

STORIES TO REMEMBER
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PRESENTS

HITLER'S COURTS

BETRAYAL OF THE RULE OF LAW
IN NAZI GERMANY

STUDY GUIDE



HITLER'S COURTS

BETRAYAL OF THE RULE OF LAW IN NAZI GERMANY

**A Study Guide
2009**

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Credits

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Preface

This Study Guide grew out of the Touro Law Center conference on the Nuremberg war crimes trials held in the summer of 2005. The conference took place in Nuremberg – indeed, the first day of the conference was held in the courtroom where the first war crimes trial was conducted immediately after World War II – and culminated in a book edited by Herbert R. Reginbogin and Christoph J.M. Safferling, The Nuremberg Trials: International Criminal Law Since 1945, and a DVD, “*Hitler’s Courts: Betrayal of the Rule of Law in Nazi Germany*,” produced and directed by Joshua M. Greene and Shiva Kumar. The DVD was broadcast on PBS (on WNET 13 in New York) and received an Excellence in Cinema Award (New York International Independent Film and Video Festival) and a Remi Award (WorldFest-Houston). Now this Study Guide, to accompany the *Hitler’s Courts* DVD, continues the project of sharing the ideas and lessons learned at the conference.

One of the lessons from the Holocaust is that it is incumbent upon educators to teach others about the Holocaust. The Study Guide and *Hitler’s Courts* provide a vivid, accessible account of the role of law and lawyers during the Nazi era. The Study Guide can be used with high school and college students in a number of courses, including history, sociology, and political science.

Hitler’s Courts and the Study Guide continue to be relevant today in American society as we wrestle with the difficult balance between civil liberties and national security. Democracy is fragile, and the experience of Germany in the 1930s and 1940s demonstrates how even a constitutionally governed nation could succumb to the rhetoric of despots. Although substantial progress has been made since World War II towards establishing an international rule of law, without vigilance on the part of our lawyers and judges, the men and women who are charged with the task of safeguarding the rule of law, any nation is vulnerable to the effects of fear and propaganda. That should be the most enduring lesson of the DVD and the Study Guide.

Dean Lawrence Raful
Central Islip, New York
April 2009

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Introduction to the Study Guide

This Study Guide accompanies the Touro Law Center documentary film *Hitler's Courts*, produced and directed by Joshua M. Greene and Shiva Kumar. The purpose of the study guide is to enable student learning and understanding of:

- The history of the Nazi regime in Germany
- The legal system during this period, its development, and the ethical dilemmas the legal system posed for individuals and officials
- The war crimes trials at Nuremberg after World War II and the abiding international legacy of the trials
- The importance of civil liberties and the status of law in our society

By any measure, the mass killings and atrocities committed by the Nazi government under the leadership of Adolf Hitler were extraordinary. Equally incredible was the role of the legal system in Hitler's rise to power.

This Study Guide sketches the relevant history for addressing these issues. At the end of each section it poses a number of discussion questions. Several appendices and a bibliography are included at the end of the guide. This guide has drawn extensively on the papers presented at the conference, which are collected in The Nuremberg Trials: International Criminal Law Since 1945 (edited by Herbert R. Reginbogin and Christopher J. M. Safferling). This book may be obtained from Touro Law Center.

This DVD and Guide will provide insight into teaching how, during the Nazi era, numerous laws were passed and enforced to facilitate Hitler's rise to power and to legitimize racial discrimination against minorities, beginning with systematic exclusion

"All that is necessary for the triumph of evil is for good men to do nothing."

Edmund Burke (1729-1797)
British Statesman and Philosopher

from society and ending in mass murder. A number of teaching disciplines will be able to satisfy educational standards when using *Hitler's Courts*. For example, teachers of Government will discover an inextricable link between democracy and the freedom of people to express themselves. World History teachers

will find that the examples of the Nuremberg trials after the war challenged the free world to see its responsibility in holding a once-great nation and its leaders accountable for their actions. Sociology teachers and their students will grapple with harsh facts as they learn about incomprehensible acts of individual leaders and the groups who were perpetrators and bystanders. Finally, all educators will find that *Hitler's Courts* forces each of us to examine responsibility to our communities and to search for ways to prevent an unhealthy society.

The Nuremberg Trials have been central to international law since World War II. In this Study Guide, we present case studies for students in the areas of “ethics,” “law and morality,” and “international law.”

Students will be able to:

- Explore cases from the Nuremberg trials and their outcome.
- Engage in empathetic decision-making.
- Recognize the importance of civil liberties and individual rights as citizens in a democracy.

Ethics

The Nazi atrocities forced leaders of nations and individuals to examine ethical dilemmas. Students will be challenged to:

- Actively debate the ethical issues raised by the trials.
- Grapple with difficult decisions that result in consequences for today.

Law and Morality

The decision to conduct war crimes trials raised further questions.

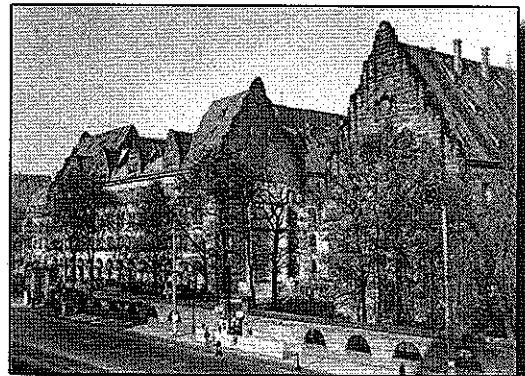
- With what crimes would the Nazi leaders be charged?
- What procedures should be followed at the trials?
- Should other participants of the Nazi regime – for example, the judges who enforced the Nazi laws, or the doctors who conducted horrific “experiments” in the name of Nazi science – be tried for war crimes?

International Law

Immediately after World War II, the victorious Allied powers – the United States, the Soviet Union, Great Britain, and France – were faced with a dilemma. What should they do with the surviving leaders of Nazi Germany? There were only two realistic possibilities:

- Summary execution, a proposal initially favored by the United States during the course of war.
- Trials of the Nazi leaders for the commission of war crimes.

As the film details, the choice to bring those accused to trial prevailed.



View of the Palace of Justice in Nuremberg, where the International Military Tribunal trial of war criminals was held.

Glossary

Students will find a glossary of Holocaust Terms and Legal Terms in the appendices.

Part I HISTORY

The History of the Nazi Regime: 1933 - 1945

What were the Nuremberg Laws?

The Nuremberg Trials: Historical Perspective 1945 - 1950

The History of the Nazi Regime: 1933 - 1945

TEACHING STANDARDS FOR SOCIAL STUDIES

Time, Continuity and Change

- Hitler's rise to power
- Nuremberg Laws
- Racial Ideology

Power, Authority and Governance

- German legal system/court system
- Nuremberg Trials

Hitler's Courts details Hitler's rise to power and the resulting increase in discriminatory actions taken against Jews and other minorities as a result of Nazi racial ideology in Germany from 1933 through the end of World War II in 1945.

Questions to consider when reviewing this History Section:

- Why did the German people support Hitler's rise to power?
- Why didn't the lawyers and judges attempt to preserve the rule of law?

1933 was an extraordinary and tumultuous year in Germany:

- **January:** Hitler came to power.
- **February:** the mysterious Reichstag fire.
- **April:** the anti-Jewish boycott began.
- **May:** book burnings occurred, followed by street violence committed by the Brownshirts later that year.
- Hitler employed the Gestapo as part of his campaign for power. The next year, in June 1934, the blood purge occurred, making possible the rise of Hitler as Führer.

The film describes the role of lawyers and the law as an instrument in Hitler's rise to power. The Nuremberg Laws, adopted in 1935, were part of a legal campaign to strip Jews and other minorities of political and civil rights as an implementation of the Nazi Party's

"The Reichstag fire was a cataclysmic event and the equivalent of our capitol burning down since the Reichstag was their congress. The Reichstag couldn't meet, was not in session, thus giving the Chancellor emergency powers."

Honorable Sol Wachtler (*Hitler's Courts* 2:20)

racial ideology. In addition, the German courts became an arm of the Nazi government. Judges were obligated to swear an oath of loyalty to the Führer. Laws were enacted giving the Führer extraordinary, in some cases absolute, discretion in exercising power, thereby affirming the Führer principle, under which all governmental power - legislative, executive and judicial - was aggregated in Hitler's hands. [The Case Study

in Part II on the "Justice Case" examines the role of law, lawyers, and judges in the Nazi regime.]

"Now, this is the time the judiciary could have and should have stood up and said wait a moment, we have rules and laws here, this is our nation that is being corrupted."

Honorable Sol Wachtler (*Hitler's Courts* 4:50)

Escalations in the campaign against Jews and other minorities abated somewhat in 1936. Subsequently, we have testimony from Max Friedlaender in the film recalling the horror of Kristallnacht (also known as the "Night of Broken Glass," a pogrom against Jews in Germany and parts of Austria) which took place the night of November 9th and into the morning of the 10th, 1938.

Under a dictatorship, laws are arbitrary – what might have happened if Friedlaender's friend had not been on duty at that moment? How does this situation exemplify the lack of standards in who was "chosen" and who was not? Hitler began to establish concentration camps in 1933. Later, outside of Germany, Hitler made aggressive and successful

efforts to expand his empire,

assuming power over Austria in early 1938 and annexing Czechoslovakia later that year. In September 1939, Germany invaded Poland, setting World War II into motion.

"I was awakened by loud voices. Five SA men yelled, Police Open Up! and then declared that Hirtzfelder and I were under arrest. When we arrived at our local police station, something surprising happened. The officer on duty was someone that I had known for a long time. He told the SA men that there has been a mistake, and to us he said, 'you are free to go.'"

Max Friedlaender (*Hitler's Courts* 14:22)

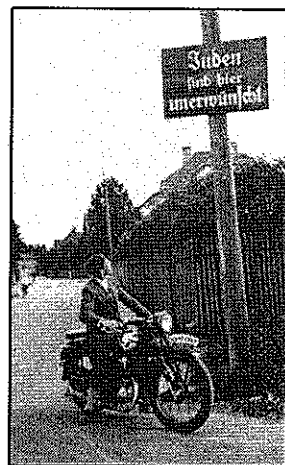


Local residents watch the burning of the ceremonial hall at the Jewish cemetery in Graz during Kristallnacht (the "Night of Broken Glass"). Graz, Austria, November 9-10, 1938.

What were the Nuremberg Laws?

After Adolf Hitler came to power in 1933, there were annual Nazi party rallies in Nuremberg. The rallies, which were memorialized in Leni Riefenstahl's propaganda film "Triumph of the Will," featured soldiers marching through Nuremberg and speeches by Hitler before an excited audience of as many as 250,000 at the Luitpold Arena.

The Nuremberg Laws (see Appendix 1) deprived German Jews of their political and civil rights. Hitler presented the laws near the end of the 1935 rally, during a special session of the Nazi legislature (known as the Reichstag). In his speech, Hitler described the laws as an effort to "achieve the legislative regulation of a problem which, if it breaks down again, will then have to be transferred by law to the National Socialist Party for final solution."



A young man on a motorcycle gazes up at a sign posted on a telephone pole that reads, "Jews are not welcomed here."

"When the Nazis first came to power, they ended up promulgating a number of laws that incrementally deprived Jews, and other persecuted minorities, of civil rights. These incremental steps that we are talking about, that result in the final solution are all legal steps. You can trace this, you can trace the Holocaust as a legal event."

Prof. Michael J. Bazyler
(Hitler's Courts 7:30)

The principal Nuremberg laws regulated German Jews in two ways.

- One law, entitled "The Law for the Protection of German Blood and German Honor," prohibited marriages and extra-marital intercourse between "Jews" and Germans (another ordinance to the new laws also defined the term Jew) and made illegal the employment of German females under the age of 45 in Jewish households.

- The second law, "The Reich Citizenship Law," denied Jews full German citizenship and restricted their political rights.

There was confusion over who was a Jew and therefore two months after the Nuremberg laws, the Nazis issued a supplemental decree which provided definitions to determine who was a "full Jew" and who was a "half-breed" known as *Mischling*. There were two degrees of *Mischling(e)*, depending upon how many Jewish grandparents a person had as well as family status. In addition, the Nazis issued charts to assist officials in determining an individual's degree of Jewishness.

"I could no longer afford the beautiful house that had been my family's home for twenty-eight years. Our dear friends, the Hirtzfelters, had an apartment available on the second floor of their house. I arranged to move in with them and began the painful process of selling my home."

Max Friedlaender
(Hitler's Courts 13:35)

DISCUSSION QUESTIONS:

1. The Nazis claimed Jewishness was racial. However, they ultimately defined Jews by referring to their affiliation with the Jewish religious community. Why did the Nazi Party employ this approach to determining who was a Jew?
2. During the Nazi era, segregation was legal in the United States. For example, white students attended white-only schools, while black students attended separate schools for blacks. In what ways did the existence of racial segregation in the United States influence the ability of the United States to criticize the Nazi regime?

The Nuremberg Trials:

Historical Perspective 1945 - 1950

TEACHING STANDARDS FOR SOCIAL STUDIES

Global Connections

- Holding a nation responsible for crimes against international law

Civic Ideals and Practices

- Swift punishment or legal trial

The Allies' First Decision: Should There Be Trials?¹

The Nuremberg war crimes trials are generally celebrated today as a genuine effort to achieve fairness and justice. At the time, the conduct of orderly trials was not a foregone conclusion. The trials presented an extraordinary challenge:

- assembling an international tribunal
- responding to the desire for revenge against the defeated Nazi leaders
- acting without legal precedent for war crimes trials

In 1944, President Roosevelt's Secretary of War, Henry Stimson, made the following argument to support holding war crimes trials after the war rather than engaging in summary execution:

It is primarily by the thorough apprehension, investigation, and trial of all the Nazi leaders and instruments of the Nazi system of terrorism, such as the Gestapo, with punishment delivered as promptly, swiftly and severely as possible, that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to extirpate it and all its fruits forever.²



Henry Morgenthau Jr., Secretary of the Treasury under Franklin D. Roosevelt. Washington, D.C., United States.

President Roosevelt considered two proposals.

1. The Morgenthau Plan, named after its sponsor, Secretary of the Treasury Henry Morgenthau Jr., called for creation of a list of "Arch criminals of [World War II] whose obvious guilt has been recognized by the United Nations." That list was to be transmitted to the military. After the military confirmed the identification of an individual on the list, that person would be "put to death by firing squads made up of soldiers of the United Nations."

2. Roosevelt, and later Truman, came to support the prospect of trials, as did other American leaders. In April 1945, Roosevelt appointed Associate Supreme Court Justice Robert Jackson the United States' Chief Counsel for war crimes.

¹ This section draws upon the essays by Raymond M. Brown, "The American Perspective on Nuremberg: A Case of Cascading Ironies," and Michael J. Bazyler, "The Role of the Soviet Union in the International Military Tribunal at Nuremberg," in *The Nuremberg Trials: International Criminal Law Since 1945*.

² For a detailed examination of the debate within the Roosevelt Administration during World War II over whether to hold war crimes trials, see www.crimesofwar.org/tribunal-mag/garybass_print.html

DISCUSSION QUESTIONS:

1. What arguments would an advisor to President Roosevelt or his successor President Truman have made in 1945 to support execution? * Why?
2. What arguments would an advisor to President Roosevelt or President Truman have made in 1945 to support war crimes trials? Why?

(*President Roosevelt died on April 12, 1945)

The Criticism of the War Crimes Trials as “Victors’ Justice”¹

Just as the trials were not a foregone conclusion, neither were they met with widespread approval. Critics did not wish to see the Nazi leaders set free; rather, they saw the trials as “victors’ justice” – an assertion of power rather than the administration of justice by the Allied nations over the vanquished German leaders.

The most prominent defendant in the first trial, Hermann Goering, is said to have sounded this note upon receiving the indictment, commenting that, “The victor will always be the judge and the vanquished the accused.”

Perhaps most famously, Senator Robert Taft made the comment about the post-war trials occurring in Germany and Japan:

“I believe that most Americans view with discomfort the war trials They violate that fundamental principle of American law that a man cannot be tried under an ex post facto statute. The trial of the vanquished by the victors cannot be impartial, no matter how it is hedged about with the forms of justice. . . . About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice.”

Senator Robert Taft

In other words, it would be impossible for the trials to be – and to be perceived as – fair. The United States and its allies had just defeated Germany in a long and brutal war. Senator Taft and other critics contended that for the victorious nations to now hold a trial of the German leaders would not be consistent with legal notions of fairness – because the Germans would be tried for actions that were not considered crimes when they occurred – and would not amount to more than revenge, which was antithetical to the notion of justice.

¹ This section draws upon the essay by Raymond M. Brown, “The American Perspective on Nuremberg: A Case of Cascading Ironies,” in The Nuremberg Trials: International Criminal Law Since 1945.

DISCUSSION QUESTIONS:

1. Discuss whether it would have been possible for any trial to proceed without being criticized as victors' justice.
2. If the trials were victors' justice, how does that undermine the moral justification for conducting the trials? Why did this criticism have more force immediately after World War II than it does today?

The First Trial¹

Initially 24 defendants were indicted and charged with an array of crimes. All were charged with at least two of the following four offenses: war crimes, crimes against peace, crimes against humanity, and conspiracy.² Some were charged with all four offenses. Among the defendants were Hermann Goering, who had served as Reichsmarschall and Luftwaffe (Air Force) Chief; Karl Doenitz, an admiral who eventually commanded the Navy and succeeded Hitler as Führer; Wilhelm Keitel, Chief of Staff of the German High Command; and Albert Speer, Reichminister of Armaments and Munitions. Only 21 defendants were present in the courtroom for their trial.³

The first trial is certainly the most well-known of the Nuremberg trials. The trial began on November 20, 1945. In presenting the prosecution's case, Jackson argued that the crime of aggressive war made the crimes against humanity possible. Jackson also

"The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."

Justice Robert Jackson's opening statement
Nuremberg, November 21, 1945

explained the culpability not only of individual defendants but of the Nazi party itself. This part of the prosecution was intended to thwart the possible resurgence of Nazism by the German people.

The Nuremberg trials are most celebrated today for the prosecution of crimes against humanity – in particular the collection and presentation of extraordinary documentary evidence detailing the horrors of the Holocaust. However, at the time of the trial, the principal focus of the case

was on the Nazi conspiracy to wage aggressive war. Jackson sincerely hoped that the trials would discourage future aggression and promote post-war peace.

In 1946, the tribunal rendered its judgment soon after the end of the trial proceedings. To briefly summarize: Of the 21 defendants, 11 were sentenced to death by hanging; three were sentenced to life in prison; four received prison terms of between ten to 20 years; and three were acquitted.⁴

After judgement was entered in the first, there were 12 subsequent trials. They were conducted under international law and by agreement among the allied powers, albeit under the sole jurisdiction of the United States (which remained in Germany as an occupying power) and not that of the International Military Tribunal.

¹ This section draws upon the essays by John Q. Barrett, "One Good Man": The Jacksonian Shape of Nuremberg," Michael J. Bazylar, "The Role of the Soviet Union in the International Military Tribunal at Nuremberg," Raymond M. Brown, "The American Perspective on Nuremberg: A Case of Cascading Ironies," Lawrence Douglas, "History and Memory in the Courtroom: Reflections on Perpetrator Trials," Whitney R. Harris, "Tyranny on Trial – Trial of Major German War Criminals at Nuremberg," and Herbert R. Reginbogin, "Confronting Crimes Against Humanity, from Leipzig to the Nuremberg Trials," in *The Nuremberg Trials: International Criminal Law Since 1945*.

² Appendix II identifies the 21 defendants who were present for the first trial, the charges against them, and the sentences imposed upon those who were convicted.

³ Three defendants avoided trial. Robert Ley committed suicide on October 25, 1945, before the trial began; Gustav Krupp von Bohlen und Halbach suffered from health problems that resulted in the postponement of his trial; and Martin Bormann was not in custody but nevertheless was tried *in absentia* (and convicted and sentenced to death). Nearly ten years later, Bormann was officially proclaimed dead by a German court, which declared that he had been killed in early May 1945.

⁴ See Appendix II for more details.

DISCUSSION QUESTIONS:

1. The United States and Great Britain did not include testimony of Holocaust victims in their cases. What did they gain by not including that testimony? What did they lose?
In answering these questions, consider the role of the trial in creating a historical record of the atrocities that had occurred in Nazi Germany from 1933 through 1945.
2. Not every defendant at the first trial was convicted. Several of the defendants were acquitted. Explain why this was or was not fair.

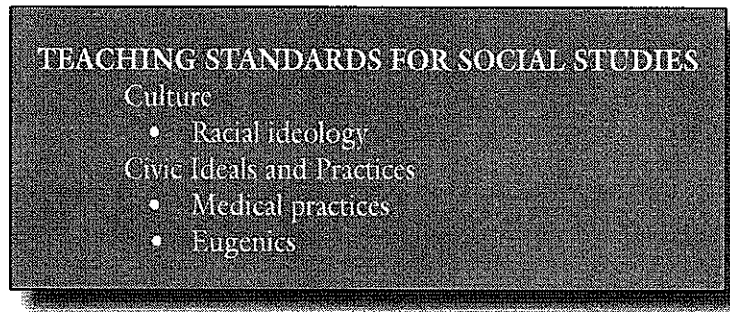
Part II NUREMBERG TRIALS

Case Study 1: Ethics – The Doctors’ Trial

Case Study 2: Law and Morality – The Justice Case

Case Study 3: International Law

CASE STUDY 1: Ethics - The Doctors' Trial¹



Originally designated as *United States v. Karl Brandt, The Doctors' Trial*, so named because 20 of 23 of the defendants were Nazi doctors, was the next trial after the trial of the Nazi leaders. (Karl Brandt was Hitler's personal physician.) The doctors were charged with crimes including crimes against humanity and genocide, committed through acts such as murder and forced sterilization.

The trial began in late 1946 and lasted more than eight months. The trial focused on the horrific human medical experiments conducted on the inmates at the concentration camps. There was an extensive record of the experiments because the Nazi doctors documented their crimes in great detail.

Among the experiments documented at the trial was a freezing experiment in which subjects were immersed in freezing water or kept outdoors naked in freezing weather at the concentration camp of Dachau. (The ostensible medical justification for this experiment was that it would provide information on how to revive and warm German aviators who had been shot down and parachuted into the sea.) Other experiments involved burning the victims to see which burn preparations worked best, or amputating two victims and then performing full limb transplants. Of course, many of the human "research" subjects died during the experiments.

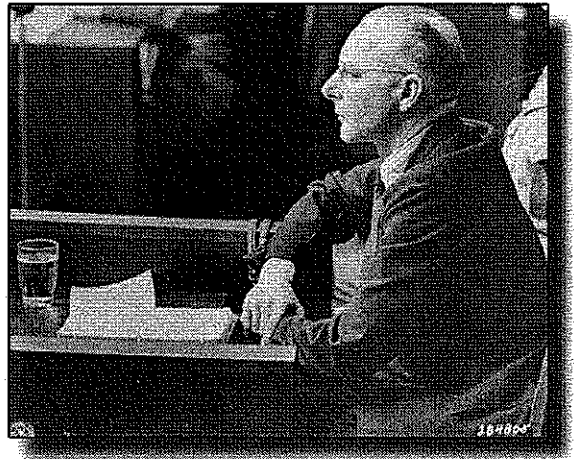
The doctors were fully aware of the permissible ethical boundaries on human experimentation, especially given the Reich Circular of 1931, which required the full consent of the subject. However, the ethical limits were not necessarily relevant because the doctors actively and fully participated in carrying out Nazi laws enacted to create and maintain "racial purity." Racial hygiene, or *Rassenhygiene*, was a vital component of the Nazi policy and resulted in passage of laws requiring tests for "racial purity." The intended result was to exclude Jews from citizenship and ultimately to justify sterilization and the euthanasia program. Under the premise of saving the Aryan race, the German doctors sterilized over 350,000 people, and killed over 70,000 people from mental hospitals.

There were many doctors who ignored medical ethics and others who sought to practice medicine according to some ethical standards. The trials demonstrated that it was not entirely impossible for a doctor to resist the medical practices and experiments ushered in by the Nazi regime. One of the defendants, a Dr. Romberg, presented evidence that

¹ This section draws upon the essay by Louise Harmon, "The Doctors' Trial at Nuremberg," in *The Nuremberg Trials: International Criminal Law Since 1945*.

he had protested to his superior, Dr. Rascher, about a high altitude experiment resulting in the death of the subject in Dachau. Dr. Romberg then went to Berlin to protest even though he had signed an agreement with his Nazi superiors that prevented him from disclosing any activities at the concentration camps.

After being convinced to return to Dachau, Dr. Romberg continued to argue with Dr. Rascher about the deaths of subjects. However, he could not do much more than that, at least openly. Dr. Romberg testified that there were three types of resistance available to a doctor: to emigrate, if possible; to engage in open resistance which would most likely end in death, or to attempt passive resistance. Dr. Romberg felt that his only option was to engage in passive resistance, which entailed acquiescing to orders but then misplacing them and delaying their implementation. At the conclusion of the Doctors' Trial, Dr. Romberg was acquitted.



Victor Brack on the first day of his testimony in his own defense during the Doctors' Trial.

At the end of the trial, many of the defendants were convicted. Of the 23 defendants, seven were convicted and sentenced to death; five were convicted and sentenced to life imprisonment; four were convicted and received lesser prison terms; and seven were acquitted or freed.

DISCUSSION QUESTIONS:

1. Under Nazi racial ideology and medical experimentation, the subjects were not considered to be human beings. In what ways did this allow the doctors to set aside ethical behavior and perform their experiments?
2. Should Dr. Romberg have been acquitted? Why or why not?

CASE STUDY 2: Law and Morality - The Justice Case¹

TEACHING STANDARDS FOR SOCIAL STUDIES

Power, Authority and Governance

- Status of law
- Democracy
- Contemporary issues

Individual Development and Identity

- Unjust law
- Moral issues

As one of the 12 subsidiary trials conducted by the United States after the prosecution of the major war criminals, “The Justice Case” was brought to trial in Nuremberg in March 1947. There were 16 defendants, of whom six were judges in the Nazi era and four were prosecutors. The remaining defendants were civil servants who had

been members of Reich Ministry of Justice and various courts.

“Maybe one characteristic of Germans is that they have a tendency to want to be perfect. So they also want to have a perfect legal system, and this is where it got horribly wrong, when the law turned out to be utterly unjust.”

Dr. Christopher Safferling
(Hilter’s Courts 24:35)

The defendants were charged with “judicial murder and other atrocities committed by destroying law and justice in Germany, and then utilizing the empty forms of legal process for persecution, enslavement and extermination on a vast scale.” Essentially, the defendants were

charged with the destruction of the German legal system and then using that broken structure for the commission of atrocities. The trial lasted over seven months.

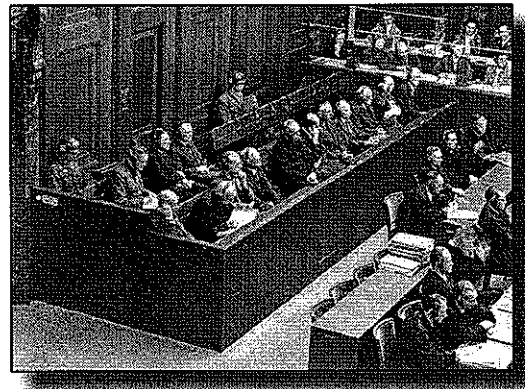
The Nazis recognized early, while coming to power, that the law was a very powerful instrument to get the German public to acquiesce in those early steps of the subversion of constitutional safeguards. As detailed above, from 1933 through 1945, the Nazis, through the laws, courts and judges, stripped Jews and other minorities of their legal protections. The judges upheld and enforced Nazi laws that had been enacted pursuant to the ideology of racial superiority.

When Judge Lothar Kreyssig discovered that inmates at a local mental hospital were secretly being removed and killed, he publicly charged the Nazis with the systematic extermination of mentally-and physically-impaired people, issued injunctions against the euthanasia program and attempted to prosecute Nazi officers. Given his high profile, Judge Kreyssig was “encouraged” to retire. Subsequently, however, even a high public profile did not offer protection from the Nazis as they consolidated power. A Supreme Court justice later spoke publicly about the Nazi betrayal of law. He was arrested and executed in the Sachsenhausen concentration camp.

¹This section draws upon the essay by Harry Reicher, “The Jurists’ Trial and Lessons for the Rule of Law,” in The Nuremberg Trials: International Criminal Law Since 1945.

For the most part, the judiciary became the willing instrument of Hitler's terror. By 1945, the German courts had handed down over 50,000 death sentences. We will look at the facts regarding two defendants in the Justice Case.

Franz Schlegelberger A civilian in the Justice Ministry, Franz Schlegelberger was involved many times with concocting legal justifications for SS shootings of defendants whose court sentences were deemed disapproved of by Hitler. For instance, in the case of Markus Luftglass, an elderly 74 year-old Jew charged with stealing eggs, Schlegelberger provided the justification and documentation necessary to have Luftglass executed by the Gestapo after Hitler disapproved of his two-and-a-half-year sentence. The Tribunal focused on the fact that Schlegelberger disregarded any legal judicial process in order to fulfill the will of Hitler, and thus contributed to the destruction of judicial independence.



The defendants in the dock at the Justice Case.

Oswald Rothaug The Rothaug case illustrates how the empty structure of the German legal system was used to commit atrocities. In a case before Rothaug, the defendant, Leo Katzenberger, was charged with "racial pollution" based on an alleged relationship with an Aryan woman. There was only one credible witness, Irene Seiler, the woman with whom he allegedly had the relationship. She testified that he did not commit the crime. But Katzenberger was a Jew and thus, Rothaug, true to "judging like the Führer," had to ensure Katzenberger lost and was sentenced to death. So, Rothaug simply had Seiler charged with perjury and by doing so reasoned that if she perjured herself in denying the crime, then the crime had actually taken place. Then, since the charge of racial pollution did not carry the penalty of death, Rothaug superimposed the crime of "public enemy" and sentenced him under that crime. The Tribunal found that Rothaug had made his court an instrument of terror and was an "evil and sadistic man."

In their defense before the Tribunal, some defendants claimed they remained in their positions to prevent the worst from happening. However, after hearing testimony from 138 witnesses and receiving 2,000 pieces of evidence, the Tribunal concluded that many of the defendants had consciously participated in "a nationwide government organized system of cruelty and injustice, in violation of the laws of war and of humanity."

Conclusion Of the 16 defendants in The Justice Case, ten were found guilty; four were acquitted; one became ill and a mistrial was declared; and one committed suicide before the trial. Of the ten convicted, four were sentenced to life imprisonment, and six were sentenced to between five and ten years.

"Our Declaration of Independence talks about certain inalienable rights and among those rights are life, liberty and the pursuit of happiness. That's natural law, it's not written anyplace. The founding brothers all believed that there were certain rights that people just had as human beings that they were entitled to. And I think that those sorts of principles, which are principles of morality, can be stated other ways. Some people say that these are rights that come from God and other people say that they are inherent from the fact that you are a human being."

Prof. Howard Glickstein
(Hilter's Courts 26:15)

Franz Schlegelberger and Oswald Rothaug were released from prison in 1950 and 1956, respectively, and each man was awarded a monthly pension and back pay. This leniency was typical of the Federal Republic of Germany in the post-War years, which included the "re-employment of Nazi-era officials as judges, prosecutors and civil servants."

DISCUSSION QUESTIONS:

1. Considering that Judge Kreyssig was forced into early retirement for speaking out and that subsequently another judge was executed, what could a judge have done to preserve the rule of law and the German legal system?

(Explore ways to resist that were discussed in The Doctors' Case and whether they apply to The Justice Case.)

2. What happens when the rule of law is replaced by loyalty to a single leader? In that situation, how does an ordinary citizen or a legal professional respond to the absence of the rule of law?
3. One of the arguments made to explain the judges' conduct in Nazi Germany was the absence of the international human rights laws. How could such laws, which establish and protect human rights, have prevented the destruction of the German legal system?

CASE STUDY 3 - International Law

TEACHING STANDARDS FOR SOCIAL STUDIES

Power, Authority and Government

- Authority of law enforcement
- Contemporary issues
- Governance

Global Connections

- Decisions and consequences
- Analysis
- Interpretation of law

Individuals, Groups and Institutions

- Examine societal response to law
- Rights and liberties

Nuremberg and its Progeny

The Nuremberg trials were a novel enterprise when they were held after World War II. After the last trial concluded in 1949, the Nuremberg trials became an example for later human rights trials. This has been especially true during the past two decades, when a number of tribunals have conducted war crimes trials in a number of different countries. The legacy of the Nuremberg trials can be seen in the trial of Slobodan Milosevic, the former president of Serbia; the trials in Rwanda following the Hutus' genocide campaign in 1994 against the Tutsis; and the trials of Saddam Hussein by an Iraqi Special Tribunal in 2005 and 2006. More details about these trials and the tribunals that held them are below.

Slobodan Milosevic

Nearly half a century after World War II came to an official end, the International Criminal Tribunal for the former Yugoslavia ("ICTY") was formed by the United Nations. The purpose of the ICTY was to investigate and prosecute individuals involved in committing war crimes during the Balkan conflict of the 1990s. Located in The Hague, Netherlands, the ICTY has a staff of judges, lawyers and prosecutors representing 81 nationalities. Slobodan Milosevic, who was elected president of Serbia in 1991 under the promise to create a "Greater Serbia," is the most well known individual who was indicted and placed on trial by the ICTY.¹

Milosevic was indicted on 66 counts of crimes against humanity, genocide, and war crimes committed during his government's invasion of the Balkan states of Bosnia and Kosovo in the early 1990s. Tens of thousands of Bosnian Muslims and Kosovians were murdered during the wars, with some estimates for the entire war reaching 200,000 missing and/or dead. After a trial that lasted over four years, Milosevic escaped the Tribunal's verdict when he died in his jail cell from poor health in 2006. His trial was only months from concluding and was viewed by many as a success. Through the testimony of over 3,500 witnesses and the admission of guilt and cooperation of Milosevic's military officers, the Tribunal was able to create a historical record and bring a sense of justice to the many thousands of victims across the region.²

¹ www.icty.org

² www.cnn.com/2006/WORLD/europe/03/11/milosevic.trial/

Rwanda

In 1994, after years of ethnic hostilities, extremist Hutus, with the help of some members of the Rwandan government and military, began a campaign of systematic killings (genocide) against the Tutsis, resulting in the murder of approximately 800,000 Tutsis



During 1994 genocide in Rwanda, ID cards were death warrants for many Tutsi stopped at checkpoints.

and moderate Hutus in only three months. The UN became involved in 1994 when it joined forces with the Rwandan Government to form the International Criminal Tribunal for Rwanda ("ICTR").

Since its first indictment in 1995, the ICTR has convicted over 20 individuals for their actions in Rwanda. These crimes include genocide, complicity in genocide, and crimes against humanity, consisting of murder, rape, persecution, as well as other serious violations of the Geneva Conventions of 1949. In December 2007, the ICTR sentenced Francois Karera, a former Provincial Leader of Rwanda, to life in prison for crimes against humanity in commanding several attacks against Tutsis in the 1994 genocide. The ICTR's mandate was scheduled to expire at the end of 2008, but there are cases awaiting trial and cases in progress. Therefore, Rwanda is petitioning to take over the Tribunal's caseload and has waived the death penalty, improved detention facilities, and implemented significant judicial reforms in preparation for that decision.³

³ www.globalpolicy.org/intljustice/rwandaindx.htm

Saddam Hussein

Saddam Hussein was captured by US forces in 2003. There was no international forum available for his trial since France and Russia said that they would not authorize an international tribunal, and the permanent International Criminal Court cannot try any case based on events that occurred before July 1, 2002. The Iraqi legislature created the Iraqi Special Tribunal, which by its statutes and rules was to function as an international domestic tribunal applying international law and rules but with Iraqi judges and prosecutors. In July 2005, Hussein was formally charged with war crimes and crimes against humanity for ordering the killing of 148 Shiites in the City of Dujail after a failed attempt on his life.⁴

This trial was supposed to be a prelude to the much bigger second trial in which Hussein was to be held accountable for the genocide of 180,000 Iraqi Kurds in connection with his authorization to use poison gas in the 1980s against Kurdish towns and villages. But, while this second trial was underway in 2006, Hussein was found guilty in November in the Dujail case. A nine-judge appellate court affirmed the death sentence and he was taken to the gallows and hanged on December 30, 2006. Some argue that the execution should have been deferred until the full extent of the former regime's cruelty and participation in genocide could be publicized in the second trial. Others argue that his execution was necessary given that the first Hussein trial was continually marred by violence – including the murder of three defense attorneys – and became a rallying point for Sunni militants in the war.⁵

DISCUSSION QUESTIONS:

1. Compare the different tribunals. Does one seem to offer more legitimacy than others? Why or why not?
2. Was ultimate justice avoided in the Milosevic and Hussein trials? Why or why not?

⁴ www.edition.cnn.com/2005/WORLD/meast/10/17/michael.scharf.cnn/index.html

⁵ www.nytimes.com/2006/11/05/world/middleeast/05cnd-saddam.html

Part III AMERICA AND THE POST WORLD WAR II ERA

Introduction: America and The Post WWII Era Case Studies

Case Study: The American-Japanese Experience

**Case Study: Life After September 11, 2001:
The War on Terror**

Introduction: America and The Post World War II Era

The case studies that follow focus on American experiences both directly after World War II and in the present time.

"...without vigilance on the part of our lawyers and judges, the men and women who are charged with the task of safeguarding the rule of law, any nation is vulnerable to fear and propaganda. . . ."

Dean Lawrence Raful

Is Dean Raful's warning well-founded? With our Constitution and independent judiciary, it seems unlikely, even farfetched, that the United States could be so vulnerable to fear and propaganda that we would deny our citizens basic rights.

Consider the following quotes:

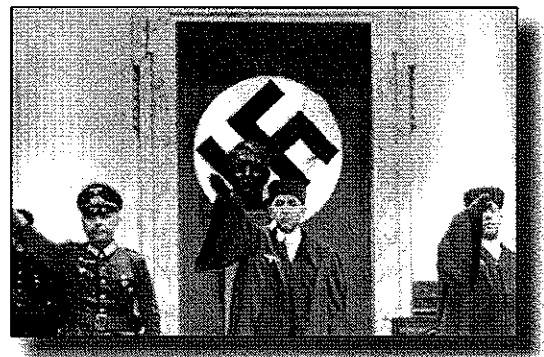
- "For the enemy of the state, there is only one course in prosecution and sentencing – unflinching severity and, if necessary, total annihilation."
- "Their racial characteristics are such that we cannot understand or trust even Citizen Jew."
- "When we are dealing with the Caucasian race we have methods that will test the loyalty of them. But when we deal with the Jews, we are on an entirely different field."

The first quote was uttered by Roland Freisler, who was president of the People's Court in Germany during the Nazi era.

The other two quotes were made by officials of the United States after the Japanese attack on Pearl Harbor on December 7, 1941, which brought the United States into World War II. The only difference is that "Jew" is substituted for "Japanese."

Here are the original quotations:

- "Their racial characteristics are such that we cannot understand or trust even Citizen Japanese." Henry L. Stimson, United States Secretary of War, 1942.
- "When we are dealing with the Caucasian race we have methods that will test the loyalty of them. But when we deal with the Japanese, we are on an entirely different field." California Attorney General Earl Warren, 1942. (Warren later became the chief justice of the United States Supreme Court, a position he held from 1953 through 1969.)



Roland Freisler (center), president of the Volk Court (People's Court), gives the Nazi salute at the trial of conspirators in the July 1944 plot to kill Hitler. Under Freisler's leadership, the court condemned thousands of Germans to death. Berlin, Germany, 1944. See note at end of Appendix III.

CASE STUDY: The American – Japanese Experience

TEACHING STANDARDS FOR SOCIAL STUDIES

Power, Authority and Governance

- Authority in governing process
- Rights
- Civil liberties

Global Connections

- Consequences
- Governmental loyalties

Civic Ideals and Practices

- Laws of citizenship
- Public policy
- Rights and liberties

Immediately after the attack on Pearl Harbor, the US Government froze assets, raided homes and imposed curfews on Japanese Americans, including those who were American citizens. In addition, President Roosevelt signed Executive Order 9066 on February 19, 1942, authorizing the forced relocation of over 100,000 Japanese Americans, over 60 percent of whom were American citizens. Despite no evidence that any Japanese Americans were involved in spying or sabotage, the Order gave the military the power to ban any Japanese person from a 60-mile wide coastal area stretching from Washington State down through California and inland to Arizona. The stated purpose for the order was for “protection against espionage and against sabotage.”¹

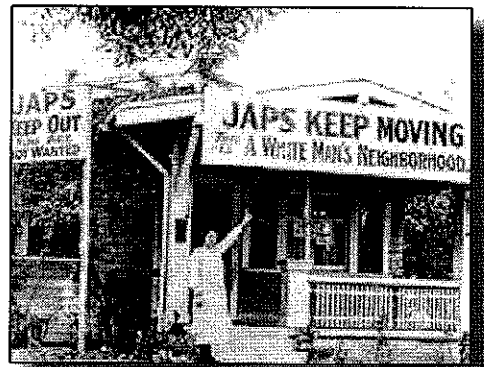
Following Executive Order 9066, an Army notice was posted throughout California, which read in part:

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon Tuesday, April 7, 1942.

No Japanese person will be permitted to enter or leave the above described area after 8:00 am Thursday, April 2, 1942, without obtaining special permission from the Provost Marshal...

These Japanese Americans were given a few days to gather up their lives – pull their children out of school, quit their jobs, sell their homes – before having to report for assignment to internment camps that were manned by armed guards and surrounded by barbed wire. They were only allowed to bring with them what they could carry and then were sent to internment



Woman pointing to a sign displayed above porch “Japs Keep Moving, This Is A White Man’s Neighborhood.”

¹ William R. Manchester, *The Glory and the Dream* (1974); Julie Des Jardins, *The Gilder Lehrman Institute of American History*, “From Citizen to Enemy: The Tragedy of Japanese Internment,” Issue Fourteen, December 2007. See: www.historynow.org/12_2007/historian4.html

camps away from the West Coast. The purpose of the camps was to isolate the Japanese Americans so that they would not be able to collude with the enemy. Most of the Japanese Americans remained in these camps for close to four years, until 1946.²

Just as we examined the actions of Germany's judges during the Nazi era, we now consider the judicial response to the government's actions in the United States. The first case to make it to the Supreme Court was brought by Gordon Hirabayashi, who was a University of Washington student and had been convicted of violating a curfew and relocation order. In 1943, the Supreme Court decided that the application of curfews against Japanese-Americans was constitutional when the nation was at war with the country from which they originated.³

In 1944, the Court upheld the constitutionality of the forced relocation of Japanese-Americans from the West Coast. Fred Korematsu was an American citizen, 22 years old, when he refused to report for internment. The Court adopted the Government's arguments that disloyal Japanese could not be separated from loyal Japanese and that there was no time for hearings and trials to determine who was loyal. Thus, the Court wrote, because we were at war, and there was a serious risk to national security, "hardships had to be endured."⁴ Even with the broad powers given to the government, not a single Japanese American however, was ever charged with espionage during World War II.⁵

Eventually the United States Government not only recognized the error of its actions but apologized for them as well. In 1976, President Gerald Ford said the internment was a "national mistake" and "sad day in American history," and in 1983, a unanimous federal commission found that the internment policies were not justified by military necessity and actually were the result of "rac[ial] prejudice, war hysteria and a failure of political leadership." In 1988, President Ronald Reagan authorized reparations of \$20,000 to each internment camp survivor.⁶ The Hirabayashi and Korematsu convictions were overturned by Federal Courts in 1987 and 1983 respectively.⁷

As you heard, the Nuremberg Laws reflected Nazi preoccupation with racial purity, and in effect, Jews and other minorities underwent a civil death long before millions met their physical death in the camps. Section 2 of The Reich Citizenship Law provided: "A Reich Citizen is a subject of the State who is of German or related blood, who proves by his conduct that he is willing and fit faithfully to serve the German people and Reich."

² Id.

³ *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁴ *Korematsu v. United States*, 323 U.S. 214 (1944). On the same day that it decided *Korematsu* case, the Court held that the government could not continue to detain a citizen that the government admits is loyal and law-abiding. *Ex Parte Endo* 323 U.S. 283 (1944).

⁵ Nanette Dembitz, "Racial Discrimination and the Military Judgement: The Supreme Court's *Korematsu* and *Endo* Decisions," 45 *Colum. L. Rev.* 175 (1945).

⁶ John T. Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). <http://www.presidency.ucsb.edu/ws/?pid=5591>; President Gerald R. Ford's Proclamation 4417, Confirming the Termination of the Executive Order Authorizing Japanese-American Internment During World War II; 100th Congress, S. 1009.

⁷ *Korematsu v. United States* 584 F.Supp. 1406; New York Times, Fred Korematsu, 86, Dies; Lost Key Suit on Internment, April 1, 2005, www.nytimes.com/2005/04/01/national/01korematsu.html, <http://seattletimes.nwsource.com/special/centennial/june/photo/hirabayashi.html>.

DISCUSSION QUESTIONS:

1. What are the differences between the Executive Order 9066, which revoked Japanese American's civil liberties, and the Nuremberg Laws, which stripped German Jews of their civil liberties? In answering this question, is it significant that the United States was at war when it adopted the executive order?
2. Compare the quotations from United States government officials and the proclamations made by the Nazi official. The United States officials mention "loyalty" and "trust" while the Nazi official employs the phrase "enemy of the state." How does this language make it easier for the government to accomplish its objectives? Discuss whether the terms were merely a pretext for officials to carry out racially prejudiced actions.
3. In comparing the experience of Germany during the 1930s and the United States during World War II, discuss the extent to which citizens can rely on judges and lawyers to protect and promote the rule of law.

CASE STUDY: LIFE AFTER SEPTEMBER 11, 2001: THE WAR ON TERROR



Since September 11, 2001, when a number of al-Qaeda terrorists commandeered four airplanes and attacked the United States on suicide missions, there has been a constant debate over the appropriate balance between protecting national security and preserving civil liberties. Much of the debate has focused on a law known as the Patriot Act, which was enacted shortly after the attacks and re-authorized in 2006. In addition, there has been substantial debate over the use of racial profiling as a tactic to deter and detect potential terrorist threats.

The Patriot Act has many provisions and is a complicated law. It has been challenged many times in court, sometimes with success. The government's use of racial profiling also has resulted in legal challenges. This section will discuss only a few of the issues raised by the War on Terror after September 11 including:

- A brief summary of the Patriot Act
- Several legal challenges to the Act
- Highlights of the issues raised by the Act
 1. the expansive use of the government's powers
 2. the potential threat to civil liberties
 3. the role of lawyers and courts in resolving the conflict between security and individual rights

This section takes a similar approach in discussing racial profiling. By now, certain aspects of this discussion should be familiar.

The Patriot Act

The Patriot Act expanded the authority of law enforcement agencies for the stated purpose of fighting terrorism in the United States and abroad. Among other things, the Act increased the ability of law enforcement agencies to search telephone and e-mail communications and medical, financial, and other records, eased restrictions on foreign intelligence gathering within the United States, and enhanced the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts.¹

¹ USA Patriot Act; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Pub. L. 107-56, Oct 26, 2001.

For example, prior to the Patriot Act, in order to search a person's home as part of a criminal investigation, the government was required under the Fourth Amendment of the Constitution to demonstrate "probable cause" that an individual had committed a crime to a "detached and neutral magistrate." The Patriot Act reduced that burden in certain cases. As long as the government is able to show that the individual may be an agent of a foreign government, the government does not have to show "probable cause" in gathering evidence for a criminal investigation.²

There have been lower court rulings in which provisions of the Patriot Act – specifically its relaxation of the probable cause requirement – have been held unconstitutional.³ In September 2007 a federal judge in Oregon held that two provisions of the Patriot Act were unconstitutional.⁴ The court stated that a "difficult balance must be struck in a manner that preserves the peace and security of our nation while at the same time preserving the constitutional rights and civil liberties of all Americans."⁵

The case involved Brandon Mayfield, a lawyer mistakenly arrested and jailed for two weeks after he was linked by the FBI to the terrorist attacks in Spain in March 2004 in which 191 persons were killed by a series of bombings on commuter trains. Mayfield was a Muslim convert and a lawyer who had represented several defendants in terrorism-related cases. Despite the facts that he did not have a passport, had not been out of the country since the early 1990s, and the Spanish National Police had determined that his fingerprints were not present on a bag of detonators found after the attack, Mayfield was taken into custody. In addition, the FBI used its powers under the Patriot Act to secretly search Mayfield's house and office, tape his telephone conversations, and copy his computer files.⁶

The court in Mayfield's case held that the provisions concerning electronic surveillance and physical searches violate the Constitution because they "permit the executive branch of government to conduct surveillance and searches of American citizens without satisfying the probable cause requirement of the Fourth Amendment."⁷ (The United States Government subsequently apologized to Mayfield and paid him and his family \$2 million.⁸) However, the majority of courts have held that these same provisions are reasonable and that the Patriot Act does not violate the probable cause requirement of the Fourth Amendment.⁹

Racial Profiling

After September 11, 2001, the government began a "massive" investigation to identify and apprehend those responsible for the attacks. In October 2001, as part of that effort, the government detained and secretly arrested more than 1,000 Middle Eastern,

² Mayfield v. U.S., 504 F.Supp.2d 1023, 1036 (D. Or. 2007).

³ Mayfield v. U.S., 504 F.Supp.2d 1023; see also Doe v. Gonzales, 500 F. Supp.2d 379 (S.D.N.Y. 2007) (invalidating certain nondisclosure provisions of the Patriot Act as unconstitutional under the First Amendment). But see U.S. v. Mubayyid 521 F.Supp.2d 125 (D. Mass 2007); In re Sealed Case 310 F.3d 717 (For.Intel.Surv.Rev. 2002).

⁴ 50 U.S.C. §§ 1804, 1823 as amended by the Patriot Act; Mayfield v. U.S., 504 F.Supp.2d 1023, 1042-43 (D. Or. 2007).

⁵ Mayfield v. U.S., 504 F.Supp.2d at 1036.

⁶ Id. at 1033.

⁷ Mayfield v. U.S., 504 F.Supp.2d at 1039.

⁸ See www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112901179.html

⁹ See, e.g., United States v. Wen, 477 F.3d 896 (7th Cir. 2007); In re Sealed Case, 310 F.3d 717 (For.Intel.Surv.Rev. 2002); U.S. v. Mubayyid, 521 F.Supp.2d 125 (D. Mass 2007).

South Asian and Muslim immigrants.¹⁰ Numerous newspapers and congressmen asked the Government to release information about the individuals who had been detained, specifically asking for the names of the detainees and the reasons for their detention. The lawsuit was concerned with what appeared to be the governmental use of racial profiling – the impermissible use of race, religion, ethnicity, or national origin in deciding who to investigate. The Government refused, saying that the release of the information would compromise national security.¹¹

In December of 2001, a number of public interest groups sued the Department of Justice seeking the release of this information under a law known as the Freedom of Information Act.¹² In response to the lawsuit, the Department of Justice contended that disclosure of this information would interfere with its investigation. The district court found some merit in the arguments made by each side. It ruled that information relating to the dates and locations of the arrests could be withheld but required the government to disclose the names of the detainees and their lawyers.¹³

The government appealed this decision and won. The D.C. Circuit Court of Appeals set aside the district court decision requiring the disclosure of certain information and permitted the government to continue to withhold names and information regarding hundreds of Muslim immigrants rounded up after the September 11th attacks.¹⁴ The court stated that “The need for deference [to the Justice Department] in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.”¹⁵ The court elaborated:



A protestor makes her views known about the Patriot Act.

A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation, and since these organizations would generally know the activities and locations of its members on or about September 11, disclosure would inform terrorists of both the substantive and geographic focus of the investigation. Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not.¹⁶

¹⁰ Center for Nat. Sec. Studies v. U.S. Dept. of Justice, 215 F.Supp.2d 94, 96 - 97 (D.D.C. 2002), *rev'd*, 331 F.3d 918 (C.A.D.C. 2003).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 113.

¹⁴ Center for Nat. Sec. Studies v. U.S. Dept. of Justice, 331 F.3d 918 (C.A.D.C. 2003).

¹⁵ *Id.* at 928.

¹⁶ *Id.*

Subsequently, the Supreme Court declined an opportunity to review this decision of the court of appeals.¹⁷

Around the same time that the D.C. Circuit issued its decision in June 2003, the Justice Department's Office of the Inspector General (OIG) reported that 762 of the individuals who were taken into custody by the government after September 11 were held for months even though the government concluded that they were not connected to terrorism. The report stated that the average length of time from the arrest of a September 11th detainee to clearance by FBI Headquarters was 80 days and that for more than a quarter of the 762 detainees the clearance investigations took longer than 3 months.¹⁸

Judge Richard A. Posner argues that although a nation such as the United States may be criticized in retrospect for overreacting to dangers that it faces, the greater risk is often initially underestimating the danger posed by a potential threat, such as a hostile nation or a group of terrorists. He cites tragic events such as the attack on Pearl Harbor in 1941 and the al-Qaeda attack on September 11, 2001, as examples of security risks underestimated by the United States. Posner argues that although we now know, with the benefit of hindsight, that the internment of Japanese-Americans did not shorten World War II, we did not know that at the time. He then asks if the government did not know that its internment policy would not help in its efforts to win the war, "shouldn't the Army have erred on the side of caution as it did?"¹⁹ Judge Posner's reasoning can be applied to support the Patriot Act's restriction of civil liberties and the government's use of racial profiling in its efforts to apprehend the terrorists who planned the September 11 attacks.

DISCUSSION QUESTIONS:

1. Explain whether you agree or disagree with Judge Posner's arguments in support of the Patriot Act.
2. Explain whether you agree or disagree with Judge Posner's arguments in support of the government's use of racial profiling in its investigation after September 11.
3. Assume that the government's use of racial profiling helped it apprehend one of the individuals involved in the September 11 attacks. Discuss whether that would justify the government's use of racial profiling in conducting its investigation.
4. What are the differences between World War II and the War on Terror? How, if at all, are those differences relevant to evaluating measures such as the Patriot Act? How, if at all, are those differences relevant to the role courts should play in evaluating government measures such as racial profiling and the Patriot Act?

¹⁷ Center for Nat. Sec. Studies v. U.S. Dept. of Justice, 540 U.S. 1104 (2004).

¹⁸ Office of the Inspector General Report, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," (June 2003). www.usdoj.gov/oig/special/0306/index.htm; Statement of Glenn A. Fine, Inspector General, U.S. Department of Justice, before the Senate Committee on the Judiciary concerning "Detainees" June 15, 2005. www.usdoj.gov/oig/testimony/0506b.htm.

¹⁹ Richard A. Posner, "The Truth About Our Liberties," *The Responsive Community*, vol. 12, Summer 2002.

Appendices

- I Anti-Jewish Legislation**
- II The First Trial at Nuremberg**
- III The Judges' Trial**
- IV Biographies**
- V Holocaust Terms**
- VI Legal Terms**
- VII Suggestions for Further Reading**

I Anti-Jewish Legislation

The following list (from the *Hitler's Courts* documentary at 12:54) includes some of the anti-Jewish Legislation and limitations set by the Nazis to diminish Jewish activity in society beginning in 1933. The Nuremberg Laws, which eliminated citizenship and other rights of German Jews, were among these laws.

- 1933 Law to Restore Professional Bureaucracy
 Law to Revoke German Citizenship from Jews
- 1935 Law for the Protection of German Blood and German honor
 Law Prohibiting Mixed Marriages
- 1937 Secret directive: Protective custody for all “defilers of race”
- 1938 Ordinance forbidding Jews to practice medicine
 Law requiring Jews to change their family names
 Ordinance forbidding Jews to practice law
 Ordinance for excluding Jews from German economy
 Ordinance forbidding Jews from participating in all cultural functions
 Jewish children barred from attending school
 Ordinance requiring sale of all Jewish businesses
 Directive pertaining to “settlement of the Gypsy question”
- 1939 Confiscation of all radios
 Directive requiring Jews to wear the yellow star
- 1940 Declaration of Re-Germanizing of Lost German Blood
- 1941 Führer Decree for Police Protections of Newly Occupied Eastern Territories
 Decree for the Implementation of the Law of Family and First Names of Jews
 Decree for the Protection of the People and State
 Decree on Passports of Jews
 Reich Decree on the Appearance of Jews in Public
 Decree on the Identification of Jews
 Decree on the use of Public Transportation by Jews
 Reich Citizen Law
 Decree of the Exclusion of Jewish from the Press and Radio
 Decree on the Exclusion of Jews

II The First Trial at Nuremberg: The defendants, the charges, the verdicts and the punishments

Count One: Conspiracy to Wage Aggressive War

This count helped address the crimes committed before the war began, showing a plan to commit crimes during the war.

Count Two: Waging Aggressive War, or "Crimes Against Peace"

Included "the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances."

Count Three: War Crimes

These were the more "traditional" violations of the laws of war including mistreatment of prisoners of war, slave labor, and use of outlawed weapons.

Count Four: Crimes Against Humanity

This count involved the actions in concentration camps and other atrocities.

DEFENDANT	INDICTED ON	IN THE END
Doenitz, Karl German admiral who would eventually command the entire navy. Chosen by Hitler to succeed him as Führer. Negotiated surrender following Hitler's suicide.	Counts I, II and III	Guilty on Counts II and III Served a 10 year sentence. Died in 1980.
Frank, Hans Governor-general of Nazi-occupied Poland, called the "Jew butcher of Cracow."	Counts I, III and IV	Guilty on III and IV Hanged in Nuremberg on Oct. 16, 1946.
Frick, Wilhelm Minister of the Interior	Counts I, II, III and IV	Guilty on II, III and IV Frick stated, "Hanging--I didn't expect anything different . . . Well, I hope they get it over with fast." (10/1/46) Frick was hanged on Oct. 16, 1946.
Fritzsche, Hans Head of the Radio Division, one of 12 departments in Goebbels' Propaganda Ministry.	Counts I, III and IV	Guilty of no counts Fritzsche was acquitted by the IMT. Fritzsche stated, "I am entirely overwhelmed--to be set free right here, not even to be sent back to Russia. That was more than I hoped for." He was later tried and convicted by a German court, then freed in 1950. He died in 1953.

Funk, Walther Minister of Economics	Counts I, II, III and IV	Guilty on counts II, III and IV Funk was sentenced to life imprisonment by the IMT. He was released in 1957 because of poor health and died in 1959.
Goering, Hermann Reichsmarschall and Luftwaffe (Air Force) Chief; President of Reichstag; Director of the "Four Year Plan"	Counts I, II, III and IV	Guilty on counts I, II, III and IV Goering committed suicide on the day before his scheduled hanging by taking a cyanide pill that was smuggled into his cell. Goering wrote in his suicide note, "I would have no objection to getting shot," but he thought hanging was inappropriate for a man of his position.
Hess, Rudolf Deputy to the Führer and Nazi Party Leader	Counts I, II, III and IV	Guilty on counts I and II Hess was sentenced to life in prison. He remained in Spandau prison (for many years as its only prisoner) until he committed suicide in 1987 at age 93.
Jodl, Alfred Chief of Operations for the German High Command	Counts I, II, III and IV	Guilty on counts I, II, III and IV Jodl was hanged in Nuremberg on Oct. 16, 1946. Critics have called Jodl's death sentence harsh in relation to the sentences received by other German officers of similar rank.
Kaltenbrunner, Ernst Chief of RSHA (an organization which includes offices of the Gestapo, the SD, and the Criminal Police) and Chief of Security Police	Counts I, III and IV	Guilty on counts III and IV Kaltenbrunner was hanged on Oct. 16, 1946 in Nuremberg.
Keitel, Wilhelm Chief of Staff of the German High Command	Counts I, II, III and IV	Guilty on counts I, II, III and IV Keitel was hanged in Nuremberg on October 16, 1946.
Raeder, Erich Commander in Chief of the German Navy	Counts I, II and III	Guilty on counts I, II and III Raeder was sentenced to life in prison. He served nine years before his release in 1955. He died in 1960 at age 84.
Rosenberg, Alfred Chief Nazi Philosopher and Reichminister for the Eastern Occupied Territories	Counts I, II, III and IV	Guilty on counts I, II, III and IV Rosenberg was hanged on October 16, 1946.

Sauckel, Fritz Chief of Slave Labor Recruitment	Counts I, II, III and IV	Guilty on counts III and IV Sauckel was hanged on October 16, 1946.
Schacht, Hjalmar Reichsbank President and Minister of Economics before the War	Counts I and II	Not guilty on any counts Schacht was found not guilty. Schacht was later convicted by a German court and sentenced to eight years. He was freed in 1950. He died in 1970 at age 93.
Seyss-Inquart, Arthur Austrian Chancellor, then Reich Commissioner for the Netherlands	Counts I, II, III and IV	Guilty on counts II, III, and IV Seyss-Inquart was hanged on October 16, 1946.
Speer, Albert Reichminister of Armaments and Munitions	Counts I, II, III and IV	Guilty on counts III and IV Speer served his 20-year sentence. He wrote two books about his life. He died in 1981 at age 76.
Streicher, Julius Anti-Semitic Editor of Der Sturmer	Counts I and IV	Guilty on count IV Streicher was hanged on October 16, 1946.
von Neurath, Konstantin Minister of Foreign Affairs (until 1938), then Reich Protector for Bohemia and Moravia	Counts I, II, III and IV	Guilty on counts I, II, III, IV Von Neurath was sentenced to 15 years in prison. He was released because of poor health in 1954 and died two years later.
von Papen, Franz Reich Chancellor prior to Hitler, Vice Chancellor under Hitler, Ambassador to Turkey	Counts I and II	Not guilty on any counts. Von Papen was acquitted.
von Ribbentrop, Joachim Foreign Minister	Counts I, II, III and IV	Guilty on counts I, II, III and IV Von Ribbentrop was hanged on October 16, 1946.
von Schirach, Baldur Hitler Youth Leader	Counts I and IV	Guilty on count IV Von Schirach was sentenced to 20 years in prison. He was released from Spandau Prison in 1966. He died in 1974 at age 67.

* Martin Bormann was an original defendant, indicted on counts I, III and IV. He was a member of the Staff of the Supreme Command of the SA from 1928-30. He was also involved in the Aid Fund of the Party and was Reichsleiter from 1933-45. Throughout his career he became Chief of Staff in the Office of the Führer's Deputy, Head of the Party Chancellery, Secretary to the Führer as well as head of the Volkssturm and a General in the SS. He was tried in absentia and is not listed in the chart. His lawyers argued he was deceased, but no evidence was conclusive. Had he ever been found alive, his sentence could have been mitigated through the presentation of additional evidence. Bormann was found guilty on counts III and IV. His sentence was death by hanging.

III The Judges' Trial

The Charges

Count One¹: Common design and conspiracy to commit war crimes and crimes against humanity.

Count Two: War crimes “involving the commission of atrocities and offenses against persons and property,” including the use of “irregular courts superimposed upon the regular court system” in order to create “a reign of terror to suppress political opposition to the Nazi regime.”

Count Three: Crimes against humanity, which included “subject[ing] certain German civilians, and nationals of occupied countries[,] to discriminatory and special penal laws and trials, and denied them all semblance of judicial process.”

Count Four: Membership in criminal organizations.

DEFENDANT	INDICTED ON	THE VERDICT AND THE PENALTY
Altstoetter, Josef Chief of the Civil Law and Procedure Division (Abteilung VI) of the Reich Ministry of Justice	Counts I, II, III and IV	Guilty on count IV 5 year sentence
Barnickel, Paul Senior Public Prosecutor of the People's Court	Counts I, II, III	Not guilty on all counts
Cuhorst, Hermann Chief Justice of Special Court (Sondergericht) and other positions	Counts I, II, III and IV	Not guilty on all counts
Engert, Karl Chief of Penal Administration Division and of the secret Inmate Transfer Division (Abteilung XV) of the Reich Ministry of Justice and other positions	Counts I, II, III and IV	Mistrial due to illness
Joel, Guenther Legal adviser to Reich Minister of Justice concerning criminal prosecutions and other positions	Counts I, II, III and IV	Guilty on counts II, III and IV 10 year sentence
Klemm, Herbert State Secretary of the Reich Ministry of Justice; Director of the Legal Education and Training Division in the Ministry of Justice and other positions	Counts I, II, III	Guilty on counts II and III Life imprisonment
Lautz, Ernst Chief Public Prosecutor of the People's Court	Counts I, II, III	Guilty on counts II and III 10 year sentence

¹ Count 1 was dropped after the Tribunal declared the charge to be outside of its jurisdiction. The Tribunal stated that it “has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offense” but added that “there are allegations in count one of the indictment which constitute charges of direct commission of war crimes and crimes against humanity.” Therefore the Tribunal removed the conspiracy charge from count one and did not reach a decision on guilt or innocence on that charge for any of the defendants.

Mettgenberg, Wolfgang Representative of the Chief of the Criminal Legislation and Administration Division of the Ministry of Justice	Counts I, II, III	Guilty on counts II and III 10 year sentence
Nebelung, Guenther Chief Justice of the Fourth Senate of the People's Court and other positions	Counts I, II, III and IV	Not guilty on all counts
Oeschey, Rudolf Judge of the Special Court in Nuremberg and successor to the defendant Rothaug as Chief Justice of the same court and other positions	Counts I, II, III and IV	Guilty on counts III and IV Life imprisonment
Petersen, Hans Lay Judge of the First Senate of the People's Court; Lay Judge of the Special Senate of the People's Court; and Obergruppenfuehrer in the SA	Counts I, II, III	Not guilty on all counts
Rothaug, Oswald Senior Public Prosecutor of the People's Court; formerly Chief Justice of the Special Court in Nuremberg; member of the Leadership Corps of the Nazi Party at Gau executive level	Counts I, II, III and IV	Guilty on count III Life imprisonment
Rothenberger, Curt State Secretary of the Reich Ministry of Justice and other positions	Counts I, II, III	Guilty on counts II and III 7 year sentence
Schlegelberger, Franz State Secretary; Acting Reich Minister of Justice	Counts I, II, III	Guilty on counts II and III Life imprisonment
Von Ammon, Wilhelm Ministerial Counsellor of the Criminal Legislation and Administration Division of the Reich Ministry of Justice	Counts I, II, III	Guilty on counts II and III 10 year sentence
Westphal, Carl Ministerial Counsellor of the Criminal Legislation and Administration Division of the Reich Ministry of Justice	Counts I, II, III	Committed suicide after the indictment but before the trial.

Roland Freisler, who is mentioned several times on the DVD, is not included in this chart because he died prior to the trial. Freisler was a prominent and notorious Nazi German judge. He became State Secretary of Adolf Hitler's Reich Ministry of Justice and President of the Volksgerechtshof ("People's Court"), a court established to try individuals accused of committing political offenses against Adolf Hitler's regime. Freisler chaired the First Senate of the People's Court, acting as judge, jury and prosecutor. The number of death sentences rose sharply under Freisler's leadership. Freisler was killed during an Allied air raid on Berlin on February 3, 1945.

Sources: www.mazal.org/archive/nmt/03/NMT03-T0015.htm

See also www.law.umkc.edu/facult/projects/ftrial/nuremberg/alstoecker.htm

IV Biographies

Michael Bazylar

is Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law. He is also a research fellow at the Holocaust Education Trust in London and the holder of previous fellowships at Harvard Law School and the United States Holocaust Memorial Museum in Washington, D.C. Professor Bazylar is the author of *Holocaust Justice: The Battle for Restitution in America's Courts*.

Max Friedlaender

(1873-1956) was a prominent attorney in Munich and a nationally recognized authority on legal ethics. With his brother Adolf, a judge in Limburg on the Lahn, he co-authored two widely used reference works – one on the laws governing attorneys, the other on the laws governing attorneys' fees – and also published over 1000 articles on legal ethics, attorneys' fees, and civil law in various law journals. Friedlaender was arrested on Kristallnacht and released in the general confusion; with the help of a nephew living in Switzerland, he was able to secure a Swiss visa within 24 hours and thus was able to escape the fate of so many of his Jewish colleagues in Munich: incarceration in the Dachau concentration camp. After a few months in Switzerland, Friedlaender spent the rest of his life in England.

Howard Glickstein

is Dean Emeritus and Professor of Law at Touro Law Center. Dean Emeritus Glickstein worked at a New York law firm, the Department of Justice, and the U.S. Commission on Civil Rights before entering the academic world. Before he became the dean of Touro Law Center in 1986, Dean Emeritus Glickstein held faculty and administrative positions at Notre Dame Law School, Howard University Law School, and the University of Bridgeport Law School.

Justice Robert Jackson

(1892-1954) was the United States Attorney General in 1940-41 and served as an Associate Justice of the United States Supreme Court from 1941 until his death in 1954. During 1945-46, Justice Jackson played a principal role in establishing the International Military Tribunal in Nuremberg and served as Chief of Counsel for the United States during the first trial at Nuremberg.

Lawrence Raful

is Dean and Professor of Law at Touro Law Center. Before he became the dean of Touro Law Center in 2004, Dean Raful was the Dean of Creighton School of Law in Omaha, Nebraska, where he taught Comparative Law, Legal History, Professional Responsibility, and Elder Law.

Christoph J.M. Safferling

is Assistant Professor in the Institute for Criminal Law, Criminal Procedure and Criminology in the Law Faculty of the Friedrich-Alexander-Universitat, Erlangen-Nurnberg in Germany. He has been involved as a legal advisor to the claimants in several class action proceedings concerning compensation for forced labor during the Nazi regime.

The Honorable Sol Wachtler

was appointed to New York Supreme Court in 1968 and elected to the New York State Court of Appeals in 1972. In 1985, he was appointed Chief Judge of the State of New York and the Court of Appeals, positions in which he served until 1993. Judge Wachtler is currently an Adjunct Professor of Constitutional Law at Touro Law Center.

V Holocaust Terms

These terms have been gathered from:

The United States Holocaust Memorial Museum, [Holocaust Encyclopedia](#); Yad Vashem, The Holocaust Martyrs' and Heroes' Remembrance Authority; [Resource Center](#); the [Merriam-Webster Dictionary](#) and, Joshua M. Greene and Shiva Kumar, [*Hitler's Courts: The Betrayal of the Rule of Law in Nazi Germany*](#).

Anti-Jewish boycott

On April 1, after the Nazis came to power in 1933, the Nazi leadership staged an economic boycott against the Jews of Germany. In that year about 600,000 Jews lived in Germany which equaled less than one percent of the total population. More than 100,000 German Jews had served in the German army during World War I with many decorated for bravery.

On the day of the boycott, The SA (Brownshirts) stood menacingly in front of Jewish-owned department stores and retail establishments and the offices of professionals, such as doctors and lawyers. The Star of David was painted in yellow and black across thousands of doors and windows, with accompanying antisemitic slogans and acts of violence against individual Jews and Jewish property. Although the national boycott operation lasted only one day, it marked the beginning of a nationwide campaign by the Nazi party against the entire German Jewish population.

Antisemitism

Prejudice against or hatred of Jews. Antisemitism and the persecution of Jews represented a central tenet of Nazi ideology. In their 25-point Party Program, published in 1920, Nazi party members publicly declared their intention to segregate Jews from "Aryan" society and to abrogate Jews' political, legal, and civil rights.

The Holocaust, the state-sponsored persecution and murder of European Jews by Nazi Germany and its collaborators between 1933 and 1945, is history's most extreme example of antisemitism.

Blood purge

The Night of the Long Knives was a purge that took place in Nazi Germany between June 30 and July 2, 1934, when the Nazi regime executed at least 85 people for political reasons. Most of those killed were members of the "Storm Battalion" (SA), a Nazi paramilitary organization. Adolph Hitler moved against the SA and its leader, Ernst Rohm, because he saw the independence of the SA and the penchant of its members for street violence as a direct threat to his power.

Book burnings

On May 10, 1933, university students joining the Nazi propaganda efforts to "purify" Germany in the arts and cultural organizations, burned upwards of 25,000 volumes of "un-German" books. That night students marched in torchlight parades "against the un-German spirit." The scripted rituals called for high Nazi officials, professors, rectors, and student leaders to address the participants and spectators. At the meeting places, students threw the pillaged and unwanted books into bonfires with great joyous ceremony, band-playing, songs, "fire oaths," and incantations to promote "Aryan" culture and suppress other forms of artistic production.

Brownshirts

In 1921 Adolph Hitler formed his own private army called the Sturm Abteilung (Storm Section). The SA (also known as storm troopers or brownshirts) was instructed to disrupt the meetings of political opponents and to protect Hitler from revenge attacks. SA men were often called "brownshirts," for the color of their uniforms and to distinguish them from the Schutzstaffel (SS), who wore black and brown uniforms.

The SA grew in power and size and eventually outnumbered SS, Gestapo and regular army. Hitler became concerned about their size, radical nature and loyalty and ordered the arrest and subsequent execution of its leadership during the Blood Purge (see above).

The SA remained active until the end of the war, but its significant action after 1934 was Kristallnacht, when all SS and SA units were activated to riot against Jews, destroying Jewish businesses and synagogues.

Concentration camp

The term concentration camp refers to a camp in which people are detained or confined, usually under harsh conditions and without regard to legal norms of arrest and imprisonment that are acceptable in a constitutional democracy.

In Nazi Germany between 1933 and 1945, concentration camps were an integral feature of the regime. The Nazis used the camps to incarcerate real and perceived political opponents of Nazi policy, and to gather mass numbers of Jews.

Democracy

A government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.

Dictatorship

A dictatorship is an autocratic form of government in which the government is ruled by a dictator.

Eichmann, Adolph

Adolph Eichmann headed the Gestapo Department for Jewish Affairs, serving as a self-proclaimed 'Jewish specialist', and was the man responsible for keeping the trains rolling from all over Europe to extermination camps during the Final Solution. Eichmann escaped to Argentina following the surrender of Nazi Germany in May of 1945. He lived under an assumed name for ten years until Israeli secret agents abducted him on May 11, 1960. Eichmann went on trial in Jerusalem for crimes against the Jewish people, crimes against humanity and war crimes. During the four months of the trial over 100 witnesses testified against him. Eichmann was found guilty on all counts and sentenced to death. He was hanged on May 31, 1962.

Einsatzgruppen (German for "task forces" or "intervention groups")

Paramilitary groups operated by the SS before and during World War II. Their principal task, according to their own records, was the annihilation of the Jews, Sinti and Roma, and political commissars. Documentation at the Nuremberg trials established that the Einsatzgruppen were responsible for killing at least one million people.

Enabling Act

Passage of the Enabling Act on March 23, 1933, was a major step through which the Nazis obtained dictatorial powers using largely legal means. With the passage of the Enabling Act, the German parliament (Reichstag) effectively surrendered its authority to the Nazis by transferring legislative power, the ability to enact laws without the participation of the Reichstag, to Hitler's cabinet. By mid-July, the Nazi party was the only political party left in Germany.

Euthanasia program

The Nazi euthanasia program sought to eliminate "unworthy life" and at first focused on newborns and very young children by requiring doctors to register children up to age three who showed symptoms of mental retardation, physical deformity, or other symptoms included on a questionnaire from the Reich Health Ministry. The Nazi euthanasia program quickly expanded to include older disabled children and adults.

Extermination camps

Following the Nazi plan to annihilate the Jewish people (called The Final Solution) the Nazis established extermination camps in Poland which were designed for efficient mass murder. Six such camps were built.

Final Solution

The “Final Solution” was the culmination of many years of evolving Nazi policy. It was the code name for the Nazis’ plan to solve the “Jewish question” by engaging in the systematic murder of the European Jewish population. The term was coined by Adolph Eichmann and the implementation of the “Final Solution” resulted in the most deadly phase of the Holocaust.

Mass killings of over one million Jews occurred before the plans of the Final Solution were fully implemented in 1942, but it was only with the decision to eradicate the entire Jewish population that the extermination camps were built and industrialized mass slaughter of Jews began in earnest.

Freisler, Roland

Roland Freisler (October 30, 1893 – February 3, 1945) was a prominent and notorious Nazi German judge. He became State Secretary of Adolf Hitler’s Reich Ministry of Justice and President of the Volksgerichtshof (“People’s Court”), a court set up outside constitutional authority to try those accused of political offenses against Adolf Hitler’s dictatorial regime. Freisler chaired the First Senate of the People’s Court, and acted as judge, jury and prosecution embodied into one man.

Führer

Führer is a noun meaning “leader” in the German language. Führer was the title granted by Chancellor Hitler to himself by the Enabling Law, which gave him supreme power in the German Reichstag (Parliament), following the death of the President Paul von Hindenburg in 1934. The new position unified the offices of State/Party leader (Germany becoming a one-party state at this point) and Chancellor, formally making Hitler Germany’s Head of State as well as Head of Government respectively; and in practice, the dictator of the Nazi Third Reich.

Gestapo

The Gestapo (acronym of Geheime Staatspolizei) was the official Secret State Police of the Third Reich and served as Hitler’s main instrument of torture and terror. The Gestapo was established prior to the Nazi rise to power and through a series of laws passed, had the power to impose “protective custody” on whomever it liked. This meant that if a person was arrested by the Gestapo, they would lose all civil rights and were no longer protected by the law. Legally, the Gestapo had free reign to do whatever it wanted to its victims, including sending them to concentration camps and determining whether they would live or die there and by what method.

Goering, Hermann

Hermann Goering (1893-1946) was the highest-ranking Nazi official tried at Nuremberg. After Hitler’s appointment as Chancellor of Germany in 1933, Goering took on many positions of power and leadership within the Nazi state: Commander in Chief of the Luftwaffe (German Air Force), Director of the Four Year Plan in the German economy, and, at the outbreak of war in Europe, Hitler’s acknowledged successor. It was Goering who ordered Security Police chief Reinhard Heydrich to organize and coordinate a “total solution” to the “Jewish question.”

The International Military Tribunal charged Goering on all four counts (crimes against peace, war crimes, crimes against humanity, and conspiracy to commit crimes against peace, war crimes, and crimes against humanity). He was convicted and sentenced to death. On the eve of his scheduled execution, he committed suicide in his prison cell.

Heydrich, Reinhard

Reinhard Heydrich (1904-1942), Nazi SS leader who was the leading planner in the planning and execution of the “Final Solution.” Heydrich served as head of the Nazi Security Police (SIPO), the Security Service (SD), and the Reich Security Main Office.

Czech resistance fighters attacked Heydrich in an ambush near Prague. He died of his wounds on June 4, 1942. Five days later, the Germans retaliated by burning the Czech village of Lidice to the ground and killing all of its men. Aktion Reinhard, which was the operation for the mass murder of the Jews of Poland, was named for Heydrich.

Himmler, Heinrich

Heinrich Himmler (1900-1945) was the Reich Leader of the SS of the Nazi party from 1929 until 1945, the Chief of German Police, as well as one of Hitler's main advisors. Himmler presided over a vast ideological and bureaucratic empire that defined him as the second most powerful man in Germany during World War II. Given overall responsibility for the security of the Nazi empire, Himmler was the key and senior Nazi official responsible for conceiving and overseeing implementation of the so-called Final Solution, the Nazi plan to murder the Jews of Europe.

Hitler, Adolf

Adolph Hitler (April 20, 1889 – April 30, 1945) was a German politician who became the leader of the National Socialist German Workers Party and was appointed as the Chancellor of Germany in 1933. After the death of President Paul von Hindenburg in 1934, Hitler declared himself Führer, combining the offices of President and Chancellor into one using the power vested in him by the Enabling Act, and he remained a totalitarian ruler until his suicide in 1945.

Kristallnacht

Kristallnacht - literally, "Night of Crystal" - is usually referred to as the "Night of Broken Glass." It is the name given to the violent anti-Jewish pogrom of November 9 and 10, 1938. The Germans officially explained Kristallnacht as a spontaneous outburst of public rage but it was instigated primarily by Nazi party officials and the SA (Brownshirts), and occurred throughout Germany (including annexed Austria and the Sudetenland region of Czechoslovakia).

Jewish homes along with 8,000 Jewish shops were ransacked in numerous German cities, towns and villages, as civilians and both the SA and the SS destroyed buildings with sledgehammers, leaving the streets covered in shards of glass from broken windows. Jews were beaten to death; 30,000 Jewish men were taken to concentration camps; and 1,668 synagogues ransacked, with 267 set on fire.

Mischlinge

Mischlinge ("crossbreed" in German) was the German term used during the Third Reich era in the German Empire to denote persons deemed to have partial Jewish ancestry.

As defined by the Nazi Nuremberg Laws in 1935, a Jew was a person who had at least three Jewish grandparents, regardless of religious affiliation or self-identification (a Jewish grandparent was one who belonged to the Jewish religious community); or an individual with two Jewish grandparents who either belonged to the Jewish religion or was married to a Jew. People who did not belong to the Jewish religion but had two Jewish grandparents were Mischlinge of the first degree; those with only one Jewish grandparent were Mischlinge of the second degree.

Nazi

The term Nazi is derived from the first two syllables of Nationalsozialistische Deutsche Arbeiterpartei, the official German language name of the National Socialist German Workers Party, also known as the Nazi Party. Racism, including racial antisemitism (prejudice against or hatred of Jews based on false biological theories), was always an integral part of German National Socialism (Nazism). The Nazis perceived all of human history as the history of a biologically determined struggle among people of different races.

Nazi racial ideology

The Nazis drew the practical consequence that “inferior peoples” had to be physically eliminated altogether immediately by mass murder or within a generation by sterilization – as in policies towards Jews, Sinti and Roma, persons with disabilities living in institutions, and German residents of African descent – or intellectually decapitated through mass murder of the leadership elites and reduction of the surviving population into a reservoir of uneducated forced manual laborers.

Nuremberg Laws

At their annual party rally held in Nuremberg in September 1935, the Nazi leaders announced new laws passed by the Reichstag (German Parliament), which institutionalized many of the racial purity theories prevalent in Nazi ideology. These laws deprived Jews and other persecuted minorities of their civil rights.

- The first of the Nuremberg Laws was called the Reich Citizenship Law. This law stripped persons not considered of German blood of their German citizenship. This stripped the Jews of their political rights and reduced them from citizens of the Reich, like the Aryans, to state subjects.
- The second law defined Jews as racially impure, thus marriage between Jews and non-Jews would defile the race and was now prohibited. This law was titled the “Law for the Protection of German Blood and Honor.”
- Thirteen additional decrees were added to the Nuremberg Laws over the next eight years.

Sources: University of Minnesota, Center for Holocaust and Genocide Studies.
<http://www.cbgs.umn.edu/educational/brokenThreads/nuremberg.html>
United States Holocaust Memorial Museum www.ushmm.org

Pogrom

A Russian word meaning devastation used to describe an organized, systematic discriminatory action against Jews.

Propaganda

Following the Nazi seizure of power in 1933, Hitler established a Reich Ministry of Public Enlightenment and Propaganda headed by Joseph Goebbels. The Ministry’s aim was to ensure that the Nazi message was successfully communicated through art, music, theater, films, books, radio, educational materials, and the press.

In his book *Mein Kampf* (1926), Adolf Hitler wrote: “Propaganda tries to force a doctrine on the whole people... Propaganda works on the general public from the standpoint of an idea and makes them ripe for the victory of this idea.” Hitler first advocated the use of propaganda to spread the ideals of National Socialism - among them racism, antisemitism, and anti-Bolshevism.

Racism

The doctrine of racism declares that blood is the marker of national-ethnic identity and claims that innate, inherited characteristics biologically determine human behavior. Racists define national-ethnic identity through the myth of “pure inherited blood,” though in practice they can only point to differences in visible but biologically superficial characteristics such as skin, hair and eye color.

Rassenhygiene

A key part of Nazism was the concept of racial hygiene and often served as the theoretical backbone of Nazi policies of racial superiority and later genocide.

Reichstag

Germany’s parliament from 1871 to 1945. The Reichstag as a parliament dates back to the Holy Roman Empire but ceased to act as a true parliament in the years of Nazi Germany (1933-1945). During the Nazi era, the German president had the right to dissolve the parliament of his own

accord or issue emergency decrees as he saw fit (see Enabling Act).

In January 1933 Adolph Hitler and the Nazis rose to national power without a majority of votes or seats. Less than a month after being elected chancellor, Hitler and the Nazis anonymously burned down the Reichstag building in order to gain better control. Hitler used this fire at the Reichstag building to suspend constitutional law and place unlimited traditional authority in the hands of the government. The Reichstag fire was a cataclysmic event for the German government, and would be the equivalent of the United States capitol burning down since the Reichstag was the German Congress. The Reichstag was not in session, thus giving the chancellor emergency powers.

A section of the emergency order of February 28, 1933 reads:

Article 1 ...sections of the Constitution of the German Reich are suspended until further notice. Thus, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association, and violations of the privacy of postal, telegraphic, and telephonic communication, and warrants for house-searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.

Article 2 If in a state the measures necessary for the restoration of public security and order are not taken, the Reich Government may temporarily take over the powers of the highest state authority.

Resistance

Organized armed resistance was the most forceful form of Jewish opposition to the Nazis. The largest armed uprising was the Warsaw ghetto uprising (April-May 1943) sparked by rumors that the Nazis would deport the remaining ghetto inhabitants to the Treblinka extermination camp in Poland. As German forces entered the ghetto, members of the Jewish Fighting Organization (Żydowska Organizacja Bojowa, ŻOB) fought off the Germans for 27 days although the Nazis had far greater numbers and weapons.

In addition to armed resistance, Jews engaged in unarmed defiance. This included organized attempts at escaping from the ghettos into nearby forests, non-compliance with Nazi demands on the part of certain Jewish community leaders, illegal smuggling of food into the ghettos, and spiritual resistance.

Spiritual resistance refers to attempts by individuals to maintain their humanity, personal integrity, dignity, and sense of civilization in the face of Nazi attempts to dehumanize and degrade them. Most generally, spiritual resistance may refer to the refusal to have one's spirit broken in the midst of the most horrible degradation. Cultural and educational activities, maintenance of community documentation, and clandestine religious observances are three examples of spiritual resistance.

SS

The Schutzstaffel (SS) was a major Nazi paramilitary organization exclusively under Adolph Hitler and the Nazi Party. Founded and commanded by Heinrich Himmler, the SS grew from a small paramilitary unit to an elite force that served as the Führer's "Praetorian Guard," became a force with greater influence than the regular German armed forces. Under Himmler, the SS selected and trained its cadre as per the "Aryan" racist ideology and used the SS to develop an order of men claimed to be superior in racial purity and abilities than other Germans and national groups, the model for the Nazi vision of a "master race."

The SS was responsible for the vast majority of war crimes perpetrated under the Nazi regime. Chosen to implement the Nazi "Final Solution" for Jews and racial groups deemed "inferior," the SS carried out the enslavement, torture and killing of an estimated 12 million people. The vast majority of victims were Jews, Russians and Slavs from Eastern Europe, but a significant

number of victims included homosexuals, Catholic and Protestant groups, Jehovah's Witnesses, Roma and Sinti, journalists, Communists, prisoners of war and German civilians who were seen as threats to Nazi hegemony.

Sterilization program

In July 1933, the "Law for the Prevention of Genetically Diseased Offspring," was put into effect. This law required the forced sterilization of German citizens who "suffered" from any of nine conditions assumed to be hereditary: feeble-mindedness, schizophrenia, manic-depressive disorder, genetic epilepsy, Huntington's chorea (a fatal form of dementia), genetic blindness, genetic deafness, severe physical deformity, and chronic alcoholism. The sterilizations were performed by doctors throughout the Reich. The operation was performed even if it was against the wishes of the person to be sterilized. It is estimated that between 200,000 to 350,000 individuals were sterilized between 1933 and 1945.

Wannsee Conference

On July 31, 1941 Reinhard Heydrich was given the task of defining the "Final Solution" to the "Jewish question" of all the Jews in Europe. To successfully coordinate this, Heydrich needed the cooperation of all the government's ministries. He convened the Wannsee Conference in Berlin on January 20, 1942, to discuss and further organize the mass extermination of all European Jewry with the senior Nazis and senior Governmental administrators.

The records and minutes of this meeting were found intact by the Allies at the end of the war and served as valuable evidence during the Nuremberg Trials.

VI Legal Terms

Absolute discretion

Unrestricted power to judge or act without being limited by a constitution or parliament.

Acquitted

Judicially discharged from an accusation; absolved.
Black's Law Dictionary (8th ed. 2004).

Arbitrary

Depending on individual discretion (as of a judge) and not fixed by law. "The manner of punishment is arbitrary." Not restrained or limited in the exercise of power: ruling by absolute authority. Merriam-Webster Online Dictionary (2008).

Chief Counsel for War Crimes

In May, 1945, President Truman named Robert Jackson as U. S. Chief Counsel for the prosecution of Nazi war criminals.

Civil servant

A government employee or an employee in a government department.
MSN Encarta Dictionary, encarta.msn.com/encnet/features/dictionary/dictionaryhome.aspx

Commission of war crimes

An act of committing a war crime. A war crime is a punishable offense under international law, for violations of the laws of war by any person or persons, military or civilian.

War Crimes Commission

The United Nations War Crimes Commission (UNWCC) was inaugurated on October 20, 1943, by representatives of the 17 Allied nations. It was the only international framework that addressed the issue of war crimes and war criminals during World War II. The commission continued to operate until March 31, 1948.

Culpability

Blameworthy and deserving of punishment.
Black's Law Dictionary (8th ed. 2004).

Defendant

A person sued in a civil proceeding or accused in a criminal proceeding.
Black's Law Dictionary (8th ed. 2004).

Disenfranchisement

The act of taking away the right to vote in public elections from a citizen or class of citizens.
Black's Law Dictionary (8th ed. 2004).

Ex post facto law

A law that applies retroactively, especially in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed.
Black's Law Dictionary (8th ed. 2004).

Extrajudicial punishment

Extrajudicial punishment is punishment by the state or some other official authority without the permission of a court or legal authority. Agents of a state often carry out this type of punishment if they believe that a person is an imminent threat to the overall security of its political system. The existence of extrajudicial punishment is considered proof that some governments will break their own legal code if deemed necessary.

Human Rights

Any basic right or freedom to which all human beings are entitled and in whose exercise a government may not interfere, including rights to life and liberty as well as freedom of thought and expression and equality before the law.

www.thefreedictionary.com/human+right

Indictment

The formal written accusation of a crime, presented to a court for prosecution against the accused person.

Black's Law Dictionary (8th ed. 2004).

International Military Tribunal (at Nuremberg)

The International Military Tribunal was a court convened jointly by the victorious Allied governments. On December 17, 1942, the leaders of the United States, Great Britain, and the Soviet Union issued the first joint declaration officially noting the mass murder of European Jewry and resolving to prosecute those responsible for violence against civilian populations. Though some political leaders advocated summary executions instead of trials, eventually the Allies decided to form an International Military Tribunal.

United States Holocaust Memorial Museum. www.ushmm.org

Jurisdiction

The right and power to interpret and apply the law – legal power.

wordnet.princeton.edu

Legal precedent (stare decisis)

This doctrine is when a point or principle of law has been officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those who are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

Black's Law Dictionary (8th ed. 2004)

Mistrial

A trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings, or a trial that ends inconclusively because the jury cannot agree on a verdict.

Black's Law Dictionary (8th ed. 2004).

Morgenthau Plan

The Morgenthau Plan was proposed in 1944 by Henry Morgenthau, Jr., United States Secretary of the Treasury, one of President Roosevelt's advisers. The Morgenthau Plan advocated measures intended to remove Germany's ability to wage war. It called for the occupation of Germany, using German POWs to rebuild Europe, and for Germany to be dismembered, partitioned into separate independent states, and stripped of all heavy industry thus remaking Germany an agricultural society.

www.trumanlibrary.org/whistlestop/study_collections/nuremberg/

Oath of loyalty

In August, 1934, mandatory loyalty oaths were introduced throughout the Reich. These oaths were pledged to Hitler personally, not the German state or constitution.

1. The oath of loyalty of public officials:

'I swear: I shall be loyal and obedient to Adolf Hitler, the Führer of the German Reich and people, respect the laws, and fulfill my official duties conscientiously, so help me God.'

2. The oath of loyalty of the soldiers of the armed forces:

'I swear by God this sacred oath: I will render unconditional obedience to Adolf Hitler, the Führer of the German Reich and people, Supreme Commander of the Armed Forces, and will be ready as a brave soldier to risk my life at any time for this oath.'

United States Holocaust Memorial Museum. www.ushmm.org; www.historyplace.com

Perjury

The act or an instance of a person's deliberately making material false or misleading statements while under oath.

Black's Law Dictionary (8th ed. 2004).

Promulgate

To declare or announce publicly or to proclaim. To put a law or decree into force or effect. In regard to an administrative agency, to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal.

Black's Law Dictionary (8th ed. 2004).

Prosecutor

A legal officer who represents the state or federal government in criminal proceedings.

Black's Law Dictionary (8th ed. 2004).

Roosevelt, Franklin D.

Franklin D. Roosevelt was elected President in November 1932, to the first of four terms, at the depth of the Great Depression. He sought, through neutrality, legislation to keep the United States out of the war in Europe, yet at the same time to strengthen nations threatened or attacked. When France fell and England came under siege in 1940, he began to send Great Britain all possible aid short of actual military involvement. When the Japanese attacked Pearl Harbor on December 7, 1941, Roosevelt directed organization of the United States' manpower and resources for global war. He also devoted much thought to the planning of a United Nations, in which, he hoped, international difficulties could be settled. As World War II drew to a close, Roosevelt's health deteriorated, and on April 12, 1945, while at Warm Springs, Georgia, he died of a cerebral hemorrhage.

www.whitehouse.gov/history/presidents/fr32.html

Summary execution

A summary execution is a type of extrajudicial punishment in which an accused or reported suspect of criminal activity is killed, often at the time and place of being discovered.

United States Supreme Court

The highest federal court in the United States, consisting of nine justices and having jurisdiction over all other courts in the nation.

www.thefreedictionary.com/Supreme+Court

Taft, Senator Robert

In the 1930s Senator Taft was President Roosevelt's most vocal congressional critic, denouncing the president's domestic and foreign policy. In 1940, Senator Taft was unsuccessful in his attempt to win the Republican presidential nomination. After the Republicans' defeat in the general election, Taft fought even harder against Roosevelt's policies. And when Harry S. Truman assumed the presidency in 1945, Taft turned his attention to opposing Truman's postwar plans for the nation.

United States Senate, Art & History, www.senate.gov/artandhistory/history/common/generic/People_Leaders_Taft.htm

Truman, Harry S.

Harry S. Truman became a Senator in 1934. As vice president, he succeeded Franklin D. Roosevelt, who died 82 days after he began his fourth term. As President, Truman made some of the most crucial decisions in history. Soon after V-E Day, the war against Japan had reached its final stage. An urgent plea to Japan to surrender was rejected. Truman, after consultations with his advisers, ordered atomic bombs dropped on two cities, Hiroshima and Nagasaki. Japanese surrender quickly followed.

McNulty, Bryan. [The Great Atomic Bomb Debate](http://www.ohio.edu/perspectives/archives/9701t/bomb2.htm), Ohio University, news.research.ohio.edu/perspectives/archives/9701t/bomb2.htm; www.whitehouse.gov/history/presidents/ht33.html

United Nations

The name "United Nations," coined by United States President Franklin D. Roosevelt, was first used in the "Declaration by United Nations" on January 1, 1942, during the World War II, when representatives of 26 nations pledged their governments to continue fighting together against the Axis Powers. The United Nations officially came into existence on October 24, 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories.

History of the United Nations www.un.org/aboutun/history.htm

Vanquish

To overcome the enemy in battle or to defeat in a conflict or contest.
Merriam-Webster Online Dictionary (2008).

Vengeance

Punishment inflicted in retaliation for an injury or offense.
Merriam-Webster Online Dictionary (2008).

VII Suggestions for Further Reading

- Michael Bazylar, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003).
- Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (2004).
- Robert E. Conot, *Justice at Nuremberg* (1983).
- Belinda Cooper, *War Crimes: The Legacy of Nuremberg* (1999).
- Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001).
- G.M. Gilbert, *Nuremberg Diary* (1947).
- Whitney R. Harris, *Tyranny on Trial* (1954).
- Daniel Jonah Goldhagen, *Hitler's Willing Executioners* (1996).
- Arnd Kruger and William Murray (editors), *The Nazi Olympics: Sport, Politics, and Appeasement in the 1930s* (2003).
- Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* (1997).
- Bernard D. Meltzer, *Remembering Nuremberg* (1995).
- Joseph Persico, *Nuremberg: Infamy on Trial, the Palace of Justice* (1994).
- William Shirer, *The Rise & Fall of Adolf Hitler* (1961).
- Drexel Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account* (1999).
- Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992).
- John Toland, *Adolf Hitler* (1976).