

## Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State

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### Abstract

The Nazi regime had loyal judges who willingly transformed the liberal German law into an instrument of oppression, discrimination and genocide. This was achieved without substantially interfering with the operation of the courts and without applying disciplinary measures on the judges. But, not all judges were congenial servants of the regime—some resisted in their capacity as judges. Based on case-studies and existing literature, this Article distinguishes between two different lines of judicial opposition to those in power: Between opposition taking place in the open and opposition in secret, and between opposition within what is accepted by those in power as being within the law and opposition that is in breach of the law. The Article then seeks to explain the deference the regime gave to judicial by employing institutional theory and the concept of path dependence. Germany was deeply embedded in the Western legal tradition of emphasis on law as an autonomous institution with an independent judiciary.

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### A. Hitler's Speeches

Hitler hated judges. Following the Nazi Press criticisms of a judge for an outrageously mild sentence of five years in prison for the murder of his wife, Hitler addressed the judiciary in a speech in the Reichstag on April 26, 1942. Among other things, Hitler said:

I expect the German legal profession to understand that the nation is not here for them but they are here for the nation . . . . From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.<sup>1</sup>

According to the US military tribunal in Nuremberg, "This menacing blast from the Fuhrer . . . wiped away the last remains of judicial independence in Germany."<sup>2</sup> Nevertheless, in a less known speech to Nazi Party leaders on May 23, 1942, Hitler stated that despite his speech in the Reichstag, he wanted the party not to interfere with the functioning of the judiciary. He later repeated this desire and prohibited putting pressure or interfering in any way whatsoever with any actor in legal proceedings.<sup>3</sup> The legacy of the Western legal tradition seems to have tempered even Adolf Hitler. On the one hand, Hitler wanted to bring judges to heel. On the other hand, he sought to protect the independence of the judiciary in deciding individual cases. This contradictory approach to the judiciary effectively disciplined the majority, while also providing some space for judges who objected to demands of the regime.

The Nazi regime was overall successful in reconciling these seemingly contradictory aims. Generally, the regime had loyal judges who willingly transformed the liberal German law into an instrument of oppression, discrimination, and genocide. In the words of US prosecutor Telford Taylor at Nuremberg, the "leaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage, and slaughter."<sup>4</sup> Later research confirms this portrait of Nazi judges as compliant servants of the regime, which remains the general opinion in legal and historical research.<sup>5</sup>

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<sup>1</sup> *The Justice Case*, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 50 (1951).

<sup>2</sup> *The Justice Case*, *supra* note 1, at 51.

<sup>3</sup> RALPH ANGERMUND, DEUTSCHE RICHTERSCHAFT 1919–1945 255 (1990).

<sup>4</sup> *The Justice Case*, *supra* note 1, at 31.

<sup>5</sup> See most notably H.W.KOCH, IN THE NAME OF THE VOLK POLITICAL JUSTICE IN HITLER'S GERMANY (1989); INGO MÜLLER, FURCHTBARE JURISTEN DIE UNBEWÄLTIGTE VERGANGENHEIT UNSERER JUSTIZ, (1987) (Ger.), *translated in* HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (1991). For a treatment of military courts see MANFRED MESSERSCHMIDT, WAS DAMALS RECHT

A compliant judiciary resulted without substantial interference with the operation of the courts and largely without applying disciplinary measures on judges.<sup>6</sup> German authorities even treated judges in occupied countries with deference, although they sometimes applied harder measures. Still, some judges were dismissed in the Netherlands and arrested in Belgium for protesting against German measures in their rulings.<sup>7</sup> But, despite such repercussions, not all judges were congenial servants of the regime.

Nevertheless, efforts by contemporary jurists after the fall of the Nazi regime to show that not all judges were willing servants, such as the extensive study by Hubert Schorn,<sup>8</sup> were dismissed as apologetic by later observers. Müller scorned the case-stories presented by Schorn as ridiculous.<sup>9</sup> A similar debate took place over the military courts, where a study by contemporaries was written off by later scholars as “a point of departure that has to be departed.”<sup>10</sup> The successor regime in the West, the Federal Republic of Germany, rehabilitated judges<sup>11</sup> while making pitiful efforts to hold even the worst of the judges

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WAR. . . NS-MILITÄR- UND STRAFJUSTIZ IM VERNICHTUNGSKRIEG (1996). See also the overview of the research by Kenneth F. Ledford, *Judging German Judges in the Third Reich*, in ALAN E. STEINWEIS & ROBERT D. RACHLIN, *THE LAW IN NAZI GERMANY IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE* 161–89 (2013).

<sup>6</sup> See Karl Loewenstein, *Reconstruction of the Administration of Justice in the American Occupied Germany*, 61 HARV. L. REV. 419, 444 (1948):

But not a single case is reported in which a judge who resigned was sent to a concentration camp, or even lost his pension. If he wished, he could leave the service and “sit the regime out” on his pension. Though such cases occurred not too frequently, they were known and widely commented on by the judiciary. Moreover—and this too was fully known—there were some judges, particularly among the older generation, who, neither resigning nor yielding, resisted pressure to the end. Nor is it correct to assume that non-party members among the judiciary were invariably denied promotion. No doubt one reason for this is that very few judges mounted any opposition against the regime. But some did quite openly without meeting with more serious sanctions than transfer to a different jurisdiction, lack of promotion or removal from office with a pension.

<sup>7</sup> See Derk Venema, *The Judge, the Occupier, his Laws, and their Validity: Judicial Review by the Supreme Courts of Occupied Belgium, Norway, and the Netherlands 1940-1945 in the Context of their Professional Conduct and the Consequences for their Public Image*, in *JUSTICE IN WARTIME AND REVOLUTIONS: EUROPE 1795–1950* 203, 209, 213 (M. de Koster & D. Heirbaut eds., 2012).

<sup>8</sup> See HUBERT SCHORN, *DER RICHTER IM DRITTEN REICH GESICHTE UND DOKUMENTE* (1959).

<sup>9</sup> See Müller, *supra* note 5, at 200.

<sup>10</sup> MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA STUDIES ON LEGAL HISTORY IN NAZI GERMANY* 151 (1988).

<sup>11</sup> JOACHIM PERELS & WOLFRAM WETTE, *MIT REINEM GEWISSEN WEHRMACHTRICHTER IN DER BUNDESREPUBLIK UND IHRE ÖPFER* 16–7 (2011).

responsible for their deeds.<sup>12</sup> The focus for critical scholarship was therefore not to bring to light how judges had opposed the regime, but to show how the judiciary had contributed to the oppression and the atrocities of the Nazis, and that these responsible individuals had not been brought to account for their misdeeds.<sup>13</sup>

In recent years, renewed interest has surfaced for those in Germany who resisted the Nazi regime.<sup>14</sup> Despite general works on resistance to the Nazi regime, little has been done to uncover resistance within legal institutions and, particularly, within the judiciary. The only attention Mommsen pays to the judiciary in his book on German resistance under the Third Reich is an introductory remark noting that the administration of justice was completely usurped and that “the judiciary functioned as a loyal instrument of the regime.”<sup>15</sup> The prominent German legal scholar and judge Bernd Rüter published a small book in 2008 recounting examples of opposition that had hitherto been overlooked, and discussing why they are mostly forgotten in the collective German memory.<sup>16</sup> He includes the story of the lawyer Hans Calmeyer who worked as head of the department for internal affairs at the Reichskommissariat in the Netherlands. In that post, Calmeyer was responsible for organizing the seizure of all Jews in the country. Instead, he saved several thousand from deportation by falsely categorizing people as “non-Jewish” by encouraging the use of false certificates that he then certified as valid. Recently, another book edited by the German politician and former minister of justice Heiko Maas provides short portraits of seventeen judges and prosecutors.<sup>17</sup> For the most part, these people publicly spoke out against Nazi’s undermining the rule of law, or engaged in some form of secret and active resistance against the regime. Three of the portraits correspond to judges who opposed the regime through their legal rulings.

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<sup>12</sup> See JÖRG FRIEDRICH, FREISPRUCH FÜR DIE NAZI-JUSTIZ DIE URTEILE GEGEN NS-RICHTER SEIT 1948 EINE DOKUMENTATION (1983); HANS PETER GRAVER, JUDGES AGAINST JUSTICE: ON JUDGES WHEN THE RULE OF LAW IS UNDER ATTACK 143–57 (2015).

<sup>13</sup> Studies of Nazism have at different times portrayed the German population as resistant to or complicit with the regime. See Ian Kershaw, *Preface to the Bloomsbury Revelations Edition*, in *THE NAZI DICTATORSHIP PROBLEMS AND PERSPECTIVES OF INTERPRETATION* (2015).

<sup>14</sup> See generally PETER HOFFMAN, *HISTORY OF THE GERMAN RESISTANCE, 1933-1945* (3d ed. 1996); HANS MOMMSEN, *ALTERNATIVES TO HITLER: GERMAN RESISTANCE UNDER THE THIRD REICH* (2003); NATHAN STOLTZFUS, *HITLER’S COMPROMISES: COERCION AND CONSENSUS IN NAZI GERMANY* (2016). See also *GERMANS AGAINST NAZISM: NONCONFORMITY, OPPOSITION AND RESISTANCE IN THE THIRD REICH: ESSAYS IN HONOUR OF PETER HOFFMANN* (Francis R. Nicosia & Lawrence D. Stokes eds., 2015) (providing a comprehensive overview of the subject).

<sup>15</sup> MOMMSEN, *supra* note 14, at 15.

<sup>16</sup> See BERND RÜTERS, *VERRÄTER, ZUFALLSHELDEN ODER GEWISSEN DER NATION? FACETTEN DES WIDERSTANDES IN DEUTSCHLAND* (2008).

<sup>17</sup> HEIKO MAAS, *FURCHTLOSE JURISTEN RICHTER UND STAATSANWÄLTE GEGEN DAS NS-UNRECHT* (2017).

It is difficult to draw sharp lines between criticism of the regime, defiance, oppositional activity, and active resistance. The German historian Hans Mommsen considers it fruitless to attempt to conceptualize the distinction between active resistance and other forms of non-cooperation and anti-Nazi behavior.<sup>18</sup> This difficulty is heightened by the fact that most opposition in Nazi Germany corresponds to people acting in political and social isolation. This creates methodological problems in the study of resistance and leaves a wide scope for interpretation. There is no indication that there was any organized opposition among German judges. Acts of subversion seem to have largely been the acts of individuals acting alone. Schorn describes how some judges met with each other and with other members of the legal profession to discuss how to act to temper or counter the measures of the regime.<sup>19</sup> This, however, seems to have been the exception to the general picture of isolation.

Instances of judicial resistance and opposition to authoritarian regimes, and how such regimes react to resistance are important topics for research. Insight into the conditions of opposition may enhance the possibility of future opposition. Familiarity with and recognition of the brave people who have stood up to authority may inspire others. This does not mean that the general picture of the German judges as loyal to the Nazis is false. Nevertheless, efforts to demonstrate how the judges contributed to the implementation of oppressive policies must not lose sight of examples of the opposite. The purpose of this Article is to set this right, to bring forgotten instances back into the light, and to discuss lessons that we can learn from them. Many of the cases are known to those familiar with the literature. They have, however, not previously been seen in light of each other, but rather have been recounted as isolated events. Some new instances that have not previously been the subject of scholarly treatment have been sought out from archives. These include the SS Court in occupied Norway and the German military judiciary of occupied Denmark. Such studies can increase our insight into the efforts and conditions of judicial opposition.

All the examples are of German judges. I nevertheless believe that they generally have something to offer to the understanding of the judicial role, at least for legal orders that belong to the Western legal tradition. The role of a judge offers many opportunities for opposition, and opposition may take many forms. After discussing the cases, I present a typology of judicial resistance. This typology may make it easier to discover instances of resistance in historical sources to bring more instances to light. This will make it possible to present a more nuanced picture of the role of the judiciary in authoritarian settings.

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<sup>18</sup> See MOMMSEN, *supra* note 14, at 33.

<sup>19</sup> See Schorn, *supra* note 8, at 50–2.

## B. The Difficult Choice

A judge who experiences that the regime he is serving is undergoing a transition from a liberal political order to an authoritarian regime, or even totalitarian regime, has several options. These may be divided into eight distinct categories. He may choose to resign or stay. In some cases, not resigning can serve as a strategy of opposition. To elaborate, when a law is clearly oppressive, a judge applying it may choose to voice his dissent in the opinion, openly characterizing the law as unreasonable, and in this way, influencing the regime. Ronald Dworkin describes the next three options in *Law's Empire*.<sup>20</sup> When applying a law, a judge can try to limit its excesses by interpreting the legal practices of the regime in their least bad light. He may alternatively misrepresent the law and lie about what he thinks the law is or the facts of the case are. Or he may disregard legal sources and obligations as far as he can get away with it.

The next option is for the judge to not apply an otherwise valid law, either because unjust laws cannot constitute valid law, or because he has a moral right or even a moral duty to disregard highly unjust laws. The first of these positions has been taken by legal scholars such as Radbruch, Fuller, and Dworkin, to mention some of the most influential. The second position has been taken by scholars such as Hart and Raz. Raz points out that the criteria that deprives unjust laws of their validity may be part of the positive law of the relevant legal order.<sup>21</sup> Following Fuller, however, many scholars claim that the notion of law as such entails such criteria. To complete the picture, legal orders extraneous to the legal order of the judge can also create an obligation to not apply the laws of his own legal order. For example, German judges were convicted at Nuremberg under international law for applying special criminal provisions against Poles.<sup>22</sup>

The last option a judge has is to undermine the efficiency of the regime through extra-legal activities. Some of these activities may be undertaken through the non-judicial functions of his job. The judge often also has several administrative tasks to perform. Or he may join a resistance movement and use his position as a judge as a respectable cover.

There are many lines of action and many options available for the judge who wants to oppose or resist a regime. This Article discusses examples of judges taking many of these options in opposition of the Nazi regime. The main emphasis, however, will be on forms of opposition that the judge can perform in his capacity as a judge.

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<sup>20</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 105–07 (Harv. Univ. Press 1986).

<sup>21</sup> See JOSEPH RAZ, *THE AUTHORITY OF LAW* 330 (2d ed. 2009).

<sup>22</sup> See Hans Petter Graver, *Judging without Impunity: On the Criminal Responsibility of Authoritarian Judges*, 4 BERGEN J. CRIM. L. & CRIM. JUST. 1, 125–49 (2016).

While resignation may seem an obvious option, most judges chose to stay on. This choice is not easy, and involves issues of politics, loyalty, morals, and personal safety and well-being. A judge has many loyalties—to his employer, himself and his family, but also, to the law. Such loyalties may encourage a person to stay in the position as a judge and try to make the best of it.

In some cases, the choice was based on careful deliberation. The most famous oppositional German judge, Lothar Kreyszig, wrote in an autobiographical note published by his son in 2011:

In the spring of 1933 I drafted my letter of resignation. I recounted numerous instances of breaches by the prosecutors of the most elementary legal rules, both in acts and omissions. After a sleepless night, I realized that this was too simple. It would let the contradictions sink into oblivion and leave the field open to those who had been led astray.<sup>23</sup>

Kreyszig wrote that the uncertainty of the right thing to do left him alert to the conflicts that would confront him in the line of duty. Soon after, the Jews of his town Chemnitz were arrested and placed in a detention center near the courthouse.<sup>24</sup> The court was told to open proceedings against the prisoners and the case was assigned to Kreyszig. He immediately approached the warden of the center to ensure that the detainees were not ill-treated, something that was not obvious at the time. He then put all other matters on his docket aside to speedily address the substance of the cases. After looking into each case, he found that all the complaints were groundless, and he released all the prisoners. At that time, many other judges of Germany acted differently, regarding the detention of Jews as something inevitable.

Choosing to stay is not an obvious choice. Commenting on South Africa in the apartheid state of the 1980s, the South African legal scholar Raymond Wachs called for the resignation of judges by appealing to their moral and legal duty in an authoritarian State: “A resignation would be a clarion call: A statement of judicial despair and outrage. It would be an assertion of the judge's absolute fidelity to justice, a protest against the abuse of law.”<sup>25</sup> The resignation of the Norwegian Supreme Court judges in December 1940, as a protest against the German occupiers' claim to uncontested legal power, sent a clear message to the Norwegian population about the illegitimacy of the civil rule established by the Germans and

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<sup>23</sup> LOTHAR KREYSSIG, *AUFSÄTZE, AUTOBIOGRAPHIE UNTER DOKUMENTE* 114 (Hans-Joachim Döring ed. 2011).

<sup>24</sup> *See id.* at 115.

<sup>25</sup> Raymond Wachs, *Judges and Injustice*, 101 S. AFRICAN L. J. 266, 284 (1984).

Vidkun Quisling and his party. Their resignation was praised as a call to the Norwegian population to resist the puppet government.<sup>26</sup>

The fact is, however, that judges seldom resign. Of those that do not resign, most remain to perform their functions to the full satisfaction of those oppressors in power. In doing so, they give validity to the new order, recognizing the authoritarian regime as legitimate even in cases where the regime has come to power by illegal means.<sup>27</sup> As a rule, what the regime enacts as law is law; and the main duty of the judge is to apply the law.

Generally, the scope for opposition from the bench is perceived as being non-existent or very limited. Many judges perceive judicial opposition as illegitimate and contrary to the judicial role. South African judges replied, when they were criticized for their complicity in Apartheid that:

A judge, whether positioned by personal conviction on the left, center, or right of the political spectrum, who feels free to ignore the oath of office when compliance with it conflicts with his or her own credo, is no hero. Such conduct is bereft of integrity and is a self-indulgent abuse of judicial power. There are only two honest courses open to a judge in such a situation: Either resign or comply with the oath of office.<sup>28</sup>

Under this call to action, judges who stay on should disregard any personal objections they may have and loyally apply the law for the regime in power. In my experience, this latter prescription expresses the view of judges in many different legal systems. Many also believe that judicial opposition is of no avail. In other words, judges have no power to enforce their judgments independent of those in command of the State because aberrant rulings will be reversed on appeal or bring about new legislation to “set things right.” Closer inspection reveals, however, that opposition is possible, does occur, and may have important effects in countering oppression. Judges can form an important part of a “legal complex” that can be effective in the struggle for political liberalism in authoritarian regimes.<sup>29</sup> This is an

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<sup>26</sup> See Venema, *supra* note 7, at 218.

<sup>27</sup> See T Mahmud T, *Jurisprudence of Successful Treason: Coup d’Etat and Common Law*, 27 CORNELL INT’L L. J. 27 49, 124 (1994).

<sup>28</sup> *The Truth and Reconciliation Commission and the Bench, Legal Practitioners and Legal Academics—Written Presentations*, 115 S. AFRICAN L.J. 15, 45 (1998).

<sup>29</sup> See TERENCE C. HALLIDAY, LUCIEN KARPIK, & MALCOLM M. FEELEY, *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* (2007).

important message to send out for those who want to preserve the rule of law in challenging times.

Resistance may be the right thing to do, despite the demands of the judicial role. Breaking the law may be a moral obligation for the judge.<sup>30</sup> In fact, judges may become liable under criminal sanctions in proceedings of transitional justice after the fall of an authoritarian regime for failing to oppose measures of the regime, even when the measures were considered legal by the criteria of the legal system that the judge served under.<sup>31</sup> Bringing instances and effects of judicial opposition to the attention of judges and participants in the legal system may encourage more opposition, and thus make judges better guardians of the rule of law during extreme conditions. In this Article, I record and discuss instances of judicial opposition in order to analyze different possibilities and forms.

Outside of my frame of analysis are instances where judges act politically or otherwise outside the scope of their judicial role against the regime. Famous examples of this are the leading official and judge Hans von Dohnanyi and Chief Justice Karl Sack, both of which were executed in April 1945.<sup>32</sup> The two were accused of participating in plots against Hitler. Other participants in these plots include Dietrich Bonhoeffer and admiral Wilhelm Canaris. Another example of a judge acting beyond their judicial role is Paal Berg, Chief Justice of the Norwegian Supreme Court, who after his resignation in December 1940 became the supreme leader of the Norwegian resistance movement.<sup>33</sup>

### C. The Case Studies

Not all judges in Germany were always compliant with the wishes of the Nazi rulers. It is important to note that in many cases, even in cases of great political importance, courts initially continued to function as independent courts, basing their judgments on the traditional approach to law. A *cause célèbre* is the case of the Reichsgericht after the fire in the Reichstag on December 23, 1933, where four of the five accused were acquitted by the court due to the lack of evidence. This provoked the fury of Hitler and led to the establishment of the People's Court and the special courts to deal with political cases.<sup>34</sup> One

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<sup>30</sup> See JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY THE ETHICS OF LAWLESS JUDGING* (2010) (providing a brilliant and convincing argument on the subject).

<sup>31</sup> See Graver, *supra* note 22.

<sup>32</sup> 100. Geburtstag von Hans von Dohnanyi: Ansprache des Präsidenten des Bundesgerichtshofs Prof. Dr. Günter Hirsch beim Festakt aus Anlaß des 100. Gubertstags von Hans von Dohnanyi am. März 200, DER BUNDESGERICHTSHOF, <http://www.bundesgerichtshof.de/DE/DasGericht/Praesidenten/Hirsch/HirschReden/rede08032002.html> (last visited March 8, 2002).

<sup>33</sup> See Venema, *supra* note 7, at 218.

<sup>34</sup> See GERT BUCHHEIT, *RICHTER IN ROTER ROBE: FREISLER, PRÄSIDENT DES VOLKSGERICHTSHOFES*, 27–9 (1968).

might argue that this case occurred so early that the judges had not yet fully adapted to their new role under National Socialism. It is also worth noting that, based on a law retroactively given by Hitler as Reich Chancellor, the one conviction resulted in the pronouncement of a sentence of death.

There were also other instances of judges initially holding on to the ideals and legal traditions of the old times. Eduard Tigges, president of the Berlin Kammergericht, tried to stop the attacks of the SA against Jewish members of the court, and filed protests with the Prussian minister of justice. Following further measures by the Ministry against Jewish judges and lawyers, he submitted his resignation in April 1933.<sup>35</sup>

The Prussian Administrative Court held onto the principle of legality for some time by interpreting both old laws and laws passed by the Nazi regime narrowly, thereby curbing the power of the authorities.<sup>36</sup> The Prussian Administrative Court maintained this line throughout the 1930s and until the court was abolished in 1938 and replaced with a Reich Administrative Court.

Initially, prosecutors and judges reacted against the misuse of power and the atrocities in the Concentration Camps. In May 1933, prosecutors in Munich started investigations into killings of inmates in Dachau.<sup>37</sup> These investigations were met with resistance and countermeasures by the SS, and the confrontations between the legal institutions and the SS were soon brought to the highest political level.<sup>38</sup> Nevertheless, SS guards in several camps were found guilty of mistreatment of prisoners and given prison sentences. In 1935, Hitler confirmed that the camps could operate outside of the law, pardoning the SS men. This brought an end to legal proceedings in regular courts against operations in the camps.

Independent judgments in political cases prevailed. In 1936, the authorities initiated a campaign against the monasteries, convents, and members of religious orders, charging them with the offense of “homosexuality,” often on the basis of the testimony of young witnesses recruited from mental institutions. The cases were highly profiled and supported by the Party propaganda apparatus and Goebbels himself. Monks were apprehended by the Gestapo and kept in custody as ordered by the courts. In Cologne, one of these cases involving four monks reached the Oberlandesgericht on appeal. The lower courts had approved the detainments in summary decisions. The three judges of the Oberlandesgericht demanded the documents of the case and made a thorough investigation of them. In a ruling

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<sup>35</sup> HANS BERGEMANN & SIMONE LADWIG-WINTERS, JÜDISCHE RICHTER AM KAMMERGERICHT NACH 1933—EINE DOKUMENTATION 27 (2005).

<sup>36</sup> See Graver, *supra* note 12, at 98–101.

<sup>37</sup> See Maas, *supra* note 17, at 245–64.

<sup>38</sup> See NIKOLAUS WACHSMANN, KL: A HISTORY OF THE NAZI CONCENTRATION CAMPS 86–93 (2015).

spanning over more than fifteen pages, the Oberlandesgericht released the monks and severely criticized the methods of the Gestapo. The court revealed that the Gestapo had made use of illegal detentions, tortured prisoners, and intimidated witnesses. One young patient suffering from diabetes was denied medication until he made accusations against the monks. Other courts followed suit. Eventually this led Hitler to order a cease in the persecution of the monks, fearing reactions from abroad. Only a small number of the initially accused monks were ultimately convicted, and most of them were released with the charges dropped.<sup>39</sup>

A well-known case is the case against Martin Niemöller, one of the founders of the Confessional Church, an organization that opposed the nazification of German Protestant churches. This case was brought before the special court of Berlin, and the verdict came to pass on March 2, 1938. The court was, in other words, one of the courts specifically established in 1934 to deal with political cases. The judges were hand-picked for the task. Niemöller was accused of disturbing the peace, misuse of office, and encouraging opposition against measures enacted by the government of the State. Instead of the long prison sentence envisioned by the Gestapo, Niemöller was fined 2,000 Reich Marks after an impeccable proceeding as judged by any normal legal standard. A Swiss paper celebrated that “there [were] still judges in Berlin.”<sup>40</sup> Sadly, Niemöller was never released from Gestapo custody, and was transferred to Sachsenhausen and then, in 1941, to Dachau, where he spent the rest of the war.

Some judges refused to apply the Nazi anti-Semitic world view and continued to treat Jews as ordinary legal subjects.<sup>41</sup> Three such cases are reported in a recent book that portrays seventeen judges who opposed the regime in different ways.<sup>42</sup> In 1935 in the small town of Triberg, Baden, Friedrich Bräuninger came under severe pressure by the authorities for allowing a Jewish doctor to return to his practice after serving a prison sentence for performing illegal abortions. A German doctor had been appointed as an interim doctor in the regular doctor’s absence and refused to surrender the practice. Bräuninger ordered him to do so, stating that the view of the Party—that Jews were only guests and not citizens—was not yet the law of the land.<sup>43</sup>

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<sup>39</sup> See Schorn, *supra* note 8, at 404–08.

<sup>40</sup> WILHELM NIEMÖLLER, *MACHT GEHT VOR RECHT DER PROZESS MARTIN NIEMÖLLERS* 83 (1952).

<sup>41</sup> See Graver, *supra* note 12, at 60–8 (reporting the mainstream adaptation of Nazi Anti-Semitism into judicial practice).

<sup>42</sup> See Maas, *supra* note 17.

<sup>43</sup> See Maas, *supra* note 17, at 43–53.

In 1934, Karl Steinmetz found in favor of a Jewish butcher who went to court to reclaim his butcher's knives that had been confiscated by two SA-men in Neukirchen. The two failed to appear to the court hearing, and Steinmetz found against them under procedural rules of non-appearance. He was called to the Ministry of Justice, first of Prussia, and then of the Reich, and asked to recall his decision, which he refused. As a consequence, he was ordered to take a position in Oberhausen, 200 kilometers from his home.<sup>44</sup>

In 1938, Alfred Weiler refused to accept the legal ideology depriving Jews of normal legal rights in a case where a landlord wanted his Jewish tenants removed from his property on the ground that their presence in an "Arian household" was unsustainable. The regional court leader criticized the ruling as being against the "*esprit des lois*."<sup>45</sup>

The following event became famous because it was mentioned in the US Military tribunal case in Nuremberg against the leaders of the Nazi Judicial system. In November 1941, Dr. Willi Seidel, a judge of one of Berlin's county courts, was confronted with an unusual case.<sup>46</sup> Five hundred Jews brought claims against the city's food authorities. After the announcement of extra coffee rations, Berlin citizens had gone to their local grocers to collect their coffee. Among these were thousands of Berlin's Jewish population. The food authorities saw the Jews' conduct as an offense against the distribution regulations and accordingly imposed fines on six thousand Jews. Seidel wrote a twenty-page ruling where he came to the conclusion that the Jews had not committed a punishable act. The contrary interpretation on the part of the food authorities was absolutely incompatible with the established facts. Notably, the food authorities had "overlooked" various factors. In his ruling, Seidel characterized the legal view of the authorities as "untenable," "fabricated," and "abstruse."

The ruling was a slap in the face of the Nazi authorities. According to the Reich Ministry of Justice:

[T]he judge should have put himself the question: How will the Jew react to this 20-page-long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority without losing one word about the reaction of our own people to this insolent and arrogant conduct of the Jews.<sup>47</sup>

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<sup>44</sup> See Maas, *supra* note 17, at 199–212.

<sup>45</sup> See Maas, *supra* note 17, at 238.

<sup>46</sup> See Schorn, *supra* note 8, at 649–52 (providing the relevant description of the case); see also *The Justice Case*, *supra* note 1, at 530–32 (providing the Reich Ministry of Justice's translation of the case).

<sup>47</sup> *The Justice Case*, *supra* note 1, at 531.

In the opinion of the Ministry, the legal reasoning of Seidel was obviously doubtful, because “the fact that Jews were not entitled to a supply of genuine coffee was self-evident even if it was not specially mentioned in the official decree.”<sup>48</sup>

Willi Seidel was reported by the head of the food office to the president of the Court with the request that he be transferred to another position. The president of the Court rejected this request, and again when the regional leader of the Nazi Party (*Gauleiter*) repeated the request. The head of the food office appealed the refusal to the Reich Ministry of Propaganda, which, after consultation with the Ministry of Justice, received Roland Freisler’s reply that Dr. Seidel had been reprimanded.

The Party Court charged Seidel, revoking his membership to the National Socialist Party. The Party Court found that he had shown absolute lack in political attitude through a serious misconception of the Jewish issue. Even if he believed that his decision was necessitated by the law—which the Party Court commented was not the case under an intelligent interpretation—he should have consulted with the Ministry of Justice before passing a judgment that could undermine the authority of State bodies.

The Ministry consequently transferred Seidel to the civil department of the Court so that he would no longer deal with criminal matters. As a judge in the civil law department, he was no longer exempt from the draft and was subsequently called up for military service. He survived the war and was later appointed to president of a Berlin district court.

There were also instances of opposition among those who ostensibly served the regime in a loyal way. Law student Konrad Morgen joined the SS shortly after the Nazi takeover of power in Germany.<sup>49</sup> In the 1930s, after his graduation, he underwent further legal training as a judge until he was called up to join the Waffen SS with the invasion of Poland in September 1939. After the invasion of France, Morgen was demobilized and sent to Berlin to join the SS judicial corps. He was first sent as a judge to the SS court of Cracow, where he got involved in cases of corruption within the *General Gouvernement*. Prosecuting and convicting SS officers for corruption made him many enemies, and in June 1942 he was dismissed from the service and sent to the front, on the pretext that he had misapplied the law in a minor criminal case.<sup>50</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> The presentation of Konrad Morgan and his activities is based on the book by HERLINDE PAUER-STUDER & DAVID VELLEMAN, *KONRAD MORGEN: THE CONSCIENCE OF A NAZI JUDGE* (2015).

<sup>50</sup> See PAUER-STUDER, *supra* note 49, at 41.

In May 1943, however, he was called back from the front to the SS judicial head office in Munich, and he was assigned by the Main Office SS Courts to the Reich Criminal Police Department in Berlin. There he was given the task to investigate corruption in the concentration and extermination camps. He investigated Weimar-Buchenwald, Lublin, Auschwitz, Sachsenhausen, Oranienburg, Hertogenbosch, Krakow, Plaszow, Warsaw, and the Dachau. About 200 cases were tried during this time. Morgen personally arrested five concentration camp commanders. At least one of them was executed.<sup>51</sup>

Morgen had authority to visit concentration camps, an authority held by very few. Before beginning an investigation, he closely examined every detail of the concentration camp in question, paying special attention to arrangements that seemed particularly important to him. In the winter of 1943–44, he visited Lublin and Auschwitz and discovered that mass extermination by gassing was taking place. While being interrogated as a witness for the defense during the main criminal trial at Nuremberg, counsel for the SS Horst Pelckmann asked Morgen what he would have done under normal circumstances after learning of all those terrible things. Morgen answered that “under normal circumstances [he] would have had to have Kriminalkommissar Wirth and Commander Höss arrested and charged with murder.”<sup>52</sup> He acknowledged that such would have been impossible because the extermination was considered a legal activity under positive law. After first contemplating a flight to Switzerland to “combat and topple the system from without,”<sup>53</sup> Morgen ultimately decided that his job gave him a possibility to pursue the crimes.

Morgen recognized that there was no way to attack the legality of the mass exterminations by normal legal measures. Nevertheless, he thought he could get at them through other, more indirect actions. In his own words:

I saw a practical way open to me by way of justice; that is, by removing from this system of destruction the leaders and important elements through the means offered by the system itself. I could not do this with regard to the killings ordered by the head of the State, but I could do it for killings outside of this order, or against this order, or for other serious crimes. For that reason, I deliberately started proceedings against these

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<sup>51</sup> See *id.* at xi.

<sup>52</sup> *One Hundred and Ninety-Eighth Day: Thursday; 8 August 1946*, in NUREMBERG TRIAL PROCEEDINGS VOLUME 20, <http://avalon.law.yale.edu/imt/08-08-46.asp>.

<sup>53</sup> See PAUER-STUDER, *supra* note 49, at 89.

men, and this would have led to a shake-up of this system and its final collapse.<sup>54</sup>

Morgen expected that the defendants would invoke superior orders as defense, and that this would open discussions into the mass exterminations. These discussions could lead to the suspension of the entire legal system, if the leadership admitted to ordering the mass exterminations, or to an official sanction permitting the prosecution of camp leaders for the exterminations.<sup>55</sup> Morgen went ahead with cases against Odildo Globocnik, SS and police leader in the district of Lublin, and Maximilian Grabner, head of the Auschwitz Gestapo. Morgen also sought a way to get at Adolf Eichmann, leader of the department IV B4 of the Head Office of the Reich Security, tasked with overseeing Jewish affairs and evacuation. Morgen issued a warrant for his arrest in connection with the embezzlement of a pouch of diamonds stolen from Jewish prisoners. Ernst Kaltenbrunner, the Chief of the Head Office of the Reich Security, suppressed the warrant.

Konrad Morgen was not successful in halting the Holocaust. He was, however, one of the very few who successfully prosecuted leading officials of the Nazi concentration and extermination camps. This includes prosecutions that took place after the fall of the Nazi regime. Konrad Morgen was no moral hero. According to the careful study by Herlinde Pauer-Studer and David Velleman, Morgen's motives were ambiguous. First, he wanted an "ideal SS" and the crimes he found contradicted this ideal. Second, he was afraid that the State would be ruined and that the SS-men involved in the mass extermination would become absolutely corrupt. Konrad Morgen's commitment to justice may seem uncertain, and there may even be grounds to doubt his claim that he was acting to do what he could to impede the extermination taking place in the camps. Nevertheless, that he prosecuted camp commanders and tried to indict Adolf Eichmann are notorious facts. There are also good reasons to believe, as shown by Pauer-Studer and Velleman, that he did this in pursuit of a greater, more subversive goal.<sup>56</sup> He must therefore be counted among those judges who resisted the regime by the employment of legal measures.

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<sup>54</sup> *One Hundred and Ninety-Eighth Day: Thursday; 8 August 1946, supra note 52.*

<sup>55</sup> See PAUER-STUDER, *supra* note 49, at 95.

<sup>56</sup> An alternative hypothesis might be as follows. After the war, and after learning about the world's reaction to the holocaust, Morgen realized the moral implications of what he had been involved with, or at least he understood the reaction of the rest of the world. At the same time, an important witness implicated him directly in the deportation of Jews from Hungary. He was in American custody and as an SS judge he belonged to the class II, possibly even class I, of offenders on the list of the allies. This would mean that he may have had a real fear of being brought to trial and receiving a severe sentence. To counteract this, he started portraying himself as a resister of the mass killings. Although he was denounced in the early days after the defeat, he was protected by the solidarity of the old network as time passed. This is quite in line with the general experiences. To elaborate:

But here enters a socio-psychological element which AMG (American Military Government) was unable to neutralize—the class solidarity of the judiciary, which, subconsciously or consciously, began to balance

There were also other instances of opposition from judges in SS courts. The SS Court in Norway was given jurisdiction over breaches of the rules and orders issued by the Reichskommissar of occupied Norway. This meant that it tried cases against Norwegian nationals who were accused of espionage, sabotage, and political opposition. Later the court got jurisdiction in all criminal cases against Norwegians provided that the SS Security service or the German Wehrmacht decided that German interests were involved.<sup>57</sup> The court was headed by the German judge Hans Paul Latza. Latza was arrested after the war and charged with war crimes connected with his judicial functions. He gave several statements to the police during the investigations against him. He was eventually acquitted by the Norwegian Supreme Court.<sup>58</sup>

The SS Court was notorious in the Norwegian population for its severe punishments and the frequent use of the death penalty. Latza points to the fact that in a war, where the best part of the male population is sent to risk their lives at the front, and where civilians at home are killed in enemy bomb raids, it seems contrary to all reason to treat traitors and those who actively oppose the war efforts mildly.<sup>59</sup> Sharp measures in such cases were not only ordered from above, but were also part of the general consensus of the time.<sup>60</sup> Precisely because this

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and outweigh the desire for political cleanliness. In fact, under the impact of the occupation, a certain national solidarity has emerged—not merely in the civil service but among all classes—which tries to save as many colleagues as possible from the clutches of the denazification beast.

Karl Lowenstein (Reconstruction of the Administration of Justice in American-Occupied Germany, 61 HARV. L. REV. 419, 449 (1948). This illustrates the methodological difficulties present in most of the cases when investigating into instances of resistance. In many cases those that try to resist have to keep this secret in order to be effective and to protect themselves. This counts for a scarcity of sources. At the same time, many may have motives to paint themselves in a better light after the end of an authoritarian regime in order to escape criticism. This puts both the validity and the reliability of sources in doubt.

<sup>57</sup> See ROBERT BOHN, REICHSKOMMISSARIAT NORWEGEN: "NATIONALSOZIALISTISCHE NEUORDNUNG" UND KRIEGSWIRTSCHAFT 92 (2000).

<sup>58</sup> See Norsk Retstidende [Norwegian Court Reports] 468 (1947); Norsk Retstidende [Norwegian Court Reports] 1088 (1948).

<sup>59</sup> See *Massnahmen und Bemühungen des Gerichts, um die scharfen Tendenzen Terbovens und Rediess zu mildern, Oslo, Akershus* (Dec. 4, 1945) (on file in L-sak Oslo politikammer, dom 4028–2030: Latza, Regis, Kehr mfl).

<sup>60</sup> The US Military Tribunal in the case against leaders of the German judicial system expressed an opinion along the same line in saying:

The limitations on freedom of speech which were imposed in the enforcement of these laws are revolting to our sense of justice. A court would have no hesitation in condemning them under any free constitution, including that of the Weimar Republic, if the limitations were applied in time of peace; but even under the protection of the

opinion was so widespread, it was difficult—if not impossible—to step out of line, even for a judge. On the one hand, if one did not follow the general line, one would be dismissed and replaced with a person with a better understanding of the necessity of the time. On the other hand, according to Latza, he and his court made efforts to counter the sharpness of the Reichskommissar and the secret police in order to ameliorate the force applied by German justice on the Norwegian resistance. Latza describes several examples.<sup>61</sup>

He writes that they received many complaints against the secret police of the SS Security service from dependents of and counsel for the defendants. He regularly notified the commander of the police of these complaints, with little results. He therefore wrote a formal letter listing more than thirty issues that he considered to be instances of unacceptable practices. The letter was discussed in a formal meeting where Latza was accused of “shooting” against the SS Security service. The letter nevertheless led to actions taken against some of the officers of the police and corrections of some of the practices. In general, Latza describes the relation between the SS Court and the SS Security service as tense. Another example he mentions is that the court refused to accommodate requests by the Gestapo to give prior notice of when the accused were released for time already served in custody or on the basis of acquittals. The Gestapo wanted this information to prepare for re-arrest individuals in cases where they deemed it necessary to take them into “preventive custody.”<sup>62</sup>

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Constitution of the United States a citizen is not wholly free to attack the Government or to interfere with its military aims in time of war. In the face of a real and present danger, freedom of speech may be somewhat restricted even in America. Can we then say that in the throes of total war and in the presence of impending disaster those officials who enforced these savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity?

See *The Justice Case*, *supra* note 1, at 1026. See also the line of reasoning by the famous US Justice Oliver Wendell Holmes in the well-known case on forced sterilization, where he states:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

*Buck v. Bell*, 274 U.S. 200 (1927).

<sup>61</sup> *Massnahmen und Bemühungen des Gerichts, supra note 59 um die scharfen Tendenzen Terbovens und Rediess' zu mildern, Oslo, Akershus, supra note 59.*

<sup>62</sup> Such an exchange of information had been established in 1939 between the Volksgerichtshof and the Gestapo in Berlin. See KOCH, *supra* note 5, at 87.

In some cases, he would convince the SS Security service to drop charges. He mentions a case of espionage against approximately thirty professors and students at the University of Trondheim accused of collecting observations of ships and troops on the way to the eastern front. The SS expected conviction and severe sentences. He felt sympathy for the accused after remembering his own days as a student in the French occupied part of Germany east of the Rhine River. He deferred fixing a date for the case, and after a while many more cases with more serious charges had emerged. The head of the police ultimately agreed to withdraw the case. He also mentions other instances where delaying the case was used as a strategy to have the case dismissed eventually.

He also mentions other examples of bending the rules. In a case against four members of the armed resistance, it was discovered that one of them—a captain on a Norwegian vessel—had a year earlier been responsible for a rescue operation saving the lives of several German soldiers. The correct procedure would have been to go through with the case, which would certainly have resulted in death sentences for the accused, and only afterwards recommending the captain for a pardon by Reichskommissar Terboven. Instead Latza cancelled the scheduled proceedings and sent the case back to the SS Security service, who agreed to drop the case. Although the four did not escape the “security measures” imposed by the SS Security service—which meant being sent to concentration camps—they avoided their immediate death sentences. Latza could act this way in such cases because the head of the prosecution office was an “SS man with human instincts.” Otherwise, he would not have risked bending the rules as he did by not taking the matter to Terboven.

Some judges committed even more serious breaches of rules. In one case, a sitting judge imposed prison sentences where established practice required imposing a death sentence. The ruling had to be confirmed by the head of the SS in Norway, General Wilhelm Rediess. Rediess initially refused, but after intervention from Latza he eventually agreed to confirm the ruling. Some months later, notice came from Berlin that the head office had reviewed the case and decided to overrule the confirmation. The files were to be sent to Berlin for a retrial. Knowing that this would certainly lead to a death sentence for the accused, the judge and the chief administrator of the court physically destroyed the files. Afterwards they claimed that the documents were lost in the mail and filed a missing report.

In the winter of 1941–42, Germany introduced a special campaign to collect wool for the troops on the Eastern front. The campaign was accompanied by legislation introducing capital punishment for petty theft of wool and woolen products. When this legislation was introduced in Norway, Latza protested and argued that such severe measures would not be understood by the Norwegian population. His successful protests resulted in these German rules not being enforced in Norway.

Latza also engaged in legal argument with the Reichskommissar. Following a British raid on Spitzbergen, more than one hundred Norwegian nationals in allied uniform were arrested. Most of them had escaped from Norway and joined the Norwegian forces in Britain.

Reichskommissar Terboven wanted them tried for the capital offence of leaving the occupied territory to join forces with an enemy power. Latza protested and pointed out that the men were prisoners of war according to international law, and that it would be a war crime to execute them. The issue went all the way to Hitler, who sanctioned Latza's opinion. Instead of being tried, the men were held as prisoners of war until the end of the war.

A similar narrative of resistance surrounds the actions of Ernst Kanter, the Chief military judge and advisor to the Supreme Commander of the German forces of Denmark.<sup>63</sup> After the fall of the regime, Kanter became advisor to the Ministry of Justice in the Federal Republic until being appointed a Supreme Court judge. He left this position following a report published in the GDR that exposed his past as a leading military judge in the Nazi regime.

Kanter writes that he had increasing problems of conscience with his service as judge at the Supreme Military Court because of the number of death sentences he contributed to. He tried several times to get leave to be dismissed but failed. Finally, he succeeded and he left the court on September 30, 1942. After some weeks, he was recalled into service in the military judicial office, and in January 1943 was sent to Denmark as Chief military judge and legal advisor to the Supreme Commander of the German forces in Denmark, Hermann von Hanneken. There, he was charged with the task of writing the emergency rule provisions for the court procedures. In order to be able to intervene in the execution of death sentences, he added a provision that all death sentences had to be confirmed by the Supreme Commander before they were implemented. In this way Kanter managed to get von Hanneken to annul two death sentences imposed during the state of emergency declared in August 1943.

After a BBC report on the occupation of Denmark commending the lenient practices of the German courts there, Hitler ordered a change. He demanded that the courts use capital punishment in cases against members of the resistance. In order to ensure the implementation of these sentences, he ordered that weekly reports on the practices of the courts be sent to Berlin. Kanter manipulated the figures in these reports to prevent a dramatic increase of execution of Danish citizens. Although executions could not be altogether avoided, he inflated capital punishment numbers by including all verdicts into the count—including pardons—and counting each death sentence twice—once after the pronouncement of the judgment and then again after the execution of the sentence. He even included some cases of death sentences against members of the German troops.

Toward the end of 1944, Field Marshal and Army Chief Wilhelm Keitel gave an order that allowed military commanders to be present during military court proceedings. The objective

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<sup>63</sup> ERNST KANTER, ERLEBNISSE ALS CHEFRICHTER IN DÄNEMARK FEBRUAR 1943–MAI 1945 (Signatur ZS 1991) 1 INSTITUT FÜR ZEITGESCHICHTE MÜNCHEN-BERLIN ARCHIV (1991).

of the order was to intimidate judges into pronouncing harsh sentences. Kanter advised von Hanneken to disregard this order, as it was illegal and contrary to the provisions of judicial independence. von Hanneken initially did not heed this advice, and turned up at the proceedings of a military court. Kanter managed to warn the judges in advance. When von Hanneken entered the conference room of the judges, the judges paused their deliberations and von Hanneken left. After this, Keitel's order was no longer effective in Denmark.

#### **D. A Typology of Judicial Opposition**

The instances recounted here show different types of judicial obstruction of the aims of the Nazi regime. But is it meaningful to categorize it as judicial opposition? There is no evidence of any organized resistance among the judges. On the one hand, resistance is a difficult concept to understand within a setting where judges work everyday to uphold the laws and the legitimacy of those in power. On the other hand, we should also recognize that there are differences between those who go about their role as judges in an ordinary fashion and those who at least try to obstruct the rulers to some extent.

Ian Kershaw has proposed distinguishing between resistance, opposition, and dissent.<sup>64</sup> The term resistance should be reserved for organized attempts to work against the regime with the aim of undermining it. Opposition comprises all forms of action with partial and limited aims that are not directed at the system as would a resistance. Passive resentment and voicing attitudes that do not necessarily lead to action can be classified as dissent. Based on these categories, the instances of judicial action that we have examined may be classified as opposition and dissent. There does not seem to have been any resistance against the regime by the judiciary or a "legal complex" comprising of judges and other members of the legal profession.<sup>65</sup>

We can distinguish between opposition taking place in the open and in secret, and between opposition within what is accepted by those in power as being within the law and opposition that is in breach of the law. The cases referred to initially, the Reichstag fire, the case of Niemöller, and the Berlin coffee case are examples of opposition in the open. For the most part, they are also regarded as being within the scope of law, at least in the sense that the opposition was within the legally accepted scope of action of a judge. The attempts made by Latza and Kanter to persuade executive and police commanders to change their practices fall into the category of dissent. Konrad Morgen is different. Although he did nothing ostensibly illegal, he had a secret strategy guiding him in his actions. Had he openly declared that his aim was to stop the mass exterminations and to get at those responsible for it, his efforts would immediately have been put to an end. Apart from the fact that he was acting alone, his actions could have been regarded as an instance of judicial resistance. Some of

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<sup>64</sup>See Kershaw, *supra* note 13, at 240.

<sup>65</sup> See HALLIDAY, *supra* note 29, at 6–9 (providing a description of the concept of a legal complex).

the actions taken by Latza, in particular the destruction of files demanded by the head office in Berlin, were both covert and illegal. But, as they did not have the aim to wholly or partly undermine the regime, they were instances of opposition and not resistance. Accordingly, we may come to the following table through which we can analyze the different types of judicial opposition:

		Legality	
		Legal	Illegal
Openness	Overt		
	Covert		

A judge may oppose legislation passed by the regime in one of two ways: Through open opposition or by covert means. These methods of opposition, in turn, may be done within the law or outside the scope of law. Whether opposition is carried out within the scope of the law depends on the particular legal order. A strong factor in this latter consideration, for example, is whether the law recognizes a right for the judges to review legislation. If the legal order respects the independence of judges, at least some scope of opposition is possible within the interpretation and application of general norms of law. The judge may also express dissent within his rulings without coming in conflict with the law.

In a liberal democratic regime, opposition is tolerated to a certain extent and dissent is even encouraged. Generally, the Nazi dictatorship did not tolerate either. Active resistance is another matter—even within liberal legal orders such is seldom tolerated. For a judge to engage, in the capacity of a judge, in active resistance against the regime that he serves, is difficult to reconcile with any reasonable understanding of the rule of law. We can expect any regime to protect itself against active resistance. We can also expect any regime, liberal or authoritarian, to condemn judicial actions that are outside the scope of legality—in other words, actions that break the law regardless of whether they are measures of resistance or opposition. When it comes to covert illegal actions by the judge, most legal orders sanction such actions through disciplinary measures or criminal law. The destruction of the files at the SS Court in Norway would have been a severe breach of duty under any legal order, as would the conscious manipulation of statistics by Kanter. Even greater difficulties are found in the overt breaches of rulings that are indefensible from the point of view of positive law.

In such circumstances, we are talking about judicial rulings that lie outside of the law. The Berlin Coffee case represents one such poignant example. The demands of judicial independence require that such rulings be dealt with within the system of appeals and without holding individual judges liable for their rulings that fall short of exceptional circumstances.<sup>66</sup>

Rulings within the law that are against the interests of the regime must be considered as a normal part of the game in liberal societies based on the rule of law. Under regimes where no dissent or opposition is tolerated, however, we may expect that even judges can run into trouble. On the one hand, deviant judges were unceremoniously removed in the communist regimes of Eastern and Central Europe. On the other hand, many oppressive regimes have tolerated judges that keep a dialogue going on the legality of measures taken by the regime by voicing their dissent and following up with judicial action.<sup>67</sup>

The last category, where judges use their power for extraneous purposes, may be legitimate or illegitimate depending on the circumstances. If the judge's decision on matters of fact or law depends on extraneous motives, their conduct falls into the category of illegal rulings. Differently, if the judge reaches his decision independently of his extraneous motives, there are no grounds for criticism, provided that the aims the judge pursues are within his or her jurisdiction. A famous instance of this latter type is the prosecution and conviction of Al Capone for evasion of taxes. If the judge pursues aims outside of his jurisdiction—for example, personal reasons—potentially conflicting interests may oblige him to recuse himself. Failure to do so can lead to sanctions.

Opposition depends both on motivation and effects. Some forms require great moral courage and entail risks, while others are perhaps more properly categorized as “internal emigration” than acts of opposition or dissent. In line with this, Peter Hoffman lumps judges awarding lenient sentences in political cases together with people refusing to fly the swastika flag on prescribed days and people joining the army in order to be safe from persecution and escape the Gestapo.<sup>68</sup> In fact, some prominent jurists joined the military courts in the 1930s because they perceived doing so as being less subject to political control than would be the case in ordinary courts.<sup>69</sup>

When it comes to the legal forms of opposition that did not involve any open statement of dissent, it is difficult to distinguish between obstructive actions and unacceptable excuses for collaboration. After the fall of the regime, many highly placed officials of the regime

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<sup>66</sup> See Graver, *supra* note 22.

<sup>67</sup> See Graver, *supra* note 12, at 41–5.

<sup>68</sup> See Hoffman, *supra* note 14, at 20.

<sup>69</sup> See Schorn, *supra* note 8, at 315.

sought to exonerate themselves by claiming that they had remained in their position to work against the regime. A famous example is the defense at Nuremberg of Wilhelm Stuckart, the State Secretary at the Ministry of Interior responsible for Jewish affairs and one of the leading Nazi legal experts on racial laws and public administration. Stuckart argued that he was not responsible for participating in planning the evacuation of Jews from Germany, and that thanks to his efforts at the Wannsee conference, persons of mixed blood and the so-called “privileged Jews”—Jews married to Germans—were exempted from evacuation, sterilization, and compulsory divorce. These arguments were dismissed by the US Military Tribunal and he was sentenced to prison for placing his “skill, learning, and legal knowledge. . . at the disposal of those who originated the plan of extermination.”<sup>70</sup> Due to a serious heart condition, the tribunal ordered his release immediately after the passing of the verdict.

From an empirical and a moral point of view, it may be difficult to distinguish between those who actually opposed the regime and those who came up with a seemingly unacceptable excuse for their own collaboration only after the regime fell. Those who openly defied the regime or who broke the rules and performed illegal acts to oppose the regime undoubtedly engaged in acts of opposition. Those who went along trying to make the best of it, and used their position to avoid worse evils, ran the risk of becoming collaborators and, albeit unwilling, supporters of the regime. As pointed out by Hannah Arendt, totalitarian regimes condition government officials and the public at large by consciously taking advantage of the disposition many have for accepting the lesser of two evils.<sup>71</sup>

### E. The Risks and Nazi Tolerance

Given the intolerance of the Nazi regime to all opposition, and the draconian measures taken by the SS and the courts, it is surprising to find that highly placed officials were willing to take the risk of subversion and obstruction. There were heroes who engaged all their energy in resisting the regime by any means, even sabotage and assassination plots. The brilliant young lawyer Hans von Dohnanyi was one of these few.<sup>72</sup> While working as a high official in the Ministry of Justice, Dohnanyi conspired with Admiral Canaris against the Nazis. He also openly engaged in discussions with deputy minister Roland Freisler over the nazification of the German Criminal Code in the middle of the 1930s. He was removed from the Ministry to the Supreme Court in Leipzig, but soon resigned to return to Berlin where he was better placed to continue the work against the regime and Adolf Hitler. He was convicted by an SS court and executed in Sachsenhausen on April 6, 1945.

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<sup>70</sup> LAW REPORTS OF TRIALS OF WAR CRIMINALS VOL. XIV, UNITED NATIONS WAR CRIMES COMMISSION 646 (1949) (reporting on what is known as the Ministries Case)..

<sup>71</sup> HANNAH ARENDT, RESPONSIBILITY AND JUDGEMENT 35 (2003).

<sup>72</sup> See Maas, *supra* note 17, at 55.

Latza's and Kanter's subversion was certainly less heroic. Nevertheless, both were still examples of officials who at great personal risk were willing to defend values that they believed in. The values they defended were deeply engraved in their professional identity as lawyers, and they stood up against what they perceived as a misuse or perversion of law. They were not resisters, and they did not try to topple the regime; on the contrary, they were its loyal servants. But they also had loyalty to the idea of law and justice, and this loyalty sometimes outweighed their loyalty to the regime. Konrad Morgen falls into the same category, although his loyalty to the purity of the ideas of the SS seems somewhat more perverted.<sup>73</sup>

Given the fact that their acts of subversion came relatively late in the war, at a time when the future of the regime was at best uncertain, there might be some measure of what Helmke has called "strategic defection" in the actions of some, such as Kanter. Strategic defection is when a judge rules against a regime because he fears being punished by the government's successor.<sup>74</sup> One can widen this approach and include other motivations such as laying the foundation for a continued successful career under a successor regime. Kanter defected from the *Reichskriegsgericht* in 1942 after a successful legal career under the Third Reich. He went on to continue a successful legal career after the war under the Federal Republic, reaching a supreme court once again.<sup>75</sup>

What little opposition there was from the judiciary was mainly in the form of rulings against the Party or the State. As exemplified by Latza and Kanter, these rulings took the form of argumentation for a greater adherence to legal values. The many examples given by Hubert Schorn in the book that he wrote to re-establish the reputation of the German judiciary mostly represent accounts of this kind.<sup>76</sup> Although Schorn mentions instances involving more than five hundred judges, the number is not impressive when we recognize that the number of persons employed as judges during the Nazi time was more than 15,000. Nevertheless, many judges refused to accept the doctrine that "law is what serves the people," at least in the sense of accepting the party and the officials responsible for maintaining the security of the State as the authoritative interpreters of what serves the people. In many cases, judges refused to give judgments according to the demands of the State, which the State then accepted. There were instances of this even within the SS. Functioning under martial law, all judgments had to be confirmed by the chief commander (*Gerichtsherr*) in order to take effect. On the one hand, according to second in command of the SS legal service, Günter Reinecke, there were instances where Himmler as *Gerichtsherr*

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<sup>73</sup> See PAUER-STUDER, *supra* note 49, at 120–27.

<sup>74</sup> See GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS JUDGES, GENERALS AND PRESIDENTS IN ARGENTINA* 21 (2004).

<sup>75</sup> See MANFRED GÖRTEMAKER & CHRISTOPH SAFFERLING, *DIE AKTE ROSENBERG DAS BUNDESMINISTERIUM DER JUSTIZ UND DIE NS-ZEIT* 143 (2016).

<sup>76</sup> See Schorn, *supra* note 8.

refused to confirm a judgment, and sent a case to retrial two times before eventually giving in to persistent judges.<sup>77</sup> On the other hand, those in power had means to circumvent inconvenient rulings by placing people who were treated too leniently in camps and pardoning loyal party members who were convicted for ill doings as part of their terrorizing of the population.

Surprisingly, the regime tolerated such instances of judicial dissent and opposition. The tolerance of deviant judges even went so far as to abstain from taking measures against judges who obviously bent the law further than the prevailing doctrine allowed. The security of tenure was formally abolished by the new act on public servants (*Beamtengesetz*) of 1937. According to Article 37, public servants, including judges, could be forcibly put into retirement if they did not engage themselves in the furtherance of the National Socialist State. According to Article 171 of the same act, retirement could not be based on the contents of a judicial ruling. On the one hand, this provision was undermined by an explicit wish of the Führer that the act be used to cleanse the service of all persons of whom “the Third Reich could have no use.”<sup>78</sup> On the other hand, only five cases to remove judges were initiated in the ten years between 1932 and 1941.<sup>79</sup> These cases were all based on the behavior of judges acting outside their judicial role, like engaging in political expressions against the Nazis and refusing to adapt to Nazi conventions.

The coffee case of Judge Seidel mentioned in the introduction is illustrative of the reluctance to remove judges. One other notable example is the fascinating case of the district court Judge mentioned in the introduction, Lothar Kreyssig. Kreyssig was an able jurist that was well respected among his colleagues. He became one of the early members of the Confessional Church when it was formed in opposition to the Nazification of the Lutheran church in 1934. Because of his activities there, the Nazis sought to have him removed from his position as judge. This attempt was blocked by the Ministry of Justice.<sup>80</sup> There had also been earlier complaints against him. At the revealing of a portrait of Adolf Hitler in May 1, 1933, he left the room in protest. He also dropped out of “continuing education” events and failed to shout a three-time “Heil Hitler” at a formal occasion. The Ministry rejected the claim that these were grounds for dismissal. The Ministry told Kreyssig that its decision was the last word on these matters, and that he should not fear that they would be used against him

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<sup>77</sup> See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945—1 OCTOBER 1946 416, 429–30 (1947) (providing the testimony of Günther Reinecke before the International Military Tribunal in Nuremberg on August 6, 1945).

<sup>78</sup> See to the act and the letter from the office of the Führer to the Ministry of Justice, EKKEHARD REITTER, FRANZ GÜRTNER, *POLITISCHE BIOGRAPHIE EINES DEUTSCHEN JURISTEN 1881–1941, 192–193* (1976).

<sup>79</sup> See Maas *supra* note 17, at 176.

<sup>80</sup> Anke Silomon, *Lothar Kreyssig—Realistischer Visionär, Prophet und Schwärmer*, in KOTHAR KREZZSIG AUSÄTZE, AUTOBIOGRAPHIE UND DOKUMENTE, EVANGELISCHE VERLAGSANSTALT LEIPZIG 19 (Hans Joachim Döring ed., 2011).

in the future. They would, however, be reconsidered should future grounds for action against him arise.<sup>81</sup> Some months later Kreyssig bought a farm some distance away and applied for relocation to another court in its vicinity. The Ministry did not make use of this opportunity to rid themselves of a troublesome judge and instead granted his request.

Early in 1940, Kreyssig became aware of the fact that institutionalized mentally ill people, who were under his judicial custody, were being taken to another institution and put to death. Kreyssig believed this was in breach of the law, and he wrote a letter to this effect to the Court president.<sup>82</sup> In the letter, he rejected the maxim that “law is what serves the people.” He characterized the doctrine as terrible because it allowed openings into the main parts of life and society that were in turn devoid of the safeguards of law—first, with the concentration camps and then again with the institutions for the mentally ill. The president demanded that he revoke his letter, which he refused. He was then ordered to have conversations with the Ministry. During two meetings with deputy minister Roland Freisler, the Ministry failed to produce any grounds that could show that the killings were legal. The euthanasia program was so secret that even the Ministry of Justice had not been informed of it. Because the Ministry could not come up with anything to show the legality of the killings, Kreyssig issued an order to the institutions under his jurisdiction banning the removal of persons to places where euthanasia was performed. He also initiated criminal proceedings for murder against the person whom he had been told was responsible for the euthanasia program.

The president of the province demanded that Kreyssig’s prohibition be lifted, and the Ministry issued a renewed order to Kreyssig to come for conversations. By then, the Ministry had received the secret order from Hitler authorizing the euthanasia, and this was shown to Kreyssig. This time Kreyssig’s meeting was with the minister himself, but the minister could not convince Kreyssig of the legality of the killings. The minister then said that a person who could not accept the will of the Führer—as the highest source of law—could not hold a judicial position, and that proceedings to pension off Kreyssig would be initiated. A couple of days later, Kreyssig wrote to the minister stating that his conscience prohibited him from revoking his ban. He subsequently applied for his resignation with pension rights. The Ministry granted him his pension in March 1942.<sup>83</sup>

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<sup>81</sup> Lothar Gruchmann, *Ein unbequemer Amtsrichter im Dritten Reich*, in KOTHAR KREZSSIG AUSÄTZE, AUTOBIOGRAPHIE UND DOKUMENTE 41 (Hans Joachim Döring ed., 2011).

<sup>82</sup> The letter and other documents from his file in the Ministry of Justice are printed in Döring (ed.) 2011 pp. 143 ff.

<sup>83</sup> Stoltzfus claims that Adolf Hitler pardoned Kreyssig, “instead of following the will of other government agencies to exact punishment.” Stoltzfus, *supra* note 14, at 20, 76. Nevertheless, in March 1942, Hitler approved the recommendation by the Ministry of Justice of May 10, 1941, to dismiss Kreyssig from his position with pension rights. See Gruchmann, *supra* note 81, at 47.

Kreyssig's story is unique because there are no other known examples of a judge taking such an open stance over such a long period of time against the very basis of the legal ideology of the time—that law serves the people and that the Führer is the highest source of law. Kreyssig had his own conception of law based on Christian natural law that set limits to the legality of measures of positive law and to the prevailing legal ideology. He did not reject the legality of the regime as such, rejecting instead the regime as the sole and highest source of law. Kreyssig is only unique, however, in that he represents one extreme end of a scale. There were others less extreme and less willing to expose themselves, but who nevertheless drew their own line and broke the law in their defense of it. On the one hand, there is hope in the fact that there were such judges during the Nazi regime. It is, on the other hand, rather depressing that they were so few, given the fact that the Nazi conception of law and the measures taken were so outrageously far removed from any reasonable conception of the rule of law as we understand it in our Western legal tradition.

#### **F. The Power of Tradition**

The fact that so many of the judges went along with the system and became its willing servants is perhaps not surprising. What is surprising is the tolerance the regime shown towards those that did not go along with it and instead tried to curb and moderate it. Better insight into the factors surrounding this tolerance may serve to educate judges as to how to better oppose oppression and atrocities in the future.

The Nazi regime did not relentlessly crush all opposition. Stoltzfus maintains that an explanation for the effectiveness of the Nazi domination of the German people was Hitler's recognition of the limits of force in some cases.<sup>84</sup> But what limited the effectiveness of the use of force against the judiciary? On the one hand, resistant judges may have been "spared" because there were so few of them. There was no point for the regime to appear to oppress judges if the great majority of them were subservient. On the other hand, there were active struggles over how to react to troublesome judges between the Ministry of Justice and court leaders, on the one side, and the SS and the Party on the other. This seems to suggest that the answer cannot fully be that restraint was an effect of a balanced calculation. Why did the judicial administration engage in defense of judges, and how can we explain their reasonable success? It may be that the task of the Ministry would have been more difficult if the number of judges that opposed the regime had been greater. But the opposite may be equally true. More widespread opposition could have restrained the regime, especially in its initial years.

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<sup>84</sup> See STOLTZFUS *supra* note 14, at 271.

A more general explanation may be traced to the path dependency of institutions and their resistance to change.<sup>85</sup> German law is part of the Western legal tradition, and the conception of an autonomous legal order is deeply ingrained in centuries going back to the middle ages.<sup>86</sup> An important aspect of this tradition is the notion that the ruler is not the highest source of law and, accordingly, is also bound by law.<sup>87</sup> This notion stands in stark contrast to the Nazi dogma that the Fuhrer himself was both the highest source of law and the ultimate judge with a right to intervene in any legal proceeding.

Institutions create roles that are filled by people who form organizations. These organizations represent structures of power that work to preserve those institutions that serve their interests. Actors in different positions within the Nazi State acted out the contradiction between the force of tradition and Nazi dogma. The Ministry of Justice was actively involved in protecting the judiciary from intervention by the Party. In 1934, a case was brought against the commander and members of the guard of the concentration camp Hohnstein for sadistic and perverse treatment of prisoners. The head of the Sachsen administration tried to quash the case by bringing a complaint against the prosecutor to the Ministry. The Ministry rejected the complaint and stated that prosecutors could be instructed by only the Fuhrer and chancellor himself. The case went on. After the proceedings, when the judges were deliberating the case, the Sachsen chief approached the judges and argued for a dismissal of the case. This recommendation was disregarded by the judges. After the verdict and the sentences had been passed, the two lay judges and the prosecutor were expelled from the Party. The Minister of Justice complained to the Fuhrer's office, but received no support. Instead, the Minister was pressured to appeal for a pardon of the convicted guards, and their sentences were subsequently substantially reduced.<sup>88</sup> Buchheit, in his biography on Roland Freisler—the infamous Secretary of State and later President of the People's Court—mentions several other examples where the Ministry protected judges against the fury of the Party.<sup>89</sup>

On a lesser scale, Kanter records instances where he sought and received support from the headquarters of the military judicial office against his military commander in Denmark.

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<sup>85</sup> See Hans Petter Graver, *Judicial Independence Under Authoritarian Rule: An Institutional Approach to the Legal Tradition of the West*, HAGUE J. RULE L. (2018).

<sup>86</sup> See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 9–10 (1983).

<sup>87</sup> DOUGLASS C. NORTH, *THE PARADOX OF THE WEST* 107 (Stanford Univ. Press 1991); FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* 246 (Farrar, Straus & Giroux ed. 2011).

<sup>88</sup> See KOCH, *supra* note 5, at 104–07 (describing the battle in 1941 between the Ministry and Richard Heidrich over the respect of the statutes of the Volksgerichtshof).

<sup>89</sup> See Buchheit, *supra* note 34 at 46–54.

Institutional arrangements protected judges.<sup>90</sup> The Judges at the SS court in Norway were not under the jurisdiction of the German authorities in Norway, but rather under the head office in Munich of the SS judiciary. Terboven could therefore not have the judges dismissed or removed if they displeased him and instead would have to lodge complaints in Munich. Even within the SS itself, Konrad Morgen was protected when he was dismissed for failing to apply the racial laws with sufficient severity in a case. The SS judiciary head office intervened on his behalf and prevented him from being sent to a concentration camp.<sup>91</sup>

There was dissent and argument over issues of policy between different bodies of government and between the Party and the State at all levels and throughout the rule of the Nazis.<sup>92</sup> The events surrounding Wilhelm Stuckart from the Ministry of Interior represent one such example. The struggles that went on between the Ministry of Interior, the SS, and the Party over the policy toward persons of half-Jewish descent are well known. These struggles remained unresolved at the end of the war, saving the lives of hundreds of thousands.<sup>93</sup> The question remains open, however, whether this was thanks to the struggle of bureaucrats and officials, or whether was due to leading Nazi's fearing popular reactions against their policies.<sup>94</sup>

The Ministry of Justice was involved in skirmishes with Party officials and Hans Frank—the leader of the newly established German Law Academy—over vitriolic public party criticism of judicial rulings. The Ministry finally managed to obtain the support of the office of the Fuhrer and the Ministry of Propaganda in prohibiting the Party press from publishing open criticisms of court rulings.<sup>95</sup>

Similarly less known is the struggle between the Ministry of Justice and Himmler over the relations between the SS and the judiciary. The SS wanted unfettered power to impose “security measures” in individuals, in other words to place them in a concentration camp without any intervention or review by the courts. This included the incarceration of persons acquitted by a court or those persons served sentences that the Gestapo considered insufficient. This was opposed by the Ministry of Justice, and there were struggles over the

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<sup>90</sup> Kanter, *supra* note 63.

<sup>91</sup> See PAUER-STUDER, *supra* note 49, at 41.

<sup>92</sup> The government in Nazi Germany has been characterized as “chaotic in structure.” See KERSHAW, *supra* note 13, at 94.

<sup>93</sup> See LEGISLATING THE HOLOCAUST: THE BERNHARD LOESENER MEMOIRS AND SUPPORTING DOCUMENTS (Karl Schleunes ed., 2001).

<sup>94</sup> See the discussion between Natan Stoltzfuss and Wolf Gruner over the demonstrations by German wives of 1,700 Jewish husbands in Rosenstrasse in February 1943 in *American Historical Review* 2007 pp 1628–1629.

<sup>95</sup> See Reitter *supra* note 78, at 147.

right to legal review, the right to legal representation of those arrested by the Gestapo, and the prohibition of measures against persons that were acquitted or served their sentence.<sup>96</sup> The Ministry lost these battles, but in light of how little opposition these measures received from the judiciary, it is astonishing that the Ministry could keep up its opposition for so long. Perhaps they could have been more successful had they received more support from the judiciary.

Despite the occasional ferocious attacks on judges in the Nazi press and by Nazi ideologists—all the way up to Hitler himself—as well as the total disregard for legality and the rule of law, Hitler spared the judges. There are many reasons for this. In 1941, the German-Jewish émigré Ernst Fraenkel introduced his theory on the Dual State based on his experiences as a lawyer practicing in Germany during the 1930's.<sup>97</sup> According to Fraenkel, the German State doubly operated as a normative State and a prerogative State. The normative State operated under some basic elements of the rule of law, whereas the prerogative State was not restrained by any rules or subject to any review by courts. The prerogative State also defined the limits of its own operations. Fraenkel credits the persistence of the normative State to the relationship between the Nazis and the leaders of the German industry. Some measure of normality and rule of law was necessary to maintain a functioning market economy.<sup>98</sup> Germany was a modern industrialized economy that probably could not function without a working legal order. Nevertheless, the situation in present day China shows that it is possible to protect investments and enforce contracts even without an independent judiciary. The judges of Germany were intimidated, and many were probably acting out of fear. In this sense, many judges were not acting independently. Still, the State did not use its force of terror on judges who chose not to comply with the commands of its executives. The economy therefore cannot be the whole explanation. The best explanation is most likely the force of history—that is, the embedment of Western legal tradition into German society. This is the underlying variable that explains both the economic and the legal orders. People at the time were probably not aware of the great potential of resistance against the regime that the legal order represented.

Deeply embedded institutions consist not only of formal rules, but also informal norms and ways of thinking and the organizational structures built upon them. This makes them difficult to change, and change is often incremental and path dependent. According to economic historian Douglass C. North, path dependence is the “interaction of beliefs, institutions, and organizations in the total artefactual structure [which] makes path dependence a fundamental factor in the continuity of society.”<sup>99</sup> Path dependence is not only a matter of

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<sup>96</sup> See *id.* at 201–07. See also KOCH, *supra* note 5, at 87.

<sup>97</sup> See ERNST FRAENKEL, *THE DUAL STATE A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (2006).

<sup>98</sup> See JENS MEIERHENRICH, *THE REMNANTS OF THE RECHTSSTAAT AN ETHNOGRAPHY OF NAZI LAW* (2018).

<sup>99</sup> DOUGLASS C. NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* 51 (2005).

history influencing the choices of the present but also a much more fundamental phenomenon: “Path dependence is a fact of history and one of the most enduring and significant lessons to be derived from studying the past. The difficulty of fundamentally altering the paths is evident and suggests that the learning process by which we arrive at today’s institutions constrains future choices.”<sup>100</sup> Path dependence is both an effect of organizations and people brought into an institutional matrix attempt to resist changes that affect their position and interests. Furthermore, the belief system underlying an institutional matrix deters radical change. Institutions shape beliefs, values, and the development of knowledge. According to North, “the whole structure that makes up the foundation of human interaction is a construct of the human mind and has evolved over time in an incremental process; the culture of a society is the cumulative aggregate of the surviving beliefs and institutions.”<sup>101</sup>

Pierre Bourdieu makes the same point with his concept of *habitus*. Habitus are “systems of durable, transposable dispositions” produced by the structures of a particular environment.<sup>102</sup> Habitus is produced by the structures imposing different definitions of the impossible, possible, and the probable, which “cause one group to experience as natural or reasonable practices or aspirations [that] another group find[s] unthinkable or scandalous, and vice versa.”<sup>103</sup> This system of dispositions tends to reproduce itself by presenting itself in practices that are structured according to its principles. The habitus of German lawyers, made it unthinkable, even to the Nazi lawyers, to abolish judicial independence completely.

A particular fact of the Nazi and fascist regimes was their tolerance of judicial opposition and their recognition of the independence of the judge to decide the individual case. In this they differed from many other authoritarian regimes, notably those dominated by a communist ideology. One explanation is that such is a function of path dependence within countries of the Western legal tradition. To the extent that this may be the case, these historical experiences have particular relevance to judges in Western legal systems, should they be confronted with authoritarian measures in the future.

The belief in judicial independence prevailed also with those judges deeply embedded in Nazi ideology. This was clearly an instance of habitus and path dependence. Buchheit writes of Roland Freisler as a man “with two souls in his chest”.<sup>104</sup> The independence of judges was seen by central Nazi jurists as one of the central features distinguishing Nazi Germany from

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<sup>100</sup> See *id.* at 77.

<sup>101</sup> *Id.* at 83.

<sup>102</sup> See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 72 (1977).

<sup>103</sup> *Id.* at 78.

<sup>104</sup> See Buchheit, *supra* note 34, at 49.

“Bolshevism.” Hans Frank, the head of the Nazi Lawyers’ Association and later governor general of occupied Poland, was of the opinion that the very existence of their “bourgeois culture” depended upon the independence of the judges.<sup>105</sup> Even as late as 1944, the German High Command issued a regulation stating that

[M]ilitary judges [were] not under any orders when it comes to deciding the facts of the matter and their exercise of judicial functions. They [were] to decide according to their conviction based on all that ha[d] been presented during the case, according to soldierly values and an interpretation of the law based on the national socialist view of the world (*Weltanschauung*).<sup>106</sup>

At least in a rudimentary form, the legacy of the German legal institutions protected the independence of the judiciary.

This did not mean that there was no interference with the judiciary. Disregarding the fact that intervention from the Party into the functioning of the judiciary was prohibited, instances of intimidation and threats against witnesses, prosecutors, and even judges were common.<sup>107</sup> Party members intervened, particularly in cases where Party members were involved as defendants or parties in civil cases. When cases involved transgressions by party-members, the reactions against such conduct was lenient, if at all reacted against. In this respect, the regime functioned as a dual State where unregulated terror operated alongside the normative order.<sup>108</sup> But this meant that both the established institutions and the people within the legal organizations operated to protect the judges from outside interference, and from sanctions against them because of unpopular or inconvenient judgments.

Most judges, however, exercised their independence in a way that accommodated the interests of the Nazis.<sup>109</sup> Although independent, they did not act independently. The judges

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<sup>105</sup> See MARC LINDER, *THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS*, 15 (1987).

<sup>106</sup> Detlev Garbe, *Im Namen des Volkes?! Die Rechtlichen Grundlagen der Militärjustiz im NS-Staat und ihre „Bewältigung“ nach 1945* in *ERINNERUNGSARBEIT GRUNDLAGEN EINER KULTUR DES FRIEDENS*, (Nolz, Bernhard und Popp, Wolfgang Hrsg. 2000), 100 (my translation from German).

<sup>107</sup> See REITTER, *supra* note 78, at 177–80.

<sup>108</sup> See ERNST FRAENKEL, *THE DUAL STATE A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941).

<sup>109</sup> This is not to say that their approach to law was positivist and that legal positivism can explain the conformity of the German judiciary with the demands and interests of the Nazi rulers. Nevertheless, the famous article of Gustav Radbruch in which he proposed legal positivism as the factor that could account for the atrocities of the German judiciary quickly established itself as a convenient exculpating explanation. For an overview see for an overview see for an overview Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the “Positivist” Theses*, 13 *L. & Philosophy* 313 (1994). The

in Nazi Germany were confronted with contradictory demands. The central Nazi dogma of the Führer as the highest source of law and the ultimate judge conflicted directly with the fundamental notion of the Western legal tradition that law binds the sovereign. The judicial role itself experienced a basic tension between the requirement that the judge apply the law of the regime and basic legal principles, such as equality before the law. Most judges resolved these tensions by offering obedience to the Führer and Nazi ideology and by applying the law without question. But for some judges, the tensions made them act differently.

The future is shaped by choices people make, and not by history itself. But what path could the future have taken beginning in Germany in 1933 had people been aware of the powerful force they had at hand? The wish to restore German pride was widespread, as was the resentment of Jews. The future would probably have been pretty grim for many people in any case. But we may speculate that the worst excesses in giving the SS free reigns could have been avoided had people within the legal system made different choices. This would have been no small achievement, and would potentially have changed the path of history, and not just for people in Germany. The past experiences also have relevance to the future. There are more options open to people when the first seed of authoritarianism are sown, before the legal order slides into an extreme condition. That is why it is important to understand judicial opposition to authoritarian rulers.

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positivism thesis also established itself within academic literature on the history of Nazi Germany. See for instance Koch 1997 p. 247. It has, however, been solidly refuted after careful studies of official and legal material of the time. See, e.g., BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, MOHR SIEBECK TÜBINGEN 1968 (7th ed. 2012); HERLINDE PAUERSTUDER & JULIAN FINK, *RECHTFERTIGUNGEN DES UNRECHTS DAS RECHTSDENKEN IM NATIONALSOZIALISMUS IN ORIGINALTEXTEN* (Surkamp Berlin 2014). One reason why a positivism explanation may seem compelling is that it may be confused with psychological factors that place obedience with authority. The German judges were obedient, but this does not entail that the predominant legal theory and method were positivist. See Graver, *supra* note 12, at 239–51.

