

**THE ENABLER, THE TRUE BELIEVER, THE FANATIC:
GERMAN JUSTICE IN THE THIRD REICH**

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Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.¹

--ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA

I. Introduction

What would we have done?

When I was young, I often wondered whether I would have had the courage, discipline, and skill to have crossed Omaha Beach, to have held out at Pegasus Bridge or Arnhem, or to have braved the cold and isolation at Bastogne. It is of course impossible to know how any of us would have responded, but millions of ordinary Americans, British, French, Polish, Russian, and other soldiers were able to accomplish these things, in large part because they had received training, matériel, and moral support of their armies, and the approbation of their societies.

The far more difficult question is what any of us would have done had we been lawyers or judges in the German legal system between 1933 and 1945. Would we have resisted the Nazi corruption of the legal system? Could we have found a way to resist injustice from within the system? We would hope that we would not have collaborated with the system or worse to have enabled it. However, once again, we can never know.

What we do know is that there was resistance to Nazi rule from members of other political parties, such as the ninety-four Social Democrats who voted against the Enabling Act (see discussion, *infra*), and from the White Rose student groups, the Confessing Church, the Kreisau Circle, the July 20 Conspiracy, and

¹ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (J.P. Mayer trans., Harper Perennial 1969) (1835).

the German Army, and the traditional aristocracy. Yet there is virtually no history of resistance from the German legal profession or judiciary.

This paper will explore the conduct in the Nazi era of three prominent members of the German legal system, Franz Schlegelberger, Kurt Rothenberger, and Oswald Rothaug; the enabler, the true believer, and the fanatic of the title. Each of these men was a defendant in the Justice Trial, the third of the twelve Nuremberg Military Tribunals.² During the course of the trial, there was extensive documentation of each of their acts, and each of them testified in his own behalf before a panel of disinterested American judges. Although their testimony was self-serving, it gives powerful insight into the inner workings of the legal system under the Nazis, and the attitudes of its participants.

Schlegelberger would argue that he cooperated with the Nazis in what would ultimately be a vain effort to mitigate Nazi tyranny and to preserve the vestiges of judicial independence. Rothenberger was a committed Nazi with what would prove to be a naïve belief that Nazism was compatible with a rational legal system. Rothaug was a fanatical Nazi who would willingly use the legal system to persecute the victims of Nazism.

In Section II, this paper will introduce the three jurists and will outline the development of the German legal system to the end of World War II. Part III will describe the evidence concerning each man and the defense to the charges offered by each during the trial. Part IV will be a discussion of the quest for order which drove the three to the disastrous choices they made. Part V will be a meditation on justice based on the experiences of these three men.

II. THE GERMAN LEGAL SYSTEM

JUSTICE IS THE SET AND CONSTANT PURPOSE WHICH GIVES TO EVERY MAN HIS DUE... THE PRECEPTS OF THE LAW ARE THEN: TO LIVE HONESTLY, TO INJURE NO ONE, AND TO GIVE EVERY MAN HIS DUE." JUSTINIAN'S CODE, DIGEST, TITLE I, BOOK I.

² There are many excellent accounts of the International Military Tribunal and the events leading up to it. The best accounts are TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (Skyhorse Publishing, 2013) (1991); and ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (Skyhorse Publishing, 2010) (1983). The best account of the subsequent trials, including the Justice Trial, is KEVIN HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011).

a. The German Judiciary Before the Third Reich

Franz Schlegelberger was the highest-ranking judicial official in the Justice Trial. His career offers a microcosm of the development of the German judiciary to the time of the trial. In 1933, Schlegelberger was fifty-nine years old. He had had a distinguished career as a judge, scholar, and justice official. His books were read around the world, and he had lectured on legal matters in a number of countries. As a Ministry of Justice official, he had played an important role in taming the hyperinflation of the 1920s. Although he was quite conservative, he was not a Nazi and had no history of extreme anti-Semitism.³ Fourteen years later, he would be convicted of war crimes and crimes against humanity, and he would be sentenced to life imprisonment.⁴

Schlegelberger was born in 1874. Just four years before his birth, Prussia had defeated France in the Franco-Prussian War, and Prussia under Bismarck had reorganized all of the German principalities into the new German Empire. A year after the formation of the Empire, Germany adopted a penal code which has remained the basis for German criminal law from 1871 to the present day.

In 1877, the German judiciary was reorganized. From 1877, each German state, or *Land*, would have three court levels. The lowest level would be the *Amtsgericht*, or Petty Court, with jurisdiction over crimes with a penalty of less than five years imprisonment and smaller civil claims. The next level would be the *Landgericht*, or County Court, a general jurisdiction trial court, which had original jurisdiction over more serious crimes and larger civil claims. The County Court also heard appeals from the Petty Court. Each *Land* also had an *Oberlandesgericht*, or Court of Appeals, which served as an intermediate appeals court. Finally, at the national level there was the *Reichsgericht*, or Supreme Court, which could hear appeals from the Courts of Appeal from around the country.⁵

Bismarck also changed the method of recruitment of judges to assure that the judiciary would remain conservative with a strong commitment to preservation of the German state.⁶ German law students in the judicial track (as a civil law country, German law students could choose to be on a practice track or a judicial

³ TRIALS OF THE WAR CRIMINALS BEFORE THE NURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: "THE JUSTICE CASE" 284-86, 1081-82 (1951) [hereinafter "J.T.," Justice Transcript] (Schlegelberger Testimony and Trial Opinion).

⁴ J.T., *supra* note 3, at 1087; HELLER, *supra* note 2, at Appendix A.

⁵ INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 1-3 (1991); MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY 1-5 (1988).

⁶ MÜLLER, *supra* note 5, at 6-9.

track) would begin their careers by serving after graduation an unpaid training period of four years, as a probationary judge. After completion of training a probationary judge would become an assistant judge. However, neither a judge in training nor an assistant judge had tenure, so he could be dismissed at any time. The result of this system was that a prospective judge had to have some independent means of support through law school and training. Additionally, politically unreliable judges could be dismissed at any time before becoming tenured, fully qualified judges. Judges therefore tended to be chosen from among more affluent families, and left-leaning judges and Jews had difficulty reaching tenure.

Schlegelberger was a typical product of this era. He attended law school at the University of Leipzig, and on December 1, 1899, was awarded a doctorate of law. He took and passed his bar exam and entered the judiciary as an Assessor, the lowest civil service rank as a judge. In 1902 he became an assistant judge, and in 1904 passed his probation period and became a permanent judge in Berlin. He continued to serve as a judge until 1919 when he joined the Reich Ministry of Justice, where he remained until his resignation in 1942. From 1922 on, he served as a member of the Adjunct Faculty of the University of Berlin.⁷

The period from the end of World War I to the Nazi seizure of power in 1933 was a difficult and traumatic period for Germany as a whole and for the judiciary in particular. By recruitment and temperament, the judiciary had been a bulwark of the Imperial German state. Although Imperial Germany was an authoritarian state, with only limited legislative authority vested in the Reichstag, it viewed itself as a *Staatsgericht*, or “constitutional state.” It protected property rights, respected the law, and had orderly procedures.⁸

However, the world of the German judiciary was upended by World War I. In late 1918, the German army suffered a series of major defeats, and by October 1918 was beginning to crumble. Strikes broke out in Berlin and spread throughout the country. A mutiny in the German fleet led to the abdication of the Kaiser and the declaration of a republic. The Social Democratic Party

⁷ J.T., *supra* note 3, at 289; 1081–82 (Schlegelberger Testimony and Trial Opinion).

⁸ MÜLLER, *supra* note 5, at 1–3; H.W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY 8 (St. Martin's Press, 1989). The German legal system, like that of many other European systems, was based on the civil law. That is, it derived from Roman law as codified in the Code of Justinian. A key characteristic of the judiciary was the prevalence of positivism as the dominant legal philosophy, i.e. the dissociation of morality and law. Positivism of course was a logical attitude of a judiciary committed to the stability of the state, and positivism would later serve as an excuse for collaborative judicial conduct in the Nazi era.

(“SDP”) formed a new government, which sued for peace. The armistice was signed on November 11, 1918.⁹

Because the surrender was arranged for by the left-wing government, and not the army, the legend developed that the army had been “stabbed in the back” by a disloyal SDP. The “stab in the back” became a common belief in conservative circles, including the judiciary.¹⁰ The SDP had additional problems after the armistice. A radical faction, known as the *Spartakusbund*, broke off from the mainstream SDP in an attempt to form a Soviet republic. As the army by this time had disintegrated, the SDP relied upon right-wing paramilitary groups, the *Freikorps*, to defeat the Spartacists.¹¹

A new German republic was established in the town of Weimar in 1919. The Weimar Republic was forced to agree to the humiliating terms of the Treaty of Versailles, which among other things called for the by-now destitute Germany to pay massive war reparations to France and Belgium,¹² to accept exclusive guilt for starting the war,¹³ and to try the Kaiser and his supporters for war crimes.¹⁴ The Leipzig War Crimes Trials which followed were a fiasco, with many acquittals and many light sentences.¹⁵

The problems of the Weimar Republic did not end there. After another abortive left-wing uprising, there were two right-wing uprisings, one by a veteran named Kapp, known as the Kapp Putsch, and one by the newly formed National Socialist German Workers’ Party (“NSDAP” or Nazi Party for short) in 1922. All three of these revolts were easily suppressed. However, the left-wing radicals received lengthy sentences and, in a pattern which would continue through the end of the Republic, the right-wing radicals got lenient sentences. As an example, Adolf Hitler served a short sentence in a minimum security prison, where he wrote *Mein Kampf*.¹⁶

⁹ See generally ERICH EYCK, A HISTORY OF THE WEIMAR REPUBLIC: FROM THE COLLAPSE OF THE EMPIRE TO HINDENBERG’S ACCESSION 40-46 (Harlan P. Hanson & Robert G.L. Waite trans., Science Editions 1963)

¹⁰ KOCH, *supra* note 8, at 19–20; EYCK, *supra* note 9, at 121-23.

¹¹ EYCK, *supra* note 9, at 78-79; IAN KERSHAW, HITLER: 1889-1936, HUBRIS 111 (2000).

¹² See Treaty of Versailles, Pt. 8, § 1, Art. 232 and Annex I.

¹³ *Id.* at Pt. 8, § 1, Art. 231 (the “War Guilt Clause”).

¹⁴ *Id.* at Pt. 8, Arts. 227-30. See MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD (2003) for an excellent account of the Versailles Peace Conference.

¹⁵ TUSA & TUSA, *supra* note 2, at 242–68.

¹⁶ MÜLLER, *supra* note 5, at 12–14.

In 1923, in a dispute over reparations, the French Army invaded the Ruhr River valley, and the German government adopted a policy of hyperinflation. The hyperinflation, which reached absurd levels, destroyed all savings and erased all debts denominated in Marks. Schlegelberger helped work out currency reform, which helped bring the inflation under control.¹⁷ However, by 1923, the new republic was associated with the “stab in the back” armistice, a military defeat, a humiliating peace treaty, abortive war crimes trials, revolts from the left and the right, and economic mismanagement which wiped out savings and the accumulated wealth of the middle class. There could hardly have been a less auspicious start to the new democracy.

After the onset of the Great Depression in 1929, Germany suffered from massive unemployment and deflation.¹⁸ The Nazi Party began to grow, and the German political system began to fragment. From 1931 on, Germany engaged in a series of inconclusive elections punctuated by increasing street violence between Nazi para-military units, the *Sturmabteilung* (the SA, sometimes referred to as the Storm Troopers), and Communist militias. On January 30, 1933, President Paul von Hindenberg, to break the political impasse, appointed Hitler to be the new Chancellor, i.e., chief of government, of Germany.¹⁹

During the Weimar Republic, the German judiciary, long dedicated to the preservation of the German state, developed an adversarial relationship with the Republic. It was increasingly called upon to deal with political questions because of the political impasse, and had to adjudicate the fate of putative revolutionaries from the left and right. It also experienced a loss of wealth during the hyperinflation, and a loss of income after the beginning of the depression as the government imposed austerity measures.²⁰

b. The German Legal System under National Socialism 1933-1939

*“I sit in one of the dives
On Fifty-second Street
Uncertain and afraid
As the clever hopes expire
Of a low dishonest decade;...”
September 1, 1939, W.H. Auden*

¹⁷ J.T., *supra* note 3, at 286 (Schlegelberger Testimony).

¹⁸ ADAM J. TOOZE, *THE WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY* (2006).

¹⁹ KERSHAW, *supra* note 11, at 431.

²⁰ KOCH, *supra* note 8, at 10–12; MÜLLER, *supra* note 5, at 14–24.

Very few German judges in 1933 were members of the Nazi Party. However, the judges clearly were primed to accept a nationalist alternative to the Weimar government, particularly if the nationalists came to power with some semblance of legality. As the Nazi takeover took place formally by legal means (although accompanied by massive street violence and intimidation by the SA) rather than by military coup or violent overthrow, the German judiciary was able to rationalize its acquiescence to the Nazi ascension to power.²¹

After President von Hindenberg appointed Hitler to be Chancellor of Germany on January 30, 1933, Hitler formed a cabinet which mostly consisted of members of nationalist conservative parties. However, the Nazis took control of the interior ministry, which included the police and security services. Hitler then called for a new election to take place in March of 1933.²²

On February 28, 1933, after a fire broke out in the Reichstag building in Berlin, Hitler induced President von Hindenburg to invoke Article 48 of the Weimar Constitution,²³ a provision which permitted the suppression of civil liberties in the event of a national crisis, alleging that the fire was an effort by the Communists to stage an uprising. Article I of the decree reads:

Articles 114, 115, 117, 118, 123, 124 and 153 of the Constitution of the German Reich are suspended until further notice. Thus restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, or the right of assembly and the right of association and interferences with the secrecy of postal telegraphs, and telephone communications, and warrants for house searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.²⁴

Under this provision (repealed only in 1945 by Allied Control Council Law No.1)²⁵ the Nazis commenced a reign of terror during the election campaign. The SA physically intimidated the opposing political parties and broke up

²¹ MÜLLER, *supra* note 5, at 35-39.

²² KERSHAW, *supra* note 18, at 439.

²³ Art. 48, § 2 reads: "Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take measures necessary for their restoration, in intervening in the case of need with help of armed forces. For this purpose he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in Articles 114, 115, 117, 118, 123, 124 and 153."

²⁴ J.T., *supra* note 3, at 160 (*Reichsgesetzblatt*, pt. I, at 83, 28 February 1933).

²⁵ Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, 1945, vol. I, at 101.

campaign events with impunity. The police arrested all of the Communist members of parliament and suppressed all Communist party activities. The police also arrested or threatened with arrest members of the Social Democratic Party and the Center Party (the Catholic Party).²⁶

Despite all of this the NSDAP received only 43% of the vote. However, with other Nationalist parties the Nationalist vote comprised over 50% of the total vote. The Nazis therefore had a working majority in the Reichstag.²⁷

However, it was not Hitler's intention to serve as a conventional Chancellor, even with a working majority. The Nazis proposed an Enabling Act which would amend the Weimar Constitution to allow Hitler to rule by decree. However, a constitutional amendment required a two thirds majority of the Reichstag. Hitler got his two thirds majority by arresting all of the Communist members of the Reichstag so that they could not vote. Next he sought to intimidate and coerce the Center Party into voting for the Enabling Act. He secured their votes after his government signed a concordat with the German Catholic bishops guaranteeing them autonomy in clerical matters.²⁸

On March 24, 1933, the Reichstag voted by 444 to 94 to pass the Enabling Act.²⁹ The 94 opposing votes were cast by the remaining Social Democratic members of the Reichstag. Thus ended democracy in Germany until 1945.

The Enabling Act authorized Hitler to rule by decree and to depart from the provisions of the Weimar Constitution so long as he did not abolish the Reichstag or reduce the power of the President. (Hitler assumed the office of President himself shortly thereafter.)³⁰ Although the Reichstag was never abolished, from March 24, 1934, it ceased to function as a legislative body.

²⁶ See KERSHAW, *supra* note 11, at 459-60.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ The Enabling Act reads in part:

The Reichstag has decreed the following law, which is hereby promulgated in agreement with the Reich Council after it has been established that the prerequisite of legislation changing the constitution have been fulfilled.

Article 1. Laws of the Reich can be decreed, apart from the procedure provided by the constitution of the Reich, also by the government of the Reich. . . .

Article 2. The laws decreed by the government of the Reich may deviate from the constitution of the Reich as long as they do not concern the institution of the Reichstag and the Reich Council as such. The rights of the Reich President remain untouched. . . .

Article 5. This law comes into force on the day of its promulgation. It will become invalid on April 1, 1937; it will further become invalid if the present government of the Reich will be

Thus, between January 30 and March 24, all civil liberties had been suspended, the Constitution had been amended to let Hitler rule by decree, one of the major political parties had been suppressed, and the two remaining democratic parties were under enormous pressure.

Two weeks later, on April 7, two decrees were issued. One of them expelled "Non-Aryans" (i.e., Jews) and political undesirables from the professional civil service. The other provided that:

The admission [to the Bar] of attorneys who, according to the Law for the Restoration of the Professional Civil Services of 7 April 1933, are of non-Aryan descent, may be revoked before 30 September 1933.

The provision of paragraph 1 does not apply to attorneys who were already admitted on 1 August 1914, or who, during World War I, fought for the German Reich or her allies or whose fathers or sons were killed in action in World War I.³¹

At the time, Jews were permitted to become lawyers, although other professions were closed to Jews. Thus 22% of all of the lawyers in Germany were Jewish. Up to 60% of the attorneys in the Berlin Bar were Jewish. As a result of this law, 1,500 of the 4,400 Jewish lawyers were disbarred immediately.³² Over the next several years, no Jews were admitted to the Bar and because of forced emigration, discriminatory law, and political persecution, by the time of the outbreak of war, the legal profession and the judiciary had been purged of their Jewish members. There was no significant opposition to this purge from the organized bar or the judiciary.³³

If Schlegelberger was a product of the pre-Nazi legal system, Kurt Rothenberger, the True Believer, was an agent for its Nazification. Rothenberger was born in 1896. After his service in the German Army during World War I, he studied law. By the late 1920s, he had begun a relationship with local Nazi leaders in the Hamburg region, although he did not join the Party until May of 1933. In 1929, he spent eight months in Great Britain studying the British legal system.³⁴ Rothenberger was part of a coterie of Nazi lawyers who wished to transform the

replaced by another one." J.T., *supra* note 3, at 163 (Berlin, 24 March 1933, *Reichsgesetzblatt*, pt. I, at 141).

³¹ J.T., *supra* note 3, at 164-65 (Berlin, 7 April 1933, *Reichsgesetzblatt*, pt. I, at 188). The translated text refers to "World War I." The original German would likely have referred to the war by a different name, such as the "Great War."

³² MÜLLER, *supra* note 5, at 59-62.

³³ *Id.*

³⁴ J.T., *supra* note 3, at 490, 493.

German legal system into an instrument of Nazi control. This group included Hans Frank, who would be convicted of war crimes and crimes against humanity in the International Military Tribunal, and the two most notorious jurists during the war, Roland Freisler and Otto Thierack.³⁵ At the time of the Nazi seizure of power, Rothenberger was the President of the Hamburg Senate—that is, he was the equivalent of the Minister of Justice at the *Land* level.

Rothenberger actively participated in the purge of Jewish and Social Democratic lawyers and judges in the Hamburg area. After he joined the Party, he became the *Gauleiter* (political officer) for the National Socialist Jurists' League. During the 1930s, he served both as a court administrator and as a judge in Hamburg.³⁶

In July 1933, less than 5 months from the emergency decree, all political parties other than the NSDAP were banned. Later that year, the Land governments were deprived of their authority, and power was centralized into the national government.³⁷

On February 16, 1934, the judiciary was reorganized by centralizing the judiciary on a national basis and eliminating the *Land* as a part of the judicial organization. All of the Courts were integrated into a national court system which would be under the Reich Ministry of Justice. All appeals would now bypass the former *Land* Appellate Courts and would go directly to the Reich Supreme Court. There was no resistance to any of these measures by the German judiciary.

One of the peculiar features of the Nazi regime was its frequent creation of parallel and competing organizations with similar functions to existing governmental institutions. Most frequently the parallel organization was a branch of the SS or of a new government agency controlled by the Nazi Party competing with a traditional governmental organization.³⁸ Two such organizations were created in the judicial arena early in the regime, the Special Courts and the People's Courts. Indeed, many of the defendants in the trial were either judges of the People's Courts—e.g., defendants Rothaug, Barnickel, Nebelung, Lautz, Engert, and Petersen—or were judges of the Special Courts—e.g., defendants Oeschy and Rothaug. (Rothaug served on each of these courts at different times.)

³⁵ DIETRICH ORLOW, *THE NAZI PARTY, 1919-1945: A COMPLETE HISTORY* 243 (Enigma Books 2010) (2005).

³⁶ J.T., *supra* note 3, at 1107.

³⁷ J.T., *supra* note 3, at 988.

³⁸ As examples, the Gestapo and the ordinary police, and the Waffen SS (that is, the military SS) and the Wehrmacht.

The Special Courts were created by decree on March 21, 1933,³⁹ originally as a part of the judicial system of the *Land* before the centralization of the judiciary. These courts had jurisdiction over crimes arising under the Emergency Decree or against any decree involving internal subversion. This court ran parallel to the ordinary courts, however no appeal was allowed from a decision of the Court. As the Nazi era continued, more and more acts were defined as internal subversion so there was a migration of cases from the regular criminal courts to the Special Courts. The Special Courts each were to have three judges, but as newly created courts, the new regime was able to choose the judges for the Special Courts.⁴⁰ Most of its judges were Nazis or Nazi sympathizers.

The People's Courts were established by a decree on April 24, 1934,⁴¹ with exclusive jurisdiction over cases of high treason and treason. However, the definitions of high treason and treason were regularly extended during the Nazi era so that a substantial number of ordinary criminal cases were transferred to the People's courts. The People's Court also acquired exclusive jurisdiction over cases involving plots against Hitler, and therefore was the court which tried the July 20 plotters.⁴² Obviously, there was substantial overlap in the jurisdiction of the People's Court, the Special Courts, and the ordinary criminal courts. A People's Court consisted at the beginning of five members, two of whom were professional judges and the other three typically Nazi Party officials, members of the SS and Army officers. Once again no appeal was permitted to a decision of the People's Court.⁴³

The legal profession was also reorganized in the early Nazi years. The German Federation of Judges was folded into the Federation of National Socialist Jurists. New judges had to swear a personal oath to Hitler: "I swear I will be loyal and obedient to the Fuehrer of the German Reich and people, Adolf Hitler, to adhere to the law, and to fulfill the duties of my office conscientiously so help me God."⁴⁴

Similarly, lawyers were required to swear an oath of obedience to the Fuehrer as well. Indeed, in October 1933, at an open-air rally over 10,000 German lawyers

³⁹ J.T., *supra* note 3, at 222-25.

⁴⁰ *Id.*

⁴¹ J.T., *supra* note 3, at 231-33.

⁴² On July 20, 1944, an attempt was made by a large group of Wehrmacht officers and prominent citizens, to assassinate Hitler and stage an anti-Nazi coup. Hitler survived the bomb, and the coup was suppressed.

⁴³ J.T., *supra* note 3, at 232-33.

⁴⁴ Quoted in Matthew Lippman, *The Prosecution of Josef Alstoetter et al.: Law, Lawyers, and Justices in the Third Reich*, 16 Dick. J. Int'l L. 343, 355 n.119 (1997-1998).

took an oath to Hitler.⁴⁵ Law students henceforth would be trained in the “National Socialist Conception of Law” and upon graduation would swear an oath to Hitler. The new lawyer, before being admitted to practice, would also have to pass a character test mostly oriented towards the applicant’s commitment to National Socialism. This notion of a “National Socialist Conception of Laws” would prove to be a major theme during Rothenberger’s career, as we shall see.

One of the emerging National Socialist concepts of law was contained in a decree of June 28, 1935, authorizing judges to decide cases “by analogy”:

Article 2. Whoever commits an act which the law declares as permissible or which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people, shall be punished. If no specific penal law can be directly applied to the act, it shall be punished according to the law whose underlying principle can be most readily applied to the act.

Article 170a: If an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the law, the prosecutor will examine whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by analogous application of that penal law.

Article 267a: If the trial shows that the defendant has committed an act which deserves punishment according to the sound sentiment of the people, but is not declared punishable by the law, the court will examine whether the underlying principle of a penal law applies to the act and whether justice can be helped to triumph by analogous application of that penal law.⁴⁶

This same law also authorized the Reich Supreme Court to ignore its own precedents, and it authorized the prosecution to enter a “nullity plea”--that is, a motion to set aside a lower court ruling or sentence for not being sufficiently harsh--and the extraordinary plea, which authorized a prosecutor to petition to set aside a verdict of acquittal in a criminal case within one year if he thought the acquittal was unjust.⁴⁷

By this law, the German judiciary, which had been committed to a judicial philosophy of positivism, became utterly untethered to the law. From this

⁴⁵ MÜLLER, *supra* note 5, at 38.

⁴⁶ J.T., *supra* note 3, at 176.

⁴⁷ J.T., *supra* note 3, at 405-06, 410-11.

moment on, the German prosecutors and judges in fact could find a person guilty of an offense which was not a crime, could sentence a Defendant to a term in prison derived from an analogous crime, and could retry a person already acquitted of a crime.

Oswald Rothaug, the Fanatic, would make regular and brutal use of law by analogy during his tenure as a judge. Rothaug was born in 1897. Although roughly the same age as Rothenberger, Rothaug was the culmination of the Nazification of German justice rather than its implementer. He studied law after his service in World War I, and passed the equivalent of the bar exam in 1925. From 1925-37, Rothaug served variously as a prosecutor and counsellor to various courts in Nuremberg. From 1937-43, he served as a judge of the People's Court and Special Court in Nuremberg. He joined the Nazi Party in 1938, but had already been a member of the National Socialist Jurists League and the National Socialist Public Welfare Association. Throughout his tenure as a judge, he maintained a close relationship with the *Sicherheitsdienst*, or "SD," the secret security and intelligence arm of the SS. Rothaug, unlike Schlegelberger or perhaps even Rothenberger, was a virulent racist who loathed Jews and Poles.⁴⁸

Several months after the law by analogy decree, the so-called Nuremberg laws were promulgated, which changed the status of Jews in Germany. Rothaug would ultimately preside over the most famous trial under the Nuremberg race laws.⁴⁹

The Law for the Protection of German Blood and Honor⁵⁰ prohibited marriages and sexual relations between Jews and "German nationals of German or related blood." The law also forbade Jews from employing any German nationals in the home unless the German was at least 45 years old. A companion law limited German citizenship to persons of "German or German related blood," thereby denying Jews the rights or protection of citizens. The law contained detailed definitions of who would be considered a Jew for purposes of the law.⁵¹

After the Nuremberg race purity laws were passed, race, as defined in Germany, became a decisive factor in all legal dealings involving Jews. As an example, at Rothenberger's insistence, race even became a defense in debt collection cases;

⁴⁸ J.T., *supra* note 3, at 1143-45. See discussion *infra*.

⁴⁹ See discussion *infra*.

⁵⁰ J.T., *supra* note 3, at 180.

⁵¹ *Id.*

Jews were denied the right to proceed *in forma pauperis* in civil matters;⁵² race rather than conduct dominated criminal proceedings.⁵³

One of the most striking features of the judiciary between the Nazi takeover and the war was the degree to which the legal profession and judiciary embraced the Nazi Program. Returning once again to Schlegelberger, who it should be recalled was not a Nazi until involuntarily enrolled in the Party in 1938, Schlegelberger gave a speech at the University of Rostock on March 10, 1936, in which he stated,

In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto.⁵⁴

Rothenberger and Rothaug for their parts used their Nazi connections and their participation in Nazi activities to rise rapidly in government and Party leadership circles. Rothenberger became State Secretary for the Ministry of Justice after Thierack replaced Schlegelberger in that role in 1942, and Rothaug achieved prominence as a Judge in Nuremberg.

There are other examples of distinguished, non-Nazi judicial officials endorsing Nazi legal doctrines and principles.⁵⁵ More to the point, however, was the general acquiescence of the judiciary to the Nazi legal revolution, and lack of any visible protest to any of the changes in the law.⁵⁶

⁵² J.T., *supra* note 3, at 642, 1113-14.

⁵³ Race in the German conception distinguished among groups which Americans would not define in racial terms, e.g. Jews, Poles, Russians etc. were viewed as inferior "races." The American conception views race largely in terms of color. However, American race laws, like German ones, frequently forbade intermarriage, although not sexual relations, between races and often included race definitions. *See Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁴ J.T., *supra* note 3, at 1082.

⁵⁵ MÜLLER, *supra* note 5, at 39-45, 70-72.

⁵⁶ Indeed, Ingo Müller argues that he has only found one instance of judicial resistance to Nazi law. Dr. Lothar Kreyssig, a judge in a Guardianship Court, was removed from his judgeship because of his active role in the Confessional Lutheran Church which had resisted Nazi rule, and because he would not give the Nazi salute. He later was reinstated, but got into trouble again when he learned that persons with disabilities under his jurisdiction were being euthanized. He launched an investigation and issued an injunction against the practice. He wrote letters to the Ministry of Justice protesting against the treatment of persons who were mentally ill and also objecting to the use of concentration camps for any purpose. When he was ordered to desist, he

Finally, and significantly, the one legal value which at least some in the judiciary were willing to fight for was judicial independence, and Hitler initially promised that the judiciary would remain independent. In fact, judicial independence would not finally disappear until August 1942.

All these changes in practice reflected a basic shift in German jurisprudence during the Nazi era. German law, like all civil law systems, had been based on legal principles derived from Roman law. As the purpose of the criminal law in particular was to modify the behavior of its citizens so that proscribed acts were punished or deterred and mandatory acts performed, Roman law, and hence German law, required that laws be published, that they be applied equally among people similarly situated, that they not be applied retroactively, that trials be fair and impartial, and that trials follow rational procedures.

The new German jurisprudence operated on wholly different presumptions. The actual conduct of the individual was of less importance than his or her status. Fair process would be subordinate to the needs of the state or to the racial needs of the German people. A clear expression of the new jurisprudence was given in a speech by Joseph Goebbels before the judges of the People's Court in July 1942. In the summary of the speech prepared for the Ministry of Justice, Goebbels is quoted as saying:

The idea that the judge must be convinced of the defendant's guilt must be discarded completely. The purpose of the administration of the law was not in the first place retaliation or even improvement, but maintenance of the state. One must not proceed from the law, but from the resolution that the man must be wiped out.⁵⁷

This notion that one must no longer proceed from the law but the man must be wiped out was increasingly prevalent during the peacetime Nazi years, but became dominant after the outbreak of the war.

c. The German Legal System, 1939-1945

"Such decrees [unjust laws] are not so much laws as acts of violence, because as Augustine says, 'An unjust law does not seem to be a law at all.'"

St. Thomas Aquinas

refused and instead resigned as judge. Thereafter, rather than being punished for his actions, he received his full pension and was allowed to live in peace. *Id.* at 193–95.

⁵⁷ J.T., *supra* note 3, at 453 (Summary by Dr. Crohne of the Reich Ministry of Justice concerning Goebbel's speech to the members of the People's Court, 22 July 1942).

The Minister of Justice from 1933–1941 was Franz Gürtner. Had he not died in 1941, he would likely have been in the dock in 1947 rather than Schlegelberger. However, upon Gürtner's death, Schlegelberger who was the deputy Minister for civil affairs, became the acting Minister of Justice. Schlegelberger's tenure became a constant struggle between the judiciary, the Gestapo, the SS, and the Nazi Party for control of the legal process,⁵⁸ a struggle which the judiciary would lose badly in 1942.

By Schlegelberger's own account, much of his conduct as Minister of Justice was part of a strategy to maintain some semblance of judicial independence, and the Tribunal ultimately concluded that there was some substance to Schlegelberger's position. However, Schlegelberger was intimately involved in two brutal developments in German law during the early war years, specifically the "Penal Law against Poles and Jews" and the "Night and Fog Decree." These two laws would ultimately form the bases for the charges and convictions of Schlegelberger, Rothenberger, Rothaug, and others.⁵⁹

In addition to these two decrees, there was a third major development which became particularly important after Schlegelberger's resignation in 1942. At the beginning of the war Germany adopted a series of wartime measures, which in some cases were comparable to the laws passed by other belligerent powers. As an example, Germany adopted laws to prohibit hoarding, to control the black market, to prohibit abuse of blackout restrictions as by nighttime burglaries, and to prevent the interference with military recruitment. However, there were additional laws to prohibit listening to foreign radio broadcasts, to make comments disparaging Hitler or the Nazi Party, or to damage the morale of soldiers.⁶⁰

During the course of the war, and particularly as Germany's military situation deteriorated, violations of these laws increasingly became the province of the People's Courts and the Special Courts which turned these laws into vehicles to terrorize and intimidate opponents of the regime. The administration of these laws became a third ground for the post-war prosecution.

⁵⁸ J.T., *supra* note 3, at 292-99.

⁵⁹ J.T., *supra* note 3, at 1083-1086 (Schlegelberger); 1110-1118 (Rothenberger); 1143-1156 (Rothaug).

⁶⁰ J.T., *supra* note 3, at 182, 184-86, 187-89, 192-93.

1. The Law against Poles and Jews

“... a Pole is less sensitive to the imposition of an ordinary prison sentence.”
Franz Schlegelberger.

The war began on September 1, 1939 with the German invasion of Poland. Several weeks after the invasion, the Soviet Union by agreement with the Germans invaded Poland from the East. Despite a heroic defense, Poland was badly defeated by early October. Britain and France declared war on Germany on September 3, 1939, but offered no significant assistance to the Poles.

Poland was partitioned between the Germans and Soviets. Part of German-occupied Poland was organized into the “Government General,” where military law would apply. The parts of Poland contiguous to Germany were annexed to Germany and became known as the “Incorporated Eastern Territories.” The Law Against Poles and Jews was issued to provide the legal framework for the administration of the Incorporated Eastern Territories.⁶¹

This law was adopted at least in part because of Rothaug’s conviction that existing law was too lenient to Jews and had gaps in its application to Poles. Although, as we shall see, Rothaug would make creative use of law by analogy to enable persecution of Poles and Jews, he wanted to have clear authority to do so. Rothaug successfully urged his contacts in the Ministry of Justice to adopt a law addressing the new circumstances.⁶²

The law had two major themes. First, in the new regime, Poles would be reduced to a docile permanent underclass who would support the spread of German settlement in Eastern Europe and over time be eliminated. Thus, the law as to Poles would be applied harshly to break the spirit and establish German domination, but would not seek to eliminate the Polish population in the short run.⁶³ Second, the goal would be to eliminate the massive Jewish population of

⁶¹ J.T., *supra* note 3, at 598-601.

⁶² J.T., *supra* note 3, at 373.

⁶³ Richard J. Evans, *The Third Reich in History and Memory* 173, 370-72 (2015). The Poles were to be eliminated in the medium- to long-run to permit German colonization of Eastern Europe and to divert food production to Germany. Tooze notes that German policy was to starve Polish and other Eastern European urban areas to reduce the number of people to be fed by 20-30 million people. The Holocaust and the starvation of Russian POW’s was a first installment. *See* TOOZE, *supra* note 18, at ch. 14. The author’s great grandmother died of starvation in the Greek famine of 1942.

Poland. However, the law was not applied to Jews after 1943 because of the ghettoization and ultimate extermination of the Jewish community.⁶⁴

As the acting Minister of Justice, Schlegelberger was called upon to draft a law governing the administration of justice in Poland, and he in fact personally prepared the draft which ultimately became the law. In his cover letter transmitting the draft to the Reich Minister and Chief of the Reich Chancellery, Hans Heinrich Lammers (himself later tried and convicted of war crimes in NMT XII, the Ministries Case), Schlegelberger laid out the policy rationale for the law:

. . . a Pole is less sensitive to the imposition of an ordinary prison sentence. Therefore, I had taken administrative measures to ensure that Poles and Jews be separated from other prisoners and that their punishment be rendered more severe In my opinion, a special penal law against Poles and Jews in such a form would neither restrict the liberty of action of German officers and officials, nor allow Poles and Jews to profit from its administration insofar as they would be able to lodge unwarranted actions and complaints against German officials. Factual penal law provides for such an increase in severity in the penalties threatened that these will act as the strongest possible deterrent. Any hole in the law through which a Polish or Jewish criminal might slip is also closed. In the sphere of criminal proceedings, the draft clearly shows the difference in the political status of Germans on one side and Poles and Jews on the other.⁶⁵

In a portion of the letter, utterly without irony, Schlegelberger rejected the use of corporal punishment against Poles and Jews: “I cannot agree to this form of punishment as in my judgment it would not correspond to the level of civilization of the German people.”⁶⁶

The law itself provides substantively that Poles and Jews would be subject to the death penalty for any of the following activities:

1. Any act of violence against a German;
2. Manifesting any anti-German sentiment by making anti-German comments or defacing or removing official notices or lowering the prestige of the German people.

The sentence would be death or imprisonment for any of the following:

⁶⁴ J.T., *supra* note 3, at 685-86.

⁶⁵ J.T., *supra* note 3, at 611-13 (Letter, Schlegelberger to Lammers, 17 April 1941).

⁶⁶ *Id.* at 615.

1. Any act of violence against any member of the German armed forces, police, or any agency of the Nazi Party whether the victim was German or not;
2. Causing damages to any installation of the German government or the Nazi Party;
3. Soliciting any person to disobey any decree or regulation;
4. Conspiring with or aiding or abetting anyone in the violation of this decree;
5. Possession of any weapon;
6. Committing any other act contrary to “fundamental principle of German law” or contrary to the interest of the German state.

The death penalty was made mandatory for any act for which death was the only penalty. A schedule of prison terms ranging from three months to ten years was prescribed where imprisonment was an option. However, “. . . in those cases where the law does not provide for the death penalty, it shall be imposed if the act shows a particularly base attribute or is particularly serious for other reasons” The minimum penalties could not be reduced unless the crimes were committed against a fellow Pole or Jew. The law also changed the procedures available to a Polish or Jewish defendant:

1. The cases would be brought before the Special Courts in most cases.
2. All sentences, including the death penalty, would be carried out without delay.
3. The prosecutor could appeal a decision, but the defendant had no right to appeal.
4. Poles and Jews had no right to lodge a criminal complaint.
5. Poles and Jews had no right to ask for recusal for bias of a German judge.
6. Poles and Jews could not be sworn in as witnesses. However, even if unsworn, they could be prosecuted for perjury or false statements.⁶⁷
7. Although proceedings would be conducted in accordance with the German Law of Civil Procedure, the court was free to depart from the established rules when appropriate for the rapid and efficient conduct of proceedings.

The Law allowed the governor of the Incorporated Eastern Territories, to impose martial law and to try Poles and Jews before civilian court-martials, or to

⁶⁷ The provision of this law forbidding the swearing in of Poles or Jews as witnesses, while retaining penalties for perjury, would seem to be contradictory. However, the purpose of the provision was to discourage the calling of Poles or Jews in any case involving a German and to receive such testimony only with the utmost caution. J.T., *supra* note 3, at 668 (Letter from Reich Ministry of Justice to Presidents of District Courts of Appeal, August 7, 1942, signed by Freisler).

defer trial indefinitely and to refer the case directly to the Gestapo. Finally, Poles and Jews were forbidden to file civil cases.⁶⁸ In January, 1942, a subsequent decree was issued over Schlegelberger's signature making this law retroactive.⁶⁹

On July 1, 1943, a new decree was issued which deprived Jews of any right to a trial at all and turned any Jew accused of a crime over to the police for processing. The Jew's property would be confiscated upon his death. Thus, the Law against Poles and Jews would no longer apply to Jews.⁷⁰ This change in the law reflected the official adoption of the so-called Final Solution, that is, the systematic murder of the entire Jewish population in the occupied territories of Europe.

The Justice Tribunal estimated that 61,836 persons were convicted under the Law against Poles and Jews in the year 1942 alone.⁷¹

b. The Night and Fog Decree

By 1941, resistance movements had sprung up in a number of occupied countries, and the German Army was struggling to find a solution to the growing problem of maintaining control of the occupied territories. Hitler instructed the German Army to implement a program whereby suspected resistants would disappear into the "Night and Fog." (The German phrase used was "Nacht und Nebel" so that the program in the transcript was variously referred to as Night and Fog, Nacht und Nebel, or "NN." This paper will use "Night and Fog.")

The Night and Fog Decree was issued on December 7, 1941, at Hitler's direction by Field Marshal Wilhelm Keitel, who was the Chief of the Supreme Council of the Armed Forces. (Keitel himself would be tried by the IMT and found guilty of war crimes, crimes against humanity, crimes against the peace, and conspiring to commit crimes against the peace. He would be executed in 1946.)

The decree provided that in circumstances in which the trial of a member of the resistance could not be dealt with within one week of arrest, the resistor would be transferred to Germany for trial. The defendant's family and acquaintances would not be informed of his or her fate, would be allowed no contact or correspondence with the person, nor be informed of his or her location. If the person died, either of natural causes or execution, the family members would not

⁶⁸ See J.T., *supra* note 3, at 632-36 (1941 *Reichsgesetzblatt*, pt. I at 759, issued December 4, 1941).

⁶⁹ See J.T., *supra* note 3, at 647 (1942 *Reichsgesetzblatt*, pt. I at 52, January 31, 1942).

⁷⁰ See J.T., *supra* note 3, at 685-86 (1943 *Reichsgesetzblatt*, pt. I at 372).

⁷¹ J.T., *supra* note 3, at 683, 1079.

be informed. If the defendant wrote a will or a farewell letter, the document would not be delivered until the war's end. As no foreign witnesses would be allowed to testify in court to preserve secrecy, the defendant essentially had no ability to call witnesses on his own behalf. The defendant would have the right to counsel in capital cases (the great majority of cases), but the choice of counsel would be made by the court with permission of the prosecutor. The proceedings would be conducted in German with no provision for interpreters.⁷²

The decree was made applicable in all cases involving:

1. Assault with intent to kill;
2. Espionage;
3. Sabotage;
4. Communist activity;
5. Crimes liable to create disorder;
6. Favoring of the enemy by smuggling people into a country, enlisting in an enemy army, or support of members of an enemy army such as by harboring parachutists; and
7. Illegal possession of weapons.⁷³

Although the decree was applicable to all of the occupied territories, it in fact was primarily directed at the west European occupied countries with the exception of Denmark, i.e., France, Belgium, the Netherlands, Luxemburg, and Norway.⁷⁴

Although Keitel was a Field Marshall of the Wehrmacht and overall commander of the German armed forces, the legal staff of the German Army was not enthusiastic about this decree or the program it created.⁷⁵ The question arose as to whether the trials under the decree should be courts martial under the auspices of the army, or summary proceedings by the Gestapo, or trial by the judiciary.⁷⁶ The army did not want the program itself and did not want to give it to the Gestapo.⁷⁷ Accordingly, Rudolf Lehmann, the Chief of the Legal Division

⁷² See J.T., *supra* note 3, at 774-81 (Night and Fog Decree, December 7, 1941). See also *id.* at 794-97 (Secret Instructions of Reich Ministry of Justice to Prosecutors and Judges concerning measures to maintain secrecy in Night and Fog cases. March 6, 1943).

⁷³ *Id.* at 778-79.

⁷⁴ See J.T., *supra* note 3, at 788-89 (Memorandum of Defendant Von Ammon to Defendant Rothenberger 9 and 26 December 1942 concerning Night and Fog cases).

⁷⁵ See, e.g., J.T., *supra* note 3, at 797 (File Note of Defendant Von Ammon, 7 October 1943); *id.* at 806 (Testimony of Rudolf Lehman).

⁷⁶ See J.T., *supra* note 3, at 805-08 (Testimony of Rudolph Lehmann, Chief of the Legal Division of the German Armed Forces).

⁷⁷ See J.T., *supra* note 3, at 1040.

of the Armed Service approached Roland Friesler, who at that time was deputy minister in charge of the criminal division of the Ministry of Justice (and who afterwards became the most notorious of the judges of the People's Courts), and asked if the Justice Ministry would take on the responsibility for the Night and Fog cases. Friesler himself was not enthusiastic about the program and asked Schlegelberger, the acting Minister, whether the civilian judiciary should take on the cases.⁷⁸

Schlegelberger testified that he agreed to take the Night and Fog program in order to keep the prisoners out of the hands of the Gestapo where they would have been denied any possible legal process and would have been treated harshly. In his own words:

The provisions regarding secrecy had to be made so that the matter would not be taken out of the hands of Hitler. I was faced with the problem as to whether I should refuse to take over the NN [Night and Fog] cases altogether, and the Tribunal will recognize that would have been very simple for me. I could have held the position that as far as my department was concerned that I had nothing to do with the matter and therefore could reject it or have anything to do with it. But I could not take the responsibility to assist, to contribute, that the Hitler order he carried out and that the NN prisoners remain in the custody of the police.⁷⁹

Friesler on behalf of the Ministry of Justice assigned the cases to the Special Courts, see discussion *supra*. During the period during which Schlegelberger remained as acting Minister, the courts did in fact function within the minimal procedural guarantees of German law. However, after Schlegelberger's resignation in 1942, Otto Thierack, a committed Nazi, became Minister of Justice, and the policy towards the Night and Fog defendants changed.

First, the People's Courts acquired concurrent jurisdiction with the Special Courts over Night and Fog cases. The People's Courts were even more ideological and harsher than the Special Courts.⁸⁰ Second, Thierack developed a new practice with respect to defendants. If a defendant were executed or given a long sentence, he would be sent to a concentration camp in police custody to have the penalty carried out. However, if he or she were acquitted or nolle

⁷⁸ *Id.*

⁷⁹ See J.T., *supra* note 3, at 871 (Schlegelberger Testimony). See also J.T., *supra* note 3, at 808-15 (Schlegelberger Testimony).

⁸⁰ See J.T., *supra* note 3, at 818-19 (Testimony of Defendant Von Ammon).

prosequi, or if the defendant had been given a short sentence which had expired, the defendant would not be released, but would instead be turned over to the Gestapo to be held, presumably in a concentration camp, but under a lower security level, until the end of the war. Thus, regardless of the result of the trial, the defendant would likely end up in police custody in a concentration camp, albeit in a slightly less harsh confinement if the defendant were innocent or had served out his or her term.⁸¹

To this day there are no accurate calculations of the total number of Night and Fog victims primarily because few records were kept. An internal report in 1944 concluded that there were 8,369 persons in custody at that time. However, that number is clearly an underestimate of the total number of victims. Very few survived the war.⁸²

One can get a flavor of the actual application of German law by looking at two cases which led in part to Rothaug's conviction by the Tribunal.⁸³

The first of these was the trial of Leo Katzenberger and Irene Seiler, one of the most famous cases of the Nazi era.⁸⁴ Leo Katzenberger was a wealthy Jewish businessman in the City of Nuremberg in the 1930's. He later became the most prominent leader of the Jewish community of that city. In the early 1930's, he had promised Irene Seiler's father, a non-Jewish German who was a close friend of Katzenberger, to help Irene Seiler, after she moved to Nuremberg and set up a photography shop. Katzenberger and Seiler became close friends and were observed by the neighbors to greet each other with embraces, and on at least one occasion she was seen to have been sitting on his lap. They denounced Katzenberger to police, and Katzenberger was charged under the race laws with having sex with a non-Jewish German woman. The case attracted the attention of the rabidly anti-Semitic newspaper *Der Stürmer*, which mounted a press campaign against Katzenberger.⁸⁵

⁸¹ *Id.* See *id.* at 1044-46 for a description of the brutal treatment of Night and Fog defendants in concentration camps.

⁸² See MÜLLER, *supra* note 4, at 170-173; JT at 1054.

⁸³ It should be noted that Rothaug was found guilty of crimes against humanity, because of the consistent pattern of racial persecution rather than because of the results of a specific case. The cases were used as examples.

⁸⁴ The Katzenberger-Seiler case was the basis for the "Feldenstein" case in the Academy Award-winning movie JUDGMENT AT NUREMBERG (Roxlom Films 1961). Judy Garland played the character based on Irene Seiler. See also CHRISTINE KOHL, THE MAIDEN AND THE JEW: THE STORY OF A FATAL FRIENDSHIP IN NAZI GERMANY (John S. Barrett trans., Steerforth Press 2004) (1997) (a good general account of this case).

⁸⁵ See KOHL, *supra* note 81, at 5; J.T., *supra* note 3, at 652.

Rothaug, who by that time was sitting as a judge of a Special Court, took jurisdiction away from the ordinary courts and tried the case before a panel he headed. As Katzenberger and Seiler denied any sexual involvement, Rothaug charged Seiler with perjury and consolidated her trial with that of Katzenberger, thereby barring her testimony.

The trial itself was conducted in a circus-like atmosphere. Spectators bought tickets, and the gallery was full of uniformed Nazi Party and SS leaders.⁸⁶ *Der Stürmer* gave the trial front-page treatment, and Rothaug berated the two defendants from the bench. At one point, Rothaug stated that “the Jews are our misfortune,” and blamed the Jews for starting the war. This statement was a common catchphrase in *Der Stürmer* and many Nuremberg Nazi Party circles.⁸⁷ Rothaug would not permit Seiler’s husband, who was present at many of the meetings between Katzenberger and Seiler, to testify on Katzenberger’s behalf. Despite the lack of any evidence of sexual impropriety, Rothaug concluded that it was against all “practical experience” that the relationship could be innocent. He therefore concluded that there must have been intercourse, for which the law prescribed two-and-one-half years of imprisonment.⁸⁸

Rothaug went on to conclude that a sexual relationship between a Jewish man and a non-Jewish German woman was an attack on “the purity of German blood” and that Katzenberger had taken advantage of blackout conditions to facilitate his visits to Seiler’s apartment. Thus, Rothaug found Katzenberger to have violated the law against public enemies which imposed the death penalty on anyone who made use of wartime conditions to facilitate a crime. Katzenberger was sentenced to death, and Seiler was sentenced to two years of hard labor.⁸⁹

A second case was that of two Polish girls, Durka and Struss, who were working in an armaments factory near Nuremberg. One of the girls was seventeen years old, and the other slightly older. A fire broke out in the factory, and the girls were accused of setting it. The girls were arrested and charged with sabotage. The trial was scheduled for the same day as the arrest. The court-appointed attorney was notified of the trial two hours before its start, but Rothaug denied the attorney’s request for postponement. The case was tried under the Law against Poles and Jews. The girls were convicted and sentenced to death and

⁸⁶ J.T., *supra* note 3, at 749.

⁸⁷ KOHL, *supra* note 81, at 133-34; J.T., *supra* note 3, at 750-51. Kohl puts the phrase in the mouth of the prosecutor; however, Rothaug in this account made numerous anti-Semitic comments of his own. KOHL, at 139.

⁸⁸ J.T., *supra* note 3, at 661.

⁸⁹ J.T., *supra* note 3, at 663-64.

were executed four days after the fire. It should be noted that under German law, the seventeen-year-old was entitled to treatment under juvenile law.⁹⁰

Ironically, the Katzenberger case actually damaged Rothaug's career, because Hitler assumed that Seiler was convicted of racial pollution. Hitler apparently felt that the man was always the sexual aggressor and the woman always the victim, even when the sex was consensual.⁹¹

3. The Loss of Judicial Independence and the Administration of Thierack

One of the most important themes of the German legal system in the war years was the gradual surrender of judicial independence by the judiciary itself followed by the seizure of complete control by Hitler and the Nazi Party. The key figures in the gradual surrender were Schlegelberger and Rothenberger. Rothenberger, unlike Schlegelberger, was in fact a committed National Socialist. However, both of them were also committed to the independence of the judiciary. Their defense of judicial independence laid the groundwork for its ultimate loss.

Shortly after Schlegelberger's appointment, he learned of Hitler's displeasure with a specific sentence in a criminal case which he felt was too lenient, and a general unhappiness with the performance of the judiciary. Schlegelberger's response was an extraordinarily obsequious letter to Hitler:

In continuing the work of the deceased Reich Minister, Dr. Gürtner, I will do my utmost to instill the administration of justice with all of its broad branches more and more firmly within the National Socialist State. In the course of the large number of verdicts pronounced daily there are still judgments which do not comply with the necessary steps. In order that such judgments be dealt with rapidly you, my Fuehrer, have created the nullity plea and the extraordinary objection for criminal cases. For civil proceedings, the right of application for the Chief Reich Prosecutor at the Reich Supreme Court for the resumption of the procedure could serve the same purpose in an ordinance drafted by myself. So as to avoid all such wrong verdicts, the public prosecutor's office is called on, in this draft, to participate in civil proceedings, and should stress the right of the national community against the individual interests of the opposing parties.

⁹⁰ J.T., *supra* note 3, at 1146-47.

⁹¹ There was also discomfort in legal circles at the coupling of the sexual purity laws with the blackout laws with the result of the imposition of the death penalty. KOHL, *supra* note 81, at 143-44.

Apart from this it is desirable to educate the judges more and more in a correct way of thinking, conscious of the national destiny. For this purpose it could be invaluable if you, my Fuehrer, could let me know if a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibility and are firmly resolved to discharge their duties accordingly.

I feel it is my duty to you, my Fuehrer, to bring it to the attention of the judges if a decision does not conform to the opinion of the state leadership.

Heil, my Fuehrer! Dr. Schlegelberger.⁹²

In this remarkable letter, Schlegelberger, the acting Minister of Justice, and the leader of the legal apparatus of the state: (1) endorsed the nullity plea, by which a prosecutor could ask an appellate court to set aside a sentence he felt to be too lenient; (2) endorsed the extraordinary objection by which a prosecutor could have a verdict, including a verdict of acquittal, set aside and the case retried; (3) on his own initiative, proposed that the prosecutor have the right to intervene in private civil cases; (4) agreed to reeducate the judiciary on its national responsibilities; (5) invited Hitler to make known any objection he may have to any verdict, (6) declared that judges are responsible to Hitler personally; (7) declared his personal duty to Hitler, to call to the attention of any judge if his opinion in a case failed to conform to the opinion of the state leadership.

The record is replete with instances during Schlegelberger's tenure, of Hitler, or the Party's interventions in criminal cases, to increase sentences to the death penalty whenever leniency was shown to any defendant, particularly if the defendant were Jewish or Polish. As an example, two weeks after this letter was written, Schlegelberger was told that Hitler was displeased that a Polish farm hand who had committed a sex crime was not sentenced to death because of extenuating circumstances, by a three-judge court. Schlegelberger demoted the judges involved.⁹³ On another occasion, a Jewish man had been accused of hoarding 60,000 eggs, presumably for sale on the black market. He was convicted of violating anti-hoarding laws and was sentenced to two and a half years in prison. Upon Hitler's complaint, Schlegelberger arranged to have him turned over to the Gestapo for execution.⁹⁴

⁹² J.T., *supra* note 3, at 417-18 (Letter, Schlegelberger to Hitler, March 10, 1941).

⁹³ J.T., *supra* note 3, at 424 (Letter, Schlegelberger to Reich Minister April 3, 1941).

⁹⁴ J.T., *supra* note 3, at 431 (Letter, Schlegelberger to Reich Minister Lammers, October 29, 1941).

Cases like this continued throughout Schlegelberger's tenure as acting Minister of Justice with Schlegelberger by his own account fighting a continuous rearguard fight to maintain the integrity of the judiciary. The crisis in the judiciary came in a speech Hitler made to the Reichstag on April 22, 1942. In his speech he asked that he be given the authority to remove from office regardless of rights of tenure any person, including judges, whom he felt was not doing his duty. Hitler went on to say:

Furthermore, I expect the German legal profession to understand that the nation is not here for them, that they are here for the nation, that is, the world which includes Germany must not decline in order that formal law may live, but Germany must live irrespective of the contradictions of formal justice.

From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.⁹⁵

Schlegelberger and Rothenberger immediately understood this speech as a formidable assault on the remnants of judicial independence, and both scrambled to mitigate the impact of the speech. Schlegelberger proposed a decree to Hitler which while recognizing Hitler's new authority, would have delegated his authority to remove judges and to intervene in cases to the Ministry of Justice. This idea was rejected.⁹⁶

Rothenberger proposed in a memo to Hitler a radical reorganization of the entire German legal system along National Socialist lines, including the reeducation of existing judges and a new system of legal education to train new judges with a proper National Socialist frame of mind.⁹⁷ He also argued that a strong judiciary and the rule of law were ultimately compatible with a strong authoritarian state even though a great leader establishing a new order should not be bound by traditional constraints of law. Thus, even the National Socialist state would ultimately need a functioning judicial system.

⁹⁵ J.T., *supra* note 3, at 437–38. The Reichstag vested the power to remove judges notwithstanding the law by unanimous vote that day. *Id.* at 437.

⁹⁶ J.T., *supra* note 3, at 438–44.

⁹⁷ Rothenberger's reforms borrowed heavily from his experiences in Great Britain. He argued that German legal education should move away from lectures on abstract legal propositions and instead move toward discussion of the use of legal principles in actual cases. He also suggested that there no longer be a Judge's track in recruitment, but that judges be chosen from among attorneys with extensive practical and legal experiences, and in no event should anyone become a judge until he was at least thirty-five years old. J.T., *supra* note 3, at 479.

The memo suggests then that Hitler would take on the role of the Supreme Judge of the German people, and that all judges would have a direct relationship with the Supreme Judge who would lead and instruct the others. No other agency, including the Gestapo, the SS, or the Party would be allowed to stand between the Supreme Judge and the judiciary. As he put it: “Because a judge who is in direct relation of fealty to the Fuehrer must judge ‘like the Fuehrer.’”⁹⁸

Rothenberger would testify that this memo was his effort to persuade Hitler not to end judicial independence, but rather to enhance it by insulating the judiciary from the SS, Gestapo, and the Party. He acknowledged, however, that Hitler took the notion of being the Supreme Judge more seriously than he might have wished.⁹⁹

With the change in the status of the judiciary, Schlegelberger apparently had reached his limit. He resigned as acting Minister, and Otto Thierack was appointed Minister of Justice in August 1942. Upon his retirement, Hitler awarded Schlegelberger a bonus of 100,000 Reichsmarks, a considerable sum of money.¹⁰⁰

The period from August 1942 to the German surrender on May 8, 1945, marked the final triumph of Nazism over any semblance of pre-Nazi legal justice. This final period is dominated by two figures, Otto Thierack and Roland Freisler. Otto Georg Thierack served in the German army in World War I and was wounded. After the war he completed his legal studies and became a judge. He joined the Nazi Party in 1932 and became a leader of the National Socialist Jurists Association. After the formation of the People’s Courts, he became a judge of the People’s Court where he served with several breaks, until his appointment as Reich Minister of Justice replacing Schlegelberger in August 1942.¹⁰¹

Roland Freisler was a lawyer who joined the Nazi Party in 1925. He served in the Ministry of Justice under Schlegelberger as State Secretary.¹⁰² With Thierack’s appointment as Minister of Justice, a vacancy was created in the position of

⁹⁸ *Id.* at 474.

⁹⁹ *Id.* at 499–502.

¹⁰⁰ J.T., *supra* note 3, at 1082. See discussion *infra*, page 41.

¹⁰¹ Müller, *supra* note 5, at 39, 143-144.

¹⁰² Although this would not play a role in the subsequent prosecution, Schlegelberger was invited to the Wannsee Conference in January 1942 where the Final Solution was decided upon and organized. Freisler attended the conference as Schlegelberger’s designee. It is likely that Schlegelberger knew of the Final Solution, but he resigned within six months of the conference so he may have played a minimal role. Freisler, a committed Nazi, would play an important role.

Chief Judge of the People's Court, and Freisler was appointed to take Thierack's place.¹⁰³

Rothenberger was appointed to be State Secretary of the Ministry of Justice with the intent that he would implement some of the reforms in his memo. However, not surprisingly, Hitler, the Party apparatus, and Thierack proved to be less interested in a National Socialist conception of Justice than Rothenberger had supposed. However, Hitler did accept Rothenberger's suggestion that he was the supreme judge and legal authority. Rothenberger proved to be a nuisance to his superiors who had very little interest in or patience with his proposed reforms, Rothenberger served as State Secretary until 1943 when he was demoted to notary, a low-level judicial position, where he served until his arrest. (Rothenberger's experience is consistent with a saying variously attributed to Mark Twain, Robert A. Heinlein, or folklore, that "you should not try to teach a pig how to sing, it's a waste of your time and it annoys the pig.")

Thierack and Freisler ended all pretense of legality in Germany. Under Thierack, the few procedural protections defendants had were substantially reduced and in many cases trials were dispensed with as persons were turned over to the Gestapo with no trials at all. In early 1943, Jews were excluded from the Law Against Poles and Jews so that they were completely excluded from the courts. *See discussion supra*. In November 1944, because of a backlog of Night and Fog cases, Thierack directed that all Night and Fog defendants be turned over to the Gestapo without trial.¹⁰⁴ Additionally, Thierack directly intervened in criminal proceedings to make sentencing harsher. As an example, he introduced regular "Judge's Letters" to the judges in which he would review recent cases and would praise the harsh sentences and criticize lenient ones that had taken place.¹⁰⁵

Freisler, as head of the People's Court assigned himself many of the political cases which arose in this period. As an example, he tried the cases of the White Rose, a non-violent, anti-Nazi group made up of Christian university students and their professor. The leaders of the group including the sister and brother, Sophie and Hans Scholl, were convicted and sentenced to death by Freisler in a trial marked by Freisler's denunciations of the students. The Scholls and one other student were arrested on February 18, 1943, and were tried, convicted, and executed on February 22, 1943. The rest of the White Rose was arrested later and also received perfunctory trials under Freisler.¹⁰⁶

¹⁰³ *Id.* at 144.

¹⁰⁴ Secret Directive of the Reich Ministry of Justice, January 21, 1944. (Tr. at 799).

¹⁰⁵ JT at 523-530.

¹⁰⁶ KOCH, *supra* note 7, at 136-138.

Freisler also presided over the trials of the July 20 conspirators. On July 20, 1944, Colonel Klaus von Stauffenberg, a wounded veteran of the Eastern Front and a staff officer in the German army, set off a bomb in a bunker during a meeting with Hitler. Upon Hitler's death, the plan called for a military coup led by anti-Nazi senior officers who would negotiate an end to the war. However, Hitler survived the blast and the coup was easily defeated. The conspirators, including many prominent officers and civilians, were arrested and tried before Freisler. These trials were conducted in a brutal fashion with Freisler berating and bullying witnesses and the accused. Most of the alleged conspirators were found guilty and either received death sentences or harsh prison sentences.¹⁰⁷

Among the changes to the legal system were the following: (1) Thierack issued a decree in accordance with Hitler's speech, removing all civil service or tenure protections for judges on March 3, 1943; (2) he invited the SS and the Gestapo to participate more closely in judicial proceedings; (3) he issued a directive that defendants would be allowed to have counsel only at the discretion of the judge; (4) when they had developed a backlog of executions because of pending clemency appeals, Thierack on September 8, 1943 at Hitler's request disallowed all clemency appeals without review to allow the executions to proceed.¹⁰⁸

Under Thierack and Freisler's lead, the number of executions skyrocketed. In the People's Courts alone, the number of executions rose as follows:¹⁰⁹

Year	Number of Accused	Number Sentenced to Death
1937	618	32
1938	614	17
1939	470	36
1940	1096	53
1941	1237	102
1942	2572	1192
1943	3338	1662
1944	4379	2079

Thus, the number of executions went from 102 in 1941 to 1,192 in 1942 during the first half of which Thierack was chief of the People's Court, and during the

¹⁰⁷ *Id.* at 198-215.

¹⁰⁸ KOCH, *supra* note 7, at 161.

¹⁰⁹ KOCH, *supra* note 7, at 132.

second half of which Freisler was head. The percentage of total cases resulting in the death penalty was:¹¹⁰

Year	Death Penalty	Acquittal
1940	4.8%	7.3%
1941	8.2%	5.9%
1942	46.3%	4.7%
1943	49.8%	5.4%
1944	47.9%	11.7%

The increases in the death penalty after 1942 were largely due to the Night and Fog cases, and in 1944 to the July 20th conspiracy trials.¹¹¹ The remaining defendants were generally given substantial prison terms. There are no good figures for the number of executions ordered by the German judiciary during the Nazi era, but all the numbers are astonishing. The Ministry of Justice of the Federal Republic of Germany estimated that there were 32,000 judicial executions.¹¹² Koch gives a competing figure of 16,560.¹¹³ Muller notes that the Italian judiciary under Mussolini issued 29 death sentences in 5,319 trials from 1926 on, and Japanese civilian courts condemned two persons to death for crimes against the state from 1928 on. Fascist Italy and Imperial Japan like Nazi Germany had mass arrests, harsh imprisonment, and extrajudicial killings, but the German judiciary was an outlier even among Fascist states.¹¹⁴

Freisler did not stand trial at Nuremberg because he was killed in February 1945 during an air raid. Thierack would have stood trial, probably as the primary defendant in the Justice Trial, but he committed suicide after his arrest. Germany surrendered on May 8, 1945, and civil administration of the country was turned over to the Allied Control Council, which consisted of the commanding officers of the American, British, French, and Soviet armies in Germany. Allied Control Council Law No. 1, issued on September 20, 1945, repealed all political or discriminatory laws during the Nazi era, including all the restrictions on Jews or other subject populations, as well as the Reichstag Decree, the Enabling Act, and all laws giving privileged status to the NSDAP.¹¹⁵

¹¹⁰ KOCH, *supra* note 7, at 234.

¹¹¹ *Id.* at 234.

¹¹² MÜLLER, *supra* note 4, at 196.

¹¹³ KOCH, *supra* note 7, at 232.

¹¹⁴ MÜLLER, *supra* note 4, at 196–97.

¹¹⁵ Allied Control Council Law No. 1.

III. The Justice Trial

By 1943, all three of our subjects had been demoted or transferred from their positions. Schlegelberger had resigned in 1942 during the crisis over judicial independence. Rothenberger was demoted to notary in 1943 because his reform ideas had become a nuisance, and Rothaug would be reassigned to be a prosecutor rather than rise in the judicial hierarchy.

Their fates would become intertwined after the war when all three were arrested and charged with war crimes, crimes against humanity, and conspiracy to commit war crimes and crimes against humanity. They were tried before Nuremberg Military Tribunal III, in what became known as the Justice Trial.

The case against Schegelberger focused on his role in drafting the Law against Poles and Jews and his participation in the Night and Fog program. The case against Rothenberger rested on his role in the Night and Fog program and his role in barring Jews from any access to the civil courts. The case against Rothaug was based on the large number of cases in which he had denied justice to persons on the basis of race.

The defenses raised by the three were self-serving, as would be expected, but were remarkably revealing about the mind-set of key members of the German judiciary. The most striking feature of the defense is that none showed any particular sympathy for the victims, nor any shame or remorse for their conduct. All three—indeed, all of the Justice defendants—lacked insight into their actions.

Schlegelberger was the target defendant for the prosecution because of his pre-Nazi prominence, and because of his role in crafting the laws which formed much of the basis of the horrors inflicted by the Nazi judiciary. Schegelberger noted that he had never been a Nazi until he was involuntarily enrolled in the Party in 1938.¹¹⁶ He testified that he bore no ill will against Jews and felt that God had created all people as equals.¹¹⁷ He further claimed that his personal physician was half-Jewish, and that his best friend was a Jew.¹¹⁸

Schlegelberger explained his conduct as essentially a rear-guard action to prevent worse things from happening. His rhetorical support for National Socialism,

¹¹⁶ J.T., *supra* note 3, at 288, 291.

¹¹⁷ J.T., *supra* note 3, at 717.

¹¹⁸ *Id.* at 718. Non-American readers may miss the irony of this testimony. In American culture, persons often disclaim bigoted remarks or conduct by claiming that “I am not an anti-Semite; some of my best friends are Jews (or black, or Hispanic, or gay, etc.)”

such as his 1936 speech, *supra*, or his personal letters to Hitler, *supra*, were merely intended to establish his good faith with the regime. His demotion of the notary who bought postcards from the Jewish merchant similarly was done to preserve his position.¹¹⁹

Schlegelberger agreed to take the Night and Fog program from the military courts because he knew that if the program were not in the judiciary or the military courts, it would go straight to the Gestapo. He defended the specific provisions of the program, such as forbidding the use of foreign witnesses, as a matter of military necessity, although this feature deprived the defendant of the ability to defend himself.¹²⁰

Schlegelberger defended the Law against Poles and Jews on the grounds that it preserved some minimum level of procedure and rules to govern court proceedings against Poles and Jews. By doing so, he headed off the possible denial of all legal rights to those groups.¹²¹ In actual fact, after 1943 under Thierack, Jews were deprived even of the vestigial rights accorded them under the Law against Poles and Jews.

Schlegelberger finally testified that he conducted an ongoing bureaucratic struggle against three elements, the SS under Himmler, the Party Chancellery under Martin Bormann, and the Propaganda Ministry under Goebbels, to preserve what he could of the integrity and independence of the judiciary. When Hitler crossed the line in his Reichstag speech in April 1942,¹²² Schlegelberger finally resigned from his position, and was rewarded by Hitler with 100,000 Reichsmarks and a number of special privileges in retirement.¹²³ Things did get worse after his retirement with the appointment of Thierack.¹²⁴

In his final statement to the Tribunal, Schlegelberger says:

These words of Pope Gregor[y] VII are world-famous: "I loved justice and hated arbitrariness; therefore, I die in exile."

I feel confident that your judgment will save me from that fate. But I, too, in imprisonment, could not overcome the bitterness of being

¹¹⁹ J.T., *supra* note 3, at 289.

¹²⁰ J.T., *supra* note 3, at 807-11.

¹²¹ J.T., *supra* note 3, at 725-730.

¹²² J.T., *supra* note 3, at 303-306.

¹²³ J.T., *supra* note 3, at 305.

¹²⁴ J.T., *supra* note 3, at 302-303.

rewarded for my hard struggle for justice by this period of shame and misery.¹²⁵

It seems absolutely clear that Schlegelberger to the end felt that he was a just man, and that his prosecution was unjust.

It is also clear that Schegelberger had a narrow conception of justice. He did not view it as “giving every man his due” or as conducting trials fairly or protecting rights. Instead justice concerned the preservation of the independence and prerogatives of the judiciary. Thus, he easily acquiesced to Hitler's criticism of judicial leniency, and his offer to correct any sentence that Hitler disagreed with, apparently so long as the judiciary was in charge of the correction. However, when Hitler proposed to dismiss judges himself if he felt that they were not doing their duty, Schlegelberger felt compelled to resign.

The Tribunal's final judgment against Schegelberger reads:

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's policies, Schegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the state demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. ... The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the state which is not found in frank atrocities which do not sully judicial robes....

Schlegelberger is a tragic character. He loved the life of the intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security....¹²⁶

Schlegelberger was found guilty of war crimes and crimes against humanity and was sentenced to life imprisonment.

Rothenberger testified extensively about his memo. He had favored the ideas behind the memo for many years, but he actually submitted the memo just before Hitler's April 26, 1942, speech ending judicial independence.

¹²⁵ J.T., *supra* note 3, at 941.

¹²⁶ J.T., *supra* note 3, at 1086-87.

Rothenberger testified that he felt he would be able to persuade Hitler to adopt his ideas.¹²⁷ However, after thirteen months as assistant secretary, he realized that Hitler could not be convinced of anything and that his memo had provided an additional rationale for the end of judicial independence. Furthermore, he had made powerful enemies in Himmler, the Party, and Thierack, who forced him to resign.

The other testimony against Rothenberger was not as clear-cut as against the rest of the defendants. As an example, he strongly objected to the Gestapo's practice of taking into "protective custody" persons who had been acquitted of crimes by the judiciary. He went so far as to inspect the notorious Mauthausen concentration camp.¹²⁸ However, although he found that there were persons being held in protective custody there, he did nothing about it. (He also seems to have missed the other horrors of the camp.) Rothenberger also was instrumental in another comparatively minor, yet cruel, injustice. After the Kristallnacht attack on the Jewish community in 1938, the Nazis imposed a massive fine on the Jewish community which led to the impoverishment of many Jewish families. Rothenberger created a policy in Hamburg to deny Jewish litigants of any right to proceed *in forma pauperis*, thereby denying them any access to the civil courts. He also told judges to disregard all settlement of claims. Thus, Jews had no recourse when non-Jews cheated them or failed to pay rents, debts, or salaries to Jews.¹²⁹

The Tribunal concluded that:

the evidence discloses a personality full of complexities, contradictions, and inner conflict. He was kind to many half-Jews, and occasionally publicly aided them, yet he was instrumental in denying them the rights to which every litigant is entitled. He fulminated publicly against the "*Schwarze Korps*" [SS newspaper] for attacking the courts, yet he reproached judges for administering justice against Party officials and unquestionably used his influence toward achieving discriminatory action favorable to high Party officials and unfavorable to Poles and Jews ...

Rothenberger was not happy with his work in Berlin. ... Soon he learned of the utter brutality of the Nazi system and the cynical wickedness of Thierack and Himmler, whom he considered his personal enemies. He could not stomach what he saw, and they could not stomach him. The

¹²⁷ J.T., *supra* note 3, at 499.

¹²⁸ J.T., *supra* note 3, at 1114.

¹²⁹ J.T., *supra* note 3, at 642-46.

evidence satisfies us that Rothenberger was deceived and abused by his superiors; that evidence was “fraud” against him; and that he was ultimately removed, in part at least, because he was not sufficiently brutal to satisfy the demands of the hour.¹³⁰

Rothenberger was found guilty of war crimes and crimes against humanity and was given the relatively light sentence of seven years with credit for time served.¹³¹

The evidence against Rothaug consisted of numerous examples of cases similar to that of Katzenberger and Durka and Struss, the two young Polish girls, see discussion, *supra*. His defense was that as a German judge he was obligated to follow the letter of the law and had little discretion in its application.

However, there was unarguable testimony in the record that Rothaug was a fanatic Nazi who loathed Jews, Poles, and other foreigners.¹³²

The Tribunal concluded as to Rothaug:

Despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug’s opinions were formed and decisions made, and in many instances publicly and privately announced before the trial had even commenced and certainly before it concluded.... By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. ... [W]e find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.¹³³

Rothaug was found guilty of crimes against humanity and was the first person in history to have been found guilty of genocide. He was sentenced to life imprisonment.

¹³⁰ J.T., *supra* note 3, at 1117-18.

¹³¹ J.T., *supra* note 3, at 1118, 1200.

¹³² J.T., *supra* note 3, at 1166.

¹³³ J.T., *supra* note 3, at 1156.

In the aftermath of the trials, the fate of the convicted war criminals became a sore point in the relationship between the United States and the new Federal Republic of Germany. The trials also became controversial domestically within the United States. During the 1950's a process was initiated by John McCloy, the High Commissioner for Germany which led to the commutation of virtually all of the sentences of the Nuremberg defendants in all of the trials. Schlegelberger was released in 1951 and died in 1961, the year of the release of the movie *Judgement at Nuremberg*, in which Burt Lancaster played a character who was a composite of Schlegelberger and Rothaug.¹³⁴ Rothenberger was released in 1950. He committed suicide in 1959. Rothaug was the last of the Justice Trial defendants released in 1956. All three received their full pensions with credit for their time served under the Nazi regime.¹³⁵

IV. The Quest for Order

From 1933 to 1945, the German legal system, once a well-respected, constitutionally-based institution, degenerated into an instrument of Nazi despotism. Yet the judges and lawyers of Germany, with few exceptions, acquiesced or participated actively in this development. Why did this happen?

The key is contained in the de Tocqueville quotation at the beginning of this article and in part of the testimony of Professor Hermann Jahrreiss, an expert witness for the defense in the Justice Trial.

De Tocqueville's insight, derived from his observation of lawyers in Britain and the United States, the two most democratic countries of his era, is that lawyers by instinct and training value stability, logical thought processes and orderly procedures. Even when confronted by injustice, they may acquiesce if the law has been followed. This insight has often been true in American history, particularly in the period between Reconstruction and the New Deal, but has been profoundly wrong in other eras, such as the aftermath of World War II and the Warren Court.

It does explain much of what went on in the Nazi era.

This tendency within the legal profession was reinforced by another phenomenon peculiar to Germany in the interwar period. As Prof. Jahrreiss noted:

¹³⁴ JUDGMENT, *supra* note 85.

¹³⁵ HELLER, *supra* note 2, at 331-69 has an excellent account of the aftermath of the trials.

It is easy to forget that the German people for 33 years have never had really normal conditions... For all these people, life—and that was the normal thing for them--was a continuous change from open to latent crisis. One was always exposed to danger and always with a longing for stable conditions. The consequence is that for most Germans, order, which deserves that name, is something hard to imagine. To the German people order has become to mean something transitory, something unstable, something upon which one cannot depend....¹³⁶

[S]mall wonder that a state, to see to it that laws once decreed have to be carried out by the authorities, demanded *particular* emphasis because otherwise not even the minimum of order could be guaranteed.... *The essence that “an order is an order” had to become the last refuge of those actually in power.*¹³⁷

For all three of these men, the quest for order within the parameters of the legal system would largely govern their conduct.

Schlegelberger, born in 1874, was forty years old and established in his profession in 1914 when the world he grew up with crumbled. He was fifty-nine in 1933 at the time of the Nazi accession to power, and he would spend the next twelve years accommodating himself to the Nazi revolution while trying to preserve something of the legal tradition he had grown up with.

In his case this meant a steady capitulation to Nazi demands with largely ineffective efforts to mitigate the worst of Nazi excesses. The Tribunal correctly noted that Schlegelberger’s strategy facilitated and legitimized Nazi excesses.¹³⁸

Thus, Schlegelberger actually drafted the vile Law against Poles and Jews, but could rationalize his role because it did provide for small residual rights for Poles and Jews caught up in it.¹³⁹

One of the most striking parts of his effort, however, was that he would write: “... a Pole is less sensitive to the imposition of an ordinary prison sentence,” in the same memorandum in which he wrote, with respect to corporal punishment,

¹³⁶ J.T., *supra* note 3, at 258.

¹³⁷ J.T., *supra* note 3, at 259 (emphasis added).

¹³⁸ J.T., *supra* note 3, at 286-87.

¹³⁹ J.T., *supra* note 3, at 725-30.

“I cannot agree to this form of punishment—as in my judgment it would not correspond to the level of civilization of the German people.”¹⁴⁰

Similarly, Schlegelberger would attempt to modify the decree ordering Jews to be deported to the east and certain death, by permitting half-Jews to remain if they agreed to be sterilized.¹⁴¹

It should be remembered that Schlegelberger was not just another lawyer. He was an internationally-known legal scholar, well respected within the German legal community, and serving as the Acting Minister of Justice. His acquiescence and apparent embrace of laws such as Night and Fog and the Law against Poles and Jews provided powerful legitimacy to the Nazi revolution, while his attempt to take the edge off of the rank injustice of the measures had little effect. When Schlegelberger did finally resign, his successor, Thierack, making use of the precedents he had set, ran rough shod.

The search for order goes to the heart of Schlegelberger’s dilemma. Before 1933, he had voted for the German National People’s Party, an extremely conservative and nationalist party, which had avoided the extreme anti-Semitism of the Nazis. This party, however, was nostalgic for the pre-war Wilhelmine period.¹⁴²

Schlegelberger had been content with the Nazification of the legal sector, or at least not objected to it until he was elevated to be Acting Minister. He did not resign or retire, despite his age, even after Jews were expelled from the judiciary or legal profession, or after the Nuremberg laws, or the adoption of law by analogy, or the abrogation of civil liberties under the Reichstag decree or the Enabling Act, or the dramatic expansion of the use of the death penalty. He not only acquiesced in the Night and Fog Decree and the Law against Poles and Jews, he actually helped draft both.

The issue that prompted his resignation was the passage by the Reichstag of the decree that Hitler could remove any judges that he was dissatisfied with, with no limitation. Schlegelberger did not object to the impact of Nazi laws on individuals, but rather objected to the attack on the institutional integrity of the judiciary. Thus, he recognized that the judiciary had lost its battle with the SS, the Party, and Goebbels, to maintain some minimal level of legal order.

¹⁴⁰ J.T., *supra* note 3, at 611-13.

¹⁴¹ J.T., *supra* note 3, at 649.

¹⁴² J.T., *supra* note 3, at 287.

Rothenberger was only eighteen years old in 1914, and thirty-seven years old in 1933. Thus, he had spent his entire adult life during the turmoil and unrest of World War I and the Weimar Republic. He was a committed National Socialist and saw it as a political movement which could restore order and bring renewal to Germany. He enthusiastically set about creating a Nazi legal system in Hamburg and clearly viewed himself as a legal reformer.

Rothenberger's memorandum to Hitler, on the creation of a National Socialist legal system, represented an idealistic and utterly naïve misreading of the regime he was serving. His memorandum was intended to eliminate the chaotic struggle among the judiciary, the SS, and the Party, which had so consumed Schlegelberger. However, Rothenberger, the true believer, concluded that the best way to do that was directly to subordinate the judiciary to Hitler with no intervening forces. The judiciary would then rule like the Führer. Even a Nazi state would be more stable and successful with a properly functioning judiciary, thereby reaffirming de Tocqueville's insight about the legal profession. Rothenberger got his chance to implement his program with his appointment as Deputy Minister of Justice after Schlegelberger's resignation in 1942.

Rothenberger soon learned that Hitler liked his idea of the direct subordination of the judges to him, but was otherwise uninterested in reform. Rothenberger, the idealist, wore out his welcome with the circle of fanatics surrounding Hitler and, in 1943, he suffered a drastic demotion to notary.

Rothaug, Rothenberger's contemporary, was cut from different cloth. Rothaug was a committed Nazi and a passionate anti-Semite and hater of all things Jewish and Polish. His notion of stability consisted of a ruthless suppression of the Jews and Poles within his grasp. Katzenberger, and Durka and Struss, were just two of many cases demonstrating Rothaug's attitude. Rothaug viewed himself, however, as being an instrument of the law and in many ways fit perfectly with Jahrreiss's analysis of a desperate need to comply precisely with orders. However, Rothaug was less concerned with order in the sense of institutional integrity as was Schlegelberger, or as a stable and flourishing Nazi legal system as was Rothenberger, but rather order in the sense of the control and elimination of alien and "polluting" elements in German society, that is, Jews, Poles, and other foreigners.

Sadly, the quest for order of these three legal officials was to accelerate the degeneration of German law into irrationality and barbarism.

V. A Meditation on Justice: What Would We Have Done?

At the beginning of this paper, the question was posed, “What would we have done?” The “we” of course means any judge, lawyer or legal official who would read this paper.

In a sense the question rightfully could be answered only by someone who had been a lawyer or judge in Germany in 1933, or by someone who had survived living as a legal professional in a dictatorship. We know that the participants in the German legal system failed the German people, the people of Europe, their profession, and themselves by their failure to resist or to alter the new system. Clearly all three protagonists, but especially Schlegelberger lacked the courage, the integrity, or even the decency to have met the challenge of Nazism. Of course, just as we cannot ever know whether we would have been able to storm Omaha Beach, we cannot be sure whether we could have maintained integrity in the face of Nazi oppression.

However, all legal systems have flaws and all will from time to time inflict injustice or make errors, sometimes systematically. What is the proper response? There is no easy answer.

The United States at the time of the Nazi era in Germany still recognized “separate but equal” as the law of the land and the Supreme Court itself approved the internment of loyal Japanese Americans during the course of the war. *See United States v. Korematsu*, 323 U.S. 214 (1944) (Other democratic common law countries would have their own injustices with respect to aboriginal and indigenous peoples and colonial populations.)

However, after World War II, the American legal system, led by courageous lawyers and judges, helped lay the groundwork for the ultimate success of the Civil Rights movement by removing the legal basis for racial discrimination, *see e.g. Brown v. Board of Education*, 349 U.S. 294 (1955), *Loving v. Virginia*, 388 US 1 (1967). The legal system has not yet resolved the crisis in police-community relations, which persists in many American cities (including the city in which the author presides), and perhaps in cities around the world.

Perhaps the lesson of the German judges is the necessity of acting with courage, integrity, and professionalism in the face of injustice.