

University of Nevada, Reno

**Judicial Independence and the Tragic Consequences that Arose in Nazi Germany
from a Lack Thereof**

A dissertation submitted in partial fulfillment of the requirements
for the degree of Doctor of Philosophy in Judicial Studies

by

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ABSTRACT

This dissertation discusses the topics of judicial independence and judicial accountability using the federal and state court systems of the United States as major examples since much of the work on judicial independence derives from the American experience. I define judicial independence by addressing the inquiries of independence for whom, independence from whom, independence from what, and independence for what purpose. Conditions that foster or supplant judicial independence are then summarized to facilitate their application to the case of Nazi Germany and its judicial system.

It is next proffered and considered that upon Adolf Hitler's usurpation of power within Nazi Germany judicial independence was abruptly and purposefully dispatched through the passage on March 23, 1933, of the Enabling Act, or The Law for the Recovery of People and Reich from Suffering.¹ In his speech to the Reichstag advocating the acceptance of this law, Hitler was forthright, honest, and provided an omen of what was to subsequently transpire relative to judicial independence in the Third Reich when he stated, "The security of tenure of the judges on the one side must correspond on the other with an elasticity for the benefit of the community when reaching judgments. The centre of legal concern is not the individual but the Volk."²

Hitler had obtained unlimited power in a constitutional manner and therefore whatever he did was legal in the juridical sense, but the rule of law was completely preempted and no longer prevailed within Germany. No judicial system could resist and continue to function in a constitutional manner once Hitler had been granted dictatorial

¹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 35.

² *Id.* at 35.

powers. The creation of the Volksgerichtshof or People's Court on April 24, 1934,³ and its ensuing operation epitomized a belief in the law to the detriment of justice, sanctioning the National Socialist regime to pervert justice to accommodate their particular purposes.

This paper concludes with a discussion of some individuals who chose to resist the barbarism and inhumanity of Nazi tyranny and how they were dealt with by the judicial system in Germany. These individuals were convinced that Hitler and his minions were ruining Germany, once known as the land of "thinkers and poets," and had to be stopped before total destruction occurred, recognizing they were being ruled by criminals who had no regard for human life. The individual in the resistance attempted to show that there was indeed "another Germany," that not all inhabitants of Germany were hateful, arrogant, and uncultured.⁴ However, their actions culminated in "show trials" before the wholly dependent People's Court, resulting in clear demonstrations of how Germany's judiciary had lost all semblance of independence, and were therefore complacent in what transpired during that dark period of German history.

³ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 45.

⁴ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), xxiv-xxvi.

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Chapter I: Introduction

As individuals in American society, we have been extremely privileged to reside within a country that has aspired to emphasize a fundamental principle, the rule of law. Unfortunately, the citizens of the Weimar Republic of Germany began to experience the disintegration of this proposition on January 30, 1933, with the usurpation of power by Adolf Hitler and his tyrannical regime. Judicial independence and autonomy were expeditiously dispatched and completely terminated through the subsequent functioning of the *Volksgerichtshof* (“VGH”), or People’s Court, in Nazi Germany. The People’s Court was a tribunal designed to judicially implement the dictates of Nazi Party elites without any semblance or pretext of judicial independence or autonomy.

In this dissertation, a comprehensive analysis of judicial independence and judicial accountability will be proffered on both the federal and informative state court levels within the United States, so as to provide a paradigm of the components necessary for their existence within a democracy. It is then asserted and discussed that judicial independence was intentionally arrogated and deliberately absent within Nazi Germany. In addition, it is contended that most members of the German judiciary who presided under this tyranny did so voluntarily under Hitler’s dictatorship, and were fully cognizant that they had to comply with the “general line” prescribed by the regime when effectuating their juristic functions.

Legal positivism⁵ teaches that all law emanates from the state and demands from judges absolute loyalty to the letter of the law even if they consider the law unjust.⁶ As a theory, it equates law with the behavioral norms determined by the state and society, and which therefore require no further justification, rejecting natural law, describing it as mere unproven speculation. In essence, legal positivism is marked with doubt as it negates the possibility of the existence of generally accepted and unchanging ethical norms.⁷

Virtually no professional group emerged from the Nazi era with such a clear conscience as that of the jurists. They categorically denied that German judges had participated in the injustices of the Hitler dictatorship.⁸ On the contrary, judges ascribed all guilt to the lawmakers, asserting that they were simply following the existing legislation as a result of their “positivistic training.” It was true that legal positivism, with its demand that judges be strictly bound to the law, had been the unchallenged doctrine of the authoritarian state under the Kaiser. During the fourteen years of the Weimar Republic, however, the judicial system and legal scholars assumed a position against the democratic government. Only a minority of legal theorists had implored the judiciary to obey the laws of the democracy. The courts of the Weimar Republic rarely announced that a particular law could not be applied or was unconstitutional, but with “interpretations” that had little to do with its actual wording, they could achieve the same

⁵ *Black's Law Dictionary*, Eighth Edition, defines “legal positivism” as, “The theory that legal rules are valid only because they are enacted by an existing legal authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.”

⁶ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 247.

⁷ *Id.*

⁸ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 219.

effect. Apart from a small minority of supporters of the Republic, no one in the German legal profession endorsed positivism any longer.⁹

Placing the judiciary under a strict obligation to follow the letter of the law would have been an impediment to the “legal order” of the Nazi regime and would have limited its power. For this reason, judges were required to declare their loyalty to the Führer rather than to the law itself. Any appeal to the letter of the law was dismissed as “moral and legal thinking typical of Jewish liberals.”¹⁰ The Grand Criminal Panel of the Supreme Court exhorted German judges to recall that “the judiciary...can fulfill the task imposed on it by the Third Reich only if it does not remain glued to the letter of the law, but rather penetrates to its innermost spirit; the judiciary must do its part to see that the goals of the lawmakers are achieved.”¹¹

Some National Socialist legal doctrines were the exact opposite of legal positivism, the claim that judges and prosecutors were merely following the laws and that this was how they had been trained by their democratic professors during the Weimar Republic became an excuse for the whole profession. The view became that laws passed in a proper procedure could not be questioned by the courts or administrators on either constitutional or ethical grounds. According to this doctrine, there were allegedly no obstacles in Hitler’s accession,¹² “He was *legibus solutus*, free from all laws.”¹³

This explanation for the downfall of the rule of law under National Socialism soon became established. The fallacy of legal positivism exonerated the entire judiciary;

⁹ Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 219.

¹⁰ *Id.* at 220.

¹¹ *Id.*

¹² *Id.* at 220-221.

¹³ *Id.* at 221.

it was seized upon by those who should have been held responsible for the crimes they had committed during the Nazi era, but the courts readily accepted their self-justification.¹⁴

A select few German citizens nurtured upon the rule of law refused to accept the dictatorial mandates of National Socialism and instituted individual and collective resistance in defiance of this totalitarian system. This opposition was exhibited in manners that individuals, living in a society based upon fundamental freedoms, would presuppose as personal rights and liberties. These individuals initiated activities conceived to arouse the consciousness of their nation against Nazism. With full awareness that their actions were treasonous, they failed to disclose information of contemplated unlawful conduct,¹⁵ listened to foreign radio broadcasts,¹⁶ discussed possible alternative forms of government in the post-Nazi era,¹⁷ and exercised freedoms of speech and press.¹⁸ However, residing in a country with a fascist government in place, these activities represented the pinnacle of criminal culpability.

Johannes Georg Klamroth, Helmuth Hübener, Helmuth James von Moltke and the Kreisau Circle, along with the members of the White Rose, engaged in these prohibited enterprises, leading to their arrests, Gestapo interrogations, “show trials” before the People’s Court, and subsequently ordered annihilations. Even though history has since

¹⁴ Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 221-222.

¹⁵ Bruhns, W. (2009). *My father’s country: The story of a German family*. New York, NY: Vintage Books.

¹⁶ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). Provo, UT: Academic Research Foundation.

¹⁷ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. London, GB: Van Nostrand Reinhold Company Ltd.

¹⁸ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. New York, NY: G.P. Putnam’s Sons.

vindicated these resistance groups, at that time, they were desperately alone, reviled by the general public, and forced to defy the laws, their oaths of national allegiance, and public opinion. Through their decisions to make an honorable choice to physically confront barbarism, they exhibited to the world the existence of the “other Germany.” Each possessed the ethical and personal courage to become pariahs within their own country, knowing that they were living outside the law, and prepared to accept the deadly consequences of their struggle.

Although silenced by the People’s Court, an instrumentality of death within Nazi Germany, those involved in the resistance movements to Hitler are now viewed as virtuously principled human beings. While their actions failed to overthrow the Nazi regime or to shorten the war, and had little influence on the form of the post-war Germanies, their resistance may certainly be said to have redeemed the honor of the German people. This dissertation is directed not only to the judiciary, but to those individuals who desire a greater understanding of the legal ramifications that arise when the rule of law is abrogated through a loss of judicial independence or autonomy, using the Nazi experience as exemplification thereof. These manifestations of judicial action resulted when members of the judiciary relinquished their independence to despotic and corrupt political authorities and ignored the directives of the First Commandment. It also serves as attestation to the world that a tyrannical government is something which must be prevented rather than cured because ousting such a reign of terror, once it has gained power, is profoundly catastrophic in terms of both human lives and material resources, and that these sacrifices will affect future generations of humankind in perpetuum.

Chapter II: Literature Review

The subject matter of judicial independence and judicial accountability, and the requisite principles therefore, within the United States, have produced much literature. Writings approach the topics from both theoretical and analytical perspectives in federal and state court jurisdictions. Most of the practical discussions however, focus on state court judges and balancing the judicial function between independence and accountability.

Scholars examining Adolf Hitler and his Nazi regime have generated a plethora of printed materials in the eighty years since his assumption of power on January 30, 1933, and the resulting tyrannical despotism that quickly precipitated with the assistance of his compliant minions. I will not discuss each book in this Literature Review, but feel it imperative to mention and emphasize some of these published works and their importance in this project.

*Judges Under Fire – Human Rights, Independent Judges, and the Rule of Law*¹⁹ presents seven practical analyses of the ramifications to societies and the rule of law when there is a threat to or an absence of judicial independence. One of the illustrations that the author, Harold Baer, Jr., a judge of the United States District Court for the Southern District of New York, provides is of the People's Court in Nazi Germany.

*Justice Accused – Antislavery and the Judicial Process*²⁰ written by Robert M. Cover was interesting, albeit idiosyncratic to the Civil War period. However, Cover does

¹⁹ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. Chicago, IL: ABA Publishing.

²⁰ Cover, R.M. (1975). *Justice accused: Antislavery and the judicial process*. New Haven, CT: Yale University Press.

accentuate that antislavery judges did deny personal responsibility for their actions, as Nazi judges would subsequently. Judges from both periods condemned the positive law that had been enacted for the restrictions placed upon them when rendering their judicial decisions.

The most comprehensive and detailed investigation of judicial independence and judicial accountability of any of the readings on these subjects was *Without Fear or Favor – Judicial Independence and Judicial Accountability in the States*.²¹ It also provided an invaluable practical application of these principles for the benefit of those individuals functioning within the judicial branch.

*Hitler's Hitmen*²² was especially enlightening as it considered in detail six individuals: Adolf Eichmann, Baldur von Schirach, Martin Bormann, Joachim von Ribbentrop, Roland Freisler, and Josef Mengele. The information provided on Freisler was the most definitive my research disclosed, but even then, paucity exists beyond the most basic of information, relative to Freisler, which is repeated from one source to another.

*Hitler's Justice: The Courts of the Third Reich*²³ and *In the Name of the Volk: Political Justice in Hitler's Germany*²⁴ were very interesting and provided useful material. I felt the latter supplied the most beneficial insight into the People's Court, its

²¹ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. Stanford, CA: Stanford University Press.

²² Knopp, G. (2002). *Hitler's hitmen*. Sparkford, GB: J.H. Haynes & Co. Ltd.

²³ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. Cambridge, MA: Harvard University Press.

²⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd.

background and functioning. Likewise, *The Law under the Swastika*²⁵ proved to be a beneficial source of information for this endeavor.

The only publication available on Johannes (Hans) Georg Klamroth is, *My Father's Country: The Story of a German Family*.²⁶ It was written by his youngest daughter, Wibke Bruhns, who felt compelled to compose this genealogical portrait after happening to view a video segment of her father's trial before Roland Freisler and the People's Court. I have also seen this much abbreviated film and can only feel the deepest empathy for Ms. Bruhns after observing the berating of her father and the lack of respect exhibited by Freisler during the proceedings.

The trilogy associated with the Helmuth Hübener Group was interesting as each book was either a biography or autobiography of or by the members. In addition to *Hübener vs. Hitler: A Biography of Helmuth Hübener, Mormon Teenage Resistance Leader*,²⁷ *Three against Hitler*²⁸ was the autobiography of Rudolf Wobbe, while the autobiography of Karl-Heinz Schnibbe was presented in *When Truth Was Treason: German Youth against Hitler, the Story of the Helmuth Hübener Group, Based on the Narrative of Karl-Heinz Schnibbe*.²⁹

²⁵ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. Chicago, IL: The University of Chicago Press.

²⁶ Bruhns, W. (2009). *My father's country: The story of a German family*. New York, NY: Vintage Books.

²⁷ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). Provo, UT: Academic Research Foundation.

²⁸ Wobbe, R. & Borrowman, J. (2002). *Three against Hitler*. American Fork, UT: Covenant Communications, Inc.

²⁹ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. Chicago, IL: University of Illinois Press.

Both *German Resistance to Hitler: Count von Moltke and the Kreisau Circle*³⁰ and *Helmuth von Moltke: A Leader against Hitler*³¹ provide in-depth and detailed descriptions of the resistance activities of Moltke and the Kreisau Circle. The personal friendship between Michael Balfour and Julian Frisby, co-authors of *Helmuth von Moltke: A Leader against Hitler*,³² with Helmuth James von Moltke, allowed them to provide enlightening intimate knowledge in this volume, connecting exact dates with the actions of Moltke and the Circle.

*Letters to Freya: 1939-1945*³³ is the first person account of Freya von Moltke, wife of Helmuth James von Moltke, and presents the actual correspondence written by Helmuth to Freya between August 22, 1939, and January 11, 1945. At times the letters are a little difficult to comprehend as they had to be written in somewhat of a cryptic style to avoid detection by the Gestapo censors, when posted by Helmuth. Likewise, Freya prevented the Gestapo from discovering the letters she received from Helmuth by concealing them in the beehives on the Kreisau estate, until the conclusion of the war.

*Memories of Kreisau & the German Resistance*³⁴ is authored by Freya herself and presents a concise summary of the activities of the Kreisau Circle.

By far, the most published works relate to the resistance actions of the White Rose and its affiliated members. *A Noble Treason: The Revolt of the Munich Students*

³⁰ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. London, GB: Van Nostrand Reinhold Company Ltd.

³¹ Balfour, M. & Frisby, J. (1972). *Helmuth von Moltke: A leader against Hitler*. London, GB: MacMillan London Limited.

³² *Id.*

³³ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). New York, NY: Vintage Books.

³⁴ Winter, J.M. (Ed.) (2003). *Memories of Kreisau & the German resistance*. (F. Von Moltke, Trans.). Lincoln, NE: University of Nebraska Press.

*against Hitler*³⁵ furnishes a comprehensive account of the group and its members, without dwelling more than necessary on any particular member. By necessity, Hans and Sophie Scholl and their actions receive a greater amount of Richard Hanser's attention, but not inordinately so, while other authors focus primarily on the Scholl siblings.

It would appear that Annette E. Dumbach and Jud Newborn attempted to simply increase their royalties by publishing in 1986, *Shattering the German Night: The Story of the White Rose*,³⁶ and then having the same book republished in 2006 under the title *Sophie Scholl and the White Rose*.³⁷ I must say to their credit that they did include nine appendices in the second book that were not in the first work, but otherwise, the publications are exactly identical. However, the additional information contained in the second printing is readily available elsewhere.

My research associated with judicial independence, judicial accountability, and Nazi Germany, produced numerous law review articles, including the following.

Stephen B. Burbank appears to be one of the most prolific theorists in the area of judicial independence and judicial accountability. In addition to being the co-editor, along with Barry Friedman, of *Judicial Independence at the Crossroads – An Interdisciplinary Approach*,³⁸ a collection of ten essays arising from a conference of the American Judicature Society, held on March 31-April 1, 2001, he has also authored several law review articles.

³⁵ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. New York, NY: G.P. Putnam's Sons.

³⁶ Dumbach, A. & Newborn, J. (1986). *Shattering the German night: The story of the White Rose*. Boston, MA: Little, Brown and Company.

³⁷ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. New York, NY: Oneworld Publications.

³⁸ Burbank, S.B. & Friedman, B. (Eds.) (2002). *Judicial independence at the crossroads: An interdisciplinary approach*. Thousand Oaks, CA: Sage Publications, Inc.

In “The Architecture of Judicial Independence,”³⁹ Burbank defines judicial independence in terms of what it was, is, and should be. He also examines the balancing that is involved between judicial independence and judicial accountability, and the differences in individual and institutional judicial independence. Through “What Do We Mean by ‘Judicial Independence?’”⁴⁰ Burbank argues that judicial independence is not an end of government but a means to an end or ends, that judicial independence and judicial accountability are not discrete concepts at war with each other, but rather complementary concepts that can and should be regarded as allies, and that judicial independence is not a monolith between federal and state courts and trial and appellate courts.

V.G. Curran’s “Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law”⁴¹ examines the courts of France and Germany during the Vichy and Nazi periods to observe judicial methodology during periods of crisis. Curran concludes that judicial positivism was not a significant basis for the courts’ injustice during these periods, but did, in conjunction with other fundamental causes, contribute to substantive outcomes that complied with the texts of enacted laws.

Once again, I will not review every article that I read for this project, but will delineate the following as utilized in this dissertation.

³⁹ Burbank, S.B. (1999). The architecture of judicial independence. *Southern California Law Review*, 72, 315-351.

⁴⁰ Burbank, S.B. (2003). What do we mean by “judicial independence”? *Ohio State Law Journal*, 64, 323-339.

⁴¹ Curran, V.G. (2001-2002). Fear of formalism: Indications from the Fascist period in France and Germany of judicial methodology’s impact on substantive law. *Cornell International Law Journal*, 35, 101-168.

David S. Law in his article “Judicial Independence”⁴² poses four questions: Independence for whom, from whom, from what, and for what purpose? He responds with concise and insightful responses which are incorporated into my chapter on Judicial Independence and Judicial Accountability.

The Nizkor Project’s, “Nazi Conspiracy & Aggression, Volume I, Chapter VII, Means Used by the Nazi Conspirators [sic] in Gaining Control of the German State,”⁴³ contains very brief quotations from Otto Georg Thierack, Nazi Minister of Justice, relative to judicial independence, or the lack thereof, in Nazi Germany.

The Chairman of this committee, Dr. James T. Richardson, graciously provided an article he wrote entitled, “The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis,”⁴⁴ that describes the autonomy or discretion that judges may exercise in different societies.

The research that I conducted for this paper has failed to disclose any existing literature that collectively discusses judicial independence and judicial accountability in conjunction with the specific resistance movements presented, and the very unfortunate individual annihilations that resulted from the proceedings conducted before the People’s Court. To reiterate, depending upon the particular resistance effort, a modicum of material may exist, as in the case of Johannes Georg Klamroth, with increasingly

⁴² Law, D.S. (2010). Judicial Independence. In *International Encyclopedia of Political Science*, 5, 1369-1372. Retrieved from <http://ssrn.com/abstract=1557348>

⁴³ Nazi Conspiracy & Aggression: Means used by the nazi conspirators in gaining control of the German state. (n.d.). In *The Nizkor Project*, 1(7), 227-229. Retrieved from <http://www.nizkor.org/hweb/imt/nca/nca-01/nca-01-07-means-18.html>

⁴⁴ Richardson, J.T. (2006). The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis. *Sociology of Religion*, 67(3), 271-294.

available publications progressing from Helmuth Hübener, through Helmuth James von Moltke and the Kreisau Circle, and culminating with the White Rose.

Chapter III: Methodology and Methodological Concerns

My methodological approach was to utilize the information gleaned from the previously described materials, as well as, my personal interview with Dr. Traute LaFrenz-Page. From this research, I discuss the essential elements needed to ensure judicial independence and judicial accountability, along with the specific individuals and their various activities as functionary instruments in the Nazi regime or as modes or members of the diverse resistance coteries. However, I am compelled to add to my methodology these observations relative to the numerous inconsistencies that became readily and disconcertingly apparent as I progressed with the investigation and fact-finding for this project. The harsh reality and verity is that we can only speculate about history; we have at our disposal mere fragments of events that are verifiable, but there remain many obscure expanses where one perusing and analyzing the available literature rapidly discovers that the various researchers and authors on the topics have engaged in instinctive speculation, and that these suppositions have transpired and manifested themselves into their respective publications. The most difficult issues to expose and retrieve from the past are these unspoken assumptions.

Unfortunately, as in the witnessing of any current event, two people seeing the same occurrence may subsequently describe conflicting accounts of the incident. The passage of time only serves to further exacerbate the unintentional discrepancies. In addition, it is patently discernible that personal monetary gain is a motivating consideration and component for some writers. As an illustration, I have read the same alleged quoted accounts of various correspondences by members of the resistance and found them to contain different contextual meanings. The discrepancies were so

dissimilar that translation error is not conceivable, but intentional sensationalism provides possible monetary remuneration, and because of this, may impart an explanation for these inconsistencies. I also discovered a “blogger” whose factual recitation contained blatant and flagrant misstatements, but should an individual be so inclined, they may purchase the author’s publications for rather exorbitant fees. Included in these publications are the alleged “voices” of the members of a particular resistance movement. This author also advertises the availability of a minimum of sixteen different publications associated with this group, including additional opportunities to acquire such items as photocopies of alleged leaflets and computer screensavers. A different website presents the viewer with the possibility to “sign-up” for relevant E-mails discussing the movement and concurrently requests monetary donations to the organization. As with all other societal opportunities presented in today’s computer age, a person must be vigilant in all aspects of their life, including when performing historical research, as individual profit motivations are omnipresent.

On August 25, 2012, it was my honor and privilege to meet and interview Dr. Traute LaFrenz-Page. Traute LaFrenz, as she was then known in the early 1940s, was a member of the resistance group that subsequently became recognized as the White Rose. My prior readings pertaining to the White Rose disclosed that only three other individuals, who were directly associated with the group in addition to Dr. LaFrenz-Page, are surviving today. When I questioned Dr. LaFrenz-Page relative to one of those survivors, her response was, “He’s kind of one of those guys that you don’t trust too

much.”⁴⁵ However, he too, has been quoted in sundry publications as affording factual irrefutability.

With the caveat that historical research and writing is susceptible to unintentional, as well as, intentionally flagrant and brazen perils, I will now commence my discussion of judicial independence and judicial accountability and the inevitable consequences ensuing from their absence within Nazi Germany on the individuals who were the impetus for this endeavor. In doing so, I have made a concerted and predetermined attempt to confine myself to those historical facts that are corroborated by more than one source, and have, if at all possible, avoided including items that are available or obtainable from solely one author, so as to avert any unintentional misstatements of fact on my part as originator of this disquisition.

In an effort to comprehensively consider my research topic, Judicial Independence and the Tragic Consequences that Arose in Nazi Germany from a Lack Thereof, included are individual chapters covering the following subject areas:

- A) Judicial Independence and Judicial Accountability;
- B) Judicial Independence, or a Lack Thereof, in Nazi Germany;
- C) How Could German Civilization Collapse So Completely?;
- D) The Rule of Law and the *Führerprinzip*;
- E) The German Court System and Its Applicable Laws under the Nazi Regime;
- F) The Volksgerichtshof (VGH), or People’s Court;
- G) Dr. Roland Freisler, President of the People’s Court;
- H) Johannes “Hans” Georg Klamroth;

⁴⁵ LaFrenz-Page, Traute. (2012, August 25). Hollywood, SC.

- I) Helmuth Guddat, Also Known as Kunkel, Subsequently Hübener;
- J) Count Helmuth James von Moltke and the Kreisau Circle;
- K) The White Rose; and,
- L) Conclusions and Recommendations.

Chapter IV: Judicial Independence and Judicial Accountability

An abundance of research and discourse relative to judicial independence and judicial accountability has occurred in the United States. Therefore, this chapter will focus on the fundamental principles essential for judicial independence and judicial accountability, emphasizing how judges are selected in this country so as to maintain the rule of law. It is only through judicial independence and judicial accountability that the underlying guarantees of fairness and equality can be ensured for the benefit of the citizenry.

Chief Justice John G. Roberts, Jr., in his 2007 Year-End Report on the Federal Judiciary, wrote:⁴⁶

Most Americans are far too busy to spend much time pondering the role of the United States Judiciary—they simply and understandably expect the court system to work. But as we begin the New Year, I ask a moment’s reflection on how our country might look in the absence of a skilled and independent Judiciary. We do not need to look far beyond our borders, or beyond the front page of any newspaper, to see what is at stake.

More than two hundred years after the American Revolution, much of the world remains subject to judicial systems that provide doubtful opportunities for challenging government action as contrary to law, or receiving a fair adjudication of criminal charges, or securing a fair remedy for wrongful injury, or protecting rights in property, or obtaining an impartial resolution of a commercial dispute. Many foreign judges cannot exercise independent judgment on matters of law without fear of reprisal or removal.

Americans should take enormous pride in our judicial system. But there is no cause for complacency. Our judicial system inspires the world because of the commitment of each new generation of judges who build

⁴⁶ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. (Chicago, IL: ABA Publishing), ix.

upon the vision and accomplishments of those who came before.⁴⁷

Judges must embrace their roles as the primary advocates in the pursuit of judicial independence. They must be constantly vigilant to ensure that we, as a country, never fall prey to a type of leadership that has caused inordinate damage to the rule of law in other sovereignties throughout the world. A government's continuity is within the control of its judiciary. It requires committed, independent, and indomitable judges to guarantee the survival of not only human rights and fundamental individual liberties, but the rule of law. Justice, prerogative, and freedom depend in large measure on an independent and effective judiciary. Should a totalitarian government attempt to impose its will on the judiciary, no democracy, constitution, or rule of law can endure without tenacious and undaunted jurists.⁴⁸

Judicial independence is a difficult concept to define. In a literal sense, it refers to the ability of courts and judges to perform their duties free of influence or control by other actors. However, the term is often used in a normative sense to refer to the kind of independence that is considered desirable for courts and judges to possess. As a practical matter, the type of judicial independence that is considered both the most important and difficult to achieve is independence from other government actors. This form of judicial independence is valued by those who impute to courts a responsibility for ensuring that individuals and minorities do not suffer illegal treatment at the hands of the government or a tyrannous majority. Obtaining this character of independence is arduous because the

⁴⁷ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. (Chicago, IL: ABA Publishing), ix-x.

⁴⁸ *Id.* at x-xii.

other branches of government may possess the power to disobey or thwart the enforcement of judicial decisions, if not also to retaliate against the courts for decisions that they oppose. In Alexander Hamilton's formulation, the judiciary is the "least dangerous" branch, having "no influence over either the sword or the purse" and is therefore the least capable of defending itself against the executive and legislative branches.⁴⁹

Formal guarantees of judicial independence from government control date to at least England's Act of Settlement of 1701, which gave judges explicit protections from unilateral removal by the Crown,⁵⁰ by changing tenure of English judges from "the King's pleasure" to "good behavior."⁵¹ Today, two-thirds of the world's current written constitutions contain some form of definitive protection for the independence of the judiciary.⁵² Empirical research suggests however, that the existence of formal constitutional guarantees of judicial independence is poorly correlated with substantive respect for its processes in actual practice.⁵³

Any attempt at a coherent definition of judicial independence must address several inquiries. Such questions are: independence for whom; independence from whom; independence from what; and, independence for what purpose.

⁴⁹ Law, D.S. (2010). Judicial Independence. In *International Encyclopedia of Political Science*, 5, 1369-1372. Retrieved from <http://ssrn.com/abstract=1557348>

⁵⁰ *Id.*

⁵¹ Cover, R.M. (1975). *Justice accused: Antislavery and the judicial process*. (New Haven, CT: Yale University Press), 144.

⁵² Law, D.S. (2010). Judicial Independence. In *International Encyclopedia of Political Science*, 5, 1369-1372. Retrieved from <http://ssrn.com/abstract=1557348>

⁵³ *Id.*

A) Independence for Whom?

Judicial independence can be defined as a characteristic of an individual judge or of the judiciary as a whole. If judicial independence is guaranteed at the institutional level but not at the individual level, individual judges can be forced to obey the dictates of the leadership of the judiciary; consequently, this may result in a diminution in the enforcement of the rule of law. However, if judicial independence is ensured at the individual level, individual judges will find themselves at liberty to pursue their own preferences. Not only does unbridled discretion of this nature invite abuse, it also increases the likelihood that judges will decide cases in an inconsistent manner, with the potential to thereby neutralize the predictability and stability of the law.

B) Independence from Whom?

The existence and adequacy of judicial independence become matters of concern when a court must decide a dispute involving the interests of an actor or institution with potential or actual power over the court. As a general rule the more powerful the actor whose interests are at stake, the greater the need to protect the independence of the court from the functionary. If both parties in the litigation are equally powerful, that symmetry of authority may, in and of itself, provide the requisite protection for the court.

There are three scenarios that a jurist may encounter:

1. Disputes between private parties;
2. Disputes between government actors; or,
3. Disputes between private parties and government actors.

In the first conception, the court must strive to remain independent from the parties, who may attempt to undermine its independence by a variety of methods, such as

bribery or intimidation. In this situation, the government is an ally of judicial independence as it usually can be expected to defend the autonomy of the court from the improper conduct of the parties.

In the second postulate, the expectancy for judicial independence is again generally favorable. The court is required to choose between two equally powerful actors in an impartial way. Whichever side is determined by the court to be correct, the result will yield a dynamic of two-against-one that should provide the court with sufficient protection from retaliation from the unsuccessful litigant. The government habitually does not pose a meaningful threat to judicial independence in such cases because it is in conflict with itself. However, if one entity of the government is much more powerful than the other in the dispute, then the possibility for intimidation of the judiciary can arise.

In the third possible scheme, the government poses a threat to judicial independence, as the court is asked to make a determination that is antagonistic to that of the government actor. Here the prospects for judicial independence are at their minimum. The judiciary is called upon to demonstrate independence from the government, but typically it lacks the help of a powerful assistant to withstand the pressures that may be exerted.

There are mechanisms to protect judicial independence in the wake of such threats. Strategies include limiting government discretion over judicial salaries, placing restrictions on the removal of judges from office, establishing the minimum jurisdiction that courts are to possess, and relieving judges of personal liability for acts performed in the course of their duties. However, it is difficult to create a perfectly independent

judiciary that is completely insulated from all forms of political and popular influence. Even a highly independent court, such as the United States Supreme Court, is likely over time to be both reshaped by political forces and to accommodate the desires of a persistent political majority. There are limits to what can be accomplished by adjusting the institutional characteristics of the judiciary or by extolling the inviolability of judicial independence. The capability for attaining even moderate levels of judicial independence may depend on political and historical conditions that are external to the judiciary itself, such as the existence of a stable multiparty democracy.

C) Independence from What?

Not all forms of influence over judicial decision-making constitute threats to judicial independence. While some activities are calculated to influence courts, such as bribery and physical intimidation, and are inappropriate under all plausible conceptions of judicial independence, others must be evaluated on the basis of normative judgments. Should a judge be shielded from public protests in front of the courthouse relating to a matter pending in their court, or is this action privileged as a form of political expression? One may assert that judges in a democracy are permitted to consider public opinion, but another perspective alleges that a judge's deliberations are not to be tainted by contemplation upon irrelevant issues. To define the requirements of judicial independence in such cases demands a regulating theory of what courts are to take into account when deciding cases, what judicial independence is to achieve, and to what extent it can and should be balanced against other objectives and considerations.

D) Independence for What Purpose?

Judicial independence is considered a means to an end, rather than an end in and of itself. The ultimate goal may be described as the fair and impartial adjudication of disputes in accordance with the law. However, if that is the goal, then the pursuit of judicial independence is subject to objections.

First, the goal may be unattainable because it rests upon a misconception of the nature of both law and adjudication. Many legal theorists believe that the law is frequently indeterminate, and that it is therefore impossible for judges to decide disputes by applying preexisting law. Rather, the act of adjudication requires judges to make the law that they are purporting to apply. Consequently, if adjudication entails lawmaking, then judicial independence not only protects the ability of judges to decide disputes in accordance with the law but, likewise, endows them with the authority to make and impose whatever laws they deem fit. This is a prospect that many consider incompatible with either the appropriate role of the judiciary in a democracy or the conception of separation of powers.

Another challenge is that judicial independence is neither necessary nor sufficient to ensure impartial adjudication in accordance with the law. It is possible for a judge who faces potential retaliation to nevertheless decide cases in an impartial manner. However, there is no guarantee that giving judges the freedom to decide cases as they wish will ensure that they choose to do so fairly and in conformity with the law. Even if it were possible to create a judiciary that was free from both popular and political control, there is nothing to prevent judges from deciding cases on the basis of personal prejudice or self-interest. It is on the basis of such concerns that many believe it is essential to

balance judicial independence against judicial accountability, and to distinguish appropriate forms of influence over the judiciary from inappropriate forms.⁵⁴

In this regard, judicial independence can be approached and understood in terms of relationships and interdependencies. Much emphasis has been placed upon the critical associations between judicial independence and judicial accountability, individual judicial independence and institutional judicial independence, and the independence of federal courts and that of state courts. Judicial independence is thus not an operative legal concept but a technique to describe the consequences of legal arrangements.

Separation of Powers

Most discussions of judicial independence in the United States begin with the autonomy of federal judges and of the federal judiciary.⁵⁵ Pursuant to Article III, Section 1 of the United States Constitution:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.⁵⁶

The significance of this provision lies in a description of judicial independence as an essential aspect of the separation of powers central to confirming the judiciary as the third

⁵⁴ Law, D.S. (2010). Judicial Independence. In *International Encyclopedia of Political Science*, 5, 1369-1372. Retrieved from <http://ssrn.com/abstract=1557348>

⁵⁵ Burbank, S.B. (1999). The architecture of judicial independence. *Southern California Law Review*, 72, 315-351, 316-317.

⁵⁶ U.S. Constitution, Article III, Section 1.

branch of government, assuring that federal judges were to be free of legislative and executive control, and in a position to determine if the assertion of power against the citizens was consistent with law, including the Constitution.

These constitutional guarantees have not frustrated all attempts to control the federal judiciary. Office-stripping, impeachment, and executive court-packing have each been utilized throughout United States history as methods of control, although without much success. Another instrument of executive control is the assertion that the judiciary is “the least dangerous” branch, lacking the power of the purse and the sword, reflecting that judicial independence, as essential for judicial review and judicial supremacy, is meaningless unless the executive branch is willing and able to effectuate and enforce the orders as issued by the federal courts.

Removal through the impeachment process, office-stripping, court-packing, and executive defiance have not been found to be viable methods of control of the judiciary in the United States. As a result, Congress has on numerous occasions turned to the jurisdiction and powers of the federal courts as more promising areas for exercising its control. The executive branch has attempted to exert some control by using its selection of possible candidates for nomination to fill vacancies on all levels of the federal courts, including the Supreme Court.⁵⁷

⁵⁷ Burbank, S.B. (1999). The architecture of judicial independence. *Southern California Law Review*, 72, 315-351, 317-319.

State Courts and State Judges

Most of the judicial function in the United States is conducted in state courts, and it is here that perhaps the most serious threats to judicial independence are directed, at state court judges. Initially, attention to methods of selecting state court judges places in question whether elections are adverse to the goal of insulating judicial decisions from control by a state's executive and legislative branches. Many accounts of state judiciaries have described the movement toward selection of jurists by election as a component of popular democracy, while others argue that such an analysis is not so simplistic. An important goal of many of those who advocated the election of judges was,⁵⁸ "to insulate the judiciary . . . from the branches that it was supposed to restrain."⁵⁹ These people were distressed by the level of partisanship in the existing selection systems and believed that an elective system would be less subject to partisan abuse. However, numerous studies reveal that in many states with elective judicial systems, the majority of judges have been appointed to fill unexpired terms rather than elected.⁶⁰ No matter how they originally came to the bench and regardless of the prescribed term between elections, judges in states with elective systems may serve as long as or longer than judges appointed to serve during good behavior.⁶¹

Elections are potentially a powerful mechanism for influencing judicial decisions at the state level. Nonetheless, elections pose difficulty because of the risk that they

⁵⁸ Burbank, S.B. (1999). The architecture of judicial independence. *Southern California Law Review*, 72, 315-351, 322.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

present to a possible compromise of the rule of law whenever a judge rules differently from the way they might have had electoral considerations not been taken into account.

Historically, the period of actual tenure for state judges is no better guide to the quality of their independence than is the length of their terms between elections. Also, the particulars of the arrangements a state makes for the election of judges can affect perceptions of judicial independence. Even a retention election system designed to afford maximum breadth to judicial independence, while preserving the potential for popular accountability, can be manipulated. Interest-group politics can have an adverse effect on tenure of office and hence judicial independence, as those parties promoting single issues can take advantage of retention elections to attempt to defeat judges whose rulings were not viewed as favorable.

Judicial independence as previously defined is the freedom of courts to make decisions without control by the executive or legislative branches or by the people. Likewise, judicial independence enables judicial review, and is also instrumental in the resolution of ordinary cases according to law, thus, compelling evidence for the association between judicial independence and the rule of law. This relationship requires that those responsible for judicial decisions interpreting laws or making law themselves be impartial, free of interests, prejudices, or incentives that could materially affect or influence the character or results of the judicial process and thus be accountable therefore.

Individual and Institutional Judicial Independence

Judicial independence also exists to protect individual judicial officers from attacks on their judicial decisions, as most contemporary criticisms focus not on the judiciary as an institution, but on individual judges. The capacity of the judiciary, federal and state, to function independently of control by the executive and legislative branches thus requires the capability of individual jurists to enjoy independence beyond the institution of the judiciary itself. It necessitates that the judiciary, as a system of courts, functions and be perceived to function according to law. This demands that individual judges yield some intrainstitutional independence that they may otherwise choose to assert, other than through the text of a dissenting opinion, so as not to place a strain on the public's perception of the rule of law. Continuing disobedience to the rule of law by an individual jurist may result in public awareness of this recalcitrant behavior and precipitate queries as to the implications thereof with respect to the legal system generally.

Federal and state judiciaries should protect themselves by ensuring fidelity to the rule of law. When doing so, claims of judicial independence ought not to be permitted to sacrifice the institution for the individual judge. Judicial independence as a concept describes the consequences of legal arrangements that were designed to protect a branch of government. Individual judicial independence is instrumental to that greater goal, and on occasion must be moderated, or subordinated to the interests of institutional independence, if institutional independence is to be preserved.⁶² To illustrate that judicial

⁶² Burbank, S.B. (1999). The architecture of judicial independence. *Southern California Law Review*, 72, 315-351, 323-329.

independence and judicial accountability are not at odds with each other, the corrupt acts of an individual jurist may reduce the judicial branch's independence through a loss of public respect for the judicial branch. The independence, autonomy, and integrity of a branch of government should take precedence over the independence of an individual officeholder.⁶³

Judicial Independence and Accountability in the States

Currently the conflict in the states over judicial independence and accountability focuses on judicial selection and tenure. Historically, the debate in the states has been much broader, encompassing the role of courts and judges and the character of the judicial function. It has also addressed from whom judges must be independent and for what purpose, to whom they should be accountable, and how that may be accomplished without jeopardizing independence.

Independent of Whom?

Before the American Revolution, colonial governors, selected by the Crown, appointed judges, raising concerns that those selected might be biased in favor of royal interests. Those receiving these patronage appointments served at the pleasure of the Crown rather than, like their counterparts in Britain, during good behavior. Thus, the issue of judicial independence arose in America in reaction to excessive executive control over, and possible manipulation of, the administration of justice. The Declaration of

⁶³ Burbank, S.B. (1999). The architecture of judicial independence. *Southern California Law Review*, 72, 315-351, Footnote 186.

Independence charges the king with⁶⁴ “refusing his assent to laws for establishing judiciary powers,” with making “judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries,” with “depriving us in many cases of the benefits of trial by jury,” and with “transporting us beyond seas to be tried for pretended offenses.”⁶⁵

The Declaration’s indictment of the Crown is framed not through an expression of judicial independence, but in terms of popular access to justice, embracing both the availability of judicial forums, “refusing his assent to laws establishing judiciary powers,” and proper administration of justice within those forums. Proper administration of justice required that trials be presided over by impartial magistrates, not “judges dependent on his will alone,” in venues subject to public scrutiny, not “beyond seas,” and with independent decision-makers who could be trusted to render impartial verdicts, not “depriving us in many cases of the benefits of trial by jury.” Insofar as the Declaration addresses judicial independence, it emphasizes freeing judges from subservience to an unaccountable executive whose interests differed from those of the general public. The Declaration left open whether making the judiciary accountable to the people, either directly or through their elected representatives, posed the same problems for the rule of law or for the impartial administration of justice.⁶⁶

State judges in the decades after Independence may have been appointed by the executive, the legislature, or by some combination of the two, but state legislatures

⁶⁴ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 8-9.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.*

generally dominated judicial selection. Once selected, judges remained under legislative scrutiny, and judges who issued unpopular rulings may have been called before the legislature to explain their decisions. A legislature could eliminate a judge by enacting “ripper bills” that abolished the judge’s position or the court, as the structure of a state court system was typically not established in a state’s constitution. They did, however, customarily guarantee the people’s representatives control over a judge’s continuation in office, provided for short judicial terms or conversely, for tenure during “good behavior.”

A legislature might act against a “misbehaving” judge through impeachment, with the grounds therefore under early state constitutions considerably broader than those under the federal Constitution. States that defined impeachable offenses in their constitutions did so expansively. Several states supplemented impeachment with provisions authorizing the governor to remove judges upon address by two-thirds of the state legislature. Removal by address offered an additional, and potentially far more reaching, mechanism for legislative control. The address did not have to allege willful or criminal misconduct, and it needed only a favorable vote by both houses of the legislature, not an investigation or trial. Thus, judges were not guaranteed the basic elements of due process before they were removed. Address allowed legislators to hold judges accountable not only in cases of clear wrongdoing, as might be reached by impeachment, but even in instances where their performance could not be characterized as criminal. In rejecting removal of federal judges by address, the delegates to the

Constitutional Convention of 1787 indicated their understanding that removal by address had perhaps greater applicability than did impeachment.⁶⁷

Removal of Judges

State legislatures did occasionally employ their removal powers to advance political objectives or punish courts for their rulings. The use of impeachment for political purposes peaked at the state and federal levels during the first decade of the nineteenth century. In the states, concern with respect to a disparity between popular sentiment and judicial ruling underlay the use of impeachment to punish judges for decisions striking down legislation. At the federal level, the unsuccessful impeachment of Justice Samuel Chase established that judges would not be removed for honest mistakes.

No one questioned that judges should be free from influence or manipulation by the executive, but whether they should likewise be immune from influence by the people, or their agents in the state legislature, was unclear. Unchecked judicial power was as dangerous as any unrestrained authority. The system of tenure during good behavior exacerbated concerns about a power not answerable to the people. During the early decades of the Republic, state judges were deemed accountable for their rulings. State legislatures punished judges whose rulings were perceived as exhibiting a partisan bias. Some state legislators believed that judges could be removed for mistaken rulings, even

⁶⁷ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 10-14.

though rendered in good faith. State legislatures felt justified in exercising such oversight as they believed they were acting as the agents of the people.

By the 1830s, the popular loss of confidence in the judgment and integrity of legislators led constitutional reformers to seek controls on state legislatures, rather than continuing to rely upon them to supervise the courts. The objective thus shifted to judicial oversight of state legislatures, so states began the transition to judicial elections. Elected judges could claim just as compelling a connection to the people, the source of all political authority, as legislators could, and this gave them greater legitimacy in challenging legislative enactments.⁶⁸

Independent as to What?

If judges were safeguarded against undue external pressures so they could exercise their judicial powers independently, their domain of authority needed to be determined. The definition of the judicial realm changed over time, with judicial review of legislation receiving the most attention.

An initial issue was whether there was a distinctly judicial function. During the colonial period there was an established practice of legislative adjudication that paralleled dispute resolution on the basis of law by the courts, a practice that reflected a distrust of judges who owed their continuation in office to the favor of the Crown. After Independence, safeguards were designed to prevent misuse of the legislature's

⁶⁸ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 14-18.

adjudicative power, such as, state constitutions prohibiting bills of attainder and retrospective laws, but this did not preclude legislative adjudication.

Once decided that the judicial branch alone should resolve disputes, judges did not exercise this sole authority, but shared decision-making responsibilities with juries, which ensured popular participation in the administration of justice. This role of the jury necessarily diminished the function and task of the judge. During the colonial period, the jury's authority served to restrain abuses by judges who may be susceptible to the blandishments or threats of the Crown, and to block the enforcement of unjust laws by refusing to give them effect. After the Revolution, the selection of judges changed, but the rationale for jury power did not. There was an expectation that the people would control judicial behavior, not only indirectly through selection and removal of judges, but directly through their participation in judicial decisions via the jury process. The jury's authority also reflected an understanding of the character and sources of the law. Most law was common law in comparison to statutory law, and the common law was viewed as arising out of and reflecting the community, rather than as a form of law elaborated by legally trained professionals. The jury served as a shield for the local community against "outside interference."

Although the American judiciary's role in dispute resolution may have been circumscribed during the colonial era, it also exercised powers beyond what today would be understood as judicial powers. Judicial responsibilities included the obligation to furnish legal advice to other branches of government, enshrined in constitutional provisions requiring state supreme courts to issue advisory opinions upon request of the legislature or executive, similar to the abstract review exercised by constitutional courts

today. State judges sporadically took upon themselves a political role, defending the judicial branch against perceived invasions of their prerogatives by issuing resolutions attacking the constitutionality of legislative enactments.

These wide-ranging responsibilities of judges in excess of dispute resolution discouraged the development of discourse on judicial independence and accountability because the definition of judicial independence and the arguments in support thereof are premised on judges being engaged in the resolution of disputes. The development of reasoning and contentions for judicial independence required a distinct judicial function that differentiated the tasks of courts from those of the other branches and confined the courts to those assignments.

The eighteenth century produced a distinctive conception of the place of the judiciary in government. The line distinguishing the judicial branch from the other branches and the judicial function from other provinces proved to be unclear and permeable. In such a legal context, the contemporary debate about judicial independence and potential threats to the impartial administration of justice would have been incomprehensible. For this debate to develop, changes had to occur in legal and political institutions. Courts had to obtain from other governmental institutions exclusive control over the resolution of disputes. Judges had to make an effective assertion that their legal expertise gave them a preeminent ability to enunciate and interpret the law and that a proper exercise of that responsibility required judicial independence. The nineteenth century witnessed the beginning of these changes.⁶⁹

⁶⁹ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 18-25.

The Changing Judicial Function and Judicial Independence

During the first half of the nineteenth century, the responsibilities of state judicial branches expanded, so that by the 1850s state courts were exercising essentially the same decisional power that they do today. States moved to protect the judicial sphere by eliminating the participation of other institutions in matters that today are recognized as inherently judicial. State legislatures ceased granting new trials to disappointed litigants, state courts expanded their authority, taking from juries the power to find the law and undertaking to shape the common law, and they extended and solidified their power to strike down statutes as unconstitutional.

Judicial review emerged following independence as crucial in defining the scope of judicial supremacy. By refusing to give effect to unconstitutional laws, courts were reaffirming the constitution as fundamental law and protecting the citizens against legislators who sought to transgress its safeguards. The doctrine of judicial review attained general acceptance by 1820, as *Marbury v. Madison* had been decided on the federal level in 1803.

Over time the task of constitutional interpretation came to be seen as no different in character than the uncontested judicial responsibility of applying and enforcing ordinary law. Judicial review also became a judicial prerogative to choose among competing interpretations of the state's constitution. These shifts provided the foundation for the institutionalization of judicial review and with this acceptance, the debate switched from the issue of judicial review to the subject matter of judicial independence and judicial accountability.

After the revolution, some Americans opposed the continued reliance on common law, arguing that it was tainted through its association with the Crown. They also distrusted the common law because it was inaccessible to ordinary citizens, empowering legal professionals, judges and lawyers, who understood the common law so as to manipulate it for their own self-interested purposes. Despite these concerns, no state abolished the common law, instead receiving it with reservations. Legal continuity was necessary because it would have been difficult to craft an entirely new body of law in the midst of a revolution.

During the early nineteenth century the state judge's role in the enunciation of the common law altered. For a system of case law to operate, judges and attorneys had to have easy access to appellate rulings; therefore, a readily available body of American case law developed. Judges also began to set aside jury verdicts as contrary to law, and they claimed broad authority to determine what was law. Also, judges adapted common law principles when they no longer served the purposes for which they were created. Although precedent continued to exert considerable influence, judges came to believe it appropriate to depart from precedent if considerations of social policy justified a shift or to avoid manifestly unjust results. This conception of the law encouraged legal innovation by state judges, involving them to choose among policy directions rather than merely elaborating unchangeable principles.

The legal profession depicts judges as trained professionals, possessed of expert knowledge, dealing dispassionately with complex, technical and sometimes arcane subject matter. This description helps justify judicial independence, by asserting that non-lawyers lack the legal expertise necessary to comprehend the responsibilities of

judges or to critique their rulings in an informed manner. This conception of judicial independence had to be constructed and connected to the rule of law and to the conception of judges as experts in the law. In the states, this did not occur until the nineteenth century as the emergence of this new understanding had to await developments in the law, courts, legal profession, and society. Among the most important of these were the institutionalization of judicial review, the acceptance of the Constitution in maintaining the distinction between law and politics in the exercise of judicial review, and the proliferation of case law. Developments in the courts included the changing role of the jury and the solidifying of a judicial monopoly over dispute resolution.

In spite of these modifications, efforts to advance judicial independence met with claims that judges, like other officials in a democracy, should be responsive to popular concerns and accountable to the people or their representatives. Critics questioned whether judicial independence would free more than professional judgment and if it might operate to disguise the pursuit of personal interests of the judiciary, the legal profession, or the class to which judges were a part. The emergence of the modern conception of judicial independence coincided with the adoption of reforms that today are viewed to be in conflict with judicial independence, that is, the partisan election of judges and the reduction of judicial tenure from “good behavior” to limited terms of office.⁷⁰

⁷⁰ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 26-37.

Judicial Tenure

During the first half of the nineteenth century, most states abandoned tenure during good behavior in favor of limited judicial terms, preceding by decades judicial elections. By 1860, judges in more than two-thirds of the states were serving limited terms of office.

Initially, the movement to shorter judicial tenure was connected with the effort in the early decades of the nineteenth century to diminish judicial independence and discipline judges who issued unpopular rulings. Limiting tenure along with impeachment, removal by address, and ripper bills, or abolishing courts or their positions, were utilized to restrain courts. Underlying this movement to limit judicial terms were the assumptions that the judiciary posed a threat to popular government, that legislatures should, as the agents of the people, maintain oversight of judicial power and hold judges accountable, and by specific judicial rulings that suggested a disconnect between popular and judicial views.

Judicial Elections

In 1846, New York adopted a constitution under which voters would elect all judges. Within a decade, fifteen of the twenty-nine states in the Union had repositioned to judicial elections. Between 1846 and 1861, eighteen states held constitutional conventions, and sixteen of those states adopted judicial elections in the course of revising their exiting constitutions. These reforms, reducing the number of offices subject to legislative appointment and control and expanding the number subject to popular election, not only increased public control over those officials, but enabled those

officials to claim that they had an equally viable connection to the people as the legislators. Popular election of judges also indicated a loss of public confidence in the judgment and probity of legislators, thus believing it necessary to constrain legislative choice.⁷¹

According to its proponents, popular election of judges would promote judicial independence by freeing judges from partisan control. Less optimistic individuals acknowledged the potential for popular influence on judicial decisions, but concluded that the public threat to independence was not as detrimental as that posed by powerful interests or by the other branches of government. The choice was framed as one between influence by the populace as a whole, which contributed to justice, versus influence by a segment of society that sought its own advantage.⁷²

Nineteenth-century proponents of popular elections believed that they would empower judges by granting them democratic legitimacy, liberate them from the control of political elites and special interests, and thereby embolden them to strike down legislative enactments that violated constitutional norms. The available data on the exercise of judicial review are consistent with the notion that popular election freed judges to scrutinize legislative enactments more closely.⁷³ Judges felt an increased freedom to interpret and apply the law without fear of political repercussions, an important element of the definition of judicial independence. This is important because popular election of judges did not eliminate partisan politics from judicial selection.

⁷¹ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 40-46.

⁷² *Id.* at 48.

⁷³ *Id.* at 51.

Nominees for judicial office were, until the advent of primary elections in the early twentieth century, chosen by party conventions and they then had to run for election on party labels. Those nominated were typically party stalwarts. The prevalence of party voting reflected the significance of strong partisan allegiances and the usefulness of a party as a voting cue in the absence of other information that might have informed voter choice.

Voters were also amenable to lengthening judicial tenure, beginning in the 1860s; several states extended terms of office so that by the latter half of the nineteenth century, the average term in office for a state judge was 8.9 years. While acknowledging that longer periods in office reduced the frequency of public scrutiny, proponents insisted that they encouraged judicial independence, reduced the influence of party leaders, and the possibility for corruption in judicial selection.⁷⁴

Judicial Independence and Accountability in the Progressive Era

The issue of judicial independence and accountability once again arose in the late nineteenth century through the involvement of both federal and state courts in making public policy. This led to proposals such as the recall of judges and legislative review of judicial decisions. Recall suggests an expansion in the mechanisms to enforce judicial accountability and in the eyes of critics, to invade judicial independence. By the end of the nineteenth century, many believed that judges were usurping legislative power, thus, judges went from being perceived as a solution for problems to being comprehended as

⁷⁴ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 52-54.

the difficulty themselves. Detractors surmised that via judicial review, judges maintain a veto power, and had become a political organ of government without corresponding political responsibility.

Popular Recall of Judges

Debate surfaced relative to consideration of methods, other than judicial selection and tenure, for constraining judicial power and enforcing accountability. Primary among these was the recall, under which voters would be authorized to remove judges from office prior to the expiration of their terms. Those individuals opposing recall conjectured that recall posed an even greater threat than elections because it promised immediate retribution for unpopular decisions. Judges fearful of removal would weigh popular sentiment into their decisions, and this would undermine the rule of law. Judges who were subject to impeachment had the opportunity to hear the charges against them and defend themselves, whereas, recall offered no such guarantee of due process. Additionally, because recall was involved when the populace disagreed with judicial rulings, it reflected popular willfulness, rather than a desire to uphold the law against judicial usurpations.

Recall of Judicial Decisions

As an alternative to the recall of judges, Theodore Roosevelt proposed in 1912, that voters have the power to recall judicial decisions in which judges ruled that a law violated either the federal Constitution or a state constitution. Recall of decisions would enable the populace, through ballot question, to overturn judicial interpretations of a

constitution without constitutional amendment. Roosevelt contended that his proposal safeguarded judicial independence more so than judicial recall because it permitted the correction of judicial decisions without intimidating judges by threatening their positions. Critics maintained that such a popular intrusion into the legal realm would politicize legal issues and threaten basic constitutional freedoms. However, the recall of judicial decisions, like the recall of judges, had no practical or operative effect on judicial independence.⁷⁵

Nonpartisan Judicial Elections

A movement then commenced favoring replacing partisan election of judges with nonpartisan elections, in which candidates would run in nonpartisan primaries and the two candidates receiving the most votes would then run without party labels in the general election, in an effort to reduce the influence of political parties. Proponents of nonpartisan elections believed that insulating judicial candidates from the influence of political parties throughout the selection process was of utmost importance.⁷⁶

Nonpartisan elections disappointed many reformers as they reduced voter participation in judicial races, and thus accountability. It was avowed that without gatekeepers to exclude unqualified aspirants, nonpartisan elections attracted the wrong lawyers for the positions, that they did not eliminate the influence of party leaders, who discovered new contrivances to dominate the electoral process, and they failed to enhance the quality of the bench because voters purportedly lacked the knowledge to choose

⁷⁵ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 56-62.

⁷⁶ *Id.* at 63-64.

among competing candidates. Thus, as early as 1913, it was alleged that nonpartisan elections failed to secure judicial independence and an alternative was sought.⁷⁷

Merit Selection

As an option, merit selection was proffered. It was argued that the only effective way to insulate judges from external pressure was to eliminate the input of political parties and the populace in the selection of judges, substituting a system of professional appointment. In 1940, Missouri became the first state to institute merit selection for all its judges, with the governor as the appointing authority.⁷⁸

Outcomes

Few states adopted the recall of judges, recall of judicial decisions, or other reforms offered by proponents of judicial accountability, as judges were infrequently recalled, and court rulings denied the recall of judicial decisions of their effectiveness. By contrast, several states moved from partisan to nonpartisan judicial elections, and a large number transposed to merit selection later in the century.⁷⁹

These results reflect the differing perspectives of proponents of judicial accountability and advocates of judicial independence. Those calling for greater accountability were interested in the substance of judicial rulings. They espoused increased accountability in order to reorient court rulings, which they viewed as distorted

⁷⁷ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 64.

⁷⁸ *Id.* at 64-65.

⁷⁹ *Id.* at 65.

by political ideology and class loyalties. Proponents of judicial independence were concerned with eliminating partisan and popular pressures on the courts. They believed that making courts responsive to professional norms rather than external forces would contribute to the rule of law and enhance the standing of the courts. As a result, they sought nonpartisan elections and subsequently, merit selection, enjoying considerable success in their endeavors.

This past is an exemplar for the current debate over judicial selection and judicial performance. Today, the complaint is expressed that judges frustrate popular government by reading their own ideological predilections into the law through judicial activism, and that merit selection places political power in the hands of judges. These positions are criticized, stating, that unfair ideological attacks on the courts, combined with political efforts to influence judicial rulings, are subverting public respect for the courts and threatening the rule of law. As in the past, those advocating merit selection and retention elections find themselves on one side of the ideological divide, viewing the problem less in terms of the substance of judicial rulings and more in terms of the quality of the bench and its insulation from political influences. Having had the benefit of a half-century of experience with nonpartisan elections and merit selection, an assessment of their actual effectiveness in safeguarding judicial independence while ensuring appropriate judicial accountability can be rendered.⁸⁰

⁸⁰ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 65-67.

The Changing Face of State Judicial Selection

For most of the twentieth century, state judicial elections, whether partisan or nonpartisan, contested or retention, tended to be de-politicized and subdued events. Incumbents often ran unopposed and if contested, they rarely encountered serious challenges. Candidates did not raise substantial campaign funds, advertise in the media, or commence sustained attacks on their opponents. This was by design. Rules promulgated in the states, guidelines established by the American Bar Association, and state bar associations, prohibited candidates for judicial office from stating anything controversial, as their statements may compromise judicial independence or vitiate impartiality. Such low-spending, low-conflict campaigns attracted little attention. In recent decades however, the situation has changed. The progression for merit selection has halted, no state since 1994, has adopted it as a method of choice, although no state has yet replaced it with an alternate form of approbation. Today, incumbents are far more likely to face electoral competition. Judicial races have also become increasingly visible in the public's consciousness. This transformation extends to partisan and nonpartisan races, to contested and retention elections alike. As of 2012, nine states selected their state supreme court justices in partisan elections, thirteen in nonpartisan elections, and fifteen through a system of merit selection in which justices run in retention elections after their initial appointments. In addition, justices in California were appointed but ran in retention elections, and justices in New Mexico were appointed with the use of a nominating commission but ran for their initial reelection in partisan races.⁸¹

⁸¹ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 69-70.

Seven states that employ merit selection do not use retention elections, either awarding tenure during good behavior or to a retirement age or providing for reappointment rather than election for continuation in office.⁸²

Campaign Spending for Judicial Offices

Judicial election campaigns are more expensive than in the past, with the largest contributors being businesses, lawyers, and lobbyists. Interest groups, political parties, and individuals also spend substantial sums to elect judges. Open-seat races tend to be more expensive than incumbent-challenger contests. Partisan races are likewise generally more costly than nonpartisan contests.⁸³

The threat need not emanate from an opposing candidate. Although incumbents are nearly always retained in retention elections, the absence of opposing candidates is no guarantee that those elections will be uncontested. Whereas opposing candidates must file for candidacy, making known their intention to contest a race, groups seeking to defeat a sitting judge need not state their intentions early in the process. Thus uncertainty relative to opposition in a retention election may lead to the same fundraising and campaigning found in contested elections, even when incumbents are not challenged.

Incumbents typically can raise and spend more than challengers. The fact that incumbents can raise more money than their opponents does not guarantee electoral success; the adversaries only need raise sufficient funds to mount a competitive

⁸² Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 200, Footnote 17.

⁸³ *Id.* at 70-71.

campaign. It is the level of challenger spending, not of incumbent spending, that most affects vote margins in incumbent-challenger races.⁸⁴

The escalating cost of judicial campaigns is a threat to judicial independence. Having to raise money may create a sense of obligation, and a concern not to alienate potential contributors to future campaigns may also influence judicial decisions. Expensive campaigns may undermine respect for the judiciary through the perception that contributors are manipulating court rulings. Both poll and experimental data confirm that campaign contributions adversely affect public perception of judicial impartiality and the institutional legitimacy of courts.⁸⁵ Conversely, others view the increased expenditures in judicial races as positive, bringing judicial elections into line with races for other political offices. The belief asserted is that increased spending provides more voter information and correspondingly, higher voter participation. Greater involvement by an informed electorate enhances accountability.⁸⁶

Television and Campaign Advertisements

Judicial campaigns have not only become more expensive, they have also changed in character. Campaigns have not abolished traditional means of communicating with voters, such as public appearances, posters, and leaflets, but there is now a reliance on mass media, especially television.

⁸⁴ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 72-73.

⁸⁵ *Id.* at 73.

⁸⁶ *Id.* at 73-74.

Although judicial candidates are responsible for a majority of television advertisements in judicial elections, increasingly interest groups and political parties have purchased airtime to support their favored candidates or, more frequently, to attack their opponents. Accompanying the increasing involvement of interest groups in political advertising has been a modification in tone, as television ads assail the character, integrity, and rulings of incumbent judges. These advertisements encourage voters to cast their ballots based upon their agreement or disagreement with judges' rulings on particular issues rather than on whether they adhered to the law, perhaps tempting judges to constitute their rulings on what is popular rather than what the law requires.⁸⁷

Group Participation in Judicial Selection

A significant development in judicial elections has been the increased involvement of interest groups in the selection process. In recent years they have recognized that a mechanism to shape the development of the law is by affecting who sits on the bench, and these groups have increasingly sought to influence judicial composition irrespective of the selection system. Interest group opposition to candidates has changed the intensity and character of the election process as they have the resources to increase the salience of judicial races, and because they are not bound by the ethical restrictions that may otherwise limit the campaign messages of judges and judicial candidates. The increased involvement of interest groups in judicial elections is likely to continue

⁸⁷ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 74-75.

because, whereas a change in a single seat in the state legislature may have only a minimal effect, the results of replacing a single justice may be dramatic.⁸⁸

United States Supreme Court Involvement

In *Republican Party of Minnesota v. White* (2003), the United States Supreme Court upheld a challenge under the First Amendment prohibiting judicial candidates from announcing their views on contested issues that might come before the courts. Before this ruling, state codes of judicial conduct restricted what those seeking or holding judicial office could say in judicial campaigns. In the wake of *White*, groups can now more effectively press candidates to announce their attitudes on disputed legal and political issues and publicize those views to the electorate.⁸⁹

Those individuals defending judicial independence condemn the changes in the character of judicial elections, arguing that the movement to competitive and politicized elections promotes a false accountability, while threatening judicial independence, the rule of law, and the quality of the bench. For others, the escalation in the costs of judicial campaigns is a positive development in that it signals that races for judicial office have become more competitive, and that this increased competition translates into additional meaningful choices for the electorate as greater information is transmitted to the voters.⁹⁰

⁸⁸ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 81-84.

⁸⁹ *Id.* at 84-85.

⁹⁰ *Id.* at 89.

Reconsidering Judicial Elections

In recent years, the literature condemning judicial elections has proliferated; however, no state since 1985 has abandoned contested judicial elections. Public opinion polls continue to reveal strong popular support for electing judges, even as they disclose citizen concern relative to the influence of financial interests on judicial elections, approximately 89 percent of state judges face election at some time in their judicial careers. Judicial elections now closely resemble races for other political offices with their increased spending, interest-group involvement, and acerbic political advertising.⁹¹

Some individuals deny that judicial elections promote meaningful accountability to the public, as nearly 80 percent of the electorate does not vote in judicial elections with the same percentage unable to identify the candidates for judicial office. In partisan elections, the selection of which candidates will appear on the ballot may be dominated by party leaders.⁹²

For voters to hold judges accountable, elections must not be merely contested but competitive, there has to be an actual possibility that incumbents will lose. There are also important differences among partisan, nonpartisan, and retention elections, where judges are rarely not retained. Retention elections usually fail to provide meaningful accountability, but the same is not true for partisan and nonpartisan elections. Partisan elections are almost always contested, and nonpartisan elections are increasingly contested. Partisan races offer genuine opportunities for turnover and hence, the potential for significant accountability. However, if a partisan or nonpartisan election is

⁹¹ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 122.

⁹² *Id.* at 123.

uncontested, there is no way for voters to render a verdict on a candidate. In such circumstances retention elections provide greater accountability because voters can vote for or against an incumbent judge.⁹³

Concluding Remarks

Many scholars, including Burbank and Friedman, as editors of *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, have suggested that judicial independence and judicial accountability “are complementary concepts that can and should be regarded as allies.”⁹⁴ Others suggest that these two hypotheses are opposed or at least in tension with each other, and that certain choices must be made as delineated herein.

Ultimately, a broader perspective may be appropriate, one that focuses on the substance of the law rather than solely on the independence or accountability of its interpreters. In a system of self-government the people should determine, either directly or through their elected representatives, the substance of the law. Judges may say what the law is, but the people must say what it should be. Provided this ability endures, so will our government and country based on the rule of law.

This chapter has described the elements necessary for judicial independence and judicial accountability within a democracy. The chapters that follow will concentrate upon and describe the ramifications to German society when judicial independence and

⁹³ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 124-125.

⁹⁴ Burbank, S.B. & Friedman, B. (Eds.) (2002). *Judicial independence at the crossroads: An interdisciplinary approach*. (Thousand Oaks, CA: Sage Publications, Inc.), 10.

the rule of law were deliberately and willfully abrogated in accommodation to and countenance of a tyrannical authority.

In Nazi Germany, judicial independence was abolished for both the individual judge and for the judiciary as a whole. Members of the bench were expected to follow the “general line” dictated by the regime and to give deference to this ideology when rendering their judgments. Separation of powers was considered to be an archaic doctrine and judicial elections were nonexistent. Only jurists who would acquiesce to the dictates of Nazi tyranny were permitted to retain their judicial office or be subsequently appointed thereto by Adolf Hitler and his Nazi sycophants, with resulting consequences that will relentlessly endure in eternal infamy.

Chapter V: Judicial Independence, or a Lack Thereof, in Nazi Germany

This dissertation asserts that a lack of judicial independence and autonomy were precipitating factors in the annihilation of individuals by malevolent judicial officers presiding within the Nazi regime. Judges in Nazi Germany were not free to decide cases unfettered by the whims of the criminal Nazi organization, but received both general and specific instructions so as to administer predetermined judicial findings and judgments.

Sharply contrasted with high degrees of autonomy are situations where the courts serve only at the pleasure of despotic rulers, with its functionaries appointed by such entities . . . Judges in those circumstances understand that they (have) little autonomy . . . Judges under such systems understand that they are to assist in implementing an ideology.⁹⁵

For the unfortunate people who are presented in the case studies contained hereinafter, it was the actualization and enforcement of Nazi dogma that was the provocation for their destruction.

The Nazi conspirators restricted and abrogated the independence of the judiciary and rendered it subservient to their ends. Like all other public officials, German judges who failed to comply with the racial and political requirements of the Nazis were removed from office. Nazi legal theorists admitted that there was no accommodation in their scheme for independent judges. They controlled all judges through special directives and orders from the leadership. The role of the judge was that of a political functionary and as an administrator in the National Socialist state.

⁹⁵ Richardson, J.T. (2006). The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis. *Sociology of Religion*, 67(3), 282.

After the war began, Otto Georg Thierack, then Minister of Justice, revealed the state to which the judiciary had fallen under Nazi rule. He stated that judges were not the “supervisor” but the “assistant” of the government. He announced that the word “independent,” as applied to judges, was to be eliminated from the vocabulary and that although a judge could retain a certain freedom of decision in some cases, the government “can and must” give him the “general line” to follow. For this purpose, Thierack decided in 1942 to send letters to German judges setting forth the political principles and directives that all judicial personnel were obligated to discharge.⁹⁶

During the 1930s, the German rule of law began a precipitous decline that accompanied the rise of the National Socialist German Workers’ Party, the Nazis. In a 1934 speech, Hitler provided his conception of judges and the law:⁹⁷

If anyone reproaches me and asks why we did not call upon the regular courts for sentencing, [those responsible for the actions that transpired during the Night of the Long Knives] my only answer is this: in that hour, I was responsible for the fate of the German nation and was thus the Supreme Judge of the *German Volk* . . . When people confront me with the view that only a trial in court would have been capable of accurately weighing the measure of guilt and (and) expiation, I must lodge a solemn protest. He who rises up against Germany commits treason. He who commits treason is to be punished not according to the scope and proportions of his deed, but rather according to his case of mind as revealed therein.⁹⁸

⁹⁶ Nazi Conspiracy & Aggression: Means used by the Nazi conspirators in gaining control of the German state. (n.d.). In *The Nizkor Project*, 1(7), 227-229. Retrieved from <http://www.nizkor.org/hweb/imt/nca/nca-01/nca-01-07-means-18.html>

⁹⁷ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. Chicago, IL: ABA Publishing, 45-47.

⁹⁸ *Id.* at 47.

Hitler essentially explained away the need for an independent judiciary; he knew treason when he saw it, and he could grasp by intuition a guilty mind, from the fact of the treasonous act itself. In Hitler's conception of justice, judges, without discretion of their own, were merely to be the administrators of the regime's precepts.

Based on these principles, Hitler established the *Volksgerichtshof*, or People's Court, which, rather than serving the people, represented only the interests of Hitler and the National Socialists. He then sought and received passage of the Enabling Act, which greatly expanded his plenary powers and allowed the executive to pass laws, budgets, and modify the constitution. Articles Two and Three of the Act provided that the Chancellor could unilaterally enact laws, and that those laws could deviate from the Constitution. The Enabling Act allowed Hitler to promulgate any law he desired, and the judges of the People's Court would ensure that his edicts and "justice" were swiftly carried out. Hitler used the Law for the Restoration of the Professional Civil Service to further frustrate judicial independence, as this law required judges to approach cases with "a healthy prejudice" and enter their decisions in accordance with "the main principles of the Führer's government."⁹⁹

Immediately after he enacted the Law for the Restoration of the Professional Civil Service, Hitler expelled from the judiciary Jewish judges, judges unsympathetic to the Nazi philosophy, and judges who refused to comply with executive directives. He appointed partisan judges, who were, according to the Vice President of the People's

⁹⁹ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. Chicago, IL: ABA Publishing, 47-48.

Court, Karl Engert, “politicians first and judges second.”¹⁰⁰ The resultant distorted entity was a justice system in name only; the People’s Court spewed injustice, inequity, and prejudice.

After Hitler had solidified his power and dismantled the independent judiciary, which before the Nazi regime was guaranteed by the Weimar Constitution, he was free to begin his barbaric agenda of depopulation and social engineering. By the time World War II had commenced, Hitler and the Nazi party had complete control over the legal system, both legislative and adjudicative.

On April 26, 1942, Hitler informed the Reichstag that he would have exclusive control over the tenure of judges:¹⁰¹

I do expect one thing: that the nation gives me the right to intervene immediately and to take action myself whenever a person has failed to render unqualified obedience . . . I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty and to cashier or remove from office or position without regard for his person or his established rights, whoever, in my view and according to my considered opinion, has failed to do his duty From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.¹⁰²

The Reichstag confirmed Hitler’s request and resolved that:

The Führer must have all the rights postulated by him which serve to further or achieve victory. Therefore—without being bound by existing legal regulations—in his capacity as leader of the nation, Supreme Commander of the Armed Forces, governmental chief and supreme executive chief, as supreme justice, and leader of the

¹⁰⁰ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. Chicago, IL: ABA Publishing, 48.

¹⁰¹ *Id.* at 48-49.

¹⁰² *Id.* at 49.

Party—the Führer 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 violation of these duties, the Führer is entitled after conscientious examination, regardless of so-called well-deserved rights, to mete out due punishment, and to remove the offender from his post, rank and position, without introducing prescribed procedures.¹⁰³

Hitler had placed himself in such a position that he was released from the bounds of law, he was now above the law, and the judiciary was unreservedly merely a constituency of his sycophants.

It is averred that in the courts of the Third Reich, justice, customarily considered to be based on moral or ethical absolutes, was rendered an entirely relative concept. It was based upon the caprice of a small clique of ruling elites. When adjudicating cases, judges found no guiding principles to consult and no consistent rule of law to call upon. Rather, in any given case, they waited for the executive to determine the “law” to be applied.¹⁰⁴ The actions of the People’s Court, as hereinafter described, exemplify that executive orders have no prerogative in the courts.

In the Third Reich, it is proffered that constant pressure on judicial officers to make their decisions conform to political objectives eroded the judiciary of its independence and autonomy until it became an undistinguished administrative body without discretion, capable of the most grievous violations of human rights. If the ordinary citizens, as subsequently described, were willing to risk their lives to challenge

¹⁰³ Baer, H., Jr. (2011). *Judges under fire: Human rights, independent judges, and the rule of law*. Chicago, IL: ABA Publishing, 49-50.

¹⁰⁴ *Id.* at 58.

the transgressions that surrounded them, certainly judges, those specifically entrusted with maintaining and advancing justice, might have made a stand against Hitler's regime of injustice. Instead, the judges of the People's Court conformed and reconciled their judicial conduct to Hitler's will, forsaking their independence and autonomy. Their motivation for abandoning their judicial independence is not of great significance. Be it because of fear, greed, opportunism, or indifference, it made no difference; the result was wrongful imprisonment, torture, annihilation, genocide, and one of the darkest chapters in human history.

It was then and remains now a constant endeavor for judges to determine what the safeguards are that protect a structure of laws and thus a society. It is postulated that if a judge waits until their only choice is to submit or resign their position, then judicial independence has already been abolished and overwhelmed. Any meaningful opportunity for peaceful action to redeem the rule of law had heretofore been suppressed and extinguished.

Chapter VI: How Could German Civilization Collapse So Completely?

In order to embrace the lack of judicial independence and autonomy that came to exist in Nazi Germany, it is imperative for the reader to comprehend the societal milieu existing within Germany that validated the Nazi's initial assumption of governmental authority. This environmental chaos is discussed in "How Could German Civilization Collapse So Completely?"

The National Socialist German Workers' Party, abbreviated NSDAP, the members of which became known as Nazis, from the German word for National, i.e., *Nazional*,¹⁰⁵ initially stated with complete candor what they desired. On April 30, 1928, Joseph Goebbels pontificated:

We're entering the Reichstag to arm ourselves from democracy's arsenal. We will become Reichstag members in order to paralyze the Weimar mentality with its own support. If democracy is so stupid as to give us free railway tickets and allowances for this disservice, then that's their business. According to the constitution we're obliged only to observe the legality of the road, not the legality of the goal. We want to conquer power legally, but what we do with that power once we've got it is up to us.¹⁰⁶

Germany in the decade of the 1930s was in extreme turmoil and deeply affected both financially and socially by the loss of the First World War. Political chaos bordered on civil war, currency lost its value as a result of devastating inflation, and the rampant unemployment rancored the working class against the government's failure to alleviate these collective afflictions in the years preceding Hitler. All of this disorder enabled

¹⁰⁵ McCabe, J. (1937). *Nazism and the state of Germany: An account of the rise of Hitler and the appalling conditions which have resulted from his usurpation of power.* (Girard, KS: Haldeman-Julius Company), 5.

¹⁰⁶ Bruhns, W. (2009). *My father's country: The story of a German family.* (New York, NY: Vintage Books), 218-219.

Hitler to rise to power even though his party never held a majority in the Reichstag. His was a coalition government arising from an environment in which a number of factions competed against one another, preventing any one party from obtaining an indomitable position with the electorate.

It was this divisiveness that provided Hitler with his opportunity. The diverse political groups were unable to unite to solve Germany's economic and social maladies. Hitler succeeded in creating a compromise based upon anti-Semitism as the uniting theme. His views were not new as anti-Semitism had been expressed over a long period of time within Germany, and he was able to build upon this base, which had been tolerated and had a long-standing history of its own. The Nazi goal of destroying the Jews in Europe was developed by appealing to those elements that embraced anti-Semitism, by strengthening their position politically and by electing Nazi officials. Hitler rose to power on the pretense that Jews were separate from Germans, and that mutual coexistence between these two groups was not possible. Nazi philosophy rested upon the supposition that the existence of the Jewish "race" was a threat to the survival of the German "race." In order to affect this distinction, the Nazis had to invent racial terms for groups that were not racially distinct. To effectuate this alleged difference, Hitler incorporated into German folklore the pretext of an "Aryan" race, and made Aryan a Nordic and racial concept, a pure Caucasian race of people whose racial purity required preservation and protection from "lesser" races, particularly those of Slavic and Jewish origin.¹⁰⁷

¹⁰⁷ For additional information on this subject matter, see *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, by Daniel Jonah Goldhagen.

The Nazi regime placed into existence the theory that one race is superior to another. This Aryan concept became state policy in Germany in 1933, when it was made legal and legitimate through the force of law.¹⁰⁸

Anti-Semitism in Germany can be traced to Martin Luther, German founder of the Protestant Reformation, in addition to others. Luther suggested that the proper treatment for Jews was to burn their synagogues, destroy their houses, take their books, forbid rabbis to teach, and deny them access to public roads.¹⁰⁹ The ideas articulated by Luther were continued with tragic implementation by Hitler.¹¹⁰

Other declarations of the Nazis arose from the German nationalistic movement initiated in the late eighteenth century. German philosopher, Johann Gottlieb Fichte, known as the father of German nationalism, saw Jews as a threat to the German state, and helped consolidate the idea of German nationalism as an ideal of racial purity. In 1793, Fichte described Jews as a state within the state and advocated that permitting their presence to continue would destroy Germany. Fichte's theories became popular to Germans. For Germans, the term *Volk* held a much greater meaning than simply "the people."¹¹¹ A derivative of the word "*volkisch*," meaning "ethnic," *Volk* implied a distinction that was racial in fervor and depth, and encompassed the entire fiber of the German way of life, "culture, territory, morality, attitudes, and the heritage, both

¹⁰⁸ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945.* (Jefferson, NC: McFarland & Company, Inc.), 5-6.

¹⁰⁹ *Id.* at 6.

¹¹⁰ For additional information on this subject matter, see *The Destruction of the European Jews*, by Raul Hilberg, and *The war against the Jews 1933-1945*, by Lucy S. Dawidowicz.

¹¹¹ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945.* (Jefferson, NC: McFarland & Company, Inc.), 7.

historical and racial, of Germany.”¹¹² Elucidating upon this definition, Lucy S.

Dawidowicz articulated that *Volk*:

. . . is a word that has come to mean more than simply ‘a people,’ more than the usual idea of a people united by common traditions and cultural heritage, language, territory, values, and morality . . . it signified the union of a group of people with a transcendental essence . . . sometimes called nature, cosmos, mythos. This essence was fused to man’s innermost nature, and represented the source of his creativity, his depth of feeling, his individuality, and his unity with other members of the *Volk*.¹¹³

Being German allowed an individual to have a sense of *Volk*, while being non-German or non-Aryan meant that one did not have *Volk*. According to this rationale, Jews thus did not have validity as people, nor did they have character as individuals.

Publishing pamphlets and public oratory to convey anti-Semitic propaganda gave way to a more formal movement in 1878, with the first overtly anti-Semitic political party being formed in Germany, the Christian Social Worker’s Party.¹¹⁴ Its theme was that, “everything that was wrong in the world was a consequence of an international Jewish conspiracy.”¹¹⁵ The momentum of anti-Semitism continued to the turn of the century with politicians being more willing to express their desires for drastic measures against the Jews. Jews were described as nonhuman, alien, not deserving of life, and certainly not entitled to the treatment of a native German. Anti-Semitism diminished as the First World War approached, but once again, increased as the tide of war turned

¹¹² Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 7.

¹¹³ Dawidowicz, L.S. (1975). *The war against the Jews 1933-1945*. (New York, NY: Holt, Rinehart and Winston), 34-35.

¹¹⁴ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 7-8.

¹¹⁵ *Id.* at 8.

against Germany. Military setbacks and food shortages led to anti-Semitic forces blaming the Jews for the tribulations suffered by Germany.

The decade of the 1920s led not only to significant anti-Semitic literature being published, including, in 1925, Hitler's *Mein Kampf*, or My Struggle, but elements within the scientific community became interested in the concept of racial purity. By 1923, Fritz Lenz, a physician and geneticist, criticized the lack of laws designed to protect racial purity. Lenz advocated forced sterilization to protect racial hygiene, reasoning that the state had the right and responsibility to decide who should be permitted to procreate. The Nazis espoused this proposition to support their policy of genocide for the benefit of the Aryan race.¹¹⁶

The German tolerance of Nazi anti-Semitism developed through decades of justification for those beliefs. Germany's disintegration at the conclusion of World War I helped to accentuate the anti-Semitic attitude within the country. These antagonistic feelings were also intensified by the Allies' treatment of Germany in the peace negotiations. President Wilson demanded the abdication of Kaiser Wilhelm II as a condition of signing the armistice along with the principles delineated in his Fourteen Points. Subsequently, Wilson qualified his offer: peace terms were still to be formulated on the Fourteen Points, but with two exceptions. First, the Allies were to be compensated for war damages through reparations, and second, Great Britain was to retain its right to control of the seas. The onerous restrictions placed upon Germany by the terms of the Versailles Treaty were to become a uniting point for the German nation.

¹¹⁶ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 10-11.

For Germany, the most controversial clause contained in the peace treaty was Number 231, the War Guilt Clause, which read:¹¹⁷

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.¹¹⁸

This clause became the foundation upon which the justification for charging Germany reparations for the costs associated with the First World War was then based. Because Germany was not permitted to participate in the actual peace discussions, it was thus denied the ability to protest either the clause or the amount of required reparations it would have to remit. For Hitler, the War Guilt Clause became one of his major political points. He promised to rectify this clause and punish those responsible for its creation, this becoming one of the inducements for the Second World War.

Conditions within Germany had deteriorated prior to November 11, 1918, the day the Treaty of Versailles was executed. When the Kaiser abdicated on November 9, 1918, as President Wilson had demanded, the German government was in chaos. Civil unrest and discontent prevailed, with the Communists attempting to establish a new government. Having witnessed the consequences of Communism in Russia, many Germans were fearful of this contemplated usurpation of power. On December 23, 1918, an armed group, the Spartacists, endeavored to seize power and promulgate a socialist

¹¹⁷ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 12-13.

¹¹⁸ *Id.* at 12.

republic. To combat these conditions of virtual civil war, the *Freikorps* was organized and prevented Germany from becoming a Communist country in 1919.¹¹⁹

On February 11, 1919, a new government, the Weimar Republic, was formed. The new constitution that was passed and ratified by President Hindenburg on August 31, 1919, contained a clause later employed by Hitler to seize total control of the government. Article 48 gave the president dictatorial powers during an emergency. It also granted Jews complete societal equality. Despite this social guarantee, a recurring theme emerged with respect to the Jews in German temperament; the Jews were responsible for Germany's defeat in World War I and for the punitive provisions embodied in the Versailles Treaty.

The creation of the new republic did not quell Germany's problems. The peace conference formally ending World War I included representatives from 27 countries, but Germany was excluded from participation. By May of 1919, the terms of the German treaty had been confirmed and only then were German delegates asked to attend, explicitly for the purpose of signing the accord, not to negotiate its terms.¹²⁰

Treaty terms included, "disbanding the Austria-Hungary empire, disposal of all of Germany's colonies, a division of the state of Prussia by creating a Polish corridor, and punitive reparations."¹²¹ Germany's armed forces were limited to no more than 100,000 members, they were not allowed any planes or tanks, and the navy was not to build any ships exceeding 10,000 tons. In July of 1920, the Allies agreed to divide the reparations

¹¹⁹ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 13.

¹²⁰ *Id.* at 13-14.

¹²¹ *Id.* at 14.

among themselves, whereby France was to receive 52 percent of the total, Britain 22 percent, and Italy 10 percent, with the remainder allocated to the other Allied powers. Total reparations demanded from Germany were set at 150 billion gold marks. Although the terms of the treaty were unpopular with Germany, its leaders were required to execute the document on June 28, 1919.

Hitler pointed consistently to the Treaty of Versailles as a “stab in the back” of Germany; the Allied powers had made promises, but then failed to honor them. However, Germany had lost the war, its forces being unable to continue in battle nor to break the enemy blockade. The treaty was punitive to Germany and the citizens were aware of this; Hitler made effective recourse of this knowledge in his ascent to power. Widespread bitterness over the retribution extracted by the treaty added to the political and social turmoil within Germany. Anti-Semitism became a focal point for the right wing, and those in the middle classes, longing to regain their lost pride and national identity, were also attracted to the Nazi Party.

This trend continued in the decade of the 1920s, when Nazi voting trends broadened to include a wider segment of the German voting public. The Nazi rise to power was not sudden, nor did its deputies ever represent a majority in the Reichstag, but they were able to accumulate sufficient influence that the government was compelled to acknowledge the Party. Nazi ascendancy occurred through the course of coalition, compromise, and eventually, capitulation of its opponents.

Hitler recognized a need for control on two levels. First, he had to take control of the streets, recognizing that it was better to disrupt the opposition’s rallies with force than to have the opposition do the same to the Nazis. Second, he would need to assume

control of the government. Only by achieving both of these objectives could Hitler hope to gain the support of the military, essential to his ultimate intentions.

The oppressive unemployment experienced in Germany, approximately 40% in the early 1930s, along with the continuing societal chaos, contributed to Hitler's appeal and rise to power. He made it seem plausible that the Jews had "stabbed the country in the back" and were now personally profiting from the German misery. This theme, repeated incessantly over time, became less ludicrous and more acceptable until it was an unchallenged and universally known truth in the minds of most of the German people.

The appeal of the Nazi movement grew from German society's acceptance of anti-Semitism and its victimization of the Jews. Anti-Semitic sentiment progressed to the enactment of formal laws through Nazi dictates, and purposely eroded civil rights leading to the loss of millions of lives, the near-total destruction of European Jewish culture and society, and the emergence of a German resistance based upon these atrocities.

Hitler put his crusade against the Jews into effect through the legal system. He became Chancellor of Germany on January 30, 1933.¹²²

On the evening of Monday, February 27, 1933, the Reichstag building was burned which precipitated, on February 28, 1933, the approval of a statute known as the "Decree of Reich President von Hindenburg for the Protection of People and State," better known as the "Reichstag Fire Decree." The first paragraph suspended the civil liberties contained in the Weimar Constitution, permitted the imprisonment without trial of anyone the regime deemed to be a political threat, and read as follows:

¹²² Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945.* (Jefferson, NC: McFarland & Company, Inc.), 14-16.

Restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and association, and violations of the privacy of postal, telegraphic and telephonic communications, and warrants for house searches, orders for confiscations as well as restrictions on property rights are permissible beyond the legal limits otherwise prescribed.¹²³

June 22, 1933, saw the enactment of a sterilization law, granting to government the legal right to control the determination of whether a life was unworthy of living. Genocidal policies also arose in law, with the first of these mandates regulating the government's right to control whether a person or class of people should be prohibited from procreating.

On March 23, 1933, the Enabling Act was passed, conferring upon government the authority to enact future laws without Reichstag approval, effectively granting to Hitler total control and simultaneously nullifying democratic rights, along with any checks and balances of the Reichstag. Eight days later, Hitler dissolved the legislatures of all German states, with the exception of Prussia, and directed that Communist held seats not be filled. Another law passed on April 7, 1933, appointed Reich/Nazi governors in all states, with broad powers including the ability to appoint and remove judges and other state officials. Also on April 7, the Law for the Restoration of the Professional Civil Service was enacted, allowing for dismissal of non-Aryan civil servants. On April 9, the Law Regarding Admission to the Bar was passed, forbidding Jews the right to practice law in Germany, and on April 11, 1933, a law defining "non-Aryan" status was

¹²³ Hett, B.C. (2008). *Crossing Hitler: The man who put the Nazis on the witness stand*. (New York, NY: Oxford University Press, Inc.), 160.

authorized which required proof of genealogy in order to obtain civil service employment. The Law Against the Overcrowding of German Schools and Institutions of Higher Learning was sanctioned, limiting non-Aryan school attendance to no more than 1.5 percent of the total enrollment.

As a result of the Enabling Act, the legislative branch of government had ceded its powers to Hitler, Reichstag approval for legislation no longer being necessary. The only political threat thus remaining to Hitler that could possibly arise would be from opposition parties, but on July 14, 1933, this risk was eliminated with the enactment of the Law Against the New Formation of Parties, forbidding all political parties in Germany other than the National Socialist Germany Workers' Party.

Each of these laws systematically excluded Jews from mainstream society and placed the country on a path to the actual removal of Jews from mankind through expulsion, relocation, and finally, extermination. It was important for Hitler to proceed through the color of law as he realized that broad-based support, from industrialists, the military, and the middle classes of the country was necessary. In this regard, Hitler succeeded as these changes were viewed by the non-Jewish segments of German citizenry as positive and necessary.¹²⁴

With President Paul von Hindenburg's death on August 2, 1934, at the age of 87,¹²⁵ rather than call new elections as required by the constitution, Hitler's cabinet passed a law proclaiming the presidency vacant and transferred the role and powers of the head of state to Hitler as Führer, or leader, and Chancellor. This action effectively

¹²⁴ Hett, B.C. (2008). *Crossing Hitler: The man who put the Nazis on the witness stand*. (New York, NY: Oxford University Press, Inc.), 16-18.

¹²⁵ *Id.* at 34.

removed the last legal remedy by which Hitler could be dismissed.¹²⁶ Hitler no longer needed to be concerned with internal opposition to his plans. As long as Hindenburg was alive, Hitler was forced to proceed slowly, as Hindenburg held the power to demand the resignation of the Chancellor; with Hitler's new position, anti-Jewish legislation and other measures could be accelerated.

At the Nazi Party congress rally held in Nuremberg on September 15, 1935, the Reich Citizenship Law was passed declaring that only individuals of "German or kindred blood" could be citizens of Germany. Additionally, the Law for the Protection of German Blood and German Honor was enacted, thereby forbidding marriages and sexual relations between Jews and German or kindred blood. A decree of November 14, 1935, dealt with marriages between Jews and non-Jews, declaring it to be illegal to have such a marriage, regardless of when it was entered.¹²⁷ Hitler had thus violated the principle of *nulla poena sine lege*, which forbids punishment for actions that had not previously been formulated into positive law, or the retroactivity of penal provisions for crimes for which there had been no precedent, an *ex post facto* law.¹²⁸ Jews were also no longer allowed to hire German citizens under the age of 45 as domestic help or to display the German flag.

An ordinance arising on October 18, 1935, from the Nuremberg laws regulated sterilization and the issuance of marriage licenses, creating a system to track individuals with specific hereditary traits over a period of several generations. Several laws were enacted furthering restrictions on the rights of Jews. On March 26, 1938, the Decree

¹²⁶ Henssonow-Marseken, S.F., Surhone, L.M., & Timpledon, M.T. (Eds.) (2010). *Roland Freisler: Nazism, Germany, judge, Adolf Hitler, show trial*. ([Saarbrücken](#), DE: VDM Publishing House Ltd.), 75.

¹²⁷ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 19.

¹²⁸ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 315.

Regarding the Reporting of Jewish Property mandated all Jews to access and report the value of their property by June 30 of that year. This law thus aided the Nazis when they subsequently appropriated Jewish-owned property. Then, on August 17, 1938, the Second Decree for the Implementation of the Law Regarding Changes of Family Names and Given Names was instituted. Jews were forbidden to take Aryan names, all Jewish men were required to add the name Israel to their name, and all Jewish women were compelled to add the name Sarah to their name. This law being conceived to identify people of Jewish heritage who had taken Christian-sounding names in an effort to pass in German society without the restrictions that had been imposed on the Jews and to identify those individuals who had baptized their children in Christian churches, giving them Christian names for the same purpose. Also beginning in 1938, Jews could be arrested without due process, their property seized, their children kept out of school, and their right to operate a business constrained and finally prohibited.

A final step in the complete removal of Jewish civil rights occurred on September 1, 1941, with the sanctioning of the Police Decree Concerning the Marking of Jews. This decree specified that Jews over the age of six were not permitted to appear in public without displaying the yellow Star of David, worn visibly with the word "Jew" in black letters. Jews were also forbidden to leave their neighborhoods without carrying written permission from the local police.

Most importantly, Nazi endeavors to destroy the Jews in Europe culminated on January 20, 1942, at the Wannsee Conference through a "Plenipotentiary for the Preparation of the Final Solution of the European Jewish Question." Reinhard Heydrich, head of the SS Intelligence Service, described the process that had taken place since 1933

with respect to the Jews.¹²⁹ It began by expelling Jews “from various spheres of life of the German people,” then “from the living space of the German people,” and as announced at the conference, the “evacuation of the Jews to the East.”¹³⁰ The stage was thus set for the total destruction of European Jewry.

A major faction of the Nazi movement was based on the contrived conflict between Aryans and Jews. Efforts had been expended by the Nazi regime into legalizing the removal of Jewish civil rights with the sole intention of their succeeding removal and ultimate murder.¹³¹

It was from this societal confusion that Hitler and his minions assumed control in Germany. With their seizure of administration, the judicial independence and autonomy that previously prevailed within Germany were soon eviscerated.

¹²⁹ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 19-20.

¹³⁰ *Id.* at 20.

¹³¹ *Id.*

Chapter VII: The Rule of Law and the *Führerprinzip*

On the basis of the *Führerprinzip*, the foundation of the methodology by which the Nazi legal scheme functioned, the aggregation of all governmental power, legislative, executive, and judicial, ultimately resided in the Führer. As a consequence, individual and institutional judicial independence and autonomy were eradicated to accommodate the dictates and caprice of the Nazi regime.

Professor Kurt Huber, executed on July 13, 1943, for his resistance activities as a member of the White Rose, stated, with respect to the rule of law under the Nazi regime:

There is a point at which the law becomes immoral and unethical. That point is reached when it becomes a cloak for the cowardice that dares not stand up against blatant violations of justice. A state that suppresses all freedom of speech and which, by imposing the most terrible punishment, treats each and every attempt at criticism, however morally justified, and every suggestion for improvement as “plotting to high treason,” is a state that breaks an unwritten law.¹³²

Once in power, Hitler apperceived that it would not be possible to continue and rule without the force of law; he also was cognizant that principles of equity would not support his policies or his views. His was a regime that not only destroyed civil rights, but used the law as a means for suppressing others. Enacting new legislation would not change this reality: an immoral regime that did not respect the rights of its citizens who dissented could never claim moral righteousness. All Hitler could do was to silence the regime’s opponents or change the law to conform to his programs.

¹³² Wobbe, R. & Borrowman, J. (2002). *Three against Hitler*. (American Fork, UT: Covenant Communications, Inc.), 169.

Hitler had to silence any political opposition while concurrently operating within the law. A legal environment was created, devoid of fairness and justice, yet with sufficient flexibility to allow his doctrines to succeed. Hitler suppressed political opposition by altering the justice system. He enacted laws in order to provide himself with the legal authority to do whatever he desired and that was expedient for the regime, astutely aware that if he acted and operated outside of the law, it would prove to be politically disastrous.¹³³

Göring expressed the Nazi legal philosophy on July 12, 1934, as, “The law and the will of the Führer are one.”¹³⁴ In 1936, Commissioner of Justice, Dr. Hans Frank, expanded upon this idea declaring, “The National Socialist ideology is the foundation of all basic laws, especially as explained in the party programs and in the speeches of the Führer.”¹³⁵ The underlying principle of Nazi rule in all aspects of German life thus became the *Führerprinzip*, or the leadership principle.

Hitler had emphasized its importance in *Mein Kampf*, but the leadership principle did not originate with the Nazis; it was a characteristic of fascist societies generally. Its establishment in Germany after 1933 had preceded the Weimar Republic with the idea of an authoritarian leader and had gained acceptance and popularization during this period.

Hitler never supported the leadership principle institutionally or legally. It was not contained in the party program of 1920 or in any legislation subsequent to 1933. Instead the leadership principle was instilled mentally within the mind of the German

¹³³ Thomsett, M.C. (1997). *The German opposition to Hitler: The resistance, the underground, and assassination plots, 1938-1945*. (Jefferson, NC: McFarland & Company, Inc.), 82.

¹³⁴ *Id.*

¹³⁵ *Id.*

people. By making reference to the leadership principle, the regime was relying upon a frame of reference that had previously been implanted within the psyche of the citizenry. The regime adapted the external adornments and the rituals associated with the leader, as exemplified in Nazi public ceremonies, with the individual, Hitler, who then became exalted and venerated by the German populace.

The leadership principle was vague, unlimited, and flexible. The Führer's power was without any legal constraint and absolute. Not only did the Führer's orders have to be interpreted, but the will of the Führer became the standard upon which all actions were to be established. Existing German constitutional law was replaced by slogans, postulates, and general clauses. The Führer's puissance could be understood only "intuitively;" legal considerations were abrogated because they contradicted the leadership principle. Legal systems of thought were dismissed and replaced with values of the community. However, these ideals and conventions were never clearly defined. The regime spoke of the *völkische Gesamtordnung*, the racial all-embracing order, but the legal distinctiveness remained unexplained. It also spoke of a *völkische Verfassung*, a constitution, but the constitution never became a reality. Had a written constitution actually been formalized, it would have contained rights and duties, thereby erecting constraints on the exercise of the Führer's powers. In order to be free from such limitations and uniformity, Hitler sought and obtained passage of the Enabling Act.¹³⁶

The leadership principle was to be unconditionally implemented by the judiciary. In the initial years of the Third Reich, the principle of judicial independence was not

¹³⁶ For additional information on this subject matter, see *Eichmann in Jerusalem: A Report on the Banality of Evil* and *The Origins of Totalitarianism*, by Hannah Arendt.

formally abolished; instead its independence was to be transmuted in the Nazi spirit. The approach adopted by the Third Reich was to reconcile the independence of judges with the leadership principle, but this was met with opposition even from regime judges, who insisted on the continuation of their independence, while linking it with the will of the Führer.¹³⁷ “The Führer is the highest German judge, he is the German judge.”¹³⁸

Article 1 of the Law for Securing the Unity of Party and State, of December 1, 1933, stated, “Since the victory of the National Socialist revolution the National Socialist German Workers’ Party is the carrier of the idea of the German state and thus indissolubly united with the state.”¹³⁹ As a consequence, Hitler and the Nazi Party claimed infallibility in all their actions and in all spheres of German life. Institutionally, political leadership, administrative leadership, and judicial leadership were inextricably amalgamated, with the Führer and the merged positions of president and chancellor, which he occupied, at the pinnacle. The Führer’s orders became the decisive instruments, with his minions being entrusted with the task of attending to their fulfillment.

The Nazi Party’s dominance over the state was effectuated by duplicating offices which already existed as institutions within the state. The Party stated unequivocally that the German state was second to the Party and its ideology. The Nazi Party was the primary element of all *völkisch* life, the example for the present undeveloped state, as the existing state was considered only temporary.¹⁴⁰ *Völkisch* was understood to be those who sought to construct a new political system for Germany based upon racial, rather

¹³⁷ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 38-39.

¹³⁸ *Id.* at 39.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 39-40.

than legal, similarities among the German people.¹⁴¹ Appointments and promotions within the bureaucracy and judiciary were subject to the agreement of the Party.

The Nazi Party and the regime perceived itself and themselves as the conclusive and utmost form of expression for the *Volksgemeinschaft*, the racial national community, which they claimed to lead. There was an unqualified rejection of the liberal legal system, its individual liberties, and of the rights contained in the Weimar Constitution. Until the outbreak of war, arguments persisted relative to the Weimar Constitution ceasing to be in force after January 30, 1933, or whether only portions thereof were suspended through Nazi legislation, tantamount to constitutional amendment. An example was the legislation associated with the Reichstag fire, wherein the Nazis were unambiguous concerning their perspective:¹⁴² “The present legislation has only for the sake of order . . . used the formal procedures laid down in the Weimar Constitution, but does not derive its justification from it.”¹⁴³

The Weimar Constitution and the legal principles deduced from it had been overcome by the *Volksgemeinschaft* and the Nazi Party ideology. Terms of the Weimar Constitution were negated by judges and declared irreconcilable with the Nazi concept of state if there was a conflict between the legal edict expressed in or through the Constitution and that espoused by the Party. To transgress against this view or to change the Constitution by the judiciary was sanctioned. Some judges considered the Nazi Party

¹⁴¹ McKale, D.M. (1974). *The Nazi party courts: Hitler's management of conflict in his movement, 1921-1945*. (Lawrence, KS: The University Press of Kansas), 194.

¹⁴² Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 40-41.

¹⁴³ *Id.* at 41.

program as the legal basis for their decisions,¹⁴⁴ and in 1934, it was stated that the constitutional structure must begin with the sentence: “The Weimar Reich Constitution is no longer valid.”¹⁴⁵ The Nazi Party leadership principle superseded and replaced any legal constraints and allowances that may have been imposed by the Weimar Constitution.

Ernst Huber, a Nazi who became a law professor at the University of Kiel, in a 1937 publication reduced all of law to the will of the Führer. Although that will was defined as embodying the will of the people, the Volk, the equation of the Volk with the Führer’s will becomes assumed and axiomatic, nullifying any need to inquire into the will of the people.¹⁴⁶ Huber stated that, “In the leader’s will [the] law achieves its external form; the will of the leader, emerging in statutes, can be nothing else but the conscious, molded form of the people’s justice (*völkische Gerechtigkeit*) . . . Where he has spoken, the content of the people’s law has been determined with conditional binding force.”¹⁴⁷

As a result, Huber expressed a fundamental truth in Nazi Party law, the end of individual rights and “the principle of guarantees has been overcome in general . . . The people’s constitution (the “people’s constitution” is the name Huber gave to an allegedly unwritten constitution with which Hitler was said to have replaced the defunct Weimar

¹⁴⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 41.

¹⁴⁵ *Id.*

¹⁴⁶ Curran, V.G. (2001-2002). Fear of formalism: Indications from the Fascist period in France and Germany of judicial methodology’s impact on substantive law. *Cornell International Law Journal*, 35, 101-168, 128.

¹⁴⁷ *Id.*

Constitution) . . . does not protect individuals and groups against the whole, but serves the unity and wholeness of the people against individualist and group subversion.”¹⁴⁸

Officially, Nazi legal theory was that the Volk defined the Führer, but the practical hierarchies of authority comprehended by legal theorists writing after Hitler’s ascent to power, presumed that the Führer defined the Volk. In practice, Nazi legal theory repudiated any legal value or source of law other than the Führer and explicitly rejected the authority of enacted law if it did not comport with Hitler’s wishes and agenda.¹⁴⁹ Thus, Hitler replaced and became the rule of law through the *Führerprinzip*, and thereafter, barbarism became the societal standard for Nazi Germany. In the words of Eric Hobsbawm, barbarism is:

“[T]he disruption and breakdown of the system of rules and moral behavior by which *all* societies regulate the relations among their members and, to a lesser extent, between their members and those of other societies.” More particularly, barbarism means “the reversal of what we may call the project of the eighteenth-century Enlightenment, namely the establishment of a universal system of such rules and standards of moral behavior, embodied in the institutions of states dedicated to the rational progress of humanity: to Life, Liberty and the Pursuit of Happiness, to Equality, Liberty and Fraternity.” When “traditional controls disappear,” we have to get used “to living in a society that is uncivilized.” It is a society that has “got used to killing,” a society where “ruthlessness and violence” are routine, and as such a society of “great inhumanity.”¹⁵⁰

This represents a very unfortunate, exact, and wretched characterization of Hitler’s Nazi Germany.

¹⁴⁸ Curran, V.G. (2001-2002). Fear of formalism: Indications from the Fascist period in France and Germany of judicial methodology’s impact on substantive law. *Cornell International Law Journal*, 35, 101-168, 128.

¹⁴⁹ *Id.* at 128-132.

¹⁵⁰ Kuspit, D. & Waage, P.N. (2012). *Vebjorn Sand, scenes from the Second World War, part one & two*. New York, NY: Gallery Sand.

The *Führerprinzip* was the absolute antithesis of United States' style constitutional separation of powers, with its inherent system of checks and balances. Under the *Führerprinzip*, Hitler was, at once, the chief executive, chief legislator, and chief justice, and judicial independence and autonomy ceased to exist as an indubitable postulate within Nazi Germany.

Chapter VIII: The German Court System and Its Applicable Laws under the Nazi Regime

This chapter provides an historical overview of the courts and law in Germany prior to the usurpation of power by the Nazis, as well as thereafter. This perspective is necessary in order to effectively evaluate the loss of judicial independence and autonomy that ensued after Hitler became Chancellor of Germany on January 30, 1933.

The revolution of 1918 and the Constitution of 1919, the Weimar Constitution, transformed Germany from a monarchy into a republic. Germany became a democratic state with a strong President and Chancellor at the head of a bicameral parliament, the Reichstag as the popularly elected lower house and the Reichsrat as the upper house representing the interests of the *Länder*, the states.¹⁵¹

For the National Socialist courts to function as Hitler desired, a substantial minority, if not the majority, of judges had to embrace Nazi ideology as an appropriate doctrine in the courtroom. These men, known for their integrity and strict adherence to the law, continued their careers under the Third Reich with little protest. This transformation occurred even though prior to 1933 virtually no judges had been members of the Nazi Party. Weimar forced the judiciary into a political position. Being disenchanted with the Republic, the jurists accepted the Reichstag's constitutional amendments which released them from their position as adjudicators of political cases. The changes that ensued under Weimar provided the judiciary with the motivation to

¹⁵¹ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 1.

receive Hitler when he came to power. It was then only a negligible maneuver from the politicized courts of the Republic to those of the Third Reich.

Bismarck's Second Empire had laid the foundation for a strong judiciary. One of the problems brought about by the re-unification of Germany in 1871 had been that of producing unified codes of law; under Bismarck's leadership, such codes began to take shape. For the first time in Germany's history, the courts essentially operated as a cohesive unit with both a consistent legal procedure and structure in the disposition of civil and criminal matters. The judiciary became a conservative attribute of the state, while maintaining its independence throughout the life of the Empire.¹⁵²

The structure of the legal system that had evolved between 1871 and 1918 was essentially retained. After the revolution of 1919, these law codes remained in force: the Civil Code of 1900, the Penal Code of 1871, and the Laws of Procedure. The function of the courts was to apply the rules laid down in the codes, the German legal system having significantly less judge-made or common law than the Anglo-American legal system.¹⁵³

There is no doubt that the judiciary was shaken by the collapse of the Empire and that it never recovered from the impact of the Weimar Republic and its failure to attain real stability. The judiciary was accustomed to a stable environment in which they could preside over routine civil and criminal cases, and in which they could retain their apolitical posture. Weimar cast this relative tranquility into chaos.

¹⁵² Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 7-8.

¹⁵³ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 1.

After 1920, it was increasingly impossible to form a government based on the majority support of the Reichstag. Minority governments dominated. The average duration of governments between 1919 and 1928 was seven months, as politically inspired violence developed. Judges were thus called upon to adjudicate cases of crimes committed by revolutionaries who claimed their acts to be privileged, but for the justice system were crimes to be dealt with by the traditional norms as set forth in the German penal code. It was a conflict in the interpretation of the law that neither side fully comprehended, with which the judiciary was unprepared to address, and correspondingly, added to the tension of the judiciary's position relative to the government and the public.

From its inception, the Weimar Republic did not have the strength to mobilize support on its behalf, and this discontented majority included the judiciary. However, this is not to say that the judges acted against the Republic. They fulfilled their duty as their training had directed. Some defended the Republic, although this was an unpopular position for which its proponents came under attack from monarchists, the extreme left and right, and those indifferent to the Republic. Most judges continued to view with skepticism and apprehension those activities termed the political process within the Weimar Republic.¹⁵⁴

Already unpaid, judicial salaries were reduced by approximately twenty percent, through inflation, the deflation of the Weimar period, and by government economic measures. It is uncertain as to the extent to which judicial officers and those aspiring to

¹⁵⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 8-10.

become judges became victims of National Socialist propaganda, but both groups were disillusioned with the Republic so as to entertain the prospects of a political alternative.

The early years of the Republic were confounded by a series of, mostly left-wing, disruptions. As a result, court cases which these events engendered put the judiciary into turmoil. Initially because the penal code held no solutions to the issue of how to administer political crimes, and second, there was an almost complete lack of self-protective action on the part of the country's elected representatives. A great deficiency of the Weimar Constitution was that it contained no provision which directed itself against those forces whose explicit aim was to destroy the Republic. It was not unconstitutional to overthrow the government, providing it was accomplished with the assent of the necessary two-thirds majority of the Reichstag as stipulated in the Constitution. This constitutional omission transferred the problem of a conflict between ambitious revolutionaries to the judicial system. If the government would not take preventative action, the judiciary was required to respond to these activities.

This judicial retort drew criticism from all sectors. With left-wing insurgencies pre-dating and far outnumbering those of the right, the left suffered more victims than its right-wing opponents. However, when those from the right were placed on trial, the judiciary was equally harsh as it had been with the Communists. The judiciary was thus placed in the impossible position of pleasing neither the left nor the right, and certainly not the general public.

In 1928, there appeared a series of the judiciary's most politically infused cases. They arose from right-wing political murders committed in secret for allegedly treasonable undertakings.¹⁵⁵

After 1921, the army had encouraged the formation of various quasi-official military and intelligence units. Under the direction of the counter-intelligence unit, the Abwehr, these units appeared throughout the country to defend the nation. Pursuant to the terms of the Treaty of Versailles, these military and intelligence groups were illegal, as any German military refortification was forbidden. The government had to purport to know nothing about these factions. However, these clandestine units were subject to infiltration by members of the left, seeking to expose their operations and to publicize the creation of the illegal military in the press. Because these groups operated outside the legal system, any interloper who was caught could not be referred to the authorities, but was summarily executed. When the murders came to light in the late 1920s, the perpetrators were arraigned before the courts. When a member of one of these covert organizations came to trial in late 1928, he was sentenced by the jury to three years hard labor. Until this time, most political trials had been of left-wing activists. The right perceived the judiciary to be persecuting patriots defending the country against traitors and foreign occupation.

The verdict illustrated that the urgency of the emergency situation had not overwhelmed the judiciary's proper application of the law. Legally, the provisions of the Treaty of Versailles had become part of the German law, but motivated German

¹⁵⁵ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 10-11.

nationalists were not prepared to accept this decision. This strongly felt sentiment was an indication for the future of the Republic.¹⁵⁶

There was a growing ambivalence among the legal order relative to strict adherence to the law in the face of a national security crisis. The judiciary was subjected to public attack and their urge to escape this situation profoundly influenced it toward the end of the Weimar Republic.

An issue then ensued concerning the devaluation of the Mark. In its ruling the judiciary departed for the first time with the formality of the law. According to the law, judges were bound to the principle that one Mark equaled one Mark, regardless of whether it was tendered in gold or paper currency. By 1923, paper currency had become worthless, and anyone receiving paper rather than gold Marks did so to their own detriment. The judiciary overturned the law, requiring that debts of any kind could no longer be paid in paper currency.

This was a judicial encroachment into the legislative prerogative. Never before had the judiciary sought to do more than interpret the law; now it had abolished legislation. A general discussion proceeded concerning the function of the judiciary and the scope of its power. The government castigated the assumption of such powers, but refrained from intervention.

Subsequently, the extension of the judiciary's power into the legislative sphere was no longer questioned, and in practice judges began to apperceive the law with increased consideration for expediency than previously. They were no longer servants of

¹⁵⁶ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 12-13.

the law, but formulated it themselves. This tendency continued to accelerate the more the national and regional parliaments failed in their functions as legislators. The judicial mandate associated with the treatment of the Mark set the judiciary on a course the results of which were only seen in the Third Reich.

The Reichstag set a similar precedent in legislative terms by applying the Constitutional provision which granted the President emergency powers. It was argued that the use of this article would deprive the Weimar Republic of its liberty and permit tyranny. Once dictatorship was sanctioned in a parliamentary and democratic manner, the general legal clauses established by the judiciary over the 1920s and early 1930s required only their infusion with new ideology in order for the existing law to be applied in accordance with National Socialist principles. The legal codes developed during the Second Empire were becoming progressively obsolete. The application of nationalist and Nazi doctrine met with little opposition.

The National Socialists may not have had such an effortless task if the judiciary had not been permitted to arrogate such extensive powers to itself. The authority under which the judiciary acted remained vague and ill-defined, but the judges had become amenable to exercising political power.¹⁵⁷

In 1922, the Reichstag passed the Law for the Protection of the Republic. Its justification was the escalation of terrorism within Germany; however, it politicized penal laws to an unprecedented degree, and abrogated the basic rights of the individual as set forth in the Constitution. For the first time in German legal history, the judiciary was

¹⁵⁷ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 13-15.

authorized to depart from the principle of *nulla poena sine lege*, no punishment without law. The Nazis would later capitalize on this precedent in passing its emergency legislation of 1933, The Reichstag Fire Decree. The law also heightened the judiciary's political role and gave it greater autonomy in pursuing political cases.

The politicization of the penal law was decried with disgust by many judges as the government's elected representatives had passed to the judiciary the burden of handling the political crisis. It is debatable that the judiciary under the Republic was overburdened with political trials, that it dealt with them too leniently, and that in this sense it therefore failed.

Initially, the judiciary's relationship with the Nazis was remote; until January 30, 1933, the party claimed almost no judicial members. For this reason it is remarkable that the transition from Republic to dictatorship was conducted without great changes in the personnel of the judiciary. One explanation proffered is that the end of the Weimar Republic came about legally. Weimar became a victim of its own constitutional law.¹⁵⁸

At the pinnacle of the judiciary, continuity was preserved. Franz Gürtner, the Reich Minister of Justice, retained his ministerial post until his death in 1941. Erwin Bumke, the President of the Reichgericht, did the same. Max Schlegelberger served as Permanent Secretary of State in the Ministry of Justice and after Gürtner's death, became Minister of Justice. Thus the judiciary, criticized from all aspects, largely politically

¹⁵⁸ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 16-17.

apathetic, and economically underprivileged, was disposed to put its confidence, however cautiously, in a new party and a new regime, the Nazis.¹⁵⁹¹⁶⁰

Not every judge conformed with the ideal expressed in 1943¹⁶¹ by Curt Rothenberger, Undersecretary at the Ministry of Justice that,¹⁶² “The apolitical, neutral judge of the liberal multiparty state, who stands on the sidelines, must become a National Socialist with sure instincts and a feeling for the great political aims of the movement. Politics, philosophy, and justice are one and the same.”¹⁶³ Refusals to cooperate did occur in the judiciary; however, a judge had “no alternative but to apply the unjust laws, and risked . . . his own life if he objected.”¹⁶⁴

Two prominent judges were executed for their resistance during the Third Reich. Dr. Karl Sack, a general staff judge, was arrested on September 8, 1944, and murdered on February 4, 1945, in the Flossenbürg concentration camp. Dr. Johann von Dohnanyi, a Supreme Court judge, was killed in the camp at Sachseuhausen, presumably on April 8, 1945. Both individuals were executed for their participation in the July 20, 1944, assassination plot against Hitler. Neither judge was persecuted for their professional conduct. On the contrary, each had had successful judicial careers in the Third Reich.

In 1938, having just turned thirty-six, Dohnanyi became the youngest member of the Supreme Court, where the average age of appointment at that time was fifty-three.

¹⁵⁹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 17-18.

¹⁶⁰ For additional information on this subject matter, see *Rethinking the Weimar Republic: Authority and authoritarianism, 1916-1936*, by Anthony McElligott.

¹⁶¹ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 326, Note 2.

¹⁶² *Id.* at 192.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

After three years on the Third Criminal Panel, Dohnanyi left the court. He had become an opponent of the regime, and had been keeping a record¹⁶⁵ of the “crimes committed by party leaders.”¹⁶⁶ In 1941, Admiral Walter Wilhelm Canaris recruited him for the Abwehr, where he became an important presence in the coterie around Canaris and Hans Oster. He was arrested on April 5, 1943, for illegal currency transactions, since he had been assisting Jews transfer their assets to Switzerland.

Judge Sack was appointed to the Supreme Military Court Panel for Treason and High Treason in 1938; he was assigned to the Army High Command in 1942, and became a general staff judge in 1944.

There is one documented case of resistance in which a judge opposed the regime in the course of fulfilling his judicial duties: Dr. Lothar Kreyszig, a Judge at the Court of Guardianship in the town of Brandenburg, on the Havel River. Kreyszig, who was appointed to the County Court in 1928, had been considered a good judge by his superiors, until the President of his district Court of Appeals noted in his file that,¹⁶⁷ “since the spring of 1934 his conduct has given grounds for complaint, in that he has drawn considerable attention to himself as a member of the Lutheran Confessional Church.”¹⁶⁸

Kreyszig had committed minor acts of insubordination, such as departing early from a ceremony in his court when a bust of Hitler was being unveiled, and publicly protesting against the suspension of three judges after the passage of the Law for

¹⁶⁵ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 192-193.

¹⁶⁶ *Id.* at 193.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Restoration of the Professional Civil Service,¹⁶⁹ on April 7, 1933. It was on this day that it became legal to dismiss civil servants, judges, and attorneys for being of non-Aryan descent.¹⁷⁰ Kreyssig's actions led to the filing of a demand for his dismissal with the Reich Ministry of Justice in March of 1936. Subsequently, a formal investigation was begun, with the intent of removing him from office, after he referred to Nazi church policies as "injustice . . . masquerading in the form of law."¹⁷¹ When Kreyssig publicly opposed the arrest of theologian Martin Niemöller in June of 1938, a criminal investigation was opened on suspicion of "misuse of the pulpit" and infringement of the 1934 Law against Treacherous Attacks on the State and Party.

At his own request, Kreyssig was reassigned to the Petty Court in Brandenburg, where he functioned as a judge for the Court of Guardianship. When he learned that inmates were being removed from a mental hospital and killed, he sent a letter about these occurrences to the President of the Prussian Supreme Court, asking for "clarification and advice." Kreyssig was summoned to the Reich Ministry of Justice, where Undersecretary Roland Freisler heard his complaints but failed to alter his thinking on the matter. Kreyssig then issued injunctions to several hospitals in his capacity as judge of the Court of Guardianship, prohibiting the hospitals from transferring wards of his court without court permission. In addition, he brought criminal charges against Nazi party leader Phillip Bouhler before the public prosecutor in Potsdam, since Freisler had indicated to him that Bouhler was responsible for the euthanasia program.

¹⁶⁹ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 194.

¹⁷⁰ *Id.* at 94.

¹⁷¹ *Id.* at 194.

Once again, Kreyssig was commanded to appear before the Ministry of Justice, where on this occasion Franz Gürtner attempted to persuade him that the program had been an “order of the Führer” and was therefore lawful. Gürtner also informed Kreyssig that if he “did not recognize the will of the Führer as the fount of law,” then he would no longer be tolerated as a judge. Soon thereafter, Kreyssig wrote Gürtner that since his conscience would not allow him to withdraw the injunctions against the hospitals, he was therefore requesting permission to retire ahead of schedule. Kreyssig was granted temporary approval to retire on December 10, 1940; this was confirmed on March 4, 1942, and included full pension benefits. In April the criminal investigation against him was closed, and he was thereafter left in peace by the Third Reich.¹⁷²

Kreyssig’s case is revealing, as it attests that if a judge refused to accept the injustices of the Nazi system, early retirement was the penalty imposed. Judge Hermanns was also an example of someone who received early retirement. Hermanns had joined the Nazi Party on February 1, 1932, and rose to the position of a Presiding Judge at a County Court. He gradually withdrew his support for the dictatorship and sent a 130-page report to the Reich Ministry of Justice in 1943, documenting cases in which local party and government officials had broken the law and overstepped the bounds of their authority.¹⁷³

Regardless of the diligence of the search for judges who refused to serve the Nazi regime from the bench, there remains a total of only one judge, Dr. Lothar Kreyssig, Judge of the Court of Guardianship in Brandenburg on the Havel. The overwhelming

¹⁷² Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 194-195.

¹⁷³ *Id.* at 195.

majority of German judges shared responsibility for the terror and barbarism that was Nazi tyranny.¹⁷⁴

The degree to which the judiciary became a readily functioning component of the National Socialists' system of intimidation and corruption becomes clear upon an examination of the number of death sentences imposed. There are no exact statistics, but it is estimated that the courts ordered "at least 40,000 to 50,000 death sentences," not counting the verdicts in the summary proceedings of the military and the police, where approximately eighty percent of these were carried out. Figures from the "Department of Military Losses" of the High Command document 11,500 death sentences passed by Courts-Martial through the middle of 1944, ninety percent of which were enforced.¹⁷⁵ The lower computation of the number of people condemned by the judicial system is based on official publications of the Third Reich, which ceased in mid-1944, and are also incomplete. They contain neither the *Nacht-und-Nebel*, or Night and Fog prisoners nor the number of death sentences passed in the occupied territories. Since it was the courts in the eastern regions that employed maximum use of the death penalty, and as the suppression of all opposition within Germany was entering its most deadly phase in the summer of 1944, an estimate of 80,000 victims may be the most accurate.¹⁷⁶

German courts were comprised of three levels, the Reichsgericht, the highest appellate court for civil and criminal matters, and after 1927, also for labor law litigation. At the middle level were the Oberlandesgerichte in the federal states. The lower courts

¹⁷⁴ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 196.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

for civil and criminal cases were the Amtsgerichte and Landgerichte, the local and regional courts. Specialized courts also existed for specific areas of the law, such as tax and social law, with administrative courts handling disputes between citizens and the state.¹⁷⁷

The Amtsgericht was the lowest court in the judicial structure and dealt with criminal cases in which the sentence was not likely to exceed one year's imprisonment. It was presided over by one judge who acted either individually or in cases where the penalty was presumptively not to surpass three years of imprisonment, with the assistance of lay judges.

The next highest court was the Landgericht. It was a court of appeal from any sentence imposed by an Amtsgericht, but divided in cases of criminal law into two chambers, one the small penal chamber, the other the large penal chamber. Both chambers dealt with cases that exceeded the jurisdiction of the Amtsgericht. In addition to the presiding judge, there were two professional judges who assisted.

Next in the hierarchy, and superior to both the Amtsgericht and the Landgericht was the Oberlandesgericht, a court of appeal from decisions made by the lower courts and one which had a small and large penal senate when adjudicating criminal matters. The small senate acts as a court of appeals from the Amtsgerichte and from the small and large penal chambers of the Landgerichte, while the large senate heard actions of alleged treason, both in first instance and as the court of final jurisdiction. A court of final appeal, the Reichsgericht or Supreme Court, which dealt with particularly serious cases

¹⁷⁷ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 1-2.

of treason, continued throughout the Third Reich. However, after 1934, the Volksgerichtshof, or People's Court, assumed exclusive control in cases of treasonable activity.^{178 179} Members of the armed forces or civilian employees of the Reichwehr, and later the Wehrmacht, accused of treason could only be tried by the highest court of Germany's armed forces, the Reichskriegsgericht. After the July 20, 1944, bomb plot on the life of Adolf Hitler, members of the Wehrmacht were first expelled by a "Court of Honour" from the armed forces so that they could then be prosecuted before the People's Court.¹⁸⁰

The Nazi regime initially assumed traditional law, and the functioning of the courts and judges as they then existed. However, during the first months of 1933, there were indications that the regime was abandoning the *Rechtsstaat*, the state based on the rule of law: Jewish judges, notaries, and lawyers were dismissed; criminal sanctions increased; the principle of no punishment without law was abolished; and political enemies sent to concentration camps. The mass killing of political rivals in June of 1934 went unpunished. Hitler proclaimed a law that declared these murders,¹⁸¹ "acts of national self-defense, and as such, lawful."¹⁸²

¹⁷⁸ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 2.

¹⁷⁹ In the fall of 1933, the Reichsgericht acquitted several communists from involvement in the Reichstag fire for a lack of evidence. In response, the Nazi government established the People's Court, in April 1934, to try political cases, and staffed the Court with affirmed National Socialists. The People's Court was a tribunal of terror utilized to persecute and intimidate political opponents of the regime. Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 2.

¹⁸⁰ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. London, GB: I.B. Tauris & Co. Ltd., 243-245.

¹⁸¹ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 2.

¹⁸² *Id.*

During the war, the judicial system was curtailed, stages of appeal were shortened or abolished, and the entire structure was dominated by enhanced harsh penal justice. External and internal tensions transformed the scheme into an instrument of horror. Notwithstanding these modifications, the penal justice system failed to perform its tasks to the regime's satisfaction, thus Sondergerichte, Special Courts, were organized to adjudicate lesser crimes and impose intense punishments. Special Courts also existed in the military, Wehrmachtjustiz, to discipline troops with draconian penalties and thousands of death sentences. Lastly, there were the Schutzstaffel ("SS"), or protective force, that executed untold numbers of individuals without any semblance of trials and sentences.¹⁸³

Within the National Socialist state, there were areas of the law that remained unchanged and functioned just as they had during the Weimar Republic. The regime strongly desired to preserve the impression of normalcy. Nazi rule was based on its ability to gain the cooperation of the economic elites and the civil servants and judges who were dissatisfied with the Weimar Republic. These groups were largely nationalistic and antiparliamentarian in their philosophy, but they also disliked open terror. Before coming to terms with the Nazi regime, they required assurance that the *Rechtsstaat*, would be established, that society would function in accordance with the rule of law, and that excesses would not be tolerated. Therefore, the initial strategy of the National Socialists relative to the legal system was to change only those elements that were indispensable to securing power and demarcating the primary ideological positions. All

¹⁸³ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 3.

other aspirations for reform would be fulfilled after the “final victory.” This was the approach assumed by the Nazis with respect to both civil and criminal law. They preserved the façade of a state based on the rule of law to avoid alarming those from whom accordance was desired.

The statutory law that was in force during the Weimar Republic was, in principle, subsumed en bloc and continued to be valid unless superseded by new legislation. As the regime continued in power, the ratio of traditional law to new law was progressively reversed and changed to the detriment of the old order. The more secure the Nazis became, the more they discarded elements of the *Rechtsstaat*.

It was characteristic of National Socialist law that the modifications were only in part changes through legislation. The developing positive law was expanded further on a continuing basis through individual decisions in the administration and judicial systems instead of through statutes. What judges and administrative officials thought was right prevailed. The legal system that operated between 1933 and 1945 and claimed validity was a combination involving the judiciary that reacted expeditiously and legislative activity that progressed slowly. Additionally, the various fields of law and branches of the court system in which the regime took varying degrees of interest, manifested differing rates of change. However, no area of the law remained entirely without intervention by the political assertions of the system.

After January 30, 1933, Germany transitioned from a parliamentary system to a dictatorship within a few months. Political parties were dissolved and the National Socialist German Workers’ Party was declared to be the state party. Intermediary controls were abolished by the party staffing the most important executive posts with

party functionaries, creating a network of horizontal affiliations between the party and the state apparatus. The professional civil service was reformed into one that was purged of political enemies and German Jewish victims of racial persecution, becoming duty-bound to serve the new state.

The principle of the separation of powers and the distinction between public and private law were abolished. All forms of free social organization, unions, professional alliances, associations, and politically significant clubs were either outlawed or coordinated into Nazi ideology. Freedom of the press was eliminated and artistic activity was placed under official supervision and control. The result was a militarized and authoritarian centralized state. A constitution in the usual sense no longer existed, even though the Weimar Constitution was not formally abrogated. Rather, a lack of rules and a hostility to the law increasingly dominated society. Along with the law there were *Maßnahmen*, arbitrary measures, and “Führer’s orders,” some of which were unpublished. Areas in which the application of the law was maintained as usual stood alongside arbitrary terror. Any remaining normative guarantees of the law were dependent on the concept of the “welfare of the national community,” which could be defined however the state wanted. This tactic was deliberately used by the regime as a method of generating fear.

Fundamental violations of the principle of equality began when the regime disenfranchised minorities by revoking their citizenship. Soon after came the first discriminatory and persecutory measures against German Jews, as well as other political, religious, or racial groups. These discriminatory and circumscribing measures continued and were subsequently enacted into law.

The judicial system was the arena for initial definitive action. This activity was directed at personnel policy and at providing guidance for the “cleansed” judges by ideologically educating them through “governing principles.” The precepts enunciated by the Reichsjuristenführer, Hans Frank, on January 14, 1936, were the official party doctrine:¹⁸⁴

“The basis for the interpretation of all legal sources is the National Socialist ideology, particularly as expressed in the party program and the Führer’s statements. When it comes to those decisions by the Führer that are couched in the form of a law or a decree, a judge has no right of judicial review. A judge is also bound by other decisions of the Führer, insofar as they give unequivocal expression to the desire to establish a law.”¹⁸⁵

During both the period of the seizure of power and lasting throughout the war, interpreting the existing law under the guidance of National Socialist ideology proved a superior approach to legislating new law. Nazi avidity to transform the legal system into an instrument serving the goals of the leadership thus entailed both legislative activity and an unrestrained interpretation that changed the previous state of the law. Disregard of the original legislative intent by ideologically guided judges became far more significant in the daily legal life of National Socialism than injustice directly commanded by legislation.

National Socialist administrative law was characterized by an end in the distinction developed by the *Rechtsstaat* between law, regulation, and individual acts, the displacement of the notion of legality with the ideological concept of “rightfulness,” the

¹⁸⁴ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 7-14.

¹⁸⁵ *Id.* at 14.

diminution of judicial review concerning “acts of political leadership” and discretionary political decisions, and the elimination of personal rights in public law and its replacement by the obligation of duty that was subject to intervention and manipulation. The administrative courts remained intact until after the beginning of the war. However, since they were considered as being part of the *Rechtsstaat*, these courts were progressively displaced from supervising administrative conduct. The only exception was the Higher Administrative Courts in six states preserving their constitutional foundations in the areas of building, trade, employment, road, energy, and water law.

Civil law largely retained its normative core, but there was a shift in the administration of justice and jurisprudence to communal thinking, and a curtailment of rights in favor of duties. However, marriage law and family law underwent legislative modification. The National Socialist state enacted changes in the law of adoption and in the procedures for contesting legitimacy. On September 15, 1935, the Blood Protection Law was passed forbidding marriage and sexual relations between Jews and non-Jews under the pretext that this constituted “racial pollution,” outlawing the employment of non-Jewish domestic help by Jews, and barring Jews from flying the national colors.

Labor laws also departed from the existing Civil Code. Following the dissolution of the unions, the establishment of the German Labor Front, and the abolition of collective bargaining, employees and employers were oriented toward the “common benefit of the people and the state,” and interpreting the employment relationship as a “communal relationship.” Strikes were outlawed, wages frozen, and the right to freely choose one’s job during the war was prohibited.

Nazi leadership broadened the powers of management in business law, while changes in social law limited public welfare as the regime tried to rid themselves of “useless” social welfare recipients through euthanasia and deportations to concentration camps. The Tax Amending Law of October 16, 1934, prescribed that the norms of tax law be interpreted in accordance with National Socialist ideology, leading to impediments for organizations disliked by the Nazis. Jewish clubs of all types, hospitals, old age homes, ecclesiastical foundations, religious orders, and other ideologically significant institutions, had their tax-exempt status revoked. Tax evasion was considered to be “treason against the national community.”

From the beginning, the National Socialists recognized the political usefulness of the criminal law and acted correspondingly. They used criminal law to intimidate opponents and suppress groups, to create fear among their own supporters, and to formulate an attachment to the “national community” by criminalizing visible victims, i.e. those murdered during the “night of the long knives,” communists and Jews. The Nazis erected a system of penal controls and oppression in which traditional criminal and trial law, gradually reshaped, assumed an important role. It was buttressed by expansive criminal statutes, the police, special powers granted to the party, and the Schutzstaffel. After 1933, a crime was no longer seen as the violation of a legally protected interest but as a breach of duty, while punishment was imposed not for an offense but for the perpetrator’s willingness to commit the act. The range and severity of punishment was expanded, and the idea of deterrence and protection of the nation took precedence over rehabilitation. The procedural position of the prosecutor was strengthened, the rights of defense counsel were curtailed, the appeal process shortened, and the powers of the

police and Gestapo were increased. The Nazis implemented these changes by passing specific legislation, and by guiding the interpretation of existing laws.

A survey of the developments in the various areas of National Socialist law clearly indicate that just as there was no separate National Socialist history, there was also no National Socialist legal philosophy or theory.¹⁸⁶ Point 19 of the Nazi party program, “We demand that Roman law, which serves a materialist world order, be replaced by German common law,” remained relatively insignificant.¹⁸⁷

The Parteigerichte or Nazi Party Courts

Prior to concluding this discussion on the German court system and its applicable laws under the Nazi regime, I feel it imperative to consider one additional court in existence during Hitler’s ascension and dictatorship, the Parteigerichte, or party courts.

The National Socialist German Workers’ Party was a mass political organization that possessed its own conflicts and disruptions, particularly during the party’s rise to power in the Weimar Republic. Adolf Hitler, as the party’s leader, employed a variety of techniques for handling strife within the movement. The official mechanism for confronting this internal turmoil, the party’s judiciary, was composed of the Parteigerichte, initially created by Hitler in July of 1921. Although the Nazi party has been characterized as an absolutely totalitarian movement, within the party, it was democratic and liberal with respect to the system it established to afford its members an opportunity to defend themselves against accusations by other members and as a means

¹⁸⁶ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 15-21.

¹⁸⁷ *Id.* at 21.

for recourse against unjust actions by party leaders. These courts provided due process and appellate opportunities for all National Socialists, operating according to strict investigation and trial procedures. Notwithstanding the presence of proper procedures there remained no guarantee that these courts would rule fairly or equitably. They were instruments of control that were designed to manage or suppress conflict, where necessary, to the advantage of Hitler and the party's leaders. However, Hitler never hesitated to ignore the rulings of the Parteigerichte if they disagreed with his own predilections.

The party courts also offered advantages to the personal image of Hitler. These tribunals were to stand above individual Nazis, even Hitler. Nevertheless, these courts and their judges were not judicially independent; they were completely dominated by Hitler and his minions. Under the authority of these judicial bodies, the Nazi leader was able to enforce decisions that were unpopular in the party while simultaneously maintaining anonymity. The Parteigerichte enabled Hitler to avoid publically involving himself when he resolved differences among his subordinates or between party organizations. Additionally, the Parteigerichte permitted Hitler to transform his own inclinations into binding party policy under the authority of institutions that appeared to transcend individuals. This veiled power prevented his unpopular rulings from adversely affecting his greatest personal asset, his image as the unchallenged Führer of the Nazi party and subsequently, Germany.¹⁸⁸

¹⁸⁸ McKale, D.M. (1974). *The Nazi party courts: Hitler's management of conflict in his movement, 1921-1945*. Lawrence, KS: The University Press of Kansas, 1-3.

This chronicled overview has presented the status of the court system in Germany, as well as the applicable laws in advance of and subsequent to the Nazi seizure of prerogative in Germany. It was from this posture that judicial independence and autonomy were completely and consciously abolished by Hitler and his henchmen.

Chapter IX: The Volksgerichtshof (VGH), or People's Court

The Volksgerichtshof, or People's Court, was not constrained by statutes or precedent; it functioned as the arm of the Reich executive. Law, as conceived by Hitler and his followers, was practiced in the People's Court with the sole purpose of promoting the national and military aims of the Nazi government. As a consequence, individual and institutional judicial independence and autonomy were concepts that could no longer be tolerated in Nazi Germany.

The Third Reich used legal means to obstruct the course of justice and impose its own definitions of right and wrong within specific areas of the law. In the hands of Hitler's judiciary, the courts became a constructive weapon of the state and an instrument of terror. The Volksgerichtshof or People's Court was instituted by the Nazis as the court having exclusive jurisdiction in cases of treason, and this new judicial institution epitomized the use of the judicial branch by Hitler.

Reinforced with the German principle of *Treu und Glauben*, loyalty and good faith, the People's Court attended to its treason cases with callousness and harshness. It was the legal armament in Hitler's struggle to cleanse the nation, performing this function through loyalty to country and its leader.¹⁸⁹ "Those not with me are against me,"¹⁹⁰ became its motto. In the People's Court loyalty was defined whereby any doubting of authority became an act of treason, and pursuant to which it sentenced thousands of Germans and citizens of occupied countries to hard labor, imprisonment, and death. The tenure of the People's Court provides rebarbative documentation of the ease with which

¹⁸⁹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), ix.

¹⁹⁰ *Id.*

an instrument of a state initially based upon the rule of law can be transformed into an apparatus of carnage and annihilation through its lack of judicial independence.

The People's Court existed during the years of Nazi domination, from 1934 to 1945, but was grounded in the Weimar Republic, when the judiciary became politicized and the precedent for denial of civil rights to an accused was established. In 1922, The Law Protecting the Constitution broke for the first time the principle of *nulla poena sine lege*, no punishment without law. The abrogation of this principle established the basis for a system of punishment without full legal protection which Hitler and his regime then extended to its ultimate conclusion.

Three main features in the country's history determined the ascendancy of the People's Court in German legal and political culture. First, the conviction of a large portion of the German people, including Hitler and some of his opponents, that Germany had suffered defeat in World War I as a result of treason and revolution. Front line soldiers had been betrayed by the rear echelon;¹⁹¹ Germany had been, "stabbed in the back."¹⁹² This conviction, especially after 1939, that 1918 should not be replicated, shaped both the policy and the practice of the People's Court. Second, the Enabling Act of March 23, 1933, explicitly empowered the government to enact legislation deviating from the Weimar Constitution and to do so without the necessary sanction of the Reichstag. The government was accordingly granting legislative power which Hitler expeditiously engrossed. Third, the final formative element in the history of the People's Court was the *Führerprinzip*, or leadership principle, the acceptance of the absolute

¹⁹¹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), ix-x.

¹⁹² *Id.* at x.

authority of the leader. Unquestioned loyalty was demanded, presupposed, and applied with great rigor in the senates,¹⁹³ or judicial panels,¹⁹⁴ of the People's Court. Roland Freisler, the President of the People's Court in its most fanatical years, applied the leadership principle with pernicious and lethal injustice.¹⁹⁵

The most decisive event in the establishment of the People's Court was the Reichstag fire of February 27, 1933. As a consequence, basic rights contained in the Weimar Constitution were suspended, including,¹⁹⁶ “the liberty of the person, the inviolability of one's dwelling, the secrecy of the mail, the right of free opinion and assembly, the right to form associations and the inviolability of personal property.”¹⁹⁷ Additionally, the death sentence could now be imposed for offenses that were previously punishable only by imprisonment,¹⁹⁸ notably in cases of high treason, *Hochverrat*, or planning to overthrow the government and *Landesverrat*, or treason to country, helping other countries to defeat the German government.¹⁹⁹

In the trial of those accused of having set fire to the Reichstag, it was presumed that a young Dutch Communist, Marinus van der Lubbe, could not have set fire to the Reichstag alone, but must have had accomplices. Along with van der Lubbe, Ernst Torgler, from the German Communist Party, Georgi Dimitroff, the head of the Western

¹⁹³ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), x.

¹⁹⁴ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 141.

¹⁹⁵ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), x.

¹⁹⁶ *Id.* at 43.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Balfour, M. (1988). *Withstanding Hitler: In Germany 1933-45*. (New York, NY: Routledge, Chapman and Hall, Inc.), 70.

European Office of the Comintern, and two of Dimitroff's Bulgarian associates were indicted. For Hitler and the Nazis, the trial proved to be very embarrassing. On December 23, 1933, all defendants but van der Lubbe were acquitted. These verdicts thus manifesting that the Supreme Court of the Reich, the Reichsgericht, still retained its integrity and judicial independence, and had not been influenced by Nazi propaganda and pressure.

Nazi criticism of the Supreme Court's decision followed expeditiously, denouncing the judgment as plainly faulty. At party and cabinet levels, thoughts precipitated regarding the need for a special court which would deal exclusively with cases of treason. At a cabinet meeting on March 23, 1934, Hitler, Minister of the Interior, Dr. Wilhelm Frick, Reich Minister of Justice, Franz Gürtner, Göring and Minister Without Portfolio, Ernst Röhm, agreed that trials for *Hochverrat* and *Landesverrat* should be within the jurisdiction of a special People's Court. According to them, the court should consist of two professional and three lay judges. It was also decided that the Reichsgericht, Germany's final appellate court, should no longer have jurisdiction in matters of treason. On April 24, 1934, the People's Court was formally founded. Subsequently, the editor-in-chief of the *Völkischer Beobachter*, the National Socialist German Workers' Party newspaper, Wilhelm Weiss, commented:²⁰⁰

For good reasons the National Socialist state, after the seizure of power, has created a special court for the trial of the most serious crimes that exist in political matters. Whoever is familiar with the sentencing policy of German courts especially before the NSDAP seizure of power can

²⁰⁰ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 44-45.

fully appreciate the necessity for such a court of law. One could object by saying that before 30 January 1933 high treason and Landesverrat were matters for the Reichsgericht in Leipzig. The trials which were pending or dealt with there could not lead to a satisfactory solution in the National Socialist sense, because the Reichsgericht in its work and tendency was dependent on the general political and spiritual basic attitude which dominated in the democratic state of Weimar. Any trial for treason in Leipzig was as a rule an affair which led to confrontations in parliament and produced a shameless agitation by the gutter press against all who made a modest attempt to protect the Reich at least from the most blatant acts of treason.

The legal uncertainty which dominated before the National Socialist seizure of power is furthermore evidence of the fact that a state cannot be protected solely by the letter of the law, if the law is not in accord with a clear political idea. In this sense then the Volksgerichtshof for the German Reich is an organic creation of the National Socialist state. It is a form of expression of National Socialist basic concepts in the field of the application of the law.²⁰¹

Pursuant to the law founding the People's Court, Berlin was specified as its seat. It was to have five judges; however, as stated, only the presiding judge and one assistant judge needed to be professional judges; the three lay judges were to be appointed on an honorary basis and were not required to have formal legal training. All appointments were to be for a period of five years, with nominations offered by the Minister of Justice and subject to confirmation by the Chancellor. No judge could reject his appointment to the People's Court.

The president of the People's Court was to divide the court into separate senates, distribute the cases between the senates, and staff them with professional and lay judges.

²⁰¹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 45.

Later decrees empowered the president of the People's Court to convene sessions in other parts of Germany, and to emphasize the importance and significance of the court; all judges were to wear red robes, a privilege previously accorded only to the judges of the Reichsgericht.

On July 14, 1934, the People's Court was formally opened and the first sessions were held on August 1, 1934. A new law enacted on April 16, 1936, amended the term of the professional judges from five years to life and required them to be at least 35 years of age; however, the term of the honorary lay judges was not modified.

Within the Ministry of Justice, Secretary of State, Roland Freisler repeatedly published the need to alter basic attitudes within the German judiciary. He advocated replacing the then current legal perspectives with Nazi concepts of law, incorporating their defined principles and accentuating that the responsibility for decision-making should be derived from the leadership principle to inform every judicial decision. Freisler also illuminated the speed and efficiency with which the People's Court was functioning, and stressed the benefits accruing from the imposed limitation that its sentences were non-appealable. It was truly a court of first and last instance.

The first president of the People's Court was Dr. Fritz Rehn, who died on September 18, 1934. Until June 1, 1936, the office of president remained vacant, when Dr. Otto Georg Thierack was appointed president of the People's Court. Judicially, Thierack did not hesitate to abandon legal procedure and act with brutality in the pursuit of his own personal ambitions.

Lay judges were appointed from the higher officials within the Nazi Party and officers of the three services of the Wehrmacht. It was thought desirable that these lay

judges should possess expert knowledge and experience in dealing with subversive attacks directed against the state or any of its various institutions. The number of lay judges on the People's Court considerably exceeded the number of professional judges.

Nazi criminal justice classified the political criminal among the lowest category of criminals. Political criminality was a new concept in German criminal justice, but such an individual was the enemy whose political aims and ideological principles were in direct opposition to the Nazi philosophy, the regime, and by definition, to Germany as a whole.²⁰² Freisler emphasized that it was the task of the judiciary to “secure formally and irrevocably the guarantee of the National Socialist revolution and evolution.”²⁰³ He placed importance on close cooperation between the prosecutor's office and the agencies of the Nazi Party. His aim, for which the People's Court was to serve as a model, was to punish quickly and sharply.²⁰⁴ “Within 24 hours the indictment must be drawn up, within 24 hours the sentence must be passed, to be carried out immediately . . . the time for extenuating circumstances is past.”²⁰⁵ In his Reichstag speech of March 23, 1933, Hitler stated, “Not the individual, but the Volk, should be the centre of legal concern. *Landes- und Hochverrat* must henceforth be expurgated ruthlessly.”²⁰⁶ The People's Court took this admonishment fervently and zealously.

The legal basis upon which the People's Court operated was the existing penal code, interpretations therefrom, laws enacted as a result of the Enabling Act, and further extensions of the penal code through Führerbefehle, or Führer's orders. Provisions

²⁰² Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 46-48.

²⁰³ *Id.* at 48.

²⁰⁴ *Id.* at 48-49.

²⁰⁵ *Id.* at 49.

²⁰⁶ *Id.*

defining high treason were delineated in the penal code and defined as an action attempting to change the Constitution or territory of one of the federal states. Also enumerated was the crime of conspiracy to commit high treason, denoted as cases in which individuals planned to commit high treason but did not have the opportunity to conduct the activity. Preparation for high treason was also a punishable offense. Through 1933, the available sentences for these offenses were hard labor, imprisonment, and confiscation of property; after 1933, these crimes became punishable by death.

Landesverrat was committed when a German, acting in concert with a foreign power, tried to damage the interests of Germany through²⁰⁷ “the destruction or sabotage of war matériel, fortresses or means of communication, the recruitment of Germans for enemy powers, incitement to desertion, spying or supporting spies, betrayal of operational plans or the plans of fortresses and . . . incitement to mutiny in Germany’s armed forces.”²⁰⁸ These prohibitions applied to both Germans and to foreigners residing in Germany, and equally as well to actions by Germans against their country when abroad. Threatening to commit treason was punished as gravely as having committed an act of treason, and admission of mitigating circumstances into evidence was proscribed. Treason was the lowest form of criminality and the alleged perpetrator of such a crime, if not sentenced to death, could be detained without time limitation.

Jurisdiction of the People’s Court was restricted to cases of treason and to those offenses listed in the Decree for the Protection of the German People and State of February 28, 1933. However, the scope of the jurisdiction of the People’s Court was not

²⁰⁷ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 49-51.

²⁰⁸ *Id.* at 51-52.

exclusive, and certain trials for treason, particularly for preparation of treason, could be heard by the next lower court, the Oberlandesgericht, in order to avoid overburdening the People's Court. In time, the jurisdiction of the People's Court was expanded as the definition of treasonous activities was enlarged. Germany's territorial augmentation between 1936 and 1939 also extended the area of operation for the People's Court, as averred treasonous actions committed by non-Germans were now within the purview of the People's Court.

The People's Court considered itself as a political court, and no attempt was made to conceal this bias or its lack of judicial independence. Nevertheless, with Dr. Otto Georg Thierack's appointment as President of the People's Court on June 1, 1936, this political inclination of the court increased as he espoused the view that judges should take as their guidance the principles advanced by Nazi leadership, and only on that basis should justice be imposed. Protecting the security of the Third Reich and of the Nazi regime was to be the main function of the People's Court. Thierack subsequently wrote to Freisler:²⁰⁹

In no other court as in the VGH is it so clearly apparent that the application of the law of the highest political court must be in accord with the leadership of the state. Therefore it will, for the most part, fall to you to lead the judges into this direction. You must therefore look at every indictment and recognize where it is necessary in confidential and convincing consultation to convince the judges concerned what is essential for the state. I want to emphasise again, that this must take place in a manner which convinces and does not order the judges . . .²¹⁰

²⁰⁹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 52-55.

²¹⁰ *Id.* at 55.

To elaborate on the political predisposition of the People's Court, close collaboration was established between the Ministry of Justice, state prosecutors, and the Judges of the People's Court on the one hand and the Gestapo on the other. On June 13, 1936, the principal officers of each organization met in Berlin to discuss issues associated with acts of treason. Mutual agreement was reached regarding the necessity for cooperation between the judiciary and the Gestapo, with a regular exchange of treason files between the Gestapo, prosecutors, and the investigating judges of the People's Court then being instituted.

The Nazi regime was determined to consolidate its position and not to permit its power and authority to be usurped. Therefore, virtually any action against the state or the Nazi Party was defined as high treason. Thus, any form of political organization or activity, other than the Nazis, was deemed to be committing high treason, as was an attempt to infiltrate the army and police forces. Any production or publication of materials directed against the Nazi Party and state, or listening to illegal radio broadcasting stations were also treasonous actions. Additionally, the penal code stipulated that anyone who knew of treasonable activities or their preparation and failed to report them was guilty of either high treason or *Landesverrat*.

Until 1936, the People's Court was disposed to sentence individuals relatively mildly, while applying existing law broadly and with flexibility. Upon Thierack's appointment as president on June 1, 1936, sentences decidedly became more severe. In contrast to the war years, during its early years, the sentences of the People's Court were not widely publicized, and were confined to legal journals and Nazi Party leadership

personnel. The population at large was not aware of the People's Court,²¹¹ and Hitler was still reluctant to apply with full fervor and vigor his maxim of, "He who is not for me, is against me."²¹²

At no stage of the dictatorship did Nazi principles ever produce a fully coherent ideology; old concepts continued to exist, though in the course of twelve years many of them were eroded and deprived of their original essence. The civil and criminal law codes remained intact although the penal laws were amended and penalties for violations increased to serve the regime's objectives. Freisler and other members of the judiciary persisted in believing in the fictions of the *Rechtsstaat*: that Germany continued to be a state based on the rule of law.

Volk, race, and blood had become the foundations of the Nazi *Rechtsstaat* and the previously acknowledged principles of justice subordinated to Nazi postulations, whatever they may be. From 1934, until his appointment as President of the People's Court on August 20, 1942,²¹³ Freisler profusely published articles and commentaries on the state of the law under the Nazi regime. For Freisler there was no place in his concept of state and justice for the separation of powers. He considered this as an obsolete legacy from the past, of a time of distrust between the people and their political leadership. Under Nazi leadership, this suspicion had been overcome; as such, there was no longer any need for the separation of powers.

²¹¹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 56-65.

²¹² *Id.* at 65.

²¹³ *Id.* at 118.

Freisler declared that what was specifically fundamental to the Nazi state was the premise that the judiciary and lawyers must not be constrained by any notion of a static natural law. In order to secure Volk and state, law must always be organic and developing, adaptable to changing circumstances, and at all times maintaining the vitality of Volk and state, while protecting their interests. Law was thus no longer a normative, but an instrument of political expediency. Therefore, people residing in lands under German domination, particularly those in the east, may continue to live under their own laws provided they corresponded to Germany's interests, so Freisler argued. Special legislation would administer the law for²¹⁴ "inferior races such as Jews and Poles,"²¹⁵ though not to dispense justice, but to assert Germany's superior dominance and to ensure its racial purity. Freisler's concept of state was based upon force expressed and contained in political expediency, not on moral considerations.

Freisler placed prominence on the value of the *Führerprinzip* in the courtroom. At all times, it was the judge who should lead the trial, his leadership being more important than the files containing the evidence. Likewise, Freisler demanded that judges give preference to the leading role of the judge rather than to the law. For Freisler, the greatest national security threat was posed by acts of high treason and *Landesverrat* and should be prosecuted to the fullest extent. To him, these acts were of such magnitude that any consideration of their motivation was irrelevant. In his view, the will and the intention were as dangerous as the actual crime, and should be punished with equal force.

²¹⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 68-72.

²¹⁵ *Id.* at 72.

Freisler's writing career was focused upon establishing the People's Court at the apex of the judiciary and thereby replace the Reichsgericht in the process. Using the *Führerprinzip*, it was to be the judge's task, along with the prosecution, to ensure that all trials would proceed quickly and thoroughly. The presiding judge was to lead and decide; fellow professional and lay judges could advise but not decide, as responsibility rests with the presiding judge alone. From the judges of the People's Court to the most unpretentious lawyer, everyone was to be,²¹⁶ "a Soldier of the Law."²¹⁷

According to Freisler, the judiciary's role was not to be a supervisor of the executive, but a faithful follower of the leadership, as the principle of the separation of powers no longer existed, distrust having been overcome by the Führer and the Nazi Party and replaced,²¹⁸ "by the healthy unity of the Volk."²¹⁹

The most consequential of all of Freisler's missives was the implicit negation of the independence of the judiciary. In Freisler's view, within the context of the Nazi regime, the independence of the judiciary had become archaic. Judicial independence had to be ignored as much as individual rights within the regime, as Nazism derived its strength and purpose from the Volk. It was not the responsibility of the judges to make the law; this was the task of the Volk represented within the regime and led by the Führer. The judiciary's function was to apply the law in the interest of the Volk, not for the benefit of the individual. Judicial officers were to subordinate themselves to the totalitarian will of the Nazi regime. In territories returned to Germany by appeasement,

²¹⁶ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 72-81.

²¹⁷ *Id.* at 81.

²¹⁸ *Id.* at 83.

²¹⁹ *Id.*

i.e., annexation, or occupation, the role of the judiciary was the same as that within Germany,²²⁰ “Harshness against the enemy of the Volk means the well-being of the Volk.”²²¹

As a result of the previously discussed June 13, 1936, Berlin meeting, there existed already a large degree of cooperation between the judiciary and the Gestapo. During 1939, the number of cases increased in which individuals acquitted by the People’s Court, as hereinafter detailed, were then re-arrested by the Gestapo and interned in concentration camps. On July 29, 1939, Ernst Lautz, one of the chief prosecutors of the People’s Court wrote to the Reich Minister of Justice, Franz Gürtner:²²²

I have discussed with the president of the VGH the issue of whether people accused of activities hostile to the state should be handed over to the Gestapo when their arrest can no longer be maintained by the VGH. Until further order I shall proceed in future as follows: in agreement with the president of the VGH, when acquittal has occurred, or the sentence is already covered by the period which the accused has spent remanded in custody, I shall in principle hand over such persons to the Gestapo except when the Gestapo has expressly stated it is unnecessary to do so. If an acquittal, because of proven innocence, is likely to occur, I shall ask the Gestapo whether a transfer is required or not. Should the Gestapo declare that it would be necessary to carry out protective custody, I shall initiate the transfer.²²³

Not only was this action illegal, it was also a complete capitulation of the judiciary to the Nazi regime.

²²⁰ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 84.

²²¹ *Id.*

²²² *Id.* at 87.

²²³ *Id.*

By the end of 1941, the People's Court consisted of six senates, the first of which was presided over by the president of the Court, Dr. Otto Georg Thierack. In total, these six senates were comprised of 78 professional judges and 74 prosecutors. All but three judges and two prosecutors were members of the Nazi Party. In addition, there were 81 lay judges, 71 of which were officials within the Nazi Party, the remainder being Wehrmacht officers of the rank of colonel and above in the three services. None of the Wehrmacht lay judges were Party members.²²⁴

Hitler had an inherent mistrust and expressed contempt of the legal profession,²²⁵ which placed the judiciary in a position of constant criticism. On May 31, 1942, Hitler opined that the relevant criteria in the selection of judges required fundamental change. In the future, only people who were at least 35 years of age, and had already proven themselves with extensive experience in practical life, who identified with Nazi Party views, and were aware of the problems associated with leadership, would be considered for judicial positions. He also stated in a speech before the Reichstag's last session on April 26, 1942, that he expected certain things:²²⁶

That the nation gave me the right, wherever service is rendered less than unconditionally in the task which involves the question of to be or not to be, to intervene immediately and effectively. Fighting forces and home front, transport administration and judiciary must subordinate themselves to one aim only, namely the obtaining of victory . . .

I therefore ask the German Reichstag for its express confirmation that I possess the legal right to force everyone to do his duty, or to punish anyone who in my view does

²²⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 87-90.

²²⁵ *Id.* at 86.

²²⁶ *Id.* at 110-113.

not fulfill his task conscientiously, by demotion or removal from office, without regard to who he is and what well-earned rights he may possess . . .

Equally, I expect the German judiciary to understand that the nation does not exist for the judiciary but the judiciary for the nation, that is to say that the whole world, including Germany, is not to be blown to smithereens just in order that a formal law can exist, but that Germany must live on, however much the formalities of the judiciary may be in contradiction with this . . . This means that . . . from now on I shall intervene in . . . cases and remove judges who are obviously not aware of the necessity of the hour.²²⁷

Hermann Göring, as President of the Reichstag, moved that such powers be granted. These were prerogatives that Hitler already possessed, but with enactment became legal. Hitler had thus formally preempted and supplanted the supreme judicial authority in Germany. No *Führerbefehle* before, no matter the area, was any longer subject to question. The *Führerprinzip* was preeminent and omnipotent. As Goebbels stated on April 27, 1942,²²⁸ “. . . the Führer demanded absolute plenary powers during wartime for himself to do whatever he considered necessary, even with reference to individuals without having to take into consideration any so-called well-earned rights. This demand was approved enthusiastically and noisily by the Reichstag . . .”²²⁹

On August 20, 1942, it was agreed that Thierack was to become Minister of Justice and upon Hitler’s suggestion, Freisler was appointed President of the People’s Court. As a result of these measures and actions, Hitler himself had now replaced the *Rechtsstaat*. The German judiciary had ethically succumbed to the power of corruption

²²⁷ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 113-114.

²²⁸ *Id.* at 114.

²²⁹ *Id.*

by allowing their independence to be appropriated, and had become completely subjugated to Hitler and the Nazi regime. From 1942 until the war's final conclusion, it was Hitler who controlled and administered what he considered to be justice with implementation through judges who were ideologically convinced Nazis.²³⁰

Freisler wrote on May 9, 1942,²³¹ shortly after his appointment to the presidency of the People's Court, "Well, someone is going to have to be the bloodhound."²³² In a letter from Thierack, as new Minister of Justice, to Freisler dated September 9, 1942, Thierack stated:

. . . in this instance it moves me personally to hand over the Volksgerichtshof and its judges, a court which I have built up and led with joy.

In no other court than the VGH does it emerge so clearly that the administration of the law in the highest political court must be in accord with the leadership of the state. It will be your main task to guide the judges in this direction. You will have every indictment submitted to you and will recognize where it is necessary to underline to the judge concerned in confidential and convincing discussion what is essential for the state. I must emphasise again that this must take place in a manner which convinces rather than orders judges . . .

In general, the judge of the VGH must become accustomed to seeing primarily the ideas and intentions of the leadership of the state while the human fate which depends on it is only secondary. The accused before the VGH are only little figures of a much greater circle standing behind them which fights the Reich.²³³

²³⁰ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 118-125.

²³¹ *Id.* at Note 1 to Chapter 8, 126 and 279.

²³² *Id.* at 126.

²³³ *Id.* at 127.

As the war approached, commenced, and then proceeded, the number of indictments for high treason and *Landesverrat* increased dramatically over the years.²³⁴

Year	Total Number of Indictments	Number of Indictments for High Treason and <i>Landesverrat</i>
1939	341	340
1940	598	595
1941	690	684
1942	1,084	1,069
1943	1,327	1,324
1944	2,120	2,115

According to Thierack's and Freisler's own reports between 1937 and 1944, the People's Court issued the following number of death sentences:²³⁵

Year	Number of Accused	Death Sentences Imposed	Other Sentences Imposed	Acquittals
1937	618	32	422	52
1938	614	17	393	54
1939	470	36	388	40
1940	1,096	53	954	80

²³⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 131.

²³⁵ *Id.* at 132.

1941	1,237	102	1,058	70
1942	2,572	1,192	1,266	107
1943	3,338	1,662	1,477	181
1944	4,379	2,079	1,744	489

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Within the six senates of the People's Court that existed in 1942, the First Senate, led by the president of the Court, first Thierack and then Freisler, had the highest number of death sentences, in part because they drew the most important cases into their senates. In 1942, prior to Freisler becoming president, the First Senate imposed 649 death sentences out of a total number of 1,192; in 1943, under Freisler, of the total 1,662 death sentences ordered, Freisler's senate passed 769; and, in 1944, of the 2,079 death sentences, the First Senate ordered 866. Freisler aspired to comport himself according to his self-proclaimed title, "Bloodhound."

In the fall of 1942, Thierack began authoring periodic circulars to all judges providing Nazi Party guidelines for the administration of justice. These bulletins were all under the theme that the judiciary was to be reformed in accordance with the demands of the Führer, that judges should return to the Germanic leadership principle whereby the Chief was also the Supreme Judge, and that there was no longer any room for independence within the judicial ranks. Thierack also communicated in his epistles that questions of clemency were within the exclusive purview of the Führer, greater control of

²³⁶ I hasten to point out that the total number of individuals sentenced to some form of punishment when combined with the number of acquittals does not equal the number of accused, but I have included this information to provide a general indication of the relative increase in the severity and harshness of the penalties imposed by the People's Court as the war years progressed.

defense lawyers was required, and that “inferior peoples,” such as Poles and Jews, had no right to a proper trial in court since they were by definition “lawless.”²³⁷

Wehrkraftersetzung, or undermining national defense, was the charge with which the People’s Court was most often confronted. Next came the *Nacht-und-Nebel*, or night-and-fog, trials emanating out of the *Nacht-und-Nebel* decree personally introduced by Hitler in December of 1941. Under this decree, according to Hitler, any participant in a public disturbance or demonstration outside of Germany should be either sentenced to death in the German occupied country or deported to Germany. The relatives of those transported to Germany were not to be notified of their relocation. Wilhelm Keitel, the Chief of the Supreme Command of Armed Forces, elucidated Hitler’s instructions into the following order:²³⁸

It is the long considered will of the Führer that in occupied territories attacks against the Reich or the occupying power should be met with measures other than those used hitherto. The Führer’s view is the following: all prison and hard labour punishments for any such actions will be considered a sign of weakness. An effective and long-lasting deterrence can only be achieved by the death sentence or by measures which keep the dependents of the criminal in uncertainty about his fate. This purpose is served by deporting them to Germany. The guidelines attached for the prosecution of such punishable acts are in accordance with the thinking of the Führer. They have been examined and approved by him.²³⁹

Keitel went on to state that anyone sentenced in occupied territories should be executed within 24 hours. Additionally, no death sentences were to be imposed against

²³⁷ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 132-133.

²³⁸ *Id.* at 133-142.

²³⁹ *Id.* at 142.

women, except for acts of murder and terrorism, that the *Nacht-und-Nebel* decree was not to apply to Germans or racial Germans within occupied territories, and that Jews were excluded from the operation of the decree, since they had previously been excluded from the application of judicial procedures and were subject only to the Schutzstaffel (“SS”),²⁴⁰ or Protection Squads of the Nazi Party,²⁴¹ and the police.

All trials were to be held secretly and in a speedy manner. Priests and clergymen were refused admission to the accused and an acquittal may not result in liberty, but subsequent detention by the Gestapo with transfer to a concentration camp. Secrecy even continued beyond death as final letters were withheld and destroyed, although the registry offices were informed of each case and the names of the deceased entered into a death register. Any notice or information concerning the death of the individual was to be concealed, except in cases where the Minister of Justice had given approval for release. Also, the press was not to be apprised.

The first *Nacht-und-Nebel* trials began in late August of 1942, and through the end of that year, over 1,000 cases had been submitted to the People’s Court for disposition. Freisler transferred approximately 800 of these to other courts, while retaining the balance for trial before the People’s Court, mostly before his own First Senate. Some cases involved hundreds of accused, the largest encompassing 360 defendants. In light of these large numbers, the trials often had to be conducted in the local Berlin prisons and sentences carried out in prisons in other areas of the Reich, as the local prisons could not fulfill the number of executions imposed. No reliable figures are

²⁴⁰ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 145.

²⁴¹ *Id.* at 249.

available relative to the total number of *Nacht-und-Nebel* cases tried before the People's Court, but they involved mostly French, Belgian, Dutch and Norwegian nationals. Only after the Allied invasion of France in June of 1944 did Hitler issue an order suspending all *Nacht-und-Nebel* prosecutions, with defendants awaiting trial being remanded to the Gestapo for transfer to concentration camps where those individuals who were considered dangerous were soon liquidated. The particularly inhumane character of the *Nacht-und-Nebel* decree arose from the secrecy surrounding the cases. Dependents never knew if the arrested family member had survived, and from the practice, already applicable to German citizens, if an acquitted defendant was remanded to the custody of the Gestapo and the concentration camp system.

In 1942, Josef Goebbels spoke to the members of the People's Court, initially stating that his remarks had been previously approved by the Führer. He insisted that when making a decision, the judge had to take as his frame of reference not the law, but the basic principle that the accused must be expelled from the *Volks* community. In wartime, it was not important if a judgment was just or unjust; all that was necessary was that it fulfilled its purpose. The state was required to defend itself in the most effective manner against its internal enemies through their extermination.

Goebbels then referenced the Jews, asserting that they should be denied from employing German legal remedies, from German law, and of any right to appeal official measures taken against them. On April 21, 1943, it was formally decreed that the Penal Code for Poles and Jews no longer applied to Jews; they were now beyond the pale of the law and, therefore, outside the protection and assistance of any laws.

In February of 1943, a ruling was issued that in cases before the People's Court involving citizens of occupied states; it was within judicial discretion whether the defendant could be represented by defense counsel. Cases also arose in which Heinrich Himmler did not consider it to be within the public interest to have the matter tried before any tribunal, including the People's Court, and simply ordered that the individuals concerned be shot.

Freisler, like his predecessor Thierack, reserved all potentially important matters for himself, including the discretion to decide which cases of high treason and *Landesverrat* should be tried before the First Senate. As a result of the July 20, 1944, bomb plot against the life of Adolf Hitler, the jurisdiction of the People's Court was further expanded whereby all political crimes of all Germans, including members of the Wehrmacht, SS, and police, tending to damage confidence in the political and military leadership of the Reich were to be tried by the People's Court or, if necessary, by special courts. It was then within the discretion of the Ministry of Justice to decide whether the case should proceed before the People's Court or a special court. Once this determination was reached, the Führer resolved whether the accused would be "released" from the Wehrmacht, SS, police, or expelled from the party and transferred to the civil judiciary for trial.

On November 16, 1943, Melitta Wiedemann, editor of *Die Aktion, Kampfblatt für das neue Europa*, addressed a correspondence to Minister of Justice Thierack in which she criticized Freisler, referencing their former talks and then proceeding to say:²⁴²

²⁴² Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 145-172.

Our former talk has remained in my memory, and not only the part about which I had actually to report, because you provided logical and psychologically effective reasons which are suited to make the harshness of our laws understandable to the broadest circles of the population, and even abroad.

Unfortunately, by accident I have heard from a number of very superior witnesses comments which expressed great concern about the law and that at the VGH (First Senate) a series of trials is being conducted which shows no evidence of awareness of the necessity for psychological and propagandistic understanding . . .

Instead, the presiding judge was so hard, unjust and unfriendly towards the accused, that he was obviously endeavouring to obstruct the man in his defence, although he was as good as sentenced to death already, while he openly courted the witnesses.

As the propaganda campaign just started proves, the mood of the German people is considered particularly important. Therefore it is important to reshape VGH trials...[so] that the public is confronted by matter-of-factness, a humane treatment of the accused, so the conviction reigns supreme [and people will understand that] the subsequent harsh judgment has been necessary in the interest of the state and therefore deserves affirmation...²⁴³

Freisler's temperamental outbursts have been recorded on film. His demeanor to those who appeared before him depended upon their attitude; attempts to belittle or deny what Freisler considered to be obvious crimes were met with his malevolence and maliciousness. Those defendants who affirmed their actions received a more dispassionate jurist; however, nothing may have influenced the final resolution.

Freisler's reputation began to suffer during the summer of 1944. Lay judges in increasing numbers began producing medical certificates excusing them from attending

²⁴³ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 172.

sessions of the People's Court. Freisler was also ridiculed due to his inability to adequately define "defeatism;" he could explain it only by reference to several practical examples, and concerning his view that a phrase in the Penal Code that the defendant "can" be punished mildly, means that he should "not" be punished mildly. However, Freisler's greatest personal forum was yet to come, that being provided through the series of trials of the July 20, 1944, conspirators,²⁴⁴ presided over by Freisler until his death on February 3, 1945.

Freisler's objective in dealing with those individuals indicted in the July 20, 1944, plot on Hitler's life was to keep strictly to the charges themselves, allowing the defendants and their defense counsel to speak only relative to the crimes alleged, and preventing them from making any statements in court regarding their objectives and personal moral motivations for acting. Hitler had ordered trials that excluded the general public, only admitting to the gallery a selective but large group of spectators. Most of the accused in the first trials were members of the armed forces and by law were subject to the military judiciary. To circumvent this restriction, Hitler created a Military Court of Honour; this court then proceeded to expel all of the accused defendants of the armed services from the Wehrmacht and thereby subject them to the jurisdiction of the civil courts, in these instances, the People's Court and Freisler.

On August 7, 1944, the first of the trials commenced before Freisler and the First Senate of the People's Court. As the original building housing the People's Court had been damaged by bombs, the trials were held in the Berlin Chamber Court. The public

²⁴⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 173-174.

gallery was always filled to capacity with its invited guests, including journalists and film crews; therefore, though closed to the general citizenry, the public nevertheless participated through press reports and community conversations.

Freisler conducted himself during the trials not only as a judge whose task, in German judicial procedure, was to obtain the truth, but as someone determined to destroy evil within the regime and society. Particular mention is made of Defendants, Peter Graf Yorck von Wartenburg and Fritz-Dietlof Graf von Schulenberg, who, undeterred by Freisler's acerbic and caustic comments, managed to present their deeply held motivations and acknowledged, without reservation, what each had undertaken in the conspiracy, desiring only to save Germany from utter misery.

During the trial on February 3, 1945, of one of the conspirators, Schlabrendorff, the proceedings were interrupted by an Allied air raid in the course of which Freisler was killed. He was buried in a simple ceremony as Hitler had objected to a state funeral. His service was attended only by his wife, a few colleagues from the People's Court, a representative of the Ministry of Justice, and a few Nazi Party officials, with his obituary appearing in the last issue of German Justice on February 16, 1945.

The trials following the July 20, 1944, plot against Hitler constituted the climax in the development of the People's Court. From the latter half of 1944 onward, billboards throughout Germany contained new posters, pink in color, headed "Im Namen des Volkes," announcing death sentences for defeatism, listening to foreign broadcasting stations, plundering after air raids, and for thefts of postal packages destined for soldiers at the front, but the trials associated with the July 20, 1944, plot were the culmination for the People's Court.

Between 1937 and 1941, the People's Court imposed 240 death sentences, one-sixth of all the death sentences ordered by the German judiciary during this period. The trend toward the increased mandating of death sentences had been introduced by Thierack and heightened by Freisler upon his assumption of the Presidency. This was at a time when the tide of war was turning against Germany; the radicalization of the judiciary kept pace with the negative progression of the German war effort, the latter being the driving force not only for the People's Court, but also of the military judiciary.

Freisler was a fanatical Nazi and for him the judge was Führer; he led his professional and lay judges, discussing cases with them prior to the actual trials, in many instances thereby prejudging cases he was about to convene. He had prejudices against Roman Catholic clergy and Jews and was asked to deliver judgments on practical political issues which the Third Reich expected and whose deterrent value would be comprehended by the German citizens.

During a trial the most egregious offense a defendant could commit was to attempt to extricate himself out of the charge, especially if the case and the accused's guilt were incontrovertible. Freisler had stated prior to his appointment, what he deemed paramount, i.e., the defendant's frame of mind, to intend to commit a crime was tantamount to actual perpetration. He believed in Hitler, the Nazi Party and Germany, defending them until his death.

Under pressure from Hitler, who had preempted the right to convert any sentence into a death sentence, the People's Court decreed death sentences in greater numbers. Within Germany, the Court was considered an instrumentality to avoid defeat and achieve "final victory." It has been calculated that the People's Court ordered 12,891

death sentences between 1934 and 1944; however, this figure can never be conclusively verified. One can state that the number of death sentences passed by the Court before the war was low, that they increased with the outbreak of fighting, and accelerated rapidly as the war turned against Germany.²⁴⁵ Comparison of yearly percentage totals of death sentences imposed to acquittals granted substantiates this enhanced harshness:²⁴⁶

Year	Death Sentences	Acquittals
1940	4.8%	7.3%
1941	8.2%	5.4%
1942	46.3%	4.7%
1943	49.8%	5.4%
1944	47.4%	11.7%

The rise in death sentences from 1942 onward can be attributed to the *Nacht-und-Nebel* cases and the July 20, 1944, plot. Customarily, each sentence of death passed by the People's Court required Hitler's assent, but this practice changed during the war when Hitler, informed that over 900 individuals awaiting capital punishment were still in prison, empowered Thierack to order immediate executions in all cases that he considered to be without doubt.

After Freisler's death, and as Allied air raids kept interrupting trials, on April 24, 1945, the People's Court was relocated once again, on this occasion from Potsdam to Bayreuth, but no further trials were conducted. The Court was formally dissolved on

²⁴⁵ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 196-234.

²⁴⁶ *Id.* at 234.

October 20, 1945, by Proclamation No. 3 of the Allied Control Council for Germany; thereby, this instrument of terror within the Nazi regime legally ceased to exist.

However, Germany has retained the legacy of the People's Court, in so much as the institution and its members were never fully indicted by the Nuremberg War Trials. On January 25, 1985, the Bundestag of the Federal Republic of Germany did, by unanimous vote, declare all judgments entered by the People's Court to be null and void.²⁴⁷

Subsequently, on Tuesday, September 8, 2009, a unified German parliament unanimously passed, once again, legislation overturning Nazi-era verdicts convicting people of treason, nearly 65 years after the end of the Second World War. Justice Minister Brigitte Zypries stated, "By rehabilitating all so-called war traitors, we restore the honor and dignity of a long forgotten group of victims of the Nazi justice system." Some members of parliament had initially been opposed to the blanket measure overturning the convictions, contending that some of those sentenced may have harmed their comrades in arms, but acquiesced when it was concluded that it was impossible to determine if the acts for which people were sentenced actually harmed others. Justice Minister Zypries asserted that, "Even if not all of those who were sentenced to death as war traitors were political resistance fighters, they definitely all were victims of a criminal justice system that killed in order to maintain the Nazi regime."²⁴⁸ These acts constituted a potentially dangerous precedent relative to the separation of powers in a democracy.

Constitutionally, the Bundestag and parliament were allowed only to request judicial

²⁴⁷ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 234-241.

²⁴⁸ Germany Overturns Nazi-Era Treason Convictions. (2012). In *Guardian News and Media Limited*. Retrieved from <http://www.guardian.co.uk/world/feedarticle/8697060/print>

review of all judgments entered by the People's Court and decide each separately, an extremely onerous request and task.²⁴⁹

Societies, governments, and countries cannot expunge themselves of their pasts. The record that evolved from 1934 to 1945 is historical, a chronicle of the barbarism of the Nazi regime, of the lack of judicial independence and autonomy that existed thereunder, and that will in infamy forever speak for itself, regardless of legislative or judicial activity, remorse, and contrition.

With the formal abrogation of the People's Court, three components that marked its origin, development, and actions also came to their definitive resolution: the stab in the back myth; the Enabling Act which empowered the regime to enact laws deviating from the Constitution and without legislative approval; and, the *Führerprinzip*.²⁵⁰ All that remains are the vestiges of its reprehensible ignominy in failing to take account of individual defendants and the collective identification of groups of "criminals," such as Jews, gypsies, and other minorities, hopelessly caught in the machinery of what was then termed law and justice. This legal apparatus brutalized human beings through ideology, turning functionaries into instruments of this dogma, thereby sacrificing their individuality and judicial independence and autonomy to the cause, identifying with the cause, and existing only for its ends without consideration of the means. Subordinates within this political labyrinth had no reason for being other than to ruthlessly and remorselessly enslave, persecute, and exterminate people who did have other motives and justifications for their respective actions.

²⁴⁹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 241.

²⁵⁰ *Id.* at 234-242.

Chapter X: Dr. Roland Freisler, President of the People's Court

The President of the People's Court, Roland Freisler, was an early zealot of the Nazi movement. He deployed a keen intellect and an unshakable dedication to Hitler in the perversion of justice that was extreme even by standards of the Third Reich.²⁵¹ In Freisler, Hitler found an eager and implacable collaborator in his drive to subordinate the judiciary to his will. Freisler readily abandoned his individual judicial independence and autonomy in his yearning to cooperate with the regime.

Roland Freisler died on Saturday, February 3, 1945, at the scene of his misdeeds. He was killed during an Allied air raid while leaving his courtroom and seeking the safety of a bomb shelter. Freisler died less than 24 hours after passing his last death sentence and only a few hours before he would have ordered his next execution. On February 2, 1945, Freisler had imposed death sentences on Klaus Bonhoeffer, brother of Pastor Dietrich Bonhoeffer, and on Rüdiger Schleicher, a senior official in the Reich Aviation Ministry; both men had been found guilty of complicity in the attempted assassination plot of July 20, 1944, on the life of Adolf Hitler.

Roland Freisler's sudden death received only a meager acknowledgment in the Nazi Party newspaper, the *Völkischer Beobachter*, or National Observer, stating simply that the President of the People's Court, Dr. Roland Freisler, had been killed during an air raid on Berlin.²⁵² The Reich Ministry of Justice had issued a press notice reading,

²⁵¹ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 63.

²⁵² Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 210-211.

“Newspapers are to refrain from commenting on or making their own additions to the foregoing report.”²⁵³

Freisler was not a popular man; he was feared and hated. Hitler considered him to be an ignoble sycophant, yet it was only by serving the Führer that Freisler could achieve the authority he desired. The Nazi regime afforded him the opportunity to act as lord over life and death. His cruel and evil cunning lay in the humiliation of the accused; he sought to destroy the dignity of his victims.

By August 20, 1942, the date of Freisler’s appointment as President of the People’s Court, justice had already given way to openly arbitrary judicial decisions.²⁵⁴ After his appointment, Freisler wrote to Hitler that, “the People’s Court will always endeavor to judge a case in the same way as you, mein Führer, would judge it yourself.”²⁵⁵

Freisler was born on October 30, 1893, and baptized in the reformed Protestant faith on December 13, 1893, in Celle, Lower Saxony, the city of his birth. Two years later his brother, Oswald, was born. Their father, Julius Freisler, who was originally from Moravia, moved to Germany where he married Charlotte Auguste Florentine Schwerdtfeger in Celle. In December of 1893, the family moved to Hanover and then Hamelin, where Roland’s brother, Oswald, was born.²⁵⁶ In 1901, Julius Freisler, an engineer, was offered a professorship at the Royal College of Building in Aachen, which

²⁵³ Knopp, G. (2002). *Hitler’s hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 211.

²⁵⁴ *Id.* at 212.

²⁵⁵ *Id.*

²⁵⁶ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 28.

guaranteed Julius and his family an assured income with both sons thereby being able to receive better schooling.²⁵⁷

In 1903, at the age of ten, Roland Freisler entered Kaiser Wilhelm grammar school. He subsequently established a reputation for academic exactitude and a willingness to engage in debate. In the autumn of 1908, the family settled in Kassel, Hesse, where in 1912, Roland Freisler took his Abitur,²⁵⁸ the high school certificate for those planning to attend university,²⁵⁹ finishing first in his class. He then matriculated to the University of Kiel to read law, but had his studies interrupted by the outbreak of World War I in 1914, entering the 167th Infantry Regiment in Kassel as an ensign.

After a short period of training, on November 10, 1914, his regiment attacked Langemarck in Flanders, the graveyard of Germany's youth. Freisler was wounded and returned home for convalescence. In the spring of 1915, he rejoined his regiment which was then transferred to the northern sector of the Russian front. After being promoted to lieutenant and awarded the Iron Cross of both classes for bravery, he led a reconnaissance mission which fell into a Russian ambush resulting in his capture as a Russian prisoner of war. Freisler spent the rest of the war as a prisoner in an officers' camp north of Moscow. With the Bolshevik Revolution and the Treaty of Brest-Litovsk, this camp was transferred to German administration; Freisler was appointed as its Commissar, managing the camp's food supplies.²⁶⁰ While interned, Freisler learned Russian along with the

²⁵⁷ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 213-214.

²⁵⁸ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 28.

²⁵⁹ Hett, B.C. (2008). *Crossing Hitler: The man who put the Nazis on the witness stand*. (New York, NY: Oxford University Press, Inc.), 20.

²⁶⁰ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 28-29.

teachings of Marxism and although he later rejected all accusations that he had tentatively approached the enemy, he could never fully escape the skepticism of being a “Bolshie.”²⁶¹

Freisler returned from Russia on July 17, 1920, and once again devoted himself to his legal studies at the University of Jena where within one year he received his Doctor of Law degree, the subject of his thesis being, “Fundamental Factors in Industrial Organization.” He then moved to Berlin where in 1923, he successfully took the final bar examination which permitted him to practice as a lawyer. During the period between completing his doctorate and the bar examination, he served as a *Referender* and then as an *Assessor*,²⁶² or a newly qualified lawyer,²⁶³ at the Celle local court.

Upon returning from Russia, Freisler became a member of the right-wing Völkisch-Sozialer Bund and within a few months of Hitler’s re-founding of the National Socialist German Workers’ Party in Munich,²⁶⁴ became in July of 1925,²⁶⁵ a Nazi Party member, having membership number 9,679.²⁶⁶ In 1924, he had returned to Kassel and together with his brother, Oswald, established a successful law practice. Roland attained a reputation as a criminal defense lawyer and acquired the desire to become a politician, entering the city counsel of Kassel,²⁶⁷ the Prussian Diet and after 1932, a member of the

²⁶¹ Knopp, G. (2002). *Hitler’s hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 215.

²⁶² Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 29.

²⁶³ Hett, B.C. (2008). *Crossing Hitler: The man who put the Nazis on the witness stand*. (New York, NY: Oxford University Press, Inc.), 3.

²⁶⁴ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 29.

²⁶⁵ Knopp, G. (2002). *Hitler’s hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 216.

²⁶⁶ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 29.

²⁶⁷ Knopp, G. (2002). *Hitler’s hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 215.

Reichstag.²⁶⁸ Freisler also saw the Nazi Party as the impetus for his career, making his name as an advocate for the future Nazi Germany.²⁶⁹

On March 24, 1928, he married Marion Russegger (February 10, 1910 – January 21, 1997),²⁷⁰ the daughter of a somewhat affluent merchant. Together they had two sons, Harald, born on November 1, 1937, and Roland, date of birth, October 12, 1939; both were baptized as reformed Protestants in Berlin. Neither Freisler nor his wife abandoned their religious affiliations at a time when many individuals considered it more expedient to leave the Protestant Church and become “German Christians” or nondenominational “believers in God” pursuant to Nazi phraseology.

Freisler emerged as one of the preeminent counsel of the Nazi Party. Hesse was one of the main centers of Germany’s Social Democrats, and the city police, administration, and judiciary were all against the Nazi Party in general and Freisler in particular. He was the subject of a number of press confrontations, with charges encompassing embezzlement and personal enrichment, but he was always exonerated.²⁷¹

In February of 1933, Freisler received a letter from Berlin appointing him as a department head in the Prussian State Ministry of Justice. Four months later, he was appointed permanent secretary at the Prussian Ministry of the Interior, and he gained a reputation as a jurist, but one who was emotional, unpredictable, domineering and terrifying to those who opposed his ideas. Anyone who shared his Nazi ideology

²⁶⁸ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 29.

²⁶⁹ Knopp, G. (2002). *Hitler’s hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 216.

²⁷⁰ Roland Freisler – Biography (n.d.). Retrieved from <http://www.imdb.com/name/nm0293887/bio>

²⁷¹ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler’s Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 29-31.

received his goodwill and appreciation, but those opposed to Nazism met with contempt and castigation. Freisler's career became connectedly defined with the laws of the Nazi regime and the accompanying moral degradation of the German judiciary through its loss and abandonment of judicial independence.

From the outset, Freisler had set for himself the goal of interpreting existing legislation in conformity with Nazi ideology and wanted to create a "new system of justice." In his position papers he postulated himself as a "servant of the national community," that anyone who did not abide by the laws was "a perpetrator, and every perpetrator an enemy of the state," regardless of whether the act was criminal or political in nature. The state was engaged in a war against crime, and criminals were subhuman, "traitors against the state." To Freisler, treason was the most egregious crime, and such criminals must not merely be condemned as enemies of the state; they must be eliminated. In his writings, he aspired to subject every area of law and justice to total dictatorship,²⁷² stating in 1934, that, "The Führer protects the law from the gravest abuse, when in the moment of danger he makes law directly by virtue of his authority as Führer."²⁷³

Scarcely anyone in the ministry could tolerate his personality; he was considered deceitful and untrustworthy, but his concern was the approbation of the Führer. He laid personal claim to the *Führerprinzip* in two forms. First, he wanted to effectuate the Führer's commands without hesitancy; second, he behaved in a subordinate manner to the Führer so as to necessitate others to be submissive to him. Freisler saw himself as the

²⁷² Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 216-220.

²⁷³ *Id.* at 220.

Führer of the courtroom. It was not the documents, testimony or other evidence that were crucial to his decision, but whatever he defined from his own personal perspective as wrong.

When Franz Gürtner, the Reich Minister of Justice, died in 1941, Freisler contemplated assuming his office, thus promoting him to a leading position within Hitler's entourage. Hitler denied this promotion to him; it was a disappointment from which Freisler would never recover. The head of the Reich Security Main Office, Reinhard Heydrich, referred to him as the "slimy charlatan" and asked Heinrich Himmler to decline his request to join the SS. Likewise, Martin Bormann, head of the Nazi Party, ascribed him as, "the madman."²⁷⁴ Only Goebbels, the Minister of Propaganda, was favorably inclined toward him and upon his proposal of Freisler as Minister of Justice, Hitler's dismissive reply was, "That old Bolshevik? No!"²⁷⁵

The odium associated with his time as a prisoner-of-war remained with Freisler, but ultimately it was his brother that impeded the professional advancement he desired. In the 1930s, Oswald Freisler had relocated his law practice from Kassel to Berlin. Although a member of the Nazi Party, he assumed the defense of some Catholic lay brothers. Upon Hitler being informed of this representation, he ordered Oswald's immediate expulsion from the Party. Subsequently, Oswald undertook the defense of a bank director. In order to have incriminating evidence destroyed, he bribed an employee of the state prosecution service. A scandal ensued and on March 4, 1939, the police appeared at Oswald Freisler's law office. Officially, he had asked to use the restroom

²⁷⁴ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 221.

²⁷⁵ *Id.*

facilities and then jumped out of a window to his death. Privately, it was said that he had not acted voluntarily, but may have been assisted in his fall by the Gestapo. In any event, Oswald Freisler, aged 43, died of unnatural causes on March 4, 1939.

The objectionable nature of Oswald Freisler's law practice, from the perspective of the regime, along with his subsequent death, contributed to Roland Freisler's failure to achieve the highest office in the Reich judiciary, Minister of Justice, as the Nazis had instituted the *Sippenhaft* principle, punishment of a family for the crime of a member. As a result, Dr. Otto Georg Thierack, then President of the People's Court, was appointed Minister of Justice with Freisler becoming President of the Court, on August 20, 1942.

Hitler chose Freisler to be President of the People's Court because he needed a ruthless administrator and Freisler was obsessed with the belief that he needed to validate himself to his Führer. He had never belonged to the confidential circle of Nazi Party members and had no right to express an opinion. He was to simply listen, obey and implement his assigned responsibilities. Freisler was a compliant instrumentality within the Third Reich,²⁷⁶ who publically illustrated this conformity and obedience in an address given in 1938:

We Germans march in columns. As soldiers we look forward. And there we see one person: our leader. Wherever he points we march. And wherever he points he always marches first, ahead of us. That is in keeping with our German nature. In the face of this all the "constitutional law" of the past has blown away like chaff in the wind:

The separation of powers; supervision of the leadership by the led; protection of personal rights by courts; a state based on the rule of law, which nobody wanted less than the organs of justice themselves, that is to

²⁷⁶ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 221-223.

say, the review of true acts of leadership to determine whether they are in formal compliance with the law; constraints on the vanguard and limitations on their instruments of leadership; the rule of numbers over will, of anonymous numbers, that is, of irresponsibility.

All this – once carefully hedged about in constitutions with legal guarantees – has now been swept away.²⁷⁷

Prior to his appointment as President of the People's Court and of note is that Freisler, in January of 1942, represented the Reich Ministry of Justice at Reinhard Heydrich's Wannsee Conference. At this meeting, the large scale deportation of Jews to the east was discussed²⁷⁸ and it was decided to make their extermination a systematically organized operation, known as the "Final Solution."²⁷⁹

Freisler's courtroom demeanor was such that he would not cease in his belittlement and humiliation of a defendant until the accused stood broken and weeping before him. Initially, his preferred victims were communists, perhaps reasoning that by abusing them he would be distancing himself from his own past. In the struggle for ultimate victory, Freisler's philosophy was that no verdict was too harsh, even for those on the home front. In some cases, the arbitrary draconian will of Freisler exceeded the tolerance of the Minister of Justice.²⁸⁰ A chance remark relative to the Führer, which the defendant had uttered to a friend, was declared public by Freisler, since "our National Socialist Reich requires every Volksgenosse ("national partner") to concern himself with

²⁷⁷ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 82.

²⁷⁸ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 117.

²⁷⁹ Roland Freisler – Hitler's Judge. (n.d.). In *Bulletin*. Retrieved from <http://www.wv2f.com/wvii-general/10052-roland-freisler-hitler-s-judge.html>

²⁸⁰ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 224-226.

politics and, for that reason, whatever political view is expressed forms part of the nation's fund of political ideas."²⁸¹ Thierack wrote to Freisler in September of 1943, that with such reasoning, the "concept of what is public loses all meaning."²⁸² Even so, Freisler proceeded with the defendant's ordered execution. Freisler replied in October of 1943, "I am fully aware of the fact that I administer justice in a one-sided way, but I do this for a political purpose. I have to prevent, with all the strength at my disposal, a repetition of the events of 1918."²⁸³

As time progressed, the proceedings of the Court became more inhumane and ineluctable. Whether defense counsel would be allowed to speak was within Freisler's discretion; the accused was therefore often wholly defenseless.²⁸⁴ It must be remembered that it is through the defense bar that popular opinions are brought into the courtroom and lead judges to make decisions that they may not have otherwise made. The task of the criminal defense lawyer is to act in permanent opposition to the state prosecutor. Therefore, the degree of independence and power the defense enjoys in the courtroom is a reliable index of the broader degree of liberty, tolerance, and pluralism in the society as a whole. All of these concepts and principles were completely and intentionally abrogated by Freisler as being incompatible and discordant with his conception of lawfulness and legitimacy. "It is not a matter of dispensing justice but of destroying the opponents of National Socialism."²⁸⁵

²⁸¹ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 226.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 228.

²⁸⁵ *Id.* at 229.

With the attempted coup d'état of July 20, 1944, Colonel Stauffenberg planned to remove Hitler and put an end to the Nazi absurdity. Having failed in their objective, they granted "Raving Roland" the spectacular show-trials he desired. Freisler would no longer be trying anonymous defeatists, but publically known men that he could use as examples to the German citizens.

Freisler prepared to document the trials by having hidden cameras concealed under the swastika banner hanging behind his bench. He subjected the defendants to contemptible bellowing, to capture on film their total humiliation for posterity and for the Führer. However, what was intended as a propaganda spectacular was instead a failure. Because of Freisler's ravings, the dignity exhibited by the vast majority of the defendants was consummately apparent.²⁸⁶ Erich Stoll, a cameraman at the trial of the plotters stated, "We had to tell Freisler that he was shouting too loudly at the defendants, so that the sound-engineer wasn't able to get a good balance between his shrieking and the quiet voice of the defendant."²⁸⁷ The newsreels were never shown in German cinemas as contemplated; the Ministry of Propaganda feared a "disagreeable discussion" concerning Freisler's conduct and demeanor in the cases.

Opening the proceeding on August 7, 1944, Freisler took the opportunity to inform the defendants that nothing they might say would have any influence on the outcome of the trials. Any attempts to escape their previously decided fates were destined for failure. After having the allegations read against Field Marshal Erwin von Witzleben, Freisler proceeded to humiliate the one-time hero of the Wehrmacht.

²⁸⁶ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 230-232.

²⁸⁷ *Id.* at 232.

Witzleben was forced to stand before the bench holding up his trousers as his belt had been taken away from him, prompting Freisler to state,²⁸⁸ “You dirty old man, why do you keep fumbling around in your trousers?” He addressed General Erich Hoepner with the words, “In 1938 you were the general commanding the Panzer Corps. What zoological characteristics would you consider appropriate to show the court what you have done? For as regards your intellect you are an ass, and as to your character you are a Schweinehund.”²⁸⁹

With his frenzied and turbulent outbursts, Freisler revealed his inability to conform to his own ideal of dispassionate and calloused killing. Additionally, he was contradicting Hitler’s address to the nation relative to this plot involving only a “small clique.” By his conduct at the trials he educed a much more extensive plot, increasing the significance of the resistance movement against Hitler.²⁹⁰

Minister of Propaganda, Josef Goebbels, criticized Freisler, saying, “Freisler’s bellowing is not appropriate for propaganda. It would tend to have an off-putting effect on the uncommitted.” An attorney, Otto Gritschneider declared, “The impression we had of Freisler was of a power-crazed sadist, for it gave him an inordinate feeling of pleasure to see men trembling with fear and to condemn them to death. It is impossible to identify with the motivation of a psychopath like that.”²⁹¹

Hitler was decidedly satisfied with Freisler’s trial results; he had performed the tasks that Hitler had instructed.²⁹² The initial sentences were carried out the same day,

²⁸⁸ Knopp, G. (2002). *Hitler’s hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 233-234.

²⁸⁹ *Id.* at 234.

²⁹⁰ *Id.* at 235.

²⁹¹ *Id.*

²⁹² *Id.* at 238.

with their hands tied behind their backs; the men who tried to assassinate Hitler were taken to the execution room in Berlin's Plötzensee Prison and were hanged with piano wire suspended from meat hooks. The executioners followed Hitler's instructions that "they are to hang like slaughtered animals."²⁹³ However, with the trials on September 7, 1944, of Carl Goerdeler, the former Mayor of Leipzig, Wilhelm Leuschner, a union leader, and Ulrich von Hassell, the former German ambassador to Rome, Freisler's intemperate conduct exceeded the imperturbability of the Minister of Justice, Thierack, who complained in a correspondence to Hitler's secretary, Martin Bormann:

The conduct of the trial by the president was, in the case of the defendant Goerdeler, unobjectionable and factual. But he would not let Leuschner and von Hassell have their say. He shouted them down repeatedly. This made a thoroughly bad impression, particularly as the president had allowed some 300 persons in to witness the proceedings. Which persons received admission tickets is something still to be checked. That kind of behaviour in such sessions is very questionable. Otherwise, the political conduct of the trial did not give cause for complaint. Unfortunately, however, Freisler addressed Goerdeler like a halfwit and spoke as though he were a complete nonentity. The serious nature of this important gathering was gravely damaged by this. Frequent long speeches by the president, whose purpose was purely for propaganda, had a repugnant effect on this audience. Equal damage was done to the seriousness and dignity of the court. The president is completely lacking in cool, restrained detachment.²⁹⁴

As the German war effort succumbed and the Allied fronts moved closer to Berlin, Freisler refused to accept the inevitable conclusion to the war and retained his manic dedication to work, remaining the demonic force of a ruthless and unbridled assailant on humanity. With the deterioration of the military situation, Freisler

²⁹³ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 237.

²⁹⁴ *Id.* at 238-240.

conjectured it was no longer “worth the trouble” to investigate cases of “subversion of the armed forces,” death sentences were imposed indiscriminately. Freisler asserted that the exigent circumstances required trials to be expeditiously concluded and the sentences to be implemented with consistency. He continued steadfast and uncompromisingly championing Hitler, writing on October 26, 1944:²⁹⁵

In one's innermost self one has to admit that it is no longer impossible that Germany might lose the war. The reprisal weapons [the V1 and V2] have not brought the success so passionately hoped for. But we must hold out, at whatever cost; the longer we hold our ground, the sooner this unnatural alliance between the Anglo-Americans and the Soviets will break down. When I look at all that has happened over the last few years, I feel compelled to abandon my belief in a worldwide Jewish conspiracy. That belief is too simple a view. All Germans are now in the same boat; we must all row with the same stroke in order to achieve victory or, if the worst should happen, to guarantee that Germany will rise again in her final, greatest triumph.²⁹⁶

Freisler's allegiance and conviction to the Nazi regime persevered unremittingly.

On January 9, 1945, the trial of Helmuth James von Moltke began. At one point in the proceedings, reference to the Criminal Code was made, but not a single copy of the manual could be located in the building. Such was the administration of justice under Dr. Freisler.

While presiding over the trial of another plotter, Fabian von Schlabrendorff, on February 3, 1945, just before 9:00 A.M. the air-raid sirens began; everyone in the courtroom left for the shelter. Schlabrendorff was near Freisler when the latter was killed, still clutching the defendant's file in his arm, a file that would have for Freisler

²⁹⁵ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 240-241.

²⁹⁶ *Id.* at 241.

certainly produced Schlabrendorff's execution. Schlabrendorff survived not only the air-raid, but his subsequent retrial²⁹⁷ in February of 1945;²⁹⁸ Freisler died, along with 20,000 others, in one of Berlin's heaviest air-raids of the war.

Scarcely a person mourned the death of "The Hanging Judge," "Raving Roland" Freisler.²⁹⁹ Luise Jodl, widow of General Alfred Jodl, recounted more than 25 years later that she had been working at the Luetzow Hospital when Freisler's body was transported to the facility. She related that a co-worker commented, "It is God's verdict." According to Mrs. Jodl, "Not one person said a word in reply."³⁰⁰

Without a memorial monument of his own, Freisler was buried anonymously in his wife's family plot³⁰¹ at Waldfriedhof Dahlen Cemetery in Berlin.³⁰² After the war, Mrs. Freisler and her children changed their names to avoid possible association with their husband and father.

Roland Freisler's legacy embodies and symbolizes crimes which were inflicted upon humanity under the pretext of justice during the Nazi regime. The verdict of the Military Tribunal at Nuremberg called him "the blackest, most brutal and bloodiest judge in the entire German administration of justice," and listed him in conjunction with Heinrich Himmler and Reinhard Heydrich as the men who were among the most "loathsome" individuals the world has ever seen. However, it must be distinguished that

²⁹⁷ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 241-243.

²⁹⁸ Dulles, A.W. (2000). *Germany's underground: The anti-Nazi resistance*. (Cambridge, MA: Da Capo Press), 68.

²⁹⁹ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 241-243.

³⁰⁰ Henssonow-Marseken, S.F., Surhone, L.M., & Timpledon, M.T. (Eds.) (2010). *Roland Freisler: Nazism, Germany, judge, Adolf Hitler, show trial*. (Saarbrücken, DE: VDM Publishing House Ltd.), 4.

³⁰¹ Roland Freisler – Biography (n.d.). Retrieved from <http://www.imdb.com/name/nm0293887/bio>

³⁰² *Id.*

Freisler was a manifestation of, rather than the precipitating factor in, state-sponsored terrorism by the Nazi regime.

As late as the 1960s, the name Roland Freisler was continuing to appear in the press. Marion Russegger, as Freisler's widow then called herself, she having returned to using her maiden name, had initiated proceedings to receive pension payments emanating from her marriage to Freisler. The Munich social service office granted her an allowance of DM 400 per month, in addition to her pension as a war victim. The rationale for this allotment was that had Freisler not died as the result of an Allied bombing, he could have earned alimention in postwar Germany as "a lawyer or a higher civil servant."³⁰³

Freisler never succeeded in attaining the benevolence of his adored Führer, but Hitler did grant him consummate and limitless power over life and death for purposefully relinquishing and surrendering his individual judicial independence and autonomy. In return, Hitler exploited Freisler as nothing more than a compliant lackey. For the Führer, it was essential to have reticence on the home front and Freisler obliged by dispensing the stillness of the grave. His tragedy was that he never received the praise and adulation from Hitler that he so fervently coveted, though he trampled over thousands of corpses of individuals in a floundering attempt for Hitler's personal acclamation, forsaking his own integrity and probity in the wake.

³⁰³ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), 243.

The Sacrifice in Human Lives Extracted Through a Lack of Judicial Independence

I will now begin a brief narration of some of those individuals who were annihilated by the People's Court for actions commanded by their individual principles. A more recent historical event occurred on the morning of June 5, 1968, when an assassination attempt was perpetrated against the life of Robert F. Kennedy. Senator Kennedy was shot at the Ambassador Hotel in Los Angeles, California, and had just completed delivering his victory speech, subsequent to his successful campaign in the 1968 California Democratic presidential primary election.³⁰⁴ He subsequently died as a result thereof on June 6, 1968, and was eulogized by his brother, Edward M. Kennedy, on Saturday, June 8, 1968, at St. Patrick's Cathedral in New York City, with these words:

My brother need not be idealized, or enlarged in death beyond what he was in life; to be remembered simply as a good and decent man, who saw wrong and tried to right it, saw suffering and tried to heal it, saw war and tried to stop it.

Those of us who loved him and who take him to his rest today, pray that what he was to us and what he wished for others will some day come to pass for all the world.

As he said many times, in many parts of this nation, to those he touched and who sought to touch him:

‘Some men see things as they are and say why. I dream things that never were and say why not.’³⁰⁵

This locution of Edward M. Kennedy applies with equal and tantamount validity to the activities of Johannes Georg Klamroth, Helmuth Günther Hübener, Helmuth James von Moltke, Hans Fritz Scholl, Sophia Magdalena Scholl, Christoph Probst, Alexander

³⁰⁴ Hill, G. (1968, June 6). Kennedy is Dead, Victim of Assassin; Suspect, Arab Immigrant, Arraigned; Johnson Appoints Panel on Violence. *The New York Times*. Retrieved from <http://www.nytimes.com/learning/general/onthisday/big/0605.html>.

³⁰⁵ Kennedy, E.M. Address at the public memorial service for Robert F. Kennedy, Delivered June 8, 1968, at Saint Patrick's Cathedral, New York. Retrieved from www.americanrhetoric.com/speeches/ekennedytributetorfk.html

Schmorell, Wilhelm (Willi) Graf, and Professor Kurt Huber, as members of the German resistance to the Nazi regime of Adolf Hitler during World War II. All of these individuals were sentenced to death and annihilated by dependent and malevolent judges of Hitler's specially conceived and contrived People's Court, in particular, Judges Karl Engert and the President of the People's Court, Hitler's Blood Judge, Dr. "Raving" Roland Freisler.³⁰⁶

Subsequently, Sir Winston Churchill eloquently stated the contribution these courageous and valiant individuals made to humankind:

The political history of all nations has hardly ever produced anything greater and nobler than the opposition which existed in Germany. These people fought without any help, whether from within or from without, driven only by the uneasiness of their consciences. As long as they were alive, they were invisible to us, because they had to put on masks. But their deaths brought their resistance to light.³⁰⁷

Churchill would never have uttered those words had the German judiciary not voluntarily and purposefully relinquished its judicial independence and autonomy to despotic and corrupt political authorities. By doing so, the rule of law was dismissed in accommodation to Nazi tyranny and totalitarianism.

Judges must continually embrace their roles as the primary advocates of judicial independence. However, in World War II Germany, judicial independence was eradicated for both the individual judge and the judiciary as a whole. Judicial members were required to follow the "general line" mandated by the Nazi regime and to obediently

³⁰⁶ Knopp, G. (2002). *Hitler's hitmen*. (Sparkford, GB: J.H. Haynes & Co. Ltd.), xviii.

³⁰⁷ McDonough, F. (2009). *Sophie Scholl: The real story of the woman who defied Hitler*. Gloucestershire, GB: The History Press.

implement its ideology when issuing their judgments and imposing sentences. The doctrine of separation of powers was considered to be an obsolete principle, as Hitler was now the law. Hence, no judicial attempt was expended to adjudicate cases in an impartial manner once Nazi will had been expressed. Judges had intentionally surrendered their freedom to decide cases without control by the regime. The judiciary's role was not to control the executive, but to be a faithful follower of the leadership.³⁰⁸ Its task was to subordinate itself to the totalitarian will of National Socialism.³⁰⁹

Judicial elections were non-existent as Hitler had the power to appoint and remove judges as he deemed expedient. Judicial terms of office were thus within his sole discretion and only those jurists who complied with the mandates of the regime were sanctioned to remain in office or be subsequently appointed thereto. After 1934, a defendant was judged by a jurist who had been appointed expressly because of his loyalty to the National Socialist state.³¹⁰

The German judiciary completely failed to protect themselves, and correspondingly, German society, by ensuring fidelity to the rule of law. Ethically, they had fully succumbed to the power of corruption. From April 1942 onwards, it was Hitler who controlled and administered what he considered to be justice.³¹¹

A very small portion of the catastrophic cost in human lives resulting from the ramifications of these derelictions is described in the following four case studies.

³⁰⁸ Koch, H.W. (1989). *In the name of the Volk: Political justice in Hitler's Germany*. (London, GB: I.B. Tauris & Co. Ltd.), 83.

³⁰⁹ *Id.* at 84.

³¹⁰ *Id.* at 4.

³¹¹ *Id.* at 125.

However, the consequences of the German judiciaries' collapse will forever persist in ignominy and disgrace.

The reader is asked to keep these failures of the Germany judiciary in continual recollection as they study these succeeding four chapters detailing the actions of some of those individuals or groups who stood in resistance to Hitler. They had their actions subsequently adjudicated by the wholly dependent People's Court, a judiciary that had surrendered its independence and autonomy to Hitler and his unscrupulous minions.

Chapter XI: Johannes “Hans” Georg Klamroth

This dissertation demonstrates the perplexing issues associated with the functioning of the German judiciary during the period of Nazi tyranny. The following chapter discusses the trial of a resistance member to the regime, Johannes “Hans” Georg Klamroth, who was sentenced to death by the People’s Court for failing to disclose information of the contemplated assassination attempt of July 20, 1944, on the life of Adolf Hitler. However, Hans Georg neither participated in the planning of the event nor took any concerted action in its consummation. He was executed on August 26, 1944, subsequent to a “show trial” before a wholly dependent judiciary that had relinquished its independence and autonomy to despotic and corrupt political authorities and was utilized by them to advance the dictates of the Nazi reign of terror. The guilt of Hans Georg and the manner of his death were determined by Hitler prior to his trial, it being a mere formality in the Nazi legal scheme which the regime proffered as “justice.”

As I initiated the research for this enterprise, one of the very first video recordings that I discovered chronicled Roland Freisler, President of the People’s Court, verbally berating and embarrassing an apparent intelligent, ashamed, and defeated man, in an oversized civilian suit, his hands folded before him in visibly manifest resignation. Interspersed within this brief artifact were images of a much more joyous time, of a German officer holding the hand of a small girl as they walked and frolicked on the front lawn of a charming residence. Although the material relative to Johannes Georg Klamroth is decidedly scant, that abridged film archive, lasting less than two minutes, drew my attention to the grievous annihilation of Johannes “Hans” Georg Klamroth by the Nazi regime through its operative instrumentality, Roland Freisler.

Johannes Georg Klamroth was born in Halberstadt, Prussia, on October 12, 1898, and was murdered, at the age of 45, by the Nazis on August 26, 1944,³¹² at 12:44 P.M.³¹³ He was arrested by the Gestapo on July 21, 1944, and sentenced to death following a “show trial” before President Judge Roland Freisler of the People’s Court on August 15, 1944.³¹⁴ Klamroth’s execution was conducted by strangulation hanging from a meat hook in Plötzensee Prison, Berlin Charlottenburg.³¹⁵ He was convicted of treason for his involvement in the July 20, 1944, plot to assassinate Adolf Hitler, pursued by Colonel Stauffenberg and the civilian-military conspiracy. His implication in the cabal was that his son-in-law, Lieutenant Colonel Bernhard Klamroth,³¹⁶ who had just five months prior married Hans Georg’s second eldest daughter, Ursula, informed him on July 10, 1944,³¹⁷ that he handled the explosives that were to be used in the attempt on Hitler’s life. Hans Georg failed to divulge the conspirators’ intentions to the Nazi authorities and was thus executed as an accomplice in the connivance.³¹⁸

Christened Johannes Georg, and called by the family Hans Georg,³¹⁹ he was a company commander with the Twelfth Infantry Regiment along the Polish border at the

³¹² Facts about Hans Georg Klamroth. (2012). In *True Knowledge*. Retrieved from http://www.trueknowledge.com/q/facts_about_hans_georg_klamroth.

³¹³ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 12.

³¹⁴ Johannes Georg Klamroth. (n.d.). In *German Resistance Memorial Center – Biographie*. Retrieved from <http://www.gdw-berlin.de/nc/en/recess/biographies/biographie/view-bio/klamroth-1/druckversion.html>.

³¹⁵ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 12.

³¹⁶ Facts about Hans Georg Klamroth. (2012). In *True Knowledge*. Retrieved from http://www.trueknowledge.com/q/facts_about_hans_georg_klamroth.

³¹⁷ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 13.

³¹⁸ Harding, L. (2004). My Father the Nazi. *The Guardian*. Retrieved from <http://www.guardian.co.uk/world/2004/mar/16/germany.historybooks/print>.

³¹⁹ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 36.

outbreak of war on September 1, 1939. The campaign in Poland had barely begun when the SS Einsatzgruppen, in the wake of the troops, engaged in mass shootings of Jews and Polish teachers, lawyers, vicars, and landowners. The Polish elite were liquidated. Hans Georg was distraught over the suffering inflicted upon the Polish civilian population. When the German forces were near Warsaw, no food could be supplied to the city,³²⁰ “they’re so hungry, and I’ve given orders that at least our hosts are allowed to eat with us in the field kitchen, but we can’t feed the whole of Warsaw.” Also, the “shocking destruction of the city, the work of our artillery” was perplexing to him. “If they had surrendered sooner, it wouldn’t have happened. But the Poles are very proud, you can see that in the dark, closed faces that line the street, they hate us, and I can’t blame them.”³²¹

On September 27, 1939, Warsaw capitulated, and from October 13, the fighting troops withdrew. Six months after the Polish campaign, Hans Georg entered the Abwehr, the German counterintelligence department, and on February 5, 1940, he was ordered to the Wehrmacht Senior Command at its Berlin headquarters “on a special assignment.” They sent him to Copenhagen, as a civilian, arriving on March 21. The preparations for Operation Weser Exercise, the occupation of Norway and Denmark by German troops, were ongoing since January of 1940. On April 9, Denmark capitulated without a struggle and Norway was attacked, with the Operation being concluded on June 13. He remained

³²⁰ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 265-268.

³²¹ *Id.* at 268.

in Copenhagen as an Abwehr officer until February of 1942, when he was transferred to the Eastern Front.³²²

Prior to Hans Georg's arrival in Russia, Bernhard Klamroth, Hans Georg's second cousin, born in 1910, and the son of banker, Walter Klamroth, from Berlin-Grünwald, fell in love with Ursula, Hans Georg and his wife, Else's, second daughter, born in 1924. The romance developed in June of 1941, when Ursula was sixteen and Bernhard was thirty, a Major on the General Staff of the Fourth Army, and who was stationed on the front line in the Russian offensive. In November of 1941, Bernhard went to Berlin for a one-and-a-half-day visit. On a park bench opposite his parents' house on Paulsborner Strasse, he asked Ursula to marry him. Until then they had seen each other for a total of four and a half days. In barely two and half years, the lives of Hans Georg and Bernhard would be terminated in Plötzensee Prison.

Ursula and Bernhard were engaged on July 17, 1942, Ursula's eighteenth birthday. The wedding ensued on January 5, 1943, followed by a two week honeymoon at the Platterhof in Obersalzberg, Hitler's hotel in the mountains surrounding Berchtesgaden.

Despite the Nonaggression Pact, on June 22, 1941, Germany attacked the Soviet Union with three million men. Napoleon also invaded Russia in June of 1812; the years had changed, but not the eventual outcome. Eight months later, Hans Georg was re-posted as an officer with Military Intelligence Third Command in Pleskau, on the border with Estonia, the base of Army Group North. This position was in recognition of Hans

³²² Bruhns, W. (2009). *My father's country: The story of a German family*. (New York, NY: Vintage Books), 268-280.

Georg's past achievements, as his predecessor was a lieutenant colonel, and as a mere captain, it was a great honor for which he was commended. He was in charge of a military intelligence unit, which battled the enemy on both sides of the front. In his combat against partisans,³²³ Hans Georg stated, "these people behind the front are extremely dangerous, and they're breeding like cockroaches!"³²⁴ Hans Georg's people attempted to infiltrate their organizations, to raid their command centers to capture them, and they were then interrogated at Hans Georg's office if caught alive. His job also involved the questioning of officers and defectors held as prisoners of war.³²⁵

Since the beginning of 1943, Bernhard was with the Oberkommando des Heeres ("OKH") or Army High Command, in Mauerwald, East Prussia, near the "Wolf's Lair," the Führer's headquarters. Shortly after posting, he was promoted to lieutenant colonel at age 32.

In March of 1943, Hans Georg was transferred back to Berlin to the Foreign Department/Intelligence III in the Wehrmacht High Command ("OKW"). In this new assignment, Hans Georg's department monitored staff and secret protection of the Army Ordinance Office, which was responsible for modern weapons development, from atomic research to missiles.³²⁶

In December of 1943, Hans Georg was promoted to group leader³²⁷ and took command of the company responsible for the preventive nondisclosure protection of military research projects, including most preeminently, the army's experimental rocket

³²³ Bruhns, W. (2009). *My father's country: The story of a German family*. (New York, NY: Vintage Books), 282-307.

³²⁴ *Id.* at 291.

³²⁵ *Id.* at 291-296.

³²⁶ *Id.* at 308-314.

³²⁷ *Id.* at 318-328.

center at Peenemünde, where the V-2 was being built. It was the first midrange rocket, developed over a period of ten years primarily by Wernher von Braun. According to Josef Goebbels, this was the secret miracle weapon that promised invincibility, a last-minute salvation for the German war effort. There was also the V-1, a jet-propelled “flying bomb,” an unmanned plane with a payload of one thousand kilograms of explosives that was susceptible to being shot down because of its lack of velocity. The V-2, a liquid-fuel rocket flew at five thousand kilometers per hour, when it flew. Fewer than half of the 6,000 completed rockets performed as they were designed. Hans Georg’s mission was as difficult a task as that of Sisyphus. Not only were the German long-range weapons a target for enemy spies and saboteurs, but there were thousands of technical and civilian staff who worked in the center itself, with its many suppliers, all within the surveillance accountability of Hans Georg.

In addition, the individual branches of the German military machine were not on the most hospitable of terms. The Luftwaffe supported the V-1, while the army favored the V-2; both competed for Hitler’s priority, meaning funding, raw materials, and manpower. Also involved was the personal competition for authority between Reichsführer SS Heinrich Himmler and armaments minister, Albert Speer. Himmler wanted to bring the German arms industry under the control of the SS, including supervision of the rocket center at Peenemünde. For this to transpire, Wernher von Braun and two of his colleagues had to be eliminated. All three had previously expressed their preference for the army, calculating that they would be allowed greater freedom of action by the army in contrast to the SS. Early in the morning of March 15, 1944, the three scientists were arrested by the Gestapo and accused of high treason. “Before witnesses,”

they had expressed defeatist thoughts relative to the outcome of the war, and openly discussed their desire “to build a spaceship, rather than an instrument of murder.”

The commander of the experimental rocket center, General Walter Dornberger, was unable to persuade either Himmler or General Field Marshal Wilhelm Keitel, head of the OKW, to free his three scientific staff members. Hans Georg’s assistance as an army officer was requested. He enlisted the support of Albert Speer who understood that this was yet another individual attack upon him by Himmler. Speer appealed to Hitler, and together with Hans Georg, brought about the acquittal of the three prisoners after fourteen days confinement.³²⁸ Hans Georg’s diary entry for April 7, 1944, revealed, “I’ve even learned to become personally involved in the inevitable conspiracies that go on in different departments among the authorities, and recently played a downright virtuoso aria on this instrument, which won me the undivided applause of all participants.”³²⁹

The SS had been at Peenemünde since June of 1943, because there was a concentration camp there with prisoners from Buchenwald who were initially deployed to build the security fences around the assembly plant for the V-2 rocket. On the night of August 17, 1943, the British bombed Peenemünde; more than seven hundred people died, most of them forced laborers. Subsequently, the decision was made to transfer production below ground, to the southern Harz, near Nordhausen. There was a limestone massif there inside which two tunnels had been formerly dug. On August 28, 1943, the first 107 prisoners from Buchenwald arrived to begin work on a project designated, Mittelbau Dora.

³²⁸ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 323-325.

³²⁹ *Id.* at 325.

By day and night, the production sites for the V-2, Mittelwerk, were built by prisoners and forced laborers in dark, airless tunnels. Survivors reported after liberation:³³⁰

The tunnels were extended by means of heavy compressed air drills, and the removal of even massive chunks of stone had to be accomplished with hands and shovels. Stone dust and gases were constantly being swirled up, and there were no ventilation systems. In the tunnels there was no water for washing or drinking, out of desperation the men urinated in their hands so that they could at least wash the chalk dust from their faces.³³¹

The sleeping tunnels were cramped and crowded, full of excrement, rodents, and decomposing corpses. Many of the prisoners had no shoes and had to walk barefoot on the debris; they worked in freezing water, excavating with their hands due to a lack of digging implements, starving, and suffering from exhaustion. Anyone who collapsed was beaten back to work. The mortality rate was higher than in any other concentration camp in Germany. Seriously ill inmates were deported in liquidation transports to Auschwitz, Majdanek, and Bergen-Belsen.³³² Cautious estimates of fatalities ranged from 16,000 to 20,000 between September 1943 and April 1945.³³³

Hans Georg was present at Nordhausen on several occasions, maintaining security for the development of the V-2 rocket was his responsibility. He must have been cognizant of the conditions under which it was progressing, going underground into the building site to learn the requisite and appropriate safeguards that he was to furnish. The Dora concentration camp was adjacent to the Mittelwerk project and impossible to

³³⁰ Bruhns, W. (2009). *My father's country: The story of a German family*. (New York, NY: Vintage Books), 325-326.

³³¹ *Id.* at 326.

³³² *Id.* at 326-327.

³³³ *Id.* at 327.

ignore, with its electric fence, wooden watchtowers, and inmates in their striped uniforms. Hans Georg could not have overlooked any of these horrifying details of this Nazi reality.³³⁴

In early February 1944, Hans Georg traveled on Abwehr business to Mauerwald in East Prussia, the base for the OKH, when Hitler was at the Wolf's Lair. There he met the four men with whom he would find himself before the People's Court, six months later: General Major Hellmuth Stieff, head of the organizational section of the Army General Staff; Bernhard Klamroth, Stieff's group leader II, succeeding Claus von Stauffenberg in this post; Major Joachim Kuhn, Bernhard's colleague; and, Senior Lieutenant Albrecht von Hagen, Bernhard's friend. These four men were jointly involved in the acquisition of the explosives for the July 20, 1944, attempt on Hitler's life. The verdict delivered by the People's Court against Hans Georg stated that he was informed of the conspiracy on July 10, in Berchtesgaden, but he may have had knowledge much earlier. The men executed in connection with the plot were all well known to him. It was doubtful that Hans Georg was involved in any planning associated with the attempt. He was a confidant, not a fellow perpetrator; however, the same cannot be said relative to the other four individuals, they were active participants.

In the summer of 1943, Hans Georg wrote about the "violent battle of ideologies, even within," and about the "intellectual movements that will influence our time." During Gestapo interrogation he mentioned Stalingrad as the cause for his revolution, high treason; however, it may have been a cumulative development.

³³⁴ Bruhns, W. (2009). *My father's country: The story of a German family*. (New York, NY: Vintage Books), 327-328.

On his last visit home to Halberstadt on July 21, 1944,³³⁵ Hans Georg told Else that on July 10, he met Stauffenberg, Stieff, Bernhard, and General Erich Fellgiebel, head of the Signal Corps, in Berchtesgaden. Fellgiebel was to block communications from the Führer's headquarters to the leaders of the Wehrmacht after the attack. They talked regarding the plans for the attempted assassination, after which he spent time discussing the matter with Bernhard. The original interrogation records of the Gestapo have disappeared; the sole remaining files are those of Ernst Kaltenbrunner, successor to the murdered Reinhard Heydrich, head of the Security Police, the Security Service, and the Reich Security Main Office. Historically, these reports are problematic because they were prepared for Reichsleiter Martin Bormann and Hitler, and contain subjective interpretations on the part of the Gestapo rather than statements from the parties being interrogated, but these are the only extant documentation.

According to Kaltenbrunner's reports, under interrogation both Hans Georg and Bernhard keep rigorously to the undeniable facts.³³⁶ Hans Georg spoke of his initial "doubts, first of all after the loss of Stalingrad, that the war would have a satisfactory outcome for us;" and described an "overall atmosphere that could almost be called fatalistic," among the staff of the OKH, "Although I cannot quote individual sources, the general mood was more or less *après nous le deluge*. I was and remain unable to judge where this fatalism comes from and what would be the remedy for it."³³⁷ The report related a conversation between Hans Georg and Bernhard about the details and extent of

³³⁵ Bruhns, W. (2009). *My father's country: The story of a German family*. (New York, NY: Vintage Books), 330-335.

³³⁶ *Id.* at 345-347.

³³⁷ *Id.* at 347.

the conspiracy, stating, “If there is no other way, we will have to wait for an opportunity when all the ‘yes-men’ are in one big heap with the Führer, and then all of them will be obliterated at once.”³³⁸ The interrogators repeatedly expressed their astonishment that despite the openness with which the plans for the coup were discussed among the relevant officers, they were not uncovered. Hans Georg was condemned because he did not report Bernhard to the appropriate authorities, to this he responded:³³⁹

Connected to this is the lack of political direction in the officer corps, which I now recognize as corrupt. The majority of officers—and I must count myself among that majority—are helpless to respond to problems that suddenly arise outside of our own field of duty, and inclined to suggest solutions only through the line of command. The order from the next senior officer up will be carried out, and what he doesn’t order is no concern of mine.³⁴⁰

The accused all do the same, they incriminated dead people, where possible, or they charged themselves.

On August 7, 1944, the trials were commenced in Berlin, before the People’s Court and President Judge Roland Freisler. Hans Georg, Bernhard, and four other defendants were tried on August 15, 1944. It is unknown where Hans Georg was held from the time of his arrest until trial. Bernhard was incarcerated after his arrest on July 21, in a jail on Lehrter Strasse. After the trial, no documentation existed for either individual other than their respective executions at Plötzensee Prison.

³³⁸ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 348.

³³⁹ *Id.*

³⁴⁰ *Id.* at 348-349.

It states in the verdict for Hans Georg³⁴¹ that his “betrayal of the Führer” cannot be excused because of his “difficult family conditions from which he was suffering at the time, nor because his own son-in-law had to be named.”³⁴² On August 15, 1944, they were sentenced to death by hanging. It was the third show trial of those involved in the July 20, conspiracy; the People’s Court was crowded with hand-selected spectators in assorted uniforms.

Before the trial, a military “Court of Honour” called by Hitler with Field Marshal Gerd von Rundstedt presiding, expelled the defendants from the Wehrmacht “in disgrace,” so that they could be tried in a civilian court. Pursuant to Hitler’s instructions,³⁴³ “they must be brought to trial at lightning speed, they must not be allowed to get a word in edgewise.”³⁴⁴ Freisler behaved like a “madman, roaring and bellowing and interrupting the defendants as soon as they start to reply.”³⁴⁵ Minister of Justice, Otto Georg Thierack, complained to Martin Bormann regarding Freisler’s conduct, “He spoke of the defendants as ‘sausages.’ That did considerable damage to the seriousness of this important assembly.”³⁴⁶

All defendants confirmed their confessions before the court, “although Hans Georg Klamroth repeated his only when he saw that his attempts to dismiss it were collapsing under their internal contradictions.”³⁴⁷ He was asked by Freisler if he was aware that “to do nothing is treason?” Hans Georg responded, “No!” Freisler then

³⁴¹ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 349-350.

³⁴² *Id.* at 350-351.

³⁴³ *Id.* at 351-352.

³⁴⁴ *Id.* at 352.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 353.

shouted “deviant” a few times, “hide and seek” and “national community.”³⁴⁸ Otherwise, his tirades were incomprehensible.

Bernhard was found guilty of acquiring explosives, Hans Georg because he did not betray Bernhard and the others. The other defendants that day were Adam von Trott zu Solz and Hans-Bernd von Haeften, Count Wolf-Heinrich Helldorf, the prefect of police in Berlin and Major Egbert Hayessen, of the Army Headquarters in the OKH. Freisler’s verdict in the name of the German people applied to all defendants:³⁴⁹

Traacherous, dishonorable, and arrogant, rather than following the Führer in a manly fashion, like the whole nation, to fight for victory as no one had ever done throughout the whole of our history, they betrayed the sacrifice of our warriors, people, Führer, and Reich. They set in motion the assassination of our Führer. In cowardly fashion they thought they could deliver our nation to the mercy and disfavor of the enemy, to enslave it to the dark forces of reaction. Traitors to all that we live and fight for, they are all sentenced to death. Their assets pass to the Reich.³⁵⁰

Shortly after July 20, Hitler established the manner of death: “They are not to be given the honest bullet. They are to hang like common traitors. And it must be done within two hours of the delivery of the verdict. They must hang immediately, without any mercy.”³⁵¹ Hitler also directed Freisler and the executioners that there were to be no clerics present, and any suffering of the condemned men should not be alleviated in any matter: “They are to hang like slaughtered cattle.”³⁵² Bernhard’s death certificate gives the time of his death as 8:14 P.M. on August 15, 1944, cause of death, hanging. Else

³⁴⁸ Bruhns, W. (2009). *My father’s country: The story of a German family*. (New York, NY: Vintage Books), 353.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 353-354.

³⁵¹ *Id.* at 354.

³⁵² *Id.*

received a message dated September 29, 1944, from the senior Reich attorney with the People's Court.³⁵³ "Former Major Hans Georg Klamroth has been convicted of high treason and condemned to death by the verdict of the People's Court of the Great German Reich. The sentence has been carried out . . ."³⁵⁴ No date of death was provided. At the end of October, Hans Georg's assigned counsel established that he died on August 26. Else received two letters that he wrote; one on the day of the sentence, the other immediately before his death. She obtained the first shortly before Christmas, the second in February of 1945. He wrote,³⁵⁵ "Teach the children to pray, now I know what it means."³⁵⁶

Hans Georg was executed on August 26, 1944, along with Adam von Trott zu Solz, Baron Ludwig von Leonrod, and Otto Carl Kiep. Hans Georg was second to die after Adam von Trott zu Solz. Death by hanging did not mean a broken neck. The regulation was to leave the men hanging for twenty minutes, to be sure that they were dead. A further regulation stated that the men were to be slowly strangled.³⁵⁷

Emotionally, out of the millions of Germans, a very small number of individuals, including Johannes "Hans" Georg Klamroth, put their conscience above their lives. Had these individuals not done so, there would have been nothing for their survivors to psychologically embrace in the moral ruins of post-war Germany. His resistance demonstrated personal conviction, and provided his scion with their foundation for ethical intemperateness in the face of Nazi depravity, iniquity, and injustice.

³⁵³ Bruhns, W. (2009). *My father's country: The story of a German family*. (New York, NY: Vintage Books), 354-355.

³⁵⁴ *Id.* at 355.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 355-361.

For allowing his individual principles to govern his actions, Hans Georg was culpably guilty of treasonous conduct pursuant to the dictates of Nazi “justice.” As a consequence, his fate was determined by the wholly dependent People’s Court, a judiciary that had deliberately discarded its independence and autonomy to tyrannical and depraved political authorities and that was willfully exploited by them to advance the mandates of Nazi barbarism through sanctioned and endorsed judicial murder.

Chapter XII: Helmuth Guddat, Also Known as Kunkel, Subsequently Hübener³⁵⁸

This dissertation demonstrates the perplexing issues associated with the functioning of the German judiciary during the period of Nazi tyranny. The following chapter discusses the trial of a resistance member to the regime, a juvenile Helmuth Guddat, also known as Kunkel, subsequently Hübener, who was sentenced to death by the People’s Court for listening to foreign radio broadcasts and attempting to exercise his freedoms of speech and press. This was a judiciary that no longer protected these fundamental rights of the individual. Helmuth, a 17 year-old boy, was executed on October 27, 1942, subsequent to a “show trial” before a wholly dependent judiciary that had relinquished its independence and autonomy to despotic and corrupt political authorities and was utilized by them to advance the dictates of the Nazi reign of terror. The guilt of Helmuth was determined prior to his trial, it being a mere formality in the Nazi legal scheme which the regime proffered as “justice.”

Helmuth Hübener was born in Hamburg on January 8, 1925, and led in 1941 and 1942, respectively, resistance activities against the Nazi regime that were decidedly influenced by the religious movement, the Church of Jesus Christ of Latter-day Saints, the Mormons (LDS Church).³⁵⁹ Helmuth, then 16, accompanied by his friends, Karl-Heinz Schnibbe, 17, Rudolph (“Rudi”) Wobbe, 15,³⁶⁰ and joined somewhat later by

³⁵⁸ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), xxvi.

³⁵⁹ Helmuth Hübener. (n.d.). In *German Resistance Memorial Center – Biographie*. Retrieved from <http://www.gdw-berlin.de/nc/en/recess/biographies/biographie/view-bio/huebener/druckversion.html>

³⁶⁰ Weaver, S.J. (2012). Documentary Reveals ‘Truth and Conviction.’ In *Church News*. Retrieved from <http://www.ldschurchnews.com/articles/print/42969/documentary-reveals-truth-and-conviction.html>

Gerhard Düwer, 17,³⁶¹ distributed printed materials in Hamburg denouncing Adolf Hitler and his propaganda machine.

Helmuth was very intelligent, versed in the Mormon scriptures, and politically aware. He had access to a typewriter, paper, and information gleaned from BBC radio broadcasts and heard on a shortwave radio during a time when the Nazi government had restricted listening to any radio transmissions other than those on the approved party station. With the information he obtained from the BBC, Helmuth wrote anti-Nazi leaflets, which Karl-Heinz and Rudi then distributed.³⁶² Karl-Heinz later stated, “Helmuth wasn’t so stupid and naïve to think we could bring German leaders to their knees. No, Helmuth wanted people to think.”³⁶³

On August 11, 1942, Helmuth was condemned to death and the loss of his civil rights during his lifetime,³⁶⁴ by the Second Senate of the People’s Court,³⁶⁵ in Berlin,³⁶⁶ after being found guilty of “listening to a foreign radio station and distributing the news heard in connection with conspiracy to commit high treason and treasonable support of the enemy,”³⁶⁷ and murdered on October 27, 1942, in Berlin’s Plötzensee Prison,³⁶⁸ the

³⁶¹ Helmuth Hübener. (n.d.). In *German Resistance Memorial Center – Biographie*. Retrieved from <http://www.gdw-berlin.de/nc/en/recess/biographies/biographie/view-bio/huebener/druckversion.html>

³⁶² Weaver, S.J. (2012). Documentary Reveals ‘Truth and Conviction.’ In *Church News*. Retrieved from <http://www.ldschurchnews.com/articles/print/42969/documentary-reveals-truth-and-conviction.html>

³⁶³ *Id.*

³⁶⁴ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 220.

³⁶⁵ Wobbe, R. & Borrowman, J. (2002). *Three against Hitler*. (American Fork, UT: Covenant Communications, Inc.), 75-76.

³⁶⁶ Helmuth Hübener. (n.d.). In *German Resistance Memorial Center – Biographie*. Retrieved from <http://www.gdw-berlin.de/nc/en/recess/biographies/biographie/view-bio/huebener/druckversion.html>

³⁶⁷ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 220.

³⁶⁸ Helmuth Hübener. (n.d.). In *German Resistance Memorial Center – Biographie*. Retrieved from <http://www.gdw-berlin.de/nc/en/recess/biographies/biographie/view-bio/huebener/druckversion.html>

site of an estimated 2,400 executions between 1933 and 1945.³⁶⁹ Karl-Heinz was sentenced to five years imprisonment “for listening to a foreign radio station and distributing foreign news.” Rudi had imposed upon him a ten year term of incarceration “for listening to a foreign radio station and distributing foreign radio news in connection with conspiracy to commit high treason,” while Gerhard was encumbered with a four year term of confinement “for distribution of foreign radio news.”³⁷⁰

These young men acted alone, their actions only vaguely rooted in the blue-collar sociocultural milieu of their families. They were also among the youngest to become involved in a resistance effort in opposition to the Nazis. Until 1941-1942, those involved in the movement were primarily older men and some women. Even the White Rose group was comprised of university students some years older than Helmuth and his associates.³⁷¹

Hübener’s ultimate execution is an example of the conundrum of the relationship between legality and morality that exists in all societies, but was particularly applicable to the Nazi state. There was no doubt that he was guilty of having violated the “Decree about Extraordinary Radio Measures of 1 September 1939,” an extraordinary law for extraordinary times, in keeping with laws against the dissemination of enemy rhetoric. Propaganda was a weapon perhaps more deadly than soldiers. Hübener’s justification for his actions was a moral response, believing it was a citizen’s duty to oppose an immoral regime, particularly in wartime, when that war had been commenced by the machinations

³⁶⁹ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 348.

³⁷⁰ *Id.* at 220.

³⁷¹ *Id.* at xiii-xiv.

of a power-hungry madman and his cohorts. Such considerations did not affect the illegality of what Hübener had done, and the wheels of “justice” ground to their inexorable conclusion. This is also the reason that Hübener was to be disappointed in his prophecy, as stated to the Court that condemned him that their time would come. It never did, as the Nazi judiciary escaped judgment because although what they had done may have been immoral, it was “legal.” By executing Hübener, the Nazis acknowledged the danger he represented to the existence of their order. Seen in this perspective, his actions were ineffectual only because the state, recognizing their seriousness, acted with its barbaric efficiency as leniency may have provided encouragement to others.³⁷²

Helmuth Hübener was the youngest German teenager to single-handedly organize a resistance movement against the Nazi tyranny.³⁷³ He spoke English quite well, having learned it in school, was articulate, an avid reader, and very intelligent. The first American missionaries from the LDS Church came from Salt Lake City, Utah, to Hamburg in 1923; Helmuth drew close to them speaking fluent English at age 14. It was not only the missionaries’ friendships, but also their personal views that affected and prompted Helmuth.³⁷⁴ Rudi explained that when the missionaries were at Helmuth’s residence, “quite often” for Sunday dinner, “they always talked about freedom of speech,

³⁷² Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), xiv-xx.

³⁷³ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 1.

³⁷⁴ *Id.* at 39-48.

free press, and the freedom they were enjoying in their country and what it meant to be an American, that you could do what you want to do...³⁷⁵

Helmuth attended the basic school, Louisenweg, from ages 6 to 12, and because of his straight-A grades and “above average capabilities,” was placed in the “upper track” at Brackdamm, an all boys’ school. He completed his final four years there, finishing in 1941. At Brackdamm, Helmuth excelled; his favorite subjects were geography and history, he was also proficient in English, typing, and stenography, but above all, distinguished himself in German and German composition. He was allowed two more years of schooling than most other adolescents, graduating at age 16. It was during this time that Helmuth transformed from pro-Nazi to anti-Nazi. In 1938, at age 13, he joined the German Young Folk which he enjoyed “at first,” but by November of 1938, he would turn against the Nazis and its youth organizations. On April 20, 1939, three months after his 14th birthday, he would transfer to the Hitler Youth and use it as a “cover” to hide his true beliefs.³⁷⁶

In late April 1941, Helmuth began listening to the BBC on a regular basis from his grandparents’ apartment. At 10 o’clock every night came the first four notes of Beethoven’s Fifth Symphony, played three times, then the words,³⁷⁷ “The BBC London sends news in German,” or “This is the BBC London, German news broadcast.”³⁷⁸ Helmuth listened four to five times per week and since he knew shorthand, he took notes, and then transcribed his annotations.

³⁷⁵ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 48.

³⁷⁶ *Id.* at 49-65.

³⁷⁷ *Id.* at 86-89.

³⁷⁸ *Id.* at 89.

On June 22, 1941, the German army attacked Russia. Helmuth knew from his previous readings that no European country had ever successfully attacked Russia. He also conjectured that Germany had comparatively few natural resources for waging war. He believed that the operation of German tanks and airplanes would be thwarted by the Allies preventing Germany from having access to its oil supplies. He saw the Reich collapsing and was convinced that Hitler had to be replaced before total destruction ensued. He next learned Hitler would not retreat, even once he realized his armies were in a hopeless state; rather, he would attempt to continue the march into Russia, sacrificing hundreds of thousands of German soldiers.

German radio spewed its propaganda, claiming German victories, but Helmuth discerned who was being truthful, not only from the BBC, but from the increasing numbers of obituaries in the newspapers. He confided to his friends, Rudi and Karl-Heinz, about the German news media and its untruthfulness and his concern that the German people were now being called upon by the regime to enlarge their sacrifices. Many food and household items were no longer available because of the war, a war they were told, they would win.

Helmuth first undertook to recruit Karl-Heinz by showing him his radio and a flyer he had written grounded on the BBC newscasts. Karl-Heinz was aware that listening to enemy broadcasts was forbidden and punished severely, but proceeded to hear, along with Helmuth, a newscast concerning the Russian campaign, code-named "Barbarossa." According to Karl-Heinz, the British reports provided greater detail than the German narration, and they gave their own casualties, not just the enemy's. The

German news accounts sounded of propaganda, while the British were more realistic.³⁷⁹

Karl-Heinz stated tersely, “The German people were being duped.”³⁸⁰

Karl-Heinz attended Helmuth’s radio listening sessions once a week and asked Helmuth to transcribe the other broadcasts that he missed. Helmuth then asked Karl-Heinz to commence distributing flyers,³⁸¹ telling him that “it was the moral duty of every truth-loving person to combat the regime.”³⁸² On his way home that night from Helmuth’s apartment, Karl-Heinz distributed flyers in telephone booths and mailboxes in apartment houses. Karl-Heinz recalls his resistance beginning in April of 1941. The next time Karl-Heinz went to Helmuth’s apartment, Rudi was also present. Neither he nor Rudi were aware that Helmuth had been sharing his radio broadcasts with the other. It was then that Helmuth initiated his “group;” all three boys were now entangled.³⁸³

As time passed, Rudi and Karl-Heinz would listen “several times” even though fully aware of the dangers involved; newspapers reported that listeners were receiving up to three years imprisonment for those found guilty of this crime. However, Rudi expressed the group’s reasoning,³⁸⁴ “We wanted the other people to know what was really going on . . . we thought we were doing the right thing.”³⁸⁵ Likewise, Helmuth was convinced that other people must hear the truth, “We can warn the people. We can wake them up. We can get them to start asking questions. And when enough people hear the

³⁷⁹ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 89-105.

³⁸⁰ *Id.* at 105.

³⁸¹ *Id.* at 107.

³⁸² *Id.*

³⁸³ *Id.* at 107-112.

³⁸⁴ *Id.* at 112-113.

³⁸⁵ *Id.* at 114.

truth . . . then who knows?”³⁸⁶ The boys decided that if anyone were caught, he should assume the entire blame, in order to exonerate the others.

Rudi states that he placed flyers in stairwells, mailboxes, and on bulletin boards. He concentrated his distribution efforts in the blue-collar worker section of Hamburg named Rothenburgsort.³⁸⁷

In the beginning, Helmuth produced a new flyer every one to two weeks, then as Rudi and Karl-Heinz became more diligent, he wrote and prepared a new flyer every week, then two per week. In the early autumn of 1941, Helmuth no longer composed small flyers, but full-page leaflets with detailed, accurate accounts of military and geopolitical issues. Helmuth’s leaflets ranged from sarcastic exposés regarding Reich propaganda relative to the war to calls for outright insurrection against the Hitler Youth.³⁸⁸

As time progressed, the Gestapo came to surmise that numerous adults were involved, thinking that they were operatives of a British government operation. At work, Helmuth fraternized with a fellow apprentice, Gerhard Düwer, and in early January of 1942, he asked Gerhard if he wanted to join “a secret club.” When Düwer inquired about the club, Helmuth told him it involved a spy ring to overthrow the regime and that he was receiving orders to produce flyers. Later, Helmuth admitted that he had lied; he was not associated with any such organization, but found Düwer not only responsive to the flyers but desiring to become active in his movement.³⁸⁹

³⁸⁶ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 117.

³⁸⁷ *Id.* at 117-120.

³⁸⁸ *Id.* at 121-122.

³⁸⁹ *Id.* at 125-145.

Helmuth was determined to get his leaflets to the French prisoners of war who labored in the Altona district of Hamburg, but this entailed someone who could translate the documents into French. At his office he located a fellow employee, Werner Kranz, who could perform this function. On January 17, 1942, while they shared a class in the administrative school, Helmuth noticed Kranz taking notes in a tablet for French vocabulary. Helmuth inquired if he knew French and Kranz acknowledged in the affirmative. Helmuth then asked if he would translate the documents. Kranz replied that he would first need to know the contents, which Helmuth refused to disclose. Three days later, Helmuth accompanied by Gerhard again approached Kranz.³⁹⁰ Kranz recalls that:

Hübener shared with me quietly that ‘they’ were producing inflammatory brochures, which they wanted to give to the prisoners. I told him that such a thing was out of the question for me and urgently advised him to cease his activity . . . On the 20th of [January], he tried secretly to press some folded papers into my hand. I did not accept the writings and declared to him that I, under no condition, would accept or read them. The administrative apprentice, Düwer, who had entered the room with Hübener, was present at this conversation. They left the room together again after I refused.³⁹¹

The deciding incident in Helmuth’s demise was the moment Kranz refused the folded papers, at that instant their supervisor saw the aberrant interaction.

Helmuth’s superior was Heinrich Mohns.³⁹² He was the “overseer” of loyalty, “with political and social control” in their office.³⁹³ Mohns requested an explanation from Kranz. Kranz then relayed to Mohns that Helmuth had requested that he translate

³⁹⁰ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 146-148.

³⁹¹ *Id.* at 148.

³⁹² *Id.* at 148-151.

³⁹³ *Id.* at 151.

an inflammatory leaflet into French, as Helmuth claimed to have influence with French prisoners of war, but that he refused Helmuth's solicitation. Kranz was also able to determine that the material was anti-Nazi and reported this to Mohns.

At 5:00 P.M. on February 5, 1942, Gestapo agents entered his office and arrested Helmuth along with Gerhard Düwer.³⁹⁴ When Helmuth did break under the torture of Gestapo interrogation methods, he mentioned Rudi and Karl-Heinz only as curious acquaintances, not as co-conspirators. He also stated that they were with him on only one occasion when he attempted to listen to the BBC, but the Germans had successfully jammed the transmission that evening. The inevitable then happened to Rudi and Karl-Heinz. While at work on February 10, at approximately 12:00 P.M., Karl-Heinz, was arrested by the Gestapo, and on Wednesday, February 18, 1942, the Gestapo arrested Rudi.³⁹⁵

One of the first Gestapo queries was, "Who are the adults that put these kids up to this?"³⁹⁶ Hans Kunkel, Helmuth's half-brother, relates that, "The Gestapo could not imagine that a 16 year-old alone, by himself, carried out this scheme and composed these clever flyers without adult help. They believed he was a member of a large adult resistance organization."³⁹⁷ Life for Helmuth, Rudi, and Karl-Heinz was now an ordeal and tormented suffering few teenagers have ever had to endure.

³⁹⁴ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 151-156.

³⁹⁵ *Id.* at 161-167.

³⁹⁶ *Id.* at 167.

³⁹⁷ *Id.*

The boys generally abided with their plan of not implicating others.³⁹⁸ Karl-Heinz recounts, “I saw [Helmuth’s] face and . . . thought, ‘Oh my gosh, what have they put you through?’ . . . He looked like he had been in a meat grinder.”³⁹⁹ During his interrogations, Karl-Heinz admitted that he tried listening to the BBC, but claimed it was jammed. He also acknowledged that Helmuth had earlier written broadcast notes for him at his request and that Helmuth displayed a flyer to him on one occasion, but nothing more. He did not disclose that they listened repeatedly, but stated they tried to listen just one time.⁴⁰⁰ Gestapo Agent Müssener’s cryptic report was deciphered by Uli Sander, “Only after lengthy remonstrances (beatings) and emphatic admonishments (torture) was Hübener moved (forced) to make a confession about the extent of his destructive activity.”⁴⁰¹ Rudi states that he was interrogated three times, each attended with severe beatings.

On May 28, 1942, the boys were presented with their indictments. The charges against Helmuth and Rudi were conspiracy to commit high treason and listening to and distributing foreign radio broadcasts, while the charges against Karl-Heinz and Gerhard were similar, but less incriminating, listening to and/or distribution of foreign broadcasts. Their trial was scheduled for Tuesday, August 11, 1942, before the Second Senate of the People’s Court in Berlin.⁴⁰²

³⁹⁸ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 183.

³⁹⁹ *Id.* at 184.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 185.

⁴⁰² *Id.* at 198-203.

Neither Rudi nor Karl-Heinz trusted their court-appointed lawyers,⁴⁰³ Rudi analyzing, “all lawyers belonged to the National Socialistic law club. So that was the pool the court would draw them from. They were all Nazis. And he treated me like he was a Gestapo agent and just kept interrogating me. So I didn’t trust him.”⁴⁰⁴ All assigned defense lawyers were members of the NSRB, National Socialistic Justice Association, a coalition of lawyers that actively supported the Nazi Party.⁴⁰⁵

After a week in Moabit prison, the boys entered an overflowing courtroom on August 11, 1942, for their trial.⁴⁰⁶ Rudi stated, “I had a feeling the minute I entered the courtroom that we were already sentenced. It was just a show they were putting on, just a big show.”⁴⁰⁷ Three judges entered the courtroom wearing “blood-red” robes with a “large golden eagle” embroidered with a swastika, they were: Karl Engert, Vice President of the People’s Court; Chief Justice Fikeis; and Motorized SA Brigade Leader Heinsius.⁴⁰⁸ Other court personnel present were Senior District Leader Bodinus, Senior District Judicial President Hartmann, who represented the public prosecutor, First State Attorney Dr. Drullmann, and Secretary of Justice Wöhlke.⁴⁰⁹ Attending were Gestapo Officer Müssener, who had arrested and interrogated Helmuth; Heinrich Mohns, Helmuth’s supervisor at work; Werner Kranz, Helmuth’s co-worker, and Karl-Heinz’s

⁴⁰³ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 206.

⁴⁰⁴ *Id.*

⁴⁰⁵ Wobbe, R. & Borrowman, J. (2002). *Three against Hitler*. (American Fork, UT: Covenant Communications, Inc.), 75.

⁴⁰⁶ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 206-209.

⁴⁰⁷ *Id.* at 210.

⁴⁰⁸ *Id.* at 210-211.

⁴⁰⁹ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 67.

father,⁴¹⁰ Johann Schnibbe,⁴¹¹ who was the only parent, friend, or supporter granted permission to attend.

The trial began with opening statements, having each defendant stand when his name was called. A small intelligence test was given to each of the accused, wherein a few general knowledge questions were posed regarding the Party program, the number of points therein, and the date of Hitler's birthday. Helmuth was asked his opinion of the Party, answering that he did not like it and held the Church of Jesus Christ of Latter-day Saints in high esteem.⁴¹² In light of his response, the Court determined "that he should be judged as an adult."⁴¹³ Witnesses were then called, including Kranz,⁴¹⁴ Mohns, who boasted that he "tried to keep his office free from impure political thinking,"⁴¹⁵ and Müssener. These witnesses were then followed by the interrogation of each defendant by the chief prosecuting attorney and the judges.

After a lunch recess, the judges had the spectators removed from the courtroom as the leaflets were to be read. The judges read and discussed each handbill and leaflet,⁴¹⁶ and when asked, Helmuth always answered, "Oh yes, I remember this."⁴¹⁷ Helmuth admitting that he authored all the documents. Judges Engert and Fickeis denounced one

⁴¹⁰ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 211.

⁴¹¹ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 345.

⁴¹² Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 211-212.

⁴¹³ *Id.* at 212.

⁴¹⁴ *Id.* at 214.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 215.

⁴¹⁷ *Id.*

of Helmuth's leaflets relative to the Asian theatre of war⁴¹⁸ stating, "The leaflet 'WHO'S INCITING WHOM' contains inflammatory statements about the entry of Japan into the war, which in a venomous manner is given for the outbreak of the war with America."⁴¹⁹ Attacking Pearl Harbor meant nothing to the judges, but criticizing Japan was seen as poisonous and they blamed Helmuth for castigating Japan.⁴²⁰ Another flyer, "The Nazi Reichmarshal," referred to "good old fat Hermann: Oh yes, he has something on the ball, this little rogue with the saucer eyes. A dazzling career, a pretty actress and a very ample salary that is not to be sneezed at, but no brains. No, really not, as big as his head is."⁴²¹ This particular handbill caught the judges' sense of humor, and the grave occasion was broken with laughter from the bench.⁴²²

Karl-Heinz reminisces, "I was astonished how cool, clear, and clever Helmuth was. The court went over every detail in the leaflets and he recalled everything. He knew precisely when, how, and where he had conceived an idea and what he meant by it..."⁴²³ When asked, "Why did you do that?" Helmuth responded, "Because I wanted the people to know the truth."⁴²⁴ At one point Fickeis queried, "Would you have us believe that the British are telling us the truth?" To which Helmuth replied, "Yes, surely, don't you?"⁴²⁵ The judges then asked, "You don't doubt Germany's ultimate victory, do you?" Helmuth answered incredulously, "Do you actually believe that Germany can win

⁴¹⁸ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 216.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* at 216-217.

⁴²² *Id.* at 217.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 217-218.

the war?”⁴²⁶ When asked why he had passed flyers among the working class, Helmuth stated, “Hamburg will always stay in opposition to the Party . . . especially in the labor sections of Hamburg where the laborer, the common worker, cannot be fooled like the rich people.” The judicial retort, “You snot-nosed kid, what do you know about it?”⁴²⁷

Both Rudi and Karl-Heinz believed that during the proceedings, Helmuth attempted to focus the attention for the conspiracy on himself, so as to shield them from culpability. The court-appointed defense counsel spoke “about one minute each,” whereupon the prosecution recommended the death penalty for Helmuth, seven years incarceration for Rudi, and a minimum of two years imprisonment for Karl-Heinz and Gerhard, respectively.

When announcing their decision the judges opined that they considered Helmuth’s mental abilities far advanced for his years. They claimed that his school thesis written by a boy “in his 15th and 16th years,” as well as his leaflets, his general knowledge, his political knowledge, and his appearance and behavior before the court,⁴²⁸ “show without exception the picture of a precocious young man, intellectually long since having outgrown his youth.”⁴²⁹ Helmuth was the type of individual the Nazis were most afraid of; they extolled and glorified him in order to destroy him. The judges’ commented on his thesis, stating that it was “so well written that it could have been the work of a 30-year-old assessor,” or which could have been written by a 30-year-old

⁴²⁶ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 218.

⁴²⁷ *Id.* at 218-219.

⁴²⁸ *Id.* at 219-221.

⁴²⁹ *Id.* at 221.

“university professor.”⁴³⁰ Thus, “For Helmuth Hübener, charged with preparation of high treason, aiding and abetting the enemy we sentence him to death. And the forfeiture of his human civil rights for his lifetime,”⁴³¹ which meant they could then physically mistreat him until his execution.⁴³² The court sentencing document for Helmuth states, “The defendant was aware of the danger of his propaganda and of the reasons for it. Therefore the death penalty, which is compellingly prescribed, must be imposed on him...”⁴³³ Rudi received the maximum of ten years imprisonment for preparation of high treason and aiding and abetting the enemy, Karl-Heinz, for distributing broadcast news, five years imprisonment, and Gerhard, for distributing minor information, four years confinement. Düwer’s sentence was less than the others because it was not proven that he ever listened to the radio. When asked by the court if they had anything to say, all defendants with the exception of Helmuth declined.⁴³⁴ Helmuth stood and faced the judges saying, “Now I must die, even though I have committed no crime. So now it’s my turn, but your turn will come.”⁴³⁵

Helmuth was the first juvenile defendant to be sentenced to death as punishment for violating the radio law of September 1, 1939; even hardened Nazis were astonished at the verdict.⁴³⁶ Legally, this was permitted by the decree of October 4, 1939, which transferred youths 16 years of age and older from the juvenile court system to the more

⁴³⁰ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 222.

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.* at 223.

⁴³⁵ *Id.* at 224.

⁴³⁶ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 347.

severe jurisdiction of the adult penal code, if⁴³⁷ “their mental or moral development put them on a par with adults,”⁴³⁸ which the court was very anxious to deem Helmuth as being so endowed. Just seven years earlier, a group accused of similar offenses, to that of Helmuth, received sentences of only one to three years of incarceration.⁴³⁹

Rudi was fortunate that the court sentenced him to only ten years imprisonment. On March 21, 1943, Roland Freisler, President of the People’s Court, instructed lower jurisdictions that “too mild sentences” were a hindrance to the Gestapo. He informed the Presidents of the higher regional courts to discontinue imposing sentences exceeding ten years incarceration, for cases in which more than ten years confinement was justified, the death penalty was to be applied instead of imprisonment.⁴⁴⁰

Three days after his trial, Helmuth’s mother wrote a note to the Attorney General at the People’s Court requesting that she and her mother be allowed to visit Helmuth, for his clemency, and that he be given an opportunity to ameliorate for his actions. Six appeals for clemency were submitted, including: one from his fellow employees; his Hitler Youth group; the public authorities in Hamburg; one from his attorney, Dr. Knie; from the Berlin office of the Gestapo; and, from his stepfather, Hugo Hübener, who had officially adopted Helmuth and given him his name.

⁴³⁷ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 225.

⁴³⁸ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 347.

⁴³⁹ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 221-225.

⁴⁴⁰ Holmes, B.R. & Keele, A.F. (1995). *When truth was treason: German youth against Hitler, the story of the Helmuth Hübener group, based on the narrative of Karl-Heinz Schnibbe*. (Chicago, IL: University of Illinois Press), 347.

Gestapo Agent Müssener, who had caught and interrogated Helmuth, did something unexpected; he went before the Court and asked that Helmuth's life be spared, but to no avail. On October 15, 1942, the Minister of Justice signed the decree of execution. Along with the death warrant, a letter was forwarded under date of October 19, 1942, addressed to the Attorney General at the People's Court requesting,⁴⁴¹ "that you arrange with the greatest haste for all necessary subsequent actions."⁴⁴² At 1:05 P.M., on October 27, 1942, six men appeared at Helmuth's cell, two officials from the Office of the Attorney of the People's Court, Ranke and Renk; Mr. Rohde, a representative of the prison director; Dr. Schmitt, the prison doctor; and two prison guards. They read to Helmuth the judgment of the People's Court of August 11, 1942, along with the decree of the Minister of Justice of October 15, 1942, stating that he would not avail himself of his right of clemency, "but to let justice run its course." Helmuth was then told that the execution would occur that evening after 8:00 P.M.⁴⁴³

Helmuth was in the execution chamber less than 18 seconds before being murdered. The Minister of Justice recommended that his body be delivered to the Anatomical Institute of the University of Berlin. His family was given no information with respect to his execution or his grave. Hans Kunkel states that the family never received any correspondence as to his burial site. He further reiterates that Helmuth's mother learned of his death in a most cruel manner.

⁴⁴¹ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 229-236.

⁴⁴² *Id.* at 236.

⁴⁴³ *Id.* at 236-240.

The Nazis made an example of Helmuth by announcing his death on October 28, with thousands of blood-red posters throughout Germany. His mother happened to see a placard on a cement wall; it was her birthday. The local newspaper in which Helmuth's execution was announced, the *Hamburger Anzeiger und Nachrichten*, consisted of one long paragraph, a quarter page in length.⁴⁴⁴

Helmuth, Rudi, Karl-Heinz, Gerhard, and other members of the resistance, provided the moral foundation for the rebirth of Germany. Helmuth's story lay in relative obscurity for 20 years after his death, until 1962, when the group was rediscovered. German novelist, Günter Grass, a Nobel Laureate in 1999, wrote a novel in the 1960s, *Local Anesthetic*, based upon Helmuth and his associates. Grass' work concerns informing younger people of the Nazis and the resistance efforts arising therefrom, despite the older generation's not desiring to discuss the issues, and the resultant tension between the age groups.

After the war, Helmuth's legacy received some attention in Germany, while in the United States little has been reported of him. In October 1976, the play *Huebener* was written by Thomas Rogers and produced by Brigham Young University ("BYU"). It was restaged at BYU in 1992, and by Rogers in Bountiful, Utah, in May of 2003, while another play, *Huebener Against the Reich*, was written by David Anderson in Salt Lake City, where it ran from February to early March 1984. Other books and plays have likewise been written about Helmuth. In Germany, Helmuth played an important role not only in Grass' novel, but a play, *Davor (Up Tight)*, written by Alan Keele, has been seen

⁴⁴⁴ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 245-247.

on television in several countries, and Paul Schalluck's radio play, *Helmuth Hübener*, has been heard throughout Germany. At Berlin's Plötzensee Prison, visitors are provided a booklet that portrays a photo and short article relative to Helmuth's life. In December 2002, Brigham Young University produced a documentary, *Truth & Conviction*, about the Hübener group, mainly from the perspective of Karl-Heinz that aired several times during 2003.

For all that has been organized and accomplished to commemorate Helmuth and his fellow resistance members, Gerhard Kunkel, Helmuth's half-brother, in his final commentary describes this lasting painful peculiarity:⁴⁴⁵

In 1994 we went to Hamburg to see my brother's memorial building, the Helmuth Hübener House, which in 1985 had been renamed from 'Bieberhaus,' the administrative building for the Hamburg government. But the plaque was now gone, and the building has been renamed back to 'Bieberhaus.'

A street which had borne Helmuth's name had also been renamed to something else, and the old street sign bearing Helmuth's name had been removed. I suppose the new generation does not know and appreciate their heritage.⁴⁴⁶

In a final analysis, whenever one takes a stand against evil, they will initiate a controversy. Helmuth felt that he had done nothing wrong, while others criticized his actions as imprudent, in a pragmatic sense, leaving those of his family and fellow church members subject to increased scrutiny. What may have started with some measure of adventure acquired political, religious, and philosophical content and profoundness. Helmuth possessed not only perception, but courage. By virtue of his intelligence, this

⁴⁴⁵ Dewey, R. L. (2003). *Hübener vs. Hitler: A biography of Helmuth Hübener, Mormon teenage resistance leader* (2nd ed.). (Provo, UT: Academic Research Foundation), 313-320.

⁴⁴⁶ *Id.* at 320.

16 year-old man, was able to perceive and illuminate the fabrications of the entire Nazi regime. By doing so, he became a threat to a government built upon lies; thus, all of the official German fears regarding the credibility of the Führer became fatally focused. For the Nazis, Helmuth's pen was mightier than their sword.

His response to an unjustified regime was a sincere, if naïve, attempt to revolutionize by educating his fellow citizens. Had the Nazis held sacred the freedom of conscience and protected the individual in their inherent and inalienable rights through its laws, not depriving its people of their privilege of free exercise of religious beliefs or proscribing them in their opinions, Helmuth would never have become a malefactor; his temperament and mentality were not of that character. Members of a society would do better to err in the direction of being more concerned, as Helmuth's actions demonstrate, rather than less, about the survival of those principles of freedom they hold dear, and to exhibit the courage to act here and now, in this and other free countries around the world, before the wicked rule and history once again repeats itself. One should follow the sincerity, purity of heart, courage, and heroism exemplified in and through Helmuth Hübener's behavior when confronted by the significant depravity in our ever-changing and modernizing world.

For steadfastly enduring against Hitler's corruption and perversion, Helmuth was culpably guilty of treasonous conduct pursuant to the dictates of Nazi "justice." As a consequence, his fate was determined by the wholly dependent People's Court, a judiciary that had deliberately discarded its independence and autonomy to tyrannical and depraved political authorities and that was willfully exploited by them to advance the mandates of Nazi barbarism through sanctioned and endorsed judicial murder.

Chapter XIII: Count Helmuth James von Moltke and the Kreisau Circle

This dissertation demonstrates the perplexing issues associated with the functioning of the German judiciary during the period of Nazi tyranny. The following chapter discusses the trial of a resistance member to the regime, Count Helmut James von Moltke, and a group of individuals with whom he was affiliated, known as the Kreisau Circle. Moltke was sentenced to death by the People's Court for privately deliberating possible alternative forms of government in the post-Nazi era. Moltke's defense was that he had only "thought," but his thoughts were sufficient for the Nazis to find him culpable of high treason. He was executed on January 23, 1945, subsequent to a "show trial" before a wholly dependent judiciary that had relinquished its independence and autonomy to despotic and corrupt political authorities and was utilized by them to advance the dictates of the Nazi reign of terror. The guilt of Moltke was determined prior to his trial, it being a mere formality in the Nazi legal scheme which the regime proffered as "justice."

Count Helmuth James von Moltke was an anti-Nazi lawyer, before and during the Third Reich, who challenged the regime and was ultimately murdered by it because he would not denounce his Christian faith and swear allegiance to Hitler and his immoral legal system.⁴⁴⁷

On October 11, 1944, after nearly nine months in jail, Helmuth James von Moltke was served with his arrest warrant, accusing him of treason. He wrote a farewell letter to

⁴⁴⁷ Hunter, W. (2010). Independent or adrift at sea: How the concept of independence has warped American legal ethics. *The Journal of the Legal Profession*, 34, 367-380, 370.

his two sons, aged 5 and 3, respectively, in which he explained the basis for his criminal condemnation that was to be carried out against him:⁴⁴⁸

Throughout my life from my schooldays onwards I have fought against a spirit of narrowness and subservience, of arrogance and intolerance, against the absolutely merciless consistency which is deeply engrained in the Germans and has found its expression in the National Socialist state. I have made it my aim to get this spirit overcome with its evil accompaniments, such as excessive nationalism, racial persecution, lack of faith and materialism. In this sense and seen from their own standpoint the National Socialists are right in putting me to death.⁴⁴⁹

The Nazis were not justified in murdering him for committing or advocating acts of violence because he had always been opposed thereto, such as the attempted coup d'état of July 20, 1944. He believed that such an act would not change the mentality behind the Third Reich.

Helmuth James von Moltke was born on March 11, 1907, in Silesia,⁴⁵⁰ the first child of Count Helmuth von Moltke (1876-1939), who was a great-nephew of General Field Marshal Helmuth Graf von Moltke, and Dorothy, née Rose Innes (1885-1935), she being the only child of Sir James Rose Innes (1855-1942) and his wife, Jessie, née Pringle. Sir James had been Attorney General and retired as Chief Justice of South Africa.

⁴⁴⁸ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 3.

⁴⁴⁹ Balfour, M. & Frisby, J. (1972). *Helmuth von Moltke: A leader against Hitler*. (London, GB: MacMillan London Limited), 331.

⁴⁵⁰ Helmuth James Graf von Moltke. (n.d.). In *Conservapedia*. Retrieved from http://www.conservapedia.com/index.php?title=Helmuth_James_Graf_von_Moltke&printable=yes.

Kreisau, together with the neighboring estates of Nieder-Gräditz and Wierischau, comprised approximately 1000 acres. General Field Marshal Helmuth Graf von Moltke had acquired the properties with monies granted him by his King after the Prussian war against Austria in 1866. By prevailing standards it was a modest estate. The Field Marshal became a widower in 1868, without children. On his death in 1891, the estate passed to his nephew, Wilhelm, and upon his death in 1905, to his eldest son, Count Helmuth von Moltke.

Helmuth James von Moltke began his studies in law, politics, social history, the history of socialism, and journalism, receiving instruction at Breslau, Berlin, and Vienna with potential careers in either politics or law, possibly as a judge, to emulate his grandfather. He started work in the statistical department of a Berlin company and in his non-working hours enjoyed discussions with his friends and Berlin's cultural atmosphere. However, in October of 1929, the manager of Kreisau died, and the estate was discovered to be in total disorder and substantial debt. Helmuth's father called on his eldest son, Helmuth James, to alleviate the quandary and disorder. He became his father's plenipotentiary, analyzed the situation, and persuaded the creditors to permit him one year in which to establish that they would benefit from his management of the manor. He was also beginning at this time the practical phase of his law studies. By October of 1930, the worst had passed and he was able to enjoy the economic management of Kreisau.⁴⁵¹ In addition, until Hitler's ascent to power in 1933, Helmuth worked in

⁴⁵¹ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 4-8.

different law offices, the second and third of which he specialized in international private law. He had no desire to become a judge under the Nazi regime.⁴⁵²

After 1935, there were added political complications, not only whether there was any purpose to staying in Germany, but increasingly, if remaining there while keeping his distance from the Nazis, did this not also involve him in culpability, because it helped to maintain a façade behind which horrendous things were occurring. However, he was able to help the persecuted by doing whatever possible. Additionally, he was much attached to Kreisau, which despite the debt and the hostility of the Nazi farmers' organization provided an economic base that permitted him relative independence, and also became his personal emotional retreat.

In the winter of 1933-34, he was required to spend some weeks in a camp at Jüterbog devoted to ideological indoctrination and pre-military training for young lawyers. By the autumn of 1934, Himmler's SS had begun its ascendancy, which brought the gradual change from authoritarian *Gleichschaltung*, or coordination, to totalitarian rule. On August 2, 1934, President von Hindenburg died and Hitler assumed his office and merged it with the chancellorship, while maintaining the leadership of the Party. The armed forces had to then take an oath swearing personal allegiance to Hitler, not to the defense of the Constitution. For Helmuth, the question of his life's direction became more demanding and momentous. During a subsequent visit to England, he realized that the study of British law, with the aim of being called to the British bar, held the most promising prospect.

⁴⁵² Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 8.

He applied for admission to the Inner Temple and over the ensuing years not only read for the bar, but paid frequent visits to England for the required dinners. His first visit to England had been in 1934, when he met Lionel Curtis, co-founder of the Royal Institute of International Affairs at Chatham House and Fellow of All Souls College in Oxford. Curtis introduced him to many people, and Helmuth used the opportunities to inform these individuals of the true character and objectives of the Third Reich. He did not believe that the Nazis would ameliorate into a respectable government, or that a policy of concessions would promote this change. He was deeply concerned that the principle of appeasement would gain popularity in England and lead the Nazis to believe that Britain would remain neutral in the event of war and thus only serve to embolden Hitler.

As Helmuth had foreseen, the policy of appeasement did indeed lead to further German threats and coercive actions and as he also predicted, the radicalization of Nazi domestic policy. The exodus of refugees from the German sphere of influence increased, especially after the coordinated, nation-wide anti-Jewish excesses of November 1938. He became extremely industrious in assisting with emigration. By the time the war began, Helmuth had passed his English bar exams and located an office in London. He then made use of his experience in international and British law, joining the Foreign Division of the Abwehr, the German intelligence service, as legal adviser to the High Command of the Armed Services, Oberkommando der Wehrmacht ("OKW").

The Abwehr, under Admiral Wilhelm Canaris, was the center of concentration for much opposition to the regime. Canaris and his assistant Colonel, later Major General,

Hans Oster, as well as other members of the Abwehr, were executed before the end of the war for their resistance activities.

In the early phase of the war, Helmuth was absorbed in the prevention of breaches of international law and the protection of neutrals. It was very difficult to affect strategic planning, but he was involved in efforts to get Hitler to cancel or postpone plans for a campaign in the West after the defeat and partition of Poland. There was little that could be done by the Wehrmacht to preclude the atrocities committed by the Schutzstaffel ("SS") against the Polish leadership and citizens. He did, however, contend for the recognition of Polish prisoners of war as such and for the Poles who fought with the French and British after escaping Poland as combatants. Moltke continually endeavored to expand the protection of the Wehrmacht to people who would otherwise be subjected to the barbarity of the SS. He was aware and somewhat involved in the efforts of opponents of the regime both within and outside of the Abwehr to contact Britain regarding a negotiated peace after the desired elimination of Hitler. Josef Müller, also a member of the Abwehr, went to Rome, where Pope Pius XII was willing to act as the intermediary to the British Ambassador at the Holy See. But nothing could halt Hitler's course of aggression. The Nazis occupied Denmark and Norway in April of 1940, and attacked Holland, Belgium, Luxemburg, and France in May. The rapid defeat of the French disarmed and disoriented the domestic opposition in Germany; Hitler stood at the zenith of his popularity and power.

In the summer of 1940, Moltke began a systematic contact with like-minded men to discuss the principles upon which Germany should be rebuilt in the time after Hitler and in a liberated Europe. It was the Gestapo which would later designate the group as

the “Kreisau Circle,” when interrogators discovered its existence during the investigation surrounding the July 20, 1944, assassination plot on the life of Adolf Hitler. Helmuth was conscientious to include Socialists and religious representatives, two groups he saw as fundamental to the reconstruction of Germany. Likewise, he brought together emissaries of both the Protestant majority and Catholic minority. Hitler’s electoral base had been predominantly Protestant; the Protestant churches were stridently nationalistic, and the “German Christians” had shown how German Protestantism could evolve into Nazi philosophical propaganda.

In addition to his official Abwehr position and the increasing resistance activities in connection with the “Kreisau Circle” discussions and propositions, Moltke maintained his private law practice. He also kept a watchful though distant observation on the farming operations at Kreisau, always longing to be there, but rarely able to go for a weekend or working vacation. Helmuth’s rank in the Abwehr corresponded to that of a major; he was not required to wear a uniform, though repeatedly urged to do so. His surname assisted both in his work and in preserving his freedom, until his arrest on January 19, 1944. The name of Bismarck’s general still maintained an aura in the Third Reich.

After the capitulation of France, Moltke struggled to maintain his own morale and confidence in an ultimate British victory, with the Bible assuming a predominant role in his life and affecting him as being very topical. He also continued to attempt to influence Alexander Kirk, the American Chargé d’Affaires in Berlin, to counteract the United States tendency toward isolationism, which was being fostered by the American Ambassador in London, Joseph Kennedy. When Kirk left Berlin in October of 1940, he

transferred this⁴⁵³ “most delicate and valuable of his clandestine ‘contacts’ among the German oppositionists”⁴⁵⁴ to George Kennan, who later wrote that:⁴⁵⁵

. . . it was in fact, largely from Moltke that [Kirk] had derived his conviction that the war, all early German triumphs notwithstanding, would end badly for Germany.... Even at that time—in 1940 and 1941—he had looked beyond the whole sordid arrogance and the apparent triumphs of the Hitler regime; he had seen through to the ultimate catastrophe and had put himself to the anguish of accepting it and accommodating himself to it inwardly, preparing himself—as he would eventually have liked to prepare his people—for the necessity of starting all over again, albeit in defeat and humiliation, to erect a new national edifice on a new and better moral foundation.⁴⁵⁶

Helmuth had read the *Federalist Papers* and envisaged a federal structure for Germany and Europe; he impressed Kennan by having risen above the pettiness and primitivism of latter-day German nationalism.

As a result of the German attack on the Soviet Union in June of 1941, Britain’s year of solitary opposition against Hitler ended. The attack precipitated ideological and total war. As long as the Hitler-Stalin pact of August 1939 was in force, the Nazis had fought the West, now came the struggle opposing “Jewish Bolshevism.” It was then a fight not only for *Lebensraum*, the land, natural, and human resources of the Soviet Union, but for the destruction of communism and those who embodied it, partisans, civilians, and Jews. The Jews were also left for cold-blooded murder by the Einsatzgruppen, forces of the Security Police and Sicherheitsdienst or SD. Soon

⁴⁵³ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 9-14.

⁴⁵⁴ *Id.* at 14.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 14-15.

however, in addition to the Jews in the Soviet Union, Jews from Germany and countries occupied by or allied with the Nazis were being exterminated. Deportations from Berlin began in October of 1941; in January 1942, the “final solution of the Jewish question” was initiated for the whole of Europe. Moltke had heard of SS men suffering nervous breakdowns, and in October of 1942, received reliable reports relative to the use of poisonous gas in an extermination camp. In May 1943, on his only trip to occupied Poland, he witnessed the cloud of smoke above the Warsaw ghetto.

Helmuth contended for the lives of Soviet prisoners of war, who were dying in large numbers and remained the responsibility of the armed forces. Although he pleaded for respect for international law and humanity, he knew that agreements for expediency and reciprocity were more effective. German practices relative to Soviet prisoners of war were not modified until it could be proven that there were German prisoners in Russian captivity; here the assistance of the International Red Cross was required. Another factor that advanced change in German practices was the manpower shortage; prisoners were needed as laborers and could not be left to starve, yet millions died. Also, Moltke’s visit with Werner Best, the Reich Plenipotentiary in Denmark, coincided with the aborted seizure of Danish Jews; he contributed to the rescue of most of these individuals.

Trips to occupied or neutral countries always served more than one purpose. He continually looked for people who were willing to work against the escalation of the war, Nazi atrocities, and oppression. He found, particularly in Holland and Scandinavia, persons sympathetic to the endeavors of the Kreisau Circle and their post-war plans.

This secret working group had grown since summer 1940; the summer of 1941 saw the beginning of Moltke’s regular exchange of news and opinions with Konrad von

Preysing, the Catholic Bishop of Berlin, who was also kept informed about the deliberations of the group. The first members of the assemblage, Peter Count Yorck von Wartenburg, Horst von Einsiedel, Hans Peters, Otto Heinrich von der Gablentz, and Adam von Trott zu Solz, were joined by the Socialists, Adolf Reichwein, Carlo Mierendorff, and Theodor Haubach. Hans Bernd von Haefen, a member of the Foreign Service and a Protestant, joined in 1941, as did Theodor Steltzer, another Protestant, stationed in Norway. Protestant prison chaplain Harald Poelchau also joined. Karl Ludwig Guttenberg stabilized connections with the Munich Jesuits, their Provincial, Augustin Rösch, and Fathers Alfred Delp and Lothar König, the last two joining in 1942, as did Protestant Eugen Gerstenmaier, and the Protestant Bishop of Württemberg, Theophil Wurm, who since the summer of 1941, had become the acknowledged, though unofficial, head of the Confessing Church. Another late addition, Catholic Paulus van Husen, assumed a dominant role in drafting the plans for punishing Nazi criminals.

The Kreisauers mostly met in Berlin in small groups of often two or three, in Moltke's apartment at Derfflingerstrasse 10, which he shared with his usually absent brother-in-law, Carl Deichmann. Meetings were also held, especially when a larger involvement was anticipated, at the residence of the Yorcks' in Hortensienstrasse, Berlin Lichterfelde-West. The first of three large meetings at Kreisau took place in May of 1942, and dealt with questions of political structure, education, university reform, and church and state relations. The second Kreisau meeting, in October 1942, was preceded by preliminary discussions between the Socialist, Carlo Mierendorff and the trade unionists, Wilhelm Leuschner and Hermann Maass as one faction, and the Jesuits, Rösch, Delp, and König, as the other, in order to achieve a consensus between Social Democrats

and Christian trade unionists and religious representatives. Wilhelm Leuschner and Hermann Maass, as his surrogate at the Kreisau gathering, favored one large trade union; whereas, the others preferred work unions, to activate local initiative and avoid the centralization that the federalist constitutional plans were intended to counteract in the political area. “Small communities” were to restore to the individual a sense of having some voice and responsibility.

Preparatory talks for the third and what proved to be the last Kreisau meeting, in June of 1943, overlapped with continuing discussions of the results of the second conference. There were deliberations and documents relative to the punishment of Nazi criminals⁴⁵⁷ and on the “translation to the European plane”⁴⁵⁸ of the federal plans drafted for Germany. In April 1941, Helmuth had written a paper regarding the design of a peace settlement after Germany’s defeat.⁴⁵⁹ He postulated “a unitary European sovereignty from Portugal to a point as far east as possible, with a division of the entire continent into smaller, non-sovereign political units,”⁴⁶⁰ along with an Anglo-Saxon Union.

By June 1943, the political atmosphere had shifted due to the German defeats at Stalingrad and Tunisia, the demand for a German unconditional surrender proclaimed by Roosevelt and Churchill at their Casablanca Conference in January of 1943, the conflict between the Soviet Union and the “London” Poles, and the tensions between Russia and the Western Allies. In addition, Nazi policies in occupied Europe made any German planning for a united Europe after the war more difficult. Moltke also saw a perplexing

⁴⁵⁷ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 15-17.

⁴⁵⁸ *Id.* at 17.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

danger in any coup d'état, the creation of a new stab-in-the-back myth, similar to the one that had perpetrated so much political harm and discord in Germany subsequent to 1918. It is for this reason that he held a clear military defeat to be necessary. To prepare for this eventuality, the Kreisauers worked in the summer of 1943, looking for suitable men, "Regional Commissioners," who would assume responsibility once the time had arrived for transition.

All these plans and personnel decisions necessitated travel, which as before, were connected with official missions or disguised as such, including two trips to Turkey in July and December of 1943, respectively, when Moltke tried in vain to meet with Alexander Kirk. Earlier attempts to persuade the British to post an intermediary in Stockholm, for liaison with the German resistance, had proved equally unsuccessful.⁴⁶¹

The last months before Moltke's arrest on January 19, 1944, were also made more strenuous by the escalation of Allied air raids. The central offices of the Abwehr moved to the new OKW headquarters at Zossen, outside Berlin; however, Helmuth continued to work in Berlin with a small group. When his apartment on Derfflingerstrasse was bombed, he began residing with the Yorcks.

The immediate cause for his arrest was the detention of his colleague Otto Kiep, who he had warned was under surveillance. The Gestapo learned of the appraisal and that afforded justification to apprehend Moltke; the true reason lay in the conflict of the SD against Canaris and the Abwehr. It was unlikely, however, that Helmuth would have

⁴⁶¹ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 17-19.

been permitted to engage in his resistance controverting Nazi principles and practices indefinitely, despite the protection of his family name.

No charges were lodged initially, the confinement being classified as “protective custody.” After a few days of interrogation at Gestapo headquarters on Prinz-Albrecht-Strasse in Berlin, he was sent to a prison near the women’s concentration camp at Ravensbrück. There he had a fairly comfortable captivity; his wife, Freya, was permitted to visit a few times; they discussed family and farm issues and, discreetly, his present quandary. His Abwehr office was still allowed to forward some papers from work for his attention and by summer of 1944, it appeared as if he might be released, but the failed assassination conspiracy of July 20, 1944, altered any such thoughts and expectations.

Yorck and others associated with the Kreisau Circle had joined the coterie of plotters preparing a coup d’état under the leadership of Colonel Claus Schenk von Stauffenberg. Yorck was in the initial group of defendants tried before the People’s Court, and was hanged on August 8, 1944. In the course of the interrogations of possible people connected, or suspected of being involved, with the connivance, the Gestapo discovered additional names of individuals who had schemed against the regime in conjunction with Moltke. Even though he had been in protective custody for six months before the attempt, and although his critical attitude toward the conspiracy was known, Moltke was seen as a principal and driving force in the July 20, 1944, assassination plot.

As these allegations escalated, in September, Moltke was returned to Berlin and placed in Tegel Prison; there finding all too many acquaintances, but because of his being shackled, he encountered difficulty when attempting to communicate with others.

However, prison chaplain, Harald Poelchau, whose connection with the Kreisau Circle

was never discovered, was allowed to visit with all of them and help to harmonize their statements and defense strategies. He also conveyed correspondences between Helmuth and Freya, who was permitted a few more visits. She spent the last weeks in Berlin offering her assistance to help her husband, even calling upon Gestapo chief, Heinrich Müller, who stated to her that the Third Reich would not commit the same mistake as in 1918, letting its internal enemies survive. Moltke had to die, but the family would be unharmed. Moltke's trial before Roland Freisler and the People's Court was convened from January 9 through 11, 1945, his execution being January 25, 1945.

He had prepared himself for his trial, both legally and psychologically. The arrest warrant, for a man already in jail,⁴⁶² was presented to him on October 11, 1944.⁴⁶³ It accused him of having tried, together with others, to change the constitution of the Reich by violence and thereby aiding and abetting foreign powers in wartime, thus high treason and the death penalty. Five different violations of the Penal Code had been adduced as applicable; however, none of these alleged criminal transgressions appear in the Court's judgment; instead, as a result of his astute defense, he was deemed guilty of failing to report treasonous activities and defeatism.

In all, there were only three long weekend meetings at Kreisau, and it was from these that the name was generated, even though the principal work was accomplished in Berlin. Therefore, Berlin can more readily be described as the center of activity rather

⁴⁶² Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 20-22.

⁴⁶³ *Id.* at 3.

than Kreisau. However, the so-called Kreisau Circle was actually a loose, informal, organization.⁴⁶⁴

The first weekend at Kreisau took place on Pentecost 1942, from May 22 to 25. It was disguised as Helmuth inviting his coworkers for a long weekend in the country; all travelled by rail but not on the same train. There were definite topics for each of the three weekends at Kreisau, with each topic having a discussion leader. Relatively harmless themes had been chosen for the first weekend; had information concerning the meeting gotten disclosed, it could have been justified without becoming treasonous. The subject matter included school and universities, and the relationship between church and state. The Nazi regime had a very destructive effect on education; thus, Adolf Reichwein, who had trained teachers until his dismissal, reported on this area. Although the group was in favor of separation of church and state, many Catholics wanted to retain sectarian elementary schools. Helmuth spoke on the reform of the universities, while Theodor Steltzer, a *Landrat*, or the head of an administrative district,⁴⁶⁵ in Schleswig-Holstein before his dismissal in 1933, led the debate on church and state. Hans Peters, a professor of public law in Berlin, but drafted into the service, spoke pertaining to the concordant Hitler had concluded with the Catholic Church in 1933; he and Rösch presenting the Catholic viewpoint, Steltzer and Poelchau as Protestants. Questions of faith became vitally important for almost all members of the group, even if they were not church-going Christians because it gave them their foundation and courage. Their faith

⁴⁶⁴ Winter, J.M. (Ed.) (2003). *Memories of Kreisau & the German resistance*. (F. Von Moltke, Trans.). (Lincoln, NE: University of Nebraska Press), 24-26.

⁴⁶⁵ *Id.* at 86.

also imposed upon them the duty to act against the destruction of humanity by National Socialism because they believed in the future of Christianity, of it becoming alive once again.

That was the first of the Kreisau weekends. Many discussions about the results of this weekend and preparatory work for the second took place mainly in Berlin, but also in Munich and Stuttgart, prior to the second Kreisau weekend on October 16 through 18, 1942. In addition to Yorck and Moltke, the economics expert Horst von Einsiedel, as well as Haubach, Steltzer, and Peters were all present at Kreisau. New to the second meeting were the theologian Eugen Gerstenmaier and Jesuit Father Alfred Delp, sent by Father Rösch. Labor unionist, Wilhelm Leuschner, had delegated Hermann Maass to join in for this weekend; however, he could not be called a Kreisauer as he was always distrustful of the group and of the motives of the participants from noble families.

The second Kreisau weekend was not as relaxed as the first with work extending late into the night, concerning planning for a new state and the economy. For the reconstruction process of both entities, the ideas of decentralization and self-government were important to the Circle. They intended to make better democrats out of the Germans by practicing self-government and avoiding the mistakes of the Weimar Republic. They also wanted to install self-government into the economic sector in the form of company labor unions. According to the Kreisauers, a company was described as a⁴⁶⁶ “community of people who work in it,”⁴⁶⁷ and all members of the company should participate in its decision-making process.

⁴⁶⁶ Winter, J.M. (Ed.) (2003). *Memories of Kreisau & the German resistance*. (F. Von Moltke, Trans.). (Lincoln, NE: University of Nebraska Press), 27-32.

Horst von Einsiedel and Carl Dietrich von Trotha had done the preliminary work on the question of economic planning and had provided a basis for discussion. Their preparatory output stated that the European economy⁴⁶⁸ “should be freed from the inherited limitations of a nation-state” in order to “bring about the joining of the separate national economies of Europe into an organic and structured unity.”⁴⁶⁹ The Kreisauers thought in terms of Europe and were convinced that the sovereign European nation-state was coming to its conclusion; securing world peace required⁴⁷⁰ “the creation of an order that comprised the individual states.”⁴⁷¹ Although they were not completely finished, at the culmination of the weekend, Helmuth was satisfied with what had been achieved and the contribution of the new members.

The third and final weekend at Kreisau, Pentecost, June 12 through 14, 1943, was influenced by both the participants and the existing conditions. There was more pressure because of the continuing war and the available information relative to the acts of the Nazis. Besides Yorck and Moltke, Reichwein, Gerstenmaier, Delp, Einsiedel, and Adam von Trott zu Solz attended this meeting. Paulus van Husen, a state-employed lawyer, also attended as a new member. The topics were foreign relations questions and how to treat the Nazis and war crimes after the collapse of the dictatorship.

Adam von Trott zu Solz spoke relative to foreign policy because the Circle had always desired to attempt to contact anti-Nazi resistance groups in the occupied countries. The Kreisauers believed that would be useful for the time after the war, as

⁴⁶⁷ Winter, J.M. (Ed.) (2003). *Memories of Kreisau & the German resistance*. (F. Von Moltke, Trans.). (Lincoln, NE: University of Nebraska Press), 32.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

representatives of the resistance against the Nazis in Europe, with whom they could work together, would then come to power. They were successful in making contact with the resistance in Holland and Norway, but not in France.

Several times Adam von Trott zu Solz had brought information of the existence and composition of the German opposition to the Nazis in Germany to Switzerland and Sweden, both neutral countries. Moltke had done the same, going also to Sweden, Norway, Denmark, and neutral Turkey. It was in this way that leaflets of the White Rose went through Helmuth to Sweden and from there to England, but there was never a response from either England or the United States.

Paulus van Husen brought a draft concerning the "Punishment of the Violators of the Law," which was discussed. The Kreisauers wanted the Germans to participate in the prosecution and sentencing of war and Nazi crimes, suggesting proceeding before an international court, on which the victors, neutral countries, and Germany would sit together.

In August, after another larger meeting in Berlin, everything was finalized, with the documents being dated August 9, 1943, and entitled, "Principles for the New Order" combined with "Directions to the Regional Commissioners." Regional commissioners were to be people who were ready to maintain inner unity based upon Kreisau resolutions in the various parts of Germany in the event of a collapse, and to prevent disintegration. Included in the Directions was the abolition of all discrimination on the basis of race or religion. Regional commissioners were sought for all of Germany; some people were ascertained ready to assume this responsibility on "Day X," the day on which defeated from either the inside or the outside, the Third Reich would collapse.

Nothing was ever realized of the plans, some later resolutions were related to corresponding Kreisau suggestions, but there was no direct connection; all decisions were made by the victorious allies. However, one must credit the Kreisauers for asking the right questions for the post-war future Germany, and acknowledge that behind the plans stood the participant's principled protest against a tyrannical criminal dictatorship that despised honorable and righteous people to the extent of annihilation.⁴⁷²

Almost all members of the Kreisau Circle who had taken part or became implicated in the events of July 20, 1944, were arrested. Yorck, Gerstenmaier, Lukaschek, Adam von Trott zu Solz, von Haefen, Steltzer, van Husen, Haubach, Delp, and Rösch were all taken into custody, in addition to the prior detention of Moltke. Besides König, only von der Gablentz, Peters, von Einsiedel, von Trotha and Poelchau among the members of the "inner circle" were not arrested.

Moltke knew after the failure of the July 20, 1944, plot that several members of the Circle had been incriminated and thus lost to reconstruction; another consequence was the thwarting of his own release. He had always been skeptical about the feasibility of an assassination attempt,⁴⁷³ saying, "Don't you see that we are not conspirators? We can't do it, we haven't learned how, and we ought not now to try it for the first time; it will go awry and we will do it in a dilettante manner."⁴⁷⁴ Endeavors to obtain Allied military support for the coup had all been in vain. Moltke was therefore negative about

⁴⁷² Winter, J.M. (Ed.) (2003). *Memories of Kreisau & the German resistance*. (F. Von Moltke, Trans.). (Lincoln, NE: University of Nebraska Press), 33-41.

⁴⁷³ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 275-276.

⁴⁷⁴ *Id.* at 276.

what was done on July 20, 1944, although realizing its conceivable importance when viewed from the perspective of the world outside Germany.⁴⁷⁵

Moltke's personal internal conflict associated with the proposed assassination of Hitler is revealed and expressed by the private papers of the late Bishop Berggrav of Oslo. The Bishop's memoranda describing his conversations with members of the German resistance include notes on meetings with Steltzer and Moltke on January 8 and March 18, 1943, respectively. Their discussion included the composition and plans of the various groups and the possibility of influencing Allied propaganda. At their second meeting, Moltke raised the question of the ethical and theological justification for an attempt on Hitler's life. Berggrav, who later described it as the most difficult matter on which he had ever been asked to give his advice, replied that in certain circumstances the murder of a tyrant was justified, but that in his opinion it was already too late to murder Hitler. Those who were contemplating removing the despot needed not only the means to assassinate him, but also, and more importantly, the ability to form a new government which could secure the peace. However, by this stage of the war, Berggrav did not believe that any new German government could accomplish this undertaking. Nevertheless, the existence of these notes demonstrates that Moltke had ruminated upon the issue and sought divine judgment and intervention with respect thereto.⁴⁷⁶

After interrogation, all of the participants in the attempt, including the insiders of the Kreisau Circle, were sentenced to death by Roland Freisler of the People's Court. He described the death sentences as, "God's judgment," in trials recounted as, "a caricature

⁴⁷⁵ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 276.

⁴⁷⁶ *Id.* at 387.

of legal process.”⁴⁷⁷ In the course of his trial, Yorck had the courage to say that the treatment of the Jews and National Socialist legal practice had been decisive in determining his attitude toward the Nazi regime.⁴⁷⁸ “What is fundamental, what links all these problems together, is the state’s totalitarian claim upon the citizen which excludes his religious and moral obligations to God.”⁴⁷⁹

On August 15, 1944, von Haeften and Adam von Trott zu Solz stood before the People’s Court. When asked by Freisler whether he saw that he had committed treason, von Haeften responded in the negative and declared that he viewed Hitler as the instrument of evil in history. It was not until October 20, 1944, that Julius Leber and Adolf Reichwein came before Freisler. When Reichwein began in a feeble voice to give a defense of himself, mistreatment in prison had affected his modulation, Freisler perceived that he was still able to enthrall people; he interrupted and attempted to drown everything Reichwein said by bellowing at him in order to prevent him from making an impression on the spectators. Leber was never given a chance to speak, he was dubbed the “German Lenin” by Freisler. He had been one of Stauffenberg’s closest colleagues and was not executed until January 5, 1945. From his prison cell, Leber greeted his friends who were still free with the words,⁴⁸⁰ “For such a good and just cause the sacrifice of one’s life is the proper price.”⁴⁸¹

The importance of the Kreisau Circle in the resistance movement against National Socialism came to prominence and was highlighted by Freisler in the January 9 and 10,

⁴⁷⁷ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 276.

⁴⁷⁸ *Id.* at 276-277.

⁴⁷⁹ *Id.* at 277.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

1945, trial of Moltke, Haubach, Gerstenmaier, Delp, and Steltzer. As previously indicated, the accused were in regular contact with each other during their incarcerations and had coordinated their defense. The case against them was that⁴⁸² “they had together undertaken to change the constitution of the Reich by force, and to deprive the Führer of his constitutional power and thereby, at the same time, to give assistance at home to the enemy power during a war against the Reich.”⁴⁸³ As these were the charges, the accused had agreed to put their non-participation at the center of their defense.

While the others were being tried, their relations with Moltke and the “Moltke Circle” were consistently accentuated. Moltke rejected the charges against him and insisted upon his own non-involvement, maintaining that he had only “thought.” As the Nazis could not prove anything else against him, this defense was maintained throughout the trial. His plea was rejected and the notes on his sentence stated,⁴⁸⁴ “He did not only think.”⁴⁸⁵ For the Nazis, his thoughts were sufficient for being culpable of high treason. During trial discourse Moltke and Freisler succeeded in establishing,⁴⁸⁶ “the incompatibility between Christianity and National Socialism.”⁴⁸⁷ Freisler admitted this incompatibility; a discordance the regime had always concealed or denied, even though its actions spoke inhumanity and savagery.⁴⁸⁸ The two had only one thing in common

⁴⁸² Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 278.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 278-279.

⁴⁸⁵ *Id.* at 279.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 22.

and that was that they each demanded “the whole man.”⁴⁸⁹ Freisler recognized the fundamental character of Moltke’s resistance, as Moltke was able to say, “We shall be hanged as disciples of Christ.”⁴⁹⁰ Moltke’s letters regarding his trial disclose relief, gratitude, and elation. He found himself standing,⁴⁹¹ “before Freisler not as a Protestant, not as a big landowner, not as a nobleman, not as a Prussian, not as a German . . . but as a Christian and nothing else.”⁴⁹²

On January 23, 1945, Moltke, Haubach, and others were executed. Theodor Haubach, was seriously ill, and had to be carried to the gallows on a stretcher. Steltzer was saved through the assistance of his Scandinavian friends who persuaded Himmler’s Finnish masseur to intervene on his behalf. As Himmler attached great importance to the goodwill of the Swedes, he gave orders on February 4, 1945, that the execution should not be conducted the day before it was scheduled to occur. Hans Lukaschek and Paulus van Husen were brought to trial after Freisler’s death; van Husen was given a light sentence, and Lukaschek was acquitted, as he emphasized the torture that he had endured and retracted all admissions that he had made during his interrogations. Augustin Rösch was not brought to trial before the end of the war and was thus saved.⁴⁹³

The German resistance was the response of a minority, who, in their rejection of National Socialism, were one; the ideas of the various groups of which the resistance was composed were many. Typical for most of them was the internal renewal that they had

⁴⁸⁹ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 279.

⁴⁹⁰ *Id.*

⁴⁹¹ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 22.

⁴⁹² *Id.* at 410.

⁴⁹³ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 279-280.

undergone through the course of the Nazi years. The Kreisau Circle was acutely aware that a transformation would be necessary, and they therefore rejected any idea of a restoration and formulated their resistance on the demands of the future. The Kreisauers' plans were described by one of its leading members, sociologist and Catholic, Alfred Delp, in the following words:⁴⁹⁴

We must endeavour so to organize the external life of men, their social, their economic, their technical relations, that they are assured of relatively secure access to everything that they need to make life, in all its forms, livable. Men themselves are to be the measure of their own objective, and the implementation of our plan must always be judged in the light of what it is reasonable to believe possible. Is this going to lead men to God? That is the basic presupposition. We must first strive to order and shape the conditions of life in such a way that the vision of God is no more a superhuman effort.⁴⁹⁵

The Kreisau Circle had always considered an occupation of Germany after the collapse of the regime to be necessary; they believed that Germans would only be ready for an inward renewal if they were compelled to understand that the National Socialist leaders were alone responsible for the defeat and chaos. Moltke also had hoped that the victors would by their example further the renewal. Hans Lukaschek commented that the debt to the Americans for the aid that they, as victors, had granted to the vanquished should never be forgotten; nor should Germany's economic recovery be attributed solely to their nation's own virtues. With regard to the attitude of many of his fellow German countrymen, he remarked,⁴⁹⁶ "I do not believe in collective guilt, but unlike the majority

⁴⁹⁴ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 281.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* at 282-283.

of my compatriots, I believe just as little in collective innocence.”⁴⁹⁷ The resistance movement of Count Helmuth James von Moltke and the Kreisau Circle exemplified their contempt and disdain for the concept and presumption of “collective innocence,”⁴⁹⁸ believing that individuals must act when confronted by a tyrannical authority.

Count Helmuth James von Moltke was a man of integrity and who through his own initiative, set an example in his official activities and in the work of the Kreisau Circle. He planned, coordinated, allocated tasks, prodded when necessary, and maintained impetus, focus, and momentum, never failing to acknowledge that the mode of application was through a pooling of individual experiences and discourse to arrive at mutually agreed upon positions and stratagems. His continuity of intent was to mitigate the horrors of Nazism by all means at his disposal and to prepare for a transcended future for Germany and its citizens.⁴⁹⁹

It should be noted that pursuant to the provisions of the Potsdam Agreement of 1945, the greater part of German Silesia came under Polish administration,⁵⁰⁰ and Kreisau, now known as Krzyzowa, is presently located in Poland. Friends of the resistance against dictatorships in Germany and Poland have assembled and founded the “Kreisau Foundation for European Understanding,” which presently owns the farm complex and Berghaus. These two governments have provided the financial resources for building renovations. Kreisau is once again designated as a place for meetings, speaking,

⁴⁹⁷ Van Roon, G. (1971). *German resistance to Hitler: Count von Moltke and the Kreisau circle*. (London, GB: Van Nostrand Reinhold Company Ltd.), 283.

⁴⁹⁸ Balfour, M. & Frisby, J. (1972). *Helmuth von Moltke: A leader against Hitler*. (London, GB: MacMillan London Limited), 316.

⁴⁹⁹ Von Oppen, B.R. (Ed.) (1995). *Letters to Freya: 1939-1945*. (B.R. Von Oppen, Trans.). (New York, NY: Vintage Books), 23.

⁵⁰⁰ Potsdam Agreement. (n.d.). Retrieved from

<http://dictionary.reference.com/browse/potsdam+agreement?fromAsk=true&o=100074>

listening, and above all, as a place where young and old can meet. Kreisau will now, should now, and can now, appropriately be a place to promote a better coexistence in Europe.⁵⁰¹

For being an individual of integrity and goodness, who would not rebuke his Christian faith and avow fidelity to Hitler and his morally corrupt legal system, Helmuth James von Moltke was culpably guilty of treasonous conduct pursuant to the dictates of Nazi “justice.” As a consequence, his fate was determined by the wholly dependent People’s Court, a judiciary that had deliberately discarded its independence and autonomy to tyrannical and depraved political authorities and that was willfully exploited by them to advance the mandates of Nazi barbarism through sanctioned and endorsed judicial murder.

⁵⁰¹ Winter, J.M. (Ed.) (2003). *Memories of Kreisau & the German resistance*. (F. Von Moltke, Trans.). (Lincoln, NE: University of Nebraska Press), 83.

Chapter XIV: The White Rose

This dissertation demonstrates the perplexing issues associated with the functioning of the German judiciary during the period of Nazi tyranny. The following chapter discusses the trials of resistance members to the regime known as the White Rose. Six friends and immediate constituents of this group were sentenced to death by the People's Court for exercising their freedoms of speech and press. This was a judiciary that no longer protected these fundamental rights of the individual. These executions were carried out subsequent to "show trials" before a wholly dependent judiciary that had relinquished its independence and autonomy to despotic and corrupt political authorities and was utilized by them to advance the dictates of the Nazi reign of terror. The guilt of these six individuals was determined prior to their trials; they were mere formalities in the Nazi legal scheme which the regime proffered as "justice."

The White Rose was primarily a young adult resistance movement whose members recognized the injustices of the dictatorial Nazi regime and who had the determination to act against its tyranny. Their undertaking was not an endeavor to assert their own individuality, but an enterprise on behalf of humanity, affirming a collective right to purge itself of despotism and terror. They were nonconformists with a will and judgment of their own, accompanied by an integrated conscience refusing to imperceptively obey totalitarian domination. Hans Scholl, Sophie Scholl, Christoph Probst, Alexander Schmorell, Willi Graf, and Professor Kurt Huber were murdered by the Nazi government for attempting to dismantle Hitler's Germany by fomenting an internal revolt of the German populace, and by appealing to their virtuous and social convictions. In the middle of Europe's darkest night, they chose to confront this evil, not

with weapons, but with words, desiring to stir their fellow citizens from their accumulated fear and inactivity by awakening their sense of accountability and obligation to mankind. Against the physical puissance and prerogative of the Nazi regime, these efforts could be considered hopeless and imprudent, if one only focuses on the overwhelming physical capability of the Nazis, and disregards the spiritual element of the human essence. The White Rose sought to convince their fellow Germans that they, in fact, bore moral responsibility for the atrocities of Nazism and invoke this essential character of the humanitarian soul, so they may rightfully regain their dignity and comportment as vindicated members of the world community.

To comprehend and acknowledge one's own guilt was the significance of the White Rose's message and is exemplified in their Second Leaflet from the summer of 1942.⁵⁰²

The German people slumber on in their dull, stupid sleep and thereby encourage these fascist criminals; they give them the opportunity to carry on their depredations; and of course they do so. Is this a sign that the German people have become brutalized in their most basic human feelings, that the sight of such deeds does not strike a chord within them, that they have sunk into a terminal sleep from which there is no awakening, ever, ever again? It seems that way, and will certainly be so, if the German does not arouse himself from this lethargy at last, if he does not protest whenever he can against this gang of criminals, if he doesn't feel compassion for the hundreds of thousands of victims—not only compassion, no, much more: *guilt*. For his apathy allows these evil men to act as they do; he tolerates this “government” that has taken upon itself such an enormous burden of guilt; indeed, he himself is to blame for the fact that it came about at all! Everyone shrugs off

⁵⁰² Kuspit, D. & Waage, P.N. (2012). *Vebjorn Sand, scenes from the Second World War, part one & two*. New York, NY: Gallery Sand.

this guilt, falling asleep with his conscience at peace. But he cannot shrug it off; everyone is *guilty, guilty, guilty!*⁵⁰³

In the early 1940s, several students and a professor at the University of Munich,⁵⁰⁴ also known as, Ludwig-Maximilians-Universität München,⁵⁰⁵ comprehended that anyone in Germany, under Adolf Hitler's dictatorship, who said or did something against the Führer or his regime could atone for that criticism with their life. Nevertheless, they came to believe that Hitler's war was wrong and that the racist reign of terror had to be removed. Cooperating as a small and secret resistance, they decided to act in order to realize their goals, eventually being executed for acting on their beliefs. The deeds of the White Rose continue to have influence even after the war. The main square of the University is named Geschwister-Scholl-Platz, in honor of brother and sister, Hans and Sophie Scholl, who were among the group known as the White Rose. Every year on February 22, the anniversary of the first executions,⁵⁰⁶ a public commemoration is held in the atrium of the Lichthof building on the campus of the University.⁵⁰⁷ There is also a museum and archive located there. All over Germany, high schools and streets are designated for the courageous participants in the White Rose.⁵⁰⁸

In 1999, the German women's magazine *Brigitte* voted Sophie Scholl "Woman of the Twentieth Century." A German TV series in 2003, called *Greatest Germans*, found

⁵⁰³ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 191.

⁵⁰⁴ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 5.

⁵⁰⁵ Welcome – LMU Munich: Ludwig-Maximilians-Universität München. (n.d.). Retrieved from http://www.en.uni-muenchen.de/about_lmu/index.html.

⁵⁰⁶ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 7.

⁵⁰⁷ McDonough, F. (2009). *Sophie Scholl: The real story of the woman who defied Hitler*. (Gloucestershire, GB: The History Press), Unnumbered page.

⁵⁰⁸ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 7.

Sophie Scholl to be the highest-ranking German woman of all time. In 2005, a German film by the name of *Sophie Scholl: The Final Days* became a box-office success,⁵⁰⁹ and also in 2005, the German television station ZDF invited viewers to nominate the greatest Germans of all time. Hans and Sophie Scholl came in fourth place, ahead of Goethe, Bach, and Einstein. Among young viewers, the White Rose placed first.⁵¹⁰

Today's atmosphere is much different from that which surrounded these activists. Then, they kept their thoughts and efforts to themselves, not even telling their parents or spouses what they were doing, it was too dangerous; the state considered them traitors and their movement treasonous. Today, they are esteemed as heroes, having one attribute in common, a desire to act upon their principles and values rather than wait out the war.⁵¹¹

It is not possible to declare that those who were executed were greater in stature than those who served only prison terms or were exonerated. Likewise, it is impossible to know how those who were murdered would have lived out the remaining years of their respective lives if they had had the opportunity. But those who died for their resistance have become symbolic of a spirit and courage that was not overwhelmed by fear. Together they sought to awaken their fellow citizens and ventured with their very lives. They felt the need to do something against a regime that they believed was wrong. Some took inane chances; they had attributes and vulnerabilities, some that ultimately proved fatal. They did not all agree with each other on political issues.

⁵⁰⁹ McDonough, F. (2009). *Sophie Scholl: The real story of the woman who defied Hitler*. (Gloucestershire, GB: The History Press), 7.

⁵¹⁰ Kuspit, D. & Waage, P.N. (2012). *Vebjorn Sand, scenes from the Second World War, part one & two*. New York, NY: Gallery Sand.

⁵¹¹ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 7.

The White Rose was a resistance by a small group of students and a professor in Munich, the city that was the center of the Nazi movement.⁵¹² In 1920, the Nazi Party had been founded in Munich and on August 2, 1935, Hitler bestowed the title “Capital of the Movement” on the city.⁵¹³

With Munich as their locus of operation, the members wrote and distributed anti-Nazi leaflets throughout Germany and painted graffiti critical of the regime within the city during 1942 and early 1943. Their desire was to awaken the conscience of German citizens relative to crimes that were being committed by their government and to encourage additional resistance against the Nazis. They hoped to hasten the end of the war, entirely cognizant that they could be sentenced to death for their treasonous activity. It was the first, if not only, resistance group within Germany to explicitly castigate the Nazi government for its heinous crimes against the Jews. In addition to this inhumanity, the senselessness of World War II prompted them to action in the summer of 1942.

University of Munich medical students,⁵¹⁴ Hans Fritz Scholl, Christoph Hermann Probst,⁵¹⁵ Alexander (Shurik) Schmorell,⁵¹⁶ and Wilhelm (Willi) Graf,⁵¹⁷ joined by Hans’ younger sister, Sophia (Sophie) Magdalena Scholl⁵¹⁸ and inspired by Professor of philosophy and musicology, Kurt Huber, were the individuals directly associated with the White Rose and executed by the Nazis for their resistance. From the spring of 1942, until

⁵¹² Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 22.

⁵¹³ Müller, F.J. (1991). *The White Rose exhibition on the resistance by students against Hitler*. (Munich, DE: White Rose Foundation), 12.

⁵¹⁴ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 22-23.

⁵¹⁵ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 214.

⁵¹⁶ *Id.* at 237.

⁵¹⁷ *Id.* at 234.

⁵¹⁸ *Id.* at 214.

their capture on February 18, 1943, the White Rose printed six leaflets and distributed them covertly. They were initially called “Leaflets of the White Rose,” then subsequently, “Leaflets of the Resistance Movement in Germany.” Typed on a typewriter and reprinted on a hand operated mimeograph machine, the members mailed them from various cities to addresses in Germany and Austria, some of which were randomly selected from telephone books. The sixth leaflet ultimately was transported to England and copies dropped from British airplanes flying over Germany.

Hans began to study medicine at the University of Munich in the spring of 1939. Much the same as the other medical students, he was a member of the Student Corps which was a part of the army. Its members studied like other students, but during their vacations, they were compelled to perform military service. Hans became acquainted with fellow students who, like himself, were critical of the regime. He began to study religion and philosophy, and his feelings with respect to National Socialism began to intensify, as he and his companions found common ideas in individual freedom and responsibility. Shortly after the war began on September 1, 1939, Hans, as a member of the Student Corps, was posted to France as a medic. Upon fulfilling his service duty, he returned to Munich, where he continued his medical education and proceeded to develop private contacts with fellow students and sympathetic educators.

Sophie followed Hans’ erudite pursuits in philosophy and theology and through her family’s liberal contacts, met artists whose work had been deemed degenerate by the Nazis. She began to develop her own ideas of a resistance to Nazi totalitarianism. On her twenty-first birthday, May 9, 1942, Sophie went to Munich to embark on her

university studies in biology and philosophy. It would be the last birthday she would commemorate.

Sophie Scholl celebrated her twenty-first birthday with her brother Hans and some of his friends, including fellow medical students Alexander Schmorell, Christoph Probst, who was married and the father of two children, and Willi Graf. All were opposed to Hitler and the Nazi Regime and angry about the abuses occurring in Germany. They would subsequently witness greater crimes being committed in the name of their country.

Alexander Schmorell was born in Russia in 1917. His father was of German ancestry, and a physician. His mother was a Russian who died soon after Alexander's birth. The family then relocated to Germany accompanied by their Russian maid, who continued the traditions of Russian culture and language in their new homeland. Alexander developed an aversion to the Nazi regime, which defined persons of Slavic descent, including Russians and Poles, as inferior to Aryans. He was ambivalent relative to his German and Russian heritage.

Christoph Probst's parents had divorced when he was young, his father then remarrying a woman of Jewish derivation. Christoph's father committed suicide in 1936, and Christoph married Herta Dohrn in 1941; they had three children, the last of which was born just before Christoph's execution for his treasonous White Rose involvement.

Willi Graf came from a devout Catholic family; his religious values led him to reject Nazism. Willi never joined the Hitler Youth, but was active in Catholic youth organizations, such as the Gray Order, which he joined in 1934.

Hans, Alexander, Christoph, and Willi met as medical students in Munich, all with reservations concerning the regime. In the spring of 1941, Schmorell invited Hans to join in some evenings of literary readings that he had organized with Christoph. Initially, there was limited discussion of politics at these gatherings; instead they conversed appropriately regarding literature, philosophy, religion, music, and drank wine together until late in the night. Together they also attended concerts and went hiking and swimming. They were young adults and behaved accordingly.

By May 1942, Hans and Alexander had decided that some action had to be taken with respect to the Nazi regime, as they had heard rumors of mass deportations and shootings. Additionally, the war was not progressing well for Germany, a year had passed since Germany had attacked the Soviet Union, and the effortless victories that the German armed forces had first achieved now ceased. Some public dissent had also arisen.

The Munich students organized their resistance in June 1942, when they decided to express their beliefs in leaflets, with the idea of expanding their view that there were Germans who were opposed to Hitler. They were aware that they could not overthrow the government and did not encourage revolution, but could disseminate information and stimulate other Germans to challenge the dictatorship.

Hans and Alexander prepared the first leaflet, distributed on June 6, 1942, under the title, "Leaflets of the White Rose." It criticized Germans who indifferently accepted Hitler's regime and urged them to passively resist the Nazis.⁵¹⁹ The leaflet begins:

⁵¹⁹ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 52-60.

Nothing is so unworthy of a civilized nation as to allow itself to be “governed” without any opposition by an irresponsible clique that has yielded to basest instincts. It is certainly the case today that every honest German is ashamed of his government. Who among us has any conception of the enormous shame that we and our children will feel when eventually the veil drops from our eyes and the most horrible of crimes—crimes that eclipse all atrocities throughout history—are exposed to the full light of day?⁵²⁰

This first leaflet was distributed shortly after Sophie began her university studies in Munich. Initially, Sophie was uncertain who was involved, but when she learned the truth, she wanted to be included. At first, Hans did not feel it proper because of the risk, but eventually Sophie helped prepare and distribute the subsequent leaflets; she also managed the group’s finances. A copy of a leaflet was sent to the family of the landlord where Traute LaFrenz was residing. Traute was also unsure who was accountable, but upon reading the various quotes from the philosophers mentioned in the leaflet, she felt it must have been written by her friends.⁵²¹ In an ensuing leaflet Traute recognized “a verse from Ecclesiastes that I had once given to Hans. Now I knew. I asked Hans about it. He said it was wrong to ask the author, that the number of immediate co-workers must be kept to a minimum, and that the less I knew the better for me.”⁵²² Traute would help in the preparation and dispersal of future leaflets.

In the summer of 1942, prior to assuming their Student Corps duty station near the Russian front, the friends prepared three more leaflets manifesting the title, “Leaflets

⁵²⁰ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 186.

⁵²¹ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 60-63.

⁵²² *Id.* at 63-64.

of the White Rose.” Christoph added to what Hans and Alex had written. The leaflets were all mailed between mid-June and mid-July 1942.

The leaflets were duplicated on a hand-operated mimeograph machine, the paper and stamps having to be procured discreetly, as anyone buying quantities of these items may be suspected of a treasonous pursuit. Alexander had bought the typewriter, duplicating machine, stencils, and paper with his allowance. Manfred Eickemeyer, an architect, permitted the students to use his studio as their printery. Leaflets were sent to addresses of individuals who may possibly be in accord; some were mailed to addresses taken from telephone books; recipients also included specific persons at various universities and owners of restaurants, while some were placed in public telephone booths.⁵²³

The second leaflet was even more explicit than the first, referring to the murder of “three hundred thousand Jews”⁵²⁴ in occupied Poland, forcing readers to confront information the Nazis did not want disseminated. The third leaflet induced Germans to commit sabotage against the German armament industries and proposed an alternative to the Nazi regime, a government that would place the protection of the individual and community above all else. The fourth leaflet, which Hans composed himself, focused on an explanation of the war as an expression of evil. All leaflets attacked the Nazi regime and enumerated its crimes, from the mass extermination of Jews and the murder of Polish

⁵²³ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 64-66.

⁵²⁴ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 190.

nobility to the dictatorship and the elimination of the personal freedoms of the German citizens. They contained quotes for Goethe, Aristotle, Lao-tzu, and the Bible.

People were fearful of being caught with the leaflets; many recipients submitted them to the Gestapo, which then began to investigate their origin. In July of 1942, after the first four leaflets had been produced and distributed, Hans, Alexander, and Willi were sent to the eastern front to work as medics; they left Munich on July 23, remaining at their stations until October.

Upon returning to Munich in October of 1942, the friends were convinced that their resistance was necessary. Hans and Sophie were now living in an apartment on Franz Josef Strasse, while Christoph had been transferred to Innsbruck, Austria, thereby limiting his contact with the group. In January 1943, the members discussed with their philosophy professor, Kurt Huber, their resistance activity. They were aware of his anti-Nazi sentiments as he artfully managed to disparage the Nazis during his class lectures without actually saying anything explicitly against the government. He composed the sixth and final leaflet.

The final two leaflets of the White Rose were printed in January and February of 1943, under the designation, "Leaflets of the Resistance Movement in Germany." These leaflets were produced in greater quantities than the first four. Sophie and Traute purchased paper, envelopes, and stamps in different shops around Munich to avoid arousing suspicion. The fifth leaflet was a collaborative effort between Hans and Alexander. It was brief and offered a plan for Germany's future:⁵²⁵

⁵²⁵ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 72-79.

A Call to All Germans!

The war is nearing its inevitable end. As in the year 1918, the German government is trying to focus attention exclusively on the growing threat of submarine warfare, while in the East the armies are constantly in retreat and invasion is imminent in the West. Mobilization in the United States has not yet reached its peak, but already it exceeds anything that the world has ever seen. It has become a mathematical certainty that Hitler is leading the German people into an abyss. *Hitler cannot win the war, only prolong it.* The guilt of Hitler and his minions exceeds all measures. Retribution draws closer and closer . . .

Germans! Do you and your children want to suffer the same fate that befell the Jews? . . .

Freedom of speech, freedom of religion, the protection of individual citizens from the arbitrary will of criminal regimes of violence—these will be the bases of the New Europe.

Support the resistance. Distribute the leaflets!⁵²⁶

The conspirators carried the leaflets to different areas of the country in suitcases and mailed them from different locations in an effort to make it appear as if the White Rose was larger than in reality. Some leaflets were left in public places during the night, while others were left on parked vehicles. Sophie's sister, Elisabeth, would recall Sophie saying that,⁵²⁷ “the night is a friend of the free.”⁵²⁸

In early February 1943, the German military suffered defeat at Stalingrad; this was the turning point in the war. The sixth leaflet, written by Professor Kurt Huber was in response to this defeat. Aimed at students, Huber urged for resistance against the Nazis and accused Hitler for the massive death toll.⁵²⁹

⁵²⁶ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 199-200.

⁵²⁷ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 80.

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 80-81.

Fellow Students!

Our people are deeply shaken by the fall of our men at Stalingrad. Three hundred and thirty thousand German men were senselessly and irresponsibly driven to their deaths by the brilliant strategy of our World War I corporal. Führer, we thank you! . . .

There is only one slogan for us: fight against the Party! Get out of all Party organizations, which are used to keep our mouths shut and hold us in political bondage! Get out of the lecture halls run by SS corporals and sergeants and Party sycophants! We want genuine learning and real freedom of expression . . .

The name of Germany will remain forever stained with shame if German youth do not finally arise, fight back, and atone, smash our tormentors, and set up a new Europe of the spirit. Women students! Men students! The German people look to us! Just as in 1813 when the people expected us to shake off the Napoleonic yoke, so in 1943 they look to us to overthrow the National Socialist terror through the power of the spirit. Beresina and Stalingrad are aflame in the East; the dead of Stalingrad beseech us!⁵³⁰

Within a few days of the German defeat at Stalingrad, and over a three night period, Hans, Alexander, and Willi, painted graffiti on buildings and walls in Munich. They used tar-based paint, writing slogans such as, “Down with Hitler! Freedom! and Hitler Mass Murderer,” along with crossed-out swastikas.⁵³¹

The Gestapo had begun an investigation after the first leaflets appeared in the summer of 1942, becoming more intense after the mailing of the fifth leaflet on January 28, 1943. They reasoned that the resistance was travelling by train to distribute the leaflets around the country and started searching the railway system at the beginning of February, even placing a notice in newspapers within southern Germany, seeking

⁵³⁰ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 201-202.

⁵³¹ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 83.

information from people and offering a reward for assistance in apprehending the offending parties.

Hans Hirzel from Ulm was the first to be arrested. After his interrogation had concluded, he went to the Scholls' to warn them, talking with Inge Scholl. Otl Aicher, Inge's boyfriend, telephoned Hans Scholl on February 17, 1943, telling him that he had important information, with the two arranging to meet at 11:00 A.M., the next morning; however, it would prove to be too late.

On the morning of February 18, 1943, Hans and Sophie had carried a suitcase full of leaflets to the University. While students were in class, they placed quantities of the sixth leaflet in the halls of the Lichthof, finishing before the students were released from their classes and leaving the edifice. Once outside, they realized there were still leaflets remaining in the suitcase and returned inside the building. From an upper balcony, Sophie threw the remaining leaflets into the atrium, as university custodian, Jakob Schmidt, observed these actions. The doors of the building were locked, Hans and Sophie were escorted to the office of the President, Dr. Walther Wüst, and were there interrogated by Robert Mohr of the Gestapo. Mohr had his agents gather all the leaflets found and collected within the building; they fit exactly into the empty suitcase that Hans and Sophie were carrying. They were arrested and taken to Gestapo Headquarters in Wittelsbach Palace.

Their rooms at Franz Josef Strasse were searched with other incriminating evidence being discovered. When he was arrested, Hans had Christoph Probst's handwritten draft of the proposed seventh leaflet in his possession. Although Hans attempted to destroy the document, the police were able to identify Christoph's

handwriting through papers found in Hans' apartment. Christoph, who was in Innsbruck and unaware of these developments, was arrested the next day; his wife had just given birth to their third child. Willi was also arrested the next day, while Alexander was not arrested until a few days later.

At Wittelsbach Palace, Hans and Sophie were interrogated separately; however, they could no longer deny their involvement in light of the documentary evidence found in their rooms. Each stated that they were the only two responsible for the resistance of the White Rose.

Hans, Sophie, and Christoph each received court-appointed lawyers, with their trial set for Monday, February 22, 1943, before President Judge Roland Freisler, of the People's Court, who expressly came to Munich from Berlin for the proceedings. Freisler's presence in Munich was designed as a message to the German public; any resistance would not be tolerated.⁵³²

The gravity of the situation was made known to Sophie on Sunday afternoon, when she received a copy of her indictment. It was dated February 21, 1943, and issued by the Office of the Chief Prosecutor of the People's Court, Berlin. Defendants named in the document were Hans Fritz Scholl, Sophia Magdalena Scholl, and Christoph Hermann Probst. They were jointly accused of committing acts of High Treason with intent to:⁵³³

. . . alter the Constitution of the Reich by force; to render the Wehrmacht incapable of fulfilling its duty to protect the German Reich from its enemies;

⁵³² Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 83-92.

⁵³³ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 261-265.

to influence the masses through the production and dissemination of subversive literature; to aid and abet foreign powers in time of war while damaging the fighting potential of the Reich; and, to paralyze the will of the German people in their determination to maintain their national integrity by military means.⁵³⁴

In a more rational time it would have been inconceivable for one of the great nations of the world to seriously believe that three young citizens were capable of doing such damage to its institutions, armed forces, and morale through the distribution of sheets of paper produced by a hand-cranked mimeograph machine. They had not realized that they were as dangerous to the Third Reich as the regime considered them.

The indictment traced the background of the accused, the history of the leaflet operation beginning with the White Rose phase, and the particular offenses of Hans, Sophie, and Christoph. That Christoph had not participated in the production and distribution of any of the leaflets, and had only written an outline for one which was never circulated, was not taken into account; the charges against him were as grave as for Hans and Sophie.

On the morning of February 22, 1943, Roland Freisler, President Judge of the People's Court, called the proceeding to order at approximately 10:00 A.M. He was accompanied by lay judges SS Major General Breitbart and a Group Leader of the Storm Troopers named Köglmaier. Freisler denounced the Defendants as if he were the prosecutor instead of the judge. There was no trial in any acceptable meaning of the term. Evidence was produced: the leaflets, the duplicating machine, stencils, and the

⁵³⁴ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 265.

brushes and paint from the graffiti escapades. Jakob Schmidt was present as a witness, if needed, as were Gestapo agents, Robert Mohr and Anton Mahler, but no witnesses were called since the Defendants had made full admissions. One of their defense counsel did manage to say in his summation,⁵³⁵ “I can only say fiat justita. Let justice be done.”⁵³⁶ Sophie’s retort to Freisler has been remembered and repeated,⁵³⁷ “Somebody, after all, had to make a start. What we wrote and said is also believed by many others. They just don’t dare to express themselves as we did.”⁵³⁸ At another point, she said, “You know the war is lost. Why don’t you have the courage to face it?”⁵³⁹

Subsequently, each of the three Defendants was permitted to make a statement on their own behalf. Sophie stood silent, while Christoph explained that he had acted in the best interest of his country by trying to bring the war to an end in an effort to save Germany from further Stalingrads. He was shouted down by the bench and audience and was unable to continue. He then pleaded that his life should be spared for the benefit of his three children and wife, who was currently ill in a hospital subsequent to the birth of their third child. Hans attempted to support his friend, emphasizing that Christoph had contributed virtually nothing to the leaflet operation. Freisler interrupted saying,⁵⁴⁰ “If you have nothing to bring forward for yourself, be so good as to keep quiet.”⁵⁴¹ Like his sister, Hans declined to plead on his own behalf.

⁵³⁵ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 265-274.

⁵³⁶ *Id.* at 274.

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 274-275.

⁵⁴¹ *Id.* at 275.

Robert and Magdalene Scholl, Hans and Sophie's parents, ventured to force their way into the courtroom. They had been informed of the arrests on Friday, but were also told that visits to the jail were not allowed on weekends. Their youngest son, Werner, was home on leave from the Russian front, and they were all on an early train to Munich Monday morning. Otl Aicher met them at the railroad station and hastened them to the Palace of Justice.

Robert Scholl wanted to speak in an effort to defend his children, but Freisler denied this request. As he was being escorted from the courtroom he said,⁵⁴² "One day there will be another kind of justice! They will go down in history!"⁵⁴³

For Hans, Sophie, and Christoph, the verdicts rendered on February 22, 1943, were never in doubt. The words of Roland Freisler were as expected,⁵⁴⁴ "for the protection of the German people, and of the Reich, in this time of mortal struggle, the Court has only one just verdict open to it on the basis of the evidence: the death penalty. With this sentence the People's Court demonstrates its solidarity with the fighting troops!"⁵⁴⁵ They did not for a moment imagine that they could, by their own efforts, demolish the National Socialist state. They could not know what effect their travail would have on the course of events or if any results would ensue. What they did know was that they could not remain silent any longer, and by their silence, acquiesce in the brutal, corrupt, and immoral system.⁵⁴⁶

⁵⁴² Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 275-276.

⁵⁴³ *Id.* at 276.

⁵⁴⁴ *Id.* at 23.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.* at 26-27.

In tacit recognition of their strength of souls and physical courage, and as an unspoken tribute to them, the prison administration at Stadelheim Prison took the risk of breaching the rules of procedure and allowed the three of them out of their cells to smoke a last cigarette together and exchange farewells. Sophie was the first to be taken to the executioner, Johann Reichhart, with his tall hat and bowtie; it was 5:00 P.M., on February 22, 1943. Christoph was next, with Hans last. Before Hans passed into the execution building, he called out,⁵⁴⁷ “Long live freedom!”⁵⁴⁸

Alexander had been evading capture since being informed of the arrest of Hans and Sophie. The night of February 24, 1943, was to be his last in freedom.

With the help of a friend, he altered the identification papers of a Russian worker and substituted his own. He then proceeded to Innsbruck where he telephoned a woman and asked that she meet him there. She was close to the man in charge of a camp for foreign workers, and it was Alexander’s idea to get into the compound and vanish among the other Russians, but the friend failed to appear.

At a sanatorium in the mountains, a Russian coachman, with whom Alexander was acquainted, took him in for several days until someone reported a suspicious stranger at the facility. The driver gave him a blanket and supplies, but snowstorms forced him to return to Munich.

For days the citizens of Munich had been aware that he was a fugitive from the police. There were “Man Wanted” posters all over town, and the newspapers were carrying his picture, stories on the manhunt, and the offer of a reward. A female friend

⁵⁴⁷ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 278-284.

⁵⁴⁸ *Id.* at 284.

reported Alexander to the building superintendent who then called the Gestapo at Wittelsbach Palace.

When the interrogation began, Alexander was unaware that Hans and Sophie were dead. In accordance with their agreement, he freely admitted everything the Gestapo had charged; his intent being to assume sole responsibility and divert attention from his comrades to himself. He did not realize that whatever he now stated would fail to benefit Hans and Sophie. His role in the White Rose and the Resistance Movement in Germany was established second only to that of Hans.

The Gestapo investigation was now resulting in the arrest of numerous suspects, including, Hans Hirzel, Gisela Schertling, Traute LaFrenz, Katharina Schüddekopf, and Kurt Huber. Huber's wife and sister were also arrested although he was not informed of their detentions. His status as a university professor was immediately taken from him, terminating his salary and cancelling his pension. When he was not being interrogated, he worked in his cell on articles involving his expertise, folk music and folk songs, and on his book relative to the philosopher, Gottfried Wilhelm Leibniz. He was employing the time left him in an effort to provide for his family.

On the morning of April 19, 1943, fourteen additional men and women were to be tried before Roland Freisler and the People's Court for their White Rose resistance activities. Freisler stated in his opening remarks,⁵⁴⁹ "This trial stands in the closest

⁵⁴⁹ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 285-290.

relationship to the proceedings against the Scholls last February. They were the core of this treasonable movement.”⁵⁵⁰

When the texts of the leaflets were read out, murmurs of indignation and outrage were audible in the courtroom. The lawyer representing Kurt Huber then expressed to the court,⁵⁵¹ “Heil Hitler! This is the first time I have heard the contents of these leaflets. As a German and a protector of the law of the German Reich I cannot tolerate such vilification of the Führer. I cannot defend such a monstrous crime. I respectfully ask this court to be relieved of the obligation to defend my client.”⁵⁵² Freisler granted the request and appointed another lawyer who had no opportunity to prepare a case for Professor Huber, yet was appointed by Freisler to assume Huber’s defense. When the attorney protested that he could not prepare in time, Freisler responded,⁵⁵³ “I’ll tell you anything you need to know about the case.”⁵⁵⁴ This was a second setback for Huber, a friend and respected historian on whom he was relying as a character witness, had sent word that he was unable to attend the trial, being “engaged out of town.”

The court then turned to the case of Alexander Schmorell. In his interrogation, he had tried to explain his attitude relative to the war by describing how he was affected by his birth in Russia, his Russian mother, and his ties to that country. To this Freisler’s reply was, “Twaddle.” He was particularly upset by Alexander’s statement that he would shoot at no one, Russian or German. Freisler asked,⁵⁵⁵ “Then what did you do when you

⁵⁵⁰ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 290.

⁵⁵¹ *Id.*

⁵⁵² *Id.* at 290-291.

⁵⁵³ *Id.* at 291.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

were at the front? “I took care of the wounded as a medical corpsman is expected to do.”⁵⁵⁶ Alexander replied and reminded the court that, as a recruit, he had declined to take the oath of loyalty to the Führer and did not feel bound thereto. Freisler then addressed the spectators saying,⁵⁵⁷ “Look at this traitor! He stabs the Fatherland in the back at a time of great danger. And he’s supposed to be a sergeant in the German army.”⁵⁵⁸ Freisler then dismissed Alexander.

Willi Graf’s indictment linked him beyond denial to Hans and the Resistance Movement in Germany phase of the White Rose. Willi had been able to deflect the Gestapo’s interrogations with carefully phrased answers that were not lies but misled his interlocutors. Freisler commented,⁵⁵⁹ “You had the Gestapo running in circles for a while, didn’t you? But in the end we were too smart for you, weren’t we?”⁵⁶⁰

Kurt Huber provided the clearest and most resolute justification for the resistance of the Munich students when presented with the opportunity to address the court. For weeks in his jail cell, he had been preparing his defense. His purpose was to vindicate not only his actions in opposition to the National Socialist regime but also to defend those accused with him, making no denials or retractions. Freisler interrupted him, saying,⁵⁶¹ “You call yourself a professor, I don’t see a professor before me, I see a *Lump* (a scoundrel).”⁵⁶²

⁵⁵⁶ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 291.

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.* at 292.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 293.

⁵⁶² *Id.*

Undaunted, Huber traced his relationship with Hans from their first meeting to the last Resistance Movement in Germany leaflet in which he appealed to university students to rise up against the Nazis. The corruption of German education while teachers and academicians stood by and did nothing was one of his most passionate concerns. Of his own opposition to the established authority he said:⁵⁶³

There is an ultimate limit to formal legality beyond which it becomes invalid and immoral. That is when it becomes a cover for the cowardice that does not dare to stand up against the injustices of the state . . .

I demand that freedom be given back to us Germans. We do not want to fritter away our short lives in chains, even if they are golden chains of prosperity and power.⁵⁶⁴

He made it apparent that he had not acted as a revolutionary; his whole intent was striving to retain ideals and values which were being destroyed or eroded. Throughout he had seen himself as a German patriot, upholding traditional imperatives, never a radical.⁵⁶⁵

The return to clear moral fundamentals, to the rule of law, to the mutual trust of one person for another—that is not illegal but the opposite. It is the restoration of legality.⁵⁶⁶

In order to sustain the fiction, that the proceedings were lawful, each of the Defendants was examined in turn and allowed to offer a defense. It was nearly 10:00 P.M. when the judges retired to consider their verdicts. When they returned, the words of the judgment were:⁵⁶⁷

⁵⁶³ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 293.

⁵⁶⁴ *Id.* at 294.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.* at 295.

Alexander Schmorell, Kurt Huber, and Wilhelm Graf have, in time of war, produced leaflets urging sabotage of the armaments industry and the overthrow of the National Socialist way of life; they have also spread defeatist ideas and vilified the Führer in the grossest manner; all of which aided and abetted the enemies of the Reich and undermined the fighting capacity of our nation. They are therefore condemned to death.⁵⁶⁸

The court asserted that these sentences, along with those imposed at the previous trial, would eradicate the “core group” of the subversive White Rose operation. As stated in the judgment,⁵⁶⁹ “Had such activity been punished otherwise than by death, it would have meant the start of a chain reaction of the kind whose end once was 1918.”⁵⁷⁰ The document condemned Kurt Huber as an educator who had betrayed his mission by failing to imbue his students with absolute faith in the Führer and by not molding them into iron-hearted warriors of the Third Reich.⁵⁷¹ “Such a professor no longer belongs among us.”⁵⁷²

The sentences of Traute LaFrenz, Gisela Schertling, and Katharina Schüddekopf were to incarceration for a year each, less than they had feared. Susanne Hirzel, a pretty Nordic blond, had impressed Freisler, who called her⁵⁷³ “quite a decent girl.”⁵⁷⁴ She was sentenced to only six months.

For Alex, Willi, and Kurt Huber, there was no swift dispatch, the weeks and months of waiting that lay ahead for the second trio of the White Rose were an ordeal

⁵⁶⁸ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 295.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.* at 295-296.

⁵⁷² *Id.* at 296.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

that was spared the first. Kurt Huber was concerned that he may not be able to complete his book on Gottfried Wilhelm Leibniz, as he was depending upon the royalties from the published document to support his family. As the day of execution neared, it was still two chapters from completion. He petitioned the People's Court to grant him time to finish his work, pointing out that this would not lessen the sentence that had been inflicted; however, his petition was denied.

The prolongation of the executions, which lasted almost three months, was owing to Berlin's delay in responding to the appeals for pardon or leniency of the three condemned men filed by their counsel. Alexander and Will had been noncommissioned officers; their cases were advanced through the echelons of military justice to the very pinnacle, to the Führer himself. Toward the end of June came the decision,⁵⁷⁵ "I reject these appeals for leniency. A. Hitler."⁵⁷⁶ Efforts through civilian channels on behalf of Kurt Huber were similarly fruitless.

The official order of execution, when issued, contained only the names of Alexander Schmorell and Kurt Huber, the date was set as July 13, 1943.⁵⁷⁷ The order directed that Alexander should be first, and then Kurt Huber, the time was set for 5:00 P.M. However, there was a delay, three SS officers arrived at Stadelheim Prison and produced Gestapo papers authorizing them to witness the execution. The officers wished to ascertain exactly how long it took for a man to strangle to death when hung and whether the length of time could be extended or shortened at will. They were annoyed to

⁵⁷⁵ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 296.

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at 299-300.

learn that this was not to be a hanging but a beheading. In order that some benefit might nevertheless be derived from their visit, they delayed the execution in order to examine the guillotine and to have its operation explained to them in detail.

Willi Graf was now the last of the six who had joined together under the symbol of the White Rose to be murdered. Willi had entered the resistance not out of political passion or in support of any particular dogma, but because he could not reconcile himself to a system that was forcing him to live his life in violation of his convictions. For seven months he was held in his cell at Stadelheim Prison while the Gestapo attempted to extract additional information from him. They tempted him with a possible commutation of his death sentence if he would provide the names of the other White Rose members still at large. They also threatened reprisals against Willi's family if he failed to provide the information they desired. Not one new arrest was made by the Gestapo's investigation of the White Rose during this time. Willi's end came on the afternoon of October 12, 1943. It was officially recorded that only eleven seconds elapsed between the time "the above-named" was delivered into the hands of the executioner and the fall of the blade. "No untoward incidents occurred," stated the routine document that was sent from Stadelheim Prison to the Ministry of Justice in Berlin. Willi's family was not notified, they learned of his death only when a letter mailed to him was returned with "DECEASED" stamped across his name on the envelope.⁵⁷⁸

⁵⁷⁸ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 300-304.

In all, a total of twenty-nine individuals were placed on trial before the People's Court for their White Rose related activities,⁵⁷⁹ with seven death sentences resulting.⁵⁸⁰ Additional proceedings occurred on July 13, 1943, in Munich, April 3, 1944, at Saarbrücken, and October 13, 1944, in Donauwörth.⁵⁸¹

At the fifth trial, chemistry student Hans Leipelt and his girlfriend, Marie-Luise Jahn, were convicted of continuing to disseminate the sixth leaflet, although they had not had personal contact with those who were previously executed. They also had collected money for the widow of Professor Huber, who had no income. Leipelt was sentenced to death; Jahn received a twelve-year prison term.

Like her brother Hans, Sophie and the other members of the White Rose, were confident that the impact of their actions would not end upon their deaths, but would continue beyond. Shortly after the deaths of Hans, Sophie, and Christoph, a new version of their sixth leaflet began to circulate with an addition:⁵⁸² “DESPITE EVERYTHING, THEIR SPIRIT LIVES ON!”⁵⁸³ Before a year had passed, planes of the Royal Air Force were dropping millions of the leaflets across Germany. The British gave this sixth leaflet a new title:⁵⁸⁴ “A GERMAN LEAFLET – MANIFESTO OF THE MUNICH STUDENTS.”⁵⁸⁵ News of the leaflets even extended into the concentration camps. In addition, information of the White Rose reached the Soviet Union where a “National

⁵⁷⁹ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 206.

⁵⁸⁰ Axelrod, T. (2001). *Holocaust biographies; Hans and Sophie Scholl: German resisters of the White Rose*. (New York, NY: The Rosen Publishing Group, Inc.), 98.

⁵⁸¹ Dumbach, A.E. & Newborn, J. (2006). *Sophie Scholl and the White Rose*. (New York, NY: Oneworld Publications), 206.

⁵⁸² Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam's Sons), 305.

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.* at 305-306.

Committee for a Free Germany” had been established by captured German officers and soldiers. On the “Free German Radio,” which could be heard in Germany, Hans, Sophie, and their comrades were eulogized as heroes of freedom. In the United States, over “The Voice of America,” the words of Thomas Mann were heard stating that the White Rose members had redeemed the name of Germany before the world. Newspaper articles also appeared in *The New York Times* on Sunday, April 18, 1943, and Monday, August 2, 1943, respectively.

However, not everyone was exalting the actions of the group. On the evening of February 22, 1943, an assemblage of several thousand students in Munich condemned the White Rose and those connected with it, while Jakob Schmidt was applauded when he appeared before the crowd. The next day, the account of the gathering reported that,⁵⁸⁶ “the Munich student body stands as before, and will continue to stand, solidly behind the Führer and his National Socialist movement.”⁵⁸⁷ Not a professor or university official had protested the executions.

The entire Scholl family was arrested by the Gestapo, with the exception of Werner, the youngest Scholl sibling, under the *Sippenhaft* principle and given jail sentences of varying duration, with Robert receiving the longest term of two years incarceration, but he was released before the expiration of his sentence.

Werner Scholl, the youngest Scholl sibling, was not arrested, as he was due to return to his unit on the Russian front; unfortunately, he was not spared as he was subsequently reported missing in action. In somewhat of a quirk of fate, Johann

⁵⁸⁶ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 306-307.

⁵⁸⁷ *Id.* at 307.

Reichhart, who had served the National Socialist regime so efficiently as executioner, continued to practice his specialty under the Allied Military Government, which availed itself of his expertise in the execution of Nazi war criminals at Nuremberg.

Schools, streets, squares, and foundations have been named for the people of the White Rose, but there were also those who questioned the purpose and value of their resistance, expressing the view that the students were only impractical idealists with no organized cadres behind them and no clearly defined political objectives. The most convincing testimony to the impact of the White Rose came from the Nazis themselves. By their reaction, they acknowledged that they feared the leaflets and perceived them as a clear and present danger. The leaflets presented the case against National Socialism as powerfully as it had ever been accomplished, the members of the White Rose acting upon individual and collective integrity, without regard for their personal vulnerability and peril, asserted their resistance to Hitler and his regime of tyranny.⁵⁸⁸

For being people of personal and unified rectitude, Hans Scholl, Sophie Scholl, Christoph Probst, Alexander Schmorell, Willi Graf, and Professor Kurt Huber were culpably guilty of treasonous conduct pursuant to the dictates of Nazi “justice.” As a consequence, their fates were determined by the wholly dependent People’s Court, a judiciary that had deliberately discarded its independence and autonomy to tyrannical and depraved political authorities and that was willfully exploited by them to advance the mandates of Nazi barbarism through sanctioned and endorsed judicial murder.

⁵⁸⁸ Hanser, R. (1979). *A noble treason: The revolt of the Munich students against Hitler*. (New York, NY: G.P. Putnam’s Sons), 307-309.

A Personal Experience before a Tribunal That Lacked Judicial Independence

On August 25, 2012, I personally interviewed Dr. Traute LaFrenz-Page, a member of the White Rose, at her residence in South Carolina.

As related to the lack of judicial independence existing in Nazi Germany at that time, Traute explained that because of her activities in the White Rose, she was arrested and placed on trial before Roland Freisler and the People's Court. Traute LaFrenz-Page was tried on April 19, 1943, and upon being found guilty, was sentenced to a period of imprisonment for one year at Rodenfelds, a previous youth center that had been converted into a prison for adolescent criminal offenders.

When I questioned Dr. LaFrenz-Page relative to her trial before Freisler, she stated, "That was a joke. He came in, Freisler, with two guys and a book, and he said, 'We don't need this book, we don't need laws, we judge for the Germans.'" Traute believed that Freisler merely conducted a show trial, "yelling and talking like a clown." Traute LaFrenz-Page confirmed that she was not sentenced to death because Freisler had not been informed that she had sent and transported leaflets from Munich to Hamburg.

After completing her one-year sentence of incarceration, Traute was informed that additional arrests were being effectuated, and she was rearrested and held in custody awaiting her second trial, but was transferred several times because of Allied bombings. She was detained in Fuhlsbuttelt, Cottbus, Leipzig, and finally, Bayreuth, from which she was liberated on April 15, 1945, by Patton's Third Army. In all, Traute LaFrenz-Page was incarcerated from March 1943, until her liberation by United States forces, with the

exception of approximately two weeks between her initial discharge and subsequent re-apprehension.

She was outside working in the fields on April 15, 1945, when she first saw the Allied soldiers. She stated, "I thought the Americans were the best things that could happen!"

Traute queried as to how the German justice system could fall to such a level. "They (the judges) were all bright guys, you didn't become a judge by being totally stupid, and they all cowed down. It's just amazing." She believes, and personally experienced firsthand, that the Nazi judges abandoned their conscience and thus, their judicial independence.

Dr. LaFrenz-Page asked rhetorically, "The judges, what happened to the judges? How they crumbled one after the other. They were nobodies, they were the ones that Hitler had said to, 'Do whatever is necessary.' That was used then as the law. Do whatever is necessary."⁵⁸⁹

Traute LaFrenz was able to thwart her Gestapo inquisitors, thus, there was little evidence of her connection to the White Rose for use at her first trial. Still she was sentenced to one year of imprisonment. Shortly after her release she was arrested once again. On this occasion having abundant evidence against her, the outcome would have, in all likelihood, been judicial murder committed by a wholly dependent tribunal, the People's Court.

⁵⁸⁹ LaFrenz-Page, Traute. (2012, August 25). Hollywood, SC.

Chapter XV: Conclusions and Recommendations

Judges entangled between considerations of law and morality have only four possible choices of decision alternatives available. They may apply the law against their conscience; apply conscience and be faithless to the law; resign; or, circumvent the issue by stating that the law is not what they believe it to be and, thus preserve an appearance to others of conformity between law and morality.⁵⁹⁰ For those individuals functioning as Nazi jurists these options were without significance and irrelevant as they had willfully relinquished their judicial independence to National Socialist ideology far in advance of such a conundrum. The far more consequential question was not, “How should a judge of integrity decide these cases?” but rather, “how can a man of integrity judge these cases?”⁵⁹¹

Taking as true that the Nazi legal scheme did not deserve respect, one must then query when an individual owes fidelity to the rule of law. Natural law theory posits the existence of a law that is separate from positive or man-made law. If an extrinsic law or reason exists, then one has a definitive measure with which to judge not only an individual’s actions, but also the law itself. If you presuppose the existence of this natural law, then human cogitation can differentiate between a legal system, the pronouncements of a state backed by force, and the law to which individuals owe their respect and allegiance.

Some legal theorists assert that natural law exists independently of mankind’s law, and insofar as human law orders itself according to this natural law, these human

⁵⁹⁰Cover, R.M. (1975). *Justice accused: Antislavery and the judicial process*. (New Haven, CT: Yale University Press), 6.

⁵⁹¹*Id.* at 178.

legal enactments take on part of this natural law. As such, human law would then deserve individual respect and adherence. If a law harmonizes with natural law, it may be morally wrong to disobey that law; this then being classic natural legal theory. With its immoral laws, the connivance purported by the Nazis to be a legal system did not deserve individual regard. Law does not necessarily deserve reverence merely because it is enacted. A relationship between positive law and reason must exist in order to confer legal and ethical correctness upon it so that we intuitively know it deserves individual and societal veneration.⁵⁹²

The rule of law is viewed as the safeguard against the excesses of extremism. In the totalitarianism of the Nazi dictatorship, the courts and the judiciary became subordinate to the political interests of Hitler and his regime. Judges and the judicial process were deployed to discourage dissent, eliminate critics, and insure social stability. Nazi Germany exemplified the subordination of law and judges to the dictates of unbridled political power. In the Third Reich, the judiciary and the judicial process became a central component in the regime's political repression and terror.⁵⁹³

The German Federation of Judges issued a declaration on March 19, 1933, which endorsed the new Nazi government's plan for putting "an end to the immense suffering of the German people" and pledged to cooperate in the "task of national reconstruction." The statement noted that judges had been traditionally loyal to Germany and that they

⁵⁹²Hunter, W. (2010). Independent or adrift at sea: How the concept of independence has warped American legal ethics. *The Journal of the Legal Profession*, 34, 367-380, 370.

⁵⁹³Lippman, M. (1997). Law, lawyers, and legality in the Third Reich: The perversion of principle and professionalism. *Temple International and Comparative Law Journal*, 11, 199-308, 199.

“place(d) their full confidence in the new government.”⁵⁹⁴ However, Hitler remained distrustful of the judiciary, leading him to announce in an April 26, 1942, address to the Reichstag that he would henceforth directly intervene in the judicial process. He expressed his intent to remove from office judges who “do not understand the demands of the hour.” He stressed that the German legal profession must understand that “the nation is not here for them; but that they are here for the nation . . . 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.”⁵⁹⁵ The Führer concluded by requesting authorization to unilaterally intervene and correct decisions of jurists that he determined to be erroneous. The Reichstag immediately adopted a resolution recognizing Hitler’s authority to “enforce, with all means which he may consider suitable . . . (i)n case of violations of duties . . . he may remove anyone from his office, rank and his position, without resort to the established procedures.”⁵⁹⁶ As a result, not only had judicial independence been abolished, but tenure in office was also vitiated. Judges were now appointed by the Führer on the recommendation of the Minister of Justice.⁵⁹⁷

In an address to the People’s Court on July 22, 1942, Josef Goebbels reiterated Hitler’s criticisms of the judiciary. Goebbels proclaimed that judicial decisions should be based on expediency, rather than law in order to eliminate internal adversaries from the community. He admonished that this required jurists to discard the doctrine that they were required to be convinced of an offender’s guilt. The security of the State, rather

⁵⁹⁴Lippman, M. (1997). Law, lawyers, and legality in the Third Reich: The perversion of principle and professionalism. *Temple International and Comparative Law Journal*, 11, 199-308, 232.

⁵⁹⁵*Id.* at 235.

⁵⁹⁶*Id.* at 235-236.

⁵⁹⁷*Id.* at 252.

than retribution or rehabilitation, was to be their consideration. Goebbels also noted that many otherwise trivial offenses took on an increased seriousness during wartime and therefore merited the death penalty.⁵⁹⁸ There could not be any misunderstanding; the offender must realize that he “will lose his head, should he assault the foundations of the State.”⁵⁹⁹

Goebbels built upon Hitler’s threat to remove nonconformist judges, scolding those who persisted in “old ways of thinking.” Just as generals can be replaced, warned Goebbels, so can judges. Judicial officers were to proceed not from statutes, but from the fundamental idea that criminals must be excluded from society. Implicit in this notion was the abstraction of criminality from any antecedent statutory definition. A judge would know illegal conduct “when he saw it.”⁶⁰⁰

Nazi jurists also became subject to pressure from the Party itself. Judges who failed to join the National Socialist Party were threatened with dismissal. Once having enlisted, they were subject to Party discipline and direction. Party officials and security personnel also submitted political evaluations of defendants which they expected judges to heed when sentencing.⁶⁰¹ Karl Engert, Vice-President of the People’s Court, and presiding jurist in the trial of Helmut Hübener, declared that the Court must be guided by politics rather than law.⁶⁰² The Court’s objective, in the words of senior prosecutor

⁵⁹⁸Lippman, M. (1997). Law, lawyers, and legality in the Third Reich: The perversion of principle and professionalism. *Temple International and Comparative Law Journal*, 11, 199-308, 239.

⁵⁹⁹*Id.*

⁶⁰⁰Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 67.

⁶⁰¹*Id.* at 243.

⁶⁰²*Id.* at 252.

Heinrich Parrisius, was not to dispense impartial justice, “but to annihilate the enemies of National Socialism.”⁶⁰³

Hitler became the law for the German people and the judiciary swore an oath of loyalty to him rather than to the maintenance of the rule of law. This oath mandated judges, as Hitler’s surrogates, to adhere to the Führer’s will. His commands were incontestable and those who failed to fulfill his dictates were subject to removal. Law became a matter of politics and judges were to coordinate their activities with the aims of the political leadership, interpreting statutes in light of Nazi ideology. Lay Judge, Hans Peterson of the People’s Court observed that a defendant’s guilt was secondary; the central concern was whether the defendant’s attitude and conduct required their removal from the community.⁶⁰⁴

The methodology by which the regime and the legal system in particular, operated may best be summarized in one word: *Führerprinzip*. It was a statement of constitutional principle.

In its application to the judiciary, the *Führerprinzip* was articulated in the “Rothenberger Memorandum” of March 31, 1942, written by Curt Rothenberger, a lower court judge who aspired to the position of State Secretary of the Ministry of Justice. The Memorandum contained three statements which constituted a summary of the Führer Principle, as applied to the judiciary:⁶⁰⁵ 1) “Law must serve the political leadership; 2)

⁶⁰³Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 67.

⁶⁰⁴Lippman, M. (1997). Law, lawyers, and legality in the Third Reich: The perversion of principle and professionalism. *Temple International and Comparative Law Journal*, 11, 199-308, 274.

⁶⁰⁵ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 143-144.

The Führer is the supreme judge; theoretically, the authority to pass judgment is only his; and, 3) A judge who is in a direct relation of fealty to the Führer must judge like the Führer.⁶⁰⁶

The message was very explicit, the concept of judicial independence was renounced, the role of judges was to be no more than execution of the political will, specifically, to judge as the Führer would want them to judge. Courts were thus anchored in politics. There was no longer any allowance for individual judicial responsibility. All the basic decisions were formulated at the pinnacle, where governmental policy was established, and all instructions on how to function were communicated downward, either directly or indirectly.⁶⁰⁷

The Nazi regime had eviscerated the independence and autonomy of the judiciary, creating courts and jurists who willingly implemented a series of draconian decrees. The establishment of this tyrannical regime, and the abrogation of the separation of powers, resulted in the creation of a lawless legal system that was utilized to repress minorities and opponents of Hitler, as well as to insulate members of the Nazi Party from criminal liability. The legal system became an accomplice to Nazi despotism by not prosecuting these individuals and their actions, therefore, permitting them to occur and continue unimpeded. The Nazis' extermination and annihilation of racial minorities, social undesirables, and political opponents, such as Johannes Georg Klamroth, Helmuth Hübener, and members of the Kreisau Circle and the White Rose, respectively, was not confined to concentration camps and killing squads. The wholly dependent judiciary was

⁶⁰⁶ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 144.

⁶⁰⁷ *Id.* at 145-147.

also utilized by the regime, between 1934 and 1945,⁶⁰⁸ to further these atrocities through judicial murder.

The corruption of the Nazi justice system is commonly attributed to legal positivism. However, David A.J. Richards ascribes the rise of legal totalitarianism to “the corruption of responsible persons who surrender(ed) their moral independence, who support(ed) rather than check(ed) the claims of arbitrary power, and most inexcusably, who support(ed) forms of indiscriminate violence aimed at undermining confidence and reducing citizens in [sic] abject and terrified subjects.”⁶⁰⁹ Christopher R. Browning asserts that it was a combination of ideological and situational factors that allowed a popular, dogmatically driven, dictatorial regime and its loyal adherents to mobilize and harness the vast majority of German society to its purposes.⁶¹⁰ He would explicate this depraved judicial conduct and compliance with Nazi exhortations as: “the importance of conformity, peer pressure, deference to authority, and the legitimizing capacities of government.”^{611 612} Regardless of the theoretical assumptions, it is manifestly apparent that Nazi judges willingly and voluntarily perverted legal principles by ceding their conscience to the regime, preferring money and power to morals, principles, and judicial independence and autonomy.

⁶⁰⁸Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 306-307.

⁶⁰⁹Lippman, M. (1997). Law, lawyers, and legality in the Third Reich: The perversion of principle and professionalism. *Temple International and Comparative Law Journal*, 11, 199-308, 307-308.

⁶¹⁰United States Holocaust Memorial Museum. The “Willing Executioners”/ “Ordinary Men” Debate. (1996). Retrieved from http://www.ushmm.org/m/pdfs/Publication_OP_1996-01.pdf

⁶¹¹Knafla, L.A. *Violent crime in North America (criminal justice history)*. (Westport, CT: Praeger), 196.

⁶¹²For additional information on this subject matter, see *Ordinary men: Reserve Police Battalion 101 and the final solution in Poland*, by Christopher R. Browning.

Judges in Nazi Germany rendered their judgments on existing valid law at the time. However, a distinction must be drawn between a normal legal order and a system based upon injustice and corruption, the foundation from which the Nazi justice structure arose. The Nazis were capable of promulgating rules through decrees. They established themselves by virtue of prevailing domestically and winning recognition internationally as the legal Reich government. The sovereign acts of the regime were at that time valid law. Other countries and the majority of the German people recognized and abided by this legal order, irrespective of the obvious moral and political objections to the regime. It is imperative to emphasize how typical the combination of normality and terror was for the Nazi regime, with terror emerging as a necessary occurrence. Law that was considered normal and law that was regarded as terroristic buttressed each other; to separate them is to distort reality.

Members of the resistance violated valid law. They broke the terroristic legal rules set in place by the Nazi regime being fully aware of their criminal conduct, and were condemned by the People's Court, an institution of the system calling itself a court but in actuality,⁶¹³ "the death machine of the Nazi party."⁶¹⁴

On the basis of the Enabling Act, the Nazi State was in a position to enact valid law and as a result, the People's Court was officially established. However, it was not an independent court. The purpose of the Court was to destroy or intimidate political opposition to the Third Reich. Through the disintegration of procedural safeguards, the elimination of all constitutional guarantees, and Freisler's unpredictability and bellowing,

⁶¹³Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 158-160.

⁶¹⁴*Id.* at 160.

this goal was obtained. For someone who desired to create fear and terror, Freisler could not be troubled by the Code of Criminal Procedure; he had to liberate himself of what Thierack called,⁶¹⁵ “the crutches of the law.”⁶¹⁶ The People’s Court was a dependent court engendered from Nazi ideology, an occurrence that was natural in a state that also rejected judicial independence and the rule of law. As Josef Goebbels noted in his diary on September 23, 1943, “Freisler, as president of the People’s Court, (has) become a bird of an altogether different feather. He is once again the radical National Socialist he used to be in the Prussian Chamber of Deputies. Just as he did too little as undersecretary in the Ministry of Justice, today as president of the People’s Court he is doing too much.”⁶¹⁷

Roland Freisler has been described as “perhaps the most sinister and bloodthirsty Nazi in the Third Reich after Heydrich.”⁶¹⁸ His readiness to pervert the German system of justice for ideological and political ends was “extreme even by the standards of the Third Reich.”⁶¹⁹ Although the autonomy of the German judiciary had been steadily deteriorating since 1933, Freisler’s appointment as President of the People’s Court eliminated any remaining pretense of judicial independence in the administration of justice, particularly as it pertained to politically infused acts.

As a result of the widening war, the Nazi regime intensified the severity with which it reacted to cases of dissent and resistance. Freisler dispensed with any⁶²⁰

⁶¹⁵Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 160-161.

⁶¹⁶*Id.* at 161.

⁶¹⁷Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 145.

⁶¹⁸Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 157.

⁶¹⁹*Id.* at 7.

⁶²⁰*Id.* at 7-8.

“outward insignia of impartiality and procedural regularity,” and the People’s Court became a “naked instrument of Hitler’s single-minded aim of mobilizing all institutions of German life, including the judiciary, for the promotion of war aims.”⁶²¹

The judicial philosophy applied by Freisler on the People’s Court was premised upon two principles: first, the legal system was subordinate to the will of the Führer, and second, the traditional dictum of *nulla crimen sine lege*, no crime without a law, should not apply in Germany. Thus, defendants could be tried for actions that had not been determined in advance to have been illegal. Taken together, these two principles resulted in a repudiation of the positivist legal tradition in Germany whereby legal norms were defined by specific, clear enactments. Freisler denounced the notion that judges should be bound by written criminal law as un-German. The law, he argued, is what the Führer said it was. His approach to the law was one that rejected the norms and traditions of the German *Rechtsstaat* and placed the prerogatives of the national leadership above the law.⁶²²

In his proceedings, Freisler not only abandoned all pretense of judicial impartiality, but also dispersed with any veneer of judicial dignity, and remorselessly hectoring his hapless defendants with a ferocity that embarrassed some of the Nazi leadership. Under Freisler, the People’s Court spread terror throughout the German population by inflicting extreme penalties for acts that would pass unremarked in a non-totalitarian society. The court’s procedures were calculated to afford the accused no

⁶²¹ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 8.

⁶²² *Id.* at 8.

realistic opportunity of defense. Its decisions were little more than vigilante justice,⁶²³ perpetrated under the direction and instruction of Hitler and his henchmen who had destroyed law with power, and thereby manifested that power unrestrained by law proceeds to individual and societal destruction.⁶²⁴

The sentences passed by the People's Court, on the bases of laws that were morally repugnant but valid at the time, were lawful sentences, which the German legislature was subsequently correct in annulling. Likewise, Freisler and all the other judges of the People's Court knew what they were perpetrating and were thus fully aware of the possible personal criminal consequences should the Nazi State fail.⁶²⁵

Members of the resistance represented the "other Germany," the land of poets and thinkers, in contrast to the Germany that had reverted to barbarism and was striving to take the world along. Their actions made them enduring symbols of the struggle, universal and timeless, for the freedom of the human spirit wherever and whenever it is threatened, and are therefore of vital importance in the present and for the future. They each chose the path of resistance, when they could have acquiesced and conformed, refusing to be silenced by a criminal regime or to betray their individual principles.

One must query whether the behavior of German judges' during the Third Reich represented their failure to fulfill a prescribed role in state and society, or if judges under any circumstances can succeed as bulwarks against radically unjust political regimes. In any event, the world community must never allow the consequences resulting from a lack

⁶²³ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 63-65.

⁶²⁴ *Id.* at 131.

⁶²⁵ Stolleis, M. (1998). *The law under the swastika: Studies on legal history in Nazi Germany*. (Chicago, IL: The University of Chicago Press), 161.

of judicial independence and autonomy, as exemplified by the tyranny of the Nazi regime, to diminish from its collective recollection. Alexander Hamilton's designation of the judiciary as the "least dangerous" branch must always be remembered by the citizenry. It is imperative that the public remain vigilant to any threatened action to its democratic structure. As the German experience demonstrates, once the Nazis were in power, the judiciary was without the ability to overcome such totalitarianism. A tyrannical government is something which must be prevented rather than cured because ousting such a reign of terror, once it has gained power, is profoundly catastrophic in terms of both human lives and material resources, and these sacrifices will affect future generations of humankind in perpetuity. The distressing reality is that the judicial branch lacks potency to act once such an impetus has achieved momentum. The admonition proffered by this dissertation is that preventing the potential for despotic activity is thus the combined responsibility of a vibrant public sphere and the judiciary, while continuing to maintain its judicial independence and autonomy prior to any attempted usurpation thereof by a dictatorial administration that can then demand of its compliant and tractable judges that they, "Do whatever is necessary."⁶²⁶

In closing, certainly the pressures placed on American judges pale in comparison to those thrust upon the Nazi judiciary. However, the German experience offers a profound message for all jurists relative to judicial independence and judicial accountability, and the importance of judicial disciplinary commissions in monitoring judges' behavior.

⁶²⁶LaFrenz-Page, Traute. (2012, August 25). Hollywood, SC.

Judicial accountability imposes constraints on judges by holding them legally or politically responsible for their behavior.⁶²⁷ Accountability “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”⁶²⁸ Judicial accountability fits within the broader spectrum of American government by holding public officials responsible in order to prevent corruption, usurpations of power, or other abuses, and in order to ensure that governmental policy reflects the values and interests of the populace. The ability to require to account and sanction behavior is as necessary in the case of judges, as it is for other civic officials because jurists also may be tempted to abuse their authority or evade their responsibilities. Nevertheless, the form that this accountability demands must respect the distinctive functions that judges perform. Judicial accountability should therefore address itself to instances of wrong-doing but not interfere with the impartial resolution of disputes or impose influence to depart from adherence to the law.

Individual judges should be held accountable for their behavior, whether on or off the bench, unrelated to the merits of their decisions that⁶²⁹ “is prejudicial to the effective and expeditious administration of the business of the courts.”⁶³⁰ In the courtroom, inappropriate behavior might include exhibiting racial or gender bias, failing to treat attorneys, defendants, litigants, and witnesses with appropriate respect, engaging in *ex*

⁶²⁷ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 92.

⁶²⁸ *Id.*

⁶²⁹ *Id.* at 92-93.

⁶³⁰ *Id.* at 93.

parte communications, or otherwise acting in an arbitrary manner.⁶³¹ These were all actions in which Roland Freisler routinely participated as President of the People’s Court. It may also include failures to act, such as neglecting cases or dereliction in conducting court proceedings in a timely fashion. Off the bench, judicial misbehavior might involve improper activity or conduct, be they violations of the law, excessive drinking or gambling, sexual improprieties, or other comportment that could undermine societal respect for the courts.⁶³²

The responsibility for ensuring behavioral accountability of judges is delegated to the judicial branch through the creation of judicial disciplinary commissions to proctor judges’ nondecisional conduct. These disciplinary commissions investigate, prosecute, and adjudicate allegations of judicial misconduct. It has been stated that,⁶³³ “It is striking to note how *little* threat to independence is implicit in most instances that seem to call for accountability.”⁶³⁴ Judicial disciplinary commissions can take account of misconduct that does not rise to the level of an impeachable offense, but they assure due process for the accused judge, requiring a specification of charges and an opportunity for the judge to respond. These commissions also employ a range of sanctions for enforcing accountability beyond mere removal from office, such as private reprimands, public reprimands, and suspension from office. This enables them to address a wider domain of behavioral misconduct, with punishments proportionate to the offense. Also, the body that is implementing the behavioral norms is situated within the judicial branch rather

⁶³¹ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 93.

⁶³² *Id.*

⁶³³ *Id.* at 97.

⁶³⁴ *Id.*

than in a coordinate branch, thereby obviating concerns relative to institutional independence of the judiciary.⁶³⁵

Through the performance of these judicial disciplinary commissions, American judges should comprehend the increased judicial independence that is provided to them by guaranteeing to the public that only those jurists truly deserving, are permitted to remain in office. Thus, it is for the advancement and benefit of both society and the judiciary that such commissions subject judicial conduct to continual scrutiny and oversee behavior for compliance with ethical standards. These standards demand nothing less than deportment that concurs with the dignity entrusted by the public to the function and prescribed obligations of the office.

⁶³⁵ Tarr, G.A. (2012). *Without fear or favor: Judicial independence and judicial accountability in the states*. (Stanford, CA: Stanford University Press), 97.

Coda

Evading Responsibility for Crimes against Humanity

The most comprehensive investigation of Nazi judges ever undertaken was at the Nuremberg War Crimes Trial, known as the “Justice Case,” “Case 3,” or the “Altstoetter Trial.” This proceeding was devoted to the jurists of the Third Reich.⁶³⁶ Acting under international law and by agreement with the other allied victors in the Second World War, the United States conducted this litigation as one of a series of twelve trials in the U.S. zone of occupation.

The Justice Case was the third in the progression of trials and commenced on February 17, 1947,⁶³⁷ with the charges alleged against the jurists being war crimes, organized crime, and crimes against humanity.⁶³⁸ The sixteen defendants before the Court were “the embodiment of what passed for justice in the Third Reich,”⁶³⁹ according to the prosecutors; they stood as representatives of the entire Nazi justice system. Its highest leaders could no longer be prosecuted. Reich Minister of Justice Gürtner had died in 1941. His successor, Otto Thierack, had committed suicide in 1946 in a British prison camp. Erwin Bumke, President of the Reichgericht, had also taken his own life as the United States Army was entering the city of Leipzig, and Roland Freisler, President of the People’s Court, was killed in an Allied bombing raid on February 3, 1945. The highest official on trial was thus Franz Schlegelberger, former Undersecretary in the

⁶³⁶ Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 270.

⁶³⁷ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 137-138.

⁶³⁸ Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 270.

⁶³⁹ *Id.*

Reich Ministry of Justice and Acting Minister; along with Thierack's two Undersecretaries, Curt Rothenberger and Ernst Klemm. Other defendants included several additional high-ranking officials from the Ministry of Justice: Ernst Lautz, Prosecutor General at the People's Court; the Senior Public Prosecutors of the People's Court, Paul Barnickel and Oswald Rothaug, formerly the Presiding Judge of the Nuremberg Special Court; the former Vice-President of the Nuremberg Special Court and subsequently of the People's Court, Karl Engert; the Presiding Judge of one of the panels of the Nuremberg Special Court, Günther Nebelung; and two Presiding Judges of other Special Courts,⁶⁴⁰ Rudolf Oeschey and Hermann Cuhorst. Also indicted were Josef Altstoetter, Chief of the Civil Law and Procedure Division of the Reich Ministry of Justice; Wilhelm Von Ammon, Ministerial Counsellor of the Criminal Legislation and Administration Division of the Reich Ministry of Justice; Guenther Joel, Legal Adviser to the Reich Minister of Justice; Wolfgang Mettgenberg, Representative of the Chief of the Criminal Legislation and Administration Division of the Reich Ministry of Justice; Hans Petersen, Lay Judge of the First Senate of the People's Court; and Carl Westphal, Ministerial Counsellor of the Criminal Legislation and Administration Division.⁶⁴¹

Because these men were not fanatic National Socialists, the ordinary workings of the judicial system during the Third Reich were exposed to scrutiny, and it became clear to what extent the largely conservative legal profession had been profoundly involved in the Nazi reign of terror. The main charges against them were "judicial murder and other

⁶⁴⁰ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 270-271.

⁶⁴¹ Taylor, T. Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. 3, Case No. 3, United States against Josef Altstoetter, et al. ("The Justice Case") (1947). Retrieved from <http://www.pegc.us/archive/fragments/alstoetter.txt>, 15.

atrocities which they committed by destroying law and justice in Germany, and by then utilizing the empty forms of legal process for persecution, enslavement, and extermination on a vast scale.”⁶⁴² The essence of the charges were that the accused perverted the legal system, emptying it of all content and meaning, and then used the remaining façade to bring about barbarity.⁶⁴³

Schlegelberger based his defense on the claim that he had remained at his post to prevent the worst from happening, and that only for this reason had he committed all the acts of which he stood accused. However, this argument could be used not only by him and all the other jurists on trial to exonerate themselves, but also by every other individual who had any responsibility in the crimes of the Third Reich. This line of defense would in the end have found Hitler to be solely culpable. After careful and thorough consideration, the Court stated:⁶⁴⁴

Schlegelberger presented an interesting defense . . . He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler’s police, Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry

⁶⁴² Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 271.

⁶⁴³ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 139-140.

⁶⁴⁴ Müller, I. (1991). *Hitler’s justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 271.

of Justice as a means for destroying the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police is cold comfort to the survivors of the “judicial” process, and constitutes a poor excuse before this Tribunal. The prostitution of a judicial system for the accomplishment of criminal aims involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.⁶⁴⁵

A broad range of additional justifications and rationalizations were also placed before the Court in support of pleas of innocence. Among them was the proffered “central defense”⁶⁴⁶ of legal positivism: “I was following the law, and the law required me to do it.” The implication being: “I was required to do what I did; I had no choice and, therefore, I had no responsibility.”⁶⁴⁷

During the trial, 138 witnesses were heard and 2,093 pieces of evidence admitted. From this overwhelming amount of information, the Court drew this conclusion:⁶⁴⁸

“Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nationwide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.”⁶⁴⁹

⁶⁴⁵ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 271-272.

⁶⁴⁶ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 143.

⁶⁴⁷ *Id.*

⁶⁴⁸ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 272.

⁶⁴⁹ *Id.*

Most shocking to the conscience of the Court was not the various appalling crimes themselves, but that they had been committed under the pretense of legality.⁶⁵⁰

Of the sixteen defendants in the case, ten were convicted and four acquitted. One had since died, and the proceedings against another were declared a mistrial.⁶⁵¹

Schlegelberger, Klemm, Rothaug, and Oeschey were each sentenced to terms of imprisonment for life, while the other six defendants received prison sentences of between five⁶⁵² and ten years.⁶⁵³

Although the Nuremberg trial could prosecute only a limited number of examples, it has remained the most concerted effort to illuminate the role of the judiciary under the National Socialist dictatorship. However, it had little effect on the German legal profession, which tended to dismiss the Nuremberg trials as “retribution” on the part of the Allies. The American and West German authorities themselves soon began rescinding the results of the proceeding. The life sentences were commuted to twenty years, and by 1951 all of the defendants were released except for Rothaug, who was not discharged until 1956. Even Schlegelberger, who had been provisionally liberated for health reasons in 1950, was freed permanently by January 1951.⁶⁵⁴ Both Rothaug and

⁶⁵⁰ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 272.

⁶⁵¹ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 153.

⁶⁵² Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 273.

⁶⁵³ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 153.

⁶⁵⁴ Müller, I. (1991). *Hitler's justice: the courts of the Third Reich*. (Cambridge, MA: Harvard University Press), 272-273.

Schlegelberger died of natural causes, Rothaug in 1967, at the age of 80, and Schlegelberger in 1970, at age 94.⁶⁵⁵

Some would assert that an unmistakable message was sent by the main trial at Nuremberg, that individuals live, simultaneously, in two legal systems, the national and the international. It is not enough for actors to look to only the national juristic scheme to determine what is permissible or required under national law. Rather, the inquiry must encompass essentials of international law also and consider holding defendants to that standard, as the accused were in the main trial at Nuremberg.⁶⁵⁶

In light of the allegations contained in the indictments against the jurists in the Justice Case, and with reflection upon the express words contained in the opinion of the Court; I will allow the reader to contemplate the severity of the sentences initially imposed by the Tribunal, to ruminate upon the subsequent reductions thereof, and then to query if justice truly was effectuated. Conversely, had the defendants justifiably asserted that they “applied the laws of (Germany) in the manner in which they were intended?”⁶⁵⁷

⁶⁵⁵ Steinweis, A.E. & Rachlin, R.D. (Eds.) (2013). *The law in Nazi Germany: Ideology, opportunism, and the perversion of justice*. (New York, NY: Berghahn Books), 154.

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.* at 149.

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