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### Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich

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# ARTICLE

*Cynthia L. Fountaine*

## Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich

*To ignore evil is to become an accomplice to it.*

—Martin Luther King, Jr.<sup>1</sup>

*Once parties, unions and associations, churches and clubs, universities, schools and courts  
have been forced into line, there comes a point when the ethics of opposition survive  
only in quixotic heroic gestures.*

—Bernhard Schlink<sup>2</sup>

*It happened, therefore it can happen again: this is the core of what we have to say.*

*It can happen, and it can happen everywhere.*

—Primo Levi<sup>3</sup>

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1. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 91 (Beacon Press 2010) (1967).

2. BERNHARD SCHLINK, *GUILT ABOUT THE PAST* 32–33 (House of Anansi Press 2010) (2009).

3. PRIMO LEVI, *THE DROWNED AND THE SAVED* 199 (First Vintage Int'l 1989) (1986).

**Abstract.** A fundamental tenet of the legal profession is that lawyers and judges are uniquely responsible—individually and collectively—for protecting the Rule of Law. This Article considers the failings of the legal profession in living up to that responsibility during Germany’s Third Reich. The incremental steps used by the Nazis to gain control of the German legal system—beginning as early as 1920 when the Nazi Party adopted a party platform that included a plan for a new legal system—turned the legal system on its head and destroyed the Rule of Law. By failing to uphold the integrity and independence of the profession, lawyers and judges permitted and ultimately collaborated in the subversion of the basic lawyer–client relationship, the abrogation of the lawyer’s role as advocate, and the elimination of judicial independence. As a result, while there was an elaborate facade of laws, the fundamental features of the Rule of Law no longer existed and in their place had grown an arbitrary and chaotic system leaving people without any protection from a violent, totalitarian government.

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## ARTICLE CONTENTS

I.	Introduction.....	201
II.	The German Legal System of the Weimar Republic—1919–1928.....	205
III.	The Development of a Nazi Legal System—1929–1933.....	208
IV.	The Purge and Coordination of the German Legal System—1933–1939.....	211
	A. Hans Frank and the Development of the Nazi Legal Regime .....	217
	B. Purging the Legal Profession.....	220
	C. Coordination of the Legal System .....	224
V.	Control of the Legal System—1939–1945 .....	228
VI.	Complicity in the Perversion of Justice.....	241

## I. INTRODUCTION

The “Rule of [L]aw is a principle under which all persons, institutions, and entities are accountable to laws that are: [p]ublicly promulgated[,] [e]qually enforced[,] [i]ndependently adjudicated[,] [a]nd consistent with international human rights principles.”<sup>4</sup> Furthermore, the Rule of Law requires “measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and . . . legal transparency.”<sup>5</sup>

A fundamental tenant of the legal profession is that lawyers and judges are uniquely responsible—individually and collectively—for ensuring the protection of the Rule of Law. As this Article will demonstrate, the legal profession catastrophically failed to fulfill this responsibility during Germany’s Third Reich.

This Article will consider the incremental steps used by the Nazis to gain control of the German legal system and abrogate the Rule of Law in Germany during the Third Reich. In so doing, this Article will explore the legal and ethical failings that ultimately resulted in the legal system being turned on its head. By failing to uphold the integrity and independence of the profession, lawyers and judges permitted and ultimately collaborated in the subversion of the basic lawyer–client relationship, the abrogation of the lawyer’s role as an advocate, and the elimination of judicial independence. As a result, while there was an elaborate facade of laws, the fundamental features of the Rule of Law no longer existed, and in their place had grown an arbitrary and chaotic system designed to carry out Hitler’s evil will and racist agenda.

On Remembrance Day 2018, a New York Times headline said, “*Holocaust Is Fading From Memory, Survey Finds*.”<sup>6</sup> The article noted, “[41] percent of

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4. *Overview – Rule of Law*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> [<https://perma.cc/NAM9-LPDH>]; see also *What is the Rule of Law*, UNITED NATIONS, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> [<https://perma.cc/K275-SXTA>] (“For the United Nations (UN) system, the [R]ule of [L]aw is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”).

5. *What is the Rule of Law*, *supra* note 4.

6. Maggie Astor, *Holocaust Is Fading From Memory, Survey Finds*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/holocaust-education.html> [<https://perma.cc/M9Y2-M4PA>].

Americans, and 66 percent of millennials, cannot say what Auschwitz was. And 52 percent of Americans wrongly think Hitler came to power through force.”<sup>7</sup> Moreover, most Americans—including many lawyers and judges—know very little about the legal system in Nazi Germany and how it contributed to and facilitated the Third Reich’s rise to power. There is a general perception that it was a lawless system, that the Rule of Law had been completely abandoned from the beginning. However, the reality is that Hitler used the legal system to legitimize his terroristic dictatorship and, while eventually there was a complete breakdown in the Rule of Law, it did not happen all at once; it happened over time and with the complicity of the legal profession. This Article will consider how Hitler effectively perverted the legal system, at first working within it and later taking complete control of it.

This Article does not attempt to provide an exhaustive history of the period or its legal system.<sup>8</sup> This Article also does not seek to hold the United States up as an example of the only way, or even necessarily the right way, to run a legal system—either now or in the past<sup>9</sup>—or to criticize Germany’s legal response over the last seventy-five years. Indeed, Germany now has many additional protections in place, including making protection of human dignity a basic human right and ensuring the independence of its judiciary, which provides as much or more protection of human rights than any other country today.<sup>10</sup>

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7. *Id.*

8. Other authors have done so. *See* INGO MÜLLER, HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987) (providing an excellent and thorough history of the Nazi legal system, with emphasis on the role of the courts during the period); STANISLAW PIOTROWSKI, HANS FRANK’S DIARY (1961) (discussing the Nazi legal regime and Hans Frank’s role); *see also* INGO MÜLLER, FURCHTBARE JURISTEN: DIE UNBEWÄLTIGTE VERGANGENHEIT UNSERER JUSTIZ (7th ed. 1987) (outlining crimes committed by the judiciary in Nazi Germany); HANNES LUDYGA, DAS OBERLANDESGERICHT MÜNCHEN: ZWISCHEN 1933 UND 1945 (2012) (providing detailed information about the Higher Regional Court in Munich; edited by the President of the Oberlandesgericht München).

9. The U.S. was not exemplary from a human rights perspective at that time and even resorted to its own concentration camp system for segregating Japanese Americans during World War II. Also, judicially sanctioned racial segregation was the law of the land in the United States at that time, and racially discriminatory laws and policies—as well as laws and policies discriminating against the disabled and others—could be found in every state. Indeed, structural racism still persists in the U.S. legal system.

10. Germany’s Grundgesetz (Basic Law), adopted on May 23, 1949, states: “All state authority is derived from the people.” GRUNDGESETZ [GG] [BASIC LAW], art. 20 (Ger.), *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0019](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019) [<https://perma.cc/8D>

What this Article does seek to do is consider the role of German lawyers and judges in tolerating, facilitating, encouraging, and legitimizing the Nazi agenda. This agenda resulted in the state-sponsored torture and murder of over 11 million human beings<sup>11</sup>—over 6 million of whom were Jews—and

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XH-4YN3]. Germany's Basic Law protects human dignity as *the* fundamental core value by implementing the following as a basic right:

I. Basic Rights:

Article I

[Human dignity – Human rights – Legally binding force of basic rights]

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The . . . basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

*Id.* at art. 1. The German Basic Law goes on to protect the following as basic rights: personal freedom; equality before the law; freedom of faith, conscience, and creed; freedom of expression; protection for marriage and the family, including children born outside of marriage; the right to education; freedom of assembly; freedom of association; privacy of correspondence, posts, and telecommunications; freedom of movement; occupational freedom and the prohibition of forced labor; the right to avoid military service on grounds of conscience; the inviolability of the home; the right to own and inherit property and limits on expropriation; the right to socialization; the right not to be deprived of German citizenship or extradited to a foreign country absent particular circumstances; the right of asylum; and the right of petition. *Id.* In addition, these basic rights are given added protection in Article 19, which provides:

- (1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.
- (2) In no case may the essence of a basic right be affected.
- (3) The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.
- (4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.

*Id.* at art 19. This provision was adopted in direct response to the lawlessness of the Nazi regime, and it is considered the “crown jewel” of the German Basic Law. The protections of Article 19 are without precedent in German law.

11. See Katharine Stephens, *11 Million, Not 6 Million, Died in the Holocaust*, WASH. POST (May 26, 2017, 5:42 PM), [https://www.washingtonpost.com/opinions/11-million-not-6-million-died-in-the-holocaust/2017/05/26/6fdcc270-3f1c-11e7-b29f-f40ffced2ddb\\_story.html](https://www.washingtonpost.com/opinions/11-million-not-6-million-died-in-the-holocaust/2017/05/26/6fdcc270-3f1c-11e7-b29f-f40ffced2ddb_story.html) [https://perma.cc/YF3G-MNBR] (“[A]bout 6 million Jews and about 5 million non-Jews were murdered by the Nazis.”);

sparked a World War that resulted in the deaths of another 60 million people, including 20 million soldiers and 40 million civilians, around the world<sup>12</sup> between 1933 and 1945. This consideration of where the German legal profession went wrong in the 1930s and 1940s will provide lessons for how we can strengthen modern legal systems and emphasize the legal profession's responsibility—including the individual responsibility of each member of the legal profession—to maintain a just legal system.

A common misconception about the role of German judges and lawyers in the Third Reich is that the lawyers and judges were all Nazis who followed Hitler blindly. Although there were definitely some Nazi judges and lawyers—and some of them were directly responsible for the failings of the German legal system during the Third Reich—the vast majority of lawyers and judges were not Nazis, but were ordinary lawyers and judges, part of the educated cultural elite of Germany. They had personal and professional motivations for what they did and did not do, and those motivations may not have had anything to do with loyalty to Hitler and the Nazis. Nevertheless, these lawyers and judges also failed Germany entirely; they fueled Hitler's agenda of genocide and hatred by giving it legitimacy and authority.

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*see also Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution> [<https://perma.cc/J3SD-RVXG>] (reporting statistics “calculated from wartime reports generated by those who implemented Nazi population policy, and postwar demographic studies on population loss during World War II”).

12. Thus, more than 71 million people were killed, world-wide, during the Second World War. That amounts to about 3% of the world's 1940 population. Many sources have estimated, collected, and published statistics regarding the casualties of WWII and the Holocaust. *See Research Starters: Worldwide Deaths in World War II*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war> [<https://perma.cc/7PAP-ZDJH>] (calculating the casualties of WWII); *World War 2 Statistics*, SECOND WORLD WAR HIST., <https://www.secondworldwarhistory.com/world-war-2-statistics.php> [<https://perma.cc/TBK3-WA3W>] (“World War 2 was one of the largest conflicts in recorded history with no corner of the planet left untouched.”). To give some additional context to these numbers, the 1940 U.S. population was 132 million people, *About the 1940 Census*, 1940 CENSUS, <https://1940census.archives.gov/about.asp> [<https://perma.cc/FVE7-92VU>], the 2018 population of the United Kingdom was 66.4 million, *Overview of the UK Population: August 2019*, OFF. FOR NAT'L STAT., <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/august2019> [<https://perma.cc/3EF4-EUNA>], and the most populous state in the U.S.—California—had a 2019 estimated population of 39.5 million people, *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [<https://perma.cc/4GR3-55MH>].



As a starting point, it is important to understand that Hitler despised lawyers and promised “[t]o make every German realize that it is a disgrace to be a lawyer.”<sup>13</sup> He once said, “[e]very lawyer must be regarded as a man deficient by nature or else deformed by usage.”<sup>14</sup> He also said:

The lawyer’s profession is essentially unclean, for the lawyer is entitled to lie to the court . . . The lawyer looks after the underworld with as much love as owners of shoots taking care of their game during the closed season. There will always be some lawyer who will jiggle with the facts until the moment comes when he will find extenuating circumstances . . . .<sup>15</sup>

His goal was not only to purge the legal profession of those he thought undesirable and coordinate the legal system to promote his agenda, but to control the legal system to a complete degree so that there was no real distinction between himself and the law. The process by which Hitler hijacked the legal system to achieve this goal was an incremental one. It happened as a result of many steps that led to the breakdown of the ability of the legal system to fulfill its fundamental mission to protect the people from governmental tyranny.

## II. THE GERMAN LEGAL SYSTEM OF THE WEIMAR REPUBLIC—1919–1928

When the Weimar Republic began in 1919, many members of the legal profession were concerned and disappointed because they had been loyal to the monarchy that preceded the Republic. Indeed, most were members of the nobility class. They saw the fall of the German Empire and the rise of the Weimar Republic as an improper change in the power structure. Nevertheless, when faced with the alternative of early retirement, the vast majority accepted the transition, pledged an oath to the new government, and went on in their positions.

During the German Empire, in 1878, the Bar of Germany had been designated as a “free profession,” which meant the legal profession was independent of state control and operated as a self-regulated profession.<sup>16</sup>

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13. Kenneth C. H. Willig, *The Bar in the Third Reich*, 20 AM. J. LEGAL HIST. 1, 13 (1976) (citing MAX DOMARUS, HITLER: REDEN UND PROKLAMATIONEN 1932–1945, at 1874 (1962)).

14. *Id.* at 1.

15. *Id.* at 11 (quoting HITLER’S SECRET CONVERSATIONS 1941–1944, at 26, 109 (Hugh Trevor-Roper ed., Norman Cameron & R. H. Stevens trans., 1953)).

16. *Id.* at 2.

The Weimar Constitution declared judges independent and bound only by law.<sup>17</sup>

A member of the Bar could practice before any lower court in the country and, with some minor restrictions, before any of the country's appellate level courts as well.<sup>18</sup> An attorney could be disbarred only upon "conviction of a felony or a similarly serious offense against professional ethics . . . ."<sup>19</sup>

Despite the independence of the Bar—which was open to anyone who had the proper training and qualifications—there was not much social mobility between the poor working class and the educated professional class.<sup>20</sup> By the beginning of World War I in 1914, there were 12,297 registered practicing attorneys, and only about 500 more than that in 1923.<sup>21</sup> Very few of these lawyers were members of the National Socialist German Workers' Party (Nazi Party). However, it was within this group that the Nazi Party, in an effort led by Hans Frank, began organizing lawyers, with the goal of shifting the German Bar from an independent one that recognized lawyers' basic duty of loyalty to their clients to a Bar that served the interests and objectives of the National Socialist Party.

The German judiciary was also independent.<sup>22</sup> In 1926, most German judges were members of the *Deutschnationale Volkspartei*—the German National Popular Party—and their political positions leaned very conservative within that conservative party.<sup>23</sup> Most judges, having lost the political and social influence they had previously enjoyed as members of the nobility and the social elite—were dissatisfied with Weimar Republic politics and believed that the government should have exercised decisive power to reestablish stability within Germany.

Nevertheless, despite the general political, economic, and social upheaval of the period in Germany, the German legal system was thriving,<sup>24</sup> with an

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17. REICHsverfassung [WEIMAR CONSTITUTION], art. 102 (Ger.). Section 7 of the Weimar Constitution contained guarantees for independent courts and judges and Chapter 2, Section 1 provided protection of individual liberties. *Id.* at arts. 102, 110. However, the Weimar Constitution, which was never annulled, was not able to prevent Nazi totalitarianism. The 1933 Law to Remedy the Distress of the People and the Reich was able to subvert the protections of the Weimar Constitution without expressly repealing it.

18. Willig, *supra* note 13, at 2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See supra* note 17 and accompanying text.

23. MÜLLER, *supra* note 8, at 10.

24. REICHsverfassung [WEIMAR CONSTITUTION], art. 102 (Ger.). Law was viewed as distinct from morals and fact-bound determinations. SURI RATNAPALA, JURISPRUDENCE 69 (2009)

independent Bar and judiciary to implement it, and a dedication to the enforcement of the Constitution which protected individual rights and permitted a system of private law to flourish. German law was respected throughout the world.

However, as early as 1920, the Nazi Party had developed a plan to upend the German legal system. The Nazi Party platform was “based in large part on hatred of the Jews, blaming both German Jews and Jews worldwide for Germany’s defeat in the First World War and for its postwar economic troubles. Targeting Jews was an integral part of the Nazis’ racist vision . . . .”<sup>25</sup> In a 1936 article in the *Yale Law Journal*, Karl Loewenstein—by then a former member of the Munich Bar and former lecturer at the University of Munich—summarized the Nazi Party’s twenty-five-point platform as being built on seven basic pillars: “state, race, soil, labor, honor, cultural and spiritual values, [and] military power.”<sup>26</sup> Loewenstein posited that the only novel component of the Nazi platform was “racism as a new guiding principle of social life” and that “all values drawn from freedom as a concept of innate law” were missing from the Nazi political-legal system.<sup>27</sup>

The Nazis knew they had to subvert the legal system to accomplish this racist vision. Thus, Article 19 of the Nazi Party platform stated that “[w]e

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(introducing the prevailing legal philosophy as Kantian positivism, as envisioned by Hans Kelsen, an Austrian Jew). Kelsen’s theory of legal positivism has been described as follows:

The key elements . . . are these. Facts consist of things and events in the physical world. Facts are about what there *is*. When we wish to know what caused a fact we look for another fact. A stone thrown in the air comes down because of the force of Earth’s gravity . . . . A norm, unlike a fact, is not about what there is but is about what *ought* to be done or not done. Whereas facts exist in the physical world, norms exist in the world of ideas. Facts are caused by other facts. Norms are imputed by other norms. The requirement that a person who commits theft ought to be punished is a norm. It does not cease being a norm because the thief is not punished. (He may not get caught.) The norm that the thief ought to be punished exists because another norm says so. Not all norms are laws. There are also moral norms. Legal norms are coercive; moral norms are not.

*Id.* 69–70. According to Kelsen’s theory, all law derives from a basic norm, or “grundnorm”—the norm from which all others follow. *Id.* at 70. The system of laws—or legal norms—is connected by a common origin to a basic norm. This theory influenced legal theorists around the world. Some legal scholars have theorized that the disassociation of law and moral justification for law, inherent in legal positivism, left the German legal system open to sabotage by the Nazi Party.

25. MICHAEL BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 5 (2016).

26. Karl Loewenstein, *Law in the Third Reich*, 45 *YALE L.J.* 779, 780 (1936). Loewenstein’s article says there are six pillars, but he goes on to list seven.

27. *Id.*

demand that Roman Law, which serves a materialistic World Order, be replaced by German law.”<sup>28</sup> This meant a system of law that was not influenced by Jewish legal theorists and jurists, and that would embrace, promote, and implement the Party’s racist objectives.

### III. THE DEVELOPMENT OF A NAZI LEGAL SYSTEM—1929–1933

While the Nazis understood the importance of gaining the support of lawyers, their success in attracting lawyers to their cause was slow at first. In 1928, pursuant to specific instructions from Hitler, Hans Frank<sup>29</sup>—a lawyer who would go on to be the chief architect of the Nazi legal system—started the Association for National Socialist German Jurists (the BNSJD).<sup>30</sup> This was the first effort to organize a professional group in support of the Nazi agenda.<sup>31</sup>

However, the Nazis’ early efforts to organize German lawyers proved ineffective and slow. Lawyers were not inclined to give up their independence, prestige, and perceived intellectual superiority to join an organization with a radical agenda and already known to be extremely violent.<sup>32</sup> By 1931, the BNSJD only had 700 members, and most of the members were from less elite segments of the profession, including young lawyers, law students, and immigrants.<sup>33</sup>

To increase membership in the BNSJD, Frank initiated a propaganda campaign aimed at lawyers. Among other tactics, he ran weekly, full-page newspaper segments about Germany’s legal problems. In addition to Frank’s propaganda about the legal system, a vicious antisemitic propaganda campaign took hold of Germany,<sup>34</sup> and the legal profession was not immune from the building racial tensions.<sup>35</sup>

28. Robert Aitken, *Hans Frank: Hitler’s Lawyer*, LITIG., Fall 2002, at 54.

29. See *infra* notes 62–78 & accompanying text; Aitken, *supra* note 28, at 54 (“In 1928, Frank formed the Union of Nazi Lawyers and became their leader.”). Frank was involved in 2,400 cases representing Nazi Party members arrested between 1927 and 1930 for violating Weimar Republic law (this was a small fraction of the over 40,000 such cases during that period). *Id.*

30. Willig, *supra* note 13, at 3; see PIOTROWSKI, *supra* note 8, at 17 (“Frank became Hitler’s legal adviser and emerged as the leading Nazi lawyer. In 1928 Frank formed a union of Nazi lawyers and became their ‘Führer’ or leader.”).

31. Willig, *supra* note 13, at 3.

32. See Aitken, *supra* note 28, at 54 (stating between 1927 and 1930, there were over 40,000 arrests of Nazi SA paramilitary storm troopers accused of inciting violence or committing violent acts).

33. Willig, *supra* note 13, at 3.

34. RICHARD LAWRENCE MILLER, NAZI JUSTIZ: LAW OF THE HOLOCAUST 9–42 (1995).

35. Matthew Lippman, *They Shoot Lawyers Don’t They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary*, 23 CAL. W. INT’L L.J. 257, 275 n.139 (1993) (“Many lawyers welcomed

Other factors were also at play that caused more lawyers to join the BNSJD. For example, prior to 1929, lawyers enjoyed relative prosperity and economic stability, but the Great Depression introduced uncertainty for all economic segments, including lawyers. In addition, the German Bar began to grow at a much faster rate than it had in the past. While the number of registered lawyers increased by only about 500 in the nine years between 1914 and 1923, it increased by 2,024 in just two years between 1931 and 1933.<sup>36</sup> The growth in the number of lawyers, combined with the general economic downturn of the Great Depression, meant lawyers were suffering financially and experiencing a lack of economic confidence for the first time in the profession's history. This threatened lawyers' prestige and social standing, and thus weakened their resolve to hold steadfast to principles of an independent profession. It also made the exclusionary policies of the Nazi platform more appealing to those who wanted to protect their social and economic turf.

Thus, with the increasingly successful propaganda campaign, the growth in the number of lawyers, the simultaneous economic decline, and the increasing antisemitism taking hold of the country and the legal profession, membership in the BNSDJ more than doubled.<sup>37</sup> By 1933, the BNSDJ had 1,600 members and would soon fully take over the German Bar with little or no resistance from the membership.<sup>38</sup>

Also, while the economic disruption and propaganda campaign was changing the attitudes of lawyers within the profession, a simultaneous change in legal philosophy was occurring. In 1929, Dr. Erwin Bumke, a member of the national conservative DNVP, was sworn in as the new

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the purging of their Jewish competitors. The Nazis claimed that Jews, who numbered roughly one percent of the total Reich population, comprised as much as 17.5 percent of the lawyers in Prussia.”). In 1933, 4,394 of the 19,500 members of the German bar were Jewish; that is, about 22%. In Berlin, Jewish lawyers were about 60% of the Bar; according to some sources, in Vienna, Austria, as many as 80% of the lawyers in private practice were Jewish. MÜLLER, *supra* note 8, at 59–60. Many of the leaders of the Bar, especially the private defense bar, were Jewish. Nevertheless, the numbers of Jewish people in civil service were much lower than Nazi authorities would have had the public believe. The German ambassador to the U.S., Hans Luther, claimed that nearly 50% of German civil servants in 1933 were Jewish; Hitler said in an interview with American journalists in 1933 that 62% of government jobs were held by Jewish people. *Id.* at 59. However, these numbers were dramatically exaggerated. The reality was that less than one quarter of one percent (about 0.16%) of German government employees were Jewish in 1933. *Id.*

36. Willig, *supra* note 13, at 2, 4.

37. *Id.* at 4.

38. *Id.*; see Lippman, *supra* note 35, at 275 (“[B]y May 1933, all of the traditional associations of lawyers had been dissolved and absorbed into BNSDJ.”).

President of the German Supreme Court,<sup>39</sup> a position he would hold until 1945 when he died by suicide in Leipzig—the seat of the Supreme Court—while the U.S. Army was moving into the city.<sup>40</sup> He was not a member of the Nazi Party at the time of his ascendancy to the Supreme Court presidency, but as a staunch conservative, he strongly opposed and harshly criticized the appointments of Social Democrats to the German judiciary.<sup>41</sup> He became closely aligned with Nazism during his time in office and joined the Nazi Party in 1937.<sup>42</sup> He gained the confidence of Hitler, who later appointed him as Chair of the Special Panel—also known as the Führer's Court—which heard all special appeals brought in the Führer's name.

Bumke's vision of statutory interpretation for Germany emphasized an evolving interpretive standard over originalism in interpreting German law.<sup>43</sup> This signaled a significant shift in German judicial interpretive philosophy that gave judges more room to interpret the law in ways consistent with Nazi philosophies.

Bumke believed the old code was antiquated—it had existed in much the same form since the early 1900s—and that, consequently, judges should adapt their interpretation of code sections to modern circumstances. Otherwise, he said, injustice would result. He said, “we, as judges and lawyers are seekers of truth and we are trying to establish justice.”<sup>44</sup> According to Bumke, unless the court modernized its interpretation of the statutory provisions, it would not achieve this objective.<sup>45</sup>

This shift in philosophy played right into Hitler's hands, so to speak, by giving him an inroad to encourage a shifting of the way the old laws were interpreted. Hitler did not have to change the law; he just had to get the judges to interpret it in a manner that would further his agenda.

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39. See MÜLLER, *supra* note 8, at 40 (“When Supreme Court president Walter Simons took early retirement in 1929, Bumke was named to succeed him. At the same time, he became presiding judge of the Third Criminal Panel of this court, president of the Combined Panels, and chairman of the State Court for the German Reich.”).

40. *Id.* at 41.

41. *Id.* at 39–40.

42. *Id.* at 41.

43. *Id.* at 220.

44. Though Bumke spoke of justice, his distorted understanding of justice was not much different from the Nazis'. Bumke led the Supreme Court to an extreme and expansive interpretation of the race laws, revised other courts' verdicts to impose harsher sanctions—often including the death penalty—than the ones imposed by the judge in the first instance, participated in planning the procedures for the murder of handicapped people, and other atrocious acts that subverted justice. *Id.* at 41.

45. *Id.* at 220.

#### IV. THE PURGE AND COORDINATION OF THE GERMAN LEGAL SYSTEM— 1933–1939

On January 30, 1933, Hitler was appointed as German Chancellor by President Paul von Hindenburg in order to forge a political coalition between Hindenburg's Nationalist Conservative Party and the Nazis.<sup>46</sup> Within a month after Hitler's appointment as Chancellor, the Reichstag Fire occurred.<sup>47</sup> The Reichstag Fire, an arson attack on the German parliament building, was key to what happened to the legal system for the rest of Hitler's rule.<sup>48</sup> When the Reichstag burned in an apparent act of terrorism, widespread public fear and panic broke out.

In roaring speeches, Hitler stoked those fears by claiming that Germany was being attacked from within by Communists, the Reichstag was burned by Communist dissidents, and no one was safe until society was rid of all of them. The Nazis further exacerbated and exploited this fear through extensive propaganda, and in doing so, gained the unquestioning loyalty of a large segment of the population.

The Weimar Constitution allowed the president to declare a state of emergency, and thereby suspend all individual rights and make laws by decree. Accordingly, on the day after the fire, President Hindenburg issued the Decree of the Reich President for the Protection of the People and the State (known as the Reichstag Fire Decree), thereby decreeing a state of emergency giving himself the power to enact additional laws by decree.<sup>49</sup> It

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46. *Id.* at 27.

47. The Reichstag Fire occurred on February 27, 1933. *Id.*

48. *See id.* at 28 (discussing how the Nazis profited through the Reichstag fire).

49. Reichstagsbrandverordnung [Reichstag Fire Decree], Feb. 28, 1933, REICHSGESETZBLATT [RGBL I] at 83 (Ger.), *translation at* <https://encyclopedia.ushmm.org/content/en/article/reichstag-fire-decree> [<https://perma.cc/BSH6-52XS>]. The Decree of the Reich President for the Protection of the People and the State provided as follows:

In virtue of Article 48(2) of the German Constitution, the following is decreed as a defensive measure against communist acts of violence endangering the state:

##### Article 1

Sections 114, 115, 117, 118, 123, 124, and 153 of the Constitution of the German Reich are suspended until further notice. Therefore, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association, and violations of the privacy of postal, telegraphic, and telephonic communications, warrants for house searches, orders for confiscations, as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.

was this national state of emergency that provided the legitimacy and power for nearly everything the Nazis did thereafter.

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Article 2

If in a state the measures necessary for the restoration of public security and order are not taken, the Reich Government may temporarily take over the powers of the highest state authority.

Article 3

According to orders decreed on the basis of Article 2 by the Reich Government, the authorities of states and provinces, if concerned, have to abide thereby.

Article 4

Whoever provokes, or appeals for, or incites the disobedience of the orders given out by the supreme state authorities or the authorities subject to them for execution of this decree, or orders given by the Reich Government according to Article 2, is punishable-insofar as the deed is not covered by other decrees with more severe punishments-with imprisonment of not less than one month, or with a fine from 150 up to 15,000 Reichsmarks.

Whoever endangers human life by violating Article 1 is to be punished by sentence to a penitentiary, under mitigating circumstances, with imprisonment of not less than six months and, when violation causes the death of a person, with death, under mitigating circumstances, with a penitentiary sentence of not less than two years. In addition the sentence may include confiscation of property.

Whoever provokes or incites an act contrary to public welfare is to be punished with a penitentiary sentence, under mitigating circumstances, with imprisonment of not less than three months.

Article 5

The crimes which under the Criminal Code are punishable with penitentiary for life are to be punished with death: i.e., in Paragraphs 81 (high treason), 229 (poisoning), 306 (arson), 311 (properties), and 324 (general poisoning).

Insofar as a more severe punishment has not been previously provided for, the following are punishable with death, life imprisonment, or imprisonment not to exceed 15 years:

1. Anyone who undertakes to kill the Reich President or a member or a commissioner of the Reich Government or of a state government, or provokes such a killing, or agrees to commit it, or accepts such an offer, or conspires with another for such a murder;
2. Anyone who under Paragraph 115(2) of the Criminal Code (serious rioting) or under Paragraph 125(2) of the Criminal Code (serious disturbance of the peace) commits the act with arms or cooperates consciously and intentionally with an armed person;
3. Anyone who commits a kidnapping under Paragraph 239 of the Criminal Code with the intention of making use of the kidnapped person as a hostage in the political struggle.

This decree is in force from the day of its announcement.

Berlin, February 28, 1933[.]

*Id.*



At the same time Hindenburg declared a national state of emergency, Germany expanded police power to allow searches, arrests, and indefinite incarceration—either in prisons or concentration camps—without specific charges and without judicial review.<sup>50</sup> The police were given broad discretion to take anyone into so-called “protective custody” if they were deemed to be potentially dangerous to the Reich.<sup>51</sup> This police power

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50. *Arrests Without Warrant or Judicial Review*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/arrests-without-warrant-or-judicial-review> [<https://perma.cc/J3XT-H3ZS>] [hereinafter *Arrests Without Warrant*].

51. *Id.* The following were the specific guidelines for exercising preventative police action:

In the internal distribution of responsibilities of the police, prevention of “political crimes” is assigned to the Secret State Police [Gestapo]. In other cases the criminal police is responsible for the prevention of crime. The criminal police operates according to guidelines in the prevention of crime according to the following principles:

The tools used in the prevention of crime are systematic police surveillance and police preventive arrest.

Systematic police surveillance can be used against those professional criminals who live or have lived, entirely or in part, from the proceeds of their criminal acts and who have been convicted in court and sentenced at least three times to prison, or to jail terms of at least three months, for crimes from which they hoped to profit.

Further, habitual criminals are eligible if they commit crimes out of some criminal drive or tendency and have been sentenced three times to prison, or to jail terms of at least three months, for the same or similar criminal acts. The last criminal act must have been committed less than five years ago. The time the criminal spent in prison or on the run is not counted. New criminal acts that lead to additional convictions suspend this time limit.

All persons who are released from preventive police arrest must be placed under systematic police surveillance.

Finally, systematic police surveillance is to be ordered despite these regulations if it is necessary for the protection of the national community [*Volksgemeinschaft*].

In the application of systematic police surveillance the police can attach conditions such as requiring the subject to stay in or avoid particular places, setting curfews, requiring the subject to report periodically, or forbidding the use of alcohol, or other activities; in fact, restrictions of any kind may be imposed on the subject as part of systematic police surveillance.

Systematic police surveillance lasts as long as is required to fulfill its purpose. At least once every year the police must reexamine whether the surveillance is still required.

Preventive police arrest can be used against the following:

Professional and habitual criminals who violate the conditions imposed on them during the systematic police surveillance of them or who commit additional criminal acts.

enabled the Gestapo<sup>52</sup> and Kripo<sup>53</sup>—both arms of the security police—to search, arrest, and detain almost anyone, including political opponents, Jews, Roma and Sinti (known as “gypsies”), Jehovah’s Witnesses, and anyone who refused to swear an oath to the Nazis or serve in the military. People detained under this power had no access to a lawyer, no right to trial or appeal, and there was no procedure for judicial review of their confinements. Concentration camps were established to house the rapidly growing population of prisoners.<sup>54</sup> Within two months of the Reichstag Fire, the Gestapo had arrested and detained over 25,000 people, and by the end of 1939, more than 12,000 people were being held in concentration camps under this protective custody power.<sup>55</sup> This executive power was being exercised without any limitation or review whatsoever by the judicial or legislative branches.

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Professional criminals who live or have lived, entirely or in part, from the proceeds of their criminal acts and who have been convicted in court and sentenced at least three times to prison, or to jail terms of at least three months, for crimes from which they hoped to profit.

Habitual criminals if they have committed crimes out of some criminal drive or tendency and have been sentenced three times to prison, or to jail terms of at least three months, for the same or similar criminal acts.

Persons who have committed a serious criminal offense and are likely to commit additional crimes and thereby constitute a public danger if they were to be released, or who have indicated a desire or intention of committing a serious criminal act even if the prerequisite of a previous criminal act is not established.

Persons who are not professional or habitual criminals but whose antisocial behavior constitutes a public danger.

Persons who refuse to identify, or falsely identify themselves, if it is concluded that they are trying to hide previous criminal acts or attempting to commit new criminal acts under a new name.

Normally, police preventive arrest is to be used against these persons if it is concluded that the more mild measure of systematic police surveillance will unlikely be successful.

*Id.* (translating WERNER BEST, DER DEUTSCHE POLIZEI 31–33 (1940)).

52. The Gestapo was the Nazi secret state police force. *Id.*

53. The Kripo was the Nazi criminal police force. *Id.*

54. One of the first concentration camps to be established was Dachau Concentration Camp. Located in the Munich suburbs, this camp mainly housed political prisoners during the entirety of the Nazi period. *See* BAZYLER, *supra* note 25, at 6 n.9 (“Dachau housed approximately 200,000 prisoners from over thirty countries, one-third of them Jews. At least 32,000 died of starvation, disease, and the gruesome medical experiments conducted on the prisoners. After its liberation in April 1945, Dachau became the site of the first trial of German perpetrators held under American military command.”).

55. *Arrest Without Warrant*, *supra* note 50.

The German judiciary did not balk at this, but rather, generally supported it. On March 19, 1933, the Federation of Judges' governing board issued the following statement:

[We approve of] the will of the new government to put an end to the immense suffering of the German people [and will cooperate in the] task of national reconstruction . . . . May German law hold sway in German domains! German judges have always been loyal to the nation and aware of their responsibility . . . . German judges place their full confidence in the new government.<sup>56</sup>

There were many reasons for the judiciary's support of the Reichstag Fire Decree and the expansion of police power. One reason was that the justices and other members of the judiciary saw these as legitimate governmental actions in response to significant threats to governmental stability and security. Justices of the Supreme Court and other judges generally supported action against people thought to be left-wing radicals—such as Communists—who posed a perceived threat to the safety and security of Germany and threatened the government's stability.<sup>57</sup> In other words, the judicial branch saw this as a legitimate and necessary exercise of the police power in response to threats against national security.<sup>58</sup>

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56. MÜLLER, *supra* note 8, at 37. Not all German judges were so optimistic about the future under a Nazi government. Karl Linz, chair of the German Federation of Judges, stated in his 1933 New Year's message that "all signs point to new attacks and new struggles to maintain the rule of law and an independent legal system." *Id.* at 36. He said he was concerned about signs that suggested that the new government might "plac[e] in question the security of judges' tenure in office and the independence of the courts." *Id.* However, by April—perhaps seeing the writing on the wall—Linz made a statement in support of Hitler: "We have placed everything in his hands with complete confidence. The chancellor was clearly in agreement with our remarks and assured us that he would continue to maintain the independence of judges, even though certain measures would be necessary." *Id.* at 37. Linz made this statement in order to calm concerns following the civil service decree mandating removal of all Jewish, Social Democrats, and other "politically unreliable" judges from office. *Id.* He had apparently obtained assurances from Hitler about protection of judicial independence and was also assured that "[w]e may . . . rest assured that the regulations contained in the law on the civil service will be dropped again as soon as possible." *Id.*

57. See *Arrest Without Warrant*, *supra* note 50 (showing the judiciary's approval of the "Nazi leadership's decisive action against left-wing radicals").

58. The significance of the Reichstag Fire should not be underestimated in creating mass fear and panic in Germany. The Reichstag was the center of the German government—the seat of the National government—and burning it by arson was a clear act of terrorism against the state. People—including judges and other members of the legal profession—were shaken and fearful of what might happen next. They were worried about their own personal safety as well as the safety and security of their government. Thus, the Reichstag Fire is a significant event in the buildup of Nazi power. It

Another reason the Supreme Court failed to object to the Reichstag Fire Decree and the simultaneous expansion of police power may have been due to the justices' desire to protect the court's docket. The Supreme Court was the trial court in cases of treason and it was overwhelmed with cases; the justices foresaw that, very quickly, many hundreds of cases would have built up on the docket.<sup>59</sup>

As a consequence of the freedom given to the police to arrest and detain people deemed "dangerous to the security of the Reich," a dual system of justice was established.<sup>60</sup> The police could arrest anyone they wanted to and then decide how they would classify the crime. Dissidents could be sent directly to concentration camps by the police with no judicial review; cases involving other crimes could be sent to the courts and prosecuted through the traditional process.<sup>61</sup>

Then on March 24, 1933—a month after the Reichstag Fire—the Law to Remedy the Distress of the People and the Reich (the Enabling Act) was enacted by the legislature, expanding the power to decree law, including laws that deviated from the Constitution, to the Chancellor (Hitler).<sup>62</sup> This gave

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simultaneously provided the perception of legitimacy to the use of a brutal and discretionary police power and silenced any would-be objectors in the name of national security and the safety of the people of Germany. See *The Reichstag Fire*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/the-reichstag-fire> [<https://perma.cc/NZA9-4WZQ>] ("[The coalition government] exploited the Reichstag fire to secure President von Hindenburg's approval for an emergency decree . . . . Popularly known as the Reichstag Fire Decree, the regulations suspended the right to assembly, freedom of speech, freedom of the press, and other constitutional protections, including all restraints on police investigations."); see also *supra* notes 47–49 and accompanying text.

59. See *Arrest Without Warrant*, *supra* note 50 ("[T]he Supreme Court had been the court of first instance for treason cases since the Imperial period but, by the 1930s, it was overburdened with such trials . . .").

60. *Id.*

61. *Id.*

62. Ermächtigungsgesetz [The Enabling Act], Mar. 23, 1933, REICHSGESETZBLATT [RGBL. I] at 141 (Ger.), *translation at* <https://encyclopedia.ushmm.org/content/en/article/the-enabling-act> [<https://perma.cc/GD36-BERS>]. The text of the Law to Remedy the Distress of the People and the Reich decreed:

The Reichstag has enacted the following law, which has the agreement of the Reichsrat and meets the requirements for a constitutional amendment, which is hereby announced:

Article 1

In addition to the procedure prescribed by the Constitution, laws of the Reich may also be enacted by the Reich Government. This includes laws as referred to by Articles 85, Sentence 2, and Article 87 of the Constitution.

Hitler the opportunity to reframe the legal system by decree. Hitler tapped Hans Frank to design and build a legal system that would not only tolerate the Nazi agenda, but help advance it.<sup>63</sup>

#### A. *Hans Frank and the Development of the Nazi Legal Regime*

The foundation for Hans Frank's central role as the architect of the Nazi legal system was laid when he answered a newspaper advertisement in 1927—a mere three years after receiving his Doctorate of Laws degree<sup>64</sup>—to provide *pro bono* representation for Nazi storm troopers who were accused of violent crimes.<sup>65</sup> As a member of Germany's cultural elite, Hans Frank had just recently accepted an appointment as an Assistant

##### Article 2

Laws enacted by the Reich Government may deviate from the Constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat. The rights of the President remain undisturbed.

##### Article 3

Laws enacted by the Reich Government shall be issued by the Chancellor and announced in the *Reichsgesetzblatt*. They shall take effect on the day following the announcement, unless they prescribe a different date. Articles 68 to 77 of the Constitution do not apply to laws enacted by the Reich Government.

##### Article 4

Reich treaties with foreign states that affect matters of Reich legislation shall not require the approval of the bodies concerned with legislation. The Reich Government shall issue the regulations required for the execution of such treaties.

##### Article 5

This law takes effect with the day of its proclamation. It loses force on April 1, 1937, or if the present Reich Government is replaced by another.

Berlin, March 24, 1933[.]

*Id.*

63. See PIOTROWSKI, *supra* note 8, at 17–18 (outlining Frank's career path within the NSDAP). Then, on August 2, 1934, President Hindenburg died, and Hitler took over the power of both the chancellor and presidential offices. After that, he was able to execute his agenda through the legal system with ease. *Id.* at 18.

64. See Aitken, *supra* note 28, at 53 (stating Hans Frank received his law degree in 1924).

65. JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 20 (1995); WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 140 (1960); Aitken, *supra* note 28, at 53.

Professor at the Technical University of Munich (Munich's polytechnic school) and was looking for ways to become more active in the Nazi Party.<sup>66</sup>

Hitler took notice of Frank's effectiveness in getting short sentences for the storm troopers and invited Frank to come to work for the party to represent party members accused of crimes. Between 1927 and 1930, there were over 40,000 cases involving Nazi storm troopers and other party members who were accused of inciting or committing violent and non-violent criminal acts.<sup>67</sup> Frank was involved in representing Nazi defendants in at least 2,400 of these cases.<sup>68</sup>

In one such case in 1930, Frank represented three German Army lieutenants in the Leipzig Reichswahr trial in Germany's Supreme Court.<sup>69</sup> The three defendants were accused of "preparing to commit high treason" by trying to persuade other officers to refrain from resisting an armed Nazi revolt.<sup>70</sup> Frank called Hitler as a witness for the defense. This gave Hitler an opportunity to publicly state that the Nazis did not intend to use force to establish power and to explain that his earlier statement that "heads will roll" was meant as hyperbole and not as a literal threat.<sup>71</sup> Although the three defendants were found guilty, they received light sentences, a successful outcome that reinforced Frank's reputation as the premier Nazi lawyer.<sup>72</sup> In addition, Frank had been able to provide a platform for the dissemination of powerful propaganda about Hitler's intentions that assuaged public concerns about a violent take-over of the government.

66. Aitken, *supra* note 28, at 53.

67. *Id.* at 54.

68. *Id.*

69. *Id.*

70. *Id.*

71. See PIOTROWSKI, *supra* note 8, at 18 ("Hitler fraudulently swore that he would seek power only by legal paths."); Aitken, *supra* note 28, at 54. According to Aitken's biography of Frank, Hitler testified as follows:

Our movement has no need of force. The time will come when the German nation will get to know of our ideas; then 35 million Germans will stand behind me . . . . When we do possess constitutional rights, then we will form the State in the manner which we consider to be the right one [by constitutional means].

*Id.* This testimony did not comport with the reality of the violent means being employed on a regular basis by Nazi SS and SA officers. In 1930–1931 alone, there were 1,184 documented cases of Nazi violence, in which sixty-two people were killed and 3,209 were injured. In addition, forty-two meetings were disrupted, twenty-six attacks on trade union headquarters took place, and numerous cemeteries were desecrated. MÜLLER, *supra* note 8, at 20–21. There were numerous other clues to the intended use of violence in the Nazi take-over and control of the government. *Id.*

72. See Aitken, *supra* note 28, at 54 (describing the defendants' sentences as "mild").

As a result of Frank's success in representing Nazis accused of crimes and his enthusiasm for the party platform, Hitler hired Frank as his personal lawyer and appointed him to be the leader of the legal arm of the Nazi regime.<sup>73</sup> In this role, Frank would become responsible for organizing the legal profession and reforming the legal system to replace what Frank termed "a law Byzantine in origin and partly Jewish in spirit" with one that would facilitate the achievement of the Nazi Party's racist social goals.<sup>74</sup>

In 1928, Frank established the first organization for Nazi lawyers, the BNSDJ, and in 1930—at the age of thirty—he was elected to the Reichstag.<sup>75</sup> Then, in 1933, after Hitler was appointed Chancellor, Frank's yeoman's work in reforming the legal system began in earnest. He was appointed the Bavarian Minister of Justice and Reich Commissioner. In this position, he established the German Legal Front (the *Rechtsfront*), which was the organized Bar of Germany, and the Academy of German Law, which was the organization charged with implementing Article 19 of the party platform<sup>76</sup> by establishing a Nazi legal system.<sup>77</sup> Through these two organizations, Frank controlled the legal profession and the legal system.

During his career, Hans Frank received other prestigious appointments, including Reich Law Leader, Reich Minister of Justice without Portfolio, and President of the Academy of German Law. In 1939, he was appointed as the Governor General of Poland, where he ordered the execution of hundreds of thousands of Polish people, confiscated Polish property on behalf of the Third Reich, and transported hundreds of thousands of Polish people to Germany as slave labor.<sup>78</sup> For these acts, Frank was convicted at

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73. *Id.*

74. PIOTROWSKI, *supra* note 8, at 18.

75. Aitken, *supra* note 28, at 54.

76. *Id.* Article 19 stated: "We demand that Roman Law, which serves a materialistic World Order, be replaced by German Law." *Id.*

77. PIOTROWSKI, *supra* note 8, at 18; Aitken, *supra* note 28, at 54–55. Frank would become the President of the Academy of German Law in 1939. PIOTROWSKI, *supra* note 8, at 19.

78. Aitken, *supra* note 28, at 56–57. On March 4, 1940, Frank wrote in his diary:

I am responsible for what has happened since 11 October 1939, no matter what happened, how it happened or by whom it was done. I bear the responsibility and I am not passing it on to anybody. And because of this I also want to stress that this responsibility can be borne. If there were here and there events which were, let us say, regrettable from the point of view of humanity in general, we must accept the responsibility all the more.

*Id.* at 56. Then, on October 7, 1940, Frank wrote in his diary about a speech he had given in which he said:

Nuremberg of war crimes and crimes against humanity, sentenced to death, and executed.

Described later as “a man of exceptional ambition with an exaggerated idea of his own ability and importance,” a twenty-year-old Frank had written in his diary that he “would like to become the future head of the German nation.”<sup>79</sup> He eagerly applied this ambition to his work in reforming the legal system, aiming at every opportunity to elevate himself to more powerful positions and status, but doing so in the name of Hitler and the Nazi Party.<sup>80</sup>

Frank established two primary strategies to bring the Nazi legal system within the complete control of the Reich: *purging* the legal profession and *coordinating* the legal system. Each of these strategies will be considered below.

### B. *Purging the Legal Profession*

Soon after the BNSDJ took over the German Bar in 1933, laws designed to “purge” the legal profession were declared.<sup>81</sup> On April 7, 1933, the Law on the Admission to the Legal Profession prohibited the admission of Jews and others to the Bar and effectuated the disbarment of most Jewish, Social

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At the current level of rations some 1,200,000 Jews had been expected to die of hunger. We must obliterate the Jews. We cannot kill them with poison. But some way or other we will achieve their extermination. My dear comrades! . . . I could not eliminate all lice and Jews in only one year. But in the course of time, and if you help me, this end will be attained.

*Id.* at 57. Although Frank remained in the Governor General position until he was captured by Allied forces and tried at Nuremberg, his relationship with Adolf Hitler became strained when he began to make public statements favoring the rule of law in an effort to assuage public resistance to the use of terrorist tactics by the police. In addition, he was sharply criticized for the lavish lifestyle he lived in Poland. *Id.* For example, he was accused of using government funds to purchase a large number of furs, which he and his family would wear or give away as gifts. He also had stockpiled luxury goods like eggs, tea, coffee, chocolate, and alcohol, and he was accused of taking art pieces from churches and from Jewish people who had been dispossessed of their homes and property. *Id.* He was removed from all positions relating to the legal system, but he was forced to stay in Poland despite his strong and repeatedly expressed preference to return to Bavaria. *Id.* at 58. He submitted his resignation from the Governor General position several times, but each time it was rejected by Hitler and he was ordered to remain in Poland in his position. *Id.* at 49.

79. PIOTROWSKI, *supra* note 8, at 20. Frank kept a detailed diary for most of his life. He believed it to be a valuable document from a historical perspective and turned it over to the Nuremberg tribunal in 1945.

80. *Id.* at 21–23.

81. Willig, *supra* note 13, at 4.



Democrat, and Communist lawyers.<sup>82</sup> On the same day, the Law for Restoration of the Professional Civil Service mandated removal of all Jewish, Social Democrat, or other “politically unreliable” judges, public prosecutors, and district attorneys from their positions.<sup>83</sup> Additionally, Jewish and politically progressive members of law faculties were dismissed and replaced with Nazi-sympathetic faculty members.<sup>84</sup>

Additionally, women lawyers—whose numbers had grown in the years before 1933 due to expanded educational opportunities for women in the Weimar Republic—were fired from government jobs. Thereafter, women’s entry into the profession was strictly limited through a rigid quota system that limited their opportunities for legal education as well as their job prospects following admission to the Bar.<sup>85</sup>

Laws or policies were also established that prevented Jewish and other disbarred lawyers from obtaining other jobs related to the law. They were not allowed to serve as notaries, work as legal assistants or office managers in law firms, or teach or tutor law students (or any other students).<sup>86</sup> They

82. *Id.* at 5. At the time of the first purge (1933), Jewish lawyers made up 16% of the practicing bar. MÜLLER, *supra* note 8, at 62. Jewish lawyers who were WWI veterans were not disbarred under the 1933 law, but their practices were limited. *Id.* In some cities, such as Berlin, many of the Jewish lawyers were WWI veterans and therefore were not disbarred until a subsequent 1938 law effected the disbarment of all remaining Jewish lawyers (approximately 1,753 lawyers). *Id.* After 1938, only a few Jewish lawyers were permitted to continue practicing as Jewish Legal Advisors, and their practices were limited to representing Jewish clients in certain types of cases. *Id.*

83. Gesetz zur Wiederherstellung des Berufsbeamtentums [Law for the Restoration of the Professional Civil Service], Apr. 7, 1933, REICHSGESETZBLATT [RGBl I] at 188 (Ger.), *translation at United States v. Alstötter, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS: “THE JUSTICE CASE” 164–65 (1951) [hereinafter TRIALS OF WAR CRIMINALS]*. This law effectuated the removal of 643 Jewish judges in Prussia alone. Only one Supreme Court Justice was dismissed pursuant to this law: Hermann Grossman, who was a Social Democrat. MÜLLER, *supra* note 8, at 37.

84. See James Wilford Garner, *The Nazi Proscription of German Professors of International Law*, 33 AM. J. INT’L L. 112, 113–14 (1939) (tracing the removal of “non-Aryan” international law professors from the German universities). One commentator observed: “The result of the Nazi ‘purge’ has been . . . to denude the German universities of the great majority of the professors of international law . . . whose reputations extended beyond the frontiers of Germany.” *Id.* at 118. The April 7, 1933 decree also barred Jews from being teachers at any school and from being doctors at public hospitals. In addition, a decree issued within a month also established a quota of 1.5% of “non-Aryan” students at universities, and also shortly after the April 7 decree, mass rallies took place at which books by Jewish authors were burned. See generally BAZYLER, *supra* note 25, at 8 (“These laws also banned Jews from being professors at public universities, teachers in public classrooms, and doctors at state medical institutions.”).

85. Willig, *supra* note 13, at 5–6.

86. See MÜLLER, *supra* note 8, at 62–63.

were effectively purged not only from the legal profession but also from employment in any capacity in Germany.

The German judiciary mounted almost no resistance to these actions. Although Karl Linz, Chair of the German Federation of Judges, had expressed earlier in 1933 that he had concerns about the job security of judges, those concerns were quickly assuaged. Hitler met with Linz on the same day the Law for the Restoration of the Professional Civil Service was issued. Following the meeting, Linz stated that “[w]e may . . . rest assured that the regulations contained in the law on the civil service will be dropped again as soon as possible,” and that he had received assurances from Hitler that judicial independence would be maintained.<sup>87</sup>

By April 21, 1933—just two weeks after the purging laws had been issued—the Association of Prussian Judges and Public Prosecutors<sup>88</sup> issued a statement calling on its members “to enter the front line of Adolf Hitler’s ranks and join the Federation of National Socialist Jurists, for unconditional solidarity is a necessity for the success of our struggle.”<sup>89</sup> Soon thereafter, other state organizations followed suit. By the end of May, the German Federation of Judges—the national organization—sent a letter to Hans Frank, by then *Reichsjuristenführer* (Leader of the Jurists of the Reich), saying that it would join the Federation of National Socialist Judges.<sup>90</sup>

In accordance with the April 7, 1933 purging laws, all lawyers and judges were required to fill out a questionnaire that traced their blood heritage and required them to disclose all their political affiliations and beliefs. Those who did not “pass” these tests were asked to resign. The SA soon began to engage in torture and humiliation tactics to force out Jewish lawyers and judges who had not resigned.<sup>91</sup>

In one instance, Dr. Michael Seigel, a Jewish lawyer, went to police headquarters on behalf of his client, a Jewish storeowner in Munich who had been taken to Dachau Concentration Camp for so-called “protective custody.” When Dr. Seigel objected to his client’s detention and requested his released, Dr. Seigel was escorted to a room where he was beaten so badly

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87. *Id.* at 37.

88. The largest state organization of judges and prosecutors.

89. MÜLLER, *supra* note 8, at 38.

90. *Id.*

91. *See I Will Never Again Complain to the Police*, YAD VASHEM, [https://www.yadvashem.org/YV/en/exhibitions/our\\_collections/siegel/index.asp](https://www.yadvashem.org/YV/en/exhibitions/our_collections/siegel/index.asp) [<https://perma.cc/QJ26-RGS4>] (detailing how a Jewish lawyer was beaten then publicly humiliated for going to the police in an attempt to advocate for one of his Jewish clients).

that “several teeth [were] knocked out and his eardrum was perforated.”<sup>92</sup> The SA then cut off the legs of his pants and placed a sign around his neck with the words, “I am a Jew but I will never again complain to the police.”<sup>93</sup> He was forced to walk around the streets of Munich, ending at the main train station, where the SA officers lifted their rifles at Dr. Seigel and told him he would be killed. Instead of killing him, they laughed and left him there.<sup>94</sup>

Nazi-controlled state bar associations began to develop new rules of professional conduct that were designed to prevent Jewish attorneys from practicing. For example:

The Bar association of Berlin declared that establishing or maintaining a law firm with partners of both “Aryan” and “non-Aryan” descent was unethical. The Bar Association of Düsseldorf decreed that it was a violation of professional standards for anyone to take over the practice of an attorney whose membership in a bar association had been revoked, to employ former “non-Aryan” attorneys, or to take over their clients. It concluded with the sweeping statement: “Every professional contact with disbarred, non-Aryan attorneys is a violation of standards.”<sup>95</sup>

In a further effort to intimidate and force out Jewish attorneys, the Federation of National Socialist German Jurists released a list of thirty “Aryan” litigants who, in the words of the newspaper that published the list, “possessed the audacity to engage Jewish attorneys,” including the file numbers of their cases and the names of their attorneys.<sup>96</sup>

The process of purging the legal profession had a powerfully negative impact on the legal system and the administration of justice. As Ingo Müller wrote:

Justice as an ideal disappeared from Germany with the “elimination” (the most popular word in legal writings of those twelve years) of the Jewish, socialist, and democratic members of the legal profession, who made up one

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92. *Id.*

93. *Id.*

94. Dr. Seigel later emigrated to Peru, where he lived until his death in 1979 at the age of ninety-seven. *Id.* After WWII, he returned to Munich every year where he renewed his Bar membership and maintained a good relationship with the Bar. He always considered himself a German and a German lawyer.

95. MÜLLER, *supra* note 8, at 61 (footnotes omitted).

96. *Id.*

fifth of the total number and were the group at which Hitler's attacks were chiefly aimed. What remained was a mutilated and perverted sense of justice, characterized . . . by glorification of power, brutalization of the climate of opinion, and inhumanity . . . which shared Hitler's aversion to all "legal mindedness."<sup>97</sup>

The process of purging the legal profession advanced the Nazi goal of subversion of the legal system but did not complete it. Once all the Jewish lawyers and judges and all those with political ties opposing the Nazis had been forced out of participating in the legal system, the remaining judges and lawyers were then retrained and instructed to implement the Nazi agenda through a strategy of "coordination" of the legal system.

### C. *Coordination of the Legal System*

As Jewish lawyers were being excluded—by law, policy, and practice—from the legal profession, the profession was being transformed away from an independent, self-regulating one to one controlled by the government. In February 1934, the Law for the Transfer of the Administration of Justice to the Reich shifted control of the Bar and the legal system to the Reich in Berlin, giving the Reich Ministry of Justice the power to issue all rules and regulations related to the legal system.<sup>98</sup> In 1936, the statute establishing an independent Bar was rescinded and replaced by the National Lawyer's Code, which mandated compliance with Nazi Party doctrine.<sup>99</sup>

Following the purge of lawyers and judges, the German Federation of Judges stated its main task as "the cooperation of all judges in the revision of German law . . . Free of all shackles, . . . judges must remain beyond the reach of the spirit of trade unionism and narrow professionalism."<sup>100</sup> Not only were judges expected to fall in line; lawyers too were expected to coordinate their thinking with that of the Reich. The Reich Ministry of

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97. *Id.* at 296.

98. TRIALS OF WAR CRIMINALS, *supra* note 83, at 167–68. Before this, lower court judges had been appointed by the various state governments, and German Supreme Court justices were appointed by the President. Judges had guaranteed life tenure and could only be removed through disciplinary action. Under the new regime, judges would no longer have life tenure and they would be appointed by Nazi officials. See Friedrich Roetter, *The Impact of Nazi Law*, 1945 WIS. L. REV. 516, 536–38 (1945) (discussing the changes to the German civil service profession during Hitler's tenure and the Nazi Party's reign).

99. Willig, *supra* note 13, at 6.

100. MÜLLER, *supra* note 8, at 38.

Justice instructed lawyers to “march as an army corps of the Fuehrer.”<sup>101</sup> German judges and lawyers alike were required to take an oath of loyalty to Hitler. The oath was as follows: “I swear I will be true and obedient to the Führer of the German Reich and the people, Adolf Hitler, observe the law, and conscientiously fulfill the duties of my office, so help me God.”<sup>102</sup>

Hitler’s vision for the legal system was one turned on its head, where lawyers’ professional obligations were shifted from client to state and in which the applicable law was whatever he wanted it to be. Hitler made it clear that a lawyer was to be “a person representing the state, like the judge,” and Reich Justice Minister Otto Thierack wrote that “the position of the attorney in the legal life of Germany will have to have an entirely different orientation in the future, . . . toward the state.”<sup>103</sup> The impact of this shift in professional obligation would eliminate the independence of the profession and bring it within the absolute control of the Reich.

Thus, the process of coordinating the profession—lawyers and judges alike—became the process of converting all of the legal profession to one with “unanimity of aim.”<sup>104</sup> Ingo Müller explained:

Developed by German legal scholars, it was explained by Heinrich Henkel, a professor of criminal law, as follows: “By freeing ourselves from the notion of parties [to a lawsuit], we free ourselves from the liberal notion of a trial as a conflict of aims, an unleashing of a struggle to find the truth, which by its very nature as a conflict between two parties makes finding the truth difficult. We thus become free to set against the liberal system of opposing forces a new order, in which the participants have a unanimity of aim.” In the view of the prominent right-wing defense attorney Dr. Alfons Sack, judges, public prosecutors, and defense attorneys should be “comrades on the legal front . . . fighting together to preserve the law . . . . The coordination of their tasks must guarantee their practical cooperation and comradeship . . . . Just as the new trial no longer represents a conflict between the interests of an individual and the state, now the legal participants should regard their tasks

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101. TRIALS OF WAR CRIMINALS, *supra* note 83, at 98.

102. *Oaths of Loyalty for all State Officials*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/oaths-of-loyalty-for-all-state-officials> [<https://perma.cc/Q39A-JACL>]. This was the loyalty oath for all state officials. Only one German judge—Martin Gauger—is on record as refusing to take the oath and instead resigning. Ashley G. Stollar, *28th Annual Bar Media & Judiciary Conference*, 24 GA. B.J. 24, 27 (2019). In a letter to his brother, he wrote that he believed Hitler had violated the law and that the oath amounted to giving Hitler a blank check to exert his will. *Id.*

103. MÜLLER, *supra* note 8, at 64.

104. *Id.*

no longer as opposed to one another, but rather as a joint effort infused with a spirit of mutual trust.”<sup>105</sup>

The new rules of professional ethics established by the Bar mandated an ethical duty of all lawyers to show unwavering support for Hitler and his policies in both professional and personal contexts. These rules would be enforced by a new Court of Honor, which operated under the authority of the German Supreme Court as the final arbiter of professional conduct and discipline.<sup>106</sup> Lawyers were penalized, and even disbarred, if they deviated from loyalty to the Nazi agenda in their personal or professional lives. For example, one lawyer was disciplined for refusing to return the Nazi salute in court on the grounds that the lawyer's failure to salute diminished the public's confidence in the legal system.<sup>107</sup> Another attorney was disbarred because she was treated by a physician whom she knew to be Jewish.<sup>108</sup> Another attorney was disbarred for refusing to vote in the 1936 Reichstag election as a protest against Gestapo practices.<sup>109</sup> Another attorney was disbarred for voting “no” in the referendum regarding the annexation of Austria.<sup>110</sup> Another attorney was disbarred because “she was seen playing chess and drinking coffee with a fellow tenant who was known to be Jewish.”<sup>111</sup>

The 1933 Law on Requirements for Continued Admission to the Bar included provisions that would require an attorney to be disbarred if the attorney “had been active in a Communist sense.”<sup>112</sup> While it was unclear what “active in a Communist sense” meant exactly, it was clear that an attorney who even attempted to represent a client might be reprimanded for doing so or even disbarred; some attorneys who had represented Communists or Social Democrats were disciplined or disbarred.<sup>113</sup>

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105. *Id.* (footnotes omitted).

106. *Id.* at 65.

107. *Id.* at 66.

108. *Id.*

109. *Id.*

110. *Id.*

111. Willig, *supra* note 13, at 8.

112. MÜLLER, *supra* note 8, at 65.

113. Examples abound in which lawyers were disciplined or brought up on disciplinary charges because of who they represented or how they conducted the representation. One attorney was brought before the disciplinary court on grounds that he was “active in a Communist sense” because he agreed to represent his Catholic friend's son who had been arrested for protesting against the Hitler Youth. Roetter, *supra* note 98, at 543. The attorney disciplinary authority concluded that he had “abandoned the common front of the party” by betraying his obligation to oppose “political Catholicism.” *Id.* He

Eventually, an administrative interpretation of the provision was issued that said—in equally vague terminology—that an attorney’s representation of Communists constituted being “active in a Communist sense” only “if this is justified by the particular circumstances, in particular the frequency of such defense or representation, the manner in which it is conducted, or the circumstances in which the case was taken on.”<sup>114</sup> Predictably, this ended all but the most superficial representations of people accused of political crimes and led to attorneys actually speaking out *against* their clients in court. For example, in the trial of General Erich Hoepner, who was accused of participating in the July 20, 1944 plot to assassinate Hitler,<sup>115</sup> the attorney representing Hoepner stated in open court that he was horrified by his client’s actions and he asked the court to sentence his client to death.<sup>116</sup>

Ensuring the shift in legal perspective also included coordinating the training of new lawyers in law school. After the 1933 purge of academics, new academics sympathetic to the Nazi doctrine were appointed by the Nazi leadership.<sup>117</sup> Legal academics were told “to extol the Führer as a figure of light and a hero who is leading the German soul out of the depths into the light, showing it the safe path to Valhalla.”<sup>118</sup> In addition, all new law students were required to pass physical tests as well as academic ones. They

successfully defended himself by saying that he only agreed to represent the boy to gain his confidence so he would reveal who else was involved, thus enabling the lawyer to turn over to police the names of the others who were involved in the protest. *Id.*

114. MÜLLER, *supra* note 8, at 65. Another lawyer was sharply criticized by the Reich Minister of Justice because he “mention[ed] a speech by one of the Czech defendants in one breath with a speech by the Fuehrer [which] was—no matter how it was meant—outrageous. Such a thing cannot be excused as an ‘awkward mistake.’ Lack of instinct is a feature of one’s character.” TRIALS OF WAR CRIMINALS, *supra* note 83, at 566. The lawyer’s mistake had been that he read an excerpt from his client’s pro-German speech to demonstrate that the client was actually pro-Nazi, and while reading, the lawyer paused and noted “I could almost believe I hear my Fuehrer speak.” *Id.* at 558.

115. Known to Americans as the Valkyrie Plot, after the 2008 film starring Tom Cruise.

116. MÜLLER, *supra* note 8, at 64. Not surprisingly, Hoepner was convicted and executed. Another well documented example is in the famous White Rose trial of Sophie and Hans Scholl, two University of Munich students accused of having distributed leaflets critical of the Nazis. Jacob G. Hornberger, *Holocaust Resistance: The White Rose—A Lesson in Dissent*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/the-white-rose-a-lesson-in-dissent> [https://perma.cc/7XB4-Q3CE]. The court-appointed defense lawyer summed up his defense of the accused as follows: “I can only say *fiat justitia*. Let justice be done.” *Id.* By this, he undoubtedly meant that the defendants deserved a harsh punishment. The court sentenced the three defendants to death, and they were beheaded within 24 hours of the court’s sentence. *Id.*

117. Most of these newly-appointed law professors would remain in their academic appointments until the 1960s.

118. MÜLLER, *supra* note 8, at 70.

were also required to have spent time working for the Reich labor service, and they must have served in the student sections of the SS or an equivalent organization.<sup>119</sup> Once they graduated, all new lawyers were subjected to a probationary period in which their loyalty to the Nazi legal system would be scrutinized.<sup>120</sup>

Furthermore, Frank said in a speech to German judges:

Formerly we were in the habit of saying: 'This is right or wrong.' Today we must ask the question: 'What would the Führer say?' We are under the great obligation of recognizing as a holy work of our Folk Spirit the laws signed by Adolf Hitler. Hitler has received his authority from God.<sup>121</sup>

## V. CONTROL OF THE LEGAL SYSTEM—1939–1945

By 1939, the Nazis had near-complete control over the legal profession and the legal system. The lawyer's duty was no longer to the client, but to serve and further the interests of the Reich. Attorneys, like judges and prosecutors, had recited an oath of loyalty to Hitler.<sup>122</sup> Earlier, in 1934, Hitler had established an entirely new special court system—the People's Court (*Volksgerichtshof*)—that operated outside of the already existing constitutional German court system.<sup>123</sup> This court was staffed by Nazi

119. See Lippman, *supra* note 35, at 279 (explaining the various requirements the National Socialists set forth for new law students seeking to obtain legal certification).

120. *Id.* at 279–80.

121. ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 79 (Carroll & Graf Publishers ed. 1984).

122. The oath was as follows: "to remain loyal to the Fuehrer of the German Reich and people, Adolf Hitler, and to fulfill conscientiously the duties of a German attorney, so help me God." Roetter, *supra* note 98, at 542.

123. See Manfred Dauster, *The German Court System in Combatting State Security Matters, in Particular Terrorism*, 42 S. ILL. U. L.J. 31, 36 (2017) ("At a certain point in the Nazi terror regime, the People's Court (Volksgerichtshof) assumed jurisdiction on state security matters.") This illegitimate court was created in response to the German Supreme Court's acquittal of some of the codefendants in the Reichstag Fire case. *Id.* Since cases of treason were tried before the Supreme Court, the trial of the Reichstag Fire defendants was held in the Supreme Court. *Reichstag Fire Trial*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/film/reichstag-fire-trial> [<https://perma.cc/QVZ3-LBT1>]. Marinus van der Lubbe, a Communist dissident, was the primary defendant and was convicted and executed for the crime. *Id.* The death penalty was imposed pursuant to the Law for the Imposition and Implementation of the Death Penalty, issued on March 29, 1933, an *ex post facto* law enacted specifically to change the sentence in Van der Lubbe's case. *Id.* The codefendants, however, were acquitted. *Id.* This angered Hitler and, in response, he created the new People's Court. *Law and Justice in the Third Reich*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/law-and-justice-in-the-third-reich> [<https://perma.cc/E6MP-ZSJB>].



judges under the complete control of the Reich and given jurisdiction over cases involving political crimes. The People's Court, under Nazi Judge Roland Freisler, who was President of the court between August 20, 1942 until his death on February 3, 1945,<sup>124</sup> conducted show trials and sentenced thousands of people to death between 1934 and 1945, including members of the White Rose anti-Nazi resistance movement<sup>125</sup> and the July 20, 1944 Plot (also known as Valkyrie) defendants.<sup>126</sup>

The Nazi goal in implementing Article 19<sup>127</sup> of the Nazi Party platform meant new legal doctrine would have to be established and implemented as well. As one legal academic explained: "Almost all the principles, concepts, and distinctions of our law up to now are stamped with the spirit of the Enlightenment, and they therefore require reshaping on the basis of a new kind of thought and experience."<sup>128</sup>

The legal standard to apply in every case was "sound popular judgment" (*gesundes Volksempfinden*),<sup>129</sup> under which the judge was required to prioritize the good of the community over the individual. In Hitler's own words, "[o]ur judiciary must, first and foremost, serve the preservation of the Volk community . . . . Not the individual, but the *Volk* must be the focus of legal concern."<sup>130</sup>

124. Freisler was killed when an Allied bomb hit the courthouse while he was holding court. TRIALS OF WAR CRIMINALS, *supra* note 83, at 94.

125. The White Rose was formed by a group of German university students who created and distributed leaflets promoting Nazi resistance. *The White Rose*, HOLOCAUST EDUC. & ARCHIVE RES. TEAM, <http://www.holocaustresearchproject.org/revolt/whiterose.html> [https://perma.cc/BFN9-JZRV]. Members of the White Rose were tried for and convicted of treason in the People's Court. *Id.* A few hours after their convictions, they were executed by guillotine. *Id.*

126. The Valkyrie Plot consisted of a failed assassination attempt against Hitler. *Failed Hitler Assassins to Get Day in Court*, DAILY CHRONICLES WORLD WAR II (Aug. 7, 1944), <https://ww2days.com/failed-hitler-assassins-to-get-day-in-court.html> [https://perma.cc/3M3V-425H]. The trials were held in the People's Court, where the defendants were sentenced to death and immediately hanged. *Id.*

127. "We demand that Roman Law, which serves a materialistic World Order, be replaced by German Law." Aitken, *supra* note 28, at 54.

128. MÜLLER, *supra* note 8, at 71.

129. WILLIAM F. MEINECKE, JR. & ALEXANDRA ZAPRUDER, LAW, JUSTICE, AND THE HOLOCAUST 35 (Kathryn Grunder ed., 2009), <http://ohiojudges.org/Document.aspx?DocGuid=743061ff-af1e-45e1-a8a4-f140cc7219a1> [https://perma.cc/FVT3-89DV].

130. Robert D. Rachlin, *Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror*, in THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE 63, 65 (Alan E. Steinweis & Robert D. Rachlin eds., 2013). "Volk" is a German word that means "people" or "community."

As a practical matter, the actual test for “sound popular judgment” was “the Führer’s will,” and this concept became known as the “Führer Principle.” In 1936, Hans Frank instructed judges that the bedrock principle of Nazi jurisprudence was as follows: “Say to yourselves at every decision which you make: ‘How would the Fuehrer decide in my place?’ In every decision ask yourselves, ‘Is this decision compatible with the National Socialist conscience of the German people?’”<sup>131</sup> Roland Freisler, President of the illegitimate Nazi People’s Court, said: “Whether the judgment is sound must be tested against the standards and guidelines that the Führer himself has repeatedly given to the people . . . in important questions affecting the life of the people.”<sup>132</sup> Judge and State Secretary Dr. Wilhelm Stuckart said that “[t]hose actions of judges that seek to limit the political decisions of the Führer and ultimately obstruct them are in direct opposition to the central legal conception of the National Socialist state, namely the Führer Principle.”<sup>133</sup> Reich Justice Carl Rothenberger described the Führer Principle as follows:

[W]ith the Fuehrer a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge—first of all, of course, as ‘judge’ over their fate in general, but also as ‘supreme magistrate and judge.’ . . . The judge is on principle bound by the law. The laws are the orders of the Fuehrer (Adolf Hitler).<sup>134</sup>

Thus, it became the duty of the judge in every case to discern what Hitler would decide in that particular situation. If the judge got it wrong, there were provisions whereby final judgments could be corrected, and if the judge got it wrong too many times, the judge would be removed. In this way, Hitler exercised complete control over the outcomes of individual cases. Security Police would supervise judges’ decisions and report back to

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131. SHIRER, *supra* note 65, at 268; Aitken, *supra* note 28, at 55.

132. MEINECKE & ZAPRUDER, *supra* note 129, at 59.

133. *Id.* at 75. Stuckart was so committed to Nazi doctrine that he signed the Reporting Obligations of Deformed Newborns decree, which provided the basis of the Nazi’s program of euthanizing children with congenital disorders, and which led to the euthanization of his own one-year-old son who was born with Down Syndrome. Hans-Christian Jasch, *Civil Service Lawyers and the Holocaust: The Case of Wilhelm Stuckart*, in *THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE*, *supra* note 128, at 53.

134. TRIALS OF WAR CRIMINALS, *supra* note 83, at 1012–14.

Reich authorities—and ultimately Hitler—if any questionable judgments or lenient sentences were issued.<sup>135</sup>

If Hitler disagreed with the outcome of a particular case, he would order the judgment to be changed. An example is the case of Markus Luftgas, who had been convicted of hoarding eggs and sentenced to two-and-one-half years in prison.<sup>136</sup> In its opinion convicting State Secretary in the Reich Justice Ministry Franz Schlegelberger<sup>137</sup> of war crimes and crimes against humanity, the United States Military Tribunal wrote: “On 25 October 1941, Lammers notified Schlegelberger: ‘The Fuehrer wishes that Luftgas be sentenced to death.’ On 29 October 1941, Schlegelberger wrote Lammers: ‘I have handed over to the Gestapo for the purpose of execution the Jew Markus Luftgas . . . .’”<sup>138</sup>

On October 1, 1942, in an act that further restricted—if not completely eliminated—the independence of the judiciary, Reich Minister of Justice Otto Thierack sent the first in a series of letters to the German judges.<sup>139</sup> The letter provided sentencing guidelines and instructed judges to closely follow Nazi ideology when sentencing, including providing harsher sentences to Jewish people and members of other disfavored groups.<sup>140</sup> Judges were admonished that their failure to correctly impose harsh sentences would result in the sentence being changed and could carry harsh penalties for the judges themselves; judges were threatened with removal from office, disciplinary sanctions or disbarment, and even criminal

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135. Lippman, *supra* note 35, at 273.

136. TRIALS OF WAR CRIMINALS, *supra* note 83, at 1016–17.

137. Schlegelberger, the highest-ranking defendant in the Nuremberg Judges Trial, was found guilty of war crimes and crimes against humanity and sentenced to life in prison. *Id.* at 1202. The Nuremberg Military Tribunal’s opinion stated: “Schlegelberger supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence.” *Id.* at 1083. In 1950, seventy-four-year-old Schlegelberger was released from prison due to his advancing age. He died twenty years later, in 1970, at the age of ninety-four.

138. *Id.* at 1016–17.

139. *First Letter to All Judges*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/first-letter-to-all-judges> [<https://perma.cc/H6MW-V9YR>]. The letters were classified as state secrets because of an SS determination that it was important the public not know that the courts were being deprived of their independence. *Id.* The SS report stated “[t]he people want an independent judge. The administration of justice and the state would lose all legitimacy if the people believed judges had to decide in a particular way.” *Id.*

140. *Id.*

charges.<sup>141</sup> In response to edicts to revise sentences, Justice Ministry Secretary Franz Schlegelberger wrote to Hitler as follows:

I entirely agree with your demand, my Fuehrer, for very severe punishment for criminals [Verbrechertum], and I assure you that the judges have honest will to comply with your demand. Constant instructions in order to strengthen them in this intention and the increase of threats of legal punishment have resulted in a considerable decrease of the number of sentences to which objections have been made from this point of view, out of a total annual number of more than 300,000. I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures as before.<sup>142</sup>

Beginning in 1944, the right to counsel, even in death penalty cases, was discretionary with the judge hearing the case.<sup>143</sup> Furthermore, even if counsel was permitted or appointed, the defense lawyer's ability to represent the client was very limited.<sup>144</sup> In order to undertake a representation, the lawyer would have to get the permission of the Ministry of Justice, the BNSDJ, and the court's president (who could withdraw consent at any point, including during trial, for any reason, including for putting on an actual defense).<sup>145</sup> The prosecutor controlled whether and when the defense lawyer could speak to the client and to witnesses as well as what evidence could be used by the defense.<sup>146</sup> In addition, and perhaps most fatal to any pretense of representation of the accused, the defense lawyer could not make any arguments that might be interpreted as being critical of the state; to do so would mean removal from the proceedings, likely disbarment, and possible criminal charges against the lawyer.<sup>147</sup> Moreover, if a client testified untruthfully, as determined by the judge, or made "slandorous" statements, including statements that were capable of being interpreted as critical of the Reich, the lawyer could be subject to criminal liability as an accomplice to the crime with which the client was

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141. Although there are no documented cases where these penalties were actually imposed, a law was adopted that provided the authority to remove judges from office. *Id.*

142. TRIALS OF WAR CRIMINALS, *supra* note 83, at 421 (quoting Letter from Franz Schlegelberger, Justice Ministry Secretary, to Adolf Hitler (Mar. 24, 1942)).

143. *Id.* at 211.

144. *See supra* notes 114–17 and accompanying text.

145. Willig, *supra* note 13, at 9.

146. *Id.*

147. *Id.*

charged.<sup>148</sup> For these reasons, attorneys became very hesitant to represent anyone charged with crimes.

Lawyers attempting to represent clients in civil suits were subject to similar hardships. Kenneth Willig described an example:

Puender was a prominent Berlin attorney who acted as the legal advisor to the Swedish Embassy. In 1935 he was approached by the widow of Minister-director Klausener, whose husband had been killed by the SS in the Roehm purge of June 30, 1934. Frau Klausener wanted Puender to represent her in a civil suit against an insurance company which refused to pay her an annuity on the grounds that officially her husband was listed as having committed suicide and therefore to pay her claim would constitute an attack on the government for murder.

Puender, after ascertaining the facts and gathering sufficient evidence to disprove the suicide theory, agreed to accept the case. Pursuant to the statute which regulated this type of civil suit, he approached the Interior Ministry and formally requested permission to begin litigation as well as the assurance that neither he nor his client would be prosecuted if the suit were entered. The Under-Secretary at the Ministry told him not to worry and sue. Puender, however, making doubly sure of his ground went to the Justice Ministry and received the same assurances from no less a Nazi luminary than Roland Freisler (Under-Secretary in the Justice Ministry and future president of the People's Court) who said if any difficulty arose the case would automatically be referred to the Interior Ministry "*Spruchkammer*,"<sup>149</sup> as had previously been done with similar suits arising from the Roehm murders. Puender armed with these guarantees sued and was immediately arrested by the *Gestapo*, charged with slander and unprofessional conduct, and whisked off to a concentration camp where he remained until it was agreed to "voluntarily" drop the suit.<sup>150</sup>

Meanwhile, numerous laws in Germany and in other countries occupied by the Nazis were decreed and enacted which created a web of laws designed to instill fear and legalize brutality. Very few legal scholars at the time produced scholarship analyzing this myriad of laws designed to legalize the Nazi regime's reign of terror. The work of one scholar who did pay contemporaneous attention—Raphael Lemkin<sup>151</sup>—was described as follows:

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148. *Id.*

149. This was the equivalent of a special trial court.

150. Willig, *supra* note 13, at 10–11.

151. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944).

Here's a lawyer who looks at this horror and tries to understand it as a system of law. His key insight was that occupation, not just in Poland but right across Europe, had inverted the whole tradition of European jurisprudence. So, that you have these incredible insane decrees. Food distribution, for example, in Poland, is entirely racialized. You get food depending on your racial category. Jews get almost no food at all. Other examples: marriage law in occupied Holland was organized on racial grounds. Germans responsible for getting Dutch women pregnant were not punished, as would be the case in any normal code of military justice or honor. They were rewarded because the resulting child would be a Nordic Aryan addition to the master race. Lemkin was the first scholar to notice the insanity of this kind of jurisprudence, to understand its unremitting racial bias, and to see that the extermination of groups that he begins to pick up evidence of is not an accidental or incidental cruelty of occupation, but the very essence of the whole program.<sup>152</sup>

One such law was the Decree Against Public Enemies (the Folk Pest Law).<sup>153</sup> This decree dramatically expanded the availability of the death

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152. BAZYLER, *supra* note 25, at 19 (quoting Michael Ignatieff, Transcript of "The Legacy of Raphael Lemkin," Lecture at U.S. Holocaust Museum, Dec. 13, 2000). Bazylar points out the dearth of research and documentation of laws and legal systems in German-occupied territories between 1939 and 1945, *id.*, and notes the following sources that do: DOCUMENTS ON THE HOLOCAUST (Yitzhak Arad, Yisrael Gutman, & Abraham Margalot eds., 8th ed. 1999) (compiling accounts of destruction in Poland, Austria, and the Soviet Union); RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (1996) (describing Nazi occupation of France); J.N.M.E. MICHIELSEN, THE "NAZIFICATION" AND "DENAZIFICATION" OF THE COURTS IN BELGIUM, LUXEMBOURG AND THE NETHERLANDS (2004) (outlining destruction in Belgium, Luxembourg, and The Netherlands). See BAZYLER, *supra* note 23, at 18–20 n.32–36.

153. Volksschädlingsverordnung [Folk Pest Law], Sept. 5, 1939, Reichsgesetzblatt [RGBL I] at 1679 (Ger.), *translation at* <https://encyclopedia.ushmm.org/content/en/article/decreed-against-public-enemies> [<https://perma.cc/E9N4-KECY>]. This law was enacted in 1939, just four days after Germany invaded Poland, an act that marked the beginning of World War II. The title of this law in German was *Volksschädlingsverordnung*, translated as "public enemy regulation" or "people pest regulation," and was known as the Folk Pest Law. The full text of the decree is as follows:

The Ministerial Council for the Defense of the Reich decrees with the force of law:

1. Plunder in Evacuated Areas

1. Who plunders in evacuated areas or in voluntarily evacuated buildings or rooms will be punished with death.
2. The decision will be made, insofar as the Summary Military Courts do not have jurisdiction, by the Special Courts.
3. The death penalty can be carried out by hanging.

penalty for even minor crimes, and was used to justify the imposition of over 15,000 death sentences between 1941 and 1945 for crimes ranging from violation of the Nuremberg Race Laws<sup>154</sup> to crimes involving food hoarding<sup>155</sup> or petty theft.<sup>156</sup>

Specifically, the law called for the death penalty if the circumstances of the crime exploited the conditions of war and “sound popular judgment”

2. Crimes during Air Raids

Who commits a crime against the body, life, or property of a person using measures enacted in the defense against air raids in furtherance of the crime will be punished with penitentiary up to 15 years or with life in penitentiary and, in especially grievous cases, with death.

3. Crimes Endangering the Community

Who commits arson or other crimes endangering the community and thereby damages the ability of the German people to engage in national defense will be punished with death.

4. Use of Conditions of War as Grounds to Increase Criminal Penalties

Anyone who commits a crime using the special circumstances induced by the condition of war will be punished, overstepping the normal legal penalties, with penitentiary of up to 15 years, with life in prison, or with death in accordance with the requirements of sound popular judgment [gesundes Volksempfinden] or the need to especially repudiate the criminal act.

5. Simplification of the Procedure Used in the Special Court

In all proceedings before the Special Court the sentence must be carried out immediately, without respect to the usual time limits, in cases where the perpetrator was caught in the act or where guilt is otherwise readily apparent.

6. Areas of Jurisdiction

The provisions of this ordinance apply in the Protectorate of Bohemia and Moravia and also to persons who do not hold German citizenship.

7. Final Provisions

The Reich Minister of Justice will decree all the legal and administrative measures required for the implementation of this ordinance.

Berlin, September 5, 1939[.]

*Id.*

154. See TRIALS OF WAR CRIMINALS, *supra* note 83, at 86 (“[Lehmann] Katzenberger was indicted before the Nuernberg district court for so-called ‘racial pollution,’ having being accused of sexual relations with . . . an Aryan woman . . . . There were no witnesses to or other evidence of the accused act. Since an acquittal of the Jew was unthinkable . . . Katzenberger was remanded to the Nuernberg Special Court, tried as a ‘public enemy,’ sentenced to death, and executed.”).

155. See *id.* at 1016–17 (explaining how “the Jew Luftgas” was originally given a two-and-one-half year imprisonment sentence for hoarding eggs, but later, his sentence was changed to death).

156. See *infra* text accompanying notes 160–79.

suggested the need for a harsh penalty to send a message.<sup>157</sup> This decree provided the Nazis a mechanism to enforce Hitler's seemingly unquenchable desire for more death sentences and enabled the courts to maintain a pretense of independence because the judges had the ostensible power to exercise broad discretion to determine when to sentence people to death.

In reality, the judges lacked any real discretion. The Justice Ministry had admonished them that they were expected to hand down harsh sentences, especially in cases involving Jewish defendants.<sup>158</sup> Thierack's *First Letter to All Judges* specifically addressed the Folk Pest Law. In explaining the need for liberal use of the death penalty—and providing specific examples—in circumstances falling within the Folk Pest Law, Thierack wrote:

Those in the administration of justice must recognize that it is their job to destroy traitors and saboteurs on the home front. . . . The home front is responsible for maintaining peace, quiet, and order as support for the war front. This heavy responsibility falls especially to German judges. Every punishment is fundamentally more important in war than in peace.<sup>159</sup>

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157. *First Letter to All Judges*, *supra* note 139.

158. See *supra* text accompanying notes 137–40.

159. *First Letter to All Judges*, *supra* note 139. The full text of the first letter is as follows:

First Letter to All Judges (Guidelines for Sentencing)

October 1, 1942

Pests (*Volksschädlinge*), especially blackout criminals

Judgments of various courts from the years 1941–1942

1. Shortly after his hiring in the winter of 1941–1942, a 19-year-old worker who was employed on the Reich railway since 1941 exploited the blackout and stole from the baggage car of a long-distance train, from parked mail carts, and from packages. In total, he was involved in 21 cases [of theft]. The Special Court sentenced him as a “pest” to four years in prison.
2. At the end of 1941, a 34-year-old metalworker tried to commit a purse-snatching during a blackout. In a darkened street, he attacked a woman, ripping her purse from her arm. He was chased down and arrested. The culprit had been previously convicted six times for, among other things, larceny, physical assault, and manslaughter. He was convicted for physical assault in 1931 because he and a Communist beat up a National Socialist with a gatepost.

The Special Court classified the crime as larceny rather than mugging because the woman carried her handbag so loosely that the robber didn't have to use violence to take it. The



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court, however, did declare him a “pest” because he posed a serious threat to the community. However, the punishment was only two years in prison.

3. In early 1941, a repeat offender, a “work-shy” 29-year-old worker, tried to steal a handbag during a blackout. He had just been released from the hospital, where he had been faking an illness, and wanted to get some money. He pursued two women on a dark street and grabbed for a handbag as he passed them. He couldn’t tear it away, however, because it was tightly held. A few men came rushing when they heard a cry for help and they captured the accused. The Special Court sentenced him to death for attempted robbery as a “pest.” The court indicated at sentencing that those walking on darkened streets require special protection in order to safeguard people’s feeling of public safety.
4. At the start of 1941, an 18-year-old culprit, W., who had previously led a faultless life, exploited the blackout to commit sexual assault on the wife of a soldier at the front. After visiting a bar and returning home around midnight, he and his 19-year-old girlfriend, P., spoke with a young woman who was just returning from work. She explained to the youths that she had to leave because her husband was away at the front and that she wanted to go home. A man standing close by observed W. beat the victim repeatedly in the face without reason. He then pushed the women into a park, beating her and then raping her on a bench. He quelled her efforts at resistance by telling her he had a pistol. During the incident, P. was nowhere to be found. The Special Court sentenced W. to death for sexual assault as a “folk vermin” (*Volkschädling*). P. received a five-year prison sentence as an accomplice.

#### Official Position of the Reich Minister of Justice

At a time when the best of our people are risking their lives at the front and when the home front is tirelessly working for victory, there can be no place for criminals who destroy the will of the community. Those in the administration of justice must recognize that it is their job to destroy traitors and saboteurs on the home front. The law allows plenty of leeway in this regard. The home front is responsible for maintaining peace, quiet, and order as support for the war front. This heavy responsibility falls especially to German judges. Every punishment is fundamentally more important in war than in peace. This special fight is targeted especially against those designated by law as “pests.” Should a judge decide after conscientious examination of the criminal act and of the perpetrator’s personality that a criminal is a “pest,” then the seriousness of this determination must also be firmly expressed in the harshness of the verdict. It is a matter of course that a plunderer, who reaches for the possessions of another after a terror attack [bombing] by the enemy, deserves only death. But every other culprit who commits his crimes by exploiting the circumstances of war also sides with the enemy. His disloyal character and his declaration of war [on the German people] therefore deserve the harshest punishments. This should especially be applied to criminals who cowardly commit their crimes during blackouts. “I don’t want,” the Führer said, “a German woman to return from her place of work afraid and on the lookout so that no harm is done to her by good-for-nothings and criminals. After all, a soldier should expect that his family, his wife, and relatives are safe at home.”

The majority of German judges have recognized the immediate needs of the moment. The death sentence that the Special Court handed out to the 18-year-old assailant of the defenseless soldier’s wife, and to the “work-shy” purse-snatcher, placed the protection of the people above all other interests. There are, however, still cases in which the personal circumstances of the culprits are placed above the interests of the necessary protection of the community. This is shown in the comparison of the judgments listed above. The cunning, nighttime handbag robbery

Two cases illustrate the unequal, unpredictable, and unjust results in cases during the period: the case of Erna Wazinski and the case of Walter Meyer. Both cases involve young people charged with stealing something of little value. However, how the crime was characterized in each case had life-and-death significance.

Erna Wazinski was a nineteen-year-old woman who worked nights in an armaments factory to support herself and her widowed, ill mother.<sup>160</sup> While Erna was at work one night, a bomb hit her home where her mother was alone.<sup>161</sup> This was the fourth time her home had been bombed and this time, almost everything was destroyed.<sup>162</sup> She was required to stay at her job site for the night after the bombing, and all night she worried that her mother had been killed.<sup>163</sup> The next day, when she was cleared to leave work, she returned home and was overjoyed to find her mother had safely gotten to their neighbor's basement and was uninjured.<sup>164</sup> However, their possessions were nearly all destroyed.<sup>165</sup> With the help of a friend, she collected what she could find in the rubble, including a couple of suitcases with clothes in them.<sup>166</sup>

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perpetrated by a culprit with prior convictions and the 21 thefts committed by the 19-year-old worker were wrongly punished with four years in prison. The decisive factor [in sentencing] is not whether stealing the handbag was legally theft or robbery (which, by the way, does not depend upon whether the bag was carried tightly or loosely); it is not whether the sex offender caused a specific damage with his offense. That he cowardly and cunningly attacked a defenseless woman, and endangered the security of the darkened streets, makes him a traitor. The protection of the community, above all, requires that punishment in such cases serve as deterrence. Prevention here is always better than reparation. Every sentence given a "pest" that is too lenient sooner or later damages the community and carries in itself the danger of an epidemic of similar crimes and the gradual undermining of the military front lines. It is always better for the judge to quell such epidemics early than to stand helpless later against an infected majority. In the fourth year of his prison sentence the criminal should not get the impression that the community's fight against him is waning. On the contrary, he must always feel that German judges are fighting just as hard on the home front as the soldiers are with the foreign enemy on the military front.

*Id.*

160. COLIN PATEMAN, BEHEADED BY HITLER, CRUELTY OF THE NAZIS, JUDICIAL TERROR, AND CIVILIAN EXECUTIONS 1933–1945, at 172 (2014).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

It turned out that one of the suitcases belonged to a neighbor, and the neighbor reported Erna to the police for stealing.<sup>167</sup> The police arrested Erna, interrogated her for an extended period of time, and severely beat her.<sup>168</sup> When she emerged from the interrogation, she had noticeable wounds on her face, and she had confessed to stealing her neighbor's property.<sup>169</sup> Despite her confession, the evidence showed that she probably took the neighbor's suitcase by accident—mistaking it for hers or her mother's in the confusion of the bombed-out rubble when she was distraught at the destruction of her home and having worried all night that her mother had been killed.

Erna's sentence would turn on whether the judge decided that Erna's crime was mere theft or looting by exploiting the conditions of war. Many people wrote letters on her behalf requesting clemency, emphasizing her youth, her previously clean record, her obligation to care for her mother, and her contributions to the war effort by working in an armaments factory.

However, Erna's case seemed to fit squarely within the example provided to the judiciary in Justice Minister Thierack's *First Letter To All Judges*, in which he stated, “[i]t is a matter of course that a plunderer, who reaches for the possessions of another after a terror attack [bombing] by the enemy, deserves only death.”<sup>170</sup> Therefore, the court convicted Erna of looting and sentenced her to death, reasoning that she took advantage of the conditions of war by taking the suitcase from the bombed-out rubble. She died by beheading.<sup>171</sup>

Walter Meyer was a sixteen-year-old championship swimmer. He was also rebellious. He had dropped out of the Nazi Youth<sup>172</sup> and was known to have helped French prisoners of war by mailing letters for them, an act that was strictly forbidden. He had also pestered Nazi Youth, going so far as to vandalize and steal their bicycles.<sup>173</sup> Although the court and the prosecutor did not know it, he had also hidden a Jewish friend in his basement.<sup>174</sup>

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167. *Id.*

168. *Id.*

169. *Id.*

170. *First Letter to All Judges*, *supra* note 139.

171. PATEMAN, *supra* note 160, at 172.

172. WALTER MEYER, TOMORROW WILL BE BETTER: SURVIVING NAZI GERMANY 15 (Matt Valentine ed., 1999).

173. *Id.*

174. *Id.* at 30.

Walter was in his town's commercial center one day shortly after a bomb hit a shoe store, sending shoes flying into the street.<sup>175</sup> He picked up two shoes that he thought were very nice, and he took them as a gift to a girl. She noticed the shoes were both for the same foot and got suspicious. She called the police, who promptly determined that the shoes had been stolen. Walter was arrested.

The prosecutor charged Walter with looting under the Folk Pest Law and sought the death penalty.<sup>176</sup> Walter had a lawyer, but the lawyer could not mount much of a defense because of the risk that any defense would seem to be a criticism of the state. An argument that Walter had been overcharged or improperly charged would be seen as a violation of the lawyer's oath not to criticize the state and would lead to disciplinary and possibly even criminal action against the lawyer.<sup>177</sup> Walter's lawyer had no safe grounds on which to challenge the prosecution or defend his client.

In Walter's case, the prosecution urged the judge to sentence Walter to death not only because Walter had stolen the shoes in circumstances that exploited the conditions of war, but also because Walter had been involved in other improper activities that suggested that Walter should be classified as an enemy of the state, such as fraternizing with the enemy (the French POWs), quitting the Hitler Youth, and stealing from the Hitler Youth.

However, the judge found Walter guilty of mere theft instead of looting, partially because of Walter's young age, his outstanding involvement in athletics, and the reputations of his father (who had won an Iron Cross during World War I) and his grandfather.<sup>178</sup> Walter was not sentenced to death, but instead was sentenced to one to four years in prison and sent to Ravensbrück Concentration Camp.<sup>179</sup>

Erna's and Walter's cases demonstrate the courts' dramatically different results on very similar facts and applying the very same law: the

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175. *Id.* at 13.

176. *Id.* at 38.

177. *See supra* notes 134–46 and accompanying text.

178. MEYER, *supra* note 172, at 28.

179. While at Ravensbrück, Walter "contracted tuberculosis and decided to escape before he was killed. Under cover of heavy fog, he reached a farmhouse. The farmer gave him his son's army uniform and helped him board a train home to Düsseldorf. Walter recovered after hospitalization, and later moved to the United States." *Walter Meyer Describes His 1943 Trial for Looting, and the Impact of His Role in the Edelweiss Pirates on the Sentence He Received*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/oral-history/walter-meyer-describes-his-1943-trial-for-looting-and-the-impact-of-his-role-in-the-edelweiss-pirates-on-the-sentence-he-received> [https://perma.cc/NPS6-7QF6].

Folk Pest Law. This lack of predictability created a climate of terror in which the law was unfixed and arbitrary; people worried that the simplest mistake would lead to their torture and death. This arbitrary and chaotic exercise of power ungrounded in established legal standards is the very antithesis of the Rule of Law.

#### VI. COMPLICITY IN THE PERVERSION OF JUSTICE

The incremental steps used by the Nazis to gain control of the German legal system—beginning as early as 1920 when the Nazi Party adopted a party platform that included a plan for a new legal system based on “racism as a new guiding principle of social life”<sup>180</sup>—turned the legal system on its head, creating an elaborate facade of laws, but at the same time destroying the Rule of Law. The law was applied in a despotic and chaotic way, leaving people without any protection from a violent, totalitarian government.

By failing to uphold the integrity and independence of the profession during the Third Reich, lawyers permitted the subversion of the basic lawyer–client relationship, the abrogation of the lawyer’s role as an advocate, and the elimination of judicial independence. The basic lawyer–client relationship was disrupted and then eliminated. Lawyers could not advocate on behalf of their clients. Basic ethical duties such as loyalty and confidentiality were superseded by the imposition of a duty to uphold and promote the Nazi regime and “sound popular judgment.” Lawyers and judges did not individually or collectively maintain the integrity of the profession as one that promotes justice and the Rule of Law.

The failing of the legal profession began with a willing ignorance on the part of the legal profession of the evil being promulgated by the Nazi Party, or worse, with a knowing tolerance or even embrace of its racist vision. Once the legal system had been subverted—forced into line through purging and coordination—it was too late for the legal profession to fulfill its responsibility to promote the just administration of law and resist the atrocities that resulted from the implementation of that racist vision. By that point, the profession had become complicit in destroying the Rule of Law in the Third Reich.

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180. Loewenstein, *supra* note 26, at 780.

*Post Scriptum*

*My purpose in writing this Article was to highlight what can happen when people—especially lawyers—do not speak up and actively resist injustice in the legal system. As this Article goes to print in the early summer of 2020, the need to speak out against persistent racial injustice in the United States has been amplified by recent killings of several African Americans, including George Floyd and Breonna Taylor, and the sometimes violent governmental responses to protests sparked by these deaths. I began this Article with the words of Dr. Martin Luther King, Jr. and now conclude with the words of Justice Thurgood Marshall: “where you see wrong or inequality or injustice, speak out, because this is your country. This is your democracy—make it—protect it—pass it on.”<sup>181</sup>*

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181. *Alumni Work to Create Thurgood Marshall Professorship*, UVA LAW. (Fall 2014), <https://www.law.virginia.edu/static/uvalawyer/html/alumni/uvalawyer/f04/marshall.htm> [<https://perma.cc/L9X5-L8QX>] (excerpting the commencement address Justice Thurgood Marshall delivered to the University of Virginia School of Law on May 21, 1978).