

SECOND GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY¹

HITLER'S COURTS BETRAYAL OF THE RULE OF LAW IN NAZI GERMANY

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Thank you for this honor of giving the second Major General George S. Prugh Lecture on Military Legal History. Given my lack of formal training in military legal history, it is an honor I do not deserve. But as George Burns once said, I have arthritis and I don't deserve that either.

¹ This is an edited transcript of a lecture delivered on 23 April 2008 by Mr. Joshua M. Greene to the members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Va. The chair is named in honor of MG George S. Prugh (1920-2006).

* After returning from thirteen years in Hindu monasteries, Professor Joshua M. Greene became an author, filmmaker, and communications consultant specializing in religion and the peace process. Currently, he teaches in the Religion Department of Hofstra University and at Jivamukti Yoga School in New York.

In 2000, his book *Witness: Voices from the Holocaust* (Simon & Schuster, 2000) was made into a feature film for PBS and voted one of the best Holocaust films of all time by Facets Educational Media. His one-hour family special on cultural diversity "People" debuted at the United Nations, received an Emmy nomination, and has been incorporated into elementary and high school classes nationwide. He is a six-time recipient of TV Guide's Best Program of the Year award.

Mr. Greene's book *Justice at Dachau* (Random House, 2003) traces the largest yet least known series of Nazi trials in history. The book was called "masterful" by *Publishers Weekly* and adapted to film by Discovery. His editorials on war crimes tribunals appear in newspapers and magazines internationally including the *Los Angeles Times*, the *International Herald Tribune*, and the *London Economist*. His biography *Here Comes The Sun: The Spiritual and Musical Journey of George Harrison* (John Wiley, 2006) made the bestseller list. His most recent film for PBS was "Hitler's Courts," which explores the complicity of the German judiciary during the Nazi era.

Greene is a frequent lecturer. Keynotes have included the World Economic Forum, Microsoft, Harvard University Law School, the New York Public Library's Distinguished Authors series, and the Washington Holocaust Memorial Museum. He served as Director of Programming for Cablevision, the nation's sixth largest cable provider, and was Senior Vice President for Global Affairs at Ruder Finn, an international communications firm. In 2000 he was appointed Director of Strategic Planning for the United Nations World Peace Summit of Religious and Spiritual Leaders. He sits on the boards of the American Jewish Committee, the Holocaust Memorial and Educational Center of Nassau County, and the Coalition for Quality Children's Media. He lives with his family on Long Island.

The invitation to be here today prompted me to think about parallels between your career in the military and the calling I followed into Hindu monastic life. We're both up at 5:30 for PT—that's "prayer time" for me. Both paths involve interpreting laws which have far-reaching implications for others. And we both report to superior officers who think they are divinely inspired. There is an upside to our respective callings. We are, I believe, both motivated by selfless service—the term in the Sanskrit language of India is Bhakti, literally devotional service—and we derive a satisfaction, perhaps even a joy in that selfless service which is hard for people outside that experience to understand.

But we also share two downsides to our callings. One is a tendency to become so absorbed in our mission that we can sometimes forget to slow down and smell the roses. At the risk of sounding presumptuous, I'd like to encourage you to take the opportunity of being here at the JAG Legal Center and School to not overlook occasions to catch up with family and friends—and with yourselves as well. We humans seem to make our most meaningful contributions when we are stimulated by new experiences, and that means going outside the parameters of daily routines. My students at Hofstra, for example, are not allowed to quote Wikipedia as a source in their papers. I do that not only because it is poor scholarship but because I want them to get away from their computers and go to a place where serendipity can occur. When you peruse the shelves of a library, you come upon books and sources you never expected to find, and these can inspire very different ways of looking at a problem. That kind of serendipity doesn't happen as frequently online.

The other downside to our respective callings is that we can become tainted by the satisfaction of our mission, lured into believing that our way is the only right way. And that brings me to the subject of the film we are about to see.

Forty years ago this week, when I was seventeen and a freshman at the University of Wisconsin in Madison, I went to work as a reporter for the student paper. UW was a good school but in those days students spent more time in the streets protesting the Vietnam War than they did in class studying. The Madison police force was using Mace to disperse demonstrators, a chemical spray that had put a number of people in the hospital, and one of my first assignments was to write about it.

One day the editor-in-chief called me over and showed me the front page, and there was the lead article citing one Joshua Greene as writer.

That was it for me, and apart from that thirteen-year detour through monastic life, I've been writing and making films about justice and injustice in one form or another ever since.

The Madison police were not bad people. They were church-goers, some had sons or daughters who were attending the university, and back then I could not understand their extreme reaction to student protestors. The reason became clear to me years later, and it was reinforced more recently by producing the film we are about to screen. The police, like many of the student protestors, simply were unwilling to see past their own priorities. They were fiercely loyal to their community, to their families and friends and those who saw things as they did—in other words, fiercely loyal to their own kind. They adhered to a narrow definition of the rule of law as anything which supported their sense of what is right, and anything different needed to be put down.

Let me be clear up front that I am no longer a romantic. My bellbottoms and love beads are safely stowed away in a closet, my wife keeps the only key, and she comes from a family of diehard Republicans. Her vigilance aside, I have done some writing and filmmaking about the Holocaust period and see now what I could not see as an idealistic college student: that there is nothing romantic about transgressing the law however convinced we are of possessing the Truth. Nor is there anything romantic about a government that suspends or subverts the rule of law under a pretext of emergency measures. Not only is it hypocritical to claim we compromise the law in order to defend the law, but it also doesn't work.

Why doesn't it work? We might look at the current recession as a parallel. To no small degree the current fiscal crisis owes its genesis to the corporate catastrophes of a few years ago. Those debacles led to a series of new laws called Sarbanes-Oxley whose purpose, in theory, was tighter control of corporate behavior. In practice, however, the added laws did nothing to curtail malicious business habits. What they did was make white collar criminals more cunning in circumventing regulations. Laws by themselves do little to change people's hearts and a whole lot to make lawyers richer.

“Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany” was produced at the behest of the good folk at Touro Law School on Long Island. Their purpose was to document the connection between the success of tyrants and the failure of lawyers and judges to defend the rule

of law. The bottom line in this film is that our personal philosophies infiltrate and shape our professional behavior. Tell me who your heroes are, and I'll tell you something about how you practice law. Rule of law alone is insufficient. It must be coupled with men and women of impeccable character who can implement the law with integrity of purpose. Briefly, here is the story presented in the film.

In 1933, less than a month after being elected Chancellor, Adolf Hitler used the pretext of a fire in the Reichstag building to suspend Constitutional law and place unlimited judicial authority in the hands of the government. The German legal system in the 1930s was quite sophisticated, but after the burning of the Reichstag—which was more than a symbolic destruction of Germany's Parliament—the vast majority of Germany's judiciary, more than 10,000 lawyers and judges, took an oath of personal loyalty to the Fuhrer. This set in motion the “Fuhrer prinzip,” the notion that Hitler now had absolute discretion to make any ruling whatsoever in the interests of the state, and that lesser “fuhrers” under him had similar discretion limited only by what the fuhrer above had told them to do.

Over the next twelve years, the Nazi party continued its subversion of Constitutional safeguards until Germany's courts amounted to nothing more than tools for the implementation of National Socialism. Early in their subversion of law, Nazi officials established Special Courts to deal with anyone the party deemed an enemy of the Reich. In these courts there was no pretrial investigation, judges determined arbitrarily what evidence to consider, and there was no right of appeal. In retrospect, this would have been the time—while there was indeed still time—for men and women of good faith to stand up and say, “Wait a moment, we have a Constitution in this country, we have rules and laws that we will not see ignored.” Why that did not happen may be a question more aptly addressed by psychologists than historians, but one explanation lies in the response Hitler offered to detractors. “This is,” the Fuhrer promised, “only temporary. We are under attack by terrorists and need to suspend Constitutional law.” If any of this begins to sound familiar, it is.

SIDEBAR

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*“In this hour I am responsible for the fate of the German nation. Hence,
I am the supreme Law
Lord of the German people.”* Adolf Hitler, July 13, 1934

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Once he succeeded in concentrating legal authority into his own hands, Hitler then had the tools for eliminating all those whom he deemed to be enemies of the Reich, most prominently Jews but also other minorities. On April 7, 1933, the German government enacted a law forbidding attorneys of non-Aryan descent from representing Aryan clients. If anyone dared to do so their names were published in the press and their businesses boycotted. This decree was followed by others that incrementally deprived civil rights to these “enemies of the Reich.”

In 1934, the government established the People’s Court to try persons accused of political offenses. Eventually, the court came under the presidency of Roland Freisler, a Nazi of such extreme sentiments that he shocked even his fellow Nazi judges. Freisler was one of an echelon of senior German jurists who paved the way for the subversion of law in the 1930s. Others included Carl Schmitt, Hitler’s legal theorist, a wealthy and ambitious conservative who described the Fuhrer as “Germany’s Guardian of Justice;” and Erwin Bumke, the man who drafted Hitler’s emergency laws. These and other senior officials of Hitler’s courts empowered police to disband organizations, seize assets, make arrests, and determine on their own initiative what constituted a threat to the State.

The Nuremberg Laws of 1935 allowed Hitler’s courts the further liberty of condemning enemies of the State not for anything they had done but on the sole grounds of racial, ethnic, and religion type. These laws reflected Nazi preoccupation with “racial purity,” an idea concocted from vague elements of religion, citizenship, and heredity. Since the laws defined Jews as racially impure, marriage between Jews and non-Jews would defile the race and was now prohibited. Resourceful judges found other applications for the Nuremberg Laws, by arguing for example that because Jews were no longer considered full human beings they did not qualify for legal rights. In effect, Jews and other minorities underwent a civil death long before millions met their physical death in the camps.

With the official declaration of war in 1939, Nazi lawmakers moved into high gear as thousands of so-called enemies of the Reich were arrested and tried. By 1939, roughly sixty percent of all law school professors were Nazi appointees engaged in training a new generation of lawmakers: young zealots raised and educated under Nazi rule. And if some of this new generation harbored misgivings, hardly any ever dared question the Nazi distortion of the rule of law.

Among the few who dared was Dr. Lothar Kreyssig, a judge on the Court of Guardianship in Brandenburg. In 1934, Kreyssig objected to Hitler's euthanasia program and even attempted to prosecute Nazi officers for sending hospital patients to their death. Because he had been a respected citizen, the courts encouraged him to retire ahead of schedule. Kreyssig was left to live out the rest his life in peace. Such leniency was extremely rare. Dr. Johann von Dohnanyi, at thirty-six the youngest member of the German Supreme Court, also spoke out against the Nazi betrayal of justice. He was arrested and later executed at concentration camp Sachsenhausen. The overwhelming majority of Germany's legal community cooperated with the Nazi regime. Postwar statistics estimate that by 1940 the number of death sentences handed down by Germany's various courts had exceeded 50,000 annually, of which more than eight percent were carried out.

Yet another blow to the rule of law took place in September 1942, when the Reich Ministry of Justice empowered the SS to change any court decision it deemed overly lenient. Thousands of prisoners were delivered to the SS at that time for summary execution.

SIDEBAR

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"For the enemy of the state, there is only one course in prosecution and sentencing—unflinching severity and, if necessary, total annihilation." Roland Freisler, President, The People's Court

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On January 20, 1942 a meeting took place in Wannsee outside Berlin. Among those present were Reinhard Heydrich, Head of the Reich Security Main Office; Adolf Eichmann, Heydrich's expert for deportations; and thirteen other high-ranking representatives of the Nazi party. Minutes from the meeting, known as the Wannsee Protocol, spelled out in clear terms plans for the deportation and murder of all European Jews and the active participation of Germany's public administration in the genocide. More than half the participants at Wannsee were legally trained. Heydrich made mention of the fact that he was particularly surprised at how easily the lawyers and judges sitting around the table went along with the others.

In March 1947 the Justice Trial took place at Nuremberg, one of eleven subsequent trials that followed the main Nuremberg trial of

December 1945. The Justice Trial included sixteen defendants who had been members of the Reich Ministry of Justice or of the People's and Special Courts. The trial raised the issue of what responsibility judges have for enforcing grossly unjust but arguably binding laws. The charge was: "judicial murder and other atrocities committed by destroying law and justice in Germany, and by then utilizing the empty forms of legal process for persecution, enslavement, and extermination on a vast scale."

In their own defense, the accused claimed they had stayed to prevent the worst from happening. But after hearing 138 witnesses and introducing more than 2,000 pieces of evidence, the Nuremberg court concluded that the defendants had consciously participated in "a nationwide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity." The court ruled that during the Nazi era "the dagger of the assassin was concealed beneath the robe of the jurist."

Perhaps, given the circumstances and the history of their country, Germany's judiciary was more vulnerable to extremism than other nations. Still, like many Germans then, many Americans today seem to view the imposition of law as a panacea for anything impeding the progress of Democracy as we understand it, at home or abroad. Nazi Germany showed us the risks in taking that assumption too far. Looking back on that dark time in history, we would do well to remember that the strongest weapon against tyranny in all its forms is not the rule of law alone, but the rule of law implemented by men and women of impeccable character.

I'm honored to have shared this time with you today.