

Nazi Law

From Nuremberg to Nuremberg

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Introduction

John J. Michalczyk

Following the First World War and the Versailles Treaty of 1919, the Weimar Constitution with all of its strengths and weaknesses offered Germany a legal foundation to rebuild a civilized, democratic society. The Preamble states, “The German people, united in all their **racial** elements, and inspired by the will to renew and strengthen their Reich in liberty and **justice**, to preserve peace at home and abroad and to foster social progress, have established the following constitution.” Adolf Hitler bluntly stated, however, “I will use the Constitution to destroy the Constitution.” During his five-month imprisonment in the Landsberg prison, for his role leading the evolving National Socialist Party through the failed Beer Hall Putsch of November 8–9, 1923, Hitler expressed a specific ideological agenda in his political and racial blueprint for Germany, *Mein Kampf*, which would defy the Constitution protection of all Germans. Unity of the races would be the farthest concept from the mind of the Führer, and justice would have no place in the German courts. Jews would play no part in the well-being of the country, although many Jewish attorneys and judges had served in the First World War and offered prestige to the profession. They would be eliminated in the Protection of Civil Service Act of 1934, opening the floodgates to laws based on Nazi policies and not on justice. Hitler fulfilled his desire to destroy the Constitution by manipulating the legal system to wreak havoc on the German community and bring down devastation on Europe while almost completely annihilating its Jews in the Shoah. Through the myriad of racial-based laws, both the Jewish people and the justice system came under siege, as the traditional notion of Roman law was replaced with Nazi law.

The first part of this book focuses on the role of Jews and others caught in the political turmoil during the rise of the National Socialist Party. Douglas Morris lays the foundation with Chapter 1 dealing with the concept of political thought and natural law prior to the First World War, during the Weimar Republic (1918–33), and in the postwar era. This theory advocated the idea that some universal principles are ultimately more important than statutes. Morris points out that many leading jurists were Jewish and entered into the discussion of natural law.

Chapter 2 on pro-Nazi Carl Schmitt (1888–85) shows the controversial thinker wearing many hats: “Legal theorist, intellectual historian, political theorist, political propagandist, political theologian, and activist.” Schmitt had great influence within the legal profession during the early years of the Nazi rule as editor of the leading legal periodical, *Deutsche Juristenzeitung*, as head of the Association of German Jurists, and as a member of Göring’s Prussian State Council. In great part Schmitt was responsible

for providing the groundwork for Nazi racial theory as promulgated in law, and in an indirect sense, feeding Goebbels's propaganda theories about targeting the enemy. In this case, the enemy was "the Jew" who had to be eliminated for the health and unity of the nation. His prevalent antisemitic writings and belief in a two-tiered justice system reflect a brilliant legal mind of a person going over to the dark side of the law during the Nazi era. He supported the idea of the Führer's will as the new standard for determining the justness of a legal decision. He also advocated a legal system in which those who were not racially pure Aryans and those whose actions or very existence threatened the new Nazi German State had no rights and no legal protections. His work reflected the general political tone of the National Socialist Party in office and furnished the basis for the total abuse of the judicial system.

The Nuremberg Laws, promulgated by a hastily organized session of the Reichstag at the 1935 Nuremberg rally, put into effect the essence of Schmitt's ideological and personal beliefs, designating German citizenship by race. Jews were soon categorized by gradations in Jewish blood and labeled "full," "half," or "quarter" Jews. Depending on their genealogical roots, Jews were denied citizenship and forbidden to marry Aryans. Chapter 3 on Nuremberg details the basis and establishment of these laws, while Chapter 4 indicates how the Nuremberg Laws were applied beyond the borders of Nazi Germany and were promulgated in Vichy and the Occupied Zone of France. The postwar trials of Marshal Philippe Pétain brought to light the complicity of the Vichy government in enforcing the Nazi racial laws in its marginalizing and then relocating (read "deporting") of the Jews from detention centers such as Drancy "to the East," a euphemism for an extermination camp like Auschwitz.

At the outset of the German occupation of Poland in September 1939, Reinhard Heydrich stated in a letter to the heads of the *Einsatzgruppen*, the mobile killing squads, that a council of Jewish elders had to be established in Jewish communities to carry out the instructions of the Nazis. The *Judenrat* has been viewed in various lights, one seeing them as administrators of the Germans' "dirty work," and the other as providing as much physical and moral support possible to the community in a severely restricted environment. Chapter 5 elaborates on the controversial perspective of the *Judenrat* in the Terezin ghetto as described in an interview with Rabbi Benjamin Marmelstein recorded in 1975 by Claude Lanzmann for the more recent film, *The Last of the Unjust* (2014).

Chapter 6 focuses on two diverse cases of the People's Court as Roland Friesler, "the Hanging Judge," sentences the defendants to death for "defeatism" in wartime. Friesler insisted on "Total Victory," and anyone even "thinking" of a Germany possibly losing the war was guilty of treason and subject to capital punishment. A priest, Fr. Max Josef Metzger, and a lawyer from an elite Prussian family, Helmuth James von Moltke, faced the judge's wrath and met their early demise.

Part 2 of the book concentrates on legal issues as they pertain to medicine. Starting with the mindset that one race, the Aryan peoples, was superior to all others, the Third Reich applied principles of Eugenics in racial and disability policies to foster the strength and supremacy of the German *Volk*. From forced sterilization to a euthanasia program and from government support of unethical experimentation to extermination, the Third Reich went down a path that led to the loss of millions of lives. Chapter 7 addresses the medical and spiritual resistance to Nazi law. Offering

a view of the diverse army of physicians and medical workers in the Third Reich, the authors show how each group faced the challenges in the Nazi regime where the nation was considered a biological organism. The Nazi doctors, Jewish doctors in the ghetto, and the Jewish rabbis and leaders in the ghetto had differing views on how medicine was to be administered. The Nazi doctors shared in the process of elimination of the Jews from Germany through their inhumane experiments and selection processes at the concentration camp ramps. In the ghetto Jewish doctors offered both a sense of dignity and physical assistance to the incarcerated Jewish community. Laws against the Jews were extensive, but the Jewish religious and secular figures offered spiritual hope and resistance to the Nazi laws that attempted to suffocate them physically and metaphorically through their restrictive policies.

Paragraph 175 of the German criminal code on homosexual activity established in 1871 existed in law until 1994 when it was stricken due to more open acceptance of gay relationships. Approximately 100,000 men were arrested on suspicion of homosexuality during the Third Reich, with 90,000 of those arrests occurring from 1937 through 1939, facilitated by a revision to Paragraph 175, which was hardly publicized but made almost any physical contact between men grounds for arrest. After 1934 the Nazi regime did not make public their sentencing statistics; however, best estimates suggest 50,000 convictions from 1933 to 1944, including 4,000 juveniles. Statistics for imprisonment in concentration camps are estimated at between 10,000 and 15,000. Chapter 8 describes how the Third Reich treated homosexuals in an inhumane manner as perverted degenerates whose failure to father children was the most obvious but not the only way they undermined the Reich. The Regime propagated sexual defamation and other hate speech against homosexuals, giving Germans the right to feel contempt and express abuse toward gay men as a way to foster support and consensus. The true believers in the drive against homosexuals, and in particular Himmler, assiduously sought to save the Reich from homosexuals. Gay men were treated with cruelty and contempt during the Third Reich while at the war's end they were still considered criminals. It took two decades or more in postwar Germany for them to find their voice and for their stories to be told. Most did not receive government compensation for their incarceration, since for years they were not regarded as victims. This view was generally held by the Allies and other European powers after the Second World War; despite his brilliant work on the Enigma project during the war, Alan Turing faced conviction for homosexuality and punishment of chemical castration which is only one dramatic instance of the revulsion for homophobia in the postwar years. Even in the United States until 1973, the American Psychiatric Association classified homosexuality as a mental disorder, and later, until 1987, registered it as "sexual orientation disturbance."

Chapter 9 delves into the dark past of Nazi human experimentation in the name of science, indicating how the Nuremberg Doctors' Trial of 1946–47 help set the standard for humane and ethical experimentation in the establishment of the Nuremberg Code. The authors make their narrative especially relevant in describing how the United States was guilty of prior human experimentation and the use of black ops sites where torture was, until more recently, acceptable by the American government. In both cases, the end justified the means, as in Abu Ghraib.

Chapter 10 adds a pertinent dimension of medicine to our work in indicating how medicine and the Holocaust are related. As a pediatrician and professor who deals with the subject of medicine during the Holocaust, Ashley Fernandes is most aware of the crucial need to educate medical students about the importance of maintaining a moral compass throughout challenging ethical decisions. Using concrete examples from the Shoah, he indicates that Holocaust education today can provide a fine template for grasping issues that humanity faces on a daily order.

Part 3 of this book briefly lays out two areas of economic exploitation of Jews, in Germany and other countries such as Poland. From September 1939, Nazi Germany extended its influence with respect to race and enrichment throughout occupied Europe. Although German Jews suffered most extensively from 1933 on, other European Jews soon fell under the jurisdiction of Third Reich policies. Chapter 11 offers specific details on how the General Government in Poland, set up by the Germans, considered Polish Jews as nonhumans and Polish Christians as subhumans. The Jews were eventually stripped of all their rights, possessions and then, in the case of approximately 90 percent of the Jewish population, of their lives. Those who survived faced insurmountable odds in attempting to reclaim what little property they owned prior to the Nazi occupation.

The engaging narrative of the Monuments Men (Monuments, Fine Arts, and Archives Program) in film and literature acknowledged the widespread looting by Nazis of art collections owned by Jews throughout Europe, as well as the complex issue today of clarifying the provenance of such stolen works for the return to rightful owners. Chapter 12 depicts the process that the Nazi legal system used to strip Jews of their possessions, including valuable art, to fill the Third Reich coffers and also to be distributed among the government leaders. The passage of time and the lack of material evidence have created major hurdles in obtaining restitution for the stolen artwork.

Part 4 of this book studies the debilitating effects on religion by the Third Reich. Although many Nazis were practicing Christians, their traditional, established spiritual beliefs became secondary to the religious fervor they expressed through National Socialist ideology. The Nazi Party became the worshipped false god, which is detailed here through chapters on the Protestant and Catholic churches functioning in a Nazi nation, as well as on the struggles of the Jehovah's Witnesses persecuted for their antimilitarist resistance. Chapter 13 offers insights into the range of Catholic stances in Germany with regard to the National Socialist Party ideology. Once the Third Reich came into power, Roman Catholics faced a dilemma—to support the government or refrain from anything to do with the Nazi Party, including membership.

Protestants in Nazi Germany fell primarily into two groups. Those who found the National Socialist policies compatible with their religious beliefs maintained membership in the National Reich Church. The other dissenting group, the Confessing Church, resisted government attempts to Nazify the Protestant Church. Chapter 14 chronicles the actions of two lesser-known members of the Confessing Church, Julius von Jan and Heinrich Fausel. Like Dieterich Bonnhoeffer and Martin Niemöller of the Confessing Church, both pastors von Jan and Fausel courageously spoke out against the interference in the religious sphere of German citizens and the treatment of Jews.

In this triptych of religious complexity during the Nazi era, the Jehovah's Witnesses, "Bible Students," were persecuted for their refusal to give the Hitler salute, join Nazi organizations like the *Hitler Jugend*, and serve in the military. Chapter 15 describes the hostile treatment of the Bible Students who were sent to concentration camps in large numbers. Unique among the victims of camp inmates, these believers had the opportunity to procure their freedom by signing a form renouncing practice of their beliefs. Few, however, if any, took that option.

The final part of this book leads up to the prosecution of the war criminals who brought about the apocalyptic destruction of Europe and the deaths of countless millions of Jews, gypsies, homosexuals, and political dissidents, besides engaged military and innocent civilians caught in the crossfire. Following the trial by the International Military Tribunal (IMT) of the major war criminals, there ensued a series of further trials of those involved in criminal deeds during the Third Reich, such as the SS, judges, doctors, and others. Michael Bryant describes the court system in handling such cases in the post-Nuremberg era. West German courts found it a daunting challenge to prosecute concentration camp personnel, for example, due to lack of evidence and the disappearance of witnesses. Opting in favor of a "collective guilt" theory, or a common plan, to try personnel for aiding and abetting murder opened the door to more convictions.

The industrialization of mass murder by the Third Reich remains an astonishing complex labyrinth of those who collaborated with the perpetrators, from the suppliers of weaponry like Krupp, to the chemists who produced the lethal Zyklon B gas. Chapter 17 on the I.G. Farben trial reveals the problematic participation of the I.G. Farben conglomerate of Germany's eight leading chemical producers, including Bayer. This post-IMT trial reinforced the US goal of the political, social, and industrial management of Germany in the years following Germany's surrender.

Of the twelve postwar Nuremberg Trials, the results of the Doctors' Trial in the establishing of the Nuremberg Code with respect to human experimentation have made the most serious impact on society and especially the medical profession. Chapter 18 traces the evolution of human experimentation in Nazi Germany as well as in the United States, indicating how the Doctors' Trial set a precedent for ethical norms used in human experimentation that has resonance today in the responsibilities of the Institutional Review Boards. Sandra Johnson also demonstrates that racialized medicine was not pursued solely in Nazi Germany but that even in the United States pseudoscientific beliefs informed medical practice and medical research resulting in a pattern of abusive experimentation with African American subjects even at the time of the trial.

With this book, the authors hope to engage in the continual dialogue about the importance of law for any civilization to survive and prosper. At the same time, the writers fully understand that since the demise of the Third Reich with its abuse of law and power, numerous examples of genocide, ethnic cleansing, and atrocities have occurred from Cambodia to Rwanda and from the Balkans to South Africa. Destroying the mindset that one race, ethnic group, or religion is superior to another offers an initial, major step in the right direction.