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THE LAW IN NAZI GERMANY



Ideology, Opportunism, and
the Perversion of Justice

Edited by

Alan E. Steinweis

and

Robert D. Rachlin



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Michael Siegel, a Jewish lawyer, is paraded through Munich by SA-men on 10 March 1933. Siegel had lodged a protest over the treatment of one of his clients who had been taken into custody. The sign reads, "I will never again complain to the police."
Source: Bundesarchiv, Berlin

Chapter 5

DISCRIMINATION, DEGRADATION, DEFIANCE

Jewish Lawyers under Nazism



Douglas G. Morris

ON 11 SEPTEMBER 1933, IN Samaden, Switzerland, outside St. Moritz, a Jewish German lawyer from Berlin shot himself to death.¹ On 30 January, Hitler had become Germany's chancellor; on 27 February, a blazing fire gutted the main chamber of Germany's Reichstag, its parliament building; and in late March, the lawyer's partner had told him that he intended to dissolve their practice together. The partner denied being an anti-Semite, of course, but times had changed and he needed to worry about his own family and responsibilities. Around the same time, a former client, now a member of the SA, the organization of Nazi paramilitary street fighters, warned the lawyer that he was no longer safe in Berlin and must leave. The lawyer did leave, arriving in Switzerland in mid-April. There he suffered a nervous breakdown. He refused opportunities for work, obsessed about events in Germany, lost weight, and spontaneously broke out into tears. Fewer than a dozen people attended the funeral—much like the burial of Willy Loman in *Death of a Salesman*, it was a small affair that did not match the dead man's dreams.²

As with Willy Loman, the final respects for this Jewish German lawyer evoked a grief chilled by loneliness, exhaustion, disappointment, and a sense of injustice. But there the similarity ends. This funeral was not for a professional failure. This funeral was for Max Alsbberg—the most celebrated criminal defense lawyer of the time. Berliners knew of Max Alsbberg. He was a public figure. When the historian Werner T. An-

gress and his mother were walking in Berlin one day in the late Weimar Republic, she stopped, pointed and said: "That is the office of Max Alsbberg."³ The man was worth noting and the name worth remembering. He represented the rich and the famous. They could not have hired an attorney more knowledgeable in the law or more skilled in courtroom argument. Jurists turned to his legal scholarship, lay people crowded his public lectures. He taught, he edited, and he wrote plays. He accrued a fabulous art collection—auctioned off in January 1934.⁴

We cannot know for sure what drives a man to suicide. Greek heroes sacrificed their lives in the hope of future fame; Alsbberg ended his upon the collapse of his renown. He could not go on without the reassurances from adulating surroundings—from his colleagues, from his adversaries, from his clients, from the public, from his audience. And he could not go on without his immersion in German law. Whatever the psychology behind his suicide, this much we can say with confidence: Alsbberg's career epitomized the success that Jews had achieved in the German legal profession, and his death marked the roll-back of Jewish emancipation and the collapse of liberal law.

Emancipation: Jewish Lawyers before Nazi Rule

Alsbberg's lifetime spanned the rise and fall of an era of liberal law in Germany. He was born in 1877, in the decade of German unification, at the time when legal reform took a quantum leap forward. New national laws—the Penal Code of 1871, and the Constitution of the Courts, the Lawyers' Statute, and the Codes of Criminal and Civil Procedure, all taking effect in 1879—actualized the liberal principles of legal equality.⁵ These laws rationalized court structures, reformed legal procedures, gave rise to a free legal profession (free insofar as it was freed from state control), and opened its doors to Jews. Jews flowed into the legal profession and soon made up a large proportion of practicing lawyers. In theory, Jews could become judges too, but judges were more closely tied to the state, which had persisting traditions of excluding outsiders; Jews only slowly breached the ranks of the judiciary.

The numbers are dramatic. Those numbers for Prussia, by far the largest province in Germany, are illustrative. In 1872, Prussia had 75 Jewish lawyers, 3 percent of the total; by 1880, the number had doubled to 146 lawyers, 7.3 percent of the total; and by 1893, the number had risen six-fold to 885, more than a quarter of the total. From then un-

til 1933, the proportion of Jewish lawyers hovered between 25 and 30 percent of the total. In some cities the numbers were even more stunning. In Berlin almost half the lawyers were Jewish (or by some counts 54 percent), and in Breslau more than a third. The number of Jewish judges increased too, but far less dramatically. In 1872, Prussia had 9 Jewish judges, a fraction of a percent of the total; by 1880, the number had increased to 99 judges, 3.8 percent of the total; and by 1893, the number had increased to 168, or 4.5 percent of the total. The number and the proportion of Jewish judges continued to increase until 1933, when 401 constituted 7.0 percent of the total.⁶

By the time of the Weimar Republic, and for its duration, Jewish lawyers had gained public prominence and professional influence. The historian Benjamin Hett has written that the "great lawyers of Weimar ... represented an array of collective brilliance that formed a fitting counterpoint to the artistic, literary, and scientific glories of Weimar Berlin."⁷

De-Emancipation: The Nazi Attack on Liberalism

Upon gaining power, the Nazi regime reversed Jewish emancipation. It began a five-year process of hounding Jews out of the legal profession. But that tells only part of the story. The reversal of Jewish emancipation and the elimination of Jewish lawyers were like vines entangled with something else, namely, the demise in Germany of liberal law, the transformation of the German legal system, and the creation of a new anti-liberal Nazi legal order. The laws from the 1870s that had ushered Jews into the legal profession did not simply expand opportunities for a specific group. Those laws embodied new liberal principles of equality under the law, individual rights, and democratic participation. In eliminating Jewish lawyers, the Nazi regime was not just uprooting a specific group, it was reversing liberal principles. The Nazis replaced equality with racial superiority, subordinated the individual to the Aryan community, and discarded democratic participation for the dictatorial Führer state.

Uprooting Jewish lawyers and disentangling them from the German legal system took five years. But within months of gaining power in 1933, the Nazi regime struck its first blows, both violently and methodically. By the time Max Alsbberg died in September 1933, the regime had already shown that it meant to rid the German legal profession of Jews

and rid German law of liberal principles, and that it had an approach for getting the job done. That approach was present in the attacks on Jewish lawyers in the spring of 1933.

The turning point was the Reichstag fire on 27 February 1933, which served as the pretext the following day for an emergency measure titled, "Decree for the Protection of the People and the State." In *The Dual State*, written during the 1930s (although published in 1941), the Jewish German lawyer Ernst Fraenkel aptly described the decree as the "constitutional charter of the Third Reich." Purporting to protect Germany against communist violence, the decree indefinitely suspended civil liberties guaranteed in the Weimar constitution; it empowered the national government to intervene to restore order, whenever and wherever necessary; and it handed Nazi officials enough purported authority ultimately, over the next several years, to transform Nazi rule into a permanent dictatorship with unlimited powers.⁸

With this abrupt transition from the Weimar Republic to Nazi rule, the new regime created what the title to Fraenkel's book suggests, a dual state. This consisted of the prerogative state on the one hand, and the normative state on the other. The prerogative state was the realm of arbitrary power and official violence, against which citizens enjoyed no legal protection. The normative state was the legal order, which included both traditional law and newly enacted Nazi law. Thus, with the emergency decree in place, the new regime delivered a double-punch against Jewish lawyers, a jab by Nazi law, an uppercut by Nazi lawlessness.

Nazi lawlessness burst on the scene the night of the Reichstag fire, as police rounded up 4,000 of the Nazis' political opponents, including politically active, especially leftist, Jewish lawyers. One was a young lawyer named Hans Litten, the son of a Protestant mother and Jewish law professor. In courtrooms in the late Weimar Republic, he had represented working class defendants involved in political brawls, taunted conservative judges as he pushed the law to its limits, and scorned the Nazis to their faces as he exposed their brutality to the public. Most famously, at the Eden Dance Palace trial in 1931, he had caused a sensation when he cross-examined Hitler. In 1933 his mother begged him to get out of Germany, but he refused, saying, "Millions of workers cannot leave, so I must also stay put."⁹

In December 1935, the later Nazi Foreign Minister Joachim von Ribbentrop wrote (maybe not coincidentally in connection with Litten himself), "Revolutions are not fought out and decided in courts of justice or according to the regular rules of legal procedure."¹⁰ After

the Reichstag fire, the Nazis bypassed the courts and rules and simply arrested Litten and others. Under the rubric of protective custody, the Nazis empowered themselves to arrest whomever they saw as a threat to the public order, or a future threat. The notion of protective custody was antithetical to liberal law. The arrestee faced no charges and had no legal recourse. No judicial warrants authorized the arrests, and no court orders could end the detentions. Nazi officials could make their decisions secretly and arbitrarily, without heeding any preexisting public rules and without facing any later impartial judicial review. The Nazi regime was creating the prerogative state, a realm of Nazi action independent of law and beyond the reach of judicial scrutiny.¹¹

Litten, like others in protective custody, could still ask a lawyer to seek his release. Unable to rely on legal authority, the lawyer could only make ad hoc petitions to those in power, meet with officials, and exploit connections. Seeking a lawyer for her son, Litten's mother asked Max Alsborg. He declined.¹² Alsborg probably simply exercised good sense. When, on 10 March 1933, one Jewish lawyer, Michael Siegel, who was representing a client in protective custody, lodged a complaint at a police station in Munich, SA men seized him, tore his trousers at the knees, and marched him barefoot through the streets with a sign hanging from his neck stating: "I will never again complain to the police."¹³

On the night of the Reichstag fire, the Nazis targeted their political opponents. They arrested Jewish lawyers as political opponents, not as Jews. But within weeks, the Nazis turned their attention to lawyers as well as judges for no other reason than that they were Jewish. Instead of arresting lawyers in the dead of night, they attacked courthouses in the light of day. SA men—the so-called brown shirts, uniformed thugs—stormed courthouses and occupied them, searched for Jews, and chased them away. Invariably, police arrived on the scene too late.¹⁴

One of the first courthouse attacks occurred on 11 March in the city with Germany's third largest Jewish population, Breslau. Here is one lawyer's description:

Suddenly—it was exactly eleven o'clock—we heard in the hallway a roaring, as if of wild animals, that got closer and closer. The doors to the lawyers' chambers flew open. Two dozen SA men rushed in ... and screamed, "Jews out." For a moment everyone, Jews and Christians, froze. Then most Jewish lawyers left the room. ... At first I didn't budge. Then an SA man sprang at me and grabbed me by the arm. I shook him away, at which point he pulled out of his tight shirt-sleeve

