of 1934, the formative document and clarion call of the movement, opposed forcefully both the German Christians and so-called Aryan Christianity, the increasingly dangerous situation of German Jews is not even mentioned. This presaged the reality that many in the Confessing Church would demonstrate themselves to be either indifferent to their plight or in fact antisemitic. Further, the Declaration's statement on the relationship between church and state was constructed cautiously so as not to appear too disapproving of the Nazi regime.[12]

Confrontations between the Confessing Church and the German Christians usually focused on theological and church-state matters. The majority of Protestants tried to stay neutral in the "Church Struggle" (*Kirchenkampf*), as it came to be called, choosing not to affiliate formally with either the German Christian or Confessing Church wings. The Church Struggle was very real for its participants, especially where theological ideas were concerned. Yet, such rifts often masked an underlying consensus on what to do with or about German Jews. Further, most Protestants were nationalists who, despite skepticism about certain Nazi beliefs and policies, either actively supported the regime or simply obeyed the law because that is what they believed God required of them.[13]

German Protestants and Nazi law

On April 7, 1933, the Nazi regime introduced its first wave of sweeping repressive legislation, beginning with the Law for the Restoration of the Professional Civil Service. Paragraph 3 (which came to be known as the "Aryan Paragraph"), coupled with subsequently enacted legal decrees, effectively forbade Jews from employment as civil servants.[14] The introduction of the Aryan Paragraph into the German Protestant Church in September 1933 may be regarded as a seminal event in the Church Struggle. Subsequently reintroduced and repealed several times, it became a flashpoint for divisions among German Protestants, and led eventually to the formation of the Confessing Church. It was primarily the issue of church autonomy, theologically considered, that colored the debates about the Aryan Paragraph, rather than the rights of "Jewish Christian" pastors (those who had converted from Judaism to Christianity), who constituted a miniscule percentage of the German Protestant clergy.[15]

The second wave of legislation against German Jews occurred in 1935, with the most significant measures being the "Nuremberg Race Laws," which were passed hastily after the party rally in September in Nuremberg, and culminating in the First Supplementary Decree of the Reich Citizenship Law in November, which clarified the issue of who was a full or part Jew. Michael Burleigh and Wolfgang Wippermann

rightly note the irony that "these criteria were based upon a religious, rather than a scientific, definition of race."[16]

How, then, did German Protestants react to such draconian measures, which came into force in the first two years of the Nazi regime, in the immediate wake of the demise of the Weimar Republic, a liberal democracy? Two theological constructs, one centuries-old, the other a more recent development, shaped the thinking of most German Protestants. In the sixteenth century, Martin Luther taught the existence of two kingdoms, one spiritual and the other temporal.[17] In this schema, which came to be known as the "two kingdoms doctrine" (*Zwei-Reiche-Lehre*), ordinary Christian citizens were expected to obey authority. Yet, it is doubtful that Luther encouraged the radical quiescence that has been assumed by many historians.[18] In any case, most German Protestants believed that they were commanded by God to obey the Nazi authorities despite the nefarious nature of the regime.[19]

The second theological construct had a more recent pedigree. By 1935, most German Protestants had come to view the *Volk* (the people of the German nation) as an "order of creation." Systematic theologian Paul Althaus, of Erlangen University, was an influential figure in German Protestantism in late Weimar and the Third Reich. He was also the leading proponent of a theology shaped by *Schöpfungsordnungen* (orders of creation). In his groundbreaking 1934 work titled *Theologie der Ordnungen* (Theology of the Orders), Althaus defined the orders (*Ordnungen*) as the (God-given) "forms of human beings living together, which are essential conditions of the historical life of mankind." They included family, governmental authorities, and—crucially during late Weimar and the Third Reich—the *Volk*.[20] The elevation of the *Volk* to semi-divine status in Althaus's theology served a crucial role in justifying for most German Protestants both antisemitic attitudes and endorsement or at least acceptance of Nazi anti-Jewish policy.

Julius von Jan

The words and actions of Confessing Church pastor Julius von Jan stand in stark relief to those of most of his Protestant colleagues. Von Jan exhibited a kind of courage that, in the hostile environs of Nazi Germany, was exceptionally rare among German Protestant ministers. This audacity was on full display on Wednesday, November 16, 1938, one week after *Kristallnacht* and indeed on the last of seven fateful days in which some thirty thousand Jewish men were arrested and taken to Dachau, Buchenwald, and Sachsenhausen.[21] Given the widespread apathy toward and even hostility against Jews and Judaism in the German Protestant clergy, it is ironic that this was the annual Day of Repentance in the liturgical calendar of the German Protestant Church. Borrowing prophetic tones from the biblical text, Jer. 22:29 ("O land, land, land, hear the Word of the Lord!"), von Jan delivered a blistering sermon to his Oberlenningen congregation in which he condemned rather explicitly as unjust: the burning down of synagogues; the destruction and theft of Jewish property; and the casting into concentration camps of thousands of Jews on the basis of their race.[22]

Von Jan was a German patriot, who, like millions of other young German men, had enlisted enthusiastically in the German army at the outset of the First World War in August 1914, only to be captured by the English in April 1917 after being wounded during his time on the battlefield. Having been set free at the end of 1919, von Jan dealt with the bitter disappointment of the fall of the German Empire through theological study and pastoral ministry. In 1935, he became pastor of the Protestant congregation at Oberlenningen, shortly after his predecessor there died of a heart attack following clashes with local leaders of the Nazi Party and police.

In the early days of the Third Reich, von Jan joined and became a representative for the local branch of the Confessing Church, whose members were generally wary of Nazi intrusion in church matters but often embraced nationalistic and anti-Judaic sentiments.[23] While von Jan's critique of the Nazi regime boiled over in his 1938 Day of Repentance sermon, this was not his first foray into such thematic terrain. According to the verdict rendered by the Special Court in Stuttgart on November 15, 1939 (see below), von Jan had long been a vocal opponent of Nazi intrusions on church sovereignty:

> The defendant [von Jan], a fanatical adherent of the "Confessing Church," has repeatedly given cause for criticism in the political regard. . . . Frictions with the Party authorities in Brettach resulted from the fact that the accused believed it necessary, time and again, to intercede publicly for his fellow pastor Niemöller. After his transfer to Oberlenningen, difficulties arose in increasing measure because the accused could not refrain from dragging politics into the pulpit and from taking a position against State and Party in a veiled manner.[24]

The context for von Jan's Day of Repentance sermon is crucial. On November 7, 1938, a teenaged Polish Jew named Herschel Grynszpan sought an audience with the German ambassador in Paris. He was denied, and was instead referred to the German Legation secretary, Ernst vom Rath. A desperate, stateless person, Grynszpan had just learned that his parents and two sisters had been forcibly deported from Germany to Poland. Grynzspan had come armed with a revolver, with which he shot vom Rath several times. Vom Rath was seriously wounded, taken to a hospital, and died two days later on November 9. This date happened to mark the anniversary of both the abortive Hitler putsch in Munich and the establishment of the Weimar Republic. On the day of the shooting, Goebbels's Propaganda Ministry instructed the press to give prominent place to the event and to describe it as an assault by "world Jewry" on the Reich which would invite the "heaviest consequences" for German Jews.

The consequences indeed were grave. Hundreds of Jewish synagogues were left in shambles. At least 7,500 of their businesses were destroyed, their goods looted. Between November 9 and 16, roughly thirty thousand Jewish men were arrested and taken to concentration camps at Dachau, Buchenwald, and Sachsenhausen. Though the official Nazi report on the pogrom estimated just ninety-one deaths, the death toll was much higher—probably hundreds, and perhaps more than one thousand. At least three hundred suicides occurred in Germany as a result of the hopelessness elicited by the pogrom. While hundreds of thousands of Jews had left Germany during the

first five years of the Third Reich, tens of thousands of frightened Jews now began to emigrate with intensified determination to other places, including America, Palestine, and the UK.[25]

In his Day of Repentance sermon, von Jan utilized provocative undertones and direct confrontation alike. He called contemporaries of Jeremiah who resisted the prophet's calls to repentance "those who proclaim in national enthusiasm salvation and victory [*Heil und Sieg*]." Later, he made explicit the comparison between Jeremiah's day and his own:

> In these days one question goes through our *Volk*: Where is the prophet in Germany, who is sent into the king's house, in order to say the Word of the Lord? Where is the man, who calls in the name of God and of justice, like Jeremiah called: Uphold justice and righteousness, rescue [those who have been] robbed from the hand of the evildoers! Do not oppress strangers, orphans and widows, do violence to no one and do not shed innocent blood!
>
> God has sent such men. They are today either in the concentration camp or muzzled.[26]

Drawn from the biblical text, the theme of justice—especially where the oppressed, those on the margins of society, were concerned—ran through the sermon, as did a rejection of violence against innocents. The close interaction with the biblical text was typical of sermons in the Württemberg Pietist tradition, to which von Jan adhered throughout his life.

The intensity of the sermon reached its height, when, in the wake of vom Rath's murder at the hand of Grynzspan, von Jan railed:

> A crime has happened in Paris! The murderer will receive his fair punishment, because he transgressed the divine law. . . . But who would have thought that this one crime in Paris could have resulted in so many crimes by us in Germany? . . . Passions are unleashed; God's commandments are despised; houses of worship that were holy for others have been burned down with impunity; the property of strangers robbed or destroyed. Men who served our German *Volk* faithfully and performed their duty conscientiously were thrown into concentration camps simply because they belonged to another race. . . . What a person sows, so he will reap! Indeed, it is a dreadful seed of hatred that is now being sown. What a dreadful harvest will grow from it, if God does not grant us and our *Volk* the grace for honest repentance.[27]

In view of these elegant yet fearless publically uttered words, it is not hard to see why von Jan soon garnered the violent disapprobation of local Nazi authorities.

According to several eyewitnesses, on the evening of November 25, a few hundred men arrived in the small village, having come by car, bus, truck, and motorcycle. Having gathered at the local gymnasium, they emerged singing and acting raucously. Two of them showed up at the church parsonage, banging on the door and demanding to see Pastor von Jan. Some young women who were gathered there to assemble

Advent wreaths answered (truthfully) that the pastor was in nearby Schopfloch. After some time, others banged on the door all the more loudly, continually demanding that the pastor come out.

By now, a large number of people from the community had gathered to see what the tumult was about. Window panes were smashed and the parsonage was searched from top to bottom. The outsider thugs shouted, chanted, cursed, and hurled abuses, demanding that the "slave of the Jews" (*Judenknecht*) show himself lest they burn the building down.

Von Jan was able to finish the worship service he was holding in Schopfloch. Not long after, however, a mob of SA men (*Sturmabteilung;* "Storm Troopers") chased him down, forced him against his will into a car and brought him back to the front of the parsonage in Oberlenningen. Here, the awaiting mob beat and kicked him, eventually throwing him on top of a woodshed opposite the parsonage, upon which he was beaten until unconscious and robbed of the money in his wallet. After being carried to the town hall by some brave and sympathetic townspeople, he eventually regained consciousness, only to be slapped in the face by one of the thugs before being interrogated. Von Jan was then taken to the jail in nearby Kirchheim, where he was incarcerated for four months.[28]

Despite the fact that his arrest warrant had been lifted on March 27, 1939, von Jan was seized by the Gestapo upon being released and transferred to a notorious prison in Stuttgart, where he endured both strict supervision and an infestation of bed bugs. Fearing that her husband would be taken to a concentration camp, von Jan's wife Martha began to suffer from ill health. Quite unexpectedly, von Jan was released from custody on April 13, but was forced to leave his home province of Württemberg.

He took up a position as a parish administrator in Bavaria, but in November 1939 was brought up on the charge of treason by the Stuttgart Special Court, found guilty of offenses against the Pulpit Paragraph and the Insidiousness Law,[29] and sentenced to sixteen months in jail, which he began to serve in January 1940. After nearly five months in a Landsberg prison, he was released and given three years' probation. During this period, he worked in several churches in Bavaria before serving in the Wehrmacht, returning after the war to Oberlenningen in September 1945.[30]

Laws such as those that von Jan was convicted of violating were merely instruments that the leaders of the Nazi regime utilized to achieve the "world without Jews" that they sought.[31] This instrumentalization of the law is demonstrated by the words of Hans Frank, head of the Nazi Lawyers' Association and of the Academy of German Law (and, after the outbreak of the Second World War, Governor General of occupied Poland):

> In the National Socialist state the law can only be a means for the maintenance, securing, and encouragement of the racial-*völkisch* community. The individual can be judged by the law only from the point of view of his value for the *völkisch* community.[32]

As viewed through the prism of Nazi law, von Jan's post-Kristallnacht sermon threatened, tore down, and hindered the racial-*völkisch* community.

Heinrich Fausel

Like Julius von Jan, Heinrich Fausel was a Confessing Church pastor during the Third Reich. Fausel was born in 1900 in Reutlingen, near Stuttgart. After passing his *Abitur* (a college entrance exam required in the German educational system), he served in the military in the waning months of the First World War.[33] Fausel would later marry his friend Hermann Diem's sister Helene. After serving as vicar in several churches in the early 1920s, in 1927 Fausel became pastor in Heimsheim. From 1934 to 1936, Fausel was part of the regional Council of Brethren and a delegate to the national Confessing Church synods. He remained at Heimsheim until 1946.[34]

Fausel eschewed openly political talk in his sermons, lectures, and writings, but his theology also bore marks of the "orders of creation" theology associated with Althaus. In a district-wide liturgical festival of song that took place in Heimsheim in May 1933, Fausel urged parishioners that if they wanted to see a resurrection of the Volk, they must hear the Word of God anew and honor God in their heart "who at all times leads and guides us, not only in times of upswing, but also in times of judgment and downfall." The "Volk lives," he proclaimed, "if it affirms itself as *order of creation,* ordered in the world [by God]."

On January 10, 1934, Fausel gave a lecture titled "*Die Judenfrage*" (The Jewish Question) at a packed town hall in Leonberg, a town roughly halfway between Heimsheim and Stuttgart. Much of the address was dedicated to correcting extreme representations of German Protestant reformer Martin Luther's sixteenth-century rhetoric against Jews, which had gained some cultural cachet in the late 1920s and early 1930s. Yet, Fausel affirmed many of the anti-Judaic and antisemitic stereotypes in Luther's writings. He also justified early Nazi measures against Jews, describing immigration of Jews to Germany as a "threatening invasion" by a foreign people—"decadent Judaism."

Early in the lecture, Fausel explored several images of Jews selectively drawn from the Hebrew Scriptures. Fausel offered here a rather one-sided presentation of Jewish disobedience and obduracy. His examples from the Hebrew Scriptures emphasized all of the negatives, and none of the positives about Israel's existence.

Fausel spent the second half of the address discussing German Protestant reformer Martin Luther's writings about Jews and Judaism. Most of this material was not overtly political. Yet, he did elucidate Luther's infamous seven severe recommendations against Jews, which appeared in his 1543 treatise *Von den Juden und ihren Lügen* (On the Jews and Their Lies). The most widely known aspect of the treatise, its anti-Jewish social program, appeared in the fourth and final section. Luther here made a series of very harsh proposals concerning Jews: their synagogues and schools should be burned to the ground; their houses should be "razed and destroyed"; their "prayer books and Talmudic writings" should be confiscated; their rabbis should be "forbidden to teach henceforth on pain of loss of life and limb"; they should be denied safe-conduct on the highways; usury should be prohibited to them and their gold, silver, and cash should be taken from them; and finally, they should be subjected to harsh labor (as retribution for their supposed laziness).[35] Despite setting these recommendations in their historical context and cautioning against mob rule, Fausel left the decision

about what to do with ("obdurate" and "blind") Jews in the hands of "the authorities" (i.e., the State). The "two kingdoms doctrine" is apparent here. It is given an all the more menacing quality as it is intertwined with a decidedly deprecatory view of Jews and Judaism.

Fausel later applied Luther's anti-Jewish writings to the current situation. Luther's position, he argued, should lead his fellow Protestants to affirm "the national efforts for the protection of (our) own *Volk*" and to reject "all attempts to introduce the Aryan Paragraph into the area of the church legally." Fausel called the adoption of the Aryan Paragraph "senseless," in part because this "foreign invasion" did not occur among the German Protestant clergy. "Of the 18,000 German pastors," it would apply for "approximately 6," he said. His numbers were wrong—there were more likely several dozen—but his argument underscored the prevailing Confessing Church view that the issue was "minor" because it involved so few ministers.

Fausel explicitly supported the prohibition of mixed marriages between Jews and non-Jews and placing restrictions on the number of Jewish civil servants in Germany. "An absolutely valid reason" for these, he said, "is present in the menacing foreign infiltration of [our] own *Volk* by a decadent Judaism, which is uprooted from its own faith and its *Volkstum* [nationality]."

Nine years after this 1934 lecture, as the so-called Final Solution was ongoing, Fausel and his wife gave shelter to Hertha Pineas. Their efforts were part of a so-called Rectory Chain in which a group of clergy and parishioners sheltered more than fifteen Jewish refugees in sixty Württemberg church parsonages. Pineas was a Jewish woman who beginning in 1941 had helped to supply Berlin deportation transports before going into hiding in late February 1943. She was part of a dwindling group of Jewish women who provided food and drink for Jewish deportees and helped them find what luggage of theirs had not been confiscated by the Gestapo. Their work took place under the watchful eyes of Gestapo personnel. At the time of her stay in the Fausels' home, her husband Hermann, who had worked previously as a neurologist in Berlin, was in hiding in Austria. As a result of the Fausels' actions, and those of several other Protestant pastors and their families, Hertha and Hermann survived the Holocaust, eventually emigrating to the United States.[36]

The Württemberg Ecclesiastical-Theological Society's April 1946 Declaration on the Jewish Question was one of the most forthright Protestant declarations of guilt in the early postwar period. Fausel was one of the leaders of the Society, which consisted of between fifty and one hundred participants, including a number of non-theologians. Four of the five signatories of the declaration, including Fausel, had participated in rescuing Jews, as part of the Württemberg "Rectory Chain." In a wide-ranging fashion, these five men, on behalf of the Society, confessed explicitly their guilt for numerous sins. One significant passage of the declaration is quite remarkable in its frankness. It reads in part:

> We retreated despondently and idly as the members of the *Volk* of Israel among us were dishonored, robbed, tormented, and killed. We permitted the exclusion of fellow Christians who originated according to the flesh from Israel, from the

> offices of the church, even allowing the ecclesiastical refusal of the baptism of Jews. We did not object to the prohibition of Jewish mission. We did not resist the militaristic falsification of the love of fatherland.

All of this revealed them to be, among other things, "weak in faith" and "remiss in love."

In the early years of the Third Reich, Heinrich Fausel coupled a dark and distorted view of Jews and Judaism with an ostensibly apolitical tack. Yet, his view of being "apolitical" assumed an affirmation of government laws and policies; to be "political" apparently meant to be critical of the same. Combining a traditional, Lutheran "two kingdoms doctrine" with a more contemporary "orders of creation" theology, Fausel lent legitimacy to anti-Jewish Nazi laws and policies.

Fausel's participation in Herta Pineas's rescue and his signature on the Society's 1946 Declaration reveal a general sense of collective guilt for the dreadful fate that had been visited on millions of Europe's Jews. These words and actions clash, of course, with his 1934 lecture on "The Jewish Question" and indeed with some of his postwar sermons. Thus, the inconsistency of Fausel's position toward the Jewish people endured at least into the early postwar period.

The "Grüber Office"

Hermann Maas was born in 1877 and grew up as the son of a pastor in Gernsbach, near Baden-Baden. After his ordination in Freiburg in 1900, he went on to become first a vicar, later a parish administrator, and finally a pastor in Laufen/Sulzburg in the Black Forest (1903–1915). In 1903, he took part in the sixth Zionist Congress in Basel. This began what would become a lifelong engagement with issues surrounding Christianity, the Jewish people, and Palestine/Israel.[37]

Maas joined the Verein zur Abwehr des Antisemitismus (Society for Protection against Antisemitism) in 1932. One year later, he spent several months studying in Palestine. In the first year that the Nazis were in power he became a member of the Pastors' Emergency League (a precursor of the Confessing Church) and, later, the Confession Community of Baden. In August 1935, he spoke about "The Question of the Christian Non-Aryans" at the preliminary session of the World Alliance's meeting in Chamby. He proposed offering concrete help to affected "non-Aryan" Christians in the areas of education, employment, and land for housing.

In 1938, Maas became a cofounder of the "Grüber Office" with Heinrich Grüber. Maas was responsible for the organization's work in Baden, while Grüber coordinated national efforts from Berlin. As noted above, the Grüber Office provided Jews who were under grave threat from the Reich counsel about emigration, helped find them employment outside of Germany, rendered them social assistance, and gave them support with both legal and educational matters. Through this work and his ecumenical contacts abroad, including George Bell, bishop of Chichester, Maas assisted in the emigration of many persecuted Jews. He accomplished all of this while

serving as pastor of the Heiliggeistkirche (Holy Spirit Church) in Heidelberg from 1915 to 1943.

Heinrich Grüber was born in 1891 in Stolberg, near Aachen and thus both the Belgian and Dutch borders. His mother having descended from a Flemish Huguenot family, Grüber spoke fluent Dutch from his early childhood and spent some time studying in Utrecht. His early pastoral work included numerous opportunities for Church social work, including work with troubled, disadvantaged, and unemployed youth. His facility with the Dutch language, coupled with his contacts with the Dutch community and embassy in Berlin, made him uniquely suited to head the office that would become associated with his name.

The work of the Grüber Office expanded very quickly, despite being tolerated only grudgingly—for about a year—by the Gestapo and other regime authorities. The regime was only too cognizant of the bad press that any crackdowns on such an organization could engender outside of Germany. This remained true, however, only until the war began. In the early days of the Third Reich, Grüber was committed not only to the Nazi Party and State, but also to the Confessing Church movement. An early supporter of both the Pastors' Emergency League and the Confessing Church, Grüber served as a member of the first Berlin-Brandenburg Council of Brethren. Accused of producing and distributing banned leaflets, Grüber was detained for days in the summer of 1937. Yet, he had assured his church consistory in January 1934 of his complete fealty to the new Nazi government. Not only had he belonged to the Nazi Party for years, but he supported the movement both "non-materially and financially" as well. If Grüber was to become a hero for many Jewish refugees several years later, he would be an unlikely hero indeed.[38]

By May 1939, the Grüber Office had more than twenty satellite offices among most of the regional Protestant Churches. Their work proceeded without much interference until early 1940.[39] This relative freedom of movement was due not only to the Nazi regime's aversion to engendering bad press outside of Germany, but also to the fact that, from 1938 to 1940, emigration was still the preferred solution to the "Jewish question."[40] Thus, the goals of the Grüber Office and the regime coincided—temporarily, and were guided, of course, by diametrically opposed motivations. When regional SS leaders and even Reinhard Heydrich were queried about the legality of Grüber Office activities by wary church workers during this brief window of time, they gave their approval.[41]

In February 1940, just months after the Nazi conquest of Poland, some eighteen hundred Jews were deported from the German towns Stettin and Schneidemühl to Lublin in Poland. Once there, these Jews encountered difficult wintry conditions and temporary barracks. The newly appointed SS and Police Leader of the Lublin District, Odilo Globocnik, declared that "the evacuated Jews should feed themselves and be supported by their countrymen, as these Jews had enough [food]. If this did not succeed, one should let them starve."[42]

After these mass deportations began, Grüber tried to intercede with officials high in the government and the party. For this, Grüber received a sharp rebuke from the Gestapo; the Grüber Office came under closer police surveillance. Even so, the office

was able to send large amounts of needed medicines to the Polish collection centers for deported Jews.[43]

Because of his daring activities, Maas was harassed by the Gestapo and eventually had speaking, writing, and professional prohibitions levelled against him. In 1943, he was forced by the high church council, who were under pressure from the Reich, to resign from his position at Heidelberg, and later that year he was transferred to France to endure work in a hard labor camp. He returned to ministerial employment in Heidelberg after the war.[44]

Heinrich Grüber was arrested on December 19, 1940 and taken to Sachsenhausen. His colleague Werner Sylten continued running the office, but was arrested and taken to Dachau on February 27, 1941, where he was killed a year-and-a-half later. Grüber was also later moved to Dachau, but released after a total of two-and-a-half years in concentration camps. Just a few of the fifty-five workers in the office survived the end of the war, with many probably dying in the gas chambers.[45]

The consequential year in which the Grüber Office was founded, 1938, witnessed the Anschluss, the Sudetenland crisis, and Kristallnacht. After five years of Nazi anti-Jewish policy, including, for example, the Law for the Restoration of the Professional Civil Service, the so-called Nuremberg Race Laws, and, in the wake of Kristallnacht, the Decree on the Elimination of the Jews from Economic Life, Jewish life in Germany had been decimated. During the period in which the activities of the Grüber Office were reluctantly tolerated by the Nazi regime, its members could, with relative freedom of movement, offer assistance to Jews suffering under such onerous policies. This was not to be the case after the deportation of Jews to Poland began. Scuttling the "two kingdoms doctrine" in favor of solidarity with the Jewish victims of the Nazi Holocaust, the men and women of the Grüber Office exhibited extraordinary courage in the face of enormous human suffering.

Conclusion

Research on the German Protestant Church in Nazi Germany has demonstrated that, where care and concern for their fellow Jewish citizens was concerned, von Jan represents the attitudes of a miniscule portion of his Protestant cohort. At the institutional level, Protestants were deafeningly silent (or worse) on the so-called Jewish Question. Julius von Jan was one individual among very few who flouted the law and risked his life by speaking out on behalf of Jews during the Third Reich. Heinrich Fausel's views are much more representative of the general tenor of a broad spectrum of German Protestants. They are consonant with the outlook on Jews and Judaism of most in the pro-Nazi, deeply nationalistic German Christian faction of the Protestant Church and also of many Protestants who did not formally affiliate themselves with either the Confessing Church or the German Christians. Despite their general uneasiness with certain aspects of Nazism, pastors in the Confessing Church were by no means immune from antisemitic and nationalistic sentiments. Their reactions to surrounding events were more often than not guided by the

"orders of creation" and "two kingdoms" doctrines. Very few offered any public support or private assistance to their imperiled Jewish neighbors, as did Fausel, *despite* his antisemitic views. By supporting unequivocally the human rights of their Jewish countrymen, von Jan and the brave men and women who worked for the Grüber Office contravened the law and disregarded the potential extra-judicial consequences. Such individuals were few and far between in Nazi Germany, even in the Confessing Church.

15

Persecution of Jehovah's Witnesses Before, During, and After the Third Reich

Gerhard Besier

Introduction

There is a fundamental difference between the history of the persecution of the two mainstream churches, on the one hand, and the persecution of the Jehovah's Witnesses' religious community, on the other hand. With the exception of the years from 1933 to 1945, and 1949 to 1989 (GDR), the churches held a clearly privileged status within German society. However, it has taken until 2006 for Jehovah's Witnesses to be recognized as a public statutory body in the majority of German federal states. The persecution of Jehovah's Witnesses began long before 1933, and did not stop after either 1945 or 1989. Whether in an authoritarian or a democratic state[1]–let alone under a dictatorship–Jehovah's Witnesses were never safe from persecution.

An analysis of the collective beliefs of this small religious community would achieve little in explaining this phenomenon.[2] On the contrary, it is the implications of these religious convictions that time and again cause the (self)-exclusion and subsequent persecution of this minority religion. In their rigorous interpretation of the Bible, for example, Jehovah's Witnesses refused to participate in socially sanctioned symbolic actions that were deemed to be "sacred acts" within the overwhelmingly Christian mainstream society in a civil-religious sense[3]—this would include such actions as the Nazi salute in Germany or school prayers and saluting the flag in the United States. For patriots of all nations, primary importance was placed on their fatherland and its welfare. Against this background, how provocative must it then have been when Jehovah's Witnesses were obedient to the "governing authorities" (Rom. 13: 1-7), but left no doubt about the fact that, according to the Bible, limits were to be set with regard to this obedience. In addition, Jehovah's Witnesses hurt the feelings of those loyal and nationally conscious citizens who invariably aligned themselves on the side of the opinion-forming majority with their frequently harsh judgments about worldly power as a satanic entity. Ultimately, with their uncompromising adherence to strict ethical and moral principles, Jehovah's Witnesses held a mirror up to this majority, who likewise saw themselves as Christian. Just like many earlier Christian reform movements,[4] Jehovah's Witnesses criticized the established forms of Christianity by

recognizing them as the "Whore of Babylon" and, in constant new attacks, denounced the established Christianity's continual willingness to compromise with the powers of darkness. In this way, Jehovah's Witnesses alienated many Christian organizations and their believers, who also had a feeling of having been caught in their readiness to compromise.

In 1924, the Bible Students, as they were known until 1931,[5] adopted a resolution with the title "Ecclesiastics Indicted" and "unsparingly exposing the clergy." [6] Fierce reactions to this attack were inevitable. From 1919, the church, which was effectively spoiled by power, had to cope with the new reality that it was no longer the "State Church" and the monarch was no longer the principal bishop. As a result, it campaigned against the "sects" with any and every means at its disposal. Time and again, members of the clergy hauled well-known Bible Students before the courts in the hope that this forum would come to the clergy's defense against the ongoing attacks. Furthermore, it was hoped that Jehovah's Witnesses would subsequently be banned from distributing and disseminating negative messages about the mainstream churches among the general public.[7]

Persecution between 1914 and 1933

The first really serious confrontations between the State-supporting, mainstream churches' majority and the biblically oriented, but distanced from the State, minority occurred in 1914 in connection with conscientious objection to military service. By following the principle of neutrality as a consequence of a process of inner discernment and clarification, Jehovah's Witnesses refused to fulfill their duties to the fatherland—or, at the least, the duties as the vast majority of society understood them. As a result, they were suspected of being traitors to their country—and not only in Germany.[8] The distribution of their publications and public proclamations was partially banned[9] because it was feared that the Bible Students were promulgating defeatist and subversive ideas that would undermine military strength. Just like in Germany, Jehovah's Witnesses in the United States, Canada, and Britain were accused of treasonable activities toward their native country because of their apparent lack of patriotic feelings for the one or the other side.[10] In order to be able to classify them as "state-endangering forces,"[11] it was asserted in Germany in a form like the claimed Jewish-world conspiracy theory—that Jehovah's Witnesses maintained a close proximity to, or collaboration with, other traitors to the fatherland, such as Jews, but also Freemasons, Bolshevists, and political Catholicism. This evidence of an alleged "dangerousness" was to continue—with varying structures of accusation—to the present day. Descriptions of "the enemy" may have changed, but not the ultimate verdict of being dangerous. In the end, this judgment was primarily based on their obvious deviations from the majority's standards of conduct—a circumstance that draws suspicion toward Jehovah's Witnesses, and offers all manners of possible starting points for stereotypes, prejudices, xenophobic concepts,[12] and, ultimately, overt discrimination.

Jehovah's Witnesses, it was claimed in the 1930s, did not work as henchmen or in collaboration with the enemies of the German people. Far more, it was believed

that Jehovah's Witnesses, supported by considerable funds from Jewish bankers in New York, propagated a Jewish-Bolshevist message for the destruction of Germany and its traditional churches.[13] It would seem that state, cultural, and psychological collapse threatened Germany.[14] Plagued by serious fears of secularization, the churches endorsed these stereotypes and prejudices that were primarily being disseminated among populist-nationalistic circles and, thus, greater credibility was given to the clichés.

Even though the 1919 Weimar Imperial Constitution had proclaimed the division of state and church, as well as the in-principle equality of all religious communities,[15] the constitution accorded privilege in such a way that the two mainline churches effectively amounted to being state churches. In spite of, or possibly because of, this privileged status, both of these leading churches increasingly lost their realm of influence as mass society steadily became more pluralistic and secular.[16] At the same time, religious rivalry increased within the increasingly complex market of religion. The national Protestant culture, which essentially had a state hegemony, did not so much fear the many little denominations[17] as much as the confusion or complexity, or "uncontrolled proliferation."[18] Because the churches had unequivocally placed themselves at the service of the nation throughout the First World War, Jehovah's Witnesses' accusations regarding the clergy, and their demand to leave this church that was so bonded to the state, hit upon a sore point after the defeat in the war—the mainline churches had a significant credibility problem.[19] In order to reestablish the old sense of order and to combat the small religious communities more effectively, the Protestant Church created their own defense organization—the so-called Centre for Apologetics—an institution that still exists today, albeit with a different name.[20] Under the auspices of this venture, the "Centre for Apologetics" did not argue to remove their competitors from the playing field in favor of the own religious interests. Instead, they slipped into the role of guardian-protector for the benefit of the German people. The Centre was leading the fight against sects in order to eliminate the "canker within our people." This was a battle that they were waging not to repulse any religious competitor but as a selfless "service for the people."[21]

In this struggle for the protection of the "German people's soul" and against the "un-German pacifism" of the Bible Students, the Protestant Church sought support from their traditional ally—the State. The "Centre for Apologetics" constantly supplied the authorities with allegedly damning material about Jehovah's Witnesses and agitated—particularly in the light of the state of emergency in 1923–24—for prohibitive measures.[22] However, the state turned the situation back on the church by conceding, on the one hand, that "the sect's activities are undesirable for the state" but asserting that the combating of these activities, on the other hand, lay within the church's field of responsibility.[23] The democratic constitutional state also was reluctant to respond to the church's less drastic demands, such as the confiscation of leaflets and printing templates hostile to the church, and advised the pursuit of legal action.[24] Drastic measures, such as the disallowance of the public utility status (*Gemeinnützigkeit*), proved to be untenable in court.[25] Penalties were only imposed for "insulting a recognized religious community" [26]—but in 1928 there were, nevertheless, 1,600 cases to this effect—such as violations of the trading regulations and hawking tax law.[27] The aim was to restrict

the house-to-house preaching ministry and the selling of literature on Sundays and public holidays by means of police regulation to keep these holidays and holy days sacred. A large-scale conversion initiative, involving some 1200 evangelizers who flocked to the region south of Würzburg, was to be stopped by the *Reichsbahn*, the German National Railway, refusing to transport participants for some time. However, this policy of petty aggravation was initially unable to gain any genuine foothold in the Weimar constitutional state. In the final period of the Weimar Republic, it was intended that the state would gradually abandon its religious neutrality. Within the framework of the "Decree for the Resistance of Political Acts of Violence" from March 28, 1931, individual assemblies or meetings in the open air and Bible Students' publications were banned under the pretext that the Bible Students vilified and disparaged the established churches. When these selective interventions against the "problem of sects" did not suffice for the churches, they turned to the Protestant National Socialists. They quickly found willing allies against the "sectarian phenomena" among the aspiring Nazi Party (NSDAP). With their front-line position against the Bible Students,[28] as well as against many other groups, the National Socialists appealed to the churches and gave them hope that a ban on the Bible Students would ultimately prevail once the Nazi Party was able to assume power.

Persecution of Jehovah's Witnesses between 1933 and 1945

In mid-April 1933, the International Bible Students Association's (IBSA) activities were banned in the states of Mecklenburg-Schwerin, Bavaria, and Saxony.[29] The Ordinance for the Protection of the German People (February 4, 1933)[30] and the Reichstag Fire Decree (February 28, 1933)[31] served as legal instruments against the religious community. At this early stage of the "New Reich," the Interior Ministry refrained from a ban across the entire Reich because the closure of the business enterprise Watchtower Society would have further increased unemployment figures, and because there was serious concern about diplomatic intervention from the United States. In fact, the American General Consulate did ultimately intervene following the occupation and closure of the Watchtower Society's headquarters in Magdeburg on April 24, 1933. As a result, the Prussian Interior Ministry did back down; the Prussian Secret State Police Office (GESTAPA) confined its actions to the seizure and banning of only some Bible Students' publications. However, the two mainline churches, which at this point in time still took the Nazi commitment regarding Christianity at face value, did not relent, demanding that the regime should finally take action on both the regional and central level against this religious community that was allegedly hostile to both church and state.[32] On April 20, 1933, marking the Führer's birthday celebration, the Lutheran minister Otto broadcast on the radio:

> The German Lutheran Church of the State of Saxony has consciously come to terms with the new situation and will attempt in closest cooperation with the political leaders of our people once again to make available to the entire nation the strength of the ancient gospel of Jesus Christ. The first results of this cooperation

> can already be reported in the ban today placed upon the International Association of Earnest Bible Students and its subdivisions in Saxony. Yes, what a turning point through God's direction. Up until now God has been with us.[33]

Ultimately, Prussia did impose a ban on the IBSA on June 24, 1933,[34] to be quickly followed up by other states.[35] All ecclesiastical sides joined in the general church celebration including, in particular, the *German Christians* (*Deutsche Christen—DC*) who were closely aligned to the Nazis.[36] Moreover, the majority considered that this decision confirmed their positive judgment regarding the Hitler movement being church-friendly. Police were able to rely on willing denunciation of further groups within society in the wake of their actions against the Bible Students.[37] At the same time, there was a clear lack of enthusiasm regarding the persecution methods involved; there were some community sympathies for the restrained actions of Jehovah's Witnesses, especially given that overtly "hostile to the State" activities could not actually be established.[38] Nevertheless, the first convictions of Jehovah's Witnesses occurred in special courts created in March 1933.[39]

With American support,[40] the IBSA lodged an appeal against the ban, and passed a petition at a major event in Berlin on June 25, 1933 intended to disprove the allegations.[41] Eventually, a decree from the Prussian Interior Ministry released all the Watchtower Association's assets;[42] nevertheless, the ban on activities and operations remained in place.[43] In August 1933, books, bibles, and pictures with a total weight of 65,189 kilograms were confiscated and taken away in twenty-five trucks.[44] Members of the religious community who had been taken into custody were also released. In spite of their negative experiences with the Nazi regime, the believers illegally resumed their preaching and missionary activity, and continued to distribute those publications that were smuggled in from neighboring countries. "But a large number hesitated, feeling it best to wait, for Jehovah would surely do something to prevent this persecution of his people."[45] Balzereit had settled in Czechoslovakia, and Harbeck, who had American citizenship, assumed the management of the Society's interests in Germany from his Bern base.[46] However, in mid-December 1934, the Secret State Police, the Gestapo, renewed the ban on activities for the Watchtower Society, and punished any refusal to undertake activities that were loyal to the state or civil religious, such as not participating in elections[47] or non-membership of a Nazi organization,[48] with protective custody.[49] Those who did not easily integrate into the "national community" experienced public discrimination, as seen in the example of the ticket agent for the railroad Max Schubert from Oschatz (Saxony). For two-and-a-half long hours, SA officers led him around his hometown wearing a sign, on which was written: "I am a scoundrel, a traitor to the fatherland, because I did not vote." [50] After this sentence, which everyone present was shouting in chorus, they called out "Where does he belong?" And the mob chanted, "In a concentration camp!" After that, civil servants like him were summarily dismissed. Children of Jehovah's Witnesses, who professed to their parents' beliefs, had to leave secondary school, like Helmut Knöller, and undertake an apprenticeship, where their life was also made as difficult as possible.[51] Others were taken from their parents and given to foster parents who were to educate and bring them up under Nazi beliefs.[52] In some cases, this course of action was also successful.[53]

Known Bible Students had their mail intercepted and regular house searches were imposed on their apartments. Because the Nazi state increasingly wanted to organize and mold people's lives into political organizations, and Jehovah's Witnesses nevertheless continued to refuse to join political organizations of any type, conflicts intensified rapidly. In the Nazi context, membership in the structure of the Party and the observation of the new rituals were more than just formal acts: they were classified as a sacred commitment to the "political religion"[54] of the National Socialist ideology. To refuse and to stand apart, even to speak of "satanic" organizations, was tantamount to self-identification as the "enemy" and, as a consequence, meant exclusion from the German Peoples' Community.[55] Specific penalties—following an action such as refusing to give the Hitler salute[56]—included dismissal from the public service and open discrimination in the first instance, through to withdrawal of basic living conditions and revocation of parental custody[57] in subsequent stages.[58] In spite of this oppression, Jehovah's Witnesses were able to continue their preaching work in the first couple of years under the Nazi rule—albeit with significant difficulties, such as the relocation of activities into the private sphere only and a relabeling of their publications.

This unstable intermediate state quickly changed in 1935, the beginning of the phase where National Socialist authoritarian rule began to be truly consolidated (1935–39). The relevant ministries (RMdI, AA und RJM), the "rod of the Führer's representative," and the newly created Security Service (*Sicherheitsdienst, SD*) Head Office in Berlin determined at the beginning of February 1935 that the ban on the Watchtower Society (*Wachturm Gesellschaft* or *WTG*) was to be implemented once more. On April 26, 1935, the Magdeburg headquarters were occupied and all those present were arrested. Because of a dissolution and prohibition order, the Watchtower Society and its legal department were forced to discontinue their activities. As a consequence, crucial legal advice for believers ceased to exist. Given that the Imperial Court of Justice likewise confirmed the ban in a judgment on September 24, 1935, the Watchtower Society was forced to forego an administrative criminal proceeding and obtained, in return, the cancellation of the confiscation of assets. A decree from the Ministry of Justice ensured that harsh sentences were handed down in courts against the Bible Students.[59] For the majority of deviating social behaviors, it was sufficient simply to introduce preventative measures for the "maintenance of a healthy body among the German people."[60] The vocabulary was virtually identical with that of the Weimar era.

From this time on, the Secret Police prosecuted all Jehovah's Witnesses' activity that was now clearly illegal, although it could not yet be said to be a case of systematic persecution. It was not until the Reichstag elections on March 29, 1936 that the Gestapo[61] and SD truly intensified their approach to Jehovah's Witnesses, as the members of this religious community had systematically not complied with their duty of "compulsory voting," nor reported for conscription, even though universal military service had been introduced.[62] In mid-August 1936, a newly created "Special Gestapo Command" discovered the location where illegal publications and recordings were being produced, including a literature warehouse and an illegal printing press. Shortly thereafter, the *Reichsleiter*, or German head of the International Bible Association, Fritz Winkler, was arrested and interrogated, and subjected to physical and psychological torture.[63] On the basis of the information gained through this process and the statements of

further detainees—for example, Georg Bär and Konrad Franke[64]—leading Jehovah's Witnesses across the Reich were arrested, including regional heads of service,[65] and illegal support bases were smashed, as was the courier service between Harbeck and Winkler.[66] Without individual denunciations, spies, and informers, the Gestapo and SD would not have been able to achieve such successes in these and other cases.[67] Committed National Socialists, as well as members of both major churches (Roman Catholics and Lutherans),[68] were a thorn in the side of Jehovah's Witnesses—even under the terms and conditions of the dictatorship.

In spite of all the acts of persecution and repression, and even though there was definitely considerable disagreement among the traveling supervisors,[69] Jehovah's Witnesses still called repeatedly for coordinated protest and missionary activities. As a result, a congress took place from September 7 to 9, 1934, in the Basel Trade Fair building (Switzerland), and approximately 1000 Jehovah's Witnesses from Germany were able to participate despite the current political climate. Under Rutherford's leadership, it was resolved that on October 7, 1934, all Jehovah's Witnesses worldwide would gather at the same time for a meeting, and would send telegrams or letters to the government, and afterward, they should continue to pursue their missionary activities. Because the Gestapo only found out about this undertaking at the last minute, they were able to arrest just a small number of Jehovah's Witnesses.

Letter "To the Officials of the Government Imperial Government," dated October 7, 1934 (1974 *Yearbook of Jehovah's Witnesses*, 136f.):

> The Word of Jehovah God, as set out in the Holy Bible, is the supreme law, and to us it is our sole guide for the reason that we have devoted ourselves to God and are true and sincere followers of Christ Jesus.
>
> During the past year, and contrary to God's law and in violation of our rights, you have forbidden us as Jehovah's Witnesses to meet together to study God's Word and worship and serve him. In his Word he commands us that we shall not forsake the assembling of ourselves together. (Heb. 10:25) To us Jehovah commands: "Ye are my witnesses that I am God. Go and tell the people my message." (Isa. 43:10, 12; Isa. 6:9; Mt. 24:14) There is a direct conflict between your law and God's law, and, following the lead of the faithful apostles, "we ought to obey God rather than men," and this we will do. (Acts 5:29) Therefore this is to advise you that at any cost we will obey God's commandments, will meet together for the study of his Word, and will worship and serve him as he has commanded. If your government or officers do violence to us because we are obeying God, then our blood will be upon you and you will answer to Almighty God.
>
> We have no interest in political affairs, but are wholly devoted to God's kingdom under Christ his King. We will do no injury or harm to anyone. We would delight to dwell in peace and do good to all men as we have opportunity, but, since your government and its officers continue in your attempt to force us to disobey the highest law of the universe, we are compelled to now give you notice that we will, by his grace, obey Jehovah God and fully trust Him to deliver us from all oppression and oppressors.

Even so, approximately 300 Jehovah's Witnesses (including Erich Frost) were successful in traveling to Switzerland, where they were able to establish the core of a new IBSA Organization for Germany on the margins of the international IBSA Convention in Lucerne (September 4–7, 1936).[70] Erich Frost (1901–87) and his deputy Heinrich Dietschi were assigned the responsibility for the German branch of the organization. The course of the congress was strongly influenced by the prohibition of the IBSA by the Austro-Fascist regime of the Schuschnigg-Government.[71] Jehovah's Witnesses were encouraged once again in their assumption of a Fascist-Catholic alliance.[72] In a resolution that was sent in large quantities (300,000 copies) to numerous governments, to the pope, as well as to ordinary members of religious organizations, the Lucerne delegates documented their determination to disclose the treatment and persecution being inflicted on their religious community in Nazi Germany. The resolution states:

> We raise strong objections to the cruel treatment of Jehovah's Witnesses by the Roman Catholic Hierarchy and their allies in Germany as well as in all other parts of the world, but we leave the outcome of the matter completely in the hands of the Lord, our God, who according to his Word will recompense in full. . . . We send heartfelt greetings to our persecuted brethren in Germany and ask them to remain courageous and to trust completely in the promises of the Almighty God, Jehovah, and Christ.[73]

In September 1936, the Gestapo had issued a memorandum in which they had intended, by means of the imprisonment campaign, to prove the inherent danger of Jehovah's Witnesses.[74] In doing so, they assumed, however, that their actions had smashed the Bible Students' movement. As a consequence, the Secret Police's shock was all the greater when around 3,500 Jehovah's Witnesses distributed more than 200,000 pamphlets and leaflets in an action across the entire Reich "on 12 December 1936, from 5:00 to 7:00 p.m."[75] Through this action, the Bible Students not only confirmed the high degree of underground organization they had established, but also provoked even harsher persecution measures on the part of the Gestapo. Numerous Witnesses, including Erich Frost, were arrested.[76] As a result of their conspiratorial skills and their persistence, Jehovah's Witnesses were now deemed to have moved up to the level of the communists. Mass arrests and significant congestion within the courts were the resulting consequences. Even after the verdict after serving a prison sentence, Bible Students were not released but taken into "protective custody." In the case of repeated offenses, the protective custody was enforced in a concentration camp.[77] However, in the eyes of the Secret Police, the judiciary still did not act with sufficient severity against the Bible Students, and so the executive demanded that the Bible Students should henceforth be charged with high treason.[78] Yet, despite these massive persecution actions, Jehovah's Witnesses were able to reorganize themselves one further time, and distributed an "Open Letter to the Bible-believing and Christ-loving people of Germany" by means of almost 70,000 pamphlets across many towns in June 1937.[79] Again, the "open letter" was to be distributed in a "blitz campaign" on June 20, 1937.[80] The letter documented attacks on Jehovah's Witnesses by the state police and specifically mentioned the names of the brutal instigators and the victims

of these abuses.[81] The Security Service (SD) now sought to create a file on all potential Jehovah's Witnesses in order to prevent any further reorganization attempts through preventative arrests.[82] Because the Gestapo had arrested the majority of the regional managers, there was a push from the women to release members of their community. They quickly filled the breaches and maintained contact between the congregations and Dietschi.[83] These women and a few other Witnesses from Germany were still able to participate in the 1937 Convention in Paris. However, when Dietschi returned home, he found the Gestapo waiting for him in his Berlin apartment. He was arrested and sentenced to four years in jail.[84]

Although Jehovah's Witnesses had experienced increased persecution from the Nazis in the years 1937–38 in comparison to previous years, the outbreak of war now enabled the Reich main security office to punish the Bible Students' conscientious objection as acts of subversion and open sabotage. However, this paled in the face of the onset of war when the Reich security head office prosecuted the Bible Students' refusal to bear arms or report for conscription. Anyone who refused to serve in the Army would experience "special treatment," the euphemism for execution.[85] In the space of August 26 to November 18, 1939, 11 Jehovah's Witnesses were condemned to death,[86] by September 1940 the number had risen to 112 death sentences, and by the end of the war the Nazis had enforced the execution of 250 Jehovah's Witnesses in the whole territory of the "Reich."[87] Difficult individual destinies and stories hide behind the bare statistics—examples of absolute faith, barely tolerable challenges, but also stories of betrayal.[88] On the "domestic front," special courts were established to administer martial prosecution of civil *Volksschädlinge*,[89] also known as "Pests on the Body Politic," who—like the Bible Students—took part in connections that were considered "hostile to the Army" and having the potential to undermine or subvert "military strength."[90] Simple believers were threatened with lengthy prison sentences, regional leaders were sentenced to death.[91] A further tightening of prosecutions was enforced in January 1943 with the allocation of cases of subversion of the armed forces to the People's Court.[92]

Hans Müller, a lapsed Jehovah's Witness, supported and served the persecutors as agent provocateur in Bern by establishing contact to his brothers-in-faith (*Glaubensbrüder*) in Germany—allegedly with the purpose of "rebuilding the underground organization in Germany."[93] Shortly after they had come together, the Gestapo intervened. Harbeck had been warned, but he could not believe that Hans Müller was working with the Gestapo in Germany.

In the concentration camps, Jehovah's Witnesses formed a special group. Other than the Jews, they were the only group from 1937 to wear an identification badge specifically relating to their religious affiliation—the purple triangle. As far as quantitative figures are concerned, Jehovah's Witnesses represented a comparatively significant number of concentration camp inmates from 1935 onwards. Given the relatively small size of the religious community, numbering only some 20,000 active believers in 1933, the hundreds of inmates comprised 10 or more percent of the camp inmates.[94] Hundreds were sent to the concentration camps in Sachsenburg, Esterwegen, and Moringen.[95] And even in the camps, they continued to refuse to give the Hitler salute, to accord the guards appropriate military respect, or to undertake work for the Nazi subdivisions.[96]

They boycotted both Hitler's birthday and the Führer's speeches,[97] but at the same time tried to win fellow inmates and even the guards over to their religious beliefs.[98] A surprising number of camp inmates did, in fact, join the religious community—including a number of Jews.[99] Camp commanders reacted to this unmanageable or obstinate behavior with an array of punishments that were increasingly radicalized. Solitary confinement, in a darkened cell, physical violence, refusal of medical treatment, and extended periods of blocking postal delivery were just some of the punishments meted out.[100] In the men's camps, Jehovah's Witnesses were forced to undertake heavy labor, and violations of camp regulations brought on arrests and beatings.[101] Frequently, Jehovah's Witnesses' attitude and behavior provoked camp guards and staff members to such an extent that they felt compelled to break their unrelenting belief through physical abuse.[102] As a result, Jehovah's Witnesses felt they faced a religious test in this situation, a test that demanded martyrdom from them—just like the early Christians faced. In the Sachsenhausen concentration camp, every fourth Bible Student of the 130 Witness inmates died, and one in three from the 143 Jehovah's Witnesses did not survive the Mauthausen camp.[103] Furthermore, in Sachsenhausen, perhaps also Flossenbürg and Mauthausen, public executions of Jehovah's Witnesses who had refused military service were carried out.[104] Hundreds of female Bible Students who had refused to participate in the demands of war production were sent to the gas chambers.[105] Those who survived were marked for the rest of their lives by the cruel torture that they had been forced to endure.[106]

By 1943, the percentage of German concentration camp prisoners had sunk to just 17 percent[107] and the challenging war environment necessitated that camp inmates also work productively. Jehovah's Witnesses profited significantly from this situation, because they were deemed to be reliable, honest, and hard-working.[108] In part, they were granted the status of being "semi-free";[109] they were predominantly employed in the agricultural field, in housekeeping, and in those areas where there was greater potential for escape. As a matter of principle, Jehovah's Witnesses did not use the freedom granted to them to escape, but utilized it as an opportunity to rebuild communication networks, for distribution of their publications and for missionary purposes. However, as they were so desperately needed for the purposes of production, the consequent punishment measures could, for the most part, not be maintained for long.[110] In this respect, the concentration camp inmates were generally exposed to a lower level of risk than those Jehovah's Witnesses who were caught up in the machinery of the relentless Nazi judiciary.[111] Nevertheless, numerous Bible Students lost their lives in connection with the Nazi medical experiments[112] and, in the final stages of dissolution of camps, through the camp evacuations and the death marches.[113] In total, some 6 percent of active believers in Germany paid for their faith with their lives, and approximately 10 percent were forced to endure the concentration camps.[114]

Outlook

While both the major churches in West Germany have been celebrated as Resistance organizations that fought the Nazi state,[115] there was an overwhelming silence regarding

the fate of Jehovah's Witnesses until well into the 1980s. However, that is not the end of their problems: Opponents of the religious community, including the churches, resumed their practices of defamation and marginalization from the Weimar era. The mental prerequisites remained favorable for this outcome, because the conviction that deviant behavior was indicative of inferiority and danger had entrenched itself so deeply in the German mind over the many years of persecution.[116] Jehovah's Witnesses had to fight well into the final decades of the twentieth century to be acknowledged on an equal status with the mainline churches and to gain the status of a corporation under public law.[117]

After a relatively short breather, Jehovah's Witnesses in the East German Democratic Republic suffered oppression and persecution once again. It seems that even the Communist ideological state did not want to tolerate deviation from the Socialist behavioral norm. Instead, the state used all means at its disposal to work toward destroying this small religious community.[118]

At least 500 Jehovah's Witnesses experienced discrimination or persecution in one form or another under both dictatorships. Three hundred and twenty-five of them suffered persecution in the GDR, as well as under the Nazi regime, most of them were men. Of these 325 citizens, 29 (25 men, 4 women) died in the Soviet occupation zone (SBZ) or in prison in the GDR, for example, as a result of illness (refusal of medical treatment), as a consequence of severe maltreatment, or were intentionally killed, or died as a direct result of their imprisonment. Of the 62 fatalities in the Soviet occupation or GDR prisons (46 men, 16 women; of this number, one man and one woman in the Soviet occupation zone) approximately 47 percent had already been imprisoned under the Nazi regime.

Conclusion

Of the approximately 25,000 Jehovah's Witnesses in Germany (35,000 when the occupied countries are included) around 10,700 German Jehovah's Witnesses were openly persecuted by the Nazis (including the occupied territories: 13,400), approximately 8,800 Germans were imprisoned (including occupied countries: 11,300) and 2,800 were deported to concentration camps (including occupied countries: 4,200). About 950 Germans lost their lives as a direct consequence of Nazi persecution in the years up to 1945 (approximately 1,500 when the occupied countries are included). In total, around 370 Jehovah's Witnesses were executed, having been sentenced to death, for the most part, as conscientious objectors. After their liberation from the Sachsenhausen concentration camp, 230 Jehovah's Witnesses from six different countries met on May 3, 1945, in a forest near Schwerin in Mecklenburg. Together, they drafted a resolution in which they thanked their God Jehovah for His undeserved goodness, and committed themselves anew to studying the Bible and to their missionary work.[119]

Part Five

To the Victor Belongs Justice: At Nuremberg and Beyond

From 1942 on, the Allies, especially the Soviets, felt obligated to bring the Nazi war criminals to justice. From the early phase of the German invasion of Russia, Operation Barbarossa, in June 1941, the Soviets ambitiously filmed all the atrocities committed during the occupation of Russia and Ukraine. Vyacheslav M. Molotov, people's commissar of foreign affairs of the USSR, in his note to all ambassadors and ministers of countries, described the documentation of Nazi atrocities which later filled the screen at the Nuremberg Trials. The graphic footage filmed by cameramen with the Soviet Red Army highlighted the massacre of innocent citizens on the German Army drive toward Moscow. It was only at the Allied liberation of the concentration camps that the British and Americans were able to show the West the shocking images of the Third Reich's victims. Prior to the liberation of the camps, the West perceived accounts from Russia as propaganda. General Dwight D. Eisenhower, on his visit to Ordruf concentration camp on April 12, 1945, confirmed the atrocities of the Nazis and invited the media, politicians, and publishers to make known that this was not propaganda. The Allies paraded German citizens into the barracks overflowing with corpses and walking skeletons to inculcate in them a sense of guilt for having allowed their leaders to abuse the law and turn a blind eye to the gradual destruction of European Jewry.

Already in December 1942, the Allied leaders of Great Britain, the United States, and the Soviet Union had every intention of prosecuting those Nazi leaders responsible for the mass murder of civilians primarily noting the large numbers of Jews massacred. Churchill proposed an outright execution of the Nazi leadership while Stalin initially urged the execution of 50,000–100,000 German staff officers. Later he agreed upon a trial, but in his mind, it would be a show trial like the 1930s Soviet mock trials where the defendant was convicted prior to the trial. Reason prevailed, thanks to the Americans.

The four Allied powers, the United States, England, France, and the Soviet Union, met in London on August 8, 1945 to decide upon the prosecution of the Nazi war criminals and signed the London Agreement. It became the foundation for establishing the International Military Tribunal at Nuremberg, and Chief Justice Robert H. Jackson led the US team at Nuremberg in November 1945 in a democratic process whereby those charged with criminal activities had their day in court with legitimate defense

attorneys. The conspiracy charges brought against the high-ranking officials included war crimes, crimes against peace, and crimes against humanity.

In addition to the principal Nuremberg Trial that the four Allies organized, the International Military Tribunal, there were twelve subsequent Nuremberg Trials that were conducted by the Americans in that zone, including the more well-known Physicians' Doctors' Trial (December 9, 1946 to August 20, 1947). One of the trials the Americans also held there was the juror's trial (March 5 to December 4, 1947), a trial of sixteen judges and attorneys who were charged with creating a plan to establish racial purity throughout Germany through racial policies as in the Nuremberg Laws and eugenics principles. This was a critical trial because it focused on the recommitment to law following the manipulation and abuse of the legal system since 1933.

Later trials, such as those within Germany, like the Frankfurt Auschwitz Trials (1963–67), had trouble holding individuals fully accountable for crimes during the Third Reich but helped preserve evidence of atrocity and the historical record, as well as the possibility for restitution for victims. The hope was that they would educate the next generation of Germans as well as an international audience and deter similar potential offenses. As the staff at the Simon Wiesenthal Center state, "Late, but not too late!" The famed Nazi hunter himself once proclaimed, "Justice for crimes against humanity must have no limitations."

16

German Courts in the Maelstrom of Criminal Guilt: The Career of Functional Liability in Nazi Death Camp Trials, 1963–2016

Michael Bryant

For all its fragility and imperfection, the capacity of the mind to register its perceptions and relay them accurately and intelligibly has been essential to the success of the trials of Nazi perpetrators. This was no less true in proceedings conducted decades after the events at their center as it was for trials of accused Nazi perpetrators immediately after the war. In an interview Dieter Ambach, the prosecuting counsel in the mammoth West German Majdanek trial (1975–81), affirmed the critical role of witness testimony:

> Question: Do you think the statements of witnesses are still vital for a trial dealing with crimes that lie so far in the past? Is it reasonable to examine witnesses 20 or 30 years after the event [they are alleged to have experienced]?
>
> Ambach: Yes, that is highly reasonable. Because the events we inquired about were of such a horrible nature that they were seared into the minds [of the witnesses], so that after many years they were retrievable. We proved relatively quickly the crimes and the charges. There were around 120 different charges in the indictment. *The difficulty was to connect certain persons with these events.* (emphasis added)[1]

The italicized final sentence in the preceding quotation underscores the centrality of eyewitnesses to proving illegal acts against individual criminal defendants. In death camp cases like the Majdanek trial, witnesses were particularly crucial because the documentary evidence connecting specific perpetrators to specific crimes was thin. Hence the prosecution called 215 former prisoners from the Majdanek camp to testify (all together 250 witnesses from 10 countries testified at the 474-day trial, making it the longest trial in German history). The Frankfurt Auschwitz trial (1963–65) yielded a similar statistic: 211 erstwhile inmates testified against their former tormentors.[2] Although the outcomes of these death camp trials were mixed, without eyewitness testimony not a single defendant would ever have been indicted, much less convicted.

To the sane nonlegal mind, the demand of the law for proof of a concrete criminal act in death camp cases may seem inexplicable. Shouldn't service as a guard in a death

camp be enough to convict? Why require live eyewitness testimony afflicted with all the flaws and infirmities of human recollection when we know that a suspect participated in atrocities, albeit in unverifiable measure? Here the sane nonlegal mind parts way with established criminal law and the flow of postwar German history. Modern criminal law is the byproduct of the Enlightenment, which laid down stringent conditions that the authorities would have to satisfy before a person could be convicted of an offense. Among these were the demand that criminal laws be clearly written, that the accused be able to confront her accusers and examine the evidence against her, and that she was immune to punishment in the absence of a law prohibiting her conduct (*nulla poena sine lege*—no punishment without a law). Another aspect of Enlightenment criminal jurisprudence was the related idea of individual criminal responsibility (*nulla poena sine crimen*). Before the state could prosecute and punish, it must first prove convincingly that the accused committed an illegal act defined as such by law. The requirement of a provable criminal act (*actus reus*, or *konkreter Einzeltatnachweis* in German) rejected the archaic principle of collective responsibility—a principle which, in the hands of powerful European monarchs in the early modern period, had led to despotic excess.[3] To counteract arbitrary government power, Enlightenment reformers insisted that an accused could be punished only after proof that he personally and intentionally committed a criminal act.

For this reason, the demand of West German law after 1949 that Nazi perpetrators could be convicted of murder only when proven to have committed a homicidal act was the expression of a modern, liberal legal order. That the requirement of an *Einzeltat* worked in favor of Nazi murderers, however ironic, does not vitiate the essential modernity of the rule. The Bundestag might have chosen a different path in the early years of the Federal Republic; it could have passed a law enabling the judiciary to convict Nazis involved in genocide during the war, on a theory of organizational criminality honed at Nuremberg and in the US Army trials of concentration camp guards at Dachau. That it did not meant that German judges and prosecutors who faced Nazi killers in the postwar era were equipped only with the conventional tools of criminal law—tools ill-suited to the singularities of Holocaust-related atrocities.[4]

That is, until 2011. In a criminal trial of former Sobibor guard John Demjanjuk, widely expected at the time to end in an acquittal, a Munich court convicted the former Cleveland auto worker of aiding and abetting murder, despite lack of evidence that Demjanjuk had himself committed a homicidal act within the camp. In the aftermath, state prosecutors across Germany reopened cold cases and indicted elderly former death camp guards, including two ex-Auschwitz guards convicted in 2015 and 2016 on a theory of liability crafted at the Demjanjuk proceeding.[5] The alacrity with which other trial courts in Germany swiftly adopted the Munich *Landgericht*'s reasoning in the Demjanjuk case may be without precedent in German legal history. Although this trend is too late to salvage the numerous cases rendered stillborn by the old rule, it signifies a noteworthy departure in German law from the procedural status quo, aligning the German legal system more closely with recent developments in international criminal law.

How did German courts come to discard the *Einzeltat* requirement in death camp cases? According to Holocaust scholar Lawrence Douglas, the direct cause of this

change was the Munich *Landgericht's* acceptance of the legal theory developed by German investigator Kirsten Goetze and advanced by the Munich prosecutor, Thomas Walther, that Demjanjuk's mere presence in the death camp was decisive to proving his guilt. Once Demjanjuk's assignment as a guard to Sobibor was established by means of his Trawniki identity card, Goetze reasoned, the lack of evidence of a specific criminal act committed by him became legally irrelevant. Rather, the burden of proof shifted from the prosecutor to the defense, which then could only avoid conviction by showing that Demjanjuk had not facilitated through his actions the camp's sole purpose—the mass extermination of Jews. In other words, during his five-and-a-half months at Sobibor, Demjanjuk *must have* participated in genocide as an accomplice of the Nazis. The accused's inability to meet this burden ensured his conviction.[6]

Prof. Douglas is undoubtedly right about the direct cause of this adoption of an "atrocity" paradigm in favor of the older "conventional murder" model.[7] Elsewhere in his consideration of the Demjanjuk trial, he suggests other, more contextual factors—the kind of factors once described by legal scholar Leo Katz as "mere conditions"[8]—which contributed to the change, such as the end of the Cold War and the passing of a compromised generation of former Nazis holding influential positions in the Federal Republic. Ultimately, whatever the long-term conditions that gradually enabled change, the breakthrough came when German courts ceased to view Nazi genocide as an ordinary crime and approached it instead "as a special challenge . . . demanding legal innovation."[9] The innovation was investigator Goetze's theory of "functional participation,"[10] holding that unspecified participation as a guard in a death camp was ipso facto proof of complicity to murder.

In fact, as Prof. Douglas recognizes, the theory of "functional participation" (or at least some version of it) is not truly innovative as a theory of criminal liability. While its roots lay in the Anglo-American doctrine of conspiracy as this notion was applied to Nazi crimes at Nuremberg, numerous legal systems before 1945 had condemned participation in criminal associations. The British India Act No. 30 (1836) prescribed a life prison term with hard labor for anyone "proved to have belonged to a gang of thugs." Article 266 of the French Penal Code (1944) likewise threatened with hard labor anyone who "affiliates with a combination formed, or participates in an alliance established for the purpose [of preparing or committing felonies]." Germany's efforts to combat criminal associations date back to the German Penal Code of 1871, which criminalized "participation in an organization, the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged." In the late 1920s, Weimar courts branded the German Communist Party a criminal organization, meting out sentences not only to its leaders but also to the lowest echelons of the group, including a delivery boy and a courier. We sometimes forget that, more than two decades before the IMT at Nuremberg, the Weimar judiciary had characterized the Nazi Party as a criminal organization.[11]

At Nuremberg the notion of a "criminal organization" was closely linked with the theory of conspiracy. Both were the handiwork of Lt. Col. Murray Bernays, a lawyer in the War Department's Special Projects Office. Drawing on US conspiracy law like the "Smith Act" (1940), which criminalized membership in any group advocating

the violent overthrow of the government, Bernays argued that Nazi perpetrators could be charged not only with substantive offenses like war crimes but also with membership in criminal organizations, the very purpose of which was to commit such acts.[12] Bernays's conspiracy idea surfaced in Robert Jackson's subsequent report to the president (June 6, 1945), in which he announced his intention "to establish the criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people and then their neighbors." The charge of conspiracy/criminal organizations was subsequently incorporated into the Charter of the IMT, Articles 6 (Common Plan or Conspiracy) and 9 (criminal organization). When the IMT issued its indictment on October 6, 1945, it listed the twenty-four named defendants as well as seven Nazi organizations: the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS, the SD, the Gestapo, the SA, and the general staff/high command of the German military.[13] In addition to war crimes, crimes against peace, and crimes against humanity, the defendants were charged with membership in one or more of these criminal organizations.

In his addresses to the IMT, Jackson expounded the four elements of collective criminality embodied in the conspiracy/criminal organizations charge. First, the members of the organization had to be bound together by "a collective, general purpose" or "a common plan of action." Second, the members must have joined voluntarily. Third, the aims of the organization were to commit acts listed as crimes in the IMT Charter, Art. 6. Fourth, it must be proven that the members knew of the organization's criminal aims. Once the IMT had declared a Nazi organization to be criminal and each of the four elements had been proven against a defendant, the burden of proof shifted to him. He was now presumed guilty, although this presumption could be rebutted by proof negating one or more of the four elements.[14]

The IMT largely followed Jackson's framework of labeling certain Nazi organizations as "criminal" and convicting the accused for membership in them.[15] However, the IMT judges insisted that membership alone would not be sufficient to convict a defendant. Rather, defendants could be convicted only when "they were personally implicated [as members of the organization] in" the crimes identified in Article 6. Absent this showing, defendants would be found not guilty. The proof requirement of an illegal act despite proven membership in a criminal organization would be enforced in both the IMT and proceedings before the US National Military Tribunal that followed, resulting in occasional acquittals.[16]

The ideas of group criminality and vicarious liability that underpinned the Allies' approach at Nuremberg were interpreted quite differently by other courts after 1945. To a striking degree, these non-Nuremberg proceedings more closely anticipate the rationale in the 2011 Demjanjuk case, raising the intriguing yet unverified prospect that Goetze and Walther were reaching back to these earlier trials for inspiration in drafting their own theory of functional participation. As the Allies were prosecuting the major war criminals at Nuremberg, the US Army was conducting a parallel series of military commission trials centered at the former Dachau concentration camp near Munich. Most of these trials dealt with breaches of the Law of War committed at the major German concentration camps. What is notable about these trials is that the military prosecutors and judges devised a theory of liability independent of the

Nuremberg proceedings. Rather than charge their defendants—most of whom were concentration camp guards—with conspiracy, the military commissions charged them with participation in a "common design" to mistreat prisoners in the camp. The "common design" was the sine qua non of the prosecutor's case at the Dachau "parent" case in November 1945: according to the chief prosecutor in his closing argument, "If there is no such common design then every man in this dock should walk free. . . . The test to be applied is [whether a defendant] did . . . by his conduct, aid or abet the execution of this common design and participate in it?" At trial, the prosecution portrayed the Dachau concentration camp as a system engineered to inflict harm on the prisoners—a system implemented and enforced by all members of the camp staff. The prosecution could prove the guilt of a former guard through evidence that his duties necessarily involved him in promoting the common design of harassment and maltreatment of the prisoners. In effect, the Dachau parent case (as well as the subsequent Mauthausen parent case, held from March 29 to May 13, 1946) established a rule to be followed in all subsequent military commission trials—namely, that being a guard at a Nazi concentration camp created a rebuttable presumption of guilt. Although not explicitly described as such, the Dachau trials held that concentration camps like Dachau, Mauthausen, Buchenwald, etc. were criminal organizations, the members of which were presumed to have committed war crimes *because that was their job*.[17]

The common design schema at the Dachau trials was not a synonym for the conspiracy doctrine at Nuremberg. The latter required evidence of the accused's meeting with his confederates to pursue an illicit purpose. Such direct contact among co-conspirators is far easier to prove when the accused is a high-ranking official serving in a position that generates a paper trail. Low-ranking concentration camp guards, by contrast, rarely leave paper trails probative of their involvement in a conspiracy; hence, that doctrine was deemed early on to be ill-matched to their crimes. Instead, the common design theory was adopted because it did not require evidence of a meeting; it required only, in the words of Black's Law Dictionary from which the idea was taken, proof of a "community of intention between two or more persons to do an unlawful act."[18] Proof of assignment to the camp as a guard was enough.

The American Army was not the only national judicial body experimenting with the criminal organizations idea. In the postwar trials of top Nazi officials conducted by "Poland's Nuremberg," the Supreme National Tribunal (in Polish, *Najwyższy Trybunał Narodowy,* or NTN), Polish judges embraced a theory of systemic criminality that closely resembles the Army's "common design." In August 1944, the "Lublin Committee," the provisional government of Poland after Soviet liberation, issued a decree to authorize prosecution of Nazi perpetrators in Poland. An amended version of the decree (revised in December 1946) reflected the influence of the London Charter's criminal organizations charge. The new Article 4 provided that participation in a "criminal organization" established by Germany or its allied states was punishable by a prison term of not less than three years or even the death penalty. §2 of Article 4 defined as criminal any such organization which "aimed to commit crimes against peace, war crimes, or crimes against humanity," or which used these crimes in the pursuit of other goals. As interpreted by NTN judges, Article 4 criminalized the same bodies which the

Figure 13 Headquarters of the War Crimes Group of the Dachau concentration camp. Courtesy of the United States Holocaust Memorial Museum.

Nuremberg IMT had done: the SS, SD, Gestapo, and the leadership of the NSDAP (the Gauleiters, Kreisleiters, Ortsgruppenleiters, and Amtsleiters). Thus, when the NTN held its trial of former Auschwitz commandant Rudolf Hoess in Warsaw (March 1947), the indictment charged him inter alia with membership in two criminal organizations, the NSDAP and the SS.[19] In the Hoess trial, the Poles remained within the parameters of Nuremberg's definition of Nazi criminal organizations. By the time of the "2nd Auschwitz trial" in December 1947, however, the NTN sitting in Cracow struck off in a boldly innovative direction, declaring that the system of German concentration camps was itself a criminal organization. In their verdict, the NTN judges acknowledged that they had enlarged the IMT's definition of criminal organizations yet insisted that they had the right to declare Nazi organizations criminal independently of the IMT's judgment, so long as their definitions did not contradict the IMT's findings. Insofar as the IMT in its verdict had referred to the camps as an instrument for committing war crimes and crimes against humanity, the subsequent declaration by another court that the administration and personnel of the camps amounted to a criminal organization did not contradict the IMT's position.[20]

Given the prevalence of the "atrocity paradigm" at Nuremberg, the Dachau trials, and the Polish NTN, why didn't the West Germans adopt it in their own Nazi prosecutions? The simple answer to this complex question is summed up in the words of the presiding judge in the Frankfurt Auschwitz trial, Hans Hofmeyer, who

described the proceedings as "dealing here with a normal criminal trial, may it have a [remarkable] background."[21] The Germans, in other words, believed that ordinary German criminal law and procedure would be adequate for their prosecutions of Nazi perpetrators. From late 1951 onward, when West German courts were vested with full jurisdiction over Holocaust-related offenses, death camp personnel would be charged with murder[22] either as principals or as accomplices. Guilt would not be attributed to them based on their membership in organizations—like the Nazi death camps—devoted to the genocide of European Jews. Rather, guilt or innocence would be determined by proof of individual acts of homicide within the camps. Particularly in death camp cases in which there was a paucity of documentary evidence,[23] this meant that eyewitness testimony clearly and reliably connecting individual defendants with homicidal crimes would be decisive.

Remarkably, German courts in the 1960s occasionally flirted with an expansive interpretation of criminal liability. In its 1964 review of the appeals filed by former guards at the Chelmno camp, the German Supreme Court (*Bundesgerichtshof*, or BGH) set forth a rationale bearing an uncanny resemblance to the theory of functional participation in the Demjanjuk trial:

> According to the findings . . . solely through their membership the defendants had supported the killing of the victims by the Sonderkommando [at Chelmno], which had been formed expressly to eradicate the Jewish population of Poland. . . . The kind of tasks entrusted to them in the implementation of individual [acts of killing] is therefore—at least in this context—without significance.[24]

By 1969, however, the BGH had recanted its earlier sympathy with functional participation. In its review of appeals from the Frankfurt Auschwitz trial, the high court in effect held that mere presence at Auschwitz as a guard was not enough to convict; an individual homicidal action by the defendant had to be proven.[25] In the wake of this verdict, West German courts followed the BGH's evidentiary rule until 2011.

Well before the Supreme Court's reaffirmation of the *Einzeltat* requirement in 1969, German courts were already grappling with the Nazi death camps using the tools of West German domestic law. In the 1964 trial of eight former staff members of the Belzec death camp, seven were acquitted because their defense of duress could not be refuted by surviving witnesses. (The only defendant convicted, Josef Oberhauser, was found guilty only because he enjoyed command authority within the camp.) Far more successful were the Auschwitz and Treblinka trials. The Frankfurt Auschwitz trial (1963–65, twenty-two defendants) ended in a conviction rate of 77.3 percent, including six defendants sentenced as perpetrators of murder to lifelong prison terms. The Düsseldorf Treblinka trial (1964–65, 14 defendants), buoyed by a powerful and consistent eyewitness testimony, achieved a conviction rate of 90 percent, sending four of the accused to prison for life.

The outcomes of the Chelmno, Sobibor, and Majdanek trials were uneven but on balance disappointing. Between 1962 and 1965, four trials of some thirteen camp guards from the Chelmno death camp were held in the Bonn *Landgericht*, leading to a 50 percent acquittal rate and no lifelong prison sentences among the convicted

(all were considered accomplices rather than principals). The *Landgericht* Hagen convicted six of the eleven former Sobibor guards in 1966; among the convicted, only Karl Frenzel was deemed a principal (*Täter*) and given a life sentence.[26] The *Landgericht* Düsseldorf acquitted four of the twelve Majdanek accused in 1979; in 1981 the court convicted seven of the remaining defendants and acquitted the eighth. Only Hermine Ryan received a life prison term, while her co-defendants were given anywhere between three and twelve years. In view of the enormous amount of time and effort invested in the trial, many German observers, including the prosecutors, were crestfallen with the result. A banner was unfurled outside the courtroom after the verdicts were announced, bearing the motto "The Majdanek Trial. A Picture of Misery of Judicial Praxis."[27]

Wherever in these trials an accused was acquitted, the cause was failure to prove a specific criminal act committed by the defendant. Eyewitness testimony, while nearly always a necessary condition for convicting ex-guards in death camp trials, was not always sufficient: acquittals occurred even in the midst of trials bolstered with hundreds of witnesses as in the Majdanek and Auschwitz cases. This was also the evidentiary standard during the first decade of the 2000s, when the Demjanjuk case was being assembled for prosecution. In 2003, the head of the main German investigative office for Nazi crimes in Ludwigsburg, Kurt Schrimm, wrote about Demjanjuk: "Guard: Trawniki, Okzow, Majdanek, Subobir [*sic*], and Flossenbürg; proffered documents do not support an allegation of individual criminal wrongdoing."[28] Several years later, shortly before the trial began, a leading Dutch expert on Nazi trials puzzled over why the Germans would prosecute a former death camp guard without proof that he had committed a homicidal act, and predicted Demjanjuk's acquittal. Both Schrimm and the Dutch expert knew that no German court in the past half-century had accepted the theory that service in a death camp was enough to convict an accused guard of murder.[29]

And yet, it did. By 2011, the German judiciary was ready to accept the logic of the atrocity paradigm in favor of the ordinary crime model that had dominated previous death camp trials. Lawrence Douglas tends to vacillate on the reason for this *volte face*. In an article published on the trial in *Harper's*, he opined that the German judiciary's "belated understanding" of the "simple, terrible logic of the exterminatory process" coincided "with the passing of the generation of the perpetrators"—a fact "as ironic as it is unsurprising."[30] Similarly, in his monograph on the trial, Douglas suggests that the disappointing results of West German prosecutions of Nazi crimes, particularly in the 1950s, were due at least in part to the "bad faith" of German jurists.[31] However, elsewhere in his book, he derides the critical view as "naïve" and "crudely deterministic."[32] For Douglas, a structuralist approach to Nazi trials in German courts best explains the state of German law, both before the Demjanjuk trial and afterward. "[The change] never would have happened without the stubborn exertions of the OSI and the Central Office" [two offices deeply involved in the Demjanjuk investigation—MB]. This view, however, begs the question of why judges throughout Germany—and not just in Munich—should have been so receptive to these "stubborn exertions" that they were willing to overturn decades of settled law and risk being reversed on appeal.

The point is not that Douglas is wrong; I think his thesis is quite defensible. The point is that it is only part of the story. Undoubtedly the research of OSI and Central Office officials affected the outcome. The passing of a generation closely connected to the events of the Second World War assuredly played a role (according to one poll done in 1964, 63 percent of men and 76 percent of women in West Germany opposed trials of accused Nazis).[33] I would like to suggest a further factor that may have contributed to the change registered in the Demjanjuk verdict: the openness of German law to external legal standards that have increasingly altered the very nature of the German legal system.

Since the emergence of the Federal Republic out of the Allied Trizone in 1949, German civil, criminal, and administrative law[34] have been at the crossroads of European and international legal principles. In the late 1950s, as the West Germans were reengaging with Nazi trials, the European Economic Community (EEC) was established, firmly anchored by France and Germany as founding members. Thereafter the EEC formed an executive authority, the Commission, which implemented community policies; a Council of Ministers, which passed community law; a European Parliament, at its origin a consultative body consisting of delegates from the national legislatures of member states; and the European Court of Justice (ECJ), which decided cases and resolved disputes involving community law. In landmark verdicts issued in 1963 and 1964, the ECJ asserted the supremacy of EEC law over the domestic law of community nations.

The two foundational principles of the ECJ are the doctrines of "direct effect," which states that EU treaties and legislation are directly binding on the citizens of member states regardless of their national law, and "supremacy," holding that EU law prevails over the law of member states that might conflict with it. Although both of these principles have at times brought the ECJ into sharp disagreement with German courts, the German legal system has overall been remarkably deferential to EU law. Similarly, the Germans have adapted their law when necessary to the requirements of the European Convention on Human Rights and its interpreter, the European Court of Human Rights (ECtHR) in Strasbourg. The Germans have been so amenable to the substantive concerns of the European Convention that, in the two years preceding the Demjanjuk verdict, the ECtHR rendered adverse judgments against Germany in only a handful of instances. One reason for Germany's success in defending these cases before the ECtHR is the civil rights filtering process under German law: the Federal Constitutional Court (FCC), Germany's preeminent authority on the Basic Law, reviews constitutional complaints before they reach Strasbourg for decision. In 2010 and 2011, the FCC found not one case in which basic rights had been violated—a remarkable fact indicative of the degree to which German courts at all levels have internalized European standards of basic rights.[35]

Similar trends respecting the interpenetration of German and international criminal legal standards are observable. One of the areas of German law suggestive of international influence is the role of the victim in the criminal trial. As a German legal expert described it in a 2011 article, we are witnessing the dawning of the "era of the victim" in German criminal procedure—an era in which concerns to integrate the victim of crime into the trial process, as well as to seek restitution for victims'

losses, increasingly displace the previous emphasis on rehabilitating the offender.[36] The emergence of justice for victims as a priority of the criminal trial has tracked parallel developments in international criminal law. The Statute of the International Criminal Court (ICC), Art. 68 (3), explicitly enjoins the Court, "where the personal interests of the victims are affected," to "permit [victims'] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court."[37] The ICC Appellate Chamber has interpreted Art. 68 (3) to guarantee victim participation as early as the investigation stage of the case.[38] We might debate the causative direction in this convergence of international and German national law pertaining to victims' rights—that is, whether the Germans acquired the new emphasis from international law or vice versa. Regardless, it seems clear that the affinity, far from being accidental, has arisen from a genuine interaction of international and German procedural norms.

The receptivity of German law to outside influence, be it from Strasbourg or The Hague, may help account for the stunning decision in the Demjanjuk trial. If memes beyond German law have been transformative of it, why not the idea of a "joint criminal enterprise?" Joint criminal enterprise doctrine (sometimes referred to as the "common purpose doctrine") is a new wine skin containing vintage wine—namely, the "common design" construct of Nazi war crimes trials of the postwar era.[39] The modern reincarnation of "common design" as JCE occurred on the cusp of the new century, when the International Criminal Tribunal for Yugoslavia's Appeals Chamber reviewed the case of Duško Tadić, a member of a Serbian paramilitary force accused of killing five Bosniak civilians. The trial court had acquitted him for lack of evidence that he had directly participated in the murders of the five villagers. In its decision reversing Tadić's acquittal, the ICTY Appeals Chamber revived the notion of a "common criminal purpose" from post–Second-World-War trials. The Appeals Chamber classified "common purpose" into three types: (1) cases in which all of the accused, possessing the same criminal intention, acted in accordance with a common design; (2) concentration camp cases (e.g., Dachau and Belsen), in which the defendants, all members of the camp hierarchy, "acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes"; and (3) cases in which one of the accused commits an act outside the common design that is nonetheless a foreseeable result of carrying the plan into effect. Thus, while no individual acts of homicide could be proven against Tadić, the Appeals Chamber insisted that he should have been convicted of war crimes and crimes against humanity. The evidence proved that he intended to support the criminal purpose of removing the non-Serb population from the Prijedor region. In carrying out this plan, the killings of non-Serbs was foreseeable (JCE #3, above).[40]

ICTY indictments in the aftermath of the Tadić appeal until 2004 were studded with allegations of JCE. As much as 64 percent of all indictments filed mentioned JCE, while others accusing defendants of acting "in concert" have been glossed to implicate JCE doctrine, thereby raising the percentage to 81 percent.[41] The stringent criteria for proving rape as a crime against humanity have enticed prosecutors at both the ICTY and International Criminal Tribunal for Rwanda (ICTR) to categorize rape and sexual violence as instances of JCE #3—thereby enabling conviction even where an individual

act of rape has not been proven. As scholar David Crowe notes, the ICTR judges have made frequent use of JCE doctrine as it has emerged from ICTY trials, characterizing JCE as a "mode of liability" rather than a crime itself.[42]

JCE #2 relating to international crimes committed in concentration camps bears a striking resemblance to the Demjanjuk court's theory of functional participation. Sobibor, of course, was not a concentration camp, but the single-minded purpose of the death camp—to murder every last Jew stepping foot within its precincts—lends an a fortiori cogency to treating Sobibor like a joint criminal enterprise. Service as a concentration camp guard would inevitably involve one in mistreating prisoners; however, because concentration camps were not given over solely to the purposes of genocide, a concentration camp guard could not be presumed to have been an accomplice to murder without proof of an individual criminal act. On the other hand, if one worked as a guard at a death camp like Sobibor, in the performance of one's duties, one must necessarily have supported the criminal design of the Nazis to exterminate the Jews. Q. E. D.

The Munich *Landgericht's* judgment does not refer to JCE under international law as a factor in its consideration.[43] So far as I know, neither Thomas Walther, Kirsten Goetze, nor the *Strafkammer* judges have recounted the intellectual and historical foundations underlying their theory of functional participation. In the final analysis, it hardly matters. The permeability of modern German law to European and international conceptions is not an immediate cause of the Demjanjuk bombshell; it is more akin to Leo Katz's "mere conditions" behind historical events. Nonetheless, it helps explain why German judges would decide in 2011 to change course. On the view I'm advancing here, the minds of German jurists were conditioned by the broad, cosmopolitan environment in which German law has existed since the rise of the EEC in the 1950s. Consciously or not, German jurists are influenced by these categories and concepts, and from time to time these ideas effect a change in the substance and procedure of German law. The Demjanjuk verdict was one such occasion. In 2011, the Federal Republic of Germany arrived at the view held as long ago as 1945 that the worst of the Nazis' crimes was a criminal plan to annihilate Europe's Jewish population. Participation in carrying out such a design by necessity involved criminal wrongdoing of the worst, most heinous kind. With its verdict in Demjanjuk, Germany ceased to be a country on its own *Sonderweg*, its own peculiar path, using the limited tools of ordinary law to deal with extraordinary crimes. For the first time, the atrocity paradigm flashed like a meteor over a Nazi trial in a modern German court. There is moral grandeur in this turn, even if it occurred far too late fully to satisfy the thirst for justice.

17

The Devil's Chemists on Trial: The American Prosecution of I. G. Farben at Nuremberg

Mark E. Spicka[1]

The International Military Tribunal (IMT) from November 1945 to October 1946 has captured the attention of historians and the general public alike, but it was not the only trial conducted at Nuremberg. Appearing before the tribunal were major officials of the Third Reich, such as Hermann Göring, Rudolf Hess, Albert Speer, Joachim von Ribbentrop, Wilhelm Keitel, Hjalmar Schacht, Hans Frank, and others. The IMT is deservedly remembered as a landmark step in the development of international law by setting precedent for offenses such as crimes against peace, crimes against humanity, and membership in a criminal organization. Relatively unexamined are the war-crimes trials conducted by the United States in Nuremberg that began after the conclusion of the IMT and ran until April 1949.[2] The American trials were unique among war-crimes trials held by the Western occupying powers. While the French and British prosecuted mainly concentration camp personnel or German soldiers who had committed specific atrocities, the American trials were deliberately wide ranging in an effort to help reform Germany by condemning major segments of the Third Reich. The docket included bankers and industrialists; governmental officials; SS, police, and party officials; physicians; and military leaders. In a number of the trials, the prosecution pursued the legally ambiguous—and difficult to prove—offenses of crimes against peace and conspiracy rather than more concrete offenses, in the hope of exposing the breadth of war-crimes guilt.

Frank Buscher in *The US War Crimes Trial Program in Germany, 1946-1955* has argued that the United States had three goals with its war-crime trials: to prosecute criminals, to reeducate the Germans, and to establish a future code for governments and armies. Focusing primarily on high-level policy developments, he contended that the Americans failed on all counts because the program drew criticism upon the American occupation from the press and politicians at home and abroad, and as a result, American commitment to the program quickly faded. Furthermore, with the Germans' reluctance to accept collective guilt for the Nazi crimes, the war-crime trials failed as an instrument of reeducating the Germans.[3] Other scholars have detailed how the social and political context of the Allied occupation and the conditions of the postwar world shaped the IMT and subsequent trials. Most notably, Donald Bloxham

has argued that the American desire to document the entire conspiracy of a Nazi plan to wage aggressive war was a product of both political and legal considerations and resulted not only in a number of disappointing judgments for the prosecution but also in a distorted memory of Nazi crimes that minimized the genocide of the Jews.[4] Trying to serve justice to individual war criminals while also using the trials as part of the denazification of Germany and the establishment of precedent in international law was an endeavor undoubtedly fraught with challenges. The examination of the single trial of the industrial giant of I. G. Farben illustrates quite clearly the conflicted political factors at work in the American occupation of Germany that help explain the American failure to prosecute effectively German war criminals.

Of the twelve American-sponsored trials at Nuremberg, the I. G. Farben case best represents the counteracting dynamics of what might be called the "three Rs" that formed simultaneously competing goals of the occupation: retribution, reform, and reconstruction. Many historians of the American occupation have contended that the American Military Government quickly emphasized economic recovery over any plans for retribution or reform. High-level policy toward I. G. Farben illustrates this view well. I. G. Farben, the largest chemical firm in the world, was the most notorious German industrial concern during the Third Reich. It practically monopolized the German chemical industry while it actively participated in Göring's Four-Year Plan and by war's end exploited slave labor at its synthetic rubber plant at Auschwitz and elsewhere. Consequently, I. G. Farben was a key focus of America's occupation policy regarding the denazification and decartelization of the German industry.[5]

Yet while the trial of I. G. Farben was ongoing in 1947–48, the firm began to play an increasingly large role in the American plans for West Germany's reconstruction. As a result, the American commitment in Washington and at the level of the American occupation zone to prosecute the I. G. Farben executives and to break the firm into small, inefficient units began to fade. Despite the changing goals of the occupation as a whole, however, and despite growing legal and administrative constraints, including unfavorable precedents set at the IMT and limited financial resources at the disposal of the prosecution, the I. G. Farben prosecutors persisted in their efforts for reform and retribution. Why, despite the likelihood of its failure, did the prosecution attempt to prove the accused guilty of crimes against the peace and conspiracy? The answer lies in how the prosecution leader conceived the Third Reich and German society as a whole. Telford Taylor, the head of the subsequent trials, believed that implicating German industrialists with Nazi aggression was essential for the establishment of German democracy, while Josiah Dubois, the head of the I. G. Farben trial team, was convinced that I. G. Farben represented part of a fundamentally belligerent German culture that had to be destroyed lest further outbreaks occur. Together, their views led them to pursue a flawed trial plan at the expense of more promising strategies.

Even before the war had ended, I. G. Farben had drawn considerable attention from American policy planners. In 1942, the Antitrust Division of the Department of Justice established an Economic Warfare Section to investigate the activities of German firms in neutral nations. In addition, the State Department organized the

Executive Committee on Economic Foreign Policy to study economic concentration within Germany in the context of international cartel control. All agreed that cartels had a pernicious effect on economic development, employment, and freedom of trade. But within the circles of policy planners, especially in the State Department, there were great differences of opinion on what actually was the relationship between cartels and the "German Problem." Fundamentally, the issue revolved around whether German industry, in its highly concentrated form, had been used as an instrument by the Nazis for the purpose of waging war, or whether it had contributed to German belligerence from the very start. Arguments supporting reform of, or retribution from German industry—different, yet overlapping positions—were already present in discussions in Washington. Many planners involved in these discussions made their way to occupied Germany, working on reparation and decartelization issues with the Economics Division of the Office of the Military Government for Germany, United States (OMGUS). The division of Germany into the American, Soviet, British, and French zones eventually led to a de facto breakup of the firm, and in late 1951 the three successor firms of Hoechst, Bayer, and BASF were established.[6]

The genesis of the American trial plan occurred in Washington in autumn 1944, when the Treasury Department, headed by Henry Morgenthau, battled with the State and War Departments over the American occupation policies. Morgenthau attempted to push through his infamous plan for retribution, "Program to Prevent Germany from Starting World War III," which stipulated that Germany should have its industry stripped away. He even suggested that members of Nazi organizations such as the SS and the SA be summarily shot. Department of War secretary Henry Stimson fervently opposed Morgenthau's proposal and sought a more moderate plan that would help promote democracy within Germany. At the same time, Murray Bernays, a civil attorney working in the War Department, wrote a short report entitled "Trial of European War Criminals" in which he argued that individual defendants should be tried, but that each defendant would represent a major German government organization. Once these individuals were convicted for conspiracy to commit murder, terrorism, and violation of the laws of war, their organizations would also be found criminal. Every member of these organizations would be a criminal conspirator and subject to arrest and punishment, thereby providing the Allied authorities with an effective instrument to cleanse Germany of second-rank Nazis. By early spring 1945, this pragmatic view had won out over Morgenthau's and was combined with the theory of the conspiracy of the Nazis to wage an aggressive war (i.e., crimes against peace). It was this trial plan that the Americans pressed their allies to pursue in the IMT.[7]

The twelve American subsequent trials at Nuremberg were built upon the IMT, with jurisdiction for the trials based upon the charters established by the Americans, Soviets, British, and French during the war. The St. James Declaration of January 1942 and the Moscow Declaration of November 1943 spelled out the intention of the Allies to conduct trials, while the London Charter actually established the jurisdiction of the IMT. Control Council Law No. 10, ratified on December 20, 1945, granted jurisdiction to the four powers for subsequent trials held in their individual zones of occupation. The law also recognized the four categories of crimes to be pursued in the subsequent trials: "Crimes against peace," the planning, preparation, initiation, and waging of

aggressive war; "war crimes," foul play in combat or against combatants; "crimes against humanity," the degradation or extermination of national, political, racial, religious or other groups; and "membership in criminal groups or organizations."[8]

In January 1946 Executive Order No. 9679 stipulated that OMGUS would pursue a subsequent set of war-crime trials once the IMT was completed. In October 1946 the Office of the Chief of Counsel for War Crimes (OCCWC), which was to conduct the subsequent trials, was established as a division under the authority of OMGUS. At the same time Telford Taylor, who had prosecuted the German high command and general staff at the IMT, was named head of the OCCWC, reporting directly to the military governor, Lieutenant General Lucius D. Clay. With these measures the actual mechanism of the trials within the American zone was created, although Taylor and his staff had been working on the subsequent trials since early 1946, while the IMT was still being held. During this time Taylor thought there might be a subsequent IMT running parallel to the American trials, but by October 1946 the effort for a subsequent IMT had been abandoned because it would be cheaper and quicker to run trials in the individual occupation zones. This was especially attractive to Justice Robert H. Jackson, the chief counsel of the US prosecution at the IMT, since most of the defendants could be charged with "single and specific crimes which will not involve a whole history of the Nazi conspiracy."[9] In spite of Jackson's sentiments, however, the case against I. G. Farben involved precisely such a history.

Telford Taylor's perception of the "German Problem," including the relationship of German economic leaders to the Nazi regime, helped lead to the construction of a trial plan focused upon crimes against peace. During the 1930s he had been a lawyer within several governmental agencies, including the Agricultural Adjustment Administration and the Senate Committee on Interstate Commerce, and was a firm supporter of Roosevelt's New Deal. He believed strongly in the trials as a vehicle for reforming German society. To Taylor, the chief counsel for all the subsequent tribunals held at Nuremberg, the I. G. Farben trial was part of the implementation of the US' policy of denazification, democratization, demilitarization, and decartelization. In his final report on the trials to the Secretary of the Army in 1949, Taylor explained that he had pursued the crimes against peace "out of strong personal conviction no less than because it was my official duty to enforce the provisions of Law No. 10—including its proscription of war-making."[10] In an interim report from May 1948, Taylor wrote that the usefulness of the subsequent trials lay in the precedent they set for others to follow in international law. The trial records had to be published since the United States had "made a heavy moral investment in these trials, and this investment will not show a favorable rate of return if the records are left in the dust on the top shelf out of reach."[11] Part of the investment that the United States had made was to reestablish a democratic government in Germany supported by responsible citizens. In his final report Taylor expounded on the use of the trial records to create a guide for Germany's reeducation. He emphasized that the trials in Nuremberg were an essential element of the occupation as a whole because they undermined the defense put forth by the industrialist Friedrich Flick that he was merely "howling with the wolves," just going along with the pack. Therefore, to Taylor, the trials exposed the "true nature of the Third Reich," in which the responsibility for war crimes was shared by many. The

inclusion in the trial plan of crimes against peace, which spread guilt to industrialists, therefore was imperative for the reeducation of Germans back to what he described as the "normalcy" of democracy.[12]

By early 1946 Taylor had organized the various subsequent trials divisions of the Office of Chief of Counsel for the Prosecution of the Axis Criminality, the predecessor of the OCCWC, into six groups, two of which would investigate industrialists and financiers and their relationship to the Nazi regime. Taylor asked his researchers to compile information on large industrialists who had "a) supported the Nazis in their rise to power; b) participated with the Nazis in preparing Germany for aggressive war; or c) assisted the Nazis substantially in waging aggressive wars."[13] Those industrialists who had profited from the expropriation of property on political or racial grounds, or who had committed crimes against humanity, among other charges, were to be investigated. A draft of criteria for investigating leading German industrialists written by Drexel Sprecher, who had participated in several cases at the IMT and was by the beginning of 1946 the chief investigator of industrialists, stressed that industrialists had helped bring about an aggressive war and that one criterion should be "active participation in and planning for the conversion or expansion of German industry for war prior to September 1939, including secret rearmament."[14] Although slave labor and plunder and spoliation were still included in the criteria, crimes against peace occupied by far the most attention in the directives.[15]

According to Control Council Law 10, crimes against peace consisted of four different acts: planning, preparation, initiation, and waging an aggressive war. However, the dimensions of these charges were not exactly clear, especially before the IMT had reached judgment in October 1946. For example, what degree of knowledge of the aggressive character of the war must be possessed? How influential had an individual to be in determining national policy, or at what state of the criminal enterprise had he to have become involved? Was it sufficient merely to wage aggressive war after its inception if he had no share in its planning or initiation? As seen by the early directives, investigators were trying to maintain the broadest interpretation of crimes against peace.[16]

By the middle of 1946 Taylor must have been well aware of the difficulties of successfully trying an individual for a common plan and conspiracy to wage aggressive war. In an April 1946 cable to the secretary of state and secretary of war, and also forwarded to Taylor, Justice Jackson commented that "if this tribunal [IMT] should hold the case against Schacht [Hitler's economics minister until 1937] insufficient, the precedent will embarrass the trial and probably preclude the conviction of other industrialists." At the IMT by this point it was apparent that only a handful of the top Nazis would be found guilty of this count. In fact, Jackson indicated that "rumors about judges' attitudes float about Nuremberg just as they do about any county seat. Without relying too much on them, it is possible of course that some defendants, possibly Schacht, will escape."[17] In the end, Hjalmar Schacht was acquitted of all charges, and only eight out of the twenty-two defendants at the IMT were found guilty of crimes against peace.

In Josiah Dubois, the head of the prosecution of I. G. Farben, Taylor had found perhaps the perfect lawyer to carry forth the charge of crimes against peace in the

courtroom. In contrast to Taylor's reformist views, Dubois sought to extract retribution from I. G. Farben. Dubois, a civilian lawyer from Camden, New Jersey, had worked during the war for the legal department of the Treasury Department and was part of a team in charge of seizing I. G. Farben's assets in Latin America. During this period he served on the War Refugee Board aiding the resettlement of Jews. As the war drew to a conclusion, Dubois worked closely under Secretary of the Treasury Morgenthau on the issue of reparations, and he wrote several of the draft chapters of Morgenthau's book *Germany is Our Problem*. When Morgenthau resigned from the secretary of the Treasury and the momentum behind the Morgenthau Plan began to dissipate, Dubois traveled to Potsdam, Moscow, and Japan to represent the Treasury Department's interests in reparation discussions. After working for a period for the UN Committee on Economic Warfare, Dubois was asked by Telford Taylor to head up the prosecution of I. G. Farben in December 1946.[18]

Dubois brought to the I. G. Farben case the same assumptions and views that dominated the circle around Morgenthau. To Morgenthau, the Third Reich was a monolithic, totalitarian regime that was synonymous with German aggression and expansionism. He saw National Socialism not as an ideological movement that sought to restructure German society according to its worldview, but as the continuation of Germany's authoritarian and militaristic traditions. Morgenthau commented in *Germany is Our Problem* that the German people not only rejected democracy, but also had been "reared in theories of racial superiority, supremacy of the state over the individual, glory of war, the natural duty of some to rule and many to obey, and the absolute rightness of might." The Germans were a lost cause; the Nazis were merely the latest outbreak of the deeper symptoms of the illness of aggression since "the traditional German will to war goes back as far as our own traditional will to freedom."[19] The only rational option, therefore, was to ensure that the German scourge would never have the strength to plague the world again.

In the prosecution of I. G. Farben, Dubois reflected the ideas found in the Morgenthau Plan, the Carthaginian peace calling for the deindustrialization of Germany. While his views were akin to those of reformist New Deal trustbusters in the sense that both distrusted concentrated economic power in cartels and monopolies, their goals were very different. Antitrust New Dealers sought to reform the power structures of the German economy; Dubois saw himself rooting out totalitarian elements that were endemic in German society—not to rehabilitate them, but to destroy them. The trial lawyers worked on the assumption that the Third Reich reflected aggressive and militaristic characteristics inherent in German culture and the German people. Corporations such as I. G. Farben were imbued with these very same characteristics and had to be punished so as to pose no future threat. In this way, Dubois's desire to obtain retribution lent itself to the construction of a trial plan concentrating on the count of crimes against peace, instead of the easier to prove charges of slave labor and plunder and spoliation.

Moreover, financial and administrative constraints were pushing Taylor forward with this flawed strategy. Perhaps Taylor's most pressing concern in the fall of 1946 was the selection of the defendants within the financial constraints that limited the scope of the trials. In addition, the trials had to be expedited in a way acceptable to the head

of OMGUS. In the late summer of 1946, Taylor and OCCWC requested $3.7 million for the fiscal year of 1947 and an additional $2.2 million for the year of 1948 in order to conduct the envisioned trials. At that point only $2 million were available for 1947. Taylor was ordered to economize, especially in manpower requirements, because his requirements were termed "excessive," a response indicative of the American efforts to minimize the costs of the occupation.[20]

As head of OCCWC, Taylor had exclusive responsibility for the selection of defendants and their charges. In order to demonstrate the far-ranging responsibility of those within the Third Reich, he sought defendants who represented major segments of German society organized into four groups: government officials; SS, police, and party officials; military leaders; and bankers and industrialists. His early recommendations to Justice Jackson set the probable number of defendants at about 100, ballooning to between 200 and 500 as he became more familiar with the Third Reich and the evidence available. In March 1947 Taylor submitted a proposal to OMGUS of 18 separate tribunals with 220 defendants, but with the fiscal limits placed by OMGUS, Taylor had pared down the trial program to 14 tribunals with about 180 to 200 defendants by September. Eventually 185 individuals were tried in 12 tribunals. The selection process, admitted Taylor, involved "some preconceptions" on the structure of the Third Reich in order to approach the endless mass of evidence, not to mention the availability of adequate evidence and the defendants themselves. Due to I. G. Farben's domination of the German chemical industry, its key role in providing the Nazi war machine with crucial materials, and its extensive use of slave labor, the firm was part of the American trial plan from its inception.[21]

Taylor knew that the necessary proof to support crimes against peace was more time-consuming and complicated than the slave labor and plunder and spoliation counts. To show that I.G. Farben participated in rearmament was one thing, but to prove that this was done with guilty intent to initiate an aggressive war was much more difficult. Because of the vastness and complexity of the I. G. Farben empire, the trial team had to gather a mass of documentation from Washington and across the European Theater, further contributing to the team's difficulties. But in spite of the challenges that the count of crimes against peace presented, it was central to the prosecution's case against I. G. Farben.[22]

By late 1946 and early 1947 fiscal and administrative constraints were forcing Taylor to begin the trials. As a result, he had no other real choice but to proceed with the strategy already developed before the IMT's final judgment in October 1946 that placed the prospect of prosecuting industrialists for crimes again peace in legal doubt. His researchers had been at work for over one year gathering evidence for prospective cases against industry, much of the time pursuing the crimes against peace elements of the cases. Military governor Clay was pressuring Taylor to begin the subsequent trials immediately following the IMT and have them conclude by December 31, 1947, so as not to lose their "psychological" effects on the Germans and make "political stability difficult to attain." Clay feared that a drawn-out set of trials would delay the conclusion of the "denazification" of occupied Germany, a policy that was already under attack from Washington because it was removing leaders in the economy and government who could contribute to German economic recovery.[23] By the middle of 1947,

American plans for retribution and reform through decartelization were in retreat, as seen by the American abandonment of reparation and decartelization policies, while the emphasis on recovery was in advance. With the emergence of the Cold War and the announcement of the Marshall Plan in June 1947, the American plans of fundamentally restructuring German society rapidly became a distant memory. Instead, American policy favored economic reconstruction of Germany, both to minimize the costs of occupation and to construct a strong capitalist economy resistant to the spread of communism.[24]

In May 1947 the I. G. Farben prosecution team indicted twenty-three of the top managers of I. G. Farben including Carl Krauch, the chairman of the *Aufsichtsrat* (supervisory board), the entire *Vorstand* (managing board), and four lower ranking managers (see appendix). All twenty-three were indicted for planning, preparation, initiation, and waging of wars of aggression and invasions of other countries (crimes against peace), plunder and spoliation, slavery and mass murder, and common plan or conspiracy, while only three were charged for membership in the SS. Most of the indictment argued that I. G. Farben had sought an alliance with Hitler, helped bring the Nazis to power, and had knowledge and assisted in the Nazi plans to wage an aggressive war. Among many of the charges under the aggressive war count were synchronization of all I. G.'s activities with the German high command; participation in and direction of Germany's economic mobilization for war; carrying on propaganda, intelligence, and espionage activities; and preparation for and participation in the planning and execution of Nazi aggressions and reaping the spoils therefrom.[25]

In preparing necessary documentation to conduct the case, the prosecution team had its own administrative problems. All through the early part of 1947, the trial team lawyers complained of the difficulties of translating the documents crucial for the formulation of their case. In March 1947, only two months before the indictment against I. G. Farben was filed, Drexel Sprecher, the second ranking lawyer under Dubois, commented that the Farben case had obtained almost no translations in months because the language division had a backlog of "many hundreds of pages" on cases which were in trial or were about to go to trial.[26] In June 1947, a month after the indictment was filed, Dubois finally assigned trial team lawyers to prepare the specific aspects of the case. The crimes against peace count had by far the most points to be investigated and demanded the most time from the lawyers. Dubois concentrated his own efforts on this count, putting himself in charge of what he saw as the most vital points of the case such as the alliance of I. G. Farben with Hitler and the Nazi Party, I. G. Farben's participation in creating the Nazi military machine, its participation in weakening Germany's potential enemies, I. G. Farben's planning of the execution of aggression, and the common plan and conspiracy to commit the counts charged. Clearly, with the administrative constraints facing the trial team, it had to rely much on its preconception that I. G. Farben had helped initiate the Nazi wars of aggression in order to construct its case.[27]

It seemed clear to Dubois that these "generals in gray suits," as he called them, had not just profited from the Nazi rearmament, but had conspired to bring the Nazis to power and helped them initiate an aggressive war. In his memoir of his experiences at Nuremberg, *The Devil's Chemists*, he insisted that I. G. Farben was a vast concern

that had penetrated nations around the world like economic shock troops of Nazi aggression. In fact, he argued that the firm had actually preceded the German armies into Poland and Czechoslovakia and had been already working to undermine the stability of these countries when the German armies occupied them. To Dubois, I. G. Farben was an expression of German tendencies toward militarism and aggression and an example of what he termed "totalitarian industry," in league with and parallel to the Nazi Party itself. [28]

To Dubois the trial was not only about I. G. Farben, but it was also about preventing the next world war. Germany had to be rendered incapable of spreading destruction to the rest of the world. I. G. Farben had to be shown for what it was: a concern bent on conquest. Dubois argued in his opening statement to the Military Tribunal on August 27, 1947:

> The evidence will show that the main common aim of both groups [I.G. Farben and the Nazi Party] was aggrandizement at the expense of other countries and the reaping of the spoils thereof, regardless of whether war might be necessary to accomplish this purpose and regardless of how much death, misery, and destruction might ensue. This common objective bound the two groups together, and without this collaboration, Hitler and his Party followers would never have been able to seize and consolidate their power in Germany, and the Third Reich would never have dared to plunge the world into war.[29]

Dubois and his trial team then showed I. G. Farben's state of mind by documenting its actual structure and the economic power the firm held. The first weeks of the trial were consumed with wave after wave of organizational charts, cartel agreements, corporate correspondences and reports, various bylaws for the managing board, laws governing joint stock companies, and notes on various corporate meetings. At one point in the proceedings, Judge Morris admonished the prosecution for slowing down the trial "by a mass of contracts, minutes, and letters that seem to have such a slight bearing on any possible concept of proof in this case."[30]

Joseph Borkin, a Justice Department lawyer who investigated I. G. Farben during the war, has written that by trying to reveal the concentration of economic power in the firm, the prosecution constructed the case as if it was an antitrust case, not one that involved defendants charged with utilizing slave labor and mass murder. In fact, the counts of plunder and spoliation and slave labor were not developed until months into the trial. The defense countered by arguing that the German industrialists were forced to bend to the demands of the Nazi regime in order to survive within the authoritarian state. In addition, the defense also suggested that I. G. Farben was a business concern like any other that was pursuing its own profit, like those in the United States. Furthermore, it had acted as a bulwark against the spread of communism, an appeal to the Cold War sensibilities of the judges.[31]

As the trials progressed, Taylor lamented the financial and administrative obstacles facing the American prosecution. In a report to the military governor in September 1947, he admitted that the war-crimes indictments for some of the cases had been too broad and precluded speedy trials. He was painfully aware that the budget for the war-

crimes program was to drop precipitously at the end of fiscal year 1947/48 and staffs were to be cut severely. Therefore, the pace of the war-crimes trials had to be hastened. In addition, Taylor worried that the impetus behind the tribunals was waning with an American press more critical of the trials and a tiring group of judges and prosecuting counsel. He feared that the defense counsel would take advantage of this situation by pursuing delaying tactics within the trials. Taylor complained that many judges were giving the defense too many opportunities to explain away every charge. Although he agreed that this judicial tactic was necessary to avoid the impression that the defense was being railroaded, it resulted in "undue protraction of the proceedings." Perhaps most distressing to Taylor was the difficulty in prosecuting the defendants because very few of them "committed a murder or other crime with their own hands," and therefore the conclusive proof of the defendants' criminal responsibility was not easy to produce. Taylor became increasingly pessimistic as the trials progressed.[32]

In the end, Dubois' charge of crimes against peace did not stand up in court. Despite his efforts, when judgments were handed down on July 29 and 30, 1948, none of the twenty-three defendants representing I. G. Farben were found guilty of either crimes against peace or conspiracy to prepare and wage an aggressive war. Although contributing to German rearmament, chairman of the supervisory board Krauch and the members of the managing board were determined to lack the criminal intent to wage aggressive war. The court ruled instead that only leaders in political, military, and industrials fields who were responsible for the formulation and execution of policies could be held liable for crimes against peace. Ten defendants were found not guilty of all counts, and the others were found guilty of plunder and spoliation and slave labor and given sentences between one-and-a-half and eight years (see appendix). By 1951 John McCloy, the high commissioner of Germany, had ordered all the defendants' sentences commuted. The United States had turned its attention toward new threats.[33]

Peter Hayes in *Industry and Ideology: I.G. Farben in the Nazi Era* has argued that I. G. Farben became "Nazified" during the 1930s when the firm's chiefs learned to live profitably with their failure to resist the intrusion of the Nazi economic and foreign policy and became an instrument of the Nazis. While I. G. Farben took part in achieving Nazi goals, it had relatively little influence in setting those goals. Hayes maintains that "they [I.G. Farben executives] became not so much guilty of the Nazi horrors, since they lacked Hitler's intent, as co-responsible for them."[34] The prosecution could not detect this distinction. Raymond Stokes has argued that the prosecution's strategic mistake "probably emerged naturally from a false sense that they 'knew' the concern in its essentials before the trial began." According to Stokes, the prosecution was made of antitrust lawyers active during the 1930s, and their trial plan stemmed primarily from their view of the firm as a trust and cartel organization.[35] Joseph Borkin also has contended that the prosecution team treated the case as an antitrust case and argued that it failed because it focused upon the crimes against peace count, when it should have started with Auschwitz.[36]

Although Stokes and Borkin are correct in their assessments of the broad context of the trial, the prosecution's courtroom strategy can be better explained by something other than an antitrust background of the lawyers. In fact, neither Dubois nor the

Figure 14 An American soldier guards the main entrance to the courtroom during the I. G. Farben trial. In the back sits the Military Tribunal VI. Courtesy of the United States Holocaust Memorial Museum.

second ranking prosecutor, Drexel Sprecher, was an antitrust lawyer. Dubois's view of I. G. Farben had little to do with the New Deal antitrust sentiment that sought to reform the structures of the German economy or improve conditions for international trade in the postwar world. As seen by his writings on the trial, Dubois believed that the prosecution of I. G. Farben was about retribution. He "knew" the firm indeed, but in the Morgenthauian sense as a manifestation of the German deep-rooted mania for aggression. An antitrust courtroom strategy of demonstrating I. G. Farben's economic power was for Dubois a means to an end quite different from antitrust goals. To Dubois this concentration of economic power, combined with the German lust for conquest, was part of the proof necessary to show that I. G. Farben was an accomplice to the Nazi plan to wage war. To prove the crimes against peace would support Morgenthau's already shelved plans to keep Germany economically prostrate and provide ammunition against those who wanted to reconstruct Germany.[37]

In *The Devil's Chemists*, Dubois expounded on the belief that the United States had not learned the correct lesson from the 1930s and 1940s. The US' support of the reconstruction of West Germany and its alliance with I. G. Farben in the postwar world would backfire horribly. "If World War III breaks out," he wrote, "they [I.G. Farben executives] will be fighting for Soviet Russia, not for the West. And in treating such groups as friends, we are losing true friends all over the world." Dubois implied that the judges in Nuremberg had been easy on I. G. Farben because Germany had to be built up and used as a "bulwark against Communism."[38]

Dubois believed that to take the moral high ground against communism, Americans needed to eradicate any traces of totalitarianism, and he drew upon current events in Central Europe to justify the strategy he utilized in I. G. Farben trial. Dubois used the Cold War term of "totalitarian" to understand a past phenomenon and to convince the 1952 public of the mistakes that had been made at Nuremberg, citing the "Soviet conquest of Czechoslovakia from the inside" as a prime example of the charges that his team tried to prove against I. G. Farben. To Dubois one of the basic characteristics of totalitarianism was the presence of a "master plan" of conquest. The Nazis and I. G. Farben had a clear plan of aggression, much like the Soviets had in Eastern and Central Europe. Dubois was not alone in this belief; in the early period of the Cold War, many Americans ignored or could not see the vastly different origins, goals, and characteristics of the Nazi and Soviet regimes, while focusing on their similarity of methods. Even with a few years of distance from Nuremberg, Dubois did not carefully distinguish between the Nazis and the communists, or chose to ignore that distinction. Dubois' dogmatic appraisal of I. G. Farben and the Third Reich reflected a view of the German Problem that was a holdover from his Treasury Department days.[39]

War-crime trials are a problematic endeavor. The selection of crimes and the prosecution of defendants, in other words the pursuit of justice, will always be subject to larger political influences. The competing conceptions of the Third Reich and the "German Problem" that the American prosecution brought to Nuremberg undermined efforts to secure the desired verdicts against I. G. Farben. The prosecution allowed its view of the larger political significance of the I. G. Farben trial to skew its pragmatic considerations of the conduct of the case. Taylor's wish to use the trial as means to reeducate Germany and Dubois's desire to punish I. G. Farben both resulted in a trial plan that did not stand up in court. From this perspective, the trial illustrates the dynamics of counteracting interests of retribution, reform, and reconstruction at work in the American occupation of Germany. One is left to wonder whether the American efforts against I. G. Farben at Nuremberg were doomed from the start.

Appendix

List of I. G. Farben Defendants

Carl Krauch—chairman of the Supervisory Board of Directors (Aufsichtsrat); general plenipotentiary for Special Questions of Chemical Production on Goering's staff in the Office of the Four-Year Plan.

Guilty on slave-labor count only; sentenced to six years.

Members of the Managing Board of Directors (Vorstand)

Hermann Schmitz—chairman of the Managing Board of Directors; member of the Reichstag.

Guilty on plundering count only; sentenced to four years

Georg von Schnitzler—chief of Commercial Committee of Managing Board of Directors, which directed Farben's domestic and foreign sales and commercial activities.

Guilty on plundering count only; sentenced to five years.

August von Knieriem—chief counsel of Farben; chairman of legal and patent committees.

Not guilty on all counts.

Heinrich Hoerlein—chief of chemical research and development of vaccines, sera, pharmaceuticals, and poison gas; Nobel Prize winner in field of medicine.

Not guilty on all counts.

Fritz ter Meer—chief of the technical committee; in charge of production of Buna, poison gas, dyestuffs, chemicals, metals, and pharmaceuticals.

Guilty on slave-labor and plundering counts; sentenced to seven years.

Christian Schneider—In charge of production of nitrogen, gasoline, diesel and lubricating oils, methanol, and organic chemicals; chief of central personal department, directing the treatment of labor at all I. G. Farben plants.

Not guilty on all counts.

Fritz Gajewski—chief of production of photographic materials, artificial fibers, gunpowder, and explosives.

Not guilty on all counts.

Otto Ambros—chief of chemical warfare committee of the Ministry of Armaments and War Production; production chief for Buna and poison gas; manager of Auschwitz.

Guilty on slave-labor count only; sentenced to eight years.

Heinrich Buetefisch—production chief for gasoline, methanol, and chlorine electrolysis production at Auschwitz and Moosbierbaum; lieutenant colonel in the SS.

Guilty on slave-labor count only; sentenced to six years.

Ernst Buergin—production chief for light metals, dyestuffs, organic intermediates, plastics, and nitrogen.

Guilty on plundering count only; sentenced to two years.

Hans Kuehne—production chief for inorganics and organic intermediates.

Not guilty on all counts.

Carl Lautenschlaeger—production chief for solvents and plastics.

Not guilty on all counts.

Friedrich Jaehne—chief engineer in charge of construction and physical plant development.

Guilty on plundering count only; sentenced to one-and-a-half years.

Karl Wurster—production chief of inorganic chemicals.

Not guilty on all counts.

Heinrich Oster—member of the commercial committee.

Guilty on plundering count only; sentenced to two years.

Paul Haefliger—member of the commercial committee; chief of metals department.

Guilty on plundering count only; sentenced to two years.

Max Ilgner—chief of I. G. Farben's Berlin N.W. 7 office, directing intelligence, espionage, and propaganda activities; member of the commercial committee.

Guilty on plundering count only; sentenced to three years.

Wilhelm Mann—member of the commercial committee; chief of the Sales Combine Pharmaceuticals.

Not guilty on all counts.

Max Brueggemann—member of the legal committee; deputy chief of the Sales Combine Pharmaceuticals.

Discharged on grounds of poor health.

Non-Vorstand Defendants

Walter Duerrfeld—director and construction manager of the Auschwitz plant of I. G. Farben.

Guilty on slave-labor count only; sentenced to eight years.

Heinrich Gattineau—chief of the political-economic policy department of I. G. Farben's Berlin N.W. 7 office.

Not guilty on all counts.

Erich von der Heyde—member of the political-economic policy department of I. G. Farben's N.W. 7 Office.

Not guilty on all counts.

Hans Kugler—member of the commercial committee of I. G. Farben.

Guilty on plundering count only; sentenced to one-and-a-half years.

Source: *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol VII*, 11–14 and Dubois, *The Devil's Chemists,* 345–46 and 365–67.

18

Nazi Experiments, the Nuremberg Code, and the United States

Sandra H. Johnson

Monsters. Any description of the brutal experiments performed on human beings in the Nazi concentration and death camps leads one to exclaim that the perpetrators must be monsters, inhuman themselves. The postwar Nuremberg Medical Trial revealed some of the details of the torture of concentration camp prisoners performed by doctors and scientists under the guise of medical experimentation. The prosecution strained in the trial to identify contemporaneous positive law that set enforceable standards for medical experimentation, and the tribunal ultimately relied upon what the judges believed were commonly shared norms for humane medical experimentation. The tribunal summarized the principles under which it judged the Nazi experiments and included those in its final judgment in a portion that has come to be known as the Nuremberg Code.[1]

Although the prosecutor and judges in the Medical Trial stated that this mayhem in the name of science was not the work of evil individuals standing alone, the popular perception that the Nazi doctors were deviants outside of civilized human society persisted for decades. That mythology created a serious misconception that significant abuse of human beings in the name of research would not occur in societies, such as the United States, with strong professional cultures. Many episodes of research abuse in the United States, however, reveal a pattern regarding race, confinement, and militarization that, even without the specter of the Nazi experiments, should strengthen the commitment to the principles of the Nuremberg Code. The ruthlessness of the Nazi experiments done in the context of mass killing cannot be matched. Notions of Nazi villainy and American virtue in research, however, nearly allowed the Nuremberg Code to pass into historical irrelevance.

Deeper inquiry into the context of Nazi law, medicine, and health policy demonstrates that the experiments were an extension of broader social, legal, and policy norms that had been adopted in Germany prior to and during the Third Reich. Health policy and law created a disrespect for the humanity of specific groups, most especially Jews, transforming persons into raw material for the Nazi research engine. Medical experimentation in Nazi Germany was not an outlaw system but rather reflected the larger social, legal, and policy environment within which it operated.

This chapter begins by describing the work that has been done to place the Nazi experiments, the Medical Trial, and the resultant Nuremberg Code in their historical legal and policy context. Particular instances of research abuse in the United States confirm that the connection between research abuse and a nation's policy and legal frameworks is not unique to the German experience. The second section of this chapter contrasts the paradigm of Nazi depravity and the idealized view of research in the United States with the history of research abuse in the United States, including during the Medical Trial itself. After years of dismissal and outright resistance produced by these combined attitudes, the Nuremberg Code finally emerged as the core influence on ethical and legal norms governing research in the United States. This chapter concludes by describing the transformation of the code's principles into legally enforceable regulations in the United States, although research regulations adopted in Germany in 1931 contained a good number of the substantive provisions now incorporated into those regulations.

Policy and legal context of the Nazi experiments and the Nuremberg Code

The Medical Trial, also known as the Doctors' Trial, was conducted as part of the postwar Nuremberg Trials from December 9, 1946 to August 6, 1947. Under a postwar agreement among the victorious Allies, the United States conducted twelve trials, including the Medical Trial (*USA v. Karl Brandt, et al.)*, for war crimes committed within territory occupied by the United States after the war.[2]

The defendants were charged with having committed "murders, tortures, and other atrocities committed in the name of medical science"[3] amounting to war crimes, crimes against humanity, and conspiracy to commit those crimes. Twenty-three were charged in the case; sixteen were convicted; and eight, acquitted. Seven of those convicted (of whom four were physicians) were hanged; five received life sentences (commuted later to terms of fifteen to twenty years); and four received lesser prison terms.

The prosecution's opening statement described in some detail the brutal procedures performed by these defendants,[4] but no brief listing can capture the horror. The pressure chamber "experiments" subjected men (intentionally selecting Jews, Russians, and Poles) to extreme atmospheric pressure, producing torturous pain and, typically, death, although those "who did not die . . . surely wished that they had."[5] Other procedures intentionally infected camp prisoners with malaria and typhus; inflicted deep wounds and then infected those with mustard gas causing extreme burns; forced men (intentionally selecting Roma) to drink sea water for days producing "terrible suffering"[6]; freezing prisoners to see if they could be warmed up successfully or not; and administering poison to Russian prisoners to watch how they died. Jews in Auschwitz were photographed and measured and then killed, and their bodies sent to Strasbourg to supply an "anthropological" collection of Jewish skeletons. Experiments performed on women at Ravensbruck were "the most barbaric of all."[7] Deep wounds were inflicted upon the women, some then infected and others made gangrenous followed by surgery. In others, bones were removed and transplanted and procedures

Figure 15 Defendant Herta Oberhauser is sentenced to twenty years in prison by the Military Tribunal at the Doctors' Trial. Courtesy of the United States Holocaust Memorial Museum.

to test whether bone, muscle, and nerves could be regenerated were performed. Doctors not trained as surgeons used the women of Ravensbruck to learn or to invent new surgical techniques and often performed these surgeries, including amputation and reattachment of limbs, without anesthesia.[8] This was only a small selection of the inhuman procedures performed using thousands upon thousands of persons confined to the camps.

If there is an iconic figure that personifies the medical leadership of the Nazi concentration camps, it is Josef Mengele, whose name has come to symbolize cruelty, evil, and perhaps madness. Mengele escaped, and so was not a defendant in the Doctors' Trial, and, in fact, was never captured and tried. Mengele's experiments on children, focusing mostly on twins and numbering about 1500, were outrageously cruel. In some, he would infect one twin with material intended for germ warfare, and then when that child died, he would kill the other to have a comparison in autopsy. In others, he tested whether gender could be changed by cross-transfusions and whether eye color could be changed by injecting a chemical into the eyes. He also attempted to create conjoined twins by sewing two twins back to back and connecting blood vessels and organs.[9]

Robert Jay Lifton, in his treatise on the psychology of the Nazi doctors, notes that he did not focus on Mengele because that would "further the cult of demonic personality"

as an explanation for what happened.[10] The Nazi experiments were not the work of madmen or even a small cadre of physician-criminals. Rather, they were an integral part of efforts to implement specific goals of Nazi health policy and law adopted before the camps were established.

The Medical Trial itself necessarily focused on individual culpability for the crimes committed. In the opening statement for the prosecution, however, Chief of Counsel for War Crimes Telford Taylor noted that while there may have been among the defendants "sadists who killed and tortured for sport," most were "trained physicians" and some were "distinguished scientists."[11] Taylor's opening statement argued that the Nazi experiments emerged from "insane and malignant doctrines"[12] and identified the Nazi racial objectives and militarization as the framework that produced and supported the Nazi experiments. More recent examination of Nazi health policy and law has proven that Taylor's observation was accurate in identifying the prime motivations of race and war, but that much broader health policies actually established the norms and practices that spawned and championed the Nazi experiments.

A decade before the war began and years before the camps were established, German health policy adopted an explicit "biomedical ideology"[13] that espoused two related core values. The first was the rejection of the primacy of the dignity and well-being of each individual patient in favor of efforts to "perfect the health of the German people . . . [to realize] the full potential of its racial and genetic endowment."[14] This principle led directly to the view that non-Aryan races were manifestations of illness polluting the pure German stock which, in turn, supported aggressive sterilization programs. The second core value was the development of the perspective that some persons—Jews, Roma, the disabled—were "life unworthy of life" (*lebensunwertes Leben*),[15] justifying mass killing.

During the Weimar Republic, several years before Hitler came to power, leaders in German medicine adopted eugenics theory and practice,[16] often expressing the need to compete with the American success in legalizing forced sterilizations.[17] Propaganda advocating the sterilization of "inferior" persons produced broad public support,[18] and the practice of involuntary sterilization spread quickly, just as in the United States where thirty-three states had enacted involuntary sterilization laws by 1930.[19] With the adoption of the Sterilization Law in 1933, and the establishment in 1934 of Genetic Health Courts, a massive sterilization effort began, creating a demand for more efficient, high-volume techniques.[20] While eugenics statutes in the United States established a model for Germany, international news coverage of the scope of the Reich's practice of forced sterilization contributed to the decline of the eugenics movement in the United States.[21]

In a Germany undergoing the combined effects of the destruction of the First World War and the beginning of the Great Depression,[22] the elimination of "unnecessary eaters" moved beyond the advocacy in medical journals that appeared years before Hitler came to power.[23] The active program of euthanasia in hospitals began with disabled infants and toddlers,[24] and a series of films focusing on "mercy killing" deepened public support for the practice.[25] The killing program in Germany's hospitals escalated during the war, with the justification of creating space for the military wounded, and hospitals were emptied of the disabled, the mentally ill, and individuals

suffering from the traumatic psychological effects of the war.[26] The T4 Campaign, beginning in 1939, engaged all health-care facilities in collecting health information on individual patients, purportedly for health data purposes but actually used to select patients for gassing. Specific hospital facilities were dedicated to the killing of larger numbers of these hospital patients as well as the homeless, beggars, the insane, and the nonproductive. Although the formal T4 campaign was cancelled in 1941, the killing continued.[27]

These core health policies of the Nazi regime converged to support the Nazi experiments. The aggressive program of sterilization as a way of purifying the population directly produced experiments to develop quicker methods for sterilizing large numbers of people, including experiments where camp prisoners were subjected to surgical removal of reproductive organs and to extreme amounts of radiation causing severe burns.[28] The actual equipment used to increase the volume of the medicalized killing in the hospitals was moved directly to the camps.[29] The volume of murder exploded with the policy of exterminating the Jews and set the doctors on the pathway of searching for ever more efficient methods of killing. The practice of massive camp killings itself was in turn used as a rationalization for death-dealing experiments: These persons were going to die anyway so why not in this manner rather than by gassing or starvation, and weren't the longer-term experiments giving them the benefit of a longer life?[30] Mobilization for total war built upon the principles of racial purity and elimination of "useless" persons and produced many of the experiments related to wartime, including the pressure chamber, mustard gas, malaria, typhus, and poison experiments.

While most of the literature on the Nazi experiments focuses on procedures conducted in the camps, the Nazi biomedical ideology, with its reliance on (pseudo) scientific foundations for health policies led to a great expansion of research across all of Germany.[31] Camp prisoners provided a steady supply of "human material" for the burgeoning national research program.[32] Academic medicine in particular provided stalwart support of the Nazi health policies. Early on, nearly 1,000 university medical faculty members signed a public vow to support Hitler, and with the government appointment of "reliable Nazis" as rectors and deans, that support was solidified over the course of the war.[33] Ambitious doctors were advised to "serve the cause and make his medical name by means of experiments,"[34] and research scientists eagerly supported policies of racial cleansing.[35]

Rather than performing experiments in secret, the Nazis established formal procedural authorities for approving the design and providing the resources for the execution of research in Nazi Germany. In several decrees, Hitler solidified control of medical research under the direction of Dr. Karl Brandt, one of the defendants in the Medical Trial,[36] and appointed Hermann Göring as director of the Reich Research Council.[37] Some Nazi experiments were subject to a prescribed committee review and approval,[38] and results of the experiments using camp prisoners were disseminated in conferences and in academic publications.[39]

The lack of contemporary substantive laws governing permissible and impermissible research in Nazi Germany presented a challenge to the prosecution in its effort to prove that the experiments violated German law in effect at the time.[40] Two documents

issued by German administrative agencies prior to the Second World War adopted principles for research with human subjects that clearly required the consent of the individuals subjected to the research. In 1900, the Minister of Religious, Educational and Medical Affairs issued a directive that held that research was "absolutely prohibited" if the individual was a minor or otherwise incompetent or if the individual has not "declared unequivocally that he consents" after the potential adverse consequences of the intervention have been explained. The directive also required prior approval of the director of the organization in which the experiment was to be performed and a written record of the intervention and its approval. The 1900 directive did not prevent widespread research abuses, however, and by the 1920s and early 1930s criticism of research abuse by the German medical profession gained significant notice in Germany.[41]

In response to these concerns, the Reich Health Council held a meeting to examine abuse of subjects in human research. Thereafter, in 1931, the Reich Minister of the Interior issued a circular entitled "Regulations on New Therapy and Human Experimentation," recommending that the document be given to all physicians and that physicians sign a commitment to these standards at the initiation of employment. The principles adopted by the Health Council are quite sophisticated and extend significant protections to subjects in research. The 1931 document required consent and prohibited experimentation with minors if it "in any way endangers" the child; it stated that "exploitation of social hardship" violates medical ethics; and it required that a written report of the experiment and the consent be maintained. The document also prohibited experimentation with "dying patients" as such experimentation is "incompatible with the principles of medical ethics." Finally, the Regulations required that experimentation with human subjects "be avoided if it can be replaced by animal studies" and required that experimentation with human beings be preceded by animal or laboratory studies to test the validity of the experiment design.[42]

Whether the 1931 document ever had the force of law is seriously disputed, with considerable evidence indicating that it was never considered enforceable positive law.[43] Moreover, the principles of the 1931 Circular were overtaken by the law and practices enforcing the Nazi racial hygiene and euthanasia policies. In addition, a statute enacted in November 1933 directly contradicted the 1931 Circular in providing that all experiments imposing pain and injury upon animals, especially those involving cold, heat, or infection, were prohibited and were to be allowed only under exceptional circumstances.[44] Once the Nazi research engine could take advantage of the thousands of camp prisoners made available for experiments, animal studies were no longer necessary in any case. As "life unworthy of life" itself, the prisoners were not considered worthy of the protection accorded to animals.

The state of the law in Germany, and in fact on the international level, left the medical ethics experts serving the prosecution in the Doctors' Trial searching elsewhere for legal bases for the criminal charges relating to medical experimentation. Ultimately, the experts relied on the Hippocratic Oath; US law review articles concerning malpractice for innovative therapy; the 1931 Circular; and guidelines adopted by the American Medical Association in 1946. The defense argued, in effect, that this evidence of legal

standards governing experiments was irrelevant. The Hippocratic Oath does not address experimentation; US law is irrelevant as German law governs; the 1931 Reich Circular did not have the force of law; and the AMA's principles postdated the actions for which the defendants were charged. The defendants also justified their actions in the context of war and argued that medical experimentation conducted throughout the world, including in the United States, violated the principles articulated in the documents relied upon by the prosecution.[45]

The judgment issued by the tribunal states that "judged by any standard of proof the record clearly shows the commission of war crimes and crimes against humanity" in conducting "criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and "'asocial' persons" on a "large scale in Germany and the occupied countries."[46] The tribunal articulates ten principles, in a section entitled "Permissible Medical Experiments," which "must be observed in order to satisfy moral, ethical and legal concepts." It does not identify a specific source for those standards.[47]

In applying those principles, the tribunal found that experiments were performed on human beings without their consent, even where it was contended that the subjects volunteered to participate, because they lacked any liberty to refuse or withdraw. The tribunal also found that the experiments were conducted by "unqualified persons . . . for no adequate scientific reason" and that the experiments were conducted in a way that caused "unnecessary suffering," subjecting human beings to "extreme pain or torture." Relying on "international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations," the tribunal concluded that the experiments violated "'the principles of the laws of nations . . . established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.'"[48]

Some observers believe that the tribunal intended that the statement of legal and ethical principles for research should operate as a code, filling the legal vacuum and variability in practices in human experimentation revealed during the course of the trial.[49] If the tribunal's statement of principles was intended to have that impact, however, it was not effective for many years after the conclusion of the Doctors' Trial.

The paradigm of Nazi depravity and US idealism

The Nuremberg Code was greeted with great skepticism on the part of physicians and researchers in the United States. Jay Katz notes that the general view of the American medical profession was that the code was needed for "barbarians but not for civilized physician-investigators,"[50] reflecting the notion that the Nazi doctors were evil monsters separated by their brutality from basic human and medical norms. This reaction to the code resonates as well with the dominant framework for medical ethics of the time, that of virtue ethics which relies primarily on the moral compass of the individual physician informed by classic personal virtues of right action.

THE NUREMBERG CODE

1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. This latter element requires that, before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person, which may possibly come from his participation in the experiment. The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.
2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.
3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study, that the anticipated results will justify the performance of the experiment.
4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.
5. No experiment should be conducted, where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.
6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.
7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.
8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.
9. During the course of the experiment, the human subject should be at liberty to bring the experiment to an end, if he has reached the physical or mental state, where continuation of the experiment seemed to him to be impossible.
10. During the course of the experiment, the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill, and careful judgment required of him, that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

Text of the Nuremberg Code
("Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10," Vol. 2, pp. 181–82. Washington, D.C.: US Government Printing Office, 1949).

The dismissal of the Nuremberg Code as irrelevant rested as well on the belief that US physician researchers would not engage in medical experiments that would violate the basic ethical principles articulated in the uniquely extreme context of the Doctors' Trial. This belief, however, proved to be seriously mistaken. In fact, documented instances of US medical experiments that presented serious risk to the subjects and were performed without consent were known at the time of the Doctors' Trial and were used in the defense. In particular, defendant Gerhard Rose argued that malaria experiments conducted by the United States were of the same character as those for which he was charged.[51] In fact, several US experiments carried on immediately prior to and during the war used mentally challenged institutionalized persons, prisoners, soldiers, and minors as subjects, infecting them with gonorrhea or malaria and subjecting thousands to mustard gas. The subjects in some, but certainly not all, of those experiments signed documents agreeing to participate but without information about serious risks and typically when they were not in a position to voluntarily consent.[52] In addition to the malaria experiments cited by Rose, the US Public Health Service conducted studies during and after the Doctors' Trial (from 1946 to 1948) in which soldiers, prisoners, and psychiatric patients, some as young as ten, were intentionally infected with gonorrhea and syphilis.[53] From 1944 through 1974, the US government funded experiments on the effect of radiation on human beings, which included injecting individuals with plutonium without their consent.[54] And, of course, the Tuskegee Study, described below, was in full swing during the trial itself.

Some argue that the specter of the Nazi doctors is used too blithely to justify research regulation in the United States and that parallels drawn are misleading and even offensive.[55] To be sure, the Nazi experiments, performed within a system where the first priority was mass killing, is quite different from the context for research in the United States. As in Nazi Germany, however, US research has always operated within the accepted social and legal norms of the time, and this has repeatedly resulted in particular groups being targeted for risky research. Parallels to the Nazi experiments are unnecessary to appreciate the role that racialized norms and structures have played in experimentation in the United States.

Despite wishes to the contrary, there are significant parallels between the Nazi experiments and the use of slaves as subjects for brutal experiments in the antebellum United States. As were the Jews in Nazi Germany, black slaves in the United States were viewed as subhuman. As in Nazi Germany, medicine of the time provided the pseudoscience that confirmed cultural biases enforced by a legal system that considered blacks as less than human. Certain medical beliefs about the physical distinctiveness of Africans rationalized torture in the name of medical progress. Physicians of the time, for example, generally believed that Africans could better tolerate pain, and this made them appropriate subjects for "exquisitely painful surgeries" performed without anesthesia for experimental and training purposes.[56]

Like the victims confined to the camps in Germany, American slave populations provided a steady source of human material for medical experiments and training which physicians could access through a simple purchase or trade of men, women, and children.[57] An ad placed by an infirmary in a Charleston newspaper in the 1830s, for example, offered "any person having sick negroes, considered incurable . . . and wishing to dispose of them" the "highest cash prize" for their sale to the infirmary to be used as "clinical material" to test new surgical techniques and formulations.[58] Even in the 1880s, medical schools in the South recruited students by noting that the black population provided "abundant clinical opportunities" and interesting cases on which to practice surgery (which at the time was performed in hospital only on blacks.)[59]

Individual physicians also acquired slaves for the purpose of experimentation. For example, Dr. Thomas Hamilton acquired a slave named John Brown and subjected Brown to torturous experiments, as described in Brown's published 1854 autobiography. These included burying Brown in a pit made hot with fire until he fainted to test whether certain compounds could increase Brown's tolerance for heat. Hamilton tried to measure how deep Brown's black skin went by inflicting severe blisters on his skin, as well as "other experiments upon me, which I cannot dwell upon."[60] In the late 1840s, Dr. J. Marion Sims, often called the "Father of Gynecology," developed his technique for repairing post-childbirth vaginal fistulas by performing surgery, without anesthesia, upon black slave women, including one woman who was operated upon thirty times.[61] There is considerable controversy over whether Sims's research was unethical because Sims wrote that he secured consent from his subjects and that his intent was to cure their debilitating condition.[62] Slaves did not have the liberty to refuse, however, and only when the technique was perfected and anesthesia more widely available, did Sims begin surgeries on white women.

The issue of race in US medical experimentation did not disappear with the end of slavery. Rather, it persisted through the Jim Crow era, with its legalized racial segregation, legal prohibitions on inter-race marriage, and legal support for forced sterilization, all of which had influenced Nazi law.[63] The Tuskegee Syphilis Study is perhaps the most well known of the experiments performed after the slave era on African Americans without consent and without regard to the well-being of the subjects. The Tuskegee Study was carried on by the United States Public Health Service (USPHS) "before, during, and after the Nazi concentration experiments."[64] The project began in 1932 and ended in 1972 only after a public outcry—stimulated by media revelation of the study. The purpose of the study was to observe the natural course of syphilis, and researchers enrolled 399 African American male sharecroppers who had syphilis as subjects, without any information as to its purpose or risks. As in the earlier slave experiments, medicalized biases informed the Tuskegee Study. Doctors saw syphilis as the "quintessential black disease"[65] in a population prone to vice and disease[66] and believed that African American men would not be interested in continuing necessary treatment once symptoms subsided.[67] Even after effective treatments for syphilis were developed, the USPHS aggressively acted to ensure that the men would not receive treatment elsewhere and to persuade them to stay in the study. The study victimized not only the research subjects, but also their wives, partners, and children who would be infected.[68]

The Tuskegee Study is not an isolated episode in modern American research. For several years in the 1950s, for example, Dr. Robert Heath performed experimental psychosurgery on black prisoners.[69] As to selection of subjects for some of their experimental work, Heath's coworker Dr. Harry Bailey is quoted as saying "[It was] cheaper to use N—than cats because they were everywhere and cheap experimental animals."[70] In addition, most medical experiments in the United States between the 1940s and the end of the twentieth century have been performed in teaching hospitals. Because of the history of the development of teaching hospitals and their location in poorer urban areas defined by earlier legally enforced racial segregation, these hospitals generally have served, and conducted research and training upon, a disproportionate number of African American patients. For example, total body irradiation (TBI) experiments performed at the University of Cincinnati hospital from 1960 to 1972 involved 200 individuals, 150 of whom were African American.[71] Dr. Clarence Lushbaugh, who was involved in the research, maintained that the TBI was itself therapeutic but said in an oral history taken in 1994 that the hospital was located amid "huge slums," noting that "in such typical slums, these persons don't have any money and they're black and they're poorly washed."[72]

These episodes confirm that medical experimentation reflects the larger social, policy, and legal milieu in which it occurs. That influence is not confined to race alone, of course, although in the United States that has been a powerful factor.

From principles to regulations: The Nuremberg Code and the Common Rule

Two very public revelations of research practices in the United States ultimately brought the Nuremberg Code back into the spotlight some twenty years after its first publication in the tribunal's judgment. The first event is the 1966 publication of an article by Dr. Henry Beecher in the *New England Journal of Medicine* that detailed twenty-two published studies that clearly violated basic ethical norms such as those in the Nuremberg Code.[73] Among the studies Beecher described were studies conducted at the Brooklyn Jewish Chronic Disease Hospital and at Willowbrook State Hospital. In the first of the two, physician researchers, funded by the National Institutes of Health and the US Public Health Service in 1963, injected live cancer cells into twenty-two indigent elderly patients to see how their bodies rejected foreign cells. There was no consent sought or given, and the doctors involved argued that no harm was done.[74] In the Willowbrook study, researchers deliberately infected institutionalized children with hepatitis to study the course of the disease and the effects of gamma globulin. The researchers argued that, because of the prevalence of hepatitis in the facility, the children would have become infected anyway and this controlled infecting would do them less harm.[75] Parents had consented after having received a one-paragraph written consent and been promised placement for their children within the facility when it was otherwise full.[76]

Beecher's revelations, when first presented at a conference in spring 1965 and then with his subsequent article, received extensive coverage in US newspapers, producing

an extreme public reaction.[77] Beecher's conference presentation and article are generally viewed as a watershed event in exposing research abuse in the United States and generating calls for change.[78] There had been a nascent effort to establish standards for medical research in the United States at the time of publication of Beecher's article. A 1962 federal statute required that consent be obtained from subjects for research leading to requests for approval of drugs by the Food and Drug Administration. Broad exceptions to allow for nonconsensual research where consent was "not feasible" or not in the best interests of the subject, however, gutted the central requirement, especially at a time where informed consent in medicine generally was rejected in clinical medicine as not serving patients well. On the international front, the World Medical Association had adopted a set of guidelines known as the Declaration of Helsinki in 1964, which was endorsed by the House of Delegates of the AMA in 1966, but with no enforcement tools and with little effect.[79]

In 1966, the surgeon general required that a committee of the researcher's colleagues review any proposed study to account for consent, the risks of the experiment, and the rights and welfare of the subjects; but these committees were entirely composed of fellow scientists. Also in 1966, the US Public Health Service issued Policy and Procedures Order 129 that included guidelines for research funded by the USPHS. None of these efforts was particularly effective.[80]

The Tuskegee Syphilis Study proceeded unabated despite the 1966 USPHS research policy and an ad hoc committee review in 1969 which agreed that such a study should never be repeated but did not recommend termination or asking for the subjects' consent to continue.[81] Finally in 1972, news articles reported on the study with some articles including comparisons between the Tuskegee Study and the Nazi experiments. The ensuing controversy finally caused the termination of the Study and provided the final trigger for serious consideration of legal controls on medical research in the United States. The US Senate conducted extensive hearings on research and medical experimentation resulting in the enactment of the National Research Act of 1974.[82] The Act established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research and required that research institutions establish internal Institutional Review Boards to review protocols that would receive federal funding "to protect the rights of the human subjects of research." At the same time, the Department of Health, Education, and Welfare (HEW, the precursor to HHS) promulgated its first regulations to govern HEW-funded research, anticipating the implementation of the Act.[83]

Despite the frequent invocation of the Nuremberg Code in calls for controls on medical experimentation, including in the National Commission's influential Belmont Report,[84] the code was not easily accepted in the research community.[85] In 1970, for example, Henry Beecher advocated for the 1964 Declaration of Helsinki over the Nuremberg Code as a model for constraining abuse in research:

> The Nuremberg Code presents a rigid act of legalistic demands. . . . The Declaration of Helsinki, on the other hand, presents a set of guides. It is an ethical as opposed to a legalistic document and is thus more broadly useful [to physicians] than the one formulated at Nuremberg.[86]

The Helsinki Declaration begins by stating that it provides "recommendations as a guide to each doctor in clinical research." Its general tone, as compared to the Nuremberg Code, is one of confidence in the ethical character of physicians in research and deference to the judgment of the individual physician in applying the guidelines, including for the issue of informed consent.[87] In contrast, the tribunal itself emphasized the legal character of at least some of its principles as it stated that it relied solely on those that were "purely legal in nature" to determine the criminal culpability of the Nazi doctors.[88] It also, after all, advocated by its own action that principles of appropriate research should be enforced by law. The declaration and the code also treat informed consent quite differently. The declaration requires consent of the patient for research, combined with clinical care, but only if consent is "consistent with patient psychology," leaving the physician to determine whether it is appropriate. In contrast, the Nuremberg Code states as its first requirement that consent of the subject is "absolutely essential."

The handprint of the Nuremberg Code upon the regulations finally adopted by several federal agencies to regulate the conduct of research performed by or funded by the agencies[89] is apparent although there certainly is not an identical match between the two. Most significantly, the federal regulations, like the Nuremberg Code, establish legally enforceable standards for research even as they rely substantially on internal review of research protocols by research organizations themselves.[90]

The Nuremberg Code and the Common Rule, as the federal regulations are now known, share many substantive principles. For example, both require that any experiment with human subjects be designed and conducted in a way to produce valid results; that there are limits on the degree of risk that a subject will be allowed to undertake; that there should be continuing review of the performance of the research to assure that it is producing valid results and has not presented unanticipated risks; and that the subject always has the right to withdraw. The Common Rule devotes considerable attention to the content of information that must be given to potential subjects, as do the Institutional Review Boards in reviewing individual research protocols; but it diverges from the Nuremberg Code on one key point regarding consent. The Nuremberg Code holds that freely given consent is "absolutely essential" and does not make way for any research with human subjects without consent. The Common Rule, in contrast, does allow for research without consent in certain circumstances, including allowing proxy decision-makers to consent where the subject is legally incapable of consenting. While the code did not address proxy consent as this was not at issue in the Doctors' Trial,[91] the divergence between the code and the Common Rule evidences the continuing tension between the drive for new knowledge and protection of vulnerable human subjects, one that is mediated only unsatisfactorily by the requirement of consent.[92]

For all of its ultimate significance, the Nuremberg Code is a brief and limited document. In fact, the 1931 Reich circular provides a more comprehensive guide to ethical medical research with standards that "were visionary in their depth and scope."[93] It sets standards for both "scientific experimentation" and innovative therapy in the context of clinical care; exploitation of social hardship; research with the dying and with children; and requires that records of the research and the subject's consent,

including proxy consent where applicable, be kept. Of course, the 1931 circular had been submitted into evidence in the Doctors' Trial, and its influence on the substantive principles of the Nuremberg Code is clear.[94]

Conclusion

There may be nothing in the history of medical experimentation that approaches the scope of the cruelty and brutality of the Nazi experiments performed in the context of mass killing. Even in the United States, however, racialized medicine supported research abuse of African Americans with horrendous effect during the time of slavery and with disproportionate serious harm long thereafter. Rather than the aberrant behavior of a few evil individuals, the Nazi experiments emerged directly from Nazi law and health policy. Massive forced sterilizations under a racial hygiene policy; medicalized killing of hospital patients viewed as lives unworthy of life; and the militarization of research all combined to support Nazi experiments inside and out of the concentration camps using concentration camp prisoners as cheap and disposable raw material.

There is no doubt that the Nazi experience informs our own regulation of medical research as does the history of research abuse in the United States. The Doctors' Trial and the Nuremberg Code paved a pathway for the development of more enforceable constraints on research with human subjects in the United States when the country confronted its own excesses in the name of research.

Epilogue

John J. Michalczyk

Despite the fact that the Second World War and the Holocaust ended more than seventy years ago, the repercussions of these apocalyptic events still resonate in today's terror-filled society. In 2015–16 approximately a million immigrants registered in Germany, primarily fleeing the violence witnessed in Iraq and Syria. Chancellor Angela Merkel championed an open-border policy toward these refugees, much to the concern of the growing number of nationalists such as Alternative für Deutschland whose members demanded stricter laws and even called for German soldiers to fire upon refugees crossing into Germany. German courts struggle over the banning of ultra-right wing, nationalist groups, such as the anti-immigrant National Democratic Party (NPD). Echoing some of the same xenophobic ideas rampant in antisemitic Nazi Germany, nationalists decry the presence of the "welfare" immigrants who allegedly consume the precious resources of the country and are at the heart of terrorist attacks. The attack on a Berlin Christmas market in December 2016 by a Tunisian truck driver who killed twelve people while claiming allegiance to ISIS fueled nationalists' voices calling for stricter policies against potential Arab/Muslim extremists.

Restitution for the theft of Jewish art and other possessions has not been made for all victims and their surviving families. Cases such as *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) controversy of the rightful possession of Gustav Klimt's "Adele Bloch-Bauer I" (1907) dragged on for years. The legal case was featured in the film *Woman in Gold*. Compensation from the German Forced Labor Compensation Program (GFLCP) has not been fully made to the slave labor force coerced into working for the Third Reich engaged in war. Stumbling blocks still remain for some of the 50,000 claimants. Swiss banks have been sued for holding Nazi gold stolen from the Third Reich's victims. Germany, and in a lesser manner, Austria, however, have made attempts to rectify their past criminal activity. Strong anti-Nazi laws are now in place in Germany; the Criminal Code (*Strafgesetzbuch*) in § 86a prohibits the "use of symbols of unconstitutional organizations" such as a swastika or an SS insignia. The dissemination of propaganda linked to the Nazi Party also falls under the prohibition. Holocaust denial in Germany is also punishable by imprisonment.

The International Military Tribunal at Nuremberg of the major Nazi war criminals set a precedent, but further work had to be done to bring other Nazis to judgment. On July 17, 1998, 120 countries adopted the Rome Statute, which established the International Criminal Court (ICC) and became formally operational in July 2002. The ICC today takes up the challenge of prosecuting genocide, war crimes, and crimes against humanity. Hybrid courts, such as the Extraordinary Chambers in the Courts of

Cambodia (ECCC) prosecute crimes during the regime of the Khmer Rouge (1975–79). In November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) to investigate the genocide of approximately 800,000 Tutsis and Hutu Tutsi-sympathizers. The International Criminal Tribunal for the former Yugoslavia has brought war criminals to trial from all sides of the conflict for crimes of genocide and ethnic cleansing during the early 1990s.

In the wake of new German laws about prosecuting Nazi war criminals in the wake of the John Demjanjuk case in 2011, the courts have opened up recent cases of former Auschwitz guards. These camp guards were accused of aiding and abetting the murder of Jews. In June 2016, the German court sentenced Reinhold Hanning, 94, to five years in prison for facilitating the death of camp prisoners. Paul A. Shapiro, director of the Mandel Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum in Washington, commented on the challenge to prosecute aging war criminals: "It is often asserted, and is true, and has been taken for granted as something that was unavoidable, that most perpetrators of the Holocaust were never held accountable for their crimes or even called before a court."[1] He further acknowledged the legal difficulties: "The failure to bring more Holocaust perpetrators to justice was not unavoidable, but at the time the law was not equipped to deal with crimes committed on such a monumental scale. It has taken decades of hard work to develop the law and legal precedent necessary to fix this."[2] Oskar Groening, "the accountant of Auschwitz," at the age of 94, was sentenced to four years in prison in July 2015 for being an accessary to the murder of 300,000 prisoners. In Luneberg, Germany, the presiding judge Franz Kompisch acknowledged the significance of finally bringing such criminals to justice at this late date: "Even after 70 years, one can create justice, and one can find a verdict. . . . There is a hope that the victims could find some peace and some reconciliation."[3]

On October 11, 2016, The *Christian Science Monitor* noted that according to the report on the Rosenburg Project dealing with former members of the Nazi Party in the postwar German justice system, "Researchers found that some 77 percent of senior officials in the Justice Ministry had once identified as Nazis, a portion higher than during the Third Reich, the period between 1933 and 1945 when Adolf Hitler controlled Germany, and much higher than researchers expected."[4] Heiko Maas, Germany's justice minister, said "Injustice can appear in the guise of the law,"[5] when he presented the report on October 10 in Berlin. Germany continues to examine its "dark past" and analyze how former Nazi officials in the postwar legal system have influenced Germany's present judicial apparatus. This applies, for example, to Germany's criminal laws for murder as well as to the case of "50,000 men accused of homosexual acts and punished criminally until 1969."[6] Maas concluded: "Knowledge of history can sharpen people's senses for situations where human rights and the rule of law are called into question—again."[7]

Notes

Chapter 1

1 For their helpful review and comments on an earlier draft, I would like to thank Volker Berghahn, Jon Bush, and Marion Kaplan.

2 Gustav Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," *Süddeutsche Juristenzeitung* 105–08 (1946), in Gustav Radbruch, *Rechtsphilosophie* (Stuttgart: K. F. Koehler, 1973), 347–57, 353; see also Gustav Radbruch, "Die Erneuerung des Rechts" (1947), in Werner Maihofer, ed., *Naturrecht oder Rechtspositivismus?* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1962), 1–10, 3; Gustav Radbruch, "Fünf Minuten Rechtsphilosophie," *Rhein-Neckar-Zeitung* (September 12, 1945), in Radbruch, *Rechtsphilosophie*, 327–29, 328; Gustav Radbruch, "Gesetz und Recht" (1947), in Gustav Radbruch, *Gesamtausgabe: Rechtsphilosophie*, Band 3, ed., Arthur Kaufmann (Heidelberg: C. F. Müller Juristischer Verlag, 1990), 96–100, 99; see generally Albrecht Langner, *Der Gedanke des Naturrechts seit Weimar und in der Rechtsprechung der Bundesrepublik* (Bonn: H. Bouvier, 1959), 165. This translation and all others are my own, unless otherwise noted.

3 For example, Arthur Kaufmann, "Die Naturrechtsrenaissance der ersten Nachkriegsjahre—und was daraus geworden ist," in Michael Stolleis et al., eds., *Die Bedeutung der Wörter: Festschrift für Sten Gagnér zum 70. Geburtstag* (Munich: Beck, 1991), 105–32; Kristian Kühl, "Rückblick auf die Renaissance des Naturrechts nach dem 2. Weltkrieg," in Gerhard Köbler et al., eds., *Geschichtliche Rechtswissenschaft: Ars Tradendo Innovandoque Acquitatem Sectandi. Freundesgabe für Alfred Söllner zum 60. Geburtstag* (Gießen: Brühler Verlag, 1990), 331–57.

4 Monika Frommel, "Rechtsphilosophie in den Trümmern der Nachkriegszeit," *Journal der Juristischen Zeitgeschichte* 10 (June 2016): 47–92; Joachim Perels, "Die Restauration der Rechtslehre nach 1945," *Kritische Justiz* 17 (1984): 359–79, 371–72.

5 See generally Douglas G. Morris, "Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch after the War," *Law and History Review* 34 (2016): 649–88, 649–53, 664–65.

6 See Peter C. Caldwell, "Legal Positivism and Weimar Democracy," *American Journal of Jurisprudence* 39 (1994): 273–301, 279–85; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997), 3–4, 13–39; Everhardt Franssen, "Positivismus als juristische Strategie," *JuristenZeitung* 24 (December 1969): 766–75, 769; Arthur Kaufmann, "Die Naturrechtsrenaissance"; Stefan Korioth, "Prologue—The Shattering of Methods in Late Wilhelmine Germany: Introduction," in Arthur J. Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 41–50, 42–43; Langner, *Der Gedanke des Naturrechts,* 11; Wolf Rosenbaum, *Naturrecht und positives Recht: Rechtssoziologische Untersuchungen zum Einfluss der Naturrechtslehre auf die Rechtspraxis*

in Deutschland seit Beginn des 19. Jahrhunderts (Neuweid: Luchterhand, 1972), 73–74; Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik: Die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933* (Munich: Deutscher TaschenbuchVerlag, 1978), 66–67.

7 See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, CA: Stanford University Press, 1969), 31–33, 66.

8 See Caldwell, *Popular Sovereignty*, 41–43; Korioth, "Prologue—The Shattering," 45–46; Langner, *Der Gedanke des Naturrechts,* 12–13; Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998), 90.

9 See Rosenbaum, *Naturrecht und positives Recht,* 65, 75–76.

10 See Caldwell, "Legal Positivism," 276; Caldwell, *Popular Sovereignty*, 43–44; Korioth, "Prologue—The Shattering," 48–49; Langner, *Der Gedanke des Naturrechts*, 36; Rosenbaum, *Naturrecht und positives Recht,* 78; Stolleis, *The Law*, 89.

11 Gnaeus Flavius [Hermann Kantorowicz], *Der Kampf um die Rechtswissenschaft* (Heidelberg: C. Winter's Universitätsbuchhandlung, 1906), 10–11; see also Monika Frommel, "Hermann Ulrich Kantorowicz (1877–1940): Ein Rechtstheoretiker zwischen allen Stühlen," in Helmut Heinrichs et al., eds., *Deutsche Juristen Jüdischer Herkunft* (Munich: C.H. Beck, 1993), 631–41, 632–38; David Ibbetson, "Hermann Kantorowicz (1877–1940) und Walter Ullmann (1910–83)," in Jack Beatson and Reinhard Zimmermann, eds., *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (New York: Oxford University Press, 2004), 269–98, 271–73.

12 Richard Engländer, "Die Renaissance des Naturrechts," *Der Kampf*, H. 1, N. 12 (September 1, 1908): 547–52, 552 (quotation).

13 Engländer, "Die Renaissance des Naturrechts," 552; Flavius [Kantorowicz], 44–46, 48.

14 See Caldwell, *Popular Sovereignty*, 41, 82–83; Douglas G. Morris, *Justice Imperiled: The Anti-Nazi Lawyer Max Hirschberg in Weimar Germany* (Ann Arbor: University of Michigan Press, 2005), 142–43; Sontheimer, *Antidemokratisches Denken*, 66; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Weimarer Republik und Nationalsozialismus* (Munich: Beck, 2002), 51–52, 182; Stolleis, *The Law*, 90.

15 See generally Caldwell, *Popular Sovereignty*, 85–119.

16 Caldwell, *Popular Sovereignty*, 81; Clemens Jabloner, "Hans Kelsen: Introduction," in Jacobson and Schlink, *Weimar*, 67–76, 68–69; Sontheimer, *Antidemokratisches Denken,* 67–69.

17 Hans Kelsen, "The Idea of Natural Law" (1928), in Ota Weinberger, ed., *Essays in Legal and Moral Philosophy* (Dordrecht, Boston: Reidel, 1974), 27–60; Hans Kelsen, "Legal Formalism and the Pure Theory of Law" (1929), in Jacobson and Schlink, *Weimar*, 76–83; Hans Kelsen, "On the Essence and Value of Democracy" (1929), in Jacobson and Schlink, *Weimar*, 84–109; Hans Kelsen, "State-Form and World-Outlook" (1933), in Weinberger, *Essays in Legal and Moral Philosophy,* 95–113; see also Hans Kelsen, "The Natural-Law Doctrine before the Tribunal of Science," *The Western Political Quarterly* 2 (1949): 481–513, 484; Hans Kelsen, "What Is Justice?" (1953), in Weinberger, *Essays in Legal and Moral Philosophy*, 1–26, 23; see generally Caldwell, *Popular Sovereignty*, 64–65, 86; David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (New York: Oxford University Press, 1997), 137–48; Peter Intelmann, *Franz L. Neumann: Chancen und Dilemma des Politischen Reformismus* (Baden-Baden: Nomos, 1996), 79–81; Jabloner, "Hans Kelsen: Introduction," 69, 73–74; Ulfrid Neumann, "Naturrecht und Politik

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18 William E. Scheuerman, "Carl Schmitt's Critique of Liberal Constitutionalism," *The Review of Politics* 58 (Spring 1996): 299–322, 319 fn. 50; see also ibid., 301–13, 315, 319; Dyzenhaus, *Legality and Legitimacy*, 44–50; Stolleis, *Geschichte*, 178–81.

19 See generally Caldwell, *Popular Sovereignty*, 89–90, 107; Scheuerman, "Carl Schmitt's Critique," 303–04, 307–08, 315.

20 Kelsen, "The Idea"; see also Kelsen, "The Natural Law Doctrine," 482, 484, 485 fn. 7, 501, 513; Kelsen, "What Is Justice?" 20–22; see generally Dyzenhaus, *Legality and Legitimacy*, 103–04, 118, 133–36, 154; Manfred Friedrich, "Erich Kaufmann (1880–1972): Jurist in der Zeit und jenseits der Zeiten," in Heinrichs, *Deutsche Juristen Jüdischer Herkunft*, 693–704, 700; Langner, *Der Gedanke des Naturrechts*, 24–25; Ulfrid Neumann, "Naturrecht und Politik," 72–73; Stanley L. Paulson, "Some Issues in the Exchange between Kelsen and Kaufmann," in *Scandinavian Studies in Law* 48 (2005): 269–90, 277–78; William E. Scheuerman, *Between the Norm and the Exception: the Frankfurt School and the Rule of Law* (Cambridge, MA: MIT Press, 1994), 176–78; Sontheimer, *Antidemokratisches Denken,* 71.

21 George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (New York: Greenwood Press, 1989).

22 See generally Caldwell, *Popular Sovereignty*, 78–84; Sontheimer, *Antidemokratisches Denken,* 85–92; Manfred Walther, "Hat der juristische Positivismus die deutschen Juristen im 'Dritten Reich' wehrlos gemacht? Zur Analyse und Kritik der Radbruch-These," in Ralf Dreier and Wolgang Sellert, hrsg., *Recht und Justiz im "Dritten Reich,"* 1. Aufl. (Frankfurt am Main: Suhrkamp, 1989), 323–54, 325–32.

23 See Caldwell, "Legal Positivism," 288–99; Franssen, "Positivismus als juristische Strategie," 768; Intelmann, *Franz L. Neumann,* 142–51, 188–90; Franz Neumann, "Bemerkungen zu der Arbeit von Hans Mayer" (New York: Institute for Social Research, 1936), Max Horkheimer Archives, Universitätsbibliothek Frankfurt am Main, Germany: 3–4; Walter Ott and Franziska Buob, "Did Legal Positivism Render German Jurists Defenceless during the Third Reich?" *Social & Legal Studies* 2 (1993): 91–104; Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13 (August 1994): 313–59, 345–46; Rosenbaum, *Naturrecht und positives Recht,* 91–93; Sontheimer, *Antidemokratisches Denken,* 77; Walther, "Hat der juristische," 329.

24 See Caldwell, "Legal Positivism," 286–87; Franssen, "Positivismus als juristische Strategie," 770–73; Sontheimer, *Antidemokratisches Denken,* 85–87; Stolleis, *Geschichte*, 169–71, 177–78, 185, 200–02; Stolleis, *The Law*, 91–95; Michael Stolleis, "Richterliches Prüfungsrecht, Verwaltungs- und Verfassungsgerichtsbarkeit in der Weimarer Republik," in Michael Stolleis, *Nahes Unrecht, Fernes Recht: Zur Juristischen Zeitgeschichte im 20. Jahrhundert* (Göttingen: Wallstein, 2014), 23–45, 38, 40.

25 For example, Viktor Cathrein, "Naturrechtliche Strömungen in der Rechtsphilosophie der Gegenwart," *Archiv für Rechts- und Wirtschaftsphilosophie* 16 (1922/23): 54–67; Viktor Cathrein, *Recht, Naturrecht und Positives Recht: Eine Kritische Untersuchung der Grundbegriffe der Rechtsordnung* (Freiburg im Breisgau: Herder, 1909).

26 For example, Otto Friedrich von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, trans. Ernest Barker (Cambridge: Cambridge University Press, 1934); Kurt Wolzendorff, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes*

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27 See generally Caldwell, "Legal Positivism," 275–76; Caldwell, *Popular Sovereignty*, 79, 82, 149–50; Stolleis, *Geschichte*, 94, 170, 190–91.

28 See Stephen Cloyd, "Erich Kaufmann: Introduction," in Jacobson and Schlink, *Weimar*, 189–196; Franssen, "Positivismus als juristische Strategie," 772; Paulson, "Some Issues," 270–79; Rosenbaum, *Naturrecht und positives Recht,* 99–100; Sontheimer, *Antidemokratisches Denken,* 70–71; Stolleis, *Geschichte*, 167–68, 176; Stolleis, *The Law*, 91.

29 Erich Kaufmann, "Die Gleichheit vor dem Gesetz im Sinne des Artikels 109 der Reichsverfassung" (1926), in A. H. van Scherpenberg et al., eds., *Gesammelte Schriften: Zum achtzigsten Geburtstag des Verfassers am 21. September 1960* (Göttingen: O. Schwartz, 1960): 246–65, 247.

30 Ibid.

31 Ibid., 248.

32 Ibid., 254.

33 Ibid., 255; see also ibid., 261–62, 264.

34 Caldwell, *Popular Sovereignty*, 150 (Caldwell's translation); see also Ulfrid Neumann, "Naturrecht und Politik," 70–71.

35 See generally Sontheimer, *Antidemokratisches Denken,* 69–70; see also Erich Kaufmann, *Kritik der neukantischen Rechtsphilosophie: Eine Betrachtung über die Beziehungen zwischen Philosophie und Rechtswissenschaft* (Tübingen: J. C. B. Mohr (Paul Siebeck), 1921): 98–101.

36 Kantorowicz, 35.

37 See Werner Heun, "Der Staatsrechtliche Positivismus in der Weimarer Republic: Eine Konzeption im Widerstreit," *Der Staat* 28 (1989): 377–403, 394.

38 Erich Kaufmann, 263; see also Langner, *Der Gedanke des Naturrechts,* 43–47; Sontheimer, *Antidemokratisches Denken,* 76–78; Stolleis, *Geschichte*, 94, 170, 175–76, 189–92.

39 See Stephen C. Neff, *Justice Among Nations* (Cambridge, MA: Harvard University Press, 2014): Ch. 6.

40 Erich Kaufmann, "Studien zur Staatslehre des monarchischen Prinzipes" (Leipzig: Druck von O. Brandstetter, 1906), 33–35, 53, 56–101; see also Christian Tomuschat, "Erich Kaufmann," in 37 *Orden pour le Mérite für Wissenschaften und Künste: Reden und Gedenkworte* 219–36 (2008–09): 224.

41 Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Statibus* (Tübingen: J. C. B. Mohr (P. Siebeck), 1911): 146, as quoted in Tomuschat, 226; see also ibid., 225–27; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, New York: Cambridge University Press, 2001), 179–81, 249–57.

42 Erich Kaufmann, *Bismarck's Erbe in der Reichsverfassung* (Berlin: J. Springer, 1917), 8.

43 Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Heidelberg, Dover, NH: Berg, 1986) (abbreviated hereafter as "*ROL*"): 277; Neumann, "Bemerkungen zu Hans Mayer," 6; Franz Neumann, "The Change in the Function of Law in Modern Society" (1937), in Franz Neumann, *The Democratic and the Authoritarian State* (Glencoe, IL: Free Press, 1957), 22–68, 54; see also Caldwell, "Legal Positivism," 287; Caldwell, *Popular Sovereignty*, 80, 148, 150–51; Horst Dreier, "Die Radbruchsche Formel—Erkenntnis oder Bekenntnis?" in Heinz Mayer, ed., *Staatsrecht in Theorie und Praxis: Festschrift Robert Walter zum 60. Geburtstag* (Vienna: Manz, 1991), 117–35, 121–22; Franssen, "Positivismus als juristische

Strategie," 771; Heun, "Der Staatsrechtliche, 390–95; Intelmann," *Franz L. Neumann,* 137; Langner, *Der Gedanke des Naturrechts,* 45–47; Franz Neumann, "Gegen ein Gesetz über Nachprüfung der Verfassungsmässigkeit von Reichsgesetzen," *Die Gesellschaft: Internationale Revue für Sozialismus und Politik* 6 (1929): 517–36, 519; Ott and Buob, 96–97; Paulson, "Fuller, Radbruch," 349–53; Rosenbaum, *Naturrecht und positives Recht,* 85–88; Sontheimer, *Antidemokratisches Denken,* 76–77; Stolleis, "Richterliches Prüfungsrecht," 32; Walther, "Hat der juristische," 326.

44 Neumann, "The Change in the Function of Law," in Neumann, *The Democratic and the Authoritarian State*, 53; see also Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York: Harper & Row, 1966), 446; Neumann, "Bemerkungen zu Hans Mayer," 6.

45 Neumann, ROL, 68.

46 Fabian Wittreck, *Nationalsozialistische Rechtslehre und Naturrecht* (Tübingen: Mohr Siebeck, 2008), 12–13.

47 Kelsen was not a party member. Jabloner, "Hans Kelsen: Introduction," 71.

48 Franz Neumann, "Rechtsphilosophische Einleitung zu einer Abhandlung über das Verhältnis von Staat und Strafe" (Juristische Dissertation, Frankfurt am Main, June 5, 1923), 27–29; see also ibid., 93–94, 105; Neumann, "Gegen ein Gesetz," 523–24.

49 Neumann, "Gegen ein Gesetz," 523; see also Intelmann, *Franz L. Neumann,* 134–51.

50 Radbruch, *Rechtsphilosophie*, 108, 178–79; see also Kühl, "Rückblick auf die Renaissance," 337; Ian Ward, *Law, Philosophy and National Socialism: Heidegger, Schmitt and Radbruch in Context* (Bern, New York: P. Lang, 1992), 184–85, 188.

51 Ulfrid Neumann, "Naturrecht und Positivismus im Denken Gustav Radbruchs: Kontinuitäten und Diskontinuitäten," in W. Härle und B. Vogel, eds., *"Vom Rechte, das mit uns geboren ist": Aktuelle Probleme des Naturrechts* (Freiburg im Breisgau: Herder, 2007), 11–32.

52 In this paragraph I rely on the account of Hermann Heller's thought provided by David Dyzenhaus. See Dyzenhaus, *Legality and Legitimacy*, 165–66, 170, 177, 181–84, 189, 192–99, 202–05, 211–16; David Dyzenhaus, "Hermann Heller and the Legitimacy of Legality," *Oxford Journal of Legal Studies* 16 (Winter 1996): 641–66, 650–51, 655–63; see also Christoph Müller, "Hermann Heller (1891–1933): Vom liberalen zum sozialen Rechtsstaat," in Heinrichs, *Deutsche Juristen Jüdischer Herkunft*, 776–77; Stolleis, *Geschichte*, 183–85; Stolleis, *The Law*, 93.

53 See generally Intelmann, *Franz L. Neumann,* 142–51, 188–90; Neumann, "Bemerkungen zu Hans Mayer," 3–4; Ott and Buob, 98; Paulson, "Fuller, Radbruch," 345–46; Rosenbaum, *Naturrecht und positives Recht,* 91–93; Sontheimer, *Antidemokratisches Denken,* 77; Walther, "Hat der juristische," 329.

54 See generally Franssen, "Positivismus als juristische Strategie," 707, 707 fn. 20.

55 Wittreck, 19–25.

56 Wittreck, 49–55; see also Langner, *Der Gedanke des Naturrechts,* 60–64, 74–79, 86–87.

57 See Wittreck, 20–21, 25–45; see also Langner, *Der Gedanke des Naturrechts,* 64–72, 79–84.

58 Ulfrid Neumann, "Naturrecht und Politik," 71, 72; Walther, "Hat der juristische," 338–39.

59 Ernst Fraenkel, *Der Urdoppelstaat* (1938), in Fraenkel, *Gesammelte Schriften* (abbreviated hereafter as *GS*), eds., Alexander von Brünneck, Hubertus Buchstein, Gerhard Göhler, 6 vols. (Baden-Baden: Nomos Verlagsgesellschaft, 1999–2011) (abbreviated hereafter as "*UDS*"): 2: 401–05, 409, 411–12, 460; see also Caldwell, "Legal Positivism," 276–77; Langner, *Der Gedanke des Naturrechts,* 79–84; Stolleis, *Geschichte*, 387–88 fn. 187; Wittreck, 4.

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61 See Morris, "Write and Resist," 202–07, 212–20.
62 Franz Neumann, "Types of Natural Law" (1940), in Neumann, *The Democratic and the Authoritarian State*: 69–95, 69.
63 Morris, "Accommodating Nazi Tyranny," 661–63.
64 See generally Kenneth F. Ledford, "Judging German Judges in the Third Reich: Excusing and Confronting the Past," in Alan E. Steinweis and Robert D. Rachlin, eds., *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (New York, Oxford: Berghahn Books, 2013), 161–89, 171.
65 Franz Neumann, "German Democracy 1950," *International Conciliation* 28 (New York: Carnegie Endowment for International Peace, 1950): 251–96, 257.
66 Ibid., 257.
67 Ibid.; see also ibid., 263–64, 265 fn. 17.
68 Neumann, "German Democracy 1950," 290; see also ibid., 258, 263–64; Franz Neumann, "Military Government and the Revival of Democracy in Germany," *Columbia Journal of International Affairs* 2 (1948): 3–20, 6–8, 18–19.
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71 See generally Konrad H. Jarausch, "Jewish Lawyers in Germany, 1848–1938: The Disintegration of a Profession," *Leo Baeck Institute Year Book* XXXVI (1991): 173–78; Douglas G. Morris, "Discrimination, Degradation, Defiance: Jewish Lawyers in Nazi Germany," in Steinweis and Rachlin, *The Law in Nazi Germany*, 106–07.
72 See generally Michael Stolleis, "Rechtsordnung und Justizpolitik in Deutschland, 1945–1949," in Stolleis, *Nahes Unrecht, Fernes Recht: Zur Juristischen Zeitgeschichte im 20. Jahrhundert* (Göttingen: Wallstein Verlag, 2014), 65–95, 81, 87–88; Michael Stolleis, "Hesitating to Look in the Mirror: German Jurisprudence after 1933 and after 1945" (Chicago: Fulton Lectures, 2001), 3–6.

Chapter 2

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4 Ibid.
5 Schmitt, *Über Schuld und Schuldarten*, 73.
6 Ibid.
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20 Karl Bracher, *Geschichte als Erfahrung* (Stuttgart: Deutsche Verlags-Anstalt, 2001), 20.
21 Jürgen Manesmann, *Carl Schmitt und die Politische Theologie: Politische Anti-Monotheismus* (Münster: Aschendorff Verlag, 2002), 37.
22 Carl Schmitt, *Der Wert des Staates und Die Bedeutung des Einzelnen* (Tübingen: J.C. Mohr, 1914), 3.
23 Schmitt, *Der Wert des Staates,* 6.
24 Ibid.
25 Martin Pilch, *System des Transendentalen Etatismus, Staat und Verfassung bei Carl Schmitt* (Wien: Larolinger, 1994), 123.
26 See Carl Schmitt, *Tagebücher: Oktober 1912 bis Februar 1915*, Herausgegeben von Ernst Hüsmert (Berlin: Akademie Verlag, 2003); Carl Schmitt, *Die Militärzeit 1915 bis 1919*, Herausgegeben von Ernst Hüsmert und Gerd Giesler (Berlin: Akademie Verlag, 2005).
27 Blasius, *Carl Schmitt: Preussicher Staatsrat in Hitlers Reich*, 153.
28 See Manfred Dahlheimer, *Carl Schmitt und der Deutscher Katholizismus, 1888-1936* (Paderborn: Ferdinand Schöningh, 1998), 459.
29 Schmitt's editorials in *Deutsche Juristenzeitung* and his advisory decisions on the Prussian State Council make these positions clear.
30 See Schmitt, *Tagebücher, 1912-1915, 1915-1919, 1919-1924.*

31 Schmitt, *Tagebücher, 1930-1934*, 47. "Georg Eisler kam abends, grosse Freude, darüber, er sagte am Tisch: er wünschte, er ware keine Jude, sondern ein Deutscher."
32 Schmitt, *Tagebücher 1912-1915*, 315.
33 Schmitt, *Tagebücher 1930-1934*, 4.
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40 Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy* (Chicago: University of Chicago Press, 2011), 29.
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48 Carl Schmitt, "Die Deutschen Intellektuellen," *Westdeutscher Beobachter* (Juni 1933), Anhang.
49 Gross, *Carl Schmitt and the Jews,* 46.
50 Carl Schmitt, "Kodifikation oder Novelle—Über die Aufgbe und Methode der Heutigen Gesetzgebung," *Deutsche Juristenzeitung*, 40 Jahrgang, Heft15/16 (August to September, 1935), 919.
51 Carl Schmitt, "Weiterentwicklung des Totalen Staats in Deutschland," *Verfassungs Aufsätze* (München: Dunker& Humblot), 361.
52 Blasius, *Carl Schmitt: Preussicher Staatsrat in Hitlers Reich*, 164.
53 Ibid., 14.
54 Ibid., 112.
55 Carl Schmitt, "Romantik," *Hochland*, 22 Jahrgang, Heft 2 (November 1924), 157–71; "Der Statusquo und der Friede," *Hochland*, 23 Jahrgang, Heft 1 (October 1925), 1–9; "Der Völkerbund und Europa," *Hochland*, 25 Jahrgang, Heft 2 (January 1927), 345–54.
56 Carl Schmitt, *Römischer Katholizmus und Politischer Form* (München: Theatine Verlag, 1925).
57 Carl Schmitt, *Politische Theologie—Vier Capitel zur Lehre von der Souveränität* (München: Duncker & Humblot, 1922).
58 Mehring, *Carl Schmitt: Aufsteig und Fall*, 310.

59 Frequent references in Schmitt's diaries, particularly *Tagebücher 1930-1934*.
60 Quoted in Schmitt, *Tagebücher 1915-1919*, 304.
61 Schmitt, *Römischer Katholizmus und Politischer Form*.
62 Shapiro, *Carl Schmitt and the Intensification of Politics* (London: Rowman & Littlefield, 2008), 98.
63 Barbara Boyd, "Carl Schmitt Revival Designed to Justify Emergency Rule," *Executive Intelligence Review* (January 19, 2001).
64 Pilch, *System des Transcendentalen Etatismus und Verfassung bei Carl Schmitt*, 120.
65 Carl Schmitt, *Der Nomos der Erde in Völkerrecht des Jus Publicum Europaeum* (Berlin: Dunker & Humblot, 1997), first published in 1954. Earlier citation had first published before later publication, no. 47.
66 Hugo Grotius, *The Rights of War and Peace* (Indianapolis: Liberty Fund, 2005).
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68 William Scheuerman, "Carl Schmitt and the Road to Abu Ghraib," *Constellations* 13, no.1 (2006), 109.
69 Schmitt, *Der Theorien des Partisan*, 64.
70 Scheuerman, "Carl Schmitt and the Road to Abu Ghraib," 110.
71 Quoted in William Scheuerman, *Morgenthau* (New York: Wiley, 2009), 33–34.

Chapter 3

1 I am deeply thankful to Gerd Bayer, Stuart Jenks, and Jana Schmalfuss for their critical readings of early versions of this chapter.
2 Lothar Gruchmann, "'Blutschutzgesetz' und Justiz: Zu Entstehung und Auswirkung des Nürnberger Gesetzes vom 15. September 1935," *Vierteljahreshefte zur Zeitgeschichte* 31.3 1983: 434.
3 First critical treatments of the complex prehistory of the Nuremberg Race Laws have been provided in Karl A. Schleunes, *The Twisted Road to Auschwitz: Nazi Policy Toward German Jews 1933-1939* (Urbana and Chicago: University of Illinois Press, 1990 (1970)), esp. 92–132, and in Uwe D. Adam, *Judenpolitik im Dritten Reich* (Düsseldorf: Droste, 1972), esp. 114–44. Several aspects of these initial accounts, such as the interpretation of the role of individual decision-makers, have been challenged by later research. The most thorough and comprehensive treatment of the origins of the Nuremberg Race Laws to date can be found in Cornelia Essner, *Die "Nürnberger Gesetze" oder Die Verwaltung des Rassenwahns* (Paderborn: Schöning, 2002).
4 The complete judgment against Katzenberger, as well as its discussion in the context of the Nazi juridical practice, can be found in Ilse Staff, ed., *Justiz im Dritten Reich: Eine Dokumentation* (Frankfurt and Hamburg: Fischer, 1964), 194–208, here 203; translation by Oleksandr Kobrynskyy.
5 According to Christiane Kohl's account of the Katzenberger trial, the charges were based exclusively on conjectures and on hearsay. None of those who testified in court have actually witnessed any of the culpable actions. Both Irene Seiler and Leo Katzenberger explained in court that their relationship was friendly and that the bodily contact never exceeded conventional signs of affection. Judge Rothaug, however, willfully ignored any evidence that jeopardized his always apparent intention of finding Katzenberger guilty. On March 26, 1947 Irene Seiler again appeared in the same Court

Room 600 in Nuremberg, this time as a witness of the prosecution in the Nuremberg Lawyers' Trial of 1947. Oswald Rothaug was sentenced to life imprisonment. However, like most Nazi criminals tried by postwar courts, he did not serve his sentence fully and was released in 1956. Christiane Kohl, *Der Jude und das Mädchen. Eine Verbotene Freundschaft in Nazideutschland* (Hamburg: Spiegel, 1998), 205, 245–61, 312, 317. An English translation of Kohl's book appeared in 2004 as *The Maiden and the Jew: The Story of a Fatal Friendship in Nazi Germany.*

6 *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre* (September 15, 1935, RGBl. I: 1146): "§2 Außerehelicher Verkehr zwischen Juden und Staatsangehörigen deutschen oder artverwandten Blutes ist verboten." Cited in Rudolf Beyer, ed., *Hitlergesetze XIII: Die Nürnberger Gesetze*, 4th ed. (Leipzig: Reclam, 1938), 34; translation by United States Holocaust Memorial Museum, "The Nuremberg Race Laws: Translation," accessed on May 17, 2016, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007903.

7 *Erste Verordnung zur Ausführung des Gesetzes zum Schutze des deutschen Blutes und der Deutschen Ehre* (November 14, 1935, RGBl. I: 1334): "§11 Außerehelicher Verkehr im Sinne des §2 des Gesetzes ist nur der Geschlechtsverkehr." Cited in Beyer, *Hitlergesetze*, 39; translation by Oleksandr Kobrynskyy. In the years 1935–40, an overall number of 1,911 individuals were convicted on race defilement charges. Gruchmann, "Blutschutzgesetz," 434.

8 *Verordnung gegen Volksschädlinge* (September 5, 1939, RGBl. I: 1679), *Beschluß des Großen Senats für Strafsachen* (December 9, 1936, RGSt 68: 20); cited in Staff, *Justiz*, 208–11.

9 Lothar Gruchmann assumes that high-ranking officials who stayed close to Hitler during those days in Nuremberg convinced him about the necessity of rapid anti-Jewish legislation. Gruchmann, "Blutschutzgesetz," 431.

10 Staff, *Justiz*, 196.

11 *Erste Verordnung zum Reichsbürgergesetz* (November 14, 1935, RGBl. I: 1333). Cited in Beyer, *Hitlergesetze*, 25–28. On the genesis of the first supplementary decree to the Reich Citizenship Law and on legal implications of the term *volljüdisch*, see Jeremy Noakes, "Wohin gehören die 'Judenmischlinge'? Die Entstehung der ersten Durchführungsverordnungen zu den Nürnberger Gesetzen," in *Das Unrechtsregime: Internationale Forschung über den Nationalsozialismus. Band 2: Verfolgung—Exil—Belasteter Neubeginn*, Ursula Büttner, ed. (Hamburg: Christians, 1986), 67–89.

12 Cornelia Essner, "Reichsbürgergesetz und Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre ['Nürnberger Gesetze'], 15. September 1935, und die beiden ersten Ausführungsbestimmungen, 14. November 1935. Zusammenfassung; Einführung," *100(0) Schlüsseldokumente zur Deutschen Geschichte im 20. Jahrhundert*, accessed on May 17, 2016, http://www.1000dokumente.de/index.html?c=dokument_de&dokument=0007_nue&object=context&st=&l=de.

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14 Peter Longerich, *Holocaust. The Nazi Persecution and Murder of the Jews* (Oxford: Oxford University Press, 2010), 4.

15 "Obwohl aus jüdischen Mischehen manche hervorragende Geister hervorgegangen sind, glaube ich von dem Eingehen einer solchen Mischehe doch dringend abraten zu müssen. . . . Es ist zu hoffen, daß mit der Erstarkung des germanisch-nordischen Rassenbewußtseins einerseits, des jüdisch-zionistischen andererseits die Mischehen in Zukunft seltener werden." Fritz Lenz, *Menschliche Auslese und Rassenhygiene* (*Eugenik*), 3rd ed. (München: Lehmanns, 1930), 504; translation by Oleksandr Kobrynskyy.

16 Peter Longerich, *Hitler: Biographie* (München: Siedler, 2015), 153, 1055, footnote 102.
17 "Ehen zwischen Deutschen und Juden sind zu verbieten, solange überhaupt noch Juden auf deutschem Boden leben dürfen." Alfred Rosenberg, *Der Mythos des Zwanzigsten Jahrhunderts*, 5th ed. (München, 1933), 579, cited in Adam, *Judenpolitik*, 127, footnote 69.
18 *Programm der NSDAP mit Aufnahmeerklärung und Wahlaufruf zum 2. Wahlgang der Reichspräsidentenwahl 1932* (April 10, 1932, DO 56/1614.19).
19 *Änderungsantrag Dr. Frick und Genossen zur zweiten Beratung des Entwurfs eines Gesetzes zum Schutze der Republik und zur Befriedung des politischen Lebens* (March 13, 1930, Reichstag IV. Wahlperiode 1928, Drucksache Nr. 1741).
20 Saul Friedländer, *Nazi Germany and the Jews. The Years of Persecution, 1933-1939* (New York: HarperCollins, 1997), 28.
21 *Gesetz zur Wiederherstellung des Berufsbeamtentums* (April 7, 1933, RGBl. I: 175).
22 Achim Gercke's memorandum "Soll man den deutsch-jüdischen Bastarden die vollen Staatsbürgerrechte geben?" (BAL R 15.09/11, 14) is discussed in Essner, *Die "Nürnberger Gesetze,"* 77–82.
23 "Entwurf zu einem Gesetz zur Regelung der Stellung der Juden" (SAMo 500-1-379) is discussed in Essner, *Die "Nürnberger Gesetze,"* 82–86.
24 I owe both terms to Cornelia Essner, who writes about "kontagionistischer Antisemitismus" and "grotesk anmutende Blutsarithmetik." Essner, "Reichsbürgergesetz."
25 *Erste Verordnung zur Durchführung des Gesetzes zur Wiederherstellung des Berufsbeamtentums* (April 11, 1933, RGBl. I: 195).
26 "Bei der Auslegung des Begriffs der arischen Abstammung nach §3 des Berufsbeamtengesetzes ist nicht die Religion maßgeblich, sondern entscheidend ist die *Abstammung*, die *Rasse*, das *Blut*." Wilhelm Frick's circular letter from September 1, 1933 (BA R 43 II/418 a) is discussed in Noakes, "Wohin gehören," 70; translation by Oleksandr Kobrynskyy.
27 *Nationalsozialistisches Strafrecht, Denkschrift des Preußischen Justizministers* (Berlin: 1933) is discussed in Gruchmann "Blutschutzgesetz," 419, and in Essner, *Die "Nürnberger Gesetze,"* 96–98.
28 Gruchmann, "Blutschutzgesetz," 419–21; Essner, *Die "Nürnberger Gesetze,"* 98.
29 Schleunes, *Twisted Road*, 120.
30 Essner, *Die "Nürnberger Gesetze,"* 111–12.
31 Noakes, "Wohin gehören," 71–72.
32 Gruchmann, "Blutschutzgesetz," 430–31.
33 A particularly vivid account of the creation of Nuremberg Race Laws is provided by Bernhard Lösener, who as *Rassereferent*, an official of the Interior Ministry, was in charge of designing the drafts for the race laws. Bernhard Lösener, "Als Rassereferent im Reichsministerium des Innern," *Vierteljahreshefte zur Zeitgeschichte,* 9.3 (1961): 264–313. In 1948 Lösener appeared as witness in the Nuremberg Ministries' Trial in order to exonerate his former direct supervisor Wilhelm Stuckart. In his postwar testimony, which was published in the year of the Eichmann trial by the *Institut für Zeitgeschichte*, Lösener describes the extraordinary time pressure under which the officials had to work on the drafts for two straight days before the special session on Sunday, September 15, 1935 would end the Reichstag and the laws would be proclaimed. While Lösener's narrative has been corroborated by some historians (such as Scheunes, cp. *Twisted Road*, 121–2), it should be read with caution. Lösener makes sure to accentuate the rush in Nuremberg in order to create the impression that the idea to design anti-Jewish laws took him and Wilhelm Stuckart by surprise. It is very

unlikely that Lösener, who as *Rassereferent* knew the ins and outs of Nazi *Judenpolitik*, came to Nuremberg clueless and without any preliminary drafts in his suitcase. Lösener's apologetic narrative is still a highly readable document. But it should not cloud our critical judgment. The Nuremberg Race Laws were not so much the result of an all-nighter pulled by Nazi clerks but rather a distillate of suggestions and blueprints that went back several years. For a thorough critique of Lösener's account, see Essner, *Die "Nürnberger Gesetze,"* 113–34.

34 "Staatsangehörige deutschen oder artverwandten Blutes"; *Reichsbürgergesetz* (September 15, 1935, RGBl. I: 1146). Cited in Beyer, *Hitlergesetze*, 24; translation by Oleksandr Kobrynskyy.

35 *Dreizehnte Verordnung zum Reichsbürgergesetz* (July 1, 1943, RGBl. I: 372). See also Gruchmann, "Blutschutzgesetz," 442.

Chapter 4

1 Jacques Adler, "Vichy: Reflections on French Historiography," *The Historical Journal,* vol. 44, no. 4 (2001), 1067.

2 Lucy Dawidowicz, *The War Against the Jews, 1933-1945* (New York: Bantam Books, 1975), 360–63.

3 Dawidowicz, *The War Against the Jews,* 360–61.

4 Ian Ousby, *Occupation: The Ordeal of France, 1940-1944* (New York: St. Martin's Press, 1998), 98.

5 See Michael Curtis, *Verdict on Vichy: Power and Prejudice in the Vichy France Regime* (London: Weidenfeld & Nicolson, 2002), 105.

6 Adler, "Vichy: Reflections on French Historiography," 1072.

7 John Sweets, *Choices in Vichy France: The French under Nazi Occupation* (New York: Oxford University Press, 1994), 119.

8 Henri Sinder, "Lights and Shades of Jewish Life in France, 1940-42," *Jewish Social Studies,* vol. 5, no. 4 (1943), 373.

9 Sinder, "Lights and Shades," 377.

10 Ousby, *Occupation: The Ordeal of France,* 99.

11 Adler, "Vichy: Reflections on French Historiography," 1067–68.

12 Curtis, *Verdict on Vichy*, 112.

13 Adam Rayski, *Le Choix des Juifs sous Vichy, entre soumission et résistance* (Paris: Éditions de la Découverte, 1992), 8 and 16. (Attributed to Chaillet, P. in "La France au palmarès hitlérien de l'antisémitisme," *Témoignage chrétien 1941-1944*, ré-édition intégrale en facsimilé, préface de Renée Bedarida (Paris, 1980).)

14 Rayski, *Le Choix des Juifs sous Vichy,* 18.

15 Revisionist outbursts giving Pétain credit for helping to save French-born Jews still emerge. Most recently, Éric Zemmour, an editorial writer for *Le Figaro*, published the controversial book, *Le Suicide français* (2014), in which a chapter sarcastically titled "Robert Paxton, Everybody's Mentor," challenges Paxton's indictment of the Vichy government. Zemmour writes, "Vichy makes a pact with the Devil. He negotiates with the Germans and says, 'We'll give you the foreign Jews,' without knowing in 1942 that they will all be exterminated, and you will not touch the French Jews." Zemmour's only historical source for his assertion is that 85 percent of native French Jews somehow managed to survive.

16 Gérard Bon, *Le Point*, October 3, 2010, accessed http://www.lepoint.fr/petain-a-durci-le-texte-sur-les-juifs-selon-un-document-inedit-03-10-2010-1244328_19.php.
17 Ousby, *Occupation: The Ordeal of France,* 100.
18 Adam Gopnik, review of Timothy Snyder's *Black Earth* in *The New Yorker*, September 21, 2015, 102.
19 Gopnik, review of Timothy Snyder's *Black Earth*, 103.
20 Laurent Joly, "The Genesis of Vichy's Jewish Statute of October 1940," *Holocaust and Genocide Studies* (27, 2, 2013), 277.
21 Joly, "The Genesis of Vichy's," 285.
22 Ibid., 288.
23 Quoted in Rayski, *Le Choix des Juifs sous Vichy,* 34–35. See Renée Poznanski, "The Jews of France and the Statutes on Jews, 1940-1941," and her book, *Jews in France during WW II* (Waltham, MA: Brandeis University Press, Jewish Studies/WW I, 2001), for a detailed account of the Consistory and its dealings with the Vichy government. Poznanski cites this letter from a French deputy for the Indre department in the Loire Valley, Max Hymans, as an example of how French Jews sought to understand the implications of the October 3, 1940 statute and somewhat naively attributed it to the Germans: While reeling under the blow of the law of October 3, 1940, it is my view that his law was imposed by the occupying powers. If this document is an arm of foreign policy designed to reduce the overall sacrifices demanded of the nation, I am almost proud to offer my moral suffering for the sake of the country. If, however, this statute continues to be enforced in the future, I would deplore for France's sake an act which can only be compared to the revocation of the Edict of Nantes, the consequences of which are still tangible three centuries later. (120)
24 Quoted in Rayski, *Le Choix des Juifs sous Vichy,* 35.
25 Dawidowicz, *The War Against the Jews,* 361.
26 Ibid., 362.
27 Curtis, *Verdict on Vichy*, 112.
28 Dawidowicz, *The War Against the Jews,* 361.
29 Sinder, "Lights and Shades," 378.
30 Ibid.
31 Patrick Modiano, *Dora Bruder* (Paris: Gallimard, 1997).
32 Modiano, *Dora Bruder,* 55–56.
33 Dawidowicz, *The War Against the Jews,* 362.
34 Modiano, *Dora Bruder,* 87.
35 Dawidowicz, *The War Against the Jews,* 362.
36 Modiano, *Dora Bruder,* 60.
37 Dawidowicz, *The War Against the Jews,* 362.
38 There has been an increased level of recent studies and research on the Holocaust in North Africa, especially Algeria and Morocco, as well as Tunisia and Libya. See "Jews in North Africa: Oppression and Resistance" (https://www.ushmm.org/wlc/en/article.php?ModuleId=10007312) and "The Jews of Algeria, Morocco and Tunisia" (http://www.yadvashem.org/yv/en/education/newsletter/25/algeria_marocco.asp),
39 Henry Rousso, *The Vichy Syndrome: History and Memory in France since 1944* (Cambridge, MA and London: Harvard University Press, 1991), 7.
40 Modiano, *The War Against the Jews,* 143.
41 Dawidowicz, *The War Against the Jews,* 363.
42 Rousso, *The Vichy Syndrome,* 133.

Chapter 5

1 Dr. Israel Rudolph Kastner (Hung.: Rezsö Kasztner, April 1906 to March 15, 1957) was a member of the Budapest Aid and Rescue Committee during the Holocaust and organized various rescue activities, such as the "Kastner Train." Following the accusation by an Israeli journalist, Malchiel Gruenwald, that Kasztner had collaborated with the Nazis, Chaim Cohen, Israel's attorney general, accused Gruenwald of libel. The trial, which aroused public interest, turned into a broad investigation of the fate of the Jews of Hungary during the Holocaust and Kastner's actions during the war. This was known as the "Kastner Trial." During the trial, Kastner was assassinated. See also Beeria Barnea, "Kastner: Savior or traitor?" accessed on October 19, 2016, https://israelkasztner.wordpress.com.
2 Benjamin Murmelstein, *Terezin: Il ghetto-modello di Eichmann* (Milan: Cappelli, 1961).
3 Alan L. Mintz, *Popular Culture and the Shaping of Holocaust Memory in America* (Seattle WA: University of Washington Press, 2001), 3–36.
4 Raul Hilberg, *The Destruction of the European Jews* (London: Allen, 1961).
5 Gerald Reitlinger, *The Final Solution* (London: Vallentine, Mitchell, 1968).
6 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1963). See especially Gershom Scholem's letter to Arendt, June 23/24, 1963, 132 in the Hebrew ed.
7 Dan Michman, "A new look at the Judenrat." In *Heker Ameinu* (Research on Our People), Ramat Gan: Heker Ameinu, Institute for the Study of the Psychology of the Jewish People, April 1991 [Heb.].
8 Jean Baudrillard, *America* (London and New York: Verso, 1998).
9 Hayden White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (Baltimore and London: Johns Hopkins University Press, 1973).
10 Yvonne Kozlovsky Golan, "Shaping of the Holocaust," 1–53; see also John J. Michalczyk, *Filming the End of the Holocaust: Allied Documentaries, Nuremberg and the Liberation of the Concentration Camps* (London: Bloomsbury, 2014).
11 Uri Klein, "International Holocaust Remembrance Day," *Last of the Unjust:* Claude Lanzmann's requiem for self. *Haaretz,* January 27, 2014. (Heb.)
12 Ibid.
13 Benjamin Murmelstein, *Terezin: Il ghetto-modello di Eichmann* (Milan: Cappelli Milan, 1961).
14 Ariel Schweitzer and Jean-Philippe Tessé, "On *Last of the Unjust* (2013), a film by Claude Lanzmann." (Shulamit Haran, trans.). *Takriv: A journal of documentary cinema*, 8, "The Documentary Soundtrack." (Heb.)
15 Ibid.
16 Mark Lilla, "The Defense of a Jewish Collaborator," *New York Review of Books*, December 5, 2013, accessed on October 19, 2016, http://www.nybooks.com/articles/2013/12/05/defense-jewish-collaborator/.
17 Raul Hilberg, *Destruction of the European Jews* (orig. pub. Chicago: Quadrangle, 1961).
18 Gerald Reitlinger, *The Final Solution: The Attempt to Exterminate the Jews of Europe, 1939-1945.* (New York: Beechurst Press, 1953).
19 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil.* (New York: Penguin, 1963), 162.
20 Nachman Blumenthal, *Teudot mighetto lublin [Documents from the Lublin Ghetto],* Jerusalem 5727 (1967), 32. (Heb.).

21 Trunk, *Judenrat*, 19–240
22 Weiss, "The debate," 279–95.
23 Michman, "New look," 2–8.
24 Primo Levi, *The Drowned and the Saved*, Chapter 2: "*The Gray Zone,*" 36–69, 1991. Originally published in Italian as *Sommersi e i salvati* (Milan: Einaudi, 1986).
25 Anita Shapira, "The Eichmann Trial: What we see from here is not what is seen from there," in Yad Vashem *Search and Research, 2* (Jerusalem: Yad Vashem, 2002).
26 Arthur Koestler, *Darkness at Noon* (New York: Macmillan Company, 1941).
27 Arendt, *Eichmann,* 55.
28 Emmanuel Levinas, *Le Temps et l'Autre* (*Time and the Other)* (1948). Heb. trans., Tel Aviv: Hakibbutz Hameuhad.
29 Karl Jaspers, *The Question of German Guilt* (orig. pub. 1947), Heb. ed. *Sheelat Haashma,* David Bankier and Yaakov Golomb (eds.) (Jerusalem: Magnes, 2006), 9.
30 David Merhav, "Thoughts on the Holocaust after Agamben," in *Neged hazerem* blog, accessed on October 19, 2016, http://davidmerhav.wordpress.com/2008/04/30/%; Giorgio Agamben, *What Remains from Auschwitz: The Archive and the Witness* (*Homo Sacer III*), Heb. ed., (Tel Aviv: Resling, 2007), 7–24.
31 Boaz Neumann, (*Reiyat haolam hanazit: merhav, guf, safa / National Socialist Weltanschauung: Space, Body, Language*) (Haifa: Haifa University/Sifriat Maariv, 2002).
32 Michman, "New look," 2–8.
33 Except for Ghetto Łodz, where Rumkowski seemed to think that the Germans gave him a city to control, which he ruled high-handedly, all of the heads of the ghettos in one way or another understood their situation in one way or another. Each in his own way attempted to better their fate as best as they could to work within the constraints to alleviate their people's terrible situation.
34 On the issue as to whether it is possible to project this discussion on to the trials of the Nazi leadership as an independent sovereign entity at Nuremberg in 1946, Jaspers brings up the "Natural Law" applicable no matter whether there is a national law or international law or not. See also *Jaspers, Question of German Guilt*, 34–36; Nathan Schneider, "Guilt of the German toward humanity," *Haaretz*, February 26, 2006. (Heb.).
35 Schneider, Ibid.,
36 Laurence Rees, *The Nazis: A Warning from History* (London: BBC Books, 1998); see also Neumann, *National Socialist Weltanschauung.*
37 Jaspers, *Question of German Guilt,* 83, secs. 1–3.
38 Ibid., 57–60.
39 *Levi, Drowned*, Chapter 2.
40 Ibid., 31.
41 Ibid., 32.
42 Ibid., 33.
43 Ibid.

Chapter 6

1 The Reich government put into existence the People's Court with Article III of the Law Amending Criminal Law and Criminal Procedure. Judge Thierack was promoted from his position in the court to minister of Justice.

2 Frederick Hoefer, "The Nazi Penal System," *Journal of Criminal Law and Criminology (1944-1945)* vol. 35, no. 6, 393.
3 John Toland, *Adolph Hitler* (New York: Ballantine Books/Random House, 1977), 1120. At the famous Zinoviev trials, Vishinsky screamed out at the defendants in the same vitriolic manner as Freisler: "Shoot these rabid dogs. Death to this gang who hide their ferocious teeth, their eagle claws, from the people! Down with that vulture Trotsky, from whose mouth a bloody venom drips, putrefying the great ideals of Marxism!'" For his unstoppable death sentences, Freisler was also referred to as the Robespierre of the national revolution.
4 Army generals in the White Rose trial seen in *The Last Days of Sophie Scholl* hang their heads in mortification. The filming of the July 20, 1944, conspirators' trial, namely that of Josef Wirmer, shows an army officer turning around and smiling. (*Critical Past* archival footage, accessed June 9, 2016, https://www.youtube.com/watch?v=Fgpbq2hd0yY,) Hitler requested the filming of the extensive trial and a camera was placed behind the presiding judge and another in the rear of the room.
5 Allen Welsh Dulles, *Germany's Underground* (New York: The Macmillan Company, 1947), 82–83. Dulles, working for the Office of Strategic Services in Switzerland prior to the July 20 plot on Hitler's life, was in contact with some of the conspirators.
6 Ibid., 82.
7 Although the concept of the people/*Volk* was used early on by legal theorists such as Carl Schmitt in 1933 supporting the Enabling Act, the term *Volk* as a unified body became a constant byword of the Nazi Party, first developed by Ferdinand Tönnies in *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie* (first edition in 1887, xxxii–xxxiii).
8 For a vivid perspective on the verbal mannerisms of Judge Freisler, view *Hitler's Henchmen: Arbitrator of Death and Life—Roland Freisler* (1991), producers Guido Knopp, Sebastian Dehnhardt, and Henry Kohler.
9 The case of Rev. Alfred Delp, S. J., a member of the Kreisau Circle, resulted in the same type of opprobrium before the People's Court.
10 Leonard Swidler, *Bloodwitness for Peace and Unity* (Denville, NJ: Dimension Books, 1977), 62. For a similar portrayal of the case of Pater Max Josef Metzger, see Marianne Möhring, *Täter des Wörtes: Max Josef Metzger—Leben und Wirken* (Meitingen /Freising: Kyrios-Verlag, 1966), especially Part IX, "Metzger unter der Nationalsozialismus," 139–55.
11 For a discussion of the Nazi censorship of the religious-affiliated press and the role of Max Amann, head of the Reich Media Chamber and Reich Press, see Oron J. Hale, *The Captive Press in the Third Reich* (Princeton, NJ: Princeton University Press, 1964), and of the Catholic press, 169–84.
12 Fr. Metzger wrote this verse about "Una Sancta" in German while in prison: accessed June 5, 2016, http://www.max-josef-metzger-meitingen.de/Src/Una-sankta.php?style=styleC.
13 Swidler, *Bloodwitness for Peace and Unity*, 100.
14 Freiburger Diözesan-Archiv, Verlag Herder, Volumes 105–06 (1985), 229, 249.
15 Swidler, *Bloodwitness for Peace and Unity,* 96.
16 Ibid., 1.
17 Ibid., 2.
18 Ibid., 102.
19 Detlev J. K. Peukert, *Inside Nazi Germany: Conformity, Opposition and Racism in Everyday Life,* translated by Richard Deveson (New Haven and London: Yale University

Press/ Batsford Ltd., 1987), 220. See also Peukert's Thesis 11, which indicates how repressive tactics are employed as normative (248).

20 "Max Josef Metzger 1887-1944," A *Lexicon of Spiritual Leaders In the IFOR Peace Movement*, accessed June 6, 2016, http://ifor-mir.ch/wp-content/uploads/2012/08/Spiritual_Leaders_IFOR_V4.pdf, 34–35. When Rehse was sentenced by a West Berlin court in 1967 to five years in prison for aiding and abetting murder, the West German Supreme Court overturned the judgment through the "Judge's Privilege." See Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Berlin/Heidleberg: Springer-Verlag, 2015), 155–56. Following the war, according to early statistics, 95 of the 258 judges and public prosecutors of the People's Court found employment in West Germany. Of the 577 legal officials of the People's Court, only former chief prosecutor Ernst Lautz served time in prison, released after three years of his ten-year sentence. (See more detailed accounts of Nazi lawyers and judges in the West German legal system in the October 2016 Rosenbenburg Project, which indicates a greater Nazi assimiliation into the fabric of German law.)

21 See http://www.kirchenlehre.com/justmrd2.htm, a homepage organized by Catholic activists. The archive references for the document can be found in 8 J 190/43 g. l H 253/43, accessed June 7, 2016.

22 Trappist monk Thomas Merton, an outspoken antiwar activist during the Vietnam conflict, praised Fr. Metzger for his pacifist efforts in his essay on peace, "A MARTYR FOR PEACE AND UNITY: FATHER MAX JOSEF METZGER (1887-1944)": Ironically, the Kentucky Un-American Activities Committee had in its file a letter submitted to it about Merton, "He is of an undesirable element and should be considered the #1 target of your committee."

23 William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York: Simon and Schuster, 1960), 1015–16.

24 Peter Hoffmann, ed. *Behind Valkyrie: German Resistance to Hitler [Documents]* (Montreal: McGill-Queen's University Press, 2011), 43.

25 Ibid., 89.

26 Shirer, 1070.

27 Dulles, *Germany's Underground,* 83. Dulles notes that Goebbels saved the film and intended to screen the film following the war with the title "They would have deprived us of victory."

28 View *The Top Secret Trial of the Third Reich* (1979), *Geheime Reichssache*, directed by Jochen Bauer which also provides a history of other assassination attempts on Hitler's life beside the July 20 conspiracy. The trials of the Kreisau Circle and White Rose students are also briefly chronicled.

29 Peter Hoffmann, "Helmuth von Moltke's Consitutional Concepts for the Reconstruction of Germany, October 1940," *Behind Valkyrie*, 45–46. Hoffmann notes that Moltke, a Lutheran, was highly influenced by Pope Pius XI's social encyclical *Quadragesimo Anno* on ethical issues involving workers and employers.

30 Hans Mommsen, *Alternatives to Hitler: German Resistance under the Third Reich* (Princeton, NJ: Princeton University Press, 2003), 146–47.

31 Shirer, *The Rise and Fall of the Third Reich*, 1025.

32 Michael Balfour and Julian Frisby, *Helmuth von Moltke: A Leader Against Hitler* (London and Basingstoke: Macmillan London Limited, 1972), 306. Balfour was a friend of Moltke's.

33 Robert Loeffel, *Family Punishment in Nazi Germany : Sippenhaft, Terror and Myth* (New York: Palgrave Macmillan, 2012), 121–66.

34 Helmuth James von Moltke, *Letters to Freya: 1939-1945,* edited and translated by Beate Ruhm von Oppen (New York: Knopf, 1990), 400. His January 10, 1945 letter to Freya offers a detailed personal account of the trial before Freisler.
35 Ibid., 401.
36 Dulles, *Germany's Underground,* 82.
37 Moltke, *Letters to Freya*, 402.
38 Ibid.
39 Ibid., 404.
40 Balfour and Frisby, *Helmuth von Moltke*, 321.
41 Freya von Moltke further discusses her husband's assistance to Jews who had to escape Nazi Germany and his profound love of the country in the documentary *The Restless Conscience: Resistance to Hitler within Germany 1933-1945,* directed by Hava Kohav Beller (1992). Prior to his arrest Moltke forwarded materials of the White Rose student resistance movement to London through Norwegian resistance and related the information from a German officer that the Nazis were killing 6,000 Jews a day in a nearby camp. See Freya von Moltke's account of the Kreisau Circle's postwar resistance plans in "Our Work for the Future," in *Memories of Kreisau and the German Resistance* (Lincoln, Nebraska: University of Nebraska Press, 1998), 21–42, including the last days of her husband Helmuth.
42 In Moltke's words, "für den heiligen Ignstius von Loyola sterbe," quoted in Günter Brakelmann, *Helmuth James von Moltke 1907-1945: Eine Biographie* (Munich: Verlag C.H. Beck, 2007): 356. Four of the five photos (353–353) show Moltke actively arguing his case in the court, in contrast to other alleged criminals who were rendered speechless by Freisler.
43 "Address by Federal Chancellor Angela Merkel at the Concert Marking the 100th Anniversary of the Birth of Helmuth James Graf von Moltke," accessed July 9, 2016, http://www.nebbadoonpress.com/dvmmerkel.htm.
44 Ibid.
45 Shirer, *The Rise and Fall of the Third Reich*, 1140.

Chapter 7

1 Much of our discussion of Nazi medicine and physicians draws from the earlier work of Michael A. Grodin, in particular the introduction by Grodin and George J. Annas to *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation,* George J. Annas and Michael A. Grodin, eds. (Oxford: Oxford University Press, 1993), 3–11, and Grodin's encyclopedia article "Nazi Legacy and Bioethics," in *Bioethics*, 4th Edition, Bruce Jennings (Farmington Hills, Michigan: Gale, 2012), 2162–66.
2 Robert N. Proctor, "Nazi Doctors, Racial Medicine, and Human Experimentation," in eds. Annas and Grodin, *The Nazi Doctors and the Nuremberg Code*, 19.
3 Proctor, "Nazi Doctors, Racial Medicine, and Human Experimentation," 23.
4 See Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995).
5 For an application of the major theories of the Nazi perpetrator to physicians specifically, see the discussion in Michael A. Grodin, "Mad, Bad, or Evil: How Physician Healers Turn to Torture and Murder," in ed. Sheldon Rubenfeld, *Medicine After the Holocaust* (New York: Palgrave Macmillan, 2010), 49–65.

6 This section was adapted from the Introduction by Michael A. Grodin to his book, *Jewish Medical Resistance in the Holocaust* (New York: Berghan, 2014).
7 "Antisemitic Legislation 1933–1939." *United States Holocaust Memorial Museum.* United States Holocaust Memorial Council, accessed on August 4, 2016, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007901.
8 For more information about the Jewish Councils and a discussion of the debates over its activities, see Isaiah Trunk, *Judenrat: The Jewish Councils in Eastern Europe under Nazi Occupation* (New York: Macmillan, 1972).
9 Grodin, "Introduction," in *Jewish Medical Resistance in the Holocaust.*
10 Charles G. Roland, "Courage Under Siege: Starvation, Disease, and Death in the Warsaw Ghetto," in Grodin, *Jewish Medical Resistance in the Holocaust,* 59–92.
11 Alexander Sedlis,"The Jewish Hospital in the Vilna Ghetto," in Grodin, *Jewish Medical Resistance in the Holocaust,* 141–47.
12 Mckenna Longacre et al., "Public Health in the Vilna Ghetto as a Form of Jewish Resistance." *American Journal of Public Health* 105.2 (2015): 293–301.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 Avraham Tory, *Surviving the Holocaust: The Kovno Ghetto Diary*. Edited by Martin Gilbert (Cambridge, MA: Harvard University Press, 1990), 157.
18 Shimon Huberband, *Kiddush Hashem: Jewish Religious and Cultural Life in Poland During the Holocaust.* Trans. David E. Fishman. Edited by Jeffrey S. Gurock and Robert S. Hirt (New York: Ktav, 1987), 35.
19 *Halakhah* is the collective rabbinic term for the prescriptive laws of Judaism. Throughout centuries of dispersion, *halakhah* embraced both the Jewish heaven and earth: what obtained between man and God, and what transpired between man and man. *Halakhah* defined the course of day-to-day Jewish existence, and was in turn defined by it. For a helpful overview of the structure of Jewish law, see the chapter by David M. Feldman, "The Structure of Jewish Law," in his book *Birth Control in Jewish Law: Marital Relations, Contraception, and Abortion as Set Forth in the Classic Texts of Jewish Law* (New York: Jason Aronson, 1998).
20 Ephraim Oshry, *The Annihilation of Lithuanian Jewry*, translated by Y. Leiman (New York: Judaica Press 1995), 38.
21 Ibid., 38.
22 Ibid., 39.
23 Ibid., 44.
24 Ibid., 47.
25 Ibid., 46.
26 Ibid., 89.
27 Ibid., 85.
28 Ibid., 85.
29 Ibid., 102.
30 Ibid., 91.
31 As quoted in Douglas Martin, "Ephraim Oshry, 89, a Scholar In Secret During the Holocaust," *New York Times*, October 5, 2003, accessed on June 16, 2016, http://www.nytimes.com/2003/10/05/nyregion/ephraim-oshry-89-a-scholar-in-secret-during-the-holocaust.html?_r=0.

Chapter 8

1 Robert Beachy, "The German Invention of Homosexuality," *The Journal of Modern History*, December 2010, 838.
2 Edward Ross Dickinson, "Policing Sex in Germany, 1882-1982: A Preliminary Statistical Analysis," *Journal of the History of Sexuality*, May 2007, 208.
3 Ibid., 209.
4 Ibid., 232.
5 Beachy, "The German Invention of Homosexuality," 805.
6 Chandak Sengoopta, "Glandular Politics: Experimental Biology, Clinical Medicine and Homosexual Emancipation in Fin-de-Siècle Europe," *Isis*, September 1998, 445–73.
7 Beachy, "The German Invention of Homosexuality," 820, 836.
8 Elizabeth Heineman, "Sexuality and Nazism: The Doubly Unspeakable?" *Journal of the History of Sexuality*, January to April 2002, 32.
9 The party ceased to make it an issue in 1931, because Ernst Röhm's homosexuality left them vulnerable in discussion.
10 Erik N. Jensen, "The Pink Triangle and Political Consciousness: Gays, Lesbians and the Memory of Nazi Persecution," *Journal of the History of Sexuality*, January to April 2002, 349.
11 Stefan Micheler and Patricia Szobar, "Homophobic Propaganda and the Denunciation of Same-Sex Desiring Men under National Socialism," *Journal of the History of Sexuality*, January to April 2002, 103.
12 Ibid., 117 and *passim*.
13 Erwin J. Haeberle, "Swastika, Pink Triangle and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany," *The Journal of Sex Research*, August 1981, 273.
14 Andrew Wackerfuss, *Stormtrooper Families: Homosexuality and Community in the Early National Socialist Movement* (New York: Harrington Park Press, 2015), 183.
15 Ibid., 176–78.
16 Ibid., 248.
17 Anson Rabinbach, "Staging Anti-Fascism: The Brown Book of the Reichstag Fire and the Hitler Terror" *New German Critique* 35, Spring 2008, 112.
18 Wackerfuss, *Stormtrooper Families*, 249.
19 Eleanor Hancock, "The Purge of the SA Reconsidered: 'An Old Putschist Trick?'" *Central European History*, December 2011, 669.
20 Hancock, "'Only the Real, the True, the Masculine Held its Value': Ernst Rohm, Masculinity, and Male Homosexuality," *Journal of the History of Sexuality*, April 1998, 617.
21 Ibid., 627.
22 Ibid., 621.
23 Tim Pursell, "Queer Eyes and Wagnerian Guys: Homoeroticism in the Art of the Third Reich," *Journal of the History of Sexuality*, January 2008, 115.
24 Harry Oosterhuis, "Medicine, Male Bonding, and Homosexuality in Nazi Germany," *Journal of Contemporary History*, April 1997, 198.
25 Ibid., 205. See also Geoffrey J Giles, "The Institutionalization of Homosexual Panic in the Third Reich," in *Social Outsiders in the Third Reich*, ed. Robert Gellately and Nathan Stoltzfus (Princeton: Princeton University Press, 2001), 238.
26 Wackerfuss, *Stormtrooper Families,* 304.

27 Geoffrey J. Giles, "Legislating Homophobia in the Third Reich: The Radicalization of Prosecution by the Legal Profession," *German History*, July 2005, 340.
28 Hancock uses the term and announces further research being done on the concept by Derek Hastings, 682. Their creation of the People's Court was a response to a trial in connection with which accusation and innuendo that the Nazi Party was dominated by homosexuals was widely publicized, especially in *The Brown Book*.
29 Despina Stratigakos, *Hitler at Home* (New Haven: Yale University Press, 2015), 12.
30 Ibid., 23.
31 Ibid., 151.
32 Ibid., 152.
33 Ibid., 93–94. A relatively unknown Third Reich insider, Gerdy Troost, was Hitler's primary designer, decorator, and architect. She was a partner with her older husband Paul Troost in Troost Associates. After Paul Troost passed away in 1934, Gerdy continued the work of Atelier Troost and completed many important projects for Hitler such as the renovation of the Prince Carl Palace in Munich as a guesthouse for foreign visitors. She was a juror for Reich art exhibitions. "In 1937, Gerdy Troost had begun to work in a new area of design: the creation of certificates and presentation folders and boxes for Third Reich awards." These elaborate works imitated "medieval reliquaries or treasure bindings." (124) She was one of few people to have close, continuous access to Hitler. Julius Schaub, Hitler's chief adjunct, remembered that Hitler felt that "she was the ideal conversational partner with whom he could talk endlessly about his architectural plans, who understood him, and who gave his ideas practical form in design." (125) She "crafted the look of National Socialist interiors and left her mark on the elite material culture of the regime . . . such as silverware and china for Hitler" (132). She last saw him in 1944 at the "Wolf's Lair," to which only one other woman had been allowed visitor access. While she was part of the creation of Hitler's normative image, she herself lived from 1939 with photographer Hanni Umlauf. People who know them assume the two women to have been a couple although this is not certain. Goebbels described Gerdy Troost as a *Blaustrumpf*, a blue-stocking with the implication that she was a lesbian. (135) Again, Hitler's lack of concern with normative domesticity and sexuality in his close associates is underscored. See Stratigakos, Chapter 5, "Hitler's Other Chosen Architect," in *Hitler at Home*, 107–46.
34 Giles, "Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany," United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies, Occasional Paper, 2005, 4.
35 Josef Meisinger, "The Combating of Homosexuality and Abortion as a Political Task," in Gunter Grau, ed. *Hidden Holocaust, Gay and Lesbian Persecution in Germany 1933-1945* (London: Cassell, 1995), 110.
36 Richard Plant, *The Pink Triangle: The Nazi War against Homosexuals* (New York: Henry Holt and Company), 137–143.
37 Ibid., 130.
38 Ibid., 126–130.
39 Ibid., 130–131.
40 Memorandum from Gestapo Headquarters, April 8, 1937, (Extract), in Grau, ed. *Hidden Holocaust*, 136.
41 Michael Burleigh, *Sacred Causes: The Clash of Religion and Politics from the Great War to the War on Terror* (New York: Harper Perennial, 2007), 193. Burleigh adds, "Seven years later he [Goebbels] and his wife Magda poisoned all four of their 'most precious treasures.'"

42 Giles, "Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany," United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies, Occasional Paper, 2005, 3. Also, "There was no regulation that permitted the SS deliberately to kill homosexuals in concentration camps, but it regularly happened." Ibid., 286.
43 Pierre Seel**,** *I, Pierre Seel, Deported Homosexual: A Memoir of Nazi Terror* (New York**:** Basic Books**,** 2011), 43. Seal's name was on a "pink list" of suspected homosexuals kept by the Strasbourg police, although keeping such lists was illegal in France. Once Germany invaded Alsace-Lorraine, the Gestapo accessed these lists, which were kept legally in Germany.
44 Gad Beck, *An Underground Life: Memoirs of a Gay Jew in Nazi Berlin* (Madison: University of Wisconsin Press, 1999), 148.
45 Claudia Schoppmann, "The Position of Lesbian Women in the Nazi Period," in Grau, ed. *Hidden Holocaust*, 8–15. See also, Schoppmann, *Days of Masquerade: Life Stories of Lesbians During the Third Reich* (New York: Columbia University Press, 1996).
46 Eugen Kogon, *The Theory and Practice of Hell* (New York: Farrar, Straus, and Giroux, 2006). Originally appearing in 1950, this is the English translation of Kogon's *Der SS-Staadt Das System der deutschen Konzentrationslager*, published in 1946.
47 Heinz Heger, *Die Manner mit dem Rosa Winkel* (Hamburg: Merlin, 1972).
48 Robert Sommer, "Situational Homosexual Slavery of Young Adolescent Boys in Nazi Concentration Camps," *Lessons and Legacies*, Vol, XI, 2014, 86. All pipels (attractive male boys favored by SS) were not necessarily adolescents—"Heinz Heger" wrote of being a pipel in his twenties.
49 Michael Burleigh and Wolfgang Wipperman, *The Racial State: Germany 1933-1945* (Cambridge: Cambridge University Press, 1994), 197.
50 By "'the Law against Dangerous and Habitual Criminals and Measures for Protection and Recovery' . . . [judges could order castration] . . . only in cases of rape, defilement, illicit sex acts with children . . . coercion to commit sex offenses . . . ..the committing of indecent acts in public . . . and murder and manslaughter of the victim . . . if they were committed to arouse or gratify the sex drive." Grau, *Hidden Holocaust,* 246.
51 Giles, "'The Most Unkindest Cut of All:' Castration, Homosexuality and Nazi Justice," *Journal of Contemporary History*, January 1992, 48.
52 Ibid., 53.
53 Giles, "Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany," United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies, Occasional Paper, 2005, 16.
54 Ibid., 17.
55 Grau, *Hidden Holocaust,* 281–92.
56 Marhoefer, Laurie, "Lesbianism, Transvesititism and the Nazi State: A Microhistory of a Gestapo Investigation, 1939-1943," *The American Historical Review*, October 2016, 1193.
57 Ibid., 1191.
58 Ibid., 1172.
59 John Connelly, "Gypsies, Homosexuals and Slavs," *The Oxford Handbook of Holocaust Studies* (Oxford: Oxford University Press, 2010), 288.
60 Heineman, "Sexuality and Nazism," 61.
61 Giles, "Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany," United States Holocaust Memorial Museum, Center for Advanced

Holocaust Studies, Occasional Paper, 2005, 12. It appears that few were told about the new death sentence, however.

62 Giles, "Legislating Homophobia in the Third Reich: The Radicalization of Prosecution by the Legal Profession," *German History*, July 2005, 354.

63 *Paragraph 175,* 81 min., directed by Robert Epstein and Jeffrey Friedman (USA, 2000).

64 Heineman, "Sexuality and Nazism," 61–62. See also Giles, "The Institutionalization of Homosexual Panic in the Third Reich," in *Social Outsiders in the Third Reich*, ed. Robert Gellately and Nathan Stoltzfus, (Princeton: Princeton University Press, 2001), 235–36, where he notes the analogous nature of Himmler's view of the threat posed by homosexuals to the healthy community with Hitler's view of the ruination of an Aryan women who had sexual relations with a Jewish man.

65 Michael Burleigh and Wolfgang Wipperman, *The Racial State,* 434.

Chapter 9

1 This chapter was adapted and updated from Annas, GJ, Crosby SS. "Post-9/11 Torture at CIA 'Black Sites': Physicians and Lawyers Working Together," *New England Journal of Medicine*, 2015; 372:2279–81, and George J. Annas, "Licensed to Torture" (in) *Worst Case Bioethics: Death, Disaster*, *and Public Health* (New York: Oxford University. Press, 2010), 41–57.

2 Scott Shane, "Waterboarded, he now makes a case to go free," *New York Times*, August 24, 2016, A1.

3 "Committee Study of the Central Intelligence Agency's Detention and Interrogation program," *Amnesty International,* December 3, 2014, accessed on October 6, 2016, https://www.amnestyusa.org/pdfs/sscistudy1.pdf. Unattributed quotations are taken directly from this report.

4 Nick Cumming-Bruce, "U.N. Rights Chief Criticizes World Powers," *New York Times,* March 6, 2015, A8.

5 "Committee Study of the Central Intelligence Agency's Detention and Interrogation program," *Amnesty International,* December 3, 2014, accessed on October 6, 2016, https://www.amnestyusa.org/pdfs/sscistudy1.pdf. Unattributed quotations are taken directly from this report.

6 "Committee Study of the Central Intelligence Agency's Detention and Interrogation program," *Amnesty International,* December 3, 2014, accessed on October 6, 2016, https://www.amnestyusa.org/pdfs/sscistudy1.pdf. Unattributed quotations are taken directly from this report.

7 Dick Cheney, *Cheney's Tortured Facts*, interview by Chuck Todd, *Meet the Press*, December 14, 2014, accessed on October 6, 2016, http://www.factcheck.org/2014/12/cheneys-tortured-facts/.

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Chapter 10

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Chapter 13

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Chapter 14

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2 Mark S. Brocker, "Editor's Introduction to the English Edition," *Conspiracy and Imprisonment, 1940–1945,* vol. 16 of *Dietrich Bonhoeffer Works* (Minneapolis: Fortress, 2006), 1–2, 8–15; Ferdinand Schlingensiepen, *Dietrich Bonhoeffer 1906-1945: Martyr, Thinker, Man of Resistance*, trans. Isabel Best (London: T&T Clark, 2010), 245–49.
3 Victoria Barnett, "Dietrich Bonhoeffer: Resistance and Execution," *United States Holocaust Memorial Museum*, accessed on March 3, 2017, https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/dietrich-bonhoeffer/resistance-and-execution.
4 Ibid.
5 Probst, *Demonizing the Jews*, 196, n 13.
6 Matthew D. Hockenos, *A Church Divided: German Protestants Confront the Nazi Past* (Bloomington: Indiana University Press, 2004), 34.
7 Probst, *Demonizing the Jews*, 1–2.
8 Wolfgang Gerlach, *And the Witnesses Were Silent: The Confessing Church and the Persecution of the Jews,* trans. Victoria J. Barnett (Lincoln: University of Nebraska Press, 2000), 154–160.
9 On the Protestant church's dire record regarding the plight of Jews during the Third Reich and the Holocaust, see, for example, Doris L. Bergen, *Twisted Cross: The German Christian Movement in the Third Reich* (Chapel Hill: University of North Carolina Press, 1996); Susannah Heschel, *The Aryan Jesus: Christian Theologians and the Bible in Nazi Germany* (Princeton: Princeton University Press, 2008); Robert P. Ericksen, *Complicity in the Holocaust: Churches and Universities in Nazi Germany* (Cambridge: Cambridge University Press, 2012). On the Holocaust, the breadth and depth of the historical literature is enormous. See, for example, Saul Friedländer, *Nazi Germany and the Jews, 1933-1945: Abridged Edition*, Paperback (New York: Harper Perennial, 2009); Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (New Haven and London: Yale University Press, 2014); Dan Stone, *Histories of the Holocaust*, Paperback Edition (New York, Oxford: Oxford University Press, 2010).

10 On the Confessing Church, see, for example, Gerlach, *And the Witnesses Were Silent* and Victoria Barnett, *For the Soul of the People: Protestant Protest against Hitler* (New York: Oxford University Press, 1992).
11 Probst, *Demonizing the Jews*, 8–9; Ibid., 207, n 1.
12 Ibid., 9; Ericksen, *Complicity in the Holocaust*, 98. It should be acknowledged that an ample amount of fluidity existed between the three groups described here. See Probst, *Demonizing the Jews*, 10–11.
13 Probst, *Demonizing the Jews*, 9. On modern German nationalism, see Hartmut Lehmann's excellent essay, "The Germans as a Chosen People: Old Testament Themes in German Nationalism," *German Studies Review,* 14, 2 (1991): 261–73.
14 Saul Friedländer, *The Years of Persecution, 1933–1939,* vol. 1 of *Nazi Germany and the Jews* (London: Weidenfeld and Nicolson, 1997), 27–28.
15 Gerlach, *And the Witnesses Were Silent,* 24, 64ff.; Barnett, *For the Soul of the People,* 34–35, 128–33.
16 Burleigh and Wippermann, *Racial State,* 44–45.
17 Paul Althaus, *The Ethics of Martin Luther,* trans. Robert C. Schultz (Philadelphia: Fortress Press, 1972), 43–82.
18 And, indeed by historical actors such as Karl Barth, Reinhold Niebuhr, and Thomas Mann. See especially the essays by Tracy, Brady, and Gritsch in James Tracy, ed., *Luther and the Modern State in Germany,* vol. 7 of *Sixteenth Century Essays and Studies* (Kirksville: Truman State University Press, 1986); Thomas A. Brady, Jr., "Luther's Social Teaching and the Social Order of His Age," in *The Martin Luther Quincentennial*, ed. Gerhard Dünnhaupt (Detroit: Wayne State University Press, 1985), 270–290.
19 See, for example, Ericksen, *Theologians under Hitler,* 25, 84, 115, 178; Uriel Tal, *Christians and Jews in Germany: Religion, Politics, and Ideology in the Second Reich, 1871–1914,* trans. Noah Jonathan Jacobs (Ithaca, NY: Cornell University Press, 1975), 292, 305.
20 Probst, *Demonizing the Jews*, 27–37.
21 On *Kristallnacht* and its aftermath, see, for example, Alan E. Steinweis, *Kristallnacht 1938* (Cambridge, MA: Harvard University Press, 2009).
22 On von Jan's post-Kristallnacht sermon, see especially Gerlach, *And the Witnesses Were Silent*, 144–49.
23 The biographical details about von Jan included here are drawn from Thomas Wolfes, "Jan, Julius von," in *Biographisch-Bibliographisches Kirchenlexikon* (Herzberg: Verlag Traugott Bautz, 2001), 18:752–60 and Eberhard Röhm and Jörg Thierfelder, *Ausgestoßen, 1938–1941,* vol. 3/I of *Juden-Christen-Deutsche, 1933–1945* (Stuttgart: Calwer, 1995), 69–92.
24 Special Court of the Superior Land court district of Stuttgart, in *Behind Valkyrie: German Resistance to Hitler, Related Documents*, Peter Hoffmann, ed. (Montreal: McGill-Queen's University Press, 2011), 170.
25 Probst, *Demonizing the Jews*, 122–23.
26 Julius von Jan, United States Holocaust Memorial Museum Heinrich Fausel Collection, 89, Unpublished Sermon Manuscript, "Predigt vom Bußtag, den 16 November 1938."
27 Von Jan, "Predigt vom Bußtag."
28 Röhm and Thierfelder, *Ausgestoßen, 1938-1941*, 69–73, 84.
29 The Pulpit Paragraph refers to the so-called muzzling decree issued by Reich Bishop Müller in 1934, which threatened punishment against clergy who publicly opposed the Reich Church government and its policies. The Insidiousness Law (Law against

Insidious Attacks against the State and Party and for the Protection of the Party Uniform) criminalized false statements against the State or Party. See, for example, Hoffmann, ed., *Behind Valkyrie*, 158, 179, n. 12, 13.

30 Röhm and Thierfelder, *Ausgestoßen, 1938-1941*, 84–86, 92.

31 Confino, *A World Without Jews*.

32 Jeremy Noakes and Geoffrey Pridham, eds., *Nazism, 1919-1945. Volume 2: State, Economy and Society 1933-1939: A Documentary Reader*, Paperback, 3rd ed. (Exeter: University of Exeter Press, 2001), 280.

33 The material in this section is reprinted, with minimal alteration, from Christopher J. Probst, *Demonizing the Jews: Luther and the Protestant Church in Nazi Germany* (Bloomington: Indiana University Press, 2012), 1–2, 94–98, 170–72. Courtesy of Indiana University Press. All rights reserved.

34 The Council of Brethren (*Bruderrat*) was an advisory council of the Confessing Church. These councils existed on both the regional and national levels and consisted of both lay and clergy representatives. See Gerlach, *And the Witnesses Were Silent,* 287.

35 Probst, *Demonizing the Jews*, 49.

36 On Hermann and Hertha Pineas, see *Center of Jewish History*, accessed on March 3, 2017, http://access.cjh.org/home.php?type=extid&term=1361837#1.

37 The biographical material about Hermann Maas in this section is reprinted, with minimal alteration, from Christopher J. Probst, "Protestantism in Nazi Germany," in *Life and Times in Nazi Germany*, ed. Lisa Pine (London: Bloomsbury Academic, 2016), 225–26. Courtesy of Bloomsbury Academic Press. All rights reserved.

38 Röhm and Thierfelder, *Entrechtet, 1935–1938,* 259–62.

39 Gerlach, *And the Witnesses Were Silent*, 155–56, 159.

40 On the related question of the relationship between Zionism and antisemitic Nazi Jewish policy, see, for example, Francis R. Nicosia, "Zionism in Nazi Jewish Policy, 1934-1938," in *Zionism and Anti-Semitism in Nazi Germany* (Cambridge: Cambridge University Press, 2008), 106–44.

41 Barnett, *For the Soul of the People,* 144.

42 Friedländer, *Nazi Germany and the Jews*, 157–58.

43 Gerlach, *And the Witnesses Were Silent*, 159.

44 Probst, "Protestantism in Nazi Germany," 226.

45 Gerlach, *And the Witnesses Were Silent*, 159.

Chapter 15

1 See also Jens-Uwe Lahrtz, "Die Zeugen Jehovas während des Zweiten Weltkrieges in Großbritannien, Kanada und den USA," in *BzG* 37 (1995), 44–54; George D. Chryssides, *Jehovah's Witnesses: Continuity and Change* (Farnham: Ashgate, 2016), 25 ff.

2 Cf. Jolene Chu, "'No Creed but the Bible': The Belief System of Jehovah's Witnesses" in *RSG* 16 (2015), 109–17.

3 Cf. Wolfgang Eßbach, *Religionssoziologie: Glaubenskrieg und Revolution als Wiege neuer Religionen* (Munich: Wilhelm Fink, 2014), 529 ff.

4 Cf. Walter Nigg, *Das Buch der Ketzer* (Zürich-München: Artemis, 1949); 6th ed. (1981); Ernst Benz, *Kirchengeschichte in ökumenischer Sicht* (Leiden-Köln: Brill, 1961), esp. 86.

5 Cf. John Gordon Melton, ed., *The Encyclopedia of American Religions*, Vol. II (Tarrytown: Thomson Gale, 2009), 145–58.
6 Cf. 1974 *Yearbook of Jehovah's Witnesses*, Brooklyn 1973, 100.
7 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 108 ff.; Gerald Hacke, *Die Zeugen Jehovas im Dritten Reich und in der DDR. Feindbild und Verfolgungspraxis* (Göttingen: V & R, 2011), 30–31.
8 See Shawn Francis Peters, *Judging Jehovah's Witnesses. Religious Persecution and the Dawn of the Rights Revolution* (Lawrence: University Press of Kansas, 2000), and the British example: G. Besier, *Britannien und Irland* in G. Besier and Katarzyna Stokłosa, eds., *Zeugen Jehovas in Europa—Geschichte und Gegenwart*, vol. 2, (Berlin-Münster: LIT, 2015), 177–252.
9 Cf. Detlef Garbe, *Between Resistance & Martyrdom: Jehovah's Witnesses in the Third Reich* (Madison: The University of Wisconsin Press, 2008), 33–34.
10 Cf. Marley Cole, *Jehovas Zeugen. Die Neue-Welt-Gesellschaft. Geschichte und Organisation einer Religionsbewegung* (Frankfurt/M.: Pyramiden Verlag, 1956), 92.
11 Garbe, *Between Resistance & Martyrdom*, 34.
12 Cf. G. Besier, *Neither Good Nor Bad: Why Human Beings Behave How They Do* (Newcastle upon Tyne: Cambridge Scholars, 2014), 73 ff.
13 Cf. Watchtower Society ed., 1974 *Yearbook of Jehovah's Witnesses*, 108 ff.; Gerald Hacke, *Die Zeugen Jehovas im Dritten Reich und in der DDR. Feindbild und Verfolgungspraxis*, (Göttingen: V & R, 2011), 30–31.
14 Cf. Hans Lienhardt, *Ein Riesenverbrechen am deutschen Volke und die Ernsten Bibelforscher*, 2nd ed. (Weißenburg i. Bay.: Großdeutscher Verlag, 1921), 14–15; 25–26; 39.
15 Cf. Gerhard Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis* (1933) (Darmstadt: Wiss. Buchgesellschaft, 1965), 618 ff.
16 See G. Besier and Eckhard Lessing, eds., "Die Geschichte der EKU," vol. 3: *Trennung von Staat und Kirche, kirchlich-politische Krisen, Erneuerung kirchlicher Gemeinschaft* (Leipzig: Evangelische Verlagsanstalt, 1999), 187–205.
17 In 1933, there were no more than 19,268 active Bible Students and 25,000 communicants in Germany. Cf. 1974 *Yearbook of Jehovah's Witnesses*, 109–10.
18 Cf. Besier, "Pastorennationalismus und autoritärer Staat. Politische ‚Glaubenskulturen' im deutschen Protestantismus während der 20er und 30er Jahre," *RSG* 4 (2003), 7–40, here, 16. See also Todd H. Weir, "The Christian Front Against Godlessness: Anti-Secularism and the Demise of the Weimar Republic," in *Past & Present* no. 229 (2015), 201–38.
19 Cf. Gerhard Besier, "The Great War and Religion in Comparative Perspective. Why the Christian culture of war prevailed over religiously-motivated pacifism in 1914," in *KZG/CCH* 28 (2015): 21–62.
20 For the so-called Evangelische Zentralstelle für Weltanschauungen (EZW) [*Evangelical Central Authority for World Views*], cf. their monthly publication "Materialdienst."
21 Cf. Matthias Pöhlmann, *Kampf der Geister. Die Publizistik der "Apologetischen Centrale" (1921-1937)* (Stuttgart: Kohlhammer, 1998), 170 ff; 214.
22 Cf. ibid., 186; 213.
23 Quoted in Hacke, *Die Zeugen Jehovas*, 37.
24 Cf. Garbe, *Between Resistance & Martyrdom*, 61.
25 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 102–03.
26 Procedure under §§ 166–67. StGB.

27 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 103; 105.
28 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 108.
29 See Hacke, *Die Zeugen Jehovas*, 41.
30 Imperial Law Gazette I, 35, § 2 also penalized the disparagement of religious communities under public law.
31 Decree of the Reich President for the Protection of People and State, of February 28, 1933 (RGBl / Imperial Law Gazette 1, 83; translated in *Law, Justice, and the Holocaust*, ed. by The United States Holocaust Memorial Museum, Washington, DC 2014, 10–12), also known as the Reichstag Fire Decree, annulled the Weimar Constitution's civil rights, and, in conjunction with the Ordinance for the Protection of the German People of February 4, 1933 and the Enabling Act of March 24, 1933, these decrees were an important step toward Hitler's seizure of power and the removal of the democratic constitutional state. See Lothar Gruchmann, *Justiz im Dritten Reich. 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, 3., revised edition (Munich: Oldenbourg, 2001); Thomas Raithel and Irene Strenge, "Die Reichstagsbrandverordnung. Grundlegung der Diktatur mit den Instrumenten des Weimarer Ausnahmezustandes," in *VfZG* 48 (2000), 413–60; Andreas Schwegel, *Der Polizeibegriff im NS-Staat. Polizeirecht, juristische Publizistik und Judikative 1931–1944* (Tübingen: Mohr-Siebeck, 2005).
32 Cf. Garbe, *Between Resistance & Martyrdom*, 73; Pöhlmann, *Kampf der Geister*, 215; Hacke, *Zeugen Jehovas*, 46–47.
33 Quoted in 1974 *Yearbook of Jehovah's Witnesses,* 112–13.
34 See Franz Zürcher, *Kreuzzug gegen das Christentum. Moderne Christenverfolgung—eine Dokumentensammlung* (Zürich-New York: Europa-Verlag, 1938), 75–77.
35 Cf. Garbe, *Between Resistance & Martyrdom*, 81–82; 131; Garbe, "Sendboten des jüdischen Bolschewismus Antisemitismus als Motiv nationalsozialistischer Verfolgung der Zeugen Jehovas" in Dan Diner and Frank Stern, eds., *Nationalsozialismus aus heutiger Perspektive* (Gerlingen: Bleicher-Verlag, 1994), 156.
36 Cf. *Evangelium im Dritten Reich*, July 9, 1933.
37 Cf. Ralph Jessen, *Polizei und Gesellschaft. Zum Paradigmenwechsel in der Polizeigeschichtsforschung*, in Paul and Mallmann, eds., *Die Gestapo. Mythos und Realität* (Darmstadt: Primus Verlag, 1996), 19–43; here: 32–33; Bernward Dörner, NS-Herrschaft und Denunziation: Anmerkungen zu Defiziten in der Denunziationsforschung, in Historical Social Research, 26, Nr. 2–3, 2001, 55–69.
38 Cf. Reimer Möller, "Widerstand und Verfolgung in einer agrarisch-kleinstädtischen Region: SPD, KPD und 'Bibelforscher im Kreis Steinburg 1933 bis 1945'" in *Zeitschrift für Schleswig-Holsteinische Geschichte* 144 (1988), 125–228; here, 167; Reiner W. Kühl, "Widerstand im Dritten Reich: Die ernsten Bibelforscher in Friedrichstadt" in *Unterhaltung für Friedrichstadt und die angrenzende Gegend. Mitteilungsblatt der Gesellschaft für Friedrichstädter Stadtgeschichte* 27 (1985), 165–190; here, 168.
39 Cf. Friedrich Schroeder and Christian Lahrtz,"Die nationalsozialistischen Sondergerichte in Sachsen 1933-1945," in *Sächsische Justizgeschichte 6 (1996): Justiz, Juristen und politische Polizei in Sachsen 1933-1945,* 66-108. See also Herbert Schmidt, *"Beabsichtige ich die Todesstrafe zu beantragen."* *Die nationalsozialistische Sondergerichtsbarkeit im Oberlandesgerichtsbezirk Düsseldorf 1933-1945* (Essen: Klartext, 1998), esp. 97–98 Cf. furthermore Garbe, *Between Resistance & Martyrdom*, 120 ff.; Klaus J. Volkmann, *Rechtsprechung staatlicher Gerichte in Kirchensachen 1933-1945* (Mainz: Matthias-Grünewald-Verlag, 1978), 197 ff.; Hubert Roser, ed., *Widerstand*

und Verweigerung der Zeugen Jehovas im deutschen Südwesten 1933 bis 1945 in *idem*, *Widerstand und Bekenntnis. Die Zeugen Jehovas und das NS-Regime in Baden und Württemberg* (Konstanz: UVK-Verlag, 1999), 47; Elke Imberger, *Widerstand "von unten": Widerstand und Dissens aus den Reihen der Arbeiterbewegung und der Zeugen Jehovas in Lübeck und Schleswig-Holstein 1933-1945* (Neumünster: Wachholtz, 1991), 266; Gerhard Hetzer, *Ernste Bibelforscher in Augsburg in* Martin Broszat/Elke Fröhlich/Anton Großmann, eds., *Bayern in der NS-Zeit. Herrschaft und Gesellschaft im Konflikt*, vol. IV (Munich: Oldenbourg), 1981, 625. See Hans Hesse, ed., *Persecution and Resistance of Jehovah's Witnesses During the Nazi-Regime 1933-1945* (Bremen: Edition Temmen, 2001).

40 Both the State Department and Rutherford intervened. Cf. Johannes Wrobel, *Die Verfolgung der Zeugen Jehovas im Nationalsozialismus—Rezeption, Rezension, Interpretation in RSG*, 4 (2003), 115–50; here, 123.

41 Cf. Gabriele Yonan, *Jehovas Zeugen, Opfer unter zwei Diktaturen, 1933-1945 und 1949-1989* (Berlin: Numinos, 1999, 64–73); George Chryssides, *Jehovah's Witnesses: Continuity and Change* (Farnham: Ashgate, 2016), 112 ff.

42 See the publication in the *Deutschen Justiz* 96 (1934), 757.

43 Cf. *Garbe, Between Resistance & Martyrdom*, 92 ff.

44 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 112.

45 Ibid., 113–14.

46 Ibid., 131–32.

47 Cf. Detlef Garbe/Bruno Knöller, "Die Bibel, das Gewissen und der Widerstand. Die Familie Knöller im Dritten Reich," in Rose, ed., *Widerstand als Bekenntnis*, 221–72; here, 228; Michael Hetzner, *Christen im Feuerofen. Jehovas Zeugen im Dritten Reich. Dokumente und Erinnerungen aus Heilbronn und Umgebung* (Heilbronn, 1998) (Manuscript, not published); Klaus Drobisch/Günther Wieland, *System der NS-Konzentrationslager: 1933-1939* (Berlin: Akademie Verlag, 1993), 101; Hacke, *Die Zeugen Jehovas*, 68 ff.

48 Cf. Rüdiger Gollnick, *"An das bibel—und christusgläubige Volk Deutschlands." Widerstand und Verfolgung der Zeugen Jehovas in Dinslaken in der NS-Zeit. Vergessene Geschichte 1933-1945* (Kleve: Boss-Verlag, 1983), 285–95; here, 287; Detlef Garbe, *"Gott mehr gehorchen als den Menschen." Neuzeitliche Christenverfolgung im nationalsozialistischen Hamburg* in *Verachtet—Verfolgt—Vernichtet: zu den vergessenen Opfern des NS-Regimes.* ed. by Projektgruppe für die vergessenen Opfer des NS-Regimes in Hamburg e.V., (Hamburg: VSA-Verlag, 1988), 173–219; here, 187. When the "German Labor Front" was declared an "affiliate of the NSDAP" in October 1934, many Jehovah's Witnesses resigned their membership in the Nazi Party.

49 Cf. Karin Orth, *Das System der nationalsozialistischen Konzentrationslager. Eine politische Organisationsgeschichte* (Hamburg: Hamburger Edition, 1999), esp. 32–33.

50 Cf. *1974 Yearbook of Jehovah's Witnesses*, 116.

51 Cf. ibid., 117–18.

52 Ibid., 119 ff.

53 Ibid., 122 ff.

54 See G. Besier and K. Stokłosa, *European Dictatorships. A Comparative History of the Twentieth Century* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013), 591 ff.

55 Cf. Frank Bajohr and Michael Wildt, eds., *Volksgemeinschaft. Neue Forschungen zur Gesellschaft des Nationalsozialismus* (Frankfurt/M.: S. Fischer, 2009); Detlef Schmiechen-Ackermann, ed., "*Volksgemeinschaft": Mythos, wirkungsmächtige soziale*

Verheißung oder soziale Realität im "Dritten Reich"? Zwischenbilanz einer kontroversen Debatte (Paderborn: Ferdinand Schöningh, 2011); Dietmar von Reeken and Malte Thießen, eds., "*Volksgemeinschaft" als soziale Praxis. Neue Forschungen zur NS-Gesellschaft vor Ort* (Paderborn: Ferdinand Schöningh, 2013).

56 Cf. Garbe, *Between Resistance & Martyrdom*, 110–11.

57 Cf. Michael Schepua, *Nationalsozialismus in der Pfälzischen Provinz: Herrschaftspraxis und Alltagsleben in den Gemeinden des heutigen Landkreises Ludwigshafen 1933-1945* (Mannheim: Palatium Verlag, 2000), 488; Garbe, *Between Resistance & Martyrdom*, 191; Kurt Fricke, *Die Justizanstalt "Roter Ochse" Halle-Saale 1933-1945. Eine Dokumentation* (Magdeburg: Ministerium des Innern des Landes Sachsen-Anhalt, 1997), 67. In at least 860 cases, Bible Students had the right to custody of their own children withdrawn; see 1974 *Yearbook of Jehovah's Witnesses*, 125; Heinz Boberach, ed., *Richterbriefe. Dokumente zur Beeinflussung der deutschen Rechtssprechung 1942-1944* (Boppard am Rhein: Boldt-Verlag, 1975), 49.

58 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 174 ff.; Garbe, *"Gott mehr gehorchen,"* 187; Hansjörg Riechert, *Bibelforscher in Nationalsozialismus in Detmold. Dokumentation eines stadtgeschichtlichen Projekts*, Ed. by Stadt Detmold done by Hermann Niebuhr and Andreas Ruppert, Bielefeld 1998, 723–52; here, 729–30; Dirk Hartwich/Wolf Stegmann, eds., *Dorsten unterm Hakenkreuz: Kirche zwischen Anpassung und Widerstand. Eine Dokumentation zur Zeitgeschichte*, vol. 2, (Dorsten: Self-published by the editors, 1984), 134; Hetzner, *Christen im Feuerofen*, 18–23; Zürcher, *Kreuzzug gegen das Christentum,* 133.

59 Cf. Garbe, *Between Resistance & Martyrdom*, 131–32; Lothar Gruchmann, *Justiz im Dritten Reich 1933-1940. Anpassung und Unterwerfung in der Ära Gürtner* (Munich: Oldenbourg, 1990), 541; Imberger, *Widerstand "von unten,"* 290.

60 Cf. Ulrich Herbert, *Von der Gegnerbekämpfung zur "rassistischen Generalprävention." Schutzhaft und Konzentrationslager in der Konzeption der Gestapo-Führung 1933-1939,* in *idem*/Karin Orth and Christoph Dieckmann, *Die nationalsozialistischen Konzentrationslager—Entwicklung und Struktur* (Göttingen: Wallstein, 1998), 60–86; here, 72–73.

61 Carsten Dams and Michael Stolle, *The Gestapo: Power and Terror in the Third Reich* (Oxford: Oxford University Press, 2014).

62 Cf. Hans Hesse and Jürgen Harder, *"Und wenn ich lebenslang in einem KZ bleiben müßte." Die Zeuginnen Jehovas in den Frauenkonzentrationslagern Moringen, Lichtenburg und Ravensbrück* (Essen: Klartext, 2001), 437–38.

63 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 150 ff. As early as May 1933, state-sanctioned means of torture, including sleep deprivation, individual neglect, cells with no light, practices causing extreme fatigue and beatings, were utilized against Jehovah's Witnesses in order to extract confessions and denunciations. Cf. Gerhard Paul, *Staatlicher Terror und gesellschaftliche Verrohung* (Hamburg: Ergebnisse-Verlag, 1996), 208; Isabel Richter, *Hochverratsprozesse als Herrschaftspraxis im Nationalsozialismus. Männer und Frauen vor dem Volksgerichtshof 1934-1939* (Münster: Westfälisches Dampfboot Verlag, 2001), 62–63. In the second half of 1937, seven "unexplained deaths" occurred as a result of the aggravated interrogations. Cf. 1974 *Yearbook of Jehovah's Witnesses*, 125–26; Zürcher, *Kreuzzug gegen das Christentum*, 169 ff.

64 See also Franke's biographically based report in "The Watchtower," dated 1/6/1963, 340–43.

65 Cf. Garbe, *Resistance & Martyrdom*, 232.

66 Cf. Roser, *Widerstand und Verweigerung*, 65 ff.; Inge Marßolek and René Ott, *Bremen im Dritten Reich. Anpassung—Widerstand—Verfolgung* (Bremen: Carl Schünemann, 1986), 306*; 1974 Yearbook of Jehovah's Witnesses*, 156.
67 Cf. Wolfgang Dierker, *Himmlers Glaubenskrieger. Der Sicherheitsdienst der SS und seine Religionspolitik 1933-1941* (Paderborn: 2002), 248.
68 Cf. Möller, *Widerstand und Verfolgung*, 225; Marßolek/Ott, *Bremen im Dritten Reich*, 307; 495; Michael Stolle, *"Betrifft: Ernste Bibelforscher." Zeugen Jehovas im Visier der badischen Gestapo* in ed. Roser, *Widerstand und Bekenntnis,* 89–146; here, 103–04.
69 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 1974, 132.
70 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 154 ff.; Garbe, *Between Resistance & Martyrdom*, 234–35.
71 Cf. Emmerich Tálos, *Das Austrofaschistische Herrschaftssystem. Österreich 1933-1938* (Berlin-Wien: LIT, 2013), esp. 240 ff.; Lucile Dreidemy, *Der Dollfuß-Mythos. Eine Biographie des Posthumen* (Wien: Böhlau, 2014). By 1935, the National Socialist Senate in Danzig banned the IBSA. Cf. Garbe, *Between Resistance & Martyrdom,* 233–34.
72 Cf. Zürcher, *Kreuzzug gegen das Christentum*, 37 ff.
73 1974 *Yearbook of Jehovah's Witnesses*, 155; Hesse and Harder, *"Und wenn ich lebenslang,"* 428–29.
74 Cf. Hans Eckart Niermann, *Politische Strafjustiz im Nationalsozialismus. Exemplarische Bedingungen ihrer Durchsetzung und Radikalisierung im Dritten Reich 1933-1945* (Aachen: Shaker-Verlag, 1996), 302–03.
75 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 155 ff.
76 Cf. ibid., 158. See also Erich Frost's biographically based report about the Nazi era in "The Watchtower," dated July 1961, 409–15.
77 Cf. Garbe, *Between Resistance & Martyrdom*, 243–45; Gruchmann*, Justiz im Dritten Reich*, 620.
78 The judiciary as a means of delay can be observed up until the appointment of the new Reich minister of justice, Otto Georg Thierack in August 1942. Cf. Garbe, *"Gott mehr gehorchen,"* 195; Walter Wagner, *Der Volksgerichtshof im nationalsozialistischen Staat* (Stuttgart: DVA, 1974), 277 ff.
79 Cf. ibid., 261; Zürcher*, Kreuzzug gegen das Christentum*.
80 1974 *Yearbook of Jehovah's Witnesses*, 157. Cf. Hesse and Harder, *"Und wenn ich lebenslang,"* 430–31.
81 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 156 ff.
82 Cf. Hacke, *Die Zeugen Jehovas im Dritten Reich*, 148. Nonetheless, in 1944 larger groups were able to come together. Cf. Garbe, *Between Martyrdom & Resistance*, 336 ff.
83 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 160.
84 Ibid., 161–62.
85 Cf. Dietrich von Raumer, *Zeugen Jehovas als Kriegsdienstverweigerer. Ein trauriges Kapitel der Wehrmachtsjustiz* in ed. Roser, *Widerstand als Bekenntnis,* 181–220; here, 187 ff.; Garbe, *Between Resistance & Martyrdom*, 351 ff.
86 Cf. Hacke, *Zeugen Jehovas im Dritten Reich*, 152.
87 Cf. Garbe*, Between Resistance & Martyrdom*, 358 ff.
88 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 163 ff.
89 Cf. Verordnung gegen Volksschädlinge vom 5. 9. 1939 (Regulation against Volksschädlinge / Pests on the Body Politic), RGBl. 1939 I, 1679.
90 Cf. Garbe*, Between Resistance & Martyrdom*, 343.

91 Cf. Karl Schröder, *Vom Leben und Sterben des Bibel-Forschers Ludwig Cyranek aus Adscheid, Gemeinde Hennef. Ein Beitrag zur Verfolgung der Zeugen Jehovas im Dritten Reich* in *Die vierziger Jahre—Der Siegburger Raum zwischen Kriegsausbruch und Währungsreform,* ed. by Stadtmuseum Siegburg (Siegburg: Rheinlandia-Verlag, 1988), 34–41; here, 34 ff.
92 Cf. Verordnung zur Ergänzung und Abänderung der Zuständigkeitsverordnung, January 29, 1943, RGBl. 1943 I, 76.
93 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 178–79.
94 Cf. Detlef Garbe, *Der lila Winkel. Die "Bibelforscher" (Zeugen Jehovas) in den Konzentrationslagern,* in *Dachauer Hefte* 10/1994, 3–31; here, 8; Hesse and Harder, *"Und wenn ich lebenslang",* 315–16; Carina Baganz, *Erziehung zur "Volksgemeinschaft"? Die frühen Konzentrationslager in Sachsen 1933-34/37* (Berlin: Metropol-Verlag, 2005), 142–43; See, in addition, Nikolaus Wachsmann, *KL. A History of the Nazi Concentration Camps* (London: Little Brown, 2015).
95 See 1974 *Yearbook of Jehovah's Witnesses*, 163 ff.
96 In this way, Jehovah's Witnesses refused to repair donated clothes for the Winter Relief programme. Cf. Jürgen Harder and Hans Hesse, *Female Jehovah's Witnesses in Moringen Women's Concentration Camp: Women's Resistance in Nazi Germany,* in ed. Hesse, *Persecution and Resistance,* 36–59; here, 51–52.
97 Cf. Hesse and Harder,*"Und wenn ich lebenslang,"* 102 ff.
98 Cf. Christoph Daxelmüller, *Solidarität und Überlebenswille. Religiöses und soziales Verhalten der Zeugen Jehovas in Konzentrationslagern* in ed. Hesse, *Am mutigsten waren immer wieder die Zeugen Jehovas,* 21–34; here, 31; Garbe, *Der lila Winkel*, 9.
99 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 174; 190–91.
100 Cf. Hesse and Harder, *"Und wenn ich lebenslang,"* 81 ff.; 108 ff.; Harder and Hesse, *Female Jehovah's Witnesses,* 52.
101 Cf. Garbe, *Der lila Winkel*, 12 ff.
102 Cf. Niermann, *Politische Strafjustiz im NS*, 303.
103 Cf. Garbe, *Der lila Winkel*, 15.
104 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 166–68. August Dickmann was the first one who was executed in Mauthausen on September 15, 1939. Hägele and Gottlob died in Flossenbürg, Grzybinoga (resp. Grzebinoga) and Bernhard Schubert in Mauthausen—under yet unexplained circumstances. There is some evidence that they were shot. But we don't know yet whether they were murdered in public executions or in secret.
105 Cf. Hesse and Harder, *"Und wenn ich lebenslang,"* 165 ff.
106 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 194, 164; 170.
107 Cf. Orth, *Das System der nationalsozialistischen Konzentrationslager*, 103–04.
108 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 195 ff.; Garbe, *Between Resistance & Martyrdom*, 469 ff.; Falk Pingel, *Häftlinge unter SS-Herrschaft. Widerstand, Selbstbehauptung und Vernichtung im Konzentrationslager,* (Hamburg: Hoffmann und Campe, 1978), 168.
109 Cf. Hesse and Harder, *"Und wenn ich lebenslang,"* 71–72
110 Cf. Garbe, *Between Resistance & Martyrdom*, 328 ff.; 437 ff.; Hesse/Harder, *"Und wenn ich lebenslang,"* 453 ff.; 1974 *Yearbook of Jehovah's Witnesses*, 203–04.
111 Cf. Garbe, *Between Resistance & Martyrdom*, 347–48.
112 Cf. Ibid., 198; Hesse/Harder, "Und wenn ich lebenslang," 202–03.
113 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 205 ff.; Garbe, *Zwischen Widerstand und Martyrium*, 454 ff.; 467.; Thoma Rahe, *Zeugen Jehovas im Konzentrationslager*

Bergen-Belsen in Abgeleitete Macht: Funktionshäftlinge zwischen Widerstand und Kollaboration, ed. by KZ-Gedenkstätte Neuengamme (Bremen: Edition Temmen, 1998), 106–16; here, 110.

114 Cf. Garbe, *Between Resistance & Martyrdom*, 483–84.

115 Cf. Gerhard Besier et al., eds. *Kirche nach der Kapitulation*, 3 vols. (Stuttgart and Weinheim: Kohlhammer and Deutscher Studienverlag, 1989, 1990, and 1995). Cf. also Antonia Leugers, ed., *Zwischen Revolutionsschock und Schulddebatte* (= theologie.geschichte; Beiheft 7) (Saarbrücken: Universaar), 2013.

116 Cf. Gerhard Besier, "FECRIS and its Affiliates in Germany. The Country with the Most Anti-Sect Organizations," in *RSG* 13 (2012): 341–60.

117 Gerhard Besier, "Der Status und die Rolle von Religion in Staat und Gesellschaft," in *RSG* 11 (2010), 125–37; Hermann Weber, "Körperschaftsstatus für Religionsgemeinschaften: Gelöste und ungelöste Probleme," in *ZevKR* 57 (2012): 347–89.

118 Cf. Gabriele Yonan, ed., *Im Visier der Stasi. Jehovas Zeugen in der DDR* (Niedersteinbach: Edition Corona, 2000); Hans-Hermann Dirksen, *"Keine Gnade den Feinden unserer Republik." Die Verfolgung der Zeugen Jehovas in der SBZ/DDR 1945-1990* (Berlin: Duncker & Humblot, 2001); Waldemar Hirch, *Die Glaubensgemeinschaft der Zeugen Jehovas während der SED-Diktatur. Unter besonderer Berücksichtigung ihrer Observierung und Unterdrückung durch das Ministerium für Staatssicherheit* (Frankfurt/M. et al.: Peter Lang, 2003).

119 Cf. 1974 *Yearbook of Jehovah's Witnesses*, 208 ff.

Chapter 16

1 "'aber wir haben wenigstens den Beweis geführt, was diese Leute alles verbrochen hatten.' Interview mit Dieter Ambach, Anklagevertreter im Düsseldorf Majdanek-Prozess," in *Das KZ Lublin-Majdanek und die Justiz: Strafverfolgung und verweigerte Gerechtigkeit: Polen, Deutschland und Österreich im Vergleich*, ed. C. Kuretsidis-Haider, I. Nöbauer, W. R. Garscha, S. Sanwald, Andrzej Selerowicz (Graz: Clio, 2011), 227.

2 "Überlebende als ZeugInnen vor Gericht am Beispiel des Düsseldorfer Majdanek-Prozesses und seiner Filmischen Dokumentation," in Ibid., 293.

3 Before the French Revolution, punishment in France was sometimes meted out not just to the offender but to his family. This problem was addressed by the National Assembly in the Law of January 21, 1790: "Neither the death penalty nor any infamous punishment whatever shall carry with it an imputation upon the offender's family," since "the honor of those who belong to his family is in no wise tarnished." This law captures the Enlightenment idea that collective punishment should be impermissible.

4 Already in the early 1980s, Henry Friedlander diagnosed the "political cowardice of the Bundestag" in failing to pass laws to avoid the structural limitations of traditional German law in dealing with Holocaust crimes; see, for example, idem, "The Judiciary and Nazi Crimes in Postwar Germany," *Simon Wiesenthal Center Annual* 1 (1984): 38. Jurist Gerhard Werle made the same point in a 1992 law review article, arguing that the "cleanest means" of enabling punishment of Nazi killers would have been "an explicit addendum to the Basic Law." Gerhard Werle, "Der Holocaust als Gegenstand der bundesdeutschen Strafjustiz," *NJW* 40 (1992): 2535.

5 "Former Auschwitz Guard Convicted in One of Germany's Last Holocaust Trials," *The Telegraph*, June 17, 2016, accessed on November 2, 2016. http://www.telegraph.co.uk/news/2016/06/17/former-auschwitz-guard-sentenced-to-five-years-in-prison/.
6 Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton, NJ: Princeton University Press, 2016), 156–57.
7 The "atrocity paradigm" achieved its supreme expression at Nuremberg, where the Allies created new categories of criminal liability (crimes against peace, war crimes, and crimes against humanity) and special courts—that is, the International Military Tribunal, among others—to address Nazi misdeeds. The postwar West Germans, by contrast, spurned the atrocity model in favor of ordinary criminal courts and the conventional German Penal Code. Douglas, *The Right Wrong Man*, 161. See also Werle, "Der Holocaust als Gegenstand," 2533. While not using the terminology of the "atrocity paradigm," Werle portrays in these terms the question of how Nazi crimes would be judged, asserting that the West German government's decision to prosecute Nazi crimes on the basis of German law as it existed during the war was misconceived. Instead, Werle insists, the Germans should have followed the Allied approach, even at the risk of incurring the stricture that they were applying retroactive law (see, for example, his discussion in ibid., 2533, 2535).
8 Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (Chicago: University of Chicago Press, 1987), 236 ff. The distinction between "causes" and "conditions"—or, in the language of the law, "causes in fact" and "proximate causes"—relates to "circumstances that cause a certain consequence [i.e., "causes"] and circumstances that are merely necessary to its occurrence [i.e., "conditions"]. Ibid., 305.
9 Douglas, *The Right Wrong Man*, 10–15; idem, "Ivan the Recumbent, or Demjanjuk in Munich: Enduring the 'last great Nazi war-crimes trial,'" *Harper's Magazine*, March 2012, 52. ("That this belated understanding [of the exterminatory process] should coincide with the passing of the generation of the perpetrators is as ironic as it is unsurprising.")
10 Douglas, *The Right Wrong Man*, 156.
11 See the discussion of these and other laws in UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (Buffalo, NY: W. S. Hein, 2006), 304 ff.; "The Criminal Conspiracy in Japanese War Crimes Trials," NARA, RG 0153, Entry 135, Box 0106, 27 ff. Robert Jackson, the chief of the US prosecution team at Nuremberg, cited these and other precedents to support extending the law of conspiracy to the crimes of the major Nazi war criminals.
12 John F. Murphy, "Norms of Criminal Procedure at the International Military Tribunal," in Georg Ginsburgs and V. N. Kudriavtsev, *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff, 1990), 63; Bradley Smith, ed., *The American Road to Nuremberg* (Stanford, CA: Hoover Institution Press, 1982), 10–11.
13 International Military Tribunal, Indictment, reproduced in Marrus, 58.
14 UN War Crimes Commission, History, 305–07.
15 The IMT declared as criminal only four of the six organizations proposed in the indictment: the Leadership Corps of the Nazi Party, the SD, the Gestapo, and the SS.
16 See, for example, *US v. Oswald Pohl et al.* (the WVHA case), in which defendants Rudolf Scheide and Leo Volk were acquitted despite membership in the SS.
17 Quoted in UN War Crimes Commission, "Case No. 60—The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-nine Others," *Law Reports of Trials of War Criminals*, vol. XI (London: His Majesty's Stationery Office, 1949), 12. For a recent analysis of the US military commission cases tried at Dachau, see Tomas

Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, MA: Harvard, 2012).

18 Quoted in UN War Crimes Commission, 14. The "special findings" of the military commission in the Mauthausen case emphasized the inherently criminal nature of the concentration camp system, holding inter alia that "any official, governmental, military or civil, . . . or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, . . . is guilty of a crime against the recognized laws, customs and practices of civilized nations and the letter and spirit of the laws and usage of war, and by reason thereof is to be punished." Quoted in ibid., 15. See also Jardim, *Mauthausen Trial*, 182.

19 USWCC, "Case No. 38: Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess," *Law Reports*, 18. During the trial, the NTN judges focused on Hoess's membership in the SS inasmuch as Hoess was not deemed to have been a member of the leadership corps of the NSDAP—the only echelon of the Nazi Party branded as criminal at Nuremberg.

20 Ibid., 18–24. For recent scholarship on the NTN, see Alexander V. Prusin, "Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal," *Holocaust and Genocide Studies* 24, no. 1 (September 2010): 1–25; Michael J. Bazyler and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York and London: New York University Press, 2014), 108 ff.; Włodzimierz Borodziej, "'Hitleristische Verbrechen': Die Ahndung deutcher Kriegs- und Besatzungsverbrechen in Polen," in *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, ed. Norbert Frei (Göttingen: Wallstein, 2006), 412 ff.; Kuretsidis-Haider et al., *KZ Lublin-Majdanek und die Justiz*, *passim*.

21 Quoted in T. Horstmann and H. Litzinger, *An den Grenzen des Rechts: Gespräche mit Juristen über die Verfolgung von NS-Verbrechen* (Frankfurt/NY: Campus, 2006), 9. As Gerhard Werle affirms, the West Germans' decision to charge Nazi crimes as violations of German law was based on the familiar maxim, "Was damals Recht war, kann heute nicht Unrecht sein" ("What was law at the time cannot be illegality today"). Werle, "Holocaust als Gegenstand," 2533.

22 Sec. 211, German Penal Code.

23 Due in part to efforts by the camp staff to destroy documentation in the waning months of the war; see, for example, Interview with Dieter Ambach, in Kuretsidis-Haider et al., *Das KZ Lublin-Majdanek und die Justiz*, 218.

24 BGH, Judgment of November 25, 1964, 2 StR 71/64, quoted in Thilo Kurz, "Paradigmenwechsel bei der Strafverfolgung des Personals in den deutschen Vernichtungslager?," *Zeitschrift für Internationale Strafrechtsdogmatik* 3/2013, 122 (translation by the author). See also the discussion and citation to other German cases sympathetic to functional participation in Douglas, *The Right Wrong Man*, 155.

25 BGH, Judgment of February 20, 1969, 2 StR 280/67, reprinted in *Justiz und NS Verbrechen*, Vol. XXI, Serial Number 595 b.

26 Michael Bryant, *Eyewitness to Genocide: The Operation Reinhard Death Camp Trials, 1955-1966* (Knoxville, TN: University of Tennessee Press, 2014).

27 Claudia Kuretsidis-Haider, "Majdanek und die deutsche Justiz," in Kuretsidis-Haider et al., *Das KZ Lublin-Majdanek und die Justiz*, 172–73.

28 Quoted in Douglas, *Right Wrong Man*, 152.

29 Ibid., 160.

30 Lawrence Douglas, "Ivan the Recumbent, or Demjanjuk in Munich: Enduring the 'last great Nazi war-crimes trial,'" *Harper's Magazine*, March 2012, 52.

31 Douglas, *Right Wrong Man*, 176.
32 Ibid., 256.
33 Horstman and Litzinger, *An den Grenzen*, 21.
34 Due to space constraints, my discussion will focus chiefly on EU and international legal standards relevant to criminal trials. For further reading on the influence of EU civil law on the German legal system, see the analysis of the 2002 Reform of the German Civil Law Code (BGB) in Mathias Reimann, "The Challenge of Recodification Worldwide: The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations," 83 TUL. L. REV. 880–915 (2009). For the EU's influence on German administrative law, see Georg Nolte, "General Principles of German and European Administrative Law: A Comparison in Historical Perspective," 57 *The Modern Law Review* (March 1994): 191–212.
35 Sebastian Müller and Christoph Gusy, "The Interrelationship between Domestic Judicial Mechanisms and the Strasbourg Court Rulings in Germany," in *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy*, ed. Dia Anagnostou (Edinburgh, UK: Edinburgh University Press, 2013), 27–44.
36 Christoph Safferling, "The Role of the Victim in the Criminal Process—A Paradigm Shift in National German and International Law?," 11 *International Criminal Law Review* (2011): 183–215.
37 Article 68, Protection of the victims and witnesses and their participation in the proceedings, Rome Statute of the International Criminal Court, accessed on July 29, 2016, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
38 ICC Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, 01/04–01/06, Decision on victims' participation, January 18, 2008, para. 108.
39 International criminal law scholars Beth Van Schaack and Ronald Slye trace JCE to "the post-WWII period involving concentration camps and other institutions." Van Schaack and Slye, *International Criminal Law and its Enforcement: Cases and Materials* (New York: Foundation, 2010), 815. They might have added the theory of systemic criminality adopted by the NTN trials in Poland.
40 Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement (July 15, 1999), reproduced in ibid., 817–27.
41 A. M. Danner and J. S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of international Criminal Law," 93 *Calif. L. Rev*. 75, 107 (2005), cited in ibid, 831.
42 David M. Crowe, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014), 357. For the ICTR's construal of JCE, see the verdicts in Nchamihigo (ICTR-01-63-T) and Mpambara (ICTR-01-65-T).
43 The reader will note that JCE appears only in the case law of the ICTY and ICTR; neither of the Statutes establishing the two bodies mention it. Neither does the ICC recognize JCE doctrine; rather, it adopts the theory of "co-perpetration" (in German, *Mittäterschaft*). Van Schaack/Slye, *International Criminal Law*, 835.

Chapter 17

1 Material for this chapter was previously published in *The Historian* 61:4 (Summer 1999): 865–82.

2 An excellent analysis of the trials' contributions to international jurisprudence is provided in Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Law* (Oxford: Oxford University Press, 2011).
3 Frank M. Buscher, *The US War Crimes Trial Program in Germany, 1946-1955* (New York: Praeger, 1989), 2–3.
4 See Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Bloxham, "From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited," *History: The Journal of the Historical Association* 98, no. 332 (October 2013): 567–91; and Patricia Heberer and Jürgen Mattäus eds., *Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln: University of Nebraska Press, 2008).
5 Raymond G. Stokes, *Divide and Prosper: The Heirs of I.G. Farben under Allied Authority, 1945-1951* (Berkeley: University of California Press, 1988), 37–63, 156–59, 173–79; Rebecca L. Boehling, *A Question of Priorities: Democratic Reforms and Economic Recovery in Postwar Germany: Frankfurt, Munich, and Stuttgart under US Occupation 1945-1949* (Providence: Berghahn Books, 1996); and John Gimbel, *The American Occupation of Germany: Politics and the Military, 1945-1949* (Stanford: Stanford University Press, 1968).
6 Stokes, *Divide and Prosper*, 38–49, 118–22, 179–89; Graham Taylor, "The Rise and Fall of Antitrust in Occupied Germany, 1945-1948," *Prologue* 11 (Spring 1979): 23–30; and Regina Ursula Gramer, "Reconstructing Germany, 1938-1949, United States Foreign Policy and the Cartel Question" (PhD diss., Rutgers University, 1997), 97–214.
7 John H. Backer, "From Morgenthau Plan to Marshall Plan," in *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944-1952*, ed. Robert Wolfe (Carbondale: Southern Illinois University Press, 1984), 155–165; Warren F. Kimball, *Swords or Ploughshares?: The Morgenthau Plan for Defeated Nazi Germany, 1943-1946* (New York: Lippencott, 1976), 25–55; Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books,1981), 20–29; and Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), 27–29, 55–60.
8 John Mendelsohn, *Trial by Document: The Use of Seized Records in the United States Proceedings in Nürnberg* (New York: Garland Publishers, 1988), 8–9 and *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. VII* (Washington, DC: US Government Printing Office, 1953), 11.
9 Assistant Prosecutor Taylor to Chief Justice Jackson, January 30, 1946; War Crimes Branch Nuremberg Administration Files, 1944–49; Records of the Office of the Judge Advocate General, Record Group 153, (hereafter RG 153) Box 1; National Archives and Records Administration, College Park, MD (hereafter NARA) and Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crime Trials Under Control Council Law No. 10* (Washington, DC: US Government Printing Office, 1949), 26, 33–36.
10 Taylor, *Final Report to Secretary of the Army*, 66.
11 Telford Taylor, Interim Report to the Secretary of the Army, May 12, 1948 in *Final Report to the Secretary of the Army*, 115.
12 Taylor, *Final Report to the Secretary of the Army*, 106–12.
13 Telford Taylor to all documentation and research personnel concerned on research for evidence involving Nazi industrialists in war crimes, February 4, 1946; Correspondence, Reports, and other records, 1945–49 (hereafter Correspondence, 1945–49); chief

of council, General Records (hereafter Chief of Council); Office of the Chief Council for War Crimes, 1933–49 (hereafter OCCWC); Collection of WWII War Crimes Records, Record Group 238, (hereafter RG 238) Box 3; NARA.

14 Drexel Sprecher to all research personnel regarding criteria for preliminary investigations of leading German industrialists and financiers in connection with possible subsequent trials for war crimes, March 13, 1946; Correspondence, 1945–49; Chief of Council; OCCWC; RG 238, Box 3; NARA.

15 Telford Taylor, points of information and evidence relevant to the investigation of leading German industrialists and financiers who may be chargeable with war crimes, June 3, 1946; Correspondence, 1945–49; Chief of Council; OCCWC; RG 238, Box 3; NARA.

16 Taylor, *Final Report to the Secretary of the Army*, 64, 222.

17 Office of US Chief of Counsel Nuremberg signed Jackson, April 1946; Nuremberg War Crimes Trials (hereafter NWCT); Office of Adjutant General (hereafter OAG); OMGUS; Record Group 260, (hereafter RG 260) Box 3; NARA.

18 Josiah E. Dubois, "Oral History Interview with Josiah E. Dubois," Interview by Richard D. McKinzie (June 29, 1973), *Harry S. Truman Presidential Oral History Collection* 24–25, 29–30.

19 Henry Morgenthau Jr., *Germany is Our Problem* (New York: Harper and Brothers, 1945), 138, 105.

20 Lucius D. Clay, deputy military governor to C. R. Huehner, chief of staff, HQ, US Forces, European Theater, September 9, 1946 and Huehner to Clay, September 21, 1946; NWCT; OAG; RG 260, Box 3; NARA.

21 Taylor, *Final Report to the Secretary of the Army*, 17, 25, 74–76 and Telford Taylor to deputy military governor on Program of War Crimes to be brought by the office of chief of counsel before the Military Tribunals, September 4, 1947; NWCT; OAG; RG 260, Box 118; NARA.

22 Taylor, *Final Report to the Secretary of the Army*, 66–67 and I. G. Farben trial team; Division of Histories, OCCWC; office of the chief council for war crimes; RG 260, Box 1; NARA.

23 Lucius Clay, military governor of Germany to C. R. Huehner, chief of staff, US Forces, European Theater, September 9, 1946; NWCT; OAG; RG 260, Box 3; NARA.

24 Gimbel, *The American Occupation of Germany*, 150–185 and Taylor, "The Rise and Fall of Antitrust in Occupied Germany, 1945-1948," 35–39.

25 *Trials of War Criminals Before the Nuremberg Military Tribunals, Vol VII,* 10–80 and Joseph Borkin, *The Crime and Punishment of I.G. Farben* (New York: Andre Deutsch 1978), 137.

26 D. A. Sprecher to all lawyers on Farben case, Farben Bulletin No. 14, March 14, 1947; Correspondence and Reports, Trial Team #1 (I. G. Farben); Executive Council; OCCWC; RG 238, Box 1; NARA.

27 Josiah Dubois to all Farben attorneys, June 24, 1947; Correspondence and Reports, Trial Team #1 (I. G. Farben); Executive Council; OCCWC; RG 238, Box 1; NARA.

28 Josiah E. Dubois, Jr., *The Devil's Chemists: 24 Conspirators of the International Farben Cartel Who Manufacture Wars* (Boston: The Beacon Press, 1952), 3–30, 97–121.

29 Dubois, *The Devil's Chemists*, 357–63 and *Trials of War Criminals Before the Nuremberg Military Tribunals, Vol VII*, 119.

30 Quoted in Dubois, *The Devil's Chemists*, 82.

31 Borkin, *The Crime and Punishment*, 141, 149.

32 Telford Taylor to deputy military governor on Program of War Crimes Trials to be brought by the office of chief of counsel before the Military Tribunals, September 4, 1947; NWCT; OAG; RG 260, Box 118; NARA.

33 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol VIII* (Washington, DC: US Government Printing Office, 1953), 1124–25; Dubois, *The Devil's Chemists*, 345–46, 358–59; and Jonathan Friedman, "Law and Politics in the Subsequent Nuremberg Trials, 1946–49," in *Atrocities on Trial*, 84. For more on Judge Paul M. Herbert's dissent arguing that all members of the managing board should have been found guilty on the slave labor charge, see Alberto L. Zuppi, "Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Herbert," *Louisiana Law Review* 66, no. 2 (Winter 2006): 495–526.
34 Peter Hayes, *Industry and Ideology: I.G. Farben in the Nazi Era* (Cambridge: Cambridge University Press 1987), 379.
35 Stokes, *Divide and Prosper*, 153–54.
36 Borkin, *The Crime and Punishment*, 141.
37 For more on the lingering influence of Morganthau's plans in postwar Germany as distinct from ideas of deconcentration of German industry, see Taylor, "The Rise and Fall of Antitrust in Occupied Germany, 1945–48," 29–30.
38 Dubois, *The Devil's Chemists*, X, 338–56. Heller explores in more detail the possible bias against the prosecution among the judges in the I. G. Farben case stemming from Cold War attitudes. *The Nuremberg Military Tribunals*, 95–96.
39 Ibid., IX–X, 3–30, 115–20, 338–56; Les K. Adler and Thomas G. Paterson, "The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism," *American Historical Review* LXXV no. 4 (April 1970): 1046–64.

Chapter 18

1 Judgment, in *Trials of War Criminals before the Nuremberg Military Tribunals, Vol. II* (Washington, DC: US Government Printing Office, 1949), 170–300, 181–82.
2 Control Council Law No. 10 in *Trials of War Criminals before the Nuremberg Military Tribunals, Vol. I* (Washington DC: US Government Printing Office, 1949), XVI–XIX.
3 Opening Statement of the Prosecution by Brigadier General Telford Taylor, December 9, 1946, in *Trials of War Criminals before the Nuremberg Military Tribunals, Vol. I* (Washington, DC: US Government Printing Office, 1949) 27–74, 27.
4 Opening Statement, 37–56. See also Extracts from Argumentation and Evidence of Prosecution and Defense, in *Trials of War Criminals before the Nuremberg Military Tribunals Vol. I*, (Washington, DC: US Government Printing Office, 1949), 83–91.
5 Ibid., 41.
6 Ibid., 47.
7 Ibid., 45.
8 Vera Laska ed., "The Stations of the Cross," in *Medicine, Ethics, and the Third Reich: Historical and Contemporary Issues*, ed. John J. Michalczyk (Kansas City, KS: Sheed & Ward, 1994), 129–42.
9 Eva Mozes-Kor, "The Personal, Public, and Political Dimensions of Being a Mengele Guinea Pig," in *Medicine, Ethics, and the Third Reich*, 101–05.
10 Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 2000), 337.
11 Opening Statement, 28.
12 Ibid., 29.
13 Lifton, *The Nazi Doctors*, 16, 31, 33.

14 Ibid., 30, quoting Gerhard Wagner.
15 Ibid., 21.
16 Robert Proctor, "Racial Hygiene: The Collaboration of Medicine and Nazism," in *Medicine, Ethics, and the Third Reich,* 35–41.
17 Robert Proctor, "Nazi Doctors, Racial Medicine, and Human Experimentation," in *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation*, eds. George J. Annas and Michael A. Grodin (New York: Oxford University Press, 1992), 21; Lifton, *The Nazi Doctors*, 23.
18 Christian Pross, "Nazi Doctors, German Medicine, and Historical Truth," in *The Nazi Doctors and the Nuremberg Code,* 39.
19 Mary Ziegler, "Eugenic Feminism, Mental Hygiene, The Women's Movement, and the Campaign for Eugenic Legal Reform, 1900-1935," 31 *Harv. J. L. & Gender* 211, 212 (2008).
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Glossary

Decree against Public Enemies (Volksschädlingsverordnung)**, September 5, 1939** The decree was enacted right after the invasion of Poland and prohibited the exploitation of war conditions subjecting violators to the death sentence. This sentence was passed 15,000 times from 1941 to 1945.

Decree of the Reich President for the Protection of the People and the State (Reichstag Fire Decree), February 28, 1933 Following the Reichstag fire of February 27, the new Third Reich government took serious security measures by instituting "protective custody," and restricted freedom of the press, assembly, and speech. It became permanent, lasting the duration of the Third Reich.

Decree on Guardianship for Absentees, October 11, 1939 Allegedly trustees could govern the property of German emigrants, but eventually the property of deportees augmented the coffers of the Reich.

Decree on the Elimination of the Jews from Economic Life, November 12, 1938 Jews were banned from engaging in any type of business. Within two weeks Jewish businesses were "Aryanized."

Decree on the Registration of the Property of Jews, April 26, 1938 This mandate required Jewish enterprises to register their property, marking them as a prime target when the confiscations and deportations began.

Decree on the Wearing of Jewish Badge, November 23, 1939 In Poland, General Governor Hans Frank ordered all Jews over the age of ten to wear a "Jewish Star." On September 1, 1941, Reinhard Heydrich decreed that all Jews over six years wear a Star of David in the Reich.

Decree to Protect the Government of the National Socialist Revolution from Treacherous Attacks, March 21, 1933 This decree covered falsely wearing the Nazi uniform as well inciting others to revolt, or defaming the government in foreign circles.

Euthanasia Policy, September 1, 1939 (backdated from October) "Reich Leader Bouhler and Dr. med. Brandt are charged with responsibility to extend the powers of specific doctors in such a way that, after the most careful assessment of their condition, those suffering from illnesses deemed to be incurable may be granted a mercy death." The plan code-named "Aktion T-4" was to eliminate any children and then adults "unworthy of life," termed "useless eaters." Six centers were established to handle the disabled. Hitler cancelled the program in August 1941 following Catholic reactions in the wake of Bishop Clemens von Galen's sermon attacking the policy.

Führer Principle (Führerprinzip **or "leader principle")** This granted absolute power to the Nazi leader Adolf Hitler, requiring total obedience. As being extra-legal, it had priority over any other law.

Gestapo/Secret State Police (Geheime Staatspolizei)**, April 26, 1933** The Secret Police Office was established by decree to handle any political crime in order to control alleged "enemies of the people." It operated outside of the law with Heinrich Himmler as its notorious chief.

Judenrat Council of Jewish "elders" first established by Reinhard Heydrich in Poland in 1939 and then designated for all occupied areas in order to implement Nazi orders for the Jewish community.

Law against Dangerous Habitual Criminals and Measures for Protection and Recovery, **1933** German judges had the power to order compulsory castration in cases of certain sex offenses with adults or children.

Law against Insidious Attacks upon the State and Party and for the Protection of the Party Uniform, December 20, 1934 The National Socialist Party became immune from any type of social or political threat; the party uniform was deemed symbolically sacred**.**

Law against the Founding of New Parties, July 14, 1933 Not only were new political parties forbidden to be initiated, but all political parties except the National Socialist Party were banned. No political competition therefore existed.

Law for the Prevention of Genetically Diseased Offspring (Sterilization Law), July 14, 1934 This law, partially based on the eugenics principles established in the United States by Harry Laughlin, obliged citizens with a hereditary disease (epilepsy, schizophrenia, blindness, etc.) to be sterilized.

Law for the Repeal of Naturalization and Recognition of German Citizenship, July 14, 1933 This law enabled the state to revoke the naturalization of East European Jews that had taken place between 1918 and 1933.

Law to Remedy the Distress of the People and the Reich (The Enabling Act), March 24, 1933 This act allowed the Cabinet to introduce legislation without first presenting it to Parliament (Reichstag), which basically put all power in the hands of Chancellor Hitler eventually.

Law for the Restoration of the Professional Civil Service, April 7, 1933 Non-Aryan and political opponents, although tenured, were dismissed from civil service. This included professors and judges at first, and then lawyers, doctors, and other professionals. Hence the legal system was controlled by the National Socialist Party and not guided by the Weimar Constitution.

Law on the Confiscation of Products of Degenerate Art, May 31, 1938 A total of 15,997 artworks, primarily "modern art" were confiscated from 101 German museums without compensation.

Law on the Seizure of Assets of Enemies of the People and the State, July 14, 1933 This law permitted the government to seize assets of those designated as enemies of the State, notably Communists and then Jews, primarily those who had emigrated.

Military Court As part of the Special Court system it had the **responsibility of** trying cases dealing with desertion, espionage, sabotage, and in some cases treason.

Military Service Law, March 16, 1935 This law reintroduced universal military service which had been forbidden for the Reich by the Treaty of Versailles.

Mischling This person was considered of mixed ancestry (Aryan and Jewish). The *Mischling* Test, a part of the Nuremberg Laws of 1935, determined who could be labeled Jewish or of "mixed breed" descent.

Night and Fog Decree (Nacht-und-Nebel Erlass) On December 7, 1941, Hitler gave the secret order, signed by Chief of Staff of the Army Wilhelm Keitel, to round up "any persons endangering German security" in the German-occupied countries to be sent to the concentration camps under the cover of darkness. This measure came about due to increased activities of Resistance groups, notably in France.

Nuremberg Laws: (Law for the Protection of German Blood and German Honor and Reich Citizenship Law), September 15, 1935 These two laws approved by Hitler were read by Herman Goering at the annual Nazi rally in Nuremberg (Reich Party Congress of Freedom) declaring who was entitled to German citizenship by German blood and issues of marriage and sex between Jews and German citizens. Jews were to be designated by their ancestry, that is, by the number of grandparents.

Paragraph 175 This law was a section of the Imperial Criminal Code of the German Empire from 1871. The law forbade intercourse-like acts between men and also outlawed such acts between men and animals. Proving an offense against Paragraph 175 was difficult without the cooperation of the accused, nor were such cases strenuously pursued in the later years of the Weimar Republic. In 1935, the Third Reich altered Paragraph 175 to outlaw sex offenses between men which included almost all forms of physical contact and even suggestive gazes. A leap in arrests and convictions followed the broadening of the law, part of the Regime's concerted campaign against homosexuality among German men. Paragraph 175 was repealed in 1968 in the German Democratic Republic and altered in the Federal Republic in 1969. In 1994, it was stricken entirely from the German Criminal Code.

People's Court (Volksgerichtshof) A "Special Court" set up by Adolf Hitler in 1934 following the Reichstag Fire Trial to operate outside of the realm of constitutional law. The court notably handled crimes of treason with Roland Freisler (1942–45) as its most notorious judge. Cases such as the White Rose students and the July 20, 1944 conspirators ended with executions.

Protective Custody As part of the Decree of the Reich president for the Protection of the People and the State, the Gestapo had the power to incarcerate anyone without a legal trial.

Security Service (Sicherheitsdienst **or** SD) Established in 1931, its primary responsibility under Admiral Wilhelm Canaris was intelligence gathering for the Third Reich and the SS.

Sippenhaft **law or "kin responsibility"** During the Third Reich, the family and other relatives were held liable for the family member's alleged criminal activity and arrested since they possibly were aware of the activity. At times, spouses were sent

to jail or concentration camps. This was especially true in the case of the failed July 20, 1944 assassination plot.

Special Court (Sondergerichte) A court system that used ideology instead of justice as a norm, as in the case of the People's Court. Its modus operandi was to enforce Nazi legislation. By 1942, there were seventy-four courts in existence in which there was no appeal.

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