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THEY SHOOT LAWYERS DON'T THEY?: LAW IN THE THIRD REICH AND THE GLOBAL THREAT TO THE INDEPENDENCE OF THE JUDICIARY

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January 30, 1993 marked the sixtieth anniversary of Adolf Hitler's ascendancy to power in Germany. The last decades have witnessed an exponential growth in books and articles describing and analyzing the Third Reich. Virtually every aspect of government and society during the reign of National Socialism has been deciphered and discussed. The scholarly searchlight, however, has rarely focused on the legal system. The interested reader will find few English language discussions of the philosophy, structure and operation of the Nazi judiciary.¹

The evolution and function of the legal system in the Third Reich continues to merit our attention. How could a relatively advanced judicial system degenerate into barbarism? Do we confront a similar danger? Events in this period also have profound ethical import. Following the war, various governmental lawyers and judges who were responsible for erecting and administering the Nazi courts of terror were adjudged to be internationally liable for war crimes and crimes against humanity. This prosecution clearly established that legal officers and officials have obligations which transcend the demands of domestic law. These judgments unfortunately have had little deterrent impact. Non-democratic regimes continue to aspire to emulate the Nazi's model of totalitarian law. In order to achieve this goal, these regimes have launched relentless attacks against the judiciary. Various judges, unfortunately, have responded by tailoring their decisions to the demands of dictators. The National Socialist ideology permeated every aspect of the law in Germany. The consequences of this philosophy emerge most Starkly in

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This article is dedicated with enduring love to the beloved memory of Lidia Janus (June 9, 1958 - January 24, 1991).

1. For a comprehensive assessment of the historical literature on the holocaust, see MICHAEL R. MARRUS, THE HOLOCAUST IN HISTORY (1987).
criminal law and procedure and it is this area which will be the focus of this essay. The architecture of the Nazi legal system initially is described. This is followed by a brief discussion of the post-war prosecution and punishment of Nazi lawyers and judges. In conclusion, the global effort to safeguard the independence of judges is outlined and the international community is urged to adopt a declaration which guarantees the independence of the judiciary.

I. THE LEGAL SYSTEM IN THE THIRD REICH

A. The Emergence Of The Nazi Party

On January 30, 1933, President Field Marshal Paul von Hindenburg appointed Adolf Hitler, leader of the National Socialist German Workers' Party (NSDAP), to the Chancellorship of Germany. Hitler seemed an unlikely choice. Adolf "Schicklgruber" had devoted his energies since 1919 to building the pan-German and anti-semitic NSDAP or Nazi Party into a political force. Under normal conditions, the platform of these farsical fanatics likely would have fallen on fallow fields. However, post-World War I Germany provided fertile ground for Hitler's appeals. Many Germans felt humiliated by their defeat and by the terms of theVersailles Treaty. The country was burdened by war reparations, humiliated by France's occupation of the German industrial heartland in the Ruhr and overwhelmed by inflation and unemployment.

These strains propelled voters into the ranks of various right and left-wing fringe parties. The number of parties proliferated. In 1930, ten parties attracted over a million votes and no single party or group of parties was able to construct a governing coalition. Attempts at alliance fell victim to inter-party competition, backroom bargaining and conspiratorial connivance. With parliament paralyzed by partisanship, President Hindenburg authorized Chancellor Heinrich Bruening to govern through the use of extra-parliamentary emergency decrees.

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3. Id. at 60-61. Schicklgruber was his father's name before it was changed to Hitler. Id. at 22-23.
4. Id. at 68-69.
5. Id. at 90-91.
6. Id. at 91, 95.
7. Id. at 95.
8. Id. at 192.
10. SHIRER, supra note 2, at 212-23.
11. Id. at 225-29.
12. Id. at 213.
Germany, politically divided, economically destitute and stricken by street crime, turned to the Nazi Party. By July 1932, the National Socialists had become the plurality party in parliament. In 1933, eighty-five-year-old President Hindenburg reluctantly requested the “Austrian Corporal,” Adolf Hitler, to form a government. Hitler named a new cabinet which was comprised of eight conservatives and two Nazis, Wilhelm Frick and Hermann Goering.

This was the death knell for the Weimar Constitution of 1919 which was “on paper, the most liberal and democratic document of its kind the twentieth century had seen, mechanically well-nigh perfect, full of ingenious and admirable devices which seemed to guarantee the working of an almost flawless democracy.”

On the wintry morning of January 30, 1933, the tragedy of the Weimar Republic, of the bungling attempt for fourteen frustrating years of the Germans to make democracy work, had come to an end.

In this way, by way of the back door, by means of a shabby political deal with the old-school reactionaries he [Hitler] privately detested, the former tramp from Vienna, the derelict of the First World War, the violent revolutionary, became Chancellor of the great nation.

B. Hitler’s Legal Cosmology

Hitler’s views on law were sketchy. He paid little attention to jurisprudence in his rambling, incoherent and often contradictory magnum opus of 1925, Mein Kampf. Any attempt to summarize Hitler’s thought runs the risk of crediting him with greater coherence than is merited.

Hitler’s core belief was that people were divided into a racial hierarchy. At the top stood the Aryan. He wrote that “[i]f we were to divide mankind into three groups, the founders of culture, the bearers of culture, the destroyers of culture, only the Aryan could be considered as the representative of the first group.” The role of the lower racial groups in Hitler’s view was to serve as beasts of burden for the brahmins of the Aryan race. Inter-marriage between the Aryans and the so-call inferior races, according

13. Id. at 233, 241.
14. Id. at 256-57.
15. Id. at 258. Frick was Minister of the Interior and Goering was Minister without Portfolio. Goering also was named to be Minister of the Interior of Prussia, an office which enabled him to control the Prussian police. Id.
16. Id. at 88-89. The Constitution provided for popular sovereignty, freedom of speech, assembly and religion and equality before the law. Id. at 89.
17. Id. at 257.
18. ADOLF HITLER, MEIN KAMPF (Ralph Manheim trans. 1943). Hitler wrote this volume while in jail following his unsuccessful Beer Hall Putsch. SHIRER, supra note 2, at 104-19.
19. HITLER, supra note 18, at 290.
20. Id. at 294-95.
to Hitler, will inexorably lead to "blood poisoning" and to national disintegration.21

In Hitler’s genealogical scheme, the Jews were the most pernicious racial strand.22 They were responsible for propagating the false and dangerous dogma of Marxism which erroneously viewed class conflict rather than race as the driving force of history.23

   Was there any form of filth or profligacy, particularly in cultural life, without at least one Jew involved in it?
   If you cut even cautiously into such an abscess, you found, like a maggot in a rotting body, often dazzled by the sudden light-a kike!24

The calling of the so-called Folk (Volk) State, in Hitler’s view, was to preserve and to promote the Aryan people.

   Anyone who speaks of a mission of the German people on earth must know that it can exist only in the formation of a state which sees its highest task in the preservation and promotion of the most nobile elements of our nationality, indeed of all mankind, which still remains intact.25

   The crown of the folkish state’s entire work of education and training must be to burn the racial sense and racial feeling into the instinct and the intellect, the heart and brain of the youth entrusted to it. No boy and no girl must leave school without having been led to an ultimate realization of the necessity and essence of blood purity.26

Hitler viewed the role of law in the Folk State as the promotion and protection of the Aryan race. Hitler wrote that it “should not be forgotten that the highest aim of human existence is not the preservation of a state, let alone a government, but the preservation of the species.”27 A government which failed to fulfill this mandate, in Hitler’s view, should be overthrown.28 At his 1924 trial for helping to lead the infamous Beer Hall Putsch against the German regime, Hitler argued that he was justified in attempting to depose the Berlin government.

21. Id. at 562.
22. Id. at 21.
23. Id. at 65.
24. Id. at 57.
25. Id. at 397-98 (emphasis omitted).
26. Id. at 427 (emphasis omitted).
27. Id. at 96.
28. Id. Hitler believed that a German regime which failed to promote and protect the support of the Aryan race was contravening natural law. Such a regime thus was entitled to the obedience of the citizenry. He wrote that “[h]uman law cancels out state law.” Id. A people which was unable or unwilling to fight for its existence was not entitled to survive: “Providence in its eternal justice has decreed that people’s end.” Id.
"The judges of this state may go right ahead and convict us for our actions at that time, but History, acting as the goddess of a higher truth and a higher justice will one day smilingly tear up this verdict, acquitting us of all guilt and blame."

And then she will call all those before her judgment seat, who today, in possession of power, trample justice and law underfoot, who have led our people into misery and ruin and amid the misfortune of the father land have valued their own ego above the life of the community.29

The principles of National Socialist law remained opaque. Nevertheless, Article 19 of the 1920 "Programme of the German Workers' Party" demanded that "Roman Law, which serves a materialistic world order, be replaced by a German common law."30 Hitler derisively dismissed the existing legal code as "'Romano-Jewish-Byzantine'" law.31 The latter was characterized as individualistic and mechanical. In contrast, Teutonic law was described as the product of an altruistic and collective sensibility. It was depicted as being based on emotion and romanticism rather than on reason, and was described as a product of common blood rather than of shared history.32 According to Nazi ideologist Alfred Rosenberg, only "a pure race can create a pure legal conscience. . . . Among all races, the Aryans alone count . . . [and is] creative of cultural values. . . . [L]aw is not a technique or a science, but innate and transmitted only by blood; so that only he who enjoys the proper racial inheritance has the creative spirit of law."33 Of course, the call for the replacement of the so-called Roman codes with a German common law was a preposterous notion. The codes imported, developed and refined in Germany already were thoroughly infused with Germanic elements.34 At any rate, it was completely unrealistic to propose replacing the existing legal order with "Germanic laws of the middle ages, intended for a purely agricultural and feudal society."35

29. Id. at 686.
31. Karl Lowenstein, Law In The Third Reich, 45 YALE L.J. 779, 784 (1936).
32. Id. at 786.
33. Id.
34. Id. at 784-86.
35. Id. at 785. The so-called Hereditary Peasants Farm Law of September 29, 1933 was the clearest example of the disastrous ramifications of adopting a so-called German law. Under this law, farms of 125 hectares (300 acres) were compulsorily converted into hereditary plots. They were exempted from the civil law of inheritance. Upon the farmer's death, the estate passed to the eldest son or to the nearest male relative and the younger children were entitled to claim support from the farm. The owner had no right to sell or to mortgage the farm. The farm and its accessories could not be attached or foreclosed by creditors without the permission of the Farm Tribunal. The Farm Tribunal also had to approve the sale or mortgage of the land. As a result of this law, private creditors refused to extend loans to farmers who found themselves yoked to the land. Ironically, some claimed Jewish blood in order to escape being tied to their plots. Id. at 799.

The notion of a Germanic law was rooted in the so-called European historical school of jurisprudence which claimed that the law should reflect the national spirit of each country. There
According to Hitler, the content of this primordial Teutonic legal tradition could only be grasped and articulated by a single, seemingly omniscient figure—the Fuehrer (or leader) who embodied the spirit of the volk.36 According to Hitler, “[t]here is no principle which, objectively considered, is as false as that of parliamentarianism.”37

[T]here is one thing which we must never forget: in this, too, the majority can never replace the man. It is not only a representative of stupidity, but of cowardice as well. And no more than a hundred empty heads make one wise man will an heroic decision arise from a hundred cowards.38

The Nazi Party was portrayed as the vanguard for creating this new Folk State.39 The first step towards the resuscitation of the German corpse was the eradication of the non-Aryan vermin and the elimination from the body politic of those elements responsible for Germany’s defeat in World War I.

[T]here is no use in hanging petty thieves in order to let big ones go free ... some day a German national court must judge and execute some ten thousand of the organizing and hence responsible criminals of the November betrayal and everything that goes with it.40

C. The Entrenchment of Nazi Power

On the day following Adolf Hitler’s appointment as Reich Chancellor, President Hindenburg authorized Hitler to dissolve the Reichstag and to conduct new elections.41 On February 27, 1933, as the election campaign reached its height, the Reichstag building was consumed by flames.42 Documents seized at Karl Liebknecht House, the headquarters of the Communist Party, allegedly substantiated the Nazi’s allegations that the fire had been the work of the Communists. The burning of the Reichstag, according to the Nazis, was intended to serve as a spark which would ignite a firestorm of Marxist insurrection throughout Germany.43 The incriminat-

36. HITLER, supra note 18, at 82, 91.
37. Id. at 84.
38. Id. at 82.
39. Id. at 517.
40. Id. at 545.
41. INGO MULLER, HITLER’S JUSTICE THE COURTS OF THE THIRD REICH 27 (1991). The dissolution of the Reichstag enabled the Nazis to issue emergency decrees. Only five days after coming to power Hitler’s government issued the Decree for the Protection of the German People which required political organizations to report all meetings and marches in advance and authorized the police to forbid political meetings and demonstrations. Id.
42. Id.
43. Id. at 27-28.
ing documents, however, were obviously forged and were quietly withdrawn. 44

On February 28, 1933, Hitler persuaded President Hindenburg to sign a decree as a "defensive measure against Communist acts of violence endangering the State." 45 Article One suspended "until further notice" the constitutional protections against arbitrary search and seizure, abrogated the freedoms of speech, assembly and unionization and suspended the guarantee of due compensation for expropriated property. 46 Article Two authorized the Reich government to temporarily take over the powers of any State which failed to take the measures considered necessary to restore public security and order. 47 Criminal penalties were imposed for a failure to obey the orders implementing the decree. 48 The penalty for eleven offenses ranging from treason to poisoning and arson also was increased to capital punishment. 49

Following the issuance of this decree, some four thousand Communist officials and a substantial number of Social Democratic and liberal leaders, many of whom were members of parliament, were arrested. The Communist and Social Democratic press and political meetings were banned and suppressed. It was announced that only the Nazis and other allied right-wing parties would be permitted to campaign for votes in the forthcoming March election. 50

The courts timidly fell into lockstep formation behind the Nazi Party and broadly interpreted the concept of "Communist subversion." Judges upheld the prohibition of church youth groups and charitable organizations as well as meetings of opponents of vaccination. 51 They reasoned that Germany could not tolerate a marketplace of ideas. The free expression of opinion threatened to confuse, divide and weaken the unity of the German people and

44. Id. at 28. Some allege that it was the Nazis who planned and carried out the arson. SHIRER, supra note 2, at 268.

45. Decree, 28 February 1933, By Reich President Von Hindenburg, Cosigned By Reich Chancellor Hitler And Reich Ministers Frick And Guertner, Suspending Constitutional Rights And Instituting Other Measures, reprinted in III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 160 (1951) [hereinafter Decree for the Protection of People and State] [hereinafter III TRIALS OF WAR CRIMINALS]. Article 48 of the Weimar Constitution permitted the issuance of Presidential decrees to protect public order and safety. The President was authorized to suspend civil liberties under these decrees. However, the President was required to inform parliament of any measures which were to be taken. The Reichstag could require the revocation of any measures to which it objected. See Extracts from the Weimar Constitution of 1919, in OTTO KIRCHHEIMER & FRANZ NEUMANN, SOCIAL DEMOCRACY AND THE RULE OF LAW 194-95, art. 48(2)(3) (Leena Tanner & Keith Tribe trans. 1987).

46. Decree for the Protection of People and State, supra note 45, at 161, art. 1.

47. Id. art. 2.

48. Id. at 262, art. 4.

49. Id. art. 5.

50. SHIRER, supra note 2, at 271.

51. MULLER, supra note 41, at 47-48.
weakened their resistance to the Communist virus. The Munich Court of Appeals went so far as to approve the revocation of the permit of a taxi driver who had criticized the Ministry of Traffic. The Court reminded the driver that Germans no longer could afford to indulge in the luxury of criticizing their government.

March 5, 1933 marked the last democratic election in Germany. The Nazis increased their vote by over five and a half million and polled over seventeen million votes or forty-four percent of the total. Their 288 parliamentary votes, when combined with the fifty-two seats (eight percent of the total vote) won by the right-wing Nationalist Party, gave the National Socialist government a majority of sixteen in the Reichstag.

Marinus van der Lubbe, a demented Dutch pyromaniac, was charged with having set the Reichstag fire. Also arrested were Ernst Torgler, the parliamentary leader of the Community Party, and three Bulgarian Communists-Georgi Dimitroff, Blagaoi Popov and Vassily Tanev. The Reichstag trial opened on September 21, 1933 in Leipzig. The trial later was briefly suspended and reconvened on October 10 at the scene of the fire in Berlin.

The pre-trial investigation was subject to widespread international criticism. The often tendentious “brown book” on the trial, which was published by the left-wing World committee for the Relief of the Victims of German Fascism, noted:

For five of the seven preceding months the accused had, contrary to law, been kept in chains; the prisoners had been . . . deprived of free and impartial legal assistance; they had been dragged through the confusion of many lengthy interrogations; their legitimate requests had been refused by the police and the Examining Magistrate; they had been obstructed and hindered in the preparation of their defence at every turn; now, faced with a hundred and more witnesses, with a hostile Court and with all the force and enmity of a Fascist regime, they came to their trial.

Nevertheless, after reviewing the skeletal evidentiary record, the Court reluctantly acquitted four of the five defendants. The mentally muddled van der Lubbe was the only defendant convicted and he was later beheaded. Although there was no evidence linking van der Lubbe to a conspiracy to foment a Communist insurrection, he was convicted and executed.

52. Id. at 48.
53. Id. at 49.
54. SHIRER, supra note 2, at 273.
55. Id. at 269-70.
56. MULLER, supra note 41, at 31.
58. Id. at 249.
59. Id. at 250-53.
pursuant to a law which retroactively imposed the death penalty for treason.60

The Nazi Party newspaper characterized the acquittals as a miscarriage of justice. Hitler proclaimed that the tribunal’s judgment was “‘laughable.’”61 Hermann Goering added that the trial demonstrated that it was “‘impossible to adhere to abstract paragraphs when an infamous political crime is to be adjudged, such a course leads to an impossible position.’”62 The Nazis vowed that they no longer would be constrained by the fetters of bourgeois law and rapidly moved to reconstitute the legal system. Goering brazenly boasted that the Nazis would “not be crippled by any judicial thinking . . . I don’t have to worry about justice, my mission is only to destroy and exterminate, nothing more!”63

Hitler’s next step was to free himself from the limitations imposed by the Weimar constitution. On March 24, 1933, Hitler introduced, and the Reichstag passed, the Law for the Solution of the Emergency of People and Reich or the “enabling act” which constituted the major pillar of Nazi rule.64 Article One abrogated the separation of powers and authorized the executive to promulgate decrees without parliamentary consultation.65 Article Two permitted the government to “deviate” from the requirements of the constitution.66 Article Four authorized the executive to enter into treaties without legislative approval.67 In introducing the legislation, Hitler challenged the parliament: “[m]ay you now, my honourable deputies, make your own decision-peace or war!”68 Only the Social Democrats defied the loud and angry throng of brown-shirts gathered outside the Reichstag. Otto Wells, leader of the Social Democrats, a dozen of whose deputies had been detained, protested that “[n]o enabling act can give you [the Nationals Socialists] the power to destroy ideas which are eternal and indestructible.”69 Wells was unable to persuade other parties to oppose the measure

60. Id. at 270-71.
61. MULLER, supra note 41, at 34.
62. BROWN BOOK, supra note 57, at 243.
63. BULLOCK, supra note 9, at 264.
64. The “Enabling Act,” reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 163. The “enabling act” was based on article 76 of the Weimar Constitution which permitted constitutional change with the assent of two thirds of the quorum of Reichstag deputies. A quorum was comprised of two thirds of the total number of Reichstag deputies. H.W. KOCH, IN THE NAME OF THE VOLK POLITICAL JUSTICE IN HITLER’S GERMANY 35 (1989). The Reichstag renewed the act every four years. “It met only a dozen times up to the war, ‘enacted’ only four laws, held no debates or votes and never heard any speeches except those made by Hitler.” SHIRER, supra note 2, at 378.
65. The “Enabling Act,” supra note 64, at 163, art. 1.
66. Id. at 163-66, art. 2.
67. Id. at 164, art. 4.
68. KOCH, supra note 64, at 36.
69. SHIRER, supra note 2, at 277.
and the final vote was 441 in favor of the measure and 84 (all Social Democrats) opposed to the measure.  

Hitler now was free of the Weimar Constitution. Parliamentary democracy had been abandoned. The "Enabling Act" vested Hitler with the power to promulgate decrees without having to gain either presidential or parliamentary approval. English historian Allan Bullock writes that the "street gangs had seized control of the resources of a great modern State, the gutter had come to power."  

Hitler next took steps to further handicap his political opponents. The July 14, 1933, Law Against A New Formation of Parties, stated that the "only political party in existence is the National Socialist German Workers' Party (N S D A P)." Section Two provided that the maintenance or formation of another political party will be punished with up to three years imprisonment.  

On October 14, 1933, President Hindenburg signed a decree dissolving the Reichstag and ordering new elections. Of course, only the National Socialist Party was legally authorized to contest the election and to appear on the ballot.  

The Law for the Safeguarding of Unity of Party and State, decreed on December 1, 1933, proclaimed that the National Socialist German Workers' Party is the bearer of the German State ideology" and is "merged with the State inseparably." In order to guarantee the "closest cooperation" between the party and public authorities, the Fuehrer's party deputy and the chief of staff of the Nazi militia were named as members of the Reich cabinet. The decree recognized that the members of the Nazi Party and militia possessed "an enhanced duty toward the Fuehrer, the Nation, and the State" and, as a result, they were made subject to the exclusive jurisdiction

70. Id. at 277-78.  
71. See supra notes 64-70 and accompanying texts.  
72. Article 48 of the Constitution permitted President Hindenburg to issue emergency decrees. The "enabling act" permitted Hitler to issue decrees without Hindenburg's endorsement or support. See BULLOCK, supra note 9, at 270. The cabinet also cased to function under Hitler. The previous practice had been to permit the ministers to adopt measures by a majority vote. Friedrich Roetter, The Impact Of Nazi Law, 1945 Wis. L. REV. 516, 525 (1945).  
73. BULLOCK, supra note 9, at 270.  
74. Law against the new formation of parties, of July 14, 1933, reprinted in Roetter, supra note 72, at 560.  
75. Id. At the same time, Hitler issued the Law concerning Referendum of July 14, 1933. Id. The act permitted the Reich government to conduct referendums on its policies. It was not stated whether a negative vote could prevent a measure from coming into force. Id.  
76. Id. at 526.  
77. Law of 1 December 1933 Concerning Special Nazi Party And Storm Troops' (SA) Jurisdiction Over Members Of The Nazi Party, The SA, And Their Subordinate Organizations, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 166, art. 1(1) [hereinafter Law for the Safeguarding of Unity of Party and State].  
78. Id. art. 2.
of special party courts. This effectively immunized party members from legal accountability.

Hitler took two final steps to consolidate his power. On January 30, 1934, the first anniversary of Hitler’s appointment as Chancellor, the Reichstag passed the Law About The Reconstruction Of The Reich. The law dissolved the national assemblies of the federated states and the state governments were amalgamated into the Reich. On August 1, 1934, the Reich government ratified the Law About The Head Of The State Of The German Reich. This decree provided that at the time of death of Reich President Hindenburg that the office of Reich president was to be “merged” with that of Reich chancellor. The next day, President Hindenburg passed away. Adolf Hitler now assumed the added powers of head of state and Commander in Chief of the Armed Forces. The title of president was abolished and Hitler was proclaimed as Fuehrer and Reich Chancellor. The single threat to Hitler’s centralization of power was eliminated when the military willingly swore an oath of unconditional obedience to Adolf Hitler as the Fuehrer and Supreme Commander. On August 19, 1933, ninety-five percent of the registered voters went to the polls and thirty-eight million, or ninety percent, approved Hitler’s usurpation of power. Only four and a quarter million Germans voted “‘No.’”

The foundation for the Third Reich now had been firmly established. On September 4, 1934, the Nazi Party Congress assembled in Nuremberg. Thirty thousand listened as Gauleiter Adolf Wanger of Bavaria read the Fuehrer’s proclamation:

The German form of life is definitely determined for the next thousand years. The Age of Nerves of the nineteenth century has found its close with us. There will be no other revolution in Germany for the next one thousand years!

Hitler’s contempt for democratic procedures and his consolidation of power should not have been surprising. In 1930, he had proclaimed that the National Socialists had never

79. Id. art. 3.
81. Law about the Reconstruction of the Reich of January 30, 1934, reprinted in Roetter, supra note 72, at 561, app.
82. Id. at 562, art. 1.
83. Id. art. 2. The administration of Justice was centralized in the Reich. See Extracts From The Second Law Concerning The Transfer Of The Administration Of Justice To The Reich, 5 December 1934, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 172.
84. Roetter, supra note 72, at 526.
85. SHIRER, supra note 2, at 314.
86. Id. at 318.
87. Id. at 318-19.
D. The Nazification Of The Judiciary

The Nazis immediately launched a concerted campaign to limit the independence and impartiality of the judiciary. They quickly dismissed and demoted politically unreliable judges and officials of the Ministry of Justice.90

Hitler had little regard for the legal profession. He was particularly horrified after reading of a building technician who had killed his wife and who had been convicted of manslaughter and sentenced to five years hard labor. Hitler criticized the legal curriculum as "one great systematic denial of responsibility."90 He vowed to make the study of law "dispised" and to terminate ninety percent of those involved in the administration of justice.91

The Fuehrer’s radical aspirations were articulated in a memo written by Curt Rothenberger, an Under Secretary in Ministry of Justice.92

The present crisis in the administration of justice today is close to . . . a climax. A totally new conception of the administration of justice must be created, particularly a National Socialist judiciary, and for this the druggist’s salve is not sufficient; only the knife of the surgeon, as will later be shown, can bring about the solution.93

The criterion . . . for the functions of justice and particularly of the judge in the National Socialist Reich must be a justice which meets the demands of national socialism.94

88. Quoted in KOCH, supra note 64, at 34.
89. The twenty year training period for the judiciary tended to limit access to the judiciary to the upper-middle and upper classes. The judiciary, although accessible to Jews, generally was nationalistic, conservative and anti-semitic. MULLER, supra note 41, at 6-7, 12-13, 18-19. There was a significant amount of continuity between those at the top-echelon of the Weimar and National Socialist legal system. KOCH, supra note 64, at 17-18. The "judiciary, criticized from all sides, largely politically apathetic, economically underprivileged, was bound to put its hopes, however cautiously, in a new party and a new regime." Id. at 18.
90. KOCH, supra note 64, at 112.
91. Id.
92. Report From Defendant Rothenberger To Defendant Schlegelberger, 11 May 1942, Noting Rothenberger’s Intention To Intensify “‘The Internal Direction And Steering Of The Administration Of Justice,’” And Enclosing Copies Of Rothenberger’s Instructions To Judges In His District, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 483.
93. Correspondence Between The Reich Chancellery And Hitler’s Adjutant, May And June 1942, Mentioning That Hitler Had Considered “Noteworthy” The Rothenberger Memorandum On Judicial Reform, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 467, 469.
94. Id. at 472.
He who is striding giganticly toward a new world order cannot move in the limitation of an orderly administration of justice. To accomplish such a far-reaching revolution... is only possible if... all outmoded institutions, concepts, and habits have been done away with-if need be in a brutal manner... [a]ll clamor about lawlessness, despotism, injustice, etc., is at present nothing but a lack of insight into the political situation.  

The Law for the Restoration of the Professional Civil Service of 7 April 1933 provided that officials, including judges, who were of non-Aryan descent were to be retired. Those officials, who because of their previous political activity, did not offer the security that they would act at all times and without reservation in the interests of the national state also were to be dismissed from the civil service. Officials also could be freely transferred to another office in the same or equivalent career, even to one carrying a lower rank or salary.

Six hundred and forty-three Jewish judges were terminated in Prussia alone. The small number of politically progressive members of the judiciary also were dismissed. Among the 122 judges sitting on the various panels of the Supreme Court, only one, Hermann Grossman was a Social Democrat. In April 1933, Grossman was dismissed on the grounds that he was politically unreliable.

The other judges remained silent and supine as their colleagues were terminated. In the spring of 1933, the state and national German Federation of Judges agreed to permit themselves to be absorbed into the Federation of National Socialist Jurists and acknowledged the leadership of Chancellor Adolf Hitler. The German Federation of Judges now proclaimed that its "main task" was "the cooperation of all judges in the revision of German law... Free of all shackles... judges must remain beyond the reach of the spirit of trade unionism and narrow professionalism." Writing in the federation's publication, Supreme Court judge Erich Schultze endorsed the notion that there should be severe penalties imposed on those Aryans who betrayed Germany by having children with a member of inferior races. The clearest demonstration of Hitler's support among jurists occurred in Leipzig

95. Id.
96. Law For The Restoration Of The Professional Civil Service Of 7 April 1933, reprinted in DOCUMENTS supra note 30, at 223-24, sec. III, para. 1. On April 1933 non-Aryan was defined to include persons with only one non-Aryan grandparent; and on June 30, this provision was extended to those married to non-Aryans. Id. at 224 n.8. Non-Aryan officials were not forced to retire if had been in the military service as of August 1, 1914; if they had fought at the front during World War I; or if their fathers or sons had been killed in World War I. Law for the Restoration of the Professional Civil Service of 7 April 1933, Id. sec. III, para. 2.
97. Id. sec. IV. A supplementary law of July 20, 1933 provided that civil servants who belonged to any party or organization which furthered the aims of Communism, Marxism or the Social Democrats were to be dismissed. Id. n.9.
98. Id. sec. V, art. 1.
99. MULLER, supra note 41, at 37.
100. Id. at 38.
in October 1933. Ten thousand lawyers gathered in front of the Supreme Court building and swore, with their right arms raised in the Nazi salute, "by the soul of the German people" that they would "strive as German jurists to follow the course of our Führer to the end of our days." The judges also pledged to be "loyal and obedient to the Fuehrer . . . Adolf Hitler, to adhere to the law, and to fulfill the duties of my office conscientiously so help me God." The purge of Jewish and politically progressive judges did not insure the complete subordination of the judiciary to the Nazi Party. Some continued to cling to the notion of judicial independence. In April 1942, Hitler claimed the right to intervene to correct judicial decisions and to remove judges who did not "understand the demand of the hour."

Furthermore, I expect the German legal profession to understand that the nation is not over for them but 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.

The Reichstag endorsed Hitler's power to intervene into the judicial process and proclaimed that Adolf Hitler was the supreme law lord as well the supreme political and military leader. In the Unanimous Decision Of The Greater German Reichstag, Concerning Unrestricted Powers of Adolf Hitler, the Nazi parliament recognized that the Fuehrer possessed the power to impose punishment on offenders and to remove them from office.

'[W]ithout being bound by existing legal regulations-the Fuehrer . . . must be in a position to force with all means at his disposal every German, if necessary, whether he be common soldier or officer, low or high official or judge, leading or subordinate official of the Party, worker or employee, to fulfill his duties. In case of violations of these duties the Fuehrer is entitled, after conscientious examination, regardless of so-called well

101. Id. at 38. Most judges joined the Nazi Party. Those who were not members were expected to belong to the Reich Federation of German Officials and to the Nazi Rechtswahrer Federation which were affiliated with the National Socialists. Roetter, supra note 72, at 538.

102. Roetter, supra note 72, at 535. Judges generally were appointed on the recommendations of the Gauleiters (local party leaders) to the Ministry of Justice while those who held important and visible judicial positions were appointed by Hitler. KOCH, supra note 64, at 84.

103. See Report From The President Of The Court Of Appeal In Hamm, 7 July 1942, Concerning The Alarm Among Judges Caused By Hitler's Reichstag Speech of 26 April 1942, And Certain Activities Of The Gestapo And The Nazi Party Affecting Legal Matters, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 448.

104. Extract From Hitler's Speech To The German Reichstag, 26 April 1942, Requesting Confirmation Of The Right To Keep Everyone At His Duty And Expressing His Intention To Intervene Where Judges "Do Not Understand The Demand Of The Hour," reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 436, 438 (emphasis omitted).

105. Id. at 437 (emphasis omitted).
established rights, to impose due punishment, and to remove the offender from his post, rank and position, without using prescribed procedures.\textsuperscript{106}

In August 1942 Hitler issued a decree which gave the new Reich Minister of Justice broad powers to bring the administration of justice into conformity with Nazi ideology:

'A strong administration of justice is necessary for the fulfillment of the tasks of the Greater German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice, and to take all necessary measures in accordance with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law.'\textsuperscript{107}

Judges, like other Germans, were expected to adhere to the Fuehrer-prinzip or leadership principle.\textsuperscript{108} Hermann Goering pronounced that "the law and the will of the Fuehrer are one."\textsuperscript{109} Carl Schmitt, perhaps the leading constitutional jurist in the Third Reich, pronounced that "[l]aw is no longer an objective norm but a spontaneous emanation of the Fuehrer's will."\textsuperscript{110} Judges were envisioned as the Fuehrer's vicar who were required to rule as the Fuehrer would in a given situation.\textsuperscript{111} The judiciary was to follow rather than restrain the Fuehrer. Cases were to be decided in accordance with Nazi ideology, intuition and the spirit of the "volk" rather than on the basis of evidence or formal rationality.\textsuperscript{112} Judges were admonished to avoid permitting the "details" of litigation to distract them from reaching the appropriate decision.\textsuperscript{113}

Prosecutors typically met with judges prior to trial in order to instruct them as to the expected disposition of the case. The President of the Berlin

\begin{flushleft}
106. Unanimous Decision Of The Greater German Reichstag, 26 April 1942, Concerning Unrestricted Powers Of Adolf Hitler, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 204-05.  
Hitler's position as supreme law lord provided him with unrestrained power. When Nazi storm troopers were accused of having ruthlessly murdered innocents during the so-called Roehm-Putsch, Hitler convened the Reichstag and proclaimed:  
'If we are reproached for not for not leaving matters to be dealt with by the ordinary courts, I can only say this: in that hour I was responsible for the fate of the German nation, and thus I was the Supreme Law Lord of the German people.'

Roetter, supra note 72, at 532.  
On July 3, 1934, Hitler issued a decree legalizing this infamous blood-purge of June 30, 1934. Lowenstein, supra note 31, at 811.  
107. Quoted in III TRIALS OF WAR CRIMINALS, supra note 45, at 51.  
108. KOCH, supra note 64, at 38.  
109. SHIRER, supra note 2, at 370.  
110. Quoted in Lowenstein, supra note 41, at 811.  
111. See KOCH, supra note 64, at 39.  
112. See id. at 73. See also "the spirit of the Volk" MULLER, supra note 41, at 72-73.  
113. Roetter, supra note 72, at 538.
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Court of Appeal wrote Justice Minister Schlegelberger in 1942 complaining that these meetings were undermining trust in the judiciary and suggested that they should be conducted with greater circumspection one day prior to trial.\(^{114}\)

A series of "Judges' Letters" were circulated among the judiciary which criticized erroneous decisions and praised those which were viewed as enlightened.\(^{115}\) Justice Minister Otto Thierack reminded the judges that their role was like that of a physician: "he gives aid to the compatriot who asks him for help and thus prevents damage to the community. The judge like a physician, must be able to eliminate the seat of a disease or perform operations like a surgeon."\(^{116}\)

In an autumn 1940 case, it had been announced that a special coffee ration would be distributed to the population of a local town. Local Jews registered for the distribution, but it later was proclaimed that they were not eligible to receive the coffee. Five hundred Jews were then fined for violating the ration regulations. A local judge ruled that the statute of limitations had tolled and concluded that the Jews had been improperly fined.\(^{117}\) He characterized the fines as "'untenable,'" "'fabricated,'" and "'abstruse.'"\(^{118}\) Minister Thierack attacked the court's opinion as contributing to the "pilloring [of] a German administrative authority by the Jews."\(^{119}\) He noted that the judge should have avoided "harming the prestige of the food office and . . . putting the Jew expressly in the right."\(^{120}\)

Thierack also was critical of a two year sentence which had been handed out to a German Jew who had been arrested in Holland in 1941 for a currency violation.\(^{121}\)

The court applies the same criteria for imposing punishment as it would if it were dealing with a German fellow citizen as defendant. This cannot be sanctioned. The Jew is the enemy of the German people, who has plotted, stirred up, and prolonged this war. In so doing, he has brought unspeakable misery upon our people. Not only is he of different but of inferior race. Justice, which must not measure different matters by

\(^{114}\) Letter From The President Of The Berlin Court Of Appeal To Defendant Schlegelberger, 3 January 1942, Commenting Upon "Influence Exerted Upon The Judges," reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 433, 435-36.

\(^{115}\) See Circular Letter From Thierack To Judges, 7 September 1942, Explaining The Establishment And Function Of The Judges' Letters, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 523.

\(^{116}\) Id. at 524.

\(^{117}\) The First Issue Of The Judges' Letters, 1 October 1942, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 525, 530.

\(^{118}\) Id. at 532.

\(^{119}\) Id. at 531.

\(^{120}\) Id.

\(^{121}\) Id. at 532-34.
the same standard, demands that just this racial aspect must be considered in the meting out of punishment.122

In a third case, Justice Minister Thierack criticized a local court’s handing out a modest fine of thirty Reichmarks or ten days in prison to a Jewish proprietress of a boarding house who had failed to add the required surname “Sara” to her listing in the phone book.123 Thierack observed that the defendant had engaged in a “typically Jewish camouflage in her business dealings.”124 Earlier, various judges had been attacked for the lenient treatment they had meted out to Polish defendants. The judges were admonished that the Poles constituted a “serious danger” and should receive the “heaviest sentences.”125

As late as 1942, the Security Police sent a secret report to Hitler which argued that additional “political and ideological adjustment of the judiciary” was required in order to insure that their decisions fully complied with principles of National Socialism.126 The Justice Ministry feared that the Security Police was attempting to assert administrative control over the judicial bureaucracy and assured Hitler on various occasions that it was adequately controlling, monitoring and correcting sentences.127 The Fuehrer, however, harbored continuing suspicions concerning the competency of judges and regularly found it necessary to intervene to correct sentences. In 1941, the Fuehrer read of Makus Luftgus, a seventy-four year old Jew, who had been sentenced to two and one-half years in prison for having purportedly hoarded sixty-five thousand eggs. Hitler complained to the Justice Ministry which promptly turned Luftgus over the Gestapo for

122. Id. at 533.
123. Id. at 534.
124. Id. at 535.
126. Secret Report Of The Chief Of The Security Police And SD, 3 September 1942, Concerning “The Control Of Penal Jurisdiction” and The Reactions Of Judges Thereto, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 454, 456-57. The report recognized that the coordination of judicial decisions was inherently difficult given the diversity of fact situations which confronted the judiciary. It pointed to one case in which the Fuehrer criticized a criminal sentence handed out to a mother whose child was fatally scalded after falling into a tub of hot water. The Fuehrer believed that the loss of a child was sufficient punishment. The judiciary, according to the report, erroneously interpreted the Fuehrer’s objection as being based on the principle that women should be mildly punished. As a result, in a subsequent case, a women who attempted to bribe a judge was mistakenly punished with a mild sentence. Id. at 459.
127. See Four Communications, May-June 1942, Concerning The Authority For The Confirmation Of Sentences, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 438. The Justice Ministry had an ambitious plan for simplifying the hierarchy of German courts, drastically reducing the number of judges and implementing an intense educational and training program. However, the plan was never implemented. Id. at 52.
execution. In another instance, Hitler protested a sentence of ten years hard labor and the loss of civil rights which had been handed out to a Anton Scharff, a young, impoverished nineteen year old. Scharff had snatched a handbag from a young woman as she attempted to open her front door during an air raid blackout. Hitler again insisted on capital punishment “considering the heroic fighting of our soldiers.” Those judges whose sentences were corrected invariably were replaced or were expelled from the National Socialist Party.

In other cases, party officials intervened to frustrate prosecutions. In 1933, a group of Storm Troopers engaged in a series of vicious assaults and attacks against a group of political prisoners who had been confined in a German concentration camp. The guards were reprimanded and subjected to minor disciplinary measures. Party officials, however, were able to persuade the Justice Ministry to abandon plans to subject the guards to criminal prosecution. It was pointed out that the guards had lacked experience in controlling Communist inmates, most of whom displayed an insubordinate and insolent attitude. Circulars also were issued advising that no prosecutions should be initiated against German civilians who had lynched Allied pilots or who had committed atrocities against Poles, Jews and other “undesirable elements during the Polish campaign.”

E. The Nazification Of The Legal Profession

Hitler had low-regard for the legal profession. Ingo Muller writes:

He detested lawyers as pen-pushers who filled whole volumes with tangled commands and prohibitions and always had their noses buried in ridiculous tomes. He once confided to a gathering of confidants that going to law school must turn every rational person into ‘a complete idiot,’ and that for

128. Correspondence Between Lammers, Schaub, And Defendant Schlegelberger, October 1941, Concerning Transfer Of Markus Luftgus To The Gestapo For Execution, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 429, 430-31.
129. Correspondence Between Bormann, Lammers, And Defendant Schlegelberger, 25, 29 May and 28 June 1941, Concerning A Suggestion Of Hitler To Convert A Prison Sentence Into A Death Sentence, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 425.
130. See Two Orders Signed By Defendant Schlegelberger For The Initiation Of Criminal Proceedings Against Notaries Because Of Their Attitude Toward The National Socialist State, 19 May 1938 And 6 December 1938 reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 363-65.
131. See Letters From Guertner, Reich Minister Of Justice To Hitler’s Deputy Rudolf Hess And To The SA Chief Of Staff, Viktor Lutze, 5 June 1935, Concerning Interference In The Trial Of Camp Hohenstein Personnel reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 352-56.
132. Id. at 47.
133. See Secret Circular From Martin Bormann To Nazi Party Leaders, 30 May 1944, Concerning “People’s Justice Against Anglo-American Murderers” reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 577.
134. Id. at 55.
his part he would ‘do everything he could... to make people despise a legal education.’

The German legal profession numbered some fifteen thousand at the time of the Nazi ascendancy in 1933. Their training consisted of a three or four year program which prepared them for a national examination. After passing the examination, they entered into a lengthy apprenticeship program. At this point, they were eligible for the great state Assessor Examination. Those who passed were admitted to practice.

In 1928, the Nazi Party established an affiliate organization of lawyers initially known as the National Socialist German Jurists’ League (BNSDJ), which was headed by Hans Frank. In 1931, the membership of the Nazi organization only numbered roughly six hundred or less than one percent of all German jurists. However, by May 1933, all of the traditional associations of lawyers had been dissolved and absorbed into the BNSDJ. Lawyers rushed to join the new organization which by 1934 boasted a membership of 80,000 and claimed to be the largest organization of jurists in the world. All lawyers, even those who were not party members, were later required to belong to the organization of Nazi jurists. Lawyers also were compelled to belong to the Reich Chamber of Attorneys which organized the country’s attorneys into a myriad of connected cells, each of which was supervised by a block leader. Attorneys who were party members were brought before party courts for breaches of discipline while attorneys who were not party members were brought before so-called Courts of Honor.

An April 1933 decree prohibited the practice of law by those of non-Aryan descent as well as by those who had engaged in Communist activities. In Prussia, in 1933 there were a total of 18,038 lawyers and

135. MULLER, supra note 41, at 295.
136. III TRIALS OF WAR CRIMINALS, supra note 45, at 95-96.
137. Id. at 96-97. The organization’s name later was changed to the Nationalsozialistischer Rechtswahrebund (NSRB), or the National Socialist Organization of Those Who Maintain And Preserve The Law. Id. at 97.
138. Id. at 97.
139. Id. Many lawyers welcomed the purging of their Jewish competitors. The Nazis claimed that Jews, who numbered roughly one percent of the total Reich population, comprised as much as 17.5 percent of the lawyers in Prussia. Nazi policies also led to a brisk business in such areas as restructuring corporations to protect Jewish interests during the Aryanization program. MICHAEL H. KATER, THE NAZI PARTY A SOCIAL PROFILE OF MEMBERS AND LEADERS 1919-1945, 113 (1983). In the end, the dislocation of the war severely limited lawyers’ practice and income. Id. at 111.
140. Roetter, supra note 72, at 542.
141. Law, 7 April 1933, Concerning Admission To The Bar, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 164-65, arts. 1, 4.
142. Id. at 165, arts. 3, 4. The law exempted those admitted to the bar prior to August 1, 1933 or who during World War I had fought for the German Reich or her allies, or whose fathers or sons had been killed in action during World War I. Id. art. 1. On the basis of this law, 1,500 attorneys were deprived of their right to license. However, roughly 2,900 Jewish attorneys were
notaries (attorneys who prepared documents). By 1935, their ranks had been pruned to a total of 5,424.\textsuperscript{143} Ingo Muller writes:

Justice as an ideal disappeared from Germany with the “elimination” . . . of the Jewish, socialist and democratic members of the legal profession, who made up one fifth of the total number and were the group at which Hitler’s attacks were chiefly aimed. What remained was a mutilated and perverted sense of justice, characterized . . . by glorification of power, brutalization of the climate of opinion, and inhumanity . . . which shared Hitler’s aversion to “legal-mindedness.”\textsuperscript{144}

National Socialism proclaimed that the lawyer’s primary duty no longer was to their client. The interests of the client were to be considered only so far as they did not conflict with fealty to Adolf Hitler. Attorneys swore “to remain loyal to the Fuehrer of the German Reich and people, Adolf Hitler, and to fulfill conscientiously the duties of a German attorney, so help me God.”\textsuperscript{145} The journal of the Ministry of Justice exhorted lawyers to “march as an army corps of the Fuehrer.”\textsuperscript{146} Attorneys who failed to demonstrate adherence to the principles of National Socialism found their careers stymied. For instance, the Ministry of Justice circulated a memo that in defending certain political criminals, “[o]nly such attorneys can be considered whose attitudes prove beyond doubt that they fully approve of the political plans of the State and of the ideological aims of the movement.”\textsuperscript{147}

Lawyers, like their judicial counterparts, received hortatory letters which still permitted to practice under this exemption. Local bar associations implemented local rules which prevented these remaining Jewish lawyers from serving as advocates. For instance, the Bar Association of Berlin declared that establishing or maintaining a law firm with partners of both “Aryan” and “non-Aryan” descent was unethical. The Bar Association of Dusseldorf decreed that it was a violation of professional standards for anyone to take over the practice of an attorney whose bar membership had been revoked, to employ former “non-Aryan” attorneys, or to take over their clients. MULLER, supra note 41, at 61. The Law on German Citizenship of September 27, 1938, revoked the right to practice of all remaining “non-Aryan” attorneys and demoted them to the rank of “Jewish legal advisers.” These advisers were permitted to act in an extremely limited fashion on behalf of Jewish clients. A number of additional decrees were passed which prevented Jews from having any role whatsoever in the practice of law. For instance, it was declared illegal to employ disbarred Jewish attorneys in subordinate positions such as office manager or legal assistance. Id. at 62.

\textsuperscript{143} KOCH, supra note 64, at 43. Jews in Germany had limited access to employment. They constituted 0.16 percent of all government employees. Roughly 250 ministers served in the twenty different post-war German cabinets in the Weimar era. Six were Jewish, only two of whom actively practiced their faith. Largely excluded from the civil service, they gravitated to law, medicine and the arts. There were roughly 19,500 members of the bar in Germany, roughly 4,394 were Jewish. In Berlin, sixty percent of the legal profession were Jewish and in Vienna, perhaps eight percent of attorneys in private practice were Jewish. They tended to be among the most liberal elements in the German legal system. MULLER, supra note 41, at 59-60.

\textsuperscript{144} MULLER, supra note 41, at 296.

\textsuperscript{145} Roetter, supra note 72, at 542.

\textsuperscript{146} III TRIALS OF WAR CRIMINALS, supra note 45, at 98.

\textsuperscript{147} Circular Letter From Defendant Sehlegelberger To Presidents Of District Courts Of Appeal, 31 January 1938, Requesting Lists Of Attorneys Allowed To Defend Prisoners Held In Protective Custody, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 321-22. See also Roetter, supra note 72, at 544.
instructed them concerning the appropriate attitude and behavior. Justice Minister Thierack reminded attorneys that Germany was waging war on its enemies both at home and abroad and that the legal profession was on the front lines of this domestic war.\textsuperscript{148} A trial no longer was to involve a confrontation between prosecutors and defense attorneys. The defense attorney's role had changed. Their primary responsibility was to align themselves with the state in eliminating those who posed a threat to the social order. Attorneys were to assist in the process of determining whether a defendant was guilty of the offense with which they were charged. The question, however, was not merely whether the defendant was guilty, but whether he or she were loyal and devoted members of the Reich. Thierack admonished that "[w]hoever is not ready to accept this . . . ought not to don the robe of a German lawyer nor take a place at the defense counsel's bench."\textsuperscript{149}

Thus, there was to be a "unanimity of aim" between judges, prosecutors and defense attorneys. It was not unusual for defense attorneys to denounce their clients before the court and to demand that they be punished.\textsuperscript{150} Those that represented their defendants with enthusiasm or conviction at times were disbarred for activity "in a Communist sense."\textsuperscript{151} Any act which was perceived as demonstrating a lack of loyalty to Hitler was deemed to be a violation of the attorney's oath and was considered to constitute a ground for disbarment.\textsuperscript{152} In one case, an attorney who voted "No" in the referendum on the annexation of Austria was disbarred by the Court of Honor for having breached his duty of loyalty to the Fuehrer. Another attorney was disbarred for having continued to consult a Jewish physician who had saved her life.\textsuperscript{153}

A third lawyer attempted to demonstrate a Czech defendant's pro-German attitude by reading portions of a speech written by the defendant. The attorney interrupted his discourse and noted that "I could almost believe I hear my Fuehrer speak."\textsuperscript{154} Justice Minister Thierack attacked the lawyer's lack of prudence:

To mention a speech by one of the Czech defendants in one breath with a speech by the Fuehrer was—no matter how it was meant—outrageous. Such a thing cannot be excused an 'awkward mistake.' Lack of instinct is a feature of one's character.\textsuperscript{155}

\textsuperscript{148} Extracts From Lawyers' Letter No. 1 Signed By Reich Minister Of Justice Thierack, 1 October 1944 \textit{reprinted in III TRIALS OF WAR CRIMINALS, supra} note 45, at 554-55.
\textsuperscript{149} Id. at 561.
\textsuperscript{150} MULLER, \textit{supra} note 41, at 64.
\textsuperscript{151} Id. at 65.
\textsuperscript{152} Id. at 65-66.
\textsuperscript{153} Id. at 66.
\textsuperscript{154} Extracts From Lawyers' Letter No. 1 Signed By Reich Minister Of Justice Thierack, 1 October 1944, \textit{reprinted in III TRIALS OF WAR CRIMINALS, supra} note 45, at 554, 558.
\textsuperscript{155} Id. at 566.
Another attorney was brought before the Court of Honor for offering to defend a Catholic friend’s young son who had been arrested on suspicion of having participated in a demonstration against the Hitler youth. The attorney was ordered by the local party sub-leader to drop his defense and was prosecuted for having betrayed his obligation to eliminate and oppose “political Catholicism.” He was acquitted after persuading the tribunal that his purpose was to gain the young man’s confidence, discover the others involved and then betray his privileged relationship and turn the names over to the Gestapo.\(^{156}\)

Law faculty and students also were subjected to scrutiny. On April 7, 1933, all Jewish and political progressive instructors were expelled from law school faculties. As a result, 120 out of the 378 scholars holding academic positions were dismissed. The Nazi government took control of the appointment process and filled the vacant posts with young National Socialist faculty. Most continued to teach until the late 1960s (by 1939, fully two thirds of the faculty at German law schools had been appointed in or after 1933).\(^{157}\) In certain specialties, such as international law, over one-half of faculty were expelled.\(^{158}\) American James Wilford Garner, writing in 1933, observed:

> The result of the Nazi “purge” has been . . . to denude the German universities of the great majority of the professors of international law, “Aryans” and “non-Aryans” alike, whose reputations extended beyond the frontiers of Germany. Of those who have been undisturbed, only a few are known even by reputation to American international lawyers. . . . The vacancies created by the removals have been filled for the most part (if at all) by men without distinguished reputations and who are largely unknown outside Germany, but whose loyalty to Naziism is at least publicly professed.\(^{159}\)

This new breed had no interest in disinterested and objective scholarship. Carl Schmitt, the darling of Nazi legal intellectuals, wrote that “‘[t]he whole of German law today . . . must be governed solely and exclusively by the spirit of National Socialism . . . Every interpretation must be an interpretation according to National Socialism.’”\(^{160}\) Wilhelm Sauer, who had been appointed to a professorship in 1919, exhorted his fellow academics in 1933 “to extol the Führer as a figure of light and a hero who is leading the German soul out of the depths into the light, showing it the safe path to

\(^{156}\) Roetter, supra note 72, at 543.

\(^{157}\) MULLER, supra note 41, at 69. Law faculty under the National-Socialists were appointed by the government. See Max Rheinstein, Law Faculties And Law Schools. A Comparison Of Legal Education In The United States And Germany, 1938 Wis. L. Rev. 5, 12 n.19 (1938).


\(^{159}\) Garner, supra note 158, at 118.

\(^{160}\) MULLER, supra note 41, at 70.
Valhalla. . ."\(^{161}\) Fredrich Schaffstein, in his inaugural professorial lecture in January 1934, reminded his colleagues that "'[a]lmost all the principles, concepts, and distinctions of our law up to now are stamped with the spirit of the Enlightenment, and they therefore require reshaping on the basis of anew kind of thought and experience.'"\(^{162}\)

The National Socialists made two major modifications in the process leading to legal certification. First, physical and ideological training was introduced into the curriculum. As prerequisite to admission to law school, the candidate was required to demonstrate that they had spent time in the Reich labor service.\(^{163}\) Once admitted, students were required to serve in the student cadres of the Storm Troopers and the SS Elite Guards.\(^{164}\) Students also were exposed to a heavy dose of ideological education. The legal curriculum was required to involve "a serious occupation with National-Socialism and its ideological fundaments, with the idea of the ties between blood and soil, and between race and culture, with German community life, and with the great men of the German people."\(^{165}\) This training continued throughout the candidates' legal clerkships and some were required to attend special indoctrination camps prior to being given permission to take the final state legal examination.\(^{166}\) At the end of their studies, students were required to pass a character as well as a substantive examination. They were expected to have a knowledge of the Nazi Party program, history and of Hitler's accomplishments, background and thought.\(^{167}\) Prior to being admitted to practice in Prussia, a candidates had to display his "'consciousness of being a member of the national community, his social understanding, and . . . [that] the entire race development of the German people in the present and future constitute the basis of his personality. . . ."'\(^{168}\) Hitler commemorated national holidays by annulling the test results of those who had passed the character examination, but who had failed the substantive portion.\(^{169}\)

In addition to this physical and ideological training, the Nazis added an additional probationary period onto the requirements for judges, lawyers and prosecutors. This was designed to further monitor the candidate's commit-
ment to the Nazi cause.\textsuperscript{170} For instance, after being admitted to practice, individuals were required to work for three years as a junior attorney in the office of an established lawyer before they were permitted to practice independently. Two commentators living in the United States noted that “[a]t every step through the long process of training it has been possible to eliminate those whose views are not regular from a Nazi viewpoint.”\textsuperscript{171} As a result, “all lawyers in Germany have, to a larger extent than they have with us, the official point of view and attitude.”\textsuperscript{172} As Nazi ideologue Alfred Rosenberg wrote in 1936 in his book \textit{The Myth of The Twentieth Century}, the goal of education is to encourage conformity rather than thought: “Today the strongest personality no longer wants individualization but typification . . . the folkish, earthbound living style, anew Germanic type, comes into being . . . to form that type is the task of the twentieth century.”\textsuperscript{173}

\section*{F. The Reorganization Of The Courts}

Pre-Nazi German law was based on uniform criminal and civil codes. However, primary responsibility for administering the judicial system was vested in the federated states. The states jealously guarded their authority to appoint judges and prosecutors and to administer the courts.\textsuperscript{174}

States generally organized their courts in a similar fashion. The two thousand local courts (Amtsgerichte) were the workhorses of the judicial system. Each local court was presided over by a single judge who was advised by a lay assessor. The local court was vested with original jurisdiction over minor civil suits and criminal offenses which were punishable by one year or less in prison.\textsuperscript{175} Original jurisdiction over more important civil and criminal cases was exercised by some 180 district courts (Landgerichte).\textsuperscript{176}

The principal appellate courts in Germany were called the district courts of appeal (Oberlandesgerichte). The president of the district court of appeals also served as the administrative head of the courts within his district.\textsuperscript{177} The Supreme Court of the Reich (Reichsgericht) in Leipzig was the final arbiter of the law. It entertained appeals from the district court of appeals


\textsuperscript{171} \textit{Id.} at 526.

\textsuperscript{172} \textit{Id.} at 525.

\textsuperscript{173} Roettger \textit{supra} note 72, at 548. Ninety-four editions of the book were printed. \textit{Id.}

\textsuperscript{174} III \textit{TRIALS OF WAR CRIMINALS}, \textit{supra} note 45, at 34.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.} at 34-35.

\textsuperscript{177} \textit{Id.} at 35.
as well as criminal appeals from the district courts. The Supreme Court also possessed original jurisdiction over important treason cases.178

In February 1934, control over the administration of justice was centralized in the Reich government in Berlin. The Law For The Transfer Of The Administration Of Justice To The Reich proclaimed that “courts shall pronounce sentence in the name of the German people.”179 The Reich Minister of Justice was authorized to issue all regulations which were necessary to transfer the administration of justice to the Reich.180 The justice ministries of the several states were soon dissolved and the Reich Ministry of Justice was left as the supreme judicial authority in the Germany.181

The Hitler regime immediately organized various extraordinary courts. Special Courts (Sondergerichte) were established in order to adjudicate the guilt of “opponents of the new regime.”182 Each tribunal was composed of a president and two associates drawn from the sitting judges within the district. The Special Courts were given jurisdiction over the various offenses enumerated in the decree of February 28, 1933.183 Their jurisdiction later was expanded to include violent crimes, highway robbery, crimes against the war economy and offenses involving opposition to the war and violation of various internal security measures.184 Most of these offenses carried the possibility of the death penalty and, in certain instances, such as violent crimes, capital punishment was mandatory.185 The Special Court also had

178. Id. at 35. The lower court judges were appointed by the governments of the federated states. The judges of the Reich Supreme Court were appointed by the Reich President. Judges were guaranteed life tenure and could only be removed by a disciplinary court composed of his peers. Id. Judicial appointments under the National Socialist regime were centralized in the Reich Ministry of Justice which sought advice from Nazi party officials. Judges also no longer enjoyed life tenure. See Roetter, supra note 72, at 536-38.
179. Extracts From The First Law For The Transfer Of The Administration Of Justice To The Reich, 16 February 1934, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 167-68, art. 1.
180. Id. at 168, art. 5.
181. Id. at 35-36.
182. Id. at 215. One Special Court was created for each district court of appeal. Id. Party members were subject to a distinct and more lenient system of criminal punishment. See Law Of 1 December 1933 Concerning Special Nazi Party And Storm Troops’ (SA) Jurisdiction Over Members Of The Nazi Party, The SA, And Their Subordinate Organizations, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 166.
184. Decree Of 21 February 1940 Concerning Jurisdiction Of Criminals Courts, Special Courts, And Additional Provisions Of Criminal Procedure, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 222-23, art. 13 [hereinafter Decree Concerning Jurisdiction Of Special Courts]. A 1942 decree permitted the president of the Special Court or his deputy to conduct trials “alone, if he considers the cooperation of his associates dispensable in view of the factual and legal simplicity of the case, and if the public prosecutor agrees.” See Extracts From Decree Of 13 August 1942 For The Further Simplification Of The Administration Of Justice In Criminal Cases, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 206-07, art. IV.
185. MULLER, supra note 41, at 155.
jurisdiction over other crimes and offenses if the prosecution was of the opinion that immediate sentencing by the special Court was required by the "gravity or the wickedness of the act, by the public excitement aroused or in consideration of a serious threat to public order or security."

Two aspects of the Special Courts were designed to ensure immediate and certain punishment. First, there was no legal appeal against a decision of the Special Court. This provision permitted the immediate imposition of punishment in those cases in which the offender was caught "in the very act or if his guilt is otherwise obvious." In all other cases, punishment was to be imposed within twenty-four hours. The procedure of the Special Court thus corresponded to what Supreme Court Justice Otto Schwarz termed the "'good criminal trial.'" It "'fulfills the aim of punishing a crime . . . by letting the penalty follow upon the criminal act with the greatest possible thoroughness and speed, and at the lowest cost.'" As observed by Ingo Muller:

The aims of the Nazi leadership with regard to the legal system were in large measure realized when the Special Courts were created. . . . The fact that defendants had no recourse and that a sentence took effect immediately freed the judges from the necessity of making sure that procedures were followed carefully and that their decisions would stand up under review. This made the work of the courts simpler in two ways: there were no appeals proceedings, and the trials that did take place could be shorter.

Prosecutors, when given a choice between bringing cases before regular or Special Courts, invariably chose the speedier "'summary courts of the inner front.'" These courts offered both efficient procedures and a harsh, punitive approach to the administration of the criminal law. In Hamburg between 1936 and 1939, only one out of every six criminal trials took place before the Special Court. By 1943, two-thirds of all criminal trials in Hamburg were brought before these tribunals. Muller notes that, the "Nazi leaders had dreamed of a judicial system in which the harshest of

186. See supra note 184, at 223, art. 14. The Special Court also had jurisdiction over all crimes joined with offenses within its jurisdiction. Id. at 223-24, art. 15. The Special Court was required to hand down a decision in a case even if the act with which the defendant was charged was not within the jurisdiction of the Special Court. The only exception was offenses falling within the jurisdiction of the People's Court. Id. at 225, art. 25.

187. Id. at 225, art. 26.
188. Id. at 224, art. 23(1).
189. Id. art. 23(2).
190. Quoted in Muller, supra note 41, at 153.
191. Id. at 153-54 (quoting Supreme Court Judge Otto Schwarz).
192. Id. at 154.
193. Id. at 158.
194. Id.
sentences could be imposed after a minimum of formalities, and with the Special Courts this wish was fulfilled.\textsuperscript{195}

The next step in the reorganization of the judicial system was the establishment of the People’s Court (VGH). This extraordinary tribunal was given jurisdiction over treason, which previously had been the preserve of the Supreme Court.\textsuperscript{196} The panel was later also given jurisdiction over attacks against the Fuehrer, the damaging of military equipment, failure to report treason and endangering the armed forces of friendly states and economic sabotage.\textsuperscript{197} The People’s Court was the realization of Hitler’s vision of a revolutionary tribunal which would serve as a forum for the prosecution and punishment of enemies of the state. In 1930, Hitler had vowed before a German tribunal that “‘[w]hen our movement is victorious, then a new Supreme Court will be assembled, and before this court . . . you may be sure heads will roll in the sand.’”\textsuperscript{198} The official publication of the Nazi party’s Office for Legal Affairs stated that the “‘People’s Court must play the role in the domestic political life of our nation that the army plays in foreign affairs, for its goal is to guarantee the security of the government on the home front: here its tasks are similar to those of the state police.’”\textsuperscript{199} The Tribunal’s senior prosecutor declared that the purpose of the People’s Court was to “‘annihilate the enemies of National Socialism.’”\textsuperscript{200}

By the end of 1941, the People’s Court had been expanded to six senates, The first of which was presided over by the president of the VGH. Each of the senates had responsibility for various portions of the Reich and the occupied territories.\textsuperscript{201} They were staffed by seventy eight professional judges, seventy-four prosecutors and eighty-one lay judges. Seventy-one of the lay judges were high Nazi Party functionaries and the reminder were

\textsuperscript{195} Id. at 159. The Special Courts gradually absorbed virtually all significant criminal cases. \textit{See} Letter From Thierack, Reich Minister Of Justice, To Presidents Of Courts Of Appeal, 5 July 1943, Discussing Development And Effectiveness Of Special Courts And Proposing Limitations On Their Jurisdiction, reprinted in III TRIALS OF WAR CRIMINALS, \textit{supra} note 45, at 227. In 1943, Justice Minister Otto Thierack noted that the courts originally had been envisioned as a “keen weapon for the conviction of political criminals.” However, he complained that the increase in their case load had resulted in inefficiency and a decline in the severity and uniformity in their sentences. \textit{Id.} Thierack recommended that only political cases and cases arousing public excitement should be reserved for the Special Courts. He also suggested that cases should be brought before the president of the court, sitting as a single judge. \textit{Id.} at 230-31.

\textsuperscript{196} Extract From Law of 24 April 1934 Amending Regulations Of Penal Law And Criminal Procedure, reprinted in III TRIALS OF WAR CRIMINALS, \textit{supra} note 45, at 231, art. 1(1) [hereinafter Law of 24 April 1934].

\textsuperscript{197} Extracts From Decree, 21 February 1940, Concerning The Jurisdiction Of Criminal Courts, Special Courts, And Additional Provisions Of Criminal Procedure, reprinted in III TRIALS OF WAR CRIMINALS, \textit{supra} note 45, at 234-35, art. 5.

\textsuperscript{198} MULLER, \textit{supra} note 41, at 20.

\textsuperscript{199} Id. at 142.

\textsuperscript{200} Id.

\textsuperscript{201} Memorandum From Freisler, President Of The People’s Court, 1 April 1944, Concerning Assignment Of Various Types Of Cases To The Several Senates Of The People’s Court, reprinted in III TRIALS OF WAR CRIMINALS, \textit{supra} note 45, at 238.
military officers of the rank of colonel and above.\textsuperscript{202} As a visible symbol of their stature, the judges on the People's Court were permitted to wear the red robes which previously had been reserved for the justices of the Supreme Court.\textsuperscript{203}

Between 1937 and 1944, the Court adjudicated 14,319 cases. The Tribunal sentenced 5,191 of these defendants to death.\textsuperscript{204} In July 1942, Reich Minister Hermann Goebbels addressed the judges who sat on the People's Court and attacked their lenient treatment of defendants. He lectured the judges that they

should proceed less from the law than from the basic idea that the offender was to be eliminated from the community... \textsuperscript{1}\textsuperscript{It was not so much a matter of whether a judgment was just or unjust but only whether the decision was expedient. The State must ward off its internal foes in the most efficient way and wipe them out entirely. The idea that the judge must be convinced of the defendant's guilt must be discarded completely. The criminal must know beforehand that he will lose his head, should he assault the foundations of the State.\textsuperscript{205}

The Tribunal developed an insatiable appetite for blood with the appointment of Roland Freisler to the presidency of the tribunal. In Freisler's inaugural year of 1942, 1,192 of the 2,572 defendants who came before the People's Court were sentenced to death; in 1943, 1,662 of the 3,338 defendants received capital punishment; and in 1944, 2,097 of the 4,379 defendants were sentenced to death.\textsuperscript{206} In 1942, roughly forty-six percent of defendants were sentenced to death and five percent were acquitted; in 1943 approximately fifty percent were sentenced to death and five percent were acquitted; and in 1944, roughly forty-eight percent of defendants were sentenced to death and about twelve percent were acquitted.\textsuperscript{207} The judges consciously singled out these defendants for harsh treat-

\textsuperscript{202} KOCH, \textit{supra} note 64, at 90. By 1944, the number of lay judges had risen to 173, most of whom were Nazi functionaries. MULLER, \textit{supra} note 41, at 142-43.

\textsuperscript{203} MULLER, \textit{supra} note 41, at 142.

\textsuperscript{204} \textit{Id.} at 143.

\textsuperscript{205} Summary By Dr. Crohne Of The Reich Ministry Of Justice Concerning Goebbels' Speech To The Members Of The People's Court, 22 July 1942, \textit{reprinted inIII TRIALS OF WAR CRIMINALS, supra} note 45, at 452-53.

\textsuperscript{206} MULLER, \textit{supra} note 41, at 143. Following Franz Gurtner's death in January 1941, Undersecretary Franz Schlegelberger provisionally filled the post of the Minister of Justice. In 1942, Otto Thierack, President of the People's Court, was appointed Minister of Justice. Roland Freisler was moved from the ministry to the presidency of the court. \textit{Id.} at 143. For statistics on the People's Court, \textit{see also} Letter From Freisler, President Of The People's Court, To The Reich Minister Of Justice, 17 January 1944, Transmitting Summary Of Activity Of The People's Court From 1 January To 31 December 1943 \textit{reprinted inIII TRIALS OF WAR CRIMINALS, supra} note 45, at 236. It is alleged that during the twelve years of Hitler's rule that 32,600 people were sentenced to death in Germany. The People's Court passed 12,891 of these sentences. KOCH, \textit{supra} note 64, at 232.

\textsuperscript{207} KOCH, \textit{supra} note 64, at 234. The percentage of death sentences differed between the various senates. \textit{Id.} at 235.
ment. It was noted that the accused before the People's Court "are only little figures of a much greater circle standing behind them which fights the Reich." 208

The People's Court was designed as an instrument of propaganda as well as punishment. In 1944, the Justice Minister wrote President Freisler instructing him to insure that those attending the trial understood the seriousness of the offense. Minister Thierack wrote that "[e]verybody who is taking part in the proceedings must have the inner conviction when leaving the courtroom not only that the punishment was just but also why it was just. . . . the people must always understand why in these crucial months of the war the instigator deserves death. . . ." 209

As the docket of the People's Court increased, President Thierack proposed that those who were minor figures in treasonous conspiracies should be transferred without trial to concentration camps. He wrote that "it is wrong for every follower . . . even the smallest, to be given the honor of appearing for trial . . . before a People's Court . . . the culprits should surely be shown that German sovereignty will not put up with their behavior and that it will take action accordingly." 210

In fact, since 1933, The Gestapo (State Police) had been authorized to detain individuals in protective custody without trial. 211 They were confined based upon the fact that their actions were thought to "endanger the welfare and the security of the people and the State." 212 Defendants who had been acquitted often were seized by the Gestapo immediately following the court's verdict. 213 The State Police also was empowered to order the temporary arrest, for up to ten days, of persons who were likely to engage in subversive activities or who were likely to destroy evidence or who were suspected of preparing to escape. 214 Those placed in protective custody were detained in concentration camps. 215 In these camps the detainees

208. Id. at 127 (quoting letter from Otto Thierack to Roland Freisler).
209. Letter From The Reich Minister Of Justice To The President Of The People's Court, 18 October 1944, Commenting Upon Its Functions And The Selection Of Presiding Judges "In Particularly Important Political Cases," reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 241-42.
210. Letter From People's Court President, Thierack, To Guertner, 14 August 1940, Recommending Transfer To Concentration Camps Without Trial Of Persons Falling Within A "Minor Guilt" Category Of High Treason, reprinted in TRIAL OF WAR CRIMINALS, supra note 45, at 340-41.
211. Extracts From The Regulations Of The Reich Ministry Of The Interior, 25 January 1938, Concerning Protective Custody, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 318-19.
212. Id. at 318-19, art. 1(1).
213. MULLER, supra note 41, at 175-76. The Ministry of Justice found this practice embarrassing. As a result, it instructed the presidents of the Courts of Appeals to make certain that the Gestapo waited until the defendants had exited the courtroom before seizing them. Id. at 176.
214. Regulations Concerning Protective Custody, supra note 211, at 319-20, art. 3.
215. Id. at 320, art. 6. Protective custody originally was designed to protect an arrestee from mob violence. Roetter, supra note 72, at 534-35.
were severely brutalized and were executed for the mildest violations of camp protocol.\textsuperscript{216} Those who were executed usually were euphemistically reported to have been shot "'while attempting to escape.'"\textsuperscript{217}

The courts were under continual pressure to speed their procedures and harshly punish offenders. The Justice Ministry feared that the Gestapo would eventually be given authority over or completely supplant the judicial system.\textsuperscript{218} In 1942, a decree required that procedure in penal cases should be "simplified and expedited, by eliminating all dispensable measures."\textsuperscript{219} Indictments and judicial decisions were to be "written in concise style and cut down to the absolutely necessary."\textsuperscript{220} In the same year, the Justice Ministry agreed to extend the preventive detention program. The Gestapo was permitted to systematically transfer prisoners who had already been convicted and confined in penal institutions to concentration camps. Those who were to be removed included Jews, Gypsies, Russians, Ukrainians and Poles living in the Reich and those incarcerated in various German occupied territories.\textsuperscript{221} In 1943, a decree permitted the punishment of Jews by the police without resort to the courts.\textsuperscript{222}

As the war drew to a close, the last semblance of due process was discarded. The judicial system came to be infected by the same type of arbitrary decisions which characterized the process of protective custody. A February 1945 decree established emergency civil courts martial in areas "menaced by the approach of the enemy."\textsuperscript{223} The preamble stated those who fail to fulfill their duties "must at once be called to account with the necessary severity, so that the State will not suffer damage through the failing of one single person."\textsuperscript{224} These martial law tribunals consisted of a single criminal court judge as well as a member of the Leadership Corps of the Nazi Party and an army or police officer.\textsuperscript{225} The tribunals were given broad jurisdiction over "all kinds of crimes endangering the German fighting power or undermining the people's fighting strength and will to

\textsuperscript{216} Shirer, supra note 2, at 374-76.
\textsuperscript{217} Muller, supra note 41, at 175.
\textsuperscript{218} Id. at 181-82.
\textsuperscript{219} Fuehrer Decree, 21 March 1942, Concerning Simplification Of The Administration Of Justice, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 203, art. 1.
\textsuperscript{220} Id. art. II. The decree also permitted the head judge of the various tribunals to restrict the participation of associate judges. This presumably was intended to centralize control in the most politically reliable judges. Id. art. III.
\textsuperscript{221} Directive On Behalf Of The Reich Minister Of Justice To Public Prosecutors, 22 October 1942, Concerning The "Transfer Of Asocial Prisoners To The Police," reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 343-47.
\textsuperscript{222} Thirteenth Regulation Under The Reich Citizenship Law, 1 July 1943, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 685, art. 1.
\textsuperscript{223} Decree Of 15 February 1945 On Civilian Courts Martial Procedure, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 250, art. 1.
\textsuperscript{224} Id. at preamble.
\textsuperscript{225} Id. at 251, art. II.
fight." The were authorized to sentence offenders to either death or acquittal or to commit them for trial before a regular court.

In addition to these extraordinary criminal tribunals, eugenics courts were established and charged with responsibility for maintaining the purity and strength of the race. In 1933, the Hereditary Health Courts were authorized to sterilize those afflicted with a "hereditary disease . . . if . . . a hereditary impairment of his progeny, either physical or mental, is to be expected in all likelihood." According to the law, those suffering from disease's ranging from schizophrenia to hereditary blindness and deafness and hereditary physical malformation and chronic alcoholism, were to be sterilized. The right to propose sterilization was vested in the individual as well as in a public health officer or superintendent of a hospital, sanatorium, asylum, or penitentiary.

The Hereditary Health Court was presided over by a local county judge who was joined by a public health officer as well as by another physician with "expert knowledge of matters pertaining to eugenics." Provision also was made for appeal to a Higher Hereditary Health Court with a similar composition. The order of the Higher Court was final and the Court was empowered to order the involuntary sterilization of those subject to its jurisdiction. A December 1933 decree approved the sterilization of individuals with latent hereditary diseases. The activity of the courts finally was suspended in 1944.

The 181 eugenics courts rarely rejected applications. In their first year of operation, the tribunals ordered 56,244 sterilizations while rejecting 3,692 applications. In 1934, only 441 of four thousand persons successfully appealed their sterilization order. Throughout the Nazi period, only three

226. Id. art. III(1).
227. Id. art. IV(1). The military courts also became increasingly punitive as the war progressed. It is estimated that roughly thirty-three thousand death sentences were passed by Nazi military courts. MULLER, supra note 41, at 184.
228. Law Of 14 July 1933 For The Prevention Of Progeny With Hereditary Diseases, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 243, art. 1(1).
229. Id. art. 1(2)(3).
230. Id. art. 2.
231. Id. at 244, art. 3.
232. Id. art. 6.
233. Id. art. 10.
234. Id. at 245, art. 12.
235. Extracts From Decree Of 5 December 1933 For The Execution Of The Law For The Prevention Of Progeny With Hereditary Diseases, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 245.
percent of appeals succeeded. In all, perhaps 350,000 sterilizations were performed, resulting in 17,500 fatalities. Half of all the cases heard were initiated on the grounds of congenital feeblemindedness while in twenty-seven percent of the cases the diagnosis was schizophrenia. The characteristics of both of these diseases, of course, were vague and imprecise. The eugenics courts, at times, appeared to be making moral rather than medical judgments and in their sterilization orders often appeared to be fixed by the applicant’s early sexual experiences, penchant for masturbation and fondness for alcohol.

The policy of preventing the birth of “undesirables” was extended in “Program T4” which authorized the mass murder of the physically and mentally disabled. At the beginning of the war, inmates in state hospitals were transferred to extermination sites where they were murdered by injections or in gas chambers. News of the program gradually spread. Various prosecutors and judges were disturbed that the exterminations were being carried out without a decree legally authorizing the procedure. One local court judge issued an injunction against the “T4” program while several public officials launched criminal investigations into the scheme. The Ministry of Justice convened a high-level meeting of judges and prosecutors in order to explain that the Fuehrer had personally approved the program. The officials were instructed that in the future they should refrain from interference with the killings. Satisfied that the program was lawful, legal officials turned a blind eye to the murder of more than seventy thousand “useless eaters.” Approximately one hundred thousand more fell victim to the informal euthanasia program which was instituted after the official program was terminated in August 1942.

G. The Reorganization Of Courts In The Occupied Territories

Following the German conquest of Poland, German law was extended to encompass the occupied territories. In 1940, the Justice Ministry issued a decree establishing German courts in the eastern territories. It provided that courts in the Incorporated Eastern Territories “shall render

238. Id. at 106-07.
239. MULLER, supra note 41, at 121.
240. Id. at 121-22.
241. Id. at 124.
242. Id. at 126.
243. Id. at 127.
245. Decree of 6 May 1940 On The Extension Of The Application Of German Criminal Law, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 195.
judgments in the name of the German people. A series of special regulations were issued for the Eastern Territories. For instance, anyone who instigated or incited disobedience to a decree or order issued by German authorities was subject to the death penalty and, in less serious cases, to hard labor or to imprisonment for a fixed period. Capital punishment also was inflicted on those who uttered anti-German utterances, removed or defaced official notices or prejudiced the prestige or the well-being of the German Reich or the German people. A broad provision also provided that punishment shall be imposed on Poles or Jews if they “commit any act for which they deserve punishment in accordance with the fundamental principles of German criminal law and in view of the interests of the State in the Incorporated Eastern Territories.

Prosecutors were given discretion whether to prosecute before Special Courts, local German courts or, where appropriate, before the People’s Court. Every sentence was to be “carried out without delay.” The prosecutor was required to lodge an appeal against an unfavorable verdict or sentence within two weeks. Poles and Jews were prohibited from challenging a German judge “on account of alleged partiality.” Although liable for perjury, Poles and Jews also could not be sworn in as witnesses in criminal proceedings. As a result, their testimony carried less weight in court than did that of German witnesses who testified under oath. The court and the public prosecutor were permitted “to dispense” with the rules of criminal procedure “whenever this may be expedient for the rapid and more efficient conduct of proceedings.” Poles and Jews also were prohibited from filing private suits. In January 1942, the substantive and procedural provisions pertaining to the occupied territories were given retroactive application to “offenses committed before the decree came into force.” A decree of December 3, 1942 prohibited German advocates

247. Id. at 607, art. 1.
248. See Decree Of 6 June 1940 On The Introduction Of German Penal Law In The Incorporated Eastern Territories, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 608.
249. Id. at 609, sec. 10.
250. Decree Of 4 December 1941 Concerning The Administration Of Penal Justice Against Poles And Jews In The Incorporated Eastern Territories, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 632, art. I(3).
251. Id. at 633, art. II.
252. Id. at 634, art. V, paras. (1)-(3).
253. Id. art. VI(1). Temporary detention of suspects also was permitted. Id. art. VIII(1)-(2).
254. Id. art. VI(2).
255. Id. art. VII.
256. Id. art. IX.
257. Id. at 635, art. XII.
258. Id. at 635, art. XI.
259. Supplementary Decree 31 January 1942, Concerning The Administration Of Penal Justice Against Poles And Jews In The Incorporated Eastern Territories, id. at 642, art. I.
from defending Poles in the Incorporated Eastern Territories. This effectively denied Poles legal representation since Polish lawyers previously had been prohibited from engaging in legal practice.260

Justice Minister Schlegelberger wrote the Reich Chancellory in 1941 that "a Pole is less sensitive to the imposition of an ordinary prison sentence. Therefore, I [have] taken administrative measures to insure that Poles and Jews be separated from other prisoners and that their imprisonment be rendered more severe."261 Several months later, Schlegelberger adopted an even harsher approach. He admonished a group of judges and lawyers that the Poles constituted a "danger to the security of the German people" and that they confronted the Reich with an "implacable enemy."262 When challenged by "[e]lements clearly criminal and sexual criminals of Polish Nationality" the appropriate punishment would be "death."263

In October 13, 1942, the Reich Ministry of Justice decreed that it was no longer necessary to subject Poles, Russians, Jews and Gypsies to trial. Instead, these defendants were to be turned over to the Gestapo for punishment.264 Justice Minister Thierack wrote that "the administration of justice can only make a small contribution to the extermination of members of these peoples . . . that is not enough to constitute a material contribution toward the realization of the above-mentioned aim."265 He noted that "considerably better results" could be achieved by surrendering such persons to the police, "who can then take the necessary measures unhampered by any legal criminal evidence."266

On December 7, 1941, Adolf Hitler issued the infamous "Night And Fog Decree."267 The Decree recounted that Communist and other anti-German forces have increased their attacks on occupation forces in the occupied territories. As a result, severe measures were required to combat these "malefactors."268 The decree proclaimed that criminal acts committed

260. Id. at 73. Three Polish advocates were permitted to practice in the Incorporated Eastern Territory. Id. Similar provisions were extended to the Protectorate of Bohemia and Moravia. Id. at 74.

261. Letter From Defendant Schlegelberger To Lammers, 17 April 1941, Concerning "Penal Laws For Poles And Jews In The Incorporated Eastern Territories," reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 611, 613.


263. Id.

264. Letter From Reich Minister Of Justice Thierack To Bormann, 13 October 1942, Concerning The "Administration Of Justice Against Poles, Russians, Jews, And Gypsies," reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 674-75.

265. Id. at 675.

266. Id.

267. Secret Night And Fog Decree Of Hitler, Signed By Keitel, 7 December 1941, Concerning Measures To Be Taken Against Persons Offering Resistance To German Occupation, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 775.

268. Id. at 776, para. 1.
by non-German civilians against occupation forces should be punishable by
the death penalty.\textsuperscript{269} Trials for such acts were only to take place in the
occupied territories where it appeared probable that capital punishment was
going to be imposed and that the execution "can be carried out without de-
lay."\textsuperscript{270} In other cases, the offenders were to be secretly transported to
Germany.\textsuperscript{271} Those who inquired into the fate of the detainees were to be
told that they had been arrested and that the "state of the proceeding does not
allow further information."\textsuperscript{272}

Special Courts were established in France, Norway and Germany and
were charged with conducting secret trials of the detainees.\textsuperscript{273} Defense
counsel in these cases were selected by the presiding judge with the
concurrence of the prosecutor.\textsuperscript{274} The presiding judge also was permitted
to waive legal representation in those instances in which the presence of a
defense counsel was considered to be "superfluous."\textsuperscript{275} Those who were
acquitted or against whom proceedings were quashed or who had completed
their sentence were to be handed over to the Gestapo.\textsuperscript{276}

Extraordinary measures were taken to insure that the fate of the detainees
who had been swept up by the Germans would remain a mystery. The goal
was to intimidate the detainees' family, relatives and friends and to spread
fear throughout the occupied territories. Records and statistics were not
maintained, letters were not forwarded and relatives and the press were not
informed in the case of death.\textsuperscript{277} The number of victims of this program
remains uncertain.\textsuperscript{278} One internal survey indicates that when the program
was halted in the fall of 1944 at least 8,639 "Night And Fog" prisoners had
been deported to Germany and brought to trial.\textsuperscript{279}

In a memorandum accompanying the first implementation decree of the
Night And Fog program, the head of the program, Field Marshal Wilhelm

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\textsuperscript{269} Id. at 776, para. I.
\textsuperscript{270} Id. para. II.
\textsuperscript{271} Id.
\textsuperscript{272} Id. art. III.
\textsuperscript{273} Circular Decree Of The Reich Ministry Of Justice, Signed By Under Secretary Freisler,
6 February 1942, Assigning Particular Special Courts To Handle Night And Fog Cases,
reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 784-85, para. 1.
\textsuperscript{274} Id. at 785, art. 3.
\textsuperscript{275} Extracts From Official Correspondence Arising Out Of The Question Of Providing
Defense Counsel In Night And Fog Trials, 4 January-19 February 1943, reprinted in III TRIALS
OF WAR CRIMINALS, supra note 45, at 791, 793.
\textsuperscript{276} Secret Directive Of The Reich Ministry Of Justice, 21 January 1944, Ordering Transfer
To Gestapo Of Night And Fog Prisoners Who Were Acquitted, Against Whom Proceedings
Were Quashed, Or Who Had Served Their Sentences, reprinted in III TRIALS OF WAR
CRIMINALS, supra note 45, at 798-99.
\textsuperscript{277} Secret Instructions Of Reich Ministry Of Justice To Prosecutors And Judges, Initialed By
Defendants Altstoetter, Mettgenberg, And Von Ammon, 6 March 1943, Concerning Measures
Necessary To Maintain Secrecy Of Night And Fog Procedures, reprinted in III TRIALS OF WAR
CRIMINALS, supra note 45, at 794-96.
\textsuperscript{278} MULLER, supra note 41, at 173.
\textsuperscript{279} Id. at 172.
Keitel wrote that "even life imprisonment, is . . . a sign of weakness. An effective and lasting deterrent can only be achieved by death sentences or by measures which will keep the relatives of the perpetrator and the population in suspense concerning the fate of the perpetrator." Members of the Nazi regime displayed little remorse concerning their treatment of the population in the occupied territories. Otto Ohlendorf, a Nazi intellectual and former commander of a German killing squad in the Soviet Union, argued that

'One day those allegedly tortured peoples will understand the blessing it was for themselves that we have realized our conceptions, because they bring us victory which will be of benefit not only to us but also to all the peoples of Europe.'

H. The Modification Of Criminal Law And Procedure

The Nazi regime expanded the scope of the criminal law and imposed sanctions on a range of relatively innocent activities. Virtually every aspect of life was regulated. A survey of the Reich law bulletin over a three year period during the Nazi regime determined that the number of national statutes, decrees, ordinance, orders and publications exceeded four thousand.

Some examples of the wide scope of the criminal law include a provision imposing imprisonment for up to two years for deliberately false or grossly distorted statements which were likely to debase the welfare of the Reich, or the prestige of the Reich government or the National Socialist Party. Imprisonment also was imposed for statements which demonstrated a "malicious, inciting or low-minded attitude toward leading personalities" of the State or the Nazi Party; and for malicious statements "about orders issued by them or about institutions created by them which are apt to undermine the confidence of the people in its political leadership." In addition, intentionally listening to foreign radio stations was punishable by hard labor. The deliberate spreading of news from foreign radio stations which was


281. KOCH, supra note 64, at 123-24.

282. Lowenstein, supra note 31, at 781. This did not include the countless regulations enacted by various subsidiary agencies and governmental units. Id.


284. Id. at 173-74, art. 2. Statements which were not made in public "shall be punished equally if the offender reckon that his statements will eventually circulate in public." Id. at 174, art. 2(2).

285. Decree, 1 September 1939, Concerning Extraordinary Measures With Regard To Foreign Radio Broadcasts, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 185, art. 1.
likely to undermine the defensive strength of the German people also was punishable by hard labor and in particularly severe cases by death.286

A complex series of laws regulated the relationship between “Jews and German nationals of German or related blood.”287 For instance, marriages288 and sexual intercourse between Jews and Germans were prohibited289 and were punishable by imprisonment or hard labor.290 Jews also were not permitted to employ female Germans below the age of forty-five in their household291 or fly the German flag.292

Typical of the type of issues confronting courts was the definition of sexual intercourse. In December 1935, the Grand Criminal Panel of the German Supreme Court adopted a broad interpretation and explained that this was justified by the fact that the law was meant to protect German honor as well as German blood. The Grand Panel emphasized that courts should not confine themselves to the letter of the law, but should “‘penetrate its inner core.’”293 Courts responded by treating masturbation, giving as well as receiving a stomach massage from a physical therapist as sexual intercourse.294 Prosecutors were able to bring these “blood honor” cases before the Special Courts by indicting the defendants under the Law on Dangerous Habitual Criminals. This statute authorized the imposition of the death penalty if the “‘protection of society and the need for just atonement require it.’”295

By 1939, the death penalty had been authorized for a wide array of offenses. For example, capital punishment was meted out to those who publicly solicited or incited others to evade compulsory military service; or who publicly sought to “paralyze or undermine the will of the German or

286. Id. at 185, art. 2.
287. Law, 15 September 1935, For The Protection Of German Blood And Honor, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 180.
288. Id. art. 1(1).
289. Id. art. 2.
290. Id. at 191, art. 5(1)(2). Only men were held liable under the provision prohibiting sexual intercourse. Id. art. 5(2).
291. Id. art. 3.
292. Id. art. 5(1). A dizzying array of legal tests were developed to determine whether an individual was a “Jew.” For instance, a “crossbreed” was considered to be an individual with two entirely Jewish grandparents. A “crossbreed” was considered to be a Jew if they were a member of the Jewish religious community or were married to a Jewish spouse. These two qualifications did not apply to “crossbreeds” of foreign nationality. However, German “crossbreeds” who lost their citizenship by reason of marriage to a foreign Jew were considered to be Jews. MULLER, supra note 41, at 98-99.
293. MULLER, supra note 41, at 101.
294. Id. at 102-03.
295. Id. at 112. Under this statute, the death penalty also could be imposed upon offenders who had committed three crimes the nature of which suggested that they were a dangerous habitual offender. Most, however, were imprisoned. Although both “German blooded” and Jewish men were prosecuted under the sexual intercourse provision, Jews were three times as likely to receive prison sentences. Id. at 104. By the end of 1938, the average sentence was four to five years in a penitentiary. Id. at 105.
allied people to assert itself by force of arms.” 296 Offenses committed against the person or property while “taking advantage of air raid protection measures” also were punishable in severe cases by death. 297 In addition, any criminal act committed by exploitation of the extraordinary conditions caused by war was punishable by death if the “sound sentiment of the people requires it because of the particular wickedness of the act.” 298 The Reich was particularly intolerant of violent street crime. In 1939, the use of a weapon or dangerous object to commit rape, robbery or any other serious act or threat of violence was made punishable by death. 299 An attempt to commit these offenses or aiding and abetting in the commission of these offenses also was punishable by capital punishment. 300

As the war intensified, billboards throughout Germany featured a pink poster announcing the number of death sentences imposed for defeatism, for listening to foreign broadcasting stations, for plundering following air raids, and for thefts of postal packages destined for soldiers at the front. 301 One of the most infamous prosecutions involved the sentencing to death of the members of an insignificant student opposition group known as the White Rose 302 Hans Scholl and Christopher Probst, who were attending medical school, along with Sophie Scholl, a young philosophy student, with the assistance of other young people wrote and mailed anti-Nazi leaflets, scattered them on the streets and at the University of Munich and painted anti-Hitler slogans on walls. 303 The People’s Court ruled that “[i]f a deed of this sort were to be punished otherwise than by death, we would be forging the first links of a chain whose end-in-an earlier time was 1918 . . . The People’s Court knows that it is at one with our soldiers in this decision.” 304

In a subsequent trial, several other members of the White Rose were sentenced to death. The court criticized Professor Kurt Huber who inspired

296. Extracts From Decree, 17 August 1938, For Special Criminal Law In Time Of War And Special Emergency, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 188, art. 1.

297. Decree, 5 September 1939, Against Public Enemies, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 188, art. 2.

298. Id. at 189, art. 4.


300. Id. at 194, art. 4.

301. KOCH, supra note 64, at 228. The statutory limits on punishment were completely abrogated in 1944. A decree permitted the imposition of hard labor for a limited period, life imprisonment or death, for any individual who willfully or negligently caused “a specially serious advantage or a specially serious danger to the war effort or the security of the Reich.” Decree Of 25 August 1944, For The Protection Of The Total War Effort, reprinted in III TRIALS OF WAR CRIMINALS, supra note 45, at 210, art. I(2).


303. See Indictment of Hans and Sophie Scholl and Christoph Probst as drawn up by the Reich Attorney General to the People’s Court, February 21, 1943, reprinted in SHOLL, supra note 302, at 105, 116-17.

304. Id. at 117.
the students and assisted in drafting one of the leaflets. Huber was castigated for lecturing about federalism and multiparty democracy instead of propagating the principles of National Socialism. In the view of the tribunal, Huber constituted "a blemish upon German scholarship" who richly deserved to have been removed from his post and stripped of his professorial rights and privileges.\textsuperscript{305} The Court emphasized that the "days when every man can be allowed to profess his own political 'beliefs' are past. For us there is but one standard: the National Socialist one. Against this we measure each man!" Huber thus has contributed to the national disunity of the Reich and has earned his death.\textsuperscript{306}

Jurists did not merely mechanically apply the letter of the law. They were encouraged to creatively construe legal codes in order to obtain convictions and specifically were instructed to ignore prior precedents.\textsuperscript{307} Judges were specifically authorized to create "law by analogous application of penal laws." This methodology permitted jurists to convict an individual of a criminal offense despite the fact that the individual's conduct was not specifically prohibited. Article Two of the Criminal Code provided:

\begin{quote}
Whoever commits an act which the law declares as punishable 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.\textsuperscript{308}
\end{quote}

As noted by Nazi jurist Carl Schmitt: "Today everyone will recognize that the maxim 'No crime without punishment' takes priority over the maxim 'No punishment without law' as the higher and stronger legal truth."\textsuperscript{309} Justice Minister Franz Gurtner stressed that the law no longer was the sole yardstick for determining right from wrong:

\begin{quote}
What is right may be learned not only from the law—but also from the concept of justice which lies behind the law and may not have found perfect expression in the law. . . . [T]he legislator is aware of the fact that
\end{quote}

\textsuperscript{305} Transcript of the Sentence of Alexander Schmorell, Kurt Huber, Wilhelm Graf, and Others Associated with the Resistance of the White Rose, Pursuant to the Trial Held on April 19, 1943, \textit{reprinted in SHOLL, supra} note 302, at 119, 126.

\textsuperscript{306} \textit{Id}. at 127.

\textsuperscript{307} \textit{See} \textit{Extracts From The Law, 28 June 1935, The Code Of Criminal Procedure And The Judicature Act, reprinted in III TRIALS OF WAR CRIMINALS, supra} note 45, at 177-79, sec. II. In practice, judgments of the German Supreme Court were considered binding by lower courts. A reversal of precedent required a plenary session of all the combined Senates of the Supreme Court. Loewenstein, \textit{supra} note 31, at 804.

\textsuperscript{308} \textit{Extracts From Law Of 28 June 1935 Amending The Criminal (Penal) Code, reprinted in III TRIALS OF WAR CRIMINALS, supra} note 45, at 176-77, art. 2. \textit{See also} \textit{Extracts From The Law, 28 June 1935, The Code Of Criminal Procedure And The Judicature Act, reprinted in III TRIALS OF WAR CRIMINALS, supra} note 45, at 177-78, arts. 170a, 267a.

\textsuperscript{309} MULLER, \textit{supra} note 41, at 75.
he cannot give exhaustive regulations covering all the situations which may occur in life; he therefore entrusts the judge with filling in the remaining gaps. . . . 310

Judges also arbitrarily presumed facts and broadly interpreted statutes in order to convict defendants of crimes carrying the death penalty. For instance, Eastern workers who had been impressed to work inside the Reich frequently attempted to escape. Those who were apprehended were charged with treason and prosecuted before the People’s Court. The Courts, without evidentiary support, presumed that the workers were fleeing to Switzerland to join putative guerilla forces which were being organized to overthrow the Reich. Prosecutors privately conceded that most workers were driven to escape to Switzerland by their inadequate salaries, poor rations and harsh conditions of employment. 311 Courts also broadly interpreted the prohibition against publicly attempting to paralyze or undermine the will of the German or an allied nation to defend itself. The judiciary presumed that any critical remark had the impact of psychologically weakening the will of the Reich population to pursue the war against the Allied Powers. 312 For example, a Dutch pianist, Karlrobert Kreiten, while on a concert tour in Berlin, remarked to his companion, who was an ardent National Socialist, that Hitler was “brutal, sick, and insane,” and predicted that the National Socialist regime would lose the war and would be toppled from power. 313 Kreiten was prosecuted and convicted before the People’s Court. In imposing the death penalty, the tribunal proclaimed that “[w]hoever acts as Kreiten did is doing . . . precisely as our enemies would wish. He becomes their henchman in their war of nerves against the steadfastness of our people. . . .” 314 The Tribunal reasoned that Kreiten’s remark qualified as public since it impacted on “the fundamental political thought of our nation.” 315 Justice Minister Otto Thierack was motivated to write the President of the People’s Court Roland Freisler in September 1943 that the decision had “‘robbed’ the concept of ‘public’ of ‘all meaning.’” 316

The Nazi regime also undermined the due process principles that all judgments should be considered to be final and that individuals should not be twice prosecuted for the same offense. The “extraordinary objection” permitted the Chief Reich Prosecutor to file an objection within one year

310. DOCUMENTS, supra note 30, at 483. Another innovation was the doctrine of “‘theological concepts.’” This permitted judges to examine the intent underlying a legal doctrine and to determine whether the rule should be applied. For instance, a Jew might be denied the right to resort to self-defense against a German since the doctrine might be viewed as being limited to the protection of Aryans. MULLER, supra note 41, at 80-81.
311. III TRIALS OF WAR CRIMINALS, supra note 45, at 82-83.
312. MULLER, supra note 41, at 145-47.
313. Id. at 147.
314. Id.
315. Id. at 148.
316. Id.
after a sentence had become final "if, because of serious misgivings as to the
justness of the sentence, he deem[ed] a new trial and decision in the case
necessary."317 The Special Penal Senate of the Reich Supreme Court was
required to try the case against which the objection had been lodged a
"second time."318

Extraordinary appeals were entered on twenty-one occasions. In four
cases sentences were substantially increased and in fourteen instances prison
sentences were changed to the death penalty. One appeal was lodged on
behalf of a German police officer who had been convicted of beating a
confession out of a detainee. The Department of Justice cancelled the
proceedings before the Special Panel could rule. In two instances, sentences
were slightly reduced.319

In 1940, the "nullity plea" was introduced to enable the prosecutor's
office to appeal what it viewed as faulty legal interpretations.320 The Chief
Public Prosecutor was authorized to appeal against a final judgment within
one year from the date of its becoming final, "if the judgment is unjust
because of an erroneous application of law on established facts."321 The
Reich Supreme Court was authorized to quash the lower court decision and
to enter a new verdict or to refer the case to the original court or to a new
court for retrial.322 Ingo Muller writes that roughly three-quarters of the
appeals were filed on behalf of the prosecution. The cases in which the
Supreme Court "failed to accede to the wishes of public prosecutors were ex-
tremely rare. In only one case out of twelve was the plea that had been
entered against a lower court’s decision . . . rejected."323 In such instances,
the Supreme Court typically would refer the case back to the lower court and
would instruct the lower court as to what it considered to be a "‘just’"
decision.324

The Supreme Court used these occasions to encourage lower and
associated courts to expansively interpret statutory provisions. For instance,
the punishment of those who exploited the extraordinary conditions caused
by war to commit a criminal act traditionally had been interpreted to

317. Extract From Law, 16 September 1939, Amending Regulations Of General Criminal
Procedure, Military Criminal Procedure, And The Penal Code, reprinted in III TRIALS OF WAR
CRIMINALS, supra note 45, at 405, art. 3(2).
318. Id. at 405, art. 3(2). Where the first sentence was passed by the People's Court, the
objection was to be filed with the People's Court. Id. at 406, art. 3(3). The Special Penal
Senate was comprised of the President of the Supreme Court along with two associate and two
lay judges. Roetter, supra note 72, at 534.
319. MULLER, supra note 41, at 129. In extraordinary appeals to the Special Senate of the
People's Court, the death sentence was imposed in roughly seventy percent of the cases. See III
TRIALS OF WAR CRIMINALS, supra note 45, at 89.
320. Decree Of 21 February 1940 Concerning The Nullity Plea, reprinted in III TRIALS OF
WAR CRIMINALS, supra note 45, at 410.
321. Id. at 410, art. 34.
322. Id. at 410-11, art. 35(4).
323. MULLER, supra note 41, at 130.
324. Id. at 131.
encompass serious offenses. In one case, however, the Supreme Court ruled that the death penalty, rather than a small fine, should have been imposed on an individual who wrote love letters to a married woman whose husband was absent in the military. The Court reasoned that this “insulting behavior” had been committed by exploiting the unusual circumstances “caused by the war.”\textsuperscript{325} In other cases, the Supreme Court and special courts interpreted the law which made the death sentence mandatory for certain crimes committed through the use of a dangerous weapon to include offenses committed using a bell, a foot and the perpetrator’s hands.\textsuperscript{326} In another case, the Supreme Court unilaterally imposed the death penalty on a Pole who had given a pair of pants to a Serbian prisoner of war. The Pole explained that he had felt pity for the Serb and intended to help him escape. The Supreme Court reasoned that the Pole was guilty of treason since the defendant should have anticipated that the Serb would flee and join Tito’s guerilla forces.\textsuperscript{327}

Courts thus demonstrated a willingness to brazenly bend their decisions and procedure to the political ideology of the National Socialist regime. The judiciary seemed to be able to accept any excess so long as it was embodied in a formal agreement or decree. For instance, the Ministry of Justice objected to the Gestapo’s practice of beating and abusing defendants prior to trial. The use of force to extract guilty pleas and confessions was viewed by some judges as an unacceptable interference with the integrity of the judicial process. However, the Ministry’s qualms were allayed when the Gestapo entered into an agreement in which it pledged to limit the beatings to certain categories of political prisoners.\textsuperscript{328} The agreement specified that “[a]s a general principle . . . only blows with a club on the buttocks are permissible, up to the number 25. . . . Beginning with the tenth blow, a physician must be present. A standard club will be designated, to eliminate all irregularities.”\textsuperscript{329}

II. THE PROSECUTION OF NAZI JURISTS

In 1947, in United States v. Josef Altstoetter et. al., the United States prosecuted and convicted fourteen former members of the German legal

\textsuperscript{325} Id. at 133.

\textsuperscript{326} Id. at 134.

\textsuperscript{327} Extract From The Testimony Of Defendant Rothaug Concerning A Case Where, After A Nullity Plea, The Reich Supreme Court Changed A Prison Sentence To The Death Sentence Without Referring The Case Back To The Special Court Of First Instance, \textit{reprinted in III TRIALS OF WAR CRIMINALS}, supra note 45, at 416.

\textsuperscript{328} MULLER, supra note 178-79.

\textsuperscript{329} Id. at 179.
establishment for international penal offenses.\textsuperscript{330} Ten were convicted and four were sentenced to life terms, four to ten years in prison, one defendant to seven years in the penitentiary and one to five years.\textsuperscript{331} The indictment charged the defendants with participation in one or more of four criminal acts. Count one alleged that the defendants had been involved in a conspiracy to commit war crimes and crimes against humanity between January 1933 and April 1945;\textsuperscript{332} count two charged the defendants with the commission of war crimes against civilians in the territories occupied by Germany and against members of the armed forces of nations at war with Germany after September 1939; count three alleged that the defendants had committed crimes against humanity against both German civilians and the nationals of occupied countries after the outbreak of World War II. Court four charged several of the defendants with membership in organizations which had been declared criminal by the International Military Tribunal at Nuremberg. The specific offenses alleged in the indictment included murder, persecution on political, racial and religious grounds, deportation and enslavement, plunder of private property, torture and other atrocities.\textsuperscript{333}

American prosecutor Telford Taylor, in his opening statement, observed that the prosecution was "unusual" in that the defendants were charged with crimes "committed in the name of the law."\textsuperscript{334} Together with their de-

\textsuperscript{330} III TRIALS OF WAR CRIMINALS, supra note 45, at 954. Those indicted were Josef Altstoetter, an official in the Ministry of Justice; Wilhelm Von Ammon, official in the Ministry of Justice; Paul Barnickel, prosecutor in the People's Court; Hermann Cuhorst, Chief Judge of the Special Court; Karl Engert, an official in the Ministry of Justice; Guenther Joel, legal adviser to the Ministry of Justice; Herbert Klemm, an official in the Ministry of Justice, Ernst Lautz, Chief Prosecutor of the People's Court; Wolfgang Mettgenberg, an official in the Ministry of Justice; Guenther Nebelung, Chief Justice of the Fourth Senate of the People's Court; Rudolf Oeschey, Judge of the Special Court in Nuremberg; Hans Petersen, Lay Judge of the First Senate of the People's Court; Oswald Rothaug, Senior Public Prosecutor of the People's Court and formerly Chief Justice of the Special Court in Nuremberg; Curt Rothenberger, an official in the Ministry of Justice; Ranz Schlegelberger, an official in the Ministry of Justice; and Carl Westphal, an official in the Ministry of Justice. For a biographical description of the defendants, see id. at 15-17.

\textsuperscript{331} The defendants convicted were Schlegelberger to life in prison; Klemm, to life in prison; Rothenberger to seven years in prison; Lautz to ten years in prison; Mettgenberg to ten years in prison; Von Ammon to ten years in prison; Joel to ten years in prison; Rothaug to life in prison; Oeschey to life in prison; Altstoetter to five years in prison. \textit{Id.} at 1199-2001. Two central figures, Franz Guertner and Georg Thierack both had passed away prior to the filing of the indictment. \textit{Id.} at 3.

\textsuperscript{332} The Tribunal ruled that it lacked jurisdiction to hear the conspiracy charge and treated count one as a alleging the commission of war crimes and crimes against humanity. \textit{Id.} at 4.

\textsuperscript{333} \textit{Id.} at 3. Altstoetter, Cuhorst, Engert and Joel were charged with membership in the State Police (SS); Cuhorst Oeschey, Nebelung and Rothaug were charged with membership in the Leadership Corps of the Nazi Party; and Joel was charged with membership in SD, the domestic intelligence branch of the SS. \textit{Id.} at 25-26. The legal test applied was whether a defendant became or remained a member of the organization with knowledge that the organization was being used for the commission of acts declared criminal or who were personally implicated as members of the organization in the commission of crimes. \textit{Id.} at 1030.

\textsuperscript{334} \textit{Id.} at 31. The three United States judges were Carrington T. Marshall, formerly Chief Justice of the Supreme Court of Ohio; Judge James T. Brand, Justice of the Supreme Court of Oregon; Judge Malory b. Blair, Associate Justice of the Court of Civil Appeals for the Third District of Texas. Judge Marshall retired from the case due to illness. Judge Brand succeeded
ceased and fugitive colleagues, these men "were the embodiment of what passed for justice in the Third Reich." 335

Indeed, the root of the accusation here is that those men, leaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage, and slaughter.

... The defendants and their colleagues distorted, perverted, and finally accomplished the complete overthrow of justice and law in Germany. They made the system of courts an integral part of dictatorship. They established and operated special tribunals obedient only to the political dictates of the Hitler regime. They abolished all semblance of judicial independence. They brow-beat, bullied, and denied fundamental rights to those who came before the courts. The "trials" they conducted became horrible farces, with vestigial remnants of legal procedure which only served to mock the hapless victims. 336

The trial of the Nazi jurists, according to Taylor, was more than an effort to extract retribution against those who engaged in criminal acts against innocent civilians and combatants. It was the first step towards the redemption and reconstruction of the German legal system which the defendants had so ignominiously "defiled ... and delivered ... into the dictatorship of the Third Reich." 337

The Tribunal was organized under Control Council Law No. 10. Under this agreement, the four occupying powers recognized the right of each of the Allied Powers to prosecute those within their zone suspected of crimes against peace, war crimes and crimes against humanity. 338 The Tribunal ruled that Control Council Law No. 10 was an expression of the "assumption and exercise of supreme governmental power by the Allies." 339 The prosecution of these jurists was part of a larger effort to foster democratic and humanitarian values in German society. 340 It also was stressed that the

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Judge Marshall as presiding judge. The alternative judge, Judge Justin W. Harding, formerly Assistant Attorney General of Ohio and District Judge of the First Division of the Territory of Alaska took judge Harding's place. Id. at 13.

335. Id. at 31.
336. Id.
337. Id. at 33.
338. Control Council Law No. 10 (1945) reprinted in VI TRIALS OF WAR CRIMINALS, BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at XVIII, XX, arts. II-III.
339. Id. at 960.
340. Id. The Tribunal ruled that the United States and the other Allied Powers were not bound by the rules of land warfare which limit a belligerent's activities in occupied territory. Id. at 961.

The clear implication from the foregoing is that the Rules of Land Warfare apply to the conduct of a belligerent in occupied territory so long as there is an army in the field attempting to restore the country to its true owner, but that those rules do not
trial was not an arbitrary exercise of raw sovereign power—the defendants merely were being prosecuted for violating preexisting principles of international law.\textsuperscript{341} Those who now stood before the Tribunal clearly were aware that the international community had condemned those Germans who had been personally responsible for the commission of war crimes and crimes against humanity following World War I. The Allied Powers also had repeatedly warned the leadership of the Reich that they would be held accountable for the atrocities which they had visited upon the inhabitants of Europe.\textsuperscript{342}

The American Judges rejected the defense that the defendants had relied on German domestic law and thus could not be held criminally liable for their purported criminal activities. They stressed that the essence of the charges lodged against the German jurists was that by enforcing the laws of the Third Reich that they had furthered the criminal policies of the Nazi regime. Their obeisance to domestic law cannot provide them with a defense against the requirements of international law which remain “superior in authority to any German statute or decree.”\textsuperscript{343}

The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecution did those crimes assume international proportions. It can scarcely be

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apply when belligerency is ended, there is no longer an army in the field, and, as in the case of Germany, subjugation has occurred by virtue of military conquest.

\textit{Id.} at 962.

\textsuperscript{341} \textit{Id.} at 966. These principles had previously been recognized by the International Military Tribunal and by the United Nations General Assembly. \textit{Id.} at 968.

\textsuperscript{342} \textit{Id.} at 978. The Tribunal certainly struck out in an unprecedented direction when it argued that international common law recognized crimes against humanity committed against a domestic population. It argued that systematic governmental participation in atrocities and offenses against a country’s domestic population or amounting to persecutions on political, racial, or religious grounds were cognizable under international law. The Tribunal argued that such gross and persistent brutalities imperil international peace and security and thus are of international concern. \textit{Id.} at 982.

The force of circumstances, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.

\textit{Id.} at 979.

The Tribunal, however, limited its consideration of the defendants’ guilt or innocence to the period following the outbreak of the war in 1939. \textit{Id.} at 985.

\textsuperscript{343} \textit{Id.} at 984.
said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.\textsuperscript{344}

The Tribunal also refused to permit the defendants to invoke the defense of judicial immunity. The Court explained that such immunity is premised on the notion of an independent judiciary which impartially administers the law in good faith. The American panel ruled that in view of the German judiciary’s subordination to the Nazi regime that there was “no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity.”\textsuperscript{345}

The “function of the Nazi courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.”\textsuperscript{346} The Tribunal also noted that courts traditionally had not recognized judicial immunity for acts of “malfeasance in office.”\textsuperscript{347}

The American judges held the defendants liable for four legal activities: the arbitrary administration of the law; the prosecution of defendants for treason; the “Night And Fog” program; and the racially discriminatory application of the law. The panel declined to enter a ruling as to whether German law unduly punished habitual criminals, looters, hoarders or those guilty of undermining the defensive strength of the nation.\textsuperscript{348} As to the limitations on freedom of speech which were imposed in Germany, it noted that “even under the protection of the Constitution of the United States a citizen is not wholly free to attack the Government or to interfere with its military aims in time of war.”\textsuperscript{349} In addition, the tribunal held that the mere enforcement of the criminal law against opponents of the war did not constitute criminal liability for involvement in wars of aggression. It argued that those outside the Nazi inner circle were not aware of Hitler’s plans. At any rate, the American judges went on to explain that the extension of liability below the policy-level would mean that “every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare . . . would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality.”\textsuperscript{350}

\textsuperscript{344} Id. The indictment did not charge the murder or abuse of any particular person or groups. Instead, the indictment was couched in general terms in order to emphasize that the defendants were involved in a large-scale, organized system of cruelty and injustice in violation of the laws of war and of humanity. Id. at 984-95.

\textsuperscript{345} Id. at 1024.
\textsuperscript{346} Id. at 1024-25.
\textsuperscript{347} Id. at 1024.
\textsuperscript{348} Id. at 1125-26.
\textsuperscript{349} Id. at 1026.
\textsuperscript{350} Id. at 1027.
Defendants, however, were held criminally liable for having enforced the law in an arbitrary, harsh and discriminatory fashion which was "shocking to the conscience of mankind."\textsuperscript{351} Those judges were held liable who had distorted or ignored evidence, perverted statutory requirements, denied defendants due process of law and who had punished Jews, Gypsies and Slavs more harshly than German defendants.\textsuperscript{352}

Defendants involved in prosecuting, convicting and sentencing defendants who had attempted to escape from the Reich for high treason also were held criminally liable. The Tribunal pointed out that the territory which the defendants were charged with attempting to depart consisted primarily of portions of Poland. At the time of the defendants' prosecutions, Germany could claim the status of an occupying power, but did not possess sovereignty over the Polish territory. According to the Court, prosecution in these cases represented an unwarrantable extension of the concept of high treason and constituted a war crime and a crime against humanity. The "wrong done in such prosecutions was not merely in misnaming the offense of attempting to escape from the Reich; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offense."\textsuperscript{353}

Officials in the Ministry of Justice, judges and public prosecutors also were held liable for having participated in the "Night And Fog" program.\textsuperscript{354} According to the Tribunal, this program "violated . . . every principle of the law of military occupation."\textsuperscript{355} The policy was to "terrorize and in some instances to exterminate the populations."\textsuperscript{356} It concluded that those who "respect human rights and human personality and dignity can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in their treatment of the population of occupied areas and territories."\textsuperscript{357}

Lastly, the defendants were charged with involvement in a governmental plan and program for the persecution and extermination of Jews and Poles. This plan was described as having "transcended territorial boundaries as well as the bounds of human decency."\textsuperscript{358} According to the Tribunal, such racial discrimination, when enforced in the occupied territory, constituted war crimes and when applied within Germany comprised crimes against humanity.\textsuperscript{359} Some of the defendants took part in the drafting of laws and decrees which furthered the aim of exterminating Poles and Jews in Germany and

\textsuperscript{351} \textit{Id.} at 1165.

\textsuperscript{352} \textit{See id.} at 1159-70 (discussing Rudolf Oeschey).

\textsuperscript{353} \textit{Id.} at 1028.

\textsuperscript{354} \textit{Id.} at 1055.

\textsuperscript{355} \textit{Id.} at 1060.

\textsuperscript{356} \textit{Id.}

\textsuperscript{357} \textit{Id.} at 1061. The illegalities in this program included the deportation of defendants, \textit{id.} at 1059, the denial of due process, \textit{id.} at 1061, and the mistreatment of internees. \textit{Id.}

\textsuperscript{358} \textit{Id.} at 1063.

\textsuperscript{359} \textit{Id.} at 1081.
throughout Europe. Others participated in the enforcement of these discriminatory laws. Finally, various judges “distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior.” All these defendants were held liable as principals or accessories to the crime of racial persecution which they variously helped to design, further and to carry out.

One of the central defendants was Franz Schlegelberger. Schlegelberger had progressed through the judicial bureaucracy before being appointed to the Ministry of Justice in 1931. He served as undersecretary and upon the death of Minister Franz Guertner was appointed acting Minister for roughly nineteen months. Although Schlegelberger was not a confirmed Nazi, he was involved in drafting or approving programs ranging from the Night And Fog decree to the special judicial procedures to be applied against Poles and Jews in the occupied territories. He also willingly revised various criminal sentences in response to requests from Hitler and from those in the Fuehrer’s inner-circle.

Schlegelberger excused his behavior on the grounds that he feared that if he resigned that a “worse man would take his place.” In fact, he was succeeded by Otto Thierack who permitted the police to usurp the administration of justice and “murdered untold thousands of Jews and political prisoners.” However, the Tribunal ruled that the fact that countless more might have been executed under another Minister, did not excuse Schlegelberger’s criminal conduct. His guilt also was not lessened by the fact that the numbers tortured and killed paled in comparison to those exterminated by the Nazis in pogroms, deportations and death camps. The American judges concluded that 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.” The Tribunal fully recognized that Schlegelberger was a “tragic character” who loved the “life of an intellect, [and] the work of the scholar.” Despite the fact that he likely “loathed the evil did,” the fact remains that Schlegelberger “sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security.”

360. Id. at 1063.
361. Id.
362. Id. at 1082-83.
363. Id. at 1084-85.
364. Id. at 1085-86.
365. Id. at 1086.
366. Id.
367. Id.
368. Id.
369. Id. at 1087.
370. Id.
In contrast to Schlegelberg, most of the other defendants displayed neither contrition or remorse. Defendant Oswald Rothaug, chief prosecutor of the People's Court and a former Chief Judge on the Special Court at Nuremberg, was described by the American jurists as "the personification of the secret Nazi intrigue and cruelty" and as a "sadistic and evil man."\textsuperscript{371} Rothaug's court was characterized as an "instrumentality of terror which won the fear and hatred of the population."\textsuperscript{372} In his closing statement, Rothaug defended his conduct and explained that he fulfilled his assignments with "a pure heart, and without malice."\textsuperscript{373}

I applied the laws of my country in the manner in which they were intended, to the best of my conscience and belief. . . . We were no specialists in crimes against humanity, and no proof has been furnished in any single case that, in any connection, we had applied an illegal method.\textsuperscript{374}

Rudolf Oeschey succeeded Rothaug as Chief Judge of the Nuernberg Court. He was pictured as even more vindictive and spiteful than Rothaug. Oeschey regularly insulted and humiliated defendants and was described as being intent on exterminating racial minorities and enemies of the Reich.\textsuperscript{375} Oeschey, like Rothaug, explained that as a dutiful judge that he had been obligated to enforce the letter of the law.

I always acted in the belief and in the conviction that I was doing right, by obeying the law to which I was subjected and applying it in the manner in which my conscience told me to. And it is the truth that it was a matter of conscience for me not to misuse the law in a criminal way, but to apply it in accordance with the will of the legislator, and to grant the offender a proper trial and a just verdict. Therefore, my conscience knows that it is clear of the crimes with which I am charged.\textsuperscript{376}

III. COMBATING THE GLOBAL THREAT TO THE INDEPENDENCE OF JUDGES AND LAWYERS

A. The Contemporary Threat To The Independence Of Judges

The imponderable questions remain. Why did the German legal profession conform to the dictates of the Nazi regime? Could and should

\textsuperscript{371} Id. at 1156.
\textsuperscript{372} Id.
\textsuperscript{373} Id. at 947.
\textsuperscript{374} Id.
\textsuperscript{375} Id. at 1168.
\textsuperscript{376} Id. at 952. Courts in the Federal Republic of Germany for the most part refused to convict former jurists of war crimes. See MULLER, supra note 41, at 274-92. Former Nazi jurists made a swift transition and assumed leading roles in the legal system of the Federal Republic of Germany. See Mathias Reimann, National Socialist Jurisprudence And Academic Continuity: A Comment On Professor Kaufmann's Article, 9 CARDOZO L. REV. 1651 (1988).
jurists have protested the National Socialists' perversion of the legal system.\textsuperscript{377} The expulsion of Social Democratic, Communist and Jewish lawyers and judges denuded the legal profession of those most likely to challenge the legal policies of the Third Reich. The remainder acquiesced out of a combination of ambition, avarice, pragmatism, peer pressure, ideology and fear. They psychologically distanced themselves from the consequences of their actions and allayed their doubts by foisting responsibility onto their superiors.\textsuperscript{378}

The legal establishment was not comprised of zealous Nazis. Only a handful of the key jurists in the National Socialist regime were veterans of the Nazi movement. Most were conservative nationalists who had established their reputations prior to Hitler's ascendance to power.\textsuperscript{379} Yet, Doctor Lothar Kreyssig, a judge at the Court of Guardianship, in the town of Brandenburg, on the Havel River, was the only sitting judge who publicly protested the excesses of the Nazi regime. He eventually was permitted to resign with full pension rights.\textsuperscript{380}

The events in Germany, are not merely an isolated historic tragedy. Judges and lawyers throughout the world continue to be threatened. Non-democratic regimes have sought to limit their independence and to transform the legal system into a mechanism for legitimizing and implementing governmental policies.\textsuperscript{381} Judges who have refused to acquiesce, at times,

\textsuperscript{377} On the duty of Germans to protest laws which did not comply with natural law principles, see Gustav Radbruch, \textit{Five Minutes Of Legal Philosophy, in III READINGS FOR LEADERS: LAW, JUSTICE AND THE COMMON GOOD A GREAT DEBATE AND A SEARCH FOR MEANING} 175 (1988). Following the war, a lively debate was ignited concerning whether those who informed on their German neighbors and relatives should now be subject to criminal punishment. \textit{See Recent Cases, Criminal Law—In General—German Citizen Who Pursuant To Nazi Statute Informed On Husband For Expressing Anti-Nazi Sentiments Convicted Under Another German Statute In Effect At Time Of Act, 64 HARV. L. REV. 1005 (1951). See generally Lon L. Fuller, Appendix: \textit{The Problem Of The Grudge Informer, in THE MORALITY OF THE LAW} 245 (rev. ed. 1969).}\n
\textsuperscript{378} On the capacity of professionals to rationalize their immoral conduct during the Third Reich see generally ROBERT JAY LIFTON, THE NAZI DOCTORS MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1986).

\textsuperscript{379} \textit{See MULLER, supra note 41, at 38-39, 45. See also KOCH, supra note 64, at 17-18.}

\textsuperscript{380} MULLER, supra note 41, at 193-95. Two judges who were involved in assassination plots against Hitler were executed in 1945, Dr. Karl Sack, a general staff judge, and Dr. Johann von Dohnanyi, a Supreme Court Judge. \textit{Id. at 192.}

\textsuperscript{381} The Nazi legal system was a prototype for contemporary totalitarian regimes. Some of the characteristics of such political systems include a resort to extra-judicial punishment; a disregard of fundamental legal norms, such as notice of legal provisions, the finality of judgments, a prohibition on double jeopardy and retroactive punishment; a reliance on harsh, certain and swift
have been dismissed,\textsuperscript{382} threatened,\textsuperscript{383} and in extreme cases, they have been kidnapped\textsuperscript{384} and assassinated.\textsuperscript{385} In some countries, the judiciary also has been under attack by opposition guerilla groups and organized crime syndicates. These interests have attempted to intimidate judges into refusing to preside over criminal trials or into acquitting or handing out light sentences to gang members.\textsuperscript{386} Argentina vividly illustrates the precarious political independence enjoyed by judiciary. Disgruntled Argentine regimes have replaced the members of the Argentinian Supreme Court six times in the past thirty-one years.\textsuperscript{387}

punishment; a simplification of legal procedures such as a limitation on appeals; a differential quality of justice meted out to groups based upon their varying social status; the extension of criminal law to encompass a range of private conduct and public actions which pose minimal social harm; and a concern with political crime and the establishment of special political courts. See generally Mark S. Baker, The South American Legal Response To Terrorism, 3 B.U. INT’L L.J. 67 (1985).

382. See Centre For The Independence Of Judges And Lawyers, Report On The Harassment And Persecution Of Judges And Lawyers, ICI NEWSLETTER, July-September 1989, at 16 [hereinafter First Report]. The Malaysian Supreme Court’s decision in several cases was unfavorable to the government. In 1988, the Prime Minister initiated several public attacks against the judges. The Lord President of the Court privately complained to the King and was subsequently removed. Two other judges who objected to the Lord President’s removal also were removed. Id. See generally Geoffrey Robertson, Malaysia: Justice Hangs In The Balance, CUL BULL., October 1988, at 8. See also Centre For The Independence Of Judges And Lawyers, Report On The Harassment And Persecution of Judges And Lawyers, ICI NEWSLETTER, July-September 1990, at 15, 16 [hereinafter Second Report]. In the Sudan, fifty-eight leading judges were dismissed following the June 1989 coup. The bar association also was banned and thirteen lawyers were incarcerated. Id. (The ICJ, International Commission Of Jurists is a group of prominent international jurists who investigate and report on human rights violations throughout the world. The International Commission established the CILJ, The Centre For The Independence Of Judges And Lawyers, to report on threats to the independence of the legal system).

383. Centre For The Independence Of Judges And Lawyers, Chile, CUL BULL., April 1988, at 1-2. A judge investigating allegations of torture against the state security police during military rule received threats against himself and his wife and had his home burglarized. Id. See also Second Report, supra note 382, at 16. Eight Argentinian judges who were investigating police corruption were threatened and were targeted for assassination. Id.

384. Centre For The Independence Of Judges And Lawyers, Guatemala, ICI BULL., Oct. 1988, at 4-5. On July 20, 1988, Judge Julio Anibal Trejo Duque who was presiding over the trial of a group of Treasury Police accused of numerous kidnappings was himself kidnapped by ten heavily armed men. A police agent and friend of Judge Trejo’s later was found beaten to death and his body was found near the place where the judge’s car was located after the abduction. Id.

385. Centre For The Independence Of Judges And Lawyers, El Salvador, IJL BULL., Oct. 1988, at 3-4. On May 11, 1988, Judge Jorge Alberto Serrano was shot and killed in front of his home. Judge Serrano was to issue a decision in the next few days pertaining to whether military officers jailed for involvement in a kidnapping-for-profit scheme were eligible to be released under an amnesty provided for under the Central American peace accords. Judge Miriam Artiga, who initially had been assigned to the case, had withdrawn after her house had been machine gunned. Id.

386. Columbian judges have been singled out for attacks by drug cartels. In one year, thirty-seven judges and lawyers were killed. See Second Report, supra note 382, at 16.

387. Keith S. Rosen, The Protection Of Judicial Independence In Latin America, CUL BULL., Oct. 1988, 13, at 30. Other Latin American judiciaries which have been subject to attack include, Brazil, El Salvador and Peru. Id. at 30-31.
More subtle steps also have been taken to influence the judiciary. Contumacious judges have been punished by being transferred to distant courts. They also have been reassigned to courts, such as those concerned with taxation, where they pose little threat to the regime. In other cases, judges have been appointed for limited periods and the terms of those who have proven to be independently-minded have not been renewed. Alternatively, the established rules or conventions governing the appointment of judges have been suspended or abrogated and judicial appointments have been made on political grounds. Some regimes have demonstrated less subtlety and have merely issued emergency decrees which have vested criminal jurisdiction in military or in specially constituted courts. Other tactics of intimidation have included public attacks and agitation against the judiciary; investigations into judicial conduct; and the denial of adequate budgetary support, salaries and pensions to judges.

Criminal defense and human rights lawyers also have been under attack. Governments have imposed limits on lawyers' statements and activities. Activist lawyers also have been exposed to governmental surveillance and harassment; have been subject to detention without trial; charged with criminal offenses stemming from their representation of their clients; and have been assassinated. In other cases, bar

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389. Id. at 9.

390. Id.

391. See Center For The Independence Of Judges And Lawyers, Brazil, CJIL BULL., April-October 1987, at 3-4. In Brazil wealthy landowners have organized para-military squads to intimidate lawyers working with agricultural workers. Between 1977 and 1984, at least thirty lawyers were victims of assassination attempts or of assassination. Id.

392. Center For The Independence Of Judges And Lawyers, Indonesia, CJIL BULL., Apr.-Oct. 1987, at 6-7. The Indonesian government prohibited lawyers from acting, behaving, assuming attitudes, using words or issuing statements that, among other things, display disrespect for the legal system, the courts and legal officials. The judiciary was authorized to impose disciplinary measures against lawyers ranging from disbarment to disbarment for life. Id.


394. See Center For The Independence Of Lawyers And Judges, Singapore, CJIL BULL., Apr. 1988, at 14-15. Three lawyers were detained in 1987 and 1988 under the Internal Security Act. One for social activism and two for agreeing to represent political appointees. Id. Human rights lawyers also have been detained in Kenya, see Center For The Independence Of Judges And Lawyers, Kenya, CJIL BULL., Apr.-Oct. 1987, at 7-8; Syria, see Center For The Independence Of Judges And Lawyers, Syria, in id. at 13-14; and in Ghana, see Center For The Independence Of Judges And Lawyers, Ghana, CJIL BULL., Oct. 1989, at 3-4.

395. A Moroccan lawyer was charged with an offense against "sacred institutions" based upon his allegedly blasphemous plea on behalf of a student client. See Center For The Independence Of Lawyers And Judges, Morocco, CJIL BULL., Apr. 1988, at 11. A Paraguayan lawyer who represented street vendors whom the local government wanted to evict from the market area was charged with two counts of incitement to violence based upon his leading a demonstration and organizing a student music festival. See Center For The Independence Of Judges And Lawyers, Paraguay id. at 11-12.
associations have been suspended or abolished, and the leadership and other prominent lawyers have been subjected to criminal prosecution or disciplinary proceedings.397

In August 1989, the Centre For The Independence Of Judges And Lawyers published a report on the harassment and persecution of judges and lawyers. The report listed 145 judges and lawyers who had been harassed, detained or killed in thirty-one countries since 1988. This included thirty-five lawyers who had been killed, thirty-seven detained and thirty-eight who had been attacked or threatened with violence over the preceding eighteen months.398 In August 1990, the Centre reported that 430 judges and lawyers had been killed, detained or harassed in forty-four countries between July 1989 and June 1990. This total included sixty-seven lawyers and judges who had been killed, 167 who had been detained, forty who had been attacked and sixty-seven who had received threats.399 In 1990, the Commission on Human Rights of the Economic and Social Council adopted resolution 1990/33 in which it expressed consternation over the “continued harassment and persecution of judges and lawyers in many countries.”400 The Commission called upon governments to respect the independence of the judiciary and to ensure the protection of practicing lawyers, prosecutors and judges against “undue restrictions and pressures in the exercise of their functions.”401

B. The Judiciary And The Protection Of Human Rights

An independent judiciary is central to the maintenance of a limited, democratic government which respects human rights. It is charged with insuring that the other branches of government do not exceed their constituted powers and abuse individual rights. The judiciary also stands as a barrier against the tides of public opinion, popular panic and political self-interest. It thus is vital that the judiciary remain free of partisan sympathy and maintain its independence from political control. The legal profession performs a complimentary role. The profession is the advocate of the weak,
vulnerable and disenfranchised. A vigorous legal profession is vital for
insuring that the government remains a servant of the law rather than of
those who populate political office.402

The preamble to the United Nations Charter proclaims the organization’s
determination “to establish conditions under which justice and respect for the
obligations arising from treaties and other sources of international law can
be maintained.”403 Clearly, one “condition” for a just society is an inde-
pendent and impartial judiciary. The Statute of the International Court of
Justice, the legal arm of the United Nations, specifically provides that the
Court shall be composed of “independent judges” elected from among
persons of “high moral character” who possess the qualifications required in
their respective countries for appointment to the highest judicial office.404
Every member of the Court shall, before assuming office, make a “solemn
declaration in open court that he will exercise his powers impartially and
conscientiously.”405

The Universal Declaration of Human Rights, the foundation human
rights instrument, contains several provisions which recognize the importance
of an independent and impartial judiciary.406 Article 8 states that everyone
has the right to an “effective remedy” before a competent national tribunal
for acts which are violative of fundamental human rights.407 Article 10 proclaims that everyone is entitled in “full equality” to a “fair and public
hearing” by an “independent and impartial tribunal” in the determination of
their rights and obligations and in the adjudication of any criminal charge
which is lodged against them.408

The International Covenant on Civil and Political Rights reiterates and
elaborates upon these provisions.409 Article 14 provides that defendants
facing a criminal charge shall be entitled to a “fair and public hearing” by a
“competent, independent and impartial tribunal established by law.”410

402. See generally ICJ Conference On The Independence Of Judges And Lawyers, CUL Bull.,
April 1989.
1043 (done at San Francisco, June 26, 1945; entered into force, Oct. 24, 1945) (entered into
404. U.N. CHARTER, Statute Of The International Court of Justice, art. 2, 59 Stat. 1031, T.S.
No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052 (done at San Francisco, June 26, 1945; entered
405. Id. art. 20. See also arts. 17, 24.
407. Id. art. 8.
408. Id. art. 10.
410. Id. art. 14(1).
In addition to providing for an exhaustive set of due process rights,\textsuperscript{411} the Covenant provides that individuals shall have the right to have their conviction and sentence reviewed by a “higher tribunal according to law.”\textsuperscript{412} Regional human rights instruments, such as the American Convention on Human Rights,\textsuperscript{413} the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{414} and the African Charter on Human and Peoples’ Rights,\textsuperscript{415} embody similar provisions. Various international human rights instruments also stress that individuals should be guaranteed equal access to the courts and equal justice under law.\textsuperscript{416}

These instruments thus recognize that an independent and impartial judiciary and aggressive legal profession is vital to the fair administration of justice and to the protection of human rights. Yet, little progress has been made towards the drafting and adoption of a binding multilateral instrument which provides international protection for the autonomy of judges and lawyers.

C. Towards The International Protection Of Judicial Independence And Impartiality

In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary.\textsuperscript{417} It invited governments to implement the principles “taking into account the political, economic, social and cultural circumstances and traditions of each country.”\textsuperscript{418} It also urged regional and international bodies to become involved in implementing the principles.\textsuperscript{419}

The preamble to the Basic Principles recognizes that the United Nations Charter, as well as various human rights instruments, provide for the right to a fair and impartial trial. It goes on to note that there frequently is a gap between the vision underlying these principles and the situation within

\textsuperscript{411} Id. arts. 14-17.
\textsuperscript{412} Id. art. 14(5).
\textsuperscript{418} Id.
\textsuperscript{419} Id. at 59.
particular countries. This creates a particularly serious threat to human rights since judges typically possess the "ultimate decision over life, freedom, rights, duties and property of citizens." 

The first section addresses the subject of judicial independence. The first paragraph requires that the independence of the judiciary should be guaranteed and enshrined in law. The judiciary is charged by the Basic Principles with deciding the matters before them impartially, on the basis of facts and in accordance with law, without "any restrictions, improper influences, inducements, pressures or interferences, direct or indirect, from any quarter or for any reason." Nor should judicial decisions be subject to revision or review by political authorities. The Principles also require that the judiciary should have exclusive authority over whether an issue submitted for decision lies within its jurisdiction. ParagraphFive prohibits the establishment of tribunals which do not use the "duly established procedures of the legal process" and which are "created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals." This provision appears to be designed to prevent regimes from creating extraordinary military and special courts and religious tribunals to prosecute political dissidents and members of minority ethnic, minority and religious groups. Paragraph Seven states that it is the duty of each State to provide "adequate resources" to the judiciary so that it is able to "properly perform its functions." This clause appears to be designed to provide the judiciary with the resources which are required to process its caseload. Inadequate salaries and poor working conditions also may discourage qualified advocates from pursuing a judicial career. Paragraph Seven also might be amended to suggest that the budget of the judicial branch should be prepared in collaboration with the judiciary.

Two paragraphs guarantee judges certain fundamental rights. The judiciary is entitled to freedom of expression, belief, association and assembly, provided that such rights are exercised in a dignified fashion.
Judges also are reminded that they should not engage in conduct which is likely to create a conflict of interest or compromise the image of the judiciary. The Basic Principles also state that judges shall be free to form and join associations of judges or other organizations which are organized to promote their professional interests and to protect their independence.430

A broad provision provides that those selected for judicial office shall be individuals of “integrity and ability with appropriate training or qualifications in law.”431 Any method of judicial selection shall safeguard against judicial appointments for improper motives. States also are reminded that there should be no discrimination in the selection of judges on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status.432 This provision impliedly recognizes that a diverse judiciary is less likely to be dominated by a single ideology or to maintain loyalty to particular economic or political interests. It may have been strengthened by urging regimes to actively recruit judges from various backgrounds. It also might be advisable to urge regimes to provide for wide participation in the selection of judges and to take into consideration the views of the organized bar and citizens groups. In addition, to the extent possible, governments should be urged to appoint full-time judges who are able to devote the necessary time and energy to the judicial enterprise.

A series of provisions seek to insulate judges from termination, demotion, transfer or other sanctions on account of their judicial decisions or activities. Paragraph Eleven seeks to shield judges from economic pressure by requiring that the judges’ remuneration, conditions of service, pensions and age of retirement should be “adequately secured by law.”433 Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office.434 Their promotion, to the extent possible, should be based on “objective factors.”435 Regimes also should be prohibited from transferring judges or taking any other punitive action as a result of their decisions or judicial philosophy. Paragraph Fourteen requires that the assignment of cases to various judges should be an “internal matter of judicial administration.”436 This clause guards against political efforts to see to it that significant cases are assigned to sympathetic judges.

Paragraph Fifteen provides that judges shall be bound by professional secrecy with regard to their deliberations and shall not be required to reveal

430. Id. para. 9.
431. Id. para. 10.
432. Id.
433. Id. para. 11.
434. Id. para. 12.
435. Id. at 62, para. 13.
436. Id. at 61, para. 14.
confidential information.\(^{437}\) This provision protects judges against being called before investigative tribunals and being compelled to justify or to explain their decisions or to reveal the contents of their deliberations. Judges also are to be guaranteed personal immunity from civil suit. This, however, does not preclude grievants from seeking to bring judges before disciplinary panels or lodging a legal action against the state.\(^ {438}\) Civil immunity protects judges against harassment and frivolous suits. It also permits judges to make difficult and controversial decisions without fear of being subject to suit by aggrieved parties. Judges presumably remain vulnerable to criminal prosecution.

The final section provides that any charge or complaint which is made against a judge in his or her judicial and professional capacity shall be processed efficiently and fairly under established procedures.\(^ {439}\) Disciplinary decisions also generally should be subject to independent review.\(^ {440}\) Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them "unfit to discharge their duties."\(^ {441}\) Regimes also should be required to insure that these disciplinary panels are comprised of a diversity of examiners who possess competency in judicial ethics and cannons of behavior.

In resolution 40/32, the United Nations General Assembly endorsed the resolutions adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.\(^ {442}\) A month later, on December 13, 1985, the General Assembly specifically called attention to the Basic Principles on the Independence of the Judiciary and invited governments "to respect them and to take them into account within the framework of their national legislation and practice."\(^ {443}\) It also urged that continued attention should be devoted to studying the topic of judicial independence and impartiality.\(^ {444}\)

On May 24, 1989, The Economic and Social Council adopted Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.\(^ {445}\) Procedure One requires all States to "adopt and implement" the Basic Principles "in accordance with their

\(^{437}\) Id. para. 15.

\(^{438}\) Id. para. 16.

\(^{439}\) Id. at 62, paras. 17, 19.

\(^{440}\) Id. para. 20.

\(^{441}\) Id. para. 18.


\(^{444}\) Id. See also G.A. Res. 41/149 (XXXXI), 41 GAOR Supp. (No. 53) at 200, A/41/874/Add. 1.

constitutional process and domestic practice.” The Procedures go on to proclaim that no judge shall be required to act in a fashion which is inconsistent with the Basic Principles. In addition, no judge shall accept an appointment or act in a fashion which is inconsistent with the Principles. The remainder of the Procedures establish mechanisms for publicizing and implementing the Basic Principles. The central provision admonishes States to “pay particular attention” to the need for adequate judicial resources, including the appointment of a sufficient number of judges in relation to case-loads, providing the courts with the necessary support staff and equipment and offering judges appropriate personal security, remuneration and emoluments. States also are required to disseminate the Basic Principles, promote or encourage seminars and courses and submit quinquennial reports informing the United Nations Secretary-General of any progress which has been achieved in publicizing and implementing the Principles. The Secretary-General is required to insure that these reports, along with the text of the Basic Principles, are given wide circulation.

The United Nations, through its Department of Technical Co-operation for Development, is charged with assisting governments in establishing and strengthening their judicial systems and in implementing the Basic Principles. The United Nations also is to promote national and regional seminars and to conduct research into effective measures for implementing the Basic Principles. On December 15, 1989, the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary was endorsed by the United Nations General Assembly.

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in addition to the Principles on the Independence of the Judiciary, adopted a resolution on the Role of Lawyers. The resolution recommended that “Member States should provide for protection of practicing lawyers against undue restrictions and pressures in

446. Id. at 46, para. 1.
447. Id. para. 2.
448. Id. at 47, para. 5.
449. Id. para. 4.
450. Id. para. 6.
451. Id. at 47, para. 7.
452. Id. paras. 9, 10.
453. Id. para. 11(a).
454. Id. para. 11(b).
455. Id. para 11(c)(d). The United Nations regional and interregional research and training institutes for crime prevention and criminal justice as well as other concerned entities within the United Nations system shall assist in the implementation process. Id. para. 12-15.
the exercise of their functions." 458 It also requested the Eighth United Nations Congress on the Prevention and the Treatment of Offenders to consider how to improve the delivery of legal services, guarantee equal access to the legal system and provide protection for lawyers throughout the world. 459 The Eighth United Nations Congress adopted the Basic Principles On the Role of Lawyers. 460 This document recognizes that all persons are entitled to the assistance of a lawyer of their choice to protect and establish their rights and to defend them. 461 Governments are obligated to ensure that all persons have equal access to legal services 462 and that they are informed of their right to an attorney. 463

Most importantly, governments are obligated to ensure that lawyers are able to perform their professional functions without "intimidation, hindrance, harassment or improper interference." 464 Attorneys shall not be subjected to criminal, administrative or economic sanctions based on actions undertaken pursuant to their professional obligations. 465 They should be free to consult with their clients 466 and governments should safeguard them against threats and retribution. 467 They "shall not be identified with their clients or their clients' causes as a result of discharging their functions." 468 Lawyers, like other citizens, are entitled to freedom of expression, association and assembly 469 and should be free to form and join professional associations to represent their interests. 470 Disciplinary proceedings against lawyers charged with violations of their professional code of conduct are to proceed in accordance with due process procedures. 471

On December 14, 1990, the United Nations General Assembly welcomed the instruments and resolutions adopted by the Eighth Congress and invited Governments to be guided by them in the "formulation of appropriate legislation and policy directives." 472 Four days later, the General Assembly specifically welcomed the Basic Principles on the Role of Lawyers and

458. Id. at 88.
459. Id. at 87-88.
461. Id. at 32, para. 1.
462. Id. paras. 2-3.
463. Id. at 32-33, paras. 4-8.
464. Id. at 35, para. 16(a).
465. Id. para. 16(c).
466. Id. para. 16(c).
467. Id. para. 17.
468. Id. para. 18.
469. Id. at 36, para. 23.
470. Id. para. 24.
471. Id. at 37, paras. 26-29.
invited Governments to "respect them and to take them into account within the framework of their national legislation and practice."473

D. Towards A Declaration On Judicial Independence

The pluralism of political systems throughout the world complicates any international effort to protect the independence and impartiality of the judiciary. Nevertheless, the Basic Principles on the Independence of the Judiciary are an unprecedented multilateral effort to safeguard judicial integrity. It is now time to incorporate the Basic Principles into a binding declaration which is open to signature and ratification by States.474 The protection of judges, of course, cannot guarantee fair and equal justice. The conservatism of elite judges and their identification with the prevailing power structure may incline the judiciary to uphold the status quo. Judges thus may have a tendency to resolve economic and political conflicts in favor of established interests.475 As a partial antidote, judges should be reminded that they are obligated to respect internationally guaranteed human rights. It should be stressed that this obligation is not abrogated by the declaration of a state of emergency.476

The Principles on the Independence of the Judiciary should be expanded to include a protocol setting forth judicial duties as well as rights. Judges throughout the world should be asked to pledge to uphold internationally recognized human rights and fundamental freedoms. Judges also should be reminded that they are required to adhere to accepted cannons of interpretation and should not compromise universally accepted principles such as the prohibition on ex post facto laws.477 It should be clearly proclaimed that contemporary judges, like their German colleagues, are criminally liable for the commission of international crimes.478 Non-governmental organizations, such as international legal organizations, also should be urged to closely monitor the actions of judges, protesting their acquiescence in

476. States of emergency pose a threat to human rights. International instruments permit the suspension of a wide array of rights during duly declared public emergencies which threaten the life of the nation. See International Covenant On Civil And Political Rights, supra note 409, art. 4.
478. See generally United Nations Congress, supra note 417, para. 16.
violation of human rights and intervening to guarantee their protection.479

CONCLUSION

The events in Nazi Germany vividly illustrate the importance of preserving the independence and impartiality of judges and lawyers. The politicalization of the legal process in Germany led to the perversion of the rule of law. The ranks of advocates and judges were purged of progressives and Jews; conventional cannons of interpretation and jurisprudential principles were discarded; and extraordinary tribunals displaced established courts. The judiciary acquiesced in the use of extra-judicial punishment and responded to political pressures in the adjudication of cases. In the end, the legal process was transformed into an instrument of raw repression and discrimination.

A number of the judges and lawyers who were responsible for designing and implementing the Nazi’s policies were brought to the bar of international justice following the end of the war. An American tribunal proclaimed that those judges who commit war crimes and crimes against humanity cannot drape themselves in the immunity traditionally accorded to those who populate the judicial office. These legal officers and officials thus owe their ultimate fealty to internationally proclaimed principles of justice rather than to the ephemeral dictates of domestic law.

Nazi Germany, of course, was an extreme example of the perils presented by the politicalization of the judiciary and the legal profession. Judges and lawyers remain under varying degrees of threat throughout the world. Yet, the international community has been astonishing slow to guarantee the independence of the judiciary. Human rights and equal justice cannot be achieved without a strong and vigorous judiciary.

The existing documents, while well conceived, are not legally binding. Hopefully, the next generation of human rights instruments will include a Declaration on the Independence of the Judiciary.

479. Non-governmental organizations have intervened on behalf of lawyers. See Judicial Independence And Impartiality, supra note 388, at 15-16.