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♦ TBA BRIEFINGS ♦

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Defining Rule of Law

By Jim Rankin

In this and next month's essay, I will attempt to examine the question of whether people may take comfort that the rule of law will always prevail over arbitrary administration of justice. Considering the facts of one of the most extreme cases of national crisis known to Western Civilization, the answer might seem to be "yes" with the caveat that the law need not be just or even reasonable. This and next month's essay suggest that the rule of law may be twisted to create an earthly hell.

"So whatever you wish that men would do to you, do so to them; for this is the law and the prophets."

Matthew 7:12 RSV

Judge Ernst Janning: *"Judge Haywood… the reason I asked you to come: Those people, those millions of people…I never knew it would come to that. You must believe it, you must believe it."*

Judge Dan Haywood: *"Herr Janning, it "came to that" the first time you sentenced a man to death you knew to be innocent."*

Judgement at Nuremberg, A play by Abby Mann (1957)

October 1, 1946, the International Military Tribunal sitting at Nuremberg handed down the individual sentences for more than 20 Nazi leaders who were on trial since 1945. Twelve of the defendants were sentenced to death and hanged. The international military trials involved those members of the Nazi high command such as Göring, Hess, Jodl, and Kaltenbrunner, then in allied custody. Hitler and Goebbels committed suicide in the spring of 1945 and many other Nazis, such as Adolf Eichmann, escaped Germany or were hiding within Germany. After the International Tribunal handed down its verdicts, further international cooperation concerning the trials became impossible.[1]

The Nuremberg Trials were not universally supported. Certainly not in Germany but not even in the United States. Harlan Stone, Chief Justice of the United States Supreme Court at the time, described the proceedings as a "sanctimonious fraud" and a "high-grade lynching party." Associate Justice William O. Douglas said at Nuremberg, the Allies "substituted power for principle." The *ex post facto* nature of the international human rights concepts supporting the Nuremberg prosecutions raised concerns because these principles had not existed as law prior to the war. Nevertheless, the United States proceeded with additional Nuremberg Trials after the International Tribunal had completed its work.[2]

Among the subsequent trials were the so called "Justice Trials" (officially styled" *The United States of America v. Joseph Altstötter*, et al, 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948)), which began March 5 and ended December 4, 1947.[3] The Justice Trials were the subject of the celebrated 1961 film Judgement at Nuremberg, starring Spencer Tracy, Marlene Dietrich, and Maximilian Schell. Sixteen lawyers and judges were charged with furthering the Nazi policy of racial purity by rendering unwarranted verdicts and assisting with enforcement of Nazi eugenics laws. The indictment included four counts. All defendants were charged with the first three: *viz* conspiracy to commit war crimes and crimes against humanity; war crimes

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against civilians in territories occupied by Germany and against soldiers of countries at war with Germany; and crimes against German civilians and nationals of occupied territories. The fourth count of the indictment charged seven of the defendants with membership in the SS, SD, or the leadership corps of the Nazi Party, all of which had been declared criminal organizations by the International Military Tribunal. Essentially, the defendants were charged with judicial murder and other atrocities, which they committed by undermining law and justice in Germany and circumventing traditional legal procedure in order to enable mass persecution, enslavement and extermination.

Perhaps the most notorious example of the judicial crimes involved Judge Oswald Rothoug. Rothaug was the presiding judge at the Nuremberg Special Court from 1937 to 1945. The case in question involved a 68-year-old Jewish man named Katzenberger. Katzenberger was tried under Article 2 of the Nazi law for protection of German blood. The law forbad sexual relations between Jewish persons and other German nationals. Katzenberger was accused of having sex with a 19-year-old German girl. Both Katzenberger and the girl denied the charges and described the relationship as fatherly. The only evidence submitted was that the girl had been seen sitting on Katzenberger's lap. For Judge Rothaug that was sufficient. Manuevering the case into a special proceeding, Rothaug permitted uniformed Nazi officials to offer opinions as to Katzenberger's guilt. In order to enhance the normal punishment for Article 2 violations (usually life in prison), Rothaug interpreted a law—prescribing death for law violations intended to take advantage of the war effort—as applicable to Katzenberger. Rothaug imposed the death sentence on Katzenberger on the ground that Katenberger had exploited the German "black out" rules—an air raid precaution—in order to pursue his sexual interests. Katzenberger was executed and the German girl was imprisoned for perjury. When the issue of insufficient evidence was raised, Rothaug stated: "it is sufficient for me that the swine said that a German girl sat upon his lap."[5]

Ten of the Justice Trial defendants were found guilty. Four were acquitted. Two defendants were not included in the judgment because one had died before the trial began and one case resulted in mistrial. Four defendants were sentenced to life in prison and six defendants were imprisoned for shorter terms. Few convicted defendants served their entire prison term. The two most notorious of the Nazi judges, Roland Freisler, president of the People's Court in Berlin, and Reich Minister of Justice, Otto Theirack, escaped the judgement at Nuremberg altogether. Freisler was killed in a February 1945 bombing raid on Berlin. Thierack committed suicide after his arrest by the allies.

Clearly, the German judges participated in and enabled Nazi atrocities. These were adult men, educated, cultured and worldly. How did the judges succumb to Nazi influence? Writing in the New Republic, retired Seventh Circuit Court of Appeals Judge Richard A. Posner provided insight concerning judges becoming caught up in mass movements:

> "Perhaps in the fullness of time the growing of marijuana plants … will come to be no more appropriate objects of criminal punishment than 'dishonoring the race.' Perhaps not; but [the story of the German judges] can in any event help us to see that judges should not be eager enlisters in popular movements of the day, or allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions."

Judge Posner's comment helps us understand and relate the problems of Germany in the 1930s and 40s to our own time and place, but there is a darker and more compelling prospect. The German judges were influenced by the authoritarian tradition of the German Empire, they had no long tradition of working through challenges to a liberal constitutional order and in 1934 they, along with other civil servants, were required to swear allegiance and loyalty to Adolph Hitler. Moreover, there was

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philosophical predisposition toward rigid thinking that affected judicial rulings. Perhaps another insight—looking beyond the circumstances of the judiciary—is even more helpful:

> "There are many features which were then regarded as 'typically German' which are now equally familiar in America and England, and many symptoms that point to a further development in the same direction: the increasing veneration of the state, the fatalistic acceptance of 'inevitable trends,' the enthusiasm for 'organization' of everything (we now call it 'planning')."
>
> Frederich von Hayek, the Road to Serfdom (1944)

Rechtsstaat

The German philosopher Immanuel Kant (1727–1804) is credited with introducing the term *Rechtsstaat* or constitutional state into German legal thought. Kant appears to have developed the concept based upon his observations of the late 18th century developments of the United States and French written constitutions. Kant's concept focused on the supremacy of a nation's written constitution as a means of assuring peacefulness, happiness and prosperity for citizens. The idea was to unify the citizenry under law. Kant's concept and modifications to the concept by later continental thinkers bring *Rechtsstaat* into rough equivalency with what Anglo-Americans refer to as the rule of law. However, unlike the "rule of law," *Rechtsstaat* also encompasses the idea of what is morally right. *Rechtsstaat*, therefore, may be seen as in opposition to *Obrigkeitsstaat*, which describes a state where arbitrary power is exercised, an authoritarian state.

According to Kant, civil society rests upon three things: freedom of each societal member, the equality of each member with the other, and independence of every societal member as a citizen. This formulation assumes individual freedom comes before the state. Kant's thinking is consistent with liberal constitutionalism where individual freedom is in general theoretically unlimited and state authority is limited.

Kant's thinking inspired German 19th and early 20th Century liberalism. Kant's *Rechtsstsaat*—rule of law—idea is also found in modern German public law including the Weimar Constitution of 1919. Indeed, the Weimar Constitution contained provisions protecting fundamental rights, division of governmental power, and a measure of superior federal court judicial review (albeit generally limited to questions of consistency of state or Länder regulations with the national constitution). The Weimar Constitution was based upon liberal democratic principles consistent with the idea of *Rechtsstsaat* and technically remained Germany's constitution throughout the Nazi period.[6] Unfortunately, the history surrounding the implementation of the Weimar Constitution and the Constitution's sovereign oriented provisions made survival of its democratic and republican principles problematic.

Weimarer Republik

Germany faced upheaval after World War I. The war was lost and Kaiser Wilhelm II was forced to abdicate the Hohenzollern throne. In Berlin, radical Marxists clamored for a socialist republic and German sailors were engaged in a Bolshevick style mutiny at Kiel. Monarchial power had to be replaced by some form of democratic republican stability in order to stave off revolution engendered by the socialist left or by ultra-nationalists on the right. The compromise solution came during a constitutional convention held in a city chosen for its distance from the turmoil in Berlin and Munich. The town of Weimar, not far from Frankfurt am Main lent its name to Germany's first republican constitution. The new constitution, however, had many weaknesses. The office of president was

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Save the Date

Turkey Shoot
November 20, 2015
Creekside at Berryton

Holiday Party
December 3, 2015
Governor's Row House

Community Events Calendar

Women's Night Out
benefitting the YWCA
Thursday, October 8, 5-9 p.m.
Visit ywcatopeka.org for more information or contact Alison St. Clair at astclair@gseplaw.com

Topeka Chamber Fast Forward Social
hosted by TBA's Young Lawyers Division
Thursday, October 22
Kansas Bar Association
5-7 p.m.

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empowered to dismiss the chancellor and appoint a successor, regardless of the appointee's lack of support in the *Reichstag*. Unfortunately, the Weimar Constitutional convention created the office of president with too much power. Not only could the president dismiss the chancellor, he could dismiss the cabinet, dissolve the *Reichstag* and veto legislation. Talk of a "substitute emperor" began soon after the constitution was adopted and indeed the power granted to the new republic's president reflected the predilection of many Germans for monarchial rule. In essence, the Weimar president held enough power to stop politics. The president could effectively interrupt the constitutional conversation within the German polity, thus vitiating opportunities for compromise and reconsiliation. The Constitution also enabled the election of splinter parties. Small political factions in the *Reichstag* made it difficult for any party to organize a workable coalition during much of the 1920s. Most importantly, the Weimar Constitution included the notorious Article 48 allowing emergency suspension of several constitutional protections, including *habeas corpus*, freedom of expression, freedom of assembly and freedom from warrantless search. Article 48 could be invoked by the president in a public emergency.[7]

The Weimar Constitution with or without its flaws was not the sole cause of the Nazi upheaval. There was great resentment over the Treaty of Versailles ending World War I. Germans felt the Treaty was unjust. Eastern Prussian territories were ceded to Poland and Treaty imposed reparation payments created material hardship on ordinary Germans. Germany lost its colonies and military restrictions were imposed. Additionally, the Versailles Treaty and the Treaty of Saint Germain forbade the joinder of Germany and Austria into a greater German state which was deeply resented by those German speakers romantically attached to the idea of the Reich as successor to the Holy Roman Empire of the Middle Ages. Splinter groups, both communist and nationalist, largely made up of former Reich soldiers mustered out of the army after World War I, began to form paramilitary groups ostensibly for reasons of public safety.

Economic instability added to the political and cultural unrest. In the early 1920s to meet cash obligations under the Treaty and to pay promised benefits, the Weimar government simply printed more money. However, this was at a time when Germany had no ability to sell production abroad. Payments and currency printing drastically limited hard currency reserves. The result was hyperinflation. Several years later, in 1930, the world-wide depression hit Germany.

Finally, the success of the Weimar Republic was impeded by the attitude of many German civil servants. During the Weimar period, Germans civil servants, including judges, were remnants of the Bismarkchian imperial state. Weimar German judges were unfamiliar and uncomfortable with democracy. There was a preference for authority through sovereign control which, as indicated above, was reflected in the president's power under the Constitution. Thus, the old order authoritarian attitude of many German judges helps explain their benign attitude toward the growing influence of National Socialism and Hitler's Third Reich. One commentator states:

> "Amid calls for reform of the judiciary in 1921, Gustav Radbruch, the newly installed Social Democrat justice minister for the Reich, publically accused judges of hiding behind 'judicial objectivity' to exercise a form of justice that was an 'alien authoritarian body in the social people's state.'… Indeed, a great part of Weimar's judiciary was unable to undertake the mental shift toward democracy; instead, they remained locked into the authoritarian and deferential atmosphere of the Bismarckian state."
>
> McElligott, Rethinking the Weimar Republic
>
> Authority and Authoritarianism 1916 – 1936, (2014), p. 111.

The chaos of the post World War I German social and economic order, the authoritarian views of many German judges, and personal intimidation by Brown Shirts and other paramilitary groups are the most direct explanation for the conduct of German judges during the Weimar period and under the Nazi regime. Radbruch's reference to "judicial objectivity," within the above quoted passage, hints at an additional explanation. That is, the influence of judicial positivism among the German judiciary.

Rechtspositivismus

The possibility that strict legal positivism, (combined with the traditional positivist idea of sovereign command) as a jurisprudential theory may have influenced German judges—and the German legal profession as a whole—during the Nazi Reich and contributed to the failure of German judges to block Hitler's racial, expansionist, and totalitarian policies will be the main topic in the November issue. It is certainly noteworthy that there was no effort through the judiciary of otherwise to challenge Hitler's Enabling Act of 1933, making *Der Führer's* decrees the rule of law.

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[1] As early as June 1945, Soviet dictator Joseph Stalin was conspiring with German communists to undermine Western democratic influence in order to bring all of Germany within the Soviet orbit. Ultimately, Stalin's perfidy resulted in the closure of access to West Berlin. The West responded with the successful airlift to relieve Berlin (April 1948 to May 1949). The Cold War began before the Nuremberg trials were completed.

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[2] It was possible to hold the subsequent trials in Nuremberg since Bavaria was within the American zone of occupation. The second set of trials, known as the United States Nuremberg Military Tribunals, were proceedings before United States military courts but, as with the International Trial, the subsequent American proceedings were held in the Nuremberg Justice Palace. There were twelve subsequent American Nuremberg trials, beginning in December 1946 and lasting until April 1949.

[3] An exceptional on-line resource regarding the Justice Trials, including a transcript of the proceedings, may be found at http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm.

[4] Unfortunately, Germany had a tradition of "special" courts. The old Imperial Constitution allowed for declaration of a State of Siege (Belagerungszustand) whereby certain acts threatening the wartime community could be tried in special courts. Such courts operated off and on after the national unification of 1871 throughout World War I. The concept was eventually replaced by Article 48 of the Weimar Constitution, allowing for declaration of a national emergency and suspension of otherwise constitutionally provided civil rights.

[5] Nazi treatment of "undesirables" is well known, but there was earlier mistreatment of Germany's unwanted residents. During the monarchy, thousands of minorities living in the German Empire were expelled. The expulsion orders were mainly directed at ethnic Poles but socialists, Jesuits, French nationalists, and "Gypsies" were all removed. Most of the expulsions were the work of the Prussian government. 19th century romantic theories of "pan-Germanism" provided a popular foundation for the removals. The ideal of pan-Germanism may be seen as a precursor to the Nazi ideas of untermensch and lebensraum.

[6] After passage of the Enabling Act of 1933, whatever liberal promises the Weimer Constitution may have offered were obviated. Soon after the Reichstag Fire Decree invoking Article 48 of the Weimar Constitution, Hitler completed his power grab by causing the Reichstag to pass, by super majority, The Enabling Act of 1933 (Ermächtigungsgesetz), effectively amending the Constitution. The Enabling Act, effective for a period of four years unless renewed by the Reichstag (which it was, twice), empowered Hitler to enact laws without involving the Reichstag. Passage of this outrageous law was made possible because communist party members were removed from the Reichstag by the Fire Decree and the Social Democrats – many of whom refused to return to the assembly to vote on the Act – were "deemed" to have voted because Reichstag President Hermann Göring's had deviously changed voting rules for Reichstag members. The Fire Decree and the Enabling Act created a "lawful" dictatorship which Nazis could argue was consistent with Rechtsstaat.

[7] Beginning in the summer of 1930, the Weimar President, Paul von Hindenberg, was obliged to rule by emergency decree because the Social Democrats' Reichstag majority had collapsed and coalition governance was becoming impossible. Less than one month after having been appointed Chancellor in 1933, Hitler caused President von Hindenburg to invoke Article 48 citing the excuse of a fire at the Reichstag. The fire was blamed on German communists, permitting Hitler to ban communist delegates from the Reichstag.