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Ordinary Jurists and the Legal Construction of the Holocaust

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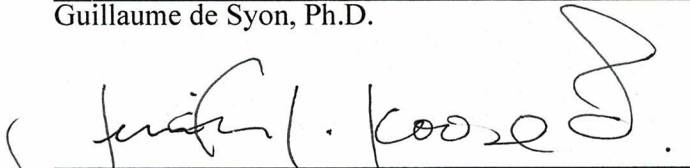
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The Holocaust is one of the most significant incidents of the 20th century. It left a body count of between five and seven million Jews, who had enjoyed total enfranchisement within European society before the tragedy. It is not surprising, but perhaps easily overlooked, that the law was a critical tool used by the Nazis and their collaborators to facilitate the Holocaust. It is therefore important to consider how the law was used to catalyze the deaths of millions. In so doing, one may examine who among jurists was most-closely related to the use of the law during the Holocaust; and what their motivations for their actions were. A snapshot of these issues can best be taken through an examination of Nazi Germany, Vichy France, and Fascist Italy. One was the main perpetrator of the tragedy; the second actively collaborated following its 1940 defeat; and the third was Germany's closest ally, yet very late in enacting anti-Semitic law.

Thus, the legal face of the Holocaust formed differently in each of the three nations. Overall, it becomes clear upon reviewing the record that average lawyers and judges—more than any individual leader—most closely affected the legal construction of the Holocaust. This is an important distinction between typical attorneys and Nazi figures like Adolf Hitler. The average jurists either developed or attempted to hinder the propagation of anti-Semitic laws during the Holocaust. Finally, it becomes clear that the jurists entertained a vast array of reasons for why they acted as they did during the Holocaust, whether it was as a perpetrator or resistor. These motivations are best understood through specific examples, which highlight the moral shades of grey that surround the Holocaust. To do so, one must first discuss a central tenet of Holocaust historiography, the interpretation of responsibility in the tragedy. This digression is in fact relevant to the argument of this thesis.

The Influence of a Leader: Hitler

Most people familiar with the history of the Holocaust are aware that Nazi Germany was the primary perpetrator of the approximately six-million-person mass murder. Adolf Hitler undeniably stood atop the chaotic Nazi hierarchy. Consequently, it is tempting to assign an intentionalist interpretation of the events by linking every event in the 1933-1945 period to Hitler. After all, most major decisions issued from Berlin bore the markings “on order of the Führer,” in line with the hierarchical structure of the regime. Often, German historians of the 1960s and 1970s, as well as early scholars of the Holocaust like Lucy Dawidowicz, followed that approach.

Dawidowicz viewed Nazi Germany as a kind of evil that struck in corporate clothing, thus linking the leadership of the party to its structure.¹ Indeed, not only does Hitler bear the greatest moral culpability for the atrocities of the Holocaust, he also plays a central role in the judicial dimension of the tragedy, as it eventually thrust all jurists of Nazi Germany into the history of the Shoah. It is possible that Hitler might have had a complex plan of his own mental devices, through which he meticulously planned and executed the Holocaust. After all, “in *Mein Kampf* Hitler had made it clear that he planned to, ‘deal with’ the Jews.”² Yet, there is very little evidence that supports such a strictly intentionalist argument, namely placing the sole responsibility for the Holocaust on Hitler. Scholars actually disagree over Hitler’s degree of planning for the Holocaust, and this is a difficult discussion due to the deep moral implications inherent to the Holocaust.³

¹ Lucy Dawidowicz, *The Holocaust and the Historians* (Cambridge, MA, Harvard University Press, 1981), 19-22.

² Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (Lanham, MD, Rowman & Littlefield, 2016), 73.

³ Bergen, 46.

A key issue with the purely intentionalist view is that it exculpates too many of the ordinary people, some of whom were attorneys and judges, from the extreme moral weight of the Holocaust. Consequently, it is tempting to follow the approach that some historians of Germany adopted in the 1970s to suggest that structural failures in German society had led to a series of competing bureaucracies endeavoring to interpret Nazi ideology. The result was that much of German society was thus involved, only accidentally as part of its focus on everyday activities rather than executing an overarching plan on behalf of Hitler.⁴ The corollary of this approach has been to suggest that the Nazi leadership, despite its commitment to racial and anti-Semitic ideals, had little knowledge of the details of the Holocaust.

While it is well-known historically that some very ordinary people had a major role in the direct perpetration of the Holocaust, the very structure of Nazi society and the ideology it propagated from 1933 onward suggests a middle approach does exist, whereby once the orders were given (as documented in several studies of the Nazi leadership), rank-and-file Germans became involved. True, there is no signed order from Hitler, but the likes of Himmler, Goering and Goebbels all recorded in writing or reported a “Führer order” had been issued. Bridging the gap, “moderate functionalists” seek to examine what happened after the order came.

Christopher Browning, a professor of history at the University of North Carolina-Chapel Hill, offered a monograph on the actions of Reserve Police Battalion 101 of the Nazi Order Police in Poland that was originally published in 1992.⁵ Through his scholarship leading to that publication, Browning reached the conclusion that, “the Holocaust took place because at the

⁴ Timothy Mason, “Intention and Explanation: A Current Controversy about the Interpretation of National Socialism,” in *Der Führerstaat: Mythos und Realität*, ed. Gerhard Hirschfeld and Lothar Kettenacker (Stuttgart, Klett-Cotta, 1981), 21-40.

⁵ “Christopher R. Browning,” UNC College of Arts and Sciences: History, Accessed 03-16-19, <https://history.unc.edu/emeritus/christopher-r-browning/>.

most basic level individual human beings killed other human beings in large numbers over an extended period of time.”⁶ In *Ordinary Men*, Browning reveals that most of the men committed, “atrocities by policy,” and that they acted not with hate, but with calculation.⁷ In other words, *Ordinary Men* lends credence to the Moderate Functionalist school of thought: Any profession can potentially lend itself to prosecution of a minority should the conditions of the leadership, morality, social tensions and political breakdown combine to allow it.

This salient point clears the way for this paper to understand the role of the average jurist who either remained silent or directly aided in the calamity of the Holocaust by practicing and adjudicating the code of laws. Granted, the practicing lawyer did not create the laws that were in place. For that reason, and in light with the moderate functionalist approach, it is important to consider—if only briefly in the scope of this study—the role of the Nazi Leadership in shaping the legal history of the Holocaust.

Moderate Functionalism Applied: The Nuremberg Laws

One of the most significant pieces of Nazi law, directly linked to later deportations and executions of the Holocaust Era, was the *Law for the Protection of German Blood and German Honor*.⁸ As one of two laws passed in what is collectively known as the *Nuremberg Race Laws*, it was ratified on September 15, 1935.⁹ In one legal instant, German Jews were stripped of their German citizenship and the rights thereof. They also lost the right to marry, employ, or have any

⁶ Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, Harper Perennial, 1993), xvii.

⁷ Browning, 160.

⁸ United States Holocaust Memorial Museum, “The Nuremberg Race Laws,” *Holocaust Encyclopedia*, <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-race-laws>. (Accessed December 24, 2018).

⁹ “The Nuremberg Race Laws.”

romantic engagement with German gentiles whose citizenship had not been revoked.¹⁰

Obviously, without the rights afforded through German citizenship, Jews had no venue for recourse against any future legal injustices, of which there would be a great many.

While it is difficult to agree with the intentionalist claim that Hitler bears sole responsibility for the perpetration of the Holocaust, he was, however, instrumental in the timing and parameters of the *Nuremberg Laws*, as outlined in Saul Friedlander's seminal *Nazi Germany and the Jews* (Volume One). Friedlander's treatise on the early years of Jewish persecution by the Nazis devotes a brief yet important section to exploring Hitler's motivations behind the laws' promulgation. It avers that timing proved significant at the historical level. The laws were announced at the 1935 Nuremberg Nazi Party Rally, and this might have been an effort by Hitler to pacify members of the party after his decapitation of the Nazi paramilitary arm—the SA—in 1934.¹¹ In that initial purge by Hitler, he clandestinely executed the head of the SA, Ernst Röhm. It is not beyond the realm of the imaginable that Hitler might have felt pressure to assuage the party at-large, after favoring the German State Apparatus' authority over that of his own party.¹²

Friedlander, a Holocaust survivor and scholar of ethical theory, suggests it is also possible that Hitler's timing for the announcement of the *Nuremberg Laws* was more dependent on international affairs of the time. According to Friedlander, Hitler was planning on making a statement of some length regarding the situation of Italy's invasion of Abyssinia, until he was dissuaded from doing so by Foreign Minister Konstantin von Neurath.¹³ This would have

¹⁰ "The Nuremberg Race Laws."

¹¹ Saul Friedlander, *Nazi Germany and the Jews: Volume One: The Years of Persecution 1933-1939* (New York, Harper Collins, 2009), 242-243.

¹² Friedlander, 242-243.

¹³ Friedlander, 241-242.

necessitated an expeditious shift in Hitler's speaking plans, and it perhaps explains why Hitler personally decided on the exact language of marriage law at around 2:30 on the morning of September 15, 1935.¹⁴ This course of events was backed by testimony from Bernhard Lösener, who was the Nazis race specialist, and adds credence to reports of Hitler's direct role in the legal perpetration of the Holocaust.¹⁵ Friedlander's chief contribution to this observation of the legal history of the Holocaust is in showing Hitler's direct hand in its construction. Hitler, however, certainly could not have presided over the entire Nazi Bar singlehandedly. Thus, it is necessary to look to the jurists of Nazi Germany, and of the majority of Western Europe, in filling the gaps between passing anti-Semitic laws at the top of a government, and effectuating them to a degree that eliminates one third of an entire religious population through the ordinary legal system in place.

It is obvious that the *Nuremberg Laws*—even if one has never read the actual text—had to have been formulated, or at least approved at the highest level of the Nazi Government to be presented to the Reichstag for a staged approval. The seemingly smooth functioning of that pyramidal structure was in fact the result of its capricious leader and the struggles of Hitler's closet associates to incur favor with him, thus proving the “moderate functionalist” approach that emphasizes, as Dominick LaCapra argues and others suggest, a joint German responsibility in the Holocaust.¹⁶

This study views the Holocaust as a whole from the perspective of a moderate functionalist. It then seeks to apply Christopher Browning's theories regarding the role of

¹⁴ Friedlander, 244.

¹⁵ Friedlander, 243.

¹⁶ Professor Dominick LaCapra, interview by Amos Goldberg, June 9, 1998, interview excerpt, Accessed March, 2019, https://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%203647.pdf.

ordinary men in Poland to the role of ordinary jurists in Nazi Germany, Vichy France, and Fascist Italy. As has already been addressed, the jurists acted quite differently in each of the three nations observed, yet they were always the major actors of the legal side of the Holocaust in their homes.

The Actions of the Jurists: Germany

Germany was the birthplace of the Holocaust, and a national responsibility for the Holocaust inevitably rests on its shoulders as a result. The most important consideration with regard to the Nazi jurists is trying to understand why they so willingly used the law to turn on their own Jewish countrymen. Several scholars lend theories to explain the behavior of the Nazi jurists. Ranging from obsessive legal positivism to simple opportunism on the part of some narcissistic jurists, all of the ideas play a role in answering why the jurists of Nazi Germany became so casually evil in their professions. To understand the dynamics of this process, however, it is necessary to bring in legal specialists to complete the investigations historians have undertaken.

Renowned legal ethical theorist David Luban of Georgetown University is also a diligent applier of Hannah Arendt's observations on the banality of evil.¹⁷ The latter, when covering the trial of the Nazi Adolf Eichmann for The New Yorker in 1961 had been stunned to find a mild-mannered, focused functionary obsessed with efficiency rather than a self-important violent ogre, thus coining the term 'banality' of evil. A quarter century later, in a symposium on Nazis in the Courtroom for the Brooklyn Law Review, Luban agrees with German jurist Ingo Müller, who

¹⁷ "University Professor David J. Luban," Georgetown Law, Accessed 02-04-19. <https://www.law.georgetown.edu/faculty/david-j-luban/>.

states, “that the Nazi judges quite literally got away with murder.”¹⁸ Luban recognizes the fact that the Holocaust could not have occurred without the complicity of the majority of the jurists in Nazi Germany. That simple fact has not been uniformly accepted by the legal community, especially in Germany.

For example, Hubert Schorn, a retired German judge authored a post-war book detailing accounts of anti-Nazi resistance by German judges.¹⁹ Schorn’s efforts at relating instances of righteousness by German judges is devastatingly contradicted by his own assertion that, “the overwhelming majority of judges had opposed the Nazi system, and that a judge had no alternative but to apply the unjust laws, and risked his own life if he objected.”²⁰ The Nazis did circumvent extant constitutional law by establishing their own party court, the Volksgerichtshof or People’s Court, to prosecute political offenses.²¹ This is possibly evidence that, “portions of the legal establishment were not necessarily as ideological as the Nazis wanted.”²² To that point, Michael Bayzler offers Schorn’s example of Lothar Kreyssig.

Kreyssig was a German judge who was appointed during the waning Weimar Republic year of 1928.²³ Schorn began criticizing the Nazis’ policies in 1934, and was subjected to increasing retaliation from them, which culminated in a formal criminal investigation into his actions in 1938.²⁴ Kreyssig eventually accepted early retirement as a means to avoid criminal

¹⁸ David Luban, “A Report on the Legality of Evil: The Case of the Nazi Judges,” in “Symposium: Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France,” *Brooklyn Law Review* 61 no. 4 (1995), 1143.

¹⁹ Michael J. Bayzler, “The Thousand Year Reich’s Over One Thousand Anti-Jewish Laws,” in Jonathan C. Friedman, ed., *The Routledge History of the Holocaust*, (London, UK, Routledge, 2011), 87.

²⁰ Bayzler, 87.

²¹ Bayzler, 87.

²² Bayzler, 87.

²³ Bayzler, 87.

²⁴ Bayzler, 87-88.

punishment.²⁵ Kreyssig's is the testament of a German jurist who openly resisted the Nazis' racist policies in the course of performing his professional duties. Kreyssig's example is an uplifting one, however, to assume that all—or even the majority—of German jurists were equally conscientious of their morals is wrong. To imply as much, as Hubert Schorn would, could only serve to undermine the fact that the Holocaust was, “the culmination of the acts of ordinary people in the ordinary course of events within ordinary governmental and legal structures ... Throughout the Nazi period, German lawyers continued to act as lawyers ... judges judged,” even as people died daily at Auschwitz and other camps.²⁶ As Müller aptly explains, nowhere in the world did the Axis—but especially the German—jurists find peers in their willing complicity to evil.²⁷

Michael Bayzler grasps the role of ordinary jurists in perpetrating the Holocaust well. He references Müller's observation in *Hitler's Justice: The Courts of the Third Reich*, in which Müller addresses the fact that many German jurists eagerly enacted the Nazi leadership's policies.²⁸ ‘Coordination’ of all of German society was a major goal of the Nazis, and tenured attorneys and judges actively endeavored to ‘coordinate’ themselves to Hitler's Aryan, German-centric worldview.²⁹ Bayzler explains that the Nazi German jurists not only sought to survive the terrors of the Holocaust era through complicity. They actively tried to profit from the misfortune of Jewish German jurists who found themselves expelled from the Bar to which they had dedicated their careers.³⁰ This directly contradicts the popular retort of 1970s Germans that

²⁵ Bayzler, 87-88.

²⁶ Bayzler, 86.

²⁷ Bayzler, 88.

²⁸ Bayzler, 86-87.

²⁹ Bayzler, 86-87.

³⁰ Bayzler, 86-87.

they became enmeshed or entangled in the Nazis' pseudo-legal web.³¹ Bayzler's evidence of the role of average German jurists in perpetrating the Holocaust is the 40,000-50,000 death sentences the German Courts handed down during the Holocaust era.³² Notably, that figure discounts the many more that died as a result of any number of summary sentences passed in military and police tribunals.³³ Michael Bayzler advocates strongly for the case of ordinary German jurists' role in facilitating and perpetrating the Holocaust, yet the motivations of these jurists is a rather nuanced topic.

In the symposium, "Nazis in the Courtroom," David Luban attempts to understand in some way the motivations or perhaps persuasions that caused most of the German Bar to be complicit in the horrors of the Holocaust. It is obviously difficult to come to terms with the hypocrisy shown by German attorneys and judges who abandoned the ethical obligations to which they had pledged themselves in favor of a de-facto license to kill through the use of legal texts. This raises questions regarding the psychological predispositions of members of the German Bar. Luban addresses the concept of legal positivism as it relates to the legal structure of the Holocaust in Europe.³⁴ Legal positivism is an ideology among jurists that laws authorized from a governmental authority must be adhered to strictly according to the text. The parameters of any law are only as they appear on paper. This leaves little to no room for interpretation from any individual attorney or judge, and is a significant factor in Luban's assessment of the jurists of Nazi Germany.

³¹ Bayzler, 88.

³² Bayzler, 88.

³³ Bayzler, 88.

³⁴ Luban, 1141.

Gustav Radbruch argued that the Nazi attorneys and judges were slaves to the positive legal text, which called for the expulsion of Jews from German society.³⁵ Radbruch was actually a fairly notable positivist from the Weimar Republic era, and so his assessment was a painful self-criticism of a legal ideology in which he firmly believed.³⁶ Radbruch's thesis on legal positivism as the impetus for juristic complacency in the Holocaust's atrocities was accepted by the worldwide legal community, including that of the United States.³⁷ This assessment, however, seems to exculpate all of the German jurists from any moral responsibility for those that died during the Holocaust era. Luban, on the other hand, intimates that the Nazi judges and attorneys were not intricately tied to the concept of positivism. Rather, he suggests that they were not truly positivists at all. This position is based on Luban's theory of rule-following versus role-identification.³⁸

Luban intimates that rule-following and role-identification explain how a mid-level functionary, in this case a jurist, could adhere to a government's policy that calls for total moral ignorance. Jurists must inherently adhere to a rule of recognition, which constitutes what is legitimate law versus what is not.³⁹ This rule identification can lead jurists to be overly positivistic, and therefore complacent to evil policies like those of the Nazis. Role identification, on the other hand, is another way in which ordinary people can be complacent to evil for very different reasons.⁴⁰ The key lies in a person's orientation. He explains that rule-oriented people comply passively with laws and adhere to their parameters minimally—in other words, they do

³⁵ Luban, 1141.

³⁶ Luban, 1142.

³⁷ Luban, 1142.

³⁸ Luban, 1148.

³⁹ Luban, 1147.

⁴⁰ Luban, 1147-1148.

only what is requisite to avoid being in a state of violation of any law.⁴¹ Additionally, rule-oriented persons only resist a given law if it threatens their personal safety.⁴² Role-oriented people, on the other hand, are socialized to fully believe in a government's policies. They participate and identify actively with the state's laws.⁴³ Role-oriented people resist laws only if they threaten a person's status or position within society.⁴⁴ The main difference between rule-oriented and role-oriented people is that rule-oriented persons act in a way that seeks to uphold the rule of law as it is written—even if that law is not necessarily moral—while the latter group believes they must take an active role to uphold their government's policies.

Gustav Radbruch considered the actions of the German jurists to be manifestations of positivism that equated a narrow, rule-oriented interpretation of law.⁴⁵ Instead, the Nazi Bar was full of role-oriented opportunists, who actively identified with the Nazis' policies, and enjoyed the benefits their Aryan statuses afforded them. They were certainly not at all concerned for the fate of the Jews who suffered from every legal decision that was authored. In fact, they likely viewed the Jewish expulsion from the German Bar as symbolic of their own job security. In short, German jurists were happy to benefit from the Holocaust.⁴⁶ The way German jurists benefitted from the Holocaust is best understood through specific example. In fact, the Holocaust was very personal to the Nazi jurists who adjudicated Hitler's racist, anti-Semitic decrees. In Germany, perhaps one of the greatest examples of an ordinary jurist who directly facilitated the Holocaust is Roland Freisler.

⁴¹ Luban, 1148.

⁴² Luban, 1148.

⁴³ Luban, 1148.

⁴⁴ Luban, 1148.

⁴⁵ Luban, 1146-1148.

⁴⁶ Luban, 1148.

A Specific Example: Freisler

Roland Freisler was the president of the Volksgerichtshof, who, even as early as 1933, was clearly indoctrinated into the Nazi ideology.⁴⁷ In March of that year, Freisler burst out, “in a public harangue against Jews, transmitted over loudspeaker,” that could easily have resulted in—and perhaps was intended to cause—a pogrom in Frankfurt.⁴⁸ Freisler succinctly summarized his position on German Law with his proclamation that, “the judge should be based on his faith in the Fuehrer and nation and on, ‘the sound sense of the people.’”⁴⁹ According to this line of thought, punishment was not to be meted according to a deed in violation of a law.⁵⁰ Rather, “it should be based on the will of the fuehrer [Hitler].”⁵¹ This clearly indicates Freisler’s belief in Hitler and the Nazi State. Still, his actual actions as a practicing jurist are even more revealing about his direct role in perpetrating the Holocaust across Europe, as nothing more than a judge sitting on a bench in Germany.

Two examples from Freisler’s career aptly illustrate his role in perpetrating the Holocaust. One is the case of Herschel Grynszpan, who in a fit of anger over the fate of his family left behind in Germany assassinated diplomat Ernst vom Rath at the German Embassy in Paris on November 7, 1938.⁵² That act had tremendous consequences for Germany’s Jews—most notably ‘Reichskristallnacht’, the worst catastrophe for Jewish community up to that

⁴⁷ Hermann Beck, “Between the Dictates of Conscience and Political Expediency: Hitler’s Conservative Alliance Partner and Antisemitism during the Nazi Seizure of Power,” *Journal of Contemporary History* 41 no. 4 (2006), 627.

⁴⁸ Beck, 627.

⁴⁹ John S. Conway, “The Holocaust and the Historians,” *Annals of the American Academy of Political and Social Science* 450 (1980), 163.

⁵⁰ Conway, 163.

⁵¹ Conway, 163.

⁵² Alan E. Steinweis, “The Trials of Herschel Grynszpan: Anti-Jewish Policy and German Propaganda, 1938-1942,” *German Studies Review* 31 no. 3 (2008), 471.

point.⁵³ After the fall of Paris in July 1940, Grynszpan fell into the hands of the Nazis, who planned to hold, “an ambitious show-trial for Grynszpan.”⁵⁴ Freisler, then serving as State Secretary in the Ministry of Justice, was initially chosen to perform the duties of chief prosecutor.⁵⁵ Freisler was selected due to his reputation as an old Nazi, who was, “known for his toughness and ideological fanaticism.”⁵⁶ At the request of Joseph Goebbels, however, Freisler was replaced with Otto Georg Thierack, the future Minister of Justice, whom Goebbels believed would be more sympathetic to the goals of the Propaganda Ministry.⁵⁷

It is difficult to imagine that there was a jurist in Nazi Germany who could possibly view the Jews in a less favorable light than Freisler. Still, it is significant that Freisler was considered—and first chosen—to prosecute in what was intended to be one of the most significant displays of Nazi propaganda during the early World War II period.

Perhaps the most historically notable example of Freisler acting in perpetration of the Holocaust is his handling of the White Rose group, which was led by the Scholl siblings. Hans and Sophie Scholl were both guillotined at the order of Freisler for distributing anti-Nazi pamphlets.⁵⁸ In 2006, Marc Rothmund directed the award-winning film *Sophie Scholl: Die letzten Tage*, which is an excellent piece of popular media with overtly historical benefit.⁵⁹ The film draws attention to Freisler’s vicious indoctrination to the Nazi ideology through his historically accurate, vehement dismissal of anything defensive that Sophie Scholl, Hans Scholl,

⁵³ Steinweis, 471.

⁵⁴ Steinweis, 471.

⁵⁵ Steinweis, 479.

⁵⁶ Steinweis, 479.

⁵⁷ Steinweis, 479.

⁵⁸ Andrew Cohen, “Memory and History in Germany,” *International Journal* (Summer 2008), 550.

⁵⁹ David I. Smith, “Chapter Five: Teaching (and Learning from) the White Rose,” *Counterpoints 376: Critical Essays on Resistance in Education* (2010), 72.

or Christoph Probst presented at their joint trial.⁶⁰ Ultimately, Freisler issued a sentence of death, which was carried out on the same day of the trial for all three defendants. According to the official, handwritten transcript of the verdict, which was likely authored and inscribed by Freisler himself, “During a time of war, the accused have [aided and abetted the enemies of the Reich and demoralized the armed forces [struck]] called for the downfall of the Reich in leaflets and [illegible, but struck] [very long illegible section [not struck]] and they have aided and abetted the enemies of the Reich and demoralized its armed forces.”⁶¹

Roland Freisler’s fanatical adherence to the Nazi legal ideology in the Scholl trial is extremely troubling. The ease with which he sent three people—two of whom were less than 25 years old—to their deaths on the same day as he passed his sentence illustrates his total moral failure as a judge. The Honorable Jack Weinstein aptly highlights how Freisler’s actions on the bench indicate the character of a man who should never have been given the opportunity to control the fate of other people’s lives through a broken, perverse set of laws. Weinstein avers that, in the face of evil such that the Nazis presented, the only behavior that is not acceptable of any jurist is quiet acquiescence to that evil.⁶² The judges of Nazi Germany, unfortunately, exemplified the very acquiescence to evil that Weinstein condemns.⁶³ He notes that senior Federal Judges, of which he is one, have the inalienable right to refuse to hear entire classes of cases in which, “unjust results are preordained.”⁶⁴ Weinstein posits that if, in the face of

⁶⁰ Smith, 73-74.

⁶¹ Roland Freisler, “Handwritten Trial Transcript,” White Rose History: January 1933-October 1943, Accessed 01-17-19, <https://whiterosehistory.com/1943/02/22/handwritten-trial-transcript/>.

⁶² Jack B. Weinstein, “Symposium: Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France,” *Brooklyn Law Review* 61 no. 4 (1995), 1155.

⁶³ Weinstein, 1155.

⁶⁴ Weinstein, 1155.

abhorrent Nazi decrees, the German judges had either in whole or in large part refused to adjudicate them, the pseudo-laws would have died in their infancy. In other words, if the Nazi judges had actually chosen to address the moral situation in the courts during the Holocaust, morality would have trumped legal duty.⁶⁵ Ultimately, Weinstein highlights the blatant deficiency in Freisler's fitness to sit on any legal bench. He also proves that Hubert Schorn's assertion regarding juristic resistance to the Nazis are false, for if the German judges had done so, the laws of the Holocaust should have quickly faltered under the weight of non-enforcement.

The complicity of the Nazi jurists in the perpetration of Holocaust atrocities is shocking by modern ethical standards. Of course, for a mass murder on the scale of the Holocaust, it is intuitive that there had to be some legal and bureaucratic complicity. If, however, the legality of evil that the Nazi jurists embodied was the totality of the situation, understanding the tragedy would be a much simpler task. To the contrary, jurists across Europe adjudicated laws in agreement to those of Nazi Germany quite willingly, and that needs to be addressed. Vichy France is an example of a nation that readily retrofitted its laws to comply with those of the Nazis, but it is first necessary to understand the difference between Vichy and other areas of Europe where the law was used to justify Holocaust injustices.

Occupation Versus Proactive Implementation: Vichy France

Aside from Nazi Germany, Vichy France has perhaps the most questionable legacy from the Holocaust of any other collaborator nation. Vichy France is infamous for its zealous implementation of racist, anti-Semitic laws before its Nazi ally even issued such directives. The fact that the Vichy French were independent of the Germans makes their motivation toward legalized anti-Semitism significant in a different way. Whereas the Germans had lived in the

⁶⁵ Weinstein, 1154-1155.

context of anti-Semitic laws ever since 1933, France had enjoyed a relatively progressive legal history until 1940. Vichy and its jurists' willing transition to a racist practice of the law creates an even larger moral grey area to address. In the case of Vichy, the question to confront is not simply 'why the jurists committed evil', but 'why did the state initiate the evil independently from Germany, and why did the jurists remain complacent to the laws after their liberal legal heritage'.

To understand the French role in perpetrating the Holocaust, it is important to understand how the Nazis dealt with their occupied territories. Until the Nazis broke the status quo, occupying armies typically made efforts not to alter the pre-existing laws of a country, unless those laws directly opposed the goals of the occupation.⁶⁶ Unsurprisingly, the Nazis seemed to find all extant laws contrary to the goals of their occupation. As Raphaël Lemkin—the man who coined the term genocide—explains, the Germans were not attempting to establish an occupation. Rather, they wished to establish a, “new European order under German hegemony.”⁶⁷ This was a common trend of the Nazis before and during World War II.⁶⁸ With the Nazis' sheer will to pervert all European law to fit their deplorable agenda, there was little any occupant could do to withstand them after already being defeated militarily.

Vichy France was not occupied by the Nazis, as so many states were. It was an independent, sovereign nation led by Henri Philippe Pétain, and not until 1942 did it become a subject of Nazi German physical control. This is a critical difference, and Richard Weisberg dedicates his book, *Vichy Law and the Holocaust in France*, to explaining how the French state perpetrated the Holocaust independent of Nazi Germany. Weisberg notes that the issue of race

⁶⁶ Lemkin, 25.

⁶⁷ Lemkin, 25.

⁶⁸ Lemkin, 25.

and nationality was one of the first issues that the Vichy government addressed after its installation in 1940.⁶⁹ Within the first 20 days, the majority of Vichy's legislative attention was, "directed to denaturalization policy, including bars to government employment for those deemed no longer to be French."⁷⁰ *The Public and Private Status of the Jews in France (Le nouveau statut des Juifs en France)*, which was passed on October 3, 1940, sought to define what constituted being a legal Jew in France.⁷¹ Notably, *Le statut des Juifs* was more obstructive than the German race laws, and the French enacted their racial legislation much faster than the Nazis did in Germany.⁷²

The troubling point to consider about the Vichy French is that they could have avoided passing the legislation that led to the deportation and execution of around 75,000 foreign Jews living in France.⁷³ Weisberg notes that the Italians serve as a surprising example of a German ally that opposed Nazi pressure to deport its Jews.⁷⁴ This raises questions as to what the French jurists' motivations were for remaining complacent in the face of such racism. Of course, *Vichy Law* suggests that anti-Semitism was a contributing factor, but anti-Jewish sentiments simply cannot explain the overwhelming scope of the France's legislation against its Jewish citizens. With that in mind, Weisberg presents two popular theories to explain the French enthusiasm to deport its Jews. One of those theories is that the French jurists, like the Germans, were overly positivistic with regard to their interpretation of legal texts.⁷⁵ This suggests that there might have

⁶⁹ Richard H. Weisberg, *Vichy Law and the Holocaust in France* (New York: New York University Press, 1998), 37.

⁷⁰ Weisberg (1998), 37.

⁷¹ Weisberg (1998), 38-39.

⁷² Weisberg (1998), 39-41.

⁷³ Michael R. Marrus, "Foreword," in Richard H. Weisberg, *Vichy Law and the Holocaust in France* (New York: New York University Press, 1998), xv.

⁷⁴ Weisberg (1998), 50-51.

⁷⁵ Weisberg (1998), 390.

been a philosophical, positivist trend throughout the European legal community. It could, however, simply aver that the Vichy French mimicked their German allies in their veiled excuse for persecuting Jewish citizens. Regardless, the implication with the theory is that, “this ‘positivist’ argument holds that the French legal community, which was committed to obey the promulgated laws, had little choice but to follow the statutes once they were in place.”⁷⁶

As with the German situation, positivism simply falls short as an explanation for the juristic acquiescence to the legal code of Vichy. The other possible explanation for the French jurists’ actions is what Weisberg terms a Franco-French coercion, where anti-Semitic laws were forced on the French jurists by the very top levels of the Vichy government.⁷⁷ Weisberg avers that there were certainly figures with anti-Semitic sentiments at the top of the Vichy government. Raphaël Alibert, who signed the *Statut des Juifs*, had some clearly anti-Semitic feelings of his own.⁷⁸ Still, the French jurists were too willing in their practice of the French racial laws to claim that they were forced to do so by the heads of government. Weisberg suggests on his own that the theories of positivism and a Franco-French coercion can only explain at, best half, of the legal hermeneutic that led to the deaths of some 75,000 French Jews.

Given Weisberg’s acknowledgement that positivism and a governmental coercion fails to fully explain the Vichy legal culture which aided in perpetrating the Holocaust, it seems relevant to entertain another possibility. In *Vichy Law*, Weisberg avers that French Catholicism likely played role in the legal persecution of the Jews in Vichy France to a degree of some significance. Jean Barthélemy, the second Vichy Minister of Justice, perfectly embodied this Catholic anti-

⁷⁶ Weisberg (1998), 393.

⁷⁷ Weisberg (1998), 390.

⁷⁸ Weisberg (1998), 38-39.

Semitism.⁷⁹ Weisberg avers that Barthélemy drastically changed his juristic behavior during the Vichy period. He states that some innate element of his personality with a drive to survive reared itself viciously where it had previously been more benign to persecuted groups.⁸⁰ “That element, in my [Weisberg’s] view, [was] a form of French Catholic racism”.⁸¹ Barthélemy’s Catholic racism essentially sought to identify, and ostracize the ‘other’ from French society.⁸² The, “irredeemable other,” that Barthélemy was seeking to identify for the French Bar was, of course Vichy’s Jews—“Christ-killers in the less polite language of the extreme right.”⁸³

In spite of the historical inaccuracy of the Christ-killer accusation, it is undeniable that such a title obviously would have been detrimental to Jews of Holocaust France. Indeed, some Catholics believed that the nation of their Saint Joan of Arc had an excuse for, “ridding itself of a threatening and basically exogenous population.”⁸⁴ Barthélemy latched onto this type of pre-war anti-Semitism, which highlighted the association of Christian iconography with Jewish deception.⁸⁵ Weisberg intimates that not all of Catholicism dovetailed into an overt, anti-Jewish movement during the Holocaust years in France. Still, it is difficult to argue that men like Barthélemy did not use Catholicism as a weapon in the arsenal of the Holocaust in France.⁸⁶ It appears as though Catholic racism played a part, but was not necessarily central to all jurists’ acquiescence to the Holocaust.

⁷⁹ Weisberg (1998), 116.

⁸⁰ Weisberg (1998), 116.

⁸¹ Weisberg (1998), 116.

⁸² Weisberg (1998), 117.

⁸³ Weisberg (1998), 117.

⁸⁴ Weisberg (1998), 144.

⁸⁵ Weisberg (1998), 144.

⁸⁶ Weisberg (1998), 145.

Ultimately, as it regards the French side of the Holocaust's legal construction, the jurists are once again at the center of the dilemma. It appears that the French attorneys and judges enjoyed the expulsion of the Jewish population from their pool of employment just as much as the Germans. This, as well as an obvious aura of anti-Semitism among the French jurists, makes Vichy France as culpable for the Holocaust's atrocities as Nazi Germany. It is difficult to succinctly determine why exactly French jurists so willingly participated in the Holocaust. It seems as though many were veiled anti-Semites, who claimed either positivism, coercion, or even religious conviction as defense for their brazen miscarriage of justice.

French Example: Duverger

Evidence that the rank-and-file jurists of Vichy France were the root of allowing murders of the Holocaust to occur is best embodied through the example of Maurice Duverger. Duverger was a French attorney and legal analyst who wrote in defense of Vichy France's anti-Semitic legislation.⁸⁷ Probably the most deplorable writing of Duverger was one in which he openly claimed that the banishment laws regarding the French Jews were a matter of public interest.⁸⁸ Perhaps the most troubling fact about Duverger is that following the War, he attempted to defend the religious statutes that were used to effectively condemn his Jewish countrymen to death in some of the most horrific ways.⁸⁹ He argued, "an always available view of the main religious statutes that ... would have negated the statutes' application," existed, and in the process of doing so, he went so far to aver that his own wartime texts suggested the use of such an interpretation.⁹⁰ Regardless of what he might aver, Duverger's significance to the legal

⁸⁷ "Duverger, Jurist who justified excluding Jews from public service under Vichy...", *Le Monde* (December 22, 2014), 2-3.

⁸⁸ "Duverger, Jurist who..." (2014), 3.

⁸⁹ Weisberg (1998), 405.

⁹⁰ Weisberg (1998), 405.

aspect of the Holocaust is in having normalized genocide for a national audience. In short, his legacy illuminates the moral shades of grey that pervaded legal society during the Holocaust. As with Freisler in Germany, Duverger serves as a French example of the moral ambiguity of some Holocaust actors. Duverger certainly should have spoken out against the new decrees, but his defense of the law was not overtly anti-Semitic in nature.

Counterpoint: Italy

France's collaborationist era makes it clear that some unexpected realms of Europe would make Nazi Germany's exterminationist work easier. However, the question remains of other German allies. It turns out that there too, shades of grey affect the record of Fascist Italy, even though the end result is largely a dark legacy. One might assume that, given its military alliance with Nazi Germany, Fascist Italy would have been an ardent ally in anti-Semitism as well. In fairness, Italy did institute its own *Status of the Jews* in 1938, however its application was not as uniform or expedient as was seen in the other two examples.⁹¹ Additionally, Italy's race laws did not become even close to genocidal until Benito Mussolini was removed from power in 1943. This lends credence to the idea that Italy had, "vague and multiple identities."⁹² Italy has much to offer to the discussion of moral shades of grey within the legal construction of the Holocaust. It had nationally-recognized racism through its laws, however, some of its jurists serving in southern France actively defied those laws to shelter some Jews from the atrocities of the Holocaust. In some cases, the motivations of the jurists to help the Jews highlights the moral ambiguity of the situation, more than the laws themselves.

⁹¹ Michael A. Livingston, *The Fascists and the Jews of Italy: Mussolini's Race Laws, 1938-1943* (Cambridge: Cambridge University Press, 2014), iBooks, 21.

⁹² Paolo Caroli, "The Role of the Judiciary Within the Construction of Collective Memory. The Italian Transition," *Wroclaw Review of Law, Administration and Economics*, (n.d.), 163.

Regarding Italy, the record is remarkable, as some Italians actually engaged in legal altercations with the Vichy and Nazi governments to the benefit of the Jews under Italian authority. Daniel Carpi, in his book *Between Mussolini and Hitler*, relays the efforts made by the Italian jurists and authorities to shelter the Jews of Italian-controlled France. Beginning in the fall of 1942, Vichy's government lost much of its autonomy due to Allied advancement into Axis territories. By November, and until Italy fell in September 1943, the regime took control of a large swathe of southern France, and as a result, affected the fate of the Jews there.⁹³

It is true that, "in complete contrast to the situation in those days in most of the European countries occupied by Axis armies, in southern France, the national rivalry and political hostility between the two nations [Italy and France] benefited the Jews."⁹⁴ The conflict that saved so many Jews in southern France became manifest on December 20, 1942, when Alpes-Maritimes prefect, Marcel Ribière, ordered that all foreign Jews living in the prefecture who had entered France after January 1, 1938, be evacuated to a German-occupied territory.⁹⁵ The fate of these Jews, had Ribière's orders been followed, would have certainly been death at any one of the Nazis' extermination camps. Fortunately for them, many of the Jews that would have been affected by Ribière's order were Italian citizens.

In response to the threat facing Italian Jews, the consul-general of Nice, Alberto Calisse approached Ribière directly and demanded that Italian Jews be exempted from the order.⁹⁶ Even after that confrontation, Inspector Rosario Barranco, who was in charge of policing the Italian Occupation Zone, intimated that the French initiative planned to target Jews in the Alpes-

⁹³ Daniel Carpi, *Between Mussolini and Hitler: The Jews and the Italian Authorities in France and Tunisia* (Hanover, NH, University Press of New England, 1994), 79-82.

⁹⁴ Carpi, 83-84.

⁹⁵ Carpi, 88.

⁹⁶ Carpi, 88.

Maritimes prefect, “without distinction of nationality, age, or sex.”⁹⁷ In response to this dilemma, orders were handed down not to allow the deportation of any Jews residing in the Italian Zone of Occupation to areas of German control.⁹⁸

The actions of Calisse and Barranco show how individual jurists were able to make a significantly positive difference for the Jews of Europe. Notably, the Italian jurists helped the Jews under their control simply by refusing to abide by the whims of their Nazi allies. Still, it would be wrong not to mention the less-than-noble reasons the Italians may have intervened on the Jews’ behalf. Carpi makes it clear that the Italians had a vested interest in establishing their authority in southern France. One way they did this was to essentially disobey the directives of their German military supporter and its French puppet.⁹⁹ The Italian events that Carpi describes show how individual jurists were certainly able to make a positive impact in the course of the Holocaust if they were willing to take a stand. It is, however, clear from Carpi’s monograph that there were very few unselfishly motivated heroes in the European legal circle of the Holocaust years.

Michael A. Livingston, the author of *The Fascists and the Jews of Italy: Mussolini’s Race Laws, 1938-1943*, builds upon the idea that most Italian jurists were not particularly sympathetic to the Jews in their vicinity. According to Livingston, the idea that the Italians were somehow less racist or less prejudiced does not fare well under critical analysis.¹⁰⁰ “The [race] laws were by and large enforced as written, although the wealthy were better able than the poor to evade them.”¹⁰¹ He implies that any benefits Jews enjoyed in Italy Proper were likely not from reduced

⁹⁷ Carpi, 88-89.

⁹⁸ Carpi, 88-89.

⁹⁹ Carpi, 95-96.

¹⁰⁰ Livingston, 828.

¹⁰¹ Livingston, 828-829.

anti-Semitism.¹⁰² Rather, Italy did not create and maintain a specific force to oversee the application of its race laws, which allowed their application to vary from one locality to another.¹⁰³

Italian Fascism allowed for more judicial independence than did Nazism, so certain areas could resist Italy's race laws, however, that should not be taken to mean that Italy's legal community completely avoided the Holocaust.¹⁰⁴ Livingston explains that the case of Italy is important not because the laws themselves hurt the Jews. It is significant, because, "the behavior of those who were caught up in the maelstrom—lawyers, judges, Demorazza officials, often Jews themselves—is difficult or impossible to understand without recognizing that they saw the Race Laws, although perhaps unjust in nature, as legal enactments having the formal and even substantive legitimacy that adheres to such provisions."¹⁰⁵ Livingston attempts to state that the Italian jurists were trapped by legal texts just as the Nazi jurists were, but given Italian cities' abilities to resist the Race Laws for the majority of the life of Fascist Italy, that explanation fails utterly. Rather, the application of the Race Laws anywhere in Italy is indicative of a total moral lapse in the jurists, which likely led to a person's death. By modern, American standards, this would certainly result in disbarment and possibly criminal liability.

It is still shocking that Europe, with one of the most progressive legal structures in the world during the 20th century, was the site of the Holocaust. It is further disturbing that none of the many laws, which could have been used to stop the atrocities, were ever enforced as they should have been to protect the Jewish populace. The law was an undeniably useful tool in the

¹⁰² Livingston, 829.

¹⁰³ Livingston, 829.

¹⁰⁴ Livingston 829-830.

¹⁰⁵ Livingston, 834.

overall perpetration of the Holocaust. It is all but irrefutable that the leaders of Nazi Germany and Vichy France were highly responsible for the approximately six-million-person body count at the end of the global nightmare. It is equally troubling, however, to arrive at the conclusion that the jurists of western Europe were complacent, if not equally motivated to see the racist legislation of the Nazis and Vichy French adjudicated to its fullest extent. There were some instances of legal resistance from jurists like those of Italy, but the vast majority of attorneys and judges in Europe were entirely complicit with the perversion of legitimate law into a tool for murder.

Considering Nations Together

Observing the three sovereign examples from this study leaves much to consider. The three nations provide distinct examples of how a nation might approach the pressures of the Holocaust legally. Germany, as the epicenter of the calamity, displayed a unique legal culture during the Holocaust where the Nazi jurists actively and thoroughly implemented the laws with the expressed purpose of disenfranchising Germany's Jewish citizens. Their actions sparked a discussion, which has resulted in the contemporary belief that the Nazi jurists were quite happy with Germany's anti-Semitic legal code. Vichy France is an equally vexing case, because of its zeal in implementing anti-Semitic laws before Nazi Germany mandated it. As with Nazi Germany, the jurists of Vichy France have used a number of excuses, such as positivism to defend their actions during the Holocaust. This creates the opportunity for a unique comparison. Even though Nazi Germany primarily perpetrated the Holocaust, the jurists of Germany and Vichy are remarkably similar. In both cases, a strictly positivist interpretation, as well as coercion from the top of the government, were popular excuses for the legal atrocities in those

areas. This is certainly evidence that the legal, moral ambiguity of the Holocaust era was present across multiple legal hermeneutics.

Italy further complicates the discussion of moral shades of grey, especially considering it in conjunction with the other examples. In some ways, Italy is a great example of a resistor to the Nazis' anti-Semitic laws, based on the lack of implementation of its own anti-Semitic laws, as well as the defense of Jews under Italian protection in southern France. This is remarkably different from the cases of Germany or Vichy. However, Italy did pass its own *Status of the Jews* in 1938. While it might not have been implemented immediately, the law's passage undeniably opened the door to potential atrocities later, and they did upon Mussolini's forced abdication in 1943. Additionally, Italian jurists were perhaps motivated to help the Jews in southern France simply as a way of undermining the Vichy and Nazi officials who were opposed to the Italians' course of action. Considered as a whole, and in conjunction with Germany and Vichy, Italy stands as an example of how moral shades of grey from ordinary jurists significantly affected the legal construction of the Holocaust.

Conclusion: Returning to Browning

It would be nearly impossible for this study to exist without the efforts of Christopher Browning in *Ordinary Men*. That seminal work stretches the moderate functionalist approach to its furthest extent, and observes the extent to which ordinary persons can be morally culpable for actions which they believed to be done out of their control. The study in *Ordinary Men* is relatable to that of this project. It sought to discover how laws were used during the Holocaust to persecute European Jews on the way to their eventual deaths; who used the law to either perpetrate or resist the Holocaust; and the reasons why the jurists took those actions. It is clear now that the laws were used to strip Jews of their citizenship and the rights thereof. Aside from

a few high-ranking officials, such as Adolf Hitler, average attorneys and judges were responsible for how the law was used during the Holocaust. In places like Germany and Vichy France, the law was almost exclusively used by average jurists to expel the Jews from society. Italy provides an example of a few jurists who defended the Jews under Italian control in southern France, yet it still has a dubious legacy overall. The reasons why the jurists acted the way they did was most intriguing. Ultimately, it is clear that they acted as they did for a variety of reasons in the various nations discussed here. The ultimate finding is that shades of grey pervaded the actions and motivations of the jurists who legally constructed the Holocaust in Europe.

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