

**Image and Incitement:  
The Harlan, Hippler, and Rupprecht cases in postwar Germany,  
1945-1951**

**Bild und Anstiftung:  
Die Harlan, Hippler, und Rupprecht Verfahren in Nachkriegsdeutschland  
1945-51**

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## Abstrakt

Diese Dissertation untersucht die rechtliche Anwendbarkeit einer strafrechtlichen Anklage wegen Anstiftung durch Bilderzeugnisse von ihrer ersten Erwähnung am Internationalen Militärgerichtshof (IMT) anhand der Fälle Streicher und Fritzsche in der Zeit nach dem Zweiten Weltkrieg. Da keiner der Angeklagten weder beim IMT noch beim NMT (Nürnberger Militärtribunale, 1946-9) speziell wegen Volksverhetzung durch Bild- und Filmerzeugnisse angeklagt wurde, blieb es eine offene Frage, ob hasserfüllte und aufhetzende Bilder den gleichen Stellenwert hatten wie die Aufstachelung durch gedruckte oder gesprochene Worte. Die Alliierten stellten diese rechtliche Verbindung nie her. Die deutschen Spruchkammern und die Justiz der Nachkriegszeit während des Entnazifizierungsprozesses taten es jedoch, um Mitglieder und Vermittler des ehemaligen nationalsozialistischen Regimes zu identifizieren und zu bestrafen. Diese Bemühungen wurden durch rechtliche, historische, politische, soziale und praktische Faktoren beeinträchtigt: Die verschiedenen Verfahren warfen die Frage der Hetze (gegen Juden und andere) in den Fällen gegen die Filmregisseure Veit Harlan und Fritz Hippler und gegen Julius Streichers Karikaturisten Philipp Rupprecht auf. Diese drei Ermittlungen stellen die einzigen Fälle dar, in denen eine Anstiftung durch das Bild in Betracht gezogen wurde. Die Vereinigten Staaten haben die rechtliche Natur der Aufhetzung ausführlich untersucht – auf analoge Weise, die dem deutschen Nachkriegsrecht zugute gekommen sein könnte, als es darum kämpfte, sich mit dem Erbe des Nationalsozialismus auseinanderzusetzen – aber nur die Deutschen selbst versuchten, die Verantwortung auf diejenigen auszudehnen, die Deutschland von 1933-45 mit antisemitischen Bildern überfluteten. Die gleichen Bilder durchdringen heute das Internet und schüren immer noch Hass, sowohl nationale als auch internationale Rechtssysteme befinden sich heute immer noch an der gleichen Stelle wie in den Jahren unmittelbar nach dem Zweiten Weltkrieg.

“The government of the Federal Republic, in the belief that many have subjectively atoned for a guilt that was not heavy, is determined where it appears acceptable to do so, to put the past behind us.”

Konrad Adenauer, 20 September 1949<sup>1</sup>

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<sup>1</sup> *Verhandlung des Deutschen Bundestages*, vol. 1, WP., 5 Sitzung vom 20.9.49 (Berlin: DeGruyter, 1949), p. 27.



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## Note on Sources and the Lack of Sources

While ample archival material on Veit Harlan, Philipp Rupprecht, and Fritz Hippler should exist, it does not.

Hippler and Rupprecht have files at the Staatsarchiv München, but Hippler's is fragmentary. Records of his initial detention in British custody and their referral of him to the Spruchkammer should exist in the British National Archives at Kew, but not so. The missing files are a mystery I have not been able to solve.<sup>2</sup>

Other than Rupprecht's file in München, his postwar life also has no paper trail at any of the above-cited institutions. The United States Army interned him for two years, which makes it even more curious that they retain no official bureaucratic memory of it.

Harlan's substantial file is at the Staatsarchiv Hamburg but he, too, is absent from British records entirely (although he was, like Hippler, in British custody).

The postwar proceedings against three have left no trace in the records of the United States Holocaust Memorial Museum or the Simon Wiesenthal Center, other than notable examples of Rupprecht's work (USMHM has an impressive collection of it) and collateral references to his wartime output.

I am deeply indebted to the kindness and professionalism of the archivists at all these institutions. Even when the results were negative, they gave valuable suggestions for where other material might be found and went beyond the call to help me find it. There is no substitute for a truly great archivist.

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<sup>2</sup> There is a brief Hippler file at the Institut für Zeitgeschichte, Mc 31 / 1, covering court activities in 1948.

## Abbreviations

BA	Bundesarchiv
BDC	Berlin Document Center
BDM	Bund Deutsche Mädel (League of German Girls)
BRD	Bundesrepublik Deutschland
BVerfG	Bundesverfassungsgericht
DM	Deutsche Mark
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IfZ	Institut für Zeitgeschichte
IMT	International Military Tribunal
KPD	Kommunistische Partei Deutschlands
MVP	Ministerium für Volksaufklärung und Propaganda
NA	US National Archives
NMT	Nuremberg Military Tribunals
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei
NS-Zeit	National Socialist period, 1933-45
OMGUS	Office of Military Government United States
RCM	Rules for Courts-Martial (US)
RM	Reichsmark
SA	Sturmabteilung
SD	Sicherheitsdienst
SH	Staatsarchiv Hamburg
SM	Staatsarchiv München
SN	Staatsarchiv Nürnberg

SPD	Sozialdemokratische Partei Deutschlands
SS	Schutzstaffel
StaM	Stadtarchiv München
StaN	Stadtarchiv Nürnberg
StGB	Strafgesetzbuch
StPO	Strafprozessordnung
UFA	Universum Film AG
UKNA	UK National Archive



## Illustration Credits

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8 June 2021

United States of America

Caption reads: "Jud Süß: Behead the Lernaean Hydra of Zionism"

## Chapter I: Introduction

“Nein,” sagte der Geistliche, “man muß nicht alles für wahr halten, man muß es nur für notwendig halten.” “Trübselige Meinung,” sagte K. “Die Lüge wird zur Weltordnung gemacht.”<sup>3</sup>  
- Franz Kafka, *Der Prozess*

### 1.1 Current events

One could reasonably conclude that the 21<sup>st</sup> century has become the apex of hateful and inciting speech. My own country barely survived an insurrection on January 6, 2021. The thousands of extremists who participated in the attack on the US Capitol Building were not motivated by the rich prose of Marx or Che Gueverra; they were instead the product of the modern age of information at its lowest common denominator. Except to believe that they have found (and continue to find) a spontaneous common cause, validation, and confirmation of their radical dissatisfaction with democratic society, the economy, race, ethnicity, gender, and religious belief, it is only possible to conclude that they must have been radicalized and incited by exterior means.

One culprit might be the President of the United States. Following the attack, the social media platform Twitter suspended Donald Trump for being the prime mover:

“After close review of recent Tweets from the @realDonaldTrump account and the context around them — specifically how they are being received and interpreted on and off Twitter —

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<sup>3</sup> “No,” said the priest, “you don’t need to accept everything as true, you only have to accept it as necessary.” “A melancholy conclusion,” said K. “The lie made into the rule of the world.” *Der Prozess* (Berlin: Verlag die Schmiede, 1925), p. 388.

we have permanently suspended the account due to the risk of further incitement of violence.”<sup>4</sup>

He was then impeached by the US House of Representatives – the Constitutional remedy to remove a sitting President from office – for “Incitement of insurrection.” The articles of impeachment state that, “Thus incited by President Trump, members of the crowd he had addressed, in an attempt to, among other objectives, interfere with the Joint Session's solemn constitutional duty to certify the results of the 2020 Presidential election, unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious acts.”<sup>5</sup>

However, this explanation is woefully incomplete. Trump did not act alone, and in many ways, he only rode the wave of existing online hatred. He used it, but this stripe of incitement has its provenance as far back as the Renaissance and increasing rapidly after the Gutenberg press with moveable type made mass-distribution of text combined with images feasible.<sup>6</sup> Our contemporary methods of incitement exist in forms that require no particular intellect or education to comprehend and inhabit a space untouched by critical reasoning. Amplified by near-instantaneous transmission through Twitter, Facebook, 4chan, 8chan, Truth Social, Reddit, and other platforms, this hatred speaks to the audience in the form of memes, graphic art,

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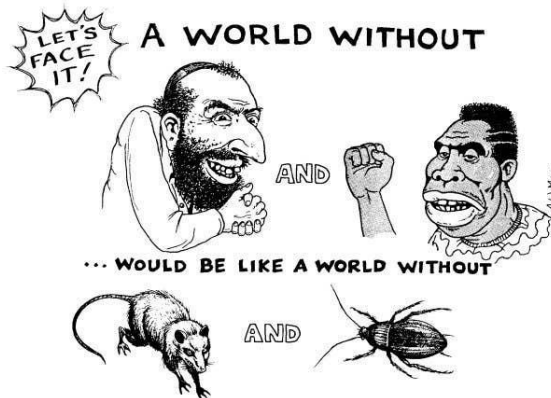
<sup>4</sup> [https://blog.twitter.com/en\\_us/topics/company/2020/suspension.html](https://blog.twitter.com/en_us/topics/company/2020/suspension.html)

<sup>5</sup> [https://web.archive.org/web/20210202154003/https://judiciary.house.gov/uploadedfiles/house\\_trial\\_brief\\_final.pdf](https://web.archive.org/web/20210202154003/https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf). Trump was found not guilty in a trial in the Senate, where the Republican Party controlled the vote.

<sup>6</sup> [https://www.huffpost.com/entry/five-stages-of-anti-semit\\_b\\_6707728](https://www.huffpost.com/entry/five-stages-of-anti-semit_b_6707728)

video clips, and is growing at an exponential rate.<sup>7</sup> The number of people thus reached easily in the tens of millions, almost certainly more.<sup>8</sup> All too many of the slogans and caricatures are quite familiar; they come directly from the antisemitic National Socialist newspapers, publications, and films from the middle of the 1920s through the end of the Third Reich.<sup>9</sup> That is, incitement by the art and motion pictures of Nazi Germany.<sup>10</sup>

### Incitement by other means



<sup>7</sup> This process is facilitated by targeted algorithms, which aim to increase engagement with extreme content and thus monetizing that practice for the social media platforms. The US intelligence community concluded that the Russian GRU, through its Internet Research Agency, intervened in the American election process by creating content that was then pushed to users along ideological fault lines to further increase the likelihood that Trump would be elected in 2016. One social media platform, “Gab,” that presents overly antisemitic material, has recently become noteworthy in 2022 when Arizona Republican candidates sought and received its endorsement. Gab’s founder, Andrew Torba, has said, among other equally vile things that, “We’re building a parallel Christian society because we are fed up and done with the Judeo-Bolshevik one.”

<https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2016/item/1635-joint-dhs-and-odni-election-security-statement> and <https://www.azmirror.com/2022/07/28/mark-finchem-and-wendy-rogers-are-honored-to-be-endorsed-by-gab-founder-a-prominent-antisemite/>

As the GRU understands, images and memes are more effective means of incitement than words.

<sup>8</sup> The US Department of Justice sponsored a study of this issue: Phyllis B. Gerstenfeld, Diana R. Grant, Chau-Pu Chiang, “Hate Online: A Content Analysis of Extremist Internet Sites,” *Journal Analyses of Social Issues and Public Policy*, Volume: 3 Issue: 1 NCJ Number 205179 (2003), pp. 29-44.

<sup>9</sup> <https://www.adl.org/education/references/hate-symbols/pepe-the-frog>

<sup>10</sup> The literature on the use of Nazi symbols connected to the January 6<sup>th</sup> insurrection and to extremist groups generally is both extensive and growing. Both the Anti-Defamation League and the Southern Poverty Law Center maintain the most current list, one that is growing. <https://www.adl.org/resources/hate-symbols/search> and <https://www.splcenter.org/fighting-hate/intelligence-report/2006/look-racist-skinhead-symbols-and-tattoos> Some insurrectionists at the Capitol wore shirts reading “Camp Auschwitz” and “Work makes you free” while others used swastikas in a variety of forms. [https://worldisraelnews.com/anti-semitic-symbols-and-invective-openly-displayed-during-pro-trump-mobs-assault-on-capitol-hill/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=anti-semitic-symbols-and-invective-openly-displayed-during-pro-trump-mobs-a](https://worldisraelnews.com/anti-semitic-symbols-and-invective-openly-displayed-during-pro-trump-mobs-assault-on-capitol-hill/?utm_source=rss&utm_medium=rss&utm_campaign=anti-semitic-symbols-and-invective-openly-displayed-during-pro-trump-mobs-a) There are likewise many websites that offer merchandise emblazoned with slogans and images of NS films and Der Stürmer’s antisemitic images. I shall not cite them here.

The *Nahimana, et al.* case<sup>11</sup>, decided by the International Criminal Tribunal for Rwanda in 2003, was rightfully considered a triumph in furthering the concept in international criminal law that incitement speech is an essential component of crimes against humanity. By using their words and the media (primarily radio), the defendants planned, announced, directed, and facilitated the killing of vast numbers of civilians and were the essential link between a desire to kill and the killing itself. Without their conspiracy and coordination of many diverse elements of mass-murder, the crimes could not have reached the extreme lethal results that they did.

*Nahimana* showcased systemic hate speech as the key ingredient in mass atrocity, and followed upon the trail blazed in 1945, when the victorious allies agreed upon the London Charter as the legal framework for trying National Socialist officials for four separate offenses.

The most significant of these, crimes against humanity, contained within it the idea – then untested - that persecution manifested as inciting speech fueled the Holocaust. It focused on what seemed self-evident: that more than a decade of vile, public antisemitism laid the foundation for the physical elimination of Jews within and without the boundaries of the Third Reich. Tens of thousands of ordinary people were involved in various aspects of extermination, therefore words must have helped condition the German people to tolerate or accept the genocidal plan; it had to have molded the listeners to act accordingly, to kill and facilitate killing. This self-evident logic drove the Charter for the International Military Tribunal to criminalize incitement and at the trial, to feature defendant Julius Streicher as the personification for evil, a spewer of hatred, and a cheerleader for annihilation.

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<sup>11</sup> *Nahimana et al. (Media case) (ICTR-99-52)*

Streicher was convicted of crimes against humanity for his persuasive, hateful words, translated into action by others. However, his co-defendant Hans Fritzsche, a senior official in the Reich radio propaganda office, was acquitted, despite the prosecution using much of the same evidence. But there were significant differences; Streicher employed hate images along with hate speech, whereas Fritzsche used only his voice; Streicher was viewed as a prime mover whereas Fritzsche worked at the behest of Joseph Goebbels' Propaganda Ministry. Streicher, then, might have the requisite criminal intent and Fritzsche the natural defense of being a mere order-follower under duress. The truth is much more nuanced.

Left unanswered at the IMT is the legal treatment of an inchoate offense – an illegal attempt to mature a criminal act, regardless of whether the act is accomplished. In ordinary criminal law, for example, an attempt to commit a robbery is a stand-alone, inchoate offense. This understanding is enshrined in the Genocide Convention, the Statute of the International Criminal Court, and numerous other public and legal declarations but remains an often opaque charge subject to the same difficult definition of intent as the completed crime of incitement itself, with the difference being drawn in law between someone who wanted to incite and someone who actually did so.

Following immediately after the IMT, the Americans convened the Nuremberg Military Tribunals. One of those cases featured the former Reich press chief, Otto Dietrich.<sup>12</sup> Like Streicher and Fritzsche, he was accused (and convicted) of crimes against humanity predicated on his words or words written by others but with the important distinction that he never directly called for violence against Jews or other enemies of the Reich. His guilt lay more in supervisory

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<sup>12</sup> *United States of America vs. Ernst von Weizsäcker, et al., U.S. Military Tribunal IV, Case No. 11, 1948-1949*



responsibility and as facilitator, given his role as chief of all newspapers in the Reich. In that function, he allowed and encouraged Streicher and other publishers to generate hatred of Jews and groups whose existence was considered inimical to the Reich. Dietrich said that he had no idea of the reason behind those directives or what Hitler's end goal might be. Like Fritzsche, the question became one of deciding whether Dietrich was the proponent of incitement or a cog in the machine.

## **1.2 Stochastic terrorism: incitement in the modern age**

Recently, another term has entered the English-speaking lexicon: stochastic terrorism. Succinctly defined, the stochastic terrorist is the person who uses mass media to broadcast memes that incite unstable people to commit violent acts.<sup>13</sup> One or more unstable people respond to the incitement by becoming a lone wolf and committing a violent act. While their action may have been statistically predictable (e.g., "given the provocation, someone will probably do such-and-such"), the specific person and the specific act are not predictable (yet).

The stochastic terrorist can hide behind plausible deniability: "It was just a lone nut, nobody could have predicted he would do that, and I'm not responsible for what people in my audience do."<sup>14</sup> This, in many ways, is an accurate picture of hateful speech and its relationship to action but only if intent is discoverable as a matter of law. Note, too, that the stochastic model has not been codified as a separate offense or been applied to government actors, although it certainly fits

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<sup>13</sup> <https://www.dictionary.com/e/what-is-stochastic-terrorism/>

<sup>14</sup> <https://www.dailykos.com/stories/2011/01/10/934890/-Stochastic-Terrorism:-Triggering-the-shooters>

several current scenarios, including most prominently, evidence of Donald Trump's incitement to insurrection. However, the formulation in international law does not require that the persecutor be a government official with state distribution mechanisms, although it certainly adds weight to the reach of the intended message. The speaker may be – and quite possibly will be – an ostensibly private citizen who has the ability to spread hateful content to a mass audience. And one who knows the power of images to influence.

No matter the station/position of the offender, the offense of inciting speech in international criminal law hinges on intent – did the speaker intend for the words and images to have an effect, and (in crimes against humanity) did that intended effect come about. Actual causation, defined as the link between an initiating event and a result, is not a necessary element to incitement (in genocide).<sup>15</sup> Rather, the law demands only that the speaker or illustrator mean that the words should have a fatal outcome, whether they did or not.

In modern genocide prosecutions, the necessary culpable intent is called *dolus specialis* – a higher standard than the normal *mens rea* – so that the speaker anticipated the specific outcome and knew that the incendiary words would facilitate it.<sup>16</sup> Walking this narrow semantic tightrope, actual causation – inciting words spoken with specific intent, the listener heard those words, and because of those words committed genocide – is not an element that prosecutors need to prove. But only in cases of genocide; Crimes Against Humanity operates under a different set of rules. The judgment in *Prosecutor v. Akayesu*, for example, said that causation was not an element of

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<sup>15</sup> <https://legaldictionary.net/causation/>

<sup>16</sup> <https://www.un.org/en/genocideprevention/genocide.shtml>

the crime while simultaneously adding that it was necessary to prove a “possible causal link” between the speech and subsequent violence.<sup>17</sup>

### **1.3 Challenges to prosecuting incitement by image**

Perhaps the most problematic aspect of *Nahimana*, leaving aside the hazy formulation of incitement, is that the underlying facts present an almost idealized situation which is unlikely to be duplicated in the future. Defendants working on behalf of the Hutu government in Rwanda or directly employed by the government, broadcast inciting messages in clear language that not only encouraged genocide but directed, coordinated, and facilitated it. In every respect but the physical killing, they provided the means, coordination, and motive by which murders took place. Records exist of what they said and when they said it, leaving no doubt of the causal connection. Further, the distribution of inciting images played no part in the Rwandan genocide, leaving unanswered what sort of standard might be crafted to incorporate that aspect of inciting or hateful speech.

And yet judges and prosecutors usually try to show causation, and the offers of proof accepted by the various national and international courts – that is, the kind of conduct which rises to the level of incitement as a crime against humanity/genocide – are wildly inconsistent; this is a problem that cannot help but grow worse as social media provides a seemingly endless proliferation of platforms for hateful and inciting speech beyond the ability of governments to regulate, even assuming they wish to do so or have the capability to sanction effectively.

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<sup>17</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), ¶ 533

But what about images? By examining only the premium cases from the ICTY and the ICTR, it might be possible to create or retroject a logical and sensible standard to recognize inciting speech when it happens but the situation is infinitely more complicated when the question concerns the degree to which art – broadly defined – crosses into persecution. This last adds new dimensions and raises new questions. Can hateful images in and of themselves be inferred as persecution or must they be accompanied by incitement in words? How can a court accurately determine the defendant's intent? What if the intent is present but there is no evidence offered to prove causation – leaving only the facts sufficient to prove an inchoate (attempted) crime but not necessarily contributing to a mass atrocity or genocide. Does persecution require causation or is it sufficient that it exists. Under which law: American, German, or international? As set forth by the Nuremberg Trials? Can persecution by image stand alone as a crime against humanity?

The focus of this study is to search for a legal pathway from Nuremberg in terms of incitement, persecution and artistic media – motion pictures and graphic illustration – as it developed in Germany immediately following World War II but based on conduct that began in the 1920s. This is valuable because the novel situation after 1945 allowed Allied and German courts to consider issues that had only just become manifest: persecution by image and how this should be interpreted against existing laws against the backdrop of the most horrific crimes in history.

#### **1.4 Why German courts?**

The domestic German cases in the five years after 1945 allow examination of more likely situations: persecution in the form of image that is less overt, where causation and intent are subjective matters of judicial and artistic interpretation, and even more deeply subjective about

the cognitive and sensory effect on the viewer. Can pictures make people kill or facilitate killing?

The perpetrators were not all direct government employees (only Fritz Hippler fits this category) but worked in concert with state objectives and financially benefitted from the antisemitic objectives that state mandated. The postwar German denazification tribunals – the Spruchkammern – were empowered to examine the defendants’ records and then classify them according to a five-part hierarchy of culpability, from major offenders to those who were innocent, a yardstick applied to the entire adult population in the American sector and in theory in the other Allied zones. The standards were informed by the verdicts at the International Military Tribunal at Nuremberg and the subsequent Nuremberg Military Tribunals but still remained separate from them. Instead, the aims of denazification went beyond punitive or custodial sentences and sought to remove former National Socialists from regaining power and influence in a Nazi-free postwar Germany. The Allies believed that the malign Nazi influence which had dominated the country for twelve years could be cleansed, and must be cleansed, in order that Germany be set upon the path of democracy.<sup>18</sup> This system also envisioned justice for the millions of victims of the National Socialist state.

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<sup>18</sup> JCS 1067 of 17 October 1945, which specified under §4: 4. Basic Objectives of Military Government in Germany:

- a. It should be brought home to the Germans that Germany's ruthless warfare and the fanatical Nazi resistance have destroyed the German economy and made chaos and suffering inevitable and that the Germans cannot escape responsibility for what they have brought upon themselves.
- b. Germany will not be occupied for the purpose of liberation but as a defeated enemy nation. Your aim is not oppression but to occupy Germany for the purpose of realizing certain important Allied objectives. In the conduct of your occupation and administration you should be just but firm and aloof. You will strongly discourage fraternization with the German officials and population.
- c. The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and

An immediate difficulty the Allies and German authorities (prior to a re-established national sovereignty) faced was finding people who could administer the new policy but had no trace of the past crimes and attitudes that the denazification program intended to expunge.<sup>19</sup> This proved difficult, if not impossible, due to the complete domination Nazi Germany had exercised over the legal profession. While there were certainly surviving opponents to the immediate political past, their numbers and skill sets were not sufficient to fully realize the practical realities of denazification. How then to structure the cleansing? The Allies also had the burden of showing impartial moral and legal legitimacy while still acting as an occupying army. Would a devastated population embrace punitive efforts from occupying powers? Would they soon take the lead to rehabilitate themselves? If so, how long would it require, and could the momentum be sustained?

The officials on the Spruchkammern had an immediate concern: to interpret what crimes they could adjudicate, what incitement meant in connection with crimes against humanity and whether clear evidence existed to convict the creators of public art – film and print – as offenders. Particularly in one case, when does the subtextual message of a movie become persecution? For

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demilitarization of Germany, with continuing control over Germany's capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.

d. Other Allied objectives are to enforce the program of reparations and restitution, to provide relief for the benefit of countries devastated by Nazi aggression, and to ensure that prisoners of war and displaced persons of the United Nations are cared for and repatriated.

[https://en.wikisource.org/wiki/JCS\\_1067](https://en.wikisource.org/wiki/JCS_1067)

<sup>19</sup> See Manfred Görtemaker and Christoph Safferling, *The Rosenberg Files – The Federal Ministry of Justice in the Nazi Era* (Federal Ministry of Justice and Consumer Protection, 2016)

[https://www.bmjv.de/SharedDocs/Publikationen/DE/Akte\\_Rosenburg\\_EN\\_Geschichtsband\\_1.pdf?\\_\\_blob=publicationFile&v=6](https://www.bmjv.de/SharedDocs/Publikationen/DE/Akte_Rosenburg_EN_Geschichtsband_1.pdf?__blob=publicationFile&v=6)

this reason, the prosecutions and denazification proceedings of directors Veit Harlan and Fritz Hippler, and antisemitic cartoonist Philipp Ruprecht, are important, although missing in the otherwise exhaustive scholarly legal studies of persecuting and inciting speech as a crime. It also highlights the struggle of German courts in the immediate postwar period to balance judicial reckoning for National Socialist crimes with both domestic priorities and the introduction into the existing legal system the necessity to prove – or not – how visual, artistic incitement contributed to the Holocaust.

Veit Harlan was probably the most famous film director in the Third Reich; he crafted the motion picture spectacular *Jud Süß*. Fritz Hippler, also a filmmaker and additionally a high official in the Propaganda Ministry, directed what is perhaps the most vicious and incendiary antisemitic images ever captured on film: *Der ewige Jude*. Philipp Ruprecht drew hundreds of memorable images that filled the pages of Julius Streicher's *Der Stürmer* and other similar publications for twenty years. Common to all three is that their offenses consisted not primarily of inciting speech but rather the more insidious inciting images. The result of their graphic art burned themselves into the minds of viewers in ways the written or spoken words could not. Ruprecht's depictions of the subhuman Jew are still popular memes on the malignant parts of the internet.

On the social assumption that people do not naturally feel an impulse to hate, denigrate, and kill, it logically follows that those attitudes are the product of both covert and overt conditioning. Something made the Einsatzgruppen killers murder their victims, the thousands of apparatchiks of the Holocaust do their assigned jobs, and the general public willing to at least tolerate their peaceful neighbors being “evacuated” to the east, where no forwarding address was necessary – because the places their bodies were buried was beyond the reach of mail. The images of

incitement carried a weight beyond any other form of antisemitic hatred perpetrated by the Nazi state. They played on the audience's mind in dark theaters, in freely available newspapers at every town square, in school curricula, the literature of *Hitler-Jugend* and BDM weekly meetings, and to members of the SS and Wehrmacht through a flood of free publications.

### **1.5 Overview of the examination**

This dissertation begins with the relevant cases of incitement and persecution at the IMT and NMT, followed by an overall look at Allied denazification policy and practice, and the subsequent transition to German subject matter jurisdiction with the Spruchkammern and Berufungskammern. It covers Julius Streicher's testimony at the IMT for the reason that all other cases of persecution by art in the Third Reich rested upon the hatred first created in the pages of *Der Stürmer*. It is important to examine what Streicher said and intended when confronted by the evidence against him. An examination of the Harlan, Hippler, and Rupprecht cases follow – with the Hippler and Rupprecht procedures allowing a more in-depth look at denazification issues. Finally, the last substantive chapter seeks to explore the utility of the American courts' definition and legal formulation of incitement – comparing it to the one created by the IMT and interpreted under §130 of the German criminal code, evaluating how courts might judge the three defendants' guilt or innocence by a American approach available to the postwar tribunals – but never used.

Persecution by image as a crime against humanity is not a quaint relic; we are guaranteed to see more instances of it and indeed, it is ascendent. With a subtle understanding of what happened in the German judicial system and how they considered the words and images of National



Socialist *Hauptschuldigen* and *Mitläufer*, the law of persecution might be strengthened in national and international criminal law in the future. Alternatively, it might continue to live in the margins of the international legal world with few prosecutions, fewer convictions, and little impact on the future commission of monstrous crimes. While the United States court system has considered incitement at length – as will be explored here – no American court has yet dealt with the specific issue of incitement by image, and whether the law is able to overcome the barriers to placing the picture in its place alongside the word as an initiator of violence.<sup>20</sup>

But German courts after World War II did. In three cases.

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<sup>20</sup> It is difficult to establish a negative but an exhaustive search on LexisNexis and Westlaw (the two primary legal research tools) produced no cases of incitement by image in either American federal or state courts.

## Chapter II: Streicher and the IMT

### 2.1 The IMT

The June 1945 London conference met to hammer out the scope of the proposed International Military Tribunal. It set the place (Nürnberg) for the trial but more importantly, it attempted to create a mechanism from among four competing legal traditions, each of which came burdened by political objectives that went far beyond objective notions of justice. Of the four counts finally agreed upon, only one had a pedigree: Conspiracy/joint-enterprise was established in Anglo-American practice but alien to the German, French, and Soviet systems. The remaining three – Crimes Against Peace, War Crimes, and Crimes Against Humanity – were entirely new and accordingly lacked the specificity which only comes from common law crimes that have been tried, examined, and applied against new situations over the course of decades. The situation was further complicated by the specifications of each charge. While they mostly contained established legal language familiar to practitioners, the sum of it was entirely new.

Further, there were no fixed rules of evidence – the cornerstone of any trial – other than the court was empowered to consider anything it deemed relevant, essentially no standard at all.<sup>21</sup> The IMT judges could, and did, consider thousands of affidavits without requiring the declarant be subject to cross-examination. Defendants were allowed to make either sworn or unsworn

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<sup>21</sup> “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value.” Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal, Article 19, at <https://avalon.law.yale.edu/imt/imtconst.asp>. The court did issue Rules of Procedure.

statements.<sup>22</sup> Defendants' words made under compulsory interrogation and without the possibility of counsel during pretrial confinement were freely admitted into evidence.

Persecution as an offense was discussed early in the process. At the London Conference to set the trial framework, Justice Jackson made a point to clarify incitement with Sir David Maxwell-Fife, saying "The knowing incitement and planning is as criminal as the execution."<sup>23</sup> Jackson followed this line exactly in his opening when he referred to the "inciters behind the scenes."<sup>24</sup>

The difficulty was that the IMT charter did not identify incitement or persecution as separately criminal acts but were instead gathered under the heading of Crimes Against Humanity. Prosecutors decided against – or did not consider at all – charges under Article 6 that made liable those "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes."<sup>25</sup> Part of the language that made up Count I (Conspiracy) was the issue; the flawed drafting of this section relative to the other three counts proved problematic with the judges who ruled that, as worded, conspiracy could only be applied to Crimes Against Peace. Meaning, under the Charter, there could be no guilty verdict for a conspiracy to commit Crimes Against Humanity. Further, instigation is different under law from incitement and persecution. As defined, instigation in

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<sup>22</sup> In American law, a defendant cannot make a statement in court prior to verdict except under oath and subject to cross-examination. In German criminal procedure, by contrast, defendant statements are unsworn without a negative inference being drawn by the court. StGB § 60, [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0295](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0295)

<sup>23</sup> Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Department of State 1945) p. 376.

<sup>24</sup> Second Day, Wednesday, 21 November 1945, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (Nuremberg 1947), pp. 104–05. [hereinafter IMT]

<sup>25</sup> Charter of the International Military Tribunal at Nuremberg art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

international criminal law (post-Nuremberg) is speech prompting another to commit an offense when the offense is actually committed, and the speech makes a substantial contribution to its commission.<sup>26</sup> Causation would have to be established between the speech and the act for this application; this was critical in the Streicher and Fritzsche cases.

As published, Article 6 (c) of the Charter defined Crimes Against Humanity as “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the law of the country where perpetrated.”<sup>27</sup> The drafters (Jackson, principally) decided to word this so as to split the offense – inhumane acts and persecution on discriminatory grounds. It also permitted charging and conviction for acts committed entirely in Germany.<sup>28</sup> Streicher and Fritzsche were brought to trial under this rubric.

On the 19<sup>th</sup> day of the trial, American Major William Walsh addressed the court with his presentation, “Persecution of the Jews.” Defining the term “persecution,” he said “Academically, I am told, to persecute is to afflict, harass, and annoy. The term does not convey, and indeed, I cannot conjure a term that does convey the ultimate aim, the avowed purpose to obliterate the

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<sup>26</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law* (2d. ed. 2013), p. 326.

<sup>27</sup> Nuremberg Charter, supra note 54, art. 6.

<sup>28</sup> The so-called “war nexus” of the charter likewise mandated that crimes against humanity be linked to one of the other counts, crimes against peace and war crimes. The reasons for this are complicated, but in part driven by Jackson’s primacy on the new crimes against peace offense as the central element at the IMT, to the detriment of the other charges.

Jewish race.” Walsh used the book *Der Giftpilz*, and examples from Julius Streicher’s newspaper, as indicative of the extreme, inciting aims of the NSDAP, eventually leading to the Holocaust.<sup>29</sup>

Julius Streicher’s animus – hatred – against Jews was a constant, defining point of his public life.<sup>30</sup> He became famous precisely because of that hatred. In the multi-faceted group that constituted the cornerstone of the NSDAP, Streicher’s contribution consisted of beating the drum for antisemitism and for his slavish loyalty to Adolf Hitler.

## 2.2 Streicher’s path to incitement

Born in 1885 in Fleinhausen, Oberbayern, Streicher was a difficult child and adolescent but eventually qualified as a schoolteacher. When WWI came, he entered the Reichsheer and served until war’s end, earning the Iron Cross (first class) and battlefield promotion to lieutenant. Like so many others, his pre-war nationalism blossomed into nationalist fanaticism after Versailles. In 1919, he joined the *Deutschvölkischer Schutz und Trutzbund*.<sup>31</sup>

Even a cursory read of the principles of the group reveals its aims of antisemitism and active persecution. An excerpt from the constitution of the *Deutschvölkischer Schutz- und Trutzbund*:

“The Bund fights for the moral rebirth of the German people . . . It considers the pernicious and destructive influence of Jewry to be the main cause of the defeat and the removal of this

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<sup>29</sup> IMT, Day 19, p. 522. <https://avalon.law.yale.edu/imt/12-13-45.asp#jewishpersecution>

<sup>30</sup> He afterward claimed that his antisemitism began when he was five years old and saw his mother crying because she’d been cheated by the Jewish owner of a fabric shop. Laurence Rees, *The Holocaust: A New History* (New York: PublicAffairs, 2017), p. 21.

<sup>31</sup> <https://encyclopedia.ushmm.org/content/en/article/julius-streicher-biography>

influence to be necessary for the political and economic recovery of Germany, and for the salvation of German culture."<sup>32</sup>

Streicher switched to the *Deutschsozialistische Partei* (DSP) later in 1919, which soon had branches in several major German cities. He attempted to shift the group's emphasis toward more overt antisemitism and when that was resisted, he took his followers to yet another organization, the *Deutsche Werkgemeinschaft*, with the aim of consolidating the various *völkisch* movements. His pattern repeated; even among the generally antisemitic *völkisch* crowd, he was considered too extreme. Streicher resented the criticism and finally joined forces with the nascent NSDAP, bringing along his coterie of rabid antisemites. It immediately doubled the size of the Nazi party, putting Streicher in a position of obvious influence and reaffirming the organizational policy toward Jews that Hitler had already initiated. In due course he became a general in the SA. Gauleiter of Franconia and a Reichstag deputy. In Nuremberg, he acted as a feudal lord. In 1923, he formed *Der Stürmer* ("The Attacker")<sup>33</sup> newspaper and the publishing house *Stürmer-Verlag*. The first edition editorial set a tone that was only magnified in the coming twenty-two years: "As long as the Jew is in the German household, we will be Jewish slaves. Therefore he must go."<sup>34</sup> Streicher hired cartoon illustrator Philipp Rupprecht in 1925 to give visual aid to the antisemitic theme. Rupprecht shaped the public face of both Streicher and *Der Stürmer's* persecution crusade for the next two decades.

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<sup>32</sup> [http://www.historisches-lexikon-bayerns.de/artikel/artikel\\_44476](http://www.historisches-lexikon-bayerns.de/artikel/artikel_44476). The group used the swastika as its symbol before it was later adopted by the NSDAP. Both Reinhard Heydrich and Einsatzgruppe commander Franz Stahlecker were also members, as was Chief of the Chancellery of the Führer, Philipp Bouhler.

<sup>33</sup> The literal translation is "The Stormer" but that is an inexact English equivalent. "Striker" would be closer.

<sup>34</sup> Randall L. Bytwerk, *Julius Streicher: Nazi Editor of the Notorious Antisemitic Newspaper Der Stürmer* (New York: Cooper Square Press, 2001), p. 52.

### 2.3 *Der Stürmer*

The infamous magazine had its origin in *Deutscher Sozialist*, the antisemitic-leaning publication of the DSP, with Streicher as its editor. After shifting to the NSDAP, he founded *Der Stürmer* in 1923<sup>35</sup>, which ran continuously for the next quarter century. It had a peak circulation of between 600,000 and 800,000 (although numbers are difficult to ascertain with precision). Further complicating any evaluation of its scope and impact were two factors: 1) a percentage of copies were given away or put on public display by local SA detachments in glass cases in most sizeable German towns and 2) official subscribers might have enrolled more for appearances, to show their fealty to the ideas that the party espoused, than from ideological commitment.<sup>36</sup> Did most readers believe the lies within? To what degree did it shape country-wide popular attitudes? This is obviously impossible to state with certainty, only that people had wide exposure to Streicher's words and the overtly pornographic and antisemitic caricatures of his graphic artist, Philipp Rupprecht (aka "Fips"):

"Subscribers were exhorted to pass their copies to friends, and about 15 percent of each print run was distributed free of charge. Local SA units built lavish oversized display cases for *Der Stürmer* at bus stops, newsstands, and market-places so that casual bystanders could hardly avoid the tabloid's message. Elaborate dedication ceremonies and competitions for the best display design produced even more outsized and garish publicity."<sup>37</sup>

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<sup>35</sup> On Hitler's birthday, 20 April.

<sup>36</sup> By contrast, the *Völkischer Beobachter*, the NSDAP official newspaper, reached a circulation of 1.7 million by 1944. <https://encyclopedia.ushmm.org/content/en/article/writing-the-news>

<sup>37</sup> Claudia Koonz, *The Nazi Conscience* (2003), p. 229.

The editorial scheme of *Der Stürmer* was simple enough – visually compelling graphic art (provided by Rupprecht) and an endless series of articles warning the public about the dangerous plague of the Jews around them. The target reader was on the lower end of the educational and intellectual spectrum, for whom the artwork became more informative than Streicher's screeds in the text. It drew heavily on the *Protocols of the Elders of Zion* for inspiration but went far beyond them. Every issue carried the frontpage slogan: "Die Juden sind unser Unglück!"<sup>38</sup>

The paper's themes depicted Jews, all of them, as a race, as sexual predators, sexual criminals, pedophiles, and ritual murderers of Christian (especially Catholic) children. Streicher and Rupprecht particularly focused on Jews as rapists of Aryan girls or as deceitful monsters who tricked German women into sexual intercourse, and then left them with Jewish bastard children who would poison the purer Aryan race. Streicher subscribed to Nazi religious fanatic Alfred Dinter's theory of telegony – that Jewish sperm changed the racial characteristics of the woman, and that any subsequent offspring would be tainted by Jewish blood, as outlined in Dinter's 1917 book, *Die Sünde wider das Blut* (The Sin Against the Blood).<sup>39</sup>

Streicher expanded his attention to cast Jews as financial criminals who would do anything for profit, to include murder. He identified prominent Jews by name and address, kept track of their

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<sup>38</sup> "The Jews are our misfortune." 19<sup>th</sup> century historian and political thinker Heinrich v. Treitschke coined the slogan. He also observed that, "[t]he international Jew, hidden in the mask of different nationalities, is a disintegrating influence; he can be of no further use to the world." Mark Levene, *Genocide in Age of Nation State*, v. 2, Rise of the West and the Coming of Genocide, p. 34. Treitschke was an extreme nationalist who endorsed broad expansionism. He likewise despised Catholics, Socialists, in addition to Jews.

<sup>39</sup> Dinter was too fanatic even for the Nazis. Hitler removed him as NSDAP Gauleiter of Thuringia in 1927 and then expelled him from the party in 1928. Dietrich Orlow, *The History of the Nazi Party: 1919-1933* (Pittsburgh, University of Pittsburgh Press, 1969), p. 49. Dinter was fined DM 1000 in his denazification procedure after WWII. C.f. H. Ahrens: "Wir klagen an den ehemaligen Parteigenossen Nr. 5 Artur Dinter, Gauleiter der NSDAP in Thüringen." In: *Aufbau* 3 (1947) p. 288–290.



charitable donations, believing them part of an international syndicate to rob honest German businessmen and customers. Jewish restaurant owners were accused of poisoning food and using parts of ritually-murdered Christian children in their recipes. Acting like a neighborhood watch coordinating organization or conductor of a crowd-sourced mob, *Der Stürmer* ran a “Lieber Stürmer” section which purported to be tips from readers informing the public of illegal and immoral Jewish acts. This was reinforced by the theme “Wer bei Juden kauft, ist ein Volksverräter” – that prepared the population for Kristallnacht.<sup>40</sup> The paper kept track of those accused of violating the Nuremberg Laws; Streicher demanded death sentences for such “racial defilers.”

#### **2.4 Incitement broadened: *Deutsche Volksgesundheit aus Blut und Boden* and *Die Juden Frage im Unterrecht***

From 1933 until 1935, Stürmer-Verlag augmented its main inciting antisemitic clarion with a little-known “medical” journal which aimed at incitement by word (often by Streicher) and image (by Philipp Rupprecht) which purported to be “in collaboration with doctors, teachers, and healers,” to combat the Jewish-ness in the medical field. For example, this article by Karl Holz from 1 December 1943:

“Everything is now clear. Now Gentiles know why the Jew enters the health professions. Why he fills it with members of his race. Why he fills influential positions with Jews. The healing arts are

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<sup>40</sup> “Who buys from Jews is a traitor to the People” – although the word *Volk* used in this sense has overtones of ethnicity.

to be led astray, they are to be corrupted. The Jew does not want a healthy, happy German people. He wants this people to sicken and die. His hate commands that. The Talmud orders it. The German people, however, want to recover from sickness and an unnatural existence. It wants to build new strength from blood and soil. It wants to march healthy and strong into a great future. Above all, the German people must do one thing. It must ensure that the Jew and the Jewish spirit vanish forever from the German health system.”<sup>41</sup>

Much of the journal’s work was in support of a failed campaign against vaccination and ceased publication in 20 months.<sup>42</sup>

*Die Juden Frage im Unterrecht*, published by Stürmer-Verlag in 1937 had a similar purpose, to raise awareness and incite, but this one was aimed at teachers and other educators.

“No one among our people should or may grow up without learning the true depravity and danger of the Jew. That requires that the German teacher himself master the racial and Jewish Question...to show German teachers simple ways in which the Jewish Question can be incorporated naturally into the curriculum. He who has mastered the highway will himself discover a thousand side streets and find new ways himself.”

In an uncomfortable pre-echo of Veit Harlan’s film, *Jud Süß*, the pamphlet introduces a scenario that the author recommends for classroom use:

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<sup>41</sup> Karl Holz, “Jude und Heilkunde,” *Deutsche Volksgesundheit aus Blut und Boden!*, 2 (#23) 1 December 1934, pp. 1-2. at <https://research.calvin.edu/german-propaganda-archive/dvg34-23.htm> Rupprecht drew the accompanying illustration of a presumably Aryan hand caught in a spider web. The spider has a Star of David on its abdomen, in the place where a Black Widow hourglass would be on an arachnid.

<sup>42</sup> Holz (1895-1945) was a committed Nazi, SA-Gruppenführer, deputy Gauleiter of Franconia to Julius Streicher and then later acting Gauleiter and Reichsverteidigungskommissar. Appointed Gauleiter in 1944, he led the defense of Nürnberg. Refusing to surrender despite the city being in ruins, he made a last stand in the Palmenhofbunker, perhaps shot Mayor Willy Liebel, and then died by either suicide or from Allied attack. [https://verwaltungshandbuch.bavarikon.de/VWH/Holz,\\_Karl#lang-de](https://verwaltungshandbuch.bavarikon.de/VWH/Holz,_Karl#lang-de) and Ernst Klee, *Das Personenlexikon zum Dritten Reich*. 2. Auflage (Frankfurt am Main: Fischer Taschenbuch Verlag, Frankfurt, 2007)

Students who hear the teacher tell of this amazing natural event will think deeply for a while. It would be surprising if a student then did not stand up and say: "That is the way it was with our people, in our country. The foreigners who came to us and gained entry were the Jews. At first there were a few, then more and more. After the war they came in swarms from the east. When they felt strong enough, they led a revolution. They hunted our people's leaders. There was murder everywhere. There was no order. The Jew became lord of the country and the state." The teacher will help them along by expanding on the subject:

Yes, children, that is how it was. It was not long ago. The "leaders" of our people let the Jews in because they thought they could not get along without the financial and court Jews. The Jew earned the favor of the rulers by bribery. He took over one post after another in the government. He infiltrated everywhere, everywhere he had his paid lackeys.<sup>43</sup>

## 2.5 Streicher at the IMT

The British prosecutor at the International Military Tribunal stated,

"The defendant Streicher is an accessory to the persecution of the Jews within Germany and in occupied territories which culminated in mass murder of an estimated six million men, women, and children. The propaganda in *Der Stürmer* and other Streicher publications, for which he had admitted responsibility, was of a character calculated to stir up fanatic fear and hatred of the Jewish people and to incite to murder. It was disseminated, moreover, in a country in which there was no free market of ideas; in which, in fact, as defendant Streicher well knew and approved, no countervailing argument could find public expression; and in which, therefore, the impact of such propaganda was of a clearly foreseeable and peculiarly sweeping force. Through propaganda designed to incite hatred and fear, defendant Streicher devoted himself, over a period of twenty-five years, to creating the psychological basis essential to carrying through a program of mass

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<sup>43</sup> Fritz Fink, *Die Judenfrage im Unterricht* (Nürnberg: Stürmerv Verlag, 1937), pp. 1-12. The pamphlet was principally illustrated by comparative photographs depicting the proper Aryan vs. Jewish children in racial profile. See <https://research.calvin.edu/german-propaganda-archive/fink.htm#:~:text=The%20National%20Socialist%20state%20demands%20that%20teachers%20teach,about%20the%20Jews%20must%20himself%20become%20an%20expert>. Fink (1893-1945) was a poet, antiquarian, and bookseller in Weimar who largely self-published at Fritz-Fink-Verlag. [https://www.wikiwand.com/de/Fritz\\_Fink](https://www.wikiwand.com/de/Fritz_Fink)

murder. This alone would suffice to establish his guilt as an accessory to the criminal program of extermination.”<sup>44</sup>

Unable to prove that Streicher had a causal connection to the actual implementation of mass murder, the prosecution settled for the argument that Streicher actively “recommended and promoted the program of extermination” while mass murder was being committed.<sup>45</sup>

The indictment against Streicher read:

The Defendant STREICHER between 1932 and 1945 was: A member of the Nazi Party, a member of the Reichstag, a General in the SA, Gauleiter of Franconia, editor-in-chief of the antisemitic newspaper Der Stürmer. The Defendant STREICHER used the foregoing positions, his personal influence, and his close connection with the Fuehrer in such a manner that: He promoted the accession to power of the Nazi conspirators and the consolidation of their control over Germany set forth in Count One of the Indictment: he authorized, directed, and participated in the Crimes against Humanity set forth in Count Four of the Indictment, including particularly the incitement of the persecution of the Jews set forth in Count One and Count Four of the Indictment.<sup>46</sup>

In the pretrial phase, the exact definition of persecution was undefined. During the prosecution case-in-chief, Major William Walsh, the Assistant Trial Counsel for the United States, clarified the term on 13 December: “This title, ‘The Persecution of the Jews,’ is singularly inappropriate when weighed in the light of the evidence to follow. Academically, I am told, to persecute is to afflict, harass, and annoy. The term used does not convey, and indeed I cannot conjure a term

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<sup>44</sup> IMT, Thirty-First Day, Thursday, 10 January 1946, V Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg, 14 November 1945–1 October 1946, at 91 (Nuremberg, 1947).

<sup>45</sup> <https://encyclopedia.ushmm.org/content/en/article/assessing-guilt>

<sup>46</sup> Trial of the Major War Criminals (hereafter IMT), Vol. I, Indictment, Appendix A., p. 87. [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf)

that does convey the ultimate aim, the avowed purpose to obliterate the Jewish race." Walsh continued, citing both Hitler and a pointed example from the book published by Stürmer-Verlag, *Der Giftpilz*:

Hitler: "It must open the eyes of the people with regard to foreign nations and must remind them again and again of the true enemy of our present-day world. In the place of hate against Aryans-from whom we may be separated by almost everything but to whom, however, we are tied by common blood or the great tie of a common culture-it must dedicate to the general anger the evil enemy of mankind as the true cause of all suffering.

It must see to it, however, that at least in our country he be recognized as the most mortal enemy and that the struggle against him may show, like a flaming beacon of a better era, to other nations, too, the road to salvation for a struggling Aryan mankind."

*Der Giftpilz*: "This book brands the Jew as a persecutor of the labor class, as a race defiler, devil in human form, a poisonous mushroom, and a murderer. This particular book instructed school children to recognize the Jew by caricature of his physical features, shown on Pages 6 and 7; taught them that the Jew abuses little boys and girls, on Page 30; and that the Jewish Bible permits all crimes, Pages 13-17. The Defendant Streicher's periodical *Der Stürmer*, Number 14, April 1937, in particular, went to such extremes as to publish the statement that Jews at the ritual celebration of their Passover slaughtered Christians.

It is difficult for our minds to grasp that falsehoods such as these could fall on fertile soil, that a literate nation could read, digest, or believe these doctrines. We must realize, however, that with a rigidly controlled press which precluded an exposure of such lying propaganda, some of the ignorant and gullible would be led to believe."

The prosecutor expanded on this theme: "This propaganda campaign of hate was too widespread and notorious to require further elaboration. Within the documents offered in

evidence in this and in other phases of the case will be found similar and even more scurrilous statements, many by the defendants themselves and others by their accomplices.”<sup>47</sup>

There was no shortage of evidence relating to Streicher’s monomaniacal hatred of Jews, and the prosecution presented these to great effect. However, there were issues in proving the case which went beyond the statements themselves.

## **2.6 Incitement and intent**

With the IMT as the first trial in history to charge Crimes Against Humanity, the included offense of persecution under that rubric was fraught with intangibles. The prosecution team had no way of knowing whether the court would accept that specification and application. This concern was well-founded; Streicher was indicted also on Count I of the indictment, being a participant in a conspiracy or common plan as part of Crimes Against Peace. The connection was extraordinarily tenuous, based on a broad application of conspiracy to all of the other counts – Crimes Against Peace, War Crimes, and Crimes Against Humanity. This approach failed, and in the final court verdict the judges interpreted the conspiracy count to only apply – as ambiguously phrased in the indictment – for Crimes Against Peace.

Charging Streicher with Crimes Against Peace was ludicrous. He was never involved in the larger discussions of state or military policy, largely shunned by other NSDAP leaders, and after even the Nazis were so appalled with his personal conduct that they referred him to the *Uschla* (*Untersuchung und Schlichtungs-Ausschuss* - Committee for Investigation and Settlement) in 1940 over charges that he had illegally appropriated Jewish property (which should instead

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<sup>47</sup> IMT, Day 19, 13 December 1945.

have been appropriated by the state) and made slanderous comments about Hermann Göring. He was removed from his titular position as the Gauleiter of Franconia in February, although allowed to continue publishing *Der Stürmer*.<sup>48</sup> He was, therefore, not a government official when the Einsatzgruppen were active in Russia, or the extermination camps began operations. In the evident view of the prosecution, to validate the persecution-as-crime-against-humanity approach, they would need to produce evidence of the inciting statements themselves, show that Streicher understood the nature of what he advocated, but further, try to show – if possible – a nexus between the pure inflammatory nature of the words as crime and the extermination program. At the very least, even if subjective proof of this was not forthcoming, it might be sufficient to show that Streicher made persecutory statements after knowledge that Jews were, in fact, being killed. To incite in a vacuum is one thing, but issuing inciting screeds after the defendant knows that his words were coming to fruition was something different. This highlights a foundational difficulty with the prosecution case. They had to hope that neither the defense counsel or the court recognized and wanted to draw attention to an important point: that Streicher's antisemitic tirades did not directly ask his listeners, readers, and viewers of antisemitic cartoons to take direct criminal action themselves, but could be read as merely Streicher's personal and editorial opinion, repugnant as it was. If there was no connection between words and action, then a significant part of the prosecution case could collapse. The historical record is silent on whether there was any internal effort to procure

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<sup>48</sup> Robert Wistrich, *Who's Who In Nazi Germany* (New York: Routledge, 1995), p. 251-52.

witness testimony to the effect that Streicher's words and images produced causation in the public's mind.

Then there was the issue of capacity to form intent. Under Anglo-American law, if Streicher was insane or suffering under a mental impairment at the time when he incited, or at the trial, and was thus unable to meaningfully assist his counsel to prepare his defense, he could not be tried. He was widely despised by the other defendants, partially due to the self-evident pornographic nature of *Der Stürmer's* content and partially due to what was perceived as Streicher's degraded mental acuity. Hans Fritzsche said of him, "He is often classified with me because he was a journalist and propagandist. I always thought him very dumb and a sexual pervert...today I think a trifle better of him. I think he is mainly stupid. The crime does not lie in him but in the man who gave him power – the Führer."<sup>49</sup> The prison psychologist who conducted multiple interviews with Streicher commented that "Streicher impresses me as an old psychopathic personality with sexual and other conflicts, whose inadequacy found expression in an obsessive preoccupation which for the past twenty years has filled the narrow stream of his life."<sup>50</sup> In Wechsler-Bellevue intelligence tests administered to all the defendants, Streicher came in last with a score of 106.<sup>51</sup>

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<sup>49</sup> Leon Goldensohn, *The Nuremberg Interviews* (New York: Vintage, 2005), p. 71.

<sup>50</sup> *Ibid.*, p. 254. Goldensohn added that, "Pinning Streicher down to any particular subject was most difficult because his ability to discuss anything logically was quite limited."

<sup>51</sup> Airey Neave, *On Trial at Nuremberg* (Boston: Little, Brown and Company, 1978), p. 267. In his several interactions with Streicher, Major Neave (who spoke fluent German, improved during his time as a prisoner at Colditz) commented on the prisoner's monomania about Jews and his various perversions. Neave was murdered in an IRA bombing in 1979.

[http://news.bbc.co.uk/onthisday/hi/dates/stories/march/30/newsid\\_2783000/2783877.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/march/30/newsid_2783000/2783877.stm)



American prosecutor General Telford Taylor offered this assessment of the defense case and the burden the prosecution had to overcome:

To save Streicher from a capital sentence, [attorney Hanns] Marx needed to do two things: persuade the Tribunal that there was insufficient evidence that Streicher had incited the killing of Jews, and prevent hateful reputation and repulsive appearance from crucially influencing the Tribunal's decision. But what did 'incitement' mean? Before the war Streicher and many other Germans 'incited the persecution of Jews,' but under the Charter these acts were not international crimes. Most German Jews were expelled to Poland shortly before the war, and soon after the Germans occupied that country. Within a year or so the Germans were sending Jews from other countries in the East for extermination or forced labor; that was certainly criminal persecution.

But in the meantime the German government had rusticated Streicher, and his voice was heard only in *Der Stürmer*. It was a small newspaper (some 15,000 subscribers), and Streicher had no connections with Himmler or his subordinates, who were actually carrying out the Holocaust. Marx traced Streicher's record in the Party and his activities with *Der Stürmer* during the war, and made a very strong argument that the defendant could have little or no impact on the situation and fate of the Jews. A few issues of *Der Stürmer* contained articles calling for extermination of Jews, but its 'incitement' was surely imperceptible, especially when Field Marshal von Reichenau and other military leaders were issuing instructions to their troops that were just as rabid against Jews as was Streicher's rag. Marx made little effort to rehabilitate Streicher as a human being worthy of the law's protection. Indeed, at the end of his argument Marx declared that he had had 'a difficult and thankless task' as defense counsel (which no doubt was true) and left Streicher's guilt or innocence 'in the hands of the High Tribunal,' thus seeming to wash his own hands of his client.<sup>52</sup>

As to intent – the key question in persecution and incitement, Taylor observed, “The charges in the indictment were brought against a private newspaper owner and journalist to punish him for publishing statements in which he believed.”<sup>53</sup> The pertinent question

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<sup>52</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Knopf, 1992), p. 378.

<sup>53</sup> *Ibid.*

then, is whether speaking one's own mind, if that mind is deranged, amounts to persecution.

## 2.7 Insanity and Mens Rea

Given Streicher's bizarre behavior and indications that he was mentally unfit to stand trial, the implied task of the direct examination of Streicher and the cross-examination of supporting defense witnesses was to overcome even the suggestion that he was legally insane. The Anglo-American case on this point was M'Naghten, decided in the Court of Common Pleas in 1843.<sup>54</sup> Although subject to common law refinement in subsequent cases, it remains the bedrock for legal insanity in the United States, Britain, and countries of the former Commonwealth. The House of Lords summarized the test for legal insanity as a defense in this form: "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."<sup>55</sup> Two aspects apply – the defendant appreciating the nature

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<sup>54</sup> M'Naghten's Case 1843 10 C & F 200

<sup>55</sup> See <http://www.bailii.org/uk/cases/UKHL/1843/J16.html>. In the United States, this was followed by *State vs. Pike*, 49 N.H. 399 (1869) and then *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), which said, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The approach had many critics. The Model Penal Code went further in 1962, Under the MPC, a defendant is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." The test thus takes into account both the cognitive and volitional capacity of insanity. Following the attempted assassination of President Reagan, Congress passed the Insanity Defense Reform Act of 1984, which established a legal presumption of sanity and shifted to the defense the burden of proving otherwise. To succeed, the defendant must have been proved insane at the time of the offense. Within the last year, in 2020 the US Supreme Court decided *Kahler v. Kansas* upholding Kansas' abolition of the insanity defense, stating that the Constitution does not

and quality of the act and knowing the act was wrong. So, if Streicher could be sympathetically shown from his own words or from those of others, not to have realized that his words were by nature inciting or labored under a reasonable mistake that they were not, then the Allied case presented by the British prosecutor might find a difficult reception with the president of the court. Lord Justice Lawrence, who certainly knew the M’Naghten Rule by heart, regardless of the fact that insanity was not an approved affirmative defense vis-à-vis the Nuremberg Charter.

Streicher’s beleaguered attorney, Hanns Marx, brought the issue to the IMT.<sup>56</sup> On 15 November 1945, the lawyer requested a psychiatric examination due to “the exceptional nature of the case and of the difficulties of the defense in handling it.”<sup>57</sup> By “it,” Marx surely meant his client. The Russian prosecutor, Col. Y.V. Pokrovsky, endorsed the motion, adding that he felt there was doubt as to Streicher’s “mental stability,” following the last Soviet interrogation when the defendant stated that his remarks about the Jews were from “a Zionist point of view.”<sup>58</sup> This followed a consistent pattern in any interactions with the defendant.

On 17 November, the Tribunal issued the order for Streicher’s mental examination. The court asked three questions.

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require Kansas to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong. 589 U.S. 140 S. Ct. 1021; 206 L. Ed. 2d 312.

<sup>56</sup> Marx (1882-1973) was from Nuremberg and had been excluded from the NSDAP due to his membership in a Masonic lodge. <https://www.lto.de/recht/feuilleton/f/strafverteidigung-nuernberger-prozesse-studie/2/> In official documents from the IMT, his first name is alternatively (and wrongly) given as Hans.

<sup>57</sup> Taylor, p. 150.

<sup>58</sup> Ibid.

The Tribunal desires that you examine the Defendant JULIUS STREICHER to determine:

1. Is he sane or insane? 2. Is he fit to appear before the Tribunal and present his defense? 3. If he is insane, was he for that reason incapable of understanding the nature and quality of his acts during the period of time covered by the Indictment?

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The examination was perhaps not remarkably thorough. The results came back the next day, 18 November:

In response to the Tribunal's request that the Defendant Julius Streicher be examined, the undersigned psychiatrists did examine the Defendant Julius Streicher on 17 November 1945. The following examinations were made: Physical, neurological and psychiatric examinations.

In addition, the following documents were studied: All available interrogations, biographical data, inspection of examples of his written works, all psychological investigations and observations of the prison psychiatrist.

The following results of the examination and unanimous conclusions are submitted:

- 1) Defendant Julius Streicher is sane.
- 2) Defendant Julius Streicher is fit to appear before the Tribunal and to present his defense.
- 3) It being the unanimous conclusion of the examiners that Julius Streicher is sane, he is for that reason capable of understanding the nature and quality of his acts during the period of time covered by the Indictment.<sup>60</sup>

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<sup>59</sup> <https://avalon.law.yale.edu/imt/v1-24.asp>. Examining officials were Dr. Jean Delay, Professor of Psychiatry at the Faculty of Medicine in Paris; Professor Eugene Krasnushkin; Professor of the Scientific Research Institute in Moscow; Col. Paul Schroeder, U.S. Army.

<sup>60</sup> IMT, Report of Examination of Defendant Streicher, 18 Nov 1946. <https://avalon.law.yale.edu/imt/v1-25.asp>

Rapid assessment aside, this cursory finding did not negate the possibility that the court would take notice of Streicher's evident mental deficiencies, and even if found guilty of persecution as part of the larger Crimes Against Humanity, might draw the conclusion that his inability to form a normal perception of the world could affect his intent and mitigate his guilt, and save him from the noose.

## **2.8 Opening statement by the prosecution**

The prosecution offered a powerful assessment of Streicher's complicity.

It may be that Streicher is less directly involved in the physical commission of the crimes against Jews than some of his co-conspirators. The submission of the Prosecution is that his crime is no less worse for that reason. No government in the world, before the Nazis came to power, could have embarked upon and put into effect a policy of mass Jewish extermination in the way in which they did, without having a people who would back them and support them, and without having a large number of people who were prepared to carry out the murder themselves. (See Chapter XII on Persecution of the Jews.)

It was to the task of educating and poisoning the people with hate, and of producing murderers, that Streicher set himself. For 25 years he continued unrelentingly the perversion of the people and youth of Germany. He went on and on, as he saw the results of his work bearing fruit.

In the early days he was preaching persecution. As persecution took place he preached extermination and annihilation and, as millions of Jews were exterminated and annihilated, in the Ghettos of the East, he cried out for more and more.

The crime of Streicher is that he made these crimes possible, which they would never have been had it not been for him and for those like him. Without Streicher and his propaganda, the Kaltenbrunnners, the Himmlers, the General Stroops would have had nobody to do their orders.

In its extent Streicher's crime is probably greater and more far-reaching than that of any of the other defendants. The misery which they caused ceased with their capture. The effects of this man's crime, of the poison that he has put into the minds of millions of young boys and girls goes on, for he concentrated upon the

youth and childhood of Germany. He leaves behind him a legacy of almost a whole people poisoned with hate, sadism, and murder, and perverted by him. That people remain a problem and perhaps a menace to the rest of civilization for generations to come."<sup>61</sup>

## 2.9 Case in Chief

The main presentation of evidence against Streicher began on 10 January 1946, with British LTC Mervyn Griffith-Jones.<sup>62</sup> He cited numerous examples from the 1920s and 30s where Streicher plainly said (in 1925), "Let us start today, so that we can annihilate the Jews." And "full and final victory will have been achieved only when the whole world is rid of Jews." (1937). This was followed by graphic testimony, quoting from Streicher as well as the exhibits demonstrating visually the defendant's pornographic focus on the issue of Jews as sexual predators.<sup>63</sup>

JONES:

My Lord, it may be that this defendant is less directly involved in the physical commission of the crimes against Jews, of which this Tribunal have heard, than some of his co-conspirators. The submission of the Prosecution is that his crime is no less the worse for that reason. No government in the world, before the Nazis came to power, could have embarked upon and put into effect a policy of mass extermination in the way in which they did, without having a people who would back them and support them and without having a large number of people, men and women, who were prepared to put their hands to their bloody murder. And not even, perhaps, the German people of previous generations would have lent themselves to the crimes about which this Tribunal has heard, the killing of millions and millions of men and women.

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<sup>61</sup> IMT, Chapter XVI, Part 10.

<sup>62</sup> Mervyn Griffith-Jones was an extraordinary courtroom lawyer, evidenced by his cross-examination of Streicher. He was later Crown counsel for the Lady Chatterley's Lover case (R v. Penguin Books Ltd.) in 1960 where he argued that the book violated existing obscenity laws. He lost that one. Michael Beloff, 'Jones, (John) Mervyn Guthrie Griffith- (1909–1979)', Oxford Dictionary of National Biography, Oxford University Press, September 2010.

<sup>63</sup> Griffith-Jones quoted from a book, *The Jewish Question in the Schools*, by Fritz Fink, introduction by Julius Streicher. See earlier footnote concerning Fink.

It was to the task of educating the people, of producing murderers, educating and poisoning them with hate, that Streicher set himself; and for 25 years he has continued unrelentingly the education - if you can call it so - or the perversion of the people and of the youth of Germany. And he has gone on and on as he saw the results of his work bearing fruit.

In the early days he was preaching persecution. As persecutions took place he preached extermination and annihilation; and, as we have seen in the ghettos of the East, as millions of Jews were being exterminated and annihilated, he cried out for more and more.

That is the crime that he has committed. It is the submission of the Prosecution that he made these things possible - made these crimes possible which could never have happened had it not been for him and for those like him. He led the propaganda and the education of the German people in those ways. Without him the Kaltenbrunnners, the Himmlers, the General Stroops would have had nobody to carry out their orders. And, as we have seen, he has concentrated upon the youth and the childhood of Germany. In its extent his crime is probably greater and more far-reaching than that of any of the other defendants. The misery that they caused finished with their incarceration. The effects of this man's crime, of the poison that he has injected into the minds of millions and millions of young boys and girls and young men and women lives on. He leaves behind him a legacy of almost a whole people poisoned with hate, sadism, and murder, and perverted by him."<sup>64</sup>

## **2.10 Case for the Defense**

The defense strategy was evidently to establish that while Streicher might be an antisemite – something that his defense counsel Dr. Hans Marx was unable to credibly deny – he was not in position to know of the extermination program and disbelieved what hints he might have had of it. Playing the cards dealt to him, Marx wanted to dismantle the bridge that the prosecution had built linking the words to the criminal actions.

DR. MARX: The Prosecution have drawn the conclusion from numerous articles in Der Stürmer, that as early as 1942 and 1943 you must have had knowledge of the mass executions of Jews which had taken place.

What statement can you make on this, and when, and in what way, did you hear of the mass executions of Jews which took place in the East?

STREICHER: I had subscribed to the Jewish weekly that appeared in Switzerland. Sometimes in that weekly there were intimations that something was not quite in

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<sup>64</sup> IMT, 26 April 1946.

order; and I think it was at the end of 1943 or 1944-I believe 1944-that an article appeared in the Jewish weekly, in which it said that in the East-I think it was said in Poland-Jews were disappearing in masses. I then made reference to this in an article which perhaps will be presented to me later. But I state quite frankly that the Jewish weekly in Switzerland did not represent for me an authoritative source, that I did not believe everything in it. This article did not quote figures; it did not talk about mass executions, but only about disappearances.

Streicher was his own worst witness.

As concerned the many inciting antisemitic images contained in both *Der Stürmer* and in related publications under the imprint of Stürmer Verlag, Marx wanted to make the case that while his client was the publisher, he was not the content creator and therefore he was not responsible for what impact the images might have had.

MARX: Who was the author of these picture books?

STREICHER:

The book *Trust No Fox in the Field and No Jew Under His Oath* was done and illustrated by a young woman artist, and she also wrote the text.<sup>65</sup> The title which appears on the picture book is from Dr. Martin Luther. The second picture book was done by the Editor-in-Chief of *Der Stürmer*, who was a former schoolteacher. Two criminal cases in Nuremberg, which were tried here in this courtroom, as far as I know, were the occasion for my publishing these two books.<sup>66</sup>

Cross-examination resumed on 29 April. Jones' evident strategy was to produce a mountain of writings from *Der Stürmer*, intending to prove that Streicher had persecuted. But with incitement/persecution being a novel argument in international law, the certainty of that argument prevailing remained in doubt. While Jones never expressed any second thoughts

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<sup>65</sup> This was Elvira Bauer, discussed further in the Rupprecht chapter.

<sup>66</sup> 26 April 1946, p. 347.



about the legal basis, American senior prosecutor Taylor did. He was doubtful of a provable nexus between Streicher's antisemitic screeds and the crimes charged. He noted, "Streicher had nothing to do with the military decisions and had been a political nonentity since 1940. Virtually all of his Nazism had gone into antisemitism, most of embodied in his journal, *Der Stürmer*. Beyond question he had been an important force in sowing the seeds of the anti-Jewish atrocities, but was that a crime under international law? ... Was the publication of a German newspaper in Germany, no matter how scurrilous, an international crime"?<sup>67</sup>

Nevertheless, Jones stayed on course.

JONES: "Will you look at Page 3-A of that bundle, Document Number D-809, which becomes Exhibit Number GB-331: "The Jewish problem is not yet solved, nor will it be solved when one day the last Jew will have left Germany. Only when world Jewry has been annihilated, will it have been solved." Is that what you were working for when you say you were working for the international solution to this problem, an annihilation of world Jewry?"

STREICHER: "If that is how you understand 'annihilation.' That was written by my chief editor at the time. He says that the Jewish problem will not yet be solved when the last Jew will have left Germany. And when he suddenly says that only when world Jewry has been annihilated will it be solved, then he certainly may have meant that the power of world Jewry should be annihilated. But my Party comrade Holz did not think of mass killing or the possibility of mass killing."<sup>68</sup>

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<sup>67</sup> Taylor, p. 264.

<sup>68</sup> In addition to his other duties as deputy Gauleiter, Holz was editor-in-chief at *Der Stürmer* from 1933-38. Michael D. Miller and Andreas Schulz, *Gauleiter: The Regional Leaders of the Nazi Party and Their Deputies, 1925-1945*, Vol. I (Herbert Albrecht – H. Wilhelm Huttman) (San Jose: R. James Bender Publishing, 2012), p. 530.

JONES: The German word used there is 'vernichtet' is it not? Look at your copy. 'Vernichtet' that means 'to annihilate.'

STREICHER: Today when you look back, you could interpret it like that, but not at that time.

JONES: All I ask you about that is: Is that not advocating the murder of Jews, that article; if it is not, what is it advocating?

Jones scored a few points when he got Streicher to admit that he had seen articles in the Swiss-published *Israelitisches Wochenblatt*, which contained articles about Jews being killed in the East. The defendant did not deny the evidence but had an explanation.

STREICHER: Sometimes that journal contained hints that everything was not in order. Later in 1943 an article appeared stating that masses of Jews were disappearing but the article did not quote any figures and did not mention anything about murders.

JONES: Was it possible to exterminate people in that way only after some 20 years of incitement and propaganda by you and other Nazis? Is that what made that possible?

STREICHER: I deny that the population was incited. It was enlightened, and sometimes a harsh word may have been directed against the other side as an answer. It was enlightenment, not incitement. And if we want to keep our place before history I have to state again and again that the German people did not want any killings, whether individually or en masse.

Starting on the morning of 30 April, Dr. Marx began his brief direct examination of Ernst Hiemer, senior editor at *Der Stürmer* after Holz's departure. The objective was to show that

Streicher refused to credit these reports in the Swiss press and believed them to be premeditated lies.

HIEMER: He declared that these reports were being printed merely for the purpose of undermining the prestige of the German people abroad. It is true Streicher soon changed his opinion. He began to doubt that his opinion was right and finally he believed that the occurrences in concentration camps, as pictured in the Swiss press, did after all correspond to the facts. Streicher said that Himmler was the only man who could have authorized such crimes.<sup>69</sup>

DR. MARX: You said that Streicher soon changed his opinion. What does that mean?

HIEMER: In the beginning he had decidedly said that these reports could not be true. Then he became uncertain and said that perhaps they might be true. I had the impression that either the detailed manner of the reports in the Swiss press had convinced Streicher that these things had actually occurred or that Streicher, from one source or another, either through personal contact or through letters, had received knowledge that these happenings were actually taking place in the concentration camps. To that I ascribe his change of view.

DR. MARX: What attitude did he take when he was finally convinced? Did he express satisfaction at the fact that so many people had been killed?

HIEMER: No. Streicher definitely deprecated what was done in the concentration camps. It did happen that Streicher, in anger-if he had been especially upset by political events-often or at

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<sup>69</sup> IMT, 30 April 1946. Also available at <https://www.youtube.com/watch?v=3aFVR8QHm-o&t=160s> for the original trial film recording.

times, asserted that Jews, as an enemy of the German people, should be exterminated.

However, Streicher talked in that way only in the first phase of excitement. When he was calmed, he always opposed the extermination of the Jews.

DR. MARX: But repeatedly in articles of *Der Stürmer* there is talk of the extermination of the Jews?

HIEMER: Yes. It is a fact that in reports of *Der Stürmer* the extermination of Jewry is spoken about. However, on the other hand, Streicher again and again opposed the murder of the Jews, and I am quite convinced that Streicher and *Der Stürmer* had nothing whatever to do with the happenings in concentration camps. I do not believe it. For it is known now that these crimes in the concentration camps were committed on the instructions of individual leading men; that is, on official orders, and it is my firm conviction that neither Streicher nor *Der Stürmer* had anything to do with them.<sup>70</sup>

While Jones was successful in one sense, he did not reveal anything surprising that Streicher had not already said in interrogation.<sup>71</sup> The testimony was complicated by an inconvenient attitude (from the prosecution perspective): of the defendants in the dock, Streicher was the only one – apart from Albert Speer, whose partial acceptance of responsibility was to save himself from a death sentence – to admit that he believed that millions of Jews had been

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<sup>70</sup> Available at <https://www.youtube.com/watch?v=jC1EYgxMX1c>. The prosecution elected not to cross-examine Hiemer.

<sup>71</sup> Marx called four witnesses for Streicher, Fritz Herrwerth (a subordinate at *Der Stürmer*), Adele Streicher (Streicher's wife), Hiemer, and Phillip Wurzbacher (an SA leader in Nürnberg). Griffith-Jones cross-examined only Hiemer, asking about the statement in an article that "Judaism cannot be vanquished, disarmed, or rendered powerless; it must be exterminated." Hiemer answered that he "was not able to judge the intention of the article. But I do maintain that Streicher made statements opposing the murders in the concentration camps, and he did not want the murder of Jewry." Drexel Sprecher, *Inside the Nuremberg Trials* (Lanham, MD: University Press of America, 1998), p. 933-4, Quoting from IMT, Vol. XII, pp. 404-412.

murdered.<sup>72</sup> He likewise generally accepted ownership of what he wrote. The question of what all that meant, and a defendant obviously suffering from a profound mania and profound convictions, was next in the hands of the Tribunal.

That was easier said than done. After initial discussions, Lord Lawrence dissented from the others as to Streicher's guilt on crimes against humanity but did, bizarrely, assess guilt (along with Francis Biddle, Donnedieu de Vabres, and Iona Nikitchenko) on Count Three (war crimes), for which Streicher had not been indicted. French judge Robert Falco and both Russian judges thought him guilty of Count One (conspiracy, connected to crimes against peace). The next meeting of judges produced no reconciliation or common agreement, just the decision that whatever the exact nature of his guilt, the majority wanted Streicher hanged.<sup>73</sup>

## **2.11 Verdict**

The court rendered its decision in October 1946. It was stark:

As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of "Der Stürmer" between 1938 and 1941 were produced in evidence, in which the extermination "root and branch" was preached. Typical of his teachings was a leading article in September, 1938, which termed the Jew a germ and a pest, not a human , being, but "a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the

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<sup>72</sup> Goldensohn, p. 261.

<sup>73</sup> Taylor, pp. 561-62. Telford Taylor had no sympathy for Streicher or his words, but was appalled by the lack of legal consideration that went into the rushed verdict. "The Tribunal's hasty and unthinking treatment of the Streicher case was not an episode to be proud of...the carefree way in which the Tribunal members sent him to the gallows, as if they were stamping on a worm, is especially hard to condone." At p. 562.

interest of mankind." Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that fifty years hence the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate." Streicher, in February, 1940, published a letter from one of *Der Stürmer's* readers which compared Jews with swarms of locusts which must be exterminated completely. Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialists policy of Jewish persecution and extermination. A leading article of "*Der Stürmer*" in May, 1939, shows clearly his aim. "A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch." As the war in the early stages proved successful in acquiring more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are twenty-six articles from '*Der Stürmer*', published between August, 1941 and September, 1944, twelve by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms. He wrote and published on 25 December, 1941: "If the danger of the reproduction of that curse of God in the Jewish blood is to finally come to an end, then there is only one way – the extermination of that people whose father is the devil." And in February, 1944, his own article stated: "Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate, annihilation, death." With knowledge of the extermination of the Jews in the Occupied Eastern Territory, this defendant continued to write and publish his propaganda of death. Testifying in this trial, he vehemently denied any knowledge of mass executions of Jews. But

the evidence makes it clear that he continually received current information on the progress of the "final solution." His press photographer was sent to visit the ghettos of the East in the Spring of 1943, the time of the destruction of the Warsaw Ghetto. The Jewish newspaper "Israelitisches Wochenblatt," which Streicher received and read, carried in each issue accounts of Jewish atrocities in the East, and gave figures on the number of Jews who had been deported and killed. For example, issues appearing in the summer and fall of 1942 reported the death of 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Rumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all of Poland. In November, 1943, Streicher quoted verbatim an article from the Israelitisches Wochenblatt which stated that the Jews had virtually disappeared from Europe, and commented "This is not a Jewish lie." In December, 1942, referring to an article in the London Times about the atrocities, aiming at extermination, Streicher said that Hitler had given warning that the second World War would lead to the destruction of Jewry. In January, 1943, he wrote and published an article which said that Hitler's prophecy was being fulfilled, that world Jewry was being extirpated, and that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors. The face of the evidence before the Tribunal it is idle for Streicher to suggest that the solution of the Jewish problem which he favoured was strictly limited to the classification of Jews as aliens, and the passing of discriminatory legislation such as the Nuremberg Laws, supplemented if possible by international agreement on the creation of a Jewish State somewhere in the world, to which all Jews should emigrate. Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and

racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity.

## **2.12 Summary and analysis**

Streicher's direct and cross-examination revealed clearly his monomania about Jews and confronted with the evidence from his own pen, could not deny that he had for decades harassed and persecuted them. More damningly, he explicitly and repeatedly called for their extermination in print. This editorial priority – absent which there was no real content to *Der Stürmer* – was also the basis of Philipp Rupprecht's lifetime output of artistic work. Further, Rupprecht faithfully rendered Streicher's own fixation with quasi-pornographic images and the perpetual theme of rape and race-pollution by the stereotype Jew that *Der Stürmer* created. Nevertheless, there was a difference. While Streicher was, even by the assessment of the prison psychologist, a psychopathic personality type with extreme monomania and paranoia, Rupprecht had no such defense of mental disease or defect. His motives were of quite another kind entirely. The Tribunal outlined several points: that incitement was a form of persecution, and not the other way around; that the systemic nature of Streicher's conduct was critical – that is, he made hate speech over a period of time; that the inciting speech was tied to people being killed but did not seek to validate the cause-and-effect relationship that the prosecution outlined in their opening statements. It was sufficient that Streicher wrote (and Rupprecht drew) words advocating the extermination of Jews while simultaneously knowing that Jews were being exterminated. Thus, one could conclude by subjective implication the speech (and images) did not have to cause the killing, which in any case would be beyond the ability of the



prosecution to prove. In defense, Streicher claimed that while he read of Jews being murdered, he did not believe the stories – which is plausible, although he continued to champion their murder after being put on notice. This was the gravamen of the Crimes Against Humanity charges based on persecution and incitement, and presumably the reason why he was found guilty and executed. For future prosecutions, the Tribunal's verdict failed to settle or even discuss the issue of intent. They assumed causality between word/image and killing but no evidence was introduced to support that. Their evident conclusion, that the words and drawings must have helped make people kill or facilitate killing, became a reasonable article of faith, but not a proven fact. If the judges had instead used the verdict to explicate the issue, they might have decided that incitement and persecution were inchoate – that the crime in international law was completed whether or not there was a connection to murders. This did not happen and served to pass along uncertainty to future courts after the International Military Tribunal. The persecution by image that Rupprecht and Streicher pioneered had another important role, as well. Since their debut in the 1920s – and based on existing stereotypical cartoons that debuted in the 19<sup>th</sup> century – the tropes and images had the effect of creating an antisemitic template others used as a model. When film was co-opted to serve the National Socialist message of racial hatred, it had a common visual and narrative framework upon which to draw. Without Streicher and Rupprecht, the crude messaging of *Der ewige Jude* or the more polished antisemitism in *Jud Süß* would have been impossible for audiences to assimilate. By 1940, when those films premiered, movie-goers were quite familiar with the visual concept of the evil Jew and his corruption of German society. The filmmakers just took the next logical step on a road that ended at Auschwitz-Birkenau.



### Chapter III: Hans Fritzsche, IMT and Otto Dietrich, NMT

**“The ‘clever persistent propaganda’ consisted largely of generous doses of poison which flowed night and day from presses throughout the Third Reich into the veins of German and world thought.**

**This venom was prepared and distilled by the defendant Otto Dietrich”**

- *United States of America vs. Ernst von Weizsäcker, et al.*, Nuremberg Military Tribunal<sup>74</sup>

The Streicher and Fritzsche cases offer seemingly idiosyncratic judgments suggesting that speech can be prosecuted (in the case of Streicher) as a Crime Against Humanity if it calls for violence, regardless of whether the doers were animated by it, and is made after knowledge of the underlying crimes is known to the speaker; Fritzsche takes the opposite tack – that even though the words are inciting, they are not a Crime Against Humanity unless they can be specifically linked as a motivating or facilitating factor in the killings, something the prosecution was unable to do. Some scholars point to a difference in the nature of the defendant’s vocabulary, that one was more incendiary and more direct than the other, to account for the disparate sentences, although this seems an unsupported attempt to bridge too large a chasm between hanging and acquittal based on subjective word choice.<sup>75</sup>

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<sup>74</sup> [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-XII.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XII.pdf), p. 197.

<sup>75</sup> See, e.g., *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, 209 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf) (finding that the hate speech alleged in the indictment did not constitute persecution because it did not directly call for violence and thus failed to rise to the same level of gravity as the other enumerated CAH acts, such as murder and rape); Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 NEW ENG. INT’L & COMP. L. ANN. 17, 39–40 (2005) (suggesting that, in light of freedom of expression concerns, hate speech not directly calling for violence should not be the basis for crimes against humanity (persecution) charges).

### 3.1 Fritzsche: the curious verdict

Hans Fritzsche's case before the IMT is curious. Reading the indictment, and the almost palpable fatigue in the brief presentation of prosecution and defense evidence, it is unsurprising that the not-guilty judgment for the count of Crimes Against Humanity by persecution and incitement takes up less than a minute when read aloud:

The prosecution has asserted that Fritzsche incited and encouraged the commission of war crimes, by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities under Counts Three and Four. His position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns.

Excerpts in evidence from his speeches show definite antisemitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out "as unpleasant as the Fuehrer predicted." But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East. The evidence moreover shows that he twice attempted to have publication of the antisemitic "Der Stürmer" suppressed, though unsuccessfully.

In these broadcasts Fritzsche sometimes spread false news, but it was not proved he knew it to be false. For example, he reported that no German U-boat was in the vicinity of the "Athenia" when it was sunk. This information was untrue; but Fritzsche, having received it from the German Navy, had no reason to believe it was untrue.

It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.

### 3.2 Fritzsche's background

From Bochum, Fritzsche fought in WWI from 1917 to 1918 and afterward began working as a journalist for Alfred Hugenberg's right-wing newspaper *Telegraphen Union* and editor-in-chief of the "International News Service." Beginning in 1932, he was the head of the news division of the national *Rundfunk* (radio). When Hitler assumed the chancellorship, Fritzsche saw opportunity. He joined the NSDAP on 1 May 1933, the same day as he began as head of the *Drahtlöserdienst* (wireless service), and simultaneously as head of the news section of the Press Division of the Propaganda Ministry. In 1938, he became the deputy to Ingemar Berndt, head of the Press Division.<sup>76</sup> "In December 1938 Fritzsche succeeded Berndt and between 1938 and November 1942 was promoted three times. He advanced in title from Superior Government Counsel to Ministerial Counsel, then to Ministerialdirigent, and finally to Ministerialdirektor. In November 1942 Fritzsche was relieved of his position as head of the Press Division by Dr. Goebbels and moved to a newly created position in the Propaganda Ministry, Plenipotentiary for the Political Organization of the Greater German Radio. At the same time, he also became head of the Radio Division of the Propaganda Ministry. He held both these positions in radio services until the Nazi downfall."<sup>77</sup>

There are a great many examples of Fritzsche's on-air antisemitic commentary. On 18 December 1941, still reveling in Japan's attack on Pearl Harbor and Germany's subsequent declaration of war against the United States, he said "The fate of Jewry in Europe has turned

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<sup>76</sup> IMT Day 41, 23 January 1946. <https://avalon.law.yale.edu/imt/01-23-46.asp>

<sup>77</sup> Ibid.

out to be as unpleasant as the Führer predicted it would be in the event of a European war. After the extension of the war instigated by Jews, this fate may also spread to the New World, for it can hardly be assumed that the nations of this New World will pardon the Jews for the misery of which the nations of the Old World did not absolve them."<sup>78</sup> From 18 March 1941: "We Germans have taken the liberty to break the domination of Jewry and of its capital in Germany, of Jewry which believed it had inherited the crown of secret world domination."<sup>79</sup> From June 1941: "It was only the Fuehrer's decision to strike in time that saved our homeland from the fate of being overrun by those subhuman creatures, and our men, women, and children from the unspeakable horror of becoming their prey."<sup>80</sup> All of those comments would be perfectly at home in the pages of *Der Stürmer*. After 1942, Fritzsche assumed the position of Plenipotentiary for the Political Organization of the Greater German Radio under the authority of which he issued orders to all radio programming in the Third Reich. His main direct connection to the audience was through the weekly program, "Hans Fritzsche speaks!" for which he wrote his own scripts.

### **3.3 At the IMT: proving incitement**

However, the prosecution had issues which threatened to undermine their case. First, the American prosecutor questioned whether Fritzsche was even the right defendant. On the Reich press organizational flow chart, he was – at best – fourth in line. Goebbels was dead, Otto Dietrich (who would have made a more logical defendant at the IMT, was destined to wait until

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

the Nuremberg Military Tribunal Ministries Case to face the court), and Werner Naumann, State Secretary in the Propaganda Ministry, remained in hiding until 1949.<sup>81</sup> Second, the evidence of the crimes that Fritzsche was accused of committing was entirely missing. The Americans had no evidence whatsoever and when US prosecutor Drexel Sprecher asked the British, he was told that the BBC's discs of intercepts of the broadcasts had been reused. In short, other than translations of what Fritzsche was alleged to have said, there was nothing. In turn, the prosecution was unable to share with the defense translations (into German) of English translations of German originals.<sup>82</sup> Further, the Soviet Union had provided what they referred to as the "Fritzsche Confession," extracted from the defendant while he was in custody in Moscow, which the Americans suspected as at least partially fraudulent.<sup>83</sup> Accordingly, the Americans entered into an unusual relationship with the Fritzsche's counsel, Dr. Heinz Fritz, whereby the Americans and British agreed not to use the Soviet document – although they could not bind the Soviet team.<sup>84</sup> "I [Sprecher] also told Dr. Fritz that our immediate concern

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<sup>81</sup> Naumann was named in Hitler's Political Testament as the Minister for Propaganda, with Goebbels taking over as Reichskanzler. The Testament and the Führer's will were signed on 29 April 1945, one day before Hitler committed suicide and what remained of the Reich effectively collapsed. US National Archives, RG 242, Collection of Foreign Records Seized, 1675-1958, Personal Papers of Adolf Hitler, 1939-1/20/66, Marriage Certificate, Private Will, and Political Testament of Adolf Hitler, Image 32 at <https://catalog.archives.gov/id/6883511>. As to Naumann's hiding and extremist political action after the war, see "Naumann-Entlassung: Das Angebot der CDU," *Der Spiegel*, No. 32, 4 August 1953 at <https://www.spiegel.de/politik/das-angebot-der-cdu-a-7c42e964-0002-0001-0000-000025657293?context=issue>

<sup>82</sup> Drexel Sprecher, *Inside the Nuremberg Trials* (Lanham, MD: University Press of America, 1998), p. 535. Under American criminal procedure, then and now, this evidence would not generally be admitted and the copies of copies would be viewed as prejudicial to the defendant. *Federal Rules of Evidence*, Article X, §1001-1007 at <https://www.rulesofevidence.org/article-x/>

<sup>83</sup> *Ibid.*, p. 534.

<sup>84</sup> In cross-examining a later witness, Generalfeldmarschall Friedrich Paulus, Dr. Fritz questioned the witness quite effectively concerning the time that Fritzsche was attached to 6. Armee. Paulus was asked whether Fritzsche counseled that the infamous "Commissar Order" (Hitler's/OKW's directive of 6 June 1941 to shoot captured Red Army commissars immediately) be canceled. Paulus responded that while he did not remember this specifically, given Fritzsche's character, it was probable he had done so. *Ibid.*, p. 605. When he testified, Fritzsche made the somewhat incredible claim that "I made it my business to have the order as such rescinded, and I achieved this," although he presented no supporting evidence on this. *Ibid.*, 1093.

was to obtain a correct statement of Fritzsche's positions so that this could be introduced early in the trial along with similar statements by other defendants. Soon thereafter Fritzsche revised a draft in German which I made of his positions."<sup>85</sup>

In his opening statement, Sprecher made the point about causation in incitement: "Most ordinary members of the German nation would never have participated in or tolerated the atrocities committed throughout Europe if they had not been conditioned and goaded to barbarous convictions and misconceptions by the constant grinding of the Nazi propaganda machine."<sup>86</sup>

The centerpiece of the Fritzsche prosecution should have been the opportunity to expose him on cross-examination. Justice Jackson had decided that although Sprecher had done a fine job with the case-in-chief, the Soviet Union would conduct the cross-examination.<sup>87</sup> In a previous statement, the defendant admitted that he "wanted a restriction on the predominant influence of Jewry in German politics, economy, and culture," which should have allowed a logical origin point for elucidating an admission that bore on the issue of incitement.<sup>88</sup> Not so. Instead, Soviet prosecutor, General Roman Rudenko made a mess of it, conducting one of the most inept sessions at the IMT. They sparred over the meanings of words, admissions by the defendant went unquestioned, and Rudenko seemed more intent on getting Fritzsche to admit that he

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<sup>85</sup> Ibid., p. 536. The Soviets later asked the Americans to refrain from using broadcast transcripts where the defendant used language that was "scurrilous and highly offensive to the Soviet Union." Ibid., p. 538.

<sup>86</sup> Ibid., 541.

<sup>87</sup> Ibid., p. 1098-9. Also, the Soviet team did not bother to contact the US to assist in preparation for cross-examination.

<sup>88</sup> Telford Taylor, p. 463.



was a fascist beast. In one exchange, where Rudenko finally stumbled on a productive line of inquiry, he then immediately abandoned it:

GEN. RUDENKO: Very well. I should now like to question you regarding your attitude toward the racial theory. You gave yesterday a detailed explanation in this connection to your counsel, so that I am going to put to you only two or three questions, and I should like you to reply briefly.

GEN, RUDENKO: Did you agree with this racial theory?

FRITZSCHE: Yes, and precisely to the extent which I described to you yesterday.

GEN. RUDENKO: All right. In a radio broadcast on 6 April 1940 you spoke about Poland...<sup>89</sup>

Despite this, the prosecution made the prima facie case that the defendant was more than a simple errand boy who was forced to comply with Goebbels' orders. He helped shape the National Socialist antisemitic message on hundreds of occasions, and it fed into the larger narrative advanced in film and print. In May 1942, Fritzsche was with a Propagandakompanie in the 6<sup>th</sup> Army, driving on Stalingrad. Previously, he had received a letter from an SS officer in the Ukraine who said he had an order to kill Jews and Ukrainian intelligentsia. Fritzsche inquired to Reinhard Heydrich, the architect of the Holocaust, who assured him there was nothing to it.<sup>90</sup>

The Fritzsche case goes directly against the rationale of the other verdicts. He was a government official (unlike Streicher, who although an NSDAP Gauleiter and delegate to the Reichstag, was largely a private citizen after 1940) which should have made him more, not less, responsible for his actions. It is undisputed that he made incendiary antisemitic statements to

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<sup>89</sup> Ibid.

<sup>90</sup> Taylor, p. 462.

an audience of millions, and for years. Additionally, the London Charter mandates that “following orders” is not a defense but can only be considered in mitigation of sentence – yet that was Fritzsche’s only defense: he was a subordinate to Goebbels and despite his title, did not make the radio editorial policy that he so willingly enunciated.<sup>91</sup> Part of the explanation may be that he was seen as a poor substitute for Joseph Goebbels. Further, Fritzsche and Großadmiral Erich Raeder were the only two defendants that the Soviets could contribute to the IMT – and even Raeder was a weak case, the Grand Admiral having retired from active duty in 1943.<sup>92</sup> It also benefited Fritzsche that he was in the dock along with Julius Streicher, and any comparison could only work in the radio propagandist’s favor. Nevertheless, based on what even Fritzsche admitted, he should have been adjudicated as guilty of persecution and incitement. The Tribunal’s verdict is an outlier and serves only to muddy the water in international criminal law.

Fritzsche remained free for a few days before being charged by German authorities and four months later brought before the denazification Spruchkammer in Nürnberg. Sentenced to nine years at a labor camp, along with loss of civil privileges, he was pardoned in 1950 but died of cancer in 1953, immediately before his autobiography was published.<sup>93</sup> Even in the autobiography (actually a narrative exclusively about his experiences at the IMT, and nothing

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<sup>91</sup> <https://avalon.law.yale.edu/imt/06-28-46.asp>. Fritzsche on direct examination. His testimony was that he knew nothing about Jews being killed, that Germans knew nothing about that, he never had any information about concentration camps other than they held political prisoners, that he never spoke with Hitler, and that Goebbels assured him that Russian press about the Kharkov Trial (of Einsatzgruppen personnel) was pure Communist propaganda.

<sup>92</sup> Raeder was indicted on Conspiracy, Crimes Against Peace, and War Crimes, and sentenced to life imprisonment. Due to illness, he was released from Spandau prison in 1955. Sprecher, p. 104.

<sup>93</sup> Taylor, p. 612.

prior), published in the United States under the title "The Sword in the Scales," Fritzsche evidenced a difficulty keeping his story straight. At points he at least acknowledges the facts of the Holocaust but then quickly qualifies that acceptance to make it clear both he and the German people had no responsibility; "No one can, or dare, deny that this mass-extermination was a crime...our people have neither the resilience nor the self-confidence which enables other nations to come to terms with homicides for which their statesmen are responsible."<sup>94</sup> Even his otherwise strictly narrative descriptions of trial events cannot help but contain a whiff of antisemitism: "A glance around the hall revealed the presence of a comparatively large number of Jews, the fate of whose race was one of the chief features of the trial and who, therefore, represented to us the hostile camp in a double sense."<sup>95</sup> He returns, of course, to his trial defense strategy which rested on ignorance of events: "I remembered the replies given by the German information centers to whom I submitted all current reports of atrocities, and who had disputed their accuracy in no uncertain terms."<sup>96</sup> Therefore when, much to his dismay, he heard Allied stories of atrocities about which he had no direct knowledge or participation, he did the responsible thing and inquired of the authorities; the authorities denied the stories; therefore, how could innocent Hans Fritzsche have incited anyone via the airwaves to commit acts for which he had official denial that those acts occurred. QED.

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<sup>94</sup> Hans Fritzsche, *The Sword in the Scales* (London: Alan Wingate, 1953), pp. 146-7.

<sup>95</sup> *Ibid.*, p. 87.

<sup>96</sup> *Ibid.*, p. 102. Fritzsche was the protagonist in an article in *Life Magazine* in 1949, which focused on his ill treatment at the hands of Soviet interrogators. By this point, nearly three years after the verdicts at the IMT, American focus had shifted to anti-communism and away from Holocaust accountability. Konrad Heiden, "Why They Confess: The Remarkable Case of Hans Fritzsche," *Life Magazine*, 20 June 1949. See also, John Hickman, "Why have so few journalists been prosecuted for incitement to war crimes?" *European Journal of Communication*, Vol 33, Issue 6, 2018.

### **3.4 Streicher and Fritzsche and inchoate offenses, a comparison**

#### **a) Streicher**

The divergent decisions in these two IMT cases raise relevant points as to how incitement might be applied going forward to the postwar. Although Streicher's prosecutors attempted to link the defendant's words to actions, the court decision did not go to that precise end in its judgment. "Streicher's incitement to murder and incitement at a time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds." On the surface, that verbal and evidentiary linkage between word and action seems evident. If so, the IMT precedent would be that inciting speech must be connected in fact to a crime against humanity, and not serve as a CAH by words alone. In other words, an inchoate crime. However, the court never stated so in explicit words that the substantive crime must follow. Instead, the language suggests that Streicher's guilt lay in his words filling the listener's and reader's minds with an unending stream of antisemitic poison. As precedent, then, it is ambiguous with the weight slightly to the position that hateful words by themselves were the gravamen of the case.

#### **b) Fritzsche**

The Fritzsche decision makes for a more nuanced case, if for no other reason than this defendant lacked Streicher's deeply monomaniacal antisemitic obsession that was so evident through decades of published work. The IMT Fritzsche case focused instead on the relative position of the accused, his degree of independent action, and the effect of the words over the airwaves ("having incited and encouraged the commission of War Crimes by deliberately

falsifying news to arouse in the German People those passions which led them to the commission of atrocities”). While the bridge between word and deed remains, the language is softened in comparison with that in Streicher’s case.

The verdict made clear that Fritzsche received the benefit of the doubt. Finding that “his position and official duties were not sufficiently important...to infer that he took part in originating or formulating propaganda campaigns” and that his radio commentary “did not urge persecution or extermination of Jews.” Coming to the point, the court was “not prepared to hold that his broadcasts were intended to incite the German people to commit atrocities on conquered peoples.” The linkage which existed at indictment had been excised by the time the court judgment was rendered. The judges instead opted to look at the evidence for intent and the nature of the words he used, finding that they were not sufficiently explicit to merit conviction. The absence of linkage of inciting words and killing resulted in an analysis that added more to the idea that he might have been convicted on an inchoate theory had his intent and word choice been more explicit.

### **3.5 Fritzsche and the Spruchkammer**

Despite acquittal at the IMT, Fritzsche was not destined for a soft landing. As mentioned above, he found himself facing the Spruchkammer I in Nürnberg for denazification, a process quite independent from his experience at the Palace of Justice. He was classified as a Gruppe I, *Hauptschuldige* and promptly sentenced to nine years imprisonment. Unlike the Allied decision, the Spruchkammer found him culpable as one whose own written speeches were in perfect step with National Socialist ideology, and that his responsibility only increased when in 1942 he

became Ministerial Director for the Propaganda Ministry's Radio Division, and from which he had even more control over the public attitude toward Jews and others considered enemies of the Nazi regime. He was found to be "einer der einflussreichsten und aktivisten Propagandaisten der Nazi-Ideologie."<sup>97</sup> As differentiated from the IMT, the German court identified him as "intellektueller Urheber," with overwhelming influence on the minds of the population, making it possible for them to internalize the National Socialist propaganda, to include hatred of Jews.<sup>98</sup>

As one might expect, Fritzsche disagreed and subsequently appealed the decision to the Berufungskammer I. That court affirmed the Spruchkammer ruling, went further, and in what was a rare occurrence, both referred to and took exception to an IMT ruling. Looking at the same evidence as the International Military Tribunal, the court found that there was sufficient evidence to conclude that the defendant's position was sufficiently influential and that his words did shape the minds of the German people. While the IMT considered Fritzsche's antisemitism to be almost incidental, the Berufungskammer thought otherwise. He had, rather, incited hatred against Jews, going so far as to claim that the war was entirely due to "die Herrschaft des Judentums" aimed at "die Vernichtung des deutschen Volkes." Even more incendiary and prescient, Fritzsche believed that the Jews would shortly be killed everywhere as they were then being killed in Europe, that it was "hardly to be assumed that the nations of the

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<sup>97</sup> Staatsarchiv München, *Hans Fritzsche Urteil*, Aktenzeichen I/2398, Spruchkammer I, Stadtkreis Nürnberg, 31 January 1947, SpKa Karton 475, p. 4.

<sup>98</sup> Ibid.

New World [America] would forgive the Jews the misery of which the Old World did not acquit them.”<sup>99</sup>

The appeals court concluded: “Wenn er auch nicht direkt zur Verfolgung oder Ausrottung der Juden aufgefordert hat, so half er doch in hervorragendem Masse mit, im deutschen Volke eine Stimmung zu schaffen, welche der Verfolgung und Ausrottung des Judentums günstig war.”<sup>100</sup>

[Even though he did not directly call for the persecution or extermination of the Jews, he nonetheless helped to an extraordinary extent to create amongst the German people a mood which was favorable to the persecution and extermination of Jewry].

The court attributed to the defendant the necessary mens rea, that he made such statements with knowledge of antisemitism and existing incitement against Jews, knew of concentration camps and the conditions in them, and could logically foresee the impact of his words. Criminal conduct, therefore, existed in the spoken inciting words, regardless of a direct connection to the physical extermination of the Jews. In other words, an inchoate offense, albeit one that was a necessary predicate to what followed.<sup>101</sup>

### 3.6 Dietrich case

As concerns image, word, and persecution, the case of former Reich Press Chief Otto Dietrich before the Nuremberg Military Tribunal is the largely overlooked but perhaps most significant

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<sup>99</sup> Staatsarchiv München, *Hans Fritzsche*, Ber.-Reg.-Nr. BKl/695, Berufungskammer I, Nürnberg-Fürth, 30 September 1947, SpKa Karton 475, p. 8.

<sup>100</sup> *Ibid.*, p. 10.

<sup>101</sup> Fritzsche served four years of his sentence. In 1950, the Minister for Political Liberation for Bavaria released him from a labor camp in Eichstätt, having determined that the penalty was unusually heavy among similarly responsible defendants. “Entschliessung, Betrifft Erlass der Arbeitslagerhaft für Hans Fritzsche, Ministerialdirektor a.D. im früheren Reichspropagandaministerium, verwahrt im Lager Eichstätt”, Minister für politische Befreiung in Bayern, 10 August 1950, 33/6711 F 1232, m/St./6373, Staatsarchiv München, SpKa Karton 475.

and instructive precedent case, at least from one criminal justice perspective, that of the United States (and eventually from an international viewpoint).

Unlike Streicher and Fritzsche, the prosecution of Dietrich was entirely in American hands. The authority for the NMT was predicated on Allied Control Council Law No. 10, which retained the substance of Count Four of the IMT, crimes against humanity, but the improved indictment eliminated the “war nexus” aspect which tied CAH to one of the other charged offenses.

Further, it added torture, imprisonment and rape to the list of enumerated qualifying acts.

In terms of importance to the Reich, Dietrich was far more influential than Fritzsche, but had evaded capture just long enough to miss the cutoff for inclusion as an IMT defendant. His time came at the Ministries Case (*United States of America vs. Ernst von Weizsäcker, et al.*), held from January to November 1948, with the verdicts announced in April 1949. From a temporal perspective as well, Dietrich’s luck held – by the time the judges determined his fate, it was already a foregone conclusion that he would see little if any time in prison.

### **3.7 Dietrich background**

Unlike the *Altekämpfer* Streicher, Dietrich was a later convert to National Socialism. Born in Essen in 1897, he served in WWI and earned the Iron Cross First Class. He completed a doctorate in political science in 1921 at Freiburg and then worked in a series of newspapers – the Essen *Nationalzeitung* and the *Augsburger Zeitung*, at the second of which he was the business manager. He married the daughter of the publisher of the *Rheinisch-Westfälische-Zeitung*, and through his father-in-law gained access to the heads of German industry. He joined the NSDAP in 1929 and immediately improved his standing by facilitating the



introduction between Hitler and the industrialists at the famous Düsseldorf meeting which was responsible for the Party's rapid growth, financial support, and consolidation in the early 1930s.<sup>102</sup> Dietrich's reward was his promotion to NSDAP Press Chief in 1931, and he joined the SS in 1932. More advancement followed in quick succession: Reichsleiter in 1933, Vice-President of the Reichspressekammer under Max Amman.<sup>103</sup> As of 1936, he was a member of the Reichstag and in 1937 Reich Press Chief of the Government and a State Secretary in the Propaganda Ministry. He reached the SS rank of *Obergruppenführer* (equivalent to a US Lieutenant General) in 1941. It is almost impossible to find an adequate parallel for Dietrich's meteoric rise in the Nazi system.

In his role as Reich Press Chief, he approved everything that appeared in print.<sup>104</sup> The mechanisms for this were several. He conducted daily briefings with the editors of the major papers and gave "Tagesparolen," daily directives from which there was no dissent. Dietrich drafted the Editorial Control Law, which mandated that newspaper and magazine editors join the newly created Reich League of the German Press.<sup>105</sup> This included a draconian system of fines and removals for editors who violated the sensibilities that the NSDAP wished to

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<sup>102</sup> *United States of America vs. Ernst von Weizsäcker, et al.* (Ministries Case), p. 199.

<sup>103</sup> Dietrich also wrote an odd English-language book, *With Hitler on the Road to Power: Personal Experiences with My Leader*, in 1934, published by Liberty Bell Publications. This publishing house was associated with another antisemitic press, The Patriot Publishing Company, whose major imprint was an edition of the Protocols of the Elders of Zion, also from 1934. In 2004, still in business, they issued a reprint of Martin Luther's *The Jews and their Lies*. [https://www.worldcat.org/title/protocols-of-the-meetings-of-the-learned-elders-of-zion-with-preface-and-explanatory-notes/oclc/57511113&referer=brief\\_results](https://www.worldcat.org/title/protocols-of-the-meetings-of-the-learned-elders-of-zion-with-preface-and-explanatory-notes/oclc/57511113&referer=brief_results)

<sup>104</sup> In 1936, he penned a fawning tribute to Hitler, "Der Führer und das deutsche Volk," *Adolf Hitler. Bilder aus dem Leben des Führers* (Hamburg: Cigaretten/Bilderdienst Hamburg/Bahrenfeld, 1936), pp. 19-26. It ends with the line, "What eternal power, what lasting blessings will result for the people and the Führer, for the Führer and the German people!"

<sup>105</sup> Schriftleitergesetz, 7 Oct 1933 at <https://alex.onb.ac.at/cgi-content/alex?apm=0&aid=dra&datum=19330004&seite=00000713&zoom=2>

promote.<sup>106</sup> Specifically, Dietrich had oversight over every issue of *Der Stürmer* and every cartoon that Philipp Rupprecht drew. If Dietrich had objections as to content or message, Streicher and Rupprecht's careers would have come to a sudden end. On the contrary, Dietrich was responsible for shaping that message and ensuring publishers and editors conformed. His directives, seen from a macro-level, were what coordinated the psychological conditioning of the German people across the entire spectrum; a total circulation of 30,000,000.<sup>107</sup> From that perspective, it effectively ties the persecution by word and art directly to the heart of the Nazi state.

### **3.8 Ministries case**

The indictment at the Ministries Trial was comprehensive and somewhat confusing.

Dietrich was indicted on:

Count One – Crimes Against Peace

Count Three – War Crimes

Count Four – Crimes Against Humanity: Persecution of German Nationals

Count Five – Crimes Against Humanity: Atrocities and Offenses Committed against Civilian Populations

Count Eight – Membership in Criminal Organizations

The Tribunal dismissed Count Four in its entirety, which was exclusively focused on persecution, leaving Dietrich guilty on Counts Five and Eight. Count Five applied to Dietrich's media control and hate speech.<sup>108</sup> The first paragraph under Count Five states that the defendant committed

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<sup>106</sup> Jeffrey Herf, *The Jewish Enemy: Nazi Propaganda during World War II and the Holocaust* (Harvard University Press, 2006), p. 18.

<sup>107</sup> *Ibid.*, p. 189.

<sup>108</sup> The Ministries Case, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-XIII.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIII.pdf)

The Tribunal's rationale was that it was limited by the decision of the IMT that CAH had to occur within the nexus of other charged offenses. The prosecution argued that Article II of C.C. No. 10 untethered the NMT on this point. The court disagreed. "This [prosecution argument] contention is based upon the fact that the definition in Control

“crimes against humanity” as defined by Article II of Control Council Law No. 10, in that he participated in offenses including, “persecutions on political, racial, and religious grounds.”<sup>109</sup>

The prosecution made its position clear: that Dietrich, through his direction of the German press establishment, “infected the German mind with the virus of antisemitism, and incited the German people to active persecution.”<sup>110</sup>

There was no shortage of antisemitic statements in the press directives Dietrich issued which, given his direction of the German press, constituted a sustained campaign of persecution:

"It is to our interests that all Jewish statements against Germany or the authoritarian states should be well noted. The reason for this wish is that measures of an inner political nature may be expected."

"The duty of all periodicals is to work up attacks on the destructive influence of the Jews with respect to the cultures of peoples. The effect desired is the elimination of any vestige of popular sentimentality for the 'poor Jews.'"

"Every individual Jew, wherever he is and whatever he does, is to blame. There are no 'decent Jews', but rather only those with greater or lesser camouflage. The Jew is a notorious criminal."

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Council Law No. 10 does not contain that certain qualifying phrase which is contained in the Charter definition, which phrase, immediately following the listing of the offenses constituting crimes against humanity, is as follows, 'in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.' This position, in our view, is not tenable, and cannot justify an extension of the jurisdiction of this Tribunal beyond the sphere to which the International Military Tribunal properly limited itself." *Ibid.* p. 114.

<sup>109</sup> *Ministries Case*, supra note 125, pp. 43–44.

<sup>110</sup> Dietrich instructed all these publications that Jewish themes should not, as he put it, "be seized upon unimagatively, but used only to incite." *Ministries Case*, Vol. XII, p. 202.

“In headlines and text material, the Jewish Bolshevik murder and arson ring must always be referred to, not only today or tomorrow, but continuously must the world's mortal enemy be unmasked and grappled with.”<sup>111</sup>

Perhaps most tellingly from February 1944, two years after the extermination camps became operational – “The instigator, supporter, and leader of this war is, and will remain, the international Jew – that criminal race which now, as in the centuries past, is to blame for the fact that the nations of the earth are arrayed against one another in war. An understanding among the peoples of the earth can be hoped for only when this world pest once and for all is stamped out.”<sup>112</sup>

The prosecution theory was clear: since Dietrich effectively managed Streicher’s antisemitic hatred, “the evidence shows the character and intensity of the antisemitic directives released by the defendant Dietrich during the period to which the IMT referred in passing judgment on Streicher.” Meaning, if Streicher was found guilty, then the Tribunal had no other choice but to likewise find Dietrich equally guilty.

### **3.9 Verdict**

The Tribunal agreed.

It is thus clear that a well thought-out, oft-repeated, persistent campaign to arouse the hatred of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich. That part or much of this may have been inspired by Goebbels is undoubtedly true, but Dietrich approved and authorized every release...The only reason for this campaign was to blunt the

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<sup>111</sup> Ministries Case, Vol. XII, p. 203. Considering Dietrich’s position in his postwar memoir – that he was an active resistor who tried to soften the regime’s antisemitism – his 1950 version is just that: a postwar fiction.

<sup>112</sup> Ibid., p. 204.

sensibilities of the people regarding the campaign of persecution and murder which was being carried out...

These press and periodical directives were not mere political polemics, they were not aimless expression of antisemitism, and they were not designed only to unite the German people in the war effort. Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews.<sup>113</sup>

A peculiar aspect of the judgment is that while concluding the defendant committed a crime against humanity, it does not specifically speak of persecution – although even basic logic demands a conclusion that the underlying offense could be no other. And as the Tribunal found, the hate speech was criminally actionable for the “furnishing” of “excuses and justifications” to “subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.”<sup>114</sup> The speech itself, and by extension, the illustrations which accompanied and furthered the speech, was persecution and therefore a Crime Against Humanity.

Despite the damning indictment and equally scathing judgment, Dietrich’s luck held. The Tribunal’s decision was read on 12 April 1949, and he was sentenced to seven years, with credit for time served. He spent the next period in Landsberg Prison (where Hitler served his brief incarceration following the 1923 *Putsch*) writing his memoir, *12 Jahre mit Hitler*.<sup>115</sup> He was

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<sup>113</sup> Ibid. Vol. XIII, pp. 575-76.

<sup>114</sup> Ibid., p. 576.

<sup>115</sup> Published by Atlas Verlag (Köln) in 1955. The American edition, *The Hitler I Knew: Memoirs of the Third Reich’s Press Chief*, came out in 2010.

released by order of US High Commissioner for Germany John McCloy in 1950, having been in prison less than a year.<sup>116</sup> Dietrich's good fortune ended soon afterward; he died in November 1952.<sup>117</sup>

### 3.10 Dietrich and inchoate crime

Unlike the Streicher and Fritsche judgements, the Dietrich case allows a clear standard for persecution as a crime against humanity in its inchoate form and is directly relevant to the postwar cases against practitioners of persecution by art: "Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected." The verdicts of the IMT and NMT cases were common knowledge<sup>118</sup>, and this clear statement of the crime of persecution was available to every Spruchkammer and every member of the German judiciary who supervised the Harlan, Hippler, and Rupprecht proceedings. Unfortunately, there appear to be few in the denazification system that referenced them.<sup>119</sup>

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<sup>116</sup> McCloy either pardoned or commuted the sentences of almost every convicted criminal from the NMT and other American war crimes trials. He also ordered property confiscated from the Krupp and Flick defendants returned to their original, convicted, owners. <https://www.nytimes.com/1995/09/14/obituaries/w-j-wilkins-98-was-judge-at-trial-of-nazi-industrialists.html> On his pardon list was Edmund Veessenmayer, who organized the deportation of 350,000 Hungarian Jews to Auschwitz in 1944, where they were exterminated. These actions were taken, in part, on the recommendation of the Advisory Board for Clemency for War Criminals (aka The Peck Panel), a non-binding advisory board McCloy convened to evaluate the sentences. It advocated sentence reductions in 77 of 99 cases. Curiously, the FBI also investigated McCloy in 1950-1 after allegations that he might hold communist sympathies. The FBI did not find this credible. <https://vault.fbi.gov/john-mccloy/john-mccloy-part-01-of-01/view>  
<sup>117</sup> <https://www.jewishvirtuallibrary.org/otto-dietrich>

<sup>118</sup> Unfortunately, the full German language translation of the NMT proceedings did not appear until 1996 – although an East German version was published in 1969, and a redacted one in the Federal Republic in 1985. Larry May and Elizabeth Edenberg, eds., *Jus Post Bellum and Transactional Justice* (Cambridge: Cambridge University Press, 2015), p. 60.

<sup>119</sup> See Gregory Gordon, "The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law," *Ohio State Law Journal*, Vol. 75, No. 3, 2014.

### 3.11 Inchoate crime and image

One further note. Neither the IMT nor the NMT, as per their authorizing documents and Allied policy, ever explicitly endorsed the idea of inchoate crime as related to the enumerated offenses, charges, or specification. That is, the prosecution never sought to punish the attempt to commit an offense, regardless of whether there was an evidentiary nexus between the defendant's actions and the crime(s). In the case of incitement, had the Allied pursued this route from the initiation of the IMT, it might have been easier to hold those accountable – such as Fritzsche, and many others – where the court was not convinced that the documentary record sufficient to justify conviction on persecution/incitement because of a nebulous connection to the crimes committed during the course of the war. It was an opportunity lost, and one that would have ramifications in other spheres.

Incitement by image played only a minuscule role in the Streicher prosecution, and none in the Fritzsche and Dietrich cases. This is logical in the sense that Fritzsche was a radio personality and Dietrich was a bureaucrat. They had no direct means of disseminating inciting images. With Streicher, the IMT heard evidence about image only in incidental testimony as part of the larger focus on *Der Stürmer's* content while the impetus remained on the hateful nature of his words. This, too, was a missed opportunity in the judgment where the court could have made a finding that hateful, incendiary art could (and did) sway the mind in exactly the same manner as the spoken word, and that the attempt to do so also constituted a crime.



4. Hans Fritzsche signing autographs after his acquittal at the IMT



5. Reich Press Chief Otto Dietrich



## Chapter IV: American policy, the Spruchkammern, and Denazification – National Overview

From 1945 through 1951, the Allied powers attempted to rid occupied and then reconstituted Germany of the vestiges of National Socialism. While these were noble aims with vital rehabilitative purposes, the reality of the task soon overwhelmed the goals, and in the end, those Germans charged with persecution and incitement, other than a few selected major offenders, were essentially set free and declared blameless for crimes against humanity they might have committed. Neither the Allied nor domestic legal framework was sufficient to perform the mission demanded of it, and the attitude toward leniency only grew as the inevitability of a renewed sovereign German state approached. Each in their own way, Dietrich, Fritzsche, Harlan, Hippler, and Rupprecht were fortunate beneficiaries.

### 4.1 Initial Allied plans for denazification

Prior to the end of 1944, no in-depth plans existed for how to govern Germany. US Army LTC Murray Bernays conceived the solution for how to approach the complicity of Nazi party members – the criminal organizations conspiracy charge at the IMT – but even that was subject to qualification. There were approximately 8.5 million party members in a population of 65 million, but they differed in individual circumstances and criminal intent. Some were the more ideologically committed *Alter Kämpfer* (originally those who joined prior to the 1923 Putsch<sup>120</sup>, later more broadly applied to those who joined before the NSDAP gained power in 1933) while

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<sup>120</sup> <https://research.calvin.edu/german-propaganda-archive/hinkel.htm>, citing Hans Hinkel, *Einer aus Hunderttausend* (Munich: Verlag Knorr & Hirth, 1943).

others came later (following Hitler's suspension of new party memberships between 1934-7) because of genuine political kinship or opportunistic gain. In addition, there were hundreds of mandatory and voluntary professional, social, and trade organizations affiliated with but not requiring party membership, all part of the *Gleichschaltung* (coordination) of every aspect of the National Socialist state.<sup>121</sup> For example, any legal professional wishing to practice in the court system would have to join the *Nationalsozialistischer Rechtswahrerbund*; persons working in any aspect of motion pictures were members of the *Reichsfilmkammer*. Professional artists of any kind were required to be in the *Reichskulturkammer*, and then also one of the sub-organizations dedicated to the artist's specific field. In the *Hitler-Jugend* alone, membership was mandatory for all youth after 1939 and more than 8 million enrolled by 1940.<sup>122</sup> If the Allied or domestic German postwar denazification aim had been to penalize, the total would then run to more than 40 million people, most of the population. This was clearly impractical for obvious reasons.

#### **4.2 The first Allied directives**

*The Handbook for Military Government in Germany* (August 1944) represented the first American policy framework but was rejected by both Treasury Secretary Henry Morgenthau and President Roosevelt as being unduly lenient. The next iteration, Joint Chiefs of Staff (JCS) 1067, issued in June 1945 after the end of the war in Europe, focused on economic policy as well as civil order, food supply, and public health. It was, however, not published until October

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<sup>121</sup> See *Organisationsbuch der NSDAP* (München: Zentralverlag der NSDAP, 1936). Online at <https://archive.org/details/organisationsbuc00nati>

<sup>122</sup> Peter D. Stachura, "Hitler Youth". In Dieter Buse; Juergen Doerr (eds.). *Modern Germany: An Encyclopedia of History, People, and Culture 1871–1990*. 2 Vols. (New York: Garland Publishing, 1998), p. 479.

and even then carried with it Morgenthau's emphasis on punishment for all aspects of German society and infrastructure.<sup>123</sup> In Morgenthau's original blueprint, Germany was to have been dismantled, deprived of industry, and purposefully kept at an essentially pastoral standard of living.<sup>124</sup> JCS 1067 was finally replaced by JCS 1779/1 in July 1947 and this represented considerably readjusted priorities in line with more realistic goals: "An orderly prosperous Europe requires the economic contributions of a stable and productive Germany."<sup>125</sup> The directive gave further guidance for the direction of German courts:

"You will exercise such supervision over German Courts as necessary to...enforce compliance with the provisions of the Control Council and Military Government legislation. You will foster the independence of the German judiciary by allowing the courts the freedom of their interpretation and application of the law and by limiting the control measures instituted by the Military Government to the minimum consistent with the accomplishment of the aims of the occupation...

...You may extend the jurisdiction of the German courts to all cases which do not involve the interests of the Military Government or persons under the protective care of the Military Government.

...a basic objective of the occupation is the reestablishment of the rule of law in Germany."<sup>126</sup>

As the Cold War came into focus, the fight to restore economic and political stability was a key aspect in the fight against Soviet communism. German national sovereignty ceases to exist on 5

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<sup>123</sup> Department of State, Foreign Relations of the United States, 1945, vol. 3, European Advisory Commission; Austria; Germany, p. 484.

<sup>124</sup> Henry Morgenthau, "Suggested Post-Surrender Program for Germany [The original memorandum from 1944, signed by Morgenthau] (text and facsimile)". Box 31, Folder Germany: Jan.-Sept. 1944 (i297). Franklin D. Roosevelt Presidential Library and Museum.

<sup>125</sup> Department of State Bulletin, Vol. 17, Part 1, Directive to Commander-in-Chief of US Forces of Occupation, Regarding the Military Government of Germany, July 11, 1947, (Washington: Government Printing Office, 1947), p. 186.

<sup>126</sup> Ibid, p. 188.

June 1945, following the formal surrender of the German forces on 8 May at Berlin-Karlshorst.<sup>127</sup>

Allied leaders were thinking ahead to some degree about the denazification task ahead. In April 1945, came the Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany.<sup>128</sup>

In the interim, American rehabilitation efforts were directed by the US Group Control Council, Germany (USGCC) from May to October 1945, succeeded by the Office of Military Government,

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<sup>127</sup> Oddly, the Flensburg government (with Großadmiral Karl Dönitz as the President of Germany, as per Hitler's Political Testament) occupied a limbo status from 8 May until it was dissolved on 23 May. The joint Berlin Declaration of 5 June declared the Allies the supreme government in Germany. "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." <https://english.dipublico.org/2176/declaration-regarding-the-defeat-of-germany-and-the-assumption-of-supreme-authority-with-respect-to-germany-by-the-governments-of-the-united-states-of-america-the-union-of-soviet-socialist-republics/#:~:text=The%20Governments%20of%20the%20United%20States%20of%20America%2C,any%20state%2C%20municipal%2C%20or%20local%20government%20or%20authority.>

<sup>128</sup> Part I (6) Denazification. "(c.) All members of the Nazi party who have been more than nominal participants in its activities, all active supporters of Nazism or militarism and all other persons hostile to Allied purposes will be removed and excluded from public office and from positions of importance in quasi-public and private enterprises such as (1) civic, economic and labor organizations, (2) corporations and other organizations in which the German government or subdivisions have a major financial interest, (3) industry, commerce, agriculture, and finance, (4) education, and (5) the press, publishing houses and other agencies disseminating news and propaganda. Persons are to be treated as more than nominal participants in Party activities and as active supporters of Nazism or militarism when they have (1) held office or otherwise been active at any level from local to national in the party and its subordinate organizations, or in organizations which further militaristic doctrines, (2) authorized or participated affirmatively in any Nazi crimes, racial persecutions or discriminations, (3) been avowed believers in Nazism or racial and militaristic creeds, or (4) voluntarily given substantial moral or material support or political assistance of any kind to the Nazi Party or Nazi officials and leaders. No such persons shall be retained in any of the categories of employment listed above because of administrative necessity, convenience or expediency.

German courts were considered in (11)(b): All ordinary criminal, civil and administrative courts, except those previously re-established by order of the military government, will be closed. After the elimination of all Nazi features and personnel you will permit those which are to exercise jurisdiction within the boundaries of your zone to resume operations under such regulations, supervision and control as you may consider appropriate. Courts which are to exercise jurisdiction over territory extending beyond the boundaries of your zone will be reopened only with the express authorization of the Control Council and under its regulation, supervision and control. The power to review and veto decisions of German courts shall be included within the power of supervision and control. <https://avalon.law.yale.edu/wwii/ger02.asp>

United States (OMGUS) from January 1946 until its dissolution in December 1949.

Denazification and democratization were the two central elements of the OMGUS efforts. Five regional satellite offices were established: Berlin, Bremen, Bavaria, Greater Hesse, and Württemberg-Baden, responsible to the main headquarters at Frankfurt-am-Main (at the former IG Farben building complex). Cooperation with the French, Soviets, and British occurred through the Allied Control Council at the Kammergericht, Berlin. Many significant joint directives and orders followed, to address common interests of the joint Allied occupation – several concerning propagandists.

ACC Directive No. 9 made legal the London Agreement for the prosecution of the major war criminals at the International Criminal Tribunal at Nuremberg. ACC Law No. 1, formally repealed the Enabling Act of 1934, which granted Hitler the authority to sidestep the Weimar Constitution (although the constitution theoretically remained in effect), and prohibited discrimination against anyone based on race, nationality, or religion.<sup>129</sup> The most important piece of occupation policy was certainly Allied Control Council Law No. 10, enacted on 20 December 1945. It directed each Allied power to create a legal system to investigate and try war criminals outside the ambient of the International Military Tribunal. This mirrored the fractures in the relationship between the occupying powers, and any possibility of an IMT sequel had already collapsed. Prior to ACC No. 10, ACC Law No. 4 re-established the German court system, with the criminal law returning to its un-Nazified roots in the *Strafgesetzbuch* of

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<sup>129</sup> ACC Law No. 1 became invalid when the Bundestag passed the *Erstes Gesetz zur Aufhebung des Besatzungsrechts* – BGBl, p. 437 in May 1955. The Enabling Act was specifically rejected (again).

1871.<sup>130</sup> There were changes to reflect the National Socialist crimes; §130 of the 1871 StGB against inciting violence remained in force, although its precise language referred to concerns at the time it was written in the Nineteenth century – violence perpetrated by one class upon another (“Wer in einer den öffentlichen Frieden gefährdenden Weise verschiedene Klassen der Bevölkerung zu Gewalttätigkeiten gegen einander öffentlich anreizt, wird mit Geldstrafe bis zu zweihundert Thalern oder mit Gefängniß bis zu zwei Jahren bestraft.”).<sup>131</sup> Nevertheless, it was sufficient to at least criminalize actions committed by propagandists or hate-mongers in film and art. Since the postwar, laws against incitement were strengthened and in 1960, the Bundestag approved a new StGB §130 which criminalizes the following:

- 1) Inciting hatred against segments of the population, calls for violent action, or measures against them that disturb the peace
- 2) Insulting, maliciously maligning, or defaming segments of the population in a manner capable of disturbing the peace
- 3) Disseminate, publicly make accessible, produce, obtain, supply, stock, offer, announce, commend, undertake to import or export, or facilitate such use by another of written materials that assaults the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group

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<sup>130</sup> CC No. 10 Art. III (1)(d) gave authority to establish German courts to try offenders: “Each occupying authority, within its Zone of Occupation...shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.” <https://avalon.law.yale.edu/imt/imt10.asp>

<sup>131</sup> [https://de.wikisource.org/wiki/Strafgesetzbuch\\_f%C3%BCr\\_das\\_Deutsche\\_Reich\\_\(1871\)#%C2%A7.130](https://de.wikisource.org/wiki/Strafgesetzbuch_f%C3%BCr_das_Deutsche_Reich_(1871)#%C2%A7.130).

- 4) Approve of, deny or downplay an act committed under the rule of National Socialism in a manner capable of disturbing the peace<sup>132</sup>

This, though, was many years in the future.

In furtherance of denazification, ACC Directive No. 24 of 12 January 1946 set in place the requirements for removing from public office anyone who had more than a nominal role in National Socialist party activities, and directed their subsequent removal from any civil service, civil organization, labor union, education, industry, the press, and any other work above the level of laborer.<sup>133</sup> Specific to the Harlan, Hippler, and Rupprecht cases, Section Two identifies offenders who “authorized or participated affirmatively in any Nazi crimes, racial persecutions or discriminations.” Section Three goes on to penalize persons who “voluntarily” give substantial moral or material support or political assistance of any kind to the Nazi Party or Nazi officials and leaders.” In the appended list of categories is included “all officials of Nazi Agencies who have written propaganda of a primarily political nature.”<sup>134</sup>

ACC Directive 38 (12 October 1946), Art. 3 (A)(II)(1) defines as an Offender “anyone who contributed to the establishment, consolidation, or maintenance of the national socialist tyranny, by word or deed, especially through speeches or writing. Article 8 provides sentences

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<sup>132</sup> This is related to §130: Sedition. Section three makes it a crime to deny NS-era genocide; Section 4 prohibits the glorification or approval of the NS regime. <http://www.gesetze-im-internet.de/stgb/>

<sup>133</sup> *Allied Control Authority Control Council, Directive NO. 24: Removal from Office and from Positions of Responsibility of Nazis and Persons Hostile to Allied Purposes.*

<https://images.library.wisc.edu/History/EFacs/GerRecon/Denazi/reference/history.denazi.i0014.pdf> This is a meticulous and holistic snapshot of the enormity of organizations that existed under the NS-regime.

<sup>134</sup> *Ibid.*, p.16. For example, there was an organization called the *Reichserbhofgericht*, which aimed to promote the bizarre *Blut und Boden* NS racial purity concepts in livestock; its officials also earned special scrutiny for reasons that are unclear.

ranging from death, life imprisonment, 5-15 years confinement, and property confiscation, and other civil penalties. The definition for Major Offenders (Art. 2 (6)) was “anyone who gave major political, economic, propagandist or other support to the national socialist tyranny.”

### 4.3 Allied Control Council No. 10

Operating under ACC Law 10, the Americans directed that all adult German citizens complete a questionnaire (*Fragebogen*) and detail their activities during the Third Reich.<sup>135</sup> This would have been an exercise in perjury had not the Allies already possessed near-complete NSDAP membership records as of April 1945, with additional documents seized and translated at the Berlin Document Center in connection with the upcoming International Military Tribunal. Beginning in 1945, the United Nations War Crimes Commission began issuing a comprehensive list of wanted persons. This list – The Central Registry of War Criminals and Security Suspects (CROWCASS) – was used in connection with the *Fragebogen* to identify and detain major offenders. Anyone who joined the NSDAP prior to 1933 were assumed to be devoted followers and received the most attention. This total came to 1.5 million Germans.<sup>136</sup> The *Fragebogen* consisted of 131 questions and its submission was required to receive a ration card or work under Allied occupation.<sup>137</sup>

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<sup>135</sup> The *Fragebogen* was created by the German Country Unit, a civil affairs section of the Supreme Headquarters, Allied Expeditionary Force (SHAEF) as part of its initial work on the *Handbook for Military Government for Germany* in 1944. See exemplar at <https://geschichtsbuch.hamburg.de/wp-content/uploads/sites/255/2020/01/Military-Government-of-Germany-Fragebogen-Juli-1947-klein.pdf>

<sup>136</sup> Frederick Taylor, *Exorcising Hitler: The Occupation and Denazification of Germany* (Bloomsbury Press, 2011) p. 255. In an article from the 13 October 1945 newspaper *Statesman Journal*, General Eisenhower was quoted as saying it would “take 50 years of hard work” to reeducate Nazi Germany in democratic ideals.

<sup>137</sup> For the different attitudes about denazification prior to the end of the war, see Alicia Mayer, *The Failed Post War Experiment: How Contemporary Scholars Address the Impact of Allied Denazification on Post-World War II Germany* (University Heights: John Carrol University, 2019). <https://collected.jcu.edu/cgi/viewcontent.cgi?article=1130&context=mastersessays>



#### 4.4 Categories of offenders

ACC Directive No. 38 specified the following determinative categories, based on the

Fragebogen:

- 1) Major Offenders
- 2) Offenders
- 3) Lesser Offenders
- 4) Followers
- 5) Exonerated Persons

The major offender category is expansive.<sup>138</sup> The law defined Offender to include “activists” who “substantially contributed to the establishment, consolidation, or maintenance of the

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<sup>138</sup> 1. Anyone who, out of political motives, committed crimes against victims or opponents of national socialism;

2. Anyone who, in Germany or in the occupied areas, treated foreign civilians or Prisoners of War contrary to International Law;

3. Anyone who is responsible for outrages, pillaging, deportations, or other acts of brutality, even if committed in fighting against resistance movements;

4. Anyone who was active in a leading position in the NSDAP, one of its formations or affiliated organizations, or in any other national socialistic or militaristic organization;

5. Anyone who, in the government of the Reich, the Länder, or in the administration of formerly occupied areas, held a leading position which could have been held only by a leading national socialist or a leading supporter of the national socialistic tyranny;

6. Anyone who gave major political, economic propagandist or other support to the national socialistic tyranny, or who, by reason of his relations with the national socialistic tyranny, received very substantial profits for himself or others;

7. Anyone who was actively engaged for the national socialistic tyranny in the Gestapo, the SD, the SS, or the Geheime Feld- or Grenz-Polizei;

8. Anyone who, in any form whatever, participated in killings, tortures, or other cruelties in a concentration camp, a labour camp, or a medical institution or asylum;

9. Anyone who, for personal profit or advantage, actively collaborated with the Gestapo, SD, SS or similar organisations by denouncing or otherwise aiding in the persecution of the opponents of the national socialistic tyranny;

10. Any member of the High Command of the German Armed Forces, so specified. <https://germanhistorydocs.ghi-dc.org/pdf/eng/Denazification%20%20ENG.pdf>

National Socialistic tyranny by word or deed, especially in public through speeches or writings...using his personal reputation or his position of influence in political, economic, or cultural life.”<sup>139</sup> By contrast, a Follower (Mitläufer) was one who “was not more than a nominal participant or an insignificant supporter of National Socialism.” The test to be applied was if the person “did no more than pay his membership dues, participate in meetings where attendance was obligatory, or fulfilled unimportant or purely routine duties.”<sup>140</sup>

During the initial phase, all denazification was carried out by the American authorities, resulting in an administrative nightmare of some 40,000 Fragebogen arriving each day for processing, comparison to reference lists, and determination. Even by December 1945, mere months after the program was initiated, although 500,000 questionnaires had been processed, 4,000,000 had piled up, with many millions still to come.<sup>141</sup> This, in addition to the fact that few American administrative officials spoke or read German, meant reliance on translators of varying degrees of competence, who might have their own background issues. While they waited for a decision, millions of starving Germans were unable to work other than as manual laborers. In the American sector, the rate of dismissal for civil servants because of Nazi affiliations ran close to half, further complicating an already tenuous situation in a bomb-ravaged country trying to find its feet.<sup>142</sup>

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<sup>139</sup> Penalties for Offenders included labor camps for up to five years, property confiscation, mandatory ineligibility to hold public office, mandatory loss of pension, loss of right to vote, loss of right to be elected to office, ban from trade unions, and restrictions in housing and residence.

<https://images.library.wisc.edu/History/EFacs/GerRecon/Denazi/reference/history.denazi.i0013.pdf>, p. 10.

<sup>140</sup> Ibid. p. 7.

<sup>141</sup> Taylor, p. 261.

<sup>142</sup> A symptom of this was the switch from the Fragebogen to the Meldebogen, a two-page versus the multiple-page questionnaire on NS-period activity.

## 4.5 Befreiungsgesetz

Because of the impossibility for reaching anywhere near the denazification goal at the current rate of progress, The Law for Liberation from National Socialism and Militarism of 5 March 1946, came as welcome relief.<sup>143</sup> Authored by the Americans but administered by the German court system (under authority granted by ACC Directive 24) and passed into the law in the federal states (the Befreiungsgesetz), it was the mechanism which turned the denazification process over to German courts – the Spruchkammern. The law retained the categories of guilt established by the ACC in Articles 1-9, and 11-13, from major offenders through those uninvolved with National Socialist crimes.

First and foremost, the Spruchkammer retained the form of a criminal court but was not strictly a criminal proceeding. It was primarily a civil determination of status relative to the denazification process. Even those deemed to be Category I offenders would have to be convicted in a separate process for normal criminal penalties to apply. The final determination from the Spruchkammer might result in a criminal referral, but this was by no means automatic. Indeed, it was exceedingly rare. As the practical emphasis shifted from identification and punishment to rehabilitation, fewer individuals could expect to see the inside of a criminal court via referral.

This was an understandable but catastrophic error for certain types of offenses.

Spruchkammern aside, National Socialist criminals could be prosecuted in the manner of

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<sup>143</sup> Gesetz Nr. 104 zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946  
<http://www.verfassungen.de/bw/wuerttemberg-baden/befreiungsgesetz46.htm>

ordinary criminal defendants, which functioned perfectly well after ACC No. 4. Amtsgerichte, Landgerichte, and Oberlandesgerichte could have easily handled any of the relevant charges, passed sentence, survived appeal, and sent the defendants to prison upon conviction.<sup>144</sup> The Spruchkammern, in that situation, would be fully complementary to a purge of National Socialist crimes since their function was primarily administrative. The Strafgesetzbuch already criminalized persecution, although defined by archaic standards relative to what happened during the NS period. Yet for several reasons, the individual Länder elected to go another way during the immediate postwar period. Prosecutions of war criminals outside the Spruchkammer system did not gain more than minimal traction until after the Ulm Einsatzkommando trial in 1958, and even then, on a relatively modest scale.<sup>145</sup>

The Befreiungsgesetz directed the Prime Minister of each Land to appoint a Minister for Political Liberation, who must be a long-standing opponent of National Socialism, actively pro-democracy, and a supporter of the legal principles at issue. This minister would construct Tribunals to hear the denazification cases in urban and rural districts, create an appellate tribunal, and assign a public prosecutor to the Spruchkammer.<sup>146</sup>

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<sup>144</sup> The 1949 Grundgesetz (Article 92 is devoted to the makeup of Land courts and jurisdiction.

<sup>145</sup> <https://zentrale-stelle-ludwigsburg.justiz-bw.de/pb/,Lde/Startseite/Einrichtung/Gruendung+und+Zustaendigkeit> Even then, Erwin Schüle, the first director of the Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen was only authorized to investigate (not prosecute directly) crimes committed outside Germany, and only involving those against civilians. This changed in 1964 and 1966, allowing an expanded remit. Ironically, Schüle had been a member of the NSDAP and SA, a fact he kept hidden until exposed in 1966. See Annette Weinke, *Eine Gesellschaft ermittelt gegen sich selbst: Die Geschichte der Zentralen Stelle Ludwigsburg 1958 – 2008* (Darmstadt: WBG Academic, 2012) and [https://www.deutschlandfunk.de/strafverfolgung-mit-hindernissen.724.de.html?dram:article\\_id=99309](https://www.deutschlandfunk.de/strafverfolgung-mit-hindernissen.724.de.html?dram:article_id=99309)

<sup>146</sup> Composition of the tribunal was one chairman and at least two assessors. The chairman should be otherwise qualified as a normal judge or higher administrative service. There are further stipulations about consulting with the Land Minister of Justice and the political make-up of the tribunals, which were to guard against discrimination

While unexpectedly generous safeguards for the respondent who appears before the tribunal were present in this scheme, the burden of proof was slightly shifted. Whereas normally innocence would be assumed until proved beyond a reasonable doubt, if the respondent was initially determined as a Category I or II offender, the burden was upon him to show he belonged in a more favorable category. Anyone who considered themselves a member of a lower classification, *Mitläufer* or *Enlastete*, had the burden to prove that if it was questioned. If the respondent was a member of a group deemed criminal at the IMT (SS, Gestapo, etc.), the presumption existed of a knowing membership in that criminal organization unless the respondent proved otherwise (Article 34).<sup>147</sup> As with the IMT and NMT, the tribunal could hear witness testimony under oath as well as consider affidavits.

Should the respondent fail to appear – elected to flee the Land jurisdiction or whose whereabouts were unknown – the public prosecutor could (but was not required to) move for an expedited oral hearing. In case of a hearing, a representative was appointed for the missing party. The tribunal was empowered to order the arrest of an absent defendant, but only within the jurisdiction. That aspect alone proved crucial in the *Hipler* case. Reasons for the determination were to be rendered in writing (Article 44), and witness testimony was to be recorded in detail (Article 45).<sup>148</sup>

There were exit lanes. The Land Minister for Political Liberation had the authority to vacate any decision, order a new trial, or remand the case to a different tribunal, although the review

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against the defendant on unrelated grounds. As a legal matter, the tribunals were NOT bound by precedent or the decisions of other agencies.

<sup>147</sup> *Ibid.*, p. 18.

<sup>148</sup> The decision was to be indicated on the respondent's registration card (Article 51).

process was not automatic. The public prosecutor, too, could recommend the determination be vacated or mitigated, leaving it to the Minister for final decision (Article 53). The Prime Minister had the full power to pardon.<sup>149</sup>

Someone designated as a Mitläufer could receive penalties to include travel restrictions, some limits on employment, and a fine. Even Category III Minderbelastete faced only probation with restrictions.

Under Articles 19-22, certain defendants and certain circumstances were eligible for mitigation. These included youths, severe injury as a result of the war, economic hardship, or those prosecuted under criminal law whose sentences might be taken into consideration when determining punishment through the Spruchkammer.<sup>150</sup>

As of March 29, 1948, the following paragraph was added to Article 17 with effect from March 25, 1948:

“VIII. The determination of atonement measures and the ordering of a probationary period can be wholly or partially dispensed with if the person concerned has already proven himself in terms of his overall attitude, or if there is a disproportion between the atonement measures to be imposed on the basis of the classification and the personal or economic restrictions that have existed since. If the determination of atonement measures and a probation period are

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<sup>149</sup> Befreiungsgesetz at <http://www.verfassungen.de/bw/wuerttemberg-baden/befreiungsgesetz46.htm>

<sup>150</sup> Befreiungsgesetz, <http://www.verfassungen.de/bw/wuerttemberg-baden/befreiungsgesetz46.htm>

completely disregarded, the person concerned can be classified immediately in the group of followers without any follow-up proceedings (Art. 52, Paragraph 2).”

This means that the court could sidestep any of the previous regulations about how the defendants were punished for which crimes based on their “overall attitude” (presumably remorse, although the act does not specify this, leaving it open for rampant abuse), or in consideration of the defendant’s economic plight.

A law of 1 April 1946 created 545 civilian tribunals, with a staff of 22,000, consisting almost entirely of lay judges who would not have to go through the more thorough review necessary for existing lawyers and career jurists from the NS period.<sup>151</sup> The initial caseload was staggering: almost a million. Efficiencies took priority. Otherwise liable persons who were born after 1919, disabled veterans, and those who could secure exonerating statements, and thereby legal exoneration (nicknamed “Persilscheine” – for the laundry whitening-like effect of turning something dirty into something clean). A black market trade in Persilscheine emerged, rendering the Spruchkammern’s consideration of affidavits almost meaningless. The pace quickened and judicial review became farcical. As one legal historian observed, “The bureaucratic nature of the denazification process engendered so much resentment that the vetting boards eventually reducing major crimes into minor misdemeanors, thereby becoming an infamous Mitläuferfabrik.”<sup>152</sup> With evidence of mass-murder and genocide being impossible to deny, the BUNDESREPUBLIK DEUTSCHLAND took a path which resulted in practical

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<sup>151</sup> Frederick Taylor, *Exorcising Hitler: The Occupation and Denazification of Germany* (London: Bloomsbury Press, 2011), p. 281.

<sup>152</sup> Konrad H. Jarausch, “The Conundrum of Complicity: German Professionals and the Final Solution” in *The Law in Nazi Germany* (Alan Steinweis and Robert Rachlin, eds.), (New York: Berghahn, 2013), p. 27.

exoneration, stressing the criminal disposition of the Nazi leadership and holding only a small minority responsible, thereby absolving the majority of accomplices. As long as professionals conformed to these explanations, they could rewrite their CVs and continue to practice, minimizing their personal role.”<sup>153</sup>

Dark comedy aspects aside, there were genuine risks to the judiciary and the Spruchkammern staff. On 7 January 1947, someone bombed the Nuremberg Spruchkammer, thought to be the work of “Werewolves” aimed at revenge after the Spruchkammer case of Gestapo officer Michael Härtl was referred to criminal court. A second bomb (incendiary grenade) attack happened on 1 February at the office of Camille Sachs, also in Nuremberg, who oversaw the denazification case against Franz Papen.<sup>154</sup> Denazification records were destroyed in a similar attack in München, and an arson attack in March 1947 severely damaged the Spruchkammer building in Schlüchtern (near Kassel).<sup>155</sup> Sachs was one of the heroes of denazification. An experienced prosecutor and judge, he was removed from his post by the Bavarian administration following the enactment of the Nuremberg Laws in 1935; Sachs was a Jew.<sup>156</sup> He was later physically attacked when an SA mob broke into his apartment. He was reappointed to

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<sup>153</sup> Ibid., pp. 26-7.

<sup>154</sup> Stephen G. Fritz, *Endkampf: Soldiers, Civilians and the Death of the Third Reich* (Lexington: University Press of Kentucky, 2004), p. 220.

<sup>155</sup> Perry Biddiscombe, *Last Nazis: SS Werewolf Guerilla Resistance in Germany, 1944-47* (Cheltenham: The History Press, 2004)

<sup>156</sup> Hans Bergemann / Simone Ladwig-Winters: *Richter und Staatsanwälte jüdischer Herkunft in Preußen im Nationalsozialismus. Eine Dokumentation*, 2004 Köln, p. 137f. Sachs received the Großes Bundesverdienstkreuz in 1952.



the bench in August 1945 and ran the Staatsministerium für Sonderaufgaben until that office was dissolved. He retired in 1951 and died in 1959.<sup>157</sup>

#### 4.6 The British Zone

Residents of the British Zone of Occupation found a very different situation. While they aggressively sought and prosecuted Germans guilty of offenses against prisoners of war, British postwar officials prioritized economic recovery and stability over denazification. As early as October 1945, “nominal” National Socialists were allowed to return to their positions in the legal field. The emphasis on the economy meant the quickest way to resume industrial production was to return control of large corporations to the NS-friendly owners and managers who had operated them in the 1930s through the end of the war. Most critically, rather than the comprehensive American approach, British authorities required a Fragebogen only for those applying for official positions<sup>158</sup> As a result, many who might have faced scrutiny in the American sector quietly moved to the British. Veit Harlan and Fritz Hippler did exactly this. By January 1946, six months after the initiation of the denazification policy, the British turned it over to German courts, retaining only nominal supervisory authority.<sup>159</sup>

The British zone of occupation had an additional legal feature not duplicated by the Americans or French: Der Oberste Gerichtshof für die Britische Zone (OGH-BZ) – the Supreme Court for the British Zone. Established in 1947, it functioned from March 1948 until September 1950, headquartered in Köln. Its jurisdiction matched the geographic limits of the British military

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<sup>157</sup> “Camille Sachs” in *Jüdisches Leben in Unterfranken* at <https://www.historisches-unterfranken.uni-wuerzburg.de/juf/Datenbank/detailsinclude.php?global=;search;29359>;

<sup>158</sup> Taylor, pp. 302-3, 310.

<sup>159</sup> *Ibid.*, p. 303.

government: Schleswig-Holstein, Hamburg, Niedersachsen, and Nordrhein-Westfalen. This approximated the eight Oberlandesgerichte districts for Schleswig, Hamburg, Braunschweig, Celle, Oldenburg, Hamm, and Köln. With the collapse of the German system at the end of the war, the OGH-BZ represented the highest appellate court prior to the creation of the Bundesgerichtshof. The judges were German, and the rulings applied to the German Landgerichte within the designated geographic and subject matter responsibility.<sup>160</sup> With the authority of ACC No. 10, Article II, Sect. 1c, the court was charged with prosecuting “crimes against humanity” as a separate criminal offense outside the IMT/NMT framework. Subject matter jurisdiction applied equally to offenses committed both internal and external to Germany, from 1933 until 1945. In turn, the courts under the OGH-BZ were empowered to do the same.

#### **4.7 Summary**

By any fair measure, the Allied denazification policy failed, although as much due to their hurry to transfer responsibility to German courts as any other single cause. Even in the American sector, the number of exempt categories increased rapidly from 1946-48, ensuring that key offenders in crimes against humanity would escape what was already a porous net. The Soviet Union was the first to quit the denazification effort, despite an early enthusiastic attitude supervised by the NKVD. Their Order No. 35 in February 1948 declared the end of the process as of 10 March. Their German client-state, the DDR, removed civil sanctions on members and supporters of the NSDAP in November 1949. Moves to grant amnesty for those denazified and

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<sup>160</sup> See Martin Grieb, *In Names des Rechts: Der Oberste Gerichtshof für die Britische Zone als Höchstgericht in Zivilsachen zwischen Tradition und Neuordnung* (Mohr Siebeck, 2015).

mass-murderers convicted by the NMT and other Allied tribunals had been gathering steam for years.<sup>161</sup> In November, the Bundestag adopted a recommendation to end the denazification process, and this was accomplished on 11 May 1951, with passage of Article 131 of the Grundgesetz.<sup>162</sup> Hardcore Nazis filtered back into the law, the government, the military, and resumed a postwar version of the positions they had occupied under Hitler. Official denazification was over.<sup>163</sup>

Already before, and then in bulk immediately afterward, former Nazi officials returning to state employment included those who were central to the worst human rights crimes of the NS-regime. This issue was conclusively addressed only in 2016 with the publication of *Die Akte Rosenberg: Das Bundesministerium der Justiz und die NS-Zeit*, a scholarly investigation into the pasts of jurists under National Socialism who found renewed employment as jurists and legal officials under the Justice Ministry of the Federal Republic. As the Federal Minister of Justice and Consumer Protection writes in the introduction to the summary: “The results are depressing. Of the 170 lawyers who held senior positions in the Ministry between 1949 and

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<sup>161</sup> Indeed, Konrad Adenauer used extortion and the Western Allies’ fear of communism, making the revival of the Bundesrepublik conditional on exactly this platform to end denazification. The Himmerod Memorandum (October 1950) outlined his accepted position: 1) release of German war criminals; 2) end to “defamation of German soldiers” to include the Waffen-SS; and the necessity to mold public opinion favorably in terms of the new German military. It was the cornerstone of the “Clean Wehrmacht” myth that both the Germans and Allies needed to accept. Ronald Smelser and Edward Davies, *The Myth of the Eastern Front: The Nazi-Soviet War in American Popular Culture* (New York: Cambridge University Press, 2008), p. 72-3.

<sup>162</sup> <https://www.alliiertenmuseum.de/en/topics/denazification.html>

<sup>163</sup> There remains the argument that Germany effectively denazified itself, but only after the WWII generation passed and changes in the law, education, politics, economics, and culture were able to take root. The 1950s and 1960s were not that time. See also, <https://www.bpb.de/izpb/10067/demokratisierung-durch-entnazifizierung-und-erziehung?p=all>

1973, 90 had been members of the Nazi Party and 34 had been members of the SA. More than 15 percent had worked in the Nazi Reich Ministry of Justice before 1945.”<sup>164</sup>

Even accepting the dismal situation at the highest levels of judicial administration, the situation was, of course, more immediately complicated in the Länder through the sheer lack of resources to even begin to perform the task demanded of the local Spruchkammer. During the course of denazification in Bavaria, the questionnaires of 6,780,188 people were processed by December 31, 1949. 72% were determined not involved; Approximately 28% were referred to the justice system. 99.9% of these cases were finally settled by the ruling chambers in the first instance. Of these, 28% fell under the youth and 52% under the Christmas amnesty. 80,139 people (15%) were assigned to one of the five categories. 15% of those were exonerated, 0.3% were the major offenders, 4% were incriminated, 19% less-incriminated and 77% followers/Mitläufer. Property and imprisonment sentences were seldom fully effective: many judgments were settled through legal delay, simple refusal or amnesties.<sup>165</sup>

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<sup>164</sup> Manfred Görtemaker / Christoph Safferling, *The Rosenberg Files –The Federal Ministry of Justice and the Nazi Era* (Berlin: Federal Ministry of Justice and Consumer Protection, Division for Public Relations; Digital Communication), 2016.  
[https://www.bmjv.de/SharedDocs/Publikationen/DE/Akte\\_Rosenburg\\_EN\\_Geschichtsband\\_1.pdf?\\_\\_blob=publicationFile&v=6](https://www.bmjv.de/SharedDocs/Publikationen/DE/Akte_Rosenburg_EN_Geschichtsband_1.pdf?__blob=publicationFile&v=6)

<sup>165</sup> <http://www.rothenburg-unterm-hakenkreuz.de/entnazifizierung-3-grundlage-war-das-gesetz-nr-104-zur-befreiung-von-nationalsozialismus-und-militarismus-von-1946/>. See also, *Entnazifizierung. Politische Säuberung und Rehabilitierung in den vier Besatzungszonen 1945-1949*, hrsg. von Clemens Vollnhals in Zusammenarbeit mit Thomas Schlemmer, München 1991; Klaus-Dietmar Henke, “Die Trennung vom Nationalsozialismus. Selbstzerstörung, politische Säuberung, „Entnazifizierung“, Strafverfolgung,“ in: ders./Hans Woller (Hrsg.), *Politische Säuberung in Europa. Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, München 1991, p. 21-83; Lutz Niethammer, *Die Mitläuferfabrik. Die Entnazifizierung am Beispiel Bayerns* (Berlin/Bonn 1982); Cornelia Rauh-Kühne, “Die Entnazifizierung und die deutsche Gesellschaft,“ in: *Archiv für Sozialgeschichte* 35 (1995) p. 35-70; Thomas Schlemmer, “Ein gelungener Fehlschlag? Die Geschichte der Entnazifizierung nach 1945,“ in: Martin Löhnig (Hrsg.), *Zwischenzeit. Rechtsgeschichte der Besatzungsjahre*, (Regenstauf: Gietl Velag, 2011), p. 9-33.

In total, most serious offenders had a minimal chance of being prosecuted as such and for those that were, the social and financial burden of guilt lasted only a very short time.



4. 1946 caricature from Rothenburg ob der Taube:  
 “In Nürnberg and elsewhere: ‘He told me to!’”

Absender: *Wien-Stadt*  
**Spruchkammer**  
 Der öffentliche Kläger

Drucksache  
**Portopflichtige**  
 Dienstsache

Akten *12.2.47*

**IDONAU**

Datum des Poststempels

Auf Grund der Angaben in Ihrem Meldebogen sind Sie von dem Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. 3. 1946 nicht betroffen.

L. Nr. 13a

**Spruchkammer**  
 Der öffentliche Kläger  
 Wien a. D. (Stadt)

*[Signature]*

5. One form of a “Persilschein” – a person exonerated by the largely self-reported information in their Meldebogen.

## Abschrift

1070

### Der öffentliche Kläger

bei der Spruchkammer

Ingolstadt-Land

Ingolstadt, 26. Februar 1947

Datum

Aktenzeichen: M. B. Nr.: 2062/36

An die  
Spruchkammer Ingolstadt-Land

### Klageschrift

Ich erhebe Klage gegen

Hans Lindner, Bäckermeister (selbst.),  
(Vor- und Zuname) (Beruf)

geb. 13.4.85 in Langenbruck

wohnhaft Ringsee, Martin-Hemm-Str. 15 / Gde. Unsernherrn

auf Grund des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946

mit dem Antrage Lindner in die Gruppe 2

der Belasteten einzureihen.

### Begründung:

Parteigenosse seit 1.5.33 - Anlage zum Gesetz,  
(Mitglieds-Nr. 2 944 308) Abschnitt D II, Ziffer 4.

Gemäß Artikel 10 des Gesetzes gilt der Betroffene bis zur Widerlegung als Belasteter, weil er in Klasse II der dem Gesetz beigelegten Liste aufgeführt ist. Die Vermutung, daß der Betroffene in Klasse II einzureihen ist, kann durch Gegenbeweise im Verfahren vor der Kammer entkräftet werden. In diesem Falle hat er gemäß Artikel 34, soweit nicht bereits geschehen, in klarer und überzeugender Weise darzutun, daß er in eine für ihn günstigere Gruppe fällt. Die Gegenbeweise sind unverzüglich der Kammer vorzulegen.

./.

### 8. Spruchkammer Klageschrift



Dieser Sachverhalt rechtfertigt nach Art. 10 des Gesetzes die Klage.  
Die örtliche Zuständigkeit der Spruchkammer ist nach Art. 29 des Gesetzes begründet.  
Ich beantrage die Anordnung der mündlichen Verhandlung / des schriftlichen Verfahrens.

**Beweismittel:**

1. Urkunden: Meldebogen , Arbeitsblatt.

2. Zeugen: ---

3. Sachverständige: ---

4. weitere Beweismittel: ---

**Der öffentliche Kläger  
bei der Spruchkammer Ingolstadt-Land**

gez. Pflaum .

Beglaubigte Abschrift an Betroffenen  
und an Militärregierung Ingolstadt  
sowie Mitteilung an Vermögensverwaltung  
Ingolstadt, Hallstr.6.

Zwecks Zustellung an den Betroffenen  
zur Post gegeben am: 22.2.47/3. März.

Für die Richtigkeit der Abschrift:  
Ingolstadt, den 26. Februar 1947



Geschäftsstelle  
des öffentlichen Klägers

(Weisenrieder)

Geschäftsstellenleiter

9. Spruchkammer Klageschrift



**MILITARY GOVERNMENT OF GERMANY  
FRAGEBOGEN  
PERSONNEL QUESTIONNAIRE**

**WARNUNG.** Im Interesse von Klarheit ist dieser Fragebogen in deutsch und englisch verfaßt. In Zweifelsfällen ist der englische Text maßgeblich. Jede Frage muß so beantwortet werden, wie sie gestellt ist. Unterlassung der Beantwortung, unrichtige oder unvollständige Angaben werden wegen Zuwiderhandlung gegen militärische Verordnungen gerichtlich verfolgt. Falls mehr Raum nötig ist, sind weitere Bogen anzuhäften.

**WARNING.** In the interests of clarity this questionnaire has been written in both German and English. If discrepancies exist, the English will prevail. Every question must be answered as indicated. Omissions or false or incomplete statements will result in prosecution as violations of military ordinances. Add supplementary sheets if there is not enough space in the questionnaire.

**A. PERSONAL  
PERSONNEL**

Name _____	Vorname(n) _____	Ausweiskarte Nr. _____
Name _____ Zunahme _____ Surname _____	Middle Name/Christian Name _____	Identify Card No. _____
Geburtsdatum _____	Geburtsort _____	
Date of birth _____	Place of birth _____	
Staatsangehörigkeit _____	Gegenwärtige Anschrift _____	
Citizenship _____	Present address _____	
Ständiger Wohnsitz _____	Beruf _____	
Permanent residence _____	Occupation _____	
Gegenwärtige Stellung _____	Stellung, für die Bewerbung eingereicht _____	
Present position _____	Position applied for _____	
Stellung vor dem Jahre 1933 _____		
Position before 1933 _____		

**B. MITGLIEDSCHAFT IN DER NSDAP**

1. Waren Sie jemals ein Mitglied der NSDAP?  
Ja \_\_\_\_\_ Nein \_\_\_\_\_
2. Daten \_\_\_\_\_
3. Haben Sie jemals eine der folgenden Stellungen in der NSDAP bekleidet?  
(a) REICHSLEITER, oder Beamter in einer Stelle, die einem Reichsleiter unterstand? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_
- (b) GAULEITER, oder Parteibeamter innerhalb eines Gaues? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Daten \_\_\_\_\_ Amtsart \_\_\_\_\_
- (c) KREISLEITER, oder Parteibeamter innerhalb eines Kreises? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_ Amtsart \_\_\_\_\_
- (d) ORTSGRUPPENLEITER, oder Parteibeamter innerhalb einer Ortsgruppe? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_ Amtsart \_\_\_\_\_
- (e) Ein Beamter in der Parteikanzlei? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_
- (f) Ein Beamter in der REICHSLEITUNG der NSDAP? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_
- (g) Ein Beamter im Hauptamt für Erzieher? Im Amte des Beauftragten des Führers für die Überwachung der gesamten geistigen und weltanschaulichen Schulung und Erziehung der NSDAP? Ein Direktor oder Lehrer in irgendeiner Parteiausbildungsschule? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_
- (h) Waren Sie Mitglied des KORPS DER POLITISCHEN LEITER?  
Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Daten der Mitgliedschaft \_\_\_\_\_
- (i) Waren Sie ein Leiter oder Funktionär in irgendeinem anderen Amte, Einheit oder Stelle (ausgenommen sind die unter C unten angeführten Gliederungen, angeschlossenen Verbände und betreuten Organisationen der NSDAP)? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Titel der Stellung \_\_\_\_\_ Daten \_\_\_\_\_
- (j) Haben Sie irgendwelche nahe Verwandte, die irgendeine der oben angeführten Stellungen bekleidet haben? Ja \_\_\_\_\_ Nein \_\_\_\_\_  
Wenn ja, geben Sie deren Namen und Anschriften und eine Bezeichnung deren Stellung an \_\_\_\_\_

**B. NAZI PARTY AFFILIATIONS**

- Have you ever been a member of the NSDAP? yes, no, Dates \_\_\_\_\_
- Have you ever held any of the following positions in the NSDAP?  
REICHSLEITER or an official in an office headed by any Reichsleiter? yes, no; title of position; dates, \_\_\_\_\_
- GAULEITER or a Party official within the jurisdiction of any Gau? yes, no; dates; location of office, \_\_\_\_\_
- KREISLEITER or a Party official within the jurisdiction of any Kreis? yes, no; title of position; dates; location of office, \_\_\_\_\_
- ORTSGRUPPENLEITER or a Party official within the jurisdiction of an Ortsgruppe? yes, no; title of position; dates; location of office, \_\_\_\_\_
- An official in the Party Chancellery? yes, no; dates, title of position, \_\_\_\_\_
- An official within the Central NSDAP headquarters? yes, no; dates; title of positions, \_\_\_\_\_
- An official within the NSDAP's Chief Education Office? In the office of the Führer's Representative for the Supervision of the Entire Intellectual and Politico-philosophical Education of the NSDAP? Or a director or instructor in any Party training school? yes, no; dates; title of position; Name of unit or school, \_\_\_\_\_
- Were you a member of the CORPS OF POLITISCHE LEITER? yes, no; Dates of membership, \_\_\_\_\_
- Were you a leader or functionary of any other NSDAP offices or units or agencies (except Formations, Affiliated Organizations and Supervised Organizations which are covered by questions under C below)? yes, no; dates; title of position, \_\_\_\_\_
- Have you any close relatives who have occupied any of the positions named above? yes, no; if yes, give the name and address and a description of the position, \_\_\_\_\_

**C. TÄTIGKEIT IN NSDAP HILFSORGANISATIONEN**

Geben Sie hier an, ob Sie ein Mitglied waren und in welchem Ausmaße Sie an den Tätigkeiten der folgenden Gliederungen, angeschlossenen Verbände und betreuten Organisationen teilgenommen haben:

**C. NAZI "AUXILIARY" ORGANIZATION ACTIVITIES**

Indicate whether you were a member and the extent to which you participated in the activities of the following Formations, Affiliated Organizations or Supervised Organizations:



11. Typical Spruchkammer – Winifred Wagner's denazification proceeding.



12. Internment camps in Allied occupied Germany

## Chapter V: Veit Harlan Trials

### 5.1 The film

The movie *Jud Süß* opens with the death of the Duke of Württemberg and the ascension of the new Duke, Karl Alexander. He is shown as a fat, immoral ruler who pursues wine, riches, and women but gives little thought to the welfare of the kingdom he has sworn to protect. The upright citizens who supported the old Duke are introduced: Councilor Sturm (Eugen Klöpfer), his innocent daughter Dorothea (Kristina Söderbaum), and her fiancé Faber (Malte Jaeger). Because of the Duke's weak character and betrayal of the people, the council refuses him more money. Karl Alexander then sends a messenger to the decrepit Jewish ghetto in Frankfurt to see Jud Süß Oppenheimer, a jeweler and moneylender, to purchase coronation gifts for his wife. Although his neighbors are stereotypical ugly and filthy Jews, Oppenheimer's physical features are more nuanced. In exchange for a pass to present the jewels personally to the Duke, he agrees to provide them at a substantial discount. After shedding his Jewish appearance and dressing in proper court clothes – a costume to fool the outside society – Oppenheimer meets the Duke, and offers to provide the expensive items for free, and further gives the ruler money to fund his guards, ballet, and opera. When the Duke realizes that he owes hundreds of thousands of thalers to Oppenheimer, the moneylender offers to erase the debt if the Duke will give him authority over the roads and bridges and the ability to tax anyone using them. The people suffer and hunger because of the new taxes but Süß and the Duke prosper. When Süß destroys part of a blacksmith's house to demonstrate his power, and the blacksmith attacks his carriage, Süß has the man hanged.

Oppenheimer convinces the Duke to repeal the ban on Jews settling in Württemberg, and caravans of dirty Eastern Ashkenazi Jews flood in. Lusting after Dorothea, and after convincing the Duke that the council is plotting against him, he orders Dorothea's father imprisoned. Süß makes Karl Alexander believe that all would be well if he dismissed the council and ruled as an autocrat; the newly-arrived Jews in Ludwigsburg will provide all the money he needs. Faber and Dorothea marry in secret but then Faber attempts to leave the city to help organize opposition against the Duke's planned coup. He is caught and tortured but does not reveal his co-conspirators. When Dorothea goes to Süß to beg for her husband's release, Oppenheimer rapes her; Dorothea drowns herself in shame. The released Faber discovers his wife's body and carries her to the gates of the palace, along with a mob that assembles along the way. Although ordered to do so by Süß, the Duke's soldiers refused to fire on the people. Karl Alexander has a heart attack and Süß is taken prisoner.

At his trial, Jud Süß – now reverted to a stereotypical Jewish ghetto appearance – pleads his innocence to the charges of treason, financial theft, and raping a Christian woman, which is clearly the most serious crime. He is sentenced to death. As his body is hoisted inside an iron cage with a rope around his neck, Sturm reads an order banishing Jews from Württemberg, adding “May our descendants adhere to this decree and thereby be spared suffering, for their own well-being, and the sake of their children and their children's children.”<sup>166</sup>

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<sup>166</sup> *Jud Süß*. Holocaust Studies Series – Special Edition DVD, Archiv DVD, 2008. Along with *Der ewige Jude* and *Jud Süß*, the third of the antisemitic films in the triad, *Die Rothschilds: die Aktien von Waterloo*, also came out in 1940.

## 5.2 Historical background and screenplay

The story of Jud Süß has historical roots in the person of Joseph Süß Oppenheimer, a “court Jew” who served the Duke of Württemberg from 1732 to 1737 as a financial advisor and court functionary. His sage advice dramatically improved the fortunes of the Duchy, and the Duke personally, while earning enemies among those officials and families who were jealous of the arrangement. After the Duke’s death, Oppenheimer was arrested and charged with treason, fraud, bribery, and immorality with women, all of it tinged with overt antisemitism. Following a brief trial, he was sentenced to death but given the opportunity to mitigate the sentence by converting to Christianity; he refused. Oppenheimer was hanged in public and his body was displayed for six years in a cage in Stuttgart-Pragsattel before being hastily buried.<sup>167</sup>

The first literary treatment of Jud Süß was Wilhelm Hauff’s eponymous novella published in 1827. Hauff portrays Süß as Christian-born but raised as Jewish without knowledge of his religious roots. He remained a polished swindler who worms his way into the good graces of the Duke. The key moment occurs before his execution when he learns the truth but refuses to turn his back on the Jewish community.<sup>168</sup> While not one of the world’s great novels, Hauff’s version is historical fiction and presages the common elements of the literary Süß plot prior to Harlan’s script – an odd mix of philo-Semitism and antisemitism. Antisemitic in terms of his background and character at the court but which also praises his loyalty to his faith.

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<sup>167</sup> Susan Tegel, *Jew Süß: Life, Legend, Fiction, Film* (London: Continuum, 2011), pp. 1-46.

<sup>168</sup> See Jefferson Chase, “The Wandering Court Jew and the Hand of God: Wilhelm Hauff’s ‘Jud Süß’ as Historical Fiction,” *The Modern Language Review*, Vol. 93, No. 3 (July 1998), pp. 724-740.

Bavarian Jewish novelist Lion Feuchtwanger – an outspoken opponent of Nazism in every form – published the novel *Jud Süß* in 1925. In this telling, Oppenheimer was the victim of his own human foibles: ambition, greed, and pride. It was in no way antisemitic. The book sold well and established Feuchtwanger as a rising star in the German literary scene. This did not last. His book *Erfolg* (1930) took aim at the Nazi movement, which he considered to be in decline. The combination of *Süß* and *Erfolg*, as well as other works, were sufficient to place him on the Ausbürgerungsliste des Deutschen Reichs (deprivation of citizenship list) in 1933 along with Tucholsky, Mann, and thirty other “un-German” persons who were declared enemies of the regime, most of them Jews.<sup>169</sup>

The immediate catalyst for Harlan’s *Jud Süß* was director Lothar Mendes’ film treatment in 1934. Like Feuchtwanger, Mendes was a Jewish exile from Nazi Germany and his film with Gaumont-British Pictures, based closely on Feuchtwanger’s novel, was aimed at exposing the antisemitism at the heart of the NSDAP policy then escalating in his home country. It was both a commercial and critical success, being praised by Albert Einstein and others.<sup>170</sup>

Back in Germany, unsuccessful screenwriter Ludwig Metzger had been trying to market a film project based on Joseph Oppenheimer’s life since 1921 without success. When he landed a job at Terra Filmkunst in 1939, he attempted to interest executives in the idea but again found no

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<sup>169</sup> Feuchtwanger survived. He was in the United States on a speaking tour when the list was announced. He lived the rest of his life in exile, writing until his death in 1958 in Pacific Palisades, California. See Reinhold Jaretsky, *Lion Feuchtwanger* (Reinbeck bei Hamburg: Rowohlt, 1984)

<sup>170</sup> Thomas Doherty, *Hollywood and Hitler, 1933-1939* (New York: Columbia University Press, 2013), p. 59. The film starred another German exile, noted actor Conrad Veit. Veit was married to Ilona Prager, a Jew. Commenting once about his role as the evil Major Heinrich Strasser in *Casablanca*, Veit said that was ironic he was praised “for portraying the kind of character who had forced him to leave his homeland.”  
<https://www.chronicle.com/article/heres-looking-at-you-casablanca/>

support. His direct approach to Joseph Goebbels turned things around, resulting in Peter Paul Brauer being installed as studio head with explicit instructions to see that Metzger's project went forward. Metzger was tasked with the screenplay but the result – based loosely on Hauff's novel – was insufficiently antisemitic for Goebbels' purposes. Eberhard Wolfgang Möller, a Nazi with no experience in screenwriting, was added to ensure the Minister's racial and ideological objectives were met.<sup>171</sup> Hauff's novel was abandoned and the script proceeded along independent lines. Casting for the lead role ran into difficulty when leading actors refused, citing other commitments or ill-health. Brauer was fired, and Goebbels ordered the more malleable director and SS officer Dr. Fritz Hippler (head of the Reichsfilm dramaturg) to hire Veit Harlan instead.

Harlan's postwar testimony is that he did everything he could to refuse the assignment, even to the point of threatening to volunteer for the Wehrmacht. This is supported to some degree by the postwar reminiscences of Leni Riefenstahl.<sup>172</sup>

### 5.3 Harlan and the cast

Harlan was active as an actor in the 1920s and early 30s but switched to directing with the theater production of the comedy *Hochzeit an der Panke*, and then directed and filmed *Krach im Hinterhaus*. These were small productions but sufficient to attract attention by the studios.

Harlan became a bankable commodity for his large-scale directing of the propaganda-tinged film, *Der Herrscher*, which won the National Film Prize in 1937. His new status within Goebbels' film

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<sup>171</sup> Möller's career highpoint had been the 1934 stage play, *Rothschild siegt bei Waterloo*, an antisemitic comedy set in the age of Napoleon. He had been an NSDAP member since 1931. Baird, Jay W., 'Hitler's muse: The political aesthetics of the poet and playwright Eberhard Wolfgang Möller,' *German Studies Review*, 17 (1994), pp. 269-70.

<sup>172</sup> Leni Riefenstahl, *Leni Riefenstahl: a Memoir* (New York: Macmillan, 1995). p. 264.



industry meant he never felt compelled to join the NSDAP for career reasons and did not do so; this fact becomes important suggestive evidence for Harlan at the Spruchkammer and the two trials.

The degree to which the leading actors in *Jud Süß* were dutiful volunteers, anti-Semites, party ideologues, or coerced performers remains the subject of intense academic and legal debate.

Ferdinand Marian, the Süß of the movie, was reluctant to become involved. He had a daughter with his first wife, Jewish pianist Irene Saager, who was already classified as a *Mischling ersten Grades* (a mixed blood, half-Jew) under the Nuremberg Laws. Additionally, his second wife's first husband was Jewish, and his stepson also fell into the same Mischling category.<sup>173</sup> Marian was also paid a significant salary of RM 50,000 for his role, and he made eleven further films. He was never a party member and there is evidence that the stress of playing Süß contributed to alcoholism. He died in an alcohol-involved traffic accident in 1946.

Werner Krauss played every other Jewish speaking character in the film – at least six roles. His early support for National Socialism was absolute and he was rewarded with the vice-presidency of the *Reichskulturkammer* and designated a *Staatschauspieler*. His signature to the *Anruf der Kulturschaffenden* in 1934 only improved his favored status.<sup>174</sup> Following the movie, he was

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<sup>173</sup> There were additions to the laws as time went on. As of 17 September 1935, a mixed-race child was classified as a Jew if the marriage date occurred after that date. Mischlinge automatically become Jews if married to a Jew, with their children also designated as Jewish. *Reichsbürgergesetz und Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre* ["Nürnberger Gesetze"], 15. September 1935, und die beiden ersten Ausführungsbestimmungen, 14. November 1935 at [https://www.1000dokumente.de/index.html?c=dokument\\_de&dokument=0007\\_nue&object=translation&st=&l=d](https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0007_nue&object=translation&st=&l=d)

<sup>174</sup> The "Call to Artists" was a declaration of loyalty and approval for Adolf Hitler's merger of the Reich President and Chancellor following the death of Reich President Paul v. Hindenburg. Other signatories included Richard Strauss, Mies van der Rohe, and Wilhelm Furtwängler.

among those recognized as “God-gifted” (Gottbegnadeten-Liste) in the arts, which exempted him from military service, in addition to other financial benefits.<sup>175</sup> Kraus was effectively banned from the stage in Austria after the war but found a sympathetic reception in Germany.<sup>176</sup>

Heinrich George, the actor playing the Duke of Württemberg, had been politically suspect at the start of the Nazi regime. He was an active Communist, and his association with Bertolt Brecht did him no favors and neither did his starring role in *Berlin-Alexanderplatz – Die Geschichte Franz Bieberkopfs* (1931) which cinephiles Goebbels and Hitler viewed as Weimar-era degeneracy. However, he was rehabilitated and attained the distinction of Staatsschauspieler, later becoming director of the Schiller Theater in Berlin.<sup>177</sup>

Kristina Söderbaum, Dorothea Sturm in *Süß*, personified the National Socialist ideal of the Aryan woman. Petite, pretty, blonde, and entirely feminine, her career apogee reached its zenith in the NS-period, most notably in collaboration with her husband/director Veit Harlan and UFA. Several of those roles called for her to be the innocent victim of *Rassenschande*, her sexual assault being the catalyst for Jud *Süß*'s arrest and in *Die goldene Stadt* is seduced by a guileful Czech. Her death

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<sup>175</sup> See “Langer Abschied,” *Der Spiegel*, 4 June 1989, <https://www.spiegel.de/kultur/langer-abschied-a-90e8aece-0002-0001-0000-000013493397?context=issue>

<sup>176</sup> Krauß was deemed *minderbelastet* in postwar denazification and fined DM 5000. His return to the Berlin stage in 1950 was marked by demonstrations against his Nazi past but did not affect the award of German citizenship in 1951 and the Bundesverdienstkreuz in 1954. He died in 1959. Hans-Michael Bock and Tim Bergfelder, *The Concise Cinegraph: encyclopaedia of German cinema* (New York and Oxford: Berghahn Books, 2009). p. 261.

<sup>177</sup> George played Herr Volker in the putrid 1933 film *Hitlerjunge Quex* but this was an exception to his otherwise solid performances in popular entertainment unconnected to overt propaganda. The last notable role was in Veit Harlan's epic *Kolberg*, released in January 1945. He died in an NKVD detention/interrogation facility at the former KL Sachsenhausen in September 1946 where he was held as a Nazi collaborator. Anne Fuchs, Mary Cosgrove, Georg Grote, *German memory contests: the quest for identity in literature, film, and discourse since 1990*, (Rochester, NY: Camden House, 2006). p. 199.

by drowning in both films – she died often in her roles – led to the nickname “Die Reichswasserleiche” (the Reich drowned corpse).<sup>178</sup>

After Heinrich Himmler attended the September 24, 1940 premiere, he instructed all members of the SS and police to see the film sometime during the course of the winter.<sup>179</sup> But even without Himmler’s directive, millions of viewers attended – between 1940 and 1943 at least 20.3 million people in Germany and across occupied Europe saw *Jud Süß*;<sup>180</sup> during the 1961 Auschwitz Trial, one witness noted that it had been screened at concentration camps along with other incitement films (*Hetzfilme*) to stoke guards’ antisemitic feelings.<sup>181</sup>

Harlan’s film career continued to blossom after *Jud Süß*, while almost every other production during the final years of the Reich suffered resource shortages. As a mark of Harlan’s favor in the Propaganda Ministry, and despite the worsening conditions on the Eastern Front, his last four films used the limited stocks of Agfa color film. His final picture, the epic *Kolberg*, filmed as Russian forces closed in on German territory, had German military personnel as extras – rather than them being at the front where they were desperately needed.<sup>182</sup> The propaganda value of *Kolberg*, like *Jud Süß*, outweighed any other incidental factors.

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<sup>178</sup> Antje Ascheid, *Hitler's Heroines: Stardom and Womanhood in Nazi Cinema* (Temple University Press, 2003) p. 43. Söderbaum’s 1983 autobiography, *Nichts bleibt immer so. Rückblenden auf ein Leben vor und hinter der Kamera*, is a near-art form in Holocaust unawareness. She continued acting after the war, mostly in Veit Harlan productions, until his death in 1964. Her last film role was in 1992’s *Night Train to Venice*. Hugh Grant referred to it as the worst movie he had ever been in. <http://hughgrant.free.fr/Interviews/JWradio2002.html> Söderbaum died in 2001 in Hitzacker, Germany.

<sup>179</sup> Bundesarchiv, RA56/132, Himmler letter of 30 September 1940, cited in Susan Tegel, *Jew Süß: Life, Legend, Fiction, Film* (London: Continuum, 2011), p. 182. However, I cannot locate a file with this number in the Bundesarchiv system and therefore cannot confirm its accuracy.

<sup>180</sup> Gerd Albrecht, *Der Film in dritten Reich: eine Dokumentation* (Karlsruhe: Doku Verlag, 1979), p. 24.

<sup>181</sup> Hermann Langbein (ed.), *Der Auschwitz Prozess, I* (Frankfurt am Main: Neue Kritik, 1995), p. 208.

<sup>182</sup> Frank Noack, *Veit Harlan: The Life and Work of a Nazi Filmmaker* (Lexington: University of Kentucky Press, 2016), p. 222.

#### 5.4 The attempted denazification and Hamburg Trials

Harlan relocated to Hamburg in early 1945 after his Berlin-Grünewald house was destroyed in an air raid. Immediately after the German surrender, he was already preparing his defense for the denazification process to come. The British occupied Hamburg on 5 May and by 9 June, Harlan circulated his 32-page “My Attitude to National Socialism.” It was a curious document, part defense, part blame. He accused “my Jewish colleagues after emigrating to foreign countries” of placing his name on the list of suspects. This was followed by a description of how Goebbels forced him to make *Jud Süß*. He had, he wrote, helped many in the industry who were married to Jews or half-Jews to keep working and saved even more from the “dangerous” Organization Todt.<sup>183</sup>

At the same time, Harlan submitted his Fragebogen to British authorities. Without being placed in denazification Category V “exonerated,” he would be unable to obtain a license to continue working. This became more difficult when writer (and screenwriter) Erich Kästner published an article in *Die Neue Zeitung*, referring to Harlan as a “Gesinnungsakrobat” for his ability to contort his views to meet the appropriate circumstances; essentially, it categorized Harlan as a fellow-traveler with the NSDAP, enriching himself with Goebbels and perfecting his art at great human cost to many others.<sup>184</sup>

Harlan completed a Meldebogen in January 1946, during the period when the British authorities were transferring denazification to the newly-formed Spruchkammer. His case lingered in the

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<sup>183</sup> Staatsarchiv Hamburg (SH), Veit Harlan Misc 6911, Veit Harlan, “My Attitude to National Socialism,” pp. 30-31. This is also available on Amazon.

<sup>184</sup> Erich Kästner, “Harlan oder die Weisse Mütze,” *Die Neue Zeitung*, 30 Nov 1945.

queue, not taken up by the Hamburg tribunal until autumn. The Chamber watched the film, read affidavits in support of the defendant and against, and heard from Harlan himself. He maintained that any “vague antisemitism” in the film should be understood in context of what was known in 1940, and not with what happened later.<sup>185</sup> The Zentralausschuß für die Ausschaltung der Nationalsozialisten der Hamburger Spruchkammer (Central Committee)<sup>186</sup> debated whether to hand the Harlan case over to the Sonderbeauftragter for criminal charges but ultimately decided they did not have that authority but agreed they could allow the “Jewish Committee” to do so.<sup>187</sup>

In what can only be described as an attempt by Harlan sympathizers to achieve a favorable result, the Central Committee held an emergency meeting to which no Harlan opponents from the subcommittee were invited. The impetus for this seems to have been the pending arrival from Berlin of Wolfgang Schmidt, secretary of the denazification section dealing with cultural affairs, who was bringing more documentation that implicated Harlan. In an expedited proceeding, the committee voted to declare Harlan as Category V.<sup>188</sup>

It was not the end, though. The British Control Commission governing that zone of occupation still had to affirm the classification. Writing from the Intelligence Section of the Licensing Control office in Berlin, Major Kaye Sely (of MI-5) brought the matter to the attention of his intelligence colleagues in Hamburg: “You are no doubt aware that Veit Harlan, the infamous film director, has been placed in category V by the Hamburg Central Committee (Zentral Ausschuss) and I

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<sup>185</sup> Tegel, p. 202.

<sup>186</sup> Under the direction of the Staatskommissar für die Entnazifizierung und Kategorisierung der Hansestadt Hamburg

<sup>187</sup> Tegel, p. 203.

<sup>188</sup> Ibid.

presume you agree with me that one can describe this decision as monstrous. The repercussions will be considerable.”<sup>189</sup>

Then the unexpected happened: Veit Harlan and Kristina Söderbaum were banned when they visited the Hamburger Kammerspiele for the premiere of the film *Ehe im Schatten* at the Waterloo Theater. When discovered among the guests, and at the instigation of host Walter Koppel and cinema owner Heinz Heisig, the Harlans were asked to leave, and the newspapers picked up the story.<sup>190</sup>

Next, the "Association of those persecuted by the Nazi regime" (Vereinigung der Verfolgten des Naziregimes - VVN)<sup>191</sup> and the "Emergency Community of Those Affected by the Nuremberg Laws" filed a criminal complaint with the Hamburg public prosecutor <sup>192</sup> on the basis of Allied Control Council Law No. 10, specifically accusing Harlan of participating in a Crime Against Humanity by means of writing and directing films that incited hatred of Jews – and thereby facilitating the Holocaust.<sup>193</sup>

In July 1948, Harlan was desperate to round up Jewish character witnesses who could testify to his [non-existent] resistance to the regime’s antisemitism. His efforts sometimes misfired. Writing to Rabbi Joachim Prinz, he said that he was worried the case might do “harm to all Jewry,”

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<sup>189</sup> Bundesarchiv, BDC, Harlan file, Sely to Ramsbothom (Hamburg Intelligence), letter of 22 December 1947.

<sup>190</sup> Hans Schmid, “Schuldspruch für einen Film” in Telepolis, 2 June 2009 at <https://www.heise.de/tp/features/Schuldspruch-fuer-einen-Film-3381350.html>

<sup>191</sup> Today the Vereinigung der Verfolgten des Naziregimes – Bund der Antifaschistinnen und Antifaschisten (VVN-BdA)

<sup>192</sup> [http://www.cinegraph.eu/chronik/1951/content/debatte\\_harlan.htm](http://www.cinegraph.eu/chronik/1951/content/debatte_harlan.htm)

<sup>193</sup> Article 6(c) of the Nuremberg Charter covers activity that, in addition to other types, “falls outside the ambit of traditional war crimes, such as crimes where the victim is stateless, has the same nationality as the perpetrator, or that of a state allied with the perpetrator.” This subject matter jurisdiction carried over into Law No. 10 of the Allied Control Council for Germany.

and that his film was “no hate campaign, but an account of the Jewish problem with artistic measures; no distorted image, but articulation of the essential, the human.” Prinz’s response was not what Harlan hoped: “Actors, directors, films, and the arts in general are trivialities in view of the death of several million people...if only one man had suffered because of your film and be driven into his death, this was cause enough to put the people who had put their artistry into the service of the hangman [i.e. Harlan] before the tribunal of justice. As for the judgment that may ensure for the Jewish people as a result of the trial, let that be our concern. We have had sorrows enough. We can endure more.”<sup>194</sup>

In the specific language of the indictment, Harlan was charged with “having contributed as an accessory to the commission of crimes against humanity by means of persecution based on race, and having been associated with the planning of such crimes.”<sup>195</sup>

A logical prosecutorial strategy for the prosecution case-in-chief (witness/document testimony introduced by the prosecutor) would be to first prove by percipient witnesses and written documentation that the movie was antisemitic and intended to be so; that it was from the start a film designed to malign Jews and encourage the audience to despise them. Second, tie Harlan to the writing, directing, and editing, thereby establishing his ownership of the message; this, too, was easily done by testimony readily available. Third – and this was not required to convict – introduce evidence that Himmler instructed members of the SS to watch it, including

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<sup>194</sup> Noack, p. 265.

<sup>195</sup> Quoted in Frank Liebert: “Vom Karrierestreben zum ‘Nötigungsnotstand.’ Jud Süß, Veit Harlan und die westdeutsche Nachkriegsgesellschaft (1945–50).” in Thomas Henne / Arne Riedlinger, eds.: *Das Lüth-Urteil aus (rechts-) historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts* (Berlin: BWV, 2005), pp. 111–146, here p. 126.

concentration camp personnel and the Einsatzgruppen.<sup>196</sup> At the very least, prosecutor Dr. Gerhard Kramer had to destroy Harlan's credibility. None of this occurred when the case came to court. Further, Kramer committed the cardinal sin in trial law: not preparing his witnesses adequately; he seemed genuinely surprised by the testimony they gave before the court. This, combined with cross-examination which never seemed to go to plan, were not encouraging signs.

Harlan's first trial lasted from 3 March until 23 April 1949 in the Hamburg *Landgericht*. It is difficult to conceive of a prosecution more ineptly planned or executed, despite or perhaps because *Oberstaatsanwalt* Dr. Gerhard Kramer spent much of the previous year working on the 23-page indictment.<sup>197</sup> Harlan was defended by Dr. Otto Zippel and the case heard before *Landgericht* judge Dr. Walter Tyrolf.<sup>198</sup>

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<sup>196</sup> Based on 30 years' experience as a prosecutor.

<sup>197</sup> In the 1930s, as member of the Berlin bar, Kramer defended Solly "Sol" Epstein, who was accused of participating in the murder of SA man, Horst Wessel. Although the motive around the killing concerned a prostitute with whom Wessel was living, his death at the hands of "Communists and Jews" was sufficient to make him the posthumous martyr for the National Socialist cause. Epstein was not charged at the time (1930) but was arrested in 1934, convicted, and executed by guillotine. For some reason, "Solly" is often wrongly given as "Sally" in historical accounts. See Heinz Knobloch, *Der arme Epstein. Wie der Tod zu Horst Wessel kam* (Berlin: Christopher-Links-Verlag, 1993)

<sup>198</sup> Zippel was experienced in defending accused war criminals, albeit unsuccessfully. First in the Zyklon B trial [Case No. 9, Trial of Bruno Tesch and Two Others, British Military Court Hamburg, 1st-8th March, 1946], also referred to as one of the "Curiohaus Trials," where he represented named defendant Bruno Tesch (convicted and executed by hanging) later the auxiliary cruiser commander Hellmuth v. Ruckteschell, Korvettenkapitän Karl-Heinz Möhle, and Carmen Mory in the Ravensbrück Trial. "Totentänze in der Scheffelstraße," *Der Spiegel*, No. 15, 1949. Ruckteschell was convicted by a British admiralty court for ordering his men to fire on surrendered ships and failing to rescue survivors. He was sentenced to ten years. Möhle was a U-boat commander (U-123) who testified against his former superior, Großadmiral Karl Dönitz, at the IMT and stated that Dönitz ordered him to kill survivors of torpedo ships. In turn, Möhle was put on trial in October 1946 and sentenced to five years imprisonment. Mory was a notorious Kapo who was convicted of abusing prisoners and murdering sixty herself. Sentenced to death, she committed suicide before her execution. "Möhle, Karl-Heinz" in Ernst Klee, *Das Personenlexikon zum Dritten Reich. Wer war was vor und nach 1945*. 2. Auflage, (Frankfurt am Main: Fischer-Taschenbuch-Verlag, 2007)



Tyrolf had his own pedigree problems. He earned his Dr. jur. in 1926 and joined the Nazi party in 1937.<sup>199</sup> In 1940, he became the chief prosecutor of the *NS-Sondergericht* in Hamburg. Among other cases, he prosecuted the Nazi-created crime of *Rassenschande* (racial defilement) in 15 instances where the defendants were executed.<sup>200</sup> Tyrolf passed quickly through postwar denazification and resumed work as *Untersuchungsrichter* almost immediately.<sup>201</sup>

Dr. Kramer called 35 witnesses for the state. The result was a mess. Instead of sensibly establishing and proving the elements of the crimes charged, the prosecution strategy instead focused on Harlan's financial situation and whether he could have declined the offer to direct *Jud Süß* – a pre-emptive move to counter the expected defense argument that Harlan was forced to accept the movie assignment under financial duress.<sup>202</sup>

This proof came in the form of a tedious examination of salaries. Harlan had been paid 3,000 RM for *Krach im Hinterhaus* in 1935, between 10,000 and 12,000 RM for *Die Kreuzersonate* in 1936, and then between 80,000 and 123,000 for *Jud Süß*. Kramer meant to show this as evidence of Goebbels' favor and that Harlan had a financial motive to depict antisemitism – neither of which was germane to a Crime Against Humanity. For no purpose whatsoever, the prosecutor

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<sup>199</sup> His doctoral dissertation was an uninspiring 45-page treatment of unincorporated associations in inheritance law (Kirchhain, Bez. Kassel, 1926).

<sup>200</sup> See Dr. Klaus Bästlein, Helge Grabitz, Wolfgang Scheffler (Eds.), "Für Führer, Volk und Vaterland ..." Hamburger Justiz im Nationalsozialismus (Hamburg: Justizbehörde, 2019) at <https://www.hamburg.de/contentblob/12393686/f54d5289945b077ddeb3a2fa1996857b/data/buch-fuer-fuehrer-volk-und-vaterland.pdf>

<sup>201</sup> Joachim Szodrzynski, *Entnazifizierung – am Beispiel Hamburgs*, p. 26. <https://www.hamburg.de/contentblob/4462240/c74125f820e125e20c176410f905a407/data/aufsatz-szodrzynski.pdf>

<sup>202</sup> The trial cost 500,000 DM. Noack, p. 267.

introduced evidence that Kristina Söderbaum received between 40,000 and 60,000 RM with the idea to add this to the married asset benefit the couple received from the state.

Kramer read aloud Harlan's biography, to include details which had no possible relevance; for example, that as a youth, Harlan held a silver-forging apprenticeship. Actor Eugen Klöpfer appeared at the second session, testifying that he was happy each day to leave the set of *Jud Süß* because he felt his involvement in the movie was "unanständig" (indecent).<sup>203</sup> On the third day, the prosecutor asked the court to screen both *Jud Süß* and Fritz Hippler's *Der ewige Jude* at the Esplanade theater; the court reconvened there. Apparently, Kramer's strategy was to demonstrate both as antisemitic and inciting to crimes against humanity. The effect, though, only highlighted the differences between Harlan's more subtle cinematographic variety of hatred and the crude narrative and images that Hippler used.<sup>204</sup> The court could conclude that if Hippler's was a crime against humanity, as it was reasonable to assess, then Harlan's film was not quite that. This was hardly the point the prosecutor intended to make.

Kramer began the next week with pointless, entirely irrelevant questioning of another notorious director, Dr. Fritz Hippler, seeking to impeach his own witness about whether he had provided Dr. Joseph Goebbels with mistresses, this having nothing to do with the case at hand. Others were asked about the quality of the film on an artistic level. Peter Brauer, the director originally assigned to *Jud Süß*, described Harlan as a skilled director but one who had abused his talent with

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<sup>203</sup> P. 268. Klöpfer was charged at his own denazification hearing in Schorndorf, Baden-Württemberg for his role in the suicide of actor Joachim Gottshalk. Gottshalk and his Jewish wife Meta killed themselves and their disabled son Michael in 1941, immediately before the Gestapo arrived to take Meta and Michael to KZ Theresienstadt. Klöpfer was exonerated. <https://www.archivportal-d.de/item/T3UMYXJ5MOX2ADVS5L3HQHH3GPM452TA?lang=en>

<sup>204</sup> <https://germanfilms.net/harlan-jud-suss-trial-1949/>

the project. Alf Teichs said Harlan had saved the movie project but that other directors had tried to sabotage it. Teichs was permitted to relate hearsay conversations he said he had with deceased actor Heinrich George (Duke Karl Alexander in the film) whereby George thought Harlan did not do anything wrong. Malte Jaeger told the court that none of the cast thought they were participating in a propaganda film. Hans-Otto Borgmann, neighbor of the deceased Ferdinand Marian – and film production head Otto Heinz Jahn – supported Harlan’s statement that he tried to avoid directing the movie by threatening to join the army. Kramer did not have access to Goebbels’ diary entry of 15 December 1939: “Harlan reworked brilliantly the *Jud Süß* film. This will be *the* antisemitic film.” It is questionable whether Kramer would have known what to do with it.

Witness Otto Jacobs was asked about an allegation that Kristina Söderbaum bathed in the nude at the Venice Film Festival. Immediately afterward, Harlan suffered a minor heart attack; the trial was suspended and then moved to Berlin-Moabit which was more proximate to the remaining witnesses and the place where the authorities planned to hold trials concerning artists.<sup>205</sup> Things did not improve. Witness Alfred Greven described Alf Teichs (who had testified against Harlan in Hamburg) as the moving force behind the film but he recanted once he learned that Teichs was not dead, as he had been led to believe. The defense called Charlotte Koehn-Behrens, who conducted a May 1933 interview with Harlan for the *Völkischer Beobachter*; she said that the paper had changed some of Harlan’s statement to make them appear more antisemitic than they were. *Film-Kurier* staff film critic Günther Sawatzki testified exactly the same.

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<sup>205</sup> Noack, p. 269.

The Schwurgericht moved back to Hamburg. Several witnesses were not called because they were engaged on other movie projects. Ferdinand Marian's widow, Maria Byk, took the stand to offer useless and almost mentally disconnected testimony on Harlan's behalf, and went on to claim that she had been pushed into the Alster River during the trial by a stranger. Bizarrely, she drowned herself or was drowned by someone else soon after leaving the trial. The defense countered with their own bizarre parade of evidence, most of it having nothing whatsoever to do with the issue at hand: Harlan's complicity in a crime against humanity by producing inciting words and images.

Actor Gustav Fröhlich testified that Harlan was a committed National Socialist and that during the filming of *Der große König* (1942), the director denounced him as unpatriotic.<sup>206</sup> For no useful reason whatsoever, Fröhlich then made a joke about Harlan's size. Fröhlich had been engaged to Czech actress Lida Baarova before she dropped him to become Goebbels' mistress, something to which Harlan's defense counsel alluded.

Even what should have been the star witness of the trial, Dr. Heinz Leopold, a concentration camp survivor who spent years in brutal conditions, and head of an organization called "Die von Theresienstadt" – admitted he could offer no evidence of the film's connection to murder.<sup>207</sup>

Auschwitz survivor and activist Norbert Wollheim made an impassioned plea and gave his opinion

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<sup>206</sup> *Der große König* has an interesting backstory. Originally filmed in 1940, the historical Russian army's role in Frederick's defeat at Kunnersdorf had to be re-shot before the film's release in 1942; following the German invasion of the Soviet Union in June 1941. In 1940, Germany and the Soviets had been allies. The movie is a thinly disguised endorsement of the "Führerprinzip" and the necessity of sacrifice to save the homeland, whether in 1759 or 1942. Kristina Söderbaum plays a supporting role, this time as a soldier's loyal, pretty wife, Luise Treskow, who encourages her husband to obey his oath to Friedrich der Große and the state.

[https://www.filmportal.de/film/der-grosse-koenig\\_d31314a4b3124607961e276b127b0891](https://www.filmportal.de/film/der-grosse-koenig_d31314a4b3124607961e276b127b0891)

<sup>207</sup> This survivor organization seems to have left no available online trace other than at the Harlan Trial, at least within the confines of this research.

that *Jud Süß* and works like it could only fuel hatred, but this was largely speculative and certainly of limited value considering the mismanagement in the remainder of the state's case and its inability to connect cause and effect, as they evidently intended to do.<sup>208</sup>

Kramer never made a causal link between the film, Harlan, and the mass-murders of Jews. His closing statement reviewed Nazi exterminationist policies and weakly tried to associate the defendant with them.<sup>209</sup> He asked for a sentence of two years and a 105,000 DM fine.<sup>210</sup> In an odd alternative, Kramer agreed that justice might accept Harlan serving one day in jail for each 1,000 DM of the fine. Harlan delivered his own closing statement.<sup>211</sup>

Tyrolf announced the not-guilty verdict on 23 April. The reasons given were that it was practically impossible to determine the film's impact – which the prosecutor was clearly inept in proving – and that whether or not the film had the requisite psychological conditioning effect, the killings would have occurred regardless. Tyrolf's decision, though, mischaracterized the evidence and effectively exonerated both the film itself and its director in language that echoed Goebbels: "Die Angst der Juden vor dem Film ist lediglich auf die aufreizende Reklame zurückzuführen, nicht

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<sup>208</sup> Wollheim was a force of nature. He went on to co-found the Jewish Trust Corporation in 1950, which pressed restitution claims on behalf of murdered victims and their surviving families. By the time of its dissolution in 1967, the JTC had recovered almost 50 million dollars. He was also the plaintiff in a landmark case against IG Farben A.G. in 1950-58, which resulted in a 30 million DM settlement to former forced workers at the Buna/Monowitz plant at Auschwitz-Birkenau. Wollheim had been one of those slave-laborers. Robert Hüttenmüller, *I.G. Farbenindustrie Aktiengesellschaft in Liquidation: Bericht über die Entflechtung und Liquidation. Vorgelegt aus Anlass der ordentlichen Hauptversammlung am 27. Mai 1955* (Frankfurt am Main, 1955), p. 66. and [http://www.wollheim-memorial.de/en/norbert\\_wollheim](http://www.wollheim-memorial.de/en/norbert_wollheim)

<sup>209</sup> In 1998, author and professor Friedrich Knilli, author of *Ich war Jud Süß*, asked the concentration camp memorials for information as to whether the guards had ever screened the movie. Kramer seems not to have done this. Hauptstaatsarchiv Stuttgart, J 25 Bü 106, "Recherchanfragen zur Vorführung von 'Jud Süß' in Konzentrationslagern." See also, <http://www.ich-war-jud-suess.de/index2.html>

<sup>210</sup> Considering the 500,000 DM cost of the trial, no matter the verdict or Harlan's willingness to pay, this would have been a significant financial loss for the Hamburg Regional Court.

<sup>211</sup> Frank Noack, *Veit Harlan: The Life and Work of a Nazi Filmmaker*, p. 272.

aber auf den Film selbst, dessen so milde Form die Juden als eine Erleichterung empfunden haben."<sup>212</sup> Even had the prosecution presented an exemplary case, Tyrolf's comments make it apparent that it would have had no impact on his verdict.

Kramer appealed successfully in December 1949 and a new trial was scheduled. The players remained the same: Kramer as prosecutor, Zippel as defense attorney, and Dr. Walter Tyrolf – re-judging the judgment he rendered in the first trial. The prosecution again ineptly called witnesses damaging to its own case, the defense briefly championed Harlan's innocent nature and character, and the final result was identical.<sup>213</sup> There was a slight difference in the judge's reasoning, namely that had Harlan refused the Propaganda Ministry's commission, he might have put himself in danger.<sup>214</sup> Harlan was acquitted for the second time on 29 April 1950.<sup>215</sup> The Staatsanwaltschaft initially filed a notice to appeal but later withdrew it. Kramer continued as a

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<sup>212</sup> "The Jews' fear of the film can only be traced back to the irritating advertising, but not to the film itself, the mild form of which the Jews found a relief." <https://www.welt.de/print-wams/article108871/Fassbinders-Vorbild.html>

<sup>213</sup> Seeing the inevitable result, Norbert Wollheim refused to testify in the second attempt, noting that "Having the courts in this country pass judgment on crimes against humanity has turned out to be, to put it mildly, one of the great mistaken ideas of the occupying powers." [http://www.wollheim-memorial.de/en/harlanprozess\\_en](http://www.wollheim-memorial.de/en/harlanprozess_en)

<sup>214</sup> Susan Tegel, *Jew Süß: Life, Legend, Fiction, Film* (London: Continuum, 2011), p. 210.

<sup>215</sup> Tyrolf's connection with the NS past continued after the trial. In 1963 he married Ingeborg Margarete Wetzels, a former doctor with the T-4 euthanasia program who was involved with the murder of children. She, too, had been cleared quickly in postwar denazification proceedings.

<https://www.abendblatt.de/hamburg/article124763933/Die-Kindermoerderin-von-Rahlstedt.html>

Veit Harlan's son Thomas, a noted author and journalist, considered his father to be guilty of the charges and likewise named Tyrolf as a "Blutrichter." <https://www.abendblatt.de/kultur-live/article108032950/Der-Mann-der-die-Scham-seinen-Kindern-ueberliess.html>. His book, *Veit*, is useful for its assessment of his father's character and motives. Thomas directed the unsettling movie "Wundkanal" the plot of which is an 80-year-old war criminal being interrogated while being filmed. It is a disturbing testament to unresolved parent-child issues in the Harlan household.

prosecutor until 1956, when he became Generalstaatsanwalt in Hamburg.<sup>216</sup> In 1952, Kramer wrote and published a somewhat peculiar novel, based on WWII.<sup>217</sup>

## 5.5 Lüth case

Harlan returned to the legal spotlight in 1950. Erich Lüth was an editor with the *Hamburger Anzeiger* and a pre-war member of the left-liberal Deutsche Demokratische Partei (DDP) in the Hamburg City Council. And later the Radikaldemokratischen Partei (RDP). He served in Africa and Italy during the war, returning afterward to head the State Press Office in Hamburg. As a decades-long opponent of the NSDAP and their philosophy, Lüth became enraged – as noted earlier – when Harlan and Söderbaum arrived at a film screening in 1947. He was even more enraged when the director's film *Unsterbliches Geliebte* was set to premiere in 1950; Lüth organized a press boycott.<sup>218</sup>

He said this:

“The person least likely to restore the claim to morality which the German film forfeited during the Third Reich is the man who directed ‘Jud Süß’ and wrote the

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<sup>216</sup> <https://justiz.hamburg.de/sta-geschichte/>

<sup>217</sup> *Wir werden weiter marschieren/We Shall March Again* (Berlin: Lothar Blanvalet Verlag, 1952). The protagonist is described in one review as “He loses a cushy occupation job in Paris and his officer's rank when he takes up with an old girlfriend who is in the resistance. Shipped to the Russian front, he does nothing more dangerous than guard and kitchen duty, and manages to escape handily when the great retreat gets under way. He becomes a chauffeur at headquarters, and he always manages to keep just out of reach of the Russians. At the end he joins a group that deliberately deserts and chooses the British as the most desirable captors.” The English title is badly translated. It should be “We shall march on.”

<sup>218</sup> This is well covered by Dietrich Kuhlbrodt: “‘Jud Süß’ und der Fall Harlan/Lüth. Zur Entnazifizierung des NS-Films“ in Peter Reichel (Ed.): *Das Gedächtnis der Stadt. Hamburg im Umgang mit seiner nationalsozialistischen Vergangenheit* (Hamburg: Hanser, 1997), pp. 101-112. Lüth could not have known about it but that same year, Harlan completed an unpublished manuscript. Among other items, it contained the line, “Diese demokratische Freiheit gilt dann nicht, wenn es den Juden so gefällt. Also eine Minderheit von 60.000 Menschen will in Deutschland ein 60-Millionen-Volk geistig vergewaltigen.“ (This democratic freedom does not apply if the Jews like it that way. So a minority of 60,000 people in Germany want to mentally rape a 60 million people.). Harlan was not quite rehabilitated, it seems. Filmmuseum Potsdam, *Nachlass Veit Harlan* DL/N109 30–39, Schriftgut (verschiedenes): Aufsätze Veit Harlan, „Menschen – Tiere – Sensationöchen“, undated (prob. 1950–51)

script for it. If this very man is chosen to represent the German film industry, who can tell what harm we may suffer throughout the world? True he was acquitted in a formal sense in Hamburg, but substantially the judgment was a condemnation. We must call on the distributors and cinema owners to show character – not cheap, but worth the price. And I want the German film to show character as well. If it shows character in its imagination, visual daring and sterling craftsmanship, it will merit every assistance and achieve what it needs in order to survive: success with the public here in Germany and abroad.”<sup>219</sup>

After Domnick-Film-Produktion GmbH and Herzog-Film GmbH (the distributor of *Unsterbliche Geliebte* in the Federal Republic) filed a complaint with the Hamburg court, Lüth then said this:

“The court did not gainsay the fact that for much of the Hitler regime Veit Harlan was the ‘Nazi film-director No. 1’ or that his film *Jud Süß* showed him to be a committed exponent of the Nazis’ murderous purge of the Jews. Some businessmen here and abroad may not be opposed to Veit Harlan’s re-emergence, but the moral integrity of Germany must not be destroyed by hard-faced money-makers. Harlan’s return can only reopen wounds barely healed, and resuscitate diminishing distrust fatal to German reconstruction. For all these reasons it is not only the right but the duty of all decent Germans to protest against, and even to boycott, this ignominious representative of the German film industry.”<sup>220</sup>

The plaintiffs amended their complaint accordingly and asked for an injunction and a judgment against Lüth for violating BGB §830. Harlan had been acquitted in the criminal proceedings and fully denazified, so Lüth’s attempt to organize theater owners against his performance (and the producer’s and distributor’s investment) was an illegal act in restraint of Harlan’s free expression of his art and interfered with the right to make a living. Lüth appealed the Hamburg decision to the Bundesverfassungsgericht, claiming the lower court violated his rights under Title 5, Section

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<sup>219</sup> <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369#:~:text=He%20said%2C%20inter%20alia%3A%20The%20person%20least%20likely,what%20harm%20we%20may%20suffer%20throughout%20the%20world%3F>

<sup>220</sup> <https://germanlawarchive.iuscomp.org/?p=51>



1 of the Grundgesetz: “Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt.” (Everyone has the right to freely express and disseminate his or her opinion in words, writing and images and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through radio and film are guaranteed. Censorship does not take place).<sup>221</sup> In essence, his more important human right to freedom of expression should be given more weight than the tort he committed by making damaging statements (even if true or an opinion) about Harlan, his past, and his work for Nazi Germany, or his caustic influence on the postwar generation.

The court agreed, and in the process of vindicating Lüth’s rights, it expanded and clarified them for all Germans. The BVerfG recognized that there existed within the intent of the Federal Constitution the reality of substantive rights to freedom of speech (and by extension, other fundamental principles) instead of viewing law from a purely procedural/judicial review standard. The court introduced a balancing approach which has become the hallmark of modern German law since 1958 (the year of the BVerfG decision).<sup>222</sup> It also indirectly validated the position taken by both Lüth and Oberstaatsanwalt Kramer – that Harlan was, in fact, Hitler’s number one director.

Absent an attempt to prosecute an inchoate crime, the Harlan prosecution in Hamburg failed to establish a connection to incitement and persecution, words and actions, and even if it had been,

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<sup>221</sup> [https://www.gesetze-im-internet.de/gg/art\\_5.html](https://www.gesetze-im-internet.de/gg/art_5.html)

<sup>222</sup> Judgement 15 January 1958 in : BVerfGE 7, 198

it is unlikely, given his previous decision, that Tyrolf would have convicted Harlan. German public and judicial interest in prosecuting incitement as a crime against humanity, to the extent that it existed at all, had passed. Indeed, the audience at the Harlan verdict cheered.<sup>223</sup> That attitude has undergone a metamorphosis (several of them, forward and backward) in the decades since but the effect in 1949, and the fact that Harlan emerged vindicated when he clearly was culpable, acted as a catalyst that took half a century to mature. In this century, by comparison, Germany asserts jurisdiction for crimes against humanity committed by any German citizen or by non-Germans who are in the Bundesrepublik, regardless of where those crimes happened. The BRD has come a long way since the Harlan decision.

Harlan made a further twelve movies, none of them successful, before dying on Capri in 1964.<sup>224</sup> The 2008 documentary by Felix Moeller, *Harlan - Im Schatten von Jud Süß*, explores the background, family reaction, legacy, and Harlan's motives for making the film.<sup>225</sup> He does not emerge in innocence.

As historian Eric Rentschler notes:

“What was different about *Jew Süß* was its overt call to action. At the time of the film's production, the Wannsee Conference had not yet transpired and the ‘Jewish Question’ had not been resolved. The possible alternatives under consideration – extermination or expulsion – are literally enacted in the film's double conclusion: Süß is brutally executed, and all Jews in Stuttgart are forced to leave the city. *Jew Süß* reinforced and built on well-known racial stereotypes, and it did so with hurtful intent. As propaganda, it not only confirmed existing prejudices; it agitated, militated, and called for action.”<sup>226</sup>

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<sup>223</sup> Szodrzyński, p. 26.

<sup>224</sup> Actually eleven, if the 1965 posthumous re-release of *Kolberg* is included.

<sup>225</sup> Zeitgeist films. <https://www.zeitgeistfilms.com/film/harlan>

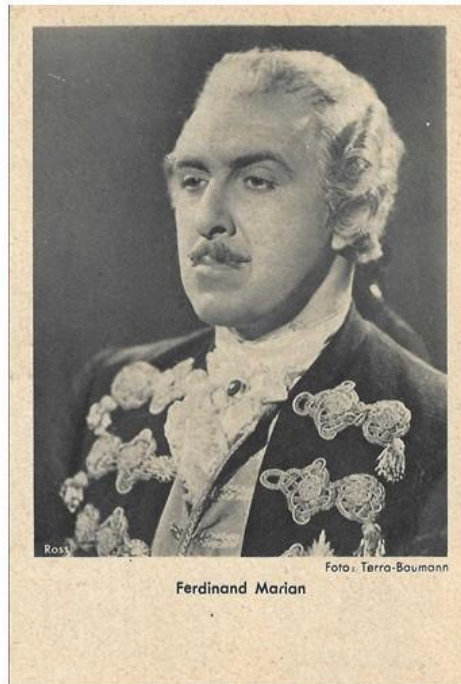
<sup>226</sup> Eric Rentschler, “The Legacy of Nazi Cinema: Triumph of the Will and Jew Süß Revisited” in *The Arts in Nazi Germany: Continuity, Conformity, Change*, Jonathan Huener and Francis R. Nicosia (eds.), (New York: Berghahn Books, 2006), pp. 73-4.

The evidence seems clear: Harlan's film did not cause the Holocaust; it simply made it easier for the audience to ease their conscience and validated views already held after seven years of an avalanche of hatred and incitement. As regards to the *Jud Süß* and its legacy, Joseph Goebbels accurately characterized the film and its impact as "in fact a new program. It proves that films can affect and inflame feelings in keeping with our own views."<sup>227</sup>

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<sup>227</sup> Klaus Kanzog, "Staatspolitisch besonders wertvoll": *Ein Handbuch zu 30 deutschen Spielfilme der Jahre 1934 bis 1945* (Munich: Schaudig und Ledig, 1994), p. 220.





14. Ferdinand Marian as Jud Süß



15. Kristina Söderbaum – “Die Reichswasserleiche”



16. Reichsminister Dr. Goebbels, Dr. Fritz Hippler, Veit Harlan, 1940



17. *Jud Süß* premier. L. to r., Ferdinand Marian, Veit Harlan, Dr. Goebbels, Fritz Hippler



18. Adding authenticity to the anti-Semitic message, the inter-scene card reminds audiences that the film is based on historical events.





19. Harlan (c) confers with his attorneys. Right is Dr. Otto Zippel



20. Harlan and secretary Lu Schlage leave the Hamburg courtroom





21. Harlan, hoisted on the shoulders of his supporters, leaves the court after his acquittal





23. Harlan's nemesis and protagonist in the "Lüth Urteil" – Erich Lüth

## Chapter VI: Hippler, Taubert, Schweitzer

### 6.1 Preparing the stage for Hippler's incitement

Allied attempts to prosecute Nazi propagandists did not end with the IMT. American war crimes officials planned to hold a special trial of German propaganda and education officials but in the end, only one of the propagandists, Reich Press Chief Otto Dietrich, was prosecuted by the US tribunal. Other denazification courts at least attempted to hold responsible former Nazi propagandists such as Hans Fritzsche, Max Amann, Fritz Hippler, Philipp "Fips" Rupprecht, and Veit Harlan.<sup>228</sup> They were by no means the only perpetrators.

Antisemitism in film during the Third Reich occurred before and after Hippler's work, the first being *Juden ohne Maske* in 1937. Created to accompany the München exhibition of "Der ewige Jude," it was only 37 minutes long, and while the original cut featured the NSDAP leadership, as well as a brief examination of "Jewish types" that included actor Peter Lore in his role in "M," the surviving short film is bizarre.<sup>229</sup> Without sound, it shows a soldier returning to his home in distress, killing an old man for no clear reason, attacking a woman at a party, and then being put on trial. No context, just juxtaposed, badly-spliced scenes with no attempt at transition or exposition.<sup>230</sup> Even the promotional literature for the short film cannot quite describe what it is about: "The movie offers a cross-section of Jewish film production during the system period [a

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<sup>228</sup> <https://www.ushmm.org/propaganda/timeline/1946-present/>

<sup>229</sup> The original is presumed lost. What remains is a 13-minute cut and production stills. <https://www.imdb.com/title/tt0494509/> and [https://www.filmportal.de/film/juden-ohne-maske\\_ac096f8da23a45979b006e9c5b7ea87f](https://www.filmportal.de/film/juden-ohne-maske_ac096f8da23a45979b006e9c5b7ea87f)

<sup>230</sup> <https://archive.org/details/1937-Juden-ohne-Maske>

derogatory term for the Weimar Republic] and proves the necessity of the Nuremberg Laws, which brought an end to this subversive activity in the fields of culture and the economy.”<sup>231</sup>

Lore would return in Hippler’s film as well, with his role in “M” as child-murder standing in perfectly an an example of the racism that National Socialism wished to convey. The image and tone appear aimed at persecution, degrading and humiliating Jews and pointing to their nefarious impact on German society, but is so chaotic and ineffective that it barely registers as a predicate or inspiration for Hippler.

In 1939’s *Leinen aus Irland* (Linen from Ireland), a Bavaria Films production directed by Heinz Helbig, an Austro-Hungarian Jew in a textile factory imports cheaper fabric from Ireland, economically disadvantageing the local production. While it plays on the traditional tropes of antisemitism, the film’s message follows the narrative of the Jew as the dishonest merchant. That same year, the antisemitic musical comedy, *Robert und Bertram*, appeared. In the plot, two prison escapees help a poor man who is being forced to sell his daughter to the rapacious Jew Biedermeier. The two steal from another Jew in Berlin to get the money necessary to thwart the first Jew. It introduces the “Ghetto Jew” to German film and makes the point that stealing from Jews is not really a crime, since the Jews no doubt stole first from their customers.<sup>232</sup>

*Die Rothschilds, die Aktien von Waterloo* is the first major motion picture with a more potent antisemitic theme, and is rightfully considered the first of the triad of movies which move from making Jews the object of ridicule to portraying them as a clear threat to the German way of life.

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<sup>231</sup> <https://www.lbi.org/1938projekt/detail/jews-unmasked/>

<sup>232</sup> <https://www.heise.de/tp/features/Dr-Goebbels-und-die-Weltverschwoerung-Antisemitismus-mit-Spiel-und-Tanz-und-FSK-3387449.html>

In this picture, director Erich Waschnek falls back on the legacy from the *Protocols of the Elders of Zion* – the Jews have organized a behind-the-scenes conspiracy to manipulate events and control the global financial markets. Here, Nathan and James Rothschild devalue stock in order to profit from the 1815 Battle of Waterloo. Reichsminister Goebbels apparently wanted a shift in production values in order to counter the malaise many Germans felt after *Kristallnacht* for the Nazi measure against Jewish business, synagogues, and individuals. The public needed to raise its enthusiasm for antisemitism and messaging through film was an ideal medium to accomplish that.<sup>233</sup> Of the other two films of the triad, *Jud Süß* has already been covered. We arrive now at the last and worst.<sup>234</sup>

## 6.2 Friedrich “Fritz” Hippler background

The Fritz Hippler case from 1948 presents a different aspect of incitement and persecution in crimes against humanity; he was responsible for the most virile antisemitic film to emerge from the Third Reich. A Berliner by birth, Hippler joined the NSDAP in 1925 (at age 17), was an active *Hitler-Jugend* leader and then a tireless member of the SA. As a student at Berlin University, he was expelled in 1932 for public Nazi agitation, and burned books in October 1933 in concert with a Goebbels speech, although he was later readmitted to the university when the NS Minister of Education Bernhard Rust issued an amnesty for students penalized for National Socialist activity. He earned a PhD from Heidelberg University where he belonged to the Landmannschaft Teutonia Heidelberg Mensur. Although Hippler later claimed a distinct lack of antisemitism, his 1934 book

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<sup>233</sup> Lawrence Rees, *Auschwitz: A New History* (PublicAffairs, 2006), p. 16.

<sup>234</sup> Katherin Bower, "Wahr Spricht, Wer Schatten Spricht": Die Angst Vor Der Unbestimmbarkeit in Der Darstellung Des Holocaust" in *Kulturelle Repräsentationen des Holocaust in Deutschland und den Vereinigten Staaten* (Klaus L. Berghahn, Jürgen Fohrmann, and Helmut J. Schneider, Eds.), (New York: Peter Lang, 2002), pp. 1-22.

*Jugend fodert* he describes sexuality – which was antithetical to the Hitler-Jugend ethos, as “Jewish symptoms of decadence.” He was hired in 1935 by Hans Wiedemann for the Deutsches Film-Nachrichtenbüro, which controlled newsreel production for the Propaganda Ministry. Hippler’s initial role was to visit the offices of the four existing newsreel companies and ensure they prominently showcased state and NSDAP events. He assumed Weidemann’s job in 1939 and was promoted to *Leiter der Reichsfilmabteilung* (Reich Film Department) in 1939 and then to Reichsfilmintendant in 1942. Hippler joined the SS in 1932 and ended the war as an SS-Obersturmbannführer.<sup>235</sup> He had a falling out with the SS in 1943 and was expelled, even being gently reminded to return his commemorative Totenkopf (Death’s Head) ring.<sup>236</sup> He is remembered chiefly as the director of *Der ewige Jude*, the natural follow-up to the “Der ewige Jude” exhibit created by the Propaganda Ministry at the Deutsches Museum in München from 1937-38 to show Jewish degeneracy in the visual arts, accompanied by an illustrated book of the same name.<sup>237</sup>

Around the same time but before the release of *Der ewige Jude*, Hippler published *Betrachtungen zum Filmschaffen* (Considerations of Cinematic Works), a 107-page evaluation of film motifs and his opinion of selected recent German films. He cites *Jud Süß* as an example of a movie that deserved its critical acclaim. The rest of the somewhat turgid treatment moves along without relevance until it arrives at page 100. Hippler wrote this:

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<sup>235</sup> Equivalent to Lieutenant Colonel in the US Army or Oberstleutnant in the Bundeswehr

<sup>236</sup> BA, Hippler, document 19, Reichsführer-SS Hauptamt to Hippler, August 1943. Although Hippler raised this as a point in his favor and proof of his anti-Nazi credentials, the SS documentation reveals reason to be that he had lied on his ancestry form, neglecting to mention a Jewish relative. BA, Hippler (File document 150), 24 March 1943.

<sup>237</sup> <http://www.holocaustresearchproject.org/holoprelude/derewigejude.html>. The exhibit later moved to Wien and then Berlin. The initial venue in München recorded more than 400,000 visitors.

In Film mehr als im Theater muß der Zuschauer wissen: Wen soll ich lieben, wen hassen. Mache ich z.B. einen antisemitischen Film, so ist es klar, daß ich die Juden nicht sympathisch darstellen darf. Stelle ich sie aber unsympathisch dar, so müssen ihre Gegenspieler sympathisch sein. Sind diese Gegenspieler aber Engländer, die überdies freundlicher-weise einen Vernichtungskrieg gegen uns führen, so können richtigerweise diese Engländer ebenfalls nur unsympathisch dargestellt werden. Kontrastiere ich nun aber Juden gen Engländer, d.h. unsympathische Menschen, so hat das denselben Effekt, als würde ich einen noch so künstlerischen Scherenschnitt aus schwarzem Papier auf eine ebenso schwarze Unterlage werfen und ausrufen: "Seht, wie künstlerisch!"

[In film more than in the theater, the audience must know: Who should I love, who should hate. If I make an antisemitic film, for example, it is clear that I am not allowed to portray the Jews sympathetically. But if I portray them as unsympathetic, their opponents must be sympathetic. But if these opponents are Englishmen, who, moreover, are more friendly and inclined to wage a war of extermination against us, these Englishmen can also be portrayed unsympathetically. But if I contrast Jews with the English (i.e., unsympathetic people), it has the same effect, as if I were throwing an artistic cut of black paper onto an equally black underlay and exclaiming: "Look how artistic!"]<sup>238</sup>

### 6.3 Der ewige Jude – the motion picture

Following the invasion of Poland and the realization that Germany now had an even larger population of Jews within its territorial boundaries, Goebbels resurrected the concept from the previous years' exhibition, writing in his diary on 5 October 1939 that he had, "discussed a ghetto film with Hippler and Taubert. The material will be shot in Poland now. This will be a first-class propaganda film. I am providing a plan for it."<sup>239</sup> It was distributed by Terra Film and produced by the Deutsche Filmherstellungs u. Verwertungs-GmbH, and released on 28 November 1940.<sup>240</sup>

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<sup>238</sup> Fritz Hippler, *Betrachtungen zum Filmschaffen* (Berlin: Max Hesses Verlag, 1940), p. 100.

<sup>239</sup> Diary entry from October 6, 1939 (Goebbels, 1987) p. 140.

<sup>240</sup> Terra, a Swiss company managed by Ralph Scotoni on behalf of his family, was a major producer of films during the Third Reich. It was effectively nationalized and then directed by Cautio Treuhand in 1937 before being

The film narrative goes through several preparatory stages to construct the necessary framework for its final conclusion.<sup>241</sup>

#### **6.4 Scenes, words, and images**

After the titles, the camera opens to a crowded ghetto, accompanied by sinister music. Cramped conditions outside and then a family dwelling with flies on the wall. A rabbi conducts prayers while moving forward and back. Jews in the marketplace, dragging chickens and geese by their necks.

Then the scene shifts. Aryan men engaged in engineering and working together at harvest. Uplifting, triumphal music. This is quickly shifted to the scene of a Jew counting money in the street, Jewish sellers at a market, gradually moving to scenes of increasing size and finally to a corporate bank. The contrast between hardworking Aryan who produces and is taken advantage of by the Jew who produces nothing but makes a profit from honest Aryan labor.

Next comes shots of Jews as they colonized the world, moving stealthily to the East and then to Europe and the rest of the globe in the previous two centuries. Rats arrive, as a metaphor, pointing out the Black Death that killed much of Europe when vermin were allowed to remain unchecked.

In the following scene, Jews are shown in traditional clothing and then in western dress, revealing how easily the Jew can wear a disguise (as in *Jud Süß*), and how they can cavort with Aryan

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absorbed by UFA in 1942. Most of the major actors worked at one time or another for Terra, and it produced *Jud Süß*. "The Time Shop in the New Era": A Swiss film company in the Third Reich, *Basler Zeitung*, 4 May 1991.

<sup>241</sup> Narrator Harry Giese was classified as a Mitläufer in denazification proceedings but resumed work as a voice actor in 1948 and worked in the German film industry until 1957. <https://www.imdb.com/name/nm2233358/>



women in restaurants and nightclubs. The film then focuses on Jewish banking families, the Rothschilds, and the Warburgs, who seek to enrich themselves from the sweat of the working man. Jews are shown controlling the New York Stock Exchange and explained as parasites to the host nation, no matter where they are. Germans during WWI are shown suffering while Jews hold important and lucrative jobs. Graphs and charts follow that illustrate Jewish control of the professions, their migratory pattern, and finally a comparison between the salaries of Germans versus Jews. Jews live well while decent Germans are in poverty. This is followed by Jewish contamination of German culture, art, and religion. The point is highlighted by clips from movies produced by Jews which show sexual violence and crime. To drive this home, Peter Lore is depicted in his role of a child murderer in the 1931 Fritz Lang film, *M*.<sup>242</sup>

Hippler moves on. His next target is the nature of the Jewish faith. The narrator advises the audience that Jews are the real vermin – the rats who need to be eliminated – and supports this with Jews celebrating the Purim festival, Jews with stereotypical features and traditional religious clothing. At this point, the narrator warns the audience that sensitive viewers should not watch before the camera shifts to overly-graphic slaughter of a cow by kosher butchers, some of them shown smiling before cutting the animal's throat. This footage is followed by the same procedure inflicted upon a calf. The scene shifts yet again, this time to content cows grazing on a German farm and sheep being tended by Aryan-looking German farmers. In the next series Jewish

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<sup>242</sup> A Hungarian by birth, Lore fled Germany in 1933; he was Jewish. He appeared in what are generally considered two of the finest movies of the golden age of Hollywood, *Casablanca* and *The Maltese Falcon*. Lore became an American citizen in 1941. [https://www.imdb.com/name/nm0000048/bio?ref\\_=nm\\_ov\\_bio\\_sm](https://www.imdb.com/name/nm0000048/bio?ref_=nm_ov_bio_sm)

butchers kill a lamb and watch while a cow staggers, blood gushing from a neck wound. Another scene shift shows and speaks of a National Socialist law banning ritual slaughter.

In the final section, Hitler addresses the Reichstag, telling them that “the flag has been raised in war against all Jewry.” Germans cheer, salute, smile, and chant at what Hitler says. Images appear of handsome, athletic, healthy, Aryan men and women. Words appear, a quote from Hitler: “The eternal law of nature, keeping one's race pure – a unified German nation march on into the future.” Most chillingly, in terms of public incitement, the film ends with Hitler’s speech to the Reichstag in January 1939, to which the Führer returned many times over the following five years: “If international Jewish financiers inside and outside Europe should succeed in plunging the nations once more into a world war, then the result will not be the victory of Jewry but the annihilation of the Jewish race in Europe.” Dissolve shot of marching soldiers and a short clip taken from Leni Riefenstahl’s *Triumph des Willens*. National Socialist flags, many, close-up, and swastikas.

The feature film – which was made in the style of a newsreel documentary – depicted the Jews of Europe as a modern scourge, which simultaneously attacks the health, culture, financial structure, and religion of its “host.” The lasting image from Hippler’s work is that of rats teeming around sacks of grain, leaving unnecessary the overt question of what is always the proper solution to a rodent infestation. The director makes his point clear, cutting seamlessly between the rats and shots of seedy Jewish men clad in dirty black, before mounting a crude attack on all stereotypical aspects of international Jewry. “Where rats turn up, they spread diseases and carry extermination into the land. They are cunning, cowardly and cruel, they travel in large packs, exactly the way the Jews infect the races of the world,” the narrator informs. In another scene,

before the viewer's eyes, filthy East European Jews are transformed into clean-looking Western Jews, driving home Hippler's point that a secret fifth column lives among contemporary Aryans.

### 6.5 Der ewige Jude's reception

In a pamphlet Goebbels wrote personally to go along with the film, the Propaganda Minister summarizes the message he wished it to convey: "In shining contrast, the film closes with pictures of German people and German order which fill the viewer with a feeling of deep gratification for belonging to a race whose Führer is fundamentally solving the Jewish problem."

Hippler told a postwar interviewer that "With this film, Hitler wanted to prove that the Jews were a parasitic race within mankind that had to be separated from the rest of mankind."<sup>243</sup> After seeing the rushes, Goebbels' diary entry was more honest and less self-serving than Hippler's later assessment: "The Jew film...Never seen anything like it. Scenes so horrific and brutal in their explicitness that one's blood runs cold. One shudders at such barbarism. This Jewry must be eliminated."<sup>244</sup>

The movie opened in Berlin in 1940, two months after the premiere of *Jud Süß*. Despite the active promotional campaign from the Propaganda Ministry, it did poorly at the box office following the initial viewing.<sup>245</sup> A report from the SS security service, the *Sicherheitsdienst* (SD), which assessed public opinion throughout the war, noted that at the showing on 20 January 1941, the audience applause was "almost liberated and enthusiastic during the film when the Führer was shown at

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<sup>243</sup> "Fritz Hippler, Nazi Filmmaker" at <https://www.youtube.com/watch?v=2FaGWsW1khw&t=2s>

<sup>244</sup> Goebbels' Diary, entry for 17 October 1939. "'Dieses Judentum muss vernichtet werden."

<sup>245</sup> Report from the Bundesarchiv, Koblenz. R58/157, pp. 7-9, dated 20 January 1941, at Erwin Leiser: "Deutschland, erwache!" *Propaganda im Film des Dritten Reiches* (Reinbek bei Hamburg: Rowohlt Verlag, 1968), p. 137f. The R58/157 is Leiser's citation.

the point of one of his speeches where he predicted that a new war would only result in the end and annihilation of Judaism.” The audience in this instance also apparently reacted well to the images of Jews as rats. As a whole, though, the initial attendees did not come back, and the SD considered that the style of the film contributed to “nerve strain,” and that the superior movie *Jud Süß* had already covered the same ground but in a way that better appealed to most filmgoers.<sup>246</sup> One official review in the *Illustrierter Filmkurier*, however, noted that “In striking contrast to this [the hordes of rats], the film closes after these terrible scenes with images of German people and German order, which fill the viewer with the deepest gratitude for being able to belong to this people, whose leader is fundamentally solving the Jewish problem.”<sup>247</sup>

## 6.6 Hippler’s message and meaning

In terms of Hippler and incitement, it becomes difficult to ascertain his degree of culpability. He directed the film, shaped the visual imagery, and had significant direction over the message – that Jews are rats. That message was, as psychologist David Livingstone Smith noted, “It is wrong to kill a person but permissible to kill a rat.”<sup>248</sup> But did Hippler intend murder as the outcome? Did he cause that outcome? Did he meaningfully encourage others who committed crimes?

Hippler’s natural defense is that the film did not explicitly call for violence and that, in any case, he was merely an unwitting tool of Goebbels’ antisemitic agenda, and that Goebbels retained the

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<sup>246</sup> Ibid.

<sup>247</sup> Saul Friedlander, *The Years of Destruction: The Third Reich and the Jews 1939-1945* (Munich: Beck, 2006), pp. 126–128. “In leuchtendem Gegensatz dazu [den Rattenscharen] schließt der Film nach diesen furchtbaren Szenen mit Bildern deutscher Menschen und deutscher Ordnung, die den Besucher mit tiefster Dankbarkeit erfüllen, diesem Volk angehören zu dürfen, dessen Führer das Judenproblem grundlegend löst.“

<sup>248</sup> David Livingstone Smith, *Less than Human: Why We Demean, Enslave, and Exterminate Others* (New York: St. Martin’s Press, 2011), Note 8, at p. 15.

controlling role in the film's development. This is partially true in that the Propaganda Minister took a personal interest in what he called his "Jew film."<sup>249</sup> Prior to the German invasion of Poland in 1939, Hippler attempted to get permission from the Polish government to film in Jewish ghettos but failed. This was rectified after German occupation, at Goebbels' insistence.<sup>250</sup> In any event, Hippler's career prospered, for a while. He was promoted again in the SS, made several short documentary films, and as a senior assistant to the Minister, deciding which foreign films came into the Reich and editing them according to Goebbels' directives.<sup>251</sup> He was ultimately dismissed from the Propaganda Ministry for his alcoholism and unreliability.<sup>252</sup>

Problematic for Hippler's defense case is that Goebbels' diaries, published in full only in the 1990s, prove Hippler to be a liar, an important evidentiary element that was unavailable to American or German authorities in the immediate postwar period. Unlike testimony offered after the war, Goebbels had no contemporary reason to distort information in his private writings, not expecting them to ever become public. They show Hippler to have been involved in the idea of a feature film documentary before he left to film in Poland and that he was, in fact, the hands-on person who made the movie; his name is accurately connected to the final product, its contents, and the message contained within. More damningly still, records from the Berlin Document

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<sup>249</sup> Saul Friedländer and Orna Kenan, *Nazi Germany and the Jews, 1933–1945* (New York: HarperCollins, 2009). p. 153.

<sup>250</sup> Richard A. Etlin, *Art, Culture, and Media under the Third Reich* (Chicago: University of Chicago Press, 2002), p. 148.

<sup>251</sup> He had a few film credits after *Der Ewige Jude*, to include *Der Führer und sein Volk* (short subject, 1942) and a series of short documentary-style films centered on the Eastern Front (ex. "Angriff von Infanterie und Panzern gegen eine Ortschaft," 1942, for the series *Frontschau*). <https://www.imdb.com/name/nm0386162/> and <https://www.youtube.com/watch?v=CKuwDbDYUM>

<sup>252</sup> He directed the 1943 short "Juden in Dombrova." It is an odd product, spliced B-roll of Jews in cities and rural settings. It was produced by the SS-Leitung and never seems to have had a general release to audiences or incorporated into other films. [https://www.imdb.com/title/tt2152755/?ref=nm\\_flmg\\_dr\\_2](https://www.imdb.com/title/tt2152755/?ref=nm_flmg_dr_2)

Center allowed German prosecutors to understand the full scope of Hippler's direct involvement in the film's message and image.

## 6.7 Postwar difficulties, criminal and Spruchkammer

Prior to the war's conclusion, Hippler was listed on the Allied CROWCASS (Combined Registry of War Criminals and Security Suspects) for his work as director of film at the Propaganda Ministry.<sup>253</sup> At this point, the British seemed unaware that he was the filmmaker responsible for *Der ewige Jude*. He was arrested at the end of the war and interned as a senior SS officer from 1945 at the British Internment Camp No. 6 at Neuengamme.<sup>254</sup>

While still interned in autumn 1947, Dr. Aubert<sup>255</sup> of the Staatsanwaltschaft in Hiddesen, initiated a criminal proceeding based on Hippler's evident violation of CC Law No. 10, membership in a criminal organization (the SS). Almost immediately, Hippler – through his attorney – arranged for a flood of supporting affidavits to land in Dr. Aubert's office, all testifying to his sterling character. Heinrich Roellenbleg, former UFA and Bavaria Studios director, was certain that Hippler saw through Goebbels' "satanic methods" and was disgusted by them. Further, that Hippler showed

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<sup>253</sup> BA, Z42V-2815 (Hippler), Berlin Document Center to Aubert, 3 April 1948. Hippler appeared on page 169 of the CROWCASS. At the same time, the BDC sent other material that is discussed later. CROWCASS was a continually updated "wanted" list which was published in multiple volumes, containing some 60,000 names. It was connected to both the United Nations War Crimes Commission and the Office of Military Government (US).

<sup>254</sup> Hippler stated he was a prisoner of war, interned at the former KL Neuengamme. Camp No. 6, established in 1945 on the site of the former KL and remained in operation until 1948. It housed SS, Party officials, Gestapo, SD, and suspected war criminals. Starting in 1947, internees who had been members of a criminal organization as determined by the IMT were sent before the Spruchkammer at Hamburg-Bergedorf. Heiner Wember, *Umerziehung im Lager. Internierung und Bestrafung von Nationalsozialisten in der britischen Besatzungszone Deutschlands*. In: *Düsseldorfer Schriften zur Neueren Landesgeschichte Nordrhein-Westfalens*, Bd. 30. Essen 1991, p.70f.

<sup>255</sup> Aubert's first name is never given in any of the many documents he authored about the Hippler matter. Attempts to learn it have failed, to include deep internet searches and an unanswered email to the Staatsanwaltschaft Detmold. There is a Spruchgericht Hiddesen inventory file at the Bundesarchiv, BArch Z 42-V, but as it is a collateral matter to the present dissertation, this is perhaps a good research project for another day.

sympathy for 20 July conspirators who attempted to assassinate Hitler at Rastenburg – an attitude which strains credibility past the breaking point, considering the fate of anyone who openly did so.<sup>256</sup> Actress Frieda “Henny” Porten emphatically wrote that, “My husband is Jewish. That says everything!” before describing Hippler as “warm-hearted and humane” and who “lightened my tremendous burden.”<sup>257</sup> Author and screenwriter Erich Kästner sent a brief note of exoneration, as did the former police and SD chiefs in wartime Berlin.<sup>258</sup> Actor Emil Jannings likewise testified to Hippler’s humanity.<sup>259</sup>

Not all of the submissions were so glowing. The Magistrate from Greater-Berlin, Abteilung für Volksbildung, Herr Baensch wrote that “Hippler was always a very passionate advocate of NS politics. It was his task to ensure that the German film production in its thematic and course of action was closely aligned to NS viewpoint. He was also present as a film director, for example the notorious works *Der Feldzug in Polen* and *Der ewige Jude*. It was probably his wish to sink the entire German film production to such a level...besides the propaganda films he was partially responsible for *Jud Suss*.”<sup>260</sup>

It was the first time that Hippler’s name and *Der ewige Jude* were linked by prosecution authorities.

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<sup>256</sup> BA, File page 40, Roellenbleg to Staatsanwaltschaft.

<sup>257</sup> Ibid., File page 49, Porten to Staatsanwaltschaft.

<sup>258</sup> Ibid, File page 62, Kästner to Staatsanwaltschaft.

<sup>259</sup> Ibid., File page 53, Jannings to Hippler, 11 August 1947. Actor Heinz Rühmann wrote a similar letter. One supporting affidavit, from writer Ilse Aeckerle, described Hippler as a “pacifist and jew-friendly.” File page 39. She had reviewed one of Veit Harlan’s earlier films (*Verwehte Spuren*) for *Der deutsche Film*, in 1938. Under the name Ilse Wehner-Ackerle, she had a brief career in the postwar as a television series writer.

<https://www.imdb.com/name/nm8898666/>

<sup>260</sup> Ibid, File page 90, 26 January 1948.

## 6.8 Defense statement

In connection with this, Hippler was interrogated about his knowledge of both persecution of the Jews and the concentration camp system, related to the criminal aims of the organization. His answers were a tapestry of professed ignorance:

I was aware of the fact that Jews were supposed to be pushed out of the political and economic life in Germany. I was in Berlin in November 1938 and witnessed the escalation toward Jews. It was clear to me that these actions have been directed from higher authorities. At this point, I was not aware of who that was. I have voiced my negative opinion to these actions very clearly to the at that time, supervisor of the film department of the propaganda ministry, and toward the chief of the ministerial department. During the war, I became aware of the fact that Jews were forced to wear a star of David and were evacuated. At that time, I was not aware of where they were transported to. As far as the situation in the occupied eastern regions go, I was aware of the fact that Jews were recruited to work (*dass Die Juden zur Arbeit eingesetzt wurden*) and that they were concentrated into ghettos. I did not know that Jews from Germany and from the occupied Western areas were in the ghettos. I did not know that almost the entire Jewish population in Generalgouvernement and in the occupied Russian areas fell to extermination. Although I worked in the propaganda ministry until 1943 and traveled to foreign countries – Stockholm, Venice, Prague, Rome, Paris – I did not hear of those occurrences. Especially in the Propaganda Ministry, there was a climate of extreme secrecy in a way that one department never knew what the other was doing. For example during the war, I could not listen to the DNB nor did I have permission to listen to foreign radio stations. Besides that, it is my point of view that the good faith that was shown toward Hans Fritsche at Nuremberg should also be awarded to me.

Predictably unaware of anything horrific occurring at concentration camps:

Of course I was aware of the fact that there were concentration camps in Germany. I also knew that aside from career criminals, people that were enemies of the state were also interned there. Those people were arrested by the Gestapo and their cases were investigated by the police. I was aware that not all enemies of the state in the KLs had their day in court before being interned. Besides those two groups, you could find former SS personnel in KLs, for example because of excesses they have done while drunk. I didn't know anything about the way prisoners were treated in the camps or of the cruelties that occurred there.<sup>261</sup>

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<sup>261</sup> Ibid., File page 15, Hippler interrogatory.



Although the matter began as a rather benign prosecution – Hippler could expect only a fine as a result and forfeiture – when Dr. Aubert received the full BDC files on 3 April 1948, the nature of the case changed dramatically. The next day, 4 April, Aubert wrote to the British Public Relations and information service, asking for copies of Hippler’s films *Feldzug in Polen* and *Der ewige Jude*.<sup>262</sup>

One of the documents Aubert received was Hippler’s service record with the entry that he had been awarded the Gold NSDAP Badge, that he was a member of the Lebensborn organization while in the SS, and the details of his state and SS career.<sup>263</sup> A second document was a bit more problematic. From SS-Gruppenführer Hans Hinkel – the SS specialist in cultural affairs at the Propaganda Ministry – the brief note from 2 March 1940 said only that “Kochanowski will look into the numbers of Jewish physicians and lawyers and numbers of Jewish land ownership.”<sup>264</sup>

## 6.9 The focus group

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<sup>262</sup> Ibid., File page 93, Hippler to British Public Relations and Information Service, 4 April 1948.

<sup>263</sup> Founded in 1935, Lebensborn (“font of life”) was an SS/state organization which had the aim of encouraging the procreation and raising of genetically pure Aryan offspring through a series of homes and programs. It had a complicated history and was linked to the kidnapping of children in occupied countries that met the threshold test as Aryans and were then placed in suitable German homes. It is unclear how Hippler fit into this and he was never asked a follow-up question about this topic. <https://encyclopedia.ushmm.org/content/en/article/lebensborn-program>

<sup>264</sup> BA, File page 98, 2 March 1940, Hinkel to Hippler. Erich Kochanowski, also an SS officer, was one of Hinkel’s close colleagues in the “Special Cultural Tasks” section of the Propaganda Ministry. Hinkel later became the Reich Film Superintendent and head of the Ministry’s film department. Extradited to Poland in 1947, he was inexplicably returned to the Federal Republic in 1952. His antisemitic books (ex. *Judenviertel Europas: die Juden zwischen Ostsee und Schwarzen Meer*, published by Volk und Reich Verlag, 1939) were banned in the Soviet Zone. Filled with photos that featured antisemitic tropes and derogatory stereotypes, one of the images of Jewish children was labelled, “Das jüdische Werk: die Vergiftung der Seelen” (The Jewish Work: poisoning the souls). Hinkel died in Göttingen in 1960. <http://www.polunbi.de/bibliothek/1946-nslit-i.html>,

The third document was the worst. On 1 March, Hinkel convened a focus group on Hippler's behalf to view a rough-cut of *Der ewige Jude* for 120 people; the "group consisted of known artists, university professors, comrades from political offices in the state and in party, formation leaders." The purpose was to make the film more effective as propaganda, more antisemitic by soliciting comments from the audience on how to accomplish that.<sup>265</sup>

"Min. Dir. Kurt Meyer of the Reichsstelle f. Sippenforschung believed that 'contrary to opinion of Hinkel (thought slaughter scene too much for broad audience), needs to be shown for full extent and needs to remain, and that warning should be taken out of the text so the bourgeoisie masses can be shown...also scene on wailing wall could be explained by the narrator in one or two short sentences, also the later shown Purim feast. Otherwise Meyer fully in agreement with the movie with one acknowledgement that the statistics concerning Jewish workers needs to be completed and better depicted.'"<sup>266</sup>

Prof. Dr. Johann v. Leers advised that "the Jewish feast scenes not too long, and the slaughter scene needs to be shown in its fullest extent – the opinion of 99% of the audience – Leers rightfully mentions in the narration the term 'nomad' is mentioned but to be historically accurate the term should not be used because it is not a negative attribute."<sup>267</sup>

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<sup>265</sup> Ibid., File page 99, Hinkel to Hippler, 1 March 1940.

<sup>266</sup> Meyer was responsible for formalizing the racial classifications against Jews under the Reich Citizenship Law, as a department head with the Race and Settlement Office and was also a Standartenführer in the SS. He and his family attempted group suicide in June 1945 at Bad Oldesloe, his wife surviving and later dying in British captivity. Diana Schulle, *Das Reichssippenamt. Eine Institution nationalsozialistischer Rassenpolitik*. Dissertation, Universität Greifswald (Berlin: Logos, 2001), p. 383.

<sup>267</sup> A Nazi since 1929 and SS-Sturmbannführer, v. Leers was a leading antisemitic theorist in his position as law Professor at the University of Jena. In 1942, he published *Die Judenfrage*, which complimented Islam's persecution of Jews, who he viewed as an existential threat. He fled Germany after the war, first to Italy, then to South America, and finally finding a home in Egypt as an antisemitic governmental advisor to Gamel Abdel Nasser. He

Reichsleiter (Kanzlei des Führers) Herbert Backe, “wants to ensure the last cut of the slaughter scene remains the one that shows the lethally wounded animal without any sedation. He also mentions if the choir song in the magnificent synagogue scene should be dubbed by something because in the Catholic areas there the similar sounds to worship music, the Volksgenossen could come to a wrong impression.” By this he evidently means that the score should sound foreign, not to induce sympathy.<sup>268</sup>

Friedrich Bethge: “Some transitions might be a little harsh. With the Jewish and Catholic music there is little difference – should use the Kol Nidre-Gebet (Aramaic prelude to Yom Kippur).”<sup>269</sup>

Prof. Dr. Adolf Ludin: “Agrees with film completely, but missing (as we know) numbers of Jewish doctors and so-called judges, and the Jewish exploitation of Aryan ingenuity. He wishes at the

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converted to Islam changed his name to Omar Amin, dying in 1965 in Egypt. Robert Solomon Wistrich, *Who's who in Nazi Germany*, (Hove, UK: Psychology Press, 2002) p. 152-153.

<sup>268</sup> Even by Nazi standards, Herbert Backe was a monster. In his work as State Secretary in the Reich Ministry for Food and Agriculture, he authored the “Hunger Plan” in 1941, which aimed at the deliberate deaths of millions in the occupied East – to the point of calculating a gradual reduction in necessary caloric intake – but also considering their value of useful forced labor prior to their extinction. See *The Trial of the Main War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945 to October 1, 1946*, Vol. 31, Nuremberg 1948, p. 84, Doc. 2718-PS, *Memo on the Result of the Meeting Today with the State Secretaries about Barbarossa, May 2, 1941*. Backe joined the SA in 1922 and became, in addition to his state job, the senior rank of SS-Obergruppenführer. Arrested in 1945, he was designated as a defendant in the Wilhelmstrasse Trial but committed suicide in his cell in April 1947. Gérard Gesine, “Food and Genocide. Nazi Agrarian Politics in the occupied territories of the Soviet Union,” *Contemporary European History*, Vol. 18, No. 1 (Feb., 2009), p. 64.

<sup>269</sup> Bethge was a noted playwright, dramatist, and poet whose work was infused with National Socialist ideology. His circle of admirers included Hitler and Goebbels. He was simultaneously an SS-Obersturmbannführer. In postwar denazification, he was classified as *Minderbelastet* and fined 200 Marks. He became a fixture with the Nazi-leaning *Deutsche Kulturwerk Europäischen Geistes* (DKEG). He died in 1963 in Bad Homburg. See Ines Bethge-Bonk: “Friedrich Bethge - the ‘species-appropriate’ playwright. In: Rolf Düsterberg (Ed.): *Poet for the "Third Reich"*. Volume 2. *Biographical studies on the relationship between literature and ideology* (Bielefeld: Aisthesis 2011), p. 74.

end fewer formations and more German-type people (soldiers, workers, farmers, Arbeitsdienst, etc.)”<sup>270</sup>

Prof. Otto v. Kursell (Staatkunsthochschule): “Completely content. The end can be more precise. Maybe with speech of the Führer. Also asks for fewer but more beautiful Nordic people.”<sup>271</sup>

Prof. Emil v. Reznicek: “In the narration, they talk about the German Volk; he thinks would be more appropriate to change to Aryan people, so would not exclude others. Also suggests that the end of the film could come back to the rat scene, for example with a map it could be shown that National Socialism liberated middle Europe from the rat plague.”

Prof. Kutschmann: Staatkunsthochschule: “As previously discussed with Hippler, he wishes few but clear pictures or sculpture of the Jewish degenerate art – the visual arts – Bauhaus is not even being mentioned.”<sup>272</sup>

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<sup>270</sup> Ludin was a noted hydraulic engineer and held a doctorate from the Technical University of Karlsruhe, and was a member of the Prussian Academy of Sciences. His modern biographies make no mention of his advisory work on behalf of *Der ewige Jude*. <https://stadtlexikon.karlsruhe.de/index.php/De:Lexikon:bio-0713> In 1961, he was awarded the Bundesverdienstkreuz.

<sup>271</sup> Kursell was an “Alte Kämpfer,” having joined the NSDAP in 1922 and participant in the 1923 Putsch. He rose through the ranks of the SA and the SS, achieving the rank of SS-Obersturmbannführer. A painter and graphic artist, he became a member of the Presidential Council of the Reichskunstammer and in 1934 was appointed department head in the Reich Ministry of Science, Education and National Education, as well as Professor at the Staatliche Hochschule für Bildende Künste in Berlin-Charlottenburg, where he was later also the director. Arrested by the Soviets, upon his return to the Federal Republic in 1950, he was exonerated by the Munich Appeals Chamber. He died in Munich in 1967. „Kursell, Otto von“ in Theodor Kellenter, *Die Gottbegnadeten: Hitlers Liste unersetzbarer Künstler* (Kiel: Arndt, 2020), p. 135.

<sup>272</sup> Max Kutschmann was director of the State Academy of Fine Arts in Berlin, director at the Reichskunstammer, the cultural expert at the SS Race and Settlement Main Office, and leader of the Kampfbund for German Culture. In 1941, he won the Goethe Medal for Art and Science. He died in 1943. “Kutschmann, Max” in Ernst Klee, *Das Kulturlexikon zum Dritten Reich. Wer war was vor und nach 1945* (Frankfurt am Main: S. Fischer, 2007), pp. 347.

Regierungsrat Waldemar Wünsche: “Agrees completely and want to change verbiage from barter to exchange. Other people also want to conclude with heads of soldiers, especially the Navy.”<sup>273</sup>

Parteigenosse Menz (Zeitgeschen Rundfunk) – current affairs: “The text ahead of the slaughter scene needs to be clearer, indicating the cult-like ritual methods of the slaughter. Bethge and Brack, et al agree. Furthermore the NSDAP has clarified the Judenfrage. The heads of political warriors instead of soldiers should be shown.”<sup>274</sup>

Oberspielleiter Bernhard Herrmann (Fachschaft Bühne): Agrees completely but would like to see even more petulant Jewish theater stars, for example Siegfried Arno, Robitschek, and singer Fritz Schulz (as the handsome Jew). The end should be shorter.”

Prof. Dr. Havemann: “The scene from the Jewish festivities is not too long however, certain transitions from one scene to the next would give to the unknowledgeable broad audience not enough time to think. Too often, one gets surprised by new perspectives/settings about certain questions.”<sup>275</sup>

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<sup>273</sup> Wünsche later went on to be the German propaganda advisor to Finland. He had a soft landing after WWII. As of 1957, he held a position with the Bundespresseamt. Grossman, Johannes, “Vom ‘christlichen Kominform« zur »geistigen Nato,‘ Das Internationale Comité zur Verteidigung der Christlichen Kultur als transnationale antikommunistische Propagandaagentur“ in *Jahrbuch für Historische Kommunismusforschung*, JHK 2011 (Berlin: Aufbau Verlag, 2011), p. 9 and [http://www.elisanet.fi/fmp/fmp\\_tk39\\_44.html](http://www.elisanet.fi/fmp/fmp_tk39_44.html)

<sup>274</sup> Hans Fritzsche thought well of Menz, one of his senior broadcasters: “Menz ist nach Urteil aller Sachverständigen einer der tüchtigsten Funkfächleute überhaupt. Ein Verzicht auf seine Fähigkeiten würde wirklich einen Verlust für den Rundfunk bedeuten. Menz hat sich in den vergangenen zehn Jahren seiner Zugehörigkeit zum Zeitfunk nur auf diesem Gebiet übermäßig verausgabt. Ein Wechsel in seinem Wirkungskreis würde ihm erneut Auftrieb geben und dem Rundfunk sehr nützen.” Fritzsche to StS Naumann, 27.1.1944, BA R 55/20011, B1.274

<sup>275</sup> Probably Gustav Havemann, noted violinist and head of the Reichsmusikkammer from 1933-35. He had a falling out with Goebbels in 1935 but never fully left the Nazi orbit. He was a judge for music competitions at the 1936 Berlin Olympics; Werner Egk, Paul Höffer (Germany), and Gabrielle Bianchi (Italy) won their respective categories, to no one’s surprise. Ernst Klee, *Das Kulturlexikon zum Dritten Reich. Wer war was vor und nach 1945* (Frankfurt am Main: S. Fischer, 2007), pp. 224–225 and <https://www.olympedia.org/athletes/5005163>

Dr. Rudolf Bode (Staff of the Reichsbauernführers): "The wiggling of the Jews during the ritual prayers cannot be understood by the lay person. The narration should provide a short explanation of this foreign mannerism. Otherwise, I absolutely agree."<sup>276</sup>

Generalarbeitsführer Hermann Kretschmann – Reichsarbeitsdienstführerschule: "Agrees in all aspects but after so much Jewish stuff rather than see labor service he would like to see only good workmen's heads at the end (a lot of people in agreement with him)."<sup>277</sup>

Hinckel summarized the findings:

"In conclusion, all present regardless of university professor or artist, man, woman, directors of government offices, formation leaders, were all in all enthusiastic, and confirmed that this was a successful piece of work. Spontaneous applause erupted after the words of the Fuhrer, against international Judaism, in case of an impending new world war. All other mentions from individuals were partially agreed upon and partially dismissed. All in all, the film was deemed as excellent for public presentation. One expects this first-time film of this kind to have a positive effect in a political sense. Generally, there was the opinion that since this was an evening-filling film that some transitions were too abrupt and could be extended more to give the broad masses a breather. The film needs to address the Aryan people. Dr. Hippler took note of the above critique. Much of it is already known. A few things still need to be improved."<sup>278</sup>

As is clear from the released version of *Der ewige Jude*, Hippler took careful notice of the critique and included most of the focus group's suggestions. It also effectively undermines his repeated

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<sup>276</sup> Bode founded the "Bodebund für Körpererziehung" in 1922 and prospered in the Third Reich and became the technical director of the Reichsschule des Reichsnährstand in Burg Neuhaus near Braunschweig. He also developed a peculiar form of the Neuhaus gymnastics, as compensatory athletic activity for farmers; it was apparently not well-received. Recovering quickly after the war, he reopened his "Bodebund für Rhythmische Gymnastik" in 1948. Versions of his rhythmic gymnastic movements are still taught in German secondary schools. "Bode, Rudolf" in Ernst Klee, *Das Kulturlexikon zum Dritten Reich. Wer war was vor und nach 1945* (Frankfurt am Main : S. Fischer, 2007), p. 61f.

<sup>277</sup> Kretschmann was one of the "Old Fighters," having joined the NSDAP in 1922. He authored *Bausteine zum Dritten Reich, Lehr und Lesebuch des Reichsarbeitsdienstes* in 1937. During WWII, he held the position of Arbeitsgauführer in Thüringen under slave labor chief, Fritz Sauckel. "Kretschmann, Hermann" in Ernst Klee, *Das Kulturlexikon zum Dritten Reich. Wer war was vor und nach 1945* (Frankfurt am Main: S. Fischer, 2007), p. 338.

<sup>278</sup> BA, Hippler, File document pages 99-104.

postwar claim that he knew nothing about the film's creation, that he was only responsible for shooting documentary footage in Poland, that his name was solely added to the credits so he could get paid, and he only did what Goebbels ordered and no more. He was, in fact, creator from start to finish.

### **6.10 Spruchkammer in the British Zone**

The British occupation authorities set up six tribunals (Neuengamme, Eselsheide, Staumühle, Fallingbostel, Recklinghausen and Sandbostel) and 82 Spruchkammer in their zone, each headed by a professional judge. For denazification processes in Westphalia – where Hippler found himself interned – the majority of former party officials were tried at Hiddesen, Bielefeld, and Recklinghausen. Most of the procedures took place between 1947 and 1948, and prosecutors had the benefit of documents and evidence adduced at the IMT.<sup>279</sup> In practice, the defendants before the Spruchkammer persisted in blanket denial when it came to their involvement in and knowledge of most of what happened in the Third Reich. As one study put it,

“Übereinstimmend beharrten alle Angeklagten darauf, daß sie von der Vernichtung der Juden keine Kenntnis gehabt hätten” (All accused agreed that they had no knowledge of the extermination of the Jews)<sup>280</sup> – this despite overwhelming evidence in many cases to the contrary.

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<sup>279</sup> Military Government, Germany, British Zone of Control, Ordinance No. 69 (trial of members of criminal organizations) 31 December 1946, pp. 138-141.

<sup>280</sup> Wolfgang Stelbrink, *Die Kreisleiter NSDAP in Westfalen und Lippe*, Band 48 (Münster: Nordrhein-Westfälischen Staatsarchiv, 2003), p. 88.

Further, in the negotiations themselves, the defendants often appeared more adamant than in the first interrogations. Nevertheless, the discrepancy between the indictments and the admitted knowledge often remained considerable and could not usually be closed even through testimony and written evidence. The principle of “in dubio pro reo” applied in the conviction. The alleged complete or partial ignorance of the accused regarding the facts or the involvement of the [defendants] on some or all of the offenses could therefore vary often in the reasons for the verdicts with succinct statements such as “the opposite could not be proven” or “according to his undisputed information.”<sup>281</sup>

The British’s early move toward reconciliation had other beneficial effects. As of April 1948, returning internees, like Hippler, could only be classified in Categories III to V, so regardless of the accused’s guilt, their punishment would be correspondingly small.<sup>282</sup> Even ACC No. 24 left room for otherwise guilty people to have their culpability downgraded: “When there is positive evidence [i.e. affidavits], supported by investigation, that individual is not more than a nominal Nazi and is not hostile to the Allied cause, he be retained in office in spite of the mandatory clauses contained in this directive.”<sup>283</sup> Prior internment, in addition to general fatigue with the unpopular denazification process, typically had an effect on the Spruchkammern that was positive for the accused, effectively offering constructive credit toward even meager attempts to hold defendants accountable by the imposition of a custodial sentence.<sup>284</sup>

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<sup>281</sup> Ibid. p. 90.

<sup>282</sup> Military Government, Germany, British Zone of Control, Ordinance No. 110 (Transfer to the Land Governments of Responsibility for Denazification), 1 October 1947, pp. 152.

<sup>283</sup> See § 5 of the directive of January 12, 1946, in: Official Journal of the Control Council in Germany, p. 20. [https://www.loc.gov/rr/frd/Military\\_Law/Enactments/Volume-II.pdf](https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-II.pdf)

<sup>284</sup> Stelbrink, p. 107.



Hippler, unaware of what the prosecutor had learned, was then being held at the British Internment Camp No. 5 at Staumühle in Nordrhein-Westfalen, writing supporting statements for Veit Harlan's upcoming criminal trial.<sup>285</sup> Aubert wrote many letters to British and American authorities, trying to get a copy of *Der ewige Jude*, but met with no success. Writing to the British section in Hamburg, he says quite clearly, "Without the performance of these films it would be rather impossible to convict the late superintendent of film for the Reich...in consequence, these films serve as the most important evidence."<sup>286</sup>

This was followed by a denazification process on 28 and 29 September at the Spruchgericht Hiddesen (near Detmold, in Ostwestfalen-Lippe), which was paired to the Staumühle camp.<sup>287</sup> For reasons not revealed in the existing record, the prosecution dropped the separate criminal case and decided to fold the offense of Hippler's membership in the SS into his denazification/Spruchkammer process. Dr. Aubert managed to get copies of *Der Feldzug in Polen*, *Der ewige Jude*, and *Jud Süß*, which he planned to show to the court at the Detmolder Lichtspiele theater. The Chief Prosecutor, Kleffel would lead the team, with Aubert as second.<sup>288</sup> Hippler planned to call Gustav Fröhlich, Henny Porten, and actor/comedian Werner Fink, although Porten begged off, with a doctor's note that she had bronchitis, needed rest, and thereafter had a professional engagement.<sup>289</sup> Hippler was represented by attorney Karl Kühne from Bielefeld.

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<sup>285</sup> SM, SpKK 715, Hippler, Hippler affidavit in Harlan Trial in Hamburg, 5 February 1948.

<sup>286</sup> BA, Hippler, File page 115, Aubert to Film Section, Hamburg, 19 April 1948.

<sup>287</sup> Ibid., File no. 5/3Sp Js644/47. Trial on 28/29 Sept. 1948, verdict under file no. 5SpLs233/48 (6-62/48), p. 6-7. Prosecution filed for revision of the verdict (1st Spruchsenat des Oberstenspruchgerichtshof Hamm), denied. Concerning Staumühle and the Hiddesen court, see Heiner Wember, p. 70.

<sup>288</sup> BA, Hippler, File document 235, Kleffel to MOJ Legal Branch, 10 September 1948. Kleffel later became the public prosecutor in Hildesheim. <https://www.spiegel.de/politik/rueckhaltlos-im-einsatz-a-1b9cd198-0002-0001-0000-000042625996-amp>

<sup>289</sup> Ibid., File document 221, Vorsitsender statement, 31 August 1948.

## 6.11 The decision

Something happened in the Spruchkammer deliberations. Instead of basing its conclusion on the overwhelming evidence of Hippler's direct role in *Der ewige Jude*, the judgment didn't mention the film at all by name. It spoke instead of the work that Hippler was compelled to do by Goebbels, his being a champion of the racially, politically persecuted, one who had a moral reckoning through attending the Protestant church, and apparently well-respected by his colleagues. It accepted entirely his uncorroborated statements that he was led astray by the Nazis and did very little, and even that only at Goebbels' behest. The court found that, "Weiter machte der Angeklagte vor Gericht einen günstigen Eindruck. Der Gericht war daher der Überzeugung, dass der Angeklagte nicht bewußt mit der Wahrheit zurückhielt (Further, the accused made a good impression before the court. The court is satisfied that the defendant did not knowingly hold back the truth)." While the Spruchkammer found that he had been a member of a criminal organization in violation of CC Law No. 10, and knew of its policy of persecuting Jews, the court decided that "He did not seek out the SS. It sought him," thereby lessening his responsibility on even the one allegation they took seriously. The accused knew about the concentration camps but had no idea what went on there, only that political opponents of the regime were detained. Hippler could hardly have hoped for a better outcome.

The Spruchkammer categorized him as a Mitläufer for being a member of a criminal organization, assessed a fine of DM 5000, then simultaneously rescinded the fine, and released him.<sup>290</sup> There

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<sup>290</sup> The court reasoned that he had been interned from 1945 until 1948, and that therefore he had already paid in time served, the equivalent of more than DM25 per day. BA, Hippler, Urteil, pp. 62-70, 15 Oct 1948. The Vorsitzender was a judge, Schroeder (no first name given), with two Beisitzer, Fritz Burgdorf and Wilhelm Marrè.

were no other employment or civil restrictions, and no monetary forfeiture, other than that Hippler had to pay the cost of the hearing. The Staatsanwaltschaft appealed the determination, and that motion was forwarded to the reviewing regional court in Hamm. The appeal was denied. British intelligence (MI6) took note when Hippler appeared in person as a witness for the defense at Harlan's trial. In March 1949, they took the extraordinary step of writing to the US Military Government for Bavaria, setting out Hippler's past, reminding the Americans that the production of *Der ewige Jude* was certainly a crime against humanity, and recommended Hippler's indictment in a US military court.<sup>291</sup>

Whether in connection with the British recommendation is unclear but in April, Landesrabbi Bayerns Aron Orenstein wrote to the US Military Government for Bavaria in reference to an evaluation he was asked to give on *Der ewige Jude*. His observations are entirely accurate: that the supposed quotes from the Talmud are lies, and that in his view, the aim of the film was to portray Judaism falsely and justify crimes already committed. He writes that he hopes the Americans will bring Hippler to justice, where he belongs. If this should happen, Rabbi Orenstein strongly suggested that Jewish experts be called as witnesses who can explain the lies and atrocities depicted in the movie. In a poignant closing, he referred to the scene in *Der ewige Jude* where the cow is butchered. Compare this, he says, "to the hundreds of thousands of Jewish victims who had to dig their own graves. Compare them side-by-side and let the objective viewer judge which was more humane."<sup>292</sup>

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<sup>291</sup> SM, Hippler, Letter of 12 March 1949, Lizenz Berater, Zonen-Amt des Nachrichtendienstes, Hamburg-Mohlenhof to Amt der Militärregierung Bayern, Rechtsabteilung, München.

<sup>292</sup> Ibid., Letter of 11 April 1949, Orenstein to US Military Government of Bavaria. This letter appears only in Hippler's German file, not in the minimalist American records.

Unknown to Rabbi Orenstein, Hippler did feature in American denazification discussions although not in a way that was helpful to having him answer for any crimes.<sup>293</sup>

### **6.12 American/Bavarian denazification policy**

Hippler benefited from the evolving nature of denazification policy. Bavarian denazification began on 15 May 1945 when the Americans created a “Special Branch” as part of the Safety Office of the Regional Military Government. Its job was to evaluate complicity on the basis of the Fragebogen and then implement the policy of removing Nazis from office or positions of authority (in the case of private companies).<sup>294</sup> To facilitate this, the US pressured Minister President Fritz Schäffer to resign – although the Americans had installed him only shortly before – and replaced him with Wilhelm Hoegner, insisting at the same time that more Communists should be represented in the cabinet.<sup>295</sup> This honor went to Heinrich Schmitt (KPD), who became Minister of State for Special Tasks. Schmitt became responsible for implementing Hoegner’s order of 24 October for “cleansing Bavaria from National Socialism and militarism.”<sup>296</sup> By November, Schmitt submitted the “Guidelines for the cleansing of the Bavarian state from National Socialist influences and elements,” to include a classification system and the early conception of what became the Spruchkammern.<sup>297</sup>

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<sup>293</sup> USNA, 4.13 Miscellaneous (Political) (Incitation to Class Struggle) 15.738 Dr. Hippler in Box 23 of the series: Reports, 1949-1951; Entry A1 189; Records of the US High Commissioner, Record Group 466 at Stack 250/72/10/05. This 70-page collection constitutes the entirety of Hippler’s case in US records.

<sup>294</sup> Paul Hoser, “Denazification,” in Historisches Lexikon Bayerns, [https://www.historisches-lexikon-bayerns.de/Lexikon/Entnazifizierung#Das\\_Ende\\_der\\_Entnazifizierung\\_in\\_Bayern](https://www.historisches-lexikon-bayerns.de/Lexikon/Entnazifizierung#Das_Ende_der_Entnazifizierung_in_Bayern)

<sup>295</sup> General George Patton was removed as Military Governor at the same time. He was correctly assessed by Eisenhower as having little interest in denazification. Schaffer later became Minister of Finance in the Adenauer government and in the 1950s, Minister for Justice. At Bayerische Staatsregierung, <https://web.archive.org/web/20080507181347/http://www.bayern.de/Fritz-Schaeffer-.263/index.htm>

<sup>296</sup> “Schmitt, Heinrich” at Bundesstiftung Aufarbeitung.

<sup>297</sup> Hoser, *Ibid.*

The CDU-dominated cabinet reacted badly to the proposal, arguing it only reinforced the idea of collective guilt for National Socialist offenses. This effectively ended the Bavarian government's full cooperation with the American objectives of a clean sweep of Nazism. Head of the Office of Military Government, General Lucius Clay, insisted that Allied Control Council Directive No. 24 (published in January 1946), which specified the removal of those <sup>298</sup> "who have been more than nominal participants in its (Nazi Party) activities," be administered in full but realized this was unlikely. Law No. 104, Liberation from National Socialism and Militarism, became German domestic law on 26 March 1946 when adopted by the *Länderrat des amerikanischen Besatzungsgebietes* (State Councils of the American Zone of Occupation) and endorsed by the Minister Presidents of Bayern, Groß-Hesse, and Württemberg-Baden, accepting a commitment to denazification and the five categories of offenders.

Anyone classified as a particularly active National Socialist in group 1 or 2 could, after hearing the witnesses of accusation and exoneration, and after taking evidence, be sent to a labor camp for reparation and reconstruction work; the main culprits for a period between two and ten years, the incriminated up to five years. Labor camps were to be set up by the German authorities, which finally occurred in February 1947. Property confiscation was considered a contribution to reparation. In May 1946, the State Office for Asset Management and Reparation (BLVW) was founded in Bavaria for this purpose.<sup>299</sup>

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<sup>298</sup> Enactment and Approved Papers of the Control Council and Coordinating Committee," Allied Control Authority Germany, 1945, Vol. II, pp. 16-24.

<sup>299</sup> Bavarian Ministry of State for Education and Culture, Science and Art, 12. Okt 2016, p. 3 at [https://www.lootedart.com/web\\_images/pdf2016/Translation%20of%20Culture%20Minister%20Spaenle.pdf](https://www.lootedart.com/web_images/pdf2016/Translation%20of%20Culture%20Minister%20Spaenle.pdf)

In the three western occupation zones, only 0.7 percent of those affected were grouped into the first two categories. More than half of the Spruchkammer proceedings ended with a classification as follower or exonerated. About a third of the proceedings were discontinued.<sup>300</sup> Further, a Court of Cassation (Kassationshof) was established to oversee the appeal process from the Spruchkammern; it had the power to repeal or modify and Spruchkammer decision by a *Kassatorische Entscheidung* (Cassatorial decision) without referring the case back to the lower court.<sup>301</sup>

Compared to criminal proceedings, the burden of proof was reversed at the Spruchkammer: the person concerned had to rebut the presumption of guilt; it was not the ruling chamber's task to prove it. As a result, the majority of the accused tried to justify their actions so that a "clean man" image emerged. This came in the form of the so-called "Persilschein" – exonerating statements considered by the Spruchkammer that allowed a former Nazi to escape punishment for wartime activities.<sup>302</sup> The most valuable of these could come in the form of attesting letters from so-called "alibi Jews" whose very existence allowed defendants to rebut charges that they were in any way antisemitic.<sup>303</sup>

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<sup>300</sup> Aufgliederung der Entnazifizierungseinstufungen in den westlichen Besatzungszonen (1949-1950). [https://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=2304&language=german](https://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=2304&language=german)

<sup>301</sup> See § 354 StPO.

<sup>302</sup> Ernst Klee, *Persilscheine und falsche Pässe. Wie die Kirchen den Nazis halfen*, (Frankfurt am Main, Fischer-Taschenbuch-Verlag, 1992).

<sup>303</sup> David De Jong, *Nazi Billionaires: The Dark History of Germany's Wealthiest Dynasties* (New York: Mariner Books, 2022), p. 204. And <https://m.ipost.com/diaspora/antisemitism/article-702222/amp>. These became useful in the denazification cases of Günther Quandt and August von Fink, who both were deeply involved in the use of slave labor and expropriation of Jewish businesses. Both were declared as mere Mitläufer, suffered no significant disability under either US, British, or postwar German governments and soon resumed their places as multi-millionaire industrialists.

### 6.13 Shifting Bavarian policy

The system went awry when Anton Pfeiffer was appointed as the new Staatsministerium für Sonderaufgaben in July 1946 and effectively ran both the Spruchkammern apparatus as well as the labor camps set up under Law No. 104. He ordered a review of the dismissals already conducted, resulting in some 10,000 adverse determinations being overturned. He also dismissed almost 900 of the 1200 Spruchkammer representatives who were members of the KPD. In September 1946, he overhauled the system set up by Schmitt; seven chambers of appeal were created according to the respective administrative districts, which exercised supervisory authority over the Spruchkammern, rendering them open to political and popular resentment over denazification in general.<sup>304</sup>

As of November 1946 there were 201 Spruchkammern in Bavaria with 357 chairmen, 358 prosecutors, and 3,307 assessors. In addition, the prosecutors employed 2,407 people, and the chairmen a further 1,362. The internment and labor camps had their own ruling chambers. Pfeiffer was forced out that month, when General Clay (again) expressed publicly his dissatisfaction with the pace of Bavarian denazification. This occurred with the simultaneous inclusion of the WAV (*Wirtschaftliche Aufbau-Vereinigung* – Economic Reconstruction Union) party into the governing coalition. Its leader, right-leaning populist Alfred Loritz, was ironically a proponent of denazification and Minister-President Hans Ehard rewarded him with the Ministry for Special Tasks.<sup>305</sup> This proved to be a poor choice, for reasons to include Loritz's lack of

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<sup>304</sup> Hoser, *Ibid.*

<sup>305</sup> Ehard was a remarkable, long-serving politician in Bavaria, serving from 1946 until 1954 and then again from 1960 to 1962 as Minister-President of Bavaria. In 1924, he was the chief prosecutor at the Hitler/Luddendorf trial following the 1923 putsch. The prosecution and judgment were exceptional for their profound incompetence,

qualifications and heavy-handed managerial style. While he did indeed advocate for firm denazification policy against major offenders, he simultaneously shredded the system, arguing that most people were Nazi party activists for economic reasons or coercion and should bear no guilt.<sup>306</sup> His brief time in office was a golden age for rampant corruption by the WAV members, to include his close ally Julius Höllerer, who was given a special department that assisted WAV members in navigating around the denazification tribunals and laws. He likewise assumed control of labor camp security by forming an essentially private force, largely consisting of WAV and allies. By March 1947, he presented Ehard with a report detailing over six million personnel processed, with plans for a youth and Christmas amnesty completed. The number of Spruch and Berufungskammern were increasing. The honeymoon, though, was over. Loritz was at odds with the Office of Military Government. Not willing to risk American encroachment into newly reestablished Bavarian sovereignty, Ehard fired Loritz in June.<sup>307</sup>

#### **6.14 American policy re-evaluated and the end of denazification**

The change of office at the ministry coincided with a shift in American attitudes towards purge policy. With the advent of the Cold War, the Liberation Act and denazification apparatus now

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largely due to political factors. Ehard also had a problematic Nazi past. He resigned from the Bavarian Ministry of Justice when Hitler acolyte Hans Frank became Minister. On September 1, 1933 he became President of the Senate at the München Higher Regional Court (civil senate), in 1937 also Chairman of the München Hereditary Court and in 1941 became Chairman of the German Medical Court in München which monitored the fidelity of medical professionals to NSDAP political and racial ideology. Martin Rüter, "Mit windigen Paragraphen wider die ärztliche Ethik," *Deutsches Ärzteblatt* 94, Heft 9, 28. Februar 1997, pp. 511-515.

<https://www.aerzteblatt.de/pdf.asp?id=5300>. Also, [http://knerger.de/html/ehardhanpolitiker\\_22.html](http://knerger.de/html/ehardhanpolitiker_22.html)  
He could easily have found himself as a defendant in the Judges' Trial at the NMT; instead, he became the *Ministerpräsident des Freistaates Bayern*.

<sup>306</sup> Loritz intervened in the Philipp Rupprecht case, as will be seen in that chapter.

<sup>307</sup> Loritz's future career did not end well. He was later arrested and charged with inducing perjury and fled to Austria, where he received political asylum. He died in 1975. <https://www.spiegel.de/politik/alfred-loritz-a-34074c19-0002-0001-0000-000039686074?context=issue>



appeared as obstacles on the way to economic recovery and as disruptive factors for Germany's integration into the Western alliance. The new American policy radically shifted direction; judicial action should now only be taken against the most guilty and the remaining nine-tenths should immediately be declared Mitlaufer and summarily exonerated.

The new special minister moved immediately and ordered most of the internees to be released. With the exception of Nürnberg-Langwasser, the labor camps were closed on October 1, 1948. As of April 1952, four people remained interned under conditions that in no way involved hard labor. They eventually were sent on leave from which they never had to return. The "Landshut Labor Camp" department was formally dissolved that year.

The last Minister for Special Tasks, Ludwig Hagenauer, died on July 20, 1949. Ehard unofficially took over the ministry himself rather than appoint a successor. His former state secretary, Camille Sachs, managed the operations.

On 15 November 1949, the Council of Ministers ordered the dissolution of the State Ministry for Special Tasks, but this was not accomplished until 8 March 1950, when the state parliament finally resolved unanimously to dissolve the ministry. Further processing was carried out by the Ministry of Finance under the office of "Minister for Political Liberation."<sup>308</sup>

The law on the conclusion of political liberation in Bavaria of 27 July 1950 severely limited the number of those affected. The management tasks were transferred to the Ministry of Justice in

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<sup>308</sup> Hoser, *Ibid.*

November 1951. Justice Minister Joseph "Ochsensepp" Müller assumed the functions when Sachs retired on December 31, 1951.

Müller submitted a far-reaching bill that was supposed to finally complete denazification, but it failed to pass. After that he wanted at least to dissolve the office. He applied to the Ministry of Finance, the Ministry of the Interior, the State Office for the Protection of the Constitution and the President of the Administrative Court, but no one suitable was willing to take over the functions and its anemic role in what was left of the unpopular denazification process. The liquidation staff under the district court president Johann Knör, the last head of the Court of Cassation, consisted of only five officials in 1951; In 1953 the entire rest of the apparatus, including the Putzfrauen, comprised a mere 40 people. Formally, the office was only abolished by a law concluding the political liberation of December 17, 1959 but the Court of Cassation ceased to exist as a functioning unit in 1951.

In the period to December 1949, the state of Bavaria processed 6.7 million Fragebogen. On the basis of these, 72.5% were immediately determined as uninvolved. A further 23.25% were amnestied or proceedings were suspended. 4% were assigned in any of the five categories of offenders.<sup>309</sup> Hence the reason author Lutz Niethammer referred to this process as a "Balance sheet of failure."<sup>310</sup>

After September 1, 1949, only the chambers of appeal existed in München and Nürnberg, and following 1954, only those in München. That office, which existed only on paper and in the ever-

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<sup>309</sup> Ulrich Schuh, *Entnazifizierung in Nürnberg – Die Durchführung des Spruchkammerverfahrens in der ehemaligen "Stadt der Reichsparteitage," Jahrbuch für fränkische Landesforschung*, Bd.: 67.(Erlangen: 2007), p. 297.

<sup>310</sup> Lutz Niethammer, *Die Mitläuferfabrik, Die Entnazifizierung am Beispiel Bayerns* (Berlin: Dietz, 1982), p. 540.

continuing state bureaucracy, formally ceased operations on 1 January 1960. Denazification died a slow, bureaucratic death in Bavaria.

In the meantime, Hippler's situation became known to the Berchtesgaden public through a newspaper article in the *Süddeutsche Zeitung*. The reporter was puzzled that a former Nazi party member and *Mitlaufer* incitement propaganda director was working as a civil servant (*Beamter*) for the Bavarian state travel bureau in Berchtesgaden.<sup>311</sup> But he was. Hippler sold train and bus tickets and handed out travel newsletters. Amazingly, Hippler agreed to speak about the war but said nothing surprising; Goebbels could be charming to foreigners but terrifying to people who worked for him. As for *Der ewige Jude*, the propaganda minister had a private viewing of Hippler's Litzmannstadt footage at his home and decided to make a film of it – nothing to do with Hippler at all. When the article was published, Hippler responded in a letter to the editor. He was upset; it had been a conversation not an interview for publication, and the reporter depicted him falsely. He was not – as the article implied – Goebbels' efficient servant but was instead punished by being sent to military service with the Army in 1943. This was not the end of the matter. *Der Neue Film* newspaper in May 1949 featured a cartoon of Hippler selling tickets, along with yet another short article with an interview. Hippler did not mind; he said that he would have a better job by that time the following year. There is no evidence that the state of Bavaria took any action or explained how someone with Hippler's past could secure a state position.<sup>312</sup>

### 6.15 Renewed attention

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<sup>311</sup> Hippler's wife ran the travel office. BA, Z42V-2815a, Hippler, File page 126.

<sup>312</sup> SM, STAANW 6604\_0031, *Süddeutsche Zeitung*, 28 April 1949, "Der Reichsfilmintendant verkauft Fahrkarte."

Hippler's legal troubles were not yet over; the München criminal authorities were taking an interest in him. Apparently in response to an official inquiry, Harlan's prosecutor, Oberstaatsanwalt Dr. Gerhard Kramer, wrote to the Staatsanwaltschaft München that the judge's written opinion from the Harlan case was not yet available but he would send it when it was. He noted that there was no verbatim record of witness testimony (presumably Hippler's), just a summary. Kramer offered the opinion that it would be difficult for a German court to prosecute under ACC 10, which was an incorrect reading of the law.

Indeed, the Soviet Zone took the freedom granted by ACC 10 to bring criminal proceedings against psychiatrist Paul Nitsche, an enthusiastic supporter of eugenics and euthanasia and former director of the Heilanstalt Sonnenschein in Pirna (from 1928-39), where 15,000 people were murdered under the T4 euthanasia program.<sup>313</sup> Nitsche went on to become deputy director of the T4 medical office. Arrested in 1945, he faced a three-week trial at Dresden in 1947, charged by Soviet prosecutors with crimes against humanity under ACC 10.<sup>314</sup> He was convicted in July 1947 and executed by guillotine on 25 March 1948. The key part is that the Dresden proceedings against the fifteen defendants were before a German civilian court, not the Soviet occupation legal system.<sup>315</sup>

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<sup>313</sup> Böhm, B. (2012). "Paul Nitsche – Reformpsychiater und Hauptakteur der NS-"Euthanasie," *Der Nervenarzt*, Berlin: Springer-Verlag, 83 (3), p. 293–302.

<sup>314</sup> Die Stiftung Sächsische Gedenkstätten, NS-Euthanasie vor Gericht - Chronologie des Prozesses vom 16. Juni bis 7. Juli 1947 at <https://www.stsg.de/cms/sites/default/files/u5/Tafel%2005.pdf>

<sup>315</sup> Hohmann, Joachim (1995) "Die nationalsozialistische 'Euthanasie' in sächsischen Anstalten und ihre strafrechtliche Ahndung in der SBZ" (Historical Social Research. Leibniz-Institute for the Social Sciences. 20 (4)), p. 31–60. At [https://www.ssoar.info/ssoar/bitstream/handle/document/3239/ssoar-hsr-1995-no\\_4\\_no\\_76-hohmann-die\\_nationalsozialistische\\_euthanasie\\_in\\_sachsischen.pdf?sequence=1&isAllowed=y&lnkname=ssoar-hsr-1995-no\\_4\\_no\\_76-hohmann-die\\_nationalsozialistische\\_euthanasie\\_in\\_sachsischen.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/3239/ssoar-hsr-1995-no_4_no_76-hohmann-die_nationalsozialistische_euthanasie_in_sachsischen.pdf?sequence=1&isAllowed=y&lnkname=ssoar-hsr-1995-no_4_no_76-hohmann-die_nationalsozialistische_euthanasie_in_sachsischen.pdf)

Likewise, the Landgericht in Frankfurt tried four members of the T4 program in 1946 in what was termed the Eichberg Prozess. The lead defendant was SS-Hauptsturmführer Dr. Friedrich Mennecke, who had been employed by the *Rassenpolitischesamt der NSDAP* before graduating to T4 in 1940, where he oversaw selection of persons to be killed at Hadamar and Hartheim facilities. In parallel to this, Mennecke directed the murder of children at his home institute at Eichberg. In December 1946 he was sentenced to death for “murder in an unspecified number of cases” and for his role as an accomplice in the euthanasia program overall.<sup>316</sup> However, he died in February 1947 before his sentence could be carried out.<sup>317</sup>

One of the Eichberg co-defendants, Dr. Walther Eugen Schmidt, was initially sentenced to life imprisonment but after an appeal by the prosecutor, this was changed to death in 1947. Schmidt worked at both the Hadamar euthanasia center and Eichberg, where he murdered children and later served in the administration of T4. Schmidt never found the gallows; in 1949 his sentence was reduced by Hessian President Georg Zinn to ten years, but he was released in 1953 when the remainder of his sentence was suspended.<sup>318</sup>

As it relates to Hippler (as well as to Harlan and Rupprecht), the point is that German courts in the immediate postwar period could and did exercise jurisdiction for criminal acts under ACC 10

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<sup>316</sup> Urteil des Landgerichts Frankfurt am Main vom 21. Dezember 1946 (4 Kls 15/46), cited in: Adelheid L. Rüter-Ehlermann (Bearb.), *Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945-1966* (Amsterdam: University Press Amsterdam, 1968), p. 135.

<sup>317</sup> <https://www.t4-denkmal.de/eng/Friedrich-Mennecke>

<sup>318</sup> Landesarchiv Baden-Württemberg/Staatsarchiv Sigmaringen; Wü 29/3 T 1 Nr. 1759/03/01, Revisions-Urteil des Oberlandesgerichts Frankfurt gegen Dr. Walter Eugen Schmidt und Oberschwester Helene Schürg (Dezember 1946) – Bd. 72, Blatt 1-34. Dr. Camille Sachs, mentioned elsewhere in this dissertation, was the presiding judge. See USNA, Hippler file, Schmidt decision, file No. Ss 92/47. At [https://www2.landesarchiv-bw.de/ofs21/bild\\_zoom/zoom.php?bestand=657&id=3186709&gewaehlteSeite=06\\_0000904585\\_0001\\_6-904585-1.png&screenbreite=1536&screenhoehe=864](https://www2.landesarchiv-bw.de/ofs21/bild_zoom/zoom.php?bestand=657&id=3186709&gewaehlteSeite=06_0000904585_0001_6-904585-1.png&screenbreite=1536&screenhoehe=864)

as well as the penal code of 1871. That was the ideal situation the American authorities hoped for – that there would be a transition from the ACC to German criminal courts. The question was whether they wished to exercise that jurisdiction or not.

The most interesting section of the Kramer letter to Hippler's new would-be prosecutors, was where he drew attention to Hippler's 1942 book, *Betrachtungen zum Filmschaffen*. Hippler discussed "sweet endings" for maximum audience impact. It could be, he wrote, a kiss between the man and woman. But "also the hanging of Jud Süß."<sup>319</sup> The Staatsanwaltschaft wrote to the court in Hamm, asking them to send Hippler's file from the earlier, dismissed prosecution appeal to his denazification status.<sup>320</sup>

At this point, attempts to prosecute Hippler in the Land criminal court system or to re-evaluate his denazification status ran into the formidable obstacle of German bureaucracy. In October, the Bavarian State Minister for Special Tasks, wrote to the München prosecutors, asking for progress updates and – oddly – Hippler's address.

Immediately after, Hippler learned of the impending storm. In a letter to the Stadtrat Polizei Präsidium in München on 22 October, Hippler maintained he was not a propagandist, but an innocent victim of judicial persecution. He bemoaned that everyone brought up his denazification process from Hiddesen but he had been ordered by Dr. Goebbels to take images in Łódź (Litzmannstadt) only for archive purposes and was given a PK crew for this purpose alone. Hippler had nothing to do with the film and that the images in it were included without his

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<sup>319</sup> SM Hippler, Letter of 17 May 1949. Kramer referred to page 107 of Hippler's book.

<sup>320</sup> Ibid., Letter of 10 June 1949, Neudeck (Staatsanwaltschaft München I) to Obersten Spruchsenat Hamm/Westfalen.

knowledge or supervision. He explains that the reason his name appears is only so that he could justify his salary. He only did what Goebbels demanded. The Propaganda Minister wanted to see him in a supervisory position in the German film industry, but he refused because he preferred to remain as an independent filmmaker.<sup>321</sup>

Hippler stated that because of all the failed attempts to prosecute him, he was therefore not guilty of persecution of Jews and that any additional prosecution on those facts would violate the legal principle of double jeopardy. Indignant, and refusing to attend any further proceedings in München due to financial hardship. He finished his letter by observing “I allow myself the freedom to say that the American courts are not as orderly as the ones in the British sector.”<sup>322</sup>

Either through political interference, fatigue, or the simple evaluation of the case, the Oberstenstaatsanwalt in München issued its Verfügung (order) on 5 January 1950 decided in Hippler’s favor. There would be no new criminal proceeding. The decision cited the “orderly” sentence from 29 September 1948 that Hippler was only a Mitlaufer. In their view, Hippler was tasked by Goebbels only to take images in the eastern zone following the Polish campaign, that he went to Litzmannstadt prior to the ghetto being established, where he took images of “normal” life unobserved by the Jews there. His objectivity went so far that he arranged with Jewish cultural commune leaders to film a religious service. Goebbels, delighted by the film, ordered the DFG to make a documentary from it. Hippler was under the impression that he would be able to review the rough cut and suggest changes but Goebbels prevented this. It was not

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<sup>321</sup> Ibid., Letter of 22 October 1949, Hippler to Stadtrat München. He cites his denazification case, File No 5/3 SP Js 644/47 from trial on 28/29 September 1948; verdict File No. 5 SplS233/48 (6-62/48), p. 6-7. Prosecution filed for revision at the 1<sup>st</sup> Spruchsenat des Oberstenspruchgerichtshof Hamm; this was denied.

<sup>322</sup> Ibid.

possible for him to argue with the Propaganda Minister about how the Jews were depicted or voice his views, especially from an artistic point of view. Clearly, he was only fulfilling his orders and had no influence. The scene with the rats teeming around the grain was staged by the direct wishes of Goebbels. Opening credits were written by Goebbels himself, and Friedl wrote the music using Jewish liturgical templates but was directed to distort them in a grotesque way. Friedl was able to verify (the Verfügung did not specify how) all this. Hippler was in a similar situation with his documentary/propaganda film, *Feldzug in Polen* – his name was on it as director, but he had no responsibility for the final antisemitic product. In perfect alignment with Hippler's unsubstantiated defense, the Oberstenstaatsanwalt found that he tried to resign because the pay was better on the open market but Goebbels would not allow this.

Oberstenstaatsanwalt Neudeck concluded that since the appeal from Hippler's denazification was denied by the Spruchgerichtshof in Hamm on 27 May 1949, and since the same issue was here (instigation of class hatred under StGB §130 and religious insult (StGB §166), he was already found not guilty on the same facts. New investigations showed no new evidence, so there was no justification to proceed with the indictment.<sup>323</sup> Hippler was free again.

Nevertheless, other honest prosecutors still tried. On 25 July, the Oberstaatsanwalt in Traunstein requested the Hippler files.<sup>324</sup> This was followed by action. On 11 November, the Minister for Politische Befreiung Johann Knör, Amtsgerichtspräsident wrote to the Öffentlicher Kläger der

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<sup>323</sup> Ibid., Verfügung, München Oberstesstaatsanwalt, 5 January 1950.

<sup>324</sup> Ibid., Oberstaatsanwalt Traunstein to Staatsanwaltschaft München I, 25 July 1950.



Hauptkammer, responding to a request from the special envoy in Nordrhein-Westfalen, Knör directed that they begin preparing an indictment against Hippler.<sup>325</sup>

## 6.16 The American role

For precise reasons that are impossible to glean from the surviving documents, Nordrhein-Westfalen then approached the Americans on the understanding that the United States had a proprietary interest in Hippler, since Hippler currently fell within what had been the US zone of occupation. There followed an odd series of messages passed from München to the Americans, who then forwarded the information to the Spruchkammer prosecutors in Nordrhein-Westfalen. Beginning on 2 March 1950, the Sonderbeauftragte für die Entnazifizierung wrote to the Berlin Document Center, asking whether the “preliminary” proceedings against Hippler for Crimes Against Humanity were pending at the Legal Division in München or whether they had led to a prosecution. “The denazification procedure was suspended [in Nordrhein-Westfalen] because of preliminary proceedings and I intend, if possible, to instruct the denazification panel to carry through denazification now.”<sup>326</sup>

In May, the American Office of Military Government/Bavaria Legal Division wrote to Minister President, notifying him that Hippler was still wanted “for miscellaneous crimes” by the USWCC (United States War Crime Commission) and remained listed on the Central Registry of War Criminals and Security Suspects (CROWCASS), number 98293.<sup>327</sup> Further, the Minister President

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<sup>325</sup> Ibid., Knör to Hauptkammer/Offentlicher Kläger, 6 November 1950. The Spruchkammer became the Hauptkammer/Offentlicher Kläger the same month.

<sup>326</sup> USNA, 4.13 Miscellaneous (Political) (Incitation to Class Struggle) 15.738 Dr. Hippler in Box 23 of the series: Reports, 1949-1951; Entry A1 189; Records of the US High Commissioner, Record Group 466 at Stack 250/72/10/05. 2 March 1950 Saalwaechter to BDC.

<sup>327</sup> The last CROWCASS updated list was issued in June 1948. Ibid., Ormond to OMGUS/Bavaria, 18 May 1949.

was told that the Sonderbeauftragte for Nordrhein-Hessen had suspended the decision by the denazification panel in Paderborn to place Hippler as a Category-IV offender, and ordered a re-examination to commence once the inquiries “into crimes against humanity are completed by the American Authorities/Legal Division Munich.”<sup>328</sup> There is no evidence from the US file that the Americans undertook such an investigation.

Two full months earlier, on 12 January 1950, Albert Roll, writing for the Generalstaatsanwalt München, wrote to Paul Moeller, Chief of the German Justice and Legislation Branch, that the investigation into Hippler had been discontinued.<sup>329</sup> Moeller, in turn, on 20 January notified William Dubensky, Advisor for the Motion Pictures Branch with the State Department, enclosing the München decision.<sup>330</sup> This was then re-routed to the desk of Kurt Rosenow at the Berlin Document Center, who in turn passed the request to the Legal Affairs, Land Commissioner for Bavaria (Amt des Landkommissar für Bayern), asking them the status on behalf of the officials in Nordrhein-Westfalen.<sup>331</sup>

Why this almost comic series of messages taking circuitous and overlapping paths happened is not clear, only that the prosecutors in Nordrhein-Westfalen did not feel able to write directly to their counterparts in München and simply ask for the status in the Hippler case, or that if they did that the Bavarian Staatsanwaltschaft would tell them. It is also evident that the Americans,

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<sup>328</sup> Ibid., Leonard Ganse to Minister President, 27 May 1949.

<sup>329</sup> Ibid. Roll to Amt des Landkommissars für Bayern, 12 Jan 1950.

<sup>330</sup> Ibid., Moeller to Dubensky, 20 Jan 1950.

<sup>331</sup> Rosenow was a Berlin-born, Jewish attorney who had emigrated to the United States with his wife in 1940, and returned to Europe in 1943 as an intelligence specialist tasked with analyzing letters from prisoners of war. Posted to Berlin in August 1945, he was the first director and the driving force behind the Berlin Documents Center and responsible for finding, organizing, and translating practically all the documents used in the International Military Tribunal and hundreds of prosecutions since. See his obituary at <https://www.ikn.army.mil/apps/MIHOF/biographies/Rosenow,%20Kurt.pdf>

certainly by 1950, would never question or detain Fritz Hippler, let alone have a desire to prosecute him for incitement. After the birth of the Bundesrepublik, their jurisdiction to do so had evaporated and evidenced by American prosecutorial indifference prior to 1949 in Hippler's case, the United States was no longer an interested party.

### **6.17 Münchhausen vs. Hippler**

Yet, not all hope was lost. In October 1950, the special prosecutor of the denazification courts in Nordrhein-Westfalen, Dr. Ernst-Friedemann Frhr. v. Münchhausen, attempted to have Hippler answer in criminal court for crimes against humanity.<sup>332</sup> His jurisdiction rested on the initial Spruchkammer proceeding in Hiddesen (within his legal purview) but the defendant was then in the state of Bavaria, with no plans to return to Nordrhein-Westfalen. To achieve the goal of putting Hippler in prison, he would need help from the Bavarian legal machinery. In a letter to the Bavarian State Ministry for Special Missions, he challenged the decision by the Hamburg denazification court, which had declared Hippler as a Category-4 Mitläufer. He was frustrated by the decision of that court to refuse a re-hearing (they gave as their reason an ongoing München criminal probe into Hippler's conduct – a probe that had already dissolved without any findings), at which point the Hamburg court ended its process, also without making a determination.

Hippler had by that time moved from Nordrhein-Westfalen to Berchtesgaden (Bavarian jurisdiction) and Frhr. v. Münchhausen asked the Spruchkammer München to indict him and to

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<sup>332</sup> Although Frhr. v. Münchhausen repeatedly used the phrase "crimes against humanity," in connection with Hippler's crimes, none of his counterparts in the Bavarian prosecutorial or judicial system ever did, to judge from the available documents.

make an official request for the files, noting that this was “obviously a crime against humanity.”<sup>333</sup> He stressed that he regarded Hippler’s prosecution as “urgent.” Nothing seems to have happened in response; Hippler remained free, absolved of guilt, and beyond the reach of Frhr. v. Münchhausen. In one of the great ironies of history, Hippler had been fired from his job producing the 1943 Ufa film, *Münchhausen*, marking the demise of his relationship with Goebbels and the effective end of his film career. Of all the officials involved in the denazification and criminal investigations into the director of *Der ewige Jude*, Dr. Ernst-Friedemann Frhr. v. Münchhausen was one of the few who seemed motivated to have justice done. He should be recognized for that.<sup>334</sup>

München made a pro forma attempt. In a memo from November 1949, the Kriminaluntersuchungsabteilung reported that they tried to reach Hippler on 10 October through the Berchtesgaden Polizei but the police there reported – after telephoning Hippler, not going in person – that he was traveling and would not return until 17 October, and the police promised to update the München Staatsanwaltschaft at that time. They did not. Hippler himself wrote to

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<sup>333</sup> Ibid., letter of 19 October 1950. Frhr. v. Münchhausen noted that the district where Hippler had received his initial denazification classification had been dissolved.

<sup>334</sup> Frhr. v. Münchhausen had a number of high-profile cases to include the Third Reich finance minister, Lutz Graf Schwerin v. Krosigk, whose chief concern about his denazification classification was the degree to which “Entlastet” would improve his state pension – despite the fact that he had been sentenced to 10 years imprisonment at the Ministries Trial. John McCloy granted him amnesty in 1951, at which point Krosigk had served slightly more than a year of his sentence. In another case, the widow of Generalfeldmarschall Walter Model petitioned (unsuccessfully) for a posthumous denazification. Model committed suicide in March 1945 and was in no way an opponent of the Nazi regime. Dr. Ernst-Friedemann Frhr. v. Münchhausen, unpublished manuscript, pp. 330-33. Münchhausen became a judge in 1951 and was the State Secretary for the Justice Ministry in Nordrhein-Westfalen from 1967-70. For his service in the law, he received both the Großes Verdienstkreuz mit Stern and the Verdienstorden des Landes Nordrhein-Westfalen. In 1937, he married Marie Louise Freiin v. Hammerstein-Equord. The marriage did not last and she defected to East Germany in 1949, having been a Soviet agent for some time beforehand. Hermann Weber; Andreas Herbst. “Hammerstein, Marie Louise von \* 27.9.1908 † 6.11.1999,” *Handbuch der Deutschen Kommunisten* (Berlin: Karl Dietz Verlag & Bundesstiftung zur Aufarbeitung der SED-Diktatur, Berlin) at <https://www.bundesstiftung-aufarbeitung.de/de/recherche/kataloge-datenbanken/biographische-datenbanken/marie-louise-von-hammerstein?ID=4419>

München on 26 October, saying that he was unavailable to come for questioning due to his strained financial circumstances – despite having just returned from a trip.<sup>335</sup> There followed many months of files being transferred to and from Detmold, Düsseldorf, München, and letters to and from Hauptkammern, the Staatsanwaltschaft, the Berufs-Haupt-Kammer, Hippler's attorney Rechtsanwalt Bergemann, and then back to München.

### 6.18 München speaks

On 5 January 1950, the Oberstaatsanwalt rendered what turned out to be its last ruling on Fritz Hippler. It deserves to be quoted in full:

“The process is going to be stopped.

The participation of the accused during the production of the film *Der Ewige Jude* was already subject to the process at Spruchgericht Hiddesen. In the final judgment from 29 September 1948, the accused was sentenced to a fine of 5000 DM because he was a member of the Allgemeine-SS in the rank of Obersturmbannführer even though he knew this was a criminal organization according to Article 6 of the statute of the International Military Tribunal. The reason for the judgment states, among others: “After the end of the Polish campaign he received the mission from Dr. Goebbels to take photographs of the life and activities of the Jews in the occupied Eastern Territories for archival purposes. The accused drove to Litzmannstadt with an employee from October 11-15 1939. He took images from the life of the Jews in the old part of town which would later be the ghetto but at that point was not established.”<sup>336</sup> These images

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<sup>335</sup> SM, München Polizeipräsidium, Kriminal Oberkommissar Marr to Staatsanwaltschaft München, 18 November 1950.

<sup>336</sup> Curious that the court would note this – that the ghetto had not yet been established – without considering that *Der Ewige Jude* might have played a part in what happened there. Goebbels visited Litzmannstadt in November 1939, writing that “These are no longer people, these are animals.” This is therefore not a humanitarian but a surgical task. You have to make cuts here, and quite radical ones at that. Otherwise Europe will one day perish from the Jewish disease.” [“Es ist unbeschreiblich. Das sind keine Menschen mehr, das sind Tiere. Das ist deshalb auch keine humanitäre, sondern eine chirurgische Aufgabe. Man muß hier Schnitte tun, und zwar ganz radikale. Sonst geht Europa einmal an der jüdischen Krankheit zugrunde.”] Elke Fröhlich, Ed., *Die Tagebücher von Joseph Goebbels, Sämtliche Fragmente* (München: K.G. Saur, 1987), Vol. 3, p. 628. The Ghetto was formally established in February 1940 and by the time of its liquidation in 1944, more than 200,000 people had been murdered or died of disease and starvation, with last group being sent for extermination at Auschwitz-Birkenau. [https://web.archive.org/web/20121013034501/http://www.ushmm.org/research/library/bibliography/index.php?content=lodz\\_ghetto](https://web.archive.org/web/20121013034501/http://www.ushmm.org/research/library/bibliography/index.php?content=lodz_ghetto)

from the life and activities were taken unobserved. He contacted the head of the Jewish religious community and received permission to make recordings of an original Jewish service.<sup>337</sup> Dr. Goebbels was so enthusiastic about this footage, that the images and sound were so realistic, that the party-owned film production company was commissioned to produce a documentary film. While the accused, according to his testimony, submitted the footage to the Wochenschau documentary and drama department so they could be scanned and changes and suggestions added before Dr. Goebbels viewed them. Dr. Goebbels insisted on seeing the unedited film immediately so that the accused in most cases saw them for the first time himself in the presence of Dr. Goebbels, which naturally hindered his ability to edit. The accused could not be refuted [in his testimony] that Dr. Goebbels, who devoted most of his working hours to the production of movies, so that one could voice an opinion from an artistic point of view, which most of the time would be corrected. However, in political and personal matters one would solely be a recipient of orders. According to the accused, this was the case here. At the instigation of Dr. Goebbels, the most important things were taken from films about the Jews before 1933, and pictures of prominent Jews were added from the photo archives. The rat scene corresponded to Dr. Goebbels' particular wishes. The opening credits were also written by him. The composer Friedl wrote the music using liturgical music, whereby Dr. Goebbels ordered the Jewish songs and temple chants to be distorted in a grotesque way.<sup>338</sup> The accused was named as director even though, according to his own statement and the statement of composer, that besides making the images in Litzmannstadt, he had no influence over the layout of the movie.

The accused could not be refuted {“*Die Anklage kann nicht wieder legt werden*”} that his name appeared in this case as in the case of the film, *The Campaign in Poland*, to justify the allowance paid to the accused by the Deposit Film Trust Company [Kaution-Filmtreuhandgesellschaft] to the Court of Auditors. His name should appear as director to prove and validate his ability as a director besides his film in *Promi* [this reference is unclear]. The accused had repeatedly expressed the

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<sup>337</sup> The court got this wrong, too. The service was filmed at the Vilker *shul* in Łdoz. As detailed by historian Saul Friedländer, “The Germans assembled the congregation, ordered it to put on a tallithim and tefellin and to stage a full-scale service. Shimon Huberband later recorded the details of the event for the underground historical archives kept in Warsaw. ‘A large number of high-ranking German officers came,’ Huberband noted, ‘and filmed the entire course of the service, immortalizing it on film!’ Then the order was given to read out the Torah scroll and read from it. The Torah reader, a clever Jew, called out in Hebrew before beginning to read the scroll: ‘Today is Tuesday.’ This was meant as a statement for posterity that they were forced to read the Torah.” The Torah is generally read only on Monday, Thursday, and Saturday. Saul Friedländer, *Nazi Germany and the Jews, 1933-1945, Abridged Edition* (New York: Harper Perennial, 2009), p. 153. Hippler’s story about the service done “with permission” is a good example of “*freiwillig gezwungen*” - an offer the Jews in Łodz could not afford to refuse. The Germans set fire to the shul in 1940, but not before carrying off the Torah scrolls to an unknown destination. <https://kehilalinks.jewishgen.org/lodz/syn.htm#Zachodnia>

<sup>338</sup> This is Franz R. Friedl (1892-1977).

wish to be in the film business because of better earning potential. However, despite his extensive work, this was rejected and he continued to be paid as a civil servant.”

The revision of the prosecuting authority against said judgment was rejected by the Supreme Court [*Oberste Spruchgerichtshof*] on 27 May 1949. The final decision of the Spruchgericht does not prevent the accused from being prosecuted for the same occurrences in ordinary criminal proceedings. If the accused is responsible for the editing and production of the movie, it may be considered to prosecute him for incitement for class hatred (§130, StGB) and for religious insult (§166, StGB). The accused defends himself with the same argument as in the Spruchgericht. A refutation was not possible in the Spruchgericht proceedings although extensive investigations were carried out and in particular all witnesses who could be reached were heard. There is therefore no sufficient basis for indictment.”<sup>339</sup>

The prosecutor’s office accepted Hippler’s account of his actions without question and seemingly not bothering to perform even a cursory investigation of their own. Further, although they quote (apparently) the Hiddesen Spruchkammer with approval, the München office omitted entirely the evidence presented there that proved Hippler a liar. Most interestingly, they recognized the ability to prosecute using paragraphs 130 and 166 of the StGB, yet pointedly declined to refer Hippler to criminal court, without explanation.<sup>340</sup>

After ten months of meaningless and half-hearted bureaucratic paper shuffling, files lost and found, Herr Becker at the Berufs-Haupt-Kammer wrote on 29 August 1951 that they finally found Hippler’s complete file but confirmed the decision not to pursue further action against him.<sup>341</sup>

The case died there, never to be resurrected.

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<sup>339</sup> USNA, Hippler. Decision of 5 January 1950. It is not signed by the Oberstaatsanwalt, but at his direction by a subordinate, Neudeck.

<sup>340</sup> Compare with BA Hippler, File document 221, Vorsitzender statement, 31 August 1948.

<sup>341</sup> Ibid., Becker to Staatsanwaltschaft München, 29 August 1951.

It is difficult to avoid the rather plain conclusion that the München judicial and political authorities did their best to protect Fritz Hippler. Despite anemic interest from the Americans and British, and a determined effort by Freiherr v. Münchhausen, the Bavarian state prosecutor's office fended off any attempt to bring Hippler to answer criminal charges in other fora by their continuing review of the matter until such time as official state policy became one of forgiveness and forgetfulness. While Hippler remained within the territorial boundaries of Bavaria, he remained a free man.

### **6.19 Hippler postscript**

Much later, when talking about his life's greatest regret, Hippler gave a peculiar answer. "There are many possibilities. Perhaps it's that I could not care for my mother 100 percent as I could have," he said. "If someone asks me if I could go back in time and do something differently, I would say I would do it exactly the same." When asked specifically about his most famous movie and its relationship to the larger issue of mass murder, Hippler replied, "After all the bloodshed took place, I fully believe that the film can be considered a milestone on the road to the Holocaust," he said in slow, measured speech. "I am ashamed for many things but I cannot be ashamed about this thing," he said. "They were not killed because of my intentions, my will or my order."<sup>342</sup>

### **6.20 Dr. Eberhard Taubert, war criminal**

While Harlan and Hippler were the public faces of antisemitic incitement in film, others were moving participants behind the scenes. Judging only based on the prewar public record, Hippler

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<sup>342</sup> <http://www.fpp.co.uk/online/00/12/Hippler.html>



did not have an aggressive antisemitic profile prior to *Der ewige Jude*, although he had an excellent Nazi pedigree dating from before he attended university. He certainly held opportunistic motives for advancing his career with no scruples about the nature of the work he did. The footage itself in the film was certainly the product of Hippler's quasi-artistic vision, but the inciting script and the guiding hand behind the project was certainly Dr. Eberhard Taubert, the eminence grise of hatred for Jews at the Propaganda Ministry, who held views as extreme as anyone in the SS.

From Rathenow, Taubert studied law, and received his Dr. jur. from Heidelberg in February 1931, shortly before joining the NSDAP (No. 712,249) and the SA. Taubert was SA-Sturmführer in Berlin-Brandenburg, and became the legal advisor to the Greater Berlin district and "anti-Bolshevism" consultant to Gau leader, Dr. Joseph Goebbels. Following Hitler's assumption of the chancellorship, Taubert moved up, becoming leader of the Department of General Domestic Policy within the Reich Ministry for Public Enlightenment and Propaganda. He focused on church affairs and anti-communism, founding the General Association of German Anti-Communist Associations and the publishing house, Nibelungen-Verlag GmbH. A significant Nibelungen publication was the book *Der Jude als Verbrecher* (The Jew as Criminal).<sup>343</sup>

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<sup>343</sup> Francis G. Gentry, *The Nibelungen Tradition: An Encyclopedia*. Routledge, 2002, p. 312. *Der Jude als Verbrecher* is filled with 212 pages of hateful, inciting images and words. The authors were Josef Keller and Hanns Andersen, published in 1937, with a forward by Julius Streicher.

The contents, in addition to a mention of Feuchtwanger's *Jud Süß*, lists "*Vernichtungskampf des Juden gegen alles Wahre, Gute und Edle in der deutschen Welt...ausgeprägte Neigung des Judentums zum Verbrechen Kriminalität der , jüdische Solidarität mit verbrecherischen Rassegenossen, Bündnis zwischen Judentum und Unterwelt, Bolschewismus: Aufstand der Unterwelt unter Führung des Judentums, Angriff des s auf die Kulturvölker, jüdischer Vergewaltiger, der Jude als Anführer und Drahtzieher der kriminellen Unterwelt, geborene Anführer des Untermenschentums, verdorbenes Glied einer unterrassischen Mischung.*" [the Jews' struggle for extermination against all that is true, good and noble in the German world...Judaism's pronounced tendency towards crime, criminality of the, Jewish solidarity with criminal racial comrades, alliance between Jewry and underworld,

Starting in 1939, Taubert formally expanded his area of concern, becoming director of the Institute for the Study of the Jewish Question, later renamed Antisemitic Action. His responsibilities included the day-to-day supervision of policy concerning what he referred to as the coordination between Jews, communists, and intellectuals, specifically the “active propaganda against the Jews.” He was the author of Propaganda Ministry guidelines for the press, film, and radio which defined the scope of their content, goals, and nature of their activities, their relation to Jews as targets. Goebbels recognized Taubert’s talent for antisemitic agitation, calling him a “sympathetic fanatic.”<sup>344</sup>

In the preparatory phase, Taubert accompanied Hippler to Poland in October 1939, immediately following the Polish campaign, to film ghetto scenes and images of ritual animal slaughter that were included in the final version. Taubert did more than write the script. 8th Army command in Warsaw received a telegram on 7 October that Taubert and Hippler would arrive on behalf of the Propaganda department and ordered the Army to furnish the assistance of Propaganda Kompanien (PK). Taubert’s activities are unclear but Hippler went to Łódź where he received assistance from PK 501 and some footage originally used in a regular PK film was subsequently

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Bolshevism: insurrection the underworld under the leadership of Judaism, attack of the Jews on the civilized peoples, Jewish rapist, the Jew as the leader and mastermind of the criminal underworld, born leader of the subhuman, depraved member of an subracial mixture]

In his introduction, Streicher writes, “*Und daß die Volker der Gegenwart nur dann am Leben bleiben, wenn der in ihnen fressende jüdische Bazillus beseitigt wird, kann nur von Leuten bestritten werden, die die Wahrheit nicht sehen wollen.*” [And that the people of the present only stay alive if the Jewish bacillus that feeds on them is eliminated can only be denied by people who do not want to see the truth.] Contents at [http://bvbr.bib-bvb.de:8991/exlibris/aleph/a23\\_1/apache\\_media/8AUYKMI58F35G6BGIA9H7LUCJ5QCVA.pdf](http://bvbr.bib-bvb.de:8991/exlibris/aleph/a23_1/apache_media/8AUYKMI58F35G6BGIA9H7LUCJ5QCVA.pdf)

<sup>344</sup> Goebbels, Joseph. "Tagebucheintrag vom 3. Oktober 1935," *Die Tagebücher von Joseph Goebbels* (Boston: De Gruyter, 2012). <https://www.degruyter.com/document/database/TJGO/entry/TJG-3067/html>. Accessed 2021-03-06.

included in *Der ewige Jude*.<sup>345</sup> On 17 October, Goebbels recorded that Hippler had returned, with material for his “ghetto film.”

Later, after *Der ewige Jude*, Taubert became head of *Generalreferat Ost*, managing all propaganda stations in the eastern occupied territories, the heartland of the Holocaust. During the period from 1934, he served as an assessor judge with the People’s Court, where he pronounced multiple death sentences.<sup>346</sup>

It makes sense then, that Taubert worked with Goebbels to bring Hippler’s mediocre artistic talents to *Der ewige Jude*. The words spoken by the narrator – Taubert’s words – are as vile as anything to come from *Der Stürmer*: “As parasites, rats have been with people from their beginnings. They are insidious, cowardly and cruel. Among the animals they represent the element of insidious, deceitful decomposition. Nothing else than the Jews among the people.” [“Die Ratten begleiten als Schmarotzer den Menschen von seinen Anfängen. Sie sind hinterlistig, feige und grausam. Sie stellen unter den Tieren das Element der heimtückischen, hinterlistigen Zersetzung dar. Nichts anderes als die Juden unter den Menschen.”]

Following the German surrender, Taubert evaded denazification and never stood trial for his crimes. He adopted the alias “Dr. Erwin Kohl,” and lived briefly in Hamburg before fleeing the country for South Africa and Iran. He returned to the Federal Republic in 1950. No one questioned

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<sup>345</sup><https://www.yadvashem.org/articles/academic/wehrmacht-propaganda-troops-and-the-jews.html>. Article by Daniel Uziel, *Wehrmacht Propaganda Troops and the Jews*. In an earlier, perhaps related matter, on 2 October, PK in Poland was ordered that, “Of high priority is film footage showing all sorts of Jewish types. We need more than before, from Warsaw and all the occupied territories. What we want are portraits and images of Jews at work. This material is to be used to reinforce our antisemitic propaganda at home and abroad.”

<sup>346</sup> Wolfgang Benz, “Taubert, Eberhard,” *Handbuch des Antisemitismus*, Volume 2/2 (Berlin: De Gruyter, 2009), p. 819 f.

his wartime past. He soon became involved in anti-Communist politics, founding the People's League for Peace and Freedom (Volksbundes für Frieden und Freiheit/VFF) in 1950, which was subsidized by the *Bundesministerium für gesamtdeutsche Fragen*.<sup>347</sup>

His wartime past eventually came to light in 1955 and he was forced to resign from the VFF, although he continued to advise German politicians, to include Franz Joseph Strauss, Defense Minister from 1956-61, as a consultant in "psychological warfare" which came with the benefit of an office in Bonn.<sup>348</sup> In the 1970s, he had contact with Manfred Roeder, an even more extreme political figure and convicted criminal for incitement.<sup>349</sup> Never serving a moment as a defendant before any court to answer for incitement of the Holocaust, Taubert died from injuries sustained in a traffic accident in 1976.

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<sup>347</sup> Bernt Engelmann: *Schwarzbuch Franz Josef Strauß* (Köln: Kiepenheuer und Witsch; 1. Edition, 1972) 1980, p. 176ff.

<sup>348</sup> Strauss, a longtime influential and famously corrupt CDU politician wrote in a letter in 1957 to the postwar SS lobbying group, HIAG, that "I think you know how I personally think about the frontline units of the Waffen-SS. They are included in my admiration for the German soldiers of the last world war." "Waffen-SS: Eine helle Freude" *Der Spiegel*. 25 March 1964. The same article quotes Konrad Adenauer addressing CDU friends in Hannover in 1953: "Die Männer der Waffen-SS waren Soldaten wie alle anderen auch ... machen Sie einmal dem Ausland klar, daß die Waffen-SS nichts mit Sicherheitsdienst und Gestapo zu tun hat! Machen Sie einmal den Leuten deutlich, daß die Waffen-SS keine Juden erschossen hat, sondern als hervorragende Soldaten von den Sowjets am meisten gefürchtet war." <https://www.spiegel.de/politik/eine-helle-freude-a-341d7b6d-0002-0001-0000-000046173314?context=issue>

<sup>349</sup> Roeder came from an SS family, became a lawyer after WWII, and was a member of CDU for five years before resigning to form the "Bürgerinitiative gegen moralische und politische Anarchie." Over the course of the next many years, he served briefly as attorney for Rudolf Heß, founded a neo-Nazi group (*Deutsche Aktionsgruppen*) which denied the Holocaust and carried out murderous attacks on foreign workers and asylum seekers. Roeder served eight years of a twelve-year sentence. After his release, he continued his far-right activities. For the crime of *Volkshetze*, he received a ten-month sentence from the courts of Schwerin and Rostock. Five months later he committed the same offense, was sentenced in Schwalmstadt, but almost immediately released because of ill-health. He lived another nine years after his "ill-health," dying in 2014. See <https://www.hna.de/lokales/schwalmstadt/schwarzenborn-ort101492/schwarzenborn-haus-richberg-gibt-seminare-fuer-neonazis-8329319.html> and Volker Rühle, "Auf Kampfstation," *Focus Magazin*, No. 51, 1997 at [https://www.focus.de/politik/deutschland/auf-kampfstation-volker-ruehe\\_id\\_1886029.html](https://www.focus.de/politik/deutschland/auf-kampfstation-volker-ruehe_id_1886029.html)

## 6.21 Hans Schweitzer

Hans Herbert Schweitzer appeared before the Spruchkammer in Hamburg-Bergedorf in 1948. He had joined the NSDAP in 1926, and Goebbels later wrote that Schweitzer was among the first thirty party members in Berlin. A trained graphic artist, he co-founded *Der Angriff*, the Berlin Gau newspaper for the NSDAP. He did work for other party publications to include the *Völkischer Beobachter* and the *Die Brennesel*, which regularly featured Schweitzer's antisemitic cartoons and satirical articles. He designed hundreds of leaflets, fliers, and posters during the period leading up to the 1932 election, many with an antisemitic and anti-foreign theme, working principally for Goebbels in his role as Gauleiter, and then after the election directly for the Propaganda Ministry. Schweitzer worked under the pseudonym "Mjölñir" – Thor's hammer – which identified him with Nordic mythology as well as conjuring the image of a hammer smashing the enemies of National Socialism.

After the Nazi seizure of power, his star only ascended. Named Reich Commissioner for Artistic Design in 1935, he was responsible for graphic design on stamps and coins. Schweitzer was appointed to the Presidential Council for the Reich Chamber for Fine Arts and then – surprisingly for someone with limited formal education – was awarded the title of professor.<sup>350</sup> By 1940, he was charged with the leadership of the "Committee for the Appraisal of Inferior Art Product," and led the effort to confiscate work designated "degenerate" by Hitler and other senior members of the NSDAP, in connection with the "Entartete Kunst" exhibit, followed by a traveling

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<sup>350</sup> Klee, *Das Kulturlexikon zum Dritten Reich, Wer war was vor und nach 1945* (Frankfurt am Main: S. Fischer, 2007) p. 560.

show to twelve cities through 1941.<sup>351</sup> During the war, Schweitzer was Chairman of the Reich Committee for Press Illustrators but gradually lost political influence and most of his patronage. By 1942 he was promoted to SS-Oberführer and spent his remaining time as a draftsman with a Propaganda Kompanie, although he exhibited his work in a 1944 show for Reichsführer-SS Himmler, *Deutsche Künstler und die SS*. At the end of the war, he fled to a village near Flensburg. During his tenure at the apogee of the Nazi graphic arts pyramid, Schweitzer drew images of Jews as a fat banker with a yellow star of David, a fat Jew captioned as the type who brought about the war, and one other image, too. Schweitzer created the movie poster for *Der ewige Jude*, featuring the face that fit every Nazi stereotype of the Jewish Untermensch. The postwar Hamburg denazification Spruchkammer fined him DM500 and sent him on his way.<sup>352</sup>

In much the same vein, UFA company director and chief of production Karl Ritter, director of some of the most important motivational films during the Third Reich, was determined to be a mere Mitläufer at his Spruchkammer proceeding. This hampered him not at all, and with financial help from Winifred Wagner, he relocated to Argentina, later returning to Germany and founding a new production company.<sup>353</sup> His comeback was unsuccessful, and he eventually returned to

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<sup>351</sup> <https://www.zukunft-braucht-erinnerung.de/hans-schweitzer-mjoelnir/>

<sup>352</sup> He later worked for the German federal government in *Das Presse und Informationsamt der Bundesregierung*, and designed posters for the neo-Nazi *Partei der guten Deutschen* in the 1950s. Wolfgang Benz u. a. (Hrsg.): *Handbuch des Antisemitismus. Judenfeindschaft in Geschichte und Gegenwart*, Band 7 (Literatur, Film, Theater und Kunst), Berlin / New York 2014.

<sup>353</sup> Rolf Giesen, *Nazi Propaganda Films: A History and Filmography* (McFarland, Jefferson, North Carolina/London: McFarland, 2003), p. 256.

South America, dying there in 1977.<sup>354</sup> Hippler referred to him dismissively as a lower-echelon figure in German film.<sup>355</sup>

## 6.22 Hippler in later years

Hippler never made another movie after the war but gave periodic interviews about his career under Goebbels.<sup>356</sup> He saved his most vicious antisemitic diatribes for the books he wrote. In *Die Verstrickung*, he repeated earlier denials but added a new item: that Goebbels told him in advance of the Litzmannstadt trip that the Jews were going to be deported to Madagascar, so there was a need for urgency.<sup>357</sup> His 1995 book, *Korrekturen*, is a primer for Holocaust-denial and traditional antisemitic rhetoric. He identifies Hitler as the Zeitgeist, that images of dead bodies from concentration camps were actually German dead from Dresden, and then expanded into an extended chapter speaking about Jews, generally. “Wenden wir uns also den Fragen zu, warum und wie das Judentum seit vorbiblischen Zeiten zu einem weltweiten Problem hat werden können.”<sup>358</sup> Jews, he wrote, were the ones who most benefited from antisemitism, and his pseudo-history of the Jews and their influence parallels uncomfortably close to the narrative structure in *Der ewige Jude*.

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<sup>354</sup> <https://www.imdb.com/name/nm0728774/>

<sup>355</sup> SM, Hippler affidavit to Harlan Trial in Hamburg, 5 February 1948.

<sup>356</sup> For example, his interview with American journalist Bill Moyers as part of the PBS series, “Walk Through the 20<sup>th</sup> Century.” <https://www.youtube.com/watch?v=2FaGWsW1khw>. Hippler stresses the effective propaganda strategy of “simplify and repeat.” He likewise spoke to *Zeitgeschichte in Bild und Ton*: <https://www.youtube.com/watch?v=kswX02xuia8>.

<sup>357</sup> Hippler, *Die Verstrickung* (Düsseldorf: Verlag Mehr Wissen, 1982), p. 187.

<sup>358</sup> Hippler, *Korrekturen: Zeitgeschichtliche Spurensuche, einmal anders* (Inning: Verlagsgesellschaft Berg, 1995), p. 247. Holocaust denial comments on p. 264. Translation of the above: “So let's turn to the questions of why and how Judaism has become a worldwide problem since pre-biblical times.”

It is worth noting that his publisher, Verlagsgesellschaft Berg, is infamous. It was cited in a 2006 report by the Bundesamt für Verfassungsschutz as one of the most extreme right-wing publishers in Germany.<sup>359</sup> Founded in 1991, it absorbed three older neo-National Socialist-friendly companies: Druffel-Verlag, Türmer-Verlag, and Vowinckel-Verlag. The VGB's owner, Gerd Sudholt, has been convicted multiple times for violating StGB§130, yet continues to sponsor Holocaust-denial literature. One book, *Uns trifft keine Schuld*, argued that the Jews brought the Holocaust upon themselves.<sup>360</sup> Two of Hippler's works found a home with Sudholt.

The former *SS-Obersturmbannführer* and director of the most repugnant antisemitic film of the Third Reich died at Berchtesgaden in 2002. He was unrepentant. *Der ewige Jude* remains banned by the Federal Republic of Germany for general audiences.<sup>361</sup>

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<sup>359</sup> [https://www.verfassungsschutz.de/download/SHOW/vsbericht\\_2006.pdf](https://www.verfassungsschutz.de/download/SHOW/vsbericht_2006.pdf)

<sup>360</sup> <https://jungle.world/artikel/1999/03/antisemitisches-von-harry-zweifel>. The author is listed as "Harry Zweifel." Sudholt also owns "Linda Sudholt Versandbuchhandlung" and the "Scharnhorst Buchkameradschaft."

<sup>361</sup> Jugendschutzgesetz §15. This follows from Article 5, Paragraph 2 of the Grundgesetz and StGB § 130 (1) and (2). *Jud Süß* falls into the same category for inciting hatred.





24. *Der ewige Jude*. Directed by Fritz Hippler. Poster by Hans "Mjölhir" Schweizer.



25. Der ewige Jude exhibit – predicate to Hippler's film



26. SS-Sturmbannführer Dr. Fritz Hippler showing Reichsminister Goebbels images from the Jewish ghetto. The Ehrenwinkel der Alten Kämpfer on his right arm was awarded to those who joined the NSDAP or SS prior to Hitler's chancellorship.

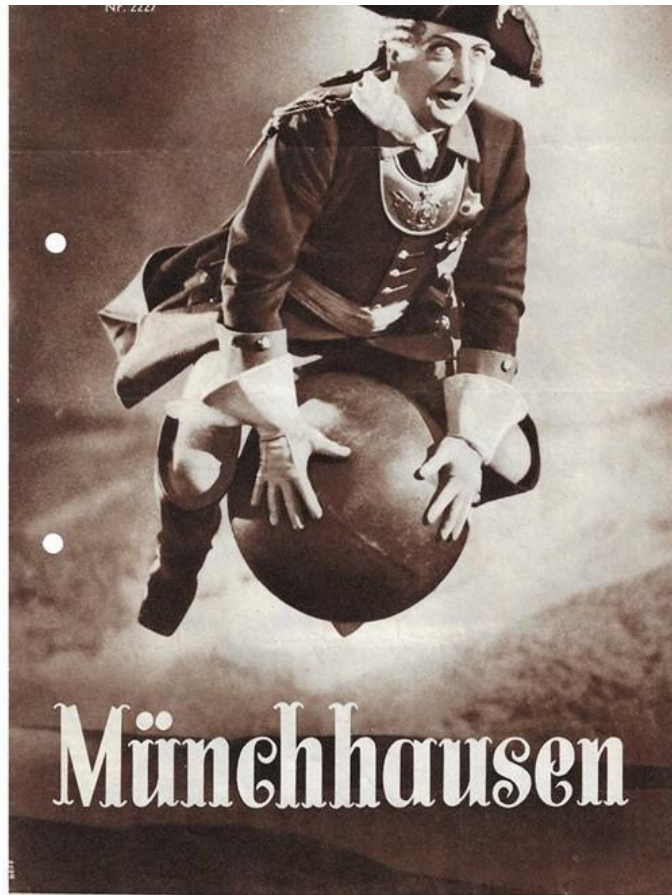


27. Photos of Hippler as a member of the Hitler-Jugend in 1928 and the NSDAP in 1932.



27. SS-Brigadeführer Hans Hinkel, cultural affairs specialist in the Propaganda Ministry who helped facilitate the production of *Der ewige Jude*. In lower photo, Hinkel sits next to General der Waffen-SS and Polizei Ernst Kaltenbrunner at a session of the People's Court. Kaltenbrunner was executed by the IMT for Crimes Against Humanity.





29. Hippler's last film and ironically, the surname of the prosecutor who went after him. Ferdinand Marian also featured in the production.



30. Dr. Ernst-Friedemann Frhr. v. Münchhausen, the prosecutor in Nordrhein-Westfalen who tried to bring Hippler to trial.



31. Dr. Eberhard Taubert, rabid anti-Semite, attorney, high official in the Propaganda Ministry, and screenwriter for *Der ewige Jude*. He advised the West German government after WWII.



32. Artist Hans Schweitzer with Dr. Goebbels



33. Schweitzer's artwork – "Who is to blame for the war"

## Chapter VII: Philipp Rupprecht

### 7.1 Background

Philipp “Fips” Rupprecht was born in Nürnberg on 2 December 1900 and worked a variety of unskilled jobs before briefly joining the *Kaiserliche Marine* in 1918 but saw no active service before the war’s end.<sup>362</sup> Apparently in search of an absent father interned in Uruguay in 1916, Rupprecht emigrated to Argentina in 1920 where, after working another series of menial jobs in restaurants and on a cattle ranch, he found work as a contributing illustrator with a newspaper in Buenos Aires. He married a Swiss expatriate in 1921 and returned to Germany in 1925.<sup>363</sup> He secured a job at the *Fränkische Tagespost* drawing political caricatures.<sup>364</sup> Present at the libel case of the Nürnberg Oberbürgermeister Hermann Luppe against Julius Streicher, he was assigned to depict Streicher but instead made Lippe the target.<sup>365</sup> This pleased Streicher so much that he offered Rupprecht a job with *Der Stürmer*, where he remained for the next

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<sup>362</sup> This entitled him to Des Ehrenkreuz des Weltkrieges, based on participation, not achievement. He later said that as a teenager he worked in a Jewish-owned restaurant in Nürnberg where most of the customers were Jewish, indicating that he could not therefore be an anti-Semite. SM, Hippler, file page 135.

<sup>363</sup> This is the information provided on his Fragebogen and what he told the Spruchkammer. An antisemitic election campaign poster from 1924 (date written on the poster) shows what appears to be vintage Rupprecht artwork. The timing is problematic. The poster refers to an election for the München Stadtrat but the NSDAP was banned under that name on 9 November 1923 (not un-banned until February 1925). <https://stadtarchiv.muenchen.de/scopeQuery/detail.aspx?ID=514541> Likely that the date on the poster (and at the Stadtarchiv) is wrong and instead refers to the 1932 election.

<sup>364</sup> The Tagespost was affiliated with the SPD. It was banned after the Reichstag Fire in February 1933; Kurt Eisner (Minister-President of the Volksstaat Bayerns until his assassination in 1919) was formerly one of its editors. It resumed publication from 1948 through 1971. Historisches Lexikon Bayerns at [https://www.historisches-lexikon-bayerns.de/Lexikon/Fr%C3%A4nkische\\_Tagespost](https://www.historisches-lexikon-bayerns.de/Lexikon/Fr%C3%A4nkische_Tagespost)

<sup>365</sup> Luppe was one of the founding members of the Deutsche Demokratische Partei (DDP) and served as Oberbürgermeister from 1920-33. He was often in and out of custody during the Third Reich and was an active member of the resistance. He was killed on 3 April 1945, just before the end of the war. See “Hermann Luppe” at the Gedenkstätte Deutscher Widerstand; <https://www.gdw-berlin.de/vertiefung/biografien/personenverzeichnis/biografie/view-bio/hermann-luppe/>



twenty years. More precisely, every working day for the next two decades, Rupprecht's only function was to draw antisemitic "cartoons" to accompany the articles and editorials that Julius Streicher wrote, in addition to designing the paper's front page.<sup>366</sup>

Rupprecht joined the NSDAP in 1929 and the SS in 1930. He later claimed that his membership was only for a month – because he and Streicher were journalists at party rallies and wanted to fit in. Considering the rather extensive racial background and physical examinations necessary to join the SS-Verfügungstruppe, this is an almost comical explanation.<sup>367</sup>

While most of Rupprecht's antisemitic persecution was done on behalf of *Der Stürmer*, he found time (and profit) in promoting his talents for similar publications. Noteworthy among these was Kurt Plischke's 1934 book, *Der Jude als Rassenschänder: Eine Anklage gegen Juda und eine Mahnung an die deutschen Frauen und Mädchen* (The Jew as Race Defiler: An Accusation Against Juda and a Warning to German Women and Girls).<sup>368</sup> The illustrations followed exactly the *Stürmer* playbook, making the case that Jews were rapists and child molesters, whose sole aim was to pollute the purity of German blood.<sup>369</sup> Plischke's diatribe was published by the main National Socialist press in Berlin, raising Rupprecht's profile even more, although in a less mass-marketed format than usual.

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<sup>366</sup> He was briefly absent from *Der Stürmer* in 1926/7 when he worked as editor of the magazine "Die Lupe" but soon returned on the promise of a larger salary. Daniel Roos, *Julius Streicher and "Der Stürmer," 1923-1945* (Verlag Ferdinand Schöningh, 2014), p. 135.

<sup>367</sup> SM, SpK K 1478, Rupprecht file, page 78, Interrogation of 29 January 1947.

<sup>368</sup> Kurt Plischke, *Der Jude als Rassenschänder: Eine Anklage gegen Juda und eine Mahnung an die deutschen Frauen und Mädchen* (Berlin-Schöneberg: NS Druck u. Verlag, 1934).

<sup>369</sup> C.f. Bruno Blau, "The Jew as Sexual Criminal" in *Jewish Social Studies*, Vol. 13, No. 4, Oct 1951, pp. 321-24.

## 7.2 Trau keinem Fuchs

One of the minor mysteries with Rupprecht concerned Stürmer-Verlag's 1936 publication, *Trau keinem Fuchs auf grüner Heid und keinem Jud auf seinem Eid: Ein Bilderbuch für Groß und Klein* (Trust No Fox on his Green Heath and No Jew on his Oath: an illustrated book for large and small). The title comes from a line by Martin Luther<sup>370</sup>, the images are Rupprecht-ish, but the author (an illustrator) was said to be teenager Elvira Bauer, a secondary school student in a two-year training program to be a kindergarten teacher at the Municipal Kindergärtnerinnen and Hortnerinnenseminar in Nürnberg. She unsuccessfully sought Streicher's financial support to pay for her course. In *Der Stürmer's* heartwarming story, Bauer wrote the text and illustrated the book; she was turned down by numerous publishers, including the NSDAP Franz-Eher-Verlag, before having her manuscript accepted by Streicher.<sup>371</sup> This is the origin story but the racially aware, pure Aryan, female teenager Bauer – precisely the profile that obsessed a deviant Streicher – appears to be only involved to a point, represented in only a single photo that appeared in the magazine.<sup>372</sup> While the syntax has Ernst Hiemer's mocking style, rhyme and tone, Bauer did exist, and apparently still upset after the war that Streicher failed to pay

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<sup>370</sup> Martin Luther, *Von den Juden and ihren Lügen* (1543). "Trau keinem Wolf auf wilder Heiden // Auch keinem Juden auf seine Eiden // Glaub keinem Papst auf sein Gewissen // Wirst sonst von allen Drein beschissen" <https://beruhmte-zitate.de/zitate/123395-martin-luther-trau-keinem-wolf-auf-wilder-heiden-auch-keinem/>

<sup>371</sup> Martin Bauer: *Elvira Bauer und ihr Werk „Trau keinem Fuchs auf grüner Heid und keinem Jud bei seinem Eid!“*. *Ein Beitrag zur Historiographie des Bilderbuchs im „Dritten Reich“*, München 2006, p. 7 (unpublished thesis)

<sup>372</sup> Elvira Theodolinda Bauer was registered as living in Berlin in 1937 but thereafter disappeared from the public record. Stadtarchiv Nürnberg C 21/III Nr. 917.

her anything.<sup>373</sup> The author (or Streicher's editorial staff) thoughtfully included many cartoons and a tribute to the owner and operator of *Der Stürmer*:

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Other tricks performs the Jew,  
Inspired by his Satanic blood.  
Urged on by just this meanness.  
He's fooled the lot of us Germans,  
But he shan't do that any more.  
A valiant man stood up for us,  
Hailing from Germany's heart, Franconia.  
To him we owe our deepest thanks  
That German stock remains so sound.  
The Jews in turn he's taught a lesson,  
The value of a healthy folk.  
He's let them feel the German spirit  
Twixt Jew and us he's shown the difference.  
That is Streicher!!

Rupprecht's seemed particularly sensitive about Bauer in his postwar interrogation. He denied making the illustrations, and said he had only seen Bauer once. The public prosecutor in Ebersberg did not believe him.<sup>374</sup>

The chapters are arranged to cover the full gamut of Jewish stereotypes: The Father of the Jews is the Devil, The Eternal Jew, Jewish names, Once a Jew, always a Jew, The Cattle Jew, The Sabbath, The Jewish Lawyer, The Servant Girl, The Jewish Doctor, The Führer's Youth. By appealing to an audience of children, *Trau keinem Fuchs* aims to inculcate antisemitic hatred from the earliest possible age. It does not explicitly call for extermination; it does not need to.

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<sup>373</sup> Fred Hahn: *Lieber Stuermer. Leserbriefe an das NS-Kampfblatt 1924 bis 1945* (New York/Stuttgart: Leo-Baeck-Institut, 1978), p. 159. Hahn is evidently referencing the Bernard Kolb Collection at LBI. See <https://archives.cjh.org//repositories/5/resources/14006>

<sup>374</sup> SM, (file page 663) Rupprecht interrogation of 14 April 1947. Statements about Bauer's life are remarkably unsourced. For example, [https://de.metapedia.org/wiki/Bauer,\\_Elvira](https://de.metapedia.org/wiki/Bauer,_Elvira)

Instead, the book does its part to condition the young that harming the people whose father is the devil is not wrong, it is merely civic and cultural protection. Much like in Hippler's film, it leaves the reader to connect the obvious dots.

Erika Mann observed that:

"The bright red cover shows, next to this title, two pictures - the fox, treacherous and eager for prey, peeping around a corner; and under the Star of David, the Jews - the caricature of the Jew running across the country - giant nose, bald head, bulging lips, watery eyes - swearing his perjury with fat fingers. The book is magnificently furnished, illustrated in many colors, even printed in two colors, whereby the words that the author is concerned with, such as 'devil', 'Jews', 'hanging mouth', 'scoundrel' etc. are made unforgettable for the children by printing in red should be. Each of these verses would have to be reprinted here, each of these pictures reproduced. Because it is to be feared that without this it will not be possible to describe the degree of sadistic brutality, demagogic mendacity and to make it vivid."<sup>375</sup>

### 7.3 Der Giftpilz

Perhaps Rupprecht's most notorious graphic art contribution came in 1938. In that year, in addition to the weekly antisemitic cartoons for the magazine, he lent his pen to the Stürmer-Verlag's *Der Giftpilz - Ein Stürmerbuch für Jung u. Alt* (The Poison Mushroom – a Stürmer book for young and old). In many ways, it is the companion volume to the incitement literature allegedly written by Elvira Bauer but Ernst Hiemer was the book's author as well as the chief editor of *Der Stürmer*. His 1942 editorial offered the thought that only when "Judaism ceased to exist throughout the world" would Jewish organized crime end. That same year, he wrote *Der*

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<sup>375</sup> Erika Mann, *Zehn Millionen Kinder. Die Erziehung der Jugend im Dritten Reich* (Reinbek bei Hamburg: Rowohlt, 1997), p. 62. This is also covered in the superb article by Mary Mills, "Propaganda and Children During the Hitler Years." <https://yadvashem.org/downloadeducation/conf/Millsishedwithoutpic.pdf>

*Jude im Sprichwort der Völker* (The Jew in the Proverb of the People) also published by Streicher, which is just as vicious as *Der Giftpilz*, minus Rupprecht's art.<sup>376</sup>

*Der Giftpilz* was so horrific that even Joseph Goebbels found it objectionable.<sup>377</sup> Rupprecht's images accompany fourteen chapters which build to its conclusion – the final solution to the Jewish Question:

How to Recognize a Jew; How the Jews Came to Us; What is the Talmud?; Why the Jews Let Themselves be Baptized; How a German Peasant was Driven from House and Farm; How Jewish Traders Cheat; The Experience of Hans and Else with a Strange Man; Inge's Visit to a Jewish Doctor; How the Jew Treats his Domestic Help; How Two Women were Tricked by Jewish Lawyers; How Jews Torment Animals; What Christ Said about the Jews; Money Is The God Of The Jews; How Worker Hartmann Became a National-Socialist; Are There Decent Jews?; Without Solving the Jewish Question No Salvation for Mankind. The last included an inspirational quote: "Without a solution of the Jewish question, No salvation for Mankind!...He who fights the Jews battles the Devil" - Julius Streicher.<sup>378</sup>

While the text is awful enough, the memorable parts of the book, then and now, are Rupprecht's illustrations. From the cover art of the long-nosed Jew as a mushroom, he carefully drew a color image for each chapter. The fat, dirty Jew. The hook-nosed thief. The lecherous

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<sup>376</sup> <https://collections.ushmm.org/search/catalog/bib257435>. The book was reprinted in 2016 in Leipzig by Verlag der Scheim, an extremist right-wing press with ties to the NPD. <https://daserste.ndr.de/panorama/aktuell/Razzia-bei-rechtsextremem-Versandhandel-Der-Schelm,schelm100.html>

<sup>377</sup> Goebbels, Joseph, Diary entry, 29 May 1938: "Streicher has published a new children's book. Terrible stuff. Why does the Führer put up with it?"

<sup>378</sup> <https://research.calvin.edu/german-propaganda-archive/thumb.htm> The book was at the center of the prosecution case against Streicher at the IMT. Testimony on this point on 10 January 1946: <http://www.zeno.org/Geschichte/M/Der+N%C3%BCrnberger+Proze%C3%9F/Hauptverhandlungen/Einunddrei%C3%9Figster+Tag.+Donnerstag,+10.+Januar+1946/Nachmittagssitzung>

child molester. The eternal trickster trying to induce an Aryan maiden into surrendering her virginity and betraying her heritage. 60,000 copies were printed, ensuring that many German children saw and were subliminally influenced by the artistic version of persecution and incitement.<sup>379</sup>

Hiemer was called for Streicher's defense at the IMT on Day 117, where his testimony did more harm than good. He was interned in the camp at Langwasser from June 1945 until his release in 1948, classified as a Mitläufer in an expedited denazification hearing, and then discharged. He died in Altötting in 1974.<sup>380</sup>

Of significance is that despite the desperate need for fit men at the front, when war broke out, Rupprecht was drafted back into the Kriegsmarine and assigned to a minesweeper but his valiant wartime service lasted less than a month before he was dis-enrolled and returned to work for Streicher where his efforts for victory were judged more significant.<sup>381</sup> He continued in his work until the last issue of *Der Stürmer* on 1 February 1945.<sup>382</sup>

The American CIC arrested Rupprecht in May 1945 and confined him at 7<sup>th</sup> Army Internment Camp 74 in Ludwigsburg-Oßweil, where he was classified as a Tier 1 offender, and later transferred to IC 6 in Moosburg, northeast of München.<sup>383</sup> There is no indication why the Americans failed to charge and prosecute him, although they certainly had sufficient evidence

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<sup>379</sup> Heinz Schreckenberg, *Erziehung, Lebenswelt und Kriegseinsatz der deutschen Jugend unter Hitler: Ein kritischer Überblick*. LIT Verlag, Münster 2001, p. 44.

<sup>380</sup> Stadtarchiv Nürnberg, C 21/III Nr. 1108.

<sup>381</sup> Roos, p. 136.

<sup>382</sup> Jennifer Rosenberg, "Der Stürmer: An Overview of the Nazi's Antisemitic Newspaper," (ThoughtCo, 2019) at <https://www.thoughtco.com/der-stuermer-newspaper-1779279>

<sup>383</sup> His fellow prisoners at IC 74 included SS-Obergruppenführer Prinz August Wilhelm v. Preußen, Reichsminister für Ernährung und Landwirtschaft Waler Darré, and former Reich Finance Minister, Johann Graf Schwerin v. Krosigk. <http://www.flak-kaserne-ludwigsburg.com/geschichte.html>

to do so.<sup>384</sup> He was released on 16 December and returned to Aßling but not free for very long. An arrest order was issued in January 1947 and he was transferred to the criminal jurisdiction of the Spruchkammer Ebersberg.<sup>385</sup> Rupprecht and his wife angrily objected to this, claiming that he was denounced. They were correct about that, at least in part. His landlord in München, Eduard Stracheter, made a statement to the court in January that Rupprecht “has more knowledge about the Party line than he wants to admit.” There had been a dispute over certain rooms that the landlord wanted returned but Rupprecht refused, saying he needed them for his “political activity” and then had the NSDAP Kreisleiter reprimand the landlord. The final straw came at the end of the war when the building’s septic system was blocked and the plumber discovered many copies of *Der Stürmer* deposited there by Rupprecht in an attempt to hide them.<sup>386</sup>

#### 7.4 Interrogation

Rupprecht was interrogated by the Öffentliche Kläger Richard Schönfelder on 29 January. Schönfelder very evidently despised Rupprecht and proved to be a very determined prosecutor. He probed with leading questions and allowed Rupprecht to speak at length, with the idea that the more the accused spoke, the more convinced the prosecutor would be. That was an error.

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<sup>384</sup> Rupprecht’s lawyer produced a statement signed by American Army Major Arvid Dahl (from the Ludwigsburg IC), testifying to Rupprecht’s good conduct as an internee and – weirdly – asking that he be allowed a license as a commercial artist because, “I feel that his paintings would be a great asset to all people.” This syntax is not American English, raising the possibility the testimonial might be less than what it seems. SM (file 141), Dahl to “Whom it may concern,” 24 January 1947. However, Rupprecht gave a copy of his camp sketches to Army Provost Martial William Gunstin. Unsure what to do with it, Gunstin donated it to the United States Holocaust Memorial Museum, where it remains. <https://collections.ushmm.org/search/catalog/irn50080>

<sup>385</sup> The arrest did not go smoothly. The Spruchkammer telephoned the Polizei in Aßling only to be told that all the officers were at lunch and to call back. Later, there was only one officer present who could not leave the station. Finally, a Polizist went to Rupprecht’s home where Frau Rupprecht was doing the laundry. She said her husband was out and could not guess when he would return. SM, Hippler, file page 70, Aktennotiz from E. Hirt, Spruchkammer-Geschäftsstelle.

<sup>386</sup> SM (file page 73), Eduard Stacheter statement, 30 January 1947.

The defendant protested his innocence. Caricatures like his were drawn all over the world. People like Streicher were responsible, Rupprecht was only an artist. He only wanted to make enough money to move his family to South America. He saw bad caricatures in Jewish magazines, too. In a feeble effort to separate himself from Streicher and antisemitism, he made an analogy: if he worked for a person who sold hair products, but he had hair himself, it does not affect him; just a job and he would do his best.

Rupprecht said he could not be an anti-Semite because he got his ideas from the magazine *Simplissimus*, and their drawings were much worse.<sup>387</sup> He knew Jewish families and did illustrations for the Jewish-owned Lowenstein company right before the NS seizure of power. Schönfelder knew how to provoke his witness. When confronted with the effect of his drawings on the murder and the gassing of millions, Rupprecht shouted angrily, “It’s called freedom of the press, free speech!” At the IMT, that statement alone might have been enough to hang him.<sup>388</sup>

Rupprecht said that Jews in the Ludwigsburg IC camp admired him and that the Americans knew him to be an artist without ulterior motives. At that point, the Spruchkammer Vorsitzender, Werner Krumme, asked, “If someone came to you and said that murder is okay, would you work for them, too? Rupprecht answered, “Yes, as long as it is accredited by the state, I have no responsibility.”<sup>389</sup>

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<sup>387</sup> This is false. *Simplissimus* was a political satire magazine published from 1896-1944, and then again from 1954-67. It set the standard for cartoons to make social statements. The editor during the Kaiserreich and Weimar periods, Thomas Theodor Heine – a Jew – was a fierce opponent of the Nazi movement. He left Germany in 1933, remaining in exile until his death in 1948. After his departure, the magazine followed the guidelines from Reich Press Chief Otto Dietrich. <http://www.simplicissimus.info/index.php?id=5> and <https://illustrationage.com/2019/07/02/turn-back-the-pages-simplicissimus-magazine/>

<sup>388</sup> SM, (file page 76) Rupprecht interrogation.

<sup>389</sup> Ibid., (file page 78).



The day before this interview, Schönfelder had written to the editor of the *Münchner-Mittag*, asking if they had back copies of *Der Stürmer* with Rupprecht caricatures and if they would ask their readers for a copy of *Der Giftpilz* and any other material that might be relevant. He closed with, “I suppose you are also interested in the prosecution and punishment of such a Nazi criminal.”<sup>390</sup>

Both Schönfelder and the Krumme asked profitable leading questions, understanding that the defendant was anxious to prove his innocence, revolving around several predictable points: 1) He was only a subordinate with no editorial control; only did what Streicher ordered him to do; 2) that he was actually a resistor to Streicher’s antisemitism – if it was antisemitism – because he turned down or modified instructions that would have resulted in even more virulent images; 3) that other artist’s images were much worse than anything he drew; 4) that the Americans told him he was innocent so the entire Spruchkammer proceeding was illegitimate; 5) he had no knowledge of the Holocaust, so no reason to suspect that his political cartoons would encourage people to kill Jews; 6) he knew Jews so could not be an anti-Semite.

**Krumme:** Streicher made you draw a Jew with a big, crooked nose and a sign on his chest that says, “I am a Jewish pig”?

**Rupprecht:** There was no force.

**Krumme:** So you could work freely – your idea, your work?

**Rupprecht:** Not my idea. I was given Jewish magazines as an example to see how Jews characterize Jews. Much worse than I would ever draw. I was told to do it

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<sup>390</sup> Ibid., (file page 68) Schönfelder to Redaktion der *Münchner-Mittag*, 28 January 1947.

similar. I know in other countries where they do not hold back with drawings about Germans.

**Schönfelder:** Did your caricatures cause the deaths of millions?

**Rupprecht:** I don't know about – the latest discoveries [of the victims of the Holocaust]

**Schönfelder:** I'll make sure you see the film *Todesmühlen* until you throw up!<sup>391</sup>

**Rupprecht:** As a simple man, I can only think things are in order.

**Krumme:** As a simple man, you think it was in order that Jews were exterminated without mercy?

**Rupprecht:** I have no information about that. The Americans recommended that I get my license back. Must I be incarcerated?

**Schönfelder:** Yes.

Schönfelder then turned the interrogation to the subject of Rupprecht's illustrations in books aimed at children. Rupprecht responded that "Well, I never give it to my kids." He then moves back to his defense of being a resistor, that he'd been offered a seat on the Nürnberg city council or a movie theater of his own in Wien, but had refused those incentives. Schönfelder observed, "I can imagine why not. You had an annual income of RM 22,000. It was not

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<sup>391</sup> *Die Todesmühlen* (Death Mills) was the American-produced documentary film from 1945 that premiered in selected German theaters in 1946 to show video evidence of the Holocaust. Largely drawn from the exhibits introduced at the IMT, the OMGUS hoped it would aid rehabilitation by demonstrating the depth and breadth of Nazi crimes. The footage is gruesome. In surveys afterward, the reception was less than hoped, with many Germans regarding it as Allied propaganda. Norbert Frei: *1945 and we* (München: CH Beck, 2005), p. 149. The British engaged director Alfred Hitchcock to develop a version for their zone of occupation, *German Concentration Camps Factual Survey*. For any number of reasons – to include a change in occupation policy and concern that the movie might encourage sympathy for Jews emigrating to Palestine – the movie project was shelved. The rough cut became the property of the Imperial War Museum in 1952, It was restored, completed, and finally debuted in 2015. <https://www.pbs.org/wgbh/pages/frontline/camp/faqs.html>

necessary to take other jobs. Rupprecht only answers, “It was not illegal to work for *Der Stürmer*.”

When Rupprecht returned to his defense about the Americans considering him innocent, Schönfelder said, “I can understand why the Americans wanted nothing to do with it. It was mainly Germans who were exterminated. During the Third Reich, *Der Stürmer* was promoted [by the government]. No one could have forced an artist to make these drawings. Rupprecht responds, “No one forced, but no one forbade it.”

At that point, and after noting that “You had no other function than to pull Jews into the dirt” Schönfelder sums up what Rupprecht was and what he did. “Some humans have a conscience that tells them something is wrong. Your conscience simply did not bother you about glorifying the murder of Jews.”<sup>392</sup>

In a subsequent interview on 14 April, Rupprecht again demonstrated his antisemitic attitude: “Die meisten sagen, sie hatten *Der Stürmer* nicht gelesen, aber die Juden and Leute von der CIC [US Army Counterintelligence Corps] haben ihn gelesen!” (Most people say they did not read *Der Stürmer* but the Jews and the people from the CIC read it!)<sup>393</sup>

Rupprecht’s undercurrent – the Jews, the Jewish conspiracy, the Jewish conspiracy out to get him, was precisely what Schönfelder needed to evoke. From the public records, it seemed that the prosecutor wanted something from Rupprecht that the defendant was unwilling to give – acceptance of responsibility for the offenses charged. Absent that, the path now only ran straight to the Spruchkammer.

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<sup>392</sup> SM (file page 84).

<sup>393</sup> Ibid. (file page 663), p. 7.

## 7.5 Before the Spruchkammer, May 1947<sup>394</sup>

Ruppercht's Spruchkammer chairman was Dr. Klaus Krain, with six "Beisitzer" (Assessors), two from the CSU party and four from SPD.<sup>395</sup> In keeping with normal German criminal procedure, the attorneys representing the state (Richard Schönfelder) and the defendant (Dr. Robert Bandorf) took turns presenting their cases to the court but could not object to their opponent's questions or witness' answers in either form or substance, as would be common in the American or British systems. Both lawyers were permitted closing statements. Krain and the Beisitzer, however, could question witnesses directly and Krain was responsible for procedure, maintaining courtroom order, the admissibility and presentation of evidence, and supervising the decisions of the Spruchkammer as a whole. The defendant could be compelled to testify but this was seldom an issue and the court could order named witnesses called by either side to appear.

## 7.6 The defense case

To rebut the determination that he was a Hauptschuldige, Rupperecht's defense trial strategy had to walk a thin line in order to prevail. He had to show remorse for what could be proven

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<sup>394</sup> SM (file pages 647-682)

<sup>395</sup> For a more comprehensive look at the postwar justice situation in Ebersberg specifically, see Karl Dickhof, *Der Landkreis Ebersberg: Geschichte und Gegenwart* (Kreissparkasse Ebersberg, 1995). It is a well-written local history. The Beisitzer were Benno Grabmeier (CSU), Hans Schmidt (CSU), Georg Widera (SPD), Pankraz Mennacher (SPD – who also served as the first postwar Bürgermeister in Glonn), Hans Ziegler (SPD), and Albert Killi (SPD). The Protokolführer was Johann Maria Hinterholzer.

beyond doubt – that he had worked for Streicher for twenty years, that he had drawn caricatures which were antisemitic. The chief difficulty ahead was that he had to simultaneously demonstrate his closeness to Streicher while at the same time making it clear that he disowned the publisher's philosophy, ideology, sexual deviance, and actions. The first part, his proximity to Streicher, was essential to emphasize that he only worked under direct orders and never freelanced his art to represent his own antisemitism. Indeed, he had to show that he repudiated antisemitism in any form and acknowledge what he learned since the war about what the Nazi regime had done. Specifically, Rupprecht had to forcefully reject the editorial policies of *Der Stürmer* and make it clear that his work on the paper and in the affiliated books was done under a terrible misapprehension of what was going on in Germany at the time. To best complete his argument, Rupprecht needed to suggest that he was an active resistor to both Streicher, *Der Stürmer*, and the Nazi state. In sum, Rupprecht had to nimbly navigate the obstacles in front of him and chart a course that would play to the presumed attitudes of the court. An intelligent defendant might have managed it; Rupprecht instead steered his ship onto the sharp rocks.

Prosecutor Schönfelder made his case in a lengthy direct examination of defendant Rupprecht. He had clearly reviewed all the relevant material and memorized what Rupprecht said in the prior interviews. His strategy was to present the defendant with factual evidence that could not be denied by a reasonable person and see what Rupprecht did with it, counting on him to be as ridiculously evasive and untruthful as he had been before.

Under questioning, Rupprecht said:

- 1) He had never seen anyone wearing a yellow Star of David in Nürnberg. Once in Berlin, maybe.
- 2) He had never listened to Hitler's speeches on the radio. Too busy at work.
- 3) He saw broken glass on the streets at Kristallnacht in 1938 but had heard it was in retaliation for Americans boycotting Germans, and this was a "battle of world views."
- 4) He did not realize that *Der Stürmer* incited hatred against Jews.
- 5) He never saw any of the signs in Nürnberg reading, "Eintritt für Juden verboten!" or "Verkauf an Juden verboten!" His wife could verify what he did not see.
- 6) He never knew that incitement against Jews was part of the NSDAP platform ("Das habe Ich nie gehört, dass die Judenhetze ein Programmpunkt war.")
- 7) He had only been a "promotional member" of the SS when he donated 1 RM. It was all a clerical misunderstanding.
- 8) When Rupprecht bragged that he had known many Jews and could not therefore be an anti-Semite, Schönfelder asked if he ever wondered what happened to them all. Rupprecht said he did not.
- 9) He said the point of *Der Stürmer* was to express concerns so that Germany would improve. Schönfelder asked if this were so, how did the newspaper masthead "Die Juden sind unser Unglück" and the tagline "Der Jude ist der Teufel in der Welt" make Germany better. Rupprecht could not say.
- 10) Asked if he saw SA groups marching through Nürnberg, Rupprecht said he did. Asked then if he heard them singing, he could not remember. Asked if he would nevertheless

know their song, “Wenn das Judenblut vom Messer spritzt” (If Jewish blood spurts from the knife), he said he did not.<sup>396</sup>

11) He said he served for 27 days in the Kriegsmarine in 1939 before being released. He had no idea how that happened, if Streicher was responsible or if his work for the newspaper had anything to do with it.<sup>397</sup>

And not a word of remorse; in Rupprecht’s mind, he did nothing wrong.

There was more but it went along the same lines. Rupprecht came across as a liar, a minimizer, an anti-Semite who voluntarily drew images designed to promote hatred, and that he profited from this for two decades. He might not have been a long-serving member of the NSDAP but he came across as a disingenuous Nazi who created visual poison and gave his audience a reason to accept the ideas and actions behind the Holocaust. It is difficult to imagine a hearing going more poorly for the defendant than this one did. By contrast Richard Schönfelder’s language in the documents comes across as calm, professional, and in full command of both the specific evidence as well as effectual command of the defendant through artful questioning. He set the moral tone of the proceeding.

When the time came, Rupprecht called unbelievably inept defense witnesses. A neighbor in Aßling testified that he seemed depressed in 1944. Another neighbor said he never saw Rupprecht use the “Heil Hitler” greeting.<sup>398</sup> His aunt Babette Müller testified that they worked in a kosher restaurant (?), that her nephew was always concerned for the Jews, and that he had

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<sup>396</sup> The full lyrics were “Wenn der Sturmsoldat ins Feuer geht/ei, dann hat er frohen Mut/und wenn’s Judenblut vom Messer spritz, dann geht’s nochmal so gut.”

<sup>397</sup> SM, Rupprecht file, , pp. 153-7, verbatim interrogation, 29 January 1947.

<sup>398</sup> Ibid., p. 206, Statement of Stephan Haider, 3 May 1947.

always given money to support them.<sup>399</sup> His wife's friend testified that "Rupprecht told me that he had worked for different Jewish firms," but otherwise offered nothing in exculpation.<sup>400</sup> A Lutheran minister testified that he was a member of the church during the Third Reich.<sup>401</sup> None of his character witnesses offered relevant testimony to the charges he faced. The defense was likewise unable to find a Jew to verify Rupprecht's kindness to them, as no affidavits from them were submitted.

### **7.7 The prosecution's closing**

In his closing remarks to the court, Schönfelder summed up the culpability of Rupprecht, and by extension, Harlan, Hippler, and many others:

"When the defense attorney declares that he cannot believe of crimes as seen in Poland and here in the KZs, then I have to respond: 'I fully agree with your statement.' It is indeed incomprehensible how Germans, how humans, could find themselves ready for such mass murders, could find themselves ready to carry out those orders, and that is the essential thing that is argued today, again and again, that is was an order from above.

According to everyone questioned in all of Germany, there is only one guilty party, and that is Hitler; he can no longer be apprehended, so maybe Himmler, but he is no longer available, either. I emphasize again: what the defendant has done requires clear consideration. There is no denying that he drew caricatures. There is no question at issue about the artistic value of his drawings. The only question is whether or not all these things were triggered by the activity of the defendant at the Stürmer, and whether the defendant is complicit in the whole process or not.

The question must be clarified, and if it is clear, it will show that a sentence of ten years at a labor camp has not been requested lightly. If the defendant was even partially complicit, ten years are nothing. Consider that millions of humans perished in the concentration camps, a large number of them being Jews. Jews and non-Jews had to be killed by other human beings. German people had to find themselves willing to shove living Jews into the cremation ovens.

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<sup>399</sup> Ibid., p. 646, Statement of Babette Müller 16 May 1947.

<sup>400</sup> Ibid., p. 207, Statement of Mathilde Rademacher, 30 April 1947.

<sup>401</sup> Ibid., page 261, Statement of Minister Dimmenting, Grosskarolinenfeld, 18 April 1947.



In order to create such people, one cannot assume that people were already like that on their own – it required constant propaganda, and what was rammed into the minds of the people. What we see in the copies of the *Stürmer*. For this purpose, as the defense attorney said, the defendant lent his ‘God-given talent.’ That is why I submitted the sentence recommendation that I did.”<sup>402</sup>

## 7.8 The verdict

Vorsitzender Dr. Krain delivered the verdict on 19 May. Under the provisions of section 15 of the Act. Rupprecht was sentenced to the following:

- 1) 10 years’ work camp for reparation and reconstruction work – political incarceration after 8 May 1945 not counted toward his sentence.
- 2) His assets are seized for reparation. He was left enough money for the basic necessities to provide for his family. Future income during the 10 years is subject to forfeiture, as well.
- 3) Permanently banned from public office, including notary public, or any kind of attorney.
- 4) Loses all eligibility for his pension.
- 5) Loses right to vote, be elected, and right for any political activity or to become a member of a political party.
- 6) Not allowed to join a union or any kind of professional association.
- 7) For 10 years, he was not allowed a) to work as an independent contractor in a company or any kind of controlling position in a company, not even partially. B) not allowed to be self-employed except as a simple laborer; c) not allowed as teacher, pastor, journalist, author, radio commentator.

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<sup>402</sup> Ibid., page, 683-9, Schönfelder statement, 19 May, 1947.

- 8) Limited where he can live and can at any time can be called in for community service work.
- 9) Loses all titles, degrees, licenses, and cannot own a car.<sup>403</sup>

In the reasoning behind the decision, Krain reviewed Rupprecht's defenses (i.e., not an anti-Semite, only worked for economic reasons, etc.). The Spruchkammer rejected them. Instead, it found that the defendant:

"Over the years, despite the economic miseries he claims, could have changed his employer had he shown any development of character, but he did not try. His mercenary mentality to be ready for anyone who pays, was distinctly visible in his deposition on 29 January 1947. Certainly he lied when he said that he did not know about the propaganda because he never read the *Stürmer* or that he didn't know what Hitler said because he didn't own a radio, and never saw anyone wearing the Star of David. If he claims to be as artistic as he said, it should have been quite obvious what was going on around him."

...the Chamber is convinced that Rupprecht's unscrupulous work was directed because he believed in the Thousand Year Reich and never imagined that he would be held responsible for what he did."<sup>404</sup>

Clear to the court, Rupprecht put forward a pattern of lies. His attorney (Dr. Zippfel) was found to have presented false evidence before the Chamber (a forged cartoon supposedly from a British magazine with anti-Nazi figures).

"The Chamber is convinced that the lack of scruples was rooted in his firm belief in the Thousand Year Reich and therefore his belief that he never expected to be held accountable for his actions or have to justify them...when Chamber decided on punishment, it not only took into account his NS ideologies (which he influenced for the whole country) but also his character and lack of remorse for what happened. Because of that, the maximum sentence allowed under the law, is barely enough."

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<sup>403</sup> SM (file pages 85-93) Rupprecht decision, 19 May 1947.

<sup>404</sup> Ibid., page 133.

Rupprecht's reckoning did not last long. Already in May 1949, less than two years after he arrived at the Arbeits-und-Festhaltungslager Eichstätt, his sentence was reduced to six years on the order of the Bavarian Minister for Special Tasks.<sup>405</sup> Minister Loritz had evidently inquired because the Ebersberg prosecutor then sent a copy of the Spruchkammer decision directly to him. From the record it seems unclear whether Rupprecht spent all his time at the camp. As of May 1950, the Hauptwachmeister of the Aßling Landpolizei reported that Rupprecht had angina (chronic sore throat variety) and should not be sent back to Eichstätt.<sup>406</sup> A medical diagnosis of pharyngitis follows, and then a flurry of motions and letters between the state ministries, Philipp Rupprecht, Frau Berta Rupprecht, and the work camp authorities. It had an effect; on 2 August, the Minister für Politische Befreiung ordered his release date moved up to 24 November.<sup>407</sup> The commandant at Eichstätt objected and noted, correctly, that Rupprecht had not even served a quarter of his already-reduced sentence.<sup>408</sup> The Minister was not swayed, and at that point the Minister für Sonderaufgaben became involved again, adjusting the release date to 23 October.<sup>409</sup> For committing what the Spruchkammer Ebersberg recognized as a Crime Against Humanity, *Hauptschuldige* Phillip Rupprecht served slightly less than three years in a camp fifteen minutes from his family home.

As might be expected, the case did not end there. In early 1949, while he was still incarcerated, he appealed to the Berufungskammer with allegations that the judges in his proceeding were

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<sup>405</sup> Ibid., page 530, Lagerleiter Oberinspektor Hoffmann to Minister für Sonderaufgaben, 4 May 1947.

<sup>406</sup> Ibid., page 565, Hauptwachmeister Dauner to Camille Sachs, 10 May 1950.

<sup>407</sup> Ibid. (file page 467), Staatssekretär to Eichstätt, 2 Aug 1950.

<sup>408</sup> Ibid. (file page 468), Hoffmann to Minister, 29 Sept 1950.

<sup>409</sup> Ibid. (file page 473), Minister to Hoffmann, 23 Oct 1950.

prejudiced against him. Justizrat Dr. Kollmann disagreed, and then went on at length to explain that Rupprecht was lucky to have only received the penalties that he had.<sup>410</sup> After the defendant's release, the case went silent for a time, only to be resurrected in 1950 by his new, different attorney, Dr. Ferdinand Zilcher of Nürnberg. Writing to the Kassationshof in München, Zilcher said Rupprecht's classification as a Category I offender was unjust, and he should be a Category II or III, since 1) he was removed from political life in the Third Reich and 2) some Gauleiters were being released, so Rupprecht should be also. Just because he drew "ugly pictures" does not mean he supported National Socialism or had any extraordinary propaganda value. Plus, there was nothing special about them; "in all civilized countries of the world, Jewish caricatures are the order of the day at all times." No one worried about this before 1933 and even fewer people worried about the terrible caricatures of Germans.<sup>411</sup>

"Phillip Rupprecht was allowed during the Weimar Republic to draw such nasty pictures. Naturally, he was allowed to draw them during the Nazi time. All of a sudden now, after the Nazi time, it is supposed to be a crime so bad that Rupprecht had to be incarcerated for six years."<sup>412</sup>

It is worth noting that Dr. Zilcher and his wife Edith were themselves the subject of a civil proceeding for appropriating the house of a Jewish family, Jakob and Anna Gutmann, who fled Nürnberg in 1936.<sup>413</sup>

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<sup>410</sup> Ibid. (file page 29) , Kollmann to Rupprecht, 25 Mar 1949.

<sup>411</sup> Ibid. (file page 50), Zilcher to Kassationshof, 8 Feb 1950, p. 3.

<sup>412</sup> Ibid., p. 4.

<sup>413</sup> <https://www.archivportal-d.de/item/IOFONM7BQRPOEF2JGSAVBOCMQ4PPUZRH>. The Gutmann's finally made it to New York and their twin sons returned to see their former home at 75 Rankestraße in May 1945 as sergeants in the US Army. The Zilchers kept the house.

The timing between this appeal and the ministerial decision to commute Rupprecht's incarceration suggest a connection, although this is not reflected in the records. Only that immediately thereafter, Rupprecht started having a persistent sore throat.

The case again went silent until 1954 when his new attorney, Dr. Braun, filed a motion with the Gnadenabteilung der Berufungskammer, asking for a pardon. Rupprecht's sentence was disproportionately harsh and he was damaged by it and cannot now build a new life. The case cost him three rooms of furniture, a dining room set, his car (an Adler), the apartment in München, and an artist's drawing table, valued at DM 450. Before the Währungsreform (currency conversion from the Reichsmark to Deutsche Mark), his family received RM 300 per month in state assistance, now nothing. "Punitive measures should not punish such a previously righteous family."<sup>414</sup>

This produced a response, not from the Berufungskammer<sup>415</sup> but from Abteilung H at the Ministry of Justice (which had just replaced the Ministry for Political Liberation in Bavaria).

Braun was asked to provide details of the Rupprecht family (number, age, education, income, pension, aid, and any fines paid) within the following two weeks.

In March, Braun appealed to the Berufungskammer (again) for a retrial, and in a 4-page plea, told the court that egregious mistakes were made by the Ebersberg Spruchkammer: their expert consultants were not really experts – an expert in the field art aesthetics could not make a determination about caricatures, especially concerning "the problem of the Jews;" that

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<sup>414</sup> SM (file page 66), Braun to Gnadenabteilung, 8 Dec 1954. On 20 June 1948, all currency was switched in the trizone of Allied occupation.

<sup>415</sup> Ibid. (file page 20), Abteilung H to Braun, 4 Jan 1955.

Rupprecht proved his good character by not accepting a house from Julius Streicher; that there was no difference in the Third Reich between a private and state employee.<sup>416</sup> Appeal denied. Braun next tried the Hauptkammer, asking for the Spruchkammer sentence to be overturned and for compensation for the property Rupprecht forfeited because of his manifestly unjust conviction.

Vorsitzender Dr. Becker reviewed the case and noted that Rupprecht requested for DM 21,300 for lost property. Becker concluded the arguments for innocence did not carry any weight; it was clear that Rupprecht was guilty. Examining the appellant's arguments to the contrary, that 1) he was only a caricaturist; 2) he was offered a house in exchange for work but did not take it; 3) that he had no choice; 4) that sometimes he tried to decline certain work; 5) that he was in a subservient position. Becker found instead that it was irrelevant how many others worked at Der Stürmer; the fact that he was offered a house showed how important his position was; 3) he was employed in a private enterprise so no penal sanctions if he rejected commissions and what he might have refused is irrelevant compared with the hundreds of hateful images he did produce. Rupprecht was tried fairly and sentenced fairly for what he did. The appellant did not meet the evidence threshold required by Article 48 of the Befreiungsgesetz. Rupprecht was ordered to pay the costs of the appeal.<sup>417</sup>

In the meantime, Braun had appealed the Berufungskammer denial, and this aspect of the case finally came to a decision in the Senat der Berufungskammer in München. And to Dr. Max

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<sup>416</sup> Ibid. (file page 33), Braun to Berufungskammer, 8 Mar 1955.

<sup>417</sup> Ibid. (file page 22), Becker to Rupprecht, 6 Apr 1956.

Gramich, who had little sympathy for National Socialism and its most famous antisemitic artist.<sup>418</sup>

He first notes Rupprecht's attempt at a new "data dump" but that it has to be relevant and suitable to come to a different decision. Nothing he advances is relevant.

The Hauptkammer already explained that relevant witnesses have been heard. To understand the propaganda motive of his work, it does not take an expert witness for political caricatures. The court is quite capable of determining that from his material. You cannot claim you had no knowledge of the tendencies of the Nazi tyranny. From the beginning, their propaganda was the fight against Judaism here and in the entire world. No one could claim not to have been aware. After National Socialism was in power, it had the extermination first of the economic and cultural and later the physical extermination of Jewish humans as their objective. That is what *Der Stürmer* had to portray to the citizens in word and picture. This effect cannot be denied by any expert witness, especially not after the NSDAP got into power, and after 1935 when the anti-Jewish laws were implemented, or in 1938/39 when the extermination started. The artistic work of the plaintiff in *Der Stürmer* supported the propaganda to exterminate the Jews in an extraordinary way, as is evident in the volume of his work and that even now, twenty years later, is still known and the worldwide effect his products had, especially the ones delivered under his tradename "Fips."

The racial war of the National Socialists – which should not be misunderstood – had as its cause the arrogant and racially-centered Master Race point of view of the Nordic, Germanic race. This had the direct effect that also Slavic and Romanic races were more-or-less categorized as sub-human, and as we saw later, also being treated as such. The race war of *Der Stürmer* and its artists against the Jews had also an effect on other Nordic countries such as Norway, Holland, and England where out of the above-described ideas, anti-Jewish, closely related "movements" to National Socialism developed (Quisling, Mussert, Mosely, and others). The Chamber did not err in the assessment that the plaintiff has given extraordinary support to the NS-tyranny with his work in *Der Stürmer*...since everyone who has witnessed the Thousand Year Reich, has a clear understanding of this, it is not necessary to hear an expert...The plaintiff has drawn significant benefit from the NS-tyranny. He is not accused of that. The chamber is convinced that the plaintiff would not have been offered a house if his work was not to the contentment of the enemy of the Jewish people, Julius Streicher. The declination of the gift of the house out of anti-National Socialist notions is a contradiction in itself for anyone who has seen the work of the plaintiff. The same reasoning applies to the

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<sup>418</sup> Gramich was warned in 1938 by the NS Rechtsanwaltskammer for making fun of judges (document in author's collection).

plaintiff's notion that he declined to do work that was "too hateful" shows he was not so suppressed in his position that he had no choice how to proceed in his work. Plaintiff cannot produce new circumstances that can result in a more favorable sentence."<sup>419</sup>

Rupprecht was running out of legal options. In ministerial response, the government determined that he was prohibited from appealing the sentence of the Berufungskammer. Citing the Befreiungsgesetz (GVBi.S.161), Article 4, Clause 1, Ministerialrat Gernet replied to Rupprecht that he could likewise no longer ask for a Spruchkammer decision to be reviewed and negated.

Not entirely surprising, considering it was in response to a Rupprecht diatribe that revisited his usual defenses and added commentary – with exclamation marks (!) "Bavarian justice has seriously sinned!" and that the judicial philosophy was "We do what we want!"<sup>420</sup>

The final episode, a short one, happened in March 1957, ten years after his Spruchkammer proceeding and 35 years since Rupprecht began drawing hate-inspiring caricatures for *Der Stürmer*. Berta Rupprecht wrote to the Bavarian Ministry for Justice from the family home at Grafing b.München, saying that Staatsanwalt Dr. Knirsch recommended she ask for a pardon (*Gnadengesuch*) on her husband's behalf; he could not ask himself, she wrote, because that would mean admitting to the legitimacy of his sentence, something he could not do.<sup>421</sup> She described her circumstances as

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<sup>419</sup> SM (file pages 25-28), Gramich to Rupprecht, 18 July 1956.

<sup>420</sup> Ibid. (file pages 10-12), Rupprecht to Staatsministerium für Justiz, 22 November 1956. Respectively, "Die Bayerische Justiz hat schwer gesündigt!" and "Wir machen was wir wollen!"

<sup>421</sup> StPO §452 permits pardons for those cases under federal jurisdiction, but the Länder have equivalent authority in their region. Authority in those cases vary with the individual Land; some with the Minister-President or Minister of Justice and lesser cases to the Staatsanwaltschaft. In a painful irony, Nazi Germany likewise had a nominal



“unbelievable.” Her husband had been in internment camps for six years and she had suffered although not being connected in any way to a crime. She asks the Minister for land seized after the Spruchkammer decision. It was purchased during their marriage from money willed from her father. Philipp Rupprecht, she says, had an accident in the Eichstätt Arbeitslager and could not work. Also he has heart and pulmonary issues. She included a list of loans and asked for the land or money or both.<sup>422</sup>

Six months later, the Ministry for Justice ordered the property in Hersbruck returned to Berta Rupprecht, citing Article 53 of the Befreiungsgesetz.<sup>423</sup> That is the last document in the Rupprecht file, except for one thing. On 4 April 1949, during the time that Rupprecht was supposed to be in the Eichstätt workcamp serving his sentence for fueling antisemitic hatred, the *Neue Berliner Illustrierte* came out in East Berlin. The back page was devoted to political satire, usually cartoons. In the upper left corner, holding a tiny, roaring British lion, is the stereotypical fat Jew sitting on a bag of money. The cartoon is unsigned but it is identical to Rupprecht’s style. His judicial file includes the magazine but no indication that the authorities devoted resources to determine whether Rupprecht’s incitement and persecution continued while he was behind the wire.

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pardon system which was less-than-effective. See *Das Gnadengesuch, ein Leitfaden für Gesuchsteller* by Regierungsrat Dr. Wolfgang Menschall (Berlin: Deutscher Rechtsverlag, 1941). Articles 52-54 of the Law No. 104, Befreiungsgesetz, which allowed the Land Minister for Political Liberation full pardon powers, provided many of those convicted by the Spruchkammer a reasonably easy path to civil restitution, essentially sabotaging the system. See also, Die Akte Rosenberg, p. 190.

<sup>422</sup> Ibid. (file pages 7-9), Berta Rupprecht to Bay. Staatsministerium Justiz, 20 Mar 1957.

<sup>423</sup> Ibid. (file page 6), Staatsministerium to Spruchkammer Ebersberg, 10 Oct 1957. Modern Hersbruck has made a public reckoning with its past. The town had a sub-camp of KZ Flossenbürg where an estimated 4,000 inmates – mostly Jews and political opponents of the NS regime – died or were killed.

Rupprecht lived in Starnberg, Stuttgart-Bad Cannstatt, and Grafing bei München after his release, working as a painter and decorator. He died in 1974.<sup>424</sup>

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<sup>424</sup> Carl-Eric Linsler: Stürmer-Karikaturen. In: *Handbuch des Antisemitismus. Judenfeindschaft in Geschichte und Gegenwart*, Bd. 7: Literatur, Film, Theater und Kunst (Wolfgang Benz, Berlin 2015), p. 480.



34. Philipp "Fips" Rupprecht



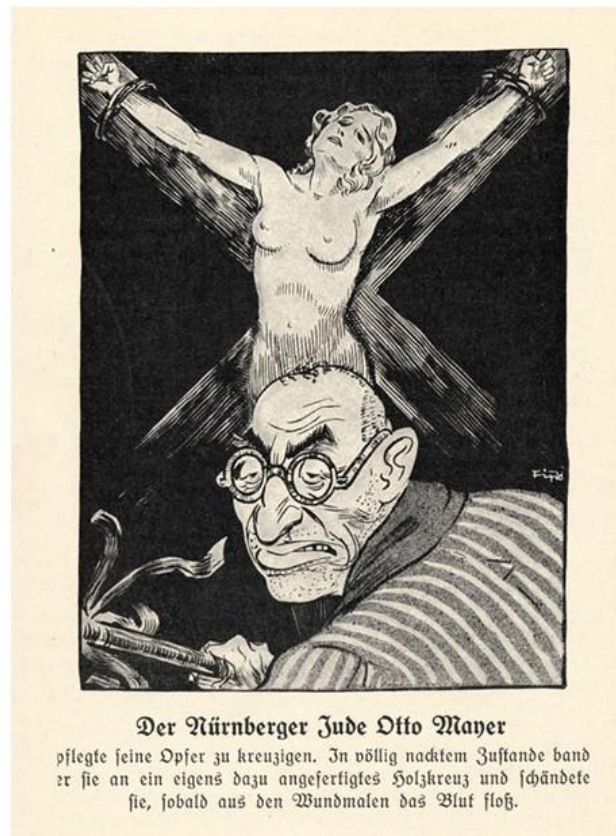
35. Rupprecht wearing a Kriegsmarine uniform during his month-long service in the war effort



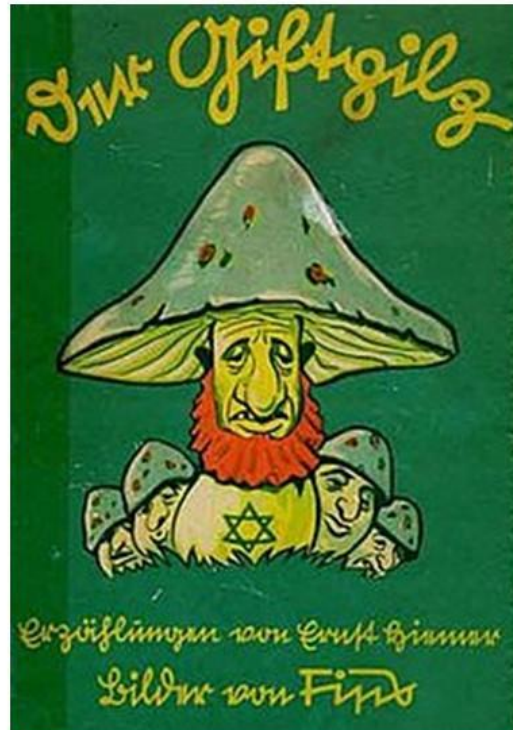
36. Rupprecht's comic insert in Der Stürmer, "Zeitspiegel" (Time Mirror)



36. Rupprecht: “For the Jews every person is just a commodity with which he can do his business”



37. Rupprecht: “Otto Mayer used to crucify his victims. In a completely naked condition, he tied her to a wooden cross specially made for the purpose and raped her as soon as the blood flowed from the wound.”

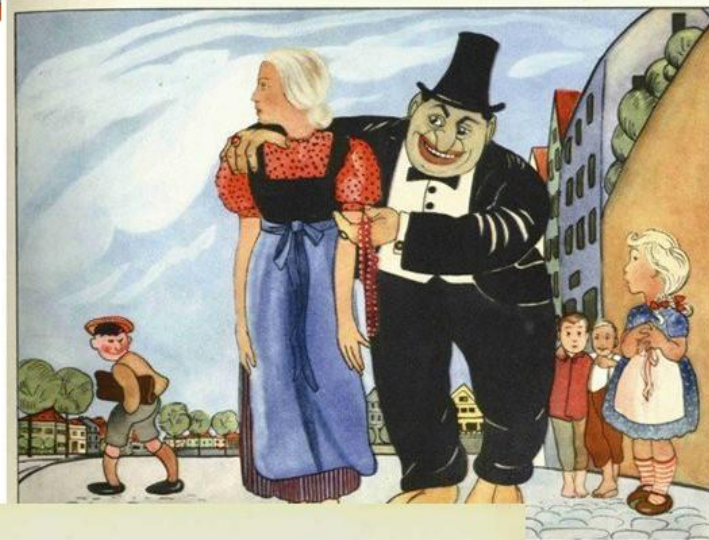


38. *Der Giftpilz*. Text by Ernst Hiemer and illustrations by Rupprecht

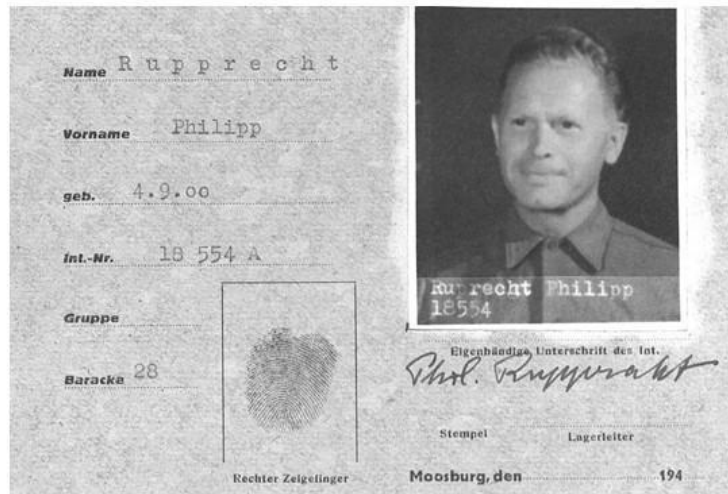


39. Rupprecht illustration from *Der Giftpilz*; A Jew offers candy to German children to entice them.





40. Trau keinem Fuchs auf grüner Heide und keinem Jud bei seinem Eid  
 (Trust No Fox in the Green Meadow and No Jew on His Oath)



41. Rupprecht's interneer card



42. Rupprecht at the Spruchkammer hearing



## **Chapter VIII: United States Supreme Court decisions, the legal standard for incitement, and the problem with persecution**

The history of controlling cases in the modern United States Supreme Court evidences the shift in the way the law considers the definition and practice of criminalizing incitement. In no instance has the court considered a case where a government official or quasi-government official committed the crime but have given serious attention to what incitement means, how the court might define intent, and whether it is necessary to show a causal connection between the words and any subsequent action by others. Additionally, American decisions frequently weigh the First Amendment protections of free speech, an aspect that parallels Art. 118 of the 1919 “Weimar” Constitution.<sup>425</sup> The first, most important point is to define incitement within the meaning of the law, a task that is less easy than first appears.

### **8.1 *Abrams v. United States*, 250 U.S. 616 (1919)**

*Abrams* upheld the 1918 amendment to the Espionage Act of 1917, which made it a criminal offense to urge the curtailment of production of the materials necessary to wage the war against Germany with intent to hinder the progress of the war. The 1918 Amendment of the 1917 Act usually referred to as if it were a separate law, the Sedition Act of 1918.<sup>426</sup>

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<sup>425</sup> <https://www.lwl.org/westfaelische-geschichte/que/normal/que843.pdf>

<sup>426</sup> [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=3903](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3903). Section 3 is the relevant part: Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports, or false statements, ...or incite insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct ...the recruiting or enlistment service of the United States, or ...shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States,

The language of the underlying Espionage Act of 1917 is important, criminalizing the following:

To convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.

This was punishable by death or by imprisonment for not more than 30 years or both.

To convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies when the United States is at war, to cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or to willfully obstruct the recruiting or enlistment service of the United States.

This was punishable by a maximum fine of \$10,000 or by imprisonment for not more than 20 years or both. The Act also gave the Postmaster General authority to impound or to refuse to mail publications that he determined to be in violation of its prohibitions.

## **8.2 Sedition Act of 1918**

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or the Constitution of the United States, or the military or naval forces of the United States ...or shall willfully display the flag of any foreign enemy, or shall willfully ...urge, incite, or advocate any curtailment of production ...or advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years, or both.”

Because the war continued, the Espionage Act was extended on May 16, 1918, by the Sedition Act of 1918, actually a set of amendments to the Espionage Act, which prohibited many forms of speech, including "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States ... or the flag of the United States, or the uniform of the Army or Navy".[10]

On March 3, 1921, the Sedition Act amendments were repealed, but many provisions of the Espionage Act remain, codified under U.S.C. Title 18, Part 1, Chapter 37 and were used as recently as 2019, when Julian Assange and Daniel Hale were both charged under these provisions.<sup>427</sup>

In a related case, *Debs v. United States*, 249 U.S. 211 (1919), the Court upheld the conviction of Socialist Party of America leader Eugene V. Debs, for violating the same Espionage Act. He had produced and distributed the pamphlet "Antiwar Proclamation and Program." While in prison serving his sentence, Debs ran for president (his fifth attempt) in the 1920 election, receiving 3.6% of the vote.<sup>428</sup> The justices were not of a mindset to favor either disruptive actions in the middle of a war or from either the Socialist Party or anarchists, in particular.

### **8.3 The facts in Abrams**

The police arrested Hyman Rosansky and six other defendants, part of an anarchist group in lower Manhattan, after Rosansky threw leaflets out a 4<sup>th</sup> floor window in August 1919 to the crowd gathered below. The leaflets, partially in Yiddish, attacked the Wilson Administration for their

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<sup>427</sup> [https://www.washingtonpost.com/local/legal-issues/wikileaks-founder-julian-assange-charged-with-violating-espionage-act/2019/05/23/42a2c6cc-7d6a-11e9-a5b3-34f3edf1351e\\_story.html](https://www.washingtonpost.com/local/legal-issues/wikileaks-founder-julian-assange-charged-with-violating-espionage-act/2019/05/23/42a2c6cc-7d6a-11e9-a5b3-34f3edf1351e_story.html)

<sup>428</sup> <https://uselectionatlas.org/RESULTS/national.php?year=1920> and Morgan, H. Wayne, *Eugene V. Debs: Socialist for President* (Syracuse: Syracuse University Press, 1983) for full treatment of a fascinating bit of American political theater.

support of the Russian Provisional Government during WWI and attack on the Bolshevik government after the Armistice. The leaflets had been printed at a basement room rented by named defendant Abrams. Defendant Jacob Schwartz died at Bellevue Hospital while incarcerated, leaving six defendants to face trial.

The trial concluded on October 23, 1919. Gabriel Prober was acquitted; Hyman Rosansky, who had informed on the others, was convicted and sentenced to 3 years; Jacob Abrams, Hyman Lachowsky and Samuel Lipman were sentenced to 20 years and a \$1,000 fine each; and Mollie Steimer was convicted and sentenced to 15 years and a \$5,000 fine. The defendants appealed their convictions to the United States Supreme Court.<sup>429</sup>

#### **8.4 Abrams majority opinion**

Justice John Clarke authored the majority opinion. Writing for the Court, he found that the leaflets demonstrated an intent to hinder production of war material, and could not be characterized as mere expressions of political opinion. Quoting translations of a leaflet written in Yiddish and then addressing its dangerous contents, Clark concluded:

“This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the

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<sup>429</sup> Abrams and fellow defendant Mollie Steimer were involved in several different anarcho-communist and anarcho-syndicalist movements, some of which advocated violence, and were deported to the Soviet Union in 1921 where they continued their anarchist activities until arrested by the GPU. Steimer was deported to Germany in 1923 where she joined anarchists Alexander Berkman and Emma Goldstein, remaining there until 1933, moving then to Paris until the German invasion, and then to Mexico. Paul Avrich, *An Anarchist Life: Mollie Steimer (1897-1980)*, pp. 4-12. At [http://www.thesparrowsnest.org.uk/collections/public\\_archive/PAR0098.pdf](http://www.thesparrowsnest.org.uk/collections/public_archive/PAR0098.pdf) Abrams was deported to Mexico in 1926, dying in 1953 <https://libcom.org/article/abrams-jacob-aka-jack-abrams-1883-1953>

production of all munitions and other things essential to the conduct of the war."<sup>430</sup>

In essence, the Court concluded that the prohibition against sedition did not violate the defendant's right to free speech and the freedom to disseminate that speech in print. Dismissing the idea that the defendants were concerned only with United States' intervention in Russia and thus not culpable for advocating general sedition, Clark reasoned that the leaflets

"sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battlefield, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe."<sup>431</sup>

The Court held that the leaflets' call for a general strike and the curtailment of munitions production violated the Sedition Act of 1918. Congress' determination that all such propaganda posed a danger to the war effort was sufficient to meet the standard set in *Schenck v. United States* for prosecution of attempted crimes (inchoate offenses), when the attempt was made through speech or writing. Holmes' argument, in dissent, that criminal prosecution required a showing of the specific intent to bring about the particular harm at which the statute was aimed, was rejected by the majority.

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<sup>430</sup> Abrams, p. 623. The leaflet's language was not likely to generate sympathy with the Court: "His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity." And "He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'" Ibid.

<sup>431</sup> Ibid., p. 624.

The Court was also obviously concerned with the fact that the defendants were anarchists and that this might have informed their intent to incite sedition:

“All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and, at the time they were arrested, they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and, of these, three frankly avowed that they were "rebels," "revolutionists," "anarchists," that they did not believe in government in any form, and they declared that they had no interest whatever in the Government of the United States. The fourth defendant testified that he was a "socialist," and believed in "a proper kind of government, not capitalistic," but, in his classification, the Government of the United States was "capitalistic."<sup>432</sup>

Holmes wrote that although the defendant's pamphlet called for a cessation of weapons production, it had not violated the Act of May 16, 1918 and that the defendants did not have the requisite intent "to cripple or hinder the United States in the prosecution of the war" against Germany. The defendants were objecting only to the United States intervention in the Russian civil war. The defendants therefore lacked the specific intent to commit the crime of obstructing the war effort.

### **8.5 Schenk v. United States**

Holmes's three earlier opinions for a unanimous Supreme Court concerned convictions under the 1918 Sedition Act, in the first of which, *Schenck v. United States*, he crafted the "clear and present danger" standard: speech could be punished if it posed a clear and present danger of causing some harm that Congress had the authority to forbid. The defendants Charles Schenck and

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<sup>432</sup> Ibid., pp. 618-9.

Elizabeth Baer had mailed leaflets to men awaiting induction, urging them to resist the draft, arguing that the draft violated the 13<sup>th</sup> Amendment against involuntary servitude.<sup>433</sup> The defendants did not deny that they intended a result – stopping the draft. Since they could have been prosecuted for a crime if they accomplished the intended result, and there was a clear and present danger that they would, they could also be convicted of an attempt to commit the crime of obstructing the draft.<sup>434</sup> Although “the leaflets did not encourage any unlawful activity, nor had any resulted from their distribution, the Court found them to be outside the protection of the First Amendment and upheld the defendants’ convictions.”<sup>435</sup> In a relevant statement to all prosecutions for incitement, the Court noted that “We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.”<sup>436</sup>

The statute only applied to successful obstructions, but common-law precedents allowed prosecution for an attempt. In his opinion, Holmes relied on the common law of "attempts," and concluded without much discussion that an attempt might be made by words as by other means.

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<sup>433</sup> Schenk’s pamphlets urged the readers, “Wake up America – your Liberties are in Danger!” And to “Assert your rights!” It also spoke of the “Moloch of Militarism,” in a reference that was probably too obscure and certainly unwelcome in an America which celebrated the declaration of war on Germany. Helpfully, the leaflet also included the address (1326 Arch Street) and telephone number (Filbert 3121) of the Socialist Party Bookstore and Headquarters, which is where police went to make the arrests.

<https://carlyapamericanblog.blogspot.com/2019/02/ladblog-31-schenck-v-united-states.html>

<sup>434</sup> The defendants were charged under three counts: violation of the Espionage Act, conspiracy to commit an offense against the United States, and use of the mail to circulate material which violated the Espionage Act. *Schenck v. United States*, 249 U.S. 47 (1919) at 249.

<sup>435</sup> Fagan, B., “Rice v. Paladin Enterprises: Why Hit Man is beyond the pale,” *Chicago-Kent Law Review*, Vol. 76, Issue 1 (2000), p. 605. At <https://scholarship.kentlaw.iit.edu/cklawreview/vol76/iss1/12>.

<sup>436</sup> Schenk at 250.

Holmes expressed himself more fully than in his earlier opinions for a unanimous Court concerning the value of free expression, and the reasons for which it might be regulated. However, he had not asked the Supreme Court as a whole to endorse this larger application of the principle in the earlier cases.

It is unclear why or how Holmes altered his views over the course of the weeks between the two sets of opinions in *Schenk* and *Abrams*. Holmes always maintained that he had adhered to the standard for punishing criminal attempts used in the earlier convictions. In his *Abrams* dissent, Holmes first disposed of the argument that the facts in the case supported a conviction under the clear-and-present-danger standard, insisting that a criminal prosecution required proof of specific intent to commit the crime that was charged. He then went on to say, however, that even if the defendants' speech could be punished as an attempted crime, even if "enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper," the sentences of ten and twenty years, followed by deportation, showed that *Abrams* and his friends were prosecuted, not for their dangerous attempts, but for their beliefs. Holmes went on to challenge, not the Court's conclusion, but the Wilson Administration's prosecution of these defendants as a political attack on ideological enemies. Holmes championed the "marketplace of ideas" as the foundation of the constitutional system, not merely the First Amendment, and efforts to suppress opinions by force therefore contradict a fundamental principle of American democracy. All in all, it represents quite a reversal of attitudes from a modern Supreme Court justice.



Although Abrams gets frequent mentions in academic circles, the Supreme Court has largely abandoned citing it in either support or rejection of precedent.<sup>437</sup> The World War I sedition cases, as they were focused largely on an anarchist threat, were overshadowed by new prosecutions under new statutes or fundamental changes in existing laws in the Second World War through current application. Learned Hand, a judge of the Second Circuit Court of Appeals, contributed to the modern dislike of the "clear-and-present-danger" formula by citing it in an opinion upholding the convictions of the leaders of the Communist Party; his opinion was upheld by a bitterly divided Supreme Court in *Dennis v. United States* (1951)<sup>438</sup>, and the Supreme Court subsequently avoided use of that phrase, replacing it with a revised formula in *Brandenburg v. Ohio* (1969), holding that speech can only be prosecuted as an attempt if it is intended to produce "imminent lawless action."

### **8.6 Holder vs. Humanitarian Law Project**

More recently, the Court has expressly rejected the reasoning of Holmes' Abrams dissent in two decisions. In *Holder v. Humanitarian Law Project* (2010) the facts were similar to those in Abrams.<sup>439</sup> Respondents (HLP, five other organizations, and two individuals) had offered training, advice, and other verbal assistance to the Kurdish PKK and Sri Lankan Tamil Tigers, organizations designated as terrorist as part of their efforts to "provide human rights and conflict resolution

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<sup>437</sup> See Vincent Blasi, "Reading Holmes through the Lens of Schauer: The Abrams Dissent." *Notre Dame Law Review* 72 (July 1997).

<sup>438</sup> *Dennis v. United States*, 341 U.S. 494 (1951). Dennis involved a conviction against eleven members of the Communist Party of the United States for advocating the violent overthrow of the US government, in violation of the Smith Act. In his majority (6-2) opinion, Chief Justice Vinson wrote that "in each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger." Dennis at 510. *Yates v. United States*, 354 U.S. 298 (1957) later made the Court's doctrine more precise, holding that it was not a violation to advocate for the violent overthrow of the government in the abstract.

<sup>439</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)

training” and were subject to prosecution for attempting to provide material support to terrorist organizations in violation of the 18 U.S.C. § 2339B(a), the USA Patriot Act.<sup>440</sup> The respondents argued, supported by three dissenting justices, that they lacked the specific intent to aid in terrorist acts, and therefore could not be prosecuted for a criminal attempt. At stake was a central question: Whether a federal law that prohibits individuals and groups from giving “material support” to certain foreign organizations designated as engaging in terrorist activities violates the First Amendment. The majority rejected this argument, however, and repeated without citing the majority opinion in *Abrams*, that Congress had the power to determine as it considered proper that all such expressive conduct posed a threat to national security.<sup>441</sup>

In the same year, in *Citizens United v. FEC*, the dissenting judges cited Holmes's argument that the Constitution broadly protects the "marketplace of ideas," but the majority opinion brushed this aside, saying that freedom of expression was an individual right, not rooted in community interests, possessed by artificial as well as natural persons.<sup>442</sup> As the law now stands, it appears that neither the majority opinion in *Abrams*, with its reliance on the clear-and-present-danger formula, nor Holmes's dissent, are authoritative, and while *Schenck* appears to remain valid law as precedent, it is now more common to cite *Brandenburg v. Ohio* for the standard to be applied in criminal prosecutions, except in cases involving national security in which *Holder v. Humanitarian Law Project* governs.

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<sup>440</sup> <https://charityandsecurity.org/litigation/HLP/>

<sup>441</sup> *Ibid.*, pp. 28-34, Chief Justice Roberts writing for the majority.

<sup>442</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

## 8.7 *Brandenburg v. Ohio*

In search of a clear and unambiguous test to determine whether speech is, in fact, that rule comes from the controlling of *Brandenburg v. Ohio* (1969). The justices considered the exact issue, determining that point where words transcended from being idle and essentially harmless to those which threatened the physical safety of others. Also at play was finding the place where speech exceeded the boundaries of constitutional protection.

Clarence Brandenburg, a Ku Klux Klan (KKK) leader in Ohio, contacted a reporter at a Cincinnati television station and invited him to cover a KKK rally that would take place in Hamilton County in the summer of 1964. Portions of the rally were filmed, showing twelve men in robes and hoods, some carrying guns, burning a cross in the continuing legacy of the racist organization, and then making hate-filled speeches. One speaker promised "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken" [sic] against "Niggers," "Jews," and those who supported them. Another orator opined that "our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race," and announced plans for a KKK march ("four hundred thousand strong") on Washington on the Fourth of July.<sup>443</sup> The footage was shown on both a local television station and then nationally. Brandenburg was charged with advocating violence under Ohio's criminal syndicalism statute for his participation in the rally and for the speech he made.<sup>444</sup>

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<sup>443</sup> The parallels between this and the attack on the US Capitol on January 6, 2021 are obvious.

<sup>444</sup> Ohio Rev. Code Ann. § 2923.13

In relevant part, the statute – enacted in 1919 during the first Red Scare – proscribed "advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."<sup>445</sup>

Convicted in the Court of Common Pleas of Hamilton County, Brandenburg was fined \$1,000 and sentenced to from one to ten years in prison. The Ohio First District Court of Appeal affirmed the conviction, rejecting the appellant's claim that the statute violated his First Amendment and Fourteenth Amendment right to freedom of speech. The Supreme Court of Ohio dismissed the case without a written opinion.

Although *Yates v. United States* had overturned the convictions of mid-level Communist Party members in language that seemed suggestive of a broader view of freedom of expression rights than had been accorded them in *Dennis v. United States*, all *Yates* did was to interpret a federal statute, the Smith Act. Thus, *Dennis*' reading of the First Amendment remained in force: advocating that others violate the law, even as an abstract doctrine, could be punished consistent with the free speech clause.

The U.S. Supreme Court reversed *Brandenburg*'s conviction, holding that the government cannot constitutionally punish abstract advocacy of force or law violation. The earlier draft had originally been prepared by Justice Abe Fortas before he was forced to resign in the midst of an ethics

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<sup>445</sup> One of the co-defendants, Richard Hanna, was a member of the American Nazi Party, and in full quasi-Nazi uniform at the rally. <https://mtsu.edu/first-amendment/article/189/brandenburg-v-ohio>

scandal, and would have included a modified version of the clear and present danger test.<sup>446</sup> In finalizing the draft, Justice Brennan eliminated all references to it, substituting instead the "imminent lawless action" language. Justices Hugo Black and William Douglas concurred separately.

The *per curiam* majority opinion overturned the Ohio Criminal Syndicalism statute, overruled *Whitney v. California*, and articulated a new test – the "imminent lawless action" test – for judging what was then referred to as "seditious speech" under the First Amendment:

...Whitney has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

In *Schenck v. United States* the Court had adopted a "clear and present danger" test that *Whitney v. California* subsequently expanded to a "bad tendency" test: if speech has a "tendency" to cause sedition or lawlessness, it may constitutionally be prohibited. *Dennis v. United States* used the clear and present danger test while still upholding the defendants' convictions for acts that could not possibly have led to a speedy overthrow of the government.

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<sup>446</sup> Fortas was a Supreme Court Justice for slightly less than four years; he resigned in 1969, following disclosure of an arrangement with financier Louis Wolfson for a presidential pardon from President Lyndon Johnson in exchange for a \$20,000 per year fee. Wolfson did not get the pardon. Bob Woodward, "Fortas Tie To Wolfson Is Detailed," *The Washington Post*, 23 January 1977.

The *per curiam* opinion cited *Dennis v. United States* as though it were good law and amenable to the result reached in *Brandenburg*. However, *Brandenburg* completely did away with Dennis's central holding and held that "mere advocacy" of any doctrine, including one that assumed the necessity of violence or law violation, was *per se* protected speech. It may be that principles of *stare decisis* figured in the Court's decision to avoid overruling the relatively recent *Dennis*, but the distance between the two cases' approach is obvious and irreconcilable.

### **8.8 The *Brandenburg* Imminent Danger test:**

The three distinct elements of this test (intent to speak, imminence of lawlessness, and likelihood of lawlessness) have distinct precedential lineages.

Judge Learned Hand was possibly the first judge to advocate the intent standard, in *Masses Publishing Co. v. Patten* in 1917, reasoning that "[i]f one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."<sup>447</sup> The *Brandenburg* intent standard is more speech-protective than Hand's formulation, which contained no temporal element.

While *Brandenburg* did not explicitly overrule the bad tendency test, the Court effectively overruled the earlier formulation. The new *Brandenburg* test effectively made the time element of the clear and present danger test more defined and more rigorous.

Several prominent members of the court authored concurrences. Justice Hugo Black, renowned civil libertarian and First Amendment absolutist, filed a short concurrence indicating his

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<sup>447</sup> 244 F. 535 (S.D.N.Y. 1917)

agreement with Justice William O. Douglas's longer opinion and pointing out that the *per curiam*'s reliance on Dennis was more symbolic than actual.

Justice Douglas's concurrence reflected the absolutist position that only he and Black, among Supreme Court justices, ever fully subscribed to, namely that the phrase "no law" in the First Amendment ought to be interpreted very literally, and that all speech is immune from prosecution, regardless of the governmental interests advanced in suppressing some particular instance of speech. He briefly traced the history of the "clear and present danger" test, illustrating how it had been used over the years since its debut in *Schenck* to dismiss dozens of what Douglas viewed as legitimate First Amendment claims. This represents an extremist position in the American experience with incitement law.

A short section of Douglas's opinion indicated that he might be open to allowing the government greater latitude in controlling speech during time of "declared war" (as distinguished from the then-current Vietnam War), although he only phrased that possibility in terms of doubt (as opposed to his certainty that the clear and present danger test was irreconcilable with the First Amendment during time of peace).

Douglas also pointed out the legitimate role of symbolic speech in First Amendment doctrine, using examples of a person ripping up a Bible to celebrate the abandonment of his faith or tearing a copy of the Constitution in order to protest a Supreme Court decision, and assailed the previous term's *United States v. O'Brien*, which had allowed for the prosecution of a man for burning his draft card. In all these situations, Douglas argued, an action was a vital way of conveying a certain message, and thus the action itself deserved First Amendment protection.

Finally, Douglas dealt with the classic example of a man "falsely shouting fire in a theater and causing a panic". In order to explain why someone could be legitimately prosecuted for this, Douglas called it an example in which "speech is brigaded with action." In the view of Douglas and Black, this was probably the only sort of case in which a person could be prosecuted for speech.

In Black's concurring opinion, he quoted Holmes' dissent in an earlier case, *Gitlow v. People of State of New York*<sup>448</sup>, and drew a clear connection between the speech and the proximity of action – and intent:

"The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."

The *Brandenburg* test was the Supreme Court's last major statement on what the government may do about inflammatory speech that seeks to incite others to lawless action. It resolved the debate between those who urged greater government control of speech for reasons of security and those who favored allowing as much speech as possible and relying on the marketplace of ideas to reach a favorable result, leaving the law in a state along the lines of that which Justices Louis Brandeis, and, post-Schenck, Oliver Wendell Holmes advocated in several dissents and concurrences during the late 1910s and early 1920s.<sup>449</sup>

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<sup>448</sup> *Gitlow v. People of State of New York*, 268 U.S. 652, 45 S.Ct. 626, 69 L.Ed. 1138

<sup>449</sup> For a thoughtful discussion, see Michael J. Sherman, "Brandenburg v. Twitter," 28 *Geo. Mason U. C.R.L.J.* 127 (2018). [http://sls.gmu.edu/crlj/wp-content/uploads/sites/16/2019/02/GMC202\\_crop-1-1.pdf](http://sls.gmu.edu/crlj/wp-content/uploads/sites/16/2019/02/GMC202_crop-1-1.pdf)



The *Brandenburg* test remains the standard used for evaluating attempts to punish inflammatory speech, and it has not been seriously challenged since it was laid down in 1969. Very few cases have actually reached the Court during the past decades that would test the outer limits of *Brandenburg*.<sup>450</sup> Much recent discussion has occurred on the possible application of the *Brandenburg* standard if former President Trump should face federal criminal charges for incitement of the January 6<sup>th</sup> insurrection.<sup>451</sup>

### **8.9 *Terminiello v. City of Chicago***

*Terminiello v. City of Chicago*, 337 U.S. 1 (1949), was a case in which the Supreme Court held that a "breach of peace" ordinance of the City of Chicago that banned speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" was unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Arthur Terminiello, a Catholic priest under suspension, was giving a speech to the Christian Veterans of America in which he criticized various racial groups and made a number of inflammatory comments about Jews, Franklin Roosevelt, First Lady Eleanor Roosevelt, Communists, and the people gathered outside protesting Terminiello's speech.<sup>452</sup> There were approximately 800 people present in the auditorium where he was giving the speech and a crowd of approximately 1,000 people outside, protesting the speech. The Chicago Police Department was present, but was unable to keep order. Terminiello was fined \$100 for violating Chicago's

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<sup>450</sup> Clarence Brandenburg later spent sixty days in jail after repeatedly phoning his Jewish neighbors with a antisemitic messages. <https://www.theparisreview.org/blog/2020/01/06/the-upside-of-brandenburg-v-ohio/>

<sup>451</sup> <https://www.crimlawpractitioner.org/post/we-fight-like-hell-applying-brandenburg-to-trump-s-speech-surrounding-the-u-s-capitol-siege>

<sup>452</sup> He referred to the crowd as "bedbugs, snakes, and slimy scum." Terminiello at 49-69.

breach of peace ordinance. He appealed. Both the Illinois Appellate Court and Illinois Supreme Court affirmed and the US Supreme Court granted certiorari.

Justice William O. Douglas, writing for the majority, reversed Terminiello's conviction, holding that his speech was protected by the First Amendment (which was made applicable to the states by the Fourteenth Amendment) but also that the ordinance, as construed by the Illinois courts, was unconstitutional. Douglas explained that the purpose of free speech was to invite dispute even where it incites people to anger; in fact, the provocative and inflammatory content of speech could potentially be seen as positive. Although Douglas acknowledged that freedom of speech was not limitless and did not apply to "fighting words" (citing *Chaplinsky v. New Hampshire*), he held that such limitations were inapplicable under the facts in Terminiello:

The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon*, 299 U.S. 353, 365, 260, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges v. California*, 314 U.S. 252, 262, 193, 159 A.L.R. 1346; *Craig v. Harney*, 331 U.S. 367, 373, 1253. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."<sup>453</sup>

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<sup>453</sup> Terminiello at 7.

Chief Justice Fred M. Vinson dissented on the ground that the jury instruction which the majority objected to had been affirmed by both appellate courts. He felt that the Illinois courts had construed the ordinance only as punishing fighting words – the legal concept that certain words are by their nature, offensive and likely to provoke violence – and as he noted, Douglas’ opinion was a prime case of judicial activism, finding an unconstitutional element that had not been noted either at trial or by appellant’s counsel on appeal.<sup>454</sup>

### **8.10 Jackson’s dissent**

Justice Robert Jackson's dissent was considerably longer and more elaborate than Vinson's or Frankfurter's. Jackson believed the majority was ignoring the very real concern of maintaining public order, and that the majority's generalized suspicion of any restriction of free speech was blinding them to the fact that a riot was occurring at Terminiello's place of speaking. His basic argument was that although the First Amendment protects the expression of ideas, it does not protect them absolutely, in all circumstances, regardless of the danger it may create to the public at large. To underscore his point, Jackson reiterated the testimony given at trial by Terminiello himself, as well as excerpts from the defendant’s speech (which was full of antisemitic remarks, inflammatory comments about various U.S. government officials, and statements praising fascist leaders), in order to demonstrate the environment Terminiello helped create. Jackson made a precise attack on what he saw was the majority’s ignorance of and toleration for incitement:

“But we must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some

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<sup>454</sup> Ibid., 15-18.

speech-making to some mass of people. A street may be filled with men and women and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties...

...The ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it, after the classic example of Antony, and this was not lost on Terminiello. And whether one may be the cause of mob violence by his own personification or advocacy of ideas which a crowd already fears and hates, is not solved merely by going through a transcript of the speech to pick out 'fighting words.' The most insulting words can be neutralized if the speaker will smile when he says them."<sup>455</sup>

Jackson, former lead US prosecutor at the International Military Tribunal, architect of its foundational principles, naturally viewed Terminiello's speech and the violence which surrounded it in terms of the global struggle between fascism and communism in the post-World War II world. He feared that these two groups, dominated as they were by radicals and accustomed to using violent means to propagate their ideology, were a threat to legitimate democratic governments and that the court's decision would greatly reduce the power of local law enforcement to safeguard democracy. He also understood incitement, having seen Streicher in the dock at Nuremberg. Jackson quoted from *Mein Kampf*, to date the only reference to the Hitler work in a Supreme Court opinion.<sup>456</sup> Jackson also noted that without the help of the Chicago Police Department, Terminiello would not have even been able to give his speech and

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<sup>455</sup> Ibid. at 95-101.

<sup>456</sup> "We should not work in secret conventicles but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but by the conquest of the streets. We must teach the Marxists that the future master of the streets is National Socialism, just as it will someday be the master of the state." Ibid. at 74.

that the majority's opinion was not in line with the "clear and present danger" test set forth in *Schenck v. United States*.

Jackson's dissent in this case is most famous for its final paragraph:

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."<sup>457</sup>

Curiously, the same court two years later reached an almost opposite conclusion in *Feiner v. New York*.<sup>458</sup> Irving Feiner, a student, spoke to a crowd from a street corner in Syracuse, NY, encouraging blacks to "rise up in arms and fight for equal rights." He further made disparaging comments about President Harry Truman. Asked three times by police to stop, Feiner was then arrested, charged, and convicted for disorderly conduct. When the case finally arrived at the Supreme Court, Justice Vinson (writing for the majority) held that Feiner was rightfully convicted, not for the content of what he said, but rather for his conduct in "incitement to riot." Citing *Cantwell v. Connecticut*, Vinson noted, "When clear and present danger of riot, disorder, interference with the traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." The court relied

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<sup>457</sup> Ibid. at 108.

<sup>458</sup> *Feiner v. New York*, 240 U.S. 315 (1951)

upon *Chaplinsky v. New Hampshire* (1942) in holding that “fighting words” put the defendant’s conduct beyond the protection of free speech. Justices Black and Douglas, predictably, dissented.

### **8.11 *Hess v. Indiana***

*Hess v. Indiana*, 414 U.S. 105 (1973), was a United States Supreme Court case involving the First Amendment that reaffirmed and clarified the imminent lawless action test first articulated in *Brandenburg*. *Hess* is still cited by courts to protect speech threatening future lawless action.

The facts involved an anti-war protest of more than one hundred people on the campus of Indiana University at Bloomington. The sheriff and his deputies then cleared the streets of the protestors. As the sheriff passed, one of the members of the crowd, Hess, said, "We'll take the fucking street later" or "We'll take the fucking street again." Hess was arrested on the spot and later convicted in Indiana state court of disorderly conduct.

The Supreme Court reversed Hess's conviction because the statement, at worst, "amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech."

*Brandenburg* had clarified what constituted a "clear and present danger", the standard established by *Schenck v. United States* (1919), and overruled *Whitney v. California* (1927), which had held that speech that merely advocated violence could be made illegal. Under the imminent lawless action test, speech is not protected by the First Amendment if the speaker intends to incite a violation of the law that is both imminent and likely. While the precise meaning of "imminent" may be ambiguous in some cases, the court provided later clarification in *Hess v. Indiana* (1973) in which the court found that Hess's words did not fall outside the limits of

protected speech, in part, because his speech "amounted to nothing more than advocacy of illegal action at some indefinite future time," or – as defense counsel suggested, Hess was trying to calm the crowd from immediate action by promising substitute action later, and therefore did not meet the imminence requirement.

As reviewed above, the *Brandenburg* standard is controlling:

Advocacy of force or criminal activity does not receive First Amendment protections if (1) the advocacy is directed to inciting or producing imminent lawless action, and (2) is likely to incite or produce such action.

The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it.<sup>459</sup> But *Whitney* has been thoroughly discredited by later decisions.<sup>460</sup> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

### **8.12 NAACP v. Claiborne Hardware**

In the next Supreme Court incitement case, *NAACP v. Claiborne Hardware Co.* (1982)<sup>461</sup>, the defendants in Port Gibson, Mississippi had instituted a boycott in 1966 of certain white-owned

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<sup>459</sup> *Fiske v. Kansas*, 274 U.S. 380 (1927)

<sup>460</sup> See *Dennis v. United States*, 341 U.S. 494, at 507 (1951)

<sup>461</sup> *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)

businesses but it was not put into effect until 1968, following racial tensions after the murder of Martin Luther King, Jr. and the shooting of a black teenager by Port Gibson police. Field Secretary Charles Evers told his supporters that, "If we catch any of you going into these racist stores, we're going to break your damn neck." This was followed by Evers organizing "Black Hats" or "Deacons" to watch for black customers entering boycotted stores, and those names were published in a black newspaper and read aloud at subsequent NAACP meetings. Several people who violated the boycott were subjected to violence – shots fired into their homes, bricks through car windows, having their tires slashed – but many of these incidents were from 1966 (the date of the earlier boycott) and not after Evers' speech. The dates of other violent incidents could not be dated with specificity. Merchants (who had not been the subject of any violence) sued 146 individuals, the NAACP, and the group Mississippi Action for Progress to recover money damages from the boycott and to legally enjoin any further action.<sup>462</sup>

The trial court found 130 defendants liable, assessed damages at \$1,250,699, and prohibited further boycott activity. The Mississippi Supreme Court affirmed the decision. The US Supreme Court overruled the lower state court, citing the lack of causation between Evers' speech and the violence, which in any case, predated the speech: "The judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made, because those speeches did not incite violence or specifically authorize the use of violence." The

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<sup>462</sup> The case did not hurt Claiborne Hardware's business. It was sold to the national chain Ace Hardware in 1976. <https://www.acehardware.com/store-details/02305>



lesson from the court – unless violence arose as a direct intentional consequence of speech, it is protected expression, regardless of how repugnant the speech might be to others.

### **8.13 *Bible Believers v. Wayne County***

This is the last issue directly addressed by the United States Supreme Court. However, a 2015 case, *Bible Believers v. Wayne County*, heard by the 6<sup>th</sup> US Court of Appeals, the issue before the court was the legitimacy of pre-emptive action by authorities to stop incitement speech before violence can occur. “The scenario presented by this case, known as the “heckler’s veto,” occurs when police silence a speaker to appease the crowd and stave off a potentially violent altercation.”<sup>463</sup> The plaintiffs were (and are) a group of Christian activists who preached hate, directly insulting a public gathering of Muslims at the Arab International Festival in Dearborn, Michigan, some of whom responded with threats of violence against the speakers – thus inciting speech designed to create a violent reaction from the target of the hate speech.

The founder and organizer of the Bible Believers – known as “Israel” – made a point of leading his followers in and among the Muslim group, proclaiming (with signs and speech) that Muslims were damned to Hell and that Mohammed was a false prophet. Officers with the Wayne County Sheriff’s Office removed the Bible Believers from the scene. The group planned to return to the Arab International Festival in 2012 and applied for a permit. The County replied with a letter that reminded the Bible Believers that, under state law and local ordinances, individuals can be held

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<sup>463</sup> *Bible Believers, et al. v. Wayne County, et al.*, No. 13-1635 (6th Cir. 2014), p. 4.

criminally accountable for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace.”<sup>464</sup>

This did not deter “Israel.” His group arrived and engaged in behavior almost certainly designed to provoke violent reaction. One of the Biblical fanatics carried a severed pig’s head into the middle of the Muslim crowd, telling a reporter that, “it would keep the Muslims at bay.” Others shouted via a megaphone that “You believe in a prophet who is a pervert. Your prophet who wants to molest a child.” Signs contained messages that read, “Islam Is A Religion of Blood and Murder” and “Jesus Is the Way, the Truth and the Life. All Others Are Thieves and Robbers.” The festival-goers responded by throwing bottles and other debris, and shouting back at the Bible Believers. Police eventually threatened the Christian group with arrest if they did not immediately leave. “Israel” and his followers later filed suit in the United States District Court for the Eastern District of Michigan, claiming violations of their First Amendment rights to free speech and free exercise of religion. Israel lost in District Court and the case was appealed to the full 6<sup>th</sup> Circuit.

Leaving aside the non-relevant First Amendment issues, the court decided in favor of Bible Believers, holding in part that, “the hostile reaction of a crowd does not transform protected speech into incitement.” Specifically, the Christian evangelists were not advocating violence or a crime, and therefore the speech did not rise to the level of inciting or intending violence.<sup>465</sup>

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<sup>464</sup> Ibid.

<sup>465</sup> Since this case, Ruben “Israel” Chavez has turned his attention to attacking LGBT groups in the United States and Canada, in addition to seditious attacks on the United States government; the Bible Believers is on the Southern Poverty Law Center’s list of hate groups. He currently has a YouTube channel to spread his message, in addition to various social media platforms. <https://loveisgreatercollective.wordpress.com/ruben-israel-chavez/>

The court ruled that, “In this opinion we reaffirm the comprehensive boundaries of the First Amendment’s free speech protection, which envelopes all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation.”<sup>466</sup> Inciting speech, therefore, must directly encourage violence or lawlessness – and as *Brandenburg* specifies, it must be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Indeed, the decision requires the government NOT intervene to prohibit hateful but protected speech unless there is a clear showing of intent to incite violence and that violence occurs.

#### **8.14 State of the law on incitement**

In short, the American courts require the following to determine if criminal incitement occurs: spoken or written words of a character likely to cause others to act, the speaker must clearly intend that criminal action happens, and the action must actually occur. While the key words, likely and intend are situationally dependent and cannot avoid some subjective judicial interpretation on a case-by-case basis, it does present a commonsense legal framework for international criminal law – where the test(s) for inciting speech is anything but straightforward and clear.

Keeping in mind the *Brandenburg* test (as clarified in *Hess*): Advocacy of force or criminal activity does not receive First Amendment protections if (1) the advocacy is directed to inciting or producing imminent lawless action, and (2) is likely to incite or produce such action. Since the Supreme Court is yet to expand its definition and test for incitement to incorporate incitement

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<sup>466</sup> Ibid.

by images, it is impossible to know with certainty how that might be interpreted against the wording and spirit of the Constitution. How then might the cases of Harlan, Hippler, and Rupprecht fare if a court were to expand the rule to images as incitement?

### **8.15 German cases under *Brandenburg* analysis**

Using precisely the test an American trial court would follow, it is possible to apply the defendant's actions to the legal test and determine whether those actions would today result in a conviction in US Federal District Court, with the court treating images as potentially inciting words. Note: this is a novel approach. As of the writing, no case with analogous facts has been ruled upon.

#### **Harlan**

Harlan would probably pass the *Brandenburg* test as incitement yet fail on the charge of persecution. His film is undeniably antisemitic and seems to endorse – in terms of the fictional plot as set out by his screenplay and the charged visual images which appear on screen – vigilante violence at the moment where the mob cries out for the rapist Jew. The film's coda reminds the audience to rid German lands of Jews as heritage, cultural wisdom, and self-protection. Yet, the movie *Jud Süß* remains just shy of encouraging the audience to murder Jews or put themselves forward as accessories to murder, enslavement, or any of the other individual charges adduced at the IMT, NMT, or the Statute of Rome. Even in the light most favorable to the prosecution, one could not make the case that even if Harlan (and Goebbels) intended to incite violence, there is no evidence that they intended it to be imminent. Harlan's

actual and sensible defense is that the movie was a quai-fictional story set to film, with the sole purpose of public entertainment, not meant to be taken literally any more than *Baron Münchhausen* should encourage viewers to ride cannonballs. However, the law also asks what the defendant could reasonably expect the outcome or reaction to be. If there is no evidence that either Harlan or Goebbels viewed *Süß* as predicate to massmurder, and the full measure of the government plan to exterminate did not take place until Wannsee, a year and a half after *Jud Süß* premiered. For their purposes in 1940, simply reinforcing the existing omnipresent propaganda against Jews was enough. In that respect, it did precisely as its creators wished.

### **Hippler**

Like Harlan, Hippler is difficult to assess by *Brandenburg* due to the application of the word "imminent." The images in *Der ewige Jude* are clearly the visual hate speech, accompanied by an equally hate-speech narrative. What did Hippler (and Goebbels, again) intend by this film? Not for Germans to go immediately into the streets and kill Jews, and not incitement to hatred to immediate physical violence. Rather the goal, like with *Jud Süß*, appears to be directed at psychological and social conditioning, to prepare the population for whatever solution the National Socialist authorities would eventually decide upon. They had already taken the necessary steps toward a Jew-free society, using the mechanism of law: disenfranchisement, social ostracism, loss of even basic civil rights, loss of German citizenship, incarceration in concentration camps, sporadic but organized killing both in the camps and without; Jews and others

had already been killed by the first organized and directed incarnations of the Einsatzgruppen in Poland, although this was not made public. Based on when the film was made and the conditions that existed at that time, a solid prosecution case could be made that it was incitement to the deprivation of human rights but not yet to publicly-sanctioned murder, yet it had the effect of preparing the groundwork necessary to accomplish it. The film was certainly discriminatory, defamatory, and aroused hatred in a focused beam of antisemitism.

### **Rupprecht**

Philipp Rupprecht spent two decades promoting hate, practically begging the German population to loathe Jews and regard them as an existential danger to state, culture, livelihood, and morals. As with Harlan and Hippler, it would be difficult to prove Rupprecht intended imminent action to violence or – as his defense would surely contend – he merely wanted others to demand the Jews' exodus. In common law, he could well be guilty of manslaughter for his reckless disregard, for promoting hatred, essentially for supplying motive to anyone who killed afterward, but this would require proof of a causal relationship between his endless drumbeat of hateful images and the person who killed or facilitated the killing of even one Jew. This issue is paramount in the line of American cases on incitement – is uttering the words sufficient or must someone hear the words and do what they understand the words to encourage.

Streicher was convicted on the tribunal's rationale that he explicitly called for Jews to be killed and continued this exhortation even after he knew they were being murdered.<sup>467</sup> By using art, instead of clear, direct inciting words, Harlan, Hippler, and Rupprecht stopped short of explicitly calling for murder. Their messages were more subtle. Only Rupprecht would be within the nexus of incitement, as he continued to peddle antisemitism after Streicher (and by extension, Rupprecht) understood what was happening in the East. Did Rupprecht ever see the stories or speak to Streicher about them? The record does not say. Under *Brandenburg*, action need not follow inciting words, only the court's determination that action was likely to happen. It matters, too, that all three cases were aimed at different social demographics – Harlan toward those who could appreciate a more nuanced antisemitism in artistic message, and with Hippler and Rupprecht at the lower end, appealing to the less-sophisticated information consumer or people who were barely literate.

### **8.16 Application of the standard**

Should the courts regard incitement as a predicate subset or element of persecution? While incitement is defined (by the American courts, at least) to a reasonable certainty, the same is not true for persecution. The term is used many times at the IMT and NMT, yet nowhere does the prosecution or the court explain precisely what it means or suggest universal elements that might be applied to make the determination of whether it exists or not. The tribunal in the Dietrich case comes closest, yet it still falls far short of exactitude:

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<sup>467</sup> Referencing the testimony cited earlier, Streicher's defense was that he did not believe the stories in the *Israelitisches Wochenblatt*, regarding them as Allied/Jewish propaganda.

“It is thus clear that a well thought-out, oft-repeated, persistent campaign to arouse the hatred of the German people against Jews...The only reason for this campaign was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out...These press and periodical directives were not mere political polemics, they were not aimless expression of antisemitism, and they were not designed only to unite the German people in the war effort. Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected. By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews.”<sup>468</sup>

There remains only an application of verbal guesswork and an uneven dose of common sense, hardly an optimal and objective legal standard. What – exactly – marks the crossover point between discrimination and persecution. The intent? The result? The actions? If so, which ones?

This issue is exacerbated by the ICC in *Nahimana*, the case which focused more on incitement and persecution than any other: “The Appeals chamber reiterates that ‘the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).’”<sup>469</sup> This unclear formulation blurs the line

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<sup>468</sup> Ministries Case, pp. 575-76.

<sup>469</sup> *Nahimana et al.* (Media case), ICTY-99-52-A, Appeal Judgment – 28.11.2007, referencing ICTY Statute Article 3(h) and ICTY Statute Article 5(h), which are equally vague. This ambiguity is matched in a number of other international cases, for example Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, p. 209 (Int’l Crim.



between discrimination (which may or may not be illegal) and persecution (which is always illegal). In the ICTY Kupreškić case, the Chamber even said outright, “a narrow definition of persecution is not supported in customary international law” and using the IMT’s broad language that persecution could be understood to “include a whole spectrum of acts...ranging from discriminatory acts targeting...general political, social and economic rights, to attacks on [the] person.” The court attempted to narrow the term, but failed: persecution includes acts such as murder and other attacks, is “commonly used to describe a series of acts rather than a single act,” and “will...usually form part of...a patterned practice, and must be regarded in their context”; “may not, in and of themselves, be so serious as to constitute a crime against humanity”, for example, curtailing rights to participate in social life (e.g., visits to parks, theaters, or libraries).<sup>470</sup> This formulation is little help to prosecutors or judges. The legal definitions incitement, persecution, and discrimination await clarity.

In cases of incitement, as well as persecution, any court must also balance a defendant’s actions against the freedom of expression guaranteed by the US Constitution, the Weimar Constitution,<sup>471</sup> the Grundgesetz of the Federal Republic, the UN Declaration of Human Rights, and hundreds of other controlling documents.<sup>472</sup> *Brandenburg* and *Hess* attempt to locate the

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Trib. for the Former Yugoslavia Feb. 26, 2001), where the court concluded that hate speech not calling for action is not incitement/persecution.

<sup>470</sup> Greg Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, 2017) – citing Kupreškić, Case No. IT-95-16-T, p. 619 n.897.

<sup>471</sup> Article 118.

<sup>472</sup> For German law as it applies to persecution and refugees, see <https://www.loc.gov/law/help/refugee-law/germany.php> and the controlling German high court decision, *Bundesrepublik Deutschland v. Y and Z* from 2012: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0071:EN:HTML>

dividing line between free speech and prohibited incitement of force or violence; this distinction does not yet exist in other courts and in other countries; even in the United States it is not at all a seamless application.

## Chapter IX: Conclusion

The legacy of the Harlan, Hippler, and Rupprecht proceedings is mixed, and persecution by art remains an ongoing debate. Despite an avalanche of Allied administration and the very public evidence of crimes against humanity adduced at the International Military Tribunal, the Nuremberg Military Tribunals, and the many smaller-scale war crimes trials, nothing transformative happened by the legal processes of denazification to either punish what had happened or to serve as a guide for the legal machinery to follow. A handful of perpetrators were inconvenienced, and even fewer served minimal prison sentences. Within a short time, the taint of Nazism vanished, and those who persecuted Jews and facilitated the Holocaust were free and ready to resume their roles in society. Hippler wrote books written for a neo-Nazi audience, Rupprecht returned to making commercial art, Harlan continued to churn out movies with Kristina Söderbaum as his perpetual star, and Taubert became a highly-paid political advisor for governments and industry. The nameless victims, many of them German, paid the lasting price. They were dead, mutilated, or psychologically devastated. The images created by their persecutors did exactly what they were designed to do with few postwar repercussions. Their voices were almost entirely absent from the process ostensibly set up by the Allies to give a measure of justice in payment for the horrible crimes committed against them.

### 9.1 The legal nature of persecution by image

The IMT and NMT recognized the essence of persecution is a knowing act that systematically denigrates or defames persons of another group. By word, image, or deed, persecution makes the victims to be less than human, inferior, and existentially dangerous to “normal” citizens and

the approved culture. Even though Nazi policy toward the Jews was a decades-long evolutionary process which culminated in organized biological extermination as the situation changed, the preparation of the population by image ensured that the only logical outcome was the Holocaust or something like it. Rupprecht's cartoons – accompanied by Streicher's exhortations to destroy the Jewish race – presented only a view of Jews as child molesters, and degenerates. Harlan's Jew rapes an innocent Aryan girl. *Der ewige Jude* led the audience to only one conclusion: All Jews are vermin who destroy the grain of German civilization, the vermin are spreading, and everyone knows what must be done with vermin. This is not a case of accidental persecution or harmless hyperbole; as a matter of law, it can only be persecution as incitement.

The charge of persecution from the IMT and in StGB §130 does not require a causal link between word/image and murder. Persecution exists in law when it happens, regardless of any subsequent nexus. It requires only legally sufficient evidence that the defendants intended to persecute. Abundant evidence, including their own words, existed of these defendants' precise intent to denigrate Jews, defame them, and ostracize them from German society. Whether this was done for genuine ideology or at the behest of others – “only following orders” – is irrelevant, as stipulated in the London Charter, ACC No. 10, and even German criminal law that existed during the National Socialist regime.<sup>473</sup> It also does not matter whether the accused intended extermination as a consequence or that death/harm was reasonably foreseeable.

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<sup>473</sup>Militär-Strafgesetzbuch für das Deutsche Reich [Military Criminal Law manual for the German Reich] §. 47: Wird durch die Ausführung eines Befehls in Dienstsachen ein Strafgesetz verletzt, so ist dafür der befehlende Vorgesetzte allein verantwortlich. Es trifft jedoch den gehorchenden Untergebenen die Strafe des Teilnehmers:  
1) wenn er den ihm erteilten Befehl überschritten hat, oder

The prosecution theme at the IMT was that the combination of different forms of persecution must have poisoned the minds of Germans, that they were shaped by psychological conditioning; citizens were made into killers, accessories to killers, or affected to such a degree as to remain silent when others were killed. While all that is certainly true, it remains an intangible idea which is impossible to prove in a court of law – that such a cause-and-effect relationship existed. This is a frequent and reasonable criticism of Streicher’s death sentence, that causation between his words and the Holocaust was unproven. No murderer stepped forward under oath to testify that but for the poisonous words in *Der Stürmer*, he would not have killed. This argument is entirely sensible but also wrong. Precise detangling of a person’s motivation or willingness to commit a crime is impossible, and single-reason motives seldom exist in the real world. Something – a combination of somethings – turned thousands of otherwise law-abiding citizens into willing participants. If not the words and images of Streicher, Harlan, Hippler, Taubert, Schweitzer, and Rupprecht, then what? That question will likely never have a neat, satisfying answer.

## **9.2 Failure of the systems**

For German postwar courts trying to punish offenders for inciting images, this presented a problem. Other than the statutory wording of §130, the Spruchkammern had no measuring stick and no precedent-based system to first define persecution that they could apply to images and no guidance to determine if the cases met a sensible (and binding) judicial test. They did

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2) wenn ihm bekannt gewesen, daß der Befehl des Vorgesetzten eine Handlung betraf, welche ein bürgerliches oder militärisches Verbrechen oder Vergehen bezweckte.  
*Reichsgesetzblatt*, Nr. 181, Teil I (Berlin: Okt. 1940), p. 1351.

not have ready access to the precedent or legal reasoning of the IMT or NMT but were supposed to be guided by C.C. No. 10.

Spruchkammer Vorsitzender Krimm explained his reasoning in beautifully clear prose – why Rupprecht’s caricatures represented a crime against humanity, the relationship between the image and persecution, and between persecution and incitement. He made a moral argument that was profound. No court outside of Ebersberg ever looked at it. First, because no mechanism existed for printed rulings to be shared in other jurisdictions. Second, because even if it had been available, the legal system did not recognize binding precedent as an integral part of the justice machinery. Third, the ruling in Ebersberg was almost certainly unknown and entirely irrelevant to persecution cases occurring elsewhere; judges and lay court members were tasked with strictly following the law as written, an attitude which fed into pre-existing legal practice from the Third Reich whereby courts did not follow a *stare decisis* practice of looking to other courts for help to interpret the law. Spruchkammern in Baden-Württemberg could not care less what a Spruchkammer in Oberbayern had to say on the matter. Indeed, even a Spruchkammer in another administrative district in Bavaria need pay little attention to what happened in Ebersberg. The Rupprecht decision should be persuasive to everyone. Currently it is persuasive to no one, and that situation is unlikely to change.

The inconsistent results from the Spruchkammern were predictable. There was no place for judicial determination of what persecution meant, what facts did or did not constitute it, or common sentencing guidelines for the crime. Rupprecht was sentenced, Harlan and Hippler went free, Taubert and Schweitzer were not prosecuted at all. Even today, almost eighty years after the fact, and with the establishment of the Bundesverfassungsgericht and a highly-

functional system of Land courts, the precedents of the IMT, NMT, and the Ebersberg Spruchkammer have no place in the domestic legal interpretation of what it means to persecute. The comparison chapter with American courts on the issue of defining incitement illustrates that there is another option.

### **9.3 Evolving goals of the Spruchkammern**

From their inception at the behest of the Allied powers, the Spruchkammern had a somewhat hazy mission amidst changing national and international goals. At first, the Allies wanted them as parallel institutions to pursue the official denazification policy. Allied courts would handle the major offenders while the newly-reconstituted German system dealt with the vast majority of lesser criminals under the guidelines established by C.C. No. 10, which likewise gave authority to the Nuremberg Military Tribunals. While the NMT relied on precedents from the IMT and other NMT cases, this practice did not carry over to the German court system due to a lack of translated, published records, and resentment of the IMT and ACC No. 10 – although the original Allied intention, albeit naively, envisioned a smooth transition.<sup>474</sup> Whereas the IMT and then the American proceedings had the benefit of using those prior decisions to clarify offenses and offender conduct, the still-fractured German system reverted to what it knew best: the statute-based legal system and the criminal code of 1871. The Allied grand scheme was also somewhat schizoid. It alternated between an outcome of pure punishment versus the goal of punishment as a means to rehabilitate postwar German society and inoculate it against the rising tide of Soviet Communism. Punishment and rehabilitation are logically at opposite ends

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<sup>474</sup> John J. McCloy, "Present Status of Denazification," in *Office of the U.S. High Commissioner for Germany, 5th Quarterly Report on Germany. October 1 – December 31, 1950*, pp. 46-55.

of the spectrum. It should have surprised no one that as Germany moved away from World War II, denazification was replaced as a matter of both practice and then policy by rehabilitation and reintegration. This shift was made official by Konrad Adenauer's government and acquiesced to by the United States. There is a sense in Adenauer's position; with the establishment of the Federal Republic in mind, there was politically nothing to be gained from a policy of continuing to purge Nazi elements and keeping that specter alive. Quite the contrary, if new Germany was going to allow past self-inflicted wounds to heal, then the court processes must come to an end. Further, Adenauer needed the enthusiastic support of many who had connections to the Nazi past and had profited from it.<sup>475</sup> This also raises another important aspect – both the Spruchkammer and the national rehabilitation plans were focused on the perpetrators and what their status should be, not on the victims. National German rebranding could not afford a victim-centric approach.<sup>476</sup>

#### **9.4 Denazification system overview**

The Spruchkammern had other challenges.

Think through just the logistical and administrative aspects: Let us say that in 1946, the

Spruchkammer in Kitzingen has a suspect in crimes against humanity by means of persecution.

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<sup>475</sup> The expert on this aspect is Dr Norbert Frei. See *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (München: Beck 2012). The term generally refers to the laws established in the first five years after the Federal Republic was established. There is scholarly and public debate on whether this was a necessary evil, considering the "braunen Biographieanteile" (brown – i.e. SA or National Socialist generally) past of so many citizen. Frei's argument, in part, was that the popular dismissal of the Nuremberg Trials and denazification as "victor's justice" necessarily pushed morality into the shadows, and delayed a national reckoning with the past, and the poisonous mentality of the past, in exchange for Adenauer's short-term benefit which allowed a whole range of Nazis back into the positions of influence and authority. The "Rosenburg" cases are perfect examples of this.

<sup>476</sup>



The prosecution needs to check the NS records but does not have a copy of the membership records of the more than 8 million NSDAP party members, so will have to out-source this research task to the Americans at the Berlin Document Center. Lacking a reserve of fluent German speakers, the Americans themselves subcontracted the administrative duties to German nationals. Some of those people have been improperly vetted. Evidence of crimes does not necessarily exist in the NSDAP lists but might in the records of the SS, the Foreign Ministry, or any of the other hundreds of wartime organizations for which there was no central registry. Many of those documents were deliberately or accidentally destroyed and are woefully incomplete, confronting the Kitzingen court with a series of challenges including but not limited to finding the victims, witnesses, and funding. This was in addition to providing for the processing of other defendants in normal criminal cases unrelated to denazification.<sup>477</sup>

External and internal German politics affected the outcome. While there certainly were people inside postwar Germany dedicated to erasing the stain of the Nazi past and holding offenders to account, they were necessarily in a minority. Although C.C. Law No. 4 specified that former Nazis have no place as judges or administrators in the Spruchkammern, that was a known physical impossibility even before the ink dried on the regulation. Every legal practitioner of any sort during the NS period was necessarily a member of either the NSDAP or one of its affiliate organizations. For the Spruchkammern to function on a legal basis, therefore, former Nazis had

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<sup>477</sup> For example, in Ebersberg in 1947, there were 37,374 people required to complete a Meldebogen. After an initial review 25,726 did not meet the specified criteria. Of the remaining 11,628 – 544 were processed through the Spruchkammer, 3991 fell under the Christmas and 2710 under the Juvenile amnesties. 4403 cases were held over to the next year. The prosecutor was reported as exhausted and ill, and it was necessary to procure a third Vorsitzender. Karl Dickopf, *Der Landkreis Ebersberg, Geschichte und Gegenwart*, Band 4 (Kreissparkasse Ebersberg, 1995), p. 54.

to participate as lawyers and judges – there were not enough former SDs or KPD members with legal training available, given the number of tribunals the Allies knew were necessary. Instead, the system used what it had. Harlan’s judge (twice) was not only a former Nazi but one who had sentenced Hitler’s enemies to death by beheading during his service on the Sondergericht. He had no trouble during his own brief denazification procedure. In the 1930s and 40s, his wife murdered children for the T4 Program yet was officially denazified and kept her medical license. Additionally, the denazification process was almost universally despised by the German population, as the Allies should have expected and well knew.<sup>478</sup>

### **9.5 Move toward forgiveness**

Adenauer’s Vergangenheitspolitik finally led to the passage of Art. 131 GG (the rehabilitation of most civil servants who served Nazi Germany), his championing of the “Spandau Seven,” and his support of Bundestag legislation ending denazification in October 1952, marking the close of the brief window of quasi-accountability.<sup>479</sup> Nazi-connected civil servants poured back into the government but the ineffective process had started well before that in both Germany and Austria. Marianne Turk, a physician in Vienna who killed possibly hundreds of children by

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<sup>478</sup> Tony Judt, *Postwar: a History of Europe since 1945* (Toronto: Pimlico, 2007), p. 58. For example, In 1946, 37% in the US occupation zone said about the Holocaust that "the extermination of the Jews and Poles and other non-Aryans was necessary for the security of Germans" and 1 in 3 in the US occupation zone said that Jews should not have the same rights as those belonging to the Aryan race; In 1950, 1 in 3 said the Nuremberg trials had been unfair; In 1952, 37% said Germany was better off without the Jews on its territory. In 1952, 25% had a good opinion of Hitler.

<sup>479</sup> [https://www.gesetze-im-internet.de/gg/art\\_131.html](https://www.gesetze-im-internet.de/gg/art_131.html) The law required the government to rehire at least 20% from those called “131ers.” Amazingly, it included some Gestapo and SD personnel who, if they had transferred from other branches, were deemed “clean.” Sect. 67. There was not a single objection in the Bundestag, including KPD members. <http://dipbt.bundestag.de/doc/btp/01/01132.pdf>

injection at her Am Spiegelgrund clinic found the denazification process fairly mild. Sentenced to ten years during her trial in 1945/46, she was soon declared incapable of imprisonment due to poor health and released on parole in 1948. Austrian President Theodor Körner remitted the rest of her sentence in 1952. The University of Vienna returned her medical license in 1957. She died in 2002, apparently recovered from her earlier debilitating illness.<sup>480</sup>

SS-Obersturmbannführer Martin Sandberger commanded Sonderkommando 1a of Einsatzgruppen A in Estonia. Units under his direct command murdered more than a thousand people, although Sandberger under oath admitted to “only 300-350.” He was afterward promoted to SD chief in Verona and oversaw the transport of Northern Italian Jews to Auschwitz. Although convicted at the NMT Einsatzgruppen trial and sentenced to death, that did not happen. Instead, his sentence was reduced to life imprisonment by a clemency panel of the US High Commissioner for Germany, at which point German political maneuvering began. Sandberger’s influential father, a retired director at IG Farben, successfully lobbied Bundesrepublik President Theodor Heuss, Federal Minister of Justice Haußmann, and Landesbischof Martin Haug. Carlo Schmid expressed his concern. Sandberger was released in 1958, received his state pension, and died peacefully in a Stuttgart retirement home in 2010.<sup>481</sup> Indeed, denazification became an open joke for the actual killers, let alone for those who contributed to mass-murder by the less physical but just as essential process of persecution by

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<sup>480</sup> [https://de.wikipedia.org/wiki/Marianne\\_T%C3%BCrk](https://de.wikipedia.org/wiki/Marianne_T%C3%BCrk)

<sup>481</sup> <https://abcnews.go.com/International/interview-death-nazi-officer-martin-sandberger/story?id=10380750>

moving pictures or cartoons. If Marianne Turk or an SS-Einsatzgruppen commander had no fear, what judicial danger could possibly threaten Veit Harlan?

Nothing ever did. Harlan benefited from changing circumstances that came from delay. Had his case been adjudicated in 1945 or early 1946, and by the Allies instead of the Spruchkammer, the result might have been different, at least until the Cold War amnesty overcame all other priorities. He went through an expedited denazification hearing, then two trials where the verdict was never in serious doubt, despite the efforts of a rogue prosecutor willing to bring him to justice. Hippler likewise benefitted from a generous denazification classification and avoided a dedicated prosecutor in Ostwestfalen-Lippe because the Spruchkammer did not wish to convict and another prosecutor in Nordrhein-Westfalen because of the bureaucratic judicial shuffling of his case from one jurisdiction to another. The Staatsanwaltschaft München could have ordered his arrest but instead spent months politely requesting his presence to answer questions while Hippler remained in his Berchtesgaden home, refusing to travel. To no one's surprise, any interest in prosecuting him ran out of steam and he remained a free man.

## **9.6 The trajectory of Positivism and German law**

Legal positivism was defined by influential Austrian jurist Hans Kelsen in his *Reine Rechtslehre* as the study of the science of law as separate and independent from morality and notions of ethics. Law (*lex*) does not have any necessary connection with justice (*ius*) and accordingly, what is can be distinguished from what ought to be, making it a calculation that is entirely amoral – neither built on moral principles nor explicitly rejecting them. By separating the 'is' from the 'ought' in legal analysis, positivists divide cleanly any connection of morality and ethics

from jurisprudence. This is separate from the legal theory of the Law of Nature, that the law should reflect the essential human rights granted to every person. German theory in the 19<sup>th</sup> and first half of the 20<sup>th</sup> century inclined toward the positivist ideas of The German School of Historical Law, based on the work of Friedrich Carl von Savigny and Gustav Hugo, which emphasized the historical limitations of the law and stood in opposition to natural law. Savigny approached law as an expression of the convictions of a specific people and the product of individual cultures. Law, according to him, was not grounded in universal principles, but in an organic, growing consciousness of the spirit of the people, the *Volksgeist*, which adapts itself to the evolving needs of society.<sup>482</sup> The effect of this was the growth of a nationalistic spirit in which German law was seen as a privileged and necessary isolate, tailored for the German people and state without recourse to larger, more universal concepts of justice. This mix of existing scholarly foundation and the Nazi *Gleichschaltung* combined to create a decades-long poisoning of the judiciary which had the practical effect of making criminal proceedings less about the victim and more about the relationship of the perpetrator to the law. As legal scholar Aaron Kaufmann wrote, when the National Socialists intruded upon basic rights, the only audible sound was applause.<sup>483</sup> It likewise allowed a convenient means of rationalizing conduct during and after the war, and for finding reasons why the conduct of guilty defendants could be minimized and reconciled to the changed political situation in the postwar world. Indeed, it became essential that this occur. This philosophic rationale had a chilling effect on both

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<sup>482</sup> Yang, Kenny, The Rise of Legal Positivism in Germany: A Prelude to Nazi Arbitrariness? *The Western Australian Jurist*, vol 3, 2012, p. 245. [https://www.murdoch.edu.au/School-of-Law/\\_document/WA-jurist-documents/WAJ\\_Vol3\\_2012\\_Yang---The-Rise-of-Legal-Positivism.pdf](https://www.murdoch.edu.au/School-of-Law/_document/WA-jurist-documents/WAJ_Vol3_2012_Yang---The-Rise-of-Legal-Positivism.pdf)

<sup>483</sup> Arthur Kaufmann, "National Socialism and German Jurisprudence from 1933 to 1945" (1988) 9 *Cardozo Law Review* 1629-34.

Spruchkammern and the criminal proceedings where former Nazis sat in judgement of former Nazis – although not the principal reason the Spruchkammern failed in their task.<sup>484</sup>

### 9.7 Positivism, Natural Law, and the NMT

A significant aspect of the defense argument in Case 3 at the NMT, *The United States of America vs. Josef Altstötter, et al.*, concerned the distinction between Positivism and Natural Law. In what amounted to an extended lecture by Dr. Herman Jahrreiβ, this first defense witness made the argument that the German concept of *Recht* was separate from anything in Anglo-Saxon jurisprudence. Using the term *Sittlichkeit* (morality/virtue), he noted that Positivism solely concerned itself with what was done by the legislature, and neither the judge or citizen should concern themselves with the moral implications beyond it, whether of a subjective or objective nature. Jahrreiβ maintained that this system was, in fact, a better representative of the *Corpus Christianum* (the body of Christ) than the American or British versions. He did not suggest that German jurists operated under a radically different moral compass as individuals but that as an institution, the law was understood only within the Positivist lens. Whatever fault there was belonged only to the government and society, not the judiciary. Indeed, he advanced the rather curious notion that the judiciary used their higher

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<sup>484</sup> See also, Lena Foljanty, *Recht oder Gesetz, Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit* (Tübingen: Mohr Siebeck, 2013). Her argument is that Christian naturalism made a renaissance after WWII as a consequence of maintaining the identities of the lawyers and judges that practiced during the NS-Zeit. It proposes that there was a “null-Stunde” in which legal science reinvented itself and that this was perpetuated in the postwar image. This idea is not without critics, who correctly argue that such a “zero hour” never existed and that since the Nazis also used a version of Natural Law – racism – the Christian Natural Law was a perfect bridge between the two worlds, allowing the same leading legal theorists to rise again and shape the thinking and writings of legal philosophy after the war. See Bernd Rütters, “Recht oder Gesetz? Gründe und Hintergründe der ‚Naturrechtsrenaissance‘ – zugleich eine Besprechung zu Lena Foljanty: Recht oder Gesetz’ (*Juristen Zeitung*, 6. September 2013, 68. Jahrg. Nr. 17), pp. 822-829.

moral sensibilities to alleviate the worst excesses of the Nazi state by standing firm with the *Rechtlichkeit* of their training and traditional exercise of legal norms. As per Jahrreiß, the defendants in the dock were heroes who stood like soldiers at their posts and tried to do justice despite the difficult circumstances.<sup>485</sup>

The German legal philosophy and foundation, based as it is on the Civil Law concept, as opposed to the Common Law framework in Great Britain and the United States, believes that the basic mechanism for even gradual legal change and interpretation in response to evolving social understanding rests with the legislature, not the courts. For example, in the United States, understanding what a law means is a process that goes beyond consulting the wording in the statute. It instead looks to the published decisions of state and federal appellate courts and just as importantly, their reasoning as guided by the principle of *stare decisis*. The court must examine the particular circumstances of a case and then consult rulings from superior courts in that and then other jurisdictions. Precedent is everything. By contrast, the German legal system had a long tradition in an irreconcilable legal world which was necessarily at odds with Allied-imposed norms. The Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1953) were a starting point for the triumph of Natural Law over Positivism but it took a generation more for that to mature in connection with

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<sup>485</sup> Kim Christian Preimel, *The Betrayal: The Nuremberg Trials and German Divergence* (Oxford: Oxford University Press, 2016) p. 267-8. Original at *Trials of War Criminals Before the Nuremberg Military Tribunal under Control Council Law No. 10* (Washington: USGPO, 1949-53), 25-6 June 1947. *United States of America v. Alstötter et al.* ("The Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948). Jahrreiß, a law professor and legal scholar at the Universität zu Köln, assisted the defense of Generaloberst Alfred Jodl at the IMT. During the war, he was part of Akton Ritterbusch, a project examining ethno-geographic and spatial issues in the Reich territories in line with National Socialist ideology. Carl Schmitt was one of his colleagues. He never faced charges in connection with this, and died in 1992. See Ernst Klee, *Das Personenlexikon zum Dritten Reich. Wer war was vor und nach 1945* (Frankfurt am Main: Fischer Taschenbuch Verlag, 2005), p. 282.

German criminal law, procedure, and the prosecution of war criminals that began to gain momentum in the 1980s.

The impact of this on the Harlan, Hippler, and Rupprecht cases is less about the road traveled by German legal philosophy, whether Positivist or Natural Law. The Positivist school inclined judges to see only the statute and not the great swath of gray in between the black and white of individual circumstances; what certainly affected the outcomes in an obvious way was the unwillingness of the criminal processes and Spruchkammern to apply objective justice to their former comrades in National Socialism. Legal philosophy – as opposed to legal practice – played no meaningful role in IMT, NMT, and other Allied courts; defendants were either guilty or not, although as the reality of the Cold War and German sovereignty drew near, and the overwhelming bulk of the cases were shifted to German courts, it was clear that most former Nazis would go free. Left on their own, and with many postwar personnel in the “Rosenburg” Ministry of Justice having earlier served the Third Reich, it was axiomatically certain what must follow. Whether at the federal level or the regional Spruchkammer, the effect was identical; to use an apt German idiom, “Eine Krähe hackt der anderen kein Auge aus.” (A crow does not peck out the eye of another crow). Rupprecht alone had no friends in high places and therefore no one to protect his eye when the time came. Positivism vs. Natural Law played no meaningful role in that more prosaic dynamic; human nature did.

### **9.8 Postwar trials, abrogation of responsibility and the role of accessories**

The NMT Einsatzgruppen Trial, which lasted from 1947-48, brought together comprehensively in one proceeding some of the most of brutal aspects of the Final Solution, the murder of more



than a million victims by the mobile extermination squads, largely in the occupied Soviet Union and Baltic states. Prosecutor Benjamin Ferencz did not call a single percipient government witness, instead allowing the defendant's own words to speak to the nature of their crimes and the criminal motivations behind them. Twenty defendants were convicted. In the verdict, the court drew attention to the statement of SS-Brigadeführer Erich Naumann, commander of Einsatzgruppe B.<sup>486</sup> "On the witness stand whether he saw anything morally wrong in the Führer's order [to exterminate the Jews], and he answered in the negative. He was asked again and he responded emphatically: "I believed the order was correct because in my opinion it was necessary in the course of conducting warfare and achieving the aims of the war." So that there was no doubt about his stance, the court asked whether with his reply Naumann wanted to say that he 'saw nothing wrong with the order even though it included the murder of defenseless people' and he replied, 'Jawohl.' There was no regret from the defendant's statements, only justification and excuse.<sup>487</sup>

West German courts came to a different conclusion than did the NMT. Instead of aligning themselves in a similar manner as the IMT and NMT (and as was clearly stipulated in C.C. Law No. 10), which operated under the basic principle that following orders is not a defense to crime, they went in another direction. Acquittals aside, 91.6% of those Einstazgruppen members tried after the war were judged as accessories, not perpetrators, regardless of the fact that most themselves held the weapons that sent bullets into the brains of helpless men,

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<sup>486</sup> Musmanno, Michael A., U.S.N.R, Military Tribunal II, Case 9: Opinion and Judgment of the Tribunal. Nuremberg: Palace of Justice. 8 April 1948. pp. 137 - 141 (original mimeographed copy)

<sup>487</sup> Nathan Stoltzfus and Henry Friedlander (eds.), *Nazi Crimes and the Law* (Cambridge: Cambridge University Press, 2008), p. 94-5.

women, and children.<sup>488</sup> Instead, it was considered that because they were under higher orders, they had not acted with sufficient initiative when murdering civilians, but were actually only accessories. This argument was adopted in near-universal form, and even the *Deutscher Juristentag* (Association of German Jurists) which criticized it, still ended up defining a murder as anyone who killed without a specific order, anyone who did more than they were commanded to do, and anyone who as commander ordered killings “on his own decision-making authority or his own discretionary power.” The only substantive criticism, a minor one considering the circumstances, was to reject the idea that motivation plays a relevant part. The wholesale legal metamorphosis of murderer into accessory represents a formulation that would be impossible under Anglo-American common law.<sup>489</sup>

### 9.9 German criminal procedure as an accessory

Under German criminal procedure, dating back to codification in the Reich Criminal Procedure Code of 1877, victims (and a victim’s counsel) may join a criminal proceeding, and extension on the traditional state monopoly on punishment. This joined party, the *Nebenkläger*, has the right to be present at hearings and to question witnesses and the defendant.<sup>490</sup> Because the *Spruchkammern* were not courts in the normal sense but rather administrative determinations

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<sup>488</sup> Bettina Nehmer, “Die Täter als Gehilfen? Zur Ahndung von Einsatzgruppenverbrechen,” in Redaktion Kritische Justiz (Hg.), *Die juristische Aufarbeitung des Unrechts-Staat* (Baden-Baden, 1998), p. 645.

<sup>489</sup> German law requires a finding of the lowest motives (*niedere Beweggründe*) which “relate to the act not the actor.” Christoph Safferling, “Public Prosecutor v. Djajic. No. 20/96,” in *The American Journal of International Law*, Jul., 1998, Vol. 92, No. 3 (Jul. 1998), pp. 528-532 (Cambridge: Cambridge University Press) This can have the effect of a finding most favorable to the defendant if the court is unsatisfied that this element is clearly established, despite – in this instance – the defendant being party to multiple murders in Bosnia-Herzegovina. He was instead convicted of being an accessory (*Gehilfe*) by the Bavarian Supreme Court.

<sup>490</sup> StPO §395-402. It covers a range of crimes where this is allowed, from sexual offenses to inchoate crimes, crimes involving bodily harm, etc. *Strafprozessordnung* (StPO) = Code of Criminal Procedure.

with the power to affect civil rights and intern for a fixed period, this was not an aspect in denazification processes against Harlan, Hippler, Rupprecht, or any of the others. It would have given victims an opportunity to testify first-hand about what *Der ewige Jude* meant in real terms, rather than relying on the self-supporting testimony of the defendant or the equally self-serving, and apparently quite persuasive, affidavits from persons whose own conduct during the Third Reich was potentially under the microscope.<sup>491</sup>

### 9.10 Intent, motive, and the German Penal Code of 1871

In Anglo-American law, motive is never an element of the charge – intent is – and the original German 1871 code, Section 211, defined murder similarly as “Wer vorsätzlich einen Menschen tödtet, wird, wenn er die Tödtung mit Ueberlegung ausgeführt hat, wegen Mordes mit dem Tode bestraft.” (Anyone who deliberately kills a person will be punished with death for murder if he has carried out the killing with deliberation).<sup>492</sup>

However, the modern StGB language is different: A murderer under this provision is someone who “kills a person out of a lust to kill, to obtain sexual gratification, out of greed or otherwise base motives, perfidiously or cruelly or by means constituting a public danger or to facilitate or cover up another offence.”<sup>493</sup> Meaning, motive, intent to kill, plus one of the other enumerated

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<sup>491</sup> Perhaps as telling, there was a vocabulary shift that accompanied this period and into the post-1949. “Kriegsverbrecher” (war criminal) became “Kriegsschuldige” (war-guilty) and “Kriegsverurteilten (war-convicted).” Daniel Bloxham, “Milestones and Mythologies: The Impact of Nuremberg,” in Patricia Herberer and Jürgen Matthäus (eds.), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln, Nebraska: University of Nebraska Press, 2008), p. 269.

<sup>492</sup> [https://de.wikisource.org/wiki/Strafgesetzbuch\\_f%C3%BCr\\_das\\_Deutsche\\_Reich\\_\(1871\)#%C2%A7.\\_211](https://de.wikisource.org/wiki/Strafgesetzbuch_f%C3%BCr_das_Deutsche_Reich_(1871)#%C2%A7._211).

<sup>493</sup> Ironically, Nazi judge Roland Freisler of the notorious *Volksgericht* was the architect of the change in wording. Reichsgesetzblatt, Teil 1, 1941, p. 549.

circumstances. Without going into the interpretive specifics or elaborate constitutional history, in practice this definition of murderer, and the subjective test that necessarily goes with it as to the defendant's motive (which relies heavily on the defendant's own statements), allowed in the postwar period the frequent situation where perpetrators who would have otherwise been punished much more severely by the American or British courts, were given comparatively light sentences despite committing horrific acts of homicide. As a pertinent example, at the 1963-65 First Auschwitz Trial, 22 cases went to verdict. Three were acquitted and seven found guilty of murder (of whom one was a juvenile at the time of the offense and sentenced on a different scale); Ten defendants were deemed accessories. Sentences for convicted defendants were from 39 months to nine years.<sup>494</sup>

As a matter of criminal procedure, the law uniquely requires that the defendant have "knowledge of the illegality of the act," so that unlike the Anglo-American understanding that citizens know the law, the German counterpart allows a defendant to offer that they had no knowledge they were committing a crime.<sup>495</sup> This reach a high point (or low point) in cases of doctors and personnel involved in the Aktion T4 euthanasia program. "Doctors were exculpated in the judgments because of what was defined as the general perversion of medicine at the

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<sup>494</sup> See Irmtrud Wojak, Fritz Bauer Institut, "Gerichtstag halten über uns selbst..." Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses (Campus, Frankfurt am Main: Campus, 2001).

<sup>495</sup> §17 StGB: "Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte. Konnte der Täter den Irrtum vermeiden, so kann die Strafe nach § 49 Abs. 1 gemildert werden."

time.”<sup>496</sup> Meaning that the doctors had no clear understanding, given the state of the profession under Nazi oversight, that what they were doing was wrong.

Along the same lines, SS-Unterscharführer Gustav Münzberger, who had served in the SS at the Sonnenschein euthanasia center and later operated a gas chamber at Treblinka, was responsible for forcing incoming Jews inside. To make maximum efficiency with each group to be gassed, he threw children over the heads of adults so as to create more floor space. It was estimated that he was directly involved in the murders of at least 300,000 people. In a Düsseldorf criminal proceeding – the Treblinka Trial – that ran for ten months in 1964-65, he was found guilty and sentenced to 12 years as an accessory, but released after six for good behavior.<sup>497</sup>

The former commander of Einsatzkommando 8, Obersturmbannführer Dr. Otto Bradfisch, was tried in a Munich court in 1961, charged with abetting murder.<sup>498</sup> The unit under his direct supervision killed 8,000 Jews. In their verdict, the judges were honest and forthright in describing the atrocities Bradfisch committed, specifically an action at Mogilev in September 1941. EK 8, with assistance from Police Battalion 316 and Belorussian auxiliaries, transported Russian prisoners and Jews – at least 4,100 of them – to a large trench outside of the town.

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<sup>496</sup> Rebecca Wittmann, “Tainted Law: The West German Judiciary and the Prosecution of Nazi War Criminals” in Patricia Herberer and Jürgen Matthäus (eds.), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln, Nebraska: University of Nebraska Press, 2008), p. 217.

<sup>497</sup> Ernst Klee, *Das Personenlexikon zum Dritten Reich: Wer war was vor und nach 1945* (Frankfurt-am-Main: Fischer-Taschenbuch-Verlag, 2007), p. 424.

<sup>498</sup> Munich I from July 21, 1961, 22 Ks 1/61. Bradfisch held a doctorate in economics from the University of Innsbruck, studied law at FAU and the University of Munich and qualified as an attorney in Munich in 1935 – the same city where he was tried. He was a NSDAP member from 1931 and the SS from 1938. After the war, he lived under an alias until 1953, after which he resumed using his correct name. Bradfisch was a member of the Gestapo before and after his assignment with EK 8.

Bradfish personally killed some of the victims. Despite this, the court reasoned he was not a murderer. It accepted the defendant's claim that he "deplored the execution of Jews and only participated in carrying out the Führer's orders on account of the exigencies of that time, which left him no other way out." Bradfish, therefore, had no independent desire to kill but only did so at the behest of his superiors. "It is a hallmark of the numerous crimes committed during the Third Reich that the responsible Nazi leaders, who had the state's instruments of power at their disposal, carried out the crimes through military or other subordinates in a similar position of obedience as if they were tools, and that the attitude of the subordinates cannot be judged as the 'intention of a perpetrator (*Täterwille*).'"<sup>499</sup> Thus, "there is no indication of a hostile attitude toward Jews on the part of the defendant or of expressions of opinions on the Jewish question." When he killed his thousands of victims, the court decided, Bradfish did not dislike Jews or intend them ill. Sentencing Bradfish to ten years imprisonment as an accessory, the court further noted that the defendant only murdered because he "completely approved of the state at that time," and through no real fault of his own. Bradfish served a total of just over four years in prison before being released early in 1965. He died peacefully in Seeshaupt, Bavaria, in 1994.<sup>500</sup>

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<sup>499</sup> [http://www.gelsenzentrum.de/urteil\\_bradfish.htm](http://www.gelsenzentrum.de/urteil_bradfish.htm). The court was generous with mitigation of sentence: "In favor of the Defendant Bradfish, it was taken into account that he had led an impunity-free life before and after the commission of the actions pending trial in the present proceedings. Furthermore, the fact that he admitted a large part of the external course of events, even though he tried to deny responsibility for the largest executions, could be assessed as mitigating the penalty. He was also credited with having been transferred to Einsatzgruppe B without his intervention and may have obeyed the extermination order primarily because he affirmed the then state out of full conviction and therefore, out of a misunderstood sense of duty, also a criminal instruction of the Believed to owe "Führer" obedience."

<sup>500</sup> Bradfish was sentenced to a further 13 years in Hamburg in 1963 for his transport of Jews to their extermination in Kulmhof in 1944 when he was Gestapo chief at Łódź. Prosecutor Dr. Dietrick Goetz introduced a message where Bradfish asked for a mill with which to grind the bones of the victims. This sentence was

This judicial interpretation – that killers are not murderers, only accessories – continued with the spatter of cases conducted in West Germany which concerned the Nazi past and most recently to prosecutions of now-elderly former concentration camp personnel (Oskar Gröning, et al.).<sup>501</sup> By the same train of legal reasoning, that murder was not necessarily murder, the Hamburg regional court considering Harlan and the Spruchkammern in Hippler's case concluded that incitement was not necessarily incitement. The interpretation makes real what Justice Robert Jackson said in his closing argument at the International Military Tribunal:

It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this Trial as bloodstained Gloucester stood by the body of his slain king. He begged of the widow, as they beg of you: "Say I slew them not." And the Queen replied, "Then say they were not slain. But dead they are..." If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.<sup>502</sup>

### **9.11 Harlan, Hippler, and Rupprecht: persecution by image in perspective**

The official documentation does not establish that any of the three defendants had direct knowledge of the Holocaust at the time they committed their acts. However, their individual roles in preparing the German population to accept antisemitism, participate in it, or consent through silence – persecution through psychological conditioning of the audiences via images – is another matter. Persecution and incitement were essential predicates to Holocaust but also

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concurrent with his existing Munich conviction, so he served no additional time. <https://www.jta.org/archive/two-nazi-officers-sentenced-for-killing-thousands-of-lodz-jews>

<sup>501</sup> Alison Smale, "Oskar Gröning, Ex-SS Soldier at Auschwitz, Gets 4-year Sentence" NYT, 15 July 2015 at <https://www.nytimes.com/2015/07/16/world/europe/oskar-groning-auschwitz-nazi.html>

<sup>502</sup> IMT, 26 July 1946, Day 187, <https://avalon.law.yale.edu/imt/07-26-46.asp>, p. 431.

exist in German and international law as a crime apart from the extermination. To be guilty, the accused need not know anything of Dachau or Auschwitz; they must only have committed acts designed to defame the Jewish people and cause others to hate them.

Hippler was a mid-level officer in the SS but not on active military service; secret state plans for the Jews is hardly the information Goebbels would have communicated to him. His decades-long claim was that he had no role in his own movie, beyond filming scenes from the ghetto that he believed to be for purely documentary purposes; this was a lie. His cinematic work – what little there was of it – before *Der ewige Jude* was generally free from overt antisemitism. Nevertheless, Hippler chose to end his film with Hitler's prophecy (or promise) from January 1939, that if the Jews plunged the world into war, it would result in only the extermination of the Jewish race. *Der ewige Jude* was made after 1 September 1939 – so what point was he making with the prophecy? He was never asked and never answered that question. The only logical conclusion from the images of rats and grain is that he intended for the viewers to further despise Jews, even in the absence of information about the Einsatzgruppen killings in Poland. He was aware of what was already public knowledge: the Nuremberg Laws and the Nazi separation of Jews from German society, concentration camps, and about deportations to the ghettos east. His defense of being an unwitting patsy of Goebbels' machinations and the leadership's plans for racial purging was finally undone by the publication of Goebbels' diaries and the minutes of Hippler's own focus group (used in this dissertation). They show clearly that Hippler's role was that of a mediocre director who eagerly followed Goebbels' lead and was deeply involved in the conception, editing, and production of the most vicious antisemitic film ever made. He had every reason to anticipate the effect on the viewers and their psychology.



Indeed, as he wrote in the years afterward, he was an expert on the use of propaganda and film. His prewar, wartime, and postwar writing leaves no doubt that his deeply-held antisemitism mirrored perfectly the movie's narrative.

Harlan had no record of antisemitism prior to *Jud Süß*, and the remainder of his work for Goebbels did not involve it, although the scripts leaned into themes of overt nationalism and the multiple threads of National Socialist social messaging: sacrifice, *Blut und Boden*, the inferiority of Slavs, and German redemption. His film sends a message that persecutes but not necessarily one that advocates murder. It rather speaks to the need to cleanse Jews from German society, ending as it does with the exhortation that future generations keep true to the necessity to drive them out of German lands because Jews can never be trusted and will inevitably poison their German host. Streicher thought so much of that line that he included it on a cover for *Der Stürmer*. *Jud Süß* did not have to condone murder to do its job; to be effective it had only to reinforce the other, more blatant Nazi propaganda from Hippler and Rupprecht which was more than sufficient to first generate hatred, and then facilitate extermination, even if Harlan did not foresee this outcome.

Rupprecht is in a different category altogether, and more influential than some defendants who stood trial at the IMT and NMT. Eighty years later, no one can quote a famous line from Julius Streicher's speeches or the deluge of his hateful words in *Der Stürmer*. Yet people still frequently reference and recycle the images that Rupprecht created of the stereotypical Jew. The renewal of antisemitism and extremism has given them new life, and they proliferate on the internet. If Streicher was condemned for the psychological conditioning premised on what he wrote and said, what about the graphic artistic depictions that had (and have) still more

recognition? Even illiterate people understand the subtextual ideas that Rupprecht intended – that an alien people are corrupters of humanity, not really persons at all, but a parasitic subspecies fit only for removal and extermination. Rupprecht did this both with and independent from Streicher, so could hardly claim to be a helpless person under orders.

The three cases had different outcomes for a variety of reasons. Although never articulated by them as the cause, the Allies were preoccupied for the brief period between 1945-49 with major offenders whose crimes could be proven without the courts making a subjective, difficult-to-prove determination of what was or was not inciting, let alone when the cases concerned image and not simply hateful speech. Prosecution of actual killers or those who gave the orders for killing was an easier path than asking a less-than-fully-qualified judge at the NMT to grasp as a matter of law that, for example, Hippler intended his audience to hate Jews and then to harm them. As Telford Taylor noted, the idiosyncratic judgments in the twelve NMT proceedings reflected a distinct absence of a common judicial outlook when deciding what constitutes proof of the elements of the crimes.

In the Spruchkammern cases, status mattered. Harlan was famous and regarded by many as a true cinema artist; he had famous and influential friends; his chances of incarceration or serious civil difficulty were negligible. Hippler was an odious character but still had inexplicable support from prominent officials in the Bavarian state and the same film community that rallied around Harlan. They ensured that while he might have to walk a thin line, he was never in mortal danger; he received his *Persilschein*. Rupprecht was essentially a pornographer whose professional output was inextricably linked to the rapid antisemitism of his employer. He had no professional support system and only luckily benefited from policy changes after his

Spruchkammer conviction. When the American and German politicians agreed on the policy of reconciliation and remission rather than punishment, none of the persecutors had anything left to fear.

### **9.12 German penal law**

After C.C. Law 10 returned most legal functions to the German criminal courts, they operated with few alterations under laws and legal procedures of the Penal Code of 1871 and the Code of Criminal Procedure of 1877. While the most obvious Nazi-implemented ordinances that accumulated since 1933 were removed at Allied insistence, the postwar state was left with a cumbersome system that was in no way adequate to address the special circumstances of National Socialist crimes.

However true, this assessment can be misleading and allow for a facile conclusion that the judges and Spruchkammern were victims of the law as written and were just people trying to do their best under difficult, straight-jacketed circumstances. That is false. The depressing truth was that judges and Spruchkammern members who did not wish to impose penalties were able to throw up their hands and blame the legacy of German Imperial law for the unsatisfactory results. In their self-serving rationalization, the iron wording of the legal code was responsible for murderers being deemed accessories, and this was not the fault of an impartial, reformed, denazified, and newly-enlightened judiciary.

In a sense, it permitted the postwar judicial machinery to do the same thing that Hitler did with the Weimar Constitution; using the strict language of the statutes to undermine the very law and spirit that they were sworn to protect. Whereas the then-Reichskanzler availed himself of

the emergency powers granted to the senile and malleable President Hindenburg under Article 48, postwar judges before and after 1949 used Section 211 of the Strafgesetz as the legal fiction to ensure that no serious reckoning occurred for Nazi crimes in that brief window before Adenauer's *Vergangenheitspolitik* became the new norm in the Federal Republic. Likewise, Section 130, which could have been immediately rewritten to accommodate precisely the sort of incitement that Streicher, Hippler, Rupprecht, Harlan, and Taubert purveyed, was only anemically revised from its imperial roots in June 1960, and concerned "Whoever attacks the human dignity of others in a way that is likely to disturb the public peace."<sup>503</sup> Violators were subject to a possible imprisonment of three months and perhaps a fine, with no overt connection to a crime against humanity or the slaughter of millions that was fueled by the incitement in image and word that had taken place a mere fifteen years before. The modern version had to wait until 1994, and even then only carried a maximum penalty of five years.<sup>504</sup>

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<sup>503</sup> BGBl. 1960 I S. 478

<sup>504</sup> Without shifting this topic into a new dissertation on modern German criminal law, it is important to point out that in Germany incitement can be viewed in an alternative manner. As Wibke Timmermann pointed out: "German and Swiss law also distinguish instigation from incitement, using the "private versus public" dichotomy. Instigation requires the "determination" or inducement of the perpetrator – that is, the instigator must succeed in convincing the addressee to take a conscious decision to commit the substantive crime. This approach is commendable for various reasons and deserves to be looked at in greater detail. In German law, instigation (Anstiftung) is penalized in §126 of the German Penal Code (Strafgesetzbuch, StGB): "Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat."

Under German law the reason for punishing an instigator lies in the fact that the instigator, in influencing the will of the perpetrator of the act instigated, is deemed originally responsible for the commission of the main act. At the same time, instigation also constitutes an offense in itself: the crime of instigation has been committed as soon as the instigation has brought about in the perpetrator's mind the decision to commit the crime ("Entschluß zur Tat"). Furthermore, where the person instigated – the main perpetrator – fails to commit the crime the instigator sought to bring about or commits a lesser act, the instigator will be guilty of attempted instigation, punishable under §130 of the German Penal Code, which provides that the attempt to convince another person to commit a crime or to instigate a crime is also punishable. The difference between the crime of instigation and the crime of attempted instigation lies in whether the instigator succeeds in inducing in the perpetrator the decision to commit the crime, in which case the crime of instigation has been committed. For the actus reus of instigation to be complete it should therefore not matter whether or not external circumstances ultimately prevent the commission of the crime. Where the instigator does not succeed for various reasons in causing the perpetrator to

### 9.13 An American alternative

Without at all preferencing one national criminal justice system above another, the introduction of American common law precepts on incitement might have avoided many of the legal pitfalls experienced in the German system when it was forced to denazify the country. As social, legal, and economic norms changed from the 19<sup>th</sup> century, US courts were generally able to react to new circumstances and adjust the law accordingly, first at the trial court level and then percolating up to the US Supreme Court. The written statute in America is not intended to be a perpetual commandment but rather the starting point for eventual judicial review – a principle first espoused in the landmark case of *Marbury vs. Madison* in 1803.<sup>505</sup> The courts at trial level are empowered to make substantive rulings and to go beyond the legislative wording to achieve the more nuanced goal of objective justice. Had this practice been permissible in

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decide to commit the crime and the crime is not committed, he or she would be guilty of attempted instigation and would be punished less harshly. It is submitted that this is sensible, as in such a case the danger of harm occurring is obviously considerably less than where the main perpetrator has made the concrete decision to commit the crime in question. Similarly, where the instigator has made the decision to commit the crime, the danger is present whether or not he or she then goes on to commit the crime or is prevented by external circumstances from doing so. However, as mentioned above, it is clear from the wording of §126 that instigation as such is penalized only where it has been successful, whereas instigation which is not followed by commission of the substantive crime is punished as attempted instigation.

In contrast to §126 and §130, §111 of the German Penal Code punishes the “öffentliche Aufforderung zu Straftaten,” and provides that whosoever publicly, in an assembly or through the distribution of writings, invites others to commit a crime, shall be punished on the same terms as an instigator. The decisive difference between this provision and §126 criminalizing instigation lies in the fact that §111 does not call for another person as “Bestimmungsobjekt” – that is, there is no need for there to be another individual who must be caused selectively to decide to commit the crime. This makes sense, as the danger in public incitement is that it can quickly become uncontrollable, as pointed out above.” Wibke Kristin Timmermann, “Incitement in International Criminal Law, *International Review of the Red Cross*, Volume 88, Number 864, December 2006, pp. 848-9.

<sup>505</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The case originated in a dispute between a failure to deliver letters of Federal appointment from the Adams administration before the inauguration of President Thomas Jefferson. The Supreme Court, in an unexpected move, ruled that the Congressional law that gave them jurisdiction was itself unconstitutional. The decision stated that courts had the power to declare invalid acts of Congress that violate the US Constitution. See summary at [https://www.law.cornell.edu/wex/marbury\\_v\\_madison\\_%281803%29](https://www.law.cornell.edu/wex/marbury_v_madison_%281803%29)

German law at either the Spruchkammern or the various criminal courts, there is every reason to believe in a different outcome, at least in theory. However, even in the American system, there have been a multitude of issues over time when US courts – and juries – decide that justice is best served by maintaining the status quo.<sup>506</sup> Slavery, after all, was validated by the US Supreme Court until a war decided the issue for it. In that respect, certainly, Americans are exactly like their German counterparts in the postwar; if the human beings in the judicial system and in the population at large decide a change is unnecessary or dangerous to the social fabric, then no change occurs, at least in that generation.<sup>507</sup>

The byzantine German formulation for the elements of the crime of murder, and the near-arbitrary difference, on the same set of underlying facts, between murder and accessory, are difficult to reconcile with the Anglo-American common law system. By the same token, a more comprehensive statutory expansion of what constitutes incitement per the Strafgesetz had to

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<sup>506</sup> The recent case of *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al.*, 597 U.S. \_\_\_\_ (2022) is a good example of where a reactionary court overturned seventy years of established precedent.

<sup>507</sup> Note: a prosecutor-student of mine, US Army Major Scott Linger, made an analysis of all military courts-martial from 2006-2009 where the defendant was a US soldier and the victim was either Iraqi or an Afghan civilian. Under the Uniform Code of Justice, accused persons can choose either trial by panel (jury) or a military judge. Manual for Courts-Martial United States, R.C.M 903(a)(2). As compared with the other cases during this timeframe where the defendants overwhelmingly opted for a judge trial (in cases where both perpetrator and victim were American), the numbers during the war reversed themselves, with more defendants selecting the panel, which would presumably be more lenient on a soldier where the victim was a non-US-citizen. That strategy was successful. Of the 31 panel trials, 10 defendants were acquitted, of the remaining 21, 6 were allowed to remain in the service, meaning 61.2% freely walked out of the courtroom. These numbers would look familiar to persons involved in German criminal trials and denazification proceedings in 1948. Scott Linger, "War Crime Abrogation: Will the Army's Failure to Investigate, Try, and Punish its Own Result in the International Criminal Court Doing it for Us?" (Unpublished Master of Laws thesis, 57th Judge Advocate Officer Graduate Course, 2011), p. 9. Major Linger was dissuaded by his superiors from publishing the results. Military law inexplicably allows "following orders" as an affirmative defense, ignoring the IMT precedent which permitted it in mitigation only, not admissible to rebut the charges. R.C.M. 916 (d)

wait decades to come about, and even now, has some of the same issues with adherence to ambiguity as did the previous iterations dating back to 1871.

Making the outcome in German courts all the more tragic was that victims of the Nazi totalitarian state never testified at the Spruchkammern. Hippler and Rupprecht and the others never had to look into the eyes of even one of the millions they harmed. Dr. Heinz Leopold of the organization “Die von Theresienstadt” briefly testified at Harlan’s criminal trial but in such a meaningless way that his evidence was essentially useless. Norbert Wollheim likewise testified at the first trial; realizing the effort was in vain, refused to testify in the retrial.<sup>508</sup> Wollheim's assessment was correct.

#### **9.14 Exceptions to the rule**

While higher German state judicial officials contributed to the denial of justice by bureaucratic obstruction, generous commutations, and pardons, there were several prosecutors and at least one judge who risked their careers to go beyond the Adenauer platform and residual sympathy some felt for fellow former-National Socialists that incited by art. Berufungskammer judge Dr. Max Gramich and Ebersberg prosecutor Richard Schönfelder expressed in profound words what Nazism meant and the crimes it committed through willing helpers. Dr. Ernst-Friedmann Frhr. v. Münchhausen and Dr. Aubert went to extraordinary lengths to make Hippler answer for his crimes, although their efforts were sabotaged. Despite others in the machinery of state and

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<sup>508</sup> In his letter to the court, Wollheim attacked the “degraded the process of cleansing post-Hitler Germany of its criminals who were responsible for its catastrophe.” Norbert Wollheim, “... denn Harlan ist ein ehrenwerter Mann.” [“... for Harlan is an honorable man.”], *Allgemeine Wochenzeitung der Juden in Deutschland*, June 17, 1949, p. 7. His echo of Mark Anthony’s reference to Brutus after the assassination of Caesar is perfectly ironic.

judiciary protecting the defendants, Gramich, Schönfelder, von Münchhausen, and Aubert were, in a very Yiddish sense, *Menschen*.

### 9.15 What might have been

Perhaps the greatest positive legacy contains more than a hint of irony. Of the three defendants discussed here at length, Harlan endured the least. While Hippler spent two years in British custody and Rupprecht two in American custody and another two in a work camp, Harlan never spent a night in jail. His was the most inept prosecution, first resulting in minimal denazification and then criminal acquittal. Yet, if not for Harlan, then there would have been no *Lüth* decision by the Bundesverfassungsgericht in 1958. The essence of National Socialism was the denial of the idea of the individual and submission of human rights to blind adherence to written law and the Führer's will made legal. *Lüth* enshrined the triumph of unalienable human rights in the Federal Republic, an apt rejection of everything the Nazi state and its postwar followers in the Bundesrepublik Deutschland's judiciary represented.

Judging by the situation in the 21<sup>st</sup> century, one could conclude that Adenauer's policy of rehabilitation and reintegration must have worked. Germany developed into a robust democracy and a global economic superpower. German law is respected and leads most countries in the progressive application of international criminal legal principles, to include universal jurisdiction for crimes against humanity. But there were legal and moral casualties from a flawed denazification that was abandoned almost as quickly as it began. In the many Spruchkammer cases studied for this dissertation, there was not a single case where the accused admitted guilt. As a matter of logic, rehabilitation becomes a non-sequitur when none



of the perpetrators accept responsibility and allocute to what they have done. The process became a perfect example of *Dienst nach Vorschrift*, in which the participants in the system do only the necessary amount of work to give the appearance of fulfilling the goal but in reality aim to frustrate it.

### **9.16 Where the Spruchkammern worked**

That said, there were exceptions. The Fritzsche Spruchkammer arguably achieved a more just result than did the well-funded and staffed IMT, using exactly the same evidence. Rupprecht's proceeding identified him as a major war criminal and sentenced him to ten years, although it is likely that he would have been acquitted in an American or British court, based on what happened with Fritzsche. Harlan and Hippler's Spruchkammern went awry for many reasons, but perhaps most significantly because of the lack of legal and political will to convict them. And another important point: the successful Spruchkammern did something unexpected: when looking at the defendant's activities to incitement by image, the decisions make clear that they were less focused on intent but rather whether the accused did what was charged. Secondly, the prosecutors made no attempt to try and show causality between the images and the multitude of crimes that comprised persecution and the Holocaust. By contrast, Harlan's prosecutor became enmeshed in a confusing (and sometimes contradictory) narrative that tried, without success, to prove what was probably beyond the ability of the evidence to establish.

### **9.17 Opportunities lost and found**

At the start, this dissertation aimed to explore the denazification proceedings involving incitement by image to answer a few basic questions: what happened, why, and what was the lasting effect. The answers were surprising and had little to do with the legal processes themselves. The reason that denazification of hate image peddlers often failed the victims of incitement and shielded the perpetrators had everything to do with human nature and the predictable outcome of protecting the members of the homogeneous majority against what are perceived to be the alien. This is precisely the reason why a robust and functioning International Criminal Court is the only antidote, even if profoundly imperfect, to a repeat of what happened and what has continued to happen in settings far removed from postwar Germany.<sup>509</sup>

The Americans enjoyed the first and best opportunity to set a meaningful course. With German sovereignty dissolved under Allied occupation, the United States and Great Britain had ample reason to modify German criminal procedure and courts as they wished, to include changes to the law of incitement by recognizing the validity of charging incitement as an inchoate offense and/or decoupling intent from the elements of the crime. The Allies assumed responsibility and claimed supervisory authority over all denazification until they surrendered this task to German courts; that did not have to rest upon the existing language of the Criminal Code of 1871. Indeed, they could have insisted that ACC 10 become the singular bedrock law under which the Spruchkammer and Land courts operated. The Allies did not.

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<sup>509</sup> In the American system, recent pardons of convicted war criminals (Goldstein, Lorange, and Gallagher) by Donald Trump make the point that this is not by any means a uniquely German phenomenon. <https://www.theatlantic.com/ideas/archive/2019/11/trump-issues-pardons-war-criminals/602140/>

By the same token, German Spruchkammern and criminal courts, under the aegis of the Länder, could have taken the initiative to do the same, a decision that would have certainly met with the approval of the Allied authorities. It might have been a powerful statement and rejection of the National Socialist past. ACC 10 was entirely suited to this purpose, and at least in the Soviet zone, this was sufficient to sustain a guilty verdict in German courts. The German postwar authorities, like their American and British occupation counterparts, made no changes in this direction. Prosecutions for inchoate offenses, like incitement by image, might have been the centerpiece of criminal proceedings against Hippler and Harlan. Alternatively, it was within their power to make new laws that omitted the requirement to show intent in inchoate incitement. However, yet again, the moment passed.

### **9.18 Last thoughts: Kafka**

Thinking about the victims of persecution by image who never received even the posthumous vindication they deserved from the Allied or German denazification process, I am reminded of Kafka's existential short story, *Vor dem Gesetz*. A man from the country wants to access the Law but is blocked before the doorway by a solemn guardian. He spends the rest of his life trying in vain to gain entrance. In frustration, the man asks if he will ever be allowed in and the guardian laconically replies, "Est is möglich...jetzt aber nicht."<sup>510</sup> It is possible, but not now.

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<sup>510</sup> <http://literaryjoint.blogspot.com/2014/02/vor-dem-gesetz-by-franz-kafka-before.html?m=1>

DENAZIFICATION PROCEEDINGS  
in the U.S. Zone

Total registrants	...	...	...	...	...	...	13,416,101
Not chargeable cases	...	...	...	...	...	...	9,746,862
Chargeable cases	...	...	...	...	...	...	3,669,239
Monthly average of new registrations during period							
1 October 1949 to 30 September 1950	...	...	...	...	...	...	13,800*
Cases amnestied by Public Prosecutors' categorization							2,456,731
Otherwise quashed by Public Prosecutors				...	...		252,875
Classifications by Trial Tribunals:							
Major Offenders	...	...	...	...	...	...	1,698
Offenders	...	...	...	...	...	...	22,598
Lesser Offenders	...	...	...	...	...	...	106,995
Followers	...	...	...	...	...	...	487,996
Exonerated	...	...	...	...	...	...	18,571
Amnestied	...	...	...	...	...	...	320,713
Cases to be completed by Trial Tribunals							1,062
Cases to be completed by Appellate Tribunals							678
Inmates of internment camps			...	...	...	...	73
Persons permanently ineligible to hold public office							23,616
Persons restricted in employment				...	...	...	125,510
Subject to confiscation of property				...	...	...	27,587
Persons fined	...	...	...	...	...	...	572,993
Sentenced to Special Labor but not imprisoned						...	30,781

\*Returning POWs and returnees from the East.

Source: John McCloy report, 1950

# APPENDIX: Rupprecht Spruchkammer Decision

59

**Die Spruchkammer**  
EBERSBERG

**Urschrift**

Ebersberg, den 19. Mai 1947

Datum

Aktenzeichen: R 132

Auf Grund des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946 erläßt die Spruchkammer Ebersberg

bestehend aus

1.	<u>Klaus Krahn</u>		als Vorsitzender
2.	<u>Benno Grabmeier</u>	(CSU)	als Beisitzer
	<u>Hans Schmidt</u>	(CSU)	
3.	<u>Georg Widera</u>	(SED)	als Beisitzer
	<u>Fankraz Menzacher</u>	(SED)	
4.	<u>Hans Ziegler</u>	(SED)	als Beisitzer
	<u>Albert Killi</u>	(SED)	
5.			als Beisitzer
6.	<u>Richard Schönfelder</u>		als öffentlicher Kläger
7.	<u>Joh. Maria Hinterholzer</u>		als Protokollführer

gegen Philipp Rupprecht, Künstler  
geb. am 4.9.1900 in Nürnberg, wohnhaft in Assling, Graingerstraße.

auf Grund der mündlichen Verhandlung — ~~öffentliches~~ Verfahren — folgenden

**Spruch:**

Der Betroffene ist: Hauptschuldiger nach Art. 5 Ziffer 6 des Gesetzes.

Es werden ihm folgende Sühnemaßnahmen auferlegt: Nach Artikel 15:

- Der Betroffene wird auf die Dauer von 10 Jahren in ein Arbeitslager eingewiesen, um Wiedergutmachungs- und Aufbauarbeiten zu verrichten. Die politische Haft nach dem 8. Mai 1945 wird nicht in Anrechnung gebracht.
- Sein Vermögen ist als Beitrag zur Wiedergutmachung einzuziehen. Es ist ihm nur der Betrag zu belassen, der unter Berücksichtigung der Familienverhältnisse und der Erwerbsfähigkeit zum notwendigen Lebensunterhalt erforderlich ist. Er unterliegt laufend Sonderausgaben zu einem Wiedergutmachungsfond, soweit er Einkommen bezieht.
- Er ist dauernd unfähig, ein öffentliches Amt einschliesslich des Notariats und der Anwaltschaft zu bekleiden;

**Begründung:**

- Er verliert alle Rechtsansprüche auf eine aus öffentlichen Mitteln zahlbare Pension oder Rente;
- Er verliert das Wahlrecht, die Wahlbarkeit und das Recht, sich irgendwie politisch zu betätigen und einer politischen Partei als Mitglied anzugehören.

6.

F 17 100 1. 47. N/021

6. Er darf weder Mitglied einer Gewerkschaft noch einer wirtschaftlichen oder beruflichen Vereinigung sein;
7. Es wird dem Betroffenen auf die Dauer von 10 Jahren untersagt:
  - a) in einem freien Beruf oder selbständig in einem Unternehmen oder gewerblichen Betrieb jeglicher Art tätig zu sein, sich daran zu beteiligen oder die Aufsicht oder Kontrolle hierüber auszuüben.
  - b) in nicht selbständiger Stellung anders als in gewöhnlicher Arbeit beschäftigt zu sein;
  - c) als Lehrer, Prediger, Redakteur, Schriftsteller oder Rundfunk-Kommentator tätig zu sein.
8. Der Betroffene unterliegt Wohnungs- und Aufenthaltsbeschränkungen und kann zu gemeinnützigen Arbeiten herangezogen werden.
9. Er verliert alle ihm erteilten Approbationen, Konzessionen und Berechtigungen, sowie das Recht einen Kraftwagen zu halten.

B e g r ü n d u n g :

Antrag des Öffentlichen Klägers laut Klageschrift vom 26. April 1947:  
Einreihung in die Klasse 1 der Hauptschuldigen.

Der Betroffene war:

Mitglied der NSDAP von 1928 bis 1929 für einige Monate,  
ferner 5 Monate förderndes Mitglied der SS im Jahre 1930 (Monatsbeitrag 1.- RM)  
Mitglied der Reichskammer der bildenden Künste von 1937 bis zur Auflösung

Mitglied der anti-jüdischen Weltliga  
Mitglied der NS Pressekammer von 1942 bis 1945  
Mitarbeiter der antisemitischen Zeitung "Der Stürmer" von 1927 b. 1945,  
sowie Zeichner für weitere antisemitische Erzeugnisse, wie  
"Juden stellen sich vor" und das Jugendbuch "Der Giftpilz".  
Dem Betroffenen wurden ausser den antisemitischen Hetzzeichnungen  
der Vorwurf gemacht, für die uneingeschränkte Weiterführung des  
Krieges in der Zeitung "Der Stürmer" durch die Ankündigung der  
sogenannten "Waffenwunder" eingetreten zu sein.

Ob die nur einige Monate währende Beitragszahlung bzw. Mitgliedschaft bei den oben genannten Organisationen bei der Beurteilung des Betroffenen wesentlich erscheint, wurde von der Kammer verneint, da diese Tatbestände nicht ursächlich mit dessen Hauptschuldfrage im Sinne des Art. 5 Ziffer 6 in Verbindung stehen.

Die mündliche Verhandlung beschäftigte sich daher in der Hauptsache mit dem Kernpunkt der Klageschrift, mit der schriftstellerischen und zeichnerischen antisemitischen Tätigkeit des Betroffenen, und es oblag der Kammer, zunächst zu prüfen, welche Gründe Vorerwähnten veranlassen, als antisemitischer Zeichner in Funktion zu treten. Politische Absichten verneinte Rupprecht. Allein wirtschaftliche Gründe hätten ihn nach seiner Angabe veranlasst, erst gelegentlich, dann ausschliesslich für den "Stürmer" tätig zu sein. Um diese Angaben glaubhaft zu machen, gab

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Anhang 1 zum Spruch der Sprachkammer Ebersberg vom  
19. Mai 1947 in Sachen Philipp R u p p r e c h t,  
Künstler, geb. am 4.9.1900 in Nürnberg, wohnhaft  
in Assling, Grafingerstraße.

Rupprecht einen ausführlichen Lebensbericht. Danach musste er schon  
frühzeitig für den Lebensunterhalt aufkommen und schlug sich durch  
viele Länder in den verschiedensten Berufen durch, bis in Amerika  
seine eigentliche zeichnerische Begabung entdeckt wurde. Im Jahre  
1925 kehrte der Betroffene nach Deutschland zurück und hatte nun als  
Familienvater erneute wirtschaftliche Kämpfe zu bestehen. Er zeichne-  
te für unpolitische und auch politische Zeitungen der verschiedensten  
Richtungen. Der Betroffene bezeichnet sich als einen völlig unpoliti-  
schen Menschen ohne innere Bindung, sodass er es als durchaus mit den  
guten Sitten vereinbar ansah, als er als Beauftragter der sozialdemo-  
kratischen Fränkischen Tagespost beim Streicher-Prozess in Nürnberg  
im Jahre 1925 mit Journalisten der antisemitischen Stürmer-Zeitung in  
Verbindung trat, als der verantwortliche Herausgeber (Streicher) ver-  
handelt wurde.

Auf den antisemitischen Charakter der Zeitung aufmerksam gemacht, er-  
klärte der Betroffene, dass er schon früher Juden karikiert und von  
diesen stets Anerkennung gefunden hätte. Dass die Tendenz des "Stürmer"  
bereits damals in den zwanziger Jahren nichts mehr mit dem Wesen der  
Karikatur, dem "Komischen" zu tun hatte, um etwas nur lächerlich zu  
machen, sondern das Ziel verfolgte, zu verzerren, um Hass zu erzeugen,  
will dem Betroffenen damals nicht klar gewesen sein. Die Kammer hält  
diese Angabe des Betroffenen für unglaubwürdig unter Berücksichtigung  
der Aussagen, die er im weiteren Verlauf der Verhandlung machte. Im  
übrigen verwies er bei Vorhaltungen immer wieder auf seine finanziellen  
Schwierigkeiten, seine innere politische Ungebundenheit und seine Aus-  
legung der Karikatur. Wenn es ihm auch nicht gelang, dies in passende  
Worte zu kleiden, so musste die Kammer aus seinen Ausführungen schlie-  
ßen, dass er seine Tätigkeit als "Ulk" auffasste, der angeblich auch  
Juden nicht unangenehm auffiel.

Der Betroffene wollte der Kammer glaubhaft machen, dass er kein Anti-  
Semit gewesen sei. Eine eigene Zeitschrift "Lape" gab der Betroffene  
von etwa 1926 bis Mai 1927 heraus. Die der Kammer vorgelegten Nummern  
weisen keine antisemitische Tendenz auf, vielmehr wurden darin allge-  
meine Zeitprobleme "verulkt". Das Eingehen der Zeitschrift führte der  
Betroffene auf Streicher zurück. Angeblich hätte dieser das Ziel ver-  
folgt, die Zeitschrift zu vernichten, um Rupprecht wieder zurückzuge-  
winnen. Zum Beweis dafür verwies der Betroffene auf eine auf Streicher  
bezugnehmende Zeichnung in der "Lape". Selbst wenn Streicher dieses  
Ziel verfolgt haben sollte, so ist die Kammer der Auffassung, dass das  
unter den damaligen Verhältnissen nicht gelungen wäre, weil der "Stür-  
mer" ein unbedeutendes Aussenseiterblatt war ohne wirtschaftliche oder  
entscheidende propagandistische Machtmittel. Für die Beurteilung des  
Gesamtverhaltens des Betroffenen ist dieser Tatbestand unerheblich,  
ebenso seine Mitteilung, dass er Juden als Zeichner beschäftigt haben  
will. Organisatorische oder kaufmännische Mängel dürften im übrigen  
das Eingehen der Zeitschrift veranlasst haben, vielleicht auch die  
frühere Mitarbeit des Betroffenen beim "Stürmer".

3 Monate später, also im Herbst 1927 wurde Rupprecht seinen Angaben  
nach ständiger Mitarbeiter des "Stürmer". Streicher soll sich (siehe  
Protokoll der mündlichen Verhandlung) um den Betroffenen bemüht haben  
und sein Werben soll deshalb von Erfolg gewesen sein, weil angeblich  
keine andere Zeitschrift mehr bereit war, Rupprecht zu beschäftigen.

Der



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Antwort  
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Der Öffentliche Kläger unterstellte bei der öffentlichen Sitzung diese Angaben des Betroffenen als wahr und hielt diesem sein Verhalten während des Streicher-Prozesses vor, um ihm klar zu machen, dass er für die nach dem Zusammenbruch der Zeitschrift aufgetretenen wirtschaftlichen Schwierigkeiten selbst verantwortlich war. Die Kammer kam zu der Auffassung, dass, selbst wenn der von betroffenen vorgetragene Tatbestand vorgelegen haben sollte, es seine Pflicht gewesen wäre, von dieser Zeitung so weit wie möglich Abstand zu nehmen, auch wenn man zugunsten des Betroffenen annehmen wollte, dass ihm die Hass-Tendenz der Streicher-Zeitung nicht bekannt war. Der Betroffene selbst erklärte, dass er das Eingehen dieser Zeitschrift auf Streicher zurückführte, der sich nur seine Arbeitskraft dienstbar machen wollte. Umso mehr hätte er, wenn man diese Angabe als wahr unterstellt, bemüht sein müssen, die unedlen Absichten seines Widersachers zu vereiteln. Dass der Betroffene keineswegs nur auf die Streicher-Zeitung angewiesen war, beweist die Aussage des Betroffenen in der Vernehmungsniederschrift vom 29. Januar 1947 (S. 3), in der er erklärt, dass er bis kurz vor der Machtübernahme Bilderbücher für den jüdischen Bilderbuch-Verlag Löwenstein illustriert habe. Dass diesem die Stürmer-Tätigkeit des Betroffenen bekannt war, erscheint der Kammer äusserst unglaubwürdig. Genau so wenig hätte wohl Streicher dafür Verständnis gehabt, wenn er davon erfahren hätte, dass Rupprecht für ein jüdisches Unternehmen Zeichneraufträge entgegennahm.

Die Kammer kam zu der Auffassung, dass der Betroffene im Laufe der Jahre trotz aller wirtschaftlichen Misere bei entsprechender Charakterbildung die Möglichkeit gehabt hätte, einen Stellenwechsel vorzunehmen. Er hat ihn aber gar nicht angestrebt! (vergl. Vernehmungsniederschrift vom 14. April 1947 Seite 3X). Seine Landsknechtatur, für jeden da zu sein, der zahlt, kam auch in der Vernehmungsniederschrift vom 29. 1. 1947 deutlich zum Ausdruck. Auf die Frage des Vorsitzenden: "Wenn heute zu Ihnen jemand kommt, der den Mord als sittlich gerechtfertigt hält und der Mann überzeugt Sie, dann zeichnen Sie auch für ihn. Sie zeichnen für jeden, der zu Ihnen kommt und Ihnen Geld bietet?", antwortete der Betroffene: "Ich zeichne für jeden, der von staatswegen anerkannt ist. Ich habe ja nicht die verantwortliche Schriftleitung." Nach dem Vorhergesagten dürfte dargelegt sein, dass der Betroffene schon vor 1933 bei gutem Willen Gelegenheit gehabt hätte, sich von dem "Stürmer" zu trennen.

Es war von der Kammer zu prüfen, ob der Betroffene sich über die Absichten des "Stürmer" im klaren war und über seine verhängnisvolle Rolle, die er selbst dabei mitspielte. Um Rupprecht die Zeit vor Augen zu führen, da in periodischen Abständen eine gleichgeschaltete Presse in Form von Verordnungen die wirtschaftliche, seelische und körperliche Vernichtung des Judentums verkündete, wurde ihm vom Vorsitzenden die Frage gestellt, ob er Zeitungen gelesen habe. Der Betroffene verneinte es. Er verstieg sich sogar zu der Behauptung, dass er nicht einmal die "Stürmer-Zeitung" gelesen habe, in der er zeichnete. Er wollte sich auch nicht an Reden Hitlers erinnern können, in denen dieser von der Vernichtung der Juden Europas sprach, weil er angeblich auch kein Radio vernahm. Bei der Verteidigungstaktik des Betroffenen war es direkt verwunderlich, dass er sich an die Scheiben-Aktion im Jahre 1938 erinnern konnte, sowie an die Tatsache, dass er auch den Judenstern gelegentlich gesehen haben will. Dass der Betroffene bewusst falsche Angaben machte, schloss die Kammer nicht nur aus dem Umstand, dass Rupprecht als Künstler die damaligen Ereignisse mehr noch als die übrigen in Deutschland lebenden Zeitgenossen mit offenen Augen wahrnehmen musste, sondern auch aus der Antwort, die er dem Öffentlichen Kläger auf die Frage erteilte, welche Absichten wohl der "Stürmer" seiner Ansicht nach verfolgt hätte. Antwort



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Anhang 2 zum Spruch der Spruchkammer Ebersberg vom  
19. Mai 1947 in Sachen Philipp R u p p r e c h t,  
Kunstmaler, geb. am 4.9.1900 in Nürnberg, wohnhaft  
in Assling, Grafingerstraße.

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Antwort des Betroffenen: "Dass es Deutschland besser geht."  
Diese Antwort erteilte er, nachdem ihm 154 Stürmer-Zeitungen vorgelegt wurden mit der stets sich wiederholenden Schlagzeile "Die Juden sind unser Unglück", nachdem ihm seine eigenen Zeichnungen vorgeführt wurden, die sein Signum trugen und die er als die seinen anerkannte - Juden im Blut wadend, Juden als Ungeziefer, Juden in allen erdenklichen verbrecherischen Handlungen in der ekelerregendsten Weise dargestellt. Es war somit dazgetan, auf welche Kosten das "Bessergehen Deutschlands" vorgenommen werden sollte. Deutlicher konnte der Betroffene gar nicht zum Ausdruck bringen, dass seine Angaben, nicht gegen die Juden eingestellt zu sein, unwahr sein mussten. Der Betroffene konnte nicht bestreiten, gestellte Themen zeichnerisch ausgeführt und Texte dazu selbst in Reime gebracht zu haben. Es war dabei für die Beurteilung unerheblich, dass diese Texte angeblich ungereimt geliefert wurden und er sie erst veröffentlichungsreif machte. Das für die Kinder bestimmte Buch "Der Giftpilz", das der Kammer als Beweismittel vorlag und den Juden als Kinderverführer, eben als Teufel in Menschengestalt vorführte im Gegensatz zu der lichten Gestalt des edlen nordischen Menschen, eine Gegenüberstellung, die auch in "Stürmer" von dem Betroffenen wiederholt angewandt wurde, war ausreichend genug, um die Kammer von der antisemitischen Hetze des Betroffenen und seiner Verantwortlichkeit dafür zu überzeugen.

Der Betroffene bestritt auch nicht, dass ihm die Verzeitsweise des "Stürmer" bekannt war durch Aushang in den sogenannten "Stürmer-Kästen", die sich in den Städten fast in jeder Straße und auf dem Land an fast jedem Dorfeingang zu sehen waren. Bei seiner im allgemeinen bei der Verhandlung verfolgten Taktik des Nichterinnerkönnens war es für die Kammer erstaunlich, dass er auch zugab, davon gehört zu haben, dass während der Olympiade im Jahre 1936 die Stürmer-Zeitungen aus den Kästen entfernt wurden, als der Ausländerbesuch eintraf. Im Vollbesitz seiner geistigen Kräfte musste sich der Betroffene über die Art seiner Arbeiten, über die ideologische Unterstützung, die er den verbrecherischen Gesetzgebern gewährte, im klaren sein. Erschwerend fiel ins Gewicht, dass der Betroffene die Juden von Jugend auf kannte, selbst erklärte und sich auch bescheinigen liess, kein Antisemit gewesen zu sein und trotzdem fast 20 Jahre lang wider besseres Wissen nur um des Verdienstes willen skrupellos die Juden fortgesetzt in Büchern und in bereits genannter periodisch erscheinender Zeitschrift als gemeinste Verbrecher hingestellt zu haben. Welche Aufgabe er damit zu erfüllen hatte, gab Streicher in einem Vorwort zu einem von dem Betroffenen gezeichneten Buch "Juden stellen sich vor" dadurch zum Ausdruck, indem er schreibt, dass die Zeichnungen des "Fips" (Pseudonym des Betroffenen) die Wirkung haben, dass derjenige, der sie sieht, in der Seele nicht unberührt bleibt, dass das die Aufgabe sei, die "Fips" mit seiner Kunst erreichen will. Er will sein Wissen in die Seele des deutschen Volksgenossen hineinzeichnen. Erschwerend fiel auch ins Gewicht, dass sich der Betroffene mit seinem Jugendbuch "Der Giftpilz" an Menschen wandte, deren Urteilsvermögen erst im Entstehen war. Auf die Quelle ersten menschlichen Begreifens schüttete er für Geld wider besseres Wissen das rassenhasserregende Gift seiner Kunst. Erschwerend fiel ferner ins Gewicht, dass dem Betroffenen bekannt war, dass von den 18 Jahren seines Schaffens für den "Stürmer" 12 Jahre lang keine Presse bestand, die in Deutschland gegen Erzeugnis

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Anhang 3 zum  
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Produktion Stellung nehmen durfte und dass zur gleichen Zeit, da diese Produktion erschien, die Menschen seine verbrecherischen Darstellungen in Stadt und Land in auffälligster Weise vorgesetzt erhielten, Juden diskriminiert und von fanatisierter Menge verfolgt wurden.

Der Betroffene selbst gab die Kenntnis des "Fenstersturmes" bei der mündlichen Verhandlung und auch im Vernehmungsprotokoll vom 29.1.1947 zu. Auch wenn er von den KZ's nichts gewusst haben will, die Tatsache, dass ihm die seelische (Judenstern), die wirtschaftliche und körperliche Verfolgung der Juden bekannt war (Scheibenaktionen) und die antisemitische Einstellung der Regierung, in deren staatsgeförderter Zeitung der "Stürmer" der Betroffene "befehlsgemäss" allwöchentlich die angeblichen jüdischen Verbrechen als sogenannte gezeichnete Leitartikel, wie der Öffentliche Kläger richtig feststellte, zum Ausdruck brachte, die Tatsache, dass der Betroffene trotz Kenntnis all dieser Dinge auch in der Vernehmungsniederschrift vom 29.1.1947 erklärte, dass er für jeden zeichnet, der von staatswegen anerkannt wird, kennzeichnet seine Verantwortlichkeit.

Ausser dem Vorwurf der Schürung des Rassenhasses wurde dem Betroffenen in der Klageschrift zur Last gelegt, für die Weiterführung des Kampfes eingetreten zu sein, auch noch zu einer Zeit, als die Aussichtslosigkeit des Krieges bereits jedem denkenden Menschen klar wurde. Zum Beweis dafür legte der Öffentliche Kläger eine "Stürmer"-Zeitung vom Februar 1945 vor, in der die sogenannten Waffenwunder des dritten Reiches propagiert wurden, um die Durchhaltepolitik Hitlers zu unterstützen. Dieses Beweismittel stellte nur eine Ergänzung der bereits vorgebrachten Anschuldigung gegen den Betroffenen dar, die nationalsozialistische Gewaltherrschaft ausserordentlich politisch, wirtschaftlich und propagandistisch unterstützt zu haben.

Dass der Betroffene die Voraussetzungen des Art.5 Ziffer 6 erfüllt, davon ist die Kammer nach Vorhergesagtem überzeugt und sie ist der Auffassung, dass sie es bereits genügend dargelegt hat. Die beigebrachten eidestattlichen Erklärungen, die sich der Betroffene ausstellen liess, und die u.a. aussagen, dass er nie mit "Heil Hitler" grüsste, keine Propaganda-Reden hielt, keine Versammlungen besuchte, sind keine Argumente, die zu dem ~~nicht~~ zur Last Gelegten als Entlastungsmaterial verwertet werden können.

Für den Rechtsbeistand des Betroffenen war es nach dem erdrückend vorliegenden Beweismaterial auch nach Ansicht der Kammer ein schwieriges Unterfangen, die Verteidigung des Betroffenen zu übernehmen. Trotzdem war der Weg, den er anfangs beschritt, um sich seiner Aufgabe zu unterziehen, sehr merkwürdig bzw. auch sehr undurchsichtig, welche Absichten er bei Beginn seines Mandats verfolgte. Wollte er die Ideologie der nationalsozialistischen Gewaltherrschaft verteidigen, indem er zunächst nazistische Fragestellungen auf die Tagesordnung setzte und u.a. von einem Judenproblem sprach (siehe Protokoll)? Wollte er eine Aussetzung der Sitzung herbeiführen durch sein merkwürdiges Benehmen, um dem Betroffenen Gelegenheit zu geben, noch einmal Zeit zu gewinnen? Oder beabsichtigte er, bei dem Betroffenen selbst Widerspruch auszulösen, da dieser bisher versicherte, kein Judegegner gewesen zu sein, ein Umstand, der, selbst wenn er eingetreten wäre, bei der Beurteilung Rupprecht's unerheblich gewesen wäre nach allem Vorhergesagten. Oder aber beabsichtigte der Rechtsanwalt, die Kammer auf einen Umweg durch sogenanntes Verständlichmachen

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nationalsozialistischer Fragestellungen Sympathie bei der Kammer für den Betroffenen zu erwecken? Durch einen Zwischenfall erkannte der Rechtsanwalt scheinbar erst, dass sein Vorgehen abwegig ist, und so beschränkte er sich im übrigen bei seiner Verteidigungsrede auf die Schilderung der damaligen wirtschaftlichen Verhältnisse des Betroffenen, um seine Verantwortlichkeit herabzumindern, ein Umstand, der von der Kammer bereits genügend gewürdigt wurde und nicht als Milderungsgrund in Anrechnung gebracht wird, wie bereits genügend dargetan. Um den Betroffenen zu entlasten, legte der Rechtsanwalt eine Zeichnung vor, die im Jahre 1937 in einer englischen Zeitung erschien mit dem Signum des Betroffenen. Auf diesem Bild waren braune Uniformen ohne Kopf zu sehen, um die Dummheit der damaligen Machthaber zu charakterisieren. Da der Betroffene sich während der Verhandlung ~~stets~~ auch damit verteidigte, aus Furcht vor Streicher einen Stellungswechsel unterlassen zu haben, so dürfte wohl auch klar sein, dass er absichtlich kaum eine derartige Zeichnung der Öffentlichkeit übergab. Die Kammer nimmt an, dass dieses Bild vom Betroffenen selbst gar nicht angefertigt wurde, sondern eine Fälschung darstellt. Bei der Vernehmung Rupprecht's am 14.4.1947 legte er dem Öffentlichen Kläger eine Zeichnung vor mit seinem Signum, worauf der Kläger die offensichtliche Nachahmung feststellte, die allerdings so täuschend nachgemacht wurde, dass man sie auf den ersten Augenblick nicht erkennen würde. Der Betroffene hat während seiner Vernehmung die Feststellung des Klägers nicht bestritten. Selbst wenn in früheren Jahren eine derartige Zeichnung von Rupprecht einmal angefertigt worden wäre, würde das nur seine bereits eingehend geschilderte Landsknechtsnatur charakterisieren, ohne ihn von der Verantwortung zu entbinden, die er durch sein verbrecherisches Wirken übernommen hat.

Im übrigen konnte der Rechtsanwalt selbst nicht umhin, die breite Wirkung der Publikationen des "Stürmer" und damit auch des Stürmer-Zeichners zuzugeben. Er gab auch selbst zu, dass er nach Beendigung des Krieges erschüttert gewesen wäre, dass deutsche Menschen bereit waren, andere Menschen in der teuflischsten Weise zu vernichten. Wenn er die Wirkung der antisemitischen Publikationen zugab, so hätte sich der Rechtsanwalt Rupprecht's die Antwort auf diese von ihm festgestellte erschütternde Tatsache selbst geben müssen. Es ist für die Kammer selbstverständlich, dass nach dem bereits Dargelegten das gesunde Empfinden, vor allem noch nicht geistig voll entwickelter Menschen abgetötet wurde und der Betroffene so mithalf, die Voraussetzungen zu schaffen, die später zu Ausschreitungen, Plünderungen und Gewalttaten führten. Die Kammer ist überzeugt, dass die Skrupellosigkeit Rupprecht's in Bezug auf seine Arbeit ~~unter besseres Wissen~~ darauf zurückzuführen ist, dass er an das 1000 jährige Reich glaubte und somit niemals damit rechnete, eines Tages zur Verantwortung gezogen zu werden.

Bei der Bemessung der Sühnemassnahmen war nicht nur ausschlaggebend, dass er die öffentliche Meinung als Künstler im Sinne der nationalsozialistischen Ideologie entscheidend beeinflusste, sondern seine charakterliche Gesamtbeurteilung und die fehlende Reue für das bisher Angerichtete. In der Vernehmungsniederschrift vom 29. Januar 1947 erklärte er ausdrücklich, dass er sich nicht zu entschuldigen habe. Somit scheint

die



die gesetzliche erlaubte Höchststrafe gerade ausreichend genug.

Die Kosten des Verfahrens werden dem Betroffenen auferlegt.  
Der Streitwert wird auf 21.500.- RM festgesetzt.

Unterschriften siehe Anhang 4.

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