ADVANCE SHEET – August 5, 2022

President's Letter

The arguments concerning what to do about rogue rulers are as old as history, and are certainly contemporary. On the one hand are those who believe that political distempers should find political cures, through such means as impeachment, investigation and exposure, summary execution incident to victory in war, defeat at elections, or the 'truth and reconciliation' commissions used in South Africa and some Latin American countries. On the other are those favoring trials by national or international courts, including many lawyers who, as Judge Henry Friendly once observed, are instinctively attracted to due process like dogs in heat. The historian Jill Lepore has noted the criminalization of American politics in the last several administrations, even though the binary nature of trials can lead to either vindication or martyrdom and the prospect of them can make rulers reluctant to relinquish office. Sometimes the purposes merge; the value of the Nuremberg trials is sometimes said to arise not from the sentencing of a dozen second-level Nazi leaders, the 'Big Four' having committed suicide, but in Justice Jackson's eloquent opening and closing speeches and in the assembly of a published documentary record rendering Holocaust denial unfeasible and aiding the judgment of history.

We here tender three notable reflections on these matters. The first is a chapter from *Political Justice* (Princeton University Press, 1956) by Professor Otto Kirchheimer, a German refugee scholar and notable member of the pre-Nazi Frankfurt School of political science. The second are two chapters from Professor Philip Kurland's *Watergate and the Constitution* dealing with the role of congressional investigations and special counsel in that affair. The third is Senator Robert Taft's speech at Kenyon College on the Nuremberg trials, the ambivalent reaction to which is said to have cost him a Presidential nomination while earning him a chapter in John F. Kennedy's *Profiles in Courage*.

George W. Liebmann

Due to the length and file size of the Kirchheimer chapter, the material from Professor Kurland and Senator Taft will appear in the next issue of the *Advance Sheet*. - J.B.

Thanks For Letting Us Know

In the last issue of the *Advance Sheet* there appeared an article entitled "A Chip Off The Old Block," in which we listed a number of Baltimore families where sons had followed their fathers into the legal profession. The proverbial ink had barely dried when a friend and member of the Library's Board told me I had forgotten a member of the Bar Library family, the Honorable Charles E. Moylan, Jr., who has served on the Library's Board since 2012. Judge Moylan served as the State's Attorney for Baltimore City from 1964 to 1970 and on the Court of Special Appeals from 1970 to 2000. For the past twenty-two years he has continued to sit as a "senior judge." His brother, Daniel W. Moylan served on the Washington County Circuit Court from 1982 to 1997. Presently, Judge Daniel Moylan's son Daniel P. Moylan is a Partner with the firm of Zuckerman Spaeder, while his daughter, Dana Moylan Wright is a member of the Washington County Circuit Court. Batting leadoff for the Moylan family, however, was Charles E. Moylan, Sr., who in addition to being a pilot in the Naval Flying Corps during World War I, served on the Supreme Bench of Baltimore City from 1943 to 1967.

I had barely finished hearing about the Moylan family, when someone brought to my attention the Fine family. Not one, two or three generations, but four. Melvin Fine was followed by Howard, Stanley and Robert Fine who were followed by Richard and Alex Fine who have been followed by Mitchell Fine. My question to all of you of course is "Do I hear five?" Let me know and next issue I will let our readers know.

Letting us know, about this matter and all others is what drives us here at the Library. Knowing what you need, knowing how we can help, that is in fact what we are all about. The Library has a great deal to offer in the way of services and collections. All of it is meaningless, however, unless we hear from you, or better yet, have you drop by.

I look forward to seeing you soon.

Joe Bennett

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POLITICAL JUSTICE

The Use of Legal Procedure for Political Ends

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BY OTTO KIRCHHEIMER

PRINCETON, NEW JERSEY
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CHAPTER VIII

TRIAL BY FIAT OF THE SUCCESSOR REGIME

> Unparteilichkeit im politischen Prozess steht ungefär auf einer Linie mit der unbefleckten Empfängnis; man kann sie wünschen, aber nicht sie schaffen.
>
> —THEODOR MOMMSEN, *Römisches Strafrecht*, 4. Buch*

Introduction: Special Political Jurisdictions

WHILE the logic of the Communist system leads to a revamping of the sum total of conditions under which the judiciary operates, more traditional political orders have reserved their special attention mostly to organizing jurisdiction in politically tinged trials. Before plunging into discussion of a particularly intensive type of political trial, the trial by fiat of the successor regime, we shall analyze briefly the various types of special jurisdiction established by a number of regimes to handle political cases quickly and effectively.

When Charles I and Louis XVI met their fates, there was, as they and their counsels spoke of amply, little doubt as to the complete irregularity of both jurisdiction and procedure. Those who framed the indictment and those who judged the case were practically indistinct from each other. As their cases and their ultimate disposal were at the same time the constitutive acts of a new era, the decisions on the cases and the principles applied formed identical manifestations of the same political will. But did the fifteenth, sixteenth, and seventeenth century sovereigns act much differently when their own political interests were at stake? The British king might not only order a command performance of his judges, questioning the tenor of and reasons for their prospective judgments, but he might also dismiss them should their opinions give him sustained reason for displeasure. The French king would have

* "Impartiality in political trials is about on the level with Immaculate Conception: one may wish for it, but one cannot produce it."

found it difficult to dismiss his judges, for it would have involved a costly refunding operation for the charges they had bought from the Crown. But from the days of Jacques Le Coeur to those of Cinq-Mars, Fouquet, and Mademoiselle de Montespan, the king might entrust instruction and judgment of his enemy's cases or any other delicate matter to specially appointed extraordinary commissions, in which learned friends of the king or cardinal and open enemies of the persons to be judged might find a strategic place. The eighteenth and the beginning of the nineteenth century saw the generalization of the judge's appointment "quamdiu se bene gesserint," and the prohibition against withdrawing cases from the judge to whom the law had assigned jurisdiction.

But these secular moves did not solve the problem of jurisdiction in political cases. As we mentioned previously, such prosecutions often take place at the strategic juncture when the old regime has been replaced and the incoming one prepares to sit in judgment over it. As a result of such change, the whole court system might well be reorganized; at the very least, the regime will fashion its own system of juridical defense against its political foes, manning strategic legal bastions with its own men of confidence. But even under a long established regime there might arise a number of special occasions, such as prolonged riots bordering on civil war, where the traditional court organization will not suffice. Constitutional lawyers interpreting constitutional documents that prohibit *ad hoc* jurisdictions might haggle endlessly over whether the ban on such jurisdictions only excludes resort to courts selected and manned for a specific case, or whether it also intends to protect against establishment of a new line of jurisdiction to meet situations of some duration. In one form or another—and there exist many subterfuges—the second practice, of setting up special courts for an indefinite time and for special, mostly political, offenses, has been a frequent practice in many countries.

Apart from the political needs of a new regime and of a government hard-pressed by its foes, there exists a long historical tradition of special political jurisdictions. Archbishop Laud, the Earl of Strafford, and Warren Hastings before the House of Lords, Justice Chase and President Johnson before the United States Senate, Polignac, the conspirators of 1843, Caillaux (treated more exhaustively in Chapter III), and Malvy before the Senate—all have become integral parts of their countries' historical lore. The present system of regular, that is, constitutionally or traditionally sanctioned, political jurisdictions operates

with a great number of variations and combinations. But of the established forms of jurisdictions there are three distinct types.

There is first what one may call the political assembly, doubling in selected and rather infrequent instances as a political court: the House of Lords up to 1948 or the United States Senate sitting in cases of impeachment arising from the personal quality of the defendant, a British peer, a United States president, or a federal judge. Apposite, too, is the French Senate. Until the demise of the Third Republic, the Senate sat as High Court, both to judge a few categories of political offenses (ratione materiae) and to decide the responsibility for acts (ratione personae) committed by a cabinet member, relating to his tenure of office, and, in cases of high treason, by the president. France's last two constitutions have remodeled both the composition and jurisdiction of the High Court. In 1960 it was composed of 24 members elected in equal numbers from both assemblies. With one exception,[1] it has relinquished jurisdiction over everyone but the president and cabinet members. The ancient quarrel over the qualification of the reprehensible acts has been resolved—except for the president, whose high treason remains intentionally undefined—in favor of a narrow interpretation: the acts are defined and limited by the descriptions of the Criminal Code.[2]

Of ancient vintage, political jurisdiction by assembly formed a costly and cumbersome apparatus. Even before it was largely formally abolished, it became obsolete. This was due partly to the reduced political weight of some of the defendants, the peers, and partly to the fact that since Hannoverian and Benjamin Constant's days, other ways have

[1] A person may now be deferred to the High Court only in a security offense if he has acted in concert with a member of the government. In conformity with the anti-parliamentary tendency of the 1958 Constitution, the rules concerning the High Court have been carefully established with a view to preventing this jurisdiction from ever becoming a sort of auxiliary parliamentary weapon for combatting either president or government. Not only must the act of accusation emanate from both houses—an anomaly in constitutional theory and practice—but neither house of parliament has any influence on the conduct of pretrial proceedings. They are entirely in the hands of five judges selected every year by the Bureau de la Cour de Cassation; they may, if they so choose, either completely countermand or modify the action of the parliament. Constitution, Art. 68, and Ordiñance of January 2, 1959, esp. Arts. 18, 25, and 26.

[2] In contrast, the present Italian Constitution, in its Arts. 90, 96, and 134, and Par. 43-52 of the implementing law of March 11, 1953, have travelled the opposite road. They leave to the Constitutional Court, enlarged for that purpose with sixteen lay judges, the job of defining the "attempt at the Constitution" and "high treason"; in addition, they saddle the court with the discretionary determination of sanctions, criminal and civil, "adequate to the fact," and this both for presidential offenses and the crimes committed in the exercise of their functions by members of the government.

been found to enforce the political responsibility of a straying cabinet minister or possibly even a president before the inevitable, catastrophic change in political climate that leads to parliamentary impeachment.

In more serious political offenses by less exalted persons, the second type of jurisdiction seems to be a contemporary trend. Some countries (such as France or Italy, as cited in Ch. II) will leave it to established lower court jurisdiction to deal with political offenses, permitting themselves leeway to shift choice cases to military jurisdiction, there invoking intelligence with the enemy and demoralization aspects. Other countries, such as the German Federal Republic or Switzerland, will concentrate jurisdiction over political cases to some extent in their highest civil court. From the viewpoint of the defendant, the latter procedure has obviously the same disadvantage as historical upper house or high court proceedings. The federal court might become the final judge of both law and fact; the possible benefit of a change of political perspective is thus excluded in those types of cases where it may come strongest into play, not to mention the fact that the quota of reversible errors has never tended to decrease when proceedings are granted immunity from review.

The third type of jurisdiction, in vogue after the war, is the constitutional court, now existing in the German Federal Republic, in Austria, and in Italy. It functions mostly as a kind of arbiter between the highest organs of the state within the constitutional system, especially important in a federal structure, as a guarantor of individual rights embodied in the constitution, and as a general guarantor of the constitutionality of all legal and administrative enactments. But the court has also been entrusted with functions similar to those traditionally exercised by upper house jurisdictions. The president—in some countries the cabinet ministers, too—might be indicted by parliamentary majorities before the court for "intentional violation of the constitution," again a doctrinal and somewhat impractical echo of Benjamin Constant's preoccupations under a constitutional but preparliamentary system.[3] The German Constitutional Court, as discussed in Part Three, also exercises a quasi-repressive function, allowing the broad operation of political repression clothed as penal action. The government may, at its discretion, start proceedings before this court for banning a political party, the tendencies of which endanger the constitutional order.

Established as a self-evident matter with the inception of a new regime, or—as experience with regular American juries in this century

[3] See below, n. 10.

would suggest—as a possibly unnecessary precaution by an established regime, or simply as an historical and somewhat anachronistic survival, political jurisdictions function in many countries. Special jurisdictions have frequently been created for trials instituted by successor regimes against the personnel of their predecessors. Discussing this trial category, we shall dwell on the yardsticks used by successors for measuring the political responsibility of the predecessors' personnel. Which are the value structures that transcend the lifetime of a political regime against which acts of predecessors can be measured? Further, how is the attitude of the individual to be related to the sum total of the record of the regime he served? Is the concept of a *régime criminel* a useful tool for such an enterprise? Where is the more or less precise point at which action in the service of a political goal turns into criminal conduct? If the obstacles to a successor's justice are admittedly substantial, which of them are germane to the particular situation of this kind of trial and which should be counted among the general and unavoidable risks involved in any major trial?

1. The Quest for a Yardstick

The legal formulas under which trials by fiat of a successor regime take place might show a close resemblance to those of the run-of-the-mill criminal law categories. Nevertheless, from the viewpoint of both their instigators and their victims, such trials have a different significance from those that occur under the authority and rule of a long-established regime. They constitute more than just a link in a chain of tribulations and maneuvers through which a regime either achieves greater solidity or marches toward its final disintegration. Setting the new regime off from the old and sitting in judgment over the latter's policies and practices may belong to the constitutive acts of the new regime. In charting the course of action toward its predecessor, any successor regime, whether purporting to achieve moral and political regeneration, or intent, in addition, on consciously remodeling the whole social fabric, faces two contradictory sets of pressures.

Its staunchest adherents and those who might have suffered most from the oppressive hands of the old regime cry not only for revenge, but for the construction of a permanent, unmistakable wall between the new beginnings and the old tyranny. In the passionate language of St. Just asking the Convention to make short shrift of Louis XVI, they all seem to clamor: "Une loi est un rapport de justice: quel rapport de justice y-a-t-il donc entre l'humanité et les rois? Qu'y a-t-il de commun

entre Louis et le peuple Français, pour le ménager après sa trahison?"[4]

On the other hand, there is pressure, probably somewhat less vehement but nonetheless persistent and likely to be more widespread, toward minimizing the insecurity from widespread prosecution and indiscriminate rejection of the record of the old regime. The length and the bloodiness of the battle, or reversely, the comparative ease with which the transition took place, might be reflected in the attitudes of the new masters. Some may accentuate repression, such as the Franco regime in Spain, after it won out in a three-year civil war; on a smaller scale, the French provisional government in 1944, liquidating the heritage of Pétain and collaboration; and in our own day Fidel Castro, dealing with the remnants of the Batista regime. In contrast, the incoming English and French Restoration regimes of 1660 and 1814, acting under conditions where large popular masses still remained unconcerned, or where they were prudent onlookers of the affray, found convincing enough reasons to try minimizing the rancor against the protagonists of the old order—not to mention the "Glorious Revolution" which, with Jeffreys removed by death, saw no need for prosecutions. More recently, the French shift from the Fourth to the Fifth Republic not only occurred in the outward forms prescribed for constitutional change, but was conceived so as to obliterate the categories of victors and vanquished, beneficiaries and victims, accusers and accused; it was to cover all under the image of a father lovingly embracing all his children.

Original political intent and social pressures may conform with each other: Charles II gave assurances not only to old and new friends, but also to the great mass of those who had been actively engaged in upholding or carrying through some aspect of Cromwell's administration (witness the declaration of Breda). With full assent and even under prodding of Parliament, he exempted from this show of benevolence only a selected few, who had been instrumental in the demise of his father's regime or directly involved in his death. Louis XVIII went even further and declared his willingness to accept the regicides into the national community. But in the harsher climate of the Second Restoration, a Royalist majority of a chamber—more royalist than the king—though unable to underpin the irregular white terror of the provinces by wholesale legal proscriptions had the last word on the regicides. Eventually three quarters of the still living regicides saw themselves exiled from France. Yet the fateful vote in January 1793

[4] From the speech before the Convention of November 13, 1792, concerning the judgment of Louis XVI.

trapped only those who had compounded the remote crime of having murdered the king with the imprudence of having rallied to Bonaparte's cause during the One Hundred Days.

The declared intentions of a new regime may not always determine the course of political repression. Original political intent may be deflected by supervening pressures. Modification in the structure of the new regime, reinforced by obstruction from the administrative and judicial corps, may wash out and redirect repressive policies. Italian repression of Fascism, as set out in the decree of July 27, 1944, seemed all-embracing on paper. The members of the Fascist government, the purveyors of violence, whoever had through his action contributed to keeping Fascism in power, as well as the collaborators with the German invaders—all fell under the spell of the wide, imprecise, and retroactive definitions of the ordinance. Yet a jurisprudence that was as narrow in its interpretation of the decree as it had been liberal regarding the 1946 amnesty, helped along by the maintenance of the judicial and administrative cadres of the Fascist regime, quickly ended any attempt to eradicate the political heritage of Fascism.[5]

If the practice of dealing with one's predecessors shows great variations, so do the formulas applied. Momentary needs and strategies, including anticipated defense mechanisms against the portents of the future, intertwine with *ad hoc* legal procedures. Rarest seems the open or even implied admission that the new regime is taking an unprecedented course. At times, though, this may be inevitable. The trial of Charles I rested on the juxtaposition of two radically different constitutional theories. Starting from the premise of traditional constitutional law, Charles' refusal to recognize the jurisdiction of the High Court is irrefutable: "No impeachment," he says, "lies against the King; they all go in his name."[6] But if he continues to ask his accusers to show him the basis of the new law, they have a readymade answer, implied in the very manner in which they drew up their charges and the verdict. Their detailed stories of his manifold hostile acts presuppose the existence of an authority, Parliament, fully empowered to make

[5] The legal and political elements in the failure of purge attempts are exhaustively narrated in Achille Batagllia, *Giustizia e Politica Nella Giurisprudenza* in Dieci Anni, cited above. Luigi Villari gives the Fascist version of this legislation (*The Liberation of Italy, 1943-1947*, Appleton, 1959, Ch. 25). But even in this thoroughly ex parte account, the author admits (p. 219) that what he calls injustices committed by the various governments succeeding one another after July 25, 1943, have been corrected either through the action of the judiciary or through changes of heart by some of the more influential members of the cabinet and officialdom.

[6] S. R. Gardiner, *The Constitutional Documents of the Puritan Revolution*, 3rd ed.; Oxford, 1951, p. 375.

the final decisions for the realm. But many of Cromwell's colleagues recoiled from carrying such an interpretation to the logical conclusion of calling the king's assumption of his traditional prerogative treason.

The Convention's case against Louis XVI was stronger, for the simple reason that Louis had accepted, albeit with mental reservations, the role of a constitutional king under the 1791 document. The Convention could therefore brush aside St. Just's perspective, calling the execution a "mésure," a necessary incident in the fight between the new and the old order. As against St. Just's general verdict on the king's record, "On ne peut régner innocement," the Convention preferred specific allegations against the constitutional king's acting systematically in defiance of his constitutional position and in collusion with foreign countries inimical to France. If there was no choice but to execute Louis—and, exactly as in the case of Charles I, many wanted to avoid such a conclusion—there was sustained interest in constructing at least as watertight a case as possible. The various constructs to get around the king's constitutionally sanctioned inviolability sound better to the ears of the historian, who knows the extent of Louis' foreign involvement, than to many a member of the Convention. But at least the findings in the famous "cachet," giving some indication of the nature of the king's foreign connections, would substitute proof of his intentions for what was missing in constitutional prerequisites for trying a king.

But regimes do not topple only after having lasted centuries, and then by great revolutionary convulsions, leaving the constitutive act of violence, the murder of a king or czar, the dispersion of a constituent assembly, standing out in stark nakedness, defying even half-hearted attempts at regularization and justification. Many regimes that are only uncertain way stations in the evolution of new societies come to their end after a relatively short span of life, opening for their successors alternative lines of conduct. On paper one might disregard one's predecessor entirely and treat the previous regime as if it had never existed. But this is a style of political play-acting rather than a policy. "The political acts of the preceding regime," writes a contemporary German author, "are attacked in their very legal existence, but only few ideological fools will try to carry such policy to its logical conclusion."[7]

Charles II and Louis XVIII dated their accession to the throne from the execution of their predecessors. As previously discussed, this did not keep them from giving their placet to most of the changes that had taken place since then. The August 9, 1944 ordinance of the provisional French government adopted this policy in regard to the Pétain

[7] Hans Dombois, *Politische Gerichtsbarkeit*, Gütersloh, 1949, p. 12.

regime, pronouncing its legal nonexistence. The same ordinance, however, then proceeded to lay down a complex network of rules determining the various degrees of validity or validity presumptions of its predecessor's enactments. By refusing any recognition to the Pétain constitutional settlement, however, the successor widened the choice of legal formulas under which to attack those who had served under Pétain.

What is at stake, therefore, is the question of how to measure the record of those who operated for the now-defunct regime. Here any number of legal complications might result from the uncertainty or novelty of the norms applicable to facts and events of the previous regime—without such difficulties ever having become insurmountable barriers for the courts of a resolute successor regime.

When Charles X was overthrown by the July Revolution of 1830, Louis Philippe carried on under the revamped Charte of 1814. It was therefore under the terms of the Charte, unchanged in this particular point, that proceedings were instituted against the members of Charles' cabinet who, under Polignac's leadership, had tried to refashion the regime of the Charte in an absolutist direction. Part of what they had done might be called an abuse of discretion granted to the king under the terms of that document; other actions of theirs were in direct contravention of its explicit terms. As the Charte had survived the fall of Charles X, Martignac, Polignac's predecessor who had become his lawyer, could not convince the Pairs sitting in judgment that in dethroning the king the revolution had terminated Polignac's responsibilities, leaving no case to try.[8] But other more serious legal difficulties arose. Had they not been ministers, their punishability for an attempt to endanger the internal security of France would have seemed beyond dispute. However, the Charte established the ministers' criminal responsibility for "treason and concussion" without defining these terms; nor was the promised implementing legislation ever issued. The Senate, sitting as High Court, convicted them on the basis of some assimilated articles of the Penal Code and sentenced them to some arbitrarily fashioned punishment.[9]

But fifteen years before the Senate had forged the indeterminate treason concept of the Charte into a weapon against Polignac's defeated crew, the intellectual godfather of early French constitutionalism, Benjamin Constant, had tried his hand at fashioning a treason concept that would be stripped of defamatory notions and would relate purely to reproaches concerning inadmissible political conduct. In the short-

[8] *Procès des Ex-ministres,* 3rd ed.; Paris, Vol. 2, p. 353.
[9] *Ibid.,* Vol. 3, p. 266.

lived "Acte Additionel" he prepared for Bonaparte's use after his return from Elba, Constant had installed the Senate as a jurisdiction before which the lower house could try ministers and army chiefs for "having compromised the security and honor of the nation"; logically this also allowed the political jurisdiction to fix a discretionary punishment.[10] It is a political formula for formal elimination of a scapegoat or political enemy rather than a clearly incriminated fact situation.

In the terminal stage of the French monarchy, 1766, a similar formula was used by the Paris *parlement* to justify the conviction of General Lally-Tollendal, executed in the wake of his misfortunes in India. The Third Republic has seen—without benefit of a clear-cut text covering it—the 1918 conviction and banishment of former Minister of Interior Malvy by the Senate for "having violated the charges of his office." While the United States has never gone through a change of regime since the inception of the Republic, a similar question arose over the meaning of the phrase "high crime and misdemeanor" in Article 2, Section 4 of the Constitution. The opinions of the fathers, who viewed it as a "method of national inquest into the conduct of public men,"[11] and the fact that conviction results only in forfeiture of office might have suggested a wide interpretation. But if one abstracts from the provision's cumbersome use as a device to eliminate indelicate federal judges from lower courts, the limited practice—on Justice Chase, President Johnson,[12] and Secretary of War Belknap—suggests that the provision is a kind of shorthand allusion to specific offenses. In more recent times, the Vichy regime has tried its luck with impeaching the record of its predecessors by resort to a similar formula. On July 30, 1940 Pétain instituted a new Supreme Court of Justice, to which all former ministers and their immediate civil and military subordinates could be deferred not only for specific offenses, but also "for having acted treasonably in the exercise of their duties." But in contrast to the acts defined in the

[10] Benjamin Constant's *Cours de Politique Constitutionelle* (first pub. 1818-1820), Paris, 1861, p. 387, contains a somewhat facile attempt to differentiate between the political and the normal criminal responsibility of a dignitary; for Constant finance matters and matters politic were, at least in theory, easily distinguishable.

[11] Alexander Hamilton in *The Federalist*, No. 65.

[12] Johnson's counsel, former Justice Benjamin R. Curtis, emphasized a number of times that affirmation of the impeachment charges would presuppose a violation of existing law, such as "an intentional misconstruction of the Tenure of Office Act"; *Trial of Andrew Johnson*, published by order of the Senate, 1868, Vol. 1, pp. 147, 383, and 691. The opposite view is expressed in Willoughby, *On the Constitution of the United States*, 3rd ed.; N.Y., 1929, Par. 931. It invokes the authority of former President Taft, but the cases quoted by Taft refer to the situation of lower court judges for whom the "good behavior clause" suggests a wider interpretation.

Penal Code, this treason, in line with the treason of Article 51 of the Charte Constitutionelle of 1814, remains undefined. From the viewpoint of present powerholders it thus implies a judgment on erroneous and nefarious policies rather than commission of a definite criminal offense. The actions exposed to judicial scrutiny were to have a double aspect. From the viewpoint of the German authorities who took a sustained interest in the Riom proceedings, they were to serve the purpose of having official France sanction the thesis that the men of the defunct Third Republic were responsible for the outbreak of the war. For the Vichy regime, interest concentrated on the asserted negligence of those who had left France without adequate preparation to conduct military operations. Both the act of accusation and the accompanying propaganda were carefully planned to avoid discussion of military operations; they concentrated instead on all those elements which would show up the shortcomings and lack of judgment of the leaders of the Third Republic in the years immediately preceding the outbreak of the war.[18] Before inquiries had advanced enough to lead to the opening of the trial, however, Pétain, anxious for the condemnation of the leaders of the Third Republic, convoked an *ad hoc* Council of Justice in August 1941. By the very formula of the July 30 decree, the Council was to report on the sanctions to be taken. It promptly did so, with the result that four political and military leaders of the defunct Republic were put in a fortress without their having been questioned in the course of these administrative proceedings. With the subsequent trial thus prejudged—in spite of the contrary assertions of the president of the Supreme Court of Justice—public proceedings began in Riom on February 19, 1942. While the court accepted the treason definition of the July 30, 1940 enactment, it discarded the count relating to the German-inspired search for those responsible for having started the war. It retained proceedings only against those defendants who could be held responsible for gaps in the organization and equipment of the French military forces.

As usually happens with arguments of constitutionality and retroaction in the courts of the victors, the court rejected the procedural argument of the defense; their argument had rested on the lack of a constitutional basis for the proceedings and on the fact that the newly-

[18] Among the literature on the trial, probably the most revealing are Maurice Ribet (Daladier's lawyer), *Le Procès de Riom*, Paris, 1945, together with Léon Blum's own tale in *L'Oeuvre de Léon Blum*, Paris, 1955, Vol. 2, esp. pp. 220-30. Ribet also brings out the interesting orders given to the press (p. 38); they clearly indicate the regime's desired goals and what problems it tried to avoid both in court and certainly in public.

created offenses had not been in existence when the reproached act had been committed.[14] Thereupon the defense took to contesting the lack of proper war preparations, laying many of the shortcomings directly at the doorsteps of the pre-*Front Populaire* Minister of War, Marshal Pétain. Neither the Germans, who had been cheated out of the expected inquiry into the war guilt issue, nor the Pétain regime, whose authority was jeopardized by the course of the Riom debates, would evince any further interest in the enterprise. As the course of future French history was entirely open in spring 1942, Vichy propaganda had a difficult time opposing the interpretations of Blum and Daladier, the masters of the defunct regime. With convincing enough counterarguments they defended their own record by attacking the tactical mistakes and the spirit of defeatism exuding in the thirties from the circle of those now in power. German displeasure with the course of the trial was brought home to Vichy by a special visit of Dr. Friedrich Grimm, the Third Reich's foreign trial specialist. It became clear that the antecedents and the course of the Vichy regime were beset with too many question marks to serve as a propitious background for an open settling of accounts with Vichy's predecessors. The Riom debates were therefore suspended by government fiat on April 14, 1942, though as a matter of form the court was asked to complete pretrial investigations. The government thus abandoned its attempt to get judicial confirmation of the executive measures it had taken.

The political wheel turned in summer 1944. The new regime, General de Gaulle's Provisional Government, as well as the re-established constitutional governments of Belgium, Holland, and Norway, did not recognize the legal existence of the Pétain or Quisling predecessors. The clearer it was that members of such regimes were functioning as native auxiliaries of the enemy invader, the easier it became to apply such treatment; the regime could consider them as traitors, excluding debate on the feasibility and justifiability of their course of action, which would have necessitated discussion of their aims and programs. But even in such countries as Holland, Norway, and Belgium, the relative simplicity of the treason–foreign invader formula, while it took effective care of the problems of the ranking collaborators, left a considerable legacy of borderline cases. Where, for instance, is the line between merely keeping office in order to administer to the current needs of the population and action which implicitly involves recognition of the invader's title?[15] What is the form and style of obedience

[14] Ribet, *op.cit.*, pp. 41-50.

[15] Interesting examples of how to draw the dividing line may be found in Henry L.

which reflects acknowledgment of the power of coercion but avoids any move toward helping to transform naked power into authority? Many a contemporary would be happy to know the answer.

Under the impact of complete and voluntary submission to a foreign invader, which from the outset stamps as traitors those nationals who become full-fledged collaborators, the patriotic norm may serve as a guidepost. The problem—legal texts to the opposite notwithstanding—becomes more difficult and complex in France and Italy. In neither case would denial of the legal character of the predecessor regime and constructs of treasonable relations with the enemy work out too smoothly. We have already mentioned the debacle of the Italian legislative attempt to establish the criminal responsibility of the major figures and abettors of the Fascist regime after it had lasted over two decades. The attempt of the April 22, 1945 decree to establish the criminal responsibility of those who had collaborated with the Germans and held office under Mussolini's short-lived Social Republic of Saló, installed in northern Italy after his rescue, foundered equally as quickly in the courts. A number of poor devils held the bag, while the principals were able to show that they had worked both the Fascist and, clandestinely, the anti-Fascist racket—practitioners of *doppo gioco*, as the Italians called it.[16] In Italy collaboration with the Germans had been the policy of a government which had been in power for twenty years. Both the regime and its policies became increasingly unpopular from 1942 on. There might have been a national consensus in the crisis years 1942-1944, consisting in the attempts of many combined forces, old-line political personnel, Catholic Church, the independent and the Communist resistance, to guide Italy back toward independence from its German overlords. But this consensus, too fragile and narrow, and too uncertain in its ultimate effect, could not serve as a patriotic norm of such unquestionable strength that it would support criminal sanctions for reprehensible political action, unless aggravated by acts of special brutality.

In the Vichy regime foreign domination and a certain amount of home-grown initiative to replace the institutions of the Third Republic with a new authoritarian model became inextricably mixed. By some

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Mason, *The Purge of Dutch Quislings*, The Hague, 1952, esp. pp. 85ff. The unenviable record of the Dutch High Court during the German occupation has been dealt with in detail, from the viewpoint of the destruction of the court's authority-building image, in Gerald I. Jordan, "The Impact of Crises on Judicial Behavior," paper read before the American Political Science Association meeting in New York, September 8-10, 1960.

[16] Details, especially the legislation's vain attempts to transform participation in the Saló enterprise into a nonrebuttable presumption of collaboration, are dealt with by G. Vasalli and G. Sabati in *Il Collaborazionismo e l'Amnistia Politica*, Rome, 1946.

avenue of correct legal transition the regime had been connected with the institutions of the Third Republic. The respective amounts of voluntariness and coercion in the 1940 change were certainly not much smaller than during the 1958 transition from the Fourth to the Fifth Republic. The threat of Massu's parachutists stood as much as godfather to the Fifth Republic of de Gaulle as the proximity of German tanks did to the ascent of Pétain. Thus if the acceptable origin of the Pétain regime and the smooth transition were doubtless generated by the pressure of circumstances, they were still confirmed by a substructure of willing, if passive, popular acceptance. Moreover, at least until the country's total occupation in November 1942, the regime retained a certain margin of freedom for maneuvering, a margin probably not much smaller than that held by many contemporary governments. However that may be, the refusal to concede legal existence to the Vichy regime would allow its leaders to be made responsible after-the-occasion for an attempt to scuttle the republican regime, endangering the internal security of the state; it would also open the way to prosecuting them for treason. Inasmuch as the armistice with Germany, even if its validity were recognized, would not end the war with Germany, relations with the Germans could be called "intelligence with the enemy." The 1939 decree modifying Article 75(4,5) of the Penal Code specifically incriminated "intelligence with a foreign nation," with a view to forwarding that nation's endeavors, as well as the support given in time of war to military personnel joining the services of a foreign nation.

Thus once one admits the correctness of the initial hypothesis, the legal nonexistence of the Vichy regime and the continuation of a state of war with Germany,[17] there exists a detailed enough body of treason law for building up a good case against the major Vichy leaders. The "intelligence with the enemy" construction was supplemented for the various categories of officials by ordinances establishing echelons of criminal and disciplinary responsibility according to the importance of the function and the degree of facility with which acceptance or maintenance of such function could have been avoided. The courts, with the help of the "intelligence with the enemy" concept, could measure the attitude of the defendant by a patriotic norm whose continuing validity was assumed even if the actions of those temporarily in power did not correspond to it. In this way, the problem of the genuine domestic basis of the Vichy regime and the various impulses it was

[17] The point has been elaborated in Emile Garçon, *Code Pénale* (cited above, Ch. II, n. 34), annotation 192 before Art. 75, following the decision in Suarez by the Cour de Cassation, *Sirey*, 1945.1.29.

obeying, which were not necessarily always determined by the German overlords, could be skirted, at least officially.

Due to the rapid change of political alignments, the "intelligence with the enemy" concept has been allowed to fall into oblivion since the beginning of the fifties. To put it differently, it has been reduced from an official tenet of policy to a piece of intellectual property of the extreme left. But during the immediate postwar period it fulfilled a psychological, political, and juridical function. No cognizance needed to be taken of the fact that among many strata of society the patriotic norm of the traditional state had been eroded. These assumptions, however fictitious they might have been, created a legal basis that allowed the courts to circumvent discussion of the nature and goals of the Vichy regime, measuring its performance instead by a narrower yardstick: its attitude toward the German enemy.

Of course, not even the "intelligence with the enemy" thesis, and even less the hypothesis of retrospective subverting of the constitutional government, could eliminate one fundamental ambiguity which leaves questions about some, though by no means all, of the trials against the Vichy personnel.[18] In conflict are two interpretations of history. One, made with the benefit of hindsight, rests on the knowledge that Vichy's policy of collaboration was doomed to eventual defeat and hence to the detriment of France. The other interpretation and its consequent choice of action were made at a time when the future course of history was a matter of conjecture. Even if we, like the court in Pétain's case, brush aside the defense argument of "double jeu,"[19] a carefully worked-out system to simulate adherence to the German cause while in substance trying to work itself free from German domination; even if we admit that Vichy had, at least since Laval's return to power in spring 1942, been set on the German card, can we determine whether this was a mistake or a crime?

Under two suppositions this policy may be called a crime. The first is interesting but need not detain us here. It leads back to the successor

[18] As usual, there exists an enormous body of partisan literature, written more often than not to justify the cause of the various defendants; despite its useful biographical information, I would classify José Agustin Martinez, *Les Procès Criminels de l'Après-Guerre*, Paris, 1958, in the same category.

[19] Trochu, former president of the Paris Municipal Council, testifying as a defense witness for Pétain, expressed himself in the following way: "Le double jeu, il y a beaucoup de gens qui l'invoquent; mais le double jeu d'un particulier est zéro, tandis qu'un chef d'état et un ministre des affaires etrangères ont quelque fois le dévoir de jouir le double jeu!" Haute Cour de Justice, *Procès du Maréchal Pétain*, Paris, 1945, p. 181; for the court's refusal to accept the argument, see the verdict, p. 386.

regime's judgment of the political worth of its predecessor. It is indeed possible to conclude from all the available evidence that German collaboration was not only sought to improve France's national position, but was in conformity with the desire to foreclose return to democratic institutions. The implications of the second supposition will detain us longer. At least since mid-1942 the Vichy authorities must have been aware that collaboration with Germany implied part acquiescence to, part active collaboration with, policies that far transcended a regime's traditional effort to keep itself in power: collaboration with German programs of forced labor and Jewish extermination.

2. *"L'État Criminel" and Individual Responsibility*

We are facing a question that transcends the successor's always problematic judgment on the qualities and policies of their predecessors. Beyond the evanescent yardsticks of successor regimes, with their conflicting principles of organization, belief systems, and interest configurations, we are searching for a fundamental notion to which all groups and nations must at least submit, if not always subscribe. Respect for human dignity and rejection of the degradation of human beings to mere objects comes to mind. To define such a notion is easier than to determine its meaning in the individual circumstance. There is a temptation to conceive an ideal normal state which, in its legal pronouncements and organizational devices, meets the minimum requirements of respect for human dignity and is opposed to the image of an *état criminel*. On the basis of its attitude toward and treatment of the human material under its domination, such a state could not ask that credence be given to its acts nor expect the actions of its servants to be clothed with the presumption of legality. But is there such a state, one that is somehow analogous to the criminal organization construct of the London War Crimes Statute?

During a somewhat less complicated period of history, one of the most intelligent scoundrels of all time, Prince Talleyrand, tried in his own inimitable way to conceive an answer, and it is one that is no less interesting for its being tailored to a specific situation. In 1823 Savary, Napoleon's Minister of Police, accused Talleyrand of having been instrumental—in 1804, while Napoleon's minister of foreign affairs—both in the seizure of the Duc d'Enghien, scion of the Bourbon family on the territory of the Grand Duke of Baden, and in d'Enghien's subsequent execution in the Vincennes fortress. In the aide-memoire which Talleyrand submitted to Louis XVIII, he argued—contrary to all evidence that has come down to us—that his part in the events was de-

cidedly minor; he was sort of a diplomatic agent doing a routine job, strictly within the limits of his office, with all vital decisions emanating from Napoleon himself. But for good measure, Talleyrand added a more far-reaching argument:

"If a man, by the force of circumstances, is forced to live under an illegitimate regime, the decision of what to do when ordered to commit a crime should depend on the following circumstances: if the crime should draw the country into great danger, into social disorganization, contempt of law, he should not only resist the order, but do all in his power to do away with the enemy of the country. However, if the crime should remain an isolated one and have no other consequence than to stain the reputation of the individual who committed it, then one might be given to grievance over the admixture of greatness and weakness, of energy and perversity, yet the respective distribution of glory and the elements of infamy must be left to the justice of future ages. Anyhow, when the act only compromises the good name of the principal, with the law of nations, the general state of morality unaffected, the servant of the state has a right to continue in office. Were it otherwise, government jobs would be deserted by the more capable and more generous of men. Terrible results would derive if this principle were neglected. It should be adhered to as long as the defense of the social order and moral right are preserved intact."[20]

Talleyrand's theorem has been echoed in dozens of variations, often embellished in the immediate postwar period by the contention that the job was kept by the individual in question only to stave off worse tragedies.[21] It would be acceptable only if its logical presupposition, the distinction between an easily perceptible cleavage between the occasional operation of a normal state organization and the contemptible and inhuman doings of the criminal state—the dead-end street of an entirely vicious political setup—corresponded to reality. The argument does not improve by its being turned upside down. Professor Hermann Jahrciss, laying the theoretical foundation for the Nuremberg defense, readily admitted that Hitler, in contrast to Talleyrand's picture of a Napoleon who only occasionally deviated from the social norm,

[20] *Memoires of the Prince de Talleyrand*, New York, 1891, p. 216.

[21] When proferred by Franz Schlegelberger, acting minister of justice (Justice case transcript, 27 and 30 June 1947, pp. 4347 and 4384-87), the argument was rejected by the Military Tribunal No. 10 (Vol. 3, p. 1086). The rejection has been explicitly approved by Gustav Radbruch, "Des Reichsjustizministeriums Ruhm und Ende," *Süddeutsche Juristenzeitung*, Vol. 3 (1948), pp. 58, 63. Configurations where the "preventing worse evil" argument might find a foundation in a particular situation are discussed in H. Jeschek, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht*, Bonn, 1952, p. 398.

was the evil incarnate. He thereupon used this admission to demonstrate that inasmuch as all decisions were concentrated in Hitler, all agents below his level, unable to affect his will, were devoid of responsibility.[22] Between the occasional aberration within the framework of the social order and the effortless affirmation of the existence of an evil incarnate, elevated to the rank of an abstract mechanism of imputation, the principle of personal responsibility evaporates.

No pure *état criminel* exists in practice. There is no criminal genius who would be able to cajole, seduce, or force a whole people into absolute obedience. As everywhere else in human society, the elements of freedom and coercion, of enthusiastic, matter-of-fact, resigned, or reluctant obedience, of underhanded obstruction and rebellion are inextricably mixed. A modern state organization cannot be run like a concentration camp with the overwhelming majority of the population as its inmates. In order to be workable, even a despotic state organization must serve the basic needs of a sizeable number of the population. Hence the necessity to organize a great number of "neutral" services closely corresponding to those of any other modern state.[23] But it is not only in their common pursuit of necessary societal functions that a normal and criminal state are indistinguishable. The very notion of their separability accounts for only part of our contemporary experience. It originates with the Third Reich, whose goals, the forcing into subservience of the people of the European continent, were as evil as the means of killing and enslaving millions of its real or fictitious, present or future enemies.

The goals need not be abhorrent or repulsive. Collectivization and accelerated industrialization within the administrative framework of the Soviet state are also, though by no means exclusively, motivated by the desire to eventually raise the living standard of the population. And in the last decade, within the framework of their policy to maintain France's predominant position, the French in Algeria have certainly worked toward raising the cultural and material standards of the in-

[22] *IMT*, Vol. 17 (1948), pp. 458-94. (The *IMT* abbreviation refers only to the trial before the International Tribunal, not the American Military Tribunals sitting in Nuremberg.) For a measured refutation of Jahreiss' argument, see H. Donnedieu de Vabres, "Le Procès de Nuremberg devant les principes modernes du droit pénal international," *Recueil des Cours de l'Academie Internationale de la Haye*, Vol. 70, No. 1 (1947), pp. 483, 570.

[23] The same point has recently been made in a judgment of the German Constitutional Court (2 BV.R 234/60, Entscheidungen des Bundesverfassungsgerichts, Vol. 11 [1961], p. 150: "Even an unjust system cannot but solve problems of daily community life in a way which, on the surface at least, comes close to the ways of the traditional legal order."

digenous population. In both cases the framework in which these policies have been carried through by those in power has involved untold misery for large numbers among the population, including those who have not dared to resist the official promptings. Yet official policies may be subject to many oscillations and to varying degrees of implementation. Other segments of the population or of the official apparatus might try not only to check or soften measures of implementation, but to reorient the very goal structure. This might lead, as it has in France, to the curious situation of two segments of society existing side by side: the normal sector, following the traditional rules of a state, where state-individual relations are organized within a legal framework, and a military and police order, geared to maintain French domination over Algeria and utilizing for this end any means from persuasion and indoctrination to open terror.

But this is only an extreme and especially vivid illustration. Each society has such islands where the rule of law is at best uncertain, conjectural, and often nonexistent. These islands may connote identifiable geographic areas or specific group relations; in other cases they may be nothing more than predispositions of certain groups ready to enter the field if the sociopolitical configuration changes and restraining influences remain weak. The decisive difference, in separating a normal from a criminal state, involves the degree to which such islands are kept under control and whether they are encroaching on wider and wider fields of social activities.[24]

In the problematic enterprise of couching political responsibility in legal terms, it may be considered futile to even begin to try and differentiate between political responsibility for a policy that failed and political responsibility for a policy whose criminal character rests in its inherent violation of the basic rules of human conduct. One might argue, for example, that the means of destruction utilized in any future war are so horrible, the consequences so disastrous, that whoever engages in a major warlike enterprise must necessarily become a criminal, regardless of his goals and motivations. Any power holders and their major subordinates who would apply violence exceeding the amount compatible with maintaining the present state of civilization would automatically acquire the status of criminals.[24a] Such a course is alto-

[24] For a discussion, under a related heading, of the beginning years of the NS state, see Ernst Fraenkel, *op.cit.*

[24a] As Guenter Lewy put it succinctly in his recent "The Dilemma of Military Obedience in the Atomic Age," *American Political Science Review*, Vol. 55 (1961), pp. 3, 21: The question awaiting answer is, where does legal warfare end and humanity begin?

gether likely, even though the word "criminal," connoting an institutionalized type of handling, might be out of place; the action against the criminal would probably be closer to the way the Italian partisans disposed of Mussolini after his final capture. But still there might be violence in one country or in a region and with tacitly or openly agreed upon restrictions to conventional weapons. This might allow, or even make it advisable for, successor regimes to sort out the motivations, goals, and action patterns of those who saw their cause defeated.

At any rate, it might be useful for us to see how much the difference between responsibility for political failure and for inhuman conduct is more than a utopian construct or, worse, a hypocritical formula put up to enhance the prestige of a specific type of successor operation.

3. *Nuremberg: The Prerequisites of a Trial*

A. THE NATURE OF THE CHARGES

What does the Nuremberg war crimes trial before the International Military Tribunal, the most important "successor" trial in modern history, teach us about the relation between traditional political charges and those concerning the total destruction of human dignity and personality?[25] The trial differs in one important respect from other successor trials: instead of a domestic successor regime, a syndicate of four foreign powers handled the trial. Whatever the differences over legal formulas by which to construct this fact, these powers in 1945 became the provisional, yet firmly established successors of the Hitler regime.

The charges preferred in the Nuremberg indictment show throughout a hybrid character. The trial originated as an inquest of the victor-successors, charging the preceding National Socialist regime with its major policies; aggressive warfare aimed at subjugating the continent. Due both to the nature of the parties concerned with the prosecution, a victorious foreign power syndicate, and their declared aim, to stamp out aggression, the type of political charge changed: instead of an inquest into the reasons for losing the war, the men in the dock faced responsibility for having started it. From the outset this fact determined the entire trial configuration. Mismanagement of the nation's affairs and the history of subversion of the constitutional establishment, the usual fare of successor trials against the preceding regime's top-ranking personnel, receded behind the grievances of those who had suffered from National Socialist Germany's wanton aggression.

[25] Except when specifically referred to, the discussion does not pertain to the trial before the Far Eastern International Military Tribunal, nor to trials before United States military commissions operating in the Far East.

But this political charge was tied to other ones, directed toward making the defendants accountable for inhumane conduct in the pursuit of their political goals. To complicate the picture still further, part of the war crimes charge concerned not the acts of unprecedented cruelty, such as killing millions of Jews and prisoners of war, or enslaving the population of entire countries, but the uncertain and shifting boundary lines of the laws of warfare—practices in the taking and killing of hostages, for example, and similar problems in partisan and submarine warfare. Of course, the fact that these practices happened often at the explicit orders of a regime which had planned aggressive war and was committed to the physical destruction of nations and races blurred the picture to some extent. It was not always easy to differentiate between typical incidents, coming up under conditions of any modern war, and action which originated from and related to Hitler's preconceived campaign plans.

This kind of hybrid prosecution, which mixes political accountability for planning and initiation of aggressive war with criminal responsibility for inhumane conduct, has to our eyes a politically justified element. Full-fledged warfare in contemporary society must almost necessarily lead to inhumane results. Therefore, establishing a precedent for penalizing aggressive warfare could justifiably be regarded by Justice Jackson as the paramount political goal of the Nuremberg proceedings. Had the noble purpose of the crime against peace charge succeeded, had it helped to lay a foundation for a new world order, the uncertain juridical foundation of the charge would now be overlooked and the enterprise praised as the rock on which the withdrawal of the states' rights to conduct aggressive warfare came to rest. As the coalition pursuing the Nuremberg enterprise broke up before the ink on the Nuremberg judgment had time to dry, the dissensions among the wartime partners threw a shadow over the whole affair. Exceptions taken to the charge of crime against the peace—one of the trial's integral charges but legally the most problematic one—have often been used as strategy to discredit the enterprise as a whole.

Discussion of this new variant among successor trials might well admit both the difference in structure and legal conclusiveness between the crimes against peace and the legally unnecessary conspiracy charge,[26] closely coordinated with the former in the findings of the court, and the war crimes charges proper. The crime against peace charge was a political charge in a double sense: it incriminated a certain type of

[26] Donnedieu de Vabres, *Le Procès de Nuremberg* (Cours de doctorat), Paris, 1947, p. 254, calls it "la construction intéréssante mais un peu romancée de l'acte d'accusation."

political conduct, namely the National Socialist attempt to subjugate Europe by all available means, including the launching of aggression; and the degree of illegality of the incriminated course of action remained as conjectural as in some of the previously discussed proceedings.

While the outlawry of aggressive warfare had been enshrined on parchment in 1929 and duly ratified by the major states, it was not until the London War Crimes Charter, perfected six years after the war had begun, August 8, 1945, that what had been a charge of international illegality was converted to the status of international punishability. In preparing the charter, both the French and to some degree also the USSR members of the London conference had anticipated the difficulties which this type of charge would raise.[27] However, together with their governments they bowed to the missionary zeal of the American representative Justice Jackson, who was eager to undertake the job of a "commission of codification."[28] In doing so he had to overlook that a codification commission must either confirm firmly implanted practices—which certainly did not exist in this field —or restrict itself to announcing rules for future behavior rather than maxims by which to judge past performances. Experience shows that every successor regime feels intensely that in condemnation of the predecessors' practices is the key to humanity's future. In spite of all justified scepticism against successors' evaluations of their predecessors' efforts, and because we know what we do of the likely shape of future wars, we must admit that Justice Jackson's position, though it has the inevitable share of hypocrisy, possesses an element of inherent logic: the need to create a precedent which can form a barrier, however weak, against future aggression.[29]

[27] The record of this conference, in many ways as interesting as the final judgment of the IMT, may be studied in *International Conference on Military Trials*, London, 1945 (Dept. of State Publication 3080, Washington, 1948), esp. 335, 378, 379, 385.

[28] *Ibid.*, p. 335. The objections to the (unnecessary) crime against peace counts were vigorously stated at the time by Erich Hula, "Punishment for War Crimes," *Social Research*, Vol. 13 (1946), p. 22.

[29] The one member of the IMT who had been a lifelong student of international criminal law, the Sorbonne professor Donnedieu de Vabres, though not hiding his reservation against the charge, has vigorously stressed the function of the judgment as an "incomparable precedent." *Op.cit.* (see n. 22 above), p. 577. The incomparable precedent would backfire, however, if it induced the leaders of a future war to fight to the bitter end rather than surrender and face the possible fate of war criminals.

See also the arguments of Robert K. Woetzel, *The Nuremberg Trials in International Law*, London/New York, 1960, pp. 170-71, 242, which rest on the charter's and judgment's confirmation by the international community. Given the after-history of the international community, a frank attempt to break the fetters of legal positivism,

If the crime against peace charge was a legal novelty, in that it created the offense of aggressive warfare,[30] it was also a typical successor regime concern, establishing the responsibility of the governing ranks of the predecessor for the policy course they had taken. With the war crimes charges and the related crimes against humanity charges we are directly concerned with the quality of human action regardless of the hierarchical level at which it occurred.[31] The newly coined "crimes against humanity" concept (Article 6c of the charter) corresponds to a deeply felt concern over the social realities of our age: the advent of policies intent on and leading to debasing or blotting out the existence of whole nations or races. But if the social and political mechanism employed in such cases is unfortunately very clear, the legal formulas to cover and repress such actions remain problematic. In the absence of a world authority to establish the boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state, the French government and its Algerian foes, the South African government and the representatives of the downtrodden negro and colored population, not to mention the Hungarian regime and its adversaries and victims, might continue to have a very different viewpoint on the meaning of the concept. While the IMT, in the particular instances which it had to judge, might have had little doubt about the concrete meaning of the classification, it nevertheless appreciated both the looseness of some of the terminology of Article 6(c) and the novelty of the charge. It therefore preferred, whenever feasible, to convict the defendants on the basis of the war crimes charges, which embraced all the traditional common crimes, while underemphasizing as much as possible the charges of crimes against humanity. Only in two cases,

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especially if the latter serves as "value-blind guarantees for any kind of status protection," seems preferable. Such an attempt is outlined by Helmut Ridder, "Nuernberger Prozesse," *Staatslexicon*, 6th ed.; Freiburg, 1961, Vol. 5, p. 1,133.

[30] But strictly speaking, legally, the charge that this "novelty" violated the *nulla poena sine lege* principle is not well taken. Although most advanced constitutional systems contain this protective rule, positive international law does not know it. Woetzel, pp. 111-17, shows the impracticability of the rule, for both the development of international law and the absence of injustice where violated obligations are recognizable.

[31] It may well be that policy and lower level action are closely connected. The reprehensible goal, the subjugation of Europe by aggressive war, and the criminal means, the inhuman treatment of the underlying populations, form part of one and the same pattern. But the evidence would suggest that it might have been possible to accept the premises of power politics, including wars of aggression, without originally perceiving how closely such policy was geared to inhuman means. See the characteristic testimony of Feldmarschall v. Paulus, *IMT*, Vol. 7, p. 284.

Julius Streicher and Baldur von Schirach, did the conviction rest exclusively on a crimes against humanity charge, though even in these cases the court made an effort to find related war crimes aspects.[82]

Thus the main weight of the conviction—for what the French prosecutor François de Menthon aptly characterized crimes against the human status, with this status an image of the constitutive elements of any civilized society[83]—must rest on the war crimes aspect. Even if they were accepted as a category, crimes against peace would have to rest on the concrete possibility that major policies were furthered; just like the older successor trials, therefore, trials based on crimes against peace would involve mostly top-ranking personnel. But the individual fact situation brought under war crimes charges might involve responsibility way below the top echelons.

There exists, as pointed out before, no pure *état criminel*. Even when the London charter tried much more mildly to have the court determine the criminal character of organizations to which various defendants belonged, the court's recommendations, which form an integral part of the judgment, closely circumscribed the possible results for the members of these organizations, if, indeed, they did not completely vitiate those results. There remains nothing but to search for individual responsibility for inhumane conduct. In this search for the commission of common crimes, undertaken in connection with totalitarian political programs by various war crimes tribunals and, in a more haphazard and incidental way, by indigenous German courts, some defense arguments retain more than technical interest. We want to consider four of these arguments.

B. FOUR REJOINDERS

1. The Sanction of the Legal Order. In the first argument, a judge or another official attempts to invoke the sanction of the existing legal order. The defendant may assert, as in the "Justice" case, for example, that the incriminated act was carried through in pursuance of legal enactments whose validity went unchallenged at the time of the trial. Such a plea raises a point of principle. Not every piece of legislation enacted by a government in conformity with its own rules acquires, by the mere fact of enactment, the quality of binding the lower echelons. If it shows on its face the character of inhumanity, as did the decree

[82] See de Vabres' critical evaluation of the crime against humanity charges, *op.cit.* (n. 22 above), pp. 243-46.

[83] *IMT*, Vol. 5, pp. 406-07. "It [the human status] signifies all those faculties the exercising and developing of which rightly constitute the meaning of human life."

concerning the administration of penal justice against Poles and Jews in the incorporated Eastern territories,[34] then reference to its valid enactment cannot be invoked as defense by those who applied it. In those patently exceptional cases the value of legal certainty is not strong enough against the principle that intentional violation of minimum standards deprives an enactment of the claim to legal validity.[35] Setting up machinery for the wanton destruction of human beings "selected out" on the basis of national or racial characteristics in the form of a general command rather than by specific order does not give such enactments the dignity of law. It is the negation of the purpose of law, which even in the form of the shoddiest enactment must still offer a password: the ordering of human relations. However, even under terroristic conditions, framers of legislation rarely couched their legislation in offensive terms. The need for legal certainty will make it awkward to contest the validity of a legal enactment on account of the illegitimacy of the regime or of the presumed policies which the originators of such legislation might pursue on the basis of the enactment.[36]

The presumed validity of an enactment does not necessarily exculpate those who might consider invocation of the statute a foolproof defense mechanism. An enactment in itself is a mere cipher, whose real import and weight, changing from situation to situation, are determined by those who fashioned it or learned to mold it in constant practice. The ease with which the rulers of the day might manipulate legislation is not a carte blanche for the last-line interpreter to exhaust all the possibilities which the enactment might open up to him. At best, the enactment is a credit card which tells nothing about whether judicial or administrative implementation was necessary, convenient, or abusive. Those who sit in judgment on the enforcers of such legislation will have to examine the circumstances of application in the individual case.

In one case, for example, the presiding judge of a German special

[34] The text of the decree of December 4, 1941, is reprinted in the Justice case volume, *op.cit.*, p. 632.

[35] See the formulations of Gustav Radbruch, *Rechtsphilosophie*, 5th ed.; Stuttgart, 1956, p. 353. Among the more recent discussions, see Lon L. Fuller, *op.cit.*

[36] Entscheidungen des Bundesverfassungsgerichts, Vol. 6 (1957), pp. 132, 198-200, discussing the validity of National Socialist civil service legislation. The decision differentiates between the setting up of manifestly unjust law, bare of any effect, and those parts of the National Socialist legislation which, while illegitimate in origin, enjoy "sociological validity." I take this expression to mean *inter alia*: a) that such rules do not create protected legal situations extending into the period following the demise of the regime; b) that they may be invoked as justification of action, unless the circumstances of the case established the bad faith of the actor.

court sentenced to death a Polish farm laborer who had had altercations with his employer and had also made advances to his employer's wife. When the military tribunal in the "Justice" case asked how the case of a "racial German" would have been treated if submitted to the German Reichsgericht on the identical fact situation, the judge replied: "This is a very interesting question, but I cannot even theoretically visualize the case, as the decisive elements cannot be transferred to a German."[37] The basic fact that the way he handled his job violated the minimum standards of decency and equality before the law to which all human beings are entitled did not occur to the judge. Should he therefore escape punishment?[38]

II. Binding Orders and Necessity. The second argument draws its strength from the concrete condition under which individuals below the highest level exercise their function. The London charter, in Article 8, had somewhat sweepingly done away with the invocation of binding orders except in mitigation of punishment. This problem, which comes up time and again, is most frequently discussed in terms of military hierarchical relationships. Authors of many nations, especially in the wake of the Korean conflict where no side has been strong enough to insist on the punishment of their adversaries' alleged war crimes, have commented on the conflict of loyalties which the policy of the London charter would create. They have denied that the rejection of binding orders could ever be squared with the social reality of hierarchical com-

[37] Justice case transcript, December 4, 1947, p. 10625.

[38] The most persistent critic of the Nuremberg trials, especially those before the American Military Tribunals, August von Knieriem (*The Nuremberg Trials*, Chicago, 1959), tried to exculpate those who framed the decree of December 4, 1941, with the argument that referring the case to such a tribunal was preferable to the method chosen thereafter: killing Poles and Jews without benefit of any trial (p. 279). This is a somewhat specious application of the lesser evil argument. Does the fact that others invented devices to kill speedily millions of people exculpate those who put a somewhat less efficient machinery into motion, only killing hundreds? In Radbruch's judgment of such arguments in the Schlegelberger case: "For the man of the law seeing that a frontal attack against an evil situation appears impossible, the only way is to acknowledge that in legal terms there remain no remedies except those with which he would stain his own reputation" (*op.cit.*, p. 62).

While in Knieriem's mind the first argument serves those who framed the legislation, its application by a judge, constituting the putting into practice of "valid" law, was no offense if the judge did not know that he acted wrongly (p. 284). Knieriem overlooks that the Federal Court considers that the application of excessively severe punishment in cases clearly not warranting such action is a crime, even though the law under which the judge was operating would authorize such sentence. Bundesgerichtshof, Entscheidungen in Strafsachen, Vol. 3 (1952), pp. 110, 118; Vol. 10 (1958), pp. 295, 301.

mand relations."[39] The harsh judgment is not unwarranted. However, a differentiation imposes itself.

Military command relationships on the lower level, where strict discipline and complete subjection of the individual judgment to that of the commanding officers may be the price of survival, are quite different from the social reality of higher level command relations. Except for their outward forms, higher level military command relations are more like relations within what might be abbreviated a power elite, and should correspondingly be judged in these terms.[40] In contemporary bureaucratic establishments only the lower level, doing a more or less repetitive, partly mechanical job, finds both work routine and assignment externally determined, with a minimum of its own control over rhythm and conditions of work; for many jobs this involves difficulties even in asking for reassignment. In contrast, the executive groups, whether public or private, find their assignments rely much less on explicit, formal rules than on traditions and goals of their organization. The more important their place in the organization, the more intimate their knowledge of its ways, and the more strategic their role in the system of intra- and interorganizational coteries and alliances, the better their chance to evaluate the force and speed of outside demands on the organization and of the ways and means to cope with them. None of the higher executives could adequately perform his job or reach some measure of personal security if he did not try to become as conversant as possible with the action patterns of related and superior organizations which could harm his own setup. If the whole political regime changes, he might flatter himself for a time on his ability to safeguard the integrity of his own organization while outwardly going along with policies which he knows to be unacceptable by the standards of human decency. But in every case there will come a point when the illusion that one's own influence can arrest more general developments will be dis-

[39] See, for example, Pierre Boissier, *l'Epée et la Balance*, Geneva, 1952, esp. pp. 89, 140; Jean Pierre Maunoir, *La Répression des Crimes de Guerre devant les Tribunaux Français et Alliés*, Geneva, 1956, with interesting material on the possible effect of the 1949 Geneva Red Cross Convention on Korean war practices.

[40] There is an instructive German discussion in Beilage zu Das Parlament, July 17, 1957, on "The Criminal Order," dealing with the legal implications of and the attitudes toward the so-called "Commissar Befehl" by high level German officers; see esp. the comments of the prosecutor Hölper (p. 438), emphasizing the relation between command position and degree of knowledge, and of Freiherr von Gersdorf, which relates a commanding general's reaction when asked to participate in a common protest to Hitler against the illegality of the "Kommissar Befehl": "If I do that, Hitler will send you Himmler as commanding general" (p. 439). (He visualizes Hitler's retaliatory action in terms of his replacement, not his punishment!)

pelled. At this moment there arises the conflict of open resistance or silent withdrawal. No successor regime can legitimately judge the elite of its predecessor according to its willingness to engage in active resistance. Active resistance will always remain a highly personal decision. However justified resistance might be, to whatever degree constitutional settlements may make a show of recognizing the right to resist oppression, any existent regime will consider resistance a sacrilege. Its justifiability will only be vindicated in the courts and market places of a strong successor regime.

If active resistance to the oppressor is therefore an illusory yardstick, withdrawal from significant participation in public life of the defunct regime, industrial command posts included, is a legitimate yardstick. It could be otherwise only if the individual in question established proof that such withdrawal would have been tantamount to a serious threat to his life. A large body of experience teaches us that many men show a fatal proclivity toward pushing themselves, or allowing themselves to be pushed, into positions where they know in advance the honors and rewards will entail corresponding entanglement and responsibility.[41] But vague assertions to the contrary,[42] it is much less certain that incumbents who under some pretext did drop out incurred major risks. Only when a regime is nearing its final agony will last-minute deserters be uniformly treated without mercy by those whom they desert and those whom they seek out. Otherwise, terroristic regimes will discount the value of those who vacillate and will ridicule the scruples of those too weak to serve. Too irresolute either to resist or to serve, they may, from the viewpoint of the regime, just as well withdraw into obscurity.

[41] The recent book by Herbert Schorn, *Der Richter im Dritten Reich*, would confirm this position. Its comments on p. 114 demonstrate (a) that with enough perseverance it was possible for a judge to have a nomination to a "special court" withdrawn under some pretext; and (b) that there were enough judges available who thought it would enhance their career prospects to work on the bench of a "special court" that was handling cases in which the regime took a special interest. There is a conclusion that Schorn refrains from drawing: a silent strike of the profession, with its great majority refusing to serve on such courts, would have embarrassed the regime, lowering its prestige with the population at large.

[42] Knieriem, *op.cit.*, p. 263; but see Donnedieu de Vabres, *op.cit.* (n. 22 above), p. 570. The state of necessity pleas have been dealt with at various times in the decisions of American military tribunals in Nuremberg. The plea has been rejected —in somewhat extreme terms—in the Krupp judgment (German trial record, pp. 13,396-97); here as well as in others, among them the so-called Wilhelmstrasse judgment, the rejection of the plea rested on the absence of proof of an imminent danger to life and limb; Wilhelmstrasse trial record, p. 27,468. In contrast, the court in the Flick case (trial record, p. 10,736), without going into any details, has accepted the plea in regard to three of the defendants.

But for exactly the same reason—a modicum of danger to their personal security—willingness to disappear into oblivion is a standard which may be rightfully imposed by those sitting in judgment over the elite personnel of a regime which, during its course, gave rise to many practices constituting crimes against the human condition.[43]

III. The Prejudicial Court. The last two arguments are of a wider nature, and while they were utilized by the critics of Nuremberg for all they were worth, they could be leveled with equal force against all political trials, and especially against all trials by successor regimes. The third argument concerns the partisan quality of the court. It has been asserted very often that the judges in Nuremberg were the judges of the victors. It is alleged that the defendants should have been tried either before a tribunal composed from the ranks of victor, neutral, and German judges or, still better, before an exclusively German tribunal. The latter, it is said, would have guaranteed the application of familiar German substantive and especially procedural rules, rather than the hodgepodge of retroactively applied foreign *ad hoc* substantive law and the mostly Anglo-American procedure to which the defendants and their German lawyers saw themselves exposed.

As to the court of the victor argument, the rebuttal is simple and unavoidable. It goes straight to the very nature of political trials. In all political trials conducted by the judges of the successor regime, the judges are in a certain sense the victor's judges. Whether their jurisdictions have been newly formed, or whether they have been confirmed, with whatever modifications, by the victors, they will be working on the basis and within the framework of the legal organization created by the political system of the victor. In a somewhat wider sense, all judges, not only those of a successor regime, are working under the conditions of the existing legal and political system which they are dutybound to uphold. Could John Lilburne decline the judges of Charles I or of the Long Parliament; could Gracchus Babeuf make his rejection of the Haute Cour of the Directoire stick; General Mallet refuse to have truck with Napoleon's military commission; or did Daladier and Léon Blum and three years later Pétain have more luck with their attempts to contest the jurisdiction of the various high courts installed by the respective regimes of the day?[44]

[43] See also Appendix B. Guillaume du Vair: The Case of a Successful Loyalty Shift.

[44] A recent incident sharply illuminates the extent to which jurisdictional complaints are now considered a necessary property of any major political trial. At the very opening stage, when public attention is greatest, these complaints give the trial an air of legal finesse and propriety without ever putting the regime that is staging the

In the London discussion on organizational form, law, and procedure of the future International Military Tribunal, there were apparently two theses on the function of the judges and the character of the future trials. With a realistic appreciation of the historical role of the forthcoming trial, but with a lack of subtlety quite understandable against the background of the political trial formulas of the Stalin period, General Nikitschenko, the USSR representative, emphasized that the speedy procedure he wanted adopted should guarantee the execution of the decisions regarding the chief war criminals; these decisions, which he called "convictions," had been previously announced by the heads of the Allied establishments.[45] Justice Jackson thereupon took to underline the traditional Western position on the distinction between the executive power to set up a tribunal and organize the prosecution, and the independent role of the trial judges evaluating the evidence presented to them.[46] Both the cynical realism of the USSR representative and the apparent traditionalism of Justice Jackson overstate their respective cases.

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trial in any untoward danger. The rejection of the jurisdictional objection is a foregone conclusion.

In April 1960, *in absentia* proceedings opened before the High Court of the DDR against the West German Minister of Expellee Affairs Theodor Oberländer, for his participation in war crimes. The DDR court provided two defense lawyers, including the chairman of the East Berlin Lawyers' Cooperative, and the defendant himself took no notice of the proceedings. The lawyers proferred written objections against the jurisdiction of the DDR court. These were rejected, with great learning, by a professorial member of the bench (*Neues Deutschland*, April 21, 1960). Thereafter, the prosecution began to produce experts and witnesses from the DDR and other eastern states, connecting Oberländer with the elaboration of war crimes policy. Local inhabitants, too, identified the defendant as having been personally present at and in command of the commission of atrocities. The trial reporting does not mention any attempt by the official lawyers to question the story of the identifying witnesses, even leaving a perfunctory "Are you certain?" kind of query to the president. (See the testimony of the witnesses Kuchar and Hübner in *Neues Deutschland*, April 23 and 24, 1960.)

Jurisdictional objections give the performance the atmosphere of a trial; otherwise, the scenario is arranged to cast as few doubts as possible on the perfection of the propaganda image to be produced by the trial. Analysis of the judgment, distributed as a supplement to *N.J.*, Vol. 14 (May 20, 1960), No. 10, would confirm this impression. An almost simultaneous preliminary investigation of the Bonn district attorney's office, based on the testimony of witnesses located in Western lands, led to a *nol pros* fully rehabilitating Oberländer in regard to his alleged participation in atrocities. In neither of the two proceedings was there an opportunity for the two sets of witnesses, from East and West, to confront each other. But the rulers of the DDR were at a tactical advantage: they had proposed a joint investigation which, as they knew beforehand, the Federal Republic would be unwilling to accept.

[45] *International Conference on Military Trials*, pp. 104-05.

[46] *Ibid.*, pp. 113, 115.

Occurring in the wake of a National Socialist defeat, the trial could not but take the defeat of National Socialist doctrine and practice as its starting point. But in the Western mind this self-evident fact did not exclude judicial freedom of appreciation of the role of the individual German leaders. This fact was expressed, among others, against the protest of the USSR member of the court, in the acquittal of three of the defendants in the proceedings before the IMT. The antithesis between *judicial tribunal* and *manifestation of power*, which pervades part of the war crimes discussion and also finds its way into some of the judicial opinion on the war crimes issue,[47] therefore misses the point. The appointment procedure and the nature and genesis of applicable texts do not in themselves decide the character of proceedings. When determining the type of credit and rating given to a successor trial, one must take equal account of the method of examining and evaluating submitted facts, for it reflects the tribunal's amount of independence from momentary outside pressures.

The IMT had been mandated to follow up the political eradication of National Socialism and the general revulsion from its inhumanity by a search into individual responsibility for National Socialist policy and action patterns. To this extent, the addition of judges from neutral nations, while psychologically possibly useful, would have created great inconvenience for Allies and neutrals alike. It would have forced these nations to underwrite the Allied policy on which the trial rested; and it would have made a semblance of unified conduct of the trial by prosecution and court, which was difficult enough, almost impossible. In essence it would have meant the anticipation of a world penal court which, despite all projects in this direction, has, in the absence of a unified world community, never been established. The proceedings before the Eastern War Crimes Tribunal have grown no less objectionable

[47] See the Indian judge Pal's dissenting opinion, which uses this point as one of his main arguments to brand the proceedings before the International Military Tribunal for the East as outside the province of genuine legal proceedings. *International Military Tribunal for the East*, dissident judgment of R. B. Pal, Calcutta, 1953. Justice Douglas, in his concurring opinion in Koki Hirota, Pet. v. General of the Army Douglas MacArthur et al., 330 U.S. 197, 205 (1948), turns the same argument into grounds for rejecting Supreme Court review of the proceedings of the Eastern IMT. "It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law." Douglas compares the American president's political decision made in conjunction with America's allies on how to treat the enemy leaders with the 1815 decision to banish Napoleon to Elba. However, the fact that similar proceedings could have been applied to the Japanese leaders by executive fiat does not control what standard and criteria should apply once an irrevocable decision in favor of a trial has been made.

by the Indian judge Pal's being given the opportunity to pen to them his fulminant dissent of principle.[48] Whatever its legal shortcomings, the charter that established the function of the IMT expressed the objective necessities of a political situation which in this case—possibly a rare but salutary coincidence—happened to conform with the moral consciousness of humanity at large.

To say that a German court, dealing with the defendants under German law, would have been more appropriate is more than an argument to impugn the fairness of the trial in technical terms; it wants to convey the opinion that an indigenous German trial would have been able to provide a greater amount of "objectivity." The reverse would be nearer the truth. The victorious Allies could be nothing but inimical to the National Socialist system as a whole. However, the cases of the individual defendants were for the judges nothing but news items. They had little, if any, relation to the judge's own life experience, and this guaranteed a maximum of fairness in the weighing of the individual charges. Unlike the German proceedings against German officers indicted for war crimes after World War I, which took place before the unregenerated bench of the Leipzig Supreme Court, a German successor trial in the second half of the forties would have taken place before German judges and with German prosecutors from the ranks of those untainted by service under the National Socialist regime; it might also have included both domestic foes and victims of Nazism. It is quite possible that such a trial would have covered different territory and have led to a closer and more vivid understanding of the action patterns of the defendants. From the viewpoint of the defendants, this might not have been an advantage. Equipped with the weapons of continental criminal procedure, the court would have concentrated the conduct of the trial in its own hands, rather than presiding impartially over a time-consuming contest between a great variety of prosecutors and defense lawyers. Without need to engage in prolonged wrangling over the admissibility of evidence according to rules originating in the practice of jury trials, and without need of cumbersome translations, it would have judged the documentary evidence against the background of its own knowledge, understanding, and experience of National Socialist policies and procedure. A German court if left its freedom would naturally have shown less interest in one of the most problematic aspects of the various Nuremberg trials: the definition of the

[48] The manifold and quite substantial objections to the proceedings of the Eastern IMT are discussed in J. A. Appleman, *Military Tribunals and International Crime*, Indianapolis, 1954, Ch. 38.

boundary lines of the rules of warfare under actual combat conditions. Instead of discussing crimes against peace, it would have concentrated on some of the domestic aspects of the regime, specifically omitted from consideration by the IMT. Whether the judgments and sentences of German courts would have evoked a more positive response from the German citizenry and thus helped the population to come to a sharper and less opportunistic appreciation of their immediate past; whether it would have led to a more rational pattern of dealing with a great variety of offenders against the concept of the human condition, and avoided the spotty, lottery-type trials now taking place over much too long a period of time before the regular German courts—this is another question.[49] But the claim that the juridical liquidation of the National Socialist heritage by the foreign "victors-successors" was less dispassionate than corresponding proceedings before indigenous German jurisdictions would have been in 1946 and 1947 is, to put it mildly, hard to believe.

IV. Tu Quoque. Successor justice is both retrospective and prospective. In laying bare the roots of iniquity in the previous regime's conduct, it simultaneously seizes the opportunity to convert the trial into a cornerstone of the new order. Against the inherent assertion of moral superiority, of the radical difference between the contemptible doings of those in the dock and the visions, intentions, and record of the new master, the defendants will resort to *tu quoque* tactics.

This fourth and last argument raises the objection that the new regime is guilty of the same practices with which it now tries to besmirch its predecessor's record. It is advanced as an estoppel against the victor's attempt to call into question the lawfulness of acts by the defendants. It was anticipated in the discussions of the London War Crimes Commission,[50] and it formed a weapon which the Nuremberg defense frequently tried to use and to which later critics returned frequently and invariably when assailing the Soviet Union's participation in the Nuremberg proceedings.

[49] Only in 1958 did the various judicial administrations of individual German states agree to put up a joint office which is systematically collecting information on and coordinating investigations of people suspect of participation in various forms of atrocities. Yet from May 1960 on, prosecutions for anything but first-degree murder have been excluded through the operation of the statute of limitations. Parliamentary attempts to defer the statute's coming into effect have been justifiedly defeated. German authorities had a full decade to get busy, and, official assertions to the contrary, could have undertaken many more prosecutions than they managed to do. At best, uncertain shifts in public appreciation are not a good enough reason to withdraw from anybody the benefits of the statute of limitations.

[50] *International Conference*, pp. 102, 304-06.

In a wider sense, the *tu quoque* argument could be leveled against any type of terrestrial justice. Only the archangel descending on judgment day would be exempt from the reproach that blame and praise have not been distributed according to everyone's due desert. Only a dispenser of justice who is fortunate enough to preside over the ordering of property relations in a society which has solved its problems of economic organization and has satisfied the status and psychological problems of its members would be justified to hold court over offenses against property relations. In matters politic, only a state organization which never applied coercion and foul methods to keep itself in power could bring its foes to justice for unsuccessful attempts to gain power by the same methods. Seneca's query of how many prosecutors would escape conviction under the same law they are invoking expresses an elementary fact of life.[51] The *tu quoque* proposition in political trials, therefore, implies more an argument addressed to the public at large and the future historian than a legal defense.[52] In asserting that an accident of history rather than an inherent quality of those who govern determines who should sit in judgment and who should be the defendant, it tries from the outset to devaluate the meaning and import of the judgment.

But *tu quoque* can become a legally pertinent objection only if it is built up enough to indicate the lack of universally agreed norms. It cannot simply show what is usual, that the prosecution has not shown the same zeal against violators of a universally acknowledged norm in its own ranks.[53] Whether the legal claims of the new order will ever be converted into moral claims, with present power holders being able and willing to live up to their own new order concept, is a question only posterity will answer. A judge who is more than a technician translating prevailing trends into formal community evaluations will strive, at least in his sentencing practice, to weigh the known, presumed, and ex-

[51] *De Clementia*, I, 7.

[52] A recent attempt to invoke *tu quoque* occurred before a Paris military court, when the lawyers tried to relate the attempts of their NFL Algerian clients to assassinate Soustelle to French depredations in Algeria for which they made him responsible. *Le Monde*, February 7, 1959.

[53] It has been asserted that while the appeal to *tu quoque* has no place in municipal criminal law, the situation should be different in international criminal law. Under municipal law, it is argued, any person may register grievances to the authorities, which the latter are dutybound to follow up. Thus anyone could function as initiator of criminal proceedings. Such possibilities of redress would be lacking in international criminal law; see Jeschek, *op.cit.*, p. 277. This argument would be valid only if the legality principle were everywhere observed; moreover, it shows a somewhat mechanical faith in the operation of the administration of justice.

pected sins of commission and omission of his own side against the depredation of those whom the course of events has brought before him. But it would be foolish for a defendant to rely on what might at the very best be an unusual coincidence, the presence of a sensitive and fearless judge.

As to *tu quoque* in the trial before the Nuremberg IMT: both in its acquittals and gradation of punishment—which were by no means only mechanically related to the number of counts under which the defendants were found guilty—the court made an attempt to differentiate between the various incriminating fact situations. Of those misdeeds which we call offenses against the human condition, no comparable practices of any state of the world, whether represented on the bench or not, could serve in exculpation or mitigation, even if the court had allowed greater latitude in introducing proof of such misdeeds by victor nations. In cases where the *tu quoque* argument was salient and strong enough to raise doubts about the existence of a well-established body of law, as happened in regard to unlimited submarine warfare, the court disregarded the respective incriminations.[54] But in cases concerning the participation of the USSR in acts of aggression or their utilization of prisoners of war in danger zones, the court rejected the argument at hand. Obviously, the more nearly identical the asserted practices were with those which the court was asked to judge, the less moral ground the court's rejection had.[55]

C. THE QUALITY OF A COURT

The Nuremberg trial had its own peculiar dialectics. It constituted an attempt to enforce on a multinational basis criminal responsibility for political action whose implementation involved crimes against the human condition. The criminal action may have been planned from the outset as integral to the political planning, as in the liquidation of Jewry. Or it may have been improvised as the most efficient or least burdensome way to carry through the military and political program, as in the murdering and starving to death of millions of PWs. As the case was unprecedented, so was the pattern of the four-state prosecution, the criminal procedure, and the criminal law fashioned for the purpose by the statute elaborated at the London International Conference and by the Nuremberg court. Therefore, when compared with any homegrown

[54] See, for example, the motivation of the Doenitz sentence, *IMT*, Vol. 22, pp. 556, 559, and the Raeder sentence, Vol. 22, p. 561.

[55] A sweeping statement of the court rejecting the *tu quoque* argument may be found in *IMT*, Vol. 13, p. 521.

variety of law and procedure, the case will show any number of anomalies. If these anomalies are stated cumulatively, the proceedings might give the impression of gross irregularity, allowing the trial itself to be put on trial. What would then remain but a kind of morality play which, being refuted immediately thereafter by the course of history, would have nothing to teach? What is the answer?

Recent experience has familiarized us with enough proceedings which do not merit the name of trial to establish the difference between a trial—even though it may have the particular features of a political trial—and an action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results. A trial presupposes an element of irreducible risk for those involved. It derives from the judge's or jury's freedom and their preparedness to evaluate the unfolding of both the official and the defendant's story in the light of a conduct norm. Of this norm the defendants are by and large aware. The judge who mortgages his freedom in advance, whether out of fear or out of subservience, does not, as both German and French courts had occasion to insist, want to act as judge. "Who does not want to render justice cannot invoke the fact that he has observed the trappings of the law, because his fundamental attitude makes it evident that this was only an act of simulation."[56] A judge who is willing to assume the function of a presiding judge—after having assured the minister of justice pushing the proceedings that he can count on him—and sentences defendants to death on the basis of retroactively raised punishment (which the authorizing decree inserted into the law gazette in such a way as to mask its retroactive character) does not partake in the administration of justice.[57] As another example: a court-martial, composed of members handpicked for the case by the secretary general in charge of public order and meeting in the prison director's office, which, in the absence of any defense lawyers, sentences to death 28 defendants within four hours for participation in a prison riot "cannot be considered to have rendered a judicial decision."[58]

Even in the administration of injustice, however, there are gradations. In the courts-martial of the Vichy militia and the people's tribunals of the first liberation days, enemies, whose fate had been settled in advance, were butchered. The liberation type of cour de justice, with all its

[56] Bundesgerichtshof, Entscheidungen in Strafsachen, Vol. 10 (1957), pp. 295, 301.

[57] This incident of summer 1941 is narrated in detail in Robert Aron, *Histoire de Vichy*, Paris, 1954, p. 416. For a feeble attempt by one of the main participants to explain away his role in the case, see *France Under the German Occupation*, Stanford, 1959, Vol. 2, p. 595.

[58] *Cour de Cassation*, 1948, No. 133, p. 199.

prejudices, allowed for some primitive rights of defense.[59] Finally, there is the marginal case of an elaborate military commission set up by the United States for the trial of Japanese foes. The commission held months of formal hearings; the lingering doubts pertained mainly to the ways of handling evidence and to the question of the commission's *de facto* independence of the commander in chief.[60] In each case the tribunal sought the mechanical certainty of the result while trying to partake—illegitimately—in the creative suspense of a result which can legitimately originate only in the unfolding of the trial itself.

Viewed in this light, the Nuremberg trial before the IMT was not a simulated trial. If there was some measure of retroactive law applied, not only were the defendants, while acting, fully aware of the possible consequences of their action, but, as pointed out previously, their sentences could be explained without resort to the retroactive features. The jurisdictional problems of the trial, if compounded by the multinational character of the prosecution, were not particular to this trial. They are, as shown, common to political trials and inevitably connected with trials by successor regimes. As in all such trials, the general frame, though not the decisions reached for the individual defendants, was set by the political and military context in which the trial took place: to confirm the defeat of Hitlerism. Whatever pressure there was, was of the situation rather than of an organized group determined to have its way. It was no organized Montagne asking for the head of the king, no clamor of the street, as in Polignac's case. It was the language of the charnel houses, the millions who had lost their families, husbands, or homes. If isolation against this language was possible or even desirable for the calm of the judicial process, such calm was better guaranteed in the chambers of the Nuremberg Allied and American Temporary War Crimes bureaucracy than in the disoriented minds and bare courtrooms of the 1946 and 1947 Germans.

It has been shown how difficult it will be in the future to have recourse to violent political change on a state-transcending level without at the same time creating situations that lead to the very negation of

[59] For these gradations, see Robert Aron, *Histoire de la Libération de la France*, Paris, 1959, pp. 532ff.

[60] See the dissenting opinion of Justice Rutledge re Yamashita, 327 U.S. 48, 56 (1945), and Frank Reel, *The Case of General Yamashita*, Chicago, 1949, p. 162. In fairness to the commission, it must be pointed out that its judgment rested essentially on the defendant's responsibility for omitting supervision of the military forces under his command. The defense tried to show either that atrocities committed did not occur under the defendant's jurisdiction, or that he had had no power to prevent them. However, he submitted scarcely any affirmative proof that he had positively tried to prevent such occurrences.

the "human condition." And in wading through the evidence on mass annihilation and mass enslavement, those fact situations which we have since come to describe as genocide have established signs, imprecise as they might be, that the most atrocious offenses against the human condition lie beyond the pale of what may be considered contingent and fortuitous political action, judgment on which may change from regime to regime. The concrete condition under which the Nuremberg litigation arose and the too inclusive scope of the indictment may make it difficult for us to separate the circumstantial elements which it shares with all other successor trials[61] from its own lasting contribution: that it defined where the realm of politics ends or, rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity. In spite of the Nuremberg trial's infirmities, the feeble beginning of transnational control of the crime against the human condition raises the Nuremberg judgment a notch above the level of political justice by fiat of a successor regime.

4. Trial Technique: Eternal Quest for Improvement

Of all the shortcomings of the Nuremberg proceedings, none has been more consistently attacked than the inequality which existed between prosecution and defense. This inequality was grounded in the procedural law applied. In the absence of a court—it was established only after the indictment—the whole trial preparation was left to a prosecution working in conformity with Anglo-American rather than continental practices. Continental prosecution, at least in theory, means that a state organ sifts impartially all available evidence. The Nuremberg prosecution aimed at convicting the defendants. Beyond this, it was impossible for the defendants to resort to counsel in the pretrial stage.

[61] Not only successor trials. Because of the division of Germany, the judges of one regime, the Federal Republic, may be sitting in judgment over the (fugitive) judges of the courts of the DDR. See the decision of the Bundesgerichtshof of January 28, 1959, reported in *Recht in Ost und West*, Vol. 2 (1958), p. 204. The fugitive DDR judge who presided over a trial of five Jehovah's Witnesses was prosecuted and convicted of having deflected the law to the disadvantage of a party (par. 336, Penal Code). The conviction was quashed, with emphasis resting on the question of whether the judge, while acting as he did, was convinced that the law he applied was binding. However, the court must have realized that this argument might open up more questions than it was then prepared to tackle. (The same argument could obviously have been used, and was used, to defend the record of NS judges; Max Güde, *Justiz im Schatten von Gestern* [cited above, Ch. I, n. 4].) Thus the argument adds a number of more concrete grievances against the lower court judgment, including the compulsion under which the judge may have acted.

The second disadvantage was a great factual inequality between prosecution and defense. Powerful, if not highly organized, the prosecution could roam around freely, collecting its material and marshaling its witnesses. The defense had meager resources and, due to prevailing conditions, restricted freedom of movement outside the courtroom. Though always in evidence, however, this inequality affected the outcome of the trial less than it might have. The prosecution's case rested less on oral testimony than on the production of documentary evidence taken from original German files. Thus there was little of the uphill battle of a defense exposed to partisan witnesses of the victorious side and unable to marshal effective enough testimony in rebuttal. The defense's problem was an intellectual one: to explain why the responsibility for whatever had happened did and could not rest with their clients. Despite multiple handicaps, the defense was equipped to handle the problem.

All this is well known. What is less well known is the extent to which these disadvantages contain risk elements inherent in all criminal trials, not only in this specific trial. The following pages, therefore, will try to show that a) the risk deriving from factual inequality in trial representation is one of the most doubtful features in Anglo-American trial practice, and that b) the European trial procedure, recommended by many of the critics of the Nuremberg trial, has, for quite different reasons, as strong a built-in aleatory element as the Anglo-American practice.

How does trial organization affect the outcome of the political trial? Anglo-American and continental trial organization rest on two radically different assumptions. The Anglo-American trial remains essentially at the disposal of the parties, while the continental trial revolves around the judge's own responsibility to search for the truth. Anglo-American adversary procedure organizes the trial as a battle of wits between the prosecution and defense, with the judge acting as their referee, constantly deciding what line of questioning and what material should be allowed to enter the minds of the jury. Yet the judge's authority in this respect may be more official than real: a skillful lawyer will be able to make his point before his adversary can open his mouth to object. The resulting wrangling on admissibility and the judge's ritual exhortation in summing up what points to disregard—for example, the political loyalties of the defendant in an espionage trial—only make the forbidden fruit more tempting to the jury than all the rest.[42]

[42] Judge Jerome Frank refers to such warnings as "an empty ritual," and infers that the only remedy is to waive a jury trial. United States v. Rosenberg, 195 F 2d (CCA 2d) 582, 596.

Anglo-American procedure takes this chance as part of a deep-seated conviction that from the endless flow and counterflow of argument, centering on the prosecution's attempt to make the indictment stick, with both defense and prosecution mercilessly searching into and exposing the weaknesses and inconsistencies of each other's position, the truth or falsity of the indictment will finally emerge. This method is at its best when a revealing flash illuminates the whole situation. Even if it languishes under the seemingly uncoordinated chaos of themes and materials, now picked up, now discarded, according to the whims and hunches of the lawyers, a jury might not miss such a flash, especially as the lawyers will endlessly amplify it and drive its impact home relentlessly while summing up. If neither party is blessed with such luck, the lawyers will have to rely on thumbing methodically through the material—an ungrateful job under the circumstances of adversary procedure—and either put together isolated parts into a composite picture or tear them asunder before they are firmly joined.

To yield satisfactory results, adversary procedure rests on the implied premise of a strictly maintained legal equality between the parties, on their parity in research, resources, and preparations, and above all on forensic skill and general level of intelligence. If the defense lawyer lacks these prerequisites, may parity be restored by the judge's intervention? Many authorities will answer unhesitatingly in the affirmative, upholding the judicial practice not only to put to the witness additional questions that are liable to clarify an issue, but also to call additional witnesses, even expert witnesses, if need be; the latter the judge may do on his own.[63] The proposition sounds excellent on paper, but how would it fit into the system of adversary proceedings?

To take a concrete example from recent political trial practice: in the Rosenberg trial the only witness to the open act, David Greenglass, contended that he had delivered drawings made from memory to Julius Rosenberg. The circumstances under which copies of such drawings were made by Greenglass, while under detention, became therefore

[63] This position is held most strongly by Wigmore, *On Evidence*, 3rd ed.; 1940, Vol. 3, par. 151, and Vol. 9, par. 2484. See also the opinion of Justice Frankfurter, dissenting in Johnson v. United States, 333 U.S. 46, 54 (1948): "Federal judges are not referees at prize fights but functionaries of justice"; and the note, "The Trial Judge's Views of his Power to Call Witnesses—an aid to adversary presentation," *Northwestern University Law Review*, Vol. 51 (1957), pp. 761-74. There is a particularly instructive discussion by Judge Charles Wyzanski, "Freedom of the Trial Judge," *Harvard Law Review*, Vol. 65 (1952), pp. 1281-1304. However, it should be especially noted that Judge Wyzanski gives two telling examples from his own trial practice (p. 1284), showing that in political libel cases "the judge is not the commander but merely the umpire."

vital for the evaluation of Greenglass's testimony. Mr. E. H. Bloch, Jr., the defendant's principal lawyer, did not call the prison officials to learn in somewhat greater detail how the copies of these blueprints originated. Did he just forget about the possibility? Not very likely. Or, given his pattern of submissiveness and exaggerated deference to the judge, only hiding with difficulty his marked feelings of insecurity, did he take a cue from the judge's remark that the charge related to the transfer of secret material rather than to its accuracy in detail?[64] In this case an insecure lawyer might well have become doubtful about the importance of the question. Or did he simply follow the instruction of his clients who did not expect to benefit from such testimony? The same would hold true for what might have been the equally vital testimony of an expert witness who had probed into how a person with David Greenglass's mediocre school record could develop the ability to produce such sketches from memory. Again, did Bloch never think of such a possibility? Did he or his clients have no resources for hiring such experts, or did his clients, again for good reasons of their own, not want to pursue this line?[65] Conceivably, the judge might have made good some of these omissions—if they were omissions, which obviously we do not know. But the judge in his own mind might have been quite satisfied with the degree of preciseness with which the FBI witness testified on the origin of the copy blueprints, and with the answers given by Greenglass when Bloch tried his hand in probing into his amount of technical knowledge.[66] Moreover, if, in this deeply politically tinged case, supplementary witnesses had provided further support for the allegation of the prosecution, it would have appeared as if the judge had taken it upon himself to tip the scales against Bloch's clients.[67]

[64] Transcript of record, Vol. 1, p. 613 (reprint by Sobell committee).

[65] John Wexley's ex parte work, *The Judgment of Julius and Ethel Rosenberg*, New York, 1955, reproaches Judge Kaufmann for preventing Bloch from asking the witness Derry the "all important" question (p. 430) relating to Greenglass's capacity to prepare a copy unaided. However, Bloch's question was rightly excluded, as the answer was not in the witness's province. But Wexley fails to enlighten his readers on why Bloch did not present his own expert probing into Greenglass's intellectual capacity, as, for example, the Hiss defense did in regard to the mental state of Chambers. Wexley states (p. 432) that "there was no time given the defense during trial to elicit expert opinion on the question." He adds as a footnote that it is highly doubtful that any American scientist would have risked his career in challenging the very essence of the government's case. The trial record shows no attempt by the defense either to call such an expert to the witness stand or to secure a recess to procure such an important witness after the defense must have recognized the importance of the issue from Greenglass's testimony.

[66] Transcript, Vol. 1, pp. 610, 611.

[67] See the comment of Judge Wyzanski, *op.cit.* (n. 63 above), and Bernard Botein,

The American judge's interference with the arrangement of testimony—at best an exception in proceedings at the disposal of and under the responsibility of the parties—is necessarily limited. Unlike British proceedings, the frame within which federal judges and most state judges may comment on the evidence in their summing up is rather narrow.[68] Thus if one follows the activist school, the judge would be able to take a decisive part in the trial but be unable to evaluate the meaning of his interference: a somewhat contradictory situation. Moreover, one of the most fateful trial decisions, whether to put the defendant on the stand or not, must remain entirely outside his province. Judicial activism and adversary principle are not easily compatible. But the Rosenberg case, where a smoothly functioning prosecution, abundantly equipped with resources, manpower, intelligence, and self-confidence, confronted a struggling lawyer who had little confidence in his own ability, vividly illustrates the inherent limitations of the trial by combat principle. Just because the case as built up by the prosecution was logically consistent and might well have reflected rather clearly the actual sequence of happenings, at least as far as the Rosenbergs were concerned, the absence of a more powerfully presented defense was felt all the more.[69]

But what about the continental procedure? While under Anglo-American procedure the prosecution tries to establish proof of the contentions made in the indictment, with the defense trying to refute same, in continental European practice the act of accusation only offers the court a preliminary version of the historical happenings. It is the job of the court to find that reconstruction of the historical incident which will serve as an adequate basis for the verdict. In this job of reconstruction the judge is not bound by the assertions and offerings of either party; rather, both prosecution and defense, although given a number of procedural prerogatives, among them to call witnesses and experts, remain auxiliaries of the court.[70] The court, sitting mostly with some lay

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Trial Judge, New York, 1952, p. 104, who quotes the telling remark on the troubles of a judge taking over the questioning of a witness when confronted with an inexperienced lawyer: "Judge, I don't mind your trying the case for me, but for God's sake, don't lose it."

[68] The rules were laid down in Querica v. United States, 286 U.S. 466 (1933).

[69] For an incisive comment on the potential consequences of inequality in representation, see Joseph B. Warner, "The Responsibilities of the Lawyer" (*op.cit.*, Ch. VI, n. 31), p. 326. For an example of the dominating influence of an insufficient defense, see G. Louis Joughin and Edmund M. Morgan, *The Legacy of Sacco and Vanzetti*, New York, 1948, Ch. III.

[70] See the discussion in Ursula Westhoff, *Über die Grundlagen des Strafprozesses*

assessors, does not have to face the problem of keeping a jury both instructed and protected against possible prejudicial knowledge. Consequently, it will be both willing and able to admit almost any evidence liable to throw light on the incident under discussion. But it is the court which will direct the taking of the evidence toward as coherent a picture as possible. Proceedings will first concentrate on interrogation of the defendant who, as he does not testify as a witness, may answer as he sees fit. The witnesses, too, will be questioned by the judge, with the parties as a rule expected to ask them questions through him. It goes without saying that in proceedings dominated by the judge, he can call supplementary witnesses and appoint experts of his own in pursuance of his search for the objective truth.

But this concentration of power in the hands of the judge, somehow uniting in his person the functions of prosecutor, defense lawyer, and truthfinder, has a built-in shortcoming. To be able to direct the proceedings with authority and efficiency and to concentrate the hearings from the outset on the relevant points, rather than to listen to whatever the parties see fit to submit, the judge will have to be fully informed about all that has transpired at the pretrial stage. Unless a pretrial motion has by chance come his way, the Anglo-American judge enters the courtroom with his mind a *tabula rasa*. The continental judge, though, will have made a painstaking study of the whole file of the case transmitted to him by the prosecutor. It will contain everything which has transpired so far, including police reports, pretrial depositions of defendants and witnesses, and defense motions to the criminal record of the defendant. As he has perforce formed some opinion on the case, his is the temptation to make reality conform to the file.[71] Unlike his Anglo-American colleague, he might well go on questioning and calling witnesses until he arrives at what seems to him the most meaningful reconstruction of reality. But he may in point of fact be satisfied with much less: with the facile confirmation of what his blue and red pencils have previously underlined in the file as his understanding of the

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mit besonderer Berücksichtigung des Beweisrechts, Berlin, 1955, esp. pp. 62 and 173; see also Binding, *Strafrechtliche und Strafprozessuale Abhandlungen*, pp. 190-201. Art. 166, II, of the new French Code of Criminal Procedure, establishes the rule that if, in the opinion of the court, an expert opinion becomes necessary, two experts should be immediately appointed by the bench. They would be asked to furnish a joint report or, if necessary, to discuss explicitly the reasons why they have arrived at different conclusions from one another.

[71] See F. Hartung (former judge of the Leipzig Supreme Court), "Einführung des Amerikanischen Strafverfahrensrechts in Deutschland?" in *Festschrift fur Rosenfeld*, Berlin, 1949; and Maurice Garcon, *op.cit.*, Vol. III, p. 26.

relevant facts. Again, this is an extreme. Witnesses, defense counsel, and prosecutor will have the opportunity to mark their points, possibly counteracting the judge's first hypothesis. Both the judge-official who enters the trial with strong preconceptions about the "Gestalt" of his case and the judge-arbitrator who settles for making a go of what parties, often unevenly represented, may have to offer[72] face an equally stiff uphill fight, if they want to arrive at the best possible result.

[72] Hermine M. Meyer, "German Criminal Procedure," *American Bar Association Journal*, Vol. 41 (1955), pp. 592-94, emphasizes the precarious position of the American defendant who depends on the skill of his lawyers. The author also shows the much stronger legal position of the lawyer in European pretrial investigations. The inferior position of the defendant in the American pretrial stage has only recently become the subject of systematic and searching study: A. S. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," *Yale Law Journal*, Vol. 69 (1960), pp. 1149-99; pp. 1163 and 1182-83 are especially relevant to our discussion.